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NOTES

POST-McNALLY REVIEW OF INVALID CONVICTIONS THROUGH THE WRIT OF CORAM NOBIS

INTRODUCTION

The writ of coram nobis, a post-conviction remedy granted by the court that rendered the original judgment of conviction, vacates the conviction or grants a new trial. To be granted a writ of coram nobis, the petitioner must allege an error which was not previously litigated, which was not ascertainable through ordinary diligence at the time of the trial, and which probably would have affected its outcome. The petitioner must also explain any delay in discovering the facts or in filing his petition, and must assert the unavailability of any other remedy. Originally limited to errors of fact, the writ's modern application has principally addressed errors of law discovered when the petitioner is no longer in custody and therefore cannot avail himself of the writ of habeas corpus.

The writ of coram nobis has recently re-emerged in the wake of the Supreme Court's decision in McNally v. United States, which overturned the doctrine that loss of intangible rights, rather than simple loss of tangible property rights, was cognizable as mail fraud and wire fraud. Under that doctrine, certain intangible interests—such as the right to faithful service or honest government—were protected in ways otherwise


2. See L. Yackle, supra note 1, § 8, at 33-34.

3. See id. at 31.

4. See id. at 31-32.

5. See id. at 32; see also United States v. Keogh, 391 F.2d 138, 148 (2d Cir. 1968) (coram nobis petition properly granted only when court concludes that undisclosed evidence would have permitted defendant to raise reasonable doubt as to his guilt).


7. See E. Frank, supra note 1, § 1.02, at 3.


10. See id. at 360-61.
reserved for tangible property rights.\textsuperscript{11} \textit{McNally} held the intangible rights doctrine inapplicable to mail fraud and wire fraud in the absence of clear legislative intent.\textsuperscript{12}

In the aftermath of \textit{McNally}, some individuals who had been convicted of mail fraud or wire fraud under the intangible rights doctrine, and had completed their sentences, petitioned for writs of \textit{coram nobis}.\textsuperscript{13} A question then arose concerning whether, and under what standards, it is proper for a federal court to issue a writ of \textit{coram nobis} if the sentence resulting from conviction has already been served.

Circuit courts have developed two contrasting tests for the issuance of the writ after completion of a sentence. The Seventh Circuit requires that the petitioner be under a continuing civil disability\textsuperscript{14} which is "unique to criminal convictions."\textsuperscript{15} A variation of this approach also requires a continuing civil disability, but does not stipulate that the disability be unique to a criminal conviction.\textsuperscript{16} In contrast, the Fourth Circuit has developed a more liberal standard, finding that the writ of \textit{coram


\textsuperscript{12} See \textit{McNally}, 483 U.S. at 360-61. Significantly, Congress amended the mail fraud and wire fraud statutes in November 1988 by adding section 1346, which makes loss of intangible rights cognizable as mail fraud and wire fraud. See 18 U.S.C.A. § 1346 (West Supp. 1990).


\textsuperscript{14} A continuing civil disability is the present and future impairment of some civil right, such as the right to vote or to maintain an occupational license. See United States v. Keane, 852 F.2d 199, 203 (7th Cir. 1988), cert. denied, 109 S. Ct. 2109 (1989); see also L. Yackle, supra note 1, § 51, at 226-29 (circumstances justifying \textit{coram nobis} jurisdiction).

\textsuperscript{15} Keane, 852 F.2d at 203.

\textsuperscript{16} See United States v. Marcello, 876 F.2d 1147, 1154 (5th Cir. 1989); United States v. Stoneman, 870 F.2d 102, 105-06 (3d Cir.), cert. denied, 110 S. Ct. 236 (1989).
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is appropriate unless the petitioner is guilty of the crime "as . . . charged in the indictment." 17
This Note examines the criteria under which a writ of coram nobis may issue when the petitioner's criminal sentence has already been completed. Part I reviews the history of the writ of coram nobis, from its evolution in English common law to its present application in the United States. Part II discusses the doctrine of intangible rights and the coram nobis issues raised in the aftermath of the McNally decision. Part II also analyzes the conflicting criteria for the issuance of the writ of coram nobis set forth by the various United States Courts of Appeals. Part III concludes that a petitioner's desire to have his record cleared must be weighed against the government's interest in the finality of judgment. The writ of coram nobis should be issued only where the indictment under which the petitioner was convicted failed to state a crime and the petitioner has exhausted his rights of appeal.

I. THE HISTORY OF THE WRIT OF CORAM NOBIS

The British common-law writ of coram nobis evolved in the sixteenth century as a remedy for petitioners alleging a judicial wrong. 18 Applied in both civil and criminal cases, 19 the writ was brought before the court that had rendered the original judgment, and requested relief in the form of a new trial. 20 In order to obtain the writ, the petitioner had to allege an error of fact 21 which could not have been ascertained through ordinary diligence at the time of the trial, 22 and which, in all probability, would have affected its outcome. 23 As a result, a fact that had been litigated could not again be brought before the court, even if the law had changed. 24
The writ of coram nobis was traditionally brought before the trial court to correct an error of fact which did not appear on the record. 25 In

18. See L. Yackle, supra note 1, § 9, at 36-37. The petition was submitted in the court of the King's Bench, or "before us," that is, before the King. See id. § 9, at 37. The writ of coram nobis, an analogous procedure, was heard by the judges of the Court of Common Pleas, or "before you." See id. Although the latter term has occasionally been used in the United States, see, e.g., United States v. Mayer, 235 U.S. 55, 67 (1914), the distinction is virtually meaningless in the American context. See L. Yackle, supra note 1, § 9, at 38-39.
19. See L. Yackle, supra note 1, § 8, at 31.
20. See id. § 9, at 37.
21. In early practice, errors of fact could be remedied only through the writ of coram nobis, see id. § 8, at 32-33, while the writ of habeas corpus was reserved for errors of law. See id. § 3, at 4. In modern practice, habeas corpus is the remedy for errors of law when the petitioner is still in custody. The writ of coram nobis may address errors of either fact or law when the petitioner has completed his sentence. See id. § 8, at 33.
22. See L. Yackle, supra note 1, § 8, at 31-32.
23. See id. § 8, at 32.
25. See Cohen, supra note 1, at 6.
its modern application, the writ alleges an error of fact or law, and is invoked when the petitioner is no longer imprisoned on that charge. It may thus be distinguished from a writ of habeas corpus, which alleges an apparent error of law and is addressed to a higher tribunal. The writ of habeas corpus challenges the legal right to continue to hold a petitioner in custody.

Traditionally available in both civil and criminal cases, the writ of coram nobis has rarely achieved prominence in American federal practice. Chief Justice Marshall first recognized the availability of the writ in 1810. Nearly fifty years later, however, the Circuit Court of Massachusetts held in United States v. Plumer that the federal circuit courts had no jurisdiction to issue writs of coram nobis in criminal cases. Plumer nonetheless acknowledged that the writ had been used and was appropriate in rare civil cases.

The Supreme Court struggled with the writ of coram nobis into the twentieth century. In Bronson v. Schulten, the Court disapproved of

27. 28 U.S.C. § 2255 (1988). For the relation between the writs of habeas corpus and coram nobis, see United States v. Loschiavo, 531 F.2d 659 (2d Cir. 1976): "Even if § 2255 were unavailable to [petitioner], in view of the fact that he had fully served his sentence under a federal felony conviction, he could simply bring a petition for coram nobis under the 'All Writs' statute... because such relief is available from the sentencing court even after release from custody." Id. at 662 (citation omitted).
29. See id.; see also Darr v. Burford, 339 U.S. 200, 203 (1950) ("The writ of habeas corpus commands general recognition as the essential remedy to safeguard a citizen against imprisonment by State or Nation in violation of his constitutional rights.") (overruled on other grounds by Fay v. Noia, 372 U.S. 391 (1963)).

The custody requirement, though crucial to the issuance of a writ of habeas corpus, is interpreted extremely broadly. "Simply put, the requirement of 'custody' identifies those restraints upon individual liberty that are severe enough to justify the exercise of the extraordinary federal habeas jurisdiction." L. Yackle, supra note 1, § 42, at 178. See also Hensley v. Municipal Court, 411 U.S. 345 (1973) (petitioner released on bail pending appeal "in custody" for habeas purposes); Carafas v. LaVallee, 391 U.S. 234 (1968) (petitioner's parole did not render habeas petition moot); Yackle, Explaining Habeas Corpus, 60 N.Y.U. L. Rev. 991, 1001-02 (1985) (review of custody criteria).
31. See infra notes 32-39 and accompanying text.

In the various states, the writ is either available under the common law, expressly abolished by statute, or impliedly displaced through the provision of other remedies. See L. Yackle, supra note 1, §§ 10-13, at 41-69. For a history of the writ in federal practice, see United States v. Morgan, 346 U.S. 502, 506-11. This Note addresses the writ in federal practice.
33. 27 Fed. Cas. 561 (C.C.D.M. 1859) (No. 16,056).
34. See id. at 571-73.
35. The writ of coram nobis might be issued to correct "[e]rrors of fact in the process of a civil action, or such as happened through the fault of the clerk in the record of the proceedings." See id. at 572-75.
36. 104 U.S. 410 (1881).
the trend in the states to award the writ,37 and expressed doubts as to the writ's validity in the federal system.38 The Court repeated its doubts several times during the next seventy years.39

Federal Rule of Civil Procedure 60(b), adopted in 1946, abolished the writ of coram nobis in civil cases.40 The rule provides that "[w]rits of coram nobis [and] coram vobis... are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."41 Nonetheless, Rule 60(b) does not abolish the writ of coram nobis in criminal questions.42

In United States v. Morgan,43 the Supreme Court finally held that federal courts could issue the writ of coram nobis in a criminal case in which the petitioner challenged his conviction by claiming that he was not informed of his right to counsel.44 While the Court agreed with earlier opinions holding that the writ was not specifically authorized by any congressional statute,45 it concluded that the writ was authorized by the All Writs Act,46 which provides that "[t]he Supreme Court and all courts

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37. See id. at 415-16.
38. See id. at 417. The Bronson Court identified narrow permissible criteria for issuing the writ: error on the part of the court clerk or error as to a matter of fact, such as the death of one of the parties before judgment, the defendant not being of age, or either party being a married woman when suit was joined. See id. at 416; see also United States v. Plumer, 27 F. Cas. 561, 573 (C.C.D.M. 1859) (No. 16,056) (listing same criteria).
39. In United States v. Mayer, 235 U.S. 55 (1914), the Court again expressed concern regarding federal court jurisdiction to issue the writ. See id. at 68-69. However, the Court declined to decide whether the writ of coram nobis was available in criminal cases in the district courts. See id. at 69.
40. See United States v. Morgan, 346 U.S. 502 (1954) (Minton, J., dissenting): "I am unable to agree with the decision of the Court resurrecting the ancient writ of error coram nobis from the limbo to which it presumably had been relegated by Rule 60(b) Fed. R. Civ. P. and 28 U.S.C. § 2255." Id. at 513.
41. Rule 60(b) provides relief from judgment or order by reason of "mistake, inadvertence, . . . excusable neglect, . . . newly discovered evidence, . . . fraud" or a void judgment. Fed. R. Civ. P. 60(b).
42. See Morgan, 346 U.S. at 505-06 n.4.
44. See id. at 511-12. In its 5-4 decision, the majority held that Federal Rule of Criminal Procedure 35, which permits the correction of "an illegal sentence at any time," did not apply when an authorized conviction was based upon the denial of constitutional rights. See id. at 504-06.
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.47

Morgan also stated that a writ of habeas corpus did not supersede the writ of coram nobis: "Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions."48 Morgan, however, identified the writ of coram nobis as an "extraordinary remedy" to be issued "only under circumstances compelling such action to achieve justice."49

II. CORAM NOBIS IN THE AFTERMATH OF McNALLY V. UNITED STATES

A. Post-McNally Petitions

In the 1970's, lower federal courts developed the theory of intangible rights,50 under which certain interests were considered analogous to property rights.51 Under this reasoning, employers had an intangible interest in faithful service, voters had an intangible interest in fair elections, and citizens had an intangible interest in honest government.52

The primary vehicle for the development of the intangible rights doctrine was the federal mail fraud statute,53 which sanctions individuals who, "having devised or intend[ed] to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," use the mails to further their aims.54 Public officials whose acts deprived citizens of their intangi-
ble rights were prosecuted and convicted for mail fraud.\textsuperscript{55}

The Supreme Court invalidated the intangible rights doctrine in \textit{McNally v. United States},\textsuperscript{55} ruling that Congress did not intend such a remedy under the mail fraud statute. As a result, a number of individuals who had completed their sentences after conviction under the intangible rights doctrine applied for relief by writ of \textit{coram nobis}. These petitioners sought to have their sentences vacated on the ground that the original indictments, upon retroactive application of the \textit{McNally} decision, failed to state a crime.\textsuperscript{57}

B. Criteria for Issuance of a Writ of Coram Nobis

The Supreme Court has restricted post-conviction review under a writ of \textit{coram nobis} to "errors...of the most fundamental character, that is, such [that the error] rendered the proceeding itself irregular and invalid); Ra\textsuperscript{55} roff, \textit{The Federal Mail Fraud Statute (Part I)}, 18 Duq. L. Rev. 771 (1980) (history of mail fraud statute).


Private defendants were also convicted under the mail fraud statute for schemes that defrauded the public. See, e.g., United States v. Lovett, 811 F.2d 979 (7th Cir. 1987) (bribing mayor); United States v. Alexander, 741 F.2d 962 (7th Cir. 1984) (bribing deputy in county assessor's office) (overruled on other grounds by \textit{United States v. Ginsburg}, 773 F.2d 798 (7th Cir. 1985) (en banc)); United States v. Rauhoff, 525 F.2d 1170 (7th Cir. 1975) (bribing state secretary of state); United States v. Faser, 303 F. Supp. 380 (E.D. La. 1969) (bribing state officials).

\textsuperscript{56} 483 U.S. 350 (1987).


In Carpenter v. United States, 484 U.S. 19 (1987), the Court resolved many of these claims by holding that the mail fraud statute applied only to intangible property rights and not to other intangible rights. Thus, a conviction which was based upon intent to defraud an employer of an intangible property right—such as confidential business information—was held not to be affected by the \textit{McNally} decision. See \textit{id}. at 23-24.
Although the Court has not established specific criteria for issuance of the writ of *coram nobis*, it has suggested consequences that the writ might properly mend: heavier penalties on subsequent convictions or adverse effects on the petitioner's civil rights. The Court noted, however, that the original proceedings are presumed correct and that the burden of proving them otherwise rests upon the petitioner.

The circuits disagree as to the standards and criteria to be applied in determining when to issue a writ of *coram nobis*.

1. Continuing Civil Disability

Several circuits have required a continuing civil disability, such as the loss of the right to vote or to maintain an occupational license, in order to grant a writ of *coram nobis*. This requirement is based primarily upon a comparison with the writ of habeas corpus, which is the proper form of collateral review if the petitioner is still in federal custody and thereby under a continuing deprivation. Because the justification for habeas corpus ends with the completion of custody, the petitioner for a writ of *coram nobis* must show a continuing civil disability that is serious enough to substitute for the custody requirement. The governing theory is that the writ of *coram nobis* should be reviewed under at least as stringent a standard as the writ of habeas corpus.

The requirement that the petitioner suffer a continuing civil disability meets this criterion. The Seventh Circuit applied this standard in denying a writ of *coram nobis* where the petitioner, a lawyer who had been disbarred as a result of his conviction, was not under a continuing civil disability.

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58. United States v. Mayer, 235 U.S. 55, 69 (1914); see also United States v. Morgan, 346 U.S. 502, 511 (1954) (*writ of coram nobis* is an “extraordinary remedy” to be issued “only under circumstances compelling such action to achieve justice”).


60. See id. at 512.

61. See supra notes 14-17 and accompanying text.


65. See, e.g., United States v. Bush, 888 F.2d 1145, 1147 (7th Cir. 1989); Stoneman, 870 F.2d at 105-06; Keane, 852 F.2d at 203. For current interpretation of the habeas corpus custody requirement, see L. Yackle, supra note 1, § 42, at 178-81; Yackle, supra note 29, at 1001-02.

66. See United States v. Bush, 888 F.2d at 1147 (7th Cir. 1989).

67. See id.


disability because he had since been readmitted to his state bar. In another case, the Seventh Circuit concluded that the petitioner's inability to attract a high-visibility public relations position did not constitute a civil disability.

Some decisions have required not only that there be a continuing civil disability, but that the disability be "unique to criminal convictions." Examples of such civil disabilities include loss of the right to vote, the right to maintain an occupational license, or the right to bear arms. In addition, the possibility that a criminal conviction may result in harsher penalties for future criminal offenses may also be considered in determining the propriety of the writ. On the other hand, fines or loss of reputation do not meet the necessary standard because they might equally result from a civil judgment.

2. The Indictment Failed to State a Crime

Some decisions have established a more liberal test than the civil disability standard, holding that a writ of *coram nobis* is appropriate as long as the petitioner is not guilty of the crime "as charged in the indictment." Under this test, a court scrutinizes both the indictment and the jury instructions to determine whether the defendant was convicted of an act that is no longer considered a crime. In the wake of *McNally v. United States*, many mail fraud convictions were overturned on the ground that the indictments did not state a crime. The conclusion that the defendants' indictments had never, in

70. See id. at 203-04.
71. See United States v. Bush, 888 F.2d 1145, 1149 (7th Cir. 1989).
72. See United States v. Osser, 864 F.2d 1056, 1059-60 (3d Cir. 1988); United States v. Keane, 852 F.2d 199, 203 (7th Cir. 1988), cert. denied, 109 S. Ct. 2109 (1989). A disability unique to criminal convictions is one which could not stem from a civil judgment. See Osser, 864 F.2d at 1059-60; Keane, 852 F.2d at 205.
73. See Keane, 852 F.2d at 203.
74. See id. But see Osser, 864 F.2d at 1060 n.3 (declining to rule whether harsher penalties constitute sufficient disability).
75. See United States v. Bush, 888 F.2d 1145, 1148 (7th Cir. 1989); Keane, 852 F.2d at 203; see also Osser, 864 F.2d at 1060 (loss of civil service pension due to conviction equivalent to civil money judgment and therefore not sufficient ground for granting writ of *coram nobis*); cf. L. Yackle, *supra* note 1, § 42, at 181 (fine alone not sufficient "custody" to invoke writ of habeas corpus).
77. See Mandel, 862 F.2d at 1074.
78. See id. at 203-04.
79. See, e.g., United States v. Price, 857 F.2d 234, 236 (4th Cir. 1988) (union offi-
fact, a crime was held to meet the standard of fundamental error necessary to issue the writ of coram nobis. Decisions applying this test will not review the evidence to determine whether the petitioner could have been convicted of a crime for which he was not charged.

Other decisions, however, have held the absence of a crime from the indictment to be an insufficient basis to issue a writ of coram nobis. If the defendant could have been convicted of a crime other than that which was stated in the indictment, a writ of coram nobis should not be granted; United States v. Ochs, 842 F.2d 515, 529 (1st Cir. 1988) (scheme to obtain building permit); United States v. Holzer, 840 F.2d 1343, 1345 (7th Cir.) (state judge), cert. denied, 486 U.S. 1035 (1988); United States v. Gordon, 836 F.2d 1312, 1313 (11th Cir. 1988) (election fraud), cert. dismissed, 109 S. Ct. 28 (1988); United States v. Murphy, 836 F.2d 248, 251-52 (6th Cir.) (state bingo permit), cert. denied, 109 S. Ct. 307 (1988); United States v. Gimbel, 830 F.2d 621, 622 (7th Cir. 1987) (tax evasion).


See United States v. Marcello, 876 F.2d 1147, 1154 (5th Cir. 1989); Allen v. United States, 867 F.2d 969, 972 (6th Cir. 1989); Mandel, 862 F.2d at 1075; United States v. Travers, 514 F.2d 1171, 1178-79 (2d Cir. 1974).

Several courts have granted a writ of coram nobis, concluding that the indictment under which the petitioner was convicted failed to state a crime. In Travers, for example, the Second Circuit granted the writ because the defendant was convicted of mail fraud for conduct later ruled by the Supreme Court to be outside the mail fraud statute. See Travers, 514 F.2d at 1172. In granting the writ, the Travers court held that the decisive factor was a strict construction of the terms of the indictment rather than the petitioner's conduct. See id. at 1178-79; cf. United States v. Maze, 414 U.S. 395, 405 (1974) (defendant's credit card fraud held not within the mail fraud statute, since his use of the mails was only incidental to the fraud, rather than "for the purpose of executing such scheme or artifice") (quoting 15 U.S.C. § 1644 (1988)).

In Marcello, the Fifth Circuit concluded that the petitioner's conviction had been based exclusively upon the intangible rights doctrine. See Marcello, 876 F.2d at 1150-51. In its view, the question was not whether, upon the facts, the indictment might have stated charges which would survive McNally scrutiny, but whether the indictment actually had done so. See id. at 1152. Although the court stated that "[e]xcoriate coram nobis is appropriate only where the petitioner can demonstrate that he is suffering civil disabilities as a consequence of the criminal convictions and that the challenged error is of sufficient magnitude to justify the extraordinary relief," id. at 1154, it nonetheless granted the writ because the defendant must "be absolved of the consequences flowing from his branding as a federal felon." Id.

In Allen v. United States, 867 F.2d 969 (6th Cir. 1989), the Sixth Circuit affirmed a writ of coram nobis and set aside a pre-McNally conviction for mail fraud under reasoning which implicitly followed the failure to state a crime test. In Allen, since the indictment failed to specify that the state had been defrauded of a tangible or intangible property right and the jury was not instructed that loss of a property interest was a necessary element of mail fraud, the court determined that the petitioner had been convicted under the intangible rights theory. See id. at 971-72. The court rejected the government's argument that a property loss was implicit in the activities with which the defendant was charged. See id. at 972. As a result, the court concluded that the indictment and instructions "permitted a conviction for conduct not within the reach of the mail fraud statute." Id. This, the court found, was sufficient to justify the issuance of a writ of coram nobis. See id.

granted. This view is based upon a strict reading of the purpose of the writ, which concludes that the remedy is "not to reverse these convictions if they are in error, but to overturn them only if justice so compels." The Third Circuit expressed this view in United States v. Osser, concluding that the indictment stated a crime, even in light of McNally, because the petitioner's acts caused the deprivation of property and monetary loss in addition to the loss of intangible rights. Because these charges would have been sufficient to convict the petitioner even after the invalidation of the intangible rights doctrine, Osser concluded that the writ of coram nobis was not appropriate.

Several decisions that have reviewed petitions for coram nobis have drawn a parallel to the habeas corpus remedy, citing Sunal v. Large, where the Supreme Court denied habeas corpus to petitioners who had not directly appealed their convictions. These holdings reasoned that the same standard should apply to coram nobis, because a defendant who has not followed the established appeals procedure has waived his rights, and may not later assert them at the expense of the stability and predictability of the judicial process.

83. See Mandel, 862 F.2d at 1079 (Hall, J., dissenting). The rule that allows a court to determine whether the indictment could have stated another crime for which the petitioner might have been convicted may be challenged on the grounds that the Constitution requires that a defendant only bear the consequences of crimes for which he has been indicted, tried and convicted. See Allen v. United States, 867 F.2d 969, 972 (6th Cir. 1989); Mandel, 862 F.2d at 1075; see also Chiarella v. United States, 445 U.S. 222, 235-37 (1980) (Court declined to decide whether petitioner's conviction could have been upheld on alternative theory, since that theory was not submitted to jury).

84. Mandel, 862 F.2d at 1079 (Hall, J., dissenting).

85. 864 F.2d 1056 (3d Cir. 1989).

86. See id. at 1063.

87. See id. at 1063-64.

In United States v. Stoneman, 870 F.2d 102 (3d Cir.), cert. denied, 110 S. Ct. 236 (1989), the Third Circuit again held that, although the district court had erred in instructing the jury that the defendant could be convicted under the intangible rights doctrine alone, the original indictment still charged a valid offense. See id. at 108. The court conceded that "an error in jury instructions is normally remedied by the grant of a new trial." Id. Nonetheless, because "a valid conviction could have been had under different instructions . . . [the defect] is not the sort of fundamental defect that produces a complete miscarriage of justice." Id. (quoting United States v. Keane, 852 F.2d 199, 205 (7th Cir. 1988), cert. denied, 109 S. Ct. 2109 (1989)).


89. See id. at 183-84; United States v. Osser, 864 F.2d 1056, 1062 (3d Cir. 1988); United States v. Travers, 514 F.2d 1171, 1176 (2d Cir. 1974).

90. See Osser, 864 F.2d at 1060; Travers, 514 F.2d at 1177. But see Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977) (petitioner's failure to make timely objection to admission of evidence bars federal habeas corpus review, absent showing of cause for noncompliance and actual prejudice); Fay v. Noia, 372 U.S. 391, 398-99 (1963) (failure to appeal conviction not procedural default sufficient to deny relief on merits). The tension between the Wainwright and Fay standards has not been fully resolved.
3. Exhaustion of Statutory Right of Review Resulting in No Other Remedy

Certain criteria for the issuance of a writ of *coram nobis* have been universally recognized. The Supreme Court has noted that "deliberate failure to use a known remedy at the time of trial may be a bar to subsequent reliance on the defaulted right." Therefore, all statutory rights of review must have been exercised at each stage of the litigation before a petitioner may be granted a writ of *coram nobis*.

In *United States v. Mandel*, the Fourth Circuit concluded that because the petitioners had appealed their conviction at each stage, no remedy was available to them other than the writ of *coram nobis*. In *United States v. Travers* the Second Circuit limited the writ of *coram nobis* to defendants who had exhausted the appellate process. Travers conceded, however, that the writ might be available to those convicted after the Second Circuit declined to review the mail fraud statute and before the Supreme Court had overruled the intangible rights doctrine, when an appeal would have been futile.

4. Finality of Judgment

Several decisions have found that the policy of finality of judgment and the cost of the diversion of scarce prosecutorial resources justify limiting the availability of the writ of *coram nobis*. This position was strongly encouraged by the dissent in *United States v. Morgan*, where the justices stated: "[t]he important principle that means for redressing deprivations of constitutional rights should be available often clashes with the also important principle that at some point a judgment should become final."
This concern for the finality of judgment has led the Seventh Circuit to refuse to grant the writ when the basis for its issuance has previously been litigated. In United States v. Keane, for example, the court denied a petition for a writ of coram nobis, holding that the petitioners' legal contention had already been rejected after complete litigation. This was held to justify dismissal even though, as a result of the McNally decision, there had been an intervening change of law.

III. THE PROPER CRITERIA FOR ISSUING A WRIT OF CORAM NOBIS

In determining when the writ of coram nobis should issue, the petitioner's interest in redress must be balanced against the judicial system's need for finality of judgment. The petitioner's two primary interests in clearing his record are the potential damage to his reputation and the possibility of continuing civil disabilities. The government, on the other hand, is concerned with ensuring the finality of the judgment against the petitioner. These governmental concerns are based on an interest in the stability of the judicial system and the efficient use of judicial resources. Moreover, relitigation years after the original trial may prove unreliable on matters of fact.

The writ of coram nobis should be granted when the indictment has failed to state a crime and the petitioner has exhausted his statutory right of appeal. Under these circumstances, issuance of the writ would provide the necessary protection to the petitioner with only a minimal impact on the interest of judicial finality. If the petitioner has failed to exhaust his statutory remedies, however, he has effectively waived his rights to them, and should not be allowed to reclaim them at the expense of judicial stability.

A. The Petitioner's Interest in Clearing the Record

1. Damage to Reputation

Because loss of reputation is a substantial harm, the petitioner convicted under an indictment that failed to state a crime has a valid interest in having his conviction expunged by a writ of coram nobis. Chief Justice Warren addressed the impact of felony conviction in Parker v. Ellis, stating that the "[c]onviction 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

101. See Keane, 852 F.2d at 203.
103. See id. at 206.
104. See id.
105. See infra notes 108-122.
106. See infra notes 123-129.
107. See infra notes 128-129.
108. 362 U.S. 574 (1960) (overruled on other grounds by Parker v. Ellis, 391 U.S. 234 (1968)).
economic opportunities." The Court expressed a similar concern in *Fiswick v. United States*, noting that "[the petitioner] would, unless pardoned, carry through life the disability of a felon."

An invalid conviction, with its attendant stigma and inevitable consequence of thereafter labeling the petitioner a felon, is an "error[] of the most fundamental character, . . . render[ing] the proceeding itself irregular and invalid." Such fundamental error justifies the issuance of a writ of *coram nobis*.

2. Continuing Civil Disabilities

A felony conviction may have substantial impact on the petitioner in ways that cannot be immediately demonstrated or directly linked to his felony conviction. For example, he may lose the right to vote or to maintain an occupational license. The Supreme Court has evaluated the impact of such continuing civil disabilities in a series of decisions that consider whether a petitioner's claim for appeal of his conviction is moot when the criminal judgment has been satisfied.

In *Fiswick v. United States*, the Court held that the alien petitioner's completed sentence did not moot his appeal of a conviction for conspiracy to defraud the United States. The Court stated that the conviction might have a detrimental effect in future deportation proceedings or on the petitioner's eligibility for American citizenship. The Court further reasoned that "the disability of a felon" put the petitioner at risk of losing certain civil rights, including the rights to serve on a jury, to hold office, or to vote.

In *United States v. Morgan*, the Court held that the case was not moot upon similar grounds, expressing concern that the petitioner's conviction might affect his civil rights, or cause future disabilities in the form of heavier penalties for subsequent convictions. The Court concluded that "respondent is entitled to an opportunity to attempt to show that

109. Id. at 593-94 (Warren, C.J., dissenting) (emphasis in original).
110. 329 U.S. 211 (1946).
111. Id. at 222.
113. See id.
117. See id. at 221-22.
118. See id.
119. Id. at 222.
121. See id. at 512-13.
this conviction was invalid."

B. Finality of Judgment

Balanced against the petitioner's interest in exoneration is the government's interest in finality of judgment.\textsuperscript{123} While every defendant is entitled to full and fair litigation, there is no right to be afforded multiple opportunities for relitigation.\textsuperscript{124} The need for finality of judgment has caused the Supreme Court to review collateral attacks on judgments more stringently than direct attacks.\textsuperscript{125}

Requiring a petitioner to challenge his conviction primarily through direct attack, and only in narrow instances through collateral attack, promotes the stability of the judicial system and provides an incentive to present the case fully the first time it is litigated.\textsuperscript{126} Limitations on collateral attacks also encourage the efficient use of judicial resources.\textsuperscript{127} Moreover, collateral attacks do not guarantee that justice will finally be satisfied. New litigation, which generally takes place years after the original events and initial trial,\textsuperscript{128} is likely to be "less reliable on questions of

\textsuperscript{122} Id. at 513.

The Court no longer requires the petitioner to prove a continuing civil disability but instead presumes its existence. See Pollard v. United States, 352 U.S. 354, 358 (1957). For example, in Sibron v. New York, 392 U.S. 40 (1968), the Court acknowledged "the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." Id. at 55. The Court held that the possibility of such consequences is enough to keep a criminal case from becoming moot. See id. For further discussion of the level of collateral legal consequences necessary to justify post-conviction review, see Hensley v. Municipal Court, 411 U.S. 345, 348-53 (1973); Carafas v. LaVallee, 391 U.S. 234, 237-40 (1968); see also Yackle, supra note 29, at 1001-02 (discussion of "in custody" requirement).

The Sibron Court further concluded that efficiency and fairness mandate addressing the issue at once, rather than requiring the petitioner to await demonstrable adverse consequences. See Sibron, 392 U.S. at 57.

123. Upholding the principle of finality of judgment has been among the deciding factors in a number of federal court reviews of collateral attacks. In United States v. Frady, 456 U.S. 152 (1982), the Supreme Court stated that "[o]ur trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks. To the contrary, a final judgment commands respect." Id. at 164-65.


125. See Frady, 456 U.S. at 165 (quoting United States v. Addonizio, 442 U.S. 178, 184 (1979)).

126. See Keane, 852 F.2d at 201.


128. Petitions filed in the wake of the 1987 McNally decision include those considered in United States v. Marcello, 876 F.2d 1147, 1149 (5th Cir. 1989) (petitioner convicted in
fact even if more reliable on questions of law." 129

C. Proper Balance of Interests

The writ of *coram nobis* should be issued when the indictment under which the petitioner was convicted failed to state a crime and the defendant has exhausted statutory review. 130 When the petitioner has appealed his conviction at each stage of the litigation, he has met the threshold *coram nobis* requirement that no other remedy exist. 131 At this point, the interest in removing the consequences of the felony conviction legitimately outweighs the interest in finality of judgment.

The petition for *coram nobis* does not require reassessment of the validity of the petitioner's conviction because a court has already held the indictment invalid. 132 Because the petitioner is merely asking the court to expunge the already invalid conviction from the record, 133 the interest in finality of judgment is unaffected. The slight diversion of judicial resources necessary to issue a writ of *coram nobis* is justified because it is the only remedy available to satisfy the substantial interest the petitioner has in having his record expunged.

When the petitioner has not exhausted the statutory right of appeal, however, the balance of interests shifts in favor of denying the writ of *coram nobis*. Because the petitioner has chosen not to avail himself of the statutory appeal process, he cannot legitimately claim that the writ of *coram nobis* is the only means of redress. In such a case, he has not minimized the impact of his petition upon the interests of judicial finality. Moreover, the petitioner has failed to assist the fact-finding process by challenging his conviction while the evidence was as fresh as possible. 134 Under these circumstances, the value of finality of judgment properly outweighs concern for the continuing stigma of a felony conviction.

CONCLUSION

The writ of *coram nobis* should be issued when the indictment has failed to state a crime and the petitioner has exhausted his statutory right of appeal. In such circumstances, a collateral attack on the conviction is justified by the petitioner's loss of reputation and the potential civil disa-


129. United States v. Bush, 888 F.2d 1145, 1150 (7th Cir. 1989).

130. See *Marcello*, 876 F.2d at 1154; Allen v. United States, 867 F.2d 969, 972 (6th Cir. 1989); *Mandel*, 862 F.2d at 1075; United States v. Travers, 514 F.2d 1171, 1175-77 (2d Cir. 1974).


132. See supra notes 56-57 and accompanying text.

133. See supra note 79 and accompanying text.

134. See supra notes 128-129 and accompanying text.
bilities which ensue. These injuries meet the coram nobis criterion of fundamental error resulting in a serious miscarriage of justice.

M. Diane Duszak