ORIGINAL

21-5920

IN THE

SUPREME COURT OF THE UNITED STATES
NO._____

JASON BROOKS

Petitioner,

-vs-

COLORADO PAROLE BOARD,

Respondents.

ORIGINALLY FILED WRIT OF HABEAS CORPUS

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QUESTIONS PRESENTED

The Colorado Attorney General has conceded, *sub silentio*, that Petitioner likely stands convicted of an act the law does not make criminal yet is drowning Petitioner in a procedural morass to prevent his being able to obtain his freedom. Prior to this Court's decision in *Class v. United States*, 138 S. Ct. 798 (2018), Colorado precedents precluded Petitioner from being able to challenge the constitutionality of his statute of conviction *in toto* because he plead guilty. However, using the look through presumption federal habeas courts must employ, the Court will witness that Colorado's Supreme Court has both procedurally barred Brooks from challenging the constitutionality of Colorado's Securities Act, while simultaneously holding Petitioner "has other remedies" available to adjudicate his actual innocence claims, which simply do not exist. The Colorado Supreme Courts irreconcilable conflict on the matter cannot be harmonized, establishing the State is attempting to time-bar Brooks actual innocence claims ever having to be adjudicated. In addition, the Anti-Terrorism Effective Death Penalty Act of 1996 ("AEDPA") has numerous gatekeeping provisions, all of which have also precluded Petitioner from having his actual innocence claims adjudicated on their merit. Consequently, the Suspension Clause is clearly indicated in this circumstance because refusing to hear Brooks actual innocence claims would constitute a complete denial of any collateral review of a claim that arose only after the decision

in *Class* was announced. Because on the face of the record the State court had no power to enter the conviction or impose the sentence in this case, this Court must answer:

(1) Whether a freestanding claim of actual innocence can overcome AEDPA's gatekeeping provisions and/or whether a prisoner may be entitled to federal habeas relief based on a freestanding claim of actual innocence?

(2) Whether the State of Colorado had the power to enter the conviction or impose the sentence in this case, including:

(a) Whether Brooks was involved in selling securities?

(b) Whether the State of Colorado had jurisdiction to Indict Brooks?

(c) Whether criminal enforcement of the Colorado Securities Act ("CSA") is unconstitutionally vague, overbroad, and is criminalizing otherwise innocent conduct?

PARTIES

The petitioner is Jason Brooks, an inmate recently released from physical custody on August 16, 2021, now serving the mandatory parole portion of his sentence. The respondents are the Colorado Parole Board.

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The Tenth Circuit Court of Appeals decision denying authorization for Petitioner to file a second or successive habeas application premised upon the decision in *Class*, *inter alia*, is unreported; a copy of the decision is attached as Appendix A to this petition. *See* *In re Brooks*, No. 19-1251 (10th Cir. Aug. 7, 2019). The Tenth Circuit Court of Appeals decision denying Petitioner the ability to reopen his original judgment pursuant to Rule 60(b)(6) premised upon the decision in *Class* is found at *Brooks v. Archuleta*, 839 Fed. Appx. 287, 288 (10th Cir. March 7, 2021); a copy of the decision is attached as Appendix B to this petition. The order of Colorado Supreme Court ("CSC") refusing to exercise jurisdiction over Brooks originally filed habeas corpus petition pursuant to Colorado Appellate Rule 21 is unreported; a copy of the judgment without an opinion is attached as Appendix C to this petition. *See* *Brooks v. Executive Director of CDOC*, Colo. Supreme Court Case No. 2020SA385, Order of Court, December 23, 2020 (EN BANC). The Colorado Court of Appeals ("CCOA") determining the decision in *Class* does not establish good cause, justifiable excuse, or excusable neglect to allow an out-of-time filing of a direct appeal is unreported; a copy of the decision is attached as Appendix D to this petition. *See* *People v. Brooks*, 19CA2028, Order of Court, February 4, 2020, The decision of the CSC upholding the CCOA's decision precluding the out-of-time direct appeal premised upon the announcement of *Class* is unreported; a copy of the

judgment**Error! Bookmark not defined.** is attached as Appendix E to this petition. *See* *In Re: Brooks v. People*, 2020SA45, Order of Court, March 6, 2020 (EN BANC)

JURISDICTION

The order of the CSC declining to exercise jurisdiction over Brooks originally filed habeas corpus petition without a decision was entered on December 23, 2020. *See* *People ex rel. D.S.*, 2012 COA 199, ¶ 8 (*citing* *Bell v. Simpson*, 918 P.2d 1123, 1125 n.3 (Colo. 1996) ("An order of the supreme court declining to exercise its original jurisdiction under C.A.R. 21 is *not a review on the merits* of the claims presented."); *accord* *People in Interest of JP.L.*, 214 P.3d 1072, 1077 (Colo. App. 2009); *People v. Daley*, 97 P.3d 295, 297 (Colo. App. 2004). Jurisdiction thus could not be conferred by 28 U.S.C. § 1257(a). However, since Petitioner is alleging a free-standing claim of actual innocence, this Courts Rule 20 (procedure for petitions for extraordinary writs) is the appropriate mechanism in this circumstance, granting the Court original jurisdiction over this petition pursuant to the All Writs Act, 28 U.S.C. § 1651. *See also* *Felker v. Turpin*, 518 U.S. 651 (1996).

REASONS FOR NOT MAKING APPLICATION TO DISTRICT COUT AS REQUIRED BY 28 U.S.C. § 2242

Petitioner has requested both authorizations to file a second or successive habeas petition and for the ability to reopen his original judgment pursuant to Rule 60(b)(6). The Tenth Circuit, however, has denied both requests and opined it could

not even consider the merits of Brooks actual innocence claims due to AEDPA's procedural technicalities. *See* Brooks, 839 Fed. Appx. at 287-88 ("the question before us is not whether Mr. Brooks presented a *meritorious* motion under Rule 60(b)(6); the question is whether he presented a motion under Rule 60(b)(6) at all."). Thus, if Petitioner attempted to file another habeas petition premised upon his actual innocence claims in the U.S. District Court for the District of Colorado, it would be procedurally barred for lack of jurisdiction. Moreover, Petitioner has been discharged from imprisonment and is now serving his mandatory parole term, which can be discharged at any time. Petitioner being placed on parole, however, still meets the jurisdictional requirements for purposes of habeas corpus. *See* Jones v. Cunningham, 371 U.S. 236, 243 (1963); *Cf.* Hensley v. Municipal Court, 411 U.S. 345 (1973) (less restrictive restraints imposed on person released on own recognizance following conviction are in custody within the meaning of 28 U.S.C. § 2254). Resultantly, further delays in having to rule on the merits of Brooks' actual innocence claims would eventually lead to Petitioner lacking standing to ever bring a habeas corpus challenge, as he will eventually no longer be "in custody" *de facto* once discharged from his mandatory parole term.

The writ of habeas corpus' "function has been to provide a *prompt* and efficacious remedy for whatever society deems to be intolerable restraints." Fay v. Noia, 372 U.S. 391, 401 (1963). Further continuation of the current procedural

morass would eventually lead to an outright denial of consideration of Petitioners actual innocence claims, violating the Suspension Clause. However, even if there were a state remedy available for Brooks to adjudicate his actual innocence claims (which simply do not exist[1]), the CSC not allowing Brooks to use the writ of habeas corpus to adjudicate his actual innocence claims is a *pro tanto* suspension of the great writ regardless. Additionally, applying the "look through" presumption this Court is required to employ under federal habeas law, it is undisputed the CSC upheld the COA's ruling that the decision in *Class* would *not* constitute good cause, justifiable excuse, or excusable neglect under Colorado law to permit a late postconviction filing. *See* Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018) ("We hold that the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale."); "*looking through*" to the decisions in 19CA2028; 2020SA45. Hence, Brooks has no ability to raise the claim in State court as a matter of law, as it is undisputed Brooks has no State court remedies available. Furthermore, because the CSC will not permit

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[1] All Colorado Courts, including the CSC, have set the law of the case on whether Brooks has any state postconviction remedies still available, repeatedly noting he has been procedurally barred from filing state postconviction motion since 2014. *See attached decisions in Appendix F*; People v. Brooks, No. 19CA1032 at ¶ 12(Colo. App. February 6, 2020)(noting that "[a]lthough Brooks argue that *Brooks II* was wrongly decided, the Colorado Supreme Court denied certiorari review of that ruling, at which time Brooks II became *the law of the case*); People v. Brooks, No. 18CA0336 at ¶ 9 (Colo. App. March 28, 2019) (noting "Brooks is not entitled to relief [under Crim.P. 35(c)] because the motion was untimely."); *see also* People v. Brooks, No. 16CA0755 (Colo. App. June 29, 2017).

Brooks to use CHCA to adjudicate his actual innocence claims, Petitioner's right to the writ of habeas corpus has been unconstitutionally suspended *ad infinitum*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case includes: the Suspension Clause of the First Amendment to the United States Constitution, which provides, "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U. S. Const., Art. I, § 9, cl. 2. The Fourteenth Amendment to the United States Constitution, which provides that, "[n]o 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." U. S. Const., Art. XIV, § 1. Moreover, because Petitioner is not guilty of any criminal act, his punishment violates the Eight Amendment to the United States Constitution, which holds "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U. S. Const., Art. VIII. Lastly, the case involves the Supremacy Clause, which holds "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges

in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2.

STATEMENT OF THE CASE

Brooks' claims of actual innocence are premised upon three separate and distinct claims, each of which would nullify Petitioner's conviction *in toto* individually. *See* Bousley v. United States, 523 U.S. 614, 623-624 (1998) ("Actual innocence in this context refers to factual innocence and not mere legal sufficiency"). First, "on the face of the record the Court had no power to enter the conviction or impose the sentence [in this case]," Class, 138 S. Ct. at 806 (*quoting* United States v. Broce, 488 U. S. 563, 569 (1989), because: (1) Brooks was not involved in selling securities *de facto*, using the "family resemblance test" from this Court's holding in Reves v. Ernst & Young, 494 U.S. 56, 64-67 (1990) ; (2) the definition of a note pursuant to § 11-51-201(17) C.R.S. remains unconstitutionally vague under the CSA; and (3) "[i]f there is no security, there cannot be securities fraud." People v. Mendenhall, 2015 COA 107M, ¶ 2; *see also* at, ¶ 40 ("the court committed constitutional error by failing to provide a complete and accurate definition of the term 'note'"). Additionally, the CSC did not adopt the "family resemblance test" from *Reves* (thus adopting the holding in *Mendenhall*) until its announcement in Thompson v. People, 2020 CO 72, made September 14, 2020. Thus, Brooks complete claims could even be challenged until after that time.

Second, the State of Colorado lacked jurisdiction to prosecute Brooks under the CSA because it remains undisputed every single investor in the case agreed to arbitrate any claims arising from breach of the agreements between Brooks and his investors to a tribunal, not judicial forum, as will be discussed, *infra*. Thus, Colorado courts have conceded the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, has "precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Meardon v. Freedom Life Ins. Co. of Am.*, 2018 COA 32, ¶ 21 (*quoting Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). "The FAA thus *displaces* [state statutes] with respect to arbitration agreements covered by the Act." *Ibid.* This Court has also specifically held that arbitration provisions must be enforced and are adequate means of enforcing the provisions of the Securities Acts, while the Securities Exchange Commission has also specifically upheld arbitration for securities. *See Shearson/American Express v. McMahon*, 482 U.S. 220, 229 (1987); *Rodriguez de Quijas v. Shearson/American Express. Inc.*, 490 U.S. 477, 481 (1989) ("by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the [Securities] statute[s]; it only submits to their resolution in an arbitral, rather than a judicial, forum.") (*quoting Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

Third, the CSC has held "the anti-waiver provision in the CSA, section 11-51-604(11), C.R.S., which prohibits waiving compliance with any other provision of the CSA, *did not embody a public policy that prohibited a forum selection clause.*" Cagle v. Mathers Family Trust, 2013 CO 7, ¶ 3. Thus, by the CSC's own holding, the State of Colorado lacked subject matter jurisdiction to prosecute Brooks. *Cagle* further outlined the unambiguous language of the CSA, delineating, "[s]ection 11-51-101(3) states that the CSA '*shall* be coordinated' with the applicable federal acts and statutes to which references are made in the article." *Id.* at , ¶ 24. Consequently, because "[t]he language of the CSA shows the legislature's intent that Colorado securities law be *coordinated with federal securities law*, as evidenced by the wording of section 11-51-101(3)," *id.* at, ¶ 27, criminal enforcement of the CSA is unconstitutional on its face and violated this Court's explicit precedents on the matter as:

(1) It is undisputed the CSA is fashioned after Section l0(b) of the 1934 Securities Exchange Act, 15 U.S.C. § 78j, and Rule l0b-5 promulgated by the SEC, 17 C.F.R. § 240.10b-5." Black Diamond Fund, LLLP v. Joseph, 211 P.3d 727, 735 (Colo. App. 2009) (*citing* People v. Riley. 708 P.2d 1359, 1363 (Colo. 1985)); People v. Terranova, 38 Colo. App. 476, 480 (Colo. App. 1976); People v. Prendergast, 87 P.3d 175, 179 (Colo. App. 2003)); *accord* Rosenthal v. Dean Witter Reynolds, Inc., 883 P.2d 522, 526 (Colo. App. 1994); People v. Rivera, 56 P.3d 1155, 1163 (Colo. App. 2002).

(2) Since the CSA follows federal law, under the 1934 Securities Exchange Act, this Court has held a finding of specific intent to defraud (i.e., "scienter") is a necessary element to find a defendant guilty of securities fraud. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Aaron v. SEC, 446 U.S. 680, 695 (1980) ("Scienter is a necessary element of a violation of § 10 (b) and Rule 10b-5"). Consequently, eliminating scienter in criminal securities fraud prosecutions, as has occurred under the CSA, violates both *Aaron* and *Hochfelder*. Additionally, Colorado erroneously omitted scienter from Colorado's criminal statute under the CSA, while it remains in civil recovery statutes, raising even more constitutional concerns. *Compare* § 11-51-604(3), C.R.S. ("willfully") *with* § 11-51-602(2), C.R.S. ("scienter") and § 11-51-604(3), C.R.S. ("intent to defraud").

(3) The term "willfully" in Colorado securities fraud jurisprudence does not include "[p]roof of evil motive or intent to violate the law, or knowledge that the law was being violated." People v. Blair, 195 Colo. 462, 468(Colo. 1978). Thus, Colorado courts have "erred, therefore, in instructing that only a general criminal intent need be shown in the crime of willfully offering or selling a security by means of a material misrepresentation or omitting to state a material fact, and that a person acts with general criminal intent [only] when he *intentionally* does that which the law declares to be a crime." People v. Simon, 9 Cal. 4th 493, 886 P.2d 1271, 1291 (Cal. 1995) (in banc).

Consequently, since criminal enforcement of the CSA does not require evil intent, the statute is unconstitutional as applied to Brooks. Hence, "[i]f a statute is

either facially unconstitutional or unconstitutional as applied, a defendant would not be subject to retrial." *Riley*. 708 P.2d at1362. Therefore, since its undisputed Brooks currently stands convicted of an act the law does not make criminal, this Court must ask whether it can find "any convincing reason to [allow criminal convictions under the CSA to] depart from the ordinary presumption in favor of scienter?" *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019).

BASIS FOR FEDERAL JURISDICTION

This Court's precedents have long inferred that claims of actual innocence cannot be procedurally barred because such interpretation would be an unconstitutional reading of AEDPA's gatekeeping provisions and violate the Suspension Clause. In fact, Justice Gorsuch inferred in another of Brooks request to file a second or successive habeas petition (in an unrelated case), when newly accruing events occur after a habeas' prior filing, a petitioner does not need authorization to file a second or successive habeas petitions because, "[a]s a general matter, a habeas petition asserting a newly accrued claim based on events occurring *after* a prior petition is not second or successive." *In re Brooks*, No. 16-1052, 2016 U.S. App. LEXIS 23786 at *3 (10th Cir. 2016) (*citing James v. Walsh*, 308 F.3d 162, 168 (2d Cir. 2002) ("Denial of habeas relief in the present case may implicate the Suspension Clause, because it would constitute a complete denial of any collateral review of a claim that arose only after James filed the 1997 petition."). Hence, in

this case denial of habeas relief implicates the Suspension Clause because it would constitute a complete denial of any collateral review of Brooks claims, which could have only been challenged procedurally in Colorado after the decision in *Class* was announced. Accordingly, Brooks claims of actual innocence must be adjudicated on their merit because he has clearly established—that even if he was involved in selling securities and even if the State had jurisdiction to prosecute Brooks—he currently "stands convicted of 'an act that the law does not make criminal.'" Bousley, 523 U.S. at 620 (*quoting* Davis v. United States, 417 U.S. 333,346 (1974)). As a result, this Court cannot delay exercising its authority to adjudicate this petition, especially since Brooks has been paroled and will eventually lack standing to bring a habeas challenge, coupled with the Courts never "resolv[ing] whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." McQuiggin v. Perkins, 569 U.S. 383, 392-393 (2013) (*quoting* Herrera v. Collins, 506 U.S. 390, 404-405 (1993)).

REASONS FOR GRANTING THE WRIT

I. The Court Should Decide Whether a Freestanding Claim of Actual Innocence Can Survive AEDPA's Gatekeeping Provisions?

Federal courts have always recognized that a prisoner "otherwise subject to defenses of abusive or successive use of the writ [of habeas corpus] may have his federal constitutional claim considered on the merits if he makes a proper showing

of actual innocence." *Id.*, at 404 (*citing* Sawyer v. Whitley, 505 U.S. 333 (1992)); *see also* Murray v. Carrier, 477 U.S. 478, 496 (1986) ("[W]e think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."). In other words, federal courts have always presumed that a credible and/or *prima facie* showing of actual innocence must allow a petitioner to pursue his constitutional claims on their merit, irrespective of the existence of any procedural mechanisms standing in the way of relief. "This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." Herrera, 506 U.S. at 404 (*quoting* McCleskev v. Zant, 499 U.S. 467, 502 (1991)). The miscarriage of justice exception to overcome various procedural defaults include "successive" petitions asserting previously rejected claims, *see* Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion), "abusive" petitions asserting in a second petition claims that could have been raised in a first petition, *see* McCleskey, 499 U.S. at 494, failure to develop facts in state court, *see* Keeney v. Tamayo-Reyes, 504 U.S. 1, 11-12 (1992), and failure to observe state procedural rules, including filing deadlines, *see* Coleman v. Thompson, 501 U.S. 722, 750 (1991); Carrier, 477 U.S., at 495-496 . These miscarriage of justice exceptions have

survived AEDPA's passage. In *Calderon v. Thompson*, 523 U.S. 538 (1998), the Court has applied the exception to hold that a federal court may, consistent with AEDPA, recall its mandate in order to revisit the merits of a decision. *Id.* at 558 ("The miscarriage of justice standard is altogether consistent...with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence."). As indicted, however, the Tenth Circuit precluded Petitioner from reopening his original judgment "for any other reason that justifies relief" under to Rule 60(b)(6), despite a showing of actual innocence, and opined it could not even consider Brooks actual innocence claims due to AEDPA's gatekeeping provisions. *See Brooks*, 839 Fed. Appx. at 287-88 ("the question before us is not whether Mr. Brooks presented a *meritorious* motion under Rule 60(b)(6); the question is whether he presented a motion under Rule 60(b)(6) at all. He did not."). In *Bousley*, 523 U.S. at 622, the Court held that actual innocence may overcome a prisoner's failure to raise a constitutional objection on direct review. Most recently, in *House v. Bell*, the Court reiterated that a prisoner's proof of actual innocence may provide a gateway for federal habeas review of a procedurally defaulted claim of constitutional error. 547 U.S. at 537-538 (2006). These decisions "see[k] to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

"Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations." *McQuiggin*, 569 U.S. at 393.

Finally, in *Teague v. Lane* the Court held "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced," 489 U.S. 288, 310 (1989), unless the new rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" *id.* at 311 (*quoting Mackey v. United States*, 401 U.S. 667, 692 (1971), or could be considered a "watershed rule of criminal procedure." 489 U.S. at 311. The decision in *Class* would satisfy the *Teague* doctrine in this case because prior to *Class*, in Colorado — "[a] valid, unconditional guilty plea waives all non-jurisdictional objections, including allegations that constitutional rights have been violated." *People v. Butler*, 251 P.3d 519, 520 (Colo. App. 2010) (*quoting People v. Neuhaus*, 240 P.3d 391, 393 (Colo. App. 2009); *affirmed by Neuhaus v. People*, 2012 CO 65; *accord People v. Pharr*, 696 P.2d 235, 236 (Colo. 1984)). However, these Colorado precedents, *inter alia*, have been overruled by *Class*, which holds that a guilty plea by itself does not bar a criminal defendant from challenging the constitutionality of the statute of conviction. *See* 138 S. Ct. at 803. Thus, unlike the defendants in *Broce*, Petitioner's challenge does not in any way deny that he engaged in the conduct to which he admitted. Instead, like

the defendants in *Blackledge v. Perry*, 417 U. S. 21 (1974) and *Menna v. New York*, 423 U. S. 61 (1975), he seeks to raise a claim which, "'judged on its face'" based upon the existing record, would extinguish the government's power to "'constitutionally prosecute'" Brooks if the claim were successful. *Class*, 138 S. Ct. at 805-806 (*citing Broce*, supra, at 575) (*quoting Menna*, 423 U. S. at 62-63, and n. 2). Consequently, Petitioners claims do not fall within any of the categories that Brooks' plea agreement has forbid him to raise. Instead, they challenge the States power to criminalize Brooks conduct, thereby calling into question the State's power to "constitutionally prosecute" him. *Id.* at 805 (*citing Broce*, 488 U. S. at 575) (*quoting Menna*, 423 U. S. 61 at 61-62, n.2). While perhaps Brooks' "innocence is a mere technicality, [] that would miss the point. In a society devoted to the rule of law, the difference between violating or not violating a criminal statute cannot be shrugged aside as a minor detail." *Dretke v. Haley*, 541 U.S. 386, 399-400 (2004).

The reasons the Court has never had the opportunity to decide whether a freestanding claim of actual innocence can survive all AEDPA's gatekeeping provisions is because Courts have usually taken *prima facie* showings of actual innocence seriously and find procedural mechanisms for a defendant to adjudicate such claims on their merit. However, this case presents the quantum enigma in that regard. Fundamentally, the fact that both the state and federal courts refuse to even

consider the merits of Brooks actual innocence claims should be a Red Flag indicator that Brooks has, in fact, established a *prima facie* showing of invalid confinement.

II. The Face of the Record Establishes Brooks was Not Involved in Selling Securities.

"If there is no security, there cannot be securities fraud." *Mendenhall*, 2015 COA 107M at ¶ 2. At the time of Brooks indictment, "Colorado case law had not directly addressed the issue of whether 'any note' is a security." *Thompson*, supra, at ¶ 16. However, because Colorado is mandated to follow federal securities fraud jurisprudence, the suggestion the law was not settled on what constitutes a security is a simple fallacy. Additionally, when the CCOA announced for the first time in *Mendenhall* (in 2015) that Colorado courts where "commit[ing] constitutional error by failing to provide a complete and accurate definition of the term 'note,'" *Mendenhall*, supra at ¶ 40, there can be no argument the statute was unconstitutionally vague prior to its being settled, when Brooks was Indicted. Thus, Brooks has been convicted by mandatory presumption, which has been held unconstitutional by the Tenth Circuit in specific regards to securities fraud jurisprudence. *See United States v. McKye*, 734 F.3d 1104, 1109 n. 5 (10th Cir. 2013) (*quoting Francis v. Franklin*, 471 U.S. 307, 314- 15, 314 n.2 (1985) ("a mandatory presumption, either conclusive or rebuttable, as to an element violates a defendant's

due process rights because it conflicts with the prosecution's burden to prove beyond a reasonable doubt every fact necessary to constitute the crime charged").

To make matters even worse, section 11-51-201, C.R.S. clarifies that all definitions under the CSA are to be used "unless the context otherwise requires." However, this Court has held a note should "not be considered a security if the *context otherwise requires.*" Marine Bank v. Weaver, 455 U.S. 551, 558-59 (1982). Since the definition of security under the CSA "means any note" pursuant to § 11-51-201(17), C.R.S., it is undisputable the statute remains unconstitutionally vague to this very day and needs to be corrected. "Invoking so shapeless a provision to condemn someone to prison" for 32 years "does not comport with the Constitution's guarantee of due process." *Johnson v. United States*, 135 S. Ct. 2551, 2558 (2015).

Not only is the definition of a security unconstitutional, but the face of record also establishes Brooks was *not* involved in selling securities *de facto*. *See attached Grand Jury Indictment*, Appendix G. The Essential Facts ("EF") of the Grand Jury Indictment articulates that Brooks was allegedly subject to prosecution under the CSA because, "[t]he GENIUS, INC. investments offered and sold by BROOKS and CAREW, evidenced in part by the promissory notes and agreements, constitute ' securities' pursuant to§ 11-51-201(17) C.R.S., and as such, are subject to the provisions of the Colorado Securities Act." EF, pg. 5 ¶ 1. *Mendenhall* found, however, that not only does context otherwise require to determine whether "any

note" is a security (in direct violation of *Marine Bank*), but the CCOA also noted the "family resemblance test" adopted by the Court in Reves v. Ernst & Young, 494 U.S. 56, 64-67 (1990) applies to determine whether a note is a security for purposes of the CSA. *See* Mendenhall , supra at ¶ 37. This test was also adopted by the CSC in Thompson, supra. Accordingly, the EF provides *prima facie* evidence establishing Brooks was not involved in the selling securities when applying the family resemblance test in *Reves*. Under the following four factors, the face of the record rebuts the presumption that Brooks was involved in selling securities:

(1) "First, we examine the transaction to assess the motivations that would prompt a reasonable seller and buyer to enter into it. If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a 'security.' If the note is exchanged to facilitate the purchase and sale of a minor asset or consumer good, to correct for the seller's cash- flow difficulties, or to advance some other commercial or consumer purpose, on the other hand, the note is less sensibly described as a 'security.'" Thompson, supra, at ¶ 1.

Under the first factor, according to the EF, it is undisputed Brooks was raising money to facilitate the purchase and sale of minor consumer goods—namely electronics and appliances—and to correct for his cash flow difficulties. In this

circumstance, the investment offered and sold by Brooks "is less sensibly described as a 'security,'" because "[p]ayment terms ranged from a percentage of the principal to a fixed amount, and payment schedules provided varying timeframes, normally between twenty-one days and one month." EF, pg. 3 ¶ 3. Interestingly, "the statutory definition [of a note] *excludes* only currency and notes of a maturity of less than nine months." *Marine Bank*, 455 U.S. at 556. In fact, Section 3(a)(10) of the 1934 Securities Exchange Act exempts "any note... which has a maturity at the time of issuance of not exceeding nine months." 15 U.S.C. § 78c(a)(10). While this Court has never reached "the questions of how to interpret [this] exception" and has never expressed a "view on how that exception might affect the presumption that a note is a security," *Reves*, 494 U.S. at 65 n.3, "short-term notes are, as a general rule, sufficiently safe that the Securities Acts *need not apply*." *Id.* at 73. By the rule then, the Securities Act should not have been used in this case, but even ignoring the dispositive fact, Brooks used investor funds, *inter alia*, to facilitate the purchase and sale of a minor consumer good and to correct for his cash flow difficulties, as outlined by the EF. Hence, "the agreement between [Brooks and his Investors] is not the type of instrument that comes to mind when the term 'security' is used and does not fall within 'the ordinary concept of a security.'" *Marine Bank*, 455 U.S. at 559 (*quoting Teamsters v. Daniel*, 439 U.S. 551, 556 (1979)). The first factor thus fails to establish Brooks was involved in selling securities.

(2) "Second, we examine the 'plan of distribution' of the instrument to determine whether it is an instrument in which there is common trading for speculation or investment.'" *Thompson*, supra at ¶ 31.

Under this second factor, the "notes" offered by Brooks were unregistered, *private* investment loans, and not traded on any exchange. They were not offered and sold to a broad segment of the public, which has been "held to be necessary to establish the requisite 'common trading' in an instrument." *Reves*, 494 U.S. at 68. It is also undisputed that there was no "plan of distribution" of the instruments and no "common trading for speculation or investment." *Id.* Fact is, "[i]nvestors act on inevitably incomplete or inaccurate information, [consequently] there are always winners and losers; but those who have 'lost' have not necessarily been defrauded." *Basic Inc. v. Levinson*, 485 U.S. 224,256 (1988) (*quoting Dirks v. SEC*, 463 U. S. 646, 667, n. 27 (1983)). Nor does "every instance of financial unfairness constitutes fraudulent activity under§ l0(b) [which the CSA is fashioned after]." *Cent. Bank, N A. v. First Interstate Bank, N A.*, 114 S. Ct. 1439, 1446 (1993) (*quoting Chiarella v. United States*, 445 U.S. 222, 232 (1980)). Consequently, while the CSA has numerous catchall provisions, "what it catches must be fraud," *id.* at 1447, for criminal sanctions to be levied. The CSA was never intended to become a broad remedy for all fraud, nor was it created as a "scheme of investor insurance." *Basic*

Inc., 485 U.S. at 252. It is therefore undisputed that the "notes" Brooks was offering could not establish a security under this second factor in any capacity.

(3) "Third, we examine the reasonable expectations of the investing public: The Court will consider instruments to be ' securities' on the basis of such public expectations, even where an economic analysis of the circumstances of the particular transaction might suggest that the instruments are not 'securities' as used in that transaction." *Thompson*, supra at ¶ 31.

Under the public's reasonable perceptions, this third factor also supports a finding that the "notes" in this case were not "securities." The investments were never advertised and there are no countervailing factors that would have led a reasonable person to believe these personal loans were securities. In fact, a year prior to Brooks being indicted, his co-defendant, Scott Carew, and listed victim Michael Laptalo sued Brooks in Weld County District Court. *See* Appendix H, *Complaint and Exhibits from Carew, et al., v. Brooks, et al.*, Case No. 2008CV58, Weld County District Court. The entire Complaint did not mention the word "security" a single instance. This establishes that not only did Brooks investors not believe these personal loans were securities, but a versed lawyer drafting a lawsuit against Petitioner did not believe they were either. Moreover, a template of the form "Agreement" signed by all investors in this case proves that investors were providing

money "in the form of a *loan* or investment to Brooks, and/or GI (Genius, Inc.). *See* Appendix I, Agreement of investor Tim Yost ("ATY'), pg. 1 ¶ 6, BATES/Label 2148-2150. This template agreement shows up verbatim and repeatedly in Carew, et al., v. Brooks, et al., supra. *See* Appendix H, Plaintiff's Exhibits 3, 4, 5. Thus, "the law of contracts in most, if not all, jurisdictions long has employed a process by which agreement ...may be implied." Perry v. Sindermann, 92 S. Ct. 2694, 2700 (1972) (quoting 3A. Corbin on Contracts§§ 561-572A (1960)). "And, 'the meaning of [the promisor's] words and acts is found by relating them to the usage of the past.'" *Ibid.* It is thus indisputable all investors in this case agreed to loan money to Brooks, "a natural person," ATY, pg. 1 ¶¶ 3-4, whom could do whatever he wished with investors' money, or Genius Inc., "a Colorado corporation in good standing, involved in the wholesale purchase and sale of electronics, appliances, and other related products." *Id.* While the EF frames the egregiousness of Brooks actions by his allegedly spending "less than five percent of investors' funds...to purchase electronics and appliances," EF, pg. 2, 1, the admission proves Brooks business was involved in the purchase and sale of electronics *de facto*. The AG simply omitted and changed the entire foundation of reasons investors premised their investment. Additionally, it can be presumed that a criminally usurious "note" would itself cause "a reasonable investor" to call into question the validity of that investment decision. Accordingly, if the short length or maturity of an investment has no bearing on

whether or not a "note" is exempted from being a security pursuant to§ 78c(a)(l 0), then every single investor in this case was a criminal usurer because all had received effective rates of interest that were criminally usurious and exceeded the statutory limit pursuant to § 5-12-103, C.R.S. *See* Blooming Terrace No. 1, LLC v. KH Blake St., LLC, 2019 CO 58. The CSC even cited "Usury and Fiduciary Duty Concerns" in adjudicating *Thompson*. That concern cannot be brushed aside, as investors used Brooks to make large sums of money, none of which the AG attempted to recover as ill-gotten gains. This third factor, therefore, fails to establish Brooks was involved in selling securities.

(4) "Finally, we examine whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary." Thompson, supra at ¶ 31.

Under this fourth and final factor, Brooks has established by clear and convincing evidence that the "Agreements" signed by all investors in this case significantly reduced the risk of the instrument, rendering application of the CSA superfluous. The EF repeatedly outline that Brooks returned "investments from individuals by promising an agreed upon return payable in a *short period of time*," EF, pg. 2 ¶ 5, "normally between twenty-one days and one month." *Id.* at pg. 3 ¶ 3. Because securities fraud jurisprudence under the CSA follows federal law, Brooks

again asserts that "the statutory definition [of a note] EXCLUDES only currency and notes with a maturity of less than nine months," *Marine Bank*, 455 U.S. at 556, exempting him from liability under the Securities Acts entirely, as the Supreme Court has made clear that "short-term notes are, as a general rule, sufficiently safe that the Securities Acts need not apply." *Reves*, 494 U.S. at 73. Moreover, investors kept returning to Brooks to re-invest in these short-term deals, as repeatedly referenced by the Indictment. For example, in Count One, Andrew Moore and Michael Stradt "provided BROOKS with approximately nine hundred sixty one thousand nine hundred sixty two dollars ($961,962.00)...in approximately thirty seven (37) transactions." *See* Appendix G, pg. 5, Count One. The reason 37 transactions occurred is because after each short-term deal Mr. Moore and Stradt got every single penny back and then re-invested. These investors made large sums of money, which is reason Andrew Moore is not listed in the restitution table. *See* Appendix J, Restitution Table. The $307,867.43 Brooks still owes Mr. Stradt is also not premised upon any principal and is only interest remaining. The AG never attempted to recover millions of dollars in what can only be considered ill-gotten gains, since the AG essentially posited Brooks business was partially fraudulent. In any event, coupled with the short maturity dates of all the "notes" offered, if the exemption pursuant to § 78c(a)(10) was not to apply, all investors in this case were criminal usurers guilty of class six felony offenses.

Additionally, the "Agreements" offered by Brooks explicitly stated that investors agreed to submit any disputes arising from the Agreements to arbitration for resolution, which was to be "the sole method available for resolution of any dispute." ATY, pg. 3 ¶ 2; *see also* Appendix H, Plaintiff's Exhibits. This Court has specifically held that arbitration provides adequate means of enforcing the provisions of the Securities Exchange Act, while the Securities Exchange Commission has also specifically enforced arbitration. *See* Rodriguez de Quiias v. Shearson/American Express. Inc., supra (the arbitration clause in petitioners' investment contract was not nullified by the Securities Acts.); *accord* Shearson/American Express v. McMahon, supra; *see also* Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc., supra. *See also* Section III, infra.

Finally, Colorado's Revised Statues ("C.R.S.") are another regulatory scheme that significantly reduced the risk of the instruments Brooks offered. In fact, Colorado's theft statute renders application of the Securities Acts completely unnecessary in this case, as it provides Coloradoan's protection against theft by deception, as set forth in section 18-4-401(1)(a), C.R.S., which "requires proof that the victim relied on a swindler's misrepresentations, which caused the victim to part with something of value." West v. Roberts, 143 P.3d 1037, 1040 (Colo. 2006). The AG, however, manipulated the CSA's unconstitutionally overbroad definition of a "note" pursuant to § 11-51-201(17), C.R.S. to allow the State of Colorado to

prosecute Brooks' actions under the guise of a security—and the AG did this for shameful reasons. Because the Grand Jury did not come back with theft charges against Brooks, it concluded he did not intend to defraud anyone; however, the *only* reason Brooks was indicted for securities fraud is due to the securities expert during Grand Jury testimony answering the following question from a juror:

Juror:	Is it possible for someone to commit securities fraud even if an investor had been paid everything Brooks promised them?
Securities Expert:	Yes, it does not necessarily preclude a securities fraud violation.

It was this erroneous testimony that led to Brooks being prosecuted for fraud even when investors received "the total owed principal and interest from BROOKS." Appendix G, Counts 13 & 16. While the CSA has numerous catchall provisions, "what it catches must be fraud," *Cent. Bank, NA*, 114 S. Ct. at 1447, and this answer provided by the securities expert was misleading at best, as he was describing commissioners' broad authority under the Securities Acts to seek prophylactic relief—not criminal fraud violations. In any event, under this Fourth Factor, the short duration of the "notes' offered by Brooks, arbitration, and the C.R.S. all provide adequate and effective remedies to significantly reduce the risk of the instrument to investors, rendering application of the CSA superfluous and, in this case,

unconstitutional. Had the Grand Jury not been lied to, Brooks would have never been indicted. Fact remains, Brooks was not involved in the selling of securities and "[i]f there is no security, there cannot be securities fraud." *Mendenhall*, supra at ¶ 2.

III. The State of Colorado Lacked Jurisdiction to Prosecute Brooks under the CSA

The State of Colorado Lacked Jurisdiction to Prosecute Brooks Under the CSA, as evidenced by the "Agreements" Brooks has shown to be used by all investors in this case. *See* Appendices G, H. The Supremacy Clause provides the constitutional foundation for federal authority to preempt state law. *See* U.S. Const. art. VI, cl. 2 ("federal law shall be the supreme Law of the Land...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1265 (2012). Preemption of state law, by operation of the Supremacy Clause, can occur in one of several ways: express, field, or conflict preemption. *Id.* at 1265-66. This issue involves a case conflict preemptions because the State of Colorado could not prosecute Brooks under the CSA due to every single investor in this case agreeing to arbitrate any statutory claim to resolution "in an arbitral, rather than a judicial, forum." *Rodriguez de Quijas*, 490 U.S. at 483. Thus, the State of Colorado had no statutory authority to abrogate "the strong language of the [Federal] Arbitration Act, which declares as a matter of federal law that arbitration agreements 'shall be valid, irrevocable, and enforceable,

save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2." *Rodriguez de Quijas*, 490 U.S. at 483. Colorado courts have conceded this fact in *Meardon*, supra, and the CSC has specially held the CSA has *not* embodied a public policy that "prohibited a forum selection clause." *Cagle*, 2013 CO 7 at ¶ 3. Consequently, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the [Securities] statute[s]; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Rodriguez de Quijas.*, 490 U.S. at 481 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628). As a result, the State of Colorado violated the Supremacy Clause of the U.S. Constitution by conflicting with the FAA, divesting Colorado from prosecuting Brooks under the CSA as a matter of law.

IV. The CSA Lacking a Scienter Requirement Conflicts with Thoroughly Established Constitutional Law.

It is undisputed Colorado's legislature erroneously omitted scienter from Colorado's criminal statute under the CSA, while it remains in civil recovery statutes. *Compare* § 11-51-604(3), C.R.S. ("willfully") *with* § 11-51-602(2), C.R.S. ("scienter") and § 11-51-604(3), C.R.S. ("intent to defraud"). For purposes of clarity, while term "willfully" and "knowingly" normally suffice to establish "evil intent" in most jurisdictions, this is not the case under the CSA. Specifically, regarding securities fraud jurisprudence in Colorado, the terms "willfully" and "knowingly"

do not establish "[p]roof of evil motive or intent to violate the law, or knowledge that the law was being violated." *Blair*, 195 Colo. at 468. Compounding the constitutional concern, when Brooks was being investigated by the Colorado Division of Securities in 2008, commissioner Fred J. Joseph admittedly had no idea "why the relief sought, whether criminal sanctions, civil injunctive relief, or licence revocation, determines whether scienter is required?" *In re: Marvin*, Case No. XY-07-04, 2008 Colo. Sec. LEXIS 29, *19. Irrespective of the facts, it is undisputed Brooks currently stand convicted of crime without any evil intent, intent to violate the law, or knowledge that the law was being violated, a clear Eighth Amendment and Due Process Violation.

"We must start from the longstanding presumption, traceable to the common law, that [Colorado's legislature] intend[ed] to require a defendant to posses a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct." *Rehaif*, 139 S. Ct. at 2195 (quoting *United States v. X-Citement Video*, 530 U.S. 64, 72 (1994)); *see also Morissette v. United States*, 342 U.S. 246, 256-58 (1952). "Scienter requirements advance this basic principle of criminal law by helping to 'separate those who understand the wrongful nature of their act from those who do not.'" *Id.* at 2196 (*quoting X-Citement Video*, supra, at 72-73). While criminal enforcement of the CSA lacks a scienter requirement, this Court has "interpreted statutes to include a scienter requirement even when the

statutory text is silent on the question…'even where the most grammatical reading of the statute' does not support one." *Ibid.* Thus, the State of Colorado is required to prove that the defendant knew his conduct was unlawful—"even though that was a question of law." *Id.* at 2198. The fact that Brooks was given a 32 year prison sentence without any guilty knowledge is a clear Eighth Amendment violation, irrespective of his guilt or innocence.

A. Conflicts with Decisions of This and Other Courts

As discussed, Brooks prosecution conflicts with *Rehaif*, *Morissette*, *Franklin*, *Reves*, *Marine Bank*, *Basic Inc.*, *Dirks*, *Cent. Bank, N A.*, *Chiarella*, *Rodriguez de Ouiias*, *McMahon*, *Mitsubishi Motors Corp.*, *Aaron*, and *Hochfelder*—as they are all dispositive to this case because it is undisputed Colorado securities law must coordinate with federal securities law "as evidenced by the wording of section 11-51 -101(3)." Cagle, supra at ¶ 27. Thus, Colorado securities fraud jurisprudence cannot deviate from these Courts precedents. Additionally, the Court has explicitly 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 713-714; Hochfelder, 425 U.S. at 205. Since the CSA has improperly removed scienter from criminal prosecutions and because this Court mandates scienter be alleged and

proven when criminal sanctions are levied, Brooks could not have plead guilty to an act the law does not make criminal.

Moreover, California's Supreme Court has addressed the *exact* issue that currently plagues 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." *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 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 logic proves that a criminal conviction for securities fraud under the CSA always requires proof of "scienter" or an "intent to defraud", as the term "willfully" in Colorado securities fraud jurisprudence does not establish, infer, or otherwise prove the requisite elements for criminal sanctions to attach under the CSA. California's Supreme Court also opined "*Simon* concluded that it would be incongruous, and *possibly unconstitutional*, to impose criminal punishment—presumably a more serious sanction than civil liability—without guilty knowledge

when civil liability required guilty knowledge." *People v. Salas*, 37 Cal. 4th 967, 977 (2006) (*quoting Simon*, supra, 9 Cal.4th at pp. 516-518, 522.).

B. Importance of the Questions Presented

The importance of the questions presented in this case cannot be overstated. It presents a fundamental question of whether a defendant who is completely innocent of any criminal offense can remain barred from having his claims of actual innocence decided on their merits. It is difficult to imagine a strange equitable claim for keeping open the courthouse doors than one of actual innocence, "the ultimate equity on the prisoner's side." *Withrow v. Williams*, 507 U.S. 680, 700 (1993) (nothing the Court has continuously recognized that "a sufficient showing of actual innocence—is normally sufficient, standing alone, to outweigh other concerns and justify adjudication of the prisoner's constitutional claim.").

The questions presented in this case are also of enormous public importance because of AEDPA's gatekeeping implications on the Suspension Clause when a *prima facie* showing of actual innocence is demonstrated by a petitioner. Furthermore, the case requires the Court to address 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. This Court has also *never* addressed *criminal* enforcement provisions under the Securities Acts. The

egregiousness of Brooks conviction becomes even more disturbing because Brooks was charged with criminal securities fraud offenses even when investors received "the total owed principal and interest from BROOKS." *See* Appendix G, Counts 13 & 16. So, to be clear, even when investors received every single penny Brooks had promised them in this case, he was still Indicted and subject to an 8–24 year prison term for these two Counts, without anyone losing a cent or suffering any harm. This undisputed fact should shock the Courts conscience!

The rational in enabling these sweepingly broad enforcement provisions under the Securities Acts has also been clarified by the Court 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. Beniamin, 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.

Aside from the fact that many investors in Brooks case suffered zero "loss", and while it may be of small comfort for the investor to know whether he has been bilked by negligent mistake rather than by fraudulent design, it is of grave concern for a defendant being charged with a criminal securities fraud offense. The degree of culpability between negligent misrepresentation and deliberate swindling in this case has resulted in some quite possibly the most egregious inequity this country has ever seen. The disparate treatment that Brooks faced between committing a negligent mistake—a cease and desist order—vs. deliberate swindling—276 years—is simply shocking, as is the fact that Brooks' plea was premised upon an inability to defend his conscience actions. It is even more troubling 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 if he proceeded to trial. However, this Court has made clear that only in instances of deliberate swindling are criminal punishments allowed to be obtained, with scienter being plead and proven, as outlined in *Aaron* and *Hochfelder*.

Lasty, Colorado has unconscionably inverted the order of operations the Constitution requires to satisfy the punishment Brooks has received. The State eliminated an element required for civil liability to attach ("intent to defraud" or

"scienter"), alleged less 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 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. 358, 36(1970). The State of Colorado, therefore, has not obtained a valid criminal 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. Had Colorado's 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 for the same offense—it would have expressly provided for it in the text of the statute or comments and that has not happened. Therefore, it is abundantly clear "on the face of the record the court had no power to enter the conviction or impose the sentence" in Brooks case. *Class*, 138 S. Ct. at 806 (*quoting Broce*, 488 U. S. at 569.

CONCLUSION

Refusing to hear this case would be the very definition of a miscarriage of justice. Brooks spent 12 years in prison for a crime that doesn't exist, yet still is having his liberty curtailed by parole. The face of the record clearly establishes that Brooks was not involved in selling securities (resulting from section 11-51-201, C.R.S. being unconstitutionally vague), nor did the State of Colorado even have jurisdiction to prosecute him. Even ignoring this *prima facie* evidence, Brooks conviction lacks any evil intent due to Colorado's legislature unconstitutionally omitting scienter from its criminal code. Brooks currently stands convicted of an act the law does not make criminal and that fact cannot be ignored any longer.

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

Respectfully submitted on this 28th day of September 2021.

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APPENDICIES