

1 Court has adhered to, and that -- that is precisely the
2 implication of courts that, when deciding these claims,
3 look for waivers of sovereign immunity, because the
4 assumption is that the deprivation of both the liberty
5 and the property at the time of conviction is lawful,
6 and that the property passes into public funds.

7 JUSTICE GINSBURG: Was Mr. Banner wrong,
8 then, when he told us that before the Exoneration Act,
9 Colorado, like every other State, just gave the money
10 back?

11 GENERAL YARGER: He is -- that is incorrect,
12 Your Honor.

13 JUSTICE GINSBURG: What did Colorado do --

14 GENERAL YARGER: Well --

15 JUSTICE GINSBURG: -- with respect to
16 monetary sanctions before the Exoneration Act?

17 GENERAL YARGER: They -- they didn't have
18 authority to give it back. One example I can give --
19 and there aren't many -- is People v. Noel. It's a
20 Colorado court of appeals case from 2005 where the court
21 declined to order what -- what they describe as a refund
22 of amounts charged for probation, even though that
23 conviction was later overturned.

24 Now, the chief case they reply upon is
25 Toland v. Strohl. It's a Colorado case from 1961. And

1 the court there did order refunds of the fines, but in
2 that case, and as interpreted by the Colorado supreme
3 court in this case, there was specific wrongful conduct
4 that violated the Constitution on the part of the
5 justice of the peace that presided over that case.

6 So as the Colorado supreme court understands
7 it, that was a case about wrongful conduct on the part
8 of someone adjudicating the case, rather than merely an
9 erroneous conviction that requires the status quo to be
10 restored after that conviction was overturned.

11 JUSTICE SOTOMAYOR: Are you denying that
12 there were courts -- lower courts that routinely ordered
13 the refund of these monies?

14 GENERAL YARGER: I -- I am, Justice
15 Sotomayor.

16 JUSTICE SOTOMAYOR: I think in the briefing,
17 we're pointed to any number of situations in which lower
18 courts did order -- automatically gave -- ordered the
19 money to go back.

20 GENERAL YARGER: Justice Sotomayor, we're
21 not denying that there are certainly some courts that
22 have done so. But there are many courts that do not
23 treat these claims as return-of-property claims. They
24 treat them as claims for compensation against the State
25 for which a waiver of sovereign immunity is required.

1 JUSTICE SOTOMAYOR: That's, to me, a
2 question of labels. And -- and if you have no
3 conviction to justify the -- a payment of money because
4 it's been voided, why is it your money now? Just simply
5 because you collected it beforehand, even though the
6 basis for the collection is wrong?

7 GENERAL YARGER: Well, as Petitioners --

8 JUSTICE SOTOMAYOR: How about if you took
9 his car?

10 GENERAL YARGER: Well, that would be a
11 forfeiture situation. And there are other --

12 JUSTICE SOTOMAYOR: Why isn't this
13 comparable to forfeiture?

14 GENERAL YARGER: Well, in fact, the
15 forfeiture proceedings in some cases provide a useful
16 analogy. If the district court orders forfeiture and
17 a -- someone with an ownership interest in that property
18 does not properly appeal or seek a stay of the
19 disposition of that forfeited property --

20 JUSTICE SOTOMAYOR: Let's go to the stay.
21 Could you -- can you honestly say to me that if this
22 defendant had moved for a stay, that the trial court
23 would have granted one? In how many cases do you think
24 of the thousands of convictions that Colorado goes
25 through would a court order a stay?

1 GENERAL YARGER: Justice Sotomayor, you're
2 correct; not many, as the -- the requirement is that
3 there must be a serious question of substance. And if
4 that is the case, then the -- the district court can
5 order a stay. Both execution of the judgment of
6 incarceration and --

7 JUSTICE SOTOMAYOR: What a wonderful
8 procedural quagmire you're throwing on courts below.
9 The number of vacated convictions are tiny. The number
10 of proceedings you want now with stay motions to be
11 determined by trial courts is hundreds, if not
12 thousands. That's what you're advocating.

13 GENERAL YARGER: I'm sorry, Justice
14 Sotomayor?

15 JUSTICE SOTOMAYOR: You want every trial
16 court to decide whether a stay is appropriate.

17 GENERAL YARGER: No. I'm just describing
18 what current procedure provides in terms of stays.

19 JUSTICE GINSBURG: Let me ask you this
20 question: Suppose we have a criminal trial. The jury
21 comes in with a verdict of guilty. And then the trial
22 judge said judgment vacated. There was insufficient
23 evidence to convict. In that case, the defendant would
24 not owe any fees to the State; right?

25 GENERAL YARGER: That's correct, Your Honor.

1 JUSTICE GINSBURG: But the judge instead
2 says there was sufficient evidence; appeal. The court
3 of appeals then says there was insufficient evidence, so
4 we vacate the conviction. In that case, all that money
5 is kept -- can be kept by the State? What's the
6 difference whether the finding was made by the trial
7 judge or by an appellate court?

8 GENERAL YARGER: The difference is that at
9 that time, there was a lawful conviction in place, and
10 that is what's required. And that's why the question in
11 this case is whether this is a return of property that
12 is properly thought of as the criminal defendants or
13 it's a claim for compensation. Just as in United States
14 v. Gettinger where the conviction was overturned because
15 the statute on which it was based was unconstitutionally
16 vague, the Court -- this Court denied compensation
17 because there was no waiver of sovereign immunity.

18 JUSTICE GINSBURG: We're not talking about
19 compensation. We're talking about getting your money
20 back.

21 GENERAL YARGER: Well, that's the -- Justice
22 Ginsburg, that's the question. Is this properly
23 considered under State law or under the Constitution as
24 a substantive matter property of the criminal defendant
25 or is it not? And --

1 JUSTICE BREYER: It says on page 27 of their
2 brief, they had three cases, one going back to 1832 of
3 this Court that says the law is that when you reverse
4 the judgment in a civil case -- I wouldn't know why it
5 would apply, too, as well as to criminal -- that you --
6 the person on the other side gets the money back.

7 Now, it doesn't say what law. And,
8 moreover, you heard your brother here say, well, the
9 Colorado supreme court said that this wasn't a question
10 here of whose property it was, it was a question of the
11 remedy. The property belonged to the criminal
12 defendant.

13 Now, so, one, what do you say about those
14 cases? Two, what did the Colorado supreme court say as
15 a matter of property law?

16 GENERAL YARGER: Yes, Justice Breyer. First
17 of all, the cases -- there are cases that say upon
18 reversal of an erroneous judgment, there can be
19 restitution. But --

20 JUSTICE BREYER: It doesn't say "can." It
21 says the law raises an obligation to the one who's
22 received the benefit of the erroneous judgment to make
23 restitution to the other party --

24 GENERAL YARGER: Well --

25 JUSTICE BREYER: -- or creates an

1 obligation. It doesn't say "may."

2 GENERAL YARGER: Respectfully, Justice
3 Breyer, some -- some courts use that specific
4 formulation --

5 JUSTICE BREYER: This Court used that.

6 GENERAL YARGER: This --

7 JUSTICE BREYER: This Court was the one --

8 GENERAL YARGER: This Court likewise --

9 JUSTICE BREYER: In 1832. All right.

10 GENERAL YARGER: In two cases, Justice
11 Breyer, Atlanta Coast Line Railroad, which is a Justice
12 Cardozo case from 1935, and United States v. Morgan,
13 which is a case from 1939, the Court overturned an order
14 from the district court and yet declined to provide a
15 refund because what the Court said is it had to remand
16 for a hearing on the merits of the substantive dispute.

17 One of Petitioner's own sources, a --

18 JUSTICE BREYER: I'm more interested in what
19 does the -- did the Colorado supreme court say, this is
20 his money, but we don't have a remedy? Did it say, this
21 is our money and we don't have to have a remedy? What
22 did it say?

23 GENERAL YARGER: It said that these amounts
24 are considered public funds such that a statute is
25 required providing that courts may draw on public funds

1 to award these amounts. So what the Colorado supreme
2 court necessarily decided was that this is not under
3 State law property of the criminal defendant.

4 CHIEF JUSTICE ROBERTS: But that's a
5 question, it seems to me, of -- you keep talking about
6 compensation. The issue is restitution. And under
7 normal equitable principles of restitution, it, in fact,
8 still is the property of the person from whom the money
9 has been taken away. And I wonder if your -- your
10 analysis has to be adjusted when you appreciate that
11 it's not compensation. It's not sort of the normal
12 State, give us some money. Under equitable principles,
13 it's State, give me my money back.

14 GENERAL YARGER: Yeah. Justice -- or
15 Mr. Chief Justice, that is the question, is under the
16 historical treatment of this issue, is this
17 property properly considered return of money? The
18 courts do say restitution. They also say that it is a
19 claim of unjust enrichment that depends on factors,
20 including the merits of the case. One of Petitioners'
21 own sources, a Tainter article --

22 JUSTICE BREYER: Suppose we go by the --
23 what this Court said in 1832, which seems like
24 historical tradition. Suppose I take that, unless you
25 give me a reason not to, as stating what the law is.

1 That's what it says.

2 So what's your response to that?

3 GENERAL YARGER: My response to that,
4 Justice Breyer, is I -- respectfully, I don't think
5 that's exactly what the law says. If the law says it,
6 if Petitioners establish a substantive due-process right
7 to this money back, we agree with them. Colorado law
8 doesn't vindicate that particular substantive interest.
9 And we're not arguing that it does.

10 JUSTICE SOTOMAYOR: For known -- the issue,
11 I've never known us to wonder or call it a substantive
12 due-process right to own money. Money is property. We
13 all have a right to own our property; correct?

14 GENERAL YARGER: Yes, Justice Sotomayor.

15 JUSTICE SOTOMAYOR: So I'm a little confused
16 by what you're asking for. They're saying it's my
17 money. Whether I agree with that or don't, if it is
18 their money, then you need to do a procedure that
19 comports with due process; correct?

20 GENERAL YARGER: That's correct.

21 JUSTICE SOTOMAYOR: And you don't deny that.

22 GENERAL YARGER: I don't deny that, no. And
23 so the question is whether under either State law this
24 is properly considered --

25 JUSTICE SOTOMAYOR: How about we borrow from

1 double jeopardy? Once the -- once the judgment is void,
2 you no longer have a basis to that property. It's
3 theirs. They had -- it was their money to begin with.
4 The only basis you had to collect it or keep it was a
5 constitutional conviction. Once it's voided, you have
6 no basis to keep the money.

7 GENERAL YARGER: And, Justice Sotomayor, I
8 think that that wouldn't necessarily explain cases like
9 Gettinger from 1927 when this Court denied that kind of
10 a remedy. Or ex parte Morris is another example where
11 the Court ordered that certain forfeited property be
12 returned, but the Court said, "The Court has no
13 authority to order the United States" -- "property that
14 had been placed in the United States to refund." So
15 that's the question is --

16 JUSTICE KAGAN: General, can I go back to
17 what -- I'm sorry. I interrupted you midstream.

18 GENERAL YARGER: No.

19 JUSTICE KAGAN: That's the -- you said
20 "that's the question" as though something big was coming
21 up.

22 (Laughter.)

23 GENERAL YARGER: I think I've, Justice
24 Kagan, probably said it before. It's just a question of
25 whether this is treated as a return of property or a

1 claim on compensation.

2 JUSTICE KAGAN: Okay. So you said to
3 Justice Sotomayor, you said we agree that if this were
4 their money, we would have to refund it in normal ways
5 consistent with procedural due process.

6 GENERAL YARGER: Yes, Justice Kagan.

7 JUSTICE KAGAN: Okay. So it really all does
8 depend on whether we think it's their money or it's your
9 money.

10 GENERAL YARGER: That's -- that's correct.

11 JUSTICE KAGAN: So if this were your money
12 on this -- on the simple theory of, there once was a
13 conviction, it once was valid, we collected the money at
14 that time, and that makes it our money going forward
15 forever and ever, no matter what happens to the
16 conviction. If that's your theory, it's not only true,
17 as the Chief Justice said, that you wouldn't have to
18 provide any remedy or any process for getting that money
19 back; right? You could just keep it and say, doesn't --
20 you can prove your innocence, you cannot prove your
21 innocence. Too bad. It's our money. You agree with
22 that. I think you said that to the Chief.

23 GENERAL YARGER: That's correct, Justice
24 Kagan.

25 JUSTICE KAGAN: And it would also be true, I

1 would think, that even if that conviction were
2 improperly gained, not just in the sense that it was
3 later vacated, but let's say it was the State's fault
4 that that conviction occurred; in other words, let's
5 say, oh, I don't know, there was a Brady violation or
6 something like that. It would still be your money.

7 GENERAL YARGER: Justice Kagan, in that --
8 that actually neatly illustrates the decisions that
9 States like Colorado have to make. Before the
10 Exoneration Act, for example, criminal defendants whose
11 convictions were overturned for error and they were
12 actually innocent had no remedy, except if they proved
13 some sort of a wrong such as the one you're describing.
14 Then they could sue for a constitutional tort. In fact,
15 a significant case from Colorado had exactly that. A
16 criminal defendant sued for a Brady violation and
17 received millions of dollars in compensation.

18 But what the -- the State is not required to
19 do is merely because the conviction is overturned
20 provide compensation for losses that occur attendant to
21 a conviction that is overturned.

22 CHIEF JUSTICE ROBERTS: Does your -- does
23 your analysis -- why doesn't it apply to criminal fines?

24 In other words, the fine for whatever the
25 offense is, you know, \$10,000. In other words, it's not

1 money that they paid fees along with the process. It's
2 the end of the process. You're convicted, you pay a
3 \$10,000 fine. Why don't -- when the conviction is
4 overturned, why don't you say, well, you know, this is
5 our money now, it's in the State treasury, you can't get
6 it back because of sovereign immunity?

7 GENERAL YARGER: Mr. Chief Justice, two
8 points. These -- these amounts here are -- are not
9 purely punitive, so that precise question isn't
10 presented, but our line does not depend on the
11 difference between punitive fines and payments such as
12 these and neither have past --

13 CHIEF JUSTICE ROBERTS: You say your line
14 doesn't depend. Does that mean you could apply this
15 rule to fines?

16 GENERAL YARGER: Yes.

17 CHIEF JUSTICE ROBERTS: Really? Are fines
18 in Colorado unredeemable once you -- once you put them
19 in the treasury?

20 GENERAL YARGER: As we understand the
21 Colorado supreme court's decision, yes. Just as this
22 Court held in Gettinger, that was a fine that the court
23 did not repay even though the conviction was invalidated
24 for constitutional reasons and the -- and the reason the
25 court didn't order the fine repaid was because of

1 sovereign immunity. So --

2 JUSTICE BREYER: Right. So what happens
3 then? I mean, you -- I grant you have a tough side of
4 this argument. It doesn't seem very fair. But the --
5 the -- the --

6 (Laughter.)

7 JUSTICE BREYER: You have a corporate
8 criminal defendant, you can't put him in jail, and --
9 and so what they do is they fine the corporation
10 \$15 million. And then the State says, by the way, why
11 appeal? If you win, we're not going to give you the
12 money back as the Chief Justice said. We'll assert
13 sovereign immunity.

14 Now, there's something wrong with that. I'm
15 trying to put my finger on it.

16 (Laughter.)

17 GENERAL YARGER: Justice Breyer, if there's
18 something wrong with that, then there was something
19 wrong with those long -- the cases decided previously.
20 And this is --

21 JUSTICE BREYER: Maybe they were right in
22 1832 and then they went off on a wrong track.

23 (Laughter.)

24 JUSTICE BREYER: Maybe those cases were
25 wrong. I don't -- I don't know. I have to go read them

1 and figure it out. But -- but it can't be that there's
2 no point to an appeal. Because we're not going to give
3 you back the fine.

4 GENERAL YARGER: Well --

5 JUSTICE BREYER: Now -- now, that, I stop
6 right there and then I'm asking -- I don't know what
7 your -- I have to ask him, and that's why his brief has
8 several different arguments, because it's hard to figure
9 out, but there's -- okay.

10 Do you want to say anything in response to
11 this question?

12 (Laughter.)

13 GENERAL YARGER: Justice Breyer, I
14 understand what you're struggling with. We -- we
15 struggle with it as well, but the -- the law in Colorado
16 supported by decisions of this Court and others in the
17 1800s and early 1900s suggests that this is a question
18 of whether the State has decided to provide this kind of
19 compensation. And if the Court rules that this is a
20 matter of substantive procedural -- or excuse me,
21 substantive right under the Constitution, I think you do
22 encounter very significant problems about why
23 compensation isn't awarded for the serious deprivation
24 of liberty that occurs --

25 JUSTICE ALITO: Why does it -- why does it

1 matter who owns this money at this time under Colorado
2 law? This was the defendants' money and it was taken
3 away from them. So if -- at -- you say that at some
4 point it ceased to be their money and it became the
5 state's money. But then you have to show that it was
6 taken away pursuant to due process, and consistent with
7 due process.

8 GENERAL YARGER: Yes, and the due process
9 is, as -- as Petitioners admit, and they did so below in
10 their petitions for rehearing to the Colorado supreme
11 court. They said that the -- the deprivations of their
12 liberty and their property comported with due process
13 because a conviction supported the imposition of costs,
14 fees, and restitution.

15 I believe my friend Mr. Banner said it again
16 today, so that is the due process that lead to the
17 deprivation.

18 JUSTICE ALITO: Well, how can the
19 conviction -- how -- how can the conviction have been
20 reversed if -- if they were convicted consistent with
21 due process?

22 GENERAL YARGER: Your Honor, there were
23 errors -- there were errors in these trials, but the
24 question is whether there was process sufficient to
25 allow the conviction to attach, and certainly

1 Petitioners don't argue otherwise.

2 If there were defects sufficient enough that
3 this was a wrongful deprivation of liberty, for example,
4 like the Manuel v. City of Joliet case this Court
5 encountered. There would be a claim for compensation
6 due to a wrongful defect in the due process in the
7 procedures that led to that deprivation.

8 But the question here, there was no wrongful
9 conduct that occurred, there was an error that occurred.
10 And the way that this Court's precedents have treated
11 that is not as a return for property but as a claim for
12 compensation.

13 CHIEF JUSTICE ROBERTS: Why should -- why
14 isn't it a violation of the takings clause?

15 GENERAL YARGER: For the same -- so --

16 CHIEF JUSTICE ROBERTS: Private property
17 shall not be taken without just compensation. Don't ask
18 for any procedure or process. Just give me just
19 compensation.

20 GENERAL YARGER: Chief Justice Roberts,
21 Mr. Chief Justice, that's why the -- the tax cases that
22 Petitioners cite don't apply here either. That's the
23 precise issue there where there's simply no process
24 given before the taking occurs.

25 Here, the criminal process supported the
Alderson Reporting Company

1 conviction and that was an appropriate conviction at the
2 time it was entered.

3 And -- and, again, if that were true,
4 Mr. Chief Justice, it wouldn't explain why there's no
5 constitutional requirement to provide compensation for
6 the deprivation of liberty that occurs.

7 CHIEF JUSTICE ROBERTS: Well, that's -- I
8 mean, what are you going to do? You can't -- you can't
9 give them back whatever time they've spent in jail. You
10 just can't do it, but you can give them the money back.

11 GENERAL YARGER: That's true, but -- but you
12 can compensate them for it and certainly for a very long
13 time the common law and other principles of -- of
14 jurisprudence have supported the notion that you can --
15 you can either order restitution or some other
16 compensation to account for a deprivation such as a
17 deprivation of liberty.

18 And so if the rule were that this is
19 Petitioners' property and it was -- and it certainly was
20 Petitioners' liberty before it was properly, although
21 not wrongfully although erroneously taken, it's unclear
22 why Petitioners' principle wouldn't apply to the same
23 question.

24 CHIEF JUSTICE ROBERTS: Was there any -- you
25 know, I -- one source of the difficulty we're having, it

1 seems to me, is that the Exoneration Act was addressed
2 to some -- a situation very different than what we have
3 here. It was addressed to, you know, someone wrongfully
4 imprisoned for 20 years and the State felt some
5 obligation to remedy that at least in a symbolic way.
6 But in order to qualify for that you do need to show all
7 these other things.

8 And -- I mean, is it completely settled? I
9 guess we have the decision from the Colorado supreme
10 court that that same act applies, and this strikes me as
11 a very different situation.

12 GENERAL YARGER: Well, Mr. Chief Justice,
13 I -- I agree with you that the substantive right
14 encompassed by the Exoneration Act is very narrow, and
15 it doesn't cover the claimed right that's at issue in
16 this case, and what the Colorado supreme court told us
17 is that there is no other statutory mechanism for the
18 kind of compensation that Petitioners are seeking in
19 this case.

20 So I agree with you, the Exoneration Act is
21 very narrow and is not addressed to --

22 CHIEF JUSTICE ROBERTS: Well, thanks for
23 agreeing with me. I don't think that's what I said.

24 GENERAL YARGER: Okay.

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: I guess what I said
2 is that by its -- its -- as I understand the background
3 at least, the act was not addressed to the specific
4 situation. It was addressed to a different situation,
5 and yet the court below has interpreted it far more
6 broadly, not narrowly but broadly, to cover a -- a very
7 different situation.

8 GENERAL YARGER: I don't --
9 Mr. Chief Justice, I don't think that's necessarily a
10 fair understanding of what the Colorado supreme court
11 was thinking of.

12 What the Colorado supreme court was thinking
13 of was where is the statutory authority to order this
14 type of refund. The court hadn't really encountered
15 this situation before, and so it looked and it found
16 only the Exoneration Act. So what it concluded is that
17 as a matter of substance, compensation like the kind of
18 compensation that Petitioners are seeking in this case
19 is available only on a claim of actual innocence.

20 So I'm -- I'm agreeing with you because,
21 yes, the -- the statute is that narrow, but the Colorado
22 supreme court determined that as a matter of law, this
23 is -- this is public property and there must be a -- a
24 proper claim for compensation against state funds and
25 there wasn't one in this case.

1 JUSTICE KAGAN: General, you said a couple
2 of times that if -- if we were to look at this as this
3 is not public property once the conviction is vacated,
4 that instead it once again becomes the criminal
5 defendant's property, the acquitted defendant's
6 property, if that were true what kind of procedure would
7 you have to set up to return the property, do you think?

8 GENERAL YARGER: Justice Kagan, I think it
9 would -- would be fairly minimal. I think it would
10 involve, perhaps, a motion filed in the district court.
11 I think the only burden that could, perhaps, be placed
12 on a criminal defendant would be proving the amounts
13 that were, in fact, taken from the defendant, and then
14 there would have -- there could be, for example, time
15 limits put in place.

16 But if this truly is Petitioners' property,
17 they -- they would have to be minimal requirements.

18 JUSTICE GINSBURG: This is what they, they
19 made a motion.

20 GENERAL YARGER: That's correct. So it
21 would be similar to the route that they -- they
22 attempted to take, but the courts below held that they
23 did not have authority except in the case of Madden,
24 just for the -- for the -- for the fees.

25 CHIEF JUSTICE ROBERTS: I thought you told

1 me it was not their property. In other words, even --
2 but even if it was, once it's in your treasury they
3 can't get it back because of sovereign immunity.

4 GENERAL YARGER: Chief Justice Roberts --
5 or, excuse me, Mr. Chief Justice, if this is their
6 property, if they have a present entitlement to it, it
7 is their property, then due process requires them some
8 procedure to get it back, and that's the question.

9 Is this, as a matter of substantive law,
10 their property or public funds as the Colorado supreme
11 court held, and, therefore, there's -- there can only be
12 a mechanism for compensation from public fund for those
13 losses? And so that is the key question in this case.

14 If there are no further questions.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Mr. Yarger.

17 Mr. Banner, you have four minutes.

18 REBUTTAL ARGUMENT OF STUART BANNER

19 ON BEHALF OF THE PETITIONER

20 MR. BANNER: Okay. Just a couple of -- a
21 couple of quick things.

22 First of all, this -- I believe that this
23 argument is the first time in this litigation that the
24 State has come out and said, "This is -- this money
25 belongs to the State." The Colorado supreme court did

1 not say that. The Colorado --

2 JUSTICE BREYER: It doesn't say the opposite
3 either.

4 MR. BANNER: It doesn't say the opposite --

5 JUSTICE BREYER: All right. So what do we
6 do about that?

7 MR. BANNER: But -- but -- but the -- what
8 the Colorado supreme court did was to skip over that
9 question and proceed straight to the next logical
10 question that would occur if it was -- the money was our
11 property, which is, is the Exoneration Act an adequate
12 procedure for returning it?

13 JUSTICE BREYER: Because that could be
14 consistent with the money's their property, but they
15 have an obligation to give it back.

16 MR. BANNER: Not really, because -- because
17 if it was -- if the -- if the -- if the money is the
18 State's property, then it doesn't matter. They don't
19 have to provide any procedure to give it back; right?

20 So the -- the question with the -- that the
21 Colorado supreme court actually decided, the one
22 thing -- the issue -- I mean, the part of the decision
23 that we're attacking is that this is an adequate
24 procedure for the return of the property. Okay. That's
25 my first point. The --

1 JUSTICE BREYER: They use the word "return"?
2 I'm looking for something here -- but, I mean, you see
3 what's --

4 MR. BANNER: Yeah. No, I understand.

5 JUSTICE BREYER: I'm looking for something
6 here in the opinion that will -- that I could just say,
7 "Okay. See? They concede that it is this man's
8 property. They concede it." But I haven't found that
9 sentence. That's my --

10 MR. BANNER: Well, unfortunately, they don't
11 explicitly concede it. They assume it, is what -- is
12 what we would say.

13 JUSTICE BREYER: Okay.

14 MR. BANNER: I know that's not helpful to
15 you.

16 All right. The other -- the other -- the
17 other --

18 (Laughter.)

19 MR. BANNER: The other quick point I want to
20 make is, I just want to explain very briefly why
21 sovereign immunity has never been thought to be --
22 provide any bar to these refunds. And that is, we're
23 not asking for the right to bring a new lawsuit against
24 the State. The State already brought these suits
25 against us when it charged Nelson and Madden with

1 crimes; right? We're not -- we're not seeking a new
2 judgment against the State. We already have judgments
3 in these cases, judgments in our favor. We won. And
4 yet the State is holding on to our money as if we lost.

5 We're not seeking compensation. We're just
6 seeking a refund of the money that we paid pursuant to
7 judgments that no longer exist.

8 JUSTICE BREYER: Well, wait, as long as you
9 have a minute.

10 (Laughter.)

11 JUSTICE BREYER: I mean --

12 MR. BANNER: I'm not going anywhere.

13 JUSTICE BREYER: -- let's go over your case
14 that you like, the Bank of Washington v. United States,
15 1832. And it says "the law." What law? The common --

16 MR. BANNER: The common -- I believe the
17 common law.

18 JUSTICE BREYER: Common.

19 MR. BANNER: I believe all those cases --

20 JUSTICE BREYER: That is what I am afraid
21 of. So --

22 MR. BANNER: -- are about the common law.

23 JUSTICE BREYER: Yeah, yeah.

24 MR. BANNER: Yeah. Yeah, yeah.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 The case is submitted.

3 (Whereupon, at 11:00 a.m., the case in the
4 above-entitled matter was submitted.)

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