Nelson v. Colorado: New Life for an Old Idea?

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Background[1]

In 2006, Shannon Nelson was convicted by a Colorado jury of two felonies and three misdemeanors arising from the alleged sexual and physical abuse of her children.[2] The trial court sentenced her to a prison term of 20 years to life. Pursuant to Colorado law, which provides that persons convicted of criminal activity are responsible, immediately upon their conviction, for certain costs and fees, the court ordered Nelson to pay the following: (1) $125.00 to the State's Victim Compensation Fund; (2) $162.50 to the Victims and Witnesses Assistance and Law Enforcement Fund; (3) $35.00 for court costs; (4) a "time payment fee" of $25.00; and (5) $7,845.00 in restitution, bringing the total owed to $8,192.50.[3]

Nelson was unable to pay the amount due; consequently, during her incarceration, the Colorado Department of Corrections periodically deducted money from her inmate account to satisfy the debt she owed to the state.

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[1] The factual background is taken from the Supreme Court decision in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), and the opinion below, *People v. Nelson*, 362 P.3d 1070 (Colo. 2015).

[2] Nelson's case was joined with a second case, *People v. Madden*, 364 P.3d 866 (Colo. 2015), raising the same issues under the same Colorado law. The two cases were decided together, and all references below in the singular to "Nelson's claim" should be understood to refer to Madden's as well.

[3] Nelson, 362 P.3d at 1071.

In 2009, the Colorado Court of Appeals reversed the judgment against Nelson, finding that the testimony of an expert witness at her trial had been improperly used, and remanded her case for a new trial.[4] A new jury was empaneled. It acquitted Nelson of all charges at the second trial, and she was released from state prison.

During Nelson's incarceration, the state had deducted just over $700 from her account; upon her acquittal and release, she wanted that money back. She filed a motion with the trial court, seeking its return on the ground that her acquittal eliminated whatever claim the state may have had to the funds. The trial court denied the motion, but the Colorado Court of Appeals again ruled in Nelson's favor, holding that all assessments of costs, fees, and restitution must be "tied to a valid conviction," absent which a court must "retur[n] the defendant to the *status quo ante*."[5] Accordingly, the court ordered the trial court to grant Nelson's refund motion.[6]

The state appealed, and the Colorado Supreme Court, over a vigorous dissent by Justice William Hood, reversed.[7] Relying on the principle that the allocation of public money is a legislative—not a judicial—prerogative, the court reasoned that the trial court had no inherent authority to refund Nelson's money and could only do so pursuant to express legislative direction:

> The General Assembly authorizes the collection, management, and distribution of the funds raised by costs, fees, and restitution pursuant to its power to define crimes and sentences, raise revenue, and make appropriations. These powers are inherently legislative, and a court may not intrude on the General Assembly's power by authorizing a refund from public funds without statutory authority to do so.[8]

[4] People v. Shannon Kay Gonser, n/k/a Shannon Nelson, No. 06CA1023, 2009 Colo. App. LEXIS 637 (Colo. App. Apr. 9, 2009).

[5] People v. Nelson, 369 P.3d 625, 628 (Col. App. 2013).

[6] *Id.* at 629

[7] Nelson, 362 P.3d at 1079.

[8] *Id.* at 1075–76. See also Colorado Const. Art. V §33 ("No moneys in the state treasury shall be disbursed . . . except upon appropriations made by law, or otherwise authorized by law.").

The court then found that Colorado's Compensation for Certain Exonerated Persons statute (commonly known as the "Exoneration Act"),[9] passed in 2013, contains the specific statutory authorization for the refund that Nelson sought. This law, the court held, "specifically addresses when a defendant who was wrongfully convicted may seek a refund of costs, fees, and restitution" and therefore "provides the proper procedure for seeking a refund."[10] Because no other statute addressed this question, the Exoneration Act was the "*exclusive* process for exonerated defendants seeking a refund of costs, fees, and restitution."[11] In response to Nelson's argument that a "failure to refund the money would violate state and federal constitutional guarantees of due process," the court found that the act "provides sufficient process for defendants to seek refunds of costs, fees, and restitution that they paid in connection with their conviction."[12]

Thus, if Nelson wanted a refund, she would have to file an Exoneration Act claim and proceed under that statute. Because she had not done so, "the trial court lacked the authority to order a refund of Nelson's costs, fees, and restitution based on her motion following her criminal trial."[13] As a result, the Colorado Supreme Court ordered the trial court to deny her motion for a refund with leave to file a claim under the Exoneration Act.

I. Colorado's Exoneration Act

Though it might appear as though the case was one in which the "litigants merely needed directions on where to ask for relief,"[14] several features of the Exoneration Act complicate the matter. Like more than half the states, Colorado provides a civil remedy through which individuals who have been "exonerated"—proven to be "*factually innocent* of any participation in the crime" with which they were charged and convicted[15]—can receive compensation from the

[9] Colo. Rev. Stat. § 13-65-101 et seq.

[10] Nelson, 362 P.3d at 1077–78.

[11] *Id*. at 1078 (emphasis added).

[12] *Id.* at 1071, 1078.

[13] *Id.*

[14] *Id.* at 1081 (Hood, J., dissenting).

[15] Colo. Rev. Stat. § 13-65-101(1)(a)(II) (emphasis added). See also § 13-65-102(4)(a) (declaring that an individual is "not eligible for compensation pursuant to [the Ex-

state for their wrongful incarceration. Recovery under this law is available only to persons who have served all or part of a term of incarceration pursuant to a felony conviction, and only to those whose conviction has been overturned for reasons *other than* a finding that the "evidence [was] legally insufficient to support the petitioner's conviction," or that there had been some "legal error unrelated to the petitioner's actual innocence."[16] Moreover, the burden of proving that she is actually innocent of all crimes for which she was incarcerated is on the Exoneration Act claimant, and the proof must be by "clear and convincing evidence."[17]

Successful claimants under the Exoneration Act receive a fixed payment of $70,000 for each year of incarceration (with additional amounts payable in certain specified circumstances[18]), tuition waivers at all state institutions of higher learning for all family members, along with—crucially, for this case—reimbursement for "any fine, penalty, court costs, or restitution" paid as a result of the wrongful conviction.[19]

It is safe to say that the Colorado legislators who passed the Exoneration Act did not have Shannon Nelson's particular situation in mind. The overriding purpose of the act was to provide special, and rather substantial, compensation to persons who have been especially ill-treated by the criminal justice system—compensation to which the individuals concerned would not, absent the act, be otherwise entitled. It is entirely understandable that Colorado would want to restrict the award of special compensation to those who can show that they were actually innocent of the crimes charged, and not merely "legally innocent" because their conviction had been overturned for "legal error." The conditions that the state imposed on would-be claimants under the act were meant to be difficult to fulfill; indeed, the legislature's own estimates of the financial consequences

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oneration Act] if he or she does not meet the definition of actual innocence in section 13-65-101(1).").

[16] *Id.* § 13-65-101(1)(b).

[17] *Id.* § 13-65-102(6)(b) ("[T]he burden shall be on the petitioner to show by clear and convincing evidence that he or she is actually innocent of all crimes that are the subject of the petition, and that he or she is eligible to receive compensation pursuant to this article. A trial to a jury of six must result in a unanimous verdict.").

[18] *Id.* § 13-65-103(3).

[19] *Id.*, § 13-65-103(2)(e)(V).

of the act assumed that only one person every five *years* would meet the act's requirements and qualify for a financial award.[20]

Nelson, however, wasn't seeking special compensation for the time she served in prison; she was merely seeking a return of money she had paid to the state as a consequence of her now-vacated conviction. But because the Exoneration Act—almost as an afterthought—*also* provided for reimbursement of funds previously paid by "exonerated" defendants, she would have to satisfy the act's stringent conditions in order simply to get her money back.

That hardly seems fair. It is difficult to imagine that any legislator could have known or intended enactment of the Exoneration Act to have the effect it had on individuals standing in Nelson's shoes, or intended the act to deny or delay reimbursements to individuals whose convictions are overturned without proof of their "actual innocence." Nelson is, in the eyes of the law, legally innocent—"presumed innocent"[21]—of the crime with which she was charged; her acquittal at her second trial means that the state failed to sustain its burden to prove, beyond a reasonable doubt, each and every element of the charged offense. The state's entitlement to the funds in question was based entirely on the earlier conviction. She may or may not be *actually* innocent as a matter of fact. The jury at her second trial was not asked to rule on that, and its verdict of acquittal does not speak to that question; it establishes only that the state had not sustained its burden of proving beyond a reasonable doubt that she was guilty of the crimes charged. Requiring her to prove that she is actually innocent could be a rather complex undertaking. But more important, why should she have to establish actual innocence to receive a refund of fees assessed upon her (now vacated) conviction? Once that conviction was overturned, she did not have to show that she was "actually innocent" to be released from prison—that is, to have her *liberty* restored. Why should she have to do so to have her *property* restored?

Instead of filing an action under the Exoneration Act, Nelson appealed to the U.S. Supreme Court, arguing that Colorado's

[20] Nelson, 137 S. Ct. at 1260 (Alito, J., concurring in the judgment) (citing Colorado Legislative Council Staff Fiscal Note, State and Local Revised Fiscal Impact, HB 13–1230, 2 (Apr. 22, 2013)).

[21] I discuss this concept and the role it played here in a later section of this essay.

requirement that she proceed under the Exoneration Act and prove her actual innocence by clear and convincing evidence before she could receive reimbursement violated her right to due process under the Fourteenth Amendment.

II. The Supreme Court Decision

In a 7-1 decision, the Supreme Court reversed the Colorado Supreme Court, agreeing with Nelson that Colorado's scheme "offends the Fourteenth Amendment's guarantee of due process."[22] Justice Ruth Bader Ginsburg (joined by Chief Justice John Roberts and Justices Anthony Kennedy, Stephen Breyer, Sonia Sotomayor, and Elena Kagan), wrote the majority opinion. Applying the "familiar procedural due process inspection instructed by *Mathews v. Eldridge*"[23] the Court considered three factors and found that all of them weigh decisively against the Colorado law:

1. *The private interest affected*. Nelson has an "obvious interest in regaining the money [she] paid to Colorado."[24] Once her conviction was erased, "the presumption of [her] innocence was restored. . . . Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions."[25] "[T]o get their money back, defendants should not be saddled with any proof burden. Instead, . . . they are entitled to be presumed innocent."[26]
2. *The risk of erroneous deprivation of that interest through the procedures used*. Under Colorado's procedures the "risk of erroneous deprivation"—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"—is substantial, both because "the Act conditions refund on defendants' proof of innocence by clear and convincing evidence" and because "the cost of mounting a claim under the Exoneration Act and retaining a lawyer to pursue it" will

[22] Nelson, 137 S. Ct. at 1252.

[23] *Id.* at 1255.

[24] *Id.*

[25] *Id.* at 1255–56 (emphasis added).

[26] *Id.* at 1256.

often be "prohibitive" in light of the relatively small amounts of money involved.[27]

3. *The governmental interest at stake*. This one was easy: Colorado simply "has *no* interest in withholding from Nelson . . . money to which the State currently has zero claim of right."[28]

In sum, the Court held that 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 the State has shown no countervailing interests in retaining the amounts in question. . . . [Colorado] may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated.[29]

Justice Samuel Alito concurred in the judgment and wrote separately. In his view, this case addresses "'state procedural rules which . . . are part of the criminal process,'"[30] making the *Mathews* balancing test inapposite. Instead, he would apply the more deferential framework set forth in *Medina v. California*, under which "a state rule of criminal procedure . . . violates the Due Process Clause of the Fourteenth Amendment only if it offends a fundamental and deeply rooted principle of justice," looking to "historical practice" for probative evidence of whether a procedural rule can be characterized as "fundamental."[31] He agreed, though, that even under *Medina*'s framework, the Exoneration Act procedures are inadequate:

> Under Medina, the Colorado scheme at issue violates due process. . . . The Act places a heavy burden of proof on defendants, provides no opportunity for a refund for defendants . . . whose misdemeanor convictions are reversed, and excludes defendants whose convictions are reversed for reasons unrelated to innocence. These stringent requirements all but guarantee that most defendants whose convictions

[27] *Id.* at 1256–57.

[28] *Id.* at 1257 (emphasis added).

[29] *Id*. at 1257–58.

[30] *Id.* at 1258 (Alito, J. concurring in the judgment) (citing Medina v. California, 505 U.S. 437, 443 (1992)).

[31] *Id.*

> 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.[32]

Justice Clarence Thomas was the sole dissenter. His opinion (which I discuss in more detail below) can be summarized thus: once the state has lawfully taken Nelson's money from her upon her conviction, it's not *her money* anymore; it belongs, under Colorado law, to the state. Therefore, her due process challenge to the Exoneration Act refund procedures must fail, because those procedures, whatever burdens they may impose upon her, do not constitute a "depriv[ation] . . . of [her] property" within the meaning of the Fourteenth Amendment's Due Process Clause.

III. The Significance of the Decision

Few Supreme Court decisions, one would think, *directly* impact fewer people than this one. No other state requires—or, to my knowledge, has ever required—persons seeking a return of financial exactions levied on the basis of a subsequently invalidated criminal conviction to prove their actual innocence, let alone by clear and convincing evidence.[33] So the decision will have no direct impact on the law outside of Colorado.

And even within Colorado, the decision will have negligible effect. Shortly after the Supreme Court decided to review the case, Colorado enacted a new law that provides that a "defendant whose court-ordered fines, fees, costs, surcharges, restitution, interest, or other monetary amounts resulting from a criminal conviction . . . have been paid" can obtain, by motion at the trial court, reimbursement of that money in the event that the conviction "is vacated after post-conviction proceedings or overturned on appeal," or if "the charge on which the conviction was based is dismissed or the person is

[32] *Id.* at 1260.

[33] Petition for Writ of Cert., Nelson v. Colorado, at 9 ("Colorado appears to be the only state that requires defendants to prove their innocence before they can get a refund of monetary penalties when a conviction is reversed.").

acquitted of the charge after a new trial"—thus effectively nullifying the Colorado Supreme Court decision under review.[34]

Although the new statute, which does not take effect until September 1, 2017, does not technically moot Nelson's claim,[35] its enactment surely both supports the proposition that Nelson's legal predicament was the product of pure legislative inadvertence and further shrank the already-small universe of persons directly impacted by the decision. Indeed, it would not have come as a shock had the Court chosen to "DIG" the case—dismiss as improvidently granted—after passage of the new law.[36]

But while the decision will thus have little direct impact on individuals, or on the law regarding the return of fees and costs after invalidation of a criminal conviction, it may well have an impact—and possibly a substantial impact—on developments elsewhere in the law. My guess—and it can only be a guess at this point—is that *Nelson* will turn out to be important in the intensifying legal battles over civil forfeiture practices. These have become, in recent years, quite controversial and may well become the subject of a Supreme Court decision in the not-too-distant future.

Civil forfeiture is "a legal fiction that enables law enforcement to take legal action against inanimate objects for their participation in alleged criminal activity, regardless of whether the property owner is guilty or innocent—or even whether the owner is charged with a crime."[37] As Justice Thomas recently put it:

> Modern civil forfeiture statutes are plainly designed, at least in part, to punish the owner of property used for criminal purposes. See, *e.g., Austin v. United States,* 509 U. S. 602, 618–619 (1993). When a state wishes to punish one

[34] See An Act Concerning a Process for Repayment of Certain Criminal Monetary Amounts Ordered by the Court to Be Paid Following Conviction, Colo. Rev. Stat. § 18-1.3-703, http://extras.denverpost.com/app/bill-tracker/bills/2017a/hb_17-1071.

[35] See Nelson, 137 S. Ct. at 1254 n.4 (discussing new legislation).

[36] See Perry Grossman, Common High Court Ground: The Supreme Court Is Looking for Cases to Curb Abusive Law Enforcement Seizures," Slate, Apr. 28, 2017, http://www.slate.com/articles/news_and_politics/politics/2017/04/the_supreme_court_finally_found_an_issue_that_unites_them.htm.

[37] Institute for Justice, Policing for Profit: The Abuse of Civil Asset Forfeiture 10 (2d ed. Nov. 2015), https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf.

> of its citizens, it ordinarily proceeds against the defendant personally (known as "*in personam*"), and in many cases it must provide the defendant with full criminal procedural protections. Nevertheless, . . . this Court permits prosecutors seeking forfeiture to proceed against the property (known as "*in rem*") and to do so civilly. See, *e.g., United States v. James Daniel Good Real Property*, 510 U. S. 43, 56–57 (1993). *In rem* proceedings often enable the government to seize the property without any predeprivation judicial process and to obtain forfeiture of the property even when the owner is personally innocent. . . .
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> Civil proceedings often lack certain procedural protections that accompany criminal proceedings, such as the right to a jury trial and a heightened standard of proof.[38]

The use of civil forfeiture proceedings, under state and federal forfeiture statutes, exploded during the early 1980s as part of the "war on drugs," and it has become a commonly used weapon in the government's crime-fighting arsenal. As Rep. Tim Walberg (R-MI) put it recently: "civil forfeiture is big business for the government."[39] In Justice Thomas's words again:

> [C]ivil forfeiture has in recent decades become widespread and highly profitable. . . . This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses.[40]

Whether civil forfeiture procedures comport with constitutional due process requirements is a question that is currently the subject of considerable attention in the lower federal courts and the subject of intense scholarly and public debate.[41] Justice Thomas, at least, has

[38] Statement of Justice Thomas Respecting the Denial Of Certiorari in Leonard v. Texas, No. 16-122 (Mar. 6, 2017), http://www.scotusblog.com/wp-content/uploads/2017/03/16-122-respecting-cert-denial.pdf.

[39] Tim Walberg, Stopping the Abuse of Civil Forfeiture, Wash. Post, Sept. 4, 2014, https://www.washingtonpost.com/opinions/tim-walberg-an-end-to-the-abuse-of-civil-forfeiture/2014/09/04/e7b9d07a-3395-11e4-9e92-0899b306bbea_story.html.

[40] See Statement, *supra* note 38.

[41] The literature on the civil forfeiture controversy is vast. See generally, Policing for Profit, *supra* note 37; Margaret Lemos & Max Minzner, For-Profit Public Enforcement,

clearly signaled a willingness to have the Court address the question directly.[42]

Nelson, of course, did not involve a civil forfeiture proceeding. But the question it raised has echoes in the forfeiture context: What process is due to an individual seeking, in a civil action, a return of property seized by the government? And, in particular, what role does the "presumption of innocence" play in deciding that question?

IV. The Presumption of Innocence

The "presumption of innocence" plays a curious role in the law, and it played a curious role in this case. There may well be no principle of law more familiar to most people—if only from the many TV shows and movies that have repeated the formulation—than the notion that a criminal defendant is "presumed innocent" of all charges, and that the government has the burden of proving guilt by proof "beyond a reasonable doubt." And there are few principles (if any) with deeper roots in the Anglo-American system of justice. As the Court wrote in *Nelson,* the presumption of innocence is "axiomatic and elementary," and "lies at the foundation of our criminal law," and is unquestionably a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." [43]

It was clearly critical to the resolution of this case. As the Court put it: "Once [Nelson's] conviction[ ] was erased, the presumption of [her] innocence was restored . . . Colorado may not presume a

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127 Harv. L. Rev. 853 (2014); Stefan Cassella, Asset Forfeiture Law in the United States (2d ed., Juris 2012); Sarah Stillman, Taken, New Yorker, Apr. 12, 2013.

[42] *See* Statement, *supra* note 38:

> The Court has justified its unique constitutional treatment of civil forfeiture largely by reference to a discrete historical practice that existed at the time of the founding. . . . In the absence of this historical practice, the Constitution presumably would require the Court to align its distinct doctrine governing civil forfeiture with its doctrines governing other forms of punitive state action and property deprivation. . . . One unaware of the history of forfeiture laws and 200 years of this Court's precedent regarding such laws might well assume that such a scheme is lawless-a violation of due process. . . . I am skeptical that this historical practice is capable of sustaining, as a constitutional matter, the contours of modern practice."

[43] Nelson, 137 S. Ct. at 1256 & note 9 (internal citations and quotation marks omitted).

person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions."[44] "To get their money back, defendants should not be saddled with any proof burden. Instead, . . . they are entitled to be presumed innocent."[45]

The precise meaning of the presumption of innocence, though, is a bit more slippery than one might think. It is not, for instance, a true "presumption" at all, as that term is ordinarily used in the law. A true presumption is *evidentiary* in nature, a "rule affecting the finder of fact, under [which], if a basic fact (Fact A) is established, then the fact-finder must accept that the presumed fact (Fact B) has also been established."[46]

But the presumption of innocence does not operate this way. It *doesn't* have an evidentiary function, mandating a progression from proven fact to presumed fact. As the Court put it in *Taylor v. Kentucky*:

> It is now generally recognized that the "presumption of innocence" is an inaccurate, shorthand description of the right of the accused to "remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; *i.e.*, to say in this case, as in any other, that the opponent of a claim or charge is presumed not to be guilty is to say in another form that the proponent of the claim or charge must evidence it." The principal inaccuracy is the fact that it is not technically a "presumption"—a mandatory inference drawn from a fact in evidence. Instead, it is better characterized as an "assumption" that is indulged in the absence of contrary evidence.[47]

[44] *Id*. at 1251 (emphasis in original).

[45] *Id.* at 1257.

[46] Weinstein's Federal Evidence § 301.02; accord, Lafave & Scott, Criminal Law § 8 (1972) (A presumption is generally used to describe the situation in which "a party having the burden of producing evidence of fact A, introduces proof of fact B," which proof then permits the jury to presume or infer the existence of fact A); Dean McCormick, Law of Evidence § 342 (2d ed., Edward Cleary, ed., 1972) (A presumption is generally used to describe the situation in which "a party having the burden of producing evidence of fact A, introduces proof of fact B," which allows the jury to presume or infer the existence of fact A; a presumption "in the legal sense" builds on this rudimentary concept by shifting the burden of producing evidence, as well as the burden of persuasion, on the question to the adversary.).

[47] Taylor v. Kentucky, 436 U.S. at 483 n. 12 (internal citations omitted). The Court's early confusion over the meaning of the presumption illustrates how slippery this concept can be. When it first recognized the constitutional status of the presumption,

The presumption of innocence, in other words, does *not* mandate, in the manner of a true presumption, that the fact-finder draw a *factual* inference—that is, that the defendant is *innocent in fact*—from the government's failure to produce contrary evidence. If anything, it is a kind of *anti*-presumption, *forbidding* the fact-finder from making certain inferences: for instance, inferring that the defendant performed the acts constituting the crime from any facts that are not introduced into evidence at trial, or simply from the defendant's having been arrested, detained, and charged with the commission of a crime.[48]

The so-called presumption of innocence is better characterized as an *assumption* of a defendant's legal innocence,[49] applied prophylactically in criminal proceedings because, in what is perhaps Blackstone's most famous maxim, "the law holds that it is better that ten guilty persons escape than that one innocent suffer."[50] It operates

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the Court viewed the presumption of innocence as "an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created." Coffin v. United States, 156 U.S. 432, 459 (1895). The *Coffin* formulation was the subject of scathing criticism from Professor James Bradley Thayer, the dean of U.S. evidence scholars at the time. See James Thayer, The Presumption of Innocence in Criminal Cases, 6 Yale L. J. 185 (1897), and James Thayer, A Preliminary Treatise on Evidence at the Common Law (1898). As the Court itself subsequently acknowledged, Thayer "ably demonstrated the error" the *Coffin* Court had made, "pointing out that the so-called 'presumption' is not evidence—not even an inference drawn from a fact in evidence—but instead is a way of describing the prosecution's duty both to produce evidence of guilt and to convince the jury beyond a reasonable doubt." Taylor, 436 U.S. at 483 n.12. A mere two years later, the Court retreated from its position that the presumption of innocence has an evidentiary function for the fact-finder. See Agnew v. United States, 165 U.S. 36, 51–52 (1897). See also, generally, William F. Fox, Jr., The 'Presumption of Innocence' as Constitutional Doctrine, 28 Cath. U. L. Rev 253 (1979).

[48] See Thayer, The Presumption of Innocence in Criminal Cases, *supra* note 47, at 188–89.

[49] A Mississippi case cited with approval by the Court in Taylor v. Kentucky—Carr v. State, 192 Miss. 152, 156 (1941)—was apparently among the first to use the phrase "the *assumption* of innocence" rather than the usual (though technically incorrect) "presumption." The Model Penal Code, promulgated in final form in 1962, also changes the crucial term from "presumption" to "assumption": "In the absence of such proof [beyond a reasonable doubt], the innocence of the defendant is assumed." Model Penal Code § 1.12(1) (1962). See also Fox, *supra* note 47, at 261 (noting that the Supreme Court "has long recognized that the presumption of innocence does not work as a true presumption").

[50] 4 William Blackstone, Commentaries, 358 (1765).

by allocating the burden of persuasion in criminal trials, requiring the government to bear the burden of proof with respect to each and every element of the charged offense; it "describes [a criminal defendant's] right to do nothing until the prosecution has met its burdens of production and persuasion":[51]

> [T]he general rule of our jurisprudence is, that the party accused need not establish his innocence; but it is for the government itself to prove his guilt before it is entitled to a verdict or conviction.[52]

And on "grounds of fairness and abundant caution," this presumption of innocence is "coupled with a separate special rule as to the *weight* of evidence necessary to make out guilt"[53]—the requirement of proof "beyond a reasonable doubt." It was, in Professor Thayer's words, "summed up and neatly put"[54] by Chief Justice Lemuel Shaw in an 1850 Massachusetts case:

> The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal.[55]

But all that leaves us with a question: Why is it being invoked *here*? Shannon Nelson—in *this* case—is not a criminal defendant, and she is no longer on trial. She was a criminal defendant, of course, twice. But there is no suggestion that in those trials she received anything

[51] Fox, The 'Presumption of Innocence' as Constitutional Doctrine, *supra* note 47, at 255 n. 8.

[52] U.S. v. Gooding, 12 Wheat. 460 (1827) (Story, J.).

[53] Thayer, The Presumption of Innocence in Criminal Cases, *supra* note 47, at 196 (emphasis added). See also *id.*, at 201-02 ("It seems to be true that the presumption of innocence, as applied in criminal cases, is a form of expression which requires to be supplemented by the rule as to the weight of evidence; that it is merely one form of phrase for what is included in the statement that an accused person is not to be prejudiced at his trial by having been charged with crime and held in custody, or by any mere suspicions, however grave; but is only to be held guilty when the government has established his guilt by legal evidence and beyond all reasonable doubt.").

[54] *Id.* at 196.

[55] Commonwealth v. Webster, 59 Mass. 295, 320 (1850).

less than the full protection of the "presumption of innocence"; in those trials, the burden had been correctly placed on the prosecutor to prove her guilt beyond a reasonable doubt. It's true that Colorado then placed the burden on *her* to prove her innocence in an Exoneration Act action; but that's a *civil* action in which she was the plaintiff, occurring after all criminal proceedings against her had been completed.[56] So why does due process require that she be permitted to invoke her "presumption of innocence" in a case where she is a claimant in a civil action against the state? If the presumption of innocence does no more than prescribe the burden of proof in a criminal proceeding, what relevance does it have for the case at hand?

Colorado pressed this very argument before the Court:

> The presumption of innocence applies only at criminal trials, not at hearings to establish compensation for defendants whose convictions have been overturned. *See Bell v. Wolfish*, 441 U.S. 520, 534 (1979) ("The presumption of innocence is a doctrine that allocates the burden of proof in criminal *trials*.").[57]

And Justice Alito's concurring opinion noted the apparent contradiction: the majority opinion "relies on a feature of the *criminal* law, the presumption of innocence," in holding that Nelson's payments must be refunded, while simultaneously denying that the case is "part of [Colorado's] *criminal* process" for purposes of determining the proper due process framework to apply.[58]

[56] See Nelson, 137 S. Ct. at 1255 (this case "concern[s] the continuing deprivation of property after a conviction has been reversed or vacated, with no prospect of reprosecution . . . [and] no further criminal process is implicated.").

[57] Nelson v. Colorado Brief for Respondent, Nelson v. Colorado, No. 15-1256, at 40 n. 19 (Dec. 14, 2016) (emphasis added), http://www.scotusblog.com/wp-content/uploads/2016/12/15-1256-respondent-merits-brief.pdf. The Court rejected Colorado's argument in these words:

> 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; see *id*., at 535-540. *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."

Nelson, 137 S. Ct. at 1255 n.8.

[58] *Id*. at 1258 (Alito, J. concurring). Justice Alito, recall, see *supra* note 20, would have applied the more deferential *Medina* standard—in which due process requires only

That the Court rejected the argument, and denied the apparent contradiction, may prove significant in the civil forfeiture context if not elsewhere. The "presumption of innocence" to which the Court is referring—the one that was "restored" to Ms. Nelson after her prior conviction was overturned[59]—must encompass something more than the allocation of the burden of proof to the government in a criminal trial, because there is no longer any criminal trial on the horizon.

This has long been a secondary thread in "presumption of innocence" doctrine: the presumption encapsulates not just the requirement that the government prove guilt beyond a reasonable doubt in criminal trials, but more broadly it "describes our assumption that, in the absence of contrary facts, it is to be assumed that any person's conduct upon a given occasion was lawful."[60] Or, in the words of what was apparently the first colonial court to invoke the "presumption of innocence," in 1657, "in the eyes of the law everyone is honest and innocent unless it be proved legally to the contrary."[61] As Thayer put it:

> All who are brought before the tribunal "are taken, *prima facie, i.e.*, in the absence of evidence to the contrary, to be good, honest, free from blame, presumed to do their duty in every situation in life[,] so that no one need go forward, whether in pleading or proof, to show as regards himself or another, that the fact is so, but every one shall have it presumed in his favor.[62]

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that Colorado not "offend a fundamental and deeply rooted principle of justice," because *Nelson* involved Colorado's "criminal process."

[59] Nelson, 137 S. Ct. at 1255 ("[O]nce those convictions were erased, the presumption of their innocence was restored.") (citing Johnson v. Mississippi, 486 U.S. 578, 585 (1988)).

[60] McCormick, Law of Evidence § 342.

[61] 16 Records of Massachusetts, III., 434, cited in Thayer, *supra* note 48, at 189.

[62] Thayer, The Presumption of Innocence, *supra* note 47, at 189. See also Jeffrey Thaler, Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial, 1978 Wis. L. Rev. 441, 460 (1978) (quoting Thomas Starkie's influential 1832 treatise on the law of evidence for the principle that "the law always presumes in favour of innocence, as that a man's character is good until the contrary appear, or that he is innocent of an offense imputed to him till his guilt be proved)" The amicus brief submitted by the National Association of Criminal Defense Lawyers on behalf of Petitioners in the *Nelson* case has an extensive discussion of the historical precedents for this broader meaning of the "presumption of innocence."

This somewhat broader "presumption of innocence"—a "general rule of policy and sense" that *all persons* shall be assumed, in the absence of evidence, to be "good, honest, and free from blame"—is applicable in civil as well as criminal proceedings. It is related to the notion invoked by the American colonists in their anger over the Sugar and Stamp Acts of 1764–65,[63] and it runs, Thayer notes, "through all the law."[64] If the Court is signaling here that it is prepared to recognize this broader meaning, this may give the "presumption of innocence" a new and important role in the civil forfeiture arena.

V. Justice Thomas's Dissent

Finally, a word about Justice Thomas's dissenting opinion. He begins with the uncontroversial assertion that to prevail on her due process claim, Nelson "must first point to a recognized property interest in that money, under state or federal law"; you can't, in other words, be "deprive[d] . . . of . . . property without due process of law" unless that of which you have been deprived is *your* property—*that is*, unless you can show some "substantive entitlement" to it.[65] Conversely, if Nelson "do[es] *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."[66]

And in this case, he goes on to say, the money Nelson seeks does indeed belong to the state. She does not have any substantive right, under state or federal law, to those funds—not anymore. The Colorado Supreme Court held, in the decision here under review, that

[63] "Taxation without representation" was the primary, but not the only, source of colonial anger against the two statutes. The "most onerous provisions of the [acts]" provided that merchants whose vessels were seized for alleged customs violations "bore the burden of proving that they were *not* involved in smuggling," which was "a constant source of irritation to the American colonists." Matthew P. Harrington, The Legacy of the Colonial Vice-Admiralty Courts (Part II), 27 J. Maritime L. & Comm. 323, 332–36 (1996) (emphasis added). See generally David S. Lovejoy, Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764–1776, 16 Wm. & Mary Quarterly, 459 (1959); Carl Ubbelohde, The Vice-Admiralty Courts and the American Revolution, 126-42, 154–58 (1960).

[64] Thayer, The Presumption of Innocence, *supra* note 47, at 189.

[65] Nelson, 137 S. Ct. at 1264 (Thomas, J., dissenting).

[66] *Id.* at 1263 (emphasis added) (internal quotation marks omitted).

"moneys lawfully exacted pursuant to a valid conviction become public funds . . . under Colorado law."[67]

The money that Nelson seeks, in other words, is not "her money" at all; it is Colorado's. It used to be "her money," and, when it was, the state could not deprive her of it without providing her with due process. It had done so—in her original criminal trial, where she received the full panoply of due process protections (trial by jury, proof beyond a reasonable doubt, etc.) before fees and costs were imposed on her. And once the money had been "lawfully exacted pursuant to a valid conviction,"[68] state law decreed that it became the state's money. Colorado could, if it chose, provide her with a mechanism to obtain reimbursement (as it had done in the Exoneration Act), but the Due Process Clause did not require it to do so.[69] Nor did the Due Process Clause limit the conditions—such as proof of actual innocence—it could place on receipt of those funds.

I admit that I initially found Justice Thomas's position here difficult to understand, or to square with his views as something of a civil-forfeiture hawk.[70] As I wrote shortly after the opinion was handed down:

> [It's] enough to send chills down the spine of any right-thinking libertarian out there, I would think. The state gets to define the conditions under which it can turn *your* property into *its* property; then, if you want to get it back (because you don't in fact fulfill the conditions that they set), the state doesn't have to prove that the seizure was lawful; you have the burden of proving (by clear and convincing evidence) that it was not!
>
> It's another way of saying: Once the state takes your money and calls it its own, we presume that it had a good reason for

[67] *Id.* at 1264.

[68] *Id.*

[69] *Id.* at 1266 ("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 is therefore not required to provide *any process at all* for the return of that money") (emphasis added).

[70] See *supra*, text accompanying notes 38–42.

> doing so, and we'll give it back to you only if you prove that it didn't have a good reason for doing so.[71]

That may have been overstating the case, and I now see that Justice Thomas's position has a logic, and even a certain elegance, to it. Where, after all, *does* Nelson's right to this money come from?

I think the answer to that question is this: from the "presumption of innocence," broadly conceived. The majority opinion says as much, albeit somewhat obliquely. Colorado may declare, as the dissent puts it, that "'moneys lawfully exacted pursuant to a valid conviction become public funds.'"[72] But "the convictions pursuant to which the State took petitioners' money were *invalid*, hence the State had no legal right to retain their money."[73] As the Court described:

> Colorado urges . . . that the funds belong to the State because [Nelson's] convictions were in place when the funds were taken. . . . *But once those convictions were erased, the presumption of their innocence was restored.* See, *e.g.*, *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988) (After a "conviction has been reversed, unless and until [the defendant] should be retried, he must be presumed innocent of that charge."). . . . Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions.")[74]

The Court noted that

> under the Due Process Clause, [an individual] who has not been adjudged guilty of any crime may not be punished.[75]

[71] David Post, Whose Money Is It? Clarence Thomas and the Due Process Clause, Volokh Conspiracy, Wash. Post, Apr. 21, 2017, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/21/whose-money-is-it-clarence-thomas-and-the-due-process-clause.

[72] Nelson, 137 S. Ct. at 1256 n. 11.

[73] *Id.*

[74] *Id.* at 1255–56 (emphasis added).

[75] *Id.* at 1255 n.8. See also Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., 249 U.S. 134, 145 (1919) ("[A] party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby. This right, so well founded in equity, has been recognized in the practice of the courts of common law from an early period.").

As Justice Hood noted in his state-court dissent, "an invalid conviction is no conviction at all."[76] Colorado law must recognize, to the extent possible, that Nelson's conviction never happened, and that, once her convictions have been voided, she now stands, like any other citizen, before the tribunal as one who is "good, honest, and free from blame."[77] Colorado may not constitutionally declare that the funds Nelson paid owing to an *invalid* conviction belong to the state, because the "presumption of innocence" requires restoring her, to the extent possible, to the position she was in prior to her conviction, with all her rights, including her property rights, intact.

Conclusion

Nelson v. Colorado is in some ways a very small case, although I'm not sure I'd go quite as far as the commenter to one of my blog postings about the case, who wrote: "It took seven Supreme Court Judges (and how many lower court judges, and lawyers?) to conclude what is readily apparent to anyone with an ounce of common sense?" As I mentioned earlier, no state imposes as high a burden as Colorado did here on persons seeking a return of property that was taken from them as a consequence of a criminal conviction subsequently invalidated. So striking down Colorado's perhaps inadvertent attempt to do so will have little direct impact on the American legal ecosystem.

But at the same time, a small but not trivial number of people—several hundred, at least—have their criminal convictions overturned nationwide each year.[78] The decision may prove important to them, to the extent that it prohibits states from imposing "anything more than minimal procedures" on the return of their property.[79]

[76] Nelson, 362 P. 3d, at 1080 (Hood, J., dissenting).

[77] See *supra,* text accompanying notes 60–64.

[78] This is not intended as anything other than a very rough estimate. I'm not aware of authoritative statistics on the question; my guess is based on extrapolating from two studies, one in California and one in Colorado, showing an average of around 50 and 30 overturned convictions, respectively, in the two states. See The Chief Justice Earl Warren Institute on Law and Social Policy, Berkeley School of Law, Criminal Injustice: A Cost Analysis of Wrongful Convictions, Errors, and Failed Prosecutions in California's Criminal Justice System (2015), http://tinyurl.com/y9loqt8a. (California); Amicus Brief on Colorado Criminal Defense Bar In Support of Petition for a Writ of Certiorari, Nelson v. Colorado, No. 15-1256 (Jun. 10, 2016), http://www.scotusblog.com/wp-content/uploads/2016/06/CCDB-Amicus-Nelson.pdf (Colorado).

[79] Nelson, 137 S. Ct. at 1258.

Beyond that important, but relatively narrow, compass, if the decision presages a Supreme Court, or lower courts, more disposed to recognize a somewhat stronger, more muscular "presumption of innocence" outside the confines of the criminal process, that could have substantial consequences indeed for the law. For that, only time will tell.