No. 24-

IN THE

Supreme Court of the United States

PATRICK SUTHERLAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents the following questions for certiorari review:

1. Whether, in conflict with the opinion of this Court, the United States Court of Appeals for the Fourth Circuit has improperly limited the post-conviction remedy of a writ of coram nobis.

2. Whether the dearth of this Court's decisions regarding the post-conviction remedy of a writ of coram nobis has resulted in ambiguity in its scope.

3. Whether, in conflict with the decisions of other United States Courts of Appeals, the United States Court of Appeals for the Fourth Circuit has improperly limited the post-conviction remedy of a writ of coram nobis.

4. Whether the United States Court of Appeals for the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power because it ruled that appellants are required to raise in their opening briefs issues that were not addressed nor ruled upon by the District Court or suffer affirmance based upon the doctrine of waiver.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioner, Patrick Sutherland, was the defendant in the District Court and the appellant in the Fourth Circuit. Petitioner is an individual, so there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

The respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Patrick Sutherland petitions for a writ of certiorari to review the Fourth Circuit Court of Appeals' opinion in *United States v. Sutherland*, 103 F.4th 200 (4th Cir. 2024). App. 1-24.

ORDERS AND OPINIONS OF THE COURTS BELOW

The opinion of the District Court denying Petitioner's 28 U.S.C. § 2255 motion and petition of a writ of coram nobis to vacate his convictions is reported at *Sutherland v. United States*, No. 3:21-cv-00082-MOC; 3:15-cr-00225-MOC, 2021 U.S. Dist. LEXIS 171651 (W.D.N.C. Sep. 10, 2021) and is reproduced as App. 26-51.

The opinion of the Fourth Circuit affirming the District Court's order is reported at *United States v. Sutherland*, 103 F.4th 200 (4th Cir. 2024) and reproduced as App. 1-24. The Fourth Circuit's order that this opinion applies to Petitioner's appeal of the denial of his petition for a writ of coram nobis is reproduced as App. 25.

The Fourth Circuit's order denying rehearing and rehearing en banc is reported at *United States v. Sutherland*, No. 21-7566, 2024 U.S. App. LEXIS 20232 (4th Cir. Aug. 12, 2024) and is reproduced as App. 52.

JURISDICTION

The District Court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 2255(a) (regarding the § 2255 motion) and 28 U.S.C. § 1651(a) (regarding the coram nobis petition). The Fourth Circuit had jurisdiction

pursuant to 28 U.S.C. §§ 1291 and 2253(c). This Court has jurisdiction under 28 U.S.C. § 1254(1). The Fourth Circuit's opinion was entered on May 31, 2024, and the order denying the petitions for rehearing and rehearing en banc were entered on August 12, 2024.

STATUTORY PROVISION INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a), states the following:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

A. Introduction

Petitioner was convicted of three counts of filing false tax returns in violation of 26 U.S.C. § 7206(1) and one count of obstructing an official proceeding in violation of 18 U.S.C. § 1512(c)(2). After exhausting his appellate remedies, Petitioner filed a 28 U.S.C. § 2255 motion to vacate relating to his conviction on the obstruction count, for which he was then on supervised release, and a petition for a writ of coram nobis relating to his conviction on the false tax returns convictions, for which he had already been released from supervision. Petitioner asserted in the § 2255 motion and coram nobis petition that he was denied his constitutional right to the effective assistance of counsel because trial counsel failed to present the testimony of Petitioner's brother, Phillip, and an expert

witness in accounting and taxes, both of whom would have rebutted material elements of the subject offenses and the government's evidence. Without holding a hearing, the District Court denied Petitioner's § 2255 motion and coram nobis petition. Subsequently, the Fourth Circuit granted a certificate of appealability. Thereafter the Fourth Circuit affirmed the District Court and denied Petitioner's petition for rehearing and rehearing en banc.

In affirming the District Court, the Fourth Circuit held, among other things, that the coram nobis petition was untimely because it could have been filed earlier under § 2255 despite (1) Petitioner's pursuit of his appellate remedies and the incredibly small window within which to file a § 2255 motion – 27 days between the exhaustion of his appellate remedies and his release from supervision on the tax counts, (2) Petitioner remained on supervised release for the obstruction count until the date of the simultaneous filing of the § 2255 motion and the coram nobis petition, (3) Petitioner filed his coram nobis petition simultaneously with his § 2255 motion which raised the same ineffective assistance of counsel issues, and (4) the government failed to assert any prejudice in connection with the timing of the filing of the coram nobis petition. App. 57-61, 91-94. Accordingly, as described in more detail below, the Fourth Circuit opinion all but guarantees that a criminal defendant who appeals his conviction and completes his sentence while his appeal is pending or shortly after exhausting his appellate rights will no longer have the right to coram nobis relief.

The Fourth Circuit also held that Petitioner waived the issue of the timeliness of the coram nobis petition by failing to include that issue in his opening appellate brief.

However, the District Court's order denying the coram nobis petition expressly provided that the court declined to address that issue. Thus, there was no ruling on that issue that was adverse to Petitioner. As described in more detail below, the Fourth Circuit opinion accordingly compels an appellant to make arguments in his opening brief about issues that were never addressed nor ruled upon by the district court or suffer an affirmance based upon the doctrine of waiver.

B. Course of Proceedings and Relevant Facts

As previously explained, Petitioner was convicted of three counts of filing false tax returns and one count of obstructing an official proceeding. App. 2. This Court affirmed Petitioner's convictions on direct appeal. *United States v. Sutherland*, 921 F.3d 421 (4th Cir. 2019). On February 24, 2020, Petitioner's petition for writ of certiorari was denied. *Sutherland v. United States*, 140 S. Ct. 1106 (2020).

On March 22, 2019, while Petitioner's direct appeal was pending, Petitioner was released from incarceration. Thereafter, his supervised release period for the false tax returns counts terminated on March 22, 2020, and his supervised release period for the obstruction count terminated on March 22, 2022. App. 39-40. On February 24, 2020, Petitioner's petition for writ of certiorari was denied. *Sutherland v. United States*, 140 S. Ct. 1106 (2020).

Accordingly, up through February 24, 2020, valid reasons existed for Petitioner to not collaterally attack his conviction because his direct appeals were pending through that time, thereby rendering premature any such attack.

Vis á vis the tax fraud convictions, Petitioner retained the right to file a motion pursuant to § 2255 up through termination of his supervised release on March 22, 2020, when he was no longer in custody. 28 U.S.C. § 2255(f). Thus, Petitioner had just 27 days to file a motion pursuant to § 2255 from the time of his exhaustion of his direct appeal remedies on February 24, 2020 to his release from supervision on March 22, 2020. And during this 27-day time period, he was still under supervised release for the obstruction conviction such that his § 2255 rights were still available for that count. Thus, on February 24, 2021, when Petitioner timely filed his § 2255 motion, he was on supervised release for the obstruction count, thereby satisfying the in-custody requirement of § 2255 for that count. However, on that day, because he was not in custody for the false tax return counts, thus rendering him ineligible for § 2255 relief on those counts, Petitioner filed a coram nobis petition attacking the false tax return counts that same day on the same grounds as his § 2255 motion. App. 40.

The coram nobis petition discussed each of the four elements necessary to obtain coram nobis relief in the Fourth Circuit, including its timeliness. App. 90-91. In particular, the coram nobis petition alleged the following regarding satisfaction of the elements:

> **First**, "a more usual remedy is not available" to Petitioner because he is not "in custody" on the False Tax Return Counts as his concurrent terms of one year of supervised release concluded on or about March 23, 2020, and, as a result, he is not eligible for habeas relief or relief under 28 U.S.C. § 2255. See *Akinsade* at 252 (citing to 28 U.S.C. §§ 2241 and 2255).

Second, valid reasons exist for Petitioner not attacking these convictions earlier. It is important to note that, "[b]ecause a petition for writ of error coram nobis is a collateral attack on a criminal conviction, the time for filing a petition is not subject to a specific statute of limitations." *Telink, Inc. v. United States*, 24 F.3d 42, 45 (9th Cir. 1994). See also *Morgan*, at 507 (explaining that coram nobis petitions are allowed "without limitation of time").

Petitioner's petition for writ of certiorari to the Supreme Court was denied on February 24, 2020. Were Petitioner still in custody on the False Statement Counts, his motion for relief under 28 U.S.C. § 2255 would be due on February 24, 2021 and this motion for coram relief is filed on that date. Further, this motion addresses an ineffective assistance of trial counsel claim, a claim that could not be raised on appeal, and that required new counsel, who were retained after the denial of Petitioner's petition for certiorari, to investigate grounds for this claim by obtaining and reviewing the lengthy trial record and transcripts, the numerous trial exhibits, the substantial amount of pre-trial discovery, the files of Petitioner's trial and appellate counsel, and conduct an independent investigation into whether Petitioner's right to effective assistance of counsel was denied by locating and interviewing potential witnesses and others with knowledge of this case, all in the midst of a pandemic.

Moreover, since this petition is filed within the limitations period of 28 U.S.C. § 2255 and is being filed contemporaneous with Petitioner's Section 2255 Motion which is based upon the same ineffectiveness claim as the instant petition, it enables the government to respond to both the instant petition and the Section 2255 Motion easily and contemporaneously and, thus, there is a benefit and no prejudice to the government. See, e.g., *United States v. Kwan*, 407 F.3d 1005, 1012 (9th Cir. 2005) (recognizing that the lack of prejudice to the government regarding the date of the filing of a petition for a writ of coram nobis is relevant to the issue of whether "valid reasons exist for not attacking the conviction earlier").

Third, the Fourth Circuit has held that collateral consequences are presumed to flow from any conviction. *United States v. Mandel*, 862 F.2d 1067, 1075 n.12 (4th Cir. 1988) (granting coram nobis relief because "[w]ithout coram nobis relief, the petitioners . . . would face the remainder of their lives branded as criminals" and "[c]onviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities"). The Ninth Circuit has repeatedly affirmed this presumption and has "found the presumption to be irrebuttable in this day of federal sentencing guidelines based

on prior criminal histories, federal "career criminal" statutes, and state repeat-offender provisions" See, e.g., *Estate of McKinney v. United States*, 71 F.3d 779, 782 n. 6 and 7 (9th Cir. 1995).

Because of his status as a convicted felon, Petitioner is now subject to these same guidelines, statutes and repeat-offender statutes. In addition, he suffers the civil consequence of being deprived of his right to serve as a North Carolina or federal juror in his home state of North Carolina. 28 U.S.C. § 1865(b)(5); N.C. Gen. Stat. § 9-3. See *Porcelli v. United States*, 404 F.3d 157, 160-61 n. 4 (2d Cir. 2005) (assuming without deciding that the inability to serve as a juror is a collateral consequence of conviction sufficient to support the writ of coram nobis).

Notably, in *United States v. Travers*, 514 F.2d 1171, 1172 (2d Cir. 1974), the Court cited civil consequences of felony convictions as a basis for the granting of coram nobis relief. The court relied upon *Morgan*, at 512-13 where, in discussing coram nobis relief, Justice Reed observed that, with respect to a felony conviction when the sentence has been fully served, "[a] lthough the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected."

Here, as a result of the felony convictions, and in addition to the statutory consequences that

> flow therefrom, Petitioner has lost all of his professional licenses and can no longer practice as an actuary. He was expelled from the Society of Actuaries and the American Academy of Actuaries and is no longer regarded as a fellow after over 30 years of examinations and hard work. He was also barred by FINRA the SEC and lost all his securities, insurance, and registered investment advisor licenses. Even his bank and brokerage accounts were terminated. And, Petitioner continues to be obligated to pay restitution pursuant to the False Statement Counts One. D.E. 70 (Judgment).
>
> **Fourth**, the error raised herein of ineffective assistance of counsel is of the most fundamental character. Indeed, the Fourth Circuit and other Circuits have recognized that ineffective assistance is a type of fundamental error that is redressable by a coram nobis petition. See, e.g., *Akinsade*, at 253-254; *Kwan* at 1014. See also *Kornse v. United States*, No. 16-cr-0041, 2019 WL 6169808 (W.D.N.C. Nov. 18, 2019).

App. 91-94.

Without holding a hearing, the District Court denied Petitioner's § 2255 motion and his coram nobis petition. The District Court also declined to issue a certificate of appealability. App. 50-51. Notably, although the government had claimed that the coram nobis petition was untimely, the District Court did not rule that the coram nobis petition was untimely. In fact, the District Court's order denying the coram nobis petition expressly provided that the court declined to address that issue.

App. 50 n. 4. Instead, the District Court only ruled that, because Petitioner failed to establish ineffective assistance of counsel, he did not satisfy the fourth element of coram nobis - error of the most fundamental character. App. 46.

Petitioner timely filed a notice of appeal. The Fourth Circuit granted a certificate of appealability on June 14, 2023, regarding the following two issues:

I. Whether Petitioner was denied his right to effective assistance of counsel.

II. Whether the District Court erred when it granted the government's motion to dismiss the section 2255 motion and the coram nobis petition without first conducting an evidentiary hearing. App. 11.

Subsequently, Petitioner adopted the above issues as framed by the Fourth Circuit in his opening brief for his appeal regarding both the denial of the § 2255 motion and the coram nobis petition and he fully briefed those issues in that brief. The government's answer brief argued, among other things, that Petitioner was not entitled to coram nobis relief because he did not avail himself of the opportunity to seek relief under § 2255 while he was in custody. Petitioner's reply to the government's answer brief rebutted this timeliness argument, raising the matters he asserted in his coram nobis petition, including that the filing of a § 2255 motion during the pendency of an appeal would have been premature and that the government failed to assert any prejudice. App. 57-61.

C. The Fourth Circuit Opinion

In affirming the District Court's denial of the petition for coram nobis, the Fourth Circuit held that (1) Petitioner's failure to address in his opening brief that valid reasons existed for not attacking the conviction earlier was a waiver of argument on that issue, and (2) the record did not suggest that Petitioner had valid reasons for not attacking his tax fraud convictions earlier by way of a motion pursuant to § 2255 while he was in custody for those convictions. App. 20-24.

However, the Fourth Circuit's determination that Petitioner "waited [to file his coram nobis petition] until February 2021, nearly a year after he was released from custody when § 2255 was no longer available," App. 22, and that Petitioner should have instead filed a § 2255 motion "as early as trial in October 2016," *Id.,* overlooked, *inter alia,* (1) Petitioner's pursuit of his appellate remedies and the incredibly small window within which to file a § 2255 motion – 27 days between the exhaustion of his appellate remedies and his release from supervision on the tax counts, (2) Petitioner remained on supervised release for the obstruction count until the date of the simultaneous filing of the § 2255 motion and the coram nobis petition, (3) Petitioner filed his coram nobis petition simultaneously with his § 2255 motion which raised the same ineffective assistance of counsel issues, and (4) the government failed to assert any prejudice in connection with the timing of the filing of the coram nobis petition. App. 57-61, 91-94.

The Fourth Circuit's ruling that Petitioner should have filed a § 2255 motion "as early as trial in October 2016,"

App. 22, is antithetical to case precedent discussed below and would have required Petitioner to anticipate that the finality of his direct appeals process would take almost as long as he was in custody on supervised release on the tax counts such that he would not have the year following exhaustion of his appellate remedies to seek relief pursuant to § 2255(f). In other words, Petitioner was within the § 2255 limitations period through the termination of his supervised release on the tax counts and, therefore, up through that time, he had valid reason not to file a motion pursuant to § 2255. With only 27 days from when his direct appeal process became final to his release from supervision, Petitioner cannot have been expected to have retained new counsel, researched, and filed a motion pursuant to § 2255 in this complex tax case involving a plethora of court filings, exhibits and discovery documents. Significantly, retaining new counsel was required in order to raise the issues of ineffectiveness of trial counsel because trial counsel represented Petitioner up through conclusion of the appeals process.[1] Furthermore, Petitioner filed the coram nobis petition within the limitations period of the § 2255 motion for the obstruction count regarding which Petitioner remained in custody, raising the same arguments. And, the government suffered no prejudice. App. 57-61, 91-94.

1. *See. e.g., Blanton v. United States*, 94 F.3d 227, 231 (6th Cir. 1996) ("Although laches may apply to coram nobis proceedings, the doctrine does not bar Blanton's petition. Blanton's coram nobis petition involves claims of ineffective assistance by McLellan, and those claims could not have been brought in his previous appeals or habeas petitions because McLellan represented him during those matters.").

REASONS THIS COURT SHOULD ISSUE THE WRIT

A. In Conflict with an Opinion of this Court, the United States Court of Appeals for the Fourth Circuit Has Improperly Limited the Post-Conviction Remedy of a Writ of Coram Nobis.

Pursuant to 28 U.S.C. § 2255, a person convicted of a federal offense may collaterally attack his conviction claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, *but only if he is in custody*.

Thus, this Court noted in *United States v. Morgan*, 346 U.S. 502, 512, 74 S. Ct. 247, 253 (1954) that without the equitable remedy of a writ of coram nobis, "a wrong may stand uncorrected which the available remedy [coram nobis] would right." More specifically, a petition for writ of coram nobis "provides a way to collaterally attack a criminal conviction for a person . . . who is no longer 'in custody' and therefore cannot seek habeas relief under 28 U.S.C. § 2255 or collateral habeas relief under § 2241." *Chaidez v. United States*, 568 U.S. 342, 345 n.1 (2013). Furthermore, because it is an equitable remedy, coram nobis is not subject to a limitations period. *Morgan*, 346 U.S. at 507, 74 S. Ct. at 250.

Accordingly, despite the availability and prevalence of the post-conviction remedy of a motion to vacate pursuant to § 2255, this Court explained in *Morgan* that "fundamental" errors may still be corrected "[a]lthough the term has been served" because "the results of the conviction may persist" and "civil rights may be affected." *Morgan*, 346 U.S. at 512-513, 74 S. Ct. at 253. The writ of

coram nobis has, accordingly, played an important role in our nation's history, correcting fundamental errors that remain well beyond a convicted person's incarceration, *see e.g., Morgan* (coram nobis relief granted where petitioner's federal conviction that was obtained in violation of his constitutional right to counsel was used to enhance a later state conviction) and *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) (coram nobis relief granted to correct this Court's decision upholding the racially discriminatory wartime curfew orders against persons of Japanese descent).

The Fourth Circuit's opinion emasculates *Morgan* and the remedy of coram nobis by holding that a coram nobis petition is untimely merely because the claims *could* have been raised in a motion pursuant to § 2255 and that Petitioner *should* have filed a motion pursuant to § 2255 prior to exhaustion of his appellate remedies. The ruling thus ensures that a criminal defendant who appeals his conviction and completes his sentence while his appeal is pending, or shortly after exhausting his appellate rights, can no longer avail himself of the remedy of coram nobis. Such a ruling is in conflict with the opinion of this Court in *Morgan* that the remedy of coram nobis remains despite the remedy of § 2255.

B. The Dearth of this Court's Decisions Regarding the Post-Conviction Remedy of a Writ of Coram Nobis Has Resulted in Ambiguity in Its Scope.

Outlining the general contours of coram nobis relief, this Court held in *Morgan* that "*no other remedy being then available* and *sound reasons existing for failure to seek appropriate earlier relief*, this motion in the nature of the extraordinary writ of coram nobis must be heard

by the federal trial court." *Morgan*, 346 U.S. at 512, 74 S. Ct. at 253 (emphasis added). In *United States v. Denedo*, this Court further defined the general contours of coram nobis by describing that in *Morgan* "we found that a writ of coram nobis can issue to *redress a fundamental error*, there a deprivation of counsel in violation of the Sixth Amendment . . .." *United States v. Denedo*, 556 U.S. 904, 911, 129 S. Ct. 2213, 2220 (2009) (emphasis added).

Yet, despite the 70 years since *Morgan*, those seeking to challenge their federal convictions for fundamental errors and courts attempting to rule upon such challenges have not had the benefit of this Court's direction regarding the precise contours of the remedy of coram nobis. Indeed, the Seventh Circuit has described the remedy of coram nobis as "a phantom in the Supreme Court's cases . . .." *United States v. Bush*, 888 F.2d 1145, 1146 (7th Cir. 1989). The First Circuit has stated: "The metes and bounds of the writ of coram nobis are poorly defined and the Supreme Court has not developed an easily readable roadmap for its issuance." *United States v. George*, 676 F.3d 249, 253 (1st Cir. 2012). In *Loving v. United States*, 62 M.J. 235, 252 (C.A.A.F. 2005), the Military Justice Court noted: "The Supreme Court has had very little to say on coram nobis in the last fifty years."

C. In Conflict with the Decisions of Other United States Courts of Appeals, the United States Court of Appeals for the Fourth Circuit Has Substantially Limited the Post-Conviction Remedy of a Writ of Coram Nobis.

In an attempt to fill the gap, Circuits have generally articulated the following factors a petitioner must establish to obtain coram nobis relief: "(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." *United States v. Kwan,* 407 F.3d 1005, 1011 (9th Cir. 2005). *See also United States v. Akinsade*, 686 F.3d 248, 252 (4th Cir. 2012) (same); *United States v. Stoneman*, 870 F.2d 102, 105-06 (3d Cir. 1989) (same).[2]

The Circuits have also been consistent in finding that the filing of a motion pursuant to § 2255 during the pendency of an appeal is premature, absent extraordinary circumstances, clearly establishing a judicially recognized reason for Petitioner not having pursued his collateral remedies prior to exhaustion of his appellate rights. For example, Circuits have uniformly held that the filing of a motion pursuant to § 2255 during the pendency of a direct appeal is premature, absent extraordinary circumstances. *See, e.g., Davison v. United States*, No. 20-3665, 2020 U.S. App. LEXIS 37513, at *2 (6th Cir. Dec. 1, 2020) (citation omitted) ("'[I]n the absence of extraordinary circumstances, a district court is precluded from considering a § 2255 application for relief during the pendency of the applicant's direct appeal.'"); *United States v. Vilar,* 645 F.3d 543, 548 (2d Cir. 2011) (citations omitted) ("A 'collateral attack is not a substitute

2. Other iterations of the requirements for a petition for coram nobis articulated by the Circuits, for example, are: "a coram nobis petition will be granted only when the petitioner demonstrates: (1) an error of fact, (2) unknown at the time of trial, (3) of a fundamentally unjust character which probably would have altered the outcome of the challenged proceeding if it had been known." *Blanton v. United States*, 94 F.3d 227, 231 (6th Cir. 1996).

for direct appeal and petitioners are therefore generally required to exhaust direct appeal before bringing a petition § 2255.'"); *United States v. Casaran-Rivas*, 311 F. App'x 269, 272 (11th Cir. 2009) ("[A]bsent extraordinary circumstances, a defendant may not seek collateral relief while his direct appeal is pending, as the outcome of the direct appeal may negate the need for habeas relief."). *See also United States v. Robinson*, 8 F.3d 398, 405 (7th Cir. 1993) (same); *United States v. Cook*, 997 F.2d 1312, 1319 (10th Cir. 1993) (same); *United States v. Taylor*, 648 F.2d 565, 572 (9th Cir. 1981), cert. denied, 454 U.S. 866, 70 L. Ed. 2d 168, 102 S. Ct. 329 (1981) (same). No extraordinary circumstances were present here.

In connection with the requirement establishing valid reasons for not attacking the conviction earlier, the Circuits have also been consistent in requiring the government demonstrate prejudice resulting from the delay in seeking collateral relief. Thus, for example, the Ninth Circuit in *Telink, Inc. v. United States*, 24 F.3d 42, 45 (9th Cir. 1994) (footnotes omitted), stated as follows:

> Because a petition for writ of error coram nobis is a collateral attack on a criminal conviction, the time for filing a petition is not subject to a specific statute of limitations. *Morgan*, 346 U.S. at 507 (coram nobis petition allowed "without limitation of time"); *Hirabayashi v. United States*, 828 F.2d 591, 605 (9th Cir. 1987). Rather, the petition is subject to the equitable doctrine of laches. *See id.* at 605; *United States v. Darnell*, 716 F.2d 479, 480 (7th Cir. 1983). Unlike a limitations period, which bars an action strictly by time lapse, laches bars a claim

> if unreasonable delay causes prejudice to the defendant. *International Tel. & Tel. Corp. v. General Tel. & Elecs. Corp.*, 518 F.2d 913, 926 (9th Cir. 1975). "Laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced - an inequity founded upon some change in the condition or relations of the property or parties." *Holmberg v. Armbrecht*, 327 U.S. 392 at 396.

In *Telink,* although affirming the district court's dismissal of the petition for coram nobis, the Ninth Circuit recognized that a petition for coram nobis is not subject to an "arbitrary limitations period" and adopted instead a "'flexible, equitable time limitation' based on laches." *Telink, Inc.*, 24 F.3d at 47 (citation omitted). Other Circuits have similarly held, including the Seventh Circuit in *United States v. Darnell*, 716 F.2d 479, 481, n.5 (7th Cir. 1983) ("The doctrine of laches . . . ensures that *coram nobis* relief will not be granted where a petitioner's inexcusable delay in raising his claim has prejudiced the government.") and the Sixth Circuit in *Blanton*, 94 F.3d at 231 ("doctrine of laches should apply to coram nobis proceedings"). *See also United States v. Jackson*, 371 F. Supp 3d. 257, 265 (E.D. Va. 2019). ("In addition, to determine whether a coram nobis petition is timely, courts also consider whether the government has suffered prejudice because of the petitioner's delay in seeking coram nobis relief.")

Subsequent to *Telink, Inc.,* the Ninth Circuit further explained a petitioner's burden in establishing valid reasons for the delay in collaterally challenging his

conviction: "While courts have not elaborated on what constitutes a 'sound' reason, 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." *Kwan*, 407 F.3d at 1013.

Accordingly, the Fourth Circuit here ignored precedent in other Circuits that have consistently found that the filing of a motion pursuant to § 2255 during the pendency of an appeal is premature, absent extraordinary circumstances, clearly establishing a judicially recognized reason for Petitioner not having pursued a motion pursuant to § 2255 during the pendency of his direct appeal proceedings. Furthermore, Petitioner's § 2255 motion was filed within the limitations period of § 2255 and his coram nobis petition raising the identical claims as in that motion was filed contemporaneously with his § 2255 motion. That the government never asserted prejudice, nor was there any, goes directly to the issue of and supports valid reasons for Petitioner's delay in bringing the coram nobis claims earlier.

Thus, the Fourth Circuit's holding that Petitioner failed to establish valid reason for delay in seeking post-conviction relief, determining that Petitioner "waited until February 2021, nearly a year after he was released from custody when § 2255 was no longer available," App. 22, and that Petitioner should have filed a motion pursuant to § 2255 "as early as trial in October 2016[,]" *id.*, is in clear conflict with the above described precedent of other Circuits.

D. The United States Court of Appeals for the Fourth Circuit Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Supervisory Power Because the Fourth Circuit Ruled that Appellants are Required to Raise in their Opening Briefs Issues that were not Addressed nor Ruled Upon by the District Court or Suffer Affirmance Based Upon the Doctrine of Waiver.

As previously explained herein, in the Fourth Circuit, the standard for granting a petition for a writ of error coram nobis is that 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." *United States v. Akinsade,* 686 F.3d 248, 252 (4th Cir. 2012). Petitioner squarely addressed each of these four elements in his coram nobis petition, App. 91-94, including describing the valid reasons for him not attacking the convictions earlier. App. 91-92.[3]

In the order dismissing Petitioner's coram nobis petition, the District Court relied solely upon one of the four elements as not having been shown, namely, that Petitioner had not shown an error of the most fundamental character. App. 50. That order also expressly provided that "[b]ecause Petitioner has not shown such an error, the Court declines to address the other elements required for coram nobis relief." App. 50 n. 4. Thus, the District Court never addressed the second element, i.e., that valid

3. These valid reasons are also described earlier herein. *See infra* at 5-9, and 11.

reasons existed for not attacking the conviction earlier. And, there was no ruling in the District Court that Petitioner failed to satisfy that element.

The Fourth Circuit sua sponte relied upon this second element to affirm the District Court. App. 20. In doing so, the Fourth Circuit held (1) Petitioner should have argued in his opening brief that this second element was satisfied despite the fact that the District Court expressly declined to address the second element and, thus, did not rule adversely to Petitioner with respect to it, and (2) Petitioner's "failure to address that issue in his opening brief constitutes a waiver of any argument that he may have had regarding it." App. 21.

Rule 28 of the Federal Rules of Appellate Procedure requires appellants to identify in their brief the issues and arguments they wish to make on appeal. *See* Fed.R.App. P. 28(a)(8). However, it does not require appellants to raise in that brief issues not decided adversely to them by the district court.

Furthermore, federal appellate courts recognize that it is only the *grounds upon which a district court relies* that must be challenged in the opening brief. *See, e.g., Glennborough Homeowners Association v. United States Postal Service,* 21 F.4th 410, 414-15 (6th Cir. 2021) (recognizing that it was understandable that an appellant did not raise an issue in his opening brief because the district court's discussion of the issue was "relatively spare and imprecise"); *Hi-Tech Pharmaceuticals, Inc. v. HBS International Corp.,* 910 F.3d 1186, 1194 (11th Cir. 2018) (appellant satisfied the standards for appellate review because, his "initial brief directly challenges each ground on which the district court dismissed the complaint");

Sapuppo v. Allstate Floridian, Ins. Co., 739 F.3d 678 (11th Cir. 2014) (holding that "[w]hen an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, he is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed" and relying on the appellant's failure in his opening brief to address issues which were alternate grounds for the district court's rulings); *Helwing v. Pszeniczny*, No. 21-843, 2022 U.S. App. LEXIS 5470 (2d Cir. Mar. 2, 2022) (appellant waived any challenge to issues because his "opening brief fails to address the reasons the district court dismissed his claims").

Significantly, the Fourth Circuit's opinion imposes an unfair and onerous burden upon appellants to make arguments in their opening briefs about issues that were never addressed nor ruled upon by the district court or suffer an affirmance based upon the doctrine of waiver. No other appellate courts or authorities require this. Accordingly, the Fourth Circuit's opinion has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power to correct it.

E. This Case is the Appropriate Vehicle for this Court to Resolve the Important Issues Raised Herein.

There are presently 157,973 inmates currently in federal custody as of October 31, 2024,[4] versus 1,241,677 inmates released since 1992, including 33,774 inmates released in 2024.[5] Accordingly, this Court's failure to

4. https://www.bop.gov/about/statistics/population_statistics.jsp.

5. https://www.bop.gov/about/statistics/statistics_inmate_releases.jsp.

correct the Fourth Circuit's error will detrimentally affect the rights of a population far greater than the population of present claimants seeking relief pursuant to § 2255.

The material facts are not in dispute and the legal issues are clear and preserved. The procedural posture of this case and the record below render this case appropriate for resolving the scope of the remedy of coram nobis and the conflict in the Circuits' application, including the Fourth Circuit's opinion here.

More particularly, this case presents an opportunity for this Court to resolve questions of fundamental importance to all persons seeking to collaterally attack their federal conviction: is coram nobis relief unavailable to those who could have sought relief under § 2255 but delayed such relief because of the pendency of a direct appeal, and relatedly, does the pendency of a direct appeal establish valid reason for delay in seeking post-conviction relief, and, finally, must the government establish prejudice to prevail on a claim of unreasonable delay by a petitioner in seeking to collaterally attack a federal conviction. This case also presents the important question of whether appellants are required to raise arguments in their opening briefs regarding issues that were never addressed nor ruled upon by the district court or suffer an affirmance based upon the doctrine of waiver.

Accordingly, this case is the appropriate vehicle for this Court to ensure that the considerable population of former federal inmates may avail themselves of the coram nobis remedy to correct fundamental errors, and that the requirements to obtain such relief are clear.

CONCLUSION

This Court has directed that the equitable remedy of coram nobis is available to those persons who are not in custody but seek relief for fundamental errors related to their conviction. But because the Court's direction has not been clear regarding the scope of such relief, Circuits have struggled in their efforts to apply the remedy of coram nobis. Here, by finding that Petitioner should have raised his claims in a motion pursuant to § 2255, and despite the articulated valid reasons for delay, including the pendency of direct appeal and the lack of prejudice to the government, the Fourth Circuit improperly limited the scope of coram nobis in conflict with this Court and other Circuits. This Court's intervention is necessary to achieve justice and ensure uniformity in the application of the writ of coram nobis.

Furthermore, the Fourth Circuit's opinion imposes an oppressive burden upon appellants to make arguments in their opening briefs about issues that were never addressed nor ruled upon by the district court or suffer an affirmance based upon the doctrine of waiver.

Petitioner timely articulated legally sufficient reasons for the delay in filing the coram nobis petition. The Fourth Circuit's ruling to the contrary conflicts with this Court and Circuit courts. This Court should issue a writ of certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED MAY 31, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-7566

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PATRICK EMANUEL SUTHERLAND,

Defendant-Appellant.

Argued: March 19, 2024
Decided: May 31, 2024

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Max O. Cogburn, Jr., District Judge. (3:15-cr-00225-MOC-DCK-1; 3:21-cv-00082-MOC)

Before NIEMEYER, GREGORY, and AGEE, Circuit Judges.

Affirmed by published opinion. Judge Agee wrote the opinion in which Judge Niemeyer and Judge Gregory joined.

Appendix A

AGEE, Circuit Judge:

A federal jury convicted Patrick Sutherland of three counts of filing false tax returns and one count of obstructing an official proceeding. After this Court affirmed his convictions on direct appeal, Sutherland filed a 28 U.S.C. § 2255 petition to vacate his obstruction conviction and a petition for a writ of error coram nobis to vacate his tax fraud convictions. The district court denied both petitions without holding an evidentiary hearing. Sutherland now appeals. After a careful review of the record, we affirm.

I.

For convenience, we reproduce the underlying facts as stated in this Court's decision affirming Sutherland's convictions on direct appeal:

> This case involves the defendant's attempts to avoid paying taxes, and his subsequent efforts to cover up those crimes. Sutherland owned or operated several insurance businesses that sold products out of the United States and Bermuda. He routed his international transactions th[r]ough Stewart Technology Services (STS), a Bermuda company. Defendant claims that his sister, Beverly Stewart, owned and controlled STS, but Sutherland actually managed all its day-to-day affairs. Despite allegedly owning a multi-million-dollar business, Stewart worked at the Best Western hotel in Cody, Wyoming

for less than $10 an hour. At one point, she was unable to pay a $600 fee without her hotel earnings.

Between 2007 and 2011, STS sent Sutherland, his wife, or companies that he owned more than $2.1 million in wire transfers. In each of the tax years 2008, 2009, and 2010, STS and Sutherland treated these wire transfers in inconsistent manners that provided Sutherland tax advantages. To wit, Sutherland treated the vast majority of the wire transfers from STS to his companies as bona fide loans or capital contributions, which ordinarily are not taxable income for their recipient. By contrast, STS treated nearly all of the wire transfers as expenses that had been paid to Sutherland. If the wire transfers were in fact expenses paid to Sutherland, as STS recorded them, then Sutherland and his companies should have reported the wire transfers as taxable income. Far from reporting them as income, however, Sutherland either treated the transfers from STS to him and his wife as bona fide loans or failed to account for them in his general ledger altogether. In the end, Sutherland did not report the $2.1 million as income on his tax returns.

Sutherland's treatment of the STS transfers mirrored his treatment of other income. Indeed, the defendant seemed to think that marking income as a capital contribution or loan

was a foolproof scheme. For example, three Sutherland companies—Insigne Consulting, Insigne, Inc., and XYZ Entertainment—sent almost $42,000 to Kryotech Holdings, another Sutherland company, between 2007 and 2009. The paying companies recorded each transfer as a non-taxable marketing expense, while Kryotech treated the payments as non-taxable capital contributions. The net result: none of Sutherland's companies would pay taxes on those funds. Similarly, Insigne, Inc., received more than $125,000 in taxable fees from another firm, Global Financial Synergies, between 2006 and 2010—yet Sutherland described the majority of them as non-taxable capital contributions. Come tax day, despite the millions of dollars flowing through his accounts, Sutherland reported just $88,979 of income in 2008; $16,669 in 2009; and $72,415 in 2010.

But the scheme was short lived. In April 2012, Sutherland was served with grand jury subpoenas seeking financial records from his companies, including Insigne Consulting, Insigne Financial Services, Insigne, Inc., Kryotech Holdings, and XYZ Entertainment. Just three months later, Sutherland's attorney sent to the U.S. Attorney's office a letter that purported to explain away a large number of transactions relating to the subpoenaed materials. With respect to the wire transfers from STS to Sutherland's companies, the letter

said that each transfer was a loan that was contemporaneously documented by written and fully-executed loan agreements. Those agreements were attached to the letter.

In 2015, a federal grand jury indicted Sutherland for filing false returns in the tax years 2008, 2009, and 2010, in violation of 26 U.S.C. § 7206(1), and for obstructing, influencing, or impeding the 2012 grand jury investigation, or attempting to do so, in violation of 18 U.S.C. § 1512(c)(2).

The evidence at trial [in October 2016] not only outlined the financial misdeeds described above, but also demonstrated that the loan documents Sutherland sent to the U.S. Attorney's office in July 2012 had been fabricated. Read together, the documents implausibly pledged that Sutherland would give STS 120% of the proceeds of any sale of his businesses. While the documents had purportedly been signed by Sutherland's sister, evidence revealed that Sutherland commonly signed documents for her. The loan documents from Sutherland, moreover, conflicted with internal accounting documents from STS (the purported lender). Finally, the government introduced documents in which Sutherland claimed to have made loan payments by transferring interests in his other businesses to STS. But these related documents were

> bogus and backdated. A document supposedly signed in 2011, for example, described how Sutherland's businesses had received loans from STS in 2011, 2012, and 2013. Legitimate documents do not reference potential future transactions in the past tense, just as bona fide loans do not require fake payment trails.
>
> The jury had little trouble seeing through Sutherland's manipulations of his accounting records and attempts to fabricate loan documents to cover his tracks. It found Sutherland guilty on all charges.

United States v. Sutherland, 921 F.3d 421, 423-25 (4th Cir. 2019) (cleaned up).

In June 2017, Sutherland appeared before the district court for sentencing. Seeking to mitigate the U.S. Sentencing Guidelines loss calculation in his presentence report, Sutherland presented testimony from Jayne Frazier, a certified public accountant. Frazier reviewed Sutherland's tax returns for the years 2007 to 2010 and testified that Sutherland had *underreported* his income by hundreds of thousands of dollars in the relevant time-frame. Despite that fact, she testified that Sutherland's total tax liability for that period was less than the Government alleged because Sutherland failed to claim various business-expense deductions in 2008, 2009, and 2010, which, if claimed, would have reduced his taxable income for those years. Notably, however, Frazier did not independently audit Sutherland's tax returns, and her

calculations were based largely on information provided by Sutherland, much of which could not be corroborated by itemized receipts or other documentation. *See*, *e.g.*, J.A. 1230 (Frazier testifying that her calculations included hundreds of thousands of dollars of unclaimed business expenses that were "all cash"). She also stated that her income calculations for Sutherland excluded approximately half of the $2 million in transfers from STS to Sutherland's companies because it was her "understanding" that those funds came from a line of credit in favor of STS and thus would be "treated as loan advances" and not "taxable income." J.A. 1209.

The district court overruled Sutherland's objection to the presentence report's loss calculation, finding that Sutherland's "self-reported information" to Frazier "was not reliable." *Sutherland v. United States*, Nos. 3:21-cv-00082-MOC, 3:15-cr-00225-MOC-DCK-1, 2021 WL 4142672, at *5 (W.D.N.C. Sept. 10, 2021). The district court then sentenced Sutherland to a below-Guidelines term of thirty-three months' imprisonment on each of the four counts, to be served concurrently. The court also imposed one year of supervised release on each of the tax fraud counts, to be served concurrently, and three years of supervised release on the obstruction count, to run concurrently with the other terms of supervised release.

This Court subsequently affirmed Sutherland's convictions and the district court's loss calculation, *Sutherland*, 921 F.3d 421, and the Supreme Court denied certiorari, *Sutherland v. United States*, 140 S. Ct. 1106 (2020) (mem.).

Appendix A

In March 2019, Sutherland was released from prison and began serving his concurrent terms of supervised release. A year later, he completed his supervised release terms in connection with his tax fraud convictions.

In February 2021, just before he completed his term of supervised release on the obstruction conviction, Sutherland filed the § 2255 and coram nobis petitions now before us. The § 2255 petition targets the obstruction conviction, whereas the coram nobis petition targets the tax fraud convictions.[1] In each petition, Sutherland argued that he received ineffective assistance of counsel because his trial counsel did not call his brother Phillip and a tax expert like Frazier to testify at trial. According to him, testimony from these two individuals would have

1. The reason for the separate petitions stems from Sutherland's "custody" status regarding the obstruction conviction, on the one hand, and the tax fraud convictions, on the other. When Sutherland filed both petitions in February 2021, he was still serving his term of supervised release on his obstruction conviction. And because "[a] prisoner on supervised release is considered to be 'in custody' for purposes of a § 2255 motion," *United States v. Pregent*, 190 F.3d 279, 283 (4th Cir. 1999), § 2255 provided Sutherland with the appropriate means of collaterally attacking his obstruction conviction, *see* 28 U.S.C. § 2255(a). But since Sutherland had already completed his term of supervised release on the tax fraud convictions, he was no longer "in custody" with respect to those convictions and thus could no longer collaterally attack them under § 2255, leaving coram nobis as his sole recourse. *See Wilson v. Flaherty*, 689 F.3d 332, 339 (4th Cir. 2012) (stating that the 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" (citation omitted)).

been material to his defense. In particular, Sutherland claimed that Phillip's testimony would have substantially supported his claim that the transferred funds from STS were nontaxable loans, not income, and that a tax expert's testimony would have shown that either no tax or a "de minimis" tax was due for the relevant tax years. Opening Br. 20.

The district court ordered a response from the Government, which, in turn, moved to dismiss or deny the petitions.

Without first conducting an evidentiary hearing, the district court issued an order dismissing and denying the § 2255 petition and denying the coram nobis petition.

Beginning with the § 2255 petition challenging the obstruction conviction, the district court found that Sutherland had failed to properly allege how the proffered testimony, which concerned only the nature of the STS wire transfers and the extent of Sutherland's tax liability for the relevant tax years, "would have defeated the obstruction of justice charge." *Sutherland*, 2021 WL 4142672, at *7. In the district court's view, Sutherland's generic claim that "had defense counsel presented evidence creating a reasonable doubt about the government's theory that the STS Transfers were not loans, such evidence would have defeated *all* of the counts of the indictment" was "too vague and conclusory to warrant further examination." *Id.* (emphasis added) (cleaned up). Then citing its forthcoming discussion concerning the separate coram nobis petition, the district

court ruled that Sutherland's "counsel's performance was not deficient in any event." *Id.* The court thus "den[ied] and dismiss[ed]" Sutherland's § 2255 petition. *Id.* at *8. And further finding that Sutherland had "not made a substantial showing of a denial of a constitutional right," the court denied a certificate of appealability. *Id.* at *10.

Turning to the coram nobis petition challenging the tax fraud convictions, the district court found that Sutherland had not demonstrated ineffective assistance of counsel and thus could not show an error "of the most fundamental character" warranting coram nobis relief. *Id.* at *8. Applying the two-prong standard under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984),[2] the district court first found that the decision by Sutherland's counsel not to call Phillip or a tax expert at trial did not reflect deficient performance but rather a strategic decision that "was well within the bounds of reasonable professional assistance." *Id.* at *9. The court emphasized, for example, that there were certain "risks" associated with calling either witness, including damaging cross examination, and that there was "a substantial question regarding whether Frazier's testimony would have been admissible at trial" given that it was based on unreliable "self-reported information from [Sutherland]." *Id.* The district court then went on to find that, even

2. Under *Strickland*, to succeed on an ineffective assistance of counsel claim, a petitioner "must show that (1) counsel's performance fell below an objective standard of reasonableness (the performance prong); and (2) the deficient representation prejudiced the defendant (the prejudice prong)." *United States v. Cannady*, 63 F.4th 259, 265 (4th Cir. 2023) (citing *Strickland*, 466 U.S. at 687-88, 104 S.Ct. 2052).

assuming trial counsel rendered deficient performance, Sutherland could not demonstrate any resulting prejudice under *Strickland*'s second prong. *Id.* If both witnesses testified as Sutherland claimed they would have done, the court explained, such testimony would have been insufficient to undermine confidence in the outcome of the trial. *Id.* The court therefore denied the coram nobis petition.

Sutherland timely appealed the district court's denial of the coram nobis petition and sought permission to appeal the district court's denial of the § 2255 petition.[3] As to the latter petition, we granted a certificate of appealability on the following issues:

> (1) Whether Sutherland was denied his right to effective assistance of counsel; and
>
> (2) Whether the district court erred when it granted the Government's motion to dismiss the § 2255 motion without first conducting an evidentiary hearing.

ECF No. 12.

Our jurisdiction over this appeal lies in 28 U.S.C. §§ 1291 and 2253(c).

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3. To appeal the denial of a § 2255 petition, the petitioner must first obtain a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B). No certificate of appealability is required for a coram nobis petition, however, so Sutherland could appeal the denial of that separate petition as of right.

II.

We begin with the § 2255 petition, which deals solely with Sutherland's obstruction conviction.

Under § 2255, "[a] prisoner in custody . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States" may move "to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). Ordinarily, § 2255 requires a district court to "grant a prompt hearing [to] determine the issues and make findings of fact and conclusions of law with respect" to the claims. *Id.* § 2255(b). However, no hearing is required if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Id.*

We review a district court's denial of § 2255 relief de novo. *United States v. Pressley*, 990 F.3d 383, 387 (4th Cir. 2021). Where, as here, the district court denies a § 2255 petition without first conducting an evidentiary hearing, "we construe the facts in the light most favorable to the movant." *Id.* Finally, we review a district court's decision to forego an evidentiary hearing for abuse of discretion. *Conaway v. Polk*, 453 F.3d 567, 582 (4th Cir. 2006).

Sutherland's § 2255 petition is predicated on a Sixth Amendment ineffective assistance of counsel claim. Such claims are governed by the two-prong framework set out in *Strickland.* The first prong—the performance prong—requires a petitioner to demonstrate that his attorney provided objectively unreasonable performance under "prevailing professional norms." *Strickland*, 466

U.S. at 688, 104 S.Ct. 2052. On this score, the Supreme Court has emphasized that "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689, 104 S.Ct. 2052; *accord Cannady*, 63 F.4th at 268 (explaining that "counsel enjoys the benefit of a strong presumption that the alleged errors were actually part of a sound trial strategy" (citation omitted)). The second prong—the prejudice prong—requires the petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability," *Strickland* instructs, "is a probability sufficient to undermine confidence in the outcome." *Id.*; *see also id.* at 687, 104 S.Ct. 2052 (stating that the prejudice prong "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"). Absent either showing, the petitioner's ineffective assistance of counsel claim fails. *Id.* at 687, 104 S.Ct. 2052.

In this case, "we need not analyze the sufficiency of counsel's performance" for purposes of Sutherland's § 2255 petition "since it is so clear that counsel's purported deficiencies did not prejudice" him. *United States v. Terry*, 366 F.3d 312, 315 (4th Cir. 2004); *see also Strickland*, 466 U.S. at 697, 104 S.Ct. 2052 (stating that courts may dispose of an ineffective assistance claim based on a "lack of sufficient prejudice" without first addressing "whether counsel's performance was deficient"). Put simply, Sutherland has failed to show how the proffered testimony from Phillip and a tax expert would have in any way undermined his obstruction conviction.

According to Sutherland, Phillip would have testified that, despite having "no education, training or experience in bookkeeping or accounting," he served as the bookkeeper for Sutherland's companies and "unintentionally made numerous mistakes and omissions" in that role, including with respect to the STS wire transfers central to the tax fraud convictions. Opening Br. 12. He also would have supposedly testified concerning his sister Stewart's "savvy business acumen" and that "he overheard several telephone conversations between Sutherland and Stewart discussing loans from STS to Sutherland's business entities." Opening Br. 13. As Sutherland puts it, this testimony would have "strongly supported the proposition that the subject funds were nontaxable loans and not income which was a meritorious defense to the charges." Opening Br. 8.

As for a tax expert, Sutherland claims that he or she would have testified at trial that almost half of the STS wire transfers came from a line of credit in favor of STS and that such funds were treated by STS as loans. He or she also would have allegedly testified that Sutherland failed to deduct numerous business expenses that, if claimed, would have reduced his total tax liability for the subject tax years. This testimony, Sutherland similarly contends, would have "(1) strongly supported the proposition that the subject funds were nontaxable loans and (2) provided evidence that no or only a minimal tax was due for the years at issue." Opening Br. 8.[4]

4. To be clear, Sutherland has not produced an affidavit from either Phillip or a "tax expert" swearing as to the testimony that Sutherland says each would have offered had they testified at

The problem for Sutherland is that none of this alleged testimony bears any relevance to the only conviction at issue in the § 2255 petition—the *obstruction* conviction. The evidence necessary to convict Sutherland of that charge depended not on the proper classification of the STS funds (i.e., nontaxable loans versus taxable income) or the extent of his tax liability, but on his submitting, through his attorney, *fabricated loan documents* to the U.S. Attorney's Office in response to grand jury subpoenas.

To secure a conviction for obstruction of an official proceeding under 18 U.S.C. § 1512(c)(2), "[t]he government must show that the defendant (1) corruptly (2) obstructed, influenced, or impeded (3) an official proceeding, or attempted to do so. The government must also demonstrate a nexus between the obstructive act and the official proceeding[.]" *Sutherland*, 921 F.3d at 425 (cleaned up).

Here, the obstruction count of the indictment charged that Sutherland corruptly obstructed, influenced, and impeded, or attempted to do so, a federal grand jury proceeding by "providing one or more false and misleading documents in response to a subpoena issued by that Grand Jury." J.A. 23. The petit jury found Sutherland guilty of that count based on his providing fabricated loan documents to the U.S. Attorney's Office. And as we observed in rejecting Sutherland's direct appeal, that verdict was well supported by the evidence adduced at trial:

---

trial. Nonetheless, we assume as the district court did that each would have testified at trial consistent with Sutherland's claims.

The evidence at trial not only outlined [Sutherland's] financial misdeeds . . . but also demonstrated that *the loan documents Sutherland sent to the U.S. Attorney's office in July 2012 had been fabricated.* Read together, the documents implausibly pledged that Sutherland would give STS 120% of the proceeds of any sale of his businesses. While the documents had purportedly been signed by Sutherland's sister, evidence revealed that Sutherland commonly signed documents for her. The loan documents from Sutherland, moreover, conflicted with internal accounting documents from STS (the purported lender). Finally, the government introduced documents in which Sutherland claimed to have made loan payments by transferring interests in his other businesses to STS. But *these related documents were bogus and backdated.* A document supposedly signed in 2011, for example, described how Sutherland's businesses had received loans from STS in 2011, 2012, and 2013. Legitimate documents do not reference potential future transactions in the past tense, just as bona fide loans do not require fake payment trails.

The jury had little trouble seeing through Sutherland's manipulations of his accounting records and *attempts to fabricate loan documents to cover his tracks.*

Sutherland, 921 F.3d at 424-25 (emphases added) (cleaned up).[5]

The testimony that Sutherland claims Phillip and a tax expert would have given at trial in no way bears on Sutherland's culpability as to the obstruction charge, let alone calls any of the salient record evidence into question. Indeed, (admissible) testimony from these two witnesses that (1) the STS wire transfers were really nontaxable loans as opposed to taxable income and (2) Sutherland owed less in total taxes than the Government alleged for the tax years at issue may have been relevant to the *tax fraud* counts, which were predicated on Sutherland's underreporting his income by mischaracterizing the STS wire transfers. But such testimony would *not* have implicated the free-standing obstruction charge, because that charge never hinged on whether Sutherland filed false tax returns. Instead, as we have made clear, it was premised on Sutherland's providing sham loan documents to the U.S. Attorney's Office in response to grand jury subpoenas—entirely separate, and independently

5. "[F]or all practical purposes," this determination by our Court on direct appeal—namely, that there was sufficient evidence for a jury to conclude that Sutherland submitted fabricated loan documents to the U.S. Attorney's Office—constitutes "the law of the case." *United States v. Fulks*, 683 F.3d 512, 521 (4th Cir. 2012). As such, it applies in full force in these collateral proceedings absent limited exceptions not satisfied here. *See id.* (discussing the "relationship between the direct and the collateral proceedings" and noting that "the latter is not designed to be a rehash of the former under a more defendant-friendly standard"); *see also United States v. Lentz*, 524 F.3d 501, 528 (4th Cir. 2008) (discussing the law of the case doctrine and its exceptions).

unlawful, conduct. And as to *that* distinct conduct, the testimony Sutherland proffers in his § 2255 petition is silent. He makes *no* claim that either potential witness had any personal knowledge regarding the loan documents, their authenticity, or their provision to the U.S. Attorney's Office. Thus, trial counsel's failure to call those two witnesses had no prejudicial effect on Sutherland's defense with respect to the obstruction conviction.

Sutherland muses that *if* the STS wire transfers were in fact properly classified as nontaxable loans such that he did not actually underreport his taxable income and thus was not guilty of the tax fraud counts, then there would have been "no need to cover up those crimes" by presenting fraudulent loan documents to the U.S. Attorney's Office. Opening Br. 21, 26. And absent such a need to conceal any wrongdoing, Sutherland implies, he could not have been found guilty of obstructing the grand jury investigation. We reject this conjecture for the reasons we have just discussed. Regardless of Sutherland's "need to cover up" the tax fraud crimes—and indeed, regardless of his guilt of those crimes—the evidence presented at trial concerning the fraudulent nature of the loan documents he submitted to the U.S. Attorney's Office in response to the grand jury subpoenas was overwhelming and provided more than a sufficient basis for the jury to convict him of obstruction.

Absent any showing of prejudice stemming from his trial counsel's failure to call Phillip and a tax expert at trial, Sutherland cannot demonstrate ineffective assistance of counsel with respect to his obstruction conviction. The

district court was therefore right to deny § 2255 relief. And given that the record on this issue is conclusive as to that petition, the district court did not abuse its discretion in foregoing an evidentiary hearing. *See* 28 U.S.C. § 2255(b) (stating that no evidentiary hearing is required where the record "conclusively show[s] that the prisoner is entitled to no relief "). Accordingly, we affirm the district court's judgment as to the § 2255 petition.

III.

We next turn to Sutherland's separate coram nobis petition, which relates solely to the three tax fraud convictions.

"The ancient and rare writ of coram nobis affords a district court the authority to vacate a criminal conviction after a defendant's sentence has been completely served." *United States v. McDaniel*, 85 F.4th 176, 180 n.2 (4th Cir. 2023). It is a "remedy of last resort" and "is narrowly limited to extraordinary cases presenting circumstances compelling its use to achieve justice." *United States v. Akinsade*, 686 F.3d 248, 252 (4th Cir. 2012) (cleaned up).

To obtain this extraordinary relief, a petitioner must satisfy four elements:

> (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 [of the

> U.S. Constitution]; and (4) the error is of the most fundamental character.

Id. (citation omitted).

We review a district court's denial of coram nobis relief for abuse of discretion. *McDaniel*, 85 F.4th at 182.

Although the district court below denied Sutherland's coram nobis petition solely based on its finding that Sutherland could not satisfy the fourth element, we agree with the Government that we may affirm the district court's order on the alternative—and, in our view, easier—ground that Sutherland has not satisfied the second element. *See Scott v. United States*, 328 F.3d 132, 137 (4th Cir. 2003) ("We are . . . entitled to affirm on any ground appearing in the record, including theories not relied upon or rejected by the district court.").

On appeal, Sutherland has made no effort to demonstrate why he could not have attacked his tax fraud convictions on ineffective assistance grounds earlier, despite the availability of § 2255 relief while he was still in custody for those convictions. His opening brief included no discussion of that essential element, or any of the other coram nobis elements. Sutherland's first mention of the coram nobis elements came in his reply brief, after the Government raised the issue in its response brief. And even then, Sutherland did not purport to explain why he could not have attacked his tax fraud convictions earlier. Instead, he asserted that this element "is not at issue" because "this Court did not identify timeliness as among

the issues on appeal" in the certificate of appealability. Reply Br. 4. But the certificate of appealability matters only for purposes of the *§ 2255 petition*; it plays no role in framing the issues on appeal as to the separate coram nobis petition, the denial of which Sutherland could appeal as of right—that is, without first obtaining a certificate of appealability. *Compare* 28 U.S.C. § 2253(c)(1)(B) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a proceeding under section 2255."), *and id.* § 2253(c)(3) (requiring the certificate of appealability to identify the "specific issue or issues" to be addressed on appeal in connection with the § 2255 petition), *with* 28 U.S.C. § 1651 (All Writs Act empowering federal courts to issue writs of error coram nobis but including no corresponding certificate of appealability requirement). Contrary to Sutherland's claim, therefore, whether valid reasons exist for not attacking the tax fraud convictions earlier is very much "at issue" in this appeal. And Sutherland's total failure to address that issue in his opening brief constitutes a waiver of any argument that he may have had regarding it. *See Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief or by failing to develop its argument—even if its brief takes a passing shot at the issue." (cleaned up)). That waiver alone provides a sufficient basis to affirm the district court's order.

Even putting the waiver issue aside, nothing in the record before us remotely suggests that Sutherland had valid reasons for not attacking his tax fraud convictions

earlier by way of a § 2255 petition while he was still in custody for those convictions. Critically, the facts that form the basis of his ineffective assistance of counsel claim were facts that Sutherland knew as early as trial in October 2016 and as late as sentencing in June 2017. Specifically, he knew that neither witness had been called to testify at trial. And he knew that the testimony of each was potentially relevant to his defense: Phillip was available and expected to testify at trial until the last moment and a tax expert testified at his sentencing hearing. Despite that knowledge, Sutherland never challenged his tax fraud convictions on the basis that counsel was ineffective for failing to call these witnesses at any point after his convictions were final and before he was released from custody for those convictions in March 2020. Instead, he waited until February 2021, nearly a year after he was released from custody when § 2255 relief was no longer available, before lodging such a challenge. Such circumstances bear no resemblance to those in which this Court has found the second coram nobis element satisfied. *See*, *e.g.*, *Bereano v. United States*, 706 F.3d 568, 576 (4th Cir. 2013) (finding that petitioner's "reason for not launching an earlier attack on his conviction [was] valid" because it was based on a Supreme Court decision that had been "recently rendered"); *McDaniel*, 85 F.4th at 183 ("The second requirement—timeliness—is also satisfied because McDaniel sought relief less than a year after the Supreme Court's *Johnson* decision was rendered[.]"); *Akinsade*, 686 F.3d at 252 (finding the second coram nobis element satisfied where the petitioner "had no reason to challenge the conviction" earlier "as his attorney's advice, up to that point in time, appeared accurate").

What's more, even after being alerted to this issue on appeal, Sutherland still has not provided any valid explanation for the delay in attacking the tax fraud convictions on ineffective assistance grounds. Rather, both in his reply brief and at oral argument, Sutherland merely asserted that "there is no deadline to file a petition for coram nobis." Reply Br. 7; *accord* Reply Br. at 4 ("[T]he time for filing a coram nobis petition is not subject to a specific statute of limitations."). That may be true, but it is also beside the point. The absence of a formal "deadline" for filing a coram nobis petition does not relieve a petitioner of his burden to affirmatively demonstrate that "valid reasons exist for not attacking the conviction earlier." *Akinsade*, 686 F.3d at 252.[6]

In sum, therefore, the record reveals that Sutherland had all the information he needed to challenge his tax fraud convictions in a § 2255 petition while he was still in custody for those convictions. Yet he waited nearly a year

6. Sutherland also speculates that filing a § 2255 petition would have been premature given the pendency of his direct appeal. But as the Government notes, there is no jurisdictional bar to filing a § 2255 petition during the pendency of a direct appeal. *See United States v. Prows*, 448 F.3d 1223, 1228 (10th Cir. 2006); *United States v. Rashid*, 546 F. App'x 234, 235 (4th Cir. 2013) (per curiam). Thus, Sutherland could have filed a § 2255 petition even while his direct appeal was pending and simply moved to stay the § 2255 proceedings pending the resolution of the direct appeal. In any event, moreover, Sutherland was still in custody for the tax fraud convictions when the Supreme Court denied certiorari in his direct appeal, meaning that he did in fact have the opportunity to file a § 2255 petition after his direct appeal had concluded. But, without explanation, he let that opportunity pass him by.

after his release from custody to bring any challenge with no legitimate explanation for the delay. Consequently, even had he not waived the issue, Sutherland's failure to provide "valid reasons . . . for not attacking the [tax fraud convictions] earlier," *id.*, would foreclose any entitlement to the "'extraordinary' remedy of coram nobis relief," *Bereano*, 706 F.3d at 579.

IV.

For these reasons, we affirm the district court's order below.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED SEPTEMBER 24, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-7687
(3:15-cr-00225-MOC-DCK-1)
(3:21-cv-00082-MOC)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PATRICK EMANUEL SUTHERLAND,

Defendant-Appellant.

ORDER

Upon consideration of appellant's unopposed motion, the Court grants the motion, strikes the briefing schedule in this case, and directs that the Court's opinion, judgment and mandate in *United States v. Patrick Sutherland* (no. 21-7566) also applies to the instant appeal.

Entered at the direction of Judge Agee with the concurrence of Judge Niemeyer and Judge Gregory.

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX C — MEMORANDUM OF DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION, FILED SEPTEMBER 10, 2021

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

CIVIL CASE NO. 3:21-cv-00082-MOC
CRIMINAL CASE NO. 3:15-cr-00225-MOC-DCK-1

PATRICK EMANUAL SUTHERLAND,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

September 10, 2021, Decided
September 10, 2021, Filed

Max O. Cogburn, Jr., United States District Judge.

MEMORANDUM OF DECISION AND ORDER

THIS MATTER is before the Court on Petitioner's Motion to Vacate, Set Aside or Correct Sentence under 28

U.S.C. § 2255 [CV Doc. 1],[1] Petitioner's Petition for Writ of Coram Nobis [CV Doc. 3], the Government's Motion to Dismiss Petitioner's Motion to Vacate [CV Doc. 9], and Petitioner's Motion to Strike the Government's Surreply [CV Doc. 12].

I. BACKGROUND

Petitioner Patrick Emanual Sutherland ("Petitioner") was an experienced businessman and actuary. He had a master's degree in Actuarial Science and Finance and an undergraduate degree in Mathematics, Economics, and Computer Science. [CR Doc. 57 at ¶¶ 6, 63: Presentence Investigation Report (PSR)]. Petitioner was a Registered General Securities and Financial Operations Principal with the National Association of Securities Dealers and was a Registered Investment Advisory. [*Id.* at ¶ 6]. He had more than 20 years' experience in insurance, banking, securities, and financial services industries. He was the owner, principal, director, and executive of numerous businesses, including Insigne, Inc. ("Insigne"); XYZ Entertainment, LLC ("XYZ"); Kyrotech Holdings ("Kryotech"); and Innovation Partners, LLC ("Innovation Partners"). [*Id.* at ¶ 7].

1. Citations to the record herein contain the relevant document number referenced preceded by either the letters "CV," denoting that the document is listed on the docket in the civil case file number 3:21-cv-00082-MOC, or the letters "CR," denoting that the document is listed on the docket in the criminal case file number 3:15-cr-00225-MOC-DCK-1.

Petitioner's work included deals with offshore insurance companies. He used a Bermuda company, Stewart Technology Services Limited (STS), as his primary intermediary to receive offshore commissions and fees. [*Id.* at ¶ 8]. Although Petitioner's sister, Beverly Stewart, was listed as the President and owner of STS, it was really Petitioner's company. [*Id.* at ¶ 10]. Petitioner received the statements for STS's Bermuda bank account at his Charlotte, North Carolina, residence; he was the primary contact for STS's Bermuda brokerage account; he was listed as a director and Vice President of STS and was a "customer delegate" with access to the business internet banking for the STS Bermuda bank account; and he and his wife, Yanique Lawrence, were authorized signatories on that account. [*Id.].* Petitioner, his wife, and his business entities had 36 different domestic financial accounts. [*Id.* at ¶ 11]. Between 2007 and 2010, over $2.5 million in deposits were made to these accounts. [*Id.* at ¶ 12]. Approximately $2 million of those deposits were wire transfers from STS. [*Id.* at ¶ 13].

Some of the wire transfers came from funds deposited into STS that were fees or commissions on insurance contracts. Some came from interest earned or the sale of securities from STS's brokerage account. And some originated from lines of credit purportedly obtained by Stewart. [*Id.* at ¶ 13]. Many of the wire transfers included descriptions, such as commissions, consulting fees, and service fees, that identified them as taxable receipts. [*Id.* at ¶ 14]. Despite this, the general ledgers for Insigne, XYZ, and Kryotech frequently mischaracterized these receipts as nontaxable by falsely calling them capital contributions and loans. [*Id.* at ¶ 15]. Petitioner and STS

"treated these wire transfers in inconsistent manners that provided Petitioner tax advantages." *United States v. Sutherland,* 921 F.3d 421, 424 (4th Cir. 2019), *cert. denied,* 140 S. Ct. 1106, 206 L. Ed. 2d 179 (2020). The Fourth Circuit explained:

> Sutherland treated the vast majority of wire transfers from STS to his companies as bona fide loans or capital contributions, which ordinarily are not taxable income for their recipient. By contrast, STS treated nearly all of the wire transfers as expenses that had been paid to Sutherland. If the wire transfers were in fact expenses paid to Sutherland, as STS recorded them, then Sutherland and his companies should have reported the wire transfers as taxable income. Far from reporting them as income, however, Sutherland either treated the transfers from STS to him and his wife as bona fide loans or failed to account for them in his general ledger altogether. In the end, Sutherland did not report the $2.1 million as income on his tax returns.
>
> Sutherland's treatment of the STS transfers mirrored his treatment of other income. Indeed, the defendant seemed to think that marking income as a capital contribution or loan was a foolproof scheme. For example, three Sutherland companies—Insigne Consulting, Insigne, Inc., and XYZ Entertainment—sent almost $42,000 to Kryotech Holdings, another Sutherland company, between 2007 and 2009.

> The paying companies recorded each transfer as a nontaxable marketing expense, while Kryotech treated the payments as non-taxable capital contributions. The net result: none of Sutherland's companies would pay taxes on those funds. Similarly, Insigne, Inc., received more than $125,000 in taxable fees from another firm, Global Financial Synergies, between 2006 and 2010—yet Sutherland described the majority of them as nontaxable capital contributions. Come tax day, despite the millions of dollars flowing through his accounts, Sutherland reported just $88,979 of income in 2008; $16,669 in 2009; and $72, 415 in 2010.

Id. On those same tax returns, Petitioner also failed to report, as required, his interest in or signatory authority over a financial account in a foreign country. [CR Doc. 57 at ¶ 18].

In April 2012, a grand jury in the Western District of North Carolina issued subpoenas seeking the records of Petitioner's companies. [CR Doc. 79 at 47: Trial Tr.[2]]. Three months later, Petitioner's attorney sent the United States Attorney's Office a letter attempting "to explain away a large number of transactions related to the subpoenaed materials." *Sutherland,* 921 F.3d at 424. The letter stated that STS was formed in the early 2000s to develop, manufacture, license, sell and support products and database systems for trust and insurance companies

2. Docket Nos. 77 through 82 are the trial transcripts in this matter.

and investment managers. [CR Doc. 79 at 55]. The letter also stated that Petitioner had served on the STS board of directors, but that he had no ownership interest in and was not employed by STS. [*Id.* at 56].

Petitioner's attorney represented that Stewart had agreed to lend Petitioner's companies funds until his businesses became profitable and that "[a]ll loans from STS to ... [Petitioner] were contemporaneously documented by written and fully-executed loan agreements." [*Id.*]. Pursuant to those agreements, Petitioner agreed to pay 6% interest and 20% of the proceeds received from the sale of any entity in which Petitioner had an ownership interest. [*Id.*]. The agreement provided for full repayment of the loans plus interest seven years from the end of the calendar year in which the loan was made. [*Id.*].

Petitioner's attorney stated that between 2007 and 2011, Stewart loaned Petitioner $2,052,925. [*Id.* at 56-57]. He attached loan agreements purportedly signed by Stewart and Petitioner and executed in Union County, North Carolina, in 2007, 2008, 2009, 2010, 2011, and 2012. Each of the six agreements independently granted Stewart twenty percent of the sale of any of Petitioner's businesses. Therefore, when considered together, they provided that Stewart would receive 120% of the proceeds from the sale of any of Petitioner's businesses. [*Id.* at 64]. Balance sheets for STS, reflecting assets and liabilities as of December 31, 2008, and as of December 31, 2010, purportedly signed by Stewart and Petitioner, did not reflect any loan from STS to Petitioner or his companies as an asset. [*Id.* at 41-42]. Petitioner's attorney also submitted documents purporting to transfer to STS an interest in

Petitioner's properties in St. Lucia and Brevard, North Carolina, and in two properties in Jamaica, including Stewart's home address. [*Id.* at 66-70]. Both Stewart and Petitioner purportedly signed these property transfers as they purportedly signed the others. [*Id.* at 67-68].

The grand jury indicted Petitioner, charging him with three counts of filing a false tax return, 26 U.S.C. § 7206(1), for the years 2008, 2009, and 2010 (Counts One, Two, and Three), and one count of obstructing or attempting to obstruct, influence, and impede the grand jury and aiding and abetting the same, 18 U.S.C. §§ 1512(c)(2) and 2 (Count Four). [CR Doc. 3: Bill of Indictment]. The Indictment alleged that between 2007 and 2010, Petitioner and his companies received deposits exceeding $2.5 million and underreported his income by more than $1.5 million and that Petitioner's personal expenditures "far exceeded his total income" as reported on his individual tax returns. [*Id.*]. The Indictment also alleged that in 2008 to 2010 Petitioner failed to report, as required, his interest in or authority over a financial account in a foreign country. [*Id.* at 3]. As to the obstruction count, the Indictment alleged that Petitioner had attempted to obstruct a federal investigation by providing fraudulent documents, including purported loan agreements between STS and Petitioner, to the grand jury. [*Id.* at 5]. Petitioner retained counsel and was represented by four attorneys at trial. [CR Docs. 1, 13; 9/21/2015 Docket Entry].

At trial, the United States presented evidence that in 2007, 2008, and 2009, Stewart attended a community college in Jamaica, studying hospitality and tourism management and worked in the United States over the

summer. [CR Doc. 78 at 32, 36-37, 40, 51; CR Doc. 81 at 89-90]. "Despite allegedly owning a multi-million dollar business [STS], Stewart worked at the Best Western hotel in Cody, Wyoming for less than $10 an hour," and, at one point, "was unable to pay a $600 fee without her hotel earnings." *Sutherland*, 921 F.3d at 424. In her application for employment, Stewart did not list STS as part of her "[o]ther activities and experience." [CR Doc. 78 at 54].

> The evidence at trial not only outlined [Sutherland's] financial misdeeds ..., but also demonstrated that the loan documents Sutherland sent to the U.S. Attorney's office in July 2012 had been fabricated. Read together, the documents implausibly pledged that Sutherland would give STS 120% of the proceeds of any sale of his businesses. While the documents had purportedly been signed by Sutherland's sister, evidence revealed that Sutherland commonly signed documents for her. The loan documents from Sutherland, moreover, conflicted with internal accounting documents from STS (the purported lender). Finally, the government introduced documents in which Sutherland claimed to have made loan payments by transferring interests in his other businesses to STS. But these related documents were bogus and backdated. A document supposedly signed in 2011, for example, described how Sutherland's businesses had "received loans from [STS] in 2011, 2012, and 2013." J.A. 1333. Legitimate documents do not reference potential future transactions in the

> past tense, just a bona fide loans to not require fake payment trails.

Sutherland, 921 F.3d at 424-25.

Michael Jones, Petitioner's business partner from 1999 until 2008 and a native of Jamaica, testified at trial about the companies he and Petitioner formed, their decision to form STS to act as an insurance intermediary in Bermuda, and the sources of commissions paid to their companies. [CR Doc. 80 at 62, 64-67, 74-76, 78-80]. Jones testified that Petitioner was "the primary expert in ... offshore insurance" among their collaborators. [*Id.* at 79]. When asked what relationship Stewart had with STS, Jones replied, "She had none." [*Id.* at 81]. Jones explained that he traveled to Bermuda with Petitioner on three occasions, interacting and working with representatives from companies they worked with and Stewart "was never part of any conversation." [*Id.].*

According to Jones, the companies he and Sutherland operated received commissions from the sale of their insurance products. [*Id.* at 74]. Jones testified that Petitioner's brother worked for Petitioner and paid commissions to collaborators in accordance with their contracts. Petitioner, however, did most of the bookkeeping and answered financial questions about the businesses. [*Id.* at 76-77]. Jones testified that Petitioner sent emails under his own name, Stewart's name, and his brother's name. [*Id.* at 112].

Appendix C

Jim Price, owner of a company that facilitated the sale of insurance policies in Bermuda, first met Petitioner in 2005. [*Id.* at 214]. Price testified that Stewart signed contracts between STS and Price's company but that he never met her. [*Id.* at 222, 225-26]. Price also testified that when he needed Stewart to sign a contract or other documents, he sent the documents to Stewart through Petitioner because he was told [Stewart] traveled all the time" in Europe, selling software to offshore companies. [*Id.* at 250, 254-260]. Some of these documents were ostensibly signed by Stewart in Charlotte during one of the summers she was working at the Best Western in Cody, Wyoming. [CR Doc. 78 at 36-37; CR Doc. 80 at 257-58].

Peter Barnett, the managing director of Transamerica Life between 2005 and 2010, testified that Transamerica Life contracted with STS to represent clients from the United States who wanted to buy insurance. [CR Doc. 80 at 177, 180, 195]. Transamerica Life paid commissions to STS on the policies STS helped facilitate. [*Id. a*t 182, 191-92]. Barnett testified that he negotiated with Petitioner and that, while he had seen Stewart's name on documents between STS and Transamerica Life, he never met Stewart or spoke with her. [*Id.* at 186-87].

Doug Boik, owner of an information-technology consulting company that provide website development, internet marketing, and corporate email services to Petitioner and his companies, testified that he worked with Petitioner on technology matters related to STS. [CR Doc. 79 at 141-48, 160]. Boik testified that he assumed that STS was in Charlotte because he dealt only with Petitioner

from when Boik began providing services to STS in 2007 until 2014 or so, when Stewart became his billing contact for STS. [*Id.* at 142-43, 174].

Agent Linda Polk of the Internal Revenue Service ("IRS") assisted in the investigation of Petitioner's case. She testified about financial records for Petitioner and his business entities. [CR Doc. 81 at 113]. Polk testified that she reviewed Petitioner's business ledgers and summarized how various transactions were recorded. [*Id.* at 117-18]. Some transactions between STS and Petitioner's other companies were described as "capital contributions." [*Id.* at 118]. Polk testified that capital contributions and bona fide loans are not taxable to the recipient. [*Id.* at 118-19, 198]. Polk further testified that more than $45,000 of fees and rent paid by Innovation Partners to Insigne was not treated as income to Insigne. [*Id.* at 140-41]. Polk also testified that $66,376 of income to Petitioner from sources other than STS was not treated as income on Petitioner's 2008 tax return. [*Id.* at 149]. Polk testified that almost $50,000 that Petitioner received was not reported as income on Petitioner's 2009 federal tax return, and that more than $39,000 that Petitioner received was not treated as income on Petitioner's 2010 federal tax return. [*Id.* at 150-51].

The defense called five witnesses. [CR Doc. 81 at 215, 237, 248, 257; CR Doc. 82 at 6]. Peter Moison, the president of CastleRe Insurance Company, a Bermuda company, testified regarding Petitioner's expertise and experience in the insurance field, as well as his reputation for honesty. [CR Doc. 81 at 216-17]. Moison also testified

that his company's payments went to Innovation Partners, not STS. [*Id.* at 220]. Gerald Nowotny, an attorney and business owner, testified that he had worked with Petitioner and referred clients to him, and that Petitioner had an excellent reputation for honesty. [*Id.* at 237-44]. Sally Gilliam, a due diligence consultant with Wells Fargo, testified that she had previously worked at Innovation Partners as a compliance associate and that there were nine employees working there when she left. [*Id.* at 249].

The defense prepared a summary chart of credit card accounts and balances for four accounts, one for Petitioner, one in his name for Insigne, and two for his wife. [CR Doc. 81 at 257-58]. The exhibit was admitted through the testimony of Marissa Mugan, a paralegal, and showed large balances were carried on the cards. [*Id.* at 257-60]. Finally, a business valuation expert, Bradford Taylor, testified regarding the value of Innovation Partners and Insigne Advisor Consulting at the time a percentage of those companies was transferred to STS as alleged repayment of the loans. [Doc. 82 at 6-7, 14, 17]. At the end of 2011, the total value was $10,000; in 2012 it was $250,000; in 2013 it was $720,000; in 2014 it was $1.45 million; and by 2016 it was $7.2 million. [*Id.* at 25]. Petitioner did not testify. [*Id.* at 43-44].

The jury found Petitioner guilty on all four counts. [CR Doc. 44: Jury Verdict].

Petitioner was sentenced on June 21, 2017. [CR Doc. 84 at 1: Sentencing Tr.]. At sentencing, Petitioner sought to decrease the loss calculation. He argued that

the "books mischaracterized a whole bunch of things to the benefit and to the detriment of Mr. Sutherland." [*Id.* at 6]. Jane Frazier, a managing member of a public accounting firm with a B.S. in accounting, testified for Petitioner. [*Id.* at 9-10]. She testified that she found other unreported income based on an interview with Petitioner and documents that he provided, documents from his law firm, and the Government's exhibits. [*Id.* at 12-14, 16]. Frazier testified that she had not included certain money as income because it was her "understanding" that certain transfers were from a line of credit at STS. [*Id.* at 15]. She included deductions for business expenses that were paid using Petitioner's personal credit care. [*Id.* at 17-18]. Frazier testified that she calculated a loss of $283, 438 for 2007, which she carried forward to 2008. [*Id.* at 24]. She determined that there was a policy with United Healthcare that was in the name of Kryotech Holdings. [*Id.* at 25-26]. Although payments were made for that policy from other entities, she eliminated the deduction from there and included it under Kryotech because the policy was in that company name. [*Id.* at 26]. Based on her calculations, Frazier concluded that Petitioner owed no additional tax for 2008, that he owed $2,530 for 2009, and that he owed $32,943 for 2010. [*Id.* at 28-29].

Frazier admitted that Petitioner provided much of the information regarding what charges were for business expenses, that she did not have receipts for everything, and that she did not audit all the items in QuickBooks. [*Id.* at 34-35, 49]. Her calculations showed hundreds of thousands of dollars of business expenses that were all cash. [*Id.* at 36]. She did not have all the bank records

underlying the transactions or even all of Sutherland's accounts. [*Id.* at 39-45]. She allowed business expenses of $5,000-$6,000 a year for grocery store purchases based on Petitioner's representations that they were business expenses. [*Id.* at 49-50]. Frazier deducted anything that was vehicle related based on Petitioner's representation that the expenses were business related, although there was no mileage log. [*Id.* at 52].

The Government, on the other hand, argued that the records were unreliable and "just don't make sense." The Government argued that Petitioner asked the Court to include business expenses from companies that appeared nowhere on Petitioner's tax returns in calculating loss. [*Id.* at 62-63]. The Government also stated that it was very conservative in its estimates due to the lack of records supporting different expenses. [*Id.* at 61-62].

The Court found that the self-reported information from Petitioner was not reliable and that it was "just not believable" that "you can live this lifestyle off of that little money." [*Id.* at 63-64]. The Court found that the Guidelines correctly stated the loss amount. [*Id.* at 64]. The Court varied downward and sentenced Petitioner to 33 months' imprisonment on all counts, to be served concurrently, and one year of supervised release on the tax counts and three years of supervised release for the obstruction count, to run concurrently. [*Id.* at 90].

Petitioner appealed, [CR Doc. 72], and the Fourth Circuit affirmed his conviction on April 22, 2019. *Sutherland,* 921 F.3d at 421, *cert. denied,* 140 S. Ct. 1106, 206 L. Ed. 2d 179 (2020). Petitioner was released from

prison on March 22, 2019. Petitioner's one-year term of supervised release on Counts One through Three has been discharged, but Petitioner remains on supervised release on his obstruction of justice charge. In November 2020, this Court denied Petitioner's motion for early termination of his term of supervised release on this charge. [CR Docs. 88, 94]. On February 24, 2021, Petitioner filed the pending § 2255 motion to vacate and petition for writ of coram nobis. [CV Docs. 1, 3]. In his § 2255 motion, Petitioner argues that he received ineffective assistance of counsel because his attorney did not call his brother, Phillip Sutherland, as a witness at trial and did not call an expert in accounting and taxes to testify at trial, citing the expert testimony he offered at sentencing. [CV Doc. 1 at 19, 23]. Petitioner also petitions the Court for writ of coram nobis to vacate his convictions on Counts One through Three on essentially the same grounds. [CV Doc. 3].

The matter is now ripe for disposition.

II. STANDARD OF REVIEW

A. Motion to Vacate

A federal prisoner claiming that his "sentence was imposed in violation of the Constitution or the laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a).

Appendix C

Rule 4(b) of the Rules Governing Section 2255 Proceedings provides that courts are to promptly examine motions to vacate, along with "any attached exhibits and the record of prior proceedings . . ." in order to determine whether the petitioner is entitled to any relief on the claims set forth therein. After examining the record in this matter, the Court finds that the motion to vacate can be resolved without an evidentiary hearing based on the record and governing case law. *See Raines v. United States,* 423 F.2d 526, 529 (4th Cir. 1970).

B. Coram Nobis

The All Writs Act, 28 U.S.C. § 1651(a), authorizes the Court to hear petitions for a writ of error coram nobis. *United States v. Morgan,* 346 U.S. 502, 512, 74 S. Ct. 247, 98 L. Ed. 248 (1954). A coram nobis petition is "of the same general character as one under 28 U.S.C. § 2255," but is available to petitioners who are no longer "in custody" and cannot seek habeas relief under § 2255 or §2241. *Morgan,* 346 U.S. 506 n. 4. It is a remedy of last resort and is "narrowly limited to extraordinary cases presenting circumstances compelling its use to achieve justice." *Kornse v. United States,* No. 1:19-cv-00290-MR, 2019 U.S. Dist. LEXIS 200000, 2019 WL 6169808, at *2 (W.D.N.C. Nov. 19, 2019) (citations and internal quotation marks omitted). "[J]udgment finality is not to be lightly cast aside; and courts must be cautious so that the extraordinary remedy of *coram nobis* issues only in extreme cases." *United States v. Denedo,* 556 U.S. 904, 916, 129 S. Ct. 2213, 173 L. Ed. 2d 1235 (2009).

A petitioner for coram nobis is not entitled to relief unless he can meet his burden to prove four elements: "(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." *United States v. Akinsade,* 686 F.3d 248, 252 (4th Cir. 2012) (citation omitted). This is a "substantial burden," even "'exceeding that of an ordinary habeas petitioner.'" *Hall v. United States,* No. 3:12-cv-762, 2012 U.S. Dist. LEXIS 167261, 2012 WL 5902432, at *3 (W.D.N.C. 2012) (quoting *Akinsade,* 686 F.3d at 261 (Traxler, C.J., dissenting)). Whether to grant the writ is ultimately a matter of this Court's discretion. *See Akinsade,* 686 F.3d at 252 (reviewing denial of writ for abuse of discretion).

III. DISCUSSION

The Sixth Amendment to the U.S. Constitution guarantees that in all criminal prosecutions, the accused has the right to the assistance of counsel for his defense. *See* U.S. Const. Amend. VI. To show ineffective assistance of counsel, Petitioner must first establish deficient performance by counsel and, second, that the deficient performance prejudiced him. *See Strickland v. Washington,* 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The deficiency prong turns on whether "counsel's representation fell below an objective standard of reasonableness ... under prevailing professional norms." *Id.* at 688. A reviewing court "must apply a 'strong presumption' that counsel's representation was within

the 'wide range' of reasonable professional assistance." *Harrington v. Richter,* 562 U.S. 86, 104, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (quoting *Strickland,* 466 U.S. at 689). The *Strickland* standard is difficult to satisfy in that the "Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *See Yarborough v. Gentry,* 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

The prejudice prong asks whether counsel's deficiency affected the judgment. *See Strickland,* 466 U.S. at 691. A petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In considering the prejudice prong of the analysis, a court cannot grant relief solely because the outcome would have been different absent counsel's deficient performance, but rather, it "can only grant relief under . . . *Strickland* if the 'result of the proceeding was fundamentally unfair or unreliable.'" *Sexton v. French,* 163 F.3d 874, 882 (4th Cir. 1998) (quoting *Lockhart v. Fretwell,* 506 U.S. 364, 369, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993)). Under these circumstances, the petitioner "bears the burden of affirmatively proving prejudice." *Bowie v. Branker,* 512 F.3d 112, 120 (4th Cir. 2008). If the petitioner fails to meet this burden, a reviewing court need not even consider the performance prong. *Strickland,* 466 U.S. at 670.

"The decision whether to call a particular witness is almost always strategic, requiring a balancing of the

benefits and risks of the anticipated testimony." *Jackson v. United States,* 638 F. Supp. 2d 514, 550 (W.D.N.C. 2009) (quoting *Horton. Allen,* 370 F.3d 75, 86 (1st Cir. 2004)). Risks include a witness not testifying as anticipated, witness whose character or demeanor might be viewed unfavorably by the jury, and eliciting testimony that could "prompt jurors to draw inferences unfavorable to the accused." *Id.* Strategic decisions of counsel are entitled to "enormous defendant." *United States v. Terry,* 366 F.3d 312, 317 (internal quotation and citation omitted); *Strickland,* 466 U.S. at 669. To establish ineffective assistance, counsel's decision not to call a witness must be "so patently unreasonable that no competent attorney would have made it." *Jackson,* 683 F. Supp. 2d at 550 (internal citation and quotation omitted).

A. Motion to Vacate

Petitioner moves to vacate his convictions on all four counts of conviction based on ineffective assistance of counsel. Section 2255 requires that a prisoner be in custody at the time he files his motion to vacate. *See* 28 U.S.C. § 2255; *Carafas v. LaVallee,* 391 U.S. 234, 238, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968). Where a petitioner's sentence, including any term of supervised release, has been fully discharged, the petitioner is no longer in custody. *Maleng v. Cook,* 490 U.S. 488, 491-92, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989). "[O]nce the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it." *Id.* at 492.

Petitioner is no longer in custody on his convictions for Counts One through Three. His term of supervised release on these convictions was discharged on March 22, 2020. He did not file the pending § 2255 motion until over one year later. Relief under § 2255 for these convictions is, therefore, unavailable. Relief is proper, if at all, through the writ of coram nobis, which Petitioner concedes in his petition therefore. [CV Doc. 3 at 12 ("[Petitioner] is not eligible for habeas relief under 28 U.S.C.§ 2255" on Counts One through Three.")].

The Court, therefore, considers Petitioner's motion to vacate as it relates to his conviction for obstruction of justice only. Petitioner, however, presents no viable grounds for relief on this claim. He claims that "[h]ad defense counsel presented evidence creating a reasonable doubt about the government's theory that the STS Transfers were not loans, such evidence would have defeated all of the counts of the indictment." [CV Doc. 2 at 2-3]. Petitioner, however, does not show how this evidence would have defeated the obstruction of justice charge in particular. [*See id.* at 2-9]. And Petitioner's allegations are too vague and conclusory to warrant further examination. *See United States v. Dyess,* 730 F.3d 354, 359-60 (4th Cir. 2013) (holding it was proper to dismiss § 2255 claims based on vague and conclusory allegations), *cert. denied,* 574 U.S. 827, 135 S. Ct. 47, 190 L. Ed. 2d 52 (2014). Moreover, as more fully address below, Petitioner's counsel's performance was not deficient in any event.

As such, the Court will deny and dismiss Petitioner's § 2255 motion to vacate as to all counts.

B. Coram Nobis

Relief under the writ of coram nobis, on the other hand, is available only when a petitioner is no longer in custody for the challenged conviction(s). Here, Petitioner seeks relief through this writ on his convictions on Counts One through Three for which he is no longer in custody. Because it is determinative, the Court looks directly to the fourth element of a coram nobis claim, that "the error is of the most fundamental character."

Petitioner argues that he is entitled to coram nobis relief because his trial counsel was ineffective. [CV Doc. 3 at 15]. Specifically, Petitioner argues that he received ineffective assistance because his trial counsel failed "to present material and substantial testimonial evidence supporting the defense that the subject funds were nontaxable loans and not income" and "that no or a minimal tax was due for the years at issue." [*Id.* at 16, 20]. Petitioner claims that such evidence could have been shown through the testimony of Petitioner's brother, Phillip Sutherland, and an accounting and tax expert, such as Michelle Frazier, Petitioner's expert at sentencing. [*Id.* at 16-23]. Petitioner, however, fails to establish any error let alone one of fundamental character.

As to his brother's testimony, Petitioner contends Phillip would have testified that, despite having no education, training, or experience in bookkeeping or accounting, he was the bookkeeper for Petitioner's companies, including Innovation Partners. [CV Doc. 1 at 20]. Petitioner asserts that Phillip would have admitted making numerous mistakes and omissions in QuickBooks.

[*Id.*]. Phillip would have testified that he used the name "Phillip Augustus," rather than Phillip Sutherland in work matters to avoid having the same email address as Petitioner. [*Id.* at 21]. Phillip would have testified to his sister Beverly's "savvy business acumen," her having owned a restaurant in a shopping plaza in Jamaica before 2008, and him having observed her living in a nice house in 2013. [*Id.*]. Petitioner also contends that Phillip would have testified to what Jones knew, what he overheard Petitioner and Stewart discussing, and what Petitioner and his sister-in-law told him.[3] [*Id.* at 20]. As to expert testimony, Petitioner contends that a tax and accounting expert "would have provided evidence that (1) approximately half of the source of the STS Transfers were the STS Line of Credit Funds that such expert would have characterized as loans to Sutherland and (2) because of untaken deductions, there was no or de minimis taxes due for the years in question." [CV Doc. 3 at 19]. Petitioner also asserts that his attorney failed to adequately investigate the deductions reflected in Petitioner's tax returns and that, if counsel had so investigated, counsel could have presented evidence of the nature and amount of untaken deductions at trial through an expert like Frazier. [*Id.* at 21-22].

Petitioner claims that the failure to present testimony by Phillip and a tax and accounting expert constituted deficient performance and prejudiced Petitioner "because it deprived the jury of evidence relevant to the key issue at

3. Petitioner did not provide an affidavit from his brother, Phillip, attesting to the expected testimony.

trial — whether the funds at issue were loans or income," thus, plainly "undermin[ing] confidence in the outcome." *Strickland,* 466 U.S. at 694.

Assuming for the sake of argument that Phillip would have testified as offered and that such testimony was admissible, Petitioner cannot show deficient performance or prejudice. Petitioner's attorney prepared Phillip for trial. After hearing the Government's evidence, counsel decided not to call Phillip as a witness. This decision was well within the bounds of reasonable professional assistance. There were risks incident to calling Phillip, including being cross-examined on his grand jury testimony. Moreover, Phillip's purported testimony would have emphasized his numerous bookkeeping errors, except as to Innovation Partners, the one company that had to be audited. This would have highlighted either Petitioner's knowledge of Phillip's errors or his willful blindness to them. Finally, given the evidence of fraudulent documents associated with Stewart's name, evidence from another of Petitioner's relatives would not likely have favorably impressed the jury.

Petitioner also fails to show deficient performance or prejudice regarding the failure to call an accounting expert at trial. Petitioner points to Frazier's testimony at sentencing to support what could have been shown at trial. The Federal Rules of Evidence, however, do not apply at sentencing hearings and there is a substantial question regarding whether Frazier's testimony would have been admissible at trial. *See* Fed. R. Evid. 703; *United States v. Slager,* 912 F.3d 224, 235 n.4 (4th Cir.

2019). Frazier admitted that she did not have records for all of Petitioner's accounts and that her findings of large unclaimed business expenses relied on evidence from Petitioner which was not supported by itemized receipts. Her calculations were based on hypothetical recharacterizations and shifting money to different entities. Ultimately, Frazier's testimony was insufficient to sway the Court at sentencing, in any respect, and the Court found that the self-reported information from Petitioner was not reliable. Petitioner seems also to ignore the risks that were associated with presenting tax expert testimony at trial, a risk that was born out at sentencing where Frazier's testimony was undermined. The jury could have easily seen such testimony as reflecting more evidence of intentional mischaracterization of income and expenses. Petitioner's counsels' decision not to present such testimony was well within the bounds of reasonable professional assistance.

Moreover, Petitioner's assertion that his attorney failed to adequately investigate the accounting before trial is speculative and unsupported by the record. The record shows that defense counsel was familiar with the relevant transactions and employed generalizations to support the defense that the books were messy and, thus, mistakes were less evident. This approach evidences a strategic means of casting doubt on intent.

Petitioner also fails to show prejudice. Even if an expert had testified at trial, at best, the expert would have testified that Petitioner's tax returns were not accurate and that he owed less money in taxes than shown by

the Government. Evidence that Petitioner still owed a significant amount of money in taxes to the IRS does show that the result of these proceedings was fundamentally unfair or unreliable. *Sexton,* 163 F.3d at 882. Petitioner, therefore, has not shown an error of the most fundamental character. He is not entitled to relief under coram nobis.[4]

IV. CONCLUSION

For the foregoing reasons, the Court denies Petitioner's § 2255 motion to vacate, denies Petitioner's petition for writ of coram nobis, and grants the Government's motion to dismiss.

The Court further finds that Petitioner has not made a substantial showing of a denial of a constitutional right. *See generally* 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell,* 537 U.S. 322, 336-38, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (in order to satisfy § 2253(c), a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong") (*citing Slack v. McDaniel,* 529 U.S. 473, 484-85, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)). Petitioner has failed to demonstrate both that this Court's dispositive procedural rulings are debatable, and that the Motion to Vacate states a debatable claim of the denial of a constitutional right. *Slack v. McDaniel,* 529 U.S. at 484-85. As a result, the Court declines to issue a certificate of appealability. *See* Rule 11(a), Rules Governing Section

4. Because Petitioner has not shown such an error, the Court declines to address the other elements required for coram nobis relief.

Appendix C

2255 Proceedings for the United States District Courts, 28 U.S.C. § 2255.

ORDER

IT IS, THEREFORE, ORDERED that:

1. Petitioner's Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 [Doc. 1] is **DENIED**;

2. Petitioner's Petition for Writ of Coram Nobis [Doc. 3] is **DENIED**;

3. The Government's Motion to Dismiss [Doc. 9] is **GRANTED**;

4. Petitioner's Motion to Strike the Government's Surreply [Doc. 12] is **DENIED**; and

5. Pursuant to Rule 11(a) of the Rules Governing Section 2254 and Section 2255 Cases, this Court declines to issue a certificate of appealability.

IT IS SO ORDERED.

Signed: September 10, 2021

/s/ Max O. Cogburn, Jr.
Max O. Cogburn, Jr.
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED AUGUST 12, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-7566
(3:15-cr-00225-MOC-DCK-1)
(3:21-cv-00082-MOC)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PATRICK EMANUEL SUTHERLAND,

Defendant-Appellant.

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Gregory, and Judge Agee.

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX E — REPLY BRIEF OF APPELLANT IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED DECEMBER 22, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Case No. 21-7566

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PATRICK SUTHERLAND,

Defendant-Appellant.

Filed December 22, 2023

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Appendix E

[TABLE OMITTED]

ARGUMENT

I. Introduction

The Brief of the United States ("Response") establishes the merits of the ineffective assistance of counsel claims that are the subject of the Section 2255 Motion and the Coram Nobis Petition. The Government points to no direct evidence at trial regarding the source of the funds that are the subject of the alleged false tax returns to support the notion that such funds were income and, therefore, required to be designated as such on those tax returns. Similarly, the Government points to no direct evidence at trial that the Loan Documents were fabricated, such as metadata supporting the creation of the documents after the fact or the testimony of a single witness with personal knowledge.

The failure of defense counsel to present available evidence rebutting the Government's highly circumstantial case establishes that Sutherland was denied his right to a fair trial and competent counsel. This available evidence was the testimony of Sutherland's brother, Phillip, and an accounting and tax expert. It is uncontested that Phillip was prepped, in the courthouse and ready to testify at trial regarding his responsibility and inept preparation of Sutherland's company's books and records. Also uncontested is that, pretrial, defense counsel was aware of the analyses contained in the Sharf Pera Report, including the conclusion that half of the source of the

funds in dispute derived from draws on the STS Line of Credit. The Sharf Pera Report further opined that, regardless of the source of the funds pertaining to each of the subject tax years, the tax returns did not reflect deductions that would have resulted in either no or de minimis taxes due. Had defense counsel been effective, they would have introduced this readily available evidence which was highly relevant to rebut both the False Tax Return Counts and the Obstruction Count.

Importantly, as asserted by Sutherland and as acknowledged by the Government, defense counsel was generally aware of the defenses available to Sutherland but never availed themselves of the critical evidence to *support* such defenses. The lack of any sworn statements by defense counsel to explain what possibly could have motivated them not to present critical evidence supporting their own arguments is very damaging to the Government's argument that Sutherland's constitutional right to the effective assistance of counsel was not violated. The attempt to hide behind the protective veil of "strategy" accordingly fails for this and the other reasons discussed in the Opening Brief and here.

Defense counsel's performance was deficient and there is, at the very least, a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. Accordingly, reversal and an evidentiary hearing are mandated.

II. The District Court erred when it denied Sutherland's petition for coram nobis.

a. Standard of Review

In assessing the denial of a petition for coram nobis, the district court's factual findings are reviewed for clear error, its rulings on questions of law de novo, and its ultimate decision to deny the coram nobis writ for abuse of discretion. *United States v. Lesane*, 40 F.4th 191, 196 (4th Cir. 2022). Mixed questions of law and fact are generally reviewed de novo. *Bereano v. United States*, 706 F.3d 568, 575 (4th Cir. 2013).

The decision to deny the Coram Nobis Petition was an abuse of discretion. It was also clear error for the District Court to make factual findings without an evidentiary hearing.

b. Ineffective Assistance of Counsel

This Court has held that ineffective assistance of counsel is fundamental error appropriately remedied by a Writ of Coram Nobis. *United States v. Akinsade*, 686 F.3d 248, 256 (4th Cir. 2012). As described in the Coram Nobis Petition, prior briefing and herein, Sutherland has met his burden to prove the four prerequisites to grant the petition: no other remedy is presently available, valid reasons exist for not attacking the conviction earlier; adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement and the error is of the most fundamental character. *Bereano v.*

United States, 706 F.3d 568 (4th Cir. 2013); *United States v. Akinsade*, 686 F.3d 248, 252 (4th Cir. 2012).

c. The Petition was Timely Filed

The Government argues that the Coram Nobis Petition was untimely. But this argument was made below and implicitly rejected by the District Court when it ruled on the substantive issues. Furthermore, this Court did not identify timeliness as among the issues on appeal. Accordingly, the lack of timeliness of the Coram Nobis Petition should be rejected by this Court because it is not at issue here.

In any event, the Government does not contest the unassailable proposition that the time for filing a coram nobis petition is not subject to a specific statute of limitations. *United States v. Morgan*, 346 U.S. 502, 507 (1954); *Telink, Inc. v. United States*, 24 F.3d 42, 45 (9th Cir. 1994). The cases cited by the Government in support of its claim that the Coram Nobis Petition was not timely filed are inapposite. For example, the Government's reliance upon *Carlisle v. United States*, 517 U.S. 416 (1996) for the proposition that Sutherland was required to file the petition before exhausting his appellate remedies is misplaced. The facts and the holdings in that case bear no relevance to the present case. The claimant in *Carlisle* missed the deadline to file a motion for judgment of acquittal, which motion was subject to the time limitation required by Federal Rule of Criminal Procedure 29. The Supreme Court affirmed the Sixth Circuit's reversal of the district court's granting of the untimely motion, finding

that the district court had no power to grant the acquittal. Although the district court did not address coram nobis relief, the claimant in his appellate papers suggested such relief as an alternative basis for the district court's authority. The Supreme Court rejected the claimant's argument, noting that "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.'" Id. at 429 (citation omitted). Here, of course, Sutherland's claim is ineffective assistance of counsel which is not the subject of a specific statute.

The other cases cited by the Government are similarly factually and legally inapposite—the courts in those cases determined that, because the issues raised were appropriate for appeal or a Section 2255 motion and not coram nobis relief, the petitions were dismissed. *See Foont v. United States*, 93 F.3d 76 (2d Cir. 1996) (claims raised in coram nobis petition were matters that should have been the subject of FRCrP 11 motion and appeal); *Matus-Leva v. United States*, 287 F.3d 758 (9th Cir. 2002) (claimant in custody and therefore Section 2255 motion was the proper remedy); and *United States v. Wilson*, 77 F.3d 472 (4th Cir. 1996) (claimant failed to pursue coram nobis claims in connection with a Section 2255 motion).

Furthermore, although the District Court had jurisdiction to entertain a Section 2255 motion while Sutherland's direct appeals were pending, this Court has held that filing a Section 2255 motion during the pendency of an appeal is premature. *United States v. Rashid*, 546 F. App'x 234 (4th Cir. 2013). Moreover, not only are the Government's citations unsupportive of a

claim that Sutherland was required to raise the issues that are the subject of the Coram Nobis Petition in a 2255 motion during the appeal process, such a claim has been foreclosed by the Supreme Court in *Morgan*, *supra*, which held as follows:

> The contention is made that § 2255 of Title 28, U.S.C., providing that a prisoner "in custody" may at any time move the court which imposed the sentence to vacate it, if "in violation of the Constitution or laws of the United States," should be construed to cover the entire field of remedies in the nature of coram nobis in federal courts. We see no compelling reason to reach that conclusion. In *United States v. Hayman,* 342 U.S. 205, 219, we stated the purpose of § 2255 was "to meet practical difficulties" in the administration of federal habeas corpus jurisdiction. We added: "Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions." We know of nothing in the legislative history that indicates a different conclusion. We do not think that the enactment of § 2255 is a bar to this motion [for coram nobis relief], and we hold that the District Court has power to grant such a motion.

Morgan, at 510-511.

The Government's argument is further foreclosed by the lack of any prejudice to the Government, which the Response fails to even address. Yet, for the doctrine of

laches to bar a claim for coram nobis relief, two factors must be present: inexcusable delay *and* prejudice to the Government as a result. *United States v. Jackson*, 371 F. Supp. 3d 257, 265 (E.D. Va. 2019) ("In addition, to determine whether a coram nobis petition is timely, courts also consider whether the government has suffered prejudice as a result of the petitioner's delay in seeking coram nobis relief. *See also Blanton v. United States*, 94 F.3d 227, 231 (6th Cir. 1996); *United States v. Darnell*, 716 F.2d 479, 481 (7th Cir. 1983); *United States v. Mora-Gomez*, 875 F. Supp. 1208, 1216 (E.D. Va. 1995).").

Notably, it is the Government's burden to show that it was prejudiced by the timing of the filing of a petition for a writ of coram nobis. *United States v. Kwan*, 407 F.3d 1005, 1013 (9th Cir. 2005). As previously explained, the Response is devoid of any argument that the Government was prejudiced by the timing of Sutherland's filing of his Coram Nobis Petition. Furthermore, the Response ignores that, since Sutherland's Coram Nobis Petition was filed within the limitations period of 28 U.S.C. § 2255 and was filed contemporaneous with his Section 2255 Motion, which is based upon the same ineffectiveness claim as that petition, there is a benefit and no prejudice to the Government.

The Government's claim that Sutherland should have filed his Coram Nobis Petition before exhausting his appellate remedies fails because that would have been a waste of judicial resources and is not supported by case law. To the contrary, the case law is clear that coram nobis relief is the right remedy here, providing "a way to

collaterally attack a criminal conviction for a person . . . who is no longer 'in custody' and, therefore, cannot seek habeas relief under 28 U.S.C. § 2255[.]" *Chaidez v. United States*, 68 U.S. 342, 345 n.1 (2013).

In sum, the timeliness of the Coram Nobis Petition is not at issue, there is no deadline to file a petition for coram nobis that was missed here, the Government cites no prejudice and the cases cited in the Response are inapposite.

d. Trial Counsel Rendered Ineffective Assistance of Counsel Regarding the False Tax Returns Counts

The Government acknowledges trial counsel's "familiarity with the relevant transactions," Response, p. 54, including the conclusions in the Sharf Pera Report, yet argues that evidence confirming Sutherland failed to report income, even in the context of establishing that Sutherland owed no or de minimis taxes, could have been evidence of Sutherland's criminal intent, *Id*, thus supporting trial counsel's supposed strategy to not rely upon argument and evidence of the lack of taxes due for the years in question.

However, in fact, *trial counsel did make the lack of taxes due argument*, but failed to support it with the readily available critical evidence in the form of expert testimony and documentary support establishing that Sutherland was entitled to sufficient deductions such that little or no taxes were due for the years in question,

thereby negating the willfulness element of the False Tax Return Counts. Indeed, on cross examination, Linda Polk, an IRS revenue agent, acknowledged that deductions relevant to Sutherland would have reduced income. JA794-795. Furthermore, defense counsel referenced untaken deductions and tax deficiency during opening statement, JA49-50, jury instruction arguments, JA799, and closing arguments, JA1026. But defense counsel never presented the Sharf Pera analysis and argument allowing for the jury to conclude that Sutherland lacked the intent necessary to convict him of filing false tax returns.

The Government argues that Frazier's analysis attributed ownership of STS to Sutherland—which was contrary to Sutherland's defense at trial—to establish that the STS Line of Credit should not have been considered income. Response, pp. 54-55. Yet, nowhere in the Sharf Pera Report did Frazier make such attribution. JA1178 to JA1186. It was defense counsel at sentencing that made that attribution. JA1254-1255.

Furthermore, the District Court's determination that Frazier's calculations were based upon "self-reported" expenses was wrong; such reliance, appropriate under Federal Rule of Evidence 703, was de minimus—the vast majority of the data relied upon by Sharf Pera was independently verified. JA1178 to JA1186. The Government also misrepresents, and without citation, that the business purpose was "unclear" of XYZ Entertainment, a recipient of some of the subject loan proceeds. Response, p. 42. In fact, the record reflects a plethora of references to XYZ as an operating entity in the entertainment business. See,

e.g., JA42, JA99, JA123, JA125, JA126, JA143, and JA144. Again, lacking citation in the record (but instead to this Court's appellate opinion in this case), the Government asserts that "STS, however, treated nearly all of the wire transfers as expenses that had been paid to Sutherland." Response, pp. 4-5. In fact, the record reflected that almost 75% of the wire transfers were not identified as payments that would have been considered income for tax purposes. JA1114 to JA1124 (Government exhibit).

Contrary to the Government's protestations that some of Phillip's testimony would have been deemed hearsay, what Sutherland, Lawrence and Stewart told Phillip and what he overheard about the loans would have been admitted as nonhearsay because, as a result of such statements, Phillip included on the books and records of Sutherland and his related companies numerous entries relating to the loans and was otherwise aware of them as a result of his bookkeeper status. Accordingly, such testimony would not have been admitted for the truth of whether the funds were loans but to explain, for example, why Phillip made loan entries on the books and records. *United States v. Guerrero-Damian*, 241 F. App'x 171, 173 (4th Cir. 2007) ("A statement is not hearsay if it is offered to prove knowledge, or show the effect on the listener or listener's state of mind."). Similarly, what Phillip saw in his visit to Stewart in Jamaica in 2013 would not have been excluded on hearsay grounds because what he saw is not a "statement." *United States v. Arey*, 2009 U.S. Dist. LEXIS 74446, *11 (W.D. Va., Oct. 13, 2011) ("Most of [the petitioner]'s challenged testimony was based on his personal observations, not statements he heard others

make. The Rules governing hearsay do not exclude such testimony. . .".).

The denigration of Stewart both at trial and here and her alleged lack of financial resources, a feature of the Government case, had no relevance to whether STS had the ability to loan money to Sutherland.[1] The significance of Stewart's business acumen related (or should have related) to her abilities to run the operations of STS. Phillip's testimony would have established just that. The Government's arguments to the contrary are not supported—the evidence presented at trial regarding Stewart, similar to the evidence regarding the nature of the funds from STS, and especially in light of the proffered testimony of Phillip, was highly circumstantial.

The Government argued at trial and argues here that the loans were a sham because Stewart spent several summers in Wyoming as a housekeeper and cook while attending a college internship program as a hospitality, tourism and entertainment major and that she was paid a low wage for that internship. But, again, the loans were made by STS, which indisputably had the means to make the loans as a legitimate business having sufficient income, in addition to credit, as evidenced by the STS Line of Credit. That Stewart was earning a college degree did not mean that she could not engage in the business of

1. The undisputed evidence at trial was that STS was engaged in legitimate business and had significant income; the Government here does not contest that the STS Line of Credit funds were appropriately characterized by Frazier as loans and not income to Sutherland.

STS. That Stewart did not pay all of an $800 fee up front does not mean that she did not have the means to pay it. Contrary to the Government's claim, the testimony was not that Stewart could not pay the full fee up front; it was simply that she did not pay it until she began the program. JA708, JA710.

That Stewart had the business acumen to participate in the business affairs and to make decisions on behalf of STS was relevant and evidence was readily available to the defense to establish this fact. There was no rational reason nor reasonable strategy not to present such evidence. "[M]erely invoking the word strategy to explain errors was insufficient since 'particular decisions must be directly assessed for reasonableness [in light of] all the circumstances.'" *Horton v. Zant*, 941 F.2d 1449, 1461 (11th Cir. 1991), citing *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

The Government's recently vintaged argument that presenting Phillip's testimony would have opened the door to testimony by sister Marie is simply grasping at straws. First of all, there is no evidence in the record to establish what Marie's testimony would have been because she never testified and the Government never provided a sworn statement from her asserting what she would have said. In any event, the record reflects that Marie was estranged from her family for decades, JA552, and therefore would have had no personal knowledge of any fact of consequence in the case. There was simply no risk that presenting Phillip's testimony would have resulted in damaging testimony by Marie.

Other than by innuendo, the Government presented no evidence of Stewart's finances or business acumen. Phillip's testimony would have clarified all the innuendo and unanswered questions raised by the Government.

The failure to present Phillip and an accounting and tax expert was fatal to the defense of the False Tax Return Counts. Trial counsel was ineffective for not presenting this evidence.

III. The District Court erred when it denied Sutherland's motion to vacate the Obstruction Count.

a. Standard of Review

"[This Court] review[s] de novo the district court's denial of a Section 2255 motion. *United States v. Palacios*, 982 F.3d 920, 923 (4th Cir. 2020). When the district court denies such a motion without an evidentiary hearing, [this Court] construe[s] the facts in the light most favorable to the movant. *United States v. Poindexter*, 492 F.3d 263, 267 (4th Cir. 2007)." *United States v. Pressley*, 990 F.3d 383, 387 (4th Cir. 2021).

De novo review of the denial of the Section 2255 Motion under this standard compels reversal of the District Court's Order.

b. Ineffective Assistance of Counsel

Contrary to the arguments in the Response and as described in the Opening Brief, Sutherland's Section 2255 Motion alleged specific facts about how the testimony of

Phillip and an expert would have defeated the Obstruction Count. The Motion to Vacate and Coram Nobis Petition alleged in detail that, if defense counsel had presented the testimony of Phillip and an accounting and tax expert such as Frazier, the inferences that the Government attempted to draw, including the inference of the illegitimacy of the Loan Documents were erroneous. And, logically, if, after hearing the testimony of Phillip and the accounting and tax expert, the jury found that the funds that formed the basis for the False Tax Return counts were loans, there would be no false tax return crimes, and, thus, no need to cover up those crimes by presenting fraudulent loan documents to prosecutors.

Furthermore, at the trial, the prosecutor argued in closing that (1) the Loan Documents presented to the Government had to be fraudulent (and, thus, Sutherland had to be guilty of the Obstruction Count) because Sutherland's books and records did not consistently treat the STS Transfers as loans, (JA995), and (2) the only explanation for this inconsistency was that Sutherland "[c]ouldn't keep his own lies in order." JA1002. Phillip's proffered testimony set forth in the Section 2255 Motion that the many mistakes in the books and records were the product of his lack of experience and training as a bookkeeper would have provided an explanation for these inconsistencies and, thus, the failure to present this testimony undermines confidence in the Obstruction Count verdict.

The Government contends that Phillip could have been impeached because the audited books and records of Sutherland's company, Innovation Partners, were

accurately prepared. However, there is nothing in the record to establish that Phillip could not explain this, and there is suggestion that Innovation Partners retained a compliance company, National Compliance Services, to review and correct the books and records of Innovation Partners to ensure compliance with the special broker-dealer requirements. Included in the Government's Exhibit 270[2] was a credit card payment in 2007 to National Compliance, a company that provides broker-dealer compliance services.[3]

In addition, Phillip's proffered testimony set forth in the Section 2255 Motion about Stewart's business acumen and her discussions of actual loans from STS about which he personally heard also undermines confidence in the Obstruction Count verdict. This is because, if Stewart was an experienced businesswoman who knew about the existence of those loans, it would undermine confidence in the Government's theory that there were no loans from STS, and, thus, that the Loan Documents were fraudulent.

Furthermore, that the six loan agreements when "considered together" provided Stewart would receive 120% of the proceeds of the sale of any of Sutherland's business, Response, p. 8, is not a reasonable interpretation

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2. Sutherland is simultaneously filing a Motion for Leave to File a Supplemental Appendix to include an excerpt from Exhibit 270.

3. *See* https://connect.foreside.com/files/NCSBrochure.pdf (National Compliance of Delray Beach Fl provides broker-dealer compliance services) (last accessed on December 22, 2023).

of the agreements and in any event hardly established that the Loan Documents were fabricated. The Loan Documents, one of which is reflected at SA078, are substantially the same and while certainly simplistic, do not compel the determination that STS was entitled to total payment in excess of the amounts loaned, plus interest. Further, the interests and future interests transferred in consideration for the loans had significant value. The Government's reference to a single interest estimated to be worth $110, Response, p. 10, fails to account for the other valuable interests established by the record. *See, e.g.*, JA966 (Value as of 2016 of Sutherland companies Innovation Partners and Insigne Advisor Consulting was $7.02 million.). Moreover, Sutherland's actual repayment of the loans in the form of the transfer of interests owned by a Sutherland company was reflected in a 2010 STS document. JA1022-1023 (Villa in St. Lucia).

The Government's claim, Response, p. 58, that the false tax return convictions were supported by "the evidence that on Sutherland's 2008 to 2010 tax returns he willfully failed to report that he had an interest in or signatory authority over a financial account in a foreign country. . . . *See* J.A. 116, J.A. 120, J.A. 122." However, the Indictment did not allege a failure to report such interest as part of the False Tax Return Counts and the Government's citations to the record (JA 116, 120, 122) merely establish that there was no reporting of signature authority but do not establish that there was a *requirement* on the subject tax returns to disclose such interest (because there was none), and certainly do not establish willfulness.

The further suggestion by the Government that Sutherland did not need any loans because he lived in a million-dollar home and sent his daughter to private school is belied by the record. The home was heavily mortgaged, JA1180, JA1181, JA1184, and Sutherland was heavily indebted on numerous credit cards, at one point over $350,000. JA878 to JA881 (testimony referencing defense exhibit 50).[4]

In sum, the failure to present Phillip and an accounting and tax expert was fatal to the defense of the False Tax Return Counts. Trial counsel was ineffective for not presenting this evidence.

IV. The District Court erred when it ruled on the petition for coram nobis and the motion to vacate without holding an evidentiary hearing.

The Government does not dispute that Section 2255 requires the trial court to conduct a prompt hearing "[u]nless the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief. . . ." 28 U.S.C. § 2255.

Furthermore, the Government ignores this Court's uniform case law recognizing that an evidentiary hearing is required when a movant presents a colorable sixth amendment claim showing disputed material facts and credibility determinations are necessary to resolve the

4. Sutherland is simultaneously filing a Motion for Leave to File a Supplemental Appendix to include Exhibit 50.

issues. "[A] petitioner need only allege—not prove—reasonably specific, nonconclusory facts. . . ." *Aron v. United States*, 291 F.3d 708, 715 n.6 (11th Cir. 2002). "The court on review 'must accept all of the petitioner's alleged facts as true and determine whether the petitioner has set forth a valid claim'. . . ." *Diaz v. United States*, 930 F.2d 832, 834 (11th Cir. 1991). "If the allegations are not affirmatively contradicted by the record and the claims are not patently frivolous, the district court is required to hold an evidentiary hearing." *Aron* at 715 n. 6. *See also Walker v. True*, 399 F.3d 315, 319 (4th Cir. 2005) (vacating district court's grant of summary judgment and remanding for evidentiary hearing because district court failed to "assume all facts pleaded by Walker to be true.").

The cases the Government relies upon to establish the lack of need for an evidentiary hearing are inapposite. In *United States v. Terry*, 366 F.3d 312, 314 (4th Cir. 2004), Response, p. 44, for example, this Court held that an evidentiary hearing on a petitioner's section 2255 motion was not required because petitioner failed to provide "concrete evidence" and detail regarding his claims of faulty strategy by trial counsel in connection with sentencing, in addition to the Government's low burden of proof at sentencing. This case, in contrast, involves ineffectiveness during a criminal trial which requires proof beyond a reasonable doubt and is not a case where only generalized conclusions about the pertinent evidence were made. In *Raines v. United States*, 423 F.2d 526 (4th Cir. 1970), Response, p. 44, this Court similarly held that it is within the discretion of the district court to not conduct a hearing on a Section 2255 motion which states only legal

conclusions with no supporting factual allegations, unlike the instant case. *Wilson v. Greene*, 155 F.3d 396, 404 (4th Cir. 1998), Response, pp. 58-59, is also off point because it was the review of a state collateral proceeding in which this Court stated: "evidentiary hearings have never been required on federal collateral review of state petitioners' ineffectiveness claims."

The District Court was required to but did not hold an evidentiary hearing. *See Hendricks v. Vasquez*, 974 F.2d 1099, 1110 (9th Cir. 1992) (Court remanded for an evidentiary hearing on the ineffective assistance of counsel claims because "[t]he best way to determine the reason for counsel's actions would be to hold an evidentiary hearing and ask counsel."); *Porter v. Wainwright*, 805 F.2d 930, 935 (11th Cir. 1986) (without the benefit of an evidentiary hearing at any level, the court could not conclude that the attorneys' failure to present mitigating evidence was a tactical decision); and *United States v. Davis*, No. 03-94, 2006 U.S. Dist. LEXIS 30931 (S.D. Tex. 2006) (movant entitled to an evidentiary hearing where his Section 2255 motion was sworn to and government failed to respond with an affidavit of trial counsel).

The Section 2255 Motion and the Coram Nobis Petition raised meritorious ineffective assistance of counsel claims and provided sworn and detailed evidentiary support that was not rebutted by the Government with opposing sworn support. "Unless it is clear from the pleadings and the files and records that the prisoner is entitled to no relief, the statute makes a hearing mandatory." *Raines* at 529.

Appendix E

CONCLUSION

For all of the foregoing reasons, this Court should grant all relief to which Sutherland is entitled, including but not limited to reversing the District Court's summary dismissal of his Section 2255 Motion and Coram Nobis Petition and ordering that an evidentiary hearing be held.

Respectfully submitted,

/s/ AMBER DONNER, ESQ.

/s/ RONALD GAINOR

/s/ MARCIA J. SILVERS, ESQ.

APPENDIX F — PETITION IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION, FILED FEBRUARY 24, 2021

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

DOCKET NO. 15-cr-00225 MOC-DCK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PATRICK EMANUEL SUTHERLAND,

Defendant.

Filed February 24, 2021

PETITION FOR WRIT OF CORAM NOBIS VACATING CONVICTIONS PURSUANT TO 28 U.S.C. § 1651

Defendant PATRICK EMANUEL SUTHERLAND ("Sutherland"), pursuant to 28 U.S.C. § 1651, respectfully petitions for a writ of coram nobis to vacate his convictions as to counts one to three of the indictment. Sutherland further requests that the Court grant an evidentiary hearing on the petition as to any fact in dispute and states in support of his requests:

Appendix F

I. Introduction

Sutherland was denied his constitutional right to the effective assistance of trial counsel by failing to present material and substantial evidence supporting his defenses. This petition is filed contemporaneously and in conjunction with his Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence ("Section 2255 Motion") which is premised upon this same ineffective assistance of counsel claim.

II. Procedural History

On June 27, 2017, Sutherland was convicted of three counts of filing false tax returns in violation of 26 U.S.C. § 7206(1) ("False Tax Return Counts") and one count of obstruction of an official proceeding in violation of 18 U.S.C. § 1512(c)(2) ("Obstruction of Grand Jury Count"). Thereafter, Sutherland's convictions were affirmed by the Fourth Circuit. *See United States v. Sutherland*, 921 F.3d 421 (4th Cir. 2019). Subsequently, on February 24, 2020, his petition for a writ of certiorari was denied. *See Sutherland v. United States*, 140 S. Ct. 1106 (2020).

This Court sentenced Sutherland to a term of imprisonment of 33 months on each of the four counts of conviction, to be served concurrently, and ordered him to pay the Internal Revenue Service $597,122.00 in restitution. D.E. 70, p. 6. This Court also sentenced Sutherland to one year of supervised release for each of the False Tax Return Counts, and to three years of supervised release for the Obstruction of Grand Jury

Count, all to run concurrently. Sutherland was released from the Bureau of Prisons on March 22, 2019. He remains under supervised release for the Obstruction of Grand Jury Count.

III. Facts

Background

Patrick Sutherland ("Sutherland") was an actuary with experience in the insurance, securities, and financial services industries. D.E. 80, p. 575 (Testimony of Roger Dunker); D.E. 81, pp. 746-747 (Testimony of Peter Moison). In 1999, while living in Charlotte, North Carolina, he started several businesses, including a broker-dealer business, a mortgage lending company, and an actuarial consulting firm. D.E. 80, p. 594 (Testimony of Michael Jones). Sutherland's older sister, Beverly Stewart ("Stewart"), lived in Jamaica where she and Sutherland were born. D.E. 79, pp. 345, 375 (Testimony of Rajender West). Stewart was the majority owner of a Bermuda company called Stewart Technology Services, Ltd. ("STS"). D.E. 79, pp. 317-318 (Testimony of Rajender West).

In 2006, the economy, especially the mortgage industry, started to show signs of a serious decline. For a time, Sutherland relied on advances from multiple personal credit cards and corporate credit cards with high interest rates to keep his businesses up and running. D.E. 79, pp. 345, 376 (Testimony of Rajender West).

Over the next few years, STS transferred roughly $2.2 million to Sutherland's U.S. companies ("STS Transfers"). Govt Trial Exhibit 12B. These U.S. companies were either "pass through entities" or partnerships such that, if the STS Transfers were income, they were required to be reported on Sutherland's individual tax returns. D.E. 82, pp. 1251-1252. Sutherland used the funds from the STS Transfers to pay off the credit cards and to keep his businesses afloat. D.E. 79, pp. 346-376 (Testimony of Rajender West); Govt Trial Exhibit 79, p. 5. The STS Transfers were wired from STS's bank account in Bermuda to bank accounts held by Sutherland's entities in the United States. D.E. 79, pp. 354-355 (Testimony of Rajender West). Of the roughly $2.2 million in wire transfers, about $1.6 million contained no description to indicate a purpose for the transfers. A minority of the wires indicated that the wires related to commissions or fees. Other wires indicated that they were loans. Govt Trial Exhibit 12A. The Sutherland entities that received the funds booked substantially all of the STS Transfers as loans or capital contributions and booked nine of them as marketing fees. D.E. 81, pp. 926-927 (Testimony of Linda Polk). Loan proceeds and capital contributions do not constitute income and are not taxable. D.E. 81, p. 880 (Testimony of Wesley Smith); pp. 923-924, 1003 (Testimony of Linda Polk). The STS Transfers were not reflected as income on Sutherland's individual income tax returns for 2008, 2009, or 2010. D.E. 81, pp. 953-954 (Testimony of Linda Polk).

In April 2012, a grand jury sitting in the Western District of North Carolina issued document subpoenas to

the custodians of records of five of Sutherland's United States businesses. D.E. 79, pp. 337, 343 (Testimony of Rajender West). In July 2012 and for a few months thereafter, Sutherland's attorneys sent letters along with loan and related documents ("Loan Documents") to the U.S. Attorney's Office for the Western District of North Carolina. D.E. 79, pp. 343-347; 372- 376 (Testimony of Rajender West); Govt. Trial Exhibit 79. The attorneys asserted that the STS Transfers were not income but loans from STS to Sutherland, and therefore nontaxable. Govt Trial Exhibit 79 (James Wyatt Letter to Government).

Indictment

On September 17, 2015, Sutherland was indicted. D.E. 3 (Sealed Indictment). As noted above, Counts one through three charged him with filing false tax returns for tax years 2008, 2009, and 2010, the False Tax Return Counts. The premise underlying the charges was that the STS Transfers, totaling about $2.2 million, constituted taxable income to Sutherland in the years in which the disbursements were made. D.E. 3, pp. 1-3 (Sealed Indictment). The indictment charged, therefore, that Sutherland fraudulently underreported his federal tax obligations by not including these receipts on his personal income tax returns. D.E. 3, pp. 1, 6 (Sealed Indictment). Count four charged Sutherland with obstruction of an official proceeding in violation of 18 U.S.C. § 1512(c)(2), the Obstruction of Grand Jury Count related to documents produced by Sutherland's attorneys to the U.S. Attorney's Office. The indictment alleged that, to conceal his fraud, Sutherland, through his attorneys, fraudulently presented

the U.S. Attorney's Office documentation that the STS Transfers were loans from Stewart. D.E. 3, pp. 1, 5, 7 (Sealed Indictment).

Trial

The case went to trial in October 2016. The government presented thirteen witnesses, including IRS investigators and former business partners and associates of Sutherland. The defense presented five witnesses, including defense counsel's own paralegal and business partners and associates of Sutherland, and an expert on valuation.

The government argued that the loans were a sham because Stewart spent several summers in Wyoming as a hotel maid and cook for a college internship as a hospitality major, and that she was barely making above minimum wage, D.E. 82, p. 1174 (Government Closing Argument). The Government further argued that Stewart's name was forged on the loan documents, *Id.* at 1180, 1188, and suggested that Sutherland was the forger. *Id.* at 1192. The government also argued that Sutherland's books and records did not treat the STS Transfers consistently, sometimes calling them commissions and fees. *Id.* at 1178, 1185.

But the evidence presented by the government was circumstantial and inferential. No percipient witness testified that the STS Transfers were income and not loans. No expert witness testified to the illegitimacy of the loan documents or the signatures. The government's "star" witness, Michael Jones ("Jones"), a disgruntled

former partner of Sutherland's, was unable to testify about the characterization of the STS Transfers but attacked Sutherland's character and testified about Stewart. Thus, Jones testified to Sutherland's uncorroborated statement to him that Sutherland's "accounting was very complicated. The funds had moved around amongst various accounts so it would have taken [Jones'] expert a very long time to figure out." D.E. 80, p. 649 (Testimony of Michael Jones). Jones described Stewart's relationship to STS as "none" and claimed that he knew that because he was 'involved with the ventures" and she "was never part of any conversation." *Id.* at 611.

On the direct issue of the loans, the government asked the jury to conclude, based upon various signatures in evidence, that Stewart's signatures on the loan documents were forged (with no evidence that it was Sutherland), D.E. 82, pp. 1180-1181 (Government Closing Argument), that the loan documents in one instance referred to a future event, *Id.* at 1189, and that the loan amounts were odd numbers. *Id.* at 1206-1207. All the foregoing inferences were equally interpretive of sloppy documentation and not that the funds were not loans, and, had there been contrary testimony as described below, those inferences would have not been justified.

Defense Counsel Were Ineffective for Failing to Call Phillip Sutherland

Defense counsel argued that the STS Transfers were loans to Sutherland by his sister Stewart through STS, and that the books and records of Sutherland's

companies were sloppily prepared by Sutherland's brother, Phillip Sutherland ("Phillip"), D.E. 78, p. 236 (Defense Opening Statement), who repeatedly and consistently mischaracterized transactions in QuickBooks, an accounting software. As explained below, Phillip's improper accounting included failing to properly characterize STS Transfers as loans and to deduct expenses pertaining to Sutherland's finances and tax returns that would have resulted in either no tax being due or significantly lower taxes than the amounts claimed by the government. Phillip was on the defense witness list. D.E. 36, was subpoenaed for trial, was prepped by defense counsel for his testimony and was waiting in the courthouse to be called. But defense counsel did not call Phillip. If called, Phillip would have been available and would have testified at the trial as follows:

- He was the bookkeeper for Sutherland and Sutherland's related business entities, including Innovation Partners and Insigne Advisor Consulting, during the years at issue in this case (2008 to 2010). He was not the bookkeeper for STS.

- As the bookkeeper, he alone inputted the income and expenses on Quickbooks, which was the only method used for the bookkeeping. There were no other employees of Sutherland or Sutherland's business entities who did this bookkeeping.

- He had no education, training or experience in bookkeeping or accounting and had never used

Quickbooks prior to being hired by Sutherland to work as the bookkeeper. He merely was provided with a Quickbooks user manual when he was hired by Sutherland as the bookkeeper and was self-taught on how to use it. (His college degree was in engineering).

- Due to his lack of education, training and experience in bookkeeping and accounting, he unintentionally made numerous mistakes and omissions on Quickbooks, including in the classification of income, expenses, loans, capital contributions and related matters during the 2008 to 2010 time frame at issue in this case.

- Despite being told by Sutherland and Sutherland's wife, Yanique Lawrence, that STS's wire transfers to Sutherland's business entities during 2008 to 2010 were loans, he unintentionally made numerous mistakes when he entered these wire transfers on Quickbooks by only classifying some of them as loans or loan deposits and the rest as either capital contributions, marketing fees or failing to classify them at all.

- While he was working as the bookkeeper, he overheard several telephone conversations between Sutherland and Stewart discussing loans from STS to Sutherland's business entities.

- Jones, Sutherland's business partner, knew that the Quickbooks/bookkeeping duties were

Phillip's. More specifically, Jones was aware that Phillip was the only person who inputted the data, including income and expenses, on Quickbooks and that neither Sutherland nor Lawrence did so. Jones participated in the meeting in which the decision was made to make Phillip the sole bookkeeper at the office. Phillip, Jones, Sutherland and Lawrence worked in the same office space. Every workday morning, Phillip would provide Jones and Sutherland with a Quickbooks printout of the daily balance and the profit and loss statement of their business entities.

- Phillip's middle name is Augustus. After he was employed by Sutherland, he used the name Phillip Augustus in work matters to avoid confusion between his email address and that of Sutherland since they both would have otherwise been "psutherland" on their emails. This was not done for any nefarious purpose.

- He has a close relationship with his sister, Stewart, and has personal knowledge of her savvy business acumen.

- Stewart has a college degree in hospitality management. She is entrepreneurial. For many years, Stewart owned a successful Kingston, Jamaica restaurant with indoor and outdoor dining located in a nice shopping plaza. This was before the time period of 2008 to 2010. At one

time, Stewart was considering opening a hotel in Jamaica.

- In 2013, he traveled to Jamaica and saw that Stewart resided in a modern four-bedroom house and that she had a nice Suzuki automobile. During that trip, when he was with Stewart, she took a phone call and thereafter told him it was about business with STS.

- Phillip was subpoenaed by defense counsel for the trial, defense counsel prepared him for his testimony, and he was available during the trial to testify. In fact, he was waiting at the courthouse to do so.

Various government witnesses provided testimony about some of what Phillip would have testified: that Phillip prepared the books for the Sutherland related companies, D.E. 80, pp. 587 (Testimony of Roger Dunker); D.E. 81. pp. 870, 875 (Testimony of Wesley Smith), that Sutherland and his related companies failed to deduct various expenses. D.E. 81, pp. 973, 978-979 (Testimony of Linda Polk), and that there were many errors in the books of the Sutherland related companies. D.E. 81, pp. 1003-1004 (Testimony of Linda Polk).

However, the failure to present Phillip's above-described testimony was highly prejudicial for numerous reasons. First, critically, there was no testimony or other evidence that substantiated the financial worth and ability of Stewart to control and be the majority owner of STS

or that the STS Transfers were loans. As previously explained, Phillip could and would have provided that critical testimony. Significantly, review of the Fourth Circuit opinion in Sutherland's direct appeal reflects the prejudice caused by defense counsel's failure to present Phillip's above-described testimony about the financial worth and ability of Stewart and the legitimacy of the loans: "Defendant claims that his sister, Beverly Stewart, owned and controlled STS, but Sutherland actually managed all its day-to-day affairs. Despite allegedly owning a multi-million-dollar business, Stewart worked at the Best Western hotel in Cody, Wyoming for less than $10 an hour. At one point, she was unable to pay a $600 fee without her hotel earnings." *United States v. Sutherland*, 921 F.3d 421, 423 (4th Cir. 2019).

Second, because defense counsel failed to present the testimony of Phillip that the many mistakes in the books and records were the product of his lack of experience and training as a bookkeeper, the prosecutor was able to argue in closing that (1) the loans had to be a sham because Sutherland's books and records did not consistently treat the STS Transfers as loans, D.E.82, p. 1178), and (2) the only explanation for this inconsistency was that Sutherland "[c]ouldn't keep his own lies in order." D.E.82, p. 1185.

Third, because the above-described testimony of Phillip was never presented, the damaging testimony of Michael Jones that (1) Stewart had no relationship with STS and was never part of any conversation involving STS, (2) the bookkeeping was mostly done by Sutherland, and (3) Phillip used the name "Phillip Augustus" in work

matters because federal agents "were having issues" and, if they knew that Phillip was Sutherland's relative, they would have been more suspicious, was not rebutted. D.E.80, p. 598, 606, 611.

Defense counsel's response in his closing arguments to the conclusions of the government: "That's just nuts." *Id*. at 1213. Had defense counsel called Phillip, Phillip's testimony would have explained that the mischaracterization of the STS transfers and other bookkeeping errors were unrelated to Sutherland's alleged nefarious intent and simply the result of innocent mistake by Phillip. It would have allowed for an adequate closing argument versus the "that's just nuts" closing argument.

Defense Counsel Were Ineffective for Failing to Call an Expert in Accounting and Taxes

In addition to defense counsel's failure to call Phillip, the person with the most knowledge about, and responsible for, the characterization of the STS Transfers on Sutherland's companies' books and records, defense counsel failed to adequately investigate prior to trial and to present at trial a witness with accounting and tax expertise in this tax case.

Belatedly, after the trial, defense counsel hired and presented such an expert at the sentencing hearing. That expert, CPA Jayne Frazier ("Frazier") of the accounting firm of Scharf Pera, was a licensed certified public accountant specializing in individual income tax planning and preparation, forensic accounting and tax litigation.

Appendix F

Frazier was available to testify at the trial and would have testified at trial that:

- The source of almost half of the STS Transfers ($1,014,700) was pursuant to a line of credit (Line of Credit Funds) in favor of STS and that, during the relevant time period, STS regularly drew down on the line of credit.

- The Line of Credit Funds were treated on the books and records of Sutherland and his related entities as loans and the course of conduct was consistent with such treatment as loans.

- Sutherland and his related entities' books and records failed to properly characterize numerous deductible expenses and, thus, Sutherland's tax returns at issue failed to properly deduct a plethora of such expenses from his income. For 2008, the unclaimed business expenses were $639,000; for 2009 such expenses were $311,000; and for 2010 such expenses were $291,000.

- The amount of additional taxes due for the years that are the subject of the counts of the indictment was only approximately $50,000, including characterizing the STS Transfers that were not Line of Credit Funds as income. D.E. 65-1 (Scharf Pera Report). More specifically, for 2008, count 1, no additional tax was due; for 2009, count 2, an additional tax of $17,858 was due, and for 2010, count 3, an additional tax of $32,391 was due. *Id.*

Appendix F

Defense counsel never presented the available trial testimony of a witness with accounting and tax expertise, such as Jayne Frazier, to testify at the trial that (1) almost half of the $2.2 million in alleged income at issue came from the STS Line of Credit Funds, (2) the books and records and course of conduct of Sutherland and his related entities treated the STS Line of Credit Funds as loans, and (3) Sutherland failed to deduct a plethora of business expenses from his income for the years 2008, 2009 and 2010.

Moreover, defense counsel inexplicably failed to investigate, hire or call an expert like Jaynie Frazier to testify at the trial to the lack of or de minimis amount of the unpaid taxes due for the years at issue. However, defense counsel understood the significance of establishing the lack of any tax due or a de minimis tax due for the years in question as demonstrated in counsels' discussions of untaken deductions and tax deficiency during opening statement, D.E. 78, pp. 236- 237 (Defense Opening Statement), jury instruction arguments D.E. 81, p. 983 (Charge Conference), and closing arguments, D.E. 82, p. 1209 (Defense Closing Argument).

Instead of calling an expert to testify at the trial to the lack of a tax deficiency in 2008 and the de minimis tax deficiency in 2009 and 2010 resulting from properly computed tax returns for the years in question and to the STS Line of Credit Funds which were material to this tax deficiency calculation, defense counsel's only financial presentation at trial in this tax case was their in-house paralegal and a valuation expert. The paralegal testified to a summary chart of credit card balances for

Sutherland and his wife for the relevant years, D.E. 81, pp. 1062-1066, to establish that the Sutherlands had large credit card debt during the subject years. The valuation expert testified to the value of entities regarding which Sutherland had transferred an interest to Stewart as repayment of the subject loans. D.E. 82 (Testimony of Bradford Taylor), another collateral issue.

The failure to present a witness with accounting and tax expertise such as Jayne Frazier to testify at the trial to the Line of Credit Funds greatly prejudiced Sutherland by not enabling him to establish that the source of approximately half of the alleged income from STS at issue was treated by Sutherland and his related entities as loans and that the course of conduct of Sutherland and his entities was consistent with treating those funds as loans.

The failure to call an accounting and tax expert at the trial further severely prejudiced Sutherland because the jury was never presented with the evidence that no tax or a de minimis tax was due for the years in question. This failure to present expert testimony that no tax was due in 2008 and a de minimis amount of tax was due in 2009 and 2010 deprived Sutherland of evidence of lack of willfulness, a critical element of the crimes charged herein.

IV. Argument

Writ of Coram Nobis

"In federal courts the authority to grant a writ of coram nobis is conferred by the All Writs Act, which

permits 'courts established by Act of Congress' to issue 'all writs necessary or appropriate in aid of their respective jurisdictions.'" *Id.* at 911; 28 U.S.C. § 1651. A petition for writ of error coram nobis "provides a way to collaterally attack a criminal conviction for a person . . . who is no longer 'in custody' and therefore cannot seek habeas relief under 28 U.S.C. § 2255 or collateral habeas relief under § 2241." *Chaidez v. United States*, 568 U.S. 342, 345 n.1 (2013).

Coram nobis relief under the All Writs Act "is broader than its common-law predecessor." *United States v. Denedo*, 556 U.S. 904, 911 (2009). The Supreme Court explained in *United States v. Morgan*, 346 U.S. 502, 512 (1954) (internal quotations omitted), that "fundamental" errors may still be corrected "[a]lthough the term has been served" because "the results of the conviction may persist" and "civil rights may be affected." It "is widely accepted that custody is the only substantive difference between coram nobis and habeas petitions." *Baranski v. United States*, 880 F.3d 951, 956 (8th Cir. 2018). Thus, because Sutherland has served his one-year term of incarceration and supervised release on the false tax returns counts, his relief for his claim of ineffective assistance of counsel is by a writ of coram nobis regarding his convictions on those counts.

The standard for granting a petition for a writ of error coram nobis is that 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." *United States v. Akinsade*, 686 F.3d 248, 252 (4th Cir. 2012). This case meets all four prongs of this test with respect to the False Tax Return Counts.

First, "a more usual remedy is not available" to Sutherland because he is not "in custody" on the False Tax Return Counts as his concurrent terms of one year of supervised release concluded on or about March 23, 2020, and, as a result, he is not eligible for habeas relief or relief under 28 U.S.C. § 2255. *See Akinsade* at 252 (citing to 28 U.S.C. §§ 2241 and 2255).

Second, valid reasons exist for Sutherland not attacking these convictions earlier. It is important to note that, "[b]ecause a petition for writ of error coram nobis is a collateral attack on a criminal conviction, the time for filing a petition is not subject to a specific statute of limitations." *Telink, Inc. v. United States*, 24 F.3d 42, 45 (9th Cir. 1994). *See also Morgan*, at 507 (explaining that coram nobis petitions are allowed "without limitation of time").

Sutherland's petition for writ of certiorari to the Supreme Court was denied on February 24, 2020. Were Sutherland still in custody on the False Statement Counts, his motion for relief under 28 U.S.C. § 2255 would be due on February 24, 2021 and this motion for coram relief is filed on that date. Further, this motion addresses an ineffective assistance of trial counsel claim, a claim that could not be raised on appeal, and that required new

counsel, who were retained after the denial of Sutherland's petition for certiorari, to investigate grounds for this claim by obtaining and reviewing the lengthy trial record and transcripts, the numerous trial exhibits, the substantial amount of pre-trial discovery, the files of Sutherland's trial and appellate counsel, and conduct an independent investigation into whether Sutherland's right to effective assistance of counsel was denied by locating and interviewing potential witnesses and others with knowledge of this case, all in the midst of a pandemic.

Moreover, since this petition is filed within the limitations period of 28 U.S.C. § 2255 and is being filed contemporaneous with Sutherland's Section 2255 Motion which is based upon the same ineffectiveness claim as the instant petition, it enables the government to respond to both the instant petition and the Section 2255 Motion easily and contemporaneously and, thus, there is a benefit and no prejudice to the government. *See*, *e.g.*, *United States v. Kwan*, 407 F.3d 1005, 1012 (9th Cir. 2005) (recognizing that the lack of prejudice to the government regarding the date of the filing of a petition for a writ of coram nobis is relevant to the issue of whether "valid reasons exist for not attacking the conviction earlier").

Third, the Fourth Circuit has held that collateral consequences are presumed to flow from any conviction. *United States v. Mandel*, 862 F.2d 1067, 1075 n.12 (4th Cir. 1988) (granting coram nobis relief because "[w]ithout coram nobis relief, the petitioners . . . would face the remainder of their lives branded as criminals" and "[c]onviction of a felony imposes a status upon a person

which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities"). The Ninth Circuit has repeatedly affirmed this presumption and has "found the presumption to be irrebuttable in this day of federal sentencing guidelines based on prior criminal histories, federal "career criminal" statutes, and state repeat-offender provisions" *See*, *e.g.*, *Estate of McKinney v. United States*, 71 F.3d 779, 782 n. 6 and 7 (9th Cir. 1995).

Because of his status as a convicted felon, Sutherland is now subject to these same guidelines, statutes and repeat-offender statutes. In addition, he suffers the civil consequence of being deprived of his right to serve as a North Carolina or federal juror in his home state of North Carolina. 28 U.S.C. § 1865(b)(5); N.C. Gen. Stat. § 9-3. *See Porcelli v. United States*, 404 F.3d 157, 160-61 n. 4 (2d Cir. 2005) (assuming without deciding that the inability to serve as a juror is a collateral consequence of conviction sufficient to support the writ of coram nobis).

Notably, in *United States v. Travers*, 514 F.2d 1171, 1172 (2d Cir. 1974), the Court cited civil consequences of felony convictions as a basis for the granting of coram nobis relief. The court relied upon *Morgan*, at 512-13 where, in discussing coram nobis relief, Justice Reed observed that, with respect to a felony conviction when the sentence has been fully served, "[a]lthough the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected."

Here, as a result of the felony convictions, and in addition to the statutory consequences that flow therefrom, Sutherland has lost all of his professional licenses and can no longer practice as an actuary. He was expelled from the Society of Actuaries and the American Academy of Actuaries and is no longer regarded as a fellow after over 30 years of examinations and hard work. He was also barred by FINRA the SEC and lost all his securities, insurance, and registered investment advisor licenses. Even his bank and brokerage accounts were terminated. And, Sutherland continues to be obligated to pay restitution pursuant to the False Statement Counts One. D.E. 70 (Judgment).

Fourth, the error raised herein of ineffective assistance of counsel is of the most fundamental character. Indeed, the Fourth Circuit and other Circuits have recognized that ineffective assistance is a type of fundamental error that is redressable by a coram nobis petition. *See*, *e.g.*, *Akinsade*, at 253-254; *Kwan* at 1014. *See also Kornse v. United States*, No. 16-cr-0041, 2019 WL 6169808 (W.D.N.C. Nov. 18, 2019).

Ineffective Assistance of Counsel

a. The legal standards governing Ineffective Assistance of Counsel.

The Sixth Amendment's right to counsel guarantees defendants in criminal trials the right to the *effective* assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 (1970). "An accused is entitled to be assisted by an

attorney . . . who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In *Strickland*, the Supreme Court set out the analytical framework for evaluating claims of ineffective assistance of counsel. To succeed on an ineffective assistance of counsel claim, a defendant must meet a two-part test. The defendant first must show that his attorney's performance was deficient, and second, that counsel's deficient performance prejudiced the defendant's case. *Id.* at 687 and 693. Deficient performance is established when a defendant shows that his attorney's performance falls below an objective standard of reasonableness. *Id.* at 688. Prejudice is established where there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 693. *Strickland* defines a reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Thus, to satisfy the prejudice prong of the test, a defendant need not show that, but for counsel's errors, the outcome of the proceeding would more likely than not have been different. *Id.* at 693. Rather, a defendant must only show that "there is a reasonable probability, that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *United States v. Simmons*, 763 F. App'x 303, 303 (4th Cir. 2019).

b. Sutherland was denied his constitutional right to the effective assistance of counsel because trial counsel failed to present material and substantial testimonial evidence supporting the defense that the subject funds were nontaxable loans and not income.

It was undisputed at trial that "nontaxable cash includes cash that is received as a loan [and] that a transaction may constitute a loan for federal income tax purposes even if the loan is carried out in an informal matter." D.E. 82, pp. 1253-1255 (Loan Defined Jury Instruction). Had defense counsel presented evidence creating a reasonable doubt about the government's theory that the STS Transfers were not loans, such evidence would have defeated all of the counts of the indictment. That evidence was available to defense counsel through two witnesses who were never called. The first was Phillip Sutherland, the brother of Patrick Sutherland and the bookkeeper for Sutherland and his related entities during the subject time periods. Phillip was referred to by defense counsel in opening, was listed on the defense witness list and was subpoenaed for trial by defense counsel.

A reasonably competent counsel would have presented the testimony of Phillip which would have shown that (1) his sister, Stewart, had sufficient financial worth, education and entrepreneurial ability to control and be the majority owner of STS and, thus, make legitimate loans to Sutherland's entities, in contrast to the government's theory that Stewart was so poor that she worked as a maid, and (2) due to Phillip's lack of education and experience

in bookkeeping and accounting, he mistakenly did not consistently treat the STS Transfers as loans on the books and records of Sutherland and his entities, in contrast to the government's theory that the loans had to be a sham because of these inconsistencies which showed that "Patrick could not keep his lies in order." D.E.82, p.1185. But Phillip was not called as a witness by defense counsel.

Similarly, expert testimony was also available to evidence that the STS Transfers were loans. The existence of the STS Line of Credit Funds was known to defense counsel. A reasonably competent counsel would have investigated and presented the testimony of an accounting and tax expert such as Frazier to establish the propriety of characterizing the $1,014,700 STS Line of Credit Funds as loans for the subject tax years.

Also known to defense counsel was that Sutherland and his related entities' books and records failed to properly characterize numerous deductible expenses and the tax returns at issue failed to properly deduct expenses from Sutherland's income. A reasonably competent counsel would have investigated and presented the testimony of an expert to establish the amount of these deductions and the resulting amount of tax deficiency.

"An attorney's failure to present available exculpatory evidence is ordinarily deficient, 'unless some cogent tactical or other consideration justified it.'" *Washington v. Murray*, 952 F.2d 1472, 1476 (4th Cir. 1991). *Accord Lawrence v. Armontrout*, 900 F.2d 127, 130 (8th Cir. 1990), appeal after remand, *Lawrence v. Armontrout*, 961 F.2d

113 (8th Cir. 1992) (failure to interview alibi witnesses was deficient performance under first Strickland factor); *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990) (failure to call witnesses to contradict eyewitness identification of defendant was ineffective assistance); *Grooms v. Solem*, 923 F.2d 88, 90 (8th Cir. 1991) ('it is unreasonable not to make some effort to contact [alibi witnesses] to ascertain whether their testimony would aid the defense')." *Griffin v. Warden, Corr. Adjustment Center*, 970 F.2d 1355, 1358 (4th Cir. 1992).

"In analyzing the evidence fundamental to the prosecution's case, defense counsel has a duty to investigate the circumstances and explore all facts relevant to the merits of the case." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005). "A lawyer who fails adequately to investigate, and to introduce into evidence, information that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance." *Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006) (quoting *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir. 1999)); *see also Wiggins v. Smith*, 539 U.S. 510, 527, (2003) (noting that 'S*trickland* does not establish that a cursory investigation automatically justifies a tactical decision')." *Lively v. Ballard*, No. 2:15-cv-07458, 2017 U.S. Dist. LEXIS 154226, at *40-41 (S.D.W. Va. Sept. 21, 2017).

"The Constitution does not oblige counsel to present each and every witness that is suggested to him." *United States v. Balzano*, 916 F.2d 1273, 1294 (7th Cir. 1990). But in light of the testimony that [Phillip] would have offered—

and in light of the fact that [defense counsel] knew of this testimony before trial [defense counsel's] decision not to call Phillip was an error of extraordinary magnitude." *Pavel v. Hollins*, 261 F.3d 210, 220 (2d Cir. 2001). *See also Toliver v. Pollard*, 688 F.3d 853, 855 (7th Cir. 2012) (counsel's failure to call two useful, corroborating witnesses, despite a family relationship with the inmate, constituted deficient performance.); *Poindexter v. Booker*, 301 F. App'x 522 (6th Cir. 2008) (failure to investigate two alibi witnesses, particularly when the witnesses both personally offered to provide testimony beneficial to the petitioner was unreasonable.); *Smith v. Dretke*, 417 F.3d 438 (5th Cir. 2005) (trial counsel was ineffective for failing to call witnesses that could testify to the victim's violent nature, thus supporting the defendant's claim of self-defense.).

Sutherland was prejudiced by the failure to present the testimony of Phillip and a tax and accounting expert such as Frazier because whether the subject funds were loans versus income was the primary defense at trial for each count of the indictment. As previously explained, Phillip, the preparer of Sutherland and his related entities' books and records for the years in question, would have provided evidence that the funds were loans and directly contradicted the government's evidence otherwise. A tax and accounting expert would have provided evidence that (1) approximately half of the source of the STS Transfers were the STS Line of Credit Funds that such expert would have characterized as loans to Sutherland and (2) because of untaken deductions, there was no or de minimis taxes due for the years in question. The failure to present Phillip

and a tax and accounting expert allowed the government to argue damaging facts and inferences from those facts and make claims such as the loans were bogus, Sutherland intentionally obfuscated the characterization of transfers from STS on the books and records and Stewart had no financial ability to loan Sutherland money.

The failure to present the testimony of Phillip and a tax and accounting expert like Frazier was a deficient performance because a reasonably competent attorney would have presented such testimony to the jury. The failure to present this testimony prejudiced Sutherland because it deprived the jury of evidence relevant to the key issue at the trial—whether the funds at issue were loans or income. Thus, this failure plainly "undermines confidence in the outcome." *Strickland* at 694.

c. Sutherland was denied his constitutional right to the effective assistance of counsel because trial counsel failed to present material and substantial testimonial evidence supporting the defense that no or a minimal tax was due for the years at issue.

Undisputed at trial regarding the False Tax Return Counts was that the government's burden of proof included establishing beyond a reasonable doubt that Sutherland acted willfully. D.E. 82, pp. 1244-1247 (Willfulness Jury Instruction). Vis à vis the Obstruction of Grand Jury Count, the government's burden of proof included establishing beyond a reasonable doubt that Sutherland acted corruptly with the intent to obstruct an official proceeding. *Id.* at

1257 (Obstruction of Grand Jury Instruction). Although the government was not required to prove a tax deficiency, *Id.* at 1246, the amount of the deficiency, if any, was relevant to the element of willfulness. *Boulware v. United States*, 552 U.S. 421, 432 n.9 (2008) ("Although the Courts of Appeals are unanimous in holding that § 7206(1) 'does not require the prosecution to prove the existence of a tax deficiency,' *United States v. Tarwater*, 308 F.3d 494, 504 (CA6 2002); *see also United States v. Peters*, 153 F.3d 445, 461 (CA7 1998) (collecting cases), it is arguable that 'the nature and character of the funds received can be critical in determining whether . . . § 7206(1) has been violated, [even if] proof of a tax deficiency is unnecessary,' 1 I. Comisky, L. Feld, & S. Harris, Tax Fraud & Evasion P 2.03[5], p 21 (2007)"); *United States v. Mitchell*, 495 F.2d 285, 288 (4th Cir. 1974) (conviction for violating 26 U.S.C § 7206(1) reversed because district court failed to give defense requested instruction relating to the amount of the tax deficiency which would have had an impact on the jury's ability "to find bad faith or evil motive").

During trial, both the government and the defense focused much of their arguments on the amounts at issue. Thus, in opening statement, the government contrasted Sutherland's income of "millions of dollars" versus his tax returns of "less than $200,000" and that he "claimed a lot of deductions." D.E. 78, p. 225 (Government Opening Statement). In closing argument, the government further focused on the amounts at issue, arguing that "[f]rom 2007 to 2010, despite receiving a substantial income and more than 2.1 million in wires from Bermuda, the defendant reported a total of $276,697 in income." D.E. 82,

p. 1175 (Government Closing Argument). The government thereafter went into detail regarding each tax returns' numbers. *Id.* at 1175-1176. In support of its arguments, the government presented witnesses and evidence regarding the income of Sutherland and his related entities, plus the amounts reflected on the returns, among other things. *See*, *e.g.*, D.E. 78 and 79 (Testimony of Rajender West) and D.E. 81 (Testimony of Linda Polk); Govt Trial Exhibits 1-4 (Sutherland Tax Returns), Government Exhibits 12a and 12b (Wires from STS).

Defense counsel in its arguments also focused on the amounts at issue, asserting in opening that "you will hear evidence of substantial deductible expenses that were never deducted because they were all mischaracterized." *Id.* at 239. However, defense counsel did not identify the total amount nor the nature of the "substantial" deductions. Defense counsel again referenced an indeterminate amount of deductions. *Id.* at 1209 ("You put that in as a big lump and you're losing deductions. . . . Could have been payroll taxes. It would have been deductible. Could have been a tax the company owed. We don't know what it was.").

Despite the significance of the amounts at issue and defense counsel's repeated references to deductions that were never taken, defense counsel never presented evidence at trial regarding the nature nor the total amount of such deductions. But had defense counsel investigated, that evidence would have been available to counsel in the form of expert testimony such as that of Frazier.

Indeed, in connection with Sutherland's sentencing, defense counsel finally did investigate and present such evidence by calling Frazier. Had this expert testimony been presented at trial, it would have established that, under proper accounting principles, the taxes actually due for the years in questions were a fraction of the $2.2 million in income that the government asserted was improperly reported. More specifically, such an expert would have testified at the trial that the amount of additional taxes due for the years that are the subject of the counts of the indictment was approximately $50,000, including characterizing the STS transfers that were not Line of Credit Funds as income. Thus, such an expert would have testified at the trial that, for 2008, count 1, no additional tax was due; for 2009, count 2, an additional tax of $17,858 was due, and for 2010, count 3, an additional tax of $32,391 was due.

The failure to investigate and present this expert testimony, critical to the element of willfulness, was clearly deficient and, but for this deficiency, there is a reasonable probability that the result of the proceeding would have been different. *Bryant v. Thomas*, 725 F. App'x 72, 75 (2d Cir. 2018) ("Accordingly, blood testing Bryant presented a no-risk strategy, that might well have yielded decisively exculpatory evidence. Bryant's trial counsel not only failed to pursue a blood test, but also failed to consult an expert or otherwise understand the nature of the serological evidence."); *Dendel v. Washington*, 647 F. App'x 612, 615-16 (6th Cir. 2016) ("There is a reasonable probability that had Dendel's trial counsel mounted the available expert evidence that [the victim's] death could have been caused

by a combination of drugs as her appellate counsel did, it would have, at a minimum, raised doubt about Dendel's guilt and undermined the confidence in her conviction or sentence."); *Showers v. Beard*, 635 F.3d 625 (3d Cir. 2011) (counsel was ineffective in failing to enlist expert witness to rebut prosecution's expert on key issue and relying instead on ill-informed cross-examination of prosecution's expert.); *Pavel* (failure to call expert and fact witness held to be ineffective assistance of counsel).

The failure to present this expert testimony was objectively unreasonable under prevailing professional standards because a reasonably competent attorney would have presented such testimony to the jury. The failure to present this testimony prejudiced Sutherland because it deprived the jury of evidence relevant to willfulness which is an essential element of the government's burden of proof. Thus, but for this failure, there is a reasonable probability that the result of the proceeding would have been different.

V. Conclusion

For all the foregoing reasons, Sutherland requests that this Court conduct an evidentiary hearing on this Petition for Writ of Coram Nobis and thereafter reverse his convictions on the False Statement Counts and grant all other relief to which he may be entitled.

Respectfully submitted,

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