

August 3, 1998 filed the present "Motion Under Rule 60(b)" for a writ of error coram nobis and withdrew the motion to "dismiss."

It appears that defendant is ineligible for a writ of error coram nobis.

The writ of error coram nobis is available to federal courts in criminal matters under the All Writs Act, 28 U.S.C.A. § 1651(a) It is used to attack allegedly invalid convictions which have continuing consequences, when the petitioner has served his sentence and is no longer "in custody" for purposes of 28 U.S.C.A. § 2255. The petitioner must show that he is suffering from continuing consequences of the allegedly invalid conviction.

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Use of the writ is appropriate to correct errors for which there was no remedy available at the time of trial and where "sound reasons" exist for failing to seek relief earlier. Only where there are errors of fact of the most fundamental kind, that is, such as to render the proceeding itself irregular and invalid, can redress be had. The error must go to the jurisdiction of the trial court, thus rendering the trial itself invalid. . . . Earlier proceedings are presumptively correct and the petitioner bears the burden to show otherwise.

* * * *

Coram nobis is an extraordinary remedy, and a court's jurisdiction to grant relief is of limited scope. The interest in finality of judgments dictates that the standard for a successful collateral attack on a conviction be more stringent than the standard applicable on a direct appeal. It is even more stringent than that on a petitioner seeking habeas corpus relief under § 2255.

United States v. Stoneman, 870 F.2d 102, 105-06 (3d Cir.) (internal quotations and citations omitted), cert. denied, 493 U.S. 891, 110 S. Ct. 236, 107 L. Ed.2d 187 (1989).

Here, defendant is in federal custody. To the extent that defendant wants to alter his federal sentence via the invalidation of his state conviction, the asserted error – ineffective assistance of counsel – does not relate to the jurisdiction of the state court. Defendant has not presented evidence to defeat the presumptive correctness of either the federal or the state proceeding. Nor has he presented any “sound reason” for failing to raise the issue of ineffectiveness at an earlier time, either by appeal from the state conviction, in a collateral state proceeding, or by appeal from the enhanced federal sentence. See Foont v. United States, 93 F.3d 76, 78 (2d Cir. 1996) (“Coram nobis is not a substitute for appeal, and relief under the writ is strictly limited to those cases in which errors . . . of the most fundamental character have rendered the proceeding itself irregular and invalid.”).

It appears that defendant moved for coram nobis in order to avoid the limitations on second or successive § 2255 motions created by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.² Defendant’s motion

² While coram nobis may not be pre-empted by § 2255, its continuing vitality is unclear. See Carlisle v. United States, 517 U.S. 416, 429, 116 S. Ct. 1460, 1467-68, 134 L. Ed.2d 613 (1996) (“Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is (continued...)”)

also cites In re Hanserd, 123 F.3d 922, 929 (6th Cir. 1997), and the following language in § 2255:

An application for a writ of habeas corpus [under §§ 2241 and 2244] in behalf of a prisoner who is authorized to apply for relief by [§ 2255] motion . . . shall not be entertained . . . unless it . . . appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

The suggestion is that because defendant's motion does not involve "newly discovered evidence" or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court" – the requirements for a second § 2255 motion under AEDPA – a § 2255 motion would be "inadequate and ineffective," and that he is entitled to federal habeas under § 2241. Motion, at 2.

Hanserd, however, involved an attack on a conviction based upon Bailey v. United States, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed.2d 472 (1995) ("use" under 18 U.S.C. § 924(c) does not involve mere possession), rather than an attack on a sentence. The courts of appeals have sanctioned the use of § 2241 or common law writs such as coram nobis by defendants who were convicted – and whose first § 2255 motion had been rejected – prior to the Supreme Court's non-constitutional ruling in Bailey. See In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997); In re Davenport, C.A. Nos. 97-9095, 97-9097, 1998 WL 319304, at *7 (7th Cir. June 18, 1998);

²(...continued)
controlling. . . . It is difficult to conceive of a situation in a federal criminal case today where [a writ of coram nobis] would be necessary or appropriate." (internal quotations and citations omitted).

Hanserd, 123 F.3d at 929. They have not, however, allowed this avenue around AEDPA-amended § 2255 in attacks, as here, upon a sentence. See Davenport, 1998 WL 319304, at *4 (defendant had "reasonable opportunity" to attack his sentence on direct appeal and in first § 2255 motion); In re Sonshine, 132 F.3d 1133, 1135 (6th Cir. 1997) ("Although couched in Sixth Amendment terms, the issue is basically one arising under the Sentencing Guidelines, which would be barred under both AEDPA and the old abuse-of-the-writ standard."); Dorsainvil, 119 F.3d at 251 ("We do not suggest that § 2255 would be 'inadequate or ineffective' so as to enable a second petitioner to invoke § 2241 merely because that petitioner is unable to meet the stringent gatekeeping requirements of the amended § 2255. Such a holding would effectively eviscerate Congress's intent in amending § 2255.").

Edmund V. Ludwig, J.