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# CRIMINAL LAW—Coram Nobis -THE COMMON LAW REMEDY UNDER THE NEW YORK STATUTE

# COMMENT

CRIMINAL LAW—CORAM NOBIS—THE COMMON LAW REMEDY UNDER THE NEW YORK STATUTE.—A prime motivation of American Jurisprudence has always been that where life or liberty is threatened, there is no bar to insuring that the demands of due process will be met. Often, courts and legislatures have had to dip into the fund of the common law in order to find a remedy which has been denied by the logic of modern statutes. The ancient writ of error *quae coram nobis resident* is just such a remedy which has filled a vital gap, being ideally suited to bringing about a review of the record in criminal cases where it is alleged that there has been some error of fact occurring at the trial, which is not available to an appellate court from the written record.

*Coram Nobis* was evolved by the common law courts of the 16th century,[1] but evidently fell into rapid disuse.[2] The writ sued out of Chancery after judgment[3] in a proceeding before the King's Bench. It directed the justices to review the record and correct the judgment for some alleged error of fact affecting its validity,[4] where the fact had not been in issue at the trial.

Until 1943, it had been held in New York that the court of original jurisdiction was without the power to permit a defendant to change his plea after judgment had been rendered and imprisonment begun in execution of the sentence.[5] With the ruling of the New York Court of Appeals in the case of *Lyons* v. *Goldstein*[6] and the amendment of the Code of Criminal Procedure[7] by the state legislature,[8] *coram nobis,* by virtue of its unique application after judgment for errors of fact, was made available as a last resort to a defendant after all resources of appeal had been exhausted.

[1] FITZ-HERBERT, SIR ANTHONY, NEW NATURA BREVIUM 46 (9th ed. Dublin 1793).

[2] The writ is mentioned only in an editorial footnote in Blackstone's Commentaries. See 3 BLACKSTONE, COMMENTARIES 314 n. 4 (19th London ed. 1851).

[3] There was no time limitation where it was brought for facts affecting the "validity & regularity" of the judgment. See STEPHENS, PRINCIPLES OF PLEADING 118 (4th Am. ed. Philadelphia 1841).

[4] "If a judgment in the King's Bench be erroneous in the *same* court, only, and not in point of law, it may be reversed in the *same* court by writ of error *coram nobis,* or *quae coram nobis residant*; so called, from its being founded on the record and process, which are stated in the writ to remain in the court of the lord the king, before the king himself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict, or interlocutory judgment: for error in fact is not the error of the judges, and reversing it is not reversing their own judgment. So, upon a judgment in the King's Bench, if there be error in the *process,* or through the default of the *clerks,* it may be reversed in the same court, by writ of error *coram nobis*: . . . ." 2 TIDD'S PRACTICE 1055 (2d Am. ed. New York 1807).

[5] Matter of Dodd v. Martin, 284 N. Y. 394, 162 N. E. 293 (1928).

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

[7] N. Y. CODE CRIM. PROC. § 517-19.

[8] N. Y. SESS. LAWS 1947, c. 706.

The adoption of such a remedy was evidence of the recognition that every competent tribunal should have the inherent jurisdiction to correct mistakes in its own judgments.[9] The writ of *habeas corpus* was not available for such a purpose because by both court decision and statute the writ could not be sustained where the court which had rendered final judgment had had jurisdiction over the person of the defendant and general jurisdiction over the crime.[10]

In the comparatively brief time since the enactment of the statute permitting "motions or applications coram nobis"[11] the flood of requests has made the courts increasingly aware of the problems presented by this mode of relief. The basis of each claim has been the allegation of prejudice to the defendant in some deprivation of his right of being afforded due process of law, and the non-existence of any other remedy to rectify the injustice. While the statute established the broad outlines of the remedy, it remains for the courts to define the limits within which it will operate.

The view in New York immediately prior to the passage of the statute was that an appellate review of a final judgment in a criminal case was not a necessary element of due process.[12] Consequently, the courts have carefully examined applications with respect to determining whether the writ was intended to relieve the petitioner of either the consequences of his own neglect[13] or would enable him to escape a legally imposed punishment.[14] In *People* v. *Sadness*,[15] the New York Court of Appeals established a general outline concerning the availability of *coram nobis*. The court declared that it could be used to vacate a judgment, where the plea of the defendant had been induced by either fraud or misrepresentation, or where his conviction had been obtained by the use of testimony known by the prosecutor to have been perjured, or where the court had failed to advise the prisoner of his constitutional right to counsel. In the same case the court was careful to point out that where the error was one of law apparent on the face of the record, the proper procedure was for the defendand either to appeal in the normal manner, to move in arrest of judgment, or to withdraw his plea.

Since a motion in the nature of a writ of error *coram nobis* is ad-

[9] ". . . for error in fact is not the error of the judges, and reversing it is not reversing their own judgment." 2 TIDD'S PRACTICE 1055 (2d Am. ed. New York 1807). See also Dewitt v. Post, 11 Johns. R. 460 (N. Y. 1814); People v. Mons, 195 Misc. 479, 482, 92 N. Y. S. 2d 14, 17 (Police Ct. Troy 1949).

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

[11] See note 8, *supra*.

[12] McKane v. Durston, 153 U. S. 684, 687, 143 S. Ct. 913, 915, 38 L. Ed. 867, 868 (1894); People v. Gersewitz, 294 N. Y. 163, 61 N. E. 2d 427, *cert. denied*, 326 U. S. 687, 66 S. Ct. 89, 90 L. Ed. 404 (1945), and cases cited therein.

[13] People v. Moore, 285 App. Div. 1087, 140 N. Y. S. 2d 289 (3d Dep't 1954).

[14] People v. Mons, 195 Misc. 497, 481-2, 92 N. Y. S. 2d 14, 17 (Police Ct. Troy 1949).

[15] 300 N. Y. 69, 89 N. E. 2d 188 (1949), *cert. denied*, 338 U. S. 952, 70 S. Ct. 483, 94 L. Ed. 587 (1950).

dressed to the sound discretion of the court it must receive careful judicial examination. The proceeding is designed to protect against the violation of constitutionally guaranteed rights, but it is equally important that the judicial processes be protected against the making of unwarranted attacks.[16]

Prior to its adoption in New York, the writ had elsewhere been held a proper remedy to raise the question of having been convicted while insane.[17] The first case to consider this question upon an application *coram nobis* in New York was *People ex rel. Rose* v. *Addition*.[18] In that case it was alleged that the mental incompetency of the accused had been fraudulently concealed from the court at the time she pleaded guilty. The Supreme Court of Westchester County held that her proper remedy would be by a motion of *coram nobis* in the Court of General Sessions, in which her original trial had been held. The writ has since been held proper to vacate a judgment of conviction where the defendant alleged that at the time he pleaded to the indictment, he was insane within the meaning of section 1120 of the New York Penal Law.[19]

*People v. Boehm*[20] dealt with another aspect of this problem in that, upon an application for *coram nobis* relief, the question of the mental competency of the defendants at the trial was raised. The New York Court of Appeals dealt with the issue in terms of whether or not the defendants were capable of understanding the arraignment proceedings and of intelligently waiving their right to counsel. While the appeal from the denial of their petition was dismissed, the court stated that *coram nobis* would lie to vacate the earlier conviction should either defendant actually claim that "he lacked sufficient intelligence or mental capacity to understand the trial court's admonition that he was entitled to an attorney."[21] Success of a further application would be predicated, however, upon the presentation by the defendants of sufficient evidence in support of their allegations to overcome the presumption of regularity attaching to the proceedings by which the conviction was obtained.

A competent court has never been denied jurisdiction to reopen its judgment where the conviction was based on deceit, trickery, coercion, or fraud and misrepresentation in the procurement of the plea upon which

[16] People v. Martin, 1 Misc. 2d 76, 145 N. Y. S. 2d 501 (Gen. Sess., N. Y. Co. 1955); People v. Lesser, 280 App. Div. 441, 113 N. Y. S. 2d 558 (1952), *aff'd*, 304 N. Y. 903, 110 N. E. 2d 734 (1953).

[17] Adler v. State, 35 Ark. 517, — S. W. — (1880).

[18] 189 Misc. 102, 73 N. Y. S. 2d 561 (Sup. Ct. Westchester Co. 1947).

[19] People v. Nickerson, 238 App. Div. 854, 128 N. Y. S. 2d 797 (4th Dep't 1954); *Cf.* People v. Wolfe, — Misc. —, 114 N. Y. S. 2d 447 (1952), *aff'd*, 280 App. Div. 874, 114 N. Y. S. 2d 663 (2d Dep't 1952); but see People v. Codarre, 206 Misc. 950, 138 N. Y. S. 2d 18 (Co. Ct. Dutchess Co. 1954), *aff'd mem.*, 285 App. Div. 1087, 140 N. Y. S. 2d 289 (2d Dep't 1955), People v. Valentino, 285 App. Div. 1198, 140 N. Y. S. 2d 629 (3d Dep't 1955).

[20] 309 N. Y. 362, 130 N. E. 2d 897 (1955); People v. Smythe, 3 N. Y. 2d 184, 143 N. E. 2d 922 (1957).

[21] People v. Boehm, 309 N. Y. 362, 369, 130 N. E. 2d 897, 900 (1955).

the judgment was based.[22] Such inducement to plead guilty is a fact usually lying outside the record and consequently well suited to review in a petition for the writ.

The fraud alleged in *People* v. *Sullivan*[23] was that the defendant had been induced to plead guilty to the crime of robbery in the second degree, upon the promise of the trial judge[24] that he would determine from the parole authorities whether the defendant would be required to serve the balance of an unexpired sentence, and if so, would permit the plea to be substituted by one of guilt to a lesser degree of robbery. As a result of the failure of the judge to carry out his promise, the case was remanded to the court of original jurisdiction with a direction to vacate the judgment. In its opinion, the appellate court pointed out the validity of *coram nobis* upon a question of this kind as arising from the fact that the consultations of the court with the defendant are not usually made part of the record.

Where the ground upon which a judgment of conviction sought to be vacated is a promise of a lighter sentence by the district attorney,[25] the courts have turned the granting or denial of *coram nobis* upon whether, at any time prior to final judgment, counsel for the accused knew of the promise. The duty to sentence is not within the province of the prosecutor, although it is usually he who recommends the acceptance of a plea to some lesser degree of crime, subject to court approval, and this is a fact which counsel may be presumed to know.[26] Such a promise is, therefore, not to be considered prejudicial unless made under such a circumstance that the defendant alone could be found to have relied on it.

In *People* v. *De Maio*,[27] the defendant had been advised by the court that he faced an alternative sentence, one option having been previously promised by the district attorney. In holding that the promise was not a ground for *coram nobis* relief the reasoning established the advice of the trial judge as putting the defendant on notice that the aforementioned promise was not binding upon the court.

In *People* v. *Hasentab*,[28] in which the *De Maio* case was cited as authority for the denial of a motion *coram nobis* upon a promise made by a district attorney regarding a lighter sentence, the court was careful to append the caveat that ". . . it would be going too far to say that a plea of guilty induced by the prosecutor is never a ground for *coram nobis* relief."[29] In substantiation of this view are the cases of *People* v. *Jordan*[30]

[22] See note 6, *supra*.

[23] 276 App. Div. 1087, 96 N. Y. S. 2d 266 (2d Dep't 1950).

[24] People v. Guariglia, 303 N. Y. 338, 102 N. E. 2d 580 (1951); Application of Leonard, 280 App. Div. 1, 111 N. Y. S. 2d 5, *aff'd*, 303 N. Y. 989, 106 N. E. 2d 66 (1952); People v. Ryan, — Misc. —, 132 N. Y. S. 2d 283 (Co. Ct. Kings Co. 1954). See also People v. White, 309 N. Y. 636, 132 N. E. 2d 880 (1956).

[25] People v. Jordan, 283 App. Div. 759, 128 N. Y. S. 2d 111 (3d Dep't 1954).

[26] People v. Hasentab, 283 App. Div. 433, 128 N. Y. S. 2d 388 (4th Dep't 1954).

[27] 279 App. Div. 596, 107 N. Y. S. 2d 561, *aff'd*, 303 N. Y. 939, 105 N. E. 2d 629 (1952).

[28] See note 26, *supra*.

[29] *Id.* at 435, 128 N. Y. S. 2d at 390.

[30] See note 25, *supra*.

and *People* v. *Rosato*,[31] in both of which the alleged inducement of the guilty pleas had been a purported promise by the prosecuting authorities. Hearings were ordered in each upon the issue drawn by the motion papers and opposing affidavits to determine, among other things, whether such a promise had in each case in fact been made.

The right of a defendant to be advised by counsel is one recognized in both the Federal[32] and State Constitutions.[33] This is not to say that he must always be represented, nor alternatively, that where he appears by his own attorney, the court may assign counsel at any stage of the proceedings.[34] Where such deprivation of right has occurred, however, and a final judgment has been rendered, the defendant's exclusive remedy[35] is a motion for *coram nobis* relief[36] since it would not be apparent from the record that his rights had been so prejudiced.

The allegations most generally made upon *coram nobis* applications with respect to counsel fall generally into three categories: that the accused had never been informed that he was entitled to such representation; that he was actually unrepresented at some stage in the proceedings; that he had been so inadequately represented as to constitute a deprivation of his fundamental rights.

Section 308 of the New York Code of Criminal Procedure provides that where a defendant appears for arraignment without counsel, he must be asked if he desires the aid of an attorney. If he does then the court must appoint one. Should he desire counsel of his own choice, he must be afforded not only an opportunity to secure one but a reasonable time in which to prepare a defense.[37]

There is considerable authority in New York, beginning with the case of *Bojinoff v. People*[38] for the proposition that a court's failure to advise a defendant of his right of counsel is a ground for vacating a subsequent judgment of conviction upon a *coram nobis* application. Denials of the writ predicated on this ground, have usually turned on the defendant's failure to present evidence[39] in support of his allegations sufficient to rebut the presumption of regularity attaching to a final judgment or to overcome the facts evidenced by the written record.

The *Bojinoff* case also dealt with the question that arises where the

[31] 1 A. D. 2d 957, 150 N. Y. S. 2d 237 (2d Dep't 1956).

[32] U. S. CONST. amend. VI.

[33] N. Y. CONST. art. I, § 6.

[34] People v. Price, 262 N. Y. 410, 413, 187 N. E. 298, 300 (1933) and authorities cited therein.

[35] People *ex rel.* Sedlak v. Foster, 299 N. Y. 291, 294, 86 N. E. 2d 752, 754 (1949).

[36] Matter of Hogan v. Court of General Sessions, 296 N. Y. 1, 9, 68 N. E. 2d 849, 852 (1946); Matter of Bojinoff v. People, 299 N. Y. 145, 152, 85 N. E. 2d 909, 912 (1949).

[37] People v. McLaughlin, 291 N. Y. 480, 483, 53 N. E. 2d 356, 357 (1944).

[38] 299 N. Y. 145, 85 N. E. 2d 909 (1949).

[39] People v. Barker, 276 App. Div. 1040, 95 N. Y. S. 2d 246 (3d Dep't 1950); People v. Shapiro, 188 Misc. 363, 67 N. Y. S. 2d 774 (Gen. Sess. N. Y. Co. 1947).

defendant alleges denial of counsel, to wit; a presumption that the defendant waived the right to be advised by counsel is predicated by the court. In the instant case it was held that the presumption would lie unless the circumstances were such as to imply that the waiver had been made ". . . understandingly, competently and intelligently." This test has been determined by the Appellate Division and endorsed by the Court of Appeals as being objective in nature. The personal interpretation by the petitioner of the advice he was given by the court is neither a valid ground upon which to grant a motion *coram nobis* nor to reverse the order denying such relief.[40] Where the statement by the trial court to the defendants concerning their rights was made in a purely perfunctory manner, however, they were entitled to relief.[41]

There is no prejudice to a defendant upon which *coram nobis* can be sustained where, at the time of sentencing, the accused was unattended by counsel.[42] However, at the trial, even where at first blush it was apparent that there had been representation by virtue of the filing of a notice of appearance and the presence of the attorney at the sentencing, the New York Court of Appeals reversed the order denying relief and remanded a case for a hearing, where the only activity of counsel reflected by the record was a remark to the sentencing judge that ". . . Your Honor knows the facts and I leave it in your hands."[43] The court considered the probability of an improper waiver of the right of counsel as sufficient to warrant the action.[44] Where the record clearly reflects representation of the defendant, he has the greater burden of overcoming the presumption of regularity that attends his judgment of conviction. Although the evidence he is able to present in this regard may place some doubt upon whether he was in fact advised by counsel, he must do more than raise the mere possibility of error.[45]

"Whenever the court in good faith appoints or accepts the appearance of a member of the bar in good standing to represent a defendant, the presumption is that such counsel is competent. Otherwise he would not be in good standing at the bar and accepted by the court. If the action of counsel in the presence of the court in the conduct of the trial reduces the trial to a travesty on justice, such conduct will be considered on the proposition that such a trial was a denial of due process. The conduct of counsel in the trial of a case is . . . to see that the defendant receives a fair trial. . . . The best of counsel makes mistakes. His mistakes . . . will not vitiate the trial unless on the whole the representation is of such low caliber as to

[40] *In re* Crimi, 278 App. Div. 997, 997-8, 105 N. Y. S. 2d 620, 621 (3d Dep't 1951), *aff'd*, People v. Crimi, 303 N. Y. 749, 750, 103 N. E. 2d 538, 539 (1952).

[41] People v. Marincic, 2 N. Y. 2d 181, 139 N. E. 2d 529 (1956).

[42] See note 27, *supra*; People v. Williams, — Misc. —, 132 N. Y. S. 2d 114 (Co. Ct. Kings Co. 1954).

[43] People v. Guariglia, 303 N. Y. 338, 341, 102 N. E. 2d 580, 582 (1951).

[44] *Id.* at 342, 102 N. E. 2d at 582.

[45] People v. Hendricks, 308 N. Y. 486, 127 N. E. 2d 281 (1955); People v. Tripp, 282 App. Div. 987, 125 N. Y. S. 2d 469 (3d Dep't 1953).

amount to no representation and to reduce the trial to a farce."[46] Therefore, it is only when the alleged ineptitudes of counsel are so extensive as to indicate that the entire proceedings are a mockery and a sham, that *coram nobis* will be warranted.[47]

In two different cases[48] in the Appellate Division, Second Department, the allegation upon which relief was sought was that there had been a failure of adequate representation by trial counsel in that, among other things, the respective attorneys had failed to obtain or elicit certain specified evidence. The court turned its consideration in both cases upon the question of the admissibility of the evidence which had not been produced in the first instance and concluded that the actions of the attorneys were not such as to have deprived the defendants of their fundamental rights or of effective representation.

Where there is any evidence to warrant the conclusion that the petitioner was aware of the dereliction of his attorney at the trial, his neglect in making timely disclosures to the court of the facts constituting such a failing on the part of his attorney, will foreclose him on a future application for *coram nobis* relief. The court will not then relieve him of the consequences of his own neglect to act.[49]

The courts have demonstrated a decided reluctance to renew proceedings where, while the quality of representation might be opened to question on the ground that counsel was not admitted to the bar of the State of New York, counsel had not been appointed by the court but had been chosen by the defendant.[50] One of the reasons for such a position was advanced by Judge Medina, speaking for a unanimous court in *United States* v. *Brandford;*[51] "We have no doubt that, had either counsel or the trial judge been aware of the omission, a motion to admit counsel for the purpose of trying the particular case would have been promptly granted. It is inconceivable that the failure to take this purely formal step caused any prejudice to the defendant. (Citation omitted) Moreover, had counsel been of defendant's own choosing, in the absence of some showing that he lacked the qualifications necessary for the performance of his duties as defense counsel, it would seem that the trial judge, at least in a criminal case, would have been required to permit him to proceed, despite the fact that counsel had not been admitted to practice in the district."

It also might be argued inferentially, that for the incompetence of counsel to reach the degree the courts seem to require before they will dis-

[46] United States *ex rel.* Feeley v. Ragen, 166 F. 2d 976, 980-81 (7th Cir. 1948).

[47] People v. Kalmus, — Misc. —, 123 N. Y. S. 2d 411, 415 (Gen. Sess., N. Y. Co. 1953); People v. Codarre, 285 App. Div. 1087, 140 N. Y. S. 2d 289 (2d Dep't 1955).

[48] People v. Lee, 4 A. D. 2d 770, — N. Y. S. 2d — (2d Dep't 1957); People v. Girardi, 2 A. D. 2d 701, — N. Y. S. 2d — (2d Dep't 1956); see *supra,* note 47, People v. Codarre.

[49] See notes 13 and 14, *supra.*

[50] People *ex rel.* Harrington v. Martin, 263 App. Div. 922, 32 N. Y. S. 2d 406 (3d Dep't 1942); People v. Kavak, 130 N. Y. L. J. 119, p. 1518, col. 4 (Gen. Sess., N. Y. Co. Dec. 21, 1953).

[51] United States v. Branford, 238 F. 2d 395, 397 (2d Cir. 1956).

turb a final judgment of conviction,[52] it would be apparent on the face of the record, and so generally unavailable upon a motion *coram nobis*.

The presumption of regularity which attaches to arraignment proceedings or to a final judgment of conviction has been the ground upon which the courts have most frequently based their denials of *coram nobis* applications. The bare, unsupported allegation of the petitioner is not alone sufficient to raise a triable issue of fact.

In the case of *People* v. *Richetti*,[53] the defendant had moved for a writ of error *coram nobis* to vacate his 1922 conviction for two felonies, alleging that at the time he was sentenced he was seventeen years of age. His motion papers further showed that his indictment and plea of guilty were had on the same day, sentence being imposed a few days later. He further alleged that he did not then know, nor was he informed that he was entitled to the aid of counsel. He stated that until shortly before his first *coram nobis* application in 1944, he never knew of his entitlement to counsel, and since the foregoing was so, the judgment of conviction was void.

In rebuttal were an affidavit by a former county court stenographer which showed that his minutes of the 1922 proceeding had been destroyed upon his retirement, and a statement by a probation officer. Both documents constituted evidence only of the fact that it had been the custom of the judge before whom the original trial had been held, to invariably inform every defendant of his right to counsel.

In the majority opinion, the New York Court of Appeals,[54] reversing the Appellate Division[55] which had affirmed the order of the Queens County Court denying the application, pointed out that the presumption of regularity attending judgments of conviction cannot ". . . serve to settle what would otherwise be a plain dispute of fact. A presumption of regularity exists until contrary substantial evidence appears. It forces the opposing party (defendant here) to go forward with proof, but once he does go forward, the presumption is out of the case. It could not conceivably be used to prevent the defendant from proving his allegations."[56]

The Appellate Division[57] opinion evidently did not consider that the defendant had evinced what constituted proof to raise a triable issue. "Under the presumption of regularity attending judgments of conviction, in the absence of credible evidence to the contrary, it may not be gainsaid that appellant was properly advised of his right to counsel. . . . Appellant's bald assertion to the contrary . . . when the stenographic minutes were no longer available . . . , must be rejected as insufficient to rebut the presumption. . . ."[58]

[52] People v. Kalmus, — Misc. —, 123 N. Y. S. 2d 411 (Gen. Sess., N. Y. Co. 1953); People v. Ragni, — Misc. 2d —, 159 N. Y. S. 2d 358 (Westchester Co. Ct. 1957).

[53] 302 N. Y. 290, 97 N. E. 2d 908 (1951).

[54] The court was sharply divided, three judges concurring in a dissenting opinion.

[55] 276 App. Div. 1091, 96 N. Y. S. 2d 355 (2d Dep't 1950).

[56] See note 53 *supra* at 298, 97 N. E. 2d at 912.

[57] See note 55, *supra*.

[58] *Id.* at 1092, 96 N. Y. S. 2d at 355-6. See also People v. Hendricks, 308 N. Y. 486, 127 N. E. 2d 281 (1955), and cases cited therein.

The author of the majority opinion of the court in the *Richetti* case, Judge Desmond, has clarified his position still further on the particular issue in a dissent in a 1956 appeal from a denial of the writ.[59] The defendant alleged as one basis of his application that he had been promised by the sentencing judge that he would receive a pardon after having served seven years of his term. In his opinion Judge Desmond stated; "Not only are this defendant's averments not conclusively disproven by any record, they are not even met with a direct denial. What the People did file as an answer is a collection of excerpts and notations from the indictment and the clerk's records and the minutes of proceedings, all as of dates after the defendant pleaded guilty. These later occurrences and circumstances, while they might make it seem probable that the defendant is not telling the truth, certainly should not deprive him of a trial on the issue."[60]

The *Richetti* case was cited in *People* v. *Lain*[61] as support for the granting of a hearing on an application for a writ of error *coram nobis* when the defendant's allegations are not ". . . conclusively refuted by unquestionable documentary proof." Only when the record convincingly demonstrates the falsity of such allegations will relief be denied.

A petition for *coram nobis* not being foreclosed by either a final judgment of conviction or by any statutory limitation upon the time in which it may be brought, it may still not be substituted for an objection of any defendant which was required to be timely in its own regard. In *People* v. *Begue*,[62] the defendant, by way of an application in the nature of a writ of error *coram nobis*, moved to vacate his five year old judgment of conviction on the ground that he had not had a speedy trial. While the court acknowledged that both the United States Supreme Court[63] and the New York Court of Appeals[64] had in two recent cases dismissed indictments because of the delay in their prosecution, it pointed out that the "objection that the defendant has not had a speedy trial must itself be speedily raised when the case is moved for trial." Following this line of reasoning, the County Court of Schenectady recently held that an application to vacate a judgment of conviction and to dismiss the indictment for failure to affect seasonable prosecution, made after the defendant had pleaded guilty to, and had been sentenced for, the crime charged, came too late and would therefore be denied.[65]

In a very recent decision,[66] the New York Court of Appeals made it clear that there would be little question of the application of *coram nobis* to a wider area than that in which it had been previously entertained, if

[59] People v. White, 309 N. Y. 636, 132 N. E. 2d 880 (1956).

[60] *Id.* at 642, 132 N. E. 2d at 884.

[61] 309 N. Y. 291, 130 N. E. 2d 105 (1955).

[62] 1 A. D. 2d 289, 149 N. Y. S. 2d 791 (3d Dep't 1956).

[63] United States v. Provoo, 17 F. R. D. 183 (D. Md. 1955), *aff'd on motion*, 350 U. S. 857, 76 S. Ct. 101, 100 L. Ed. 761 (1955).

[64] People v. Prosser, 309 N. Y. 353, 130 N. E. 2d 891 (1955).

[65] People v. Knowles, 7 Misc. 2d 222, — N. Y. S. 2d — (Schenectady Co. Ct. 1957).

[66] People v. Shapiro, 3 N. Y. 2d 203, 144 N. E. 2d 12 (1957).

the facts in a given case warranted such usage. In 1949,[67] the court held that *coram nobis* was available only in cases ". . . which involve the abrogation without adequate remedy of fundamental precepts going either to the jurisdiction of the court or resulting in the perpetration of a fraud upon the court." Today this same court proposes that there may be grounds for a rule ". . . authorizing the writ of error *coram nobis* as an extraordinary remedy to correct errors, frauds and constitutional violations on the record or outside of the record."[68] Since the writ has been characterized as being literally the last chance of a defendant to escape injustice, it is evident that the courts have followed this description in broadening its services to encompass and correct defects never before available under any other device at common law or under the codes.

[67] See note 15 *supra*, at 73, 89 N. E. 2d at 189.
[68] See note 66 *supra*, at 205, 144 N. E. 2d at 13.