

SUPREME COURT OF THE UNITED STATES

DEIONN DAMLIAN GREGORY
s/k/a DEIONN ARIY YEL YASHARALLAH,

RECORD NO:

Petitioner,

V.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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I. Question Presented

1. Was Petitioner denied his Sixth and Fourteenth Amendment rights when the Trial Court instructed the jury on Forcible Sodomy where model instructions included specific acts not supported by trial evidence?

II. Corporate Disclosure Statement

Pursuant to Rule 29.6 of this Court's Rules, Petitioner Gregory states that he has no parent company, and no publicly held corporation owning 10% or more of any parent company's stock.

III. List of All Proceedings

Norfolk Circuit Court, No. CR21000556-00, CR21000556-01, CR21000556-02, Commonwealth of Virginia v. Deionn Damian Gregory, October 4, 2024.

The Court of Appeals of Virginia, Record No. 0041-25-1, Deionn Damian Gregory, s/k/a Deionn Ariy Yel Yasharallah, December 30, 2025.

The Supreme Court of Virginia, Record No. 260083 Deionn Damian Gregory, s/k/a Deionn Ariy Yel Yasharallah, July 24, 2026.

LIST OF PARTIES TO PROCEEDING

DEIONN DAMIAN GREGORY
s/k/a DEIONN ARIY YEL YASHARALLAH,

Petitioner,

V.

COMMONWEALTH OF VIRGINIA,

Respondent

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I. TABLE OF AUTHORITIES

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II. Opinions Below

Court of Appeals of Virginia, Record No. 0041-25-1, Deionn Damian Gregory, s/k/a Deionn Ariy Yel Yasharallah Bey v. Commonwealth of Virginia, App. 2-17.

Supreme Court of Virginia, Record No. 260083, Deionn Damian Gregory, s/k/a Deionn Ariy Yel Yasharallah, February 13, 2020, App. 1.

III. Jurisdiction

The Supreme Court of Virginia refused the assignment by Order entered on July 24, 2026. Mr. Gregory invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for writ of certiorari within ninety days of the Virginia Supreme Court's judgment.

IV. Constitutional Provisions and Statutes Involved

The Sixth Amendment to the United States Constitution provides:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”

The Fourteenth Amendment provides: “no person shall... be deprived of life, liberty, or property, without due process of law...”

This issue was preserved in the trial court with counsel submitting an instruction, App. 18, which listed only those specific acts supported by evidence. The trial court refused the instruction, which contained several acts not supported by the evidence, App. 19. The Court of Appeals of Virginia rejected the argument, App. 2-17. The Supreme Court refused review, App. 1.

STATEMENT OF THE CASE

This case arises out of allegations of sexual abuse against the Petitioner which are claimed to have occurred between March 22, 2015, and March 21, 2018, in the City of Norfolk, Virginia. A grand jury returned a True Bill against Gregory on April 7, 2021, on one count of Forcible Sodomy – Victim under age 13, in violation of Virginia Code § 18.2-67.1; one count of Aggravated Sexual Battery, in violation of Virginia Code § 18.2-67.3; and one count of Indecent liberties with a Child under the Age of 15, in violation of Virginia Code § 18.2-370(D).

A jury trial commenced on April 10, 2024. Petitioner, by counsel, submitted proposed jury instructions. The court denied two instructions proposed by Petitioner. The first instruction provided a limited instruction regarding the charge of forcible sodomy with a child under the age of thirteen to reflect the evidence produced at trial; the instruction included specific forbidden acts not supported by the evidence. The second instruction was for the lesser included offense of sexual battery. The jury found Gregory guilty on all three counts. The Court ordered a Pre-Sentence Report.

On October 4, 2024, the Court sentenced Petitioner to a period of incarceration of 20 years on the conviction of Forcible Sodomy – Victim under age 13, 7 years for the conviction of Aggravated Sexual Battery, and 3 years for the conviction of Indecent Liberties – Victim under age 13, all to run consecutively, for a total period of incarceration of 30 years. The court suspended 10 years incarceration on the count of Forcible Sodomy, and placed him on probation for a period of 3 years following release from incarceration. The court entered an Amended Sentencing Order on October 17, 2024.

On October 4, 2024, Petitioner filed his Notice of Appeal with the Norfolk Circuit Court Clerk. The Court of Appeals affirmed Petitioner's conviction on December 30, 2025.

Petitioner filed his Notice of Appeal with the Supreme Court of Virginia on January 6, 2026. Petitioner filed his Petition on January 29, 2026. The court heard argument on June 2, 2026. The Supreme Court of Virginia affirmed the trial court's ruling on July 24, 2026. (App. 1)

Petitioner contends that the trial court erred in instructing the jury on the charge of Forcible Sodomy where the instruction included specific acts of cunnilingus, anilingus, and anal intercourse which were not supported by the evidence.

ARGUMENT

Petitioner was denied his Sixth and Fourteenth Amendment rights when the Trial Court instructed the jury on charge of Forcible Sodomy where the instruction included acts not supported by the evidence.

The standard of review for an improper instruction is harmless error. See *Neder v. United States*, 527 U.S. 1 (1999); *Carilla v. California*, 491 U.S. 263 (1989).

This Court recognized that improperly omitting an element of the crime from the jury can “easily be analogized to improperly instructing the jury on an element of the offense. *California v. Roy*, 519 U.S. 2 (1996); and where the court cannot conclude beyond a reasonable doubt the jury verdict would have been the same... it should not find the error harmless. *Neder* at 33-34.

The analysis hinges on the Sixth Amendment’s unanimity requirement for a jury conviction. See *Burch v. Louisiana*. 441 U.S. 130 (1979). Petitioner contends that the error here, where an instruction contained acts not supported by the evidence, was not harmless, and allowed the jury to guess or speculate as to the act it found Petitioner to have unanimously committed, resulting in a verdict that was not unanimous.

In *United States v. Gaudin*, 515 U.S. 506 (1995), defendant’s conviction for making a false statement was properly reversed where the trial court refused to submit the question of materiality to the jury in violation of the due process clause. The Sixth Amendment requires criminal convictions to rest upon jury determination

that the defendant is guilty of every element of the crime which he is charged beyond a reasonable doubt. *Sullivan v. Louisiana* 508 U.S. 275, 277-278 (1993). Petitioner contends that this same rational is applicable where criminal acts unsupported by any evidence are submitted to the jury for its consideration.

The appropriate instruction that should have been given to the jury was the one he proffered and was denied by the Court. App.18. This instruction properly encapsulated the evidence that was produced during the trial.

The instruction found by the Court of Appeals to have been offered and accepted by the Court is found at App. 19. This instruction permitted the jury to consider whether Petitioner had engaged in any of the following acts: cunnilingus, fellatio, anilingus, or anal intercourse. However, allowing the jury to consider all enumerated acts as set out in the instruction, although technically within the definition of Forcible Sodomy, was highly prejudicial because: (1) the acts were not support by even a scintilla of evidence introduced by the Commonwealth; (2) the inclusion of such acts were likely to inflame the passions of jurors considering the age of the alleged victim; and (3) it left the jury to guess or speculate as to which act they believed Petitioner was to have committed, thereby ignoring the unanimity required for a jury to return a verdict of guilt beyond a reasonable doubt.

One of a trial court's most important responsibilities is to ensure that a jury is properly instructed. A jury instruction which omits an element of the offense "infects the entire trial process." *Neder v. United States*, 527 U.S. 1 (1999), citing *Brecht v.*

Abrahamson, 507 U.S. 619 (1993), and “necessarily rendering a trial fundamentally unfair; *Rose v. Clark*, 478 U. S. 570, 577 (1986). *Emergency Physicians of Tidewater, PLC v. Hanger*, 303 Va. 77, 88, 899 S.E.2d 413, 419 (2024). The evidence relied upon to support a proffered instruction must amount to more than a scintilla. *Morse v. Commonwealth*, 17 Va. App. 627, 633, 440 S.E.2d 145, 149 (1994) (citations omitted). A proper jury instruction is one which “informs the jury as to the essential elements of the offense.” *Darnell v. Commonwealth*, 6 Va. App. 485, 488-89, 370 S.E.2d 717, 719 (1988) (citations omitted). “It is a fundamental principle that ‘although an instruction may correctly state the law, it should not be given if it is inapplicable to the facts in evidence . . . [and] might confuse or distract the jury.’” *Byers v. Commonwealth*, 37 Va. App. 174, 183, 554 S.E.2d 714, 718 (2001) (quoting *Morse v. Commonwealth*, 17 Va. App. 627, 630, 440 S.E.2d 145, 149 (1994)). A trial court should not give a jury instruction “which incorrectly states the applicable law or *which would be confusing or misleading to the jury.*” *Bruce v. Commonwealth*, 9 Va. App. 298, 300, 387 S.E.2d 279, 280, (1990) (emphasis added).

In this case, the Petitioner objected to the jury instruction given regarding the charge of Forcible Sodomy, Instruction No. 11, App. 19. Although the instruction given to the jury correctly stated the statutory definition of the Forcible Sodomy as:

- (1) That the defendant engaged in cunnilingus, fellatio, anilingus, or anal intercourse with [B.W.]; and
- (2) [B.W.] was less than thirteen (13) years of age at the time of such act(s).

Virginia case law is clear that the Commonwealth must show that a defendant penetrated the victim's vulva to prove that he committed cunnilingus. *See Horton v. Commonwealth*, 225 Va. 606, 613, 499 S.E.2d 258, 261-62 (1998).

In this case, the facts alleged do not reasonably support a verdict against Petitioner for cunnilingus, anilingus, or anal intercourse. In response to the question:

“Now when he said he put his tongue between your legs, and I'm sorry we have to go there, we have to be very specific, where was he putting his tongue,”

B.W. responded: “Like, again, all external so on my vulva.” App. 20-22.

The trial testimony regarding anilingus, at most, showed only an attempt to commit the act.¹

Petitioner timely objected to the victim's testimony as to these acts, arguing that: (1) neither of the acts of cunnilingus or anilingus were sufficiently proven on the record, and (2) the Commonwealth failed to previously disclose any evidence of attempted anal sex. App. 23-26. Petitioner was not charged with the separate crime of “attempted” forcible sodomy.

The Commonwealth's evidence fails to support the elements necessary for a jury to have considered the acts of cunnilingus, anilingus, or anal intercourse where

¹ The Petitioner filed a motion in the Norfolk Circuit Court during the pendency of his appeal to include the forensic interview recording and transcript in the appellate record. The Petitioner proffers that the forensic interview and the transcription thereof shows that during her forensic interview, the victim denied that the Petitioner attempted to penetrate her anally. It was for the first time at trial that she alleged that the Petitioner attempted to penetrate her anally. App. 23-26.

no evidence showed Petitioner had engaged in these specific acts. For a jury to be permitted to consider these heinous acts was prejudicial to the Petitioner.

The victim's testimony in this case clearly stated that all contact was "external." App. 23-26. A jury could not have concluded that the Petitioner ever penetrated the victim's vulva, and thus could not have found him guilty of committing the act of cunnilingus. Furthermore, the Court of Appeals incorrectly found that there was some evidence of "anal penetration" despite B.W.'s testimony that the act was only attempted.²

This evidence is insufficient to permit a jury to consider the other three acts, which were unsupported by the evidence. To include these acts, totally unsupported by the evidence, one or more jurors could have voted to find Petitioner guilty of Forcible Sodomy where no such evidence existed on the record.

The jury instruction given was highly prejudicial in that it permitted their consideration of heinous acts unsupported by any evidence. Petitioner contemporaneously objected to the introduction of the evidence in arguing that his instruction was the correct one for the jury to consider. App.23-26.

The Court of Appeals' decision merely surmised that no evidence suggested that the inclusion of these acts otherwise "inflamed the passions of the jury." The

² Petitioner objected to this evidence at trial as had not previously been produced prior to the victim's testimony and where it was not contained in the forensic interview offered for the record. App. 23-26.

very nature of these acts, in themselves, is so grotesque that their mere mention when committed against a child is sufficient to “inflame the passions” of any jury.

As a result of the jury instruction containing three enumerated acts unsupported by the evidence, no court could find that the jury’s decision was based on the only act proven beyond a reasonable doubt, that being the act of “fellatio.”

Virginia courts have long recognized that jury instructions which either misstate the law or raise issues unsupported by facts should not be presented because they lead to jury confusion over the elements that must be proved. See *Bruce v. Commonwealth*, 9 Va. App. 298, 300, 387 S.E.2d 279, 280, (1990).

In *Barney v. Commonwealth*, 69 Va. App. 604, 822 S.E.2d 368 (2019), the Court of Appeals reversed the defendant’s conviction where the given instruction did not properly restate the law. In that case, the given instruction on the charge of Use of Firearm in a Felony failed to require the Commonwealth to prove that the defendant possessed an actual firearm or an object that gave the appearance of an actual firearm. *Id.* at 613, 822 S.E.2d at 373. The court reflected that a jury instruction cannot be an accurate statement of law if it leaves “room for the jury to make a conclusion contrary to law.” *Id.* at 609. Because the instruction failed to properly instruct on an element of the crime, the Court of Appeals held that the conviction must be reversed. See *Watson v. Commonwealth*, 298 Va. 197, 207, 835 S.E.2d 906 (2019) (stating that jury instructions are only proper where the “law has been clearly

stated and that the instructions cover all issues *which the evidence fairly raises*") (emphasis added) (citation omitted).

In this case, based upon the Forcible Sodomy instruction given, a reviewing court is unable to determine which of the prohibited acts this jury unanimously believed the Petitioner committed upon finding him guilty. One is left to guess or speculate, as counsel argued below, App. 27-30, whether the jury convicted Petitioner of forcible sodomy on the only act proven and not on some other act unsupported by the evidence.

The instruction should have been limited only that act of fellatio, the only act supported by the evidence. This would have left no doubt as to the unanimity requirement. The jury was permitted to speculate and potentially convict the Petitioner of an act unsupported by the evidence. See *Caision v. Commonwealth*, 52 Va. App. 423, 440, 663 S.E.2d 553, 561 (2008) (quoting *Banks v. Commonwealth*, 41 Va. App. 539, 545-46, 586 S.E.2d 876, 879 (2003)). The conviction for forcible sodomy should be reversed.

In this case the specific act which the jury is to have found the Petitioner guilty is an element of the offense, and a jury must unanimously find that the specific act was committed. *Richardson v. United States* is distinguished.

In *Richardson*, this Court held that while the jury must unanimously find that "force" occurred as an element of the charged crime of robbery, *whether* such force was perpetrated by the use of a gun or a knife was not an element of the crime of

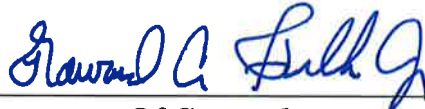
robbery, therefore negating the unanimity requirement. 526 U.S. 813, 822 (1999) (holding that the government must prove, and the jury must unanimously find, that a defendant committed each of the specific acts required to constitute a series of violations of the statute).

Here, the record fails to show whether the jury convicted Petitioner on one of the acts of Forcible Sodomy that was not proven by the evidence, and thus whether the verdict was unanimous as to all.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court issue a Writ of Certiorari to review the final judgment of the Supreme Court of Virginia.

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