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SUMMARY  
August 15, 2024

### **2024COA93**

#### **No. 23CA1406, *Solano v. Newman* — Criminal Procedure — Discovery and Procedure Before Trial — Disclosure to the Defense — Prosecutor’s Performance of Obligations — Flow of Information Between Investigative Personnel**

A division of the court of appeals addresses the remedial actions a prosecutor may take to ensure that he complies with Crim. P. 16(I)(b)(4). That rule provides that a prosecutor “shall ensure that a flow of information is maintained between the various investigative personnel and his or her office sufficient to place within his or her possession or control all material and information relevant to the accused and the offense charged.” Because a law enforcement agency had engaged in a pattern and practice of not timely disclosing Rule 16 compliant information to the prosecutor over several years and numerous criminal prosecutions, it was appropriate under the circumstances for the prosecutor to obtain

declaratory and injunctive relief to ensure the law enforcement agency timely provides Rule 16 compliant information.

Court of Appeals No. 23CA1406  
Huerfano County District Court No. 21CV30020  
Honorable M. Jon Kolomitz, Judge

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Henry L. Solano, District Attorney for the Third Judicial District, in his official capacity and on behalf of the Third Judicial District Attorney's Office,

Plaintiff-Appellee,

v.

Bruce Newman, Huerfano County Sherriff and Huerfano County Sheriff's Office,

Defendants-Appellants.

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JUDGMENT AFFIRMED

Division IV  
Opinion by JUDGE JOHNSON  
Navarro and Pawar, JJ., concur

Announced August 15, 2024

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Henry L. Solano, District Attorney, Trinidad, Colorado, for Plaintiff-Appellee

Garnett Powell Maximon Barlow, Stanley L. Garnett, Robert L. Barlow, Natalie R. Klee, Denver, Colorado, for Defendants-Appellants

¶ 1 Colorado Rule of Criminal Procedure 16 contemplates a harmonious relationship between the prosecuting attorney and various governmental personnel who investigate crimes and arrest individuals suspected of criminal conduct. This is because Crim. P. 16 indicates and Colorado case law has consistently held that a prosecutor’s discovery obligation to a defendant encompasses information the prosecutor has in his actual or constructive possession.<sup>1</sup> That same case law has also held that the prosecutor is in constructive possession of a law enforcement agency’s investigatory materials, which generally includes the information leading up to and following the defendant’s arrest. Crim. P. 16 identifies the types of evidence and information that could be in the police’s possession, which we will generally refer to as “Rule 16 complaint material.” Such information includes, “[p]olice, arrest and crime or offense reports, including statements of all witnesses”; “[a]ny books, papers, documents, photographs or tangible objects held as evidence in connection with the case”; “[a]ll tapes and

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<sup>1</sup> We use the pronouns he/him when referring to sheriffs and prosecutors, generally, because the District Attorney for the Third Judicial District, Henry Solano, and the Huerfano County Sheriff, Bruce Newman, are both male.

transcripts of any electronic surveillance (including wiretaps) of conversations involving the accused, any codefendant or witness in the case”; and “[a]ny written or recorded statements of the accused or of a codefendant, and the substance of any oral statements made to the police or prosecution.” Crim. P. 16(I)(a)(1)(I), (IV), (VI), (VIII).

¶ 2 Crim. P. 16 does not just address the scope of information the prosecutor must turn over to a defendant, but it also dictates the prosecutor’s deadlines for disclosure, his continuing discovery obligation as the case proceeds, and his duties to put procedures in place to ensure those deadlines are met and evidence is properly handled.

¶ 3 But what happens if a law enforcement agency engages in a pattern and practice of not timely disclosing Crim. P. 16 compliant material to a prosecutor’s office that spans several years and numerous criminal prosecutions? This case presents that question.

¶ 4 The District Attorney for the Third Judicial District, Henry L. Solano (DA Solano), brought a successful declaratory judgment and injunctive action against the Huerfano County Sheriff, Bruce Newman (Sheriff Newman), and the Huerfano County Sheriff’s Office (HCS Office). Sheriff Newman and the HCS Office appeal,

contending that the district court erred by (1) declaring that Sheriff Newman and the HCS Office are subject to the requirements of Crim. P. 16 and (2) entering a permanent injunction to ensure that they timely disclose Crim. P. 16 compliant materials to DA Solano.

¶ 5 The record supports the conclusion that Sheriff Newman and the HCS Office have repeatedly ignored DA Solano's requests for Crim. P. 16 compliant materials, leading courts to dismiss numerous criminal cases — many involving serious felony charges — because the prosecuting attorney was unable to meet his Crim. P. 16 deadlines. Based on our interpretation of the rule, Colorado case law, and case law from other jurisdictions, we determine that the prosecutor must take affirmative steps to ensure he receives government agency investigative materials for timely disclosure to defendants. One such affirmative step may include, as DA Solano did here, obtaining injunctive and declaratory relief that ensures Sheriff Newman and the HCS Office produce Crim. P. 16 compliant materials within certain deadlines and to establish procedures for the appropriate handling of evidence. Accordingly, we affirm the district court's declaratory judgment and permanent injunction.

## I. Background

¶ 6 Sheriff Newman is an elected constitutional official whose position and duties are set forth in article 14, section 8 of the Colorado Constitution and sections 30-10-501 to -530, C.R.S. 2024. The HCS Office functions pursuant to the same statutory scheme. See § 30-10-506, C.R.S. 2024. Sheriff Newman and the HCS Office enforce the law and perform law enforcement functions related to criminal prosecutions pursuant to sections 16-21-103 and 30-10-516, C.R.S. 2024. By virtue of this statutory authority, Sheriff Newman and his office obtain, possess, maintain, and exercise control over the evidence involved in criminal investigations for conduct occurring in Huerfano County.

¶ 7 Between 2019 and 2021, Sheriff Newman and the HCS Office were late in providing Crim. P. 16 discovery information to DA Solano's office in approximately 37% of the criminal cases the HSC Office processed from Huerfano County. This resulted in DA Solano seeking continuances in many cases, of which at least thirty-five prosecutions were dismissed for improper handling of discovery evidence. In comparison, other law enforcement agencies in the Third Judicial District, such as the Trinidad Police Department

(TPD) and Las Animas County Sheriff's Office (LAS Office), provided DA Solano's office untimely discovery evidence in only 4% and 5.8% of their processed cases, respectively.

¶ 8 In June 2021, DA Solano filed a complaint seeking injunctive and declaratory relief against Sheriff Newman and the HCS Office. The complaint alleged that Sheriff Newman and the HCS Office were not complying with law enforcement obligations by failing to (1) properly and timely provide DA Solano "investigatory evidence and information in their custody, possession or control under Rule 16"; (2) properly maintain, preserve, and inventory evidence, including labeling and maintaining a chain of custody; (3) "timely and properly send evidence for testing"; and (4) "follow appropriate standards related to extrajudicial publicity."

¶ 9 Following a hearing, the district court issued a preliminary injunction in December 2021. The court found that a preliminary injunction was necessary "to prevent harm to the public which may occur if criminal prosecutions are thwarted" and "that there has been, and continues to be, a persistent failure of the Sheriff and [the HCS Office] to comply with Rule 16 to such a degree and persistence" that the failure has led to "a detrimental impact" to the



“public safety and the prosecution of criminal case[s] in Huerfano County.”

¶ 10 After entry of the preliminary injunction, Sheriff Newman and the HCS Office continued to provide late discovery information in approximately 30% of their cases. Due to Sheriff Newman and the HCS Office’s failure to comply with the preliminary injunction, DA Solano sought a contempt citation in August 2022.

¶ 11 In April 2023, the district court found Sheriff Newman and the HCS Office in contempt of court and imposed remedial actions that required them to “prepare and enact written procedures and policies related to the timely production of mandatory discovery pursuant to Rule 16,” “establish and implement tracking and monitoring systems for compliance with Rule 16,” “adopt a training schedule for appropriate staff members,” and provide the court documentation of the measures they had taken to comply with its order. Of note, the court made findings that even after entry of the preliminary injunction, DA Solano’s office had to dismiss thirteen cases, bringing the total to forty-eight dismissals, due to the prosecutor receiving untimely Crim. P. 16 compliant evidence or because evidence had not been processed for testing.

¶ 12 In June 2023, the court entered permanent injunctive and declaratory relief requiring Sheriff Newman and the HCS Office to comply with DA Solano’s Crim. P. 16 discovery requests. The permanent injunction requires Sheriff Newman and the HCS Office to (1) properly and timely provide to DA Solano’s office investigatory evidence and information coming into the HCS Office’s custody, possession, and control; (2) properly maintain, preserve, and inventory evidence, including labeling and maintaining a chain of custody log; (3) timely and properly send appropriate evidence for testing; and (4) use the state-created, funded, and free-to-law-enforcement eDiscovery platform.<sup>2</sup> § 16-9-702(2)-(3), C.R.S. 2024.

¶ 13 Sheriff Newman and the HCS Office appeal the court’s judgment, contending that the district court improperly concluded that Crim. P. 16 applies to them.

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<sup>2</sup> The Colorado legislature mandated statewide discovery sharing be fully operational by July 2017. § 16-9-702(1), C.R.S. 2024. The eDiscovery platform is funded by the Colorado Legislature based on a budget provided by the Judicial Department, so users have no cost to use the platform. The discovery system is fully functional and operational statewide, including in both large urban and small rural judicial districts.

## II. Standard of Review and Applicable Law

¶ 14 We review a district court’s order entering a permanent injunction for an abuse of discretion. *Rome v. Mandel*, 2016 COA 192M, ¶ 60. “A court abuses its discretion if it bases its ruling on an erroneous view of the law or if its ruling is manifestly, arbitrary, unreasonable, or unfair.” *Id.* at ¶ 49. We defer to the district court’s factual findings so long as they are supported by the record. *Id.* at ¶ 60; *see also State ex rel. Weiser v. Ctr. for Excellence in Higher Educ., Inc.*, 2023 CO 23, ¶ 33 (“A [district] court’s judgment following a bench trial presents a mixed question of law and fact.”).

¶ 15 A party seeking a permanent injunction must demonstrate: (1) actual success on the merits; (2) irreparable harm will result unless the injunction is issued; (3) the threatened injury outweighs the harm of the injunction; and (4) the injunction, if issued, will not adversely affect the public interest. *Dallman v. Ritter*, 225 P.3d 610, 621 n.11 (Colo. 2010) (citation omitted).

¶ 16 We review statutory interpretation questions de novo. *McCoy v. People*, 2019 CO 44, ¶ 37. “In construing a statute, our primary purpose is to ascertain and give effect to the legislature's intent.” *Id.* We aim to effectuate the General Assembly’s intent by giving the

words their plain and ordinary meaning. *Id.* at ¶¶ 37-38. “We read statutory words and phrases in context, and we construe them according to the rules of grammar and common usage.” *Id.* at ¶ 37. We interpret the “scheme as a whole, giving consistent, harmonious, and sensible effect to all of its parts, and we must avoid constructions that would render any words or phrases superfluous or lead to illogical or absurd results.” *Id.*

¶ 17 If the statute’s plain language is clear and unambiguous, we apply it as written and need not resort to other tools of statutory construction unless it leads to an absurd result. *Harvey v. Cath. Health Initiatives*, 2021 CO 65, ¶ 16; *People v. Carian*, 2017 COA 106, ¶ 14.

¶ 18 We apply the same rules when interpreting the Colorado Rules of Criminal Procedure as we do when interpreting a statute. *People v. Corson*, 2016 CO 33, ¶ 44 (citing *Kazadi v. People*, 2012 CO 73, ¶ 11).

### III. Analysis

¶ 19 Sheriff Newman and the HCS Office contend that the district court erred by imposing injunctive and declaratory relief against them because (1) the plain language of Crim. P. 16 applies only to

the prosecuting attorney's discovery obligations; (2) Colorado case law corroborates that Crim. P. 16 only applies to the prosecuting attorney; and (3) the express remedies of Crim. P. 16 do not contemplate injunctive and declaratory relief.

¶ 20 We agree generally with Sheriff Newman and the HCS Office's interpretation of Crim. P. 16 with respect to their first and second contentions. But we disagree that a prosecutor may not seek certain remedies if necessary to ensure he can comply with his discovery obligations. In rejecting Sheriff Newman and the HCS Office's main premise — that the district court cannot impose an injunction against them because Crim. P. 16 does not apply to them — we first discuss a prosecutor's disclosure obligations to a defendant under the rule. Next, we address when those obligations are triggered because the prosecutor has actual or constructive possession of Crim. P. 16 compliant evidence. We then discuss the prosecutor's duty to ensure the flow of information between his office and various investigative agencies and how the lack of such informational flow here justified DA Solano's pursuit of declaratory and injunctive relief. Ultimately, the permanent injunction is narrowly tailored to ensure the flow of Crim. P. 16 compliant

information from Sheriff Newman and the HCS Office to DA Solano's office so that DA Solano may discharge his mandatory duties under the rule.

A. Crim. P. 16

¶ 21 Crim. P. 16(I)(a)(1) provides that “[t]he prosecuting attorney shall make available to the defense . . . material and information which is within the possession or control of the prosecuting attorney . . . concerning the pending case.” This rule requires that such information be produced “as soon as practicable but not later than 21 days after the defendant’s first appearance at the time of or following the filing of charges.” Crim. P. 16(I)(b)(1).

¶ 22 Crim. P. 16(I)(a)(3) provides that “[t]he prosecuting attorney’s obligations under this section (a) extend to material and information in the possession or control of members of his or her staff and of *any others who have participated in the investigation* or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to his or her office.” (Emphasis added.) *See also People v. Dist. Ct.*, 793 P.2d 163, 166 (Colo. 1990).

¶ 23 Crim. P. 16(I)(b)(4) imposes a responsibility on the prosecutor to “ensure that a flow of information is maintained between the

various investigative personnel and his or her office sufficient to place within his or her possession or control all material and information relevant to the accused and the offense charged.” See *People v. Adams Cnty. Ct.*, 767 P.2d 802, 804 (Colo. App. 1988). This is intended “to provide for open file disclosure of such materials in the interest of minimizing the need for judicial intervention with basic discovery as it provides for prompt, *self-executing* disclosure by the prosecution.” *Id.* Crim. P. 16’s requirements “also allow[] for the preparation of a defense as soon as possible.” *Id.*

¶ 24 The district court has discretion to remedy a prosecutor’s discovery violations, *People v. Daley*, 97 P.3d 295, 298 (Colo. App. 2004); it can order “such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed or *enter such other order as it deems just under the circumstances*,” Crim. P. 16(III)(g). This discretion is warranted because of “the multiplicity of considerations involved and the uniqueness of each case.” *People v. Tippet*, 2023 CO 61, ¶ 34 (quoting *People v. Lee*, 18 P.3d 192, 196 (Colo. 2001)).

¶ 25 The district court’s discretion, however, is not unlimited.

When fashioning a sanction, the court 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.* at ¶ 35 (quoting *Lee*, 18 P.3d at 196). The 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.” *Id.* at ¶ 37 (quoting *Dist. Ct.*, 793 P.2d at 168). When there is a pattern of neglect or willful misconduct, the district court may impose a deterrent sanction. *Lee*, 18 P.3d at 196.

#### B. Actual and Constructive Custody

¶ 26 Sheriff Newman and the HCS Office do not dispute that they are integral to the orderly administration of the criminal justice process. And they cannot disagree, given their extensive role in investigating and arresting individuals who have allegedly committed criminal offenses.

¶ 27 It is incumbent upon Sheriff Newman and the HCS Office to “keep and preserve the peace” in Huerfano County “and to quiet and suppress all affrays, riots, and unlawful assemblies and insurrections.” § 30-10-516. And they have a duty to assist the



prosecution with the criminal cases they initiate by submitting to the district attorney “the arresting agency’s name, the offender’s full name and date of birth, the charge or charges being requested, the investigating agency’s case number, and the date of arrest and the arrest number.” § 16-21-103(2)(a). In addition, “the law enforcement agency shall submit to the district attorney any relevant information about the offender’s affiliation or association with gangs or gang activities.” *Id.*

¶ 28 The prosecutor’s duties pertaining to Rule 16 compliant materials and information extend to those individuals “who have participated in the investigation or evaluation of the case.” Crim. P. 16(I)(a)(3).

¶ 29 Despite a sheriff’s express statutory duties to assist the prosecution in the investigation of crimes, no Colorado case has expressly held that a law enforcement office is an arm of the prosecution. The closest statement we could find expressing this principle is in *People v. Grant*, 2021 COA 53. In that case, the Philadelphia police arrested a Colorado fugitive who made incriminating statements while being processed. *Id.* at ¶ 3. But the Philadelphia police did not inform the Colorado police or Colorado

prosecuting attorney about the defendant’s statement until the seventh day of the defendant’s trial. *Id.* A division of this court held that “the prosecution’s disclosure obligations apply to information ‘in the possession or control’ of ‘any others’ who have been part of a case’s investigation and who, ‘with reference to the particular case[,] have reported’ to the prosecution.” *Id.* at ¶ 22 (quoting Crim. P. 16(I)(a)(3)).

¶ 30 The *Grant* division’s holding is consistent with cases from other jurisdictions that have explicitly held that law enforcement is part of the prosecution team. *See State v. Meza*, 50 P.3d 407, 412 (Ariz. Ct. App. 2002) (investigating agencies are considered a part of the “prosecution team,” or an “arm of the prosecutor”) (citations omitted); *see also Bracamontes v. Superior Ct.*, 255 Cal. Rptr. 3d 53, 62-63 (Ct. App. 2019) (same).

¶ 31 In *Meza*, the Arizona Court of Appeals held that “[t]he State must disclose not only ‘information in the possession or control of members of the prosecutor’s staff,’ but also that within the possession or control ‘of any other persons who have participated in the investigation or evaluation of the case.’” 50 P.3d at 412 (quoting Ariz. R. Crim. P. 15.1(d) (1993)). And

although the requested information was in the control of the Phoenix Police Department Crime Lab rather than the prosecutor’s office, “a law enforcement agency investigating a criminal action operates as an arm of the prosecutor for purposes of obtaining information that falls within the required disclosure provisions of [Arizona’s discovery rule].”

*Id.* (quoting *Carpenter v. Superior Ct.*, 862 P.2d 246, 250 (Ariz. Ct. App. 1993)).

¶ 32 In *Bracamontes*, 255 Cal. Rptr. 3d at 56, the California Court of Appeal, Fourth Appellate District held that private entities participating in the investigation of a defendant’s crime are under the direction of law enforcement and are “therefore properly viewed as members of the prosecution team for purposes of discovery.” Although *Bracamontes* applied to postconviction discovery, the theory remains the same pretrial — any entities or persons who assist the prosecution during an investigation are considered “members of the prosecution team.” *Id.* Although *Bracamontes* clarified when a private entity might be subject to discovery disclosures, the court said that whether a government agency is subject to discovery disclosures “is beyond dispute,” as law enforcement agencies are “part of the prosecution team for

purposes of discovery.” *Id.* at 62. “At its core, members of the team perform investigative duties and make strategic decisions about the prosecution of the case,” and the “team may also include individuals who are not strategic decision-makers,” including police officers and federal agents who submit to the direction of the prosecutor. *Id.* at 64 (quoting *People v. Superior Ct.*, 239 Cal. Rptr. 3d 71, 79 (Ct. App. 2018)). In sum, numerous states courts have found that private entities and law enforcement agencies outside the prosecution are “part of the prosecution team” and criminal justice process, and therefore subject to discovery enforcement by the prosecuting attorney. *See id.* at 62 (collecting cases).

¶ 33 And the Federal Rules of Criminal Procedure consider government agencies that assist in the investigation to be members of the “prosecution team” or an “arm of the prosecution.” Under Fed. R. Crim. P. 16, unlike our rule, the word “government” is used in lieu of the term “prosecuting attorney.” *See* Fed. R. Crim. P. 16(a) (“Government’s Disclosure”). Regardless of terminology, though, the symbiotic relationship between the prosecutor and law enforcement for pretrial discovery obligations extends broadly to members associated with the criminal justice process, which

normally includes prosecutors, law enforcement, and federal agents when they are involved in the case.

¶ 34 Sheriff Newman and the HCS Office acknowledge their role in the cases in which they are involved — that they engage in quintessentially investigative duties and responsibilities and that the office is a government agency existing, in part, to aid and assist the prosecuting attorney. In their opening brief, Sheriff Newman and the HCS Office concede that “Rule 16 contemplates a harmonious relationship between the prosecuting attorney and various investigative personnel and other governmental personnel.”

¶ 35 Given Sheriff Newman and the HCS Office’s critical role in the investigative process, it is not surprising that Colorado courts have consistently held that “[i]nformation or material in the custody or possession of [law enforcement is] covered by the Rule,” *Dist. Ct.*, 793 P.2d at 166-67, and therefore the “[m]aterial[s] in possession of the police [are] constructively in the possession of the prosecution,” *People v. Lucero*, 623 P.2d 424, 430 (Colo. App. 1980). *See also* *People v. Dist. Ct.*, 664 P.2d 247, 252 (Colo. 1983) (same); *People v. Banuelos*, 674 P.2d 964, 966 (Colo. App. 1983) (same); *Cheatwood v. People*, 435 P.2d 402, 405 (Colo. 1967) (“Clearly it is the duty of

both the prosecution and the courts to see that no known evidence in the possession of the People which might tend to prove a defendant's innocence is withheld from the defense before or during trial."); *People v. Bradley*, 25 P.3d 1271, 1276 (Colo. App. 2001) (The prosecution must "disclose to the defense any evidence within the prosecution's possession or control that tends to negate the guilt of the accused as to the offense charged.").

¶ 36 Because courts may sanction the prosecuting attorney for Crim. P. 16 violations, the crux of Sheriff Newman and the HCS Office's argument centers on whether the rule can be *enforced against them*. They point to the plain language of the rule and, indeed, spend most of their briefing on the fact that the prosecuting attorney has all the duties under the rule and the word "sheriff" does not appear anywhere in that rule's text.

¶ 37 But their plain language interpretation misses the point. DA Solano does not dispute that the duties imposed under Crim. P. 16 are his, and that if he violates them, the court will sanction him (either individually or by imposing a sanction in the relevant criminal prosecution), not the sheriff. Thus, the case law dealing with Crim. P. 16 sanctions against a prosecuting attorney focuses

on what information was in the prosecutor's actual or constructive custody. See *Lucero*, 623 P.2d at 430; *Dist. Ct.*, 793 P.2d at 166-67 (concluding information in investigating detective's possession was covered by Crim. P. 16 and therefore in the prosecution's constructive possession because of the language in Crim. P. 16(I)(a)(3)); see also *Commonwealth v. Ware*, 27 N.E.3d 1204, 1212 (Mass. 2015) ("It is well established that the Commonwealth has a duty to learn of and disclose to a defendant any exculpatory evidence that is 'held by agents of the prosecution team.'" (quoting *Commonwealth v. Beal*, 709 N.E.2d 413, 416 (Mass. 1999))); *Meza*, 50 P.3d at 412.

¶ 38 Sheriff Newman and the HCS Office frame the court's ruling as a sanction under Crim. P. 16, but it is not. This is an action that sought declaratory and injunctive relief. A permanent injunction is equitable relief a court is authorized to impose that prohibits or requires a party to act or refrain from taking some action to prevent future harm. See *Stulp v. Schuman*, 2012 COA 144, ¶ 17. The injunction requires Sheriff Newman and the HCS Office to comply with requests from DA Solano's office so that DA Solano can comply with *his duties* under Crim. P. 16.

¶ 39 Therefore, we are not surprised that there are no cases in which the police or other investigative agencies are sanctioned under Crim. P. 16. This dearth of case law, however, does not mean that DA Solano’s lawsuit against Sheriff Newman and the HCS Office is improper.

C. Prosecutor’s Duty to Ensure Flow of Information

¶ 40 We conclude that DA Solano’s pursuit of declaratory and injunctive relief is consistent with another duty Crim. P. 16 assigns to prosecuting attorneys besides the duty to disclose information to the defendant.

¶ 41 In *Grant*, ¶ 22, a division of this court noted that “Crim. P. 16(I)(b)(4) makes it incumbent on the prosecution to ‘ensure’ that information flows between the prosecutor’s office and ‘the various investigative personnel’ so that the prosecution will have ‘all material and information relevant to the accused and the offense charged’ in its possession.” That provision provides that the prosecutor “*shall ensure that a flow of information is maintained between the various investigative personnel and his or her office sufficient to place within his or her possession or control all material and information relevant to the accused and the offense*



charged.” Crim. P. 16(I)(b)(4) (emphasis added). Therefore, even though the Colorado prosecutor in *Grant* did not know about the defendant’s incriminating statements to the Philadelphia police, this court imputed the Crim. P. 16(I)(b) violation to the prosecuting attorney for the late disclosure because the prosecutor was responsible for the flow of information. *Grant*, ¶¶ 38-48.

¶ 42 Because of the symbiotic relationship between the prosecuting attorney and law enforcement — indeed the shared goal to investigate and prosecute those accused of committing crimes — the two usually work in tandem to timely provide pretrial discovery to defendants. Thus, the “flow of information” between law enforcement and the prosecutor — although not perfect — is generally seamless. And based on the record, it appears there is a symbiotic relationship with, and flow of information between, the other law enforcement agencies in the Third Judicial District and DA Solano. DA Solano has had little problem with the TPD or the LAS Office in obtaining timely Crim. P. 16 compliant materials. Between January 1, 2019 and July 29, 2021, TPD and the LAS Office provided discovery information to DA Solano’s office within seven days from the charges being filed against the defendant in

70% and 68% of cases, respectively. When comparing the HCS Office with the LAS Office, the HCS Office provided late discovery information (greater than thirty days) in 38.5% of cases whereas the latter was late in only 4.15% of cases.

¶ 43 Despite the preliminary injunction, DA Solano had to seek a contempt citation against Sheriff Newman and the HCS Office because of continued late disclosures. As part of his contempt motion, DA Solano notified the court of the forty-eighth motion to dismiss his office filed in criminal cases involving Sheriff Newman and the HCS Office because DA Solano's office had not provided timely discovery to the defendants. Although Sheriff Newman and the HCS Office have acknowledged the importance of their compliance with DA Solano's requests and with the district court's preliminary injunction, the district court concluded, with record support, that without the injunctive relief, they would continue to provide untimely information.

¶ 44 It is understandable that a prosecutor would take seriously his duty to implement procedures and practices to ensure the "flow of information." As discussed, a prosecuting attorney has a duty to timely disclose Crim. P. 16 compliant material to the defense. The

prosecutor knows that any violation under the rule will be attributed to him. And case law has consistently held that the prosecutor is in constructive custody or possession of information held by law enforcement officials who assisted with the case.

¶ 45 Given that the word “shall” appears in Crim. P. 16(I)(b)(4), both parties acknowledge that DA Solano has a mandatory obligation to implement the procedures and practices so that the “flow of information” is not hindered. *Chambers v. People*, 682 P.2d 1173, 1180 (Colo. 1984) (“This duty of disclosure extends to material in the possession or control of those reporting to the prosecutor, and the prosecutor is required to maintain conditions adequate to obtain such material from various investigative personnel.”) (citations omitted); *see also People v. Huckabay*, 2020 CO 42, ¶ 16 (there is a presumption that the term “shall” is mandatory, rather than a discretionary directive).

¶ 46 So long as DA Solano receives the timely flow of information from the sheriff’s office, he can disclose it to the defendant, and thus his duty is satisfied. And constitutional due process considerations require Sheriff Newman and the HCS Office to create and implement regular procedures to preserve evidence. *People ex*

*rel. Gallagher v. Dist. Ct.*, 656 P.2d 1287, 1291 (Colo. 1983) (“[W]hen evidence can be collected and preserved in the performance of routine procedures by state agents, failure to do so is tantamount to suppression of the evidence[,] and . . . the state must employ regular procedures to preserve evidence which a state agent, in the regular performance of his duties, could reasonably foresee might be favorable to the accused.”).<sup>3</sup>

¶ 47 Nonetheless, Sheriff Newman and the HCS Office contend that the district court erred because, for two reasons, declaratory and injunctive relief are not express remedies contemplated under Crim. P. 16.

¶ 48 First, Crim. P. 16(l)(c)(2) “does not create a separate civil right of action for the District Attorney to proactively seek declaratory and injunctive relief for future cases where the alleged harm has

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<sup>3</sup> At oral argument, counsel for Sheriff Newman and the HCS Office suggested that the record did not support a conclusion that DA Solano and his office had implemented procedures to ensure the “flow of information” between the district attorney and sheriff’s offices. But in the declaratory judgment and permanent injunction order, the court incorporated its findings of fact from its preliminary injunction and contempt orders. Those orders contain findings of fact identifying testimony and documentary evidence of communications between DA Solano’s office and the HCS Office for requests of information.

not even occurred yet.” They argue that allowing separate injunctive and declaratory relief would render Crim. P. 16(I)(c)(2) superfluous.

¶ 49 That provision states: “The court shall issue suitable subpoenas or orders to cause such material to be made available to the defense, if the prosecuting attorney’s efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court.” Crim. P. 16(I)(c)(2). But this provision is inapplicable to the law enforcement agency that investigated or participated in the case. Because, as we have discussed, a prosecutor is in constructive custody of information in possession of the police or sheriff, a prosecutor does not need to subpoena information in his possession. Instead, Crim. P. 16(I)(c)(2) refers to governmental personnel who have discoverable information involving the criminal prosecution that is not within the “possession” of the prosecutor. See Crim. P. 16(I)(c)(1) (addressing “material or information which would be discoverable if in the

possession or control of the prosecuting attorney and which is in the possession or control of other governmental personnel”).<sup>4</sup>

¶ 50 Given the purpose of Crim. P. 16 is to facilitate open file disclosure to the defense as soon as practicable and the rule is written to require limited judicial intervention, *see Adams Cnty. Ct.*, 767 P.2d at 804, requiring a prosecutor to issue a subpoena for Crim. P. 16 compliant material to the investigating law enforcement agency is not only impractical but not contemplated by the rule’s timelines for disclosure of discovery that is within a prosecutor’s constructive possession.

¶ 51 Second, Sheriff Newman and the HCS Office contend that any remedies become available only “if the prosecuting attorney’s efforts are unsuccessful” and that the “declaratory judgment and permanent injunction action as to future events is . . . improper

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<sup>4</sup> Generally, a court will not deem the prosecutor to be in constructive possession of information from private entities or individuals. Therefore, Crim. P. 17 authorizes the prosecutor to issue a subpoena to obtain such information. *See, e.g., People v. Mason*, 989 P.2d 757, 759-60 (Colo. 1999) (a prosecutor may issue a subpoena for a defendant’s telephone and bank records); *People v. Hurd*, 682 P.2d 515, 516-17 (Colo. App. 1984) (a television station’s videotape was “neither in the possession nor in the control of the People,” so issuance of a subpoena under Crim. P. 17, not disclosure under Crim. P. 16, applied).

because [DA Solano] has failed to show the existence of the requisite condition precedent — that his efforts are unsuccessful.” This is an unpersuasive argument because DA Solano brought this action *precisely because* his efforts have been repeatedly unsuccessful based on the late-provision-of-evidence percentages and resulting dismissal orders. And DA Solano’s actions can hardly be characterized as “anticipatory” when, even after the court imposed the preliminary injunction, Sheriff Newman and the HCS Office failed to comply with that injunction.

¶ 52 If we agreed with Sheriff Newman and the HCS Office’s interpretation of Crim. P. 16 — that a permanent injunction requiring compliance with DA Solano’s requests for timely information is a sanction under the rule — a prosecutor faced with an entity like the HCS Office would be left with no remedy, meaning the prosecutor would continue to be sanctioned by the court, including having criminal prosecutions dismissed. This result cannot be what the supreme court contemplated or intended when it promulgated Crim. P. 16. *See Antero Treatment LLC v. Veolia Water Techs., Inc.*, 2023 CO 59, ¶ 14 (the supreme court has authority to “make and promulgate rules governing practice and

procedure in civil and criminal cases” (quoting Colo. Const. art. VI, § 21)); *People v. Null*, 233 P.3d 670, 679 (Colo. 2010) (“We also avoid interpretations that would render any words or phrases superfluous or would lead to illogical or absurd results.”).

¶ 53 We read no limitation in Crim. P. 16(I)(b)(4) as to how DA Solano may comply with his mandatory duty to ensure that the flow of information between law enforcement and his office is timely and complete so that disclosure may be made to the defense. Because the prosecutor must “promulgate and enforce rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of a criminal investigation,” *Dist. Ct.*, 793 P.2d at 167, nothing prevents a prosecutor from seeking injunctive relief as part of his duty to “enforce rigorous and systematic procedures.”

¶ 54 The breadth of information that the prosecutor must ensure is turned over to the defense under Crim. P. 16(I)(b)(4) and (I)(a)(3) may require a more systematic approach, rather than a case-by-case solution, when, as here, the pattern and practice of the nondisclosure is so egregious. And the scope of the remedy set forth by the district court is appropriate because it is tailored to



address the Crim. P. 16 compliant information that Sheriff Newman and the HCS Office possess. In the declaratory judgment and permanent injunction, the court stated that Sheriff Newman and the HCS Office must

- a) properly and timely provide to the Office of the District Attorney of the Third Judicial District of the State of Colorado such investigatory evidence and information coming into their custody, possession or control; b) properly maintain, preserve and/or inventory evidence including labeling and maintaining a “chain of custody” log; c) timely and properly sending evidence for testing; and d) use the state-created, funded and free-to-law-enforcement E-Discovery Platform.

Thus, the injunction is narrowly tailored to ensure DA Solano can comply with his duties under Crim. P. 16.<sup>5</sup>

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<sup>5</sup> We acknowledge that the court’s permanent injunction says that Sheriff Newman and the HCS Office are “bound by” and “directed to comply with the requirements, provisions and procedures of Colorado Rules of Criminal Procedure Rule 16.” But we view this language to be descriptive of the timelines, categories of information, and procedures for the proper handling of evidence, all of which comprise part of the prosecutor’s mandatory duties of disclosure to ensure the “flow of information.” Nothing in the court’s order says that law enforcement officers are subject to sanctions under Crim. P. 16. Indeed, the record supports that DA Solano sought a remedy by means of the permanent injunction when Sheriff Newman and the HCS Office were found in contempt, not a sanction under Crim. P. 16.

¶ 55 Besides Sheriff Newman and the HCS Office’s claim that the declaratory and injunctive relief constitute a sanction under Crim. P. 16 — a proposition we have rejected — the declaratory judgment and permanent injunction do nothing more than what the rule contemplates law enforcement should already be doing in a cooperative fashion with the prosecutor’s office.

¶ 56 Accordingly, we affirm the court’s judgment granting declaratory relief and imposing a permanent injunction against Sheriff Newman and the HCS Office.

#### IV. Conclusion

¶ 57 The judgment is affirmed.

JUDGE NAVARRO and JUDGE PAWAR concur.