NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ANTOINE DOUGLASS JOHNSON, Defendant - Appellant.	No. 23-3676 D.C. No. 3:09-cr-05703-DGE-1 MEMORANDUM* {Filed 01/28/2025}

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.

Antoine Douglass Johnson appeals pro se from the district court's orders denying his petition for a writ of error coram nobis and his 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 his conviction earlier or an error of the most fundamental character. Furthermore, Johnson has not shown that the district court abused its discretion in denying his 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).

Johnson's motion to strike is denied.

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

Magistrate Judge Arnold

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA

In-Re: Search Warrants for Records in the Possession of Broadway clinic, Inc., dba Broadway Clinic and Family Practice and Antoine D. Johnson and LaWanda Johnson	No. MS 09 - 5000 Order authorizing Disclosure of Confidential Substance abuse treatment records {Filed Jan. 9th, 2009}

ORDER

This Order is entered in connection with confidential medical records that the United States seeks to obtain through search warrants and authorized investigative demands from Antoine Johnson, M.D., Broadway Clinic, Inc., dba Broadway Clinic and Johnson Family Practice[1], and Lawanda Johnson (collectively "the Johnson Practices") that contain records of substance abuse treatment. Upon consideration of the United States' Ex Parte Motion for an Order under 42 U.S.C. § 290dd-2(b)(2)(C), authorizing disclosure to the United States and

[1] Antoine Johnson has also registered a trade name, Ocean Shores Ambulatory Care.

federal law enforcement personnel of patients' records obtained from the Johnson Practices and Lawanda Johnson that contain records of substance abuse treatment, and finding that:

1. The investigation being conducted is within the lawful jurisdiction of the government authority seeking access to the records, as provided in 42 C.F.R. § 2.66(a)(l);
2. There is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry;

3. The application does not refer to any patient by name and does not contain or otherwise disclose any patient identifying information, as provided in 42 C.F;R.
   § 2.66(a)(2);

4. Good cause exists for the Order in that:
   a. There are no other effective ways of obtaining the information sought, as provided in 42 C.F.R. § 2.64(d)(l); and
   b. The public interest and the need for disclosure of the records outweigh the potential injury to the patient, to the physician-patient relationship and to the treatment services, as provided in 42 C.F.R § 2.64(d)(2);

It is hereby ORDERED that:

1. The United States may obtain production and use of the records including records referring to substance abuse treatment.

2. The United States may be assisted in the seizure of records referring to substance abuse treatment during execution of search warrants by local law enforcement officers from the Gray's Harbor County Sheriff's Office and investigators from the State of Washington Medical Fraud Control Unit and Department of Labor and Industries. However, following such seizure, records referring to substance abuse treatment shall remain in the custody of the United States pursuant to the provisions of Exhibit 3 attached to the United States' Motion, and may not be disclosed to such local and state officials absent further order of the Court.

3. As provided in 42 C.F.R. § 2.64(e)(1), disclosure shall be limited to those parts of the records which are relevant to the investigation of Dr. Antoine Johnson and Broadway Clinic, Inc., doing business as Broadway Clinic and Johnson Family Practice.

4. As provided in 42 C.F.R. § 2.64(e)(2), access to the records shall be limited to the United States and federal law enforcement personnel involved in the investigation, and to such experts as the United States may need to consult to analyze, interpret or organize the information contained in the records.

5. As provided in 42 C.F.R. § 2.64(e)(3), the United States shall follow the procedures outlined in Exhibit 3 attached-to the United States' motion in this case, which are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and-the treatment services;

6. As provided in 42 C.F.R. § 2.66(d)(l), the United States shall delete patient identifying information from any documents made available to the public;

7. As provided in 42 C.F.R. § 2.66(d)(2), the United States shall refrain from using any information obtained pursuant to this Order to conduct any investigation or prosecution of a patient, or as the basis for an application for order under 42 C.F.R. § 2.65;

8. The United States shall notify Antoine Johnson, M.D. and any patient whose substance abuse treatment records are disclosed pursuant to this Order of the fact of disclosure, within ninety (90) days of disclosure or as soon thereafter as possible, as provided in 42 C.F.R § 2.66(b), granting the affected patients and the treatment program an opportunity to seek revocation or amendment of this Order;

9. The United State is further authorized to, at its discretion, return copies and/or originals of the disclosed substance abuse patient records to Antoine Johnson, M.D.

10. The United States' Motion and this Order shall remain under seal, except that the United States may provide copies of this Order to Antoine Johnson, M.D. and the affected patients, as part of the notification required in paragraph 7.

DATED this 9th, day of January, 2009.

/s/ J. Kelley Arnold

J. Kelley Arnold,

United States Magistrate Judge

SENTENCE MONITORING

Page 002 COMPUTATION DATA

As of 01-30-2015

----------Prior Computation No: 010 ----------

Computation 010 was last updated on 04-04-2014 at USC automatically.

Computation certified on 04-18-2012 by DESIG/SENTENCE COMPUTATION CTR.

The following judgments, warrants and obligations are included in prior computation 010: 010, 010.

Date computation began ..... : 03-29-2012

Total Term In Effect..... 87 Months

Total Term In Effect Converted . . . : 7 Years 3 Months

Earliest Date of Offense..... : 04-15-2008

Jail Credit ..... : From Date Thru Date

10-05-2009 03-28-2012

Total Prior Credit Time..... 906

Total Inoperative Time..... 0

Total GCT Earned and Projected 341

Total GCT Earned.....270

Statutory Release Date Projected.....: 01-28-2016

Elderly Offender Two Thirds Date.....: 08-05-2014

Expiration Full Term Date.....: 01-03-2017

Time Served .....: 5 years 3 months 26 days

Percentage of Full Term Served.....: 73.4

Percent of Statutory Term Served .....:84.2

3621E Complete Resident Program.....:05-20-2014

3621E Complete Community Program.....:01-31-2015

3621E Release Date.....:01-31-2015

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{Page 2 of 3 filed in the U.S. District Court for the Western District of Washington on 02/07/2024}

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA

UNITED STATES OF AMERICA,
v. Plaintiff,
ANTOINE DOUGLASS JOHNSON and LAWANDA ARETTA JOHNSON,
Defendants.

NO. CR09-5703RBL

JURY INSTRUCTIONS

DATED this 7th - day of November, 2011.

/s/ Ronald B. Leighton

Ronald B. Leighton
United States District Court Judge

INSTRUCTION NO. 20

A defendant may be found guilty of health care fraud even if the defendant personally did not commit the act or acts constituting the crime but aided and abetted in its commission. To prove a defendant guilty of aiding and abetting, the government must [sic.] prove beyond a reasonable doubt:

First, the crime of health care fraud was committed by someone;

Second, the defendant knowingly and intentionally aided, counseled, commanded, induced or procured that person to commit each element of health care fraud; and

Third, the defendant acted before the crime was completed. It is not enough that to the defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person, or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit health care fraud.

The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

USA, Case No. 3:09-cr-0573-DGE

Plaintiff,

v. Order on Petition for Writ of Error Coram Nobis (Dkt. No. 751) and Related Motions (Dkt. Nos. 754, 755, 756, 763, 769, 779)

Antoine D. Johnson, et. al.,

Defendants.

{**Filed 11/06/23**}.

I. INTRODUCTION

Before the Court is Antoine Johnson's petition for writ of error coram nobis. (Dkt No. 751.) As Petitioner presents no valid reason for failing to attack his conviction earlier on the grounds presented and raises no error of the most fundamental character, the Court DENIES the petition.

Petitioner also brings several motions related to his petition for writ of error coram nobis. The Court

GRANTS Petitioner's motion to file an over-length reply brief in support of his petition (Dkt. No. 763) and DENIES Petitioner's motion to supplement / amend his petition (Dkt. No. 755), motion to appoint counsel for discovery (Dkt. No. 756), motion to disclose grand jury matter (Dkt. No. 754), motion to expedite consideration of the docket (Dkt. No. 769), and motion for sanctions (Dkt. No. 779).

II BACKGROUND

In 2011, following a trial in this Court, a jury found Petitioner guilty on multiple counts of health care fraud, one count of filing a false income tax return, and multiple counts of illegal distribution of controlled substances. (Dkt. No. 557.) Petitioner's co-defendant and mother, Lawanda Johnson, was also convicted of health care fraud and tax fraud. (Dkt. No. 561.)

The health care fraud charges against the

Johnsons stemmed from "upcoding" at Petitioner's medical practice, wherein the Johnsons would charge health insurance companies for a higher level of service than actually performed by submitting claims with a higher Current Procedural Terminology ("CPT") code. (Dkt. No. 80 at 4–11.) One argument asserted by the Johnsons at trial concerned the certification of one of their clinics—the Broadway Clinic—as a rural health clinic. Specifically, the Johnsons sought to show that, because claims submitted by a clinic in its capacity as a rural health clinic are billed on a "face-to-face encounter" basis rather than a fee-for-service basis, the Johnsons' Broadway Clinic did not bill using CPT codes and therefore could not have upcoded. (Dkt. No. 686 at 113; 687 at 100–101.) However, evidence presented at

trial showed that the Broadway Clinic did not submit claims as a rural health clinic despite its certification as such and instead billed on a fee-for-service basis using CPT codes. (*See, e.g.*, Dkt. Nos. 667 at 13; 686 at 96, 108–10.)

Petitioner was sentenced to 151 months in custody and ordered to pay $1,281,873.34 in restitution. (Dkt. Nos. 629, 634.) Petitioner has since brought numerous challenges to his convictions, including, *inter alia*, an appeal to the Ninth Circuit in 2013, *United States v. Johnson*, 540 Fed. Appx. 573 (9th Cir. 2013); and a habeas petition under § 2255 in 2015 (Dkt. No. 708). Each of Petitioner's challenges have ultimately been unsuccessful. *See Johnson v. U.S. Probation and Pretrial Services,* Case No. C22-5244-RJB, Dkt. No. 11 at 1-4 (W.D. Wash. May 17, 2022) (summarizing

challenges).

Petitioner was released from custody in 2020 and his term of supervised release ended on June 23, 2023. (Dkt. No. 761 at 1.) Petitioner now brings the instant petition for writ of error coram nobis. (Dkt. No. 751.)

III LEGAL STANDARD

The writ of error coram nobis "provides a remedy for those suffering from the lingering collateral consequences of an unconstitutional or unlawful conviction based on errors of fact and egregious legal errors." *Estate of McKinney By and Through McKinney v. United States*, 71 F.3d 779, 781 (9th Cir. 1995) (internal quotations and citation omitted). "Where the errors are of 'the most fundamental character,' such that the proceeding itself is rendered 'invalid,' the writ of coram nobis permits a court to vacate its judgments." *Id.*

The Supreme Court has observed that a writ of coram nobis is "of the same general character" as a motion to vacate, set aside or correct a sentence made pursuant to 28 U.S.C. § 2255. *United States v. Morgan*, 346 U.S. 502, 505 n.4 (1954). But whereas petitions for habeas corpus relief and motions for relief under 28 U.S.C. § 2255 may only be filed by persons who are in government custody, "[t]he writ of error coram nobis affords a remedy to attack a conviction when the petitioner has served his sentence and is no longer in custody." *McKinney*, 71 F.3d at 781. "Both the Supreme Court and [the Ninth Circuit] have long made clear that the writ of error coram nobis 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); *see also Carlisle v. United States*, 517 U.S. 416, 429 (1996) (explaining that "it is difficult to conceive of a situation in a federal criminal case today where [a writ of coram nobis] would be necessary or appropriate") (internal quotation and citation omitted) (alteration in original). The writ is "not a catchall mechanism that allows defendants to relitigate issues minimally important to the jury's decision." *United States v. Goldberg*, 776 F. Supp. 513, 517 (C.D. Cal. 1991).

To qualify for coram nobis relief, a petitioner must show all of the following: "(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 v. United States*, 828 F.2d 591, 604 (9th Cir. 1987).

IV DISCUSSION

Petitioner argues he qualifies for coram nobis relief based on his allegations of (1) federal and state agents' interference with a contract of the Broadway Clinic; (2) prosecutors' reliance at trial on false testimony; (3) prosecutors' solicitation of false statements to hamper the grand jury and influence the trial court in an evidentiary ruling; (4) violations of the Confrontation Clause; (5) new evidence; (6) prosecutors' withholding of discovery and a related failure of the Court to instruct the jury on a defense; (7) prosecutors' constructive amendment of the superseding indictment against

Mr. Johnson; (8) the trial court's failure to instruct the jury on Petitioner "rural health clinic defense"; and (9) a federal rule change that divests the trial court of jurisdiction.

The Court addresses each argument in turn and concludes that Petitioner has neither raised an error of the most fundamental character nor presented a valid reason for failing to attack his conviction earlier. As the record shows conclusively that Petitioner 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).

A. Interference with a Contract

Petitioner first argues that "Federal and state agents" violated the Contracts Clause of the Constitution by

"substantially impair[ing] the obligation of a contract"—*i.e.*, the "Core Provider Agreement (CPA)"—between one of his health clinics "and the agency administering Washington State's Plan for Medical Assistant." (Dkt. No. 751 at 3–4.) As described by Petitioner, "[u]nder the CPA terms," the Broadway Clinic had a right to payment from Washington state for rural health clinic services. (Dkt. No. 764 at 5.) Because federal and state agents allegedly "failed to enforce" law providing for reimbursement of rural health clinic services, and instead initiated criminal proceedings against him, Petitioner asserts these agents violated his right to payment under the CPA, amounting to a violation of the Contracts Clause of the Constitution. (Dkt. Nos. 751 at 3; 764 at 5.) Petitioner proceeds to argue that in so doing, federal and state agents took his "property interest in that CPA" without compensation in

contravention of the Takings Clause. (Dkt. No. 751 at 5.) Petitioner further argues that the breach of "the promises set forth in the CPA . . . results in discrimination on the basis of race." (*Id.*)

Petitioner has not provided a valid reason for failing to attack his conviction on this ground earlier. Delay in attacking a conviction has been "considered . . . reasonable when the applicable law was recently changed and made retroactive, when new evidence was discovered that the petitioner could not reasonably have located earlier, and when the petitioner was improperly advised by counsel not to pursue habeas relief." *United States v. Reidl*, 496 F.3d 1003, 1007 (9th Cir. 2007). While Petitioner argues generally in his reply that "claims within [his] Petition grounded on new evidence . . . are timely" (Dkt. No. 764 at 2), his claim does not appear grounded on any new evidence.

Petitioner's arguments also do not show fundamental error in his conviction. His argument appears to boil down to the proposition that mere fact of prosecution against him was itself a violation of the Contracts and Taking Clauses of the Constitution. (*See* Dkt. Nos. 751 at 3–6; 764 at 5–6.) But Petitioner provides no authority—and the Court is aware of none—providing that a federal prosecution can form the basis of a claim under the Contracts or Takings Clause.

Further, a claim under the Contracts Clause requires showing that a "*state law* has operated as a substantial impairment of a contractual relationship." *Apartment Assoc. of Los Angeles Cnty., Inc. v. City of Los Angeles*, 10 F.4th 905, 913 (9th Cir. 2021) (internal quotations and citation omitted) (emphasis added); *see also U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 21 (1977) ("the Contracts Clause limits . . . exercises of state

legislative authority"). Yet Petitioner is not challenging a state law. Rather, Petitioner alleges that impairment of the CPA arose not from state legislation, but from his federal prosecution.

Setting aside the Court's serious doubts as to the merits of Petitioner's Contracts and Takings Clause claims, Petitioner has not convinced the Court that Contracts and Takings Clause violations, if established, would provide a defense from criminal prosecution, nor has he explained how such violations undercut the validity of health care fraud convictions based on upcoding. Finally, Petitioner has presented no fact to support his contention that the alleged violations were based on race. (See Dkt. No. 751 at 6.)

B. False Testimony

Petitioner argues that prosecutors knowingly allowed witnesses Elizabeth Hughes, Evonne Peryea, and Karen

Beard to testify falsely in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). (Dkt. No. 751 at 6–11.)

1. Elizabeth Hughes

a. *Statement 1*

Petitioner first takes issue with testimony in which former Broadway Clinic employee, Elizabeth Hughes, answered "yes" when asked by the Government whether "[e]verything was done the same" with respect to the Clinic's billing practices following certification as a rural health clinic. (Dkt. No. 683 at 87.)

Petitioner asserts that, to the contrary, "everything was *not* done the same." (Dkt. No. 751 at 7.) In particular, Petitioner argues that because Ms. Hughes had stated in a pretrial interview with government officials that, following rural health clinic certification, Lawanda Johnson "showed other employees how to bill Medicare Part B, but [ ] would not allow Hughes to

handle the Medicare Part B," the Court should find that "[f]ederal prosecutors knowingly allowed [Ms. Hughes] to testify falsely" that everything was done the same. (Dkt. No. 751 at 6–7.) Petitioner further states that another interview with Broadway Clinic employee Susie Blundred confirms that Ms. Hughes did not handle Medicare Part B, which he contends reinforces his conclusion that "everything was *not* done the same." (*Id.* at 7.)

Petitioner has not presented a valid reason for failing to attack his conviction on this ground earlier, other than to expansively assert as to all of his arguments that his delay is justifiable because the "trial court prevented OBJECTION" and in light of the availability of new evidence. (Dkt. No. 764 at 1.) But Petitioner does not describe how the trial court prevented him from challenging his conviction earlier. And the evidence

Petitioner cites in support of his argument is from 2009 and 2011; it is not apparent why this evidence would have been unavailable to him earlier. (Dkt. No. 752 at 51–52, 54–60.)

Petitioner also has not demonstrated a fundamental error in his conviction. "A claim under *Napue* will succeed when (1) the testimony . . . was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) the false testimony was material." *Reis-Campos v. Biter*, 832 F.3d 968, 976 (9th Cir. 2016) (internal quotations and citation omitted). Mr. Johnson has not satisfied any of these elements.

The pretrial interview memorandum to which Petitioner points as evidence of falsity is actually consistent with Ms. Hughes' challenged testimony that billing practices continued in the same

manner following the Broadway Clinic's rural health clinic certification. Specifically, the memorandum confirms—consistent with Ms. Hughes' challenged testimony—that Ms. Hughes "continued to bill the same way" following the certification. (Dkt. No. 752 at 52.) That Ms. Hughes and Ms. Blundred each stated that different personnel handled different aspects of billing following rural health clinic certification does not require the conclusion that the *manner* in which the Broadway Clinic billed—*i.e.*, through the submission of CPT codes (Dkt. No. 683 at 33, 37)—had changed. In light of the consistency across Ms. Hughes' interview memorandum and trial testimony, the Court also cannot conclude that the prosecution knew or should have known

the testimony was false. Moreover, Petitioner's argument does not provide any explanation as to why the challenged testimony was material. (*See* Dkt. No. 751 at 6–7.)

b. *Statement 2*

Petitioner takes issue with Ms. Hughes' testimony that "Lytec is a computer program that we did all our medical billing" on. (Dkt. No. 683 at 18.) Petitioner asserts this statement was false because "the record proves [Broadway Clinic] medical billing was also done via a PC-ACE/EC Gateway Mailbox computer program." (Dkt. No. 751 at 7.)

Petitioner provides no valid reason for failing to attack his conviction on this ground earlier. Petitioner presumably would have known of or had

access to the billing system(s) that his *own* Clinic used well before the instant challenge. *See Wright v. United States*, 2021 WL 8919079, at *2 (C.D. Cal. Nov. 10, 2021) (denying petition for writ of error coram nobis when the petitioner "knew all the facts he now presents in support of" his petition "at the time of his conviction and sentencing").

Additionally, the Court cannot find any fundamental error based on false testimony. The evidence referenced by Petitioner does not show that Ms. Hughes' statement on billing software was actually false; rather, it merely shows the existence—not the use—of another system related to billing. (Dkt. No. 726 at 31.)

Finally, Petitioner does not describe how this purportedly false testimony was in any way

relevant to his case, let alone material. *United States v. Goldberg*, 776 F. Supp. 513, 521 (C.D. Cal. 1991) (denying petition for writ of coram nobis when it was "not clear" that the alleged "false testimony could have affected the jury's verdict in any way").

2. Evonne Peryea

Petitioner next argues that prosecutors improperly relied on four false statements by Washington State Department of Social and Health Services (DSHS) employee Evonne Peryea regarding Broadway Clinic's enrollment as a rural health clinic. (Dkt. No. 751 at 9–10.) As explained below, none of the statements reflect fundamental error in Petitioner conviction. Further, evidence relied upon in support of Petitioner's arguments

is from 2007 and 2008. (Dkt. Nos. 752 at 11, 17–49, 66; 765 at 13.) Petitioner does not present a valid reason for his failure to raise these arguments earlier.

a. *Statements 1 and 2*

Petitioner challenges as false two statements by Ms. Peryea related to whether the Broadway Clinic billed as a rural health clinic. Specifically, Petitioner challenges Ms. Peryea's statements that (1) the Broadway Clinic "did not bill as a rural health clinic on any bills to [DSHS]"; and (2) "[DSHS] never received any bills from you as a rural health clinic." (Dkt. No. 667 at 13–14.) Petitioner argues these statements are false because the Broadway Clinic *did* "bill as a RHC on bills to the department." (Dkt. No. 751 at 10.)

The only evidence to which Petitioner cites is a check to the Broadway Clinic from Washington state. (Dkt. No. 752 at 66.) However, this check does not require the conclusion that the Broadway Clinic submitted bills to DSHS in its capacity as a rural health clinic, and, consequently, does not show that Ms. Peryea's testimony was false. (*Id.*) Although Petitioner argues that the NPI Number on the face of the check "evince[s] reimbursement to a provider of RHC services in response to a RHC billed claim," (Dkt. No. 764 at 3), the Court is not persuaded. As the Government explains, an NPI Number is assigned broadly to health care providers, and not just rural health clinics (Dkt. No. 761 at 20 n.8); as such, a reference to an NPI Number does not definitively represent a claim for

reimbursement of rural health clinic services. *See* 45 C.F.R. §§ 162.410, 162.412(a), 162.414. As none of the authorities or evidence to which Petitioner cites show that an NPI Number *exclusively* identifies rural health clinic claims (*see* Dkt. Nos. 764 at 3 - 4), the Court cannot find that the single check submitted by Petitioner renders false Ms. Peryea's statements that the Broadway Clinic did not bill as a rural health clinic.[1]

b. *Statement 3*

Petitioner next challenges Ms. Peryea's testimony—elicited by Petitioner himself on cross-

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1. Petitioner also makes no attempt to explain why prosecutors knew or should have known the challenged testimony was false or why the challenged testimony was material to his conviction. *See Reis-Campos*, 832 F.3d at 976 (outlining the elements of a *Napue* claim). His challenge to this testimony fails on these independent bases, as well.

examination—that the Broadway Clinic didn't "even have an application in and that was accepted as a rural health clinic with the Department of Social and Health Services." (Dkt. No. 751 at 9–10.)

The Court cannot find that Petitioner satisfies the standard for false testimony under *Napue*. The statement is not actually false, as Ms. Peryea qualifies her testimony by explaining, "I don't handle provider accounts applications so I don't know if you ever submitted one or not," and, "I don't recall you submitting one[] [a]t least in my recollection." (Dkt. No. 667 at 14.) *See United States v. Kabov*, 2023 WL 4585957, at *1 (instructing that "[t]estimony is not 'actually false' merely because the witness's recollection is

'mistaken, inaccurate, or rebuttable.'") (internal citation omitted). Moreover, Petitioner does not attempt to show the other two elements of a *Napue* violation—*i.e.*, that the statement was material to the conviction, or why prosecutors knew or should have known of the statement's falsity. The Court therefore does not find error, much less fundamental error in Petitioner's conviction.

a. *Statement 4*

Finally, Petitioner argues that Ms. Peryea falsely testified when she stated that she didn't "believe" that "a federal certification . . . automatically certifies you at the state level at all." (Dkt. No. 751 at 9–10.) But the challenged testimony is Ms. Peryea's own belief; it was not stated as a fact. Consequently, Petitioner's

challenge under *Napue* cannot succeed. *See Hayes v. Ayers*, 632 F.3d 500, 520 (9th Cir. 2011) (finding that "qualified testimony about [a witness'] own reasonably held belief" is "not actually false"). And regardless, Petitioner does not explain how this testimony was material.

3. Karen Beard

Petitioner argues that an IRS agent Karen Beard falsely testified when answering "[n]o" in response to the Government's question of whether it is "ever okay to use both a cash and accrual method on the same tax return." (Dkt. No. 751 at 11.) Petitioner concludes that the allegedly false testimony "usurp[ed]" his "method of accounting" by denying him "the benefit of a 'safe harbor' accounting methodology." (*Id.*)

The Government's response explains that Petitioner's argument relates to his attempt at trial "to proffer a theory" under which the tax deductions that were central to the tax charges against him "would be permissible under some mix of cash- and accrual-based accounting." (Dkt. No. 761 at 22.) This theory was rejected by Judge Leighton. (*Id.*) The Government also argues Petitioner "points to no evidence or authority proving" that Ms. Beard's response was false, and that the IRS publication on which Petitioner relies actually "confirms Beard's testimony that a taxpayer cannot use both cash and accrual accounting on the same return." (*Id.* at 22–23.)

Petitioner has not provided the Court with a valid reason—or any reason—for not attacking his

conviction on this basis earlier. And as Petitioner's argument relies exclusively on legal citations, IRS publications, and the trial record (Dkt. Nos. 751 at 10–11; 752 at 124), and appears to rehash arguments he asserted during trial (Dkt. Nos. 667 at 106; 684 at 6), the Court cannot conceive of a valid reason that would justify Petitioner's delay. *See Wright v. United States*, 2021 WL 8919079, at *2 (C.D. Cal. Nov. 10, 2021) (denying petition when the petitioner had available to him at the time of his conviction the evidence relied upon); *United States v. Hummasti*, 2021 WL 5085091, at *3 (D. Ore. Nov. 2, 2021) (denying petition when the petitioner "knew about the underlying facts" more than seven years earlier and "provided no explanation for delaying"). On that basis alone

Petitioner's argument cannot stand.

At any rate, Petitioner has not shown fundamental error resulting from Ms. Beard's testimony. The legal citations and publications he submits do not show that Ms. Beard's statement was false. To the contrary, IRS publications to which Petitioner cites appear consistent with Ms. Beard's statement that cash and accrual accounting may not be used on the same tax return. As these publications state, "If you use the cash method for reporting your income, you must use the cash method for reporting your expenses"; and, "If you use an accrual method for reporting your expenses, you must use an accrual method for figuring your income." (Dkt. No. 752 at 126, 129.) Ultimately, Petitioner has not presented a

specific circumstance under which it would be acceptable to use both cash and accrual accounting in a single tax return, and, even assuming the existence of such a circumstance, Petitioner does not explain how that circumstance applies to the facts of this case so as to create error in the proceedings against him.

C. Solicitation of False Statements to Impact Grand Jury and Evidentiary Ruling

Petitioner argues that "Jerilyn McClain made false out-of-court testimonial statements about [the Broadway Clinic's] RHC billing practices" that were "solicited" or "knowingly allowed . . . to go uncorrected" by federal prosecutors to "a) avoid the protective function of the Grand Jury," and "b) influence a Trial Court evidentiary ruling." (Dkt.

No. 751 at 8.) Petitioner's arguments could have been asserted earlier; they implicate no new law or facts and Petitioner has proffered no valid reason for delay. For the reasons below, these arguments also do not present error of the most fundamental character.

1. Impact of Ms. McClain's Statements on Grand Jury Proceedings

Petitioner's argument provides little information on how exactly Ms. McClain's out-of-court statements improperly impacted grand jury proceedings, other than to state confusingly and cursorily that "[p]rosecutors failed to share RHC investigative duties with the Grand Jury" and that "RHC matters were falsely reported after the Grand Jury filed the [superseding indictment]."

(*Id.*) Nonetheless, as the Government correctly notes (Dkt. No. 761 at 24), Ms. McClain's declaration (Dkt. No. 127) was executed *following* grand jury proceedings (Dkt. No. 80), so could not have impacted those proceedings. Petitioner has stated no error arising from Ms. McClain's statements as they relate to grand jury proceedings.

2. Impact of Ms. McClain's Statements on Evidentiary Ruling

Petitioner argues that Ms. McClain's allegedly false statements were "implicated . . . in support of an evidentiary challenge," and, as a result, "prosecutors accomplished a 'deliberate deception of the court by the presentation of false evidence.'" (Dkt. No. 751 at 9.) The specific evidentiary

challenge referenced by Petitioner was an attempt by Petitioner to introduce into evidence various provisions of Washington law related to rural health clinics. (Dkt. No. 678 at 99–102.) The Government objected to that attempt, in part by informing the Court that it had witnesses who could discuss the topic of rural health clinics. (*Id.* at 100–101.) The Government did not identify by name any witnesses. (*See id.*) Ultimately, the Court denied the admission of the Washington law provisions, explaining that it does not generally admit statutes "for evidentiary purposes" but would "take judicial notice" and submit an appropriate instruction if the legal provisions became pertinent to the case. (*Id.* at 101–102.)

The Court does not find compelling Petitioner's

argument that prosecutors used Ms. McClain's declaration to deceive the Court during this evidentiary challenge. As the Government did not even reference Ms. McClain in its evidentiary objection, it is unclear that Ms. McClain's statements were actually implicated in the challenge. (Dkt. No. 678 at 100–101.) Even assuming the Government was impliedly referring to Ms. McClain, Petitioner has not shown how Ms. McClain's declaration was false. And in any event, the Court cannot find that the disposition of an evidentiary challenge on the question of whether certain provisions of state law could be entered into evidence would rise to the level of fundamental error rendering the proceedings against Petitioner invalid. *See Carlisle*, 517 U.S. at

429 ("'[I]t is difficult to conceive of a situation in a federal criminal case today where [a writ of coram nobis] would be necessary or appropriate.'") (internal citation omitted).

D. Confrontation Clause

1. Jerilyn McClain

Petitioner asserts that the Government's closing argument at trial improperly referenced out-of-court testimonial statements by Ms. McClain by stating, "[t]here w[ere] no claims ever submitted under a Rural Health Clinic matter." (Dkt. No. 751 at 12.) Although the Government did not expressly reference an out-of-court statement by Ms. McClain (and in fact, did not reference Ms. McClain at all) (Dkt. No. 687 at 117), Petitioner argues that the jury nonetheless "could readily infer the

substance of McClain's false statement [in her declaration]" that "the Broadway Clinic never submitted any health insurance claims to Medicare under its Rural Health Clinic certification number." (Dkt. No. 751 at 12.) Consequently, Petitioner argues that he was deprived of the right to confront Ms. McClain under the Confrontation Clause. (*Id.*)

The Court addressed the same argument in its prior order on Ms. Johnson's petition for writ of error coram nobis, finding that Ms. Johnson did not establish the Government's statement as false and did not provide a valid reason for failing to attack her conviction on this ground earlier. (Dkt. No. 734 at 7.) The Ninth Circuit affirmed. (Dkt. No. 771.) Petitioner's argument does not present anything to

justify a different result.

2. "[P]eople that did the research"

During cross-examination by Petitioner, Ms. Peryea stated that she was "familiar that [Johnson] did not bill as a rural health clinic on any bills to the department" and that she "actually had people that did the research on that particular issue." (Dkt. No. 667 at 13.) Petitioner now argues that he "was denied the right to cross-examine [the] 'people'" who Ms. Peryea referenced as having done "research,'" in violation of the Confrontation Clause of the Sixth Amendment. (Dkt. No. 751 at 13.)

Again, Petitioner does not offer any reason for failing to challenge his conviction on this ground earlier. Additionally, the Court does not find that

Ms. Peryea's statement implicated the Confrontation Clause, and therefore cannot find fundamental error. The Confrontation Clause generally "prohibits the introduction of testimonial statements by a nontestifying witness," *Ohio v. Clark*, 576 U.S. 237, 243 (2015), but Petitioner has identified no testimonial statement in Ms. Peryea's statement that she had "people" do research. Moreover, the Confrontation Clause does not apply because Ms. Peryea's statement was elicited not by the prosecution, but by Petitioner himself. *See United States v. Miller*, 771 F.2d 1219, 1234–1235 (9th Cir. 1985); *Ortiz v. Almager*, 2008 WL 789746, at *15 (C.D. Cal. Mar. 19, 2008).

Petitioner's discussion of *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), is not to the contrary.

In *Bullcoming*, the Supreme Court held that the prosecution violated the Confrontation Clause by "introduc[ing] a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." 564 U.S. at 652. The Court explained that "the formalities attending the 'report'" were "more than adequate to qualify" the at-issue "assertions as testimonial." *Id.* at 665. Here, however, Petitioner identifies no formal report (or any report) and identifies no assertions that could be deemed testimonial. Accordingly, *Bullcoming* does not change the Court's analysis.

E. New Evidence

Petitioner asks the Court to grant his petition because "[n]ew evidence shows Washington State Billing Instructions for Rural Health Clinics authorized RHCs to utilize fee-for-service systems." (Dkt. No. 751 at 14.) Petitioner does not explain how these billing instructions constitute new evidence; the instructions appear to be from 2006. (Dkt. No. 752 at 68–73.) The Court rejects this argument as it could have been raised earlier.

Further, it is not clear—and Petitioner does not explain—how such evidence would provide a basis on which the Court could find error in his conviction. To the contrary, any authorization of the use of a fee-for-service system for billing rural health clinic services would undercut the defense Petitioner sought to assert at trial, which was

premised on the idea that rural health clinic services are billed on a per-visit basis and therefore cannot involve upcoding through the use of fee-for-service billing. (Dkt. No. 687 at 98–104.)

F. Withholding of Discovery

Petitioner argues that prosecutors "violated [his] right to present a complete defense" by withholding discovery relevant to his "RHC theory of the case." (Dkt. No. 751 at 15–16.) Specifically, Petitioner asserts that this "withheld evidence provides a basis for believing RHC services were furnished by [the Broadway Clinic]," and, therefore "potentially could have" allowed him to "negate[] the government's scienter theory" as to its health care fraud claims. (*Id.* at 18.)

Petitioner's argument does not explain why he

was precluded from raising this challenge earlier. At most, he asserts in a conclusory fashion at the outset of his petition that "[t]here are new material facts which were not, and in the exercise of due diligence could not have been, theretofore presented and heard in the proceedings leading to conviction and sentence." (Dkt. No. 751 at 1.) But Petitioner does not explain why or how this was the case.

Petitioner's speculation that the allegedly withheld evidence "potentially could have negated" (Dkt. No. 751 at 18) an element of the health care fraud charges against him does not reflect fundamental error that would render the proceedings against him invalid. "A mere theoretical speculation" as to the possibility of a

different result cannot lead the Court to find fundamental error justifying a writ of error coram nobis. *Hummasti*, 2021 WL 5085091, at *4.

The Court also cannot discern—and Petitioner does not explain—how the allegedly withheld evidence as to the Broadway Clinic's rural health clinic status would provide a basis to negate the requisite intent for the health care fraud charges against him. This Court and the Ninth Circuit rejected a similar argument in considering Ms. Johnson's petition for writ of error coram nobis. As the Ninth Circuit held, Ms. Johnson had "not established an error of the most fundamental character . . . with respect to her claim[] that . . . she could not intend to commit health care fraud because one of her clinics was certified as a rural

health clinic." (Dkt. No. 771 at 2.)

Finally, Petitioner has not shown that the allegedly withheld evidence he references—which includes Washington state billing guidelines and letters from state and federal authorities to rural health clinics—was actually withheld by the Government. As the Government asserts in its response, the evidence would appear to have been just as accessible, if not more, to Petitioner as to the Government. (Dkt. No. 761 at 27–28.) Petitioner's reply does not refute this point. (*See* Dkt. No. 764.) As such, the Court cannot find that the Government withheld this evidence from Petitioner. *See United States v. Dupuy*, 760 F.2d 1492, 1501 n.5 (9th Cir. 1985); *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991).

G. Constructive Amendment

Petitioner argues that there was a constructive amendment of the superseding indictment against him due to the "failure of the [superseding indictment] to articulate the RHC status element." (Dkt. No. 764 at 14; *see also* Dkt. No. 751 at 18–19.) Again, Petitioner does not provide a reason for not attacking his conviction on this basis earlier; his argument can be rejected on that ground alone.

Separately, the Court does not find that a constructive amendment occurred, and therefore cannot find fundamental error. Courts find constructive amendment when "(1) 'there is a complex of facts [presented at trial] distinctly different from those set forth in the charging instrument,' or (2) 'the crime charged [in the

indictment] was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved.'" *United States v. Adamson*, 291 F.3d 606, 615 (9th Cir. 2002) (internal citation omitted) (alteration in original).

Here, Petitioner does not allege that the charges against him were substantially altered at trial. He does assert cursorily that a "complex of facts" related to the Broadway Clinic's "RHC status" were presented at trial, and that those facts were different than the facts presented in the superseding indictment. (Dkt. Nos. 751 at 18–19.) But the "complex of facts" presented at trial consists of facts Petitioner himself introduced in attempting to construct a *defense* based on the

Broadway Clinic's rural health clinic status (*id.* at 19), not facts introduced by prosecutors to prove an element of their charges. As the health care fraud charges at issue simply do not include as an element of the crime that a clinic was or was not a rural health clinic, the Court cannot find problematic the absence of facts in the superseding indictment related to the Broadway Clinic's rural health clinic status. *See* 18 U.S.C. § 1347. Moreover, the prosecution had no obligation to present facts related to Petitioner's desired defense to the grand jury. *United States v. Williams*, 504 U.S. 36, 52 (1992) (declining to "[i]mpos[e] upon the prosecutor a legal obligation to present exculpatory evidence" to a grand jury).

H. Failure to Instruct on Defense

Petitioner asserts that at trial, he "presented and relied upon a RHC defense." (Dkt. No. 751 at 19.) As he explains, "[t]here was a foundation for that defense" given the Broadway Clinic's rural health clinic status, but "[t]he Judge did not instruct on that theory." (*Id.* at 20.)

The Court rejects this argument. As it revolves exclusively around events that occurred at trial more than a decade ago (*id.* at 19–20), and presents no new facts or law, the Court cannot discern a valid reason why Petitioner did not attack his conviction on this basis earlier. *See Reidl*, 496 F.3d at 1007. The Court also cannot find that the lack of instruction gives rise to error of the most fundamental character. Failure to instruct on a "theory of defense is reversible error if the

theory is legally sound and the evidence in the case makes it applicable." *United States v. Lemon*, 824 F.2d 763, 764 (9th Cir. 1987). The portions of the trial record cited by Petitioner do not show that his rural health clinic theory is legally sound or specify how that theory would apply to this case so as to render his conviction invalid.

I. Federal Rule Change

Finally, Petitioner argues that the Court has no jurisdiction over his case because, at trial, the Court applied an "interpretation of 'holds itself out'" that "is different from the executive's interpretation of 'holds itself out' today." (Dkt. No. 751 at 20–21.) Petitioner's argument appears to relate to the Court's denial of his motion to dismiss, in which Petitioner had argued that the

Government undertook an undercover investigation without obtaining a court order, thereby violating federal regulations. (Dkt. No. 107 at 4–7.) The Court rejected this argument, concluding that the regulations requiring a court order prior to an undercover investigation did not apply because two criteria were not satisfied: (1) Petitioner did not "hold himself out" as a substance abuse treatment program, and (2) the agents involved could not be deemed "undercover agents" under the regulations. (Dkt. No. 387 at 6.)

Petitioner's argument in support of his petition now asserts that, given a change to the definition of "hold itself out," he qualifies as a "program" under federal regulations and a court order was required prior to the Government's investigation.

(Dkt. No. 751 at 20–22.) But Petitioner's argument does not address at all the Court's separate finding as to why the Government did not need a court order—*i.e.*, that the agents involved could not be deemed "undercover agents." Consequently, this argument presents no fundamental error[2].

J. New Arguments Raised in Reply

In his reply, Petitioner raises several new arguments. These arguments include allegations of prosecutors' failure to enforce the Grant Act (Dkt. No. 764 at 3), racial bias of the trial judge (*id.* at 8–12), deception of the Grand Jury due to false testimony by an IRS agent (*id.* at 13–14), and racial bias of one of the Government's witnesses

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2. Ms. Johnson made a similar argument in her petition for writ of error coram nobis. The Court did not find the argument presented fundamental error (Dkt. No. 734 at 8–9) and the Ninth Circuit affirmed (Dkt. No. 771).

(*id.* at 17). But "arguments not raised by a party in its opening brief are deemed waived." *United States v. Room*, 455 F.3d 990, 997 (9th Cir. 2006) (internal quotation and citation omitted); *see also Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief."). While the Court construes liberally *pro se* parties' filings, *pro se* status does not excuse a litigant from complying with procedural rules. *Larson v. County of Benewah*, 2018 WL 3758571, at *1 (D. Idaho Aug. 8, 2018). The Court declines to address independently each of Petitioner's new arguments, but nonetheless finds that the new arguments raised do not meet the exceedingly high standard for a writ of error coram nobis.

V RELATED MOTIONS

Petitioner also submits to the Court a motion to disclose grand jury matter (Dkt. No. 754), motion to supplement / amend petition (Dkt. No. 755), motion to appoint counsel (Dkt. No. 756), motion for leave to file an over-length reply (Dkt. No. 763), motion to expedite consideration of the docket (Dkt. No. 769), and motion for sanctions (Dkt. No. 779).

A. Motion to Disclose Grand Jury Matter

Petitioner asks the Court to grant him access to an expensive set of grand jury records, including orders authorizing the summons of the grand jury or an extension of the grand jury, "[r]oll sheets reflecting composition of the Grand Jury, attendance records of the Jurors, and any substitutions," "written authority permitting a

Special Prosecutor to present evidence to the Grand Jury," records of "the method by which the Grand Jury was empaneled," "[v]oting records[] related to any decision to extend the life of the Grand Jury," "names of persons receiving information about matters occurring before the Grand Jury," and "transcripts related to Broadway Clinic, Inc. Medicare & Medicaid provider enrollment" and "provision of Rural Health Clinic services." (Dkt. No. 754 at 1 - 2.) Petitioner argues for disclosure of these records because (1) the grand jury was not informed of the Broadway Clinic's rural health clinic enrollment and "was entitled to be apprised of that information" (*id.* at 2); (2) there was a constructive amendment of the superseding indictment (*id.* at 3); and (3)

"[a]ttorneys for the Government overlooked" certain law and evidence related to rural health clinics at trial (*id.*).

"Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." Fed. R. Crim. P. 6(e)(6). A district court may, however, order the disclosure of a grand jury matter "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii).

The grounds on which Petitioner requests grand jury records are the same grounds on which

Petitioner asks the Court to grant his petition for writ of error coram nobis. As explained, these grounds do not present error in the proceedings against Petitioner. Petitioner has therefore not established "a particularized need" for the records requested that would "outweigh[] the policy of grand jury secrecy." *See United States v. Murray*, 751 F.2d 1528, 1533 (9th Cir. 1985).

B. Motion to Supplement / Amend Petition

Petitioner asks the Court to allow him to amend his petition following the decision of the Ninth Circuit on his mother's petition for writ of error coram nobis. (Dkt. No. 755 at 1.) In support of his motion, Petitioner argues in a cursory fashion that "new evidence from the 9th Cir. is 'directly relevant to the central issues in this matter'" and

that disregarding this evidence would not serve the interests of justice. (*Id.*) But the Ninth Circuit's decision on Ms. Johnson's petition is simply not "new evidence" that would warrant an amendment. To the contrary, the Ninth Circuit's order affirming this Court's denial of Ms. Johnson's petition reinforces the Court's conclusion that the instant petition cannot succeed. The Court declines what it perceives as no more than an attempt at another bite at the apple in challenging Petitioner's conviction.[3]

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3. Petitioner's motion to amend / supplement also does not comply with the Court's local rules, which require that a party seeking amendment "attach a copy of the proposed amended pleading as an exhibit to the motion." LCR 15; *see also Earixson v. Walker*, 2006 WL 3499973, at *1 (D. Ariz. Dec. 5,

C. Motion to Appoint Counsel

Petitioner requests counsel to assist him in seeking discovery regarding his rural health clinic "claims" and alleged false statements by Ms. Hughes. (Dkt. No. 756 at 1–2.) However, there is no constitutional right to Court-appointed counsel in post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Having already found that the matters presented by Petitioner plainly do not support a finding of fundamental error in the proceedings, the Court does not appoint counsel to aid in related discovery efforts. *See Agyeman v. Corrections Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004) (discretion of court

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2006) (denying motion to amend habeas petition in light of local rule's requirement that proposed amendments to pleadings be attached to the motion to amend, as "[t]he Court cannot . . . address a nonexistent amended/supplemental petition").

in appointing counsel should only be exercised under "exceptional circumstances"); *Harrington v. Scribner*, 785 F.3d 1299, 1309 (9th Cir. 2015) (courts consider the likelihood of success on the merits in determining whether to appoint counsel).

D. Motion to File Over-Length Briefing

Petitioner moves for leave to file an over-length reply brief in support of his petition for writ of error coram nobis. (Dkt. No. 763.) The Court has considered the entirety of the parties' briefing and therefore GRANTS the motion.

E. Motion to Expedite

Petitioner asks the Court to "expedite the consideration of" his pending motions. (Dkt. No. 769 at 1.) The Court DENIES this motion as moot.

F. Motion for Sanctions

In a one-page motion, Petitioner moves the Court for sanctions against counsel for the Government on the basis that counsel "has not upheld the honor and dignity of the court and of the profession of law respecting the statutory interpretation claim presented in my Petition." (Dkt. No. 779 at 1.) Specifically, Petitioner states that counsel's arguments concerning Petitioner's delay in bringing his petition were "objectively unreasonable." (*Id.*)

The Court disagrees. 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). As Petitioner did not succeed on his petition for writ of error coram nobis, and as the Court ultimately agreed with many of the Government's arguments—including concerning Petitioner's delay—the Court does not find that the Government's filing was baseless. *Dolores Press, Inc. v. Robinson*, 2017 WL 8109711, at *1 (C.D. Cal. Jan. 26, 2017) (declining to sanction party whose arguments ultimately prevailed). The Court DENIES Petitioner's motion for sanctions.

VI CONCLUSION

Accordingly, and having considered the petition (Dkt. No. 751), related motions (Dkt. Nos. 754, 755, 756, 763, 769, 779), briefing of the parties, and remainder of the record, the Court finds and

ORDERS that: 1. Petitioner's petition for writ of error coram nobis(Dkt. No. 751), motion to disclose grand jury matter (Dkt. No. 754), motion to supplement/amend petition (Dkt. No. 755), motion to appoint counsel (Dkt. No. 756), motion to expedite consideration of docket (Dkt. No. 769), and motion for sanctions (Dkt. No. 779) are DENIED; and 2. Petitioner's motion for leave to file an overlength reply (Dkt. No. 763) is GRANTED.

Dated this 6th day of November 2023.

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David G. Estudillo
United States District Judge