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## CORAM NOBIS AND THE HOFFNER CASE

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SINCE the monumental decision of *Matter of Lyons v. Goldstein*<sup>1</sup> in 1943, prosecutors have been deluged with an increasing number of proceedings to set aside judgments of conviction, many of them of many years standing, upon the ground that such judgments had been obtained in violation of a defendant's constitutional rights. In the main, such claims were predicated upon the assertion that a plea of guilty had been induced by fraud or misrepresentation,<sup>2</sup> or that a conviction had been obtained by the use of testimony known by the prosecution to be perjured,<sup>3</sup> or that the court had failed to advise the prisoner of his right to counsel and to inquire if he desired counsel.<sup>4</sup> The Court of Appeals, in *People v. Sadness*,<sup>5</sup> epitomized these grounds as involving ". . . the abrogation—without adequate remedy—of fundamental precepts either going to the jurisdiction of the court or resulting in the perpetration of a fraud upon the court."<sup>6</sup>

Coram nobis, as it is commonly called, is steeped in antiquity. It is a descendant of an ancient common-law remedy evolved many years ago in response to the necessities of the times. It was conceived by the judiciary of England in the 16th Century to correct miscarriages of justice based on facts outside the record, which could not be corrected by then existing procedures. Since appellate review was restricted to

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<sup>1</sup> 290 N.Y. 19, 47 N.E.2d 425 (1943).

<sup>2</sup> See note 1 *supra*.

<sup>3</sup> See *Matter of Morhous v. Supreme Court of New York*, 293 N.Y. 131, 56 N.E.2d 79 (1944).

<sup>4</sup> See *Bojinoff v. People*, 299 N.Y. 145, 85 N.E.2d 909 (1949).

<sup>5</sup> 300 N.Y. 69, 89 N.E.2d 188 (1949).

<sup>6</sup> *Id.* at 73-74, 89 N.E.2d at 189.

errors of law, it was necessary to find some avenue of relief for the correction of injustices which would not have resulted had certain facts been known to the trial court. Such corrective device evolved into the writ of error *quae coram nobis resident*, which means "let the record and proceedings remain before us." It was not utilized to reflect upon the competency or the findings of the court. It was designed to bring before the court facts which affected the validity and regularity of the decision itself and which, had they been known to the court, would have potentially changed the judgment rendered.<sup>7</sup>

In the beginning the writ was used only in civil matters, as, for instance, where a judgment was entered against a defendant who was under age or was a married woman, or who had died before the verdict, facts which would have precluded the recovery of any judgment.<sup>8</sup> A little over a century later, this remedy was first employed in a criminal case.<sup>9</sup>

Even in England, where it was born, *coram nobis* was infrequently used and had but fleeting recognition. In fact, Blackstone made no mention of it in his *Commentaries*. As was stated in *Anderson v. Buchanan*,<sup>10</sup> the writ ". . . was hoary with age and even obsolete in England before the time of Blackstone. . . ." In the early days of the United States, when English practice was followed very closely in the courts here, this remedy was revived briefly, though its form was somewhat changed to meet the judicial system prevailing in this country. In fact, it was used in New York in civil matters, but was designated a motion in the *nature* of a writ of error *coram nobis*.<sup>11</sup> It apparently had fallen into disuse in this country after that time, as it had in England. No reported cases in this state have been found in which the writ of *coram nobis* was used in civil cases after the determination of *Smith v. Kingsley*<sup>12</sup> in 1838.

<sup>7</sup> See *Jaques v. Cesar*, 2 Wms. Saund. 100, 85 Eng. Rep. 776 (1671).

<sup>8</sup> See 1 *ROLLE'S ABRIDGMENT* 747, 753-755 (1668).

<sup>9</sup> *Roy v. Cornwall*, 1 Sid. 208, 82 Eng. Rep. 1060 (K.B. 1664).

<sup>10</sup> See 292 Ky. 810, 168 S.W.2d 48, 55 (1943) (dissenting opinion).

<sup>11</sup> See *Arnold v. Sandford*, 14 Johns. 417 (N.Y. 1817); *Smith v. Kingsley*, 19 Wend. 620 (N.Y. 1838).

<sup>12</sup> See note 11 *supra*.

So far as research reveals, this remedy was never invoked in New York in a criminal case even up to 1838. Such vestige of legal vitality as appeared to remain in this writ in criminal cases in New York was apparently eliminated by the adoption in 1881 of the present New York Code of Criminal Procedure. The Code provided for available remedies from then on and expressly abolished all procedural remedies not specifically included therein.<sup>13</sup> Parenthetically, no provision for a remedy in the nature of, or of the type formerly characterized as, "coram nobis" was included in the Code. Thus, in New York State after 1881, and until the decision in *Matter of Lyons v. Goldstein*<sup>14</sup> in 1943, the only remedy available to a defendant to attack a judgment of conviction was by way of motion for a new trial<sup>15</sup> or by normal and regular appellate process. Moreover, in addition to restricting the right to a new trial to the specific statutory grounds, such remedy was available only if invoked within one year, except where a sentence of death was imposed, in which case the application could be made at any time prior to execution.<sup>16</sup>

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<sup>13</sup> N.Y. CODE CRIM. PROC. § 515.

<sup>14</sup> 290 N.Y. 19, 47 N.E.2d 425 (1943).

<sup>15</sup> A motion for a new trial, as prescribed by Section 465 of the Code of Criminal Procedure, could be made only upon the following grounds:

"1. When the trial has been had in his absence if the indictment be for a felony;

2. When the jury has received any evidence out of court other than that resulting from a view, as provided in Section 411;

3. When the jury have separated without leave of the court, after retiring to deliberate upon their verdict or have been guilty of any misconduct by which a fair and due consideration of the case has been prevented;

4. When the verdict has been decided by lot or by any means other than a fair expression of opinion on the part of all the jurors;

5. When the court has misdirected the jury in a matter of law or has refused to instruct them as prescribed in Section 420; and the defendant has, at the trial, excepted to such misdirection or refusal;

6. When the verdict is contrary to law or clearly against evidence;

7. Where it is made to appear, by affidavit, that upon another trial the defendant can produce evidence such as, if before received, would probably have changed the verdict if such evidence has been discovered since the trial, is not cumulative; and the failure to produce it on the trial was not owing to want of diligence. . . ."

<sup>16</sup> N.Y. CODE CRIM. PROC. § 466.

Insofar as normal appellate review was concerned, that remedy was restricted and limited to errors in the record. If a matter *dehors* the record so tainted the judgment of conviction as to render it a nullity, no specific remedy was made available by the Code. Habeas corpus, under New York law, is not a proper remedy for a convicted defendant in possession of facts *dehors* the record which might upset his conviction, since the remedy of such writ is unavailing in attacking a judgment regular on its face.<sup>17</sup>

In this state of the law after the enactment of the Code in 1881, it appeared that no attack upon a judgment of conviction could be made except by the specific procedures provided, even though there existed facts *dehors* the record which might overturn a conviction.

In 1943, however, in *Matter of Lyons v. Goldstein*,<sup>18</sup> the Court of Appeals reopened the avenue to the type of relief in a criminal case which had formerly been provided by coram nobis, despite the apparently clear and rigid exclusion by the legislature of all remedies except those specified in the Code. In that case, one Joseph Bendix pleaded guilty in the Court of General Sessions, County of New York, to the crime of burglary in the third degree. Being a fourth offender, he was sentenced to a term of from fifteen years to life.

In 1941, after serving five years, Bendix made a motion in the Court of General Sessions, the court in which the judgment of conviction was rendered, to set aside his conviction, claiming that his plea of guilty had been induced by the alleged fraud and misrepresentation of the prosecuting official. Thereupon, the Commissioner of Correction, through the Attorney General of the State of New York, brought a proceeding under Article 78 of the Civil Practice Act to prohibit the Court of General Sessions from entertaining the motion on the ground that that court did not have jurisdiction to entertain it. The predicate of that proceeding was that Section 337 of the Code of Criminal Procedure and Section 2188 of the Penal Law provide that, once service of

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<sup>17</sup> *People ex rel. Fisher v. Morhous*, 183 Misc. 51, 49 N.Y.S.2d 110 (Sup. Ct. 1944).

<sup>18</sup> See note 14 *supra*.

a sentence has commenced, it may not be suspended or interrupted. The court at Special Term granted the order of prohibition<sup>19</sup> and the Appellate Division unanimously affirmed.<sup>20</sup> In reversing and in holding that the Court of General Sessions had jurisdiction to entertain such a motion, the Court of Appeals said:

The inherent power of a court to set aside its judgment which was procured by fraud and misrepresentation cannot be doubted. . . . No logical distinction can be made between such power over judgments in civil cases and such power over judgments in criminal cases. There is nothing unique about a judgment or its execution in criminal cases which excepts it from the rules applicable to judgments generally and the inherent powers of the courts with reference to them. The power was exercised in criminal cases at common law through the writ of error *coram nobis*. . . . If the judgment may be reviewed and set aside on the ground that it was procured by fraud, no reason presents itself why the court may not then permit the withdrawal of a plea of guilty because the record is then the same as if no judgment had ever been rendered. Indeed, it is settled that to deny a person an opportunity to be heard on proof that he was defrauded or coerced into pleading guilty to a crime would impair a constitutional right. . . . it would be an extraordinary reversal of all precedent to deny to a competent tribunal power over its own judgments in either civil or criminal cases.<sup>21</sup>

This far-reaching pronouncement by the Court of Appeals resulted in a deluge of *coram nobis* motions on myriad grounds, some meritorious but others completely baseless and restricted in scope only by the fertile imagination and ingenuity of incarcerated defendants. This mass attack on judgments of convictions undoubtedly prompted the Court of Appeals only two years later, in 1945, to serve notice that *coram nobis* was not available in every conceivable situation. In *People v. Gersewitz*<sup>22</sup> the court said:

We have sanctioned the exercise of such a power by a court to correct its own record or to set aside an order or judgment which was induced by fraud or procured in violation of a constitutional

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<sup>19</sup> 178 Misc. 155, 33 N.Y.S.2d 282 (Sup. Ct. 1942).

<sup>20</sup> 264 App. Div. 847, 36 N.Y.S.2d 419 (1st Dep't 1942).

<sup>21</sup> 290 N.Y. 19, 24-25, 47 N.E.2d 425, 428-429 (1943).

<sup>22</sup> 294 N.Y. 163, 61 N.E.2d 427 (1945).

right of a party. Perhaps that power can have no broader scope. No case has been presented to the court in which the court was called upon to define its exact limits, but in March, 1943, this court authoritatively decided (three judges dissenting) that a court of criminal jurisdiction has "inherent" power to set aside a judgment procured by fraud and misrepresentation and to permit a defendant to withdraw a plea of guilty induced by violation of his constitutional rights. . . .<sup>23</sup>

And four years later, in 1949, the Court of Appeals again felt impelled inferentially to provide a beacon for the proper channels through which *coram nobis* could be pursued. As previously indicated, in *People v. Sadness*<sup>24</sup> it was said:

On the other hand, a word should be said as to the availability of the remedy of a writ of *coram nobis* in a situation of this sort. As we have recently pointed out, it is available whenever a plea of guilty has been induced by fraud or misrepresentation . . . or where a conviction has been obtained by the use of testimony known by the prosecutor to be perjured . . . or where the court has failed to advise the prisoner of his right to counsel and to inquire if he desired counsel . . . all of which involve the abrogation—without adequate remedy—of fundamental precepts either going to the jurisdiction of the court or resulting in the perpetration of a fraud upon the court.<sup>25</sup>

Thus, while the Court of Appeals in these decisions enumerated generally the situations in which *coram nobis* was available, it apparently did not limit that avenue of relief to the particular grounds passed upon in those cases. The main principle which emerges from these decisions, however, is that *coram nobis* is available in cases where (1) there is a claim of denial of due process because of the deprivation of a constitutional right, and (2) the operative fact constituting such deprivation of due process is *dehors* the record.

A recent case in Queens County, not based upon any of the three specific grounds heretofore enumerated, but coming within the general orbit of the grounds upon which *coram nobis* can properly be granted, is *People v. Hoffner*.<sup>26</sup> Hoffner was convicted of murder in the County Court of Queens County, after trial on January 17, 1941, and was sentenced to

<sup>23</sup> *Id.* at 167, 61 N.E.2d at 429.

<sup>24</sup> 300 N.Y. 69, 89 N.E.2d 188 (1949).

<sup>25</sup> *Id.* at 73-74, 89 N.E.2d at 189.

<sup>26</sup> 128 N.Y.L.J. 1148, col. 2 (County Ct. Nov. 13, 1952).

life imprisonment in view of the jury's recommendation of clemency. The Appellate Division<sup>27</sup> and the Court of Appeals<sup>28</sup> both affirmed the judgment of conviction.

After Hoffner had served eleven years of his sentence, a *coram nobis* motion was made on his behalf in October, 1952, to set aside the judgment of conviction on the ground that he had been deprived of his constitutional rights in that there allegedly was a suppression of evidence vital to his defense.<sup>29</sup> Properly to evaluate the merit of that claim necessarily requires a somewhat detailed review of the facts in the case in order to determine whether the evidence claimed to have been suppressed was of such character that, when viewed in the perspective of all the facts in the case, its suppression constituted a denial of due process of law.

Hoffner's conviction was predicated upon a fatal shooting in the course of a holdup of a barroom on August 8, 1940. At the time of the holdup, three men were in the barroom: William Sotzing, part owner; Peter Proestos, a bartender; and James Halkias, a waiter. Sotzing and Proestos were facing the cash register with their backs to the bar, engaged in counting the day's receipts just prior to closing. Halkias was seated in a rear booth reading a newspaper.

An unknown man entered and said: "Stick 'em up." Sotzing, looking up, saw the gunman through the back mirror. Halkias also looked up from his paper and, according to his testimony, observed only the holdup man's left profile and this for only thirty-five seconds.

Sotzing left Proestos at the cash register and started to move toward the lower end of the bar. As he did so, the gunman sidled along the outside of the bar, still facing Sotzing. While the gunman's attention was riveted upon Sotzing, Halkias ran behind the gunman and out into the street. By this time, Proestos had also come from behind the bar and had reached the middle of the barroom. Two shots were fired.

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<sup>27</sup> 262 App. Div. 911, 29 N.Y.S.2d 726 (2d Dep't 1941).

<sup>28</sup> 288 N.Y. 552, 42 N.E.2d 15 (1942).

<sup>29</sup> A prior motion for *coram nobis* was denied in 1947, the court at that time finding no evidence in the record that the verdict was induced by fraud or that the defendant's constitutional rights had been violated in any way or that there were any facts not already reviewed by the appellate courts. 191 Misc. 419, 76 N.Y.S.2d 916 (1947).

Sotzing ran back into the barroom, saw Proestos lying on the floor and the gunman starting for the door. Sotzing thereupon grappled with the killer. Sotzing was, therefore, as close as humanly possible to the killer.

When Halkias ran out the front door, he turned south and sought refuge in the recessed doorway of an adjoining store. As he stood there, the gunman dashed out of the barroom, turned north and ran to the corner where he disappeared. From the recessed store entrance Halkias saw only the back of the killer's head.

When the police arrived, Sotzing and Halkias gave them a description of the killer. Significantly, in that description no mention whatsoever was made of an obvious blemish which Hoffner concededly had on his right cheek on that date. A disinterested physician testified at the trial that on the day of the crime he had examined Hoffner in connection with a bone marrow transplantation which he was giving his mother, and that Hoffner then had an obviously visible lesion about the size of a quarter on his right cheek bone. Hoffner, himself, testified that he had contracted impetigo and that the blemish was on his face from August 5, 1940, two days before the crime, to the day of his arrest, August 11, 1940, three days after the killing. This fact was confirmed by the police photograph taken of him at the time of his arrest.

That same morning, August 8, 1940, Sotzing and Halkias were taken by police officers to Police Headquarters in Manhattan, where they were shown rogues gallery photographs. Halkias picked out Hoffner's photograph, taken more than five years before, as that of the killer. Parenthetically, it should be noted that this photograph showed Hoffner full face and *right* profile, whereas Halkias had viewed only the *left* profile of the killer. On the basis of the selection of this photograph by Halkias, the police arrested Hoffner on the morning of August 11, 1940, and took him to Police Headquarters in Jamaica.

At 8 o'clock that morning, a line-up was conducted which consisted of three detectives and Hoffner. The three detectives were all taller, heavier and older than Hoffner. Halkias was then ushered into the room. Despite the mentioned disparities between the three detectives and Hoffner, Halkias

failed to identify him as the killer. When this occurred, a stenographer was present making a record of the proceedings. According to the stenographic minutes of the line-up, when Halkias viewed the line-up for the first time, he did see Hoffner's left profile. Halkias then left the line-up room. After an interval of some ten minutes, Halkias returned to the line-up room, at which time the line-up had disbanded and Hoffner was standing by himself in the center of the room. According to the transcript of the line-up minutes, Halkias walked around the defendant, and, pointing at him, then said: "That's the man; he was in the place the other night."

Immediately after this occurred, Sotzing, who had failed to identify Hoffner as the killer, was returned to the line-up room for the second time. This time Sotzing requested that Hoffner speak, apparently in an attempt to identify the voice of the killer he had heard at the time of the holdup. Hoffner immediately complied, even to the extent of repeating after Sotzing the exact words which the killer had uttered at the time of the holdup. Significantly, despite all this, the man who had the best view of the killer again failed to identify Hoffner, even when he was standing alone and after hearing him utter the identical words used by the killer.

At the trial, Halkias testified that Hoffner was the killer. Thus, the sole pivot of the People's case was such identification by Halkias.

Cross-examined as to his failure to identify Hoffner when he first viewed the line-up, Halkias sought to justify such failure by asserting that in that first view he only saw Hoffner full face and did not see his left profile. However, the line-up minutes flatly contradicted Halkias on this, the most vital point in the case, for the minutes showed, as previously stated, that when Halkias viewed the line-up for the first time, those in it were instructed to "turn around."

The trial record does not show that defense counsel made any formal request that the line-up minutes be made available to the defense for the purpose of further cross-examination of Halkias. Parenthetically, it is undisputed that such minutes were in existence prior to and at the time of the trial.

In October, 1952, a motion in the nature of a writ of coram nobis to vacate Hoffner's judgment of conviction was made. The basis of this motion was that Hoffner's constitutional rights had been violated in that defense counsel, at one of the recesses during the trial, made an inquiry of a police officer connected with the prosecution as to whether minutes of the line-up had been taken and had been informed that none had been taken. This inquiry was alleged to have been made outside the courtroom. As the police officer was then deceased, the District Attorney could not determine whether this allegation was the fact or could be refuted. In this situation, the District Attorney took the position that the allegation should be proved by sworn oral testimony which would be subject to the test of cross-examination. Therefore, an issue of fact as to a matter *dehors* the record was presented. Consequently, the District Attorney consented to a hearing.

In a painstaking opinion by the Honorable Peter T. Farrell, County Judge of Queens County,<sup>30</sup> rendered after the hearing, the following finding of fact was made:

In the hearing conducted by the court upon the present motion the district attorney (who, out of a high regard for the real duties of his office, is responsible for the disclosure) came forward with evidence of a fact which, if known at the time of the trial, might well have impelled the judge who presided there, to grant the defendant's motion for a directed verdict. That evidence consists of a transcript of the stenographic record of the proceedings at the line-up and it clearly establishes that despite his contrary testimony at the trial *Halkias did have a profile view of all the members of the line-up at which he failed to identify Hoffner.* With the case depending entirely on this one witness it is not difficult to conclude that the trial judge, informed of so vital an inconsistency, might have justly found the evidence so far below the statutory standard as to require a directed verdict.

As to the legal effect of this finding of fact upon the judgment of conviction, the court said:

There still remains for consideration petitioner's claim that he was deprived of due process of law in that the prosecutor failed to

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<sup>30</sup> *People v. Hoffner*, 128 N.Y.L.J. 1148, cols. 2, 3 (County Ct. Nov. 13, 1952).

make available to the defense evidence which would legitimately tend to overthrow the prosecution's case, to wit, the minutes of the line-up, even though no formal request therefor was made. Although the trial record strongly suggests that it might have been the calculated purpose of the trial assistant to satisfy a right sense of justice by making evident the availability of the record . . . that, unfortunately, was not enough. There was, in the content of the record, that which could "legitimately tend to overthrow the case made for the prosecution, or to show . . . it . . . unworthy of credence . . ." and there was a resultant duty to give the defense the benefit of knowledge of that element. . . . There is, in this, no criticism of a public official who, in his lifetime, was distinguished both for his integrity and a wholesome regard for the rights of an accused. None knows better than trial counsel and judges the difficulties attending decisions under stress and none know better how often the motives behind such decisions are either doubted or misunderstood. With the security of hindsight, though, it can be said that the duty of revelation existed under the singular facts of this case, particularly since the unproffered minutes of the line-up go to the very heart of the only issue in the case, to wit, identification, even though such failure to proffer was not deliberate, conscious or prompted in any way by improper motive. Had the information been made known, the course of justice might, in fair likelihood, have been completely different.<sup>31</sup>

Upon that determination the court vacated Hoffner's judgment of conviction.

Of course, the ground upon which the court proceeded to vacate this conviction is not one of the three specific grounds heretofore mentioned upon which the Court of Appeals has sanctioned such relief.<sup>32</sup> The Court of Appeals had indicated in *People v. Gersewitz*,<sup>33</sup> however, that the right to such relief was not limited to the three fact situations which that court had previously passed upon in the aforecited cases. In fact, that court had indicated in *People v. Sadness*<sup>34</sup> that such relief is available where there is involved "the abrogation—without adequate remedy—of fundamental precepts either going to the jurisdiction of the court or resulting in the perpetration of a fraud upon the court." The basis of

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<sup>31</sup> *Id.* at 1148, cols. 3, 4.

<sup>32</sup> See notes 2, 3, 4 *supra*.

<sup>33</sup> 294 N.Y. 163, 61 N.E.2d 427 (1945).

<sup>34</sup> 300 N.Y. 69, 73-74, 89 N.E.2d 188, 189 (1949).

the court's determination in the *Hoffner* case seems to come within the orbit of the concept of "the abrogation . . . of fundamental precepts . . . going to the jurisdiction of the court. . . ." The rationale for this determination appears to be the pronouncements of the Court of Appeals in *People v. Schainuck*<sup>35</sup> and *People v. Walsh*<sup>36</sup> that the failure of a prosecutor to make available to a defendant evidence in the former's possession which would *legitimately* tend to overthrow the People's case is such a deprivation of a fundamental constitutional right as to vitiate the judgment. This holding, however, should be restricted to the particular fact situation in the *Hoffner* case for the question always remaining for determination is whether the evidence not made available is merely incidental or inconsequential or whether it is of such weight and significance that it would *legitimately* tend to overthrow the People's case. Thus, each case must be judged on an over-all analysis of the particular facts therein.

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<sup>35</sup> 286 N.Y. 161, 165-166, 36 N.E.2d 94, 96 (1941).

<sup>36</sup> 262 N.Y. 140, 149-150, 186 N.E. 422, 425 (1933).