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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. LAWANDA JOHNSON, Defendant - Appellant.	No. 24-3916 D.C. No. 3:09-cr-05703-DGE-2 MEMORANDUM*

Appeal from the United States District Court for the Western District of Washington David G. Estudillo, District Judge, Presiding

Submitted January 22, 2025**

Before: CLIFTON, CALLAHAN, and BENNETT, Circuit Judges.

LaWanda Johnson appeals pro se from the district court's orders denying her second petition for a writ of error coram nobis and her motions seeking relief from that order. We have jurisdiction under 28 U.S.C. § 1291. Reviewing de novo, *United States v. Riedl*, 496 F.3d 1003, 1005 (9th Cir. 2007), we affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

We agree with the district court that Johnson is not entitled to coram nobis relief. See id. at 1006 (stating requirements for coram nobis relief). As to the claims that were properly presented to the district court, Johnson did not establish either a valid reason for failing to attack her conviction earlier or an error of the most fundamental character. Furthermore, Johnson has not shown that the district court abused its discretion in denying her motions for reconsideration and motions for relief under Federal Rules of Civil Procedure 52(b) and 59(e). See *Smith v.Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1100 (9th Cir. 2004).

We do not address Johnson's arguments for coram nobis relief that were not properly presented to the district court. See *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009) (this court generally will not review issues raised for the first time on appeal); *Cacoperdo v. Demosthenes*, 37 F.3d 504, 508 (9th Cir. 1994) (claim for relief is not properly raised before the district court if it is not made in the principal motion or petition; such a claim is not cognizable on appeal).

AFFIRMED.

24-3916

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

United States, Plaintiff, v Antoine Johnson, et al., Defendants.	CASE NO. 3:09-cr-05703-DGE ORDER ON MOTIONS (DKT. NOS. 783, 786, 787, 810, 812, 813, 834, 840)

I. INTRODUCTION

Antoine Johnson brings a motion for reconsideration (Dkt. No. 783), motion for sanctions (Dkt. No. 786), motion to amend judgment (Dkt. No. 787), and motion for expedited consideration (Dkt. No. 810). LaWanda Johnson brings a second petition for writ of error coram nobis (Dkt. No. 812) and motion for sanctions (Dkt. No. 813). The Johnsons jointly file two additional motions for sanctions. (Dkt. Nos. 834, 840.) The Court assumes familiarity with the factual and procedural history of this case. (*See* Dkt. Nos. 734 at 1–3; 782 at 2–3.)

II. DISCUSSION

A. Motion for Reconsideration (Dkt. No. 783)

Mr. Johnson moves for reconsideration (Dkt. No. 783) of the Court's denial of his petition for writ of error coram nobis (Dkt. No. 782). Mr. Johnson takes issue with the Court declining to address independently arguments that were raised for the first time in his reply but that the Court nonetheless found did not meet the high standard for coram nobis relief. (Dkt. No.783 at 1–2.) Separately, Mr. Johnson argues the CARES Act negates the Court's subject matter jurisdiction. (*Id.* at 4–5.)

Mr. Johnson's motion fails to demonstrate manifest error in the Court's denial of his petition. *See* CrR 12(b)(13)(A). Most fundamentally, Mr. Johnson fails to provide valid reasons as to why the arguments raised for the first time in his reply could not have been raised earlier. *See Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987) (to qualify for coram nobis relief, a petitioner must show "valid reasons exist for not attacking the conviction earlier"). In particular, the argument that Mr. Johnson's motion for reconsideration asks the Court to revisit takes issue with a statement made by the trial judge to the parties in 2011 (Dkt. No. 667 at 107). (Dkt. No. 783 at 2.) Mr. Johnson does not explain why he could not have attacked his conviction earlier on this basis. *See Hirabayashi*, 828 F.2d at 604.

The Court also rejects Mr. Johnson's assertion that the CARES Act retroactively divests the Court of subject matter jurisdiction. (Dkt. No. 783 at 3–5.) Mr. Johnson's arguments do not show that the CARES Act, which was enacted more than a decade after the Johnsons' convictions, deprives the Court of subject matter jurisdiction over this criminal action. *See* 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States."). The Court does not find this argument entitles Mr. Johnson to coram nobis relief.

The Court DENIES Mr. Johnson's motion for reconsideration. (Dkt. No. 783.)

B. Motion to Amend Judgment (Dkt. No. 787)

Mr. Johnson brings a motion to amend judgment under Federal Rule of Civil Procedure 59(e).[1] (Dkt. No. 787 at 1.) Rule 59(e) "offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890

[1] The parties dispute whether the Federal Rules of Civil Procedure apply. (Dkt. Nos. 802 at 2; 804 at 1.) As the Ninth Circuit has "not resolved whether the civil rules apply to coram nobis proceedings," *United States v. Kroytor*, 977 F.3d 957, 962 n.2 (9th Cir. 2020), the Court addresses the substance of Mr. Johnson's motion.

(9th Cir. 2000) (internal quotation and citation omitted). A court should not grant a Rule 59(e) motion absent newly discovered evidence, a showing of clear error, or a change in the controlling law. *Id.* Such motions "may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Id.* (emphasis in original).

Mr. Johnson challenges the Court's rejection of four arguments raised in his petition for writ of error coram nobis: (1) that prosecutors allowed IRS Agent Karen Beard to falsely testify (Dkt. No. 787 at 1–4), (2) that the Johnson's Broadway Clinic billed as a Rural Health Clinic and therefore could not have upcoded (Dkt. No. 787 at 4–8, 11–12), (3) that the Government improperly relied on testimony of Elizabeth Hughes (Dkt. No. 787 at 9), and (4) that testimony of Evonne Peryea was false (Dkt. No. 787 at 9–11).

The Court's order denying Mr. Johnson's petition rejected these arguments on two independently sufficient grounds. First, the Court found Mr. Johnson failed to provide valid reasons for not attacking his conviction earlier; and second, the Court found the arguments did not demonstrate fundamental error in his conviction. (Dkt. No. 782 at 5.) The instant motion

does not offer substantive argument as to the former determination, other than to maintain in a single sentence that "prosecutorial misconduct excuses [the] delay" in advancing the first of Mr. Johnson's four arguments. (Dkt. No. 787 at 4.) But Mr. Johnson does not prove the existence of any prosecutorial misconduct relating to Agent Beard's testimony. (See Dkt. No. 782 at 13) (rejecting arguments that Agent Beard's testimony was false). As such, the Court finds no clear error in its denial of Mr. Johnson's petition.

Mr. Johnson's motion to amend judgment (Dkt. No. 787) is DENIED.

C. Motion for Writ of Error Coram Nobis (Dkt. No. 812)

Ms. Johnson brings a second petition for writ of error coram nobis. (Dkt. No. 812.) The writ of error coram nobis affords relief "[w]here the errors" in a conviction "are of the most fundamental character, such that the proceeding itself is rendered invalid." *Estate of McKinney By and Through McKinney v. United States*, 71 F.3d 779, 781 (9th Cir. 1995) (internal quotation and citation omitted). The writ is

a "highly unusual remedy, available only to correct grave injustices in a narrow range of cases where no more conventional remedy is applicable." *United States v. Riedl*, 496 F.3d 1003, 1005 (9th Cir. 2007). To qualify for coram nobis relief, a petitioner must show "(1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character." *Hirabayashi*, 828 F.2d at 604.

Ms. Johnson advances two bases for her petition. First, Ms. Johnson asks the Court to consider her "CARES Act jurisdiction claim," contending the Court failed to consider that claim in her first petition. (Dkt. No. 812 at 1–2.) Second, Ms. Johnson argues prosecutors presented false evidence to the jury during closing arguments. (*Id.* at 3.) Among the Government's arguments in response to Ms. Johnson's petition are that (1) the abuse of the writ doctrine applies (Dkt. No. 814 at 10) and (2) Ms. Johnson's underlying contentions fail to satisfy the standard for coram nobis relief.. (*Id.* at 13.)

1. Abuse of the Writ Doctrine

The Government asks the Court to deny Ms. Johnson's petition pursuant to the abuse of the writ doctrine. (*Id.* at 10–12.) Ms. Johnson fails to respond to this argument. (Dkt. No. 816.) "The doctrine of abuse of the writ defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus." *McClesky v. Zant*, 499 U.S. 467, 470 (1991). The doctrine precludes a second habeas petition if the claim presented in the second petition could have been presented in the petitioner's first petition, *id.*, or was already raised in the first petition, *Alaimalo v. United States*, 645 F.3d 1042, 1049 (9th Cir. 2011).

While the doctrine was replaced by AEDPA insofar as it applied to habeas petitions, *United States v. Roberson*, 194 F.3d 408, 411 (3d Cir. 1999), some circuits have found the doctrine applicable to coram nobis proceedings, *see, e.g., United States v. Miles*, 923 F.3d 798, 804 (10th Cir. 2019) ("We can think of no reason why the[] [abuse of the writ doctrine] should not apply to petitions for writs of coram nobis."); *United States v. Swindall*, 107 F.3d 831, 836 n.7 (11th

Cir. 1997) ("The abuse of the writ defense applies to a writ of error coram nobis successively brought after a § 2255 motion.").[2] This is for good reason: the doctrine was motivated by an interest in finality of judgments, as well as concerns regarding the depletion of judicial resources caused by endless rounds of reexamination—both of which are motivations applicable to any collateral attack on a conviction. *See McClesky*, 499 U.S. at 490–92.

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[2] Although the Government does not provide Ninth Circuit authority finding the abuse of the writ doctrine applicable to coram nobis proceedings (*see* Dkt. No. 814 at 10–12), the Court observes that the Ninth Circuit has discussed abuse of the writ in the context of analyzing whether a petitioner has shown valid reasons for delay in attacking the conviction. *See United States v. Kwan*, 407 F.3d 1005, 1013 (9th Cir. 2005) ("While courts have not elaborated on what constitutes a 'sound' reason [for delay in attacking a conviction], our review of coram nobis cases reveals that courts have denied relief on this ground where the petitioner has delayed for no reason whatsoever, where the respondent demonstrates prejudice, or where the petitioner appears to be abusing the writ."). Accordingly, while the Court acknowledges at least some uncertainty as to whether the Ninth Circuit would adopt the abuse of the writ doctrine as a procedural bar to successive coram nobis petitions, the Court finds such adoption likely.

The abuse of the writ doctrine warrants rejection of Ms. Johnson's petition. As described below, Ms. Johnson's claims are either new arguments that could have been raised in her first petition, or arguments that were already raised. *Miles*, 923 F.3d at 804 (courts must reject a petition for writ of coram nobis "if the claim was raised or could have been raised . . . in any [] prior collateral attack on the conviction or sentence."). Ms. Johnson's reply brief fails to respond to the Government's argument in this respect (*see generally* Dkt. No. 816) and cannot reasonably be understood as showing cause for her abuse of the writ. *Miles*, 923 F.3d at 803–04.

2. Merits of Ms. Johnson's Petition

Even if the abuse of the writ doctrine does not apply, Ms. Johnson has not shown entitlement to relief on either of her arguments in support of her petition.

a. *CARES Act Jurisdiction Claim*

Ms. Johnson asserts that the Court did not consider her "CARES Act jurisdiction claim" when it denied her first petition, asking the Court to consider it now. (Dkt. No. 812 at 1–2.) But the Court questions

whether any such claim was actually properly raised in Ms. Johnson's first petition. That petition contained a single sentence that the conviction was "[v]oid for lack of jurisdiction," with no mention of the CARES Act. (Dkt. No. 720 at 2.) While the Court also considered arguments presented by Ms. Johnson in a response to an order to show cause (Dkt. No. 723), that response only referenced in passing the CARES Act (Dkt. No. 724 at 7). And Ms. Johnson's reply brief in support of her first petition merely mentioned the CARES Act in conjunction with an argument concerning a federal rule change (Dkt. No. 730 at 7–8), which the Court and Ninth Circuit rejected (Dkt. Nos. 734 at 8; 771 at 2). The Court can hardly glean from Ms. Johnson's fleeting references to the CARES Act any argument that the Court lacked subject matter jurisdiction based on that statute.[3]

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[3] The Court notes Ms. Johnson's petition for panel rehearing following the Ninth Circuit's denial of her appeal did assert an argument that the CARES Act divested the Court of jurisdiction. (*See* Dkt. No. 814-2 at 3.) The Ninth Circuit denied that petition. (Dkt. No. 808.)

In any event—and as the Court already found in assessing the same argument brought by Mr. Johnson—there is simply no merit to the assertion that a non-jurisdictional statute enacted following the Johnsons' convictions retroactively divested the Court of subject matter jurisdiction. Indeed, the instant petition does not show how the CARES Act has any relevance to the question of subject matter jurisdiction. (*See* Dkt. No. 812 at 1–2.) Ms. Johnson demonstrates no error in her conviction on the basis of her "CARES Act jurisdiction claim."

b. *Closing Arguments at Trial*

Ms. Johnson argues a prosecutor presented false evidence to the jury during closing arguments when stating that there were "no claims ever submitted under a Rural Health Clinic matter." (Dkt. No. 812 at 3.) Ms. Johnson maintains that "the factual circumstances underlying this [argument] did not occur until" after the Court ruled on her prior petition, pointing to "checks redacted by prosecutors" recently filed by Mr. Johnson with the Court (Dkt. No. 788), which Ms. Johnson contends demonstrate the Government "knew there actually were claims submitted under a Rural Health Clinic matter." (Dkt. No. 812 at 3.)

As an initial matter, Ms. Johnson already challenged her conviction on the basis that one of her clinics submitted claims as a Rural Health Clinic. (Dkt. No. 724 at 19–20.) The Court rejected that challenge. (Dkt. No. 734 at 6.) And Ms. Johnson's contention that the factual basis for her argument only recently arose is unsupported, as Ms. Johnson fails to show how she only recently learned of the checks. To the contrary, it appears the checks Ms. Johnson references were produced to the Johnsons in discovery. (*See* Dkt. No. 788 at 1.) The Court can find no valid reason for Ms. Johnson's failure to attack her conviction earlier on this basis.

The Court further finds Ms. Johnson has shown no fundamental error in her conviction. Her arguments amount to mere speculation that material allegedly withheld would be exculpatory, without any showing as to how the material in question *is* in fact exculpatory. (*See* Dkt. Nos. 812 at 3; 816 at 5–6.) In her reply, Ms. Johnson speculates that "there is a *reasonable probability* that [her] conviction and sentence would have been different," had the Government disclosed certain material. (*Id.* at 6) (emphasis added). Even assuming Ms. Johnson to be correct, this would not support a finding of error so significant as to render invalid the proceedings against her. *See McKinney*, 71 F.3d at 781.

Ms. Johnson's second petition for writ of error coram nobis is DENIED.[4] (Dkt. No. 812.)

D. Motions for Sanctions (Dkt. Nos. 786, 813, 834, 840)

Rule 11 sanctions are reserved for "rare and exceptional case[s]," *Operating Engineers Pension Trust v. A-C Co.*, 859 F.2d 1336, 1344 (9th Cir. 1988), with "[t]he central purpose of Rule 11" being "to deter baseless filings," *Newton v. Thomason*, 22 F.3d 1455, 1463 (9th Cir. 1994) (internal quotation and citation omitted). Rule 11 sanctions "are committed to the discretion of the court." *Wong v. Navient Solutions, LLC*, 2020 WL 978520, at *7 (W.D. Wash. Feb. 28, 2020).

1. Mr. Johnson's Motion for Sanctions (Dkt. No. 786)

Mr. Johnson files a motion for sanctions (Dkt. No. 786), to which he attaches six additional motions for

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[4] Because the record conclusively shows Ms. Johnson is not entitled to relief, an evidentiary hearing is not required. *See Shin v. United States*, 782 Fed. Appx. 595, 597 (9th Cir. 2019); *Bingham v. United States*, 2010 WL 4916641, at *3 (C.D. Cal. Nov. 30, 2010).

sanctions (Dkt. Nos. 786-1, 786-2, 786-3, 786-4, 786-5, 786-6). Each takes issue with aspects of the Government's opposition (Dkt. No. 761) to Mr. Johnson's petition for writ of error coram nobis (Dkt. Nos. 751). But none actually reveals the Government's opposition was baseless or otherwise improper. Indeed, the challenged opposition was ultimately successful (Dkt. No. 782). *See Dolores Press, Inc. v. Robinson*, 2017 WL 8109711, at *1 (C.D. Cal. Jan. 26, 2017) (declining to sanction party whose arguments ultimately prevailed).

At bottom, it is clear Mr. Johnson seeks to use the instant filings as a means of relitigating—again—the merits of his underlying petition and events that occurred during his criminal trial more than a decade ago. *See Humphries v. Button*, 2024 WL 624240, at *2 (D. Nev. Feb. 13, 2024) ("disagreement with [the opposing party's] position is not a basis for sanctions") (internal quotation omitted). The Court declines to engage in such an exercise under the guise of assessing a motion for sanctions. Mr. Johnson's motion for sanctions (Dkt. No. 786) is DENIED.

2. The Johnsons' First Joint Motion for Sanctions (Dkt. No. 834)

The Johnsons seek sanctions based on the Government's opposition to Ms. Johnson's second petition for writ of error coram nobis. (Dkt. No. 834 at 1.) In particular, the Johnsons argue the Government (1) misstated the law regarding whether a CMS Certification Number is required to submit a claim as a Rural Health Clinic (*id.* at 1) and (2) misstated the testimony of Ms. Johnson (*id.* at 1–2).

Both arguments are unsupported. First, the statutory and regulatory provisions the Johnsons rely upon (*id.* at 1) do not prove that a CMS Certification Number is not required for Rural Health Clinic claims, and therefore fail to prove a misstatement of law by the Government. Second, the Court cannot agree with the Johnsons' contention that the Government presented to the Court improper "intuitive inferences" about the "meaning" of Ms. Johnson's testimony. (*Id.* at 2.) The Government's characterization of Ms. Johnson's testimony (Dkt. No. 814 at 6) finds support in the record (Dkt. No. 686 at 111–13).

As the Johnsons do not show the Government's opposition (Dkt. No. 814) to be baseless or improper, the Court DENIES the motion for sanctions (Dkt. No. 834).

3. The Johnsons' Second Joint Motion for Sanctions (Dkt. No. 840)

The Johnsons bring a one-paragraph motion for sanctions (Dkt. No. 840), arguing the Government's opposition brief (Dkt. No. 831) to the Johnsons' motion for Jencks Act material (Dkt. No. 829) "seems to be a dishonest attempt to further the personal agenda of Government counsel." (Dkt. No. 840 at 1.) The Johnsons offer nothing in their motion to support their conclusory assertion. *See* Fed. R. Civ. P. 11(c)(2) (motions for sanctions "must describe the *specific* conduct that allegedly violates Rule 11(b)") (emphasis added). To the extent the Johnsons' motion may be read as incorporating arguments from their notice of intent to move for sanctions (Dkt. No. 833), the Court finds those arguments unavailing. That notice asserts that the Government's opposition to the Johnsons' Jencks Act motions contains two misstatements of law. (*Id.* at 1.) But the Government's statements are supported by law (Dkt. No. 831 at 2), and the Johnsons do not offer any showing that would allow the Court to find recklessness by or an improper purpose of the Government, *see Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001).

The Court DENIES the Johnsons' motion for sanctions. (Dkt. No. 840.)

4. Ms. Johnson's Motion for Sanctions (Dkt. No. 813)

Ms. Johnson seeks sanctions on the basis that the Government "suppressed (*i.e.*, redacted), exculpatory checks at trial and continued to withhold the redacted information during a subsequent coram nobis proceeding." (Dkt. No. 813 at 3.) Ms. Johnson contends the redacted "check data" would be "favorable" to her and was redacted with the purpose of "facilitat[ing] misstating facts to the jury." (*Id.*) She contends disclosure of the information carries "a reasonable probability of a different result" in her case, suggesting the redacted information would reveal the Johnsons submitted claims "under a Rural Health Clinic (RHC) matter." (*Id.* At 4.) Beyond conclusory assertions, Ms. Johnson does not explain how the redacted information would demonstrate that Rural Health Clinic claims were actually submitted or how the Court can reasonably conclude the Government redacted the checks in furtherance of an improper purpose. The Court DENIES Ms. Johnson's motion for sanctions.[5] (Dkt. No. 813.)

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[5] Ms. Johnson's motion also asks the Court to issue an order under Federal Rule of Criminal Procedure 5(f) (Dkt. No. 813 at 1) and require disclosure of "personnel records" relating to the name change of a trial witness (*id.* at 3). Those requests were also raised in separate motions (Dkt. Nos. 819, 829), which the Court denied (Dkt. No. 849 at 2–4). The Court finds no reason to depart from that denial here.

E. Motion for Expedited Consideration (Dkt. No. 810)

The Court DENIES as moot Mr. Johnson's motion for expedited consideration. (Dkt. No. 810.)

III CONCLUSION

The Court finds and ORDERS as follows:

1. Mr. Johnson's motion for reconsideration (Dkt. No. 783), motion for sanctions (Dkt. No. 786), motion to amend judgment (Dkt. No. 787), and motion for expedited consideration (Dkt. No. 810) are DENIED;

2. Ms. Johnson's second petition for writ of error coram nobis (Dkt. No. 812) and motions for sanctions (Dkt. No. 813) are DENIED;

3. The Johnson's joint motions for sanctions (Dkt. Nos. 834, 840) are DENIED.

Dated this 10th day of June 2024.

/s/ David G. Estudillo
David G. Estudillo
United States District Judge

Additional material from this filing is available in the Clerk's Office.