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Petitioners for Federal Writ of Error Coram Nobis Must Show "Lingering Civil Disabilities" from Erroneous Conviction

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CASE COMMENTS

PETITIONERS FOR FEDERAL WRIT OF ERROR *CORAM NOBIS* MUST SHOW "LINGERING CIVIL DISABILITIES" FROM ERRONEOUS CONVICTION

United States v. Craig, 907 F.2d 653 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2013 (1991)

In *United States v. Craig*,[1] the Seventh Circuit refined its restrictive "lingering civil disabilities"[2] test to determine when petitioners seeking post-conviction relief may obtain writs of error *coram nobis*.[3] The court held that an individual who has served a sentence pursuant to an allegedly erroneous federal conviction may not obtain a writ vacating that conviction unless there exists "a concrete threat that [the] erroneous conviction's lingering disabilities will cause serious harm to the petitioner."[4]

In the 1970s, the Seventh Circuit upheld mail fraud convictions of the four *Craig* petitioners for their roles in a scandal in the Illinois General Assembly.[5] The government prosecuted these convictions under the intangible rights theory.[6] All four petitioners had completed terms of im-

1. 907 F.2d 653, *amended by* 919 F.2d 57 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2013 (1991) [hereinafter *Craig III*].

2. *Id.* at 657. The federal circuits are divided on whether petitioners for *coram nobis* relief must allege that their prior convictions have resulted in "lingering civil disabilities," i.e., adverse collateral consequences stemming from an erroneous conviction. What constitutes a legitimate disability further divides the circuits. *Id.* at 658-59. *See infra* notes 36-67 and accompanying text.

3. A writ of error *coram nobis* is a petition for post-conviction relief based on an "error assigned as a ground for reviewing, modifying, or vacating a judgement in the same court in which it was rendered." BLACK'S LAW DICTIONARY 543 (6th ed. 1990). *See infra* notes 12-29 and accompanying text.

4. 907 F.2d at 658.

5. *Id.* at 654. A ready-mix cement industry trade organization made bribes to secure passage of a bill increasing the permissible weight of cement trucks on Illinois roads. *See* United States v. Craig, 573 F.2d 455, 463-73 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978) [hereinafter *Craig I*].

6. Under this theory, courts analogized intangible interests, such as the right of citizens to honest government, to property rights. During the 1970s, federal prosecutors frequently used the intangible rights theory to prosecute individuals under the federal mail fraud statute for "devis[ing] or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" and using the mails to execute or attempt to execute such a scheme. 18 U.S.C. § 1341 (1988). *See also* M. Diane Duszak, Note, *Post-*McNally *Review of Invalid Convictions Through the Writ of* Coram Nobis, 58 FORDHAM L. REVIEW 979, 984-85 (1990). In *Craig I*, the indictment charging the petitioners with mail fraud alleged, *inter alia*, that they had devised a scheme to "defraud the State of Illinois, its citizens, its public officers, its public employees and the loyal, faithful and honest members of the Illinois Gen-

prisonment when, in 1987, the Supreme Court invalidated the intangible-rights theory in *McNally v. United States*.[7] Robert Craig and Frank P. North, Jr., two former members of the Illinois House of Representatives, Pete V. Pappas, a former attorney involved in the scandal, and the estate of former Illinois Senator Jack E. Walker sought relief from their mail fraud convictions in light of the *McNally* decision.[8]

The petitioners applied for writs of error *coram nobis* in the District Court for the Northern District of Illinois, arguing that their convictions were illegal and that the court should set them aside.[9] The court granted the writ to North and to the Walker estate.[10] The government and the unsuccessful petitioners appealed the decision to the Seventh Circuit, which held that the law did not entitle any of the petitioners to post-conviction relief because none had shown a "concrete threat that [his] erroneous conviction's lingering disabilities will cause serious harm to the petitioner."[11]

In federal criminal practice, the writ of error *coram nobis* is the only

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eral Assembly of their right to have the State's legislative business conducted honestly and impartially." *Craig I*, 573 F.2d at 462.

7. 483 U.S. 350 (1987). In *McNally*, the Court held that the federal mail fraud statute, 18 U.S.C. § 1341, protected only property rights. 483 U.S. at 360. In 1988, Congress added 18 U.S.C. § 1346 to the mail and wire fraud statutes, which makes loss of intangible rights cognizable as mail and wire fraud. Duszak, *supra* note 6, at 980 n.12. The *McNally* decision has prompted a spate of *coram nobis* and habeas corpus petitions in the federal courts from individuals convicted under the intangible rights theory. *See* Deborah Sprenger, Annotation, *Effect Upon Prior Convictions of* McNally v. United States *Rule that Mail Fraud Statute (18 U.S.C.S. § 1341) is Directed Solely at Deprivation of Property Rights*, 97 A.L.R. FED. 797, 802 (1990).

8. *Craig III*, 907 F.2d at 654.

9. Craig v. United States, 703 F. Supp. 730, 732 (N.D. Ill. 1989), *aff'd in part and rev'd in part*, 907 F.2d 653 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2013 (1991) [hereinafter *Craig II*].

10. *Id.* at 735. The district court agreed that *McNally* invalidated North's and Walker's mail fraud convictions. *Id.* at 731. *See supra* notes 6-7 and accompanying text. The court granted the writs to North and the Walker estate because their allegations met the Seventh Circuit's requirements for a "lingering civil disability" as set out in established Seventh Circuit precedent. *See infra* notes 47-58 and accompanying text. The prior conviction subjected North to the chance of incurring a myriad of potential disabilities attaching to convicted felons under Illinois law. 703 F. Supp. at 734. These disabilities included ineligibility to obtain certain licenses and the possibility of an enhanced sentence in the event of a future conviction. *Id.* Walker's widow was unable to collect a state pension as a result of her late husband's conviction. *Id.* at 734-35. However, the court did not grant the writ to Pappas or Craig because they had violated a second federal statute that would have precluded relief during their terms of imprisonment. *Id.* at 732. This holding reflects the requirement articulated by the district court and Seventh Circuit precedent, and inherent in the Seventh Circuit's recent refinement of *coram nobis* prerequisites, that the defect in a petitioner's conviction be "the type of defect that would have justified relief during the term of imprisonment." *Id.*

11. *Craig III*, 907 F.2d at 658.

recourse short of a presidential pardon available to persons who have already served terms of imprisonment pursuant to erroneous convictions.[12] At early common law, parties used the writ only to bring errors of fact before the court that had pronounced judgment.[13] In its modern form, however, the writ may issue to correct errors of fact or law.[14]

During the 1940s, a number of developments in federal law made unclear the availability of any post-conviction remedy in the nature of a writ of error *coram nobis* to those convicted of federal crimes.[15] In 1946, the Supreme Court promulgated Rule 35 of the Federal Rules of Criminal Procedure, which allows a district court to correct "an illegal sentence at any time."[16] Rule 35, however, addresses only those sentences illegally imposed pursuant to proper convictions.[17] In 1948, Congress enacted 28 U.S.C. § 2255, which authorized motions to vacate, set aside, or correct invalid convictions, and which effectively replaced the common-law writ of habeas corpus for federal prisoners.[18] However, a section 2255 motion requires that applicants be "in custody" at the time of filing.[19] It is clear that prisoners unconditionally released after serving

12. Brendan W. Randall, Comment, United States v. Cooper: *The Writ of Error Coram Nobis and the* Morgan *Footnote Paradox*, 74 MINN. L. REV. 1063, 1070 n.43 (1990). *See also* LARRY W. YACKLE, POST-CONVICTION REMEDIES §§ 41-51 (1981 & Supp. 1991).

13. Duszak, *supra* note 6, at 981-82.

14. *Id*. *See generally* YACKLE, *supra* note 12, §§ 9-10, 37-39.

15. YACKLE, *supra* note 12, § 37; Randall, *supra* note 12, at 1067. Congress expressly abolished the writ in federal civil practice in 1946. FED. R. CIV. P. 60(b). Rule 60(b) provides that "[w]rits of coram nobis, . . . are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." *Id*. In some states, however, the common-law writ of error *coram nobis* continues to be available in both civil and criminal cases. YACKLE, *supra* note 12, § 7.

16. FED. R. CRIM. P. 35.

17. Randall, *supra* note 12, at 1068 n.29. *See also* United States v. Morgan, 346 U.S. 502, 506 (1954).

18.

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255 (1988). Congress designed § 2255 to address problems in the administration of habeas corpus petitions. Because federal law directs petitions for habeas corpus to courts in the district of confinement, those federal districts near federal prisons experienced disproportionate pressure from a rising number of petitions. Section 2255 dispersed petitions by providing for a motion directed to the sentencing district. Randall, *supra* note 12, at 1073-74. The Supreme Court upheld § 2255's constitutionality in Swain v. Pressley, 430 U.S. 372 (1977).

19. YACKLE, *supra* note 12, § 50. The Supreme Court has expanded the notion of "custody"

federal sentences pursuant to invalid federal convictions do not meet section 2255's jurisdictional custody requirement.[20]

In *United States v. Morgan*,[21] the Supreme Court held that the common-law writ of error *coram nobis* was available to fill this apparent gap in federal post-conviction remedies. The petitioner in *Morgan* was serving a state prison term that the sentencing court had enhanced because of a prior federal conviction.[22] Alleging incompetent waiver of counsel in the prior federal proceeding, he sought an order voiding the federal conviction, for which he had long since served the sentence.[23] The district court, treating the proceeding as a section 2255 motion, dismissed the action for lack of jurisdiction because the applicant was no longer in custody under the federal sentence.[24] The Supreme Court, finding that no other remedy was available, held that the district court had jurisdiction to treat the petitioner's "application" as a motion in the nature of the common-law writ of error *coram nobis*.[25] The Court rejected the government's argument that Congress had intended to restrict other post-conviction remedies when it enacted section 2255,[26] and found the source of its power to grant the writ in the All Writs Act.[27] The Court did not enumerate the specific circumstances under which a court should grant or deny the writ, but stated that the writ should be an "extraordinary

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beyond physical imprisonment so that parolees and persons free on bail, for example, are "in custody" for purposes of habeas corpus and § 2255 relief. *Id.* §§ 42-43, 50. *See also* Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1001-03 (1985). Indeed, the "in custody" requirement has become less a rigid jurisdictional restriction than a tool for identifying "those restraints on individual liberty that are severe enough" to justify collateral review. YACKLE, *supra* note 12, § 42.

20. YACKLE, *supra* note 12, § 43.

21. 346 U.S. 502 (1954).

22. *Id.* at 504.

23. *Id.*

24. *Id.* at 503-04. The court of appeals reversed, holding that § 2255 did not supersede remedies in the nature of error *coram nobis*. *Id.* at 504.

25. *Id.* at 505.

26. *Id.* at 510. The Court found that § 2255's purpose was " 'to meet practical difficulties' in the administration of federal habeas corpus jurisdiction." *Id.* at 511 (quoting United States v. Hayman, 342 U.S. 205, 219 (1952)). *See supra* note 18. The Court further added that " '[n]owhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions.' " *Id.* (quoting *Hayman*, 342 U.S. at 219).

27. *Id.* at 506. The All Writs Act, dating from the Judiciary Act of 1789, provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1988). The dissent thought that the writ of error *coram nobis* neither aided the district court's jurisdiction nor was agreeable to the usages and principles of modern law. 346 U.S. at 515 (Minton, J., dissenting).

remedy [available] only under circumstances compelling such action to achieve justice"[28] or to correct errors "of the most fundamental character."[29]

Since *Morgan*, the circuit courts have developed a variety of conflicting prerequisites for obtaining the writ.[30] The writ is universally unavailable if the petitioner has not exhausted all statutory rights of review,[31] or if another remedy is available.[32] The petitioner may not relitigate an issue that she previously raised at trial or that she could have raised at that time through ordinary diligence.[33] Furthermore, courts will not hear an issue that would not have affected the original trial's outcome.[34] However, only some courts issue writs of error *coram nobis* if the convicting court based its decision on an indictment that no longer states a crime, while others refuse to issue the writ if the convicting court could have found the defendant guilty of another crime not stated in the indictment.[35] Yet, the most significant difference among the circuits is their treatment of what, if any, lingering consequences petitioners must show as a result of an invalid federal conviction to justify vacating sentences already served.[36]

The Ninth Circuit takes the least restrictive position. Petitioners need not show any specific adverse consequences that they presently suffer or

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28. 346 U.S. at 511.

29. *Id.* at 512 (quoting United States v. Mayer, 235 U.S. 55, 69 (1914)). The dissent argued against "resurrecting the ancient writ of error coram nobis from the limbo to which it presumably had been relegated by [Federal] Rule [of Civil Procedure] 60(b), . . . and 28 U.S.C. Section 2255." *Id.* at 513. The dissent further noted the lack of principled ways to limit the remedy. *Id.* at 519 (Minton, J., dissenting).

30. In United States v. Bush, 888 F.2d 1145 (7th Cir. 1989), the Seventh Circuit discussed conflicts among the circuits and called for the Supreme Court to put these disputes to rest, noting that the decision in McNally v. United States, 483 U.S. 350 (1987), has put pressure on a "formerly quiescent corner of the law." 888 F.2d at 1149.

31. Duszak, *supra* note 6, at 990.

32. *Id.* at 979. *See, e.g.*, Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir. 1987).

33. Duszak, *supra* note 6, at 979.

34. *Id.* at 979. *But see Hirabayashi*, 828 F.2d at 604 n.14 (despite other circuits' statements to the contrary, neither the Supreme Court nor the Ninth Circuit has imposed such a requirement). Finally, reasoning that post-conviction relief should not be more readily available to those out of custody than to those still serving sentences, the Seventh Circuit grants writs of error *coram nobis* if § 2255 would have entitled the petitioner to relief had she applied for it while in custody. United States v. Keane, 852 F.2d 199, 204 (7th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989). *See supra* note 18.

35. Duszak, *supra* note 6, at 987-89.

36. *See infra* note 46. *See generally* Duszak, *supra* note 6, at 986-87.

are likely to suffer in the future.[37] Indeed, the government carries the burden of proving that "there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."[38] Adverse consequences from the conviction must give the petitioner a stake in the litigation sufficient to satisfy the case or controversy requirement of Article III of the United States Constitution,[39] but the Ninth Circuit presumes that collateral consequences flow from any criminal conviction.[40] The court bases this presumption on the Supreme Court's decisions in *Pollard v. United States*[41] and *Sibron v. New York*,[42] which "acknowledged the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences."[43] In view of this "liberal presumption,"[44] petitioners can almost automatically satisfy the Ninth Circuit's civil disabilities requirement.[45]

37. United States v. McClelland, 732 F. Supp. 1534, 1537 (D. Nev. 1989), *rev'd on other grounds*, 941 F.2d 999 (9th Cir. 1991).

38. United States v. Walgren, 885 F.2d 1417, 1421 (9th Cir. 1989) (citing Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Sibron v. New York, 392 U.S. 40 (1968)).

39. *Hirabayashi*, 828 F.2d at 604.

40. *Id.* at 606.

41. 352 U.S. 354, 358 (1957) (presuming that "convictions may entail collateral legal disadvantages in the future").

42. 392 U.S. 40 (1968) (completion of sentence does not in itself render a criminal appeal moot).

43. *Hirabayashi*, 828 F.2d at 606 (quoting *Sibron*, 392 U.S. at 55). The Seventh Circuit explicitly criticizes the *Hirabayashi* court's reliance on these cases because "a direct appeal does not present the same finality concerns that arise on a petition for a writ of error coram nobis." *Craig III*, 907 F.2d at 659 n.3. Furthermore, the issue in *coram nobis* cases is not whether completion of a sentence renders them moot, but rather, "what conditions justify the expenditure of judicial resources." *Id.* The Supreme Court itself, however, relied on language from *Morgan* as support for its conclusions in both *Pollard* and *Sibron*: "Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected." United States v. Morgan, 346 U.S. 502, 512-13 (1954); *Pollard*, 352 U.S. at 358; *Sibron*, 392 U.S. at 54-55.

44. United States v. Walgren, 885 F.2d 1417, 1421 (9th Cir. 1989).

45. *Id.* (possible adverse effect on sentencing should a court convict petitioner of another crime in the future, or allow the impeachment of petitioner as a witness sufficient to allow petitioner to seek *coram nobis* relief); *Hirabayashi*, 828 F.2d at 607 (citing Miller v. Washington State Bar Ass'n, 679 F.2d 1313, 1318 (9th Cir. 1982)) (admonition in an attorney's permanent record for which he is professionally accountable would constitute sufficient adverse consequences to satisfy Article III requirements); Rewak v. United States, 512 F.2d 1184 (9th Cir. 1975) (inability to obtain desired employment sufficient to satisfy requirements). In *Hirabayashi*, the Ninth Circuit held that it could grant a writ of error *coram nobis* to a petitioner seeking to remove the collateral consequences of a misdemeanor conviction. 828 F.2d at 608. The court rejected the government's contention that "ordinary misdemeanors have no 'collateral consequences' and therefore are not subject to post-conviction attack absent some special legal disability." *Id.* at 605.

In 1942, a court had convicted the petitioner, a Japanese-American born in Seattle, for violating curfew and exclusion orders imposed on persons of Japanese ancestry on the West Coast during the

In contrast, most other circuits require petitioners to demonstrate that they have more at stake than removing a blot from their records.[46] The Seventh Circuit has developed the most complex and restrictive analysis

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Second World War. *See generally* Marc Hideo Iyeki, Note, *The Japanese American* Coram Nobis *Cases: Exposing the Myth of Disloyalty*, 13 N.Y.U. REV. L. & SOC. CHANGE 199 (1984-85). As a matter of conscience, Hirabayashi had refused to honor the curfew and to report for processing for exclusion from the West Coast because he believed racial prejudice motivated these orders. 828 F.2d at 593. The Supreme Court affirmed his convictions under the rationale that emergency conditions justified the curfew. Hirabayashi v. United States, 320 U.S. 81 (1943). The Court upheld the exclusion orders the following year in Korematsu v. United States, 323 U.S. 214 (1944). History has long since established the *Hirabayashi* decision's injustice. *See generally* Iyeki, *supra*. However, Hirabayashi's convictions stood until the Ninth Circuit granted his *coram nobis* petition in 1987 after a researcher uncovered documents indicating the government had suppressed evidence in obtaining his 1942 conviction. 828 F.2d at 593. *See also* Peter Irons, *Return of the "Yellow Peril,"* THE NATION, Oct. 19, 1985, at 361. In Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wash. 1986), the district court held that Hirabayashi's conviction for violating the exclusion order violated due process and ordered it vacated. The court further concluded that it would not vacate the curfew conviction because the conviction rested on a different legal foundation. *Id.* The Ninth Circuit disagreed and ordered the district court to vacate both convictions. 828 F.2d at 594.

The Ninth Circuit refused to adopt a per se rule that misdemeanor convictions carry no collateral consequences. *Id.* at 605. In its decision, the Ninth Circuit referred only to consequences that were personal to Mr. Hirabayashi. He had brought suit, however, to remove the stigma of disloyalty suffered by the entire Japanese-American population in the wake of the Supreme Court's decisions in Korematsu v. United States, 323 U.S. 214 (1944), Yasui v. United States, 320 U.S. 115 (1943), and Hirabayashi v. United States, 320 U.S. 81 (1943). In an article written before the 1987 decision of Hirabayashi's *coram nobis* appeal, Marc Hideo Iyeki describes the *coram nobis* lawsuits of Hirabayashi, Yasui, and Korematsu as "analogous to a class action waged on behalf of all former internees." Iyeki, *supra*, at 214-20. He argues that courts should characterize the social stigma of wartime disloyalty based on race that the entire Japanese-American population suffered as a cognizable legal disability giving rise to a case or controversy sufficient to avoid dismissal on grounds of mootness. *Id.* The Ninth Circuit ultimately resolved the mootness issue by refusing to adopt the per se rule that the government advanced. *Hirabayashi*, 828 F.2d at 605.

As a test for granting *coram nobis* relief, *Hirabayashi* articulated four requirements: "(1) a more usual remedy [must] not [be] available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character." *Id.* at 604.

46. *See, e.g.*, United States v. Keane, 852 F.2d 199, 203-04 (7th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989). Early cases in all circuits tended to characterize as moot petitions for writs of error *coram nobis* in which the petitioner did not indicate that she currently was suffering civil disabilities. For a comprehensive list of citations, see Romualdo P. Eclavea, Annotation, *Availability, Under 28 USCS § 1651, of Writ of Error* Coram Nobis *to Vacate Federal Conviction Where Sentence Has Been Served*, 38 A.L.R. FED. 617, 637 (1978 & Supp. 1991).

The Fourth Circuit agrees with the Ninth that petitioners need demonstrate no disability other than "fac[ing] the remainder of their lives branded as criminals." United States v. Mandel, 862 F.2d 1067, 1075 (4th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989). The Fourth Circuit's position on the criteria necessary for *coram nobis* relief may be even less restrictive than that of the Ninth Circuit. In *Mandel*, the dissent protested that the successful petitioner had not satisfied the fourth element of the *Hirabayashi* test. *See supra* note 45. A court had convicted Mandel, then Governor of Maryland, of mail fraud and racketeering under 18 U.S.C. §§ 1341, 1961 and 1962. The dissent argued

of the civil disabilities requirement for *coram nobis* relief. The seminal decisions in that circuit, *United States v. Keane*[47] and *United States v. Bush*,[48] both written by Judge Easterbrook, addressed the *coram nobis* petitions of former Chicago public officials convicted of mail fraud.[49]

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that his trial had been "replete with evidence of bribery and manipulation," and thus the error was not fundamental. 862 F.2d at 1079 (Hall, J., dissenting).

The Fifth and Eighth Circuits require a showing of collateral consequences, but have not given the matter extensive consideration in published opinions. For Fifth Circuit cases, see United States v. Bruno, 903 F.2d 393 (5th Cir. 1990) (remanding cases to the district court for a determination of collateral consequences without discussing what would be sufficient); United States v. Marcello, 876 F.2d 1147, 1154 (5th Cir. 1989) (a petitioner "must be absolved of the consequences flowing from his branding as a federal felon"); United States v. Hay, 702 F.2d 572 (5th Cir. 1983) (remanding cases to the district court for a determination of collateral consequences without discussing what would be sufficient); Puente v. United States, 676 F.2d 141 (5th Cir. 1982) (youth offender's inability to obtain certain types of employment constituted sufficient adverse collateral consequences); Cline v. United States, 453 F.2d 873, 874 (5th Cir. 1972) (a petitioner "must be able to show some present or prospective adverse effect from an unconstitutional conviction"). For Eighth Circuit cases, see Stewart v. United States, 446 F.2d 42 (8th Cir. 1971) (requiring showing of "outstanding adverse legal consequences"); McFadden v. United States, 439 F.2d 285, 287 (8th Cir. 1971) (same).

In United States v. Osser, 864 F.2d 1056, 1060 (3d Cir. 1988), the Third Circuit "hinted" that its is a restrictive view of the collateral disabilities requirement. *Craig III*, 907 F.2d at 659. A 1963 Third Circuit case held that the mere moral stigma of a guilty plea in a Mann Act prosecution would not support a petition for a writ of error *coram nobis*, but that denial of the right to vote would. United States v. Cariola, 323 F.2d 180 (3d Cir. 1963).

There are no recent Second Circuit civil disabilities cases, but older cases in that circuit, consistent with older cases in other circuits, generally treat civil disabilities as a prerequisite for Article III standing. *See* United States v. National Plastikwear Fashions, Inc., 368 F.2d 845 (2d Cir. 1966) (mere moral stigma of a conviction insufficient to meet redressability requirement); Goitia v. United States, 335 F. Supp. 1044 (S.D.N.Y. 1971) (no present controversy because offender could not derive any benefits from vacatur of conviction); United States v. Gernie, 228 F. Supp. 329 (S.D.N.Y. 1964) (court empowered to hear merits of petition because results of conviction might well persist); United States v. Oddo, 129 F. Supp. 564 (S.D.N.Y. 1955) (motion in the nature of a writ of error *coram nobis* presents no case or controversy because nullification of conviction would have no effect). *See also* Kyle v. United States, 288 F.2d 440 (2d Cir. 1961) (denial of right to vote is a substantial civil disability warranting treatment of a petition to vacate sentence brought under 28 U.S.C. § 2255 as a petition for writ of error *coram nobis*).

Neither the First nor the Sixth Circuit has decided the issue. In a post-*Craig III* decision, the First Circuit explicitly stated, "[w]e need not decide whether any such [collateral consequences] requirement applies in this circuit." United States v. Michaud, 925 F.2d 37, 39 n.1 (1st Cir. 1991). No Sixth Circuit *coram nobis* decisions exist in which collateral consequences were an issue. In Flippins v. United States, 747 F.2d 1089, 1091 (6th Cir. 1984), *cert. denied*, 481 U.S. 1056 (1987), the court explained that "[t]he writ of error coram nobis is available to a convicted criminal at any time following the entry of a judgment against him or her," and the basis for granting the writ is "demonstration of (1) an error of fact, (2) unknown at the time of trial, (3) of a fundamentally unjust character which probably would have altered the outcome of the challenged proceeding if it had been known." *Id.*

47. 852 F.2d 199 (7th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989).

48. 888 F.2d 1145 (7th Cir. 1989).

49. Thomas E. Keane had been chairman of the Chicago City Council's Finance Committee.

Both petitioners sought *coram nobis* relief based on *McNally*'s invalidation of the intangible rights doctrine,[50] but were unsuccessful because they did not advance sufficient civil disabilities.[51] In *Keane*, the court held that neither the reputational injury the petitioner had suffered nor the $27,000 fine he had paid were adequate civil disabilities.[52]

Bush's petition alleged that his conviction prevented him from obtaining high visibility public relations jobs.[53] The court denied relief because the petitioner's inability to obtain desired employment was merely a kind of reputational injury that granting a writ of error *coram nobis* could not redress.[54] The civil disability requirement, Judge Easterbrook explained, arises primarily out of the legal system's interest in the finality of judgments.[55] Collateral review pursuant to section 2255 is available to federal prisoners only because they are in custody.[56] However, "[t]he reason to bend the usual rules of finality is missing when liberty is not at stake."[57] Only a "custody-substitute," the court held, justifies revisiting a conviction for which the penalties have long since expired.[58]

In *United States v. Craig*,[59] the Seventh Circuit refined "what it means for a *coram nobis* petitioner to show that he still suffers from a civil disability."[60] After reviewing *Bush* and *Keane*,[61] the court held that a bona

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He and two friends formed a partnership to acquire title to land sold at property-tax-delinquency auctions. Keane then used his position to obtain special Finance Committee treatment of the parcels and to sell them at inflated prices to public agencies. *Keane*, 852 F.2d at 200-01. Earl Bush, Press Secretary to Mayor Richard J. Daley from 1955 to 1973, had not disclosed that he was a principal in the firm that held the display advertising concession at O'Hare Airport. *Bush*, 888 F.2d at 1145.

50. *See supra* notes 6-7 and accompanying text.

51. The court denied Keane's petition for "three independently sufficient reasons." *Keane*, 852 F.2d at 206. First, the indictment stated an offense. Second, Keane had fully aired his objection to the intangible rights theory at trial and on appeal. Third, he was not under a civil disability as a result of his conviction. *Id.*

52. *Id.* at 204.

53. *Bush*, 888 F.2d at 1148.

54. *Id.* at 1150.

55. *Id.* at 1149.

56. *Id.* at 1146.

57. *Keane*, 852 F.2d at 203.

58. *Bush*, 888 F.2d at 1146.

59. *Craig III*, 907 F.2d at 653.

60. *Id.* at 658. The court also considered the jurisdictional issue of whether to apply the time limits for appeals in criminal or civil cases. The court applied the latter and concluded it had jurisdiction under Federal Rule of Appellate Procedure 4(a). *Id.* at 655-57.

61. The court noted that the petitioners in *Keane* and *Bush* had been suffering adverse effects of erroneous convictions that did not rise to the level of civil disabilities in view of the more important "systematic interests in finality." *Id.* at 658. Neither the loss of a fine nor inability to obtain a desirable job, in short, presented "a concrete threat . . . [of] serious harm to the petitioner." *Id.*

fide civil disability must satisfy three elements: the disability must cause present harm, must arise out of the erroneous conviction, and the harm must be more than incidental.[62] The court explained that the facts in *Morgan* present the best example of a situation in which *coram nobis* relief is appropriate.[63] A petitioner serving an enhanced sentence in another jurisdiction because of an allegedly erroneous federal conviction asserts a disability that meets all three of the Seventh Circuit's requirements.[64] He suffers a present harm by languishing in jail.[65] The allegedly erroneous conviction directly caused the harm.[66] Finally, enduring a longer prison sentence is a "more than incidental" harm.[67]

Turning to the claims of the four *Craig* petitioners, the court held that none was entitled to relief.[68] The court disposed of the Walker estate's claim on preliminary jurisdictional grounds, holding that it was indistinguishable from Seventh Circuit precedent[69] establishing that a decedent's estate lacks standing to bring a *coram nobis* petition.[70] The court did not reconsider whether the petitioners' convictions were invalid under *McNally*.[71] Instead, the court denied relief to all three of the remaining petitioners because none had asserted sufficient civil disabilities.[72]

The court concluded that Pappas, the former attorney seeking reinstatement to the bar, advanced a sufficiently serious harm in the loss of an occupational license.[73] However, the court regarded the possibility of harm as merely speculative.[74] The court was not convinced Pappas sincerely intended to seek reinstatement, nor did it think his prospects for

62. *Id.* In footnote two, following the second element, the court commented that "this second requirement is also reflected in our rule that if an indictment states one valid offense, then no coram nobis relief is available, 'for a single felony conviction supports any civil disabilities.' " *Id.* at 658 n.2 (quoting *Keane*, 852 F.2d at 205).

63. *Id.* at 658.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* The court stated that other situations may present legitimate grounds for *coram nobis* relief, but gave no other examples. *Id.* The court also acknowledged that its position on civil disabilities is the most restrictive of all the federal circuits. *Id.* at 658-59.

68. *Id.* at 659.

69. United States v. Kerner, 895 F.2d 1159 (7th Cir. 1990).

70. *Craig III*, 907 F.2d at 657.

71. *Id.* at 660. The court also avoided the argument advanced on appeal that Pappas' and Craig's Travel Act convictions could not stand independent of their mail fraud convictions. *Id.*

72. *Id.* at 659.

73. *Id.*

74. *Id.* *See also Keane*, 852 F.2d at 204 (loss of high-visibility public relations job insufficient disability).

reinstatement were good because dishonest conduct alone could lead to disbarment.[75]

Craig and North were unsuccessful because they asserted past harms.[76] They argued that the court's removal of their convictions would entitle them to reinstatement in a legislators' pension plan and to receive pension benefits.[77] However, the court regarded their removal from the pension plan as "a sunk cost, much like a criminal fine."[78] In addition, Craig and North argued that their convictions had erroneously deprived them of their seats in the state legislature, an injury the court deemed "a classic example of a past harm that a writ of error *coram nobis* could not or should not remedy."[79]

All three petitioners combed Illinois statutes, some long since repealed, for disabilities convicted felons suffer.[80] This tactic worked for North in the district court,[81] but failed on appeal because the Seventh Circuit considered these disabilities speculative at best.[82] As to the possibility that the petitioners might be subject to sentence enhancement for future crimes, the court refused to recognize what amounted to an intention to commit future crimes.[83] Finding that no petitioner suffered sufficient lingering civil disabilities, the court affirmed the district court's denial of the writ of error *coram nobis* to Craig and Pappas, reversed the district court's judgment granting the writ to North, and remanded the petition of the Walker estate with instructions to vacate.[84]

In *United States v. Craig*, the Seventh Circuit correctly concerned itself with restricting the writ of error *coram nobis* to the deserving. As the Supreme Court held in *Morgan*, the writ of error *coram nobis* is an extraordinary remedy that should be available only in extraordinary situations.[85] However, the imposition of an independent civil disabilities re-

75. 907 F.2d at 659.

76. *Id.* at 660.

77. *Id.*

78. *Id.* *See Keane*, 852 F.2d at 203 (reiterating the "sunk cost" argument).

79. 907 F.2d at 660.

80. *Id.*

81. *Craig II*, 703 F. Supp. at 734.

82. *Craig III*, 907 F.2d at 660.

83. *Id.*

84. *Id.* Because it had failed to order a remand of the Walker estate's appeal to the district court for dismissal, the court issued an amended order for that purpose along with its denial of the petitioners' motion for rehearing. United States v. Craig, 919 F.2d 57 (7th Cir. 1990).

85. United States v. Morgan, 346 U.S. 502, 511 (1954). *See supra* notes 21-29 and accompanying text.

quirement is not an evenhanded way to limit its availability. First, the Seventh Circuit's civil disabilities requirement is contrary to sound public policy to the extent it favors repeat offenders over those who never offend again.[86] Second, while the court correctly disapproved of collateral attacks on judgments, it should more closely adhere to the Supreme Court's *Morgan* opinion and make the writ available in the presence of "fundamental error" and "circumstances compelling such action to achieve justice."[87]

The Seventh Circuit's civil disabilities test fails most petitioners because it takes into account only two interests: the judicial system's interest in finality of judgment and the individual's interest in removing the collateral consequences of an erroneous conviction.[88] Almost never will collateral consequences personal to the individual outweigh "systemic interests in finality."[89] When fairness requires, broader concerns should weigh into the balance, such as the gravity of the government's error in obtaining the original conviction and society's interest in ensuring that means exist to correct injustice.[90]

Finally, the Seventh Circuit deviated from *Morgan* without compelling justification insofar as *Morgan* requires neither a "custody substitute" nor a present disability.[91] In holding that section 2255 does not preclude *coram nobis* relief, the *Morgan* Court provided not merely for a narrow exception to section 2255's "in custody" requirement, but for a federal

86. When two petitioners seek to void equally erroneous convictions, this requirement would force the court to grant the writ to one who had committed a subsequent crime and deny it to one who had not. As the dissent in *Morgan* recognized, providing an avenue of collateral attack to individuals no longer in federal custody gave rise to problems of limitation: "The relief being devised here is either wide open to every ex-convict as long as he lives or else it is limited to those who have returned to crime and want the record expunged to lessen a subsequent sentence. Either alternative seems unwarranted." *Morgan*, 346 U.S. at 519 (Minton, J., dissenting). Nevertheless, in *Craig* the Seventh Circuit chose the latter alternative.

87. *Id.* at 511-12.

88. *Craig III*, 907 F.2d at 658.

89. *Id.*

90. The Seventh Circuit has criticized the Ninth Circuit's *Hirabayashi* decision for holding that "anyone may obtain *coram nobis* just to bask in the satisfaction of having his position vindicated." *Keane*, 852 F.2d at 204. Much more was at stake in *Hirabayashi*, however. The government had not merely erred in the original proceeding, but had actively misbehaved by suppressing critical evidence. *See supra* note 49. Moreover, by vacating the conviction of one wrongly convicted Japanese-American, the *Hirabayashi* decision served a societal need by showing that some means exist to vindicate the truth. While cases such as *Hirabayashi* are exceedingly rare, they demonstrate that a central failing of the Seventh Circuit's civil disabilities test is its subordination of every other consideration to the principle of finality.

91. *Craig III*, 907 F.2d at 658.

collateral remedy *without* a custody requirement.[92] As the "in custody" requirement itself is no longer a rigid jurisdictional hurdle in section 2255 actions,[93] imposing a rigid collateral consequences requirement parallel to section 2255's "in custody" requirement makes little sense. Moreover, to the extent that the Seventh Circuit's civil disabilities test justifies denial of a petition for a writ of error *coram nobis* if the petitioner has not asserted a sufficient injury or stake in the litigation, it represents a heightened standing requirement that has come unmoored from the Supreme Court's standing analysis.

Unquestionably, the issue remains how to limit the availability of the writ of error *coram nobis* only to those situations in which a fundamental error in an earlier federal proceeding has produced "circumstances compelling such action to achieve justice."[94] In *United States v. Craig*, the Seventh Circuit too narrowly interpreted this language by refining a test that favors, in virtually every case, "systemic interests in finality"[95] over the individual's often weighty interests in removing the collateral consequences of an erroneous conviction.

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92. *Morgan*, 346 U.S. at 511.

93. YACKLE, *supra* note 12, § 42. *See supra* notes 19-20 and accompanying text. If the *Craig* decision relies on the theory advanced in *Keane* and *Bush* that collateral relief is not justified without a "custody-substitute," *supra* notes 47-58 and accompanying text, the civil disabilities test is incongruent both with *Morgan* and with the "in custody" requirement. The Fourth Circuit made this argument in 1966 in Mathis v. United States, 369 F.2d 43 (4th Cir. 1966). The court explained:

> While in *Morgan* the defendant's status as a second offender constituted a "present imposition" flowing from the prior conviction, the Court did not expressly or impliedly lay down such a requirement for the granting of the writ. Indeed, to the extent that the "present imposition doctrine" is analogous to the "in custody" proviso of section 2255, the Court implicitly rejected it as a prerequisite to the grant of coram nobis by holding that Congress did not intend to restrict other post-conviction remedies by enacting section 2255.

Id. at 47. The Fourth Circuit added that "[e]ven in section 2255 cases the 'in custody' requirement has been consciously relaxed to reduce its impact upon prisoners having a just claim to relief." *Id.* at 48. Finally, the court concluded that, "[i]n light of these developments it would be anomalous at this date to read into coram nobis a stringent requirement that the petitioner show a 'present adverse effect.'" *Id.*

94. *Morgan*, 346 U.S. at 511.

95. *Craig III*, 907 F.2d at 658.