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Collateral Post-Conviction Remedies Available to New York State Prisoners

COMMENTS

COLLATERAL POST-CONVICTION REMEDIES AVAILABLE TO NEW YORK STATE PRISONERS

I. INTRODUCTION

The decisions of the United States Supreme Court have, over the past fifty years, steadily developed and clarified constitutional guarantees available to an accused during a state criminal proceeding.[1] This development has been a part of a continuing process requiring, via the fourteenth amendment, that "state action . . . be consistent with the fundamental principles of liberty and justice . . . ,"[2] and that all procedural hurdles to the achievement of this end be overcome where the individual's liberty is concerned.[3]

This comment will examine the means a state prisoner has to test collaterally the constitutional validity of the proceedings against him, and, consequently, the legality of his confinement. As a basic premise, once found guilty, the accused's lack of an adequate post-conviction remedy to challenge his conviction on constitutional grounds has been held to be a denial of due process.[4]

In New York, the normal corrective processes of appeal,[5] motion for a new trial,[6] motion in arrest of judgment,[7] or motion to withdraw a plea of guilty[8] are severely limited as to time[9] and subject,[10] and, therefore, do not provide an adequate remedy in many instances.[11] Furthermore, before the defendant may

1. See, e.g., Douglas v. California, 372 U.S. 353 (1963) (indigent's right to counsel on appeal); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent's right to counsel at trial).

2. Hebert v. Louisiana, 272 U.S. 312, 316 (1926). So indefinite is the term "due process" that the courts arrive at its meaning "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." Davidson v. New Orleans, 96 U.S. 97, 104 (1877). See, e.g., Jordan v. Massachusetts, 225 U.S. 167 (1912); Twining v. New Jersey, 211 U.S. 78 (1908); Hurtado v. California, 110 U.S. 516 (1884).

3. E.g., Fay v. Noia, 372 U.S. 391 (1963).

4. Carter v. Illinois, 329 U.S. 173 (1946); Mooney v. Holohan, 294 U.S. 103 (1935) (per curiam).

5. N.Y. Code Crim. Proc. §§ 517(3), 520(2).

6. N.Y. Code Crim. Proc. § 465.

7. N.Y. Code Crim. Proc. § 467.

8. N.Y. Code Crim. Proc. § 337.

9. N.Y. Code Crim. Proc. §§ 337 (withdraw plea of guilty; any time before judgment), 466 (motion for new trial; within one year for cases involving newly discovered evidence, any time before execution in death sentences, and before judgment in other cases), 469 (motion in arrest of judgment; before or at time when defendant is called for judgment), 521 (appeal; thirty days from time of judgment or service of a copy of the order with notice of entry thereof). Only in extreme cases, such as death, removal or suspension, or physical incapacity of an attorney may the time for appeal be extended, and then only sixty days. N.Y. Code Crim. Proc. § 521-a.

10. N.Y. Civ. Prac. Law & R. § 5501.

11. The prisoner may also appeal to the Governor for executive clemency as provided in § 692 of the Code of Criminal Procedure. However, the availability of such relief will not bar coram nobis since the granting of executive clemency will not vacate the judgment.

avail himself of the federal courts,[12] he must exhaust all presently available state remedies.[13] Thus, extraordinary means have been devised to meet such exigencies.

II. New York Coram Nobis

A. *Historical Background*

Prior to 1943, there was, for example, no way for an imprisoned defendant to withdraw a plea of guilty where the term of the court which had rendered the judgment had expired.[14] Nor has state habeas corpus[15] been available to test the constitutionality of the conviction of a defendant who was imprisoned by a court having competent jurisdiction over the accused and the crime.[16] Therefore, in view of the Supreme Court's decision in *Mooney v. Holohan*,[17] requiring every state to provide a corrective process for persons convicted and imprisoned where there was a charge of violation of due process, New York was compelled to provide remedies for these situations.

The revival, in *Lyons v. Goldstein*,[18] of the old common-law writ of error coram nobis,[19] used to correct judgments which were erroneously rendered due to a mistake of fact dehors the record, met this need. In *Lyons*, five years after the defendant pleaded guilty to a felony, he applied to the court in which he was convicted to vacate the judgment on the ground that the plea had been procured by fraud and misrepresentation on the part of the prosecution. The Commissioner of Correction of New York then petitioned the supreme court of New York County to enjoin the judge in motion part from proceeding with the motion. The petition was granted, and unanimously affirmed by the appellate division.[20] The court of appeals reversed without deciding the merits of the application, and held that a trial court has the inherent power to set aside a judgment based on fraud, trickery, deceit, coercion or misrepresentation in procurement of the plea.[21] In so holding, New York gave to the convicted petitioner a means to test the validity of his detention where there was no other available remedy, since to do otherwise would be repugnant to both the state and federal constitutions.[22]

The New York Court of Appeals in *Lyons* found that the remedies available

12. See 28 U.S.C. § 2241(c)(3).

13. Fay v. Noia, 372 U.S. 391 (1963).

14. Dodd v. Martin, 248 N.Y. 394, 162 N.E. 293 (1928).

15. N.Y. Civ. Prac. Law & R. §§ 7001-12.

16. People ex rel. Carr v. Martin, 286 N.Y. 27, 35 N.E.2d 636 (1941).

17. 294 U.S. 103, 113 (1935) (per curiam).

18. 290 N.Y. 19, 47 N.E.2d 425 (1943).

19. For a discussion of the history of coram nobis at common law and in New York, see Frank, Coram Nobis (1953); Fuld, The Writ of Error Coram Nobis, 117 N.Y.L.J. 2212 (1947).

20. Lyons v. Goldstein, 264 App. Div. 847, 36 N.Y.S.2d 419 (1st Dep't 1942) (memorandum decision), affirming 178 Misc. 155, 33 N.Y.S.2d 282 (Sup. Ct. 1942).

21. 290 N.Y. 19, 25, 47 N.E.2d 425, 428 (1943).

22. Ibid.

in the Code of Criminal Procedure were not exclusive, and as there had been no attempt to provide a legislative remedy for a conviction obtained by fraud and misrepresentation, the inherent power of a court to set aside such a conviction could not be questioned.[23]

Thus, the importance of the writ cannot be overemphasized, as "it is an emergency measure enabling a defendant to avoid the effects of a conviction procured by fraud or in violation of his constitutional rights *when all other avenues of judicial relief* [other than federal relief] *are closed to him.*"[24]

B. *Grounds for Relief*

1. In General

Since its revivification in *Lyons*, coram nobis has expanded considerably. Generally, it is available when there has been an abrogation of a fundamental right and no other adequate remedy exists.[25] While its limitations are not clearly defined,[26] several general principles are clear. First, it is available "for the purpose . . . of calling up facts unknown at the time of the judgment, . . . facts which if known, would have precluded the judgment rendered."[27] Therefore, if the accused fails to make a timely presentment of facts which are known to him at the time of the trial, coram nobis will be of no avail to raise these facts at some future date.[28] Secondly, coram nobis is limited to facts dehors the record,[29] and unless the alleged error is of constitutional dimensions, involving a denial of due process[30] with no other remedy available, it may not be used

23. Ibid.

24. Fuld, supra note 19, at 2248. (Emphasis added.)

25. People v. Sadness, 300 N.Y. 69, 89 N.E.2d 188 (1949).

26. In People v. Sullivan, 3 N.Y.2d 196, 199, 144 N.E.2d 6, 9, 165 N.Y.S.2d 6, 10 (1957), Judge Desmond, concurring, said: "Because of the distinctions heretofore made and now being made as to the various post-judgment remedies in criminal causes, no clear rule or rules exist and each case must be decided according to its own equities." See also People v. Shapiro, 3 N.Y.2d 203, 206, 144 N.E.2d 12, 13, 165 N.Y.S.2d 14, 16 (1957) (concurring opinion); People v. Silverman, 3 N.Y.2d 200, 203, 144 N.E.2d 10, 12, 165 N.Y.S.2d 11, 13 (1957) (concurring opinion).

27. People v. Sullivan, supra note 26, at 199, 144 N.E.2d at 9, 165 N.Y.S.2d at 10 (concurring opinion). See also People v. Silverman, supra note 26.

28. People v. Sullivan, supra note 26. There have been some exceptions such as deprivation of counsel. However, Judge Fuld, in concurring, was unwilling to allow further exceptions, unless there is no other remedy available. Id. at 200, 144 N.E.2d at 9, 165 N.Y.S.2d at 10 (concurring opinion).

29. People v. Shaw, 1 N.Y.2d 30, 133 N.E.2d 681, 150 N.Y.S.2d 161 (1956); People v. Kendricks, 300 N.Y. 544, 89 N.E.2d 257 (1949) (memorandum decision); People v. Sadness, 300 N.Y. 69, 89 N.E.2d 188 (1949).

30. People v. Silverman, 3 N.Y.2d 200, 144 N.E.2d 10, 165 N.Y.S.2d 11 (1957). The court, while stating that deprivation of counsel may warrant the extraordinary relief of coram nobis, went on to say: "Nevertheless each exception to the rule must be justified by special evidence of a denial of due process requiring corrective judicial process. Hence the scope of coram nobis will not be expanded unless the injury done to the defendant would deprive him of due process of law." Id. at 202-03, 144 N.E.2d at 11, 165 N.Y.S.2d at 13. (Italics omitted.)

as an alternative to an appeal, motion in arrest of judgment, motion to withdraw plea or state habeas corpus.[31]

Unlike the normal process of appeal, the writ is not limited in time[32] and is returnable only to the court in which the case was tried,[33] even though the sentencing judge is no longer sitting or is disqualified.[34] While it was at first questioned whether courts not of record[35] could entertain a coram nobis motion, the court of appeals soon dispelled any doubt by saying that such courts have all the powers incidental to a proper exercise of their statutory authority.[36] Furthermore, coram nobis is not designed to test the guilt or innocence of the accused, as that inquiry is solely within the province of the jury. It is designed to test the validity and regularity of the judgment itself.

Some states, other than New York, have had difficulty with coram nobis because of inadequate procedural devices, or the availability of several unclear alternative remedies which force the defendant to ride the post-conviction "merry-go-round" before finding relief.[37] In New York, on the other hand, coram nobis is an emergency remedy which at present has no severe statutory

31. People v. Shapiro, 3 N.Y.2d 203, 206, 144 N.E.2d 12, 14, 165 N.Y.S.2d 14, 16 (1957). In People v. Noia, 3 N.Y.2d 596, 148 N.E.2d 139, 170 N.Y.S.2d 799 (1957), in denying coram nobis relief where petitioner failed to use the normal appellate procedure, the court went on to say: "And this is so even though the asserted error or irregularity relates to a violation of constitutional right." Id. at 601, 148 N.E.2d at 143, 170 N.Y.S.2d at 804.

32. People v. Richetti, 302 N.Y. 290, 298, 97 N.E.2d 908, 912 (1951): "[T]here is no time limit on such applications. Even if laches could be a defense (which we doubt but do not decide), that defense itself would require a trial." See also Bojinoff v. People, 299 N.Y. 145, 85 N.E.2d 909 (1949).

33. People v. Wilson, 13 N.Y.2d 277, 196 N.E.2d 251, 246 N.Y.S.2d 608 (1963); People v. Eastman, 306 N.Y. 658, 116 N.E.2d 494 (1953) (per curiam); People v. McCullough, 300 N.Y. 107, 89 N.E.2d 335 (1949). Under the 1962 court reorganization, motions to the old New York City Court of Special Sessions or Magistrates' court will now be returnable to the New York City Criminal Court. N.Y.C. Crim. Ct. Act § 101. Motions originally returnable to the court of general sessions or county courts will now be addressed to the supreme court. N.Y. Code Crim. Proc. § 50.

34. People v. Wurzler, 300 N.Y. 344, 90 N.E.2d 886 (1950) (per curiam) (county judge was district attorney when defendant was convicted); People v. Morris, 17 App. Div. 2d 767, 232 N.Y.S.2d 48 (4th Dep't 1962) (memorandum decision) (judge tried original conviction and might be a witness at hearing); People v. Amoroso, 8 App. Div. 2d 683, 184 N.Y.S.2d 383 (4th Dep't 1959) (memorandum decision) (because of the allegations, defendant was induced to plead guilty on the promise of a lesser sentence than actually was received).

35. N.Y. Judiciary Law § 2.

36. In Hogan v. Supreme Court, 295 N.Y. 92, 96, 65 N.E.2d 181, 182 (1946), the court said: "One of the incidental powers which every competent court needs, and must have, to carry out effectually its specific statutory powers, is the power to strike from its records judgments which are void for fraud, not merely erroneous in law. . . ."

37. See, e.g., Marino v. Ragen, 332 U.S. 561, 563 (1947) (concurring opinion), where the Court in granting federal habeas corpus, and applying the doctrine of exhaustion of state remedies, said that the opportunity to be heard in court "is not adequate so long as [petitioners] . . . are required to ride the Illinois merry-go-round of habeas corpus, coram nobis, and writ of error before getting a hearing in a federal court." Id. at 570. (Italics omitted.)

limitations,[38] and, consequently, problems arise as to when it should be used. As has been noted, the writ is unavailable where the error appears on the record, or was known to the appellant at the time of the judgment. But suppose there was an abrogation or denial of a fundamental right without an adequate remedy, or suppose the right was "existing but unknown"[39] to the accused at the time of the judgment. Also, what is the availability of the writ to test judgments which, when rendered, were clearly within the framework of the constitutional protections required to be afforded to an individual when subsequent decisions have cast doubt on their constitutionality?[40]

2. Particular Grounds

a. *Deprivation of the right to counsel*

Most of the reported cases arise from the deprivation of the right to counsel.[41] This ground appears to be the greatest single exception to the general rule that coram nobis will not lie for an error of fact appearing on the record.[42] There are at least two explanations for this: first, because of the extreme importance of the right, the Supreme Court has been continually expanding its scope and, therefore, its limits are far reaching; and second, without the aid of counsel it is hardly likely that an accused person could intelligently exercise his rights, or even know of them.[43]

Allegations of the deprivation of the right to counsel will almost always result in the granting of a hearing unless there is "unquestionable documentary proof" to the contrary,[44] such as stenographic minutes, docket entries, or

38. A study was made by the Law Revision Commission in 1959, proposing legislation modeled on the Uniform Post-Conviction Procedure Act, which provided for the maintenance of habeas corpus and a statutory remedy in lieu of coram nobis. N.Y. Leg. Doc. No. 65(L) (1959). The New York Senate bill was not reported out of committee. The Assembly bill was passed in March 1959, but the vote was reconsidered and the bill was committed to the rules committee. As of the end of 1960, the bills were still in committee. Leg. Doc. No. 65, p. 19 (1960). There has been no further action on the proposed legislation and the Law Revision Commission is still studying the subject. N.Y. Leg. Doc. No. 65, p. 18 (1961).

39. Bojinoff v. People, 299 N.Y. 145, 85 N.E.2d 909 (1949). The court, with respect to the defendant's failure to raise an objection to the denial of the right to counsel, said: "It is . . . well established that waiver of such statutory and constitutional rights is occasioned only when the accused acts understandingly, competently and intelligently . . . ." Id. at 151, 85 N.E.2d at 912. See also Gideon v. Wainwright, 372 U.S. 335 (1963).

40. See authorities cited note 184 infra and accompanying text.

41. E.g., People v. Hannigan, 7 N.Y.2d 317, 165 N.E.2d 172, 197 N.Y.S.2d 152 (1960) (per curiam); People v. Guariglia, 303 N.Y. 338, 102 N.E.2d 580 (1951).

42. See People v. Silverman, 3 N.Y.2d 200, 144 N.E.2d 10, 165 N.Y.S.2d 11 (1957); Hogan v. Court of Gen. Sessions, 296 N.Y. 1, 68 N.E.2d 849 (1946).

43. See cases cited note 39 supra.

44. People v. Lain, 309 N.Y. 291, 130 N.E.2d 105 (1955); People v. Langan, 303 N.Y. 474, 104 N.E.2d 861 (1952); People v. Richetti, 302 N.Y. 290, 97 N.E.2d 908 (1951).

judge's minute book.[45] The constitutional[46] right to counsel, as guaranteed in New York,[47] requires that where an accused is not represented on arraignment, he must be informed of his right to the aid of counsel, and, if he so desires, the court must appoint one. If the accused wishes counsel of his own choice, he must be afforded opportunity to secure one, and the selected counsel must be given adequate time to prepare his defense.[48] The defendant can, of course, waive his right to counsel, but it must be shown that the waiver was intelligently exercised, and that the accused understood the nature of the proceedings.[49] It is only where the State, through an agency such as the courts, denies the defendant the right to counsel that coram nobis will be granted.[50] Furthermore, even though the defendant was not represented by counsel at the trial, nor apprised of his right to one if he pleaded guilty, coram nobis relief will be denied where he was actually represented by counsel upon sentence.[51] Therefore, it must appear that the defendant's right to raise the issue on appeal was substantially impaired, and where the defendant has counsel before sentence is imposed who could object to a defect in any part of the proceedings, his rights have been fully protected and he cannot use coram nobis.[52] However, where the defendant has consciously made his choice of counsel, he will not be granted relief by way of coram nobis merely on the assertion that he was not satisfied with counsel,[53] or that his counsel was negligent.[54] In *People v. Brown*,[55] the

45. People v. Chait, 7 App. Div. 2d 399, 183 N.Y.S.2d 494 (1st Dep't), aff'd mem., 6 N.Y.2d 855, 160 N.E.2d 92, 188 N.Y.S.2d 560 (1959). See also Frank, op. cit. supra note 20, ¶ 4.02[b].

46. U.S. Const. amend. VI; accord, N.Y. Const. art. I, § 6.

47. N.Y. Code Crim. Proc. §§ 8(2), 188, 308, 699.

48. People v. Hannigan, 7 N.Y.2d 317, 165 N.E.2d 172, 197 N.Y.S.2d 152 (1960) (per curiam); People v. Silverman, 3 N.Y.2d 200, 144 N.E.2d 10, 165 N.Y.S.2d 11 (1957); People v. Koch, 299 N.Y. 378, 87 N.E.2d 417 (1949).

49. People v. Crimi, 303 N.Y. 749, 103 N.E.2d 538 (1952) (memorandum decision) (petitioner was sixteen at the time of conviction and did not understand that the court would appoint counsel if he couldn't afford one); People v. Boehm, 309 N.Y. 362, 130 N.E.2d 897 (1955) (mental incompetence at the time of the trial).

50. People v. Tomaselli, 7 N.Y.2d 350, 165 N.E.2d 551, 197 N.Y.S.2d 697 (1960); Lanza v. New York State Joint Legislative Comm., 3 N.Y.2d 92, 143 N.E.2d 772, 164 N.Y.S.2d 9 (1957); People v. Cooper, 307 N.Y. 253, 120 N.E.2d 813, cert. denied, 348 U.S. 878 (1954).

51. People v. Jardine, 11 N.Y.2d 941, 183 N.E.2d 228, 228 N.Y.S.2d 827 (1962) (memorandum decision); People v. Sileo, 3 N.Y.2d 916, 145 N.E.2d 875, 167 N.Y.S.2d 931 (1957) (memorandum decision), cert. denied, 356 U.S. 923 (1958); People v. Jones, 1 N.Y.2d 665, 133 N.E.2d 517, 150 N.Y.S.2d 30 (memorandum decision), cert. denied, 351 U.S. 971 (1956).

52. People v. Howard, 12 N.Y.2d 65, 187 N.E.2d 113, 236 N.Y.S.2d 39 (1962), cert. denied, 374 U.S. 840 (1963).

53. People v. Hernandez, 8 N.Y.2d 345, 170 N.E.2d 673, 207 N.Y.S.2d 668 (1960), cert. denied, 366 U.S. 976 (1961).

54. People v. Tomaselli, 7 N.Y.2d 350, 165 N.E.2d 551, 197 N.Y.S.2d 697 (1960).

55. 7 N.Y.2d 359, 165 N.E.2d 557, 197 N.Y.S.2d 705 (1960), cert. denied, 365 U.S. 821 (1961).

court of appeals said that in absence of a showing that defendant's retained counsel was so unfit as to make the trial a mockery of justice, alleged incompetence is not grounds for vacating a judgment.[56]

b. *Fraud, duress and coercion*

One of the more frequent uses of coram nobis is to set aside a judgment procured on the basis of fraud, duress or coercion. The writ will lie where a plea of guilty was coerced by the court,[57] the prosecution[58] or the police.[59]

The court in *People v. Nicholson*[60] held that where the defendant had pleaded guilty he waived issue as to whether his confession had been legally obtained, since the proper procedure was to plead not guilty and raise the issue on trial.[61] Allegations that the defendant had pleaded guilty by reason of coercion instigated by his own counsel have been held insufficient to justify relief through coram nobis.[62] However, in *People v. Battice*,[63] the court found that coercion by court-appointed counsel would be grounds for relief. Therefore, unless the petitioner could not present the issues to the court at the time of plea or trial, or the acts of the prosecution amounted to a denial of a fair trial, the motion will not be successful.

There are several circumstances in which an allegation of fraud will be a proper basis for coram nobis. One of these involves perjured testimony knowingly used by the prosecution.[64] The use of such testimony alone, without a showing that it was used knowingly by the prosecution, will not be sufficient to obtain relief.[65] However, in the recent case of *People v. Robertson*, the court

56. Id. at 361, 165 N.E.2d at 558, 197 N.Y.S.2d at 707.

57. People v. Wright, 11 N.Y.2d 1093, 184 N.E.2d 310, 230 N.Y.S.2d 718 (1962) (memorandum decision); People v. Farina, 2 N.Y.2d 454, 141 N.E.2d 589, 161 N.Y.S.2d 88 (1957) (per curiam).

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

59. People v. Van Nostrand, 4 App. Div. 2d 913, 166 N.Y.S.2d 823 (3d Dep't 1957) (memorandum decision).

60. 11 N.Y.2d 1067, 184 N.E.2d 190, 230 N.Y.S.2d 220 (per curiam), cert. denied, 371 U.S. 929 (1962).

61. Id. at 1068, 184 N.E.2d at 191, 230 N.Y.S.2d at 221. See also People v. Fisher, 11 N.Y.2d 1069, 184 N.E.2d 191, 230 N.Y.S.2d 222 (1962) (memorandum decision).

62. People v. Jones, 11 N.Y.2d 1070, 184 N.E.2d 192, 230 N.Y.S.2d 222 (1962) (memorandum decision), cert. denied, 371 U.S. 852 (1962); People v. Jones, 17 App. Div. 2d 970, 234 N.Y.S.2d 108 (2d Dep't 1962) (memorandum decision). But see People v. Berger, 9 N.Y.2d 692, 173 N.E.2d 243, 212 N.Y.S.2d 425 (1961) (memorandum decision).

63. 6 App. Div. 2d 773, 174 N.Y.S.2d 625 (1st Dep't 1958) (memorandum decision), aff'd mem., 5 N.Y.2d 946, 156 N.E.2d 920, 183 N.Y.S.2d 564 (1959), cert. denied, 361 U.S. 967 (1960).

64. Napue v. Illinois, 360 U.S. 264 (1959); accord, Morhous v. Supreme Court, 293 N.Y. 131, 56 N.E.2d 79 (1944).

65. People v. Rupoli, 1 N.Y.2d 780, 135 N.E.2d 588, 153 N.Y.S.2d 50 (1956) (memorandum decision); People v. Oddo, 300 N.Y. 649, 89 N.E.2d 896 (memorandum decision), cert. denied, 339 U.S. 961 (1950); People v. Fanning, 300 N.Y. 593, 89 N.E.2d 881 (1949) (per curiam). If the defendant's conviction is based upon false testimony not perjured, as in the case of mistaken identity, or where it was perjured but not knowingly

of appeals expanded this rule by charging the prosecution with fraud where testimony by a prosecution witness was found to be a "negligent" rather than wilful distortion.[66] The court, in so holding, said that "the giving of carelessly false testimony is . . . as much a 'fraud' . . . as if it were deliberate . . . ."[67] Conversely, if the prosecution withholds testimony which would result in a different verdict, coram nobis will lie.[68] Furthermore, since the prosecution is duty bound to reveal such information, it is immaterial whether the withholding was intentional or not.[69]

Another situation which is tainted with fraud, and for which coram nobis is the proper remedy, is one where the court[70] or prosecution[71] induced the defendant to plead guilty upon the representation that a lesser sentence would result than was actually given. The writ will not lie, however, where the defendant relied on the advice of his own counsel.[72]

c. *Error in multiple offender adjudications*

The use of coram nobis has been recognized to extend to cases in which the petitioner seeks to attack an increased sentence based on the Multiple Felony Offender Law.[73] The most frequent allegation of the invalidity of the multiple offender adjudication occurs where the foreign conviction is based on a crime which, if committed in New York, would not be a felony.[74] In determining whether a felony was committed, New York will look to the foreign statute for a definition of the basic elements of the crime and compare those elements with the New York statute.[75]

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used by the prosecution, the defendant may move for a new trial based on newly discovered evidence within one year of the judgment. N.Y. Code Crim. Proc. § 465. However, where the time for making a motion for a new trial based on newly discovered evidence has expired, his only recourse is to appeal for executive clemency, and if he receives a pardon stating that it is issued on the ground of innocence and based on the newly discovered evidence, the judgment of conviction must be set aside. N.Y. Code Crim. Proc. § 697.

66. 12 N.Y.2d 355, 190 N.E.2d 19, 239 N.Y.S.2d 673 (1963).

67. Id. at 360, 190 N.E.2d at 21, 239 N.Y.S.2d at 677.

68. People v. Fisher, 4 N.Y.2d 943, 151 N.E.2d 617, 175 N.Y.S.2d 820 (1958) (memorandum decision); People v. Anderson, 4 App. Div. 2d 886, 167 N.Y.S.2d 464 (2d Dep't 1957) (memorandum decision); Kellogg v. Macduff, 206 Misc. 330, 132 N.Y.S.2d 912 (Sup. Ct. 1954); People v. Riley, 191 Misc. 888, 83 N.Y.S.2d 281 (Kings County Ct. 1948).

69. People v. Hoffner, 208 Misc. 117, 129 N.Y.S.2d 833 (Queens County Ct. 1952).

70. People v. Farina, 2 N.Y.2d 454, 141 N.E.2d 589, 161 N.Y.S.2d 88 (1957) (per curiam); People v. Doceti, 9 App. Div. 2d 740, 192 N.Y.S.2d 907 (1st Dep't 1959) (memorandum decision).

71. People v. Hughes, 8 App. Div. 2d 302, 187 N.Y.S.2d 828 (1st Dep't 1959) (per curiam); People v. Amoroso, 8 App. Div. 2d 683, 184 N.Y.S.2d 383 (4th Dep't 1959) (memorandum decision).

72. People v. Vaughn, 15 App. Div. 2d 846, 224 N.Y.S.2d 320 (3d Dep't 1962) (memorandum decision); People v. Howe, 13 App. Div. 2d 556, 211 N.Y.S.2d 817 (3d Dep't 1961) (memorandum decision).

73. N.Y. Pen. Law §§ 1941-42.

74. People v. Kronick, 308 N.Y. 866, 126 N.E.2d 307 (1955) (memorandum decision); People v. Shaw, 1 N.Y.2d 30, 133 N.E.2d 681, 150 N.Y.S.2d 161 (1956).

75. People v. Olah, 300 N.Y. 96, 89 N.E.2d 329 (1949).

Another situation is the one where the petitioner alleges that the foreign conviction which has been used to sentence the defendant as a multiple offender in this State was void for want of due process.[76] New York has refused to extend relief in this situation, because by its very nature coram nobis is directed to the court which entered the judgment under attack.[77] Nor can state habeas corpus be used, since that remedy is available only when the court rendering the judgment lacked jurisdiction over the person or the crime.[78] Recently, the New York Court of Appeals in *People v. Wilson*[79] said that if refusal to test the validity of the foreign judgment would amount to denial of due process, then the courts would find a way to protect these rights, despite the procedural difficulties.[80] However, since New York is under no duty to provide a forum to attack foreign judgments, and since it can take these judgments at face value, the court hesitated to extend coram nobis in this situation.[81]

d. *Insanity*

Coram nobis has been extended in certain circumstances to litigate the question of the defendant's sanity at some stage in the proceedings.[82] While a defendant who is insane may not be tried, sentenced or punished,[83] it is within the trial court's discretion whether an examination should be ordered at any time before final judgment.[84] In addition, there is a presumption of regularity of criminal proceedings[85] which can only be overcome by substantial contrary evidence[86] and not by mere allegation that psychiatric treatment had been advised prior to the commission of the crime.[87] This presumption applies only to the period throughout the trial and sentencing, and will not bar relief through coram nobis where petitioner was deprived of the right to appeal because of his mental condition.[88] However, where the facts are reviewable by appeal, such as in the case where the denial of a motion for further psychiatric

76. People v. McCullough, 300 N.Y. 107, 89 N.E.2d 335 (1949), cert. denied, 339 U.S. 924 (1950).

77. Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425 (1943).

78. People v. McCullough, 300 N.Y. 107, 110, 89 N.E.2d 335, 337 (1949), cert. denied, 339 U.S. 924 (1950).

79. 13 N.Y.2d 277, 196 N.E.2d 251, 246 N.Y.S.2d 608 (1963).

80. Id. at 280, 196 N.E.2d at 252-53, 246 N.Y.S.2d at 611.

81. Id. at 280, 196 N.E.2d at 253, 246 N.Y.S.2d at 611.

82. People v. Boundy, 10 N.Y.2d 518, 180 N.E.2d 565, 225 N.Y.S.2d 207 (1962) (at trial); People v. Codarre, 10 N.Y.2d 361, 179 N.E.2d 475, 233 N.Y.S.2d 457 (1961) (at arraignment).

83. N.Y. Pen. Law § 1120.

84. N.Y. Code Crim. Proc. §§ 658, 870; People v. Nickerson, 1 N.Y.2d 815, 135 N.E.2d 604, 153 N.Y.S.2d 73 (memorandum decision), cert. denied, 352 U.S. 900 (1956).

85. People v. Smyth, 3 N.Y.2d 184, 143 N.E.2d 922, 164 N.Y.S.2d 737 (1957); People v. Flora, 306 N.Y. 615, 116 N.E.2d 79 (1953) (memorandum decision).

86. People v. Richetti, 302 N.Y. 290, 97 N.E.2d 908 (1951).

87. People v. Smyth, 3 N.Y.2d 184, 143 N.E.2d 922, 164 N.Y.S.2d 737 (1957).

88. People v. Hill, 9 App. Div. 2d 451, 195 N.Y.S.2d 295 (2d Dep't 1959), aff'd mem., 8 N.Y.2d 935, 168 N.E.2d 841, 204 N.Y.S.2d 172 (1960).

examination is in the record, or where defendant's commitment to a mental hospital after sentencing may be the basis for a new trial based on newly discovered evidence, coram nobis may not be used as a substitute.[89]

e. *Infancy*

A person under sixteen years of age is incapable of committing a crime unless it be a capital offense, and then only if he is at least fifteen years of age.[90] Therefore, a showing that the accused was under sixteen at the time of trial would be sufficient to warrant a coram nobis hearing,[91] unless such fact appeared in the record or the defendant lied or concealed his true age.[92] However, the courts have held that the Youthful Offender Law[93] and the Juvenile Delinquency Law[94] do not apply retroactively in order to vacate a conviction entered prior to the passage of such statutes.[95]

f. *Prevention from taking appeal*

Coram nobis has been recently expanded to include situations where one has been prevented from taking or perfecting an appeal from a conviction and there is no other judicial remedy.[96] Such situations have arisen where the defendant was mentally incapacitated during the time limited by law for taking an appeal from a conviction and the incapacity prevented a timely appeal;[97]

89. People v. Brown, 13 N.Y.2d 201, 195 N.E.2d 293, 245 N.Y.S.2d 577 (1963).

90. N.Y. Pen. Law § 2186.

91. People ex rel. Harrison v. Jackson, 298 N.Y. 219, 82 N.E.2d 14 (1948) (semble). The defendant had sought habeas corpus, but was denied such relief because evidence was in the record that he had been over sixteen, and therefore his conviction could not be attacked collaterally by way of habeas corpus. Judge Fuld, in concurring, reached his decision on the ground that since the petitioner was seeking to attack an erroneous multiple offender sentence based on a previous conviction in which the petitioner alleged he was under sixteen, the sentencing court had jurisdiction over the person and the crime, and, therefore, habeas corpus would not lie. He did, however, suggest relief by way of coram nobis. There was a vigorous dissent which stated that habeas corpus would lie, and doubted that coram nobis would be the proper relief, citing Hogan v. Court of Gen. Sessions, 296 N.Y. 1, 68 N.E.2d 849 (1946). While the court of appeals has not clarified its position, there is a lower court case which held that coram nobis would be the proper relief in this situation. People v. Adomaitis, 201 Misc. 707, 112 N.Y.S.2d 38 (Sup. Ct. 1952). It appears that if the fact of defendant's being under age were not in the record, coram nobis would be the appropriate relief. However, habeas corpus would also seem to be appropriate since the court lacked jurisdiction over the person of the defendant.

92. Hogan v. Court of Gen. Sessions, supra note 91.

93. N.Y. Code Crim. Proc. §§ 913e-13r.

94. N.Y. Code Crim. Proc. §§ 312b-12h; N.Y. Pen. Law § 480.

95. People v. Bond, 36 Misc. 2d 557, 232 N.Y.S.2d 875 (Sup. Ct. 1962) (Youthful Offender Law not retroactive where all proceedings completed before the statute became law); People v. Downie, 205 Misc. 643, 130 N.Y.S.2d 362 (Kings County Ct. 1954) (refused to give retroactive effect to Juvenile Delinquency Law where defendant was convicted for murder in the second degree when he was 13 years old).

96. People v. Adams, 12 N.Y.2d 417, 190 N.E.2d 529, 240 N.Y.S.2d 155 (1963).

97. People v. Hill, 8 N.Y.2d 935, 168 N.E.2d 841, 204 N.Y.S.2d 172 (1960) (memorandum decision).

or where because of erroneous advice of counsel, time for taking an appeal lapsed;[98] or where, without defendant's knowledge, timely appeal was begun by assigned counsel, but was dismissed for failure to prosecute it;[99] or where defendant, a poor person without counsel, was refused a copy of the trial minutes, so that he could not perfect his appeal;[100] or where prison authorities wrongfully prevented an appeal.[101] Here the procedure after a coram nobis hearing, where the allegations have been found to be true, is to vacate the judgment and resentence *nunc pro tunc* on the guilty verdict. The defendant would then have thirty days from the new sentence to take a direct appeal.[102]

C. *The Coram Nobis Proceeding*

Although there is no statutory procedure[103] for a motion in the nature of a writ of error coram nobis, practice has more or less become standardized.[104] Notice of the motion and a verified copy of the petition is served on the district attorney. The district attorney may then either acquiesce in the motion or demur—or he may oppose it on the merits, in which case a hearing date is set. There is no time limit on such applications.[105]

One of the major problems in the coram nobis proceeding is determining whether the defendant is entitled to a hearing to test the truthfulness of his allegations. In *People v. Guariglia*,[106] the court of appeals laid down the test: "It is only when the record conclusively demonstrates the falsity of the allegations and there is no reasonable probability at all that the defendant's averments are true that a hearing will be denied . . . ."[107] Refusal to grant a hearing would otherwise be a denial of due process.[108] However, to raise an issue requiring a hearing there must be allegations of ultimate facts and not merely conclusory assertions or allegations devoid of factual support; otherwise the

98. People v. Coe, 16 App. Div. 2d 876, 228 N.Y.S.2d 249 (4th Dep't 1962) (memorandum decision).

99. People v. Adams, 12 N.Y.2d 417, 190 N.E.2d 529, 240 N.Y.S.2d 155 (1963).

100. People v. Stanley, 12 N.Y.2d 250, 189 N.E.2d 478, 238 N.Y.S.2d 935 (1963) (per curiam). The Code of Criminal Procedure § 456 provides that in any case where the defendant is convicted of a crime or where defendant's application for coram nobis is denied or dismissed after a hearing, the state must, on request, furnish minutes of the proceedings.

101. People v. Hairston, 10 N.Y.2d 92, 176 N.E.2d 90, 217 N.Y.S.2d 77 (1961); People v. Guhr, 5 App. Div. 2d 688, 169 N.Y.S.2d 256 (2d Dep't 1957) (memorandum decision).

102. Cases cited note 101 supra.

103. See note 38 supra.

104. For a discussion of procedure and trial practice in a coram nobis proceeding, see Baker, New York Trial Practice (1963); Frank, Coram Nobis ¶¶ 4.01-.02[b] (1953); Paperno & Goldstein, Criminal Procedure in New York §§ 436-39 (1960).

105. People v. Richetti, 302 N.Y. 290, 298, 97 N.E.2d 908, 912 (1951).

106. 303 N.Y. 338, 102 N.E.2d 580 (1951).

107. Id. at 343, 102 N.E.2d at 583, citing People v. Richetti, 302 N.Y. 290, 97 N.E.2d 908 (1951).

108. People v. White, 309 N.Y. 636, 132 N.E.2d 880 (1956); People v. Richetti, supra note 107.

application may be dismissed without further proceedings.[109] Furthermore, even if the petitioner is able to establish the allegations of his petition, a hearing may be denied because such allegations fail to come within the scope of relief granted by way of coram nobis.[110]

There is a strong presumption of regularity which attaches to every criminal judgment,[111] and will only be overcome by substantial contrary evidence.[112] Once this has been done, the presumption is out of the case.[113] The mere denial by the district attorney, and dependence upon such a presumption cannot "serve to settle without trial, what otherwise would be a plain dispute of fact."[114]

If a hearing is granted, it is tried in open court, without a jury, and the right of counsel and cross-examination is afforded to both sides.[115] The petitioner also has the right to subpoena witnesses, and the records of the court are made available to him.[116] The court may order the appearance of the petitioner.[117] The petitioner has the burden of proving a violation of his constitutional rights clearly and convincingly and by a preponderance of the credible evidence.[118] The determination of any question of fact, however, which necessarily includes credibility, must remain for the trial judge on the new trial.[119] If the petitioner proves his allegations, the conviction will be vacated and he will be given a new trial. He cannot go free since the hearing was only to test the truth of the allegations and not the merits of the original action.

It appears that neither a prior application[120] nor strict principles of res

109. People v. Ashley, 17 App. Div. 2d 832, 233 N.Y.S.2d 57 (2d Dep't 1962) (memorandum decision); People v. Neeley, 4 App. Div. 2d 1019, 169 N.Y.S.2d 268 (1st Dep't 1957) (memorandum decision). In People v. White, supra note 108, the court, in determining whether a hearing should be granted, said: "The test is whether there is, as a matter of law, a dispute of fact which entitles the defendant to a hearing." 309 N.Y. at 641, 132 N.E.2d at 883.

110. E.g., People v. Brown, 7 N.Y.2d 359, 361, 165 N.E.2d 557, 558, 197 N.Y.S.2d 705, 707 (1960); People v. Tomaselli, 7 N.Y.2d 350, 356, 165 N.E.2d 551, 555, 197 N.Y.S.2d 697, 703 (1960).

111. People v. Langan, 303 N.Y. 474, 104 N.E.2d 861 (1952); People v. Richetti, 302 N.Y. 290, 97 N.E.2d 908 (1951).

112. Cases cited note 111 supra.

113. Ibid.

114. People v. Richetti, 302 N.Y. 290, 298, 97 N.E.2d 908, 912 (1951).

115. People v. Langan, 303 N.Y. 474, 104 N.E.2d 861 (1952); People v. Richetti, supra note 114; People v. Corcoran, 13 App. Div. 2d 846, 214 N.Y.S.2d 494 (3d Dep't 1961) (memorandum decision).

116. See Frank, Coram Nobis (1953).

117. N.Y. Code Crim. Proc. § 10-c. People v. Seymour, 12 App. Div. 2d 543, 206 N.Y.S.2d 701 (3d Dep't 1960) (memorandum decision).

118. Johnson v. Zerbst, 304 U.S. 458, 469 (1938); People v. Milo, 4 App. Div. 2d 679, 163 N.Y.S.2d 506 (2d Dep't 1957) (memorandum decision); People v. Girardi, 2 App. Div. 2d 701, 152 N.Y.S.2d 610 (2d Dep't 1956) (memorandum decision); People v. Adams, 1 App. Div. 2d 783, 147 N.Y.S.2d 846 (2d Dep't 1956) (memorandum decision).

119. People v. Richetti, 302 N.Y. 290, 298, 97 N.E.2d 908, 912 (1951). Accord, Hawk v. Olsen, 326 U.S. 271, 279 (1945).

120. E.g., People v. Martine, 303 N.Y. 789, 103 N.E.2d 897 (1952) (memorandum

judicata[121] will prevent successive applications. The court need not grant the motion, however, if there is no new or additional evidence, and it is solely within the discretion of the court to decide whether the evidence is sufficient to grant a new hearing.[122] Although the decision on the motion was originally held not to be appealable,[123] this was amended by statute.[124]

III. The Motion for Resentence

Technically speaking, a motion for resentence varies very little from a motion for a writ of error coram nobis. Both are addressed to the inherent power of the court to correct erroneous proceedings. The two differ, however, in certain procedural aspects. Coram nobis seeks to question the validity of the judg-

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decision) (petitioner applied four times for coram nobis relief within five years on the same ground).

121. People v. Boehm, 309 N.Y. 362, 130 N.E.2d 897 (1955); Bojinoff v. People, 299 N.Y. 145, 85 N.E.2d 909 (1949); People v. Freccia, 19 App. Div. 2d 587, 240 N.Y.S.2d 431 (4th Dep't 1963).

122. People v. Sullivan, 4 N.Y.2d 472, 151 N.E.2d 873, 176 N.Y.S.2d 316 (1958); People v. Blake, 15 App. Div. 2d 925, 225 N.Y.S.2d 528 (2d Dep't 1962) (memorandum decision). However, in People ex rel. Sedlak v. Foster, 299 N.Y. 291, 86 N.E.2d 752 (1949), the court denied the use of habeas corpus brought to vacate judgment on the ground that the defendant had been denied his constitutional right to counsel, since the court had jurisdiction of the defendant and the crime, and held that coram nobis is the only proper remedy. Although the defendant's first coram nobis motion had been denied at a time when no appeal could be taken, after the enactment of the statute permitting appeal, defendant could move again to set aside the judgment and have the correctness of the determination reviewed if leave to appeal were refused or the motion denied again.

123. People v. Gersewitz, 294 N.Y. 163, 61 N.E.2d 427 (1947). The court held that the right to appeal exists solely by virtue of statutory authorization, and is not an absolute right required by due process. Id. at 168, 61 N.E.2d at 429.

124. N.Y. Code Crim. Proc. §§ 517-19. While all defendants, including the indigent, are given this statutory right to appeal, the right of an indigent to counsel on an appeal is not absolute. Under § 308 of the Code of Criminal Procedure the indigent defendant clearly has the right to assigned counsel at the trial. However, the right to assigned counsel on appeal depends on whether or not the indigent appellant has access to a copy of the trial minutes. If he has a copy, the right to assigned counsel will be denied, People v. Breslin, 4 N.Y.2d 73, 149 N.E.2d 85, 172 N.Y.S.2d 157 (1958), whereas, if he does not have a copy available to him counsel will be assigned, People v. Pitts, 6 N.Y.2d 288, 160 N.E.2d 523, 189 N.Y.S.2d 650 (1959); People v. Kalan, 2 N.Y.2d 278, 140 N.E.2d 357, 159 N.Y.S.2d 480 (1957) (per curiam). It would appear, however, that under the rule of the recent case of Douglas v. California, 372 U.S. 353 (1963), the indigent appellant would have the right to assigned counsel whether or not he had access to the trial minutes. In respect to whether the defendant was able to afford counsel, the Supreme Court said, "At this stage in the proceedings only the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is forced to go without a champion on appeal. Any real chance he may have had of showing that his appeal has hidden merit is deprived him when the court decides on an ex parte examination of the record that the assistance of counsel is not required." Id. at 356. (Emphasis omitted.) It must be pointed out that the court expressly limited its holding to the defendant's first appeal as a matter of right, and not to subsequent discretionary appeals. Id. at 356.

ment—which, if found to be erroneous, will be vacated—whereas the motion for resentence questions only the validity of the sentence itself. Therefore, the latter may raise questions of law apparent on the record; for example, a person convicted as a multiple felony offender[125] may subsequently successfully attack a prior conviction and have it vacated, and then his sentence under the multiple offender statute would be erroneous since it was based on too many prior convictions.[126] Other cases have been based on the allegation that the defendant had not been asked whether he had any legal cause to show why judgment should not be pronounced against him, as provided in Section 480 of the Code of Criminal Procedure.[127] Here coram nobis clearly does not lie since the error is one of law apparent on the face of the record for which the defendant may not forego his right to appeal.[128] The difference between the two motions has greater importance when we consider that a denial of a motion for resentence may not be appealed.[129] Another procedural difference is that once an illegal sentence has been served a motion for resentence will not be granted since there can be no present harm to the petitioner.[130] However, if an invalid judgment or sentence can be the basis for punishment as a multiple offender in a later conviction, a petition may be made at any time, even after the sentence has been served.[131]

IV. State Habeas Corpus

Unlike coram nobis, habeas corpus is provided for in the New York constitution[132] and may not be suspended except in times of rebellion or invasion.[133] Furthermore, its use is regulated by statute.[134] Nevertheless, habeas corpus and coram nobis have certain similarities. Both test the validity of the defendant's detention without questioning his guilt or innocence,[135] and both have been used to attack erroneous multiple offender sentences.[136] Habeas

125. N.Y. Pen. Law §§ 1941-42.

126. People v. Kronick, 308 N.Y. 866, 126 N.E.2d 307 (1955) (memorandum decision).

127. E.g., People v. Sullivan, 3 N.Y.2d 196, 144 N.E.2d 6, 165 N.Y.S.2d 6 (1957).

128. Ibid.

129. N.Y. Code Crim. Proc. § 517 has no provision for appealing a denial of a motion to resentence.

130. People ex rel. Walker v. People, 3 App. Div. 2d 623, 157 N.Y.S.2d 993 (3d Dep't 1956); People v. Gifford, 2 App. Div. 2d 642, 151 N.Y.S.2d 982 (3d Dep't 1956) (memorandum decision).

131. Bojinoff v. People, 299 N.Y. 145, 85 N.E.2d 909 (1949).

132. N.Y. Const. art. I, § 4.

133. Ibid. See People ex rel. Tweed v. Liscomb, 60 N.Y. 559 (1875), where the court said: "This writ cannot be abrogated, or its efficiency curtailed, by legislative action." Id. at 566.

134. N.Y. Civ. Prac. Law & R. §§ 7001-12.

135. People v. Holland, 209 N.Y.S.2d 58 (Nassau County Ct. 1960), appeal dismissed mem., 13 App. Div. 2d 518, 212 N.Y.S.2d 569 (2d Dep't 1961), cert. denied, 371 U.S. 845 (1962).

136. People v. Perkins, 11 N.Y.2d 195, 182 N.E.2d 274, 227 N.Y.S.2d 663 (1962) (coram nobis), cert. denied, 371 U.S. 840 (1962); People ex rel. Newman v. Foster, 297 N.Y. 27, 74 N.E.2d 224 (1947) (habeas corpus).

corpus, however, has a more limited application in that it is appropriate only if the convicting court lacked jurisdiction over the accused or the crime, and may not be used to attack a conviction which is otherwise erroneous.[137]

V. Collateral Attack of State Convictions in the Federal Courts

In order to insure every accused the fullest protection of his constitutionally guaranteed rights, the United States Supreme Court, in three recent decisions—*Fay v. Noia*,[138] *Townsend v. Sain*[139] and *Sanders v. United States*[140]—has virtually guaranteed every state prisoner alleging denial of a federal constitutional right at least a careful inquiry into the state criminal proceeding.

Since the time when Congress granted the use of federal habeas corpus to state prisoners confined in violation of a constitutional right,[141] the extent of the writ has been far from clear.[142] Although use of the writ has increased with the extension of the fourteenth amendment, the problems of what effect could be given to state fact determinations in a criminal proceeding, once the matter had been brought to the federal courts, and of what issues could be decided, remained unclear or unanswered.

It was not until the now famous trilogy of *Noia*, *Townsend* and *Sanders* that concrete guidelines were established to determine the answers to these problems. The *Noia* case answered the problem of when a state prisoner can avail himself of federal habeas corpus. In 1942, Noia and two accomplices, Bonino and Caminito, were convicted of felony murder solely on the basis of the signed confessions of each. On the basis that their confessions were coerced, Bonino and Caminito sought direct appeals which subsequently failed.[143] Certiorari was not sought in the Supreme Court. Bonino filed a motion for reargument in 1947,[144] but it was denied.[145] Caminito made the same motions in 1948[146] and 1954,[147] which met a similar fate. Caminito then sought federal habeas corpus, which was denied in the district court.[148] This decision was reversed on ap-

137. Morhous v. Supreme Court of New York, 293 N.Y. 131, 56 N.E.2d 79 (1944).

138. 372 U.S. 391 (1963).

139. 372 U.S. 293 (1963).

140. 373 U.S. 1 (1963).

141. Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385-86.

142. See Hart, Foreword to The Supreme Court, 1958 Term, 73 Harv. L. Rev. 84 (1959); Reitz, Federal Habeas Corpus: Postconviction Remedy for State Prisoners, 108 U. Pa. L. Rev. 461 (1960).

143. People v. Bonino, 265 App. Div. 960, 38 N.Y.S.2d 1019 (2d Dep't 1942) (memorandum decision), aff'd mem., 291 N.Y. 541, 50 N.E.2d 654 (1943).

144. A motion for reargument has no time limit in New York.

145. People v. Bonino, 296 N.Y. 1004, 73 N.E.2d 579 (1947) (memorandum decision), cert. denied, 333 U.S. 849 (1948).

146. People v. Caminito, 297 N.Y. 882, 79 N.E.2d 277 (1948) (memorandum decision).

147. People v. Caminito, 307 N.Y. 686, 120 N.E.2d 857 (memorandum decision), cert. denied, 348 U.S. 839 (1954).

148. United States ex rel. Caminito v. Murphy, 127 F. Supp. 689 (N.D.N.Y. 1955).

peal,[149] on the ground that he had been denied due process, and he was ordered to be released or given a new trial.

After Caminito's success, Bonino again filed a motion for reargument in the New York Court of Appeals. It was granted,[150] his conviction set aside and a new trial was ordered. Both Bonino and Caminito went free, and remain so, because of the inability of the State to prove a case against them at this late date.

Noia thereafter sought coram nobis[151] in New York on the basis of his illegally obtained confession. The lower court granted the motion and vacated his conviction,[152] but the appellate division reversed;[153] the court of appeals affirmed[154] and said:

> [Noia's] failure to pursue the usual and accepted appellate procedure to gain a review of the conviction does not entitle him later to utilize . . . coram nobis . . . and this is so even though the asserted error or irregularity relates to a violation of constitutional right.[155]

Noia then sought habeas corpus in the federal courts.[156] The district court held that under the provisions of section 2254, the writ did not lie because of failure to exhaust state remedies that were once available, although they could no longer be used at the time of making the petition.[157] The Court of Appeals for the Second Circuit reversed, basing its holding, first, on the exceptional circumstances[158] underlying the failure to appeal in the state court, and, therefore, excusing compliance with section 2254; second, on the proposition that denial of coram nobis was an adequate state ground justifying refusal of the Supreme Court to grant direct review; and last, on the ground that failure of Noia to appeal did not constitute a waiver of his right to test the constitutionality of his conviction.[159] On certiorari,[160] in a six-to-three decision, the Supreme Court affirmed,[161] stating that:

> Federal courts have *power* under the federal habeas statute to grant relief despite the applicant's failure to have pursued a state remedy *not available to him at the time he applies*; the doctrine under which state procedural defaults are held to constitute an

149. United States ex rel. Caminito v. Murphy, 222 F.2d 698 (2d Cir.), cert. denied, 350 U.S. 896 (1955).

150. People v. Bonino, 1 N.Y.2d 752, 135 N.E.2d 51, 152 N.Y.S.2d 298 (1956).

151. Noia could not use a motion for reargument because he had not appealed.

152. People v. Noia, 3 Misc. 2d 447, 158 N.Y.S.2d 683 (Kings County Ct. 1956).

153. People v. Noia, 4 App. Div. 2d 698, 163 N.Y.S.2d 796 (2d Dep't 1957) (memorandum decision).

154. People v. Noia, 3 N.Y.2d 596, 148 N.E.2d 139, 170 N.Y.S.2d 799, cert. denied, 357 U.S. 905 (1958).

155. Id. at 601, 148 N.E.2d at 143, 170 N.Y.S.2d at 804. (Italics omitted.)

156. United States ex rel. Noia v. Fay, 183 F. Supp. 222 (S.D.N.Y. 1960).

157. Id. at 225.

158. Noia was motivated by two considerations in his decision not to appeal. These were the great expense, which would have been a burden upon his family, and the fear that a retrial might result in the imposition of the death sentence. 372 U.S. 391, 396 n.3.

159. United States ex rel. Noia v. Fay, 300 F.2d 345 (2d Cir. 1962).

160. 369 U.S. 869 (1960).

161. 372 U.S. 391 (1963).

adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute.[162]

As for the failure to exhaust state remedies as required by section 2254, the Court said that that requirement refers only to a "failure to exhaust state remedies *still open* to the applicant at the time he files his application [for habeas corpus] in federal court."[163] The Court went on to say that Noia's failure to appeal was not such an intelligent and understanding waiver of his rights as to preclude use of federal habeas corpus. Here the Court held that the probability of an increased penalty, if he had been found guilty on retrial, was so acute that Noia's failure to appeal "cannot realistically be deemed a merely tactical or strategic litigation step, or in any way a deliberate circumvention of state procedures."[164] If, however, the defendant waived his right in a knowing and intelligent manner, as a tactical or strategic measure, for the deliberate purpose of bypassing state procedures, then the federal court may deny relief.[165]

The case of *Townsend v. Sain*,[166] also a successful collateral attack upon a state conviction, determined that the federal courts have not only the power, but in many instances the obligation, to try the facts de novo, regardless of the state determination. Townsend objected to the validity of his conviction on the basis that his confession had been coerced. The trial court had admitted his confession into evidence and he was found guilty. Both an appeal to the Supreme Court of Illinois[167] and an application for certiorari to the United States Supreme Court failed.[168] Having exhausted all state remedies,[169] Townsend came into the federal courts, and after two appeals the Supreme Court finally determined the case on the merits.[170] In answer to the question of the federal court's duty to receive evidence and try facts anew, the Supreme Court said:

162. Id. at 398-99. (Emphasis added.)

163. Id. at 435. (Emphasis added.) The case of Darr v. Burford, 339 U.S. 200 (1950), was expressly overruled to the extent that it might bar relief if a state prisoner failed to seek certiorari in the United States Supreme Court from a state decision within the time allowed. 372 U.S. at 435.

164. Id. at 440.

165. Id. at 439. The Court stressed that the choice had to be made by the petitioner, and if made by counsel alone, this would not automatically bar relief. Ibid.

166. 372 U.S. 293 (1963).

167. People v. Townsend, 11 Ill. 2d 30, 141 N.E.2d 729 (1957) (per curiam).

168. Townsend v. Illinois, 355 U.S. 850 (1957).

169. Townsend applied for collateral post-conviction relief which was denied without a hearing. The Supreme Court of Illinois affirmed, and the United States Supreme Court denied certiorari, 358 U.S. 887 (1958).

170. 372 U.S. 293 (1963). Having exhausted his state remedies, Townsend sought federal habeas corpus relief, which was denied by the district court, and this decision was affirmed by the court of appeals. United States ex rel. Townsend v. Sain, 265 F.2d 660 (7th Cir. 1958). The Supreme Court reversed and remanded the case to the district court to determine whether a plenary hearing was necessary 359 U.S. 64 (1959) (per curiam). On remand, the district court again denied relief, and the court of appeals again affirmed. 276 F.2d 324 (7th Cir. 1960). The United States Supreme Court granted certiorari, 365 U.S. 866 (1961).

We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[171]

While the Supreme Court took deliberate pains in setting up these guidelines, the full impact of the decision must await future determinations.

The last of the three cases, *Sanders v. United States*,[172] completes the trilogy. Sanders, a federal prisoner, sought section 2255 relief,[173] claiming that he was denied counsel and that he was intimidated and coerced into pleading guilty.[174] The district court denied the habeas corpus motion without a hearing, on the ground that the allegations were conclusory.[175] This decision was not appealed. However, nine months later, Sanders filed another application alleging that he had been mentally incompetent at the time of the judgment.[176] He was denied relief again, because, among other reasons, he knew of these facts at the time of his first petition and failed to assert them.[177] The court of appeals affirmed.[178] In a seven-to-two decision the Supreme Court reversed.[179] The Court, in equating the similar relief provisions of sections 2254 and 2255, said:

Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.[180]

However, where the applicant alleges a new ground in his second application, or where the first application was not adjudicated on the merits, the principle controlling successive motions on grounds previously heard and determined cannot apply.[181] "In either case," the Court said, "full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ or motion remedy; and this the Government has the burden of pleading."[182]

171. 372 U.S. at 313.

172. 373 U.S. 1 (1963).

173. Federal writ of coram nobis. 28 U.S.C. § 2255 (1958). Although Sanders v. United States was not a habeas corpus case, the Court held the rulings specifically applicable thereto.

174. 373 U.S. at 5.

175. Ibid.

176. Ibid.

177. 373 U.S. at 5-6.

178. Sanders v. United States, 297 F.2d 735 (9th Cir. 1961) (per curiam).

179. 373 U.S. 1 (1963).

180. Id. at 15.

181. Id. at 17.

182. Ibid.

It cannot be said that these three cases are without strong judicial opposition.[183] However, it is evident that the Supreme Court is clearly in favor of expanding the scope of the federal review of state court convictions. This is apparent from the interpretation of the "exhaustion of state remedies" doctrine in *Noia. Townsend* and *Sanders* insure the applicant that once he is in the federal courts his allegations will be given careful scrutiny.

VI. Retroactivity of Supreme Court Decisions

Perhaps one of the most perplexing constitutional and jurisprudential questions which remains to be answered is the question of the retroactivity of constitutional decisions which either define new rights or clarify old ones. The problem arises because at the time of the judgment the defendant was constitutionally convicted, and only subsequently seeks to question the validity of his detention on the basis of some newly defined right. In a great majority of the cases, the only way to attack such a conviction in New York is by way of coram nobis or by resort to habeas corpus in the federal courts, since the time for direct appeal has long since past.

Ample authority exists on both sides of the question.[184] In *Eskridge v. Washington State Bd.*,[185] the Supreme Court gave retroactive application to *Griffin v. Illinois*,[186] which held that failure to furnish a transcript of the trial to an indigent at the State's expense, for purposes of appeal, was a denial of due process; and in the view of the Second Circuit,[187] the Supreme Court in *Doughty v. Maxwell*[188] has applied *Gideon v. Wainwright*[189] retroactively. As to whether the defendants in these cases waived their constitutional rights by not objecting to something, which at the time would not have been objectionable, the case of *Fay v. Noia*[190] clearly answers in the negative. It was said in that case that waiver requires " 'an intentional relinquishment or abandonment of a known right or privilege.' "[191] However, there are recent state[192] and federal[193]

183. See the dissenting opinions: Sanders v. United States, 373 U.S. 1, 23; Fay v. Noia, 372 U.S. 391, 448; United States ex rel. Townsend v. Sain, 372 U.S. 293, 325. See also Desmond, Federal & State Habeas Corpus: How To Make Two Parallel Judicial Lines Meet, 49 A.B.A.J. 1166 (1963).

184. For a full discussion of the problem, see Bender, The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio, 110 U. Pa. L. Rev. 650 (1962); Sobel, Current Problems of the Law of Search and Seizure, Is Mapp Retroactive?, N.Y.L.J., Nov. 4, 1963, p. 4, col. 1; Comment, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907 (1962).

185. 357 U.S. 214 (1958).

186. 351 U.S. 12 (1956).

187. United States ex rel. Durocher v. LaVallee, — F.2d — (2d Cir. 1964).

188. 32 U.S.L. Week 3297 (U.S. Feb. 25, 1964) (per curiam).

189. 372 U.S. 335 (1963).

190. 372 U.S. 391 (1963).

191. Id. at 439, citing Johnson v. Zerbst, 304 U.S. 458 (1938).

192. See, e.g., Moore v. State, 41 Ala. App. 657, 146 So. 2d 734 (1962); Shorey v. State, 227 Md. 385, 177 A.2d 245 (1962); State v. Long, 71 N.J. Super. 583, 177 A.2d 609 (Essex County Ct. 1962); People v. Muller, 11 N.Y.2d 154, 182 N.E.2d 99, 227 N.Y.S.2d 421, cert. denied, 371 U.S. 850 (1962).

193. See, e.g., United States ex rel. Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963);