No. 15-1256

In the Supreme Court of the United States

SHANNON NELSON and LOUIS ALONZO MADDEN,

Petitioners,

v.

COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

A party who has paid money pursuant to a judgment has always been entitled to a refund when that judgment is reversed. Pet. 16-19. Now, however, Colorado seeks to abrogate this traditional rule. The state, taking full advantage of an inartfully drafted 2013 statute (*see* Br. of Amicus CCDB), refuses to refund money it has collected pursuant to criminal convictions when those convictions are reversed. It is hard to imagine a more egregious violation of the Due Process Clause. The state is quite literally depriving its citizens of property—property that belongs to *them*, not to the state—without due process.

In its Brief in Opposition, Colorado does not argue that this money belongs to the state, or even that the state has any interest in keeping the money. Rather, Colorado argues that the Question Presented was not adequately addressed by the court below (BIO 6-10), that Colorado is not the only state that refuses to refund money in this situation (BIO 11-16), and that the sums of money at issue are not properly called "penalties" (BIO 17-22). The first two of these claims are incorrect. The third is simply irrelevant.

I. The Question Presented was thoroughly addressed by the Colorado Supreme Court.

Both the majority and the dissent in the Colorado Supreme Court thoroughly addressed the Question Presented. The majority did so in a section of its opinion titled "No Due Process Violation." Pet. App. 20a. As the majority explained, "Nelson argued that,

upon her acquittal, due process required an automatic refund of costs and fees that she had paid." Pet. App. 20a. The majority rejected this argument, using words that could not have been any plainer: "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." Pet. App. 20a.

The majority then spent four more paragraphs spelling out the reasoning for its conclusion. First, the majority noted that due process requires, at minimum, notice and the opportunity for a meaningful hearing. Pet. App. 21a. Second, the majority explained that Shannon Nelson's money was not wrongfully taken from her, because her conviction had not yet been reversed when the state took her money. Pet. App. 21a. Third, the majority reasoned that the Exoneration Act provides a process by which defendants like Nelson may seek refunds, and that Nelson did not file an action under the Exoneration Act. Pet. App. 21a-22a. Finally, the majority concluded that the Exoneration Act provides sufficient process to satisfy the Due Process Clause. Pet. App. 22a.

In his dissenting opinion, Justice Hood also thoroughly addressed this issue, in a section of his opinion titled "The Exoneration Act Is an Inadequate Remedy." Pet. App. 28a. Justice Hood observed that the Exoneration Act "is not geared toward refunds." Pet. App. 28a. He noted "the impracticability of bringing a separate civil action" to obtain refunds. Pet. App. 29a. He pointed out that the Exoneration Act provides no refunds of money withheld due to

invalid misdemeanor convictions. Pet. App. 29a n.1. He therefore disagreed with the majority's conclusion that the Exoneration Act provides sufficient process to satisfy the Due Process Clause. Pet. App. 29a.

The Question Presented was thus thoroughly addressed by the Colorado Supreme Court. That court is very unlikely to return to the issue in any future case, because both sides of the question were fully aired. No other court is likely to address this issue, because—as will be discussed below—Colorado appears to be the only state that refuses to provide refunds in this situation. In short, there are no better vehicles on the horizon.

In arguing otherwise, Colorado appears to misunderstand the Question Presented. The Question is not, as the state seems to think (BIO 6-7), whether the Exoneration Act is unconstitutional. Rather, the Question is whether it is unconstitutional for Colorado to make the Exoneration Act the exclusive remedy for defendants who seek refunds of money the state has collected pursuant to convictions that have been reversed. That money should go automatically to defendants when their convictions are reversed, just as it always has, and, so far as we can tell, just as it does in every other state.

II. The state's Brief in Opposition only confirms that Colorado appears to be the only state that does not refund payments pursuant to a conviction when the conviction is reversed.

In preparing our certiorari petition, we looked for other states that do what Colorado does, but we could not find any. Pet. 19-23. Evidently Colorado could not find any either. Despite insisting that Colorado is "not an outlier" (BIO 11), the state fails to identify any other states that refuse to refund money in the state's possession after a conviction is reversed.

As we explained in our petition (Pet. 24), and as the state correctly notes (BIO 11), there are some lower courts that have held that refunds are not required when the money at issue is restitution that the state has already disbursed to victims. Our cases involve both money retained by the state and money disbursed to victims. Of the $702.10 that Colorado owes Shannon Nelson, the state possesses $287.50 and has disbursed $414.60 in restitution to victims. Pet. 3. Of the $1,977.75 that Colorado owes Louis Madden, the state possesses $1,220 and has disbursed $757.75 in restitution to victims. Pet. 4. Our cases will allow the Court to resolve this issue in both contexts. Our view is that when a conviction is reversed, due process requires the state to refund sums that have already been disbursed to victims. Money is fungible. If a state collects an unlawful tax, the tax would have to be refunded even if the state had already spent the proceeds.

Colorado makes much (BIO 12-14) of the distinction between void and voidable judgments, but that distinction has no bearing on our issue and has played no role in any of the cases recognizing the traditional rule requiring the refund of money paid pursuant to a judgment that is reversed. Regardless of the details, when a judgment is reversed, a person who has paid money pursuant to that judgment is entitled to her money back. *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.").

III. Colorado's refusal to refund money collected from defendants pursuant to convictions—after those convictions have been reversed—violates due process, whether or not the sums of money at issue are called "penalties."

Colorado asserts (BIO 17-22) that the sums of money 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" or something else.

Under state law, the money Colorado collected from Shannon Nelson and Louis Madden goes by a

variety of names, including "fees," "surcharges," "assessments," and "restitution." Pet. 2-4. The important thing, however, is not what these charges are called, but that defendants only have to pay them pursuant to a conviction. This case is *not* about the various fees that court systems impose on all litigants regardless of the outcome of a case. It is about sums of money that states collect only pursuant to a criminal 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.

Nor is this case about fees for which the defendant received a benefit in exchange for the money, such as fees paid for rehabilitation services actually rendered to the defendant. *Cf.* BIO 18 (citing *People v. Noel*, 134 P.3d 484, 487 (Colo. Ct. App. 2005)); Pet. 23 n.11 (citing *State v. Parker*, 872 P.2d 1041, 1049 (Utah Ct. App. 1994)). This case is about the much larger assortment of ordinary charges for which defendants receive no benefit in exchange, such as those Colorado collects, pursuant to convictions, for its Crime Victim Compensation Fund and its Victims and Witnesses Assistance and Law Enforcement Fund, as well as Colorado's "docket fee," its "time payment fee," its "sex offender surcharge," its "special advocate surcharge," its "substance abuse assessment," and several others. *See* Pet. 3-4.

The Due Process Clause does not allow Colorado to require its citizens to prove their innocence to get their own money back. Colorado may not shift its burden of proof to criminal defendants. *See, e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979). If,

upon the reversal of a conviction, Colorado required defendants to prove their innocence to get out of prison, that would be an obvious deprivation of liberty without due process. This case involves the same principle as applied to property rather than liberty. When a conviction is reversed, a defendant need not prove her innocence to have her liberty or her property restored. If the state wishes to continue to deprive her of liberty or property, the Due Process Clause places the burden of proof on the state.

Nor does the Due Process Clause permit Colorado to deny a meaningful remedy for recovering money the state is wrongfully withholding. *See, e.g.*, *Reich v. Collins*, 513 U.S. 106, 108 (1994). Colorado, correctly, does not claim that this money belongs to the state. Colorado has no interest whatsoever in preventing its citizens from getting their own money back. Yet the Exoneration Act is an illusory remedy for most defendants whose convictions have been reversed, because the amounts involved are typically too small to justify a separate civil suit, and because many defendants whose convictions are reversed will be unable to prove that they are factually innocent. The Exoneration Act provides no remedy at all for many other defendants, including misdemeanants and defendants who were not sentenced to prison.

This is an issue that affects virtually every criminal case in Colorado in which a conviction is reversed, because the state collects these charges pursuant to virtually every criminal conviction. The sums of money involved may be small to the state, but they are of great significance to defendants, many of whom are indigent. To put it bluntly, the

state is taking advantage of some of its weakest citizens, by depriving them of their property without due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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