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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

REPLY 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 reply brief of not more than 18 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.

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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Petitioner James Woo ("Woo") submits the following Reply Brief in response to the Respondents' Answer Brief ("AB") and Amici Curiae's Brief ("Amici Brief").

I. The Court of Appeals erred in holding that the Colorado Governmental Immunity Act ("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. Respondents' procedural due process arguments fail because they rely upon patently false factual assertions.

Respondents indicate that Woo's criminal appeal was filed "on or about March 26, 2018" and "was pending for over four years, until last month, when it was remanded back to the criminal trial court on or about May 9, 2022." (AB, p 4, ¶ 1) In support, they provide a copy of Woo's Notice of Appeal, filed January 31, 2022 (Id., Addendum pp ADD000001-ADD000013), and the resulting Mandate indicating dismissal without prejudice, dated May 9, 2022 (Id., Addendum p ADD000014). These do not concern Woo's conviction, but the criminal court's December 6, 2021 rulings on his September 18, 2019 motions for return of property, discovery, and removal of protective order. (Id., Addendum pp ADD000004-12; p ADD000005, ¶ 2) They indicate that the Court of Appeals affirmed Woo's conviction on November 25, 2020 and this Court denied certiorari review on March 29, 2021. (Id., Addendum p ADD000001, ¶ 2; p ADD000005, ¶ 7; see also Opening Brief ("OB"), p 1 n.1) Woo provided a copy of the same order and discussed its contents. (OB, p 6; Appendix E) He submitted a Petition for Writ of Certiorari concerning that order on April 24, 2022 (Case No. 2022SC327). Thus, Respondents' assertion that Woo's appeal of his conviction was pending for over four years until May 9, 2022 is false.

More importantly, Respondents continue to falsely allege that Woo filed a motion for return

of property on May 22, 2018 and that the criminal court addressed its merits on May 25, 2018. (AB, p 4, ¶ 2) As with their brief on appeal, their arguments here rely heavily upon this categorical falsehood. See AB, p 7, ¶ 1 ("Petitioner has been heard at least twice in the criminal trial court on his request for return of property."); p 10, ¶ 1 ("the Trial court addressed petitioner's motion for return of items contained on his hard drives three days after it was filed."); p 15, ¶ 1 ("petitioner did have an adequate post-seizure remedy when he filed, and was heard by the court, on at least three motions [] for return of the property in his criminal case."); p 18, ¶ 2 ("Again, petitioner had at least three hearings, so we cannot say that he was denied an opportunity to be heard. The fact that petitioner did not obtain the relief he wants does not demonstrate a remedy was unavailable or inadequate."); p 19 ("Petitioner's own failure to comply with the Trial court's order to provide details, rendered relief 'unavailable' to him, and it was his error to cure."); p 25, ¶ 2 ("The record shows the trial court did not opt to decline jurisdiction. it addressed petitioner's motion for return less than three days after it was filed").

As Woo indicated in his Opening Brief, the May 22, 2018 motion filed by his defense counsel ("Counsel") only requested permission to release discovery hard drives in his possession to Woo: "Undersigned counsel... is seeking permission to release the hard drives before releasing them to Mr. Woo." (CF, p 34, ¶ 4; OB, pp 4-5) The criminal court's May 25, 2018 Minute Order provides clarification: "[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." (OB, Appendix C) Its historical summary of the issue is consistent with Woo's statement of facts

and contradicts that of the Respondents. (See AB, Addendum p ADD000004, ¶3)("[Counsel] sought an order...permitting him to release hard drives in discovery to Mr. Woo. At a hearing held on May 25, 2018... the defense clarified that request and indicated defense counsel wanted to release copies he received from the district attorney to Mr. Woo's family.") Thus, the motion had nothing to do with Woo's seized property. Counsel requested to release discovery in his client file that was potentially subject to a protective order to Woo's family. The discovery hard drives contain at least six terabytes ("6TB") of consolidated forensic data extracted from at least 16 electronic devices seized from Woo, the victim, and others. (See Appendix 1, p1, ¶2)("The 6TB hard drive was created by the EPSO computer forensics unit from their forensic search of various devices.") The May 25, 2018 Minute Order directing Woo to "STATE SPECIFICALLY WHAT ITEMS ARE WANTED FROM THE HARD DRIVE, WHY THEY ARE BEING [REQUESTED]" (OB, Appendix C) thus concerns these forensic discovery files in Counsel's possession; not any seized hard drive or other property.

Woo clarified this in the replevin case. (CF, pp 44-45, ¶¶ 2-4) On appeal, he devoted pages 7-10 of his reply brief addressing the same false allegations. In the current case, he again provided clarification in his Opening Brief (OB, pp 4-5), moving to append documents "for factual clarification, in light of the Respondents' numerous false assertions on appeal that [Counsel] moved for the return of his property in the criminal court in 2018."(Petitioner's Motion for Judicial Notice, submitted April 5, 2022) Still, Respondents persist with their false allegation. This is no longer a matter of inadvertent miscomprehension, but intentional misrepresentation. By excessively repeating the falsehood, they successfully misled the Court of Appeals. See Woo v. El Paso Cty. Sheriff's Office, 2020 COA 134, ¶¶ 3, 19, 24. Now they employ the same tactic to mislead this Court.

As such, all of Respondents' above-cited arguments that rely upon the May 25, 2018 order fail.

As for the March 22, 2019 "People's Response to Defendant's Request for Return of Property" (AB, p 4, ¶ 3; OB, Appendix B; CF, pp 31-32), Woo did not file his property request letter with the criminal court. He sent it only to the Prosecution as an informal demand, who then filed its response with the court without serving Woo,[1] attaching Woo's letter as "Attachment A".[2] (CF, p 31, ¶ 1) In his letter, Woo combined two separate requests for: (1) the release of a few of his seized properties (CF, pp 31-32, ¶¶ 1b-i, 4); and (2) consent to the release of all except protected contents in the aforementioned 6TB discovery hard drive that the prosecution provided Counsel, pursuant to the May 25, 2018 Minute Order (Id., ¶¶ 1a, 2, 3, 5). Police never seized a 6TB drive from Woo. (CF, pp 4-6) It was generated by the Respondents' computer forensics unit. (Appendix 1) Thus, the Prosecution's indication that Woo must "comply with the Court's (May 25, 2018) direction and give the People a list of the files he wants" (CF, p 32, ¶ 5; AB, p 4, ¶ 3) concerns the 6TB discovery drive; not Woo's seized hard drives or other property.[3]

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

1. Respondents erroneously contend that Woo has no protected property interest in his seized property. (AB, pp 11-13, "C.")

Referencing Woo's two pretrial motions to suppress evidence in his criminal case, Respondents

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[1] Due to the lack of proper service, Woo was unaware of the Prosecution's response to his letter until Respondents provided it with their motion to dismiss.

[2] Respondents omitted Woo's letter from the Prosecution's response; its contents contradicted their false assertion on appeal that the letter and response were dated March 2018, thus purportedly establishing Woo's date of discovery of injury in support of their notice of claim argument that Woo's claim was forever barred.

[3] The Prosecution's allegation that Woo stole from his employer, though irrelevant here, is unsupported by evidence. Woo was never charged with such crime, nor did the employer, whom Woo alleged to have committed millions in tax fraud (Case No. 2016CR2069, Defendant's Motion for Release of Properties and Discovery, p 7, ¶ 22, filed September 18, 2019), even file a police report to Woo's knowledge.

argue that Woo had a meaningful remedy for unlawfully seized property. (AB, p 12)

> [A] difficulty in the federal rule provisions for custody and disposition of property [is] the failure to discriminate between proceedings for suppression of evidence and proceedings for the return of seized property. ... [T]he district court, once its need for the property has terminated, has both the jurisdiction and the duty to return the contested property [] regardless and independently of the validity or invalidity of the underlying search and seizure.

United States v. Wilson, 540 F.2d 1100, 1103-04 (D.C. Cir. 1976)(citation omitted).

Most of Woo's properties were legally seized. Counsel moved to suppress evidence seized from Woo's storage unit and residence based on illegal police entries, failing to argue that some of the properties were seized outside the scope of the subsequent warrants as Woo contends. (CF, pp 48-49, ¶ 13; p 51, ¶ 16; p 36, ¶¶ 1-2) However, they never moved for the "return of the property" as Respondents falsely allege. (AB, p 15, ¶ 1) Woo only filed one motion for return of property, on September 18, 2019.

> [T]he legality vel non of the search or seizure is not relevant to disposition of a motion for return or restoration of the property... If the seizure is for evidentiary purposes of things innocent in themselves, as for example an identifying garment or incriminating records, the lawfulness of the seizure goes only to the question of when they should be returned; when their evidentiary utility is exhausted, the owner should have back his overcoat or his business ledger.

Wilson, 540 F.2d at 1103 n.4 (citing Model Code of Pre-Arraignment Procedure § SS 280.3 (American Law Inst. 1975)). All property that Woo seeks fit this description, whether or not legally seized.

As for Woo's lawfully seized property, Respondents argue that "he is not entitled to return until all evidentiary uses are complete." (AB, p 12) Despite Woo's conviction, affirmed on appeal, Respondents contend that "there was a real possibility of a new trial after a successful appeal or post-conviction proceeding, rendering evidentiary use of the seized property incomplete." (Id., p 13, ¶ 1) On this basis alone, they leap to the conclusion that "[t]herefore, Woo cannot prove he has a property interest

protected by the constitution." Id. This erroneous conclusion implies that the seized property is forfeited and no longer Woo's property, even upon his affirmed conviction. It presumes the state can retain the property indefinitely, disregarding the fact that Woo has been deprived of a hearing at which to determine evidentiary use and why the majority of the property was not used at trial or even moved for admission. Even the Court of Appeals' due process analysis indicates: "We assume for the sake of our analysis that the property Woo seeks to obtain belongs to him. Under that assumption, he suffered a deprivation of a property interest when the state seized and did not return the property." Woo at ¶ 17 (emphasis added). See also People v. Strock, 931 P.2d 538, 539 (Colo. App. 1996)("the defendant establishes a prima facie case (of ownership) by showing that the property was seized at the time of arrest and held by law enforcement authorities."). Woo clearly has a protected property interest to his seized property.

Amici indicate: "the prosecution routinely argue that some or all of the seized property should not be returned because it may be needed as evidence if the defendant is granted a new trial after a successful direct appeal or postconviction proceeding." (Amici Brief, pp 3-4) This suggests a standard practice irrespective of actual evidentiary need, despite how speculative and remote the possibility is that a defendant will receive a new trial. Woo addressed this concern in his Opening Brief. (See OB, pp 19-21, "V.") Amici's argument that "evidentiary use... may not end until the conviction is subsequently affirmed on appeal and postconviction relief has been denied" (Amici Brief, p 4) disregards Woo's contention that defendants like him with class 1 felony convictions can never fully exhaust postconviction remedies. (OB, pp 19-21, "V.") With no time limit to petition for relief, there is always the remote possibility of a new trial based on newly discovered evidence. Id. The criminal court and Prosecution can exploit this to avoid

ever holding a property hearing, thus relieving the Prosecution of the burden to prove a connection between the property and criminal activity even if the court has post-sentence jurisdiction. To indefinitely defer a hearing based on the speculative possibility of a new trial is to deprive Woo of his property without due process:

> [T]he government may not by exercising its power to seize, effect a De Facto forfeiture by retaining the property seized indefinitely. See generally United States v. United States Coin and Currency, 401 U.S. 715, 718, 91 S. Ct. 1041, 28 L. Ed. 2d 434 (1971)(forfeiture must be based on finding that property was used in connection with wrongful conduct). ...[P]roperty used as evidence must be returned once the criminal proceedings to which it relates have terminated... In Lowther v. United States, 480 F.2d 1031 (10th Cir. 1973), the court based such a holding on the premise that continued retention of evidence would constitute a taking without just compensation.[4]

United States v. Premises Known as 608 Taylor Ave., Apartment 302, 584 F.2d 1297, 1302 (3d Cir. 1978). See also United States v. Rodriguez-Aguirre, 264 F.3d 1195, 1212-13 (10th Cir. 2001)("After the criminal proceedings conclude, ...[the government's] continued retention of the property...could legitimately be viewed as a deprivation of the defendant's due process rights.").

2. Respondents' argument that the criminal court afforded constitutionally sufficient property return procedures fails because it relies upon their false assertions that the court addressed the merits of Woo's property motion.

Respondents next contend that the criminal court afforded Woo constitutionally sufficient property return procedures. (AB, pp 13-19, "d.") Here, they largely copy entire paragraphs and pages, nearly verbatim, from the Court of Appeals' opinion in Woo and the Amici Brief. Compare Woo at ¶ 18, with AB, pp 14-15. Compare Amici Brief, p 6, ¶ 1, with AB, pp 15-16, ¶ 3. Compare Woo at ¶¶ 19-22, with AB, pp 16-18. As Woo already previously addressed and refuted the Court of Appeals' relevant analyses in Woo, he defers to his Opening Brief as to these redundant contentions. (OB, pp 11-17) Respondents provide only three paragraphs of original arguments not directly copied from Woo or the Amici Brief. (See AB, p 15; p 18, ¶ 2) These rely upon their

4 "[S]overeign immunity does not preclude claims under the just compensation clause". City & County of Denver v. Desert Truck Sales, Inc., 837 P.2d 759, 768 (Colo. 1992)(citation omitted). See U.S. Const. amend. V; Colo. Const. art. II, § 15.

patently false factual assertions discussed above (section A) that are plainly detached from reality and must be disregarded.

Woo never argued that the civil court must "fill in a ... procedural gap, until the split of authority which governs criminal procedure is resolved." (AB, p 15, ¶ 2) As discussed below (section E), numerous jurisdictions permit a civil replevin action for the return of property seized by law enforcement. Respondents' procedural due process response focuses only on the procedures in place if the criminal court has post-sentence jurisdiction. It neglects to address a key issue on review as to the Court of Appeals' conclusion that due process is satisfied merely by Woo's purported ability to recover his property before sentencing, presumably even if evidentiary use is not complete. Woo at ¶ 24.

C. Respondents' substantive due process arguments (AB, pp 19-22) fail to address the constitutionality of the CGIA in barring Woo's replevin claim. Their jurisdictional arguments fail because Woo's claim was dismissed with prejudice.

In response to Woo's substantive due process arguments (OB, pp 21-29), Respondents first contend that "Woo has not met his burden to prove that he has a protected property right under the 14th Amendment. Therefore, respondents' reason for detention is subject to the rational basis (rather than strict scrutiny) test." (AB, p 20, ¶ 1) As discussed above, even the Court of Appeals' due process analysis in Woo assumed that the property belonged to Woo and therefore "he suffered a deprivation of a property interest". Woo at ¶ 17.

> The Fourteenth Amendment mandates that a state may not 'deprive any person of life, liberty, or property, without due process of law.' U.S. Const. amend XIV, § 1. The definition of what type of property is safeguarded by the Fourteenth Amendment has evolved over the years to encompass not only tangible physical property, but 'a legitimate claim of entitlement' to certain circumscribed benefits.

Hillside Cmty. Church v. Olson, 58 P.3d 1021, 1025 (Colo. 2002)(emphasis added)(citation omitted).

"In determining whether a ...denial of a particular right is deserving of strict scrutiny... we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein." Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982). Since the right infringed here concerning Woo's tangible physical property has its source in the Constitution explicitly, strict scrutiny applies.

However, Respondents do not provide a strict scrutiny or rational basis substantive due process analysis of the CGIA's infringement upon Woo's property right. Rather, they devote the remainder of their brief to subject matter jurisdiction arguments based on the lack of concurrent jurisdiction (AB, pp 20-21), priority of jurisdiction (Id., p 22), and ripeness (Id., pp 22-26). These arguments are not only irrelevant to the CGIA's constitutionality, but fail generally because Woo's replevin claim was dismissed with prejudice. (CF, pp 64-65)

"A dismissal (for lack of subject matter jurisdiction) under C.R.C.P. 12(b)(1) is not an adjudication on the merits, but rather is the result of a court lacking the power to hear the claims asserted." Grant Bros. Ranch, LLC v. Antero Res. Piceance Corp., 409 P.3d 637, 645 (Colo. App. 2016). Thus, "the dismissal... is necessarily without prejudice". Id. "The important thing is that a judgment, which is not on the merits, be correctly denominated as one without prejudice." Trinity Broad. of Denver v. City of Westminster, 848 P.2d 916, 931 (Colo. 1993) (Lohr, J. concurring in part and dissenting in part)(citing "6 Moore's Federal Practice p 56.03, at 56-58 to -59 (footnotes omitted)"). Here, Woo affirmed dismissal with prejudice for lack of subject matter jurisdiction only due to the CGIA, opining: "Woo is right that the dismissal for lack of jurisdiction does not operate as an adjudication on the merits of his replevin claim. ...

Because the dismissal was based on the [Respondents'] sovereign immunity, however, dismissal with prejudice was proper." Woo at ¶28. See Trinity, 848 P.2d at 923 (recognizing that the CGIA "is not a tort accrual statute" but a "nonclaim statute"). Respondents' concurrent jurisdiction, priority of jurisdiction, and ripeness arguments are unrelated to the CGIA, hence plausible only for dismissal without prejudice. They all fail because Woo's claim was dismissed with prejudice. Nonetheless, Woo addresses Respondents' jurisdictional arguments:

1. Lack of concurrent jurisdiction.

Citing In re W.C., 2020 CO 2, ¶¶ 11-12, Respondents argue that Woo's criminal appeal was pending throughout his replevin case and, thus, jurisdiction had been transferred from the criminal court to the Court of Appeals "for all essential purposes with regard to the substantive issues that [were] the subject of the appeal."[5] (AB, p 20, ¶ 2) They argue that Woo's notice of appeal "necessarily concern[ed] substantive issues regarding the initial seizure of some or all of the items he wants returned." (Id., p 21, ¶ 1) On this basis, they conclude that the civil court lacked jurisdiction to address Woo's claim "at the time it dismissed the complaint." Id.

Respondents' arguments concern the lack of concurrent subject matter jurisdiction. See Horton v. Suthers, 43 P.3d 611, 614 n.3 (Colo. 2002) ("See People v. Dist. Court, 638 P.2d 65, 66-67 (Colo. 1981) (holding that the perfection of an appeal of a final judgment... divests the trial court of subject-matter jurisdiction to entertain any motion for an order that affects the judgment...)"). As discussed above, these arguments fail since dismissal for lack of subject matter jurisdiction must be without prejudice, whereas Woo's claim was dismissed with prejudice. Further,

[5] Respondents' argument contradicts their false assertion that the criminal court addressed the merits of Woo's purported property motion on May 25, 2018. Said hearing occurred during the pendency of Woo's criminal appeal, filed March 26, 2018. The criminal court subsequently vacated all orders issued during the pendency of the appeal based on lack of concurrent jurisdiction. (AB, Addendum p ADD000009, ¶ 4)

this argument is not only irrelevant to the CGIA's constitutionality, but erroneous because the In re W.C. holding regarding the transfer of jurisdiction from a trial court to the appellate court has no bearing on a separate civil action. It does not justify the dismissal of Woo's replevin claim with prejudice. Moreover, Woo's property request was not material to the subject of his criminal appeal and did not directly affect those judgments.[6] "[W]hen an appeal has been perfected, trial courts do not have jurisdiction over matters material to the appeal." In re W.C., 2020 CO 2 at ¶ 12 (emphasis added)(citation omitted). Woo did not even move for property return at any time before filing his criminal appeal. Therefore, the Court of Appeals had no authority to review such issue.

More importantly, Respondents' arguments entirely miss the point of Woo's substantive due process arguments. Woo contends that, even given adequate procedural due process, the state can still deprive all criminal defendants and other individuals of their seized property simply by asserting property loss, damage, or destruction, after which they have no recourse. (OB, pp 21-24) Respondents' jurisdictional arguments are irrelevant here because damages are available only in a replevin action pursuant to C.R.C.P. 104(p); not in the criminal case or Court of Appeals. By dismissing Woo's replevin claim with prejudice, the civil court forever barred his only redress for damages, thus setting the stage for the state to arbitrarily deprive him of his property permanently with no liability.

The relevant strict scrutiny analysis here should assume that: (1) the property belongs

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[6] Woo's criminal appeal concerned: (1) the denial of motions for trial continuance; (2) improper admission of a written summary and testimony narrating video surveillance; and (3) denial of motion to suppress evidence seized from a storage unit. People v. Woo, Case No. 18CA584 (Colo. App. Nov. 25, 2020)(unpublished). Woo had no property in the storage unit and never requested the release of any item seized there.

to Woo; (2) the property is not contraband or subject to forfeiture; (3) evidentiary use is complete; and (4) the government loses, damages, destroys, or otherwise arbitrarily deprives Woo of the property. These assumptions are necessary to get to the constitutional question and are reasonable since Woo has thus far been deprived of a hearing to determine these factors. Yet he is already barred forever from an equitable claim for damages in lieu of the property. Given these assumptions, the question is whether the legislative intent of the CGIA, set forth in C.R.S. § 24-10-102 to protect governments from unlimited tort liability and fiscal burdens, "furthers a compelling state interest by the least restrictive means practically available" in barring Woo's replevin claim. Bernal v. Fainter, 467 U.S. 216, 227 (1984). Respondents provide no such constitutional analysis, plainly avoiding Woo's substantive due process arguments. Their contention that the civil court properly dismissed Woo's claim pursuant to the CGIA (AB, p 21, ¶ 2) merely operates within the CGIA without examining its constitutionality.

2. Priority of jurisdiction.

"The exercise of concurrent jurisdiction is controlled by the principle of priority, which is sometimes referred to as the rule of exclusive concurrent jurisdiction." Estates in Eagle Ridge, LLLP v. Valley Bank & Trust, 141 P.3d 838, 844 (Colo. App. 2005). Respondents' argument regarding priority of jurisdiction (AB, p 22) is not only irrelevant to the CGIA's constitutionality, but inapplicable here. Woo filed his first and only motion for return of property in the criminal court on September 18, 2019, two months after the dismissal of his replevin claim. Therefore, the criminal court never had priority of jurisdiction over his property request. Further, Respondents indicate: "the first action filed has priority of jurisdiction, and [] the second action must be

stayed". Id. (emphasis added)(citation omitted). "In such circumstances, the supreme court has recognized that the second action should be suspended or stayed rather than dismissed for lack of jurisdiction." Estates in Eagle Ridge, 141 P.3d at 844. Here, the civil court dismissed Woo's replevin claim with prejudice despite his request to stay the case if necessary. (CF, p 1, ¶ 4) Therefore, priority of jurisdiction is inapplicable.

3. Ripeness.

Respondents raise a new issue of ripeness (AB, pp 22-26), indicating that "[r]ipeness implicates subject matter jurisdiction." (Id., p 23, ¶ 1) As discussed above, this precludes dismissal with prejudice. See Asphalt Specialties, Co. v. City of Commerce City, 218 P.3d 741, 748 (Colo. App. 2009) ("the district court erred in dismissing this claim with prejudice, as it was not yet ripe for review."). Respondents' ripeness argument (AB, p 24, ¶ 2) is not only irrelevant to the CGIA's constitutionality, but is in direct contradiction to their motion to dismiss requesting dismissal with prejudice, contending that Woo's claim was forever barred based on his purported failure to file notice of claim within 182 days of discovery of injury. (CF, pp 21-23) Their assertion that "Amicus also recognizes the operative facts in this case are highly contingent" (AB, p 25, ¶ 1) is false, since the Amici Brief does not consider any fact in Woo's case. The Amici Brief addresses only the relevant procedural due process issue in general, offering no opinion as to Woo's substantive due process arguments.

Lastly, Respondents argue: "[Woo's] contention that the criminal court lacks (post-sentence ancillary) jurisdiction because his motion for return of property involves 'substantial new fact finding' is [] purely speculative." (AB, p 26, ¶ 1) This is false because the criminal

court expressly made this conclusion: "even if the [People v. Hargrave, 179 P.3d 226 (Colo. App. 2007)] ancillary jurisdiction test were applied, the court would not have jurisdiction because the property requested 'could contain both property subject to return, ... as well as (or only) contraband not subject to return...' ... such 'an inquiry would invariably involve[] 'substantial new factfinding proceedings.'" (AB, Addendum p ADD000008, ¶3)(citing People v. Chavez, 487 P.3d 997, 999 (Colo. App. 2018) "So too here." Id. (emphasis added). Rather than simply agreeing with Hargrave, its analysis only provides reasons why it lacks jurisdiction (Id., ¶¶ 2-3), thus setting a pretext to deny jurisdiction for Woo's property motion absent this current case. Respondents erroneously contend that "the trial court has extensive knowledge of the case that has been pending for nearly five years". (AB, p 26, ¶ 1) Between October and December 2021, Judge Evig replaced Judge Dubois, who presided over Woo's criminal case from its inception through trial. (AB, Addendum p ADD000004, ¶ 1; p ADD000005, ¶ 8; p ADD000012)

D. Amici Brief discussion

The Amici Brief provides only an analysis of the procedures available in the criminal court for return of seized property, without consideration for Woo's substantive due process arguments. Therefore, Amici's conclusion that "if this court agrees with Hargrave, ... barring a replevin claim in a civil case will [] not violate [defendants'] constitutional right against deprivation of property without due process" (Amici Brief, p 10) is erroneous. Even if the criminal court grants a property hearing, defendants have no recourse if the state claims property loss, damage, destruction, or otherwise arbitrarily deprives them of the property.

Woo disagrees with Amici's assertion that "[t]here are meaningful remedies for the return of property that was lawfully seized and has no evidentiary use." (Id., pp 6-8, "(2)")

A court can only determine evidentiary use if it has post-sentence jurisdiction to address a motion for property return. Amici's analysis here presumes the court has post-sentence jurisdiction. As a practical matter, this category of property belongs under Amici's analysis for lawfully seized property that may have evidentiary use after sentencing. (Id., pp 8-12)

Amici indicate that resolving the Court of Appeals split in favor of Hargrave will: (1) "ensure judicial efficiency because a motion for return of property will be litigated by the judge and the parties who are familiar with the evidentiary issues in the criminal case"; and (2) "ensure that indigent defendants will be represented by counsel in the litigation for return of their seized property." (Id., p 5) This is inapplicable to Woo since the judge who presided over his trial has been replaced (AB, Addendum p ADD000004, ¶¶ 1; p ADD000012), and the criminal court expressly denied his motion for appointment of counsel for his property request on February 6, 2020 (OB, Appendix D)("[COURT]...DENIES [REQUEST] FOR [APPOINTMENT] OF [COUNSEL]"). His criminal appellate Alternate Defense Counsel likewise declined to assist with his property request in a January 22, 2019 letter. The decades long split in relevant Court of Appeals authorities without initiative for resolution suggests that Amici and the Public Defender have little concern with their convicted clients' post-sentence requests for seized property.

E. A postseizure remedy in the criminal court and civil court need not be mutually exclusive, but should provide redress for Woo's substantive due process concerns. Numerous jurisdictions provide civil remedy.

"Property which is seized in a criminal proceeding ... may be ultimately disposed of by the court in that proceeding or in a subsequent civil action." Wilson, 540 F.2d at 1104. "[T]he Government argues that adequate civil remedies exist for appellant's relief. That is true. He could also bring

a civil action, but...that neither discharges the district court's duties nor disturbs its jurisdiction." Id. See also United States v. Martinson, 809 F.2d 1364, 1367-68 (9th Cir. 1987)("Where a court of equity assumes jurisdiction because the complaint requires equitable relief, the court has power to award damages incident to the complaint."); Soviero v. United States, 967 F.2d 791, 792-93 (2d Cir. 1992)(noting that request for return of property, whether deemed a Fed. R. Crim. P. 41(e) motion or a separate civil proceeding, is subject to equitable concerns); Mora v. United States, 955 F.2d 156, 161 (2d Cir. 1992)("If the government... no longer has the property, the district court must determine whether the government's conduct renders it liable for damages, either as an equitable remedy or under the [Federal Tort Claims Act]."); United States v. Minor, 228 F.3d 352, 355 (4th Cir. 2000)("A court sitting in equity has jurisdiction to order money damages if it cannot effect return of the specific property at issue"). Federal district courts have applied such holdings. See United States v. Farese, No. 80Cr.63 (MJL), 1987 U.S. Dist. LEXIS 11466 at * 12 (S.D.N.Y. Dec. 15, 1987)(ordering government to return petitioner's property "or a sum equivalent to the current fair market value of any item(s) not returned. The $3,307.78 is to be returned with interest"); United States v. Garcia, 2009 U.S. Dist. LEXIS 32820 at * 11, 13 (D. Ariz. April 14, 2009)("the Court will order monetary damages as equitable relief" for property seized in connection with defendant's criminal conviction); United States v. Mohammad, 95 F. Supp. 2d 236, 242 (D. N.J. 2000)("The Government is...to pay Mohammad restitution in the amount of $1,400" for a watch seized in connection with his drug conviction); Lowther, 480 F.2d at 1033 n.1 ("Plaintiff is entitled to a judgment... for the fair market value of the items... that were seized and ordered destroyed").

Moreover, numerous state jurisdictions provide civil remedy for the return of property seized

by law enforcement. See, e.g., State v. White, 2018-Ohio-2573, ¶ 20 (2d Dist.)("There is a body of case law indicating that an action in replevin is the appropriate procedure... to reclaim possession of property seized by police after the defendant has been convicted"); Brown v. City of Cincinnati, 2020-Ohio-5418, ¶¶ 13, 11 n.1 (1st Dist.)("We decline to extend tort immunity...to the replevin claims presented... indeed, the city's theory would present a troubling result—the city could seize property from its citizens and wrap itself in immunity to avoid ever returning it."; "we recognize that replevin claims may also include incidental monetary damages."); Walls v. Rees, 569 A.2d 1161, 1166 (Del. 1990)("an action for replevin is not barred by the [Delaware Tort Claims Act]"); Return of Property in State v. Johnson, No. 94-0272, 1995 Wisc. App. LEXIS 1273 at * 10-11, 13 (Wis. Ct. App. Oct. 17, 1995)(reversing in part trial court's failure to address part of a replevin action seeking return of property seized by the sheriff that was destroyed or sold; "As the Supreme Court explained... 'a judgment in replevin... can entail recovery of possession of the property or the value of the property if possession is not possible, and damages for detention of the property.'"); Laramore v. Jacobsen, 613 S.W.3d 466, 468 (Mo. Ct. App. 2020)("the statute of limitation (on replevin) begins to run when law enforcement or the court determines that the property is no longer needed as evidence."); Lookingbill v. Fetrow, No. 4:13-CV-01636, 2015 U.S. Dist. LEXIS 87153, at * 18 (M.D. Pa. July 6, 2015)("Courts have... recognized that a state-law conversion or replevin case provides an adequate post-deprivation remedy in situations of seized property."); Dwyer v. County of Nassau, 66 Misc. 2d 1039, 1041, 322 N.Y.S.2d 811, 814 (Sup. Ct. 1971)(finding that plaintiff is entitled to summary judgment in replevin action to recover $907 in currency seized by police under a search warrant); Mace Produce Co. v. State's Attorney for Baltimore City, 251 Md. 503, 507 (1968)("Suits or actions for the return of property held by the State Police must be brought... by way of an action in 'replevin'").

While the return of seized property may be more efficiently adjudicated in the criminal court if the parties litigate fairly, property owners must be afforded equitable redress in cases where the state wrongfully deprives them of property. The manner in which Respondents have repeatedly resorted to patent factual falsities here foreshadows the unlikelihood that they will litigate Woo's property request fairly and truthfully. The Prosecutor verbally asserted at the February 6, 2020 hearing (OB, Appendix D) that she intended to detain Woo's property "in perpetuity", despite its predominant lack of evidentiary value. Consequently, Woo has pursued his substantive due process arguments diligently, cognizant of the Prosecutor's intention to deprive him of his property even given a hearing; in the same manner she resorted to factual falsities and unreasonable assertions to deprive him of access to terabytes of his own case files necessary to investigate postconviction claims. (See Appendix 1; CF, pp 31-32, ¶¶ 2,3,5; OB, Appendix C; Case No. 2022SC327, Petition for Writ of Certiorari, pp 8,12) She can easily accomplish this by various vague assertions of property loss, etc., without individual legal exposure to willful and wanton acts not subject to the CGIA. Procedural due process measures alone are constitutionally insufficient against the government's arbitrary or malicious deprivation of property.

CONCLUSION

Petitioner James Woo respectfully requests that this Court reverse the Court of Appeals' decision affirming dismissal with prejudice and find the CGIA constitutionally invalid as applied, or provide any other available relief.

Respectfully submitted this 26th day of July, 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 26th day of July , 2022, a true and correct copy of the foregoing REPLY 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

District Court, El Paso County, Colorado Court Address: 270 South Tejon Street Colorado Springs, CO 80903	
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 NOTICE REGARDING CONTENTS OF 6TB HARD DRIVE

DANIEL H. MAY, District Attorney for the 4th Judicial District, State of Colorado, by and through his senior deputy, Amy C. Fitch, provides the following notice of the contents of the 6TB hard drive:

The 6TB hard drive was created by the EPSO computer forensics unit from their forensic search of various devices. The devices and their contents are as follows:

1. Western Digital 1 TB harddrive – 96,000 photos, including protected content
2. Western Digital RM26324 – 715,000 images, including protected content
3. Wife's Ipad – video and images of her playing in the symphony
4. Toshiba harddrive RM26323 - 146,000 images, including protected content
5. Seagate 26326 - 385,000 images, including protected content
6. Iomega – 145,000 images, includes porn, including protected content
7. Canon Vixia – 170,000, including protected content
8. 64 RSH – 7 hrs of audio, we would have to listen to all of that to determine whether it contains protected content
9. 73 RSH B – includes protected content
10. 73 RSH A – cannot be opened
11. 66 RSH – cannot be opened
12. SW08 – 1000 images, includes family photos of the victim's family and children
13. SW14 – duplicate of SW08
14. SW16 = cannot be opened
15. SW20 - cannot be opened
16. 6JB – just sim card data
17. 72 RSH – photos of a device, no other content

APPENDIX 1

18. A08 - C – photos of a cell phone, no other content

The contents listed above is not an exhaustive list of contents. There are additional documents and videos on several of these devices. It would be overly burdensome to list them all individually. We simply looked at each device to see if there was protected content on it. All of the devices contained some protected content except for a few of them. The reason we looked for protected content is because the contents of each individual device cannot be separated. So, images from SW08, for example, cannot be separated out and some turned over without turning over all of them. Thus, the only items that could be potentially turned over are items 3 (wife's iPad, 16 (sim card data), 17 (photos of a device) and 18 (photos of a cell phone). All of the other items contain some protected content and therefore, nothing on those devices can be turned over.

WHEREFORE, the People request this Honorable Court DENY Defendant's motion to turn over content except for the content of Items 3, 16, 17, and 18.

Respectfully submitted,

Dated this 15th day of June, 2020.

DANIEL H. MAY
District Attorney

/s/

Amy C. Fitch SCN 26042
Deputy District Attorney

"I hereby certify that I placed a copy of the foregoing in the United States Mail, postage prepaid and addressed to

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

this 17th day of June, 2020."

_____/s/_____

CCF	7.26.22
FACILITY	DATE REC'D
Dierkson	Q3321 CD
STAFF LAST NAME	ID# INT
179463 Wise	JW
DOC# OFFENDER LAST NAME	INT