ADVANCE SHEET HEADNOTE
April 24, 2023

2023 CO 18

No. 22SA384, *People v. Platteel*—Colo. Const. art. II, § 16a—Victim Rights Act, §§ 24-4.1-300.1 to -305, C.R.S. (2022)—Victim's right to attend "critical stages"—Defendant's ability to compel an unsubpoenaed victim attending a preliminary hearing to testify—*McDonald v. District Court*, 576 P.2d 169 (Colo. 1978).

In this original proceeding, the supreme court must determine whether a trial court may properly permit the defense to compel a victim—as "victim" is defined in the Victim Rights Act ("VRA")—to testify during a preliminary hearing without a subpoena. Because the supreme court concludes that a trial court may not do so, it makes absolute the rule to show cause.

The county court here relied on *McDonald v. District Court*, 576 P.2d 169 (Colo. 1978). Given the state of the record at the hearing, however, the court erred by applying *McDonald*. And, in any event, *McDonald* preceded the VRA, which was a game changer. *McDonald* is now overruled to the extent it conflicts with the VRA. Reading *McDonald* with the gloss supplied by the VRA, the supreme court

holds that defense counsel may not call to the witness stand an unsubpoenaed victim who happens to be in attendance at a preliminary hearing.

Today's opinion in no way vests a victim with immunity from testifying at a preliminary hearing. However, if the defense wishes to call a victim to testify at a preliminary hearing, it must properly serve the victim with a subpoena. Of course, the People may move to quash the subpoena served on a victim. If the People do so, the court must exercise its discretion under our jurisprudence to determine how to proceed.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 18

Supreme Court Case No. 22SA384
Original Proceeding Pursuant to C.A.R. 21
Boulder County District Court Case No. 22CR1121
Honorable Frederic Rodgers, Senior Judge

In Re
Plaintiff:

The People of the State of Colorado,

v.

Defendant:

Evan Michael Platteel.

Rule Made Absolute
en banc
April 24, 2023

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JUSTICE SAMOUR delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE HART**, and **JUSTICE BERKENKOTTER** joined.
JUSTICE HOOD, joined by **JUSTICE GABRIEL**, concurred in the judgment.

JUSTICE SAMOUR delivered the Opinion of the Court.

¶1 "[T]he full and voluntary cooperation of victims of . . . crimes with state and local law enforcement agencies as to such crimes is imperative for the general effectiveness and well-being of the criminal justice system of this state." § 24-4.1-301, C.R.S. (2022). In line with this enduring declaration, our General Assembly has sought "to preserve and protect a victim's rights to justice and due process" through the Victim Rights Act ("VRA"). § 24-4.1-302.5(1), C.R.S. (2022). One of the most fundamental rights a victim enjoys under the VRA is the right to be present for all "critical stages" of a case.[1] § 24-4.1-302.5(1)(b). Indeed, this right is enshrined in our state constitution. *See* Colo. Const. art. II, § 16a ("Section 16a"). The preliminary hearing is one of the critical stages of a case. § 24-4.1-302(2)(b), C.R.S. (2022).

¶2 The named victim in this sexual assault case availed herself of her constitutional and statutory right to attend the preliminary hearing held by the county court. After the People rested their case at the hearing, the defense called the named victim to the stand, even though it had not subpoenaed her. The named victim exited the courtroom, but the court prevented her from leaving the

[1] When we refer to a "victim" in this opinion, we mean someone who falls within the term's definition under the VRA. *See* § 24-4.1-302(5), C.R.S. (2022).

courthouse, ordered her to return to the courtroom, and eventually required her to testify. Although the People objected based on the VRA and Colorado case law, the court overruled their objection. In so doing, the court, like defense counsel, relied on our decision in *McDonald v. District Court*, 576 P.2d 169 (Colo. 1978). The People then obtained a stay and filed a C.A.R. 21 petition in our court. And we issued a rule to show cause.

¶3 We now make the rule absolute. Given the state of the record at the preliminary hearing, the county court erred by applying *McDonald*. And, in any event, *McDonald* preceded the VRA, which was a game changer. Reading *McDonald* with the gloss supplied by the VRA, we hold that defense counsel may not call to the witness stand an unsubpoenaed victim who happens to be in attendance at a preliminary hearing.

¶4 This opinion by no means vests victims with immunity from testifying at a preliminary hearing. However, if the defense wishes to call a victim to testify at a preliminary hearing, it must properly serve the victim with a subpoena. Of course, the People may move to quash a subpoena served on a victim. If the People do so, the court must exercise its discretion under our jurisprudence to determine how to proceed.

I. Our Decision in *McDonald*

¶5 Because the county court relied on *McDonald* in ruling that the defense was entitled to call the named victim to testify at the preliminary hearing, we begin by reviewing our decision in that case.

¶6 McDonald requested and received a preliminary hearing while facing charges of attempted first degree kidnapping and felony menacing. *McDonald*, 576 P.2d at 170. At the hearing, the prosecution called two police officers as witnesses. *Id.* The first testified about the incident reported by the alleged victim. *Id.* at 171. The second described a photo-lineup procedure during which the alleged victim identified McDonald as the perpetrator of the crimes charged. *Id.*

¶7 The alleged victim was in the courtroom during the officers' testimony, even though neither party had subpoenaed her. *Id.* at 170. When the prosecution rested its case, the defense attempted to call her to the witness stand both to establish the conditions surrounding the apartment complex where the crimes charged had reportedly occurred and to test her identification of McDonald. *Id.* The prosecution generally objected, and the court sustained the objection on the ground that the proposed testimony was irrelevant to probable cause. *Id.* at 170–71. The defense then filed a C.A.R. 21 petition in our court seeking an order "prohibiting the trial court from proceeding further . . . until a proper preliminary hearing" was held. *Id.* at 170. This court issued a rule to show cause. *Id.*

¶8 After the matter was fully briefed, our court made the rule absolute and ordered a new preliminary hearing.[2] *Id.* at 172. We agreed with the prosecution that the defense's first purpose for presenting the alleged victim's testimony (to set forth the conditions surrounding the apartment complex) "was clearly irrelevant to probable cause and appeared to be an attempt to gain discovery." *Id.* at 171. But we determined that the defense's second purpose for calling the victim (to challenge the identification of McDonald) was relevant to probable cause. *Id.* Relying on Crim. P. 7(h)(3), which provides in part that a defendant may introduce evidence at a preliminary hearing, we held "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 from calling the witness." *Id.*

¶9 Because the alleged victim was an eyewitness and "was available and able to testify directly from her perception" of the charged crimes, and because the officers' testimony was essentially all hearsay, we concluded that "[t]he trial court should have permitted her to testify on the relevant issue of identification." *Id.* at 171–72. We were troubled by the prosecution's reliance on testimony that was

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[2] Only four justices participated in the decision. *McDonald*, 576 P.2d at 172.

almost entirely hearsay when "the eyewitness and alleged victim[] was in court and apparently able to testify." *Id.* at 171. We ultimately ordered a new preliminary hearing with instructions on remand to allow McDonald to subpoena the alleged victim if she did not voluntarily appear at the new hearing. *Id.* at 172.

II. This Case's Procedural History

¶10 The People have charged the defendant, Evan Michael Platteel, with committing sexual assault (physical force or physical violence), a class 3 felony, on or about June 14, 2022. *See* § 18-3-402(1)(a), (4)(a), C.R.S. (2022). The complaint alleges that Platteel knowingly inflicted sexual intrusion or sexual penetration on E.G. without her consent and by causing her submission through the actual application of physical force or physical violence. At Platteel's request, the county court held a preliminary hearing.

¶11 At the beginning of the hearing, Platteel's counsel asked that all witnesses be sequestered. The prosecutor responded that he only had one witness, Detective Scott Byars. He added that, while E.G. was in the courtroom, she should not be sequestered because she had a right to be present under binding authority, including the VRA, and she would not be testifying at the hearing. The court declined to issue a sequestration order and allowed E.G. to remain in the courtroom.

¶12 Detective Byars testified about his investigation into E.G.'s allegations. He told the court that E.G. had reported meeting Platteel on a dating application in 2022, going out with him a few times, and spending time at his home the evening of June 13 into the morning of June 14. The detective further stated that E.G. had accused Platteel of forcing her to perform oral sex on him without her consent the morning of June 14 by putting his hand around her neck in a choking manner, tightening his grip, pulling her hair, and telling her to "shut the f*** up and suck my d***." According to Detective Byars, E.G. had indicated to him that she was "very scared" and thought Platteel would hurt her if she didn't comply. Detective Byars also testified that he later learned from E.G.'s friend that E.G. had shared similar details about the charged incident with her.

¶13 Notably, Detective Byars next relayed statements Platteel had made during the investigation: (1) he was with E.G. the evening of June 13 into the morning of June 14; (2) E.G. performed oral sex on him on June 14; (3) he pulled E.G.'s hair while she performed oral sex on him, though he did so at her request; (4) at some point during the evening of June 13 or the morning of June 14, he gave E.G. "hickeys" on her chest (in an area where she had bruises), but he did so at her request; and (5) while making out with E.G. the evening of June 13, and at her request, he "choked" her by wrapping his hand around her throat and squeezing.

¶14 When Detective Byars had finished testifying, the prosecutor rested. Platteel's counsel then called E.G. to testify. The prosecutor objected, noting that he was unaware the defense had intended to call E.G. as a witness. In response, defense counsel handed the court a copy of *McDonald*, asserting that our decision in that case was particularly relevant because Detective Byars's testimony reflected that E.G. had provided inconsistent statements regarding Platteel's alleged use of force or violence. Defense counsel elaborated that there were "two different versions" of events from E.G. related to the alleged application of force or violence, one to the detective and one to a medical examiner nurse.[3]

¶15 While the proceedings were on pause, defense counsel alerted the court that E.G. was exiting the courtroom and asked that E.G. "be directed to stay" pending a ruling on the outstanding request. The court obliged, which prompted the prosecutor to ask whether there was a subpoena requiring E.G. to remain in the courtroom. Defense counsel admitted that E.G. was not under subpoena but argued that *McDonald* establishes that, if an alleged victim is in the courtroom, an

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[3] On cross-examination, Detective Byars had acknowledged the existence of a report documenting E.G.'s medical forensic examination. Per the report, E.G. told the medical examiner nurse that she didn't know whether Platteel had caused her submission by force or violence because she had consumed two drinks, prepared by Platteel, late during the evening of June 13, and her memory of the charged incident was fuzzy.

accused "has a right to call her." The defense thus asked the court to order E.G. to come back to the courtroom, and the court responded that defense counsel could go out in the hallway and instruct E.G. to return. At the prosecutor's request, however, the court permitted him to contact E.G. in the hallway instead. After doing so, the prosecutor returned to the courtroom and asked that E.G. be allowed to remain in the hallway because she was "very emotional" as a result of what had just transpired. That request was granted, but the court told the prosecutor that E.G. needed to stay in the courthouse.

¶16 Following its review of our decision in *McDonald*, the court had a colloquy with both attorneys. Defense counsel stressed that the testimony on the alleged use of force or violence was inconsistent and, therefore, the court could not find probable cause as to that circumstance. Further, said counsel, absent the testimony of E.G., an available eyewitness, the court would be forced to choose between "two different hearsay stories" relayed by the detective (E.G.'s statement to him and E.G.'s statement to the medical nurse examiner).

¶17 The prosecutor countered that a preliminary hearing is not a mini-trial and is limited instead to a determination of probable cause. Additionally, contended the prosecutor, unlike the evidence presented in *McDonald*, the evidence here was not largely made up of hearsay because Detective Byars had testified about Platteel's inculpatory statements. The prosecutor reminded the court that Platteel

had admitted there were "sexual acts that were performed" by E.G. on Platteel on June 14. And, continued the prosecutor, Platteel had admitted placing his hand on E.G.'s throat and choking her while making out with her the night before. In the prosecutor's view, there was no need for E.G. to be called to the stand. Lastly, the prosecutor observed that, had the defense served E.G. with a subpoena, he would have moved to quash it and the parties and the court would have addressed his motion based on Colorado case law.

¶18 Defense counsel replied that Platteel's statements didn't establish the use of force or violence during the charged incident, so the court was left with hearsay evidence on that circumstance. Moreover, asserted defense counsel, although she could have subpoenaed E.G., doing so may have been futile because the subpoena "might have been quashed" at the prosecutor's request. And since E.G. had "voluntarily made herself available in court," defense counsel believed that Platteel was entitled to question E.G. about the alleged use of force or violence. In counsel's opinion, the situation resembled the one implicated in *McDonald*: The testimony presented was almost completely hearsay, and an eyewitness was present and available to testify about a contested circumstance the People were required to establish.

¶19 After reviewing a couple of other cases submitted by the prosecutor, the court ruled that the defense was entitled to call E.G. as a witness. In so doing, the

court agreed with defense counsel that the prosecutor's case rested "almost solely on hearsay evidence." The court sympathized with the prosecutor's concerns regarding E.G. but thought this situation probably "could have been avoided if she were not here." As the court saw it, because E.G. was in attendance and "the bulk" of the evidence, at least in its "quantification review," was "sufficiently hearsay," *McDonald* permitted the defense to call her as a witness. The court limited the scope of E.G.'s testimony, however, to the alleged application of force or violence and the issue of identification.[4]

¶20 The court then granted the prosecutor's motion for a stay, so he could seek review of its decision. The People subsequently filed a C.A.R. 21 petition invoking our original jurisdiction, and we issued a rule to show cause. We explain next why we're exercising our original jurisdiction here.

III. Original Jurisdiction

¶21 C.A.R. 21 makes clear that the exercise of our original jurisdiction is wholly within our discretion. C.A.R. 21(a)(1). Relief pursuant to our original jurisdiction "is extraordinary in nature" and limited to situations "when no other adequate remedy . . . is available." *Id.* Therefore, we have confined exercise of our original

[4] The court added the issue of identification on its own based on its reading of *McDonald*.

jurisdiction to such circumstances as when an appellate remedy would be inadequate, a party may suffer irreparable harm, or a petition raises an issue of first impression that has significant public importance. *People v. Hacke*, 2023 CO 6, ¶ 7, 524 P.3d 8, 11.

¶22 The People maintain, among other things, that their C.A.R. 21 petition affords us an opportunity to revisit our holding in *McDonald* through the lens of the VRA. This, they contend, is a novel issue of public importance justifying the exercise of our original jurisdiction. We agree.

¶23 We decided *McDonald* forty-five years ago, and a lot of water has flowed under the bridge since, including the enactment of the VRA. Platteel says that we relied on *McDonald* in *Harris v. District Court*, 843 P.2d 1316 (Colo. 1993). He's right. But we announced *Harris* a few days before the VRA became effective.

¶24 Regardless, we didn't have occasion to consider the VRA's effect on *McDonald* in *Harris*. To be sure, in our recitation of the pertinent legal principles in *Harris*, we cited *McDonald* twice, including 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." *Harris*, 843 P.2d at 1319. The issue in *Harris*, though, was whether the district court had abused its discretion in denying the accused's motion for a second preliminary hearing because a complete transcript of the first

preliminary hearing could not be prepared as a result of mechanical defects in the courtroom's recording equipment and the witnesses' failure to keep their voices up. *Id.* at 1318.

¶25 By contrast, the interplay between the VRA and *McDonald* is squarely teed up here—a first in our court. And this is a matter of importance in our state because it involves two compelling interests competing for primacy: a defendant's right to call witnesses at a preliminary hearing, *see* Crim. P. 7(h)(3), and a victim's constitutional and statutory right to attend a preliminary hearing, *see* Colo. Const. art. II, § 16a; § 24-4.1-302.5(1)(b); § 24-4.1-302(2)(b).

IV. Analysis

¶26 We first determine that the county court erred in relying on *McDonald*. In the process, we correct the court's misunderstanding of a few aspects of Colorado law governing preliminary hearings. We end by concluding that the VRA was a sea change that must be considered in reading *McDonald*.

A. Given the State of the Record at the Preliminary Hearing, the County Court Erred by Applying *McDonald*

¶27 The county court viewed this case as similar to *McDonald*. However, unlike the evidence introduced in *McDonald*, which was comprised almost entirely of hearsay, the evidence here included Platteel's admissions, which were not hearsay. *See* CRE 801(d)(2)(A) (stating that an admission by a party-opponent is

not hearsay). Indeed, Platteel's admissions constituted direct, nonhearsay proof of most of the elements of the crime charged:

1. That the defendant,
2. in the State of Colorado, on or about June 14, 2022,
3. knowingly,
4. inflicted sexual intrusion or sexual penetration on the victim.

§ 18-3-402(1)(a); COLJI-Crim. 3-4:01 (2022).

¶28 Only one element of the crime charged (knowing that the victim did not consent) and one additional circumstance (causing the victim's submission through the actual application of physical force or physical violence) were not established by Platteel's admissions.[5] § 18-3-402(1)(a), (4)(a); COLJI-Crim. 3-4:10.INT (2022). But the People introduced hearsay evidence, via E.G.'s statement to Detective Byars, to establish both of these circumstances. And

[5] Sexual assault is a class 4 felony; however, if the People prove that the defendant caused submission of the victim "through the actual application of physical force or physical violence," then sexual assault is a class 3 felony. § 18-3-402(2), (4)(a). Given the parties' stipulation that the People were required to establish the circumstance of the actual application of physical force or physical violence at the preliminary hearing, we need not pass judgment on whether such circumstance is an element of the charged offense or a sentence enhancer. For ease, going forward in this opinion, we collectively refer to this circumstance and the elements we identified earlier as "circumstances."

contrary to the defense's assertion and the county court's understanding, there is no requirement that every relevant circumstance at a preliminary hearing must be established through nonhearsay evidence. In fact, we have explained that the bulk of the People's evidence at a preliminary hearing may be hearsay. *People v. Jensen*, 765 P.2d 1028, 1030 (Colo. 1988); *see also* Crim. P. 7(h)(3) ("The presiding judge at the preliminary hearing may temper the rules of evidence in the exercise of sound judicial discretion.").

¶29 Here, then, the People presented evidence of each circumstance they were required to establish at Platteel's preliminary hearing. *See People v. Moyer*, 670 P.2d 785, 791 (Colo. 1983) (stating that the People's evidence at a preliminary hearing "must establish probable cause as to each element of the crime"). And though the bulk of their evidence could have been hearsay, *Jensen*, 765 P.2d at 1030, it was not—a substantial amount of it was actually nonhearsay.

¶30 Consequently, by the time the defense sought to call E.G. as a witness, the evidence presented, viewed in the light most favorable to the People, properly demonstrated that there was probable cause regarding each circumstance of the offense of sexual assault (physical force or physical violence). *See People v. Nygren*, 696 P.2d 270, 272 (Colo. 1985) ("Evidence presented at the preliminary hearing must be viewed in the light most favorable to the prosecution and all potential inferences must be resolved in favor of the prosecution."). Put differently, when

defense counsel asked the county court to order E.G. to testify, there was already "evidence sufficient to persuade a person of ordinary prudence and caution to have a reasonable belief that the defendant committed the crime charged." *Moyer*, 670 P.2d at 791.

¶31 The county court, however, felt hamstrung by *McDonald* and failed to recognize that, given the state of the record, it had the discretion to deny the defense's request to call E.G. to the witness stand. Crim. P. 7(h)(3) states that defendants "may introduce evidence" at a preliminary hearing, not that defendants may introduce *irrelevant* evidence or *otherwise inadmissible* evidence at a preliminary hearing. *See Rex v. Sullivan*, 575 P.2d 408, 410 (Colo. 1978) ("A defendant has no constitutional right to unrestricted confrontation of witnesses and to introduce evidence at a preliminary hearing."); *People v. Brothers*, 2013 CO 31, ¶ 17, 308 P.3d 1213, 1217 (explaining that a trial court has "discretion to control the evidence presented at a preliminary hearing" and is not required to admit evidence that is "unnecessary to establish probable cause"); *see also McDonald*, 576 P.2d at 171 n.1 ("Since 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."). After the People established probable cause with regard to each circumstance of the crime charged, what E.G. may have stated vis-

à-vis the alleged application of force or violence was irrelevant. Nothing she said could have undone or changed the establishment of probable cause.

¶32 The defense insisted, though, that E.G.'s testimony was needed because Detective Byars had relayed inconsistent statements from E.G. related to the circumstance of the actual application of physical force or physical violence. The county court seemed persuaded by defense counsel's position. But defense counsel was wrong. At a preliminary hearing, the court "may not engage in credibility determinations unless the testimony is incredible as a matter of law." *People v. Fry*, 92 P.3d 970, 977 (Colo. 2004). None of Detective Byars's testimony, including with respect to the circumstance of the actual application of physical force or physical violence, was incredible as a matter of law. Testimony is "incredible as a matter of law" only if it is about facts that physically could not have been observed or events that could not have happened under the laws of nature. *People v. Minjarez*, 81 P.3d 348, 355 (Colo. 2003). Thus, "testimony that is merely biased, conflicting, or inconsistent is not incredible as a matter of law." *Id.*

¶33 It would have been improper for the county court to make credibility determinations, including by attempting to ascertain which of E.G.'s versions of events was most believable. To the extent defense counsel urged the county court to compel E.G.'s testimony in order to permit credibility determinations, counsel was mistaken. As we've observed before, a preliminary hearing is not a mini-trial;

rather, it is a screening tool that seeks to weed out those cases in which prosecution is unwarranted. *Rex*, 575 P.2d at 410.

B. *McDonald* Must Be Read Through the Prism of the VRA

¶34 We could end our analysis on the previous paragraph. However, this original proceeding gives us an opportunity to discern how the VRA affects our decision in *McDonald*. The absence of this clarification tripped up the county court and could sow confusion among trial courts in the future. Accordingly, we forge ahead.

¶35 *McDonald* was announced in 1978. Fourteen years later, in 1992, Colorado's voters approved a constitutional amendment, Section 16a, effective January 14, 1993, in part to ensure that victims have the right to be present at all critical stages of the criminal justice process. House Concurrent Resol. 91-1003, sec. 1–3, 1993 Colo. Sess. Laws 2154–55. Section 16a led the General Assembly to amend victims' statutory rights, including by adding the right to be present at a preliminary hearing. Ch. 77, sec. 1–5, 9, §§ 24-4.1-101, 24-4.1-302 to -304, 1992 Colo. Sess. Laws 415–28. These statutory amendments eventually became known as the VRA. Ch. 152, sec. 1, § 24-4.1-300.1, 2022 Colo. Sess. Laws 969. The VRA, among other things, provides definitions, § 24-4.1-302, enumerates all of the rights afforded to victims, § 24-4.1-302.5, and sets forth procedures for protecting the rights of victims, § 24-4.1-303, C.R.S. (2022).

¶36 As relevant here, the legislature made clear that its intent in passing the VRA was to ensure that victims are "honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protection afforded criminal defendants." § 24-4.1-301. The legislature's edict could not have been more plain: Victims should be "treated with fairness, respect, and dignity," and should never be subjected to "intimidation, harassment, or abuse." § 24-4.1-302.5(1)(a).

¶37 We now conclude that *McDonald* must be read through the prism of the VRA.[6] Therefore, we hold that defense counsel may not call to the witness stand an unsubpoenaed victim who happens to be in attendance at a preliminary hearing.[7]

¶38 To hold otherwise would be to undercut the right to attend the critical stages of proceedings under the VRA. If what the county court did here were acceptable, then victims would have to think twice before attending certain proceedings like preliminary hearings—they would avail themselves of their right to be present at

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[6] We overrule *McDonald* only to the extent it conflicts with the VRA.

[7] Our holding is limited to situations like this one, where an unsubpoenaed victim is called to testify against her will. If an unsubpoenaed victim *wishing to testify* is called to the witness stand, we can perceive of no reason why she should not be allowed to testify, as long as the court, in its discretion, concludes that the anticipated testimony would be relevant to probable cause.

their own peril of being compelled to testify. There is no basis to believe that the voters and the legislature intended to pose a Hobson's choice to victims: Attend, and you may be called as a witness without notice and against your will; stay away, and you'll avoid the potential of being compelled to testify without a subpoena, but you'll give up your right to attend. Such an unenviable choice would chill a victim's right to attend the critical stages of proceedings, would be inconsistent with the constitutional and statutory goal of honoring and protecting victims, and would contravene the objective of treating victims with fairness, respect, and dignity. § 24-4.1-301; § 24-4.1-302.5.

¶39 We hasten to add that this opinion should not be understood as vesting victims with immunity from testifying at a preliminary hearing. However, if the defense wishes to call a victim to testify at a preliminary hearing, it must properly serve the victim with a subpoena. Of course, the People may move to quash a subpoena served on a victim. *See Rex*, 575 P.2d at 409–10. If the People do so, the court must exercise its discretion under our jurisprudence to decide how to proceed. *Id.* at 409–11 (holding that a trial court does not abuse its discretion in quashing a subpoena where the victim's proposed testimony is not necessary to establish probable cause); *Brothers*, ¶ 17, 308 P.3d at 1217 (same).

V. Conclusion

¶40 For the foregoing reasons, we make absolute our rule to show cause. On remand, if E.G. exercises her right to attend the remaining portion of the preliminary hearing, she may not be called to testify by the defense without a subpoena. And if the defense serves her with a subpoena and the People move to quash it, the court should proceed in accordance with our case law.

JUSTICE HOOD, joined by **JUSTICE GABRIEL**, concurred in the judgment.

JUSTICE HOOD, joined by JUSTICE GABRIEL, concurring in the judgment.

¶41 Because the majority unnecessarily overrules, at least in part, *McDonald v. District Court*, 576 P.2d 169 (Colo. 1978), a precedent that has existed in this state for nearly half a century, I respectfully concur only in the judgment of the court. The trial court could have found probable cause without letting the defendant call the alleged victim to the stand. That alone provides an adequate basis for making the rule absolute. The rest of the majority's opinion, in my estimation, is simply problematic dicta.

¶42 But let's first stake out common ground. Without question, alleged victims are entitled to be treated with fairness, dignity, and respect under the Victim Rights Act ("VRA"). *See* Maj. op. ¶ 36. As a matter of state constitutional and statutory rights, if not common decency, E.G. should be able to attend critical stages of this prosecution without fear of harassment or abuse. *See* Colo. Const. art. II, § 16a; § 24-4.1-302.5(1)(a), C.R.S. (2022). No quarrel there.

¶43 But this is not a case in which we need to overrule precedent to vindicate victims' rights. The majority explains why: Platteel's statements to the police about the alleged sexual assault provided more than enough non-hearsay evidence to find probable cause and to bind the case over for further proceedings, including trial. Maj. op. ¶¶ 27–30. That's where the majority opinion could have, and therefore should have, ended. Stare decisis compels as much. "Stare decisis

is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Love v. Klosky*, 2018 CO 20, ¶ 14, 413 P.3d 1267, 1270 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

¶44 To the extent the majority maintains that the legislature abrogated *McDonald* by passing the VRA, *see* Maj. op. ¶ 37, I struggle to see the requisite evidence of legislative intent to do so, *see Robbins v. People*, 107 P.3d 384, 387 (Colo. 2005) ("[A] statute may not be construed to abrogate the common law unless such abrogation was clearly the intent of the general assembly."). The legislature could have explicitly abrogated *McDonald*. It did not. Without calling out a particular case, it could have addressed how judges should seek to balance defendants' and victims' sometimes competing interests at preliminary hearings. It didn't do that either.

¶45 The majority implies that a trial judge's decision to allow defense counsel to call an unsubpoenaed alleged victim to the witness stand at a preliminary hearing is abusive and thus necessarily violates the VRA. *See* Maj. op. ¶ 36. But nothing in the VRA says as much, perhaps because that argument proves too much. Putting accusers on the stand isn't inherently abusive. It's simply an inevitable byproduct of the rule of law. And it demeans judicial officers around the state to

assume that they would blithely tolerate the abuse of victims or permit defendants to elicit evidence that isn't germane to the proceeding.

¶46 Instead, I believe that the legislature, in crafting the VRA, trusted judicial officers to balance competing interests on an ad hoc basis. And why not? That's what judges and magistrates do every day. It strikes me as overbroad to assume that *in every instance* calling a victim to the stand at a preliminary hearing would invariably rob the alleged victim of dignity and respect, and subject them to harassment and abuse. *See* § 24-4.1-302.5(1)(a). Our judicial officers are trusted evidentiary gatekeepers in a multitude of areas, why not here too?

¶47 Thankfully, the majority acknowledges that it only overrules *McDonald* to the extent that it conflicts with the VRA, Maj. op. ¶ 37 n.6, and thus, its holding shouldn't apply to most non-violent offenses for which a defendant is preliminary-hearing-eligible. Still, I remain concerned about VRA cases in which the prosecution relies almost exclusively on hearsay. Are we really helping victims by saying that a defendant's lawyer or investigator must track them down and serve them with a subpoena, only to then have a separate hearing before a busy trial judge on a prosecutor's motion to quash? In the end, that hearing wouldn't be so different than simply letting the judge rule on the proffered evidence at the preliminary hearing.

¶48 I say honor precedent and trust the judges. Therefore, I respectfully concur in the judgment only.

I am authorized to state that JUSTICE GABRIEL joins in this concurrence in the judgment.