DATE FILED: February 23, 2023 11:20 AM

SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Original Proceeding Boulder County Court No. 22CR1121 Honorable Frederic Rodgers, Senior/Visiting Judge	
IN RE: **THE PEOPLE OF THE STATE OF COLORADO** Petitioner, v. **EVAN MICHAEL PLATTEEL** Respondent.	▲ COURT USE ONLY ▲ Case No.: 22SA384
MICHAEL T. DOUGHERTY, District Attorney ADAM D. KENDALL, Chief Trial Deputy District Attorney* 1777 Sixth Street Boulder, CO 80302 Phone Number: (303) 441-3700 FAX Number: (303) 441-4703 Email: akendall@bouldercounty.org Atty. Reg. #: 38905 *Counsel of Record	

REPLY IN SUPPORT OF PETITION FOR RELIEF PURSUANT TO C.A.R. 21

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with all requirements of C.A.R. 28(g) and C.A.R. 32, including all formatting requirements. Specifically, the undersigned certifies that:

This reply contains **1910** words, which does not exceed the word limit.

I acknowledge that my reply may be stricken if it fails to comply with any of the requirements of C.A.R. 28(g) or C.A.R. 32.

/s/ Adam Kendall

ARGUMENT

In its Response, the Boulder County Court, Senior Judge Frederic Rodgers (the "trial court") urges this Court to deny the relief requested by the People because, in short, *McDonald v. District Court*, 576 P.2d 169 (Colo. 1978) does not conflict with the rights afforded victims under the Victims' Rights Act (the "VRA") and the circumstances of the preliminary hearing here allow for the victim, E.G., to be called to testify. Evan Platteel (the "Defendant") adopts these positions in his Answer Brief as well.[1] Both arguments fail.

To the contrary, this case shows the significant tension between a victim's rights under the VRA and *McDonald*. Further, both Defendant and the trial court exaggerate the purpose of and evidentiary requirements in a preliminary hearing in an effort to justify the trial court's order allowing Defendant to call E.G. to testify. This Court should overrule *McDonald*, reverse the trial court's order allowing Defendant to call E.G. to testify at Defendant's preliminary hearing, and hold that the People have established probable cause.

[1] Defendant also implies and, at times, directly accuses the People of filing of this Petition for improper purposes, despite this Court agreeing the Petition was extraordinary in nature and worthy of review. The People deny Defendant's allegations but will not waste this Court's time by further addressing Defendant's ad hominem bluster.

I. The *McDonald* holding allows victims to be ambushed.

With the strengthening of the VRA and development of preliminary hearing case law over the last few decades, this Court must revisit and overrule the 44-year-old holding in *McDonald*. The VRA confirms that victims like E.G. have a statutory and constitutional right to be present at a preliminary hearing. *See* § 24-4.1-302(2)(b), C.R.S (2022); § 24-4.1-301(1)(n)(I), C.R.S. (2022); § 24-4.1-302.5(1)(b), C.R.S. (2022); Colo. Const. art. II, §16a. But under *McDonald*, exercising that right puts victims at risk of being forced to testify without warning and for no legitimate purpose.

Notably, Defendant essentially confesses this tension between the VRA and *McDonald* in his Answer Brief. His argument that "prosecutors can avoid" the conflict between the VRA and *McDonald* by "informing the alleged victim that if they exercise their right to be present . . . they could be called as a witness" illustrates the exact point at issue here. Def.'s AB, p. 19. Defendant's quick fix would mean that the VRA's edict that victims have a right to be present at a preliminary hearing is nothing more than empty words. According to Defendant, victims are left with the following choice: (1) appear at the preliminary hearing and gamble that the prosecutor has not only presented enough evidence to

satisfy the judge but is also ready to defeat the argument of a clever defense attorney who has *McDonald* in hand; or (2) stay at home and out of harm's way. Under Defendant's proposal, the *only* way a victim could be sure to avoid a surprise trip to the witness stand is to surrender her rights and keep clear of the courtroom. This cannot be the state of the law.

Further, Defendant's argument as to why *McDonald* must be upheld is flawed, at best. He claims that *McDonald* is "essential" in cases, like this one, where the lead detective's testimony is "convoluted, contradictory, and confusing" and "[w]ithout 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 [Defendant] strangled her." Def's AB, pp. 12-13. He deems such a scenario as "unthinkable." *Id*. Yet, Defendant's counsel did not subpoena E.G. to the preliminary hearing, even though Defendant's counsel knew the charges Defendant faced, had received and reviewed police reports and other evidence through discovery, and had prepared an extensive cross-examination of the lead detective highlighting and attacking E.G.'s various statements. If the trial court not hearing from E.G. was potentially "unthinkable," why not serve a subpoena on her? Moreover, what would Defendant have done if she had not come to the

preliminary hearing?

As argued in the People's Petition, if the People fail to present sufficient evidence at a preliminary hearing—a low bar as the evidence is viewed in the light most favorable to the People and it is not necessary to even show the probability of the defendant's conviction—then the judge can simply not bind over the charge at issue. *People in the Interest of M.V.*, 742 P.2d 326, 329 (Colo.1987); Crim. P. 5(a)(4)(IV). If criminal defendants are concerned about the viability of the evidence supporting the charges filed in a case, they can issue subpoenas prior to the preliminary hearing that may be considered by the prosecution and the court (and quashed if necessary, as allowed by *People v. Brothers*, 308 P.3d 1213, 1217 (Colo. 2013)). Defendants should not be allowed to spring *McDonald* on an unprepared court and use the voluntary appearance of a victim under the VRA to force their testimony and potentially subject them to harassment or cause them to suffer harm.[2]

[2] Here, confusingly, Defendant's counsel argued to the trial court that Defendant needed to call E.G. as a witness because the testimony from the lead detective was "not sufficient to bind the case over on force." TR 9/15/22, p. 86:19-20. If the lack of evidence supporting probable cause was the *actual* reason Defendant wanted E.G. on the stand, why would *Defendant* call E.G.? It makes no sense that Defendant would want to call E.G. to testify and give the People a chance to shore up that issue.

While the trial court and Defendant are correct that *McDonald* has been mentioned by this Court several times since the opinion was issued in 1978, this Court has never examined the conflict between the holding in *McDonald* and the rights afforded victims under the VRA. The adoption of the VRA and the evolution of the case law surrounding preliminary hearings over the past four and a half decades since *McDonald* was decided make this issue ripe for this Court to address. This case is the vehicle for this Court to hold that is not proper for a preliminary hearing court to force an unsuspecting victim—not under subpoena—to testify at the hearing because she exercised her right to be present.

II. Preliminary hearings are just a screening device and nonhearsay evidence is not required for each element of an offense.

This Court has repeatedly held that a preliminary hearing is not a mini-trial and is merely a screening tool to determine whether there is probable cause. *Rex v. Sullivan*, 575 P.2d 408, 410 (Colo. 1978); *People v. Buhrle*, 744 P.2d 747, 749 (Colo. 1987); *Blevins v. Tihonovich*, 728 P.2d 732, 734 (Colo. 1986). The evidence must be viewed in the light most favorable to the People and the People's case should "not be judged too strictly at this early stage." *M.V.*, 742 P.2d at 329 (internal citations omitted); *see also People v. Jensen*, 765 P.2d 1028, 1030 (Colo. 1988); *People v. Dist. Ct. of Colorado's Seventeenth Jud. Dist.*, 926 P.2d 567, 570

n. 2 (Colo. 1996) (holding that "when there is a mere conflict in the testimony, a question of fact exists for the jury, and the judge in a preliminary hearing must draw the inference favorable to the prosecution." (*citing Hunter v. District Court*, 543 P.2d 1265, 1268 (Colo. 1975)). Hearsay evidence is not just allowed at a preliminary hearing but may "form the bulk of the evidence." *Buhrle*, 744 P.2d at 749, *see also Jensen*, 765 P.2d at 1030; *M.V.*, 742 P.2d at 329; *People v. Huggins*, 220 P.3d 977, 988 (Colo. App. 2009). Additionally, and contrary to both the trial court's and Defendant's arguments, the People are not required to present nonhearsay evidence as to each and every element of any charge at issue. Several Colorado cases establish this principle.

In *Jensen*, this Court held that probable cause was established at a preliminary hearing for the crime of sexual assault on a child where the People's two witnesses provided minimal nonhearsay testimony—the age of the victim and the defendant, the presence of the defendant and victim on the day of the assault, and the victim's demeanor. 765 P.2d at 1031. It was only through hearsay testimony relaying statements of the victim that the preliminary hearing court received evidence of the nature of the sexual assault and that the victim had identified the defendant as the perpetrator. *Id*.

As another example, in *Huggins*, a sexual assault on a child case, the

prosecution called one witness at the preliminary hearing—the investigating officer responsible for the case. 220 P.3d at 978. The officer primarily testified to hearsay statements of the victim connecting the defendant, her father, to the crime. *Id*. In fact, the *only* nonhearsay admitted was the officer's perception of the age of the defendant and the victim along with the defendant's statements that he was the victim's father and married to the victim's mother—nothing describing the sexual act. *Id*. The reviewing court held that the nonhearsay presented by the prosecution established two elements of the charged offense—not all of the elements—and that that this evidence along with the hearsay testimony was sufficient for a finding of probable cause for the crime charged. *Id*.

Finally, in *People v. Horn*, this Court held that testimony at the preliminary hearing from the lone prosecution witness, a detective who was not present when the crime was committed, was sufficient for a finding of probable cause. 772 P.2d 108, 109 (Colo. 1989). In *Horn*, the defendant was charged with theft of rental property. *Id*. While the detective's testimony primarily consisted of hearsay, the defendant's statements to the detective—that she rented the items, paid for them, and failed to return them—was acceptable nonhearsay evidence. *Id*.

Defendant and the trial court attempt to justify the judge's order forcing E.G. to testify because "the prosecution relied exclusively on hearsay to establish the

essential element that Defendant used physical force to compel E.G.'s submission." Trial court's Response, pp. 10-11; *see also* Def.'s AB, pp. 8-9 (relying on the trial court's assertion that the "bulk of the case . . . is sufficiently hearsay" and describing the victim's hearsay statements as "contradictory"). This argument evidences a fundamental misunderstanding of the nature of the evidence required at a preliminary hearing.

Under the binding authority cited above, the People's evidence in this case—E.G.'s hearsay statements describing Defendant's actions and Defendant's extensive nonhearsay statements establishing multiple elements of the crime—is sufficient for the purpose of the hearing and a finding of probable cause. In fact, in *Jensen* and *Huggins*, much thinner nonhearsay evidence was presented by the prosecution than what the trial court was provided here, and reviewing courts held as a *matter of law* that probable cause had been established. Pursuant to *Dist. Ct. of Colorado's Seventeenth Jud. Dist.* and *Hunter*, any alleged conflict or contradiction in E.G.s statements are to be settled in favor of the prosecution at this stage and ultimately weighed by a jury. Thus, even if this Court were to allow *McDonald* to stand, forcing E.G. to testify is unnecessary and an abuse of discretion as the People presented sufficient nonhearsay evidence and probable cause was established. The trial court erred.

WHEREFORE, the People request that this Court overrule *McDonald*, reverse the trial court's order for E.G. to testify at Defendant's preliminary hearing, and hold that the People have established probable cause in this case.

Respectfully submitted,

MICHAEL T. DOUGHERTY
District Attorney

By: /s/ Adam D. Kendall
Adam D. Kendall, Reg. No. 38905
Chief Trial Deputy District Attorney
1777 Sixth Street
Boulder, CO 80302

CERTIFICATE OF SERVICE

On February 23, 2023, I served a copy of the above REPLY IN SUPPORT OF PETITION FOR RELIEF PURSUANT TO C.A.R. 21 upon the below listed person(s) at the below indicated location(s) through the Colorado E-Filing System.

Sarah Croog
Jonathan Greenlee
Scott Jurdem
JURDEM, LLC
820 Pearl Street, Suite H
Boulder, CO 80302

Grant Sullivan
Colorado Attorney General's Office
1300 Broadway, 6th Floor
Denver, CO 80203

Keith Bradley
Brent Owen
SQUIRE PATTON BOGGS (US) LLP
717 17th Street, Suite 1825
Denver, CO 80202

Katherine Houston
Rocky Mountain Victim Law Center
899 Logan Street, Suite 512
Denver, CO 80203

/s/Adam D. Kendall
Original signature on file at
Office of the District Attorney – Twentieth Judicial District