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CURRENT TREATMENT OF CORAM NOBIS IN FEDERAL AND NEW YORK COURTS

In General

The writ of error coram nobis, which in recent years has undergone a rebirth in the state [1] and federal [2] courts of the United States, is of course ancient in origin. In its inception at common law, the latin terminology for the writ, *"quae coram nobis resident,"* was translated to mean the "record which remains before us." [3] Nobis had reference to the King in the person of his court, the King's Bench. Although the reference, in the 16th century title, is to the record before the court, the writ today is not intended to correct errors contained therein, but is a proceeding whereby a judgment may be set aside for some error not apparent on the record.[4] A motion for coram nobis will lie only in the court where the original judgment of conviction was rendered [5] and is always heard by the sentencing judge, if he is available.[6] At the hearing the defendant may testify and call witnesses, in addition to introducing the court records, in an attempt to have the prior judgment vacated. In New York he has no right to a jury since coram nobis proceedings rest solely in the discretion of the court.[7]

The writ of coram nobis will only be granted for errors of fact which do not appear in the record; it will not be granted for errors of law committed in the lower courts.[8] The latter may be attacked by a motion for a new trial, an appeal or other statutory remedy for which coram nobis is not a substitute.[9] Coram nobis is thus a supplement to other safeguards given to those accused of crimes. Where the record discloses some error the defendant has the normal proceeding at law to protect his rights, but where the record is silent as to any irregularity the courts may allow the extraordinary remedy of coram nobis to correct the injustice.

The effect of the granting of coram nobis by the court is to vacate the judgment attacked by the petitioner, but it does not mean he will automatically go free. The hearing does not go to the merits of the original action and the defendant may still be kept in custody pending

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[1] See Lyons v. Goldstein, 290 N.Y. 19, 25-27, 47 N.E.2d 425, 428-29 (1943).

[2] See United States v. Morgan, 346 U.S. 502 (1954).

[3] See People v. Reid, 195 Cal. 249, 232 Pac. 457, 459 (1924); Donoghue & Jacobson, *Coram Nobis and the Hoffner Case,* 28 ST. JOHN'S L. REV. 234, 235 (1954).

[4] People v. Shapiro, 3 N.Y.2d 203, 205, 144 N.E.2d 12, 13 (1957).

[5] People v. McCullough, 300 N.Y. 107, 110, 89 N.E.2d 335, 337 (1949).

[6] See FRANK, CORAM NOBIS ¶ 4.01[a], at 67 (1953). This leading text contains a complete discussion of coram nobis.

[7] See People v. Langan, 303 N.Y. 474, 480, 104 N.E.2d 861, 864 (1952).

[8] See People v. Sidoti, 1 A.D.2d 232, 149 N.Y.S.2d 371 (4th Dep't 1956).

[9] See Taylor v. United States, 177 F.2d 194 (4th Cir. 1949); People v. Reid, 195 Cal. 249, 232 Pac. 457, 460 (1924).

a retrial on the previous charge.[10] An order which grants or denies a motion to vacate a judgment of conviction may be appealed in New York by either the defendant or the People.[11] By vacating the judgment the writ of coram nobis removes the stigma of conviction from the defendant's record. This can be of great importance to a defendant convicted of a later crime [12] and sentenced under a Multiple Offenders Law,[13] as well as to the party convicted only once of crime. Although the defendant may still have to stand trial on the merits of the original action, the passage of time may make it more difficult for the prosecution to secure a conviction and if not acquitted the defendant may at least be convicted of a lesser degree of the crime and receive a lighter sentence.

Coram Nobis in New York

Coram nobis was resurrected in New York by the famous *Lyons v. Goldstein* [14] case which declared that a court had the power to investigate its own judgment of conviction and if necessary to set it aside. Generally the courts have stated coram nobis to be available whenever the defendant has been denied constitutional rights or has received a conviction based upon a fraud perpetrated upon the court.[15] More specifically, it has been granted on the grounds that the defendant did not receive proper representation by counsel,[16] that the prosecution used testimony which it knew to be perjured,[17] and that the defendant's plea of guilty was induced by fraud or misrepresentation.[18] In addition it has been granted where the prosecution withheld material testimony,[19] where the defendant was underage at the time of the crime [20] and where the indictment set forth no criminal act.[21] Insanity of defendant at the time of the trial has also been stated to

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[10] See FRANK, CORAM NOBIS ¶ 4.01[a], at 70 (1953).

[11] N.Y. CODE CRIM. PROC. §§ 517-20.

[12] See, *e.g.*, United States v. Morgan, 346 U.S. 502 (1954); People v. Richetti, 302 N.Y. 290, 97 N.E.2d 908 (1951); People v. Freudenberg, 10 M.2d 1091, 171 N.Y.S.2d 585 (Magis. Ct. 1958).

[13] N.Y. PEN. LAW § 1941.

[14] 290 N.Y. 19, 47 N.E.2d 425 (1943).

[15] See People v. Sadness, 300 N.Y. 69, 73-74, 89 N.E.2d 188, 189 (1949); Donoghue & Jacobson, *Coram Nobis and the Hoffner Case*, 28 ST. JOHN'S L. REV. 234, 239 (1954).

[16] Bojinoff v. People, 299 N.Y. 145, 85 N.E.2d 909 (1949); Hogan v. Court of General Sessions, 296 N.Y. 1, 68 N.E.2d 849 (1946). See FRANK, CORAM NOBIS ¶ 3.01, at 23 (1953).

[17] Morhous v. New York Supreme Court, 293 N.Y. 131, 56 N.E.2d 79 (1944); People v. Steele, 65 N.Y.S.2d 214 (Ct. Gen. Sess. 1946).

[18] People v. Guariglia, 303 N.Y. 338, 102 N.E.2d 580 (1951); People v. Goldstein, 1 A.D.2d 1044, 152 N.Y.S.2d 330 (2d Dep't 1956) (mem. opinion); People v. Sullivan, 276 App. Div. 1087, 96 N.Y.S.2d 266 (2d Dep't 1950) (mem. opinion).

[19] People v. Riley, 191 Misc. 888, 83 N.Y.S.2d 281 (County Ct. 1948).

[20] People v. Adomaitis, 201 Misc. 707, 112 N.Y.S.2d 38 (Sup. Ct. 1952). See People *ex rel.* Harrison v. Jackson, 298 N.Y. 219, 229, 82 N.E.2d 14, 19 (1948) (dissenting opinion).

[21] People v. Glass, 201 Misc. 460, 114 N.Y.S.2d 635 (Ct. Gen. Sess. 1952).

be a ground for coram nobis.[22] The attempts of defendants to extend coram nobis to other situations have so far met with failure. As already mentioned, coram nobis will not be granted to correct errors of law,[23] and in addition the courts have denied its use in attacking the credibility of witnesses,[24] introducing new evidence[25] and challenging the sufficiency of evidence before the grand jury.[26] The refusal to extend coram nobis relief to these situations is based upon the existence of alternative remedies at law, either appeal or other statutory remedy. Other grounds may be allowed for the writ in the future, since its use has been gradually expanded by the courts since the *Goldstein* case.

In addition to granting or denying coram nobis when raised on the grounds listed above, the courts in New York have been defining standards for its use. It is, for example, only available where a judgment of conviction has been entered against the defendant.[27] The writ will not be barred by the fact that the sentence has already been served.[28] The writ cannot be used to attack a prior conviction in another state since to do so is to raise a question of law, which cannot be raised by a coram nobis proceeding.[29] Traditionally, coram nobis has not been available to correct errors appearing on the record.[30] The defendant's rights in such a case are protected by the normal processes of law. However, a recent New York case[31] has declared that:

> Judicial interference with the right to counsel guaranteed to defendant by law may warrant the extraordinary remedy of *coram nobis*, even though the error appears on the face of the record. . . .[32]

A lower court case since that opinion followed the old rule.[33]

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[22] See People v. Nickerson, 1 N.Y.2d 815, 135 N.E.2d 604 (1956) (dictum).

[23] People v. Sidoti, 1 A.D.2d 232, 149 N.Y.S.2d 371 (4th Dep't 1956).

[24] People v. Whitman, 185 Misc. 459, 56 N.Y.S.2d 890 (Ct. Gen. Sess. 1945). See also People v. Salemi, 308 N.Y. 863, 126 N.E.2d 305 (1955), where coram nobis was refused when raised on the ground of use of the testimony of an incompetent witness; FRANK, CORAM NOBIS ¶ 3.02, at 53 (1953).

[25] People v. Palumbo, 282 App. Div. 1059, 126 N.Y.S.2d 381 (2d Dep't 1953) (mem. opinion). Newly discovered evidence is not a ground for coram nobis because another legal remedy exists. But since by statute a new trial is only available for one year after judgment for newly discovered evidence, coram nobis would seem to be the only remedy for vacating the judgment on this ground after the one year has expired. See N.Y. CODE CRIM. PROC. §§ 465-66.

[26] People v. Wurzler, 278 App. Div. 608, 101 N.Y.S.2d 818 (3d Dep't 1951) (mem. opinion).

[27] People v. King, 2 M.2d 187, 134 N.Y.S.2d 17 (County Ct. 1954).

[28] People v. Glass, 201 Misc. 460, 464, 114 N.Y.S.2d 635, 637 (Ct. Gen. Sess. 1952).

[29] People v. Sidoti, 1 A.D.2d 232, 149 N.Y.S.2d 371 (4th Dep't 1956).

[30] See Hogan v. Court of General Sessions, 296 N.Y. 1, 8-9, 68 N.E.2d 849, 852 (1946).

[31] People v. Silverman, 3 N.Y.2d 200, 144 N.E.2d 10 (1957).

[32] *Id.* at 202, 144 N.E.2d at 11.

[33] People v. Zizzo, 9 M.2d 484, 170 N.Y.S.2d 594 (County Ct. 1958).

Coram Nobis in the Federal Courts

The use of coram nobis in the federal courts of the United States is of relatively recent origin. An early case[34] had held that there was no precedent for a federal court to vacate its own judgment after the term of court had expired. For many years a wider use of habeas corpus, allowing the appeal court to review facts not on the record, took the place of coram nobis in the federal system.[35] Then, following an increase of applications for writs of the type of coram nobis in the federal courts,[36] Congress passed section 2255 of title 28 of the United States Code,[37] which specifically granted to federal courts the power to vacate their own judgments when the defendant could show he had been denied some basic constitutional right at the trial. This was thought for a time to preclude the use of the writ of coram nobis itself in the federal courts.[38] However, in 1954 the United States Supreme Court held in *United States v. Morgan*[39] that section 2255 was not inclusive of all remedies in this field. The Supreme Court concluded that the statute was aimed at practical difficulties in the administration of habeas corpus and was not intended to restrict a prisoner's right of collateral attack upon his conviction. Section 2255, its use limited to those in custody, was found to be more restrictive in scope than the ancient writ itself. The Court declared that since a motion for a writ of coram nobis is not specifically authorized by any statute of Congress, the power to grant such relief must come from the all-writs section of the Judicial Code.[40] Thus in the federal judicial system both statutory relief and a motion in the nature of coram nobis are available to vacate a judgment.

Although both remedies are available, under the statute the defendant must be in custody from the conviction which is sought to be vacated by the action.[41] Thus, where the petitioner is imprisoned on the judgment sought to be vacated, section 2255 will be used; where he is not imprisoned on that judgment a writ of coram nobis will be used. Once a petitioner has sought relief under section 2255 the statute declares that there is no requirement that the court should entertain a second motion for similar relief by the same prisoner.[42]

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[34] United States v. Plumer, 27 Fed. Cas. 561 (No. 16056) (C.C.D. Mass. 1859).

[35] See Frank v. Mangum, 237 U.S. 309, 330-31 (1914).

[36] See, *e.g.*, United States v. Steese, 144 F.2d 439 (3d Cir. 1944); Tinkoff v. United States, 129 F.2d 21 (7th Cir. 1942).

[37] 28 U.S.C. § 2255 (1952).

[38] 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).

[39] 346 U.S. 502, 510-11 (1954).

[40] "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." 28 U.S.C. § 1651(a) (1952).

[41] See United States v. Lavelle, 194 F.2d 202 (2d Cir. 1952).

[42] 28 U.S.C. § 2255 (1952).

However, there is apparently no reason why a prisoner, who is unsuccessful in an action brought under the statute, cannot bring successive motions of coram nobis seeking the same relief.

Contrast and Comparison

Although in general a motion in the nature of coram nobis will be granted on the same grounds in the federal and New York state courts, some differences have developed. For example, federal courts will vacate a plea of guilty inspired by a leniency promise by the prosecution,[43] while in New York the rule on this is not certain. New York courts have held that a promise made by a district attorney is not a ground for coram nobis.[44] However, such relief has been granted in the lower courts of New York in at least one such case,[45] and the Court of Appeals recently granted a motion for coram nobis because the prosecutor had allegedly threatened to group the indictments, and consequently subject defendant to a longer sentence, unless he pleaded guilty.[46] There would not seem to be any reason for discriminating between promises and threats since in both cases the defendant is misled to plead guilty. New York may therefore be coming closer to the view of the federal courts in this situation.

In still another area, the rule in New York has been that coram nobis will not be granted on the ground that defendant did not have counsel present at the time of sentence.[47] Under the federal view, the presence of counsel would be required at the time of sentence and if he was not present a motion to vacate judgment would be granted.[48] However, a recent New York case[49] has held that the defendant is entitled to the aid of counsel at each and every stage of the proceedings and failure to provide this aid is ground for a writ of coram nobis.[50] Although the federal courts have adhered to a stricter enforcement of due process in requiring the presence of counsel at the time of sentence, in a related area they have indicated that section 2255 is not available where the defendant charges in-

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[43] Ziebart v. United States, 185 F.2d 124 (5th Cir. 1950).

[44] People v. DeMaio, 303 N.Y. 939, 105 N.E.2d 629 (1952) (mem. opinion); People v. Hasenstab, 283 App. Div. 433, 128 N.Y.S.2d 388 (4th Dep't 1954).

[45] People v. Jordan, 283 App. Div. 759, 128 N.Y.S.2d 111 (3d Dep't 1954) (mem. opinion).

[46] People v. Picciotti, 4 N.Y.2d 340, 151 N.E.2d 191, 175 N.Y.S.2d 32 (1958).

[47] See note 44 *supra*.

[48] Gadsden v. United States, 223 F.2d 627 (D.C. Cir. 1955); Martin v. United States, 182 F.2d 225 (5th Cir. 1950).

[49] People v. Freudenberg, 10 M.2d 1091, 171 N.Y.S.2d 585 (Magis. Ct. 1958). See also People v. Silverman, 3 N.Y.2d 200, 144 N.E.2d 10 (1957).

[50] In a somewhat similar situation in People v. Zizzo, 9 M.2d 484, 170 N.Y.S.2d 594 (County Ct. 1958), coram nobis was not allowed where the defendant was not present when the jury, which had retired to deliberate, returned to have parts of the testimony read to it, although his counsel was present.

effectual representation by counsel.[51] The New York courts, on the other hand, tend to find this a sufficient ground for coram nobis.[52] Apparently the federal courts believe that the absence of counsel at the time of sentence is more than mere ineffectual representation, while in New York the absence of counsel at sentence does not even amount to ineffectual representation.

The treatment of coram nobis has tended to vary in the two judicial systems in the case where the petitioner alleges that the indictment was insufficient. New York has granted the relief of coram nobis where the defendant has proved this allegation.[53] However, in the federal courts the defendant cannot attack the sufficiency of the indictment after conviction where the issue has not been raised before or during trial unless the circumstances are exceptional.[54] Similarly, while coram nobis may be granted in New York for insanity of the defendant at the time of trial,[55] it is not available in the federal courts [56] as there exists another remedy.[57]

Aside from the differences already mentioned, the treatment of coram nobis is similar in both the federal and New York state courts.[58] The language of the federal statute is broad in scope and not limited

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[51] See Simmons v. United States, 230 F.2d 73 (10th Cir. 1956).

[52] See People v. Schectman, 282 App. Div. 894, 125 N.Y.S.2d 93 (2d Dep't 1953) (mem. opinion). The defendant can understandingly, competently and intelligently waive his right to counsel. Bojinoff v. People, 299 N.Y. 145, 151, 85 N.E.2d 909, 912 (1949). But the court must inquire if the defendant desires counsel at the time of arraignment even though the defendant has been at liberty on bail, raising an inference that he could procure his own counsel. People v. Koch, 299 N.Y. 378, 87 N.E.2d 417 (1949).

[53] People v. Fortson, 5 M.2d 677, 160 N.Y.S.2d 94 (County Ct. 1957); People v. Glass, 201 Misc. 460, 114 N.Y.S.2d 635 (Ct. Gen. Sess. 1952).

[54] Barnes v. United States, 197 F.2d 271 (8th Cir. 1952); Keto v. United States, 189 F.2d 247 (8th Cir. 1951); see Morneau v. United States, 181 F.2d 642 (8th Cir. 1950) (per curiam) (dictum). An attack upon the sufficiency of the indictment was allowed in Marteney v. United States, 216 F.2d 760 (10th Cir. 1954).

[55] People v. Nickerson, 1 N.Y.2d 815, 135 N.E.2d 604, 153 N.Y.S.2d 73 (1956) (mem. opinion) (dictum).

[56] See United States v. Meadows, 140 F. Supp. 184 (W.D. Mich. 1955).

[57] 18 U.S.C. § 4245 (1952). "Whenever . . . there is probable cause to believe that . . . [a person convicted of an offense against the United States] was mentally incompetent at the time of his trial, provided the issue of mental competency was not raised and determined before or during said trial, the Attorney General shall transmit the report of the board of examiners and the certificate of the Director of the Bureau of Prisons to the clerk of the district court wherein the conviction was had. Whereupon the court shall hold a hearing to determine the mental competency of the accused. . . . If the court shall find that the accused was mentally incompetent at the time of his trial, the court shall vacate the judgment of conviction and grant a new trial." *Ibid.*

[58] See, *e.g.*, Euziere v. United States, 249 F.2d 293 (10th Cir. 1957) (guilty plea inspired by threats of court); United States v. Rutkin, 212 F.2d 641 (3d Cir. 1954) (use of perjured testimony); People v. Guariglia, 303 N.Y. 338, 102 N.E.2d 580 (1951); People v. Steele, 65 N.Y.S.2d 214 (Ct. Gen. Sess. 1946).

to any particular situation.[59] Similarly, the courts of New York have extended the remedy to the denial of any fundamental rights.[60] Prior to the passage of section 2255 a motion for coram nobis was more severely restricted in the federal courts than in New York. The defendant was required to set forth a good defense to the prior conviction, and to show reasonable diligence in bringing the action.[61] The shadow of these requirements persisted under section 2255.[62] Finally, the *Morgan* case found failure to comply with these requirements insufficient to bar relief [63] and upon remand the circuit court even more clearly repudiated the old requirements, declaring that to require a good defense would be to shift the burden of proof to the defendant, and that the effect of requiring reasonable diligence in bringing coram nobis would be to validate a conviction void to begin with by the passage of years unjustly spent in prison.[64]

Conclusion

The re-establishment of coram nobis by the United States Supreme Court [65] and state courts [66] is a further safeguard of due process for the individual. It is, in the case of the Supreme Court, another example of that tribunal's increased emphasis in recent years upon the protection of individual rights. A heavier burden upon the courts and prosecuting officials may have resulted from this re-establishment,[67] but the greater protection afforded to defendants outweighs this disadvantage.

Although the language of the federal statute is broad in scope, the New York courts have tended to be more liberal in recognizing new grounds for which a judgment may be vacated. To place the

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[59] 28 U.S.C. § 2255 (1952). "A prisoner . . . 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, 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." *Ibid.*

[60] See People v. Sadness, 300 N.Y. 69, 73-74, 89 N.E.2d 188, 189 (1949).

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

[62] See, *e.g.*, Bowen v. United States, 192 F.2d 515 (5th Cir. 1951); Farnsworth v. United States, 198 F.2d 600 (D.C. Cir. 1952) (per curiam).

[63] United States v. Morgan, 346 U.S. 502 (1954).

[64] United States v. Morgan, 222 F.2d 673, 675 (2d Cir. 1955).

[65] See note 63 *supra*.

[66] See, *e.g.*, Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425 (1943).

[67] See United States v. Baker, 158 F. Supp. 842 (E.D. Ark. 1958). "The Morgan case has already produced a vast amount of litigation in the federal courts, thus increasing the already heavy workload of the judges and United States attorneys, to say nothing of putting the Government to the trouble and expense of transporting prisoners to and from penal institutions . . . to testify in support of petitions, the vast majority of which are utterly without merit . . . ." *Id.* at 849.

determination of the defendant's right to the writ entirely in the hands of the courts is perhaps to allow them to usurp a legislative function, but in viewing their use of it thus far one cannot say that they have failed to protect the right of defendants to full litigation. Of course, in the absence of a statute guaranteeing to a defendant the right to attack a judgment for some error not apparent in the record, he is always at the mercy of the courts of his particular era, whose opinions as to the necessity of continuing the use of the writ may change. That this possibility is not altogether remote can be borne out by the virtual limbo of disuse into which the writ had fallen until comparatively recent times. A statute in New York similar to section 2255, but not requiring incarceration at the time of bringing the action, might seem to be advisable. The writ of coram nobis, rather than being abolished, would be assimilated into such a statute. This was undoubtedly the intention of the creators of section 2255, which intention, however, failed.[68] This failure points up one possible disadvantage to a statutory form of coram nobis. In construing the statute the courts may actually restrict the areas in which coram nobis may be granted. The purpose of coram nobis, as has been pointed out, is to provide a remedy in a case where no other relief is available to a defendant. As a result an important ingredient in coram nobis is its flexibility. Rather than restrict its use to specific grounds the courts should, and probably will, extend coram nobis to new situations in which the defendant has no other relief, as they develop.

Moreover, except in the cases where another remedy is provided in the federal laws and none in the state laws, or vice versa, there would seem to be no valid reason for the different treatment in the two judicial systems accorded some of the problems mentioned above. A greater liberality on the side of the defendant would appear to be the better rule in such situations, for while litigation must come to an end sometime, undoubtedly most people would prefer to see the courts overzealous in guaranteeing that a defendant will not be unjustly convicted.

THE IMPOSTOR PAYEE, OR WHAT'S IN A NAME?

The impostor payee situation can arise only where one person successfully impersonates another.[1] In the classic case a swindler

[68] See United States v. Kerschman, 201 F.2d 682 (7th Cir. 1953), where coram nobis was thought to be superseded by § 2255. But as already stated in the text, United States v. Morgan, 346 U.S. 502 (1954), declared that the statute was not inclusive of the field.

[1] Aigler, *Imposters in the Law of Bills and Notes,* 46 MICH. L. REV. 787, 793 n.19 (1948).