No. 25-

IN THE

Supreme Court of the United States

CHARLES ALBERT MASSEY,

Petitioner,

v.

CHADWICK DOTSON, DIRECTOR VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Pointer v. Texas, 380 U.S. 400 (1965) held the Confrontation Clause bars admission of preliminary hearing testimony from a witness unavailable at trial if the defendant was uncounseled at the preliminary hearing. In *Crawford v. Washington*, 541 U.S. 36, 57 (2004), this Court explained prior testimony of an unavailable witness "is admissible only if the defendant had an adequate opportunity to cross-examine."

Petitioner was arrested for two counts of rape of his former fiancée and her simple abduction the following morning. At the preliminary hearing, she testified and was cross-examined. After her death a short time later, text messages revealed she feigned memory loss at the hearing.

Petitioner was indicted for the charged offenses and a new count of abduction with intent to defile[1] for her alleged asportation inside her apartment before the alleged sexual assaults. Defense counsel unsuccessfully moved to exclude her preliminary hearing testimony from trial, arguing "*the most serious indictment*[2] *came ten days after she died, so I never got a chance to talk to her about it at the preliminary hearing and I never will.*" At trial, the challenged preliminary hearing testimony was read to the jury. Massey was convicted of abduction with intent to defile and two counts of rape.

The questions presented are:

Does the Confrontation Clause allow the Petitioner to be convicted at trial—using preliminary hearing testimony

1. Va. Code § 18.2-48, which offense carries 20 years to life in prison.

2. Defense counsel was referring to the new charge, abduction with intent to defile.

of an unavailable witness—of an offense that was not charged at the time of the preliminary hearing?

Does a preliminary hearing provide an "adequate opportunity" for cross-examination under the Confrontation Clause when the most serious charge against the petitioner did not exist at the time of the hearing and the only witness at the hearing feigned memory loss?

STATEMENT OF RELATED CASES

Commonwealth v. Massey, No. FE-2013-1405, Fairfax County Circuit Court. Judgment entered August 26, 2015.

Massey v. Commonwealth, No. 142115, Virginia Court of Appeals. Judgement entered on December 13, 2016.

Massey v. Commonwealth, No. 170057, Virginia Supreme Court. Judgement entered on January 12, 2017. Petition for rehearing denied on October 6, 2017.

Massey v. Virginia, No. 17-1115, U.S. Supreme Court. Petition for a writ of *certiorari* denied May 19, 2018.

Massey v. Clarke, No. 1:21-cv-1183, United States District Court for the Eastern District of Virginia. Judgement entered denying Petitioner's federal habeas petition on December 1, 2023.

Massey v. Chadwick Dawson, No. 24-6006, U.S. Court of Appeals for the Fourth Circuit. Judgement denying certificate of appealability entered September 2, 2025. Petition for rehearing denied September 30, 2025.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Albert Massey, III, respectfully petitions for a writ of *certiorari* to the United States Court of Appeals for the Fourth Circuit to review the judgement against him in *Charles Albert Massey, III v. Chadwick Dawson*, No. 24-6006.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit denying Petitioner a certificate of appealability is unpublished; it is reproduced in the Appendix at 1a. The decision of the United States Court of Appeals for the Fourth Circuit denying Petitioner's petition for rehearing is unpublished; it is reproduced in the Appendix at 56a. The decision of the United States District Court for the Eastern District of Virginia denying Petitioner's federal habeas petition is unpublished; it is reproduced in the Appendix at 4a. The decision of the Virginia Supreme Court refusing the Petitioner's petition for appeal is unpublished; it is reproduced in the Appendix at 15a. The decision of the Virginia Supreme Court refusing a petition for rehearing is unpublished; it is reproduced in the Appendix at 57a. The decision of the Virginia Court of Appeals denying Petitioner's direct appeal on the merits is published at 67 Va. App. 108, 793 S.E.2d 816 (2016); it is reproduced in the Appendix at 16a. The final order of the Fairfax County Circuit Court is unpublished and reproduced in the Appendix at 50a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its decision denying Petitioner's petition for rehearing on September 30, 2025, requiring the Petitioner to file a petition for a writ of *certiorari* on or before December 29, 2025. On December 15, 2025, the Petitioner filed an application to extend the time to file his petition for a writ of *certiorari* until February 27, 2026. On December 19, 2026, the application for an extension of time was granted. This petition for a writ of *certiorari* is timely filed on February 27, 2026.

This Court has jurisdiction under 28 U.S.C. § 1254(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Introduction

Petitioner, Charles Albert Massey, III ("Massey"), was convicted of abduction with intent to defile[3] and two counts of rape[4] significantly based on the role-played testimony

3. In violation of Virginia Code § 18.2-48, which felony offense carries 20 years to life in prison.

4. In violation of Virginia Code § 18.2-61, which felony offenses carry 5 years to life in prison.

of the complainant, Portia Eastham ("Eastham"), who did not appear against Massey at trial. Instead, Eastham's friend took the witness stand and read a sanitized version of Eastham's preliminary hearing testimony[5] to the jury as the prosecutor and defense counsel read their corresponding parts. This strange scenario played out in a Fairfax County courtroom in 2015 resulting in Massey's unjust convictions and the imposition of a 52-year prison sentence.[6]

Eastham passed away between preliminary hearing and trial making her unavailable. Although Massey's defense counsel had *some* opportunity to cross-examine her at the preliminary hearing, Massey was not charged with abduction with intent to defile—the most serious charge against him—at that time. He was directly indicted on this charge after Eastham's death. Massey's trial counsel, in moving the trial court to exclude Eastham's preliminary hearing testimony before trial, rightly argued that "*the most serious indictment came ten days after she died, so I never got a chance to talk to her about it at the preliminary hearing and I never will.*"[7] Nonetheless, after initially granting Petitioner's motion, the trial court ultimately reversed itself and permitted the use of Eastham's preliminary hearing testimony at trial, noting

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5. Omitting objections, argument by counsel, and the preliminary hearing judge's rulings and comments. The redacted preliminary hearing testimony is available at JA 825 to 870. JA is in reference to the joint appendix filed on direct appeal in the Virginia Court of Appeals.

6. *See* final order of the Fairfax County Circuit Court, App. at 50a.

7. JA 299.

the "extraordinary lengths that our Appellate Courts will go" in admitting prior testimony.[8]

Defense counsel's inability to cross-examine Eastham on the abduction with intent to defile charge was made the more egregious when text messages from Eastham's phone found after her death showed that she deliberately feigned memory loss at Massey's preliminary hearing. One text message she sent a friend immediately after she testified "under oath" demonstrated her unreliability as a witness:

> I wish you could have seen the way I handled the cross examination with [Massey's] retarded lawyer. I gave him nothing, and it was awesome. He was throwing all sorts of stupid shit out to me about me being in a bar on August 13th and whatnot, and I responded with "I don't recall." He couldn't do anything with it.
>
> [Massey]'s attorney was an idiot, and when he crossed [sic] examined me I gave him nothing to work with. It was almost fun. I even questioned him when he was talking about irrelevant info but the judge got a little upset with me for that.[9]

Eastham's admission that she stultified defense counsel's cross-examination is borne out by the preliminary hearing transcript. While Eastham had no problem recalling purported events when questioned by the prosecution, during cross-examination, Eastham

8. JA 369.

9. JA 110-11, 287-88, 1551-52.

repeatedly claimed lack of memory or equivocated, answering "I believe so," "maybe some," "I think so," "I'm not sure," "I don't recall," "I don't remember," "it's possible," "I have no idea," "I don't know," "I suppose so," and claimed that she could not answer questions because "I just tried to block [the events] out."[10]

Massey has contended, and continues to contend, his convictions should be vacated due to the admission of Eastham's preliminary hearing testimony at his trial in violation of the Confrontation Clause based on his inability to cross-examine Eastham on the most serious charge against him, abduction with intent to defile, which was indicted after Eastham's death and the uncontradicted evidence that Eastham purposely blunted defense counsel's cross-examination at preliminary hearing. Massey submits that on habeas review, the Court's clearly established Confrontation Clause jurisprudence does not allow a defendant to be convicted at a later trial—using preliminary hearing testimony due to the unavailability of a witness—of an offense not yet existing at the time of that hearing on these facts. *Pointer v. Texas*, 380 U.S. 400, 401 (1965) (holding that using transcript from a preliminary hearing—where Pointer lacked legal counsel and therefore could not properly cross-examine the complainant—violated the Confrontation Clause when the witness was unavailable at trial); *Andrew v. White*, 604 U.S. 86, 92 (2025) ((citing 28 U.S.C. §§ 2254(d)(1)-(2)) (petitioner entitled to habeas relief where "the state court relied on an unreasonable determination of the facts or unreasonably applied 'clearly established Federal law, as determined by' this Court."). Further, Massey was not

10. JA 249-268.

afforded, and could not have been afforded, an adequate opportunity to cross-examine Eastham on the new charge, especially where she feigned memory loss at preliminary hearing. *Crawford v. Washington*, 541 U.S. 36, 57 (2004) (prior testimony of an unavailable witness "is admissible only if the defendant had an adequate opportunity to cross-examine.").

Massey's Arrest and Eastham's Preliminary Hearing Testimony

On September 4, 2013, Massey was arrested on two counts of rape and one count of simple abduction of his former fiancé Eastham in Fairfax County, Virginia.[11] The first responding officer reported that Eastham told him that Massey had raped her once in Fairfax at her apartment and a second time at his home in the City of Alexandria. She later told a detective that she had been raped twice in Fairfax.[12]

After Massey's arrest, Eastham sent a text message to a friend stating:

> Um I think my crazy streak has come to an end. Trey[13] is in jail for 5 felony counts, I had him arrested yesterday. Sorry you had to witness the horrible drunken mess I've been lately.[14]

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11. JA 1.

12. JA 571-573, 1017-20.

13. Massey is often referred to by the nickname "Trey."

14. JA 1543. Massey moved to introduce this text message at his trial as Defense Exhibit 7. During argument over the text

On November 1, 2013, less than two months after Massey's arrest, a preliminary hearing was held in the Fairfax County Juvenile & Domestic Relations Court. As Eastham was getting dressed to go to court, she texted a friend:

> Is it sick that I'm making myself look really good right now just to piss him off?[15]

At the preliminary hearing, when questioned by the prosecutor, Eastham demonstrated a clear recollection of dates and events. Eastham testified that she broke off her engagement with Massey in April 2013.[16] Afterward Eastham and Massey had sexual contact on over a dozen occasions leading up to Massey's arrest on September 4, 2013.[17] Massey called her and came to her apartment to talk about his grandmother on the evening of September 3, 2013.[18] After some conversation, Eastham agreed that Massey could sleep on the couch. Later, Eastham asked Massey to leave. Massey refused and the two began

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message's admissibility, the trial court stated "[h]ow can I not let the jury see this? [Defense counsel] is right. Notwithstanding our rules here, we have to have a fair trial. How can I not let the jury know that on the day of the rape, alleged rape, she said, 'Sorry. You had to witness the whole drunkenness [sic] mess I've been lately'?" JA 951-52. After initially ruling the text message would be admissible, the trial court reconsidered after additional argument and excluded it as hearsay. JA 957.

15. JA 1329.

16. JA 224.

17. JA 249-57.

18. JA 258.

fighting.[19] According to Eastham, Massey dragged her to her bed and raped her twice over the course of several hours.[20] They stayed in the apartment until morning. Eastham changed her clothes and got ready to go to work until Massey stopped her and forced her to come to his home in Alexandria instead. During the car ride, Eastham made no attempt to escape although the car stopped at several traffic lights.[21]

Once at Massey's house in Alexandria (outside of Fairfax County), Eastham "chose to sit on the sofa" in the living room and played with a cat while Massey moved about the house.[22] She was not physically restrained and did not attempt to escape. After more arguing, Massey bound Eastham's wrists and ankles with duct tape, wrapped a blanket around her, put her in the car and drove Eastham to her father's house.[23] Massey called Eastham's father to tell him that he was dropping her off.[24] Massey dropped Eastham in the neighborhood of her father's house and Eastham kissed Massey goodbye. She entered her father's home and she "told him what happened."[25]

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19. JA 225-27.

20. JA 229-34.

21. JA 265.

22. JA 266.

23. JA 237-40.

24. JA 240.

25. JA 240-41.

During cross-examination, the prosecution objected at least eight times on relevance grounds, arguing that because the standard of a preliminary hearing is probable cause, the couple's prior history and the witness's credibility is not relevant.[26] The trial court sustained two prosecution objections on cross-examination based on relevance, including a question about whether Massey and Eastham's father were continuing to work together to get Eastham into an alcohol treatment program against her wishes.[27] Massey's theory at trial was that Eastham fabricated the rape accusations to disrupt the joint effort of Massey and her father to get her into an inpatient treatment center.[28] This resulted in defense counsel moving on or curtailing his cross-examination by lumping potential important impeachment into broad questions to avoid the court from sustaining more prosecution objections.[29]

Eastham claimed that she was unable to answer many questions on cross-examination because of lack of memory, answering "I believe so," "maybe some," "I think so," "I'm not sure," "I don't recall," "I don't remember," "it's possible," "I have no idea," "I don't know," and "I suppose so."[30] On one occasion, Eastham claimed that

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26. JA 247, 249, 251 (twice), 254-55, 270-71 & 273.

27. JA 270.

28. JA 291, 1099-1119.

29. JA 255-258 (defense wished to go through twenty nights in August "and every one of these starts the same way the night of the 3rd did and ends the same way the night of the 3rd did"—i.e. the couple often fought and made up after; in response to objections, defense counsel "lumped" his inquiry together.).

30. JA 249-268.

she could not answer questions because "I just tried to block [the events] out."[31] On another occasion, after she objected to the relevancy of questions asked by defense counsel, Eastham was chastised by the judge to "leave the legal analysis to the attorneys in the courtroom."[32] She equivocated when, whether and how often she had sex with Massey after she broke off their engagement, although she admitted to staying with Massey for fifteen out of the thirty days in August.[33]

Defense counsel's style of examination was in stark contrast to trial cross-examination. At preliminary hearing, defense counsel asked numerous non-leading questions such as "Why?" and elicited purported prior bad acts of Massey by inquiring into the couple's tumultuous history—to which Eastham replied Massey "abused me regularly."[34] Defense counsel was not ineffective for engaging in this style of questioning because the purpose of examination at a preliminary hearing is exploratory. Further, defense counsel could not have conducted an adequate independent factual investigation prior to the preliminary hearing, as full discovery had not been received, certain impeachment evidence was not yet available, and cross-examination at preliminary hearings is limited in scope.[35]

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31. JA 257.

32. JA 254.

33. JA 250, 253, 257.

34. JA 258.

35. *See* Declaration of Joni Robin, Esquire. Exhibit 1 to Massey's Petition for a Writ of Habeas Corpus. United States District Court for the Eastern District of Virginia, No. 1:21-cv-1183, ECF 1; *see also Barber v. Page*, 390 U.S. 719, 725 (1968)

After Eastham's testimony, the judge found probable cause on all charges and certified the matter to the grand jury.[36]

Pre-Trial Events and Proceedings

Immediately after the preliminary hearing, Eastham sent the following text messages to a friend:

> I wish you could have seen the way I handled the cross examination with his retarded lawyer. I gave him nothing, and it was awesome. He was throwing all sorts of stupid shit out to me about me being in a bar on August 13th and whatnot, and I responded with "I don't recall." He couldn't do anything with it.
>
> Trey's attorney was an idiot, and when he crossed [sic] examined me I gave him nothing to work with. It was almost fun. I even questioned him when he was talking about irrelevant info but the judge got a little upset with me for that.[37]

On or about November 10, 2013, Eastham was found deceased of an alcohol and drug overdose.[38] Subsequently,

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("A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.")

36. JA 273

37. JA 110-11, 287-88, 1551-52.

38. JA 981, 986.

the Commonwealth obtained indictments from the grand jury that included the three charges from preliminary hearing, plus the additional charge of abduction with intent to defile.[39]

Motion to Exclude Preliminary Hearing Testimony

On February 7, 2014, Massey filed a motion to exclude Eastham's preliminary hearing testimony from evidence at his trial in the Fairfax Circuit Court on evidentiary and Confrontation Clause grounds. During the motion hearing, defense counsel cited demonstrable falsehoods that Eastham told at the preliminary hearing. In contrast to Eastham's preliminary hearing testimony, phone records showed that she also called Massey on the night of the alleged offenses and Massey reported that *she invited him over to her home*, contradicting the Commonwealth's theory that he had "weaseled" his way into her home.[40] Defense counsel argued that the jury would not get to see her "react to the corner in which she's painted into."[41]

Defense counsel also cited Eastham's repeated "lack of memory" at the preliminary hearing, and that just about 40 minutes later, she texted "I kind of wish you could have seen the way I handled the cross examination with his retarded lawyer . . . I gave him nothing" and "when I responded with, 'I don't recall,' he couldn't do anything with it."[42]

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39. JA 7-8.

40. JA 285.

41. *Id.*

42. JA 284.

Defense counsel summarized a common jury instruction that would now be inapposite where the jury is instructed that it "may consider the appearance and manner of her appearance on the stand, her intelligence, her opportunity for knowing the truth, for having observed what she testified to, and more importantly, her interest in the outcome of the case and her bias."[43] Importantly, because defense counsel could not examine Eastham on her untruths and other impeachment materials, Massey is "now forced to take the stand" in a case where he may not have needed to testify with such substantial impeachment.[44]

Defense counsel highlighted that Eastham told the first responding police officer to her sexual assault complaint that she had been abducted and raped in the City of Alexandria as opposed to being raped twice in Fairfax; that within 72 hours of allegedly being raped, she arranged dates with "five different men, over texts";[45] that she lied about claiming she was on the lease to get into Massey's home and take property after Massey was arrested; that she testified at preliminary hearing that she had been strangled to the point of blacking out but had no relevant marks on her neck; that she had sent a text during the summer that "Trey beat me. I had to file a domestic violence report and we're now not allowed to be alone with each other," which contradicted an Alexandria police report where she reported to law enforcement there had been no

43. *Id.*

44. JA 290.

45. JA 292.

physical violence;[46] and that she texted a friend the day after the alleged rape that Massey beat her and stole her phone—without mentioning the rape or abduction.[47]

Regarding the texts where Eastham demeaned defense counsel, defense counsel stated, "[i]f indeed cross-examination is the greatest engine of seeking the truth in the American criminal justice system, I'm never going to get to ask her about that." Defense counsel underscored that he was unable to ask Eastham about her father's remonstrations via text that she needed help for her drinking, that her parents were "notifying all police departments of your potential drunk driving," and that she had "come at [her] parents with a knife."[48] He could not cross her about her text to a male friend that "I had [Massey] put in jail yesterday, likely serving a weak life sentence."[49] Then thirty minutes later, she asked the same guy if he wanted to "meet up tonight for a drink?"[50] Critically, counsel argued that he never had the opportunity to examine Eastham on the new indictment charging Massey with abduction with intent to defile. Defense counsel noted that "*the most serious indictment came ten days after she died, so I never got a chance to talk to her about it at the preliminary hearing and I never will.*"[51]

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46. JA 294.

47. JA 295.

48. JA 296.

49. JA 297.

50. *Id.*

51. JA 299. Defense counsel was referring to the indictment on the charge of abduction with intent to defile, the new charge

The trial court agreed Massey's opportunity to cross-examine Eastham at the preliminary hearing was inadequate. Regarding impeachment evidence now in the hands of the defense, the trial court noted the "reaction of [Eastham] when she was on the stand to her statement that proved not to be true, would have been of great value to the jury and we're never going to have that."[52] The court stated that "[i]t's not just the opportunity to ask a few questions. It's really examination and meaningful cross-examination."[53] The trial court granted Massey's motion on evidentiary grounds because the preliminary hearing testimony failed to meet the criteria under Rule 2:804(b)(1) of the Virginia Rules of Evidence (Hearsay Exceptions; Declarant Unavailable).[54]

Interlocutory Appeal—Trial Court Reverses Its Former Ruling

The Commonwealth filed an interlocutory appeal to the Virginia Court of Appeals of the trial court's order excluding Eastham's testimony.[55] In an unpublished opinion, the Court of Appeals dismissed the appeal because the court lacked jurisdiction to hear it. *Commonwealth v. Charles Albert Massey III*, Rec. No. 0418-14-4 (July 25, 2014). After remand from the Court of Appeals, the

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brought after the preliminary hearing that carried a sentence of 20 years to life in prison. *See* Va. Code 18.2-48.

52. JA 324.

53. JA 323.

54. JA 12.

55. *See* Virginia Code § 19.2-398(A).

Commonwealth filed a motion to reconsider the circuit court's ruling excluding Eastham's preliminary hearing testimony. The Commonwealth included as an exhibit a recording from the Court of Appeals' argument of the interlocutory appeal in which the appellate court questioned whether the circuit court's ruling was consistent with Virginia law.[56] The Fairfax Circuit Court reversed its prior ruling, allowing the Commonwealth to admit Eastham's preliminary hearing testimony into evidence at Massey's trial.[57] The trial judge, upon reversing himself, stated that he believed Virginia's appellate courts would find the preliminary hearing admissible, noting the "extraordinary lengths that our Appellate Courts will go," and it is "not my duty to impose what I think the law ought to be based upon other states."[58]

Trial—The Commonwealth's Case and Presentation of Eastham's Testimony

Trial commenced on January 26, 2015. At trial, the centerpiece of the Commonwealth's case was the presentation of Eastham's preliminary hearing testimony. In preparation for the reading, Mary "Kate" Mitchell, a close friend of the late Eastham, took the stand to perform as a surrogate witness. The prosecutor read aloud his direct examination questions from the preliminary hearing transcript and Ms. Mitchell read Eastham's answers back to him and to the jury. After the prosecutor's "direct examination," defense counsel "cross examined"

56. JA 56.

57. JA 59.

58. JA 369.

Ms. Mitchell by reading his preliminary hearing questions aloud and Ms. Mitchell read Eastham's replies.[59] The preliminary hearing transcript was redacted to not include the various objections lodged by counsel during the preliminary hearing, the arguments of counsel, the hearing judge's rulings on those objections, and the judge's reprimand of Eastham during the hearing for objecting to a question by defense counsel.[60] The circuit court judge, in a bench conference regarding the plan to have a friend of Eastham's read her testimony remarked, "it's a first."[61] The redacted version of the preliminary hearing transcript that was read into evidence included the details of the purported offenses as well as a question from defense counsel, "Had you a history of violence between the two of you before the night of the 3rd?" to which Ms. Mitchell read back, "Yes, he abused me regularly."[62]

The prosecution also presented the testimony of a Sexual Assault Nurse Examiner who had performed a sexual assault examination on Eastham September 4, the day after the alleged assault.[63] The nurse testified in detail about the numerous bruises and abrasions Eastham had over significant portions of her body. She testified that her examination revealed a reddened area on the hymen, indicating a fresh injury. She agreed that

59. JA 821-867.

60. The redacted preliminary hearing testimony is available at JA 825 to 870. The complete preliminary hearing transcript is available at JA 219 to 277.

61. JA 823.

62. JA 854.

63. App. at 22a.

the injury was consistent with a report of "forcible penile vaginal penetration." The nurse also testified regarding Eastham's report to her, which was largely consistent with Eastham's testimony.[64]

Patricia Taylor, an acquaintance of Massey, testified that she spoke with Massey at 12:30 p.m. on September 4.[65] Massey told Taylor that he thought he needed help. He told her that he and Eastham had fought and that he "kind of made her have sex with [him]." Taylor asked if he had sexually assaulted Eastham, and his response was "Yes." He also told Taylor he had bound Eastham with tape, wrapped her in a blanket, and driven her to her father's home.[66]

Massey testified at trial and contradicted most of Eastham's claims.[67] Specifically, Massey testified that Eastham invited him to her apartment,[68] that they had a physical altercation followed by consensual "make up" sex,[69] and that Eastham voluntarily accompanied Massey to his home in the City of Alexandria so that Massey could pack a bag and go to his parents' home in Mississippi.[70] Massey admitted that while at his home he decided to

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64. App. at 22a-23a.

65. App. at 22a.

66. *Id.*

67. JA 1091-1172, 1179-1280.

68. JA 1118-20

69. JA 1124-29; App. at 23a.

70. JA 1135-38.

abduct Eastham with the intent to take her to her home, and that he did so by binding her hands and feet with tape, wrapping her in a blanket, and putting her in his car. Massey explained his conversation with Taylor and admitted he told Taylor that he "kind of" made Eastham have sex with him but described it as a commentary on their relationship and denied that he intended that he meant he raped her.[71]

In closing argument, the Commonwealth took advantage of Massey's inability to impeach Eastham by cross-examination, telling the jury:

> You were told at the outset—counsel abandoned that apparently . . . But you were told she lied, she didn't tell the truth. You were told in the opening, mind you, you were promised by the defense you will see she lied because they're collaborating to try to get her into treatment. And that's what you were told. . . . what was produced was irrelevant information about her past. . . . She swore to tell the truth, subjected herself to cross-examination and told you the truth.[72]

The jury found Massey guilty of all four counts.[73] After the trial, Massey retained new counsel and filed post-trial motions arguing for a new trial or dismissal of the case because the Commonwealth violated *Brady* by

71. JA 1145-46.

72. JA 1405-06; 1414.

73. JA 1443-44.

failing to disclose the impeachment material relating to Eastham prior to the preliminary hearing and violated his Confrontation Clause rights.[74] *Brady v. Maryland*, 373 U.S. 83 (1963). The trial court set aside the simple abduction conviction on double jeopardy grounds and denied all other defense motions.[75] The court sentenced Massey to 62 years in prison, with 10 years suspended.[76]

Massey appealed his convictions raising primarily the claim that his Confrontation Clause rights were violated by the admission of Eastham's testimony at trial. *Massey v. Commonwealth*, 67 Va. App. 108 (2016).[77] The Virginia Court of Appeals reached the merits of Massey's claims and ruled in relevant part that Massey's Confrontation Clause rights were not violated because his opportunity to cross-examine Eastham at the preliminary hearing was sufficient.[78] The Supreme Court of Virginia denied Massey's petition for appeal and his petition for rehearing.[79] This Court denied Massey's petition for a writ of *certiorari* raising Confrontation Clause challenges.

Massey sought federal habeas relief in the United States District Court for the Eastern District of Virginia, continuing to raise his Confrontation Clause challenges.

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74. JA 61-89, 1455-87; *see also* JA 78-85, 128-42, 152-54, 1467, 1480, 1495.

75. JA 1520-21.

76. JA 216-17.

77. App. at 16a

78. *Id.*

79. App. at 15a, 56a.

The district court denied his petition.[80] Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed, denying a certificate of appealability and Massey's petition for rehearing.[81]

REASONS FOR GRANTING THE WRIT

The decisions below conflict with this Court's clearly established Confrontation Clause precedent, justifying *certiorari*. Further, courts nationwide disagree on the definition of "adequate opportunity to cross-examine" and under what circumstances, if at all, preliminary hearing testimony can be admitted at trial if a witness is unavailable. This recurring issue calls for this Court to clarify what constitutes a sufficient prior opportunity for cross-examination.

I. THE DECISIONS BELOW CONTRADICT THIS COURT'S ESTABLISHED PRECEDENT

The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." While "the Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish,'" *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987) (internal citation omitted), "[c]onfrontation means more than being allowed to confront the witness physically;" the cross-examination needs to be pointed, full, and effective, not merely an opposition to the witness.

80. App at 4a.

81. App 1a.

See e.g. Davis v. Alaska, 415 U.S. 308, 309 (1974) (finding the "Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias"); *California v. Green*, 399 U.S. 149, 158 (1970) (Confrontation Clause requires that witness be "subject to full and effective cross- examination").

In *Pointer v. Texas*, 380 U.S. 400 (1965), this Court held the Confrontation Clause does not allow preliminary hearing testimony to be admitted at a later trial where the defendant was unrepresented by counsel at the preliminary hearing and therefore did not have the assistance of counsel to cross-examine the witness. *Id.* at 401. In *Crawford v. Washington*, 541 U.S. 36, 57 (2004), the Court explained "prior trial or preliminary hearing testimony [of an unavailable witness] is admissible only if the defendant ha[s] an adequate opportunity to cross-examine" the declarant. Petitioner submits the holdings of *Pointer* and *Crawford* individually and together entitle him to habeas relief where "the state court relied on an unreasonable determination of the facts or unreasonably applied 'clearly established Federal law, as determined by' this Court." *Andrew v. White*, 604 U.S. 86, 92 (2025) (citing 28 U.S.C. §§ 2254(d)(1)-(2)).

In this case, the prosecution charged Massey with a different crime, abduction with intent to defile, after preliminary hearing, rendering him unable to effectively cross-examine Eastham on that charge due to her unavailability at trial. In denying Massey's claims on direct appeal, the Virginia Court of Appeals reasoned that "the additional charge did not change the basic nature of the allegations, rather, it only added an additional

element, the intent to defile, which the Commonwealth was required to prove."[82] On federal habeas review, the district court found the state court's judgment "that the Virginia Supreme Court's decision in *Fisher v. Commonwealth*, 232 S.E.2d 798 (Va. 1977) controlled was not unreasonable"[83] and the "additional charge did not change the basic nature of the allegations, it only added an additional element." The district court further found "[Eastham's] testimony at the preliminary hearing addressed the elements of

82. App. at 44a (applying *Fisher v. Commonwealth*, 232 S.E.2d 798 (Va. 1977)).

83. The Virginia Court of Appeals in *Massey* relied significantly on the pre-*Crawford* Virginia Supreme Court decision of *Fisher v. Commonwealth*, 217 Va. 808 (1977). In *Fisher*, a new robbery indictment was brought against the defendant after preliminary hearing. At preliminary hearing, Fisher was charged with murder. The witness against Fisher died after the preliminary hearing. The Virginia Supreme Court found no Confrontation Clause violation in the prosecution admitting the transcript of the preliminary hearing as to the robbery charge where defense counsel conducted a "vigorous" and searching examination of the unavailable witness on the two central issues at trial—identity and credibility. Hence, "the transcript of [the unavailable witness'] testimony at the preliminary hearing carried sufficient indicia of reliability and provided the jury a satisfactory basis for evaluating the truth of his prior statements." *Fisher v. Commonwealth*, 217 Va. at 813. It is notable the Virginia Supreme Court applied, at least in part, the now rejected indicia of reliability standard for assessing whether the prior statements of the unavailable declarant should have been admitted. *Crawford v. Washington*, 541 U.S. 36, 61 (2004)(rejecting indicia of reliability balancing approach to the admission of prior statements and holding the Confrontation Clause is "a procedural rather than a substantive guarantee [that] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

the subsequently added charge and Petitioner's counsel engaged in cross-examination of [Eastham] related to each of these issues."[84] This reasoning was incorrect and factually belied by the preliminary hearing transcript.

Massey's trial counsel could not engage in effective cross-examination concerning a charge that did not exist. Defense counsel's questions at preliminary hearing regarding abduction were directed toward the time period *after* the sexual conduct between Eastham and Massey had concluded.[85] Critically, the abduction charge at the time of the preliminary hearing entirely concerned Massey allegedly taking Eastham from her apartment in Fairfax to his home in Alexandria. The new charge, which alleged Massey dragged Eastham to her bed inside her apartment to assault her, focused on the events *prior* to the alleged sexual assault. Importantly, the Commonwealth proceeded at preliminary hearing on a theory of simple abduction and rape. Any simple abduction that occurred prior to or during the sexual conduct "merges" with a rape offense. *Brown v. Commonwealth*, 230 Va. 310 (1985) (discussing merger of abduction and rape offenses). Therefore, at preliminary hearing, defense counsel's questions regarding abduction were directed toward the time period after the sexual conduct between Eastham and Massey concluded.[86]

After the preliminary hearing the prosecution charged Massey with the additional offense of abduction

84. App. at 13a-14a.

85. JA 258-273.

86. *Id*.

with intent to defile. By contrast, the merger doctrine has no applicability to abduction with intent to defile, which necessarily occurs prior to and/or at the same time as the rape offense. Defense counsel thus had no opportunity to cross-examine Eastham regarding the charge of abduction with intent to defile. Defense counsel asked Eastham only a handful of questions about the events prior to the first sexual contact between Massey and Eastham and none of those were directed as to Massey's intent during a purported abduction inside Eastham's apartment—there was not a single question concerning Massey's allegedly dragging Eastham to the bed.[87]

In the context of a preliminary hearing, this Court's precedent requires (at least) that an accused be represented, have an adequate opportunity to effectively cross-examine the witness, and that the witness be unavailable for a transcript of that hearing to be used against an accused at a later trial. Here, Massey did not have counsel at the preliminary hearing on the abduction with intent to defile charge, *because the charge did not then exist.* Massey submits this situation falls squarely within the holding of *Pointer v. Texas*, 380 U.S. at 401.

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87. JA 259-60. Factually, there would have been much to explore at a preliminary hearing, if permitted by the judge, regarding the newly indicted charge of abduction with intent to defile. Even if Eastham did not give consent to the sexual acts, Eastham's consent was not conclusive of Massey's subjective intent during the alleged abduction inside the apartment. Therefore, the details of what Eastham and Massey said and did before and during each sex act were highly relevant to the determination of Massey's alleged intent to defile. However, because Massey's intent was not at issue at the preliminary hearing, he had no opportunity (or motive) to ask questions relevant to that element, and Eastham was never subject to full and effective cross-examination on it.

In *Pointer*, the petitioner was unrepresented at the preliminary hearing at which a complaining witness testified that Pointer had robbed him. The witness was unavailable at trial and the preliminary hearing transcript was offered against him, resulting in Pointer's conviction. This Court reversed because Pointer did not have an adequate opportunity, being without counsel, to cross-examine the complainant. 380 U.S. at 406-7 ("the Sixth Amendment's guarantee of confrontation and cross-examination was unquestionably denied petitioner in this case. As has been pointed out, a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him."). Here, Massey did not have counsel at the preliminary hearing on the abduction with intent to defile charge, which was the most serious charge against him at his trial. *Pointer* requires reversal of Massey's convictions.

Further, the principle set forth in *Crawford v. Washington* requires reversal where the Court emphasized that such "prior trial or preliminary hearing testimony [of an unavailable witness] is admissible only if the defendant ha[s] an adequate opportunity to cross-examine" the declarant. *Crawford v. Washington*, 541 U.S. at 57. The Petitioner did not have that opportunity, especially where Eastham feigned memory loss[88] at the preliminary hearing:

88. The Virginia Court of Appeals adjudicated Massey's lack of memory claim on direct appeal, dismissing it as "novel." The court reasoned "[i]t is not at all unusual for a witness to testify that they do not recall or remember specific details" and "[t]o the extent that such memory lapses all favor one side, the witness is subject to having his credibility attacked." The district court found that "the Supreme Court has not held that a lack of memory

> I wish you could have seen the way I handled the cross examination with his retarded lawyer. I gave him nothing, and it was awesome. He was throwing all sorts of stupid shit out to me about me being in a bar on August 13th and whatnot, and I responded with "I don't recall." He couldn't do anything with it.
>
> Trey's attorney was an idiot, and when he crossed [sic] examined me I gave him nothing to work with. It was almost fun. I even questioned him when he was talking about irrelevant info but the judge got a little upset with me for that.[89]

However, it is not just that Eastham had a lack of memory, it is that she falsely claimed that she had a lack of memory rendering cross-examination ineffective. It is not possible, in light of the new charge, to square the lower courts' opinions to the Constitutional requirement that "prior trial or preliminary hearing testimony [of an unavailable witness may be introduced at a trial] only if the defendant ha[s] an adequate opportunity to cross-examine" the declarant. *Crawford v. Washington*, 541 U.S. 36, 57. This is more than just an opportunity to cross-examine, but requires that the witness be "subject to full and effective cross-examination." *California v. Green*, 399 U.S. 149, 158 (1970).

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as demonstrated by [Eastham] during the preliminary hearing violates the Confrontation Clause." App. at 41a.

89. JA at 110-11, 287-88, 1551-52. These text messages were discovered on Eastham.'s phone after her death.

A preliminary hearing is not intended to be a form of pretrial discovery nor a substitute for trial itself but is intended to safeguard persons charged with a felony against being improperly bound over for action of a grand jury solely on the basis of a complaint. This Court has noted the same. *Barber v. Page*, 390 U.S. 719, 725 (1968) ("A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.").

At his preliminary hearing, the Petitioner was not charged with abduction with intent to defile, did not have counsel to represent him on that charge, and was not prepared to examine Eastham regarding the specific elements necessary for a finding of probable cause on that charge (specifically, the intent to defile). Massey's trial counsel precisely hit the point in moving to exclude Eastham's testimony: "*the most serious indictment came ten days after she died, so I never got a chance to talk to her about it at the preliminary hearing and I never will.*"

The principles governing an adequate opportunity to cross-examine as a condition precedent to the admissibility of prior testimony justify granting *certiorari*. *Andrew v. White*, 604 U.S. at 94 ("General legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of this Court.").

II. LOWER COURTS ARE DIVIDED AS TO WHAT CONSTITUTES AN ADEQUATE OPPORTUNITY FOR CROSS-EXAMINATION

As noted by Massey's trial judge, Virginia will go to "extraordinary lengths" in admitting preliminary hearing testimony at a later trial, and in Petitioner's view, apparently finding practically any opportunity to cross-examine the witness sufficient—even as to a crime not charged and where the witness admittedly feigned memory loss. *Massey v. Commonwealth*, 67 Va. App. 108, 133, 135 (2016) (reasoning "additional charge did not change the basic nature of the allegations, rather, it only added an additional element, the intent to defile, which the Commonwealth was required to prove" and "appellant advances the novel argument that his counsel was unable to cross-examine [Eastham] at the preliminary hearing because she feigned a lack of memory regarding certain lines of inquiry").

Like Virginia, other states have an expansive view of the admissibility of preliminary hearing testimony at trial due to an unavailable witness and appear to permit the use of such testimony where the defendant merely has the "opportunity" to cross-examine. For example, the Supreme Court of Kentucky affirmed the use of the preliminary hearing testimony of a deceased witness at a later trial when defense counsel was not provided notice the witness would testify at the preliminary hearing, had received no discovery, and the preliminary hearing was held one-week after counsel's appointment. *Shields v. Commonwealth*, 647 S.W.3d 144, 148-150 (Ky. 2022) (*certiorari* denied). The Supreme Court of Utah, citing a lower court opinion, found that "'it was the opportunity to

cross-examine [the witness], not the actual undertaking of cross-examination, that satisfied the requirements of *Crawford*.'" *Mackin v. State*, 387 P.3d 986, 999 (Utah 2016) (citing *State v. Garrido*, 314 P.3d 1014, 1022 (Utah App. 2013)) (preliminary hearing testimony admissible where defense counsel elected not to cross-examine witness).

The Kansas Supreme Court similarly endorses that the "opportunity" to cross-examine is sufficient even if the witness later becomes unavailable and could not be impeached on other evidence. *State v. Young*, 277 Kan. 588, 599 (Kan. 2004) ("Although Young claims that Hickman's statements at the preliminary hearing were inconsistent with statements Hickman made at the crime scene, any inconsistency could have been addressed on cross-examination during the preliminary hearing"). California also falls within this expansive category. *People v. Wilson*, 11 Cal.5th 259, 291 (Cal. 2021) ("prior testimony of an unavailable witness may be admitted if, at that prior hearing, 'the defendant had the opportunity to cross-examine the witness. . . .'") (internal citation omitted); *People v. Andrade*, 190 Cal. Rptr.3d 442, 459 (Cal. App. 2015) ("Both the United States Supreme Court and the California Supreme Court 'have concluded that 'when a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement [], regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony") (written witness statement not available to defense counsel at time of preliminary hearing); *People v. Jurado*, 41 Cal. Rptr.3d 319, 354 (Cal. 2006) ("Absent wrongful failure to timely disclose by the prosecution, a defendant's

subsequent discovery of material that might have proved useful in cross-examination is not grounds for excluding otherwise admissible prior testimony at trial.").

In contrast, Colorado appears to have a categorical rule prohibiting the use of preliminary hearing testimony at a later trial in the event a witness becomes unavailable. In *People v. Fry*, 92 P.3d 970 (Colo. 2004), the Colorado Supreme Court considered whether a preliminary hearing provided an "adequate opportunity" for cross examination. That court held that the prior testimony was inadmissible because "credibility is not at issue" in Colorado preliminary hearings and "therefore, as a practical matter, defense counsel may decline to cross-examine witnesses at the preliminary hearing, understanding that the cross-examination would have no bearing on the issue of probable cause and that the judge may limit or prohibit the cross-examination." *Id.* at 977. The court noted that preliminary hearings were not "mini-trials" and "[w]ere we to allow extensive cross-examination by defense counsel so as to prevent any Confrontation Clause violations at trial if a witness were to become unavailable, we would turn the preliminary hearing in every case into a much longer and more burdensome process for all parties involved." *Id.* at 978.

Other courts, in assessing the admissibility of prior testimony of an unavailable witness, determine whether the defendant had an "adequate opportunity" to cross-examine the witness on a case-by-case basis. The Pennsylvania Supreme Court rejected the use of a preliminary hearing transcript where the government failed to disclose that its "star" witness had made a prior inconsistent statement to the police, that he had a

criminal record, and that he was also a suspect in the same homicide conspiracy for which the defendant was being prosecuted. *Commonwealth v. Bazemore*, 531 Pa. 582, 587 (1992). The court held that the prior testimony was inadmissible because cross-examination was inadequate. *Id.* at 589. The court rejected the government's contention the cross-examination was adequate because it was not restricted by the preliminary hearing judge: "one is hard pressed to find just how defense counsel was 'not restricted' when the Commonwealth failed to provide [the impeachment information] to the defense." *Id.* at 588 (emphasis added). In *Commonwealth v. Johnson*, the Pennsylvania intermediate appellate court determined Johnson had been denied full and fair cross-examination because:

> During the preliminary hearing, Appellee's questioning of Ms. Thompson about Ms. Hayes' relationship with Douglas Hayes was unsuccessful because the Commonwealth objected, and the judge sustained the objections. The court and the Commonwealth precluded Appellee from this line of cross-examination. We agree with the lower court that the sustaining of the Commonwealth's objections denied Appellee a full and fair opportunity to cross examine Ms. Thompson regarding Ms. Hayes' past relationships.

758 A.2d 166, 172-73 (Pa. App. 2000).[90]

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90. It is noteworthy the Virginia Court of Appeals in *Massey v. Commonwealth* dismissed Massey's claim he was not afforded adequate opportunity to cross-examine as to bias at preliminary

Similarly, the Maryland Court of Appeals, in *Williams v. State*, 7 A.3d 1038, 1053 (Md. App. 2010), held that the prior testimony of a deceased witness could not be admitted at a later trial. The court found that "although petitioner may have had an opportunity to cross-examine Ms. O'Carroll at the first trial, it was not an adequate one, because he had not been informed that Ms. O'Carroll was 'legally blind,' or at least considered herself to be so." *Id.* at 1054. This case-by-case approach has also been adopted by courts in Arizona, Massachusetts, Rhode Island, and Wisconsin. *State v. Ray*, 598 P.2d 990 (Ariz. 1979) (prior testimony inadmissible because preliminary hearing judge terminated defense questioning of witness about relevant subject matter); *Commonwealth v. DiBenedetto*, 605 N.E.2d 811, 414 Mass. 37, 44 (1992) (holding that

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hearing where Massey's counsel failed to make a "proffer" of what questions he would have additionally asked and the answers that he expected to elicit after the preliminary hearing judge sustained a prosecution objection to defense counsel's questioning as to bias. App. at 39a-40a ("appellant failed to establish what questions he would have asked and what the answers to those questions were expected to be."). The court reached this conclusion even though it appeared to acknowledge the limited purpose of preliminary hearings. App. at 40a, n. 12 ("We acknowledge that, in the normal course, litigants have no need to offer proffers in preliminary hearings in courts not of record. However, when, as here, the preliminary hearing testimony becomes the trial testimony because of the unavailability of the witness, such a step is necessary to create a sufficient record for appellate review.") To fulfill the mandate of the Virginia Court of Appeals, preliminary hearings in Virginia would indeed need to be "mini-trials" where defense counsel would need to make proffers as to what questions would be asked and what answers would be expected whenever an objection was sustained. The Colorado Supreme Court rightly noted such a procedure would be burdensome. *People v. Fry*, 92 P.3d at 978.

"admission of prior recorded testimony of unavailable witness given in homicide defendant juvenile transfer hearing violated defendant's constitutional right of confrontation, where, because witness was unrepresented and was offered immunity only as to conspiracy to rob charge, court limited direct and cross-examination of witness to conspiracy to rob"); *State v. Stuart*, 2005 WI 47, 279, 695 N.W.2d 259 (Wis. 2005) (prior testimony inadmissible where preliminary hearing judge refused to allow defendant to inquire about witness's pending charges and motive to falsely testify); *State v. Anthony*, 448 A.2d 744, 755-56 (R.I. 1982) (restriction of cross-examination regarding motive to fabricate, while "possibly proper for the preliminary hearing," limited the substantive use of the prior bail hearing testimony at trial and rendered cross-examination inadequate to satisfy the Confrontation Clause).

Some state supreme courts, including courts in Hawaii, Idaho, Illinois, and Nevada, have enunciated factors in determining whether there was an adequate opportunity for cross-examination at a preliminary hearing to render the hearing admissible at a later trial. *State v. Nofoa*, 349 P.3d 327 (Haw. 2015) (considering the following factors "1) the motive and purpose of the cross-examination, 2) whether any restrictions were placed on Nofoa's cross-examination during the preliminary hearing, and 3) whether Nofoa had access to sufficient discovery at the preliminary hearing to allow for effective cross-examination of CW."); *State v. Richardson*, 328 P.3d 504, 508 (Idaho 2014) (noting "*Crawford* did not specifically address what constitutes an 'adequate' opportunity for cross-examination," but "[t]here are three indicators of an adequate opportunity for cross-examination

based on U.S. Supreme Court case law," the first being "representation by counsel, the second "no significant limitation 'in any way in the scope or nature' of counsel's cross-examination," and the third whether it can been shown there is "'any new and significantly material line of cross-examination that was not at least touched upon' in the preliminary hearing.") (internal citations omitted); *People v. Torres*, 962 N.E.2d 919, 933-934 (Ill. 2012) ("for the preliminary hearing testimony of an unavailable witness to be subsequently admissible at trial, the trial court must have allowed defense counsel to fully explore the highly relevant areas of the witness' opportunity to observe, interest, bias, prejudice, and motive."); *Chavez v. State*, 213 P.3d 476, 125 Nev. 328, 338 (Nev. 2009) ("We will determine the adequacy of the opportunity on a case-by-case basis, taking into consideration such factors as the extent of discovery that was available to the defendant at the time of cross-examination and whether the magistrate judge allowed the defendant a thorough opportunity to cross-examine the witness.").

As a result, lower courts differ on how they decide if a defendant had an "adequate opportunity" to cross-examine a witness during a preliminary hearing when the witness is later unavailable and the prosecution seeks to use the transcript or recording as evidence at a later trial. Some courts have outlined specific factors for this determination, while others have not established clear criteria. One state's highest court has a categorical rule that appears to prohibit preliminary hearing transcripts from being used at later trials. In contrast, several other state courts appear to allow the use of a preliminary hearing transcript at trial in the event of a witness' later

unavailability if there was simply an opportunity to cross-examine. This Court's intervention is necessary.

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR THE DETERMINATION OF THE QUESTIONS PRESENTED

Massey has made out a valid claim that the use of the preliminary transcript at his trial violated this Court's established Constitutional holding in *Pointer v. Texas* as he did not have, and could not have had, counsel who could adequately confront and cross-examine the witness against him on a charge that did not then exist. 380 U.S. 400. This, coupled with the significant impeachment unavailable at the preliminary hearing and Eastham's own admissions that she stultified defense counsel's questioning at the preliminary hearing, who she derided as an "idiot," further failed to give Massey an adequate opportunity to cross-examine and confront Eastham such that the transcript of her preliminary hearing testimony should have been excluded from his trial under this Court's established Confrontation Clause jurisprudence. *Crawford v. Washington*, 541 U.S. 36, 57 ("prior trial or preliminary hearing testimony [of an unavailable witness may be introduced at a trial] only if the defendant had an adequate opportunity to cross-examine" the declarant.).

While this Court has not stated in detail what is an "adequate opportunity to cross-examine," it should not apply to a case where a witness feigns memory loss and a defendant must foresee, cross-examine on, and preserve objections at a preliminary hearing to uncharged allegations in the event the witness later becomes unavailable. Thus, the general principle that

a defendant must have an adequate opportunity to cross-examine, as stated in *Crawford*, should be viewed as clearly established law and a holding of this Court entitling Massey to habeas relief. *Andrew v. White*, 604 U.S. at 94 ("General legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of this Court.").

On the issue of what constitutes an adequate opportunity to cross-examine at a prior hearing, the Petitioner would have prevailed on his Confrontation Clause challenge in Colorado and likely many other states—but in states, like Virginia, that take an expansive view of what constitutes an opportunity to cross-examine, he stands convicted in violation of this Court's established precedent.

The application of Constitutional standards and defendants' rights should not vary based on what jurisdiction an individual resides when charged with a crime. This case presents a recurring and critical constitutional question that has been addressed by at least 14 state courts of last resort, applying varying standards as to what constitutes an adequate opportunity to cross-examine a witness at a preliminary hearing. This issue was recently presented to the Court in the petition of *Shields v. Kentucky*, No. 22-450 and the Court declined to grant *certiorari*. As such, four years have passed and still this constitutional dilemma is unresolved. It should be resolved now.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted this 27th day of February 2026.

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED SEPTEMBER 2, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6006

CHARLES ALBERT MASSEY,

Petitioner-Appellant,

v.

CHADWICK DOTSON, DIRECTOR VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, Senior District Judge.
(1:21-cv-01183-CMH-JFA)

Submitted: August 28, 2025
Decided: September 2, 2025

Before GREGORY, QUATTLEBAUM, and HEYTENS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Appendix A

Joseph Douglas King, KING CAMPBELL PORETZ & THOMAS, PLLC, Alexandria, Virginia, for Appellant.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Charles Albert Massey seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2254 petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 580 U.S. 100, 115-17 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Massey has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately

presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, FILED DECEMBER 1, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 1:21cv1183

CHARLES ALBERT MASSEY, III,

Petitioner,

v.

HAROLD CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

Filed December 1, 2023

MEMORANDUM OPINION

THIS MATTER comes before the Court on Petitioner's Motion to File Petition for a Writ of Habeas Corpus Out of Time and Respondent's Motion to Dismiss.

Petitioner Charles Albert Massey, III, filed a § 2254 federal habeas petition with this Court on October 21, 2021.

Appendix B

Petitioner is confined pursuant to a final judgment of the Fairfax County Circuit Court. A jury convicted Massey of two counts of rape and one count of abduction with intent to defile. By final order dated August 26, 2015, the trial court sentenced Massey to 20 years for abduction and 21 years for each count of rape, for a total aggregate sentence of 62 years in prison, with 10 years suspended.

Petitioner's conviction became final for purposes of federal habeas on March 19, 2018, the date the United States Supreme Court denied his petition for certiorari. *Hill v. Braxton*, 277 F.3d 701, 704 (4th Cir. 2002). Petitioner filed a timely habeas petition in state court 200 days later, on October 5, 2018. The state habeas petition tolled the statute of limitations for 728 days, from October 5, 2018 until October 2, 2020, the day the Supreme Court of Virginia refused the petition for appeal from the denial of the state habeas petition. 28 U.S.C. § 2244(d)(2). From that date, Petitioner had 165 days, or until March 17, 2021, to file a § 2254 petition. He did not file this petition until October 21, 2021, over seven months past his deadline.

Both parties agree this Petition was filed beyond Petitioner's federal habeas deadline. However, Petitioner argues for the application of equitable tolling to allow him to timely file.

Equitable tolling is available in federal habeas cases only where the petitioner shows: (1) he pursued his rights diligently; and (2) some extraordinary circumstance prevented him from timely filing his habeas petition. *See Holland v. Florida*, 560 U.S. 631, 649 (2010). The petitioner

must demonstrate a causal relationship between the extraordinary circumstance and the lateness of his filing. The petitioner bears the burden of demonstrating that he is entitled to equitable tolling. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

To satisfy the first prong of the equitable tolling test, the petitioner must have exercised "reasonable diligence, . . . not maximum feasible diligence." *Holland*, 560 U.S. at 653. Petitioner's state habeas counsel admits to the Court he failed to learn the petition for appeal from the state habeas denial had been refused by the Supreme Court of Virginia on October 2, 2020. State habeas counsel did not discover the appeal was denied until May 2021. Petitioner had already told this counsel that he wanted to pursue federal habeas relief if his state habeas appeal was denied and he agreed to represent Petitioner. The current federal habeas petition was filed on October 21, 2021, approximately five months after the state habeas counsel learned the petition for appeal was refused. Petitioner states he immediately sought new counsel to pursue his federal habeas relief once he was told his petition was refused. The Court finds, given all the circumstances, Petitioner has shown he diligently pursued his rights sufficient to satisfy the first prong in *Holland*.

Now turning to the second prong in *Holland*, whether some extraordinary circumstance prevented him from timely filing his habeas petition. Petitioner's state habeas counsel failed to check the status of his appeal for eight months. Counsel is normally expected to monitor their cases and timely act to protect their clients' rights.

Having counsel fail to act for eight months, causing their client to miss a deadline, especially when that client is incarcerated, is an extraordinary circumstance that satisfies the second prong in *Holland*.

The Court finds Petitioner is entitled to equitable tolling and this petition is timely filed. The Court will now turn to the claims in Petitioner's § 2254 federal habeas petition and the Motion to Dismiss.

Petitioner makes three claims: (Claim I) The Commonwealth violated due process by failing to disclose favorable, material evidence contained in police reports in time to enable an adequate opportunity to cross-examine P.E.; (Claim II) The trial court's admission of P.E.'s preliminary hearing testimony violated the Confrontation Clause of the Sixth Amendment where petitioner did not have an adequate opportunity to cross-examine P.E.; and (Claim III) Trial and state habeas counsel rendered ineffective assistance by failing to object on Confrontation Clause Grounds to the SANE nurse's recitation of P.E.'s report that petitioner abducted and sexually assaulted.

The first issue to determine is whether Petitioner has exhausted his state remedies for his claims.

"[A] federal court may not grant a writ of habeas corpus to a petitioner in state custody unless the petitioner has first exhausted his state remedies by presenting his claims to the highest state court." *Baker v. Corcoran*, 220 F.3d 276, 288 (4th Cir. 2000). *See O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). To meet the exhaustion

requirement, a petitioner "must have presented to the state court both the operative facts and the controlling legal principles.'" *Kasi v. Angelone*, 300 F.3d 487, 501-02 (4th Cir. 2002) (*quoting Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997)).

Claims I and II in the Petition were raised in state court by Massey's direct appeal and both parties agree they were exhausted. However, Claim III, is not exhausted because it was never raised in state court and is now procedurally barred from consideration in state court. *See Baker*, 220 F.3d at 288 ("A claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally barred under state law if the petitioner attempted to present it to the state court."); *see also Bassette v. Thompson*, 915 F.2d 932, 936-37 (4th Cir. 1990). Further, Petitioner has failed to demonstrate that state habeas counsel was ineffective for failing to raise this claim. Therefore, Petitioner's Claim III is defaulted and exhausted for purposes of this Petition.

The state record is before the Court, Respondent has filed a Motion to Dismiss that has been fully briefed, and the Court is now prepared to rule on the merits of the petition.

Under the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), federal courts may not grant habeas relief in a § 2254 action unless the underlying state-court adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application

of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d). "'[A] determination on a factual issue made by a State court shall be presumed correct.'" *Tucker v. Ozmint*, 350 F.3d 433, 439 (4th Cir. 2003) (quoting 28 U.S.C. § 2254(e)(1)). "In reviewing a habeas petition, federal courts must presume the correctness of a state court's factual determinations unless the habeas petitioner rebuts the presumption of correctness by clear and convincing evidence." *Green v. Johnson*, 515 F.3d 290, 299 (4th Cir. 2008). *See Landrigan*, 550 U.S. at 473-74.

Petitioner's Claim I is that the Commonwealth violated due process by failing to disclose favorable, material evidence contained in police reports in time to enable an adequate opportunity to cross-examine P.E. The state court determined that the information contained in the police reports were not material under *Brady v. Maryland*, 373 U.S. 83 (1963). The state court held that, under Virginia Rules of Evidence 2:607(a)(vi) and 2:613 which govern the impeachment of witnesses, that the material in the police reports were collateral as a matter of Virginia law, and therefore could not have been used to impeach P.E.'s testimony at the preliminary hearing. The state court reasoned, "[b]ecause the statements are merely collateral" as a matter of state evidentiary law, "appellant has failed to establish that' [t]he evidence not disclosed to the accused was favorable to the accused . . . because it may [have been] used for impeachment[.]'"

(*quoting Workman v. Commonwealth*, 636 S.E.2d 633, 374 (Va. 2006). The state court found in the alternative that, even if the statements could have been utilized in the examination of P.E., [Petitioner] has not made the necessary showing of prejudice required by *Brady*.

The Court finds the state court's determination that the information in the police reports was not material under *Brady* was not contrary to or an unreasonable application of Supreme Court precedent, nor was it based on an unreasonable factual finding and Petitioner's Claim I should be dismissed.

Petitioner's Claim II, that the trial court's admission of P.E.'s preliminary hearing testimony violated the Confrontation Clause of the Sixth Amendment where Petitioner did not have an adequate opportunity to cross-examine P.E., contains five arguments in support.

The first argument in Claim II is that the cross-examination at the preliminary hearing was defective because the Commonwealth did not disclose the information in the police reports prior to preliminary hearing thus he did not have an adequate opportunity to cross-examine the victim regarding that information, violating his Confrontation rights. The state court concluded that, under state evidentiary law, the information in the police reports would not have been admissible for impeachment. The state appellate court agreed, concluding that the information in the police reports was not material within the meaning of *Brady*.

Appendix B

The admission of P.E.'s preliminary hearing testimony did not violate Petitioner's Sixth Amendment right to confrontation. The *Crawford* Court stated that testimony from a preliminary hearing is inadmissible unless: (1) the witness is unavailable; and (2) the defendant had a prior opportunity to adequately cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36 (2004). It is well settled that "the Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987). P.E.'s death rendered her presently unavailable to testify at trial. Also, P.E.'s prior testimony at the preliminary hearing was under oath and accurately recorded. Finally, the record establishes that Petitioner was present at the preliminary hearing, was represented by counsel, and was afforded a meaningful opportunity to cross-examine P.E. Further, the Confrontation Clause does not bar the use of preliminary hearing testimony in the face of a witness's absence, claimed loss of memory, claim of privilege or simple refusal to answer. *Crawford*, 541 U.S. at 57.

Petitioner confronted P.E. face-to-face at the prior hearing and his interest at the pretrial hearing was the same as it would have been at trial. The Court finds the state court's judgment was not unreasonable.

In Petitioner's second argument in Claim II, he alleges the admission of P.E.'s preliminary hearing testimony violated his Confrontation rights because the government discovered and disclosed telephone records, photographs,

and text messages that, according to Massey, proved P.E. made false statements or material omissions to the police, to friends, and during her preliminary hearing testimony. The state court rejected this claim, concluding that the fact that additional material was found after the examination of a witness does not render the examination infirm, and that Massey had the opportunity to use the material at trial.

While additional, potentially useful information came to light after the preliminary hearing, Massey's motive to cross-examine P.E. was the same, to discredit P.E. and attack her credibility on the issue of consent. Therefore, Massey's opportunity to cross-examine P.E. was constitutionally adequate. Further, under Virginia law the credibility of an out-of-court declarant may be attacked by any evidence which would be admissible for those purposes if the declarant had testified as a witness. *Luck v. Commonwealth*, 515 S.E.2d 325, 330 (Va. Ct. App. 1999). The state court's judgment was not an unreasonable application of, or contrary to, federal law as stated by the United States Supreme Court, nor was it based on an unreasonable factual finding.

The third argument in Claim II, Petitioner asserts the admission of P.E.'s preliminary hearing testimony violated his Confrontation rights because the preliminary hearing judge impermissibly limited the scope of cross-examination when he sustained the prosecution's objections to question about whether Petitioner and P.E.'s father were working together to help P.E. receive treatment for substance abuse.

The state court determined that, because all of P.E.'s preliminary hearing testimony, including the exchange detailed above was read into evidence at trial, the jury heard P.E.'s acknowledgement that appellant and her father previously had discussed ways to help her. Thus, the state court reasoned, Massey "was free to use that concession to establish that P.E. had a motive to lie against him in hopes of avoiding another trip to a treatment facility or because she resented his efforts in this regard," thereby allowing Massey to argue that Massey's efforts to get her into substance abuse treatment resulted in P.E.'s bias and motive to fabricate. The Court finds the state court's judgment was not unreasonable.

Petitioner's fourth argument of Claim II asserts that P.E.'s lack of memory at the preliminary hearing rendered her unavailable for cross-examination. However, the Supreme Court has not held that a lack of memory as demonstrated by P.E. during the preliminary hearing violates the Confrontation Clause in this context. The state court's judgment was not unreasonable.

Petitioner's fifth argument in Claim II states his Confrontation rights were violated when P.E.'s preliminary hearing testimony was admitted because the additional charge after the preliminary hearing denied meaningful cross-examination as to the additional charge of abduction with the intent to defile. The state court's judgment that the Virginia Supreme Court's decision in *Fisher v. Commonwealth*, 232 S.E.2d 798 (Va. 1977) controlled was not unreasonable. The state court correctly reasoned that the additional charge did not change the basic nature of

the allegations, it only added an additional element, the intent to defile. P.E.'s testimony at the preliminary hearing addressed the elements of the subsequently added charge and Petitioner's counsel engaged in cross-examination of P.E. related to each of these issues. Petitioner's Claim II should be dismissed in its entirety.

For the foregoing reasons, Petitioner's Motion to File Petition for a Writ of Habeas Corpus Out of Time should be granted and Respondent's Motion to Dismiss should be granted.

An appropriate Order shall issue.

/s/ Claude M. Hilton
CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
December 1, 2023

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 16th day of June, 2017.

Record No. 170057
Court of Appeals No. 1421-15-4

Charles Albert Massey, III, Appellant,
against
Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/ Deputy Clerk

COURT OF APPEALS OF VIRGINIA

Present: Judges Petty, O'Brien and Russell
Argued at Alexandria, Virginia

Record No. 1421-15-4

OPINION BY JUDGE WESLEY G. RUSSELL, JR.
DECEMBER 13, 2016

CHARLES ALBERT MASSEY, III

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF
FAIRFAX COUNTY
Robert J. Smith, Judge

Patrick M. Blanch (Zinicola, Blanch & Overand, PLLC, on briefs), for appellant.[1]

Victoria Johnson, Assistant Attorney General (Mark R. Herring, Attorney General, on brief), for appellee.

Charles Albert Massey, III, appellant, was convicted by a jury of abduction with intent to defile in violation of Code § 18.2-48 and two counts of rape in violation of Code § 18.2-61. On appeal, he contends the trial court erred by: (1) denying his

[1] Appellant was represented by different counsel from the time of the preliminary hearing through the jury's verdict. His present counsel represented him regarding the post-trial motions and on appeal.

motion for a new trial because the Commonwealth failed to timely disclose exculpatory evidence; (2) not finding certain police reports exculpatory; (3) admitting into evidence the preliminary hearing testimony of the victim during the Commonwealth's case-in-chief[2]; and (4) excluding a text message the victim sent to a friend on the day of the preliminary hearing.

BACKGROUND

Preliminary Hearing

Appellant was arrested on September 4, 2013, for two counts of rape and one count of simple abduction. The preliminary hearing was held on November 1, 2013, in the Fairfax County Juvenile & Domestic Relations District Court. The victim, P.E., testified that she previously had been engaged to appellant and had lived with him for approximately nine months. They broke off the engagement in April of 2013 after she was released from a five-day involuntary stay in a rehabilitation facility. Her time in the rehabilitation facility was the result of the combined efforts of her father and the appellant to place her there.

P.E. stated that appellant telephoned her late at night on September 3, 2013, because he needed to talk to someone about the difficult time he was having in coping with a sick grandmother. She allowed him to visit her at her studio apartment in Fairfax, and he arrived close to midnight. After trying to console appellant, she asked him to leave

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[2] The Honorable Charles J. Maxfield presided over the proceedings that are the subject of these issues on appeal.

because it was late and she needed to be at work early the next morning. Appellant did not want to go and indicated that he would sleep on the couch. Initially, P.E. agreed, but she was unable to sleep and felt uncomfortable with appellant being in her apartment. Again, she asked him to leave, but he refused.

P.E. testified that she opened the door for appellant to leave, but he shut the door and dragged P.E. towards her bed. He threw her onto her bed and raped her twice. At some point during the night he struck her in the face and strangled her until she "black[ed] out or nearly black[ed] out." The next morning, appellant allowed P.E. to get dressed, but did not permit her to go to work because of the bruising on her face. He drove them to a house in Alexandria where they used to live so that appellant could pack some of his belongings for a trip to his home state of Mississippi. Before leaving the house, appellant bound P.E.'s hands and feet with clear packing tape, covered her in a blanket, and placed her in the back seat of his car. Appellant eventually removed the tape from P.E. and left her on a road near her parents' home in Fairfax.

On cross-examination, defense counsel asked P.E. several questions that P.E. claimed she was unable to answer, including the following:

> [Appellant's Counsel]: Tell me, when was the first time you had sex with him after you broke off the engagement?
>
> [P.E.:] I don't recall.

> [Appellant's Counsel]: Well, was it a matter of days[?] Would you agree with that?
>
> [P.E.:] I'm not sure.

P.E. admitted that, while intoxicated, she telephoned appellant from a bar on June 13, 2013, and he took her home, yet she did not remember whether she had sex with him on that occasion. She also remembered that she was in a bar on July 13, 2013, and called appellant on that night. She stated that "[i]t's possible" that she had sex with him that evening. P.E. also called appellant from her parents' house in July, and indicated that it's "possible" she had sex with him at that time, although she was too drunk to remember. P.E. was also questioned about her stay with appellant in August:

> [Appellant's Counsel]: Did you or did you not stay in his house for fifteen days out of the thirty days in August of this year?
>
> [P.E.:] Yes.
>
> [Appellant's Counsel]: Yes, and do you remember those nights?
>
> [P.E.:] Not particularly, no.
>
> [Appellant's Counsel]: Why?
>
> [P.E.:] I guess I just tried to block them out.

> [Appellant's Counsel]: Well, was there drinking and sex on some or all of those nights?
>
> [P.E.:] Maybe some.

Other instances of lapses in memory included her inability to remember if she exchanged text messages with appellant on September 3, 2013, whether there was any discussion about who used the condoms beside her bed, whether she remembered throwing appellant's keys on September 3, and whether she communicated with "Adam" on September 4.

In response to P.E. stating that appellant "usually told my dad that I had problems or issues, and that he was trying to help me[,]" counsel asked P.E., "Didn't [appellant] and your father collaborate on that path to help you?" P.E. replied "Yes."

After P.E.'s response, the Commonwealth objected to the line of questioning on the basis of relevance, and the court sustained the objection. In response, appellant's counsel stated "All right." At that time, he neither presented an argument designed to overcome the objection nor did he proffer questions he would have asked or answers he expected to receive to any such questions but for the court's ruling on the Commonwealth's objection. The district court certified all charges to the grand jury. The grand jury returned four indictments. In addition to the charges that were pending at the time of the preliminary hearing, the grand jury indicted appellant for an additional charge — abduction with the intent to defile in violation of Code § 18.2-48.

Trial

P.E. died prior to trial. Appellant filed a motion *in limine* to exclude P.E.'s preliminary hearing testimony from his trial arguing that introduction of the preliminary hearing transcript violated Rule 2:804(b)(1) and appellant's Sixth Amendment right of confrontation. Specifically, appellant argued in the motion that the preliminary hearing transcript should not be read at trial because "defense counsel was precluded during his cross-examination from inquiring into several important matters" and because "after the preliminary hearing, through the course of discovery, the Commonwealth produced to defense counsel numerous materials that contradict [P.E.'s] testimony that could have been used to contradict" her.[3]

The court allowed the transcript of P.E.'s testimony to be read into evidence in its entirety.[4] Thus, the jury heard P.E.'s statements regarding a lack of memory and her affirmative response to the question, "Didn't [appellant] and your father collaborate on that path to help you?"

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[3] Although appellant's motion *in limine* did not specifically reference Brady v. Maryland, 373 U.S. 83 (1963), it detailed information that was, at the time of the preliminary hearing, in the Commonwealth's possession and that appellant contended was exculpatory. Accordingly, the motion *in limine* sufficiently preserved appellant's Brady argument for appellate review.

[4] Only counsel's questions and P.E.'s answers were read at trial; the jury did not hear and therefore was not aware of any objections that had been raised at the preliminary hearing or how the judge resolved those objections.

Patricia Taylor, an acquaintance of appellant, testified at appellant's jury trial that she spoke with appellant at 12:30 p.m. on September 4. Appellant told Taylor that he thought he needed help. He told her that he and P.E. had fought and that he "kind of made her have sex with [him]." Taylor asked if he had sexually assaulted P.E., and his response was "Yes." He also told Taylor he had bound P.E. with tape, wrapped her in a blanket, and driven her to her father's home.

The Commonwealth called Elizabeth Roach, a Sexual Assault Nurse Examiner who works at INOVA Fairfax Hospital. Roach performed a sexual assault examination on P.E. on September 4, 2013. Roach testified in detail about the numerous bruises and abrasions P.E. had over significant portions of her body. She testified that her examination revealed a reddened area on the hymen, indicating a fresh injury. She agreed that the injury was consistent with a report of "forcible penile vaginal penetration." Roach also testified regarding P.E.'s report to her on the morning of September 4. According to Roach, P.E. reported that, the previous night,

> she had been in her apartment. Her ex-fiancée was there. He was not allowing her to leave. She said he had forcible penile vaginal penetration with her twice, on two occasions. That he strangled her on several occasions. She — he also suffocated her by putting his hand over her nose and mouth, making it difficult for her to breathe. And on another occasion, stuck a sheet into her mouth to make it difficult for her to breathe,

> so that — she felt that it was so she wouldn't scream. She said that her hands and her feet were bound with the tape and that she was wrapped in a blanket and put in the back seat of the car and removed.

Roach also testified, without objection, that "post-traumatic stress" causes victims of sexual assault to have memory issues. Comparing memories of the sexual assault to a deck of cards, Roach testified that "it takes [victims] a while to retrieve all the cards. Sometimes they never retrieve them in their lifetime; sometimes they may retrieve a card years or months later. So they have a hard time . . . to tell a story in a complete start to finish." Roach also stated that post-traumatic stress can explain why a sexual assault victim may give inconsistent accounts of the same event to different people.

Appellant testified that he and P.E. fought on the night of September 3, 2013. They engaged in a mutual physical fight and then engaged in consensual sex as a way to make up. Appellant testified that, prior to the sexual activity, P.E. had asked him to leave and opened the door to the apartment so that he could leave. Appellant acknowledged refusing to leave and closing the door. Furthermore, he claimed that P.E. threatened to scream if he did not leave, began screaming when he refused, and that he grabbed her and placed his hand over her mouth, apparently for the purpose of muffling her screams. He claimed to have done this in an effort to get her to "calm down." Appellant admitted to hitting P.E. in the past and binding her wrists and ankles on this occasion. He also

acknowledged that he told Taylor that he "kind of made [P.E.] have sex with [him]."

Over the course of trial, multiple text messages that had been sent by P.E. were introduced. Regarding her appearance at the preliminary hearing, P.E. texted a friend that appellant's "attorney was an idiot and when he cross examined me I gave him nothing to work with . . . . It was almost fun. I even questioned him when he was talking about irrelevant info, but the judge got a little upset with me for that[.]" Regarding her testimony, she texted another friend that

> I kinda wish you could've seen the way I handled the cross examination with his retarded lawyer, I gave him nothing. And it was awesome. . . . He was throwing all sorts of stupid shit out at me about me being in a bar on August 13th and whatnot and when I respond with I don't recall he couldn't do anything with it[.]

Appellant sought to introduce yet another text message P.E. sent to a friend the morning of the preliminary hearing. In the text message, which was marked as Defendant's Exhibit 14 for identification, P.E. wrote "Is it sick that I'm making myself look really good right now just to piss him off?" Although appellant initially withdrew the exhibit in response to the Commonwealth's objection, he eventually changed course and sought its admission, arguing that it showed animus against him and reflected a present sense impression of P.E. shortly before her preliminary hearing testimony. The Commonwealth objected on the grounds that it

was hearsay not within any exception. The trial court refused to admit Defendant's Exhibit 14 into evidence on the grounds that it was not relevant.

Both parties called Detective David Kroll of the Fairfax County Police Department in their respective cases. Detective Kroll was the member of the Major Crime Division, Adult Sex Unit, who investigated the events. In the Commonwealth's case, Detective Kroll testified regarding his investigation, his interactions with P.E., and evidence that was collected as part of the investigation. In appellant's case, Detective Kroll was examined extensively regarding potential inconsistencies in P.E.'s story. Of particular note, Detective Kroll acknowledged that P.E. initially had claimed to have been on the lease for appellant's residence but later admitted she was not.

Appellant also introduced a nude photograph of P.E. that showed her posed on a bed while holding a wine glass. The photograph was taken some time prior to the events in question. The Commonwealth objected to the relevance of the photograph. Appellant noted that, during her preliminary hearing testimony, P.E. had testified that she had never allowed appellant to take nude photographs of her, and therefore, the apparently posed picture called her credibility into question. The trial court admitted the photograph into evidence.

Ultimately, the jury convicted appellant of two counts of rape and one count of abduction with the intent to defile.[5] On May 18, 2015, appellant filed a

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[5] The jury also convicted appellant of simple abduction. Post-trial, appellant argued that, at most, the evidence established one continuous abduction from the confrontation at P.E.'s door, throughout the rapes, and until P.E. was released near her

motion to dismiss or, in the alternative, to set aside the verdict alleging a violation of Brady v. Maryland, 373 U.S. 83 (1963). Specifically, he argued that, prior to her preliminary hearing testimony, the Commonwealth was in possession of information that could have been used to attack P.E.'s credibility and that the failure to disclose such information prior to the testimony being given should have resulted in her preliminary hearing testimony being excluded at trial. The trial court denied the motion.[6]

On appeal, appellant raises nine assignments of error. Eight of the assignments of error take issue with the decision of the trial court to admit P.E.'s preliminary hearing testimony into evidence at trial. The ninth assignment of error challenges the trial court's exclusion of Defendant's Exhibit 14.

ANALYSIS

I. Admission of Preliminary Hearing Testimony at Trial

It is well established that, when a witness dies after testifying at a preliminary hearing, the preliminary hearing testimony may be read into evidence at trial so long as certain safeguards have been met. As the Virginia Supreme Court has held,

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parents' home the next day. The trial court agreed and set aside the simple abduction conviction.

[6] The next day, appellant filed another motion to set aside the verdict. The trial court denied the motion except for the portion that sought dismissal of one of the abduction counts.

> the preliminary hearing testimony of a witness who is absent at a subsequent criminal trial may be admitted into evidence if the following conditions are satisfied: (1) that the witness is presently unavailable; (2) that the prior testimony of the witness was given under oath (or in a form of affirmation that is legally sufficient); (3) that the prior testimony was accurately recorded or that the person who seeks to relate the testimony of the unavailable witness can state the subject matter of the unavailable witness's testimony with clarity and in detail; and (4) that the party against whom the prior testimony is offered was present, and represented by counsel, at the preliminary hearing and was afforded the opportunity of cross-examination when the witness testified at the preliminary hearing.

Longshore v. Commonwealth, 260 Va. 3, 3-4, 530 S.E.2d 146, 146 (2000); see also Va. R. Evid. 2:804(b)(1). Here, appellant does not challenge that the preliminary hearing transcript is an accurate recitation of P.E.'s prior testimony. He readily concedes that P.E. testified under oath at the preliminary hearing, that her death rendered P.E. unavailable at trial, and that his counsel appeared at the preliminary hearing and cross-examined P.E.

Rather, he argues that various circumstances combined to deny his counsel the ability to conduct an *effective* cross-examination of P.E. at the preliminary hearing. He argues that his inability to conduct an effective cross-examination denied him his Sixth Amendment right to confront his accuser,

and therefore, it was error for the trial court to admit P.E.'s preliminary hearing testimony at his trial.[7]

Although appellant asserts eight assignments of error regarding the admission of P.E.'s preliminary hearing testimony at trial, the alleged errors can be divided into five categories: (1) the cross-examination at the preliminary hearing was defective because the Commonwealth failed to timely disclose information it was required to disclose pursuant to Brady, (2) the cross-examination at the preliminary hearing was defective because potential impeachment evidence that was not subject to disclosure under Brady was discovered by the defense after the preliminary hearing, (3) the cross-examination at the preliminary hearing was defective because the judge at the preliminary hearing improperly limited its scope, (4) P.E.'s repeated failure to remember things during the cross-examination at the preliminary hearing rendered her "unavailable" for cross-examination, and (5) the cross-examination at the preliminary hearing was defective because the charges appellant faced changed after the preliminary hearing. We address each contention in turn.

A. Alleged Brady Violations

Appellant argues that he was denied his right of confrontation because the Commonwealth failed to disclose inconsistent statements, one explicit and

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[7] In pertinent part, the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him."

one implicit, made by P.E. that were in the Commonwealth's possession and could have been used to impeach P.E. Specifically, appellant notes that the Commonwealth was aware that, during the investigation, P.E. had claimed that she was on the lease for appellant's residence, but later conceded she was not. Appellant also argues that the Commonwealth was required to disclose that P.E. told the officers investigating the current offenses that appellant "was getting aggressive and holding [her] arms or pushing" her during an incident in Alexandria on June 5, 2013, but the Alexandria Police Department's contact form regarding the June 5, 2013 incident indicated that P.E. "stated that [appellant] has assaulted her in the past but not tonight." Appellant argues that this constitutes an inconsistent statement because her later statement to investigators in Fairfax indicates an assault took place on June 5, 2013.[8]

The Commonwealth argues that there was no Brady violation because the statements were disclosed by the Commonwealth more than a year prior to trial. Thus, the Commonwealth asserts that its Brady obligation was satisfied even though, because of P.E.'s intervening death, appellant did not have the statements when he was in a position to cross-examine P.E. Alternatively, the Commonwealth argues that appellant has not demonstrated that the statements were of such a quality or character that

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[8] For purposes of our analysis, we will assume without deciding that P.E.'s statement to the Alexandria police on June 5, 2013, that she was not assaulted on that occasion is inconsistent with her later description of the June 5, 2013 incident to Fairfax police.

would require reversal of the jury's verdict. Because we find that, due to the nature of the statements, appellant has failed to satisfy the elements necessary for a finding of a Brady violation, we need not and do not address the Commonwealth's argument that disclosure before trial but after the relevant testimony was given at the preliminary hearing was sufficient to satisfy any Brady obligation.

"A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." Youngblood v. West Virginia, 547 U.S. 867, 869 (2006). "Brady obligations extend not only to exculpatory evidence, but also to impeachment evidence[.]" Coley v. Commonwealth, 55 Va. App. 624, 630, 688 S.E.2d 288, 292 (2010). To establish a Brady violation, a defendant must establish that:

> a) The evidence not disclosed to the accused must be favorable to the accused, either because it is exculpatory, or because it may be used for impeachment; b) the evidence not disclosed must have been withheld by the Commonwealth either willfully or inadvertently; and c) the accused must have been prejudiced.

Hicks v. Dir., Dep't of Corr., 289 Va. 288, 299, 768 S.E.2d 415, 420 (2015) (quoting Workman v. Commonwealth, 272 Va. 633, 644-45, 636 S.E.2d 368, 374 (2006)).

Appellant argues that the identified inconsistent statements constitute impeachment material, and

thus, he satisfies the first Brady element.[9] It is true that, in general, a witness may be impeached through the use of prior inconsistent statements. See Va. R. Evid. 2:607(a)(vi) and 2:613. However, the mere fact that prior to testifying, a witness has made multiple statements that are inconsistent with each other does not render such inconsistencies admissible in a judicial proceeding.

The method for introducing extrinsic evidence regarding prior inconsistent oral statements for the purpose of impeaching a witness' testimony is set forth in Virginia Rule of Evidence 2:613(a)(ii). In addition, the rule provides that "[e]xtrinsic evidence of collateral statements is not admissible."

> [T]he test as to whether a matter is material or collateral, in the matter of impeachment of a witness, is whether . . . the cross-examining party would be entitled to prove it in support of his case. Therefore, when the circumstances [of the other event] have no intimate connection with the main fact; if they constitute no link in the chain of evidence . . . they ought to be excluded. Evidence . . . *which cannot be used for any purpose other than for impeachment* . . . is certainly collateral to the main issue.

McGowan v. Commonwealth, 274 Va. 689, 695, 652 S.E.2d 103, 105-06 (2007) (emphasis added) (internal

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[9] Appellant does not argue that the statements were exculpatory in and of themselves, rather he limits his argument to his desire to use the statements to impeach P.E.'s credibility.

quotation marks and citations omitted) (brackets in original).

Under this standard, the statements appellant contends that he was denied the use of are clearly collateral. First, we note that, although there is evidence that P.E. made statements that were inconsistent *with each other*, none of the pertinent statements identified by appellant as potential Brady material are inconsistent with P.E.'s preliminary hearing *testimony*. At the preliminary hearing, P.E. did not testify as to who was on the lease of appellant's residence or whether appellant assaulted her on June 5, 2013. Furthermore, neither the identity of who was on the lease of the Alexandria residence nor whether there had been an assault on June 5, 2013, shed any light on the question of whether or not appellant raped and abducted P.E. in September 2013.

Because the relevant statements are merely collateral, appellant could not have used them to impeach P.E. at the preliminary hearing. As such, appellant has failed to establish that "[t]he evidence not disclosed to the accused [was] favorable to the accused . . . because it may [have been] used for impeachment," and therefore, has failed to establish that the Commonwealth violated its obligations under Brady. Workman, 272 Va. at 644, 636 S.E.2d at 374.

Even if the statements could have been utilized in the examination of P.E., appellant has not made the necessary showing of prejudice required by Brady. To establish the necessary prejudice, appellant must show that the statements were material. For Brady purposes,

> [e]vidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. However, it is not necessary to demonstrate by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. A conviction must be reversed if the accused shows that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Coley, 55 Va. App. at 631, 688 S.E.2d at 292 (internal quotation marks and citations omitted). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Hicks, 289 Va. at 299, 768 S.E.2d at 420 (internal quotation marks and citations omitted).

Here, the verdict is worthy of confidence. As described above, the subject statements do not directly touch on appellant's guilt or innocence of the crimes charged, but deal with purely collateral matters that would not have been properly admitted and are unlikely to have had any effect on the jury's verdict if they had been admitted. The only possible use of the statements was to call P.E.'s credibility into question, something that appellant was able to do through other means, including the introduction of multiple text messages from P.E.

Furthermore, the record contains other evidence of appellant's guilt, ranging from the testimony of Taylor and Roach to the appellant's damning acknowledgements that he "kind of made [P.E.] have sex with [him]," that he sexually assaulted P.E., and that he bound P.E. with tape before dropping her off near her parents' home.

Finally, we know that at least one of the statements would not have changed the jury's ultimate conclusion because the jury became aware of the statement through other means. Detective Kroll testified at trial that P.E. initially had said she was on the lease of the Alexandria residence only to admit later she was not. In short, the record as a whole leaves little doubt that the appellant not becoming aware of the statements until after P.E.'s preliminary hearing testimony had no effect on the outcome of the trial. Accordingly, appellant has not established the requisite prejudice to make a successful challenge under Brady.

B. Discovery of Non-Brady Impeachment Material after the Preliminary Hearing

Appellant next challenges the admission of P.E.'s preliminary hearing testimony at trial by arguing that he first learned of other evidence that could have been used to impeach P.E. only after she testified. For example, P.E. testified at the preliminary hearing that appellant called her on the night of the rapes. Appellant acknowledges this was true, but notes that subsequently recovered phone records demonstrate that, in addition to receiving a call from appellant that evening, P.E. also called appellant. Additionally, appellant notes that at the

preliminary hearing P.E. testified that she did not permit appellant to take nude photographs of her, but eventually a nude photograph of P.E., taken by appellant, was discovered that appears to show P.E. as a willing participant from the manner in which she is posed. Although he received at least some of this evidence from the Commonwealth, appellant recognizes that it cannot form the basis of a Brady violation because the Commonwealth did not possess it at the time of the preliminary hearing and produced it well before trial.

The fact that additional information that might have been used in the examination of a witness is discovered after the witness testifies does not render the examination infirm. The need for finality requires that witness testimony and trials conclude and not be reopened for claims of newly discovered evidence or potential impeachment material except under the most limited of circumstances. Cf. Rule 1:1; Code § 19.2-327.10 et seq. (regarding proceedings for challenging a conviction with non-biologic, after-discovered evidence).

Moreover, unlike cases where such materials are first discovered after trial, the evidence at issue here was discovered prior to trial, and thus, appellant had the opportunity to, and did in fact, use the material. Appellant used both the phone records and the photograph to raise substantial questions about P.E.'s credibility. The after-discovered impeachment material was placed before the jury, allowing the jury to make a determination as to whether or not it raised a reasonable doubt regarding the ultimate issues — rape and abduction.[10] The jury very well

[10] Proposed Defendant's Exhibit 14 was not admitted. We address this issue in Section II below.

may have concluded that P.E. was less than forthcoming about certain issues, such as her participation in the nude photograph; however, the jury determined that it believed P.E.'s testimony regarding the rapes and the abduction.[11] There is nothing improper or inconsistent about such a conclusion. See Bazemore v. Commonwealth, 42 Va. App. 203, 213, 590 S.E.2d 602, 607 (2004) (recognizing that the factfinder is "free to believe or disbelieve, in part or in whole, the testimony of any witness").

Appellant argues that his inability to utilize the information while examining P.E. in front of the jury dictates a different result. He argues that other means of using the impeachment evidence are not a sufficient substitute for live cross-examination, noting his "inability to cross-examine [P.E.] about all of these inconsistencies and elicit her corresponding reactions at trial. Merely pointing out inconsistencies in her written statements does not satisfy the right to confrontation." In short, appellant argues that he had a right for the factfinder to see P.E. squirm when confronted with the potential inconsistencies. If appellant were correct in this assertion, the use of prior recorded testimony always would be constitutionally infirm. The unavailability of the witness in such a situation will always deprive the jury of the opportunity to view how the witness reacts when testifying, and yet, even appellant

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[11] We once again note that there was other evidence which corroborated P.E.'s testimony regarding the rapes and the abduction, not the least of which was appellant's acknowledgment of his statement to Patricia Taylor that he "kind of made [P.E.] have sex with [him]."

concedes that, at least in theory, such a process does not automatically render the testimony constitutionally suspect. Although it is preferable for the factfinder to observe the demeanor of every witness when making credibility determinations, it simply is not a constitutional requirement. As the United States Supreme Court observed more than a century ago,

> general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. . . . The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

Mattox v. United States, 156 U.S. 237, 243 (1895). Regarding the right of confrontation, the Court concluded that "[t]he substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." Id. at 244. Because appellant had the opportunity to cross-examine P.E. at the preliminary hearing and was allowed to introduce the subsequently discovered impeachment materials, his right of confrontation was satisfied in this case.

C. Alleged Limitation of Cross-Examination at the Preliminary Hearing

Appellant next asserts that he was denied his right to confront P.E. because the judge at the preliminary hearing impermissibly limited the scope of his cross-examination. Specifically, he argues that the "preliminary hearing judge limited [appellant]'s cross-examination of [P.E.] on the subject of [appellant]'s efforts to get [P.E.] into rehabilitation, which was the basis of [appellant]'s trial defense [that P.E. was lying], and which related to bias and motive to fabricate." Because the record is insufficient to support such a conclusion, we disagree with appellant.

Appellant bases his argument that his cross-examination was improperly limited on the following exchange at the preliminary hearing:

> [Appellant's Counsel]: Did [appellant] often talk to your father about the problems that the two of you had?
>
> [P.E.:] Yes, he usually told my dad that I had problems or issues, and that he was trying to help me.
>
> [Appellant's Counsel]: Okay. Didn't he and your father collaborate on that path to help you?
>
> [P.E.:] Yes.
>
> [Commonwealth]: Your Honor, I'm going to object to relevance at this point.

> [Trial Court]: I would sustain the objection.
>
> [Appellant's Counsel]: All right.

No further questions were asked regarding this point, and appellant did not proffer any questions he would have asked or answers he hoped to receive but for the ruling of the court on the Commonwealth's objection.

All of P.E.'s preliminary hearing testimony, including the exchange detailed above was read into evidence at trial. Accordingly, the jury heard P.E.'s acknowledgement that appellant and her father previously had discussed ways to help her. Appellant was free to use that concession to establish that P.E. had a motive to lie against him in hopes of avoiding another trip to a treatment facility or because she resented his efforts in this regard. Thus, the trial court did not prevent appellant from making the argument at issue by sustaining the Commonwealth's objection.

To the extent that appellant is arguing that there were additional questions he would have asked and additional answers he would have received to further his "motive to fabricate" attack on P.E.'s version of events, the record does not permit us to reach such a conclusion. "In Virginia, when testimony is rejected before it is delivered, an appellate court has no basis for adjudication unless the record reflects a proper proffer." Ray v. Commonwealth, 55 Va. App. 647, 649, 688 S.E.2d 879, 880 (2010) (internal quotation marks and citation omitted). For a proffer to be sufficient, it must allow us to examine both the "admissibility of the proposed testimony," and whether, even if

admissible, its exclusion "prejudiced" the proffering party. Molina v. Commonwealth, 47 Va. App. 338, 368, 624 S.E.2d 83, 97 (2006) (citations omitted). "The failure to proffer the expected testimony is fatal to [the] claim on appeal." Id. at 367-68, 624 S.E.2d at 97. Here, appellant made no proffer of any kind, and thus, we cannot conclude from this record whether the court below erred in sustaining the Commonwealth's objection.[12]

Even if we could determine that the court below erred in sustaining the Commonwealth's objection, we would still have to determine whether the error constituted harm. Here, appellant failed to establish what questions he would have asked and what the answers to those questions were expected to be. We can determine prejudice only upon "proper proffer showing what the testimony would have been." Holles v. Sunrise Terrace, Inc., 257 Va. 131, 135, 509 S.E.2d 494, 497 (1999); Molina, 47 Va. App. at 368, 624 S.E.2d at 97 (citations omitted). Even when "we are not totally in the dark concerning the nature of the evidence," we still must "know enough about the specifics" to be able to "say with assurance" that the lower court committed prejudicial error. Smith v. Hylton, 14 Va. App. 354, 358, 416 S.E.2d 712, 715 (1992). Because the record is silent as to those specifics and sufficient evidence was admitted to allow appellant to make the "motive to fabricate" argument, we cannot say that the ruling on the

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[12] We acknowledge that, in the normal course, litigants have no need to offer proffers in preliminary hearings in courts not of record. However, when, as here, the preliminary hearing testimony becomes the trial testimony because of the unavailability of the witness, such a step is necessary to create a sufficient record for appellate review.

objection was such that it rendered the cross-examination of P.E. infirm to the point that her preliminary hearing testimony should not have been admitted at trial.

D. Allegation that P.E.'s Lack of Memory at Preliminary Hearing Rendered Her Unavailable for Cross-Examination

In his next challenge to the admission of P.E.'s preliminary hearing testimony, appellant advances the novel argument that his counsel was unable to cross-examine P.E. at the preliminary hearing because she feigned a lack of memory regarding certain lines of inquiry. Appellant bases his claim on Turner v. Commonwealth, 284 Va. 198, 726 S.E.2d 325 (2012), and Jones v. Commonwealth, 22 Va. App. 46, 467 S.E.2d 841 (1996), cases which hold that a witness testifying to a lack of memory is "unavailable" for the purpose of the hearsay exception related to the use of prior testimony. He argues that the multiple instances of P.E. testifying "I don't recall" or only that "it's possible" coupled with the subsequent text messages where she appeared to brag about stonewalling appellant's attorney made her "unavailable," thus depriving him of his right to cross-examine her.

Appellant simply stretches the cases dealing with "unavailability" for hearsay purposes too far. These cases do nothing more than establish the circumstances in which the hearsay exception applies; they do not purport to hold that the Sixth Amendment is violated every time a witness for the Commonwealth testifies on cross-examination that he or she does not remember something. We decline

appellant's invitation to extend them in such a fashion.

It is not at all unusual for a witness to testify that they do not recall or remember specific details or events.[13] To the extent that such memory lapses all favor one side, the witness is subject to having his credibility attacked. Here, appellant used the alleged memory lapses and the subsequent text messages from P.E. suggesting that she had stonewalled appellant's attorney at the preliminary hearing to attack P.E.'s credibility. That this credibility attack did not result in an acquittal does not mean that appellant was denied his right of cross-examination. Accordingly, the trial court did not err in allowing P.E.'s preliminary hearing testimony to be read at trial.

E. Change in Charges after the Preliminary Hearing

Appellant also challenges the admission of P.E.'s preliminary hearing testimony at his trial on the grounds that, at the time of the preliminary hearing,

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[13] The evidence in this case is that such a lack of memory may be more likely to occur with the victims of sexual assaults. Comparing memories of sexual assault to a deck of cards, Nurse Roach testified, without objection, that "it takes [victims] a while to retrieve all the cards. Sometimes they never retrieve them in their lifetime; sometimes they may retrieve a card years or months later. So they have a hard time . . . to tell a story in a complete start to finish." Roach also stated that post-traumatic stress can explain why a sexual assault victim may give inconsistent accounts of the same event to different people. This explanation is consistent with P.E.'s testimony at the preliminary hearing that she "just tried to block [] out" aspects of her relationship with appellant.

he had yet to be charged with abduction with the intent to defile. According to appellant, the addition of the charge after the preliminary hearing denied him the ability to "cross-examine about a specific existing charge," and, as such, denied him a meaningful cross-examination.

Our resolution of this issue is controlled by the decision of the Supreme Court of Virginia in Fisher v. Commonwealth, 217 Va. 808, 232 S.E.2d 798 (1977). In Fisher, the Supreme Court had to

> consider whether testimony given by a witness during a preliminary hearing on a murder charge may properly be received as substantive evidence for the prosecution in the subsequent trial for both the murder and a robbery arising out of the same occurrence when the witness is deceased at the time of trial.

Id. at 809, 232 S.E.2d at 799. Despite the fact that the defendant had yet to be charged with the robbery at the time of the preliminary hearing, the Supreme Court affirmed his convictions for both murder and robbery, holding that

> [t]he robbery and murder indictments grew out of one transaction, the events of which took place "in a matter of split second." The evidence of the murder necessarily included the facts surrounding the robbery. And defendant's cross-examination [at the preliminary hearing] unavoidably dealt not only with the two issues common to both charges . . . but also with the details of the

> robbery. Under these circumstances, such evidence was properly received by the trial court in support of the robbery indictment.

Id. at 814, 232 S.E.2d at 802.

At the time of the preliminary hearing, appellant was charged with two counts of rape and with one count of abduction. Subsequently, the abduction with the intent to defile charge was added. The additional charge did not change the basic nature of the allegations, rather, it only added an additional element, the intent to defile, which the Commonwealth was required to prove. Just as in Fisher, P.E.'s testimony at the preliminary hearing addressed the elements of the subsequently added charge. She testified in detail about the rapes, appellant's refusal to let her leave her apartment, his physically forcing her to the bed, his forcing her to accompany him to his residence, and his subsequent binding her with packing tape. Appellant's counsel engaged in significant cross-examination of P.E. related to each of these issues. In sum, although the charge was added after the preliminary hearing, the factual basis of the new charge was fully developed at the preliminary hearing and appellant could and did conduct a thorough cross-examination of P.E. related to those facts.[14]

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[14] We note that P.E.'s testimony regarding the events in her apartment related to appellant preventing her from leaving the apartment and dragging her to the bed, about which she was cross-examined, fully make out the elements of abduction. See Epps v. Commonwealth, 66 Va. App. 393, 404, 785 S.E.2d 792, 797 (2016) (finding that blocking the kitchen door and detaining the victim was a separate abduction unnecessary to accomplishing the crime of assault and battery). Coupled with

Recognizing that application of Fisher to these facts is potentially fatal to his argument, appellant advances the alternative argument that "there is doubt that Fisher is still good law . . . ," suggesting that the United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004), implicitly overruled the result in Fisher. We disagree.

Unlike Fisher or the instant case, the issue in Crawford was not the admission of preliminary hearing testimony where the witness had been subject to extensive cross-examination. Rather, the challenged statement in Crawford was an out-of-court, unsworn police interview with the defendant's wife that occurred outside the presence of defendant's counsel. 541 U.S. at 39-40. When, because of the marital privilege, defendant's wife refused to testify at trial, the state sought (and was allowed) to admit her police interview as evidence. Id. at 40-41. The United States Supreme Court reversed the defendant's conviction, holding that the statement was admitted in violation of the Sixth Amendment because "[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Id. at 68. Because the preliminary hearing testimony that was admitted in Fisher was subject to cross-examination and was admitted only after a finding of

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the testimony about the subsequent rapes, the elements of abduction with the intent to defile were all addressed in P.E.'s preliminary hearing testimony.

unavailability, we conclude that Crawford did not overrule Fisher as it pertains to the issue before us.[15]

Our conclusion is buttressed by our decision in Schneider v. Commonwealth, 47 Va. App. 609, 625 S.E.2d 688 (2006). In addressing an argument that Crawford had altered Virginia's longstanding requirements for the admission of preliminary hearing testimony, we held "our law regarding the admissibility of preliminary hearing testimony has always required unavailability and an opportunity for cross-examination and complies with the new requirements of Crawford without alteration." Id. at 613, 625 S.E.2d at 690. Accordingly, the trial court did not err in allowing P.E.'s preliminary hearing testimony to be read at trial.

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[15] Even if the pertinent part of Fisher has been called into question by Crawford, we hold that appellant's Sixth Amendment right to confrontation was satisfied in this case. Crawford makes clear that the Sixth Amendment requires that the accused be allowed to confront his accuser. Implicitly, this requires that there be an accusation of which the accused is aware. Here, the accusations were established by P.E.'s testimony with which appellant was confronted and which he was able to subject to cross-examination. Because the abduction with intent to defile charge was fully made out by P.E.'s accusations at the preliminary hearing appellant could and did confront his accuser regarding her accusations, satisfying the Sixth Amendment guarantee as recognized in Crawford.

II. Proposed Defendant's Exhibit 14[16]

Appellant argues that the trial court erred in declining to admit into evidence proposed Defendant's Exhibit 14, a text message P.E. sent to a friend the morning of the preliminary hearing. In the text message, P.E. wrote, "Is it sick that I'm making myself look really good right now just to piss him off?" Appellant argues that the text message should have been admitted because it "demonstrate[s] that [she] was attempting to anger or provoke [him] during the preliminary hearing, that she was not afraid of him, and that her testimony was colored by bias, prejudice, and hatred toward [him]." Appellant also contends that the message was admissible because "[a] reasonable juror . . . may have concluded that [her] efforts to appear more sexually attractive to [appellant] at the preliminary hearing in this case made it less likely that [he] had actually raped" her.

"Generally, the admissibility of evidence is within the discretion of the trial court and [the appellate court] will not reject the decision of the trial court unless [the appellate court] find[s] an abuse of discretion." Midkiff v. Commonwealth, 280 Va. 216, 219, 694 S.E.2d 576, 578 (2010). A "trial judge's ruling will not be reversed simply because an appellate court disagrees." Thomas v. Commonwealth, 44 Va. App. 741, 753, 607 S.E.2d 738, 743 (internal quotation marks and citation omitted), adopted upon reh'g en banc, 45 Va. App. 811, 613 S.E.2d 870 (2005). Instead, a reviewing

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[16] Appellant's challenge to the exclusion of proposed Defendant's Exhibit 14 deals solely with an evidentiary ruling and, unlike his challenges to the admission of the preliminary hearing testimony, does not raise a constitutional issue.

court can only conclude that an abuse of discretion has occurred in cases where "reasonable jurists could not differ" about the correct result. Id.

Under this deferential standard, we cannot say that the trial court erred in refusing to admit the text message. P.E.'s text message on the morning of the preliminary hearing is, at best, tangential to the issues of whether or not appellant raped and abducted her in September 2013. Furthermore, given all the text messages, inconsistencies, and P.E.'s preliminary hearing testimony, it was clear to the jury that there was a degree of animus between P.E. and appellant at the time she testified. In short, we simply cannot say that the trial court abused its discretion in refusing to admit proposed Defendant's Exhibit 14.[17]

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[17] Even if it were error not to admit proposed Defendant's Exhibit 14, we conclude that any such potential error was harmless. In cases of non-constitutional harmless error, if we are "sure that the error did not influence the jury, or had but slight effect, the verdict and judgment should stand." Anderson v. Commonwealth, 282 Va. 457, 467, 717 S.E.2d 623, 628 (2011) (citations omitted). Here, given all of the evidence, including both the challenges to P.E.'s credibility and the substantive evidence of appellant's commission of the crimes (especially his confession to Taylor that he "kind of made [P.E.] have sex with [him]" and subsequent acknowledgement that he committed a sexual assault on P.E.) leads inexorably to the conclusion that the admission of proposed Defendant's Exhibit 14 would not have altered the outcome.

CONCLUSION

For the foregoing reasons, appellant's convictions for rape and abduction with the intent to defile are affirmed.

Affirmed.

APPENDIX E — SENTENCING ORDER OF THE VIRGINIA CIRCUIT COURT OF FAIRFAX COUNTY, DATED AUGUST 26, 2015

SENTENCING ORDER

JURY TRIAL

VIRGINIA: IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FEDERAL INFORMATION PROCESSING STANDARDS CODE: 059

Hearing Date: August 14, 2015

Judge: ROBERT J. SMITH

COMMONWEALTH OF VIRGINIA

versus

CHARLES ALBERT MASSEY, III,

Defendant

This case came before the Court for sentencing of the Defendant, who appeared in person with his Attorney, Patrick Blanch and Andrew Elders. The Commonwealth was represented by Katherine Stott and Casey Lingan. The Defendant appeared while in custody.

Appendix E

On 1/30/2015, the Defendant was found guilty of the following offenses:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
FE-2013-1405	**ABDUCTION (COUNT I)(F)**	**9/3/2013**	**KID-1004-F2**
FE-2013-1405	**RAPE (COUNT II)(F)**	**9/3/2013**	**18.2-61**
FE-2013-1405	**RAPE (COUNT III) (F)**	**9/3/2013**	**18.2-61**

The pre-sentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Code § 19.2-299.

Pursuant to the provisions of Code § 19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guideline worksheets. The sentencing guideline worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the Defendant desired to make a statement and if the Defendant desired to advance any reason why judgment should not be pronounced.

Appendix E

The Court **SENTENCED** the Defendant to:

INCARCERATION. Incarceration with the Virginia Department of Corrections for the term of: twenty (20) years on Count I, twenty-one (21) years on Count II and twenty-one (21) years on Count III. The total sentence imposed is **twenty (20) years on Count I, twenty-one (21) years on Count II and twenty-one (21) years on Count III.**

FINE. The Court imposed a fine, on Count I, in the amount of $100,000.00 in this case.

SUSPENDED SENTENCE. The Court further **ORDERED** that ten (10) years of the sentence be suspended on Count I, for life, upon the following conditions:

GOOD BEHAVIOR. The Defendant shall be of good behavior for life from the Defendant's release from confinement.

SUPERVISED PROBATION. The Defendant is placed on probation to commence on his release from incarceration, under the supervision of a Probation Officer for life, or unless sooner released by the Court or by the Probation Officer. The Defendant shall comply with all the rules and requirements set by the Probation Officer.

COSTS. The Defendant shall pay all costs of this case.

Appendix E

CREDIT FOR TIME SERVED. The Defendant shall be given credit for time spent in confinement while awaiting trial pursuant to § 53.1-187 of the 1950 Code of Virginia, as amended.

SEX OFFENDER REGISTRY. The Court further **ORDERED** that pursuant to § 9.1903 of the 1950 Code of Virginia, as amended, the Defendant shall register with the Department of State Police within three (3) days from his release of confinement in a state or local correctional facility. If confinement is not imposed, the Defendant shall register within Three (3) days of date of the suspension of sentence. This registration shall be maintained in the Sex Offender Registry established pursuant to § 9.1-900 of the 1950 Code of Virginia, as amended.

APPEAL RIGHTS. The Court advised the Defendant of his right to appeal from the sentence imposed, including the right to have an attorney appointed for him and to have the attorney's fees, costs and expenses in connection with an appeal paid for him in the event he is financially unable to pay. It is **ORDERED** by the Court that in the event the Defendant or his Counsel files a notice of appeal, the transcript is to be prepared and is made a part of the record in this case.

The Defendant was remanded to the custody of the Sheriff.

Entered on August 26, 2015.

/s/ Robert J. Smith
JUDGE ROBERT J. SMITH

Appendix E

DEFENDANT IDENTIFICATION:

Alias: NONE
SSN:
DOB: 11/28/1982
SEX: Male

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: twenty (20) years on Count I, twenty-one (21) years on Count II and twenty-one (21) years on Count III

TOTAL SENTENCE SUSPENDED: ten (10) years on Count I
TOTAL TIME TO SERVE: fifty-two (52) years

ABSTRACT OF CONVICTION

ADDRESS: 2402 Terrett Avenue
Alexandria, Virginia 22301

SSN/OL#:	STATE of OPERATOR'S LICENSE: Virginia
OL SURRENDERED: No	SEX: Male
DOO: 9/3/2013	DOB: 11/28/1982

CHARGE 1:

STATUTE: 18.2-48	VIOLATION: State
OTN: 059GM1300064116	VCC: KID-1004-F2

Appendix E

CHARGE 2:
STATUTE: 18.2-61 VIOLATION: State
OTN: 059GM1300064120 VCC: RAP-1129-F9

CHARGE 3:
STATUTE: 18.2-61 VIOLATION: State
OTN: 059GM1300064119 VCC: RAP-1129-F9

APPENDIX F — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED SEPTEMBER 30, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6006 (1:21-cv-01183-CMH-JFA)

CHARLES ALBERT MASSEY

Petitioner-Appellant

v.

CHADWICK DOTSON, DIRECTOR VIRGINIA DEPARTMENT OF CORRECTIONS

Respondent-Appellee

Filed September 30, 2025

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Gregory, Judge Quattlebaum, and Judge Heytens.

For the Court

/s/ Nwamaka Anowi, Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 6th day of October, 2017.

Record No. 170057
Court of Appeals No. 1421-15-4

Charles Albert Massey, III, Appellant,
against
Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 16th day of June, 2017 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/ Deputy Clerk