ADVANCE SHEET HEADNOTE
September 30, 2024

2024 CO 65

No. 24SA150, *People v. Whittington* — Discovery — Criminal Procedure — Abuse of Discretion — Sanctions — Exclusion of Evidence.

The People argue that a county court both lacked jurisdiction and abused its discretion when it excluded evidence from a felony preliminary hearing as a discovery sanction. The supreme court holds that the county court abused its discretion because it did not make factual findings to support the severity of the sanction. Accordingly, the court does not address whether the county court had jurisdiction to exclude evidence from the preliminary hearing.

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

2024 CO 65

Supreme Court Case No. 24SA150
Original Proceeding Pursuant to C.A.R. 21
Ouray County Court Case No. 23CR26
Honorable Sean Kendall Murphy, Judge

In Re
Plaintiff:

The People of the State of Colorado,

v.

Defendant:

Ashton Michael Whittington.

Rule Made Absolute
en banc
September 30, 2024

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

JUSTICE HART delivered the Opinion of the Court.

¶1 In this original proceeding, we consider whether the Ouray County Court abused its discretion by partially granting Ashton Michael Whittington's motion for sanctions against the Seventh Judicial District Attorney's Office based on violations of Crim. P. 16(I)(b)(1), both in Whittington's prosecution and as an alleged pattern in other cases. We conclude that the court abused its discretion when it excluded evidence as a sanction during the preliminary hearing without making any of the requisite findings to justify imposing that sanction. Based on our conclusion, we need not decide whether the county court had jurisdiction to impose the sanction. Accordingly, we reverse the county court's order imposing sanctions and remand for further proceedings.

I. Facts and Procedural History

¶2 The People allege that Whittington gave alcohol to a minor and was complicit in her sexual assault on May 14, 2023. Whittington first appeared in Ouray County Court on December 22, 2023, and the People filed formal charges against him on December 27, 2023.

¶3 Under Crim. P. 16(I)(b)(1), the People had to disclose certain types of evidence in their actual or constructive possession to defense counsel within twenty-one days of first filing charges against Whittington (here, by January 17, 2024). The People provided a first set of disclosures on December 27, 2023. The

People did not provide any additional disclosures within the required twenty-one-day window.

¶4 After that window closed, the People provided four additional sets of disclosures during February and March 2024. While some of these subsequent disclosures contained information that was not in the People's possession when they charged Whittington, some of that evidence had been in their possession before January 17. Some of the materials disclosed, including in the first set of disclosures, included broken links; defense counsel and the prosecution had a lot of back-and-forth communication about correcting these errors.

¶5 Whittington's preliminary hearing was originally set for March 6, 2024, but it was continued to the afternoon of March 13, 2024, at the request of the People. That morning, the People provided their fifth set of disclosures. Based on the People's failure to comply with Rule 16's mandatory disclosure timeline, Whittington filed a motion to dismiss the case or to impose other sanctions. The motion noted that some evidence in his case had still not been disclosed, and it also pointed to an alleged pattern of Rule 16 violations within the Seventh Judicial District Attorney's Office.

¶6 At the hearing, Whittington requested dismissal of the charges against him as a punitive sanction against the People. The People argued that the county court's limited jurisdiction to hold a preliminary hearing on a felony charge did

not allow it to dismiss the case. The People instead suggested that the court had jurisdiction to impose other sanctions, such as ordering a continuance of the preliminary hearing to cure the late production by permitting review of the evidence and perhaps excluding late-produced evidence from consideration at that hearing.

¶7 The court considered ordering a continuance so the defense would have an opportunity to review the evidence. Both parties agreed that the preliminary hearing would not be completed that day because it had started in the afternoon, the discovery dispute took a lot of time, and defense counsel anticipated needing multiple hours to cross-examine witnesses during the hearing.

¶8 Whittington argued, however, that a continuance would be an inappropriate sanction because he had a right to a prompt decision as to whether the People had probable cause to charge him, particularly on the complicity charge. Whittington also argued that the exclusion of evidence would be an insufficient sanction, suggesting that the late and still undisclosed evidence may have been deliberately withheld because it was exculpatory or otherwise mitigating. Finally, he argued that neither a continuance nor exclusion would be sufficient to address his allegation that the delay in his case was part of a pattern of delay by the Seventh Judicial District Attorney's Office.

¶9 Ultimately, the court reasoned that it lacked sufficient evidence to conclude that the People's untimely disclosures in this case were part of a larger pattern of violations across the district. The court also rejected Whittington's claim that the late and missing disclosures in this case specifically were the result of any bad intent. The court noted that the prosecutor had offered explanations for each of the missing and late disclosures and that it was not willing to infer an intent to deceive when there was "an officer of the court [] here before me and telling me that there's a plausible, reasonable explanation."

¶10 Despite these findings, the court ordered the exclusion of all evidence from the preliminary hearing that had been in the People's actual or constructive possession and that had been disclosed after January 17, 2024. The court did not, however, make a record as to why the exclusion of evidence from the preliminary hearing was an appropriate curative sanction or why a continuance would be insufficient.

¶11 Following the court's order, the parties began the preliminary hearing but only one witness was called for direct examination by the prosecutor before the court continued the hearing to March 29, 2024. The court entered a written order memorializing its exclusion of any late-disclosed evidence, again without findings to support the exclusion beyond a statement that "[t]he People have failed to comply with Rule 16 with respect to certain evidence." It did not include any

findings about the reasons for the delayed disclosures, the prejudice the delay had caused, or the availability of less severe sanctions to cure any prejudice.

¶12 The People appealed the county court's sanction order to the district court under Crim. P. 37.1, which permits the prosecution to file an interlocutory appeal from county to district court when the court grants a motion to suppress evidence. The district court dismissed the appeal, asserting that it lacked jurisdiction because "the matter [should be] taken up as an original proceeding pursuant to C.A.R. 21." *People v. Whittington*, No. 24CV30006, at 3 (Dist. Ct., Ouray Cnty., (May 3, 2024)).

¶13 The People then petitioned this court pursuant to C.A.R. 21, and we granted the petition.[1]

II. Analysis

¶14 We begin by addressing our original jurisdiction to hear this matter. Then, we detail the relevant standard of review and the requirements of Crim. P. 16. Assuming without deciding that county courts have jurisdiction to exclude evidence in a preliminary hearing as a sanction for discovery violations, we hold

[1] Specifically, the People presented the following issues in the petition:

1. Did the county court abuse its discretion when it excluded evidence from the preliminary hearing as a punitive sanction under Colo. R. Crim. P. 16?
2. Does a county court have the legal authority to sanction under Colo. R. Crim. 16?

that the county court abused its discretion by imposing sanctions that exceeded what was reasonably appropriate to ensure compliance with the discovery rules, without first finding either willful misconduct or a pattern of discovery violations by the sanctioned party.

A. Jurisdiction

¶15 Whether we exercise jurisdiction pursuant to C.A.R. 21 is a matter wholly within our discretion. *People v. Hernandez*, 2021 CO 45, ¶ 13, 488 P.3d 1055, 1060. We have previously exercised this jurisdiction when a trial court has abused its discretion and the remedy on appeal would be inadequate. *Hoffman v. Brookfield Republic, Inc.*, 87 P.3d 858, 861 (Colo. 2004). We do not hesitate "to take jurisdiction when a pretrial interlocutory ruling significantly interfere[s] with a party's ability to litigate the merits of the case." *People v. Dist. Ct.*, 793 P.2d 163, 166 (Colo. 1990); *see also People v. Lee*, 18 P.3d 192, 196 (Colo. 2001).

¶16 We agree with the district court that this matter is appropriate for review under C.A.R. 21. If the exclusion of this evidence is not appropriate, the People will be significantly disadvantaged in proving probable cause at the preliminary hearing, and there is no appellate remedy that can address that disadvantage. Accordingly, we exercise our jurisdiction under C.A.R. 21.

B. Standard of Review and Legal Framework

¶17 Choosing an appropriate sanction to address discovery violations lies within the sound discretion of the trial court, and we will not disturb its decision absent an abuse of that discretion. *People v. Daley*, 97 P.3d 295, 298 (Colo. App. 2004). This standard defers to a trial judge's decision on account of "the multiplicity of considerations involved and the uniqueness of each case." *Lee*, 18 P.3d at 196. A court's discretion to impose discovery sanctions is not unlimited, however. *Id.* When a court imposes discovery sanctions, it must exercise its discretion "with due regard for the purposes of the discovery rules themselves and the manner in which those purposes can be furthered by discovery sanctions." *Id.* Moreover, in previous cases,

> [w]e have laid out several factors that a court *must* consider when fashioning discovery sanctions: "(1) the reason for and degree of culpability associated with the violation; (2) the extent of resulting prejudice to the other party; (3) any events after the violation that mitigate such prejudice; (4) reasonable and less drastic alternatives to exclusion; and (5) any other relevant facts."

People v. Tippet, 2023 CO 61, ¶ 37, 539 P.3d 547, 555 (emphasis added) (quoting *People v. Cobb,* 962 P.2d 944, 949 (Colo. 1998)); *see also People v. Dunlap*, 975 P.2d 723, 755 (Colo. 1999); *People v. Castro*, 854 P.2d 1262, 1265 (Colo. 1993).

¶18 The Colorado Rules of Criminal Procedure require prosecuting attorneys to disclose certain discoverable evidence in their possession "as soon as practicable,"

but not later than twenty-one days following the defendant's first appearance at the time of or following the filing of charges. Crim. P. 16(I)(b)(1). Because this rule is self-executing, it does not require the defense attorney to request the information. *Tippet*, ¶ 33, 539 P.3d at 554. If a prosecuting attorney fails to comply with this rule, a court may order sanctions that it deems "just under the circumstances." Crim. P. 16(III)(g).

¶19 Importantly, though, the core purpose of the discovery process mandated by Crim. P. 16 is to "advance the search for truth." *Dist. Ct.*, 793 P.2d at 168. For this reason, sanctions under Crim. P. 16 must generally be aimed toward "protecting the integrity of the truth-finding process and deterring discovery-related misconduct." *Lee*, 18 P.3d at 196. These sanctions may therefore either be curative or, when there is "willful misconduct or a pattern of neglect demonstrating a need for modification of a party's discovery practices," be deterrent or punitive. *Id.* at 196–97.

¶20 Regardless of the type of sanctions imposed "the trial court must strike a balance by 'impos[ing] the least severe sanction that will ensure that there is full compliance with the court's discovery orders.'" *Tippet*, ¶33, 539 P.3d at 555 (alteration in original) (quoting *Dist. Ct.*, 793 P.2d at 168). And we have recently emphasized that a court should generally avoid excluding evidence as a sanction because exclusion is a drastic remedy that may affect the outcome of the trial,

provide a windfall to the party against whom the evidence would have been offered, or otherwise hinder the search for the truth. *Id.* at ¶ 67, 539 P.3d at 560.

C. The County Court Abused Its Discretion by Excluding Evidence as a Sanction Without Making the Necessary Findings

¶21 In the present case, the People admit that they untimely provided certain evidence to Whittington in violation of Crim. P. 16. They explained to the county court, and the court accepted, that the delay was not intentional, and that the prosecutor was working with Whittington's counsel to produce discovery as it became available. In briefing before this court, the county court asserts that the exclusion of all late-disclosed evidence was merely a curative sanction. But the court neither explains nor points to any findings to support why this sanction was still needed after the continuance of the preliminary hearing gave the defense additional time to review the late-disclosed evidence. The People, moreover, argue that the exclusion was a deterrent sanction that was unsupported by either a finding of willful misconduct or of a pattern of noncompliance.

¶22 In general, the exclusion of evidence is considered a severe sanction, imposed as punitive or deterrent rather than curative. *See, e.g.*, *Lee*, 18 P.3d at 196–97. This is because such a sanction may tend to cut against the primary purpose of the discovery rules—to reveal the truth. For this reason, we require the court to make findings in support of this kind of discovery sanction. The court

here made no such findings. To the contrary, the court specifically found no willful misconduct in this case and no basis for concluding that the People exhibited a pattern of discovery violations.

¶23 The court only found that the People had violated Crim. P. 16. That is undisputed. But the imposition of a serious discovery sanction requires more. A review of our prior discovery sanction cases is instructive to underscore the point. We have upheld severe trial court discovery sanctions when the prosecution refused to comply with a specific court order. *See, e.g.*, *Tippet*, ¶ 1, 6, 539 P.3d at 550–51 (concluding that there was no abuse of discretion in reducing the defendant's charges where, among other things, the prosecution had violated a court order requiring production of discovery); *People v. Thurman*, 787 P.2d 646, 655 (Colo. 1990) (concluding that there was no abuse of discretion in dismissing the charges in response to the prosecution's willful refusal to comply with a court order). But when there was no evidence that the prosecution had violated a court order or engaged in intentional misconduct, we have reversed a trial court's exclusion of evidence. *Lee*, 18 P.3d at 198. Under the circumstances presented here, and particularly in the absence of findings explaining the sanction, we cannot conclude that the exclusion of all late-disclosed evidence from the preliminary hearing was within the county court's discretion.

¶24 We need not decide whether the county court had jurisdiction to impose sanctions under Crim. P. 16 because the court did not make any findings to support a sanction as severe as the one it imposed here. Instead, assuming without deciding that jurisdiction was proper, we hold that the county court's exclusion of all late-discovered evidence from the preliminary hearing was an abuse of discretion.

III. Conclusion

¶25 The county court did not make the necessary findings to impose the severe discovery sanction it imposed here. Accordingly, we make the rule to show cause absolute, reverse the order imposing sanctions, and remand the case for further proceedings consistent with this opinion.

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

JUSTICE GABRIEL, joined by JUSTICE HOOD, dissenting.

¶26 The majority concludes that because the Ouray County Court did not make sufficient findings to justify the "severe" sanction of the exclusion of certain limited evidence from a preliminary hearing, the court abused its discretion when it excluded that evidence as a sanction for substantial discovery violations that the People conceded. Maj. op. ¶¶ 1, 24–25.

¶27 Because (1) the People invited the alleged error about which they now complain and, in any event, did not preserve their argument that the county court lacked the authority to impose the sanction that it did; (2) the People conceded their discovery violations, and the court crafted a narrow sanction to address those violations; and (3) the People confirmed that they did not intend to rely on the evidence that the court excluded, thereby belying any assertion that the sanction here was "severe" or that the People will be "significantly disadvantaged in proving probable cause at the preliminary hearing," *id.* at ¶¶ 16, 24–25, I perceive no abuse of discretion by the county court. Accordingly, I would discharge our rule to show cause.

¶28 I therefore respectfully dissent.

I. Facts and Procedural History

¶29 The facts pertinent to my analysis are undisputed.

¶30 On December 27, 2023, Ashton Michael Whittington was charged with (1) a class 2 misdemeanor for serving alcohol to a person under the age of twenty-one; (2) a class 4 felony for contributing to the delinquency of a minor; and (3) a class 3 felony sexual assault. These charges arose out of a minor's allegations that on May 14, 2023, Whittington had provided her with alcohol at a house party where she was later sexually assaulted by two of Whittington's friends while he observed. (Whittington's friends are facing charges in separate cases.) The county court set a preliminary hearing for March 6, 2024.

¶31 Crim. P. 16(I)(a) and Crim. P. 16(I)(b)(1) require, in pertinent part, that the People provide certain discovery materials to a defendant no later than twenty-one days after the defendant's first appearance at the time of or following the filing of charges. Whittington made his first appearance on December 22, 2023, and in accordance with the foregoing rules, the People began producing discovery packets to Whittington.

¶32 The People and Whittington appear to disagree as to when the People provided their first discovery packet. The parties agree, however, that, during a phone call in early February 2024, Whittington requested, among other things, a Snapchat video recovered from his phone that the People had claimed supported the charges in this case. The People ultimately produced that video to Whittington in late February. Around that same time, Whittington contacted the People to

request body-worn camera videos of law enforcement's search of the alleged crime scene.

¶33 Shortly thereafter, at the People's request, the court postponed the preliminary hearing until March 13, 2024.

¶34 In the two days before the rescheduled hearing, Whittington again contacted the People to request the body-worn camera videos of the search of the alleged crime scene. He also asked for the data extracted by law enforcement from the suspects' and the alleged victim's cell phones.

¶35 In the meantime, on three separate occasions in March, the People turned over additional discovery packets, one of which they produced the morning of March 13, the date of the continued preliminary hearing. That discovery packet contained eleven videos, including the videos of the crime scene search that Whittington had requested multiple times and a video of an interview with one of Whittington's co-defendants. These videos were created between May 14, 2023 and August 7, 2023. That same morning, an evidence.com link became available to Whittington, and this link included seven additional videos from the Colorado Bureau of Investigation ("CBI") spanning the time frame July to September 2023.

¶36 Immediately after receiving these untimely disclosures and approximately ninety minutes before the beginning of the previously continued preliminary hearing, Whittington filed a motion to dismiss the case or to impose sanctions

pursuant to Crim. P. 16(III)(g), which authorizes courts to impose sanctions for violations of Crim. P. 16(I). In support of this motion, Whittington cited our decision in *People v. Tippet*, 2023 CO 61, ¶¶ 64–70, 539 P.3d 547, 559–60, in which we had concluded that a district court did not abuse its discretion when it reduced a first degree murder charge to second degree murder as a sanction for a district attorney's office's two-year pattern and practice of neglect of its discovery obligations. Specifically, Whittington argued that dismissal was appropriate because (1) the People should have disclosed all of the discovery by January 13, 2024, based on Whittington's first appearance in court, or, at the latest, by January 17, 2024, based on Whittington's counsel's entry of appearance; (2) much of the discovery material disclosed to him had been turned over after those dates, and the phone extractions taken of the suspects and the alleged victim still had not been produced; and (3) the record established a pattern of at least neglectful discovery behavior by this district attorney's office, as evidenced by the findings of thirty-seven prior violations of Crim. P. 16 by that office in other cases, which findings Whittington listed in his motion.

¶37 The court addressed Whittington's motion toward the beginning of the preliminary hearing. There, Whittington repeated his request that the court dismiss the case and proposed, in the alternative, that the court dismiss at least the

class 3 felony charge (the highest degree crime with which Whittington had been charged).

¶38 For their part, the People argued that the county court did not have the authority to dismiss this case because the concurrent jurisdiction that county courts have relative to district courts concerns only dispositional hearings. Thus, in the People's view, the court was "limited to a bound over order." The People recognized, however, "There could be sanctions, *exclude the evidence, those type of things* I believe THE COURT can do for prelim [sic] purposes." (Emphasis added.)

¶39 Turning then to the merits of Whittington's motion, the People explained that (1) this case is "pretty massive" and involves "a lot of information"; (2) they had experienced delays and technical issues in obtaining discovery from the CBI; (3) the People had not obtained the Snapchat video that Whittington had requested until late February; and (4) other discovery that Whittington claimed had been disclosed late had been previously turned over "in some form or another."

¶40 Following the People's explanation, the court sought to clarify whether it was the People's position that nothing had been provided late. The People responded, "No. I agree that there are some things that are late." Then, in response to further inquiry from the court, the People acknowledged that the body-worn camera videos of the search warrant execution and the phone

extractions were late. The People further noted that certain files had been produced in a form that could not be accessed. The People remarked, however, that both dismissal of the case and exclusion of evidence were "extreme consequences." They also noted that because Whittington's motion had been submitted that morning, they were not prepared to speak to the other thirty-seven violations alleged in that motion.

¶41 Whittington questioned the People's explanation and insisted that dismissal was not an extreme remedy, especially if the court dismissed only the class 3 felony charge, which, he explained, was based on a complicity theory that also supported the class 4 felony charge. The People then repeated that the court did not have the authority to dismiss the case but stated:

> What I believe this court can do is *this court can exclude certain evidence that [the] People can use during a preliminary hearing.* I believe that this court could issue a, *basically you can't put on evidence[,] People* . . . . I think THE COURT could potentially craft something to do that.

(Emphases added.)

¶42 After considering the parties' arguments, the court issued a narrow exclusion order, finding that because the charges were filed on December 27, 2023 and twenty-one days after that date would have been January 17, 2024, "anything that was within the . . . constructive custody of the People that was not provided by January 17th, 2024 is not eligible for admission for today's preliminary hearing."

¶43 Whittington expressed concern about this ruling, noting that merely precluding the People from using such information without further sanction would afford him an insufficient remedy for what he perceived to be, at best, a pattern of negligence. Whittington further noted that the court's ruling was potentially prejudicial to him because it could have the effect of precluding the introduction of exculpatory evidence that the People may have withheld or untimely disclosed.

¶44 The court, however, stood by its previous ruling and ordered the People to provide the pending disclosure materials by the following Friday. In so ruling, the court stated, "I don't see going any further or, or dismissing charges just based on—I have to draw inferences about intent to deceive." The court continued, "I understand that your [i.e., defense counsel's] argument that there's some sort of pattern and it may be malicious, but I just don't have the basis to draw that conclusion and therefore infer anything beyond setting up those guardrails then."

¶45 The People then sought to clarify whether the transcripts of the crime scene search, as opposed to the body-worn camera videos of that search, were also excluded, even though the transcripts had been timely disclosed. Notably, during the ensuing colloquy, the People stated, "I think to clarify, I don't have an intent to use anything—Anything that we've disclosed late, I haven't had the intention

of using . . . in this case for this preliminary hearing." The court ultimately allowed the transcripts in question to come into evidence.

¶46 Shortly after that exchange, the People began and, just before 5:00 p.m., completed the victim's direct examination. Because of the time, the court continued the hearing to March 29, before Whittington's counsel began his cross-examination of the victim.

¶47 Before the preliminary hearing recommenced, however, the People filed in the district court an interlocutory appeal of the county court's sanctions ruling. The district court subsequently dismissed that appeal for lack of jurisdiction, and the People then sought relief from this court pursuant to C.A.R. 21. We issued a rule to show cause.

II. Analysis

¶48 I begin by addressing the People's contention that the county court lacked the authority to order the exclusion of evidence in a preliminary hearing, and I conclude that the People invited the alleged error about which they now complain and, in any event, did not preserve this contention. I then turn to the merits of this case and explain why I believe that the court here did not abuse its discretion when, as a sanction for admitted discovery violations, it excluded from the preliminary hearing certain evidence that the People had failed to disclose on a timely basis.

A. Authority to Exclude Evidence

¶49 The majority states that, in light of its ultimate conclusion in this case, it need not decide whether the county court had the authority to impose sanctions on the People for their Crim. P. 16 disclosure violations. Maj. op. ¶¶ 1, 24. I understand and respect the majority's judicial restraint in this regard, but I feel compelled to note that I need not even get to such an assumption because, in my view, the People invited the alleged error about which they now complain and, in any event, they did not preserve the issue.

¶50 Under the invited error doctrine "a party may not complain on appeal of an error that he has invited or injected into the case; he must abide by [sic] the consequences of his acts." *Horton v. Suthers*, 43 P.3d 611, 618 (Colo. 2002) (quoting *People v. Zapata*, 779 P.2d 1307, 1309 (Colo. 1989)).

¶51 Here, as noted above, in their effort to persuade the court that it did not have the authority to dismiss the case, the People told the court, at least twice, that the court could order the exclusion of certain evidence from the preliminary hearing as a sanction for the People's discovery violations. Having done so, the People may not now challenge the court's decision to do precisely what they invited the court to do.

¶52 Even had the People not invited what they now claim was error, they did not challenge in the county court that court's ruling excluding the evidence, and

therefore, they failed to preserve this argument for our review. *See People v. Salazar*, 964 P.2d 502, 507 (Colo. 1998) ("It is axiomatic that issues not raised in or decided by a lower court will not be addressed for the first time on appeal.").

¶53 For these reasons, I would conclude that the People are barred from challenging the county court's authority to exclude from the preliminary hearing the evidence disclosed in violation of Crim. P. 16(I)(b)(1)'s deadline, and I therefore turn to the merits of the issue before us.

B. No Abuse of Discretion

¶54 A court abuses its discretion when it imposes discovery sanctions that are manifestly arbitrary, unreasonable, or unfair. *Tippet*, ¶ 35, 539 P.3d at 554. This is obviously a high bar, and for several reasons, unlike the majority, I perceive no abuse of discretion in this case.

¶55 First, the People conceded that they had violated Crim. P. 16(I)(b)(1)'s requirements in a number of respects. Specifically, the People acknowledged at the preliminary hearing that the footage of the execution of the search warrant and the extracted cell phone data were produced late (in fact, the extracted cell phone data had not yet been turned over to Whittington). Accordingly, consideration of a sanction was proper, lest the court allow a wrong to go unremedied. Crim. P. 16(III)(g); *see also Tippet*, ¶ 34, 539 P.3d at 554 ("Choosing an appropriate

sanction for discovery violations lies within the sound discretion of the trial court and will not be overturned absent an abuse of discretion.").

¶56 Second, unlike the majority, I believe that the court made sufficient findings to justify its discovery sanction. Indeed, no party disputes that the People violated their discovery obligations in significant ways, and the court so found. In my view, the finding of undisputed discovery violations justified the county court in crafting an appropriate sanction.

¶57 Third, the court imposed an appropriately narrow sanction. As noted above, the court excluded only the material that, prior to January 17, 2024, had been in the People's constructive possession and that they had failed to disclose by the applicable deadline. The People may therefore presumably use any material disclosed before January 17, 2024 and any material disclosed to Whittington after that date but that had not been in their constructive possession by that time. Moreover, the exclusion applied only to the preliminary hearing; the order did not address the People's ability to present the excluded evidence at trial. I am hard-pressed to see how one could characterize such a carefully crafted and thoughtful remedy as manifestly arbitrary, unreasonable, or unfair. *Tippet*, ¶ 35, 539 P.3d at 554.

¶58 Finally, by their own admission, the People suffered no prejudice from the court's sanctions order. Specifically, as noted above, the People conceded that they

did not intend to use the excluded material at the preliminary hearing. Accordingly, they have not shown, nor could they show, how the court's ruling prejudiced them in any way. Nor have they shown any windfall to Whittington that would have tended to defeat, rather than further, the objectives of discovery, which would have militated against the court's sanctions ruling. *See People v. Lee*, 18 P.3d 192, 197 (Colo. 2001).

¶59 In reaching this conclusion, I am unpersuaded by the majority's determinations that further findings were necessary to support what the majority deemed a "severe" sanction and that the People would be "significantly disadvantaged in proving probable cause at the preliminary hearing." Maj. op. ¶¶ 16, 24–25. Given the People's concession that they had no intention to introduce at the preliminary hearing the evidence that the court excluded, I do not agree that the sanction that the court imposed was "severe" or that the People would in any way be disadvantaged at the preliminary hearing.

¶60 Nor am I persuaded by the People's assertion that our decision in *Tippet* precluded the county court from excluding the evidence at issue from the preliminary hearing, absent a finding of a pattern of willful or negligent misconduct.

¶61 In *Tippet*, ¶¶ 1, 42–70, 539 P.3d at 550, 556–60, we concluded that a trial court did not abuse its discretion in reducing a first degree murder charge to second

degree murder when the People (1) had failed to produce most of the discovery at issue on a timely basis; (2) repeatedly failed to comply with court orders to produce all Crim. P. 16 discovery by certain dates; and (3) displayed similar conduct on at least twenty prior occasions. On these facts, we concluded that reduction of the first degree murder charge was an appropriate sanction because the trial court had found a pattern of negligent or willful misconduct and prior sanctions had failed. *Id.* at ¶¶ 41–70, 539 P.3d at 555–60.

¶62 Notwithstanding the People's assertion to the contrary, I do not read *Tippet* to preclude the exclusion of evidence as a discovery sanction absent a finding of a pattern of willful or negligent misconduct. In *Tippet*, ¶ 36, 539 P.3d at 555, we observed that "without 'willful misconduct or a pattern of neglect demonstrating a need for modification of a party's discovery practices, the rationale for a deterrent sanction loses much of its force.'" (Quoting *Lee*, 18 P.3d at 196.) We did not say, however, that a deterrent sanction could *never* be imposed absent a pattern of willful or negligent misconduct. To the contrary, we went on to say that the exclusion or complete dismissal of charges *can* be a proper remedy to ensure compliance with discovery orders. *Id.* at ¶ 39, 539 P.3d at 555.

¶63 Here, the record established substantial discovery violations, which the People, in fact, conceded. In these circumstances, I believe that our trial courts must be empowered to act within their discretion to ensure that parties comply

with discovery rules and orders. Absent such authority, parties could violate all manner of discovery rules without material consequence, as long as they can marshal a credible argument that their conduct was merely negligent and not willful. Such a rule, however, would be directly contrary both to Crim. P. 16(III)(g) and to the settled purposes of Crim. P. 16, which are to protect the integrity of the truth-seeking process while deterring discovery-related misconduct. *Id.* at ¶ 36, 539 P.3d at 555. I therefore would not withhold from our trial courts so important a case management tool as the ability to impose an appropriate and narrowly tailored sanction for discovery misconduct.

¶64 Finally, I am not persuaded by the People's view, and the majority's suggestion, Maj. op. ¶ 21, that a continuance would have been a more appropriate sanction here, given that a continuance was inevitable anyway. I disagree with this view for several reasons.

¶65 First, neither the People nor anyone else argued in this case that a continuance would be an appropriate sanction. To the contrary, as noted above, the People asserted that exclusion of late-disclosed discovery would be an appropriate sanction. I perceive no basis for concluding that the county court abused its discretion when it imposed a sanction that the People themselves proposed.

¶66 Second, for the reasons that we articulated in *Tippet*, ¶ 65, 539 P.3d at 559–60, a continuance here would not have served the purpose of either protecting the integrity of the truth-seeking process or deterring the People's discovery-related misconduct. To the contrary, delaying the preliminary hearing for a second time would have been prejudicial to Whittington. *See id.*, 539 P.3d at 559. Moreover, for the reasons set forth in *Tippet*, rewarding the People's discovery violations by granting additional delay would have been "no deterrent at all." *Id.*, 539 P.3d at 560.

¶67 Lastly, although the People assert that in the circumstances presented, a continuance was inevitable, they overlook the fact that a continuance was going to be required solely because they had provided substantial untimely disclosures on the morning of the preliminary hearing. Obviously, had the materials been disclosed on a timely basis, then no continuance would have been necessary, and it strikes me as circular to say that a continuance was an appropriate sanction, given that a continuance was inevitable, when the sole basis for a continuance would have been the very discovery misconduct that warranted a sanction in the first place.

III. Conclusion

¶68 For the foregoing reasons, and mindful of the high bar for establishing an abuse of discretion, I would conclude that the county court did not abuse its

discretion when it excluded from the preliminary hearing in this case evidence that was in the People's constructive possession by Crim. P. 16(I)(b)(1)'s deadline but that was not disclosed to Whittington until after that deadline.

¶69 Accordingly, I would discharge our rule to show cause in this case, and therefore, I respectfully dissent.