

The importance of the presumption of innocence

Notes prepared by Capital Punishment Justice Project

Anthony Gray, 'Presumption of innocence in Australia: A threatened species' (2016) 40 Crim LJ 262

- Different rationales have been put forward for the necessity of the presumption of innocence:
 1. Historically, there was a longstanding fear 'associated with erring in finding a person guilty' especially in times where the death penalty applied to a wide range of offences. Some of this fear came from the belief that those who had wrongly found an individual guilty would be subject to retribution.
 2. Punishments for criminal offences severely restrict individual freedoms, therefore, in societies which value freedom, it is 'appropriate to require that an accuser who seeks... to curb the other's freedom...must prove their allegations against a starting presumption'.
 3. The prosecuting state has significant resources in comparison to an accused, therefore, it is necessary to balance the inequality between the state and individual with a presumption of innocence.
 4. It is necessary to retain public confidence in the criminal justice system by lessening the likelihood of convicting innocent people.

The importance of the presumption lies in the aforementioned rationales:

- We, as a society should fear wrongfully convicting an innocent person because punishments for criminal offences are life-altering and beyond redemption.
- The legitimacy and effectiveness of any legal system rests on its ability to fairly and accurately convict wrongdoers.

In Australia, this is affirmed in *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993), where Deane, Dawson and Gaudron JJ agreed that the principle of the presumption of innocence was 'fundamental' to Australian criminal law, and Mason CJ and Toohey J that the fundamental principle required the onus of proof to rest on the Crown.

Approaches in the three jurisdictions

Australia	<p><u>Prajesh Shrestha, 'Two steps back: the presumption of innocence and changes to the Bail Act 2013 (NSW)' (2015) 37(1) <i>Sydney Law Review</i> 147.</u></p> <ul style="list-style-type: none">• The presumption has been held to not only apply to the criminal trial, but to pre-trial processes as well. <p><u>Anthony Gray, 'Presumption of innocence in Australia: A threatened species' (2016) 40 Crim LJ 262</u></p> <ul style="list-style-type: none">• Australia lacks a bill of rights which would have protected the presumption of innocence from legislative interference.• Australian legislation is increasingly departing from this presumption.• It is important to keep in mind that in criminal proceedings, the burden of proof rests on the prosecution to prove each element
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	<p>of an alleged offence beyond a reasonable doubt.</p> <ul style="list-style-type: none"> ● Some examples of threats to the presumption of innocence include: <ul style="list-style-type: none"> ○ Where elements of an offence are presumed to be satisfied in certain cases (unless the accused can prove otherwise), there is essentially a reversal of the onus of proof. ○ Where, although there is no presumption against the accused, an onus still exists in relation to an accused's defence. That is, the availability of a defence to an accused rests on their ability to prove the elements to that defence. ○ Where offences are predicated on 'reasonable suspicion' as opposed to the actual commission of an offence. ● A helpful illustration is s 302.4 Criminal Code 1995 (Cth), which makes it an offence to traffic a controlled drug. This offence is punishable by up to 10 years imprisonment. If an accused is found to possess more than a certain quantity of a controlled drug, section 302.5 imposes a legal onus on the accused to prove that they did not have the requisite intention. ● The High Court has validated reverse onus provisions in statutes, justifying same on the basis that 'the defendant's knowledge of the true facts is necessarily greater than that of anyone else' (<i>Commonwealth v Melbourne Harbour Trust Commissioners</i> (1922) 31 CLR 1, 17-18). In the same case, Isaacs J made reference to the fact that English and American statutes contained reverse onus provisions. ● It is contradictory that despite judicial recognition that the presumption of innocence is a fundamental aspect of criminal proceedings, it has been acknowledged that legislative interference may still remove this presumption if the Parliament's will is clear enough (French CJ in <i>Momcilovic v The Queen</i> (2011)).
<p>United Kingdom</p>	<p><i>European Convention for the Protection of Human Rights and Fundamental Freedoms</i>, opened for signature 3 November 1950 (effective 3 September 1953). Art 6(2) enshrines the presumption of innocence with respect to someone charged with an offence, as part of the right to a fair trial. This is reflected in s 4(1) <i>Human Rights Act 1998</i> (UK) which requires courts to interpret legislation to be consistent with the <i>Convention</i>, where possible.</p> <p><u>Anthony Gray, 'Presumption of innocence in Australia: A threatened species' (2016) 40 Crim LJ 262</u></p> <ul style="list-style-type: none"> ● Lord Hope, in the House of Lords, distinguished between laws which imposed an evidentiary burden which required them to lead some evidence on an issue, and laws which imposed a legal burden on the accused, which required them to prove

something on the balance of probabilities.

- Lord Hope stated that laws which imposed an evidentiary burden were not inconsistent with the *Convention*, but that those statutory presumptions which imposed a legal burden on the accused would be absolutely incompatible if such presumptions were mandatory. This leaves room for the reverse onus provisions to operate.
- However, in practice, the ‘read-down’ power has been used in the House of Lords in order to comply with the *Convention*. For example, in *R v Lambert* [2002], a case regarding the possession of an unlawful drug with intent to supply, the House of Lords held that the prosecution need not prove beyond a reasonable doubt that the accused knew, suspected or ought have reason to suspect the thing in their possession was a prohibited drug. This raised concern that the associated defence would impose a legal burden on the accused to rebut this presumption, and could then lead to the accused’s conviction despite the existence of some doubt. Therefore, the House of Lords read down this statutory defence provision to merely require the accused to raise some evidence of their lack of knowledge, suspicion or reason to suspect.

Pamela Ferguson, ‘The presumption of innocence and its role in the criminal process’ (2016) 27(2) *Criminal Law Forum* 131

Police powers

- Generally, police powers to stop, detain, question or search are dependent on the existence of a ‘reasonable suspicion’ or ‘probable cause’ that the person being stopped, detained, questioned or searched has committed a criminal offence.
- The presumption of innocence demands a minimalist approach. For example: any detention must be limited, and reasonable suspicion may justify an external body search, but invasive searches should require judicial approval.

Incarceration Pre-trial

- The European Court of Human Rights has stated that member states must have ‘due regard to the presumption of innocence’ in ensuring that pre-trial detention does not exceed a reasonable time.
- Therefore, an implication of the presumption of innocence is that ‘if conditions are to be imposed in granting bail, these should be directed at ensuring the trial takes place, rather than being based on the presumption that the accused committed the crime’.
- This is recognised in e.g. Scotland where those who are remanded awaiting trial live in conditions reflective of their ‘presumptively innocent status’. That is, ‘they are kept separate from convicted prisoners, allowed to wear their own clothes, be entitled to more generous visiting hours, and have greater

	<p>access to legal advisors’.</p> <p><i>Jury majorities</i></p> <ul style="list-style-type: none"> ● ‘An English criminal jury comprises 12 jurors, at least 10 of whom must vote in favour of conviction or acquittal, otherwise a retrial will be ordered’. ● ‘That acquittal is not the outcome even where 9 out of 12 jurors favour a ‘not guilty’ verdict has been criticised as contrary to the presumption’. <p><i>Retention of DNA samples</i></p> <ul style="list-style-type: none"> ● It has been argued that the retention of DNA samples taken from suspects who have been acquitted or not convicted reflects a degree of distrust and presumes the person will be involved in the commission of a crime in the future. ● This ‘stigmat[ises] a person whose guilt has not been established by a court’.
<p>United States</p>	<p>The <i>Fifth Amendment</i> to the United States <i>Constitution</i> most predominantly enshrines the right to due process.</p> <p>It was held in <i>Coffin v United States</i> (1895) that the presumption of innocence is an integral part of due process.</p> <p>The <i>Fourth</i>, <i>Sixth</i>, and <i>Fourteenth Amendments</i> also include language expressing protection for the accused before trial.</p> <p>The wording of the US Constitutional Amendments indicate that the presumption of innocence is delivered through upholding due process for the accused. The <i>Sixth Amendment</i> for example, guarantees the right to a speedy trial in order to prevent the accused from being held on remand for lengthy periods of time if they are not granted right to bail.</p> <p><u>Pamela Ferguson, ‘The presumption of innocence and its role in the criminal process’ (2016) 27(2) <i>Criminal Law Forum</i> 131</u></p> <p><i>Incarceration Pre-trial</i></p> <ul style="list-style-type: none"> ● In <i>Bell v Wolfish</i> (1979), the US Supreme Court held that the presumption of innocence ‘has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun’. <ul style="list-style-type: none"> ○ Justice Rehnquist declared that the presumption of innocence was only to be applied <i>inside</i> the courtroom. <p><i>Pre-trial or post-conviction suggestions of guilt</i></p> <ul style="list-style-type: none"> ● In some US states, ‘victims and their family members are permitted to display written signs in court suggesting that the accused is guilty’.

Shima Baradaran, 'Restoring the presumption of innocence' (2011) *Ohio State Law Journal* 72(4) 723.

- Until the 1950s, judges presumed bail for all non-capital defendants and were only permitted to deny bail where there was a risk of flight.
- However, from the late 1960s onwards, courts considered various factors e.g. weight of the evidence against an individual and how her release would impact the safety of the community.
- This essentially allowed judges to make predictions on an accused's' guilt and the future likelihood that the accused would commit a crime.

François Quintard-Morénas 'The Presumption of Innocence in the French and Anglo-American Legal Traditions' (2010) 58(1) *The American Journal of Comparative Law* 107-149

- Common law scholars have reduced the doctrine to an evidentiary rule without acknowledging role of the principle as a shield against punishment before conviction.
- The narrow conception results in a dangerous exposure to the doctrine being misused or improperly applied.
- *"In the U.S. system today the presumption of innocence is only a rule of evidence that applies only to the prosecutor. That's how legal people understand it,"*
- *"Today it's mostly a rhetorical device outside a courtroom, not anything more."*

Further Cases

***Taylor v. Kentucky* (1978)**

- US SC defined the presumption of innocence as that which is benefited from in the absence of contrary evidence, or an inability to prove guilt beyond reasonable doubt.
- Under some circumstances the Court should issue instructions to the Jury on the presumption in addition to instructions relating to the threshold of beyond reasonable doubt, particularly where there is a danger that the accused may be convicted on extraneous considerations rather than the facts of the case.
- However, in ***Kentucky v Whorton* (1979)**, giving instruction on the presumption of innocence itself was held **not** to be a constitutional requirement and will not be a violation if it is absent. A determination as to the Constitutional fairness of a trial will depend on the totality of the circumstances of individual cases.

Nelson v. Colorado (2017) –

Reversal of burden on exonerated defendants in Civil Proceedings

- Colorado imposes monetary penalties and costs on convicted defendants.
- Previously, Colorado’s Exoneration Act obligated exonerated defendants to bear the onus of proving their innocence by clear and convincing evidence in civil proceedings in order to be reimbursed for any costs or penalty they may have unjustly paid, despite having been acquitted in criminal proceedings.
- A 7-1 Majority questioned Colorado’s Exoneration Act in 2017. The Colorado SC held that the Act was in violation of the guarantee of due process contained within the *Fourteenth Amendment*.
- Justice Ginsburg noted that once the convictions were erased, “*the presumption of their innocence was restored*” and “*Colorado may not presume a person adjudged guilty of no crime, nonetheless guilty enough for monetary exactions.*”
- Only applicable to the State of Colorado.

Bursac v. Suozzi (2008) –

New York Supreme Court ruling on internet posts relating to defendants prior to the commencement of their trial

- The Nassau County Supreme Court adopted the stigmas plus test, where a plaintiff may bring a claim against a government agency for defamation if they have suffered a future loss as the result of the defamation such as the loss of property; the pecuniary loss of not having obtained a job.
- A Wall of Shame had been posted by Souzzi on the internet that included the personal information of the Defendant (Bursac) which had resulted in limitless notoriety without any controls. This was posted before the defendants’ trial.
- The Court held that posting Bursac’s information on the website satisfied the stigmas plus test and violated her due process rights because it caused her humiliation and could affect her legal status by causing her information to be available to potential employers.
- After the ruling in Bursac’s favor, Suozzi amended the Wall of Shame in late 2008 to only include information about those who had been convicted of DWI **after** a trial or plea bargain.

The US Matter of Kris Maharaj

<https://reprieve.org.uk/update/kris-maharaj-turns-80/>

<https://caselaw.findlaw.com/us-11th-circuit/1115515.html>

Background

- Originally a death penalty case in Florida.
- Kris, a British citizen born in Trinidad, was living in Florida when father and son Derrick and Duane Moo Young were gunned down in a Miami hotel in October 1986. Kris had six alibi witnesses, who each confirmed that he was 30 miles away at the time, yet none of them were asked to testify at his trial and his lawyer presented no defence whatsoever.
- Kris was resentenced to life imprisonment, and he isn't eligible for parole until he is 101 years old. After years of investigation, Clive discovered that the Moo Youngs were involved in laundering billions of dollars for Colombian drug baron Pablo Escobar, and that the murders were actually carried out by the cartels after Derrick and Duane lost or stole some of the money that they were laundering.
- Kris has been imprisoned since October 1986 first on death row then laterally serving a life sentence.
- Now Kris is 81 Years old, he will be eligible for parole when he reaches 101 years old. He is in poor health.

Key facts

Date of Birth: 26 January 1939

Nationality: British

Arrested: October 1986

Sentenced to death: 1987

Status: Death sentence quashed, resentenced to life imprisonment in 2002

Currently held: South Florida Reception Center

Case summary

Krishna 'Kris' Maharaj was sentenced to death in 1987 for two murders he didn't commit. In 2002, Reprieve's work on his case led to a reduction in his sentence to life imprisonment. In 2017, Kris was granted a new hearing where new evidence of his innocence can finally be presented before the courts.

Appeal of Original Trial

<https://reprieve.org/cases/kris-maharaj/>

- The initial appeals left Kris bankrupt.
- In 2002, Reprieve's work on his case led to a reduction in his sentence to life imprisonment. He would be eligible for parole aged 101. For Kris, "life" is a death sentence in all but name.

- The second judge on the case had secretly met with the prosecutors to impose a death sentence before hearing the evidence at the judicial sentencing hearing.
- The first judge had been arrested during the trial – ironically, given what would later be proven – for taking a bribe from an undercover police officer posing as a cartel member.
- No court has been willing to find that this astounding irregularity should require a new trial.

Catalogue of injustices

- The original judge was arrested on the third day of the trial for soliciting bribes.
- The second judge conspired secretly with the prosecutors to have them draw up the execution order before the judicial sentencing hearing had even begun.
- Kris's lawyer did not submit a defence at all.
- Kris's lawyer failed to call the six alibi witnesses who placed Kris 30 miles away from the scene.
- The prosecutors told the judge the State's key witness had passed a lie detector test, when he in fact had failed. He has changed his story several times and committed perjury in six court cases. Kris, on the other hand, passed his polygraph.
- The lead detective told the jury Kris had lied about owning a gun and visiting the hotel where the murders took place; rather, documents show it was the police officer who lied.
- The State's other key witness, who originally supported Kris's alibi, changed his testimony only after the prosecutors helped him get off a possible life sentence in Jamaica.

Proved since - Evidence of Innocence

- That the police officers lied to the jury on the most important evidence, the “star” witness changed his story and failed a lie detector test (though the prosecutor had told the judge he passed it), and the defence lawyer failed to call six alibi witnesses who could place Kris 30 miles from the crime scene in the Dupont Plaza Hotel.
- The victims (father and son, Derrick and Duane Moo Young) were not the innocent businessmen portrayed at trial but were laundering money for Pablo Escobar around the Caribbean to the tune of a hundred million dollars or more. Their notes make clear that they were skimming one percent off the top – as much as a million. For someone like Escobar, this was a compelling motive for murder.
- Most of all, though, Clive tracked down half a dozen conspirators willing to admit that the cartel committed the homicides. Indeed, some of them sounded rather aggrieved that the Colombians were denied credit for a crime of such magnitude.
- The victims, far from being the clean-cut businessmen they were portrayed as in court, were actually deep in the Miami drug smuggling trade and had been laundering money for Pablo Escobar.
- Five former Cartel members, including one of Pablo Escobar's chief lieutenants, have given statements that they and not Kris were responsible for the murders. The last court ruling in Kris's case said that the former Cartel members presented “compelling” accounts that “independently corroborate one another's [...] All five individuals' stories reflect that the Moo Youngs were killed by the Cartel.”
- The only other resident on the twelfth floor of the hotel was in Room 1214, across the hall from where the murders took place. He was from Colombia, and there was a

blood smear on his door. The lead detective simply said he was “legit” – even though (unknown to the defence) he had just been indicted for membership in the Cartel.

- A government informant told his handlers at the time of the murders that the victims had been involved in the narcotics trade and the murders were a Cartel hit.
- A retired DEA special agent pointed out the various ‘red flags’ in the police investigation at the time, and agreed that the murders were the work of Colombian drug cartels.
- Testimony from a former cartel pilot, testifying under a pseudonym for fear of reprisals, that Pablo Escobar himself had warned him in December 1986 not to steal from him or he would be killed like ‘Los Chinos’, who he’d had killed in a Miami hotel. When asked why he was coming forward with this information now, he replied simply: “you got the wrong guy”.
- Miami lawyer Brenton Ver Ploeg testified about documents he found when defending the Moo Youngs’ \$1.5million life insurance policies – which he viewed as strongly indicating their involvement in narcotics and money laundering.
- Evidence from one of the State’s witnesses at trial about the alleged eye-witness, Neville Butler. Butler allegedly told him on the day of the murders that “they just started shooting and it was bullets all over the place and I think there was some remark about the money or two suitcases of money.” Butler’s shirt was torn and bloody and his watch was broken – though he had changed before speaking to police.
- Evidence from former State and Federal informant Baruch Vega that Derrick Moo Young was being investigated at the time for his involvement in narcotics, but that Vega knew then that it was a cartel murder and told his handlers this at the time.

Matter now - 2017 Granted a new hearing

<https://reprise.org/2020/01/15/kris-maharaj-justice-delayed-is-justice-denied-again/>

- A magistrate in Florida had said that Kris’ innocence was indisputable on account of “clear and convincing evidence”, and that “no reasonable juror” could convict Kris.
- This is not enough under U.S. law, which harbours the fiction that a “fair” trial may reach the “wrong” result.
- A hearing was set for January 28th, 2020 – two days after Kris’ 81st birthday – to evaluate whether the trial had been fair.
- Justice delayed is always justice denied - Predictably, the prosecutors objected to the magistrate’s order.
- 2nd January the federal judge cancelled the January hearing altogether, to take more time over the appeal.
- Kris and Marita have been denied justice for 33 years and counting.
- The case stands as the manifestation of what the presumption of innocence was instilled to prevent; the most horrifying miscarriage of justice that has all but ended the life of an innocent man.

Most recently

<https://www.sun-sentinel.com/opinion/commentary/fl-op-com-bottomley-prison-innocent-maharaj-desantis-20200428-43cqmakp4ncj7iyxxwhhhsqzie-story.html>

- The Washington Post described Florida prisons as “dangerous petri dishes for the novel coronavirus.” There is no “social distancing” in such an institution: Kris is in a

dormitory with 40 other prisoners. Now that the first man in that dormitory has been taken out with suspected COVID-19. Kris and the rest are being held in isolation. The virus may well be in the cell block with them already.

- This is little short of a second death sentence for a crime that Kris did not commit. He is at the top of the COVID-19 death list, an octogenarian with diabetes and with ten other illnesses that have to be treated every day.
- Lawyers for Kris have asked Florida Gov. Ron DeSantis to show compassion: Let Kris out on a furlough — the same as bail — to live in a small cottage with his long-suffering, 80-year old wife Marita, who has stood by his side these last 33 years, never giving up hope that he may one day be released.
- It would be an unspeakable tragedy if coronavirus were to kill him before he can be exonerated and set free.
- "Now I think they're going to execute him in a new way, by killing him with coronavirus. I am desperate for him." Marita (wife).
- "If Kris contracts coronavirus, there's a significant chance it will prove fatal."