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IN THE SUPREME COURT OF THE UNITED STATES

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SHANNON NELSON, :

Petitioner : No. 15-1256

v. :

COLORADO, :

Respondent. :

- - - - - x

Washington, D.C.

Monday, January 9, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

STUART BANNER, ESQ., Los Angeles, Cal.; on behalf of the Petitioner.

FREDERICK YARGER, ESQ., Solicitor General, Denver, Colo.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 15-1256, Nelson v. Colorado. Mr. Banner.

ORAL ARGUMENT OF STUART BANNER
ON BEHALF OF THE PETITIONER

MR. BANNER: Mr. Chief Justice, and may it please the Court:

When a judgment is reversed, a person who has paid money pursuant to the judgment is entitled to get the money back. That's common sense, and that has, unsurprisingly, been normal practice for centuries.

As far as we can tell, Colorado is the first State ever to adopt a rule to the contrary. In Colorado now, when a judgment of conviction is reversed, the State keeps the defendant's money unless the defendant files a separate civil action and can prove, by clear and convincing evidence, that she's actually innocent.

JUSTICE GINSBURG: What is the basis of -- of the right? You said the person whose conviction is overturned has a right to get the money back. Is it a constitutional right? What kind of right is it?

MR. BANNER: It's -- it's a right under the common law of property that's existed for centuries;

1 that it has always been the case that a successful
2 appellant gets her money back.

3 In this case, the money was taken from
4 Shannon Nelson and Lewis Madden pursuant to criminal
5 convictions, but --

6 JUSTICE KENNEDY: It has to be -- it -- it
7 has to be constitutional if Colorado says we don't want
8 to follow the common law. This is not the law here.

9 MR. BANNER: Well, but -- but here --

10 JUSTICE KENNEDY: So -- so if it's not
11 constitutional, then -- then what's the -- what's the
12 basis for -- for your case?

13 MR. BANNER: No. So here, the Colorado
14 supreme court did not say that this money belongs to the
15 State of Colorado. Rather, the Colorado supreme court
16 said the Exoneration Act is a good enough remedy for
17 returning the money to Nelson and Madden.

18 You're absolutely right, though, to say that
19 if the Colorado supreme court had said it doesn't matter
20 what process we use because it's not their property,
21 it's the State's property. If the Colorado supreme
22 court had said that, then you're right. Then we would
23 be having to say -- making an argument that the
24 Constitution itself gives the money -- gives a right to
25 the money to Nelson and --

1 JUSTICE SOTOMAYOR: Make that argument.

2 MR. BANNER: Excuse me?

3 JUSTICE SOTOMAYOR: Make that argument.

4 MR. BANNER: Okay. So if -- if Colorado --
5 if the Colorado supreme court had said that this money
6 belongs to the State rather than to Nelson and Madden --
7 Madden, that would be tantamount to charging people
8 money for the privilege of trying them unlawfully.
9 Right? It would be the State taking money as a result
10 of a trial that has been reversed, a trial that was
11 conducted unlawfully. That would --

12 JUSTICE SOTOMAYOR: The dissent here said
13 something quite simple, which was the only entitlement
14 to the money was the conviction.

15 MR. BANNER: Correct.

16 JUSTICE SOTOMAYOR: If the conviction has
17 been voided, then what legal right does the State have
18 to retain the money?

19 MR. BANNER: We agree with that exactly.

20 JUSTICE SOTOMAYOR: The Colorado supreme
21 court, on the other hand, said when you paid the money,
22 we were entitled to it. So where -- there's a
23 disconnect there.

24 If they were entitled to it initially, we're
25 still back to the operative question of why are they

1 entitled? What is the constitutional right for you to
2 get it back?

3 MR. BANNER: The State was entitled to the
4 money initially because there were judgments of
5 conviction in place, judgments of conviction that
6 required the payment of the money. Those judgments of
7 conviction no longer exist. They were reversed on
8 appeal. Shannon Nelson was retried and was acquitted of
9 all charges. Lewis Madden convictions were reversed and
10 the prosecutor declined to -- to retry the case. And so
11 while it was the State's money while the convictions
12 existed, once those judgments of conviction cease to
13 exist, at that point it's no longer the State's money.

14 JUSTICE ALITO: I thought your argument
15 was -- was this, but what you're saying now and a lot of
16 your brief is much more complicated, but the simple
17 argument I thought was this:

18 This was your client's money. It's a
19 certain amount of dollars. Okay. It was taken away
20 from them as a result of a trial that was flawed and
21 therefore they were deprived of that property without
22 due process of law. I thought that was the argument.
23 Am I right or not?

24 MR. BANNER: You're right.

25 JUSTICE ALITO: Okay. Now, if that is the

1 argument, there are two complications that I see in your
2 briefing. One is that you concede that they could be
3 denied restitution for equitable reasons. Let's just
4 take that.

5 Where -- where else in the law of due
6 process would something like that come up?

7 MR. BANNER: We -- we -- the reason why we
8 said that is that in several of -- of this Court's older
9 cases, the Court describes these refunds as equitable.

10 Now, in a -- in a garden variety -- in
11 garden variety criminal cases like this one, there would
12 be no equitable considerations that would interfere with
13 a refund of the money.

14 But there -- there are -- it's possible to
15 imagine other sorts of cases where it would. And so,
16 for example, the Court -- as this Court mentioned, as we
17 say in the -- in the reply brief, this Court mentioned
18 an example in which an insurance case in which a
19 refund -- a full refund would provide overcompensation
20 for some reason to -- to the successful appellant, and
21 in such a case, the refund for equitable reasons would
22 have to be scaled back.

23 In an ordinary criminal case like -- like
24 ours, there's nothing like that. Those -- those sorts
25 of equitable considerations are very, very far from --

1 from -- from a case like this one. And, you know,
2 Colorado talks --

3 JUSTICE KAGAN: If that's right, and this is
4 the basic argument, it's our money by virtue of State
5 law, and once the conviction disappears, why doesn't the
6 State have to proactively return the money? In other
7 words, why is it even required for the person to bring
8 any kind of refund action against the State?

9 MR. BANNER: No. The State does proactively
10 have to refund the money. There -- there is no
11 requirement for the successful appellant to bring -- to
12 bring an action. Rather, the -- what the --

13 JUSTICE KAGAN: So your complaint is not to
14 the nature of this action and to exactly what you have
15 to prove. You're saying that as soon as the conviction
16 is vacated, the State has to put a check in the mail.

17 MR. BANNER: Well, okay. That may be a
18 little too -- a little too simple. So that the -- in
19 our view the -- the -- a proper procedure would be the
20 procedure that was followed in these cases, where,
21 after -- in Shannon Nelson's case, after she was
22 acquitted, she filed a motion back in the original trial
23 court saying, look, I've been acquitted, please give me
24 my money back.

25 JUSTICE KAGAN: No. I guess I'm asking, if

1 your theory is right, why is even that necessary? If
2 your theory is right, it seems -- I mean, you know --
3 you know, you might file a motion because the State
4 hasn't done what it's supposed to do, but it seems as
5 though the obligation on the State's part is immediately
6 to put a check in the mail.

7 MR. BANNER: No, that's right. That's
8 right. That's right. And so when that hadn't happened
9 after several months we filed the motions in both cases.

10 Well, the -- the other --

11 CHIEF JUSTICE ROBERTS: I was just -- I -- I
12 understood you in responding to Justice Alito to say
13 that the State had to give the money back because they'd
14 acquired it as a result of a flawed prosecution. Is
15 that right?

16 MR. BANNER: Right.

17 CHIEF JUSTICE ROBERTS: Well, that's not
18 true for some of the payments. You know, there's a \$30
19 docket fee. In other words, that's not something that
20 depends upon whether the conviction is valid or not in
21 the normal case.

22 MR. BANNER: Well, yes. Well, in -- in --
23 under the -- all of these payments under Colorado law
24 are collected only from defendants who are convicted.

25 CHIEF JUSTICE ROBERTS: Including the docket

1 fee?

2 MR. BANNER: Including the docket fee,
3 right. None of these -- none of these -- none of these
4 fees, charges, et cetera, are the sorts of -- sort of
5 filing fees that are collected from any litigant, win or
6 lose. There's nothing like that in this case. This is
7 all money that is contingent upon the existence of a
8 conviction.

9 JUSTICE ALITO: The other complication that
10 I see in this make-whole argument, in other words, the
11 State took things away from you, they took property away
12 from you, and when the conviction is reversed, they have
13 to restore you to the position you were in before the
14 prosecution. Is this, the -- the restitution and all of
15 these fees are small in comparison with the main thing
16 that was taken away, and that was -- that was liberty.

17 So if your argument is correct, why
18 shouldn't this -- what -- did -- didn't the State -- the
19 State took away your clients' liberty without due
20 process of law, so would they be automatically entitled
21 to be made whole in that respect?

22 MR. BANNER: No. And the reason --

23 JUSTICE ALITO: Why not?

24 MR. BANNER: The reason -- I'm -- I'm
25 getting -- the reason for that is that while there's a

1 long historical tradition of providing refunds of
2 monetary payments upon the reversal of the conviction,
3 there is no comparable tradition of providing
4 compensation for periods of lost liberty.

5 JUSTICE GINSBURG: That's why Colorado
6 passed the Exoneration Act.

7 MR. BANNER: Exactly. Exactly. If there --
8 if there already was a tradition of providing
9 compensation for lost liberty, there'd be no need for
10 statutes of exoneration --

11 JUSTICE ALITO: Well, if tradition -- I
12 mean, if tradition like that can defeat the argument for
13 compensation for time wrongfully spent in prison, then
14 can tradition defeat the argument that you make with
15 respect to the fees and the restitution?

16 MR. BANNER: No, because the tradition is --
17 is the -- the normal practice for centuries has been to
18 refund monetary payments that are contingent upon a
19 judgment when that judgment --

20 JUSTICE ALITO: Oh, okay. So the argument
21 is tradition could do it if there were such a thing.

22 MR. BANNER: If there were such a thing, if
23 the opposite -- right. And so it's a -- it's a --

24 JUSTICE ALITO: But we have to look at the
25 tradition.

1 JUSTICE KENNEDY: Can we look at the
2 tradition again? It seems to me for constitutional
3 reasons, not for State law reasons, that's where I'm
4 somewhat confused.

5 I mean, who -- who cares about tradition if
6 the State says X and the tradition is Y, unless there's
7 a constitutional --

8 MR. BANNER: No, no, that's right. That's
9 right. That's right. And so -- and so tradition --
10 tradition comes in, you know, in -- in determining what
11 process is due, courts always -- always look to
12 tradition. Tradition is -- is always a factor in
13 considering what would --

14 JUSTICE KENNEDY: Getting back to the State
15 law for a moment.

16 MR. BANNER: Yeah.

17 JUSTICE KENNEDY: Are -- are you saying that
18 if a State creates a right under State law, it cannot
19 unduly complicate that right by flawed procedures, under
20 our procedural due process jurisprudence?

21 MR. BANNER: Well, I'd say it even more
22 simply than that. I would say that when a State is
23 holding onto property that belongs to one of its
24 citizens, the State has an obligation to have a
25 procedure that is adequate for returning the property.

1 I mean, that's the -- that's the error that
2 we're complaining about in the Colorado supreme court.
3 Below, the supreme court said the -- the Colorado
4 supreme court analyzed this as a procedural due process
5 case. The court said the question is: Is the
6 Exoneration Act a good enough procedure for returning
7 this money to Nelson and Madden? The Colorado supreme
8 court applied Mathews v. Eldridge and the State cases
9 following Mathews v. Eldridge, and the Colorado supreme
10 court determined yes, this is a good enough process for
11 returning the money to Nelson and Madden.

12 JUSTICE ALITO: Well, then your -- I think
13 your argument has moved from the simple one I started
14 out with, which is that you're absolutely entitled to be
15 made whole, to the argument that they have to provide --
16 that we look to tradition and we have -- we have to see
17 what sort of tradition is adequate.

18 So what would be an adequate procedure here?

19 MR. BANNER: They -- they have to be made
20 whole -- I guess I don't think I'm saying anything
21 different from what you're saying. I'm saying that what
22 the Due Process Clause requires is for Colorado to
23 provide a process adequate to make defendants whole when
24 their convictions --

25 JUSTICE ALITO: So what is that process

1 after the conviction is reversed?

2 MR. BANNER: Well, I'm simply -- simply to
3 refund the money. It's their money. Colorado can't
4 make defendants have to prove that they're actually
5 innocent in order to get their own money back.

6 JUSTICE SOTOMAYOR: I thought -- let's --
7 let's take the act. What parts of the procedure of the
8 act are you saying violate due process?

9 MR. BANNER: Well, the -- the requirement of
10 proving one's innocence in order to get one's own money
11 back. That's -- that's the most -- that's the most
12 obvious one.

13 JUSTICE SOTOMAYOR: It would seem to me that
14 if the State had an equitable reason, it should prove
15 it, not you.

16 MR. BANNER: Oh, exactly. Exactly. And as
17 I've said, the State talks a lot in very general terms
18 about equitable principles, but the State has yet to
19 identify what equitable principle entitles to not refund
20 the money.

21 JUSTICE SOTOMAYOR: Do you think the
22 requirement to start a separate civil action comports
23 with due process?

24 MR. BANNER: That's -- that's a harder
25 question. So let's imagine a requirement that you have

1 to file a separate civil action, but all you have to
2 prove is that your conviction was reversed, right? If
3 it was -- if it was something that -- that ministerial,
4 maybe. Maybe that would satisfy due process. Although
5 even there, I suppose, it would be hard to see what
6 purpose would be served by such an action when you --

7 JUSTICE GINSBURG: You'd have to get -- pay
8 a filing fee --

9 MR. BANNER: Yeah.

10 JUSTICE GINSBURG: You would have to engage
11 a lawyer.

12 MR. BANNER: Yes.

13 JUSTICE GINSBURG: And we're talking about
14 hundreds of dollars, not even a thousand in one case.
15 So --

16 MR. BANNER: That's right.

17 JUSTICE GINSBURG: -- if any -- it seems to
18 me any requirement that you sue to get the money back.

19 MR. BANNER: I agree. I agree. As I was
20 saying, it would have to be a very streamlined -- some
21 very streamlined, very easy sort of civil action. But
22 you -- that would be pointless. I mean, it would be
23 hard to see what purpose would be served by requiring
24 such an action. I'm agreeing with you. What purpose
25 would be served by that when you can just do what

1 appellants have been doing -- successful appellants have
2 been doing for centuries, which is going back to the
3 trial court and saying, okay. Judgment reversed.
4 Please give us our money back.

5 JUSTICE SOTOMAYOR: I assume you apply the
6 Mathews framework. Do you agree that the court got it
7 right, or do you think even under Mathews the court
8 below got it wrong?

9 MR. BANNER: Oh, no. Under Mathews, the
10 Court got it terribly wrong. I mean, the -- the
11 Colorado supreme court's application of Mathews was
12 basically to say due process requires some kind of a
13 hearing. Well, the Exoneration Act, that gives you some
14 kind of a hearing, so good enough.

15 If you look at the -- the Mathews factors
16 one by one, they all point very, very strongly in -- in
17 favor of finding the Exoneration Act an inadequate
18 remedy.

19 It's -- first of all, this is -- this is the
20 defendants' property, not the State's property.

21 Second of all, this is a terrible procedure
22 for returning property to -- to successful appellants.
23 The Exoneration Act act was not really intended to serve
24 that purpose. It doesn't serve that purpose at all.
25 It's -- it's -- virtually ensures that successful

1 appellants aren't going to get their money back when
2 their convictions are reversed.

3 And, finally, it's -- it's impossible to see
4 what interest the State has in holding onto this money;
5 right? Nelson -- Shannon Nelson's -- she was acquitted.
6 Lewis Madden, his convictions were reversed. There --
7 there -- there's no chance that either of these
8 defendants will ever be re-prosecuted. This money will
9 never belong to Colorado. Colorado has yet to explain
10 what interest it has in preventing this money --

11 JUSTICE KENNEDY: If we're writing --

12 MR. BANNER: -- from being returned.

13 JUSTICE KENNEDY: If we're writing this
14 opinion and we begin, "Tradition is very important
15 here," because?

16 MR. BANNER: Well, in the Court's due
17 process cases, the Court has often said that
18 tradition --

19 JUSTICE KENNEDY: That's --

20 MR. BANNER: -- is very important. And --

21 JUSTICE KENNEDY: That's if we're trying to
22 define the substantive right.

23 MR. BANNER: Yeah. Right. And -- and also
24 in determining what -- what process is due. And so --
25 so the -- the fact that successful appellants have

1 always gotten their money back, I mean, that's -- that
2 is -- that -- that is the tradition that -- that we're
3 invoking.

4 And tradition is important in -- in due
5 process cases because, you know, in -- in determining
6 what -- what process is due in determining what's the
7 law of the land, well, what -- what better place to look
8 than what the law of the land has always been.

9 CHIEF JUSTICE ROBERTS: Well, so that's a
10 different analysis than the Mathews analysis, though.

11 MR. BANNER: Correct.

12 You know, the thing about this case is that
13 what Colorado is doing here has never been done before.
14 So there is no precedent directly on point at a very
15 high level of specificity. So we have to look to other
16 lines of the Court's due process precedent. That's what
17 we've done.

18 JUSTICE KAGAN: Well, it -- it seems,
19 Mr. Banner, that you could be approaching this in two
20 ways. I mean, one is you could be claiming a
21 substantive due-process right along the lines that
22 Colorado said you were doing, and then you came back and
23 said no. Now, if you were suggesting that you had a
24 substantive due-process right, then surely tradition
25 would be important.

1 MR. BANNER: That's right.

2 JUSTICE KAGAN: But in -- if you're looking
3 at procedural due process, I would have thought that
4 your argument is the simple one of: This is property
5 under State law; it's -- it's my property, it's your
6 client's property. And then we apply the Mathews test
7 to determine what kind of procedure is due --

8 MR. BANNER: That's right.

9 JUSTICE KAGAN: -- to get that property
10 back. And tradition --

11 MR. BANNER: Right.

12 JUSTICE KAGAN: -- wouldn't be any part of
13 that.

14 MR. BANNER: No, that's right. And so if --
15 looking just at the Mathews test, you're absolutely
16 right. Tradition would not be part of that. But the
17 Mathews test is not the only way the Court has looked at
18 this general class of issues. And as I said, because --
19 because no State has ever done what Colorado is doing,
20 they're -- we're -- we're trying to draw from various
21 strands of due process precedent. One strand is the
22 Mathews test.

23 But there -- another strand is the -- you
24 know, the cases like Honda Motor and so on that say if a
25 State takes away a procedure that has traditionally been

1 present, traditionally been afforded, that's a pretty
2 good sign that the State is violating due process.

3 JUSTICE GINSBURG: What did Colorado do
4 before the Exoneration Act with respect to returning --

5 MR. BANNER: Just -- just gave back the
6 money just like every other jurisdiction. That's right.

7 And so the -- the novelty here is that this
8 case got to the Colorado supreme court immediately after
9 the Exoneration Act was enacted, and the Colorado
10 supreme court said, oh, now we have a statute that tells
11 how money is supposed to be refunded to exonerated
12 defendants. Under State law, that must be now the
13 exclusive remedy for defendants to recover the money.

14 But before -- before the Exoneration Act,
15 there -- there was no statute governing this -- this
16 topic, just like in many jurisdictions. And in -- just
17 as a matter of routine practice, successful appellants
18 got their money back.

19 JUSTICE ALITO: Well, is that true? I mean,
20 I still don't understand the difference between the
21 simple argument that you're required to be made whole
22 and the argument that a court could deny restitution
23 based on equitable considerations as this court has
24 said.

25 So which is your argument? You

1 automatically get it back; that's the end of it. You
2 don't -- no procedure is necessary --

3 MR. BANNER: No --

4 JUSTICE ALITO: -- or that you could be
5 denied receiving the money back for equitable reasons?

6 MR. BANNER: You automatically get it back
7 unless there is some equitable reason that you shouldn't
8 get it back. But what I'm trying to say is in an
9 ordinary criminal case like this one, there is no
10 equitable reason why you shouldn't get it back and it's
11 impossible almost to conceive of an equitable reason.
12 The reason why --

13 JUSTICE ALITO: Well, what if the State says
14 that you -- that the defendant has the obligation to
15 move for a stay of the judgment of restitution when the
16 defendant takes an appeal, and if the defendant doesn't
17 do that, then the money is not refunded?

18 MR. BANNER: Yeah. That's -- that is
19 impossible under State law for indigent defendants to
20 seek a stay of monetary payments pending appeal for two
21 reasons.

22 One is that you have to -- to get a stay
23 pending appeal, you have to post a bond in the full
24 amount of the payment. That's way out of reach for any
25 indigent defendant. In fact, we talked to experienced

1 Colorado defense lawyers who say they have never heard
2 ever of any indigent defendant seeking a stay of
3 monetary payments pending appeal. Our clients, indigent
4 defendants, they couldn't -- they couldn't have done
5 that.

6 Second, by statute, stays appear to be
7 unavailable where the money is being taken from the --
8 appellant's inmate accounts, which is the case here. So
9 even -- even if they had some sort of money outside of
10 their inmate accounts -- excuse me. I'm sorry. The
11 money had been taken from the inmate account, so -- so
12 that's the second reason why a stay would be
13 unavailable.

14 I should add --

15 JUSTICE SOTOMAYOR: Should we be --

16 MR. BANNER: Yeah.

17 JUSTICE SOTOMAYOR: Should we be
18 differentiating between some jurisdictions that don't
19 collect the money until the conviction is final and a
20 conviction that's overturned on collateral review where
21 the possibility of money having been collected may
22 exist? Should there be a difference in how we think
23 about those two situations?

24 MR. BANNER: No, because -- because whatever
25 the reason for the disappearance of the judgment of

1 conviction, the key thing is that these are -- these
2 are -- the State's only right to this money is in the
3 judgments of conviction. And so regardless --

4 JUSTICE SOTOMAYOR: Well, I have a problem
5 because there are some cases in our jurisprudence -- not
6 in English jurisprudence, but certainly in American
7 jurisprudence where the payment of restitution to a
8 third party would have been good reason, an equitable
9 reason for the State not to have to return that money.

10 MR. BANNER: Yeah. Let me --

11 JUSTICE SOTOMAYOR: So what do we do --

12 MR. BANNER: Let me -- let me say -- let me
13 say a word about -- about restitution in -- restitution
14 in the -- in the modern sense of restitution. I mean,
15 restitution --

16 JUSTICE SOTOMAYOR: Paying the victim.

17 MR. BANNER: -- to victims. Right. Right,
18 right, right.

19 Restitution in -- in Colorado is -- you can
20 only have restitution pursuant to a criminal conviction.
21 Without a criminal conviction, there can be no
22 restitution. There's no separate proceeding. There's
23 no separate proof apart from the amount of restitution;
24 otherwise, it's just -- it's just part of the sentence.

25 JUSTICE KAGAN: What do States generally do

1 if they've collected this money, they've paid it out to
2 the victim, and then the conviction is overturned? Do
3 they usually leave the money with the victim and just
4 take it out of their general treasury, or do States try
5 to take it back from the victim?

6 MR. BANNER: That -- that, I do not know.
7 And the thing is there -- there are very few reported
8 cases raising the issue of refunds of restitution after
9 the reversal of a conviction. And I think the reason it
10 must be that restitution, although -- restitution to
11 victims, although quite old in principle, really has
12 only been applied in significant amounts recently.

13 JUSTICE ALITO: But your argument is that
14 if -- let's say there's a very substantial judgment of
15 restitution and the money is paid to the victims. Let's
16 say they're victims like the ones in this case, so
17 it's -- it's therapy --

18 MR. BANNER: Uh-huh.

19 JUSTICE ALITO: -- for abuse.

20 And then even after the judgment has become
21 final, if there is -- if -- if the defendant is given
22 relief on collateral review, the State would have to --
23 would have to compensate the defendant for all the money
24 that was paid to the victims. That's your argument?

25 MR. BANNER: I -- well, I agree with all of

1 that except for the word "compensate." The State would
2 have to refund the amount of money it had taken from the
3 defendant.

4 Remember that -- that -- I mean -- and then
5 as between the State and the victims, that's between --
6 that's -- that's between the State and the victims.
7 That's no -- there's no bearing on the -- the property
8 rights or the due process rights of the defendant.

9 Bear in mind that all the money the State
10 collects from convicted defendants, whether denominated
11 restitution or denominated anything else, all of that
12 money the State is spending on something. The State --
13 the State isn't hiding that money under a mattress. All
14 of that money, even -- even fines paid into a State's
15 general fund, the State is spending that money on
16 something.

17 And so it's -- it's no excuse when -- to --
18 when you -- when you owe a debt to say, oh, gees, I'm
19 sorry, I already spent the money on something else.

20 JUSTICE KENNEDY: Well, you don't have to
21 make that argument to prevail in this case, do you? I
22 think there's --

23 MR. BANNER: Correct.

24 JUSTICE KENNEDY: -- some severe equitable
25 problems with -- with the -- with the hypothetical of

1 the State having paid the -- the victim and the victim
2 having spent the money.

3 MR. BANNER: No, no. You -- you
4 misunderstand me. The State is saying -- I'm not
5 talking about the victim spending the money. I'm -- I
6 meant to be talking about the State saying, well, I'm
7 sorry, we can't -- we can't -- upon the reversal of a
8 conviction, the State saying we -- we can't refund the
9 money, sorry, we already disbursed it as restitution to
10 the victims.

11 And what I'm saying is the State disburses
12 all the money it collects for one purpose or another.
13 That doesn't set restitution apart from anything else.

14 If I could reserve the balance of my time.

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

17 General Yarger.

18 ORAL ARGUMENT OF FREDERICK YARGER

19 ON BEHALF OF THE RESPONDENT

20 GENERAL YARGER: Thank you, Mr. Chief
21 Justice, and may it please the Court:

22 The dispositive question in this case is
23 substantive, not procedural. Petitioners are not
24 claiming that they've been denied an opportunity to
25 prove that they are -- that they meet the substantive

1 elements of the Colorado Exoneration Act. Instead --

2 JUSTICE GINSBURG: The argument is that that
3 Act is an inappropriate procedure; that the procedure
4 set up by the Exoneration Act where they have to prove
5 themselves actually innocent is a procedure that does
6 not comport with due process.

7 GENERAL YARGER: Justice Ginsburg, if I
8 understand Petitioners' argument appropriately, what
9 they're saying is that they shouldn't have to prove
10 actual innocence at all. So those procedures, because
11 they are geared toward and focused on that inquiry,
12 shouldn't have to apply. And what that means is what
13 Petitioners are arguing is that they have a substantive
14 right to automatic compensation without having to prove
15 anything at all. And so that's why --

16 JUSTICE KAGAN: Well, I think that that's
17 just mistaken, General. They're saying that they have a
18 general State law property right in the money.

19 Now, do you disagree with that? Do you
20 think that this is their money?

21 GENERAL YARGER: No, Justice Kagan. That is
22 the nub of the dispute. The question in this case is
23 whether, as a matter of substantive --

24 JUSTICE KAGAN: Whose money is it?

25 GENERAL YARGER: This is the State's money,

1 as the Colorado supreme court held. You could look at
2 Petitioner --

3 JUSTICE KAGAN: Well, why is it the State's
4 money?

5 GENERAL YARGER: Because, as -- as
6 Petitioners acknowledged during opening argument, it was
7 properly taken pursuant to a conviction.

8 And the Colorado supreme court described
9 this money as public funds. It never said that this is
10 property of the --

11 JUSTICE KAGAN: But it's -- it's money
12 that's conditioned on a valid conviction. And when that
13 valid conviction goes away, it seems the most natural,
14 obvious thing in the world to say that the State's right
15 to that money evaporates at exactly the same moment.

16 Why isn't that true?

17 GENERAL YARGER: Justice Kagan, it's the
18 same reason that, upon reversal of the conviction,
19 certainly the Petitioners can't be subject to that
20 conviction anymore. They have to be released from
21 incarceration, and they cannot be subject to continued
22 imposition of the monetary judgment.

23 But what due process has never held, and
24 what this Court's decisions have not held --

25 JUSTICE KAGAN: I'm not talking about due

1 process. I'm merely just talking about whose money it
2 is. Under State law, State property law, whose money is
3 it? They say it's their money because there's no longer
4 a valid conviction. You say notwithstanding that the
5 valid conviction has been reversed, it's the State's
6 money. I want to know why.

7 GENERAL YARGER: The reason why is that --
8 well, first of all, the Colorado supreme court described
9 this as public funds. And that's precisely how this
10 Court and other courts have treated this when they
11 encounter the issue of sovereign immunity.

12 So, for example, United States v. Gettinger,
13 this Court held that claims like these are not
14 return-of-property type claims. They are claims that
15 can be subject to sovereign immunity. And if that is
16 true, it's not property of the criminal defendant after
17 a lawful conviction has been entered and --

18 JUSTICE KAGAN: Could you just sort of
19 describe to me in sort of common sensical terms, you
20 know, rather than point me to a sovereign immunity case
21 or something, just in common sensical terms why is this
22 the State's money?

23 GENERAL YARGER: It's the State's money --
24 just as it -- just as the State lawfully incarcerated
25 these defendants -- and Petitioners don't dispute that.

1 The State lawfully, but erroneously, took the
2 defendants' liberty away in this case. That was lawful.
3 Same as the court -- or the State lawfully took custody
4 of and property in the State's -- or excuse me -- the
5 criminal defendants' money. And --

6 CHIEF JUSTICE ROBERTS: So -- so do you have
7 any obligation to return the money at all, pursuant to
8 any procedures? Could you just say once -- once you pay
9 the money, we have no procedure for you to get it back.
10 In fact, we won't give it back to you ever. It's our
11 money, we don't have to give it back.

12 GENERAL YARGER: So long as the conviction
13 itself existed at the time that the money was taken, no,
14 the State does not have that obligation. Just as it was
15 required to pass the Exoneration Act in order to
16 compensate criminal defendants who were erroneously but
17 not wrongfully convicted, otherwise they have to prove
18 that they meet the elements of, for example, a
19 constitutional tort; that they were wronged in some way.

20 CHIEF JUSTICE ROBERTS: So if you said
21 instead of the \$128 for this, the \$30 for -- if you said
22 everybody who is convicted owes the State \$10,000 and
23 you don't -- you don't get it back if you're later -- if
24 the conviction is later overturned.

25 GENERAL YARGER: That is the rule that this

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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