THE CORAM NOBIS WRIT IN AN IMMIGRATION LAW CONTEXT

There are three basic grounds based on criminal convictions[1] that may preclude entry into the United States, or once entry is effected may cause an alien to be deported. As to excludable aliens these grounds include:

(1) Aliens who have been convicted of a crime involving moral turpitude.[2]

(2) Aliens who have been convicted of two or more offenses regardless of whether the offense involved moral turpitude for which the aggregate sentences to confinement actually imposed were five years or more.[3]

(3) Any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana.[4]

Once entry is effected substantially the same grounds exist for deportation of aliens based on convictions in the United States.[5] Included as a deportable offense is the subsequent discovery after entry of an excludable ground not applied to the alien upon entry.[6]

The focus of this note will be to explore how an alien can expunge the stigma of an earlier conviction in the United States

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1. Omitted from discussion in this note is I.N.A. § 241(a)(17), 8 U.S.C. § 1251(a)(17) (1970), because it establishes grounds of deportability for a class of crime distinctively different from those enumerated in the text, *infra.*

2. Immigration and Nationality Act (hereinafter referred to as I.N.A.) § 212(a)(9), 8 U.S.C. § 1182(a)(9) (1970). For a particularly harsh application of this reasoning *see* 37 *Opinions of the Attorney General* 259 (1933), and Giammario v. Hurney, 311 F.2d 285 (3rd Cir. 1962).

3. I.N.A. § 212(a)(10), 8 U.S.C. § 1182(a)(10) (1970).

4. I.N.A. § 212(a)(23), 8 U.S.C. § 1182(a)(23) (1970).

5. *See e.g.*, I.N.A. § 241(a)(4) & (11), 8 U.S.C. § 1251(a)(4) & (11) (1970).

6. I.N.A. § 241(a)(1), 8 U.S.C. § 1251(a)(1) (1970), subjects an alien to deportation if he falls within one or more of the classes of excludable aliens. I.N.A. § 212(a)(1)-(31), 8 U.S.C. § 1182(a)(1)-(31) (1970). *See also* I.N.A. § 237(a), 8 U.S.C. § 1227(a) (1970). The distinction between deportation and exclusion is not a significant one in most instances. Adjudicatory criteria regarding grounds for exclusion or deportation are comparable. Both proceedings are held to extend procedural due process constitutional guarantees to aliens but withhold "substantive" due process. Harisiades v. Shaughnessy, 342 U.S. 580 (1952), *see also* WASSERMAN, IMMIGRATION LAW and PRACTICE (1973), at 139-141.

through a *coram nobis* writ, thus making it possible to remove him from the class of deportable aliens.[7]

I. THE WRIT'S APPLICATION

The Immigration and Nationality Act of 1952 rendered "conviction of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs" grounds for both exclusion[8] and deportation.[9] Under this enactment, as well as under prior law, a conviction for mere possession, unless specifically shown to be related to traffic in such drugs, was insufficient as a basis for exclusion.[10] In 1956, however, Congress added to the list of excludable and deportable aliens[11] those who had been convicted of illegally possessing narcotic drugs. Thus aliens convicted of possession of marihuana were not subject to deportation under either the 1952 or 1956 legislation despite attempts by the Immigration and Naturalization Service (hereinafter referred to as INS) to institute such proceedings on these grounds.[12] Congress responded to these INS efforts with uncharacteristic speed and enacted a new law making illicit possession or trafficking in marihuana a ground for deportation.[13] Today any alien convicted of violating narcotics laws is subject to deportation and exclusion.[14] A sentence need not be given as a result of the conviction; case law has decreed deportability in sentences where a finding of guilt has been followed with an order granting probation or parole.[15] Although an earlier INS decision refrained from deporting an alien where the imposition of a sentence for a narcotics conviction was deferred,[16] more recent court decisions indicate that deportation can occur despite such defer-

7. Expunging an alien's conviction through a *coram nobis* writ is not the only method of preventing his deportation. An alien's deportation based on a conviction of a crime involving "moral turpitude" as set out in I.N.A. § 241(a)(4), 8 U.S.C. § 1251(a)(4) (1970), may be prevented if the sentencing court recommends that the alien not be deported. I.N.A. § 241(b), 8 U.S.C. § 1251(b) (1970).

8. I.N.A. § 212(a)(23), 8 U.S.C. § 1182(a)(23) (1970).

9. I.N.A. § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1970).

10. However, conspiracy to violate the narcotics laws would provide a sufficient ground. Nani v. Brownell, 247 F.2d 103 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 870 (1957). *See also* Matter of B—, 5 I. & N. 479 (1953); Matter of D—S—, 3 I. & N. 502 (1949); Matter of L—, 5 I. & N. 169 (1953).

11. 70 Stat. 567, 575 (1956).

12. Hoy v. Mendoza-Rivera, 267 F.2d 451 (9th Cir. 1959); Hoy v. Rojas-Gutierrez, 267 F.2d 490 (9th Cir. 1959); *cf.* Matter of P—C—, 8 I. & N. 670 (1960).

13. 74 Stat. 505 (1960).

14. Matter of Romandia-Herreros, 11 I. & N. 772 (1966); Matter of McClendon, 12 I. & N. 233 (1967); Matter of Paulus, 11 I. & N. 274 (1965).

15. Gutierrez v. Immigration and Naturalization Service, 323 F.2d 593 (9th Cir. 1963), *cert. denied*, 377 U.S. 910 (1964); Chabolla-Delgado v. Immigration and Naturalization Service, 384 F.2d 360 (9th Cir. 1967); Matter of Johnson, 11 I. & N. 401 (1965).

16. Matter of J—, 7 I. & N. 580 (1957).

rals.[17] Thus a conviction without sentence is final for purposes of deportation or exclusion. Courts have been so rigid in this regard that a narcotics conviction is considered final even where under applicable state law the record of a conviction is expunged and the indictment dismissed after the completion of the sentence and probation period.[18]

Due to the growing number of immigrants seeking admission into the United States, the Attorney General of the United States, through the INS, is vigorously enforcing these sections of the Immigration and Nationality Act.[19] As a result, many aliens who are otherwise eligible for lawful permanent residence in this country are either deported or precluded from entry on the basis of a criminal conviction.

Criminal charges which may render the alien ineligible for lawful permanent resident status are not restricted to drug or marihuana offenses.[20] The alien unfamiliar with the English language, and unsophisticated with the methods of criminal prosecution in this country, will often plea bargain for a lesser misdemeanor offense in order to avoid the more serious felony charge. In some cases the alien may be innocent, or alternatively, would have a strong chance of acquittal on any of the alleged offenses. However, fearful of his immigrant status, the alien will often opt for a minor charge as a means of escaping the greater potential criminal liability of conviction on a felony charge. Moreover, because more often than not the alien has meager financial means, the Public Defender will advise this course of action. Under these circumstances, it is likely that counsel is not aware of the defendant's alien status or does not fully appreciate the probable collateral effects of a conviction.

The alien's decision to accept the lesser guilty plea will in time be used to his detriment. For example, when the alien applies for lawful permanent residence, the INS routinely checks police records.[21] Upon discovery of an earlier misdemeanor conviction, the INS will refuse to grant the alien lawful permanent residence.[22] Thus, under circumstances where the alien would have

17. Matter of Wong, 12 I. & N. 721 (1968); Matter of Gonzalez de Lara, 12 I. & N. 806 (1968).

18. Matter of O'Sullivan, 10 I. & N. 320 (1963); Kelly v. Immigration and Naturalization Service, 349 F.2d 473 (9th Cir. 1965); Brownrigg v. Immigration and Naturalization Service, 356 F.2d 877 (9th Cir. 1966).

19. *See* notes 2-4 *supra.*

20. *See* text accompanying notes 2 & 3 *supra.*

21. I.N.A. § 222(b), 8 U.S.C. § 1202(b) (1970), 22 C.F.R. § 42.111(b)(1) (1974).

22. Lawful admission for permanent residence is defined as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws." I.N.A. § 101 (a)(20), 8 U.S.C. § 1101(a)(20) (1970). However, an alien with a conviction

normally been granted the status petitioned for, he is effectively precluded from a favorable determination because of the conviction.

The most appropriate vehicle for attacking any criminal conviction is through common law writs.[23] The most widely used writ for persons in actual or constructive custody is the *habeas corpus* writ. Although its use should not be overlooked by diligent counsel, its nuances and scope will not be dealt with directly here.[24]

Another widely recognized but little understood means of attacking a criminal conviction is the writ of error *coram nobis*.[25] This ancient writ originated at common law in civil cases.[26] Partly due to statutes abolishing the remedy in civil litigation,[27] use of the writ of error *coram nobis* in criminal cases developed and has played an active role in the latter half of this century.[28] This comment will set forth the use of this writ with regard to an alien who has been criminally convicted and as a consequence is subject to deportation or exclusion from the United States.

II. FEDERAL PRACTICE

In *United States v. Plumer*,[29] a United States Circuit Court held that a *coram nobis* writ designed to vacate a judgment in a criminal case would not be allowed in federal court. The court painstakingly attempted to analyze the purposes of the *coram nobis* writ at common law and concluded that it never belonged to the federal criminal law system because federal courts were empowered solely by statute and were therefore without power to vacate their own criminal judgments after the "term"[30] of the court has expired.

In 1914 the United States Supreme Court[31] evaded an opportunity to decide whether the *coram nobis* writ was available in fed-

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can be excluded from admission under I.N.A. § 212(a)(9), (10), or (23), 8 U.S.C. § 1182(a)(9), (10), or (23) (1970).

23. 28 U.S.C. § 2255 (1970), has sought to simplify writ procedures and scale down the proliferation of common law writs by making that section the sole remedy for defendants who are in custody attributable to a federal conviction and who seek to escape incarceration.

24. For further treatment *see* 48 J. URBAN L. 989 (June, 1971); *see also* Stanton, *Primary Requirements For The Application Of The Federal Writ Of Habeas Corpus And Its Problem Areas*, 3 ST. MARY'S L.J. 215 (1971). For a review of post-conviction remedies *see* 50 F.R.D. 153 (1970).

25. *Coram nobis* refers to a rendering court where an alleged error or mistake was committed giving rise to the collateral attack; *coram vobis* refers to the same petition in a non-rendering court; the distinction is now archaic.

26. Debenbaum v. Bateman, 2 Dyer 195 b, 73 Eng. Rep. 430 (KB 1570); Frank, CORAM NOBIS (1953), at p. 8.

27. *E.g.*, FED. R. CIV. P. 60(b).

28. *See* United States v. Morgan, 346 U.S. 502 (1954), and its progeny.

29. Case No. 16056, 27 Fed. Cas. 561 (1856).

30. The end of the term referred to the time following defendant's judgment and sentencing while he was merely awaiting the final execution of his sentence.

31. United States v. Mayer, 235 U.S. 55, 69 (1914).

eral criminal cases, choosing instead to reserve decision on whether federal district courts could entertain the writ to vacate a judgment after the term of the court had expired.[32] It was not until the 1940's that the *coram nobis* writ began to gain greater acceptance within the judiciary.

In 1946, Federal Rules of Civil Procedure Rule 60(b) struck *coram nobis* writs from the civil jurisdiction of federal courts with the following language:

> Writs of coram nobis, 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.

Prior to the 1946 legislation, however, some federal courts had allowed *coram nobis* writs in criminal proceedings. Their use was based largely on the precept that courts always have the implied power to remedy injustices.[33]

In the same year that 60(b) was enacted Congress, in an apparent attempt to update the Judicial Codes, passed 28 U.S.C. section 2255 granting "a prisoner in custody under sentence" of a federal court the right to collaterally attack the sentence upon proper motion. This carefully drawn statute was written in such a fashion that it could be interpreted as superseding the *coram nobis* and *habeas corpus* writs. Uncertainty reigned for a time, and it was not until 1954 that a closely divided Supreme Court in *United States v. Morgan*[34] decided the fate of *coram nobis* writs in federal criminal proceedings. In *Morgan*, the defendant pleaded guilty and was given a four-year sentence which he served. Eleven years later Morgan was arrested and convicted of a felony in New York and was sentenced to a longer term as a multiple felony offender under New York Penal Law section 1941. Morgan then filed a *coram nobis* writ in the federal court that had rendered the earlier conviction on the grounds that his Sixth Amendment right to counsel had been violated. The district court treated the motion as one arising out of section 2255 and denied it on the ground that the defendant was not in custody *under the sentence being attacked* and therefore the court was without jurisdiction to hear the writ. The court's decision seemed compatible with the *Plumer* and *Meyer* decisions, as well as with the new federal statute. Justice Reed's majority decision, however, found support for the use of the writ in 28 U.S.C. section

32. Basically the same ground upon which the *Plumer, supra* note 29, decision had rested.
33. United States v. Steese, 144 F.2d 439 (3rd Cir. 1944).
34. 346 U.S. 502 (1954).

1651(a), the "all writs" section of the Judicial Code.[35] As to the new legislation, Justice Reed's opinion recited laconically:

> We do not think the enactment of § 2255 is a bar to this motion, and we hold that the District Court has power to grant such a motion.[36]

Although some observers have viewed *Morgan* as an unwarranted extension of the *coram nobis* writ,[37] others have found it a refreshing expansion of due process rights.[38] One question was now settled: notwithstanding the previous *Plumer* and *Meyer* decisions or section 2255, a motion in the nature of the ancient writ of *coram nobis* was now clearly applicable to the federal judiciary. Thus, the writ could be used to vacate a judgment in a criminal trial after the term of the court that had rendered the conviction had expired; provided further that the petitioner was no longer in custody for such offense and was still suffering from some collateral legal detriment as a result of the past conviction.[39]

After the *Morgan* decision, federal courts were expected to hold a hearing on *coram nobis* motions unless the petition on its face evidenced that petitioner was entitled to no relief.[40] Although a court's disposition refusing a hearing will ordinarily be upheld by a reviewing court in the absence of any compelling circumstances,[41] it is nonetheless true that where a petitioner's writ

35. This Section finds its genesis in the Judiciary Act of 1789, 1 Stat. 81-82, and its subsequent revisions.

36. 346 U.S. at 511.

37. For an unenthusiastic reaction to *Morgan*, *see* Amandes, *Coram Nobis—Panacea or Carcinoma*, 7 HAST. L.J. 48 (1955).

38. *See* Frank, CORAM NOBIS, at 89.

39. *See* Chavez v. United States, 447 F.2d 1373 (9th Cir. 1971). The court in *Chavez* in describing the basic test with regard to the mootness issue stated at 1374:

> In Byrnes v. United States, 408 F.2d 599 (9th Cir. 1969), we held that a coram nobis proceeding is not moot merely because the petitioner "had long since served the sentences" imposed as a result of the challenged conviction. We stated that a "criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."

The *Byrnes* doctrine emanated from Sibron v. New York, 392 U.S. 40, 52 (1968), where the court recognized the "vital importance of keeping open avenues of judicial review of deprivation of constitutional rights." The language and facts of *Morgan* specifically indicate the court's concern for the collateral effects of a conviction after its sentence has been served.

The *Morgan* decision coupled with the *Chavez-Byrnes* concept is important in the present context. Often where an alien's sentence has been fulfilled, it will be necessary to overcome the initial mootness argument. Given the unequivocal tenor of the *Chavez-Byrnes* doctrine, it would appear that no court could possibly avoid considering the possible loss of one's citizenship as an insufficient reason to grant an initial examination of a *coram nobis* petition. *See also*, United States v. Houssein, 326 F. Supp. 1194 (D. Md. 1971) (where a deportation order was avoided by the vacation of a judgment on constitutional grounds); Mestre Morera v. United States Immigration and Naturalization Service, 462 F.2d 1030 (1st Cir. 1972).

40. Owenby v. United States, 353 F.2d 412 (10th Cir. 1965), *cert. denied*, 383 U.S. 962 (1966).

41. *E.g.*, United States v. Carlino, 400 F.2d 56 (2d Cir. 1968), *cert. denied*, 394 U.S. 1013 (1969); Lauchli v. United States, 292 F. Supp. 538 (D.D.C. 1968).

presents arguable equities in favor of reviewing the fairness of an earlier conviction, an evidentiary hearing will be held to provide the petitioner with an opportunity to present his case.[42]

One of the difficulties with the *coram nobis* writ is that its underlying doctrinal foundation—avoiding the effects of injustice—does not limit the convictions subject to collateral attack.[43] Consequently, problems arise when one attempts to fit these convictions into well defined categorizations. A definitive statement of the writ's modern purpose appeared in an opinion by Chief Judge Gourley:[44]

> The writ of coram nobis is in the nature of an extraordinary writ to be granted when no other remedy is available and sound reason exists for failure to seed appropriate earlier relief. . . . It is designed to bring before the court rendering the initial judgment such matters of fact which were unknown at the time the judgment was rendered, through no fault of the defendant, but which had they been known, would have prevented rendition of the judgment.[45]

Despite the varied spectrum, there are some recurring patterns and among the more orthodox cases utilizing *coram nobis* writs in federal courts are cases pertaining to inadequate or lack of counsel,[46] mental incapacity,[47] and fundamental factual errors.[48]

A. Inadequate Counsel

In *Farnsworth v. United States*,[49] the appeals court said that the test for a *coram nobis* writ "should be whether appellant's constitutional right to the assistance of counsel has been abridged. If it has, an 'essential prerequisite' to the conviction is lacking under *Johnson v. Zerbst* 304 U.S. 458 (1938) and should be set aside."[50]

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42. United States v. Capsopa, 260 F.2d 566 (2d Cir. 1958); United States v. Strother, 434 F.2d 1292 (5th Cir. 1970); Lujan v. United States, 424 F.2d 1053 (5th Cir. 1970), *cert. denied*, 400 U.S. 997 (1971).

43. United States v. Sullivan, 278 F. Supp. 626 (D.C. Ha. 1968). The court said that "(u)nder 28 U.S.C. § 1651(a) coram nobis lies to correct errors of the most fundamental character where the defendant has completed his sentence or is otherwise not in custody and where circumstances compel such action to achieve justice."

44. United States *ex rel.* Gomori v. Moroney, 196 F. Supp. 190 (W.D. Pa. 1961), *aff'd*, 300 F.2d 755 (3rd Cir. 1962).

45. *Id.* at 191.

46. *See* United States v. Morgan, 346 U.S. 502 (1954); United States v. Garguilo, 324 F.2d 795 (2d Cir. 1963); Farnsworth v. United States, 232 F.2d 59 (D.C. Cir. 1956).

47. Johnson v. United States, 344 F.2d 401 (5th Cir. 1965); United States v. Valentino, 201 F. Supp. 219 (E.D.N.Y. 1962).

48. United States v. Cariola, 323 F.2d 180 (3rd Cir. 1963); Lipscomb v. United States, 273 F.2d 860 (8th Cir. 1960), *cert. denied*, 364 U.S. 888 (1960); United States v. Carter, 437 F.2d 444 (5th Cir. 1971), *cert. denied*, 403 U.S. 920 (1971).

49. 232 F.2d 59 (D.C. Cir. 1956).

50. *Id.* at 63.

The *Farnsworth* court went on to grant a *coram nobis* writ where effective counsel was not provided to the defendant. It should be observed, however, that such findings are not often reached by appellate courts where the defendant has had counsel. Doctrinal development has shown[51] that once counsel has been appointed for a defendant, a *coram nobis* writ will not be entertained unless counsel was so ineffective as to deprive defendant of his Sixth Amendment rights. Furthermore, even egregious errors by counsel may not allow relief from conviction unless a total failure to represent a client has occurred:

> Errorless counsel is not required, and before we may vacate conviction there must be a "total failure to present the cause of the accused in any fundamental respect."[52]

In *United States v. Forlano*,[53] the court held that although a lawyer had not been present in the courtroom while the defendant pleaded guilty, he did in fact have counsel and therefore possessed sufficient assistance of counsel for the conviction to withstand a *coram nobis* attack. *Forlano* was consistent with an earlier Pennslyvania decision, *United States ex rel. Dunkle v. Cavell*,[54] which ruled that failure to have counsel present at a verdict or a sentencing was not a matter cognizable on a *coram nobis* petition.

Federal court decisions thus clearly indicate that although counsel has been appointed, and he makes errors in presenting defendant's case or has even been absent on certain important occasions, a basis for overturning the conviction will not be found. Rather, only if it is determined that the attorney's presence was equivalent to no representation or something substantially similar,[55] will the court, in some instances, react favorably to petitioner's writ.

A more stringent judicial view is invoked where the *coram nobis* petitioner-defendant has waived the right to counsel at or before trial. Because of the possible appearance of coercion or inducement with respect to the waiver, the federal as well as most

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51. *See e.g.*, United States v. Moon, 272 F.2d 530 (D.C. Cir. 1959); *see also* United States v. Cariola, 323 F.2d 180, 185 (3rd Cir. 1963); United States *ex rel.* Darcy v. Handy, 203 F.2d 407, 427 (3rd Cir. 1953).

52. United States v. Garguilo, 324 F.2d 795, 796 (2d Cir. 1963).

53. 319 F.2d 617 (2d Cir. 1963).

54. 152 F. Supp. 675 (W.D. Pa. 1957).

55. The added element of attorney misconduct may muddle the still waters in this area; however, federal courts appear to be genuinely less receptive towards entertaining attacks on attorney's conduct than are some state courts. *Compare* United States v. Carter, 319 F. Supp. 702 (M.D. Ga. 1969), *aff'd*, 437 F.2d 444 (5th Cir. 1971), *cert. denied*, 403 U.S. 920 (1971), *with* People v. Wadkins, 63 Cal. 2d 110, 403 P.2d 429, 45 Cal. Rptr. 173 (1965). But *cf.*, Holloway v. United States, 393 F.2d 731 (9th Cir. 1968), which illustrates a changing federal temper on the issue.

state courts will scrutinize a transcript closely to insure that any waiver by the defendant was freely and voluntarily given.

In *Mathis v. United States,*[56] a federal conviction was set aside because the trial judge's explanation to defendant of his right to appointed counsel was insufficient under Rule 44 of the Federal Rules of Criminal Procedure. In *United States v. Sullivan*[57] the court indicated its reasons for overturning defendant's waiver of counsel:

> The petitioner was . . . an 18 year old indigent youth. He had had limited education and no legal training. Most of his life had been spent in foster homes or correctional institutions. Under these circumstances the trial judge was charged with a responsibility which he could not summarily discharge. His failure to make a thorough inquiry bearing upon and establishing the defendant's capacity to make an intelligent and competent waiver, as required by the 6th Amendment, stands as a jurisdictional bar to an otherwise valid conviction and sentence depriving defendant of his liberty.[58]

In *Lujan v. United States,*[59] the court overturned a lower court decision which denied an evidentiary hearing for a *coram nobis* application. In granting a hearing the court explained:

> We note particularly that the facts here are disputed, the record is inconclusive, and the government has not even attempted to refute Lujan's allegation that he was incapable of understanding his rights due to illiteracy, emotional upset, and narcotics addiction. Such matters require the evidentiary hearing for resolution.[60]

Cases allowing for a hearing are therefore not unique under the *coram nobis* rubric.[61] However, not every petition claiming an impediment due to improper waiver of counsel will be successful.[62] In fact, the scarcity of cases that have reached the evidentiary hearing through appeals suggest that the probability of obtaining such relief are not as favorable once past the district court level.

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56. 369 F.2d 43 (4th Cir. 1966).
57. 278 F. Supp. 626 (D.C. Ha. 1968); *see also* United States v. Harris, 155 F. Supp. 17 (S.D. Cal. 1957).
58. 278 F. Supp. at 630-31.
59. 424 F.2d 1053 (5th Cir. 1970), *cert. denied,* 400 U.S. 997 (1971).
60. *Id.* at 1055.
61. *See* Waller v. United States, 432 F.2d 560 (5th Cir. 1970); Palmentere v. United States, 351 F. Supp. 167 (W.D. Mo. 1972).
62. *See* Lauchli v. United States, 292 F. Supp. 538 (S.D. Ind. 1968); Deaton v. United States, 480 F.2d 1015 (8th Cir. 1973); Ybarra v. United States, 461 F.2d 1195 (9th Cir. 1972); United States v. National Plastikwear Fashions, Inc., *et al.*, 386 F.2d 845 (2d Cir. 1966); Dotson v. United States, 287 F.2d 868 (10th Cir. 1961); United States v. Marcello, 210 F. Supp. 892 (E.D. La. 1962), *aff'd,* 328 F.2d 961 (5th Cir. 1964), *cert. denied,* 377 U.S. 992 (1964). These cases underscore the limited application of the writ's scope of relief and the concomitant responsibility of an attorney to understand and properly set forth proper grounds for its consideration.

Nevertheless, where a defendant has been convicted, any absence of counsel as a result of defendant's waiver should be examined very carefully to see whether there are grounds for asserting unfairness or noncompliance with federal rules of criminal procedure. Where a client is indigent and unfamiliar with the English language and with basic court procedures, the chances of finding an invalid waiver become more likely.

B. *Mental Incapacity*

Coram Nobis petitions have also been successful where at the time of trial the defendant lacked the requisite mental capacity to stand trial, waive counsel, and to plead guilty.[63] Although it may be very difficult to prove that petitioner's mental condition is impaired at the time of trial, particularly where a substantial amount of time has elapsed since conviction, it is still possible to be successful on such a claim if substantiated by credible evidence in the record or by other provable evidence.[64]

C. *Fundamental Factual Errors*

The statement that the *coram nobis* writ is available only to correct fundamental errors of fact appears in many federal cases. This supposition is invoked to prevent a petitioner from relitigating legal issues which have already been raised at trial.[65]

Any attempt to narrowly define "fundamental factual errors" will meet with little success. For example, *Carter v. United States*[66] rejected a *coram nobis* writ which averred, among other things, misconduct on the part of an Assistant United States Attorney. Another case, *Lauchli v. United States*,[67] dealt with alleged constitutional improprieties before a plea of guilty was entered.

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63. In United States v. Valentino, 201 F. Supp. 219, 221 (E.D.N.Y. 1962), Judge Rayfiel used a test taken largely from the M'Naghten Rule and fortified by 18 U.S.C. § 4244 (1969):

> (H)is mental faculties and capacity were so substantially impaired that he was unable to understand the proceedings against him or consult with his counsel. . . .

See also Johnson v. United States, 344 F.2d 401 (5th Cir. 1965); Dunkle v. Cavell, 151 F. Supp. 675 (W.D. Pa. 1957).

64. This is more difficult than it may sound. Very frequently the errors complained of are not to be found in the record, thus rendering the claim less susceptible to proof. This may be especially true when a defendant is mentally incompetent—perhaps due to drug influence—and thus unable to point out his condition to the court. *See e.g.*, People v. Phillips, 263 Cal. App. 2d 423, 428, 69 Cal. Rptr. 675, 678 (1968).

65. *See e.g.*, Laughlin v. United States, 474 F.2d 444 (D.C. Cir. 1972), where a *coram nobis* writ was summarily dismissed because of its failure to raise non-legal issues not raised at trial.

66. 319 F. Supp. 702 (M.D. Ga. 1969); *aff'd*, 437 F.2d 444 (5th Cir. 1971), *cert. denied*, 403 U.S. 920 (1971).

67. 292 F. Supp. 538 (S.D. Ind. 1968).

Robson v. United States[68] involved an opaque question as to whether a foreign judgment based at least in part upon evidence seized in contravention of the Fourth Amendment could be expunged because of its use by a federal court to lengthen a sentence.

The factual patterns found under such a broad heading are desultory and in any particular case have to be individually scrutinized to ascertain whether a fundamental factual error has occurred. The basic uncertainty with this approach is an attorney's inability to predict what kind of errors may be interpreted as "fundamental." A prime example of this difficulty occurred in *United States v. Cariola.*[69] In 1938, petitioner Cariola pleaded "technically guilty" at the trial judge's suggestion to a violation of the Mann Act with the prior understanding that only a 24-hour sentence would be imposed. In 1962, the defendant filed a *coram nobis* writ alleging that he suffered legal infirmity due to that 1938 sentence because a New York law prohibited violators of the Mann Act from exercising their franchise. The court held that even though defendant was a New Jersey citizen he did suffer sufficient harm from the 1938 conviction to warrant invocation of the writ's protection. The majority, however, rejected Cariola's substantive objections. The court found that his counsel, although inexperienced and not performing an adequate investigation, was sufficient. The court further found that no fundamental error had been made despite the admitted impropriety of the trial judge's actions. A dissent strongly argued that the judge's suggestion for a "technical guilty" plea was a gross application of duress and as such operated to deprive Cariola of due process. Had the defendant suffered from a more serious infirmity than not being able to vote in a non-resident state, the dissent suggests that the majority would have accepted the writ given the errors stated in the affidavits and the record. As a general proposition, therefore, it can be stated that any factual errors leading to a conviction must be analyzed within the context of the post sentence stigma created. A more critical and accurate assessment of the *coram nobis* writ's application is thus ascertainable.

A *coram nobis* writ today is available in federal courts as a means of collateral attack for the purpose of vacating a previous criminal conviction. The appropriate remedy in such a case is 28 U.S.C. section 2255.[70] In addition, it must be demonstrated that

68. 279 F. Supp. 631 (E.D. Pa. 1968), *vacated on other grounds*, 404 F.2d 885 (3rd Cir. 1968).

69. 323 F.2d 180 (3rd Cir. 1963).

70. *See* text accompanying notes 34-39, *supra*, for a discussion of section 2255. Courts may disregard improper formats and deal with the merits of the petition notwithstanding procedural error especially in *pauperis* writs. Note, however, that there is some judicial apprehension over the proliferation of *coram nobis*

the defendant is suffering some present legal impairment as a direct result of the earlier conviction.[71] This legal barrier must be cognizable although there are no prescribed limits as to its collateral effects. As such, strong arguments must be made to bring the loss of one's ability to immigrate, as well as the spectre of deportation, within the ambit of such an impairment.

Although the grounds for granting such writs are diverse, of particular merit are situations where an alien has accepted a plea bargain offer to plead guilty to a lesser drug offense without being advised as to the conviction's collateral effects on his ability to immigrate or susceptibility to deportation. Thus the issue of a "knowing intelligent" waiver becomes an arguable point worthy of being explored through the *coram nobis* mechanism.

III. CALIFORNIA LAW

The *coram nobis* writ was recognized by California courts long before the *Morgan* decision. One of the first glimpses of the writ appeared in *People v. Perez*.[72] The petitioner claimed he had entered a plea of guilty to a robbery charge because the county sheriff had warned him that there was imminent danger of mob violence; in order to save himself he was told that a plea of guilty would allow them to take him to the safer confines of the penitentiary. Although the court was somewhat hesitant in approaching the technical aspects of the writ, it said that:

> it is claimed by respondent that no such proceeding is known to our practice as an application for the writ of "error coram nobis" but we need not discuss this technical phase of the question as we consider the proceeding here equivalent to a motion that the court set aside the judgment and permit the defendant to withdraw his plea of guilty upon the ground that it was extorted from him by fear of mob violence. That such a motion is proper we entertain no doubt. A confession of guilt obtained by duress is void and cannot be the basis for a valid judgment.[73]

In 1924 the California Supreme Court discussed the function of the *coram nobis* writ at some length in *People v. Reid*.[74] In *Reid* the court expressly recognized the existence of the writ but sought to limit its application by disallowing its use where any statutory remedy exists. The court endorsed such a result even where the statute of limitations had run on the statutory remedy

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and other writs which may cause courts to look on such application with cynicism.

71. *See* text accompanying note 39 *supra*.

72. 9 Cal. App. 265, 98 P. 390 (1908).

73. *Id.* at 266. The court, however, went on to dismiss the petition.

74. 195 Cal. 249, 232 P. 457 (1924). *See also* 36 A.L.R. 1435. For other early cases *see* People v. Mooney, 178 Cal. 525, 174 P. 325 (1918), *cert. denied*, 248 U.S. 579 (1918); People v. Black, 89 Cal. App. 219, 264 P. 343 (1928); People v. Forbes, 219 Cal. 363, 26 P.2d 46 (1933).

and the facts underlying the writ, through no fault of the defendant, had not been discovered until after that period. Such a restrictive view of the *coram nobis* writ is no longer law; the courts now permit the writ to lie beyond any statutory period if the defendant was not culpable for the delay.[75]

The use of the writ in California is similar to the federal practice previously discussed. Like the federal courts, California now considers the writ as part of the proceedings in a criminal case.[76]

In California the writ does not lie to correct errors in law;[77] it may only be used to correct errors of fact[78] existing at the time of trial. These errors of fact must be substantial enough so that if they had been introduced at trial, a conviction would not have been rendered.[79]

The most common grounds for issuance of the writ bears close resemblance to federal practice. Such grounds include insanity,[80] mistake or fraud,[81] and inducement to plead guilty in reliance on an unkept promise by a state official.[82] There are several differences, however, with respect to the writ's use in reviewing constitutional issues.[83]

A. Elements of a Coram Nobis Writ

People v. Shipman[84] is the most prominent California case

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75. *See* People v. Haynes, 270 Cal. App. 2d 318, 322, 75 Cal. Rptr. 800, 803 (1969), wherein the court said that:

> (i)ts purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court.

76. People v. Shipman, 62 Cal. 2d 226, 42 Cal. Rptr. 1 (1965). For the federal interpretation, *see* United States v. Morgan, 346 U.S. 502 (1954), and the text accompanying notes 34-40 *supra*. In the past, uncertainty has reigned in California courts. For example, in People v. Fowler, 175 Cal. App. 2d 808, 346 P.2d 792 (1959), the court held that a *coram nobis* petition was a civil proceeding. This was done to overcome the dictates of the California Constitution Art. I, § 13, which gives mandatory right to counsel in criminal proceedings. *Shipman* strips away the finality of the *Fowler* decision by calling the proceeding criminal and not giving courts the absolute discretion to decide whether counsel will be appointed but requiring it to do so once petitioner has alleged particular factual matter establishing a *prima facie* case. *See* text accompanying notes 87-88 *supra*, for the elements needed to show the basis for granting a *coram nobis* writ.

77. People v. Nor Woods, 154 Cal. App. 2d 589, 316 P.2d 1010 (1957); People v. Esparza, 253 Cal. App. 2d 362, 61 Cal. Rptr. 167 (1967).

78. People v. Kretchman, 23 Cal. App. 2d 19, 72 P.2d 243 (1937).

79. People v. Mendez, 28 Cal. 2d 686, 171 P.2d 425 (1946).

80. People v. Shipman, 62 Cal. 2d 226, 397 P.2d 993, 42 Cal. Rptr. 1 (1965); People v. Phillips, 263 Cal. App. 2d 423, 69 Cal. Rptr. 675 (1968).

81. People v. Williams, 253 Cal. App. 2d 560, 61 Cal. Rptr. 323 (1967).

82. People v. Wadkins, 63 Cal. 2d 110, 403 P.2d 429, 45 Cal. Rptr. 173 (1965); People v. Coley, 257 Cal. App. 2d 787, 65 Cal. Rptr. 559 (1968); People v. Vaughn, 243 Cal. App. 2d 730, 52 Cal. Rptr. 690 (1966). *Cf.*, notes 46-48 *supra*.

83. This reference is especially true with regard to the right to counsel discussed in the text accompanying notes 93-97 *infra*.

84. 62 Cal. 2d 226, 397 P.2d 993, 42 Cal. Rptr. 1 (1965). For more on *Shipman, see* Case Note, 33 FORDHAM L. REV. 716 (1965).

dealing with *coram nobis* writs in the last 15 years. The principal issue in *Shipman* involved the question of the state's responsibility to provide counsel to defendants in *coram nobis* proceedings. Following the decision of the United States Supreme Court in *Douglas v. California*,[85] the California Supreme Court was called upon to apply the *Douglas* principles to its state's *coram nobis* framework. The California Supreme Court took a moderate course by guaranteeing counsel for *coram nobis* petitioners where facts have been alleged with "sufficient particularity . . . to show that there are substantial legal or factual issues. . . ."[86] Under this circumstance, Justice Traynor spelled out what he considered to be three essential elements for the granting of a *coram nobis* writ. The first ground constitutes a showing of some extrinsic fact not presented at trial, through no fault of the defendant, which would have prevented the judgment.[87] The second requires that the new evidence cannot deal with the merits of the issues already tried.[88] The third requires that "the facts upon which the defendant relies were not shown to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ."[89]

These broad tests merely condition the issuance of a writ before any of the substantive issues raised in the petition can be dealt with. Therefore, the grounds for allowing a writ to lie are no more clearly drawn after *Shipman* than they were before.

B. *The Inapplicability of Coram Nobis in a Constitutional Law Context*

A *coram nobis* writ has been used to raise the contention that a defendant has been induced to plead guilty in reliance of a promise by a state official.[90] In other cases the court's reasoning has suggested that a *coram nobis* writ would lie where a defendant

85. 372 U.S. 353 (1963), requiring states to provide counsel as a matter of right on first appeal.

86. 62 Cal. 2d at 230.

87. *Id.*

88. *Id.*

89. *Id.* In all three tests, the court stresses the existence of some fact which would have altered the judgment rendered, yet on the passage quoted above in the text accompanying note 86 *supra*, the court alludes to "legal or factual" issues. While not a decisive flaw, this difficulty in describing with precision the area that the writ can or cannot be used has persisted and continues to permeate the *coram nobis* area. *See e.g.*, People v. Waldo, 224 Cal. App. 2d 542, 36 Cal. Rptr. 868 (1964); People v. Blevins, 222 Cal. App. 2d 801, 35 Cal. Rptr. 438 (1963); People v. Tapia, 231 Cal. App. 2d 320, 41 Cal. Rptr. 764 (1964); People v. Mendez, 144 Cal. App. 2d 500 (1956); People v. Larsen, 144 Cal. App. 2d 504, 301 P.2d 298 (1956); People v. Gamboa, 144 Cal. App. 2d 588, 301 P.2d 390 (1956); People v. Wheeler, 5 Cal. App. 3d 534, 85 Cal. Rptr. 242 (1970).

90. People v. Phillips, 263 Cal. App. 2d 423, 69 Cal. Rptr. 675 (1968); People v. Wadkins, 63 Cal. 2d 100, 403 P.2d 429, 45 Cal. Rptr. 173 (1965).

had not fully comprehended the effect of his guilty plea[91] or did not voluntarily give such a plea.[92] Further, courts have admitted that guilty pleas entered by force of coercion, mistake, or fraud may be susceptible to *coram nobis* attack.[93]

However, unlike the federal court's broad interpretation of the writ, California does not allow *coram nobis* to be used where the right to counsel has been denied[94] or where the representation provided was inadequate.[95] This interpretation results from the proposition that a *habeas corpus* writ is the proper means for asserting such a constitutional claim and not *coram nobis*.[96] With strange and pernicious irony this principle combines with the California Supreme Court's decision in *In Re Smiley*[97] to undermine an alien's position who, after serving his sentence, attempts to vacate his conviction on constitutional grounds.

In *Smiley* the Supreme Court held that a petitioner must be in actual or constructive custody before a *habeas corpus* writ can lie. The court stated that "(i)t is settled that 'the use of habeas corpus has not been restricted to situations in which the appellant is in actual, physical custody' . . . but has been invoked to relieve a wide variety of other restraints on a man's liberty.' "[98]

These "other restraints" have included defendants' parole,[99] bail,[100] or release on his own recognizance.[101] These restraints

91. People v. Buggs, 272 Cal. App. 2d 285, 77 Cal. Rptr. 450 (1969).
92. People v. Rhoades, 1 Cal. App. 3d 442, 81 Cal. Rptr. 701 (1969).
93. People v. Williams, 253 Cal. App. 2d at 566; People v. Tuthill, 32 Cal. 2d 819 (1948), citing "fraud and excusable mistake" from *People v. Reid,* note 74 *supra,* and People v. Superior Court of San Mateo County, 28 Cal. App. 2d 442 (1938).
94. People v. Williams, 253 Cal. App. 2d 560 (1967); People v. Gatewood, 182 Cal. App. 2d 724, 6 Cal. Rptr. 447 (1960); People v. Jennings, 121 Cal. App. 2d 531, 263 P.2d 37 (1953).
95. People v. Adamson, 34 Cal. 2d 320, 210 P.2d 13 (1949); People v. Birdow, 221 Cal. App. 2d 585, 34 Cal. Rptr. 620 (1963); People v. Crouch, 267 Cal. App. 2d 64, 72 Cal. Rptr. 635 (1968). Compare these outright denials with *Farnsworth* and other cases cited at note 46 *supra,* in the federal context.
96. *See* People v. Tapia, 231 Cal. App. 2d 320 (1964); People v. Waldo, 224 Cal. App. 542 (1964); People v. Blevins, 222 Cal. App. 2d 801 (1963); People v. Mendez, 144 Cal. App. 500 (1956); People v. Larsen, 144 Cal. App. 504 (1956); People v. Gamboa, 144 Cal. App. 2d 588 (1956); People v. Wheeler, 5 Cal. App. 3d 534 (1970). Earlier decisions held otherwise: In People v. Campos, 3 Cal. 2d 15 (1935), for example, the court impliedly held that a *coram nobis* writ may raise constitutional arguments in attacking a criminal conviction and that a *habeus corpus* writ is not the exclusive means for contesting a prior conviction; *see also* People v. Wadkins, 63 Cal. 2d 110 (1965) (where grand jury members with the knowledge of the district attorney promised the defendant probation which was subsequently denied in exchange for a guilty plea), and People v. Dena, 25 Cal. App. 3d 1001, 102 Cal. Rptr. 357 (1972) (involving suppression of evidence by the district attorney).
97. 66 Cal. 2d 606, 427 P.2d 179, 58 Cal. Rptr. 579 (1967).
98. *Id.* at 612.
99. *In re* Jones, 57 Cal. 2d 860, 372 P.2d 310, 22 Cal. Rptr. 478 (1962).
100. 66 Cal. 2d 606 (1967).
101. *In re* Magnus Peterson, 51 Cal. 2d 177, 331 P.2d 24 (1958).

refer to a constructive form of custody attributable to the crime defendant was convicted or accused of. No decision, however, speaks to the post-conviction collateral effects of a conviction. The importance of this omission is that once an individual serves a sentence on a criminal conviction, neither *habeas corpus* nor *coram nobis* allows any subsequent constitutional attack on the conviction.

Thus *coram nobis* cannot be used because California law dictates that only *habeas corpus* can be used to assert constitutional infringements.[102] Nor can *habeas corpus* be used because the defendant-petitioner is no longer in any sort of custody.[103] Therefore, unless California courts decide to either expand the scope of *habeas corpus* writs to include post-sentence collateral effects or allow *coram nobis* writs to be used on constitutional matters where *habeas corpus* would otherwise lie, aliens and others will be barred from attacking their convictions. It is doubtful that the former approach would be taken largely because of the long history behind *habeas corpus* practice. However, the latter alternative would certainly be in keeping with the decision as well as the spirit in *Morgan*.[104]

The present situation clearly contravenes the principles enunciated in *Morgan* because it leaves an individual, suffering from an improper conviction, without a remedy. If *Morgan* and its progeny stand for any principle, it should be that because of the detrimental legal effect flowing from a conviction, the right to attack an unjust conviction is not precluded, even by a completed sentence. The state of California law, however, allows escape from this principle in those narrow cases where a constitutional issue was not raised until after a sentence was completed. It is unfortunate that aliens may be among the class of people most adversely affected because of their poor access to adequate and timely legal counsel.

IV. CONCLUSION

The effects of this dilemma are exacerbated by the stringent nature of the immigration laws pertaining to marihuana and narcotics. Once a conviction has been entered against an alien, his only means of attacking that judgment is by a *coram nobis* writ which by design or oversight has been rendered inapplicable to

102. *See* notes 94-96 *supra*.
103. In support of *Smiley*, *see* Williams v. Department of Motor Vehicles, 2 Cal. App. 3d 949, 83 Cal. Rptr. 76 (1969).
104. 346 U.S. 502 (1954).

constitutional matters. The unjust consequences which can flow from these convictions dictate further analysis by California courts to insure that post-conviction remedies are consistent with policies set forth in *Morgan*.

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