No. 18-7652

In the Supreme Court of the United States

BRIAN ANDERSON,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

On Petition for Writ of Certiorari to the
Colorado Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Colorado state law, the crime of second degree kidnapping is a class 2 felony if the kidnapped person was a "victim of robbery." The kidnapper need not be convicted of robbery as a separate offense; it is enough that the trier of fact conclude, beyond a reasonable doubt, that the kidnapping victim was also a robbery victim.

Here, Petitioner agreed to having a judge serve as trier of fact. The judge found him guilty of second degree kidnapping as a class 2 felony, meaning that each of that crime's elements—including that the kidnapped person was a victim of robbery—had been proven beyond a reasonable doubt. Consistent with that verdict, the judge also found Petitioner guilty of the separately charged crime of robbery.

At sentencing, however, the judge merged the robbery conviction into the kidnapping conviction, believing that this was necessary under double jeopardy principles, to avoid punishing Petitioner twice for the same crime. To benefit Petitioner, in other words, the separate robbery conviction was vacated because his guilt of robbery was already established by his class 2 felony kidnapping conviction.

Petitioner argues that the absence of a separate robbery conviction makes his sentence for second degree kidnapping unconstitutional under *Nelson v. Colorado*, 137 S.Ct. 1249 (2017), and asks this Court to grant certiorari on the issue of whether *Nelson* is retroactive. But his constitutional argument turns on an

interpretation of Colorado state law, and his retroactivity question was not even litigated in Colorado's state courts.

The question presented therefore is:

Whether this Court should grant certiorari to the Colorado Court of Appeals to address a retroactivity question that was not litigated in the state courts, and where his constitutional claim would require this Court to overrule a state court's interpretation of state law.

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STATEMENT

I. Factual Background.

In 1990, following a bench trial, the trial court found Petitioner guilty of attempted first-degree murder (Count One); second degree kidnapping – person kidnapped was a victim of a robbery (Count Two); first-degree assault (Count Three); aggravated robbery (Count Four); and first-degree aggravated motor vehicle theft (Count Five).[1]

Petitioner, at gun point, robbed, kidnapped, and attempted to kill the manager of a Burger King. Petitioner first gave the victim a "robbery note" and then ordered him to accompany Petitioner out of the restaurant to the victim's car, where Petitioner ordered him to sit in the passenger seat while Petitioner drove from the scene. After driving for a while, Petitioner ordered the victim out of the car, told him "Now I'm going to shoot you," and shot him in the face.[2] The victim survived. *Id.* Law enforcement recovered documents and papers from Petitioner, including a notebook where he kept detailed notes of the planning of his crimes and afterthoughts. In that notebook, Petitioner wrote that he attempted to shoot the victim at least once more, but that his gun jammed on the second pull.[3] Petitioner

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[1] Appeals Binder Volume 1-2.pdf, pp. 25, 103, 178.
[2] Tr. 9/17/90, pp. 108-126.
[3] Suppressed Envelopes 1-3.pdf, pp. 25-27, 41-43; Appeals Binder Volume 1-3.pfd, pp. 93-100.

congratulated himself on his "superb" tactics, concluding that the "Op was conducted ok."[4]

On November 26, 1990, the trial judge sentenced Petitioner to two consecutive 48-year prison terms for the attempted murder (Count One) and kidnaping convictions (Count Two), and to a concurrent 16-year prison term for the motor vehicle theft conviction (Count Five).[5] The trial judge vacated Petitioner's assault (Count Three) and aggravated robbery (Count Four) convictions.[6] Petitioner has conceded that the aggravated robbery conviction was vacated because the trial judge merged it into the second degree kidnapping conviction.[7]

II. Proceedings in the Trial Court and Colorado Court of Appeals.

Petitioner directly appealed his convictions and sentence, and in 1992 the Colorado Court of Appeals affirmed in *People v. Anderson*, (Colo. App. No. 91CA0029, June 25, 1992) (not selected for publication).[8] In 1998 he filed a federal habeas application under 28 U.S.C. § 2254, which was denied by the U.S. District Court; the Tenth Circuit denied him a certificate of appealability.[9] Petitioner

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[4] Suppressed Envelopes 1-3.pfd, p. 26.
[5] Appeals Binder Volume 1-2.pdf, p. 25.
[6] Appeals Binder Volume 1-2.pdf, p. 25.
[7] *See* Appeals Volume 4.pdf, pp. 148-51, 164. The stenographic notes of the 1990 sentencing hearing no longer exist; they were destroyed consistent with state procedures due to the passage of time. *See also* Efiled Documents.pdf, pp. 67-71.
[8] Appeals Binder Volume 1-2.pdf, pp. 208-16.
[9] Pet. App. E, p. 1.

subsequently filed several unsuccessful state court postconviction motions and appeals.[10]

As relevant here, on January 20, 2015, Petitioner filed a postconviction motion in the state district court under Colorado Rule of Criminal Procedure 35(a), in which he asserted that his enhanced 48-year sentence for second degree kidnapping was illegal. He acknowledged that the district court had vacated his aggravated robbery conviction only because the court had merged that conviction into his second degree kidnapping conviction, but argued that the absence of a separate robbery conviction precluded the court from elevating the kidnapping conviction to a class 2 felony.[11]

On March 18, 2015, the district court denied the motion. It concluded that the merger of the two convictions at the sentencing hearing was "erroneous" because the convictions were not actually required to be merged, but further concluded that the error did not affect the enhanced sentence as the trial judge had found the kidnapping victim and robbery victim were the same person.[12]

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[10] *See, e.g.*, Appeals Volume 3.pdf, pp. 240-43, 251; Appeals Volume 4.pdf, pp. 24-31, 98-103. *See also People v. Anderson*, (Colo. App. No. 10CA0455, July 14, 2011) (not published pursuant to C.A.R. 35(f)); *People v. Anderson*, (Colo. App. 05CA2668, July 12, 2007) (not published pursuant to C.A.R. 35(f)); *People v. Anderson*, (Colo. App. No. 04CA1603, Sept. 1, 2005) (not published pursuant to C.A.R. 35(f)).

[11] *See* Appeals Volume 4.pdf, pp. 148-51, 164.

[12] Appeals Volume 4.pdf, pp. 162-63. The district court's 2015 order mistakenly refers to a jury; actually, Petitioner had waived his right to a jury and had a trial to the court. *See* Appeals Binder Volume 1-2.pdf, p. 209; Appeals Volume 4.pdf, p. 26; Efiled Documents.pdf, p. 32.

On March 30, 2015, Petitioner filed a motion for reconsideration in the district court regarding the denial of his Rule 35(a) motion.[13] In the motion for reconsideration, Petitioner contended that his vacated conviction for aggravated robbery could not be used to "enhance" or "merge" with his second degree kidnapping conviction.[14] The district court denied the motion for reconsideration on June 1, 2017, concluding that a separate conviction for robbery was not required to enhance the kidnapping conviction, only a finding that the kidnapped person was also a victim of a robbery—and the trial judge had made that finding.[15]

Petitioner appealed again, but the Colorado Court of Appeals affirmed in an unpublished opinion, concluding that Petitioner's sentence was legal.[16] It first noted that section 18-3-302(3)(b) of the Colorado Revised Statutes did not require "a *conviction* of robbery to enhance a second degree kidnapping to a class 2 felony. ... Rather, it require[d] the fact finder ... to decide whether the prosecutor proved that the person kidnapped was also a victim of a robbery."[17] The Colorado Court of Appeals further concluded that whether the trial judge erred in vacating or merging the aggravated robbery conviction was not an issue it needed to decide because Petitioner did not dispute "the fact that the victim of the second degree kidnapping

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[13] Appeals Volume 4.pdf, p. 164.
[14] Appeals Volume 4.pdf, p. 164.
[15] The filing date was June 2, 2017. Appeals Volume 4.pdf, pp. 179-84.
[16] Slip op, p. 7. Efiled Documents.pdf, pp. 57-64.
[17] Slip op, p. 6 (emphasis in original). The statutory language was the same at the time Petitioner was convicted.

and the aggravated robbery [were] the same person."[18] Accordingly, Petitioner's sentence fell within the aggravated sentencing range for a class 2 felony.[19]

Petitioner filed a Petition for Writ of Certiorari in the Colorado Supreme Court, which was denied (No. 18SC373, Sept. 17, 2018); the mandate issued on September 21, 2018.

III. Proceedings in the Federal Courts.

Petitioner sought authorization to file a second or successive 28 U.S.C. § 2254 habeas application, contending that the decision in *Nelson v. Colorado*, 137 S.Ct. 1249 (2017), "holds that if a conviction has been vacated, it cannot be used to enhance a sentence."[20]

On November 18, 2018, the United States Court of Appeals for the Tenth Circuit denied authorization.[21] The Tenth Circuit observed that, contrary to Petitioner's contention, *Nelson* held that requiring a defendant whose conviction had been vacated to file a civil proceeding and prove her innocence by clear and convincing evidence to obtain a refund of fees, court costs, and restitution violated due process."[22]

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[18] Slip op, p. 6.
[19] Slip op, p. 6.
[20] *See* Pet. App. E, p. 2 (In re: Brian Anderson, No. 18-1418 (D.C. No. 1:98-CV-00140-EWN, (D. Colo.)).
[21] *See* Pet. App. E, pp. 1-3.
[22] Pet. App. E, p. 2.

The Tenth Circuit held that *Nelson* did not "establish a new rule of constitutional law, otherwise unavailable, that has been made retroactive to cases on collateral review," and that Petitioner had failed to demonstrate that *Nelson* was made retroactive by this Court to cases on collateral review—which are prerequisites to an inmate's ability to file a successive habeas application under 28 U.S.C. § 2244(b)(2)(A).[23] It did not therefore address whether *Nelson* applied to Petitioner's claim.

REASONS FOR DENYING THE PETITION

I. Petitioner is asking this Court to revisit Colorado's appellate courts interpretation of state law. His constitutional argument is premised on the idea that—under state law—his second degree kidnapping conviction cannot be elevated to class 2 felony status unless he is separately convicted of robbery. But Colorado's appellate courts have resolved that state law question against him.

II. This is a poor vehicle for assessing the question Petitioner presents for review. That question, concerning the scope and potential retroactivity of *Nelson v. Colorado*, 137 S.Ct. 1249 (2017), was not litigated in Colorado's state courts. The retroactivity of *Nelson* was addressed only by the Tenth Circuit in denying

[23] Pet. App. E, pp. 2-3. *See also Tyler v. Cain*, 533 U.S. 656, 663 (2001) (holding that, for purposes of 28 U.S.C. § 2244(b)(2)(A), only the United States Supreme Court can make a new rule retroactive).

Petitioner's request to file a second or subsequent habeas application, a ruling from which Petitioner cannot seek certiorari. *See* 28 U.S.C. § 2244(b)(3)(E).

III. Petitioner is simply wrong in thinking that *Nelson*, concerning restitution, is applicable here. His due process argument better rests on much older case law requiring that each element of an offense be proven beyond a reasonable doubt. Petitioner's theory is that the "victim of robbery" element has not been properly established, but that element was found in his conviction for second degree kidnapping.

I. Petitioner's due process claim ultimately depends on the interpretation of state law.

While the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," *In re Winship*, 397 U.S. 348, 364 (1970), the applicability of that reasonable-doubt standard "has always been dependent on how a State defines the offense that is charged in any given case." *Patterson v. New York*, 432 U.S. 197, 211 n.12 (1977). Here, Petitioner's constitutional argument depends entirely on his assertion that—under Colorado law—his class 2 felony sentence requires a separate conviction for robbery. And on that score, he is simply wrong.

Count Two of the charging document in Petitioner's case specifically alleged that the kidnapping victim was not only seized and carried from one place to

another, but also that the same person "was a victim of robbery."[24] Petitioner waived his right to a jury trial, and the trial judge, acting as finder of fact, found Petitioner guilty of Count Two—reflecting the judge's conclusion that the prosecution had proven, beyond a reasonable doubt, that the kidnapped person was also a victim of a robbery.[25]

Because Count Two included the element that the kidnapped person was a victim of robbery, the kidnapping offense was elevated to a class 2 felony under Colorado law. The kidnapping statute in effect at the time of Petitioner's case provided that "Any person who knowingly seizes and carries any person from one place to another, without his consent and without lawful justification, commits second degree kidnapping." Colo. Rev. Stat. § 18-3-302(1) (1990). The offense "is a class 2 felony" if the person kidnapped:

> (a) Is the victim of a sexual assault; or
>
> (b) Is *a victim of a robbery*.

Colo. Rev. Stat. § 18-3-302(3) (1990) (emphasis added).[26]

The plain language of the statute therefore does not require a separate conviction for robbery to enhance the felony level of second degree kidnapping; rather, it requires a factual finding that the person kidnapped was "a victim of a

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[24] Appeals Binder Volume 1–2.pdf, pp. 38, 72–73, 76.
[25] Tr. 9/17/90, p. 4; R. Vol. 1–2.pdf, p. 144.
[26] With minor changes in wording, the statute is substantially the same today. *See* Colo. Rev. Stat. § 18-3-302 (2018).

robbery." *See* Colo. Rev. Stat. § 18-3-302(3)(b); *see also People v. Powell*, 716 P.2d 1096, 1103-04 (Colo. 1986) (holding that the kidnapping statute requires the fact-finder to determine whether the prosecution proved beyond a reasonable doubt that the person kidnapped was also a victim of a robbery).

Here, Petitioner was charged with second degree kidnapping under section 18-3-302(3), which required the prosecution to prove, among other things, that the kidnapped person was also a victim of a robbery.[27] The trial court, as fact-finder, found Petitioner guilty of second degree kidnapping, which necessarily required a finding—based on the charge—that the victim was a victim of a robbery.[28] And the testimony at trial incontrovertibly established the victim of the kidnapping and robbery to be the same person.[29] Petitioner's claim that the trial court used the "vacated" robbery conviction to enhance his sentence for second degree kidnapping is therefore inaccurate. What enhanced the kidnapping conviction to a class 2 felony was the proven fact that the kidnapped person was a victim of a robbery.

Petitioner has conceded throughout that the trial judge vacated the aggravated robbery conviction only because it believed it needed to "merge" that conviction into the conviction for second degree kidnapping.[30] For what it is worth, it appears that the trial judge in that regard was mistaken, because under Colorado

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[27] Appeals Binder Volume 1-2.pdf, p. 117.
[28] Appeals Binder Volume 1-2, pp. 47, 117.
[29] *See* Tr. 9/17/90, pp. 108-26.
[30] *See* Appeals Volume 4.pdf, pp. 148-51, 164.

precedent the former does not merge into the latter.[31] That erroneous merger of convictions, however, does not eliminate the factual finding, embodied in the conviction on Count Two, that the kidnapped person was also a victim of a robbery. The error only inured to Petitioner's benefit: it decreased the number of convictions that entered against him.

II. This is a poor vehicle for assessing the question presented for review.

As framed by Petitioner, the question presented by this case is whether *Nelson v. Colorado*, 137 S.Ct. 1249 (2017), is retroactive. This case is a poor vehicle for assessing that proposed certiorari question.

First, whether *Nelson* applied to Petitioner's case and whether it was retroactive was not litigated in this case in the state courts. Petitioner seems to claim that *Nelson* announced a new rule, but state law would determine whether Colorado's courts would apply the new rule retroactively to his conviction, which was final when *Nelson* was announced. *See Danforth v. Minnesota*, 552 U.S. 264, 266 (2008). The Colorado Court of Appeals did not even discuss *Nelson* in its opinion, likely because Petitioner did not even cite *Nelson* until his reply brief in the

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[31] Appeals Volume 4.pdf, p. 162. *See People v. Hogan*, 114 P.3d 42, 57 (Colo. App. 2004) ("The penalty enhancement factor of robbery is not a lesser included offense that merges into second degree kidnapping involving robbery."); *People v. Huggins*, 825 P.2d 1024, 1027 (Colo. App. 1991) (concluding "the penalty enhancement factor of robbery is not a distinguishable lesser included offense which merges into second degree kidnapping involving robbery").

Colorado Court of Appeals, and therefore also did not address whether it would be retroactive under state law. To the extent this Court would ever review such as a state law issue, the issue simply was not developed here.

Second, Petitioner's current focus on *Nelson's* retroactivity was prompted by the Tenth Circuit Court of Appeals' denial of his motion for authorization to file a second or subsequent 28 U.S.C. § 2254 habeas petition. The Tenth Circuit concluded that Petitioner had not demonstrated that "*Nelson* has been made retroactive by the Supreme Court to cases on collateral review," which is a statutory prerequisite to successive habeas applications under 28 U.S.C. § 2244(b)(2)(A). Pet. App. E; *see also Tyler*, 533 U.S. at 663. Petitioner cannot seek review of the Tenth Circuit's denial of authorization to file a successive habeas application because, by statute, that denial "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certriorari." 28 U.S.C. § 2254(b)(3)(E). Perhaps that is why Petitioner instead asks that this Court issue a writ of certiorari to the Colorado Court of Appeals—which did not even address the question of retroactivity.

Third, while Petitioner claims there is a federal court conflict about whether *Nelson* is retroactive, *see* Pet. 9, that claim is not demonstrated by the cases he cites. He cites *Rossignol v. United States*, 2018 WL 3340570, at *3 n.4 (D. Me., July 6, 2018), but that opinion declined to address *Nelson*'s retroactivity because it did not apply to Rossignol's claim. Likewise, *Wardell v. Joynder*, 2018 WL5839550, at **4-5 (D.S.C., Nov. 8, 2018), concluded that—contrary to Petitioner's contention—

Nelson simply did not apply to "sentence enhancements." *Minor v. Coakley*, 2018 2018 WL 4871131, at *3 (N.D.W.Va., Oct. 9, 2018), did not address whether *Nelson* applied retroactively, because that claimant's reliance on it was misplaced and his analysis incorrect. And in *Hager v. Underwood*, 2018 WL 2031925, at *3 (N.D. Tex., March 16, 2018), the court concluded that the habeas petition there failed to raise a claim that was based on a retroactively applicable Supreme Court decision.

Finally, even if *Nelson* was retroactive, it would not help Petitioner because it does not support his constitutional claim, as will be discussed next.

III. *Nelson* has no bearing on Petitioner's case because he was not acquitted of aggravated robbery, that conviction was not reversed, and otherwise he does not assert he was ordered to pay amounts based on conduct for which he was acquitted.

Petitioner argues that using his vacated aggravated robbery conviction to enhance his second degree kidnapping conviction from a class 3 to a class 2 felony violates *Nelson v. Colorado*, 137 S.Ct. 1249 (2017). Petitioner is incorrect and his reliance on *Nelson* misplaced. Petitioner also cites *Johnson v. Mississippi*, 486 U.S. 578 (1981). To the extent Petitioner relies on that case, his reliance is equally incorrect.

Initially, Petitioner did not timely raise his *Nelson*-related, due process claim with the Colorado Court of Appeals, and therefore, the Colorado Court of Appeals did not address it below. Petitioner first cited *Nelson* in his reply brief, and the Colorado Court of Appeals does not address new issues raised for the first time in a

reply. *People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990); *In the Interest of L.B.*, 413 P.3d 176, 187 (Colo. App. 2017). *Nelson* was decided on April 19, 2017. Petitioner filed his opening brief in the Colorado Court of Appeals on August 28, 2017. Accordingly, Petitioner had the benefit of the *Nelson* opinion and could have raised the issue in the Colorado Court of Appeals in a timely manner. Thus, the issue would not be properly before this Court.

In any event, *Nelson* does not apply to Petitioner's case. *Nelson* concerns the "continuing deprivation of property after a conviction has been reversed or vacated, with no prospect of reprosecution." 137 S.Ct. at 1255. There, this Court concluded that Colorado's Exoneration Act violated due process because it required defendants—who were *acquitted* or their convictions *reversed* on appeal—to prove their innocence by clear and convincing evidence to obtain refund of costs, fees, and restitution paid pursuant to the invalidated convictions. 137 S.Ct. at 1253-55.

In fact, in *Nelson*, Petitioner Nelson's conviction was reversed for trial error, and on retrial, she was *acquitted* of all charges. And, after one of Petitioner Madden's convictions was *reversed* on direct review and the other *vacated* on postconviction review, the State elected *not* to appeal or retry. 137 S.Ct. at 1250-51.

The question in *Nelson* was whether:

> When a criminal conviction is invalidated by a reviewing court and no retrial will occur, is the State obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction? Our answer is yes. *Absent conviction of a crime, one is*

> *presumed innocent.* Under the Colorado law before us in these cases, however, the State retains conviction-related assessments unless and until the prevailing defendant institutes a discrete civil proceeding and proves her innocence by clear and convincing evidence. This scheme, we hold, offends the Fourteenth Amendment's guarantee of due process.

137 S.Ct. at 1252 (emphasis added).

Therefore, even if *Nelson* applied retroactively—which Petitioner has not demonstrated—*Nelson* does not apply here because Petitioner, as set forth above, was not acquitted of any charge, his aggravated robbery conviction was not reversed by a reviewing court, and he otherwise does not assert the state retained amounts he paid based on conduct for which he was acquitted. As noted, the trial court merged Petitioner's conviction for robbery into the second degree kidnapping conviction, which required, as an element, a finding that the person kidnapped was a victim of a robbery, which, in turn, the court found beyond a reasonable doubt. That legal merger (while ostensibly unnecessary), did not affect the validity of Petitioner's second degree kidnapping conviction as a class 2 felony, nor did it restore Petitioner's presumption of innocence regarding robbery, or any other crime.

Accordingly, *Nelson* has no bearing on Petitioner's case. Petitioner's presumption of innocence was never restored and his due process was not violated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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