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"Coram Nobis"—Is It Either an Available or the Most Satisfactory Post-Conviction Remedy to Test Constitutionality in Criminal Proceedings?

By EDWIN W. BRIGGS*

INTRODUCTION

The ancient common law writ, known as the Writ of Error Coram Nobis,¹ has an interesting, though varied and conflicting history in recent years in a number of our states. It was not until 1951, however, that the Montana Supreme Court gave apparent approval to its use in Montana,² under our Code of Criminal Procedure. At that time, our court apparently assumed its availability to the petitioning party, for the purpose of putting in issue the legality of his detention in prison, though, on the face of the record, such detention, supported by a "verdict of guilty," with a regular sentencing thereafter, seemed regular and valid.

Almost certainly the readiness of our court to recognize the writ of error coram nobis, as an integral part of our remedial criminal procedure, was in response to a series of modern decisions by the United Supreme Court,³ enlarging considerably the grounds on which a defendant can attack the constitutionality of his detention in prison, although there is no defect in the basic jurisdiction of the sentencing court. A corollary of this developing doctrine is the further principle that fundamental due process also is

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¹"Error coram nobis" is a "branch" of the ancient general writ known as "writ of error," which, originally however, gave remedy by way of appeal only for an error in law. Experience demonstrated the need for relief in some cases based on "facts" which did not appear in the record at all, and so could not be the foundation for any relief based on the record. This special use of the writ of error developed slowly, quite some time after its original use to correct errors of law. As defined by Tidd's Practice, at a time when its dual use was fully developed: "A writ of error is an original writ, issuing out of Chancery; . . . it lies to the same court in which the judgment was given, or to which the record is removed by writ of error, or to a superior court. If a judgment in the King's Bench be erroneous in matter of fact only, and not in point of law, it may be reversed in the same court, by writ of error coram nobis; . . . as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict, . . . But if an erroneous judgment be given in the King's Bench, and the error be in the judgment itself, . . . a writ of error does not lie in the same court upon such judgment." 2 TIDD, PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS 1134, 1135, 1136 (9th ed. 1828). American courts have long understood that statutory remedies have completely replaced this ancient remedy.


violated by any state not providing adequate post-conviction procedures for any convicted defendant to challenge his conviction on the ground of a fundamental lack of fairness in his prosecution and conviction, even though the remedies normally given for that purpose, as motion for a new trial, or right of appeal, have long since expired. As a further corollary of such rule, where such procedures are available, the defendant must "exhaust all such remedies" in the state courts before the United States Supreme Court will entertain his plea of unconstitutionality in his conviction. Our court has intended that coram nobis satisfy this duty to give such remedy. Such awareness of and sensitiveness to the requirements of these decisions, demonstrated by the Montana State Supreme Court, certainly is to be highly commended. Nevertheless, for several reasons, there is serious question whether the writ of error is available under existing Montana law, and even if available, whether it is or can be made a satisfactory post-conviction remedy as required by the United States Supreme Court.

SUPPORTING ARGUMENTS THEREFOR

In support of the view that coram nobis is a part of Montana Criminal Procedure, our court might adopt any one of the following three different possible arguments therefor: 1. Our Criminal Code does not provide the only remedies available to the defendant, being supplemented by all common law remedies not dealt with expressly therein; 2. Though the Code is exclusive, the substance of coram nobis is recognized and given effect in certain Code provisions; 3. Although our Code is the only source of remedies generally, and though it makes no provisions whatever for coram nobis, nor anything like it, the courts possess reserved inherent judicial power, under which they are competent to provide remedies wherever necessary to meet minimum due process requirements, and coram nobis is required for that purpose as the United States Supreme Court now is defining due process. As yet, the court has not sufficiently expressed officially any rationale for recognizing coram nobis, to make at all clear which of these arguments is the most acceptable to it. There are difficulties hindering the embracing of any one of them, however.

I. THAT COMMON LAW SUPPLEMENTS STATUTE

If the Montana Supreme Court relies on the first ground, that our Criminal Code is supplemented by the common law, it will have to contend with arguments from three different sources denying or tending to deny that proposition: 1. Though possibly not conclusive, there are quite strong


*Young v. Ragen, 337 U.S. 235, 238, 69 Sup. Ct. 1073, 93 L.Ed. 1333 (1949): "The doctrine of exhaustion of state remedies, to which this Court has required the scrupulous adherence of all federal courts, ... presupposes that some adequate state remedy exists."

*The Code of Criminal Procedure does not contain a flat assertion that all common law remedies are thereby repealed. It is submitted that neither Rev. Codes of Mont., § 12-103, declaring that, "The common law of England, so far as it is not repugnant to or inconsistent with the ...constitution or laws of this state, or of the codes, is the rule of decision in all the courts of this state," nor §§ 102-04, adding
implications in the Code itself, supporting its exclusive character, and thus negating the view that common law remedies also are available; 2. Other courts with the same or very similar statutes have doubted the availability of any common law remedy not incorporated in the code, i.e., taking the view that their code provides the exclusive remedy therein; 3. Our own court has purported to so characterize our Criminal Code in previous decisions.

**Code Itself Indicates Otherwise**

The Criminal Code contains an express provision declaring that only those acts made criminal by that Code shall be deemed criminal, i.e., expressly establishing the "exclusive" character of the Code in delimiting substantive crimes. No common law crimes exist in Montana. That Code also expressly declares that, "all the forms of 'pleading' in criminal actions, and the rules by which the sufficiency of pleadings is to be determined are those prescribed by this Code." The Code also goes to much pains to set out both the contents and the form of all distinctive proceedings. It provides several corrective remedies not available at common law, including the right to move for an arrest of judgment, for a new trial, and to appeal. The right to move for a new trial often is construed as displacing coram nobis. This argument is particularly persuasive in Montana under our Code, since it not only makes newly discovered evidence one of the principal grounds for so granting, but liberalizes the period of time allowed for such motion, in terms, requiring only that the petitioner so move "within thirty days after discovery of the facts upon which the party relies in support of his motion..." Indeed, the entire Code is so drafted that it obviously intends to be a complete statement of the law. Surely a petition for writ of error coram nobis constitutes a "pleading." The nature of its contents is quite distinctive—and highly problematical—under modern practice. Yet, the Code says not one word about either its form or its contents—it is not that, "In this state there is no common law in any case where the law is declared by the code or the statute;..." are any support for the view that the common law supplements our Criminal Code. Although § 12-103, originally was part of California's Political Code, it long was carried merely as a general introductory section to our Civil Code. Section 12-104 always was a part of the Code of Civil Procedure even prior to the 1947 Revision (See the "History" to these sections). No such comparable sections are found either in our Criminal Code or our Code of Criminal Procedure. Hence rather than supporting the view that the common law supplements the criminal law in Montana, the complete failure to find comparable provisions in the Criminal Codes raises the strongest implications that such proposition is repudiated, and in any case, they provide no basis whatever upon which to determine whether our Code intends to be "exclusive," because even these sections say, "there is no common law where the law is declared by statute." So these sections do not touch our crucial question: Did the framers intend for our Criminal Code to be exclusive? Cf. State v. Zumwalt, 12 State Rep. 503, 516, 291 P.2d. 257, 266 (1955).
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mentioned. Whether considered a “motion after judgment” or a new and independent proceeding, it is at least very arguable that the above quoted section making the Code controlling as to forms and rules of pleading, impliedly negates the existence of the writ. Though admittedly not conclusive, considered alone, it becomes almost conclusive when taken in the setting of the entire Code of Criminal Procedure, reinforced by this statement from the final report of the Code Commissioners for the New York State Legislature, author of both our Civil and Criminal Codes, back in 1864, on completion of their task of drafting: “The Codes of Civil and Criminal Procedure, as reported complete by the Commissioners on Practice and Pleadings, were designed to embrace all the law of this State respecting remedies in the judicial tribunals, civil and criminal, including the law of evidence. . . .”

The Penal Code, thus prepared, defines all the crimes for which, according to the law of this state, persons can be punished, and the punishment for the same. . . .” Furthermore, without question the apparent purpose of the code framers generally, was to deal exhaustively and exclusively with criminal matters in the Code both as to substantive crimes and as to procedure. This interpretation is in keeping with the spirit of the times concerning matters of criminal law, which was that it should be made as definite and certain as possible; so, as the only crimes are statutory crimes, the only remedies are those provided by statute. Definiteness and certainty both as to the scope and the limits of crimes and of remedies has been a prime consideration particularly in the criminal law field, for the past century. The dynamic function traditionally exercised by common law courts, of shaping and developing and molding the common law, has long been frowned on in the criminal law field. Much of our Criminal Code makes it perfectly clear that it is drafted to so restrict the court. And a careful reading thereof strongly indicates that such a proceeding as a writ of error coram nobis is entirely foreign to its underlying premises.

Other States So Interpret

The courts of most of the states having the same or similar criminal codes have expressed a doubt that such remedy is available thereunder. Although as late as 1934, Orfield14 thought he could class Oklahoma with those states recognizing coram nobis, on the basis of very inconclusive dicta, that court’s most recent pronouncement negatives its existence there:

This court has never issued the writ of error coram nobis because it was a common law writ which has been largely superseded by the right given to one convicted of crime to file a motion in arrest of judgment, or a motion for a new trial because of newly discovered evidence.”

Likewise, with the same Criminal Code, North Dakota declares that,

It may be doubtful if the writ could be used in this state in any event for, . . . in our Code of Criminal Procedure writs and pleas are designated and defined by statute just as crimes are

designated and defined by statute and no provision whatever is made for such a writ. 18

Perhaps the Iowa court has stated the underlying rationale supporting the conclusion that coram nobis is not available in a state with a complete criminal code, in the following cryptic observation:

It follows that, the legislature having provided a complete Criminal Code, and not having provided for any writ of error coram nobis, such writ is not available under the practice in this state. 19

Some, however, may consider the Ohio Court’s way of putting it even more to the point:

We find that in Ohio the common-law writs and pleas are designated and defined by statute just as crimes are designated and defined by statute. The writs of coram nobis and coram vobis, which are invoked in behalf of the defendants in error, are no part of the criminal jurisprudence of the state of Ohio.20

The inferences as to their exclusive character, reasonably drawn from the Iowa and Ohio Criminal Codes are less conclusive than those supported by the Montana Code as to its exclusiveness.

Several other states likewise have denied the existence of coram nobis, as a common law remedy, on the ground that it has been superceded by the criminal code.21 With a penal code more ambiguous in its language than Montana’s, Texas likewise finds that there is no room for the writ of error coram nobis, in the criminal law, though seemingly it had some recognition in civil proceedings. It considers the “motion for a new trial” under its Code as exhausting the subject: “That the petition (for coram nobis) is tantamount to a motion for a new trial based on newly discovered evidence is obvious. Thus considered, it came too late to enable this court to revise the action of the trial court...” 22 Quite a number of other state courts also have expressed doubt as to the writ’s availability under their laws, though repeatedly avoiding formal adjudication thereon, by finding that, in any event the writ did not lie in the case at issue. Among these states are Arizona, Colorado, Utah, Washington, Minnesota.23

18Dix v. Modern Woodmen of America, 68 N.D. 38i, 390, 250 N.W. 663, 665 (1938) (Actually, the quoted statement was the personal view of the judge writing the opinion, a majority of the court considering it unnecessary to consider the issue of this criminal remedy, in the case, which was a civil proceeding).
20State v. Hayeslip, 90 Ohio St. 199, 107 N.E. 335 (1914).
Most of those states, even, which first recognized the availability of the writ, while common law writs generally were still available, have found it necessary either greatly to curb its use by judicial limitation, or to provide a statutory substitute therefor. Among the former, are Missouri and Kansas. To these, should be added California, who, though importing the writ at a relatively late date, almost immediately found it very difficult to adapt for testing due process. So, in a very large volume of litigation it has been strictly limited to its traditional uses. Instead, California has enlarged 'habeas corpus' so as to test all due process issues. The latter group, relying on modern legislation, include Illinois, North Carolina, Wisconsin, Delaware, and Indiana. An early Indiana case, Sanders v. State, probably is the most influential single case in the United States in leading the courts of some other states, where the codes permitted it, to approve coram nobis. The very special facts of that case dramatically demonstrated the occasional need for such 'review' by the trial court. However, in 1945, in a case in which the defendant revealed in his petition that his attempts to secure a reversal of his conviction included six applications for coram nobis and nine habeas corpus proceedings, the Indiana court observed, 'If trial courts will reserve the remedy for extraordinary cases of gross miscarriages of justice, few writs will be granted.' It was this case which accelerated legislative action in Indiana.

Most of the remaining states now permitting coram nobis have done so only recently, largely under the influence of the United States Supreme Court’s edict that the states must provide a remedy for raising in issue the constitutionality of the petitioner’s conviction. These include Ala-

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24FRANK, CORAM NOBIS (COMMON LAW—FEDERAL—STATUTORY) (1953), with 1954-55 Cumulative Supplement, at p. 45, summarizes the extensive restriction in Missouri law, though its very early decision, Ex Parte Toney, 11 Mo. 661 (1848), is one of most notorious coram nobis decisions in the United States, involving the issue of whether a slave could lawfully be convicted and sentenced for crime. Although State v. Calhoun, 50 Kan. 523, 32 Pac. 38 (1893), is another early famous case, permitting the vacating of conviction based on plea of guilty only because of fear of mob violence, that seems to be the only grounds recognized in Kansas; and in State v. Miller, 161 Kan. 210, 213, 169 P.2d 650, 652 (1946) the court declared that, “Although the writ of error coram nobis has not been specifically abolished by statute in this state our decisions leave little if any grounds for regarding it other than obsolete.”

25See v. Martinez, 88 Cal. App.2d 767, 199 P.2d 375 (1948), and cases cited.


30In Curran v. Woolsey, 9 Ter. 382, 104 A.2d 771 (1954), the Delaware Court has ruled that its Criminal Rule 35, satisfies due process requirements, being very similar to 28 U.S.C. § 2255, discussed infra, at note 146, concerning which the Reviser's notes to the 1948 Revision of the Judicial Codes, are said to declare that, “this section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis.” See Richard B. Amandes, Coram Nobis—Panacea or Carcinoma, 7 HASTINGS L. J. 48, 57 (1955).

31Ind. ANN. STAT., §§ 9-3301 to 3307 (Remedies Available After Conviction).

3235 Ind. 318 (1882).

bama,“ Florida,“ Georgia,“ Kentucky,“ Rhode Island,“ and Nebraska,“ aided by a statute in at least the last state. Some have no difficulty in so approving a common law remedy under their statutes;“ a few have frankly relied on the ‘‘inherent power of the judiciary’’ to provide the remedy required constitutionally.” Still others have been quite unclear as to just on what ground the writ is recognized, as has our own court.

Previous Montana Cases Rule Code Exclusive
Perhaps the most objectionable ground for basing coram nobis on the common law in Montana, is that our own court seemingly has fully approved the principle that our Criminal Code is exclusive both as to substantive crimes and procedurally. State v. Bosch, ruling that the trial court has neither the duty nor the discretion to grant a bill of particulars, in any case, under Montana law, declared that, ‘‘We hold that in this state, where our Criminal Code is complete, and the legislature has designated specifically each step in the criminal procedure and practice, there is no authority for a demand for, nor for an order, requiring the furnishing of a bill of particulars . . . Judicial discretion is the liberty, privilege and power prescribed by and conferred upon the judiciary by law. Not being conferred by law, it does not exist.’’ This, although it was necessary to thus reverse a substantial body of its own earlier decisions, to do so. Not only does this rule seem to be based on the proposition that the Code remedies are exclusive, but it involves an extreme application thereof. Hence, one does not have to approve this denial of a bill of particulars, in a criminal proceeding, to maintain that distinct common law remedies are not available under our Code. Moreover, this idea that the Code is exclusive is reaffirmed by the majority opinions in the very recent cases of State ex rel Estes v. Justice Court, Jefferson County,“ and State v. Zumwalt." In the first case, the special concurring opinion obviously is very fearful that the majority’s strict limiting of criminal procedures to those expressly authorized by the Constitution and statutes, foredooms to limbo the writ of error coram nobis. And in State v. Zumwalt, the majority further reinforces the conclusion that there are no common law criminal remedies in Montana.

"Johnson v. Williams, 244 Ala. 391, 13 So.2d 683 (1943).
Nickels v. State, 86 Fla. 208, 98 So. 497, rehearing granted 86 Fla. 208, 107 So. 535 (1923). Though antedating the modern development of due process requirements, the Florida doctrine has been elaborated on in the light of recent United States Supreme Court rulings. In a recent decision by the latter Court, it was said that, ‘‘This common law writ, in its local adaptation, is Florida’s response to the requirements of Mooney v. Holohan, 294 U.S. 103, for the judicial correction of a wrong committed in the administration of criminal justice . . . .” Haysler v. Florida, 315 U.S. 411, 62 Sup. Ct. 688, 86 L.Ed 932 (1941).
This was true, apparently, of Indiana (originally), Maryland, Florida, Kansas (originally), and Missouri.
Hawie v. State, 121 Miss. 197, 83 So. 158 (1919).
II. THAT CORAM NOBIS IS AUTHORIZED BY EXPRESS CODE PROVISION

With these strong pronouncements from recent decisions denying that there are any supplementary common law remedies—or that the court can exercise anything in the way of common law jurisdiction, not provided for by statute, it seems doubtful that our court will attempt to justify coram nobis simply as a surviving common law remedy. There remains the possibility, however, of supporting its recognition on the ground that the substance of the writ is contained in, and so, actually provided for by express statutory enactment. Once, it might have been argued that, in treating coram nobis as equivalent to a “motion to set aside, or vacate, the judgment,” California relied on a section in the Code of Civil Procedure, authorizing the court to relieve the defendant from obligations of a judgment, in certain circumstances. Treating coram nobis as essentially an original equitable remedy, as it was at common law, gives some plausibility to such view. However, its courts soon adopted a supposed common law basis therefor (though never explaining how it could be applicable), and a modern California case has expressly ruled that provisions in the Civil Code cannot be used as a basis for establishing criminal remedies. In any event, this California experience is not even relevant to the problem in Montana, because we have never had a comparable civil procedure section; moreover, as noted above, California’s example would lead us to reject outright coram nobis as a test for due process.

III. THAT COURT POSSESSES INHERENT POWER

Nowhere else does there appear to have been any attempt to support coram nobis on such basis, under a code patterned like ours. Indeed, as stated above also, the very idea of such a remedy seems foreign to the whole organization and framing of our Criminal Code. But there remains to be considered the third ground for recognizing coram nobis, mentioned at the outset—that the essence of the remedy is essential to an adequate guaranty of minimal due process requirements, and that the court may “design such further remedial writ... to meet the emergency and attain the ends of justice otherwise denied,” by virtue of its inherent and reserved judicial power to cope effectively with such emergencies. Both the majority and dissenting opinions in the last two cases cited supra, strongly suggest that this is the ground which will be relied on when the court has to face the issue squarely. In the Estes case, Chief Justice Adair stated that:

43 Cyc. Codes of Cal. (Code of Civil Procedure) § 663 (Kerr 1908), expressly authorizes the “vacation of a judgment,” though the grounds given therefor, do not appear at all appropriate for our present purpose. Id. § 473, likewise authorizes the court to relieve a defendant from liability on a judgment, “taken against him through his mistake, inadvertence, surprise, or excusable neglect;...” but the language would require considerable “adapting.”

People v. Reid, 195 Cal. 249, 232 Pac. 457 (1924); People v. Mooney, 178 Cal. 525, 174 Pac. 325 (1918).

Gonzales v. Superior Court, 3 Cal. 2d 260, 44 P.2d 320 (1935).

See cases cited in notes 16, 17, 18, 19, 20, supra.

State ex rel. Estes v. District Court, 12 State Rep. 218, 222, 284 P.2d 249, 251 (Mont. 1953). Rev. Codes or Mont., §§ 93-214 and 93-1106 (1947), applicable to civil remedies only, merely authorize writs incidental to and in pursuance of an existing jurisdiction. Hence, to cite them as creating a primary jurisdiction to issue a writ coram nobis, begs the question. Moreover, they are declaratory of the “inherent power” doctrine originating in the Constitution, so contribute nothing to a solution.
the Supreme Court has declared that each state must provide some adequate judicial procedure that will enable a convicted person to test the legality of his conviction notwithstanding that at first glance it may appear... proper... Montana... must provide a remedy, be it contemporary or ancient,... for we may not ignore the clear pronouncements of the Supreme Court of the United States nor may we decline to adopt the necessary procedure that will enable us to afford adequate relief in a proper case presented.\footnote{Ibid.}

And in Zumwalt, the majority conceded that,

> It may be that where the legislature has not spelled out the regulations and limitations, which are to bound our jurisdiction, we may act consistent with our own concept of the authority given this court by the Constitution... It is undoubtedly true also that, if this case is exigent, this court may act to meet the emergency, even though the legislature has prescribed regulations adequate to review the ordinary case by appeal. \textit{i.e.}, by framing and issuing its own original writ to fit the case.\footnote{State v. Zumwalt, 12 State Rep. 503, 506, 507, 291 P.2d 257, 260 (Mont. 1955).}

Rooting the writ in the inherent power of the court provides a very plausible basis—if the conditions for the exercise of such exceptional power can be shown to exist. That the court may so act in emergencies seems supported by certain well reasoned cases\footnote{See State ex rel. Whiteside v. District Court of First Judicial Dist., 24 Mont. 539, 63 Pac. 395 (1900). In a series of cases, our court also has developed a liberal rule under Rev. Stat. of Mont. § 94-6803 (1947), authorizing the trial court to permit withdrawal of plea of guilty, “at any time before judgment,” by allowing withdrawal also, \textit{after judgment,} \textit{but before disposition of the case,} while court still has exclusive jurisdiction of defendant: State v. Casaras, 104 Mont. 404, 66 P.2d 774 (1937) (the trial court abused discretion in not permitting where defendant was an ignorant foreigner); State v. McAllister, 96 Mont. 348, 30 P.2d 821 (1934); State ex rel. Foot v. District Court of Fourth Jud. Dist., 81 Mont. 495, 263 Pac. 979 (1928).} However, a basic condition to the exercise of such power is that there be no statutory remedy available. It is the considered judgment of the California courts, based upon an extensive attempt to give effect to coram nobis, as being substantially equivalent to a “motion to set aside the judgment,” that it is not an adequate remedial device for testing all the various aspects of the “due process requirement,” but that habeas corpus, elaborated both in Constitution and statute, is adequate for that purpose.\footnote{Peo. v. Adamson, 34 Cal. 320, 210 P.2d 13, 16 (1949); Peo. v. Martinez, 88 Cal. App. 2d 767, 774, 199 P.2d 375 (1948); Peo. v. Darcy, 79 Cal. App. 2d 683, 693, 180 P.2d 752 (1947).} If this be so, there is little ground left authorizing the court to assert its exceptional powers for “framing an original writ to fit the case.”\footnote{Loc. cit. supra, note 51.}

True, if that remedy be narrowly restricted to its strict common law limitations, measuring relief by defects appearing on the record, only, it will not always be adequate. However, California has had no difficulty whatever in enlarging habeas corpus by judicial process, to permit such challenge based on facts dehors the record.\footnote{Peo. v. Adamson, 34 Cal. 320, 210 P.2d 13, 16 (1949).} The New York Court likewise has recognized the distinct possibility of dealing with the problem in this fash-
It is submitted that, merely to enlarge the historical functions of this venerable remedy a bit, is to be preferred to either the revival of an old common law remedy, very difficult to fit into our statutory pattern generally, or to the creation of an entirely new type of original process, concerning which it is altogether impossible to know what the law governing it is, except as the court works out that original process slowly, laboriously, tortuously, inconclusively.

**IS CORAM NOBIS SIMPLE AND WELL DEFINED**

We are told however, that,

Writs of coram nobis and coram vobis are of ancient origin. Their function has not changed materially from their earliest use in the sixteenth century until the present day ... such writs are neither novel, mysterious nor unknown to our practice or procedure."

Since these two statements may seem contradictory, to some, further consideration of the problem is called for. Let us test the statement that the law governing coram nobis is simple and well known, by considering the answers given by other courts to some of the typical issues arising from a petition for coram nobis.

1. Is competency to entertain a petition for writ coram nobis limited to courts of record, or does such power vest in all courts? The common law answer was clear—the power existed only in courts of record. American decisions are conflicting on it. It will be noted that in the *Estes* case, counsel from the first, supported by our supreme court assumed the existence of such power in the justice court.

2. Can the petitioner demand a hearing as a matter of right? A number of courts have expressly said such right does not exist—it lies in the dis-

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"Matter of Morhous v. Supreme Court, 209 N.Y. 131, 139, 58 N.E.2d 79, 84 (1944) : "It may be that the courts of this state would be constrained to extend the scope of the writ (i.e., habeas corpus) beyond the limitations placed upon it by ancient practice and procedure, even though that practice and procedure has been crystalized by the statute if a case should arise where a person restrained ... alleges in his petition facts sufficient, if established, to show that the judgment falls to satisfy the requirements of due process on grounds for which the State has provided no other corrective procedure."


"2 TIDIO, PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS 1134 (9th ed. 1828) : "A writ of error is an original writ, issuing out of Chancery, and lies where a party is aggrieved by any error in the foundation, proceeding, judgment, or execution of a suit, in a court of record (emphasis added)." Peo. v. Oneida County Common Pleas, 20 Johns 22 (N.Y. 1822), in effect, rules that only those courts with competency at the common law to entertain the writ, could do so in New York. But modern New York Courts seemingly have modified the rule: Peo. v. Mons, 195 Misc. 479, 92 N.Y.S.2d 14 (1949); Hogan v. Supreme Court, 295 N.Y. 92, 63 N.E.2d 181 (1946). Mississippi, assumes that power is limited to courts of record: Carraway v. State, 163 Miss. 639, 141 So. 342 (1932). Cf. Peo. v. Superior Court, 28 Cal. App. 2d 442, 82 P.2d 718 (1938) (allowing police court to issue the writ) and State ex rel. Estes v. The Justice Court of Jefferson County, 12 State Rep. 218, 284 P.2d 249 (Mont. 1955) (assuming competency of justice of the peace court).
cretion of the trial court. Such was the common law rule, but it is altogether unacceptable for due process purposes. Those courts holding that no right of appeal exists, also would seem to affirm the discretionary character of the trial court's jurisdiction, by implication. However, those finding that a right of appeal exists, presumably give the defendant an absolute right to a hearing—another major conflict.

3. A related question is, does the petitioner have a right of appeal from an adverse ruling in the trial court? New York courts denied such right (though subsequent legislation finally granted the right) which is entirely correct under traditional common law doctrine. However, various courts, ignoring completely common law limitations, have concluded that such right exists. Again, our court has assumed the right without even arguing it. Of course, any remedy testing due process must include a right of appeal.

4. But, having so concluded, these courts are faced with the further dilemma of deciding whether it should be treated as an independent "civil proceeding," entirely original, again, as at common law, or as a criminal remedy, to determine what statutory period should be allowed for the appeal. Different courts have given different answers thereto, based on a considerable variety of reasoning.

5. Since coram nobis is based on issues of fact, can a defendant claim a right to a jury trial thereon? Several states seemingly affirm such right, while others deny it. The right did not exist at common law.

A very early New York case held the writ not to be a matter of right, but to be discretionary with the court: Smith v. Kingsley, 19 Wend. 620 (1834). Missouri has declared it to be discretionary in a very recent case: Blodgett v. State, 245 S.W.2d 839 (1952); Anderson v. Bushanan, 292 Ky. 810, 168 S.W.2d 48 (1943), also calls it discretionary. Obviously this limitation is intolerable in a remedy to test due process. Both California and Montana have declared that there is a right of appeal from an adverse ruling, which seems to import a right to a hearing in the first place. Peo. v. Paiva, 31 Cal. 2d 503, 190 P.2d 604 (1948); State v. Zumwalt, 12 State Rep. 509, 291 P.2d 277 (Mont. 1955).


That right of appeal exists in California and Montana, see cases cited supra, note 58. It should be noted, however, that, in a series of cases, decided in 1953, our court entertained proceedings seeking reversal of adverse rulings by the trial courts to petitions for coram nobis, all of which were called "original proceedings" both in the petitions and by the Court: State of Montana ex rel. Bellonza v. The District Court of the 8th Judicial District, 127 Mont. 609, 288 P.2d 749 (1953); State of Montana, ex rel. Kness v. The District Court of the Thirteenth Judicial District, 127 Mont. 608, 288 P.2d 749 (1953); State of Montana ex rel. Zumwalt v. The District Court of the Fourth Judicial District, 127 Mont. 607, 288 P.2d 749 (1953). Mississippi says that no appeal lies in Carraway v. State, 163 Miss. 639, 141 So. 342 (1932), but subsequent cases suggest slight modifications, or deviations: Wetzel v. State, 250 So. 2d 184 (1954); Graham v. State, 166 Miss. 582, 17 So. 2d 210 (1944). Cf. State v. Hudspeth, 191 Ark. 563, 88 S.W.2d 588 (1935); Hodges v. State, 111 Ark. 22, 163 S.W. 506 (1914), in which the court thinks it may be necessary to use "certiorari," but is not sure. Kansas assumed an appeal to be proper in State v. Calhoun, 50 Kan. 523, 32 Pac. 38 (1893).

See further discussion of this problem infra, at notes 71, 72 and 73.

Kansas treats issues as raising questions of fact for jury: State v. Calhoun, 50 Kan. 523, 32 Pac. 38 (1893), as does Arkansas in Adler v. State, 35 Ark. 517 (1880), though later case raises implication that practice may be limited to insanity issue: State v. Hudspeth, 191 Ark. 563, 88 S.W.2d 588 (1935), Hodges v. State, 111 Ark. 22, 163 S.W. 506 (1914), in which the court declares that, although "criminal for at least one purpose" (see Peo.
6. Another issue of profound importance involves the question of to
what extent principles of res judicata are applicable to such proceeding.
It generally is said that res judicata is not applicable at all to applications
for the writ of habeas corpus, hence we often find courts not stating any
reasons for action taken. Should it be any more applicable to coram
nobis? Of course, the answer to this question must depend, in turn, on
the modern reasons for recognizing the writ. (Much the same thing may
be said concerning the questions whether the petition is as a matter of
right or is discretionary, and whether an appeal lies therefrom.) If lim-
ited generally to its common law function, res judicata may very well be
held applicable thereto—though the common law is vague on the matter.
However, if our supreme court, or some of its members, are determined
that it be given a broad ranging dynamic function, indefinite in scope, to
protect basic constitutional guarantees, the violation of which is deemed
of such a serious character as to limit the very jurisdiction of the trial
court in rendering judgment and sentence, then it will not be surprising
to find that court sweeping aside arguments based on res judicata. We
find the latter position strongly implied in the language of some of the
judges in our most recent decision on coram nobis, in their insistence that
the supreme court should entertain the petitioner’s further petition, as an
original proceeding, after the latter had had a complete adjudication on his
coram nobis hearing in the trial court, and had lost his right of appeal.

7. Very possibly the most arguable question of all is that found in
the case last cited, involving the broad question of whether it ever is per-
missible for the defendant to petition the supreme court itself for a writ
of error coram nobis. However, the general question must be divided into
a number of more particular questions. The issue is raised in its most
common form when the judgment complained of has been affirmed by an
appellate court. It may be plausibly insisted, consistently with traditional
common law theory that, since the record (actually only a transcript there-
of, under modern practice) is before the appellate court, it is a proper
court to hear the plea, though the trial court still is the primary trier of

v. Paiva, infra, note 71) remedy is “primarily” a civil proceeding, so right to
jury does not exist absolutely: Peo. v. Adamson, 54 Cal. 2d 320, 210 P.2d 13
Langan, 303 N.Y. 474, 481, 104 N.E.2d 861 (1952): “There must be a trial .
and it will be for the Trial Judge to pass on all questions of fact...” State v.
Gentry, 223 Ind. 535, 537, 62 N.E.2d 860, 861 (1945), recognizing the common
law to be thus. Apparently, Montana district courts assume that such hearing
does not call for a jury, though no rule has been established in Montana on it.

Salinger v. Loisel, 265 U.S. 224, 44 Sup. Ct. 519, 68 L.Ed. 989 (1924), and State
ex rel. Shapiro v. Wall, 187 Minn. 246, 244 N.W. 811, both state the common law
rule thus. Acc.: Ex parte Reinhardt, 88 Mont. 252, 252 Pac. 552 (1930), even in
a custody proceeding, under statute; Ex parte Fyle, 72 Mont. 494, 234 Pac.
254 (1925).

Young v. Ragen, 337 U.S. 235, 69 Sup. Ct. 1073, 93 L.Ed. 1333 (1948), and Woods
v. Nierstheimer, 328 U.S. 211, 66 Sup. Ct. 996, 90 L.Ed. 1177 (1946) both have trou-
bles with the Illinois decisions for this reason. See Jenner, The Illinois Post-
The model uniform act, entitled “Uniform Post-Conviction Procedure Act” re-
cently approved, attempts to correct this evil by requiring full statement of rea-
sons for disposition, in Section 7, thereof.

State v. Zumwalt, 12 State Rep. 503, 291 P.2d 257, particularly at 515, and 265
(Mont. 1955).
facts. However, a variety of divergent rules have been adopted by different states. Some say that the judgment can no longer be attacked, at all; others insist that the petitioner must petition the appellate court for permission to petition the trial court; still others take the position that the appellate court should hear the application itself. The interaction of old common law theories with attempts to adapt the remedy to the theories underlying modern statutory procedures, has produced these varying rules. However, the issues become more debatable yet, when, though no appeal was taken originally, an attempt is made to persuade an appellate court to use the writ as an original process to compel the trial court to send up the record, so that the appellate court may be able to make its own independent original finding on the petitioner’s application. Is it ever proper for the supreme court to entertain such application for this purpose? We shall return to this question infra, incidental to an analysis of the Montana cases.

8. Should the writ of error be treated as a civil or a criminal proceeding; is it an original civil (equitable) action, or is it but a continuation of the original criminal trial. Answer thereto is of great importance for a number of reasons. One of the most important, involves the controlling limitations period for an appeal, where allowed. One of the most famous California cases wrestled mightily with this problem, with sharp conflict among the judges expressed. Our own court barely missed the necessity of taking a positive position on the question in the Zumwalt case. The common law answer is clear—it is an independent, original proceeding, civil in nature, originally applied almost exclusively in civil cases, though eventually extended to the criminal field. But this clear common law answer gives us no modern day answer.

People v. Reid, 195 Cal. 249, 232 Pac. 457, 462 (1924), citing cases as so establishing the common law rule.

Though originally allowing defendant to continue petitioning the trial court in Hydrick v. State, 104 Ark. 43, 148 S.W. 541 (1912), apparently it later modified this rule to require a petition to the affirming court for permission to petition the trial court, in State v. Hudspeth, 191 Ark. 963, 88 S.W.2d 858 (1935); Johnson v. Williams, 244 Ala. 391, 13 So.2d 683; Chambers v. State, 117 Fla. 642, 158 So. 153 (1934); State v. Ray, 111 Kan. 350, 207 Pac. 192.

This has become the rule in California by statute: Cal. Penal Code Sec. 1265, as amended by Stats. 1949, Ch. 1309, § 2. Prior to this statute, however, an affirmation on appeal did not seem to affect petitioner’s right at all to petition the trial court for coram nobis: Peo. v. Shorts, 32 Cal.2d 592, 197 P.2d 330 (1948); Peo. v. Gilbert, 25 Cal.2d 422, 154 P.2d 657 (1944). Actually, a number of other states also consider the trial court the only appropriate court to receive the petition, even where the original judgment was affirmed: Peo. v. Sheppard, 405 Ill. 79, 90 N.E.2d 78 (1950); Stephenson v. State, 265 Ind. 141, 130 N.E.2d 683 (1955); State v. Latshaw, 291 Mo. 592, 257 S.W. 770 (1922). At the other extreme, at least one state requires the petitioner to apply first to the supreme court for permission to petition the trial court, originally: In re Taylor, 230 N.E. 566, 53 S.E.2d 749 (1949), by virtue of its supervisory authority over inferior courts, granted by the Constitution.

In Peo. v. Paiva, 31 Cal.2d 503, 190 P.2d 604 (1948), the California court ruled the defendant entitled to have state pay costs of appeal, as a criminal proceeding, though there was a very strong dissent. In Dobbs v. State, 60 Kan. 106, 61 Pac. 408 (1900), Kansas also characterized this proceeding as part of the original criminal proceeding, though, in State v. Ray, 111 Kan. 350, 207 Pac. 192 (1922) it later held coram nobis to be in the nature of a civil action.


9. Though probably there is a larger measure of general agreement among different jurisdictions on the general rule that the peculiar function of coram nobis is to bring to the attention of the trial court itself, errors of facts (in contrast to errors in law), which the defendant was unable to introduce at the trial, which were unknown to the court at the time of the judgment, but which if known would have caused it to render a different judgment, nevertheless there is great diversity as to what allegations of fact will support the petition. However, those courts with the most experience with the writ have learned that, if its common law character is maintained to preserve any semblance of the original writ, it often will prove inadequate as a remedy to test the due process requirement of a "fair trial."

Perhaps the best place of all to see revealed the uncertainty, confusion, and conflict of views as to the essential incidents of coram nobis, and thus something of the reasons for the extreme difficulty counsel have in determining how to proceed, is in our own recent decisions on the subject. Hence, those cases require further considered attention. However, a preview of the common law development of coram nobis, including particularly the subtle distinction that law made between "coram nobis" and "coram vobis," with the real reasons therefor, is essential to an appreciation of the issues raised among our different justices.

**COMMON LAW MEANING OF "CORAM NOBIS" AND "CORAM VOBIS"**

The writs of coram nobis and coram vobis actually are a specialized form, or a variation of the more general "writ of error," but only very gradually became differentiated from the ordinary use of that writ, which was to review an error of law in an appellate court. The writ of error was an original writ issuing out of the Court of Chancery, serving both as a certiorari to remove the record from an inferior court to an appellate court, and as a commission or authorization from the Crown to the judges in the appellate court to examine the record for alleged errors of law. The record thereafter remained in the appellate court even though the writ

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7"Probably this extreme diversity of ruling as to what "fact issues," even will support coram nobis is nowhere brought out more dramatically and effectively than in *Frank, Coram Nobis* (Common Law—Federal—Statutory) (1953), with 1954-55 Cumulative Supplement, especially in his state to state analysis of the law, found in the Cumulative Supplement. Initially sympathetic with use of common law coram nobis as a due process device, the latter state to state study makes it obvious that the remedy is wholly inadequate for that purpose as developed in the large majority of other states; even New York already has begun the process of piecemeal statutory modification, evidenced by the 1947 legislation, amending New York Code of Criminal Procedure, §§ 517 and 518, to provide for appeal by both the petitioner and the state on a coram nobis petition."

8Smith-Hurd Ann. Stat. §§ 820-32, as amended by Law of 1949, p. 722, § 1; Peo. v. Adamson, 34 Cal. 2d 320, 210 P.2d 13 (1949), and cases cited; Curran v. Woolsey, 9 Ter. 382, 104 A.2d 771 (1954). The sources of this confusion and of conflicting decisions are at least threefold: 1. Uncertainty, and differences of judgment as to the exact scope and nature of the writ at the common law; 2. Difficulties in adapting and integrating the writ to other relevant code sections—and of deciding whether such code sections should be deemed "relevant" at all; 3. Differences in the purposes of different courts for recognizing the availability of the writ—what different courts wish or intend to do with the writ.

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should thereafter be quashed." The first apparent modification of the rule limiting use of the writ strictly to the review of errors of law, appears to have been first made by causing it to be directed to the justices of the King’s Bench to correct "errors in the process due to the fault of the clerk," in the King’s Bench itself." Presumably this was expanded to include other clerical and formal errors, but to review errors in law, committed by the justices themselves, it remained necessary to transfer the case to the reviewing court, though, in either case, the commission issued was called simply, "writ of error."""

The need for a distinct term became apparent only gradually as there slowly developed the practice of authorizing the trial court itself, either Common Pleas, or King’s Bench, to hear a defendant’s claim that certain facts existed at the time of judgment which, if known to the court, would have caused it to render a different judgment. As this practice became crystallized, that particular writ of error issued to commission the trial court itself to hold a hearing on new facts, came to be called "‘writ of error coram nobis,’" if directed to the King’s Bench as a trial court, and ‘coram vobis,’” if directed to the Common Pleas Bench to distinguish these "fact" writs from the "law" writs. This slight difference in terms does not indicate any difference whatever in the nature, purpose and function of the writ, based on an error of fact, but rather is the result of a difference in theory as to the relationship of the king to these respective courts. In any case, the writ simply was an authority or power coming from the king to perform a given act—the king spoke in the writ, through his Chancellor, in every case. When he spoke to the King’s Bench, he had to include himself in the authorization, because in theory he always was present at any sitting of that court. So this writ directed the court to examine the record "‘in the presence of ourselves’" or ‘‘in our own presence,’’ i.e., coram nobis; where, however, the writ was directed to the common pleas or similar court, then the king directed them to hear the petition “‘in the presence of yourselves’” or ‘‘in your own presence’”; i.e., coram vobis (since he was not a member of that court)." In either case, each court acted strictly as the trial court, and not as an appellate court. It is to make this point crystal clear that we have detailed the origins of these terms.

The only instance in which there is any apparent historical support for using the term “coram vobis” as an exercise of appellate jurisdiction, is a brief passage in Fitzherbert to the following effect:

In a Writ of Error when the Record cometh in Court if the plaintiffe all that Term do not assign his Errors, and although he do assign his Errors if he do not sue a scire fac. ad audiendum Errores against the defendant returnable the same Term, or the next Term; all the matter is discontinued and the next Term he ought to sue a new Writ of Error out of the Chancery, upon that Record directed to the Justices before whom the Record is removed to proceed upon the Record, que coram vobis residet.

"Ibid.

Fitzherbert, supra n. 76, at 50; 2 Wms. Saunders, supra n. 76, loc. cit.; 2 Tidd, supra, n. 75, at 1137.

Fitzherbert, The New Natura Brevium 50 (Rastall’s 1652).


When this statement was made, (apparently having originated in the first edition, published about 1525 A.D.) the last italicized phrase had not assumed the distinctive meaning it later acquired; the differentiation between "error in fact" and "error in law" was not established yet. Moreover, it is very important to note that in this passage Fitzherbert is talking about a second writ of error directed to the appellate court, after the record has been removed from an inferior court on an error in law, for the purpose actually of reviving the appellate review, which had been discontinued by negligence of the petitioner. The proceeding still involves an appellate review of an error in law. Hence, the chance use of the phrase "coram vobis" here can have no legal significance whatsoever. Indeed, the most authoritative exposition on writs of error generally, declares that, in the situation alluded to in the above quotation, under later developments, the second writ is properly called "coram nobis" because, although it is an appellate proceeding, since the record is permanently lodged in the King's Bench, the proper procedure is to frame the writ in the light of where the record now is, rather than where it originated. Hence, it is clear that there is no common law authority whatever for use of either writ as an original prerogative writ, or as an incident to the exercise of any "review" jurisdiction. Now to examine further the Montana cases.

MONTANA CASES CONSIDERED

The initial series of cases in Montana simply involved applications to the supreme court for relief, via coram nobis, in which that court consistently referred the petitioner to the trial court. The availability of the writ, applied in this manner, was just assumed in all of these cases. However, by 1954, the question of the writ's scope arose with a new and very interesting twist. In State ex rel Estes v. Justice Court, the relator had pled guilty in the justice court to operating a motor vehicle while intoxicated. He was fined and surrendered his driver's license. Upon learning that the Highway Patrol Board had revoked his license for a year, he moved for an order setting aside his conviction on the grounds: 1. His plea was not voluntary, because made only to avoid publicity; 2. The justice of the peace had misled him as to the legal consequences of his plea; 3. The revocation of his driver's license resulted in great inconvenience and hardship in carrying on his profession as a music teacher, because he could not drive a car. (The record does not show that anyone challenged the competence of the justice court to entertain such petition because not a court of record.) On hearing, his motion was denied, and he appealed to the district court which affirmed the denial, in due course. Relator then sought and secured from the supreme court what was styled an "alternative writ of error coram nobis, and order to show cause" directed to the justice of the peace below, to "review" the original trial proceedings, by-

"Loc. cit., supra, n. 80.
"State ex rel. Weaver v. District Court in and for the County of Liberty, Montana, 125 Mont. 616, 245 P.2d 382 (1952); State ex rel. Irvine v. District Court of Fourth Judicial District, Lake County, 125 Mont. 247, 235 P.2d 662 (1951); State v. Hales, 124 Mont. 614, 230 P.2d 960 (1951). Uncertainty and inconsistency of treatment, and in the theory of this action is reflected in the titling of these and the other cases on coram nobis. Of course, consistent entitling of these proceedings is not possible until the essential nature of the proceeding is clearly established.
passing the district court. On hearing and decision on the justice’s return to this writ, the majority quashed the writ, dismissing the proceeding, although, almost certainly, when it issued the alternative writ, a few months earlier, a majority of the court assumed it was competent to so issue. The decision was based on two principal grounds: 1. Whatever the proceeding be called the essential request of the petition was that the supreme court review the original trial proceedings in the justice court, which the supreme court cannot constitutionally do, because it has absolutely no appellate jurisdiction from justice courts, under the Constitution and controlling statutes; 2. The fact situation suggests no occasion for the supreme court to exercise either its extraordinary powers of supervisory control, or any inherent power it might have to create special writs in an emergency to avoid gross miscarriage of justice.

The Chief Justice concurred specially in the result. In contrast to the majority analysis, however, he insisted that the entire proceeding in the supreme court had been an original proceeding, initiated therein by the filing of a petition entitled “Application and Petition for a Writ of Error Coram Nobis, or Other Appropriate Writ.” As mentioned above, on coram nobis the concurring opinion had this to say:

Writs of coram nobis and coram vobis are of ancient origin. Their function has not changed materially from their earliest use in the sixteenth century until the present day. In the past this court has recognized its power and right in proper cases to entertain and determine applications for writs of coram nobis as well as for writs of coram vobis.

He also made it clear that such recognition was in response to the federal compulsion on states to provide adequate post-conviction remedies for testing due process. It seems very significant, that, under these facts the concurring opinion, reflecting the court’s majority opinion only a few months earlier, would permit the filing of a petition for writ of error coram nobis—or is it coram vobis—in the supreme court, to compel the non record trial court to make a return and show cause, so that the supreme court can make a wholly independent finding and ruling to correct “errors of fact and to correct the judgment entered, to the end that due process be not denied.” (But is this coram nobis, habeas corpus, supervisory control, or some hybrid form of all three, or is it a remedy unique and alien to any known special proceeding, fashioned by the supreme court to give it immeasurably greater control over the trial proceedings in all cases?)

The special concurring opinion in the Estes case is disappointing in that, though it assures us that our court already has “recognized its power . . . to entertain applications for writs of coram nobis as well as for writs of coram vobis . . .”, nowhere does it give an inkling as to the difference if any between the two. Hence, this interesting speculation is raised: Does our Chief Justice intend for the latter term to describe this “original pro-

The composition of the Court had been altered in the meantime, by the appointment of a new judge to fill a vacancy arising in the interim.

*Id. at 222 and 223, and 284 P.2d at 251.

*Id.

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ceeding” in the supreme court, instituted by a “Petition for a Writ of Error Coram Nobis or Other Appropriate Writ?”

The last of this series of cases, a very recent one, raises further issues as to how coram nobis should be administered, including the crucial one as to whether the supreme court ever may use it as a prerogative writ, but it fails to provide clear answers to any of the questions raised. In State v. Zumwalt, the application for the writ began normally enough. Zumwalt had pleaded guilty to an information charging him with having passed a false and fraudulent check, with intent to defraud, under section 94-2702 of our Criminal Code—one variation of the crime of obtaining property by false pretenses. However, incidentally to the rendering of formal judgment and sentencing, after establishing that Zumwalt had several prior felony convictions for the same type of crime, the trial court referred to section 94-2007, as the section under which he was sentencing Zumwalt. The latter section describes a type of crime belonging to the category generally known as a “forgery,” though the penalty that could be lawfully imposed for both crimes was identical.

After incarceration, Z filed a petition for coram nobis with the trial court, received a hearing, and a denial of his petition there, but then let the matter stand without perfecting an appeal. After the expiration of the longest statutory period had expired, which might arguably be applicable to his appeal, he petitioned the supreme court for an alternative writ to the trial court ordering it to show cause why its judgment and sentence of Z, “should not be set aside, vacated and annulled and the said relator be again arraigned on said information”—essentially the same form of writ as was issued in the Estes case. Upon return and argument, the majority opinion upheld the State’s contention that the alternative writ should be quashed, and that Z’s petition therefor was demurrable, because the supreme court was completely without jurisdiction in the premises. It assumed for purposes of argument, that coram nobis, as originally used by Z, was available, and further, that he had a right of appeal directly to the supreme court, from the district court’s denial of his petition, under the statutes regulating appeals generally; that he must conform to those statutes, so that, since he had lost his right of appeal by the lapse of time, regardless of whether his petition for coram nobis be treated as an original civil proceeding, under which he had six months to perfect his appeal, or merely as a motion after judgment, in the original criminal proceeding, allowing sixty days for appeal, he now had


Though the majority recites that no timely appeal was shown in the record, actually, it appears that Zumwalt did file a petition with the supreme court seeking reversal of the trial court’s refusal, issued on January 30, 1953, to grant him coram nobis, in time for it to be treated as an appeal in a “civil action,” since, in a ruling issued on July 2, 1953, the supreme court affirmed the trial court’s refusal, presumably because there was no sufficient transcript of any part of the record of the various proceedings had in the trial court. See State ex rel. Zumwalt v. The District Court of the Fourth Judicial District, 127 Mont. 607, 258 P.2d 749 (1953). He then waited until Dec. 1, 1954 to take further action.


State v. Zumwalt, supra, n. 91, at 506-09, and 259-62.
no further recourse to the supreme court, because that court possessed no further jurisdiction which it could exercise in his behalf.

This time, both Chief Justice Adair and Justice Bottomly dissented. As might be expected from the Estes case, the former's dissent was based squarely on the proposition that the present proceedings in the supreme court was an original proceeding in the nature of coram nobis—or coram vobis (again he fails to tell us which), and further, "that such writs are neither novel, mysterious nor unknown to our practice or procedure..." citing two cases assuming the availability of the writ. Justice Bottomly based his dissent on the premise that both the information and the sentencing were so defective as to be void; that hence, Z was being illegally detained, and so must be given an effective remedy for securing his release. He further observed that it made no difference to him whether the remedy given was called coram nobis or habeas corpus." Respectfully, it may be suggested, however, that although this particular defendant does not care what the relief granted him is called, assuming it be established that he is entitled to it, actually it becomes quite important in evaluating the meaning and import of this case for the future, for the court to be clear on whether the remedy is granted by way of enlarging the traditional scope of habeas corpus, on the one hand, or by introducing the writ of error coram nobis (or is it vobis) into our practice, for this purpose, on the other. The significance of the case for purposes of stare decisis and its implications in other factual situations, vary greatly according to which rationale be used. But let us review these last two cases to determine just what rules, if any, regulating coram nobis are actually established.

RECAPITULATION

Although we do not even yet have a decision in which the court has squarely ruled that coram nobis is available as a remedy in Montana, for any purpose, after argument thereon, the majority seemingly assumes its original availability, at least in the Zumwalt case, in its express statement that the petitioner had a right of appeal from the district court's adverse ruling thereon—though even here, such right might conceivably be only to adjudicate the availability of the remedy, in the first place, if litigated in the trial court. These cases also assume that it is an appealable remedy. Further, one of them assumes the competence of a "court not of record" to entertain the petition. Again, although the court had to consider the question of whether "coram nobis" is a "civil" or a "criminal" remedy, it was able to avoid answering it, because here, the longest time limit that might be applicable had expired."

The most significant and provocative proposition in both cases, however, is the insistence by some of the judges that there is available to any petitioner defendant, a remedy by way of an original proceeding in the supreme court itself, to review errors of fact which, though not appearing in the record, allegedly would have affected the judgment rendered if known at the time. Furthermore, such remedy would appear to be available

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"Id. at 515, and 265.
"Id. at 505, and 259.
no matter how many times the petitioner already has had an adjudication on his claims, i.e., principles of res judicata presumably are not applicable. Some of Justice Bottomley's remarks would suggest that this remedy is identical with habeas corpus in this particular respect."

If our account of the development and limits on coram nobis and coram vobis at the common law given above are correct, it is clear that there is no historical basis for giving either of these names to such remedy. Of course, if current United States Supreme Court doctrine actually requires such remedy, our supreme court should utilize all of its jurisdiction necessary to provide a remedy. However, it is as important to know what the United States Supreme Court does not require, as what it does require. It is very doubtful that a remedy of such scope is called for, or can be justified by any federal requirement. Those cases require only that there be an orderly and adequate procedure for challenging once the legality of the defendant's conviction, judgment, sentencing and detention. Of course, the right of appeal not only to the highest state tribunal, but to the United States Supreme Court itself, is an essential of any such procedure. But once the petitioner has had his day in court litigating his claims of lack of due process, "fundamental fairness" requirements are satisfied." There is nothing in federal decisions suggesting that a state must repudiate traditional procedures for releasing a defendant proved innocent, as by another's confession, by traditional administrative processes of pardoning and parole, rather than by judicial process. Of course, the writ of habeas corpus (or its equivalent) must be preserved in any event, because of constitutional guarantees, but even these do not preclude the application of traditional doctrines of res judicata. So, if the view should again prevail in our court, (as is very possible) that it should establish this very broad and vague remedy, no doubt it will assume the responsibility for justifying its introduction on some other ground than either that it is but a traditional common law remedy, or that it is only in response to the demands of the United States Supreme Court.

AS A PREROGATIVE SUPERVISARY WRIT

The court will have difficulty so justifying on the ground that it involves only a modern adaptation of coram nobis—or coram vobis. As already hinted, our judges have not been at all clear as to whether this original writ of factual review is but one branch of coram nobis, or is to be denominated coram vobis. There is some evidence, however, that, when put to it, those judges asserting the availability of the writ, will make that the distinction between these two terms, coram vobis being reserved to describe this original writ issued by the supreme court for appellate review purposes. In the first applications to the supreme court, it seemed to use the term "coram nobis" altogether as descriptive of the petition to the original trial court, for hearing. And in the Zumwalt case particularly, after citing Corpus

*Loc. cit. supra, n. 94.

*This is the clear implication of the cases cited in n. 3, supra, and of the large mass of additional similar cases. Based on a careful appraisal of these cases, all the legislation, both state and federal, seeking to implement this requirement, and discussed infra, at n. 111 and following, provides for the finality of such proceedings. Thus only is it possible to serve those two fundamental, though divergent interests of the state of assuring full justice to the defendant, on the one hand, and of avoiding the intolerable conditions resulting from endless reiteration of often groundless issues, on the other.

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Juris for the standard definition of coram nobis, Justice Adair continues with the following possibly significant description of "coram vobis," from the same source:

Literally 'Before you.' The name given to a writ of ancient origin, a writ of error directed by a court of review to the court which tried the cause, to correct an error in fact, and distinguished from 'coram nobis' see supra."

Corpus Juris Secundum, in turn, takes this statement directly from Black's Law Dictionary. But the proposition is very ambiguous on its face. It can be given either of two very different interpretations equally readily:

1. As declaring that coram vobis describes a practice by an appellate court in which it orders the trial court to send up the record so that the appellate court can pass on facts "dehors" the record;

2. That, substituting for the chancellor, the appellate court may issue a writ to the trial court requesting it to entertain the petitioner's petition to review the facts there. (The only situation in which some modern authority supports this proceeding, is where the original conviction and judgment has been affirmed by the appellate court—a readily distinguishable issue.)

Corpus Juris Secondum, itself, also cites and quotes Burrell's Law Dictionary for the same proposition for which it cites Black's thus:

Writs of error to correct judgments of other courts (such as the common pleas) are said to be coram vobis; the record and process being stated to remain 'before you'... that is, before the justices of the court."


Id. at 510, and 262. Cf. Orfield, The Writ of Error Coram Nobis in Civil Practice, 20 V.A. L. Rev. 423, 425 (1934): (After stating the traditional common law distinction between the two writs) "In the United States the former term (i.e., coram nobis) has been used if the writ was applied for in the lower court and the latter if applied for in the appellate court, but this seems erroneous since even when the writ is applied for in the appellate court the object is to vacate either its own original judgment or the judgment of the trial court which it has affirmed and which is now therefore its own judgment." (Emphasis added.)

There being no rational basis for maintaining this different terminology in modern law, (being originally based on a difference in the relationship of the king to his courts) American courts have been hard put to make sense out of the differentiating terminology, inevitably resulting in greatly divergent and conflicting adaptations, frequently commented on by modern writers. See Orfield, loc. cit. supra, n. 99. Further, some judges may have understood that the appellate courts assumed the function which the Chancellor originally had in causing the initial issuing of the writ directed to the appropriate judges—a correct assumption as to some types of writs. This may explain in part the practice approved only very recently in criminal cases in North Carolina. Coram Nobis was recognized as a permissible remedy to attack a conviction because defendant had not been given counsel in a capital case, where, apparently, counsel had appealed to the Supreme Court for permission to petition the trial court for coram nobis, the Court saying, "The instant application for permission to apply to the trial court for relief is addressed to the supervisory authority of this Court over 'proceedings of the inferior courts' of the State, Const. Art. IV Sec. 8..." In re Taylor, 230 N.C. 506, 53 S.E.2d 749 (1949). But the Court merely directed the trial court to entertain the petition. But, under the modern practice, there is nothing remotely suggestive of a genuine writ in the so-called "writ of error coram nobis." Although, originally the initial "order" emanated from the Chancellor, as a genuine writ, being the first step in the proceeding, preliminary to any application to the trial court itself, the term has long since come to refer to the "order" or decision which the trial court itself makes, following a full hearing and argument on the petitioner's petition.

18 C.J.S. 281 n. 16.

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From this statement, it is evident that there is no transfer of the record to any other reviewing court. For that matter, neither of the two authorities which Black's dictionary cites, supports any such appellate review of the facts. Indeed, these same authorities are cited in Bouvier's Law Dictionary for the following very differently worded proposition, which carefully preserves the orthodox common law meaning of coram vobis, just as does Burrill's: "A writ of error directed to the same court which tried the cause, to correct an error in fact."

This examination of the relevant source materials justifies the conclusion that, if Black's definition suggests the first of the alternate interpretations listed above, both its own authorities and all others examined compel its rejection. Furthermore, even the second interpretation is supportable only where the original judgment had been affirmed on appeal.

Three California Cases

Rather than citing Corpus Juris, Justice Adair might more plausibly have cited three or four California cases, which may be thought to support the contention that coram vobis involves an originating writ from an appellate court to the trial court ordering the record sent up for examination of the facts. Though none of them involves use of the writ for any such purpose, so, are not authority for this proposition, they contain ambiguous language which possibly could be interpreted as dictum therefor. In all three cases the petitioner had appealed to the supreme court from an adverse ruling by a trial court, refusing to issue the writ coram nobis as requested. The first and second of these cases repeat essentially the same vague language contained in Corpus Juris Secundum, purporting to define "coram vobis" to distinguish it from "coram nobis."

People v. Black, the first of these cases, citing no authority whatever therefor, asserts that,

In his petition to the superior court appellant asks for a 'writ of error coram nobis.' This term is not accurately used. The writ coram nobis is issued from a court to correct certain errors of fact made in the court that issues the writ. The writ coram vobis is issued to correct certain errors of fact made in an inferior tribunal. Therefore the writ in the present case should have been termed 'coram vobis.'

However, in this case the petitioner already had petitioned the trial court "for a writ of error coram nobis," which the trial court had re-

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103Bouvier's Law Dictionary 681 (Rawle's Revision 1914).

103aSee Orfield, loc. cit. supra, n. 90, fully supporting this conclusion.

104In a fourth case, Ex parte Dye, 73 Cal. App.2d 352, 166 P.2d 388 (1946), the petitioner also asked for relief by way of "writ of error coram nobis, writ of error coram vobis and writ of habeas corpus," apparently, in an original proceeding, in a appellate court, at the point of incarceration in a road camp, serving the Sheriff to show cause why petitioner should not be released. Though cited by Witkin, Summary of California Law § 256A (1950 Supplement), as ignoring the basic rule that coram nobis issues only from trial court, clearly having jurisdiction to entertain a hearing by virtue of the request for writ of habeas corpus, apparently the court simply decided a coram nobis issue along with habeas corpus issues.

after hearing on the petitioner's allegations of error of fact. The court expressly described the present proceeding as an appeal therefrom. So, anything the court says concerns the rights of the defendant incidental to a regular appeal from the trial court's refusal to set aside the judgment. Moreover, it would appear that the court has terribly confused established terminology with disastrous results. As noted elsewhere, under general usage of both these terms today, no "writ" is issued in fact. These terms simply have been adapted to describe the order of the hearing court itself, if it grants the petitioner's request to set aside the judgment. If it refuses to grant such request, then it is said that the trial court refused to "grant the writ." However, although the Black case does not actually say that coram vobis emanates from an appellate court to an inferior court, some of its language, in the setting of this case, strongly suggests that it understands coram vobis to be a prerogative writ of an appellate court either ordering the inferior court to correct such errors itself, or ordering that court to send up the record so that it can correct them—at the same time, shedding no light on which of these meanings it approves.

In the second and third cases, the original judgments had been affirmed. Later, the defendants each petitioned the trial courts to set aside the judgments (i.e., coram nobis); in the present cases they have appealed to the supreme court from adverse rulings thereon, but coupled with a request for a writ of habeas corpus, or alternatively coram vobis. In In re De La Roi, the court said it had no appellate jurisdiction because no formal appeal had been taken, though, on the same kind of record, no such point was made in Ex parte Lindley, the last of these three cases.

Both defendants had petitioned the supreme court, apparently within the allowable time limit governing an appeal, for "a writ of habeas corpus and by way of appeal from the writ of error coram nobis . . . , and in the alternative for a writ of coram vobis." Although De La Roi repeated in full, and Lindley in part, the formula originating in the Black case that, "the writ of error coram vobis issues to correct errors of fact of an inferior tribunal," and, "the basis for its issuance is otherwise substantially the same as for a writ coram nobis," the decisions refused to grant any further relief of any kind whatsoever, presumably on the merits.
Perhaps the most significant common feature of these three cases is that not the slightest inkling is given of how coram vobis actually differs from coram nobis. A further common element in all three cases should be noticed, however. The present proceedings, apparently taken in due time, immediately followed the trial courts' denials of a petition for coram nobis. In at least the Black case it was an appeal and nothing else. And perhaps most significantly of all, in a subsequent case, a most famous decision, although counsel was casting about desperately for any possible straw, to stave off their client's execution, following a refusal by the trial court to grant coram nobis, they were content to take a simple appeal therefrom. Nothing was said about either coram nobis or coram vobis, as a writ emanating from the supreme court. This is as it should be if a petition for coram nobis is treated as equivalent to a "motion to set aside the judgment." This puts the whole proceeding in modern terms, and makes easy a sensible and understandable disposition thereof.

Thus considered, the conclusion seems fully warranted that these three cases are no authority for the use either of coram nobis or coram vobis as an original prerogative writ of any kind. Though California attorneys may have developed a little practice at one time, requesting an "alternative writ coram vobis," quaere whether there is any real legal basis for it, even in California. None of the form books available show a distinctive form. Though noting the relevant statement in the Black case, the encyclopedias on California law give no suggestions as to what it actually means. The suspicion therefore, may be indulged in that People v. Black picked it up from Corpus Juris, and that some attorneys have seized on that case on which to model the form of relief requested. As already shown, the supporting authority, cited by Corpus Juris Secundum, is irrelevant to the present issue.

112a Such statement does not intend to ignore a subtle distinction which, it may be argued, some California cases have tried to develop between "a motion to set aside the judgment," and "a proceeding in the nature of coram nobis." In 12 CAL JUR. 2d., Coram Nobis, page 550, 554, § 4 (1953), the writer notes such supposed distinction, saying, "... some courts refuse to grant a motion to vacate judgment if the judgment is regular on its face, whereas coram nobis lies to give relief in exactly that situation—that is, where the error is extrinsic to the record." The possibility that such distinction exists also is referred to in FRICKE, CALIFORNIA CRIMINAL PROCEDURE 158 and following (3d ed. 1982).


114 12 CAL JUR. 2d., Coram Nobis, page 550, at 552, § 2 (1963), cites the Black case for this asserted difference between coram nobis and coram vobis, at n. 14, though elsewhere, it declares that, "Higher courts have no jurisdiction except on appeal from the trial court's order disposing of the application." Id. at 571, n. 4, citing In re De La Doi, 28 Cal. 2d 264, 169 P.2d 363. WITKIN, SUMMARY OF CALIFORNIA LAW, Crimes, §§ 264-65 (6th ed. 1946), says nothing of any such purported distinction, nor in the 1950 Supplement thereto, at pp. 371-74. Neither does FRICKE, CALIFORNIA CRIMINAL PROCEDURE, Ch. XIX: Motion to Set Aside the Judgment—Writ of Coram Nobis (1952) refer to any such distinction.
In raising these issues as to both the availability of coram nobis, and its desirability as a remedy in Montana to satisfy the "minimum fairness, and post-conviction" requirements of the United States Supreme Court, it is not our purpose to deny nor to minimize the importance of establishing such procedures. Indeed, the basic concern of this study is to help provide answers as to what is the most satisfactory procedure for this purpose and how it can most expeditiously be established. Therefore, having concluded that any judicial attempt to make a modern adaptation of common law coram nobis is likely to raise more questions than it solves, there remains the question of possible alternatives. Before considering alternatives, however, a brief recapitulation of the principle objections to coram nobis is in order.

In the first place, it is very debatable at least, whether it can be considered available as a common law remedy, consistently, either with the general framework of our Code of Criminal Procedure, or with other decisions of our own supreme court as to the exclusiveness of the Code remedies. Secondly, if the court relies instead on its inherent powers to provide essential remedies not otherwise available, then it should ask itself seriously whether the availability of habeas corpus, precludes resort to such inherent power—or at least whether that remedy does not offer a more satisfactory vehicle for developing adequate procedures if the court continues to find itself saddled with that job. Third, further supporting the conclusion that habeas corpus can be developed with less difficulty to test the minimum fairness of the trial, is the plethora of evidence that, instead of being a simple form of relief in any meaningful modern adaptation thereof, such attempted adaptation of coram nobis generates a myriad of complex questions, with very nearly as many different answers as there are adjudications thereon.

Both the bench and the bar may reasonably insist, however, that no really satisfactory nor adequate remedy can be developed by the courts from existing remedies. Hence, the obvious next question is, can the matter be handled more satisfactorily by formal legislation? Happily, we may profit from the experience of a number of other states which, after much confusing, embarrassing and even humiliating litigation, have turned to legislation in an attempt to provide a fully articulated, thought simple post-conviction procedure. The experience of Illinois is the most illuminating of all. Her primary difficulty was not want of any remedy, but rather a

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18One may very reasonably object that the post-conviction remedy needed here should always originate in the trial court, and that habeas corpus does not lend itself readily to that restriction. Having some validity under REV. CODES OF MONT., § 94-101-3 (1947), this objection simply points up the need for full legislative treatment of the whole subject, proposed infra.


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surfeit of possible remedies, with the extent and scope of all of them still in
doubt after much litigation. The three possible remedies, all statutory,
were coram nobis, habeas corpus, and writ of error. As administered by
the Illinois courts and its Attorney General’s Office, the United States
Supreme Court repeatedly found it impossible to determine whether the
petitioner had exhausted his state remedies, before appealing to the federal
courts, as is the requirement. Finally, in desperation, after careful study
by a responsible committee, Illinois enacted a statute expressly designed
to “be sufficiently broad and flexible to embrace the full reach of the in-
quiry required by the due process clause.” Subsequent experience with
the act has demonstrated that it furnishes a tremendous advance over the
law theretofore obtaining. A number of other states have followed Illinois’
example. It should be noted, however, that the Illinois legislation, as en-
acted there, is not a substitute for remedies existing theretofore, but is in
addition to the three possible alternative remedies mentioned above. This
may still leave the law in an unnecessarily complex condition.

With that thought in mind, following a report to it by a Special Com-
mittee on Habeas Corpus, the National Conference of Chief Justices, de-
cided that the problem should be approached on a national basis at the
state level. They referred it to the “National Conference of Commissioner-
ers on Uniform State Laws.” Last fall that Organization approved a model

remedies in Montana, they concurred completely in the conclusion that common law
coram nobis is in such a state of uncertainty, that adequate legislation dealing with
the problem should be enacted forthwith. Harold Pinsoneault, “Writ of Error
Coram Nobis,” (manuscript), doubting the availability of coram nobis in Montana;
James Purdy, “The Availability of Coram Nobis in Montana” (manuscript), con-
eluding that it is possible to resolve the difficulties which appear to bar the remedy
(though recognizing that those difficulties are serious).

amendments to 1955). The Act was specifically designed to meet the test of ade-
quacy insisted on by the U.S. Supreme Court, that it be sufficiently broad and
flexible to embrace the full reach of the inquiry required by the due process clause,
12152, 86 L.Ed. 1595 (1942) that, “asserted denial (of due process) is to be tested by
an appraisal of the totality of facts in a given case.” Jenner, on cit. supra, n. 117,
at 348, and 263. To the objection that, if three statutes fail to do the job, it is un-
reasonable to expect a fourth act to help, the short answer is that all of these tradi-
tional remedies, not having been developed for the purposes now required by the
Supreme Court, and necessarily limited in substantial measure by their traditional
functions, simply perpetuate confusion. It is for that very reason that a new
“start,” created by statute, is so needed.

North Carolina: Session Laws of 1951, Ch. 1083, § 1: Gen. Stat. of N. C. Art. 22,
“Review of the Constitutionality of Criminal Trials.” §§ 15-217 to 15-222, generally
following the Illinois Post-Conviction Act. Indiana: Act of 1947, Ch. 180, §§ 1-9,
p. 625; Burns Ind. Ann. Stat., §§ 9-3301 to 9-3307, as amended (1942 rev.). Dela-
ware: Deals with the matter by rule of court in Rules of Superior Court, Rule 35, Del. Code Ann. “Correction or Reduction of Sentence.” In Curran v. Woolsey, 9
Ter. 382, 104 A.2d 771 (1954), the Delaware Supreme Court interprets its rule as
establishing essentially the same remedy as is provided for the federal courts in 28
U.S.C. § 2255, creating a broad post-conviction remedy for defendants under actual
detention.

These statutory remedies were supposed to be coram nobis, habeas corpus, and writ
of error.
uniform act, following two years of committee study and revision. The Montana Legislature should give most serious consideration to this Uniform Act, at its next session.

EVILS DEALT WITH IN UNIFORM ACT

In discussing difficulties inherent in attempts to adapt either coram nobis, or habeas corpus to modern due process requirements, we have considered only some of the problems spawned by the administration of the "minimum fairness" rule and its progeny. Under existing laws, an especially difficult problem for the United States Supreme Court results from the requirement that the petitioner exhaust all his state remedies before appealing to it. A decision on this may be especially difficult, either because the state offers several alternative remedies (such as they are), as does Illinois, or because the state law regulating whatever remedy is offered, is in a serious state of uncertainty. (We are ripe for the same difficulties in any case taken to the United States Supreme Court from Montana.) Hence, for the federal courts, at least, multiplicity of remedies can become a prime evil. It is almost as important for them that the state remedies be clearly defined and determinable, as it is that they be "adequate." Still another difficulty in administering this branch of the law may result from the very common practice by many state courts of never stating in the record their reasons for refusing the petitioner's application either for coram nobis or for habeas corpus—thus making it always difficult, and often impossible for the Supreme Court to determine whether "a federal issue was involved," which is another condition to the exercise of its jurisdiction. Hence, multiplicity of remedies, aggravated by general failure to state reasons for rulings, with the attendant confusion and uncertainty as to when all remedies have been exhausted, have become major evils in judicial criminal administration.

Clearly related to and, indeed, an inevitable consequence of such confusion in our remedial law has been the concomitant evil of endless litigation of wholly groundless claims. In a three year period, 1944-46, there were 1260 pro se petitions in forma pauperis filed with the United States Supreme Court alone. Of these, 638 were from the single state of Illinois.

UNIFORM POST-CONVICTION PROCEEDING ACT, approved and recommended for state enactment at the annual meeting of the National Conference of Commissioners on Uniform State Laws, August 15-20, 1955. Also approved by the American Bar Association Meeting at Philadelphia, August 25, 1955. (Copies are obtainable from "National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Ill.)

See also JENNER, loc. cit. supra, n. 117 (1955).

The efforts of the Supreme Court of the United States to ascertain the state of the law in Illinois were further complicated by the fact that the Illinois trial courts seldom gave any reasons or grounds for denial of petitions for writs of habeas corpus." JENNER, op. cit. supra, n. 117, at 351 and 265. This practice is also recognized as a serious evil by the committee drafting the Uniform Act, both in their commentary and in Section 7 of the Act, which intends to correct this omission by requiring a clear statement of "the grounds on which the case was determined and whether a federal or a state right was presented and decided." See also UNIFORM POST-CONVICTION PROCEEDING ACT, Prefatory Committee Statement, at p. 9.

JENNER, op. cit. supra, n. 117, at 349, and 264.
Further, the illustration cited from Indiana, supra, wherein the defendant's petition revealed that he had instituted six coram nobis and nine habeas corpus proceedings, all but one on the same issue, rather than being exceptional, not only has become a common occurrence, but even more extreme cases are all too common. On the other hand, there are cases wherein, under existing practice, a defendant is not able to secure a hearing until after his term has expired. Indeed, in one rather extreme Oregon case, the defendant was regularly discharged from prison twenty days after argument on his petition, "and considerably before this court had completed its study of the varied and profoundly important issues presented." So, it is not surprising to find the Special Committee on Habeas Corpus commenting in its report to the Conference of Chief Justices thus:

The courts appear to be impaled upon the horns of a dilemma. If a person has been unconstitutionally imprisoned for from two to ten years while litigation has pursed the even tenor of its way, the situation becomes abhorrent to our sense of justice. On the other hand, if there has been no violation of constitutional right, and if from 90 to 99 per cent of the claims are groundless, the wear and tear on the judicial machinery, resulting from years of litigation in thousands of cases, State and Federal, becomes a matter of serious import to courts and judges, who, after all, are dedicated to the task of clearing their dockets with reasonable expedition. The element of expense is not to be ignored.

PROVISIONS OF UNIFORM ACT

Its framers drafted the Uniform Act in a determined effort to obviate the more serious evils experienced with the various post-conviction remedies available heretofore, including particularly the following marked improvements in the law: 1. To provide a complete statutory substitute for the various remedies relied on in the past to test the constitutionality of a conviction on any ground not previously adjudicated. Hence it displaces both coram nobis and habeas corpus, or variations thereon, for this purpose; 2. To furnish as speedy a proceeding as is possible, compatible with orderly judicial process; 3. To mark clearly and define positively the scope of the remedy assuring a petitioner a full and adequate opportunity to test his charges of lack of due process; 4. To bring to a definite conclusion further testing, after all reasonable opportunity to be heard.

The last objective means that, although the defendant petitioner is given every opportunity to challenge the constitutionality of his conviction, he cannot continue interminably to harass and encumber judicial administration by wholly groundless charges. To these ends, the Act guarantees to the defendant the privilege of challenging on any constitutional grounds, or for any alleged error, hereafter available under habeas corpus, coram nobis, or other common law or statutory remedy. The venue is in the trial

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124State ex rel. Emmert v. Hamilton Cir. Ct., 223 Ind. 418, 61 N.E.2d 182 (1945), n. 33 supra. See also: Dorsey v. Gill, 148 F.2d 857, 862 (1945), citing five defendants, filing respectively, 50, 27, 24, 22, 20 habeas corpus petitions.
127UNIFORM POST-CONVICTION PROCEDURE ACT, § 1 (1955).
court, without any statute of limitations—except that those courts here-
tofore exercising jurisdiction to issue a writ of habeas corpus, have an
equivalent jurisdiction under the present Act. Any petitioner is guar-
anteed counsel, and all necessary costs to perfect his remedy. The peti-
tioner has a duty to state clearly and fully and specifically the grounds of
his attack, and must swear to the truth of everything he is capable of swear-
ing to, contained in his petition.

Although considerable discretion is vested in the trial court as to in
what manner and form it wishes to receive evidence and as to requiring the
presence of the petitioner, it must "clearly state the grounds on which the
case was determined and whether a federal or a state right was decided," i.e.,
perfect a record adequate to the needs of possible subsequent
proceedings thereon. Of course, a right of appeal by both the state and the
petitioner are guaranteed, with a suggested six months limitation. The
petitioner also has the duty of including all grounds for relief in his ap-
plication, and principles of res judicata are applicable to those he could
have but did not raise, such grounds being waived, excepting that, if in a
subsequent petition, a ground is asserted "which could not reasonably have
been raised in the first petition," the court is expected to entertain further
proceedings on such new grounds.

Perhaps the most controversial feature of this Act is its endeavor to
encompass in the sweep of this statutory remedy the privilege of access to
the courts by petition for habeas corpus, generally given constitutional guar-
tantee. Presumably, however, the framers are on sound ground in their con-
cclusions that, with no statute of limitations imposed, combined with the
saving privilege provided by Section 8, of still another try, upon a pleading
of a ground for alleged voidness of his detention which could not have been
pleaded in the prior proceeding, the act will withstand attacks against its
constitutionality under our constitutional guaranty against suspension of
the writ of habeas corpus.

\[18\] Id. § 3.
\[19\] Id. § 1.
\[20\] Id. § 2.
\[21\] Id. § 5.
\[22\] Ibid.
\[23\] Id. § 4.
\[24\] Id. § 3.
\[25\] Id. § 7.
\[26\] Ibid.
\[27\] Ibid.
\[28\] Id. § 9.
\[29\] Ibid.
\[30\] Id. § 8.
\[31\] Id. §§ 1 and 8.
\[32\] Id. § 8.
\[33\] See editorial comment to § 1, Uniform Post-Conviction Procedure Act, pp. 10, 11 (1955).
\[34\] "The privilege of the writ of habeas corpus shall never be suspended, unless, in case of
rebellion, or invasion, the public safety require it." Constitution of Montana, Art. III, § 23. But this guarantee does not include the right to harass the courts
repeatedly with the same charges, where already ruled on adversely by a competent
court.
Of course, such statute would not automatically resolve all issues and uncertain questions. The problems of statutory construction accompanying the administration of any new act are sure to arise. Granting that all such ambiguities have not been resolved, it is submitted that the major evils of traditional remedies have been, and that the Act would achieve a marked improvement in criminal administration.

Although in its terms, the relief granted under the Uniform Act, is broader than that required to test “minimum fairness” under the Constitution, since it encompasses any “ground of alleged error heretofore available” under any statutory or common law remedy, of prime significance, in the light of recent Montana decisions, is the fact that it clearly gives a simple, speedy and adequate post-conviction remedy implementing the “minimum fairness and post-conviction remedy” requirements of the Constitution. So, bearing in mind that it is quite as important that we see clearly what the United States Supreme Court does not require, as what it does— with the demands of due process fully provided for, it should become possible for our supreme court to consider more objectively than in the past, whether it should assert its inherent power to put either coram nobis, or coram vobis to the unprecedented use of an original prerogative writ, issued by the supreme court itself, incidental to a reviewing of the facts in a criminal case. And if the view should again prevail there, that it should issue such writ, calling it “coram vobis” presumably, no doubt, the court will accept the responsibility for justifying it on some other ground than that the minimal conditions of due process, require the manufacture such process or that it is a simple well known common law remedy.

Any state considering the enactment of the Uniform Act, may want to examine it, particularly § 1, defining the “jurisdiction” of the Act, for possible ambiguities as to the following questions: 1. Is the Act limited to persons now actually in custody, or seeking their release from detention; 2. Does it apply to one sentenced to prison for a felony but immediately paroled under suspended sentence; 3. Does the “remedy heretofore available under the common law” referred to in § 1, revive general common law remedies, incorporating them anew locally, or does it refer only to those expressly recognized by the local law at the date of the enactment? If there are calculated ambiguities in the Act does such drafting best serve the purposes of this Act?

Editorial comment to § 1, of the Uniform Act, states that the “scope of the remedy, ... is similar to the one provided for by the federal statute,” 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...”. Although there is much evidence in the Reviser’s notes to the 1948 Code Revision that this Section was intended to state the full scope of the post-conviction remedy “similar to coram nobis,” for the federal courts, in U. S. v. Morgan, 346 U.S. 502, 74 Sup. Ct. 247, 98 L.Ed. 248 (1954), where the petitioner sought to have expunged from the record a prior conviction eleven years thereafter, and at least seven years after his release from prison thereon, so as to avoid the onus of an habitual criminal statute, in a very close 5 to 4 decision, the Supreme Court ruled that the petitioner still was entitled to a remedy “in the nature of coram nobis,” not under § 2255, but under “the all writs” section 1651(a)—this, in spite of the further fact that Rule 60 (b) of the Federal Rules of Civil Procedure expressly abolishes “coram nobis” in civil actions. The case is severely criticized in Amended, Coram-Nobis—Panacea or Carcinoma, 7 Hastings L. J. 48 (1955), wherein the author raises this question, “Can there ever be any finality against collateral attack for federal criminal judgments?” In evaluating this decision, however, it is very important to understand that it does not lay down any criteria for determining “minimum fairness” standards under state procedures, but simply interprets federal procedure for federal courts. Moreover, the vigorous dissent by four judges may presage modification of this ruling in the future.
Briggs: "Coram Nobis"—Is It Either an Available or the Most Satisfactory