Federal Courts - Petitioner under State Indictment as a Recidivist May Attack the Constitutionality of a Former Federal Conviction by a Motion in the Nature of Coram Nobis When His Release from Custody Prevents Him from Using the Applicable Habeas Corpus Remedy (28 U.S.C. 2255)

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FEDERAL COURTS—Petitioner under State Indictment as a Recidivist May Attack the Constitutionality of a Former Federal Conviction by a Motion in the Nature of Coram Nobis When His Release From Custody Prevents Him From Using the Applicable Habeas Corpus Remedy (28 U.S.C. 2255).

INTRODUCTION

In 1961 Lawrence Flanagan was given a two year suspended sentence after he was convicted on a guilty plea of transporting a stolen motor vehicle across state lines in violation of 18 U.S.C. 2312. At his trial in the United States District Court for the Eastern District of Virginia, Flanagan waived representation by counsel.

Approximately four years after Flanagan's suspended sentence had expired, he was indicted in Nassau County, New York for the felony of possession of a dangerous weapon; except for Flanagan's prior federal conviction, his New York crime would have been a misdemeanor. For this reason, on October 3, 1968, Flanagan moved the United States District Court for the Eastern District of Virginia under 28 U.S.C. 2255 to vacate his prior conviction. Flanagan's motion challenged the constitutionality of his conviction on the grounds that he had not intelligently waived his right to counsel, and that he had not knowingly entered a plea of guilty. Accepting his second contention, the court vacated his conviction after finding that his guilty plea had been involuntary. Subsequently, however, on motion of the United States Attorney, the court vacated its prior order setting aside Flanagan's conviction, because it found that the requirement of section 2255 that the petitioner be in custody had not been met. Nevertheless, after Flanagan renewed his motion to vacate, the district court held that, although the custody requirement precluded treating Flanagan's motion under section 2255, relief could be granted by issuance of a writ of error coram nobis. The court characterized federal coram nobis as

1. 28 U.S.C. 2255 (1964): A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

2. In support of its decision, the Flanagan court cited United States v. Morgan,
a remedy having two broad restrictions:

[Coram nobis] will be bounded on the one hand by the advancing coverage of section 2255 and on the other hand by the constitutional doctrine that requires this court to decide only those cases where parties' interests are actually at stake. 6

This comment will explore three problems posed by the court's delineation of federal coram nobis as a remedy having the two indicated restrictions. The first concerns the former uses of coram nobis which have been made unnecessary by the "advancing coverage" of section 2255, the probable limits of this expansion, and the consequent remaining uses of coram nobis. The second problem relates to those "substantial interests" that will support a motion in the nature of coram nobis, and whether these are the same as the substantial interests that will support a motion under section 2255. The third problem involves the applicability of other historical limitations on the ancient writ and relates particularly to the question of whether coram nobis now has additional restrictions besides the two identified by the Flanagan court.

ADVANCING COVERAGE OF SECTION 2255

In the past, federal coram nobis was used principally to permit attacks upon a conviction after the petitioner had completed serving his sentence, 5 or to allow a prisoner incarcerated under consecutive sentences to attack a sentence he would begin serving in the future. 6

346 U.S. 502 (1954), which held that federal courts have authority under the All Writs Act (28 U.S.C. 1651(a)) to issue writs of coram nobis when the absence of custody makes section 2255 inapplicable. The All Writs Act reads as follows: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

3. United States v. Flanagan, 305 F. Supp. 325, 328 (E.D. Va. 1969). The section 2255 boundary to coram nobis relief requires that, in order for coram nobis to lie, section 2255 must be unavailable. See Tivis v. United States, 302 F. Supp. 579 (N.D. Tex. 1969), where the court held that a mislabeled application for coram nobis relief by a petitioner who was entitled to proceed under section 2255 must be treated as having been properly brought under that section. The boundary "which requires that parties' interests be at stake" is commonly referred to as justiciability. A subdivision of justiciability which often becomes an issue in coram nobis cases is the doctrine of "mootness." Thus, although a petitioner might have been a proper party in interest at one time, subsequent events may so change the posture of the case that he no longer has a sufficiently personal interest to satisfy the constitutional requirement of U.S. Const. art. III, § 2 that "The judicial Power shall extend to all cases [and] controversies. . . ." The government has often contended that the release of a coram nobis applicant from custody moots his petition.

4. It should be noted that this comment will not deal with the uses of coram nobis to make post conviction constitutional challenges in state courts. For a discussion of the frequently dissimilar status of state coram nobis, see 80 Harv. L. Rev. 422, 430-431 (1966).

5. See, e.g., Igo v. United States, 303 F.2d 317 (10th Cir. 1962) (relief denied on the merits, however).

6. Thomas v. United States, 271 F.2d 500 (D.C. Cir. 1959); Migdol v. United
Prior to the United States Supreme Court's decision in *Peyton v. Rowe*, a petitioner seeking to attack a future sentence was precluded from doing so under section 2255, because he was not in custody as the term was then understood. Custody was viewed as comprehending only sentences then being served, not sentences to commence in the future. Since the decision in *Rowe*, federal habeas corpus is now available to attack a consecutive sentence which does not begin to run until the uncontested sentence the defendant is serving has expired. In *Rowe* a state prisoner had been convicted of rape, and then had pleaded guilty to a subsequent indictment charging him with "felonious abduction with intent to defile." He was sentenced to a twenty year term on this conviction, the sentence to commence at the termination of his sentence for rape. After exhausting available state remedies, he filed a petition for a writ of habeas corpus to set aside his second conviction, alleging that it violated the fifth and sixth amendments of the United States Constitution. The United States District Court for

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8. McNally v. Hill, 293 U.S. 131 (1934). However, following the Supreme Court's decision in United States v. Morgan, *supra.*, note 2, which held that federal district courts have power to grant motions in the nature of a writ of error coram nobis under 28 U.S.C. 1651(a), many district courts avoided the custody requirement by treating the petition under section 2255 as one for a writ of error coram nobis. See, e.g., Thomas v. United States, *supra.*, note 6, and cases cited thereafter.

> The Writ of Habeas Corpus shall not extend to a prisoner unless—He is in custody in violation of the Constitution or laws or treaties of the United States...

In contrast to section 2255 and federal coram nobis, which are available only to attack federal convictions, section 2241(c)(3) as implemented by section 2254 may be used to challenge the constitutionality of a state conviction. Section 2255 differs further from section 2241 in that a motion under section 2255 is directed to the sentencing court, whereas one under 2241 is made in a district court located in the state which convicted the petitioner or as provided in section 2241(d) if the state contains more than one judicial district.

Apart from these two differences, section 2255 is considered to be the equivalent of 2241. United States v. Hayman, 342 U.S. 205, 219 (1952): "The sole purpose of enacting section 2255 was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum." In particular, custody as used in section 2255 is considered to have the same meaning as custody in § 2241. Cf. Heflin v. United States, 358 U.S. 415, 418 (1959); 57 Nw. U.L. REV. 467, 472 (1962). The sections are identical in another respect. Since Kaufman v. United States, 394 U.S. 217, 226-227 (1969) was decided, the right of a petitioner to challenge the constitutionality of his federal conviction by way of section 2255 is no less extensive than the right of a petitioner to challenge the constitutionality of his state conviction. In view of this equivalence, it will be assumed in this comment that the increasing availability of federal habeas corpus to challenge the constitutionality of a state conviction implies a like increase in the availability of section 2255 to challenge a federal conviction. Furthermore, although the terminology in this area varies, in this comment the term habeas corpus should be taken to include actions under section 2255.
the Western District of Virginia dismissed the petition, holding that since the petitioner had not yet begun to serve the allegedly invalid sentence, he was not in "custody" within the meaning of section 2241. The court of appeals reversed, and the Supreme Court affirmed this reversal. The Court held that "[C]ustody comprehends [a prisoner's] status for the entire duration of his imprisonment"; and, that the term custody should embrace "[T]he aggregate of the sentences imposed. . . ." The Court further justified its liberal construction of the term "custody" on public policy grounds, saying: (1) passage of time will increase the difficulty of adjudicating fact issues in the habeas corpus proceeding and any subsequent retrial that may be required; and (2) the basic purpose of the writ is to provide swift review of unlawful restraints on liberty.

Although Rowe held only that a prisoner could attack a future sentence if he were incarcerated under consecutive sentences entered by the same court, the decision has been construed to entitle a person incarcerated under a sentence imposed by one state to attack a future sentence which was imposed by the courts of another state. Similarly, state prisoners have been permitted to attack future federal sentences by way of section 2255 prior to expiration of their unchallenged state sentences.

Nevertheless, as the Flanagan decision indicates, coram nobis retains its vitality as a post conviction remedy to attack a conviction after the sentence has been served. There are, however, two contexts in which a petitioner may attack a federal conviction by way of section 2255 after his release from prison. In the first, a released prisoner who is on parole is considered to be in custody for purposes of federal habeas corpus; in the second, a prisoner who has been sentenced as an

11. 391 U.S. at, 64.
13. United States ex rel Van Scoten v. Commonwealth of Pa., 404 F.2d 767 (E.D. Pa. 1968); Word v. North Carolina, 406 F.2d 352 (4th Cir. 1969); George v. Nelson, 410 F.2d 1179 (9th Cir. 1969). An interesting and unresolved question raised by these decisions relates to the proper court in which to file the petition. Word, supra., held that the district court in the district where the future sentence is to be served is the proper forum. The opposite position was taken by the court in George, supra., which held that the petition should be filed in the district where the petitioner was at that time incarcerated. Several problems are raised by both these approaches. See 44 N.Y.U. L. REV. 845 (1969) In any event, these decisions may represent an extension of the decision in Peyton v. Rowe, supra., note 7, since the Court's argument that the petitioner was effectively "in custody" for the aggregate of his sentences seems less compelling when the two sentences are imposed by different jurisdictions. The policy of early adjudication underlying the Peyton decision, however, is just as compelling when the future sentence has been imposed by another sovereign.
habitual offender on the basis of a constitutionally invalid prior conviction has also been able to attack that conviction by way of habeas corpus.\textsuperscript{18}

In Flanagan the petitioner was not actually incarcerated as an habitual offender; he was merely threatened with such incarceration on the basis of his challenged prior conviction. In the court's view, the mere threat of increased incarceration on the basis of a constitutionally invalid earlier conviction did not constitute custody within the meaning of that term as used in section 2255. What is required, stated the court, is "some restraint greater than continuing disabilities"\textsuperscript{17} at the time a petitioner files his petition for section 2255 relief.

The court rejected petitioner's contention that the Supreme Court's decision in Carafas v. LaVallee\textsuperscript{18} established that a habeas corpus applicant can meet the custody requirement merely by showing that he suffers from continuing restraints upon his civil freedoms as a consequence of his past conviction. The Flanagan court interpreted Carafas to require only that the applicant be in custody when the petition is filed, and indicated that the "continuing disabilities" referred to by the Carafas court were relied upon only to overcome the government's contention that the case had become moot when petitioner completed serving his sentence after having filed his habeas corpus petition.\textsuperscript{19}

Other district courts have given Carafas the same reading as the Flanagan court.\textsuperscript{20} There is, however, district court authority to the contrary.\textsuperscript{21} The court in Glover v. North Carolina held that Carafas should be interpreted to mean that continuing civil disabilities which flow from a conviction place a petitioner in custody for purposes of the federal habeas corpus statute. The court stated:

It is not actual physical custody during service of sentence that gives standing in habeas corpus; it is instead the restraint on lib-

\textsuperscript{16} Some lower federal courts have used language implying that the attack should have the effect of moving up the commencement dates of future valid sentences so as to provide for immediate release. See Tucker v. Peyton, 357 F.2d 115, 118 (4th Cir. 1966); Strouth v. Peyton, 404 F.2d 537, 538 n.3 (4th Cir. 1968). The current authority of these restrictions, however, seems to have been undercut by the decision in Peyton v. Rowe, 391 U.S. 54, 67 (1968), which makes clear that immediate release is not required. It appears that the attack need only have the effect of moving up petitioner's discharge date. Cf. United States v. Wilkins, 303 F.2d 883, 884 (2d Cir. 1962); United States v. LaVallee, 330 F.2d 303, 306 (2d Cir. 1964).

\textsuperscript{17} United States v. Flanagan, supra, note 3, at 327.

\textsuperscript{18} 391 U.S. 234 (1968).

\textsuperscript{19} The continuing disabilities were sufficient to satisfy the case or controversy requirement of Article III, section 2. Carafas v. LaVallee, 391 U.S. 234, 237 (1968).


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property, whether physical or of a more subtle nature. . . . Should one experience a substantial restraint on his liberty as a result of a conviction that has been fully satisfied, his standing in *habeas corpus* should not hinge upon whether he is on parole, is eligible for parole, or has instituted his application while he was in physical custody even though unconditionally released before a final decision was rendered by the court. Instead his standing hinges upon the substantiality of the restraints that flow from the conviction he attacks.22

This statement of the court, though perhaps a desirable further broadening of the custody concept, does not accurately reflect the holding in *Carafas*. As the *Flanagan* court indicated, the Supreme Court in *Carafas* drew a sharp distinction between disabilities that will avoid constitutional or technical mootness and restraints that will constitute custody.23 To the extent, however, that other federal courts follow the lead of *Glover* in blurring this distinction, federal *habeas corpus* will increasingly become the primary method of attacking a past conviction after discharge, regardless of whether or not petitioner is presently imprisoned as an habitual offender. In that event, *coram nobis* will have no function as a post conviction remedy, unless its scope is expanded to relieve against mere moral stigma.24

The *Glover* Court's decision is unlikely to gain widespread acceptance, in view of its obvious mixing of the mootness and custody issues. For the near future, then, federal *coram nobis* will probably retain its vitality as a vehicle for making a post conviction attack upon a completed sentence when the petitioner is threatened with incarceration as an habitual offender as a result of that sentence.

Federal *coram nobis* may also prove useful as a post conviction remedy when the petitioner suffers only civil disabilities. Its usefulness for this purpose, however, will be limited by the case or controversy restriction.

CASE OR CONTROVERSY

The theory underlying the concept of standing is that a party upon whom a decision will have little effect lacks the necessary incentive to vigorously present his case.25 Halfhearted presentation of a case, it is

22. *Id.*, at 368.
24. See the discussion at pages 334 and 335, *infra*.
25. See *Flast v. Cohen*, 392 U.S. 83, 99 (1968), quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962): "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'"
felt, will lead the courts to establish erroneous precedents.\textsuperscript{26} An important question to be settled in \textit{coram nobis} proceedings is whether civil disabilities and/or moral stigma will be deemed to inflict a sufficiently cognizable injury upon the petitioner so as to afford him standing to sue.

The \textit{Flanagan} court held only that a contingent increased criminal liability was a substantial enough interest to satisfy the case or controversy requirement.\textsuperscript{27} The court expressly refused to decide whether civil disabilities were sufficient to confer standing, though it acknowledged that other courts have held that they do.\textsuperscript{28}

To be contrasted with \textit{coram nobis} actions are habeas corpus proceedings, where civil disabilities have been held by the United States Supreme Court to avoid mootness:

It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these "disabilities or burdens [which] may flow from" petitioner's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him."\textsuperscript{29}

For this conclusion that civil disabilities present a cognizable "case or controversy" in a habeas corpus proceeding, the Court cited \textit{United States v. Morgan},\textsuperscript{30} the landmark \textit{coram nobis} decision. There seems, clearly, no valid reason to apply a different constitutional standard to \textit{coram nobis} actions than to habeas corpus proceedings.\textsuperscript{31}

Although civil disabilities should give rise to a cognizable "case or controversy" in both habeas corpus (assuming the statutory custody requirement is met) and \textit{coram nobis} proceedings, mere moral stigma seems unlikely to overcome the standing barrier.\textsuperscript{32} No cases squarely

\begin{itemize}
\item \textsuperscript{26} 103 U. PA. L. REV. 772, 773 (1955).
\item \textsuperscript{27} United States v. Flanagan, \textit{supra} note 3. \textit{Accord} United States v. Forlano, 319 F.2d 617 (2d Cir. 1963).
\item \textsuperscript{28} United States v. Flanagan, \textit{supra} note 3, at 330.
\item \textsuperscript{29} Carafas v. LaVallee, 391 U.S. 234, 237 (1968).
\item \textsuperscript{31} Even prior to the decision in \textit{Carafas} civil disabilities were considered to give standing in a \textit{coram nobis} proceeding. \textit{See} United States v. Cariola, 323 F.2d 180 (3d Cir. 1963); Kyle v. United States, 288 F.2d 440 (2d Cir. 1961), holding that deprivation of the right to vote entitles a petitioner to use \textit{coram nobis} to invalidate a prior criminal conviction.
\item \textsuperscript{32} \textit{Cf.} St. Pierre v. United States, 319 U.S. 41, 43 (1943). Most federal court decisions considering whether \textit{coram nobis} applications have become moot contain statements that moral stigma alone will not give petitioner standing. \textit{See}, e.g., United States v. National Plastikwear Fashions, Inc., 368 F.2d 845, 846 (2d Cir. 1966), \textit{cert. den.}, 386 U.S. 976 (1967).
\end{itemize}
hold that the stigma flowing from a felony conviction in itself is sufficient to refute the government's objection that a petitioner's release moots his case. There has been, however, a suggestion that it should. 

In a dissent in *Parker v. Ellis*, then Chief Justice Warren stated:

Conviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunity.8

Chief Justice Warren's conclusion that moral stigma should give standing does not contravene the policy underlying the "case or controversy" restriction of Article III, section 2.8 Even if a petitioner is unaffected by a civil disability statute, the "label of ex-con" is likely to have a disabling effect upon him. For example, he may be denied a government occupation requiring a security clearance or other position of trust. Thus, a decision of the court invalidating a past conviction will have an immediate practical effect apart from its general abstract sig-

34. Id., at 593-594. This often quoted passage was cited by the court in *Mathis v. United States*, 369 F.2d 43, at 46 n.13 (4th Cir. 1966), which did not, however, involve the question of whether moral stigma should give rise to a case or controversy. The petitioner in *Mathis*, who was serving a Florida state sentence, made a *coram nobis* attack upon an earlier federal conviction. Sentence for this conviction was to commence at the expiration of his state sentence, and federal officials had accordingly placed a detainer with Florida state officials. The district court had denied the petition on the ground that the petitioner was suffering no "present restraint on liberty." *Mathis* v. *United States*, 246 F. Supp. 116, 122 (E.D. N.C. 1965). The appellate court reversed, holding that the federal detainer constituted a "present adverse effect." 369 F.2d at 48. Notwithstanding this finding, in the course of its opinion, the appellate court stated that "... it would be anomalous at this date to read into *coram nobis* a stringent requirement that the petitioner show a 'present adverse effect?" Id. It is questionable whether the adverse effects of which the court spoke went to the issue of standing. The district court, after a murky analysis in which it analogized *coram nobis* cases to federal *habeas corpus* custody cases, seems to have attempted to establish in *coram nobis* proceedings a cognate to the custody requirement of section 2255. The appellate court's decision, therefore, might simply be construed as the correction of the district court's erroneous attempt to create a new restriction on *coram nobis* relief. However, the *Flanagan* court found a broader meaning in the decision as follows: "The *Mathis* decision contains language ... which would lend support to the claim that the desire to be relieved of a felony conviction gives a petitioner sufficient interest in the outcome of *coram nobis* litigation to create a cognizable case or controversy," United States V. *Flanagan*, 305 F. Supp. 325, 330 (E.D. Va., 1969). Although this reading of the language in *Mathis* seems questionable, the *Mathis* decision is nevertheless significant if only for its holding that a state prisoner against whom a federal detainer has been placed may attack the conviction underlying that detainer through the use of *coram nobis*.

35. Cf. 57 Nw. U.L. REV. 467, 475 (1962). Moreover, allowing moral stigma to overcome mootness would not radically depart from prior practice, as federal courts have frequently permitted a relatively slight showing of disability to give standing. See e.g., United States v. *Gornis*, 275 F. Supp. 329, 332 (S.D.N.Y. 1968), where the mere possibility that prison authorities might subtract time served on a prior invalid sentence from the sentence the petitioner was then serving was held to avoid mootness; and, United States v. *DiMartini*, 118 F. Supp. 601, (S.D.N.Y. 1953), where the mootness obstacle was avoided by a finding that an habitual offender might get damages if he demonstrated his innocence at retail.
nificance as a precedent. Such an "impact of actuality" is the essence of a case or controversy under Article III.

Should the mootness restriction eventually be relaxed so that courts permit coram nobis attacks on the strength of moral stigma alone, a question will still remain as to whether other restrictions limit the function of the writ as an alternative to section 2255 when there is no custody.

**Is Coram Nobis Coextensive with Section 2255 Absent Custody?**

The answer to the question of whether other limitations restrict the availability of federal coram nobis to make a post conviction attack requires a brief glance at the writ’s history. Coram nobis originated in equity where it was sued initially in civil proceedings. It was available to attack only errors of fact not appearing on the record and unknown to the court; the error of fact must have been undiscoverable by due diligence; a petitioner invoking the writ was required to allege his innocence; his petition might be defeated by laches; and coram nobis relief was considered to be extraordinary in nature. It has been observed that these impediments were justified by the strong policy favoring finality in civil judgments.

Nevertheless, these restrictions generally accompanied the writ when it was extended to relieve against criminal convictions. In the United States, however, federal coram nobis has undergone extensive judicial redefinition since the Supreme Court in United States v. Morgan sanctioned its use as a post conviction remedy when section 2255 is unavailable. The question, then, is whether this process has removed these historical limitations so that coram nobis is now equivalent to section 2255 absent custody. The question has two principal facets:

1. Must a coram nobis applicant successfully meet more defenses than

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38. 55 GEO. L. J. 851, 865 (1967).
39. Id.
40. Id.
41. 63 YALE L.J. 115, 121 (1953).
42. See note 38 supra, at 865.
43. See note 41 supra, at 119.
44. Cf. Briggs, supra, note 37. It would perhaps be more accurate to say that the writ did not lose its restrictions when it was extended to relieve against criminal convictions.
46. Two other related aspects of the problem concern the procedural rights of a coram nobis petitioner and allocation of the burden of proof. Though there exists uncertainty regarding the answer to the procedural problem (See 55 GEO. L.J. 851, 869.
his counterpart in a habeas corpus proceeding? and (2) May a petitioner make the same constitutional attacks in a coram nobis proceeding as he could make under section 2255?

Neither of these questions has been definitively resolved by Morgan or its progeny. The majority opinion in Morgan, considered alone, tends to suggest that coram nobis was envisioned as only a limited alternative to section 2255. Although the Court explicitly rejected the common law restriction that coram nobis lay solely to present facts unknown to the court at the time of conviction, the court made other statements implying that coram nobis was to have a narrow scope: there must be "sound reasons . . . for failure to seek appropriate earlier relief;" and, post conviction attacks "should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice."

The restrictive force of this language is weakened, however, when it is construed in connection with what was actually decided. The decision implicitly eliminated a laches requirement, as petitioner attacked a conviction entered fifteen years earlier without attempting any explanation of the delay. Likewise, the Court indirectly removed an "allegation of innocence" obstacle, as the petitioner asserted the constitutional invalidity of his conviction without alleging his innocence of the crime.

(1969), coram nobis and habeas corpus appear to be procedurally the same. For example, when faced with the question of the right of a coram nobis petitioner to an evidentiary hearing, Owensby v. United States, 353 F.2d 412, 417 (10th Cir. 1965) held that "... the issue as to whether a hearing should be held should be resolved in the same manner as it is for petitions under 28 U.S.C. 2255." In both section 2255 and coram nobis proceedings, the petition will be summarily dismissed if it contains only conclusory statements rather than allegations of fact. Accardi v. United States, 379 F.2d 312, 313 (2d Cir. 1967) (section 2255 petition summarily dismissed); United States v. Carlino, 400 F.2d 56, 58 (2d Cir. 1968) (coram nobis petition summarily dismissed). The relationship between the remedies with respect to other rights has not been settled. There seems, however, to be no apparent reason to hold that they are procedurally identical with respect to a petitioner's right to an evidentiary hearing, but different with respect to other procedures.

The remedies are additionally alike in that both habeas corpus and coram nobis petitioners bear the burden of rebutting the presumption of validity which favors the contested conviction. Johnson v. Zerbst, 304 U.S. 458, 468 (1938); United States v. Morgan, 346 U.S. 502 512 (1954) However, if the record is silent on the relevant constitutional question, as where it fails to disclose whether petitioner was represented by counsel, this presumption will be neutralized and the petitioner may himself become the beneficiary of a presumption against waiver of constitutional rights. Farnsworth v. United States, 232 F.2d 59, 64 (D.C. Cir. 1956).

47. 346 U.S. at 511.
48. Id. at 512.
49. Id. at 511.
51. Similarly, Morgan has been interpreted as removing this restriction. Haywood
The apparently restrictive effect of the requirement that there be “sound reasons for failure to seek earlier relief” is lessened when placed alongside the dissent’s objection that defendant “attempted no explanation of the prolonged delay.” Thus, to the extent that the due diligence requirement is still viable, its impeding effect may be somewhat insubstantial when viewed in light of the facts present in *Morgan.*

It is still necessary, however, in a *coram nobis* proceeding to demonstrate that such extraordinary action is compelled to achieve justice. It is as yet uncertain when the extraordinary nature of the writ will operate to bar a constitutional attack. *Morgan* held that deprivation of a defendant’s sixth amendment right to counsel calls for extraordinary relief, and the majority of the lower federal court cases following *Morgan* have involved the same constitutional defect. A showing that a guilty plea was involuntary has also frequently been considered to automatically entitle a *coram nobis* petitioner to extraordinary relief; and at least one court has permitted a petitioner to invalidate his conviction on the ground that the mandatory registration provision of the statute he violated was applied to him so as to infringe upon his

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52. 346 U.S. at 514 (1954) (Minton, dissenting).

53. The significance of the due diligence restriction appears to depend in part upon the ground of the constitutional attack. Where the petitioner claimed he was deprived of counsel, Farnsworth v. United States, *supra.* note 46, at 63 held that he “... should not be precluded from relief because he cannot satisfy a court that he had good cause for any delay in seeking it.” *Contra* Kiger v. United States, 315 F.2d 778, 779 (7th Cir. 1963), where failure to exercise due diligence defeated a petitioner’s contention that his fifth amendment due process rights were violated by the government’s knowing use of perjured testimony. The United States Supreme Court’s decision in Fay v. Noia, 377 U.S. 391 (1963) may be significant in this regard. There, the Court indicated that a *habeas corpus* petition under 28 U.S.C. 2241 would lie in the absence of a showing that petitioner deliberately and knowingly by-passed other appropriate avenues by which he could have attacked the tainted conviction. A criterion akin to this deliberate by-passing standard may come to be applied to *coram nobis* petitions, regardless of the constitutional basis of attack.

54. See note 49, *supra.*

55. See note 38, *supra* at 868.

56. Haywood v. United States, 127 F. Supp. 485 (S.D.N.Y. 1954); United States v. Forlano, 319 F.2d 617 (2d Cir. 1963); Igo v. United States, 303 F.2d 317 (10th Cir. 1962); United States v. DiMartini, 118 F. Supp. 601 (S.D. N.Y. 1953); Johnson v. United States, 344 F.2d 401, 411 (5th Cir. 1965) (held, *coram nobis* may be used to assert the invalidity of a contempt conviction on the ground that the petitioner was not afforded representation by counsel). 74 Harv. L. Rev. 1615, 1619 n.35 (1961).

57. Holloway v. United States, 393 F.2d 731, 732 (9th Cir. 1968); Thomas v. United States, 271 F.2d 500 (D.C. Cir. 1959). *Contra* Young v. United States, 337 F.2d 753 (5th Cir. 1964). Young upheld the summary dismissal of a petition challenging a conviction on the grounds of involuntary guilty plea and lack of counsel. The court dismissed the somewhat inartfully drawn petition with the statement that the circumstances did not call for extraordinary relief. Although the decision can perhaps be supported on the ground that the petitioner made mere conclusory allegations, the court’s failure to so justify its holding appears to be a deviation from common practice.
fifth amendment privilege against self-incrimination. It would seem, then, that with respect to those fundamental constitutional defects necessitating automatic reversal of a conviction, the extraordinary character of *coram nobis* will not limit its effectiveness as an alternative to section 2255.

Although a petitioner for a writ of *coram nobis* can make the same challenges to fundamental constitutional violations as an applicant under section 2255, it is unclear whether the extraordinary character of *coram nobis* will preclude its use to make other constitutional attacks which can be made by way of section 2255. Though some authorities view the remedies as having the same substantive scope, it must be remembered that there is no closed catalogue of grounds which may be asserted in a *habeas corpus* proceeding. Furthermore, it has never been held that an expansion of section 2255 to permit a new constitutional attack necessarily implies a comparable expansion of *coram nobis*.

Currently, the most important unresolved area is fourth amendment violations. There is existing authority that deprivations of fourth amendment rights are unassailable in a *coram nobis* proceeding. But such decisions were rendered at a time when fourth amendment challenges were not universally permitted under section 2255. Recently the Supreme Court in *Kaufman v. United States* resolved the problem in favor of allowing a petitioner to use section 2255 to claim he was convicted on the basis of unconstitutionally seized evidence. In re-

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58. Deckard v. United States, 381 F.2d 77, 81 (8th Cir. 1967).
59. The rule of automatic reversal requires the invalidation of a conviction regardless of whether it is otherwise overwhelmingly supported by constitutionally untainted evidence. The rule applies to correct such constitutional violations as use of a coerced confession and deprivation of right to counsel. To be distinguished from these "fundamental" constitutional errors are others such as knowing use of perjured testimony contrary to fifth amendment due process and introduction of illegally seized evidence in violation of the fourth amendment. These constitutional infringements do not automatically necessitate reversal of the conviction if the prosecution can satisfy the court that the error was harmless. See generally W. Lockhart, Y. Kamisar, and J. Choper, *Constitutional Law: Cases, Comments, and Questions*, at 612-614 (1967); and Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 Mich. L. Rev. 219, 241-242 (1962).
61. Jones v. Cunningham, 371 U.S. 236, 243 (1963): "[Habeas Corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."
65. *Id.* at 231. In so holding the Court seems to have put to rest contentions that the scope of constitutional attack under 28 U.S.C. 2255 was different from that under 2241 and 2254 by a prisoner in state custody.
jecting the view of those federal courts which had denied the use of section 2255 to press a fourth amendment challenge, the Court stated that:

The provision of federal collateral remedies rest... fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief... [A]pplication of the [rule of exclusion] is not made to turn on the existence of a possibility of innocence; rather, exclusion of illegally obtained evidence is deemed necessary to protect the right of all citizens, not merely the citizen on trial, to be secure against unreasonable searches and seizures.66

The court's use of the broad term "federal collateral remedies" and the emphasis placed upon protecting "the right of all citizens" suggests that fourth amendment claims should now be cognizable in a coram nobis action.

Even if the scope of coram nobis expands at the same pace as that of section 2255 to relieve against deprivation of constitutional rights which have not been held to be fundamental,67 there remains the possibility that common law obstacles may reappear to more narrowly limit its availability. This possibility is suggested by the decision of the United States Court of Appeals for the Second Circuit in United States v. Keough.68 Keough sought to invalidate his conviction after he had completed serving his sentence on the ground that the prosecution had failed to disclose evidence to his defense counsel at trial. After discussing what standards should govern a prosecutor's duty to disclose when relief is sought by way of habeas corpus, the court took a restrictive view of coram nobis relief with the statement that:

On a coram nobis petition such as this, it is only when the court concludes that the undisclosed evidence would have permitted the defendant so to present his case that he would probably have raised a reasonable doubt as to his guilt in the mind of a conscientious juror that justice compels the invalidation of the conviction.69

The court justified creation of this approximate equivalent of the common law "allegation of innocence" restriction on three grounds: (1) the nonfundamental character of the challenged constitutional defect;70 (2) the extraordinary nature of coram nobis;71 and (3) the

66. Id., at 226, 229.
67. See note 63, supra.
68. 391 F.2d 138 (2d Cir. 1968).
69. Id., at 148.
70. Id.
absence of any incentive to reprosecute Keough because he had already served his sentence. 72

The real grounds of the decision seem to have been lack of incentive to reprosecute and the nonfundamental character of the defect. This is apparent from the careful distinction the court made between coram nobis attacks upon completed sentences and those upon future sentences; in the court's view, section 2255 standards would govern when coram nobis was used to attack a future sentence. 73 In light of the increasing availability of habeas corpus to attack a conviction which has caused the petitioner to be incarcerated as a recidivist, 74 it is difficult to understand why the lack of incentive to reprosecute should invoke the "extraordinary nature" limitation upon coram nobis relief. 75 Moreover, creation of an additional "reasonable doubt as to guilt" 76 obstacle to post conviction relief when the petitioner has completed serving his sentence disregards the essential purpose of having collateral remedies available to correct violations of constitutional rights. As indicated in Kaufman v. United States, 77 "[C]ollateral relief . . . contributes to the present vitality of all constitutional rights whether or not they bear on the integrity of the fact finding process." 78 Encumbering this "collateral relief" with restrictions bottomed on the prosecution's lack of incentive to reprosecute would sap that "present vitality." A coram nobis applicant should face no other obstacles than his counterpart in a habeas corpus proceeding regardless of whether the alleged constitutional error is deemed "fundamental," particularly since it is questionable whether a deprivation of constitutional rights can ever be properly classified as "nonfundamental".

Nevertheless, the Keough decision evidences a judicial disposition to seize upon the "extraordinary nature" limitation to restrict relief when the constitutional transgression is not considered to require automatic reversal. To the extent that such efforts become more frequent, the growth of coram nobis as a post conviction remedy will lag behind that of habeas corpus. In the process of attempting to define what is

71. Id.
72. Id.
73. Id., at 148-149 n.9.
74. See note 6 supra., and discussion at pp. 330-332.
75. Cf. Pearce v. North Carolina, 395 U.S. 711 (1969) (held, if a petitioner is reconvicted after he has successfully attacked his prior conviction, he is entitled under the fifth amendment to have time previously served subtracted from his new sentence). It is notable that the Pearce decision made no distinction between the various forms of post conviction attack.
76. See notes 40 and 51, supra.
78. Id., at 229.
constitutionally "nonextraordinary," courts may revive old common law impediments,\textsuperscript{79} notwithstanding their irrelevance to the writ's modern function as a means of collaterally attacking the constitutionality of a criminal conviction.\textsuperscript{80} Until \textit{coram nobis} is frankly made the equivalent of section 2255 absent custody, confusion surrounding its common law limitations is likely to make it a less than coextensive avenue of attack.\textsuperscript{81}

**CONCLUSION**

A final question to be faced is how \textit{coram nobis} may continue to play an active role in the federal system of collateral relief. Its essential function has been to correct constitutional errors when the absence of custody makes section 2255 inappropriate. In recent years, the occasions for resorting to the writ have decreased as courts have broadened the definition of custody to permit challenges under section 2255 which formerly could only be made by way of \textit{coram nobis}. Some courts have attempted to otherwise limit the writ's scope by applying restrictions which have their origin in the equity courts of medieval England, where \textit{coram nobis} initially functioned as an extraordinary vehicle for reopening civil judgments.\textsuperscript{82} To the extent that the modern version of the writ is intended to be an integral part of the scheme of "federal collateral remedies" which are available to criminal defendants, its purpose is best fulfilled by adopting the view taken in \textit{United States v. Flanagan} that

This scope of use will be bounded on the one hand by the advancing coverage of section 2255 and on the other hand by the constitutional doctrine that requires this Court to decide only those cases where parties' interests are actually at stake.\textsuperscript{88} Although this approach may include some historical imperfections, it is submitted that it is the most desirable one.

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\textsuperscript{79} 66 \textit{COLUM. L. REV.} 1164, 1179 (1966).
\textsuperscript{80} Cf. 63 \textit{YALE L.J.} 115, 120 (1953): "The only issue which is relevant and which the petitioner should have to prove is that he was deprived of due process."
\textsuperscript{81} See note 79, supra.
\textsuperscript{82} See discussion of \textit{Keough}, supra., note 68, at pages 340-341.