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Denver, CO 80203</td><td rowspan="3">DATE FILED: February 2, 2023

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<tr><td>Original Proceeding
Boulder County Court No. 2022CR1121
Honorable Frederic Rogers, Senior Judge</td></tr>
<tr><td>IN RE:

Plaintiff:

The People of the State of Colorado, Plaintiff

v.

Defendant:

Evan Michael Platteel</td></tr>
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2022SA384</td></tr>
<tr><td colspan="2">ANSWER BRIEF</td></tr>
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CERTIFICATE OF COMPLIANCE

I certify that the Answer brief complies with all requirements of C.A.R. 28 and C.A.R. 32 including formatting, content and word count requirements.

/s/ Sarah Croog______________
Sarah Croog, Reg. No. 37979

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ISSUE FOR REVIEW

Mr. Platteel disagrees with the prosecution's statement that Judge Rodgers allowed the alleged victim to be called as a witness at preliminary hearing "merely" because of her presence in the courtroom. Judge Rodgers ruled that the alleged victim could be called as a perceiving witness due to a combination of the prosecution's reliance almost entirely on hearsay; the convoluted, contradictory, and confusing hearsay evidence as to the issue of the use of force; and the alleged victim's voluntary presence in the courtroom. The issue for review, therefore, is whether Judge Rodgers substantially abused his discretion when allowing the defense to call the alleged victim who was voluntarily present in the courtroom to testify as a perceiving witness to a narrow and specific purpose relevant to the determination of probable cause.

NATURE OF ACTION BY LOWER COURT AND FACTS

On July 26, 2022, Mr. Platteel was charged with Sexual Assault – Force (F3), pursuant to C.R.S. § 18-3-402(1)(a),(4)(a). The preliminary hearing commenced on September 15, 2022. Section (4)(a) requires proof that the "actor causes submission of the victim through the actual application of physical force or physical violence."

The only allegation of sexual intrusion or penetration at the preliminary hearing was that Mr. Platteel received oral sex from the alleged victim, E.G., on the morning of June 14, 2022, after she had spent the previous night at his house. (Doc. 1 p. 9 lines 19-21). The prosecution called Detective Byars to testify as their sole witness.

After relaying E.G.'s hearsay statements, Detective Byars testified that Mr. Platteel had told him he had had consensual sexual contact with E.G. on the night of June 13, 2022, but only that he had touched her vaginal area under her clothes. (Doc. 1 p. 20 line 10-22.) No testimony suggested that this touching included penetration or intrusion of her vagina.

Regarding oral sex on the morning of June 14, 2022, relevant testimony specific to the use of force allegation included testimony from Detective Byars that:

a. E.G. had failed to report anything related to oral sex occurring on the morning of June 14, 2022, when providing a narrative during her SANE examination. (Doc. 1 p. 35 lines 10-12).

b. "Nothing" in the SANE examination was consistent with E.G. having been strangled. (Doc. 1 p. 37 lines 23-25.)

c. Mr. Platteel had denied choking E.G. during oral sex on the morning of June 14, 2022. (Doc. 1 p. 22 lines 8-10).

d. Mr. Platteel had admitted to consensually pulling E.G.'s hair while she was performing oral sex on the morning of June 14, 2022 (Doc. 1 p. 22 lines 5-7) and that he had maintained that this and all other sexual and non-sexual contact had been consensual. (Doc. 1 p. 63 lines 3-6).

e. The SANE examination had not revealed any evidence that E.G. had reported pain associated with hair being forcibly pulled or evidence of missing hair. (Doc. 1 p. 63 lines 21-24.)

Detective Byars's testimony about E.G.'s follow up interview with him, five days after the SANE exam, was extremely convoluted:

a. Detective Byars initially testified on direct examination she "did state that he may have put his hand around her neck in a choking manner." (Doc. 1 p. 16 lines 2-3).

b. On further inquiry during cross examination Detective Byars first describe the oral sex as occurring with Mr. Platteel climbing on top of E.G. and pinning her down with one hand while having another hand on her throat and choking her. (Doc. 1 p. 49 line 10-16)

c. This testimony then changed after being confronted with the Detective's own text message exchange with E.G. wherein she clarified that Mr. Platteel was laying on his back while she was performing oral sex (Doc. 1 p. 51 lines 17-20.)

d. Detective Byars maintained that Mr. Platteel was on top of E.G. prior to the oral sex, but that he believed the description of her being choked and pinned down was the previous night while on the couch, not that morning of June 14 while in bed, because he could not explain how Mr. Platteel would be able to choke with one hand, pin with another hand, and still have a hand free to grab E.G.'s head. (Doc. 1 p. 51 line 14 – p. 52 line 8.)

e. Detective Byars then stated that he was not aware if Mr. Platteel was on top of E.G. or if she was on top of him while he was on his back during the lead up to the oral sex. (Doc. 1 p. 52 line 13-19.) But then he seemingly retracted his prior statement that the allegation of choking and pinning down had occurred the night before on the couch and stated that he believed that choking did occur during oral sex in the morning. (Doc 1 line 21-22).

On cross examination, Detective Byars admitted that E.G. had had a SANE examination performed the day after the alleged assault and five days prior to her first interview with law enforcement during which she had claimed to have voluntarily and knowingly consumed two alcoholic drinks with Mr. Platteel at his apartment, after which she had no memory for a period from midnight to 10:30 a.m. the following morning, and that she had complete amnesia during that time, including no memory of a sexual assault or any act of strangulation, and had woken up and believed she may have been a victim of a drug facilitated sexual

assault due to pain in her body and her lack of memory. (Doc 1 p. 31 line 8 – p. 32 line 9.)

Detective Byars admitted that E.G. had told him a different story than she had given during the SANE examination and that he had never confronted her regarding the discrepancies between her accounts. (Doc. 1 p. 55 lines 15-24).

Detective Byars testified that Mr. Platteel had maintained throughout his interview that everything that had occurred between him and E.G. was consensual. (Doc. 1 p. 70 lines 6-9).

After presenting this convoluted, contradictory, and confusing testimony, the prosecution rested. It is unclear whether Detective Byars was confused because he had failed to adequately prepare for the preliminary hearing or whether he failed to adequately investigate the case or whether he was making assumptions based on his own beliefs about what occurred without fully appreciating what E.G. had reported to him. In fact, during a follow-up interview conducted on December 2, 2022, E.G. clarified that Detective Byars was wrong and clarified that Mr. Platteel "did not put his hand on her throat or strangle her that morning." (Doc. 2)

STANDARD OF REVIEW

Mr. Platteel agrees that a trial court's interpretation of Colorado case law is subject to de novo review. *Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20, 28 (Colo. 2006). However, factual determinations made in the trial court are not

subject to review. *See Kuypers v. Dist. Ct. for Fourth Jud. Dist.,* 534 P.2d 1204, 1206 (1975). The very purpose of a preliminary hearing "would be undermined if appellate courts were to second-guess the discretionary first-hand assessments of trial courts and substitute their evaluations of testimony based on cold transcripts." *People ex rel. Leidner v. Dist. Ct. In & For Garfield Cnty.,* 597 P.2d 1040, 1042 (1979).

ARGUMENT AND AUTHORITY

I. The Court Should Deny the Petition as Improvidently Granted and Remand the Case to the County Court as Judge Rodgers did not Seriously Abuse his Discretion in Ordering the Alleged Victim to Testify under the Circumstances of This Case.

Anyone listening to the testimony of the Detective would have had no idea what was alleged to have occurred on the morning of June 14, 2022. One of the risks of using hearsay testimony from a non-perceiving witness during a preliminary hearing is that the witness will not actually know what occurred or confuse events. Under the rules of a preliminary hearing, even if a non-perceiving witness gets the hearsay testimony wrong and offers contradicting accounts of what was said, the court must consider the evidence in the light most favorable to the prosecution, potentially binding over a case on flawed testimony. No remedy exists for a defendant when a case is bound over on a higher charge than is supported by the facts based on this kind of erroneous, confused, and misleading

testimony. Instead, the prosecution is rewarded by having additional leverage over the defendant during plea negotiations and trial.

In this case, where there was obvious confusion about what was actually said by E.G. and the subject of all of the hearsay testimony is sitting in the courtroom and could quickly and easily clarify the ambiguity before the court is asked to bind over a case that has significant consequences for all parties involved – defendant, E.G., the community at large, and the search for truth and justice – it is natural for the trial judge to want to hear testimony from her.

Under these narrow circumstances, and following the conclusion of Detective Byars's testimony, the defense called the E.G. as a witness. Judge Rodgers then took time to review the applicable caselaw, *McDonald v. Dist. Ct. In & For Fourth Jud. Dist.*, 576 P.2d 169 (1978), allowed the prosecution time to respond, including a brief recess to consult with a supervisor, considered additional caselaw and arguments from the prosecution, and ruled that under the holding in *McDonald*, 576 P.2d 169, and the holding in *Harris v. Dist. Ct. of City & Cnty. of Denver*, 843 P.2d 1316 (Colo. 1993), E.G. could be called as a witness to testify with the direct examination specifically limited to questions of: (1) the application of physical force and, (2) identification. The court ruled that "the fact that she's here and the bulk of the case, in my quantification review, is sufficiently hearsay that it is permissible for the Court to call her, or allow her to be called, when she

was in the courtroom while the testimony was going on." (Doc. 1 p. 93 line 22- p. 94 line 1).

In granting the request to call E.G. of testify, Judge Rodgers did not consider any issue of credibility, nor did he fail to consider that the evidence must be viewed in the light most favorable to the prosecution. Judge Rodgers did not permit the alleged victim to be called as a witness for the purpose of resolving any conflicts between her disparate hearsay statements to the SANE nurse and Detective Byars. Rather, he permitted her to be called as to the narrow issue of the use of force – the single issue where even the Detective himself was unsure of what E.G. actually said.

In making his ruling Judge Rodgers, relied upon the following factual findings:

a. All testimony regarding the use of force was hearsay. While Mr. Platteel's statements are non-hearsay, Detective Byars testified that Mr. Platteel denied choking the allege victim during oral sex and maintained all sexual and non-sexual contact was consensual. As such, his statements, even in the light most favorable to the prosecution, cannot establish the inverse of what he said for the court to find probable cause that he caused "submission of the victim through the actual application of physical force or physical violence."

b. E.G.'s statements presented through Detective Byars were entirely hearsay and the Detective offered confusing and contradictory versions of what she "may" have said. Detective Byars stated E.G. reported she "may" have been choked, then struggled to explain the details of this accusation, at times conflating what had been reported to have occurred the night before with what was reported to have occurred in the morning, being unable to describe the physical position of their bodies, and repeatedly changing his description of how the oral sex occurred.

Given that *McDonald* is controlling and binding precedent on the issue and Judge Rodgers carefully considered the facts of the case as well as other relevant caselaw, Judge Rodgers did not seriously abuse his discretion. Judge Rodgers exercised his sound discretion over the presentation of evidence at a preliminary hearing as provided for in Crim. P. 5(a)(4)(II) and Crim. P. 7(h)(3) in finding that the specific circumstances described in *McDonald* had been met.

A. The C.A.R. 21 Petition is an Effort by the Prosecution to Maintain an Unfair Tactical Advantage.

It is important not to lose sight of the reality of this proceeding. The result the prosecution is seeking is for this Court to override the decision of Judge Rodgers and to have Mr. Platteel to be bound over on the charge that he caused "submission of the victim through the actual application of physical force or physical violence" based on the flawed testimony of Detective Byars when the

alleged victim herself later clarified to the prosecution that "Platteel did not put his hand on her throat or strangle her that morning." Judge Rodgers's assessment of the first-hand evidence as an experienced judicial officer and determination that under these specific and unique circumstances that E.G.'s testimony was necessary to determine whether there was probable cause as to the element of force proved correct from E.G.'s December 2, 2022 interview, where she confirmed the Detective's testimony was wrong. This Court should not second guess the discretion of an experienced judicial officer, especially in this situation where his instincts have been confirmed as correct by subsequent investigation.

By December 2, 2022, following E.G.'s interview with their office, the prosecution knew that Detective Byars's testimony on the issue of force during the preliminary hearing was either grossly mistaken or recklessly false but instead of taking steps to correct it, continued with the pending C.A.R. 21 it filed just two days earlier.

That the Detective's hearsay testimony appeared to be confused and likely wrong was readily apparent to those in the courtroom, including Judge Rodgers who found that E.G.'s testimony would be helpful to a determination of probable cause on the issue of force. This is not the general question that the prosecution framed in its original C.A.R. 21 petition but rather a very narrow and fact specific

issue in this case and entirely due to the prosecution's presentation of evidence and preparation of their own witnesses.

By framing the issue as a question involving the Victim Right's Act rather than their own lack of evidence, the prosecution gained a tactical and litigation advantage in stopping the preliminary hearing from proceeding forward where E.G. would have likely testified consistent with her December 2 interview that Mr. Platteel did not cause submission through the actual application of physical force or physical violence. If she had done so, the case likely would have been bound over on a lesser included charge, limiting some of the prosecution's artificial leverage over Mr. Platteel during plea negotiations and trial.

Only by stopping the preliminary hearing could the prosecution attempt to preserve the higher charge. It appears that this C.A.R. 21 petition is just another attempt by the prosecution to keep the higher charge. Prior to filing this appeal, the prosecution tried and failed to simply circumvent Judge Rodgers's ruling by secretly obtaining a grand jury indictment against Mr. Platteel for the same alleged incident. On November 10, 2022, District Court Judge Salamone dismissed the indictment as it was "was obtained in violation of the rules of criminal procedure" in an order that specifically disapproves of the prosecutions' actions in attempt to circumvent Judge Rodgers's ruling and calls into question the prosecution's candor

to the tribunal in requesting a stay and then attempting to circumvent the ruling by obtaining an indictment. (Doc. 3)

It was only after Judge Salamone prevented the prosecution from circumventing Judge Rodgers's ruling that they elected to file this appeal, purporting to act on behalf of victims to appeal a finding that no one made. Simply put, Judge Rodgers never ruled that the defense could call E.G. "merely because [she] exercised her statutory and constitutional right to remain in the courtroom." Nor is this case well suited to answer that general question. The Court should deny the C.A.R. 21 petition as improvidently granted and remand the case.

B. This Court Has Recognized that Prosecutors May Not Strike Foul Blows as They Are Attempting to Do Here.

This Court has previously recognized that "[b]alancing the 'right of the district attorney to prosecute criminal cases against the need to protect the accused from discrimination and oppression' weighs in favor of the accused when the People make a tactical decision." *People v. Noline*, 917 P.2d 1256, 1264 (Colo. 1996). Here the prosecution made a tactical decision to show probable cause by offering the convoluted, contradictory, and confusing testimony of their lead detective rather than E.G.'s actual words in an attempt to bind over a higher charge that is not actually supported by the evidence even when taken in the light most favorable to the prosecution. Without the ability to hear from E.G., the trial judge would have been left with hearsay testimony that the lead detective believes that

the alleged victim may have said that Mr. Platteel may have strangled her. It is unthinkable that a trial judge would have to make a decision to bind over a case that carries an indeterminate sentence on such thin and flawed testimony rather than exercising his discretion to allow him as the fact-finder, an understanding of the truth. Prosecutors should not be able to use the favorable rules of a preliminary hearing to attempt to rubber-stamp a higher charge to gain more advantageous litigation and negotiation positions, particularly where the higher charge is not supported by the direct testimony of the alleged victim.

In the face of these kinds of systematic abuses by prosecutors, *McDonald* is an essential protection for defendants that have few other remedies for abuses that occur during preliminary hearings that then unfairly imbalance the case going forward.

C. Judge Rodgers Actions Were an Appropriate Exercise of Judicial Discretion at a Preliminary Hearing.

Original relief pursuant to C.A.R. 21 is an extraordinary remedy that is limited in purpose and availability. *People v. Darlington,* 105 P.3d 230, 232 (Colo.2005). The party invoking the original jurisdiction of this Court has the burden of establishing circumstances justifying the exercise of this Court's discretionary authority under C.A.R. 21. *Miller v. District Court,* 737 P.2d 834, 840 (Colo.1987) (citing *Groendyke Transp., Inc. v. District Court,* 343 P.2d 535, 537 (1959)).

The petitioner also bears the burden of establishing, when applicable, that the respondent court has seriously abused its discretion. *Brewer v. District Court,* 655 P.2d 819, 820 (Colo.1982); *see Halaby, McCrea & Cross v. Hoffman,* 831 P.2d 902, 905 (Colo.1992). In determining whether Judge Rodgers substantially abused his discretion here, this Court must still give deference to his findings of fact. It is not the Supreme Court's role in an original proceeding to substitute its judgment for that of the respondent judge. *Chicago Cutlery v. District Court,* 568 P.2d 464 (1977), *People v. Dist. Ct. of 2nd Jud. Dist.,* 664 P.2d 247, 253 (Colo. 1983).

Colorado statutes and caselaw provide a presiding judge at a preliminary hearing significant discretion regarding the presentation of evidence at the hearing. A preliminary hearing affords the judge hearing the matter with significant discretion regarding the presentation of evidence, the scope of cross examination, and the defense's ability to call witnesses and introduce evidence: for all such matters, "the judge presiding at the preliminary hearing may temper the rules of evidence in the exercise of sound judicial discretion." Crim. P. 5(a)(4)(II), Crim. P. 7(h)(3). Furthermore, if a person is accused of a felony unlawful sexual offense, the presiding judge may, "upon the request of any party to the proceeding… exclude from the preliminary hearing any member of the general public." C.R.S. § 16-5-301(2). Because a presiding judge may temper the rules of evidence, hearsay

evidence that may otherwise be inadmissible is permitted at a preliminary hearing, *see Maestas v. Dist. Ct. In & For City & Cnty. of Denver*, 541 P.2d 889, 892 (1975), as well as evidence that would be excluded at trial for constitutional violations. S*ee e.g. People v. Quinn*, 516 P.2d 420, 422 (1973).

While hearsay evidence that is otherwise inadmissible is *permitted* at a preliminary hearing, it is not *preferred.* In upholding that the presiding judge may, in exercising their sound discretion under Crim. P. 5(a)(4)(II) and Crim. P. 7(h)(3), allow the presentation of hearsay evidence, Colorado Courts have repeatedly cautioned against the over-use of hearsay: "we admonish the courts to beware of the excessive use of hearsay in the presentation of government cases. The inordinate use of hearsay, as in the present case, foils the protective defense against unwarranted prosecutions that preliminary hearings are designed to afford to the innocent." *Maestas v. Dist. Ct. In & For City & Cnty. of Denver,* 541 P.2d 889, 892 (1975).

When possible, the preference is for live testimony from a perceiving witness: "[t]he process is best served when at least one witness is called whose direct perception of the criminal episode is subject to evaluation by the judge at the preliminary hearing." *Blevins v. Tihonovich*, 728 P.2d 732, 734 (Colo. 1986)."Establishing probable cause on the basis of hearsay alone should only be resorted to when the testimony of a perceiving witness is unavailable or when 'it is

demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge." *Maestas v. Dist. Ct. In & For City & Cnty. of Denver,* 541 P.2d 889, 892 (1975).

Under the circumstances of the present case, Judge Rodgers acted within his sound discretion in ordering that the alleged victim who had been voluntarily present in the courtroom and was a perceiving witness could be called to testify for a narrow and specific purpose relevant to the determination of probable cause.

II. This Court Should Not Revisit the Holding in *McDonald* as it does not Conflict with the Rights Afforded Victims in the VRA.

A. *McDonald* has remained good law for 30 years since the passage of the VRA.

The Colorado Victim's Rights Act, C.R.S. § 24-4.1-300.1 – 305, was passed in 1992, followed shortly thereafter by the passage of Colo. Const. Art. 2, § 16a (referred to collectively herein as "the VRA") which went into effect January 14, 1993. As such, both the VRA and *McDonald* have co-existed for 30 years of *McDonald's* 44-year history. *McDonald* has been the law in Colorado for longer since the passage of the VRA than before its passage.

McDonald is hardly an ancient secret. It has been good law for over 40 years and is cited to by LaFave's 2022 edition of "Criminal Procedure", 4 Crim. Proc. § 14.4(d) (4th ed.), in the Colorado Criminal Practice and Procedure guide, § 7.10. Defendant's rights at preliminary hearing—In general, 14 Colo. Prac., Criminal

Practice & Procedure § 7.10 (2d ed.) and in Wharton's Criminal Procedure. *McDonald* should be familiar to any competent attorney who handles criminal defense matters.

Nor have Colorado's courts simply forgotten about *McDonald* since 1978. *McDonald* has been favorably cited in Colorado numerous times since the passage of the VRA:

a. In 1993, *Harris v. Dist. Ct. of City & Cnty. of Denver*, 843 P.2d 1316, 1319 (Colo. 1993) cited to *McDonald* for the proposition that "a defendant is entitled to call an eyewitness to testify at a preliminary hearing if the witness is available in court and the prosecution's evidence consists almost entirely of hearsay testimony."

b. In 2002, *McDonald* was cited in *In re Att'y C*, 47 P.3d 1167, 1172 (Colo. 2002) for the proposition that "a preliminary hearing is a critical stage in the prosecution of a defendant and should not be conducted in a 'perfunctory fashion."

c. In 2009, *People v. Huggins*, 220 P.3d 977, 979 (Colo. App. 2009) cited to *McDonald* regarding the issue of whether dismissal of charges or ordering a new preliminary hearing (as occurred in *McDonald*) was a proper remedy.

d. In 2013, in *People v. Bros.,* 308 P.3d 1213, 1217 (footnote 5), *McDonald* was cited as good law for the proposition that it is "it is incumbent on counsel to explain the relevance to probable cause of the testimony he intends to elicit" in the context of a motion to quash a subpoena for a minor victim of a sexual assault.

B. Calling an Alleged Victim to Testify under the Narrow Circumstance Provided for in *McDonald* Does Not Violate the Right to be Free From Harassment, Intimidation or Abuse.

McDonald allows an alleged victim to be called as a witness at a preliminary hearing in the narrow and fact-specific circumstances where: (1) the alleged victim is an eyewitness who has testimony relevant to the determination of probable cause; (2) the alleged victim is available in court during a preliminary hearing; (3) the prosecution is relying almost completely on hearsay testimony in establishing probable cause; and (4) the defense explains the relevance to probable cause of the testimony they intend to elicit. *See McDonald* 576 P.2d at 172.

It is disingenuous to pretend that *McDonald* could now somehow open the floodgates to alleged victims being called as witnesses merely because they exercise their rights under the VRA to be present in Court. *McDonald* has been good law since 1978 and without this occurring. Over 40 years of history establishes that the ruling in *McDonald* will not, has not, and does not cause harm the prosecution claims.

Under the standard in *McDonald*, the prosecution knows exactly when an alleged victim who voluntarily appears at a preliminary hearing might risk of being called as a witness. Moreover, prosecutors can entirely avoid this situation simply by either: (1) presenting sufficient non-hearsay evidence for a finding or probable cause, or (2) informing the alleged victim that if they exercise their right to be present at a preliminary hearing, long-standing and well-known caselaw from the Colorado Supreme Court provides for circumstances where they could be called as a witness. And in the 30 years that *McDonald* and the VRA have peacefully co-existed, prosecutors across the state of Colorado had no issue following these simple steps.

The cases cited by the prosecution for the proposition that "victims can suffer harm if required to testify at a preliminary hearing unnecessarily" present very different factual circumstances and involve situations where witnesses were subpoenaed to a preliminary hearing by the defense prior to a determination that their testimony would be relevant and necessary to a determination of probable cause. Simply put, that is not the situation before this Court.

Rex v. Sullivan, 575 P.2d 408, is another 40-plus year-old cases that was decided by the Colorado Supreme Court on February 21, 1978, with the *McDonald* decision to follow a few weeks later on March 27, 1978. In *Rex*, the Colorado Supreme Court upheld the District Court's ruling quashing a subpoena for a 7-year

old sexual assault victim for a preliminary hearing was a proper exercise of judicial discretion when the Court had determined that “the child's testimony would be weak or nonexistent on the points raised by the defense and that consequently there was no need to require her to appear” and the defense had both had un-curtailed cross examination of the detective and had called other prosecution witnesses, including a physician and a forensic specialist. *Rex*, 575 P.2d at 410.

While *Rex* does not specifically address the issue of the child’s age regarding the relevance of their testimony, it is of note that under current law a 7-year-old child would be presumed to be incompetent to testify. C.R.S. § 13-90-106.

The *Rex* decision was made “under the facts here that the respondent judge properly acted within his discretion” which included that, at the request of the prosecution, the court dismissed the charge of sexual assault on a child. *Id*. at 409. *Rex* makes no mention of any harm that could be caused by the minor victim being called to testify, but bases the decision entirely on the court’s proper use of its discretion in tempering evidence and the hearing and determining the minor victim’s testimony would not be relevant for the purpose of determining probable cause.

In *Brothers*, the Colorado Supreme Court considered a C.A.R. 21 petition regarding the District Court’s refusal to consider a motion to quash a subpoena for a minor victim of a sexual assault prior to a preliminary hearing. *People v. Bros.,*

2013 CO 31, 308 P.3d 1213. The Court held that "it was an abuse of discretion for the trial court to refuse to consider the motion to quash prior to the preliminary hearing." *Id*. at 1217. While the victim in *Brothers* was 17-years-old at the time of the hearing, they would have been between 11 and 13 at the time of the offense. *Id*. at 1214.

The holding in *Brothers* is not that a victim can suffer harm by being required to testify at a preliminary hearing. The holding is that the presiding judge erred in refusing to rule on the motion to quash a subpoena prior to the hearing specifically in the context of a child victim of a sexual assault because the child could suffer psychological harm if required to prepare for and appear at the preliminary hearing even if their testimony was found to be unnecessary and they were then not required to testify. *Id*. at 1214.

The decision in *Brothers* specifically notes that it is not addressing the questions raised by *McDonald*. Because the decision did not reach the merits of the motion to quash but instead turned on the presiding judge's refusal to consider the motion prior to the hearing, the Court did not consider:

> "Respondent's argument, based on *McDonald*, that he must be permitted to call the alleged child–victim in this case as an "eyewitness." We note that *McDonald* was premised on our observation that "[s]ince probable cause is the sole issue at a preliminary hearing, it is incumbent on counsel to explain the relevance to probable cause of the testimony he intends to elicit." Whether the child's testimony is necessary to the probable cause determination is the very subject of the People's motion to quash."
> *People v. Bros*., 308 P.3d 1213, 1217 (footnote 5).

There is a significant difference between a situation as in *Brothers* or *Rex* that involved the defense issuing a subpoena to a minor victim to appear at a hearing and the timing of when the presiding judge should consider a motion to quash, and that presented in *McDonald* and the present case where an adult alleged victim chose to voluntary appear in person at a preliminary hearing without being placed under subpoena, the prosecution objected to the alleged victim being sequestered, the prosecution elected to proceed with almost entirely hearsay evidence, and the court ruled in its discretion that the defense had made a sufficient showing that the alleged victim was an eyewitness with relevant testimony as to the issue of probable cause.

The prosecution's suggestion that questioning an alleged victim during a court proceeding amounts to "intimidation, harassment, or abuse" proposes, without quite saying, that counsel would use this as an opportunity to violate their ethical duty that "a lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others" Colo. R. Prof. Proc., Preamble, or use means that have "no substantial purpose other than to embarrass, delay, or burden a third person", Colo. R. Prof. Proc. 4.4(a), and further implicitly violate the duty of candor to the tribunal by requesting to questions the alleged victim under false pretense when the true purpose is nefarious, Colo. R. Prof. Proc. 3.3. It

suggests that an attorney is incapable of questioning an alleged victim of a sexual assault without causing them undue harm.

Numerous protections against "intimidation, harassment, or abuse" already exist and would remain in place if an alleged victim were called to testify at a preliminary hearing that would prohibit the harm the prosecution claims would occur:

a. Counsel questioning the alleged victim would be bound by all ethical obligations, which would prevent using questioning for illegitimate and nefarious purposes;

b. The prosecution could object if the defense were to badger the witness, harass or argue with the witness, intimidate or menace the witness, or ask the witness prejudicial or inflammatory questions;

c. Per both *McDonald* and Judge Rodgers's order in the present case, testimony would be limited to a narrow and specific line of inquiry (that being, the actual application of physical force and identification);

d. The prosecution could object to any questioning outside of this specified area of relevance;

e. Unless the witness were to be unduly hostile, questioning would be in the form of direct rather than cross examination, with open ended questions;

f. The court would retain its authority to limit the questioning and temper the rules of evidence within its sound discretion;

g. The court could, at the request of either party, exclude any members of the public form being present during the alleged victim's testimony.

C.R.S. § 16-5-301(2);

Here, an adult woman voluntarily appeared, on her own accord, and not compelled by a subpoena, to be in person for the preliminary hearing and remained through the entire proceeding. She remained in the courtroom during hearsay testimony on both direct and cross examination from Detective Byars about the details of her account of the allegation of the use of force. She did not display any inappropriate emotions or fall apart in distress. Had she been called to testify she would have been questioned about the same topics that she had chosen to remain in the courtroom and listen to during Detective Byars testimony.

C. No Aspect of the VRA – Or This Case - Require this Court to Revisit the Precedent Set by *McDonald.*

In the 30 years that the VRA has been law, the legislature has specifically neglected to include in its numerous provisions and protections any prohibition against an alleged victim being called as a witness because they are exercising their right under the VRA to be present at a hearing.

It is this Court's role to interpret a statute by the plain meaning of the language of the statute. *Cowen v. People*, 431 P.3d 215, 218 (holding "a court

should always turn first" to the plain meaning rule "before all other[ ]" rules because "courts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (internal citations omitted). The plain meaning of a statute applies equally to what is there as to what is not. When the legislature choses to omit language from a statute, this Court must presume that the legislature intended to do so. *See e.g. People v. Cisneros*, P.2d 703, 704 (1977) (the plain meaning of a statute could not include an omitted mental state of "willfully and maliciously").

Had the legislature intended the VRA to include the protections that would prevent an alleged victim from being called as a witness in apparently any circumstances because they are present in the courtroom, nothing would have prevented the legislature from specifically enumerating these protections and including them in the VRA. But, in the 30 years since the passage of the VRA, despite amendments in 1994, 1995, 2000, 2002, 2006, 2007, 2009, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021 and 2022, the legislature has omitted to amend the VRA's numerous and highly specific protections to include what the prosecution claims it to contain.

An alleged victim being called at a witness at a preliminary hearing under the specific and narrow circumstances in *McDonald* does not violate any aspect of the VRA. Being called as a witness certainly does not violate the "right . . . to be

present . . . for all critical stages of the criminal justice process." C.R.S. § 24-4.1-302.5(1)(b). Nor does it violate "[t]he right to be treated with fairness, respect, dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process." C.R.S. § 24-4.1- 302.5(1)(a). While an alleged victim of any crime may be reluctant to testify (which notably is equally true for a false accusation as for a true accusation), no Colorado law or statute has ever found that calling a witness to testify is intimidation, harassment, or abuse, or that it violates the right to be treated with fairness, respect, and dignity.

Beyond the limited circumstances of sequestration under C.R.E. 615 – subject to the caveat that an alleged victim or their representative's presence may still be curtailed if necessary to protect the defendant's right to a fair trial or the confidentiality of juvenile proceedings —no Colorado Court has found any other circumstances that the VRA trumps any other statutory or procedural right. *See e.g. People v. Coney*, 98 P.3d 930, 935 (Colo. App. 2004; *People v. Lopez*, 401 P.3d 103, 106 (Colo. App. 2016.

Coney present a very different circumstance than the present case. Article II, § 16a of the Colorado Constitution and C.R.S. § 24–4.1–302.5 of the VRA specifically guarantee an alleged victim or their representative the right to be "present at all critical stages of the criminal justice process." As such, C.R.E. 615

is clearly in direct conflict with the plain language of Article II, § 16a of the Colorado Constitution and C.R.S. § 24–4.1–302.5 of the VRA.

Were a provision of the VRA to state in plain language when an alleged victim who is present at a critical stage cannot be called as a witness, then *McDonald* would no longer be good law. But the legislature has not done so. Nothing would prevent the legislature from enacting such an amendment if they believed it to be necessary – and it is the legislature's prerogative, not the Court's, to decide whether or not to include such a provision.

To the contrary, Colorado Courts have found that the VRA does not contain rights beyond those specifically enumerated. For example, in *Gansz*, the Colorado Supreme Court performed a strict interpretation of the legislature's chosen language defining the right of an alleged victim to be heard and whether this provided a right to be heard on a motion to dismiss: "[t]he enactment of section 24–4.1–302.5(1)(d) reflects a legislative determination as to when a victim's input would be relevant, and, therefore, when a right to be heard would be appropriate. There is no statutory right to be heard at a hearing on a district attorney's motion to dismiss criminal charges." *Gansz v. People*, 888 P.2d 256, 258 (Colo. 1995). This decision affirmed the holding by the Court of Appeals that "we cannot conclude that the General Assembly acted improperly in limiting the right of a crime victim to be heard to proceedings involving a bond reduction or modification, the

acceptance of a negotiated plea agreement, or the sentencing proceedings." *People v. Herron*, 874 P.2d 435, 438 (Colo. App. 1993), aff'd sub nom. *Gansz v. People*, 888 P.2d 256 (Colo. 1995).

Further, in this case the Court need not decide in general whether there is a conflict between the VRA and *McDonald*. Looking at the very fact specific circumstances of this preliminary hearing demonstrates that Judge Rodgers was properly exercising his discretion in allowing the witness to be called for a narrow and limited purpose.

CONCLUSION

Accordingly, Mr. Platteel requests that the Court deny the C.A.R. 21 petition as improvidently granted and remand the case to the county court.

Dated this 2nd day of February, 2023.

Respectfully submitted,

By: /s/ Sarah Croog
Sarah Croog, Reg. No. 37979

LIST OF SUPPORTING DOCUMENTS

Doc. 1 – Transcript September 15, 2022 (Redacted)

Doc. 2 – December 2, 2022 Interview with E.G. (Redacted)

Doc. 3 – Salamone Order November 10, 2022

CERTIFICATE OF SERVICE AND MAILING

I hereby certify that I have delivered a true and correct copy of the foregoing was served electronically via ICCES and/or by depositing same in the U.S. Mail, postage prepaid, this 2nd day of February, 2023, addressed to the following:

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