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Federal Procedure - Availability of Coram Nobis in Federal Cases Involving Right of Counsel

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FEDERAL PROCEDURE—AVAILABILITY OF CORAM NOBIS IN FEDERAL CASES INVOLVING RIGHT OF COUNSEL—In 1939 Robert Morgan pleaded guilty to a charge of mail theft and was sentenced by a federal district court to four years

imprisonment. He served the term and was released. In 1950 he was convicted of a crime in New York state and sentenced as a second offender[1] because of his previous federal conviction. In 1952 he made application to the district court of original sentence for a common law writ of coram nobis, seeking an order vacating and setting aside his conviction by that court on the ground that he was not given assistance of counsel and had not waived his constitutional right to such assistance. His motion was denied. Reversed by the Court of Appeals for the Second Circuit and remanded for hearing.[2] On certiorari to the Supreme Court, *held,* Morgan was entitled to show by a motion in the nature of a writ of error coram nobis that the federal conviction and sentence should be set aside. *United States v. Morgan,* 346 U.S. 502, 74 S.Ct. 247 (1954).

The writ of error coram nobis is a common law writ of ancient vintage. It was designed to allow attack, after the term of court, on a judgment rendered in the context of a fact which, unknown to the court and not appearing in the record, constitutes an error of such fundamental nature that it invalidates the court proceeding and the judgment it produces.[3] It is addressed to the trial court and is based on error of fact, not law. The history of the writ in the federal courts is a spotty one although it was recognized in a civil case as early as 1833.[4] As late as 1914, the Supreme Court refused to pass directly on whether it was available in federal courts in criminal cases,[5] and later statements of the Court cast considerable doubt on its applicability.[6] The lower federal courts appear to have admitted its availability in cases arising since 1931,[7] and in 1944 it was first granted in a case involving a claim of denial of right of counsel.[8] The picture was further complicated, however, in 1948, when 28 U.S.C. §2255 was enacted.[9] Section 2255 states that prisoners in custody under a federal sentence who claim the right to release because of violation of their constitutional rights, because of lack of jurisdiction in the sentencing court, or because their sentence is otherwise subject to collateral attack, may make a motion to

[1] N.Y. Consol. Laws (McKinney, 1944) c. 88, §§1941-1942.

[2] United States v. Morgan, (2d Cir. 1953) 202 F. (2d) 67; the case is noted in 53 COL. L. REV. 737 (1953) and 66 HARV. L. REV. 1137 (1953).

[3] FRANK, CORAM NOBIS (1953); Freedman, "The Writ of Error Coram Nobis," 3 TEMPLE L.Q. 365 (1929); 20 VA. L. REV. 423 (1934).

[4] Pickett's Heirs v. Legerwood, 7 Pet. (32 U.S.) 142 (1833); Bronson v. Schulten, 104 U.S. 410 at 416 (1881).

[5] United States v. Mayer, 235 U.S. 55, 35 S.Ct. 16 (1914).

[6] See United States v. Smith, 331 U.S. 469 at 475, n. 4, 67 S.Ct. 1330 (1947).

[7] Strang v. United States, (5th Cir. 1931) 53 F. (2d) 820; Robinson v. Johnston, (9th Cir. 1941) 118 F. (2d) 998; Tinkoff v. United States, (7th Cir. 1942) 129 F. (2d) 21.

[8] United States v. Steese, (3d Cir. 1944) 144 F. (2d) 439; Roberts v. United States, (4th Cir. 1946) 158 F. (2d) 150.

[9] The Reviser's note states, "This section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis. It provides an expeditious remedy for correcting sentences without resort to habeas corpus. . . ." Reviser's note to 28 U.S.C. (1952) §2255.

the sentencing court to have the sentence set aside, vacated, or corrected. Several of the circuit courts seemed to assume that it superseded the common law writ of coram nobis and, at the same time, limited this type of relief to those persons actually in custody under federal sentence.[10] The Morgan case definitely restores coram nobis as a concurrently available remedy, and seems to limit section 2255 to the special case of a motion by an inmate of a federal prison.[11]

If common law coram nobis is presently available in federal courts, there might still be a question as to whether failure to advise of the right of counsel or improper waiver of such right are proper grounds for the motion. Such grounds were not among those traditionally recognized by the old cases.[12] However, the Supreme Court has stated its opinion that coram nobis, if available at all, would be available in a case in which the error was so fundamental as to render the trial proceeding irregular or invalid.[13] It has also held that violation of the Sixth Amendment guaranty of right of counsel[14] destroys the jurisdiction of the trial court. It appears, therefore, that such a violation is a proper ground for coram nobis, and it has been so held by lower federal courts.[15] Even if the Court is right in concluding that coram nobis still exists and that lack of counsel is a proper basis for its application, it nevertheless appears that the Court has overlooked another factor in the history of the writ in federal courts. *United States v. Moore*[16] established rules to be observed in granting coram nobis, and the Supreme Court has upheld these rules in a previous decision which has never been overruled.[17] The rules are (1) the applicant must allege his innocence, or set forth a meritorious defense of which he was deprived by lack of counsel, and show that this defense would have resulted in a different verdict from that given; (2) the applicant must show reasonable diligence in presenting his claim; (3) the applicant should raise the question at

[10] Crow v. United States, (9th Cir. 1950) 186 F. (2d) 704; Lopez v. United States, (9th Cir. 1950) 186 F. (2d) 707; United States v. Lavelle, (2d Cir. 1952) 194 F. (2d) 202; United States v. Bradford, (2d Cir. 1952) 194 F. (2d) 197. But see United States v. Hayman, 342 U.S. 205 at 219, 72 S.Ct. 263 (1951), in which Chief Justice Vinson reviewed the legislative history of §2255.

[11] *Accord:* Howell v. United States, (4th Cir. 1949) 172 F. (2d) 213, cert. den. 337 U.S. 906, 69 S.Ct. 1048 (1949); Farnsworth v. United States, (D.C. Cir. 1952) 198 F. (2d) 600; United States ex rel. Lavelle v. Fay, (2d Cir. 1953) 205 F. (2d) 294.

[12] 2 BISHOP, NEW CRIMINAL PROCEDURE, 4th ed., §1369 (1895).

[13] United States v. Mayer, note 5 supra, at 68.

[14] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST., Amend VI. Johnson v. Zerbst, 304 U.S. 458 at 468, 58 S.Ct. 1019 (1937); Glasser v. United States, 315 U.S. 60 at 76, 62 S.Ct. 457 (1942). Fellman, "The Constitutional Right to Counsel in Federal Courts," 30 NEB. L. REV. 559 (1951).

[15] United States v. Steese, note 8 supra; Roberts v. United States, note 8 supra.

[16] United States v. Moore, (7th Cir. 1948) 166 F. (2d) 102, cert. den. 334 U.S. 849, 68 S.Ct. 1500 (1948).

[17] Gayes v. New York, 332 U.S. 145, 67 S.Ct. 1711 (1947).

the time of his conviction as a second offender or be estopped from doing so.[18] In the *Morgan* case, the motion was not made until twelve years after the original conviction and fourteen months after the second conviction; moreover, the petitioner did not allege his innocence or any defense of which he was deprived in the first case.[19] Of course, if lack of counsel is so fundamental an error as to deprive the trial court of jurisdiction, it would seem that a conviction under such circumstances should fall regardless of the state of the petitioner's innocence.[20] The inconsistency between *United States v. Moore* and the principal case indicates that it would be in order for the Court to define more adequately the ground-rules which are to be used in the granting of coram nobis. If it is brought back to life without proper safeguards and limitations on its use, the federal courts may be flooded with motions to set aside ancient convictions, and no conviction, even after sentence is served, will be free from possible later attack.

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[18] United States v. Moore, note 16 supra. *Accord:* United States v. Rockower, (2d Cir. 1948) 171 F. (2d) 423, cert. den. 337 U.S. 931, 69 S.Ct. 1484 (1949); United States v. Bice, (4th Cir. 1949) 177 F. (2d) 843; Bowen v. United States, (5th Cir. 1951) 192 F. (2d) 515. *Contra:* United States ex rel. Turpin v. Snyder, (2d Cir. 1950) 183 F. (2d) 742; Allen v. United States, (D.C. Ill. 1952) 102 F. Supp. 866.

[19] United States v. Morgan, 346 U.S. 502 at 514, 74 S.Ct. 247 (1954).

[20] Allen v. United States, (D.C. Ill. 1952) 102 F. Supp. 866 at 869: "A guilty person in custody pursuant to a void judgment, is just as improperly deprived of his liberty as is an innocent person. . . . A void judgment is as void today as it was twenty years ago."