

No. 22-7165

FILED

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES WOO — PETITIONER
(Your Name)

vs.

EL PASO COUNTY SHERIFF'S OFFICE et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COLORADO SUPREME COURT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

James Woo, DOC #179463

(Your Name)

Colorado State Penitentiary

P.O. Box 777

(Address)

Canon City, CO 81215

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

I. Whether the Colorado Supreme Court erred in holding that: (1) the Colorado Governmental Immunity Act does not violate Petitioner's constitutional right against deprivation of property without due process in barring his replevin claim; and (2) the procedural safeguards articulated in its opinion are constitutionally adequate against the risk of an erroneous deprivation of property.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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

RELATED CASES

- James Woo v. El Paso County Sheriff's Office and Fourth Judicial District Attorney's Office,
No. 19CV103, District Court, El Paso County, Colorado. Judgment entered Jul. 3, 2019.
- James Woo v. El Paso County Sheriff's Office and Fourth Judicial District Attorney's Office,
No. 19CA1360, Colorado Court of Appeals. Judgment entered Sep. 10, 2020.
- James Woo v. El Paso County Sheriff's Office and Fourth Judicial District Attorney's Office,
No. 20SC865, Colorado Supreme Court. Judgment entered Dec. 12, 2022.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at Woo v. El Paso Cnty. Sheriff's Off., 2022 CO 56, _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the Colorado Court of Appeals court appears at Appendix B to the petition and is

reported at Woo v. El Paso Cty. Sheriff's Office, 2020 COA 134, _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

[] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was _____.

[] No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from state courts:

The date on which the highest state court decided my case was December 12, 2022. A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: January 9, 2023, and a copy of the order denying rehearing appears at Appendix D.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

§ 24-10-108, C.R.S. 2022

Except as provided in sections 24-10-104 to 24-10-106 and 24-10-106.3, sovereign immunity shall be a bar to any action against a public entity for injury which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant. If a public entity raises the issue of sovereign immunity prior to or after the commencement of discovery, the court shall suspend discovery, except any discovery necessary to decide the issue of sovereign immunity and shall decide such issue on motion. The court's decision on such motion shall be a final judgment and shall be subject to interlocutory appeal.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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; nor deny to any person within its jurisdiction the equal protection of the laws.

Colo. Const. art. II, § 25

No person shall be deprived of life, liberty or property, without due process of law.

STATEMENT OF THE CASE

A. Facts and Procedural History

On April 22, 2016, law enforcement arrested Petitioner James Woo ("Woo") in Seattle on suspicion of a homicide in El Paso County, Colorado. (CF, p 1, π 4; p 2, π 6) Officers seized all property that Woo carried in his baggage at the airport, along with numerous items 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, π 4; p 33, π 1)

On April 18, 2019, Woo filed the underlying replevin complaint against the Respondents, seeking the return of 51 sets of seized property as labeled in evidence. (CF, pp 1-6) These items included diamond jewelry, cash, eight computer hard drives containing invaluable 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 wrongful because they lacked any evidentiary value to the criminal case and were never moved for trial admission. (CF, p 2, π 6)

The Respondents filed a motion to dismiss pursuant to Colorado Rules of Civil Procedure ("C.R.C.P.") 12(b)(1) for lack of subject matter jurisdiction under the Colorado Governmental Immunity Act ("CGIA") (§ 24-10-101 to -120, Colorado Revised Statutes ("C.R.S.") 2019). (CF, pp 20-27) They argued that: (1) Woo's claim was 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) the CGIA barred Woo's claim since a replevin action could lie in tort and the Respondents were immune from any such action. (CF, pp 24-26).

Woo filed an opposition to the motion to dismiss. (CF, pp 43-55) He contended that: (1) he did

¹ The People of the State of Colorado v. James Takchuan Woo, No. 16CR2069, District Court, El Paso County, Colorado. Woo's conviction was affirmed on appeal on November 25, 2020 (No. 18CA0584; 2020 WL 701683). His petitions for writ of certiorari were denied by the Colorado Supreme Court on March 29, 2021 (No. 21SC8; 2021 WL 1250452) and by this Court on November 1, 2021 (No. 21-5539; 2021 WL 5043684).

effectively file a timely notice of claim with a property request letter, which the Prosecution denied on March 22, 2019 (CF, pp 44-45, ¶ 3a; p 48, ¶ 12; pp 31-32); (2) the CGIA violated his (procedural) due process right in barring his replevin claim due to the Colorado Court of Appeals' holdings that a criminal court lacked jurisdiction to address a post-sentence motion for return of property (CF, pp 52-54); and (3) the CGIA violated his (substantive) due process right by allowing the state to arbitrarily and wrongfully deprive him and any owner of seized property (CF, pp 50-52, ¶¶ 15-19; p 53, ¶ 25).

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) It did not address Woo's constitutional challenge. *Id.*

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 his replevin claim. (CF, pp 70-73)

The Colorado 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 (2) the CGIA did not violate Woo's (procedural) due process right because he had a meaningful post-seizure remedy in the criminal case before he was sentenced; (3) the CGIA did not violate Woo's (substantive) due process right in barring his damages claim because parties did not have a constitutionally protected right to sue the government for damages for their alleged injuries; and (4) the district court properly dismissed Woo's

² "The CGIA provides that, subject to specific enumerated exceptions, 'sovereign immunity shall be a bar to any action against a public entity for injury which lies in tort or could lie in tort...' § 24-10-108, C.R.S. 2019; see also § 24-10-106, C.R.S. 2019 (enumerating exceptions). "Woo v. El Paso Cty. Sheriff's Office, 2020 COA 134, ¶ 10. "[R]eplevin in detinnet, including a claim for damages, is an action which lies or could lie in tort." *Id.* at ¶ 13 (citing City & Cty. of Denver v. Desert Truck Sales, Inc., 837 P.2d 759, 765 (Colo. 1992)). "[T]he CGIA does not waive immunity for an action in replevin". *Id.*

claim with prejudice. Woo, 2020 COA 134 at ¶¶ 1, 7, 14, 24, 25.

Woo submitted a petition for writ of certiorari on October 28, 2020, which the Colorado Supreme Court granted on August 16, 2021. Woo v. El Paso Cnty. Sheriff's Off., 2022 CO 56 ("Opinion"), ¶ 17.

On certiorari review, Woo contended that the CGIA violated procedural due process in barring his replevin claim because: (1) the Court of Appeals divisions were split as to whether a criminal court had jurisdiction to address a post-sentence motion for return of property;³ (2) the criminal court lacked ancillary jurisdiction where such motion involved substantial new factfinding proceeding; and (3) even assuming it had jurisdiction, the criminal court was not required to address a motion for return of property or grant a hearing at a meaningful time. (Case No. 20SC865, Opening Brief, pp 11-21) Woo argued that the CGIA violated substantive due process because: (1) the right against deprivation of property without due process must encompass damages as a safeguard against the state's claim of property loss, damage, or destruction; (2) the CGIA did not withstand strict scrutiny as applied to his replevin claim; and (3) the CGIA allowed the state to engage in arbitrary and wrongful property deprivation. Id. at pp 21-29.

On December 12, 2022, the Colorado Supreme Court issued its opinion, resolving the aforementioned split in Court of Appeals authorities in favor of Hargrave, *infra* at n.3, by holding that a criminal defendant may file a motion for return of lawfully seized property in the criminal court at various post-sentence junctures. Opinion, ¶¶ 4, 33. Consequently, it affirmed the Court of Appeals' judgment, concluding that because Woo now had a remedy in his criminal case, the CGIA did not violate his federal and state constitutional rights to procedural due process in barring his replevin claim. Id. at ¶¶ 5, 53. It did not

³ "[D]ivisions of this court have divided over whether a criminal court retains jurisdiction to hear a post-sentence motion for return of property." Woo, 2020 COA 134 at ¶ 23. "[C]ompare [People v. Wiedemer, 692 P.2d 327, 329 (Colo. App. 1984)] (holding that the imposition of a sentence ends a criminal court's jurisdiction to hear a motion not authorized by [Colo.] Crim. P. 35), with [People v. Hargrave, 179 P.3d 226, 230 (Colo. App. 2007)] (holding that a criminal court has ancillary jurisdiction to entertain a post-sentence motion for return of property)." Id.

address any of Woo's substantive due process or other procedural due process arguments. *Id.*

B. Preservation with Pertinent Quotations Pursuant to Rule 14(1)(g)(i)

Woo raised the federal question sought to be reviewed by challenging the constitutionality of the CGIA as applied to his replevin claim in the district court: "[Woo] is essentially deprived of the ability to pursue civil remedy for the recovery of his properties, which would be a violation of due process per Colo. Const. Art. II, § 25, and the 14th Amendment of the U.S. Constitution". (CF, p 52, ¶ 20) Woo's arguments in his opposition to Respondents' motion to dismiss implicated both procedural and substantive due process. "Colorado appellate courts have held that the [criminal] court does not have jurisdiction after sentence is imposed". (CF, p 52, ¶ 22) [Respondents] are asking this Court to deprive [Woo] of the ability to seek civil remedy... so that [they] can then permanently and wrongfully deprive [him] of his properties." (CF, pp 50-51, ¶ 15; p 53, ¶ 25) "Based on [Respondents'] CGIA arguments, if the sheriff hypothetically seizes a vehicle containing large sums of cash [in a reckless driving case], then determine the cash is the legal life savings of the [owner] that has no relevance to the case, the state can keep the money detained permanently if it so chooses, since... C.R.S. § 24-10-106 provides no waived immunity against actions that could lie in tort." (CF, pp 51-52, ¶ 19)

The district court did not address Woo's constitutional challenge. (CF, pp 64-65) On appeal, Woo again cited U.S. Const. amend. XIV, § 1. (Case No. 19CA1360, Opening Brief, p 27) He again implicated both procedural and substantive due process violation. "[T]he criminal court... may or may not address [a] motion for the release of [I] properties based on conflicting legal authorities regarding whether it has jurisdiction". *Id.* at pp 28-29. "[The aggrieved] is deprived of the right to due process... not only for the recovery of the seized properties, but... the monetary values of the properties should the district attorney claim that any of the properties are damaged or lost." *Id.* at p 29. "C.R.S. § 24-10-101 et seq. are laws that

abridge the privileges or immunities of citizens of the United States as they pertain specifically to claims for damages resulting from properties seized by law enforcement. They run contrary to the federal concept of due process of law." Id.

The Colorado Court of Appeals addressed Woo's constitutional challenges: "Because the CGIA bars Woo's replevin action to recover the property and damages, we must address his contention that barring his action violates his federal and state constitutional rights against deprivation of property without due process of law. See U.S. Const. amend. XIV, § 1; Colo. Const. art. II, § 25." Woo, 2020 COA 134 at ¶ 15. It found no procedural due process violation: "Even if, however, 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." Id. at ¶ 24. "[A post-seizure remedy] was available to Woo in the criminal court, at least before he was sentenced." Id. It found no substantive due process violation: "To the extent Woo argues that barring his damages claim... violates his due process rights, we disagree." Id. at ¶ 25. "[P]arties do not have a constitutionally protected property right to sue the government for damages for their alleged injuries." Id. Accordingly, it affirmed the district court's judgment. Id. at ¶¶ 1, 3, 4.

On certiorari review, Woo devoted his entire Opening Brief to his constitutional challenges. (Case No. 20SC865, Opening Brief, pp 1-29) He again quoted U.S. Const. amend. XIV, § 1. Id. at p 10. "The CGIA...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." Id. See Appendix E (Summary of Argument from Opening Brief on Certiorari Review in the Colorado Supreme Court).

Having resolved the aforementioned split in Court of Appeals authorities (Opinion, ¶ 33) – a relief Woo did not request – the Colorado Supreme Court affirmed, concluding "that Woo has a remedy in his criminal case to recover any property lawfully seized" and that the pertinent "procedural safeguards are constitutionally adequate." Opinion, ¶¶ 5, 49, 53. It disregarded all of Woo's substantive due process and other procedural due process arguments.

REASONS FOR GRANTING THE PETITION

This Court should grant this Petition for Writ of Certiorari because the CGIA allows Colorado government entities to arbitrarily and wrongfully deprive any person who comes within their jurisdictions of property that they seize for any reason.⁴ Whether or not the seizure is reasonable, whether the property is contraband or lawfully possessed, and whether or not the state provides a procedure for property return, the owner is remediless anytime the government asserts that the seized property is no longer available or otherwise damaged or destroyed for any arbitrary reason. The CGIA's blanket preclusion of replevin claims against the government impacts not only criminal defendants, but all persons whose property comes into the custody of the state. Because a replevin claim against the government implicates the fundamental right against deprivation of property without due process under U.S. Const. amend. XIV, the lack of state remedy under the CGIA forces aggrieved persons to then pursue their claims under 42 U.S.C. § 1983, thus burdening the federal courts unnecessarily.

This Court should grant this Petition pursuant to Rule 10(b) because the Colorado Supreme Court has decided an important federal question in a way that conflicts with the decision of another state court of last resort. The federal question here is whether the CGIA allows the state to deprive citizens of seized property without federal due process of law in barring all replevin claims. State courts of last resort are split in their findings as to whether a property

⁴ The only exceptions would appear to be: (1) actions alleging willful and wanton conduct by individual state employees for which the state is not liable (see Desert Truck Sales, 837 P.2d at 763 n.3); and (2) private property taken for public use without just compensation under U.S. Const. amend. V (see Id. at 768 ("Sovereign immunity does not preclude claims under the just compensation clause"')).

owner may file such replevin claim against the government for seized property. The Colorado Supreme Court holds that "the CGIA's bar of Woo's replevin in detention action does not render the CGIA, as applied to him, unconstitutional." Opinion, ¶¶ 53. See also Desert Truck Sales, 837 P.2d at 765, 767-68 (finding that the CGIA did not violate plaintiff's due process rights in barring a replevin claim for a seized vehicle; citing "Valley Gypsum Co., Inc. v. Pennsylvania State Police, 581 A.2d 707, 710 (Pa. Commw. 1990)(state police enjoy sovereign immunity in replevin action brought by claimant seeking return of trailer).").

On the contrary, other states permit replevin claims against the government. See, e.g., Walls v. Rees, 569 A.2d 1161, 1166-68 (Del. 1990) ("an action for replevin is not barred by the [Delaware Tort Claims Act]" where a vehicle seized from a criminal defendant was destroyed; "remand[ing] the case for a hearing to establish the fair market value of the vehicle ... and to enter a money judgment in this replevin action based on such fair market value plus interest."); Dehn Motor Sales, LLC v. Schultz, 439 Md. 460, 465-66, 487, 96 A.3d 221, 224-25, 237 (2014) (the Local Government Tort Claims Act did not bar petitioners' replevin action for 67 vehicles seized by police officers; "by filing a replevin complaint, Dehn Motor communicated to the City that it sought return of the vehicles and loss-of-use damages."); Womack v. City of Oklahoma City, 1986 OK 14, ¶¶ 4, 12, 13, 726 P.2d 1178, 1179, 1181, superseded by statute as stated in Sweeten v. Lawson, 2017 OK CIV APP 51, ¶ 24 n.12, 404 P.3d 885, 892 n.12 (finding that the trial court improperly denied owner's claim for an award of counsel fee and costs in a replevin action for an impounded vehicle under the Political Subdivision Tort Claims Act; Oklahoma's "statutory replevin action, though founded upon a person's wrongful

detention of another's personal property, is not one for settlement of a tort claim. Rather, its gravamen is vindication of the plaintiff's proprietary interest in immediate possession." (Emphasis in original));⁵ Lewis v. Sullivan, 188 Wis. 2d 157, 165, 169, 524 N.W.2d 630, 633, 634 (1994) (determining that "the alleged facts... might give rise to various remedies including... a return of the property (or its value) to the prisoner, and possibly an award for monetary damages for detention of the property"; affirming the dismissal of prisoner's replevin claim only due to failure to comply with Wisconsin's notice of injury statute); Road Material & Equipment Co. v. McGowan, 229 Miss. 611, 624, 91 So. 2d 554, 556 (1956) ("Although founded upon a tortious detention of property, [the remedy of replevin] is not one to determine claims sounding in tort. ... The primary relief sought is the return of the property in specie; damages are merely incidental."); Brown v. City of Cincinnati, 2020-Ohio-5418, ¶¶ 13, 11 n.1, 162 N.E.3d 1274, 1279, 1278 n.1 ("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.").

The dismissal of Woo's replevin claim with prejudice under the CGIA violates substantive due process by foreclosing any remedy should the state arbitrarily refuse to return his lawfully possessed, non-contraband property with no connection to any crime at a criminal court proceeding, such as by asserting loss of property. The remedy set forth in the Opinion for the return of seized

⁵ "Our conclusion that Sweeten's statutory replevin action does not fall within the scope of the [Oklahoma Governmental Tort Claims Act] is [...] supported by the language of the replevin statute... [which] is more cogently seen as a limitation on Womack, a case which essentially found statutory replevin actions do not resolve a tort claim whatsoever." Sweeten, 2017 OK CIV APP 51 at ¶ 24 n.12.

property in the criminal court does not satisfy procedural due process because it can still result in an erroneous deprivation of property in many circumstances.

I. The Colorado Supreme Court erred in holding that: (1) the Colorado Governmental Immunity Act does not violate Woo's constitutional right against deprivation of property without due process in barring his replevin claim; and (2) the procedural safeguards articulated in its opinion are constitutionally adequate against the risk of an erroneous deprivation of property.

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).

"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 Colo. Const art. II, § 25.
"The requirements of due process of law under both the United States and Colorado Constitutions take precedence over statutory enactments of [state] legislature." White v. Davis, 163 Colo. 122, 125, 428 P.2d 909, 910 (1967).

"[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). "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". Developmental Pathways v.

Ritter, 178 P.3d 524, 533-34 (Colo. 2008) (citation omitted).

The CGIA is constitutionally invalid as applied here because it operates to deprive Woo of the protected right against deprivation of property without due process in barring his replevin claim.

A. The CGIA violates substantive due process in barring Woo's replevin claim.
"The 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). Substantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty. United States v. Salerno, 481 U.S. 739, 746 (1987) (citations omitted).

The Opinion acknowledges that the Court of Appeals rejected Woo's contention that "barring his damages request in this replevin in detention case violated his due process rights." Opinion, ¶ 16 (citing Woo, 2020 COA 134 at ¶ 25). "The division pointed out that parties don't have a constitutionally protected property right to seek damages from the government for their alleged injuries." Id. Such contention sounds not in procedural, but substantive due process. These Court of Appeals holdings imply that Woo preserved his substantive due process arguments on appeal. Although Woo devoted eight pages of his *Opening Brief on Certiorari* review to his substantive due process arguments, the Opinion does not even acknowledge that he raised them.⁶ The issue on certiorari review asked "Whether the Court of Appeals erred in holding that the [CGIA] does not violate [Woo's] constitutional

⁶ The Respondents expressly agreed that Woo preserved his substantive due process arguments. (Case No. 20SC865, Answer Brief, p 19)

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." *Id.* at ¶5 n.1.⁷ However, the Opinion modifies the question to "whether such bar violates Woo's constitutional rights against the deprivation of property without procedural due process". *Id.* at ¶¶18, 19, 5 (emphasis added). The Colorado Supreme Court thus tacitly removes the substantive due process component; it essentially avoids addressing the wrong that the CGIA inflicts upon property owners by allowing the government to keep any property that it seizes for any reason in an authoritarian manner. No matter what procedure the state provides for the return of seized property, it can always resort to assertions that the property is no longer available at a hearing, then wrap itself in immunity.

1. The right against deprivation of property without due process must encompass damages as a safeguard against the state's claim of property loss, damage, or destruction, among other arbitrary reasons.

A replevin claim in Colorado authorizes a claim for damages in case the property is no longer available. See C.R.C.P. 104(p) ("judgment for the plaintiff may be for the possession or the value thereof in case a delivery cannot be had"). This vital provision prevents defendants from escaping liability merely by alleging the property is no longer available. The CGIA violates substantive due process by precluding such essential safeguard, allowing the state to then arbitrarily deprive any person of seized property by asserting — e.g., at a criminal court proceeding — that the property is lost, damaged, destroyed, or unavailable for any other reason, with no liability. Whether such assertion is a matter of error, established procedure, negligence, accident, theft, or

⁷ "The statement of an issue presented will be deemed to include every subsidiary issue clearly comprised therein. Only the issues set forth or fairly comprised therein will be considered." Colorado Appellate Rule ("C.A.R.") 53(a)(3).

malicious actions by unidentifiable individuals thirsty for additional retribution against a criminal defendant, the owner is left remediless. Woo contends that the right against deprivation of seized property without due process must encompass damages as a safeguard against such assertions, in the event of which he must be afforded redress. Otherwise, the state has carte blanche to permanently deprive all owners of seized property on such bases, as though forfeited upon seizure.

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

The Colorado Court of Appeals holds that the CGIA does not violate Woo's due process rights in barring his damages claim. Woo, 2020 COA 134 at ¶ 25. In support, it cites Norsby v. Jensen, 916 P.2d 555, 563 (Colo. App. 1995) (Plaintiff "does not have a constitutionally protected property right to sue the government and its employees for damages for his injuries."); State v. DeFoar, 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); and 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"). Id.

Since 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."); DeFoar, 824 P.2d at 787, 792 ("we... apply a rational basis test to the instant equal protection attack"; "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... 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).

Woo's replevin claim implicates the fundamental right against deprivation of property without due process pursuant to U.S. Const. amend. XIV, § 1. "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'r's, 77 P.3d 793, 798 (Colo. App. 2003)(citations omitted). See also Opinion, π 22 ("we assume...that Woo has a legitimate claim of entitlement to [his property]."). Thus, a substantive due process analysis as to the CGIA's constitutionality as applied to Woo's replevin claim must apply strict scrutiny. "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, π 17.

unlike many typical unforeseeable injuries inflicted by the state where the plaintiff can

only be made whole by monetary relief, Woo's replevin claim concerns property seized by the state in the first place that is in its custody. The state has complete control over the property to prevent loss or damage, and can resolve Woo's claim at no cost by returning his property. Any litigation cost is on account of the state's refusal to return the property despite Woo's affirmed conviction and the property's lack of evidentiary value. Claims of this nature 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. There is simply no compelling state interest in barring a claim for the very property the state seized that: (1) it largely never used in its prosecution; (2) is still in its custody; and (3) it can resolve at no cost by releasing the property.

To the extent that the state has any purported continuing interest in Woo's property for prosecution, such interest bears no correlation to the legislative intent of the CGIA. Moreover, the Respondents made no argument that they required Woo's property for any reason in their motion to dismiss and reply. (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 means in barring Woo's claim from the outset. Aside from the obvious option of simply returning Woo's property, a less restrictive mean would be to waive immunity, with reasonable restrictions. The CGIA does not withstand strict scrutiny in barring Woo's replevin claim, thereby violating substantive due process.

B. The procedural safeguards articulated in the Opinion are inadequate

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).

1. A criminal court may assert lack of ancillary jurisdiction to address a motion for return of property, even given subject matter jurisdiction.

In resolving the split in Court of Appeals authorities as to whether a criminal court has post-sentence jurisdiction to address a motion for return of property in favor of Hargrave, the Opinion "endorse[s] Hargrave's application of the four-part test articulated in [Morrow v. District of Columbia, 417 F.2d 728, 740 (D.C. Cir. 1969)]." Opinion, ¶ 33. See also Id. at ¶ 28 (quoting the four-part test set forth in Morrow). Hargrave holds that the criminal court has "'ancillary jurisdiction, or inherent power, to entertain defendant's post-sentence motion for return of property'" where the facts of the case meet the four-part criteria. Id. (quoting Hargrave, 179 P.3d at 230).

Noting the second prong of the four-part test, Woo devoted a subsection of his Opening Brief on certiorari review raising his concern that the criminal court here already opined that it would lack ancillary jurisdiction because Woo's property request would involve substantial new factfinding proceeding. (Case No. 20SC865, Opening Brief, pp 12-14)⁸ The criminal court's December 6, 2021 order indicates:

The case with facts most like Mr. Woo's is [People v. Chavez, 2018 COA 139, 487 P.3d 997], where the defendant sought the return of two computers and numerous compact discs holding information. In that case... 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, ... as well as (or only) contraband not subject to return...", and that such "an inquiry would invariably involve[] 'substantial new factfinding proceedings.'" Chavez, 487 P.3d at 999 (quoting Hargrave, 179 P.3d at 229-30). So too here.

⁸ Three months after the dismissal of Woo's replevin claim, he filed a motion for return of property in the criminal court on September 18, 2019. (Case No. 20SC865, Opening Brief, Appendix E, p 2, ¶ 2) The criminal court declined to address the motion on February 6, 2020 due to Woo's ongoing criminal appeal, then reserved ruling again in a December 6, 2021 order pending the Colorado Supreme Court's Opinion here. Id. at p 6, ¶ 3. Woo also provided a copy of said December 6, 2021 order as Appendix A to his Petition for writ of certiorari in U.S. Supreme Court case No. 22-6383.

(Case No. 20SC865, Opening Brief, Appendix E, p 5, π 3)(emphasis added).

Thus, a criminal court can assert lack of ancillary jurisdiction merely by finding that the motion for return of property cannot "be determined without a substantial new factfinding proceeding". Hargrave, 179 P.3d at 229-30. This results in "an erroneous deprivation of property under the established procedures" and calls for "additional or alternative safeguards." Opinion, π 44 (citing Mathews v. Eldridge, 424 U.S. 319, 344 (1976)). To satisfy procedural due process, a criminal court must be required to address a motion for return of property regardless of the four-part test. The defendant is clearly deprived of property without due process whenever the court can assert lack of ancillary jurisdiction.

2. A criminal court is not required to address the merits of a motion for return of property upon filing, or grant a hearing at a meaningful time.

Although the Opinion specifies the post-sentence junctures at which a defendant may now file a motion for return of property in a criminal court (Opinion, π 4), the court is not necessarily required to address its merits. "[T]he trial court may deny a motion for return of property without prejudice to allow the defendant to refile it after a direct appeal, during postconviction proceedings, or following an appeal from those proceedings". Id. at π 48. The prosecution, in turn, may demonstrate that it "may need the requested property later, including after a direct appeal, during postconviction proceedings, or following an appeal from those proceedings". Id. at π 46. Pursuant to C.R.S. § 16-5-402(1) and Colo. Crim. P. 35(C)(3)(VI), (VII), there is no time limit for Woo to theoretically file multiple petitions for post-conviction relief due to his class one felony conviction (C.R.S. § 18-3-102(3)). As such, the coupled effect of the two holdings above is that the court can indefinitely delay addressing the merits of Woo's motion based on the state's perpetual response that it may need the property later, effectively depriving Woo of his property without due process. This can be exploited

to relieve the prosecution from ever having to fulfill its burden of proof that the property is connected with any criminal activity. The Court of Appeals can then dismiss any appeal of such ruling based on the lack of a final order, leaving Woo permanently remediless.

Moreover, as the Opinion indicates, "the trial court may hold a hearing (evidentiary or non-evidentiary) before resolving a motion for return of property." Opinion, ¶ 48 (emphasis added). This implies that the court may rule against the defendant without a hearing. Woo correctly remarks that there is no guarantee the trial court in his criminal case will hold a hearing. But nowhere in Desert Truck Sales did we say that a hearing is required." Id. at ¶ 52.⁹ However, "[p]rocedural 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). "[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus, it has become a truism that 'some form of hearing' is required before the owner is finally deprived of a protected property interest." Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982) (citing Board of Regents v. Roth, 408 U.S. 564, 570-71 n.8 (1972)) (emphasis in original). As such, an erroneous deprivation of property occurs when the court makes a final ruling against a defendant without a hearing.

3. The time limit for defendants who do not appeal to move for return of property is unreasonable.

The Opinion holds that "a defendant wishing to file a motion for return of property

⁹ In Desert Truck Sales, § 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 Sales, 837 P.2d at 767 n.9.

can't do so after the deadline to lodge a direct appeal expires". Opinion, ¶ 37. Thus, a convicted defendant who does not appeal due to a plea agreement and fails to file a motion for return of property by the deadline to appeal is deprived of property without due process a mere 49 days (C.A.R. 4) after sentencing.¹⁰ An innocent person whose property is seized as evidence in another person's criminal case and neglects to closely follow the case faces the same prospect. In contrast to the far more reasonable three-year statute of limitation for replevin pursuant to C.R.S. § 13-80-101(l)(h), such a short time limit before effective forfeiture for these individuals does not satisfy procedural due process.

The constitutional shortcoming of this holding is palpable in contrast to *State v. Young*, 1991 Ohio App. LEXIS 2390 at *3, 1991 WL 87203 (5th Dist.) ("After the judgment of conviction and sentence was entered..., and the time for appeal lapsed, the trial court no longer had jurisdiction to hear appellant's motion" for return of property seized by police. "In order to reclaim possession of his property, appellant's proper remedy was to file an action in replevin, the same way a bailor seeking return of his property would sue a bailee."). The Colorado and Ohio courts are both in agreement that a criminal court lacks jurisdiction to address a motion for return of property after the time to appeal lapses. However, the Ohio defendant has a civil remedy in replevin thereafter, whereas the Colorado defendant is remedyless under the CGIA, his or her property effectively forfeited.

Lawful seizure of property may affect the timing of return, "but never the owner's right to eventual return." *United States v. Hubbard*, 650 F.2d 293, 303 (D.C. Cir. 1980). It is "fundamental to the integrity of the criminal justice system that seized property against which the government

¹⁰ It is common knowledge that the vast majority of criminal defendants are convicted pursuant to plea agreements rather than at trial, often dispensing with the need to appeal. Thus, the majority of newly convicted criminal defendants in Colorado are at risk of an erroneous deprivation of property. Acquitted defendants and those whose charges are dismissed are subject to the same time limit. See *Strepka v. People*, 2021 CO 58, ¶ 1, 489 P.3d 1227, 1229.

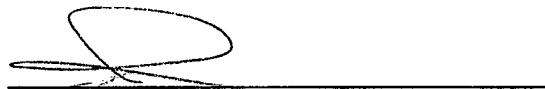
has no claim must be returned to its lawful owner." United States v. Wilson, 540 F.2d 1100, 1103 (D.C. Cir. 1976). "After the criminal proceedings conclude, ...[the government's] continued retention of the property ... could legitimately be viewed as a deprivation of the defendant's due process rights." United States v. Rodriguez-Aguirre, 264 F.3d 1195, 1212-13 (10th Cir. 2001). As such, property owners must be notified and heard before effective forfeiture. "It is [...] 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)).

The question as to whether the CGIA and similar governmental immunity or tort claims acts violate the constitutional rights of not only criminal defendants, but all property owners against deprivation of seized property without procedural or substantive due process of law is an important issue faced by courts throughout Colorado and the United States. This Court should grant certiorari review to provide guidance to courts addressing this issue in Colorado and throughout the nation, correct the Colorado Supreme Court's erroneous decision, and ensure property owners are protected against arbitrary and wrongful deprivation of property without due process of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



James Woo
Petitioner, pro se

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