No. 10-366

In the Supreme Court of the United States

ROBERT E. GRAHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, following reversal of petitioner's embezzlement conviction for insufficient evidence of guilt beyond a reasonable doubt, petitioner proved that he was actually innocent and that he did not bring about his prosecution by misconduct or neglect and therefore that he was entitled to a "certificate of innocence" under 28 U.S.C. 2513.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-39a) is reported at 608 F.3d 164. The opinion of the district court (Pet. App. 41a-51a) is unreported but is available at 2006 WL 2527613.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2010. The petition for a writ of certiorari was filed on September 10, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted of embezzlement from a program receiving federal funds, in violation of 18 U.S.C.

666(a)(1)(A). The district court sentenced petitioner to 24 months of imprisonment, to be followed by three years of supervised release. The court of appeals reversed petitioner's conviction on the ground that the evidence was insufficient to establish his guilt beyond a reasonable doubt. Petitioner then filed suit against the government in the United States Court of Federal Claims, seeking damages for unjust conviction and imprisonment under 28 U.S.C. 1495. The district court denied petitioner a "certificate of innocence," which, under 28 U.S.C. 2513, is a prerequisite to maintaining a suit under Section 1495. The court of appeals affirmed. Pet. App. 2a-28a.

1. Petitioner was the executive director of two nonprofit corporations in Wyoming County, West Virginia—the Council on Aging, Inc. (COA) and All Care Home and Community Services, Inc. (All Care). Pet. App. 4a. COA and All Care shared a board of directors (the Board), the members of which were "elderly * * *, hard of hearing, financially unsophisticated, and strongly influenced by [petitioner]." *Id.* at 6a. COA and All Care received substantial federal funding from Medicaid and the United States Department of Labor. *Id.* at 4a; Mem. Op. 2 (Aug. 30, 2006) (Bench Trial Verdict).

In 2001, petitioner submitted to the Board, and the Board approved, an employment contract that increased petitioner's annual salary from $125,000 to $185,000. Pet. App. 4a. Approximately four months later, the Board agreed to amend this contract to allow petitioner to accrue 16 hours of paid sick leave per month, retroactive to the beginning of his employment in May 1975. *Ibid.* The amended contract further provided that petitioner could convert his accrued sick leave into cash

compensation "if used for illnesses or upon the termination of this contract." *Ibid.*

In January 2003, even though petitioner had not satisfied the illness or termination conditions set forth in the contract, he sought the Board's permission to convert some of his sick leave into cash. Pet. App. 5a. When making the request, petitioner did not remind the Board of the contract's limitations on the conversion of sick leave. See *ibid.* The Board approved the request, and petitioner converted 1,200 hours of his accrued sick leave into a cash payment of $106,728. *Ibid.* Later that year, petitioner (again without satisfying the contractual conditions) made two more requests to the Board to convert sick leave into cash, which the Board approved. *Ibid.* In all, during 2003, petitioner converted sick leave into more than $160,000 of cash. *Ibid.* In January and February 2004, petitioner converted additional sick leave into cash payments totaling more than $31,000 without satisfying the illness or termination conditions. Petitioner did not inform the Board or obtain its approval for those additional conversions. *Ibid.*

In response to state investigations of alleged financial improprieties at COA and All Care, the Board convened an emergency meeting in March 2004 at which it revised the terms of petitioner's contract and ordered him to return all of the cash that he had obtained from conversions of his sick leave in 2003. Pet. App. 5a-6a. Petitioner complied with this demand. *Id.* at 6a. On the advice of his attorney, petitioner also repaid the cash he had obtained without the Board's approval in 2004. *Ibid.*

2. On July 18, 2006, a federal grand jury returned a second superseding indictment charging petitioner with 11 counts of mail fraud, in violation of 18 U.S.C. 1341, 1364 and 2; one count of wire fraud, in violation of

18 U.S.C. 1343 and 1346; ten counts of embezzlement from a program receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(A); three counts of engaging in illegal monetary transactions, in violation of 18 U.S.C. 1957 and 2(b); 11 counts of filing false tax returns, in violation of 26 U.S.C. 7206(1); and three counts of aiding and abetting the preparation of a false tax return, in violation of 26 U.S.C. 7206(2).

Two of the embezzlement counts related to petitioner's conversion of sick leave into cash: Count 13 related to the conversions that took place in 2003 with the Board's approval, and Count 14 related to the conversions that took place in 2004 without the Board's approval. The remaining charges related to various other illegal schemes in which petitioner was alleged to have engaged, including unlawfully excluding other employees from the corporations' pension plan while directing pension payments to himself and members of his family; using the corporations' non-profit status to obtain a discount on a plasma television for his personal use; and falsifying tax returns to conceal his misdeeds. See Bench Trial Verdict 3-7, 12-14.

Petitioner pleaded not guilty and waived his right to a jury trial. Following a five-day bench trial, the district court found petitioner guilty on Count 14 and acquitted him on the remaining counts. Bench Trial Verdict 15. The court stated that the evidence at trial established that petitioner's conduct was "improper and outrageous," that he "failed miserably to fulfill his duties as a public servant," and that he "squandered public resources [while] adopting a lifestyle that reflected discredit upon COA and All Care, their directors and employees." *Id.* at 14-15. Nonetheless, the court concluded that "[b]ad conduct * * * does not equal crimi-

nal conduct," and the court found that the government had failed to prove beyond a reasonable doubt each element of most of the charges against petitioner. *Id.* at 15.

For example, the court found that although petitioner's conduct in acquiring the plasma television was "doubtlessly improper and unethical," it did not violate Section 666(a)(1)(A) or the mail fraud statute. Bench Trial Verdict 3-4. And although the government's allegations concerning the pension plan were supported by circumstantial evidence—including testimony that petitioner "personally decided who was eligible to participate in the [plan] and that some employees with whom [petitioner] had close relationships, including his children, were included in the [plan] even though other similarly situated persons were not included," *id.* at 6—the court determined that the evidence was not sufficient to establish beyond a reasonable doubt that petitioner knew that the plan was illegal. *Id.* at 6-7. The counts alleging falsification of tax returns largely related to petitioner's contributions to the pension plan, and the court therefore concluded that they had not been proven for the same reasons. *Id.* at 12-13.

With respect to petitioner's conversions of his sick leave in 2003, the district court concluded that, although the evidence established that the Board may not have fully understood petitioner's requests, its approval created reasonable doubt as to whether petitioner knew that his requests were improper. Bench Trial Verdict 9. With respect to the conversion of sick leave in 2004, however, the court found that petitioner "took this money from COA without having any Board approval whatsoever." *Id.* at 11. And because petitioner had earlier sought Board approval, the court found that "the

conclusion is inescapable that [petitioner] cashed in the sick leave * * * knowing that he needed Board approval, thereby effectively stealing the money or converting it to his own use." *Ibid.*

3. The court of appeals reversed petitioner's conviction. Pet. App. 56a-67a. It concluded that "a reasonable trial of fact could not find, beyond a reasonable doubt, that [petitioner] knowingly stole any money from COA." *Id.* at 66a. The court reasoned that it was "undisputed that the Board repeatedly authorized [petitioner] to cash out his accrued sick leave without any limitations." *Id.* at 67a. The court also noted that petitioner had not attempted to hide his actions, further suggesting that he lacked criminal intent. *Id.* at 66a. Although the court of appeals agreed with the district court that petitioner was "not eligible for the priesthood," *id.* at 64a n.5, the court of appeals determined that the evidence was insufficient to prove petitioner's guilt beyond a reasonable doubt, *id.* at 62a-66a.

4. Shortly thereafter, petitioner filed suit against the government in the United States Court of Federal Claims seeking damages based on a claim that he had been "unjustly convicted * * * and imprisoned," 28 U.S.C. 1495. In order to maintain such a suit, a defendant must prove that (1) his conviction was "reversed or set aside on the ground that he is not guilty of the offense of which he was convicted" 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 * * *, and he did not by misconduct or neglect cause or bring about his own prosecution." 28 U.S.C. 2513(a). The only admissible proof of those facts is "a certificate of the court" in

which he was convicted, 28 U.S.C. 2513(b), usually referred to as a "certificate of innocence," Pet. App. 3a.

The district court denied petitioner's request for a certificate of innocence. Pet. App. 41a-51a. The court noted that Section 2513 "does not mandate the payment of public funds to everyone who has spent time in custody and been ultimately acquitted." *Id.* at 45a. Instead, it provides compensation only for "the truly innocent who have been prosecuted through no fault of their own." *Id.* at 45a-46a. After carefully reviewing the record, *id.* at 47a-49a, the court concluded that petitioner had failed to prove, as required by the statute, that he was actually innocent of the crime of which he had been convicted. *Id.* at 50a. The court acknowledged that the court of appeals had concluded that the evidence was insufficient to establish petitioner's guilt beyond a reasonable doubt, but observed that "[a] finding on appeal that the evidence adduced at trial is insufficient to support a conviction beyond a reasonable doubt is not a legitimate basis for granting a certificate of innocence." *Ibid.* The court also held that petitioner had failed to establish that he did not, by his own misconduct or neglect, bring about his prosecution. *Ibid.* Indeed, the court concluded, the evidence against petitioner established that he had "abuse[d] [his] position of public trust for his own personal benefit" and "was at the very least negligent," and that this misconduct and neglect "brought about his prosecution on the count of conviction." *Id.* at 49a-50a.

5. The court of appeals affirmed. Pet. App. 2a-39a. It observed that Section 2513 required petitioner to prove three things: (1) his conviction was set aside on the ground that he was not guilty of the offense charged; (2) he, in fact,"did not commit any of the acts charged"

or, if he did, those acts did not constitute a crime; and (3) "he did not by misconduct or neglect cause or bring about his own prosecution." *Id.* at 14a (quoting 28 U.S.C. 2513(a)). The court noted that, in requiring a defendant to prove these three predicates, "Congress clearly did not provide * * * for monetary compensation to all whose criminal convictions are reversed after incarceration" but instead reserved relief only for the "truly innocent." *Id.* at 14a-15a.

The court of appeals found that petitioner had failed to satisfy the "rigorous burden" of proof established by Section 2513. Pet. App. 16a. The court noted that petitioner "presented no evidence in support of his application" but simply argued that he was entitled to a certificate of innocence because his conviction had been reversed. *Id.* at 22a. The court held, however, that "the [g]overnment's failure to offer sufficient evidence to prove [petitioner's] guilt [did] not require the district court, in considering the same evidence, to find him entitled to a certificate of innocence." *Id.* at 21a. The court explained that, although its prior decision had held that "the [g]overnment failed to meet its burden" to prove that petitioner "acted with a guilty state of mind," "to obtain a certificate of innocence, [petitioner] must address the same issue and prove, as a matter of fact, not only that he acted with no criminal intent, but also that no 'neglect' on his part caused his prosecution." *Id.* at 22a.

The court of appeals observed that it was "not at all clear that the district court [had] abuse[d] its discretion" in finding that petitioner had "failed to meet his burden" under "the first clause of § 2513(a)(2)" to show that he did not commit any of the acts charged or that those acts did not constitute a crime. Pet. App. 17a & n.3. And the

court of appeals concluded that, even assuming the district court did abuse its discretion in finding that petitioner had not proved his actual innocence, petitioner "ha[d] not demonstrated that the court abused its discretion in concluding that he failed to meet his burden under the second clause of § 2513(a)(2), i.e., that 'he did not by misconduct or neglect cause or bring about his own prosecution.'" *Id.* at 17a. The court of appeals explained that the district court had conducted a "painstaking, fact-intensive analysis of the evidence" that revealed a long history of "neglectful conduct" in petitioner's operation of COA's and All Care's affairs, including a "marked lack of prudence" in discharging his duties as a corporate officer and "damning" evidence of malfeasance. *Id.* at 18a, 21a-22a. The court of appeals concluded that, even though that evidence was ultimately insufficient to prove guilt beyond a reasonable doubt, it provided "a reasonable basis for [g]overnment officers to prosecute, leading them to conclude (as indeed the trier of fact did) that [petitioner] committed a federal offense by stealing from his employer." *Id.* at 19a.

The court of appeals also concluded that *Betts* v. *United States*, 10 F.3d 1278 (7th Cir. 1993), does not support petitioner's claim. Pet. App. 19a-20a. The court explained that the Seventh Circuit held in *Betts* that a defendant "fails to satisfy the second clause of § 2513(a)(2) only when he has 'acted or failed to act in such a way as to mislead the authorities into thinking he had committed an offense.'" *Id.* at 19a (quoting *Betts*, 10 F.3d at 1285). To the extent that standard requires that a defendant have willfully misled the authorities, the court of appeals disagreed with that interpretation because it "effectively reads 'neglect' out of the statute."

Pet. App. 19a-20a. Nonetheless, the court concluded, "even if [it] accept[ed] the *Betts* construction of § 2513, [the court] could not conclude that the district court abused its discretion here," *id.* at 20a, because petitioner's repeated failures to seek or obtain the Board's approval for his sick leave conversions in 2004 were deliberate "omission[s] by the petitioner that misle[d] the authorities as to his culpability." *Id.* at 21a (quoting *Betts*, 10 F.3d at 1285) (brackets in original).

Judge Gregory dissented. Pet. App. 28a-39a. He argued that the "misconduct and neglect" language in Section 2513 should be interpreted as referring not to the "conduct which was found to be noncriminal," but instead "to some *additional* conduct" that occurred later, "during the course of the government's investigation," and that "induced the government to commence a wrongful prosecution." *Id.* at 32a-33a. The majority rejected the dissent's interpretation because the statutory language contains no such limitation; the dissent's interpretation would be inconsistent with the statute's purpose and is not supported by any appellate decision interpreting the statute (including *Betts*); and the dissent's proposed limitation is illogical because acts of "misconduct or neglect" that bring about a prosecution "often will have originally been charged as crimes, as they were here." *Id.* at 23a-27a.

ARGUMENT

Petitioner contends (Pet. 11-12) that the decision of the court of appeals conflicts with the Seventh Circuit's decision in *Betts* and that this Court should grant review to resolve the "uncertainty" about the meaning of Section 2513. Contrary to petitioner's contention, the decision below is correct and does not conflict with *Betts* or

with the decision of any other court of appeals. Moreover, the issue presented arises very infrequently. Accordingly, the court of appeals' fact-bound determination that petitioner failed to prove that he is entitled to a certificate of innocence does not warrant this Court's review.

1. Because Sections 1495 and 2513 waive the sovereign immunity of the United States, they must be strictly construed in favor of the sovereign. *Orff* v. *United States*, 545 U.S. 596, 601-602 (2005); see Pet. App. 16a (citing cases). Consistent with that principle, the few decisions interpreting Section 2513 and its predecessors have uniformly concluded that the statute "provides compensation only to those who can show that they are innocent of any criminal offense." *Betts* v. *United States*, 10 F.3d 1278 1283 (7th Cir. 1993); see *Osborn* v. *United States*, 322 F.2d 835, 840 (5th Cir. 1963) (Wisdom, J.) ("Congress carefully limited the availability of the Unjust Conviction Statute to those who are truly innocent."); *United States* v. *Brunner*, 200 F.2d 276, 279-280 (6th Cir. 1952) (concluding that the statute requires a defendant to prove that he is "altogether innocent"); accord *United States* v. *Racing Servs., Inc.*, 580 F.3d 710, 713 (8th Cir. 2009); *Rigsbee* v. *United States*, 204 F.2d 70, 72 (D.C. Cir. 1953); Pet. App. 14a-15a.

The statute's legislative history confirms that Congress did not intend to "open[ ] wide the door through which the treasury may be assailed by persons erroneously convicted." *Brunner*, 200 F.2d at 280. Rather, Congress intended to provide monetary relief only in those "rare and unusual" cases in which a defendant proves that he was "in fact innocent of any offense whatever." S. Rep. No. 202, 75th Cong., 1st Sess. 3 (1937) (statement of Attorney General Homer Cummings).

Indeed, the legislative history reveals that Congress explicitly contemplated cases like petitioner's in which the conviction is reversed because of insufficient evidence, and Congress concluded that such reversals would not suffice to demonstrate actual innocence. See *ibid.* (distinguishing cases in which reversals are based "on the ground of insufficiency of proof" from the cases of innocence for which the statute permits compensation); H.R. Rep. No. 2299, 75th Cong., 3d Sess. 2 (1938) ("[T]he 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."); see also *Betts*, 10 F.3d at 1284 (discussing legislative history); *Osborn*, 322 F.2d at 840 (same); Pet. App. 15a n.2 (same).

In this case, after a "painstaking, fact-intensive analysis of the evidence that had been admitted during [petitioner's] five-day bench trial," Pet. App. 22a, the district court determined that the lack of sufficient evidence to prove that petitioner was guilty beyond a reasonable doubt did not mean that he was actually innocent, and petitioner had submitted no additional evidence to satisfy his burden of proving his innocence. See *id.* at 47a-47a, 50a. The court of appeals not disturb the district court's determination on appeal. *Id.* at 17a & n.3. On the contrary, the court of appeals concluded that it was "not at all clear" that the district court had abused its discretion. *Ibid.* The court of appeals explained that "[o]n direct appeal, [it had] concluded only that the [g]overnment failed to prove [that petitioner] harbored the requisite intent." *Ibid.* And the court stressed that "reversal based on 'failure of proof beyond a reasonable

doubt' also 'leaves room for the possibility that the petitioner in fact committed the offense with which he was charged.'" *Ibid.* (quoting *Betts*, 10 F.3d at 1284).[1]

The district court's undisturbed determination that petitioner is not entitled to a certificate because he did not prove his actual innocence is entirely consistent with *Betts*. The conviction in *Betts* was reversed, not for insufficient evidence, but because the defendant's conduct "did not constitute a crime." 10 F.3d at 1284. And the Seventh Circuit did not suggest that a defendant whose conviction was reversed on sufficiency grounds and who submitted no additional evidence of innocence would be entitled to a certificate. On the contrary, the court stated that, to obtain a certificate, a defendant must prove his actual innocence and that reversal of a conviction "based on failure of proof beyond a reasonable doubt" is not equivalent to a finding of innocence. *Ibid.*

The fact-bound determination that petitioner did not prove his innocence does not warrant this court's review, and petitioner does not seek review on that question. See Pet. i. Accordingly, a decision in petitioner's favor would not afford him any relief, and the petition should be denied for that reason alone.

2. In addition, the court of appeals held that, even assuming the district court abused its discretion in find-

[1] In dissent, Judge Gregory contended (Pet. App. 30a-31a) that the reasoning of the court of appeals' earlier decision established that petitioner is actually innocent, because the earlier decision stated that the Board's approval of petitioner's sick-leave conversions in 2003 resulted in "a de facto amendment" of his written contract. *Id.* at 31a. The court rejected that contention, however, holding that its earlier decision "concluded only that the [g]overnment failed to prove [petitioner] harbored the requisite intent." *Id.* at 17a n.3; see also *id.* at 21a (noting that the court's statements about the effect of the Board approvals were made "in narrowly addressing the issue of criminal intent").

ing that petitioner failed to prove his actual innocence, petitioner still would not be entitled to a certificate, because the district court correctly found that petitioner failed to prove that he did not "bring about his own prosecution" through "misconduct or neglect." Pet. App. 17a (quoting 28 U.S.C. 2513(a)(2)). That requirement "exclude[s] from the operation of the remedial provisions of the statute those who, though innocent, had negligently or willfully failed to take the necessary measures to avoid conviction." *Osborn*, 322 F.2d at 843. The courts below correctly concluded that petitioner falls within that category. Petitioner's fact-bound disagreement with the concurrent determinations of the two lower courts does not warrant this Court's review. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

As noted above, the district court conducted a "painstaking, fact-intensive analysis of the evidence that had been admitted during [petitioner's] five-day bench trial." Pet. App. 22a. After "review[ing] all of the evidence relevant to [petitioner's] conduct and state of mind," the district court found that petitioner had engaged in numerous willful or negligent acts in connection with his stewardship of COA and his cashing-out of sick leave and that those actions "brought about his own prosecution." *Id.* at 18a-19a. As the court of appeals concluded, "ample record evidence support[ed] that finding" because petitioner's acts and omissions reasonably led government officers "to conclude (as indeed the trier of fact did) that [petitioner] committed a federal offense by stealing from his employer." *Id.* at 19a.

Petitioner argues (Pet. 5-6, 12) that the court of appeals' conclusion conflicts with *Betts*, but he is mistaken.

In *Betts*, the Seventh Circuit held that the "misconduct or neglect" provision in Section 2513(a)(2) precludes issuance of a certificate of innocence when there was "a causal connection between the petitioner's conduct and his prosecution." 10 F.3d at 1285. *Betts* further held that this "causal connection" can be established by evidence showing that the defendant "acted or failed to act in such a way as to mislead the authorities into thinking he had committed an offense," such as where the defendant "'takes the fall' for someone else" by "falsely confess[ing] to a crime or intentionally withhold[ing] exculpatory evidence." *Ibid.* The critical requirement, the *Betts* court held, is "an affirmative act or an omission by the petitioner that misleads the authorities as to his culpability." *Ibid.*

The court of appeals in this case expressed disagreement with *Betts*' "narrow reading" of the statute, observing that *Betts*' standard appears to require "willful misconduct" and thus "effectively reads 'neglect' out of the statute." Pet. App. 20a. But the court of appeals made clear that its disagreement with *Betts* had no bearing on the resolution of this case, because, "even if [the court] did accept the *Betts* construction of § 2513, [the court] could not conclude that the district court abused its discretion here." *Ibid.* The court of appeals explained that petitioner's conduct, such as his intentional and repeated failures to seek Board approval for his sick-leave conversions, constituted "omission[s] by the petitioner that misle[d] the authorities as to his culpability." *Id.* at 21a (quoting *Betts*, 10 F.3d at 1285). Because petitioner would not be entitled to a certificate of

innocence under the standard articulated in *Betts*, the decision below does not conflict with *Betts*.[2]

3. In any event, as the court of appeals noted, federal courts do not "regularly ha[ve] occasion to consider certificates of innocence," and only six circuit court decisions (including the decision below) have interpreted Section 2513 or its predecessors since the first such statute was enacted in 1938. Pet. App. 19a n.4 (citing cases). The infrequency with which the issue presented by the petition arises and the corresponding dearth of cases addressing the issue further counsel against this Court's review.

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[2] Contrary to Judge Gregory's view in dissent (Pet. App. 35a-36a), *Betts* did not hold (or even suggest) that the "misconduct or neglect" that disqualifies a defendant from receiving a certificate must be separate from, and occur subsequent to, the conduct for which the defendant was criminally prosecuted. On the contrary, the court in *Betts* devoted extensive discussion to the question whether Betts's belated notification that he would be unable to attend a hearing caused his prosecution for contempt for failing to attend that hearing. 10 F.3d at 1285-1286. The court ultimately concluded that the belated notification did not cause Betts's prosecution, because the prosecution resulted from the trial court's mistaken belief that Betts had been ordered to attend the hearing, and the untimely notification did nothing to foster that mistaken belief. *Ibid.* The discussion of that issue would not have been necessary if *Betts* had adopted a rule that the disqualifying "misconduct or neglect" must be separate from and occur subsequent to the conduct for which the defendant was prosecuted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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