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COLORADO SUPREME COURT 2 E. 14th Avenue Denver, CO 80203	
Appeal from Boulder County District Court Honorable Frederic Rogers, Senior/Visiting Judge Case No. 2022CR1121	
IN RE: The People of the State of Colorado, Petitioner v. Evan Michael Platteel, Respondent	▲COURT USE ONLY▲
Attorneys for Amicus Curiae Colorado Criminal Defense Bar Association and Colorado Office of Alternative Defense Counsel: Keith Bradley, #50453 Brent R. Owen, #45068 SQUIRE PATTON BOGGS (US) LLP 717 17th Street, Suite 1825 Denver, CO 80202 Telephone: 303-830-1776 Facsimile: 303-894-9239 keith.bradley@squirepb.com brent.owen@squirepb.com	Case No. 2022SA000384

AMICUS CURIAE BRIEF FROM THE OFFICE OF ALTERNATIVE DEFENSE COUNSEL AND COLORADO CRIMINAL DEFENSE BAR IN SUPPORT OF RESPONDENT

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☐ It contains **1812** words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☐ **For each issue raised by the appellant,** the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

☐ **In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

SQUIRE PATTON BOGGS (US) LLP

By: *s/Keith Bradley*

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I. Statement of Interest of Amicus Curie

The Office of Alternate Defense Counsel ("OADC") is the legislatively created entity responsible for providing legal services to indigent defendants in both juvenile and district court proceedings when the Office of the State Public Defender has a conflict of interest. *See* C.R.S. § 21-2-103 (2021). The Colorado Criminal Defense Bar ("CCDB") is a non-profit organization that provides training and support to the criminal defense community to promote zealous advocacy for those accused of crimes. Both entities are familiar with the ethical obligations of defense counsel generally and have a significant interest in this Court's jurisprudence regarding the purpose of preliminary hearings and the importance of producing sufficient evidence to establish probable cause. It is important for this Court to address this issue and provide clarity as to whether the defense can call a witness who is present at the preliminary hearing.

II. Introduction and Summary of the Argument

When a victim of a crime is present at a preliminary hearing, and when the prosecution relies almost entirely on hearsay to establish probable cause at that preliminary hearing, the defense is allowed to call the victim to testify. Precedent requires this. The preliminary hearing rule allows this. And logic supports this.

The holding in *McDonald v. Dist. Ct. In & For Fourth Jud. Dist.*, 576, P.2d 169, 171 (Colo. 1978), allows for the defense to call the victim in the scenario presented by this case. There is no reason to reverse course today. The purpose of preliminary hearings is to screen out cases that lack probable cause by allowing a judge to determine whether such cause exists. If the sole testifying witness at the hearing relies almost entirely on hearsay to establish probable cause, but an eyewitness to the crime is present and can testify to what happened, then refusing to allow that testimony undermines the purpose of the hearing. The hearing should serve as a guardrail from unwarranted prosecution (or overcharging)—not a *pro forma* box-checking exercise.

The Victims Rights Act (VRA) does not change this analysis. The VRA requires judges and the prosecution to treat victims of crimes with dignity and respect. The purpose of the VRA is to ensure that is done. But, the VRA does not exist to absolve those same victims of the duty to speak truthfully when doing so would promote justice. In fact, the comprehensively drafted VRA is silent on whether victims can or should be required to testify at trial or at a hearing. This is a telling indication that it was not created for, nor should be used as, a means of stiff-arming the defense from calling victims to testify.

The purpose and the provisions of the VRA do not change the well-reasoned rationale in *McDonald*, nor does the VRA disrupt the basis for the preliminary hearing requirement. This Court should uphold the trial court's discretion to manage the preliminary hearing.

III. Argument

A. This Court should uphold *McDonald*.

The *McDonald* Court resolved the issue presented by this appeal:

> we hold that where an eyewitness is available in court during a preliminary hearing, and where the prosecution is relying almost completely on hearsay testimony, it is an abuse of discretion to prohibit the defense calling the witness.

Id. at 171.

The reason the Colorado Supreme Court made this decision in the *McDonald* case is because the victim was an eyewitness to the crime of kidnapping and felony menacing and could testify from her perception of what happened. *Id.* One of the key issues in the case was identification of the defendant. *Id.* The officer's testimony about that identification was based almost entirely on hearsay. *Id.* Preventing the victim from testifying limited the court from evaluating that victim's perception and whether, based on that evidence, the prosecution established probable cause that it was the defendant who committed the crime.

Prosecutors cannot rely solely on hearsay to establish probable cause at a preliminary hearing when competent evidence is readily available. *Hunter v. Dist. Court In & For Twentieth Judicial Dist.*, 543 P.2d 1265, 1268 (Colo. 1975). And if a prosecutor does rely on hearsay, then the person offering the hearsay must be connected to the offense or its investigation, and the prosecutor must also present some competent non-hearsay evidence that addresses each essential element of the offense. *People v. Huggins*, 220 P.3d 977, 980 (Colo. App. 2009).

Here, the detective's testimony relied mainly on the inconsistent statements from the victim. And, while the detective testified, the victim was present in the courtroom, observing the hearing. Given the particular circumstances, the victim's testimony about the alleged sexual assault would be important testimony addressing the essential elements of the case. Without her testimony, the trial court would be left to guess to fill in the gaps of whether probable cause existed, because the detective had presented, second-hand, two versions of the facts, only one of which could even conceivably substantiate probable cause. When the court followed *McDonald* and called her to testify, this was a modest, sensible decision, that should be well within the ordinary discretion of a trial court.

B. The VRA does not change *McDonald*.

The prosecution argues that because the VRA was passed years after the Colorado Supreme Court decided *McDonald* that it therefore trumps that holding and precludes victims from testifying at preliminary hearings. Not so.

The purpose of the VRA is to ensure that all victims are honored and protected by law enforcement agencies, prosecutors, and judges. C.R.S. § 24-4.1-301. It also preserves and protects a victim's rights to justice and due process. C.R.S § 24-4.1-302.5. And it affords victims other rights, like the right to be informed of and present for all stages of the process; the right to be heard at any court proceeding involving pleas, bonds, or sentencings, and various other rights.

What it does not say, either explicitly or impliedly, is that judges are prohibited from allowing defendants to call victims to testify at preliminary hearings. Yet this is precisely what the prosecution is asking this Court to read into the statute. Forcing such a reading from the VRA contorts the VRA from an act intended to inform and honor victims into an act that uses them as a chess piece that can be strategically placed to put one side into a better position than the other. This gamesmanship runs contrary to the purpose of the VRA.

C. Categorically prohibiting the defense from calling a victim is unfair.

The purpose of a preliminary hearing is to allow the judge to determine whether there is probable cause to believe that the crime charged may have been

committed by the defendant. *Rex v. Sullivan*, 575 P.2d 408, 410 (Colo. 1978). Nothing about a preliminary hearing prohibits a defendant from calling a witness who is present and at the hearing and capable of testifying. In fact, the rule states that "the defendant may cross-examine the prosecutor's witnesses and may introduce evidence." Crim. P. 7(h)(3). And while the preliminary hearing is not intended to be a mini-trial, *Rex*, 575 P.2d at 410, defendants have been allowed to call their own witnesses to see that justice is done. *See McDonald,* 576, P.2d 169, 171.

The purpose of the preliminary hearing is to screen out meritless prosecutions. If the court and defense are barred from testimony that could screen out such unwarranted case, then the hearing is meaningless. Doing so eliminates the guardrail that the hearing is intended to be. Cases that would be dismissed if the court knew enough would go unexamined. This risks wasting judicial resources and provides dangerous incentive to prosecutors to not worry about filing accurate charges until the day of trial.

The better way is the one already established under *McDonald*. The Court should allow the preliminary hearing to be what it is intended to be: a hearing before the case moves forward, where the judge can hear the evidence he or she needs to hear from reliable, credible witnesses to determine probable cause. This can be done without turning the case into a mini-trial, and it can be done in a way that ensures

the victim is treated with dignity and respect. The two ideas are not mutually exclusive; indeed, judges abide by the VRA when victims testify at trial by treating them with dignity and respect, but still requiring them to testify when called to do so by either side.

D. The cases cited by the State concern subpoenas and are inapposite.

The amicus supporting the prosecution says that because in *Rex v. Sullivan*, 575 P.2d 408 (Colo. 1978), the trial court had quashed a subpoena, the court in this case should refuse to let the defense call the victim to testify. In *Rex,* the defense issued a subpoena for a child-victim in a sex assault case. They wanted her testimony to negate probable cause by showing that the victim never identified the defendant. The court quashed the subpoena. There is no subpoena here; the victim appeared voluntarily. The victim in this case is an adult, not a child-victim. And the issue is not identification, it is intent and consent. *Rex*'s holding is inapplicable here.

The prosecution also cited *People v. Brothers*, 2013 CO 31, which is also about a subpoena issued to a child-victim. Just as in *Rex*, the Colorado Supreme Court said the trial court should quash the subpoena because the alleged child-victim could suffer harm if she was requested to testify. In this case, the victim is not a child and the potential for suffering harm is mitigated, especially when she freely chose to attend the hearing.

Likewise, the prosecution cites *Williams v. Dist. Court, El Paso County*, 700 P.2d 549 (Colo. 1985), which is a case about a subpoena to the defendant's former attorney for a hearing after the trial was concluded. That case is entirely different factually from this case and has no precedential value here.

IV. Conclusion

The Court has long valued and protected the ability of trial courts to manage their cases using the insights that come from each case such as knowing the facts, the parties, the lawyers, seeing the defendants and witnesses, and hearing them in person. The *McDonald* principle, that in appropriate circumstances it can be sensible for a trial court to call upon a victim, already present in the courtroom, to testify on specific issues at a preliminary hearing, is a healthy application of the trial court's ability to manage its cases. And the trial court's approach in this case was an exemplar of the reasonable, careful use of discretion. To respond by replacing *McDonald* discretion with a prohibition on witness testimony would do a disservice to the judicial system and undermine the purpose of preliminary hearings. For these reasons we ask this Court to affirm the trial court's decision and allow the victim to testify at the preliminary hearing.

Dated: February 3, 2023

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CERTIFICATE OF SERVICE

I certify that on the 3rd day of February, 2023, the foregoing **AMICUS CURIAE BRIEF FROM THE OFFICE OF ALTERNATIVE DEFENSE COUNSEL AND COLORADO CRIMINAL DEFENSE BAR IN SUPPORT OF RESPONDENT** was filed with the Clerk of the Court and served on all counsel of record electronically through the Colorado Courts E-Filing System.

s/ Norma K. Davis
Norma K. Davis, Paralegal