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On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 15CA1394 Lake County Case No. 14CR0032	
Petitioner / Cross-Respondent, THE PEOPLE OF THE STATE OF COLORADO, v. Respondent / Cross-Petitioner, WILLIAM STEVEN BERRY.	▲ **COURT USE ONLY** ▲ Case No. 17SC430
CYNTHIA H. COFFMAN, Attorney General JACOB R. LOFGREN, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 9th Floor Denver, CO 80203 Telephone: 720-508-6459 E-Mail: jacob.lofgren@coag.gov Registration Number: 40904 *Counsel of Record	

PETITIONER / CROSS-RESPONDENT'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

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

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

> It contains **9181** words.

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

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

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

/s/ Jacob R. Lofgren

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STATEMENT OF THE ISSUE PRESENTED

Whether a sheriff's deputy, who removed several weapons from an evidence locker where they were under the possession and control of the sheriff's department, and then converted them to his own personal use, can be charged and convicted of embezzlement of public property under section 18-8-407(1), C.R.S (2018).

STATEMENT OF THE CASE

William Steven Berry, the defendant, and a co-defendant—former employees of the Lake County Sheriff's Office—took four guns from the office's evidence room without authorization and converted the guns to his own use (PCF, Vol 1, #1). He was charged with embezzlement of public property, felony theft, violation of firearms transfer background check, and first degree official misconduct (PCF, Vol 1, #11).[1]

A jury convicted the defendant of embezzlement of public property and official misconduct, but acquitted on theft and violation of firearms transfer background check (PCF, Vol 2, #104-07; TR 5/14/2015, pp 79-81). The defendant was sentenced to probation (PCF, Vol 2, #110).

[1] Initially, the defendant was also charged with the illegal possession or transfer of a large capacity magazine (PCF, Vol 1, #31-33, 36, 44). That count was dismissed at trial (TR 5/13/2015, pp 51-53).

The defendant directly appealed.

In a published opinion, the Colorado Court of Appeals affirmed the defendant's conviction for first degree official misconduct, but it vacated his conviction for embezzlement of public property, concluding that the evidence was insufficient to prove that charge. *People v. Berry*, 2017 COA 65, ¶¶ 2, 40-41. In reaching that result, the court of appeals held that the term "public property" as used in the embezzlement of public property statute—section 18-8-407(1)—is limited to property owned by the state or a political subdivision thereof. *Berry*, ¶¶ 11-33.

The People petitioned this Court for a writ of certiorari, asserting that the court of appeals erred in its determination that property must be owned by the state, rather than owned *or possessed* by the state, for the embezzlement of public property statute to apply to it.

On February 26, 2018, this Court granted review.[2]

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[2] This Court also granted the defendant's cross-petition for a writ of certiorari to address this question: Whether the court of appeals erred in finding that the cross-petitioner's purchase of firearms held in the evidence locker at the police station where he was a sheriff deputy was "an act relating to his office" as that phrase is used in section 18-8-404, C.R.S. (2018).

STATEMENT OF THE FACTS

In August 2013, the defendant, then employed as a Lake County Sheriff's Deputy, and other officers responded to a domestic violence incident involving P.E. and J.V. At the end of the encounter, P.E. told the officers that her husband, J.V., owned four guns and she wanted the guns taken from her home (TR 5/11/2015, pp 50-52; TR 5/12/2015, pp 48, 89-92, 110-11). Officers collected the guns, including a valuable Colt handgun, and secured them in the sheriff's office evidence room (TR 5/11/2015, pp 63-66; *see* TR 5/12/2015, p 159 (Colt valued at $3,800)).

Several months later, after the charges arising from the domestic violence incident had been resolved, the sheriff's office received a notice that it could release or destroy the guns (TR 5/12/2015, pp 69-72; *see* PCF, vol.2, #93). Notably, neither P.E., nor J.V., could take possession of the guns per sheriff's office policies because they were undocumented immigrants; thus, the guns were set to be destroyed (TR 5/11/2015, pp 53-57; TR 5/12/2015, pp 53-54, 63, 91, 110).[3]

[3] In the district court, there was a dispute as to whether undocumented aliens were barred from possessing guns under federal law—18 U.S.C. §

Recognizing the value of the Colt handgun and disappointed that it would be destroyed (*see* TR 5/11/2015, pp 73-75; TR 5/12/2015, pp 92-96), the defendant and another sheriff's deputy, Sergeant Hartman—the office's evidence technician—worked together to remove it and the other three guns from the evidence room for their own personal use.

Specifically, dressed in his uniform and driving his patrol vehicle, the defendant approached P.E. at a local gas station (TR 5/12/2015, pp 111-14). There, he hugged P.E. and asked about "purchasing" the guns (still held in evidence and slated for destruction) from her (TR 5/12/2015, pp 114-16). P.E. asked the defendant whether the purchase was legal, and the defendant assured her that he was a police officer and he would not propose anything illegal (TR 5/12/2015, pp 116-17). Eventually, P.E. agreed to sell the guns to him, signed a sales contract, and accepted $500.00 for the Colt handgun (TR 5/12/2015, pp 117-18).

922(g)(5) (*see* TR 5/11/2015, pp 9-20; TR 5/13/2015, pp 151-64, 176-88). Regardless, the evidence at trial proved that the sheriff's office would not return guns to undocumented immigrants (*see* TR 5/12/2015, p 63), and the defendant knew the guns would be destroyed.

Thereafter, using property releases purportedly signed by P.E., the defendant and Hartman took the Colt handgun and the three other guns from the sheriff's office evidence room and converted them to their own use (TR 5/12/2015, pp 51-54). At trial, P.E. unequivocally denied ever signing a release for the guns or retrieving the guns from the sheriff's office on her own (TR 5/12/2015, pp 118-19, 122, 128-29, 143-44; *see also* TR 5/12/2015, pp 57-61, 118-19).

Shortly after removing the guns, the defendant gave one—a rifle—to Sergeant Hartman as a "thank you" for his help in taking the guns from the evidence room (*see* TR 5/11/2015, pp 90-96). The defendant then tried to sell the rare Colt handgun online; however, he failed to complete the sale because a firearms dealer had difficulty shipping the gun to a buyer in California (TR 5/12/2015, pp 6-13, 16-17, 152-57). When the buyer did not receive the gun, he contacted the sheriff's office in an effort to locate the defendant (TR 5/12/2015, pp 16-17). The buyer spoke with the Lake County undersheriff and explained the situation; an internal investigation followed (*see* TR 5/12/2015, pp 49-62).

During the investigation, the undersheriff questioned Sergeant Hartman, asking why he released guns to an undocumented immigrant; Hartman stood silent (TR 5/12/2015, p 56). The investigation revealed that P.E. never personally sought the return of the guns and never received any of them (TR 5/12/2015, pp 49-62).

Ultimately, the internal investigation revealed that the defendant and Hartman removed the guns from the evidence room and converted them to their own personal use (*see* TR 5/12/2015, pp 49-62, 170-72; TR 5/13/2015, pp 12-15). The charges giving rise to this case followed.

SUMMARY OF THE ARGUMENT

If a public official knowingly converts a piece of property owned *or possessed* by a public entity, this Court should conclude that he or she may be convicted of embezzlement of public property under section 18-8-407. This is particularly true where the state is the caretaker over that property. An application of the rules of statutory construction supports this conclusion.

ARGUMENT

A sheriff's deputy that takes evidence held in the public trust in an evidence locker and converts it to his own use can be convicted of embezzlement of public property because the embezzlement of public property statute should cover property that is possessed by a public entity.

This Court granted the People's petition for writ of certiorari to review the court of appeals' holding that the term "public property" as used in section 18-8-407, C.R.S. (2018), refers to property *owned* by a public entity but not to property *possessed* by a public entity.

A. De novo review applies.

This issue was addressed in the trial court, though it was framed as an instructional error (*see* TR 5/14/2016, pp 71-79; PCF, Vol 2, #100).

This Court reviews issues of statutory construction de novo. *People v. Rediger*, 416 P.3d 893, 898 (Colo. 2018) (citing *Doubleday v. People*, 364 P.3d 193, 196 (Colo. 2016)).

To the extent that this issue must also review the sufficiency of the evidence, such claims also are reviewed de novo. *People v. Griego*, 209 P.3d 338, 342 (Colo. 2018).

B. Background concerning the definition of "property" provided to the jury.

The district attorney charged the defendant with embezzlement of public property (PCF, Vol 1, #11). Prior to deliberations, the district court instructed the jury on the elements of that charge, as follows:

> 1. That the defendant,
>
> 2. in the State of Colorado, County of Lake, at or about the date and place charged,
>
> 3. was a public servant, and
>
> 4. lawfully or unlawfully came into possession of public property of any kind,
>
> 5. being the property of the Lake County Sheriff's Department,
>
> 6. knowingly converted any of such public property to his own use or to any use other than the public use authorized by law,
>
> 7. without the affirmative defense in Instruction Number 14.

(PR. CF, vol.2, #102—Instruction No. 10; *see* TR 5/14/2015, p 11:6-22).

During deliberations, the jury requested a definition of the term "property" as used in that instruction (PCF, Vol 2, #100; *see* TR

5/14/2015, p 71:11-13). The defendant proposed instructing the jury that "public property" means "state or community owned property not restricted to any one individual's use or possession"; the prosecution objected (TR 5/14/2015, pp 72-78).

Ultimately, the district court instructed the jury: "[P]roperty is something owned or possessed" (TR 5/14/2015, pp 78-79). Thereafter, the jury convicted the defendant of embezzlement of public property.

C. Under section 18-8-407(1), the term "public property" should encompass property that is either owned or possessed by a public entity.

Section 18-8-407 reads, in pertinent part:

> (1) Every public servant who lawfully or unlawfully comes into possession of any public moneys or public property of whatever description, being the property of the state or of any political subdivision of the state, and who knowingly converts any of such public moneys or property to his own use or to any use other than the public use authorized by law is guilty of embezzlement of public property. . . . .

§ 18-8-407(1), C.R.S. (2018).

On review, this Court must determine whether the term "public property" in the embezzlement of public property statute—section 18-8-407—includes property *possessed by* a public entity but not necessarily owned by it.

"In construing a statute, [this Court] interpret[s] the plain language of the statute to give full effect to the intent of the General Assembly." *Griego*, 409 P.3d at 342. "To determine legislative intent, we first look to the language of the statute, giving words and phrases their commonly accepted and understood meanings." *Abu-Nantambu-El v. State*, 2018 COA 30, ¶ 9 (citing *People v. Garcia*, 113 P.3d 775, 780 (Colo. 2005)). "In doing so, [this Court] give[s] consistent, harmonious, and sensible effect to each part of the statute, and [this Court] interpret[s] every word, rendering no words or phrases superfluous and construing undefined words and phrases according to their common usage." *Griego*, 409 P.3d at 342. And this Court "avoid[s] constructions that lead to absurd results." *People in Interest of L.M.*, 416 P.3d 875, 879 (Colo. 2018). Finally, to discern the plain meaning of statutory language, this Court often refers to the common dictionary definition of

terms. *See Abu-Nantambu-El*, ¶ 9; *see, e.g., People v. Graves*, 368 P.3d 317, 327-28 (Colo. 2016); *People v. Hunter*, 307 P.3d 1083, 1086 (Colo. 2013); *People v. Janousek*, 871 P.2d 1189, 1196 (Colo. 1994); *People v. Oliver*, 405 P.3d 1165, 1175 (Colo. App. 2016).

"If the statutory language is clear and unambiguous, no further statutory analysis is required[,]" *People v. Diaz*, 347 P.3d 621, 624 (Colo. 2015), and this Court applies the statute as written, *Abu-Nantambu-El*, ¶ 9 (citing *Martin v. People*, 27 P.3d 846, 851 (Colo. 2001)).

"However, if the language of the statute is ambiguous, or in conflict with other provisions, the court may look to legislative history, prior law, the consequences of a given construction, and the goal of the statutory scheme to determine its meaning." *Id.* (citing *People v. Luther*, 58 P.3d 1013, 1015 (Colo. 2002)); *see Diaz*, 347 P.3d at 624-25 ("But if the statutory language is susceptible of more than one reasonable interpretation, it is ambiguous and we may apply other rules of statutory interpretation."); *see also* § 2-4-203, C.R.S. (2018) (providing a non-exhaustive list of factors a court may consider in determining the intentions of the General Assembly). " 'The plainness

or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.' " *Diaz*, 347 P.3d at 625 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

Finally, if this Court is not able to discern the intent of the legislature after applying interpretative rules of statutory construction, then it may, as a last resort, apply the rule of lenity, which "requires courts to resolve ambiguities in a penal code in favor of a defendant's liberty interests." *See Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004).

Given this framework, this Court should conclude that a public official's conversion of property *possessed* by a public entity—and held by that entity in its fiduciary caretaker role over seized property—constitutes embezzlement of public property because (1) nothing in the plain language of section 18-8-407 suggests that it applies only to property owned by a public entity, and (2) an application of the rules of statutory construction show that the statute should also encompass property *possessed* by a public entity when the entity holds the property effectively in a fiduciary capacity.

1. The plain language of section 18-8-407 is ambiguous, and nothing in the statutory language suggests a legislative intent that the section should apply only to property owned by a public entity.

Below, the court of appeals concluded that the plain language of section 18-8-407(1) was ambiguous; yet, it nonetheless determined that the statutory language suggested that the term "public property," as it is used in that statute, referred solely to property owned by a public entity. *Berry*, ¶¶ 15-18. This conclusion does not hold.

Initially, as the court of appeals correctly observed, there is no statutory provision defining the term "public property" for purposes of section 18-8-407(1), and turning to the definition of the more generic term "property" provides little help in interpreting "public property." *See Berry*, ¶¶ 12, 15. But "property" can be defined broadly to include things owned *or possessed* by a person or entity, even if it can be defined narrowly, as the court of appeals did, to include only things that a

person or entity owns.[4] *See id.* (citing dictionaries); *but see, e.g.,* Black's Law Dictionary 1232 (7th ed. 1999) ("[t]he right to possess, use, and enjoy a determinate thing"); Merriam-Webster's Collegiate Dictionary 935 (10th ed. 1993) (property is "something owned or possessed" or "the exclusive right to possess, enjoy, and dispose of a thing"); *see also, e.g.,* Black's Law Dictionary 1233 (7th ed. 1999) (defining "public property" as "[s]tate- or community-owned property not restricted to any one individual's use or possession").

Indeed, in a different context, this Court observed that "the term 'property' is a broad term used to describe 'whatever is the subject of

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[4] The court of appeals concluded: "Adding the word 'public' to the term aids little in determining the meaning of 'property' under [section 18-8-407] because that word merely indicates whose property must be converted." *Berry*, ¶ 15. Maybe so. But that fact further leads to the exact question that must be resolved here: Whether "property" as it is used in section 18-8-407 can also include those things *possessed* by a public entity, especially where the public entity in possession of that property exercises total control over it (and is effectively holding it as a fiduciary) until it may be lawfully returned to the rightful "owner," or, as here, where the property may not be returned to the rightful owner, and a public entity as acting as caretaker over the property until it can be disposed of. In other words, does modifying "property" to address "public" property also alter the general understanding of property as a possessory interest of an individual?

legal ownership,' including 'physical things, such as lands, goods, [or] money,' and 'intangible things, such as franchises, patent rights, copyrights, trade-marks, trade-names, business good will, rights of action, etc.' " *SDI, Inc. v. Pivotal Parker Commercial, LLC*, 339 P.3d 672, 676-77 (Colo. 2014).

In short, the term "public property," as used in section 18-8-407(1) is not statutorily defined, and it is ambiguous. Recognizing this, the court of appeals turned to a contextual analysis of the language surrounding that term. But its analysis was flawed.

First, in its contextual analysis, the court of appeals addressed the clause "being the property of the state or any political subdivision of the state," concluding that that language "tends to indicate that the property subject to the statute is property *belonging* to the state." *See Berry*, ¶ 16 (emphasis added). This conclusion, which reads the words "being the property of" to require ownership and to negate possession as a method of holding property, strains the plain language of the statute. It also created an unsupported limiting principle.

Instead, this Court should read that clause in a more natural way. In doing so, this Court should conclude that the clause merely clarifies that the statute applies to *all* public property (owned or possessed) whether that property is held by a state entity or by some other public entity—e.g., municipality, school district, fire district, etc. Indeed, read as a whole and in proper context, the clause—"being the property of the state or any political subdivision of the state"—simply clarifies that the embezzlement statute criminalizes the conversion of all public property by any public official *regardless of which type of governmental entity owns or possesses it*.

Moreover, despite the court of appeals' reading, *see Berry*, ¶ 16, section 18-8-407 never uses the word "belong" or any variation thereof. By its plain language, the embezzlement of public property statute has no requirement that the embezzled property "belong" to state. The legislature did not use the word "belong" in section 18-8-407, and this Court should not read it into the statute. *See, e.g., Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007) ("We do not add words to the statute or subtract words from it."); *id.* at 568 ("[W]e cannot supply the missing

language and must respect the legislature's choice of language."); *People v. Benavidez*, 222 P.3d 391, 393-94 (Colo. App. 2009) ("[I]n interpreting a statute, we must accept the General Assembly's choice of language and not add or imply words that simply are not there."); *see also, e.g., Diaz*, 347 P.3d at 625 ("[W]e refuse the defendant's invitation to venture into legislative territory" by reading extra words into a statute.).

Accordingly, this Court should reject the assertion that the phrase "being the property of the state or any political subdivision of the state" in section 18-8-407 necessarily suggests that, for the statute to apply, the property at issue must "belong" to a public entity.

Second, in its contextual analysis, the court of appeals addressed the clause "knowingly converts any of such public moneys or property to his own use or to any use *other than the public use authorized by law*." *See Berry*, ¶ 17 (emphasis in the original). The court of appeals decided that the last portion of that clause—"other than the public use authorized by law"—was "inconsistent with the notion that 'public property' includes property merely possessed by the state" because "one would ordinarily think of property designated by law for a public use as

property owned by the government." *Id.* In so deciding, the court did not explain why property possessed, rather than owned, by a public entity could not have a legally authorized use, and the court cited no authority in support of the broad assumption that possessed property could not have a legally authorized use. *See id.*

The court of appeals' sweeping conclusion overlooks many situations where a piece of property possessed, but not owned, by a public entity may have "use authorized by law." For instance, a vehicle leased by a public entity could have a legally authorized use yet it is not "owned" by that public entity. Similarly, a public entity may choose to rent a copy machine for long-term use or some construction equipment for a discrete project, yet the entity would not "own" that equipment. Yet, in each hypothetical, the public entity *possesses* a piece of property, exercises total control over it for some discrete amount of time (short or long), and uses it for some legally authorized public purpose.

That being the case, should a public employee, who converts leased public property to personal use, be exempt from charges for embezzlement of public property merely because the public entity

possesses property but does not "own" it? To avoid an absurd result, the answer can only be no.

The absurd results of any other construction quickly become clear. Assume, for example, that a city employee takes an older model truck owned by the city and uses it to drive his kids to school or lends it to a friend to move furniture, while another city employee takes a newly leased car and does the same. Under the court of appeals' rationale, a jury could convict the first employee of embezzlement, but not the second, because the older truck is "owned" by the city while the leased car is merely "possessed" by the city for whatever the term of the lease. The General Assembly surely cannot have intended that the two employees—both of whom converted a city vehicle to personal use—would receive divergent treatment simply because the city "owned" one vehicle and merely "possessed" the other.

To avoid such results, the clause—"knowingly converts any of such public moneys or property to his own use or to any use other than the public use authorized by law"—read as a whole explains that an embezzlement occurs when a public employee converts any piece of

public property to *any unauthorized use, personal or otherwise*. The clause does not state or imply that an embezzlement of public property may only occur when a public entity "owns" the illegally converted property. And, despite the court of appeals' contrary assumption, it is possible and not uncommon for a piece of public property to have a use authorized by law, yet that property is merely leased or rented ("possessed") by the public entity.

Accordingly, this Court should reject the assumption that the phrase "other than the public use authorized by law" suggests that the General Assembly intended that section 18-8-407 apply only to property *owned* by a public entity for a public use but not to property *possessed* by a public entity for a public use.

Because there is no statutory definition of "public property" and because, as shown above, a contextual analysis of the language surrounding that term in section 18-8-407(1) offers little guidance as to the legislature's intent, this Court should turn to the interpretative rules of statutory construction to determine its proper meaning.

2. Applying the rules of statutory construction, section 18-8-407(1) applies to property owned or possessed by a public entity.

Applying the interpretative rules of statutory construction, this Court should hold that section 18-8-407(1) applies to property owned *or possessed* by a public entity. When it interprets a statute, this Court's analysis must be aware of the fact that the General Assembly intends its statutes "to be effective" and to reach "a just and reasonable result[.]" § 2-4-201(1)(b)-(c), C.R.S. (2018). Further, statutes crafted by the General Assembly favor the public interest over any private ones. § 2-4-201(1)(e), C.R.S. (2018).

As noted above, the interpretative rules of statutory construction include, but are not limited to: (1) the legislative history and the prior law; (2) the goal of the statutory scheme; and (3) the consequences of a given construction. *See Frazier*, 90 P.3d at 811-12; *Martin*, 27 P.3d at 851; *Abu-Nantambu-El*, ¶ 9; *see also* § 2-4-203, C.R.S. (2018) (non-exhaustive list of factors a court may consider in determining the intent of the General Assembly).

a. The legislative history and prior case law do not suggest that section 18-8-407 should be limited to property owned by a public entity.

The legislative history and prior case law do not suggest that the embezzlement of public property statute should be limited to property owned by a public entity. To reach the contrary conclusion, the court of appeals traced the history of various embezzlement statutes in Colorado from their origins in 1877 to the current statute—section 18-8-407.[5] *See Berry*, ¶¶ 19-22.

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[5] Having also traced section 18-8-407 to its origins, the People find no significant flaws in the court of appeals' research. Notably, however, the court of appeals did not reference the embezzlement statutes that existed *prior* to Colorado's statehood and, thus, *prior* to the adoption of article 10, section 13 of the Colorado Constitution. *See* R.S. 1868, pp 206-07, §§ 61, 62. The earliest *post*-statehood embezzlement statutes largely track the language of the *pre*-statehood statutes. *See* G.L. 1877, §§ 658, 659; G.S. 1883, §§ 768, 769; Mills' Ann. Stat. §§ 1245, 1246 (1891); R.S. 1908, §§ 1691, 1692; C.L. 1921, §§ 6735, 6736; C.S.A. 1935, Ch. 48, §§ 100, 101; §§ 40-5-17, -18, C.R.S. (1953); §§ 40-5-16, -17, C.R.S. (1963); *see also Berry*, ¶ 19 (analyzing post-statehood statutes). Accordingly, a fuller review of the legislative history suggests that the language of the post-statehood statutes is actually rooted in language that predates the adoption of article 10, section 13.

As part of this historical overview, the court of appeals noted that the legislature apparently enacted the earliest embezzlement statutes to prohibit the misuse of public funds for private purposes in furtherance of the objectives of article 10, section 13 of the Colorado Constitution. *See id.*, ¶ 20 (citing *People v. Schneider*, 292 P.2d 982, 985 (Colo. 1956); *Moulton v. McLean*, 39 P. 78, 81 (Colo. 1895)). Article 10, section 13 of the Colorado Constitution reads:

> The making of profit, directly or indirectly, out of state, county, city, town or school district money, or using the same for any purpose not authorized by law, by any public officer, shall be deemed a felony, and shall be punished as provided by law.

Addressing that section, the court of appeals concluded:

> The objective of [article 10, section 13] is to prohibit the misuse of money belonging to the public and which is designated for some public purpose. We think this objective at least implicitly contemplates ownership of the money or property by the public, and not mere custody or possession. And therefore, absent any indication to the contrary, statutes enacted to further this objective are so limited.

Berry, ¶ 21.

The People respectfully assert that the court of appeals went awry in its reading of article 10, section 13 and the earliest embezzlement statutes as that provision and those statutes affect an interpretation of the more modern embezzlement statute—section 18-8-407.

Article 10, section 13 does not address a public officer's misuse of public *property*, let alone suggest that an individual can only be guilty of embezzling such property if a public entity owns it, but not if a public entity possesses it and holds total control over it. Instead, by its plain language, article 10, section 13 addresses only a public officer's misuse of public *money*. *See* Colo. Const., art. X, § 13 (barring public officers from making profit "out of state, county, city, town or school district *money* . . ." (emphasis added)). Because article 10, section 13 addresses only public *money* and not public *property*, any "ownership" limitations potentially contemplated by that provision should apply only to public *moneys*, not public *property*. To that end, the court of appeals went too far when it found that article 10, section 13 "contemplates ownership of the money *or property* by the public." *See Berry*, ¶ 21 (emphasis added).

Put differently, this Court should not stretch any limits inherent in article 10, section 13 to apply to section 18-8-407, which, by its plain language, is broader than both that constitutional provision and the earliest statutes that flow from it.

As the court of appeals recognized, section 18-8-407 noticeably differs from the earliest embezzlement statutes. *See Berry*, ¶ 22 ("Now, it is true that section 18-8-407 is not worded precisely as it was for the better part of a century."). Indeed, section 18-8-407 is more expansive than article 10, section 13 and the first embezzlement statutes because it penalizes more than a public official's misuse of public moneys.[6] It

[6] Section 18-8-407 was originally limited to "public moneys"; however, in 1971, the legislature amended it to include "public property." *See Berry*, ¶ 22, n.4 (citing Ch. 1121, sec. 1, § 18-8-407, 1971 Colo. Sess. Laws 462). This legislative action demonstrates the legislature's intent to broaden the scope of the embezzlement statute beyond the limitations presented by article 10, section 13 and the earlier iterations of that statute. *See Vaughan v. McMinn*, 945 P.2d 404, 409 (Colo. 1997) ("The legislature is presumed to be aware of precedent in an area of law when it legislates in that area[,]" and "the legislature is presumed to adopt the construction which prior judicial decisions have placed on particular language when such language is employed in subsequent legislation.").

specifically and additionally criminalizes a public official's misuse or misappropriate of *public property*.

Despite this clear divergence from the narrow language in article 10, section 13, the court of appeals nonetheless ruled that section 18-8-407 necessarily carried along with it the same limitations inherent in the earliest embezzlement statutes. *See Berry*, ¶ 22. As support, the court noted (1) the placement of the preposition "of" in the clause "property *of* the state"; and (2) the statute's contemplation of a "public use" for the illegally converted property. *Id.* (emphasis in the original).

First, the placement of the preposition "of" in the clause "property of the state" in section 18-8-407 does not hold the significance that the court of appeals assigns. To the contrary, the full context of the language adjoining that clause shows that section 18-8-407 is, in fact, more expansive than suggested by the court of appeals. In fact, section 18-8-407 broadly punishes the conversion of "*any* public moneys or public property *of whatever description*, being the property of the state or of any subdivision of the state . . . ." § 18-8-407(1) (emphasis added).

The use of the terms "any" and "of whatever description" show the legislature's intent to proscribe the misuse of a wide array of property, and not, as the court of appeals suggested, to limit the scope of the statute. *See Colorado Educ. Ass'n v. Rutt*, 184 P.3d 65, 75 (Colo. 2008) ("The key phrase, 'any communication,' is broad and all-inclusive."); *Woellhaf v. People*, 105 P.3d 209, 216 (Colo. 2005) (" '[A]ny' connotes a lack of restriction or limitation."); *Rocky Mountain Rhino Lining, Inc. v. Rhino Linings USA, Inc.*, 37 P.3d 458, 462 (Colo. App. 2001) (noting "the term 'any person' is broad . . ."), *rev'd*, 62 P.3d 142 (Colo. 2003); *Moss v. Bd. of County Comm'rs for Boulder County*, 411 P.3d 918, 923-24 (Colo. App. 2015) (the words "other weapon of any description" are broad and do not limit a statutory definition of firearms); *Colorado State Bd. of Accountancy v. Raisch*, 931 P.2d 498, 500 (Colo. App. 1996) ("The term 'any' is an inclusive term often used synonymously with the terms 'every' and 'all.' "), *aff'd*, 960 P.2d 102 (Colo. 1998).

Second, the broad terms intentionally used in section 18-8-407 likely reflect the fact that, in our more modern world, "public property" encompasses far more than the traditional park bench or police car; it

now includes property that can be covertly taken by a public employee, including mobile phones, camera equipment, laptop computers, or flash drives. Moreover, the broad language of section 18-8-407 is consistent with the reality that "public property" often includes items that a public entity possesses and exercises total control over, but may not "own," like leased vehicles or leased office equipment.

In sum, while it may be true that section 18-8-407 finds its roots in article 10, section 13 and the earlier embezzlement statutes, the General Assembly's intentional inclusion of more expansive language in section 18-8-407 shows its intent to broaden the scope of the misappropriations proscribed as embezzlement. And the fact that section 18-8-407's predecessors may have been more narrowly tailored should not undermine the broader goals of section 18-8-407 and should not undercut the more expansive wording of that section.

Accordingly, in light of section 18-8-407's broad language, this Court should conclude that the legislature intentionally moved away from any inherent limitations in article 10, section 13 or the earlier iterations of the embezzlement statutes.

In support of a more restrictive interpretation of section 18-8-407, the court of appeals relied on older cases, applying earlier versions of the embezzlement statutes. *See Berry*, ¶¶ 23-26 (citing *People v. Fielden*, 427 P.2d 880, 881 (Colo. 1967); *Starr v. People*, 147 P.2d 135, 137 (Colo. 1945); *Wright v. People*, 91 P.2d 499, 502-03 (Colo. 1939)). Those cases dealt with allegations of embezzlement of public *money*, not public *property*. Thus, those cases more squarely fit a restrictive reading of earlier embezzlement statutes that mirrors any limitations inherent in article 10, section 13. But none of those cases dealt with the more expansive language of section 18-8-407, and, thus, they did not touch upon the question raised here—namely, whether section 18-8-407, which is written more broadly than its predecessors, covers property possessed by a public entity, as well as property owned by it.

Accordingly, this Court should not read the cases cited by the court of appeals—decided more than fifty years ago after applying narrower versions of the embezzlement statute—to suggest that section 18-8-407 can only be satisfied if a public entity owns the property that is converted by a public employee.

b. The goal of section 18-8-407 is to prohibit a public official from reaping unjust gain by virtue of his or her position.

The overarching intent of the statutes proscribing embezzlement is to prohibit a public official from reaping unjust gains from her public position. The earliest cases applying Colorado's embezzlement statutes recognize this broad objective in the context of public funds owned by a public entity. *See People v. Skrbek*, 599 P.2d 272, 272 (Colo. App. 1979) ("The purpose of [section 18-8-407] is to prevent the intentional misapplication of public funds for private gain by those officers entrusted with the responsibility for the correct disposition of the moneys."); *People v. Gallegos*, 260 P.3d 15, 23 (Colo. App. 2010) ("[Defendant's] use of county vehicles and personnel to transport the inmates for work on his home and cutting firewood involves public moneys or public property because the vehicles were owned by the county and the personnel were county employees."); *see also Davis v. Dunlevy*, 53 P. 250, 251 (Colo. 1896) ("It is the using of public money by the officer for his own gain that is intended to be reached."); *Moulton*,

39 P. at 81 ("An examination [of two of the earliest embezzlement statutes] clearly shows [a legislative] intention to have been to prevent the misapplication and use of public funds for the benefit and profit of the officer, to strictly prohibit the use of the money by the officer for speculative purposes and for his own gain."); *accord Moore v. United States*, 160 U.S. 268, 269 (1985) ("Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come."); *United States v. Davila*, 693 F.2d 1006, 1008 (10th Cir. 1982) ("[L]awful original possession is enough to support the crime of embezzlement . . . .").[7]

[7] *See also, e.g., Fielden*, 427 P.2d at 880-81 (consistent with an existing hospital policy, defendant entered into a debtor-creditor relationship with the publicly-owned hospital where he worked; under those facts, the evidence failed to show any unlawful conversion or criminal intent); *Starr*, 157 P.2d at 135 (public official that failed to remit funds collected to the state treasurer could be convicted of embezzlement because those funds belonged to the state); *Wright*, 91 P.2d at 502-03 (defendant could not be convicted of embezzlement because the money he stole belonged to private individuals, not to the county); *see generally Schneider*, 292 P.2d at 985 (citing cases).

The court of appeals' restrictive interpretation of the expansive language in section 18-8-407 is inconsistent with this broad policy objective for, at least, four reasons.

First, reading section 18-8-407 to proscribe the conversion of both property owned and property possessed by the government furthers the broad objective of prohibiting public officials from reaping unjust gains by virtue of their position. Regardless of whether property is owned or possessed, a public official that converts property to his or her own use has wrongly gained by way of his or her public position, thereby abusing the public trust. This is the precise goal of the embezzlement of public property statute: to preserve public oversight over public employees and our government institutions by holding them to a higher standard. As such, there exists no meaningful reason why a public official should face punishment if he or she converts property owned by a public entity, yet escape culpability if he or she reaps a personal gain by converting property possessed and held in trust by a public entity.[8]

[8] For instance, assume that a small town mayor solicits donations from individuals and businesses for the purposes of defraying the costs of

Second, while the court of appeals correctly noted that the earliest embezzlement statutes addressed a loophole in the larceny statutes by covering cases where a defendant initially gains possession of property without a trespass, *see Berry*, ¶¶ 28-29 (citing cases), even property possessed and held in trust by a public entity—such as seized property held in evidence by a police department—satisfies this standard. For instance, in this case, the defendant, in his capacity as a sheriff's

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hosting a town festival, he deposits the donations into the town's bank account (with town board approval), and, thereafter, a town employee withdraws those funds to buy a personal computer. Is that employee exempt from prosecution for embezzlement of public property because the funds were not "town money," but rather the town "possessed" the money and held it in trust for an authorized public purpose?

Or assume that a city's famed clock town is struck by lightning, and a group of citizens wants to rebuild it so they organize a "Save the Clock Tower" collection (with the approval of the city council). Those citizens solicit funds and secure them in a lock box stored in the city clerk's desk. Later, a city employee takes some of the cash to buy a bicycle for his child. Is that city employee exempt from prosecution for embezzlement of public property simply because those funds were not "town money," but rather the town "possessed" the money and held it in trust for an authorized public purpose?

deputy, came into possession of the guns without a trespass because the victim willingly and voluntarily turned the guns over to police.[9]

Third, sound public policy supports the conclusion that, when it enacted section 18-8-407, the General Assembly intended to harshly punish any public employee that converted public property of whatever description to his own use. This is likely so because the conversion of such property constitutes a serious betrayal of the public trust. The legislature viewed such betrayals with such disfavor that it classified an embezzlement of public property as a felony irrespective of the value of

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[9] The court of appeals cited *Moody v. People*, 176 P. 476 (Colo. 1918), emphasizing the words "*his* property" and "with *the owner's consent*." *See Berry*, ¶ 29 (emphasis in the original). *Moody* did not involve an embezzlement of public property. 176 P. at 476. There, this Court held that an embezzlement charge could not be sustained where a defendant did not *consensually* come into possession of the property that he converted. *See id.* ("[Embezzlement] differs from common-law larceny only in the fact that there is no trespass in the original taking, but it is stealing. It includes all cases where one intrusts the care of his property to another, as his agent, who fraudulently appropriates it to his own use, or fraudulently misapplies it. It is made to cover a class and kind of larceny where the property stolen comes into the hands of the defendant originally with the owner's consent . . . ."). Because *Moody* was not a "public property" case and the idea of "his property" and "the owner's consent" were not reasonably in dispute, this Court should assign minimal weight to *Moody* when deciding this case.

the property converted.[10] § 18-8-407(2) ("Embezzlement of public property is a class 5 felony.").

If, as happened in this case, a public employee converts property possessed and held in trust by a public entity, the actions of the public employee constitute the same betrayal of the public trust and are no less egregious—and, potentially, are more egregious—than if a public employee converts property more traditionally owned by the public entity. Treating the two situations differently undercuts the public policy objectives advanced by section 18-8-407.

Fourth, the court of appeals too quickly dismissed the import of *Skrbek*, 599 P.2d at 272. *See Berry*, ¶ 31. In that case, a defendant embezzled federal funds awarded to the state to assist with crime prevention and control. *Skrbek*, 599 P.2d at 272-73. A division of the court of appeals concluded that the defendant's embezzlement of those

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[10] Theft, on the other hand, is a misdemeanor offense unless the value of the thing involved is $2000 or more. § 18-4-401(2)(a)-(e), C.R.S. (2018). Further, the value of the thing involved must be $5000 or more before theft reaches the same felony classification as embezzlement of public property. § 18-4-401(2)(g).

funds satisfied section 18-8-407 because the funds were "held in trust" by the state. *Id.* Put differently, the state's "possession" of the funds amounted to a "qualified ownership." *See id.*

Discussing *Skrbek*'s reference to "qualified ownership," the court of appeals in this case concluded that it showed that "public ownership of funds or property is a necessary element of a charge under section 18-8-407." *Berry*, ¶ 31. Not so.

It is true that *Skrbek* used the word "ownership"; however, any analysis that ends there overlooks the critical facts of that case. There, the state held federal funds *in trust* until they could be disbursed to other public entities. Put differently, the state merely "possessed" those federal funds (essentially held in public trust) until the funds could be passed along to the ultimate end user — just as with police possession of the guns here, again an exercise of public trust. Therefore, *Skrbek*'s discussion of "qualified ownership" was just another way of describing a public entity's possession of property as a fiduciary.

The People's position finds support in a case decided by this Court nearly 100 years ago. *See Price v. People*, 240 P. 688, 689 (Colo. 1925).

In *Price*, this Court concluded that the defendant's conversion of funds "held in trust" "for a specific purpose" was sufficient to support a charge of embezzlement. *Id.* ("Every dollar misappropriated by defendant came into his hands by virtue of his official position, and could have been recovered from the municipality by those entitled to it. It was either the property of the city and county of Denver, or held in trust by it, through this official, for a specific purpose. Such qualified ownership is sufficient to support a charge of embezzlement.") (citing 1 Wharton's Crim. Proc. (10th Ed.) § 592, p 766).

Further, "qualified property" has been defined as "[a] temporary or special interest in a thing (such as a right to possess it), subject to being totally extinguished by the occurrence of a specified contingency over which the qualified owner has no control." Black's Law Dictionary 1233 (7th ed. 1999). Applying that definition here, this Court should hold that property held in trust—such as evidence seized and held in an evidence locker—is "qualified property" held as "public property" at least for some discrete period of time. Here, that discrete period of possession as a "qualified owner" likely continued until the guns could

be destroyed. (*See* TR 5/11/2015, pp 53-57, 73-75; TR 5/12/2015, pp 53-54, 62-64, 91, 94, 110 (the defendant knew that the guns stored in the evidence could not be returned to P.E. and, thus, were slated for destruction; *see also* TR 5/12/2015, pp 25, 32 (re: evidence policies used in Douglas County)); *cf. generally* Arvada Municipal Code § 62-97(c) (2018) (setting forth one municipality's extensive process for handling weapons held in evidence).[11]

It also mitigates the court of appeals' concern that embezzlement must be a "crime against the owner of the property." *Berry*, ¶ 29 (citing *Moody*, 176 P. at 476; *Lewis v. People*, 123 P.2d 398, 403 (Colo. 1942); *People v. Feldstein*, 174 N.E. 843, 845 (Ill. 1931)). Indeed, if an item is

[11] The court of appeals observed that "[t]he People concede[d] that Lake County didn't own the guns. And the People . . . never alleged that any other public entity owned them." *Berry*, ¶ 33. While it is true that the People agreed that no public entity "owned" the guns in the traditional sense, the People did not and do not concede that Lake County did not have "qualified ownership" over the guns. Instead, the People have consistently argued that the sheriff's department possessed the guns and held them in trust until they could be destroyed. Accordingly, the sheriff's department held "qualified ownership" of the guns until the guns could be destroyed.

possessed and "held in trust" by a public entity, then the entity can hold "qualified ownership" of it under appropriate circumstances.

Here, for instance, the Lake County Sheriff's Office possessed the four guns and held them in trust pending the destruction of the guns. To that end, the sheriff's office was a "qualified owner" of the guns so long as the guns remained in evidence.

Accordingly, the Court should hold that section 18-8-407 covers property either owned *or possessed and held in trust* by a public entity.

c. If this Court adopts the court of appeals' narrow reading of section 18-8-407, absurd results will follow.

If this Court adopts the court of appeals' narrow reading of section 18-8-407, absurd results will follow. Indeed, under the court of appeals' interpretation, a public employee can knowingly convert property that is possessed and held in a fiduciary capacity by the government to his or her own use without fear of immediate or obvious consequence.

In addition to the hypothetical addressed earlier (Argument(C)(I)), consider the following hypotheticals:

- There is a plethora of art adorning the walls of the Ralph L. Carr Building. Much of this art is on long-term loan from private individuals. If a judicial law clerk or an employee of the Attorney General's Office sees a piece of art hanging on the wall, notices it is unique, removes it, and takes it to her own home for personal display, is she exempt from punishment for embezzlement because the state does not "own" this art?
- Many agencies lease office equipment, such as copy machines, for employee use. If an employee likes the particularly crisp copies produced by the agency's Xerox machine and takes it home, is he exempt from punishment for embezzlement because the agency does not "own" the machine? What if the machine is on loan from a citizen while the agency's machine is repaired?
- The government collects restitution on behalf of crime victims and holds that money in trust until it can be paid to the victim. If a public employee or official converts to

her own use the moneys collected as restitution, is she exempt from punishment for embezzlement because that money is not "owned" by the government?

- Similarly, a government agency collects child support on behalf of parents and holds that money until it can be paid to the intended recipient. If a staff member of Child Support Enforcement converts collected moneys to his own use, is he exempt from punishment for embezzlement because that money is not "owned" by the government?

If the answer to any of these hypotheticals is "yes," the result is absurd. If a public entity owned the copy machine or the art that the public employee that took home, that employee would surely be charged with embezzlement of public property. Yet, under the court of appeals rationale, if the property is leased, borrowed, or held in trust then that employee cannot be charged with embezzlement of public property. Put differently, an astute bad actor could reap a windfall (and potentially escape liability for his actions) if he was selective in which property he chose to convert to his own use. For example, convert *owned* painting A

and get charged with felony embezzlement of public property, or instead convert *borrowed* painting B and avoid a felony charge.[12]

The same analysis holds true for the other hypotheticals outlined above. The divergent treatment of owned property and possessed property would lead to absurd results. The legislature cannot have intended this result, and this Court should reject any interpretation of section 18-8-407 that creates such an outcome.

D. Because section 18-8-407(1) includes property possessed by a public entity, the evidence at trial was sufficient to sustain the defendant's conviction.

This Court reviews the record de novo to determine whether sufficient evidence was presented to sustain the defendant's conviction. *Marsh v. People*, 389 P.3d 100, 105 (Colo. 2017). Even under a de novo review, verdicts deserve deference and a presumption of validity; therefore, reviewing courts apply a "daunting standard" to sufficiency challenges. *See People v. McBride*, 228 P.3d 216, 226 (Colo. App. 2009).

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[12] Even if the owner of the borrowed art realized that the artwork was gone and reported it, the public employee that took it would likely face a far less severe misdemeanor theft charge.

When analyzing the sufficiency of the evidence, a reviewing court "employ[s] a 'substantial evidence test,' which considers 'whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt.' " *People v. Molina*, 388 P.3d 894, 896 (Colo. 2017) (quoting *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010)); *accord Montoya v. People*, 394 P.3d 676, 684 (Colo. 2017) (same). This test affords the same status to both direct and circumstantial evidence. *Clark*, 232 P.3d at 1291.

Applying the substantial evidence test, "[t]he pertinent question is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

Put differently, in conducting a sufficiency analysis, a reviewing court must give the prosecution every reasonable inference that can be drawn from the evidence presented. *People v. Perez*, 367 P.3d 695, 700 (Colo. 2016); *People v. McIntier*, 134 P.3d 467, 471 (Colo. App. 2005).

And, in doing so, a reviewing court must remember that determinations pertaining to the credibility of witnesses, weight of evidence, and resolution of conflicting evidence are solely within the province of the fact-finder. *McIntier*, 134 P.3d at 471-72. To that end, an appellate court cannot "act as a thirteenth juror and set aside a verdict because it might have drawn a different conclusion had it been the trier of fact." *Id.* at 472; *see Montoya*, 394 P.3d at 684.

Here, the evidence was sufficient to prove that the defendant was guilty of embezzlement of public property.

First, the evidence proved the defendant was aware the weapons taken from P.E.'s home could not be returned to her because she was an undocumented immigrant, and, as a result, the weapons would have to be destroyed (TR 5/11/2015, pp 53-57; TR 5/12/2015, pp 53-54, 63, 91, 110; *see also* TR 5/12/2015, pp 25, 32). Because the guns could not be returned to P.E., the record supports the conclusion that the Lake County Sheriff's Office held the guns in trust (as a "qualified owner") until they could be destroyed (TR 5/12/2015, pp 63-64).

Second, P.E. denied signing any release for the guns and denied retrieving the guns from the sheriff's office (TR 5/12/2015, pp 57-61, 118-19, 122, 128-29, 143-44). Instead, the evidence showed that the defendant, with Sergeant Hartman's help, removed the guns from the evidence room at the sheriff's office after executing a sham "purchase" from P.E. He then converted the guns to his own use. Indeed, after taking possession of the guns, the defendant tried to sell the rare handgun via the internet (TR 5/12/2015, pp 6-13, 16-17, 152-57).[13] That gun was recovered from a firearms dealer (TR 5/13/2015, p 26). Two other guns were recovered from the defendant's home during a police search (TR 5/13/2015, pp 12-15).

[13] Had this sale not failed, it is possible that the defendant's wrongdoing would have never been discovered. In fact, he simply could have added the gun to his personal collection, leaving his superiors none the wiser. This is so because the defendant misled P.E. into "selling" the guns to him, he covertly removed the guns with help from another officer, and, thus, nobody had reason to seek the return of the guns or inquire as to their status. This exact scenario highlights one danger of concluding that the conversion of property possessed, but not owned, by a public entity cannot constitute embezzlement of public property.

Third, the defendant gave the fourth gun—a rifle—to Sergeant Hartman as a "thank you" for his assistance with the removal of the guns from the evidence room (TR 5/11/2015, pp 90-96; *see* TR 5/12/2015, pp 171-72 (Hartman turned the rifle over to investigators when he was asked to do so)).

Finally, the defendant's act of bypassing the normal procedures for the return of guns to a private individual and, instead, soliciting help to directly remove the guns from the evidence room shows, at least circumstantially, that he was aware the guns could not be returned and that he intended to convert the guns held for destruction to his own use. *See Clark*, 232 P.3d at 1291 (the substantial evidence test affords the same status to both direct and circumstantial evidence).

In sum, the evidence, when viewed in the light most favorable to the prosecution, sufficiently proved that the defendant knowingly converted public property—namely, four guns possessed and held in trust in the sheriff's office's evidence room—to his own personal use.

Accordingly, the evidence was sufficient to sustain the defendant's conviction for embezzlement of public property.

CONCLUSION

For the foregoing reasons and authorities, this Court should reverse the court of appeals' conclusion, and hold that property owned or possessed by a public entity can be considered public property for purposes of section 18-8-407(1), C.R.S (2018).

CYNTHIA H. COFFMAN
Attorney General

/s/ Jacob R. Lofgren
JACOB R. LOFGREN, 40904*
Assistant Attorney General
Criminal Appeals Section
Attorneys for the Petitioner / Cross-Respondent
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **OPENING BRIEF** upon **REID J. ELKUS** and **DONALD C. SISSON**, and all parties herein via Colorado Courts E-filing (CCE) on September 30, 2018.

/s/ Jacob R. Lofgren

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