App. 1

United States Court of Appeals
for the Fifth Circuit

No. 20-30593

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ELAINE DAVIS,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:15-CR-155-1

(Filed Nov. 1, 2021)

Before KING, SMITH, and HAYNES, *Circuit Judges*.

King, *Circuit Judge*:

After we reversed Defendant Elaine Davis's convictions for conspiracy to commit health care fraud and health care fraud, Davis, who had been incarcerated for approximately one year, filed a motion for issuance of a certificate of innocence. The district court denied her motion, and Davis now appeals. For the reasons that follow, we AFFIRM.

I. BACKGROUND

In *United States v. Ganji*, 880 F.3d 760 (5th Cir. 2018), this court reversed Defendant Elaine Davis's convictions for health care fraud and conspiracy to commit health care fraud because the convictions were based on insufficient evidence. Davis had been incarcerated for approximately one year before this reversal. Following the *Ganji* decision, Davis filed a motion for issuance of a certificate of innocence arguing that the she fulfilled the requirements in 28 U.S.C. § 2513 (the Unjust Conviction and Imprisonment Statute) and, in the alternative, that the statute is unconstitutional in light of the Supreme Court's decision in *Nelson v. Colorado*.[1] A magistrate judge held an oral argument and subsequently recommended denial of Davis's motion. The district court allowed for supplemental briefing, heard oral argument, and subsequently denied Davis's motion, adopting and supplementing the magistrate judge's report and recommendation. Davis timely appealed, presenting us with the following two issues: (1) whether Davis is entitled to a certificate of innocence under 28 U.S.C. § 2513 and (2) whether § 2513's requirement of an affirmative showing of innocence is unconstitutional.

II. STANDARD OF REVIEW

The parties do not contest the abuse-of-discretion standard for reviewing a district court's denial of a certificate of innocence under 28 U.S.C. § 2513. However,

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[1] 137 S. Ct. 1249 (2017).

today we join other circuits and adopt the abuse-of-discretion standard.[2] Constitutionality challenges to federal statutes, however, are reviewed de novo. *United States v. Jones*, 132 F.3d 232, 239 (5th Cir. 1998).

III. DISCUSSION

We begin by determining whether the district court erred in denying Davis's motion for a certificate of innocence; then, we turn to her constitutionality challenge.

A. Denial of the Motion for Certificate of Innocence

The "default [burden of proof] for civil cases" is the preponderance of the evidence. *CIGNA Corp. v. Amara*, 563 U.S. 421, 444 (2011). We join the other circuits that have found that this default burden of proof applies to motions for certificates of innocence.[3] A person seeking

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[2] Until now this has been an open question in our circuit. *See Hernandez v. United States*, 888 F.3d 219, 222-23 (5th Cir. 2018). Other circuits have explicitly adopted the abuse-of-discretion standard of review. *See United States v. Graham*, 608 F.3d 164, 172 (4th Cir. 2010); *United States v. Grubbs*, 773 F.3d 726, 731 (6th Cir. 2014); *Betts v. United States*, 10 F.3d 1278, 1283 (7th Cir. 1993); *United States v. Racing Servs., Inc.*, 580 F.3d 710, 711-12 (8th Cir. 2009); *Rigsbee v. United States*, 204 F.2d 70, 72-73 & n.3 (D.C. Cir. 1953).

[3] *See United States v. Grubbs*, 773 F.3d 726, 733 (6th Cir. 2014); *Abu-Shawish v. United States*, 898 F.3d 726, 739 (7th Cir. 2018); *Holmes v. United States*, 898 F.3d 785, 789 (8th Cir. 2018); *United States v. Abreu*, 976 F.3d 1263, 1270 (11th Cir. 2020).

a certificate of innocence under 28 U.S.C. § 2513 is required to prove that:

> (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and
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> (2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

28 U.S.C. § 2513(a). The government conceded that Davis satisfied the first requirement. The second prong is the focus of the dispute.

Under that prong, Davis had to prove that she "did not commit any of the acts charged"[4] and that she "did not by misconduct or neglect cause or bring about [her] own prosecution." *Id.* § 2513(a)(2). The district court did not abuse its discretion in finding that Davis did

[4] As indicated by the word "or," the subsection requires only that a plaintiff prove either that she "did not commit any of the acts charged" or her "acts, deeds, or omissions in connection with such charge constituted no offense." 28 U.S.C. § 2513(a)(2). Davis's argument focuses on the acts charged in the indictment, so we restrict our analysis to the former requirement.

not prove by a preponderance of the evidence that she "did not commit any of the acts charged" (i.e., the first requirement of § 2513(a)(2)).

Davis was charged with conspiracy to commit health care fraud as well as health care fraud, and she relies only on the trial record and our opinion in *Ganji* to show that she did not commit the acts associated with those charges. In *Ganji*, regarding the conspiracy charge, our court acknowledged that "the direct evidence favors Davis" because the government's witnesses testified that Davis had never explicitly entered into an agreement with them. *Ganji*, 880 F.3d at 773. However, "[a]greements need not be spoken or formal, and the Government can use evidence of the conspirators' concerted actions to prove an agreement existed." *Id.* at 767. Our court went no further than concluding that the government "did not implicate Davis in the scheme with proof beyond a reasonable doubt." *Id.* at 777. Similarly, regarding the fraud charges, this court found that the government presented "insufficient evidence to show that [Davis] knowingly executed a scheme to defraud Medicare." *Id.* at 778. Thus, it was within the district court's discretion to find that Davis did not satisfy her burden to prove her actual innocence of the acts charged.

Davis was required under 28 U.S.C. § 2513(a)(2) to prove her lack of misconduct or neglect in addition to her actual innocence of the charged acts. Because Davis did not prove her actual innocence, we need not wade into the circuit split interpreting "misconduct or neglect" in that same prong.

B. Constitutionality of § 2513(a)'s Requirement to Prove Innocence

Davis relies on the Supreme Court's holding and rationale in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017) to argue that 28 U.S.C. § 2513(a)'s requirement of an affirmative showing of innocence is unconstitutional. However, the issue in *Nelson* and the issue here are meaningfully different, making the Court's holding in *Nelson* inapplicable. In *Nelson*, the defendants (whose convictions were reversed) moved for refunds of restitution, fees, and costs they paid upon their convictions. Notably, the Colorado law scrutinized in *Nelson* also allowed for compensation including $70,000 per year of incarceration, compensation for child support, and reasonable attorney's fees for bringing the compensation claim. *Id.* at 1254 n.6. However, the petitioners in *Nelson* did not request compensation, so the constitutionality of that part of the statute was not at issue.

Here, Davis is attempting to receive damages for her incarceration under 28 U.S.C. § 1495. *See also* 28 U.S.C. § 2513(e) (providing the damages cap). Davis's interest in receiving damages for her wrongful conviction is not about "the continuing deprivation of property after a conviction has been reversed." *Nelson*, 137 S. Ct. at 1255. Rather, she seeks something above and beyond her existing rights. "The American legal system has long treated compensation for the economic consequences of a reversed conviction very differently from the refund of fines and other payments made by a defendant pursuant to a criminal judgment." *Id.* at 1261 (Alito, J., concurring). This is exactly the distinction

the district court made. Accordingly, the district court did not err in finding *Nelson* inapplicable to this case on the question of constitutionality.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	**CRIMINAL ACTION NO. 15-cr-155-WBV-1**
VERSUS	
ELAINE DAVIS	

ORDER

(Filed Sep. 17, 2020)

Before the Court is a Motion for Issuance of a Certificate of Innocence filed by Defendant Elaine Davis.[1] The Motion is opposed and the Defendant has filed a Reply.[2] Both the Defendant and the Government then filed supplemental briefs.[3] The Court, having considered the Motion, the Government's Opposition, the Reply, the parties' supplemental briefing, the record, including the full trial transcript, the applicable law, oral argument from counsel, and the Magistrate Judge's Report and Recommendation, hereby approves the Magistrate Judge's Report and Recommendation and adopts it as its opinion, as modified and supplemented herein.

I. FACTUAL BACKGROUND

The Court finds that the Magistrate Judge's Report and Recommendation does not adequately outline

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[1] R. Doc. 377.

[2] R. Doc. 383, R. Doc. 390.

[3] R. Docs. 406, 407, 411, and 412.

the factual background of this case. Therefore, the Court adopts the Factual Background as outlined in the Background section of the Opinion of the U.S. Court of Appeals for the Fifth Circuit.[4]

II. PROCEDURAL BACKGROUND

As the Background portion of the Fifth Circuit's Opinion very clearly sets forth the factual background, the Court will not repeat that information in any detail. After a two-week jury trial, Defendant was convicted of one count of conspiracy to commit health care fraud in violation of 18 U.S.C. § 1349 and one count of health care fraud, in violation of 18 U.S.C. § 1347.

On January 30, 2018, the U.S. Court of Appeals for the Fifth Circuit issued an Opinion reversing the conviction of Defendant Elaine Davis.[5] The Defendant had been incarcerated for approximately one year prior to the reversal of her conviction. Thereafter, on June 1, 2018, the Defendant filed a Motion for Issuance of a Certificate of Innocence. The District Court Judge, who was not the trial judge in the matter,[6] referred the Motion to the Magistrate Judge for hearing, including evidentiary hearing, if necessary.[7] The Defendant's

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[4] R. Doc. 373-1.

[5] *Id.* While the Fifth Circuit also reversed the conviction of co-defendant Dr. Pramela Ganji, this Order is focused only on Defendant Elaine Davis' subsequent Motion for Issuance of a Certificate of Innocence.

[6] The trial judge was no longer with the Court.

[7] R. Doc. 379.

Motion for Issuance of a Certificate of Innocence was opposed by the Government and subsequently set for oral hearing with the Magistrate Judge.[8] On July 25, 2018, the Magistrate Judge held an oral hearing on the Defendant's Motion and took the matter under advisement.[9] The Magistrate Judge issued a Report and Recommendation on November 7, 2018 and the Defendant timely filed objections to the Report and Recommendation.[10] The District Court then ordered oral argument and allowed for supplemental briefing. Both the Defendant and the Government filed supplemental briefs.[11] Before holding any oral argument, the case was transferred again, this time to this Court.[12] The Defendant then moved for oral argument in the matter, which was opposed by the Government, and subsequently granted by the Court.[13] Oral argument was held on February 19, 2020.[14] This Order follows.

In her Motion for Issuance of a Certificate of Innocence, the Defendant argues that she has fulfilled the requirements set forth in 28 U.S.C. § 2513, the Unjust Conviction and Imprisonment Statute, for the granting of her motion and issuance of a Certificate of Innocence. The Defendant asserts that the reversal of her conviction satisfies the first portion of the statute.

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[8] R. Doc. 383, R. Doc. 384.

[9] R. Doc. 391.

[10] R. Doc. 395.

[11] R. Doc. 406, R. Doc. 407.

[12] R. Doc. 409.

[13] R. Doc. 411, R. Doc. 412, R. Doc. 413.

[14] R. Doc. 415.

Regarding the second prong of Section 2513 (identified by the Defendant as both the second and third prongs), the Defendant primarily argues that the record, as acknowledged by the Fifth Circuit's Opinion, makes clear that the Defendant did not commit any of the acts charged.[15] Further, Defendant relies on *Betts v. United States*[16] to argue that mere neglect or misconduct does not preclude relief and that there must be a causal connection between petitioner's conduct and the prosecution. Finally, the Defendant argues that 28 U.S.C. § 2513 is unconstitutional in light of the Supreme Court's decision in *Nelson v. Colorado*,[17] and that the reversal of her conviction alone is sufficient to support the issuance of a Certificate of Innocence.

In response, the Government stresses that the reversal of a criminal conviction, even one based on insufficiency of evidence, does not entitle a defendant to a Certificate of Innocence.[18] Further, the Government argues that 28 U.S.C. § 2513 is to be strictly construed because it constitutes a waiver of sovereign immunity and that it was never intended to open the door for compensation for any defendant who has been found not guilty. The Government argues that although the Fifth Circuit's reversal in this case was based on insufficiency of evidence to prove guilt beyond a reasonable doubt the reversal alone does not satisfy the

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[15] R. Doc. 377.

[16] 10 F. 3d 1278 (7th Cir. 1983).

[17] 137 S. Ct. 1249 (2017).

[18] R. Doc. 383 at 16.

requirements of 28 U.S.C. § 2513. The Government points out the Defendant has failed to provide any affirmative proof to the Court and that she relies, instead, on the lack of evidence to support her criminal conviction. As a result, the Government argues that the Defendant has not carried her burden under the statute. Even through the Government contends that the Defendant bears the burden of proof in this matter, the Government argues that the evidence, at a minimum, demonstrates that Davis's neglect and misconduct brought about her prosecution and thus she fails to meet the statutory requirements of Section 2513.[19] Finally, the Government addresses the Defendant's argument that the *Nelson v. Colorado* decision supports her contention that the reversal of her conviction alone should be sufficient to support a granting of Certificate of Innocence. In response to that argument, the Government distinguishes the facts of *Nelson v. Colorado*, which addressed the requirement of a defendant having to prove his innocence before being refunded fees and restitution, from those at issue in this case. The Government notes that in this case, the Defendant has been refunded fees and restitution paid and is now seeking compensation from the Government as a result of the reversed conviction.[20]

In reply, the Defendant argues that the Government's brief is "little more than an intellectually dishonest hodgepodge of misleading quotes from disparate

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[19] *Id*. at 20.

[20] R. Doc. 381.

cases."[21] The Defendant contends that the Government's Factual Summary ignores the Fifth Circuit's decision. Further, the Defendant argues that the Government's factual assertions that the Defendant is not innocent is contradicted by everything in this case including the trial testimony and exhibits. Specifically regarding 28 U.S.C. § 2513, the Defendant again argues that requiring an affirmative showing of innocence after a reversal for evidentiary insufficiency is unconstitutional in light of *Nelson v. Colorado*. Nevertheless, the Defendant relies on the evidence in the case as well as the Fifth Circuit's opinion to support the issuance of a Certificate of Innocence.

III. ANALYSIS

The Court fully adopts the Law And Analysis of the Magistrate Judge's Report and Recommendation as written regarding the Defendant's argument alleging the unconstitutionality of the statute and the requirements of 28 U.S.C. § 2513 and supplements it further herein.

All parties agree that the controlling law before the Court is 28 U.S.C. § 2513, the Unjust Conviction and Imprisonment Statute. That statute reads that any person suing under Section 1495 of this title must allege and prove that:

> **(1)** His conviction has been reversed or set aside on the ground that he is not guilty

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[21] R. Doc. 390.

> of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and
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> **(2)** He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.[22]

The Government conceded in oral argument that the first requirement—that the Defendant's conviction has been reversed or set aside—has been met in this case. The Court agrees that the first prong has been met. The argument in this case centers on the second factor: whether the Defendant committed any of the acts charged, or whether her acts, deeds or omissions constituted any offense, and whether by misconduct or neglect she caused or brought about the prosecution.

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[22] 28 U.S.C. § 2513. The Court notes that the Defendant—as well as several courts—refers to three factors, separating the second factor into two separate factors. This distinction does not affect the substance of the relevant test, nor does it alter the Court's analysis. This Court cites the statute as written in the Code.

The Defendant argues that the Fifth Circuit's Opinion, as well as the trial record, supports her argument that she has satisfied the statutory requirements for the issuance of a Certificate of Innocence. Further, the Defendant specifically argued in oral argument that any time that a defendant's conviction has been set aside based on insufficiency of the evidence, the defendant has satisfied the innocence prong. The Government argues that, instead, a reversal based on insufficiency of evidence in a criminal case only addresses whether the Government has met its burden of establishing guilt beyond a reasonable doubt. As such, a reversal is not sufficient on its own to allow for the issuance of a Certificate of Innocence. Both the Defendant and the Government agree that, under the Unjust Conviction and Imprisonment Statute, the Defendant carries the burden of fulfilling the requirements of the statute by a preponderance of the evidence. This Court agrees.

In reversing Davis's conviction for conspiracy to commit health care fraud, the Fifth Circuit wrote that "[a]lthough the Government presented a plausible scheme of fraudulence, it did not implicate Davis in the scheme with proof beyond a reasonable doubt. The Government did not present sufficient evidence to allow any rational juror to infer that Davis agreed to participate in a conspiracy to commit health care fraud. As such, we must reverse."[23] The panel then analyzed the sufficiency of evidence relative to the Defendant's

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[23] R. Doc. 373-1 at 25.

conviction of health care fraud. It stated: "[t]he Government based Davis's fraud completely on the actions of Dr. Ganji. It provided no evidence of Davis's own fraudulent activity as it pertains to Stewart. There was not sufficient evidence to show an agreement to commit health care fraud, and the Government did not otherwise attempt to show that Davis individually committed the fraud alleged in Count 4 . . . Thus, there is insufficient evidence to show that she knowingly executed a scheme to defraud Medicare."[24] Looking at the plain language of the Fifth Circuit's Opinion, the Court notes that the Opinion states "Although the Government presented a plausible scheme of fraudulence, it did not implicate Davis in the scheme with proof beyond a reasonable doubt."[25]

Defendant relies on *Betts*[26] to argue that the Defendant's burden to show that she did not by her misconduct or neglect cause or bring about her own prosecution applies only when that neglect or misconduct was intended to mislead authorities into thinking she had committed an offense. This Court does not read the statute similarly. The statute specifically states that a Certificate of Innocence should issue only when a defendant did not by misconduct *or neglect* cause or bring about his or her own prosecution. To hold that a defendant fails to satisfy this second prong only when he or she has acted or failed to act in such a

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[24] *Id*. at 28.

[25] R. Doc. 373-1 at 25.

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

way as to mislead authorities into thinking he or she had committed an offense would completely read the word neglect out of the statute. The Fourth Circuit in *United States v. Graham* analyzed and rejected the *Betts* interpretation of Section 2513, stating

> We reject this narrow reading of subsection (a)(2) because it effectively reads "neglect" out of the statute. Each of the *Betts* court's enumerated examples implicates some element of *wrongful* intent. Indeed, the Seventh Circuit appears to limit denial on "neglect" grounds to situations in which "a defendant has it within his means to avoid prosecution but *elects* not to do so." *Id.* (emphasis added). Tellingly, the *Betts* court draws its examples of "neglect" from the discussion in *Keegan* of "willful misconduct," *see Keegan*, 71 F. Supp. at 638, not of conduct that constitutes "neglect" (or "negligence," the prior statutory term), which *Keegan* never addresses. Although *Betts* seeks to avoid a reading of § 2513 that "would require courts to assess the virtue of a petitioner's behavior even when it does not amount to a criminal offense," 10 F.3d at 1285, the statute's "misconduct or neglect" language on its face captures noncriminal conduct and thus requires just such an assessment.[27]

The Court agrees with the Fourth Circuit's reading of the statute and, because it was not the trial court, has undertaken just such an assessment of whether,

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[27] *United States v. Graham*, 608 F.3d 164, 174 (4th Cir. 2010).

through misconduct or neglect, the Defendant has brought about her own prosecution.

The Court notes the following excerpts from the Defendant's testimony at the trial of this matter. When asked about her interactions with Dr. Murray, one of the Government's cooperating witnesses who acknowledged falsifying certifications, the Defendant testified that she had only met him once and that her "clinical people" addressed his decisions regarding health care certifications as this was out of her purview and something she delegated to her chief administrator. The Government stressed in its case during trial and in briefing the Defendant's interaction with Dr. Murray following his termination. The Court has reviewed the Defendant's testimony in detail especially regarding this interaction, detailed below:

> Q. You've described Samara Davis was running the show as far as director of nursing, right?
>
> A. Correct.
>
> Q. And Samara Davis instructed that after November 31, 2014, Christian [Home Health Agency] was to have nothing to do with Dr. Murray; isn't that right?
>
> A. Basically that's what she stated in the K-mail.
>
> Q. Okay. But you continued to actually have something to do with Dr. Murray after you fired him, correct?

A. Yes, we did.

Q. You called Dr. Murray yourself into your office, correct?

A. Correct. Into the Ponchatoula office.

Q. You called him into your office, and you gave him a stack of about 60 Form 485s relating to home health care certifications, correct?

A. There were other documents in there as well.

Q. And other documents and Form 485s?

A. Yeah.

Q. And those documents identified in those Form 485s included certifications periods that extended into May of the following year, isn't that right, Ma'am?

A. I'm not sure, because I had not gone through that stack. That stack was just handed to me by staff.

Q. So you're taking no responsibility for the contents of those documents.

A. I did not go through them.

Q. When Dr. Murray walked into your office, you told him to sign the documents, didn't you?

A. I asked him if he would sign the documents that had been previously submitted to him prior to me coming there.

Q. Okay. And you're saying this is a if you had fired Dr. Murray on September 29, 2014, why did you have him come in and sign documents that ran through May of the following year if it related to home health certification?

A. First, I am not aware that those documents ran through May of 2015. I did not go through the list of documents. Secondly, that was not a first request of ours, that was a second request of us to get Dr. Murray to sign on documents that we had previously attempted to get him to sign.

. . .

Q. Ms. Davis, you testified earlier that—let me go back. You actually then submitted claims to Medicare based upon these records, did you not, ma'am?

A. I'm not aware—I'm not sure of that.

Q. You don't know? You had Dr. Murray come in to sign documents and then you didn't submit claims based upon them?

A. I do not do my billing. I have an outside contractor that does my billing.

. . .

Q. And do you dispute that Dr. Murray's billings extended through eight months after you fired him?

A. I don't dispute that.[28]

On the face of the above exchange, the Defendant clearly testified that she handed a stack of forms to the doctor to sign, which forms were then used as the basis for Medicare reimbursements, without going through them or knowing what was in the stack. Dr. Murray, a cooperating witness for the Government, confirmed the Defendant's account of the meeting. Further, Dr. Murray was specifically asked if Ms. Davis asked him if the information contained in the documents was accurate. He testified that she did not ask him any questions at all and only asked him to sign the documents.[29] The Defendant, as owner of a home health care agency, had an obligation to oversee those responsible for making crucial decisions, whether regarding healthcare or billing. At the very least, the owner of such an agency has an obligation to oversee those administrators who oversee those responsible for making such decisions. Further, in an instance as testified to by Ms. Davis as her meeting with Dr. Murray, a person who she had terminated after he was indicted for fraud, it seems clear to the Court that the Defendant was under an obligation to make some inquiry of the doctor and/or her own administrator regarding the content of the documents that she was requiring this doctor to sign. Dr. Murray further testified that he had certified individuals as being home bound and requiring home health care inappropriately.[30] The Defendant's

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[28] R. Doc. 265 at 261-265.

[29] R. Doc. 262 at 691-692.

[30] *Id.* at 676-677.

testimony in this regard—that she failed to personally review the documents or question the doctor concerning the documents prior to requiring his signature—demonstrates, at a minimum, a neglect of duties. In further assessing whether Defendant was negligent, the Court considers Defendant's testimony in which she stated she terminated an employee for fraudulent activity, specifically for lying about making home visits to patients, only to re-hire that employee because she was a "softy" and the employee promised never to get into any other similar activity.[31] This testimony, taken as a whole, points to a lack of oversight by the Defendant as owner of the home health care agency. Importantly, it was the acts described in this testimony that were the nexus of the Government's case and the Defendant's and co-defendants' prosecution. Therefore, Ms. Davis cannot realistically claim that her prosecution was not caused by her neglect.

Further, and importantly, as pointed out by the Magistrate's Report and Recommendation, the reversal of the Defendant's conviction, on its own, is insufficient to prove her innocence. While the Defendant argues that the Fifth Circuit's finding should be sufficient to prove her innocence, this Court refers to the specific language by the Fifth Circuit in its Opinion, "Although the Government presented a plausible scheme of fraudulence, it did not implicate Davis in the scheme *with proof beyond a reasonable doubt.*"[32] A conclusion,

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[31] R. Doc. 165 at174-175.

[32] R. Doc. 373 (emphasis added).

as here, that the Government did not prove a charge beyond a reasonable doubt differs from the conclusion that the Defendant is innocent in fact.[33] The Defendant has offered no proof other than directing the Court to the trial record. Further, as noted above, the Court's reading of the trial transcript does not convince the Court that the Defendant satisfies the requirements of 28 U.S.C. § 2513.

Finally, the Court also agrees with the Magistrate Judge's reading of *Nelson v. Colorado*.[34] In short, *Nelson* dealt with procedural due process concerns that are not at issue here. In that case, a defendant whose conviction was reversed sought court costs, fees, and restitution. The Supreme Court held that the Colorado Compensation for Certain Exonerated Persons statute offended due process by requiring an additional showing of innocence by a defendant in order for her to receive costs, fees, and restitution that she had paid. But the Supreme Court did not address a statute like the one at issue here, which allows a prosecuted defendant to seek money damages from the Government beyond what was already paid by the defendant. And as Justice Alito's concurring decision in *Nelson* makes clear, "[t]he American legal system has long treated compensation for the economic consequences of a reversed conviction very differently from the refund of fines and other payments made by a defendant pursuant to a

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

[34] 137 S. Ct. 1249 (2017).

criminal judgment."[35] The Court therefore finds *Nelson v. Colorado* inapplicable here.

IV. CONCLUSION

IT IS HEREBY ORDERED that the Defendant's Motion for Issuance of a Certificate of Innocence[36] is **DENIED**.

New Orleans, Louisiana, this 17th day of September, 2020.

/s/ Wendy B. Vitter
WENDY B. VITTER
UNITED STATES
DISTRICT JUDGE

[35] *Nelson*, 137 S. Ct. at 1261 (Alito, J., concurring).

[36] R. Doc. 377.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	**CRIMINAL ACTION**
VERSUS	**NO. 15-155**
ELAINE DAVIS	**SECTION "A" (3)**

REPORT AND RECOMMENDATION

(Filed Nov. 7, 2018)

Before the Court is Elaine Davis's Motion for a Certificate of Innocence, as Required by the Unjust Conviction and Imprisonment Statute. [Doc. #377]. The District Court referred this matter to the undersigned. [Doc. #377]. Having reviewed the oral arguments, the case law, the pleadings, the Court rules as follows.

I. Background

Christian Home Health Care ("Christian") was a home health agency owned by Elaine Davis and her husband, Walter Davis, Sr., since 1989. Christian provided home health care services to patients in Southern Louisiana. Home health care services are those skilled nursing or therapy services provided to individuals who have difficulty leaving the home without assistance. These services are commonly provided to senior citizens.

The process for receiving home health care services begins when a physician identifies a patient as an eligible candidate. Usually, although not a legal requirement, a patient's primary care physician ("PCP") refers her for home health services. A nurse then goes to the patient's home to assess if she is homebound, completing an Outcome and Assessment Information Set ("OASIS"). The nurse then develops a plan of care based on the OASIS and forwards that document to a physician for approval. This is typically the same physician who initiated the process. In 2011, Medicare implemented a face-to-face requirement to further ensure that medical professionals would not order home health care without ever seeing the patient. This required medical professionals to actually see the patient for the initial meeting, but "[t]he face-to-face patient encounter may occur through telehealth in person." Regulations allow for medical professionals who are not physicians to complete the face-to-face encounter, but the professionals have to be under the supervision of a physician. A medical professional certifies that they completed this encounter by completing a face-to-face addendum. The agency then sends the addendum with the Form 485 certification forms, which are used to certify patients for home health care to Medicare for reimbursement. If the professional determines the patient is homebound, the agency staff immediately provides that care. The staff member keeps the certifying doctor updated and notifies her if the patient's needs change.

In order to provide these services, Christian employed an administrative team and medical professionals, including clinical supervisors, registered nurses, licensed practical nurses, home health aides, medical consultants, and medical directors, who are practicing physicians who contracted with Christian to provide services including nurse training, medical advice, and patient care. The directors also certify patients for home health care. Christian paid medical directors $1,000 per month in exchange for their services and throughout the years, it contracted with many physicians.

In 2010, Christian hired Dr. Pramela Ganji as a medical director in the New Orleans area. Ganji was a physician who owned a private practice and had previously worked in nursing homes and with other home health care agencies. To assist her with her new and continuing duties, Ganji entered into a collaborative agreement with Nurses Per Diem, an organization of nurse practitioners, to provide home visits to homebound patients. Cynthia Kudji, the nurse practitioner with whom Ganji closely worked, performed many of the initial face-to-face encounters.

In 2012, Christian opened an office fifty miles north in Ponchatoula to better serve the Hammond area. It later hired Dr. Winston Murray, Louella Hendricks, Kim Robinson, Kimberley Celestine, and Betty Walls. Although Christian had fewer than twenty-five patients when the Davises bought the company out of bankruptcy, between 2007 and 2015, the years the conspiracy to commit health care fraud allegedly took

place, Christian cared for 350-400 patients at any given time.

In 2007 the United States Justice Department established a Medicare fraud task force. Since then, more than 400 individuals have been prosecuted for defrauding the health care program of $1.3 billion. Notably, an individual who is a shadow in the current cast of characters was swept up in this crackdown: Mark Morad, who owned and operated a home health empire in Southern Louisiana that toppled when he was indicted and pleaded guilty to defrauding Medicare of millions of dollars. When that regime fell, other agencies scrambled to scavenge Morad's patients and provide work for those former Morad employees who the government had not publicly implicated in the conspiracy. Christian was one of these agencies.

The government's discovery of the alleged Christian scheme was rather peculiar. The FBI initiated an investigation after one of Christian's patients, Simone Joseph, filed a complaint. Joseph was the plaintiff in an unrelated personal injury lawsuit, and that suit revealed that her medical history included false statements. She complained that co-defendant, Dr. Godwin Ogbuokiri, billed Medicare multiple times although she had only seen him once.

The subsequent investigation into Joseph's claims uncovered a scheme where, according to the government, Christian employees recruited Medicare beneficiaries in exchange for incentives, which ranged from $100 bonuses to trips to Las Vegas, Nevada. To receive

the incentives, Christian employees had to recruit prospective patients who were both eligible for Medicare and immediately ready for Christian hospice or home health care services. If the PCP did not certify the patient or the patient did not have a PCP, Christian's medical directors would do so. From January 2007 through January 2015, Christian submitted 14,891 claims for home health care and related services to Medicare. These claims were worth approximately $33,232,134, and Medicare paid around $28,265,071 on those claims.

The investigation resulted in an indictment charging:

- Davis, Ganji, and Ogbuokiri with conspiracy to commit health care fraud, in violation of 18 U.S.C. § 1349 (Count One);
- Davis and Ogbuokiri with health care fraud, in violation of 18 U.S.C. § 1347 for submitting fraudulent Medicare claims with regard to Simone Joseph (Count Two);
- Davis and Ogbuokiri with health care fraud, in violation of 18 U.S.C. § 1347 for submitting fraudulent Medicare claims with regard to Leon Pate (Count Three);
- Davis and Ganji with health care fraud, in violation of 18 U.S.C. § 1347 for submitting fraudulent Medicare claims with regard to Carolyn Stewart (Count Four); and
- Davis and Ganji with health care fraud, in violation of 18 U.S.C. § 1347 for submitting fraudulent Medicare claims with regard to Jean Wright (Count Five).

During the trial, the government presented testimony from case investigators, former Christian nurses and doctors, Ogbuokiri's patients, and Dr. Jan Cooper, Carolyn Stewart's PCP. Much of the government's case hinged on the testimony of its cooperating witnesses, Murray, Louella Hendricks, and Kimberley Celestine, who admitted to fraudulently certifying patients for home health care. In the scheme, Hendricks and Celestine referred patients to Christian, taking the certification form to Murray for certification. Without extensive review of the patient's record or thorough inquiry into their homebound status, Murray signed the documents. Christian nurses, usually those who certified the patient, would then perform services for individuals who were ineligible, and Christian would receive Medicare payments.

The government's dependence on these witnesses is almost as peculiar as the scheme's discovery. Notably, these individuals worked in the Hammond area, while Ganji and Davis worked sixty miles away in the New Orleans area. Additionally, Celestine and Hendricks worked together for Morad's agencies before coming to Christian. Furthermore, Celestine and Hendricks's working relationship with Murray predated their move to Christian. When the nurses left their former employer for Christian, they immediately took the patients they brought with them to Murray for certification. Unlike other salient cases involving conspiracy to commit health care fraud, here, the government presented eighteen witnesses, none of whom could provide direct evidence of their alleged co-conspirator's actions

because the witnesses never acted with the defendants to commit the specific charged conduct.

At the close of the government's case-in-chief, the parties all filed Rule 29 motions for judgment of acquittal and renewed the motions before deliberations. The district court denied these motions. Following the trial, the jury convicted Ganji and Davis of Count 1 (conspiracy to commit health care fraud) and Count 4 (health care fraud with regard to Stewart) and returned not-guilty verdicts on all of the remaining counts. Ogbuokiri, whose patient interaction initiated the investigation, was acquitted of all charges against him.

The district court sentenced Ganji to seventy-two months' imprisonment, to be followed by two years of supervised release, and ordered that she pay Medicare $5,048,518.00 in restitution. The court sentenced Davis to ninety-six months' imprisonment, to be followed by two years of supervised release, and ordered that she pay Medicare $9,305,647.26 in restitution. On appeal, Ganji and Davis argued that the district court erred in denying their motions for acquittal because the evidence presented at trial was insufficient to support their convictions. They additionally challenged the district court's intended loss and restitution calculations. Davis further contended that the district court erred in allowing evidence of referral fees and crossover beneficiaries. The Fifth Circuit agreed, and, on, January 30, 2018, vacated all of the convictions. *See* United States v. Ganji, 880 F.3d 760, 763 (5th Cir. 2018).

II. The Parties' Positions

A. The Motion for the Certificate

Davis seeks a certificate of innocence in order to proceed with a lawsuit against the government in the Court of Federal Claims for damages due to her wrongful imprisonment. She contends that she has satisfied all of the three requirements for a certificate of innocence, as is evident from the Fifth Circuit's findings in reversing her convictions. *Id.* at 763 (5th Cir. 2018). She maintains that the Fifth Circuit's opinion establishes (1) that her convictions were overturned because she is innocent of the crimes of which she was convicted; (2) that she did not commit any of the acts charged; and (3) that she did not bring about her own prosecution through misconduct or neglect.

In the alternative, Davis challenges the statutory scheme for compensation as unconstitutional. Citing *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), she argues that because her conviction has been overturned, she is presumed innocent and requiring her to obtain a certificate of innocence to establish her actual innocence is unconstitutional.

Davis maintains that the reversal of a conviction based on insufficiency of the evidence does satisfy the first requirement. *United States v. Grubbs*, 773 F.3d 726, 732 (6th Cir. 2014); *Doli Syarief Pulungan v. United States*, 722 F.3d 983, 984 (7th Cir. 2013). She notes that the Fifth Circuit ruled that the "Government falls short of proving an agreement." *Ganji*, 880 F.3d at 773. Indeed, she notes that the Fifth Circuit

went so far as to state that "the direct evidence favors Davis." *Id.* And, she notes, the Fifth Circuit found there was "no evidence of Davis's own fraudulent activity," nor was there any evidence that Davis knew or discovered that the patient in question was not actually homebound. *Id.* at 778.

Davis then contends that there was no evidence that she committed the crimes charged. And she has maintained her innocence from the moment of her arrest until the Fifth Circuit acknowledged her innocence. She continuously stated that she had no knowledge of any wrongdoings on the part of any person associated with Christian. Davis never gave a false confession, withheld exculpatory evidence, attempted to flee, attempted to remove evidence or committed any other act or omission that would "mislead the authorities as to her culpability." *See Betts*, 10 F.3d at 1285 (7th Cir. 1993). Simply put, she argues that her prosecution was not caused by any of her own doing.

B. The Government's Opposition

The government contends that Congress did not intend to indemnify every imprisoned person whose conviction has been set aside. It argues that every court that has considered this issue has agreed that entitlement to a certificate of innocence requires the applicant to affirmatively prove his or her actual innocence. Citing case law, it maintains that reversal of a criminal conviction based on insufficiency of the government's evidence does not entitle the defendant to a

certificate of innocence. The government notes that the Fifth Circuit reversed Davis's convictions solely on the ground that there was insufficient evidence to support her conviction and, therefore, held that the District Court erred by denying her Rule 29 motion for judgment of acquittal.

The government contends that the evidence against Davis, while insufficient to prove her guilt beyond a reasonable doubt, plainly demonstrates that she is not actually innocent. Pointing to the evidence, it argues that she signed and completed Christian's Medicare enrollment applications, wherein she took responsibility for its Medicare billings and acknowledged her obligation to follow Medicare's rules and submit accurate claims; she knew that the beneficiaries used by Christian were not under the care of the doctors who certified them for home health care; she understood that beneficiaries were being referred to Christian by unqualified nurses and aides, rather than doctors, and solicited new employees to bring in new beneficiaries; she fired Dr. Murray, and then after she fired him, summoned him to her office and watched as he falsely signed home health certification documents for patients she knew he had not seen, and then used those certifications months later to fraudulently bill Medicare; she sponsored a contest to incentivize employees to bring in new beneficiaries, offering a Las Vegas trip and $2,500 bonuses for anyone who brought in 20 or more patients who were ready for immediate admission; she paid illegal kickbacks to employees, including Louella Hendricks and Kim Celestine, for

winning the contest; and she separately paid illegal kickbacks of $100 per patient for new patients they brought into Christian's census. The government maintains that the evidence, at minimum, demonstrates that Davis's neglect and misconduct brought about her prosecution.

Acknowledging *Nelson*, the government contends that the Court held only that a state framework which required defendants to prove their innocence following acquittal before they were refunded fees and restitution was unconstitutional. As the Court explained, "Just as the restoration of liberty on reversal of a conviction is not compensation, neither is the return of money taken by the State on account of the conviction." *Id.* at 1257. But here, the government maintains, the United States has restored her liberty and returned money paid pursuant to the restitution order. As Justice Alito pointed out in his concurring opinion, "the American legal system has long treated compensation for the economic consequences of a reversed conviction very differently from the refund of fines and other payments made by a defendant pursuant to a criminal judgment. Statutes providing compensation for time wrongfully spent in prison are a 20th-century innovation: By 1970, only the Federal Government and four States had passed such laws." *Id.* at 1261 (referring to the UCIS). Because Davis has failed to prove she is actually innocent, the government argues that she is not entitled to a certificate of innocence in order to receive compensation for time wrongfully spent in prison.

C. Davis's Reply

There is very little new argument in the reply. Davis cites more case law to further support her arguments. She does, however, emphasize that the Fifth Circuit's version of the facts – which they said supports Davis's arguments – is binding on this Court, and the government's version (laid out in its opposition) has been discredited.

III. Law and Analysis

Federal law creates a compensatory remedy for those wrongfully imprisoned by the United States. Under 28 U.S.C. § 1495, the United States Court of Federal Claims has jurisdiction to render judgment on any claim for damages sustained "by any person unjustly convicted of an offense against the United States and imprisoned." To establish jurisdiction under this cause of action, the petitioner must comply with the requirements of 28 U.S.C. § 2513. *Nyabwa v. United States*, 130 Fed. Cl. 179, 185 (2017).

Section 2513 requires a showing that (1) petitioner's conviction "has been reversed or set aside on the ground that [petitioner] is not guilty of the offense of which [petitioner] was convicted . . . as appears from the record or certificate of the court setting aside or reversing the conviction," (2) petitioner "did not commit any of the acts charged," or those acts "constituted no crime against the United States, or any State, Territory, or the District of Columbia," and (3) petitioner "did not by misconduct or neglect cause or bring about

[her] own prosecution." 28 U.S.C. § 2513(a); *see United States v. Graham*, 608 F.3d 164, 171 (4th Cir. 2010); *see also Osborn v. United States*, 322 F.2d 835, 840-43 (5th Cir. 1963).

Proof of these requisite facts "shall be by certificate of the court or pardon wherein such facts are alleged to appear." 28 U.S.C. § 2513(b). Accordingly, petitioners under the statute "must provide [the Court of Federal Claims] with a document, certified by the district court, which strictly complies with the recitals of § 2513." *Wood v. United States*, 91 Fed. Cl. 569, 578 (2009); *see Humphrey v. United States*, 52 Fed. Cl. 593, 597 (2002); *see Crooker v. United States*, 119 Fed. Cl. 641, 648 (2014).

A. The Unconstitutionality of the Statute

Before arguing that she satisfies these requirements, Davis contends that the entire statutory scheme is unconstitutional. This argument is relevant here because it bears on what Davis actually need prove under the first requirements of Section 2513. As noted above, Davis contends that *Nelson v. Colorado* renders Section 2513 unconstitutional. The government argues that *Nelson* is inapposite here.

In *Nelson v. Colorado*, the exonerated defendants challenged a Colorado statute that required them to prove their actual innocence after their exoneration before they could obtain reimbursement for court costs, fees, fines, and restitution paid to the government before and during their prosecution. The United States

Supreme Court ruled that this statutory scheme providing compensation for wrongful imprisonment and requiring an affirmative showing of innocence following the reversal of a conviction for insufficient evidence violated due process. 137 S. Ct. 1249 (2017). The Court noted that the presumption of innocence constitutes a "principle of justice so rooted in the tradition and conscience of our people as to be ranked fundamental." *Id.* at 1256 n.9. That presumption of innocence is reinstated whenever a court reverses a conviction for insufficient evidence. *Id.* at 1255. There is no in-between; the government may not consider a person who has been found not guilty of a crime "guilty enough." *Id.* at 1256 (emphasis in original). Accordingly, a person entitled to the presumption of innocence "should not be saddled with any proof burden." *Id.* The Supreme Court expressly held that requiring an exoneree to affirmatively prove their innocence despite a judicial declaration that they are not guilty of a crime "does not comport with due process." *Id.* at 1255.

While this argument is superficially appealing, the Court finds that it rests on a faulty expansion of *Nelson*'s holding. In *Nelson*, the Supreme Court held unconstitutional only a state-law scheme that deprived a defendant whose conviction was later overturned for reasons other than insufficiency of the evidence or legal error unrelated to actual innocence from obtaining compensation unless that defendant proved his innocence by clear and convincing evidence. *Id.* at 1254. Indeed, the statute allowed defendant to recoup any fine, penalty, court costs, or restitution paid

as a result of the offense of conviction. *Id.* (citations and quotations omitted). As Justice Ginsburg made clear, "[p]etitioners seek only their money back, not interest on those funds. . . ." *Id* at 1257. The import of this statement is that the Supreme Court was not addressing a remedial statute that granted an exonerated defendant more than he had already paid into the system before his exoneration but only restored the defendant to the status quo before his conviction.

As Justice Alito noted in his concurring opinion, "[t]his was a remedy well known at common law, memorialized as a part of the judgment of reversal which directed that the defendant be *restored* to all things which he has lost on occasion of the judgment aforesaid." *Id.* at 1259 (Alito, J., concurring) (citations and quotations omitted) (emphasis added). "The American legal system has long treated *compensation* for the economic consequences of a reversed conviction very differently from the *refund* of fines and other payments made by a defendant pursuant to a criminal judgment." *Id.* at 1261 (Alito, J., concurring).

As both Justice Ginsburg's majority and Justice Alito's concurring opinions made clear, there is a significant difference in our legal system between restoring an exonerated defendant to the status quo and allowing that exonerated defendant to pursue compensation over and above reimbursement. But that is what Davis seeks to do here: Obtain compensation over and above any reimbursement due her for her invalidated conviction. She seeks compensation for wrongful imprisonment in a lawsuit in the Court of Federal

Claims pursuant to, presumably, 42 U.S.C. § 1983. Compensation over and above reimbursement is not what *Nelson* protects. Here, the government notes that it has restored Davis's liberty and returned any restitution already paid by her, [Doc. #383at p. 23], and there is no dispute in the pleadings as to that issue. That is what the government is required to do under *Nelson*, and, until the Supreme Court extends *Nelson* to compensation over and above reimbursement, this Court declines to do so.

B. 28 U.S.C. § 2513

The Unjust Conviction and Imprisonment statute ("UCIS"), 28 U.S.C. § 2513, which establishes the requirements to obtain a certificate of innocence to sue the government in the Court of Federal Claims under 28 U.S.C. § 1495, provides:

> (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and
> (2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he

> did not by misconduct or neglect cause or bring about his own prosecution.

28 U.S.C. § 2513(a). As noted above, Section 2513 requires a showing that (1) petitioner's conviction "has been reversed or set aside on the ground that [petitioner] is not guilty of the offense of which [petitioner] was convicted . . . as appears from the record or certificate of the court setting aside or reversing the conviction," (2) petitioner "did not commit any of the acts charged," or those acts "constituted no crime against the United States, or any State, Territory, or the District of Columbia," and (3) petitioner "did not by misconduct or neglect cause or bring about [her] own prosecution." *See United States v. Graham*, 608 F.3d 164, 171 (4th Cir. 2010); *see also Osborn v. United States*, 322 F.2d 835, 840-43 (5th Cir. 1963) (same).

Davis maintains that the reversal of her conviction by the Fifth Circuit on the ground of insufficiency of evidence satisfies the first requirement, *i.e.*, that she is innocent of the crime. Having disposed of Davis's unconstitutionality argument that she need not prove her own actual innocence of the crime under *Nelson*, a thorough search of the case law surrounding Section 2513 (of which there is very little) reveals that at this stage, Davis bears the burden of proof to demonstrate that she is actually innocent of the crime. "Additionally, the statute inverts the burden of proof; the claimant must prove his own actual innocence and he must do so to the satisfaction of the judge who heard the evidence at trial." *United States v. Graham*, 595

F. Supp. 2d 681, 684 (S.D.W.V. 2008), *aff'd*, 608 F.3d 164 (4th Cir. 2010).

Every court of appeals that has examined whether a reversal of a conviction based on insufficiency of evidence establishes actual innocence for purposes of the UCIS has uniformly concluded that it does not. *See*, *e.g.*, *Pulungan v. United States*, 722 F.3d 983, 985 (7th Cir. 2013) ("A conclusion that the prosecutor did not prove a charge beyond a reasonable doubt differs from a conclusion that the defendant is innocent in fact."); *United States v. Graham*, 608 F.3d 164, 174 (4th Cir. 2010) ("[T]he Government's failure to offer sufficient evidence to prove [the defendant's] guilt does not require the district court, in considering the same evidence, to find him entitled to a certificate of innocence."); *United States v. Racing Servs., Inc.*, 580 F.3d 710, 712 (8th Cir. 2009) ("A reversal of the criminal conviction based on insufficiency of the prosecution's evidence does not entitle the defendant to a certificate of innocence."); *United States v. Osborn*, 322 F.2d 835, 840 (5th Cir. 1963) ("The claimant cannot be one whose innocence is based on technical or procedural grounds, such as lack of sufficient evidence."); *United States v. Brunner*, 200 F.2d 276, 280 (6th Cir. 1952) ("Innocence of the petitioner must be affirmatively established and neither a dismissal nor a judgment of not guilty on technical grounds is enough").

But the Fifth Circuit never explicitly stated that Davis is innocent of the crimes; it held merely that the government had failed to carry its burden of proof. There is a difference. "The fundamental proposition

underlying the statute is this – there is a difference between someone who is legitimately prosecuted and ultimately found not guilty and one who is wrongfully prosecuted when truly innocent. The statute is designed to compensate the latter; it has nothing to say about the former." *Graham*, 595 F. Supp. 2d at 684; *see also Burgess v. United States*, 20 Cl. Ct. 701, 704 (1990) ("[R]eversals in criminal cases are more frequently had on the ground of insufficiency of proof or on the question as to whether the facts charged and proven constituted an offense under some statute. Consequently, it would be necessary to separate from the group of persons whose convictions have been reversed, those few who are in fact innocent of any offense whatever.") (quoting Former United States Attorney General Cummings, in a letter embodied in the Report of the Senate Judiciary Committee [Report No. 202, 75th Congress, 1st Session]).

Accordingly, Davis must prove that she was actually innocent of the crimes for which she was convicted. Davis maintains that the Fifth Circuit found her actually innocent by citing the language in the Fifth's Circuit's opinion. *Ganji*, 880 F.3d at 776 ("One cannot negligently enter a conspiracy."); *id.* at 777 ("Although the Government presented a plausible scheme of fraudulence, it did not implicate Davis in the scheme with proof beyond a reasonable doubt."). Davis relies heavily on *United States v. Betts*, 10 F.3d 1278 (7th Cir. 1993), to support her arguments that she has done what is required under the statute.

Betts, however, is inapposite in one important particular: The *Betts* court reversed the district court's denial of a certificate of innocence to the defendant because it held that its earlier opinion had explicitly stated that Betts was innocent of the crime (contempt of court) with which he had been charged:

> *Our prior opinion makes clear that Betts did not commit a criminal offense*. 927 F.2d at 987-88. As we explained, the order scheduling the June 19th hearing was not sufficiently specific to compel Betts' attendance; accordingly, Betts did not violate a court order in failing to attend. *Id.* at 987. In other words, *we reversed Betts' conviction because he was truly innocent of contempt*, not because there was some defect in the conviction unrelated to his culpability. This is not a case where the conviction was set aside for lack of jurisdiction, expiration of the statute of limitations, use of inadmissible evidence, or *failure of proof beyond a reasonable doubt* – that is, on a ground that leaves room for the possibility that the petitioner in fact committed the offense with which he was charged.

Id. at 1284 (emphasis added). And while the Fifth Circuit noted in regard to one of Davis's convictions that "the direct evidence favors Davis" – strong language to be sure – that is not the same as saying that Davis is actually innocent of the crime. *Ganji*, 880 F.3d at 773. In *Betts*, the court did not say that the government had failed to produce sufficient evidence – as it did here –

or that the government had failed to meet its burden of proof – as it did here. *Betts* does not save Davis.

Apart from her reliance on *Betts* and the language from *Ganji*, Davis has offered no affirmative proof that would permit this Court to adjudicate her innocence. Instead, her entire claim of innocence rests on the lack of evidence to support her conviction. But, Davis "bears the burden to bring evidence of [her] actual innocence before the Court . . . and [her] threadbare references to the reversal in this case . . . do not suffice to carry that burden." *United States v. Abu-Shawish*, 228 F. Supp. 3d 878, 883 (E.D. Wisc. 2017).

Because it constitutes a waiver of sovereign immunity, "the unjust conviction statute has always been strictly construed." *Burgess*, 20 Cl. Ct. at 704; *Osborn v. United States*, 322 F.2d 835, 838 (5th Cir. 1963); *United States v. Keegan*, 71 F. Supp. 623, 636 (S.D.N.Y. 1947) (holding that "a statute creating a claim against the Government should be strictly construed, and may not by implication be extended to cases not plainly within its terms") (internal quotation marks omitted). In sum, the UCIS imposes an inflexible and rigorous burden on those who seek a certificate of innocence, the granting of which is committed to the sound discretion of the court of conviction. *Betts v. United States*, 10 F.3d 1278, 1283 (7th Cir. 1993).

Because the UCIS is constitutional and because Davis has failed to come forward with proof of her actual innocence, Davis fails to meet her burden here.[1]

IV. Conclusion

Accordingly, and for the foregoing reasons,

IT IS RECOMMENDED that Elaine Davis's Motion for a Certificate of Innocence, as Required by the Unjust Conviction and Imprisonment Statute [Doc. #377] be DENIED.

NOTICE OF RIGHT TO OBJECT

Objections must be: (1) specific, (2) in writing, and (3) served within fourteen (14) days after being served with a copy of this report. 28 U.S.C. ' 636(b)(1); Fed. R. Civ. P. 1(a), 6(b) and 72(b). A party's failure to object bars that party from: (1) entitlement to de novo review by a district judge; and (2) appellate review of the unobjected-to factual findings and legal conclusions accepted by the district court, except upon grounds of plain error. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).

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[1] Because this Court has determined that Davis has not met her burden with regard to the first prong of the UCIS, it need not address the other two.

New Orleans, Louisiana, this 7th day of November, 2018.

/s/ Daniel E. Knowles, III
DANIEL E. KNOWLES, III
UNITED STATES
MAGISTRATE JUDGE