NOTES

HABEAS CORPUS AND CORAM NOBIS IN INDIANA

Antiquated state procedures for post-conviction collateral attack on criminal judgments have been badly strained by the flood of cases resulting from the expanded protection given by the federal courts to persons denied federal constitutional rights in criminal trials.[1] The rule that prisoners convicted in state courts must exhaust their state remedies before federal habeas corpus is available[2] has caused a large increase in the number of state cases, and has revealed glaring deficiencies and much confusion in state criminal procedures.[3] The Indiana Supreme Court has experienced considerable difficulty in adapting Indiana procedure to the requirement that every state must afford prisoners "some clearly defined method by which they may raise claims of denials of federal rights"[4] after the time for an appeal has passed.

It is not only important that the Indiana courts should correct their denials of federal rights, but they also should provide an adequate remedy for the vindication of state constitutional rights, which are sometimes broader than those encompassed by the due process clause of the Fourteenth Amendment.[5] On the other hand, it is felt that judgments must eventually become final and that criminal proceedings should not be lightly set aside, especially when the passage of time has made it difficult or impossible to reassemble the witnesses and evidence for a new trial.[6] The decisions in this area reflect an attempted adjustment between these two competing principles.

There are two principal methods of collateral attack on criminal judgments in Indiana—habeas corpus and coram nobis. The former, derived from the common law, is now a statutory remedy while the latter has been primarily developed by judicial decision. Because of its greater flexibility, coram nobis has become the principal Indiana device for determining whether a prisoner received a fair trial.

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1. See Holtzoff, *Collateral Review of Convictions in Federal Courts*, 25 B.U.L. REV. 26 (1945); Peters, *Collateral Attack by Habeas Corpus Upon Federal Judgments in Criminal Cases*, 23 WASH. L. REV. 87 (1948) for discussions of the present scope of federal habeas corpus.

2. *Ex parte* Hawk, 321 U.S. 114 (1944); Darr v. Burford, 339 U.S. 200 (1950); Note, 22 IND. L.J. 180 (1947).

3. See FRANK, CASES ON CONSTITUTIONAL LAW 765 (1950); Boskey and Pickering, *Federal Restrictions on State Criminal Procedure*, 13 U. OF CHI. L. REV. 267 (1946); Comment, 42 ILL. L. REV. 329 (1947); Note, 29 NEB. L. REV. 445 (1950).

4. Young v. Ragen, 337 U.S. 235, 239 (1949).

5. Particularly important is the more extensive right to counsel under the Indiana Constitution. See Note, *Right to Counsel in Indiana*, 26 IND. L.J. 234 (1951). This right recently has been extended to misdemeanor prosecutions. Bolkovac v. State, 98 N.E.2d 250 (Ind. 1951). A section-by-section annotation of the Indiana Bill of Rights may be found in Twomley, *Indiana Bill of Rights*, 20 IND. L.J. 211 (1945).

6. See Irwin v. State, 220 Ind. 228, 241, 41 N.E.2d 809, 814 (1942).

HABEAS CORPUS

The writ of habeas corpus has been called the "Great Writ"[7] and the "Freedom Writ,"[8] but insofar as its function in Indiana as a post-conviction remedy is concerned, it might well be called the "Useless Writ." Despite the fact that it is protected from suspension by the state constitution,[9] it has become encased in a statutory and judicial strait-jacket which has made it practically unavailable as a vehicle for safeguarding the constitutional rights of prisoners.[10] The writ can be brought only in the county in which the prisoner is incarcerated[11] and only in the court in which he was convicted.[12] Even if the prisoner has the "good fortune" to be imprisoned in the county in which he was convicted, habeas corpus is of little practical advantage. Indiana still adheres, in practice as well as theory, to the hoary rule that habeas corpus may be used only to inquire into jurisdictional defects.[13] The court has refused to resort to the method by which the scope of federal habeas corpus was expanded[14]—that a court loses jurisdiction and can render no valid judgment when constitutional rights are denied.[15]

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7. Longsdorf, *Habeas Corpus—A Protean Writ and Remedy,* 10 OHIO ST. L.J. 301 (1949).

8. Note, 61 HARV. L. REV. 657 (1948).

9. IND. CONST. Art. I, § 27.

10. The federal courts sitting in Indiana no longer require a prisoner seeking federal habeas corpus to pursue habeas corpus in the Indiana courts in order to exhaust his state remedies. Williams v. Dowd, 153 F.2d 328 (7th Cir. 1946); Potter v. Dowd, 146 F.2d 244 (7th Cir. 1944); Note, 23 IND. L.J. 189 (1947).

11. IND. ANN. STAT. § 3-1905 (Burns 1933); State *ex rel.* Moore v. Carlin, 226 Ind. 437, 81 N.E.2d 670 (1948); Newsom v. Miles, 220 Ind. 427 (1942); *Ex parte* Wiley, 36 Ind. 528 (1871). It has been contended that this statute is unconstitutional under the equal protection clause of the Fourteenth Amendment, Note, 26 IND. L.J. 248, 250 n.6 (1951), and it would seem also to violate the provision of the Indiana Constitution against suspension of the writ. Nevertheless, the statute has been applied without question as to its validity since it was first enacted in 1865. Ind. Laws, c. 58 (1865).

12. IND. ANN. STAT. § 3-1918 (Burns 1933); Bryarly v. Howard, 225 Ind. 183, 73 N.E.2d 679 (1947); State *ex rel.* Kunkel v. La Porte Circuit Court, 209 Ind. 682, 200 N.E. 614 (1936); Wright v. State, 5 Ind. 290 (1854). A prisoner temporarily brought into the county in which he was convicted for the purpose of appearing in some other legal proceeding is constructively still within prison and the court does not have jurisdiction of a habeas corpus complaint filed while in the county. State *ex rel.* Howard v. Hamilton Circuit Court, 224 Ind. 220, 66 N.E.2d 62 (1946).

13. The writ will lie only where it affirmatively appears that the convicting court did not have jurisdiction of the person or the subject matter. Bangs v. Johnson, 211 Ind. 501, 158 N.E. 572 (1927). This was the common law and early federal rule. Holtzoff, *supra* note 1, at 26; Note, 15 BROOKLYN L. REV. 271 (1949).

14. Dowd v. Anderson, 220 Ind. 6, 40 N.E.2d 658 (1942); Haden v. Dowd, 216 Ind. 281, 23 N.E.2d 676 (1939); State *ex rel.* Kunkel v. La Porte Circuit Court, 209 Ind. 682, 200 N.E. 614 (1936). There have been some dicta in recent cases to the effect that "under the constitution of Indiana, *there can be no valid judgment against a defendant in a criminal case unless he has been offered, and if so desired, provided with counsel.*" (court's emphasis) Knox County Council v. State *ex rel.* McCormick, 217 Ind. 493, 511, 29 N.E.2d 405, 412 (1940). The failure of the court to seize on this to expand habeas corpus is probably due to the long-standing statutory limitations on its use and the availability of coram nobis, a remedy more susceptible to judicial development.

15. Johnson v. Zerbst, 304 U.S. 458 (1938); Frank v. Mangrum, 237 U.S. 309 (1915); Holtzoff, *supra* note 1, at 26; Peters, *supra* note 1, at 94.

Indiana habeas corpus may be a successful remedy in a few circumstances for those who can meet the geographic requirements. It will lie when the record affirmatively reveals that the trial court did not have jurisdiction of the person or of the subject matter. For instance, a prisoner was released when the facts upon which his conviction was based occurred in another state,[16] and it was suggested that the writ would lie if it appeared in the record that the trial judge was absent when the verdict was returned.[17] In some cases the court has relaxed the strict geographic requirements. If the convict can show that his sentence has expired,[18] or that he is entitled to release by reason of time off under the Good Time Law,[19] he need not bring his complaint in the convicting court.[20] However, it is only in this narrow field that habeas corpus is an effective remedy.

Procedurally, habeas corpus is in the nature of a civil action.[21] Therefore, the complainant is not constitutionally entitled to a jury trial,[22] or to the aid of the state in procuring counsel and the transcript of the record for an appeal.[23] This burden has been partially obviated by a 1945 statute creating the office of public defender to represent prisoners in these proceedings.[24] Even if the technical statutory procedure is followed,[25] if it appears either from the complaint or return that the prisoner was being held under a process or judgment of a court of competent jurisdiction, or that the complaint was not brought in the county in which the complainant was imprisoned, the judge has

16. Stewart v. Jessup, 51 Ind. 413 (1875).

17. State *ex rel.* Eggers v. Branaman, 204 Ind. 238, 183 N.E. 653 (1932).

18. Flora v. Sachs, 64 Ind. 155 (1878).

19. Dowd v. Johnson, 221 Ind. 398, 47 N.E.2d 976 (1943).

20. Hinkle v. Dowd, 223 Ind. 91, 58 N.E.2d 342 (1944).

21. Dowd v. Harmon, 96 N.E.2d 902 (Ind. 1951).

22. State *ex rel.* Allen v. Fayette Circuit Court, 226 Ind. 432, 81 N.E.2d 683 (1948).

23. State *ex rel.* Rankin v. Worden, 219 Ind. 698, 40 N.E.2d 970 (1942).

24. See note 96 *infra.*

25. A signed and verified complaint must be submitted showing where and by whom the person is restrained of his liberty; the cause or pretense of the restraint, if known; and if the restraint is alleged to be illegal, the nature of the illegality. IND ANN. STAT. § 3-1904 (Burns 1933). The complaint must allege definite statements of fact, and is subject to a motion to make more specific if it does not do so. IND. ANN. STAT. § 9-3306 (Burns Cum. Supp. 1949). The writ issues as a matter of right, IND ANN. STAT. § 3-1901 (Burns 1933), but this means only that the petitioner must be allowed to present his complaint. The sufficiency of the complaint is tested by a motion to quash the writ. McGlennan v. Margowski, 90 Ind. 150 (1883). The restraining party may make a return which is subject to an exception to determine its sufficiency. Dowd v. Harmon, 96 N.E.2d 902 (Ind. 1951). A copy of the complaint must be served on the Attorney General before the court can assume jurisdiction. IND. ANN. STAT. § 47-1937 (Burns Repl. 1951); Lester v. Grant Circuit Court, 226 Ind. 186, 78 N.E.2d 785 (1948). The common law rules of res judicata were made applicable to habeas corpus by a 1947 statute. IND. ANN. STAT. § 9-3304 (Burns Cum. Supp. 1949).

no jurisdiction to act further on the writ.[26] As a post-conviction collateral attack, the vast majority of habeas corpus proceedings result in summary dismissal.

Coram Nobis

The inadequacy of habeas corpus and the lack of another satisfactory statutory procedure motivated the Indiana Supreme Court to resort to the ancient writ of error coram nobis as a means of determining whether a prisoner received a fair trial. The use of coram nobis as a post-conviction remedy began with the famous case of *Sanders v. State*.[27] The facts of this case are indicative of the reasons which impelled the court to resurrect this obsolete writ from the common law. Imminent mob violence induced the defendant's attorney and the court officials to convince the defendant to plead guilty to a murder charge in order to escape lynching, although he maintained his innocence. No statutory procedure to reverse the judgment was available, because there was no error on the face of the record. Calling the proceedings a fraud as well as a denial of the right to a fair trial, the court held that coram nobis was applicable, vacated the judgment, withdrew the plea of guilty, and remanded the prisoner for trial.

Soon after the *Sanders* case a motion to vacate the judgment and withdraw a plea of guilty was granted in *Meyers v. State*,[28] as an exercise of the inherent power of the court, and on the authority of the *Sanders* case. The only essential difference between the two remedies is that the motion to vacate must be made in the term in which the judgment was rendered.[29] If not entered in term it will be treated as a petition for coram nobis.[30] Citations between the two lines of cases, and even the terminology, are often used interchangeably.[31] A motion to vacate raises the issue of whether "the plea of guilty was freely and understandingly made."[32] The determination of this question is primarily within the sound discretion of the trial judge, but an

26. State *ex rel.* Dowd v. Superior Court of La Porte County, 219 Ind. 17, 36 N.E.2d 765 (1941). The Indiana Supreme Court will issue a writ of prohibition to prevent the assumption of jurisdiction in such cases. State *ex rel.* Kunkel v. La Porte Circuit Court, 209 Ind. 682, 200 N.E. 614 (1936).

27. 85 Ind. 318 (1882). Good coverage of the origin and purposes of the writ at common law is given by Freedman, *The Writ of Error Coram Nobis*, 3 Temp. L.Q. 365 (1929); Thornton, *Coram Nobis Et Coram Vobis*, 5 Ind. L.J. 603 (1930); Comment, 8 Ind. L.J. 247 (1932).

28. 115 Ind. 554, 18 N.E. 42 (1888).

29. Sessler v. State, 222 Ind. 608, 56 N.E.2d 851 (1944).

30. State *ex rel.* McManamon v. Blackford Circuit Court, 95 N.E.2d 556 (Ind. 1950); Sessler v. State, 222 Ind. 608, 56 N.E.2d 851 (1944); Trattner v. State, 185 Ind. 188, 113 N.E. 243 (1916).

31. See, *e.g.*, Campbell v. State, 96 N.E.2d 876 (Ind. 1951).

32. Kuhn v. State, 222 Ind. 179, 52 N.E.2d 204 (1944); Eagle v. State, 221 Ind. 475, 48 N.E.2d 811 (1944); Dobosky v. State, 183 Ind. 488, 109 N.E. 742 (1915).

abuse of discretion may be corrected by appeal.[33] The substantive foundation of both procedures is the same, and the following discussion of coram nobis is also applicable to a motion to vacate.

Substantive Grounds

The development of coram nobis for determining whether a prisoner received a fair trial has been emphasized by the recent case of *State* ex rel. *McManamon v. Blackford Circuit Court*.[34] A petition for coram nobis based on an allegation of the acceptance of a plea of guilty from an uncounseled pauper defendant without informing him of his constitutional rights was upheld by the trial judge over the State's demurrer. The State then brought an original action in the supreme court to prohibit the trial court from proceeding with the hearing; it was contended that the trial court was without jurisdiction because the five year statute of limitations[35] on coram nobis actions had run. The majority held that the statute of limitations was a violation of the due process clause of the Fourteenth Amendment and therefore unconstitutional. Due process was said to require every state to afford prisoners some clearly defined method by which they might raise claims of denials of federal rights. The court definitely asserted that coram nobis, rather than habeas corpus, was the method employed by Indiana to redress a deprivation of constitutional rights. Therefore, it was concluded, a statute which deprived a prisoner of this remedy violates the Federal Constitution.

The rationale of this case would seem to make granting a prisoner a new trial by means of coram nobis constitutionally mandatory whenever it was established that he was not afforded due process at his original trial. This is a major step toward securing an adequate method of post-conviction collateral attack. Unfortunately, the majority did not base its decision on the Indiana as well as the Federal Constitution. It should be made clear that the rights guaranteed in the Indiana Bill of Rights are as fully protected as those guaranteed by the federal due process clause.[36] As Judge Gilkinson pointed out in

33. Williams v. State, 219 Ind. 107, 37 N.E.2d 811 (1941); Cassidy v. State, 201 Ind. 311, 168 N.E. 18 (1929); Meyers v. State, 115 Ind. 354, 18 N.E. 42 (1888).

34. 95 N.E.2d 556 (Ind. 1950).

35. IND. ANN. STAT. § 9-3301 (Burns Cum. Supp. 1949).

36. Also, it is not certain that the United States Supreme Court would construe the due process clause so as to invalidate state statutes restricting the state's method for the vindication of the federal rights of prisoners. The majority opinion in the *Blackford* case relied chiefly on Woods v. Nierstheimer, 328 U.S. 211 (1946), in which the Court refused to pass on the point because it was under the impression that the Illinois courts had not construed a similar Illinois statute at that time. See Comment, 47 MICH. L. REV. 72, 76 (1948). This does not mean that the United States Supreme Court would not adopt the position of the Indiana court. The probability that the statute violated due process is noted in a comment, written soon after the law was enacted, 22 IND. L.J. 389, 391 (1947).

Emmert, J., dissenting in the *Blackford* case, 95 N.E.2d 556, 565, considered the statute a reasonable means of preventing abuse of the writ, stressing the difficulty of regathering

his concurring opinion, "[i]t would be a stark contradiction to grant the person the liberty-rights contained in the Bill of Rights of our state constitution and then permit the state to waive those rights by statute for him."[37] However, the court has made no distinction in the past between the effect of a denial of federal and state rights, and there is no reason to believe that it will do so.

The substantive basis for most coram nobis cases is a denial of the right to counsel.[38] Usually this occurs where the trial judge accepts a plea of guilty from an uncounseled defendant without ascertaining whether it was freely and understandingly made.[39] The failure of the trial judge to explain to the accused his right to the assistance of counsel,[40] the nature of the crime of which he is accused,[41] or the consequences of a plea of guilty[42] is *evidence* that the plea was made without understanding. Although it is clearly established that a denial of the right to counsel deprives a defendant of due course of law, the court has experienced considerable difficulty in determining what constitutes a sufficient explanation to a defendant so as to enable him to plead understandingly, and thus waive his right to counsel.[43]

Even though advised by an attorney a defendant may still be denied the right to counsel, or other constitutional rights. Consequently, when a plea of guilty is entered by a prisoner while incapable of comprehending the import of what he is doing, his constitutional rights are invaded—and this even though an explanation of these rights occurred.[44] The writ will also be granted where a

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the evidence for a new trial more than five years after the first trial was had and the unlikelihood that a prisoner who delayed bringing coram nobis more than five years would have exercised reasonable diligence.

37. 95 N.E.2d 556, 564 (Ind. 1950).

38. "In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel. . . ." IND. CONST. Art. I, § 13. See Note, *Right to Counsel in Indiana,* 26 IND. L.J. 234 (1951), for a discussion of the extent of this right. This is also a federal constitutional right under the due process clause. Powell v. Alabama, 287 U.S. 45 (1932); Betts v. Brady, 316 U.S. 455 (1942).

39. Because of the prevalence of these cases and the difficulty of proof when a record is not available, the Indiana Supreme Court in 1946 promulgated a rule that trial courts make a complete record of all that transpires before the acceptance of a plea of guilty. Rule 1-11, Rules of the Indiana Supreme Court. See Campbell v. State, 96 N.E.2d 876 (Ind. 1951).

40. Campbell v. State, *supra* note 39; Harris and May v. State, 203 Ind. 505, 181 N.E. 33 (1932); Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920). The explanation must be properly made. Beard v. State, 227 Ind. 717, 88 N.E.2d 769 (1949).

41. Dearing v. State, 95 N.E.2d 832 (Ind. 1950); Rhodes v. State, 199 Ind. 183, 156 N. E. 389 (1927); Parker v. State, 189 Ind. 85, 125 N.E. 772 (1920).

42. Harris and May v. State, 203 Ind. 505, 181 N.E. 33 (1932); Mislik v. State, 184 Ind. 72, 110 N.E. 551 (1915); Dobosky v. State, 183 Ind. 488, 109 N.E. 742 (1915).

43. This problem has been exhaustively covered in Note, *Right to Counsel in Indiana,* 26 IND. L.J. 234 (1951).

44. Lobaugh v. State, 226 Ind. 548, 82 N.E.2d 247 (1948) (under influence of drugs); Vonderschmidt v. State, 226 Ind. 439, 81 N.E.2d 782 (1948) (intoxicated). The petitioner in the *Vonderschmidt* case was without the aid of counsel at his trial, and it does not appear from the opinion whether Lobaugh was represented or not. However, the language of the decisions is broad enough to include pleas entered by a defendant with legal assistance; and the same rule should apply since a person in such a condition could not intelligently enter a plea even though advised by counsel.

plea of guilty to a felony charge is entered by counsel, rather than by the defendant personally.[45] Similarly, a prisoner may obtain coram nobis if he was sentenced on a plea of guilty not freely made because coerced by mob violence,[46] or induced by the representation of a court official that a light sentence would be given.[47] And the assistance of counsel may be worse than no counsel at all if the attorney is incompetent or gives only perfunctory representation. It is well established that a defendant who is represented by "adequate" counsel waives any claim of violation of his constitutional rights if this claim is not presented at his trial.[48] Therefore, the adequacy or competency of counsel may be attacked in a coram nobis proceedings.[49]

However, the practical value of this right was made doubtful by the decision in *Schmittler v. State*.[50] The supreme court refused to find that the attorney was incompetent although he discussed the case with the defendant for only fifteen minutes and failed to advise him of his constitutional rights or of the necessary elements of the crime with which he was charged. Neither did counsel examine the accused's claim that a confession was coerced prior to the time he was persuaded to enter a plea of guilty. The majority opinion seemed more impressed by petitioner's failure to allege his innocence than with his claimed violation of constitutional rights.[51] A case decided only two months before in which the court found that the petitioner's right to adequate counsel had been denied where the attorney advised a plea of guilty under circumstances similar to those in the *Schmittler* case after a twenty minute conference with his client[52] was not mentioned.

The guilt or innocence of a prisoner should not be a consideration in coram nobis cases. Constitutional rights are for the protection of the guilty

45. State v. Richardson, 223 Ind. 557, 63 N.E.2d 195 (1945); Nahas v. State, 199 Ind. 117, 155 N.E. 259 (1927).

46. Beard v. State, 227 Ind. 717, 88 N.E.2d 769 (1949); Rhodes v. State, 199 Ind. 183, 156 N.E. 389 (1927); Sanders v. State, 85 Ind. 318 (1882). It is not enough that mere popular excitement or public indignation existed at the time of the trial. It must be shown that the conduct of the proceeding was influenced. Wheeler v. State, 158 Ind. 687, 63 N.E. 975 (1902).

47. Meyers v. State, 115 Ind. 554, 14 N.E. 42 (1888); East v. State, 89 Ind. App. 701, 168 N.E. 28 (1929). The petitioner must show that he was influenced by these inducements, and not that he was merely disappointed by the severity of the sentence. Allen v. State, 222 Ind. 431, 54 N.E.2d 104 (1944). The writ will not lie if the assurances were made by counsel, or any one other than a court official. Mahoney v. State, 197 Ind. 335, 149 N.E. 444 (1925); Monahan v. State, 135 Ind. 216, 34 N.E. 967.

48. Lucas v. State, 227 Ind. 486, 86 N.E.2d 682 (1949); Thompson v. State, 225 Ind. 78, 72 N.E.2d 744 (1947).

49. Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950); Fluty v. State, 224 Ind. 652, 71 N.E.2d 565 (1947). *Cf.* State v. Richardson, 223 Ind. 557, 63 N.E.2d 195 (1945).

50. 228 Ind. 450, 93 N.E.2d 184 (1950).

51. "As to whether the record reveals that appellant was not adequately represented, it would appear to us that the appellant was guilty as charged. He does not assert otherwise." *Id.* at 466, 93 N.E.2d at 190.

52. Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950). Note, *Right to Counsel in Indiana*, 26 IND. L.J. 234, 243 (1951) further develops this point.

as well as the innocent—both are entitled to a fair trial.[53] It is unfortunate that the court, as in the *Schmittler* case, is sometimes influenced to find that the petitioner was not deprived of constitutional rights because of his failure to allege that he was not guilty of the crime for which he was convicted.

Presumably coram nobis would be an effective remedy if it were shown that other state or federal rights were not afforded the defendant, and he had not waived his claim to such rights. But other constitutional issues, such as denial of trial by jury, are usually not present in coram nobis proceedings.[54] These rights are waived if the accused is represented by adequate counsel and no claim of denial is made at the trial, or if there is a voluntary plea of guilty understandingly made.[55] Therefore, the issue is generally whether there was a denial of adequate counsel or the acceptance of a plea of guilty without ascertaining that it was freely and intelligently made. However, the fact that such issues existed and were not considered may be evidence that the counsel was incompetent or was allowed insufficient time to prepare the case.[56]

Coram nobis has been used as a remedy in other than constitutional cases; where there is an admission of perjury at the trial by state witnesses, or where newly discovered evidence is alleged. These cases involve considerations which should not enter into the constitutional cases. They are controlled by their individual facts, and it should appear that justice will be better served by the granting of a new trial.[57] Coram nobis will be granted if the perjury was committed with the connivance of the prosecutor.[58] Other factors which have been given varying weight by the courts are: whether there is substantial evidence of guilt, other than the perjured testimony; whether the prisoner contends that he is not guilty; whether the confession of perjury is more probably the truth in the opinion of the trial judge; and whether the perjurer is able and willing to testify at a new trial.[59] A few cases state that coram nobis will never lie for newly discovered evidence which merely impeaches testimony at the trial.[60] This is a carry-over from the common law limitations on the writ, and later cases have held that the writ should issue if

53. Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950); Beard v. State, 227 Ind. 717, 88 N.E.2d 769 (1949); Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920).

54. See Swain v. State, 215 Ind. 259, 18 N.E.2d 921 (1939).

55. See cases in note 48 *supra*.

56. Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950).

57. Kleihege v. State, 177 N.E. 60, 70 (Ind. 1931); Davis v. State, 200 Ind. 88, 161 N.E. 375 (1928).

58. Davis v. State, *supra* note 57. It is a violation of due process when the prosecution *knowingly* employs perjured testimony. State *ex rel.* Lake v. Bain, 225 Ind. 505, 509, 76 N.E.2d 679, 681 (1948) (concurring opinion); Peters, *supra* note 1, at 97.

59. See Bolton v. State, 223 Ind. 308, 60 N.E.2d 742 (1945); George v. State, 211 Ind. 429, 6 N.E.2d 336 (1937); Shock v. State, 200 Ind. 469, 164 N.E. 625 (1929); State v. Partlow, 195 Ind. 164, 144 N.E. 661 (1924).

60. Hicks v. State, 213 Ind. 277, 305, 12 N.E.2d 501 (1938); Shipley v. State, 210 Ind. 253, 2 N.E.2d 389 (1936).

the new evidence is material and is of such a nature that, in the opinion of the trial judge, it would lead to a different result in another trial.[61]

The decision of the trial judge is given great weight in the non-constitutional cases. The Indiana Supreme Court has yet to find an abuse of discretion in this area, and it is probable that a very strong case would have to be presented before this would be done. Because of the necessity of weighing the creditability and probable effect of new evidence, and of determining which of two or more contradictory statements is more probably the truth when perjury is admitted, the trial judge is peculiarly qualified to make these decisions by reason of his first hand knowledge of all the facts of the case.[62] Unlike the constitutional cases, the failure of the petitioner to allege that he is not guilty of the crime for which he was convicted is a relevant consideration when perjury or newly discovered evidence is the basis of the petition. Whether the petitioner believes in his innocence may aid the court in determining the probable truth or falsity of the alleged perjured testimony and the likelihood that the new evidence would have influenced the outcome of the trial.

Limitations

Qualifications on the use of coram nobis were early established. The writ is not available whenever a statutory means of relief is provided,[63] nor will it lie for any matter that was or could have been raised at the original trial, in a motion for a new trial or in arrest of judgment, or on appeal.[64] Coram nobis will correct a mistake of fact only, not one of law.[65] The denial of constitutional rights is assumed to be a mistake of fact.[66] A few early cases declared that the writ was to be given only its common law application,[67] but this restriction has not been observed.[68]

The petitioner must exercise reasonable diligence in seeking coram nobis.[69] This usually means that the application must be filed as soon as possible after

61. Breaz v. State, 215 Ind. 605, 21 N.E.2d 405 (1939); Sharp v. State, 215 Ind. 505, 19 N.E.2d 942 (1939).

62. *See* Bolton v. State, 223 Ind. 308, 60 N.E.2d 742 (1945).

63. Sanders v. State, 85 Ind. 318, 329 (1882).

64. Gross v. State, 220 Ind. 37, 40 N.E.2d 333 (1942); Power v. State, 210 Ind. 253, 2 N.E.2d 389 (1936).

65. Steinbarger v. State, 214 Ind. 36, 14 N.E.2d 533 (1938); Ledbetter v. State, 213 Ind. 152, 12 N.E.2d 120 (1938); Sanders v. State, 85 Ind. 318 (1882).

66. Irwin v. State, 220 Ind. 228, 41 N.E.2d 809 (1942).

67. Frazier v. State, 106 Ind. 562, 7 N.E. 378 (1886); Sanders v. State, 85 Ind. 318 (1882). At common law, the writ was used principally in civil cases, but could also be utilized in criminal cases where some matter of fact existed at the time the judgment was rendered which, if known by the court, would have made a different judgment probable. Thornton, *supra* note 27, at 606.

68. The *Sanders* case, itself, was an extension of the writ as used at common law. Note, 37 HARV. L. REV. 744, 746 (1924).

69. Irwin v. State, 220 Ind. 228, 41 N.E.2d 809 (1942); Quinn v. State, 209 Ind. 316, 198 N.E. 70 (1935).

the prisoner becomes aware of the grounds on which it is based. There is no clear line of distinction in the decisions regarding what constitutes due diligence, and the determination is essentially within the discretion of the trial court.[70] A mere allegation of diligence is sufficient to withstand a demurrer.[71] The requirement of due diligence seems both reasonable and necessary—the longer the period between the original trial and the coram nobis hearing, the more likely it becomes that material witnesses and evidence will not be available for a new trial. Hence, it would be advantageous for a prisoner who was really guilty to delay petitioning for coram nobis, but deleterious to the state and society.[72] A 1947 statute, providing that coram nobis is not to be granted for any matter which had been, or might have been adjudicated in a prior coram nobis proceeding,[73] was designed to remedy the abuse of the writ by "prison lawyers" making successive applications merely to relieve the prison monotony and in the hope that eventually some judge might believe them.[74]

Procedure

For a considerable period, a petition for coram nobis could be filed either in the circuit courts or as an original action in the supreme court. The earlier cases allowing original jurisdiction in the supreme court were overruled in 1933 in *Stephenson v. State*.[75] At the present time, the petition must be entered in the court in which the prisoner was convicted, and it must be brought before the judge who tried the original case, if he is available.[76] The prisoner could conceivably be prejudiced by this requirement, since a finding that there was not a fair trial could reflect upon the judge's conduct of the original proceed-

70. State *ex rel.* McManamon v. Blackford Circuit Court, 95 N.E.2d 556, 561 (Ind. 1950); State v. Richardson, 223 Ind. 557, 63 N.E.2d 195 (1945).

71. State *ex rel.* McManamon v. Blackford Circuit Court, *supra* note 70.

72. See Irwin v. State, 220 Ind. 228, 41 N.E.2d 809 (1942).

73. IND. ANN. STAT. § 9-3302 (Burns Cum. Supp. 1949). This was part of the statute containing the invalidated five year statute of limitations on the institution of coram nobis proceedings. Ind. Acts of 1947, c. 189. This act also provides that if a prisoner perjures himself in a habeas corpus or coram nobis proceeding, such shall be considered bad conduct depriving him of time off under the Good Time Law. IND. ANN. STAT. § 9-3307 (Burns Cum. Supp. 1949).

74. State *ex rel.* McManamon v. Blackford Circuit Court, 95 N.E.2d 556, 565 (Ind. 1950) (dissenting opinion). For an account of similar abuse of federal habeas corpus, see Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313 (1947); Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1949). Speck, *Statistics on Federal Habeas Corpus*, 10 OHIO ST. L.J. 337 (1949) contains interesting data on the number of repeaters in the federal courts.

75. 205 Ind. 141, 194, 186 N.E. 293 (1933). This was based on the ground that the Indiana Supreme Court was limited by the state constitution to only such original jurisdiction as was conferred upon it by the General Assembly, and that it had never been given original jurisdiction of coram nobis petitions.

76. State *ex rel.* Meyer v. Youngblood, 221 Ind. 179, 188 N.E. 769 (1934). A change of venue from the judge cannot be had, State *ex rel.* Witte v. Smith, 220 Ind. 536, 45 N.E.2d 204 (1942), unless the original judge is not available. State *ex rel.* Emmert v. Gentry, 223 Ind. 535, 62 N.E.2d 860 (1945).

ing. However, it must be assumed that most judges will act fairly and without prejudice to either party, and it is advantageous to conduct the hearing before the judge who has personal knowledge of what actually occurred at the trial. An objective standard of review on appeal will correct most miscarriages of justice caused by any bias of the trial judge.

A person is entitled to petition the trial court for coram nobis as a matter of right,[77] and to have the petition ruled on within a reasonable time,[78] but only when jurisdictional requirements have been met. In order for the court to have jurisdiction, a copy of the petition must be served on the Attorney General.[79] The writ is not *granted* as a matter of right, but in the sound discretion of the trial judge.[80] There is no jury trial, and the issues at the original trial are not retried.[81] Either or both sides may submit affidavits, and the evidence may go behind the record.[82] The petition may be tested by a demurrer for insufficient facts.[83] A motion for a new trial need not be made.[84] The petitioner does not have the right to be present during the hearing, but his presence may be ordered by the trial judge.[85] Neither does the petitioner have a constitutional right to counsel at state expense,[86] but by statute he may obtain the aid of the public defender.[87]

Errors at the hearing may be corrected on appeal by contending that the decision of the trial judge was contrary to law.[88] An appeal must be made within thirty days after the decision of the lower court,[89] and this period cannot be extended by a motion for a new trial,[90] although a delayed appeal may

77. State *ex rel.* Lopez v. Killigrew, 202 Ind. 397, 174 N.E. 808 (1931). The petition must be verified, and allege definite statements of fact, and is subject to a motion to make more specific if it does not do so. IND. ANN. STAT. § 9-3306 (Burns Cum. Supp. 1949).

78. State *ex rel.* Thompson v. Marsh, 224 Ind. 14, 64 N.E.2d 293 (1946).

79. IND. ANN. STAT. § 49-1947 (Burns Repl. 1951); State *ex rel.* Patterson v. Miami Circuit Court, 226 Ind. 395, 81 N.E.2d 536 (1948). This requirement cannot be waived by the county prosecuting attorney. State *ex rel.* Wadsworth v. Mead, 225 Ind. 123, 73 N.E.2d 53 (1947). Other jurisdictional requirements are that the petition be brought in the court where convicted, see note 76 *supra,* and that the petition be based on matters not previously decided in a prior application. IND. ANN. STAT. § 9-3302 (Burns Cum. Supp. 1949).

80. Quinn v. State, 209 Ind. 316, 198 N.E. 70 (1935). The burden of proof is on the petitioner. State *ex rel.* Cutsinger v. Spencer, 219 Ind. 148, 41 N.E.2d 601 (1941).

81. State *ex rel.* Emmert v. Gentry, 223 Ind. 535, 62 N.E.2d 860 (1945).

82. Thompson v. State, 225 Ind. 78, 72 N.E.2d 744 (1947).

83. Lobaugh v. State, 226 Ind. 548, 82 N.E.2d 247 (1948); State v. Richardson, 223 Ind. 557, 63 N.E.2d 195 (1945).

84. Lucas v. State, 227 Ind. 486, 86 N.E.2d 682 (1949).

85. State *ex rel.* Vonderschmidt v. Gentry, 224 Ind. 42, 64 N.E.2d 679 (1946).

86. State *ex rel.* Witte v. Smith, 220 Ind. 536, 45 N.E.2d 204 (1942).

87. IND. ANN. STAT. § 13-401 to 13-405 (Burns Cum. Supp. 1949). The petitioner cannot be required to accept the services of the public defender. State *ex rel.* Fulton v. Schannen, 224 Ind. 55, 64 N.E.2d 798 (1946). See note 96 *infra.*

88. Rule 2-40, Rules of the Indiana Supreme Court.

89. *Ibid.*

90. Johns v. State, 227 Ind. 737, 89 N.E.2d 281 (1949).

be had under extreme circumstances.[91] The record of the original proceeding must be brought before the supreme court together with the record of the hearing on the petition.[92] A pauper defendant is not constitutionally entitled to state aid in obtaining counsel and a transcript of the record for the appeal,[93] and the appeal will not be considered if the record is in improper form, or not before the court.[94] The latter holdings combined to constitute a serious defect in coram nobis which often prevented a decision on the merits.[95] This has been at least partially remedied since 1945 by the statute establishing the office of public defender[96] and the statute enabling the Indiana Supreme Court to take judicial notice of the record in the first trial.[97]

Although the decision is left to the sound discretion of the trial judge in the first instance, it will be reversed for an abuse of discretion.[98] Ordinarily, in reviewing the case, the undisputed allegations and evidence of the petitioner will be accepted as true.[99] This proposition would not be in doubt but for the

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91. IND. ANN. STAT. § 9-3305 (Burns Cum. Supp. 1949); Blanton v. State, 98 N.E.2d 186 (Ind. 1951); Cook v. State, 95 N.E.2d 625 (Ind. 1951); Sweet v. State, 226 Ind. 566, 81 N.E.2d 679 (1948).

92. Breaz v. State, 215 Ind. 605, 21 N.E.2d 405 (1939).

93. State *ex rel.* Wheelock v. Wiles, 224 Ind. 239, 78 N.E.2d 432 (1946); State *ex rel.* Cutsinger v. Spencer, 219 Ind. 148, 41 N.E.2d 601 (1941).

94. Parker v. State, 224 Ind. 513, 69 N.E.2d 176 (1946).

95. See Potter v. Dowd, 146 F.2d 244 (7th Cir. 1944) (coram nobis remedy held exhausted—appeal in state court was dismissed because not in proper form although prisoner could not afford counsel); Williams v. Dowd, 153 F.2d 328 (7th Cir. 1946) (coram nobis held exhausted—appeal in state court dismissed because papers did not arrive on time since delayed by the warden); Spence v. Dowd, 145 F.2d 451 (7th Cir. 1944) (coram nobis held exhausted—twice denied in state court without hearing on merits).

96. IND. ANN. STAT. §§ 13-401 to 13-405 (Burns Cum. Supp. 1949). § 13-1402 provides that, "It shall be the duty of the public defender to represent any person in any penal institution of this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired." This would seem to make it mandatory on the public defender to represent any pauper prisoner asserting a claim of illegal detention. There are some dicta in the cases, however, to the effect that the public defender need act only when presented with a meritorious claim. *See* State *ex. rel.* Lake v. Bain, 225 Ind. 505, 76 N.E.2d 679 (1948). *Cf.* State *ex rel.* Sweet v. Hancock, 223 Ind. 701, 64 N.E.2d 294 (1946). Of course, the public defender should not be required to expend time and effort on claims which are clearly groundless, or to pursue a hopeless remedy such as habeas corpus in most instances. Davis v. Howard, 73 N.E.2d 344 (Ind. 1947). But if coram nobis is to be an adequate remedy for poor prisoners, it is essential that the public defender vigorously prosecute claims which appear to have the slightest merit. The determination of the worthiness of the prisoner's cause should be made by the courts, and not by the public defender, except in the clearest cases. An act passed by the 1951 session of the legislature providing for assistants to aid the public defender should greatly increase the efficiency of his office.

97. IND. ANN. STAT. § 9-3303 (Burns Cum. Supp. 1949).

98. Campbell v. State, 96 N.E.2d 876 (Ind. 1951); Bolton v. State, 223 Ind. 308, 60 N.E.2d 742 (1945); Cassidy v. State, 201 Ind. 311, 168 N.E. 18 (1929).

99. Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950); Beard v. State, 227 Ind. 717, 88 N.E.2d 769 (1949); Kuhn v. State, 222 Ind. 179, 52 N.E.2d 491 (1944); Cassidy v. State, *supra* note 98.

holding in *Schmittler v. State*[100] that an uncontroverted allegation of a denial of constitutional rights need not be accepted as true where the trial judge *could have inferred* that there was no denial from the whole record and his knowledge of the case. This decision is erroneous if the Indiana Supreme Court is to review the lower court's decisions on an objective basis. It is not possible to know what the judge inferred. The *Schmittler* case is not consistent with earlier Indiana cases, nor with the federal rule.[101] Later decisions appear to have returned to the accepted rule,[102] and it is to be hoped that the *Schmittler* case will not be followed in the future. Where the evidence is conflicting, the decision of the trial judge will be accepted as final.[103] A mere record entry that constitutional rights were afforded is not conclusive, and does not create a presumption that such was true.[104]

The object of coram nobis is to obtain a new trial when there has been a trial, and to vacate the judgment and withdraw the plea when sentence has followed a plea of guilty.[105] If the writ is granted, prior jeopardy is waived and is not a defense in a new trial.[106] If reconvicted, the prisoner is not entitled to credit for time served under the original sentence.[107] The classification of coram nobis is a subject of considerable confusion. It has been said to be in the nature of a civil action and thus an entirely new proceeding,[108] a criminal action and part of the original case,[109] and in the nature of a motion for a new trial.[110] These contradictions have resulted from the practice of justifying the procedure which has gradually been worked out for coram nobis by fitting the writ into a classification which already utilized that procedure.

The procedure to be followed in coram nobis cases is not without defect. The emphasis on adherence to form and the short time allowed for appeal often prevent a decision on the merits. There is no apparent reason why the

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100. 228 Ind. 450, 93 N.E.2d 184 (1950).

101. See Feiner v. New York, 340 U.S. 315 (1951).

102. Campbell v. State, 96 N.E.2d 876 (Ind. 1951); Dearing v. State, 95 N.E.2d 832 (Ind. 1951).

103. Abraham v. State, 228 Ind. 179, 91 N.E.2d 358 (1950); Power v. State, 210 Ind. 435, 4 N.E.2d 178 (1936); Sessler v. State, 222 Ind. 608, 56 N.E.2d 851 (1944).

104. Campbell v. State, 96 N.E.2d 876 (Ind. 1951); Thompson v. State, 225 Ind. 78, 72 N.E.2d 744 (1947).

105. Irwin v. State, 220 Ind. 225, 41 N.E.2d 809 (1942).

106. McDowell v. State, 225 Ind. 495, 76 N.E.2d 249 (1947); State *ex rel.* Lopez v. Killigrew, 202 Ind. 397, 174 N.E. 808 (1931).

107. McDowell v. State, *supra* note 106. This rather harsh rule results from the principle that proceedings that have been set aside through coram nobis are null and void and the parties are in the same position as if no trial had been had. The validity of this reasoning is certainly subject to criticism. See Whalen, *Resentence Without Credit for Time Served: Unequal Protection of the Laws,* 35 MINN. L. REV. 239 (1951).

108. State *ex rel.* Cutsinger v. Spencer, 219 Ind. 148, 41 N.E.2d 601 (1941); Carman v. State, 208 Ind. 297, 196 N.E. 78 (1935).

109. Irwin v. State, 220 Ind. 228, 41 N.E.2d 809 (1942); Berry v. State, 202 Ind. 294, 303, 173 N.E. 705 (1930).

110. State *ex rel.* Emmert v. Gentry, 223 Ind. 535, 62 N.E.2d 860 (1945); Hicks v. State, 213 Ind. 277, 305, 12 N.E.2d 501 (1938).

losing party should not have the usual ninety days in which to appeal,[111] rather than the thirty days allowed in habeas corpus and coram nobis cases. Rules should not become instruments of oppression which penalize an unwary defendant for the mistakes of his attorney, especially when fundamental rights are involved.[112]

With the development of coram nobis, Indiana has made commendable progress toward an effective system for post-conviction collateral attack on criminal proceedings. The creation of the public defender's office has enabled indigent prisoners to obtain professional assistance, thereby facilitating conformity to the procedural rules. Substantively, the writ does provide a remedy for the correction of constitutional violations. However, it might be suggested that the ultimate effectiveness of any such remedy will depend upon the court's regard for constitutional rights themselves.

CREDITOR GROUP LIFE INSURANCE—PROTECTING THE INSURED AGAINST MISREPRESENTATIONS AT THE TIME OF APPLICATION

Increasingly employed in the area of home financing, creditor group life insurance is designed to provide security to the mortgagee beyond the mortgage lien in event of the borrower's death. Unlike individual term life insurance, the group plan involves the issuance of a master policy to the creditor institution insuring the lives of its borrowers with the death benefit, covering the balance of the debt, payable directly to the mortgagee. Since the mortgagee as policyholder assumes complete administration of the plan, the mortgagor enjoys the resulting economies in the form of reduced rates as well as other advantages inuring from group rather than individual coverage.[1]

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111. Rule 2-2, Rules of the Indiana Supreme Court.

112. Johns v. State, 227 Ind. 737, 748, 89 N.E.2d 281, 285 (1949) (dissenting opinion); Lobaugh v. State, 226 Ind. 548, 551, 82 N.E.2d 247, 248 (1948); Wilson v. State, 222 Ind. 63, 78, 51 N.E.2d 848, 856 (1943).

1. On creditor group life insurance generally, see GREGG, AN ANALYSIS OF GROUP LIFE INSURANCE, at index, 261 (1950).

. . The arrangements of creditor group insurance differ with the various types of loan transactions and the various types of financial institutions. The particular arrangement discussed in this note which was litigated in Broidy v. State Mutual Life Assurance Co., 186 F.2d 490 (2d Cir. 1951), was designed much like a typical employer group plan. (See note 2 *infra*). The Aetna Life Insurance Company, however, occasionally has written a creditor group plan in which no negotiation with individual debtors is involved. The bank reports a single monthly premium based on the total outstanding balance of insured loans on the first day of the month. Coverage of the borrower is automatic on consummation of the loan, and the borrower's only knowledge of the plan comes by way of the bank's advertising of its loan facilities. (Personal interview with a representative of Aetna Life Insurance Company.) See also a pamphlet, PERSONAL LOAN INSURANCE