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 RESPONDENT

CYNTHIA H. COFFMAN
Attorney General

FREDERICK R. YARGER
Solicitor General
Counsel of Record

Office of the Colorado
Attorney General
1300 Broadway
10th Floor
Denver, Colorado 80203
Fred.Yarger@coag.gov
(720) 508-6168

L. ANDREW COOPER
Deputy Attorney General

CHRISTINE C. BRADY
Senior Assistant
Attorney General

JILLIAN J. PRICE
BROCK J. SWANSON
Assistant Attorneys
General

ABBIE CZIOK
Attorney,
Attorney General's
Fellowship Program

Counsel for Respondent

December 14, 2016

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Does a criminal defendant have a constitutional right to an automatic, unqualified monetary judgment against the State for amounts paid pursuant to a conviction that is later invalidated?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT

Petitioners were convicted of sexual crimes against children, sentenced to a term of imprisonment, and ordered to pay various costs and fees. They were also ordered to pay restitution for the losses their victims suffered. Although they had the right to do so, they did not contest their restitution orders.

While in prison, Petitioners paid a portion of their costs, fees, and restitution. Their convictions were subsequently invalidated on direct appeal or in post-conviction proceedings, and they sought refunds for the amounts they had paid. The state courts denied them relief because no Colorado statute grants automatic refunds in these circumstances; instead, state law provides full compensation for criminal defendants who are innocent of wrongdoing.

Here, Petitioners assert that the Due Process Clause grants criminal defendants an automatic right to compensation for monetary amounts paid pursuant to convictions that are later overturned.

I. Factual and procedural background.

Petitioner Nelson. Nelson was charged with subjecting her four minor children to aggravated incest, sexual assault, and child abuse over a five-year period. *Nelson*, R. Court File Vol. 1 at 32–42. The arrest-warrant affidavit alleged that the children had disclosed the abuse in recorded forensic interviews. *Id*. at 30.

Nelson was appointed counsel. *Id*. at 131, 137. At the preliminary hearing, the court found probable cause on all counts. J.A. 2. After a year of motions

hearings and discovery, the court held a nine-day trial that included the testimony of 14 witnesses and the child-victims. J.A. 3–5. The forensic interviews, which were played to the jury, provided evidence that Nelson had forced her children to engage in sexual acts and had beaten them. *See Nelson*, R. People's Ex. 11–12, 14, 16–17, Env. 1. The jury convicted Nelson on five counts of sex assault, aggravated incest, and child abuse. J.A. 6–7.

The court sentenced Nelson to a prison term and ordered her to pay court costs, fees, and restitution. J.A. 8. The purpose of the restitution order was to pay for mental health therapy for Nelson's children. J.A. 29–31; *Nelson*, R. Court File Vol. 2 at 323–37. Nelson did not contest the order,[1] and while she was incarcerated, the prison withheld about $700[2] from her inmate account to pay toward her balance. J.A. 44.

---

[1] Restitution compensates a victim for pecuniary loss that was proximately caused by an offender's conduct and operates as a final civil judgment in favor of the State and any victim. COLO. REV. STAT. § 18-1.3-603(3)(a), (4)(a). Defendants are entitled to notice and an opportunity to contest the imposition of restitution. *People v. Mata*, 56 P.3d 1169, 1176 (Colo. App. 2002). The prosecution must prove by a preponderance of the evidence that the defendant proximately caused the victim's losses. *People v. Pagan*, 165 P.3d 724, 729 (Colo. App. 2006).

[2] Nelson paid $125 to the victim compensation fund, $162.50 to the victim's assistance fund, $35 in court costs, and a $25 time payment fee. J.A. 39. These amounts were assessed to provide compensation for and services to victims and witnesses and to defray the costs of the judicial system. Pet. App. 5a–11a, 41a–42a (describing the statutory authority for various monetary assessments and how they must be allocated). Nelson paid $390.67 in restitution. J.A. 39.

After Nelson was convicted, the prosecution charged Nelson's brother and his wife with sexually assaulting the children in concert with Nelson. Those cases proceeded separately. *Nelson*, R. Court File Vol. 3 at 468, 481–84, 487. Nelson's brother pleaded guilty in *People v. Roy Nelson*, No. 06 CR 2357; he did not appeal. *Nelson*, R. Court File Vol. 3 at 487. His wife's jury-trial conviction, which resulted in a sentence of 32 years to life in prison, was affirmed on appeal. *Id.*; *People v. Lacie Dawn Nelson*, No. 09CA0958, 2012 WL 1883813 (Colo. App. May 24, 2012), *cert. denied*, No. 12SC468, 2012 WL 5384099 (Colo. Nov. 5, 2012).

On direct appeal of Nelson's conviction, the Colorado Court of Appeals reversed and remanded for a new trial because the trial court had allowed the prosecution to call an unendorsed expert witness. *People v. Gonser*, No. 06CA1023, 2009 WL 952492 (Colo. App. Apr. 9, 2009). On retrial, which occurred seven years after the alleged crimes took place, Nelson was acquitted on all counts, and the court entered a judgment of acquittal. J.A. 36.

Eight months later, Nelson filed a motion in her criminal case asking for return of the funds withheld from her inmate account. J.A. 37; *Nelson*, R. Court File Vol. 4 at 910. The trial court denied Nelson's motion, concluding that none of the funds had been "wrongfully taken" because at the time they were withdrawn from her inmate account, Nelson had been convicted and her conviction had not yet been reversed. The court found that the restitution had already been disbursed to pay for the children's mental health therapy and concluded that it lacked authority to order the prosecution to repay those amounts. Pet. App. 71a–73a.

Petitioner Madden. Madden was charged with attempted patronizing of a prostituted child, attempted third-degree sexual assault, and attempted sexual assault on a child. *Madden*, R. Court File Vol. 1 at 6. The arrest-warrant affidavit alleged that Madden propositioned a 14-year-old girl who was a passenger on the trolley he was driving, then pinned her against a window and sexually assaulted her. *Id*. at 11. When he was arrested, he allegedly confessed to the crime. *Id*.

Madden was appointed counsel. *Madden*, R. Court File Vol. 1 at 24. At the preliminary hearing, the trial court found probable cause on the first two counts but dismissed the third count. J.A. 46. After a three-day trial at which the victim and several witnesses testified, Madden was convicted and sentenced to prison. He was ordered to pay costs, fees, and surcharges, as well as $910 in restitution to cover the victim's mental health therapy expenses. J.A. 56–61. He did not challenge the restitution order and ultimately paid approximately $2,000[3] toward his total balance. J.A. 78.

On direct appeal, the court of appeals affirmed the conviction for attempted patronizing but reversed the attempted sexual assault conviction. *People v. Madden,* 87 P.3d 153 (Colo. App. 2003). The Colorado Supreme Court came to the opposite conclusion, affirming Madden's attempted sexual assault conviction but reversing the attempted patronizing count. *People v. Madden,* 111 P.3d 452 (Colo. 2005). On remand, the

---

[3] Madden paid $1,000 as a special advocate surcharge, $95 to the victim's assistance fund, $125 to the victim compensation fund, and $757.75 in restitution. J.A. 78–79.

trial court imposed a three-year prison sentence with credit for time served. J.A. 66–67.

Madden then filed a post-conviction motion, alleging ineffective assistance of trial counsel. J.A. 68. After a hearing, the court found that significant, properly admitted evidence pointed to Madden's guilt. J.A. 74. But the court reversed the conviction because Madden's attorney committed various errors during trial, including introducing damaging testimony about Madden's previous sexual behavior. J.A. 70–72. Madden had by then served his sentence of incarceration, and the district attorney elected not to appeal the order or retry the case. J.A. 75.

Madden requested a refund of the approximately $2,000 in costs, fees, and restitution that he had paid. J.A. 77–80. After a hearing, the trial court ordered that the costs and fees be refunded, but denied the motion as to restitution, which had already been distributed to pay for counseling services for the victim. Pet. App. 75a–76a.

II. Decisions of the Colorado Court of Appeals and Supreme Court.

Colorado Court of Appeals. Both Petitioners appealed the denial, or partial denial, of their refund motions. The court of appeals reversed in both cases.

In *Nelson*, the court of appeals held that a defendant whose conviction is overturned on appeal is entitled to a return of monetary amounts paid pursuant to that conviction, if the defendant is subsequently acquitted or the prosecution declines to retry the case. Pet. App. 50a. The court concluded that this compensation must include restitution that "has

already [been] disbursed to third parties." *Id*. at 54a, 61a. Although the court acknowledged that its decision implicated public policy issues within the province of the legislature, it nonetheless remanded the case for the trial court to "consider on the merits" Nelson's motion for refund. *Id*. at 62a–63a.

In *Madden*, the court of appeals adhered to the *Nelson* decision, explaining that its holding applied both to convictions overturned on direct appeal and to convictions invalidated during post-conviction proceedings. Pet. App. 67a.

Colorado Supreme Court. The Colorado Supreme Court reversed in both cases.[4] Pet. App. 1a.

In *Nelson*, the majority reasoned that "[j]ust as [a] court must follow statutory commands in imposing and disbursing fees, the court may authorize refunds from public funds only pursuant to statutory authority." Pet. App. 17a. The court explained that "[n]one of the statutes governing costs, fees, and restitution address whether a court may withdraw money from public funds to refund money that a defendant has already paid." *Id*. at 19a. Reading those statutes to permit such refunds, the court explained, would "intrude on the legislature's powers." *Id*. at 17a.

---

[4] The People sought certiorari to review only the portions of the court of appeals decisions involving restitution. It did not seek review of the portions upholding, or ordering, refunds of costs and fees. *People v. Nelson*, No. 13SC495, People's Pet. for Writ of Cert. (July 26, 2013); *People v. Madden*, No. 13SC496, People's Pet. for Writ of Cert. (Colo. Aug. 5, 2013). The Colorado Supreme Court nonetheless reviewed all portions of the court of appeals decisions.

The court observed, however, that a separate Colorado statute does provide a mechanism for criminal defendants to seek reimbursement: a defendant may obtain compensation through the Colorado Exoneration Act, which "specifically addresses when a defendant who was wrongfully convicted may seek a refund of costs, fees, and restitution." Pet. App. 17a. Because Nelson did not file a claim under the Exoneration Act, "the trial court lacked the authority to order a refund of Nelson's costs, fees, and restitution based on her motion following her criminal trial." *Id*. at 20a.

The majority rejected Nelson's claim that "due process required an automatic refund of costs and fees that she had paid." Pet. App. 20a. The court explained that the money withheld from Nelson's prison account "was not wrongfully withheld because a conviction supported the imposition of costs, fees, and restitution" and that "Nelson was obligated to pay only while her conviction was in place[,] and this obligation was imposed pursuant to a valid statute." *Id*. at 21a. Because "[d]ue process does not require a defendant to be compensated automatically for the time she spent incarcerated," it likewise "does not require an automatic refund." *Id*. at 22a. The compensation mechanism made available by the Exoneration Act, the court held, "provides sufficient process for defendants to seek a refund of costs, fees, and restitution that they incurred while a conviction was in place." *Id*. at 22a.

One justice dissented, arguing that Colorado trial courts have authority to order refunds through the doctrine of "ancillary jurisdiction." Pet. App. 30a. He further contended that the Exoneration Act does not

provide sufficient process for defendants in Nelson's situation because the Act "is not geared toward refunds" and "provides a different remedy" from the automatic compensation Nelson was seeking. *Id*. at 28a–29a.

In *Madden*, the majority adhered to its companion opinion in *Nelson*. Pet. App. 39a. It did not address any due process arguments, because Madden did not raise them. The same justice who dissented in *Nelson* wrote a dissent in *Madden*, reiterating his reasoning.

III. The Colorado Exoneration Act.

Colorado's Exoneration Act provides a civil remedy through which exonerated persons may obtain compensation from the State. COLO. REV. STAT. § 13-65-101. The Act is funded by general-fund appropriations allocated to the judicial department. *See* 2013 Colo. Sess. Laws 2426–27.

To establish exoneration, the district court must find that the defendant was actually innocent of the relevant crimes and did not participate in them. COLO. REV. STAT. § 13-65-101(1)(a)(I)–(VII). A court may not reach a finding of actual innocence if the conviction was reversed or vacated because of legal insufficiency or a legal error unrelated to actual innocence. COLO. REV. STAT. § 13-65-101(1)(b)(I)–(III), (3). A person is likewise ineligible for compensation if he or she committed or suborned perjury during proceedings related to the case. COLO. REV. STAT. § 13-65-102(4)(a)(II).

The statute provides successful claimants compensation for each year of incarceration, as well as for any fine, penalty, court costs, or restitution paid as a result of the wrongful conviction. COLO. REV. STAT.

§ 13-65-103(2)(e)(V). It also includes a fee-shifting provision, providing reasonable attorney fees for bringing a successful claim. COLO. REV. STAT. § 13-65-103(2)(e)(IV).

SUMMARY OF ARGUMENT

I. Petitioners' constitutional claim, although couched in procedural terms, depends on the assumption that criminal defendants have a substantive due process right to an automatic, unqualified judgment against the State for monetary amounts paid pursuant to an overturned conviction. Yet Petitioners neither clearly describe the contours of that claimed substantive right nor establish that it is deeply rooted in historical tradition. They have therefore failed to establish that the substantive due process doctrine grants them the right they seek to enforce in this case.

II. Petitioners' claim also fails under the analysis that applies to questions of procedural due process.

A. The procedural claim at issue here is governed by *Medina v. California*, 505 U.S. 437 (1992), and *Patterson v. New York*, 432 U.S. 197 (1977), not *Mathews v. Eldridge*, 424 U.S. 319 (1976). Petitioners seek to mandate, as part of the criminal process, a compensatory mechanism for criminal defendants whose convictions are overturned. Because the *Medina–Patterson* test applies to procedures within the criminal process, it governs this case.

B. Petitioners' claim fails the *Medina–Patterson* test. There was no settled historical right to an automatic, unqualified monetary judgment against the State any time a criminal defendant's conviction was overturned, and the procedures of Colorado's Exoneration Act do not offend fundamental fairness in operation.

C. Alternatively, this Court may avoid deciding whether the *Medina–Patterson* test applies here because Petitioners' claim fails the three-pronged *Mathews* test as well. First, because Petitioners' right to compensation is contingent and equitable, the State need only provide them an ordinary judicial process such as a civil action for damages. Second, Colorado minimizes the risk that criminal defendants will be inequitably deprived of property or liberty through numerous pre- and post-deprivation procedures. These procedures are effective, as statistics from Colorado's judicial branch demonstrate. Third, Colorado has an interest in ensuring that compensation paid to criminal defendants comports with notions of equity. The Exoneration Act serves that interest; Petitioners' claimed automatic right to compensation does not.

III. Petitioners' other miscellaneous arguments are flawed. *First*, Petitioners' characterization of modern practice is inaccurate, and they cannot demonstrate the sort of overwhelming consensus in favor of their position that would require setting aside the standard due process analysis. *Second*, Petitioners' reliance on cases decided in the tax context ignore that, in those cases, the government denied any pre-deprivation process. Those cases do not apply to the criminal context, in which defendants' rights are protected by numerous specialized procedures. *Third*, Colorado bears the burden to prove criminal liability beyond a reasonable doubt. Petitioners' argument to the contrary fails to distinguish between criminal trials and procedures for awarding compensation to criminal defendants. *Fourth*, the monetary assessments at issue here cannot all be described as fines or penalties. They each serve distinct purposes unrelated to criminal

punishment. Most significantly, Petitioners fail to recognize the unique nature of restitution, for which Petitioners' proposed automatic refunds are particularly inappropriate.

ARGUMENT

I. The Constitution does not grant a substantive right to an automatic monetary judgment against the State when a criminal conviction is overturned or vacated.

In attempting to present this case as a purely procedural dispute, Petitioners avoid grappling with a dispositive predicate question. Namely, they fail to identify the source of a *substantive* right to a monetary judgment against the State that attaches when a conviction is overturned. This question is both legally distinct from, and logically antecedent to, Petitioners' procedural claim, and it must be analyzed separately. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 755–56 (2005) (explaining that "[t]he procedural component of the Due Process Clause" does not apply to all asserted property interests or benefits, but only to those entitlements that are protected by "an independent source" such as state law or principles of substantive due process); *see also Bd. of Regents v. Roth*, 408 U.S. 564, 570–71 (1972) ("[T]o determine whether due process requirements apply in the first place, … [w]e must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.").

Because the arguments presented in this appeal are based entirely on due process, *see* Pet'r Br. i (raising only a due process claim), Petitioners implicitly claim that their asserted substantive right is founded in the Due Process Clause. Thus, before considering Petitioners' procedural arguments, this Court must first decide if their claimed entitlement to an automatic

monetary judgment against the State falls within the ambit of the substantive due process doctrine. *See Albright v. Oliver*, 510 U.S. 266, 275 (1994) (plurality opinion) (affirming dismissal because the substantive due process doctrine did not encompass the petitioner's claimed right to freedom from prosecution without probable cause).

The substantive component of the Due Process Clause is carefully constrained; it reaches only "certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). "[G]uideposts for responsible decision making in [the area of substantive due process] are scarce and open-ended" and "[t]he doctrine of judicial self-restraint requires [the Court] to exercise the utmost care whenever [it is] asked to break new ground in this field." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). This Court has "always been reluctant to expand the concept of substantive due process." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (quotation omitted).

Consequently, Petitioners must satisfy a demanding two-pronged test to demonstrate that they have a substantive due process right to an automatic monetary judgment against the State. Their claimed right must be both (1) clearly described and (2) "deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 721 (quotation omitted). Here, Petitioners fail both prongs of the analysis.

A. Petitioners have not "clearly described" their asserted right to an automatic monetary judgment against the State.

Petitioners broadly claim that "[a] defendant whose conviction has been reversed is entitled to a refund simply upon showing that her conviction has been reversed." Pet. Br. 25. Petitioners do not define the particular contours of this asserted right. *See Glucksberg*, 521 U.S. at 721 (requiring a "careful description" of an asserted substantive right); *Chavez v. Martinez*, 538 U.S. 760, 775–76 (2003) (opinion of Thomas, J.) ("[V]ague generalities … will not suffice."). Instead, they claim that their asserted right is generalized, automatic, and unqualified.

Petitioners fail to identify the party or state agency against whom any monetary judgment could attach, or why that judgment would not be subject to sovereign immunity. *See, e.g., United States v. Mossew*, 268 F. 383, 384–85 (N.D.N.Y 1920). Petitioners fail to differentiate between compensation for fines and penalties (which are paid as punishment for the offense), compensation for criminal fees (which are disbursed to various state funds administered by various state entities[5]), and compensation for restitution (which is not retained by the State but is instead disbursed to victims[6]). *See infra* Section III.D.

---

[5] *See* Pet. App. 5a–7a, 9a–11a (explaining to whom and how various assessments must be allocated).

[6] *See* COLO. REV. STAT. § 18-1.3-601(2) ("It is the intent of the general assembly that restitution be ordered, collected, and disbursed to the victims of crime and their immediate families.").

Petitioners fail to explain why their right to compensation is automatic rather than contingent or equitable. *See People v. Bandy*, 239 Ill. App. 273, 278–79 (1925) (holding that compensation for monetary payments is equitable). Finally, Petitioners do not explain why the Constitution grants them compensation only for the *monetary payments* they made pursuant to their convictions, while ignoring their loss of liberty during their time of incarceration. They simply assert—without any legal support or explanation—that any compensation for that particular deprivation falls outside the substantive constitutional right they seek to create through this case. Pet. Br. 22, 25 (conceding that Colorado defendants may be required to seek compensation for loss of liberty through the Exoneration Act and, consequently, that there is no automatic, unqualified right to compensation for that loss).

Under the "careful description" requirement of *Glucksberg*, Petitioners' claimed substantive right is too vague for this Court to decide in the first instance. Petitioners ask the Court not to answer a precisely identified question, but to constitutionalize a new area of law—compensation for criminal defendants in the event their convictions are overturned or vacated. This Court has declined to expand substantive due process rights based on similarly broad claims. *See Chavez*, 538 U.S. at 779–80 (opinion of Souter, J.) (declining to "revolutionize Fifth and Fourteenth Amendment law" by creating a constitutional damages remedy for self-incrimination violations; remanding to allow the lower courts to analyze the substantive due process component of the question); *cf. Glucksberg*, 521 U.S. at 723 (deciding not whether there is a general "right to

die" but whether a prior case should be expanded to include a specific "right to assistance in [committing suicide]").

B. Petitioners cannot demonstrate that their asserted substantive right is "deeply rooted" in history and tradition.

Even if Petitioners' broad formulation of their asserted right were sufficient under the "clearly described" requirement, they nevertheless fail the second prong of the substantive due process analysis. Petitioners' asserted right is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Glucksberg*, 521 U.S. at 721 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). While Petitioners cite a number of criminal cases for the proposition that a defendant is "*always* … entitled to have his money refunded" if his conviction is reversed, Pet. Br. 28–29 (emphasis added), this is neither an accurate nor a complete description of the historical record.

In England, the common law did, as a general matter, restore felons to the status quo if their convictions were reversed. But at common law, the penalty for a felony conviction was drastic. A felon "forfeited his chattels to the Crown and his lands escheated to his lord." *Austin v. United States*, 509 U.S. 602, 611–12 (1993) (quotation omitted); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *374–82. This harsh "forfeiture of estate" system was accompanied by a sweeping appellate remedy: any error—even the mere imposition of an illegal sentence—made the entire proceeding void *ab initio*, restoring the defendant to his pre-conviction status. 4 WILLIAM

BLACKSTONE, COMMENTARIES *386. If the defendant's forfeited property had been granted to another, the defendant could recover that property directly from the grantee. *Id*. This reflected the narrow authority of a common-law court of error, which had no power to "enter a proper judgment … or to remand the cause for that purpose." *Ballew v. United States*, 160 U.S. 187, 198 (1895). Instead, "a court of error was confined exclusively to the determination whether error existed, and if it found that it did, its duty was to reverse and discharge the prisoner." *Id.*

From the outset, American jurisdictions rejected the drastic "forfeiture of estate" system, *Austin*, 509 U.S. at 613; *see also* COLO. CONST. art. II § 9 (prohibiting forfeiture of estate), and likewise rejected the all-or-nothing outcome of common-law appellate review, *Ballew*, 160 U.S. at 198. Consequently, when a conviction is invalidated, American courts have not "always" ordered compensation for a defendant's monetary losses. Pet. Br. 28. They have instead adhered to various legal and equitable limitations that apply to such relief.

Sovereign Immunity. To recover monetary amounts paid to the government, a criminal defendant was often required to identify a valid waiver of sovereign immunity and comply with its procedural requirements. In *United States v. Mossew*, for example, a criminal defendant sought compensation for a fine he paid under an indictment that was later quashed. 268 F. at 383. The court denied the claim, explaining that "the United States government in its sovereign capacity cannot be sued, unless by consent of the sovereign," and "until such time as [the defendant]

complie[d] with the requirements essential to enable him to sue the sovereign government he [would be] without redress." *Id*. at 384–85. In other cases, courts likewise held that a criminal defendant could be compensated for monetary amounts paid pursuant to an invalid conviction only in compliance with an applicable waiver of sovereign immunity. *See, e.g.*, *United States v. Gettinger*, 272 U.S. 734, 735 (1927) (holding that defendants could not recover the fines they paid after their convictions were invalidated because they had not identified an applicable waiver of sovereign immunity); *Brown v. Detroit Tr. Co.*, 193 F. 622, 626 (6th Cir. 1912) (reversing a contempt order but declining to compensate the contemnor for the fine he paid because the court was "of opinion that this court has no authority to direct restitution," despite the waiver of immunity contained in the federal Tucker Act); *Herndon v. Superintendent, Va. State Farm*, 351 F. Supp. 1356, 1359–60 (E.D. Va. 1972) (denying a refund of fines paid pursuant to an unconstitutional conviction because it "constitute[d] a suit for recovery of money against the State of Virginia," and the State had not waived sovereign immunity); *cf. Ex parte Morris & Johnson*, 76 U.S. 605, 607 (1869) (in a forfeiture case, holding that "[t]he court has no authority to order the United States to refund"); *State v. Minniecheske*, 590 N.W.2d 17, 20 (Wis. Ct. App. 1998) (holding that "the writs and motions filed do not permit obtaining a money judgment against the State"); *see generally* Annotation, *Right to Recover Back Fine or Penalty Paid in Criminal Proceeding*, 26 A.L.R. 1523, § IV(a) (1923) ("[T]he government, *if it consents to be sued,* may be liable for the refunding of the fine …." (emphasis added)).

Even *United States v. Lewis*, the case that Petitioners claim "provid[e]s the clearest discussion of the issue," Pet. Br. 33, did not rely on an unqualified right to a refund, but on an explicit waiver of sovereign immunity. 342 F. Supp. 833, 835 (E.D. La. 1972) (explaining that the defendants' requests for compensation "in effect amount [to] suits brought against the government for money judgments and on this basis the court has jurisdiction under the Tucker Act"); *accord Lawson v. United States*, 397 F. Supp. 370, 371–72 (N.D. Ga. 1975) (holding that "the Tucker Act is the basis upon which the government's immunity from suit has been waived in this instance" but denying a refund because the criminal defendant had not complied with the Tucker Act's statute of limitations).

Equitable Considerations. American courts also historically recognized that compensation for amounts paid pursuant to an invalid criminal conviction "is not a matter of strict legal right, but rather one for the exercise of the court's discretion." Annotation, *Right to Recover Back Fine or Penalty Paid in Criminal Proceeding*, 26 A.L.R. 1523, § VI(a) (1923). "[T]he defendant who has paid the fine has no strict legal right upon the reversal of the judgment to an order of restitution even in jurisdictions allowing it, and whether the latter shall be granted is a matter resting in the sound discretion of the Appellate Court." *People v. Bandy*, 239 Ill. App. 273, 278–79 (1925); *see also Carver v. United States*, 111 U.S. 609, 612 (1884) (holding that, even assuming the defendant's conviction was void, he was collaterally estopped from seeking recovery of the fines he paid because he had subsequently agreed that he owed those amounts to the

government).[7] For example, where the defendant could have moved for a stay pending appeal but failed to do so, a court would deny recovery. *Bandy*, 239 Ill. App. at 278; *see also Miami v. Keton*, 115 So. 2d 547, 554 (Fla. 1959) ("There is no showing here that any of the payments were made under protest …."); *White v. Tifton*, 57 S.E. 1038, 1039 (Ga. 1907) (denying compensation for a criminal fine because the defendant's appeal expired). This often reflected the fact that, despite the invalidity of their convictions, the defendants "committed the offenses for which they were charged." *Callahan v. Sanders*, 339 F. Supp. 814, 818 (M.D. Ala. 1971); *Keton*, 115 So. 2d at 551 ("There is no showing here … that the offenses provoking the fines were not committed …."); *City of Hazleton v. Birdie*, 10 Kulp (Pa.) 98 (1900) ("As an order of this kind is one of grace, the court must be largely governed

---

[7] Although here the criminal context provides the pertinent historical practice for purposes of the substantive due process inquiry, the historical practice in civil cases was similar. The right to obtain restitution after prevailing on appeal was equitable rather than automatic. *Atl. Coast Line R.R. v. Florida*, 295 U.S. 301, 309 (1935) ("Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion; and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip." (quotation omitted)); *see also, e.g.*, *United States v. Morgan*, 307 U.S. 183, 197 (1939) ("What has been given or paid under the compulsion of a judgment the court will restore when its judgment has been set aside *and justice requires restitution*." (emphasis added)); RESTATEMENT (FIRST) OF RESTITUTION § 74 (1937) ("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, *unless restitution would be inequitable*." (emphasis added)).

by what the record shows as to the violation of law by the defendant ….").

Courts also denied recovery from the government or its officials if they no longer possessed the disputed funds and had not acted wrongfully at the time they were collected. Annotation, *Right to Recover Back Fine or Penalty Paid in Criminal Proceeding*, 26 A.L.R. 1523, § IV(a) (1923) ("[A] municipality or the government . . . may be liable for the refunding of the fine, *provided the same has been paid into its treasury*." (emphasis added)); *see also Ex parte Morris & Johnson*, 76 U.S. at 607 (explaining that compensation would have to be recovered from "the distributees within reach of the territorial jurisdiction of the court, except the United States"); *N.J. Soc'y for Prevention of Cruelty to Animals v. Knoll*, 71 A. 116, 116 (1908) (holding that the parties to whom a fine was paid were required to be "before the court" for a defendant to obtain compensation); *Houtz v. Bd. of Comm'rs*, 70 P. 840, 845 (Wyo. 1902) ("[T]he county is not answerable to the plaintiff for the money so collected unless it is shown to have been paid into the County Treasury."); *cf. United States v. Hayes*, 385 F.3d 1226, 1230 (9th Cir. 2004) ("[T]he government merely served as an escrow agent pending the final judgment and at the proper time paid the funds over to the victims. It cannot now return money it no longer has."). This undermines Petitioners' claim that the State is obligated to automatically pay to a criminal defendant, from state funds, restitution that has already been disbursed to victims.

* * *

This history demonstrates that the substantive due process doctrine does not encompass Petitioners'

asserted right to an automatic monetary judgment against the State if a criminal defendant's conviction is overturned. In seeking to newly constitutionalize such a right, and "adopt [it] as a constitutional imperative, countrywide," *Patterson v. New York*, 432 U.S. 197, 210 (1977), Petitioners ask the Court to ignore the nuances in historical practice. But historical practice is the only "guide post[ ] for responsible decision-making in this unchartered area." *Collins*, 503 U.S. at 125. "The doctrine of judicial self-restraint," *id*., counsels against this Court announcing, for the first time, that the Due Process Clause governs the compensation a State must pay to a criminal defendant whose conviction is invalidated.

II. Even assuming Petitioners have a substantive right to a monetary judgment against the State, Colorado's procedural framework for compensating criminal defendants satisfies due process.

In addition to lacking a substantive right to an automatic and unqualified monetary judgment against the State upon the invalidation of a criminal conviction, Petitioners have no procedural right to such a remedy.

A. Because Petitioners' procedural claims are directed at Colorado's criminal process, the inquiry of *Patterson v. New York* and *Medina v. California* governs this case.

This Court has articulated two analytical frameworks for evaluating procedural due process claims. The first is a "general approach" that applies to

issues arising under civil and administrative law. *Mathews v. Eldridge*, 424 U.S. 319 (1976). The second is a narrower inquiry that applies to matters of state criminal procedure. *Medina v. California*, 505 U.S. 437 (1992); *Patterson*, 432 U.S. 197. Petitioners assume, with little analysis, that the general approach articulated in *Mathews* applies here. Pet. Br. 22–23. But the subject of the dispute in this case is a matter of state criminal procedure to which *Patterson* and *Medina* apply.

Mathews is not "an all-embracing test for deciding due process claims." *Dusenbery v. United States*, 534 U.S. 161, 168 (2002). Indeed, one year after *Mathews* was announced, this Court held that matters of criminal procedure must be judged under a different test. *Patterson*, 432 U.S. at 201–02. The Court explained that "preventing and dealing with crime is much more the business of the States than it is of the Federal Government," and the Constitution should not be "lightly construed" to intrude on the States' administration of justice. *Id*. at 202. Thus, "[a State's] decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* (internal quotations omitted). In *Medina*, the Court further explained that *Mathews* is inapposite to criminal proceedings because the "Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the

careful balance that the Constitution strikes between liberty and order." *Medina*, 505 U.S. at 443.

A challenged procedure is part of the criminal process, and is therefore subject to the *Patterson–Medina* test, if it relates directly to the defendant's conviction or an underlying criminal proceeding. *See, e.g.*, *Krimstock v. Kelly*, 464 F.3d 246, 254 (2d Cir. 2006) (holding that a "challenge to an underlying criminal proceeding or the procedural rights due the criminal defendant" falls under *Medina*); *Hines v. Miller*, 318 F.3d 157, 161–62 (2d Cir. 2003) (concluding that the district court erred by applying *Mathews* in reviewing procedures for withdrawing a guilty plea). Under this formulation, the criminal process includes the remedies that are available to a defendant who challenges his conviction. For example, in *Herrera v. Collins*, 506 U.S. 390, 407–11 (1993), this Court analyzed whether a particular remedy—a new trial—was required if a defendant sought to invalidate his conviction with new evidence. The Court applied *Medina*, examined the historical record, and determined that the denial of a new trial did not "transgress[ ] a principle of fundamental fairness." *Id.* at 411.

Petitioners raise an analogous claim here. They assert that a particular remedy—an automatic monetary judgment against the State—must be part of the process that attends the challenging and setting aside of a criminal conviction. Pet. Br. 28 (arguing that "[c]riminal cases are no exception" and that defendants are "always" entitled to a refund upon reversal of a

conviction). Their claim thus falls squarely within the scope of the *Medina* rule.[8]

B. Colorado's procedures satisfy *Patterson* and *Medina*.

The *Patterson–Medina* test is similar to the test that governs substantive due process claims. It requires upholding a challenged state procedure unless the procedure offends a principle of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 505 U.S. at 445–46. As discussed above in Section I.B, there was no settled historical right to an automatic, unqualified monetary judgment against the State after a criminal defendant's conviction was overturned. *Patterson* and *Medina* therefore foreclose Petitioners' claim that Colorado is constitutionally required to provide a procedure for obtaining such a judgment. *See Medina*, 505 U.S. at 446 (explaining that a procedural due process claim failed because "no settled tradition" supported it); *Patterson*, 432 U.S. at 210 (rejecting a due process claim that was unsupported by history and explaining

---

[8] Petitioners' reliance on the dissenting opinion in *Kaley v. United States*, 134 S. Ct. 1090 (2014), and on *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), is misplaced. Pet. Br. 22–23. Those cases involved forfeiture procedures that were unrelated to a criminal conviction or to the proceedings underlying a criminal conviction. *Kaley*, 134 S. Ct. at 1094 (analyzing whether persons accused, but not convicted, of a crime and "wishing to hire an attorney" could "challenge[ ] a pre-trial restraint on their property"); *Daniel Good*, 510 U.S. at 46 (evaluating the process available in *civil* forfeiture cases). In any event, *Kaley* is non-precedential; the majority expressly declined to decide whether *Mathews* or *Medina* was the appropriate analytical framework. *Kaley*, 134 S. Ct. at 1101.

that the "subtle balancing of society's interests" on matters of criminal procedure should be "left to the legislative branch").[9]

An analysis of the procedural elements of Colorado's Exoneration Act confirms this conclusion. Those procedural elements, "in operation," do not "transgress[ ] any recognized principle of 'fundamental fairness.'" *Medina*, 505 U.S. at 448.

The Wrongful Conviction Requirement. The Act provides compensation to a criminal defendant whose conviction was "wrongful" because the defendant did not participate in the relevant crime. 2013 Colo. Sess. Laws 2412; COLO. REV. STAT. § 13-65-101(1). This requirement is consistent with the equitable nature of a refund proceeding. *Atl. Coast Line R.R.*, 295 U.S. at 310 (noting that "the court will not order [restitution upon the reversal of a judgment] where the process is set aside for a mere slip"); *Birdie*, 10 Kulp (Pa.) at 98 (explaining that restitution upon reversal of a conviction is governed by "what the record shows as to the violation of law by the defendant"). A conviction may be reversed for many reasons that have nothing to do with a defendant's innocence. As Petitioners admit, this is true of "most convictions." Pet. Br. 9. For example, an incorrect suppression ruling may require

---

[9] Contemporary practice is "of limited relevance to the due process inquiry." *Medina*, 505 U.S. at 447. Even so, a review of contemporary practice, *infra* Section III.A, demonstrates that there remains no settled view regarding Petitioners' claimed right to an automatic and unqualified monetary judgment against the State. *See Medina*, 505 U.S. at 447 (denying a due process claim where there was "no settled view of where the burden of proof should lie" (emphasis added)).

reversal and may result in a defendant's acquittal or a prosecutor's decision not to seek retrial. But its "bottom-line effect, in many cases, is to suppress the truth." *Davis v. United States*, 564 U.S. 229, 237 (2011). Such errors do not equitably demand a monetary judgment against the State. *See id.* ("[S]ociety must swallow this bitter pill when necessary, but only as a last resort." (quotation omitted)).[10]

The Burden of Proof. Placing the burden on the defendant to establish an equitable entitlement to compensation, COLO. REV. STAT. § 13-65-102(6)(b), likewise does not offend fundamental fairness. *Keton*, 115 So. 2d at 551 (noting that the defendants did not show "that the offenses provoking the fines were not committed"); *see Atl. Coast Line R.R.*, 295 U.S. at 309 ("The claimant, to prevail, must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it."). It is the criminal defendant who claims that equity requires compensation, and this Court has often held that, even with respect to alleged constitutional errors, "the burden of showing essential

---

[10] Here, it is highly unlikely that Petitioners could establish an equitable right to compensation. Nelson's restitution paid for counseling for her children, for whom she is legally responsible under state law. *See, e.g.*, *In re Estate of Reed*, 201 P.3d 1264, 1268 (Colo. App. 2008) (holding that a child's "parents were responsible in the first instance for paying for [a psychologist]'s services"). And Nelson's brother and sister-in-law were convicted of sexual crimes against those same children, crimes which Nelson herself helped facilitate. *See supra*, Statement. Madden allegedly admitted to police that he committed his crime, *Madden*, R. Court File Vol. 1 at 11, and significant evidence supported his conviction, J.A. 74.

unfairness" may be placed on a criminal defendant "who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality." *Buchalter v. New York*, 319 U.S. 427, 431 (1943) (quoting *Adams v. United States ex. rel. McCann*, 317 U.S. 269, 281 (1942)); *see also Harrington v. Richter*, 562 U.S. 86, 104 (2011) (explaining that the burden of invalidating a conviction for ineffective assistance of counsel rests with the "person challenging [the] conviction"); *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 462 (1956) ("Petitioner has been given ample opportunity to prove that he has been denied due process of law.").

The Clear and Convincing Standard. The clear and convincing standard of proof is a permissible means of ensuring that the outcome of a proceeding is equitable. Habeas corpus proceedings, for example, are equitable in nature, *Withrow v. Williams*, 507 U.S. 680, 699 (1993) (O'Connor, J., concurring in part and dissenting in part) ("Concerns for equity … resonate throughout our habeas jurisprudence."), and the evidentiary standard in federal habeas proceedings is "clear and convincing evidence," *Schriro v. Landrigan*, 550 U.S. 465, 473–74 (2007). With the passage of time, witnesses and other sources of evidence become less reliable and less available. *See Herrera*, 506 U.S. at 403. This is especially true in cases like this one, involving minor victims who experienced traumatic episodes of sexual assault years ago. Petitioners themselves admit that it would be consistent with due process to require them to satisfy the clear and convincing standard if they sought compensation for wrongful incarceration, Pet. Br. 22, a claim that would present identical equitable concerns. Given those

concerns, application of the clear and convincing standard does not transgress fundamental fairness.

C. Colorado's procedures also satisfy the *Mathews* test.

As it did in *Kaley v. United States*, 134 S. Ct. 1090, 1100–01 (2014), this Court may avoid addressing whether the *Patterson–Medina* test applies here. Petitioners' claim also fails the *Mathews* test.

Under *Mathews*, this Court considers "(1) the nature of the private interest that will be affected, (2) the comparative risk of an erroneous deprivation of that interest with and without additional or substitute procedural safeguards, and (3) the nature and magnitude of any countervailing interest in not providing additional or substitute procedural requirements." *Turner v. Rogers*, 564 U.S. 431, 444–45 (2011) (quotation omitted). Here, Colorado's procedures do not create a substantial risk of an erroneous deprivation of the defendant's interest in compensation, and any such risk is justified by the State's interest in ensuring that full compensation to criminal defendants is granted consistent with principles of equity.

The Nature of Petitioners' Interest. Petitioners assert that "people whose convictions have been reversed have a property interest in obtaining a refund." Pet. Br. 23. Again, Petitioners do not define the source or nature of this property interest. But the interest can arise from only one of two sources: the substantive due process doctrine or state law. *Gonzales*, 545 U.S. at 755–57 (explaining that, in an earlier case, the Court had found no relevant property

right under the substantive due process doctrine and proceeding to consider "what [property interest] state law provides").

In either case, Petitioners' property interest is not absolute but is rather contingent—it amounts only to the right to bring an equitable claim. *See supra* Section I.B (explaining that the historical right to compensation was contingent and equitable); COLO. REV. STAT. §§ 13-65-101(1), -102(4)(a)(II) (providing that under the Exoneration Act, compensation is available only if a defendant did not participate in the relevant criminal activity and did not commit other wrongful acts such as suborning perjury). And because the property interest here is an interest in a contingent claim, rather than a present entitlement, due process is satisfied so long as an "ordinary judicial process"—such as a civil action for damages—is provided. *Lujan v. G & G Fire Sprinklers*, 532 U.S. 189, 196–97 (2001).

The Risk of Erroneous Deprivation. To minimize the risk that criminal defendants will be inequitably deprived of property or liberty, Colorado provides numerous pre- and post-deprivation procedures.

First, certain felony defendants may, with the assistance of counsel, contest probable cause to support the charges, as Petitioners did here. J.A. 2, 46; *see* COLO. REV. STAT. § 16-5-301; COLO. R. CRIM. P. 5(a)(4), 7(h); *Schwader v. Dist. Court*, 474 P.2d 607, 610 (Colo. 1970). If the defendant does not concede probable cause and the State cannot establish probable cause, the case is dismissed, and the defendant is not required to pay costs or restitution or submit to criminal punishment such as fines or incarceration. *Second*, a defendant is

entitled to a jury trial at which the prosecution must prove guilt beyond a reasonable doubt. *See Griego v. People*, 19 P.3d 1, 8 (Colo. 2001) (discussing the right to a jury trial under the beyond-a-reasonable-doubt standard). If the defendant does not plead guilty and is acquitted at trial, he or she is not required to pay any costs or restitution or submit to criminal punishment such as fines or incarceration. *Third*, with respect to restitution, a convicted defendant is entitled to a hearing where the prosecution must prove by a preponderance of the evidence that the defendant proximately caused injury to the victims. *People v. Pagan*, 165 P.3d 724, 729 (Colo. App. 2006). If the defendant does not concede the requested restitution and the prosecution is unable to satisfy that burden, restitution is not awarded. *Fourth*, a defendant may request a stay of sentence pending the resolution of an appeal. COLO. REV. STAT. §§ 16-12-103, 18-1.3-702(1)(a); COLO. APP. R. 8.1(a)(3); COLO. R. CRIM. P. 37(f). If payments are stayed and the conviction is reversed, the defendant is not required to make any payments. *Fifth*, a defendant may challenge the validity of his conviction on appeal. If successful on the ground that the conviction is void, the defendant may be entitled to automatic compensation.[11] If successful

---

[11] A conviction may be reversed as void because, for example, it was based on a lack of jurisdiction or an unconstitutional statute. *See State v. McDonnell*, 176 P.3d 1236, 1240 (Or. 2007) (citing BLACK'S LAW DICTIONARY 861 (8th ed. 2004) and explaining that "a procedural error results in a voidable judgment, while a jurisdictional error results in a void judgment"). Under Colorado law, it appears that a void conviction would establish a right to a refund of monetary amounts paid pursuant to the conviction. *See Toland v. Strohl*, 364 P.2d 588, 593 (Colo. 1961); *see also People v.*

on grounds related to actual innocence and either not retried or acquitted, the defendant may seek compensation through the Exoneration Act, which is available if the defendant demonstrates that he or she is equitably entitled to compensation.

These procedures are effective at minimizing the risk of error. In Colorado, over 35,000 felony criminal cases are filed each year.[12] Only a fraction of dispositions in those cases are challenged; in 2014, for example, 37,966 criminal cases were filed in Colorado district courts while only 1,030 direct or post-conviction criminal appeals were filed in the court of appeals.[13] The court of appeals remanded 185 of them, and its instructions to the trial court varied from granting a new trial to correcting a clerical mistake in the mittimus.[14] Of remands that arose from direct appeals,

---

Nelson, 362 P.3d 1070, 1078 n.5 (Colo. 2015), Pet. App. 20a n.5 (distinguishing rather than overruling *Toland* because there the court had not provided "an acceptable substitute for trial"). Many cases cited by Petitioners to suggest that compensation must be available any time a conviction is overturned appear to involve void, rather than voidable, convictions. *See In re Stewart*, 571 F.2d 958, 968 (5th Cir. 1978); *United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973); *Telink, Inc. v. United States*, 24 F.3d 42, 43 (9th Cir. 1994); *United States v. Venneri*, 782 F. Supp. 1091, 1094–95 (D. Md. 1991); *People v. Meyerowitz*, 335 N.E.2d 1, 7 (Ill. 1975).

[12] Colorado Judicial Branch Annual Statistical Report, Fiscal Year 2016, pg. 18, *available at* http://bit.ly/2gAkXTq.

[13] Colorado Judicial Branch Annual Statistical Report, Fiscal Year 2014, pg. 12, *available at* http://bit.ly/2gAkXTq.

[14] A variety of sources were used to arrive at these numbers and the figures that follow. Using 2014 as an example year, we sorted

only ten cases resulted in vacation of all convictions.[15] An additional nineteen cases were remanded for post-conviction proceedings. Of those, only two cases resulted in a dismissal or acquittal after retrial.[16] Thus, in 2014 a total of only twelve cases—less than 0.04% of the total number of criminal cases filed annually and less than 1.2% of criminal cases appealed that year—were ultimately concluded with no criminal charges being sustained.[17]

---

through all of the Court of Appeals announcement documents, *available at* http://bit.ly/2hrti91, from fiscal year 2014 to find the cases that the court remanded. We then used Colorado State Court—Data Access program, *available at* http://bit.ly/2hmDW3p, to review the minute orders and final dispositions of the relevant cases.

[15] S*ee People v. Myers*, 11CR241 (Weld County), 12CA0167 (Colo. Ct. App.); *People v. Valdez*, 10CR34 (Lincoln County), 12CA0005 (Colo. Ct. App.); *People v. Elmquist*, 10CR464 (La Plata County), 11CA2225 (Colo. Ct. App); *People v. Pickering*, 10CR1608 (Weld County), 11CA2043 (Colo. Ct. App.); *People v. Dalton*, 10CR1792 (Larimer County), 11CA2128 (Colo. Ct. App.); *People v. Colbert*, 09CR2934 (Arapahoe County), 11CA0013 (Colo. Ct. App.); *People v. French*, 09CR3540 (El Paso County), 10CA1949 (Colo. Ct. App.); *People v. Priewe*, 09CR3525 (El Paso County), 11CA0351 (Colo. Ct. App.); *People v. Dixon*, 08CR35 (City and County of Denver), 10CA1841 (Colo. Ct. App.); *People v. Storm*, 08CR2562 (Arapahoe County), 09CA2782 (Colo. Ct. App.). Proceedings remain ongoing in four cases.

[16] *People v. Nava-Hernandez*, 10CR210 (Arapahoe County), 13CA0571 (Colo. Ct. App.); *People v. Gerards*, 03CR1797 (Larimer County), 12CA0587 (Colo. Ct. App). Proceedings remain ongoing in four cases, and in another the court cannot locate the defendant.

[17] In fiscal year 2014, the Colorado Supreme Court remanded around twenty criminal cases either to the trial court or to the

As these numbers demonstrate, Colorado's procedures minimize the risk that a criminal defendant will be inequitably deprived of property. Petitioners' proposed automatic monetary judgment against the State—which does not depend on considerations of equity—would not increase the likelihood of an equitable outcome.[18]

---

court of appeals. None resulted in the complete vacation of the defendants' convictions on remand.

[18] Petitioners raise various arguments regarding the conditions that are necessary for relief under the Exoneration Act. Pet. Br. 9–10. Petitioners lack standing to assert the due process rights of other defendants who may not be subject to the Act. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid ...."). In any event, Petitioners' objections are meritless. While the Exoneration Act does not grant relief in misdemeanor cases, Pet. Br. 9, an alternative procedure is often available: the Colorado Supreme Court has held that county courts must grant stays of sentences pending misdemeanor appeals. *People v. Steen*, 318 P.3d 487, 489 (Colo. 2014). And although Petitioners disparage the fee-shifting provision of the Act as inadequate to assure a remedy in cases like theirs, Pet. Br. 10, fee-shifting provisions "enable [parties] to [seek relief] even where the amount of damages at stake would not otherwise make it feasible." *Riverside v. Rivera*, 477 U.S. 561, 577 (1986). Petitioners' assertion that Colorado courts will be unable to apply the Act's fee-shifting provision is specious; state courts have significant experience applying fee-shifting provisions in small-dollar cases. *See Mercantile Adjustment Bureau, LLC v. Flood*, 278 P.3d 348, 357 n.8 (Colo. 2012) (explaining that "[t]he 'value' of victory in a fee-shifting case is not always gauged solely in monetary terms"); *id*. at 354 ("Fee-shifting provisions such as this were designed to encourage the bar to enforce these actions, which generally involve only small sums of money.").

Countervailing Interests. Petitioners assert that "the government's interest is non-existent." Pet. Br. 23. But Colorado has an interest in ensuring that any compensation awarded after a conviction is overturned comports with equitable principles. Indeed, Colorado compensates exonerated defendants for not only their payment of fines, costs, and restitution, but also any deprivation of freedom. COLO. REV. STAT. § 13-65-103(2)(e). Petitioners concede that the procedures provided by the Exoneration Act are appropriate for awarding damages related to the deprivation of freedom. Pet. Br. 22. The same government interest that applies to compensation for incarceration applies to Petitioners' claimed entitlement to a refund. *See* Pet. App. 22a.

III. Petitioners' miscellaneous arguments are flawed.

Petitioners raise various arguments to support their claimed right to automatic compensation in the event a criminal conviction is overturned. Each argument is flawed, and none changes the outcome of the above substantive and procedural due process analysis.

A. Petitioners' characterization of contemporary practice is inaccurate.

Petitioners describe Colorado as "an extreme outlier" and assert that there is a current "national consensus" that supports their claimed right to automatic compensation upon invalidation of a criminal conviction. Pet. Br. 34–35. This is inaccurate.

First, Petitioners cite various state statutes, which they claim "mandate" refunds for criminal defendants "as a matter of course when their convictions are

reversed." Pet. Br. 30. In fact, none of those statutes provide refunds for restitution; two apply only to fines; two apply only to specific surcharges and assessments; and one does not provide for refunds at all. CAL. PENAL CODE § 1262 (providing for return of fines and penalty assessments without providing for return of fees, costs, or restitution); DEL. CODE. ANN. tit. 11, § 4103(a)–(d) (providing for refunds of fines, as well as costs in certain cases, without providing for refunds of restitution); MISS. CODE ANN. § 99-19-73(12) (providing for refunds of state "assessments" without providing for refunds of fines or restitution); N.Y. PENAL LAW § 60.35(4) (providing for a refund of specific surcharges and fees without providing for refunds of fines or restitution); TEX. CODE CRIM. PROC. ANN. art. 103.008(a) (allowing courts to "correct any error in the costs" without providing for a refund).

Second, Petitioners attempt to brush aside as irrelevant jurisdictions that deny refunds in various circumstances. Pet. Br. 34 & n.13. But those jurisdictions demonstrate that Petitioners are incorrect in claiming that, everywhere but Colorado, refunds are granted automatically. *See* Pet. Br. 34 n.13 (citing five jurisdictions that deny refunds); *see also United States v. Hayes*, 385 F.3d 1226, 1230 (9th Cir. 2004) (holding that when the government has distributed restitution to victims, "the defendant has no right to recover any such sums"); *Brantley v. State*, 769 N.E.2d 676, 679–80 (Ind. Ct. App. 2002) (holding that no refund was required when monetary charges assessed against a defendant paid for a community corrections program she attended as a condition of probation); *Barnett v. State*, 695 P.2d 991, 991 (Or. Ct. App. 1985) ("[W]e are aware of [no authority] which authorizes a court in a

post-conviction proceeding . . . to require the state to repay to plaintiff the restitution that he paid for the benefit of a private party."); *Minniecheske*, 590 N.W.2d at 20 ("We therefore conclude that the writs and motions filed do not permit obtaining a money judgment against the State.").

Current practice is "of limited relevance to the due process inquiry," and if there is currently "no settled view" regarding a claimed procedural right, due process does not mandate one particular approach. *Medina*, 505 U.S. at 447. Here, there is no "settled view" regarding the right to an automatic and unqualified refund upon reversal of a criminal conviction, despite Petitioners' arguments to the contrary. Petitioners misrepresent current practice when they claim that "every other State in the Union" provides the type of relief they seek. Pet. Br. 34 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 427 (1994)).

B. The right to a refund for taxpayers who must "pay first and litigate later" has no application here.

Seeking to offer some precedent for their constitutional claim, Petitioners cite a number of cases that "involved unlawfully collected taxes." Pet. Br. 24. Those cases, Petitioners argue, "require[ ] states to provide a meaningful remedy for the recovery of money" and "appl[y] equally to monetary payments collected by a state pursuant to a conviction that is subsequently reversed." *Id*.

Petitioners cite no authority establishing that these tax refund cases are relevant to the criminal setting. *Id*. at 24–25. Indeed, the settings are significantly

different, and their differences dictate the appropriate outcome in each. In the cases Petitioners cite, the government had collected the taxes before the taxpayer was given a realistic opportunity to dispute liability. The taxpayers were required to "pay first, litigate later." *Reich v. Collins*, 513 U.S. 106, 112 (1994); *see also McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990) (explaining that the State had "relegate[d] [the taxpayer] to a postpayment refund action"); *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930) (same); *Ward v. Bd. Of Cnty. Comm'rs*, 253 U.S. 17, 24 (1920) (same); *Atchison, Topeka, & Santa Fe Ry. v. O'Connor*, 223 U.S. 280, 285–87 (1912) (same).

In the criminal setting, by contrast, States like Colorado provide numerous procedures specially tailored to the unique concerns of defendants facing a deprivation of liberty. *See supra* Section II.C. Many of those procedures are mandated by the Bill of Rights. *Medina*, 505 U.S. at 443. Importing tax-specific procedures into the criminal setting would invite precisely the type of "undue interference" with the criminal process that this Court has held would be improper. *Id*.

C. Colorado bears the burden to prove criminal liability beyond a reasonable doubt.

Due process requires a State to prove each element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). Colorado honors that requirement. *Medina v. People*, 163 P.3d 1136, 1140 (Colo. 2007). Petitioners, however, assert that unless a State provides a criminal defendant with automatic compensation for monetary amounts paid pursuant to

a conviction later held invalid, the State has unconstitutionally shifted the beyond-a-reasonable-doubt standard to the defendant. Pet. Br. 21–22. Petitioners cite no authority for that proposition, and Colorado has found none.[19]

This burden-shifting argument is simply another way of disputing that a State may condition compensation for criminal defendants on considerations of equity. As explained in Section I.B, *supra*, courts have long held that claims for compensation attendant to an overturned conviction may be treated as equitable. That Petitioners disagree with this history does not mean that Colorado has unconstitutionally shifted the burden of proof. Petitioners concede that Colorado may require criminal defendants to bear the burden of establishing a right to compensation for incarceration. Pet. Br. 22, 25. They do not explain why the rule must be different when a defendant seeks compensation for the less significant deprivation of monetary assessments paid pursuant to a conviction that is later overturned.

D. Colorado makes meaningful distinctions among the monetary assessments a defendant must pay.

Petitioners group all assessments paid by criminal defendants into a single category of "monetary

---

[19] The presumption of innocence applies only at criminal trials, not at hearings to establish compensation for defendants whose convictions have been overturned. *See Bell v. Wolfish*, 441 U.S. 520, 534 (1979) ("The presumption of innocence is a doctrine that allocates the burden of proof in criminal *trials*…." (emphasis added)).

payments," arguing that "it makes no difference what name Colorado uses for the money it collects." Pet. Br. 35. In Colorado, not all monetary assessments are punitive; many either compensate victims for losses or defray the cost of maintaining a criminal justice system. *See, e.g.*, *People v. Noel*, 134 P.3d 484, 487 (Colo. App. 2005) (holding that probation supervision fees are not refundable when a conviction is reversed because the purpose of probation is primarily rehabilitative); *People v. Howell*, 64 P.3d 894, 899 (Colo. App. 2002) (explaining that costs are imposed to reimburse the State for the actual expenses incurred in prosecuting a defendant and are not punitive). As Petitioners acknowledge, some States deny a refund based on the function that the relevant monetary assessment serves. Pet. Br. 34 n.13 (citing *State v. Parker*, 872 P.2d 1041 (Utah. Ct. App. 1994)). And many state refund statutes explicitly distinguish among types of assessments, declining to provide refunds for different categories of them. *See supra* Section III.A.

Significantly, those statutes often decline to provide refunds for restitution. *Id*. In Colorado, a restitution order—which requires separate proof by a preponderance of the evidence that the defendant proximately caused the victim's injuries—creates a civil judgment in favor of the injured victim, and payments are made to the victim, not the State. COLO. REV. STAT. § 18-1.3-603(3)(a), (4)(a); *People v. Pagan*, 165 P.3d 724, 729 (Colo. App. 2006). Given the unique nature of restitution, the weakest aspect of Petitioners' claim in this case is the assertion that they are constitutionally entitled to compensation from the State for restitution they paid to third-party victims. *See, e.g.*, *Hayes*, 385

F.3d at 1230 (holding that "if the government retains the monies until the conviction becomes final and then distributes it to identifiable victims, as it did here, the defendant has no right to recover any such sums from the government"); *Barnett*, 695 P.2d at 991 (declining to "require the state to repay to plaintiff the restitution that he paid for the benefit of a private party").[20]

CONCLUSION

The judgment of the Colorado Supreme Court should be affirmed.

---

[20] The procedures that may constitutionally govern civil forfeiture demonstrate that not all financial consequences of criminal conduct must be treated identically under the Constitution. Like civil forfeiture, restitution is based on the same conduct as a potential criminal conviction but does not depend on a valid conviction. *Compare United States v. Ursery*, 518 U.S. 267, 270–92 (1996) (holding that civil forfeiture after criminal acquittal does not violate double jeopardy) *and Austin v. United States*, 509 U.S. 602, 616 (1993) (holding that criminal conviction is not a prerequisite to civil forfeiture) *with Pagan*, 165 P.3d at 731 (holding that imposing restitution based on conduct for which a defendant was acquitted does not violate double jeopardy or collateral estoppel).

Respectfully submitted,

CYNTHIA H. COFFMAN
Attorney General

FREDERICK R. YARGER
Solicitor General
Counsel of Record

Office of the Colorado
Attorney General
1300 Broadway
10th Floor
Denver, Colorado 80203
Fred.Yarger@coag.gov
(720) 508-6168

L. ANDREW COOPER
Deputy Attorney General

CHRISTINE C. BRADY
Senior Assistant
Attorney General

JILLIAN J. PRICE
BROCK J. SWANSON
Assistant Attorneys
General

ABBIE CZIOK
Attorney,
Attorney General's
Fellowship Program

Counsel for Respondent

December 14, 2016