ADVANCE SHEET HEADNOTE
January 30, 2023

2023 CO 6

No. 22SA272, *People v. Hacke*—Eligibility for a Preliminary Hearing—§ 16-5-301, C.R.S. (2022)—"Mandatory Sentencing"—Class 4 Felony Identity Theft—§ 18-5-902, C.R.S. (2022).

The question in this original proceeding is whether the defendant, who is out of custody, is entitled to a preliminary hearing on the charge of identity theft, a class 4 felony. He is not. Because the defendant is not accused of a class 4, 5, or 6 felony that requires "mandatory sentencing" (i.e., a sentence that includes some incarceration), he has no right to a preliminary hearing. That the defendant's criminal history will subject him to mandatory sentencing in the event of a conviction is of no moment. The relevant inquiry isn't whether the defendant's criminal history subjects him to mandatory sentencing if he is convicted of identity theft. It's whether identity theft, the class 4 felony he's accused of committing, requires a mandatory sentence.

Class 4 felony identity theft does not require a mandatory sentence. Therefore, the defendant is not entitled to a preliminary hearing. Accordingly, the supreme court now discharges the rule to show cause issued in this case.

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

2023 CO 6

Supreme Court Case No. 22SA272
Original Proceeding Pursuant to C.A.R. 21
Pueblo County District Court Case No. 21CR1517
Honorable Amiel Markenson, Judge

In Re
Plaintiff:

The People of the State of Colorado,

v.

Defendant:

John Robert Hacke.

Rule Discharged
en banc
January 30, 2023

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

JUSTICE SAMOUR delivered the Opinion of the Court.

¶1 This original proceeding presents a straightforward question: Is the defendant, John Robert Hacke, who is out of custody, entitled to a preliminary hearing on the charge of identity theft, a class 4 felony? We answer no. Because Hacke is not accused of a class 4, 5, or 6 felony that requires "mandatory sentencing" (i.e., a sentence that includes some incarceration), he has no right to a preliminary hearing. That Hacke's criminal history will subject him to mandatory sentencing in the event of a conviction is of no moment. The relevant inquiry isn't whether Hacke's *criminal history* subjects him to mandatory sentencing if he is convicted of identity theft. It's whether identity theft, *the class 4 felony he's accused of committing*, requires a mandatory sentence. Class 4 felony identity theft does not require a mandatory sentence. Therefore, Hacke is not entitled to a preliminary hearing.

¶2 The district court denied Hacke's request for a preliminary hearing. Accordingly, we now discharge our rule to show cause.

I. Procedural History

¶3 The People have charged Hacke with identity theft, a class 4 felony, pursuant to section 18-5-902(1)(a), C.R.S. (2022). They allege that he knowingly used someone else's personal identifying information, financial identifying information, or financial device without permission or lawful authority and with

the intent to obtain something of value or to make a financial payment.[1] There are no other charges or allegations against Hacke in the one-count complaint and information filed. Pursuant to subsection (3) of the identity theft statute, Hacke faces a mandatory prison sentence because he has a prior conviction for identity theft. § 18-5-902(3).

¶4 After Hacke was arrested, he posted bond. During a subsequent court appearance, he asserted that he is entitled to a preliminary hearing because he is facing mandatory sentencing. Since the People did not initially take a definitive position on this contention, the court scheduled a preliminary hearing. However, the court afforded the People an opportunity to object to the preliminary hearing later if warranted.

¶5 When the parties appeared again, the court ruled that Hacke was not entitled to a preliminary hearing because identity theft under subsection (1)(a) doesn't require mandatory sentencing. Although acknowledging that there was no authority directly on point, the court drew guidance from *Maestas v. District Court*, 541 P.2d 889, 890–91 (Colo. 1975), where we held that habitual criminal

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[1] Section 18-5-902(1) contains five subsections, (a)–(e). Each of these subsections describes a different method of committing identity theft. We deal here only with subsection (a).

counts are sentence enhancers, not substantive offenses, and therefore need not be established at a preliminary hearing. The court viewed subsection (3) of the identity theft statute as a sentence enhancer and thus as analogous to the habitual criminal statutory provisions at issue in *Maestas*. It explained that, like the habitual criminal statute, subsection (3) simply requires a more severe penalty based on previous criminal conduct.

¶6 Hacke then filed a petition in our court invoking our original jurisdiction, and we issued a rule to show cause. We explain now why our interlocutory intervention is justified.

II. Original Jurisdiction

¶7 Under C.A.R. 21, we have sole discretion to exercise our original jurisdiction. *See* C.A.R. 21(a)(1). But because a C.A.R. 21 proceeding is extraordinary in nature and limited in purpose and availability, we have historically confined exercise of our original 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. Cortes-Gonzalez*, 2022 CO 14, ¶ 21, 506 P.3d 835, 842.

¶8 In urging us to exercise our original jurisdiction, Hacke contends both that he has no adequate appellate remedy and that his petition raises a novel issue of significant public importance. We agree on both fronts.

¶9 First, Hacke's request for a preliminary hearing will be rendered moot after trial. *People v. Tafoya*, 2019 CO 13, ¶ 15, 434 P.3d 1193, 1195. The purpose of a preliminary hearing is to determine whether probable cause exists "to bind an accused over for trial." *Harris v. Dist. Ct.*, 843 P.2d 1316, 1319 (Colo. 1993). Once the trial has occurred, the right to a preliminary hearing is as useful as a chocolate teapot. Accordingly, directing Hacke to raise this issue in a direct appeal would be to afford him an empty remedy. *See People v. Vanness*, 2020 CO 18, ¶ 13, 458 P.3d 901, 904.

¶10 Second, Hacke presents an issue of first impression that has significant public importance. As the district court mentioned, neither this court nor the court of appeals has ever addressed whether a defendant in Hacke's shoes is entitled to a preliminary hearing. And it is indubitable now that a preliminary hearing plays an important role in our criminal justice system. Without this procedural safeguard, an accused might have to endure an "embarrassing, costly and unnecessary trial," which would run counter to "the interests of judicial economy and efficiency." *Hunter v. Dist. Ct.*, 543 P.2d 1265, 1267 (Colo. 1975). Adding to the gravity of the situation, the issue before us is one that's likely to recur. *See People v. Huckabay*, 2020 CO 42, ¶ 10, 463 P.3d 283, 285 (making a similar statement with respect to the right to a preliminary hearing in another context).

III. Analysis

¶11 We first set forth the governing standard of review and the relevant rules of statutory construction. Using that authority to vector our analysis, we look to the preliminary hearing statute and interpret it. We then turn to our case law, which aligns perfectly with that interpretation. In the end, we conclude that Hacke has no right to demand and receive a preliminary hearing because he is charged with class 4 felony identity theft, which doesn't carry mandatory sentencing.

A. Governing Standard of Review and Relevant Rules of Statutory Construction

¶12 Whether Hacke is entitled to a preliminary hearing hinges on our interpretation of the preliminary hearing statute. Questions of statutory interpretation are subject to de novo review. *People v. Sprinkle*, 2021 CO 60, ¶ 12, 489 P.3d 1242, 1245.

¶13 In construing a statute, our chief purpose is to ascertain and effectuate the legislature's intent. *McCoy v. People*, 2019 CO 44, ¶ 37, 442 P.3d 379, 389. To do so, we begin by inspecting the language of the statute, giving every word its plain and ordinary meaning. *Id.* When the language of a statute is "clear and unambiguous on its face, we simply apply it as written" and abstain from resorting to "other interpretive aids." *Huckabay*, ¶ 13, 463 P.3d at 286. "In such a situation, the plain meaning rule—the cardinal rule in the realm of statutory interpretation—is both

the first and the last canon and nothing more is required of the judicial inquiry." *Carrera v. People*, 2019 CO 83, ¶ 18, 449 P.3d 725, 729.

B. The Preliminary Hearing Statute

¶14 The address of Colorado's preliminary hearing statute is section 16-5-301, C.R.S. (2022).[2] As pertinent here, section 16-5-301(1)(a) provides that "persons accused of a class 4, 5, or 6 felony by direct information or felony complaint which felony requires mandatory sentencing . . . shall have the right to demand and receive a preliminary hearing." Thus, Hacke is entitled to a preliminary hearing if two conditions exist: (1) he is accused of a class 4, 5, or 6 felony; and (2) the class 4, 5, or 6 felony he is accused of requires mandatory sentencing. *See Huckabay*, ¶ 15, 463 P.3d at 286.

¶15 The parties stipulate, and we agree, that Hacke is accused of a class 4 felony. *See* § 18-5-902(2)(a) ("Identity theft in violation of subsection (1)(a) . . . is a class 4 felony.").[3] So, the first condition is clearly satisfied. But what about the second

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[2] We note that section 18-1-404, C.R.S. (2022), is very similar to section 16-5-301; any differences are immaterial to our discussion. Further, Crim. P. 7(h) (district court procedures) and Crim. P. 5(a)(4) (county court procedures) generally track the language of the two statutes. For the sake of convenience, we discuss only section 16-5-301 in this opinion.

[3] Identity theft in violation of subsection (1)(c) is also a class 4 felony. When we refer to "class 4 felony identity theft" in this opinion, we mean identity theft pursuant to subsection (1)(a).

condition? Does class 4 felony identify theft pursuant to section 18-5-902(1)(a) carry "mandatory sentencing," such that section 16-5-301(1)(a) bestows upon Hacke the right to demand and receive a preliminary hearing?

¶16 "Mandatory sentencing," as used in section 16-5-301(1)(a), means sentencing involving "any period of incarceration required by law." *Huckabay*, ¶ 2, 463 P.3d at 284. Incarceration in this context encompasses prison or jail. *Id.* at ¶ 20, 463 P.3d at 287.

¶17 Class 4 felony identity theft does not require a sentence that includes incarceration. Rather, it is punishable pursuant to the statute listing the presumptive ranges of prison penalties, § 18-1.3-401, C.R.S. (2022), and the general probation sentencing statutes, §§ 18-1.3-201, -202, -203, C.R.S. (2022). Hence, unlike the penalty statutory provisions under the microscope in *Huckabay*, which directed the sentencing court to choose between two alternatives that required some incarceration, *see Huckabay*, ¶¶ 16–18, 463 P.3d at 286–87, one of the penalty provisions for class 4 felony identity theft permits a sentence that does not require incarceration, *see* § 18-1.3-202. As such, class 4 felony identity theft does not carry mandatory sentencing.

¶18 Hacke notes, however, that subsection (3) of the identity theft statute provides that the court "shall be required to sentence the defendant to the department of corrections" if the defendant "has a prior conviction" for identity

theft. § 18-5-902(3). And, advises Hacke, he has a prior conviction for identity theft, which means that, if he's found guilty as charged in this case, he will face a mandatory prison sentence. Thus, urges Hacke, he is entitled to a preliminary hearing.

¶19 We are unpersuaded. The reason Hacke faces mandatory sentencing isn't because the felony with which he is charged requires mandatory sentencing; it's because a circumstance in his individual background (his criminal history), when combined with a conviction for the felony with which he is charged (class 4 felony identity theft), requires mandatory sentencing. Had the legislature intended what Hacke claims it did, it presumably would have said that there is a right to a preliminary hearing whenever a defendant charged with a class 4, 5, or 6 felony faces mandatory sentencing. Instead, it said that there is a right to a preliminary hearing whenever a defendant is charged with "a class 4, 5, or 6 felony by direct information or felony complaint *which felony* requires mandatory sentencing." § 16-5-301(1)(a) (emphasis added). We understand the statutory phrase under scrutiny to refer to any class 4, 5, or 6 felony that, without more, carries mandatory sentencing, not to any class 4, 5, or 6 felony that requires mandatory sentencing when combined with a specific criminal history or some other circumstance in an individual defendant's background. Hence, there is a right to a preliminary

hearing if the class 4, 5, or 6 felony charged *always* requires mandatory sentencing, not if the class 4, 5, or 6 felony charged *may* require mandatory sentencing.

¶20 The proposal Hacke backs would grant defendants the right to request and receive a preliminary hearing on any charged class 4, 5, or 6 felony whenever they are: (1) additionally charged with habitual criminal counts; or (2) not eligible to apply for probation pursuant to section 18-1.3-201. Such defendants would face "mandatory sentencing" and would presumably be entitled to a preliminary hearing, even if a charged felony does not itself carry mandatory sentencing. We decline the invitation to embark on this treacherous path because it is unfaithful to the plain language of section 16-5-301(1)(a).[4]

¶21 Accordingly, we now hold that there is a right to a preliminary hearing whenever a defendant who is out of custody is charged with a class 4, 5, or 6 felony that always requires mandatory sentencing. Because Hacke is charged with class 4 felony identity theft, which does not always require mandatory sentencing, he is

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[4] The interpretation of section 16-5-301(1)(a) we reject would place a trial court in the unenviable position of having to assess whether defendants like Hacke are eligible for probation pursuant to section 18-1.3-201 in order to determine whether they face mandatory sentencing and may thus demand and receive a preliminary hearing. In stark contrast, our interpretation of section 16-5-301(1)(a) establishes a simple inquiry to ascertain preliminary hearing eligibility for such defendants: Does the class 4, 5, or 6 felony charged always require a sentence that includes some incarceration?

not entitled to a preliminary hearing. That his criminal history subjects him to mandatory sentencing if convicted does not alter the analysis.

C. Our Case Law Buoys Our Interpretation

¶22 Subsection (3) of the identity theft statute sets forth a sentence enhancer—this much is uncontested. And our court established nearly half a century ago that there is no right to a preliminary hearing on sentence-enhancing counts. *See Maestas*, 541 P.2d at 890–91. Differently put, defendants are not entitled to a preliminary hearing on counts that merely allege circumstances that, if proved, require more severe penalties in the event of a conviction. *Id.* at 890. That's because the preliminary hearing statute applies solely "to determine whether probable cause exists to believe that *the offense* charged in the information or felony complaint was committed by the defendant," § 16-5-301(1)(a) (emphasis added). "Sentence enhancers attach only after the prosecution has proven that the defendant committed *the offense*" charged, *People in Int. of B.D.*, 2020 CO 87, ¶ 14, 477 P.3d 143, 146 (emphasis added). Thus, "[a] preliminary hearing may be had with regard to [charged] offenses only." *Brown v. Dist. Ct.*, 569 P.2d 1390, 1391 (Colo. 1977).

¶23 Subsection (3) does nothing more than identify circumstances which, if proven, will require harsher penalties in the event of a conviction. As such, it is a sentence enhancer: It will be triggered here only if Hacke is found guilty of the

charged offense of identity theft. Therefore, Hacke is not entitled to a preliminary hearing on any allegation related to subsection (3).

¶24 Notably, here, there is not even an allegation, let alone a count, related to subsection (3). Neither Hacke's prior identity theft conviction nor subsection (3) is mentioned in the offense charged or anywhere in the complaint and information filed. And for good reason: It is undisputed that the People are not required either to provide notice of their intent to pursue an enhanced sentence under subsection (3) or to prove beyond a reasonable doubt to the jury that Hacke has a prior conviction for identity theft. Consequently, there is no sentence-enhancing count with respect to which Hacke may request a preliminary hearing.

¶25 Hacke counters that he's not asking for a preliminary hearing on the subsection (3) sentence-enhancing provision itself. Rather, says Hacke, he is seeking a preliminary hearing on the identity theft charge. Fair enough. But where Hacke goes astray is in arguing that it's the substantive offense of identity theft that triggers the mandatory sentencing he is facing. This contention flies in the face of the plain language of the identity theft statute—and specifically subsection (1), defining the substantive offense, and subsection (3), containing the sentence enhancer. Nothing in subsection (1) requires mandatory sentencing.

¶26 Any argument that Hacke is entitled to a preliminary hearing because the term "felony," as used in the preliminary hearing statute, includes both

subsections (1)(a) and (3) of the identity theft statute does not hold water. The class 4 felony Hacke is "accused of" committing is defined by subsection (1)(a)—and only subsection (1)(a)—of the identity theft statute. Subsection (3) does not help define, create, or otherwise describe the "felony" the People have charged in this case. Subsection (1)(a) does that all on its own. In fact, as noted, subsection (3) is not even mentioned in the complaint and information containing the charge brought against Hacke. And to hold that a defendant is entitled to a preliminary hearing whenever the statute defining the substantive offense at issue contains a sentencing provision requiring incarceration would be to rewrite the preliminary hearing statute.

¶27 Even so, Hacke attempts to prop up his position by citing three of our recent cases applying the preliminary hearing statute—*Tafoya*, *Vanness*, and *Huckabay*. In each of these cases, it is true, we arrived at our determination that the defendant was entitled to a preliminary hearing only after considering both a statutory provision setting forth the substantive offense charged and a statutory provision enhancing the applicable punishment. These cases cannot rescue Hacke, however, because they are patently inapposite. We explore each in turn, though we take *Huckabay* out of chronological order and sandwich it between the other two.

¶28 In *Tafoya*, the People charged Tafoya with DUI—three or more prior convictions ("felony DUI"). *Tafoya*, ¶¶ 21–23, 434 P.3d at 1196. DUI is a

misdemeanor, but felony DUI is a class 4 felony. § 42-4-1301(1)(a), C.R.S. (2022). We were asked to decide whether Tafoya, who remained in custody, was *accused of* a class 4 felony and was thus entitled to a preliminary hearing "or whether, in substance, she was charged with a misdemeanor DUI and a separate sentence enhancer." *Tafoya*, ¶ 20, 434 P.3d at 1196; *see also* § 16-5-301(1)(b)(II) (entitling an in-custody defendant "accused of" a class 4 felony to a preliminary hearing).

¶29 We recognized that Tafoya's relevant prior convictions, while requiring a harsher sentence, also would have converted the classification of the charged crime from a misdemeanor to a class 4 felony. *Tafoya*, ¶ 27, 434 P.3d at 1197. In that regard, we explained, the felony DUI statutory provisions conferred "qualities of both elements of an offense and sentence enhancers" upon Tafoya's relevant prior convictions. *Id.* at ¶ 28 n.2, 434 P.3d at 1197 n.2. But we didn't resolve whether those prior convictions were elements of felony DUI or sentence enhancers. We reasoned instead that, regardless of whether they could be deemed elements or sentence enhancers, the People had *accused* Tafoya of committing a class 4 felony. *Id.* at ¶ 27, 434 P.3d at 1197. And because the legislature had authorized the People "to charge certain repeat DUI offenders with a class [4] felony" and the single count in the complaint and information "unequivocally accuse[d] Tafoya of the authorized class [4] felony," we held that she was entitled to a preliminary hearing. *Id.* at ¶ 24, 434 P.3d at 1196.

¶30 In *Huckabay*, we addressed a question we left open in *Tafoya*: Is a defendant charged with felony DUI entitled to a preliminary hearing under section 16-5-301(1)(a), even though the defendant is *not* in custody? *Huckabay*, ¶ 2, 463 P.3d at 284. After determining that felony DUI always requires mandatory sentencing (prison or jail), we answered in the affirmative. *Id.* Because Huckabay was accused of committing a class 4 felony, *see Tafoya*, ¶ 27, 434 P.3d at 1197, and that felony carries mandatory incarceration, we concluded that he was entitled to a preliminary hearing.[5] *Huckabay*, ¶ 2, 463 P.3d at 284.

¶31 Finally, in *Vanness*, the question we confronted was whether Vanness was entitled to a preliminary hearing given that he (1) was charged in count 1 with possession of more than two grams of methamphetamine (a level 4 drug felony not eligible for a preliminary hearing), (2) was separately charged in count 2 with a special offender count alleging the presence of a statutory "aggravating circumstance" (possession of a firearm in a vehicle he was occupying), and (3) would stand convicted of a level 1 drug felony eligible for a preliminary

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[5] Shortly after announcing our decision in *Huckabay*, we determined that a defendant's relevant prior convictions are elements of felony DUI that "must be proved to the jury beyond a reasonable doubt," not sentence enhancers that "a judge may find by a preponderance of the evidence." *Linnebur v. People*, 2020 CO 79M, ¶ 2, 476 P.3d 734, 735.

hearing if the People proved both counts beyond a reasonable doubt to the jury. *Vanness*, ¶¶ 1, 3, 458 P.3d at 902. Staying the course we charted in *Tafoya*, we concluded that Vanness had a right to a preliminary hearing. *Id.* at ¶ 1, 458 P.3d at 902.

¶32 As part of our analysis in *Vanness*, we rejected the People's contention that neither of the counts in the complaint and information made Vanness eligible for a preliminary hearing. *Id.* at ¶¶ 19–21, 458 P.3d at 905. Everyone agreed that the substantive offense (a level 4 drug felony) didn't qualify for a preliminary hearing under the plain language of the preliminary hearing statute. *See id.* at ¶ 19, 458 P.3d at 905. And the People maintained that the special offender count didn't qualify for a preliminary hearing either because our case law establishes that sentence enhancers are ineligible for preliminary hearings. *Id.* We took issue with the People's approach:

> The People's analytical framework is inherently flawed. Were we to adopt it, Vanness's claim would rise or fall based on whether the special offender allegation is an element of a substantive offense or a sentence enhancer. But we made clear in *Tafoya* that this distinction is not necessarily dispositive for purposes of determining a defendant's eligibility for a preliminary hearing. Irrespective of whether the prior DUI convictions in *Tafoya* were considered elements or sentence enhancers, Tafoya was entitled to a preliminary hearing because the People had *accused* her of and *charged* her with a class 4 felony.
>
> We continue on the trail blazed by *Tafoya* and conclude that what matters here is that the applicable statutory scheme authorizes the People to charge Vanness with a level 1 drug felony and, through

> counts 1 and 2, that is precisely what the People have done. It follows that Vanness is entitled to a preliminary hearing. A defendant is entitled to a preliminary hearing if he is accused of a level 1 drug felony and charged accordingly.

Id. at ¶¶ 20–21, 458 P.3d at 905 (internal citations omitted).

¶33 Significantly, we acknowledged in *Vanness* that the delineation we had struck in *Maestas* between elements of substantive offenses and sentence enhancers to determine eligibility for a preliminary hearing was no more feasible there than it had been in *Tafoya*. *Id.* at ¶ 24, 458 P.3d at 906. We observed that much like the felony DUI penalty provisions in *Tafoya* conferred qualities of both elements and sentence enhancers on a defendant's relevant prior convictions, the special offender provisions in Vanness's case, *see* § 18-18-407, C.R.S. (2022), accorded "hybrid qualities" of elements and sentence enhancers to the enumerated aggravating circumstances. *Vanness*, ¶ 24, 458 P.3d at 906. In both cases, we continued, a circumstance allowing harsher punishment, if proven, would simultaneously alter the classification of the charged offense—in *Tafoya*, from a misdemeanor to a class 4 felony, and in *Vanness*, from a level 4 drug felony to a level 1 drug felony. *Id.* Because in each case the circumstance enhancing the applicable penalty affected the classification of the offense the defendant had been "accused of," *see* § 16-5-301(1)(a), we ruled that it had to be considered in determining preliminary hearing eligibility. *Vanness*, ¶ 25, 458 P.3d at 906.

¶34 Inasmuch as Tafoya could only stand *accused of* a class 4 felony (instead of a misdemeanor) if the People proved her relevant prior convictions, we had to consider those prior convictions in deciding whether she was eligible for a preliminary hearing. *Id.* at ¶ 24, 458 P.3d at 906. Likewise, inasmuch as Vanness could only stand *accused of* a level 1 drug felony (instead of a level 4 drug felony) if the People proved the special offender count, we had to consider that special offender count in deciding whether he was eligible for a preliminary hearing. *Id.*

¶35 This case stands in jarring contrast to *Tafoya*, *Huckabay*, and *Vanness*. Here, *Maestas*'s delineation between elements and sentence enhancers *is* feasible. *See id.* at ¶ 22, 458 P.3d at 905 (confirming that *Maestas* remains "good law"). That delineation, while "not necessarily dispositive" in every case, *id.* at ¶ 20, 458 P.3d at 905, *is* dispositive in this case.

¶36 Subsection (1) sets forth the elements of the substantive offense of identity theft, while subsection (3) sets forth a sentence enhancer. Subsection (3) is not a hybrid provision that has qualities accorded to both elements and sentence enhancers. It is solely a sentence enhancer, which will only be triggered if Hacke is convicted of the charged offense. Borrowing from section 16-5-301(1)(a), Hacke is "accused of" a class 4 felony under subsection (1)(a) without regard to subsection (3). That is, Hacke's prior identity theft conviction in no way affects the

felony classification of the offense he's accused of committing under subsection (1)(a).

¶37 Further, unlike the relevant prior convictions in *Tafoya* and *Huckabay* or the special offender count allegation in *Vanness*, Hacke's prior identity theft conviction is not a circumstance the People have to prove to the jury beyond a reasonable doubt. Indeed, as we mentioned, the People don't even need to include it in the complaint and information because they're under no obligation to provide notice of their intent to rely on it in pursuing an enhanced sentence. And we've never held that a defendant is eligible for a preliminary hearing based on a sentence-enhancing statutory provision that doesn't appear on the complaint and information.

¶38 In sum, Hacke is not entitled to a preliminary hearing because he is charged with a class 4 felony that does not carry mandatory sentencing. And nothing in our case law is to the contrary.

IV. Conclusion

¶39 For the foregoing reasons, we conclude that the district court correctly ruled that Hacke is not entitled to a preliminary hearing. Accordingly, we now discharge the rule to show cause.

JUSTICE HOOD, joined by **JUSTICE MÁRQUEZ** and **JUSTICE GABRIEL**, dissented.

JUSTICE HOOD, joined by JUSTICE MÁRQUEZ and JUSTICE GABRIEL, dissenting.

¶40 Section 16-5-301(1)(a), C.R.S. (2022), provides that "persons accused of a class 4, 5, or 6 felony by direct information or felony complaint *which felony requires mandatory sentencing* . . . shall have the right to demand and receive a preliminary hearing." (Emphasis added.) The only question for us here is whether the term "felony" encompasses the identity theft statute's sentence enhancer. *See* § 18-5-902(3), C.R.S. (2022). The majority says no, *see* Maj. op. ¶¶ 19, 26, and in so doing creates a test fraught with ambiguity and guesswork. Because the statute and our case law dictate a more straightforward solution, I respectfully dissent. I would instead hold that the term "felony," as it is used in this statutory context, refers to any provision in the statute creating the offense for which the defendant seeks a preliminary hearing. This would include offense-specific sentence enhancers, such as the one at issue here.

¶41 The majority focuses its analysis on the portion of the identity theft statute outlining the substantive elements of the offense. This strikes me as wrong for several reasons.

¶42 *First*, the majority asserts that "[c]lass 4 felony identity theft does not require a sentence that includes incarceration. Rather, it is punishable pursuant to both the statute listing the presumptive ranges of prison penalties, § 18-1.3-401, C.R.S.

(2022), and the general probation sentencing statutes, §§ 18-1.3-201 to -203, C.R.S. (2022)." Maj. op. ¶ 17. But, of course, the identity theft statute does require a sentence of imprisonment for defendants like Hacke. Subsection (3) states that "[t]he court shall be required to sentence the defendant to the department of corrections" if the defendant "has a prior conviction" for identity theft. § 18-5-902(3)(b). Because Hacke has a prior conviction for identity theft, the felony offense for which he sought a preliminary hearing mandates that he go to prison if he's convicted.

¶43 The majority insists, however, that this is a byproduct of Hacke's criminal history, without which no mandatory sentence would be triggered:

> The reason Hacke faces mandatory sentencing isn't because the felony with which he is charged requires mandatory sentencing; it's because a circumstance in his individual background (his criminal history), when combined with a conviction for the felony with which he is charged (class 4 felony identity theft), requires mandatory sentencing.

Maj. op. ¶ 19. True enough, but the majority's observation also demonstrates that Hacke wouldn't be subject to a mandatory prison sentence if it weren't for the offense-specific sentence enhancer that the legislature carved out for identity theft. In other words, without an ingredient supplied by the felony statute pursuant to which he sought a preliminary hearing, Hacke would have been eligible for a probationary sentence rather than a sentence to the department of corrections.

¶44 *Second*, the majority offers up a classic "slippery-slope" argument:

> The proposal Hacke backs would grant defendants the right to request and receive a preliminary hearing on any charged class 4, 5, or 6 felony whenever they are: (1) additionally charged with habitual criminal counts; or (2) not eligible to apply for probation pursuant to section 18-1.3-201. Such defendants would face "mandatory sentencing" and would presumably be entitled to a preliminary hearing, even if a charged felony does not itself carry mandatory sentencing.

Maj. op. ¶ 20. But Hacke focuses, as do I, on whether the identity theft statute requires mandatory sentencing, not whether a separate habitual or general sentencing statute does so. And here, identity theft is "the felony" that mandates imprisonment for a class of offenders that includes Hacke. So, there is no slippery slope.

¶45 *Third*, the majority finds several of our recent cases in this area "patently inapposite." *Id.* at ¶ 27. While it's true that *People v. Tafoya*, 2019 CO 13, 434 P.3d 1193; *People v. Huckabay*, 2020 CO 42, 463 P.3d 283; and *People v. Vanness*, 2020 CO 18, 458 P.3d 901, contain some factual differences from the case before us, two overarching and related points of law emerge from these cases regarding a defendant's right to a preliminary hearing: (1) we don't need to determine if a prior-conviction provision constitutes an element of an offense or a sentence enhancer or some hybrid of the two, *see Tafoya*, ¶ 27, 434 P.3d at 1197; *Vanness*, ¶ 20, 458 P.3d at 905; and (2) we focus our analysis instead on the offense-specific sentencing provisions of the felony at issue, *see Huckabay*, ¶¶ 16–19, 463 P.3d at

286–87 (concluding that a defendant charged with felony DUI is entitled to a preliminary hearing because sentencing provisions specific to felony DUI collectively require the defendant, if convicted, to be sentenced to jail or prison).[1]

¶46 The majority maintains that these cases are distinguishable, in part, because it analyzed what class of offense the defendant was "accused of." Maj. op. ¶¶ 28–38. Yet the majority fails to explain why it would be irrelevant if a provision is a sentence enhancer for one aspect of determining preliminary hearing eligibility (offense classification) but somehow relevant for another (mandatory sentencing). *Id.* Moreover, the majority's approach leaves busy criminal courts in cases involving a variety of class 4, 5, or 6 felonies to resolve whether a mandatory sentencing provision is an element, a sentence enhancer, or a hybrid. *Linnebur v. People*, 2020 CO 79M, 476 P.3d 734, has shown us, if nothing else, how challenging that exercise can be. While I believe the plain language of the preliminary hearing statute controls, any ambiguity should be resolved with these consequences in mind. *See* § 2-4-203(1)(e), C.R.S. (2022) (stating that if a statute is ambiguous, the

[1] In *Linnebur v. People*, 2020 CO 79M, ¶ 2, 476 P.3d 734, 735, this court held that a defendant's prior DUI convictions are an element of felony DUI. At the time *Huckabay* came down, however, that issue had not yet been resolved. Therefore, the holding in *Huckabay* wasn't predicated on priors constituting an element of felony DUI.

court, in determining the intention of the General Assembly, may consider "[t]he consequences of a particular construction").

¶47 Because the statute, this court's precedent, and practical considerations militate in favor of simply holding that a defendant is entitled to a preliminary hearing on a class 4, 5, or 6 felony whenever the felony statute at issue contains a sentencing provision requiring incarceration, I respectfully dissent.