95637-5

NO. 75897-7

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent.

v.

MICHAEL A. HECHT, Petitioner,

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# PETITION FOR REVIEW OF COURT OF APPEALS

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**A. IDENTITY OF PETITIONER.** Michael A. Hecht asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

**B. COURT OF APPEALS DECISION.** Petitioner seeks review of the portion of the decision which denied him restitution for his taking of his liberty by ordering him on probation and community service, his lost income by way of salary he was denied as a result of his unconstitutional conviction, his lost income from his loss of his license to practice law as a result of his unconstitutional conviction, his damages due to the infliction of emotional distress upon him and his legal fees incurred since be charged in his unconstitutional conviction. The decision was rendered by the Court of Appeals of Division I (after a transfer from Division II) which was filed on January 29, 2018. A copy of the decision is in the Appendix at pages A-1-11. There was no motion for reconsideration.

**C. ISSUES PRESENTED FOR REVIEW.**

1. Whether the United States Constitution requires restitution of what one has lost by a criminal conviction subsequently reversed and not retried?

2. Whether the United States Constitution combined with Washington Rule of Appellate Procedure 12.8, mandate restoring to Petitioner that which was taken from his as a result of a criminal conviction which was overturned for prosecutorial misconduct, particularly under the circumstances where the reasons given by the State to not try him included that the State had obtained the result it sought by obtaining the conviction?

3. Whether attorneys' fees should be awarded for this appeal?

## D. STATEMENT OF THE CASE

Judge Michael Hecht was convicted of crimes in the Pierce County Superior Court. (CP 41-44 and CP 90-124) He paid the fine, attended the "John School", and performed the required community service hours as required the sentence. (CP 41-44 and CP 90-124) He fully satisfied all the terms of the Judgment and Sentence. (CP 18-20 and CP 41-44 and CP 90-124) In addition, the conviction resulted in the loss of his elected position as a Superior Court Judge of the State of Washington. (CP 41-44 and CP 90-124) It likewise resulted in the loss of his license to practice law. (CP 41-44 and CP 90-124) It also cost him almost $60,000 in legal fees to defend himself, as well as the fees he has incurred since the conviction. (CP 41-44 and CP 90-124) The opinion of the Court of Appeals Division I, filed on February 18, 2014, reversed the trial court decision for prosecutorial misconduct (CP 1 -14). Before the mandate was issued the case was dismissed *ex parte,* without the signature of Defendant or any counsel on his behalf. (CP 22-35 and CP 36)

The State, in seeking the *ex parte* dismissal stated as its grounds:

> "Hecht resigned his position as superior court judge in 2009."
> "Hecht was sentenced in November 2009. I have verified that he has completed all conditions of his sentence..."
> "The Washington State Bar Association entered an order disbarring Hecht in May 2010...."

> "In August 2010, the Washington Supreme Court entered an order censuring Hecht and disqualifying him from holding judicial office."
> "...Hecht has already served his sentence, resigned from the bench, been disbarred, and been disqualified from holding judicial office. Hecht has no other criminal history." (CP 18 - 20)

He seeks restitution from the State in the amount of one million six hundred thousand seven hundred forty-seven and 25/100 dollars ($1,600,747.25), pursuant to *Nelson v. Colorado,* 581 U.S. ____, 137 S.Ct.1249, 197 L.Ed.2d 611 (2017) and Rules of Appellate Procedure (RAP) 12.8. (CP 41-44 and CP 90-124) He alleges the following itemization of what was taken from him for which he is entitled to restitution (CP 41-44 and CP 90-124):

Four thousand four hundred dollars ($4,400.00) represents fines, school requirements, blood testing, and community service hours (at $10.00 per hour) which Mr. Hecht paid pursuant to the Judgment of the trial Court.

Fifty-nine thousand eight hundred fifty-one and 25/100 dollars ($59,851.25) of this amount is owed to Mr. Hecht for attorney's fees expended in the original defense of the charge.

Judge Hecht lost of salary of $446,496.00, three years at $148,832.00 per year, the balance of the term for which he was elected;

Mr. Hecht requests $750,000 for the severe deterioration of his physical and emotional health as a direct result of the reversed trial court decision.

Mr. Hecht avers for the purposes of this proceeding that reapplication for reinstatement of his license to practice law will require attorneys fees of $50,0000.

Mr. Hecht avers for the purposes of this proceeding he has had lost income from his inability to work at his profession in the amount of $60,000 per year for four years, or a total of $240,000 to the date of the appeal for which he seeks review and continuing until he is restored to his profession.

He was on community supervision for two years. Using RCW 4.100.060(5)(e) as an analogy for the measure of the amount for restitution, he seeks $25,000 per year or a total of $50,000 for the unwarranted community supervision.

He also seeks restitution of his legal fees for having to bring the motion before the trial Court, the appeal before the Court of Appeals and this petition for review, as determined based upon a fee statement if this relief is granted. These are all costs, expenses and damages as a direct result of the reversed trial court decision.

When the request for restitution was brought before the trial Court

it was assigned for hearing before the same visiting Judge who had presided over the trial. (CP 50-51 and CP 62-89) The Judge ordered restitution of the fine and the cost of a mandated blood draw but declined to award any other restitution. (CP 142-143) In the oral argument of the motion for restitution the Court declined to restore the amount Judge Hecht paid for neither the "John School" nor anything for the community service he performed in lieu of jail time. (CP 131-141).

With regard to the "John School" the Court said:

> I actually think Mr. Hecht [did-sic] receive some benefit from the John school and it would almost be like unjust enrichment to give him that money back, so I'm not -- and I do have discretion, I think, to give that to him, but I'm not going to exercise discretion. (CP 137)

He went on to say:

> With respect to all of the others? My position is that that wasn't the intent of the rule, that I could award those things as restitution. Nor do I think it reads giving me any discretion to award those things. So I'm going to deny that and if the Court of Appeals disagrees and they read it in the way that you propose, then I think it needs to come back to me and at that point I'll decide whether I should exercise discretion.
>
> Since I -- I think as a matter law I can't, then I don't think I should take that next step and say anything. So I would give you an opportunity to return if it comes back on appeal. And they disagree. (CP 137-138)

The Court of Appeals in the decision for which review is sought ordered Mr. Hecht be given restitution of the $750 for the John school, in addition to the amounts the trial judge restored. (Appendix A-8-9). The

in interpreting *RESTATEMENT OF RESTITUION § 74* said: "The use of 'conferred a benefit' and reference to take property suggests restitution concerns only the property transferred between the parties." (Appendix A-8) Likewise the Court of Appeals interpreted *Nelson v. Colorado,* 581 U.S. ____, 137 S.Ct.1249, 197 L.Ed.2d 611 (2017) to refer only to money paid by Judge Hecht. (Appendix A-8-9)

**E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

**(1) Conflict with Supreme Court.** The decision of the Court of Appeals does not appear to be in conflict with a decision of the Washington State Supreme Court. It does appear to be in conflict with *Nelson v. Colorado,* 581 U.S. ____, 137 S.Ct.1249, 197 L.Ed.2d 611 (2017) as discussed below.

**(2) Conflict with published opinion.** The decision of the Court of Appeals does not appear to be in conflict with a published decision of the Court of Appeals.

**(3) Significant Constitutional question and (4) Issue of substantial public interest.** The decision of the Court of Appeals does involve a significant question of law under the United States Constitution and an issue of substantial public interest which should be determined by the Supreme Court. *Nelson v. Colorado,* 581 U.S. ____, 137 S.Ct.1249, 197 L.Ed.2d 611 (2017) holds: "To comport with due process, a State

may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated." The majority opinion did not specifically discuss restitution for incarceration, probation, community service, lost income, attorneys' fees or the physical and emotional exactions caused by an overturned conviction. However, the reasoning of the case, by relying upon the analysis under *Mathews v. Eldridge,* 424 U.S. 319, 96 S. Ct.893, 47 L. Ed. 2d 18, (1976), does support or compel a ruling in favor of the Petitioner at bar. *Nelson, at 137 S.Ct. 1255*, said:

> Under the *Mathews* balancing test, a court evaluates (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake. 424 U.S. at 335, 96 S.Ct. 893, 47 L.Ed 2d 18. All three considerations weigh decisively against Colorado's scheme.

The case involved two people convicted under Colorado law whose convictions were overturned on appeal and not retried. They asked the Courts in their criminal cases for return of fines, costs and restitution they had paid or exacted from them. Under the *Mathews* analysis the result was obvious, simple and logical. The State exacted from them, they were entitled to the presumption of innocence and the State had no interest in the exactions because there was no conviction and the people from who they exacted were innocent. The State of Colorado had argued that its

statue, which is the equivalent of RCW Chapter 4.100 should be the exclusive remedy. The *Nelson* Court rejected this argument, finding the presumption of innocence for a Defendant whose conviction was overturned on appeal was entitled to the relief, as a matter of constitutional due process, afforded by the more procedurally onerous statutory scheme. The *Nelson* Court also pointed out the statutory scheme, as in Washington, only applied to felonies, denying to misdemeanants their constitutional due process. Judge Hecht is similarly situated and this is exactly what Judge Hecht requests. RCW Chapter 4.100 by its provisions is a legislative declaration of a property right, or at least liberty right, to be free of incarceration, probation, restitution orders, legal fees and exclusion from the community by a felony conviction (thereby meriting "re-entry" services). The logic and consistency of the reasons for the *Nelson* ruling are simple and understandable. The most basic ideas of fairness and substantial justice would compel a rule that if your presumption of innocence is restored, you should be entitled to the same benefit of one who has proven their innocence. A rule which more harshly treats one who was never found guilty (restored to the presumption of innocence by an overturned conviction) than one who has proven their innocence makes a mockery of the presumption of innocence.

In his concurring opinion Justice Alito writes (*Nelson v. Colorado, at* 137 S.Ct. 1260):

> In its *Mathews* analysis, the Court reasons that the reversal of petitioners' convictions restored the presumption of the innocence and that "Colorado may not presume a person, adjudge guilty of no crime, nonetheless guilty *enough* for monetary exactions." *Ante,* at 7. The implication of this brief statement is that under *Mathews,* reversal restores the defendant to the *status quo ante,* see *ante,* at 3. But the Court does not confront the obvious implications of this reasoning.
>
> For example, if the *status quo ante* must be restored, why shouldn't the defendant be compensated for all the adverse economic consequences of the wrongful conviction? After all, in most cases, the fines and payments that a convicted defendant must pay to the court are minor in comparison to the losses that result from conviction and imprisonment, such as attorney's fees, lost income, and damage to reputation. The Court cannot convincingly explain why *Mathews'* amorphous balancing test stops short of requiring a full return to the *status quo ante* when a conviction is reversed. * * *

Justice Alito is quite right. The only logical conclusion, based solely on the due process requirements, requires the court to return Judge Hecht to his *status quo ante.* A rule which more harshly treats one who was never found guilty (restored to the presumption of innocence by an overturned conviction) than one who has proven their innocence makes a mockery of the presumption of innocence.

The holding in *Nelson v. Colorado, supra,* a fundamental constitutional ruling regarding the requirements of due process for a State criminal case, is essentially a new and rather profound adjustment to the

issues raised by this case. With the United States Supreme Court ruling, determining new constitutional requirements, this is obviously a case deserving review by the Supreme Court.

There is also a substantial public interest at stake. This case presents issues on which there is no State decisional law. It could have a profound effect on persons who have the full power of the State destroy their lives but are denied or precluded from protection by the doctrine of the presumption of innocence, a fundamental concept in defining the right of the State to impose its power on people. Such an important and fundamental right and its effect on people wrongly convicted must surely be considered a "substantial public interest".

With the *Nelson* ruling and this Court of Appeal decision, the law now requires restitution, to those with overturned convictions, to include payments to third parties, not part of the suit. In *Nelson* this was payments to alleged victims and in our case it was the John fees the Court of Appeals ordered returned. This greater impact on anyone having a conviction overturned necessarily will also impact many citizens, the general public and alleged victims. The Court of Appeals in this case determined that it should not restore Judge Hecht to full "*status quo ante*" because its interpretation of the law was that: ". . . restitution concerns only the property transferred between the parties." (Appendix A-8) This

is clearly an error of law (and logic) because neither the restitution ordered restored in *Nelson, supra,* nor the John School fee in this case involved property transferred between the State of Washington and the not convicted, presumed innocent, criminal Defendant. If this ruling stands it will be an internally inconsistent, illogical rule that will only confound all those to whom the issues are extant. Such an internally inconsistent decision, without any analysis on its insult to the principle of presumption of innocence or any other policy or consideration, should clearly be deemed of "substantial public interest". The public has a substantial interest in its decisional law being logical, consistent and based upon defensible analysis and reliance upon concepts of jurisprudence, not merely a tortured interpretation of the *Restatement of Restitution* without any in depth analysis or on point authority. The *Restatement* does not limit the rule to "unjust enrichment". It uses the word "or" between the language about a conferred benefit upon another and the language about property taken. The Court of Appeals ruling returning John School fees paid to a third party provider cannot be said to be "property transferred between the parties" any more than the restitution paid or exacted from the prevailing parties in *Nelson, supra,* was "between parties". The restitution paid in the *Nelson* case was not paid to the State of Colorado, it was paid to the alleged victims of the Defendants whose convictions were

overturned. Furthermore, there must be a substantial public interest in Washington law being consistent with the United States Supreme Court edicts on due process requirements. When the *Nelson* Court ruled restitution should be restored to the presumed innocent Defendants our Court of Appeals had to restore to Judge Hecht the John School fees he paid. But by determining only the John School fees were to be restored the Court of Appeals rejected the reason for and analysis of the *Nelson* Court and the plain meaning of the *Restatement.*

There is also a substantial public interest in seeing similarly situated people are treated similarly. Currently under Washington law one is entitled to restitution for incarceration, community probation, community service, attorneys fees, restitution paid to third parties and the law even requires the State to pay for "re-entry" services, if you prove yourself innocent but not if those things were imposed upon you and you are presumed innocent. A rule which more harshly treats one who was never found guilty (restored to the presumption of innocence by an overturned conviction) than one who has proven their innocence makes a mockery of the presumption of innocence. It also makes a mockery of the Court of Appeals decision overturning the conviction. When the State chooses to abandon its prosecution, leaving a person presumed innocent, if there are any grounds for disparate treatment, the person never convicted

should be treated less harshly than the one who was at least validly convicted, not the other way around. This should be particularly true where, as in this case, the reasons given to abandon the prosecution include that the State has obtained the sought after benefits of the conviction!

Colorado did not have a rule like our RAP 12.8. Our statewide rule is fundamental, if not critical, to insuring a consequence to a ruling overruling a trial court is a basic guarantee for enforcing common sense justice. It provides:

> EFFECT OF REVERSAL ON INTERVENING RIGHTS If a party has voluntarily or involuntarily partially or wholly satisfied a trial court decision which is modified by the appellate court, the trial court **shall** enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party, the value of the property, **or in appropriate circumstances, provide restitution.** An interest in property acquired by a purchaser in good faith, under a decision subsequently reversed or modified, shall not be affected by the reversal or modification of that decision. [Emphasis added]

The language about "or in appropriate circumstances, provide restitution" must mean something other than what must be done as it relates to property taken. Otherwise the language: "or in appropriate circumstances, provide restitution" is meaningless. There is no known rule of interpretation which holds: "ignore some words". The Court of Appeals however has ignored those words. By saying the rule only

applies to "unjust enrichment" the Court is ignoring the use of the word "or" before "in appropriate". It is also reading into the rule a concept not fairly part of the rule. The rule truly makes no mention of "unjust enrichment". The rule talks about restoring what was taken OR making someone whole when a Court has treated them wrongly. In the case at bar, when the State used as its reason to not retry Judge Hecht that it obtained the results it wanted from the conviction, there can be no more compelling or "appropriate circumstances" to restore Judge Hecht to the *status quo ante.* Added to the circumstances are that the conviction was overturned due to prosecutorial misconduct! By adopting RAP 12.8 our Court had inculcated the ruling in *Nelson, supra,* by requiring restitution in cases such as that at bar. There is a substantial public interest in seeing: real meaning to real people for rulings overturning convictions; real use of existing statewide Court Rules; and enforcing justice when a trial court made an error as grievous as destroying an elected official's life in every way.

Until the decision in this case there was only one reported decision in Washington on the application of this rule *State v. Turner,* 114 Wn.App. 653, 660-61, 59 P.3d 711 (2002). That held a defendant was not entitled to prejudgment interest as the State had not waived sovereign immunity, and did not rely on the *Restatement of Restitution.* There is a substantial

public interest in annunciating a complete, fair and meaningful explanation of a rule as important as imposing "teeth" or consequences for overruling a trial Court decision.

Judge Hecht has always contended the case against him was politically motivated and therefore of substantial public interest. It was front page news for many weeks in the county in which he was elected. The results of having him thrown from office and removed as a member of the bar, combined with the prosecutorial misconduct, the "*ex parte*" dismissal without prejudice and the choice to not retry him, only make such events more plausible in the future. The actual and potential effect on the entire judicial system clearly establishes a "substantial public interest". Due Process of Law cannot include obtaining the result of winning in Court when the Court has not ruled because the Plaintiff abandoned the case. The action of using as a reason to decline to return to Court that a decision has been overruled due to your own misconduct is as abhorrent to the idea of living by the rule of law as any example that could be posed.

F. **CONCLUSION**

This case raises issues fundamental to due process of law. The analysis of *Nelson, supra,* based upon the presumption of innocence, the import of an overturned conviction, and indeed, the power of the government to exact property, liberty and the full benefit of citizenship

from people is sound, logical and only consistent if Judge Hecht is restored to the *status quo ante* before his conviction. The existence of RAP 12.8 only makes this case stronger than *Nelson* and should lead to no other conclusion that this case is a matter of substantial public interest.

Respectfully submitted this 26th day of February, 2018.

Donald N. Powell, WSBA #12055
Lawyer for Petitioner Hecht

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | |
|---|---|
| STATE OF WASHINGTON, Respondent, v. MICHAEL ANDREW HECHT, Appellant. | No. 75897-7-I<br>DIVISION ONE<br>PUBLISHED OPINION<br>FILED: January 29, 2018 |



TRICKEY, A.C.J. — A jury convicted Michael Hecht of patronizing a prostitute and felony harassment. This court subsequently reversed his convictions. The State declined to retry him.

Hecht brought a motion under RAP 12.8 for restitution of his court imposed financial obligations, as well as his legal fees, deterioration of emotional and physical health, and unwarranted community service and community supervision. The trial court awarded only a small portion of his requested restitution. Hecht appeals the trial court's denial of the majority of the restitution sought in the motion. We affirm in part, and reverse in part, and remand for an award of the cost of the prostitution class (John School) to Hecht as restitution.

## FACTS

Hecht was a Washington State superior court judge. In October 2009, a jury convicted him of patronizing a prostitute and felony harassment. The trial court sentenced him to 240 hours of community service and 12 months of community custody. Hecht was required to attend John School, pay legal financial obligations (LFOs), and obtain a human immunodeficiency virus (HIV) test. As a result of his convictions, he was forced to resign from his judgeship and stipulate to disbarment

by the Washington State Bar Association. Hecht fully satisfied his sentence.

In February 2014, this court reversed Hecht's convictions due to prosecutorial misconduct during closing arguments. The State declined to retry the case and, in June 2014, the trial court signed an order to dismiss the charges without prejudice ex parte.

In June 2016, Hecht filed a motion under RAP 12.8 requesting $1,600,747.25 in restitution from the State. This sum included the LFOs, as well as the cost of John School, blood testing, and community service hours required by the judgment and sentence. He requested recompense for attorney fees for the original case and the motion for restitution. He also sought compensation for lost income, deterioration of his physical and emotional health, future expenses to restore his law license, and time spent under unwarranted community supervision.

Judge James Cayce was the trial judge. At the hearing on his restitution motion, Hecht filed an affidavit of prejudice and made a motion for recusal of Judge Cayce.

Hecht alleged that Judge Cayce was prejudiced in his ability to hear the restitution motion because "Judge Cayce clearly has made up his own mind about myself and was rude and insensitive to my family."[1] Hecht had also filed a complaint to the Judicial Qualifications Commission because Judge Cayce entered the ex parte order of dismissal without prejudice. The trial court denied both the affidavit of prejudice and the motion for recusal.

The trial court ordered restitution of $2,050.00 for the money Hecht had paid

[1] Clerk's Papers at 58.

for the LFOs and the court ordered blood draw. The trial court denied Hecht's other requested restitution. The court determined that Hecht benefitted from John School and would be unjustly enriched by restitution of the $750 tuition. The trial court concluded that it did not have discretion to award Hecht's other requested financial compensation.

Hecht appeals.

## ANALYSIS

### Appealability

The State argues that Hecht cannot appeal this case because his claim lacks finality. According to the State, this postdismissal order on restitution is not a final judgment because it does not settle the issues in the case. The State further contends that the only final judgment in a criminal case concerns the guilt or innocence of the defendant, which the present order does not address. The State also argues that Hecht's criminal judgment "disappeared" after his case was dismissed.[2] We disagree with the State's interpretation because the dismissal of the underlying criminal case is final and allows for appeal in this situation.

A party may seek review of a superior court judgment by appeal or discretionary review under limited circumstances. RAP 2.1(a)(1), (2). A party has a right to appeal a final order made after judgment that affects a substantial right. RAP 2.2(a)(13). A final order is only appealable under RAP 2.2(a)(13) if it affects a substantial right other than those adjudicated by the earlier final judgment. See State v. Campbell, 112 Wn.2d 186, 190, 770 P.2d 620 (1989).

[2] Br. of Resp't at 9.

A final judgment "is one that settles all the issues in a case." In re Det. of Turay, 139 Wn.2d 379, 392, 986 P.2d 790 (1999). Generally, an order of dismissal without prejudice is not considered a final judgment because it allows the State to refile charges within the statute of limitations, and "'leaves the matter in the same condition in which it was before the commencement of the prosecution.'" State v. Taylor, 150 Wn.2d 599, 602, 80 P.3d 605 (2003) (internal quotation marks omitted) (quoting State v. Corrado, 78 Wn. App. 612, 615, 989 P.2d 860 (1995)). As a result, "the legal and substantive issues are generally not resolved," and a dismissal without prejudice lacks finality. Taylor, 150 Wn.2d at 602.

While the case law is clear that a dismissal without prejudice is not final within the statute of limitations, analogous cases under other sections of RAP 2.2 suggest that such orders are appealable after termination of the statute of limitations. In criminal cases, the State can appeal a "decision that in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty." RAP 2.2(b)(1). Although a dismissal without prejudice is generally not appealable by the State because such dismissals do not "discontinue or abate" a case, expiration of the statute of limitations effectively finally determines the charges and allows for appeal. State v. Kiliona-Garramone, 166 Wn. App. 16, 21, 267 P.3d 426, 430 (2011). Once the statute of limitations has run, the State can appeal motions to dismiss without prejudice. See Kiliona-Garramone, 166 Wn. App. at 21.

Similarly, a party can appeal "[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final

judgment or discontinues the action." RAP 2.2(a)(3). A case is effectively discontinued and all issues are settled once the statute of limitations bars refiling, even if it was dismissed without prejudice. Tiart v. Smith Barney, Inc., 107 Wn. App. 885, 893, 28 P.3d 823 (2001). Therefore, for the purposes of RAP 2.2(a)(3), a dismissal without prejudice is final and appealable once the statute of limitations has run. Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 487, 200 P.3d 683 (2009).

Here, Hecht's case was dismissed without prejudice after the State declined to retry him following reversal of his convictions. The statutes of limitations on Hecht's underlying charges have since run, barring the State from refiling charges.[2] Under case law applying RAP 2.2, this effectively settles all criminal issues in this case. Because all legal and substantive issues are now resolved, the dismissal no longer lacks finality. Therefore, the motion to dismiss constitutes a final judgment.

More than a final judgment is required for appeal under RAP 2.2(a)(13). The order appealed must affect a substantial right other than those adjudicated by the earlier final judgment. See Campbell, 112 Wn.2d at 190. In this case, Hecht is legally entitled to restitution after his judgment was modified by the appellate court. See RAP 12.8; State v. A.N.W. Seed Corp., 116 Wn.2d 39, 44-46, 802 P.2d 1353 (1991). Therefore, the order denying restitution affects the substantial right to return of his property.

[2] Hecht contends that he filed the motion for restitution in June 2016, after waiting until the expiration of the statutes of limitations. However, the State claims the allowable time to refile the felony harassment charges did not expire until December 2016. Even under the State's later timeline, the statutes of limitations to refile the charges have expired.

We conclude that because the order is final and affects a substantial right, the case is appealable under RAP 2.2(a)(13).

Restitution Under RAP 12.8

Hecht argues that the trial court erred by concluding he was not entitled to his requested restitution. Specifically, Hecht challenges the trial court's decision to deny restitution for the cost of John School, unwarranted community service and community supervision, lost wages, mental and physical deterioration, and legal fees under RAP 12.8. The State contends that the trial court properly awarded restitution only for the LFOs imposed by the judgment and sentence, and that Hecht improperly requests civil damages that are unavailable under RAP 12.8. While we agree that RAP 12.8 does not support Hecht's request for community service and supervision, physical and mental deterioration, or legal fees, we remand for reimbursement of the cost of John School tuition.

> A party may seek restitution if he
>
> has voluntarily or involuntarily partially or wholly satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party, the value of the property, or in appropriate circumstances, provide restitution.

RAP 12.8. "Court rules are interpreted in the same manner as statutes." Jaffar v. Webb, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013). "When a rule is ambiguous, we must discern the drafter's intent by 'reading the rule as a whole, harmonizing its provisions, and using related rules to help identify the legislative intent.'" Jaffar, 177 Wn.2d at 526-27 (quoting State v. Chhom, 162 Wn.2d 451, 458, 173 P.3d 234 (2007)).

Interpretation of a court rule is a matter of law and reviewed de novo. Sloan v. Horizon Credit Union, 167 Wn. App. 514, 518, 274 P.3d 386 (2012). "A trial court's determination whether to award restitution under RAP 12.8 is reviewed for abuse of discretion." Ehsani v. McCullough Family P'ship, 160 Wn.2d 586, 589, 159 P.3d 407 (2007). "An abuse of discretion occurs only when exercised in a manifestly unreasonable manner or on untenable grounds." Arzola v. Name Intelligence, Inc., 188 Wn. App. 588, 592, 355 P.3d 286 (2015).

The parties agree that RAP 12.8 is ambiguous. The rule provides for restitution in "appropriate circumstances," but does not provide guidance on what constitutes appropriate circumstances. In restitution cases, courts have looked to the *Restatement of Restitution (Am. Law Inst. 1937)* as an appropriate source for guidance on generally accepted common law. See Ehsani, 160 Wn.2d at 591; A.N.W. Seed Corp., 116 Wn.2d at 45-46; Sloan, 167 Wn. App. at 519.

The State questions the applicability of the *Restatement of Restitution* in this criminal case. The *Restatement of Restitution* is civil law focused, as are the cases that advocate for its application in the RAP 12.8 context.[3] Here, the underlying criminal case has been dismissed and the statute of limitations has run. Hecht's claim for restitution under RAP 12.8 is the only remaining issue and is civil in nature. Therefore, the *Restatement of Restitution* is applicable to the interpretation of RAP 12.8 in this case.

[3] The only criminal case applying RAP 12.8 held that a defendant was not entitled to prejudgment interest as the State had not waived sovereign immunity, and did not rely on the *Restatement of Restitution*. See State v. Turner, 114 Wn. App. 653, 660-61, 59 P.3d 711 (2002).

The *Restatement of Restitution* provides, "A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final." RESTATEMENT OF RESTITUTION § 74, at 302-03. The use of "conferred a benefit" and reference to taken property suggests restitution concerns only the property transferred between the parties.

This interpretation of restitution is consistent with its underlying purpose as a remedy for unjust enrichment. See Ehsani, 160 Wn.2d at 594. A party unjustly enriched at the expense of another is required to make restitution. Ehsani, 160 Wn.2d at 594-95 (quoting RESTATEMENT OF RESTITUTION § 1, at 12-13). "RAP 12.8 provides for a refund where a party has satisfied a later reversed judgment." Sloan, 167 Wn. App. at 520. The party is entitled to a refund, but nothing more.

Furthermore, this understanding of restitution in this context comports with due process. When a criminal conviction is overturned by a reviewing court, the State is obliged to refund fees, court costs, and restitution exacted from the defendant as a consequence of that conviction. Nelson v. Colorado, __ U.S. __, 137 S. Ct. 1249, 1252, 197 L. Ed.2d 611 (2017). The State no longer has a legal claim to this property. Nelson, 137 S. Ct. at 1257-58. Restitution is required.

Under this reasoning, Hecht should recover the amount paid in satisfaction of his judgment and sentence. This includes the LFOs, cost of the blood draw, and John School tuition. These payments are the extent of the State's unjust enrichment and should be refunded to Hecht.

The trial court awarded repayment of Hecht's LFOs and HIV blood draw, but refused to refund the cost of John School. The trial court found that Hecht had received benefit from John School and reimbursement would amount to unjust enrichment. This was an abuse of discretion. Hecht was entitled to restitution of the money paid in satisfaction of his now vacated judgment and sentence. This includes the cost of the required John School. Therefore, we remand the case to the trial court for an award of an additional $750 to reimburse the John School tuition.

This is the extent of the restitution owed to Hecht under RAP 12.8. He is not entitled to recover his legal fees, compensation for his community service and community supervision, or emotional and physical deterioration. While Hecht may have suffered these losses as consequences of his convictions, they were not paid in satisfaction of his judgment and the State was not unjustly enriched by them. Hecht's entitled restitution is the amount he paid, not the amount he claims to have lost as a result of his convictions.

Recusal

Hecht argues that Judge Cayce erred when he failed to recuse himself from hearing Hecht's motion on restitution. Specifically, Hecht claims that Judge Cayce believed he was guilty and demonstrated bias and prejudice through his comments at sentencing and the subsequent ex parte order of dismissal without prejudice. The State argues that the record does not support Hecht's claims of bias and prejudice, and notes Judge Cayce's leniency on sentencing. We agree with the State.

The trial court is presumed to perform its functions without bias or prejudice. State v. Perala, 132 Wn. App. 98, 111, 130 P.3d 852 (2006). "The party moving for recusal must demonstrate prejudice." Perala, 132 Wn. App. at 111. "Casual and unspecific allegations of judicial bias provide no basis for appellate review." Rich v. Starczewski, 29 Wn. App. 244, 246, 628 P.2d 831 (1981).

"Recusal lies within the discretion of the trial judge, and his or her decision will not be disturbed without a clear showing of an abuse of that discretion." Perala, 132 Wn. App. at 111. A court abuses its discretion when a decision is manifestly unreasonable or made on untenable grounds or for untenable reasons. Perala, 132 Wn. App. at 111.

Here, Hecht's motion on recusal to the trial court included a transcript of his prior sentencing hearing. The transcript does not support Hecht's allegations of Judge Cayce's prejudice or bias. Judge Cayce made critical statements about Hecht's guilt, but acknowledged that Hecht had already suffered greatly and gave him a lenient sentence. Similarly, Hecht's complaints concerning the ex parte dismissal of his case do not provide specific evidence of bias or prejudice. The State notified Hecht's previous counsel of the decision to dismiss the charges and provided her with a motion to dismiss and the proposed order. There is no evidence that Judge Cayce acted improperly in dismissing the charges. Without specific evidence, Hecht cannot demonstrate that Judge Cayce abused his discretion when he denied the motion to recuse.

Attorney Fees on Appeal

Hecht argues that he should be awarded attorney fees on appeal as part of

his restitution claim under RAP 12.8. As discussed above, RAP 12.8 does not provide restitution beyond return of the money paid in satisfaction of the judgment and sentence. We conclude that Hecht is not entitled to fees on appeal under RAP 12.8.

We affirm in part, and reverse in part, and remand for an award of an additional $750 in restitution for the cost of John School tuition.

Trickey, ACJ

WE CONCUR:

Mann, J.

Spearman, J.

**581 U.S. __ (2017)**

**137 S.Ct. 1249, 197 L.Ed.2d 611,**

**SHANNON NELSON, PETITIONER**
**v.**

**COLORADO**

**No. 15-1256**

**United States Supreme Court**

**April 19, 2017 [*]**

Argued January 9, 2017.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

*People v. Madden*, 364 P.3d 866, 2015 CO 69 (2015)

*People v. Nelson*, 362 P.3d 1070, 2015 CO 68 (2015)

362 P.3d 1070, 2015 CO 68 (first judgment) and 364 P.3d 866, 2015 CO 69 (second judgment), reversed and remanded.

**SYLLABUS**

[137 S.Ct. 1250] [197 L.Ed.2d 613] Petitioner Shannon Nelson was convicted by a Colorado jury of two felonies and three misdemeanors arising from the alleged sexual and physical abuse of her four children. The trial court imposed a prison term of 20 years to life and ordered her to pay $8,192.50 in court costs, fees, and restitution. On appeal, Nelson's conviction was reversed for trial error, and on retrial, she was acquitted of all charges.

Petitioner Louis Alonzo Madden was convicted by a Colorado jury of attempting to patronize a prostituted child and attempted sexual assault. The trial court imposed an indeterminate prison sentence and ordered him to pay $4,413.00 in costs, fees, and restitution. After one of Madden's convictions was reversed on direct

**[137 S.Ct. 1251]** review and the other vacated on postconviction review, the State elected not to appeal or retry the case.

The Colorado Department of Corrections withheld $702.10 from Nelson's inmate account between her conviction and acquittal, and Madden paid the State $1,977.75 after his conviction. In both cases, the funds were allocated to costs, fees, and restitution. Once their convictions were invalidated, both petitioners moved for return of the funds. Nelson's trial court denied her motion outright, and Madden's postconviction court allowed a refund of costs and fees, but not restitution. The Colorado Court of Appeals concluded that both petitioners were entitled to seek refunds of all they had paid, but the Colorado Supreme Court reversed. It reasoned that Colorado's Compensation for Certain Exonerated Persons statute (Exoneration Act or Act), Colo. Rev. Stat. § § 13-65-101, 13-65-102, 13-65-103, provided the exclusive authority for refunds and that, because neither Nelson nor Madden had filed a claim under that Act, the courts lacked authority to order refunds. The Colorado Supreme Court also held that there was no due process problem under the Act, which permits Colorado to retain conviction-related assessments unless and until the prevailing defendant institutes a discrete civil proceeding and proves her innocence by clear and convincing evidence.

*Held*:

The Exoneration Act's scheme does not comport with the Fourteenth Amendment's [197 L.Ed.2d 614] guarantee of due process. Pp. 5-11.

(a) The procedural due process inspection required by *Mathewsv Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, governs these cases. *Medinav.California*, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353, controls when state procedural rules that are part of the criminal process are at issue. These cases, in contrast, concern the continuing deprivation of property after a conviction has been reversed or vacated, with no prospect of reprosecution. Pp. 5-6.

(b) The three considerations balanced under *Mathews* --the private interest affected; the risk of erroneous deprivation of that interest through the procedures used; and the governmental interest at stake--weigh decisively against Colorado's scheme. Pp. 6-10.

(1) Nelson and Madden have an obvious interest in regaining the money they paid to Colorado. The State may not retain these funds simply because Nelson's and Madden's convictions were in place when the funds were taken, for once those convictions were erased, the presumption of innocence was restored. See, *e g*, *Johnsonv.Mississippi*, 486 U.S. 578, 585, 108 S.Ct. 1981, 100 L.Ed.2d 575. And Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions. Pp. 6-8.

(2) Colorado's scheme creates an unacceptable risk of the

erroneous deprivation of defendants' property. The Exoneration Act conditions refund on defendants' proof of innocence by clear and convincing evidence, but defendants in petitioners' position are presumed innocent. Moreover, the Act provides no remedy for assessments tied to invalid misdemeanor convictions. And when, as here, the recoupment amount sought is not large, the cost of mounting a claim under the Act and retaining counsel to pursue it would be prohibitive.

Colorado argues that an Act that provides sufficient process to compensate a defendant for the loss of her liberty must suffice to compensate a defendant for the lesser deprivation of money. But Nelson and Madden seek the return of their [137 S.Ct. 1252] property, not compensation for its temporary deprivation. Just as restoration of liberty on reversal of a conviction is not compensation, neither is the return of money taken by the State on account of the conviction. Other procedures cited by Colorado--the need for probable cause to support criminal charges, the jury-trial right, and the State's burden to prove guilt beyond a reasonable doubt--do not address the risk faced by a defendant whose conviction has been overturned that she will not recover funds taken from her based solely on a conviction no longer valid. Pp. 8-10.

(3) Colorado has no interest in withholding from Nelson and Madden money to which the State currently has zero claim of right. The State has identified no equitable considerations favoring its position, nor indicated any way in which the Exoneration Act embodies such considerations. P. 10.

362 P.3d 1070, 2015 CO 68 (first judgment) and 364 P.3d 866, 2015 CO 69 (second judgment), reversed and remanded.

Stuart Banner argued the cause for petitioners.

Frederick R. Yarger argued the cause for respondent.

[197 L.Ed.2d 615] Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Breyer, Sotomayor, and Kagan, JJ., joined. Alito, J., filed an opinion concurring in the judgment. Thomas, J., filed a dissenting opinion. Gorsuch, J., took no part in the consideration or decision of the cases.

**OPINION**

GINSBURG, Justice.

When a criminal conviction is invalidated by a reviewing court and no retrial will occur, is the State obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction? Our answer is yes. Absent conviction of a crime, one is presumed innocent. Under the Colorado law before us in these cases, however, the State retains conviction-related assessments unless and until the prevailing defendant institutes a discrete civil proceeding and proves her innocence by clear and convincing evidence. This scheme, we hold, offends the Fourteenth Amendment's guarantee of due process.

**I**

**A**

Two cases are before us for review. Petitioner Shannon Nelson, in 2006, was convicted

**[137 S.Ct. 1253]** by a Colorado jury of five counts--two felonies and three misdemeanors--arising from the alleged sexual and physical abuse of her four children. 362 P.3d 1070, 1071, 2015 CO 68 (Colo. 2015); App. 25-26. The trial court imposed a prison sentence of 20 years to life and ordered Nelson to pay court costs, fees, and restitution totaling $8,192.50. 362 P.3d, at 1071. On appeal, Nelson's conviction was reversed for trial error. *Ibid.* On retrial, a new jury acquitted Nelson of all charges. *Ibid.*

Petitioner Louis Alonzo Madden, in 2005, was convicted by a Colorado jury of attempting to patronize a prostituted child and attempted third-degree sexual assault by force. See 364 P.3d 866, 867, 2015 CO 69 (Colo. 2015). The trial court imposed an indeterminate prison sentence and ordered Madden to pay costs, fees, and restitution totaling $4,413.00. *Ibid.* The Colorado Supreme Court reversed one of Madden's convictions on direct review, and a postconviction court vacated the other. *Ibid.* The State elected not to appeal or retry the case. *Ibid*

Between Nelson's conviction and acquittal, the Colorado Department of Corrections withheld $702.10 from her inmate account, $287.50 of which went to costs and fees [1] and $414.60 to restitution. See 362 P.3d, at 1071, and n. 1. Following Madden's conviction, Madden paid Colorado $1,977.75, $1,220 of which went to costs and fees [2] and $757.75 to restitution. See 364 P.3d, at 867. The sole legal basis for these assessments was the fact of [197 L.Ed.2d 616] Nelson's and Madden's convictions. [3] Absent those convictions, Colorado would have no legal right to exact and retain petitioners' funds.

Their convictions invalidated, both petitioners moved for return of the amounts Colorado had taken from them. In Nelson's case, the trial court denied the motion outright. 362 P.3d, at 1071. In Madden's case, the postconviction court allowed the refund of costs and fees, but not restitution. 364 P.3d, at 867-868.

The same Colorado Court of Appeals panel heard both cases and concluded that Nelson and Madden were entitled to seek refunds of all they had paid, including amounts

allocated to restitution. See *Peoplev.Nelson*, 369 P.3d 625, 628-629, 2013 COA 58, 2013 COA 58 (2013); *Peoplev.Madden*, 2013 COA 56, 2013 WL 1760869, *1 (Apr. 25, 2013). Costs, fees, and restitution, the court held, must be " tied to a valid conviction," 369 P.3d, at 627-628, absent which a court must " retur[n] the defendant to the status quo ante," 2013 COA 56, 2013 WL 1760869, at *2.

[137 S Ct. 1254] The Colorado Supreme Court reversed in both cases. A court must have statutory authority to issue a refund, that court stated. 362 P.3d, at 1077; 364 P.3d, at 868. Colorado's Compensation for Certain Exonerated Persons statute (Exoneration Act or Act), Colo. Rev. Stat. § § 13-65-101, 13-65-102, 13-65-103 (2016), passed in 2013, " provides the proper procedure for seeking a refund," the court ruled. 362 P.3d, at 1075, 1077. As no other statute addresses refunds, the court concluded that the Exoneration Act is the " exclusive process for exonerated defendants seeking a refund of costs, fees, and restitution." *Id.*, at 1078. [4] Because neither Nelson nor Madden had filed a claim under the Act, the court further determined, their trial courts lacked authority to order a refund. *Id.*, at 1075, 1078; 364 P.3d, at 867. [5] There was no due process problem, the court continued, because the Act " provides sufficient process for defendants to seek refunds of costs, fees, and restitution that they paid in connection with their conviction." 362 P.3d, at 1078.

Justice Hood dissented in both cases. Because neither petitioner has been validly convicted, he explained, each must be presumed innocent. *Id.*, [197 L.Ed.2d 617] at 1079 ( *Nelson* ); 364 P.3d, at 870 (adopting his reasoning from *Nelson* in *Madden* ). Due process therefore requires some mechanism " for the return of a defendant's money," Justice Hood maintained, 362 P.3d, at 1080; as the Exoneration Act required petitioners to prove their innocence, the Act, he concluded, did not supply the remedy due process demands, *id.*, at 1081. We granted certiorari. 579 U.S. ___, 137 S.Ct. 30, 195 L.Ed.2d 902 (2016).

**B**

The Exoneration Act provides a civil claim for relief " to compensate an innocent person who was wrongly convicted." 362 P.3d, at 1075. Recovery under the Act is available only to a defendant who has served all or part of a term of incarceration pursuant to a felony conviction, and whose conviction has been overturned for reasons other than insufficiency of evidence or legal error unrelated to actual innocence. See § 13-65-102. To succeed on an Exoneration Act claim, a petitioner must show, by clear and convincing evidence, her actual innocence of the offense of conviction. § § 13-65-101(1), 13-65-102(1). A successful petitioner may recoup, in addition to compensation for time served, [6] " any fine, penalty, court costs, or restitution . . . paid . . . as a result of his or her wrongful conviction." *Id*, at 1075 (quoting § 13-65-103(2)(e)(V)).

[137 S.Ct. 1255] Under Colorado's legislation, as just recounted, a defendant must prove her innocence by clear and convincing evidence to obtain the refund of costs, fees, and restitution paid pursuant to an invalid conviction. That scheme, we hold, does not comport with due process. Accordingly, we reverse the judgment of the Supreme Court of Colorado.

**II**

The familiar procedural due process inspection instructed by *Mathewsv Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), governs these cases. Colorado argues that we should instead apply the standard from *Medinav.California*, 505 U.S. 437, 445, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992), and inquire whether Nelson and Madden were exposed to a procedure offensive to a fundamental principle of justice. *Medina* " provide[s] the appropriate framework for assessing the validity of state procedural rules" that " are part of the criminal process." *Id.*, at 443, 112 S.Ct. 2572, 120 L.Ed.2d 353. Such rules concern, for example, the allocation of burdens of proof and the type of evidence qualifying as admissible. [7] These cases, in contrast, concern the continuing deprivation of property after a conviction has been reversed or vacated, with no prospect of reprosecution. See *Kaleyv United States*, 571 U.S. ___, ___, n. 4, [197 L.Ed.2d 618] 134 S.Ct. 1090, 188 L.Ed.2d 46, 70 (2014) (Roberts, C. J., dissenting) (explaining the different offices of *Mathews* and *Medina* ). Because no further criminal process is implicated, *Mathews* " provides the relevant inquiry." 571 U.S. at ___, 134 S.Ct. 1090, 188 L.Ed.2d 46, 70 ).

**III**

Under the *Mathews* balancing test, a court evaluates (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake. 424 U.S. at 335, 96 S.Ct. 893, 47 L.Ed.2d 18. All three considerations weigh decisively against Colorado's scheme.

**A**

Nelson and Madden have an obvious interest in regaining the money they paid to Colorado. Colorado urges, however, that the funds belong to the State because Nelson's and Madden's convictions were in place when the funds were taken. Tr. of Oral Arg. 29-31. But once those convictions were erased, the presumption of their innocence was restored. See, *e g.*, *Johnsonv.Mississippi*, 486 U.S. 578, 585, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988) (After a " conviction has been reversed, unless and until [the defendant] should be retried, he must be presumed innocent of that charge." ). [8] " [A]xiomatic and elementary,"

[137 S.Ct. 1256] the presumption of innocence " lies at the foundation of our criminal law." *Coffinv.United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895). [9] Colorado may not retain funds taken from Nelson and Madden solely because of their now-invalidated convictions, see *supra*, at 2-3, and n. 3, for Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions. [10]

That petitioners prevailed on subsequent review rather than in the first instance, moreover, should be inconsequential. Suppose a trial judge grants a motion to set aside a guilty [197 L.Ed.2d 619] verdict for want of sufficient evidence. In that event, the defendant pays no costs, fees, or restitution. Now suppose the trial court enters judgment on a guilty verdict, ordering cost, fee, and restitution payments by reason of the conviction, but the appeals court upsets the conviction for evidentiary insufficiency. By what right does the State retain the amount paid out by the defendant? " [I]t should make no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient." *Burksv.United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). The vulnerability of the State's argument that it can keep the amounts exacted so long as it prevailed in the court of first instance is more apparent still if we assume a case in which the sole penalty is a fine. On Colorado's reasoning, an appeal would leave the defendant emptyhanded; regardless of the outcome of an appeal, the State would have no refund obligation. See Tr. of Oral Arg. 41, 44. [11]

B

Is there a risk of erroneous deprivation of defendants' interest in return of their funds if, as Colorado urges, the Exoneration Act is the exclusive remedy? Indeed yes, for the Act conditions refund on defendants' proof of innocence by clear and convincing evidence. § 13-65-101(1)(a). But to get their money back, defendants should not be saddled with any proof burden. Instead, as explained *supra*, at 6-7, they are entitled to be presumed innocent.

[137 S.Ct. 1257] Furthermore, as Justice Hood noted in dissent, the Act provides no remedy at all for any assessments tied to invalid misdemeanor convictions (Nelson had three). 362 P.3d, at 1081, n. 1; see § 13-65-102(1)(a). And when amounts a defendant seeks to recoup are not large, as is true in Nelson's and Madden's cases, see *supra*, at 2, the cost of mounting a claim under the Exoneration Act and retaining a lawyer to pursue it would be prohibitive. [12]

Colorado argued on brief that if the Exoneration Act provides sufficient process to compensate a defendant for the loss of her liberty, the Act should also suffice " when a defendant seeks compensation for the less significant deprivation of monetary assessments paid pursuant to a conviction that is later overturned." Brief for Respondent 40. The comparison is inapt. Nelson and Madden seek restoration of funds they paid to the State, not compensation for temporary deprivation of those funds. Petitioners seek only [197 L.Ed.2d 620] their money back, not interest on those funds for the period the funds were in the State's custody. Just as the restoration of liberty on reversal of a conviction is not compensation, neither is the return of money taken by the State on account of the conviction.

Colorado also suggests that " numerous pre- and post-deprivation procedures" --including the need for probable cause to support criminal charges, the jury-trial right, and the State's burden to prove guilt beyond a reasonable doubt--adequately minimize the risk of erroneous deprivation of property. *Id.*, at 31; see *id.*, at 31-35. But Colorado misperceives the risk at issue. The risk here involved is not the risk of wrongful or invalid conviction *any* criminal defendant may face. It is, instead, the risk faced by a defendant whose conviction has already been overturned that she will not recover funds taken from her solely on the basis of a conviction no longer valid. None of the above-stated procedures addresses that risk, and, as just explained, the Exoneration Act is not an adequate remedy for the property deprivation Nelson and Madden experienced. [13]

C

Colorado has no interest in withholding from Nelson and Madden money to which the State currently has zero claim of right. " Equitable [c]onsiderations," Colorado suggests, may bear on whether a State may withhold funds from criminal defendants after their convictions are overturned. Brief for Respondent 20-22. Colorado, however, has identified no such consideration relevant to petitioners' cases, nor has the State indicated any way in which the Exoneration Act embodies " equitable considerations."

IV

Colorado's scheme fails due process measurement because defendants' interest in regaining their funds is high, the risk of erroneous deprivation of those funds under the Exoneration Act is unacceptable, and

[137 S.Ct. 1258] the State has shown no countervailing interests in retaining the amounts in question. To comport with due process, a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated.

***

The judgments of the Colorado Supreme Court are reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE Gorsuch took no part in the consideration or decision of these cases.

## CONCUR

[197 L.Ed.2d 621] Justice Alito, concurring in the judgment.

I agree that the judgments of the Colorado Supreme Court must be reversed, but I reach that conclusion by a different route.

### I

The proper framework for analyzing these cases is provided by *Medina* v. California, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992). *Medina* applies when we are called upon to " asses[s] the validity of state procedural rules which . . . are part of the criminal process," *Id*, at 443, 112 S.Ct. 2572, 120 L.Ed.2d 353, and that is precisely the situation here. These cases concern Colorado's rules for determining whether a defendant can obtain a refund of money that he or she was required to pay pursuant to a judgment of conviction that is later reversed. In holding that these payments must be refunded, the Court relies on a feature of the criminal law, the presumption of innocence. And since the Court demands that refunds occur either automatically or at least without imposing anything more than " minimal" procedures, see *ante*, at 10, it appears that they must generally occur as part of the criminal case. For these reasons, the refund obligation is surely " part of the criminal process" and thus falls squarely within the scope of *Medina*. The only authority cited by the Court in support of its contrary conclusion is a footnote in a dissent. See *ante*, at 6 (citing *Kaley v. United States*, 571 U.S. ___, ___, n. 4, 134 S.Ct. 1090, 188 L.Ed.2d 46, 70 (2014) (opinion of Roberts, C. J.). Under *Medina*, a state rule of criminal procedure not governed by a specific rule set out in the Bill of Rights violates the Due Process Clause of the Fourteenth Amendment only if it offends a fundamental and deeply rooted principle of justice. 505 U.S. at 445, 112 S.Ct. 2572, 120 L.Ed.2d 353. And " [h]istorical practice is probative of whether a procedural rule can be characterized as fundamental." *Id*, at 446, 112 S Ct. 2572, 120 L.Ed.2d 353. Indeed, petitioners invite us to measure the Colorado scheme against traditional practice, reminding us that our " 'first due process cases'" recognized that " 'traditional practice provides a touchstone for constitutional analysis,'" Brief for Petitioners 26 (quoting *Honda Motor Co* v. Oberg, 512 U.S. 415, 430, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994)). Petitioners then go on to argue at some length that " [t]he traditional rule has always been that when a judgment is reversed, a person who paid money pursuant to that judgment is entitled to receive the money back." Brief for Petitioners 26; see *id*, at 26-30. See also Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 4-14 (discussing traditional practice).

The Court, by contrast, turns its back on historical practice, preferring to balance the competing interests according to its own lights. The Court applies the balancing test set out in *Mathews* v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), a modern invention " first conceived"

[137 S.Ct. 1259] to decide what procedures the government must observe before depriving persons of novel forms of property such as welfare or Social Security disability benefits. [197 L.Ed.2d 622] *Dusenbery* v. United States, 534 U.S. 161, 167, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002). Because these interests had not previously been regarded as " property," the Court could not draw on historical practice for guidance. *Mathews* has subsequently been used more widely in civil cases, but we should pause before applying its balancing test in matters of state criminal procedure. " [T]he States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition." *Medina*, *supra*, at 445-446, 112 S.Ct. 2572, 120 L.Ed.2d 353. Applying the *Mathews* balancing test to established rules of criminal practice and procedure may result in " undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina*, *supra*, at 443, 112 S.Ct. 2572, 120 L.Ed.2d 353. Where long practice has struck a particular balance between the competing interests of the State and those charged with crimes, we should not lightly disturb that determination. For these reasons, *Medina* 's historical inquiry, not *Mathews*, provides the proper framework for use in these cases. [1]

### II

Under *Medina*, the Colorado scheme at issue violates due process. American law has long recognized that when an individual is obligated by a civil judgment to pay money to the opposing party and that judgment is later reversed, the money should generally be repaid. See, *e g*, *Northwestern Fuel Co.* v. Brock, 139 U.S. 216, 219, 11 S.Ct. 523, 35 L.Ed. 151 (1891) (" The right of restitution of what one has lost by the enforcement of a judgment subsequently reversed has been recognized in the law of England from a very early period . . . " ); *Bank of United States* v. Bank of Washington, 31 U.S. 8, 6 Pet. 8, 17, 8 L.Ed. 299 (1832) (" On the reversal of an erroneous judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost" ). This was " a remedy well known at common law," memorialized as " a part of the judgment of reversal which directed 'that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid.'" 2 Ruling Case Law § 248, p. 297 (W. McKinney and B. Rich eds. 1914); *Duncan* v. Kirkpatrick, 13 Serg. &

Rawle 292, 294 (Pa. 1825).

As both parties acknowledge, this practice carried over to criminal cases. When a conviction was reversed, defendants could recover fines and monetary penalties assessed as part of the conviction. Brief for Respondent 20-21, and n. 7; Reply Brief 7-8, 11; see, *e.g.*, Annot., Right To Recover Back Fine or Penalty Paid in Criminal Proceeding, 26 A. L. R. 1523, [197 L.Ed.2d 623] 1532, § VI(a) (1923) (" When a judgment imposing

**[137 S.Ct. 1260]** a fine, which is paid, is vacated or reversed on appeal, the court may order restitution of the amount paid . . . " ); 25 C. J. § 39, p. 1165 (W. Mack, W. Hale, & D. Kiser eds. 1921) (" Where a fine illegally imposed has been paid, on reversal of the judgment a writ of restitution may issue against the parties who received the fine" ).

The rule regarding recovery, however, " even though general in its application, [was] not without exceptions." *Atlantic Coast Line R. Co. v.* Florida, 295 U.S. 301, 309, 55 S.Ct. 713, 79 L.Ed. 1451 (1935) (Cardozo, J.). The remedy was " equitable in origin and function," and return of the money was " 'not of mere right,'" but " ' rest[ed] in the exercise of a sound discretion.'" *Id.*, at 309, 310, 55 S.Ct. 713, 79 L.Ed. 1451 (quoting *Gould v.* McFall, 118 Pa. 455, 456, 12 A. 336, 21 Week. Notes Cas. 165 (1888)). This was true in both civil and criminal cases. See, *e g*, 25 C. J., at 1165 (noting that " restitution [of fines paid on a conviction later reversed] is not necessarily a matter of right" ); Annot., 26 A. L. R., at 1532, § VI(a) (Restitution for fines upon reversal of a conviction " is not a matter of strict legal right, but rather one for the exercise of the court's discretion" ). The central question courts have asked is whether " the possessor will give offense to equity and good conscience if permitted to retain [the successful appellant's money]." *Atlantic Coast Line*, *supra*, at 309, 55 S.Ct. 713, 79 L.Ed. 1451.

This history supports the Court's rejection of the Colorado Exoneration Act's procedures. The Act places a heavy burden of proof on defendants, provides no opportunity for a refund for defendants (like Nelson) whose misdemeanor convictions are reversed, and excludes defendants whose convictions are reversed for reasons unrelated to innocence. Brief for Respondent 8, 35, n. 18. These stringent requirements all but guarantee that most defendants whose convictions are reversed have no realistic opportunity to prove they are deserving of refunds. Colorado has abandoned historical procedures that were more generous to successful appellants and incorporated a court's case-specific equitable judgment. Instead, Colorado has adopted a system that is harsh, inflexible, and prevents most defendants whose convictions are reversed from demonstrating entitlement to a refund. Indeed, the Colorado General Assembly made financial projections based on the assumption that only one person every five years would qualify for a financial award under the Exoneration Act. Colorado Legislative Council Staff Fiscal Note, State and Local Revised Fiscal Impact, HB 13-1230, p. 2 (Apr. 22, 2013), online at http://leg.colorado.gov (as last visited Apr. 17, 2017). Accordingly, the Exoneration Act does not satisfy due process requirements. See *Cooper v.* Oklahoma, 517 U.S. 348, 356, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996) (A state rule of criminal procedure may violate due process where " a rule significantly more favorable to the defendant has had a long and consistent application" ).

III

Although long-established practice supports the Court's judgment, the Court rests its decision on different grounds. In its *Mathews* analysis, the Court reasons that the reversal of petitioners' convictions restored the presumption of their innocence and that " Colorado may not presume a [197 L.Ed.2d 624] person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions." *Ante*, at 7. The implication of this brief statement is that under *Mathews*, reversal restores the defendant to the *status quo ante*, see *ante*, at 3. But the Court does not confront the obvious implications of this reasoning.

For example, if the *status quo ante* must be restored, why shouldn't the defendant

**[137 S.Ct. 1261]** be compensated for all the adverse economic consequences of the wrongful conviction? [2] After all, in most cases, the fines and payments that a convicted defendant must pay to the court are minor in comparison to the losses that result from conviction and imprisonment, such as attorney's fees, lost income, and damage to reputation. The Court cannot convincingly explain why *Mathews* ' amorphous balancing test stops short of requiring a full return to the *status quo ante* when a conviction is reversed. But *Medina* does.

The American legal system has long treated compensation for the economic consequences of a reversed conviction very differently from the refund of fines and other payments made by a defendant pursuant to a criminal judgment. Statutes providing compensation for time wrongfully spent in prison are a 20th-century innovation: By 1970, only the Federal Government and four States had passed such laws. King, Compensation of Persons Erroneously Confined by the State, 118 U. Pa. L.Rev. 1091, 1109 (1970); *United States v* Keegan, 71 F.Supp. 623, 626 (S.D.N.Y. 1947) (" [T]here seems to have been no legislation by our Government on this subject" until 1938). Many other jurisdictions have done so since, but under most such laws, compensation is not automatic. Instead, the defendant bears the burden of proving actual innocence (and, sometimes, more). King , *supra*, at 1110 (" The burden of proving innocence in the compensation proceeding has from the start been placed

upon the claimant" ); see also Kahn, Presumed Guilty Until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes, 44 U. Mich. J. L. Reform 123, 145 (2010) (Most U.S. compensation statutes " require that claimants prove their innocence either by a preponderance of the evidence or by clear and convincing evidence" (footnote omitted)). In construing the federal statute, courts have held that a compensation proceeding " is not . . . a criminal trial" and that the burden of proof can be placed on the petitioner. *United States* v. Brunner, 200 F.2d 276, 279 (CA6 1952). As noted, Colorado and many other States have similar statutes designed narrowly to compensate those few persons who can demonstrate that they are truly innocent. The Court apparently acknowledges that these statutes pose no constitutional [197 L.Ed.2d 625] difficulty. That is the correct conclusion, but it is best justified by reference to history and tradition.

IV

The Court's disregard of historical practice is particularly damaging when it comes to the question of restitution. The Court flatly declares that the State is " obliged to refund . . . restitution" in just the same way as fees and court costs. *Ante*, at 1. This conclusion is not supported by historical practice, and it overlooks important differences between restitution, which is paid to the victims of an offense, and fines and other payments that are kept by the State.

Although restitution may be included in a criminal judgment, it has many attributes of a civil judgment in favor of the [137 S.Ct. 1262] victim. This is clear under Colorado law. Although the obligation to pay restitution is included in the defendant's sentence, restitution results in a final civil judgment against the defendant in favor of the State and *the victim*. Colo. Rev. Stat. § 18-1.3-603(4)(a)(I) (2016). Entitlement to restitution need not be established beyond a reasonable doubt or in accordance with standard rules of evidence or criminal procedure. *People v. Pagan*, 165 P.3d 724, 729 (Colo.App. 2006); Colo. Rev. Stat. § § 18-1.3-603(2)-(3). And the judgment may be enforced either by the State or the victim. § § 16-18 5-106(2), § § 16-18.5-107(1)-(4).

The Court ignores the distinctive attributes of restitution, but they merit attention. Because a restitution order is much like a civil judgment, the reversal of the defendant's criminal conviction does not necessarily undermine the basis for restitution. Suppose that a victim successfully sues a criminal defendant civilly and introduces the defendant's criminal conviction on the underlying conduct as (potentially preclusive) evidence establishing an essential element of a civil claim. See, *e g* , 2 K. Broun, McCormick on Evidence § 298, 473-477 (7th ed. 2013) (discussing the admissibility, and potential preclusive effect, of a criminal conviction in subsequent civil litigation). And suppose that the defendant's criminal conviction is later reversed for a trial error that did not (and could not) infect the later civil proceeding: for example, the admission of evidence barred by the exclusionary rule or a Confrontation Clause violation. It would be unprecedented to suggest that due process requires unwinding the civil judgment simply because it rests in part on a criminal conviction that has since been reversed. And a very similar scenario could unfold with respect to a Colorado restitution judgment. The only salient difference would be that, in the Colorado case, the civil judgment would have been obtained as part of the criminal proceeding itself. It is not clear (and the Court certainly does not explain) why that formal distinction should make a substantive difference. [3]

It is especially startling to insist that a State must provide a refund after enforcing a restitution judgment [197 L.Ed.2d 626] on the victims' behalf in reliance on a *final* judgment that is then vacated on *collateral* review. Faced with this fact pattern, the Ninth Circuit declined to require reimbursement, reasoning that the Government was a mere " escrow agent" executing a then-valid final judgment in favor of a third party. *United States v. Hayes*, 385 F.3d 1226, 1230 (2004).

The Court regrettably mentions none of this. Its treatment of restitution is not grounded in any historical analysis, and--save for a brief footnote, *ante*, at 2-3, n. 3--the Court does not account for the distinctive civil status of restitution under Colorado law (or the laws of the many other affected jurisdictions that provide this remedy to crime victims).

Nor does the Court consider how restitution's unique characteristics might affect the balance that it strikes under *Mathews* . *Ante*, at 10. The Court summarily rejects the proposition that " 'equitable considerations'" might militate against a blanket rule requiring the refund of money paid as restitution, see *ibid.*, but why is

[137 S.Ct. 1263] this so? What if the evidence amply establishes that the defendant injured the victims to whom restitution was paid but the defendant's conviction is reversed on a ground that would be inapplicable in a civil suit? In that situation, is it true, as the Court proclaims, that the State would have " no interest" in withholding a refund? Would the Court reach that conclusion if state law mandated a refund from the recipients of the restitution? And if the States and the Federal Government are always required to foot the bill themselves, would that risk discourage them from seeking restitution--or at least from providing funds to victims until the conclusion of appellate review?

It was unnecessary for the Court to issue a sweeping pronouncement on restitution. But if the Court had to address this subject to dispose of these cases, it should have acknowledged that--at least in some circumstances--refunds of restitution payments made under later reversed judgments

are not constitutionally required.

***

For these reasons, I concur only in the judgment.

**DISSENT**

Justice Thomas, dissenting.

The majority and concurring opinions debate whether the procedural due process framework of *Mathewsv.Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), or that of *Medinav California*, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992), governs the question before us. But both opinions bypass the most important question in these cases: whether petitioners can show a *substantive* entitlement to a return of the money they paid pursuant to criminal convictions that were later reversed or vacated.

The Court assumes, without reference to either state or federal law, that defendants whose convictions have been reversed have a substantive right to any money exacted on the basis of those convictions. By doing [197 L.Ed.2d 627] so, the Court assumes away the real issue in these cases. As the parties have agreed, the existence of Colorado's obligation to provide particular procedures depends on whether petitioners have a substantive entitlement to the money. Colorado concedes that " if [petitioners] have a present entitlement" to the money--that is, if " it is their property" --" then due process requires [the State to accord] them some procedure to get it back." Tr. of Oral Arg. 52. And Colorado acknowledges that the procedural hurdles it could impose before returning the money " would be fairly minimal," *Id*, at 51, because petitioners would need to prove only that their convictions had been reversed and that they had paid a certain sum of money, see *ibid* Similarly, petitioners concede that if defendants in their position do *not* have a substantive right to recover the money--that is, if the money belongs to the State--then Colorado need not " provide any procedure to give it back." *Id.*, at 53. If defendants in their position have no entitlement to the money they paid pursuant to their reversed convictions, there would be nothing to adjudicate. In light of these concessions, I can see no justification for the Court's decision to address the procedures for adjudicating a substantive entitlement while failing to determine whether a substantive entitlement exists in the first place.

In my view, petitioners have not demonstrated that defendants whose convictions have been reversed possess a substantive entitlement, under either state law or the Constitution, to recover money they paid to the State pursuant to their convictions. Accordingly, I cannot agree with the Court's decision to reverse the judgments of the Colorado Supreme Court.

[137 S.Ct. 1264] I

The Fourteenth Amendment provides that no State shall " deprive any person of *life, liberty, or property*, without due process of law." U.S. Const., Amdt. 14, § 1 (emphasis added). [1] To show that Colorado has violated the Constitution's procedural guarantees, as relevant here, petitioners must first establish that they have been deprived of a protected property interest. See *Castle Rockv.Gonzales*, 545 U.S. 748, 756, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005) (" The procedural component of the Due Process Clause does not protect everything that might be described as a benefit: To have a property interest in a benefit, a person clearly must have . . . a legitimate claim of entitlement to it" (internal quotation marks omitted)). " Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillipsv.Washington Legal Foundation*, [197 L.Ed.2d 628] 524 U.S. 156, 164, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998) (quoting *Board of Regents of State Collegesv.Roth*, 408 U.S. 564, 577, 92 S Ct. 2701, 33 L.Ed.2d 548 (1972)). Petitioners undoubtedly have an " interest in regaining the money they paid to Colorado." *Ante*, at 6. But to succeed on their procedural due process claim, petitioners must first point to a recognized *property* interest in that money, under state or federal law, within the meaning of the Fourteenth Amendment.

A

The parties dispute whether, under Colorado law, the petitioners or the State have a property interest in the money paid by petitioners pursuant to their convictions. Petitioners contend that the money remains their property under state law. Reply Brief 1-3; see also Tr. of Oral Arg. 52-54. Colorado counters that when petitioners paid the money pursuant to their convictions, the costs and fees became property of the State and the restitution became property of the victims. See *id.*, at 28-30; Brief for Respondent 41.

The key premise of the Colorado Supreme Court's holdings in these cases is that moneys lawfully exacted pursuant to a valid conviction become public funds (or the victims' money) under Colorado law. The Colorado Supreme Court explained in petitioner Shannon Nelson's case that " the trial court properly ordered [her] to pay costs, fees, and restitution pursuant to valid statutes" and that " the court correctly distributed th[ose] funds to *victims and public funds*, as ordered by the statutes." 362 P.3d 1070, 1076, 2015 CO 68 (2015) (emphasis added); accord, 364 P.3d 866, 868-870, 2015 CO 69 (2016) (applying the same analysis to petitioner Louis Madden's case). The Colorado Supreme Court further noted that, " [o]nce the state disburses restitution to the victims, the state no longer controls that money." 362 P.3d, at 1077, n. 4.

The Colorado Supreme Court explained that " Colorado's constitution protects" the Colorado Legislature's " control over public

[137 S.Ct. 1265] money," and thus a " court may authorize refunds from public funds only pursuant to statutory authority." *Id.*, at 1076-1077. The Exoneration Act, the Colorado Supreme Court held, provides the only statutory authority for refunding costs, fees, and restitution when a defendant's conviction is overturned. *Id*, at 1077-1078. Because petitioners had not sought a refund under the Exoneration Act, " the trial court lacked the authority to order a refund of Nelson's costs, fees, and restitution." *Id.*, at 1078; 364 P.3d, at 867.

At no point in this litigation have petitioners attempted to demonstrate that they satisfy the requirements of the Exoneration Act. Under the Act, Colorado recognizes a substantive entitlement to the kind of property at issue in these cases only if, among other things, the defendant can prove that he is " actually innocent." [2] Colo. Rev. Stat. § § 13-65-101, 13-65-102 (2016). It is the Exoneration Act alone which defines the scope of the substantive entitlement. This Court has [197 L.Ed.2d 629] interpreted the Due Process Clause to require that the States provide certain procedures, such as notice and a hearing, by which an individual can prove a substantive entitlement to (or defend against a deprivation of ) property. But the Clause, properly understood, has nothing to say about the existence or scope of the substantive entitlement itself. See Part I-B, *infra*. If petitioners want this Court to rewrite the contours of the substantive entitlement contained in the Exoneration Act, they err in invoking *procedural* due process. See Reply Brief 1-2 (" Our argument sounds in *procedural* due process" ).

The majority responds by asserting, without citing any state law, that Colorado " had no legal right to retain [petitioners'] money" once their convictions were invalidated. *Ante*, at 8, n. 11. If this were true as a matter of state law, then certain provisions of the Exoneration Act--which require the State to return costs, fees, and restitution only in limited circumstances following a conviction's reversal--would be superfluous. Thus, to the extent the majority implicitly suggests that petitioners have a state-law right to an automatic refund (a point about which the majority is entirely unclear), it is plainly incorrect.

B

Because defendants in petitioners' position do not have a substantive right to recover the money they paid to Colorado under state law, petitioners' asserted right to an automatic refund must arise, if at all, from the Due Process Clause itself. But the Due Process Clause confers no substantive rights. *McDonaldv.Chicago*, 561 U.S. 742, 811, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (Thomas, J., concurring in part and concurring in judgment) (" The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words" ). And, in any event, petitioners appear to disavow any substantive due process right to a return of the funds they paid. See Reply Brief 1-2; Tr. of

[137 S.Ct. 1266] Oral Arg. 18-19. In the absence of any property right under state law (apart from the right provided by the Exoneration Act, which petitioners decline to invoke), Colorado's refusal to return the money is not a " depriv[ation]" of " property" within the meaning of the Fourteenth Amendment. Colorado is therefore not required to provide any process at all for the return of that money.

II

No one disputes that if petitioners had never been convicted, Colorado could not have required them to pay the money at issue. And no one disputes that Colorado cannot require petitioners to pay any additional costs, fees, or restitution now that their convictions have been invalidated. It does not follow, however, that petitioners have a property right in the money they paid pursuant to their then-valid convictions, which now belongs to the State and the victims under Colorado law. The Court today announces that petitioners have a right to an automatic refund [197 L.Ed.2d 630] because the State has " no legal right" to that money. *Ante*, at 8, n. 11. But, intuitive and rhetorical appeal aside, it does not seriously attempt to ground that conclusion in state or federal law. If petitioners' supposed right to an automatic refund arises under Colorado law, then the Colorado Supreme Court remains free on remand to clarify whether that right in fact exists. If it arises under substantive due process, then the Court's procedural due process analysis misses the point.

I respectfully dissent.

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Notes:

[*]Together with *Maddenv.Colorado*, also on certiorari to the same court (see this Court's Rule 12.4).

[1]Of the $287.50 for costs and fees, $125 went to the victim compensation fund and $162.50 to the victims and witnesses assistance and law enforcement fund (VAST fund). See 362 P.3d 1070, 1071, n. 1, 2015 CO 68 (Colo. 2015).

[2]Of the $1,220 for costs and fees, $125 went to the victim compensation fund and $1,095 to the VAST fund ($1,000 of which was for the special advocate surcharge). See App. 79; 364 P.3d 866, 869, 2015 CO 69 (Colo. 2015).

[3]See Colo. Rev. Stat. § 24-4.1-119(1)(a) (2005) (levying victim-compensation-fund fees for " each criminal action resulting in a conviction or in a deferred judgment and sentence" ); § 24-4.2-104(1)(a)(I) (2005) (same, for VAST fund fees); § 24-4.2-104(1)(a)(2) (same, for special advocate surcharge); § 18-1.3-603(1) (2005) (with one exception, " [e]very order of conviction . . . shall include consideration of restitution" ). See also 362 P.3d, at 1073 (" [T]he State pays the cost of criminal cases when a defendant is acquitted." (citing Colo. Rev. Stat. § 16-18-101(1) (2015))). Under Colorado law, a restitution order tied to a criminal conviction is rendered as a separate civil judgment. See § 18-1.3-603(4)(a) (2005). If the conviction is reversed, any restitution order dependent on that conviction is simultaneously vacated. See *Peoplev.Scearce*, 87 P.3d 228, 234-235 (Colo.App. 2003).

[4]While these cases were pending in this Court, Colorado passed new legislation to provide " [r]eimbursement of amounts paid following a vacated conviction." See Colo. House Bill 17-1071 (quoting language for Colo. Rev. Stat. § 18-1.3-703, the new provision). That legislation takes effect September 1, 2017, and has no effect on the cases before us.

[5]Prior to the Exoneration Act, the Colorado Supreme Court recognized the competence of courts, upon reversal of a conviction, to order the refund of monetary exactions imposed on a defendant solely by reason of the conviction. *Tolandv.Strohl*, 147 Colo. 577, 586, 364 P.2d 588, 593 (1961).

[6]Compensation under the Exoneration Act includes $70,000 per year of incarceration for the wrongful conviction; additional sums per year served while the defendant is under a sentence of death, or placed on parole or probation or on a sex offender registry; compensation for child support payments due during incarceration; tuition waivers at state institutions of higher education for the exonerated person and for any children conceived or legally adopted before the incarceration; and reasonable attorney's fees for bringing an Exoneration Act claim. § 13-65-103(2), (3) (2016).

[7]See *Cooperv.Oklahoma*, 517 U.S. 348, 356-362, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996) (standard of proof to establish incompetence to stand trial); *Dowlingv.United States*, 493 U.S. 342, 343-344, 352, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990) (admissibility of testimony about a prior crime of which the defendant was acquitted); *Pattersonv.New York*, 432 U.S. 197, 198, 201-202, 97 S.Ct. 2319, 53 L.Ed 2d 281 (1977) (burden of proving affirmative defense); *Medinav California*, 505 U.S. 437, 443-446, 457, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) (burden of proving incompetence to stand trial).

[8]Citing *Bellv.Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), Colorado asserts that " [t]he presumption of innocence applies only at criminal trials" and thus has no application here. Brief for Respondent 40, n. 19. Colorado misapprehends *Wolfish*. Our opinion in that case recognized that " under the Due Process Clause," a detainee who " has not been adjudged guilty of any crime" may not be punished. 441 U.S. at 535-536, 99 S.Ct. 1861, 60 L.Ed.2d 447; see *id.*, at 535-540, 99 S.Ct. 1861, 60 L.Ed.2d 447. *Wolfish* held only that the presumption does not prevent the government from " detain[ing a defendant] to ensure his presence at trial . . . so long as [the] conditions and restrictions [of his detention] do not amount to punishment, or otherwise violate the Constitution." *Id*, at 536-537, 99 S.Ct. 1861, 60 L.Ed.2d 447.

[9]Were *Medina* applicable, Colorado's Exoneration Act scheme would similarly fail due process measurement. Under *Medina*, a criminal procedure violates due process if " it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 505 U.S. at 445, 112 S.Ct. 2572, 120 L.Ed.2d 353 (quoting *Patterson*, 432 U.S. at 202, 97 S.Ct. 2319, 53 L.Ed.2d 281 ). The presumption of innocence unquestionably fits that bill.

[10]Colorado invites a distinction between convictions merely " voidable," rather than " void," and urges that the invalidated convictions here fall in the voidable category. See Brief for Respondent 32-33, and n. 11. As Justice Hood noted in dissent, however, " reversal is reversal," regardless of the reason, " [a]nd an invalid conviction is no conviction at all." 362 P.3d, at 1080.

[11]The dissent echoes Colorado's argument. If Nelson and Madden prevailed at trial, the dissent agrees, no costs, fees, or restitution could be exacted. See *post*, at 6. But if they prevailed on appellate inspection, the State gets to keep their money. See *ibid* Under Colorado law, as the dissent reads the Colorado Supreme Court's opinion, " moneys lawfully exacted pursuant to a valid conviction become public funds (or[, in the case of restitution,] the victims' money)." *Post*, at 3-4. Shut from the dissent's sights, however, the convictions pursuant to which the State took petitioners' money were *invalid*, hence the State had no legal right to retain their money. Given the invalidity of the convictions, does the Exoneration Act afford sufficient process to enable the State to retain the money? Surely, it does not.

[12]A successful petitioner under the Exoneration Act can recover reasonable attorney's fees, § 13-65-103(2)(e)(IV), but neither a defendant nor counsel is likely to assume the risk of loss when amounts to be gained are not worth the candle.

[13]Colorado additionally argues that defendants can request a stay of sentence pending appeal, thereby reducing

the risk of erroneous deprivation. See Brief for Respondent 32; § § 16-12-103, 18-1.3-702(1)(a) (2016). But the State acknowledged at oral argument that few defendants can meet the requirements a stay pending appeal entails. Tr. of Oral Arg. 33-34. And even when a stay is available, a trial court " may require the defendant to deposit the whole or any part of the . . . costs." Colo.App. Rule 8.1(a)(3) (2016).

[1]In a footnote, the Court briefly opines on how a *Medina* analysis would come out in these cases. The Court's discussion of the issue, which is dictum, is substantially incomplete. The Court suggests that *Medina* would support its judgment because the presumption of innocence is deeply rooted and fundamental. *Ante*, at 7, n. 9. It is true, of course, that this presumption is restored when a conviction is reversed. But that says very little about the question at hand: namely, what must *happen* once that presumption is restored. Notably, the Court cites not a single case applying the presumption of innocence in the refund context. At the same time, the Court ignores cases that bear directly on the question in these cases and thus must be part of a proper *Medina* inquiry. See *infra*, at this page and 4-5.

[2]The Court's position is also at odds with other principles of our procedural due process jurisprudence. It is well settled, for example, that a plaintiff who is deprived of property with inadequate process is not entitled to be compensated if the defendant can prove the deprivation " would have occurred even if [the plaintiff] had been given due process." *Thompsonv District of Columbia*, 832 F.3d 339, 346 (CADC 2016); see *Carey v.* Piphus, 435 U.S. 247, 260, 263, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). This principle is in obvious tension with the Court's holding.

[3]The Court cites one intermediate appellate case for the proposition that when a conviction is reversed, any restitution order dependent on that conviction is simultaneously vacated. *Ante*, at 2-3, n. 3 (citing *People v.* Scearce, 87 P.3d 228 (Colo.App. 2003)). *Scearce* did not discuss whether any payments had been made to victims or--if so--whether they would be recoverable from the State. More important, *Scearce* is hardly the last word on the question whether due process invariably requires the refund of restitution.

[1]As I have previously observed, the Due Process Clause may have originally been understood to require only " that our Government . . . proceed according to the 'law of the land'--that is, according to written constitutional and statutory provisions" --before depriving someone of life, liberty, or property. *Johnsonv.United States*, 576 U.S. ___, ___, 135 S.Ct. 2551, 192 L.Ed.2d 569, 595 (2015) (Thomas, J., concurring in judgment) (quoting *Hamdiv.Rumsfeld*, 542 U.S. 507, 589, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (Thomas, J., dissenting)). Because Colorado does not advance that argument, and because it is unnecessary to resolve the issue in these cases. I assume that the Due Process Clause requires some baseline procedures regardless of the provisions of Colorado law.

[2]More specifically, the Exoneration Act entitles an exonerated defendant to compensation if he was convicted of a felony, was incarcerated, and, among other requirements, can prove by clear and convincing evidence that he is " actually innocent," meaning that his " conviction was the result of a miscarriage of justice" or that he is factually innocent. Colo. Rev. Stat. § § 13-65-101(1)(a), 13-65-102(1)(a) (2016); see *Nelson*, 362 P.3d, at 1075. " Insufficiency of the evidence or a legal error unrelated to the person's actual innocence cannot support either exoneration or subsequent compensation under the Act." *Ibid.*

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## RULE 12.8 EFFECT OF REVERSAL ON INTERVENING RIGHTS

If a party has voluntarily or involuntarily partially or wholly satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party, the value of the property, or in appropriate circumstances, provide restitution. An interest in property acquired by a purchaser in good faith, under a decision subsequently reversed or modified, shall not be affected by the reversal or modification of that decision.

## CONSTITUTION OF UNITED STATES

## CONSTITUTION AMENDMENTS

**Amendment V. Rights of Persons**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## CONSTITUTION OF UNITED STATES

## CONSTITUTION AMENDMENTS

### Amendment VI. Rights of Accused in Criminal Prosecutions

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## CONSTITUTION OF UNITED STATES

## CONSTITUTION AMENDMENTS

**Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection**

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

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COURT OF APPEALS DIVISION II OF WASHINGTON

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|---|---|
| STATE OF WASHINGTON<br><br>Appellant,<br><br>vs.<br><br>MICHAEL A. HECHT,<br><br>Respondent. | NO. ~~49661-5-II~~ 75897-7<br><br>CERTIFICATE OF SERVICE OF STATEMENT OF ARRANGEMENTS |

I, Donald N. Powel, attorney for appellant, certify that on the 26th day of February, 2018, I caused a true and correct copy of the " Petition for Review of Court of Appeals with Appendix" to be served on John Hillman, located at Attorney General's Office, Criminal Justice Division, 800 5th Avenue, Ste. 2000, Seattle, WA 98104-3188 by email to John Hillman at CRJSea@atg.wa.gov, and to his assistant's email at daisyj@atg.wa.gov, pursuant to our agreement to serve and accept service by email.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2018 FEB 27 AM 10:58

DATED this 26th day of February, 2018.

Amy Mosley
Assistant to Donald N. Powell, WSBA #12055
Attorney for Michael A. Hecht



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