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Criminal Procedure--Availability of Coram Nobis in Federal Practice (United States v. Morgan, 74 Sup. Ct. 247 (1954))

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praisal.¹⁴ The trial court, in the instant case, recognizing these precedents, intimated that the plaintiff was limited to the statutory remedy.¹⁵

The principal case, in ruling that equity may intervene in a proper instance,¹⁶ indicates that New York has now adopted the majority rule. In this, the court has made a wise decision. Since, however, merger and consolidation plans may be just as oppressive to dissenting minority shareholders, this equitable relief should not be limited to sale of corporate assets situations.

In the majority of cases, of course, the dissenting stockholder will have a just remedy in appraisal, and the courts should so limit him. Further, as it is the policy of this state to guard against "strike suits,"¹⁷ equity should intervene only in the clearest of situations. It may be said, therefore, that this middle of the road policy, when properly applied, seems to be to the best interests of both the majority and minority stockholders.



CRIMINAL PROCEDURE—AVAILABILITY OF CORAM NOBIS IN FEDERAL PRACTICE.—In 1939, respondent pleaded guilty in a federal district court to mail theft and was sentenced to a four-year term which he duly served. In 1950, he was convicted of a state charge and sentenced as a second offender because of the prior federal conviction.¹ Respondent, while in state prison, filed application for writ of error coram nobis in the district court to vacate its judgment, claiming he was deprived of his constitutional right to counsel under the Sixth Amendment.² The application was denied but the Court of Appeals for the Second Circuit reversed.³ The Supreme Court,

¹⁴ *Blumenthal v. Roosevelt Hotel, Inc.*, 202 Misc. 988, 115 N.Y.S.2d 52 (Sup. Ct. 1952).

¹⁵ *See Eisenberg v. Central Zone Property Corp.*, 203 Misc. 59, 64, 116 N.Y.S.2d 154, 158 (Sup. Ct. 1952). The court then stated that the proposed plan was more than a sale of assets and enjoined the creation of the voting trust. *Ibid.*

¹⁶ "Stockholders may not be forced out of corporations by any such method at the hands of directors or officers or 'principal stockholders' . . . The Legislature never sanctioned such treatment of a minority stockholder and, on application, equity will forbid it." *Eisenberg v. Central Zone Property Corp.*, 306 N.Y. 58, 66-67, 115 N.E.2d 652, 655-656 (1953).

¹⁷ This position is evidenced by the enactment of Section 61-b of the New York General Corporation Law. *See Lapchak v. Baker*, 298 N.Y. 89, 80 N.E.2d 751 (1948).

¹ N.Y. PENAL LAW § 1941.

² There may, however, be a waiver of this constitutional right. *See Chandler v. United States*, 195 F.2d 383 (5th Cir. 1952); *De Jordan v. United States*, 187 F.2d 262 (8th Cir.), *cert. denied*, 341 U.S. 942 (1951).

³ *United States v. Morgan*, 202 F.2d 67 (2d Cir. 1953).

four justices dissenting, affirmed, and *held* that where a state court has considered a prior federal conviction in imposing sentence, the validity of the federal conviction may be inquired into by a motion in the nature of a writ of error coram nobis though sentence has been served. *United States v. Morgan*, 74 Sup. Ct. 247 (1954).

Quae coram nobis resident—let the record remain before us. This was the literal meaning ascribed the writ of error coram nobis at common law.⁴ Its function was to permit a court to review its own judgment because of an alleged error of fact which did not appear on the face of the record,⁵ but for which, judgment probably would not have been entered.⁶ The writ was an exception to the common-law rule that a court lost jurisdiction over a judgment, civil or criminal, upon the expiration of the term at which it was entered.⁷ It first appeared in the common law during the sixteenth century, but, apparently the passage of time did not reflect a proportionate increase in its employment.⁸

The remedy was employed in early criminal proceedings of several states as a device to insure "fair and impartial" trials. One of the first cases to consider the availability of the writ was *Ex parte Toney*,⁹ where the court indicated that the defendant, an escaped slave arraigned as a free person, might seek a vacatur of his conviction by coram nobis, instead of habeas corpus, proceedings. In a case of first impression, *Adler v. State*,¹⁰ an Arkansas court viewed with favor an application for the writ because of the defendant's alleged insanity at the time of trial. In *Sanders v. State*,¹¹ a conviction was vacated by means of the writ because the fear of mob violence had induced a plea of guilty.

Employment of this remedy, however, was not to stop at this point. Concomitant with the expansion of the due process concept in several celebrated Supreme Court decisions,¹² the writ, or a similar motion, its modern counterpart, was employed in state courts as a

⁴ See FRANK, *CORAM NOBIS* iii (1953).

⁵ See *Adler v. State*, 35 Ark. 517, 526 (1880) (writ might issue where the defendant was under age and appeared by attorney, or if either party was *feme covert*, or if either died before verdict).

⁶ See *People v. Touhy*, 397 Ill. 19, 72 N.E.2d 827, 830, *cert. denied*, 332 U.S. 791 (1947).

⁷ See *United States v. Mayer*, 235 U.S. 55, 67 (1914).

⁸ See FRANK, *op. cit. supra* note 4, at 1.

⁹ 11 Mo. 420 (1848).

¹⁰ 35 Ark. 517 (1880).

¹¹ 85 Ind. 318 (1882).

¹² See *Brown v. Mississippi*, 297 U.S. 278 (1936) (conviction obtained in state court by use of coerced confession); *Powell v. Alabama*, 287 U.S. 45 (1932) (failure of trial court to give defendants, charged with capital offense, a reasonable time and opportunity to secure counsel); *Moore v. Dempsey*, 261 U.S. 86 (1923) (mob-dominated trial causing an actual interference with the course of justice); see *Mooney v. Holohan*, 294 U.S. 103, 112-113 (1935) (use of testimony known to be perjured by the prosecution and withholding true evidence to procure a confession thereby).

post-trial proceeding to attack collaterally the legality of a conviction apparently proper on its face.¹³

Whether or not *coram nobis* applied to criminal proceedings in federal practice was a much disputed question until quite recently. In the past, the Supreme Court had expressly declined to make the decision.¹⁴ Earlier decisions seemed to negate the existence of the writ in criminal matters.¹⁵ The enactment of the Federal Rules of Criminal Procedure failed to clarify the situation as the writ was neither expressly excluded nor recognized.¹⁶ However, it is apparent that *coram nobis*, although superseded in form by a motion to vacate or set aside the judgment,¹⁷ became an established part of federal practice in the past decade.¹⁸ Nevertheless, the "teeth" of the remedy remained substantially unchanged, in that the court exercised a correctional jurisdiction at a subsequent term. Under such motions, relief has been granted for failure to advise one of his constitutional right to counsel and for failure to provide the same.¹⁹ Perjured testimony knowingly employed by the prosecution²⁰ and insanity²¹ are also recognized as grounds for the granting of such relief. Judicially imposed restrictions, however, required the defendant to allege his innocence, to set forth a meritorious defense and to seek the remedy

¹³ See, e.g., *People v. Guariglia*, 303 N.Y. 338, 102 N.E.2d 580 (1951) (not advised as to right of counsel, nor represented by authorized counsel); *Matter of Bojinoff v. People*, 299 N.Y. 145, 85 N.E.2d 909 (1949) (failure of court to advise one of his right to counsel plus a failure to provide the same); *Matter of Lyons v. Goldstein*, 290 N.Y. 19, 47 N.E.2d 425 (1943) (plea of guilty induced by fraud and misrepresentation of the prosecution); *People v. Sullivan*, 276 App. Div. 1087, 96 N.Y.S.2d 266 (2d Dep't 1950) (plea of guilty induced by a promise to "take care of the defendant"); *People v. Glass*, 201 Misc. 460, 114 N.Y.S.2d 635 (Gen. Sess. 1952) (indictment set forth no crime); *People v. Riley*, 191 Misc. 888, 83 N.Y.S.2d 281 (County Ct. 1948) (suppression or omission of material evidence by the prosecution); *People v. Steele*, 65 N.Y.S.2d 214 (Gen. Sess. 1946) (perjured testimony knowingly employed by the prosecution); see *People ex rel. Rose v. Additon*, 189 Misc. 102, 104, 73 N.Y.S.2d 561, 563 (Sup. Ct. 1947) (insanity when plea of guilty was made).

¹⁴ See *United States v. Mayer*, 235 U.S. 55, 68-69 (1914); *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947); *Meredith v. United States*, 138 F.2d 772, 773 (6th Cir. 1943).

¹⁵ See *United States v. Luvisch*, 17 F.2d 200, 202 (S.D. Mich. 1927); *United States v. Port Washington Brewing Co.*, 277 Fed. 306, 314 (E.D. Wis. 1921).

¹⁶ This was due, not to inadvertence, but rather to disagreement. See *Dession*, *The New Federal Rules of Criminal Procedure II*, 56 YALE L.J. 197, 233-234 (1947).

¹⁷ See *Spaulding v. United States*, 155 F.2d 919, 920 (6th Cir. 1946); *Strang v. United States*, 53 F.2d 820, 821 (5th Cir. 1931); *United States v. Luvisch*, *supra* note 15 at 202.

¹⁸ See *Roberts v. United States*, 158 F.2d 150 (4th Cir. 1946); *Garrison v. United States*, 154 F.2d 106 (5th Cir. 1946); *United States v. Steese*, 144 F.2d 439 (3d Cir. 1944); see *United States v. Monjar*, 64 F. Supp. 746, 747 (D. Del. 1946).

¹⁹ *United States v. Steese*, *supra* note 18.

²⁰ *Garrison v. United States*, *supra* note 18.

²¹ *Cf. Roberts v. United States*, *supra* note 18.

with reasonable diligence.²²

It is to be noted that one cannot attack collaterally a conviction by habeas corpus proceedings unless he is presently detained under that conviction.²³ Thus, *coram nobis* was invoked in instances where sentence had already been served if additional punishment had been imposed under a multiple offender statute.²⁴

With the enactment of Section 2255 of the Judicial Code,²⁵ permitting one to attack his conviction directly, a new problem faced the courts. Did Congress, by the adoption of such statute, intend to preempt the field of collateral attack as to *coram nobis* proceedings, or were the remedies to be co-extensive?²⁶ The section, admittedly, afforded relief to one who was "in custody" under a federal conviction.²⁷ Thus, relief was denied in instances where the federal sentence had been served, even though the petitioner was serving additional punishment under a state conviction because of the previous federal offense.²⁸ It would seem, therefore, that some courts considered Section 2255 as the statutory replacement for the common-law remedy of *coram nobis*.²⁹ Certainly, there is no room for doubt as to the availability of the remedy prior to the enactment of Section 2255.³⁰ It has been stated by the Supreme Court that Section 2255 was enacted only ". . . to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge

²² See *United States v. Moore*, 166 F.2d 102 (7th Cir.), *cert. denied*, 334 U.S. 849 (1948).

²³ See *United States v. Bradford*, 194 F.2d 197, 200 (2d Cir. 1952). "As the law now stands, the remedies open to a convict who is not in custody are limited to an appeal from the judgment, and to a motion made under Rules 33, 34 and 35 . . ." *Id.* at 201.

²⁴ *United States v. Steese*, 144 F.2d 439 (3d Cir. 1944); *cf. Roberts v. United States*, 158 F.2d 150 (4th Cir. 1946).

²⁵ 28 U.S.C. § 2255 (Supp. 1950). This direct attack, limited to matters that may be raised on collateral attack, is made not through habeas corpus proceedings in the district where the petitioner is imprisoned, but by motion in the trial court which originally entertained jurisdiction. See *FRANK, CORAM NOBIS* 95, 112 (1953).

²⁶ The better reasoning would appear to be that the remedies are co-extensive. "It is only when there has been the denial of the substance of a fair trial that the *validity of the proceedings may be thus collaterally attacked or questioned by motion in the nature of petition for writ of error coram nobis or under 28 U.S.C.A. 2255.*" *Howell v. United States*, 172 F.2d 213, 215 (4th Cir.), *cert. denied*, 337 U.S. 906 (1949) (emphasis added). ". . . [T]he motion to vacate permitted by the Code section [2255], although in the nature of *coram nobis*, is not that writ, and its nature and meaning must be ascertained from the terms of the statute." *Bruno v. United States*, 180 F.2d 393, 395 (D.C. Cir. 1950).

²⁷ *United States v. Kerschman*, 201 F.2d 682 (7th Cir. 1953); *Farnsworth v. United States*, 198 F.2d 600 (D.C. Cir. 1952), *cert. denied*, 344 U.S. 915 (1953); *United States v. Lavelle*, 194 F.2d 202 (2d Cir. 1952).

²⁸ See note 27 *supra*.

²⁹ See *United States v. Calp*, 83 F. Supp. 152, 153 (D. Md. 1949); *United States v. Morris*, 83 F. Supp. 970, 971 (D.D.C. 1949).

³⁰ See note 18 *supra*.

upon prisoners' rights of collateral attack upon their convictions."³¹ As previously noted, the Rules of Criminal Procedure did not expressly abolish this remedy, nor was one provided in its stead.³² On the other hand, many cases have considered *coram nobis*,³³ like *habeas corpus*,³⁴ as a separate proceeding, civil in nature. If this be the fact, it would seem that the remedy no longer exists, as the Federal Rules of Civil Procedure expressly abolished the writ.³⁵ Closer examination reveals, however, that there is sufficient authority for the converse of the proposition, *i.e.*, that *coram nobis* is not an independent proceeding but part of the original trial.³⁶

Nor should relief have been denied for any of the reasons stated in the vigorous dissent.³⁷ It is unnecessary for one, who is seeking such relief, to allege his innocence and set forth facts showing a meritorious defense as the question before the court is not one's guilt or innocence, but rather the regularity of the proceedings at the trial.³⁸ It has also been stated that an unreasonable delay in seeking relief will preclude review.³⁹ There is no basis for this contention under the factual situation of the instant case. There is no statute of limitations applicable to such a motion in federal practice;⁴⁰ nor could the respondent have sought review of the federal conviction when he was convicted and sentenced in New York;⁴¹ lastly, as no jurisdiction may be acquired by the court, in the first instance, if one is denied his constitutional rights under the Sixth Amendment,⁴² an

³¹ *United States v. Hayman*, 342 U.S. 205, 219 (1952).

³² "But it must be remembered that not every right, constitutional or otherwise, is mentioned or needs to be mentioned in the Rules." *United States v. Landicho*, 72 F. Supp. 425, 427 (D. Alaska 1947).

³³ See *Jones v. Squier*, 195 F.2d 179, 180 (9th Cir. 1952); *Smith v. State*, 245 Ala. 161, 16 So. 2d 315, 316 (1944); *State ex rel. Meyen v. Youngblood*, 221 Ind. 408, 48 N.E.2d 55 (1943); *Elliott v. Commonwealth*, 292 Ky. 614, 167 S.W.2d 703, 706 (1942), *cert. denied sub nom. Elliott v. Buchanan*, 319 U.S. 775 (1943).

³⁴ See *Ex parte Tom Tong*, 108 U.S. 556, 559-560 (1883).

³⁵ See FED. R. Civ. P. 60(b). "Writs of *coram nobis* . . . are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

³⁶ See *People v. Paiva*, 31 Cal. 2d 503, 190 P.2d 604, 608 (1948); *Irwin v. State*, 220 Ind. 228, 41 N.E.2d 809, 816 (1942); *Dobbs v. State*, 62 Kan. 108, 61 Pac. 408, 409 (1900), *appeal dismissed*, 184 U.S. 697 (1902).

³⁷ See *United States v. Morgan*, 74 Sup. Ct. 247, 253 (1954) (dissenting opinion).

³⁸ See *Barber v. United States*, 142 F.2d 805, 806-807 (4th Cir.), *cert. denied*, 322 U.S. 741 (1944); *Allen v. United States*, 102 F. Supp. 866, 869 (N.D. Ill. 1952).

³⁹ See *United States v. Moore*, 166 F.2d 102, 105 (7th Cir.), *cert. denied*, 334 U.S. 849 (1948); *Spaulding v. United States*, 155 F.2d 919, 921 (6th Cir. 1946).

⁴⁰ See *United States v. Moore*, *supra* note 39; *United States v. Landicho*, 72 F. Supp. 425, 427 (D. Alaska 1947).

⁴¹ *People v. McCullough*, 300 N.Y. 107, 89 N.E.2d 335 (1949).

⁴² *Johnson v. Zerbst*, 304 U.S. 458 (1938).

unreasonable delay cannot have the effect of improving the stature of a void judgment.⁴³ As the court lost its jurisdiction over the respondent, possibly after sentence,⁴⁴ but certainly after sentence had been served,⁴⁵ the invocation of the "all-writs" section⁴⁶ by the majority appears unwarranted in the instant case. From the foregoing observations, it is seen that the remedy might be considered "... agreeable to the usages and principles of law." However, it is difficult to see how the remedy was "... necessary or appropriate in aid of their [the courts'] respective jurisdictions. . . ." Jurisdiction, it would seem, must *precede* the granting of the writ, and must not be acquired by reason of it. Nevertheless, the action of the majority may be sustained on another theory. It is undeniable that a court possesses power, independent of any statute, to correct its own judgment especially to "... remedy an injustice . . . which goes to the extent of depriving a man of his constitutional rights."⁴⁷

Had the respondent been denied relief in the instant case, he would have been remediless. Habeas corpus and Section 2255 were unavailable as the respondent was no longer in custody under the federal conviction.⁴⁸ Nor was any other relief available under the federal rules as the time for any pertinent motion had long since passed.⁴⁹

On principle, the remedy affording relief such as was granted in the instant case, should exist. Instead of being deprived of his constitutional right to counsel, as in the instant case, assume that petitioner's conviction was based on perjured testimony knowingly employed by the prosecuting authorities. Assume further that the petitioner did not learn of this until after he had served his sentence. Is this man to carry the stigma of a felon for the rest of his life or suffer additional unwarranted punishment as a multiple offender be-

⁴³ See *Allen v. United States*, 102 F. Supp. 866, 868 (N.D. Ill. 1952). "As to the Government's remaining contention, i.e., that Allen did not assert his constitutional right [of counsel] with due diligence and, therefore, is not entitled to relief, the Court is unable to perceive its applicability. A void judgment is as void today as it was twenty years ago. No aging process, whereby a void judgment improves as to stature and validity by the passage of time, can properly be interposed." *Id.* at 869.

⁴⁴ See *United States v. Plumer*, 27 Fed. Cas. No. 16,056, at 574 (C.C.D. Mass. 1859).

⁴⁵ See *United States v. Wright*, 56 F. Supp. 489, 491 (E.D. Ill. 1944). However, in *Fiswick v. United States*, 329 U.S. 211, 220-221 (1946), the Supreme Court indicated that although sentence had been served, relief might have been available to the petitioner had he shown that, under state or federal law, further penalties could be imposed on him.

⁴⁶ 28 U.S.C. § 1651(a) (Supp. 1950). "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."

⁴⁷ See *United States v. Steese*, 144 F.2d 439, 442 (3d Cir. 1944).

⁴⁸ See notes 23 and 27 *supra*.

⁴⁹ See FED. R. CRIM. P. 33, 34, 35.

cause of the unjust conviction? Natural justice rebels at such a thought. Nevertheless, such a result would follow if coram nobis were unavailable as only a presidential pardon, an avenue discretionary if not doubtful, could erase the felonious brand.

Certain undesirable consequences are foreseeable as a result of the instant decision. Litigation often will not come to an end once and for all as it should. Many unfounded or fabricated petitions will undoubtedly find their way into the courts and serve to hamper the administration of justice. Notwithstanding these consequences, fundamental rights must be assured in criminal proceedings. One of these, the Sixth Amendment, is not a procedural formality and ". . . stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'"⁵⁰



MILITARY LAW—COURTS-MARTIAL—JURISDICTION TO TRY DISCHARGED SERVICEMEN. — United States military authorities arrested the accused, an honorably discharged veteran, for the murder of a Korean national allegedly committed while the accused was in service. He was immediately flown to Korea, where the crime took place, to stand trial in a military court pursuant to Article 3(a) of the Uniform Code of Military Justice. The District Court for the District of Columbia, on petition, granted a writ of habeas corpus¹ and ordered his release.² Reversing this order, the Court of Appeals held that Article 3(a) is a valid exercise of the congressional power to enact rules regulating the armed services, and, further, that the due process clause does not require a hearing before the removal of the accused to the place of trial. *Talbott v. Toth*, No. 11964, D.C. Cir., March 25, 1954.

Originally, the United States Army,³ Navy,⁴ and Coast Guard⁵ had separate systems of courts-martial. Under these systems, the military courts could not try a civilian not connected with the military, except during periods when martial law had been imposed upon a specific area.⁶ Moreover, the courts' jurisdiction over a member of

⁵⁰ See *Allen v. United States*, 102 F. Supp. 866, 868 (N.D. Ill. 1952).

¹ *Toth v. Talbott*, 113 F. Supp. 330 (D.D.C. 1953).

² *Toth v. Talbott*, 114 F. Supp. 468 (D.D.C. 1953).

³ 41 STAT. 787 (1920), 10 U.S.C. § 1471 *et seq.* (1946) (Articles of War—also applicable, in amended form, to Air Force).

⁴ 12 STAT. 600 (1862), 34 U.S.C. § 1200 (1946) (Articles for the Government of the Navy).

⁵ 34 STAT. 200 (1906), as amended, 14 U.S.C. § 141 *et seq.* (1946) (Disciplinary Law of the Coast Guard).

⁶ See *Ex parte Milligan*, 4 Wall. 2 (U.S. 1866).