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SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

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

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PETITIONER / CROSS-RESPONDENT'S REPLY BRIEF & ANSWER 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 **8242** 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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PETITIONER'S REPLY BRIEF

ISSUE ON WHICH CERTIORARI WAS GRANTED

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).

ARGUMENT

A sheriff's deputy who 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 that statute covers property 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. The People's arguments in the Opening Brief all relate to the question upon which this Court granted review.

The defendant asserts that the People failed to preserve two aspects of their argument for review—namely, sufficiency of the evidence and "qualified ownership" (OAB, p 17).

First, this Court granted review to decide 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, could be charged and convicted of embezzlement of public property under section 18-8-407(1), C.R.S. (2018). That question necessarily encompasses a determination as to whether the evidence in this case was sufficient to support a conviction for embezzlement of public property. Indeed, the entire question is whether a defendant can stand convicted as charged under the specific facts of this case. *See generally People v. Anderson*, 2019 CO 34 (addressing whether a defendant's conduct satisfied requirements to be convicted of a certain offense).

Second, the People presented the "qualified ownership" argument as one method of assessing the sheriff's department's "possession" of the guns at issue in this case, and, to the extent that it was necessary to "preserve" this argument, the People made this argument in the court of appeals, albeit not using the term "qualified ownership" (*see* COA-AB, p 20 ("Because the guns could not be returned to P.E., they became the

property of the Lake County Sheriff's Office until such time as they could be destroyed.")). To that end, the People's Opening Brief in this Court simply clarified and expanded upon an argument raised below.

B. Property possessed and controlled by the government is "public property" when that property is held in the public trust.

The defendant asserts that this Court should focus on whether the government's "possession and control" of property (as in this case) is sufficient to classify something as "public property" (OAB, p 17). The answer to that question should be yes.[1]

Arguing the contrary, the defendant first disputes the People's use of the term "qualified ownership" (OAB, pp 18-19). Qualified ownership describes the government's possession and control over the guns held in

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[1] The defendant takes umbrage with the People's use of hypotheticals involving leased or rented property, because the guns at issue in this case were not leased or rented (*see* OAB, p 17). True enough; however, it also remains true that property that is either leased or rented by the government is "possessed and controlled" by it but not owned by it. The People's hypotheticals reflect the reality that the decision in this case will have wide-ranging implications across a broad spectrum of property "possessed and controlled" by the government, but not "owned" by it. This Court can and should consider those implications when deciding what rule to craft in resolving this case.

the public trust in the evidence locker at the sheriff's office. Indeed, as set forth in the People's Opening Brief, "qualified ownership" is merely a manner of describing "possession and control" over property held in the public trust until such time as the property can be returned to its rightful owner, if there ever is such a time. In this case, the evidence showed exactly that—"possession and control" (*see* OB, pp 37-39).

Countering the People's arguments, the defendant asserts that the term "public property" in section 18-8-407 is unambiguous, and, even if it is ambiguous, he contends that an application of the rules of statutory construction supports the conclusion that "public property" includes only properly that is owned by the state (*see* OAB, pp 19-22). That assertion is inaccurate.

For the reasons set forth in the People's Opening Brief, (OB, pp 13-20), and in the court of appeals' opinion, *see People v. Berry*, 2017 COA 65, ¶¶ 13-18, the term "public property" as it is used in section 18-8-407 is ambiguous, and this Court must apply the rules of statutory construction to decide the meaning of it. In so doing, this Court should reject the claim that such an analysis supports the defendant's position.

1. The legislative history does not suggest that section 18-8-407 should be limited to property owned by a public entity.

In responding to the People's analysis of the legislative history of section 18-8-407, the defendant appears to overlook the People's critical point (*see* OAB, pp 23-25). Summarized as succinctly as possible, the People contend that the language in section 18-8-407 differs from the language in the earlier embezzlement statutes (and from the language in article 10, section 13 of the Colorado Constitution) such that any earlier "ownership" requirement inherent in the limited language of the earlier statutes should not be read into the modern statute that discusses property more broadly (*see* OB, pp 22-29). The People continue to maintain that position.

2. 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 defendant contends that "[t]he goal of [section 18-8-407] is to punish public officials who reap benefits at the expense of the state." He places added emphasis on the "at the expense of the state" portion of

that statement (OAB, pp 25-26). But the legislature's goal is more broad than that; the goal is to proscribe reaping personal benefits *and to prevent violations of the public trust*. *See* § 18-8-407 ("Every person convicted under the provisions of this section shall be forever thereafter ineligible and disqualified . . . from holding any office of trust or profit in this state."). Thus, despite the defendant's narrower reading of the cases cited by the People (*see* OAB, pp 26-32), those cases actually support the deeper notion that section 18-8-407 broadly prohibits public officials from reaping a personal benefits from their positions precisely because such acts occur at the financial expense of the state *and/or at the expense of the public trust*.

3. If this Court adopts a narrow reading of section 18-8-407, absurd results will follow.

The defendant rejects any merit to the People's hypotheticals that show the potential for absurd results. He argues that the People assume that the defendants in those hypotheticals would escape punishment altogether (OAB, pp 32-33). Not so.

First, the People recognize that other charges could result from a public official's decision to take property from his or her workplace or from any public entity (*see* OB, p 42 n.12). The potential for other charges, however, should not be a reason to permit public officials to escape liability for embezzlement—a unique violation of the public trust, and one which bars the perpetrator from subsequently holding any public office in Colorado, a penalty that does not attach to theft convictions. *See* § 18-8-407.

Second, as the People's hypotheticals demonstrate, the narrow interpretation of "public property" that the court of appeals adopted means that a public employee who steals something *owned* by a public entity could be more harshly punished than a public employee who steals something merely *possessed* by the public entity (including leased or rented property). Such divergent treatment is contrary to the notion that public officials that convert public property to their own use violate the public trust whether the government owns the converted property or merely possesses it. And, if a public employee takes public property and coverts it to his own use, the public assumes any costs associated

with that loss, whether that means replacing owned property taken by a public employee or compensating the "true owner" of property leased, rented, or held in the public trust by the government.

Finally, in response to the defendant's counter hypotheticals (*see* OAB, pp 33-34), the People offer the following responses:

First, a police officer who removes a recovered stolen bicycle from the trunk of a patrol car and coverts it to his own personal use could be guilty of embezzlement of public property. That bicycle (like the guns at issue in this case) should be stored in evidence and held in the public trust until such time as it can be returned to the rightful owner, assuming that person can be identified. A negative answer means that the public employee who took the bicycle could escape all liability because the owner of the bicycle might not be aware that police officers recovered his or her bicycle or know that an officer converted it to a personal use.

Second, the hypothetical regarding the car impounded after a DUI investigation unnecessarily conflates legal issues, and mischaracterizes the breadth of the People's argument. This Court should reject the idea

that punishing a public employee's embezzlement of property held in the public trust will give rise to a parade of constitutional violations. Indeed, by recognizing the government's property interest in a piece of property "possessed and controlled" by a public entity, this Court would not be giving officers free rein to ignore other ownership interests or constitutional concerns, but would instead be treating public officials as fiduciaries for all property under the government's control.

Accordingly, this Court should reject the narrow interpretation of section 18-8-407 advanced by the defendant and by the court of appeals.

C. The evidence at trial was sufficient to sustain the defendant's conviction for embezzlement of public property.

Because section 18-8-407(1) includes property possessed and controlled by a public entity, the evidence at trial, which showed that the defendant converted property (the guns) possessed and controlled by the government to his own use, was sufficient to sustain the defendant's conviction for embezzlement of public property (*see* OB, pp 42-46).

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 public property covered by section 18-8-407 (1), C.R.S. (2018).

CROSS-RESPONDENT'S ANSWER BRIEF

ISSUE ON WHICH CERTIORARI WAS GRANTED

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 CASE

The defendant and a co-defendant—then-employees of the Lake County Sheriff's Office—took four guns from the office's evidence room without authorization and converted the guns to personal use (PCF, Vol 1, #1). As a result, the defendant was charged with embezzlement of public property, felony theft, violation of firearms transfer background check, and first degree official misconduct (PCF, Vol 1, #11).

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

The defendant directly appealed.

In a published opinion, the Colorado Court of Appeals affirmed the defendant's conviction for first degree official misconduct, but vacated

his conviction for embezzlement of public property, concluding that the evidence was insufficient to prove that charge. *Berry*, ¶¶ 2, 40-41. Concerning the official misconduct conviction, the court of appeals, relying on two New Jersey cases, held that the evidence sufficiently proved that the defendant's "purchase" of the guns from P.E. was an "act relating to his office." *Id.* at ¶¶ 34-39.

The court of appeals concluded:

> Like the defendant in the New Jersey cases, 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. 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.
>
> These facts, when viewed in the light most favorable to the prosecution, support a finding by the jury that Berry used his office to facilitate and engage in an unlawful transaction and thus committed "an act relating to his office but constituting an unauthorized exercise of his official function." Thus, we conclude that sufficient evidence supports the official misconduct conviction.

Id. at ¶¶ 38-39.

STATEMENT OF THE FACTS

Relevant to the official misconduct charge, the evidence at trial demonstrated that the defendant, dressed in his sheriff's uniform and driving his patrol vehicle, approached P.E. at a local gas station (TR 5/12/2015, pp 111-14). There, he hugged P.E. and asked her about "purchasing" the guns held in evidence 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 for the Colt handgun (TR 5/12/2015, pp 117-18).

SUMMARY OF THE ARGUMENT

Consistent with the reasoning of the New Jersey Supreme Court as adopted by our court of appeals, this Court should hold that, when public officials commit acts of misconduct because of the office that they hold or because of opportunities afforded by their offices, such conduct sufficiently relates to the offices held to support a conviction for first degree official misconduct.

ARGUMENT

The defendant was engaged in "an act relating to his office but constituting an unauthorized exercise of his official function" when, wearing his police uniform and driving his patrol car, he approached P.E., offered to "purchase" firearms from her, and assured her that, given his position as a police officer, such a purchase was lawful.

This Court granted the defendant's petition for a writ of certiorari to review the court of appeals' conclusion that the defendant committed "an act relating to his office" as that term is used in section 18-8-404, C.R.S. (2018).

A. De novo review applies.

The People agree that the defendant preserved a sufficiency of the evidence claim for appellate review (TR 5/13/2015, pp 38-42, 120-21).

The People further agree that this Court reviews sufficiency of the evidence claims de novo. *People v. Griego*, 209 P.3d 338, 342 (Colo. 2018). Additionally, to the extent that this claim also involves an issue of statutory construction, this Court reviews it de novo. *People v. Rediger*, 416 P.3d 893, 898 (Colo. 2018) (citing *Doubleday v. People*, 364 P.3d 193, 196 (Colo. 2016)).

B. Background regarding the defendant's motion for judgment of acquittal.

At the close of the prosecution's evidence, defense counsel raised a motion for judgment of acquittal (TR 5/13/2015, pp 38-42). Regarding the official misconduct charge, defense counsel argued:

> Finally, that also, then, Your Honor dovetails into the official misconduct charge which, again, if [the defendant] was the owner of these weapons, there is no evidence that he himself violated public policy, or violated what he was supposed to be doing in the Sheriff's Office. All the evidence shows, 100 percent of the evidence shows that [Sergeant Hartman] did. So if anybody committed official misconduct, it was [Sergeant Hartman].
>
> But there is no evidence, whatsoever, that the defendant did, particularly in light of his ownership of the firearms, as I previously discussed.
>
> So based upon those arguments, Your Honor, we would ask that all the charges be dismissed in this case.

(TR 5/13/2015, p 42:10-25).

The prosecution disagreed, arguing that the defendant could not purchase the weapons from P.E. because she was not legally entitled to possess them (TR 5/13/10215, pp 43-45).

The district court denied the motion for judgment of acquittal as to the official misconduct charge (TR 5/13/2015, p 57:2-23).

After the defense presented its case, defense counsel renewed the motion for judgment of acquittal; the district court again denied it (TR 5/13/2015, pp 120:14-121:20).

C. Under section 18-8-404, the phrase "an act relating to his office" can include acts like that committed by the defendant in this case.

Section 18-8-404 reads, in pertinent part:

> A public servant commits first degree official misconduct if, with intent to obtain a benefit for the public servant or another or maliciously to cause harm to another, he or she knowingly . . . [c]ommits an act relating to his office but constituting an unauthorized exercise of his official function[.]

§ 18-8-404(1)(a), C.R.S. (2018).

On review, this Court must determine whether the defendant's act in this case—"purchasing" firearms held in the evidence locker at the sheriff's office where he worked as a deputy—was an "act relating to his office" for purposes of that statute.

This Court's general principles of statutory construction and this Court's framework for the interpretation of ambiguous statutes are fully outlined in the People's Opening Brief (*see* OB, pp 10-12); thus, the People do not rehash them here other than to note the broad principle that, if the language of a statute is ambiguous, "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." *Abu-Nantambu-El v. State*, 2018 COA 30, ¶ 9 (citing *People v. Luther*, 58 P.3d 1013, 1015 (Colo. 2002)).

Applying principles of statutory construction to this issue, this Court should conclude that the defendant's "purchase" of firearms held in the evidence room at a sheriff's office where he worked as a deputy was "an act relating to his office" under the circumstances presented in this case. To reach this conclusion, this Court should be persuaded by the reasoning of courts from other jurisdictions that have interpreted official misconduct statutes similar to Colorado's to proscribe a broad array of improper conduct committed by public officials through the course of opportunities afforded to them by their employment.

1. This Court should interpret Colorado's official misconduct statutes to apply to a broad range of improper activities by public officials.

The court of appeals aptly observed that "there is no Colorado legal authority defining the scope of acts that "relate to [an] office[.]" *Berry*, ¶ 35. Indeed, there do not appear to be any Colorado cases that address the limits of the conduct proscribed by the official misconduct statutes. However, courts in New Jersey, New York, and Illinois, which have official misconduct statutes similar to Colorado's, have addressed this issue and broadly applied those statutes.

The rationale offered by those courts is especially persuasive with this central premise in mind:

> [T]he essential characteristic of official misconduct is that public servants are 'under an inescapable obligation to serve the public with the highest fidelity;' that 'they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity' to ensure the 'soundness and efficiency of our government, which exists for the benefit of the people who are its sovereign.'

People v. Lynch, 674 N.Y.S. 894, 896 (N.Y. Cty. Ct. 1998) (quoting *Driscoll v. Burlington-Bristol Bridge Co.*, 86 A.2d 201, 221-22 (N.J. 1952)).

a. This Court should adopt the rationale of the New Jersey Supreme Court.

Interpreting and applying an official misconduct statute similar to Colorado's, the New Jersey Supreme Court addressed a case where a suspended state trooper retained his identification card and then used it to detain a drug dealer and to identify himself to as a state trooper to another member law enforcement.[2] *State v. Bullock*, 642 A.2d 397, 398

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[2] In relevant part, the New Jersey statute provides:

> A public servant is guilty of official misconduct when, with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit:
>
> > a. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner; or
> >
> > . . .

N.J. Stat. Ann. § 2C:30-2(a) (West 2018).

(N.J. 1994). That court ruled: "[W]hen law-enforcement officers commit an act of malfeasance because of the office they hold *or because of the opportunity afforded by that office*, their conduct sufficiently relates to their office to support a conviction." *Id.* at 401 (emphasis added).

Later, the New Jersey Supreme Court summarized the thrust of its holding in *Bullock*, noting the acts of the off-duty officer in *Bullock* "were sufficiently related to the officers' official status to constitute official misconduct because *they made calculated use of an office to avoid suspicion and to instill in unsuspecting victims a false sense of security*." *State v. Hinds*, 674 P.2d 161, 164 (N.J. 1996) (emphasis added); *see State v. Saavedra*, 117 A.3d 1169, 1181 (N.J. 2015) ("[T]his Court has noted that an act 'sufficiently relates' to law enforcement officers' public office when they 'commit an act of malfeasance because of the office they hold or *because of the opportunity afforded by that office* . . . .' " (quoting *Bullock*, 642 A.2d. at 401) (emphasis added)).

Years prior to *Bullock*, the New Jersey Supreme Court affirmed an official misconduct conviction where a precinct clerk exercised his "de facto authority" to cash a check payable to the municipal violations

bureau, concluding that the fact that his "duties and authority did not in fact extend to such activities is not controlling on the question of *whether they were done under color of office*." *State v. Schultz*, 367 A.2d. 423, 430 (N.J. 1976) (emphasis added); *see also State v. Johnson*, 606 A.2d 397 (N.J. 1994) (off-duty trooper could be convicted of official misconduct when he donned his uniform and feigned a drug arrest).

b. New York's application of its official misconduct statute further supports adoption of the New Jersey standard.

New Jersey is not alone in its broad interpretation of an official misconduct statute. Applying an official misconduct statute similar to Colorado's[3], the New York Court of Appeals recently held that a police

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[3] In relevant part, the New York statute provides:

> A public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another person of a benefit:
>
> > 1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or
> >
> > . . .

N.Y. Penal Law § 195.00 (McKinney 2018).

officer's conviction for official misconduct should stand where the evidence proved that the officer engaged in a series of actions in order to thwart a theft investigation concerning a friend's child. *People v. Flanagan*, 71 N.E.3d 541, 549-53 (N.Y. 2017). That court observed that New York's official misconduct statute contains a double mens rea, "requiring both an intent to obtain a benefit or deprive another of a benefit and knowingly acting or refraining from acting[.]"[4] *Id.* at 549 (citing *People v. Feerick*, 714 N.E.2d 851, 855-56 (N.Y. 1999)). The New

[4] The Court noted that New York's official misconduct statute replaced a series of prior statutes, " 'all of which dealt with specific malfeasance or nonfeasance in the accomplishment of official duties.' " *Id.* at 549 (quoting *Feerick*, 714 N.E.2d at 855). Similarly, Colorado's misconduct statutes find their roots, at least in part, in since-repealed statutes prohibiting malfeasance in office. *See People v. Beruman*, 638 P.2d 789, 793 n.3 (Colo. 1982) (referencing section 40-7-46, C.R.S. (1963), when interpreting Colorado's second degree official misconduct statute—section 18-8-405, C.R.S. (1973)); *People v. Schneider*, 292 P.2d 982, 985 (Colo. 1956) ("Malfeasance is the doing of an intentional and corrupt act by an official."); *see generally* Black's Law Dictionary 968 (7th ed. 1999) ("malfeasance" is "[a] wrongful or unlawful act; esp., wrongdoing or misconduct by a public official"); Black's Law Dictionary 1015 (7th ed. 1999) ("misfeasance" is "[a] lawful act performed in a wrongful manner"; "misfeasance in public office" is "[t]he tort of excessive or malicious or negligent exercise of statutory powers by a public officer"); Black's Law Dictionary 1076 (7th ed. 1999) ("nonfeasance" is "[t]he failure to act when a duty to act existed").

York court explained that "[t]his exacting standard is in keeping with the legislature's goal of criminalizing 'flagrant and intentional abuse of authority by those empowered to enforce the law,' rather than 'good faith but honest errors in fulfilling one's official duties[.]' " *Id.* (quoting *Feerick*, 714 N.E.2d at 855). Consequently, that court concluded: "Importantly, the two mens rea requirements were '*not [meant] to limit in any substantive way the types of conduct that would be culpable*[.]' " *Id.* (quoting *Feerick*, 714 N.E.2d at 857) (emphasis added).

Applying that framework, the New York court ruled that it was the "defendant's knowing participation in a *'purportedly' authorized official action*, [but] which was actually done in blatant violation of department protocols and state law, coupled with [other facts showing an intent to benefit the suspect's father], that permitted the jury to rationally conclude there was legally sufficient evidence to convict defendant of official misconduct . . . ." *Id.* at 551 (emphasis added); *see also Feerick*, 714 N.E.2d at 855-58 ("[D]efendants—although purportedly acting under the authority of the Police Department and while on duty—were not pursuing the [police] radio in furtherance of

prescribed law enforcement duties, but rather in violation of orders and for their own benefit. The intent behind seeking the return of the radio was . . . to benefit themselves. We therefore conclude that the evidence was sufficient to support the official misconduct count.").

c. At least one Illinois appellate court agrees that an official misconduct statute broadly proscribes a wide array of conduct that exploits public officials' positions.

Like the courts in New Jersey and New York, at least one division of the Illinois appellate court has likewise ruled the conduct covered by an official misconduct statute—and the acts related to one's office—can be wide-ranging. *See, e.g., People v. Selby*, 698 N.E.2d 1102, 1109-10 (Ill. App. Ct. 1998) (an indictment was sufficient where it alleged that the defendant, acting in his capacity as a correctional officer, engaged in sexual intercourse with prisoners). While the Illinois statute is worded somewhat differently than Colorado's, the Illinois statute does require that a public officer be acting "in his official capacity" to support a charge of official misconduct. *See* 720 Ill. Comp. Stat. Ann. 5/33-3(a)

(West 2018).[5] And, when interpreting the term "official capacity" as used in that statute, the Illinois court explained: "[A]n act is performed in one's official capacity if it is accomplished by *exploitation of his position* as a public officer or employee." *Selby*, 698 N.E.2d at 1109 (internal quotations omitted) (emphasis added); *see People v. Samel*, 451 N.E.2d 892, 896-97 (Ill. App. Ct. 1983) ("official capacity" refers to the *manipulation of public office or employment* "in order to achieve illicit gain or perform a proscribed act" (emphasis added)); *see also People v.*

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[5] In relevant part, the Illinois statute provides:

> (a) A public officer or employee . . . commits misconduct when, in his official capacity or capacity as a special government agent, he or she commits any of the following acts:
>
> . . .
>
> (2) Knowingly performs an act which he knows he is forbidden by law to perform; or
>
> (3) With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or
>
> . . .

720 Ill. Comp. Stat. Ann. 5/33-3(a) (West 2018).

Becker, 734 N.E.2d 987, 1003 (Ill. App. Ct. 2000) ("A police officer commits an act of official misconduct when the officer *exploits his official position* and acts in detriment to the public good." (emphasis added)); *id.* ("In this case, . . . defendant interjected his public office and authority as a police officer to the detriment of the victim and the public. Defendant's actions cannot be severed from his sworn duties as a Chicago police officer.").

d. This Court should adopt the New Jersey rationale.

In determining the scope of the phrase an "act related to his office" as that phrase is used in section 18-8-404, the case law from other jurisdictions—with emphasis of the standard adopted in New Jersey—provides strong support for the idea that official misconduct statues, like Colorado's, are intended to be read and applied broadly to proscribe public officials use or misuse of public office to reap a personal gain. This proscription should be read no less broadly in Colorado than it is in New Jersey, and it should apply to any and all improper or illegal acts committed by law enforcement officers "because of the opportunity afforded by that office[,]" *see Bullock*, 642 A.2d at 401, especially where,

as here, an officer "made calculated use of an office to avoid suspicion and to instill in unsuspecting victims a false sense of security[,]" *see Hinds*, 674 P.2d at 164.

Accordingly, this Court should hold that our official misconduct statute can apply to a broad range of improper acts by public officials.

2. The defendant's contrary citations do not dictate a different result.

In urging a different result, the defendant cites cases from New York, Kentucky, and the Tenth Circuit to support his position. He also cites a single case from New Jersey to support the proposition that New Jersey's standard is too broad. The People address each claim in turn.

a. This Court should not rely on the two New York cases cited by the defendant.

In arguing that this Court should apply a narrower interpretation of the phrase "an act relating to his office," the defendant relies on two cases from New York—*People v. Rossi*, 415 N.Y.S.2d 21 (N.Y. App. Div. 1979), and *People v. Groskin*, 122 A.D.2d 561 (N.Y. App. Div. 1986) (*see* OAB, pp 6-8).

Providing little substantive analysis, the one paragraph opinion in *Rossi* concluded that the defendant's act in that case—accepting a bribe to "fix" a traffic summonses—was not "an act relating to his office" because, as a corrections officer, the defendant had no real or apparent authority to take any action related to the summonses. 415 N.Y.S.2d at 22. Thus, *Rossi* stands for the idea that "[a]n action taken by a public servant that is 'completely unrelated to his [or her] position' is not 'within the scope of [his or her] real or apparent authority[.]' " *People v. Moreno*, 953 N.Y.S.2d 202, 203 (N.Y. App. Div. 2012) (quoting *Rossi*, 415 N.Y.S. at 22).

Even with that seemingly narrow proposition, however, the New York appellate courts have not applied *Rossi* as the stringent standard that the defendant desires. For instance, in *Moreno*, a division of the New York appellate court held that police officers' acts "related to their official position" where those officers assisted a drunk woman from a cab to her apartment after a 911 call, and returned several times to her apartment presumably in an attempt to establish a social relationship with her. That court explained:

> Defendants' returns to the complainant's apartment occurred while they were in uniform and on duty. Their initial contact with the complainant arose from their patrol duties, in response to a 911 call, whereby defendants acquired the complainant's personal information, became aware of her vulnerable condition, and obtained her keys, permitting them to enter the building and her apartment. In addition, during one of the entries, defendants falsely assured the complainant's neighbor that they were investigating a report of a prowler.

Moreno, 953 N.Y.S.2d at 203-04.

Thus, despite the defendant's suggestion, *Rossi* does not support the idea that the official misconduct statute is inapplicable to situations like that presented in this case, where an official's improper acts, while perhaps superficially appearing unrelated to any official function, stem from and relate to information obtained in the course of an official function. *See Moreno*, 953 N.Y.S.2d at 203-04; *see also People v. Barnes*, 984 N.Y.S.2d 693, 696-97 (N.Y. App. Div. 2014) ("A police officer's actions fall within his or her official functions 'even if the right to perform [them] did not exist in the particular case[,]' such as when the officer was off-duty." (quoting *People v. Chapman*, 192 N.E.2d 160, 161 (N.Y. 1963)); *id.* at 697 (noting a defendant need not violate any specific

rule, regulation, or policy governing the official's position to be found guilty of official misconduct); *People v. Lucarelli*, 753 N.Y.S.2d 638, 639 (N.Y. App. Div. 2002) (official misconduct charge reinstated where a police officer received a report of suspected drug activity, and, using the information that he obtained, called the suspect's mother and told her to warn the suspect).

Accordingly, not even the New York courts apply *Rossi* as broadly as the defendant desires, and this Court should not do so.

The defendant also asks this Court to rely on a New York court's decision in *Groskin*. There, the appellate court upheld a trial court's order dismissing an indictment where the defendant, a corrections employee, allegedly exercised his discretion not to deny a woman conjugal visits with her incarcerated husband in return for this woman providing him with sexual favors. 505 N.Y.S.2d at 475. The court concluded: "Defendant had no actual or apparent authority to make any recommendations whatsoever regarding conjugal visits. He simply gathered information upon which his superiors granted or denied

requests for conjugal visits. Hence, defendant could not be indicted for exercising discretion he did not have." *Id.*

Groskin involved unique facts and was wrongly decided. Indeed, in the thirty years since it was decided, it appears that only one New York court has relied on it, and, in that instance, it was relied upon only in a trial court order that an appellate court later modified (without any reference to *Groskin*). *See People v. Lucarelli*, 737 N.Y.S.2d 247, 248-49 (N.Y. Sup. Ct. Erie Co. 2002), *modified by* 753 N.Y.S.2d 638 (N.Y. App. Div. 2002). The dearth of subsequent citation suggests that: (1) the New York courts do not find *Groskin* to be particularly persuasive; and/or (2) those courts have concluded that its reasoning is limited to its unique facts.[6] In any event, given that the New York courts apparently do not rely on *Groskin*, and have not shown an inclination to apply it more broadly, this Court should be hesitant to do so in Colorado.

[6] The lack of any additional citations to *Groskin* is not a byproduct of an infrequently raised legal issue. To the contrary, the New York courts have addressed "official misconduct" on numerous occasions.

b. The Kentucky opinion cited by the defendant offers little guidance in resolving the question on which this Court granted review.

The defendant next directs this Court to a more recent Kentucky case—*Bailey v. Commonwealth*, 790 S.W.2d 233 (Ky. 1990)—where that court reversed a defendant's conviction for official misconduct (*see* OAB, p 8-10).[7] There, a defendant repeatedly disparaged another public official during the course of fiscal meetings. In deciding that the defendant's public comments did not constitute malfeasance or official misconduct, the court made two critical observations: (1) "there must be

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[7] In relevant part, the Kentucky statute provides:

> (1) 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:
>
> > (a) Commits an act relating to his office which constitutes an unauthorized exercise of his official functions; or
> >
> > . . .
> >
> > (c) Violates any statute or lawfully adopted rule or regulation relating to his office.

Ky. Rev. Stat. Ann. § 522.020 (West 2018).

an official act to convict a public official of malfeasance and official misconduct in the first degree"; and (2) "a person can do a purely personal act while in the process of performing an official function." *Bailey*, 790 S.W.2d at 235. Applying that standard, the court ruled that the defendant's disparaging comments to another official were personal statements, not "official acts"; therefore, he could not stand convicted of official misconduct. *Id.* at 236.

While the outcome in *Bailey* certainly makes sense under the facts and circumstances presented there, it does little to offer a standard for what constitutes "an official act," let alone any workable standard that this Court could adopt for determining what constitutes "an act related to [an] office" in Colorado. At best, that case dictates that one public official's decision to insult or disparage another public official is not "an official act." Beyond that, while aptly acknowledging that "a person can do a purely personal act while in the process of performing an official function[,]" it does not even attempt to articulate where an official act ends and a personal act begins.

To the extent that *Bailey* offers any guidance, this case is not that case. Indeed, the defendant's acts went far beyond personally insulting another person while performing his official duties. Here, while driving his patrol car and wearing his uniform, the defendant used his position as a law enforcement officer to approach a private citizen and convince her to unwittingly participate in his improper (at best) or illegal (at worst) "purchase" of several guns held in an evidence locker at the sheriff's department. Moreover, noting his official position, he assured that individual that the "purchase" was proper. This was not a "purely personal act."[8] To the contrary, the defendant's official position was the sole reason that he had any knowledge of the individual and the guns, and his official position is the only reason that he had the ability to get access to the guns following his "purchase."

Accordingly, *Bailey* offers little guidance in resolving the question presented on certiorari review, and this Court should reject the notion that the defendant's actions in this case were "purely personal."

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[8] Of course, had the defendant, on his day-off and not in uniform, run into P.E. at the store and engaged her in some other improper activity, he likely would not have been committing "an act relating to his office."

c. The section 1983 case cited by the defendant does not advance his position.

The defendant next asserts the court of appeals should not have relied on New Jersey Supreme Court's opinions in *Schultz* and *Bullock* (*see* OAB, pp 10-13). As support, he relies on *Haines v. Fisher*, 82 F.3d 1503 (10th Cir. 1996), asserting that it "provides a workable distinction between public and private conduct" (OAB, p 13). In *Haines*, the Tenth Circuit concluded that several police officers were not "acting under color of state law" for purposes of section 1983[9] when they pranked an acquaintance by staging a robbery at the 7-Eleven store where the acquaintance worked. *Haines*, 82 F.3d at 1505-06, 1508.

Even assuming this Court were inclined to apply *Haines*, which addressed a section 1983 claim and the legal standards associated with such claims, it does not provide a good framework for distinguishing between public officials' private and official acts in state criminal cases. And, to the extent that it does, the standard appears to be that a police officer cannot be said to have "acted under color of law" where, rather

[9] 42 U.S.C. § 1983 (2018).

than abusing his authority, he takes specific action to conceal his identity as a police officer. *Compare id.* at 1508 *with Bacon v. Allen*, 2007 WL 1852185, **2-3 (D. Kan. 2007) (distinguishing *Haines*: "[T]he officer in [*Haines*] *purposely avoided using any show of authority* to perform the prank 'robbery.' By contrast, in the instant case plaintiff may be able to show that [the officer] exercised a show of authority—*including his uniform, his patrol car, his on-duty status*, and his commands to plaintiff to follow him—in order to get plaintiff alone and to carry out the alleged assault." (emphasis added)).

Accordingly, to the extent that *Haines* offers a possible standard for this case, it supports the converse of the defendant's position. Indeed, it suggests that, where, as here, an officer approaches a person while in his uniform and driving his patrol car, and he reminds that person that he is a police officer in order to assuage concerns about the propriety of a proposed gun "sale," a sufficient nexus exists between the officer's actions and his official duties such that the actions constitute "an act related to his office." *See, e.g., Bacon*, **2-3.

d. The one New Jersey case cited by the defendant fails to show that the New Jersey standard is unworkable.

Finally, the defendant asserts that the New Jersey standard, as applied by the court of appeals here, is too expansive (*see* OAB, pp 13-14). In support of this point, the defendant cites *State v. Corso*, 810 A.2d 1130 (N.J. Super. Ct. App. Div. 2002).

As an initial matter, the People note the defendant suggests that *Corso* addressed an off-duty police officer at a nightclub convicted of official misconduct simply because he failed to execute an arrest when a drug deal occurred in his presence (OAB, p 13). That is not accurate. The facts of that case actually show that the off-duty officer *participated* in the drug transaction; thus, that officer was a drug dealer, not merely a passive observer to this drug deal. *See Corso*, 810 A.2d at 1132-33.

Additionally, in *Corso*, the court addressed the subsection of the New Jersey misconduct statute punishing an official for "refrain[ing] from performing a duty which is imposed upon him by law[,]" and not

the "act relating to his office" subsection of that same statute. *See id.* at 1135-36; *see also* N.J. Stat. Ann. § 2C:30-2(a) (West 2018).[10]

In any event, *Corso*'s holding is not as dangerously broad as the defendant paints it. The defendant suggests that, under *Corso*, an off-duty police officer shopping in a store with her child could be convicted of official misconduct if she saw someone steal an item and run out of the store because the officer failed to abandon her child in the store, chase the shoplifter, and effect an arrest (*see* OAB, pp13-14). Not so.

In fact, *Corso* significantly undercuts, if not eviscerates, the concern expressed by the defendant. As the court explained:

> [T]he [official misconduct] charge still require[s] the jury to find that defendant's *failure to act was done to benefit himself or another, as required by the statute*. As a result of the guilty verdict the jury must have found that defendant's actions were taken to benefit either himself or [another]. In either event, he could not have been convicted simply because he saw a crime being committed.

Corso, 810 A.2d at 1135 (internal citations omitted) (emphasis added).

[10] Similar to New Jersey's misconduct statute, Colorado's statute has separate subsections for these two types of acts or omissions. *Compare* § 18-8-404, C.R.S. (2018) *with* N.J. Stat. Ann. § 2C:30-2(a) (West 2018).

Colorado's official misconduct statute likewise requires that, to be guilty of official misconduct, the defendant must commit his act of misconduct with the intent to obtain a *benefit for himself or another*. *See* § 18-8-404. Thus, even setting aside considerations of prosecutorial discretion in filing charges against the off-duty officer in the defendant's hypothetical, it is highly unlikely that the prosecution could prove official misconduct in that hypothetical given the dearth of any facts suggesting that the officer intended to obtain *any benefit for herself or another* by not abandoning her child to chase the shoplifting suspect.

Accordingly, this Court should reject the defendant's assertion that *Corso* somehow demonstrates that the New Jersey standard is too broad. Instead, *Corso* demonstrates precisely how and why the New Jersey standard is workable—namely, public officials that use or abuse their offices for personal benefit can stand convicted of official misconduct.[11]

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[11] The defendant concludes his brief with a string citation to various Colorado cases that he suggests demonstrate that his standard is consistent with convictions or filings for first degree official misconduct (*see* OAB, pp 15-16 (citing *People v. Brown*, 840 P.2d 348, 348-50 (Colo. 1992); *Johns v. Dist. Court of the Thirteenth Judicial Dist.*, 561 P.2d 1, 2

For this reason and all of the reasons outlined above, this Court should reject the defendant's assertions that the court of appeals erred by adopting the New Jersey standard, and this Court should reject the defendant's contention that any other standard is appropriate. Instead, this Court should hold that, when public officials commit acts of misconduct in the offices that they hold or because of the opportunities afforded by their offices, their conduct sufficiently *relates to their offices* to support a conviction for official misconduct. *See Bullock*, 642 A.2d at 401; *see also Hinds*, 674 P.2d at 164; *Saavedra*, 117 A.3d at 1181.

D. Because section 18-8-404(1) should be read to prohibit all misconduct "related to [an] office," the evidence at trial was sufficient to sustain the defendant's conviction.

Finally, the People continue to maintain that the evidence was sufficient to sustain the defendant's conviction for first degree official misconduct under the facts and circumstances presented in this case.

(Colo. 1977); *People v. Zadra*, 396 P.3d 34, 41-46 (Colo. App. 2013)). While those cases involve traditional examples of official misconduct, none of them addressed the scope of the conduct covered by the official misconduct statute, and this Court should decline to read them in the restrictive manner that the defendant wants this Court to read them.

A reviewing court, when analyzing the sufficiency of the evidence, "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).

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." *Clark*, 232 P.3d at 1291.

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 first degree official misconduct. The evidence at trial showed that the defendant, while dressed in his full police uniform and driving his patrol car, approached P.E. in the parking lot of a gas station and urged her to "sell" to him the Colt handgun taken from her home (TR 5/12/2015, pp 111-16). During this exchange, the defendant assured P.E. that the transaction would be legal and that he, as a police officer, would not engage in any illegal activity (TR 5/12/2015, pp 116-17). Thus, the defendant used his position as a sheriff's deputy, including his uniform and patrol car, to encourage P.E. to participate in this "sale" so that he could take possession of guns slated for destruction.

Furthermore, despite the defendant's rigid insistence that P.E. retrieved the guns from the sheriff's department before the defendant "purchased" them from her, P.E. consistently denied that she signed 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).

Finally, the evidence also demonstrated that the defendant and Sergeant Hartman ignored or bypassed well-established policies which barred the return of the guns to P.E., removed the weapons from the evidence locker, and converted them to their own personal use (TR 5/11/2015, pp 53-57; TR 5/12/2015, pp 53-54, 63-64, 91, 110).

In sum, the evidence, when viewed in the light most favorable to the prosecution, sufficiently proved that the defendant, with intent to obtain a benefit for himself knowingly committed an act relating to his office but beyond the authorized exercise of his official function—namely, while driving his patrol and wearing his full uniform, he used his office as a sheriff's deputy to facilitate the purchase of guns from a former crime victim, while assuring her that, because he was a police officer, the transaction was lawful.

CONCLUSION

For the foregoing reasons and authorities, this Court should affirm the court of appeals' conclusion, and hold that a deputy's removal of firearms from an evidence locker under circumstances such as those presented in this case was "an act relating to his office" as that phrase is used in section 18-8-404, C.R.S. (2018).

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **COMBINED REPLY BRIEF-ANSWER BRIEF** upon **REID J. ELKUS** and **LUCAS LORENZ** via Colorado Courts E-filing System (CCES) on May 31, 2019.

/s/ Tiffiny Kallina

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