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SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 15CA1394 Lake County District Court, Judge Wayne Patton, Case No. 14CR32	
Petitioner/Cross-Respondent: THE PEOPLE OF THE STATE OF COLORADO. v. **Respondent/Cross-Petitioner:** WILLIAM BERRY	**▲ COURT USE ONLY ▲**
Attorneys for William Berry: Elkus & Sisson, P.C. Reid J. Elkus, #32516 Lucas Lorenz, #35739 501 South Cherry Street, Suite 920 Denver, CO 80246 Phone: (303) 567-7981 Fax: (303) 431-3753 Email: relkus@elkusandsisson.com llorenz@elkusandsisson.com	Case No. 2017SC430

RESPONDENT/CROSS-PETITIONER'S OPENING-ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, 28.1, and 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. 28.1(g)(1).

The brief contains 8,807 words (opening-answer brief does not exceed 9,500 words). I relied on my word processor (Microsoft Word 2016) to obtain the word count.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the Respondent/Cross-Petitioner, the brief contains under a separate heading before the discussion of the issue a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved and, if preserved, the precise location in the record where the issue was raised and where the court rules, not to an entire document.

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

Elkus & Sisson, P.C.

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2. 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. (2017).

STATEMENT OF THE CASE

William Berry was a Lake County Sheriff's Deputy. While still a member of the Sheriff's Department, Berry purchased firearms from PE. (*See* R. Tr. May 12, 2015, pp.121, ll.1-25 through p.134, ll.1-21; *see also*, PR. CF, Vol.#2, Tab 98, Ex. C.) The purchase of the firearms occurred on or about January 24, 2014. (*See*, PR. CF, Vol.#2, Tab 98, Ex. C.) PE and Berry executed a purchase contract for the sale. *Id.*

On January 17, 2014, Sergeant Jeffrey Hartman (not Berry) released the firearms to PE from the Sheriff's Office evidence room. (*See* R. Tr., May 12,

2015, p.70, ll.15-25 through p. 76, ll.1-25; see PR. CF, Vol. #2, Tab 98, Ex. A, 4 and 5.)[1] The guns were released *only after* the District Attorney's Office executed a release of evidence in the husband's criminal case (which was November, 2013) and after PE executed a release of property from the Sheriff's Office. (*See* R. Tr., May 12, 2015, p.69, ll.13-25 through p.77, ll.1-6; *see* PR. CF, Vol. #2, Tab 98, Ex. A, 4 and 5.) At no time could Berry physically remove and take possession of the firearms from the evidence room and then give them to a third-party without first going through Sergeant Hartman or Undersheriff Mendoza. (*See* R. Tr., May 12, 2015, p.68, ll.20-25 through p.69, ll.1-12.)

After the guns were released to PE,[2] Berry purchased the guns from her seven days later on January 24, 2014. (*See*, PR. CF, Vol. #2, Tab 98, Ex. C.) The purchase price for the weapons was $500.00. (*Id*.) Berry performed under the

[1] The guns were in the evidence room in 2013 because the Sheriff's Office took the weapons out of PE's residence at the direction of PE who, at the time, was a victim of domestic violence. (*See* R. Tr. May 12, 2015, pp.50, ll.2-25 through p.51, ll.1-25; *see also*, R. Tr., May 12, 2015, pp.97, ll.8-25; p.98, ll.1-3.)

[2] The trial court ruled that 18 U.S.C. § 922(g)(5) did not apply to prohibit PE from owning the guns. (TR 5/13/2015, pp 187:17-188:14.) The People did not appeal that ruling and did not include that issue in the request for *certiorari* review. An alleged Sheriff's Department policy against returning the guns to "undocumented immigrants" (*See* Opening Br. at 3) could not divest PE or her husband of ownership of the guns, as discussed more fully below.

purchase agreement by paying PE $500.00. (*See* R. Tr., May 12, 2015, p.121, ll.1-3.)

Undersheriff Mendoza conducted an investigation regarding the release of the firearms. (*See* R. Tr. May 12, 2015, p.57, ll.5-10.) After the Undersheriff reviewed the evidence log, the release paperwork, and the District Attorney's authorization, Undersheriff Mendoza corresponded with a Mr. Gonzalez. (*See* R. Tr., May 12, 2015, p.78, ll.21-24.) Mr. Gonzalez was the individual that was going to purchase one of the guns that Berry purchased from PE, specifically, the 38-caliber Colt. (*See* R. Tr., May 12, 2015, p.79, ll.1-3.) In his correspondence with Mr. Gonzalez, Undersheriff Mendoza stated the following:

> I was able to find the property inventory and firearms were, in fact, returned to the wife once the DA's office release them. We have a signed release and receipt of the property by the wife. My guess is that Deputy Berry subsequently purchased the firearms from the wife, although I find this potentially unethical, at this time, I do not see any criminal activity pertaining to his possession of the firearm.

(*See* R. Tr., May 12, 2015, p.79, ll.10 through p.81, ll.16-17.)

Berry was convicted of embezzlement of public property and official misconduct. (*See*, PR. CF, Vol 2, #104-07; R. Tr., May 14, 2015, pp.79-81.) Berry appealed his conviction to the Court of Appeals. The Court of Appeals affirmed Berry's conviction of first degree official misconduct and vacated his conviction for embezzlement of public property in a published opinion. *People v.*

Berry, 2017 COA 65, at ¶ 2 (Colo. App. May 18, 2017). In affirming the conviction of official misconduct, the Court of Appeals held that Berry committed an act relating to his office because "he used his office as a sheriff's deputy to facilitate and effectuate the purchase of the guns." *Id.* at ¶¶34-38.

Berry petitioned this Court for a writ of certiorari arguing that the Court of Appeals erred in its determination that Berry's conduct of purchasing firearms was "an act relating to his office" under C.R.S. § 18-8-404.

SUMMARY OF CROSS-APPEAL ARGUMENT

Under first degree official misconduct, for a public servant's conduct to be "an act relating to his office" the act must be one of the public servant's official job duties, not simply private conduct that happens to be performed while on duty.

SUMMARY OF ANSWER BRIEF ARGUMENT

To the extent the state had any interest in the guns, it was only a custodial interest by virtue of the state's temporary possession and control of the guns. The embezzlement of public property statute, C.R.S. § 18-8-407, encompasses a broad range of property, *i.e.*, not just public money but also "public property of whatever description." When it comes to who must own property for it to be within the scope of the statute, however, the plain language of the statute shows that the legislature intended "public property" to mean property owned by the state. That

is why C.R.S. § 18-8-407 characterizes public property as "being the property *of the state*." Even if this Court finds the language of the statute ambiguous, however, the rules of statutory construction show that property merely possessed and controlled by the state is not "public property." Because the People cannot prove that the state had any ownership interest, as opposed to a temporary custodial interest, in the guns, the evidence was insufficient to find Berry guilty of embezzlement of public property and the Court of Appeals correctly vacated that conviction.

ARGUMENT

I. CROSS-APPEAL OPENING BRIEF ARGUMENT

Berry's purchase of firearms which were held in the Lake County's Sheriff's evidence locker was not an act relating to his office but was instead a private transaction that was personal in nature and thereby falls outside the scope of criminal statute C.R.S. §18-8-404.

A. Standard of review

Whether the evidence was sufficient to sustain a conviction is a question of law subject to *de novo* review. *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005). When reviewing a sufficiency of the evidence contention, a Court must determine whether any rational trier of fact might accept the evidence, taken as a whole and in the light most favorable to the prosecution, as sufficient to support a finding of guilt beyond a reasonable doubt. *People v. Sprouse*, 983 P.2d 771, 777

(Colo. 1999); *People v. McIntier*, 134 P.3d 467, 471 (Colo. App. 2005). Regarding issues of statutory construction, an appellate Court's review is *de novo*. *People v. Simon*, 266 P.3d 1099, 1106 (Colo. 2011).

B. Preservation on appeal

Berry timely appealed the sufficiency of the evidence of his conviction. As such, Berry was not required to object or perform some other act in order to preserve the issue for appeal. *People v. Garcia*, 296 P.3d 285, 291 (Colo. App. 2012).

C. Berry's purchase of firearms was not an act related to his official function.

To be convicted of first degree official misconduct, a person must commit an act related to his office which act must then constitute an unauthorized exercise of his official function. *See* C.R.S. §18-8-404(1)(a). The first element of the statutory analysis is what act constitutes conduct that relates to one's office. Colorado has not previously set forth the definition for defining the scope of acts that are "related to an office." As previously articulated in Berry's petition for writ of certiorari, in answering this elemental question we must look outside Colorado for instruction.

New York has an official misconduct statute which is similar to Colorado's. Like Colorado, New York's official misconduct statute requires that the act of

misconduct "relate to the public office." *See* NY CLS Penal §195.00. Concerning this element of the official misconduct charge, the State of New York has previously analyzed which conduct constitutes an act that relates to the public office. For instance, in *People v. Rossi*, 415 N.Y.S.2d 21 (App. Div. 1979), a Correction Department officer undertook to "fix" a traffic summons upon payment to him of a sum of money by an undercover operative. The *Rossi* court held that the defendant's conviction of official misconduct could not stand because the described circumstances were not of an act relating to his office as a Correction Department officer and constituting an unauthorized exercise of his official functions. The court's rationale was that the correction department officer "has no authority in his described premises, not even colorable authority by way of some official relation thereto. The action taken by defendant, corrupt or not, was completely unrelated to his position, and not such as would be within the scope of his real or apparent authority." *Id.* at 21.

Likewise, in the case of *People v. Groskin*, 122 A.D.2d 561 (App. Div. 1986), the defendant was a part-time community services worker employed by the New York State Department of Correction. The defendant was indicted for official misconduct. The indictment alleged that the defendant "'exercised his discretion not to deny a female person known to the Grand Jury, conjugal visits with her

husband … in return for this female person providing him with sexual favors.'" *Id.* at 561. The appellate division for New York dismissed the indictment, holding that the defendant had no actual or apparent authority to grant or deny conjugal visits to the complainant and "could not be indicted for exercising discretion he did not have." *Id.* at 562.

In reaching these conclusions the New York appellate division appears to provide a standard for what constitutes an act relating a public servant's office. The standard is whether the at-issue conduct was an act that was actually delegated to the official. If there is no delegation of the alleged duty, then official misconduct may not exist.

Likewise, Kentucky has an official misconduct statute nearly identical to Colorado's. Kentucky defines first degree official misconduct as follows:

> A public servant is guilty of official misconduct in the first degree when, with intent to obtain or confer a benefit or to injure another person or to deprive another person of a benefit, he knowingly: commits an act relating to his office which constitutes an unauthorized exercise of his official functions.

K.R.S. §522.020(1)(a).[3]

[3] Though there are slight differences between Colorado's and Kentucky's official misconduct statutes, the element of committing an act relating to the office and being an unauthorized exercise of the official function is nearly the same. *See* C.R.S. §18-8-404(1)(a).

In the case of *Bailey v. Commonwealth*, the Kentucky Supreme Court analyzed whether a state official's conduct was related to his office under the first degree official misconduct statute. In *Bailey,* a former county judge executive made personal and false accusations against the county attorney during the course of a fiscal court meeting over which the defendant presided. *Bailey v. Commonwealth*, 790 S.W.2d 233, 234 (Ky. 1990). A jury convicted defendant of malfeasance under Ky. Rev. Stat. § 61.170, and official misconduct in the first degree, under Ky. Rev. Stat. § 522.020. *Id*. The *Bailey* court reversed the conviction concluding that there must be an official act to convict a public official of official misconduct. In reaching this decision the Court held that even though the at-issue remarks occurred during the course of fiscal court meetings the conduct was purely personal in nature. *Bailey*, 790 S.W.2d at 235-36. In reaching this conclusion the Kentucky Supreme Court discussed public policy concerns about expanding official misconduct into private actions. On this, the court stated:

> [A]ccording to the Commonwealth and the Court of Appeals, this is not the end of the argument. What transforms these personal remarks into official acts, they claim, is the fact that Bailey used an official forum over which he presided in which to launch his personal attack. This viewpoint fails to acknowledge that a person can do a purely personal act while in the process of performing an official function.
>
> Furthermore, we believe that the position espoused by the Commonwealth and the Court of Appeals would have a definite chilling effect on the operation of governmental bodies. A policy that makes

> official acts out of purely personal comments made by a public official during a public meeting would expose the officer to criminal liability and significantly interfere with the function of these bodies.

See Bailey, 790 S.W.2d at 235-236. The concerns expressed by the *Bailey* court apply with equal force to this case.

The Court of Appeals below focused its analysis on New Jersey's official misconduct law. *See Berry*, 2017 COA 65, at ¶¶ 36-37. The New Jersey cases relied on by the Court of Appeals are *State v. Schulz*, 367 A.2d 423 (N.J. 1976), and *State v. Bullock*, 642 A.2d 397 (N.J. 1994). *People v. Berry*, 2017 COA 65, at ¶ 36. In *Schulz*, it appears the standard applied was whether the at-issue conduct falls within the scope of action "under color of office." *Schultz*, 367 A.2d at 430. This "color of office" standard appears to have been adopted, in part, in the other New Jersey case relied on by the Court of Appeals, *State v. Bullock*. The *Bullock* court found that a law enforcement officer suspended from duty was still acting within the scope of his authority because, even though suspended, his actions were still governed by the rules and regulations of his department. Thus, conduct off the premises could still subject the officer to disciplinary action. *Bullock*, 642 A.2d at 400.

Looking at both *Bullock* and *Schulz*, it appears that the New Jersey standard is whether the at-issue conduct falls within the scope of the official's "color of

office."[4] Colorado has not adopted a "color of office" standard as it relates to the official misconduct statute. However, the Tenth Circuit has addressed color of law and law enforcement activities under 42 U.S.C. §1983. One such case is *Haines v. Fisher*, 82 F.3d 1503 (10th Cir. 1996). In *Haines*, police officers staged a robbery of a convenience store as a practical joke on an acquaintance who worked there. The participants in the prank were three police officers and a police dispatcher who were all employed by the municipality at the time of the prank. The following are the salient facts in *Haines*:

> The plan called for Reeve to disguise himself as a robber who would hold up the 7-Eleven store during the plaintiff's shift. He wore a trenchcoat belonging to the Town, which was used in its McGruff Crime Prevention program, over the pants and shoes he had worn with his uniform that evening. He did not wear his police uniform shirt, but instead wore a turtleneck. Over his face, Reeve wore a balaclava mask that also belonged to the Town. He carried the Town's M-16 automatic rifle, loaded with blanks, under the trenchcoat. On the end of the barrel of the M-16, the defendants had placed a large plastic garbage bag, intended to catch any residue that might result when the blanks were fired.
>
> Murphy, the dispatcher, put the plan into action by telephoning plaintiff at the 7-Eleven and advising him that he should be on the lookout for

[4] The *Bullock* court did not use the words "color of office," however, the court references *Schulz* in reaching its ultimate conclusion. *Bullock* also references *State v. Gora*, 148 N.J. Super. 582, 593 (Super. Ct. App. Div. 1977), for the proposition that official misconduct may be found if the officer engaged in malfeasance because of the office held or because of the opportunity afforded by that office. *Bullock*, 642 A.2d at 400-401.

> an individual who was possibly armed in the area of the 7-Eleven store. Murphy described for plaintiff a man who would look as Reeve would look in his robber regalia.
>
> Reeve had been driven by Fisher to the 7-Eleven in a police car belonging to the Town. Gerrard drove another Town police car to a location several blocks away from the scene. Gerrard and Fisher kept watch while Reeve was inside the store to be sure no member of the public saw what was going on and that no one would be hurt by the commission of their prank.

Haines, 82 F.3d at 1505-06. The acquaintance who worked at the convenience store filed a § 1983 action alleging damages as a result of the prank.

Though *Haines* was a § 1983 case, it is nonetheless instructive because the *Haines* court analyzed the scope of "acting under color of law." *See Haines*, 82 F.3d at 1508. In addressing this issue, the Tenth Circuit stated:

> [t]he traditional definition of acting under color of state law requires that the defendant in a § 1983 action exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.
>
> * * *
>
> Applying these standards, we hold that the district court did not err in granting summary judgment in favor of the individual defendants on Haines' § 1983 claims. This is not a case in which the defendants exercised power possessed by virtue of state law and made possible only because the wrongdoer [was] clothed with the authority of state law. We agree with the district court that in this case, the defendants, and in particular Defendant Reeve, were not using their badges of authority, i.e., their positions as a policemen for the Town of Torrington to accomplish the 7-Eleven prank in which plaintiff [Haines] was the intended victim.

Haines, 82 F.3d at 1508 (internal quotation marks and citations omitted). The standard articulated in *Haines*, like that in *Bailey*, provides a workable distinction between public and private conduct.

Why should this Court adopt a standard consistent with Kentucky, New York, and the 10th Circuit, rather than the New Jersey standard? The fundamental defect in the New Jersey standard is that it expands the scope of official misconduct to include purely personal conduct. This expansion of official misconduct is illustrated in *State v. Corso*, 810 A.2d 1130 (Super. Ct. App. Div. 2002). In that case, the defendant (an off-duty officer) went to a night club with a friend for a drink. While at the night club a drug transaction occurred which, while not clear from the holding, was apparently done in the presence of the off-duty officer. As a result, and because the defendant failed to make an arrest, he was convicted of official misconduct. *Id.* at 1135. Consider the following hypothetical. An off-duty police officer is shopping at a store with her children. While in the store she happens to see someone steal an item and run out of the store. Under the New Jersey standard, the off-duty officer could be charged with official misconduct because she did not abandon her children and chase the perpetrator. Following New Jersey would lead to the Colorado criminal justice system being flooded with cases that are purely personal in nature but are charged

under the official misconduct statute merely because one of the people involved happens to be a public servant. One need look no further for a real-world example of this policy concern than the present case.

The guns at issue in this case were released to PE only after she executed a release of property from the Sheriff's Office. Berry then purchased the guns after they were formally released to PE. Berry did not remove the guns from the evidence locker himself. These facts evidence that the sale and purchase of the guns fell more in line with personal conduct than an official action of Berry as a deputy sheriff. Despite the personal nature of the transaction, the Court of Appeals found official misconduct because Berry "followed the wife in his police car, spoke to her while in full police uniform, and gave her comfort that, because he was a police officer, the transaction was lawful." *People v. Berry*, 2017 COA 65, ¶ 38. While these facts may show that Berry was on duty at the time he approached PE about the sale, they do not show that his actions were related to his official duties. The Court of Appeals' conclusion expands the scope of the statute to include virtually anything done by a public servant while on the clock.

The facts elicited during the trial did not prove that Berry was specifically precluded from purchasing guns from the Sheriff's Office evidence locker, particularly when such property was formally released to the rightful owner. Thus,

under the Kentucky and New York standards, Berry's conduct would not be related to his office. When applying the *Haines* decision, Berry's conduct fell outside the color of law. Similar to the officers in *Haines*, at the time Berry was engaging in the act he was in his uniform, driving a patrol vehicle, and made a statement that "because he was a police officer, the transaction was lawful."[5] Taking these combined acts, the Tenth Circuit would not find that Berry was acting under the badge of authority because, like the *Haines* officers that were intending to prank a person, Berry intended to engage in a purely private transaction. Thus, Berry was not acting in the scope of his office. The standard advocated by Berry is consistent with other Colorado cases where there were either convictions or criminal filings of first degree official misconduct. *See People v. Zadra*, 396 P.3d 34, 41-46 (Colo. App. 2013) (the defendant was a Captain with Gunnison County Sheriff's Office who used her position at the jail to listen, or permit other staff members to listen, to attorney-client privileged phone calls at the jail facility); *People v. Brown*, 840 P.2d 348, 348-350 (Colo. 1992) (public defender admitted that while serving as a public defender he solicited and converted funds from indigent criminal defendants

[5] In *Haines*, the dispatcher telephoned the plaintiff and advised him to be on the lookout for an individual who was possibly armed in the area of the 7-Eleven store. *Haines*, 82 F.3d at 1505-06.

and their relatives);[6] *Johns v. Dist. Court of Thirteenth Judicial Dist.*, 561 P.2d 1, 2 (1977) (Police officer, in the course of arresting an individual, stuck his gun in the individual's face, called him a punk, and threatened to blow his brains out. At another point the officer stopped the car on the way to the police station and invited the individual to run so that he could shoot him. The officer was charged with felony menacing and first degree official misconduct).[7] Unlike the case-at-bar, these Colorado cases show actions of "public officials" that intended to misuse their office for some corruptible goal, which is not the case with Berry.

In conclusion, the standard for a public servant's conduct to be "an act relating to his office" should be that the act must be one of the public servant's official job duties, not simply private conduct that happens to be performed while on duty. Under this standard, Berry's conduct was not related to his office and, therefore, the official misconduct conviction should be overturned.

II. ANSWER BRIEF ARGUMENT

A. Standard of review

Berry agrees with the People's standard of review.

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[6] The *Brown* case was a Supreme Court attorney regulation disciplinary decision.
[7] The *Johns* case was an appeal regarding a preliminary hearing involving the felony charge. The Court determined there was sufficient evidence to bind the defendant over for trial. *Johns*, 561 P.2d at 466.

B. Preservation on appeal

Berry agrees that the issue of defining "public property" in C.R.S. § 18-8-407 (2017) was preserved for appeal. Berry contends that the sufficiency of evidence and "qualified ownership" arguments in the People's Opening Brief were not properly preserved for appeal. The People did not include sufficiency of the evidence as an issue for review in their Petition for Writ of Certiorari, and the People failed to argue "qualified ownership" below. *See Core-Mark Midcontinental Inc. v. Sonitrol Corp.*, 370 P.3d 353, 359 (Colo. App. 2016).

C. The state did not own, lease, or rent the guns, so the relevant question here is simply whether possession and control alone makes the guns "public property."

At the outset it is important to clarify the scope of the issue before this Court. In this case, the state did not own, lease, or rent the guns. As the Court of Appeals correctly pointed out, the People have not proven that the state owned the guns. *Berry*, 2017 COA 65, at ¶ 33. Though the People use several examples of property rented or leased by the state, (Opening Br. at 18-20, 40), there is no evidence that the guns in this case were rented or leased by the state or the Sheriff's Department. A rental or lease arises from a contract, and no such contract exists in this case. The relevant inquiry in this case is, therefore, whether possession and control alone made the guns "public property."

The People devote significant portions of their brief to arguments premised on the assumption that the state had ownership of the guns. The People characterize that as "qualified ownership," though they did not argue "qualified ownership" before the trial court and Court of Appeals. Whether the "qualified ownership" argument was preserved is ultimately irrelevant, however, because there are no facts to support a claim of "qualified ownership." "Qualified ownership" is defined as "[o]wnership that is shared, restricted to a particular use, or limited in the extent of its enjoyment." *Qualified Ownership*, Black's Law Dictionary (10th Ed. 2014). Though "qualified ownership" may be narrower than "ownership" generally, it is still a form of ownership and the People have not proven that they had *any* ownership of the guns. Because the People cannot prove that the state had any ownership of the guns, qualified or otherwise, all the arguments premised on ownership or qualified ownership are irrelevant.

The trial court ruled that 18 U.S.C. § 922(g)(5) did not apply to prohibit PE from owning the guns. (TR 5/13/2015, pp 187:17-188:14.) The People did not appeal that ruling and did not include that issue in the request for *certiorari* review. To the extent the People contend that the guns could not be returned to PE, the People largely rely on a Sheriff's Department policy. Even assuming for the sake of argument that the policy applies here, the policy alone cannot divest someone of

their property rights. This raises constitutional issues related to eminent domain and the right to bear arms. *See* Colo. Const. art. II, §§ 13, 15. "The state…cannot disarm any class of persons or deprive them of the right guaranteed under section 13, article II of the Constitution, to bear arms in defense of home, person and property…. Under this constitutional guaranty, there is no distinction between unnaturalized foreign-born residents and citizens." *People v. Nakamura*, 62 P.2d 246, 247 (Colo. 1936).

The record in this case shows that the state had a custodial interest, at best, in the guns. That custodial interest was the state's temporary physical possession and control of the guns. Having clarified the scope of the issue, the relevant question is whether property that is merely possessed and controlled by the state, *i.e.*, in the temporary custody of the state, constitutes "public property" under C.R.S. § 18-8-407.

D. Property that is merely possessed and controlled by the state, but owned by a private party, is not "public property."

The term "public property" in C.R.S. § 18-8-407 does not include property in which the state has only a custodial, rather than ownership, interest. Because there is no statutory definition of "public property" specific to C.R.S. § 18-8-407, principles of statutory interpretation come into play to ascertain the meaning of "public property."

When interpreting a statute, Colorado courts seek to give effect to the legislature's purpose or intent in enacting the statute. *Martin v. People*, 27 P.3d 846, 851 (Colo. 2001). The first step is to "look to the plain and ordinary meaning of the words in the statute." *People v. Perez*, 238 P.3d 665, 669 (Colo. 2010). The relevant words and phrases must be analyzed in the context of the specific statutory provision in which they appear, and in the context of the overall statutory scheme. *Doubleday v. People*, 364 P.3d 193, 196 (Colo. 2016). Also, the relevant words and phrases are construed "according to the rules of grammar and common usage." *Id.* If the statutory language is unambiguous, there is no need to delve into further statutory analysis. *Id.*

The term "public property" in C.R.S. § 18-8-407 is unambiguous and inapplicable to property that is only in the possession and control of the state. As noted above, it is essential to look at the term "public property" in context. The Court of Appeals correctly pointed out that the term "public property," in isolation, does not have a plain meaning. *Berry*, 2017 COA 65, at ¶ 15. Nevertheless, definitions of "public property" that require ownership can be found even when the term is viewed in isolation. "Property may be classified as either public or private. Public property is that *owned* by the public as such in some governmental capacity, and private property is that which is owned by an individual or some other private

owner, and ordinarily is devoted to the private uses of that private owner…." 63c Am. Jur. 2d *Property* § 10 (2009) (emphasis added and footnote omitted). The term can also be defined as "[s]tate- or community-*owned* property not restricted to any one individual's use or possession." *Public Property*, Black's Law Dictionary (10th Ed. 2014) (emphasis added). These definitions do not end the analysis, but they do show that even when viewed in isolation it is reasonable to interpret "public property" as requiring ownership.

When "public property" is analyzed in context, though, the meaning becomes apparent. Two phrases in the statute are essential to this analysis: "being the property of the state" and "other than the public use authorized by law." *See* C.R.S. § 18-8-407(1). The statute begins by stating, "Every public servant who lawfully or unlawfully comes into possession of any public moneys or public property of whatever description…." *Id.* This phrase explains what is the subject of the prohibited conduct: "public moneys or public property of whatever description." The statute then emphasizes who the subject property belongs to: "being the property of the state or any political subdivision of the state." It is not the property of a private party, but property of the state. The statute has already used the terms "public moneys" and "public property," so why add language stating that it must be "property of the state?" Based on the context, the phrase

"being the property of the state" serves as emphasis that the statute is referring to property that belongs to the state.

The second phrase in C.R.S. § 18-8-407(1) that shows "public property" is property owned by the state is "other than the public use authorized by law." The statute punishes a public official who converts public property to the public official's "own use or to any use other than the public use authorized by law…." C.R.S. § 18-8-407(1). Public property within the ambit of this statute, therefore, must be a type of property that is intended for a "public use authorized by law." Requiring that the property that is the subject of the statute has a "public use authorized by law" strongly suggests that the property is owned by the state. After all, it is typically understood that property being put to a public use is property owned by the state. While privately-owned property can be put to a public use, that requires compensation and raises constitutional issues. *See* Colo. Const. art. II, § 15. Such concerns are avoided, however, when it is state-owned property that is being put to a "public use." These contextual clues, that the public property at issue must be property "of the state" and earmarked for a "public use," unambiguously show that "public property" means property owned, and not merely possessed and controlled, by the state.

Even if this Court finds that the term "public property" is ambiguous, the rules of statutory construction show that "public property" does not include property that is only in the possession and control of the state. The legislature has set forth a non-exhaustive list of principles to guide courts when interpreting statutes. *See* C.R.S. § 2-4-203 (2018). Additionally, courts have crafted additional guiding principles whose goal is carrying out the legislative intent behind the statute at issue. *See People v. Jones*, 346 P.3d 44, 48 (Colo. 2015). The Court of Appeals found that "public property" in C.R.S. § 18-8-407 is ambiguous and focused its analysis on "former laws on the same subject, the objective of the statute, and common law…." *Berry*, 2017 COA 65, at ¶ 18. Similarly, the People argue that "public property" is ambiguous, and the People focus their analysis on prior law, the goal of the statute, and the consequences of the Court of Appeals' definition of "public property." (*See* Opening Br. at 21.) Contrary to the People's conclusion, however, these factors show that "public property" does not include property that is only possessed and controlled by the state.

1. Legislative history and prior law

The Court of Appeals provided an accurate summary of the history of C.R.S. § 18-8-407, *Berry*, 2017 COA 65, at ¶¶ 19-29, and the People do not argue that any part of that summary is incorrect, (Opening Br. at 22 n. 5). Berry also finds the

Court of Appeals' summary of the statute's history to be accurate and, therefore, it is unnecessary to reiterate that history here. The People criticize the Court of Appeals' analysis of the legislative history's impact, but that criticism does not undercut the Court of Appeals' conclusion about the meaning of "public property."

The People contend that C.R.S. § 18-8-407 can be traced further back in history than the Court of Appeals went, and that this impacts the relationship between C.R.S. § 18-8-407 and Colorado Constitution art. X, § 13. (Opening Br. at 23.) This criticism is irrelevant to the issue before this Court. According to the People, C.R.S. § 18-8-407 has roots in laws that existed prior to the enactment of the Colorado Constitution. (Opening Br. at 22 n. 5.) Because of that pre-statehood history and because the constitutional provision relied on by the Court of Appeals is limited to public moneys, the People argue that C.R.S. § 18-8-407 is broader than the constitutional provision. The problem with this argument is that even if the People are correct, the statute is only broader as to the type of property covered by the statute, and the People's argument has no impact on the question of what ownership interest there must be in the property.

There are several components of C.R.S. § 18-8-407, the most relevant for purposes of this appeal being whose property is covered by the statute ("property of the state"), and what type of property ("public moneys or public property of

whatever description"). The People's argument focuses on Colorado Constitution art. X, § 13, being limited to public money, while C.R.S. § 18-8-407 also includes "public property of whatever description." This distinction, however, only goes to the type of property. Who the property belongs to involves different language altogether. As discussed above, C.R.S. § 18-8-407 makes clear that the property covered by the statute is property owned by the state when it characterizes the property as "being property of the state." *See* C.R.S. § 18-8-407(1). The constitutional provision at issue also makes clear who owns the property addressed in that provision, though with different wording than used in C.R.S. § 18-8-407: "state, county, city, town or school district money." Colo. Const. art. X, § 13. Both apply to property that belongs to the state, though C.R.S. § 18-8-407 covers a broader class of property, *i.e.*, it is not limited solely to money.

At the end of the day, the People argue that "property of whatever description" is broader than "money." While this point may be true, it does not undermine the Court of Appeals' analysis of the ownership interest necessary to make something "public property."

2. Goal of the statutory scheme

The goal of C.R.S. § 18-8-407 is to punish public officials who misuse their position to reap benefits at the expense of the state. The People's analysis omits

the crucial requirement that the wrongdoing must be *at the expense of the state*. The statute does not punish embezzlement of *any* property, but instead is focused on "property *of the state*." *See* C.R.S. § 18-8-407 (emphasis added).

The cases relied on by the People on pages 30 and 31 of the Opening Brief show that embezzlement within the scope of C.R.S. § 18-8-407 must not simply be embezzlement by a public official, but it must also be at the expense of the state, *i.e.*, taking something that belongs to the state. In *People v. Skrbek*, 599 P.2d 272 (Colo. App. 1979), the defendant's conduct fell within the scope of C.R.S. § 18-8-407 because the money embezzled belonged to the government. The money originated as federal funds awarded to the State. *Id.* The funds were to be distributed "at both the state and regional levels…." *Id.* at 273. The State had, at a minimum, "qualified ownership" of the funds embezzled by the defendant. *Id.* at 272-73. Regardless, the funds were bound for either the State of Colorado or political subdivisions of the State. *Id.* at 273 ("the federal funds were transmitted to the state and deposited into the State Treasury for disbursement at both the state and regional levels of the criminal justice program. After the state Division of Criminal Justice reviewed each regional request for funds to cover local expenditures, a warrant was drawn on the State Treasury and issued to regional offices."). The *Skrbek* defendant's conduct fell within the scope of C.R.S. § 18-8-

407 because the defendant took money that belonged to "the state…or any political subdivision of the state," C.R.S. § 18-8-407(1). *Skrbek*, 599 P.2d at 273. The essential fact in *Skrbek* was who the money belonged to (the state), not simply the fact that it was taken by a government official.

The next case, *People v. Gallegos*, 260 P.3d 15 (Colo. App. 2010), specifically analyzed the definition of "public property" in C.R.S. § 18-8-407. Again, the focus of the analysis was who the property at issue belonged to. For example, the *Gallegos* court held that the defendant's "profit from the sale of firewood did not involve public moneys or public property because the wood *never belonged to* the county." *Id.* at 23 (emphasis added). Focusing on ownership, the *Gallegos* court held that the defendant's use of county vehicles involved public property "because the vehicles were owned by the county."[8] *Id.* The *Gallegos* defendant, like the defendant in *Skrbek*, profited from his position and at the expense of the government.

[8] The *Gallegos* court also held that the defendant's use of county personnel was a violation of C.R.S. § 18-8-407. *Gallegos*, 260 P.3d at 23. Obviously, county employees cannot be considered property of the county. The *Gallegos* court did not go into further detail about the county personnel, but because it mentioned "public moneys" in the context of its conclusion about county personnel, it is logical to assume that the *Gallegos* court considered use of the county personnel embezzlement of public property because public money was used to pay the salaries of the county employees, so the defendant was in effect embezzling that money. *See id.* at 23.

Like *Skrbek* and *Gallegos*, the remaining cases relied on by the People share the common fact that it was not merely a public official's profit at issue, but also that the profit came at the expense of the state. *See Davis v. Dunlevy*, 53 P. 250, 251 (Colo. App. 1898) ("'It is *the using of public money*…'" (*quoting Moulton v. McLean*, 39 P. 78, 82 (Colo. App. 1895)) (emphasis added)); *Moulton*, 39 P. at 81 ("*use of public funds* for the benefit and profit of the officer" (emphasis added)); *Moore v. United States*, 160 U.S. 268, 272 (1895) (an essential element of embezzlement is that the property came "into the possession of the prisoner by virtue of his fiduciary relation to the *owner of the property*." (emphasis added)); *United States v. Davila*, 693 F.2d 1006, 1008 (10th Cir. 1982) (though this case involved a federal embezzlement statute, it nonetheless required that embezzled property be "*property of* the United States Government." (emphasis added)).

Perhaps the most telling case relied on by the People is *Wright v. People*, 91 P.2d 499 (Colo. 1939). The most important part of the *Wright* opinion is the Court's holding that the defendant could not be charged with embezzlement of public property because the money he allegedly embezzled did not belong to the government. *Id.* at 502-03. In other words, if the embezzled property is not owned by the state, C.R.S. § 18-8-407 is inapplicable. This is consistent with the Court of Appeals' analysis below, and with the legislature's intent to punish public officials

who wrongfully profit at the expense of the state. It is the latter component, that the gain be at the expense of the state, that the People omit from their analysis.

The People also argue, in largely conclusory fashion, that the legislature intended C.R.S. § 18-8-407 to "harshly punish any public employee that converted public property of whatever description to his own use." (Opening Br. at 34.) There is no indication, however, that the legislature intended C.R.S. § 18-8-407 to have such a broad reach that it would encompass property owned by a private party that is merely in the temporary possession and control of the state. Notably, more than eight years ago the *Gallegos* court required that "public property" be owned by the government before wrongdoing may fall within the scope of C.R.S. § 18-8-407. *Gallegos*, 260 P.3d at 22-23. In the interim, the legislature has not amended C.R.S. § 18-8-407. This suggests that the *Gallegos* interpretation, at least to the extent it required ownership of the property, is consistent with the purpose behind C.R.S. § 18-8-407. *See Martin*, 27 P.3d at 855 ("we generally presume that the General Assembly is aware of our previously expressed understanding of specific language.").

Contrary to the People's argument, *Skrbek* supports the Court of Appeals' interpretation of C.R.S. § 18-8-407. As discussed above, the money at issue in *Skrbek* was federal funding awarded to the State of Colorado that the State would

in turn distribute "at both the state and regional levels of the criminal justice program." *Skrbek*, 599 P.2d at 273. Crucially, at all relevant times the funds were the property of either the State or were earmarked for distribution to some political subdivision of the State. The People attempt to characterize the funds as being "merely 'possessed'" by the State, (Opening Br. at 36), but that underplays the facts of *Skrbek*. The funds were at all times the "property of the state or of [a] political subdivision of the state…." *See* C.R.S. § 18-8-407(1). That is a far cry from mere possession. Rather than advance the People's position, *Skrbek* instead highlights the error in the People's analysis.

Likewise, *Price v. People*, 240 P. 688 (Colo. 1925), does not advance the People's cause. It is important to note that ownership of the money at issue in *Price* is not entirely clear from the *Price* opinion. The defendant was the undersheriff for Denver and, in that capacity, "he converted to his own use funds of the municipality in his hands as such officer." *Id.* The money came into the defendant's possession "from three sources: (a) Expenses collected for deputies and not paid to them: (b) expenses collected from outsiders and not officially used; (c) padded expense bills." *Id.* at 689. Finally, the *Price* Court concluded:

> 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.

Id. While it does appear that some portion of the money was not the property of Denver, it is not clear if the remainder was the property of some other division of the government. Regardless, the "qualified ownership" relied on by the *Price* Court is not present in this case, rendering *Price* inapplicable here.

Relying on *Skrbek* and *Price,* the People now argue that the state had "qualified ownership" of the guns, but that argument fails for multiple reasons. First, the People did not preserve this argument for appeal. The People did not claim "qualified ownership" of the guns in the trial court and did not argue "qualified ownership" over the guns in the Court of Appeals. The failure to preserve this argument is reason enough for this Court to reject the argument outright. *Core-Mark Midcontinental Inc.*, 370 P.3d at 359. The second reason the People's "qualified ownership" argument fails, assuming for the sake of argument that it was preserved for appeal, is because it is unsupported by the record. As the Court of Appeals correctly pointed out,

> The People concede that Lake County didn't own the guns. And the People have never alleged that any other public entity owned them. There is no evidence of such ownership in the record; rather, the evidence shows that the husband owned them.

Berry, 2017 COA 65, at ¶ 33. The Court of Appeals' conclusion is also consistent with Colorado law. *See Nakamura*, 62 P.2d at 247 ("The state…cannot disarm any class of persons or deprive them of the right guaranteed under section 13, article II of the Constitution, to bear arms…. Under this constitutional guaranty, there is no distinction between unnaturalized foreign-born residents and citizens.") Qualified ownership requires some degree of ownership interest, and the People cannot show that the state had any interest other than the custodial interest of temporary possession and control. That is not enough to bring this case within the ambit of *Skrbek* and *Price*.

Prior case law and the history of C.R.S. § 18-8-407 show that the term "public property" was intended by the legislature to apply to property, whether money or other property, that is owned by the state. The Court of Appeals correctly concluded that "public property" does not include property that is merely possessed and controlled by the state.

3. Consequences of the Court of Appeals' definition

The bulk of the People's argument about the consequences of the Court of Appeals' interpretation of "public property" is fatally flawed. The People implicitly assume that if a person is not charged with "embezzlement of public property" in the People's various hypothetical scenarios, that person will escape

punishment altogether. (*See* Opening Br. at 41.) In these hypotheticals the People fail to consider that each hypothetical wrongdoer could be charged with, at a minimum, theft.[9] The People also implicitly assume that each hypothetical situation should somehow fit into the embezzlement statute, and if any do not fit then "the result is absurd." (*Id.*) Whether it is the loaned art, the restitution money, or child support money, however, the victim is the owner of the property not the state. The People do not explain why, as they implicitly assume, all these situations should fit the embezzlement statute.

It is the People's definition of "public property" that would produce absurd results and negative consequences. The People ask this Court to hold that any property that is merely within the temporary possession and control of the state becomes "public property." Consider examples that show the problems with the People's position:

- A police officer, while on duty and driving her patrol car, sees a person riding a bicycle matching the description of a bicycle that was recently reported stolen. The policy officer stops the rider, positively identifies the bicycle as the one that was reported stolen, and puts the bicycle in the trunk

[9] The People's hypotheticals that involve a lease or rental are also unavailing because this case does not involve anything akin to a lease or rental.

of the patrol car to return it to the rightful owner. Is the bicycle now public property because it is in the possession and control of the state? If the officer returns to the police station and another public employee takes the bicycle for his own personal use, has that employee embezzled public property?

- A driver is swerving on the highway, leading police to reasonably suspect that the driver may be intoxicated. Police pull over the driver, and the driver admits to being intoxicated. Police conduct a cursory search of the vehicle's passenger compartment, though the trunk remains closed. The driver is arrested, and there is no suspicion of any criminal activity other than the DUI, nor did the police observe anything during their cursory search that gives them suspicion of any crime. After the driver is arrested for DUI, the vehicle is impounded to the government-owned impound lot. Under the People's definition of "public property," merely because the vehicle in this example is in the possession of the government the vehicle has become "public property." Because it is public property, the government could then proceed to conduct an exhaustive search of the entire vehicle, including the trunk, for evidence of any crime. That search could go beyond a routine inventory search because the vehicle is now public property. This scenario,

which is a natural consequence of the People's definition, would raise significant Constitutional problems.

The bottom line is that the People's definition of "public property" would unreasonably expand both the scope of C.R.S. § 18-8-407 and the concept of "public property" in general. Under the People's definition of "public property," C.R.S. § 18-8-407 would encompass a much broader range of conduct than intended by the legislature, and a much broader range of conduct than in prior case law interpreting C.R.S. § 18-8-407 and its predecessors. The Court of Appeals' definition of "public property," however, produces sensible results because it applies C.R.S. § 18-8-407 to only property that is owned by the state. In other words, property *of the state*.

E. Because C.R.S. § 18-8-407 only applies to property owned by the state, and the state did not own the guns, the evidence was insufficient to prove a violation of C.R.S. § 18-8-407.

The Court of Appeals correctly held that the evidence was insufficient to prove a violation of C.R.S. § 18-8-407 in this case. The statute does not apply to property that is merely in the custody of the state, *i.e.*, in the possession and control of the state. For the statute to apply the property at issue must be owned by the state, and the state did not own the guns. With no evidence in the record that the

state owned the guns, the evidence was insufficient as a matter of law to establish a violation of C.R.S. § 18-8-407.

Even if this Court assumes for the sake of argument that possession and control of the guns is enough to bring the alleged conduct within the scope of C.R.S. § 18-8-407, the People's argument fails to show reversible error in the Court of Appeals' decision. The People's sufficiency of evidence argument concerns irrelevant facts, such as whether Berry was aware the guns allegedly could not be returned, whether PE signed sale documents, whether Berry gave a gun to Hartman, etc. (*See* Opening Br. at 44-46.) These alleged factual issues concern largely collateral matters and, therefore, are not pertinent to the issue of whether the guns were "public property."

Because the embezzlement of public property statute requires more than just a temporary custodial interest, *i.e.*, possession and control, this Court may readily dispense with the People's sufficiency of evidence argument. The Court of Appeals reached the correct conclusion when it vacated the C.R.S. § 18-8-407 conviction.

CONCLUSION

Berry respectfully requests that this Court affirm the Court of Appeals' decision regarding embezzlement of public property and reverse the Court of

Appeals' decision regarding official misconduct.

Dated: December 12, 2018

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CERTIFICATE OF SERVICE

I hereby certify on December 12, 2018, a true and correct copy of the foregoing **RESPONDENT/CROSS-PETITIONER'S OPENING-ANSWER BRIEF** was filed via CCEF and served as follows:

Name of Recipient:	**Manner of Service:**	**Address:**
Jacob R. Lofgren	CCEF	1300 Broadway, 9th Floor Denver, CO 80203

s/Lucas Lorenz
Lucas Lorenz