No. 15-1256

In the Supreme Court of the United States

SHANNON NELSON and LOUIS ALONZO MADDEN,

Petitioners,

v.

COLORADO,

Respondent.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Colorado, like many states, imposes various monetary penalties when a person is convicted of a crime. But Colorado appears to be the only state that does not refund these penalties when a conviction is reversed. Rather, Colorado requires defendants to prove their innocence by clear and convincing evidence in a separate civil proceeding to get their money back.

The Question Presented is whether this requirement is consistent with due process.

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BRIEF FOR PETITIONERS

Petitioners Shannon Nelson and Louis Alonzo Madden respectfully request that this Court reverse the judgments of the Colorado Supreme Court.

OPINIONS BELOW

The opinion of the Colorado Supreme Court in *People v. Nelson* is reported at 362 P.3d 1070 (Colo. 2016). Pet. App 1a. The opinion of the Colorado Supreme Court in *People v. Madden* is reported at 364 P.3d 866 (Colo. 2016). Pet. App. 36a. The opinion of the Colorado Court of Appeals in *People v. Nelson* has not been published but is available at 2013 WL 1760903 (Colo. Ct. App. 2013). Pet. App. 50a. The opinion of the Colorado Court of Appeals in *People v. Madden* has not been published but is available at 2013 WL 1760869 (Colo. Ct. App. 2013). Pet. App. 64a.

JURISDICTION

The judgments of the Colorado Supreme Court were entered on December 21, 2015. The Colorado Supreme Court denied timely petitions for rehearing on February 8, 2016. Pet. App. 77a, 78a. The petition for certiorari was filed on April 6, 2016. This Court granted certiorari on September 29, 2016. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "nor shall

any State deprive any person of life, liberty, or property, without due process of law."

Colorado's Exoneration Act, Colo. Rev. Stat. §§ 13-65-101 to -103, is reproduced in the Appendix to this brief.

STATEMENT

Like many states, Colorado requires people convicted of crimes to pay various monetary charges, including fines, court costs, fees, and restitution. But Colorado appears to be the only state that does not refund this money when a conviction is reversed. Colorado keeps the money. The only way a person can get his or her money back is to bring a separate civil action and prove, by clear and convincing evidence, that he or she is actually innocent of the charged offense.

Colorado's scheme is inconsistent with due process.

A. Legal Background

1. A party who has paid money pursuant to a judgment has always been entitled to a refund when the judgment is reversed. *See, e.g.*, *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 145 (1919) ("[A] party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby."); *Baltimore & Ohio R. Co. v. United States*, 279 U.S. 781, 786 (1929) ("The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established.").

Until this case, Colorado followed the traditional rule. *See, e.g.*, *Toland v. Strohl*, 364 P.2d 588, 593 (Colo. 1961) (after reversing conviction, ordering that "the parties be placed in *status quo* by refund to the defendant of the sums paid as fine and costs"); *Atlantic Richfield Co. v. District Ct.*, 794 P.2d 253, 257 (Colo. 1991) (quoting *Arkadelphia Milling*, 249 U.S. at 145); *Berger v. Dixon & Snow, P.C.*, 868 P.2d 1149, 1153 (Colo. Ct. App. 1993) ("a person who has paid money to another in compliance with a judgment which is reversed or set aside is entitled to restitution").

In this case, however, the Colorado Supreme Court abrogated the traditional rule, by construing Colorado's Exoneration Act as the exclusive remedy for obtaining a refund of monetary payments when a conviction is reversed.

The Exoneration Act is entitled "Compensation for Certain Exonerated Persons." Colo. Rev. Stat. §§ 13-65-101 to -103, App. 1a-18a. As its name suggests, the Exoneration Act was intended to provide compensation for certain convicted defendants who are later exonerated of their crimes. The immediate impetus for the Exoneration Act was the case of Robert Dewey, who was convicted of murder in a Colorado state court and who served eighteen years of a life sentence before being exonerated of the crime by DNA evidence. Colorado House Judiciary Committee, Hearing on HB 13-1230, Mar. 7, 2013, at 2:15-

4:35 (statements of Reps. Williams and Pabon) (hereafter cited as House Judiciary Hearing).[1]

The sponsors of the Exoneration Act believed that Colorado owed a moral responsibility to Mr. Dewey and to others who might follow in his footsteps. *Id.* at 0:55-2:13 (Rep. Williams), 4:36-5:16 (Rep. Pabon). The Act's sponsors argued that Colorado should join the federal government, 27 other states, and the District of Columbia by enacting legislation to compensate exonerated defendants like Mr. Dewey. *Id.* at 5:43-5:50 (Rep. Pabon).

The legislation was supported equally by prosecutors and defense lawyers. The Colorado Attorney General's office supported it, as did the Colorado Criminal Defense Bar and the American Civil Liberties Union. *Id.* at 15:33-16:10 (Rep. Pabon). No individual or entity spoke in opposition to the measure.

Throughout the legislative process, the Act's supporters emphasized how few defendants would be eligible for compensation. One of the bill's principal sponsors explained that the Act was not designed to compensate defendants who "get off on a technicality." It was designed only for those who are "actually innocent." *Id.* at 16:15-16:30 (Rep. Pabon). A representative of the Colorado Attorney General's office testified that the legislation was "narrowly defined" and that it would not apply to defendants who "are

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[1] Audio at http://coloradoga.granicus.com/MediaPlayer.php?view_id=21&clip_id=3214. For more information about Robert Dewey's case, see *The National Registry of Exonerations: Robert Dewey* (2015), http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3910.

just acquitted after trial" or those "who have their convictions reversed after appeal based on a procedural or a legal error." Colorado Senate Judiciary Committee, Hearing on HB 13-1230, April 24, 2013, at 1:47:58-1:48:20 (statement of Assistant Attorney General Julie Selsberg).[2]

The General Assembly likewise assumed that the Exoneration Act would apply only in very rare circumstances. The General Assembly projected that compensation under the Act would be awarded to only one defendant every five years. Colorado Legislative Council Staff Fiscal Note, *State and Local Revised Fiscal Impact, HB13-1230*, March 26, 2013, at 2.[3] The Attorney General of Colorado testified that recent experience suggested the Exoneration Act would provide compensation even less often than that. According to the Attorney General, among the 207 defendants whose convictions had been reversed between 2007 and 2012, "none of those people are likely to be in a position to prove actual innocence." House Judiciary Hearing at 51:12-51:30 (statement of Attorney General John Suthers).

The House Judiciary Committee passed the legislation unanimously. The measure passed the full House by a vote of 60-2. The full Senate passed the bill unanimously. The Governor signed the legislation into law on June 5, 2013.

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[2] Audio at http://coloradoga.granicus.com/MediaPlayer.php?view_id=47&clip_id=3854.

[3] http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/825B615B5119309187257A83006D046D?Open&file=HB1230_r1.pdf.

2. The Exoneration Act is entitled "Compensation for Certain Exonerated Persons." The Act provides for compensation only to "a person who has been convicted of a felony," only when that person has been "sentenced to a term of incarceration … and has served all or part of such sentence," and only "upon a finding that the person was actually innocent of the crime for which he or she was convicted." *Id.* § 13-65-102(1)(a).

To recover under the Exoneration Act, a defendant must file a civil action and prove, by clear and convincing evidence, that he or she is "actually innocent" of the crime. *Id.* § 13-65-101(1)(a). The Act specifies that the "court may not reach a finding of actual innocence pursuant to this section merely … [b]ecause the court finds the evidence legally insufficient to support the petitioner's conviction." *Id.* § 13-65-101(1)(b)(I). Nor may the court reach a finding of actual innocence merely "[b]ecause the court reversed or vacated the petitioner's conviction because of a legal error unrelated to the petitioner's actual innocence." *Id.* § 13-65-101(1)(b)(II). Nor may the court reach a finding of actual innocence merely "[o]n the basis of uncorroborated witness recantation alone." *Id.* § 13-65-101(1)(b)(III). Rather, a finding of actual innocence must be based on the petitioner's presentation of "reliable evidence that he or she was factually innocent of any participation in the crime at issue." *Id.* § 13-65-101(1)(a)(II).

Moreover, before a petition may be filed under the Exoneration Act, a defendant must make two additional showings. First, a court must have vacated or reversed all convictions in the case based on either

"reasons other than legal insufficiency of evidence" or "legal error unrelated to the petitioner's actual innocence." *Id.* §§ 13-65-102(2)(a)(I), (II). That is, if the ground for vacatur or reversal is insufficiency of evidence or some other error related to the defendant's actual innocence, the defendant is, paradoxically, *not* eligible to file a petition under the Exoneration Act. Second, there must be no prospect of further prosecution. There must be either "an order of dismissal of all charges," *id.* § 13-65-102(2)(a)(I), or "an acquittal of all charges after retrial," *id.* § 13-65-102(2)(a)(II).

When a petitioner can surmount these hurdles and can prove by clear and convincing evidence that he or she is actually innocent, the Act provides a monetary award of $70,000 for each year he or she was incarcerated, *id.* § 13-65-103(3)(a), an additional $50,000 for each year he or she was incarcerated under a death sentence, *id.* § 13-65-103(3)(a)(I), and $25,000 for each year he or she served on parole, on probation, or as a registered sex offender after a period of incarceration, *id.* § 13-65-103(3)(a)(II). The petitioner is also entitled to other benefits in certain circumstances, including tuition waivers at state colleges, *id.* § 13-65-103(2)(e)(II), and compensation for child support payments, *id.* § 13-65-103(2)(e)(III).

Finally—and most importantly for this case—where a petitioner can prove by clear and convincing evidence that he or she is actually innocent, the Exoneration Act entitles the petitioner to recover "[t]he amount of any fine, penalty, court costs, or restitution imposed upon and paid by the exonerated per-

son as a result of his or her wrongful conviction." *Id.* § 13-65-103(2)(e)(V).

There is no indication that the Colorado General Assembly, by including this last provision in the Exoneration Act, meant to abrogate the traditional rule requiring the refund of money paid pursuant to a judgment when that judgment is reversed. The purpose of the Exoneration Act was to create new rights for exonerated defendants, not to take traditional rights away from non-exonerated defendants. The legislature's goal was to bring Colorado law into alignment with the law of other states, not to set Colorado apart.

Nevertheless, as a result of this case, it is now virtually impossible for most defendants whose convictions are reversed to get refunds of fines, penalties, court costs, and restitution. That is because in this case the Colorado Supreme Court interpreted the statute to provide the exclusive remedy under state law for the refund of monetary payments upon the reversal of a conviction. Pet. App. 14a-20a. Before this case, all criminal defendants were entitled to refunds when their convictions were reversed. Now, however, the only defendants entitled to such refunds are those who can satisfy the stringent requirements of the Exoneration Act. To recover monetary payments after the reversal of a conviction, Colorado defendants must now prove their actual innocence by clear and convincing evidence—the same heavy burden imposed on a defendant seeking the $70,000 per year compensation for his or her period of wrongful incarceration.

This burden is impossible for the vast majority of defendants to satisfy, for several reasons. First, most convictions are reversed because of legal errors, not because the defendant has proven her innocence. The Exoneration Act explicitly provides that reversal on legal grounds is not sufficient to constitute a finding of actual innocence. *Id.* § 13-65-101(1)(b)(II). The Act also explicitly bars a finding of actual innocence merely because a conviction has been reversed for legally insufficient evidence, *id.* 13-65-101(1)(b)(I), so even defendants the state cannot prove guilty are left unable to recover monetary payments after reversal. Even defendants who are acquitted after a reversal cannot recover, because the Act requires defendants to prove their innocence by clear and convincing evidence. *Id.* § 13-65-101(1)(a). It is not enough for a defendant to show that she is not guilty beyond a reasonable doubt.

Second, the Exoneration Act is not available to many defendants. To recover under the Act, a defendant must have been "convicted of a felony," the defendant must have been "sentenced to a term of incarceration," and the defendant must have "served all or part of such sentence." *Id.* § 13-65-102(1)(a). This provision bars many defendants from recovering monetary payments upon the reversal of a conviction, including defendants convicted of misdemeanors, defendants convicted of felonies who did not receive a sentence of incarceration, and defendants who did receive a prison sentence but who were out on bail pending appeal. Monetary payments made pursuant to convictions in such cases, including "any fine, penalty, court costs, or restitution," *id.*

13-65-103(2)(e)(V), can never be recovered by the defendant, even when her conviction is reversed.

Third, even where a defendant can get past these obstacles, the Exoneration Act is a practical barrier to recovery for defendants who merely seek a refund, because the sums involved are typically too small to justify the expense of filing a separate civil action. The only plaintiffs who can realistically be expected to file suit under the Act are people seeking tort-like damages for wrongful incarceration, because such damages can be as large as $120,000 per year. No rational person would file suit under the Exoneration Act to recover a few hundred dollars of court costs, and no rational lawyer would take such a case. Although the Exoneration Act provides "[r]easonable attorney fees for bringing a claim under this section," *id.* § 13-65-103(2)(e)(IV), the Colorado courts have not had any opportunity to consider what would be a reasonable fee for bringing a suit to recover such a small amount, because it appears that no lawyer has ever been foolhardy enough to file one.

The Exoneration Act applies to virtually all monetary payments made "as a result of" a conviction. *Id.* § 13-65-103(2)(e)(V). The Act applies to "any fine," *id.*, so a defendant whose sentence included a fine cannot recover that fine when her conviction is reversed, unless she can prove her innocence by clear and convincing evidence. The Act applies to "any … penalty," *id.*, so a defendant whose sentence included penalties other than fines (such as forfeitures and the wide array of surcharges Colorado imposes on convicted defendants) cannot recover those penalties when her conviction is reversed, unless she can

prove her innocence by clear and convincing evidence. The Act applies to "court costs," *id.*, so a defendant whose conviction entailed the payment of one of the many costs Colorado charges to convicted defendants cannot recover those costs when her conviction is reversed, unless she can prove her innocence by clear and convincing evidence. Finally, the Act applies to "restitution," *id.*, so a defendant whose sentence included the payment of restitution cannot recover that payment when her conviction is reversed, unless she can prove her innocence by clear and convincing evidence. No matter what a payment is called, Colorado keeps that payment despite the reversal of a conviction, except in the very rare case in which a defendant can prove by clear and convincing evidence that she is actually innocent.[4]

Indeed, in the three years since the Exoneration Act went into effect, we are unaware of any cases in which a defendant has sought the refund of monetary payments under the Exoneration Act upon the reversal of a conviction. The Colorado General Assembly and the Colorado Attorney General were correct when they predicted that the Act would afford a remedy to few, if any, defendants whose convictions are reversed.

By construing the Exoneration Act as the exclusive remedy for the refund of monetary payments

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[4] By contrast, the Exoneration Act expressly preserves the traditional right to a refund upon reversal where the *state* would be the beneficiary. When a judgment awarding compensation under the Exoneration Act is reversed on appeal, "the court may take such action as is necessary to recover the amount of any compensation awarded." *Id.* § 13-65-102(7)(d).

upon the reversal of a conviction, the Colorado Supreme Court has denied the overwhelming majority of criminal defendants in Colorado any opportunity to recover such payments when their convictions are reversed.

B. Facts and Opinions Below

1. This case consolidates two cases raising the same issue that were decided on the same day by the Colorado Supreme Court.

a. Petitioner Shannon Nelson was convicted in 2006 of sexual assault offenses she allegedly committed against her children. Pet. App. 1a. In addition to a prison term, Nelson's sentence included several monetary charges that state law imposes only on defendants who are convicted. These were: (1) a $125 "cost" designated for Colorado's Crime Victim Compensation Fund;[5] (2) a $162.50 "surcharge" designated for Colorado's Victims and Witnesses Assistance and Law Enforcement Fund;[6] (3) a "docket fee" of $35;[7] (4) a "time payment fee" of $25;[8] and (5) restitution amounting to $7,845, for a total of $8,192.50. Pet. App. 2a. While these charges have a variety of names, they are all levied only pursuant to a criminal conviction. Defendants who are not convicted do not have to pay.

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[5] *See* Colo. Rev. Stat. § 24-4.1-119(1)(a). The statute currently sets the cost at $163, but it was $125 when Nelson was convicted.

[6] *See* Colo. Rev. Stat. § 24-4.2-104(1)(a)(I). The statute currently sets the surcharge at $163, but it was $162.50 when Nelson was convicted.

[7] *See* Colo. Rev. Stat. § 13-32-105(1).

[8] *See* Colo. Rev. Stat. § 16-11-101.6(1).

Nelson's convictions were reversed on appeal. Pet. App. 2a. On retrial, she was acquitted of all charges. Pet. App. 2a. The Colorado Department of Corrections had already taken $702.10 from her inmate account in partial payment of the amount she no longer owed to the state—$125 for the Crime Victim Compensation Fund, $162.50 for the Victims and Witnesses Assistance and Law Enforcement Fund, and $414.60 for restitution. Pet. App. 2a n.1.

Soon after her acquittal, Nelson filed a motion seeking the refund of this money. Pet. App. 2a. She argued that the failure to return the money would constitute a denial of due process under the federal Constitution. Pet. App. 2a. The trial court concluded that it lacked the authority to order the state to refund the $702.10 it had taken from Nelson. Pet. App. 70a-73a.

b. Petitioner Louis Alonzo Madden was convicted in 2005 of attempting to patronize a prostituted child and attempted sexual assault. Pet. App. 37a. In addition to a prison term, Madden's sentence included: (1) the $125 cost designated for Colorado's Crime Victim Compensation Fund; (2) the $125 surcharge designated for the Victims and Witnesses Assistance and Law Enforcement Fund; (3) the $30 docket fee; (4) the $25 time payment fee; (5) a $2,000 sex offender "surcharge";[9] (6) a $128 fee for genetic testing of sex offenders;[10] (7) a $1,000 special advocate "sur-

[9] *See* Colo. Rev. Stat. § 18-21-103(1).
[10] *See* Colo. Rev. Stat. § 16-11-102.4.

charge";[11] (8) a $45 fee for a "substance abuse assessment";[12] (9) a $25 fee for drug testing; and (10) $910 in restitution, for a total of $4,413. Pet. App. 37a. These charges, like the ones imposed on Nelson, are levied only on defendants who are convicted.

On direct appeal, Madden's conviction for attempted patronizing was reversed, leaving only his conviction for attempted assault. Pet. App. 37a. That conviction was vacated on state collateral review. Pet. App. 37a-38a. The prosecutor chose not to retry the case. Pet. App. 38a. Madden had already paid the state $1,220 in fees and $757.75 in restitution he no longer owed, for a total of $1,977.75. Pet. App. 38a.

Madden moved for a refund of these payments. He alleged that the failure to return the money would constitute a denial of due process under the Fourteenth Amendment. Pet. App. 75a. The trial court granted Madden's motion with respect to the $1,220 in fees, but denied the motion with respect to the $757.75 in restitution. Pet. App. 76a.

2. The Colorado Court of Appeals reversed in both cases. Pet. App. 50a, 64a. The Court of Appeals determined that state law required refunding all the money that Nelson and Madden had paid.

In Nelson's case, the Court of Appeals reasoned that both fees and restitution "must be tied to a valid conviction." Pet. App. 53a. Because Nelson's convic-

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[11] *See* Colo. Rev. Stat. § 24-4.2-104(1)(a)(II)(A). The statute currently sets this surcharge at $1,300, but it was $1,000 when Madden was convicted.

[12] *See* Colo. Rev. Stat. § 18-1.3-209.

tions had been overturned, the court concluded, she was entitled to recover the amounts she had paid. Pet. App. 54a-57a. The Court of Appeals further concluded that Nelson could seek a refund in her pending criminal case without having to file a separate civil action. Pet. App. 57a-62a. The Court of Appeals noted that because it had ruled in Nelson's favor based on state law, it had no need to address her federal constitutional arguments. Pet. App. 62a.

The same panel of the Court of Appeals decided Madden's case on the same day. Pet. App. 64a. In a shorter opinion, the court applied the principles it had just elucidated in Nelson's case to conclude that Madden was also entitled to a refund of the amounts he had paid, and that he did not have to file a separate civil action. Pet. App. 65a-69a.

3. The Colorado Supreme Court reversed in both cases. Pet. App. 1a, 36a.

a. In Nelson's case, the court held that under state law, Colorado's Exoneration Act, Colo. Rev. Stat. §§ 13-65-101 to -103, provides the exclusive remedy for people who seek refunds of monetary payments when their convictions are reversed. Pet. App. 14a-20a. The court explained that the judiciary could authorize refunds from public funds only pursuant to statutory authority, Pet. App. 17a, and that the Exoneration Act is the only statute addressing the circumstances under which courts may authorize such refunds, Pet. App. 19a. Under the Exoneration Act, the court observed, an exonerated person is entitled to a refund of fines, penalties, and restitution, along with other compensation, if she can "prove, by clear and convincing evidence, that she was 'actually inno-

cent.'" Pet. App. 12a (quoting Colo. Rev. Stat. §§ 13-65-101(1)(a) and 13-65-102(1)(a)). Because Nelson had not filed suit under the Exoneration Act, the court concluded that the trial court lacked the authority to order a refund. Pet. App. 20a.

The Colorado Supreme Court then turned to Nelson's contention that due process requires a refund. Pet. App. 20a. The court rejected this contention as well. "We hold that due process does not require a refund of costs, fees, and restitution when a defendant's conviction is reversed and she is subsequently acquitted," the court concluded. Pet. App. 20a. "The Exoneration Act provides sufficient process for defendants to seek refunds of costs, fees, and restitution that they paid in connection with their conviction." Pet. App. 20a.

Justice Hood dissented. Pet. App. 22a. He began by observing that "[b]ecause Nelson was never validly convicted, we presume she is innocent." Pet. App. 24a. Therefore, "just as the State was required to release Nelson from incarceration, it should also be required to release Nelson's money paid as costs, fees, and restitution." Pet. App. 25a. "I struggle," he explained, "to see how we can sanction a system that makes money immediately due without providing for its return when reversible error occurs." Pet. App. 25a.

Justice Hood concluded that the Exoneration Act is not an adequate remedy to comply with the requirements of due process. Pet. App. 28a. First, he explained, "requiring defendants who have never been validly convicted to resort to this Act flips the presumption of innocence. The Act establishes a sep-

arate civil claim that puts the burden on the petitioner to demonstrate her actual innocence by clear and convincing evidence." Pet. App. 28a.

Second, Justice Hood noted that "the Act is not geared toward refunds." Pet. App. 28a. He observed that the Exoneration Act provides, not just refunds, "but also $70,000 for every year of wrongful incarceration." Pet. App. 28a. "But Nelson is not seeking such broad relief; she is merely asking for a return to the status quo ante." Pet. App. 29a.

Third, Justice Hood explained that "the majority ignores the impracticability of bringing a separate civil action." Pet. App. 29a. Because defendants are not entitled to state-appointed counsel to bring claims under the Exoneration Act, "they must retain a lawyer or find one willing to work for free," both of which are unlikely prospects considering "the relatively low amounts available" when defendants merely seek the return of fees. Pet. App. 29a.

Finally, Justice Hood pointed out that the Exoneration Act provides no recourse whatsoever for defendants who have had money withheld due to misdemeanor convictions that have been reversed, because the Act only grants relief to people convicted of felonies. Pet. App. 29a n.1.

For these reasons, Justice Hood "respectfully disagree[d] with the majority's determination that the Exoneration Act provides 'sufficient process'" to comply with the requirements of the Due Process Clause. Pet. App. 29a.

b. The Colorado Supreme Court decided Madden's case on the same day. Pet. App. 36a. In a shorter

opinion, the court applied the principles it had just expounded in Nelson's case. The court again explained that under state law the Exoneration Act is the exclusive means of obtaining a refund of fees and restitution when a conviction is vacated, and that because Madden had not filed suit under the Exoneration Act, the trial court lacked the authority to grant a refund. Pet. App. 44a-45a.

Justice Hood again dissented. Pet. App. 45a.

The Colorado Supreme Court denied rehearing in both cases. Pet. App. 77a, 78a.

SUMMARY OF ARGUMENT

Colorado's scheme is contrary to due process, for several reasons.

First, Colorado improperly places the burden of proof on the defendant, who must prove her innocence to avoid criminal penalties. This flouts the most basic requirement of due process in criminal cases. In order to impose a criminal penalty, the state must prove each element of the crime beyond a reasonable doubt. Colorado has taken money from Nelson and Madden, but neither stands convicted of any crime. The Due Process Clause places the burden of proof on Colorado if it wishes to keep their money, not on Nelson and Madden to get it back.

Second, Colorado's scheme fails the three-part test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), which requires consideration of (1) the private interest affected by the official action, (2) the risk of an erroneous deprivation of that interest, and (3) the government's interest. All three factors indicate that Colo-

rado's scheme is inconsistent with due process. People whose convictions are reversed have an undeniable property interest in obtaining a refund of fines, penalties, costs, and restitution. Colorado's scheme erroneously deprives them of their property in virtually all cases. Colorado has no legitimate interest in keeping this money, because there is no chance that Nelson or Madden will ever be re-prosecuted.

Third, Colorado denies a clear and certain remedy for recovering money the state has wrongfully withheld. The Court has repeatedly held that when a tax has been unlawfully collected, due process requires the state to provide a meaningful opportunity for taxpayers to secure refunds. The same principle applies here. A state cannot require monetary payments for criminal convictions and then, when the convictions are found unlawful, refuse to provide a meaningful procedure for defendants to secure refunds.

Fourth, Colorado's scheme is contrary to traditional practice. When a judgment is reversed, a person who paid money pursuant to that judgment has always been entitled to a refund. In this case, the Colorado Supreme Court abrogated the traditional rule by construing the Exoneration Act as the exclusive remedy for obtaining a refund of monetary payments when a conviction is reversed.

Fifth, there appears to be no other jurisdiction with a scheme like Colorado's. Everywhere else, defendants get their money back as a matter of course when their convictions are reversed.

Finally, it does not matter what these payments are called. When a payment is made pursuant to a

conviction, the payment must be refunded when the conviction is reversed, whether the payment is called a "penalty," a "fine," a "fee," a "surcharge," "restitution," or anything else. Due process does not depend on mere labels.

ARGUMENT

Colorado violates the Due Process Clause by requiring a defendant whose conviction is reversed to prove her innocence by clear and convincing evidence to get a refund of monetary payments entailed by the conviction.

Colorado's scheme is contrary to due process, for several reasons. First, Colorado's scheme flouts due process by placing the burden of proof on the defendant, who must prove her innocence to avoid criminal penalties. Second, Colorado's scheme cannot be squared with the fundamental principles governing procedural due process. Third, Colorado's scheme is contrary to the Court's repeated admonition that the Due Process Clause requires states to provide a clear and certain remedy to recover money the state has wrongfully withheld. Fourth, Colorado's scheme is contrary to traditional practice in both civil and criminal cases, under which, when a judgment is reversed, courts have always ordered the refund of money paid to satisfy the judgment. Finally, Colorado's scheme is contrary to the practice of every other jurisdiction. Everywhere else, defendants get their money back as a matter of course when their convictions are reversed.

These payments go by several different names under Colorado law—they are variously called "fines," "fees," "surcharges," "assessments," and "restitution." But it does not matter what they are called. Under any name, defendants only have to pay them pursuant to a conviction. When a conviction is reversed, money paid pursuant to that conviction must be refunded, just like money paid pursuant to any other judgment that is reversed.

A. Colorado improperly places the burden of proof on the defendant, who must prove her innocence to avoid criminal penalties.

The most basic requirement of due process in criminal cases is that in order to impose a criminal penalty, the state must prove each element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *Jackson v. Virginia*, 443 U.S. 307, 309 (1979). The state may not shift its burden of proof to the defendant. *Francis v. Franklin*, 471 U.S. 307, 313 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). In a criminal case, the Due Process Clause ensures that "a defendant has no obligation to prove his innocence." *District Attorney's Office v. Osborne*, 557 U.S. 52, 87 n.5 (2009) (Alito, J., concurring).

Colorado, by contrast, requires a defendant to prove her innocence. The state has taken $702.10 from Nelson and $1,977.75 from Madden, but neither stands convicted of any crime. To avoid these penalties, Nelson and Madden should not have to prove anything. The Due Process Clause places the

burden of proof on Colorado if it wishes to keep their money, not on Nelson and Madden to get it back.

Indeed, Colorado defendants must not only prove their innocence, but they must prove it by clear and convincing evidence, which the Court has repeatedly recognized as "a heavy burden." *Microsoft Corp. v. i4i Limited Partnership*, 564 U.S. 91, 102 (2011); *Cooper v. Oklahoma*, 517 U.S. 348, 361 (1996). The state may require defendants to satisfy this burden in order to recover in tort for having been wrongfully incarcerated (which is the primary purpose of the Exoneration Act). But the Due Process Clause bars the state from imposing this heavy burden on defendants who do not seek to recover in tort at all, but simply want a refund of monetary payments when their convictions have been reversed.

B. Colorado's scheme is contrary to fundamental principles governing procedural due process.

In determining whether a procedure complies with the Due Process Clause, the Court has often undertaken "[t]he three-part inquiry set forth in *Mathews v. Eldridge*," which requires consideration of "the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used … ; and the Government's interest." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The Court has used the *Mathews* test to assess the adequacy of procedures collateral to the criminal process, such as the procedure set forth in Colorado's Exoneration Act. *See, e.g.*, *Kaley v. United States*,

134 S. Ct. 1090, 1101-04 (2014); *id.* at 1110 n.4 (Roberts, C.J., dissenting); *James Daniel Good Real Property*, 510 U.S. at 53-59.

Here, all three factors indicate that Colorado's scheme is inconsistent with due process.

First, there is no doubt that people whose convictions have been reversed have a property interest in obtaining a refund of fines, penalties, costs, and restitution. It is their money, not Colorado's.

Second, Colorado's scheme poses an extraordinarily high risk—indeed, a near-certainty—of erroneously depriving such people of their property. Most people whose convictions are reversed cannot recover under the Exoneration Act, because they are unable to prove their innocence by clear and convincing evidence.

Third, the government's interest is non-existent. Colorado has no legitimate reason to keep money that rightly belongs to people whose convictions have been reversed. What the state is doing is far more egregious than the asset freezes the Court found unconstitutional in *Luis v. United States*, 136 S. Ct. 1083 (2016). There, the government at least had good reason to expect that the money it sought to restrain would one day be forfeitable by virtue of a criminal conviction. Here, by contrast, the criminal proceedings have already terminated in the defendants' favor, and there is no chance that either defendant will be re-prosecuted. This money will never belong to Colorado.

Colorado's scheme fails the three-part test of *Mathews v. Eldridge*. It serves no purpose other than

allowing the state to keep property that belongs to its citizens.

C. Colorado denies a clear and certain remedy for recovering money the state has wrongfully withheld.

The Due Process Clause requires states to provide a meaningful remedy for the recovery of money the state has wrongfully withheld. The Court's cases on this point have involved unlawfully collected taxes, but the principle applies equally to all money the state has wrongfully withheld, including money collected pursuant to a conviction that was unlawfully obtained.

Where a state has collected a tax that is subsequently determined to have been unlawful, "due process requires a 'clear and certain' remedy" for obtaining a refund. *Reich v. Collins*, 513 U.S. 106, 108 (1994) (quoting *Atchison, Topeka & Santa Fe R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912)). As the Court has repeatedly admonished, "the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional." *McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18, 22 (1990). *See also Carpenter v. Shaw*, 280 U.S. 363, 369 (1930); *Ward v. Love Cty. Board of Comm'rs*, 253 U.S. 17, 24 (1920).

This principle applies equally to monetary payments collected by a state pursuant to a conviction that is subsequently reversed. Just as a state cannot collect a tax and then, when the tax is found unlaw-

ful, refuse to provide a meaningful procedure for taxpayers to secure refunds, a state cannot collect monetary payments for criminal convictions and then, when the convictions are found unlawful, refuse to provide a meaningful procedure for defendants to secure refunds. In both instances, the state is keeping property that belongs to its citizens. In both instances, the failure to provide a meaningful procedure is quite literally a deprivation of property without due process.

Colorado's Exoneration Act is not a "clear and certain" remedy for defendants to obtain refunds of monetary payments the state is wrongfully withholding. A defendant whose conviction has been reversed is entitled to a refund simply upon showing that her conviction has been reversed. Whether she can also prove that she is factually innocent, much less prove her innocence by clear and convincing evidence, is beside the point. Again, while the state may place obstacles in the path of defendants who seek to recover in tort for their wrongful incarceration, it may not place such obstacles in the path of those who merely want their money back when their convictions have been reversed.

Far from being a clear and certain remedy, Colorado's Exoneration Act is a complete barrier to relief in the vast majority of cases. The remedy provided in the Exoneration Act is available only to the very rare defendant who can prove her innocence by clear and convincing evidence. Colo. Rev. Stat. § 13-65-101(a). The Exoneration Act is not available at all to a defendant whose reversed conviction was for a misdemeanor or a defendant who served no prison time.

Id. § 13-65-102(1)(a). The one thing that is clear and certain about the Exoneration Act is that it is unavailable to the vast majority of defendants.

D. Colorado's scheme is contrary to traditional practice, under which the reversal of a judgment has always required the refund of money paid pursuant to that judgment.

"As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994). Where a state abrogates "settled usages and modes of proceeding," *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. 272, 277 (1855), and where "the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Honda Motor*, 512 U.S. at 430.

The traditional rule has always been that when a judgment is reversed, a person who paid money pursuant to that judgment is entitled to receive the money back. The Court has referred to this rule as "the principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby." *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 145 (1919). As the Court explained, "[t]his right, so well founded in equity, has been recognized in the practice of the courts of common law from an early period. Where plaintiff had

judgment and execution, and defendant afterwards sued out a writ of error, it was regularly a part of a judgment of reversal that the plaintiff in error be restored to all things which he ha[d] lost by occasion of the said judgment." *Id.* (citation and internal quotation marks omitted).

This traditional rule is so commonsensical that one can find it stated over and over again. *See, e.g.*, *Chafin v. Chafin*, 133 S. Ct. 1017, 1024 (2013) ("Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal.") (citation and internal quotation marks omitted); *Baltimore & Ohio R. Co. v. United States*, 279 U.S. 781, 786 (1929) ("The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established. And, while the subject of the controversy and the parties are before the court, it has jurisdiction to enforce restitution."); *Northwestern Fuel Co. v. Brock*, 139 U.S. 216, 219 (1891) ("The right of restitution of what one has lost by the enforcement of a judgment subsequently reversed has been recognized in the law of England from a very early period."); *Bank of the United States v. Bank of Washington*, 31 U.S. 8, 17 (1832) ("On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost.").

See also Haebler v. Myers, 30 N.E. 963, 964 (N.Y. 1892) ("Restitution was … exercised by the appellate tribunal as incidental to its power to correct errors,

and hence the court not only reversed the erroneous judgment, but restored to the aggrieved party that which he had lost in consequence thereof."); *Restatement (First) of Restitution* § 74 ("A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside."); William A. Keener, *A Treatise on the Law of Quasi-Contracts* 417 (1893) ("a party who has paid money upon a judgment which has been subsequently reversed, may sue in a count for money had and received to recover the money so paid"); Charles W. Tainter, 2d, *Restitution of Property Transferred Under Void or Later Reversed Judgments*, 9 Miss. L.J. 157, 159-61 (1936) ("Since the acquisition of property by the appellee arose solely by force of the reversed judgment and this judgment was erroneous, the courts require him to restore *in specie* any property of which he gained possession .... [T]he result is expressed as being simply the court undoing its own wrong.").

Criminal cases are no exception. Where the defendant has paid money as a result of a conviction, and the conviction was subsequently reversed, the defendant has always been entitled to have his money refunded. *See, e.g.*, *Gonzalez v. State*, 68 Cal. App. 3d 621, 631 (Cal. Ct. App. 1977) ("[W]here a criminal conviction is set aside with the effect of finally disposing of the action, the defendant is entitled to a return of any fine imposed and there is a duty upon the public entity to which the fine was paid to return the fine on the basis that the retention of such monies will result in unjust enrichment."); *DeCecco v. United States*, 485 F.2d 372, 373-74 (1st Cir. 1973)

(where conviction reversed, ordering refund of fine); *People v. Abramowitz*, 229 N.Y.S. 467, 471 (N.Y. Ct. Spec. Sess. 1928) (same); *Lucas v. Commonwealth*, 41 Pa. C.C. 673, 675 (Pa. Ct. of Comm. Pleas 1914) (after conviction reversed, court orders that "restitution of the fines and costs be made to the defendants"); *United States v. Rothstein*, 187 F. 268, 269 (7th Cir. 1911) (after conviction reversed, agreeing with District Court that defendant "is of right entitled to the restitution of said $200 by him paid as a fine"); *New Jersey Society for Prevention of Cruelty to Animals v. Knoll*, 71 A. 116, 117 (N.J. 1908) (after conviction reversed, court orders refund of $20 fine and $3.60 in costs); *People ex rel. McMahon v. Board of Auditors*, 49 N.W. 921 (Mich. 1879) (unpublished opinion; headnote reads "Where a judgment imposing a fine is reversed after a defendant has paid the fine in order to avoid imprisonment, *mandamus* will lie to the board of auditors to refund the fine."); *Merkee v. City of Rochester*, 13 Hun. 157, 162 (N.Y. Sup. 1878) (after conviction reversed, court orders "that the money which the plaintiff sued to recover was paid under the duress of a void judgment and could be recovered back"); *Devlin v. United States*, 12 Ct. Cl. 266, 272-73 (1876) (after conviction reversed, ordering government to refund $10,000 fine).

Colorado followed this traditional practice until this case. *See, e.g.*, *Toland v. Strohl*, 364 P.2d 588, 593 (Colo. 1961) (after reversing conviction, ordering that "the parties be placed in *status quo* by refund to the defendant of the sums paid as fine and costs"); *Atlantic Richfield Co. v. District Ct.*, 794 P.2d 253, 257 (Colo. 1991) ("'a party against whom an erroneous judgment or decree has been carried into effect is

entitled, in the event of reversal, to be restored by his adversary to that which he has lost thereby'") (quoting *Arkadelphia Milling*, 249 U.S. at 145); *Denver & S.L.R. Co. v. Chicago, B. & Q.R. Co.*, 185 P. 817, 820 (Colo. 1919) ("The law is unquestioned that a party procuring a reversal of an erroneous judgment is entitled to restitution."); *Berger v. Dixon & Snow, P.C.*, 868 P.2d 1149, 1153 (Colo. Ct. App. 1993) ("a person who has paid money to another in compliance with a judgment which is reversed or set aside is entitled to restitution").

Now, however, the Colorado Supreme Court has abrogated this traditional rule by construing the Exoneration Act as the exclusive remedy for obtaining a refund of monetary payments when a conviction is reversed. Colorado has replaced a fair and sensible procedure with one that virtually ensures that defendants will not get their money back. By abrogating the traditional remedy, Colorado has denied defendants due process.

E. Colorado's scheme is contrary to the practice of every other jurisdiction.

There appears to be no other jurisdiction with a scheme like Colorado's. Everywhere else, defendants get their money back as a matter of course when their convictions are reversed. They do not have to prove anything.

Several states mandate this result by statute. *See, e.g.*, N.Y. Penal Law § 60.35(4) ("Any person who has paid a mandatory surcharge, sex offender registration fee, DNA databank fee, a crime victim assistance fee or a supplemental sex offender victim fee

under the authority of this section based upon a conviction that is subsequently reversed … shall be entitled to a refund."); Miss. Code § 99-19-73(12) ("The State Auditor shall establish by regulation procedures for … refunds after appeals in which the defendant's conviction is reversed."); Cal. Penal Code § 1262 ("If a judgment against the defendant is reversed and the case is dismissed, or if the appellate court directs a final disposition of the action in defendant's favor, and defendant has theretofore paid a fine in the case, such act shall also be deemed an order of the court that the fine, including any penalty assessment thereon, be returned to defendant."); Del. Code tit. 11, § 4103(a) ("The State Treasurer shall remit to each person, or to the attorney of such person, who has paid a fine upon a conviction which was later set aside by a court of higher jurisdiction."); Tex. Code Crim. Proc. art. 103.008(a) ("On the filing of a motion by a defendant not later than one year after the date of the final disposition of a case in which costs were imposed, the court in which the case is pending shall correct any error in the costs.").

In other jurisdictions, courts routinely refund monetary payments when convictions are reversed. *See, e.g.*, *Telink, Inc. v. United States*, 24 F.3d 42, 47 (9th Cir. 1994) ("If Telink and Burnup prevail in setting aside their convictions, the wrongly paid fines would be automatically refunded, without requiring a civil action and without regard to the limitations period for civil actions."); *Nakell v. Attorney General*, 15 F.3d 319, 322 (4th Cir. 1994) ("[I]t is the customary procedure of North Carolina courts to refund fines upon receiving notice that a conviction has

been overturned."); *In re Stewart*, 571 F.2d 958, 968 (5th Cir. 1978) (reversing conviction "with directions that the clerk be ordered to repay Stewart the fine he paid"); *United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973) ("Since the district court was empowered to set aside the conviction, it could also correct the unlawful result of the conviction and require the repayment of the money collected as fines. This it could do without requiring the bringing of another action."); *United States v. Beckner*, 16 F. Supp. 2d 677, 678-79 (M.D. La. 1998) (holding that when a conviction is reversed, federal courts have authority to order the refund of restitution collected from the defendant and disbursed to victims); *United States v. Venneri*, 782 F. Supp. 1091, 1094-95 (D. Md. 1991) (same); *People v. Meyerowitz*, 335 N.E.2d 1, 7 (Ill. 1975) ("We hold that the defendants are entitled to a refund of the fines and costs they have paid as a result of their void convictions."); *Bogard v. State*, 450 S.W.3d 690, 692 (Ark. Ct. App. 2014) (after conviction reversed, directing that "any restitution already paid by Bogard to Whitwell be refunded"); *Cooper v. Gordon*, 389 So. 2d 318, 319 (Fla. Ct. App. 1980) (after conviction reversed, court should refund fine, restitution, and fees "as part of its inherent power to correct the effects of its own wrongdoing and restore the petitioner to the *status quo ante*"); *Commonwealth v. McKee*, 38 A.3d 879, 881 (Pa. Super. Ct. 2012) (after conviction reversed, court has authority "to order the return of restitution erroneously paid").

Several courts have held, contrary to the view taken by the Colorado Supreme Court, that due process requires that defendants receive a refund of monetary payments when their convictions are re-

versed. The case often cited as providing the clearest discussion of this issue is *United States v. Lewis*, 342 F. Supp. 833 (E.D. La. 1972), *aff'd*, 478 F.2d 835 (5th Cir. 1973), in which the court observed:

> The Fifth Amendment prohibition against the taking of one's property without due process demands no less than the full restitution of a fine that was levied pursuant to a conviction based on an unconstitutional law. Fairness and equity compel this result, and a citizen has the right to expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith at the time of the prosecution.

Id. at 836.

With the exception of the Colorado Supreme Court, every other court to have addressed this question has agreed with *Lewis* that the Due Process Clause requires a refund of monetary payments when a conviction is reversed. *See Ex parte McCurley*, 412 So. 2d 1236, 1237-38 (Ala. 1982) (quoting this passage from *Lewis* and requiring a refund of fines and costs when a conviction is reversed); *State v. Piekkola*, 241 N.W.2d 563, 565 (S.D. 1976) (quoting this passage from *Lewis* and concluding that failure to refund the defendant's money "offends common sense and severely distorts the image of justice as fairness"), *overruled on other grounds*, *In re Estate of Erdmann*, 447 N.W.2d 356, 359 n.2 (S.D. 1989); *People v. Nance*, 542 N.W.2d 358, 359-60 (Mich. Ct. App. 1995) (quoting this passage from

Lewis and requiring reimbursement of money paid as a result of the defendant's conviction).[13]

The traditional rule is so sensible and fair, and Colorado's scheme is so clearly inconsistent with due process, that no other state requires defendants to prove their innocence to get their money back when their convictions are reversed.

Where a state is an extreme outlier, in failing to provide a procedure that all (or virtually all) other states provide, the Court has often determined that the state is violating the Due Process Clause. *See, e.g.*, *Honda Motor*, 512 U.S. at 427 (Oregon violates due process by denying postverdict judicial review where "[e]very other State in the Union affords post-verdict judicial review"); *Santosky v. Kramer*, 455 U.S. 745, 749-50 & n.3 (1982) (New York violates due process by using a preponderance standard in parental rights termination proceedings, where virtually every other state uses a higher standard). In determining what process is due, it makes obvious sense to use a consensus among the states as a benchmark. Due process is simply "the actual law of

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[13] In a few cases, courts have denied refunds where the person seeking the refund failed to serve the proper parties, *Hooper v. State*, 248 P.3d 748, 751 (Idaho 2011); *State v. Peterson*, 280 P.3d 184, 194 (Idaho Ct. App. 2012); *State v. Owens*, 118 Wash App. 1056, *3 (2003) (unpublished opinion); *State v. Sego*, 1995 WL 454020, *2 (Tenn. Ct. Crim. App. 1995) (unpublished opinion), and where the person seeking the refund obtained a benefit in exchange for the money, *People v. Noel*, 134 P.3d 484, 487 (Colo. Ct. App. 2005); *State v. Parker*, 872 P.2d 1041, 1049 (Utah Ct. App. 1994) (Davis, J., stating the view of the majority on this issue, *see id.* at 1042). Neither of these circumstances is present in our case.

the land." *Burnham v. Superior Ct.*, 495 U.S. 604, 619 (1990) (quoting *Hurtado v. California*, 110 U.S. 516, 528 (1884)). A national consensus is the best evidence of what the law of the land actually is. As the Court has explained, "[a]lthough virtually unanimous adherence to [a particular procedure] may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.'" *Winship*, 397 U.S. at 361-62 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)).

F. A state must refund all monetary payments pursuant to a conviction when that conviction is reversed, regardless of what those payments are called.

The money that Colorado collects pursuant to a conviction goes by a variety of names, including "fines," "fees," "costs," "surcharges," "assessments," "restitution," and so on. But it makes no difference what name Colorado uses for the money it collects. When a conviction is reversed, the state must refund all monetary payments required by the conviction, regardless of what those payments are called. A state cannot evade its constitutional obligations by changing the names it attaches to monetary exactions. *See United States v. United States Coin and Currency*, 401 U.S. 715, 718 (1971) ("From the relevant constitutional standpoint there is no difference between a man who 'forfeits' $8,674 because he has used the money in illegal gambling activities and a man who pays a 'criminal fine' of $8,674 as a result of the same course of conduct. In

both instances, money liability is predicated upon a finding of the owner's wrongful conduct; in both cases, the Fifth Amendment applies with equal force."). The process that is due does not depend on the state's choice of labels.

In its Brief in Opposition, Colorado asserted that the sums it refuses to refund should not be called "penalties." But it does not matter what they are called. They are charges that Colorado imposes only on people who are convicted of crimes. When convictions are reversed, the money no longer belongs to Colorado, whether it is called a "penalty," a "fine," a "fee," a "surcharge," or anything else. This case does not involve the various filing fees that courts impose on all litigants regardless of the outcome of a case. *See, e.g.*, *United States v. Kras*, 409 U.S. 434 (1973). The case involves sums of money that Colorado collects only pursuant to a conviction. When a conviction is reversed, money paid pursuant to that conviction must be refunded, just like money paid pursuant to any other judgment that is reversed.

Below, Colorado argued that payments called "restitution" could not be refunded upon the reversal of a conviction, where, as here, the money had already been disbursed to victims. This argument is incorrect. Money is fungible. Where A owes a sum of money to B, A cannot defend by saying "Sorry, I already spent the money," even where A spent the money for a laudable purpose. Where a state has collected an unlawful tax, the tax must be refunded even if the state has already spent the proceeds. *McKesson*, 496 U.S. at 50 ("the State's interest in

financial stability does not justify a refusal to provide relief").

Moreover, it hardly needs saying that the reversal of a conviction means the defendant stands in the same position with respect to the alleged victims of a crime as everyone else in the world who was never charged with the crime. The defendant is no more responsible for compensating the victims than anyone else is.

Of the $702.10 that Colorado owes Shannon Nelson, the state has apparently already disbursed $414.60 to alleged victims. Of the $1,977.75 that Colorado owes Louis Madden, the state has apparently already disbursed $757.75 to alleged victims. Now that neither Nelson nor Madden stands convicted, whether the state has the right to recoup this money from the victims,[14] and whether that is a right the state would wish to exercise, are issues between the state and the victims. They have no bearing on whether the state owes this money to Nelson and Madden. A state cannot avoid its debt to one citizen by placing money in the possession of another.

[14] Where a defendant is awarded compensation under the Exoneration Act, victims may keep the restitution payments they have already received. Colo. Rev. Stat. § 13-65-103(2)(e)(V). This provision does not govern in the much more common case, such as this case, where a defendant has not been awarded compensation under the Exoneration Act.

CONCLUSION

The judgments of the Colorado Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

Colo. Rev. Stat. §§ 13-65-101 to 13-65-103

Article 65
Compensation for Certain Exonerated Persons

§ 13-65-101. Definitions

As used in this article, unless the context otherwise requires:

(1)

(a) "Actual innocence" means a finding by clear and convincing evidence by a district court pursuant to section 13-65-102 that a person is actually innocent of a crime such that:

(I) His or her conviction was the result of a miscarriage of justice;

(II) He or she presented reliable evidence that he or she was factually innocent of any participation in the crime at issue;

(III) He or she did not solicit, pursuant to 18-2-301, C.R.S., the commission of the crime at issue or any crime factually related to the crime at issue;

(IV) He or she did not conspire, pursuant to 18-2-202, C.R.S., to commit the crime at issue or any crime factually related to the crime at issue;

(V) He or she did not act as a complicitor, pursuant to 18-1-603, C.R.S., in the commission of the crime at issue or any crime factually related to the crime at issue;

(VI) He or she did not act as an accessory, pursuant to 18-8-105, C.R.S., in the commission of the crime at issue or any crime factually related to the crime at issue; and

(VII) He or she did not attempt to commit, pursuant to 18-2-101, C.R.S., the crime at issue or any crime factually related to the crime at issue.

(b) A court may not reach a finding of actual innocence pursuant to this section merely:

(I) Because the court finds the evidence legally insufficient to support the petitioner's conviction;

(II) Because the court reversed or vacated the petitioner's conviction because of a legal error unrelated to the petitioner's actual innocence or because of uncorroborated witness recantation alone; or

(III) On the basis of uncorroborated witness recantation alone.

(c) As used in this subsection (1), "reliable evidence" may include but is not limited to exculpatory scientific evidence, trustworthy eyewitness accounts, and critical physical evidence.

(2) "Custodial child" means any individual:

(a) Who was conceived or adopted prior to the date upon which the exonerated person was incarcerated for the act or offense that served as the basis for his or her conviction, which conviction and incarceration is the subject of his or her petition;

(b) Whose principal residence is the home of an exonerated person;

(c) Who receives more than half of his or her financial support from the exonerated person each year; and

(d) Who is either:

(I) Less than nineteen years of age at the end of the current year; or

(II) Less than twenty-four years of age at the end of the current year and a full-time student.

(3) "Exonerated person" means a person who has been determined by a district court pursuant to section 13-65-102 to be actually innocent.

(4) "Immediate family member" means a spouse, a parent, a child, a grandparent, or a sibling of a deceased person who would be eligible for relief pursuant to section 13-65-102 if he or she were alive. The provisions of article 11 of title 15, C.R.S., shall govern which immediate family member or members have proper standing to act as a petitioner.

(5) "Incarceration" means a person's custody in a county jail or a correctional facility while he or she serves a sentence issued pursuant to a felony conviction in this state or pursuant to the person's adjudication as a juvenile delinquent for the commission of one or more offenses that would be felonies if committed by a person eighteen years of age or older. For the purposes of this section, "incarceration" includes placement as a juvenile to the custody of the state department of human services or a county department of social services pursuant to such an adjudication.

(6) "Personal financial management instruction course" means a personal financial management instruction course that has been approved by the United States trustee's office pursuant to 11 U.S.C. sec. 111.

(7) "Petition" means a petition for compensation based on actual innocence filed pursuant to the provisions of section 13-65-102.

(8) "Petitioner" means a person who petitions for relief pursuant to section 13-65-102. "Petitioner" includes the immediate family members of a deceased person who would be eligible for relief pursuant to section 13-65-102 if he or she were alive.

(9) "Qualified health plan" means a health plan that satisfies the definition of a qualified health plan set forth in the federal "Patient Protection and Affordable Care Act", P.L. 111-148, 42 U.S.C. 18021(a)(1).

(10) "State's duty of monetary compensation" means the total amount of monetary compensation owed by the state to an exonerated person.

§ 13-65-102. Process for petitioning for compensation--eligibility to petition--actual innocence required--jurisdiction

(1)

(a) Notwithstanding the provisions of article 10 of title 24, C.R.S., a person who has been convicted of a felony in this state and sentenced to a term of incarceration as a result of that conviction and has served all or part of such sentence, or an immediate family member of such person, may be eligible for compensation as set forth in this article upon a

finding that the person was actually innocent of the crime for which he or she was convicted.

(b) A petition for compensation based on actual innocence filed pursuant to this section is a civil claim for relief.

(2) A petition may be filed pursuant to this section only:

(a) When no further criminal prosecution of the petitioner for the crimes charged, or for crimes arising from the same criminal episode in the case that is the subject of the petition, has been initiated by the district attorney or the attorney general and subsequent to one of the following:

(I) A court vacating or reversing all convictions in the case based on reasons other than legal insufficiency of evidence or legal error unrelated to the petitioner's actual innocence and following an order of dismissal of all charges; or

(II) A court vacating or reversing all convictions in the case based on reasons other than legal insufficiency of evidence or legal error unrelated to the petitioner's actual innocence and following an acquittal of all charges after retrial; and

(b) Either:

(I) If the conditions described in paragraph (a) of this subsection (2) are met on or after June 5, 2013, not more than two years after said conditions are met; or

(II) If the conditions described in paragraph (a) of this subsection (2) are met before June 5, 2013, not more than two years after June 5, 2013.

(3) The district court shall not declare a person to be actually innocent unless, based on evidence supporting the petitioner's allegation of innocence, including but not limited to an analysis of the person's DNA profile, the court determines that:

(a) The person committed neither the act or offense that served as the basis for the conviction and incarceration that is the subject of the petition, nor any lesser included offense thereof; and

(b) The person meets the definition of actual innocence in section 13-65-101(1).

(4)

(a) A petitioner is not eligible for compensation pursuant to this article if:

(I) He or she does not meet the definition of actual innocence in section 13-65-101(1);

(II) He or she committed or suborned perjury during any proceedings related to the case that is the subject of the claim; or

(III) To avoid prosecution in another case for which the petitioner has not been determined to be actually innocent, he or she pled guilty in the case that served as the basis for the conviction and incarceration that is the subject of the petition.

(b) Notwithstanding subparagraphs (I) to (III) of paragraph (a) of this subsection (4), conduct described in said subparagraphs shall not include a confession or an admission that was later determined by a court of competent jurisdiction, or by

stipulation of the parties, to be false or coerced by any governmental agent.

(5)

(a) A petitioner shall file his or her petition in the district court in the county in which the case originated, to the district court judge who presided over the original proceeding if such judge is available; except that, if either party objects to such judge presiding over this civil claim for relief, then another district judge of the district court shall preside over the matter.

(b) The petition shall name the state of Colorado as the respondent. The attorney general and the district attorney of the judicial district in which the case originated shall each have a separate and concurrent authority to intervene as parties to a petition, and a copy of the petition shall be served on the attorney general and the district attorney.

(c) A petition shall contain a recitation of facts necessary to an understanding of the petitioner's claim of actual innocence. The petition may be supported by DNA evidence, if applicable, expert opinion, previously unknown or unavailable evidence, and the existing court record. The petitioner shall attach to the petition:

(I) A copy of any expert report relied upon by the petitioner to support his or her claim of actual innocence;

(II) Any documentation supporting the recitation of facts in the claim;

(III) A record from the county jail, state correctional facility, or other state facility documenting the amount of time that the petitioner was incarcerated; and

(IV) A sworn affidavit of the petitioner asserting his or her actual innocence as defined in section 13-65-101(1).

(d) Upon receipt of a petition, the attorney general and the district attorney shall each have sixty days to file a response in the district court. A joint response may be filed. The court may grant the responding party, for good cause shown, no more than one extension of time, not exceeding forty-five days, in which to file a response. The response shall contain a statement that:

(I) Based upon the petition and verifiable and substantial evidence of actual innocence, no further criminal prosecution of the petitioner for the crimes charged can or will be initiated by the district attorney or the attorney general, that no questions of fact remain as to the petitioner's actual innocence, and that the petitioner is eligible to seek compensation under the provisions of this section; or

(II) The responding party contests the nature, significance, or effect of the evidence of actual innocence, the facts related to the petitioner's alleged wrongful conviction, or whether the petitioner is eligible to seek compensation under the provisions of this section. The response shall include a recitation of facts necessary to an understanding as to why the petition is being contested.

(e) If the responding party contests the actual innocence of the petitioner, the district court may order that the responding party be allowed to retest any evidence at issue in the claim if such evidence remains to be tested and testing such evidence will not consume the remainder of the sample.

(f)

(I) If a petition is contested, the petitioner shall ensure that the district court has, or has available, the transcript from the original trial if the petitioner was convicted at trial, the post-conviction motion or appeal that resulted in a dismissal of the case that is the subject of the petition and the transcript of any hearings associated with such motion or appeal; and any other pleadings or transcripts from proceedings that the petitioner seeks the district court to consider.

(II) The district court shall use any transcripts that are within the court records for the judicial district of any proceeding involving the case that is the subject of the petition that the petitioner or the respondent wants the district court to consider.

(g) Except as otherwise provided in this section, the Colorado rules of civil procedure shall apply to petitions filed pursuant to this section. The district court may consider any relevant evidence regardless of whether it was admissible in, or excluded from, the criminal trial in which the petitioner was convicted. No evidence shall be excluded on grounds that it was seized or obtained in violation of the United States constitution or the state constitution. The district court may consider the ongo-

ing investigation and prosecution of any other individual for the crimes committed when determining the timing and scope of the hearing if the claim is uncontested or the trial if the claim is contested.

(6) As soon as practicable given the unique circumstances of claims filed pursuant to this section, the district court shall act as follows:

(a) Upon receipt of an uncontested response to a petition, the district court shall issue a final order on the petition, finding that the petitioner is actually innocent. If the district court issues a final order pursuant to this paragraph (a), the district court shall include directions to the state court administrator to act as described in section 13-3-114.

(b) Upon receipt of a response contesting the petitioner's declaration of actual innocence or his or her eligibility for compensation regardless of petitioner's claim of actual innocence, or both, the district court shall set the matter for a trial to the district court or, at the written election of either party, to a trial to a jury of six, at which trial the burden shall be on the petitioner to show by clear and convincing evidence that he or she is actually innocent of all crimes that are the subject of the petition, and that he or she is eligible to receive compensation pursuant to this article. A trial to a jury of six must result in a unanimous verdict. Following a trial to the district court, the court shall issue a final order on the petition, which order shall include findings of fact as to whether the petitioner has established by clear and convincing evidence that he or she is actually innocent and whether the

petitioner is eligible for compensation under this article. If the court finds that the petitioner is actually innocent and eligible for compensation pursuant to this article, the district court shall issue a final order awarding the petitioner compensation pursuant to section 13-65-103. Upon a finding by a jury of actual innocence, the district court shall also issue an order awarding the petitioner compensation pursuant to section 13-65-103.

(7)

(a) Either party has a right to an appeal.

(b) If the petitioner appeals the amount of compensation awarded, the state court administrator shall not delay in paying the petitioner pursuant to the directions of the district court while the appeal is pending.

(c) If the attorney general or a district attorney appeals the outcome of the trial described in subsection (6) of this section, the state court administrator shall not delay in paying the petitioner pursuant to the directions of the district court while the appeal is pending.

(d) In the event that the attorney general or district attorney prevails in an appeal, the court may take such action as is necessary to recover the amount of any compensation awarded to the petitioner pursuant to section 13-65-103.

§ 13-65-103. Compensation for certain exonerated persons--monetary compensation--financial literacy training--penalty for lack of a qualified health plan--expungement of records--damages awarded in civil actions

(1) Except as otherwise provided in this article, a district court shall direct the state court administrator to compensate an exonerated person, or an immediate family member of an exonerated person, who is determined by a district court pursuant to section 13-65-102 to be actually innocent and eligible to receive compensation pursuant to this article.

(2) A district court that directs the state court administrator to compensate an exonerated person or an immediate family member of an exonerated person pursuant to this section shall reduce the directions to writing and include within the directions:

(a) The exonerated person's name;

(b) The date upon which the order is issued;

(c) The felony or felonies, if any, of which the exonerated person has been exonerated and each conviction or adjudication of the exonerated person, if any, that has been vacated or reversed;

(d) The date upon which the exonerated person was convicted or adjudicated and the dates during which the exonerated person was incarcerated as a result of such conviction or adjudication;

(e) A statement that the exonerated person, or the immediate family member of the exonerated person, is entitled to compensation from the state, which compensation shall include:

(I) An award of monetary compensation, as described in subsection (3) of this section;

(II) Tuition waivers at state institutions of higher education for the exonerated person and for any children and custodial children of his or hers who were conceived or legally adopted before the exonerated person was incarcerated or placed in state custody for the offense of which he or she has been exonerated, as described in section 23-1-132, C.R.S.; except that:

(A) No other immediate family members of the exonerated person shall be eligible for such tuition waivers; and

(B) Notwithstanding any other provision of this section, neither an exonerated person nor a child or custodial child of an exonerated person shall be eligible for a tuition waiver pursuant to this subparagraph (II) unless the exonerated person was wrongfully incarcerated for at least three years.

(III) Compensation for child support payments owed by the exonerated person that became due during his or her incarceration or placement in state custody, and interest on child support arrearages that accrued during his or her incarceration or placement in state custody but which have not been paid;

(IV) Reasonable attorney fees for bringing a claim under this section; and

(V) The amount of any fine, penalty, court costs, or restitution imposed upon and paid by the exonerated person as a result of his or her wrongful

conviction or adjudication. This subparagraph (V) shall not be interpreted to require the reimbursement of restitution payments by any party to whom the exonerated person made restitution payments as a result of his or her wrongful conviction or adjudication.

(f) A statement notifying the person and the state court administrator that, pursuant to section 24-30-209(4), C.R.S., the exonerated person is required to complete a personal financial management instruction course before the state court administrator may issue to the exonerated person more than one annual payment of monetary compensation;

(g) A statement notifying the exonerated person and the state court administrator that, pursuant to section 13-3-114, in each year in which an exonerated person receives any annual payment from the state court administrator, the exonerated person's annual payment shall be reduced by ten thousand dollars if the exonerated person fails to present to the state court administrator a policy or certificate showing that the exonerated person has purchased or otherwise acquired a qualified health plan for himself or herself and his or her dependents that is valid for at least six months.

(3)

(a) Except as limited by the provisions of this article, an exonerated person shall receive monetary compensation in an amount of seventy thousand dollars for each year that he or she was incarcerated for the felony of which he or she has been exonerated. In addition to this amount, an exonerat-

ed person shall receive compensation in an amount of:

(I) Fifty thousand dollars for each year that he or she was incarcerated and sentenced to execution pursuant to part 12 of article 1.3 of title 18, C.R.S.; and

(II) Twenty-five thousand dollars for each year that he or she served on parole, on probation, or as a registered sex offender after a period of incarceration as a result of the felony of which he or she has been exonerated and not for any other criminal offense.

(b) Except as limited by the provisions of this article, in addition to the amount described in paragraph (a) of this subsection (3), an exonerated person shall receive compensation in a prorated amount that is proportionate to the length of:

(I) Each partial year that he or she was incarcerated or placed in state custody;

(II) Each partial year that he or she was incarcerated and sentenced to execution pursuant to part 12 of article 1.3 of title 18, C.R.S.; and

(III) Each partial year that he or she served on parole, on probation, or as a registered sex offender after a period of incarceration as a result of the felony of which he or she has been exonerated and not for any other criminal offense.

(4) A court that directs the state court administrator to compensate an exonerated person or an immediate family member of an exonerated person shall submit copies of the directions to:

(a) The exonerated person or immediate family member of the exonerated person;

(b) The state court administrator;

(c) The attorney general;

(d) The district attorney of the judicial district in which the case originated;

(e) The state department of corrections;

(f) The state department of labor and employment;

(g) The state department of revenue; and

(h) The Colorado commission on higher education.

(5) Notwithstanding any provision of this article to the contrary, a court shall not direct the state court administrator to compensate any exonerated person or immediate family member of an exonerated person for any period of incarceration during which the person was concurrently serving a sentence for an offense of which he or she has not been exonerated.

(6) The amount of monetary compensation awarded to an exonerated person pursuant to this section shall not be subject to:

(a) Any cap applicable to private parties in civil lawsuits; or

(b) Any state income tax, except as to those portions of the judgment awarded as attorneys' fees for bringing a claim under this section as described in section 39-22-104(4)(q), C.R.S.

(7)

(a) A court that directs the state court administrator to compensate an exonerated person or an im-

mediate family member of an exonerated person shall order all records relating to the exonerated person's wrongful conviction or adjudication to be expunged as if such events had never taken place and such records had never existed. The court shall direct such an expungement order to every person or agency that may have custody of any part of any records relating to the exonerated person's wrongful conviction or adjudication.

(b) If a court issues an expungement order pursuant to paragraph (a) of this subsection (7), a court, law enforcement agency, or other state agency that maintains records relating to the exonerated person's wrongful conviction or adjudication shall physically seal such records and thereafter treat the records as confidential. Records that have been sealed pursuant to this subsection (7) shall be made available to a court or a law enforcement agency, including but not limited to a district attorney's office or the attorney general, upon a showing of good cause.

(8)

(a) A court that directs the state court administrator to compensate an exonerated person or an immediate family member of an exonerated person shall reduce the exonerated person's award of monetary compensation, as described in paragraph (b) of this subsection (8), if, prior to the issuance of the award:

(I) The exonerated person prevails in or settles a civil action against the state or against any other government body in a civil action concerning the

same acts that are the bases for the petition for compensation; and

(II) The judgment rendered in the civil action or the settlement of the civil action includes an award of monetary damages to the exonerated person.

(b) Under the circumstances described in paragraph (a) of this subsection (8), the court shall reduce an exonerated person's award of monetary compensation by an amount that is equal to the amount of monetary damages that the exonerated person is awarded and collects in the civil action; except that a court shall not offset any amount exceeding the total amount of monetary compensation awarded to the exonerated person pursuant to this section.

(9)

(a) Except when procured by fraud, a court's finding that a person is actually innocent and eligible for compensation pursuant to this article shall be deemed a final and conclusive disposition of the matter of the exonerated person's wrongful incarceration or placement in state custody.

(b) A court's finding that a person is actually innocent and eligible for compensation pursuant to this article shall not be interpreted to limit the person's ability to pursue an action for damages against an entity that is not an employee, agent, or agency of the state government.