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Certiorari to the Court of Appeals Case Number 2019CA1360 District Court, El Paso County Case Number 2019CV103	
JAMES WOO, Petitioner, v. EL PASO COUNTY SHERIFF'S OFFICE AND FOURTH JUDICIAL DISTRICT ATTORNEY'S OFFICE, Respondents.	▲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: 2020SC865
OPENING BRIEF OF PETITIONER	

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of C.A.R. 28 or C.A.R. 28.1 and C.A.R. 32, including a handwritten opening brief of not more than 30 double-spaced and single-sided pages set forth in C.A.R. 28(g)(2) for a self-represented party who does not have access to a word-processing system.

The brief complies with C.A.R. 28(a)(7): It contains under a separate heading (1) a statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record where the issue was raised and where the court ruled.

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

James Woo
Petitioner, Pro se

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Pro se pleadings are held to less stringent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972). Pro se allegations will be broadly construed to ensure the movant is not denied review of important constitutional issues simply for his inability to articulate his concerns within the legal lexicon. People v. Bergerud, 223 P.3d 686, 696-97 (Colo. 2010).

ISSUE PRESENTED

I. Whether the Court of Appeals erred in holding that the Colorado Governmental Immunity Act ("CGIA") 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.

STATEMENT OF THE CASE

On April 22, 2016, law enforcement arrested Petitioner James Woo ("Woo") in Seattle on suspicion of a homicide in El Paso County (Case No. 2016CR2069). (CF, p 1, ¶ 4; p 2, ¶ 6) Officers seized all properties that Woo carried in his baggage, along with numerous properties from his San Francisco residence, and forwarded them to the El Paso County Sheriff. Id. On February 6, 2018, Woo was convicted of first-degree murder and sentenced to life without parole.[1] (CF, p 1, ¶ 4; p 33, ¶ 1)

On April 18, 2019, Woo filed the underlying replevin Complaint against the Respondents, seeking the return of 51 sets of seized items as labeled in evidence. (CF, pp 1-6) These items included diamond jewelry, cash, eight computer hard drives containing priceless aspects of Woo's professional and personal life, computer tower, iPad, iPhones, camcorder, other digital devices, documents, clothing, medication, etc. (CF, pp 4-6) Woo alleged that the detention of most of these items was

[1] Woo's conviction was affirmed on appeal on November 25, 2020 (Case No. 2018CA0584; 2020 WL 7016831). His petitions for writ of certiorari were denied by this Court on March 29, 2021 (Case No. 2021SC8; 2021 WL 1250452) and by the U.S. Supreme Court on November 1, 2021 (Case No. 21-5539; 2021 WL 5043684).

wrongful because they lacked any evidentiary value to the criminal case and were never moved for trial admission. (CF, p 2, ¶ 6)

The Respondents filed a motion to dismiss pursuant to C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction under the CGIA (§ 24-10-101, C.R.S. 2019 et seq.). (CF, pp 20-27) They argued that: (1) Woo's claim was forever barred because he failed to file a timely notice of claim pursuant to § 24-10-109, C.R.S. 2019 (CF, pp 22-23); and (2) § 24-10-106, C.R.S. 2019 barred Woo's claim since a replevin in detinet action could lie in tort (CF, pp 24-26).

Woo filed an opposition to the motion to dismiss ("Opposition"). (CF, pp 43-55) He contended that: (1) he did effectively file a timely notice of claim with a letter to the Prosecution requesting some of his properties, which the Prosecution denied on March 22, 2019 (CF, pp 44-45, ¶ 3a; p 48, ¶ 12; pp 31-32)[2]; and (2) the CGIA violated his due process right in barring his replevin claim due to the Court of Appeals' holdings that a criminal court lacked jurisdiction to address a post-sentence motion for return of property (CF, pp 52-54).

Without holding a hearing to resolve factual disputes, the district court granted the Respondents' motion to dismiss with prejudice on July 3, 2019 based on Woo's alleged failure to file a notice of claim. (CF, pp 64-65)

Woo appealed, challenging: (1) the district court's failure to resolve factual disputes regarding the notice of claim requirement; (2) the court's error dismissing with prejudice on a C.R.C.P. 12(b)(1) motion for lack of subject matter jurisdiction; and (3) the CGIA's constitutionality as applied to the deprivation of property seized by law enforcement without due process of

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[2] Woo indicated that he first discovered most of his properties were never moved for admission during his criminal appellate record review with Alternate Defense Counsel case assistants beginning February 2019. (CF, pp 46-47, ¶ 7) Woo further submitted a formal notice of claim satisfying all requirements of § 24-10-109, C.R.S. 2019 on June 13, 2019, which the County Attorney received on June 20, 2019. (See Appendix A; CF, p 48, ¶ 11)

law. (CF, pp 70-73)

The Court of Appeals affirmed on different ground on September 10, 2020, finding that: (1) the CGIA barred Woo's claim because a replevin action could lie in tort; (2) the CGIA did not violate Woo's due process right because he had a meaningful post-seizure remedy in the criminal case before he was sentenced; and (3) the district court properly dismissed Woo's claim with prejudice. Woo v. El Paso Cty. Sheriff's Office, 2020 COA 134, ¶¶ 1, 7, 24. Since the Court of Appeals affirmed on a different basis that the district court did not consider, it did not address Woo's first issue on appeal regarding notice of claim. Id. at ¶ 14 n.2.

Woo filed a petition for writ of certiorari with this Court on November 4, 2020, challenging the Court of Appeals' finding that: (1) the CGIA did not violate Woo's due process right; and (2) the district court properly dismissed his claim with prejudice. This Court granted certiorari for the first issue on August 16, 2021.

STATEMENT OF THE FACTS

The Prosecution's March 22, 2019 criminal court response to Woo's property request letter indicates: "The People will not release any of the computers or other enumerated physical evidence to Mr. Woo or his family. They may be needed in a subsequent prosecution or 35(c) hearing." (CF, p 32, ¶ 4)[3]

The district court's order dismissing Woo's claim likewise opines: "the return of [Woo's] personal property, if any, should be resolved in the court where his criminal case was tried in the first instance. The District Attorney may claim that the personal property remains evidence in

[3] The March 22, 2018 submission date of the Prosecution's response is a typographical error, as clarified by the March 22, 2019 filing date and the response's reference to a previous hearing on May 25, 2018. (See Appendix B, as the filing date of the record copy is illegible.)

the case, in case the conviction is over-turned in the future." (CF, p 64)

The Court of Appeals' due process analysis concludes that Woo had an adequate post-seizure remedy in the criminal court. Woo, supra, at ¶¶ 15-26. Specifically, it holds: "Even if... the criminal court now lacks jurisdiction to consider any motion for return of property filed by Woo, barring his replevin action does not violate his due process rights" because a post-seizure "remedy was available to Woo in the criminal court, at least before he was sentenced. That this remedy might not be perpetual does not mean that it is constitutionally inadequate." Woo at ¶ 24. In support, it indicates: "Indeed, his defense counsel's motion for release of certain items to Woo in the criminal case shows that his counsel knew of this procedure, though the motion might have been tardy." Id.

The Court of Appeals' findings rely on the following three factual errors: (1) Woo was sentenced a week after his conviction (Id. at ¶ 3); (2) Woo's criminal defense counsel ("Counsel") filed a motion in the criminal case for the return of property (Id. at ¶¶ 3, 19, 24); and (3) Woo did not argue that the initial seizure was unconstitutional (Id. at ¶¶ 12, 17).

The first factual error reflects the district court's order of dismissal erroneously indicating that Woo was sentenced on February 12, 2018. (CF, p 64) As Woo's Counsel indicates, Woo was sentenced immediately after his conviction on February 6, 2018. (CF, pp 33, ¶ 1)

The second factual error originates from the Respondents' motion to dismiss, alleging that Woo already requested return of his property in the criminal court in 2018. (CF, p 21 n.1) In support, they provided three exhibits: (1) the Prosecution's March 22, 2019 response to Woo's letter denying his request for return of property (CF, pp 31-32); (2) Counsel's May 22, 2018 motion

to allow release of hard drives to Woo's family (CF, pp 33-35); and (3) Woo's motion to order Counsel to surrender case files and resolve issue regarding 6TB discovery hard drive before withdrawal (CF, pp 36-39).

The Respondents' first exhibit indicates that it is the Prosecution's response to Woo's "letter", i.e., not to any motion Woo filed with the criminal court. (CF, p 31, ¶ 1) Counsel never moved for the release of any seized property, but only requested permission to release discovery hard drives already in his possession, i.e., defense's case files. (CF, pp 44-45, ¶¶ 2-4) This is evident in Counsel's motion: "Undersigned counsel wants to abide by the Court's orders and therefore is seeking permission to release the hard drives before releasing them to Mr. Woo." (CF, p 34, ¶ 4) The criminal court's May 25, 2018 minute order denying Counsel's motion indicates: "[COUNSEL] NOTED THAT HE IS NOT [REQUESTING] RELEASE OF ACTUAL HARD DRIVES BUT [TO BE] ABLE TO PROVIDE THE COPIES THAT HE HAS RECEIVED FROM THE DA TO [WOO'S] FAMILY." (Appendix C)

As for the third factual error, Woo indicated in his Opposition that he believed some of his properties were not within the scope of the relevant search warrants but he lacked access to his case files to confirm. (CF, pp 48-49, ¶ 13; p 51, ¶ 16; p 36, ¶¶ 1-2)

The following occurred after the dismissal of Woo's claim and are therefore not in the record. However, they are relevant to the criminal court's position as to whether it has jurisdiction to address Woo's motion for return of property.

On September 18, 2019, with both the underlying appeal in this case and his criminal appeal pending, Woo filed a motion in the criminal court for the release of some of his

seized properties with no relevance to the case. (Case No. 2016CR2069, Defendant's Motion for Release of Properties and Discovery, filed September 18, 2019; See Appendix E, p 2, ¶ 2) The Prosecution responded that the court lacked jurisdiction to address Woo's motion due to the ongoing appeal. (Case No. 2016CR2069, People's Response to Defendant's Motion for Release of Properties and Discovery, filed February 4, 2020; See Appendix E, p 2, ¶ 3) At a February 6, 2020 hearing, the criminal court declined to address Woo's motion based on the ongoing appeal, indicating that the Prosecution "WILL NOT RELEASE ANY PROPERTY AT THIS TIME NOR IN FORESEEABLE FUTURE DUE TO ANY POST-CONVICTION RELIEF THAT MAY BE SOUGHT". (Appendix D) The Court of Appeals dismissed Woo's appeal of this ruling due to the purported lack of a final appealable order in Case No. 2020CA564. (Appendix E, p 3, ¶ 2)

On December 6, 2021, with Woo's criminal appeal affirmed, the criminal court vacated all orders it issued during the pendency of Woo's criminal appeal based on lack of jurisdiction, including the aforementioned February 6, 2020 order. (Id. at p 3, "JURISDICTION"; p 6, ¶ 4) It reconsidered Woo's September 18, 2019 motion for property (Id. at p 2, ¶ 2; pp 3-6, "RETURN OF PROPERTY") and reserved ruling pending this Court's decision in this case (Id. at p 6, ¶ 3). However, citing Strepka v. People, 2021 CO 58, ¶ 16, it indicated that most Court of Appeals cases "find that trial courts lack jurisdiction to resolve requests for the return of lawfully seized property after a defendant has been sentenced." (Appendix E, p 4, ¶ 2; p 5, ¶ 2) It opined that the case with facts most like Woo's was People V. Chavez, 2018 COA 139, ¶¶ 10, 11, 14 (holding that "once a valid sentence is imposed... a criminal court has no further jurisdiction") because Woo's property request would likewise involve "substantial new factfinding proceedings."

(Appendix E, p 5, ¶ 3) This, in its opinion, would also render the criminal court without jurisdiction. Id.

SUMMARY OF ARGUMENT

The CGIA violates Woo's right against property deprivation without procedural due process in barring his replevin claim because the criminal court is not required to address his post-sentence motion for return of seized property. The criminal court lacks ancillary jurisdiction where substantial new factfinding proceeding is necessary to determine Woo's property right. Moreover, the Court of Appeals divisions are split as to whether a criminal court has jurisdiction to address a post-sentence motion for return of legally seized property. The return of Woo's property is thus entirely at the discretion of the criminal court, which need only assert lack of jurisdiction to permanently deprive Woo of his property without due process. The appellate court can then affirm based on those authorities holding that a criminal court lacks post-sentence jurisdiction, leaving Woo with no recourse. The widespread implication is that no Colorado criminal defendant is guaranteed due process with respect to the post-sentence return of property legally seized but wrongfully detained by law enforcement.

The Court of Appeals circumvents this problem by holding that Woo had an adequate post-seizure remedy in the criminal court before he was sentenced. This conclusion is manifestly arbitrary, unreasonable, and unfair because it sets a time limit within which it would have been practically impossible for Woo to recover his property. The Prosecution and criminal court both indicated, more than a year after Woo's sentencing, that his property could not be released because it might be needed in a future proceeding. Under no circumstance

could Woo have obtained his property before sentencing.

Even assuming that the criminal court has post-sentence jurisdiction, procedural due process requires that it grant a hearing at a meaningful time upon Woo's motion for return of property. Otherwise, given discretion, it can indefinitely defer granting a hearing based on the speculative possibility that the state may require Woo's property in a future post-conviction hearing. This, in turn, indefinitely relieves the Prosecution of the burden to prove by a preponderance of the evidence a connection between Woo's property and criminal activity, thus circumventing the whole purpose of a property hearing and effectively depriving Woo of his property without due process.

The CGIA further violates substantive due process in barring Woo's claim. A criminal court hearing for return of property is constitutionally insufficient because the right against deprivation of property without due process must encompass damages as a safeguard against the Respondents' claim of property loss, damage, or destruction. Otherwise, the state has carte blanche to deprive criminal defendants of their seized property with such claims. The Court of Appeals' holding that the CGIA does not violate Woo's due process rights in barring his damages claim relies upon cases holding that parties do not have a constitutionally protected property right to sue the government for damages. These authorities are inapplicable because they did not involve a fundamental right and all applied rational basis review. Woo's replevin claim concerns the fundamental right to property interest, which requires strict scrutiny.

The CGIA does not withstand strict scrutiny here because there is no compelling state interest against a claim for the return of the very property it seized that: (1) it largely never

used in its prosecution; (2) is still in its possession; and (3) it can resolve at no cost by simply releasing the property. Even if there is, the CGIA does not advance the interest by the least restrictive means possible. The CGIA further violates substantive due process by allowing the state to engage in arbitrary and wrongful property deprivation.

For these reasons, the CGIA is unconstitutional as applied in barring Woo's replevin claim.

ARGUMENT

I. The Court of Appeals erred in holding that the CGIA does not violate Woo'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.

A. Standard of Review and Preservation.

The as-applied constitutionality of a statute is reviewed de novo. People v. Perez-Hernandez, 2013 COA 160, ¶ 10. Statutes are presumed constitutional, and the challenger bears the burden to prove unconstitutionality beyond a reasonable doubt. TABOR Found. v. Reg'l Transp. Dist., 2018 CO 29, ¶ 15; but cf. United Air Lines, Inc. v. City and County of Denver, 973 P.2d 647, 658 (Colo. App. 1998) (Briggs, J. specially concurring)(disagreeing and opining that the court's ultimate conclusion in resolving a constitutional challenge does not result from the proof presented, but from the persuasiveness of legal argument).

"Generally, with an as-applied (constitutional) challenge, the claimant is arguing that the provision at issue is unconstitutional not on its face, but 'under the circumstances in which the [claimant] has acted or proposes to act.' Sanger v. Dennis, 148 P.3d 404, 410 (Colo. App. 2006). 'The practical effect of holding a statute unconstitutional as applied is to prevent its future application in a similar context, but not to render it utterly inoperative...' Id." Developmental Pathways v. Ritter, 178 P.3d

524, 533-34 (Colo. 2008).

Woo preserved his constitutional challenge of the CGIA as applied to his replevin claim in his Opposition (CF, pp 51-54, ¶¶ 18-29) and raised the issue on appeal (CF, p 71, ¶ 7c).

B. Law and Analysis.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law". U.S. Const. amend. XIV, § 1. See also U.S. Const. amend. V; Colo. Const. art. II, § 25. Under the United States Constitution, "the State cannot deny a right or impose a liability which is contrary to the federal concept of due process of law." People ex rel. Juhan v. District Court for County of Jefferson, 165 Colo. 253, 261, 439 P.2d 741, 745 (1968).

"[A] statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." Boddie v. Connecticut, 401 U.S. 371, 379 (1971). Further, it is "fundamental to the integrity of the criminal justice system that seized property against which the government has no claim must be returned to its lawful owner." People v. Buggs, 631 P.2d 1200, 1201 (Colo. App. 1981)(quoting U.S. v. Wilson, 540 F.2d 1100, 1103 (D.C. Cir. 1976)). "[E]vidence of seizure from a defendant is prima facie evidence of ownership of the property in that defendant." Id. (quoting U.S. v. Wright, 610 F.2d 930, 939 (D.C. Cir. 1979)).

The CGIA is constitutionally invalid as applied here because it operates to deprive Woo of the protected right to procedural and substantive due process in barring his replevin claim, putting him at risk of property deprivation without due process of law.

I. The CGIA violates procedural due process in barring Woo's claim.

"Procedural due process requires that a person with a possessory interest in property seized by the state must be afforded an opportunity for a hearing and adequate notice of the hearing." Patterson v. Cronin, 650 P.2d 531, 536 (Colo. 1982). "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" Fuentes v. Shevin, 407 U.S. 67, 80 (1972)(quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

i A criminal court is not required to address a post-sentence motion for return of legally seized property.

Citing City & Cty. of Denver v. Desert Truck Sales, Inc., 837 P.2d 759, 765 (Colo. 1992), the Court of Appeals holds that the CGIA bars Woo's replevin action pursuant to § 24-10-108, C.R.S. 2019 because this Court has held that replevin in detinet, where property is lawfully obtained but wrongfully detained, is an action that lies or could lie in tort. Woo at ¶¶ 10-14. It inaccurately asserts "Woo does not argue that the initial seizure was unconstitutional" to liken Woo's case to Desert Truck's factually. Id. at ¶ 17. (See CF, pp 48-49, ¶ 13; p 51, ¶ 16; Desert Truck, 837 P.2d at 767 ("Desert Truck does not challenge the validity of the initial seizure".)) It further cites this Court's conclusion that the CGIA does not violate Desert Truck's due process rights because Desert Truck had a statutory right to a mandatory post-seizure hearing to obtain possession of the seized car[4] pursuant to § 42-5-110, 17 C.R.S. (1991 Supp.). Woo at ¶ 18 (citing Desert Truck, 837 P.2d at 767-68).

However, as Woo argued in his Opposition, the due process conclusion in Desert Truck is

[4] Desert Truck's seized vehicle was presumed contraband due to its missing VIN. Desert Truck, 837 P.2d at 768. In contrast, the Respondents did not allege that any of the properties listed in Woo's Complaint was contraband. (CF, pp 4-6, 20-27, 58-63) Woo specifically did not seek the return of a number of items that might be deemed contraband, including all firearm-related or home defense items, even if legal and irrelevant to the case.

inapplicable here because no legal authority requires a criminal court to address a post-sentence motion for return of legally seized but wrongfully detained property. (CF, p 50, ¶ 14b) The Court of Appeals concedes, "no statute or rule sets out the procedure available to a criminal defendant to recover property that was legally seized". Woo at ¶ 19.

The Court of Appeals addresses Woo's argument by opining: "our Supreme court said that the hearing in Desert Truck Sales was mandatory in the sense that 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 be necessary." Woo at ¶ 22. This is erroneous because § 42-5-110(3), 17 C.R.S. (1991 Supp.) expressly mandated a post-seizure hearing: "the person from whom the property was seized... shall be notified within ninety days of seizure of the seizing agency's intent to commence a postseizure hearing". Desert Truck, 837 P.2d at 767 n.9. This Court merely opined: "We read the statute as granting the person from whom the property was seized and all claimants to the property their right, upon request, to have a postseizure hearing if a demand has not been made by the seizing agency." Id. at 768. Thus, the "upon request" phrasing is strictly within the context of the statute and does not extend to a motion for property in a criminal court. A criminal court is not required to address a post-sentence motion for property upon request.

ii. A criminal court lacks jurisdiction where a motion for property involves substantial new factfinding proceeding.

The Court of Appeals holds that Woo had an adequate post-seizure remedy for the return of property in his criminal case, citing six cases holding or tacitly approving that a criminal defendant may file a motion for return of seized property in the criminal court.

Woo at ¶ 19 ("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)").[5]

Citing Rautenkranz, 641 P.2d at 318, the Court of Appeals indicates that the criminal court should hold an evidentiary hearing upon the filing of a motion for return of property. Woo at ¶ 20. "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." Id. (citing 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. The Court of Appeals further indicates that "Crim. P. 41(e) allows an aggrieved person to move the district court for the return of illegally seized property." Id. at ¶ 19 n.3.

Crim. P. 41(e) is inapplicable here since most of Woo's properties were legally seized pursuant to warrant. Moreover, this remedy appears unavailable post-sentence: "The motion shall be made and heard before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court... may entertain the motion at the trial." Crim. P. 41(e).

Hargrave, the most recent and thorough in relevant legal analysis among the above-cited Court of Appeals cases, holds that "the [criminal] court has ancillary jurisdiction, or inherent power, to entertain defendant's postsentence motion for return of property." Hargrave, 179 P.3d

[5] Wiedemer is erroneously included here since it holds that a criminal court lacks jurisdiction to hear a post-sentence motion not authorized by Crim. P. 35. Wiedemer, 692 P.2d at 329.

at 230. Relying on the test for ancillary jurisdiction used by federal courts, Hargrave indicates that ancillary jurisdiction should attach where:

> "(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 matter, 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."

Id. at 229-30 (quoting Morrow v. District of Columbia, 417 F.2d 728, 740 (D.C. Cir. 1969)).

Noting the second prong of the ancillary jurisdiction test, the Chavez division opined that even if Hargrave were correct, the criminal court still was without jurisdiction to address Chavez's motion for the return of two computers and compact discs because those items could contain both property subject to return and contraband, and such an inquiry would involve "substantial new factfinding proceeding[s]." Chavez, 2018 COA 139 at ¶ 14. In turn, the criminal court in Woo's case opined that Woo's property request was similar and would likewise require substantial new factfinding proceeding, rendering the court without jurisdiction even under Hargrave. (Appendix E, p5, ¶3)

Further, the third prong of the ancillary jurisdiction test may render the criminal court without jurisdiction to the extent, as argued below, that a criminal court hearing may deprive Woo of the substantive right to damages if the Respondents claim property loss or damage. Thus, the criminal court lacks jurisdiction to address Woo's motion for return of property even under Hargrave.

iii The Court of Appeals divisions are split as to whether a criminal court has jurisdiction to address a post-sentence motion for legally seized property, some opining that criminal defendants have civil recourse.

The Court of Appeals acknowledges that its divisions "have divided over whether a criminal court retains jurisdiction to hear a post-sentence motion for return of property." Woo at ¶ 23 (citing Chavez, 2018 COA 139 at ¶¶ 9-14 (discussing the split and answering in the negative)). It compares Wiedemer, 692 P.2d at 329 (holding that the imposition of a sentence ends a criminal court's jurisdiction to hear a motion not authorized by Crim. P. 35) with Hargrave, 179 P.3d at 230 (holding that a criminal court has ancillary jurisdiction to entertain a post-sentence motion for return of property). Woo at ¶ 23. It indicates that, so far, this Court "has not resolved this debate." Id.

Since the CGIA bars Woo's civil claim, the return of his property is entirely at the discretion of the criminal court, which need only assert lack of post-sentence jurisdiction to permanently deprive him of all his seized properties without due process. The Court of Appeals, in turn, can affirm based on Chavez and Wiedemer, or dismiss Woo's appeal based on the purported lack of a final appealable order as it did in Case No. 2020CA564[6], leaving him with no recourse. (Appendix E, p 3, ¶ 2)

Here, the criminal court in fact declined to address Woo's property motion on February 6, 2020. (Appendix D)[7] Its December 6, 2021 order deferring ruling pending this Court's decision reveals its position that, left to its own devices, it would assert lack of jurisdiction to address Woo's

[6] The dismissal of Woo's appeal contradicts the Court of Appeals' holding that "[t]he aggrieved party may file a timely appeal of the district court's ruling on the motion, providing the opportunity to correct an erroneous order." Woo at ¶ 21.

[7] Although this was based on lack of jurisdiction due to the ongoing criminal appeal, the other rulings in the order indicate that the criminal court selectively asserted lack of jurisdiction to address some issues but not others.

motion. (Appendix E, p 5, ¶¶ 2-3)

The Court of Appeals' holding that the CGIA bars Woo's replevin claim is, further, in direct contradiction to its conflicting authorities suggesting that a criminal defendant has civil recourse for the return of seized property. See Chavez, 2018 COA 139 at ¶ 14 n.5 (opining that Chavez is not necessarily remediless since the district court may entertain a civil action); Rautenkranz, 641 P.2d at 318 (the defendant may have a civil remedy for seeking return of property); People v. Galves, 955 P.2d 582, 583 (Colo. App. 1997) (affirming district court's conclusion that its jurisdiction did not extend to the issue of return of property and that defendant could seek return of his property by filing a civil action); Hargrave, 179 P.3d at 232 (Marquez, J. dissenting) (the trial court does not have jurisdiction to address the return of seized property if the motion is filed after sentence is imposed, but the defendant is not left without a remedy because the option of filing a civil suit is available).

The widespread implication of the above conflicting authorities is that no Colorado criminal defendant is guaranteed due process with respect to the return of property legally seized but wrongfully detained by the state. Woo points criminal defendants to the criminal court since the CGIA bars civil remedy, while Chavez points them to civil remedy since the criminal court lacks jurisdiction. Contrary to the Court of Appeals' assertion, authorities such as Hargrave and Rautenkranz do not provide adequate protection against the risk of an erroneous deprivation of property. See Woo at ¶ 21 (citing Mathews v. Eldridge, 424 U.S. 319, 344 (1976) ("procedural due process rules are shaped by the risk of error inherent in the truthfinding process.")).

The Court of Appeals' holding that the CGIA bars Woo's replevin claim, together with its authorities holding that the criminal court lacks post-sentence jurisdiction to address the return of seized property, present a clear case of procedural due process violation beyond a reasonable doubt.

iv. The Court of Appeals erred in holding that due process was satisfied by Woo's purported ability to obtain his properties before sentencing.

The Court of Appeals circumvents this problem by holding that even if the criminal court now lacks jurisdiction to consider any motion for return of property, barring Woo's replevin action does not violate his due process right because Woo could have sought his property in the criminal court before he was sentenced. Woo at ¶ 24. In support, it cites In re Estate of Ongaro, 998 P.2d 1097, 1105-06 (Colo. 2000)(holding that the one-year statute of limitations period for bringing a claim against an estate under C.R.S. § 15-12-803(1)(a)(III) is not so limited as to amount to a denial of justice; citing a previous holding that "a statute of limitations does not deprive a claimant of its rights to due process unless the time for bringing the claim is so limited as to amount to a denial of justice."); and Cacioppo v. Eagle Cty. Sch. Dist. Re-50J, 92 P.3d 453, 464 (Colo. 2004)(holding that the five-day time limit imposed by C.R.S. § 1-11-203.5 concerning election contests is not manifestly so limited as to amount to a denial of justice). Woo at ¶ 24. Ongaro indicates: "The legislature is the primary judge of what amount of time is reasonable." Ongaro, 998 P.2d at 1106 (citing Dove v. Delgado, 808 P.2d 1270, 1273 (Colo. 1991)). Likewise, Cacioppo indicates: "Because the legislature is generally trusted with what timelines are reasonable for statute of limitations... and because Cacioppo has failed to prove beyond a reasonable doubt that those timelines are

manifestly unreasonable, we defer to the legislature's wisdom in this instance." Cacioppo, 92 P.3d at 464 (citations omitted).

These holdings are inapplicable here because the legislature never enacted any statute limiting the time within which a criminal defendant must move for the return of seized property in the criminal court. Here, there is only a manifestly arbitrary, unreasonable, and unfair time limit, set not by the legislature but by the Court of Appeals for the first time in Woo. Woo at ¶ 24. It effectively requires criminal defendants to recover their seized properties used at trial before sentencing, or risk permanent deprivation.

The Court of Appeals cases holding that a criminal court has post-sentence jurisdiction to address a motion for seized property (See Woo at ¶ 19) are based on the presumption that the return of such property is only possible post-sentence for prosecutorial purpose. A criminal defendant generally cannot obtain seized property before sentencing. Woo indicated in his Opposition that Counsel advised the release of any property before conclusion of the criminal case would not be an option. (CF, pp 47-48, ¶ 10) Woo was sentenced immediately after his conviction, giving him no opportunity between conviction and sentencing to move for his property. (CF, p 1, ¶ 4; p 33, ¶ 1) Moreover, the Prosecution, civil court, and criminal court have all maintained, more than a year after Woo's conviction, that his properties may be needed in case of a future Crim. P. 35(c) hearing or a new trial. (CF, p 32, ¶ 4; p 64; Appendix D) Under no circumstance could Woo have obtained his property before sentencing.

The Court of Appeals' holding that Woo had an adequate remedy before sentencing fails to satisfy procedural due process because it does not afford him the right to

adequate notice and an opportunity to be heard at a meaningful time and in a meaningful manner. See Patterson, 650 P.2d at 536. Its time limitation is manifestly unreasonable and amounts to a denial of justice.

V. A criminal court is not required to grant a hearing at a meaningful time.

The Prosecution and criminal court have both indicated that Woo's property could not be released because they might be needed in a future post-conviction proceeding. (CF, p 32, ¶ 4; Appendix D) Woo's conviction is a class one felony. See C.R.S. § 18-3-102(3). Accordingly, there is no time limit for Woo to file a Crim. P. 35(c) petition for post-conviction remedy. See C.R.S. § 16-5-402(1). There will always be a possibility that Woo can file a Crim. P. 35(c) petition, even if he has already filed one or more in the past. See Crim. P. 35(c)(3)(VI), (VII). Thus, the criminal court has discretion to indefinitely delay granting a hearing to address Woo's motion for return of property based on the speculative possibility that the property may be needed in a future post-conviction proceeding, just as it did on February 6, 2020. (Appendix D)

The whole purpose of a property hearing is to determine Woo's property right and resolve any Prosecution claim that the property is contraband or needed for its prosecution. The Prosecution bears the burden "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." Woo at ¶ 20 (citing Fordyce, 705 P.2d at 9). By declining to grant a hearing on said basis, the criminal court relieved the Prosecution of its burden of proof and circumvented the purpose of a property hearing, effectively finding, without proof, that Woo's

properties were all relevant to the case and needed for prosecution. This is rendered more unreasonable by the fact that the Prosecution did not reference or move to admit the majority of Woo's properties throughout the criminal case, and even moved to exclude all data from all computer storage devices based on their admitted lack of evidentiary value.[8]

"Once a property or liberty deprivation is shown, the fundamental procedural due process safeguards of notice and an opportunity to be heard 'at a meaningful time and in a meaningful manner' are absolute." Patterson, 650 P.2d at 531. A criminal court remedy does not satisfy procedural due process because the criminal court is not required to grant a hearing at a meaningful time. Its discretionary power to indefinitely defer granting a hearing and relieve the Prosecution of its burden of proof effectively deprives Woo of property without due process. The Court of Appeals can then dismiss any appeal of such ruling based on the lack of a final order pursuant to C.A.R. 1, as it did here in Case No. 2020CA564, leaving Woo with no recourse.[9]

In contrast, the mandatory post-seizure hearing discussed in Desert Truck satisfied procedural due process by requiring notice of hearing within 90 days of seizure. Desert Truck, 837 P.2d at

[8] The Prosecution's January 16, 2018 motion in limine, dated six days before trial, indicates: "The Court is aware that there are many hard drives, thumb drives, mobile storage devices, and camera downloads in this case. The information on these drives go back to approximately the year 2000 that is long before the defendant and victim ever met. Certainly, any information on these devices that predate the defendant and the victim meeting would be irrelevant and inadmissible. Even the information on these devices that was kept during the time of the relationship is not relevant to any fact of consequence in this trial. Much of the information would also be hearsay if offered by the defense." (Case No. 2016CR2069, Motion in Limine to Exclude Inadmissible Evidence, ¶ 3, filed January 16, 2018; Case No. 2018CA0584, CF, p 595, ¶ 3) The Prosecution further moved to exclude all text messages, emails, and phone messages between Woo and the victim. Id. at ¶ 5.

[9] The Court of Appeals in fact dismissed all of Woo's attempts to appeal the criminal court's post-sentence rulings on said basis in Case Nos. 2019CA202, 2020CA564, and 2022CA184, effectively rendering all post-sentence orders immune from review. This indicates it will likely dismiss any future appeal of property motion rulings on the same basis.

767 n.9 (citing § 42-5-110(3), 17 C.R.S. (1991 Supp.)). To satisfy procedural due process, the criminal court must be required to grant a timely hearing, where the Prosecution must prove actual connection between any property it refuses to release and criminal activity.

Finally, a criminal court hearing affords no post-sentence discovery process for Woo to obtain documents and evidence necessary to adequately address the Prosecution's arguments at an oral hearing. (See Appendix E, p 6, ¶ 5) Woo is pro se, incarcerated, and unable to even obtain a copy of most court documents in his criminal case. The court has discretion to deny any such pre-hearing request. A civil proceeding, in contrast, provides a discovery process by which Woo can obtain necessary evidence from the Respondents, in addition to a potential jury trial in accord with U.S. Const. amend. VII that will be appealable.

2. The CGIA violates substantive due process in barring Woo's claim.

"[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" Foucha v. Louisiana, 504 U.S. 71, 80 (1992)(citation omitted). "So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' Rochin v. California, 342 U.S. 165, 172 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325-326 (1937)." United States v. Salerno, 481 U.S. 739, 746 (1987).

i. The right against deprivation of property without due process must encompass damages as a safeguard against the state's claim of property loss or destruction.

"Any legislative action which takes away any of the essential attributes of property,

or imposes unreasonable restrictions thereon, violates the due process clause of the Constitutions of the United States and the State of Colorado." Denver v. Denver Buick, Inc., 141 Colo. 121, 128, 347 P.2d 919, 924 (1959), overruled on other grounds, Stroud v. Aspen, 188 Colo. 1, 6, 532 P.2d 720, 723 (1975).

> "'The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property... Property may be destroyed, or its value may be annihilated... any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property.'"

Id. (citation omitted).

A replevin claim authorizes a claim for damages. See C.R.C.P. 104(p). The Court of Appeals holds that the CGIA does not violate Woo's due process rights in barring his damages claim. Woo at ¶ 25. In support, it indicates that the statute at issue in Desert Truck did not permit damages, yet this Court found it sufficient to satisfy due process. Id. However, § 42-5-110, 17 C.R.S. (1991 Supp.) does not indicate whether it permitted damages. Desert Truck, 837 P.2d at 767 n.9. The due process analysis in Desert Truck likewise did not address the issue of damages. Id. at 767-68.

The Court of Appeals further cites cases holding that parties do not have a constitutionally protected property right to sue the government for damages for the state's tortious conduct. Woo at ¶ 25. See Norsby v. Jensen, 916 P.2d 555, 563 (Colo. App. 1995)("The due process guarantee in Colo. Const. art. II, § 25 is applicable to rights, not remedies... Contrary to plaintiff's assertion, he does not have a constitutionally protected property right to sue the government and its employees for damages for his injuries."); State v. DeFoor, 824 P.2d 783, 795 (Colo. 1992) ("There is no constitutional right for persons to sue and recover a judgment against the state for the state's tortious conduct.")(Rovira, C.J., specially concurring in part); Fritz v. Regents of Univ. of Colo., 196 Colo. 335, 339, 586 P.2d 23, 26 (1978)("The right to maintain an action against a

governmental (state) entity is derived from statutes"). The constitutional challenges in these cases did not involve a fundamental right or suspect class; they all applied rational basis review rendering their holdings inapplicable here. See Norsby, 916 P.2d at 562 ("since no fundamental right or suspect class is involved, we need only determine whether the statutory classification is reasonably related to a legitimate state objective."; DeFoor, 824 P.2d at 787, 792 ("we...apply a rational basis test to the instant equal protection attack on section 24-10-114(1)"; "We conclude that... claimants have failed to articulate a cognizable property interest in support of their due process claim."); Fritz, 586 P.2d at 25 ("Absent 'suspect' classification or infringement upon a fundamental right, both of which are absent here, our analysis of a statute attacked on equal protection grounds depends upon whether the statute rationally furthers a legitimate state interest.").

> "Substantive due process of law requires that any regulation limiting or restricting fundamental rights be subjected to strict scrutiny, so as to assure that the regulation is justified by some compelling state interest. Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); See Reno v. Flores, 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993); 2 R. Rotunda & J. Nowak, Treatise on Constitutional Law 14.6 (3rd ed. 1992)."

People ex rel. E.I.C., 958 P.2d 511, 513 (Colo. App. 1998).

> "If we find that a fundamental right or a suspect class is involved, we must apply a 'strict scrutiny' analysis, under which the legislative provision, if it is to stand, must be supported by a 'compelling state interest.' Otherwise, we apply a 'rational basis' test, under which the provision will be upheld if it is rationally related to a legitimate state interest."

People v. Turman, 659 P.2d 1368, 1371 (Colo. 1983)(citations omitted).

Woo's replevin claim implicates the fundamental right against deprivation of property without due process, guaranteed by U.S. Const. amend. XIV, § 1 and Colo. Const. art. II, § 25. "A protected interest in property exists when a person has a legitimate claim of entitlement to the property."

Whatley v. Summit County Bd. of County Comm'rs, 77 P.3d 793, 798 (Colo. App. 2003)(citations omitted). Thus, a substantive due process analysis as to the CGIA's infringement upon the fundamental right to property interest in barring Woo's claim must apply strict scrutiny.

A property hearing in the criminal court does not satisfy substantive due process if the Respondents claim that any of Woo's properties is lost, damaged, or destroyed. Woo has no recourse against such claims. "'[T]he existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.'" Parratt v. Taylor, 451 U.S. 527, 542 (1981)(citation omitted)(emphasis added), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327, 330-31 (1986). Woo contends that the constitutional right against deprivation of property without due process must encompass damages; not as compensation for any period of wrongful deprivation or depreciation in value even upon return of the property, but as a safeguard against the Respondents' claim of property loss, damage, or destruction. In the event of such claim, Woo must be compensated accordingly. Otherwise, the state has carte blanche to permanently deprive him or any criminal defendant of seized property simply by asserting loss or destruction, whether true or not, with no liability. Woo is then in the same position of property deprivation without due process.

ii The CGIA does not withstand strict scrutiny in barring Woo's claim.

"To satisfy strict scrutiny, the State must show that (the statute) furthers a compelling state interest by the least restrictive means practically available." Bernal v. Fainter, 467 U.S. 216, 227 (1984).

> "[T]he General Assembly enacted the CGIA with the purposes of (1) protecting governments from unlimited liability that could 'disrupt or make prohibitively

> expensive the provision of... essential public services,' § 24-10-102, C.R.S. (2021); (2) protecting taxpayers 'against excessive fiscal burdens' as they would 'ultimately bear the fiscal burdens of unlimited liability,' id.; and (3) 'permit[ting] a person to seek redress for personal injuries caused by a public entity' in circumstances identified in the statute, State v. Moldovan, 842 P.2d 220, 222 (Colo. 1992)."

Maphis v. City of Boulder, 2022 CO 10, ¶ 17.

A replevin claim for property seized by the state in a criminal investigation is substantially different from the types of claims arising from the state's wrongful conduct that can potentially create unlimited tort liability and excessive fiscal burdens. Unlike many typical unforeseeable injuries, such as accidents on government ground or injuries caused by the actions of state employees (See, e.g., DeFoor, Fritz, Maphis), where the plaintiff can only be made whole by monetary relief, Woo's claim concerns property seized by the state in the first place that is still in its detention. The state has complete control over the property to avoid loss or damage. It can resolve Woo's claim at no cost by returning his property.[10] Any litigation cost is on account of the state's refusal to do so despite Woo's affirmed conviction and his properties' predominant lack of evidentiary value. In that case, the state has the same burden in a civil court to prove by preponderance a connection between Woo's property and criminal activity as in a criminal court pursuant to Fordyce, 705 P.2d at 9.

Claims such as Woo's in no way expose the state to unlimited tort liability, disrupt or make prohibitively expensive the provision of essential services, or result in excessive fiscal burdens.

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[10] Woo "sought monetary damage for... wrongful detention" (Woo at ¶ 12) only to the extent that he used the JDF 116 "VERIFIED COMPLAINT IN REPLEVIN" form for his Complaint, which by default contained the "damages" wording from C.R.C.P. 104(e). (CF, p 3, ¶ 11) However, Woo does not seek monetary relief unless any property is lost, damaged, or otherwise not returned to him.

There is no compelling state interest against a claim for the very property the state seized that: (1) it largely never used in its prosecution; (2) is still in its possession; and (3) it can resolve at no cost by releasing the property.

To the extent that the state has an interest in the detention of property necessary for prosecution, such interest is not relevant to the CGIA, which bars Woo's claim only because it could lie in tort. The state interests relevant to the enactment and legislative intent of the CGIA are those set forth in C.R.S. § 24-10-102. Further, the record in Woo's criminal case will not support any argument that the Respondents used more than a few of Woo's properties during prosecution. The Respondents also made no argument in the underlying replevin case that they required Woo's property for any reason. (CF, pp 20-27, 58-63)

Even assuming the state has a compelling interest, the CGIA does not advance such interest by the least restrictive mean possible in barring Woo's claim from the outset. The least restrictive mean practically available to advance a state interest against liability and fiscal burden from Woo's claim is to simply return his property. Although this presumes no property loss or damage, the Respondents have in fact made no such allegation, thus rendering this a practically available option. Other conceivable, albeit currently unavailable, less restrictive means include a legislative change waiving immunity under C.R.S. § 24-10-106, with reasonable constraints, or the enactment of a statute providing post-sentence remedy at a meaningful time and in a meaningful manner, with provision for damages perhaps limited to property loss, damage, or destruction.

The CGIA does not withstand strict scrutiny in barring Woo's claim, thus violating substantive due process.

iii. The CGIA allows the state to engage in arbitrary and wrongful acts of property deprivation.

The CGIA derogates the common law. Maphis, 2022 CO 10 at ¶ 17 (citation omitted). A state's "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause." Honda Motor Co. v. Oberg, 512 U.S. 415, 430 (1994).

It is unreasonable for the Respondents to claim, in the criminal court, that Woo's property may be needed for future proceedings (CF, p 32, ¶ 4), while arguing that: (1) Woo's replevin claim is forever barred based on failure to file notice of claim within 182 days of discovery of injury pursuant to § 24-10-109, C.R.S. 2019[11] (CF, pp 22-23); and (2) the criminal court lacks jurisdiction to address Woo's motion for return of property, albeit based on the ongoing appeal. (Appendix E, p 2, ¶ 3) The criminal court, in turn, declines to address Woo's motion (Appendix D) and subsequently offers an analysis as to why it lacks post-sentence jurisdiction (Appendix E, p 5, ¶¶ 2-3), despite knowledge that Woo's replevin case was dismissed (Id. at p 5, ¶¶ 4-5).

The state's overall actions here thus indicate not only an inadvertent procedural conflict, but actual intent to permanently deprive Woo of his properties despite their predominant lack of relevance to the criminal case. For example, the Prosecution did not move to admit a single file among terabytes of Woo's data in eight seized hard drives in the criminal case. Rather, it moved to exclude them all from trial, expressly conceding that they were irrelevant to the case. (See n.8) Its computer forensic lab's report indicates that the lab performed

[11] The Prosecution's assertion in the criminal court that Woo's property is needed for future proceedings is an admission that, from its standpoint, Woo has not yet sustained an injury, and thus any notice of claim or civil action is premature.

a complete tape backup of Woo's hard drives before data extraction, then provided three sets of the extracted data to the Respondents, giving the state at least four copies of Woo's complete data. (Case No. 2016CR2069, Discovery, pp 3654-60) Under no circumstance will the state need to access Woo's original devices again. Yet, despite the extensive redundancy in the preservation of data completely lacking in evidentiary value, the Prosecution expressly refuses to release these devices or even provide a digital copy of Woo's data. (CF, p 32, ¶ 4) Despite Woo's pro se status, the Prosecution and criminal court further deprived him of access to all discovery hard drives provided to former defense Counsel that contained a copy of his extracted data.[12] (Appendix C, D)

The Respondents are thus using the CGIA in a concerted effort with the criminal court to deprive Woo of his own digital property that has no relevance to the criminal case, along with numerous other physical properties. (CF, p 53, ¶ 25) They are essentially imposing additional unconstitutional penalties in violation of U.S. Const. amend. VIII by maliciously depriving Woo of what little remains of him: his life history in the form of family, travel, graduation, and wedding photos; music he composed; his ex-wife's music performances; software he coded throughout his tech career; personal contacts; among countless other invaluable aspects of his personal and professional history that have no possible connection to his murder case.

The CGIA thus violates substantive due process by allowing the state to engage in such arbitrary and wrongful property deprivation that arguably "shocks the conscience" and "interferes with rights implicit in the concept of ordered liberty". See Salerno, 481 U.S. at

[12] Said discovery deprivation is the subject of Case Nos. 2019CA202, 2020CA564, 2020SA287, and 2022CA184. All three Court of Appeals cases were dismissed based on the purported lack of a final appealable order.

746; Foucha, 504 U.S. at 80. In barring all replevin claims, the CGIA facilitates the state's wrongful actions by giving the criminal court sole discretion whether to assert lack of post-sentence jurisdiction and inflict property deprivation upon any given criminal defendant.[13] Six years after the seizure of his properties, Woo still has no recourse for the recovery of his legally owned, non-contraband items that predominantly have no connection to his criminal case other than that they were in his luggage at the time of his arrest, or were seized from his residence and later determined to have no evidentiary value.

CONCLUSION

U.S. Const. amend. XIV, § 1 precedes state governmental immunity laws. The foregoing demonstrates beyond a reasonable doubt that the CGIA violates procedural and substantive due process in barring Woo's replevin claim and is therefore unconstitutional as applied. Woo respectfully requests that this Court reverse the dismissal of his claim and find the CGIA constitutionally invalid as applied, or provide any other available relief.

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[13] Assuming Woo is correct that the state is intentionally and maliciously depriving him of property, he still has no post-deprivation remedy. The criminal court's authority to assert lack of jurisdiction overcomes any claim against state employees in their individual capacities for willful and wanton property deprivation, assuming Woo can even identify such individuals and prove such claim. See Hudson v. Palmer, 468 U.S. 517, 533-36 (1984) (holding that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of due process if a meaningful postdeprivation remedy for the loss is available; finding that the respondent has an adequate postdeprivation remedy for the alleged destruction of his property by a correctional officer because state employees do not enjoy sovereign immunity for their intentional torts).

Respectfully submitted this 5th day of April, 2022.

James Woo, DOC #179463
Petitioner, Pro se
Centennial Correctional Facility
P.O. Box 600
Canon City, CO 81215

CERTIFICATE OF SERVICE

I certify that on this 5th day of April, 2022, a true and correct copy of the foregoing OPENING BRIEF OF PETITIONER was placed in the U.S. Mail, properly addressed, postage prepaid, to the following:

Mary Ritchie, Assistant County Attorney
Office of the County Attorney of El Paso County
200 S. Cascade Ave.
Colorado Springs, CO 80903

James Woo, DOC #179463
Petitioner, Pro se

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

OFFICE OF THE COUNTY ATTORNEY
OF EL PASO COUNTY
200 S. CASCADE AVE.
COLORADO SPRINGS, CO 80903

9590 9402 3133 7166 9312 05

2. Article Number *(Transfer from service label)*

7018 0040 0000 8170 9560

PS Form 3811, July 2015 PSN 7530-02-000-9053

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

~~Agent~~
☐ Addressee

B. Received by *(Printed Name)*

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

COLORADO SPRINGS CO MAIN
JUN 20 2019
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APPENDIX A

USPS TRACKING #

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Colorado Department of Corrections
Arkansas Valley Correctional Facility
12750 Hwy. 96
Ordway, CO 81034

Woo, J. 179463

4

June 12, 2019

James Woo, DOC # 179463
Arkansas Valley Correctional Facility
12750 Hwy 96 at Lane 13
Ordway, CO 81034

Office of the County Attorney of El Paso County, Colorado
200 S. Cascade Ave.
Colorado Springs, CO 80903

Re: Notice of Claim per C.R.S. § 24-10-109

To Agent of the El Paso County Attorney's Office,

Pursuant to C.R.S. § 24-10-109, I hereby file a Notice of Claim to request the return of my properties that were seized from me in case no. 16CR2069 (People v. Woo) to my agent(s). All items in my luggage, backpack, and clothing worn were seized from me on April 22, 2016 upon my arrest in Seattle, WA, then forwarded to the El Paso County Sheriff's Office and entered into evidence. Other properties of mine were also seized from my San Francisco apartment, then forwarded to EPSO and entered into evidence. I believe the district attorneys in my case, Daniel May, Amy Fitch, and Mr. Fisher of the Fourth Judicial District Attorney's Office, have sole authority regarding the release of my properties.

As of February 2019, my appellate attorney arranged for OADC case assistants to begin bringing my appellate record, including trial transcripts, to me for my review. It occurred to me during my review that not a single file in my computer hard drives that were seized from me was even motioned to be admitted at trial in any pretrial pleading or hearing, which implied that they had no evidentiary value in the case. Likewise, most of the properties that were seized were not used at trial or motioned to be admitted at trial in pretrial pleadings or hearings. The fact that most of the seized properties were not mentioned anywhere in the appellate record suggests that they had no evidentiary value for prosecution and that their detention might be wrongful. I became aware of this beginning February 2019.

I have been deprived of all my life's work and records stored in the seized hard drives that I have needed for numerous legal and personal reasons for the past three years, along with the other seized properties, despite their lack of evidentiary value. Moreover, the EPSO and DAO have multiple copies of all data in all of the seized hard drives in their discovery hard drives, as well as access to full tape backups of the original devices at their computer forensics lab, which eliminates their need for the original seized hard drives.

I hereby request the immediate release of all properties seized from me without prosecutorial evidentiary value, and the future release of any other remaining property when no longer needed for prosecution. The following is a list of the requested properties and their monetary values:

1. 7SF - iPad 4 model A1458 with green cover ($500)
2. 10SF - miscellaneous paperwork to include papers from law office, bank statements, copies of checks, university paperwork, receipts, handwritten letters, court documents from 1999, court forms, envelopes from several individuals, and pieces of papers with Chinese writing.
3. 11-SF - Computer tower with no hard drive ($2,300)
4. 13-SF - manila envelope with paperwork to include court documents, bank statements, and student enrollment history.
5. 10-RSH - iPhone 5 (white & white metal colored iPhone in a Lifeproof case) ($400)
6. 11-RSH - iPhone 6 (silver & white iPhone in white and grey Lifeproof case) ($400, contents priceless)
7. 12-RSH - 3 GBR passports and 1 USA passport ($500)
8. 13-RSH - empty black credit card wallet
9. 14-RSH - receipts
10. 15-RSH - over the counter medication ($250)
11. 16-RSH - misc. papers
12. 17-RSH - 2 wallets, one black and one brown containing credit cards ($60)
13. 18-RSH - men's leather belt, "Blue Vintage" ($100)
14. 19-RSH - white sock
15. 20-RSH - white sock
16. 21-RSH - one pair of blue Diesel brand men's underwear ($20)
17. 22-RSH - one men's blue t-shirt, Diesel brand ($40)
18. 23-RSH - one pair of men's jeans, London brand, size 30 ($150)
19. 24-RSH - one pair of men's size 8 fluorescent green Champion brand tennis shoes ($35)
20. 27-RSH - one black men's wallet with misc. credit cards. ($40)
21. 28-RSH - $520.02 in cash ($520.02)
22. 30-RSH - two bottles of medication: Omeprazole & Metaclopramide ($5)
23. 33-RSH - One men's black Rinet brand medium size jacket ($300)
24. 34-RSH - one black roller Samsonite suitcase filled with clothing ($3,000)
25. 35-RSH - receipt
26. 36-RSH - one white and green Eddie Bauer backpack full of clothes, perfume, and misc. items, including Bose noise canceling headphones ($600)
27. 37-RSH - miscellaneous papers and receipts
28. 38-RSH - US passport card, social security card, and picture from pocket #3 of 36-RSH
29. 39-RSH - cables and SSD drive from pocket # 3 of 36-RSH ($300, contents priceless)
30. 40-RSH - AT&T SIM card and kingston 4GB thumb drive from pocket #4 of 36-RSH ($50, contents priceless)
31. 41-RSH - one bracelet, one necklace, two keys, one white metal ring (engraved Tiffany's ring) 1 white metal ring with stones (1 carat diamond ring) from pocket #4 of 36-RSH ($6,500)
32. 42-RSH - nine keys on a key ring with the make Honda from pocket # 5 of 36-RSH
33. 43-RSH - check book, checks 1201 through 1210 and two $2.00 dollar bills from pocket #5 of 36-RSH ($4)
34. 44-RSH - receipts from pocket #5 of 36-RSH
35. 46-RSH - Amazon tablet, good condition from pocket #5 of 36-RSH ($50)

36. 47-RSH - Western Digital 1TB black hard drive, model WD100FALS-40U9B0 (this may be 51-RSH instead) ($150, contents priceless)
37. 48-RSH - Seagate 5TB external hard drive model SRDONF2 ($250, contents priceless)
38. 49-RSH - Iomega external hard drive enclosing 1TB Seagate hard drive, model LDHD-UP ($150, contents priceless)
39. 50-RSH - Western Digital 2TB hard drive, model WDBMVWD0208TT-01 ($200, contents priceless)
40. 51-RSH - Toshiba 1TB hard drive, model HDTC610XKB31 (this may be 47-RSH instead) ($150, contents priceless)
41. 52-RSH - digital camcorder with battery from pocket #5 of 36-RSH ($850)
42. 64-RSH - digital recorder ($50)
43. 65-RSH - CD of legal hearing from 2/14/08
44. 66-RSH - Western Digital 250 GB hard drive, WD2500 ($150, contents priceless)
45. 67-RSH - business card
46. 69-RSH - bag of prescription medications ($20)
47. 70-RSH - bag of prescription medications ($20)
48. 72-RSH - Western Digital My Passport hard drive, black, WXDIE72PAY03 ($150, contents priceless)
49. 73-RSH - Black Dell 128MB thumb drive & 1 Samsung 2GB SD card ($50, contents priceless)
50. 75-RSH - Douglas County traffic ticket
51. 77-RSH - 4 page application

Total value of all items claimed: $18,514.02 plus numerous priceless digital contents.

Although I attempted to mail this notice via certified mail with return receipt as required by C.R.S. 24-10-109(3)(a), due to my indigent status the CDOC is rejecting this request and is mailing it standard first class.

Sincerely,

James Woo

District Court, El Paso County, Colorado Court Address: 270 South Tejon Street Colorado Springs, CO 80903	DATE FILED: March 22, 2019 11:10 AM FILING ID: A35FB8FAAF501 CASE NUMBER: 2016CR2069
PEOPLE OF THE STATE OF COLORADO **vs.** **JAMES WOO, Defendant**	▲ **COURT USE ONLY** ▲
DANIEL H. MAY, District Attorney, SCN 11379 AMY C. FITCH, Deputy District Attorney 105 E. Vermijo Colorado Springs, CO 80903 Phone Number: 719-520-6000 Atty. Reg. #: 26042	Case Number:16CR2069 Div.: 17 Ctrm:

PEOPLE'S RESPONSE TO DEFENDANT'S REQUEST FOR RETURN OF PROPERTY

DANIEL H. MAY, District Attorney for the 4th Judicial District, State of Colorado, by and through his senior deputy, Amy C. Fitch, responds as follows to defendant's request to return property:

1. Defendant has sent a letter in which he requests the return of the following property: (See Attachment A)
    a. The entire 6TB hard drive minus the protected images of the victim
    b. The iPad that the defendant states belonged to his ex-wife,
    c. $500 in cash
    d. Bose headphones,
    e. Diamond ring,
    f. Computer tower,
    g. Camcorder,
    h. Several flash drives,
    i. Numerous documents seized from his apartment

2. The court has previously directed the defendant to specify which files he wants to be copied for him at a hearing on May 25, 2018. The defendant is apparently indicating that he wants everything except the protected images. He suggests that we copy the 6TB hard drive and then delete the protected images

3. The People will not copy the 6TB hard drive and then delete images. Those images would still be available on that hard drive to someone with computer expertise, which the defendant has.

APPENDIX B

~~Request for Judicial Notice - Exhibit A~~

Minute Orders

Case Number: 2016CR002069
Case Type: Homicide
Case Caption: The People of the State of Colorado v. Woo, James Takchuan

Division: 17
Judicial Officer: Jann P Dubois
Court Location: El Paso County

Appellate Case Number: 2018CA584 - Court of Appeals

Order Date: 05/25/2018

DUBOIS/LAW/FTR/DA FITCH/MAY/FISCHER MTN HRG 5/25/18 11 AM DIV 17 S380 DNP; CNSL BEDNARSKI PRES; MR. ROOT PRES BY PHONE; RE: MTN TO RELEASE EVIDENCE: CNSL NOTED THAT HE IS NOT RQSTING RELEASE OF ACTUAL HARD DRIVES BUT T/B ABLE TO PROVIDE THE COPIES THAT HE HAS RECEIVED FROM THE DA TO THE DEFT'S FAMILY; DA IS OBJ; CT ORDRS THAT DEFT STATE SPECIFICALLY WHAT ITEMS ARE WANTED FROM THE HARD DRIVE, WHY THEY ARE BEING RQSTD & CNSL BEDNARSKI TO SPECIFY IF THERE IS A CLIENT/ATTNY PRIV BREACH; PARTIES WILL HANDLE IN NORMAL COURSE; THERE IS A CV CASE FLD #18CV30938 IN EPC; PARTIES TO KEEP APPELATE CNSL INFORMED & DA TO KEEP AG OFFICE INFORMED /LAW

APPENDIX C

~~EXHIBIT 16~~

Print Minute Orders 3/12/20 9:34 AM
Status: RSTD MROG CLSD District Court, El Paso County
Case #: 2016 CR 002069 Div/Room: 17 Type: Homicide
The People of the State of Colorado vs. WOO, JAMES TAKCHUAN

FILE DATE	EVENT/FILING/PROCEEDING
2/06/2020	Minute Order (print)

JUDGE: JPD CLERK: REPORTER:
DUBOIS/LAW/FTR/DA FITCH MTNS HRG 2/6/20 1005 AM DIV 17 S380 DPWC BEDNARSKI; RE: MTN TO W/D, CNSL RQSTS MTN TO W/D BE GRANTED AS OF TODAY; DEFT AGREES; DEFT RQST ALL DISCOVERY INCLUDING 6TB HRD DRIVE BE PROVIDED TO DEFT; CNSL BEDNARSKI CAN TURN OVER ALL DISCOVERY IN HIS POSSN EXCEPT THE 6TB HRD DRIVE WHICH IS SUBJECT TO A PROTECTIVE ORDR; CNSL DOES NOT HAVE ALL OF THE DISCOVERY AS SOME OF IT IS IN THE POSSN OF PREVIOUS CNSL BAEZ; CNSL TO PROVIDE IN ELECTRONIC FORM WHAT HE CAN PROVIDE; CNSL TO ALSO CHECK TO SEE IF HE HAS ANY DISCOVERY THAT WAS PREVIOUSLY PRINTED PROVIDED TO DEFT DIRECTLY; CNSL TO PROVIDE W/I 30 DAYS & PROVIDE LIST TO CT AS TO WHAT HAS BEEN SENT TO DEFT; ELECTRONIC DISKS TO BE SENT TO SISTERS ADDRESS; CT ALLOWS CNSL TO W/D TODAY HOWEVER, CNSL TO COMPLY WITH TODAY'S CT ORDRS; DEFT TO CONTD TO OBTAIN ANY ADDT'L DISCOVERY FROM CNSL BAEZ THAT CNSL BEDNARSKI DOES NOT HAVE; CT NOTES THAT AFTER 60 DAYS, DEFT IS TO PROVIDE CT W/ UPDATE AS TO ISSUES W/ OBTAINING DOCS, ETC FROM CNSL BAEZ; DEFT TO ALSO CONFER W/ APPELLATE CNSL TO SEE IF EVERYTHING MISSING CAN BE OBTAINED FROM APPEALATE CNSL; AFTER 60 DAYS, CT MAY POSSIBLY ORDR DA TO RE-PROVIDE ALL DISCOVERY TO DEFT AGAIN (EXCLUSIVE OF ANYTHING NOTED IN PROTECTIVE ORDR); AGAIN, DEFT WLD NEED TO SPECIFY WHAT ITEMS ARE WANTED FROM THE HARD DRIVE & WHY THEY ARE BEING RQSTD; UNTIL THAT IS RCVD, PROTECTIVE ORDR WILL STAND; DEFT RQSTS A LIST OF ALL FILES ON THE HARD DRIVE TO BE ABLE TO SPECIFY WHICH FILES HE IS RQSTING FROM THE HARD DRIVE; DA TO CHECK W/ DA TECH TO SEE IF PROVIDING AN INDEX OF FILES IS A POSSIBILITY & PROVIDE UPDATE/RESPONSE TO DEFT W/I 30 DAYS; RE: DEFT'S ISSUE RE: PROTECTIVE ORDR & CNSL BEDNARSKI, CT NOTES THAT THAT IS PART OF THE APPELLATE PROCESS & CT CANNOT ENTERTAIN THAT ISSUE; RE: OTHER PROPERTY BEING RQSTD BY DEFT, THIS CASE IS STILL UNDER AN APPEAL & DA WILL NOT RELEASE ANY PROPERTY AT THIS TIME NOR IN FORESEEABLE FUTURE DUE TO ANY POST-CONVICTION RELIEF THAT MAY BE SOUGHT; RE: MTN FOR APPT OF CNSL, CT DOES NOT HAVE AUTHORITY TO APPT CNSL FOR WHAT DEFT IS RQSTING & DENIES RQST FOR APPT OF CNSL; CT ORDRS THAT ALL PLEADINGS FLD BY DA BE SENT DIRECTLY TO THE DEFT AT DOC AS WELL AS ANY CNSL OF RECORD; DEFT MAY BE RETURNED BACK TO DOC; DEFT GRANTED PERMISSION TO APPEAR BY PHONE FOR FUTURE HRGS; CASE RECLOSED /LAW

APPENDIX D

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 E

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

CCF		4/5/22	
FACILITY		DATE REC'D	
Phillips		12000	KS
STAFF LAST NAME		ID#	INT
WOC	179463		JW
DOC#	OFFENDER LAST NAME		INT