

No. _____

In The
Supreme Court of the United States

ELAINE DAVIS,

Petitioner;
versus

THE UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR A WRIT OF *CERTIORARI*

HERBERT V. LARSON, JR.
Louisiana Bar No. 8052
Counsel of Record
KELLY P. MITCHELL
Louisiana Bar No. 37807
700 Camp Street
New Orleans, Louisiana 70130
(504) 528-9500
hvl@hvllaw.com

Attorneys for Elaine Davis

January 28th, 2022

QUESTION PRESENTED FOR REVIEW¹

Davis's convictions for health care fraud and conspiracy to commit health care fraud (18 U.S.C § 1347) were reversed by the United States Court of Appeals for the Fifth Circuit, because of the insufficiency of the Government's evidence. Imprisoned during her appeal, she sought compensation under 28 U.S.C § 2513 (the "Unjust Conviction and Imprisonment" statute).

The Fifth Circuit rejected Davis's appeal of the denial of her claim, because she did not affirmatively show that she did not commit any of the acts charged, i.e., she was not "innocent," only "not guilty." This holding presents the following issue:

1. Whether 28 U.S.C. § 2513's requirement that a defendant acquitted because of insufficient evidence must affirmatively disprove the factual allegations of an indictment before obtaining compensation from the Government is contrary to the Due Process Clause of the Fifth Amendment, because it negates the presumption of innocence.

¹ The caption of the case contains the names of all the parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED CASES

United States v. Elaine Davis, Pramela Ganji, M.D. and Godwin Ogbuokiri, M.D., No. 15-cr-155, United States District Court for the Eastern District of Louisiana. Judgment entered December 7, 2016.

United States of America v. Pramela Ganji, M.D. and Elaine Davis, No. 16-31119, United States Court of Appeals for the Fifth Circuit. Judgment entered January 30, 2018.

United States v. Elaine Davis, No. 15-cr-155, United States District Court for the Eastern District of Louisiana. Judgment entered September 17, 2020.

United States v. Elaine Davis, No. 20-30593, United States Court of Appeals for the Fifth Circuit. Judgment entered on November 1, 2021.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF <i>CERTIORARI</i>	1
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
1. The unjust prosecution and conviction of Elaine Davis	4
2. Elaine Davis's appeal	5
3. Elaine Davis seeks compensation for her unjust prosecution and conviction	5
ARGUMENT AND REASONS FOR GRANTING THE WRIT	7
1. Introduction	7
2. The Fifth Circuit has interpreted an important federal statute in a way that conflicts with relevant decisions of this Court	9
CONCLUSION	15

TABLE OF CONTENTS – Continued

	Page
APPENDIX	
United States Court of Appeals for the Fifth Circuit, Opinion, November 1, 2021	App. 1
United States District Court for the Eastern District of Louisiana, Order, September 17, 2020	App. 8
United States District Court for the Eastern District of Louisiana, Report and Recommendation, November 7, 2018	App. 25

TABLE OF AUTHORITIES

	Page
CASES	
<i>Burks v. United States</i> , 437 U.S. 1 (1978)	12
<i>Nelson v. Colorado</i> , 137 S. Ct. 1249 (2017).....	<i>passim</i>
<i>Tibbs v. Florida</i> , 457 U.S. 31 (1982)	12
<i>United States v. Ganji</i> , 880 F.3d 760 (5th Cir. 2018)	5
<i>United States v. Graham</i> , 608 F.3d 164 (4th Cir. 2010)	8
<i>United States v. Keegan</i> , 71 F. Supp. 623 (S.D.N.Y. 1947)	9, 10, 11
STATUTES	
28 U.S.C. § 1254(1).....	2
28 U.S.C. § 1291	1
28 U.S.C. § 1495	3, 6
28 U.S.C. § 2513	2, 6
28 U.S.C. § 2513(b).....	1
OTHER AUTHORITIES	
“Compensating the Wrongfully Convicted,” IN- NOCENCE PROJECT, https://innocenceproject.org/compensating-wrongly-convicted/ , last vis- ited January 25, 2022	7

TABLE OF AUTHORITIES – Continued

	Page
Jeffrey S. Gutman, <i>An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted</i> , 82 Mo. L. Rev. 369 (Spring 2017)	8
Report No. 2299 of the House Judiciary Committee, 75th Congress, 3d Session.....	10, 11

PETITION FOR A WRIT OF *CERTIORARI*

Petitioner Elaine Davis respectfully petitions this Honorable Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals affirming the district court's denial of her petition for a Certificate of Innocence.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the district court is reported as *United States v. Davis*, 16 F.4th 1192 (5th Cir. 2021), and is attached at App.1-7. The opinion of the district court denying Davis's petition for a Certificate of Innocence is not reported, but is attached to this petition at App.8-24. The Report and Recommendation of the United States Magistrate Judge is not reported, but is attached to this petition at App.25-47.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over these proceedings pursuant to 28 U.S.C. § 2513(b). The Court of Appeals for the Fifth Circuit had jurisdiction over Davis's appeal pursuant to 28 U.S.C. § 1291. That court's opinion was issued on November 1, 2021. This petition for a writ of *certiorari* is therefore timely, and this

Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall . . . be deprived of life, liberty, or property without due process of law. . . .

28 U.S.C. § 2513 provides as follows:

28 U.S.C. § 2513. Unjust conviction and imprisonment

- (a) Any person suing under section 1495 of this title must allege and prove that:
 - (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and
 - (2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the

United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

- (b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.
- (c) No pardon or certified copy of a pardon shall be considered by the United States Court of Federal Claims unless it contains recitals that the pardon was granted after applicant had exhausted all recourse to the courts and that the time for any court to exercise its jurisdiction had expired.
- (d) The Court may permit the plaintiff to prosecute such action in forma pauperis.
- (e) The amount of damages awarded shall not exceed \$100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death and \$50,000 for each 12-month period of incarceration for any other plaintiff.

28 U.S.C. § 1495 provides as follows:

28 U.S.C. § 1495. Damages for unjust conviction and imprisonment; claim against United States

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim for damages by any person

unjustly convicted of an offense against the United States and imprisoned.

STATEMENT OF THE CASE

1. The unjust prosecution and conviction of Elaine Davis

On June 12, 2015, the United States obtained a five-count sealed indictment against Elaine Davis, the co-owner of Christian Home Health Care,² and two doctors who referred patients to Christian, charging all three with health care fraud (18 U.S.C. § 1347). The investigation performed by the Government before returning this indictment was at best perfunctory. The Government had not interviewed any of Christian’s employees; it had not interviewed any of the numerous physicians referring patients to Christian Home Health Care; and it had not obtained, much less reviewed any of the medical records of Christian’s patients.

Five days after the sealed indictment was returned, the Government executed search warrants, seizing all of Christian’s books, records, and computers, and all of its bank accounts. Although Christian continued to operate for several more months, primarily

² Christian Home Health Care had been purchased out of bankruptcy by the Davis family in 2000. The reorganization plan for Christian required the Davises to pay approximately \$1,000,000 to Christian’s bankruptcy creditors before ownership actually vested with them – which they did.

to locate and obtain other health care providers for its patients, it had effectively ceased operations by the end of 2015 – in large part because its funds had been seized, and the Centers for Medicare and Medicaid Services (“CMS”) had suspended all payments to Christian, based solely upon the indictment.

Elaine Davis and both doctors (Pramela Ganji, and Godwin Ogbuokiri) pled not guilty. Following an eight-day trial, Dr. Ogbuokiri was acquitted on all counts. Elaine Davis and Dr. Ganji were convicted on the same two counts: a conspiracy count, and one substantive count, related to one patient. Elaine Davis was ultimately sentenced to ninety-six months imprisonment, and ordered to pay restitution in the amount of \$9,305,647.26. She was denied bail pending appeal, and reported to federal prison on January 3, 2017.

2. Elaine Davis’s appeal

In their appeals to the Fifth Circuit, both Elaine Davis and Dr. Ganji argued that the Government’s evidence at trial was insufficient. The Fifth Circuit agreed, and reversed their convictions on all counts on January 30, 2018. *See United States v. Ganji*, 880 F.3d 760 (5th Cir. 2018). Elaine Davis was released from federal prison the next day, January 31, 2018.

3. Elaine Davis seeks compensation for her unjust prosecution and conviction

Because the Government’s conduct had destroyed a business she and her family had spent fifteen years

building, and had cost them hundreds of thousands of dollars in attorneys fees, and had resulted in Elaine Davis's imprisonment for just over a year, she sought the only recompense available to her: the \$50,000 award provided by 28 U.S.C. § 2513.

Obtaining compensation under that statute is a two-step process. First, a petitioner must obtain a "Certificate of Innocence" from the district court where she was convicted. Then, and only then, can she file a petition in the United States Court of Federal Claims for compensation, in accordance with 28 U.S.C. § 1495. Elaine Davis never got past the first step.

Her petition for a Certificate of Innocence was filed on June 1, 2018, and was referred to a United States Magistrate Judge. The Magistrate Judge then immediately set the matter for oral argument *only*. Following argument, the Magistrate Judge recommended denying the petition, and found the statute to be constitutional. App.37-40.

Davis objected to the Magistrate Judge's Report and Recommendation, and sought review in the district court. That court denied the petition, but for reasons that differed from those relied upon by the Magistrate Judge. The district court also found the statute to be constitutional. App. 23-24.

Davis timely appealed to the Fifth Circuit. That court affirmed the judgment of the district court, finding that "[t]he district court did not abuse its discretion in finding that Davis did not prove by a preponderance of the evidence that she "did not commit any of the acts

charged” (i.e., the first requirement of § 2513(a)(2)).” The Fifth Circuit rejected Davis’s claim that the statute was unconstitutional, by relying exclusively upon Justice Alito’s concurring opinion in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017): “Rather, [Davis] seeks something above and beyond her existing rights. ‘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.’ *Nelson v. Colorado* at 1261 (Alito, J., concurring).” App.6.

This petition follows that judgment.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

1. Introduction

The Federal Unjust Conviction and Imprisonment Statute (“UCIS”) (28 U.S.C. § 2513) is one of 39 statutes in the United States that allows for compensation for the wrongfully convicted.³ But the federal statute is among the least friendly to such claims for compensation. It is the only statute to require proceedings in two separate courts. It places the burden of proof on

³ According to the Innocence Project, 37 states, and the District of Columbia have mechanisms for compensating the wrongfully convicted. See “Compensating the Wrongfully Convicted,” INNOCENCE PROJECT, <https://innocenceproject.org/compensating-wrongly-convicted/>, last visited January 25, 2022.

the claimant. It sets very low limits on compensation – \$50,000 per year of incarceration. And most potential claimants never have the chance to reach those limits, because they are unaware of the statute; or they lack the knowledge and ability to make a claim under the act on their own, as counsel cannot be appointed for them; or because the Department of Justice vigorously opposes their petition – as it did with Elaine Davis.

The appellate courts have been equally unfriendly to claimants – even to those whose convictions were reversed because of insufficient evidence. Federal Courts of Appeals have consistently narrowed the scope of the statute, and ignored the disjunctive language of the second clause of the statute.⁴ As a result, claimants under the statute are rarely successful – even when they are in fact “innocent.” The only available survey of claimants (which is admittedly neither current, nor comprehensive), shows that only two federal “exonerees” have been successful in obtaining compensation under 18 U.S.C. § 2513.⁵

This is presumably not the result that Congress intended when it passed the original Unjust Conviction and Imprisonment Act, or when it passed the 2004 amendments to the statute as part of the “Justice for All Act of 2004.” And it is flatly inconsistent with this

⁴ See *United States v. Graham*, 608 F.3d 164 (4th Cir. 2010).

⁵ Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 Mo. L. Rev. 369, 385 (Spring 2017).

Court’s holdings addressing the presumption of innocence, and the right to due process of law. However, the Fifth Circuit, and the other Courts of Appeals interpret the statute to place the burden of proof upon *all* claimants, including those who have been acquitted because of insufficient evidence. This violates basic constitutional principles and is contrary to this Court’s holding in *Nelson v. Colorado*. Accordingly, review by this Court is warranted.

2. The Fifth Circuit has interpreted an important federal statute in a way that conflicts with relevant decisions of this Court.

The current version of the UCIS (28 U.S.C. § 2513) is based upon the 1938 version of 18 U.S.C. § 729. The 1938 statute was in turn based upon a 1912 bill introduced in the Senate at the instance of Prof. Edwin M. Borchard, who was then the Law Librarian of Congress.⁶ Although the 1912 “Borchard Bill” never passed, its language is instructive: that bill contained no provision requiring an acquitted defendant to disprove all of the factual allegations of the charges against him. Moreover, the Borchard Bill did not seek to exclude defendants who had been acquitted because of insufficient evidence from the category of those deemed “innocent.”

⁶ See *United States v. Keegan*, 71 F. Supp. 623 (S.D.N.Y. 1947), for a complete legislative history of the statute, and the predecessor bill (the “Borchard Bill”).

Although the Borchard Bill did not pass in 1912, as District Judge Barksdale recognized in his opinion in *United States v. Keegan*, Borchard's version of the statute formed the core of the 1938 statute, with one important exception: the 1938 statute placed the burden of proof of "innocence" upon all claimants, by requiring them to show that "such person did not commit any of the acts with which he was charged."⁷ The House Judiciary Committee, which was responsible for adding this language to the statute, explained it thusly:

While the Senate bill is limited to a person innocent 'of the crime with which he was charged and not guilty of any other offense against the United States,' the House committee believes this is not definite and specific enough, and limited it instead to one who is 'not guilty of the crime of which he was convicted and did not commit any of the acts with which he was charged' and 'that his conduct in connection with the charge did not constitute a crime or offense against the United States or of the State or Territory in which the offense or acts are alleged to have been committed.' In other words, the claimant must be innocent of the particular charge and of any other crime or offense that any of his acts might constitute. The claimant cannot be one whose innocence is based on technical or procedural grounds, such as lack of sufficient evidence, or a faulty indictment – such cases as

⁷ Report No. 2299 of the House Judiciary Committee, 75th Congress, 3d Session.

where the indictment may fail on the original count, but claimant may yet be guilty of another or minor offense.⁸

The current version of the statute continues to require a claimant to show that she “did not commit any of the acts charged,” as was recognized by the Fifth Circuit.

The constitutional problem lies in the fact that this requirement, imposed in 1938 to bar claimants relying on “technicalities” like insufficient evidence, cannot be squared with the current state of the law regarding the scope of the Due Process Clause. Nor is it a realistic requirement given the current charging practices of United States Attorneys, who routinely include sweeping conspiracy counts spanning years, if not decades. How could Elaine Davis affirmatively disprove every act in the eight-year period covered by the conspiracy count in her indictment – especially when she was never told what it was she needed to disprove, following her acquittal?

This Court’s opinion in *Nelson v. Colorado*⁹ exposes the precise nature of the constitutional flaw in § 2513. In *Nelson*, the Court was faced with the constitutionality of a Colorado statute requiring petitioners to “prove [their] innocence” in order to receive restitution for property lost pursuant to a later invalidated

⁸ Report No. 2299 of the House Judiciary Committee, 75th Congress, 3d Session, as quoted in *United States v. Keegan*, 71 F. Supp. 623, 633-634 (S.D.N.Y. 1947).

⁹ *Nelson v. Colorado*, 137 S. Ct. 1249 (2017).

conviction. Ultimately, this Court held that requiring an individual to prove their innocence, following the reversal of a conviction for insufficient evidence, was unconstitutional. The Court was emphatic: “absent conviction of a crime, one is presumed innocent.” The Court noted that the presumption of innocence constitutes a “principle of justice so rooted in the tradition and conscience of our people as to be ranked fundamental.”¹⁰

The Court held that the presumption of innocence is *reinstated* whenever a court reverses a conviction for insufficient evidence.¹¹ There is no in-between; the Government may not consider a person who has been found not guilty of a crime “guilty enough.” *Id.* at 1256 (emphasis in original). Accordingly, a person entitled to the presumption of innocence “should not be saddled with any proof burden.” *Id.* at 1256.

This presumption of innocence is unequivocal in *both* criminal and civil proceedings; there are not varying degrees of innocence. Accordingly, the Court held that a civil proceeding that places the “proof burden” on one whose conviction has already been overturned

¹⁰ *Nelson v. Colorado*, 137 S. Ct. at 1256 n.9. This is consistent with other relevant caselaw of the Court, which has held that a review of evidentiary sufficiency by an appellate court implicates the actual guilt or innocence of the defendant, and a reversal based on insufficient evidence signifies that the defendant’s “criminal culpability [has] not been established.” *Burks v. United States*, 437 U.S. 1, 15 (1978). Such a reversal is the “functional equivalent of verdict of acquittal.” See *Tibbs v. Florida*, 457 U.S. 31, 41 (1982).

¹¹ *Id.* at 1255, emphasis added.

for insufficiency of the evidence violates a litigant’s right to due process. By implication, that presumption should be unequivocal even in a “compensatory proceeding,” such as the one here.

As a consequence, the Fifth Circuit’s determination that *Nelson* does not apply to Davis’s case is completely contrary to the reasoning of *Nelson*. Nowhere in Justice Ginsburg’s majority opinion is the distinction made between the statute at issue in *Nelson*, and one allowing compensation, such as § 2513. To create this unprecedented distinction in Davis’s case, the Fifth Circuit relied on Justice Alito’s concurrence, where Justice Alito describes a distinction in American jurisprudence between “compensation for the economic consequences of a reversed conviction” and a “refund of fines or other payments made by a defendant pursuant to a criminal judgment.”

But that distinction was offered as an *alternative* basis for the majority’s decision, not as a clarification of the decision. The majority’s refusal to rely on this distinction for its ruling is what precipitated Justice Alito’s concurrence in the first place. And in fact, Justice Alito notes that the majority opinion’s endorsement of restoring the defendant’s “*status quo ante*” necessarily implicates compensation statutes like § 2513:

“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 *Matthews'* amorphous balancing test stops short of requiring a full return to the *status quo ante* when a conviction is reversed.**"

Nowhere does the majority opinion express an intention to exclude compensation statutes from the constitutional principles it pronounces. Rather, an examination of the principles underlying § 2513 confirms that it falls squarely within the parameters of *Nelson*.

Accordingly, *certiorari* should be granted, for plenary review by this Court.

CONCLUSION

Wherefore this Court is respectfully urged to grant this petition for a writ of *certiorari* to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

HERBERT V. LARSON, JR.

Louisiana Bar No. 8052

Counsel of Record

KELLY P. MITCHELL

Louisiana Bar No. 37807

700 Camp Street

New Orleans, Louisiana 70130

(504) 528-9500

hvl@hvllaw.com

Attorneys for Elaine Davis