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SUPREME COURT, STATE OF COLORADO

2 East 14th Avenue  
Denver, CO 80203

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Certiorari to the Court of Appeals, 2019CA1360  
District Court, El Paso County, 2019CV103

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**PETITIONER:**

JAMES WOO

**RESPONDENT:**

EL PASO COUNTY SHERIFF'S OFFICE AND  
FOURTH JUDICIAL DISTRICT ATTORNEY'S  
OFFICE

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Attorney for *Amici Curiae* CCDB and ADC:

Antony Noble, Reg. No. 33910  
THE NOBLE LAW FIRM, LLC  
215 Union Boulevard, Suite 305  
Lakewood, CO 80228  
Tel: (303) 232-5160  
Fax: (303) 232-5162  
Email: [antony@noble-law.com](mailto:antony@noble-law.com)

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Case No. 20SC865

**BRIEF OF *AMICI CURIAE* COLORADO CRIMINAL DEFENSE BAR  
AND OFFICE OF ALTERNATE DEFENSE COUNSEL  
IN SUPPORT OF PETITIONER**

## **CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this amicus brief complies with C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the amicus brief complies with the applicable word limit set forth in C.A.R. 29(d). It does not exceed 4,750 words.

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

The undersigned acknowledges that the brief may be stricken if it fails to comply with any of the requirements C.A.R. 29, and C.A.R. 32.

s/ Antony Noble

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## **STATEMENT OF THE ISSUE**

Whether the court of appeals erred in holding that the Colorado Governmental Immunity Act does not violate petitioner's constitutional right against deprivation of property without due process in barring his replevin claim, even if the criminal court lacks jurisdiction to address a post-sentence motion for return of property.

## **AMICI CURIAE'S STATEMENT OF INTEREST**

The Colorado Criminal Defense Bar (CCDB) is dedicated to representing those accused of crimes in Colorado and safeguarding fairness and individual rights in criminal proceedings in the state. The CCDB promotes a fair judicial system through advancement of trial advocacy skills, high ethical standards, and professionalism. The CCDB maintains a membership of about 900 practitioners. Since it was founded in 1979, the CCDB has been active in protecting the rights of the accused.

The Office of Alternate Defense Counsel (ADC) was established under section 21-2-101, C.R.S. (1997), *et seq.* as an independent governmental agency of the Colorado Judicial Branch. ADC is funded to provide legal representation for indigent persons in criminal and delinquency cases in which the Office of the State Public Defender has a conflict of interest. § 21-2-103(1)(a), C.R.S. (2021). ADC

provides representation by contracting with licensed attorneys, § 21-2-103(4), and is mandated to provide to indigent persons “legal services that are commensurate with those available to nonindigents.” § 21-2-101(1), C.R.S. (2021).

Criminal defense attorneys who are members of the CCDB and/or contractors with ADC routinely litigate the return of seized property in criminal cases. The CCDB and ADC submit this amicus brief pursuant to this court’s request and believe that the court will benefit from their perspective.

## **ARGUMENT**

### **Colorado law may not provide a meaningful remedy in a criminal case for the return of some lawfully seized property.**

The court of appeals ruled that applying the Colorado Governmental Immunity Act (CGIA) to bar Mr. Woo’s replevin claim does not violate his constitutional right against deprivation of property without due process because he had a meaningful remedy for the return of his seized property in his criminal case. *Woo v. El Paso County Sheriff’s Office*, 490 P.3d 884, 886 (Colo. App. 2020).

But depending on how this court resolves a split in divisions of the court of appeals, there may not be a meaningful remedy in a criminal case for the return of some lawfully seized property, which may include some of the property that Mr. Woo has requested to be returned.

The split in the court of appeals is between *People v. Chavez*, 487 P.3d 997 (Colo. App. 2018) in which a division ruled that a trial court has no jurisdiction to receive a motion for return of property once a sentence has been imposed and *People v. Hargrave*, 179 P.3d 226 (Colo. App. 2007) in which another division ruled that a trial court has continuing jurisdiction to receive a motion for return of property after a sentence has been imposed. This split in authority was noted by the court of appeals in this case, *Woo*, 490 P.3d at 889 (“our supreme court has not resolved this debate”), and was also acknowledged by this court in *Strepka v. People*, 489 P.3d 1227, 1229 (Colo. 2021).

If this court resolves the split in favor of *Chavez*, there would not be a meaningful remedy in a criminal case for the return of lawfully seized property that may have an evidentiary use after sentencing.

One of the main issues for a trial court to determine in ruling on a motion for the return of lawfully seized property in a criminal case is whether the property has an evidentiary use. *See People v. White*, 701 P.2d 870, 871 (Colo. App. 1985) (trial court has duty to return property to owner once all evidentiary uses have been completed). In response to a motion for return of property, the prosecution routinely argue that some or all of the seized property should not be returned because it may be needed as evidence if the defendant is granted a new trial after a



successful direct appeal or postconviction proceeding.

If a trial court loses jurisdiction to receive a motion for return of property in a criminal case once a sentence has been imposed, there is no meaningful remedy for the return of lawfully seized property that may have an evidentiary use after sentencing because the trial court loses jurisdiction before the evidentiary use of the property is completed.

Under *Chavez*, a trial court's jurisdiction to receive a motion for the return of lawfully seized property ends when the sentence is imposed, but the evidentiary use of the property may not end until the conviction is subsequently affirmed on appeal and postconviction relief has been denied. The consequence of the ruling in *Chavez* is that a trial court's jurisdiction ends before the evidentiary use of the property ends, which means that there is no meaningful remedy in a criminal case for property that may have an evidentiary use after sentencing.

Although current precedent may not provide a meaningful remedy for the return of lawfully seized property that may have an evidentiary use after sentencing, there are meaningful remedies for the return of *unlawfully* seized property and lawfully seized property that does not have an evidentiary use after sentencing. Resolving the court of appeals' split in favor of *Hargrave* will ensure that there are meaningful remedies in criminal cases for the return of all seized

property. It will also ensure judicial efficiency because a motion for return of property will be litigated by the judge and the parties who are familiar with the evidentiary issues in the criminal case. And it will ensure that indigent defendants will be represented by counsel in the litigation for return of their seized property.

If this court resolves the split in favor of *Chavez*, a replevin action would be the only remedy for the return of seized property that could not be returned while the criminal court had jurisdiction.

**(1) There are meaningful remedies for the return of property that was unlawfully seized.**

The return of *unlawfully* seized property is governed by Crim. P. 41(e), which requires the return of the property “unless otherwise subject to lawful detention.”

Recently, in *Strepka v. People*, this court ruled that a trial court retains jurisdiction to rule on a motion for return of unlawfully seized property after a case is dismissed so long as the motion is filed before the appeal deadline expires. *Strepka*, 489 P.3d at 1229.

And the court of appeals has ruled that, even if a criminal case has not been filed, “a person who has had property unlawfully seized by law enforcement officers, and who has not been charged with a crime, has standing to bring a claim for return of the property under Crim. P. 41(e).” *Boudette v. State*, 425 P.3d 1228,

1229 (Colo. App. 2018); *see also In re Search Warrant for 2045 Franklin*, 709 P.2d 597, 599 (Colo. App. 1985).

Accordingly, there are meaningful remedies for the return of property that was unlawfully seized. When a court rules under Crim. P. 41(e) that property was unlawfully seized, it can be returned to the owner immediately. The prosecution cannot argue that the property must be detained until it has no evidentiary use because unlawfully seized property has no evidentiary use. *See* Crim. P. 41(e) (unlawfully seized property not admissible in evidence at “any hearing or trial.”).

**(2) There are meaningful remedies for the return of property that was lawfully seized and has no evidentiary use.**

Once all evidentiary uses of lawfully seized property have been completed, the trial court has a duty to return it to the owner. *White*, 701 P.2d at 871.

In *White*, a police officer’s service revolver, which was allegedly used by the defendant to commit second degree murder, was seized from the defendant at the time of his arrest. *Id.* at 870. The defendant was acquitted at trial, and, six days later, the police officer filed a motion for the return of the revolver. *Id.* The trial court denied the motion, and, on appeal, the court of appeals reversed and remanded for the trial court to order the return of the revolver, finding it was not contraband nor the fruit of illegal activity by the police officer. *Id.* at 871.

There was no discussion about whether the trial court had jurisdiction to address the motion for return of property after acquittal, but the decision by the court of appeals, more than 25 years before *Strepka*, is consistent with this court's decision in *Strepka* that a trial court retains jurisdiction until the appeal deadline expires. *See Strepka*, 489 P.3d at 1229.

What is notable about the *White* decision is that the court of appeals acknowledged that a trial court or prosecutor may detain lawfully seized property until its evidentiary use has been completed. *White*, 701 P.2d at 871. In *White* that would have been an easy determination to make because the defendant was acquitted, the charge was dismissed, and the prosecution was barred by double jeopardy from retrying the defendant.

It is more difficult to make this determination when a defendant is found guilty after a trial because of the possibility of a new trial after a successful appeal or postconviction proceeding and the possible need for the evidence at a new trial. But to the extent a court can make the determination that there is no evidentiary use for seized property, there is a meaningful remedy for the return of that property immediately after trial. *See People v. Angerstein*, 572 P.2d 479, 481 (Colo. 1977) (providing procedure for return of lawfully seized property, but ruling that the defendants in this case had no right to its return because the property was

“designed or intended for use as a means of committing a criminal offense or the possession of which is illegal”).

And even though contraband cannot be returned, there is a meaningful procedure for that determination to be made. *See, e.g., People v. Ward*, 685 P.2d 238, 239-40 (Colo. App. 1984) (“Once a defendant has made a *prima facie* showing of ownership of the seized property . . . the burden shifts to the prosecution to show that the property was the fruit of an illegal activity . . . or to show a connection between the seized property and criminal activity.”) (citing *People v. Bustam*, 641 P.2d 968 (Colo. 1982)).

**(3) There may not be a meaningful remedy for property that was lawfully seized and may have an evidentiary use after sentencing.**

As stated above, divisions of the court of appeals are split on whether a trial court retains jurisdiction in a criminal case to receive a motion for return of lawfully seized property after the imposition of sentencing. *Compare Hargrave*, 179 P.3d at 230 (a trial court has jurisdiction to address a defendant’s post-sentence motion for return of property) *with Chavez*, 487 P.3d at 999 (a trial court has no jurisdiction to address a motion for return of seized property once a valid sentence has been imposed).

In *People v. Hargrave*, a division of the court of appeals concluded that “the

trial court has ancillary jurisdiction, or inherent power, to entertain defendant's post-sentence motion for return of property." *Hargrave*, 179 P.3d at 230. It concluded that its decision was bolstered because it furthers judicial economy:

That is, the court, prosecuting attorney, and defense counsel were involved in the criminal proceeding, are aware of the pertinent circumstances, and can make the requisite decisions without the necessity of extended discovery and pretrial delays typically attendant to civil proceedings. Further, because of the mutually shared knowledge, these matters are typically handled in a relatively perfunctory manner with, as here, the prosecuting attorney confessing the motion.

*Id.* The division stated that it was "persuaded by the rationale of, and the authority relied upon by, the division of [the court of appeals] in *People v. Rautenkranz*, [641 P.2d 317 (Colo. App. 1982)]," and it declined to follow the divisions in *People v. Wiedemer*, [692 P.2d 327, 329 (Colo. App. 1984)] and *People v. Galves*, [955 P.2d 582 (Colo. App. 1997)]." *Id.*

And then in *People v. Chavez*, another division declined to follow *Hargrave* and ruled that "once a valid sentence is imposed, apart from the limited claims described in Crim. P. 35..., a criminal court has no further jurisdiction." *Chavez*, 487 P.3d at 999 (citing *Wiedemer*, 692 P.2d at 329).

This court needs to resolve this split in this case. If this court agrees with *Chavez*, criminal defendants will not have a meaningful remedy in a criminal case

for the return of lawfully seized property that has an evidentiary use at the time of sentencing but no longer has an evidentiary use once the defendant's direct appeal and postconviction proceedings have concluded. But if this court agrees with *Hargrave*, defendants will have a meaningful remedy in a criminal case and barring a replevin claim in a civil case will therefore not violate their constitutional right against deprivation of property without due process.

As a matter of law, there is no clear jurisdictional bar to a trial court addressing a post-sentence motion for return of lawfully seized property that no longer has an evidentiary use. In concluding that a trial court has no subject matter jurisdiction to receive a motion for return of property after a valid sentence has been imposed, the *Chavez* division relied on *Wiedemer* in which another division ruled that “[a] trial court loses jurisdiction upon imposition of a valid sentence except under the circumstances specified in Crim. P. 35.” *Wiedemer*, 692 P.2d at 329. For this proposition, the *Wiedemer* division relied on the decision in *Smith v. Johns* in which this court ruled that a trial court loses jurisdiction to *change a sentence* after the sentence has been imposed unless the original sentence is illegal. *Smith v. Johns*, 532 P.2d 49, 50 (Colo. 1975) (citing *People ex rel. Dunbar v. District Court*, 502 P.2d 420, 421 (Colo. 1972) (trial court loses jurisdiction “to change the valid and legal sentence imposed after the defendant commenced

serving his sentence”) (emphasis added) and *Guerin v. Fullerton*, 389 P.2d 83, 84-85 (Colo. 1964) (same).) This court did not go as far as ruling that a trial court loses *all* jurisdiction in the case once a valid sentence has been imposed.

The *Chavez* division also relied on the decision in *People v. Campbell* in which this court quoted the ruling in *Smith v. Johns*—that if the sentence imposed “is a valid one, the trial court loses jurisdiction *to change the sentence.*” *People v. Campbell*, 738 P.2d 1179, 1180 (Colo. 1987) (quoting *Smith*, 532 P.2d at 50) (emphasis added). And the *Chavez* division quoted part of the *Campbell* decision: “The general rule is that once a trial court enters a final judgment in a proceeding, it has no power to take further action.” *Chavez*, 487 P.3d at 999 (quoting *Campbell*, 738 P.2d at 1180). But in making this statement in *Campbell*, this court relied on authority relating to a trial court’s lack of *concurrent* jurisdiction not its lack of subject matter jurisdiction. *Campbell*, 738 P.2d at 1180-81 (citing *Brooke v. People*, 339 P.2d 993, 996 (Colo. 1959) (once an appeal has been filed, jurisdiction is vested in the appellate court)). So, the ruling in *Chavez*—that a trial court loses subject matter jurisdiction to receive a motion for return of property once a sentence has been imposed—is not supported by this court’s precedent.

As a matter of policy, it is better to litigate the return of seized property in the criminal case rather than a separate civil replevin case. As stated by the court



of appeals in *Hargrave*, this would further judicial economy because the court and the parties in the criminal case are aware of the relevant circumstances, there is no need for extended discovery, and the motion can be handled in a perfunctory manner. *Hargrave*, 179 P.3d at 230. This would also ensure that indigent defendants are represented by counsel in the litigation for return of their seized property because the public defender and ADC have the authority to prosecute any appeals or other remedies before or after the conviction that they consider to be in the interest of justice, § 21-1-104(1)(b), C.R.S. (2021) and § 21-2-104(1)(b), C.R.S. (2021), but this authority does not extend to providing representation in a civil replevin case. *See, e.g., People v. Shank*, 420 P.3d 240, 246 (Colo. 2018) (“the statute authorizing public defenders to represent indigent defendants does not extend to civil forfeiture actions”).

## **CONCLUSION**

The CCDB and ADC request that the court consider the legal and policy arguments in this amicus brief and ensure that its decision in this case preserves the constitutional right against deprivation of property without due process.

Respectfully submitted,  
THE NOBLE LAW FIRM, LLC

s/ Antony Noble

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Antony Noble, Reg. No. 33910  
Attorney for *Amici Curiae*

### **CERTIFICATE OF SERVICE**

I certify that on the 4th day of May 2022, this **BRIEF OF AMICI CURIAE COLORADO CRIMINAL DEFENSE BAR AND OFFICE OF ALTERNATE DEFENSE COUNSEL IN SUPPORT OF PETITIONER** was served via Colorado Courts E-filing on Petitioner James Woo and Assistant County Attorney Mary Ritchie.

s/ Antony Noble