18-8431

No. 19-

In the

Supreme Court of the United States

David K. Brewster

Petitioner,

v.

Florida,

Respondent.

On Petition for a Writ of Certiorari
to the Florida Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Nelson v. Colorado, 581 U.S.___, 137 S. Ct. 1249 (2017) tore down the wall Colorado had built to prevent persons from receiving their valid returns of funds paid in connection with crimes of which they were found not guilty. Florida has built the same wall by requiring persons who have been found not guilty by a court of competent jurisdiction to again prove their innocence in a second burdensome judicial proceeding to obtain a refund of restitution and costs paid and obtain compensation for illegal incarceration. This requirement of Victims of Wrongful Incarceration Compensation Act, §961.03, Fla. Stat., is inconsistent with due process as held in *Nelson*, and the equal protection clause of the Fourteenth Amendment mandates *Nelson* be applied to Florida because persons in Florida are entitled to the same due process rights as persons in Colorado under the U.S. Constitution. Neither Florida, nor any state can enforce laws that hinder the privileges of its citizens.

The Question Presented is whether *because Nelson* is the law of the land must it not be enforced to ensure the due process rights of the citizens of Florida by holding Victims of Wrongful Incarceration Compensation Act, §961.03, Fla. Stat. unconstitutional.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David K. Brewster respectfully petitions for a writ of certiorari to review the judgment of The Supreme Court of Florida.

OPINIONS BELOW

The opinion of the District Court Of Appeal Of The State Of Florida Fourth District in *Brewster v. State* is reported at 250 So.3d 99 (Fla. 4th DCA 2018) and is reproduced in its entirety in Appendix A herein. App. 1a. District Court Of Appeal Of The State Of Florida Fourth District Order (April 5, 2018) *Brewster v. State, Per Curiam Affirmed,* has not been published but is reproduced in its entirety in Appendix B herein. App. 5a. Trial court order *Florida v. Brewster* (June 20, 2017) has not been published but is reproduced in its entirety in Appendix C herein. App. 6a. Trial court order *Florida v. Brewster* (June 16, 2017) has not been published but is reproduced in its entirety in Appendix D herein. App. 7a-App. 8a. The order of the Florida Supreme Court has not been published but is reproduced in its entirety in Appendix E herein. App.9a.

JURISDICTION

The judgment of The Florida Supreme Court was entered on December 17, 2018 and no rehearing is entertained by that court. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "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."

STATEMENT

Nelson v. Colorado, 581 U.S.___, 137 S. Ct. 1249 (2017) tore down the wall Colorado had built to prevent persons from receiving valid returns of restitution, fines and costs paid in connection with crimes of which they were found not guilty. Florida has built the same wall. In Florida the only way a person can obtain a refund of his or her restitution, fines and costs paid and receive compensation for his or her wrongful incarceration after being

found not guilty of a crime is by complying with Victims of Wrongful Incarceration Compensation Act, §961.03, Fla. Stat. The relief in Florida under this statute requires the person to prove to another court "...that verifiable and substantial evidence of actual innocence exists..." by a judicial procedure with a number of burdensome requirements. Victims of Wrongful Incarceration Compensation Act, §961.03, Fla. Stat., states:

> **961.03 Determination of status as a wrongfully incarcerated person; determination of eligibility for compensation.—**
>
> (1)(a) In order to meet the definition of a "wrongfully incarcerated person" and "eligible for compensation," upon entry of an order, based upon exonerating evidence, vacating a conviction and sentence, a person must set forth the claim of wrongful incarceration under oath and with particularity by filing a petition with the original sentencing court, with a copy of the petition and proper notice to the prosecuting authority in the underlying felony for which the person was incarcerated. At a minimum, the petition must:
>
> 1. State that verifiable and substantial evidence of actual innocence exists and state with particularity the nature and significance of the verifiable and substantial evidence of actual innocence; and
>
> 2. State that the person is not disqualified, under the provisions of s. 961.04, from seeking compensation under this act.
>
> (b) The person must file the petition with the court:
>
> 1. Within 90 days after the order vacating a conviction and sentence becomes final if the person's conviction and sentence is vacated on or after July 1, 2008.
>
> 2. By July 1, 2010, if the person's conviction and sentence was vacated by an order that became final prior to July 1, 2008.
>
> (2) The prosecuting authority must respond to the petition within 30 days. The prosecuting authority may respond:
>
> (a) By certifying to the court that, based upon the petition and verifiable and substantial evidence of actual innocence, no further criminal proceedings in the case at bar can or will be initiated by the prosecuting authority, that no questions of fact remain as to the petitioner's wrongful incarceration, and that the

petitioner is not ineligible from seeking compensation under the provisions of s. 961.04; or

(b) By contesting the nature, significance, or effect of the evidence of actual innocence, the facts related to the petitioner's alleged wrongful incarceration, or whether the petitioner is ineligible from seeking compensation under the provisions of s. 961.04.

(3) If the prosecuting authority responds as set forth in paragraph (2)(a), the original sentencing court, based upon the evidence of actual innocence, the prosecuting authority's certification, and upon the court's finding that the petitioner has presented clear and convincing evidence that the petitioner committed neither the act nor the offense that served as the basis for the conviction and incarceration, and that the petitioner did not aid, abet, or act as an accomplice to a person who committed the act or offense, shall certify to the department that the petitioner is a wrongfully incarcerated person as defined by this act. Based upon the prosecuting authority's certification, the court shall also certify to the department that the petitioner is eligible for compensation under the provisions of s. 961.04.

In other words, the person must, through a complex procedure, again prove his innocence which had previously been determined by a court of competent jurisdiction. The statute appears to be designed to be daunting especially to the untrained or inexperienced to prevent persons from even trying to comply with it. To comply with the statute in the instant case after the finding of not guilty by the granting of a habeas corpus petition by a federal district court, and having to again prove innocence in state court is not only burdensome but an abasement of the federal court. This requirement of having to prove his or her innocence a second time is the same requirement which was found in *Nelson* to be a violation of the due process clause of the Fourteenth Amendment. The application

of this holding to the Victims of Wrongful Incarceration Compensation Act is required under the Fourteenth Amendment's equal protection clause. Therefore, the requirements of Florida's statute is inconsistent with the due process and equal protection clauses of the Fourteenth Amendment.

1. After a jury trial in the Circuit Court of the Nineteenth Judicial Circuit in and for Indian River County, Florida the petitioner was found guilty of bank fraud under §655.0322(6), Fla. Stat. At sentencing he was sentenced to seven years in prison and three years probation, and, at the urging of the public defender, he also pleaded guilty to two unrelated charges and was sentenced on those charges to time served and three years probation.

2. Brewster appealed his conviction and sentence as to the bank fraud statute to the District Court of Appeal of the State of Florida Fourth District which appeal was dismissed *Per Curiam Affirmed* in Case No. 4D05-966 in June, 2006. Brewster then filed a Florida Criminal Rule 3.850 action which was denied. Brewster filed another Rule 3.850 action which was denied and appealed to the District Court of Appeal of the State of Florida Fourth District, Case No. 4D08-4690. Brewster then filed

a federal petition for habeas corpus under 28 U.S.C. §2254 which resulted in *Brewster v. McNeil*, 720 F. Supp. 2d 1369 (S.D. Fla. 2009) issued on June 12,2009, finding Brewster not guilty of the crime and vacating his conviction, judgment and sentence and ordering his immediate release. Ten days later subsequent to, and as a result of, *Brewster v. McNeil*, the Florida District Court of Appeal for the Fourth District entered its order of June 22, 2009 in Case No. 4D08-4690 citing it as a case of "manifest injustice," and subsequently found the case was moot as a result of the federal court order.[1] Shortly thereafter, Brewster attempted unsuccessfully to regain restitution, costs and fines paid and obtain damages for his illegal detention and false incarceration for a crime of which he had been found not guilty.

3. *Brewster v. McNeil* finding the petitioner not guilty of the crime and vacating his conviction, judgment and sentence and ordering his immediate release was issued on June 12, 2009 and electronically communicated to the Attorney General of the State of Florida, hereinafter sometimes referred to as "AG," on June 12, 2009. Despite the federal District Court ordering petitioner's immediate release petitioner

[1] The 4thDCA tried to jump on the train after it had left the station.

was not released from the custody of the Department of Corrections of the State of Florida, hereinafter sometimes referred to as "DOC," at Zephyrhills Correctional Institution, Zephyrhills, Florida where he was an inmate until three (3) days later on June 15, 2009. This violation of the District Court's order constituted an illegal detention of petitioner and false imprisonment. AG had a duty to see that the federal court's order was carried out.[2] AG's failure to immediately communicate the federal court's order to DOC which resulted in petitioner being illegally detained and falsely imprisoned for three (3) days constitutes at the least negligence. As a result of the violations of the District Court's order and the duty of the State of Florida, hereinafter sometimes referred to as "State," to petitioner, petitioner is entitled to monetary compensation.[3] Petitioner should be compensated in the amount of five hundred dollars ($500.00) per day, a total of fifteen hundred dollars ($1500.00) for his

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[2] **Section 787.02, Fla. Stat. "False imprisonment" provides:

(1)(a) The term "false imprisonment" means forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against her or his will.

2) A person who commits the offense of false imprisonment is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. See also Chapter 772, Florida Statutes for analogous civil liability.

[3] "The attorney general shall be the chief state legal officer." Art. IV, § 4(b) AG "Shall perform the duties prescribed by the Constitution of this state and also perform such other duties appropriate to his or her office as may from time to time be required of the Attorney General by law or by resolution of the Legislature." §16.01(2), Fla. Stat.

illegal detention and false imprisonment in violation of Section 787.02, Fla. Stat.

4. The lower court case which was vacated by the Federal Court order was Case No. 312002CF1339A in the Circuit Court of the Nineteenth Judicial Circuit in and for Indian River County, Florida (hereinafter sometimes referred to as "Case A.") Since the conviction, judgment and sentence in Case A were vacated the restitution in Case A was thus vacated *ab initio.* [4] This restitution should have been voided immediately without further proceedings.

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[4] "Where a judgment is vacated or set aside **it is as though no judgment had ever been entered.** See *Shields v. Flinn*, 528 So.2d 967, 968 (Fla 3d DCA 1988)." *E.I. DuPont De Nemours v. Native Hammock,* 698 So.2d 267, 270 (Fla 3d DCA 1997). (Emphasis added.) The quote is identical to the language in *Shields, supra* at 968.

To vacate a judgment is to nullify or cancel it. *People v. Eidel*, 745 N.E.2d 736 (Ill. App. 2001) To vacate a judgment is to render it void. *Walter v. Gunter,* 788 A.2d 609 (Md. 2002) Vacate means to annul, set aside, to render an act void. *Matter of Meekins*, 544 P.2d 872 (Okla. App. 1976) The word vacate as applied to a judgment means to render the order void or a nullity. *Young v. State ex rel Dept. of Human Services*, 119 P.2d 1279 (Okla. App. 2005) A nullity in law is a void act, having no legal force or validity, invalid, null. *Bowles v. Indianapolis Rys.*, 64 F. Supp. 865, aff'd 154 F.2d 218 (S.D. Ind. 1946) The Oxford English Dictionary, Second Edition, defines a "nullity" as "the fact of being legally null and void;" "vacate" as "annulled, made legally void;" "to make void in law, to deprive of legal authority or validity; to annul or cancel;" "annul" as "to reduce to nothing, annihilate, put out of existence, extinguish;" "to destroy the force or validity of; to render void in law, declare invalid or of none effect." Universally, to vacate a judgment is to render it legally void, a nullity, as though it had never happened; thus, anything springing from it is also legally void, a nullity, *ab initio.* In the instant case Case No. 2002CF1339A is a nullity, as if it never happened and anything springing from it is as well a nullity, as if it never happened.

In Cases No. 312002CF720A, 312002CF001483A in the Circuit Court of the Nineteenth Judicial Circuit in and for Indian River County Florida (hereinafter sometimes collectively referred to as "Case B") restitution in Case A was tied to Case B at sentencing in Case B.

When the Federal Court vacated petitioner's conviction, judgment and sentence in Case A the restitution in that case even though part of the sentence in Case B was void *ab initio.* (see Florida caselaw, i*nfra.*) Despite the Florida caselaw, *infra,* petitioner paid the restitution in Case A on September 28, 2009 since both DOC and AG refused to vacate the restitution. This payment constitutes money paid to a government authority by mistake. (See § 95.11(m), Fla. Stat.), and petitioner was and is entitled to recoup this money, an amount of $3,693.45. "In *Rodriguez* this court held, *inter alia,* that a condition of probation is invalid if it: (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. 378 So.2d at 9." *Hussey v. State*, 504 So.2d 796, 797 (Fla. 2d DCA 1987) The Florida Supreme Court later repeated this principle: "...we believe that a condition is invalid if it (1) has no relationship to the crime of which the

offender was convicted, (2) relates to conduct which is not in itself criminal..." *Biller v. State*, 618 So.2d 734, 734 (Fla. 1993), also *Epperson v. State,* 955 So.2d 642 (Fla.4th Dist. 2007), *Balkarin v. State*, 950 So.2d 478 (Fla. 4th DCA 2007), *Trent v. State*, 770 So.2d 1272 (Fla. 4th DCA 2000), *Cole v. State*, 521 So.2d 297 (Fla. 1st DCA 1988). Here the restitution concerning Case A in Case B had no relationship to the crimes in Case B, and does not relate to conduct which is in itself criminal since petitioner was found not guilty and the conviction, judgment and sentence were vacated by the Federal Court in Case A, and thus, were void, *ab initio*, (see above) and the restitution has no relation to future criminality or rehabilitation.

5. Despite the state of Florida previously refusing to refund the restitution and costs paid and to compensate the petitioner for his illegal incarceration, when this Court handed down *Nelson* the petitioner filed a complaint based on *Nelson* in the Circuit Court of the Nineteenth Judicial Circuit in and for Indian River County Florida for refund of the restitution and compensation for his illegal detention and illegal imprisonment. The Circuit Court of the State of Florida in and for Indian River County Florida dismissed petitioner's case stating in relevant part:

"This case before the court in chambers on the Defendant's pro se motion filed on June 14, 2017. The court finds that the Defendant seeks damages pursuant to *Nelson v. Colorado*, 137 S. Ct. 1249 (2017) (sic) for his illegal detention and false imprisonment, for return of fees, court costs, and restitution in these cases for convictions and sentences that were vacated on June 12, 2009. The court finds the motion untimely filed pursuant to Florida Statutes, section 961.03 (sic); where *Nelson v. Colorado* has not been held by the United States Supreme Court to apply retroactively to these Florida cases. Therefore, it is ORDERED AND ADJUDGED that the Defendant's motion is dismissed." App. 7a-8a.

This order was filled with errors. It is hard to understand exactly why the lower court denied the motion except that it wanted to kick the case upstairs. The court cobbled together an order the exact bases of which are difficult to parse since the lower court's order is circularly illogical and errs in several respects. The order states in relevant part: "The court finds the motion untimely filed pursuant to Florida Statutes, section 961.03 (sic) where *Nelson v. Colorado* has not been held by the United States Supreme Court or the Florida Supreme Court to apply retroactively to these Florida cases." App. 7a. It erred because it not only

misstated the motion and is twisted logic but then apparently denied the motion on the basis of retroactivity. The motion was not "filed pursuant to Florida Statutes, section 961.03 (sic)," but was filed precisely because *Nelson* found such an exoneration statute unconstitutional in Colorado and the petitioner was attacking the Florida statute on that basis. To state that the motion is based on a statute it is attacking is circular illogic. The Florida statute has the same flaws in relevant part as the unconstitutional Colorado statute and is, thus, also unconstitutional in violation of due process. To deny the motion based on a statute which is unconstitutional is error.

It is error also to deny the motion because the United States Supreme Court and the Florida Supreme Court had not ruled on retroactivity in regard to *Nelson*. The courts have struggled with retroactivity distinguishing between procedure and substance with mixed results, while *Linkletter v. Walker*, 381 U.S. 618 (1965) seemed to state there is no presumption that caselaw does not apply retroactively. *Montgomery v. Louisiana*, 577 U.S. ___,136 S. Ct. 718 729 (2016) again tried to clarify the issue of retroactivity: "The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the

Constitution requires state collateral review courts to give retroactive effect to that rule." The right of due process on which *Nelson* turns is a constitutional right and is substantive not procedural and should be applied retroactively. In any event a reading of *Nelson* reveals retroactivity is irrelevant because the holding in *Nelson* is intended to apply universally to, and allow recovery in, cases that had already been decided as had the Colorado cases and the instant case. *Nelson* only makes sense viewed as this Court opening the door to all these claims and the equal protection clause mandates such here. In the instant case retroactivity is a red herring.

6. Brewster filed a motion for rehearing which was also denied. App. 6a .

7. Brewster then appealed to the District Court of Appeal of Florida Fourth which was denied *Per Curiam Affirmed.* App 5a. Brewster then filed a motion for rehearing asking the court to issue an opinion so that Brewster could appeal to the Florida Supreme Court. The court then issued *Brewster v. State*, 250 So.3d 99 (Fla. 4th DCA 2018) affirming the trial court decision. App. 1a-4a.

Brewster v. State, 250 So.3d 99 (Fla. 4th DCA 2018), in addition to proposing the same retroactivity red herring as the trial court, erred in failing to focus on petitioner's attack on the, Victims of Wrongful Incarceration Compensation Act, §961.03, Fla. Stat., stating "...appellant filed his petition under section 961.03..." ignoring that the petitioner importantly did not rely on the Victims of Wrongful Incarceration Compensation Act, as the opinion indicates, but, quite the opposite, attacked it as unconstitutional under *Nelson*. App. 3a. The opinion also made other serious misstatements of facts. The court states that the petitioner "...entered into a plea agreement with the State on all three charges..." App. 3a. The petitioner did not enter into a plea agreement in case no. 02-1339 but went to trial and was convicted after trial. [See Record p. 555 and *Brewster v. McNeil*, 720 F. Supp. 2d 1369, 1370 (S.D. Fla. 2009) "I. BACKGROUND"] The court also states: "Appellant sought the return of the restitution amounts paid in 02-720 and 02- 1339." App. 3a. The petitioner only sought the restitution paid in connection with 02-1339. [See p. 2 of appellant' reply brief and *Brewster v. McNeil*, 720 F. Supp. 2d 1369, 1370 (S.D. Fla. 2009) "I.

BACKGROUND"] These errors go to the very bases of the opinion and undermine and nullify its conclusions. [5]

The Victims of Wrongful Incarceration Compensation Act, requires a person wrongly incarcerated who has been found not guilty on appeal to again prove he is innocent in the manner set forth in §961.03(1)(a), Fla. Stat.: "...a person must set forth the claim of wrongful incarceration under oath and with particularity by filing a petition with the original sentencing court..." and "(s)tate that verifiable and substantial evidence of actual innocence exists and state with particularity the nature and significance of the verifiable and substantial evidence of actual innocence..." This is exactly the draconian type of requirement that *Nelson* struck down. Again, the scheme laid out in the Victims of Wrongful Incarceration Compensation Act purposely involves jumping through a number of hoops and seems designed not to be a viable path to compensation but to discourage persons from even seeking such compensation. This is what *Nelson* describes: "This scheme, we hold, offends the Fourteenth Amendment's guarantee of due process." *Nelson* at 1255. The *Nelson* holding, which applies in the instant case stated: "Under

[5] Perhaps these errors could be called "alternative facts."

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." *Nelson* at 1255. Just as the Colorado statute "does not comport with due process" the Florida statute "does not comport with due process."

8. Brewster filed an appeal to the Florida Supreme Court which that court treated as a "Notice - Discretionary Jurisdiction." Brewster filed a Brief on Jurisdiction but the Florida Supreme Court declined jurisdiction and denied review. App. 9a. The upshot of the Florida Supreme Court declining jurisdiction and denying review is that The Florida Supreme Court by ignoring, perhaps flaunting, the holding of the Supreme Court of the United States in *Nelson,* and not focusing on the substance of the unconstitutionality of the Victims of Wrongful Incarceration Compensation Act, not only denied Brewster's valid claim but also allows an unconstitutional and harsh impact on other persons in Florida. *Nelson* at 1258 states: "To comport with due process, a State may not impose anything more than minimal procedures on the refund or exactions

dependent upon a conviction subsequently invalidated." It does not take much more than a superficial review of the Victims of Wrongful Incarceration Compensation Act, to realize that it does not pass this test but on the other hand purposefully imposes burdensome procedures for refunds or compensation. These procedures are daunting to even the experienced and even more so to most of those to whom they apply and who in most cases are unexperienced and untrained and not prepared to navigate these procedures.

9. Brewster should be refunded restitution and costs paid of three thousand six hundred ninety-three dollars and forty-five cents ($3,693.45) and paid fifteen hundred dollars ($1500.00) for AG's negligence resulting in his false imprisonment for three days, and compensation for his illegal imprisonment for over four years at the rate of fifty thousand dollars ($50,000) per annum, or a total amount of two hundred one thousand six hundred sixty-seven dollars ($201,667).[6]

[6] State that have statutes concerning amounts of compensation generally pay such amounts, i.e. Colorado $70,000 per year; this is not dissimilar to other states, i.e. Alabama, Hawaii, Michigan $50,000. Such compensation has been upheld, i.e. Searcey v. Dean, Supreme Court of The United States, No. 18-648 denied petition of certiorari (March 4, 2019) letting stand a $28,100,000 judgment against County of Gage for compensation to respondents who had been proven not guilty. Brewster's claim pales in comparison.

REASONS FOR GRANTING THE WRIT

1. *Nelson v. Colorado*, 581 U.S.___, 137 S. Ct. 1249 (2017) tore down the wall Colorado had built to prevent persons from receiving their valid returns of funds paid for crimes of which they were found not guilty. Florida violates the Due Process Clause by requiring persons who have been found not guilty by a court of competent jurisdiction to again prove their innocence in a second burdensome judicial proceeding to obtain a refund of restitution and costs paid and obtain compensation for illegal incarceration in violation of *Nelson*. Victims of Wrongful Incarceration Compensation Act, §961.03, Fla. Stat. has the same fatal flaw as the Colorado statute and is unconstitutional as a violation of due process.

2. Florida improperly places the burden of proof on the defendants, who must again prove their innocence and who are in many cases inexperienced, untrained and not prepared to navigate the burdensome procedures of Victims of Wrongful Incarceration Compensation Act.

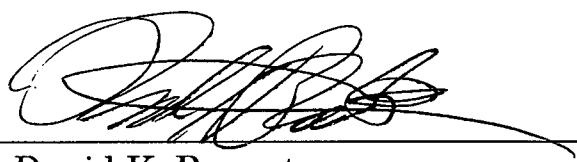
3. This case in accordance with *Nelson* clearly presents the fatal flaws of Victims of Wrongful Incarceration Compensation Act, §961.03, Fla. Stat., and demonstrates the errors of the Florida courts brushing aside Brewster's valid claim. Thus it is the ideal vehicle for addressing and

invalidating the statute as a violation of the due process clause of the Fourteenth Amendment to the United States Constitution, and the mandating of the application of the equal protection clause to the Florida statutory scheme.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



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