

<p>SUPREME COURT STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, Colorado 80203</p>	<p>DATE FILED: July 1, 2019 2:23 PM FILING ID: 59D675459824E CASE NUMBER: 2017SC430</p>
<p>On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 15CA1394 Lake County District Court, Judge Wayne Patton, Case No. 14CR32</p>	
<p>Petitioner: WILLIAM BERRY</p> <p>v.</p> <p>Respondent: THE PEOPLE OF THE STATE OF COLORADO.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorney for Appellant William Berry: Elkus & Sisson, P.C. Reid J. Elkus, #32516 501 South Cherry Street, Suite 920 Denver, CO 80246 Phone:(303) 567-7981 Fax: (303) 431-3753 Email: relkus@elkusandsisson.com</p>	<p>Case No. 17SC000430</p>
<p>RESPONDENT/CROSS-PETITIONER'S REPLY BRIEF</p>	

CERTIFICATE OF COMPLIANCE

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

The Reply Brief complies with the applicable page/word limit set forth in C.A.R. 28.1(g).

It contains 2,672 words (“reply brief does not exceed 5,700 words.”).

The brief complies with the standard of review requirements set forth in C.A.R. 28(c)-(h).

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

Elkus & Sisson, P.C.

/s/Reid J. Elkus
Reid J. Elkus, #32516
Attorney for Respondent/Cross-Petitioner

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Summary of Argument

The Attorney General asks this Court to hold that any misconduct by a public official is official misconduct. Petitioner's Answer and Reply Brief, at 40. This proposal is unsupported by law and will not help future courts determine what conduct is prohibited by §18-8-404, C.R.S. (2018).

Instead, the Court should adopt the "Scope of Duties" standard to determine whether an act is one of official misconduct. In this case, the purchase of a firearm is a private act. Officer Berry did not use the powers of his office to advance any corrupt purpose, and the location of the firearm does not change this analysis. There is no "insider trading" rule for police officers, and police officers are not prohibited from acting on information they learn in the course and scope of their job duties.

Argument

There is no law prohibiting a police officer from buying a gun. The question here is whether a police officer's act of buying guns that are held in evidence storage is an act related to his office as the phrase is used in 18-8-404. The entire relevant phrase is:

An act related to his office but constituting an unauthorized exercise of his official function[.]

§18-8-404, C.R.S. (2018).

Buying guns held in evidence storage is not official misconduct, and the location of the property does not cause the act to become related to an unauthorized exercise of a police officer's official function. Neither does the fact that the officer was in uniform cause the act to be related to his office.

The Attorney General asks this Court to hold that the private sale of a weapon is an act of official misconduct. The government cites no case in support of the claim that the location of privately sold goods makes the act official. *See* Petitioner's Answer and Reply Brief ("Answer"), at 16. It cites no case in support of the claim that entering into a private sale while on duty as a police officer is illegal or an unauthorized exercise of a police officer's duties. Answer at 34. It cites no case in support of the proposition that purchasing weapons from someone who was not allowed to and did not possess the weapons is illegal or an unauthorized exercise of a police officer's duties. Answer at 15-16. It cites no case in support of the claim that telling someone who is considering selling you weapons that you are a police officer is illegal or an unauthorized exercise of a police officer's duties. Answer at 42-43. Given any scenario, this act is not an act of misconduct related to the office.

I. The “Scope of Duties” rule is a workable standard that will provide guidance for determining whether an action is an unauthorized exercise of an official function.

A. The “Scope of Duties” rule provides a proper standard to prevent officials from exploiting their positions to advance corruptible goals.

The caselaw cited by both parties in previous briefings can be characterized by two lines of thought. The New Jersey rule adopted by the Court of Appeals prohibits the use of “de facto” authority to commit misconduct. *See State v. Schultz*, 367 A.2d 423, 430 (N.J. 1976). This “color of office” standard emphasizes whether the illicit act committed by the official was helped by the official’s position. Kentucky, New York, and the 10th Circuit have adopted a different “Scope of Duties” standard that asks whether the illicit act was within the duties of the official. *See, e.g., Bailey v. Commonwealth*, 790 S.W.2d 233, 234 (Ky. 1990).

A plain language reading of the official misconduct statute supports the “Scope of Duties” rule. An “exercise of official functions” can be understood as an exercise within the “Scope of Duties” of an official.

The “Scope of Duties” standard also advances the public interest and the reason for the official misconduct legislation. A legitimate government purpose for criminalizing official misconduct is to prohibit and punish the use of a public office for a corruptible goal.

The “Scope of Duties” cases advance the purpose of criminalizing the use of

public authority to advance a corruptible goal. The also permit private acts when the government does not have a legitimate interest in regulating an official's actions.

For example, in *Bailey* the act was a series of personal accusations against a city attorney made by a judge during official business. There, as here, the office held by the defendant was not critical to the completion of the act. The speech was not an unauthorized exercise of the judge's official function because it could have been completed by anyone regardless of their official function. The reverse is also true: the judge could have made snide comments about the city attorney in any setting. The judge did not use his office to advance any corruptible goal. The speech therefore was not an act of misconduct relating to the office.

Other cases cited by the Attorney General support the purpose of preventing officers from using their position to achieve a corruptible goal. An officer is acting within the scope of his duties when he uses his power as a police officer to identify victims for sexual assault and kidnapping. *See, e.g., People v. Moreno*, 953 N.Y.S.2d 202, 203 (N.Y. App. Div. 2012). The scope of an officer's duties includes detaining and arresting people, and using this power to scare or coerce women into sexual activities is a corruptible goal. Similarly, an officer is acting within the scope of his duties when he uses his power to as a correctional officer to engage in sexual

intercourse with inmates, a prohibited act. *See, e.g., People v. Selby*, 698 N.E.2d 1102, 1109-10 (Ill. App. Ct. 1998). The scope of a correctional officer's duties includes governing all aspects of an inmate's life and is the only reason he is allowed in prison to see inmates. Using this access to have sexual intercourse with inmates is a corruptible goal.

B. Officer Berry did not use his office and the scope of his duties to advance a corruptible goal.

P.E., a domestic violence victim whose husband had been deported, received \$500 from Officer Berry for weapons that would be destroyed otherwise. Officer Berry was not charged with giving her too little money: the government has said he committed a crime for giving her money in exchange for the title to these weapons. There is no evidence in the record that the sale of the weapons was coerced by him because of his office. There is no evidence that the price of the sale was influenced by his office.

Here, the act is a sale of weapons made by an officer. While there are regulations about the transfer and possession of weapons, the private sale of a weapon is not illegal, and the right to bear arms is a Constitutional right. U.S. Const. Amend. 2. There is no corruptible goal here.

Officer Berry also did not act within the scope of his duties when he bought the weapons. The sale could have been completed at any time, in any setting.

Indeed, anyone could have bought the weapons regardless of their occupation or connection to the police force. For that reason, it was not an act of misconduct relating to the office.

Anyone could have bought the weapons from P.E. and sought their release from the evidence locker. If Officer Berry had bought the weapons out of uniform, the AG seems to admit that he would not be facing an official misconduct charge. Answer at 34 FN 8. The AG has identified no additional facts that justify criminalizing the same conduct because he was in uniform.

II. Even the “Color of Office” standard supports Officer Berry’s position that the private sale of weapons is not an act relating to his office.

A. The New Jersey misconduct cases involve an illegal act that could not have occurred “but for” the official using his office to accomplish the act.

The New Jersey cases cited involve an inherently illegal activity. In *Schultz*, the defendant had a duty to collect checks from traffic ticket violations. He forged a signature on the back of one of those checks and cashed it at a bar. The illegal forgery could not have occurred but for his official duty that gave him access to the government’s checks. *State v. Schultz*, 376 A.2d 423 (N.J. 1976).

In *Bullock*, the defendant used a suspended officer ID card to commit crimes including kidnapping and assault. The crimes could not have occurred but for the defendant’s position as a (suspended) police officer that gave him access to the

official ID card. *State v. Bullock*, 642 A.2d 397 (N.J. 1994).

In *Saavedra*, the defendant stole documents that she was only able to obtain because of her office. The theft could not have occurred but for her official duty that gave her access to the documents. *State v. Saavedra*, 117 A.3d 1169 (N.J. 2015).

In *Corso*, the defendant was involved with or witnessed a drug transaction and failed to make an arrest.¹ His failure to make the drug arrest was held to be relating to his office. *State v. Corso*, 810 A.2d 1130.1135 (N.J. 2002). This case involves the failure to perform “a duty imposed on him by law” and not an “unauthorized exercise of” an official function. *Id.* at 1135-36. Thus, the “but for” test does not apply here, but it is informative that the act is the sale of a inherently illegal drug. *See also State v. Hinds*, 674 A.2d 161, 165 (N.J. 1996)(holding that an officer engaged in shoplifting who did not arrest his co-conspirator was guilty of the crime of official misconduct for the failure to perform a duty.)

¹ The Attorney General claims that the defendant in *Corso* was a drug dealer, not a passive observer to the drug deal. The court notes that the defendant was acquitted of drug offenses but “could not have been convicted simply because he saw a crime being committed.” *State v. Corso*, 810 A.2d 1130.1135 (2002). Whether *Corso* was the drug dealer or not, there is no dispute that the act was an illegal drug deal.

B. The “Color of Office” standard does not create an “Insider Trading” rule that restrains an officer’s ability to purchase goods he learned about while on duty.

The Attorney General claims that “the defendant’s official position was the sole reason that he had any knowledge of the individual and the guns.” Answer, at Rather than rely on an underlying criminal act, the AG claims that using legally acquired knowledge its itself the violation. In essence, they ask this Court to create an “insider trading” rule for police officers. The AG cites no law, regulation, policy, or rule prohibiting police officers from using information they learn while on the job to enter into a private sale. This Court should not create such a rule.

A rule that defines misconduct in office as using any information gained while on the job to obtain a private benefit would lead to absurd results. For example: A uniformed police officer goes into a convenience store while on duty and sees candy bars for sale at 10 cents each. Purchase of a candy bar benefits the officer, as any free market sale is conducted for the benefit of both parties. Adopting the rule proposed by the Attorney General, buying this ridiculously low-priced candy bar would be misconduct because the officer learned of the sale while on duty and in uniform. Some might argue that the candy bar clearance sale differs from a private sale, but how so? The rule proposed by the Attorney General makes no distinction.

Some might argue that the purchase of a candy bar is not misconduct, and

this would be true. But the rule proposed by the Attorney General does not clarify which transactions are misconduct and which are an unauthorized exercise of official functions.

C. Telling someone selling a gun that you are a police officer is not an act of misconduct or unauthorized exercise of duties.

The Attorney General’s brief emphasizes that the seller of the weapons asked Officer Berry whether selling the guns was legal, as if asking someone if the sale of a gun to them is legal is an unusual or improper question. It is not. In fact, there are many valid reasons why a person should ask the potential purchaser of a weapon if they are legally able to purchase or possess the weapon after the sale. *E.g.*, §18-12-111, C.R.S. (2018) (buying a firearm and transferring it to someone ineligible to possess a firearm is a felony).

Officer Berry’s response is similarly appropriate. He responded, “I’m a police officer” to the question of whether the sale was legal. This was a true statement and was relevant to whether he could purchase a gun. Police officers must be able to possess weapons as part of their jobs. That Officer Berry was an officer is evidence that he had no legal restrictions for the purchase of a weapon.

III. There is insufficient evidence to support a conclusion that purchasing weapons in evidence storage is an act related to an official office.

Whether based on the “Color of Law” or the “Scope of Duties” standard,

there is insufficient evidence to support an official misconduct conviction. Even in a light most favorable to the prosecution, a rational trier of fact could not have found that Officer Berry acted within the scope of his duties when he bought weapons at a private sale. Merely approaching someone and asking them if they will sell you an item is not a crime, whether or not you tell them you are a police officer.

There is insufficient evidence to show that Officer Berry used his office to hide the fact that he was buying weapons from P.E. He is not accused of abusing his authority as a law enforcement officer to steal from P.E. or coerce her into selling him the guns. *See e.g., Bacon v. Allen*, No. 06-1222-WEB, 2007 U.S. Dist. LEXIS 47069, at *1 (D. Kan. June 27, 2007)(Officer used his authority to pull over a woman in her car and assault her). Even if there is speculation that P.E. was influenced by Officer Berry’s uniform or job, that is not enough to prove his act was official. A “modicum of relevant evidence will not rationally support a conviction beyond a reasonable doubt.” *See People v. Sprouse*, 983 P.2d 771, 778 (Colo. 1999). Additionally, verdicts in criminal cases may not be based on guessing, speculation, or conjecture. *Id.*

IV. The holding requested by the Attorney General will not provide adequate guidance for future courts.

The holding requested by the Attorney General:

[W]hen 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.

uses more words than the official misconduct statute, but it does not provide any additional guidance. What does “in the offices that they hold” mean? What does “because of the opportunities afforded” mean?

Officer Berry proposes that the Court adopt the “Scope of Duties” standard because the scope of an official’s duties is clearly definable.

If the Court does adopt the New Jersey “Color of Law” standard, Officer Berry proposes the Court also adopt the “but for” standard that explains the conclusions of the New Jersey courts in the above cited cases.

The Court of Appeals incorrectly applied the New Jersey jurisprudence when it held that the State’s standard would lead to a conclusion that Officer Berry’s purchase of the weapons while they were in evidence storage was an act related to his office. Officer Berry may have known about the weapons because he was a police officer, but he did not have to use the authority of his office to enter into the private sale. Anyone could have purchased title to those weapons regardless of their location. The decision of the Court of Appeals is based on a clearly erroneous interpretation of law and must be reversed.

Conclusion

For the reasons stated and for any just cause apparent to the Court, Officer Berry requests that this Court reverse the decision of the Court of Appeals and find that a deputy's private purchase of weapons held in the evidence locker was not an act related to his office as that phrase is used in §18-8-404, C.R.S. (2018).

Dated: July 1, 2019

Elkus & Sisson, P.C.

/s/ Reid J. Elkus

Reid J. Elkus, #32516

Attorney for Respondent/Cross-Petitioner

CERTIFICATE OF SERVICE

I hereby certify on July 1, 2019, a true and correct copy of the foregoing **RESPONDENT/CROSS-PETITIONER'S REPLY BRIEF** was filed via CCEF and served as follows:

Name of Recipient: Manner of Service: Address:

Jacob R. Lofgren	CCEF	1300 Broadway, 9 th Floor Denver, CO 80203
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/s/ Alissa Creenan