IN THE
SUPREME COURT OF THE UNITED STATES
NO._____

JASON BROOKS
Petitioner,

-vs-

RICK RAEMISCH, Executive Director of the Colorado Department of Corrections
LOU ARCHULETTA, Warden
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

Jason Brooks #150014 Pro Se
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P.O. Box 6000
Sterling, CO 81215

QUESTIONS PRESENTED

Whether "scienter" is an element of criminal securities fraud and whether its existence is a question of fact that must be proven beyond a reasonable doubt? Whether a state's statutory scheme can impose severe criminal penalties for conduct less culpable than that for which recovery in a private civil action is not permitted under the same securities fraud statute? Whether severe criminal punishments being imposed for strict liability securities fraud violations is constitutional? Whether the term "willfully" provides notice of "an intent to defraud" and fair warning as to the elements that constituted the crime Petitioner was alleged to have committed?

PARTIES

The petitioner is Jason Brooks, a prisoner at Sterling Correctional Facility in Sterling, Colorado. The respondents are Rick Raemisch, Executive Director of the Colorado Department of Corrections, and Lou Archuleta, Warden of the Fremont Correctional Facility.

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The decision of the Fremont County Court is unreported and not cited anywhere; a copy is attached as Appendix A to this petition. The order of the Colorado Supreme Court is unreported and not cited anywhere; a copy is attached as Appendix B to this petition.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on July 3, 2018 without a decision. Jurisdiction is conferred by 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment XIV to the United States Constitution, which provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Amendment is Enforced by Title 28, Section 1257(a), United States Code:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or *where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution*, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

SUMMARY OF THE CASE

The Colorado Securities Act ("CSA"), as applied to criminal violations of Colo. Rev. Stat. § 11-51-501(1), inadvertently removed scienter from its criminal code, which has permitted the State of Colorado to impose severe criminal penalties for a strict liability offense and permits the state to manipulate its burden of proof by relying on a presumption rather than evidence to establish an element of criminal securities fraud. The CSA, therefore, has improperly permitted a lower evidence to bar for a criminal conviction of securities fraud than a civil liability case in Colorado, which clearly offends the Equal Protection, Due Process, and Cruel and Unusual Punishment Clauses of the United States Constitution.

STATEMENT OF THE CASE

The CSA, as applied to criminal violations of Colo. Rev. Stat. § 11-51-501(1), has created a substantive rule that has altered "the range of conduct or the class of persons the law punishes." *Teague v. Lane*, 489 U.S. 288, 311 (1989). This is because the CSA has imposed heavy criminal penalties for securities fraud, even when civil liability is avoided for the same violations of Colo. Rev. Stat. § 11-51-501(1). The CSA has, therefore, "placed a class of private conduct beyond the power of the State to proscribe," *Saffle v. Parks*, 494 U.S. 484, 494 (1990)(internal quotation marks omitted), which "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense," *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

"Part 6 of the CSA has established criminal and civil liability for violations of § 11-51-501. A 'willful' violation is criminal and constitutes a class 3 felony. Section 11-51-603(1)." *People v. Prendergast*, 87 P.3d 175, 180 (Colo. App. 2003); however, "civil liability arises from violations of § 11-51-501 under other circumstances. Section 11-51-604(3), C.R.S. 2002 (any person who 'recklessly, knowingly, *or with an intent to defraud*' sells or buys a security in violation of § 11-51-501(1) is liable for legal or equitable relief)." *Id*; *see also Black Diamond Fund, LLLP v. Joseph*, 211 P.3d 727, 736 (Colo. App. 2009)("The statute contains a separate and additional requirement of proof of 'scienter' if the Commissioner

also seeks damages, *restitution*, or disgorgement as part of the proceeding. § 11-51-602(2)). While the Colorado Supreme Court has stated that "definitions derived from civil law may be applied to criminal statutes," *People v. Riley*, 708 P.2d 1359 (Colo. 1985), there has been no explanation how "an intent to defraud" or scienter has been permitted to be left out of the state's criminal statute for enforcement of securities fraud violations pursuant to § 11-51-501(1), C.R.S. Without an "intent to defraud" or "scienter" element being plead or proven, the plain language of the term "willfully" in Colorado has permitted a conviction of Brooks to be obtained upon a presumption rather than evidence to establish an element of criminal securities fraud and does not even establish Brooks' civil liability to the same offense. Brooks has thus entered his guilty plea without acknowledgment of any criminal intent or wrongdoing; therefore, the plain meaning of Colo. Rev. Stat.11-51-501(1) to which Mr. Brooks plead, is constitutionally invalid.

The elements of the crime of securities fraud in accordance with § 11-51-501(1), C.R.S. (pursuant to section 11-51-603(1), C.R.S.) states:

1. That the defendant . . .
3. in connection with the offer, sale or purchase of *any* security,
4. directly or indirectly,
5. willfully,
6. (a) made any untrue statement of material fact,

-or-

(b) omitted to state a material fact necessary in order to make the statements

made, in light of the circumstances under which they were made, not misleading.

-and/or-

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Brooks' plea was premised upon the plain meaning of the term "willfully," which in Colorado does not require any intent to violate the law, or to injure another, or acquire any advantage. Since there was no fair warning given by the State as to what "willfully" entails—Brooks and his attorney's understood a criminal conviction for securities fraud could be obtained in (at least) three separate ways based simply on conscious action: for consciously stating something believed to be true but later determined to be false; for consciously not stating a fact believed to be immaterial if it is later determined that the fact was material; and for consciously acting if that act is later determined to have operated as fraud or deceit. There are numerous views consistent with this interpretation of the plain language of § 11-51-501(1), C.R.S. and the term "willfully;"[1] however, these States

[1] *See* State v. Gunnison, 618 P.2d 609, 614 (Ariz. Ct. App. 1980) ("A specific intent, an evil motive or knowledge that the law was being violated is not required in order to find a violation.")(Strict liability); State v. Fries, 337 N.W.2d 398, 405 (Neb. 1983) (citing other states for support that proof of specific intent or evil motive is not required for conviction under Nebraska's securities act)(Blue sky laws—strict liability); People v. Barysh, 408 N.Y.S.2d 190, 193 (N.Y. Sup. Ct. 1978) ("The statute, on its face, is directed at acts or practices, and not at any particular mental state on the part of the actor. Moreover, it clearly does not require several of the common-law elements of fraud, namely, reliance and scienter.")(Strict liability); State v. Martin, 187 N.W.2d 576, 581 (S.D. 1971) ("It [the definition of willfully] does not require any intent to violate law, or to injure another, or to acquire any advantage." (citing S.D. Codified Laws 22-1-2 for the definition of willfully and for the reason scienter is not an element of securities fraud)(Blue sky laws violation—strict liability).

do not penalize securities fraud violations with severe criminal penalties and most consider the securities fraud violations strict liability offenses, violate blue sky laws, and—if they are considered criminal—only minor criminal penalties. Brooks guilty plea, consequently, has been obtained without an element mandated to support his conviction—an intent to defraud or scienter.

Colorado has made no differentiation between a defendants selling of registered and unregistered securities for the purposes of criminal prosecution, which has created a mess in Colorado and throughout the entire country. It is undisputed that Brooks' case involved the sale of unregistered securities and Colorado has held that sale of unregistered securities is a strict liability offense. *See* People v. Morrow, 682 P.2d 1201, 1204 (Colo. Ct. App. 1983); however, Colorado's Supreme Court has identified that "[v]iolations of subsections 11-51-[501](b) and (c), C.R.S., are clearly not strict liability offenses," Riley, 708 P.2d at 1365. While state courts are split regarding the nature of intent required for criminal convictions of securities fraud, almost all state courts agree that scienter is not required for a criminal conviction for selling unregistered securities.[2] Most

[2] *See*, e.g., People v. Morrow, 682 P.2d 1201, 1204 (Colo. Ct. App. 1983) (holding that sale of unregistered securities is a strict liability offense); State v. Kreminiski, 422 A.2d 294, 296-97 (Conn. 1979) (ruling that in cases dealing with sales of unregistered securities, "scienter or awareness of a licensing requirement is not essential for a violation"); State v. Hodge, 204 Kan. 98, 107, 460 P.2d 596, 604 (1969) (holding that no element of intent is necessary for the offense of selling unregistered securities); State v. Dumke, 901 S.W.2d 100, 104-05 (Mo. Ct. App. 1995) (recognizing that the court's interpretation "could result in the prosecution and conviction of a person with an entirely innocent frame of mind" but, nonetheless, ruling that "[t]he state is required to prove only that [the defendant] acted intentionally in the sense that he was cognizant of what he was doing"); State v. Sheets, 601 P.2d 760, 770 (N.M. Ct. App. 1980) (ruling that conviction for the sale of unregistered securities only requires that the state prove the defendant acted intentionally in the sense that he was aware of what he was doing); State v.

significantly, however, the crime of selling unregistered securities is a regulatory offense and, therefore, strict liability is appropriate.[3]

Since Brooks, however, was facing 276 years imprisonment, Colorado has not proven the elements necessary to support Brooks' conviction, nor can an "inference" be made of intentional wrong doing under the circumstances of this case. Brooks may have acted consciously with respect to the offenses, but without the element of intention or scienter written into the criminal securities fraud statute in Colorado, Brooks' plea has been induced upon his conscience action, which is constitutionally invalid. Brooks' basis for pleading guilty was premised upon the mistaken belief that the charge in the information was proper and correct, whereas in fact all of the intentions and actions of the petitioner are not even sufficient to make him civilly liable in Colorado to the same exact securities fraud offenses. Brooks, therefore, was under the mistaken belief that the only defense to "willfully" would have been proof that he was not aware of what he was doing,

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Goetz, 312 N.W.2d 1, 12-13 (N.D. 1981) (concluding that crime of selling unregistered securities and failure to register as a salesperson does not require proof of evil intent). *But see* Hentzner v. State, 613 P.2d 821, 826-29 (Alaska 1980) (holding that, while crime of selling unregistered securities *is malum prohibitum*, it [still requires proof of criminal intent in the sense of awareness of wrongdoing or knowledge).

[3] For the purpose of analyzing decisions on the nature of intent required for criminal securities fraud convictions, it is only necessary to recognize that the crime of selling unregistered securities is significantly different. The sale of unregistered securities is a regulatory crime that meets the majority of the criteria for a public welfare offense. In brief, the act of selling unregistered securities is a crime against the state in the nature of neglecting a duty imposed by law, and the offense is *malum prohibitum*, not *malum in se*. A conviction does not do grave harm to an offender's reputation, and a violation of the law does not result in direct harm but only in potential for harm. These characteristics stand in sharp contrast to the crime of securities fraud and suggest that strict liability is appropriate. On the other hand, the crime of selling unregistered securities can also be a felony and may carry a heavy criminal penalty. If there is a heavy penalty, however, strict liability may be inappropriate and suggest "scienter" is a mandated element that must be alleged and proven.

such as involuntary or accidental behavior. Conscious actions requires only that the defendant was *aware* that he was speaking, not that he was aware that the statements were false or misleading or intending to mislead (as applied in § 11-51-501(1)(b), C.R.S.); conscious action also would have required Brooks to somehow rebut the fact that he consciously was *aware* that he engaged in a business enterprise (as applied in § 11-51-501(1)(c), C.R.S.). As an affirmative defense, Brooks would have had to prove that he spoke or acted unconsciously—a defense with relatively few real-word applications—or that he did not consciously engage in a course of business. This directly lead to Brooks' involuntary plea because he had no warning to what his conduct was have alleged to entail. "In addition, § 11-51-604(4), C.R.S. separately addresses civil liability solely for a violation of section 11-51-501(1)(b), providing liability where the seller fails to sustain the burden of proving that the buyer did not know, and in the exercise of reasonable care could not have known, of the untruth or omission." *Black Diamond Fund, LLLP v. Joseph*, 211 P.3d at 736. Even this form of defense protecting an accused against civil liability in Colorado is unavailable for a defendant in a criminal prosecution.

The Colorado Criminal Code, which governs the construction of "any offense defined in any statute of this state," section 18-1-103(1), C.R.S., further obfuscates matters by equating the culpable mental state of "willfully" with the culpable mental state of "knowingly." Section 18-1-501(6), C.R.S., states:

> A person acts "knowingly" or "willfully" with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts "knowingly" or "willfully", with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result.

This definition of "willfully" does not establish scienter, reliance, or loss causation and Colorado's legislature uses the term "scienter" in its civil code—clarifying the legislature in Colorado was not attempting to have "willfully" relate to any form of "scienter."

The history of the Federal Uniform Securities Act[4] indicates that scienter was meant to be an element of criminal securities fraud. The drafters of Colorado's legislature expressly chose section 10(b) of the Securities Exchange Act and SEC Rule 10b-5 as the model for the fraud provision of the CSA, understanding that the rules applied only to acts committed with "bad purpose" or "evil motive," which is why "an intent to defraud" appears in section 11-51-604(3), C.R.S. and "scienter"

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[4] Unif. Securities Act 101 official cmt., 7B U.L.A. 509, 516 (1985) ("This section is substantially the Securities and Exchange Commission's Rule X-10B-5 [now 240.10b- 5], 17 Code Fed. Regs. 240.10b-5 . . . . "); *See* Louis Loss, Commentary on the Uniform Securities Act at v (1976), 101 draftmen's commentary at 7 ("SEC Rule 240.10b-5 seems to be the logical model for a uniform state fraud provision, both because of the language disparities in the existing state statutes and because of the substantial body of judicial precedent which has been developed under the federal provisions."); 1 Loss & Seligman, supra note 7, at 52, 70, 3674- 75. The draftmen's commentary was not included in the Uniform Act as published in the Uniform Laws Annotated. See 7B U.L.A. 509 (1985). However, the preface to the Uniform Act explains that the draftmen's commentary was not included solely for the sake of brevity and refers the reader to the draftmen's commentary "published by Little, Brown & Co. in early 1957" in "an appendix in Loss and Cowett on 'Blue Sky Law.'" Id. at 510 (referring to Louis Loss & Edward Cowett, Blue Sky Law (1958)). Professor Loss also published the draftmen's commentary along with the Uniform Act in his 1976 book, Commentary on the Uniform Securities Act. Loss, supra

appears in section 11-51-602(2), C.R.S. Presumably the drafters also intended the fraud provision of the CSA to apply to criminal activities that must also involve scienter. Under the CSA, civil liability can be avoided if a defendant is able to show that he did not *intend* to defraud or mislead anyone—which provides numerous defenses to such allegations—and the only way restitution can be obtained is through a showing of proof of scienter. Colorado's legislature would have never intended to impose a heavy criminal penalty for a violation of securities fraud when civil liability is avoided for the same offense. Had the legislature intended this bizarre result, it would have expressly provided for it in the text of the statute or the comments and that never happened.

Interpreting section 11-51-501(1), C.R.S. to require only awareness or conscious action ("willfully") for a criminal conviction of securities fraud inappropriately creates a strict liability offense, which the Colorado Supreme Court expressly stated was "clearly" not intended. *People v. Riley*, 708 P.2d at 1365. California's Supreme Court, citing *Morissette v. United States*, 342 U.S. 246 (1952), explained that "the Supreme Court has indicated that regulatory or 'public welfare' offenses which dispense with any *mens rea*, scienter, or wrongful intent element are constitutionally permissible, but it has done so on the assumption that the conduct poses a threat to public health or safety, the penalty for those offenses is usually small, and the conviction does not do 'grave damage to an offender's reputation.'" *See People v. Simon*, 886 P.2d 1271, 1289 (Cal. 1995)(*citing*

Morissette, 342 U.S. at 256). Criminal securities fraud plainly falls outside of this small category of offenses. When intent is an ingredient of the crime, its existence is a question of fact that must be proven. *Morissette*, 342 U.S. at 274. Expanding strict liability to criminal securities fraud not only flies in the face of precedent, but also violates due process, equal protection, and cruel and unusual punishment. Colorado courts have an obligation not to interpret section 11-51-501(1)(b) and (c), C.R.S. in a way that exposes Coloradans to extreme criminal punishments for strict liability conduct. A criminal conviction obtained without proof of an intention to defraud is simply not appropriate for the serious crime of securities *fraud*—a conviction without scienter falls under the broader sweep regulating narrower securities sales and cannot justify a 32 year term of imprisonment under any circumstance, nor the over 9 years of incarceration Brooks has already served. The very nature of the crime of securities fraud suggests that the culpable mental state must encompass well beyond what "willfully" entails under Colorado's statutory scheme. This Court has acknowledged that criminal law "is concerned not only with guilt or innocence in the abstract, but also *with the degree of criminal culpability*" assessed. *Apprendi v. New Jersey*, 530 U.S. 466, 485 (2000) (*citing Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975)). Because the "consequences" of a guilty verdict for a civil and criminal conviction of securities fraud in the State of Colorado differ substantially, the State cannot circumvent the protections defined in *In re Winship*, 397 U.S. 358, 364 (1970) merely by "redefining the elements that

constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *Mullaney v. Wilbur,* 421 U.S. at 698. Colorado has attempted to redefine what the term "willfully" entails—suggesting that an *awareness* of conscious action somehow justifies a *mens rea* threshold that would satisfy punishing a securities fraud offense above that of strict liability. "While refusing to require the prosecution to establish beyond a reasonable doubt" the element of intent, Colorado "denigrates the interests found critical in *Winship*. The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty." *Id.* The fact remains that the consequences resulting from a criminal verdict of securities fraud, as compared with a civil verdict, differ drastically. "Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction," the distinction established by Colorado between securities fraud and the broader sweep regulating narrower securities sales "may be of greater importance than the difference between guilt or innocence" for securities fraud crimes. *Id.*

Due process requires that wrong choice precede punishment and it prohibits treating the individual as an object and the law as one stimulus among many which may affect the individual-as-object. Even the argument of punishing in the name of deterrence utilizes the idea of man as a means to a socially-desired end; he is

treated as an object although he has not made any choice to incur this treatment. Punishing people under these circumstances violates due process because it fails to accord worth and dignity to each individual independent of socially-desired ends. It also fails to insure that if an individual tries to obey the law and make correct choices, he will not suffer criminal condemnation.[5] In *Ratzlaf v. United States*, 510 U.S. 135 (1994) , this Court considered a provision of the Money Laundering Control Act of 1986, which imposes criminal penalties on anyone who "willfully violates" the Act. The Court concluded that a "willful" violation of the Act occurs only when a defendant acts with knowledge that his conduct is unlawful. *Id.* at 136-37. The Court's decision was motivated both by the fear of criminalizing innocent conduct and by the potential due process violation in imposing punishment on an individual acting without *notice* that his conduct is unlawful. *See Id.* at 144-48; *see also Bryan v. United States*, 524 U.S. 184,195 (1988)("The danger of convicting individuals engaged in apparently innocent activity that motivated our decisions in the tax cases and *Ratzlaf*"). The State of Colorado has criminalized Brooks conduct without notice that his conduct was unlawful, as the definition of "willfully" in Colorado does not satisfy the notice requirement of an "intent to defraud," or an inference to intentional wrongdoing, or even recklessness. Colorado Supreme Court's decision in *Riley* does not clarify that a

[5] Rachael Simonoff, Comment, Ratzlaf v. United States: The Meaning of "Willful" and the Demands of Due Process, 28 Colum. J.L. & Soc. Probs. 397, 416 (1995).

defendant must act with knowledge that his conduct is unlawful either. Without using the language of due process, this Court explained in *Morissette* that a fundamental right of all citizens is the right not to face criminal punishment without intending to do injury:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in the freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. *Id.* at 250.

Exceptions to this fundamental right must remain strictly limited to public welfare offenses that carry only small fines and do little or no damage to an individual's reputation (i.e. strict liability offenses).[6] *See* Hentzner v. State, 613 P.2d 821, 829 (Alaska 1980) (This court has consistently stated that strict criminal liability may not constitutionally be imposed for serious crimes, Guest, 583 P.2d at 839; Kimoktoak v. State, 584 P.2d 25, 29 (Alaska 1978); Alex, 484 P.2d at 681; Speidel, 460 P.2d at 80). Allowing Brooks conviction for criminal securities fraud without proof of "evil motive," "bad purpose," or "intent" breaches the boundaries of public welfare offenses and violates the fundamental freedoms espoused in

[6] One commentator has argued: The group of offenses punishable without proof of any criminal intent must be sharply limited. The sense of justice of the community will not tolerate the infliction of punishment which is substantial upon those innocent of intentional or negligent wrongdoing; and law in the last analysis must reflect the general community sense of justice. Francis Bowes Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 70 (1933).

Morissette and the spirit of the Due Process Clause. Scienter is an element of criminal securities fraud—it is essential to be charged and proven to support the possible 276 years of incarceration that Brooks was facing at trial, or the 32 years he has currently received—to support fair warning, fundamental fairness, and due process protections. Scienter is commonly used by the legal profession and the general public—it is not ambiguous; therefore, it would be an unreasonable application of the statutory scheme in Colorado to impose criminal penalties for conduct less culpable than that for which recovery in a private civil action is not permitted under the same statute. California's Supreme Court has addressed this exact issue Colorado must now confront and declared, "since the civil remedy required scienter, it would be unreasonable to conclude that when the legislature created the third tier of enforcement by criminal prosecution, it intended to dispense with any element of scienter while permitting a much greater sanction." *People v. Simon*, 886 P.2d 1271 (Cal. 1995)(in banc). This Court has clarified that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951); *see also United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978); *United States v. Freed*, 401 U.S. 601, 613 (1971)(conc. opn. of Brennan, J.). The terms "willfully" and "knowingly" in Colorado are not combinations or permutations of "intentionally," "with intent," "recklessly," "defraud," "wrongdoing," or other synonymous terms needed to substantiate

Brooks' guilt. Brooks has spent almost a decade in prison based upon this unconstitutional conviction and a guilty plea premised upon strict liability conduct cannot be supported because even the form of a strict liability securities fraud offense in Colorado requires "an intent to defraud." Mr. Brooks' conviction is, therefore, unconstitutional, invalid, and must be vacated, as it violates the very spirit of the United States Constitution.

BASIS FOR FEDERAL JURISDICTION

This case raises a question of interpretation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution; as well as the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution. The Fremont District Court had jurisdiction to rule on the habeas corpus petition pursuant to § 13-45-101(1), C.R.S., as an application for a writ of habeas corpus is a civil action, independent of the criminal charge, and is no part of an inquiry based on an information. *Oates v. People*, 136 Colo. 208, 315 P.2d 196 (1957); *Stilley v. Tinsley*, 153 Colo. 66, 385 P.2d 677 (1963); *Mulkey v. Sullivan*, 753 P.2d 1226 (Colo. 1988).

REASONS FOR GRANTING THE WRIT

A. Conflicts with Decisions of Other Courts

States that have adopted the Uniform Securities Act have basically split on the question of whether scienter is an element of criminal securities fraud, but the range of punishments for these broad ranging crimes have no commonality. A *majority* of states, however, have held that criminal convictions for securities fraud always requires proof of scienter.[7] Three states have ruled that, while specific intent to defraud is not an element of criminal securities fraud, mere conscious action is not sufficient to convict.[8] Two more states have held that scienter is

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[7] *See* Van Antwerp v. State, 358 So. 2d 782, 786 (Ala. Crim. App. 1978) (stating that a "statute employing the term 'willful' requires proof of the guilty knowledge or *mens rea*"); Hentzner v. State, 613 P.2d 821, 827-29 (Alaska 1980) (ruling that while the crime of selling unregistered securities is *malum prohibitum*, it requires proof of "awareness of wrongdoing"); People v. Simon, 886 P.2d 1271, 1291 (Cal. 1995) (in banc) ("For all of these reasons we conclude that when section 25401 [of the California Securities Act] was enacted, the Legislature did not intend to create a strict liability criminal offense."); Hubbard v. Hibbard Brown & Co., 633 A.2d 345, 349 (Del. 1993) (noting that state securities provisions modeled after Rule 10b-5 have been interpreted using federal case law and concluding that a violation of section 7303(2) requires proof of scienter); Merrill Lynch, Pierce, Fenner & Smith v. Byrne, 320 So. 2d 436, 440 (Fla. Dist. Ct. App. 1975) ("Scienter may well be an essential element in statutes where fraud and deceit are made the essence of an action. It is particularly applicable, of course, in criminal statutes."); Curtis v. State, 118 S.E.2d 264, 268 (Ga. Ct. App. 1960) (holding that an "intent to defraud" is an element of criminal securities fraud); State v. Walsh, 420 N.E.2d 1013, 1020 (Ohio Ct. App. 1979) (ruling that a person is not criminally liable for securities fraud if he in good faith believed the existence of the facts as represented); State v. Jacobs, 637 P.2d 1377, 1382-83 (Or. Ct. App. 1981) ("To support a felony conviction, the state was required to prove that defendant acted knowingly with respect to each element of the offense, which necessarily requires a mental state."); Commonwealth v. Stockard, 499 A.2d 598, 601 (Pa. Super. Ct. 1985) (holding that "willfulness" requires proof that the defendant "was aware that he was omitting" to make a statement of material fact and aware of "the nature of the statement he was omitting" (*citing* State v. Hynds, 529 P.2d 829, 834 (Wash. 1974) (en banc) to support the proposition that a defendant must have known the falsity of the representations for criminal conviction to be appropriate)); Cook v. State, 824 S.W.2d 634, 639 (Tex. Crim. App. 1991) ("A violation of the Securities Act is not a result-oriented crime. The trial court did not err in overruling Cook's objection to the charge and refusing to limit the definition of the culpable mental state to the result of the conduct.").

[8] *See* State v. Ross, 715 P.2d 471, 474 (N.M. Ct. App. 1986) (citing federal interpretation of Rule 10b-5 as support for the holding that conviction for securities fraud does not require proof of specific intent to defraud); State v. Cox, 566 P.2d 935, 939 (Wash. Ct. App. 1977) ("In considering Rule 10b-5 (similar to [the state rule]), the federal cases reflect that a specific intent to defraud is unnecessary; but it is necessary

sometimes required for criminal conviction for securities fraud[9] and this Court has interpreted Section 10(b) to require proof of "scienter" as a prerequisite for injunctive, civil, *and criminal sanctions*. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 (1976). A *minority* of states have held that criminal liability requires nothing more than proof that a defendant acted consciously (*see* note 1 from above); however, those states impose a form of strict libaility and do not carry severe criminal puishments.

California's Supreme Court has already addressed the exact issue that has given rise to this petition and is in direct conflict with Colorado, declaring that "since the civil remedy required scienter, it would be unreasonable to conclude that when the legislature created the third tier of enforcement by criminal prosecution, it intended to dispense with any element of scienter while permitting a much greater sanction." People v. Simon, supra. It is, therefore, unreasonable to conclude that when the Colorado legislature declared that enforcement of the civil remedy for of a violation of § 11-51-501(1), C.R.S. requires an "intent to defraud" pursuant

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that there be more than a showing of mere negligence . . . [but] a violation of [the state rule] does not require a specific intent to defraud."); State v. Temby, 322 N.W.2d 522, 526-27 (Wis. Ct. App. 1982) (holding that "absence of the word 'intent' is a clear indication that intent to defraud is not an element of the offense" (citing Washington v. Cox, 566 P.2d 935 (Wash. Ct. App. 1977)).

[9] Idaho and Illinois follow Aaron v. SEC, 446 U.S. 680 (1980), and do not require scienter for violations of parts two and three of section 101 of the Uniform Act but do require scienter for part one. *See* State v. Shama Resources Ltd. Partnership, 899 P.2d 977, 982 (Idaho 1995) ("Examining the literal words of the statute and giving the statutory language its plain and literal meaning, as we are required to do, we conclude that intent is not an element of securities fraud under I.C. 30-1034(2), (3)." (citations omitted)); People v. Whitlow, 433 N.E.2d 629, 634 (Ill. 1982) (holding that scienter is an element of securities fraud violation of a "device, scheme or artifice to defraud" but reading *Aaron v. SEC* to mean that scienter is not an element of the "acts or omissions" or "transaction, practice or course of business" provisions).

to § 11-51-604(3), C.R.S. and scienter pursuant to § 11-51-602(2), C.R.S., it would have intended to dispense with any element of scienter while permitting a much greater sanction for a criminal violation pursuant to § 11-51-603(1), C.R.S. This undisputable logic proves that a criminal conviction for securities fraud always requires proof of "scienter" or an "intent to defraud" in Colorado, as the term "willfully" does not and cannot establish, infer, or otherwise prove, scienter or an intent to defraud.

Additionally, in interpreting Colo. Rev. Stat. § 11-51-501(1)(b), a California Federal Court interpreted the CSA and found that "neither reliance or causation is an element of Colorado's Section [11-51-]501(1)(b)." *FDIC v. Countrywide Fin. Corp.*, 2013 U.S. Dist. LEXIS 1503, *8 (C.D. Cal). The California Central District clarified:

> "In full, Section 501(1)(b) forbids any person in connection with the sale of a security from making 'any untrue statement of a material fact or [omission of] a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.' The private right of action for enforcing Section 501(1)(b) grants the person who bought a security the right to sue '[a]ny person who sells a security in violation of section 11-51-501(1)(b),' whenever the purchaser did not know of the untruth or omission. Colo. Rev. Stat. § 11-51-604(4) ('Section 604(4)'). *Neither section mentions anything about reliance or causation.*" *Id.* at *8-9.

The Colorado Securities Act parallels the federal securities laws. *Goss v. Clutch Exch., Inc.*, 701 P.2d 33, 35 (Colo. 1985). Under federal law, if a cause of action has a scienter requirement, then the claim is for fraud and either reliance or causation is an element. *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988). As this Court has recognized, reliance is a long-standing element of common law fraud, and therefore is also an element of a statutory fraud claim. *Id*; however, the California Central District finding that "Section 501(1)(b) parallels Section 12(a)(2) of the Securities Act of 1933, not the fraud prohibitions in the Securities Exchange Act of 1934" is at irreconcilable odds with the fact that "the provisions of section 11-51-501(1), and its predecessor provisions, have been found by our [Colorado] courts to be analogous to Section 10(b) of the 1934 Securities Exchange Act and Rule 10b-5 promulgated by the SEC, 17 C.F.R. § 240.10b-5." *Black Diamond Fund, LLLP v. Joseph*, 211 P.3d 727, 736 (Colo. App. 2009); *see also People v. Riley*, 708 P.2d 1359, 1363 (Colo. 1985)(same); *People v. Prendergast*, 87 P.3d 175, 179 (Colo. App. 2003)(same); *People v. Terranova*, 38 Colo. App. 476, 480 (Colo. App. 1976)(same); *Rosenthal v. Dean Witter Reynolds, Inc.*, 883 P.2d 522, 526 (Colo. App. 1994)(same); *People v. Rivera*, 56 P.3d 1155, 1163 (Colo. App. 2002)(same). This confusion has come about because of Colorado inadvertently removing scienter from select provisions of the CSA; however, the tortured rational becomes clear when considering the following breakdown by the Colorado Supreme Court:

"Section 11-51-[501](1) is *identical* to section 101 of the Uniform Securities Act. 7B U.L A. 516 (1985); *see* Ohio v. Peterson, Lowry, Rall, Barber & Ross, 472 F. Supp. 402, 405 (D.Colo. 1979), *aff'd* 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895, 70 L. Ed. 2d 209, 102 S. Ct. 392 (1981); People v. Terranova, 38 Colo. App. 476, 480, 563 P.2d 363, 365 (1976). Section 101 of the Uniform Securities Act is substantially identical to Rule 10b-5 of the Securities and Exchange Commission, which in turn was modeled on section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1982). *See* Commissioners' Comment 7B U.L.A. 516 (1985); Peterson, Lowry, et al., 472 F. Supp. at 405; Terranova, 38 Colo. App. at 480, 563 P.2d at 365-366." Riley, 708 P.2d at 1363

Following this logic to its conclusion, Colorado has improperly assumed that violations of Section 10(b) of the 1934 Securities Exchange Act, Rule 10b-5 promulgated by the SEC, 17 C.F.R. § 240.10b-5and section 17(a) of the Securities Act of 1933 are one in the same, which they most certainly are not. One section—17(a)—imposes a form of strict liability, where criminal liability requires nothing more than proof that a defendant acted consciously; the other requires scienter pursuant to Ernst & Ernst v. Hochfelder, 425 U.S. at 193 n.12 and Aaron v. SEC, 446 U.S. 680, 695 (1980)("Scienter is a necessary element of a violation of § 10 (b) and Rule 10b-5"). This erroneous comparison is direct reason criminal convictions of securities fraud have been obtained throughout the country both with and without scienter being plead or proven, all while criminal penalties swing from fines to—in Brooks' case—the possibility of 276 years' incarceration.

The Second Circuit has articulated that if the cause of action for a securities fraud violation lacks a scienter requirement, then it is *not* a fraud claim, and does not require reliance or causation. *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359-60 (2nd Cir. 2010). "The same is true in the CSA — the fraud statute, Section 11-51-604(3), has a scienter element and consequently must have reliance or causation, but since Sections [11-51-]501(1)(b) and 604(4) have *no* scienter element, the claim does *not* require reliance or causation." *FDIC v. Countrywide Fin. Corp.*, 2013 U.S. Dist. LEXIS 1503 at *11-12. Consequently, Colorado has been obtaining criminal convictions of securities fraud, without reliance or causation—meaning it *cannot be a securities FRAUD claim* and it is, therefore, unconstitutional to convict Brooks without scienter being plead and proven.

Moreover, there is only a single state—Michigan—that uses the term "willfully" in its criminal code to prosecute securities fraud violations with severe criminal penalties like Colorado does; however, Michigan has explicitly defined "willfully" to include intentional conduct. "To willfully violate subsection 101(2) [Michigan's version of Colorado's section 11-51-501(b), C.R.S.] this defendant must have *intended* the omission which was found to be material and misleading. To wilfully offend subsection 101(3) [Michigan's version of Colorado's section 11-51-501(c), C.R.S.] he must have *intended* to engage in the course of conduct found to operate as a fraud...Like any element of a crime, knowledge and intent can be inferred." *People v. Mitchell*, 437 N.W.2d 304, 307 (Mich. App. 1989). The

definition of "willfully" in Michigan, therefore, can be distinguished from Colorado in that Michigan's statutory scheme infers that "willfully" is akin to "intentional" conduct and Michigan courts have explicitly identified that "the defendant must have *intended* the omission or *intended* to engage in the course of conduct found to operate as a fraud." *Id.*

In diametrical opposition to Michigan's explicit instruction, Colorado's Supreme Court in People v. Riley, supra has not clarified the matter at all and only stated that the accused must simply be "*aware* that he was making or omitting an untrue statement of material fact or was *aware* that he was engaging in an act or practice..." Riley, 708 P.2d at 1365. This furthers the conclusion that conscience action is all that has been erroneously required in Colorado to convict a defendant of criminal securities fraud, which is unconstitutional. Problematically, however, the Michigan Court of Appeals incorrectly explained that "other jurisdictions addressing the *same* issue have reached the same conclusions," Mitchell, 437 N.W.2d at 307. In making this erroneous assertion, the Michigan court completely misunderstood that the criminal conduct it was determining to be interrelated, was comparing its criminal securities fraud statute to Wisconsin, whom imposes a form of strict liability on the same securities fraud offense. The Wisconsin Court expressly acknowledging the following:

> "[I]t is the nature of the act which is dispositive, not the state of mind of the actor. In this sense, *the statute imposes a form of strict liability*. Once the seller has wilfully engaged in conduct which operates or would operate as a fraud or deceit, he will not be heard to argue that he did not intend the consequences of his acts. Accordingly, the State [in this case Wisconsin] was only required to prove that petitioner *willfully* engaged in the type of conduct prohibited by the act [to a strict liability offense]. [Emphasis added. Van Duyse v Israel, 486 F. Supp. 1382, 1387 (ED Wis, 1980)]." Mitchell, 437 N.W.2d at 307-08.

The fact that the State of Michigan basically argued that a defendant "will not be heard to argue that he did not intend the consequences of his acts," Van Duyse v Israel, 486 F. Supp. At 1387, while simultaneously arguing that "the defendant must have *intended* the omission or *intended* to engage in the course of conduct found to operate as a fraud," Mitchell, 437 N.W.2d at 307, leaves one at an incongruous impasse. Confusion is being sowed throughout the country as a result of the term "willfully" being used as an element of both strict liability offenses being prosecuted under one of the many sections of the Securities Act of 1933, as well as criminal punishments under section 10(b) of the 1934 Securities Act, when, in fact, these two securities fraud enforcement provisions focus on completely different conduct. Section 17(a) and the 1933 Securities Act focuses on prophylactic relief against misrepresentations that are caused by mere negligence;

Section 10(b) and the 1934 Securities Act focuses on *fraud* as a result of deliberate swindling.

This confusion also extends to Colorado seemingly being in conflict with the Fifth, Sixth and Eight Circuits. In Tarvestad v. United States, 418 F.2d 1043 (8th Cir. 1969), *cert. denied*, 397 U.S. 935 (1970), the trial court instructed the jury that an act is done wilfully "if it is done knowingly and deliberately with bad purpose," and charged that good faith was a complete defense. *Id* at 1047; *see also* Roe v. United States, 316 F.2d 617, 621 n. 9 (5th Cir. 1963). In People v. Blair, 195 Colo. 462, 468, 579 P.2d 1133, 1139 (1978), the Colorado Supreme Court found that, "[g]ood faith is not a proper defense in this case." Riley, 708 P.2d at 1366 (*citing* People v. Blair, 195 Colo. At 468, 579 P.2d at 1139). Once again, Colorado Supreme Court's findings are at irreconcilable odds. If violations of sections 11-51-501(1)(b) and (c),C.R.S. are "clearly not strict liability offenses," then good faith is a complete defense and an intent to defraud or scienter must be alleged and proven. The suggestion by the Colorado Supreme Court that "[i]f no instruction on good faith had been given in this case, the jury would have been left with proper instructions on the culpable mental state of willfully," *Id.*, is blasphemous. Including scienter as an element of a crime requires that the *actus reus* of a crime be committed with "evil motive" or "bad purpose."[10] In other words, the act that

[10] *See, e.g.*, Aaron v. SEC, 446 U.S. 680, 694 (1980) (holding that a violation of Rule 10b-5 requires "knowing or intentional misconduct" and, therefore, proof of scienter); Tarvestad v. United States, 418 F.2d 1043, 1047 (8th Cir. 1969) (approving jury instructions because "they adequately set out any

constitutes the crime must be committed with knowledge that the act is wrongful. Scienter does not require that a defendant be familiar with the specific law violated, only that the defendant's act is not committed innocently.[11] An action taken without scienter is one made in good faith without knowledge of wrongfulness.[12] To imply that a jury would be able to understand what the term "willfully" entails in Colorado is preposterous—a thoroughly versed legal professional cannot explain the term "willfully" without difficulty, nor has this Court expressly clarified the term "willfully" because "willful" is a "word of many meanings," and "its construction [is] often . . . influenced by its context." *Spies v. United States*, 317 U.S. 492, 497 (1943). As this Court has articulated, "[f]air warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed" and that "legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 347-350 (1971)(quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). The definition of "willfully" in Colorado does not establish scienter or an

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requirement for evil motive or guilty knowledge" and noting "'[e]vil motive' and 'bad purpose' are words of equivalent meaning."); *Elbel v. United States*, 364 F.2d 127, 131 (10th Cir. 1966) (approving of the instructions that "the term 'willfully and knowingly' meant acts done with an evil motive or bad purpose").

[11] See, e.g., *Bryan v. United States*, 524 U.S. 184, 191-192 (1998) ("The willfulness requirement of 924(a)(1)(D) does not carve out an exception to the traditional rule that ignorance of the law is no excuse . . . ."); *Morisette v. United States*, 342 U.S. 246, 271 (1952) ("[Defendant] must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion.").

[12] For example, the Sixth Circuit has said: [I]t is the law that if each [defendant] acted in good faith in the honest belief that what each of them said was true, or, if any one of them so acted, his honest belief condones his misstatements, and the making of the false statements which he believed to be true, would excuse him. . . . *Stone v. United States*, 113 F.2d 70, 75 (6th Cir. 1940) (discussing the requirement of scienter for prosecutions of criminal securities fraud).

intent to defraud and Colorado's legislature uses the term "scienter" in its civil code—meaning the legislature was not attempting to have "willfully" relate to any form of "scienter."

In this light, it is significant that section 18-1-501(6), C.R.S. omnibus "willfully" or "knowingly" requirement, when applied to other provisions in the Colorado Criminal Code, are completely ambiguous. A term appearing in several places in a statutory text is generally read the same way each time it appears. *See* *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992); however, this is not the case in Colorado. The criminal code in Colorado gives multiple different definitions to describe similar conduct, which ascribes various meanings to a single iteration of a willful or knowing requirement, while having to read the word differently for each code section to which it applies. A "willful" violation pursuant to section 11-51-604(14), C.R.S. is separate and distinct from a "recklessly, *knowingly*, or with an intent to defraud" element in the same statute pursuant to section 11-51-604(3), C.R.S. Then Colorado's statutory code equates "willfully" to "knowingly" in section 18-1-501(6), but applies distinctly separate definitions from subsection (5) "Intentionally" or "with intent," and subsection (8) "Recklessly." Colorado's statutes do not always apply the same meaning to the terms "willfully" and "knowingly," as they are plainly separated (at least) in section 11-51-604, C.R.S. Furthermore, "the required mental state for criminal

securities fraud in Colorado is "willfully" (not "knowingly"). *See* People v. Hoover, 165 P.3d 784, 790 (Colo. App. 2006).

It has long been settled that "construction of a criminal statute must be guided by the need for fair warning." Crandon v. United States, 494 U.S. 152, 160 (1990). Problems in reading "willfully" differently in Colorado for each code section to which it applies has opened Pandora's jar and has rendered the meaning of the terms useless without specific context. *See* United States v. Aversa, 984 F.2d 493, 498 (CA1 1993) (en banc) ("Ascribing various meanings to a single iteration of [§ 5322(a)'s willfulness requirement]—reading the word differently for each code section to which it applies—would open Pandora's jar. If courts can render meaning so malleable, the usefulness of a single penalty provision for a group of related code sections will be eviscerated and . . . almost any code section that references a group of other code sections would become susceptible to individuated interpretation."). Subsequently, there has been no fair warning to Brooks that he plead guilty to any criminal wrongdoing above that of a form of strict liability, as the term "willfully" in Colorado simply connotes an awareness of conscience action, which does not pass constitutional muster to support a felony conviction of securities fraud.

Colorado's legislature should also follow Kansas' lead. In 1993 a similar issue that has given rise to the ambiguity of the term "willfully" appeared before the Kansas legislature, which then decided to change the language of its section

17-1267 from "willfully violates" to "intentionally violates." 1993 Kan. Sess. Laws 1641. In making this change, the Kansas legislature did not intend to make any substantive changes but merely to replace terms such as "willful" "with terms that are more commonly used by the legal profession and the general public." (S. 358 cmt. of Judicial Council, 1992 Kan. Sess. Laws 1925-26) (on file with author and the Kansas Judicial Council). Section two of the bill replaced occurrences of the word "willful" with "intentional" in the Kansas Criminal Code. The change from "willful" to "intentional" in the Kansas Act occurred in S. 423, 1993 Kan. Sess. Laws 1641-42. The 1993 bill reconciled the changes made in the 1992 bill with the Kansas Act and other Kansas statutes. See S. 423 supplemental note, 1993 Kan. Sess. Laws 1641-42). Also in 1993, the Kansas legislature amended section 21-3201, defining "intentional conduct": "Intentional conduct is conduct that is purposeful and willful and not accidental. As used in this code, the terms 'knowing,' 'willful,' 'purposeful,' and 'on purpose' are included within the term 'intentional.'" *See* Kan. Stat. Ann. 21-3201(b) (1995). The State of Colorado, however, has explicitly differentiated all these terms in section 18-1-501, C.R.S. and in doing so have violated the Due Process Clause of the Fourteenth Amendment.

Constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense and a state scheme that keeps from the jury [and a defendant] facts that "expose [defendants] to greater or additional punishment,"

raises serious constitutional concerns. *McMillan v. Pennsylvania*, 477 U.S. 79, 85-88 (1986). To inadvertently remove an "intent to defraud" and/or scienter from the criminal code, thus hiding a clearly defined element of the offense from the defendant (and jury), and possibly impose a life sentence multiple times over by permitting an inference of an element of the offense and a lower bar to evidence in a civil case than a criminal case, is to destroy the founding principles of the Due Process, Equal Protection, and Cruel and Unusual Punishment Clauses of the Constitution. "Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, *must expressly charge it* to have been committed under those circumstances, and *must state the circumstances with certainty and precision.* [2 M. Hale, Pleas of the Crown *170]." Archbold, Pleading and Evidence in Criminal Cases, at 51. *See Apprendi*, 530 U.S. at 480-81. If, then, "upon an indictment under the statute, the prosecutor prove the felony to have been committed, but fail in proving it to have been committed under the circumstances specified in the statute, the defendant shall be convicted of the common-law felony only." *Id.* (*citing Duncan v. Louisiana*, 391 U.S. 145, 188 (1968)).

While the decision in *Apprendi* applies to statutory enhancements that are not present in this case, the opinion is instructive because it explains the significance of stating with "certainty" and "precision" the conduct the defendant

is facing in order to bring a defendant within a higher degree of punishment. There has been no delineation in criminal prosecutions between a defendant selling registered and unregistered securities for a conviction of section 11-51-501(1), C.R.S. in Colorado and the term "willfully" has ambiguously been permitted to crisscross spectrums of criminal conduct, while punishments of mere negligent misrepresentations are being imposed that (in Brooks case) may exceed 270 years imprisonment.

The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). That right, as this Court has explained, "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' " to both the offender and the offense. *Ibid.* (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). "The concept of proportionality is central to the Eighth Amendment." *Graham v. Florida*, 560 U.S. 48, 59 (2010). And we view that concept less through a historical prism than according to "the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285 (1976) (*quoting Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590 (1958) (plurality opinion)).

The CSA, as applied to violations of Colo. Rev. Stat. § 11-51-501(1), has permitted the State of Colorado an ability to punish Brooks with 32 years' incarceration when he has avoided civil liability to the same offense. This defies

the bounds of "the evolving standards of decency that mark the progress of a maturing society." *Id.* This Court has articulated that "none of the goals of penal sanctions that have been recognized as legitimate--retribution, deterrence, incapacitation, and rehabilitation...provides an adequate justification for imposing the sentence." Graham v. Florida, 560 U.S. at 71(*citing* Ewing v. California, 538 U.S. 11, 25 (2003)(plurality opinion). "Retribution is a legitimate reason to punish, but it cannot support the sentence...Society is entitled to impose severe sanctions on an...offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense. But "[t]he heart of the retribution rationale is that a criminal sentence must be *directly* related to the personal culpability of the criminal offender." *Id.* (*citing* Tison v. Arizona, 481 U.S. 137, 149 (1987). The "heart" of the justification for punishing Brooks conduct proves only that his culpability was of consciously acting, which cannot support a sentence of 32 years' incarceration. Again, this Court has acknowledged that criminal law "is concerned not only with guilt or innocence in the abstract, but also *with the degree of criminal culpability*" assessed. Apprendi, 530 U.S. at 485. The degree of Brooks' culpability, pursuant to Colorado's statutory scheme, is lower than that of civil liability to the same offense. The State of Colorado, however, cannot even substantiate Brooks' guilt within the constructs of civil liability because the elements of such offense have not even been plead or proven.

The concept of proportionality is central to the Eighth Amendment.

Embodied in the Constitution's ban on cruel and unusual punishments is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). Punishment for a crime in which civil liability cannot even attach cannot support justification of a 32 year sentence of incarceration under any circumstance, as clarified by the precedents proffered from this Court. As such, Brooks must be immediately discharged from custody, as this sentence, on its face, has breached the bounds of the Constitution's prohibition against Cruel and Unusual punishment.

B. Importance of the Questions Presented

This case presents us with a fundamental question of interpretation of how this court's decisions in *Ernst & Ernst v. Hochfelder*, supra and *Aaron v. SEC*, supra, have affected criminal prosecutions, as well as defining what the term "willfully" entails in a securities fraud context. The questions presented are of enormous public importance because of the due process implications that state courts must acknowledged as to the serious nature of the crime of criminal securities fraud and respecting the right of United States citizens to be free from severe criminal sanctions without blameworthy intent. Since this Court has never specifically addressed the issue of *criminal* securities fraud, Colorado and numerous other state courts have sowed enormous confused between Sections 12(a)(2), §§ 17 (a)(2) and (3) of the Securities Act of 1933, 15 U.S.C. §§ 77q (a)(2)

and (3), and the fraud prohibitions of Section 10(b) Securities Exchange Act of 1934 in interpreting whether or not scienter must be alleged and proven to obtain a criminal conviction of securities fraud. This problem has been compounded by improper apples and oranges comparisons being made to convictions being obtained under state securities fraud statues derived from either the 1933 or 1934 Securities Acts, as described herein; however, it should be announced that if criminal convictions are obtained under a derivative of the 1933 Securities Act, it can only be considered a form of strict liability and is not a *fraud* claim because reliance or causation is not a mandated element of the offense; if a criminal conviction is obtained under a derivative of the 1934 Securities Act it is intended to have a scienter element and the claim is for *fraud* and either reliance or causation is an element. *See again* Basic Inc. v. Levinson, 485 U.S. at 243. This Court has clarified that "the consistent pattern in both the 1933 Act and the 1934 Act is to grant the Commission *broad authority* to seek enforcement without regard to scienter, *unless criminal punishments are contemplated.*" Aaron, 446 U.S. at 713-14. It is clear, therefore, that enforcement of criminal prosecutions under either of the Acts requires scienter, otherwise, the claim cannot be a securities *fraud* claim. The broad enforcement provisions under the Securities Acts, however, have led to numerous states imposing criminal punishment without regard to scienter and allowing a presumption of what the term "willfully" may, or may not, entail. The

rational of enabling these sweepingly broad enforcement provision given in *Aaron* was clarified in the following excerpt:

> "The reasons for this refusal to limit the Commission's authority are not difficult to fathom. As one court observed in the context of § 17 (a), "[impressive] policies" support the need for Commission authority to seek prophylactic relief against misrepresentations that are caused by negligence, as well as those that are caused by deliberate swindling. SEC v. Coven, 581 F.2d 1020, 1027 (CA2 1978), *cert. denied*, 440 U.S. 950 (1979). False and misleading statements about securities "can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar." United States v. Benjamin, 328 F.2d 854, 863 (CA2), *cert. denied sub nom.* Howard v. United States, 377 U.S. 953 (1964). And when misinformation causes loss, it is small comfort to the investor to know that he has been bilked by negligent mistake rather than by fraudulent design, particularly when recovery of his loss has been foreclosed by this Court's decisions." Aaron, 446 U.S. at 716.

While it may be of small comfort for the investor to know that he has been bilked by negligent mistake rather than by fraudulent design, it is of grave concern for a defendant being charged with securities fraud. The degree of culpability between negligent misrepresentation and deliberate swindling have resulted in some of the most egregious inequities this country has ever seen. The disparate treatment that Brooks has received between a negligent mistake—a fine—vs. deliberate swindling—276 years—is simply shocking, as is the fact that Brooks' plea was illegally induced premised upon an inability to defend his conscience

actions. It is even more egregious considering Brooks could not even defend himself from the accusation of deliberate swindling because the State of Colorado only requires proof of negligent misrepresentation—which is what "willfully" entails under Colorado's statutory scheme—to have sent him to prison for 276 years. States have used these broad enforcement provisions from the 1933 Securities Act to support criminal punishments of negligent misrepresentations, which was never intended. It is clear that only in instances of deliberate swindling were criminal punishments intended to be obtained, with scienter being plead and proven.

The issue's importance is enhanced by the fact that Section 10(b) and 15 U.S.C. § 78j(b) are wholly separate and distinct statutes in the United States Code, but are also being given similar comparison breakdowns. Section 10(b) requires scienter pursuant to *Ernst & Ernst* and section 15 does not even address securities fraud, "the section of the Uniform Securities Act commented on solely involves *administrative sanctions*, as does the federal law section to which the comment refers...as the federal courts and the SEC have construed the term 'willfully' in section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b), all that is required is proof that the person acted intentionally in the sense that he was aware of what he was doing. Proof of evil motive or intent to violate the law, or knowledge that the law was being violated, is not required. The principal function of the word 'willfully' is thus to serve as a legislative hint of self-restraint to the

administrator." *Hentzner v. State*, 613 P.2d 821, 828 (Alaska 1980). While this Court has clearly identified that, "in the civil context...the word 'willful' has been used to impose a *mens rea* threshold for *liability that is lower, not higher, than an intentionality requirement*." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 614-615 (2010)(citing *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 57 (2007)), the Court has also acknowledged the following ambiguous differences in how the term "willfully" *may be* construed:

> "It is different in the criminal law. When the term "willful" or "willfully" has been used in a criminal statute, we have regularly read the modifier as limiting liability to knowing violations. *See Ratzlaf v. United States*, 510 U.S. at 137; *Bryan v. United States*, 524 U.S. at 191-192; *Cheek v. United States*, 498 U.S. 192, 200-201, (1991). This reading of the term, however, is tailored to the criminal law, where it is characteristically used to require a criminal intent beyond the purpose otherwise required for guilt, *Ratzlaf*, supra, at 136-137; or an additional "'bad purpose,'" *Bryan*, supra, at 191; or specific intent to violate a known legal duty created by highly technical statutes, *Cheek*, supra, at 200-201. Thus we have consistently held that a defendant cannot harbor such criminal intent unless he "acted with knowledge that his conduct was unlawful." *Bryan*, supra, at 193."*Safeco Ins. Co. of America*, 551 U.S. at 57-58, n. 9.

This furthers the suggestion that a defendant cannot be held accountable for a securities fraud violation unless he has "acted with knowledge that his conduct was

unlawful." At least two commentators on the issue, including Professor Loss, who was the draftsman of the Uniform Act, have expressed substantial doubt as to whether the meaning of "wilfully" for administrative enforcement purposes is the same as for purposes of criminal liability. 2 L. Loss, Securities Regulation ch. 8(B), at 1309 (1961); *Hentzner*, 613 P.2d 821.

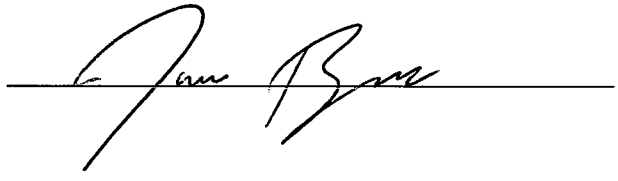
Moreover, Colorado has unconscionably inverted the order of operations the Constitution requires to satisfy the punishment Brooks has received. The State has eliminated an element required for civil liability to attach ("intent to defraud" or "scienter"), alleged a lesser degree of criminal culpability to punish the offense ("willfully"), and imposed a higher degree of punishment without expressly charging or even giving fair warning to Brooks of what his conduct entailed, which clearly offends the United States Constitution. "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. at 364. The State of Colorado, therefore, has not obtained a legal conviction of Brooks because they have not charged every fact necessary to constitute the crime of criminal securities fraud to which Brooks plead and failed to give him and his attorney's fair warning as to the elements that constituted the crime Brooks was alleged to have committed. "Willfully" and "intent to defraud/scienter" are two wholly separate and distinct elements of a violation of securities fraud. Had the Colorado legislature intended the bizarre result of being

able to impose an absurd criminal penalty of life sentences multiple times over—while civil liability is avoided to the same offense—it would have expressly provided for it in the text of the statute or the comments. That has not happened, as the clear dictates of § 11-51-501(1), C.R.S. in civil cases requires an "intent to defraud" pursuant to § 11-51-604(3), C.R.S. and scienter pursuant to section 11-51-602(2), C.R.S.; as such an "intent to defraud" must be an element of criminal securities fraud charged in the indictment pursuant to § 11-51-603(1), C.R.S. in order to satisfy adequate due process. There is not a single state that has argued against this fact and the California Supreme Court in *Simon* declared such circumstances to be unconstitutional—and it was applied to the analog of the exact same securities fraud statutes that the Plaintiff has been convicted, under the exact same circumstances, where "willfully" was used in the exact same context of the statute. *See* People v. Simon, 886 P.2d at 1280("AT THE TIME OF THE OFFENSES IT PROVIDED: 'Any person who willfully violates any provision of this law [including section 25401], or who willfully violates any rule or order under this law'"). A mistake has clearly been made by Colorado's legislature.

CONCLUSION

For the foregoing reasons, certiorari should be granted in this case.

Respectfully submitted on this 10th day of September, 2018.



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