Hastings Law Journal

Volume 7 | Issue 1 Article 2

1-1955

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CORAM NOBIS—PANACEA OR CARCINOMA*

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Modern cases in the field of criminal law show numerous petitions for the writ of error coram nobis. This is an increase in volume which has come about recently, for it was not so many years ago that the writ of error coram nobis was one of the least known remedies and, except in a very few states, most lawyers and judges were unaware of its existence, nature or scope.

What has caused the great increase in popularity of this ancient writ? In *Sanders v. State*, the Supreme Court of Indiana in 1882 misinterpreted the function of the writ of error coram nobis.[1] In the intervening years, courts throughout the United States have continuously cited Sanders as authority. These courts have further expanded upon and distorted coram nobis until it is now used far beyond its original scope. So much so that Justice Sims of the Court of Appeals of Kentucky felt compelled to say, in dissenting, in *Anderson v. Buchanan:*[2]

> "Our decisions are in such confusion on the writ of coram nobis that no one can tell where we stand. In writing on the subject we have wobbled and bobbled like a lost raft at sea. But we are not alone, as other courts likewise seem to be without mast and compass when sailing this sea. Reference to the texts and reported decisions of foreign jurisdictions will show that other courts are in the same state of confusion. The writ of coram nobis appears to be the wild ass of the law which the courts cannot control. . . ."

In order to understand how the writ has been distorted, let us look at its original meaning, use and requirements.

Distinctions of the Common Law

In England, the prescribed method of appeal was by writ of error. There were two such writs of error: the writ of error generally and the writ of error coram nobis, with a definite distinction between the two, as Stephen points out:[3]

> "A writ of error, like an original writ, is sued out of chancery, directed to the judges of the court in which judgment was given, and commanding them, in some cases themselves, to examine the record; in others to send it to another court of appellate jurisdiction to be examined in order that some alleged error in the proceedings may be corrected. The first form of writ,

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* *Carcinoma* is defined in Webster's Collegiate Dictionary as: A cancer; also an indolent tumor.

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[1] 85 Ind. 318, 44 Am.Rep. 29, 4 Crim. Law Mag. 359 (1882).

[2] 292 Ky. 810, 168 S.W.2d 48, 55 (1943).

[3] STEPHEN, PLEADING 142 (3d Amer. ed. 1882).

called a writ of error coram nobis (or vobis),[4] is where the alleged error consists of matter of fact; the second, called a writ of error generally, where it consists of matter of law."

Therefore, we find that the writ of error and the writ of error coram nobis were devised because of the absence at common law of the right to move for a new trial and the right of appeal. The writ of error has been supplanted in modern practice by appeal, by motion for a new trial and by various other procedural steps. But even today these are usually concerned with errors of law alone. To review errors of fact not apparent on the record, and not negligently concealed from the court by a defendant, the writ of error coram nobis is the remedy.

What are these matters of fact, as distinguished from matters of law, for which coram nobis was available? Writs of error coram nobis have been validly granted and the judgment of conviction has been vacated in several factual situations. Cases where the defendant was an infant and was not properly represented by guardian, where the common law disability of coverture existed, where the defendant was insane at the time of the trial, or where a valid defense existed in the facts of the case, but was not made either through fraud, duress or excusable mistake have all presented valid reasons for granting relief by way of coram nobis. Coram nobis traditionally did not lie to raise questions of newly discovered evidence, misconduct of the jury and related matters for which other remedies exist.

Other conditions were also necessary to assert coram nobis validly. The ground must have existed at the time of the trial. The writ had to be sought from the same court, and preferably from the same judge before which the defendant was tried. He knew most about the case. The matter had to be unknown to the court at the time of the trial, not appear on the record, and not be negligently concealed by the defendant. One final requirement was that, had the facts been known, the result probably would have been different.[5]

In summation of all these requisites, it is apparent that coram nobis was meant to correct errors that were the fault of no one in particular. The

[4] In the United States, most courts refer to the writ or error coram nobis, not coram vobis. The difference in phrasing arose in England. By a fiction of law, the King is supposed to be present in the Court of Kings Bench. Since all writs issue in the King's name, when addressed to the Kings Bench, his writ recites that the record and proceeding are "before us" (coram nobis), that is before himself and his royal justices. The King is not presumed to sit in the inferior Court of Common Pleas, so that when his writ issues to that tribunal, the recital is directed to the Chief Justice of that court and his Associate Justices, and is said to be "before you" (coram vobis). Thus it is seen that the predominant use in the United States of coram nobis rather than coram vobis is not due to any logical reason, there being no one in the position of the King.

An occasional case uses coram vobis. In re De La Roi, 28 Cal.2d 264, 169 P.2d 363 (1946).

[5] 1 FREEMAN, JUDGMENTS § 256 (5th ed. 1925); 5 ENCYCLOPEDIA OF PLEADING AND PRACTICE 27 (1908).

defendant must not have been negligent in failing to present the point. The facts must have been unknown to the court. The court could then freely decide the case differently, without casting any aspersions on its past acts. Thus coram nobis was intended to perform a very limited function.

Early Uses of Coram Nobis in the United States

Formerly, the few cases that invoked the writ followed the traditional requisites necessary to petition for its use. Except for an occasional case in one or two of the southern states, little mention is made of coram nobis after the early 1880's. Due to the enactment of codes of procedure in many states, and the resultant remedies to correct errors in trial court decisions, such as the motion to set aside the judgment, the motion for a new trial and appeal, the writ of error coram nobis became almost obsolete. It was never used where the codes provided a remedy. It was only available where there was no other remedy for a wrong. Where the Legislature had adopted a criminal or civil code intended to provide the exclusive procedure, without mentioning the writ, it is arguable that the writ no longer existed.

The Indiana case, earlier mentioned,[6] is mainly responsible for the deluge of cases using coram nobis today. This case has been more often quoted as authority for the use of coram nobis than any other case which has come to the attention of the author. Not only has the result been used as authority in Indiana, but in numerous other states.[7] In many of these latter states, *Sanders v. State, supra,* has provided the intial contact with coram nobis.

In order to get a fuller understanding of the reasons that the court in that case seized upon the writ of error coram nobis to aid the defendant, it will be helpful to look at the facts involved, and then see why the standard remedies were unavailable to Sanders.

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[6] See note 1 *supra.*

[7] Nickels v. State, 86 Fla. 208, 98 So. 497 (1923), *motion for rehearing* 98 So. 502, *rev'd and remanded* 86 Fla. 208, 99 So. 121 (1924) (allowing coram nobis); State v. Calhoun, 50 Kan. 523, 32 Pac. 38 (1893); Hawie v. State, 121 Miss. 197, 83 So. 158 (1919); State v. Hales, 124 Mont. 614, 230 P.2d 960 (1951); Ernst v. State, 179 Wisc. 646, 192 N.W. 65 (1923). To the effect that coram nobis may be limited by statute: People v. Reid, 195 Cal. 249, 232 Pac. 457 (1924); State ex rel. Attorney General v. Hurst, 59 Okla. Cr. 220, 57 P.2d 666 (1936); *accord,* State v. Raponi, 32 Ida. 368, 182 Pac. 855 (1919); People v. Nakielny, 279 Ill.App. 387 (1935); Jones v. Commonwealth, 269 Ky. 779, 108 S.W.2d 816 (1937), overruled by Smith v. Buchanan, 291 Ky. 44, 163 S.W.2d 5 (1942), making it square with Sanders v. State; Commonwealth v. Rollins, 242 Mass. 427, 136 N.E. 360 (1922); State v. Richardson, 291 Mo. 566, 237 S.W. 765 (1922); Carlsen v. State, 129 Neb. 84, 261 N.W. 339 (1935); Application of Lyons, 272 App. Div. 120, 69 N.Y.S.2d 715 (1947), *appeal dismissed* 297 N.Y. 505, 74 N.E.2d 198 (1947); State v. Layer, 48 N.D. 366, 184 N.W. 666 (1921); Curran v. State, 53 Ore. 154, 99 Pac. 420 (1909); Commonwealth v. Harris, 351 Pa. 325, 41 A.2d 688 (1945); Humphreys v. State, 129 Wash. 309, 224 Pac. 937 (1924); Hollibaugh v. Hehn, 13 Wyo. 269, 79 Pac. 1044 (1905). The following cases cite Sanders v. State, as supporting the right to a fair trial, though not for the use of coram nobis: Woolfolk v. State, 81 Ga. 551, 8 S.E. 724 (1889); Fountain v. State, 135 Md. 77, 107 A. 554 (1919); State v. Newsome, 195 N.C. 552, 143 S.E. 187 (1928); State v. Weldon, 91 S.C. 29, 74 S.E. 43 (1912); State v. Lattimer, 90 W.Va. 559, 111 S.E. 510 (1922).

The defendant and his wife were alone in a room when she was shot and killed. Due to his addiction to alcohol and opium, he was unable to explain her death. He was arrested and when his case came to trial, his attorneys and many witnesses claimed he was insane. His defense was planned on that ground. Public opinion had been aroused and an angry mob was milling in and about the courtroom. A jury was impaneled and a plea of not guilty was entered. However, due to the threatened danger to the defendant, counsel withdrew the plea, and substituted one of guilty. The jury returned a verdict of guilty without hearing the evidence. The defendant was sentenced to life imprisonment and hustled on a train for the trip to prison. The relief prayed was that the judgment entered upon the plea of guilty be vacated, and Sanders put upon his trial in due form of law.

From the above facts, it is obvious that a great miscarriage of justice had occurred. Let us see what the standard remedies would do for a defendant in this position.

The right to pardon is vested in the executive branch of the government. But the mere fact that this power exists does not prevent courts from considering errors in judgments. While a person may be relieved of the consequences of a miscarriage of justice by pardon, the stain of guilt is not removed from a defendant's character. This can only be done by an acquittal in court. Thus a pardon would not serve the defendant here.

Statutory remedies to correct errors in court opinions are several. Appeal is designed to correct errors in the record. But in Sander's case, the record showed a confession, for on the face of the record the plea of guilty appeared. There were no errors committed in ruling on the pleadings or in conducting the trial. It may be said that there was no trial, and in law no plea of confession, for a confession, like any other act procured through fear or violence, is without effect. If then, there was in fact no trial, and in law no plea of confession, then there was a condemnation without either a trial or a confession by plea. If it is correct to say that a plea procured by fear is of no effect, it follows that the sentence was pronounced where no hearing was had and no guilt acknowledged. Therefore the statute concerning appeals is not applicable.

Another statutory remedy is the motion for a new trial. At the time of the *Sanders* case, the statute in Indiana required that such a motion be made before judgment. That would have been impossible here. No time intervened between the sentence and its execution. Further, grounds for a new trial prescribed by the statute would not cover the wrong committed.

A motion in arrest of judgment cannot be appropriate, for the face of record was fair, and in appearance all the proceedings were regular.

Not only in law, but as a practical matter it would have been impossible to take advantage of the above enumerated remedies in that courtroom. For the crowd in attendance would not have stood for any delay in the sentencing of Sanders. Indeed, the trial judge said that he "had not drawn an easy breath until he had seen the train in motion with Sanders aboard."[8] In such circumstances it would have been folly to make an attempt to halt the proceedings.

If the foregoing is true, that there was in fact no trial, the question arises, is not habeas corpus available?[9] If this case had arisen in virtually any of the other 47 states, the case may have been disposed of by the use of habeas corpus, and coram nobis would have remained in its just state of seculsion. Habeas corpus had been enacted into statutory form in Indiana in 1865. Unfortunately, the statutes in question permitted a writ of habeas corpus to be brought only in the county in which the prisoner was incarcerated, *and* only in the court in which he was convicted.[10] Today habeas corpus is still so worthless that federal courts sitting in Indiana no longer require a prisoner seeking federal habeas corpus to pursue habeas corpus in the Indiana courts in order to exhaust his state remedies.[11] Even if the prisoner has the good fortune to be imprisoned in the county in which he was convicted, habeas corpus is of little actual advantage. Indiana still adheres to the common law and early federal rule that habeas corpus may be used only to inquire into jurisdictional defects. The court has refused to resort to the method by which the scope of federal habeas corpus was expanded, namely, that a court loses jurisdiction and can render no valid judgment when constitutional rights are denied. Failure of Indiana courts to expand habeas corpus in accordance with federal views is probably due to the statutory limitations on its use and the apparent availability of coram nobis, dating from the *Sanders* case. Habeas corpus was not even mentioned by the court in the *Sanders* case. *Sanders* and its successors have made

[8] 85 Ind. 318, 321.

[9] Though habeas corpus is often thought of as having only two possible results, that is not completely correct. True, a prisoner may be completely discharged upon a successful use of habeas corpus, or he may be remanded to custody. But in addition he may not be admitted to absolute freedom if it appears that he has committed a criminal offense or that for other reasons he should be detained. In such cases, he should be placed in custody of proper authorities in order that appropriate proceedings against him may be taken. (Thus where a prisoner is held under a void commitment, but is properly informed against before a court of competent jurisdiction, by information or indictment charging a crime, on a habeas corpus proceeding he should be discharged from his confinement under the illegal commitment and remanded to the custody of the court having jurisdiction of the information or indictment pending against him. Michaelson v. Beemer, 72 Neb. 761, 101 N.W. 1007 (1904).)

[10] IND. ANN. STAT. § 3-1905, § 3-1918 (Burns Repl. 1946). It has been contended that these statutes and the application thereof is unconstitutional under the equal protection clause of the Fourteenth Amendment, i.e., there is only one prison in Indiana, in La Porte County, and it would also seem to violate the Indiana Constitution against suspension of the writ. Regardless, the statutes have been applied without question as to their validity since first enacted in 1865.

[11] Williams v. Dowd, 153 F.2d 328 (7th Cir. 1946).

coram nobis much more susceptible to judicial development. It has never been enclosed in a statutory strait-jacket.

Having exhausted possible statutory remedies, a court may turn to remedies of the common law if any are available. Indiana laws allowed the use of such remedies if not in conflict with the Constitutions of the United States and Indiana. Constitutions require or dictate that such relief should be granted.

The court in the *Sanders* case reached this point and mentioned the writ of error coram nobis. After several pages of debate, the court came to the conclusion that a court had the power to issue a writ of error coram nobis. This was deemed to be one of the inherent powers possessed by courts to correct their records and make them speak the truth, to prevent the abuse of their authority or process and to enforce obedience to their mandates. Due to the fact that the code remedies had, to some extent, infringed upon the domain formerly covered by coram nobis, the court was hesitant regarding its right to grant coram nobis in this instance. But after further discussion, the court concluded "it is our opinion that the courts have the power to issue writs *in the nature of* the writ of error coram nobis. . . ." (Emphasis added.)

A cursory reading of the opinion lends credence to the theory that the court really did not know where it was going. This is obvious from the opening paragraph: "This is an extraordinary case. The facts proved, the procedure adopted and the relief sought are strange and unusual."[12] The wanderings of the court are nowhere more evident than in the above discussion of writs in the nature of coram nobis. Perhaps the court felt that because it was discussing a writ in the nature of coram nobis, rather than coram nobis itself, it was unnecessary to comply with all the requisities necessary to assert coram nobis. Whatever the reason, the court overlooked the requirement that the matter presented for review by way of coram nobis must have been unknown at the time of the trial. It is obvious that an uncontrolled mob was present when Sanders was asked to plead and was "tried." This could not have escaped the judge's attention or knowledge, for his statement, that he had not drawn an easy breath until Sanders was on the train on his way to prison, appears in the opinion. It is therefore obvious that the point sought to be raised by Sanders' action, that he was forced to plead guilty by fear of mob violence, was known to the court at the original trial.

The use of the remedy coram nobis, or even a writ in the nature of coram nobis was erroneous and misleading. Coram nobis was not, in truth, granted. The court just prior to setting forth its decision, states: "There are cases holding that such a cause will support a motion for a writ of

[12] 85 Ind. 318, 319.

coram nobis, *or some proceeding of like character.*"[13] (Emphasis added.) The decision was that judgment be reversed with instructions to vacate the judgment, to permit Sanders to withdraw the plea of guilty and plead to the indictment, and for further proceedings in accordance with the opinion.

The defendant had not asked for a writ of error coram nobis. The court did not grant a writ of error coram nobis. In fact, a court's inherent power to see that justice was done was being exercised. This could and should have been done without mentioning coram nobis, much less rearranging and enlarging it.

Interpretations of Sanders v. State

The *Sanders* case presented the first discussion of coram nobis in Indiana. In the years that have followed cases without number have cited *Sanders*, with approval. Included in these cases is a ruling from the Supreme Court of the United States,[14] as well as many from other states.[15]

Kentucky resurrected the writ of error coram nobis in 1937, citing the *Sanders* case as authority. However, in 1939 the Kentucky Court of Appeals had misgivings as to just what the Sanders opinion was authority for. In *Robertson v. Commonwealth,*[16] the Kentucky court said:

> "We see but little distinction between the writ of coram nobis and that of audita querela.[17] Judge Elliott, the distinguished jurist who wrote the leading case of *Sanders v. State,* had before him the writ of coram nobis, but a careful reading of that opinion will show he in effect granted the writ of audita querela. . . . The writ of coram nobis was granted not because of any mistake in fact but rather to relieve Sanders from duress and oppression, and to allow him to present a defense which was not available to him at the time of the trial. . . ."

Whether or not this interpretation is correct is open to question, but it is apparent that confusion is present.

In another Indiana case, *George v. State,*[18] the court said, in reference to the Sanders opinion:

> "The court held that the petition was in the nature of a writ of error coram nobis, and the case has been cited by many courts that the petition was for a writ of error coram nobis. We question the theory that this was

[13] 85 Ind. 318, 333.
[14] Frank v. Mangum, 237 U.S. 309 (1915).
[15] See note 7 *supra.*
[16] 269 Ky. 762, 132 S.W.2d 69, 71 (1939).
[17] BLACK'S LAW DICTIONARY (4th ed. 1951) defines audita querela as follows: "The name of a writ constituting the intial process in an action brought by a judgment defendant to obtain relief against the consequences of the judgment, on account of some matter of defense or discharge, arising since its rendition and which could not be taken advantage of otherwise. May also lie for matters arising before judgment where defendant had no opportunity to raise such matters in defense."
[18] 211 Ind. 429, 6 N.E.2d 336 (1937).

> strictly a coram nobis case. We think it can be more properly said that the court was exercising its inherent power to see that justice was done toward the defendant upon the theory that the plea of guilty was forced from the defendant by fear of death at the hands of a mob, and therefore, fraudulent."

Here was an effort to eliminate the confusion. But Sanders had been "law" too long. Unfortunately, the reasoning of *George v. State* has never been cited to refute the Sanders opinion.

We see that coram nobis was seized upon when no other avenue of relief was open. Sanders presented a hard case, and as so often happens in such circumstances, bad law resulted. These were the beginnings of coram nobis as a disruptive influence in the courts.

Coram Nobis in Recent Years

In 1949, the Supreme Court of the United States in *Young v. Ragen*,[19] laid down the rule that every state must afford prisoners "some clearly defined method by which they may raise claims of denial of federal rights," after the time for appeal has passed. Conflicting principles are involved here. The state must provide an adequate remedy for the vindication of state and federal constitutional rights. On the other hand, judgments must eventually become final. Criminal proceedings should not lightly be set aside, especially when the passage of time has made it difficult, if not impossible, to reassemble the witnesses and evidence for a new trial.

Though most states could employ habeas corpus as a practical matter to satisfy the above requirement, Indiana could not, as was discussed before.[20] As a result of the *Sanders* case and its successors, coram nobis had become quite broad. Indiana, faced with the problem of an expanding, undefined remedy, attempted to limit the use of coram nobis to a specified time. In 1949, the legislature enacted a statute of limitations upon the availability of the remedy.[21] In 1950, this statute was tested and found wanting.[22] The Indiana court cited the language of *Young v. Ragen, supra.*[23] To raise the claim of denial of federal rights in Indiana, coram nobis was the remedy, not habeas corpus. Therefore a statute that deprived a prisoner of this remedy by a specific time limit violates the due process clause of the Fourteenth Amendment of the Constitution of the United States. It has been advanced that this decision would seem to make granting a prisoner a new trial by means of coram nobis constitutionally mandatory whenever

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[19] 337 U.S. 235, 239 (1949).
[20] See note 9 *supra.*
[21] IND. ANN. STAT. § 9-3301 (Burns Cum. Supp. 1949).
[22] State ex rel. McManamon v. Blackford Circuit Court, 229 Ind. 3, 95 N.E.2d 556 (1950), overruled on other grounds by State v. Lindsey, 231 Ind. 126, 106 N.E.2d 230, 233 (1952).
[23] See note 19 *supra.*

it was established that he was not afforded due process at his original trial.[24]

In using coram nobis in this manner, another of the original purposes of the remedy has disappeared from sight. The writ should be applied for in the court which heard the case at the trial stage. The reason for this rule was that the trial court knew more about the proceedings than anyone else. And since the remedy was to correct errors of fact *unknown* to the court at the original hearing, no stigma was attached to the judge by presenting the writ to him. However, most of the cases seeking the writ on constitutional grounds today seek to correct an error committed by the judge. This usually arises as failure to furnish adequate counsel without competent waiver. In constitutional cases therefore, the judge is shown in error, and the temptation is present to refuse the writ rather than admit error. This is one more reason to deny the extension of coram nobis. Coram nobis thus becomes the panacea to cure any error arising from the violation of a constitutional right.

Coram Nobis in the Federal Courts

The federal courts have also been plagued with coram nobis. As in the state courts, occasional federal cases have made reference to coram nobis since this country was founded. However, it is only in recent years that coram nobis has come into prominence in the federal courts.

Before the promulgation of the Federal Rules of Criminal Procedure in 1946, it was an unsettled question, specifically left open by the Supreme Court in *United States v. Mayer*,[25] whether a writ of coram nobis was available in criminal cases in the federal courts.[26]

In this state of the law, it was proposed, in Rule 33 of the Rules of Criminal Procedure submitted to the Supreme Court, that a motion for a new trial based on the deprivation of a constitutional right be permitted at any time.[27] This motion would have afforded the type of relief made available by way of coram nobis in Indiana, and other states which have followed Indiana's lead. However, the Supreme Court in its rule-making capacity, deleted the proposal to allow a new trial, at any time, for the violation of a constitutional right. Thus the Supreme Court declined to assume coram nobis jurisdiction or its equivalent, and showed its disapproval

[24] 26 IND. L. J. 529, 533 (1951).

[25] 235 U.S. 55, 69 (1914).

[26] Various circuits of the Court of Appeals had sustained petitions seeking relief by way of a motion in the nature of a writ of error coram nobis. U.S. v. Steese, 144 F.2d 439 (3d Cir. 1944); Roberts v. U. S., 158 F.2d 150 (4th Cir. 1946); Robinson v. Johnston, 118 F.2d 998 (9th Cir. 1941), *judgment vacated and cause remanded*, 316 U.S. 649, *reversed on other grounds*, 130 F.2d 202 (1942). Coram nobis had been used in civil causes for many years prior to its elimination by Rule 60(b) of the Federal Rules of Civil Procedure. Pickett's Heirs v. Legerwood, 32 U.S. (7 Pet.) 638 (1833).

[27] It is to be noted that in this view of coram nobis the traditional requisites have been overlooked. Coram nobis becomes available whenever a constitutional right has been violated.

of the delayed presentation of claimed errors in criminal judgments—errors, the basis of which existed at the time of the trial.

Also in Rule 33 it was proposed that the time limit for making a motion for a new trial on grounds of newly discovered evidence (within 60 days) be eliminated to permit such motion to be made at any time. The court on its own initiative limited to two years the period within which to move for a new trial on the ground of newly discovered evidence. Thereby the court indicated that, even as to newly discovered evidence, which by definition related to matters which were not known at the trial, some period of limitation against judicial action to set aside criminal judgments was desirable. The rule of the *Mayer* case was allowed to stand. The question was left open whether coram nobis jurisdiction existed in federal courts.[28]

Thereafter, Congress, in the revision of the Judicial Codes, by enacting 28 U.S.C. § 2255,[29] granted to a prisoner *in custody* under sentence of a federal court the right to attack such sentence collaterally by a motion in the sentencing court. As seen in the Reviser's notes to section 2255, "this section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis." Also evident from a reading of section 2255, is the fact that the statute embodies the traditional elements of habeas corpus—release of a prisoner in custody when the sentencing court was without jurisdiction, or acted beyond its authority. From a reading of the above legislative history as well as a reading of the statute itself, it is apparent that 28 U.S.C. § 2255 was designed to substitute for habeas corpus and coram nobis, a remedy in the nature of, but much more inclusive than, the traditional concept and requirements of coram nobis. At the same time Congress limited the use of the remedy to cases where a prisoner is in custody under the sentence which he attacks. By defining that remedy,

[28] The general rule seems to be that coram nobis does not lie to review a conviction because of newly discovered evidence after the lapse of the statutory period of applying for a new trial. Annot. 33 A.L.R. 84.

Some courts attempt to distinguish between newly discovered evidence going to the issues tried (where coram nobis is denied in accordance with the general rule), and the so-called new facts doctrine. The latter is concerned with newly found evidence regarding issues not tried in the original proceeding. Lamb v. State, 91 Fla. 396, 107 So. 535 (1926), Dusenberg v. Rudolph, 325 Mo. 881, 30 S.W.2d 94 (1930), and George v. State, 211 Ind. 429, 6 N.E.2d 336 (1937) are cases listed in support of this doctrine. A reading of these cases shows the statement that coram nobis might be available to bring new facts to the attention of the court to be dicta at best.

Humphreys v. State, 129 Wash. 309, 224 Pac. 937 (1924), virtually relegated the new facts doctrine to its grave, by saying any new facts or evidence goes to the ultimate fact of whether the defendant was guilty. This was an issue tried. Therefore coram nobis is not available, in accordance with the general rule.

[29] 28 U.S.C. 2255: "A prisoner in *custody* (emphasis added) under sentence of a court established by Act of Congress 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."

Congress clearly set its limits, broader than those originally established but narrower than those which had developed from the *Sanders* case.

In 1954, the Supreme Court had to deal with section 2255. In *United States v. Morgan*,[30] the court had to decide whether a U. S. District Court has the power to vacate its judgment of conviction and sentence after the expiration of the full term of service. In 1939, Morgan pleaded guilty on a federal charge and was given a four year sentence, which he served. Thereafter in 1950 he was convicted by a New York court on a state charge, sentenced to a longer term as a second offender because of the prior federal conviction, and was at the time of his hearing in the Supreme Court of the United States, incarcerated in a New York state prison. Morgan sought a writ of error coram nobis on the ground that his constitutional rights had been violated through failure, without his competent waiver, to furnish him counsel in the 1939 federal trial. Because of a conflict between the decision granting relief to Morgan in the Court of Appeals for the Second Circuit,[31] and *United States v. Kerschman*,[32] a Seventh Circuit decision denying such relief, the Supreme Court granted certiorari.

The jurisdiction of the federal district courts is founded upon statute.[33] The controversy here involved 28 U.S.C. § 2255. Since the remedy by motion under 28 U.S.C. § 2255 is completely adequate for the entire period that a prisoner is in custody under a sentence, coram nobis jurisdiction was invoked in both instances for the purpose of attacking a sentence which had run its course. 28 U.S.C. § 2255 did not cover the *Morgan* and *Kerschman* cases, since the sentences in question had been imposed prior to 1940, and the imprisonments thereunder had long since been served. Both defendants therefore reached back to coram nobis as their sole remaining remedy. The court in the *Kerschman* case refused to grant the motion. However, in the *Morgan* case, the Supreme Court affirmed a decision of the Court of Appeals of the Second Circuit granting a motion in the nature of a writ of error coram nobis. The Supreme Court of the United States seemed to believe that coram nobis was superseded by section 2255, and therefore it had to go beyond and allow a writ *in the nature of* coram nobis, just as the Indiana Supreme Court did in the *Sanders* case. The fact that the *Morgan* case was decided by a 5 to 4 margin leaves some hope that coram nobis may yet return to its rightful insignificant role in the law of post-judgment remedies.

Morgan omitted several of the necessary allegations to a proper

[30] 346 U.S. 502 (1954).
[31] 202 F.2d 67 (2d Cir. 1953).
[32] 201 F.2d 682 (7th Cir. 1953). The facts in the Kerschman case were similar to those in the Morgan case. Kerschman was convicted in 1934 in a United States District Court, served a year and a day, and was convicted by New York in 1951. The Seventh Circuit denied him relief.
[33] Cary v. Curtis, 44 U.S. (3 How.) 576, 581 (1845); Gillis v. California, 293 U.S. 62, 66 (1934).

presentation of coram nobis. The trial court knew that he was unrepresented by counsel. Morgan made no showing that the result would have been different if he had had counsel. Morgan did not file his application for a writ of error coram nobis until fourteen months after the New York conviction, and until more than twelve years after being sentenced on the federal conviction, and until more than eight years after the federal sentence was completed. He made no explanation of his prolonged delay in seeking to remedy the asserted violation of his constitutional rights. It can easily be said that Morgan negligently concealed the information until it would be almost impossible to re-establish the crime. All these elements of the traditional concept of coram nobis are missing from Morgan's application for coram nobis relief. Nevertheless, relief was granted. The *Morgan* decision raises the basic issue: Can there ever be any finality against collateral attack for federal criminal judgments?

History and reason support the view that the duration of a sentence marks the limits of collateral attack upon a judgment of conviction in a criminal case. The major historical vehicle for collateral attack has been the writ of habeas corpus which, by its very nature, was limited to the period when a defendant was in custody and the writ would be effective to release him from that custody. In providing the present substitute for habeas corpus, Congress carried over the historical precedent that relief must be sought while the prisoner is in custody under the sentence being attacked. Manifestly Congress can fix a period of limitation for a motion for a new trial, for appeal or for taking any other procedural step. It also has the power to impose a time limit on collateral attacks on judgments. There is no constitutional necessity to provide further remedies when appropriate opportunities to seek relief by judicial process have been neglected.[34]

Policy reasons also exist for putting a limitation on the time of collateral attack. Facts tend to become obscured with the passage of time. It is difficult to establish the facts which give rise to the claim of invalidity, more to prove the facts relating to the crime. The grounds for collateral attack seldom presuppose innocence, and the sustaining of such an attack does not adjudicate innocence. But as a practical matter, sustaining such a claim long after the crime was committed and sentence therefor completely served, is likely to have the effect of an adjudication of innocence. Moreover, since no further sentence could be meted out on the retrial, there would be an inclination not to attempt the difficult task of a retrial. Justice

[34] Yakus v. United States, 321 U.S. 414, 444 (1944): "No procedural principle is more familiar to this court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."

is not served in allowing a defendant to profit by his own delay in seeking relief that was available to him.

In addition, a prisoner seeking to attack a completed sentence should be required to produce an adequate explanation of his failure to assert his rights earlier, and to make some showing that he is innocent of the crime charged. Only in this manner can collateral attacks, long delayed, be kept within reasonable limits. This is in accord with the traditional view that coram nobis was only available if the petitioner could show that the result would be different if the writ were granted. Under the holding in the *Morgan* case, the only requisite to a petition for coram nobis is the violation or deprivation of a constitutional right. Coram nobis was never intended to be so pervasive.

In 1948, the Supreme Court refused to assume coram nobis jurisdiction when formulating the Federal Rules of Criminal Procedure. The *Morgan* case presented the Court with a chance to affirm its stand on the subject, a choice it refused. Two other alternatives were present. The Court could have ruled section 2255 unconstitutional in so far as it purported to limit relief to the period of confinement under the sentence. It is submitted that the so-called self-imposed limitation on the Supreme Court (that it will not decide a constitutional question if the case can be disposed of on other grounds) caused it to create a greater monstrosity than would otherwise have resulted. The alternative was their action as taken, resurrection of the common law writ of error coram nobis, or, and even more vague, the writ in the nature of a writ of error coram nobis. The mere resurrection of the writ would have been uncalled for. But the Court went further and extended its applicability, completely overlooking the requisites of the writ. A petitioner seeking such a writ need allege only that a constitutional right has been violated. It is not necessary that he show that but for the violation the result would have been different. It is submitted that by the decision in *United States v. Morgan*, resurrecting coram nobis in the federal courts, a carcinoma has been allowed to germinate in our judicial system.

Conclusion

At common law, coram nobis performed a very limited function. Codes of procedure further encroached on this limited function, until coram nobis was rarely used, and then only in a few states. In federal procedure, Congress revised the Judicial Codes and provided a section to supersede coram nobis. Notwithstanding these attempts to eliminate it, the use of coram nobis is more prevalent today than ever. The reason, as well as a

solution to the problem created thereby, appears in one of the early paragraphs of *Sanders v. State*:[35]

> "That the case is one entitling appellant to some relief is clear, but whether the law vests the court with power to grant it is by no means so clear. Unless the law as its exists confers this authority, then the courts do not possess it. Hard as the case may be and grievous as may be the suitor's situation, they can make no new law to fit his case. If a new law is needed it must come from the law-making power."

Sanders presented a hard case. That he was entitled to some relief is clear. The result was just and proper. But the mention of coram nobis and its subsequent misinterpretation resulted in new law. *Morgan* did not even present a hard case. At one time he was entitled to relief, but it should have been held that he had slept on his rights.

Coram nobis, or worse, a writ in the nature of coram nobis has become a panacea. It is submitted that coram nobis was not intended to cover more than a few limited situations. A remedy to cover the more recent problems should come from the Legislature.

[35] 85 Ind. 318, 322.