

Criminal Procedure—In-Custody Requirement of Relief Under the Writ of Error Coram Nobis—*Trenkler v. United States*, 536 F.3d 85 (1st Cir. 2008)

Under the All Writs Act of the *United States Code*, federal courts have the power to entertain an array of common-law writs.¹ In certain narrow circumstances, the rare writ of error coram nobis is a remedial petition primarily available to criminal defendants who want to challenge their convictions.² When pursuing this remedy, the petitioner must meet the writ’s strict requirements for the original court to grant a hearing.³ In *Trenkler v. United States*,⁴ the United States Court of Appeals for the First Circuit considered whether the United States District Court for the District of Massachusetts properly granted the petitioner’s writ of coram nobis.⁵ Judge Selya, writing for a unanimous court, reversed the grant citing that the petitioner failed to meet the writ’s strict requirements.⁶

On November 29, 1993, a jury convicted petitioner Alfred Trenkler of, among other charges, illegal receipt and use of explosives, and the trial judge sentenced him to life imprisonment.⁷ The controlling statute included life imprisonment as an available sentence under section 34, “if the jury shall in its

1. 28 U.S.C. § 1651 (2000). The Act states, “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” *Id.* § 1651(a). Further, “[A]n alternative writ . . . may be issued by a justice or judge of a court which has jurisdiction.” *Id.* § 1651(b).

2. See William G. Wheatley, 18 AM. JUR. *Trials* 1 §1, 4 (2008) (commenting coram nobis available only after all other remedies exhausted); see also Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 43 (1985) (explaining statute that addresses issue retains authority over All Writs Act); *United States v. Ayala*, 894 F.2d 425, 428 (D.C. Cir. 1990) (clarifying federal courts may fill only “interstices” of “postconviction remedial framework” through common-law writs).

3. See *United States v. Morgan*, 346 U.S. 502, 507 (1954) (outlining requirements for the limited use of coram nobis petition). Petitioners could use the writ at common law to (1) correct errors of fact, (2) within a limited time, for (3) facts that affected the “validity and regularity” of the judgment. *Id.*; see also Lester B. Orfield, *The Writ of Error Coram Nobis in Civil Practice*, 20 VA. L. REV. 423, 424 (1934) (noting writ heard before same judge rendering judgment). Although now generally accepted that petitioners may use the writ for errors of law as well as of fact, jurisdictions differ on this issue. Compare Orfield, *supra*, at 424 (defining writ as means to correct errors of fact apparent on the record), and Wheatley, *supra* note 2, § 2 (defining use of writ for errors of fact), with *Trenkler v. United States*, 536 F.3d 85, 93 (1st Cir. 2008) (acquiescing writ flexible enough to reach “fundamental legal errors”).

4. 536 F.3d 85 (1st Cir. 2008).

5. *Id.* at 88-89 (concluding district court had no authority to issue writ). The Court of Appeals held that the district court lacked jurisdiction because Trenkler’s coram nobis petition was a disguised 28 U.S.C. § 2255 petition. *Id.* at 95-98.

6. *Id.* at 100 (explaining petitioner cannot file coram nobis after sleeping on his rights under habeas corpus).

7. *Id.* at 89 (explaining jury originally convicted under 18 U.S.C. §§ 844(d) and 844(i) (2000)). The trial judge convicted Trenkler under this statute for his role in a bombing that killed a police officer. *Id.*

discretion so direct.”⁸ Even though the jury did not make such a directive and the judge therefore lacked authority to issue this sentence, no party remarked on the deficiency.⁹

On November 6, 2006, Trenkler wrote to the original trial judge arguing for reconsideration under a writ of error coram nobis.¹⁰ Trenkler requested a correction of the unauthorized imposition of his life sentence.¹¹ The district court judge found a lack of any other remedy through which to challenge the conviction, a fundamental error of law, an inability of Trenkler to seek earlier relief, and a continuance of collateral consequences; the trial judge thereby granted the writ and resentenced Trenkler to a term of years.¹² The government appealed the grant of the writ, contending that the court lacked jurisdiction to issue it.¹³

On appeal, the First Circuit re-categorized Trenkler’s writ of coram nobis as a second attempt at a habeas corpus petition applying section 2255 of the Antiterrorism and Effective Death Penalty Act (AEDPA).¹⁴ The court held that the “strictures of section 2255” may not be “sidestepped” by the resort to a writ.¹⁵ The court explained that if a criminal defendant’s petition still fulfills the section 2255 requirements for habeas corpus relief, then that statute is the

8. 18 U.S.C. § 34 (1956) (current version at 18 U.S.C. § 34 (2000)) (prescribing if acts resulted in death, jury shall have sentencing discretion). Six months after Trenkler’s sentence, Congress amended 18 U.S.C. § 844(d) and (i) by removing the words “as provided in section 34 of this title” and in § 34 removing the words “if the jury shall in its discretion so direct.” *Trenkler v. United States*, No. 06-12072-RWZ, 2007 U.S. Dist. LEXIS 11802, at *3 (D. Mass. Feb. 20, 2007).

9. 536 F.3d at 89 (noting “anomaly went unremarked”).

10. *Id.* at 90 (outlining procedural history behind petition for writ). Trenkler wrote to the district court and asked for reconsideration of the Court of Appeals denial of his petition, which the district court allowed. *Id.* Trenkler also had quite an extensive postconviction procedural history replete with motions for a new trial, evidentiary hearings, and writ of mandamus. *See generally* *Trenkler v. Pugh* (Trenkler IV), 83 Fed. Appx. 468 (3d Cir. 2003) (upholding denial of relief under 28 U.S.C. § 2241); *Trenkler v. United States* (Trenkler III), 268 F.3d 16 (1st Cir. 2001) (affirming denial of relief under 28 U.S.C. § 2255); *United States v. Trenkler* (Trenkler II), No. 97-1239, 1998 U.S. App. LEXIS 217 (1st Cir. Jan. 6, 1998) (affirming denial of Rule 33 motion); *United States v. Trenkler* (Trenkler I), 61 F.3d 45 (1st Cir. 1995) (affirming conviction and sentence on direct review).

11. 536 F.3d at 88.

12. *Id.* The district court held that Trenkler had no other remedy for his claim, especially under section 2255. *Trenkler v. United States*, No. 06-12072-RWZ, 2007 U.S. Dist. LEXIS 11802, at *7 (D. Mass. Feb. 20, 2007). Further, the court reasoned that because section 34 controlled sentencing, Trenkler had been convicted under a fundamental error of law. *Id.* at *11. The court recognized that no party to the action had been aware of the statutory sentencing limitation; therefore, Trenkler could not have brought the petition earlier. *Id.* at *14. Finally, because Trenkler was still serving an illegally applied sentence, he suffered collateral consequences. *Id.* at *16.

13. 536 F.3d at 88. In the district court case, the government did not appear for the proceeding despite being ordered twice by the judge to file a response. *Trenkler v. United States*, No. 06-12072-RWZ, 2007 U.S. Dist. LEXIS 11802, at *5 (D. Mass. Feb. 20, 2007).

14. 536 F.3d at 95 (characterizing petition as “a wolf in sheep’s clothing: an unapproved second or successive section 2255”).

15. *Id.* at 97 (chastising petitioner’s action as simple expedient of resorting to more exotic writ).

appropriate source of assistance.¹⁶ In that sense, the All Writs Act is a “residual source of authority to issue writs . . . not otherwise covered by statute.”¹⁷ Consequently, the appeals court reversed the district court’s grant of the writ, ruling Trenkler’s filing embodied a second attempt at a habeas corpus petition barred by section 2255’s gatekeeping provisions.¹⁸

The writ of error coram nobis is an ancient common-law writ.¹⁹ Despite its complex history of application to criminal procedure, the United States Supreme Court has held it is available to criminal defendants.²⁰ The rendering court reserves the writ as a means to correct errors “of the most fundamental character.”²¹ Case law has established that to qualify for coram nobis relief the error must be all of the following: outside the record; unknown to the defendant at the time of trial; unlitigated at trial; unknown to the trial court; and, if known, preventative of judgment.²² Some courts require that the defendant no longer be in custody to employ the writ, although some case law challenges this requirement.²³

16. *Id.* (holding statute takes precedence over writ if statute specifically addresses petitioner’s claim).

17. *Id.* (citing *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985)).

18. 536 F.3d at 100 (warning provisions of section 2255 typically allow “only one bite at the post-conviction apple”).

19. *See* Orfield, *supra* note 3, at 425. Originally, the writ provided relief for only fact-based errors, and it was considered improper to assign errors of law. *Id.* at 428; *see also* Abraham L. Freedman, *The Writ of Error Coram Nobis*, 3 TEMP. L.Q. 365, 366 (1929) (discussing historical application of writ to errors of fact). *See generally* ELI FRANK, *CORAM NOBIS* (1953) (providing overview of coram nobis before AEDPA as complement to habeas corpus law).

20. *See* *United States v. Morgan*, 346 U.S. 502, 506 n.4 (1954) (defining writ as a step in criminal cases). The court held that the abolishment of coram nobis for civil cases by FED. R. CIV. P. 60(b) was inapplicable to criminal cases. *Id.* *Morgan* is the seminal case establishing the modern parameters of coram nobis in American jurisprudence from which courts continue to find rationale for their decisions in coram nobis cases. *See, e.g.*, *United States v. Sawyer*, 239 F.3d 31 (1st Cir. 2001); *United States v. Barrett*, 178 F.3d 34 (1st Cir. 1999); *United States v. Keane*, 852 F.2d 199 (7th Cir. 1988).

21. *See* *United States v. Mayer*, 235 U.S. 55, 69 (1914). Circuits split on whether fundamental errors may be those of law in addition to those of fact. *See supra* note 3 and accompanying text (describing history of application to errors of law and fact).

22. *See* *Trenkler v. United States*, No. 06-12072-RWZ, 2007 U.S. Dist. LEXIS 11802, at *8 (D. Mass. Feb. 20, 2007) (listing factors as fundamental error, explanation for not seeking earlier relief, and continuing collateral consequences); Wheatley, *supra* note 2 (outlining all five requirements necessary for resorting to writ).

23. *See* *Triestman v. United States*, 124 F.3d 361, 380 n.24 (2d Cir. 1997) (maintaining coram nobis possibly available to in-custody defendant if section 2255 unavailable); W.W. Allen, *Delay as Affecting Right to Coram Nobis Attacking Criminal Conviction*, 62 A.L.R.2d 432, §1 (1958) (noting section 2255 requirement of “in custody” prisoner “does not cover whole field of needed relief”); Romualdo R. Eclavea, Annotation, *Availability, Under 28 U.S.C.A. § 1651, of Writ of Error Coram Nobis to Vacate Federal Conviction Where Sentence Has Not Yet Been Served*, 37 A.L.R. FED. 499, §2[a] (1978) (explaining coram nobis normally applied when movant no longer in custody); Wheatley, *supra* note 2, § 6 (explaining restraint not prerequisite for coram nobis relief). Some jurisdictions have spun the requirement of being “in custody” to petition for section 2255 relief as requiring the converse, i.e., coram nobis is available only if not in custody. *See* *United States v. Sawyer*, 239 F.3d 31, 37 (1st Cir. 2001) (holding coram nobis issued once petitioner no longer in custody); *United States v. Craig*, 907 F.2d 653, 656 (7th Cir. 1990) (holding coram nobis petitions brought only after defendant released from custody).

Coram nobis operates as an extraordinary remedy available only when the defendant has no other means of assistance.²⁴ Its use must be deferred until the petitioner exhausts possible statutory habeas corpus relief codified in section 2255.²⁵ Moreover, if section 2255 had been available for the defendant's post-conviction petition, the defendant may not then file a successive section 2255 disguised as a coram nobis plea.²⁶ In 1996, Congress enacted AEDPA, which included new strict gatekeeping provisions regulating section 2255 habeas corpus.²⁷ As a result, the court must review the petition, despite the motion's name, to determine if it runs afoul of AEDPA.²⁸

AEDPA added a "savings clause" to section 2255 which allows a second habeas corpus petition only if the petitioner establishes one of two exceptions: the existence of newly discovered evidence that, if proven, would establish that no reasonable fact finder would have found the defendant guilty, *or* a new rule of constitutional law, previously unavailable to the defendant and made retroactively available by the Supreme Court.²⁹ Courts have gone so far as to hold that a claim's failure merely to meet one of the savings clause exceptions under section 2255 does not alone create a miscarriage of justice worthy of coram nobis relief.³⁰ Conversely, the Supreme Court has also held that section 2255 does not preempt other forms of relief authorized under the All Writs Act.³¹

24. See *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (cautioning difficulty in conceiving case where coram nobis appropriate); *McCleskey v. Zant*, 499 U.S. 467, 494 (1991) (qualifying an extraordinary circumstance justifying writ as any constitutional violation causing conviction of innocent).

25. 536 F.3d at 97 (cautioning use of writ potentially available only when section 2255 unavailable); *Pratt v. United States*, 129 F.3d 54, 57 (1st Cir. 1997) (pointing AEDPA's significant restrictions on second or successive habeas petitions).

26. See CARY FEDERMAN, *THE BODY AND THE STATE* 183 (2006) (characterizing AEDPA as serious undercut to prisoner having case heard in federal court); *Effect of Prior Adjudications*, 16A FED. PROC. L. ED. § 41:595 (cautioning against use of coram nobis to correct errors resolved in another postconviction proceeding).

27. See *United States v. Barrett*, 178 F.3d 34, 45 (1st Cir. 1999) (defining claim that could have properly been raised in section 2255 as second or successive). See generally Aaron G. McCollough, *For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases*, 62 WASH. & LEE L. REV. 365 (2005) (describing history and ramifications of AEDPA).

28. See 536 F.3d at 97 (characterizing any motion within scope of section 2255 as section 2255 motion regardless of title); *United States v. Winestock*, 340 F.3d 200, 203 (4th Cir. 2003) (warning courts must not allow circumvention of section 2255 limitations by prisoner's use of other labels).

29. 28 U.S.C. § 2255(h)(1)-(2) (2000); see also *Pratt v. United States*, 129 F.3d 54, 57 (1st Cir. 1997) (articulating savings clause requirements).

30. See *United States v. Barrett*, 178 F.3d 34, 50 (1st Cir. 1999) (describing section 2255 as adequate even when AEDPA standards not met); *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998) (qualifying postconviction relief as inadequate when it denies any opportunity for judicial rectification). *But cf.* *United States v. Keane*, 852 F.2d 199, 205 (7th Cir. 1988) (indicating punishment for act which law does not make criminal supports coram nobis motion).

31. 536 F.3d at 97 (reminding that Supreme Court preserved common-law writs despite section 2255); see also Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*, 30 AM. J. CRIM. L. 171, 222-23 (2003) (opining courts' readings of AEDPA's procedural hurdles strictly limit postconviction alternatives); Michael A. Millemann, *Collateral Remedies in Criminal Cases in Maryland: An Assessment*, 64 MD. L. REV. 968, 968 (2005) (categorizing coram

In *Trenkler v. United States*, the First Circuit Court of Appeals overturned the United States District Court for the District Court of Massachusetts's grant of the petitioner's coram nobis petition after categorizing the motion as a successive section 2255 appeal.³² The court determined that Trenkler did not meet the savings clause exceptions as to warrant a second bite of the section 2255 apple.³³ The court ruled that when a statute "specifically addresses a particular class of claims," it preempts any claim under the All Writs Act.³⁴ Because Trenkler was incarcerated and challenged the statutory authority of his sentence, he fell within the classic habeas corpus framework and the gatekeeping provisions of section 2255.³⁵ Further, the court determined that Trenkler "slept" on his rights with ample opportunity to correct any perceived wrongs in previous appeals.³⁶ Finally, the court noted that the writ of error coram nobis is usually available only to those defendants no longer in custody, making Trenkler's in-custody status an additional reason for quashing the writ.³⁷

By passing AEDPA, Congress attempted to limit proceedings under section 2255 through significant habeas corpus reform.³⁸ The resulting revisions provided strict gatekeeping provisions, which courts must enforce to implement faithfully legislative will.³⁹ AEDPA's rationale, however, was premised on the desire to curb guilty defendants' abusive use of the system to challenge their detention and custody.⁴⁰

Under this AEDPA framework, Trenkler was not challenging his detention or custody but rather the complete lack of authority for the judge's sentence.⁴¹ Trenkler did not wish to avoid his sentence altogether; rather, he requested a correction of his sentence because, absent a jury recommendation, the judge

nobis as remedy for those not in or under custody).

32. 536 F.3d at 97-98 (maintaining petition actually falls under purview of section 2255).

33. *Id.* at 98-99 (identifying claim as successive habeas petition, which did not meet either savings clause provisions).

34. *Id.* at 97 (cautioning section 2255 must control if it addresses particular claim at issue).

35. *Id.* at 97-98 (holding claim by prisoner in custody challenging sentence as unauthorized constitutes classic habeas corpus).

36. 536 F.3d at 99-100 (asserting Trenkler could have challenged sentence in prior reviews but "slept" on rights).

37. *Id.* at 98 (reasoning Trenkler's in-custody status as further reason for denial).

38. *See* FEDERMAN, *supra* note 26, at 158-61 (describing congressional intent to severely limit hearing of successive petitions).

39. *See* 536 F.3d at 99 (cautioning courts cannot reduce AEDPA's gatekeeping provisions to meaningless gesture); FEDERMAN, *supra* note 26, at 160-61 (outlining new gatekeeping provisions).

40. *See* FEDERMAN, *supra* note 26, at 158 (discussing congressional unrest over criminal release on technicalities rather than guilt or innocence).

41. *See* *Trenkler v. United States*, No. 06-12072-RWZ, 2007 U.S. Dist. LEXIS 11802, *9-10 (D. Mass. Feb. 20, 2007) (emphasizing court-imposed life sentence clearly violated federal statute). The district court further explained that Trenkler's position compared more to someone discovering evidence too late to prove actual innocence than to a petitioner who previously failed to raise known arguments seeking "another bite of the apple." *Id.* at *10.

imposed a life sentence in direct violation of the controlling statute.⁴² Therefore, under this case's specific facts, Trenkler's in-custody status should not have factored into the court's decision on his motion as long as he met the other coram nobis requirements.⁴³

No uniform custody requirement for coram nobis exists among jurisdictions.⁴⁴ This aspect of the First Circuit's understanding of coram nobis's modern form appears to stem from misanalogized law.⁴⁵ The seminal case resurrecting coram nobis, *United States v. Morgan*, involved a defendant challenging his sentence after serving it.⁴⁶ Since that decision, some courts have narrowly applied coram nobis by analogizing that it applies only to those with completed sentences.⁴⁷

Moreover, because section 2255 is available only to in-custody prisoners, those with served sentences may not challenge post-conviction consequences under the statute.⁴⁸ Declaring the opposite, i.e., only those *out of custody* can use coram nobis, however, commits a logical fallacy.⁴⁹ AEDPA does not address coram nobis requirements, so its legislative history does not support such restrictions.⁵⁰ Including this as one of its reasons for denying Trenkler's petition, the First Circuit Court of Appeals relies on a poorly reasoned justification that "sounds the death knell" for coram nobis availability in this circuit.⁵¹

42. See *Trenkler v. United States*, No. 06-12072-RWZ, 2007 U.S. Dist. LEXIS 11802, at *11 (D. Mass. Feb. 20, 2007) (summarizing merit of Trenkler's desire for correction of sentence from life imprisonment).

43. See *Trenkler v. United States*, No. 06-12072-RWZ, 2007 U.S. Dist. LEXIS 11802, at *11-15 (D. Mass. Feb. 20, 2007) (finding Trenkler met three requirements to apply for coram nobis relief).

44. Compare 536 F.3d at 98 (adopting that coram nobis available for defendant no longer in custody), with *Utah v. Rees*, 125 P.3d 874, 876 (Utah 2005) (considering in-custody petitioner's coram nobis petition).

45. See Hack, *supra* note 31, at 211 (explaining courts applying AEDPA to coram nobis without considering purpose ignore AEDPA's language). Hack also concedes that defendants regularly use coram nobis after their completed convictions, but the "contours of [the] writ" are subject to heated debate. *Id.* at 211-12.

46. See *United States v. Morgan*, 346 U.S. 502, 510-11 (1954) (holding section 2255 in-custody wording should not preclude coram nobis remedy).

47. See Hack, *supra* note 31, at 211-12 (noting since *Morgan* petitioners use coram nobis regularly after defendant completed sentence); Millemann, *supra* note 31 and accompanying text (outlining coram nobis for petitioners out of custody).

48. See Eclavea, *supra* note 23, § 2[b] (noting section 2255 not available to those not in custody).

49. ENCYCLOPAEDIA BRITANNICA ONLINE (2008), <http://www.britannica.com/EBchecked/topic/1442607/affirming-the-consequent> (defining the fallacy of "affirmation of the consequent"). This fallacy involves "the categorical proposition affirm[ing] the consequent of the conditional, and the conclusion affirm[ing] the antecedent," for example, "If John is a bachelor, then he is male. John is male. Therefore, John is a . . . [bachelor]." *Id.*

50. See *United States v. Barrett*, 178 F.3d 34, 56-57 (1st Cir. 1999) (highlighting situations where section 2255 inadequate for in-custody prisoners); *Triestman v. United States*, 124 F.3d 361, 380 n.24 (2d Cir. 1997) (maintaining possibility coram nobis available to in-custody defendant if section 2255 unavailable); Hack, *supra* note 31, at 211 (asserting application AEDPA without considering coram nobis purpose ignores common-law and AEDPA language).

51. See Hack, *supra* note 31, at 214 (stating courts decided no room for common-law coram nobis when section 2255 applies).

By enacting AEDPA, Congress wanted to curb abuses of the legal system. Ironically, in this decision, the First Circuit Court of Appeals makes it harder for incarcerated defendants with legitimate challenges to request that courts carry out the legislature's statutory will. The court has essentially held that the will of the legislature embodied in AEDPA trumps the will of the legislature embodied in the All Writs Act. Because both acts remain in force, and the legislature did not supersede the All Writs Act with its passage of AEDPA, the First Circuit has needlessly favored the jurisprudence of one legislative act over another.

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