

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	Civil Action
	:	No. 99-1181
v.	:	
	:	
JOHN J. MALONEY	:	Criminal
	:	No. 91-00062

O'Neill, J.

April , 1999

MEMORANDUM AND ORDER

In 1991 petitioner John J. Maloney was convicted before this Court of one count of mail fraud and sentenced to six months imprisonment, five years probation, and a \$24,788 restitution order. The conviction and sentence were subsequently affirmed on appeal. Petitioner then filed several petitions for writ of habeas corpus pursuant to 28 U.S.C. § 2255 attacking the legality of his conviction. The first was denied on the merits in 1993 and affirmed on appeal in 1995. A second petition was denied with prejudice on August 26, 1998 on grounds that petitioner was no longer incarcerated for the conviction he sought to challenge.

On March 8, 1999, petitioner, proceeding pro se, filed this action in the form of a motion styled a "Motion to Vacate, Acquit, Set Aside Sentence or Grant a New Trial." The Court treated the motion as another habeas corpus petition pursuant to § 2255 and dismissed it with prejudice, again on grounds that petitioner was not longer in custody for the conviction he sought to challenge. Petitioner now moves for reconsideration of that Order. He argues that (1) he filed his motion as a "Miscellaneous" motion rather than a §

2255 motion; (2) he seeks to challenge his conviction with “after discovery evidence,” which might be construed to mean newly discovered evidence; (3) the evidence will show that an injustice has occurred; and (4) the “Acquittal or Granting of a new trial will right a grievous wrong.” Petitioner further “Prays that the Court will grant him all relief to which he may be entitled in this proceeding.”

1.

If the Court was correct in treating petitioner’s request for review of his conviction as a § 2255 petition for habeas relief, the Court was also correct in dismissing the petition. Section 2255 only authorizes a court to consider a petition filed by a person who is “in custody under sentence of a [federal] court” at the time of filing. 28 U.S.C. § 2255; see Maleng v. Cook, 490 U.S. 488, 490-91 (1989); Carafas v. LaVallee, 391 U.S. 234, 236-238 (1968) (collateral consequences of conviction may prevent mootness of habeas corpus petition but do not confer jurisdiction on the court to consider the petition). Since petitioner filed the instant petition after his sentence for the challenged conviction had expired and he was no longer incarcerated, the Court lacked subject matter jurisdiction to consider the petition pursuant to § 2255.

2.

Upon reconsideration, however, I am inclined to think that petitioner’s motion should be construed as a petition for writ of coram nobis. This writ is the proper vehicle

for petitioners who are no longer in custody and therefore cannot use habeas procedures to obtain review of their convictions. See United States v. Morgan, 326 U.S. 502, 510-513 (1954); United States v. Stoneman, 870 F.2d 102, 105-106 (3d Cir. 1989).

Accordingly, I will vacate my previous order dismissing this action and allow petitioner the opportunity to try to demonstrate that he is entitled to coram nobis relief. Some discussion of the writ will therefore be useful.

The writ of coram nobis may be used to correct errors of either law or fact, but only in extraordinarily exceptional circumstances where relief is required to “correct errors ‘of the most fundamental character.’” United States v. Osser, 864 F.2d 1056, 1059 (3d Cir. 1988), quoting Morgan, 346 U.S. at 512; see also United States v. Keane, 832 F.2d 199, 202-203 (7th Cir. 1988) (setting forth history of the writ and stringent limitations on its proper use). In considering a request for relief pursuant to this extraordinary writ, the court must consider a number of factors. See generally Stoneman, 870 F.2d at 105-106; Keane, 870 F.2d at 202-203; Osser, 864 F.2d at 1059-1062. A constant, pre-eminent factor is society’s “weighty” interest in the finality of judgment: “Where sentences have been served, the finality concept is of an overriding nature, more so than in other forms of collateral review such as habeas corpus, where a continuance of confinement could be manifestly unjust.” Osser, 864 F.2d at 1059; see also Keane, 870 F.2d at 202-203.

Another factor, of course, is the error(s) or injustice that the petitioner contends makes the prior conviction unlawful. As already stated, coram nobis relief is appropriate

only for “fundamental” errors. See, e.g., Morgan, 346 U.S. at 512-13 (holding that district court should have considered motion for writ of coram nobis based on claim that petitioner had been convicted on guilty plea without benefit of counsel and without having validly waived counsel); Stoneman, 870 F.2d at 105 (“substantive errors which result in a person’s charge and conviction for something not a crime are fundamental”); cf. Keane, 852 F.2d at 205-206 (since petitioner could have been convicted under correct jury instructions, error in jury instructions under which he was convicted was not the “sort of fundamental defect that produces a complete miscarriage of justice” for which coram nobis relief would be proper).

A third factor is the continuing consequences -- i.e., civil disabilities -- resulting from the conviction. While it is not clear just how significant such consequences must be in order for a petitioner to maintain a petition for the writ, see Osser, 864 F.2d at 1059-60, the petitioner must establish that he suffers continuing penalties as a result of the conviction. See id.; Stoneman, 870 F.2d at 105-106 (both citing Morgan, 346 U.S. at 512-13).

Finally, the cases suggest that invoking coram nobis relief is not appropriate where the alleged error could have been raised in previous proceedings, whether direct appeal or habeas review. See Osser, 864 F.2d at 1060 (noting that, in contrast to habeas review under § 2255 where “the natural solicitude of the law to end expeditiously an unjust incarceration exerts a perhaps unacknowledged pressure for expansive review,” in a coram nobis case “sentence has been served and nothing remains but some financial [or

other] detriment, [so] judicial incentive to excuse compliance with procedural prerequisites is of a lower order”); cf. Morgan, 346 U.S. at 512 (“Where it cannot be deduced from the record whether counsel was properly waived, we think, no other remedy being then available and sound reasons existing for failure to seek appropriate earlier relief, this motion in the nature of the extraordinary writ of coram nobis must be heard by the federal trial court.”). In Osser, for example, the Court of Appeals denied coram nobis relief on grounds, inter alia, that the petitioner could and should have raised the legal issue upon which his petition was based on direct appeal some fifteen years earlier. Id. at 1061-62.

In sum, petitioner should set forth and explain the following for the Court’s consideration: (1) the errors or injustice that he claims infects his conviction; (2) the continuing consequences or penalties flowing from his conviction; and (3) whether the issues now raised by petitioner were or could have been raised in previous proceedings (i.e., on direct appeal or in petitioner’s habeas filings). Of course, petitioner may rest on the arguments already presented in his original motion (docket # 103, filed March 8, 1999) as to any one or all of these issues.

While I will allow petitioner the opportunity to try to demonstrate that he is entitled to coram nobis relief, I note that it is unlikely that petitioner can meet the stringent standard for this extraordinary relief, especially in light of the fact that petitioner has already had both a direct appeal and a habeas petition examined and denied on the merits. Therefore, the government will not be required to respond to this action unless

and until the Court finds that petitioner has demonstrated a colorable claim for relief.

AND NOW, this day of April, 1999, upon consideration of petitioner John J. Maloney's motion for reconsideration of this Court's Order dated March 10, 1999 dismissing this action with prejudice, it is hereby ORDERED that the motion is GRANTED and the Court's Order dated March 10, 1999 is VACATED.

It is further ORDERED:

- (1) The Court will treat petitioner's motion as one for the writ of coram nobis.
- (2) Petitioner may file a supplemental brief by or before May 5, 1999 addressing the issues raised by the accompanying memorandum.
- (3) Defendant need not respond to this petition or any of petitioner's filings pending further order of this Court.

THOMAS N. O'NEILL, JR. J.