

# NOT INNOCENT ENOUGH: THE DENIAL OF A CERTIFICATE OF INNOCENCE BASED ON NEGLIGENCE IN *UNITED STATES V. GRAHAM*, 608 F.3D 164 (4TH CIR. 2010)\*

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## I. INTRODUCTION

Innocence is defined as “the absence of guilt” and “freedom from guilt for a particular offense.”<sup>1</sup> In the federal court system, simply having a conviction overturned does not equal innocence when suing the government for damages under the unjust conviction and imprisonment statute.<sup>2</sup> Instead, the claimant must receive a pardon or a certificate of court proclaiming his innocence in order to bring his suit in the United States Court of Federal Claims.<sup>3</sup> A certificate of court is issued when the court order overturning the conviction specifically states that the claimant did not commit the acts for which he was charged and that his conduct was not a crime.<sup>4</sup> Alternatively, when the court order does not contain those stipulations, the claimant must petition the court for a certificate of innocence, which the court may grant at its own discretion.<sup>5</sup>

In *United States v. Graham*, the petitioner moved for a certificate of innocence to bring an unjust conviction action after his embezzlement conviction was overturned by the Fourth Circuit.<sup>6</sup> The district court denied the petitioner’s motion because it was not convinced that Graham was factually innocent and was not persuaded that Graham did not bring about his own prosecution by misconduct or neglect.<sup>7</sup> On appeal, the Fourth Circuit affirmed the holding, finding that the district court did not abuse its

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1. BLACK’S LAW DICTIONARY 859 (9th ed. 2009).

2. 28 U.S.C. § 1495 (2006).

3. 28 U.S.C. § 2513 (2006).

4. *Burgess v. United States*, 20 Cl. Ct. 701, 704 n.4 (1990).

5. *Id.* at 704.

6. *United States v. Graham*, 608 F.3d 164, 166 (4th Cir. 2010).

7. *United States v. Graham*, 595 F. Supp. 2d 681, 686 (S.D. W. Va. 2008).

discretion in finding that Graham caused his own prosecution through his neglect.<sup>8</sup>

In its holding, the Fourth Circuit thoroughly discussed the second prong of 28 U.S.C. Section 2513(a)(2), which requires the petitioner to prove that “[h]e did not by misconduct or neglect cause or bring about his own prosecution” in order to receive a certificate of innocence.<sup>9</sup> The court rejected the Seventh Circuit’s interpretation of the statute, finding that “it effectively reads ‘neglect’ out of the statute.”<sup>10</sup> The *Graham* case was incorrectly decided by the Fourth Circuit, as it created a circuit split, leading to two very different interpretations of Section 2513(a)(2) by allowing judges to make moral assessments of a petitioner’s noncriminal behavior under 28 U.S.C. Section 2513(a)(2).

In this article, Section II discusses the development of the certificate of innocence test under 28 U.S.C. Section 2513(a) and specifically reviews the interpretation of “misconduct and neglect” under the second prong of Section 2513(a)(2). Section III examines the facts, procedure, and the majority and dissenting opinions of *United States v. Graham*. Section IV analyzes the outcome of *Graham* and discusses several reasons why the decision resulted in an improper interpretation of Section 2513(a)(2).

## II. BACKGROUND

In order for a person to bring a claim for damages against the United States government for unjust conviction and imprisonment under 28 U.S.C. Section 1495, the person must satisfy 28 U.S.C. Section 2513.<sup>11</sup> Under Section 2513, the petitioner bringing the claim “must allege and prove” three things to be entitled to a certificate of innocence.<sup>12</sup> First, he must show that “[h]is conviction has been reversed or set aside on the ground that he [was] not guilty of the offense of which he was convicted” or that he was found not guilty of the offense at a new hearing or retrial.<sup>13</sup> The petitioner can meet the first test by either receiving a certificate of the court setting aside or reversing the conviction or by being “pardoned upon the stated ground of innocence and unjust conviction.”<sup>14</sup> Second, the petitioner must prove that “[h]e did not commit any of the acts charged” or that the “acts, deeds, or omissions” he did commit did not violate the laws of the United States, or the laws of any of the states, territories, or the District of

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8. See *Graham*, 608 F.3d at 177.

9. 28 U.S.C. § 2513(a)(2) (2006).

10. *Graham*, 608 F.3d at 174.

11. 28 U.S.C. § 2513(a).

12. *Id.*

13. 28 U.S.C. § 2513(a)(1).

14. *Id.*

Columbia.<sup>15</sup> Finally, the petitioner must prove that “he did not by misconduct or neglect cause or bring about his own prosecution.”<sup>16</sup>

The legislative history of 28 U.S.C. Section 2513 can be traced back to a bill drafted by Professor Edwin M. Borchard, who was the Law Librarian of Congress when the bill was introduced in the Senate in 1912.<sup>17</sup> The bill, known as the “Borchard Bill,” was not enacted by Congress in 1912, but was reintroduced in an amended form and passed in 1938.<sup>18</sup> Initially coded as 18 U.S.C. Section 729 (1940), the statute required the petitioner to prove that he did not commit the charged acts, that his conduct was not a crime, and that he did not intentionally, by willful misconduct or negligence, cause his own prosecution.<sup>19</sup> The statute was later consolidated with Sections 730-32 and rewritten in order to remove uncertainties that made the statute impracticable as originally enacted.<sup>20</sup>

Even though a statute concerning certificates of innocence has been in place since 1938, there were only five other circuit court cases with published opinions interpreting Section 2513 at the time *Graham* was decided.<sup>21</sup> These cases were *United States v. Brunner*,<sup>22</sup> *Rigsbee v. United States*,<sup>23</sup> *Osborn v. United States*,<sup>24</sup> *Betts v. United States*,<sup>25</sup> and *United States v. Racing Services, Inc.*<sup>26</sup> The legal principals derived from these cases are relied on, for the most part, by the *Graham* court.<sup>27</sup>

The scope of 28 U.S.C. Section 2513 shall be strictly construed, according to *Osborn v. United States*, based on the government’s waiver of sovereign immunity in the statute.<sup>28</sup> The court also held that the statute prevented parties that “had negligently or willfully failed to take the necessary measures to avoid conviction” from receiving a certificate of innocence.<sup>29</sup> In *United States v. Brunner*, the Sixth Circuit found that the statute providing for a certificate of innocence was purposefully designed to limit the circumstances when “erroneously convicted” persons can be

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15. 28 U.S.C. § 2513(a)(2).

16. *Id.*

17. *United States v. Keegan*, 71 F. Supp. 623, 626, 630 (S.D.N.Y. 1947).

18. *Id.*

19. 52 Stat. 438 (1938) (codified as amended at 28 U.S.C. § 2513 (2006)).

20. 28 U.S.C. Chapter 165—*United States Court of Federal Claims Procedure*, OFFICE OF THE LAW REVISION COUNSEL (Feb. 1, 2010), <http://uscode.house.gov/download/pls/28C165.txt>.

21. *United States v. Graham*, 608 F.3d 164, 173 n.4 (4th Cir. 2010).

22. *United States v. Brunner*, 200 F.2d 276 (6th Cir. 1952).

23. *Rigsbee v. United States*, 204 F.2d 70 (D.C. Cir. 1953).

24. *Osborn v. United States*, 322 F.2d 835 (5th Cir. 1963).

25. *Betts v. United States*, 10 F.3d 1278 (7th Cir. 1993).

26. *United States v. Racing Servs., Inc.*, 580 F.3d 710 (8th Cir. 2009).

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

28. *Osborn*, 322 F.2d at 838.

29. *Id.* at 843.

compensated by the government.<sup>30</sup> *Brunner* held that in order to receive a certificate of innocence, the petitioner must show that his innocence has been clearly established by another court.<sup>31</sup> Neither a not guilty judgment, based on a technicality, nor a dismissal will be enough to establish the petitioner's innocence, and a court should deny a request for a certificate unless it can determine from the record "that [the] petitioner is altogether innocent."<sup>32</sup> The Eighth Circuit agreed with this finding in *United States v. Racing Services, Inc.* by concluding that Section 2513 "compensates only the truly innocent."<sup>33</sup>

In *Rigsbee v. United States*, the D.C. Circuit held that the decision to issue a certificate of innocence is left to the discretion of the judge.<sup>34</sup> When the judge has exercised his discretion, the appellate court cannot require the judge to "stultify himself by certifying an opinion contrary to his real conviction—no matter what [the appellate court's] view might be—except . . . in case[s] which the refusal to certify innocence was completely capricious and without rational basis."<sup>35</sup>

*Betts v. United States* is the only circuit court case to reverse a denial of a certificate of innocence.<sup>36</sup> In *Betts*, the district court denied a certificate of innocence for an attorney whose criminal contempt conviction had been overturned. The district court denied Betts' petition for a certificate when it found "that Betts had brought about his own prosecution through misconduct or neglect."<sup>37</sup> On appeal, the Seventh Circuit found that Betts had clearly satisfied Section 2513(a)(1) and the first prong of Section 2513(a)(2).<sup>38</sup> The court then went into a detailed analysis of the second prong of Section 2513(a)(2) to determine "whether Betts caused or brought about his own prosecution by 'misconduct or neglect.'"<sup>39</sup> Finding that "the statute expressly requires a causal connection between the petitioner's conduct and his prosecution," the court held that simply because the petitioner participated in misconduct or acted in a neglectful manner did not mean that he violated the second prong of Section 2513(a)(2).<sup>40</sup> The court expressly declined to interpret the statute in a way that would "require courts to assess the virtue of a petitioner's behavior

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30. *United States v. Brunner*, 200 F.2d 276, 280 (6th Cir. 1952).

31. *Id.*

32. *Id.* at 279-80.

33. *United States v. Racing Servs., Inc.*, 580 F.3d 710, 712 (8th Cir. 2009).

34. *Rigsbee v. United States*, 204 F.2d 70, 72 (D.C. Cir. 1953).

35. *Id.*

36. *United States v. Graham*, 608 F.3d 164, 173 (4th Cir. 2010).

37. *Betts v. United States*, 10 F.3d 1278, 1280 (7th Cir. 1993).

38. *Id.* at 1284.

39. *Id.*

40. *Id.* at 1285.

even when it does not amount to a criminal offense.”<sup>41</sup> In order for a court to find the petitioner to have caused or brought about his prosecution by his misconduct or neglectful behavior under Section 2513(a)(2), “he must have acted or failed to act in such a way as to mislead the authorities into thinking he had committed an offense.”<sup>42</sup> Examples of misconduct under Section 2513(a)(2) include escape attempts, false confessions and testimony, and the destruction of evidence.<sup>43</sup> If the petitioner was able to avoid prosecution, but chose not to do so, his actions are viewed as ensuring prosecution, and fall under the misconduct and neglect prong of Section 2513(a)(2).<sup>44</sup> The court concluded that Betts met the misconduct and neglect prong of Section 2513(a)(2), and remanded the case back to the district court to grant the petition for the certificate of innocence.<sup>45</sup>

A recent district court case in the District of Columbia granted two petitioners who served over two decades in prison certificates of innocence after being found innocent of murder and aiding and abetting.<sup>46</sup> The court held that the petitioners did not by their own misconduct or neglect cause their prosecution, even though they gave the murderer a ride as he was fleeing the scene of the crime, were drinking heavily, carried concealed knives, and failed to report the shooting to the police or stay in the area.<sup>47</sup> The court relied heavily on *Osborn* and *Betts* in reaching its decision, holding that these actions were unrelated to the crimes of murder and aiding and abetting.<sup>48</sup>

The court in *Graham*, while heavily relying on the case law from other previous appellate court cases, specifically rejected the *Betts* court’s interpretation of the misconduct and neglect prong of Section 2513(a)(2), and denied the petitioner’s request for a certificate of innocence based on his neglectful action of cashing in sick leave without additional Board permission.

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41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Eastridge v. United States*, 602 F. Supp. 2d 66 (D.D.C. 2009).

47. *Id.* at 71.

48. *Id.*

## III. EXPOSITION

## A. Facts and Procedure

Robert E. Graham served for twenty years as the executive director of two non-profit corporations that benefited the elderly: Council on Aging, Inc. (COA) and All Care Home and Community Services (All Care).<sup>49</sup> Graham's employment contract was amended in 2002 when COA began handling All Care's expenses, including Graham's salary and benefits.<sup>50</sup> The amended employment contract contained a sick leave provision that allowed accumulated sick leave benefits to be cashed out when used for an illness or at the end of the employment contract.<sup>51</sup>

In January 2003, Graham asked the combined Board of Directors (Board) if the corporations would allow him to convert his sick leave to cash.<sup>52</sup> The Board approved his request, and Graham subsequently cashed in 1,200 sick hours to receive \$106,728.<sup>53</sup> Graham also received permission on two additional occasions in 2003 to cash in sick leave, bringing his total to \$160,000 in sick leave benefits cashed in during 2003.<sup>54</sup> Graham continued to cash out sick leave in January and February 2004, however this time he did so without asking the Board for permission.<sup>55</sup> Graham had already received another \$30,000 in cashed-in sick leave when the Board held an emergency meeting in March 2004 in response to a state investigation of COA.<sup>56</sup> Graham's contract was revised at the meeting, and he was ordered by the Board to return the cash he received for sick leave in 2003.<sup>57</sup> On his attorney's advice, Graham returned not only the money he received for sick leave in 2003 but also the money received in 2004.<sup>58</sup>

Graham was indicted in July 2006 by a federal grand jury in the Southern District of West Virginia on thirty-nine counts.<sup>59</sup> Count 13 charged Graham with "embezzling money from COA by unauthorized conversion of sick leave to cash" in 2003.<sup>60</sup> Count 14 was the same charge,

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49. United States v. Graham, 608 F.3d 164, 166 (4th Cir. 2010).

50. *Id.*

51. *Id.* at 167.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

but for 2004.<sup>61</sup> Graham entered a plea of not guilty to all counts and a bench trial was held.<sup>62</sup> The prosecution presented evidence that the Board, which was made up of elderly members whose average age exceeded eighty, was “hard of hearing, financially unsophisticated and strongly influenced by Graham.”<sup>63</sup> The court found Graham not guilty on all of the charges except for the embezzlement charge for 2004, reasoning that Graham had stolen funds in 2004 because he did not ask for permission to cash in his sick leave during that time.<sup>64</sup> Graham was sentenced to two years in prison, received a \$10,000 fine, and was ordered to return any funds received from sick leave cashed in for 2004 that he had not previously returned.<sup>65</sup>

Graham appealed, and the Fourth Circuit overturned his conviction based on insufficient evidence.<sup>66</sup> The court reasoned that because Graham had repeatedly received approval to cash in his sick leave without any restriction, Graham’s failure to obtain Board approval in 2004 to cash out his sick leave was “clearly insufficient for the purpose of establishing Graham’s intent to steal funds.”<sup>67</sup> The Board’s approval of the cash outs in 2003 was a “de facto amendment” to the employment contract that “overrode” the restrictions that allowed him only to cash in sick leave when ill or at the termination of his employment contract.<sup>68</sup> The fact that Graham had also filled out the appropriate paperwork and received approval from the Board treasurer before cashing in his sick leave also demonstrated that Graham lacked the necessary intent for embezzlement.<sup>69</sup> When the court released its decision on March 20, 2008, Graham had been in prison for thirteen months.<sup>70</sup>

As a result of the time he spent in prison, Graham filed an unjust conviction and imprisonment action in the United States Court of Federal Claims on July 21, 2008.<sup>71</sup> In September 2008, Graham petitioned the Fourth Circuit for a certificate of innocence, which was required in order to bring the action in the Federal Claims court.<sup>72</sup> The petition was dismissed without prejudice.<sup>73</sup> The court stated that a certificate of innocence would

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61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 167-68.

65. *Id.* at 169.

66. *Id.*

67. *Id.* (citing *United States v. Graham*, 269 F. App’x 281, 286 (4th Cir. 2008)).

68. *Id.*

69. *United States v. Graham*, 269 F. App’x 281, 286-87 (4th Cir. 2008).

70. *Graham*, 608 F.3d at 169.

71. *Id.*

72. *Id.*

73. *Id.*

be appropriate in the case because “the reversal of appellant’s conviction was not based on technical or procedural grounds, but in law and fact,” but refused to grant the petition because “the district court [was] the most appropriate court to issue the certificate.”<sup>74</sup>

In September 2008, Graham petitioned for the certificate with the district court.<sup>75</sup> The district court denied Graham’s petition because it was not convinced that Graham was actually innocent according to the facts, and it was unable to conclude that Graham’s misconduct or neglect did not bring about his own prosecution.<sup>76</sup> The court relied on several pieces of evidence to demonstrate that Graham was not truly innocent.<sup>77</sup> Graham controlled the Board by selecting elderly members to serve on it.<sup>78</sup> His salary was much larger than others in similar positions.<sup>79</sup> He had employees conduct personal tasks for himself and his family on company time and used COA to buy a \$6,000 television to receive a discount on the price and to avoid paying sales tax.<sup>80</sup> He also “manipulated a SEP IRA to benefit his family and assumed a lavish lifestyle including regular visits to a ‘gentlemen’s club.’”<sup>81</sup> The court found that Graham caused his own prosecution through his neglect or misconduct by not asking the Board for approval before cashing in his sick leave in 2004, as he had previously done in 2003.<sup>82</sup> The court reasoned that Graham “either simply neglected to do so or he purposely failed to do so for some specific reason such as the belief his request would not be approved.”<sup>83</sup> Regardless of whether Graham was neglectful or acting with purpose, the district court found that his conduct was the cause of his prosecution.<sup>84</sup> Graham then filed an appeal with the Fourth Circuit.<sup>85</sup>

#### B. The Majority Opinion

The majority held that the district court did not abuse its discretion in finding Graham ineligible for a certificate of innocence under the second prong of Section 2513(a)(2) because his misconduct or neglect caused or brought about his own prosecution. The court was required to affirm the

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74. *Id.*

75. *Id.*

76. *Id.* at 170 (citing *U.S. v. Graham*, 595 F. Supp. 2d 681, 684 (S.D. W. Va. 2008)).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

district court's discretionary decision to deny the petition unless there was an abuse of discretion or the findings of the court "were clearly erroneous."<sup>86</sup> The court affirmed the district court's decision.<sup>87</sup> The court reasoned that the evidence of the record clearly supported the finding since "Graham was at the very least negligent in failing to seek Board approval before obtaining cash for sick leave in 2004, and that this neglect brought about his prosecution."<sup>88</sup> Graham had admitted in the appeal of his criminal case that he needed Board approval to convert his sick leave to cash and that his lawyer had advised him in 2004 that he could not legally cash in his sick leave and suggested that he return the funds back to the corporations.<sup>89</sup> The fact that Graham violated an employment contract that he prepared himself also supported the conclusion that Graham's neglect caused his own prosecution.<sup>90</sup> "These omissions, combined with the substantial evidence of Graham's imprudent stewardship of COA, constitute[d] a reasonable basis for Government officers to prosecute, leading them to conclude that Graham committed a federal offense by stealing from his employer."<sup>91</sup>

Graham relied on *Betts v. United States* to demonstrate that the district court abused its discretion by denying his petition. In *Betts*, the Seventh Circuit held "that a petitioner fails to satisfy the second clause of Section 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.'"<sup>92</sup> The *Betts* court found that "Congress intended to preclude a certificate where there ha[d] been an attempt to flee, a false confession, the removal of evidence, or an attempt to induce a witness or an expert to give false testimony or opinion, or an analogous attempt to suppress such testimony or opinion."<sup>93</sup> However, the *Graham* court rejected the *Betts* interpretation of the misconduct and neglect prong of Section 2513(a)(2) "because it effectively read 'neglect' out of the statute."<sup>94</sup> The court found that all the examples cited by the *Betts* court had "elements of *wrongful intent*," stating that *Betts* relied heavily on *United States v. Keegan*'s discussion of willful misconduct for examples of neglect, even though neglect is a part of the statute which is not addressed in *Keegan*.<sup>95</sup> The interpretation of the

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86. *Id.* at 172.

87. *Id.* at 173.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 173-74 (quoting *Betts v. United States*, 10 F.3d 1278, 1285 (7th Cir. 1993)).

94. *Id.* at 174.

95. *Id.*

misconduct and neglect prong of Section 2513(a)(2) by *Betts*, according to the majority, prohibits courts from “assessing the virtue of a petitioner’s behavior even when it does not amount to a criminal offense.”<sup>96</sup> However, this interpretation conflicts with “the statute’s ‘misconduct or neglect’ language” which “on its face captures noncriminal conduct and thus requires such an assessment,” according to the court.<sup>97</sup>

Even under the *Betts* reasoning, the court stated it could still find that the district court did not abuse its discretion in reaching its result. Even though Graham’s failure to seek permission from the Board to convert cash to sick leave was insufficient evidence to find Graham guilty beyond a reasonable doubt, his failure could be interpreted as an omission that would reasonably cause the authorities to believe that he was guilty of an offense.<sup>98</sup> The prosecution’s failure to present enough evidence to prove Graham’s guilt did not require the district court, when considering the same evidence, to grant his petition for a certificate of innocence.<sup>99</sup> In order to receive a certificate of innocence, Graham had to prove that he did not act with criminal intent and that his neglect did not cause his prosecution.<sup>100</sup>

### C. The Dissenting Opinion

The dissenting opinion of Judge Roger L. Gregory was based on the conclusion that the majority had misinterpreted Section 2513 by combining the two prongs of Section 2513(a)(2) thus “requiring a petitioner to show not only that the charged acts were not criminal *but also* that those acts conform to some amorphous, unwritten code of conduct.”<sup>101</sup> The dissent also stated that the majority followed the wrong standard of review because the real issue was that the district court made an error of law in applying the statute, rather than performing an abuse of discretion.<sup>102</sup>

Countering the majority’s finding that it was “unclear if Graham met his burden to prove actual innocence under Section 2513(a)(1) and the first prong of Section 2513(a)(2),” the dissent reasoned that it was clear Graham met this burden because the appellate court reversed his conviction based upon insufficiency of evidence.<sup>103</sup> In overturning Graham’s conviction, the court stated that the requirements of Graham’s employment contract were amended by the permission granted by the Board to cash in the sick

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96. *Id.*

97. *Id.*

98. *Id.* (quoting *Betts v. United States*, 10 F.3d 1278, 1285 (7th Cir. 1993)).

99. *Id.*

100. *Id.* at 175.

101. *Id.* at 178 (Gregory, J., dissenting).

102. *Id.*

103. *Id.* at 178-79.

leave.<sup>104</sup> Graham's conviction was not overturned on a technicality; it was overturned because he was "truly innocent of the crime for which he was convicted," satisfying the grounds of Section 2513(a)(1).<sup>105</sup> As for the first prong of Section 2513(a)(2), the dissent reasoned that the record did not demonstrate that Graham was "guilty of some other, unindicted crime."<sup>106</sup> Even though the majority frequently referred to Graham's poor behavior in a "position of public trust," Graham's behavior was not found to be illegal.<sup>107</sup> Graham had clearly satisfied the requirements of both Section 2513(a)(1) and the first prong of Section 2513(a)(2).

In interpreting the second prong of Section 2513(a)(2), which deals with misconduct and neglect, the dissent followed the interpretation of the *Betts* court. The dissent found that "the statute expressly requires a *causal connection* between the petitioner's conduct and his prosecution; it does not preclude relief simply because the petitioner is engaged in misconduct or neglect period."<sup>108</sup> According to the dissent, in order to give meaning to each word in the statute, a person "cannot 'cause' [his] own prosecution by engaging in the very conduct which was found to be non-criminal in the first [place]."<sup>109</sup> "Instead, the second prong of the statute must be referring to some *additional* conduct, be it intentional or unintentional, willful or neglectful, which misleads the authorities into continuing their investigation of, and ultimately prosecuting, a person later cleared of criminal wrongdoing."<sup>110</sup>

To substantiate its interpretation of Section 2513(a)(2), the dissent discussed the statute's Congressional intent. A petitioner had to prove only that "his underlying conduct" was "not a crime" under the first prong of Section 2513(a)(2).<sup>111</sup> The second prong "require[d] the petitioner show that no other, subsequent conduct during the course of the government's investigation induced the government to commence a wrongful prosecution."<sup>112</sup> The second prong protected the government from those defendants that could have ended a prosecution that had already begun by providing additional information to verify their innocence, but instead chose to go to prison and later attempt to collect damages.<sup>113</sup> If Congress wanted to punish petitioners whose charged acts were social and moral

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104. *Id.* at 179.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* (quoting *Betts v. United States*, 10 F.3d 1278, 1285 (7th Cir. 1993)).

109. *Id.* at 180.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

offenses, instead of just criminal offenses, “it would not have limited a petitioner’s burden regarding the charged acts to offenses against the State; instead it would have remained silent or at minimum broadened the offenses to include more than actual crimes.”<sup>114</sup>

The dissent further argued that the majority’s reasoning for affirming the district court is flawed because they claim that “neglect” in Section 2513(a)(2) means “negligence” by stating that Graham was negligent when he did not ask for approval from the Board when cashing in sick leave in 2004, and this negligent act was the neglect that caused his prosecution.<sup>115</sup> The dissent believed the majority violated a canon of interpretation by construing the statute in a way that made part of it “inoperative or superfluous, void or insignificant.”<sup>116</sup> The meaning of the statute is completely altered if the action of the petitioner, which was determined by a court to not be a crime, could also be deemed the action that misled the government into prosecuting the petitioner.<sup>117</sup> There is no possibility for recovery under this statute under the majority’s view that the “charged conduct” is the same conduct referred to under “misconduct and neglect.”<sup>118</sup> “[E]ven a person prosecuted for simply being at the wrong place at the wrong time could easily be said to have been at the wrong place through his own ‘neglect.’”<sup>119</sup>

Next, the dissent found that the *Betts* interpretation of Section 2513(a)(2) “gave the statute its most natural reading” and did not read “neglect” out of the statute like the majority claimed.<sup>120</sup> The *Betts* interpretation included “both affirmative misconduct and careless omissions.”<sup>121</sup> The dissent relied on a previous Supreme Court case defining “neglect” that held that “[w]hen [C]ongress uses ‘neglect’ without otherwise specifying, it means ‘carelessness.’”<sup>122</sup>

Finally, the dissent reasoned that simply because the majority was offended by Graham’s conduct does not mean that Graham’s actions were criminal. The United States was founded on principles that prohibit the government from prosecuting a person who is “engaged in ‘immoral’ or ‘bad conduct’ if that conduct does not satisfy the elements of a crime.”<sup>123</sup> The majority’s interpretation of the statute creates a slippery slope

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114. *Id.*

115. *Id.* at 181.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 181-82.

121. *Id.* at 181.

122. *Id.* at 181 n.3 (quoting *Pioneer Inv. Servs. Co. v. Brunswick Ass’n Ltd. P’ship*, 507 U.S. 308, 388 (1993)).

123. *Id.* at 182.

“suggest[ing] that any time a person’s conduct offends the sensibilities of three judges or society at large, the government is privileged to incarcerate him.”<sup>124</sup>

## VI. ANALYSIS

### A. Comparing the Analysis in *Graham* and *Betts*

The majority’s analysis of Graham’s neglect is similar to the *Betts* court’s analysis of the petitioner’s acts; however the two courts reach very different results. In *Betts*, the Seventh Circuit determined that petitioner was eligible for a certificate of innocence after having his criminal contempt conviction overturned because his late notification to the court that he would not be able to attend the June 19, 1989, hearing did not cause or bring about his prosecution by misleading the prosecutor or district court as to his liability for criminal contempt.<sup>125</sup> The charge of contempt was based on the assumption that Betts had a duty to attend the June 19th hearing; however it is clear from the June 5th scheduling order that Betts’s attendance was not expressly required, and he had no legal duty to appear, so his action could not have misled the authorities.<sup>126</sup>

In overturning Graham’s conviction, the Fourth Circuit found that Graham did not commit the crime of embezzlement because the previous permission from the Board to cash in sick leave created a “de facto amendment” that overrode the restrictions in Graham’s contract that only allowed him to cash in sick leave if he had an illness or if his employment contract was terminated.<sup>127</sup> The *Graham* court reached the opposite conclusion of the *Betts* court by finding that the act of cashing in sick leave after the initial approval by the Board misled the authorities, even though Graham was legally cashing in his sick leave pursuant to this amendment, and was even filling out the proper paperwork for the process and receiving approval from the Board’s treasurer for each conversion.<sup>128</sup> In reaching this conclusion, the *Graham* court specifically permitted the court to make virtuous assessments of the petitioner’s behavior, which is directly in conflict with the holding of *Betts*.<sup>129</sup> When comparing the two cases, it appears that failing to show up to court when not legally required to do so does not constitute neglect under the statute; however, cashing in sick leave

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124. *Id.* at 182-83.

125. *Betts v. United States*, 10 F.3d 1278, 1285 (7th Cir. 1993).

126. *Id.*

127. *Graham*, 608 F.3d at 169.

128. *Id.*

129. *Id.* at 174.

after receiving approval that created a de facto amendment, which allowed cashing in sick leave contrary to an employment contract is neglect.

The majority also reasoned that Graham's petition would be denied under the *Betts* interpretation because Graham's failure to seek permission after his initial inquiry to cash in sick leave was an omission that could have reasonably misled the government as to his guilt.<sup>130</sup> However, Graham's omission was an act he did not have to perform after his employment contract was amended by the Board. Graham's acts of cashing in sick leave were not contrary to the authority he received from the Board for the initial request.<sup>131</sup> In fact, "[t]he Board repeatedly authorized Graham to buy out his accrued sick leave and did not place any restrictions on the amount of accrued sick leave he could cash out or the timing of these cash outs."<sup>132</sup> Additionally, Graham was not trying to hide that he was cashing out his sick leave, since he submitted paperwork to the Board treasurer every time he cashed out sick leave.<sup>133</sup>

It becomes even clearer that the *Graham* court departed from the *Betts* interpretation when compared to the District Court of the District of Columbia's application of *Betts* in *Eastwood v. United States*. The court in *Eastwood* held that the two petitioners were entitled to certificates of innocence because they did not, by their own misconduct or neglect, bring about their prosecution for murder and aiding and abetting, even though they provided a ride to the fleeing murderer, had been drinking heavily, and were carrying concealed knives.<sup>134</sup> The *Eastwood* court still granted certificates of innocence under the *Betts* interpretation of the statute because Section 2513(a)(2) "require[d] a causal connection between the petitioner's conduct and his prosecution" and did not "preclude a certificate of innocence simply because the petitioner engaged in misconduct or negligence, period."<sup>135</sup> The actions of the petitioners in *Eastwood* are more likely to be viewed as actions that reasonably misled the government as to the petitioners' guilt, rather than the action of cashing in sick leave in *Graham*. It is difficult to rationalize how there is a casual connection between Graham's prosecution for embezzlement and cashing in sick leave with permission when another court found there was no causal connection between being prosecuted for murder and aiding and abetting and providing a ride to the actual murderer while intoxicated and carrying weapons.

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130. *Id.*

131. *United States v. Graham*, 269 F. App'x 281, 286 (4th Cir. 2008).

132. *Id.*

133. *Graham*, 608 F.3d at 169.

134. *Eastwood v. United States*, 602 F. Supp. 2d 66, 71 (D.D.C. 2009).

135. *Id.* at 72.

The analysis of Section 2513(a)(2) by the court in *Graham* clearly departed from the *Betts* interpretation of the statute, resulting in a circuit split.

B. The Majority's Reasoning for Rejecting *Betts* is Not Consistent or Persuasive

The *Graham* court has changed the existing certificate of innocence statute in the Fourth Circuit by reaching a completely different interpretation of the misconduct or neglect prong of Section 2513(a)(2) than the Seventh Circuit in *Betts*. Though the majority stated it was not creating a circuit split by its ruling in this case, it is clearly rejecting the *Betts* interpretation of the statute.<sup>136</sup> The majority reasoned that the *Betts* interpretation read “neglect” out of the plain language of the statute and reaffirmed its argument by showing that the examples of acts that would bar a certificate of innocence provided by the *Betts* court were intentional acts of misconduct and not neglect.<sup>137</sup>

The *Betts* court determined that the statute required a “causal connection between the petitioner’s conduct and his prosecution,” noting that the statute does not prevent a court from issuing a certificate of innocence simply because the petitioner had performed any act of misconduct or neglect.<sup>138</sup> The *Betts* court briefly addressed neglect in its interpretation of Section 2513(a)(2) by admitting that the action taken by the petitioner did not always have to be intentional for a court to deny a petition a certificate of innocence.<sup>139</sup> The court found that an affirmative act or omission by the petitioner must mislead the government into charging the petitioner in order to deny the petition.<sup>140</sup>

The majority is correct when it states that the examples of the types of acts that would mislead the government<sup>141</sup> provided by the *Betts* court were made up of intentional acts, not neglectful acts.<sup>142</sup> However, no examples of neglect have specifically been given in any previous circuit court opinions on the misconduct or neglect requirement of Section 2513(a)(2), and courts have historically had difficulty determining what the statute is

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136. *Graham*, 608 F.3d at 174.

137. *Id.*

138. *Betts v. United States*, 10 F.3d 1278, 1285 (7th Cir. 1993).

139. *Id.*

140. *Id.*

141. The types of acts that would mislead authorities to prosecute the petitioner included false admissions to crimes, intentionally withholding evidence, fleeing the scene of the crime, and convincing a witness to give false testimony or suppress testimony. *See Betts*, 10 F.3d at 1285.

142. *Betts*, 10 F.3d at 1285.

looking for when it requires that the petitioner not bring about his prosecution by his own neglect.<sup>143</sup>

In the limited discussion on what constituted neglect in the earlier version of the statute,<sup>144</sup> the *Keegan* court found the requirement that the petitioner's neglect did not bring about his prosecution meant that "no one shall profit by his own wrong or come into the court with unclean hands" when petitioning for a certificate of innocence.<sup>145</sup> Graham did not commit a wrong that lead to his prosecution. He simply continued to cash in sick leave after the Board amended his contract by granting him permission to receive the funds, which eliminated the restrictions that prevented him from doing so under his employment contract.<sup>146</sup> If there was any act of neglect, it was the failure of the Board to realize that it was amending Graham's employment contract by granting him permission to cash in his sick leave, not Graham's failure to seek permission from the entire board every time he cashed in his sick leave after the initial approval.

In *Eastwood*, the District Court of the District of Columbia held that providing a ride to the murderer who was fleeing the crime scene was not an act of misconduct or neglect that led to the petitioners' prosecutions for murder and aiding and abetting.<sup>147</sup> If providing a ride to a murderer is not neglect under the *Betts* interpretation, the minor actions of Graham should not constitute neglect. The neglect interpretation of the *Graham* court is inconsistent with the established understanding of the statute in previous cases and should not be applied in future cases.

### C. Impact on Future Cases and Public Policy

The majority also holds that the language of Section 2513(a)(2) requires judges to make virtuous assessments of the petitioner's actions, even when the actions do not result in a criminal offense, which goes directly against the holding in *Betts*.<sup>148</sup> In *Betts*, the court wrote:

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143. See *United States v. Keegan*, 71 F. Supp. 623, 638 (S.D.N.Y. 1947).

144. The word "negligence" was later replaced with the word "neglect" when the statute was revised and recoded to 28 U.S.C. § 2513.

145. *Keegan*, 71 F. Supp. at 628.

146. *United States v. Graham*, 608 F.3d 164, 169 (4th Cir. 2010).

147. *Eastwood v. United States*, 602 F. Supp. 2d 66, 71 (D.D.C. 2009).

148. *Graham*, 608 F.3d at 174.

In a moral sense, perhaps, a person who engages in conduct that a prosecutor or trial court mistakenly believes to constitute a criminal offense might be said to have “brought about” his own prosecution, on the theory that he would not have been charged had he comported himself in a more upstanding fashion. Yet construing the statute in that way would require courts to assess the virtue of a petitioner’s behavior even when it does not amount to a criminal offense. We decline to interpret section 2513(a)(2) in that fashion.<sup>149</sup>

The *Graham* court’s complete disregard of the *Betts* court’s reasoning has created a slippery slope that may lead to judges denying certificates of innocence because of assessments of petitioners’ actions that are based on the judges’ personal and moral beliefs.

Though the decision on whether a petitioner receives a certificate of innocence is completely discretionary, a judge can abuse discretion when he departs from “legal and moral conventions that mold the acceptable concept of right and justice” and uses his power “to gratify the passion, partiality, whim, vindictiveness or idiosyncrasies” he has.<sup>150</sup> The dissent reasoned that the majority in *Graham* was offended by the overall conduct of Graham and decided that his failure to ask for additional permission to cash in sick leave was an action that constituted neglect in light of his additional actions,<sup>151</sup> which were offensive, but nowhere near criminal conduct.<sup>152</sup>

Allowing judges to make virtuous assessments of petitioners’ non-criminal actions in the Fourth Circuit gave judges more power under Section 2513(a)(2) than the Seventh Circuit was willing to delegate.<sup>153</sup> With no firm guidelines to differentiate between situations when an action

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149. *Betts v. United States*, 10 F.3d 1278, 1285 (7th Cir. 1993).

150. 48A C.J.S. *Judges* § 151 (2004).

151. The following is the description of Graham’s actions by the district court:

Although COA and All Care were tax exempt non-profit corporations funded by tax dollars, Graham operated them for years as his own personal domain and for the financial benefit of himself and his family. His \$185,000 annual salary, excessive by comparison to the pay of others in similar positions, was supplemented by the generous cash-out of sick leave Graham arranged for himself. The evidence at trial established that Graham used employees on company time to perform personal services for himself and his family; bought at least one expensive item, a \$6,000 television, through COA to get a better price and avoid sales taxes; manipulated a SEP IRA to benefit his family; and assumed a lavish lifestyle including regular visits to a ‘gentlemen’s club.’ ‘Bailey,’ a dancer at Graham’s favorite club, on whom he lavished gifts and money, inquired where his money came from. Graham told her ‘that he owned Council on Aging and he had built this company up and that’s where the money was coming from . . .’

*United States v. Graham*, 595 F. Supp. 2d 681, 685 (S.D. W. Va. 2008).

152. *Graham*, 608 F.3d at 182 (Gregory, J., dissenting).

153. *Betts*, 10 F.3d at 1285.

of neglect misleads authorities to prosecute, as opposed to situations when the authorities wrongfully prosecuted under the *Graham* interpretation, a petition for a certificate of innocence may now hinge on the personal morals of the judge who is deciding the case. Simply being in the wrong place at the wrong time may be tolerable if the wrong place was in a morally acceptable location to a judge. However, if the wrong place was of ill-repute, but not illegal in any sense, a judge can still hold that the petitioner's neglect led to his prosecution and deny his request for a certificate of innocence under the *Graham* interpretation.

If the *Graham* interpretation was applied in *Eastwood*, the petitioners would not have received certificates of innocence based on their actions, even though they had played no role in the murder for which they were charged.<sup>154</sup> The *Eastwood* petitioners were drunk in public, drove a vehicle after consuming large amounts of alcohol, carried concealed knives, provided a ride to the murderer as he was fleeing the scene, and failed to report the shooting to police, yet they were still granted certificates of innocence because their actions did not constitute a causal connection to the crimes for which they were prosecuted.<sup>155</sup> Under the *Graham* interpretation, which allows judges to make virtuous assessments of petitioners' behavior, the petitioners' actions would surely amount to acts of neglect that caused their prosecution because of their questionable morality alone.

Allowing judges to make moral assessments of the petitioner's behavior when determining whether the petitioner's misconduct or neglect led to his prosecution will likely result in inconsistent future decisions.. More importantly, a judge's opinion of what is virtuous could very well be the determining factor as to whether a petitioner receives a certificate of innocence. The *Betts* standard, which requires a causal connection between the behavior of the petitioner and the prosecution, is the more appropriate standard for Section 2513(a)(2) and can be applied nationwide without conflicting results as to actions of neglect that cause prosecution.

## V. CONCLUSION

In departing from the Seventh Circuit's interpretation of Section 2513(a)(2), the *Graham* court has essentially created a circuit split, and opened the door to abuse of discretion by allowing judges to make virtuous assessments of petitioners whose actions were non-criminal. Though the court in *Graham* made an analysis similar to that of the court in *Betts*, the

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154. *Eastwood v. United States*, 602 F. Supp. 2d 66, 72 (D.D.C. 2009).

155. *Id.* at 71.

two courts reached drastically different results as to what constitutes an act that misleads authorities to prosecute. The *Graham* court has also created a slippery slope by allowing judges to make virtuous assessments of petitioners' actions, even when those actions are not criminal. This extension of judicial power under Section 2513(a)(2) is exactly what the Seventh Circuit wanted to avoid in its interpretation of the statute and could have serious implications in the future when judges reach different moral assessments of the same non-criminal acts based on their own personal beliefs. Until Congress revises the law or the Supreme Court addresses the issue presented by the circuit split, there will be no firm guidelines for determining whether an action constitutes neglect that misleads authorities to prosecute a petitioner under Section 2513(a)(2) and will lead to inconsistent decisions between the circuits.

