No. 24-1036

In The Supreme Court of the United States

LaWanda A. Johnson, Ph.D.

v. *Petitioner,*

United States

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. To investigate or prosecute a substance abuse program or a person holding the records, law enforcement personnel must obtain a court order premised upon a showing of good cause under 42 U.S.C. § 290dd-2(b)(2)(C) & 42 C.F.R. § 2.66. To investigate or prosecute a patient, however, an order under 42 C.F.R. § 2.65 is required. Where information from patient records is shown to have been used in an application for a court order in violation of 42 C.F.R. § 2.66(c)(3) & (d)(2); and, no order under 42 C.F.R. § 2.65 appears in the materials of record, is summary judgment appropriate?

II. The confidentiality of records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with a substance use disorder treatment program is protected. (42 U.S.C. § 290dd-2(a)). In any proceeding conducted by any Federal authority, such records may be used or disclosed only as the regulations under 42 C.F.R. Part 2 permit. (42 U.S.C. § 290dd-2(g) & 42 C.F.R. §§ 2.12(d) & 2.13(a)). Is a coram nobis applicant entitled to a hearing; where, the evidence she seeks to present under 42 C.F.R. § 2.66(b), satisfies 28 U.S.C. § 2254(e)(2)(B)?

III. In the matter of *Mandel v. Bradley*, 432 U.S. 173 (1977), the Supreme Court wrote: "Summary actions ... should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." (*Id.* @ 176).

QUESTIONS PRESENTED- Continued

Did the court of appeals err by applying hypothetical jurisdiction to summarily affirm a district court order where: ***i)*** prior Supreme Court decisions and separation-of- powers principles forbid application of hypothetical jurisdiction; and, ***ii)*** a disputed issue of fact concerning the patient status of LaWanda Johnson is unresolved?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were Petitioner, LaWanda A. Johnson and her Co-Defendant, Dr. Antoine D. Johnson, MD. Respondent is the United States of America.

There are no corporate parties involved in this case.

DIRECTLY RELATED PROCEEDINGS

1. Petition for Writ of Error Coram Nobis in the United States District Court for the Western District of Washington at Tacoma. *United States v. LaWanda A. Johnson, Ph.D.*, No. 3:09-cr-05703-DGE (Jan. 26th, 2024).

2. A Motion challenging a use or disclosure order pursuant to the regulatory process at 42 C.F.R. § 2.66(b); granting, a part 2 program, the person holding the records and any patient "an opportunity to seek revocation or amendment of that order, limited to the presentation of evidence on the statutory and regulatory criteria for the issuance of the court order in accordance with paragraph (c) of this section." (42 C.F.R. § 2.66(b)- in pert. part). *United States v. LaWanda A. Johnson, Ph.D.*, No. 3:09-cr-05703-DGE (Feb. 12th, 2024).

DIRECTLY RELATED PROCEEDINGS- Cont'd

3. Immediate appeal of order denying revocation of a judicial disclosure order issued under 42 C.F.R. § 2.66(a)(l), to the Ninth Circuit Court of Appeals. *United States v. LaWanda A. Johnson, Ph.D.*, No. 24-4436 (July 19th, 2024).

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CITATION OF OPINIONS AND ORDERS

1. *United States v. Johnson*, 3:09-cr-05703-DGE (W.D. Wash. May 20, 2024).

2. *United States v. Johnson*, Case No. 24-4436 (9th Cir.: 12/20/2024).

3. *United States v. Johnson*, Case No. 24-4435 (9th Cir.: 12/20/2024).

4. *United States v. Johnson*, Case No. 24-3916 (9th Cir.: 01/27/2025).

5. *United States v. Johnson*, Case No. 23-3676 (9th Cir.: 01/28/2025).

6. *United States v. Johnson*, Case No. 22-35715 (9th Cir.: 01/04/2024).

BASIS FOR JURISDICTION IN THIS COURT

a) This case arises under U.S. Const., Article III, S.2, c1; because, Appellant-petitioner claims "an actual or threatened invasion of h[er] constitutional rights by the enforcement of some act of public authority ... and asks for judicial relief." (Art. III, S.2, c1).

b) The judgment of the court of appeals was entered Dec. 20, 2024. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

AUTHORITY

A. "Congress shall make no law ... abridging the freedom of speech, or ... the right of the people ... to petition the government for a redress of grievances." (U.S. Const., Amend. 1- in pert. part).

"[T]here may be a First Amendment question whether ... disclosure can be compelled." (*Hynes v. Mayor of Oradell*, 425 U.S. 610, 626 n.1 (1976)).

AUTHORITY- Continued

B. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." (U.S. Const., Amend. 4- in pertinent part).

Under the Fourth Amendment, an individual is entitled to be free from unreasonable governmental intrusion wherever an individual may harbor an "expectation of privacy that society is prepared to consider reasonable." (*United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

C. The Fifth Amendment guarantees: No person shall be "deprived of life, liberty or property without due process of law." (U.S. Const., Amend. 5- in pertinent part).

"We have recognized that the special relationship between patient and physician will often be encompassed within the domain of private life protected by the Due Process Clause." (*Cruzan ex rel. Cruzan u. Director, Missouri Department of Health*, 497 U.S. 261, 342 n.12 (1990)).

AUTHORITY- Continued

D. Section 3221 of the Coronavirus Aid, Relief, and Economic Security Act (Pub. L. 116-136: codified at 42 U.S.C. § 290dd-2 (March 27, 2020)).

E. 42 C.F.R. PART 2 - Confidentiality of Substance Use Disorder Patient Records (42 C.F.R. §§ 2.1- 2.68 (February 16, 2024)).

F. 42 C.F.R. §2.66(b) –

"Notice not required. An application under this section may, in the discretion of the court, be granted without notice. Although no express notice is required to the part 2 program, to the person holding the records, or to any patient whose records are to be disclosed, upon implementation of an order so granted any of those persons must be afforded an opportunity to seek revocation or amendment of that order, limited to the presentation of evidence on the statutory and regulatory criteria for the issuance of the court order in accordance with paragraph (c) of this section." (*Id.*).

AUTHORITY- Continued

§ 2.66(c)(3) –

"Information from records obtained in violation of this part, including § 2.12(d), cannot be used in an application for a court order to obtain such records." (*Id.* - in pertinent part).

§ 2.66(d)(2) –

"No information obtained under this section may be used or disclosed to conduct any investigation or prosecution of a patient in connection with a criminal matter, or be used or disclosed as the basis for an application for an order under § 2.65." (*Id.*).

§ 2.65 –

No order issued under this section appears in the materials of record.

§ 2.61(a) -

"Effect. An order of a court of competent jurisdiction entered under this subpart is a unique kind of court order. Its only purpose is to authorize a use or disclosure of patient information which would otherwise be prohibited by 42 U.S.C. 290dd-2 and the regulations in this part." (*Id.*).

STATEMENT OF THE CASE

Factual Background

As of this writing, no judge has resolved the issue of LaWanda A. Johnson's patient status; where, a use or disclosure order under 42 U.S.C. §290dd-2(b)(2)(C) and 42 C.F.R. § 2.66 was implemented. Importantly, the materials of record do not contain an order under 42 C.F.R. § 2.65; nor, patient consent.

Regulatory Background

"The purpose of section 2.66(b) is limited-to provide the Defendant an opportunity to seek revocation or amendment based on 'the statutory and regulatory criteria for the issuance of the court order in accordance with § 2.66(c).'" (*United States v. Norris*, 2:22-cr-00132-NT, at *18 (D. Me. Apr. 26, 2024)).

The regulation requires that upon implementation of an order, the program, the person holding the records, and any patient whose records are disclosed - a group whom we shall call *"the protected parties"* - must be afforded an opportunity to seek revocation or amendment of that order. (*U.S. v. Shinderman*, 515 F.3d 5, 11 (1st Cir. 2008)).

It is the view of the First Circuit Court of Appeals that an opportunity to contest the underlying validity and scope of a use or disclosure order "must be meaningful; otherwise, the regulation would hold out only an empty promise." (*Shinderman* @ 12).

Where an opportunity to contest means "presentation of evidence on the statutory and regulatory criteria for the issuance of the court order" (42 C.F.R. § 2.66(b)), a *meaningful opportunity* should include, court review of the presented evidence. (*Cf.* 42 C.F.R. §§ 2.65(c) & 2.64(c)- "Review of evidence: Conduct of hearing").

Procedural Background

Firstly, the coram nobis court does **not** appear to have reviewed new, undisputed evidence proving Ms. Johnson is a patient; and, proving the implemented use or disclosure order under 42 C.F.R. § 2.66 is defective.

Recall, the writ of coram nobis is "the essential remedy to safeguard a citizen against imprisonment by State or Nation in violation of his constitutional rights." (*U.S. v. Morgan*, 346 U.S. 502, 506 n.3 (1954)). To make coram nobis protection effective "federal courts have long disregarded legalistic requirements in examining applications for the writ and judged the papers by the simple statutory test of whether facts are alleged that entitle the applicant to relief." (*Id.*).

In this case, new, undisputed evidence was provided to the coram nobis court; creating, a presumption of fact recognized by 42 U.S.C. § 290dd-2(g) & 42 C.F.R. Part 2, *viz.*- LaWanda A. Johnson is a patient under 42 C.F.R. § 2.11.

Yet, constitutional violations, including jurisdictional defects, linked to that presumed fact and presented to the coram nobis court for consideration appear to have been overlooked; because, an official's actions are not justified if the official ignores or disregards "settled, indisputable law." (*Wood v. Strickland*, 420 U.S. 308, 321 (1975)).

Secondly, the judicial policy of avoidance is not applicable to 42 C.F.R. § 2.66(b), procedures: "In these cases, analysis ... necessarily focuses on the particular provisions of the immunity statute in question and on the nuances of its interpretation because there is nothing else before the court." (*Piccirillo v. NY*, 400 U.S. 548, 556-57 (1971)).

The new, undisputed evidence (App. 15), proves that after Ms. Johnson was arrested, she was identified as an individual with a substance use disorder in order to determine her eligibility to participate in a part 2 program. (42 C.F.R. § 2.11-"patient"). According to prison policy (28 U.S.C. § 522.21(a)(2)), that happened within 24-hours of her detention; and, about seven (7) months *before* the Superseding Indictment was filed (05/04/2010).

Ms. Johnson's detention order is not in the Appendix; but, can be located at entry #10 of the district court docket. Also, her Residential Drug Abuse Treatment certificate of completion, can be located at entry #817 on page 8 of that docket.

By **not** reviewing new, undisputed evidence presented under 42 C.F.R. § 2.66(b), lower "Courts fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with legal requirements" (*Camreta v. Greene*, 31 S. Ct. 2020, 14 (2011)); which, frustrates "the development of constitutional precedent and the promotion of law-abiding behavior" by public authority. (*Id.*@ 14-15).

Applying the avoidance doctrine to the 42 C.F.R. § 2.66(b) process, also invokes an objectionable canon of construction; according to which, the Government is excluded from the operation of general statutes. Here, the lower courts appear to have avoided rules, promulgated under grant of authority at 42 U.S.C. § 290dd-2(g), directing the Secretary of the Department of Health and Human Services to prescribe regulations implementing statutory disclosure provisions "to prevent circumvention or evasion thereof, or to facilitate compliance therewith." (*Id.*- in pertinent part).

But the "avoidance doctrine has no application in the absence of ambiguity" (*DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1979 (2020)). Ergo, avoidance in this statutory immunity challenge

under 42 U.S.C. § 290dd-2(c), impermissibly allows officials to: ***i)*** subvert CARES Act policy; ***ii)*** defeat its material provisions; and, ***iii)*** deprive coram nobis litigants a meaningful opportunity to seek revocation or amendment under 42 CFR § 2.66(b).

Thirdly, the legislative history of 42 U.S.C. § 290dd-2 indicates that Congress intended to deal with the "tragic national problem" of drug and alcohol addiction "in facilitating the work of drug and alcohol treatment centers by assuring the confidentiality of its patients." (*U.S. v. Eide*, 875 F.2d 1429, 1436-37 (9th Cir. 1989)).

The new, undisputed evidence proves Ms. Johnson was a patient *before* commencement of the underlying criminal suit. Thus, allowing her substance use disorder records to be used or disclosed for her criminal prosecution, in violation of the rules set forth in 42 C.F.R. Part 2: ***i)*** contradicts the literal meaning of 42 U.S.C. § 290dd-2, ***ii)*** contradicts Congressional intent underlying that statute; and, ***iii)*** may be criminal. (42 U.S.C. § 290dd-2(f) & 42 C.F.R. § 2.3).

Hence, avoiding review of evidence presented under 42 C.F.R. § 2.66(b); would, discourage people from seeking professional help for their alcohol and drug problems and would frustrate the work of alcohol and drug treatment facilities.

Plainly, the district court erred in refusing to resolve the issue of LaWanda's patient status; because, statutory immunity could be "assessed in light of the legal rules that were clearly established at the time" (*Pearson v. Callahan*, 555 U.S. 223, 244 (2009)).

This appeal follows.

REASONS FOR GRANTING THE WRIT

I. The United States did not carry its Burden of production.

> "If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the court need not consider whether the moving party has met its ultimate burden of persuasion. Accordingly, the nonmoving party may defeat a motion for summary judgment that asserts that the nonmoving party has no evidence by calling the court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party. In that event, the moving party must respond by making an attempt to demonstrate the inadequacy of this evidence, for it is only by attacking all the record evidence allegedly supporting the nonmoving party that a party seeking summary judgment satisfies Rule 56's burden of production."

Celotex Corp. v. Catrett, 477 U.S. 317, 332 (1986).

Ms. Johnson provided the coram nobis court new, undisputed facts: **1)** Sentence Monitoring Computation DATA from the Federal Bureau of Prisons ("BOP"), showing LaWanda Johnson received an 18-month sentence reduction under 18 U.S.C. §

3621(e) (App. 15); and, **2)** a "Certificate" for successful completion of that Bureau's, Residential Drug Abuse Treatment program. A legal inference arises from those facts, *viz.*- LaWanda Johnson is a "patient:"

> "Patient means any individual who has applied for or been given diagnosis, treatment, or referral for treatment for a substance use disorder at a part 2 program. Patient includes any individual who, after arrest on a criminal charge, is identified as an individual with a substance use disorder in order to determine that individual's eligibility to participate in a part 2 program. This definition includes both current and former patients. In this part where the HIPAA regulations apply, patient means an individual as that term is defined in 45 CFR 160.103."

42 C.F.R. § 2.11

Those new, undisputed facts show LaWanda Johnson has: ***i)*** applied for (28 C.F.R. § 550.53(c)); ***ii)*** been given diagnosis (28 C.F.R. § 550.53(b)(l)); ***iii)*** been given treatment (28 C.F.R. § 550.53(b)(1)); and, ***iv)*** been given referral for treatment (28 C.F.R. § 550.53(d)), for a substance use disorder at a part 2 program. (*Supra.*).

Those facts also show LaWanda Johnson is a patient; because, she was identified as an individual with a substance use disorder in order to determine that individual's eligibility to participate in a part 2 program. (28 C.F.R. § 550.53(d)). Notably, such identification occurred within 24-hours of Ms. Johnson's detention, through intake screening. (28 C.F.R. § 522.21(a)(2)).

The United States cannot "demonstrate the inadequacy of this evidence" (*Celotex* @ 332); because, judicial review of BOP substantive decisions regarding a particular prisoner, is precluded by 18 U.S.C. § 3625. Thus, the coram nobis court *wrongfully* dismissed the Motion Seeking Revocation of MS 09-5000, under *Celotex*; because, the United States did not carry its burden of production.

II. An evidentiary hearing was required; because, newly developed evidence presumptively shows the coram nobis applicant is entitled to federal coram nobis relief.

Coram nobis is a means of collateral attack. (*Wall v. Kholi,* 562 U.S. 545, 560 (2011)). Applying habeas rules, the coram nobis court must hold an evidentiary hearing; because, "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense." (28 U.S.C. § 2254(e)(2)(B)).

The evidence proving Ms. Johnson's patient status, is sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found her guilty of the underlying offense, because: ***i)*** Ms. Johnson's substance use disorder records cannot be used or disclosed to investigate or prosecute her without an order issued under 42 C.F.R. § 2.65 (see 42 U.S.C. § 290dd-2(b)(2)(C), & (c): *cf.* 28 U.S.C. § 547(l)- "Except as otherwise provided by law ..."); and, ***ii)*** the implemented order issued under 42 C.F.R. § 2.66 cannot authorize use or disclosure of those records to investigate or prosecute her co-defendant- Antoine Johnson- because, that order contains Ms. Johnson's name (i.e., "patient identifying information"- 42 C.F.R. § 2.11), which invalidates such order according to 42 C.F.R. § 2.66(c)(3) & (d)(2).

III. Hypothetical jurisdiction -a faux doctrine.

> "Although raised by neither of the parties, we are first obliged to examine the standing of appellees, as a matter of the case-or-controversy requirement associated with Art. III" (*Juidice v. Vail*, 430 U.S. 327, 331 (1977)).

In the instant case, plaintiff's Article III standing is predicated on the resolution of a disputed issue of fact, *viz.*- the patient status of LaWanda Johnson. As a patient (which the materials of record demonstrate Ms. Johnson is), the United States had no legitimate interest in prosecuting the coram nobis applicant.

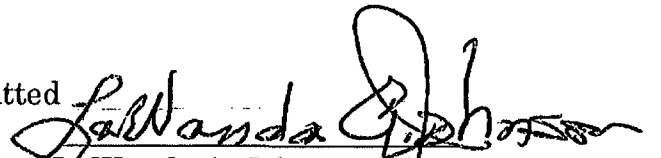
This is because the United States appears to lack a valid, use or disclosure order, *viz.*- a "unique kind of court order. Its only purpose is to authorize a use or disclosure of patient information which would otherwise be prohibited by 42 U.S.C. 290dd-2 and the regulations in this part." (42 C.F.R. § 2.61(a)). Concisely, this case turns on the resolution of Ms. Johnson's status as a patient.

Summary dismissal of the Motion Seeking Revocation of MS 09-5000, by the coram nobis court, and summary affirmance by the Ninth Circuit Court of Appeals was wrong: "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction" (*Henderson v. Shinseki*, 562 U.S. 428, 434 (2011)); and, plaintiff's "failure to follow the rule deprives a court of all authority to hear a case." (*Harrow v. Dep't. of Defense*, 144 S. Ct. 1178, 1183 (2024)).

CONCLUSION

Certiorari should be granted; and, is necessary to correct a fundamental miscarriage of justice in this case by: ***1)*** ensuring no court exceeds Constitutional or personal jurisdiction in this matter, ***2)*** redeeming Ms. Johnson's right to a meaningful opportunity to present evidence under 42 C.F.R. § 2.66(b), ***3)*** improving the administration of justice in 42 C.F.R. § 2.66(b) procedures, ***4)*** promoting law abiding behavior by public authority, and ***5)*** enforcing Congressional policy aimed at eradicating the tragic national problem of substance addiction.

Respectfully submitted
March 12, 2025



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(*In propria persona*)