

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.

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Case No.:

PETITION FOR RELIEF PURSUANT TO C.A.R. 21

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The People request this Court issue a rule to show cause to Judge Rodgers and Evan Michael Platteel (the “Defendant”), the real parties in interest, as to why the victim of Defendant’s sexual assault—who exercised her rights under the Victims’ Rights Act and was present in the courtroom for a portion of Defendant’s preliminary hearing—should now be compelled to testify at the hearing (which was continued to allow this Petition to be filed). After review, the People request that this Court make the rule absolute and remand to the county court to reverse its order allowing Defendant to call the victim to testify at Defendant’s preliminary hearing.

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PROCEEDINGS BELOW

Boulder County Court – Division 7
Senior/Visiting Judge Frederic Rodgers (substituting for Judge Zachary Malkinson)
22CR1121

ISSUE

(1) Whether the trial court erred in allowing Defendant to call the sexual assault victim in this case to testify at Defendant’s preliminary hearing after the People had rested, merely because the sexual assault victim exercised her statutory and constitutional right to remain in the courtroom for the hearing.

NATURE OF ACTION BY LOWER COURT AND FACTS

Defendant is charged with Sexual Assault – Force - Felony (F3), pursuant to C.R.S. § 18-3-402(1)(a),(4(a)) (Doc. 1, Doc. 2, Doc. 3). The complaint was filed against Defendant on July 26, 2022, amended on September 14, 2022, and a portion of the scheduled preliminary hearing was held on September 15, 2022 (Doc. 2, Doc. 4, Doc. 5, Doc. 6).

The sexual assault victim, E.G., appeared at Defendant’s preliminary hearing on September 15, 2022. Prior to any testimony being received by the county court, defense counsel requested sequestration of witnesses. (Doc. 6, TR 9/15/22, p. 3:20-23). The People noted that the victim in the case, E.G., would not

testify at the hearing but would remain in the courtroom during the hearing, as was her right under the Victims' Rights Act (the "VRA") and binding authority. (Doc. 6, TR 9/15/22, pp. 3:23-5:5). Judge Rodgers stated that "since [E.G.] will not be called as witnesses, I have no objection to [her] remaining in here." (Doc. 6, TR 9/15/22, p. 4:19-21). At no point prior to the People resting did counsel for Defendant alert the People or the county court to any intent to attempt to call E.G. at the hearing. (*See e.g.*, Doc. 6)

The People called Detective Scott Byars to testify to his investigation into Defendant's forcible sexual assault of E.G. (Doc. 6, TR 9/15/22, pp. 5:17-75:21). Det. Byars testified that E.G. relayed to him that Defendant forced E.G. to perform oral sex on him by putting his hand around her neck in a choking manner and tightening his grip after saying "shut the fuck up and suck my dick." (Doc. 6, TR 9/15/22, pp. 15:20-16:18). E.G. was scared and felt she may get hurt if she did not comply. (Doc. 6, TR 9/15/22, p. 16:17-20).

Det. Byars also testified as to statements made by Defendant to Det. Byars. Defendant confirmed that he was with E.G. on the date of offense and confirmed that she performed oral sex on him. (Doc. 6, TR 9/15/22, pp. 21:24-22:16). He further stated that he choked E.G. "at her request" the night before. (Doc. 6, TR 9/15/22, pp. 20:23-21:11).

Following Det. Byars's testimony, defense counsel called E.G. to testify, even though she was not under subpoena, citing a case that pre-dates the VRA, *McDonald v. Dist. Ct. In & For Fourth Jud. Dist.*, 576 P.2d 169 (Colo. 1978). (Doc. 6, TR 9/15/22, p. 77:6-10, p. 79:5-11). Defense counsel had a copy of *McDonald* printed out for the Court ahead of the hearing but claimed to have no idea that they might attempt to call E.G. at the hearing. (Doc. 6, TR 9/15/22, p. 77:6-10, p. 80:8).

Defense counsel asserted that they needed to call E.G. to testify because there was a question as to whether probable cause had been established with regard to force in the case. (Doc. 6, TR 9/15/22, pp. 77:23-78:18, pp 82:14-83:8). This request caused an immediate emotional response from E.G. (Doc. 6, TR 9/15/22, pp. 79:21-80:1). Relying on *McDonald*, Judge Rodgers allowed Defendant to call E.G to testify to testify as to the use of force by Defendant, finding that he "might have . . . quashed" a subpoena served on E.G. ahead of the hearing, but since she "voluntarily made herself available in court" Defendant was entitled to call her. (Doc. 6, TR 9/15/22, pp. 90:11-91:13, pp. 86:24-87:6). The People objected to E.G. being called as a witness and disagreed with the county court's reading of *McDonald*, *McDonald's* application under the circumstances of the case at issue, and its viability pursuant to case law interpreting the VRA. (Doc. 6, TR 9/15/22, pp. 87:24-92:11).

Judge Rodgers took a recess so the People could consider his ruling. (Doc.

6, TR 9/15/22, p. 92:17). The People asked Judge Rodgers to stay the case to allow for the People to appeal his order. (Doc. 6, TR 9/15/22, pp. 92:17-93:13). Judge Rodgers agreed to stay the preliminary hearing and set the matter for a status hearing on November 10, 2022, to determine where any appeal stood. (Doc. 7, Doc. 6, TR 9/15/22, pp. 94:8-9, 96:23-97:2).¹ The case is now set for a continued preliminary hearing on December 13, 2022. (Doc. 8).²

LACK OF ADEQUATE REMEDY

Under the circumstances of this case, the county court erred by ordering E.G. to testify merely because she was present for Defendant's preliminary hearing. If allowed to stand, the county court's order would result in the needless revictimization of E.G. where her testimony is not necessary to satisfy the screening purposes of the hearing. Further, appellate review of the county court's ruling after final judgment would offer no meaningful redress. Such a review would result in an advisory opinion that would not reverse the impact

¹ The People put this criminal matter before a grand jury and the grand jury returned an indictment, Boulder District Court Case 22CR1810 on November 4, 2022. The People intended to proceed forward with Case 22CR1810 and to dismiss Case 22CR1121. However, the district court dismissed Case 22CR1121 finding that it lacked jurisdiction to preside over that case. The People are taking a direct appeal of the district court's decision in Case 22CR1810.

² Should the Court grant this Petition or not rule on this Petition prior to December 13, 2022, the People will request the county court stay the case.

on E.G.

Additionally, this Court should consider issues of public importance not previously addressed by the Court. *People v. Harlan*, 109 P.3d 616, 623-624 (Colo. 2005). The Court has not addressed the holding in *McDonald* since the VRA was passed or following the amendment to Colorado's Constitution granting rights to crime victims. Through this case, where the county court violated E.G.'s rights, the Court has the opportunity to revisit *McDonald* under the lens of the VRA and the case law that has developed in the 44 years since this Court issued the *McDonald* opinion.

STANDARD OF REVIEW

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).

ARGUMENT AND AUTHORITY

I. The county court's ruling violates E.G.'s rights under the VRA and the Colorado Constitution.

The focus of a preliminary hearing is to determine whether there is probable cause to believe an accused committed the offenses charged. *People v. Holder*, 658 P.2d 870, 871 (Colo. 1975). "[A] defendant has no constitutional right to unrestricted confrontation of witnesses and to introduce evidence at a preliminary

hearing.” *Rex v. Sullivan*, 575 P.2d 408, 410 (Colo. 1978). A “preliminary hearing is not intended to be a mini-trial or to afford the defendant an opportunity to effect discovery.” *Id* (internal citations omitted). Instead, the “restricted purpose” of the preliminary hearing “is to screen out cases in which prosecution is unwarranted by allowing an impartial judge to determine whether there is probable cause to believe that the crime charged may have been committed by the defendant.” *Id*.

Additionally, testimony can be curtailed at a preliminary hearing if the People have met their burden. *Id*.

Though this Court ruled 44 years ago in *McDonald* that a “defendant is entitled to call an eyewitness to testify at a preliminary hearing if the witness is available in court,” even then, such a practice was deemed viable only when “the prosecution’s evidence consists almost entirely of hearsay testimony.” 576 P.2d at 171. In *McDonald*, the prosecution called two police officer witnesses at the preliminary hearing. *Id*. at 161. One officer relayed hearsay statements made by the victim, and the other described the victim’s identification of the defendant’s picture when shown a group of photographs. *Id*. Thus, the nonhearsay evidence presented by the prosecution at the preliminary hearing was minimal, at best. *Id*. at 162.

In the many years since *McDonald* was decided, the VRA was adopted, and

the Colorado Constitution was amended to give victims the right to be “present at all critical stages of the criminal justice process.” Colo. Const. art. II, §16a.

Further, case law has clarified the minimum amount of nonhearsay evidence the prosecution must present at a preliminary hearing. “[T]he prosecution satisfies the minimum requirement for nonhearsay if it (1) presents some competent nonhearsay addressing essential elements of the offense, and (2) presents hearsay testimony through a witness who is connected to the offense or its investigation and is not merely reading from a report.” *People v. Huggins*, 220 P.3d 977, 988 (Colo. App. 2009).

The VRA defines a preliminary hearing as a critical stage of the criminal justice process. § 24-4.1-302(2)(b), C.R.S (2022). Victims of sexual assault, like E.G., fall under the purview of the VRA. § 24-4.1-301(1)(n)(I), C.R.S. (2022). The VRA codifies the edict found in the Colorado Constitution, stating that victims have the “right . . . to be present . . . for all critical stages of the criminal justice process.” § 24-4.1-302.5(1)(b), C.R.S. (2022). Additionally, victims have “[t]he right to be treated with fairness, respect, dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.” § 24-4.1-302.5(1)(a), C.R.S. (2022). Our courts have determined that the constitutional and statutory rights of victims are strong enough to trump our rules of evidence,

including an order of sequestration. *People v. Coney*, 98 P.3d 930, 935 (Colo. App. 2004).

This Court has held that victims can suffer harm if required to testify at a preliminary hearing unnecessarily. *See People v. Brothers*, 308 P.3d 1213, 1217 (Colo. 2013); *see also Rex*, 575 P.2d at 410. If allowed to stand, the county court's ruling puts each and every victim exercising their statutory and constitutional rights to be present at a preliminary hearing at risk of being called, without warning, to testify.

The preliminary hearing standard established in *Huggins* requires the prosecution to present some nonhearsay evidence at the hearing addressing essential elements, not all elements, of the charges eligible for such a hearing. If the prosecution fails to do so, then the county court may dismiss the charge. The remedy is not to allow a defendant to call the victim—exercising a constitutional right—to testify at the hearing. Inevitably, this interpretation of the law would have a chilling effect on all victims and endorse an effort by defendants to create discovery and test the resolve of victims' participation in the criminal justice system. This Court should revisit the holding in *McDonald* and ensure that the VRA is treated with proper regard.

II. The People presented ample nonhearsay evidence at Defendant's preliminary hearing, making *McDonald* inapplicable.

Det. Byars testified as to statements made to him by E.G. and Defendant. E.G.'s hearsay statements to Det. Byars describe a completed sexual assault. The statements made to Det. Byars by Defendant are nonhearsay. C.R.E. 801(d)(2)(A). Defendant admitted to being with E.G. on the date of offense and engaging in oral sex with her on that date. Further, he admitted to choking her "at her request" the evening before the date of offense. Thus, the People presented nonhearsay evidence of numerous elements of the offense through the lead detective in the case. Pursuant to *Huggins* and *McDonald*, the county court erred as a matter of law by allowing Defendant to call E.G. to testify at his preliminary hearing under these facts.

WHEREFORE, the People request this Court grant the rule to show cause and after review remand the case to the county court to reverse its order allowing Defendant to call the victim to testify at Defendant's preliminary hearing.

Respectfully submitted,

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LIST OF SUPPORTING DOCUMENTS

1. Criminal Complaint
2. Motion to Amend Count 1
3. Order Granting Motion to Amend Count 1
4. July 26, 2022, Minute Order
5. Data Access - Summary, Charges
6. Transcript of September 15, 2022, Preliminary Hearing
7. September 15, 2022, Minute Order
8. November 10, 2022, Minute Order

CERTIFICATE OF SERVICE AND MAILING

I hereby certify that a true and correct copy of the above and foregoing Petition for Relief Pursuant to C.A.R. 21 was served at the below indicated location(s) by depositing the copy in the United States Mail, sufficient postage pre-paid, and properly addressed.

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

I hereby certify that a copy of the above and foregoing Petition for Relief Pursuant to C.A.R. 21 was delivered by interoffice mail, and addressed as follows:

Division 7
Boulder County Court
Boulder County Justice Center
1777 Sixth Street
Boulder, CO 80302

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