The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2022 CO 56

Supreme Court Case No. 20SC865
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 19CA1360

Petitioner:

James Woo,

v.

Respondents:

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

Judgment Affirmed
en banc
December 12, 2022

Petitioner James Woo, pro se

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APPENDIX A

JUSTICE SAMOUR delivered the Opinion of the Court.

¶1 Just last term, we held that, following the dismissal of a criminal case, a trial court retains jurisdiction to rule on a defendant's motion for return of property unlawfully obtained by the government "so long as the motion is filed before the appeal deadline expires." *Strepka v. People*, 2021 CO 58, ¶ 1, 489 P.3d 1227, 1229. But we cautioned that our holding was narrowly tailored to the circumstances before us. *See id.* at ¶ 17, 489 P.3d at 1231. Consequently, we expressly left for another day a question that has divided the court of appeals for some time: How does a defendant who has *already been convicted and sentenced* seek the return of property *lawfully* seized by the government? *Id.* at ¶ 16 n.2, 489 P.3d at 1231 n.2. That day has come. A mere eighteen months after *Strepka*, we turn our attention once again to motions for return of property, an issue that apparently remains in the vanguard of criminal litigation around our state.

¶2 To answer the question we confront here, we build on the foundation we laid in *Strepka*, the concrete for which was supplied by *Dike v. People*, 30 P.3d 197 (Colo. 2001). In *Dike*, we concluded that the county court retained jurisdiction to reconsider its order suppressing the results of a breathalyzer test and dismissing the case "until the time for appeal under Crim. P. 37(a) had expired." *Id.* at 200. *Dike*, in turn, found support in *People v. Dillon*, 655 P.2d 841 (Colo. 1982), where we determined that, "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*" unless a statute or rule provides an exception. *Id.* at 844 (emphasis added). Hence, under *Dillon*, after an appeal has been perfected, the trial court generally retains jurisdiction only over matters that are not relative to and do not affect the order or judgment on appeal. *Id.*; *People v. Stewart*, 55 P.3d 107, 126 (Colo. 2002) (same); *see also Molitor v. Anderson*, 795 P.2d 266, 268 (Colo. 1990) ("Courts universally recognize the general principle that once an appeal is perfected jurisdiction over the case is transferred from the trial court to the appellate court for all essential purposes with regard to the substantive issues that are the subject of the appeal.").

¶3 *Dillon*, *Dike*, and their progeny dictate that implicit in our holding in *Strepka* is the notion that a request for return of unlawfully seized property in a criminal case affects the judgment. Otherwise, *Strepka* presumably would have said that a trial court retains jurisdiction over a criminal defendant's motion for return of property even after the deadline for filing an appeal has expired. It said just the opposite.

¶4 Extending *Strepka*, we now hold that, subject to the limitations we discuss in this opinion, a defendant may file a motion for return of lawfully seized property following entry of a conviction and imposition of a sentence, so long as the motion is filed: (1) before the deadline to lodge a direct appeal expires or a

direct appeal is timely perfected; or (2) once the trial court reacquires jurisdiction following a direct appeal, during postconviction proceedings, or after any appeal related to those proceedings.

¶5 Here, following his conviction and sentence for first degree murder, James Woo brought this civil replevin action seeking the return of certain property that was lawfully seized by the government as part of his criminal case. The trial court ruled, and the court of appeals agreed (on different grounds), that the Colorado Governmental Immunity Act ("CGIA") barred Woo's claim. Woo argues that, if the CGIA precludes his replevin action, he is rendered remediless and the CGIA, as applied to him, violates his rights under the Due Process Clauses of the federal and state constitutions. Because we conclude that Woo has a remedy in his criminal case to recover any property lawfully seized, and because we further conclude that the remedy we identify is constitutionally adequate, the CGIA's bar of this replevin action does not violate his federal and state constitutional rights to procedural due process. Accordingly, we affirm the court of appeals' judgment, albeit on slightly different grounds.[1]

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[1] We granted certiorari to review the following issue:

> Whether the court of appeals erred in holding that the Colorado Governmental Immunity Act does not violate petitioner's

I. Facts and Procedural History

¶6 In 2016, police officers arrested Woo at the Seattle-Tacoma International Airport in connection with the murder of J.T., who had recently ended their three-year affair. After seizing Woo's luggage at the airport, officers recovered additional property from his apartment in San Francisco. Woo was later charged with first degree murder in Colorado state court. A jury found him guilty, and the trial court sentenced him to life in prison without the possibility of parole. Woo timely appealed his conviction in March 2018.

¶7 While the appeal was pending, Woo's attorney filed a motion in the trial court asking that certain hard drives seized by law enforcement be returned to Woo's family. The motion, which alleged that the hard drives contained personal and financial information, advised that the prosecution objected to the relief requested unless the hard drives were first scrubbed of all explicit images of the victim. According to the motion, Woo was amenable to having the hard drives scrubbed. During a telephone hearing, the court ordered Woo's counsel to supplement the motion by specifying "what items" Woo "wanted from the hard

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> 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.

drive[s]" and why those items were being requested. It also asked Woo's counsel to indicate in the supplemental filing whether there were any concerns regarding information protected by the attorney-client privilege. Neither Woo's counsel nor Woo supplemented the motion.

¶8 Some ten months later, on March 22, 2019, the prosecution filed a response opposing the motion.[2] It appears that the response was prompted by a letter from Woo requesting that the prosecution return the previously requested hard drives (without the protected images of the victim) and additional items seized by law enforcement: an iPad, cash, headphones, a ring, a computer, a camcorder, several flash drives, and numerous documents. In its response, the prosecution stated that it was unwilling to comply even with Woo's alternative request for scrubbed copies of the hard drives. The prosecution explained that any deleted images could be accessed from the scrubbed copies of the hard drives by someone like Woo with computer expertise. Additionally, the prosecution opposed the motion on the grounds that some of the property sought may have been stolen from Woo's previous employer and, in any event, may be needed later in postconviction proceedings.

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[2] The response was incorrectly dated March 22, 2018.

¶9 Woo did not reply. Instead, the following month, he brought this pro se civil replevin action against the offices of the sheriff and district attorney in the Fourth Judicial District. "Replevin is a possessory action in which a claimant seeks to recover both possession of personal property that has been wrongfully taken or detained and damages for its unlawful detention." *In re Marriage of Allen*, 724 P.2d 651, 656 (Colo. 1986). Though Woo did not dispute that the defendants had lawfully seized his property, he alleged that they were wrongfully detaining it. As such, he brought a so-called "replevin in detinet" action.[3]

¶10 In his complaint, Woo alleged that certain items collected by law enforcement—including personal documents, jewelry, an iPad, a camera, clothing, cash, credit cards, and a computer—were his, were not used as evidence in his criminal trial, and lacked any evidentiary value for future proceedings. In addition to requesting the return of these items, Woo's complaint sought an award of damages.

¶11 The defendants moved to dismiss Woo's complaint pursuant to C.R.C.P. 12(b)(1), arguing that the trial court lacked subject matter jurisdiction. More specifically, the defendants asserted that Woo had failed to provide notice of his

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[3] For the sake of clarity, we will avoid the Latin term and simply refer to "replevin in detention."

claim within 182 days of discovering his injury, as required by the CGIA. Alternatively, the defendants maintained that they were immune from replevin in detention actions under the CGIA. Woo countered that he had timely provided the required notice. And, contended Woo, if the CGIA precluded this replevin in detention action, then he was rendered remediless and the CGIA, as applied to him, violated his rights under the Due Process Clauses of the federal and state constitutions.

¶12 Without holding a hearing, the district court issued an order dismissing Woo's complaint with prejudice. The court ruled that it lacked jurisdiction because Woo had failed to comply with the CGIA's notice requirement. It added that Woo's motion for return of property should be addressed in his criminal case.

¶13 Woo appealed, and a division of the court of appeals affirmed, though it applied somewhat different reasoning.[4] Drawing guidance from our holding in *City & County of Denver v. Desert Truck Sales, Inc.*, 837 P.2d 759, 763 (Colo. 1992), the division determined that a replevin in detention action (including one in which the plaintiff seeks damages) lies or could lie in tort. *Woo v. El Paso Cnty. Sheriff's*

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[4] Two months after the division affirmed the dismissal of Woo's replevin in detention action, a different division affirmed his conviction in the criminal case. *People v. Woo*, No. 18CA0584, ¶¶ 1, 31 (Nov. 25, 2020).

Off., 2020 COA 134, ¶¶ 8–14, 490 P.3d 884, 887–88. Thus, concluded the division, the CGIA bars any replevin action that seeks both the recovery of property lawfully seized by a public entity through its police power and an award of damages resulting from such detention.[5] *Id.* at ¶ 13, 490 P.3d at 887–88.

¶14 But the division's analysis didn't end there because, as mentioned, Woo also claimed that, if the CGIA barred his claim, then the CGIA, as applied to him, violated his federal and state constitutional rights against the deprivation of property without due process of law. The division assumed for the sake of its analysis that the property in question was in the defendants' custody and that it belonged to Woo, which meant that he had suffered a deprivation of a property interest. *Id.* at ¶ 17, 490 P.3d at 888. Turning to *Desert Truck Sales* again, the division rejected Woo's constitutional challenge, ruling that he had an adequate remedy: "He could have sought (and, as to some property, he did seek) return of the property in his criminal case." *Id.* at ¶ 19, 490 P.3d at 888. And, observed the

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[5] Subject to specific immunity waivers not relevant here, the CGIA states that "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." § 24-10-108, C.R.S. (2022). In *Desert Truck Sales*, 837 P.2d at 765, 767, we established that a replevin in detention action like this one is barred by the CGIA because it lies or could lie in tort and is not subject to one of the statutorily enumerated immunity waivers.

division, longstanding Colorado jurisprudence recognizes a criminal defendant's right to file a motion for return of property with the same court in which criminal charges have been brought. *Id.*

¶15 The division was unpersuaded by Woo's contention that he lacked an adequate remedy in his criminal case because he'd already been sentenced and the trial court might therefore lack jurisdiction to entertain a motion for return of his property. *Id.* at ¶¶ 23–24, 490 P.3d at 889–90. Though recognizing that divisions of the court of appeals were divided over whether a trial court retains jurisdiction to hear a post-sentence motion for return of property, the division determined that, even if the trial court in Woo's criminal case no longer had jurisdiction to consider such a motion, barring his replevin in detention action still didn't run afoul of constitutional due process.[6] *Id.* All that's needed under *Desert Truck Sales*, said the division, is that a post-seizure remedy be available at some point. *Id.* at ¶ 24, 490 P.3d at 889–90. And here, continued the division, "[s]uch a remedy was available to Woo in the criminal court, at least before he was sentenced." *Id.* at ¶ 24, 490 P.3d at 890. The fact that the remedy was not "perpetual," opined the division, was inconsequential. *Id.*

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[6] At the time the division issued its opinion, we had not yet announced our decision in *Strepka*.

¶16 Still, insisted Woo, barring his damages request in this replevin in detention case violated his due process rights. *Id.* at ¶ 25, 490 P.3d at 890. But the division was unmoved. It noted that, though the post-seizure statute at issue in *Desert Truck Sales* didn't allow damages for the property's unlawful detention, our court nevertheless found no due process violation. *Id.* Continuing on, 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.* The division accordingly held that Woo had failed to show beyond a reasonable doubt that the CGIA's bar of this replevin in detention action, including his damages request, rendered the CGIA unconstitutional as applied to him. *Id.* at ¶ 26, 490 P.3d at 890.

¶17 Woo then petitioned our court for certiorari. And we agreed to review his case.

II. Analysis

¶18 Before we get to the heart of the matter, we clarify what is and what is not before us. Woo does not challenge the division's determination that this replevin in detention action lies or could lie in tort and is thus barred by the CGIA. The sole issue we deal with is whether such bar violates Woo's constitutional rights against the deprivation of property without procedural due process. And that issue hinges on whether Woo has a constitutionally adequate remedy to seek the return of the property lawfully seized by the government in his criminal case.

¶19 We begin our analysis by setting forth the standard of review. We proceed to answer the question we left open in *Strepka* by concluding that Woo has a post-sentence remedy in his criminal case to seek the return of any property lawfully seized by the government. Next, we determine that the remedy we identify is adequate for constitutional purposes. Thus, we end by holding that the CGIA's bar of this replevin in detention action does not violate Woo's federal and state constitutional rights to procedural due process.

A. Standard of Review

¶20 The constitutionality of a statute is a question of law subject to de novo review. *Dean v. People*, 2016 CO 14, ¶ 8, 366 P.3d 593, 596. The de novo standard of review applies to both facial and as-applied constitutional challenges. *People v. Perez-Hernandez*, 2013 COA 160, ¶ 10, 348 P.3d 451, 455.

¶21 "[D]eclaring a statute unconstitutional is one of the gravest duties impressed upon the courts." *Coffman v. Williamson*, 2015 CO 35, ¶ 13, 348 P.3d 929, 934. For that reason, courts "must presume that a statute is constitutional unless the party challenging it proves its unconstitutionality beyond a reasonable doubt." *Id.* It follows that a party challenging the constitutionality of a statute bears a heavy burden. *People v. Vasquez*, 84 P.3d 1019, 1022 (Colo. 2004).

¶22 To demonstrate a procedural due process violation like the one Woo alleges here, a plaintiff must (1) identify a liberty or property interest with which the

government has interfered and (2) demonstrate that the procedures attendant to that deprivation were constitutionally insufficient. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). Like the division, we assume for purposes of our analysis that the property Woo seeks belongs to him and is in the defendants' custody. That is, we do not concern ourselves with the first element because we assume that the government took the property sought and that Woo has a legitimate claim of entitlement to it. Our focus, instead, is on the procedures surrounding that deprivation (the second element). "For intentional, as for negligent deprivations of property by state employees, the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy." *Hudson v. Palmer*, 468 U.S. 517, 533 (1984).

¶23 So, now that he's been convicted and sentenced, does Woo have a post-deprivation remedy available? And if he does, is that remedy constitutionally sufficient? We take up each question in turn, starting with the first one, which we left unanswered in *Strepka*.

B. Question Left Open in *Strepka*

¶24 There is no statute or rule that allows a criminal defendant to seek the return of property legally seized by the government.[7] Still, Colorado case law is not barren on this issue. Scores of cases from the court of appeals expressly recognize that a criminal defendant may file a *pre-sentence* motion for return of lawfully seized property, *see, e.g., People v. Chavez*, 2018 COA 139, ¶ 13, 487 P.3d 997, 999; *People v. Hargrave*, 179 P.3d 226, 228–29 (Colo. App. 2007), and at least one of our cases has implied as much, *see People v. Angerstein*, 572 P.2d 479, 481 (Colo. 1977). Indeed, the parties are on the same wavelength on this point.

¶25 But may a defendant who has already been convicted and sentenced seek the return of property lawfully seized by the government? That's the question we left open in *Strepka*. Divisions of the court of appeals have taken polar-opposite positions on it for many years. The sticking point in their disagreement is whether a trial court retains subject matter jurisdiction to resolve a motion for return of lawfully seized property after the defendant has been convicted and sentenced.

¶26 As early as 1984, a division held that imposition of a sentence ends a trial court's subject matter jurisdiction in a criminal case except under the

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[7] Crim. P. 41(e) is inapposite because it is limited to the return of illegally seized property.

circumstances specified in Crim. P. 35 ("Postconviction remedies"). *People v. Wiedemer*, 692 P.2d 327, 329 (Colo. App. 1984). While the *Wiedemer* division observed that Colorado jurisprudence appeared to view "[t]he filing of a motion for return of seized property in the same action in which the charges were determined" as "a proper remedy," *id.* (quoting *People v. Rautenkranz*, 641 P.2d 317, 318 (Colo. App. 1982)), it concluded that such a motion must be made prior to imposition of the sentence, at a time when the trial court continues to have jurisdiction over the proceedings, because "[a] request for return of property is not within the scope of Crim. P. 35, which is limited to challenges to a defendant's conviction or sentence" and doesn't "embrace ancillary proceedings." *Id.*

¶27 In 2018, the division in *Chavez* jumped on the *Wiedemer* bandwagon, holding that "once a valid sentence is imposed, apart from the limited claims described in Crim. P. 35, *see Wiedemer*, 692 P.2d at 329, a criminal court has no further jurisdiction." *Chavez*, ¶ 13, 487 P.3d at 999. Because Crim. P. 35 doesn't explicitly authorize a motion for return of property, *Chavez* ruled that a trial court lacks subject matter jurisdiction over such a motion when it is filed after sentencing.[8] *Id.* at ¶¶ 10, 12–13, 487 P.3d at 998–99.

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[8] In *People v. Galves*, 955 P.2d 582, 583–84 (Colo. App. 1997), the division didn't cite *Wiedemer* but nevertheless decided that the trial court lacked jurisdiction over the

¶28 Interestingly, *Chavez* followed the example set by *Wiedemer* despite the fact that a different division had charted its own course eleven years earlier in *Hargrave*. In 2007, *Hargrave* held that the trial court had "ancillary jurisdiction, or inherent power, to entertain defendant's post-sentence motion for return of property." 179 P.3d at 230. Borrowing from federal case law, *Hargrave* determined that 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 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)).

¶29 In *Morrow*, the United States Court of Appeals for the District of Columbia Circuit stated that ancillary jurisdiction existed to allow the city's criminal court to

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defendant's motion for return of property after the defendant was found not guilty by reason of insanity and committed to the state's mental health institution. The division reasoned that the trial court's jurisdiction at that point was statutorily limited to the defendant's care, treatment, and release. *Id.*

prohibit the dissemination of the defendant's arrest record after the case was dismissed because without such jurisdiction "the court could neither effectively dispose of the principal case nor do complete justice in the premises." 417 F.2d at 732, 738 n.36 (quoting 1 W. Barron & A. Holtzoff, *Federal Practice and Procedure* § 23, at 94 (Wright ed. 1960)). Ancillary jurisdiction, noted the court, "is a common-sense solution [to] the problems of piecemeal litigation which otherwise would arise by virtue of the limited jurisdiction of federal courts." *Id.* at 738 n.36. The chief purpose of ancillary jurisdiction, added the court, "is to insure that a judgment of a court is given full effect." *Id.* at 740. For that reason, said the court, "ancillary orders will issue when a party's actions, either directly or indirectly, threaten to compromise the effect of the court's judgment." *Id.*

¶30 Applying *Morrow*'s four-part test, the *Hargrave* division concluded that a trial court has ancillary jurisdiction to resolve a post-sentence motion for return of property:

> The application of requirements (1), (3), and (4) to this situation cannot be questioned. The property was seized as a part of the investigation giving rise to the charges; those parties necessary to the determination of the matter can be properly notified and permitted to participate; and the matter must be determined to protect the integrity of the proceedings. With respect to requirement (2), these matters are, in our experience, normally perfunctory—that is, the property is released to the defendant on the letter of the prosecutor or an order of the court without a hearing. In those rare instances where that is not the case, and this appears to be one of them, the resolution is premised on relatively straightforward legal theories and factual issues requiring only brief proceedings.

Hargrave, 179 P.3d at 230. Notably, the division in *Hargrave* mentioned that the federal courts that have considered the matter have unanimously held that the court that presided over the criminal trial "has ancillary jurisdiction to entertain a postconviction motion for return of property and may conduct the evidentiary hearing if one is required." *Id.* (collecting cases).

¶31 But in choosing *Wiedemer* over *Hargrave*, the *Chavez* division deemed federal case law on the issue inconsequential. It posited that ancillary jurisdiction has particular relevance in the federal system because federal courts are courts of limited jurisdiction and, but for the doctrine, defendants like Chavez "might be remediless" in federal court. *Chavez*, ¶ 11 n.3, 487 P.3d at 998 n.3. Since Colorado state district courts are courts of general jurisdiction, however, the division felt that there was "no need" to resort to ancillary jurisdiction. *Id.*

¶32 This point was not lost on the *Hargrave* division, though. It explicitly conceded "that ancillary jurisdiction is particularly appropriate in the federal context where the courts are of limited jurisdiction." *Hargrave*, 179 P.3d at 230. Even so, the division touted the doctrine's application in Colorado "in situations involving state courts of both general and limited jurisdiction." *Id.* (citing appellate opinions stemming from judgments entered by both general jurisdiction courts and courts of limited jurisdiction). The division further commented that state courts elsewhere have looked to the doctrine of inherent power as an

alternative means of permitting trial courts to resolve post-sentence motions for return of property. *Id.*

¶33 We largely follow the path marked by *Hargrave*.[9] In so doing, we endorse *Hargrave*'s application of the four-part test articulated in *Morrow*. As we see it, whenever a post-sentence motion for return of property is filed in a criminal case: (1) the property in question will have been seized as part of the investigation giving rise to the charges; (2) the resolution of the motion will usually implicate straightforward, if not perfunctory, proceedings and will not require a substantial factfinding process; (3) litigation of the motion will not deprive any party of a substantial right because the parties necessary to the determination of the matter will be properly notified and will be afforded an opportunity to be heard; and (4) the matter will need to be resolved to protect the integrity of the main proceeding or to ensure that the disposition of the main proceeding won't be frustrated. *See Hargrave*, 179 P.3d at 229–30; *see also People v. Nelson*, 2015 CO 68, ¶¶ 67–70, 362 P.3d 1070, 1081–82 (Hood, J., dissenting) (approving the court of appeals' reliance on *Hargrave*, including *Hargrave*'s adoption of *Morrow*'s four-part test, to conclude

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[9] We need not, and thus do not, pass judgment on whether a trial court has "inherent power" to entertain a defendant's post-sentence motion for return of property. *See Hargrave*, 179 P.3d at 230.

that the trial court had ancillary jurisdiction to give the defendant a refund of costs, fees, and restitution after her conviction was overturned and she was acquitted at a new trial), *rev'd on other grounds, Nelson v. Colorado*, 137 S. Ct. 1249 (2017).

¶34 Significantly, trial courts will often be compelled to deny a defendant's pre-sentence motion for return of property because that property may be needed later in the proceedings. Hence, requiring defendants to file a motion for return of property before sentencing would likely be an illusory remedy. So much for *Chavez*'s suggestion that criminal defendants seeking the return of lawfully seized property in state court are not remediless because they may file motions requesting such relief before sentencing. *See Chavez*, ¶ 13, 487 P.3d at 999.

¶35 The division in *Chavez*, it is true, opined that a remedy still exists by way of "a civil action seeking equitable relief." *Id.* at ¶ 14 n.5, 487 P.3d at 999 n.5. But how'd that work out for Woo? This case highlights the challenging hurdles a defendant must clear if he is forced to seek in a civil case the return of property lawfully seized in a criminal case.

¶36 Regardless, as the division in *Hargrave* aptly pointed out, applying ancillary jurisdiction in this situation furthers judicial economy because "the court, prosecuting attorney, and defense counsel were involved in the criminal proceeding, are aware of the pertinent circumstances, and can make the requisite decisions without the necessity of extended discovery and pretrial delays typically

attendant to civil proceedings." 179 P.3d at 230; *see also Morrow*, 417 F.2d at 740 (citing judicial economy as one of the goals of ancillary jurisdiction). We have consistently "stressed that the purpose of ancillary jurisdiction is judicial efficiency." *Glover v. Serratoga Falls LLC*, 2021 CO 77, ¶ 22, 498 P.3d 1106, 1114 (ruling that the water court properly exercised ancillary jurisdiction over certain non-water claims). In our view, it makes little sense to force a criminal defendant seeking the post-sentence return of property validly seized by the government to bring a separate civil action against the prosecution (and any other pertinent law enforcement agency) in a different court and in front of a different judge. *See Crystal Lakes Water & Sewer Ass'n v. Backlund*, 908 P.2d 534, 543–44 (Colo. 1996) (explaining that requiring rulings in two different actions to bring about a just and final result approaches absurdity).

¶37 Having said that, a defendant wishing to file a motion for return of property can't do so after the deadline to lodge a direct appeal expires or a direct appeal is timely perfected. Ancillary jurisdiction is of no assistance in those circumstances. That's because the expiration of the deadline to lodge a direct appeal or the timely perfection of a direct appeal divests the trial court of authority to act on matters that affect the judgment on appeal. *See Dillon*, 655 P.2d at 844. And a motion for return of property is such a matter. *See supra* ¶ 3.

¶38 Ancillary jurisdiction is not a substitute for subject matter jurisdiction; it is a supplement to subject matter jurisdiction. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966) (explaining that a claim "must have substance sufficient to confer subject matter jurisdiction on the court" before the court may exercise "[p]endent" or ancillary jurisdiction); *Rodriguez Delgado v. Shell Oil Co.*, 322 F. Supp. 2d 798, 815 (S.D. Tex. 2004) ("[A]ncillary jurisdiction is supplemental to and necessarily dependent on the court's original assertion of subject matter jurisdiction . . . ."); *see also Glover*, ¶ 16, 498 P.3d at 1112 (concluding (1) that the water court had proper subject matter jurisdiction because the complaint raised "water matters," and (2) that the court had "ancillary jurisdiction" over "non-water matters" because they "were sufficiently related" to the water matters). Indeed, it is also known as "supplemental jurisdiction." *Sandlin v. Corp. Interiors Inc.*, 972 F.2d 1212, 1215 n.2 (10th Cir. 1992).

¶39 At its core, ancillary jurisdiction is a "judicially developed concept" that rests on the premise that a trial court "acquires jurisdiction over a case or controversy in its entirety and, *as an incident to the disposition of a dispute that is properly before it*, may exercise jurisdiction to decide other matters raised by the case over which it would not have jurisdiction were they independently presented." 6 C. Wright et al., *Federal Practice & Procedure* § 1444, at 373 (3d ed. 2022) (emphasis added). "[A]ll courts, absent some specific statutory denial of

power, possess ancillary powers to effectuate their jurisdiction." *Morrow*, 417 F.2d at 737.

¶40 So, if a trial court already has subject matter jurisdiction over a criminal case, it may exercise ancillary jurisdiction over a defendant's motion to order law enforcement to return his validly seized property (a matter ancillary to the court's subject matter jurisdiction over the prosecution of the charges brought). But if a trial court lacks subject matter jurisdiction over a criminal case, ancillary jurisdiction cannot vest the court with authority to rule on such a motion.

¶41 For purposes of our analysis, it matters not whether the motion is filed pre-sentence or post-sentence. To our way of thinking, a pre-sentence motion to order law enforcement to return validly seized property is no less ancillary to the trial court's subject matter jurisdiction than a post-sentence motion to order law enforcement to return such property. If, as the parties seem to agree, a trial court has ancillary jurisdiction to resolve the former, we fail to see why a trial court would lack ancillary jurisdiction to resolve the latter – provided, of course, that the trial court has subject matter jurisdiction over the case. Where *Chavez* and other *Wiedemer* disciples went astray is in incorrectly assuming that, save for ruling on a

Crim. P. 35 motion, a trial court is *permanently* divested of subject matter jurisdiction the moment a defendant is sentenced.[10]

¶42 We reiterate that a trial court retains subject matter jurisdiction over a criminal case until the deadline to lodge a direct appeal expires or a direct appeal is timely perfected. And we clarify that even after a trial court is divested of subject matter jurisdiction over a criminal case, it reacquires such jurisdiction following a direct appeal, during postconviction proceedings, or after any appeal related to those proceedings.[11] *See People v. Jones*, 631 P.2d 1132, 1133 (Colo. 1981) ("It is a well-established principle of law that where an appeal has been perfected, the trial court is divested of jurisdiction to issue any further orders . . . . It is equally well-settled that the trial court's jurisdiction is restored when the appellate court issues its mandate."); *Hylton v. City of Colo. Springs*, 505 P.2d 26, 27–28 (Colo. App. 1973) ("Until the disposition of the appeal is announced, the trial court defers to the appellate court, but when the appellate court announces its decision to affirm,

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[10] On the other hand, to the extent the division in *Hargrave* understood "ancillary jurisdiction" as extending a trial court's authority to resolve a post-sentence motion for return of property while the court is, in fact, divested of subject matter jurisdiction, we do not adhere to that vantage point.

[11] After a trial court reacquires subject matter jurisdiction, it may lose such jurisdiction again—for example, after an appeal related to such proceedings is timely perfected.

reverse, remand, or modify, then under Colorado law the trial court is automatically reinvested with jurisdiction."). Subject to the limitations we discuss in this opinion, a defendant may file a motion for return of lawfully seized property after the trial court has reacquired jurisdiction.[12]

C. The Remedy We Have Outlined Is Constitutionally Adequate

¶43 We have now determined that Woo has a post-sentence remedy in his criminal case to seek the return of property lawfully seized by the government. In doing so, we have answered the question we deferred in *Strepka*. But is the remedy we've identified adequate for constitutional purposes?

¶44 "[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). When analyzing procedural due process claims, *Mathews* requires us to look at several factors, including, as relevant here, the risk of an erroneous deprivation of property under the established procedures and the probable value of additional

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[12] In *Strepka*, there was no direct appeal, so we didn't address situations in which a direct appeal is timely perfected. Nor did we consider whether a motion for return of property may be filed when a trial court reacquires jurisdiction following a direct appeal, during postconviction proceedings, or after any appeal related to those proceedings. Our holding was cabined to the specific circumstances involved there.

or alternative procedural safeguards. *Id.* at 335. We are thus compelled to take a deeper dive into the remedy Woo has at his disposal to protect his private interest in the property lawfully seized in his criminal case.

¶45 In advancing a motion for return of property, a criminal defendant must make a prima facie showing that: (1) he owns or is otherwise entitled to possess the requested property and (2) the requested property was seized by law enforcement as part of his case. *See People v. Fordyce*, 705 P.2d 8, 9 (Colo. App. 1985); *People v. Buggs*, 631 P.2d 1200, 1201 (Colo. App. 1981). Making a prima facie showing is not a rigorous task. A verified motion asserting that law enforcement took the requested property from the defendant at the time of his arrest suffices. *Buggs*, 631 P.2d at 1201. So does proof that law enforcement seized the requested property from the defendant. *Id.*; *Hargrave*, 179 P.3d at 228. Even the mandatory receipt documenting the property taken by law enforcement from the defendant, *see* Crim. P. 41(d)(5)(VI), may be enough for a prima facie showing in some cases.

¶46 If a defendant makes the requisite prima facie showing, then the burden shifts to the prosecution to demonstrate by a preponderance of the evidence that: (1) the requested property is the fruit of illegal activity or is otherwise connected to criminal activity; (2) the defendant is not the owner of the requested property or a person entitled to possess it; (3) it would be unlawful for the defendant to possess the requested property; (4) the prosecution may need the requested

property later, including after a direct appeal, during postconviction proceedings, or following an appeal from those proceedings; or (5) based on any relevant factors, including the type of case and the nature of the requested property, it would be inappropriate to grant the defendant's motion. *See, e.g., Angerstein*, 572 P.2d at 480–81 (agreeing with the trial court that the defendants were not entitled to the return of property they had stolen, and holding that "if property is legally seized" and is "designed or intended for use as a means of committing a criminal offense or the possession of which is illegal, there is no right to have it returned"); *Fordyce*, 705 P.2d at 9 (stating that after a defendant makes a prima facie showing, the burden "shifts to the prosecution to prove by a preponderance of the evidence that the items seized were the fruit of an illegal activity or that a connection exists between those items and criminal activity"); *People v. Ward*, 685 P.2d 238, 240 (Colo. App. 1984) (affirming the trial court's denial of the defendant's motion for return of property because the defendant's own testimony established that "the seized money was either proceeds from his drug dealings or was money which would be used to pay off substantial debts he owed to his supplier").

¶47 In response to a motion for return of property, the prosecution may raise any applicable defenses, including laches.[13] The prosecution may also oppose such a motion by arguing that it is impermissibly successive or unreasonably untimely.

¶48 In its discretion, the trial court may hold a hearing (evidentiary or non-evidentiary) before resolving a motion for return of property.[14] *See Hargrave*, 179 P.3d at 228 (observing that when a motion for return of property is filed, the trial court may conduct a hearing "if necessary" to determine the property's "appropriate disposition"); *People v. Stewart*, 553 P.2d 74, 76 (Colo. App. 1976) (indicating that, if "there is a dispute as to whether the money seized from a defendant is the fruit of an illegal activity, due process requires that the criminal court hold a hearing in which defendant is allowed to cross-examine witnesses

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[13] The defense of laches is established by "a showing that an unconscionable delay in enforcing rights has prejudiced the party against whom relief is sought." *Superior Constr. Co. v. Bentley*, 104 P.3d 331, 334 (Colo. App. 2004). "The elements of laches are: (1) full knowledge of the facts; (2) unconscionable or unreasonable delay in the assertion of an available remedy; and (3) intervening reliance by and prejudice to another." *Id.*

[14] In *Rautenkranz*, the division appeared to read our decision in *Angerstein* as requiring a hearing every time a motion for return of property is submitted. *Rautenkranz*, 641 P.2d at 318. But we issued no such edict in *Angerstein*. We remanded *that* case to the trial court with directions to hold an evidentiary hearing because there was a dispute as to whether the items of property in question were burglary tools. *Angerstein*, 572 P.2d at 480–81.

and to present evidence"), *aff'd sub nom. on other grounds, Stewart v. People*, 566 P.2d 1069 (Colo. 1977). Further, the 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. And either party may appeal the trial court's ruling on a motion or refiled motion for return of property. *See Buggs*, 631 P.2d at 1201.

¶49 To our minds, these procedural safeguards are constitutionally adequate. Recall that, as pertinent here, procedural due process aims to guard against the erroneous deprivation of property. *Mathews*, 424 U.S. at 344. The procedural safeguards we've identified will ensure that Woo and other defendants like him will not be erroneously deprived of their property by the government. Woo has not shown, nor do we perceive, that additional or alternative procedural safeguards would have "probable value." *Id.* at 335.

D. Woo's Constitutional Challenge Falls Short

¶50 Because Woo has a constitutionally adequate remedy in his criminal case to seek the return of any lawfully seized property, we conclude that the CGIA's bar of this replevin in detention action does not violate his rights under the Due Process Clauses. Our decision in *Desert Truck Sales* is instructive on this point. There, Desert Truck Sales brought a replevin in detention action against the City and County of Denver ("Denver") to recover possession of a 1976 Rolls Royce that

had been seized and impounded by a Denver police officer for investigation while the car was driven without Desert Truck Sales' consent. 837 P.2d at 761. Desert Truck Sales also sought damages for the detention of the vehicle and the loss of its use. *Id.* Denver contended, among other things, that the action was barred by the CGIA. *Id.* Desert Truck Sales countered that a replevin in detention claim was "the only remedy available to protect its due process rights" and that, therefore, the CGIA could not constitutionally bar its claim. *Id.* at 767.

¶51 Despite concluding that the replevin in detention action was barred by the CGIA, we rejected Desert Truck Sales' constitutional challenge. *Id.* at 765–68. We explained that Desert Truck Sales had an alternative remedy available because section 42-5-110, C.R.S. (1991), provided "a procedure to obtain the return of the Rolls Royce by presenting proof of ownership" at a post-seizure hearing. *Id.* at 767 n.9. That the initiation of such a hearing was controlled by the seizing agency was of no moment because, in our view, it didn't transform the taking into a regulatory one or otherwise violate Desert Truck Sales' constitutional right to procedural due process. *Id.* at 767–68. Besides, we said, we understood section 42-5-110 as granting the party from whom the property was seized the right, upon request, to be heard if the seizing agency failed to demand a hearing. *Id.* at 768.

¶52 Similarly, here, if Woo wishes to seek the return of the property validly seized by law enforcement in his criminal case, he may file a timely motion with

the district court in that case. To be fair, 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. Nor do we read due process jurisprudence as requiring a hearing in every instance. What's required is the presence of procedural safeguards to prevent the erroneous deprivation of property. And if Woo files a motion for return of property in his criminal case in accordance with this opinion, we are confident that the procedural safeguards we've identified will ensure that he receives due process of law, as guaranteed by the federal and state constitutions.[15] Because Woo has a constitutionally adequate remedy in his criminal case to seek the return of his lawfully seized property, his constitutional challenge against the CGIA fails.

III. Conclusion

¶53 For the foregoing reasons, we agree with the division that the CGIA's bar of Woo's replevin in detention action does not render the CGIA, as applied to him, unconstitutional. Even after sentencing, Woo has a remedy in his criminal case to

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[15] Woo obviously missed filing a motion for return of property in his criminal case before his direct appeal was timely perfected and the trial court was divested of subject matter jurisdiction. But now that the mandate has issued in his direct appeal and the trial court has reacquired subject matter jurisdiction, Woo can file a motion for return of property, including during any postconviction proceedings and following an appeal related to such proceedings.

seek the return of his lawfully seized property, and that remedy is adequate for constitutional purposes. Accordingly, we affirm the division's judgment, albeit on slightly different grounds.

COLORADO COURT OF APPEALS **2020COA134**

Court of Appeals No. 19CA1360
El Paso County District Court No. 19CV103
Honorable Larry E. Schwartz, Judge

James Woo,

Plaintiff-Appellant,

v.

El Paso County Sheriff's Office and Fourth Judicial District Attorney's Office,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE NAVARRO
Fox and Casebolt*, JJ., concur

Announced September 10, 2020

James Woo, Pro Se

Diana K. May, County Attorney, Mary Ritchie, Assistant County Attorney, Colorado Springs, Colorado, for Defendants-Appellees

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2019.

APPENDIX B

¶ 1 Plaintiff James Woo appeals the district court's judgment dismissing his replevin claim against the El Paso County Sheriff's Office and the Fourth Judicial District Attorney's Office. He sought the return of property seized during and after his arrest. We conclude that (1) the Colorado Governmental Immunity Act (CGIA), §§ 24-10-101 to -120, C.R.S. 2019, bars Woo's replevin claim; (2) applying the CGIA to bar his claim does not violate his due process rights because he had a meaningful post-seizure remedy in a related criminal case; and (3) the district court properly dismissed his claim with prejudice. Accordingly, we affirm.

I. Factual and Procedural History

¶ 2 In April 2016, officers arrested Woo at the Seattle airport on suspicion of first degree murder. Officers seized his luggage and later searched his apartment.

¶ 3 A trial in the criminal case concluded in February 2018, and a jury convicted Woo of first degree murder.[1] A week later, the court sentenced him to life in prison without the possibility of parole. Thereafter, Woo's counsel filed a motion in the criminal case

[1] Woo appealed his conviction in case number 18CA0584, which remains pending as of the date of this opinion.

seeking permission to return certain computer hard drives to Woo. The record does not make clear how that motion was resolved.

¶4 In April 2019, Woo filed this replevin action against the defendants. He alleged that the items seized during his arrest and from his apartment included personal documents, jewelry, an iPad, a camera, clothing, cash, credit cards, and a computer. According to his allegations, those items were his property, were not used as evidence in the criminal trial, and should be returned to him because they lack any evidentiary value for future proceedings. He also sought damages from the alleged wrongful detention of the property.

¶5 Citing the CGIA, the defendants moved to dismiss under C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction. The motion asserted that Woo had failed to comply with the CGIA's 182-day notice of claim requirement and, in the alternative, that the defendants are immune from replevin actions. Woo responded that he had filed a notice within 182 days of his discovery of the injury (which he alleged was in February 2019). He also argued that the CGIA violates his due process rights if it bars his replevin action.

¶ 6 Without holding a hearing, the district court dismissed Woo's complaint with prejudice on the ground that he "[a]pparently" failed to provide proper notice to the defendants before filing this action and, thus, the court lacked jurisdiction. The court also concluded that "the return of property, if any," should be resolved in Woo's criminal case.

¶ 7 Applying somewhat different reasoning, we affirm.

II. The Colorado Governmental Immunity Act

¶ 8 Governmental immunity raises a jurisdictional issue. *Springer v. City & Cty. of Denver*, 13 P.3d 794, 798 (Colo. 2000). When the jurisdictional issue involves a factual dispute, we apply the clearly erroneous standard of review in considering the district court's findings of jurisdictional fact. *Id.* If the alleged facts are undisputed or the issue is purely one of law, we review the jurisdictional matter de novo. *Id.*

¶ 9 Here, the parties presented factual disputes as to when Woo discovered his alleged injury and when he gave the defendants notice of his claim. The district court, however, did not hold an evidentiary hearing to resolve those disputes based on the evidence. So, we are in the same position as the district court to address the

jurisdictional question, and we review the court's legal conclusions de novo. *See Colo. Ins. Guar. Ass'n v. Menor*, 166 P.3d 205, 209 (Colo. App. 2007). Additionally, whether the CGIA deprives a court of jurisdiction to hear a particular type of claim is a question of statutory interpretation that we review de novo. *See City of Colorado Springs v. Conners*, 993 P.2d 1167, 1171 (Colo. 2000).

¶ 10 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 regardless of whether that may be the type of action or the form of relief chosen by a claimant." § 24-10-108, C.R.S. 2019; *see also* § 24-10-106, C.R.S. 2019 (enumerating exceptions). "Through the CGIA, the General Assembly sought to protect public entities not only from the costs of judgments but the costs of unnecessary litigation as well." *Hernandez v. City & Cty. of Denver*, 2018 COA 151, ¶ 5.

¶ 11 Woo filed a "verified complaint in replevin." Replevin is a possessory action in which a claimant seeks to recover possession of personal property that has been wrongfully taken or detained, as well as damages for its unlawful detention. C.R.C.P. 104(b); *City &*

Cty. of Denver v. Desert Truck Sales, Inc., 837 P.2d 759, 763 (Colo. 1992). The "basic elements" of a replevin claim are "the plaintiff's ownership or right to possession, the means by which the defendant came to possess the property, and the detention of the property against the rights of the plaintiff." *Desert Truck Sales*, 837 P.2d at 764.

¶ 12 Woo did not allege that the initial seizure of the property was wrongful; rather, he alleged that the defendants' continued detention of it had become wrongful. Thus, he pleaded an action in replevin *in detinet* — "[r]eplevin . . . where defendant rightfully obtained possession of property but wrongfully detains it." *Id.* at 765 (citation omitted). He also sought monetary damages for the wrongful detention and for any damage the items sustained during that detention.

¶ 13 Our supreme court has held that replevin *in detinet*, including a claim for damages, is an action which lies or could lie in tort. *Id.* As a result, the CGIA bars such an action unless a waiver applies. *Id.* But, as the supreme court further explained, the CGIA does not waive immunity for an action in replevin to obtain possession of

property validly seized pursuant to a public entity's police power and to recover damages for its detention. *Id.* at 767.

¶ 14 For these reasons, the CGIA bars Woo's replevin action against the defendants.[2]

III. Due Process

¶ 15 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 deprivations of property without due process of law. *See* U.S. Const. amend. XIV, § 1; Colo. Const. art. II, § 25. He does not present a facial challenge to the law; so, we must decide whether the CGIA is unconstitutional as applied to his claim.

¶ 16 Given that Woo preserved this constitutional claim in the district court, we review it de novo. *See People v. Perez-Hernandez*, 2013 COA 160, ¶ 10. We presume a statute is constitutional, and the challenger bears the burden to prove its unconstitutionality

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[2] Because the defendants are immune from Woo's replevin action, section 24-10-108, C.R.S. 2019, requires the dismissal of the replevin action regardless of whether he timely filed a notice of claim under section 24-10-109, C.R.S. 2019. We therefore need not address the timeliness or sufficiency of his notices.

beyond a reasonable doubt. *TABOR Found. v. Reg'l Transp. Dist.*, 2018 CO 29, ¶ 15. To show a procedural due process violation, a plaintiff must first identify a liberty or property interest that has been interfered with by the state. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). Next, the plaintiff must show that the procedures attendant to that deprivation were constitutionally insufficient. *Id.*

¶ 17 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 does not argue that the initial seizure was unconstitutional. The question thus becomes whether applying the CGIA to preclude Woo's replevin action to recover the property violates his due process rights. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984) ("For intentional, as for negligent deprivations of property by state employees, the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy.").

¶ 18 On this question, *Desert Truck Sales* is again instructive because the supreme court considered whether applying the CGIA

to preclude the replevin action violated the purported property owner's due process rights. 837 P.2d at 768. Like Woo, the plaintiff in that case argued that barring a replevin action denied due process because it was the only remedy to recover the property — there, a vehicle seized by police on suspicion of theft and then detained because its vehicle identification number had been removed. *Id.* at 762. The supreme court rejected that argument, reasoning that the plaintiff had a statutory right to a post-seizure hearing to prove ownership and obtain possession of the car, and that the hearing was mandatory. *Id.* at 767-68 (citing § 42-5-110, C.R.S. 2019). The court concluded that this procedure adequately protected the plaintiff's due process rights. *Id.*; *cf. Hudson*, 468 U.S. at 533 ("[A]n unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available.").

¶ 19 Likewise, Woo had an adequate post-seizure remedy. He could have sought (and, as to some property, he did seek) return of the property in his criminal case. Though no statute or rule sets out

the procedure available to a criminal defendant to recover property that was legally seized, longstanding Colorado case law recognizes that a criminal defendant may file a motion for return of such property in the criminal court. *See, e.g.*, *People v. Hargrave*, 179 P.3d 226, 228-29 (Colo. App. 2007); *People v. Fordyce*, 705 P.2d 8, 9 (Colo. App. 1985); *People v. Wiedemer*, 692 P.2d 327, 329 (Colo. App. 1984); *People v. Rautenkranz*, 641 P.2d 317, 318 (Colo. App. 1982); *People v. Buggs*, 631 P.2d 1200, 1201 (Colo. App. 1981); *cf. People v. Angerstein*, 194 Colo. 376, 379, 572 P.2d 479, 481 (1977) (tacitly approving this practice but holding that, as to some categories of legally seized property, there is no right to have it returned).[3]

¶ 20 To recover property seized as part of a criminal proceeding, a defendant may file a verified motion seeking the return of that property with the same court in which the charges were brought. *Rautenkranz*, 641 P.2d at 318. The court should then hold an evidentiary hearing to determine the parties' rights. *Id.* The defendant makes a prima facie case of ownership by showing that

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[3] In addition, Crim. P. 41(e) allows an aggrieved person to move the district court for the return of illegally seized property.

the items were seized from him at the time of his arrest and that they are being held by law enforcement authorities. *Fordyce*, 705 P.2d at 9. The burden then shifts to the prosecution to prove by a preponderance of the evidence that the items were the fruit of an illegal activity or that a connection exists between those items and criminal activity. *Id.*

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

¶ 22 Still, Woo contends that this procedure is insufficient because, unlike the post-seizure proceeding discussed in *Desert Truck Sales*, a hearing on a motion for return of property is not mandatory. But 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. *See Rautenkranz*, 641 P.2d at 318 ("[O]n the filing of the motion an evidentiary hearing should be held."). Hence, divisions of this court have reversed district courts' rulings that declined to hold a hearing on a motion for return of property or that denied such a motion even though the prosecution did not present evidence refuting the defendant's prima facie showing. *See id.*; *Buggs*, 631 P.2d at 1201.

¶ 23 Woo also maintains that the procedure in the criminal court is inadequate because that court might no longer have jurisdiction to entertain his motion for return of the property given that he has been sentenced already. True, divisions of this court have divided over whether a criminal court retains jurisdiction to hear a post-sentence motion for return of property. *See People v.*

Chavez, 2018 COA 139, ¶¶ 9-14 (discussing the split and answering in the negative). *Compare 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). So far, our supreme court has not resolved this debate.

¶ 24 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. Our supreme court in *Desert Truck Sales* recognized that the availability of a post-seizure remedy to recover seized property satisfies the alleged owner's due process rights. Such a 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. *See In re Estate of Ongaro*, 998 P.2d 1097, 1105-06 (Colo. 2000) ("[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."); *cf. Cacioppo v. Eagle Cty. Sch. Dist. Re-50J*, 92 P.3d 453, 464 (Colo. 2004) ("[W]e hold that the five-day time limit imposed by section 1-11-203.5 is also not 'manifestly so limited as to amount to a denial of justice.'") (citation omitted). 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.[4]

¶ 25 Finally, to the extent Woo argues that barring his damages claim for wrongful detention of the property violates his due process rights, we disagree. The statute at issue in *Desert Truck Sales* did not permit damages for the property's detention, *see* 837 P.2d at 767 n.9 (citing § 42-5-110), yet the supreme court found it sufficient to satisfy due process. Moreover, parties do not have a constitutionally protected property right to sue the government for damages for their alleged injuries. *See Norsby v. Jensen*, 916 P.2d 555, 563 (Colo. App. 1995); *see also State v. DeFoor*, 824 P.2d 783,

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[4] While we hold that the CGIA bars Woo's replevin action, we express no opinion on the CGIA's applicability to other civil actions pertaining to property seized by a public entity. *Cf. People v. Chavez*, 2018 COA 139, ¶ 14 n.5 (suggesting that a civil action regarding the post-sentence return of property might be available where a criminal court lacks jurisdiction).

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). Rather, the right to maintain a tort action or tort-like action against a public entity is derived from statute. *Fritz v. Regents of Univ. of Colo.*, 196 Colo. 335, 339, 586 P.2d 23, 26 (1978); *see Desert Truck Sales*, 837 P.2d at 767 ("In enacting the [CGIA], the General Assembly described in minute detail the circumstances that can result in tort liability for a public entity or its employees."). As discussed, the CGIA bars Woo's replevin action, including his damages claim.

¶ 26 In sum, Woo has failed to show beyond a reasonable doubt that the CGIA is unconstitutional as applied to his replevin action.

IV. Dismissal With Prejudice

¶ 27 Lastly, Woo contends that the district court's dismissal "with prejudice" was error. He reasons that, because the dismissal was due to lack of subject matter jurisdiction, the dismissal was not an adjudication on the merits of his replevin claim. Because the dismissal did not adjudicate the merits, he concludes that the dismissal must be "without prejudice" so that he may refile his

complaint.[5] Although his premise is correct, his conclusion does not follow.

¶ 28 Woo is right that the dismissal for lack of jurisdiction does not operate as an adjudication on the merits of his replevin claim. *See* C.R.C.P. 41(b)(1); *see also W. Colo. Motors, LLC v. Gen. Motors, LLC*, 2019 COA 77, ¶ 19 ("Although dismissal for lack of subject matter jurisdiction does not adjudicate the merits of the claims asserted, it does adjudicate the court's jurisdiction.") (citation omitted). Because the dismissal was based on the defendants' sovereign immunity, however, dismissal with prejudice was proper.

¶ 29 Generally, a dismissal for lack of jurisdiction does not bar subsequent proceedings and, thus, dismissal with prejudice is improper. *See Mkt. Eng'g Corp. v. Monogram Software, Inc.*, 805 P.2d 1185, 1185-86 (Colo. App. 1991). This principle reflects the possibility that the plaintiff may be able to refile the complaint (in the same court or another) and plead facts that cure the jurisdictional defect. *See id.* (dismissal for lack of personal jurisdiction); *see also Grant Bros. Ranch, LLC v. Antero Res.*

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[5] Woo does not say how a new complaint might differ from his first.

Piceance Corp., 2016 COA 178, ¶ 35 (dismissal for failure to exhaust administrative remedies).

¶ 30 Where, however, an insurmountable barrier exists to a court's jurisdiction — such as a statute of limitations — dismissal without prejudice would serve no purpose. In that situation, dismissal with prejudice is appropriate. *See People in Interest of T.L.H. v. F.P.V.*, 701 P.2d 87, 88 (Colo. App. 1984) (dismissing with prejudice the People's action where the statute of limitations barred their claim but dismissing without prejudice as to other parties' potential claims that were not barred).

¶ 31 Here, the district court lacks jurisdiction to hear the merits of Woo's replevin claim because the CGIA bars the claim. That bar is "immunity from suit," meaning that he cannot maintain a replevin action against the defendants. *See State v. Nieto*, 993 P.2d 493, 507 (Colo. 2000); *Hernandez*, ¶ 5; *see also Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 923 (Colo. 1993) (recognizing that the CGIA "is not a tort accrual statute" but a "nonclaim statute"). The dismissal of his claim is thus similar to a dismissal based on the expiration of a statutory limitations period.

¶ 32 Consequently, we conclude that where, as here, a public entity objects to jurisdiction on sovereign immunity grounds, and the plaintiff's complaint or amended complaint does not allege facts that would constitute a waiver of immunity, the district court's dismissal on sovereign immunity grounds "is with prejudice because a plaintiff should not be permitted to relitigate jurisdiction once that issue has been finally determined." *Harris Cty. v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004); *see Ex parte Boaz City Bd. of Educ.*, 82 So. 3d 660, 662 (Ala. 2011) (Because the public entity and employees demonstrated that "they have immunity from the claims asserted against them, they have established a clear legal right to have the claims against them dismissed with prejudice."); *cf. Graham v. Waters*, 805 F. App'x 572, 579 (10th Cir. 2020) (holding that the district court properly dismissed the plaintiff's claims with prejudice because the defendants were immune from damages liability); *Janis v. Gonzales*, 168 F. App'x 810, 811 (9th Cir. 2006) (same).

¶ 33 The district court did not err.

V. Conclusion

¶ 34 The judgment dismissing Woo's complaint with prejudice is affirmed.

JUDGE FOX and JUDGE CASEBOLT concur.

EL PASO COUNTY COMBINED COURTS COLORADO 270 S. Tejon Colorado Springs, CO 80903 JAMES WOO Plaintiff, v. EL PASO COUNTY SHERIFF'S OFFICE; FTH JUDICIAL DISTRICT ATTORNEY Defendant.	DATE FILED: July 3, 2019 ▲ COURT USE ONLY ▲
	Case No.: 19CV103 Div.: 5 Ctrm.: S501

ORDER RE: MOTION TO DISMISS

The defendants have filed a Motion to Dismiss, alleging that this court lacks jurisdiction due to the plaintiff's failure to provide a Written Notice of Claim as required by CRS 24-10-109. The plaintiff has filed a response.

The plaintiff was tried and convicted of Murder in the 1st Degree in case number 16CR2069. He was sentenced to life without parole on February 12, 2018. He filed this case alleging that the Prosecution and Sheriff's office have kept personal property that belonged to him. The personal property had been seized during the investigation of his case. This replevin action was filed on April 18, 2019.

CRS 24-10-109 requires written notice to the Sheriff and District Attorney within 182 days of notice to the plaintiff of the injury. Apparently, written notice that complies with the statute was never given prior to the filing of this action. Accordingly, the court lacks jurisdiction to deal with these replevin claims.

Moreover, the return of his 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 the case, in case the conviction is over-turned in the future.

The Motion to Dismiss with Prejudice is GRANTED.

DONE this 3rd day July of, 2019

APPENDIX C

19CV103
BY THE COURT:

DISTRICT COURT JUDGE
LARRY E. SCHWARTZ

Cc: James Woo
AG Mary Ritchie

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: January 9, 2023
Certiorari to the Court of Appeals, 2019CA1360 District Court, El Paso County, 2019CV103	
Petitioner: James Woo, **v.** **Respondents:** El Paso County Sheriff's Office and Fourth Judicial District Attorney's Office.	Supreme Court Case No: 2020SC865
ORDER OF COURT	

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JANUARY 9, 2023.

APPENDIX D

Summary of Argument from Opening Brief on Certiorari Review in the Colorado Supreme Court

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.