No. 11-1362

In the Supreme Court of the United States

TOMMY JOE BARROW, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether petitioner is entitled to coram nobis relief from his convictions for tax evasion, filing false tax returns, and bank fraud because of *Boulware* v. *United States*, 552 U.S. 421 (2008).

2. Whether petitioner is entitled to coram nobis relief from his convictions because of an alleged error in the calculation of his 1985 alternative minimum tax liability.

3. Whether petitioner is entitled to coram nobis relief from his convictions based on alleged admissions of the case agent from his criminal trial during the agent's testimony in petitioner's later Tax Court case, where petitioner failed to include the transcript of the agent's Tax Court testimony in the district court record.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-13) is not published in the Federal Reporter but is available at 455 Fed. Appx. 631. An opinion of the court of appeals affirming the denial of relief under 28 U.S.C. 2255 is available at 8 Fed. Appx. 286. An opinion of the court of appeals affirming petitioner's conviction on direct appeal (Pet. App. 49-80) is reported at 118 F.3d 482. An opinion of the court of appeals affirming the denial of a motion for a new trial is available at 1997 WL 31427.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2012. The petition for a writ of certiorari was filed on April 9, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of making false statements in a loan application, in violation of 18 U.S.C. 1014, one count of bank fraud, in violation of 18 U.S.C. 1344, three counts of income tax evasion, in violation of 26 U.S.C. 7201, and six counts of filing false income tax returns, in violation of 26 U.S.C. 7206. He was sentenced to 21 months of imprisonment. The court of appeals affirmed. Pet. App. 49-80. Petitioner subsequently moved to vacate his sentence under 28 U.S.C. 2255. The district court denied relief, and the court of appeals affirmed. *Barrow* v. *United States*, 8 Fed. Appx. 286 (6th Cir. 2001). This Court denied certiorari. *Barrow* v. *United States*, 531 U.S. 1114 (2001). Petitioner then filed a petition for a writ of error coram nobis, asking the district court to vacate his convictions. The district court denied the petition, and the court of appeals affirmed. Pet. App. 2-13.

1. Petitioner was the founder and controlling shareholder of Barrow, Aldridge & Co. (BACO), an accounting firm, as well as the sole proprietor of Complete Information Services (CIS), a data-processing company. Pet. App. 3. In 1982, petitioner became a member of the board of directors of Detroit Central Hospital, later renamed New Center Hospital; petitioner was elected Chairman of the hospital's Board in 1984, and he became the hospital's CEO shortly thereafter. *Ibid.*; Gov't C.A. Br. 8.

In 1986, petitioner applied for a bank loan. To support his loan application, petitioner provided the bank with a false 1984 individual income tax return and a false 1985 W-2 from BACO, both of which misstated his in-

come, and he entered corresponding false income figures on his application. Based on those misrepresentations, the bank loaned petitioner $105,000 to purchase a boat, which the bank later repossessed at a loss. Pet. App. 51-52; Gov't C.A. Br. 6-7.

Petitioner prepared his own individual income tax returns for 1984 through 1988. On those returns, petitioner failed to report income received from the hospital, including checks written to him personally for his services as CEO. He also failed to report more than $29,000 in CIS's gross receipts. He claimed deductions for payments that he made to his personal housekeeper, falsely claiming they were CIS expenses. And he diverted more than $8000 of BACO income in 1988 when he deposited a check payable to BACO into his personal account. All told, petitioner had more than $150,000 of unreported income, giving rise to a $52,000 tax deficiency. Pet. App. 53; Gov't C.A. Br. 8.

Petitioner also prepared BACO's corporate tax returns. While petitioner's personal returns were being audited, petitioner filed amended corporate returns for the fiscal years ending March 31, 1988, and March 31, 1989. The amended returns falsely claimed that petitioner's personal income from the hospital was BACO income, and they claimed that no tax was due on the income because of BACO's net operating losses from prior years. Pet. App. 54; Gov't C.A. Br. 9.

2. A grand jury in the Eastern District of Michigan returned an indictment charging petitioner with one count of making false statements in a loan application, in violation of 18 U.S.C. 1014, one count of bank fraud, in violation of 18 U.S.C. 1344, five counts of income tax evasion, in violation of 26 U.S.C. 7201, and eight counts of filing false tax returns, in violation of 26 U.S.C. 7206.

After a trial, the jury found petitioner not guilty on two counts of tax evasion and two counts of filing false tax returns, but it found him guilty on all other counts. Petitioner was sentenced to 21 months of imprisonment. Pet. App. 51, 54.

3. The court of appeals affirmed. Pet. App. 49-80. In a separate opinion, the court also affirmed the denial of petitioner's post-trial motion for a new trial. *Barrow* v. *United States*, No. 96-1687, 1997 WL 31427 (6th Cir. Jan. 27, 1997). Petitioner argued that expert testimony, first presented at sentencing, showed that he did not have any alternative minimum tax liability for 1985—and therefore had no tax deficiency—even though he had unreported income in that year. The court of appeals rejected that argument, holding that the expert testimony was not newly discovered and that petitioner was simply "attempting to relitigate his case under a new theory" using evidence available at trial. *Id.* at *2. Petitioner also argued that evidence in BACO's general ledger showed that his unreported income from the hospital was actually BACO income, and that his receipt of the income represented repayment of a loan that he had made to BACO. The court of appeals rejected that argument as well, holding that the evidence was not newly discovered because the ledger was admitted into evidence at trial, and petitioner had access to it before trial. *Id.* at *3.

4. Petitioner asked the district court to vacate his sentence under 28 U.S.C. 2255, arguing, among other things, that his 1985 alternative minimum tax was miscalculated and that BACO had no earnings or profits. The district court denied the motion, and the court of appeals affirmed. *Barrow* v. *United States*, 8 Fed.

Appx. 286 (6th Cir. 2001). This Court denied certiorari. *Barrow* v. *United States*, 531 U.S. 1114 (2001).

5. Petitioner filed a petition for a writ of error coram nobis, again asking the district court to vacate his convictions. He argued that he was entitled to relief under this Court's decision in *Boulware* v. *United States*, 552 U.S. 421 (2008). He also claimed that an IRS agent had admitted, during a 2004 civil tax trial in the United States Tax Court, that petitioner did not owe alternative minimum tax for 1985. He further argued that testimony offered at the Tax Court trial by IRS Special Agent Wesley Bulik, who was assigned to petitioner's criminal case, established that Agent Bulik gave materially false testimony during petitioner's criminal trial. The district court denied the petition.

6. The court of appeals affirmed. Pet. App. 2-13. The court of appeals concluded that *Boulware* "had no relevance to [petitioner]'s case" because *Boulware* concerned diversions of corporate funds, and the government did not offer a corporate-diversion theory at petitioner's criminal trial. *Id.* at 8. It also concluded that petitioner could not relitigate the calculation of his 1985 alternative minimum tax in a coram nobis petition, because the court had already held, on direct appeal, that petitioner was not entitled to a new trial on that basis. *Id.* at 10-11. And the court held that petitioner was not entitled to relief because of allegedly false testimony by an IRS special agent during petitioner's criminal trial. The court explained that, although petitioner contended that the agent's false testimony came to light during the agent's testimony at petitioner's Tax Court trial, petitioner failed to introduce any evidence before the district court of the agent's Tax Court testimony. *Id.* at 7. In any event, the court of appeals concluded that peti-

tioner was not entitled to relief because evidence of the purported falsity was available to petitioner during his criminal trial, and the court had already held on direct appeal that petitioner was not entitled to a new trial on the basis of that evidence. *Id.* at 9-10.

ARGUMENT

Petitioner contends (Pet. 29-43) that he is entitled to coram nobis relief because his conviction is inconsistent with *Boulware* v. *United States*, 552 U.S. 421 (2008), because his 1985 alternative minimum tax was allegedly miscalculated, and because an IRS agent allegedly presented false testimony at his trial. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The writ of error coram nobis is "an extraordinary writ" that "should not be granted in the ordinary case." *United States* v. *Denedo*, 556 U.S. 904, 917 (2009) (internal quotation marks omitted). This Court has explained that courts "must be cautious" in issuing the writ, because "judgment finality is not to be lightly cast aside." *Id.* at 916. The writ is therefore to be used only to correct "errors 'of the most fundamental character,'" *United States* v. *Morgan*, 346 U.S. 502, 512 (1954) (quoting *United States* v. *Mayer*, 235 U.S. 55, 69 (1914)), such as "factual errors 'material to the validity and regularity of the legal proceeding itself.'" *Carlisle* v. *United States*, 517 U.S. 416, 428-429 (1996) (quoting *Mayer*, 235 U.S. at 68). Indeed, this Court has observed that, following the adoption of the Federal Rules of Criminal Procedure, "'it is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate.'" *Id.* at 429

(quoting *United States* v. *Smith*, 331 U.S. 469, 475 n.4 (1947) (brackets in original)).

The court of appeals correctly applied those standards and concluded that petitioner had not "made a sufficient showing of compelling circumstances to warrant issuance of the writ." Pet. App. 13. That case-specific determination does not warrant this Court's review. That is especially so because the arguments in the petition pertain to only some of petitioner's convictions, so that even if petitioner were to prevail, his bank fraud convictions and some of his tax convictions would be undisturbed. Petitioner is no longer in custody, and because the alleged errors at his trial were concededly not "of such fundamentally unjust character that [they] probably would have altered the outcome of the entire proceeding," petitioner cannot establish an entitlement to coram nobis relief. *Id.* at 10; see *United States* v. *Johnson*, 237 F.3d 751, 755 (6th Cir. 2001).

2. Petitioner argues (Pet. 31-34) that this Court's decision in *Boulware* provides a basis for coram nobis relief in this case. That is incorrect.

In *Boulware*, this Court considered the proof necessary for a defendant to establish, in a criminal tax case, that a diversion of corporate funds to a shareholder is a return of capital rather than a taxable dividend. 552 U.S. at 424. In *United States* v. *Miller*, 545 F.2d 1204 (1976), cert. denied, 430 U.S. 930 (1977), the Ninth Circuit had held that a diversion of corporate funds could be treated as a return of capital only if there were "some demonstration on the part of the taxpayer and/or the corporation that such [a diversion was] intended to be such a return." *Id.* at 1215. The Ninth Circuit followed that precedent in *Boulware*, holding that the district court had correctly refused to permit the defendant to

argue that diversions of corporate funds from a closely held corporation in which he was the majority shareholder constituted returns of capital. *Boulware*, 552 U.S. at 427-428. This Court reversed, holding that a defendant in a criminal tax case need not show intent to treat a diversion of corporate funds as a return of capital in order to present a return-of-capital defense. *Id.* at 436.

As the court of appeals explained, *Boulware* "simply [has] no relevance" to this case. Pet. App. 8. Although petitioner asserts (Pet. 31) that the government "relied upon" *Miller* below, he fails to identify any particular instances of such reliance. Instead, he points (Pet. 8-9) to the testimony of an IRS agent who stated that he did not find any evidence in BACO's books to support petitioner's contention that the hospital payments were in fact repayments of loans petitioner had made to BACO. But unlike the defendant in *Boulware*, who was prohibited from presenting a return-of-capital defense, petitioner was not precluded from presenting his loan-theory defense. To the contrary, as petitioner concedes (Pet. 9-10), the court permitted him to argue his "loan repayment" defense at trial: petitioner presented the expert testimony of a "corporate income recognition expert" that the hospital funds were BACO corporate income, and he was permitted to cross-examine government witnesses in an attempt to establish that the payments were corporate income.

In addition, the evidence at trial showed that the hospital payments petitioner received were not corporate funds at all, but rather represented petitioner's personal income. *Barrow*, 1997 WL 31427, at *2. *Boulware*, by contrast, concerned only the question whether concededly corporate funds were a taxable dividend or a return

of capital. And this Court limited its holding in *Boulware* to corporate diversions that are made "with respect to [the corporation's] stock," within the meaning of 26 U.S.C. 301(a). 552 U.S. at 436-438. *Boulware* thus has no application to petitioner's loan-theory defense, which rests on the contention that he received BACO funds that were repayments of his loans to BACO, and therefore were not funds distributed to him with respect to his BACO stock.

In any event, even if *Boulware* were relevant here, petitioner still would not be entitled to the extraordinary remedy of coram nobis relief because he does not contend that there was any "factual error[] material to the validity and regularity of the legal proceeding itself" during his criminal trial. *Carlisle*, 517 U.S. at 429 (internal quotation marks omitted). And to the extent that petitioner's argument for the application of *Boulware* depends, as petitioner contends (Pet. 31), on the alleged fact that BACO had no earnings and profits during the relevant period, petitioner is precluded from relitigating that issue: the court of appeals previously decided that petitioner procedurally defaulted the issue when it affirmed the denial of his motion to vacate under 28 U.S.C. 2255, see *Barrow*, 8 Fed. Appx. at 288, and petitioner may not relitigate it in his coram nobis petition. See *United States* v. *Esogbue*, 357 F.3d 532, 535 (5th Cir. 2004) (petition for writ of coram nobis cannot be used to relitigate a claim "already presented in [a 28 U.S.C.] 2255 petition[] that has been considered and dismissed"); accord *Klein* v. *United States*, 880 F.2d 250, 254 n.1 (10th Cir. 1989).

3. Petitioner also claims (Pet. 34-43) that the court of appeals erred in rejecting his contentions that he had no alternative minimum tax liability for 1985 and that

Agent Bulik's Tax Court testimony established that his testimony during petitioner's criminal trial was false. Those fact-bound claims lack merit.

a. The court of appeals correctly held that petitioner was precluded from relitigating, for a third time, the calculation of his 1985 alternative minimum tax liability. As the court explained, "[petitioner]'s trial defense team could have * * * challenged the [g]overnment's evidence [on this issue] at the criminal trial," Pet. App. 11, because, as the court had earlier held, petitioner's trial team had all the necessary evidence from BACO's books to offer the new calculation of petitioner's 1985 alternative minimum tax, *Barrow*, 1997 WL 31427, at *2. Because petitioner failed to show "sound reasons existing for [his] failure to seek appropriate earlier relief," he is not entitled to coram nobis relief. *Morgan*, 346 U.S. at 512.

Petitioner contends (Pet. 36) that because the Tax Court ultimately decided that petitioner did not have any alternative minimum tax liability for 1985, the court of appeals erred in holding that he was precluded from relitigating the calculation of his alternative minimum tax. But the Tax Court decision does not undermine the conclusion of the court of appeals that, at the time of his criminal trial, petitioner possessed all the evidence necessary to present the same alternative minimum tax calculation that he later presented to the Tax Court. Petitioner points to no new facts relevant to the alternative minimum tax calculation that were unavailable to him at trial, and the Tax Court itself noted that "there were no new facts that weren't available to the parties in the criminal case." *Barrow* v. *Commissioner*, T.C. Memo 2008-264, 2008 WL 5000112, at *13 (Nov. 25,

2008).[*] The court of appeals therefore correctly rejected petitioner's attempt to relitigate that issue.

Petitioner also argues (Pet. 39-41) that the decision below is contrary to *Sanders* v. *United States*, 373 U.S. 1 (1963). *Sanders* is inapplicable here, however, because it involved the standards for habeas corpus petitions and motions under 28 U.S.C. 2255, not coram nobis petitions. 373 U.S. at 15-16. In any event, *Sanders* was limited by this Court's subsequent decision in *McCleskey* v. *Zant*, 499 U.S. 467 (1991), see *Macklin* v. *Singletary*, 24 F.3d 1307, 1312-1313 (11th Cir. 1994), cert. denied, 513 U.S. 1160 (1995), and, as applied to motions under 28 U.S.C. 2255, was superseded by later amendments to the statute, see *United States* v. *Boyd*, 591 F.3d 953, 956 (7th Cir. 2010).

b. The court of appeals also correctly held that petitioner was not entitled to coram nobis relief on the basis of Agent Bulik's alleged admissions during the Tax Court trial. As the court observed, petitioner failed to offer evidence of Agent Bulik's Tax Court testimony to the district court. Pet. App. 7. Petitioner acknowledges that failure but states (Pet. 37-38) that he belatedly sought to remedy it by filing a motion with the district court to correct the record on appeal pursuant to Federal Rule of Appellate Procedure 10(e)(2)(B). But as petitioner acknowledges (Pet. 37), the district court denied that motion, so the transcript was not properly a part of the record on appeal.

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[*] Petitioner also asserts (Pet. 36) that the Tax Court held that "none of [his] tax returns had ever been fraudulent." That is incorrect; the Tax Court held that petitioner was estopped by his criminal convictions from arguing that his returns were not fraudulent for the years of conviction. *Barrow*, 2008 WL 5000112, at *13.

Moreover, petitioner errs in asserting (Pet. 35) that the court of appeals "implicitly acknowledge[d] that *coram nobis* relief would have been proper but for its own refusal" to consider the transcript of Agent Bulik's testimony before the Tax Court. To the contrary, the court of appeals concluded that petitioner's claim lacked merit, even apart from petitioner's failure to introduce the transcript before the district court, because the purported substance of Agent Bulik's Tax Court testimony related only to petitioner's factual contention that BACO's general ledger contained adjustments that were, in fact, adjustments to a loan account that supported his loan-repayment defense. Pet. App. 9-10. As the court of appeals correctly noted, petitioner had previously raised that issue in his motion for a new trial, and the court of appeals had already addressed it when it affirmed the denial of the motion on this issue, finding that BACO's books were not newly discovered evidence. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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