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Supreme Court of Colorado
Colorado State Judicial Building
2 East 14th Avenue
Denver, Colorado 80203

Colorado Court of Appeals
Court of Appeals Case No. 2019CA1360
Opinion by Judge Navarro: Fox and Casebolt, JJ. Concur

El Paso County District Court
Judge Larry E. Schwartz
Case No. 2019CV103

Petitioner:
James Woo

v.

Respondent:
El Paso County Sheriff's Office and Fourth Judicial District Attorney's Office.

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Case Number: 2020SC865

RESPONDENTS' ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R.28 or C.A.R. 28.1 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g). It contains 5,507 **words**, which is not more than the 9,500 word limit (reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

> In response to each issue raised, the respondent must provide under a separate heading before the discussion of the issue, a statement indicating whether respondent agrees with petitioner's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or C.A.R. 28.1 and C.A.R. 32.

/s/ *Mary Ritchie*
Mary Margaret Ritchie, #46745
Signature of Attorney for Respondent

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I. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

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.

II. STATEMENT OF THE CASE

A. Nature of the Case

This case arises from a Verified Complaint in Replevin ("complaint"). Petitioner James Woo ("Woo"), who is currently incarcerated, alleges respondents El Paso County Sheriff's Office ("Sheriff") and Fourth Judicial District Attorney's Office ("Prosecutors") seized his personal property on or after **April 2, 2016,** as part of the State's investigation of first-degree murder against him. (CF, p. 1 ¶ 4; p. 2 ¶ 6.) Petitioner alleges that detention of the seized property is wrongful and it should be returned to him, because it "lacks evidentiary value in his criminal case." *Id.*

Accordingly, he seeks reversal of the court of appeals order affirming the district court's dismissal of petitioner's complaint with prejudice, for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

Sheriff and Prosecutors respectfully request this Court affirm the order of the court of appeals in its entirety.

B. Relevant Facts and Procedural History

Petitioner's criminal trial concluded on **February 6, 2018.** (CF, p. 1, ¶ 4.) He filed notice of direct appeal on or about **March 26, 2018**.[1] This appeal was accepted for review on **March 29, 2018,** and was pending for over four years, until last month, when it was remanded back to the criminal trial court on or about **May 9, 2022**.[2]

Approximately two months after Woo's direct criminal appeal was accepted, on **May 22, 2018**, petitioner filed a motion to release evidence. (CF, pp. 33-35.) Three days later, on **May 25, 2018**, the trial court[3] heard the motion and ordered Woo to state what items he wanted and why they were requested.[4] Woo ignored the order.

Ten months later on **March 22, 2019**, the prosecution filed a *Response to Defendant's Request for Return of Property*, declining to release computers or other physical evidence because it may be needed in a subsequent 35(c) hearing; advising there was evidence Woo stole from his employer; and requesting that Woo comply with the Court order to submit a list of the specific items requested. (CF, pp. 31-32.)

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[1] *See* Addendum pp. ADD000001-ADD000013, Appellant's Notice of Appeal.
[2] *See* Addendum p. ADD000014, Mandate.
[3] All references to the "trial court" means to the underlying criminal court, Case No. 2016CR0002069.
[4] OB, Petitioner's Appendix C, p. 45, Minute Order. This order also refers to 18CV30938, a related wrongful death action against Woo, currently stayed.

Woo ignored the Prosecutor's Response.

Instead, on or about **April 18, 2019,** Woo filed this civil action in Replevin against Sheriff and Prosecutors for return of much of the same property. (CF, p. 1.) On **July 3, 2019, t**he district court granted respondents motion to dismiss (CF, pp. 64-65.)[5] Petitioner appealed. On **September 10, 2020**, the court of appeal affirmed. This Court granted petitioner's Writ of Certiorari on **August 16, 2021**.

C. The Ruling, Judgement and Order Presented for Review

The Order presented for review is the published opinion of the court of appeal dated **September 10, 2020,** affirming the district court's Judgment dismissing petitioner's complaint with prejudice, upon the basis of sovereign immunity under the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq*. ("CGIA") ("COA Order"). *Woo v. El Paso Cnty. Sheriff's Off.*, 2020 COA 134, ¶¶ 13-14, 490 P.3d 884, 887–88, *reh'g denied* (Oct. 1, 2020), *cert. granted in part*, No. 20SC865, 2021 WL 3713304 (Colo. Aug. 16, 2021).

III. SUMMARY OF ARGUMENT

A. No Violation of Procedural Due Process:

Petitioner argues that the district court dismissal violates his 14th amendment

[5] All references to the "district court" means the underlying civil court, Case No. 2019CV103.

right to procedural due process because: 1) the criminal court is "not required" to address a post-sentence motion for return of legally seized property; 2) the criminal court lacks jurisdiction where the motion for return of property involves "substantial new fact finding"; and 3) the court of appeals is split on whether the criminal court has jurisdiction to address a post-sentence motion for legally seized property. These arguments fail.

First, petitioner cites no Colorado statute or substantive caselaw which stands for the proposition that the **CGIA** must yield to an **unresolved** split in the court of appeal regarding whether the **criminal** court retains jurisdiction to address post-sentence motions for return of property. As long as criminal trial courts have the discretion to follow *Hargrave* and its progeny, that question is a matter for the general assembly to decide. Indeed, only one of the relevant criminal opinions remarks in a footnote, that "courts of general jurisdiction and may entertain a civil action seeking equitable relief." *People v. Chavez*, 2018 COA 139, 487 P.3d 997, 999. *Chavez* did not examine the only civil opinion to address whether CGIA can insulate public entities and their staff from a civil action in replevin, *City & Cty. Of Denver v. Desert Truck Sales, Inc.*, 837 P.2d 759, 765 (Colo. 1992). In *Desert Truck*, this Court held *en banc* that the CGIA's preclusion of a replevin claim did **not** violate the property owners due process rights because he had a mandatory right to a post-

seizure hearing.

Unlike *Desert Truck,* Petitioner has been heard at least twice in the criminal trial court on his request for return of property. Therefore his argument that such relief is not mandatory, has little appeal. The fact petitioner did not get the relief he wants from the criminal court does not demonstrate the criminal court remedy was unavailable or inadequate." *Williams v. Carbajol,* No. 20-CV-02119-NYW, 2021 WL 5579114, at *13 (D. Colo. Nov. 30, 2021) (citation omitted.) Instead, the record reflects that petitioner's own failure to comply with the trial court's **May 25, 2018** order rendered relief "unavailable" to him. This is a self-inflicted obstacle only petitioner had the ability to cure. (OB, Petitioner's Appendix C, p. 45.)

Finally, petitioner's argument that the criminal court lacks jurisdiction because his motion for return of property involves "substantial new fact finding" is purely speculative. This case has been pending in the trial court for nearly five years; that's why 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. (**Brief of *Amici Curiae***(Amici), p. 11.)

B. No Substantive Due Process Violation

Petitioner argues that the CGIA, as applied by the District Court, violates his 14th Amendment right to substantive due process, and cannot does not withstand

strict scrutiny required to overcome his fundamental protected property right, because it allows the Sheriff and Prosecutors arbitrary and wrongful deprivation of his property. This argument also fails.

At all times relevant to dismissal of the civil action for return of items seized in the criminal matter, Woo's criminal appeal was pending.[6] Courts universally recognize the general principle that once an appeal is perfected, jurisdiction over the case is transferred from the trial court to the appellate court for all essential purposes with regard to the substantive issues that are the subject of the appeal. *In re W.C.*, 2020 CO 2, ¶¶ 11-12, 456 P.3d 1261, 1263–64, *reh'g denied* (Feb. 24, 2020).

Woo's notice of appeal in the criminal case paints a very broad brush, which therefore includes substantive legal issues regarding the initial seizure of some or all of the items he wants returned. The civil district court therefore lacked authority to compel the Sheriff and Prosecutors to return petitioners items. Specifically, the district court did not have subject matter jurisdiction to return Woo's items, because the evidentiary value of his property was under the exclusive jurisdiction of the Court of Appeal.

[6] Civil complaint filed on April 18, 2019 (CF, p. 1). The district court dismissed it on July 3, 2019 **(**CF, pp. 64-65).

A protected interest in property only exists when a person has a legitimate claim of entitlement to the property. *Bd. of Regents v. Roth,* 408 U.S. 564 (1972); *Ewy v. Sturtevant,* 962 P.2d 991 (Colo. App. 1998). The trial court and prosecutor were authorized to detain all lawfully seized property until its evidentiary use has been completed *People v. White*, 701 P.2d 870, 871 (Colo. App. 1985). The court of appeals had jurisdiction to review Woo's contention that some items were illegally seized. Therefore, the trial court properly suspended efforts to determine evidentiary value; and the civil district court had neither the means nor the authority to determine whether Petitioner had a legitimate claim for return.

Accordingly, no fundamental right to the property could be proved at the time of the district court dismissal, and respondents needed only act upon rational ("reasonable") basis. However, even faced with strict scrutiny, the jurisdictional transfer to the court of appeal withstands that test. Currently, even though the matter has been remanded back to the trial court, rules regarding priority of actions require that the civil district court must defer to the criminal trial court; as both were required to defer to the court of appeal. *Town of Minturn v. Sensible Hous. Co*., 2012 CO 23, ¶ 19, 273 P.3d 1154, 1159.

Last, even the Brief of *Amici Curiae* admits that "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." (Amici, p. 11.) Therefore, the district court dismissal was well within the law.

C. Petitioner's Civil Claim is Not Ripe

While it appears that the trial court may rely upon the split to decline to hear a post-sentence motion, petitioner's civil claim is not yet ripe, because it is purely **speculative** as to whether the criminal court would decline. In fact, the record here suggests just the opposite, i.e., the trial court addressed petitioner's motion for return of items contained on his hard drives three days after it was filed. It is well settled that courts should "refuse to consider uncertain or contingent future matters that suppose a speculative injury that may never occur." *Bd. of Dirs., Metro Wastewater Reclamation Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 105 P.3d 653, 656 (Colo. 2005).

IV. ARGUMENT – ISSUE 1

A. No Violation of As-Applied Procedural Due Process

a. Standard of Review

Woo contends that barring his civil action violates his federal and state constitutional rights against deprivations of property without due process of law. *See* U.S. Const. amend. XIV, § 1; Colo. Const. art. II, § 25. He does not present a facial challenge to the CGIA itself; so, the court must decide whether the CGIA is

unconstitutional *as-applied* to his claim.

Review of a constitutional claim in the district court, is de novo. *See People v. Perez-Hernandez*, 2013 COA 160, ¶ 10, 348 P.3d 451. The court presumes a statute is constitutional, and petitioner bears the burden to prove its unconstitutionality beyond a reasonable doubt. *TABOR Found. v. Reg'l Transp. Dist.*, 2018 CO 29, ¶ 15, 416 P.3d 101. To show a procedural due process violation, Woo must first identify a liberty or property interest that has been interfered with by the state. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). If he can do so, Woo must show that the procedures attendant to that deprivation were constitutionally insufficient. *Id*

b. Preservation

Respondents agree that this issue was preserved.

c. Discussion: Woo Was Not Deprived of a Protected Property Interest

There is no challenge to the court of appeals finding that the CGIA does not waive immunity under the *facts* of this case, the question is whether this violates Woo's procedural due process rights. The court presumes the CGIA is constitutional, and petitioner bears the burden to prove its unconstitutionality beyond a reasonable doubt. *TABOR Found. v. Reg'l Transp. Dist.*, 2018 CO 29, ¶ 15, 416 P.3d 101. To show a procedural due process violation, Woo must first identify a

liberty or property interest that has been interfered with by the state. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.' " *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). A protected interest in property exists when a person has a legitimate claim of entitlement to the property. *Bd. of Regents v. Roth*, 408 U.S. 564 (1972); *Ewy v. Sturtevant*, 962 P.2d 991 (Colo. App. 1998). The parameters of protected property interests are largely established by state law.

To the extent Woo claims items were "unlawfully seized", Woo had a mandatory, immediate, and meaningful remedy for return in 2016, via his Motions to Suppress under Crim.P. 41(e).[7] To the extent Woo's property was "lawfully seized", he is not entitled to return until all evidentiary uses are complete. *People v. White*, 701 P.2d 870, 871 (Colo. App. 1985), (Amici, p. 11). In *White*, the court of appeals acknowledges that a trial court or prosecutor may detain lawfully seized property until its evidentiary use has been completed. *Id.* In that case, the charge

[7] Respondents hereby request Judicial Notice of electronic criminal court file in El Paso County District Court case no: 2016CR2069, *Motion to Suppress Evidence Seized during Unlawful Search,* September 29, 2017 and *Motion to Suppress Evidence, Search and Seizure of Items Recovered in Public Storage Unit,* June 30, 2017. A Court may take judicial notice of its own records. *People v. Linares,* App. 2008, 195 P.3d 1130, *certiorari denied* 2008 WL 4958529. Judicial Notice may be taken at any state of the proceeding. CRE 201.

was dismissed, and the prosecution was barred by double jeopardy from retrying the defendant, so it followed that all evidentiary use was complete. *Id*.

In the present case, defendant was found guilty after a trial, and there was a real possibility of a new trial after a successful appeal or post-conviction proceeding, rendering evidentiary use of the seized property incomplete. Therefore, Woo cannot prove he has a property interest protected by the constitution.

d. Return of Property Procedures Afforded to Woo By the Trial Court Were Constitutionally Sufficient

Woo fails to satisfy the first prong the inquiry can end here. However, in an abundance of caution, and without waiving any argument, respondents submit that the petitioner cannot meet the second prong of the constitutionality test to show that the criminal court procedures for return of property were constitutionally insufficient. *Whatley v. Summit Cty. Bd. of Cty. Comm'rs*, 77 P.3d 793, 798 (Colo. App. 2003) (citation omitted).

The exact procedures required by the Constitution depend on the circumstances of a given case, however, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful

manner. *Id*. Thus the question at issue here becomes whether CGIA allows petitioner a meaningful opportunity to be heard.[8]

In the Opinion presently under review, the court of appeal found *City & Cty. of Denver v. Desert Truck Sales, Inc.*, 837 P.2d 759, 765 (Colo. 1992) instructive, because the supreme court considered whether applying the CGIA to preclude the replevin action violated the purported property owner's due process rights. *Id.*, 837 P.2d at 768. Like *Woo*, *Desert Truck* argued that barring a replevin action denied due process because it was the only remedy to recover the property — there, a vehicle seized by police on suspicion of theft and then detained because its vehicle identification number had been removed. *Id.* at 762. The Supreme Court rejected that argument, reasoning that the plaintiff had a statutory right to a post-seizure hearing to prove ownership and obtain possession of the car, and that the hearing was mandatory. *Id.* at 767-68 (citing § 42-5-110, C.R.S. 2019). The court concluded that this procedure adequately protected the plaintiff's due process rights. *Id.*; cf. *Hudson*, 468 U.S. at 533 ("[A]n unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of

[8] *See also Hudson v. Palmer*, 468 U.S. 517, 533(1984) ("For intentional, as for negligent deprivations of property by state employees, *the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy*.")

the Due Process Clause of the Fourteenth Amendment if a meaningful post deprivation remedy for the loss is available.").

Petitioner disagrees and argues that the district court's dismissal is constitutionally insufficient, because the **criminal** court is "not required" to address a post-sentence motion for return of legally seized property, and may therefore decline to hear it, leaving him no meaningful remedy. As a pure hypothetical, this might be a plausible argument. However, the record in this case reflects that petitioner did have an adequate post-seizure remedy when he filed, and was heard by the court, on at least three motions to for return of the property in his criminal case. First on his motions to suppress shortly after his arrest, and again on May 25, 2018 when the trial court considered his motion for return after sentencing. (CF, pp. 33-35.) The suppression hearing resolves the issue of whether the property was lawfully seized.

Even though *Chavez* remarks in a footnote that "courts of general jurisdiction and may entertain a civil action seeking equitable relief." *People v. Chavez*, 2018 COA 139. Petitioner cites **no** statute, caselaw or constitution which mandates that the **civil** district court fill in a *potential* procedural gap, until the split of authority which governs **criminal** procedure is resolved.

There is no need for the district court to weigh-in. If the court concludes that

property was unlawfully seized under Crim. P. 41(e), it must be returned to the owner immediately. The prosecution can't 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.").

The post-trial hearing resolves whether lawfully seized evidence may still have evidentiary use after trial and sentencing. There is no specific procedural rule in a criminal action to seek return of property that was legally seized. However, longstanding Colorado case law recognizes a procedural means for a criminal defendant to file a motion for return of such property in the criminal court. *See, e.g.*, *People v. Hargrave*, 179 P.3d 226, 228-29 (Colo. App. 2007); *People v. Fordyce*, 705 P.2d 8, 9 (Colo. App. 1985); *People v. Wiedemer*, 692 P.2d 327, 329 (Colo. App. 1984); *People v. Rautenkranz*, 641 P.2d 317, 318 (Colo. App. 1982); *People v. Buggs*, 631 P.2d 1200, 1201 (Colo. App. 1981); *cf. People v. Angerstein*, 194 Colo. 376, 379, 572 P.2d 479, 481 (1977) (approving this practice but holding that, as to some categories of legally seized property, there is no right to have it returned).

Specifically, a defendant may file a verified motion seeking the return of that property with the same court in which the charges were brought. *Rautenkranz*, 641

P.2d at 318. The court should then hold an evidentiary hearing to determine the parties' rights. *Id.* The defendant makes a prima facie case of ownership by showing that the items were seized from him at the time of his arrest and that they are being held by law enforcement authorities. *Fordyce*, 705 P.2d at 9. The burden then shifts to the prosecution to prove by a preponderance of the evidence that the items were the fruit of an illegal activity or that a connection exists between those items and criminal activity. *Id.*

Therefore the court of appeals was correct in concluding that this procedure in the criminal court provides adequate protection against the risk of an erroneous deprivation of property. *Woo*, 2020 COA 134 at ¶ 21, citing *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) ("[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process."). As *Woo* explains, Crim. P. 41(d)(5)(VI) requires officers who seize property under a warrant to issue a receipt listing the properties taken, so a defendant will have notice of what property should be included in the motion for return of property. *Id*. The defendant may present evidence of ownership at the hearing, and the burden to establish a *prima facia* case is not high. *Id.,* ref. *Fordyce*, 705 P.2d at 9. The aggrieved party may file a timely appeal of the district court's ruling on the motion, providing the opportunity to correct an erroneous order. *Id*., ref. *Buggs*, 631 P.2d at 1201.

Still, Petitioner contends that this procedure is insufficient because, unlike the post-seizure proceeding discussed in *Desert Truck Sales*, a hearing on a motion for return of property is not mandatory. The *Woo* decision reasons that this Court concluded that the hearing in *Desert Truck Sales* was mandatory, because it must be granted "upon request." 837 P.2d at 768. Similarly, where a timely motion for return of property and any response present pivotal factual disputes, a hearing would also be required. *See Rautenkranz*, 641 P.2d at 318 ("[O]n the filing of the motion an evidentiary hearing should be held."). Not only did the trial court do so in this case; divisions of the court of appeals have reversed district courts' rulings that decline to hold a hearing on a motion for return of property. *See id*.; *Buggs*, 631 P.2d at 1201.

Nor can Petitioner establish that such process was inadequate. Due process does not guarantee that claimants will always receive the relief they request. Rather, due process ensures that property will not be taken away without "notice and the opportunity to be heard by an impartial tribunal." *Wecker v. TBL Excavating, Inc.*, 908 P.2d 1186, 1188 (Colo. App. 1995). Again, petitioner had at least three hearings, so we cannot say that he was denied an opportunity to be heard. The fact that petitioner did not obtain the relief he wants does not demonstrate a remedy was unavailable or inadequate. *Williams v. Carbajol*, No. 20-CV-02119-NYW, 2021 WL 5579114, at *13 (D. Colo. Nov. 30, 2021) (citation omitted.) Instead, the record

reflects that Petitioner's own failure to comply with the trial court's order to provide details, rendered relief "unavailable" to him, and it was his error to cure. (OB, p. 45)

V. ARGUMENT – ISSUE 2

A. No Violation of Substantive Due Process As-Applied:

a. Standard of Review

Review of a constitutional claim in the district court, is de novo. *See People v. Perez-Hernandez,* 2013 COA 160, ¶ 10, 348 P.3d 451. The court presumes a statute is constitutional, and petitioner bears the burden to prove its unconstitutionality beyond a reasonable doubt. *TABOR Found. v. Reg'l Transp. Dist.*, 2018 CO 29, ¶ 15, 416 P.3d 101.

Substantive due process guarantees that the state will not deprive a person of those rights for an arbitrary reason regardless of how fair the procedures are that are used in making the decision. *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 81 F. Supp. 2d 1090, 1100 (D. Colo. 2000).

b. Preservation

Respondents agree that this issue was preserved.

c. Discussion: The CGIA Does Not Allow Arbitrary Deprivation of Property

Petitioner argues that the CGIA does not withstand strict scrutiny and deprives

him of his right to substantive due process, because there is no compelling state interest in his claim, and if there is, CGIA does not do so by the least restrictive means. (OB, p. 34) Sheriff and Prosecutors disagree.

As a threshold matter, Woo has not met his burden to prove that he has a protected property right under the 14th Amendment. Therefore, respondents' reason for detention is subject to the rational basis test.

Next, at all times relevant to the dismissal of Woo's civil action for return of items seized in the criminal matter, his criminal appeal was pending.[9] Courts universally recognize the general principle that once an appeal is perfected, jurisdiction over the case is transferred from the trial court to the appellate court for all essential purposes with regard to the substantive issues that are the subject of the appeal. *In re W.C.*, 2020 CO 2, ¶¶ 11-12, 456 P.3d 1261, 1263–64, *reh'g denied* (Feb. 24, 2020). Indeed, this Court instructs:

> Allowing both trial courts and the court of appeals to adjudicate the same issue simultaneously would risk the court of appeals issuing moot opinions because the trial court may have already modified the underlying order or judgment. This is an untenable waste of judicial resources. Additionally, allowing different courts to enter rulings on the same order creates the risk of significant confusion. Potentially, the parties would be left to speculate which order, or part of an order, is in effect at any given time. For example, if the court of appeals affirmed

[9] Complaint filed on April 18, 2019 (CF, p. 1). The District Court dismissed it on July 3, 2019 **(**CF, pp. 64-65).

> an order that the trial court had already modified, both the trial court and the parties could understandably be confused as to which order—affirmed or modified—they are supposed to follow.

Id.

Since Woo's notice of appeal paints a very broad brush, it necessarily concerns substantive issues regarding the initial seizure of some or all of the items he wants returned. Thus, the respondents pass even strict scrutiny, because Prosecutors were legally authorized to detain lawfully seized property until its evidentiary use had been completed. *White*, 701 P.2d at 871. The civil district court, however, did not have jurisdiction or clear legal authority to determine whether petitioner had a legitimate claim to the seized property, at the time it dismissed the complaint.

The district court did, on the other hand, have subject matter jurisdiction over respondents' motion to dismiss *pursuant to CGIA*, because CGIA was not a matter of legal substance affecting the criminal judgement being appealed. The court of appeals thoughtful examination of this Court's opinion in *Dessert Truck Sales* and the issue of due process, shows that it was not arbitrary to conclude that petitioners claim for replevin in detinet is an action which lies or could lie in tort, and that as a result, the CGIA bars such an action because no waiver applies. *Woo*, 2020 COA 134 at ¶¶ 13-14.

Finally, the rules regarding priority of actions require that the civil district court must defer to the criminal trial court, and both must defer to the court of appeal. *Town of Minturn v. Sensible Hous. Co.*, 2012 CO 23, ¶ 19, 273 P.3d 1154, 1159.

> Where two courts may exercise jurisdiction over the same parties and subject matter, we have stated that the first action filed has priority of jurisdiction, and that the second action must be stayed until the first is finally determined ("priority rule"). The purpose of the priority rule is to promote judicial efficiency and "avoid unnecessary duplication and multiplicity of suits." Other considerations that may serve the trial court in the exercise of its discretion in granting or denying a stay include expense and convenience, availability of witnesses, the stage to which proceedings in the first action have already progressed, and the possibility of prejudice resulting from the stay.

Town of Minturn v. Sensible Hous. Co., 2012 CO 23, ¶¶ 17-19, 273 P.3d 1154, 1159 (internal citations omitted).

Based upon the foregoing, respondents respectfully submit that dismissal under CGIA was not arbitrary, because even Amicus admit that "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." (Amici, p. 11.)

VI. ARGUMENT – ISSUE 3

A. Petitioner's Claim is Not Ripe

a. Standard of Review

Courts consider de novo whether an issue is ripe for review. *Youngs v. Indus. Claim Appeals Off.*, 2012 COA 85M, ¶ 16.

Ripeness implicates subject matter jurisdiction. *DiCocco v. Nat'l Gen. Ins. Co.*, 140 P.3d 314, 316 (Colo. App. 2006) ("A court lacks subject matter jurisdiction to decide an issue that is not ripe for adjudication."). A court may not decide cases over which it does not have subject matter jurisdiction. *Long v. Cordain*, 2014 COA 177, ¶ 10. "Subject matter jurisdiction cannot be conferred by waiver or consent of the parties; lack of subject matter jurisdiction requires dismissal." *Id.* The Petitioner bears the burden of establishing jurisdiction. *Id.*; *DiCocco*, 140 P.3d at 316.

Ripeness tests whether an issue is real, immediate, and fit for adjudication. *Olivas-Soto v. Indus. Claim Appeals Off.*, 143 P.3d 1178, 1180 (Colo. App. 2006). Courts should "refuse to consider uncertain or contingent future matters that suppose a speculative injury that may never occur." *Bd. of Dirs., Metro Wastewater Reclamation Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 105 P.3d 653, 656 (Colo. 2005); *see also Robertson v. Westminster Mall Co.*, 43 P.3d 622, 628 (Colo. App. 2001) ("A court has no jurisdiction . . . to decide a case on a speculative, hypothetical, or contingent set of facts.").

On appeal, the trial court's factual findings are reviewed for clear error and legal questions are reviewed de novo. *Id.* When the trial court's judgment is correct, but upon the basis of legal theories not cited by the trial court, the appellate court may affirm the judgment on the alternative basis so long as the factual support for

the alternative basis is in the record. *Farmers Group, Inc. v. Williams*, 805 P.2d 419, 428 (Colo. 1991).

b. Preservation

Ripeness was not raised by the parties. However, the court may address it because ripeness concerns the court's subject matter jurisdiction. *People In Int. of M.S.*, 2017 COA 60, ¶¶ 13-14; *DiCocco*, 140 P.3d at 316. Issues regarding subject matter jurisdiction may be raised at any time, *see* C.R.C.P. 12(h)(3).

c. Discussion

Petitioner's argument that the trial court **may** decline jurisdiction and leave him without remedy; also begs the question of whether his claim is ripe. Respondents submit it is not, because the trial court also has discretion to **accept** jurisdiction, and it is pure **speculation** that it will not. The doctrine of ripeness recognizes that courts will not consider uncertain or contingent future matters because the injury is speculative and may never occur. *DiCocco v. National General Ins. Co.*, 140 P.3d 314, 316 (Colo. App. 2006), citing *Stell v. Boulder County Department of Social Services*, 92 P.3d 910 (Colo. 2004).

This doctrine is not discretionary, as a court has no jurisdiction to render an advisory opinion on a controversy that is not yet ripe or to decide a case on a speculative, hypothetical, or contingent set of facts. *Robertson v. Westminster Mall*

Co., 43 P.3d 622, 628 (Colo. App. 2001). To be ripe, the issue must be "real, immediate, and fit for adjudication" *(id*.) citing *Board of Directors v. National Union Fire Insurance Co.*, 105 P.3d 653, 656 (Colo. 2005)(where insured sought an answer to a not-yet ripe insurance question, district court should have dismissed insured's petition).

Even Amicus recognizes that much of the case law aligned with *Chavez* does not hold that a trial court loses *all* jurisdiction after sentencing, only the jurisdiction to *change* a valid sentence. *Smith v. Johns*, 532 P.2d 49, 50 (Colo. 1975); *People ex rel. Dunbar v. District Court*, 502 P.2d 420, 421 (Colo. 1972). *Guerin v. Fullerton*, 389 P.2d 83, 84-85 (Colo. 1964), *People v. Campbell*, 738 P.2d 1179, 1180 (Colo. 1987). Amicus also recognizes the operative facts in this case are highly contingent, when they write: "*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." Amici, p. 2 (emphasis added).

The record shows the trial court did not opt to decline jurisdiction, it addressed petitioner's motion for return less than three days after it was filed (OB, Appendix C, p. 45). Even after he ignored the order of the trial court. It is pure speculation that the trial court will decline further jurisdiction unless ordered to do so when the

case is returned.

Finally, petitioner's contention that the criminal court lacks jurisdiction because his motion for return of property involves "substantial new fact finding" is also purely speculative. It also contradicts the fact that the trial court has extensive knowledge of the case that has been pending for nearly five years, and that 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. Amici, p. 11.

Accordingly, respondents respectfully request that this Court "refuse to consider uncertain or contingent future matters that suppose a speculative injury that may never occur." *Bd. of Dirs., Metro Wastewater Reclamation Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 105 P.3d 653, 656 (Colo. 2005).

VII. CONCLUSION

Based upon the foregoing Sheriff and Prosecutors request that this court affirm the ruling of the Court of Appeals in its entirety.

RESPECTFULLY SUBMITTED this 30th day of June, 2022.

OFFICE OF THE COUNTYATTORNEY
OF EL PASO COUNTY, COLORADO

BY: s/ Mary Ritchie
Mary Margaret Ritchie, #46745
El Paso County, Colorado
200 S. Cascade
Colorado Springs, CO 80903

CERTIFICATE OF SERVICE

I certify that on June 30, 2022 I filed this Answer Brief with the Supreme Court of Colorado. A true copy was provided to the following via ICCES:

James Woo, DOC #179463
Centennial Correctional Facility
PO Box 600
Canon City, CO 81215

s/April Willie
Paralegal

ADDENDUM

Appellant's Notice of Appeal, Case Number 2016CR0002069, January 31, 2022.

Mandate, Case Number 2016CR0002069, May 9, 2022.

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: January 31, 2022 CASE NUMBER: 2016CR2069
El Paso County District Court Honorable Samuel A. Evig Case Number 2016CR2069	FILED IN THE DISTRICT AND COUNTY COURTS OF EL PASO COUNTY, COLORADO RB JAN 31 2022 SHERI KING CLERK OF COURT
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. JAMES T. WOO, Defendant-Appellant.	▲COURT USE ONLY▲
Attorney or Party Without Attorney (Name and Address): Appearing Pro Se: James Woo, DOC #179463 Centennial Correctional Facility P.O. Box 600 Canon City, CO 81215 No Telephone, no fax, no email	Case No: Div. _____ CTRM _____
NOTICE OF APPEAL	

Defendant-Appellant James Woo ("Woo") respectfully brings this appeal from the El Paso County District Court.

1. This appeal is filed pursuant to C.A.R. 3. The Colorado Court of Appeals has jurisdiction, as Woo has timely filed his Notice of Appeal within 49 days of the judgment in the underlying case. (See Appendix A, p 9)

2. On November 25, 2020, this Court affirmed Woo's conviction in the underlying case in Colo. App. No. 2018CA584 (the "Direct Appeal").

3. During the pendency of the Direct Appeal, perfected on March 26, 2018 (Id. at p 1, ¶ 2), the district court issued a number of orders. For example, it: (1) barred the release of discovery hard drives in defense counsel's possession on May 25, 2018, requiring Woo to specify files requested and the reason he wanted them (Id. at p 1, ¶ 3); (2) granted People's motion to dispose of DNA evidence on June 24, 2019; and (3) declined to address Woo's motions for release of seized properties and removal of protective order (Id. at p 2, ¶¶ 2-4).

4. Woo previously attempted to appeal some of these rulings in case no. 2019CA202 and 2020CA564. This Court dismissed these cases without prejudice based on the purported lack of a final appealable order. Said orders thus appeared immune from appellate review simply because they were issued post-sentence and during the pendency of the Direct Appeal.

5. On December 6, 2021, the district court vacated the aforementioned orders issued during the pendency of the Direct Appeal based on lack of jurisdiction. (Id. at p 6, ¶ 4; p 3, "JURISDICTION") It re-addressed Woo's post-sentence motions de novo, and entered new orders finalizing the issues. This appeal concerns these new rulings.

6. In addition to vacating all orders issued without jurisdiction, the December 6, 2021 order: (1) deferred ruling on Woo's motion for return of seized properties pending the Colorado Supreme Court's decision in case no. 2020SC865 (Id. at pp 3-6, "RETURN OF PROPERTY"); (2) denied Woo's motion for discovery previously provided to defense counsel that counsel did not surrender to Woo upon withdrawal (Id. at pp 6-8, "MR. WOO'S DISCOVERY REQUEST"); and (3) denied Woo's motion to remove protective order (Id. at pp 8-9, "MR. WOO'S REQUEST FOR REMOVAL OF THE PROTECTIVE ORDERS").

7. The central issue is that the discovery withheld from Woo is material to his ability to raise postconviction claims, in light of defense counsel's admission at the start of trial on January 22, 2018 that it was impossible to catch up to the plethora of discovery admitted in the case. (TR 1/22/18, p 4:3-10)

8. Counsel used a protective order to which he himself conceded (Id. at p 9) as the basis to withhold seven discovery hard drives that he was otherwise required to surrender upon withdrawal under Colo. RPC 1.16(d). These hard drives contain well over six terabytes of data from the numerous electronic devices seized in the case.

9. Although the December 22, 2017 protective order concerned strictly explicit images of the victim (Appendix A, pp 8-9) on a "disc of photos" and Woo conceded to the exclusion of such contents (Id. at p 2, ¶ 1), the court, under its previous judge, used the protective order as the basis to issue its May 25, 2018 order barring the release of all discovery hard drives during the pendency of the Direct Appeal (Id. at p 1, ¶ 3).

10. The court, under its previous judge, the prosecution, and counsel thus exploited the protective order for the ulterior purpose of depriving Woo of access to terabytes of legitimate discovery with no relevance to the protective order. This was a concerted effort to deprive Woo of the ability to find exculpatory evidence.

11. "If an order has effectively ended the trial court proceeding, it should be treated as a final appealable order." In re J.N.H., 209 P.3d 1221, 1222 (Colo. App. 2009). "Where... the circumstances of the case indicate that... the district court's order precludes further proceedings, dismissal... qualifies as a final judgment for the purposes of appeal." Avicanna Inc. v. Mewhinney, 2019 COA 129, n.1. The orders here are final as they dispose of all pending issues and prevent further proceedings. The court has indicated its position that it is without authority to issue further orders not falling under Crim. P. Rule 35. (Appendix A, p 8, ¶ 4; p 9) See People ex rel. S.C., 2020 COA 95, ¶ 6 ("An order is final if it ends the particular action in which it is entered, leaving nothing further for the court pronouncing it to do in order to completely determine the rights of the parties involved in the proceeding.").

12. The following issues will be raised on appeal:

I. Whether the district court erred in concluding it had no authority to order discovery previously provided to former defense counsel who did not surrender most of it to Woo upon withdrawal, despite the court's opinion that it would find a limited discovery right to provide the material out of fundamental fairness if left to its own devices (Id. at p 8, ¶ 4).

II. Whether the district court, prosecution, and former defense counsel may use a protective order concerning strictly explicit images of the victim with no relevance to the case on a "disc of photos" for the ulterior purpose of depriving Woo of all legitimate discovery from all electronic devices seized in the case, despite Woo's concession to the exclusion of all such explicit images.

III. Whether Woo, an unrepresented defendant, is entitled to his case files containing discovery that is material to his ability to raise a postconviction claim, in light of former counsel's admission at the start of trial that it was impossible to catch up to the plethora of discovery admitted in the case.

13. A Designation of Transcripts and motion for leave to proceed in forma pauperis to the district court are filed with this Notice of Appeal.

Respectfully submitted this 24th day of January, 2022.

James Woo, DOC # 179463

CERTIFICATE OF SERVICE

I certify that, on this 24th day of January, 2022, a true and correct copy of the foregoing NOTICE OF APPEAL was served by U.S. Mail, properly addressed, postage prepaid, to the attention of the following:

El Paso County District Court
270 S. Tejon St.
Colorado Springs, CO 80903

Office of the Attorney General
1300 Broadway, Floor 10
Denver, CO 80203

James Woo, DOC # 179463

DISTRICT COURT, EL PASO COUNTY, COLORADO El Paso County Judicial Building 270 S. Tejon Street, PO Box 2980 Colorado Springs, CO 80903 Telephone: 719.452.5000	DATE FILED: December 6, 2021 11:00 AM
The People of the State of Colorado, Plaintiff(s), vs. JAMES WOO, Defendant.	▲COURT USE ONLY▲
	Case #: 2016CR2069 Division: 17

ORDER DEFERRING RULING ON DEFENDANT'S MOTION FOR RETURN OF PROPERTY, DENYING DEFENDANT'S MOTION FOR DISCOVERY, AND DENYING MOTION TO MODIFY PROTECTIVE ORDERS

There are several issues in this matter pending before this Court. But prior to addressing those issues, the Court must recite some of the history in this matter. First, a jury convicted Mr. Woo of first-degree murder on February 6, 2018. In accord with Colorado law, Judge Dubois sentenced him to life in prison without the possibility of parole on that same day.

The Office of the Public Defender, on Mr. Woo's behalf, filed a notice of appeal for the criminal conviction on March 26, 2018 (the "Direct Appeal"). The Court of Appeals identified the Direct Appeal under case number 18CA584.

On May 22, 2018, Mr. Woo, through his then local trial counsel Richard Bednarski, filed a Motion to Allow Release of Hard Drives to James Woo's Family (the "Hard Drive Return Motion"). In that motion Mr. Woo's counsel sought an order from the Court permitting him to release hard drives in discovery to Mr. Woo. At a hearing held on May 25, 2018 on the Hard Drive Return Motion, the defense clarified that request and indicated defense counsel wanted to release copies he received from the district attorney to Mr. Woo's family. The district attorney objected. The trial court ordered defense counsel to state specifically what Mr. Woo wanted released from the hard drive.

On March 18, 2020, Mr. Woo's local trial counsel moved to withdraw. The trial court denied that motion based upon the outstanding issue regarding the Hard Drive Return Motion via an order issued May 17, 2019.

APPENDIX A

Local trial counsel filed the status report requested by the court's order of May 17, 2019 on May 29, 2019. The upshot of that response indicated that Mr. Woo sought everything other than photographs and videos related to the murder victim in this case. The response also indicated that some of the materials on the hard drives at issue were the subject of a protective order from the trial court.

Mr. Woo, *pro se*, filed a motion to appear telephonically regarding the Hard Drive Return Motion that the court received on June 5, 2019. On September 18, 2019, the court received two additional *pro se* motions from Mr. Woo. One sought the removal of the protection orders on some of the discovery, specifically the removal of the protection order on what he described as being a six-terabyte hard drive. The second requested both release of property in his attorney's possession as well as release of discovery to him.

The prosecution filed a response on to those motions on February 4, 2020, which claimed, with authority, that the trial court lacked jurisdiction to issue any orders on the case while the matter was on direct appeal.

The trial court held a hearing on February 6, 2020. The court ruled that local counsel could release all discovery to Mr. Woo except for the six-terabyte hard drive subject to the court's protection order. The court reiterated that the defendant had to specify what he wanted from the hard drive prior to the court ordering the release of anything.

Local trial counsel filed a letter on March 9, 2020 detailing compliance with the court's orders. That letter indicated he provided a complete copy of the bates stamped discovery to Mr. Woo's sister. The letter indicated counsel withheld some items, including discs 90-91 containing pornographic and sadistic images and discs 106A-E, which counsel identified as a cell phone extraction which, apparently, he could not copy.

Mr. Woo filed another *pro se* motion which the court received on March 25, 2020. That motion, among other things, requested the court order the district attorney to provide discs 106A-E to his designee. The motion also sought several other things.

The Court of Appeals denied Mr. Woo's Direct Appeal in an unpublished decision on November 25, 2020. The Colorado Supreme Court denied Mr. Woo's petition for review of that decision on March 29, 2021.

And finally, Mr. Woo filed a Motion to Address Pending Motions on January 28, 2021. Judge Dubois issued an order requiring a status report from the prosecution on October 8, 2021, and they filed that status report on November 5, 2021.

ISSUES

There are several issues the court must now address in this matter. First, although the parties have treated Mr. Woo's request for release of property and request for discovery as the same request, they raise separate and distinct issues. And the legal standards applicable to the two issues are different. Second, Mr. Woo requested the Court lift protection orders on portions of

the discovery. Third, there is a real question as to whether the trial court had authority to issue any orders during the pendency of Mr. Woo's direct appeal.

JURISDICTION

Taking the last of those issues first. On February 6, 2020, after Mr. Woo's appeal had been perfected in the underlying criminal case, Judge Dubois issued an order which stated that, if Mr. Woo could not receive all of the items he was requesting from his original trial and appellate counsel, the court could "possibly order DA to re-provide all discovery to [Defendant] again" but in that case the court would require Mr. Woo to provide a list of everything being sought and the reason for his request.

Mr. Woo sought to appeal Judge Dubois's order and in 2020CA564 the Court of Appeals found that the order was not a final appealable order, but also expressed concern that the trial court may have lacked jurisdiction to issue the February 6, 2020 order because the direct appeal was still pending at that time. Case law justifies their concern:

> Unless otherwise specifically authorized by statute or rule, once an appeal has been perfected, the trial court has no jurisdiction to issue further orders in the case relative to the order or judgment appealed from. Consequently, should it be necessary for the trial court to act, other than in aid of the appeal or pursuant to specific statutory authorization, the proper course would be for a party to obtain a limited remand from the appellate court.

People v. Dillon, 655 P.2d 841, 844 (Colo. 1982).

Because there was no limited remand at the time Judge Dubois issued the February 6, 2020 order, and because the return of property order did not relate to assist in the appeal and was not done pursuant to any specific statutory authorization, the trial court did not have jurisdiction at the time. "It is axiomatic that any action taken by a court when it lacked jurisdiction is a nullity." *Id.*

Where does that leave the parties? That is the crux of the issue now facing the court. And given the court lacked authority for its prior orders; the slate is clean for this court to address the issues.

RETURN OF PROPERTY

Going back to the two different requests Mr. Woo makes—and addressing his request for release of property first.

Mr. Woo's request for the return of property seized by law enforcement presents a difficulty because there is a split of authority among Colorado Court of Appeals divisions as to whether trial courts have jurisdiction to resolve such motions after a defendant has been sentenced. In *Strepka v. People*, 489 P.3d 1227 (Colo. 2021) the Colorado Supreme Court acknowledged this split of authority but, since the exact issue was not before the court in that case, declined to articulate which approach to determining jurisdiction was appropriate:

> The division in [*People v.*] *Chavez*[, 487 P.3d 997 (Colo. App. 2018)] is one of a number of divisions of the court of appeals to consider the extent of a trial court's jurisdiction to resolve motions for return of property in criminal cases. *See Chavez*, ¶ 13 ("[O]nce a valid sentence is imposed . . . a criminal court has no further jurisdiction."); *People v. Wiedemer*, 692 P.2d 327, 329 (Colo. App. 1984) ("A trial court loses jurisdiction upon imposition of a valid sentence except under the circumstances specified in Crim. P. 35."); *see also People v. Hargrave*, 179 P.3d 226, 228 (Colo. App. 2007) ("When the need for property seized in a case has ended, the trial court has the jurisdiction and the obligation to order its return and, if necessary, to conduct a hearing to determine its appropriate disposition . . . .").
>
> With the exception of *Hargrave*, the divisions in these cases have generally concluded that the trial court loses jurisdiction upon the imposition of a valid conviction and sentence.

Strepka, 489 P.3d at 1231. However, because these cases addressed the return of *lawfully* seized property and the defendant in *Strepka* was seeking the return of *illegally* seized property, the court determined that the "question of which, if any, of these approaches is correct" was not before them, and did not resolve the split of authority. So the question remains unanswered.

Case law presents two different approaches to resolve this issue. The Court of Appeals described them in *Chavez:*

> Divisions of this court are split on whether criminal courts have jurisdiction over motions for return of property made after a defendant has been sentenced.
>
> In *People v. Wiedemer*, 692 P.2d 327, 329 (Colo. App. 1984), a division of this court held that the imposition of sentence ends a criminal court's subject matter jurisdiction, with the sole exception of motions brought under Crim. P. 35. Because Crim. P. Rule 35 did not authorize the court to deal with matters of property, the division reasoned that criminal courts do not have jurisdiction over such motions made after sentencing. *Id.*; *see also People v. Galves*, 955 P.2d 582 (Colo. App. 1997).
>
> A different division held in *People v. Hargrave*, 179 P.3d 226, 230 (Colo. App. 2007), that "the [criminal] court has ancillary jurisdiction, or inherent power, to entertain defendant's post-sentence motion for return of property." *See also People v. Rautenkranz*, 641 P.2d 317, 318 (Colo. App. 1982). The division relied on the test for ancillary jurisdiction used by federal courts. 179 P.3d at 229-30. Under this test, ancillary jurisdiction attaches when:
>
> > (1) the ancillary matter arises from the same transaction which was the basis of the main proceeding, or arises during the course of the main mater, or is an integral part of the main matter; (2) *the ancillary matter can be determined without a substantial new factfinding proceeding*; (3)

> determination of the ancillary matter through an ancillary order would not deprive a party of a substantial procedural or substantive right; and (4) the ancillary matter must be settled to protect the integrity of the main proceeding or to insure that the disposition in the main proceeding will not be frustrated.

People v. Chavez, 487 P.3d at 998 (quoting *Hargrave*, *supra* and *Morrow v. District of Columbia*, 417 F.2d 728, 740 (D.C. Cir. 1969) (emphasis supplied in *Chavez*).

But as the Supreme Court in *Strepka* court noted, most cases find that trial courts lack jurisdiction to resolve requests for the return of *lawfully* seized property after a defendant has been sentenced.

The case with facts most like Mr. Woo's is *Chavez*, where the Defendant sought the return of two computers and numerous compact discs holding information. In that case, although the court ultimately elected to follow the line of cases which stated that criminal courts have no jurisdiction beyond that granted by Crim. P. 35 after a defendant has been sentenced, the court still noted that even if the *Hargrave* ancillary jurisdiction test were applied, the court would not have jurisdiction because the property requested "could contain both property subject to return, such as innocuous family photos, as well as (or only) contraband not subject to return, such as photos of unlawful sexual behavior involving" the defendant, and that such "an inquiry would invariably involved 'substantial new factfinding proceedings.'" *Chavez*, 487 P.3d at 999 (quoting *Hargrave*, 179 P.3d at 229-30). So too here.

But even the *Chavez* case presents a wrinkle in considering this matter. Because the *Chavez* court noted in a footnote that their determination that the criminal court did not have jurisdiction did not leave Mr. Chavez without a remedy because civil district courts are courts of general jurisdiction and Mr. Chavez could potentially file an action there for the return of his property. Here, Mr. Woo did. He did so by filing a replevin action against both the El Paso County Sheriff's Office and the Fourth Judicial District Attorney's Office in case 2019CV103 (the "Replevin Case").

A different district court judge dismissed the Replevin Case. Mr. Woo appealed that determination. And while the Court of Appeals upheld the district court's decision to dismiss the Replevin Case the Colorado Supreme Court has since granted Mr. Woo's petition for review.

Now, a defendant's ability to receive alternate relief was not a determinative issue in *Chavez* or any of the other cases where court addressed jurisdiction to resolve return of property motions. But Mr. Woo's replevin litigation, referenced above, seems likely to provide an answer to the question of whether this court retains jurisdiction to order the return of lawfully seized property.

That is because the Colorado Supreme Court granted review on his case to determine, "[w]hether 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." *See* 2021 WL 37113304.

Under these extremely unusual circumstances, the Court believes reserving ruling on Mr. Woo's property return request to be the appropriate course. Any order this court issues given the pending appellate case clouds, not clarifies the issue. Should the Colorado Supreme Court permit Mr. Woo's replevin claim to proceed, then he has a method to seek the return of his property. If the opinion rules otherwise, then this Court will render a decision with guidance from the Colorado Supreme Court, if any, from that case. And finally, if the Colorado Supreme Court takes no action, the Court will then consider these issues on their merits.

Depending on what happens, the issue of whether Mr. Woo has an alternative recourse in his civil case is one factor the court could consider in determining whether the court has jurisdiction to resolve this issue. After all, if there is a right the law should provide a remedy. But until the case before the Colorado Supreme Court resolves, this court cannot perform the full analysis necessary.

The Court therefore orders that Mr. Woo re-raise this issue, if necessary, after the Colorado Supreme Court takes some action in *Woo v. El Paso County Sheriff's Office and Fourth Judicial District Attorney's Office*, Supreme Court case 20SC865.

MR. WOO'S DISCOVERY REQUEST

The second issue for the court is to determine how to handle Mr. Woo's current discovery requests. In addressing this issue, the court first notes that the court issued several orders during the pendency of Mr. Woo's direct appeal. Because the court lacked jurisdiction to enter those orders and because orders issued without jurisdiction are a nullity, this court vacates them.

The status of post-conviction discovery requests is not at all certain under the rules of criminal procedure or Colorado law. Crim. P. Rule 16, by its title and terms, applies to "Discovery and Procedure Before Trial." And generally speaking, a district court has little authority to do anything in a criminal case after conviction, save for proceedings pursuant to Crim. P. Rule 32 and 35.[1] Neither of those rules address discovery requests or requirements. Further, Colorado "remains one of the few states that has never deviated from the traditional doctrine holding that courts lack power to grant discovery outside of those statutes or rules." *People in the Interest of E.G.*, 2016 CO 19 ¶ 12 (denying the defense access to a crime scene inside a non-party's residence). Further, there is no general right to discovery in criminal cases. *Id.* at ¶ 23 *citing Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

In 2009 the United States Supreme Court, in *District Attorney's Office for Third Judicial Dist. v. Osborne*, 577 U.S. 52 addressed whether defendants have a constitutional due process right to discovery in postconviction proceedings. The Court stated:

> A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man. At trial, the defendant is presumed innocent and may demand that the government prove its

[1] Crim. P. Rule 32.2 does deal with post-conviction proceedings in death penalty cases and deals with discovery issues. But by its terms it applies only in the now defunct death penalty process.

> case beyond a reasonable doubt. But "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." *Herrera v. Collins*, 506 U.S. 390, 399, 113 S.Ct. 853, 122 L.Ed. 203 (1993). "Given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." [*Connecticut Bd. of Pardons v.*] *Dumschat*, [452 U.S.] at 464, 101 S.Ct. 2460 (internal quotation marks and alterations omitted).
>
> The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief. "[W]hen a State chooses to offer help to those seeking relief from convictions," due process does not "dictat[e] the exact form such assistance must assume." *Pennsylvania v. Finley*, 481 U.S. 551, 559, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). [A defendant's] right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief. *Brady* is the wrong framework.

Osborne, 577 U.S. at 68-9.

So *Osborne* and other state cases which have examined a defendant's postconviction right to discovery have looked to a particular state's postconviction procedures to determine whether a discovery right exists. In a survey of state criminal cases, all of the cases where a defendant has been found to have had a right to discovery in postconviction cases have relied on the particular state's postconviction statute or state-specific caselaw.[2]

As noted in footnote two above, most state cases allowing postconviction discovery find it permissible as an exercise of the trial court's inherent authority. This inherent authority over discovery issues though, may not apply in Colorado. "[U]nder Colorado law, district courts have 'no freestanding authority to grant criminal discovery beyond what is authorized by the Constitution, the rules, or by statute.'" *People v. Kilgore*, 455 P.3d 746, 749 (Colo. 2020) quoting *People in Interest of E.G.*, 368 P.3d 946, 950. A "trial court's authority to grant discovery . . . must be limited to the categories expressly set forth in the rule." *Richardson v. District Court*, 632 P.2d 595, 599 (Colo. 1981).

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[2] *See State v. Szemple*, 252 A.3d 1029, 1044 (N.J. 2021) (State postconviction rules and due process did not typically allow discovery in postconviction proceedings, but "where a defendant presents the [postconviction] court with good cause to order the State to supply the defendant with discovery . . . the court has the discretionary authority to grant relief."); *Canion v. Cole*, 115 P.3d 1261, 1263 (Ariz. 2021) (State postconviction rule did "not provide a process for obtaining discovery in [postconviction] proceedings" but "trial judges have inherent authority to grant discovery requests in [postconviction] proceedings upon a showing of good cause."); *State v. Kleitzen*, 762 N.W.2d 750, 761 (Wisc. 2008) ("Nowhere in the statute does it specifically address postconviction discovery requests, although case law does permit postconviction discovery in certain circumstances . . . Nevertheless the statute obligates, pursuant to the due process requirement, that the State disclose any exculpatory evidence."); *Reed v. State*, 116 So.3d 260, 267 (Fla. 2013) ("There is no unqualified general right to engage in discovery in a postconviction proceeding. '[A]vailability of discovery in a postconviction case is a matter firmly within the trial court's discretion.").

Because, pursuant to *Osborne*, there is no due process right to postconviction discovery and under *Kilgore* and *Richardson*, a district court's authority to order discovery is limited to that authorized by rule or statute, the prosecution can only be required to provide postconviction discovery to Mr. Woo if such discovery is expressly provided for in the discovery rules. By its plain terms, Crim. P. 16 only applies to discovery obligations prior to trial. Similarly, the "plain language of Crim. P. 35(c), promulgated by the supreme court, does not authorize discovery procedures. . . . Had the supreme court intended to allow such discovery in connection with at Crim. P. 35(c) motion, it easily could have said so." *People v. Thompson*, 485 P.3d 566, 572 (Colo. App. 2020). Again, the court notes the legislature built in discovery requirements in the death penalty context and did not build in those requirements for proceedings under Crim. P. Rule 35.

Although *Thompson* examined a defendant's postconviction request for *additional* discovery of testing which had not been done prior to trial, reading its plain language interpretation of Crim. P. 35(c) alongside *Kilgore* creates a strong presumption that Crim. P. 35(c) does not authorize discovery at all, and absent such authorization in the rule, the court does not have the authority to grant discovery in postconviction proceedings.

Even Federal courts impose limitations on post-conviction discovery. *See U.S. v. Cuya*, 964 F.3d 969, 974 (11th Cir. 2020). There, a prisoner has no right to discovery until after a prisoner files a petition under 28 U.S.C.A. Sec. 2255 (the rough federal equivalent of a petition under Crim. P. Rule 35). Once a person files a petition, the federal courts apply a good cause standard to discovery requests. *Id.*

But, the Court notes that there is a sense of fundamental fairness that should allow Mr. Woo, even after his conviction and denied appeal, to have materials necessary to participate in whatever remains of his defense. And discovery, at least the relevant discovery, is the method to do that. This court, absent the Colorado case law noted above, would find a limited discovery right to provide some of the materials Mr. Woo requests if left to its own devices. That being said, the court has no authority, at least at this juncture, to order what Mr. Woo requests.

The court notes, though, that there is evidence Mr. Woo received the bulk of discovery. According to the letter filed by Mr. Bednarski on March 9, 2020, he provided a complete copy of the paper discovery to Mr. Woo's designee (his sister) as well as all discs of information except items clearly subject to the Court's protective orders and series of discs he could not copy. The Court is also uncertain as to whether the prosecution provided any discovery directly to Mr. Woo.

Given the status of these issues and given that Mr. Woo received the bulk of discovery through his attorney, the court respectfully denies his motion for discovery.

MR. WOO'S REQUEST FOR REMOVAL OF THE PROTECTION ORDERS

Mr. Woo also requests the court remove the protection orders issued in this case for certain portions of discovery. The history of this issue bears mention. The prosecution filed a "Motion to Protect the Release of Intimate Photos of the Victim, Deny the Use of These Images at Trial,

and Require the Defense to Return or Destroy Explicit Images at the end of the trial" on December 18, 2017.

The trial court granted that motion on December 22, 2017. Mr. Woo's defense counsel conceded the motion, made no objection to the protective order, and agreed to return those images after the trial.

Mr. Woo now request the court lift that order. The court notes, pursuant to Crim. P. Rule 16(III)(d), that Judge Dubois had authority to enter a protective order for these materials. And the court believes the danger of emotional damage, psychological damage, and embarrassment to the family of the murder victim justified the court's decision then.

And those dangers continue and justify the protective orders now. As a court of general jurisdiction, the court believes it has the authority to restrict access to materials such as these. The protective orders exist to do just that. The court denies Mr. Woo's request to lift the orders. And if the court lacks jurisdiction, because this issue is not one falling under Crim. P. Rule 35, the court could not afford him the relief he requests anyway. The court therefore denies his motion to lift the protection orders in this matter.

SO ORDERED: December 6, 2021

/s/ Samuel A. Evig
District Court Judge

Colorado Department Of Corrections

Name James Woo

Register Number 179463

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EL PASO COUNTY, COLORADO

SHERIFF'S OFFICE
CLERK OF COURT

ADD000013

DOC#	OFFENDER LAST NAME	INT
179463	Woo	JW

STAFF LAST NAME	ID#	INT
Burtlett	1285	CJ

FACILITY	DATE REC'D
CCF	01/27/22

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 9, 2022 1:07 PM CASE NUMBER: 2016CR2069
El Paso County 2016CR2069	
Plaintiff-Appellee: The People of the State of Colorado, **v.** **Defendant-Appellant:** James T Woo.	Court of Appeals Case Number: 2022CA184
MANDATE	

This proceeding was presented to this Court on appeal from El Paso County.

Upon consideration thereof, the Court of Appeals hereby ORDERS that the **APPEAL** is **DISMISSED without prejudice**.

POLLY BROCK
CLERK OF THE COURT OF APPEALS

DATE: MAY 9, 2022