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ARTICLES

THE WRIT OF ERROR CORAM NOBIS IN CALIFORNIA

Morgan Prickett*

John Lawrence Welch killed two persons after he had consumed a substantial quantity of alcohol. At the commencement of his trial for murder, he withdrew his initial pleas of not guilty by reason of insanity and entered new pleas of guilty to two counts of murder stipulated to have been of the first degree. He was sentenced to death. The conviction was affirmed by the California Supreme Court.

Medical tests conducted while Welch was on Death Row disclosed that he had suffered severe organic brain damage as the result of a childhood illness. It was also determined that the consumption of alcohol aggravated Welch's physical brain damage, thereby precipitating episodes of violent conduct during which he was unable to recognize or understand the nature and consequences of his acts. If this information had been known at the time of trial, Welch would not have pleaded guilty to two counts of first degree murder.

The problem was how to bring the discovery of this new evidence to the attention of the courts. The obvious and ordinary methods were not available. The time within which a motion for a new trial could be made had elapsed. The remedy of a direct appeal from the judgment had been exhausted. But by petitioning for an esoteric extraordinary writ, Welch succeeded in having the judgment of conviction vacated and his pleas of not guilty by reason of insanity

• 1990 by Morgan Prickett.

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reinstated.¹

The formal designation of the remedy used by Welch is the writ of error *quae coram nobis resident*, more simply known as *coram nobis*. The name itself evokes common law antecedents dating back to the days of Norman feudalism and royal prerogative. Developed at a time when appeal was unknown, the writ provided a means whereby a judgment erroneous as to a vital issue of fact could be set aside. As adopted and employed by the courts of California, the common law features of the writ have been substantially modified in light of such statutory remedies as the motion for a new trial and the right to appeal. Before and after enjoying a sustained vogue during the 1940's and 1950's, primarily among criminal defendants seeking to have their convictions overturned, *coram nobis* has remained enconced in a comfortable obscurity. It is at present largely ignored in law schools and treatises.² Insofar as it is at all familiar to attorneys and judges, their acquaintance with the writ is most likely derived from either a dim and distant recollection of a droning professor's lecture or a casual glance at a long-forgotten text.

Coram nobis remains one of the stranger creatures of the law.³ Yet as Welch's example demonstrates, its antiquarian nomenclature should not cloud the fact that *coram nobis* retains a vital, albeit very closely confined, utility as the twentieth century draws to a close. Although hedged about with a daunting array of substantive and procedural restrictions, *coram nobis* is the only means available in a limited category of situations for mounting a collateral attack on a final judgment. For a party who discovers new evidence concerning a fact that existed at the time of trial which—without any sloth or negligence by the party—could not have been brought to the court's attention at any earlier time and that completely undermines the op-

1. *People v. Welch*, 61 Cal. 2d 786, 394 P.2d 926, 40 Cal. Rptr. 238 (1964). For the opinion on Welch's initial appeal, see *People v. Welch*, 58 Cal. 2d 271, 373 P.2d 427, 23 Cal. Rptr. 363 (1962).

2. With regard to some of the perfunctory references in some of the standard texts, see, e.g., J. HALL, B. GEORGE & R. FORCE, *CASES AND READINGS ON CRIMINAL LAW AND PROCEDURE* 1205 (3d ed. 1976); F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 674 (3d ed. 1985); Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 1577-78 n.h., 1634-35 pt. 3 (5th ed. 1980); 11 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2867 (1973).

3. The animalistic motif is a recurrent theme in treatments of *coram nobis*. With more wit than accuracy, one commentator compared it to the coelacanth in that "its origin is ancient and uncertain, and not many people seem to recognize it when they see it." Anderson, *Coram Nobis*, 4 IDAHO L. REV. 89, 89 (1967). A Kentucky judge once called *coram nobis* "the wild ass of the law." Anderson v. Buchanan, 292 Ky. 810, 822, 168 S.W.2d 48, 55 (1943) (Sims, J., dissenting). Surprisingly, no one has likened the writ to the extinct dodo.

ponent's case without contradicting any factual issue adjudicated at trial, *coram nobis* may be the remedy of last resort and the only way to spell relief.

Part I of this Article discusses the common law origins of *coram nobis*, its transition to this country, and its early usage in California. Part II examines the nature of the writ once that usage had become settled, with particular attention to the reductions of the common law scope of *coram nobis* effected by the emergence of statutory remedies for correcting errors of fact. Part III analyzes the formidable prerequisites that a petitioner⁴ for the writ must satisfy before relief may be granted. Part IV details the procedures for obtaining the writ from either a trial or an appellate court. Finally, Part V includes some observations as to the present utility of *coram nobis*.

I. HISTORY

A. Common Law Origins of Coram Nobis

As may be gathered from its antiquated appellation, the writ of error *coram nobis* is not indigenous to American shores. It is a creature of the common law of England, with ancestry reaching back to the sixteenth century.⁵ The right to move for a new trial or to appeal being unknown at common law, the writ of error evolved as a method for reviewing a judgment.⁶ The writ had two forms. The function of the ordinary writ of error was substantially analogous to that of the modern appeal: it brought up the record of a case in order

4. A word as to terminology. As will appear, a simple motion to vacate a judgment is nowadays treated as the functional equivalent of a petition for a writ of error *coram nobis*. See *infra* notes 78-79 and accompanying text. Less formal still, relief by *coram nobis* has also been described as being available upon mere application. See, e.g., *In re Watkins*, 64 Cal. 2d 866, 870, 415 P.2d 805, 808, 51 Cal. Rptr. 917, 920 (1966); *People v. Kraus*, 47 Cal. App. 3d 568, 573, 121 Cal. Rptr. 11, 15 (1975). For purposes of simplicity, the term "petition" will be used to designate the means by which the setting aside of a judgment is sought, and the person seeking such relief will be described as a "petitioner."

5. E. FRANK, *CORAM NOBIS* 1-2 (1953); L. YACKLE, *POSTCONVICTION REMEDIES* 36 (1981).

6. E. FRANK, *supra* note 5, at 1; *People v. Reid*, 195 Cal. 249, 254, 232 P. 457, 459 (1924); *People v. Lempia*, 144 Cal. App. 2d 393, 396, 301 P.2d 40, 42 (1956) *cert. denied*, 353 U.S. 916 (1957); *People v. Sica*, 116 Cal. App. 2d 59, 62, 253 P.2d 75, 77 (1953), *cert. denied*, 346 U.S. 831 (1953); *People v. Coyle*, 88 Cal. App. 2d 967, 971, 200 P.2d 546, 549 (1948), *cert. denied*, 337 U.S. 909 (1949), *reh'g denied*, 337 U.S. 934 (1949); see 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 213-15 (7th ed. 1956); 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 664-68 (2d ed. 1899); cf. 1 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 308 (1883) ("It is a characteristic feature in English criminal procedure that it admits of no appeal properly so called . . .").

that a higher court could review it for errors of law.⁷ The English historian Holdsworth stated that this form of the writ was "little used because the procedure upon it was cumbersome, and gave no useful result."⁸

Errors of fact were another matter. For them, the writs of error *coram nobis* and *coram vobis*⁹ became the remedy. A separate cor-

7. *Jaques v. Cesar*, 85 Eng. Rep. 776, 776-80 (K.B. 1668) (editorial note); H. STEPHEN, *PRINCIPLES OF PLEADING IN CIVIL ACTIONS* 246-50 (2d ed. 1901); 2 W. TIDD, *THE PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS IN PERSONAL ACTIONS* 1134-37 (9th ed. London 1828); Freedman, *The Writ of Error Coram Nobis*, 3 *TEMP. L.Q.* 365, 366-67 (1929); Moore & Rogers, *Federal Relief from Civil Judgments*, 55 *YALE L.J.* 623, 669 (1946); Orfield, *The Writ of Error Coram Nobis in Civil Practice*, 20 *VA. L. REV.* 423, 424 (1934); *Reid*, 195 *Cal.* at 254, 232 P. at 459.

8. 1 W. HOLDSWORTH, *supra* note 6, at 215. For demonstrations of just how cumbersome was the procedure attending the writ of error, see *Jaques*, 85 Eng. Rep. at 776-802; A. FITZHERBERT, *THE NEW NATURA BREVIVM* 44-49 (n.p. 1677); 2 W. TIDD, *supra* note 7, at 1134-87. Holdsworth explained why the writ offered only limited relief:

[T]he writ was defective in that it was both too wide and too narrow. Firstly, it was too wide because any error on the record, however trifling, was ground for a writ. . . . Secondly, the writ was too narrow, because it lay only for errors on the record. It might happen that the parties alleged matters upon which the judge pronounced a decision without entering that decision on the record. Because they were not entered on the record they could not, though both material and erroneous, be assigned as errors. . . . [A]s the record took no account of some of the most material parts of the trial, where error was most likely to occur—the evidence and the direction of the judge to the jury the writ could do nothing to remedy the only errors that were really substantial.

1 W. HOLDSWORTH, *supra*, note 6, at 223, 215-16 (footnote omitted).

9. The full names of the writs were *quae coram nobis resident* ("Let the record remain before us") and *quae coram vobis resident* ("Let the record remain before you"). The distinction between them was based upon the fictional presence of the monarch in the court of King's (or Queen's) Bench but not in the less august court of Common Pleas. Thus, when the writ was issued by the Lord Chancellor to the King's Bench, the sovereign's theoretical presence was reflected by use of the designation *coram nobis* ("before us"). When the writ was issued to Common Pleas, a tribunal where the majesterial footsteps never trod, the form used was *coram vobis* ("before you") because the writ was directed solely to the judges of that court. See *Jaques*, 85 Eng. Rep. at 777; 2 W. TIDD, *supra* note 7, at 1136-37; *Reid*, 195 *Cal.* at 254, 232 P. at 459.

In the heyday of its native habitat, an actual writ of error *coram nobis* would have been in something like the following form:

Writ of error, *coram nobis*, for Robert Jaques late of the City of Canterbury, in the county of the City of Canterbury, Esq. late sheriff of the said county at the suit of Augustin Cesar Doctor of Physick on a judgment in case, . . .

Charles the Second, by the grace of God, of England, Scotland, France, and Ireland, King, defender of the faith, &c. to our trusty and well-beloved Sir John Vaughan, Knt. our Chief Justice of our Bench, and our justices assigned to hold pleas in our court before us, greeting: Because in the record and proceedings, and also in the giving of judgment, in a plaint which was in our Court before you and your companions, our Justices of the Bench, by our writ between Augustin Cesar Doctor of Physick, and Robert Jaques late of the City of Canterbury, in the county of the City of Canterbury, Esq. late sheriff of the said

rective was established because of the common law distinction between the categories of factual and legal error. This subject matter dichotomy was strictly enforced by the rule that the two categories could not be commingled in a single proceeding.¹⁰ A proper consideration of *coram nobis* must therefore begin with an understanding of the concepts of “fact” and “error” comprehended by the writ at common law. Both had meanings different from their current imports.

An error of fact—or “error in fact” as it was more commonly known—had “nothing to do with findings of fact, weight of evidence, or [the] merits, and to assign error in fact ha[d] no resemblance to appealing on the facts.”¹¹ Error in fact was not synonymous with a mistake or an incorrect decision:

Where an *issue in fact* has been decided, there is . . . no appeal in the English law from its decision, . . . and its being wrongly decided is not *error* in that technical sense to which a writ of error refers. So, if a matter of fact should exist, which was not brought into issue, but which, if brought into issue, would have led to a different judgment, the existence of such fact does not, after judgment, amount to *error* in the proceedings. . . . But there are certain facts which affect the *validity and regularity of the legal decision itself*. . . . Such facts as these, however late discovered and alleged, are *errors in fact*, and sufficient to traverse the judgment upon writ of error. To such cases the writ of error *coram nobis* applies; “because the error in fact is not the error of the judges, and reversing it is not reversing their own judgment.”¹²

county, of a plea of 551. 10s. which the said Augustin demanded of the said Robert, as it is said, which said record and proceedings now remain before us, as it is said, manifest error hath intervened, to the great damage of the said Robert, as by his complaint we are informed; We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that, if judgment be thereupon given, then, the record and proceedings aforesaid being inspected, we may cause further to be done thereupon, for correcting that error, what of right, and according to the law and custom of England, ought to be done. Witness ourself at Westminster, the 26th day of October, in the 21st year of our reign.

See *Jacques v. Cesar*, 85 Eng. Rep. 773, 773-74 (K. B. 1668); W. TIDD, PRACTICAL FORMS AND ENTRIES OF PROCEEDINGS IN THE COURTS OF QUEEN'S BENCH, COMMON PLEAS, AND EXCHEQUER OF PLEAS 519 (8th ed. London 1840).

10. See *Burdett v. Wheatley*, 92 Eng. Rep. 91, 91 (K.B. 1720); *Jeffry v. Wood*, 93 Eng. Rep. 621, 621 (K.B. 1703); *Jacques*, 85 Eng. Rep. at 793; 82 Eng. Rep. 1023 (editorial note).

11. Gordon, *Certiorari and the Revival of Error in Fact*, 42 L. Q. REV. 521, 526 (1926). Moreover, “[I]t has nothing to do with a wrong conclusion upon evidence.” *Id.* at 521 n.1.

12. H. STEPHEN, *supra* note 7, at 247-48 (original emphasis; footnotes omitted) (quot-

The authorities unanimously agree that issuance of a writ of error *coram nobis* carried no connotation of fault or misfeasance.¹³

Coram nobis was available in both civil and criminal actions, providing relief from errors in fact relating primarily to either a defect of fundamental jurisdictional process or the capacity of a party.¹⁴ Issuance of the writ was discretionary in civil cases,¹⁵ but occurred in criminal actions only with the consent of Crown authorities.¹⁶ The error was required to be extrinsic to the record because "[a]s soon as error is disclosed by the record it ceases to be error in fact, and becomes error in law."¹⁷ Perhaps because use of the writ was infrequent,¹⁸ and the procedures involved were as complex as those at-

ing 2 W. TIDD, *supra* note 7, at 1136-37), *quoted in* Freedman, *supra* note 7, at 367.

13. 3 H. STEPHEN, *NEW COMMENTARIES ON THE LAWS OF ENGLAND* 642 (London 1844) ("for the matter of fact not being apparent on the face of the proceedings, there has been in reality no error, so far as the judges are concerned"); Amandes, *Coram Nobis—Panacea or Carcinoma?*, 7 HASTINGS L.J. 48, 49 (1955) ("Coram nobis was meant to correct errors that were the fault of no one in particular"); Gordon, *supra* note 11, at 526:

The complaint is not of an error in the decision, but of something that never came before the Court for decision, not of any mistake in the judgment, but that it was a mistake to proceed to judgment at all. Error in fact arises from matters which are not only outside the issues before the trial Court, but as to which ordinarily that Court does not inquire at all. (footnotes omitted).

This point was best made by an American commentator in 1924:

The writ was thus distinctive in that it required the reconsideration of a judgment by a court which had already made a final disposition of the cause; but it cast no aspersions on the competency or finding of the court in its first judgment, for it lay only to call up facts which were unknown to the court at the time of judgment and which were not inconsistent with the record.

Note, *The Writ of Error Coram Nobis*, 37 HARVARD L. REV. 744 (1924).

14. See, e.g., Freedman, *supra* note 7, at 372; Note, *supra* note 13, at 745; United States v. Morgan, 346 U.S. 502, 507 (1954); United States v. Plumer, 27 F. Cas. 561, 573 (C.C.D. Mass. 1859) (No. 16,056).

The most exhaustive compilations identify the following as errors of fact recognized by the common law as grounds for vacating a judgment:

1. Death of a plaintiff *pendente lite* prior to judgment.
2. Insanity.
3. Infancy.
4. Suit against a married woman protected by the doctrine of coverture.
5. An interest of the trial court not amounting to misconduct.
6. Defective service of process resulting in improper entry of a default or issuance of a writ of execution.
7. Execution on a judgment not yet entered or subject to supersedeas.

Gordon, *supra* note 11, at 524, 527-29; 2 W. TIDD, *supra* note 7, at 1135-37; *People v. Reid*, 195 Cal. 249, 255, 232 P. 457, 459 (1924).

15. See Note, *supra* note 13, at 746.

16. *Ex parte Newton*, 119 Eng. Rep. 323, 323-24 (Q.B. 1855); *In re Newton*, 139 Eng. Rep. 692 (C.P. 1855); *Regina v. Paty*, 91 Eng. Rep. 431, 431 (Q.B. 1705).

17. Gordon, *supra* note 11, at 525, n.22.

18. See E. FRANK, *supra* note 5, at 3; L. YACKLE, *supra* note 5, at 39. *Coram nobis* was ignored by Blackstone, see 3 W. BLACKSTONE, *COMMENTARIES* *406 (T. Cooley 3d ed.

tending the ordinary writ of error,¹⁹ *coram nobis* was eventually abolished by statute in Great Britain.²⁰

B. *The Early California Experience*

Coram nobis survived the common law's journey from England to the thirteen colonies and was retained in the jurisprudence of the fledgling United States.²¹ The initial California decisions relating to *coram nobis* are notable for the caution and tentativeness of the reception given the writ. A review of these decisions demonstrates that, although the transition from the common law of England to the code practice of California resulted in significant modifications as to the circumstances in which the writ would issue, judicial reservations were quickly overcome, and the governing rules soon became relatively settled.

The writ was first mentioned in a pair of civil cases decided during the 1880's. In *Ward v. Ward*,²² a default judgment had been entered against a party who had received defective notice of the action. The trial court ordered the judgment vacated. Affirming the order on appeal, the supreme court stated:

We have no doubt that the entry of a judgment by default in the absence of a notice in the summons, that in case the defendant failed to appear and answer within the time prescribed by law, the plaintiff would take judgment for the sum demanded in the complaint, was at least such an irregularity as would justify the Court in vacating the judgment. A judgment may now be vacated on motion for any of the matters for which a writ of *coram nobis* or an *audita querela* would formerly lie.²³

1884), and only fleetingly mentioned in Holdsworth's great history of the common law. 1 W. HOLDSWORTH, *supra* note 6, at 224.

19. See 1 T. CHITTY, ARCHBOLD'S PRACTICE OF THE COURT OF QUEEN'S BENCH 389-94 (7th ed. London 1840).

20. The writ was abolished for civil cases in 1852, Common Law Procedure Act, 1852, 15 & 16 Vict., ch. 76, § 148, and for criminal cases in 1907. Criminal Appeal Act, 1907, 7 Edw., ch. 23, § 20.

21. See generally 1 H. BLACK, LAW OF JUDGMENT 460-61 (2d ed. 1902); 3 W. BLACKSTONE, *supra* note 18 (editorial n.4); 3 W. BLACKSTONE, COMMENTARIES *406 (W. Jones ed. 1916) (editorial nn.4-5); 2 J. BOUVIER, INSTITUTES OF AMERICAN LAW 309-10 (1872); 5 ENCYCLOPAEDIA OF PLEADING AND PRACTICE 27-37 (1908); E. FRANK, *supra* note 5, at 4-10; 1 A. FREEMAN, LAW OF JUDGMENTS 128-29 (4th ed. 1898); R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 100-01 (1941); H. STEPHEN, *supra* note 6, at 246-50; Pickett's Heirs v. Legerwood, 32 U.S. (7 Pet.) 144, 147 (1833).

22. 59 Cal. 139 (1881).

23. *Id.* at 141. It has already been shown that defective service of process was one of the traditional common law grounds for granting relief in *coram nobis*. See *supra* note 14.

The writ of *audita querela* ("having heard the complaint") mentioned in *Ward* was a

The *Ward* court's intimation that a motion to vacate had displaced the function served by a petition for a writ of error *coram nobis* was consistent with general practice in the United States at the time.²⁴ Two years later, however, the court retreated from this suggestion. In *Phelan v. Tyler*,²⁵ one of the parties had died during the pendency of an appeal. The opposing party argued that the ensuing decision on the appeal was void because the reviewing court no longer had jurisdiction. The supreme court did not agree:

[The reason why,] in such cases, the judgment is simply erroneous, but not void, . . . is because the court having obtained jurisdiction over the party in his lifetime, is thereby empowered to proceed with the action to final judgment; and while the court ought to cease to exercise its jurisdiction over a party when he dies, its failure to do so is an error to be corrected on appeal if the fact of the death appears upon the record, or by writ of error *coram nobis* if the fact must be shown *aliunde*.²⁶

The next appearance of *coram nobis* was in *People v. Perez*,²⁷ a criminal case decided in 1908. Perez sought to have his robbery conviction vacated in *coram nobis* on the ground that his plea of guilty had been induced by fear of mob violence. His petition was denied by the trial court on the apparent ground that credible proof of the inducement had not been presented. The order was affirmed on appeal, the reviewing court holding that the claim of coercion had been properly rejected.²⁸ Two aspects of the *Perez* opinion are interesting. The first is the complete absence of any authorities, decisional or otherwise, cited by the court. The second is that the Attorney General unsuccessfully argued that "no such proceeding is known to our practice as an application for the writ of error *coram nobis*."²⁹ Both of these aspects of the *Perez* opinion are indicative of the general unfamiliarity with *coram nobis* then existing.

common law remedy which was a chronological complement to *coram nobis*. The function of the two writs was generally similar, except that *audita querela* extended relief because of factual matters occurring *after* judgment. See BLACK'S LAW DICTIONARY 120 (5th ed. 1979); 3 W. BLACKSTONE, *supra* note 18 *405-06; H. STEPHEN, *supra* note 7, at 249 n.3. *Audita querela* has been superseded by statute in California. *Eureka Casualty Co. v. Los Angeles Mun. Ct.*, 136 Cal. App. 261, 262, 28 P.2d 709, 710 (1934).

24. See *Bronson v. Schulten*, 104 U.S. 410, 416 (1881); *Pickett's Heirs*, 32 U.S. (7 Pet.) at 147; 1 A. FREEMAN, *supra* note 21, at 129.

25. 64 Cal. 80 (1883).

26. *Id.* at 82-83. The death of a party was another traditional ground for *coram nobis* intervention. See *supra* note 14.

27. 9 Cal. App. 265, 98 P. 870 (1908).

28. *Id.* at 266-67, 98 P. at 870-71.

29. *Id.* at 266, 98 P. at 870.

Perez was a harbinger of things to come. Thereafter, *coram nobis* would find its greatest use in the area of criminal proceedings.³⁰ Only rarely would it be seen as the chosen method for mounting a collateral attack on a civil judgment.³¹ This was a striking departure from its usage at common law, where the writ was more frequently employed in civil actions.³²

It was not until a decade after *Perez* that the supreme court began in earnest to formulate the terms and conditions whereby "the ancient writ of error *coram nobis*"³³ would be assimilated into the twentieth century law of California. The petitioner in *People v. Mooney*³⁴ was a prominent San Francisco labor figure who had been convicted of murder, principally on the testimony of two witnesses who connected him with the crime. After he was convicted and imprisoned, the damaging testimony of these witnesses was partially recanted and largely discredited.³⁵ Mooney petitioned to have his conviction vacated in *coram nobis*, relying on new evidence that this testimony was false and perjured. In the process of holding that the trial court had properly denied his petition, the supreme court enunciated several points which have become fundamental.

The first introduced the doctrine of statutory exclusion. The court noted that the scope of the writ at common law had been constricted and supplanted in corresponding measure by the statutory remedies of the motion for new trial and appeal:

30. As may be gathered from this usage, the overwhelming number of reported decisions regarding *coram nobis* do so within the context of criminal actions. Nevertheless, the general principles governing use of the writ are applicable to both civil and criminal matters. This is recognized by the courts, which unhesitatingly cite criminal decisions as precedent in civil actions. See, e.g., *In re Sprague*, 37 Cal. 2d 110, 230 P.2d 633 (1951); *Los Angeles Airways, Inc. v. Hughes Tool Co.*, 95 Cal. App. 3d 1, 156 Cal. Rptr. 805 (1979). Accordingly, unless the context demonstrates otherwise, the use and citation of criminal decisions in this Article should be understood as equally relevant to civil matters.

31. At the time *Perez* was decided, use of *coram nobis* in other states was largely found in the area of civil, not criminal, matters. See Orfield, *supra* note 7, at 427; Orfield, *Applicability of Writ of Error Coram Nobis in Nebraska*, 10 NEB. L. BULL. 314, 315 (1932); Comment, *Coram Nobis and the Convicted Innocent*, 9 ARK. L. REV. 118, 118 (1955).

32. See 3 W. BLACKSTONE, *supra* note 21 (editorial n.5).

33. *People v. Superior Court*, 4 Cal. 2d 136, 140, 47 P.2d 724, 726 (1935); *People v. Forbes*, 219 Cal. 363, 364, 26 P.2d 466, 466 (1933).

34. 178 Cal. 525, 174 P. 325 (1918).

35. The serpentine developments of the *Mooney* case, which led to a landmark decision by the United States Supreme Court, *Mooney v. Holohan*, 294 U.S. 103 (1935) (due process requires state to provide judicial process suitable for correcting conviction based on deliberate use of perjured testimony by state officers), and eventually culminated with an unconditional pardon granted Mooney in 1939 by the governor of California, are ably recounted in C. GENTRY, *FRAME-UP* (1967).

[W]here remedies exist by statute which did not exist at common law, the office and function of the writ are abridged thereby, and in such cases the writ is unavailable. These remedies are the right to appeal and to make a motion for a new trial, and, where they are provided by statute, to that extent an application for a writ of *coram nobis* cannot be entertained. It is in those cases where the defendant has been denied a trial upon the merits, in other words, where there has been no trial at all, that relief of this kind may be granted. In such cases it is obvious that the statutory remedies have no application and that defendant is wholly without remedy; and it is upon that theory that we look to the common law to provide a remedy.³⁶

The court also unveiled the concept that *coram nobis* "does not lie to . . . contradict or put in issue any fact directly passed upon" during the course of previously completed proceedings.³⁷ With respect to the precise claim before it, the court held that

[T]he truth or falsity of the testimony of the witnesses . . . was a part of the issue submitted to the jury, and that issue, upon the return of the verdict, became an adjudicated issue of fact which cannot now by the writ of *coram nobis* be readjudicated. The remedy in such case is by motion for a new trial, and if newly discovered evidence is too late in its production, its consideration cannot be brought about under the guise of a motion to vacate the judgment. . . . The defendant in such case is without remedy.³⁸

The final and most significant of the early California decisions respecting *coram nobis* came six years later in *People v. Reid*.³⁹ Clarence Reid had been convicted of murder and sentenced to death. He petitioned for *coram nobis* relief on the basis of affidavits in which several of the jurors at his trial declared that they would not have voted for the death penalty had they not been advised by the trial judge that "life imprisonment was generally not over ten years."⁴⁰ The trial court denied Reid's petition and the supreme court affirmed.

Reid is significant for the court's reiteration and development of its earlier language in *Mooney* concerning the displacement of com-

36. *Mooney*, 178 Cal. at 529, 174 P. at 327.

37. *Id.* at 528, 174 P. at 326.

38. *Id.* at 529, 174 P. at 327.

39. 195 Cal. 249, 232 P. 457 (1924).

40. *Id.* at 252-53, 232 P. at 458-59.

mon law *coram nobis* by the existence of statutory remedies.⁴¹ As the court saw it, the basis of Reid's petition was an irregularity which could have been raised and corrected by one of these remedies, specifically a motion for new trial. That such a motion was not made because Reid did not learn of the irregularity until after the statutory period for making the motion had elapsed did not furnish a ground for evading the exclusivity of the statutory remedy and reverting to common law practice. Reiterating what it had said in *Mooney*, the court stated:

Where the legislature has provided a statutory remedy which supplants in whole or in part a corresponding common-law remedy and has appended thereto a statute of limitations different from that which governs the common-law remedy, there is presented the situation of a conflict between the common law and the statute, in which case the latter must prevail. To hold in such case that after the expiration of the statutory limit the common-law remedy could still be availed of would be to hold in effect that in case of conflict between the two the common law prevails over the statute. This question . . . is settled in

41.

The ordinary writ of error afforded to a considerable extent the remedy now available by appeal and the writ of error *coram nobis* to a very limited extent the remedy now available upon motion for new trial. As these new remedies have come into existence by statutory enactment they have supplanted this ancient writ as to so much of its former scope as is comprehended in and covered by the statutory remedies. . . . [I]t follows that the common-law remedy has been supplanted and excluded by the statutory remedy in all cases to which the latter is applicable. All of the cases which have come to our attention concur in the conclusion that the writ will not issue for any cause for which the statute provides a remedy and that its functions are strictly limited to an error of fact for which the statute provides no other remedy. In *Sanders v. State*, 85 Ind. 318 [1882] . . . the leading American case upon this subject, the supreme court of Indiana, after an exhaustive consideration of the subject, summed up its conclusions upon this point as follows:

It is our opinion that the courts have the power to issue writs in the nature of the writ *coram nobis*, but that the writ cannot be so comprehensive as at common law, for remedies are given by our statute which did not exist at common law—the motion for a new trial and the right of appeal—and these very materially abridge the office and function of the old writ.

Id. at 255-56, 232 P. at 460.

Sanders v. State was indeed the most important American decision dealing with *coram nobis*, and it was relied upon by California courts before they developed a coherent body of law governing the usage of the writ. See *People v. Cabrera*, 7 Cal. 2d 11, 13, 59 P.2d 804, 804 (1936); *People v. Superior Court*, 4 Cal. 2d 136, 149, 47 P.2d 724, 730-31 (1935); *Reid*, 195 Cal. at 256-57, 259, 232 P. at 460-61; *Mooney*, 178 Cal. at 529, 174 P. at 327; *People v. Vernon*, 9 Cal. App. 2d 138, 140-41, 49 P.2d 326, 327 (1935). Despite its undoubted influence, *Sanders* has been severely criticized as distorting the true function of *coram nobis*. See *Amandes*, *supra* note 13, at 53-55.

this state by *People v. Mooney*. . . . We conclude, therefore, that the existence of a statutory remedy for the wrong here complained of by motion for a new trial precludes a resort to the common law in this behalf. . . .

The maxim, "for every wrong there is a remedy" . . . is not to be regarded as affording a second remedy to a party who has lost the remedy provided by law through failing to invoke it in time—even though such failure accrued without fault or negligence on his part.⁴²

The court also made it clear that Reid would not be entitled to relief even if the common law practice was followed. The basis for the petition was the possibility of misconduct, which is an issue of law and not of fact. The scope of common law *coram nobis* being strictly confined to correcting errors of fact,⁴³ the writ would still have to be withheld because "[i]t never issues to correct an error of law. . . ."⁴⁴

Taking *Mooney* and *Reid* to their logical conclusion, the supreme court stated in 1935 that "the remedial provisions of modern statutes and procedure provide every relief that could be granted under the ancient writ."⁴⁵ If intended as a funeral eulogy for *coram nobis*, this statement was speedily retracted. Two years later the court backtracked partially, content to observe that although the writ was "practically obsolete," it did retain a limited scope of "rare applicability."⁴⁶ As will be shown shortly, the imperialistic view of *Mooney* and *Reid* concerning the degree of statutory exclusion has been replaced by emphasizing alternate approaches which have yielded results which are in practice almost as effective in preserving judgments as the short-lived absolutist rule.

Also in 1935 a court remarked that *coram nobis* had fallen into "relatively recent disuse."⁴⁷ However accurate this statement may have been at the time it was made, events almost immediately made it derisory. *Coram nobis* became extremely fashionable, at least in one area. Petitions for the writ in criminal cases started coming fast and furiously. The trickle of criminal cases that began with *Perez*,

42. *Reid*, 195 Cal. at 257-58, 260, 232 P. at 461.

43. See *supra* note 12 and accompanying text.

44. *Reid*, 195 Cal. at 258, 232 P. at 461. It is somewhat surprising that no California decision prior to *Reid* had made reference to this most elemental principle limiting *coram nobis* at common law.

45. *People v. Superior Court*, 4 Cal. 2d 136, 140, 47 P.2d 724, 726 (1935) (emphasis added).

46. *People v. Lumbley*, 8 Cal. 2d 752, 755, 68 P.2d 354, 355 (1937).

47. *People v. Vernon*, 9 Cal. App. 2d 138, 141, 49 P.2d 326, 327 (1935).

Mooney, and Reid increased geometrically with each succeeding decade. By the 1940's the trickle had swelled to a cascade. By the 1950's the cascade had become a torrent. Courts at all levels struggled to cope with the mushrooming volume of *coram nobis* petitions from inmates seeking to have their convictions set aside. The flood of petitions resulted in an inevitable amount of confusion as judges grappled with the novel proceeding.⁴⁸ Confronted by the growing popularity of the writ, judicial dismay increasingly gave way to outspoken irritation.⁴⁹ Throughout this period, the rules governing *coram nobis* remained relatively stable, although certain modifications were effected both by the supreme court⁵⁰ and by the legislature.⁵¹ The only

48. At least one court freely confessed to having misunderstood the nature of the writ:

The use of *coram nobis* has been somewhat abused since the writ has come into use in California. In some instances the courts, instead of definitely determining whether it was applicable to the particular case, have assumed, without deciding, that it applied. We did it in *People v. Dale*

People v. Coyle, 88 Cal. App. 2d 967, 970, 200 P.2d 546, 549 (1948).

49. The following statements are representative of the mounting judicial annoyance: "The frequent resort to a petition for this writ in recent years persuades one that those, who have been convicted of crime, have come to look upon it as a remedy which can work magic merely by reason of its invocation." *People v. Pryor*, 87 Cal. App. 2d 352, 353, 196 P.2d 948, 949 (1948) (quoting *People v. Moore*, 9 Cal. App. 2d 251, 253, 49 P.2d 615, 616 (1935)); "It would be a salutary thing if the applicants for this writ could be made to understand its narrow scope." *People v. Mendez*, 144 Cal. App. 2d 500, 503, 301 P.2d 295, 297 (1956) (quoting *People v. Ayala*, 138 Cal. App. 2d 243, 245, 291 P.2d 517, 518 (1955)); "[T]he instant appeal is another contribution to the swelling stream of such applications which engage the attention of our trial and appellate courts." *People v. Price*, 162 Cal. App. 2d 196, 196, 328 P.2d 467, 467 (1958); see *Ayala*, 138 Cal. App. 2d at 245, 291 P.2d at 518; "This is another case in which the appellant has misconceived the scope of the requested relief" *People v. Waldo*, 224 Cal. App. 2d 542, 545, 36 Cal. Rptr. 868, 869 (1964); see *Mendez*, 144 Cal. App. 2d at 502-03, 301 P.2d at 297.

50. For example, in *People v. Superior Court*, 4 Cal. 2d 136, 47 P.2d 724-25 (1935), the court had held that an order erroneously granting a petition for a writ of error *coram nobis* was not appealable by the People but could be annulled on certiorari. *Id.* at 151, 47 P.2d at 731. Nine years later the court reversed itself and concluded that such an order was appealable. *People v. Gilbert*, 25 Cal. 2d 422, 444, 154 P.2d 657, 668 (1944). *Coram nobis* proceedings were initially treated as having no connection with the underlying trial, *Superior Court*, 4 Cal. 2d at 151, 47 P.2d at 731, but this position was repudiated when such proceedings were subsequently deemed to be an integral continuation of the original case. *In re Paiva*, 31 Cal. 2d 503, 509-10, 190 P.2d 604, 608-09 (1948). Similarly, the court had early on intimated that it would conform to the common law practice of refusing to allow *coram nobis* to be used to attack a judgment which had been affirmed on appeal. *People v. Reid*, 195 Cal. 249, 260, 232 P. 457, 462 (1924); see 5 THE ENCYCLOPAEDIA OF PLEADING AND PRACTICE 29 (1896). This dictum was also discarded in *Gilbert*, 25 Cal. 2d at 444, 154 P.2d at 668.

51. Soon after the courts accepted that *coram nobis* would lie to challenge a judgment which had been affirmed on appeal, see *supra* note 50, this right was codified when in 1949 the Legislature amended Penal Code section 1265 to provide in pertinent part:

[I]f a judgment has been affirmed on appeal no motion shall be made or proceeding in the nature of a petition for a writ of error *coram nobis* shall be brought to procure the vacation of said judgment, except in the court which

major difficulty continued to be that of volume. But by the 1960's, even this problem had abated.

II. THE MODERN NATURE OF CORAM NOBIS

By 1950 *Coram nobis* had lost most of its alien quality. The applicable principles were known, accepted, and routinely applied by the courts. With one partial exception, these principles have survived unchanged to the present day.⁵² The process of accommodating the common law writ to California practice had been completed. After showing that the restrictive emanations of *Mooney* and *Reid* can be dissipated, the general nature of the writ of error *coram nobis* in its modern form will be examined.

Mooney marked the supreme court's first indication that one of the rare remaining situations where *coram nobis* relief would still be available to redress errors of fact was in instances where "there has been no trial at all,"⁵³ a point reiterated in *Reid*.⁵⁴ The clear implication from a literal reading of such statements is that issuance of the writ might be limited to vacating judgments entered following pleas of guilty in criminal cases or defaults in civil cases. Notwithstanding the obviousness of this implication, it has not been accepted. *Coram nobis* will, upon a proper showing, be ordered to set aside judgments entered even if there has been a plenary trial on the merits.⁵⁵

More fundamental still are the implications of *Mooney* and *Reid* concerning the writ's common law scope as it has been displaced by statutory remedies. The sweeping language proclaiming that the abstract availability of any statutory remedy capable of addressing a purported error of fact—without regard to when evidence of the error is actually first discovered—determines whether the error can be reached by *coram nobis*,⁵⁶ has not stood the test of time

affirmed the judgment on appeal. When a judgment is affirmed by a district court of appeal and a hearing is not granted by the Supreme Court, the application for the writ shall be made to the district court of appeal.

CAL. PENAL CODE § 1265 (West 1982). The current version, which is substantially identical, constitutes the sole express statutory reference to *coram nobis*.

52. The only significant change, announced by the supreme court in 1965, is that an indigent petitioner in a criminal case is entitled to be represented by appointed counsel if he has demonstrated a prima facie entitlement to relief in the petition. *People v. Shipman*, 62 Cal. 2d 226, 397 P.2d 993, 42 Cal. Rptr. 1 (1965). See *infra* note 283.

53. *People v. Mooney*, 178 Cal. 525, 529, 174 P. 325, 327 (1918), quoted at *supra* text accompanying note 36.

54. *Reid*, 195 Cal. at 257, 232 P. at 460.

55. See, e.g., *Rollins v. City & County of San Francisco*, 37 Cal. App. 3d 145, 112 Cal. Rptr. 168 (1974); *People v. York*, 272 Cal. App. 2d 463, 77 Cal. Rptr. 441 (1969).

56. See *Reid*, 195 Cal. at 257-58, 232 P. at 460-61, quoted at *supra* text accompanying

and experience. This language, if literally construed and applied, would eviscerate *coram nobis* of all utility and would entail its virtual disappearance. Obviously, this has not occurred, although the court may have briefly entertained this intention.⁵⁷ If the court did have this objective, the fact that this implication has not been subsequently mentioned or developed can be taken as tacit acquiescence in the writ's retention of a limited function.

That function is to bring to the attention of a court errors of fact which could not have been discovered by the petitioner at an earlier date, and which if known to the court at the time would have prevented entry of the judgment.⁵⁸ The nature of errors of fact which would prevent entry of a judgment need not necessarily implicate the ultimate substantive issue of the litigation.⁵⁹ Certain errors of fact (such as lack of jurisdiction or the failure to effect service of process) require the setting aside of a judgment even though they have little bearing upon guilt or liability. This is clearly so with respect to matters which obviated the need for a trial. The supreme court indicated in *Reid* that relief would not be denied in situations such as where "default was entered against a defendant who had not been served with summons, and who [thus] had no notice of the proceeding," or where "a plea of guilty was extorted through fear of mob violence"⁶⁰ did not result in a formal adjudication of the merits. The circumstances in which the error manifests itself do, however, have an impact on whether the judgment is to be vacated. *Coram nobis* is more easily issued in cases of a tainted guilty plea or a default judgment because the error of fact "in effect deprived the petitioner of a trial upon the merits."⁶¹ Attempts to set aside these types of judgments will have a greater likelihood of success because they do not entail vitiating a substantial amount of judicial labor, nor is there a conflict with the principle that *coram nobis* will not permit a new examination of factual issues which have already been adjudicated.⁶²

As evidenced by the multiplicity of standards, matters are decidedly more complex if the judgment targeted for extinction involves substantive topics of adjudicated fact. Subsumed within the general

note 42; *Mooney*, 178 Cal. at 529-30, 174 P. at 327.

57. See *supra* notes 45-46 and accompanying text.

58. E.g., *People v. Shipman*, 62 Cal. 2d 226, 230, 397 P.2d 993, 995, 42 Cal. Rptr. 1, 3 (1965); *People v. Tuthill*, 32 Cal. 2d 819, 821, 198 P.2d 505, 506 (1948); *Reid*, 195 Cal. at 255, 232 P. at 459.

59. See *infra* Part III.C.

60. *Reid*, 195 Cal. at 259, 232 P. at 461.

61. *Id.* at 258, 232 P. at 461. See *infra* text accompanying note 335.

62. See *infra* note 205.

test of vacating only for those errors of fact which would have prevented entry of the judgment are more particularized criteria evaluating the petitioner's newly discovered evidence to determine whether it points "unerringly" to innocence or "undermines the entire case" of the opposing party.⁶³ These criteria direct the judicial attention not just to the presence of error, but also to the broader question of the error's impact in light of the total record of the previous trial on the merits.⁶⁴ The *coram nobis* petitioner, like any appellant, must not only establish error, but go on to demonstrate that the error was prejudicial. This dual inquiry obviously involves an element of speculation as to the effect of the error, yet it is no different than the everyday appellate task of determining whether any other type of error requires reversing a judgment.⁶⁵

With one significant exception, the fact on which the petition is based must be extrinsic to the record.⁶⁶ The category of factual errors which may qualify for relief in *coram nobis* is quite limited, not only because all errors of law are obviously excluded, but also because all errors of fact which were, could have been, or should have been reviewed using any statutory remedy are likewise excluded.⁶⁷ A court lacks jurisdiction to consider *coram nobis* petitions that are based upon issues which are cognizable and correctable by a statutory remedy.⁶⁸ Certainly the same is true with respect to petitions

63. See *infra* note 213 and accompanying text.

64. See *infra* note 261.

65. With the exception of federal constitutional error, which has no application to *coram nobis*, the California Constitution commands reversal of a judgment only if "after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." CAL. CONST. art. VI, § 13 (1966). The judicial formulation for this standard's application was stated in *People v. Watson*, 46 Cal. 2d 818, 299 P.2d 243 (1956): "[A] 'miscarriage of justice' should be declared only when the court, after an examination of the entire cause, including the evidence, is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." *Id.* at 836, 299 P.2d at 254.

66. *E.g.*, *People v. Tuthill*, 32 Cal. 2d 819, 821, 198 P.2d 505, 506 (1948); *People v. Reid*, 195 Cal. 249, 255, 232 P. 457, 459 (1924); *People v. Goodspeed*, 223 Cal. App. 2d 146, 152, 35 Cal. Rptr. 743, 747 (1963); see *supra* text accompanying note 17.

The exception to this general rule is that *coram nobis* can reach certain errors going to jurisdiction. See *infra* notes 164-66 and accompanying text.

67. *E.g.*, *People v. Thomas*, 52 Cal. 2d 521, 527, 529, 342 P.2d 889, 892, 893 (1959); *In re Sprague*, 37 Cal. 2d 110, 114-15, 230 P.2d 633, 636-37 (1951); *Reid*, 195 Cal. at 260, 232 P. at 450, 461; *People v. Roessler*, 217 Cal. App. 2d 603, 605, 31 Cal. Rptr. 684, 685 (1963); *People v. Middleworth*, 172 Cal. App. 2d 619, 621, 342 P.2d 348, 350 (1959); *People v. Sharp*, 157 Cal. App. 2d 205, 207, 320 P.2d 589, 590 (1958); see *Page v. Insurance Co. of N. Am.*, 3 Cal. App. 3d 121, 128-30, 83 Cal. Rptr. 44, 48-49 (1969).

68. *E.g.*, *People v. Kerr*, 113 Cal. App. 2d 90, 94, 247 P.2d 927, 929 (1952); *People v. Ward*, 96 Cal. App. 2d 629, 633, 216 P.2d 114, 117 (1950); *People v. Russell*, 139 Cal. App.

raising issues already considered in connection with a statutory remedy.⁶⁹

This matter of statutory exclusion is one of the least understood aspects of *coram nobis*. Statements are often made that the common law scope of the writ has been supplanted in large part by statutory remedies, but these comments possess the capacity for engendering dangerous confusion. Their obvious and unexceptional meaning is that statutory remedies such as motion for new trial and appeal have, by reason of their enactment by a democratically-elected legislature, an intrinsic authority superior to that attending an obscure procedure created centuries ago by appointed royalist judges.⁷⁰ With this there is no quarrel. But inquiry must extend further. Even at common law, *coram nobis* had no application until a judgment was made. Such statutory remedies as motions for new trial or arrest of judgment, which generally operate prior to the entry of a judgment,⁷¹ should thus entail only minimal diminution of the writ's post-judgment common law scope.

Accordingly, the real essence of these statements should be perceived as one of timing. If a party obtains newly discovered material evidence, the new trial motion statutes for both civil and criminal actions furnish a means whereby it can be brought to the court's attention.⁷² A party who possesses such evidence, but who fails to bring it forward during the statutory period within which a new trial motion can be made, is not permitted to use *coram nobis* as a substitute for his or her earlier inaction. Use it or lose it. This is how the policy of statutory exclusion works.⁷³ *Coram nobis* takes

417, 419, 34 P.2d 203, 204 (1934); see *People v. Carkeek*, 35 Cal. App. 2d 499, 505, 96 P.2d 132, 135 (1939).

69. See *People v. Hanks*, 35 Cal. App. 2d 290, 300, 95 P.2d 478, 484 (1939); *Russell*, 139 Cal. App. at 418, 34 P.2d at 203.

70. See *supra* notes 41-42 and accompanying text.

71. In criminal actions, a new trial motion must be made before the judgment is entered. CAL. PENAL CODE § 1182 (West 1985). The same is true for a motion in arrest of judgment. *Id.* §§ 1185-86. The latter is, apart from appeal and new trial, the statutory remedy most often mentioned. See *People v. Knight*, 73 Cal. App. 2d 532, 535, 166 P.2d 899, 900 (1946); *People v. McVicker*, 37 Cal. App. 2d 470, 472, 99 P.2d 1110, 1111 (1940); *People v. Butterfield*, 37 Cal. App. 2d 140, 142, 99 P.2d 310, 311 (1940); *People v. Lyle*, 21 Cal. App. 2d 132, 136, 68 P.2d 378, 380 (1937); *People v. Moore*, 9 Cal. App. 2d 251, 253, 49 P.2d 615, 616 (1935).

In civil actions, a motion for a new trial is generally made prior to entry of judgment, but it can be made up to 180 days after notice of entry. See *infra* note 359.

72. See CAL. CIV. PROC. CODE. § 657(4) (West 1976); CAL. PENAL CODE § 1181(8) (West 1985).

73. The policy is clearly premised on the existence of remedies provided by statute. References to nonstatutory procedures such as a motion to abate a judgment (see *People v.*

cognizance of new evidence only if it was discovered after entry of the judgment and could not have been discovered and produced during the period when a statutory remedy was available. This accords with judicial statements that the writ reaches only errors of fact "which could not be corrected in any other manner" because no other remedy is available.⁷⁴ Insofar as evidence is found not to have been produced at the earliest possible opportunity, it is properly accounted to be within the constructive ambit of a statutory remedy's lapsed jurisdiction. But if the evidence could not have been discovered earlier, it is no affront to the statutory remedy to consider it in conjunction with a *coram nobis* petition, where its timeliness must satisfy the stringency of the writ's independent diligence prerequisite. Requiring every *coram nobis* petitioner to demonstrate the absence of any unexplainable delay in both the discovery and the presentation of the purported new evidence is a more than adequate mechanism for ensuring respect for the time limitations accompanying statutory remedies.⁷⁵

The policy of statutory exclusion should not be a guillotine that is blindly dropped whenever such a legislatively-provided remedy has the abstract capacity to correct the particular error of fact. Mr. Welch's situation is a case in point. Evidence of his mental defect could in theory have been discovered and produced at an earlier opportunity, yet this abstract possibility did not automatically disqualify him from obtaining *coram nobis* relief. It was more relevant that he was able to show that he could not have discovered and produced the evidence sooner than he did because he had no inkling of either its existence or importance. Once he had made that showing, the court had no hesitation in granting him relief.

Although exhaustion of other remedies provided by statute is not a condition precedent to petitioning for *coram nobis*, there have been intimations that it is advisable to do so.⁷⁶ Such statements prob-

Hoffman, 103 Cal. App. 2d 315, 317, 229 P.2d 486, 487 (1951)) or to recall a remittitur (*see* People v. Knight, 73 Cal. App. 2d 532, 535, 166 P.2d 899, 900 (1946)) are therefore inapposite.

The statutory exclusion policy finds secondary enforcement in the requirement that a *coram nobis* petitioner must demonstrate diligence in discovering the new evidence and presenting it to the courts at the earliest possible opportunity. *See infra* Part III.B.; *see also* People v. Carroll, 149 Cal. App. 2d 638, 309 P.2d 128 (1957), quoted at *infra* note 76.

74. *See infra* notes 76, 101, 110 and accompanying text.

75. *See infra* Part III.B.

76. *See* Rollins v. City & County of San Francisco, 37 Cal. App. 3d 145, 150, 112 Cal. Rptr. 168, 171 (1974) ("The writ of error *coram nobis* should not be used if some other remedy is available.") (quoting *In re Dyer*, 85 Cal. App. 2d 394, 401, 193 P.2d 69, 73 (1948)); *Carroll*, 149 Cal. App. 2d at 641, 309 P.2d at 130 ("Since its purpose is to secure

ably amount to a reformulation of the principle that a petitioner cannot raise arguments which could or should have been reviewed earlier.⁷⁷

A petition for a writ of error *coram nobis* is the legal equivalent of a simple motion to vacate a judgment. This has been accepted from the first decision actually considering *coram nobis*⁷⁸ to the present day.⁷⁹ Although the courts have made conflicting statements as to which of the two procedures has the broader scope,⁸⁰ *coram nobis*

relief where no other remedy exists, it is incumbent upon a [petitioner] to take advantage of every remedy provided by law to defeat the judgment pronounced against him."); accord *Hoffman*, 103 Cal. App. 2d at 318, 229 P.2d at 487; *People v. Dunlop*, 102 Cal. App. 2d 314, 318, 227 P.2d 281, 284 (1951); *People v. Bobeda*, 143 Cal. App. 2d 496, 501, 300 P.2d 97, 100 (1956) ("Since a motion for a new trial or an appeal was available, it was the duty of petitioner to exercise those processes, and since he did not use either, it was incumbent upon him to plead and prove reasonable excuses for his failure to do so . . .").

77. See *Bobeda*, 143 Cal. App. 2d at 496, 300 P.2d at 97, quoted at *supra* note 76.

78. See *People v. Perez*, 9 Cal. App. 265, 266, 98 P. 870, 870 (1908), discussed at *supra* notes 27-29 and accompanying text.

79. *People v. Stanworth*, 11 Cal. 3d 588, 594 n.5, 522 P.2d 1058, 1063 n.5, 114 Cal. Rptr. 250, 255 n.5 (1974); *People v. Griggs*, 67 Cal. 2d 314, 316, 431 P.2d 225, 226, 61 Cal. Rptr. 641, 642 (1967); *People v. Gage*, 126 Cal. App. 3d 918, 922, 179 Cal. Rptr. 171, 173 (1981); *People v. Kraus*, 47 Cal. App. 3d 568, 573, 121 Cal. Rptr. 11, 15 (1975); *People v. Wheeler*, 5 Cal. App. 3d 534, 536 n.2, 85 Cal. Rptr. 242, 244 n.2 (1970).

In spite of this utilitarian interchangeability, the title by which relief is sought has apparently concerned certain courts to an undue degree. Although instances may be found where the heading "motion to vacate" has been termed "the more simple and appropriate" designation (see *People v. Harincar*, 49 Cal. App. 2d 594, 596, 121 P.2d 751, 752 (1942); *People v. Vernon*, 9 Cal. App. 2d 138, 141, 49 P.2d 326, 327 (1935)) some courts have displayed a marked preference for the ancient title. See *People v. Williams*, 238 Cal. App. 2d 585, 587, 48 Cal. Rptr. 67, 69 (1965) (" 'Motion To Annul, Vacate, and Set Aside the Judgments' . . . is in effect a petition for writ of error *coram nobis* and should be treated as such"); *People v. Kelly*, 184 Cal. App. 2d 611, 613, 7 Cal. Rptr. 600, 601 (1960) (motion to vacate judgment "is in the nature of a petition for writ of error *coram nobis* . . . and we will so treat it"); *People v. Hamlin*, 152 Cal. App. 2d 112, 113-14, 312 P.2d 306, 307 (1957) (" 'Motion to Quash, Vacate, and Set Aside Judgment' . . . can and should be treated as a petition for a writ of error *coram nobis*"); *People v. McVicker*, 37 Cal. App. 2d 470, 473, 99 P.2d 1110, 1112 (1940) ("[A]n attack such as this, by motion to vacate the judgment, is, in legal effect, a proceeding for a writ of error, *coram nobis*, whether it be called by that name or not"). A motion to vacate has been treated as a petition for *coram nobis* even when contrary to the movant/petitioner's express wish. See *People v. Lewis*, 157 Cal. App. 2d 722, 723, 321 P.2d 859, 859-60 (1958); see also *People v. Painter*, 214 Cal. App. 2d 93, 96, 29 Cal. Rptr. 121, 123 (1963); *People v. Ward*, 96 Cal. App. 2d 629, 631-32, 216 P.2d 114, 116 (1950).

80. Compare *Ward*, 96 Cal. App. 2d at 633, 216 P.2d at 117:

If there is any difference between a petition for a writ of error *coram nobis* and a motion to vacate, it is that the former is broader than the latter. Under some circumstances a writ of error *coram nobis* can be granted although the judgment is regular on its face . . . , but a motion to vacate must be denied where, as here, the judgment is regular on its face.

with *People v. O'Neal*, 204 Cal. App. 2d 707, 708, 22 Cal. Rptr. 641, 642 (1962): Appellant's motion to set aside the judgment, while including within its scope the area of a petition for writ of error *coram nobis*, is more inclusive, as in

and a motion to vacate are identical in that both provide a means whereby the same relief—the erasure of a judgment—may be obtained.⁸¹ One of the healthier, and typically American, tendencies of courts has been their willingness not to be overly concerned with the precise designation of the papers used to invoke the judicial process for setting aside a judgment. This preference for substance over form is particularly advantageous to indigent criminal petitioners untutored in the intricacies of pleading, who have demonstrated an irrepressible urge for creative improvisation in the titling of their applications for relief.⁸² In general this approach has been applauded, and the courts do not at present attach any talismanic importance to captions.⁸³

The most elemental characteristic of *coram nobis* is that it constitutes an extraordinary remedy⁸⁴ provided by means of an ex-

addition to serving the purpose of the writ, it will lie where the judgment is void on its face.

As will appear, *Ward* is more accurate than *O'Neal* because *coram nobis* will reach jurisdictional defects which warrant setting aside a judgment even if the defect is not shown on the face of either the judgment or the record. See *infra* note 165 and accompanying text. For this reason, and in order to avoid rejection of a simple motion to vacate a judgment that is regular on its face, the petition should advise that both avenues of relief are being sought to purge the judgment.

81. See *Vernon*, 9 Cal. App. 2d at 141, 49 P.2d at 327.

82. Examples of this creativity abound. See, e.g., *People v. Tucker*, 154 Cal. App. 2d 359, 316 P.2d 417 (1957) ("extraordinary motion to annul, vacate, and set aside judgment forthwith"); *People v. Lockridge*, 233 Cal. App. 2d 743, 43 Cal. Rptr. 925 (1965) ("Motion for Stay of Execution of Sentence"); *People v. Nevarez*, 211 Cal. App. 2d 347, 27 Cal. Rptr. 287 (1962) ("Motion to Reconsider Denial of Probation"); *People v. Booth*, 210 Cal. App. 2d 443, 26 Cal. Rptr. 717 (1962) (motion to vacate revocation of probation and to reinstate probation); *People v. Grgurevich*, 153 Cal. App. 2d 806, 315 P.2d 391 (1957) (post-judgment motion to set aside guilty plea); *People v. Toth*, 224 Cal. App. 2d 130, 36 Cal. Rptr. 417 (1964), *cert. denied*, 337 U.S. 983 (1964) ("Motion to Vacate a Void Judgment"); *People v. Fleischer*, 213 Cal. App. 2d 481, 28 Cal. Rptr. 827 (1963) (same); *People v. Gerundo*, 117 Cal. App. 2d 200, 255 P.2d 18 (1953) (motion for new trial filed six months after judgment); *People v. Vaitonis*, 200 Cal. App. 2d 156, 19 Cal. Rptr. 54 (1962) (motion for modification of judgment); *People v. Mason*, 163 Cal. App. 2d 630, 329 P.2d 614 (1958) ("Petition to Modify Judgment"); *People v. Thompson*, 94 Cal. App. 2d 578, 211 P.2d 1 (1949) (motion to withdraw guilty plea); *People v. Jones*, 155 Cal. App. 2d 149, 317 P.2d 108 (1957) (motion for "the writ of *coram nobis*, *error corum bogus*"). The prize for omnibus inventiveness must be awarded to the person who filed a petition for writs of *coram nobis*, *audita querela*, *certiorari*, and *habeas corpus*, together with a motion for recall of the remittitur. *People v. Lempia*, 144 Cal. App. 2d 393, 301 P.2d 40 (1956).

83. "There is . . . no shibboleth in a petition for a writ of error *coram nobis*, even though the Latin name has survived to the present time." *People v. Moore*, 9 Cal. App. 2d 251, 253, 49 P.2d 615, 616. In *Vernon*, 9 Cal. App. 2d at 141, 49 P.2d at 327, the court noted that "the mystery and magic which now apparently attach to such an appellation . . . are completely dispelled and obliterated."

84. *People v. Shorts*, 32 Cal. 2d 502, 506, 197 P.2d 330, 332 (1948); *People v. Gilbert*, 25 Cal. 2d 422, 440, 154 P.2d 657, 666 (1944); *People v. Hinkley*, 223 Cal. App. 2d 471, 474,

traordinary writ.⁸⁵ Although *coram nobis* is recognized by statute,⁸⁶ it was created by the courts.⁸⁷ Accordingly, subject to statutory directives,⁸⁸ it is governed by such substantive limitations and procedural requirements as the courts may see fit to prescribe.⁸⁹ Although the writ may be sought in both civil and criminal actions, the proceedings for it are civil in nature.⁹⁰ A petition for the writ does not initiate a new adversary suit or an independent proceeding;⁹¹ it is instead merely a continuation of the original action.⁹² The petition does not

36 Cal. Rptr. 5, 7 (1963); *People v. Miller*, 219 Cal. App. 2d 124, 126, 32 Cal. Rptr. 660, 661 (1963); *cf. People v. Kelly*, 35 Cal. App. 2d 571, 575, 96 P.2d 372, 374 (1939) (*coram nobis* is a "rather unusual remedy"); *People v. Black*, 114 Cal. App. 468, 473, 300 P. 43, 45 (1931) (same); *Vernon*, 9 Cal. App. 2d at 141, 49 P.2d at 327 (*coram nobis* is "unknown to the ordinary practice"); *People v. Aseltine*, 139 Cal. App. 768, 771, 34 P.2d 830, 832 (1934) (*coram nobis* is an "exceptional remedy").

85. See *People v. Welch*, 61 Cal. 2d 786, 788, 394 P.2d 926, 928, 40 Cal. Rptr. 238, 240 (1964); *People v. Diaz*, 245 Cal. App. 2d 74, 77, 53 Cal. Rptr. 666, 667 (1966); *In re Rogers*, 91 Cal. App. 2d 394, 400, 205 P.2d 667, 671 (1949); *Kelly*, 35 Cal. App. 2d at 575, 96 P.2d at 374.

86. See *supra* note 51.

87. *People v. Thomas*, 52 Cal. 2d 521, 527 n.2, 342 P.2d 889, 892 n.2 (1959); *People v. Adamson*, 34 Cal. 2d 320, 329, 210 P.2d 13, 17 (1949); *People v. Marvich*, 121 Cal. App. 2d 548, 553, 263 P.2d 460, 462 (1953); *People v. Sica*, 116 Cal. App. 2d 59, 61-63, 253 P.2d 75, 77 (1953); see *People v. Miller*, 219 Cal. App. 2d at 126, 32 Cal. Rptr. at 662 (1963) ("In California, there is no statutory authority for the writ, but it is a court-made proceeding which constitutes a collateral attack.").

88. The best example of statutory modification of the common law scope of *coram nobis*, apart from its outright reduction by the provision of rights to move for a new trial and to appeal, was the termination of the trial court's jurisdiction to set aside a judgment which had been affirmed on appeal. See *infra* notes 302-06 and accompanying text; see also *People v. Allenthorp*, 64 Cal. 2d 679, 681-82, 414 P.2d 372, 374-75, 51 Cal. Rptr. 244, 246-47 (1966); *People v. Haynes*, 270 Cal. App. 2d 318, 320-21, 75 Cal. Rptr. 800, 802 (1969); *Sica*, 116 Cal. App. 2d at 61-63, 253 P.2d at 77.

89. E.g., *Adamson*, 34 Cal. 2d at 329, 210 P.2d at 17; *People v. Shorts*, 32 Cal. 2d 502, 508, 197 P.2d 330, 334 (1948); *People v. Lauderdale*, 228 Cal. App. 2d 622, 626, 39 Cal. Rptr. 688, 691 (1964); *Sica*, 116 Cal. App. 2d at 62, 253 P.2d at 77.

90. *In re Paiva*, 31 Cal. 2d 503, 505, 190 P.2d 604, 606 (1948); see *People v. Kraus*, 47 Cal. App. 3d 568, 573, 121 Cal. Rptr. 11, 15 (1975). *Coram nobis* proceedings are civil in nature even if the underlying action is criminal. See *People v. Fowler*, 175 Cal. App. 2d 808, 810, 346 P.2d 792, 794 (1959), *cert. denied*, 303 U.S. 849 (1960); *People v. Stinchcomb*, 92 Cal. App. 2d 741, 742, 208 P.2d 396, 397 (1949).

91. *Allenthorp*, 64 Cal. 2d at 681, 414 P.2d at 374, 51 Cal. Rptr. at 246; *Adamson*, 34 Cal. 2d at 330, 210 P.2d at 17; *Paiva*, 31 Cal. 2d at 509, 190 P.2d at 608; *People v. Jones*, 155 Cal. App. 2d 149, 151, 317 P.2d 108, 109 (1957); *Sica*, 116 Cal. App. 2d at 61, 253 P.2d at 77; *People v. Martinez*, 88 Cal. App. 2d 767, 769, 199 P.2d 375, 376 (1948).

92. "[I]n California a proceeding in the nature of a writ of *coram nobis* is properly regarded 'as a part of the proceedings in the case to which it refers . . .'" *Paiva*, 31 Cal. 2d at 509, 190 P.2d at 608; see *People v. Shipman*, 62 Cal. 2d 226, 231, 397 P.2d 993, 996, 42 Cal. Rptr. 1, 4 (1965); *Sica*, 116 Cal. App. 2d at 61-62, 253 P.2d at 77. Disposition of a *coram nobis* petition has been described as "a step in the post-appellate process." *Allenthorp*, 64 Cal. 2d at 682, 414 P.2d at 374, 51 Cal. Rptr. at 246.

reopen the entirety of the underlying action for review.⁹³ The scope of *coram nobis* is, however, limited to the original action, and it does not reach collateral matters unconnected with the underlying trial and judgment.⁹⁴ This too reflects the fact that the writ strikes only at vitals.⁹⁵

As an extraordinary remedy which can result in the expungement of a final judgment,⁹⁶ *coram nobis* has generated a fair amount of grandiloquent pronouncements. It has been stated that the writ was "designed to purify and keep pure the administration of justice,"⁹⁷ and to "grant relief from oppression to which the petitioner may have been subjected by the application of duress, fraud, or excusable mistake."⁹⁸ Conversely, *coram nobis* was "never intended to enable the guilty to escape punishment,"⁹⁹ and it "cannot be utilized to set aside a judgment in a case in which the defendant was given a full trial on the merits."¹⁰⁰

We are told that *coram nobis* "serves a limited and useful purpose," namely the correction of errors of fact "which could not be corrected in any other manner."¹⁰¹ Its status is distinctly subordinate to the statutory remedies whose primacy it may supplement but not supplant.¹⁰² In theory this primacy applies to any statutory remedy,¹⁰³ although in reality the major ones to which *coram nobis* must

93. *People v. Lampkin*, 259 Cal. App. 2d 673, 675, 66 Cal. Rptr. 538, 539 (1968).

94. Thus, it has been held that *coram nobis* does not reach a post-judgment motion for reduction of sentence made in conjunction with a groundless petition for the writ, *People v. Burks*, 189 Cal. App. 2d 313, 316-17, 11 Cal. Rptr. 200, 202 (1961), or a motion for preparation of a trial record made three years after rendition of the judgment, *People v. Sparks*, 112 Cal. App. 2d 120, 121-22, 246 P.2d 64, 65 (1952), or the administrative actions of prison authorities. *People v. Sumner*, 262 Cal. App. 2d 409, 415, 69 Cal. Rptr. 15, 20 (1968); *People v. Nor Woods*, 154 Cal. App. 2d 589, 591, 316 P.2d 1010, 1011-12 (1957); *People v. Rushing*, 147 Cal. App. 2d 798, 800, 305 P.2d 923, 925 (1957); *People v. Campbell*, 111 Cal. App. 2d 824, 826, 245 P.2d 311, 312 (1952); *People v. Lyle*, 21 Cal. App. 2d 132, 137-38, 68 P.2d 378, 381 (1937). *Coram nobis* is likewise unavailable to challenge a revocation of probation. *See People v. Booth*, 210 Cal. App. 2d 443, 448, 26 Cal. Rptr. 717, 720 (1962); *People v. Slater*, 152 Cal. App. 2d 814, 816-17, 313 P.2d 111, 113 (1957).

95. *See infra* Part III.C.

96. *See People v. Bobeda*, 143 Cal. App. 2d 496, 500, 300 P.2d 97, 99 (1956).

97. *People v. Kelly*, 35 Cal. App. 2d 571, 575, 96 P.2d 372, 374 (1939).

98. *People v. Knight*, 73 Cal. App. 2d 532, 535, 166 P.2d 899, 900 (1946).

99. *Kelly*, 35 Cal. App. 2d at 575, 96 P.2d at 374.

100. *People v. Egan*, 73 Cal. App. 2d 894, 899, 167 P.2d 766, 769 (1946).

101. *People v. Ayala*, 138 Cal. App. 2d 243, 246, 291 P.2d 517, 519 (1955); *People v. Bates*, 136 Cal. App. 2d 751, 753, 289 P.2d 497, 498 (1955); *People v. Martinez*, 88 Cal. App. 2d 767, 774, 199 P.2d 375, 379 (1948).

102. *Knight*, 73 Cal. App. 2d at 535, 166 P.2d at 900; *see also supra* text accompanying note 42.

103. *See People v. Ingles*, 97 Cal. App. 2d 867, 873, 218 P.2d 987, 991 (1950).

defer are the motion for new trial and appeal.¹⁰⁴

The generalized statements regarding *coram nobis* emphasize that its scope is "extremely narrow and that it is anything but a catch-all or omnibus remedy."¹⁰⁵ It is not a vehicle whereby a court may review and revise its earlier opinions and judgments.¹⁰⁶ *Coram nobis* does not furnish an occasion for courts to reconsider matters already adjudicated;¹⁰⁷ what it does is allow for reconsideration of the judgment in light of evidence of which the court was previously unaware.¹⁰⁸ In keeping with its status as an auxiliary to statutory remedies,¹⁰⁹ *coram nobis* is available only where no other remedy exists.¹¹⁰ It does not lie to correct every mistake of fact, but only

104. See *supra* note 71.

105. *People v. Goodspeed*, 223 Cal. App. 2d 146, 156, 35 Cal. Rptr. 743, 749 (1963); *People v. Darcy*, 79 Cal. App. 2d 683, 693, 180 P.2d 752, 758 (1947); see *People v. Gatewood*, 182 Cal. App. 2d 724, 726, 6 Cal. Rptr. 447, 448 (1960); *People v. Hayman*, 145 Cal. App. 2d 620, 623, 302 P.2d 810, 812 (1956) ("It is not a writ whereby convicts may attack or relitigate just any judgment merely because the unfortunate person may have become displeased with his confinement or with any other result of the judgment under attack."); *Martinez*, 88 Cal. App. 2d at 774, 199 P.2d at 379 ("The writ of error *coram nobis* is not a catch-all by which those convicted may litigate and relitigate the propriety of their convictions *ad infinitum*."). Cf. *Arledge v. State*, 329 So. 2d 613, 615 (Ala. Crim. App. 1976) ("Coram nobis is not an omnium gatherum or catchall of accordion like remedies to solve (or salve) all the supposed wrongs of those once duly convicted").

106. *E.g.*, *People v. Blalock*, 53 Cal. 2d 798, 801, 349 P.2d 953, 955, 3 Cal. Rptr. 137, 139 (1960); *People v. Tuthill*, 32 Cal. 2d 819, 822, 198 P.2d 505, 506 (1948); *People v. Gilbert*, 25 Cal. 2d 422, 442, 154 P.2d 657, 667 (1944); *People v. Mooney*, 178 Cal. 525, 528, 174 P. 325, 326 (1918); *People v. Mason*, 163 Cal. App. 2d 630, 632, 329 P.2d 614, 615 (1958); *People v. Krout*, 90 Cal. App. 2d 205, 208, 202 P.2d 635, 637 (1949); *People v. Egan*, 73 Cal. App. 2d 894, 899, 167 P.2d 766, 769 (1946).

107. See *infra* note 205 and accompanying text.

108. See *supra* note 13.

109. See *supra* notes 36 & 41 and accompanying text.

110. *E.g.*, *People v. Adamson*, 34 Cal. 2d 320, 326, 210 P.2d 13, 15 (1949); *People v. Brady*, 30 Cal. App. 3d 81, 88, 105 Cal. Rptr. 280, 284 (1973); *People v. Miller*, 219 Cal. App. 2d 124, 126, 32 Cal. Rptr. 660, 662 (1963); *People v. Sharp*, 157 Cal. App. 2d 205, 207, 320 P.2d 589, 590 (1958); see *People v. Price*, 162 Cal. App. 2d 196, 197, 328 P.2d 467, 468 (1958) ("The writ . . . is available only in the absence of any other adequate remedy."). Courts have repeatedly stressed that the purpose of *coram nobis* is "to correct errors of fact which could not be corrected in any other manner." *People v. Ayala*, 138 Cal. App. 2d 243, 246, 291 P.2d 517, 519 (1955); *People v. Bates*, 136 Cal. App. 2d 751, 753, 289 P.2d 497, 498 (1955); *People v. Martinez*, 88 Cal. App. 3d 767, 774, 199 P.2d 375, 379 (1948).

The requirement that no other remedy exist does not mean that the mere absence of alternative avenues of relief ipso facto qualifies the petitioner to redress in *coram nobis*. As will be seen, even if all other methods have been exhausted or are unavailable, the petitioner must still satisfy the full gamut of other requisites upon which issuance of the writ is conditioned. "[T]he remedy is not broad enough to reach every case in which there has been an erroneous or unjust judgment on the sole ground that no other remedy exists." *In re Lindley*, 29 Cal. 2d 709, 725, 177 P.2d 918, 928 (1947); see *People v. Thompson*, 94 Cal. App. 2d 578, 581, 211 P.2d 1, 3 (1949); see also *People v. Goodspeed*, 223 Cal. App. 2d 146, 155-56, 35 Cal. Rptr. 743, 749 (1960).

those which are prejudicial to the petitioner.¹¹¹ It is not broad enough to reach every case in which there has been an erroneous or unjust judgment.¹¹² Obviously, relief is not granted as a matter of routine.¹¹³ Issuance of the writ will be "most rare"¹¹⁴ and confined to a "very limited class of cases."¹¹⁵ It is to the precise nature of the prerequisites for issuance of the writ or error *coram nobis* that attention will now be directed.

III. PREREQUISITES

As may be inferred from the preceding discussion of the general nature of *coram nobis*, satisfying the requirements for its issuance is no small task. Just how severe are those requirements will soon be made clear. The rigorous confines of its availability are buttressed by numerous other restrictions to which close attention must be paid. Persons contemplating filing a petition for *coram nobis* must be thoroughly acquainted with the nature and legal import of the new matter upon which they intend to base the petition. The procedural history of the entire case must be carefully scrutinized, because past events exert a decisive control over which issues may or may not be raised, and in which court they must be raised. Records of the trial have to be examined in order to ascertain whether a claim is barred by *res judicata* or collateral estoppel. A very important consideration is whether relief on the particular ground now contemplated could have been sought at an earlier opportunity. Each of these factors will now be considered in turn.

A. *Coram Nobis* Does Not Lie to Correct Errors of Law

The threshold requirement for *coram nobis* is that its corrective

111. See *In re Rogers*, 91 Cal. App. 2d 394, 400, 205 P.2d 667, 671 (1949); *People v. Kretchmar*, 23 Cal. App. 2d 19, 21, 72 P.2d 243, 244 (1937). "The writ of error *coram nobis* should not be used if some other remedy is available. It could become a hindrance to the disposition of problems of merit were trifling and frivolous questions only presented." *Rollins v. City & County of San Francisco*, 37 Cal. App. 3d 145, 150, 112 Cal. Rptr. 168, 171 (1974) (quoting *Dyer v. Hill*, 85 Cal. App. 2d 394, 401, 193 P.2d 69, 73 (1948)). See also *infra* note 211 and accompanying text.

112. See *People v. Burks*, 189 Cal. App. 2d 313, 317, 11 Cal. Rptr. 200, 202 (1961); see also *supra* note 110.

113. See *Kretchmar*, 23 Cal. App. 2d at 22, 72 P.2d at 245.

114. See *People v. Lumbley*, 8 Cal. 2d 752, 755, 759, 68 P.2d 354, 356, 358 (1937); *People v. Forbes*, 219 Cal. 363, 364, 26 P.2d 466, 466 (1933); *People v. Darcy*, 79 Cal. App. 2d 683, 693, 180 P.2d 752, 758 (1947); cf. *People v. Superior Court*, 4 Cal. 2d 136, 140, 47 P.2d 724, 726 (1935) ("the ancient writ of error *coram nobis* which is seldom . . . granted").

115. *People v. Sandoval*, 200 Cal. 730, 737, 254 P. 893, 895 (1927).

power extends only to errors of fact, and not to errors of law.¹¹⁶ This principle, which California courts have stated in the most emphatic of terms,¹¹⁷ is derived from the common law antecedents of the writ.¹¹⁸ Considerable judicial comment, particularly within the domain of criminal law, has been devoted to a myriad of legal matters which are beyond scrutiny in *coram nobis*. The legal issues that cannot be remedied by *coram nobis* divide into two categories, the constitutional and the nonconstitutional.

As a general proposition, review of constitutional issues is outside the ambit of *coram nobis*.¹¹⁹ This category of error is amenable to correction by motion for new trial, direct appeal from the judgment, or, in criminal cases, by a petition for a writ of habeas corpus.¹²⁰ In addition to being excluded by reason of this general rule of nonreviewability, most of the possible constitutional claims in the area of criminal law have already and specifically been held to constitute an inappropriate basis for *coram nobis* relief.

Included within this category is the legality of an arrest,¹²¹ or a search,¹²² or the introduction of illegally seized evidence.¹²³ The

116. *E.g.*, *People v. Blalock*, 53 Cal. 2d 798, 801, 349 P.2d 953, 955, 3 Cal. Rptr. 137, 139 (1960); *People v. Banks*, 53 Cal. 2d 370, 378-79, 348 P.2d 102, 107-08, 1 Cal. Rptr. 669, 674-75 (1959); *People v. Tuthill*, 32 Cal. 2d 819, 822, 198 P.2d 505, 506 (1948); *People v. Esparza*, 253 Cal. App. 2d 362, 363, 61 Cal. Rptr. 167, 168 (1967); *People v. Miller*, 219 Cal. App. 2d 124, 127, 32 Cal. Rptr. 660, 662 (1963).

117. "The uniform conclusion of the decisions is that the function of a writ of error *coram nobis* is to correct an error of fact. *It never issues to correct an issue of law . . .*" *People v. Reid*, 195 Cal. 249, 258, 232 P. 457, 461 (1924) (emphasis added); *accord* *People v. Burks*, 189 Cal. App. 2d 313, 315, 11 Cal. Rptr. 200, 202 (1961); *People v. Gamboa*, 144 Cal. App. 2d 588, 590, 301 P.2d 390, 392 (1956); *Darcy*, 79 Cal. App. 2d at 686, 180 P.2d at 754.

118. *See, e.g.*, 3 W. BLACKSTONE, COMMENTARIES *406 (editorial n.4, at 233); *id.* (W. Jones ed. 1916) (editorial nn.4-5, at 2019-21); H. STEPHEN, *supra* note 7, at 246; 2 W. TIDD, *supra* note 7, at 1136.

119. *E.g.*, *People v. Williams*, 253 Cal. App. 2d 560, 565, 61 Cal. Rptr. 323, 326 (1967); *People v. Francisco*, 240 Cal. App. 2d 436, 440, 49 Cal. Rptr. 603, 605 (1966); *People v. Fowler*, 175 Cal. App. 2d 808, 811, 346 P.2d 792, 794 (1959); *People v. Cole*, 152 Cal. App. 2d 71, 75, 312 P.2d 701, 703 (1957).

120. *See, e.g.*, *People v. Adamson*, 34 Cal. 2d 320, 327, 210 P.2d 13, 16 (1949); *People v. Mabry*, 236 Cal. App. 2d 402, 403, 46 Cal. Rptr. 92, 93 (1965); *People v. Quigley*, 222 Cal. App. 2d 694, 700, 35 Cal. Rptr. 393, 397 (1963); *People v. Del Campo*, 174 Cal. App. 2d 217, 221, 344 P.2d 339, 341 (1959); *People v. Fritz*, 140 Cal. App. 2d 618, 622, 295 P.2d 449, 452 (1956).

121. *Del Campo*, 174 Cal. App. 2d at 220, 344 P.2d at 341; *People v. Sharp*, 157 Cal. App. 2d 205, 207-08, 320 P.2d 589, 590 (1958); *People v. Millwood*, 150 Cal. App. 2d 154, 156, 309 P.2d 495, 496 (1957); *see* *People v. Wilson*, 106 Cal. App. 2d 716, 717-18, 236 P.2d 9, 10 (1951).

122. *Sharp*, 157 Cal. App. 2d at 207-08, 320 P.2d at 590; *Cole*, 152 Cal. App. 2d at 74-75, 312 P.2d at 703.

123. *E.g.*, *People v. Parseghian*, 152 Cal. App. 2d 1, 3, 312 P.2d 81, 82 (1957); *People v. Gamboa*, 144 Cal. App. 2d 588, 591, 301 P.2d 390, 392 (1956); *People v. Cahan*, 135 Cal.

same is true with respect to statements supposedly elicited in violation of *Miranda*.¹²⁴ Also removed from the reach of *coram nobis* are purported violations of the right to be secure from double jeopardy.¹²⁵ Likewise not to be considered are claims that the petitioner's right to a speedy trial¹²⁶ or to his right to trial by jury¹²⁷ have been violated. Similarly beyond examination are grounds regarding rights to confront witnesses,¹²⁸ to have compulsory process to obtain the presence of favorable witnesses,¹²⁹ and to have the effective assistance of counsel.¹³⁰ *Coram nobis* does not reach questions of cruel and unusual punishment.¹³¹ Moreover, it does not furnish a means by

App. 2d 287, 288-89, 287 P.2d 6, 7 (1955); *People v. Lawyer*, 11 Cal. App. 2d 718, 719, 54 P.2d 747, 747 (1936).

Moreover, the legality of a search, or a seizure, or the admissibility of evidence derived therefrom, must presently be adjudicated in accordance with a statutory procedure. See CAL. PENAL CODE § 1538.5 (West 1982). These issues are consequently beyond the scope of *coram nobis* for this additional reason. See *People v. Reid*, 195 Cal. 249, 255-56, 232 P. 457, 460 (1924).

124. See *People v. Lampkin*, 259 Cal. App. 2d 673, 677-78, 66 Cal. Rptr. 538, 540-41 (1968).

125. E.g., *People v. Blalock*, 53 Cal. 2d 798, 801, 349 P.2d 953, 955, 3 Cal. Rptr. 137, 139 (1960); *People v. Fritz*, 140 Cal. App. 2d 618, 622, 295 P.2d 449, 452 (1955); *People v. Ayala*, 138 Cal. App. 2d 243, 247, 291 P.2d 517, 519 (1955); *People v. Darcy*, 79 Cal. App. 2d 683, 687, 689-90, 180 P.2d 752, 754-56 (1947); see *People v. Reeves*, 135 Cal. App. 2d 449, 452, 287 P.2d 544, 546 (1955).

126. See *People v. Reeg*, 153 Cal. App. 2d 97, 99-100, 314 P.2d 52, 53 (1957).

127. *People v. Williams*, 253 Cal. App. 2d 560, 565, 61 Cal. Rptr. 323, 326 (1967); *People v. Sorenson*, 111 Cal. App. 2d 404, 405, 244 P.2d 734, 735 (1952). A petitioner cannot get relief on the ground that prospective jurors were systematically excluded because of race. See *People v. Adamson*, 34 Cal. 2d 320, 327-28, 210 P.2d 13, 16-17 (1949).

128. See *People v. Williams*, 238 Cal. App. 2d 585, 591, 48 Cal. Rptr. 67, 71 (1965); *People v. Kennedy*, 116 Cal. App. 2d 273, 277, 253 P.2d 522, 525 (1953).

129. E.g., *People v. Cardwell*, 153 Cal. App. 2d 377, 378-79, 314 P.2d 484, 484-85 (1957); *People v. Remling*, 146 Cal. App. 2d 476, 479, 304 P.2d 97, 99 (1955); *People v. Cox*, 141 Cal. App. 2d 158, 160, 296 P.2d 72, 74 (1956).

130. E.g., *People v. Howard*, 62 Cal. 2d 237, 238, 397 P.2d 999, 1000, 42 Cal. Rptr. 7, 8 (1965); *Adamson*, 34 Cal. 2d at 328, 332-33, 210 P.2d at 16, 19; *People v. Soriano*, 194 Cal. App. 3d 1470, 1477, 240 Cal. Rptr. 328, 333 (1987); *People v. Buggs*, 272 Cal. App. 2d 285, 289, 77 Cal. Rptr. 450, 453 (1969); *Williams*, 253 Cal. App. 2d at 565, 61 Cal. Rptr. at 326; *Williams*, 238 Cal. App. 2d at 591, 48 Cal. Rptr. at 71; *People v. Blevins*, 222 Cal. App. 2d 801, 804, 35 Cal. Rptr. 438, 440 (1963); *Remling*, 146 Cal. App. 2d at 479, 304 P.2d at 99 ("the lack of effective aid of counsel, his misrepresentation of defendant, or failure to perform his duty are not a basis for relief under a writ of error *coram nobis*"). Note, however, that in *People v. Mendez*, 28 Cal. 2d 686, 171 P.2d 425 (1946), the supreme court discussed and rejected a claim that the petitioner had been denied counsel of his own choice at trial.

131. This issue was apparently decided in *People v. Waldo*, 224 Cal. App. 2d 542, 36 Cal. Rptr. 868 (1964), wherein the court summarized the pertinent allegations of the rejected petitioner as follows:

[H]e complains that he was denied a "fair and impartial trial"; that he was placed under extreme duress "by direct command of the office of the District Attorney, being in collusion with the Judicial Authorities of Fresno County,

which the petitioner can challenge the constitutionality of a statute.¹³²

The final species of legal error reaching constitutional magnitude involves the nebulous but all-pervasive concept of due process. Habeas corpus, not *coram nobis*, is the proper means to determine whether the state has knowingly used perjured testimony and thereby violated the petitioner's due process right to a fair trial.¹³³ The same is true with regard to the intentional suppression of material evidence,¹³⁴ as well as the negligent introduction of false evi-

State of California"; that the specific acts consisted of placing him "into a locked, darkened, vermin-infested room," thereby placing him in "extreme mental anguish and physical cruelty by refusing the petitioner proper food to sustain him"; that he was denied medical attention and medication that he needed very much; he was kept incommunicado, and was "constantly taunted with the threat of death" by the police officers; that all of these "cruel and unusual punishments" constituted a direct infringement on his rights of the "Federal Guaranty" of due process.

Id. at 545, 36 Cal. Rptr. at 869. See also *People v. Esparza*, 253 Cal. App. 2d 362, 363-64, 61 Cal. Rptr. 167, 168-69 (1967).

From a non-constitutional perspective, a claim of cruel and unusual punishment may also be rejected if it amounts to a challenge to an allegedly excessive sentence, another legal matter similarly not reviewable in *coram nobis*. See *infra* note 157 and accompanying text.

132. *E.g.*, *People v. Howard*, 62 Cal. 2d 237, 238, 397 P.2d 999, 1000, 42 Cal. Rptr. 7, 8 (1965); *People v. Del Campo*, 174 Cal. App. 2d 217, 220, 344 P.2d 339, 341 (1959); see generally *People v. Sharp*, 157 Cal. App. 2d 205, 207-08, 320 P.2d 589, 590 (1958); *People v. Millwood*, 150 Cal. App. 2d 154, 156, 309 P.2d 495, 496 (1957); see also *People v. Wilson*, 106 Cal. App. 2d 716, 717-18, 236 P.2d 9, 10 (1951); *cf. In re Wesley W.*, 125 Cal. App. 3d 240, 249, 181 Cal. Rptr. 401, 404 (1981) (change of law, *e.g.*, construction of a statute, is not new fact warranting *coram nobis*); *People v. Hinkley*, 223 Cal. App. 2d 471, 475-76, 36 Cal. Rptr. 5, 8 (1963) (*coram nobis* not available to set aside conviction for violating statute subsequently declared unconstitutional).

133. See *In re Imbler*, 60 Cal. 2d 554, 560, 387 P.2d 6, 8, 35 Cal. Rptr. 293, 296 (1963), *cert. denied*, 379 U.S. 908 (1964); *Adamson*, 34 Cal. 2d at 327, 210 P.2d at 16; *In re Horowitz*, 33 Cal. 2d 534, 537, 203 P.2d 513, 515-16 (1949); *In re Kirschke*, 53 Cal. App. 3d 405, 412, 125 Cal. Rptr. 680, 684 (1975), *cert. denied*, 429 U.S. 820 (1976); *People v. Serrano*, 218 Cal. App. 2d 472, 474, 32 Cal. Rptr. 811, 812 (1963); *People v. Gatewood*, 182 Cal. App. 2d 724, 727, 6 Cal. Rptr. 447, 448-49 (1960), *cert. denied*, 365 U.S. 822 (1961); see also *Renling*, 146 Cal. App. 2d at 479-80, 304 P.2d at 99.

In one early instance the court did examine a *coram nobis* claim concerning use of perjured testimony, but it did so on an "assume, without holding" basis, acknowledging that the "decisions seem to indicate that the writ of habeas corpus is the preferred remedy." *People v. Kirk*, 76 Cal. App. 2d 496, 498, 173 P.2d 367, 368 (1946), *cert. denied*, 330 U.S. 837 (1947).

134. *Imbler*, 60 Cal. 2d at 567, 387 P.2d at 13, 35 Cal. Rptr. at 300-01. *But see People v. Tate*, 136 Cal. App. 2d 31, 288 P.2d 149 (1955), where the court reversed an order denying a petition alleging that police officers had suppressed evidence of a confession made by another person before the petitioner was tried and convicted. *Tate* should be regarded as an aberrational departure from the fundamental principle that *coram nobis* may not be used to correct errors of law. *Cf. In re Busch*, 57 Cal. 2d 536, 537, 370 P.2d 689, 20 Cal. Rptr. 785 (1962), *cert. denied*, 370 U.S. 913 (1962) (*coram nobis*/habeas corpus petition denied for lack of substantiation and because "the evidence which was assertedly suppressed appears to be con-

dence,¹³⁵ if either results in the denial of a fair trial.

The area of nonconstitutional errors of law, being by nature a vastly more expansive category of matters than those deriving from either the United States or California Constitutions, has accordingly obliged courts to designate an even greater number of issues which cannot find redress by *coram nobis*. These include defects in an arraignment,¹³⁶ an information,¹³⁷ an indictment,¹³⁸ or the preliminary examination,¹³⁹ many of which can be corrected by statutory remedies prior to the commencement of trial.¹⁴⁰ In addition to the constitutional right to a speedy trial,¹⁴¹ an accused person has the same right secured by statute,¹⁴² but denial of the latter's protection is likewise not cognizable in *coram nobis*.¹⁴³ The writ will not issue by virtue of a petitioner having been denied severance and having thereafter been tried jointly with a codefendant.¹⁴⁴ Relief may not be granted because of the petitioner's failure either to present evi-

sistent with the theory of the prosecution and was not such as would have prevented entry of the judgment"); *People v. Mort*, 214 Cal. App. 2d 596, 601, 29 Cal. Rptr. 650, 652 (1963) (claim that prosecutor suppressed evidence held not to "amount to a denial of due process warranting relief by *coram nobis*").

135. *Kirschke*, 53 Cal. App. 3d at 413, 125 Cal. Rptr. at 685.

136. *E.g.*, *People v. Smith*, 109 Cal. App. 2d 76, 78, 239 P.2d 903, 904 (1952); *People v. Chapman*, 106 Cal. App. 2d 51, 54, 234 P.2d 716, 719 (1951); *People v. Thompson*, 94 Cal. App. 2d 578, 586, 211 P.2d 1, 5 (1949).

137. *People v. Collins*, 137 Cal. App. 2d 689, 690, 290 P.2d 573, 574-75 (1955); *People v. Whitton*, 112 Cal. App. 2d 328, 331-32, 246 P.2d 60, 62-63 (1952); *People v. Tate*, 78 Cal. App. 2d 894, 895, 178 P.2d 470, 471 (1947), *cert. denied* 337 U.S. 903 (1949).

138. *E.g.*, *People v. Quigley*, 222 Cal. App. 2d 694, 699-700, 35 Cal. Rptr. 393, 396-97 (1963); *People v. Cook*, 97 Cal. App. 2d 284, 285, 217 P.2d 498, 498-99 (1950); *People v. Egan*, 73 Cal. App. 2d 894, 897, 167 P.2d 766, 768 (1946), *denying cert. to Cal. Sup. Ct.*, 329 U.S. 754 (1946).

139. *E.g.*, *People v. Lauderdale*, 228 Cal. App. 2d 622, 628, 39 Cal. Rptr. 688, 692-93 (1964); *People v. Evans*, 185 Cal. App. 2d 331, 334, 8 Cal. Rptr. 410, 412 (1960), *denying cert. to Cal. Sup. Ct.*, 377 U.S. 931 (1961); *People v. Conley*, 115 Cal. App. 2d 749, 750, 252 P.2d 716, 716 (1953); *People v. James*, 99 Cal. App. 2d 476, 483-84, 222 P.2d 117, 122 (1950), *rev'd on other grounds*, 38 Cal. 2d 302, 240 P.2d 596 (1952); *In re Rogers*, 91 Cal. App. 2d 394, 400, 205 P.2d 667, 671 (1949); *In re Dorsey*, 81 Cal. App. 2d 584, 586, 184 P.2d 702, 703-04 (1947); *People v. Bagasol*, 22 Cal. App. 2d 327, 329, 70 P.2d 970, 971-72 (1937).

140. *See* CAL. PENAL CODE § 995 (West 1985) (motion to set aside information or indictment); *id.* (demurrer).

141. *See supra* note 126 and accompanying text.

142. CAL. PENAL CODE § 1382 (West Supp. 1989).

143. *People v. Jackson*, 165 Cal. App. 2d 183, 185, 331 P.2d 982 (1958), *denying cert. to Cal. Sup. Ct.*, 360 U.S. 937 (1959); *People v. Reeg*, 153 Cal. App. 2d 97, 99-100, 314 P.2d 52, 53-54 (1957); *People v. Martinelli*, 118 Cal. App. 2d 94, 97, 257 P.2d 37, 38 (1953); *People v. Dale*, 79 Cal. App. 2d 370, 378, 179 P.2d 870, 875 (1947).

144. *People v. Goold*, 90 Cal. App. 2d 640, 641, 203 P.2d 118, 118 (1949).

dence¹⁴⁵ or to obtain the presence of witnesses.¹⁴⁶

The testimony given at the underlying trial cannot be reweighed in a *coram nobis* proceeding. It is fruitless to apply for relief on the basis of a witness's lack of qualifications or credibility.¹⁴⁷ The truth or falsity of testimony will not be considered.¹⁴⁸ A court will not depart from this practice even if presented with a full confession by another person.¹⁴⁹ The petitioner is also precluded from repudiating or contradicting his own previous testimony at the trial.¹⁵⁰

Similarly beyond the scope of *coram nobis* are evidentiary rulings¹⁵¹ or errors in instructing the jury.¹⁵² *Coram nobis* cannot be

145. *In re Sprague*, 37 Cal. 2d 110, 115, 230 P.2d 633, 637 (1951), *denying cert. to* Cal. Sup. Ct., 342 U.S. 840 (1951).

146. *People v. Bates*, 136 Cal. App. 2d 751, 752-53, 289 P.2d 497, 497-98 (1955); *People v. Hardison*, 119 Cal. App. 2d 774, 776, 260 P.2d 178, 179 (1953); *People v. Hightower*, 75 Cal. App. 2d 298, 298-99, 170 P.2d 490, 490-91 (1946); *see Sprague*, 37 Cal. 2d at 115, 230 P.2d at 637; *People v. Smith*, 109 Cal. App. 2d 76, 79, 239 P.2d 903, 905 (1952).

147. *E.g.*, *People v. Campbell*, 111 Cal. App. 2d 824, 826, 245 P.2d 311, 312 (1952); *People v. Maringer*, 101 Cal. App. 2d 586, 591-92, 225 P.2d 656, 660 (1951); *see In re Lindley*, 29 Cal. 2d 709, 724-28, 177 P.2d 918, 928-30 (1947).

148. *E.g.*, *Sprague*, 37 Cal. 2d at 115, 230 P.2d at 637; *People v. Mooney*, 178 Cal. 525, 529, 174 P. 325, 327 (1918); *People v. Cardwell*, 153 Cal. App. 2d 377, 378-79, 314 P.2d 484, 484-85 (1957), *denying cert. to* Cal. Sup. Ct., 359 U.S. 961 (1959); *People v. Stinchcomb*, 92 Cal. App. 2d 741, 747, 208 P.2d 396, 399 (1949), *denying cert. to* Cal. Sup. Ct., 340 U.S. 838 (1950).

Notwithstanding the constitutional exclusion previously mentioned, *see supra* note 133 and accompanying text, the unavailability of *coram nobis* with respect to the issue of witness credibility also applies to perjured testimony:

Nor does the discovery and establishment that perjury was committed at the trial justify issuance of the writ. The falsity of the testimony, if a fact, presumably generally is known to the defendant at the time of trial in most instances. To permit reopening would merely result in again retrying the issue of fact [i.e., the credibility of the alleged perjurer's testimony] resolved in the original proceeding.

People v. Williams, 238 Cal. App. 2d 585, 592, 48 Cal. Rptr. 67, 72 (1965); *see People v. Adamson*, 34 Cal. 2d 320, 328-29, 210 P.2d 13, 17 (1949); *People v. Serrano*, 218 Cal. App. 2d 472, 474, 32 Cal. Rptr. 811, 812 (1963).

149. *See infra* notes 220-28 and accompanying text.

150. *See infra* note 186 and accompanying text.

151. *E.g.*, *People v. Middleworth*, 172 Cal. App. 2d 619, 621, 342 P.2d 348, 350 (1959); *People v. Sharp*, 157 Cal. App. 2d 205, 208, 320 P.2d 589, 590 (1958); *People v. Parseghian*, 152 Cal. App. 2d 1, 3, 312 P.2d 81, 82 (1957); *People v. Gamboa*, 144 Cal. App. 2d 588, 591, 301 P.2d 390, 392 (1956); *People v. Darcy*, 79 Cal. App. 2d 683, 686, 689-90, 180 P.2d 752, 754-56 (1947).

152. *E.g.*, *People v. Hinkley*, 223 Cal. App. 2d 471, 475, 36 Cal. Rptr. 5, 7 (1963); *People v. Vaitonis*, 200 Cal. App. 2d 156, 159, 19 Cal. Rptr. 54, 56 (1962); *People v. Houser*, 96 Cal. App. 2d 786, 787, 216 P.2d 171 (1950); *People v. Goold*, 90 Cal. App. 2d 640, 641, 203 P.2d 118 (1949); *People v. Weatherford*, 87 Cal. App. 2d 275, 277-78, 196 P.2d 832, 833-34 (1948). California has a statute expressly authorizing review of instructions on direct appeal. *See* CAL. PENAL CODE § 1469 (West 1982).

used to re-examine the qualifications of jurors.¹⁵³ It will not reach any misconduct of the jury, the court, or attorneys, if the misconduct does not amount to extrinsic fraud.¹⁵⁴ A petitioner cannot have a judgment of conviction set aside on the ground that it is not supported by substantial evidence, because *coram nobis* will not extend to this issue.¹⁵⁵ Also outside its ambit are claims that there was a failure to prove that a crime was committed.¹⁵⁶ It will not remedy imposition of an excessive or defective sentence.¹⁵⁷ It is also unable to correct a judgment alleged to be "incomplete" in that it does not specify the crime, the degree of the crime, or the term of imprisonment imposed.¹⁵⁸

153. See *In re Lindley*, 29 Cal. 2d 709, 726, 177 P.2d 918, 928 (1947); see also *supra* note 127.

154. *E.g.*, *People v. Reid*, 195 Cal. 249, 256, 258, 232 P. 457, 460-61 (1924); *People v. Mooney*, 178 Cal. 525, 530, 174 P. 325, 327 (1918); *People v. Reeves*, 135 Cal. App. 2d 449, 454, 287 P.2d 544, 547 (1955); *People v. Watkins*, 92 Cal. App. 2d 375, 377, 206 P.2d 1118, 1119-20 (1949), *denying cert. to* Cal. Dist. Ct. App., 338 U.S. 852 (1949); see *People v. Gatewood*, 182 Cal. App. 2d 724, 727, 6 Cal. Rptr. 447, 449 (1960), *denying cert. to* Cal. Sup. Ct., 365 U.S. 822 (1961); *People v. Gennaitte*, 127 Cal. App. 2d 544, 548, 274 P.2d 169, 171 (1954), *denying cert. to* Cal. Sup. Ct., 348 U.S. 983 (1955); *Goold*, 90 Cal. App. 2d at 641, 203 P.2d at 118. This principle also apparently applies to the misconduct of a court reporter in failing to make a record of proceedings in court. See *Middleworth*, 172 Cal. App. 2d at 622, 342 P.2d at 350.

People v. Reid established that misconduct in the form of the jury receiving evidence out of court was not remediable in *coram nobis*. *Reid*, 195 Cal. at 256, 258, 232 P. at 460-61. In the converse situation, where the jury was deprived of evidence to which it was entitled, relief was not withheld in *People v. York*, 272 Cal. App. 2d 463, 77 Cal. Rptr. 441 (1969), the fact that the jury had been denied review of a crucial witness's testimony was held to warrant vacating the judgment.

155. *E.g.*, *People v. Hales*, 244 Cal. App. 2d 507, 512, 53 Cal. Rptr. 161, 166 (1966); *Vaitonis*, 200 Cal. App. 2d at 159, 19 Cal. Rptr. at 56; *People v. Burks*, 189 Cal. App. 2d 313, 315, 11 Cal. Rptr. 200, 201 (1961), *denying cert. to* Cal. Dist. Ct. App., 368 U.S. 898 (1961); *Middleworth*, 172 Cal. App. 2d at 621, 342 P.2d at 350; *People v. Jackson*, 165 Cal. App. 2d 183, 185, 331 P.2d 981, 982 (1958).

156. *E.g.*, *People v. Mendez*, 144 Cal. App. 2d 500, 503, 301 P.2d 295, 298 (1956); *People v. Bible*, 135 Cal. App. 2d 65, 69, 286 P.2d 524, 526 (1955); *People v. Baker*, 92 Cal. App. 2d 623, 625-26, 207 P.2d 58, 59 (1949); *People v. Tate*, 78 Cal. App. 2d 894, 895, 178 P.2d 470, 471 (1947), *cert. denied*, 337 U.S. 903 (1949).

This is particularly true if the petitioner was convicted after entering a plea of guilty. See *People v. Tapia*, 231 Cal. App. 2d 320, 324, 41 Cal. Rptr. 764, 766 (1964) ("The appellant, by his plea of guilty, has admitted all of the elements of the offense and cannot attack any failure of proof of the corpus delicti at this time."); *People v. Dale*, 79 Cal. App. 2d 370, 379, 179 P.2d 870, 875 (1947) ("A plea of guilty includes an admission of every element entering into the offense charged and does not raise any issue of fact.").

157. *E.g.*, *In re Seeley*, 29 Cal. 2d 294, 298, 176 P.2d 24, 27 (1946); *People v. Dowding*, 185 Cal. App. 2d 274, 276, 8 Cal. Rptr. 208, 210 (1960); *People v. Zack*, 162 Cal. App. 2d 428, 430, 327 P.2d 576, 578 (1958); *People v. Tucker*, 154 Cal. App. 2d 359, 363, 316 P.2d 417, 419 (1957). This principle extends to constitutional implications of cruel and unusual punishment. See *supra* note 131 and accompanying text.

158. See *People v. Crawford*, 176 Cal. App. 2d 564, 568, 1 Cal. Rptr. 811, 813 (1959);

The requirements for *coram nobis* make no ostensible distinction between those who had a full trial with actual litigation on the merits and those who did not.¹⁵⁹ For a petitioner convicted upon a plea of guilty, *coram nobis* is not available to challenge the judgment by attacking various incidents of the plea. Among these unreachable matters are the petitioner having pleaded guilty to the "wrong" charge,¹⁶⁰ or to a charge in the information which is different from an offense charged in the original complaint.¹⁶¹ Erroneously admitting prior convictions is not a basis for relief.¹⁶² Most importantly, *coram nobis* may not be used to purge a judgment because the petitioner was not properly advised as to the consequences of entering a plea of guilty, or the constitutional rights lost thereby.¹⁶³

There is, however, one type of legal deficiency that can be reviewed in a *coram nobis* proceeding and that can constitute a ground for relief. Petitions based upon fundamental jurisdictional defects may be heard and granted, notwithstanding the fact that the judgment was affirmed on appeal or has otherwise become final.¹⁶⁴ Exempted from the usual requirement that proof of errors of fact must

People v. James, 99 Cal. App. 2d 476, 482, 222 P.2d 117, 121 (1950), *rev'd on other grounds*, 38 Cal. 2d 302, 240 P.2d 596 (1952); People v. Wahrmund, 91 Cal. App. 2d 258, 262, 206 P.2d 56, 59 (1949); People v. Darcy, 79 Cal. App. 2d 683, 689-90, 180 P.2d 752, 756 (1947).

159. *But see infra* notes 338-52 and accompanying text.

160. People v. Ingles, 97 Cal. App. 2d 867, 874-75, 218 P.2d 987, 992 (1950); *see* People v. Conley, 115 Cal. App. 2d 749, 749-50, 252 P.2d 716, 716 (1953); People v. Moore, 9 Cal. App. 2d 251, 255, 49 P.2d 615, 617 (1935).

161. Ingles, 97 Cal. App. 2d at 870-75, 218 P.2d at 990-92; *cf.* People v. Harden, 118 Cal. App. 2d 563, 565, 258 P.2d 531, 532 (1953) (petitioner found guilty of charge different from that on which he was ordered held to answer for trial).

162. *E.g.*, People v. Banks, 53 Cal. 2d 370, 377-78, 348 P.2d 102, 107, 1 Cal. Rptr. 669, 674 (1959); People v. Lumbley, 8 Cal. 2d 752, 758-60, 68 P.2d 354, 357-58 (1937); *cf.* People v. Herod, 112 Cal. App. 2d 764, 766, 247 P.2d 127, 128 (1952) (prosecution failed to meet burden of proof regarding prior convictions).

163. *See, e.g.*, Banks, 53 Cal. 2d at 378-79, 348 P.2d at 107, 1 Cal. Rptr. at 674; People v. Soriano, 194 Cal. App. 3d 1470, 1474-77, 240 Cal. Rptr. 328, 331-33 (1987); People v. Kraus, 47 Cal. App. 3d 568, 578, 121 Cal. Rptr. 11, 18 (1975); People v. Wheeler, 5 Cal. App. 3d 534, 538-39, 85 Cal. Rptr. 242, 245 (1970); People v. Rhoades, 1 Cal. App. 3d 442, 443-44, 81 Cal. Rptr. 701, 701-02 (1969); People v. Williams, 253 Cal. App. 2d 560, 566, 61 Cal. Rptr. 323, 326-27 (1967); People v. Carpenter, 137 Cal. App. 2d 792, 793, 291 P.2d 189, 190 (1955); *cf.* People v. Rodriguez, 143 Cal. App. 2d 506, 507, 299 P.2d 1057, 1058 (1956) (*coram nobis* not available to challenge trial court finding that guilty plea was intelligently made.).

164. *See* People v. Chadd, 28 Cal. 3d 739, 756-57, 621 P.2d 837, 847, 170 Cal. Rptr. 798, 808-09 (1981); People v. Thomas, 52 Cal. 2d 521, 528-29, 342 P.2d 889, 893 (1959); People v. McGee, 1 Cal. 2d 611, 613, 36 P.2d 378, 379 (1934); *see also* Banks, 53 Cal. 2d at 378, 348 P.2d at 107, 1 Cal. Rptr. at 674 (dictum); *cf.* People v. Snowden, 149 Cal. App. 2d 552, 559, 308 P.2d 815, 820 (1957) (contention that statute of limitations had run disproven by record).

be extrinsic to the record, a jurisdictional defect, such as the barring of an action by the statute of limitations, may be asserted even if the error appears on the face of the record.¹⁶⁵ Similarly, lack of jurisdiction may be recognized in *coram nobis* even if the defect was known at the time of trial.¹⁶⁶

The preceding emphasis on matters criminal is not due to inad-vertence or discrimination. The area of civil law has not proven fer-tilite ground for *coram nobis*. As recently as 1948 the supreme court made the statement that "in California the proceeding has been ap-plied . . . only in criminal cases."¹⁶⁷ Although this would soon no longer be true, reported decisions examining the writ's usage outside the criminal context are surprisingly few and far between. None in-volved a constitutional issue identified as being beyond the pale of *coram nobis*.¹⁶⁸ Most were resolved on technical grounds not involv-ing substantive issues. At present, the possible applications of *coram nobis* to civil litigation remain almost totally unexplored.

This catalogue is not intended to be exhaustive. It does, how-ever, serve to illustrate the wide and exceedingly diverse range of legal matters which, if amounting to error, are beyond the corrective reach of *coram nobis*. The lesson is simple—persons relying on er-

165. *E.g.*, *Chadd*, 28 Cal. 3d at 757, 621 P.2d at 847, 170 Cal. Rptr. at 808; *People v. Crosby*, 58 Cal. 2d 713, 722, 375 P.2d 839, 845, 25 Cal. Rptr. 847, 853 (1962); *McGee*, 1 Cal. 2d at 613, 36 P.2d at 379; *People v. Hoffman*, 132 Cal. App. 60, 62-63, 22 P.2d 229, 230 (1933). *See supra* note 66 and accompanying text.

166.

The remedy here sought is available, however, because the basis of defendant's attack on the judgment is that it is void. Fundamental jurisdictional defects . . . do not become irremediable when a judgment of conviction becomes final [W]e have no doubt that a motion to vacate was a proper manner of presenting the jurisdictional problem in this case . . . even though the facts which constitute the claimed jurisdictional defect were known to all concerned, including the trial court, when sentence was pronounced.

Thomas, 52 Cal. 2d at 528-29, 342 P.2d at 893. Note, however, that in *Wheeler*, 5 Cal. App. 3d at 538, 85 Cal. Rptr. at 245, the petitioner's claim, that the federal courts had exclusive jurisdiction to try the offense for which he was convicted in state court, was rejected on the ground that this was an issue of law not cognizable in *coram nobis*. In a similar vein, the court in *People v. Conley*, 115 Cal. App. 2d 749, 252 P.2d 716 (1953), stated: "The questions of . . . the jurisdiction of the trial court were matters which could properly have been raised upon an appeal from the judgment and are not matters which are reviewable in a proceeding for the issuance of a writ of error *coram nobis*." *Id.* at 750, 252 P.2d at 716. Although *Wheeler* and *Conley* may be abstractly correct, they must be deemed overridden by the expansive language used by the supreme court in *Thomas*.

167. *In re Paiva*, 31 Cal. 2d 503, 505, 190 P.2d 604, 606 (1948).

168. *See In re Sprague*, 37 Cal. 2d 110, 230 P.2d 633 (1951); *Los Angeles Airways, Inc. v. Hughes Tool Co.*, 95 Cal. App. 3d 1, 156 Cal. Rptr. 805 (1979); *Page v. Insurance Co. of N. Am.*, 3 Cal. App. 3d 121, 83 Cal. Rptr. 44 (1969); *In re Dyer*, 85 Cal. App. 2d 394, 193 P.2d 69 (1948).

rors of law need not apply. The principle that only errors of fact qualify for consideration (and, as will be seen, even then are subject to important additional restrictions) is the first and qualitatively most significant of the exclusionary hurdles which must be surmounted before a judgment may be erased in *coram nobis*. The next prerequisite obliges the would-be petitioner to consider whether the new evidence will be found inadequate, not by reason of its merits, but rather because of the timeliness of its presentation.

B. *Diligence in Discovering and Presenting The New Fact*

A petition for a writ of error *coram nobis* will in almost all instances be directed at vacating a judgment which, regardless of whether it was appealed, has become final.¹⁶⁹ It is this status, and not merely the passage of time, which figures as the dominant factor in the judicial aversion to reactivating the original controversy. Yet the factor of time has evolved into one of the most important and frequently mentioned prerequisites for obtaining *coram nobis* relief. The concern for this factor is expressed in terms of the diligence with which the petitioner has discovered and presented the new evidence. The importance of diligence cannot be overemphasized and is at least as great as any of the other requirements. Petitioners who fail to pay sufficient heed to it proceed at their own peril.

Diligence is far from a simple concept. Within the context of *coram nobis* it has both procedural and substantive aspects:

It is well settled that a showing of diligence is [a] prerequisite to the availability of relief by motion for *coram nobis*. . . . One who applies for a writ of *coram nobis* . . . must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief. . . . We are of the view that where a [party] seeks to vacate a solemn judgment . . . it is necessary to aver not only the probative facts upon which the basic claim rests, but also the time and circumstances under which the facts were discovered, in order that the court can determine as a matter of law whether the litigant proceeded with due diligence; a mere conclusion of the ultimate facts, or of the legal conclusion of diligence, is insufficient.¹⁷⁰

169. It is not uncommon for a petition to be filed during the pendency of a direct appeal from the judgment. For a discussion of some of the procedural questions which may arise in this situation, see *infra* notes 294, 297, 304.

170. *People v. Shorts*, 32 Cal. 2d 502, 512-13, 197 P.2d 330, 336-37 (1948); *accord*

The dividing line between the procedural and the substantive features of the diligence requirement is evanescent. The two elements are to some extent overlapping. Both require that not only must the new evidence have been discovered at the earliest possible opportunity, it must also be shown that there has been no unexplained and unexcused delay in presenting it to the court.

Procedurally, the showing of diligence in the petition must be "detailed and complete."¹⁷¹ In addition to alleging "the time and circumstances under which the facts were discovered,"¹⁷² the timeliness of their presentation must also be pleaded with particularity in order that the court may satisfy itself, as a matter of law, that the petitioner has not been disqualified from seeking relief by reason of his sloth.¹⁷³ The failure to account for any delay in seeking relief is, by itself, a sufficient basis to deny a petition.¹⁷⁴ Substantively, noncompliance with the diligence requirement entails drastic consequences. A particularized demonstration of prompt action is essential to proving that the petitioner's claim for relief does not run afoul of the statutory exclusion policy. If this requirement is not satisfied, the claim is likewise forfeited as a matter of law.¹⁷⁵

The diligence requirement is an especially perilous trap for the unwary, being probably the most frequently cited reason for denying *coram nobis* petitions. Relief has been refused for delay ranging from as little as three and one-half months¹⁷⁶ to more than 24

People v. Welch, 61 Cal. 2d 786, 790-91, 394 P.2d 926, 930-31, 40 Cal. Rptr. 238, 241-42, (1964); *see, e.g.*, People v. Adamson, 34 Cal. 2d 320, 328-29, 210 P.2d 13, 16 (1949); People v. Gage, 126 Cal. App. 3d 918, 922, 179 Cal. Rptr. 171, 173 (1981); People v. Connor, 270 Cal. App. 2d 630, 635, 75 Cal. Rptr. 905, 908 (1969); People v. Crouch, 267 Cal. App. 2d 64, 69, 72 Cal. Rptr. 635, 638 (1968); People v. Phillips, 263 Cal. App. 2d 423, 428, 69 Cal. Rptr. 675, 678 (1968); People v. James, 99 Cal. App. 2d 476, 481-82, 222 P.2d 117, 119-20 (1950).

171. People v. Waldo, 224 Cal. App. 2d 542, 546, 36 Cal. Rptr. 868, 870 (1964).

172. *See supra* note 170 and accompanying text.

173. *See* People v. Shipman, 62 Cal. 2d 226, 232, 397 P.2d 993, 996-97, 42 Cal. Rptr. 1, 4-5 (1965); Welch, 61 Cal. 2d at 791, 394 P.2d at 930, 40 Cal. Rptr. at 242; *Shorts*, 32 Cal. 2d at 513, 197 P.2d at 337.

174. *See, e.g.*, People v. Lumbley, 8 Cal. 2d 752, 761, 68 P.2d 354, 358 (1937); People v. Tapia, 231 Cal. App. 2d 320, 322, 41 Cal. Rptr. 764, 765-66 (1964); People v. Tannehill, 193 Cal. App. 2d 701, 706-07, 14 Cal. Rptr. 615, 618 (1961); People v. Fritz, 140 Cal. App. 2d 618, 622, 295 P.2d 449, 452 (1956); People v. Mitchell, 129 Cal. App. 2d 711, 713, 277 P.2d 861, 863 (1954); People v. Gennaitte, 127 Cal. App. 2d 544, 548, 274 P.2d 169, 171 (1954); People v. O'Connor, 114 Cal. App. 2d 723, 727-28, 251 P.2d 64, 66 (1952); *see also* People v. Reece, 66 Cal. App. 3d 96, 98, 135 Cal. Rptr. 754, 755 (1977); *Waldo*, 224 Cal. App. 2d at 546, 36 Cal. Rptr. at 870.

175. *See supra* text at note 42.

176. *See* People v. Del Campo, 174 Cal. App. 2d 217, 344 P.2d 339 (1959).

years.¹⁷⁷ Although the passage of time is undoubtedly an important factor, diligence is not measured solely by reference to a calendar. A more important consideration is the petitioner satisfying the court that he has protected his own interests by acting with all reasonable speed to discover and present evidence whose existence was hitherhereto unknown. It is the petitioner's own actions and conduct which are the vital focus of this inquiry. Here the procedural and substantive aspects merge, as do objective and subjective considerations. Apart from a few objective criteria, for example that inactivity will not be excused by such factors as limited education¹⁷⁸ or ignorance of the law,¹⁷⁹ the court's decision is directed to the subjective factors and circumstances unique to each individual petitioner. The petitioner's motivations and background, conversancy with legal procedures, together with the history of the case and previous attempts to overturn the judgment, are properly accounted part of the court's examination.¹⁸⁰

Obviously, it is not the mere discovery of new evidence that will suffice for *coram nobis*.¹⁸¹ Were it otherwise, the supremacy of the statutory remedies, particularly the motion for new trial would not be adequately respected. An important related concern is that the evidence must be newly discovered and not simply newly dis-

177. See *People v. Superior Court*, 4 Cal. 2d 136, 47 P.2d 724 (1935); *People v. Carroll*, 149 Cal. App. 2d 638, 309 P.2d 128 (1957); *People v. Lewis*, 72 Cal. App. 2d 318, 164 P.2d 295 (1945).

178. See *People v. Maston*, 238 Cal. App. 2d 877, 881, 48 Cal. Rptr. 439, 441 (1965).

179. See *People v. Rodriguez*, 143 Cal. App. 2d 506, 508, 299 P.2d 1057, 1058 (1956); cf. *People v. Trantow*, 178 Cal. App. 3d 842, 847, 224 Cal. Rptr. 70, 72 (1986) (ignorance as to proper means of raising claim); *People v. Hodge*, 147 Cal. App. 2d 591, 593, 305 P.2d 957, 959 (1957) (same); *People v. Miller*, 219 Cal. App. 2d 124, 127, 32 Cal. Rptr. 660, 662 (1963) (failure to realize point could have been raised on appeal).

180.

[W]e are justified in considering that defendant's belated desire to take the stand . . . is not because of any belief that he can give testimony relevant to the asserted [claims of the petition] but only to secure further delay. . . . We note, also, the lengthy history of attacks upon the judgment of death . . . and the fact that at all times since defendant went to trial on the murder charge he has been represented by experienced and devoted counsel of his selection. In these circumstances we cannot accept his allegations that he is "poor" and "ignorant" as an excuse of his failure to present a convincing factual showing in support of his conclusionary allegations

People v. Adamson, 34 Cal. 2d 320, 331, 332, 210 P.2d 13, 18-19 (1949); see, e.g., *People v. Hemphill*, 265 Cal. App. 2d 156, 159, 71 Cal. Rptr. 397, 399 (1968); *People v. Tapia*, 231 Cal. App. 2d 320, 323, 41 Cal. Rptr. 764, 766 (1964); *People v. Tannehill*, 193 Cal. App. 2d 701, 705, 14 Cal. Rptr. 615, 617 (1961); see also *infra* notes 250, 261, 292 and accompanying text.

181. See *People v. Burroughs*, 197 Cal. App. 2d 229, 234, 17 Cal. Rptr. 323, 326 (1961); *People v. Krout*, 90 Cal. App. 2d 205, 208, 202 P.2d 635, 637 (1949).

closed.¹⁸² This restriction stems from the deep judicial distaste for the calculated withholding of evidence:

[I]f the applicant for the writ has knowledge of the fact, and such fact if divulged would be for his benefit, he should not be permitted to conceal it, gamble upon the issue, and, being disappointed therewith, ask the court to relieve him from the consequences of his own intentional or negligent act.¹⁸³

The petitioner's good faith is also involved. Thus, a petitioner cannot justify *coram nobis* by advancing facts known at the time of trial only by himself.¹⁸⁴ Similarly, a petitioner who was aware of the fact before the time for making a new trial motion elapsed and who failed to present the fact to the trial court by way of such a motion is thereafter not entitled to use it to seek *coram nobis*.¹⁸⁵ These are not the only variants of a sort of rough-and-ready doctrine of clean hands partaking of estoppel which may preclude *coram nobis*. Another is the denial of relief to a petitioner who mounts a collateral attack upon the judgment using a purported new fact which is "inconsistent with the facts developed and asserted by the petitioner in his own testimony upon the trial of the cause."¹⁸⁶ Finally, a petitioner who deceived the trial court by giving perjured testimony at the trial must surrender all hope of obtaining *coram nobis*.¹⁸⁷ The

182. *People v. Shorts*, 32 Cal. 2d 502, 514, 197 P.2d 330, 337 (1948); *People v. Coyle*, 88 Cal. App. 2d 967, 975, 200 P.2d 546, 552 (1948); see *People v. Phillips*, 263 Cal. App. 2d 423, 428, 69 Cal. Rptr. 675, 678 (1968); *People v. Kelly*, 35 Cal. App. 2d 571, 575, 96 P.2d 372, 374 (1939).

183. *Shorts*, 32 Cal. 2d at 514, 197 P.2d at 337; accord *Phillips*, 263 Cal. App. 2d at 429, 69 Cal. Rptr. at 679; *People v. Wissenfeld*, 169 Cal. App. 2d 59, 61, 336 P.2d 959, 960 (1959); *Kelly*, 35 Cal. App. 2d at 575, 96 P.2d at 374; see *Hemphill*, 265 Cal. App. 2d at 160, 71 Cal. Rptr. at 400.

184. See *In re Kirschke*, 53 Cal. App. 3d 405, 415, 125 Cal. Rptr. 680, 686 (1975).

185. See *People v. Baker*, 92 Cal. App. 2d 623, 625-26, 207 P.2d 58, 59 (1949); see also *People v. Serrano*, 218 Cal. App. 2d 472, 473-74, 32 Cal. Rptr. 811, 812 (1963).

186. *Shorts*, 32 Cal. 2d at 516, 197 P.2d at 338; accord *People v. Mort*, 214 Cal. App. 2d 596, 601, 29 Cal. Rptr. 650, 652 (1963); see *In re De La Roi*, 28 Cal. 2d 264, 272, 169 P.2d 363, 368 (1946); *People v. O'Malley*, 63 Cal. App. 2d 646, 650, 147 P.2d 422, 424 (1944).

This may well be derived from the common law rule that "nothing can be assigned for error that contradicts the record." *Jaques v. Cesar*, 85 Eng. Rep. 776, 793 (K.B. 1668) (editorial note).

187. See *De La Roi*, 28 Cal. 2d at 275, 169 P.2d at 370; *People v. Gilbert*, 25 Cal. 2d 422, 440-41, 154 P.2d 657, 666 (1944); *People v. Black*, 89 Cal. App. 219, 224, 264 P. 343, 345 (1928) ("the writ cannot be invoked in a case in which the petitioner is a party to the fraud"); cf. *People v. Rosoto*, 62 Cal. 2d 684, 687-88, 401 P.2d 220, 22, 43 Cal. Rptr. 828, 830 (1965) (relief denied to petitioners whose claim that the prosecution knowingly used perjured testimony was found by a referee to be "a calculated effort to reverse the result of petitioners' trial through corrupt means").

allegations of the petition must leave no doubt that each and all of these objections do not apply to disable the petitioner from securing relief.

The diligence requirement goes beyond the petitioner's actual knowledge as of the time he requests to have the judgment set aside. Diligence encompasses what is in effect constructive knowledge. No court will tolerate, much less reward, the intentional withholding of evidence.¹⁸⁸ Furthermore, a party cannot seek *coram nobis* using facts which were known or which could have been produced at the trial or on a motion for a new trial.¹⁸⁹ The same is true for information of which the petitioner is deemed to be unavoidably cognizant, such as his or her age.¹⁹⁰ Gamesmanship concerning such matters is not countenanced. "[T]he policy of the law [is] that the claim of newly discovered evidence . . . is uniformly looked on by the courts with distrust and disfavor. . . . [P]ublic policy requires a litigant to exhaust every reasonable effort to produce at his trial all existing evidence in his behalf."¹⁹¹ From this policy has emerged the principle that evidence which could have been produced should have been produced.¹⁹² This ensures that *coram nobis* is not used as an indirect means of undermining the legitimate scope of statutory remedies. The diligence requirement debars only the petitioner who cannot establish that "the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ."¹⁹³ But if the facts were known, could have been

188. See *supra* notes 182-83 and accompanying text.

189. See, e.g., *People v. Smith*, 150 Cal. App. 2d 663, 664, 310 P.2d 480, 481 (1957); *In re Rogers*, 91 Cal. App. 2d 394, 399-401, 205 P.2d 667, 670-71 (1949).

190.

It ordinarily is to be presumed that a person knows his own age. . . . [N]either the petition for the writ, the accompanying affidavit of Shorts' attorney, nor any other of the affidavits filed in support of the motion contains any averment that Shorts himself did not at all times know his age. Clearly a defendant who has knowledge of a fact but does not disclose it until after final judgment of conviction, and who does not attempt to explain his nondisclosure, has not made the requisite showing of diligence and good faith.

Shorts, 32 Cal. 2d at 512, 515, 197 P.2d at 336, 337-38.

191. *Page v. Insurance Co. of N. Am.*, 3 Cal. App. 3d 121, 129, 83 Cal. Rptr. 44, 49 (1969).

192. Cf. *In re Dyer*, 85 Cal. App. 2d 394, 399, 193 P.2d 69, 72 (1948) (*coram nobis* "is not intended as a means of revising findings based on known facts, or facts that should have been known by the exercise of ordinary and reasonable diligence").

193. *People v. Shipman*, 62 Cal. 2d 226, 230, 397 P.2d 993, 995, 42 Cal. Rptr. 1, 3 (1965) (quoting *Shorts*, 32 Cal. 2d at 513, 197 P.2d at 336); accord *People v. Brady*, 30 Cal. App. 3d 81, 87, 105 Cal. Rptr. 280, 283 (1973); *People v. Crouch*, 267 Cal. App. 2d 64, 69,

known, or should have been known, at or about the time of trial, resort to *coram nobis* is precluded.¹⁹⁴ In situations where the petitioner can be charged with having the purported new evidence within reach or knowledge, "the remedy is not available because it was [the petitioner's] 'negligence or fault' that the facts were not known to the court."¹⁹⁵

Certainly, courts will not be oblivious to common sense in judging delay. The time at which the petitioner had the first intimation of the new fact will not necessarily be dispositive. A myriad of other factors and the realities of a petitioner's situation must be taken into account. If the petitioner is imprisoned, the natural impairment of his or her ability to gather information will be a consideration. If expert assistance with a specialized subject is involved, the need for consultation explains some inaction. The absence of counsel may also be of consequence. A reasonable period of time for the accumulation and evaluation of the factual showing planned to support the petition is recognized as legitimate and may be allowed. This grants the petitioner the flexibility and the opportunity to maximize the effectiveness of the *coram nobis* presentation.¹⁹⁶

The frequency with which petitions are denied for lack of dili-

72 Cal. Rptr. 635, 638 (1968).

194. See, e.g., *People v. Thomas*, 52 Cal. 2d 521, 527, 342 P.2d 889, 892 (1959); *People v. Adamson*, 34 Cal. 2d 320, 328, 210 P.2d 13, 17 (1949); *People v. Esquibel*, 44 Cal. App. 3d 591, 594-95, 118 Cal. Rptr. 748, 750-51 (1975), discussed at *infra* text accompanying notes 233-34; *People v. Serrano*, 218 Cal. App. 2d 472, 473-74, 32 Cal. Rptr. 811, 812 (1963); *In re Rogers*, 91 Cal. App. 2d 394, 400-01, 205 P.2d 667, 671 (1949); cf. *People v. Ingles*, 97 Cal. App. 2d 867, 873, 218 P.2d 987, 991 (1950) (petitioner "barred from raising on *coram nobis* the matters that he should have raised" in connection with a statutory remedy).

195. *People v. Banks*, 53 Cal. 2d 370, 378-79, 348 P.2d 102, 107, 1 Cal. Rptr. 669, 674 (1959).

196. Compare *People v. Welch*, 61 Cal. 2d 786, 793, 394 P.2d 926, 931, 40 Cal. Rptr. 238, 243 (1964):

We cannot say that defendant failed to exercise due diligence. Although he first became aware of his brain damage more than a year before his petition was filed, defendant spent the intervening period bolstering his case, filling the gaps in his medical history, and securing assistance. We recognize his difficulty in establishing facts such as those at issue here, while imprisoned in San Quentin. Promptly after securing a psychiatric evaluation of such facts, defendant instituted this proceeding.

with *People v. Lampkin*, 259 Cal. App. 2d 673, 66 Cal. Rptr. 538 (1968), where the petitioner claimed that he had pleaded guilty in reliance upon an unfulfilled promise of leniency. Upholding the denial of *coram nobis*, the reviewing court observed: "More than 14 months elapsed between the pronouncement of sentence and appellant's first statement that any promise had been made. Ordinarily a man so betrayed would have communicated that fact to his trial attorney or to the court in less time than that." *Lampkin*, 259 Cal. App. 2d at 680, 66 Cal. Rptr. at 542.

gence manifests the policy supporting the judicial reluctance to overturn final judgments.¹⁹⁷ Undoubtedly the trial court is allowed considerable discretion to determine whether the diligence requirement has been met, a process which leaves much room for decisions made on the basis of *ad hoc* equitable considerations. Yet the severity with which the diligence requirement has been applied transcends the discretionary fastidiousness of laches¹⁹⁸ and evidences more than the simple desire to avoid reaching a decision on the merits. Legitimate and substantial concerns are present. Excessive delay will impair or make it impossible to reach such a decision. The courts have intimated that extended delay, entailing the loss or destruction of evidence and records, the inevitable dimming of memories and even the death of parties and percipient witnesses, warrants denial because the petitioner lacks the ability to substantiate his allegations.¹⁹⁹

197.

[In] cases denying applications for *coram nobis* or *coram vobis* on the ground of newly discovered evidence, such evidence related only to matters that had been expressly adjudicated at the trial or at least had been put in issue by the accusatory pleading and the defendant's general plea of not guilty. As to those matters the defendant has had his day in court, and considerations of public policy dictate that he be barred from relitigating them after exhausting (or failing to invoke) his statutory remedies of motion for new trial and appeal.

Welch, 61 Cal. 2d at 794, 394 P.2d at 932, 40 Cal. Rptr. at 244.

In *Lampkin*, 259 Cal. App. 2d 673, 66 Cal. Rptr. 538 (1968), discussed at *supra* note 196, the court noted that the petitioner in electing to plead guilty had chosen "to renounce the procedures afforded by the state to determine his guilt or innocence in a trial and appeal. He may not now reverse his position and set aside his plea so as to litigate the issues he knowingly abandoned." *Id.* at 678, 66 Cal. Rptr. at 541. Similar language was used in *People v. Williams*, 253 Cal. App. 2d 560, 566-67, 61 Cal. Rptr. 323, 327 (1967).

198. Nevertheless, references equating lack of diligence with laches are common. See, e.g., *In re Watkins*, 64 Cal. 2d 867, 871-72, 415 P.2d 805, 809, 51 Cal. Rptr. 917, 921 (1966); *People v. Tapia*, 231 Cal. App. 2d 320, 322, 41 Cal. Rptr. 764, 765 (1964); *People v. Sharp*, 157 Cal. App. 2d 205, 210, 320 P.2d 589, 591-92 (1958) (Dooling, J., concurring); *People v. Lempia*, 144 Cal. App. 2d 393, 397, 301 P.2d 40, 43 (1956); *People v. Chapman*, 106 Cal. App. 2d 51, 56, 234 P.2d 716, 720 (1951); *People v. Krout*, 90 Cal. App. 2d 205, 209, 202 P.2d 635, 637 (1949); see also *In re Leyva*, 8 Cal. App. 3d 404, 406, 87 Cal. Rptr. 265, 267 (1970).

199. "An application for a writ of *coram nobis* should be made within a reasonable time. Diligence is required. A convicted person is not permitted to allow years to pass during which witnesses die, disappear or forget, and his own imagination grows and expands." *Lempia*, 144 Cal. App. 2d at 397, 301 P.2d at 43 (quoting *People v. Martinez*, 88 Cal. App. 2d 767, 773, 199 P.2d 375, 379 (1948)); accord *People v. Miller*, 219 Cal. App. 2d 124, 127, 32 Cal. Rptr. 660, 662 (1963); see *People v. Superior Court*, 4 Cal. 2d 136, 140, 47 P.2d 724, 726 (1935); *People v. Muhlenbroich*, 137 Cal. App. 2d 745, 747, 291 P.2d 45, 46 (1955); *Chapman*, 106 Cal. App. 2d at 56, 234 P.2d at 720:

When a person claims a right to legal redress and admits that he has known of his claimed right for at least 14 years, but does nothing to enforce his rights during that period, and waits until everyone who can contradict him is dead, it must be held that he has not proceeded with due diligence, and is entitled to no

Moreover, the diligence requirement is in effect jurisdictional: relief is not available in situations where the new evidence should have been presented on a motion for a new trial but was not discovered until the time for making the motion has lapsed,²⁰⁰ although presumably it could have been discovered and made known to the court at that time. Thus, it has been truly remarked that "long delay [i]s deadly poison" to a *coram nobis* petition.²⁰¹

It must be emphasized that although the diligence requirements are enforced in a strict if not draconian fashion, diligence is not an insurmountable barrier. Perhaps the best illustration of this comes from a pair of recent federal decisions vacating judgments dating back to World War II. Several Japanese Americans had been convicted of violating measures claimed to be necessary for public security in the early stages of the war. Forty years later they obtained information which raised the question whether the courts had been misled by the government concerning the represented danger. On this basis, and because of the considerable doubt concerning whether the judgments would have been rendered had this information been known, *coram nobis* was used to set aside the convictions.²⁰² It would be difficult to conceive of a longer delay between a judgment and an effort to have it overturned, but this did not preclude the granting of relief. The point for present purposes is that diligence is very much dependent upon circumstance and can be overcome by an appropriate showing that discovery of new evidence is in close chron-

relief.

See also *People v. Lewis*, 64 Cal. App. 2d 564, 566-67, 149 P.2d 27, 28 (1944).

200. E.g., *Welch*, 61 Cal. 2d at 793-94, 394 P.2d at 931, 40 Cal. Rptr. at 243; *Reid*, 195 Cal. at 257-58, 232 P. at 461; *People v. Mooney*, 178 Cal. 525, 529-30, 174 P. 325, 327 (1918); *People v. Darcy*, 79 Cal. App. 2d 683, 691, 180 P.2d 752, 757 (1947).

201. *People v. Hayman*, 145 Cal. App. 2d 620, 624, 302 P.2d 810, 812 (1956); see *People v. Fowler*, 175 Cal. App. 2d 808, 811, 346 P.2d 792, 794 (1959).

202. See *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986), *aff'd* 828 F.2d 591 (9th Cir. 1987); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); see also *Yasui v. United States*, 772 F.2d 1496 (9th Cir. 1985). Several of the attorneys involved in these efforts have written of the lengthy process and legal maneuvers culminating in ultimate vindication. See P. IRONS, *JUSTICE AT WAR* (1983); Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986).

Coram nobis was also the means used by Alger Hiss to try to overturn his 1950 conviction for perjury. Unlike the Japanese-Americans, Hiss was not successful. See *In re Hiss*, 542 F. Supp. 973 (S.D.N.Y. 1982), *aff'd mem.*, 722 F.2d 727 (2d Cir.), *cert. denied*, 464 U.S. 890 (1983).

Coram nobis is recognized in federal courts as a method for setting aside criminal convictions, but it has been abolished with respect to civil judgments. See *Hirabayashi*, 828 F.2d at 604; *Yasui*, 772 F.2d at 1499.

ological proximity to the claim for redress.

C. *The Fact*

The essence of *coram nobis* derives from matters of fact, not questions of law. The *sine qua non* for relief is the presentation of newly discovered evidence relative to a fact deemed sufficiently dispositive to compel the setting aside of a final judgment. But fact and law must be harmonized, and the border between them is often difficult to discern. Legal issues are not totally extraneous or devoid of importance. The trigger for *coram nobis* is factual, yet the consequences may be expressed in terms of law.²⁰³ The ultimate issue, whether had the fact been known entry of the judgment would not have occurred, clearly partakes of a legal conclusion. The balance between law and fact often teeters precariously. One evidence of this uneasy equilibrium is the clear tension between judicial respect for the finality of judgments and the maintenance of an extraordinary mechanism for setting them aside. Concern for this uneasy equilibrium is a recurring theme in discussions about *coram nobis*. The tension between these two important considerations has been made tolerable by imposing stringent standards as to the qualitative nature of the newly discovered evidence before the granting of relief will be warranted. Thus, the third major prerequisite relates to the nature and the impact of the factual matter now presented to the court.

Various rules of practice emphasize the crucial importance of framing the *coram nobis* petition in light of a thorough examination of the record in the underlying trial.²⁰⁴ In addition, a sound understanding of what matters are deemed conclusively adjudicated at the trial must be gained in order to comprehend which issues are closed to reconsideration in a *coram nobis* proceeding. One of the fundamental principles governing *coram nobis* is that the newly discovered evidence establishing the claimed error of fact must not go to the merits of issues of fact already tried; once factual issues have been adjudicated, even if decided incorrectly, they can be reopened only by a motion for a new trial.²⁰⁵ This requirement, which promotes and

203. Cf. *In re Dyer*, 85 Cal. App. 2d 394, 399, 193 P.2d 69, 72 (1948) stating:

The writ of error *coram nobis* is issued to correct an error of law that is based upon some issue of fact. . . . To correct an error of fact it is often necessary to modify a legal ruling, order, judgment or decree, but it is the fact and not the law that is the subject of change.

204. See *supra* notes 184-87 and accompanying text.

205. E.g., *People v. Shipman*, 62 Cal. 2d 226, 230, 397 P.2d 993, 995, 42 Cal. Rptr. 1, 3 (1965); *People v. Welch*, 61 Cal. 2d 786, 793, 394 P.2d 926, 931, 40 Cal. Rptr. 238, 243

protects the legitimate judicial concern for the finality of the underlying judgment, "applies even though the evidence in question is not discovered until after the time for moving for a new trial has elapsed or the motion has been denied."²⁰⁶ This restriction, which enforces the principle against relying upon evidence that could have or should have been produced earlier,²⁰⁷ compels respect for the limitation period specified by the Legislature within which a new trial motion can be made. This is one aspect of the writ's common law scope that has been supplanted by the enactment of a statutory remedy.²⁰⁸

In order to overcome the judicial respect for a final judgment, and the concomitant reluctance to set it aside, the evidence must go beyond raising a mere suspicion as to the correctness of the judgment.²⁰⁹ An early statement that "the writ of coram nobis 'is not allowed as of course, but only on its being made to appear with *reasonable certainty* that there has been some error of fact'"²¹⁰ hardly conveys the heavy odds against success. Evidence regarding a fact which would have prevented entry of the judgment clearly requires that the evidence be "crucial" and pertain to an issue which is "material."²¹¹ The evidence must possess the degree of objectively persuasive importance and credibility to surmount the judicial reluctance to purge a final judgment. The evidence must not only be "clear and convincing,"²¹² it must also point "unerringly" to the petitioner's innocence or "undermine the entire case" of the opposing party.²¹³ Put another way, the evidence must be of such intrinsically

(1964); *People v. Tuthill*, 32 Cal. 2d 819, 822, 198 P.2d 505, 506 (1948); *In re Lindley*, 29 Cal. 2d 709, 726, 177 P.2d 918, 928 (1947).

206. *Shipman*, 62 Cal. 2d at 230, 397 P.2d at 995, 42 Cal. Rptr. at 3; *accord Welch*, 61 Cal. 2d at 793, 394 P.2d at 931, 40 Cal. Rptr. at 243.

207. See *supra* notes 182-83, 189-94 and accompanying text.

208. E.g., *Welch*, 61 Cal. 2d at 793-94, 394 P.2d at 931, 40 Cal. Rptr. at 243; *People v. Reid*, 195 Cal. 249, 257-58, 323 P. 457, 460-61 (1924).

209. See *People v. Brady*, 30 Cal. App. 3d 81, 87-88, 105 Cal. Rptr. 280, 283-84 (1973); *People v. Gourdin*, 26 Cal. App. 2d 494, 496, 79 P.2d 782, 783 (1938).

210. *People v. Kretchmar*, 23 Cal. App. 2d 19, 22, 72 P.2d 243, 245 (1937) (emphasis in original).

211. See *Welch*, 61 Cal. 2d at 794, 394 P.2d at 931, 40 Cal. Rptr. at 243, *quoted at infra* note 335.

212. See *infra* note 265 and accompanying text.

213. See *People v. Rosoto*, 62 Cal. 2d 684, 687-88, 401 P.2d 220, 222-23, 43 Cal. Rptr. 828, 830-31 (1965); *In re Kirschke*, 53 Cal. App. 3d 405, 414-15 n.1, 125 Cal. Rptr. 680, 686 n.1 (1975); *People v. Darcy*, 79 Cal. App. 2d 683, 691, 180 P.2d 752, 757 (1947). This standard was derived from habeas corpus practice. See *In re Branch*, 70 Cal. 2d 200, 213-15, 449 P.2d 174, 183-84, 74 Cal. Rptr. 238, 247-48 (1969); *In re Imbler*, 60 Cal. 2d 554, 569-70, 387 P.2d 6, 14-15, 35 Cal. Rptr. 293, 301-02 (1963); *In re Lindley*, 29 Cal. 2d 709, 724, 177 P.2d 918, 927 (1947).

compelling value and force that the dint of its force alone "would have prevented the rendition of the judgment."²¹⁴ To obtain *coram nobis*, the petitioner's evidence must amount to a stake poised to plunge through the heart of the opposing party's case.

The strength required of the petitioner's new evidence may be demonstrated, in a somewhat oblique fashion, by reference to the criminal field. One of the more intriguing statements on the subject is that a petitioner's guilt or innocence cannot be tried in a *coram nobis* proceeding.²¹⁵ Strictly speaking, this is true. The issue of the petitioner's guilt was adjudicated when he or she either entered a plea of guilty or was found guilty at trial. Even if the writ is issued, the case is merely returned to the stage where guilt or innocence has not yet been determined.²¹⁶ But if the fact of innocence cannot itself be conclusively adjudicated in a *coram nobis* proceeding, it can still serve as the litmus for determining whether that form of relief should be granted. Because the test for *coram nobis* is stated in terms of evidence that unerringly points to innocence, undermines the prosecution's entire case, and would have prevented entry of the judg-

214. See, e.g., *People v. Shipman*, 62 Cal. 2d 226, 230, 397 P.2d 993, 995, 42 Cal. Rptr. 1, 3 (1965); *Imbler*, 60 Cal. 2d at 570, 387 P.2d at 15, 35 Cal. Rptr. at 302; *People v. Adamson*, 34 Cal. 2d 320, 326-27, 210 P.2d 13, 15 (1949); *People v. Tuthill*, 32 Cal. 2d 819, 821, 198 P.2d 505, 506 (1948); *People v. Mendez*, 28 Cal. 2d 686, 688, 171 P.2d 425, 426 (1946); *People v. Gilbert*, 25 Cal. 2d 422, 442, 154 P.2d 657, 667 (1949); *People v. Reid*, 195 Cal. 249, 255, 232 P. 457, 459 (1924); *People v. Goodspeed*, 223 Cal. App. 2d 146, 152-53, 35 Cal. Rptr. 743, 746 (1963); *People v. Knight*, 73 Cal. App. 2d 532, 535, 166 P.2d 899, 900 (1946); cf. *People v. Esquibel*, 44 Cal. App. 3d 591, 594, 118 Cal. Rptr. 748, 750 (1975) ("would have resulted in a different verdict"); *People v. Burroughs*, 197 Cal. App. 2d 229, 233, 17 Cal. Rptr. 323, 326 (1961) ("would have effected an acquittal of the petitioner or, at least, have caused a more favorable judgment to be entered against him"); *People v. Gatewood*, 182 Cal. App. 2d 724, 728, 6 Cal. Rptr. 447, 450 (1960) ("would have prevented the verdict of guilty or prevented a valid trial."); *People v. Paysen*, 123 Cal. App. 396, 401, 11 P.2d 431, 434 (1932) ("might have rendered a different result probable").

215. See *People v. Chapman*, 99 Cal. App. 2d 428, 430, 221 P.2d 980, 981 (1950); cf. *People v. Thompson*, 94 Cal. App. 2d 578, 582, 211 P.2d 1, 3 (1949) ("Doubt of appellant's guilt, if such there be, presents no ground for relief by way of writ of error *coram nobis* . . .").

Nevertheless, on a couple of the extremely rare occasions where the trial court's denial of a *coram nobis* petition has been reversed, the reviewing court made heavy intimations of the petitioner's substantial innocence. See *People v. Butterfield*, 37 Cal. App. 2d 140, 144-47, 99 P.2d 310, 312-14 (1940) ("grave injustice may have been inflicted on the petitioner" convicted of first degree murder whereas evidence showed him guilty of "no more than manslaughter"); *People v. Grant*, 97 Cal. App. 60, 62, 274 P. 1005, 1006 (1929) ("facts establish that defendant was not guilty, as charged in the information, and if guilty at all, he was guilty of only a minor technical offense therein included").

216. If the court grants a *coram nobis* petition to vacate a judgment founded upon a defective plea of guilty, both the judgment and the plea should be set aside. See *Gilbert*, 25 Cal. 2d at 439-40, 154 P.2d at 666; *People v. Odium*, 91 Cal. App. 2d 761, 772, 205 P.2d 1106, 1113 (1949); see also *infra* text accompanying notes 343-46.

ment, issuance of the writ is conditioned upon the presentation of evidence which leads to a de facto determination of nonguilt.²¹⁷ Perhaps the best proof of this is the absence of any reported decision of a conviction upon retrial following the granting of a *coram nobis* petition.

What the petitioner must prove is a fact or defense²¹⁸ that virtually opens the prison doors by convincing the court that retrial could not produce the same result. Evidence possessing sufficient materiality that it "would have prevented the rendition of the judgment" is evidence which, even though it cannot establish innocence, will still prevent the same judgment from being rendered. Such language notwithstanding, *coram nobis* is not dependent upon an all-or-nothing approach. Relief can be granted with the prospect that the petitioner may again be convicted, if only for a lesser offense.²¹⁹ But no matter how abstractly persuasive the new evidence, it is still disregarded if it encroaches upon factual issues previously adjudicated. For instance, the most obvious type of evidence that would appear to point unerringly to the petitioner's innocence and would destroy the prosecution's case is a complete confession by another person.²²⁰ Yet courts have repeatedly refused to accept a third-party's confession as constituting a proper basis for issuing a writ of *coram nobis*.²²¹ Upon reflection, it is understandable why another person's admission of guilt

217. Federal courts have stated that "issuance of the writ is tantamount to acquittal," *In re Hiss*, 542 F. Supp. 973, 986 (S.D.N.Y. 1982), *aff'd mem.*, 722 F.2d 727 (2d Cir. 1983), *cert. denied*, 464 U.S. 890 (1983), and is an acquittal's "practical equivalent." *United States v. Keough*, 440 F.2d 737, 741 (2d Cir. 1971).

218. The courts in criminal cases have often stated that the petitioner must show facts which constitute a "valid defense," e.g., *Tuthill*, 32 Cal. 2d at 821, 198 P.2d at 506; *Reid*, 195 Cal. at 255, 232 P. at 459; *Goodspeed*, 223 Cal. App. 2d at 152, 35 Cal. Rptr. at 746; *Burroughs*, 197 Cal. App. 2d at 233, 17 Cal. Rptr. at 326; *Gatewood*, 182 Cal. App. 2d at 726, 6 Cal. Rptr. at 448; *People v. Jackson*, 165 Cal. App. 2d 183, 184, 331 P.2d 981, 982 (1958), *cert. denied sub nom. mem.*, *Jackson v. Heinze*, 360 U.S. 937 (1958), or "which might have been properly defensive matter." See *People v. Roessler*, 217 Cal. App. 2d 603, 606, 31 Cal. Rptr. 684, 686 (1963); *Gatewood*, 182 Cal. App. 2d at 727, 6 Cal. Rptr. at 448; *People v. Hayman*, 145 Cal. App. 2d 620, 623, 302 P.2d 810, 812 (1956). As will be seen, the implication that only defendants can obtain *coram nobis* is not correct. See *infra* text following note 324.

219. See *Butterfield*, 37 Cal. App. 2d 140, 99 P.2d 310 (1940); *People v. Grant*, 97 Cal. App. 60, 274 P. 1005 (1929), discussed at *supra* note 215.

220. See *In re Branch*, 70 Cal. 2d 200, 214-15, 449 P.2d 174, 184, 74 Cal. Rptr. 238, 248 (1969).

221. See, e.g., *In re De La Roi*, 28 Cal. 2d 264 *passim*, 169 P.2d 363 (1946); *People v. Williams*, 238 Cal. App. 2d 585, 592, 48 Cal. Rptr. 67, 72 (1965); *People v. Harris*, 223 Cal. App. 2d 291, 292, 35 Cal. Rptr. 753, 753 (1963); *People v. Sutton*, 115 Cal. App. 2d 751, 752-53, 252 P.2d 633, 634 (1953); *People v. Vernon*, 9 Cal. App. 2d 138, 146, 49 P.2d 326, 330 (1935); see also *People v. Snebold*, 191 Cal. App. 2d 514, 12 Cal. Rptr. 827 (1961).

does not automatically and conclusively lead to the petitioner's cell door being thrown open. The most important reason, particularly where there has been a trial, is that the issue of the petitioner's guilt has already been adjudicated, thus putting it beyond the ambit of *coram nobis*. The confession may be ineffective or inadequate because it merely creates a conflict with other evidence of guilt produced and accepted at the trial.²²² The confession may only involve the complicity of the other person without completely exonerating the petitioner.²²³ A confession may also be disallowed because it merely contradicts the trial testimony of either the petitioner²²⁴ or the confessor,²²⁵ the matter of either's veracity having already been adjudicated at the trial.²²⁶ Moreover, *coram nobis* relief must be denied if the operative facts recounted in the confession were known to the petitioner prior to entry of the judgment.²²⁷ Finally, the exculpatory weight to which the confession might otherwise be entitled is often impaired by the circumstances in which it is made.²²⁸

The *coram nobis* petitioner's new evidence must have persuasive credibility that is objectively and, in effect, conclusively true. In addition to being newly discovered, the evidence must be directly pertinent to the issue of culpability, even if the question of liability or innocence cannot itself be decided.²²⁹ Both the nature of what the new evidence must show—either a valid defense or defensive matter which “would have prevented the rendition of the judgment”²³⁰—and the prohibition against reopening factual issues already litigated,²³¹ prevent *coram nobis* from being used as a means of presenting a new factual defense theory or a novel construction of evidence. It will not warrant relief if it would merely support inferences, opinions, or evidentiary interpretations more favorable to the

222. See *Branch*, 70 Cal. 2d at 215, 449 P.2d at 184, 74 Cal. Rptr. at 248.

223. *De La Roi*, 28 Cal. 2d at 269-75, 169 P.2d at 366-70; *Harris*, 223 Cal. App. 2d at 292, 35 Cal. Rptr. at 753. The acquittal of an accomplice or codefendant likewise proves nothing. See *People v. Kretchmar*, 23 Cal. App. 2d 19, 24, 72 P.2d 243, 246 (1937).

224. See *De La Roi*, 28 Cal. 2d at 270-72, 169 P.2d at 367-68.

225. See *id.*; see also *Sutton*, 115 Cal. App. 2d at 753, 252 P.2d at 634.

226. This is the reasoning by which the issue of perjured testimony is excluded from consideration in *coram nobis*. See *supra* notes 133, 148 and accompanying text.

227. *De La Roi*, 28 Cal. 2d at 275, 169 P.2d at 370.

228. See *id.* at 270, 169 P.2d at 367 (oral confession made to attorney 10 years after trial); *People v. Knight*, 73 Cal. App. 2d 532, 534, 166 P.2d 899, 900 (1946) (oral confession made to attorney and not put into affidavit form until four years after trial deemed “stale” and not “worthy of serious consideration”).

229. See *supra* note 215 and accompanying text.

230. See *supra* notes 214, 218 and accompanying text.

231. See *supra* note 197 and accompanying text.

petitioner.²³²

This point is aptly illustrated by *People v. Esquibel*.²³³ Esquibel had been convicted of assaulting Officer Scott with a vehicle at a riot. Scott testified at Esquibel's trial that Esquibel had intentionally hit him. Scott subsequently commenced a civil action against Esquibel for damages. Officer Rizzo, who was present at the riot, told Scott that Esquibel had not been looking at Scott when the latter was struck by the vehicle. When Scott was later deposed in connection with his civil action, he stated in effect that, in light of Rizzo's observations, he now believed that Esquibel had only been negligent. This change of opinion was held not to be a proper basis for *coram nobis*:

Here, the new fact is Rizzo's account that Esquibel was not looking at Scott when the truck struck him. Rizzo testified at the original criminal trial, and neither party asked him which way Esquibel was looking at the time of impact. If this fact had been brought out, however, it would have been but one of several factors to be considered by the jury in determining Esquibel's intent. If the fact was not known by defendant at his trial, it could have been; if the fact had been disclosed at trial, the verdict would not necessarily have been different. Thus, there is no basis for granting the writ of *coram nobis*.

Esquibel then suggests Scott's change of opinion is a basis for relief. . . . The allegedly contradictory testimony of Scott involves his opinions, not facts. Forming a new opinion based on a recently learned fact which could have been brought out at trial is not a basis for relief under *coram nobis*.²³⁴

Thus, the newly discovered evidence must be carefully examined prior to using it to invoke the extraordinary remedy of *coram nobis*. It cannot be just any new evidence. It must not be merely cumulative to evidence already produced, nor can it call into

232. See *People v. Emery*, 99 Cal. App. 2d 173, 175, 221 P.2d 223, 224 (1950); see also *infra* note 237 and accompanying text.

233. 44 Cal. App. 3d 591, 118 Cal. Rptr. 748 (1975).

234. *Id.* at 594-95, 118 Cal. Rptr. at 750-51. A change in the testimony of a crucial witness is often presented and invariably rejected. See *People v. Rosoto*, 62 Cal. 2d 684, 401 P.2d 220, 43 Cal. Rptr. 828 (1965); *People v. Serrano*, 218 Cal. App. 2d 472, 32 Cal. Rptr. 811 (1963) (no relief was granted by reason of a witness claiming to have presented perjured testimony); *People v. Paysen*, 123 Cal. App. 396, 11 P.2d 431 (1932) (*coram nobis* was denied a petitioner convicted of burglary, notwithstanding the victim declaring her belief that her property may have been merely lost and not stolen). See also *supra* notes 186-87, 221-27 and accompanying text.

question an issue of fact already adjudicated.²³⁵ The "evidence" must not encompass contradiction, repudiation, or recantation of prior testimony, particularly that of the petitioner.²³⁶ Shifts to new theories or changes of opinion will prove unavailing.²³⁷ Use of another person's confession will not suffice to overcome both the prohibition against relitigating a factual issue already adjudicated, and the judicial reluctance to set aside a final judgment. That reluctance is formidable enough to require the petitioner prove, beyond mere possibility or even probability, that the case against him or her should not have been mounted. The evidence must go beyond being helpful or pertinent: it must be dispositive.²³⁸ Moreover, the petitioner's new fact must entail that measure of credibility which demonstrates that the original case cannot be renewed. In short, the action against the petitioner must be shown to be totally misplaced and utterly devoid

235. *People v. Tuthill*, 32 Cal. 2d 819, 826, 198 P.2d 505, 509 (1948). See *supra* note 197.

236. [I]t appears that Kretchmar knew his associate, Andrews, deliberately accused him of planning to enter the Massa cabin with the purpose and intent of stealing the revolvers. He did not contradict the statements made by Andrews or McCoy at the preliminary hearing. No suggestion was then made that he entered the cabin with the consent of the owner to get his own property. Evidently that was an afterthought. It comes too late to assert with probity.

People v. Kretchmar, 23 Cal. App. 2d 19, 23, 72 P.2d 243, 245-46 (1937).

237.

[T]his is not a case where, by excusable neglect and ignorance of the defendant, he was deprived of a defense which, had it been known to the trial court, would have prevented his conviction. Rather, defendant would have the judgment of conviction vacated so that he can make a more effective and complete presentation relative to facts which were in evidence at the trial, together with a single new fact, and again present to a trier of fact the question whether the evidence shows that the killing was murder of the first degree. . . . No doubt many a convicted defendant could, by virtue of his counsel's careful study of the evidence adduced at the trial which resulted in his conviction, with further interviewing of witnesses and examination of the scene of the crime based upon such study, devise a manner of presenting his case which he believes would be more favorably received by a trier of fact than was the presentation of the case at the trial. But it cannot be said that, because such new view of the case is not devised until after final judgment, defendant has been deprived of a valid defense by excusable mistake. The ends of justice would be disserved by allowing to those accused of a crime a series of trials so that they could present one by one various theories of defense arrived at after study of the record of the previous trial. From what has been said it is apparent that the "new fact" upon which defendant relies is of the nature of newly discovered evidence pertinent to the issues which were litigated at the basic trial, and that, while it would have been material and possibly beneficial to the defendant on that trial, it is not such a new fact as would have necessarily precluded the entry of the judgment which was rendered.

Tuthill, 32 Cal. 2d at 822, 826-27, 198 P.2d at 506-07, 509.

238. *Id.*

of any hope of eventual success.

IV. PROCEDURES

The byzantine complexities of the legal requirements for *coram nobis* are daunting. The mechanics of presenting a petition and obtaining a decision upon it are by comparison rather straightforward. Nevertheless, numerous additional difficulties confront any person who would seek the *coram nobis* erasure of a final judgment.

Initially there is the matter of the petition itself. Back in the days when the taking of an appeal had to be orally announced in the trial court, a *coram nobis* petition could likewise be presented by oral motion.²³⁹ Whether this practice survives is doubtful. The most recent important decision by the supreme court proceeds in the opposite direction: by adopting the detailed pleading requirements for habeas corpus to *coram nobis* petitions, and providing for summary denial of petitions which do not establish a prima facie entitlement to relief, the court appears to have assumed that *coram nobis* relief would be sought by the filing of a written petition for the writ or a motion to vacate the judgment.²⁴⁰ Mention has already been made of the detailed allegations needed to satisfy the requirement of demonstrating diligence in discovering and presenting the petitioner's new evidence.²⁴¹ Equivalent specificity is demanded for all other operative elements of the petition, or of the declaration in support of a motion to vacate the judgment. Particularized allegations or averments regarding the fact or facts which would supposedly have prevented entry of the judgment have been called "indispensable."²⁴² The petition must set forth "a full disclosure of the specific facts relied upon and not merely state conclusions as to the nature and effect of such facts."²⁴³ In addition to comprehensive recitals of all pertinent cir-

239. See, e.g., *People v. Curtis*, 104 Cal. App. 2d 219, 221, 230 P.2d 877, 878 (1951); *Kretchmar*, 23 Cal. App. 2d at 20-21, 72 P.2d at 244.

240.

[I]t will often be readily apparent from the petition and the court's own records that a petition for *coram nobis* is without merit and should therefore be summarily denied. When, however, facts have been alleged with sufficient particularity . . . to show that there are substantial legal or factual issues on which availability of the writ turns, the court must set the matter for hearing. These issues may be decided on the basis of memoranda of points and authorities, affidavits, and other written reports.

People v. Shipman, 62 Cal. 2d 226, 230, 397 P.2d 993, 995-96, 42 Cal. Rptr. 1, 3-4 (1965); see *People v. Hemphill*, 265 Cal. App. 2d 156, 158-59, 71 Cal. Rptr. 397, 399 (1968).

241. See *supra* notes 170-74 and accompanying text.

242. *People v. Hamlin*, 152 Cal. App. 2d 112, 114, 312 P.2d 306, 307 (1957).

243. *People v. Shorts*, 32 Cal. 2d 502, 508, 197 P.2d 330, 333 (1948); see *People v.*

cumstances, such as times, places, conditions, statements, identification of persons, and the like, strict showings of causality are required.²⁴⁴

*People v. Hemphill*²⁴⁵ furnishes a good illustration of how these rules are actually applied. Mr. Hemphill had been convicted of burglary and auto theft after entering pleas of guilty. Seven months later he moved to vacate the judgment of his conviction. He averred in a supporting declaration that he had been coerced into making a false confession and pleading guilty in order that bogus charges against him and two friends would be dropped. He further stated that his attorney knew of these circumstances but still "allowed him to enter into this self-conviction thru the fraudulent plea of guilty." The court held that this was insufficient to justify vacating the judgment:

Defendant's declaration here falls short of the requirements of the law. He gives no facts in support of his statement that he was threatened, coerced, or subjected to duress, except that he was told by unidentified persons that he and two anonymous friends would be charged with unspecified crimes if he failed to confess and plead guilty. Though he characterizes his confession as false, he says nothing about what he confessed. He does not assert that he was innocent of the offenses to which he pleaded guilty. The matters stated in the petition are entirely consistent with the possibility that the officers believed in good faith that he and his friends were guilty of several offenses, but that the additional charges against defendant were dropped when he pleaded guilty to the two felonies of which he was admittedly guilty. Although he refers to this arrangement as a 'deal,' and indicates that at the time his motive was to gain freedom for his unidentified friends, he does not even aver that the officers promised to release his friends.

Defendant's assertion that his attorney 'knew that defendant was pleading guilty under duress, threat and coercion' is a pure conclusion unsupported by any statement of fact. The alleged statement of counsel that he would not 'have anything to do

Blevins, 222 Cal. App. 2d 801, 805, 35 Cal. Rptr. 438, 440 (1963); *People v. Mendez*, 144 Cal. App. 2d 500, 503-04, 301 P.2d 295, 298 (1956); *People v. Stapleton*, 139 Cal. App. 2d 512, 513-14, 293 P.2d 793, 794 (1956); see also *People v. Maston*, 238 Cal. App. 2d 877, 881, 48 Cal. Rptr. 439, 441 (1965); *People v. Evans*, 185 Cal. App. 2d 331, 333, 8 Cal. Rptr. 410, 411-12 (1960); *People v. Sharp*, 157 Cal. App. 2d 205, 209, 320 P.2d 589, 591 (1958).

244. See *People v. Sumner*, 262 Cal. App. 2d 409, 416, 69 Cal. Rptr. 15, 20 (1968); *People v. Stonom*, 139 Cal. App. 2d 408, 410, 293 P.2d 807, 809 (1956); *People v. Thomas*, 121 Cal. App. 2d 754, 756, 264 P.2d 100, 101 (1953); *People v. Bailey*, 105 Cal. App. 2d 150, 152, 232 P.2d 518, 519-20 (1951).

245. 265 Cal. App. 2d 156, 71 Cal. Rptr. 397 (1968).

with the "deal" does not mean that counsel failed or refused to advise defendant, or failed to take any other action which should have been taken on his behalf. Defendant's statement that counsel would not advise him is another conclusion which is meaningless without any showing of what facts defendant disclosed to his attorney and on what matters he sought advice.²⁴⁶

The next obstacle confronting the *coram nobis* petitioner is the matter of the adverse presumptions which must be surmounted. In criminal actions the presumption of innocence is obviously no longer operative.²⁴⁷ The petitioner is now deemed "prima facie guilty."²⁴⁸ Once again the petitioner is disadvantaged by the judicial prejudice in favor of the judgment, which is now final and consequently protected by a strong presumption that it is correct and valid in all respects.²⁴⁹ This presumption is particularly burdensome to the petitioner because it obliges the court considering the petition to adopt a skeptical if not hostile attitude in evaluating the attempt to have the

246. *Id.* at 159, 71 Cal. Rptr. at 399. See *People v. Quigley*, 222 Cal. App. 2d 694, 700, 35 Cal. Rptr. 393, 397 (1963) ("He argues that he was forced to enter a plea of guilty, but he does not state when, or where, or under what circumstances such coercion took place . . .").

247.

When a defendant has been informed against or indicted, has been afforded the right to counsel, has been regularly brought to trial, confronted with witnesses, tried, convicted, had the benefit of appeal and suffered affirmance of the judgment of conviction, he stands in a position which is different from that which he occupied before he was found guilty of the offense. Before he was adjudged guilty the state was the attacker and bore the burden of proof to overcome the strongest presumption known to the law; but after [the] verdict, and particularly after the judgment of conviction has been affirmed on appeal, the procedural burdens of the parties are transposed. The care and solicitude of the state for justice continue unabated, always; but the presumption of innocence of the defendant ended with the verdict . . .

Shorts, 32 Cal. 2d at 507-08, 197 P.2d at 333; see *People v. Evans*, 270 Cal. App. 2d 594, 596, 75 Cal. Rptr. 902, 904 (1969); *People v. Taylor*, 218 Cal. App. 2d 321, 324, 32 Cal. Rptr. 384, 386 (1963).

248. *E.g.*, *Shorts*, 32 Cal. 2d at 508, 197 P.2d at 333; *People v. Tannehill*, 193 Cal. App. 2d 701, 704, 14 Cal. Rptr. 615, 617 (1961); *People v. Fowler*, 175 Cal. App. 2d 808, 811, 346 P.2d 792, 795 (1959); *People v. Lewis*, 166 Cal. App. 2d 602, 605, 333 P.2d 428, 431 (1958); *People v. Bible*, 135 Cal. App. 2d 65, 67-68, 286 P.2d 524, 525 (1955).

249. *E.g.*, *Shorts*, 32 Cal. 2d at 508, 197 P.2d at 333; *People v. Crouch*, 267 Cal. App. 2d 64, 67, 72 Cal. Rptr. 635, 637 (1968); *People v. Maston*, 238 Cal. App. 2d 877, 881, 48 Cal. Rptr. 439, 441 (1965); *People v. Goodspeed*, 223 Cal. App. 2d 146, 152, 35 Cal. Rptr. 743, 747 (1963); *People v. Burroughs*, 197 Cal. App. 2d 229, 234, 17 Cal. Rptr. 323, 326 (1961); *Tannehill*, 193 Cal. App. 2d at 705, 14 Cal. Rptr. at 617.

This presumption is not limited to the judgment itself: "All presumptions favor the regularity of the proceedings below." *People v. Fleischer*, 213 Cal. App. 2d 481, 483, 28 Cal. Rptr. 827, 829 (1963). It also applies to any recitals in the judgment. See *People v. Thomas*, 45 Cal. 2d 433, 438, 290 P.2d 491, 495 (1955).

judgment set aside.²⁵⁰ Furthermore, the judge in whose court the judgment was made will be presumed to have performed his or her official duty in a proper manner and to have complied with all statutory requirements.²⁵¹ Finally, the trial court will also be presumed to have acted in the lawful exercise of its jurisdiction.²⁵² In order to demonstrate entitlement to relief in *coram nobis*, the petitioner must overcome all of these presumptions and satisfy formidable burdens of pleading and proof.

A petition may be denied summarily (i.e., without a hearing) if it does not appear that the operative facts "have been alleged with sufficient particularity . . . to show that there are substantial legal or factual issues on which availability of the writ turns."²⁵³ In light of this power it is clear that a denial may be based solely upon the petition itself,²⁵⁴ or upon the petition together with petitioner's sup-

250. "The petition for writ of error coram nobis is opposed by a strong presumption that the judgment . . . was correct . . . and the trial judge is required to weigh a defendant's statements against this presumption." *Crouch*, 267 Cal. App. 2d at 67, 72 Cal. Rptr. at 637; see *Tannehill*, 193 Cal. App. 2d at 705, 14 Cal. Rptr. at 617; *People v. Cole*, 152 Cal. App. 2d 71, 73, 312 P.2d 701, 702 (1957). See also *infra* note 261 and accompanying text.

251. See *People v. Superior Court*, 4 Cal. 2d 136, 147, 47 P.2d 724, 730 (1935); *People v. Quigley*, 222 Cal. App. 2d 694, 698, 35 Cal. Rptr. 393, 395 (1963); *People v. Crawford*, 176 Cal. App. 2d 564, 567-68, 1 Cal. Rptr. 811, 813 (1959); *People v. Wissenfeld*, 169 Cal. App. 2d 59, 61, 336 P.2d 959, 960 (1959); *People v. Kerr*, 113 Cal. App. 2d 90, 93, 247 P.2d 927, 928-29 (1952). This presumption is now codified. See CAL. EVID. CODE § 664 (West 1966); see also *Ross v. Superior Court*, 19 Cal. 3d 899, 913-15, 569 P.2d 727, 736-37, 141 Cal. Rptr. 133, 142-43 (1977).

Records which contradict a petitioner's claim that the trial court failed to perform some act are themselves presumed correct, see *Crawford*, 176 Cal. App. 2d at 567-68, 1 Cal. Rptr. at 813; *In re Steve*, 73 Cal. App. 2d 697, 700, 167 P.2d 243, 245 (1946), thus reinforcing the more general presumption concerning the regularity of the original proceedings. See *supra* note 249 and accompanying text.

These presumptions are not confined to the court. Prosecutors in criminal actions are similarly presumed to have performed their duty in a proper fashion and to "have had knowledge of the law and to have acted in compliance with its requirements." *Superior Court*, 4 Cal. 2d at 147, 47 P.2d at 729-30. Defense counsel will also be presumed to have properly fulfilled all professional obligations in representing the petitioner in the original proceedings. See *Crawford*, 176 Cal. App. 2d at 568, 1 Cal. Rptr. at 813.

252. *Superior Court*, 4 Cal. 2d at 147, 47 P.2d at 730; *Wissenfeld*, 169 Cal. App. 2d at 61, 336 P.2d at 960.

253. *People v. Shipman*, 62 Cal. 2d 226, 230, 397 P.2d 993, 995, 42 Cal. Rptr. 1, 3-4 (1965); accord *People v. Phillips*, 263 Cal. App. 2d 423, 426, 69 Cal. Rptr. 675, 677 (1968); *People v. Lampkin*, 259 Cal. App. 2d 673, 675, 66 Cal. Rptr. 538, 539 (1968); *People v. Vaughn*, 243 Cal. App. 2d 730, 733, 52 Cal. Rptr. 690, 692 (1966); see *Ingram v. Justice Court*, 69 Cal. 2d 832, 843-44, 447 P.2d 650, 656-57, 73 Cal. Rptr. 410, 416-17 (1968). An alternative expression of this power is that summary denial is appropriate if the petitioner's allegations are inadequate to invoke the court's jurisdiction. See *People v. Reid*, 195 Cal. 249, 254, 232 P. 457, 459 (1924); *People v. Hemphill*, 265 Cal. App. 2d 156, 160, 71 Cal. Rptr. 397, 400 (1968); *People v. Golden*, 245 Cal. App. 2d 512, 512, 54 Cal. Rptr. 91, 92 (1966).

254. *Crouch*, 267 Cal. App. 2d at 68, 72 Cal. Rptr. at 637. See *supra* note 253 and

porting proof, written or oral.²⁵⁵ The court is not bound to accept the allegations of the petition at face value,²⁵⁶ even if they are uncontradicted.²⁵⁷ The court has comparable latitude to disbelieve the petitioner's supporting proof.²⁵⁸ Self-serving allegations in the petition may be rejected,²⁵⁹ as may general and hearsay statements.²⁶⁰ The court is required to adopt a jaundiced attitude towards the petitioner's allegations and proof.²⁶¹ The court is vested with the usual powers of a trier of fact: it can believe the petitioner's proof in whole or in part, and its determination of the truth or veracity of any witness is final.²⁶²

accompanying text.

255. *Crouch*, 267 Cal. App. 2d at 68-69, 72 Cal. Rptr. at 638; *People v. Curtis*, 104 Cal. App. 2d 219, 223, 230 P.2d 877, 880 (1951); see *Quigley*, 222 Cal. App. 2d at 697, 35 Cal. Rptr. at 395.

256. *E.g.*, *People v. Adamson*, 34 Cal. 2d 320, 330, 210 P.2d 13, 17 (1949); *People v. Maston*, 238 Cal. App. 2d 877, 881, 882, 48 Cal. Rptr. 439, 441, 442 (1965); *People v. Lewis*, 166 Cal. App. 2d 602, 605, 333 P.2d 428, 431 (1958); *People v. Cole*, 152 Cal. App. 2d 71, 74, 312 P.2d 701, 702 (1957); *People v. Fritz*, 140 Cal. App. 2d 618, 621, 295 P.2d 449, 451 (1956); *People v. Martorana*, 118 Cal. App. 2d 332, 334, 257 P.2d 998, 1000 (1953); *People v. Thompson*, 94 Cal. App. 2d 578, 580, 211 P.2d 1, 2 (1949).

257. *E.g.*, *People v. Blevins*, 222 Cal. App. 2d 801, 805, 35 Cal. Rptr. 438, 440 (1963); *People v. Burroughs*, 197 Cal. App. 2d 229, 234, 17 Cal. Rptr. 323, 326 (1961); *People v. Gatewood*, 182 Cal. App. 2d 724, 728, 6 Cal. Rptr. 447, 449 (1960); *Fritz*, 140 Cal. App. 2d at 621, 295 P.2d at 451.

258. *See, e.g., Maston*, 238 Cal. App. 2d at 882, 48 Cal. Rptr. at 442; *People v. Waldo*, 224 Cal. App. 2d 542, 547, 36 Cal. Rptr. 868, 871 (1964); *People v. Tannehill*, 193 Cal. App. 2d 701, 705, 14 Cal. Rptr. 615, 617 (1961); *People v. Kirk*, 98 Cal. App. 2d 687, 692, 220 P.2d 976, 980 (1950).

259. *Crouch*, 267 Cal. App. 2d at 68, 72 Cal. Rptr. at 638.

260. *See Fritz*, 140 Cal. App. 2d at 622, 295 P.2d at 452; *Martorana*, 118 Cal. App. 2d at 334, 257 P.2d at 1000; see also *People v. Caruso*, 174 Cal. App. 2d 624, 639, 345 P.2d 282, 291 (1959).

261. The need for this skepticism has been expressed in various ways. In *People v. Adamson*, 34 Cal. 2d 320, 210 P.2d 13 (1949), the supreme court stated that "this court, like the trial court, has 'every right and the plain duty to scrutinize [defendant's claims] with a critical eye, in the light of its familiarity with the facts . . . as they had been adduced in [the trial].'" *Id.* at 330, 210 P.2d at 17-18 (quoting *Hylar v. Florida*, 315 U.S. 411, 417 (1941)); see *People v. Croft*, 134 Cal. App. 2d 800, 803, 286 P.2d 479, 480 (1955). Another court made a similar point: "Because of defendant's obvious interest in the outcome of this proceeding the trial court was not required to give full credence to his statements either in his affidavits or on the witness stand." *People v. Snowden*, 149 Cal. App. 2d 552, 557, 308 P.2d 815, 818 (1957); see *People v. Cole*, 152 Cal. App. 2d 71, 74, 312 P.2d 701, 702 (1957). The petitioner's allegations and testimony are also to be considered in light of the presumptions in favor of the judgment. See *supra* notes 247-50 and accompanying text.

262. *See, e.g., People v. Quigley*, 222 Cal. App. 2d 694, 697, 35 Cal. Rptr. 393, 395 (1963); *People v. Flores*, 147 Cal. App. 2d 243, 246, 305 P.2d 90, 92 (1956); *People v. Bobeda*, 143 Cal. App. 2d 496, 500, 300 P.2d 97, 99 (1956); *People v. Chapman*, 106 Cal. App. 2d 51, 54, 234 P.2d 716, 718 (1951); *Kirk*, 98 Cal. App. 2d at 692, 220 P.2d at 980; cf. *People v. Vaughn*, 262 Cal. App. 2d 42, 53-55, 68 Cal. Rptr. 366, 372-74 (1968) (trial court properly drew negative inference from petitioner's failure to produce evidence).

With regard to the showing of proof needed, the petitioner is still fighting uphill. The essential object of the proof—the petitioner's civil or criminal liability—has already been mentioned.²⁶³ This evidentiary burden has been described in various terms, all of which emphasize its onerousness. It must be a "strong showing"²⁶⁴ of "clear and convincing" proof.²⁶⁵ The petitioner's showing must include and establish "a preponderance of substantial and credible evidence"²⁶⁶ or "a preponderance of strong and convincing evidence."²⁶⁷ The severity of the criteria concerning the requisite quantum and quality of proof serves to underscore the recurring emphasis that *coram nobis* relief is not granted in instances where there is but a possibility of past error, but is instead confined to the rare instances of demonstrable nonconsideration of dispositive factual issues amounting to a miscarriage of justice.²⁶⁸

Once a petition has been filed, it may be summarily denied if it fails to make a *prima facie* showing of entitlement to relief.²⁶⁹ In light of the stringent prerequisites for the writ, this manner of disposition must be expected in the great majority of cases.²⁷⁰ The court's power to deny the petition summarily is not restricted by the fact

263. See *supra* notes 205-18 and accompanying text.

264. *E.g.*, *People v. Zack*, 162 Cal. App. 2d 428, 430, 327 P.2d 576, 578 (1958); *People v. Rushing*, 147 Cal. App. 2d 798, 799, 305 P.2d 923, 925 (1957); *cf.* *People v. Schwarz*, 201 Cal. 309, 314-15, 257 P. 71, 73 (1927) ("strong and convincing showing"); *People v. O'Neal*, 204 Cal. App. 2d 707, 709, 22 Cal. Rptr. 641, 642 (1962) (same).

265. *E.g.*, *People v. Evans*, 270 Cal. App. 2d 594, 596, 75 Cal. Rptr. 902, 904 (1969); *People v. Grgurevich*, 153 Cal. App. 2d 806, 811, 315 P.2d 391, 394 (1957); *cf.* *People v. Gurule*, 169 Cal. App. 2d 280, 282, 337 P.2d 111, 112 (1959) ("clear and substantial proof"); *People v. Tucker*, 154 Cal. App. 2d 359, 362, 316 P.2d 417, 419 (1957) ("credible, clear and convincing evidence").

266. *E.g.*, *Bobeda*, 143 Cal. App. 2d at 501, 300 P.2d at 100; *People v. Bible*, 135 Cal. App. 2d 65, 67, 286 P.2d 524, 525 (1955); *People v. Cravens*, 115 Cal. App. 2d 201, 205, 251 P.2d 717, 719-20 (1953); *People v. Devora*, 105 Cal. App. 2d 457, 459, 233 P.2d 653, 654 (1951); *cf.* *People v. Cole*, 152 Cal. App. 2d 71, 73, 312 P.2d 701, 702 (1957) ("preponderance of credible evidence").

267. *E.g.*, *People v. Quigley*, 222 Cal. App. 2d 694, 698, 35 Cal. Rptr. 393, 396 (1963); *People v. Burroughs*, 197 Cal. App. 2d 229, 234, 17 Cal. Rptr. 323, 326 (1961); *People v. Fowler*, 175 Cal. App. 2d 808, 811, 346 P.2d 792, 795 (1959); *People v. Lewis*, 166 Cal. App. 2d 602, 605, 333 P.2d 428, 431 (1958).

268. See *supra* notes 107-15, 209-14 and accompanying text.

269. See, *e.g.*, *People v. Shipman*, 62 Cal. 2d 226, 230, 397 P.2d 993, 995, 42 Cal. Rptr. 1, 3-4 (1965); *People v. Phillips*, 263 Cal. App. 2d 423, 426, 69 Cal. Rptr. 675, 677 (1968); *People v. Vaughn*, 243 Cal. App. 2d 730, 733, 52 Cal. Rptr. 690, 692 (1966).

270. "In view of these strict requirements, it will often be readily apparent from the petition and the court's own records that a petition for *coram nobis* is without merit and should therefore be summarily denied." *Shipman*, 62 Cal. 2d at 230, 397 P.2d at 995, 42 Cal. Rptr. at 3.

that petitioner is represented by counsel.²⁷¹ The petition may be challenged by demurrer²⁷² or by the filing of a traverse in the form of affidavits.²⁷³ The adverse party is not required to present opposition to the petition.²⁷⁴ In fact, given the statistical likelihood of summary denial by the court *ex parte*, there seems scant reason to bother presenting formal opposition unless requested by the court. The court retains the discretionary power to order a hearing notwithstanding any defects in the petition.²⁷⁵

If the petition persuades the court that "there are substantial legal or factual issues on which availability of the writ turns," the petition cannot be summarily denied but must be set for a hearing.²⁷⁶ The incidents of the hearing and the manner in which it is conducted are largely within the discretion of the court.²⁷⁷ The hearing may be conducted like an ordinary trial, but the court is not required

271. *Ingram v. Justice Court*, 69 Cal. 2d 832, 843-44, 447 P.2d 650, 656, 73 Cal. Rptr. 410, 416 (1968).

272. See *In re Sprague*, 37 Cal. 2d 110, 112, 230 P.2d 633, 635 (1951); *People v. Adamson*, 34 Cal. 2d 320, 326, 330, 210 P.2d 13, 15, 17 (1949); *People v. Owen*, 162 Cal. App. 2d 414, 415, 328 P.2d 58, 59 (1958); *People v. McConnell*, 20 Cal. App. 2d 196, 197, 66 P.2d 720, 720 (1937); *People v. Ramey*, 135 Cal. App. 573, 576, 27 P.2d 941, 942 (1933).

In light of the court's power of summary denial, the likelihood of a petition being opposed by a demurrer is probably rather remote. One situation where a demurrer may retain utility is against a petition with a defect apparent on its face, such as a lack of jurisdiction in the court in which the petition was filed. *Cf. infra* notes 286, 302-06 and accompanying text. If a demurrer is successfully interposed, the petitioner must remember that the order sustaining the demurrer, with or without leave to amend, is not appealable. An order either denying or dismissing the petition must be filed in order to ensure appellate review. See *People v. Adamson*, 33 Cal. 2d 286, 201 P.2d 537 (1949).

273. See *People v. Block*, 134 Cal. App. 217, 218, 25 P.2d 242, 242 (1933).

274. *People v. Crouch*, 267 Cal. App. 2d 64, 68, 72 Cal. Rptr. 635, 637 (1968).

275.

While appellant produced no evidence at all, he stood before the court a suitor convicted by judgment of a felony with all its implications and legal consequences, his own veracity impeached by virtue of his own recitals; convicted upon his own plea; silent for nine years; not a witness offered; not a document suggested as containing the germs of legal evidence. Therefore, when confronted with such a pleading, a court is vested with a wide discretion as to whether it will set a day, subpoena the constabulary and roll down the red carpet for petitioner.

People v. Bobeda, 143 Cal. App. 2d 496, 500, 300 P.2d 97, 99 (1956); see *People v. Mendez*, 144 Cal. App. 2d 500, 504, 301 P.2d 295, 298 (1956); *Block*, 134 Cal. App. at 218, 25 P.2d at 242-43.

276. *Ingram v. Justice Court*, 69 Cal. 2d 832, 843-44, 447 P.2d 650, 656-57, 73 Cal. Rptr. 410, 416-17 (1968); *People v. Shipman*, 62 Cal. 2d 226, 230, 397 P.2d 993, 995, 42 Cal. Rptr. 1, 3-4 (1965); *People v. Silva*, 232 Cal. App. 2d 477, 479, 42 Cal. Rptr. 723, 724 (1965).

277. *People v. Lauderdale*, 228 Cal. App. 2d 622, 626, 39 Cal. Rptr. 688, 691 (1964); *People v. Quigley*, 222 Cal. App. 2d 694, 697, 35 Cal. Rptr. 393, 395 (1963).

to do so.²⁷⁸ The court is not obliged to subpoena witnesses desired by the petitioner²⁷⁹ or to call as witnesses persons mentioned in the petition.²⁸⁰ The court may require the presence of the petitioner,²⁸¹ but the hearing may be conducted in his or her absence.²⁸² The indigent petitioner in a criminal action is entitled to have counsel appointed to represent him if a hearing is required.²⁸³ There is no right to have a jury decide the matter,²⁸⁴ which may be resolved by the court solely on the basis of the papers submitted in connection with the petition.²⁸⁵ With regard to its ultimate decision, the court is not obligated to give written grounds for either granting or denying the

278. See *Shipman*, 62 Cal. 2d at 230-31, 397 P.2d at 996, 42 Cal. Rptr. at 4; *People v. Adamson*, 34 Cal. 2d 320, 329, 210 P.2d 13, 17 (1949); *People v. Vaughn*, 243 Cal. App. 2d 730, 733, 52 Cal. Rptr. 690, 692 (1966).

279. See *People v. Remling*, 146 Cal. App. 2d 476, 480, 304 P.2d 97, 99 (1956).

280. *People v. Stonum*, 139 Cal. App. 2d 408, 410, 293 P.2d 807, 809 (1956); see *Vaughn*, 243 Cal. App. 2d at 736, 52 Cal. Rptr. at 694.

281. *Shipman*, 62 Cal. 2d at 230-31, 397 P.2d at 996, 42 Cal. Rptr. at 4; *Vaughn*, 243 Cal. App. 2d at 733, 52 Cal. Rptr. at 692.

282. See, e.g., *People v. Lauderdale*, 228 Cal. App. 2d 622, 627-28, 39 Cal. Rptr. 691-92 (1964); *People v. Waldo*, 224 Cal. App. 2d 542, 547, 36 Cal. Rptr. 868, 871 (1964); *People v. Maria*, 135 Cal. App. 2d 621, 622-23, 287 P.2d 784, 785 (1955); *People v. Genaitte*, 127 Cal. App. 2d 544, 548-49, 274 P.2d 169, 171-72 (1954).

283.

When, however, an indigent petitioner has stated facts sufficient to satisfy the court that a hearing is required, his claim can no longer be treated as frivolous and he is entitled to have counsel appointed to represent him. If relief is denied after the hearing, he is entitled to counsel on appeal . . . for the issues involved may be as substantial as those that may be raised on appeal from a judgment of conviction.

Shipman, 62 Cal. 2d at 232-33, 397 P.2d at 997, 42 Cal. Rptr. at 5; *accord Vaughn*, 243 Cal. App. 2d at 733, 735-36, 52 Cal. Rptr. at 694. This obligation can extend to the public defender. *Ingram v. Justice Court*, 69 Cal. 2d 832, 843, 447 P.2d 650, 656, 73 Cal. Rptr. 410, 416 (1968). The petitioner is also entitled to have a record for the appeal furnished without cost. *In re Paiva*, 31 Cal. 2d 503, 510, 190 P.2d 604, 609 (1948).

284. *People v. Francisco*, 240 Cal. App. 2d 436, 439, 49 Cal. Rptr. 603, 605 (1966); *People v. Black*, 89 Cal. App. 219, 223-24, 264 P. 343, 345 (1928). This follows from the nature of the proceeding—a special proceeding for an extraordinary writ not involving the adjudication of facts.

285. In *Vaughn*, 243 Cal. App. 2d 730, 52 Cal. Rptr. 690 (1966), the reviewing court noted that the trial court's order of denial showed

that the trial court not only considered the allegations of defendant's petition and the court's own records, but that it also considered the district attorney's memorandum, the four declarations in support thereof, and defendant's reply memorandum. This procedure indicates that the trial court concluded in the first instance that defendant's petition contained adequate factual allegations stating a prima facie case for relief in the form of *coram nobis*. Accordingly, the denial of such relief was not summary but followed the granting and holding of a hearing under the principles set forth in *Shipman*.

Id. at 734, 52 Cal. Rptr. at 693.

petition.²⁸⁶

The denial of a petition for *coram nobis* is not *res judicata*.²⁸⁷ Accordingly, there is no limit to the number of successive petitions which may be filed.²⁸⁸ There are, however, several cumulative disadvantages in making repeated applications for the writ. The petitioner

286. See *In re Ronald D.*, 72 Cal. App. 3d 180, 189, 139 Cal. Rptr. 840, 846 (1977); *People v. Fowler*, 175 Cal. App. 2d 809, 810, 346 P.2d 792, 794 (1959).

It may be mentioned in passing that one of the few perils for a trial court considering a *coram nobis* petition is to deny the petition on the ground of lack of jurisdiction. Although this is proper and indeed obligatory if it is clear that an appellate court has exclusive jurisdiction pursuant to California Penal Code section 1265, quoted at *supra* note 51, see *infra* notes 302-06 and accompanying text, it should be avoided in situations where jurisdiction is uncertain but where alternative or additional grounds on which a denial may be based are present. A court which bases its denial solely on jurisdictional grounds runs the risk that a reviewing court will disagree and necessitate further proceedings on the petition. Thus, in *People v. Wiedersperg*, 44 Cal. App. 3d 550, 118 Cal. Rptr. 755 (1975), the reviewing court reversed an order of denial after concluding that "the trial court had jurisdiction and that the petition stated facts upon which the court, in its discretion and if the proof is sufficient, could grant the relief sought." *Id.* at 555, 118 Cal. Rptr. at 758. See *People v. Odum*, 91 Cal. App. 2d 761, 770-72, 205 P.2d 1106, 1113 (1949).

This risk may be minimized if *Wiedersperg* is treated as something of an aberration. The reviewing court there did not apply the familiar rule of appellate practice that what is reviewed is the soundness of the order or judgment, not the reasoning behind it. This rule has been applied to orders denying *coram nobis* petitions for a supposed lack of jurisdiction. See *People v. Reid*, 195 Cal. 249, 253-54, 232 P. 457, 459 (1924); *People v. Vernon*, 9 Cal. App. 2d 138, 140, 49 P.2d 326, 327 (1935). As the supreme court stated in *Reid*,

The substance and effect of the order appealed from is a denial of the application for the writ, and the question for us to determine is whether that order was correct or erroneous, and not whether the reasoning which led to its rendition was sound or otherwise. If the order . . . was correct for [any] reasons appearing of record, it should be affirmed.

Reid, 195 Cal. at 254, 232 P. at 459. Application of this principle saves much needless judicial effort because, following reversal, the petition may again be denied on any other ground deemed appropriate. See *Odum v. Duffy*, 35 Cal. 2d 562, 219 P.2d 785 (1950).

Wiedersperg is notable for the reviewing court's reluctance to affirm the order of denial on the basis of the petitioner's failure to satisfy all prerequisites for relief. Searching for any possible defect in a *coram nobis* petition is a common appellate court practice. It is particularly evident with respect to the requirement of diligence which, as has been shown, is an issue of law. See *supra* text accompanying note 170. There are a large number of decisions where the reviewing court does not state whether the petition was denied for a specific reason or on a particular ground, but the court goes on to hold that denial was proper for any number of reasons. See, e.g., *Lauderdale*, 228 Cal. App. 2d 622, 39 Cal. Rptr. 688 (1964); *People v. Gerule*, 169 Cal. App. 2d 280, 337 P.2d 111 (1959); *People v. Hardison*, 119 Cal. App. 2d 774, 260 P.2d 178 (1953); *People v. Herod*, 112 Cal. App. 2d 764, 247 P.2d 127 (1952). It may be inferred from these decisions, which often partake of a general checklist of *coram nobis* requirements, that the rule of reviewing the result of a trial court without regard to its reasoning is frequently employed because the trial court did not rest its denial on a particular articulated ground.

287. *People v. Sharp*, 157 Cal. App. 2d 205, 209, 320 P.2d 589, 591 (1958); see *People v. Brahm*, 103 Cal. App. 247, 248, 284 P. 256, 256 (1930); see also *infra* note 292.

288. *People v. Golden*, 245 Cal. App. 2d 512, 512, 54 Cal. Rptr. 91, 92 (1966).

will bear an increasingly onerous burden of demonstrating that he exercised due diligence in discovering the new facts warranting relief and that he did not delay in presenting evidence of them to the court.²⁸⁹ The passage of time can also have a decidedly negative impact on the petitioner's ability to substantiate the allegations of the petition.²⁹⁰ In addition, each new petition must be founded upon a factual basis not set forth in previous petitions: the failure to comply with this requirement can by itself justify denial of the petition,²⁹¹ and probably summary denial obviating the necessity of a hearing.²⁹²

289.

Assuming merit in fact in appellant's contentions that the judgment of the municipal court ought to be vacated, it is still open to him to move that court for such an order [vacating the judgment], although by his mistaking the proper forum in which the motion should be originally made he may by lapse of time have jeopardized his chances of success.

Tromanhauser v. Municipal Court, 127 Cal. App. 2d 34, 37, 272 P.2d 803, 805 (1954).

290. See *supra* note 199 and accompanying text.

291. *People v. Walton*, 10 Cal. App. 2d 413, 416, 51 P.2d 1117, 1118 (1935); *People v. Vernon*, 9 Cal. App. 2d 138, 145-46, 49 P.2d 326, 329 (1935).

292. See *People v. Shipman*, 62 Cal. 2d 226, 230, 397 P.2d 993, 995, 42 Cal. Rptr. 1, 3 (1965). In *People v. Wheeler*, 5 Cal. App. 3d 534, 85 Cal. Rptr. 242 (1970), the petitioner had unsuccessfully sought post-conviction relief by way of a petition for *coram nobis*, a motion to vacate the judgment, and a petition for habeas corpus. When he filed another *coram nobis* petition the trial court, upon being advised that the purported grounds for the petition were identical to those alleged in the habeas corpus petition, summarily denied the petition without conducting a hearing on its merits. On appeal, this procedure was held not to be erroneous.

The prospects for success after denial of an initial petition for *coram nobis* may well depend upon the facts, as opposed to the grounds based on those facts, which are alleged in subsequent petitions. If the petitioner is merely reiterating the same ground, issue, or argument which has already been rejected, it has been held that he is in effect precluded from presenting subsequent petitions because the "right to raise these contentions and the right of the courts to rule on them has been 'exercised and exhausted.'" *People v. Marshall*, 126 Cal. App. 2d 357, 358-59, 272 P.2d 816, 817-18 (1954); accord *Vernon v. Rappaport*, 25 Cal. App. 2d 281, 283-84, 77 P.2d 257, 258 (1938); *People v. Paysen*, 123 Cal. App. 396, 399, 402, 11 P.2d 431, 432, 433 (1932); see *People v. Silva*, 232 Cal. App. 2d 477, 478-79, 42 Cal. Rptr. 723, 724 (1965); *People v. Ryan*, 118 Cal. App. 2d 144, 147-48, 257 P.2d 474, 476 (1953); *People v. Howard*, 7 Cal. App. 2d 283, 285-86, 46 P.2d 268, 269 (1935); *People v. Van Buren*, 134 Cal. App. 206, 207, 25 P.2d 32, 33 (1933). The rationale for this practice is to prevent multiple appeals from what is in essence the same ruling, *Vernon*, 25 Cal. App. 2d at 284-85, 77 P.2d at 258; *Howard*, 7 Cal. App. 2d at 286, 46 P.2d at 269, and thus forestall the endless filings of successive petitions. *Vernon*, 9 Cal. App. 2d at 145, 49 P.2d at 329; *Van Buren*, 134 Cal. App. at 207, 25 P.2d at 33.

The soundness of this rule is questionable. The concept of exhausted jurisdiction derives from the trial court's limited power to grant a new trial, see *Paysen*, 123 Cal. App. at 399, 11 P.2d at 432, a power that does indeed terminate after one ruling. See *People v. Lindsey*, 275 Cal. App. 2d 340, 343, 79 Cal. Rptr. 880, 882 (1969); *People v. Clifton*, 270 Cal. App. 2d 860, 861-62, 76 Cal. Rptr. 193, 194-95 (1969); *Espinoza v. Rossini*, 247 Cal. App. 2d 40, 45, 55 Cal. Rptr. 205, 209 (1966). The rule is probably still effective with regard to those petitions which merely repeat grounds already rejected without presenting new allegations of fact. See *In re De La Roi*, 28 Cal. 2d 264, 275, 169 P.2d 363, 370 (1946) ("a petition for habeas

Coram nobis is a postjudgment remedy. It is consequently not available prior to entry of the judgment.²⁹³ After the judgment has been entered, the most obvious and comprehensive mode of review is by direct appeal. Once an appeal has been perfected, the trial court is divested of jurisdiction to act on a petition for the writ.²⁹⁴ A peti-

corpus based upon the same grounds set forth in a previous petition which was denied will be denied *where there has been no change in the facts*" (emphasis added); *People v. Thomas*, 45 Cal. 2d 433, 436-37, 290 P.2d 491, 494 (1955) (same). Application of the rule in such a situation would comport with the supreme court's statement that "it will often be readily apparent from the petition and the court's own records that a petition for *coram nobis* is without merit and should therefore be summarily denied." *Shipman*, 62 Cal. 2d at 230, 397 P.2d at 995, 42 Cal. Rptr. at 3.

The rule against successive petitions, although stated in the absolutist language of exhausted jurisdiction, is neither inflexible nor invariably applied. It has been held that the appropriate court retains the discretionary power to accept and act upon a renewed petition based on the same ground pressed and rejected in a previous petition if that later petition is supported by additional facts, or by the same facts more fully pleaded. *People v. Romano*, 223 Cal. App. 2d 216, 218-19, 35 Cal. Rptr. 756, 757-58 (1963); *People v. Sharp*, 157 Cal. App. 2d 205, 209, 320 P.2d 589, 591 (19578); *People v. Stonum*, 139 Cal. App. 2d 408, 411, 293 P.2d 807, 809 (1956); *Vernon*, 9 Cal. App. 2d at 143-44, 49 P.2d at 328-29; *People v. Brahm*, 103 Cal. App. 247, 248-49, 284 P. 256, 256 (1930); cf. *In re Martin*, 44 Cal. 3d 1, 27 n.3, 744 P.2d 374, 390 n.3, 241 Cal. Rptr. 263, 279 n.3 (1987):

It is . . . the rule that a petition for habeas corpus based on the same grounds as those of a previously denied petition will itself be denied *where there has been no change in the facts* or law substantially affecting the rights of the petitioner. . . . In this case . . . new facts are alleged in the petition and supported by exhibits of recent date.

(emphasis added). The understandable concern for finality and judicial economy should not be unthinkingly used to obliterate the function of *coram nobis*. Although there is much to commend in the practice which requires a petitioner to make his best case on the first effort, practical reality will often interfere. In criminal cases the petition is commonly drafted by a person who is unskilled in the intricacies of pleading, see *Larsen, A Prisoner Looks at Writ-Writing*, 56 CALIF. L. REV. 343, 352 (1968), and who, removed from the real world, may be relying upon information obtained from second-or third-hand sources. Courts will accept a reasonable period of inaction as a legitimate consequence of the desire and the necessity to mount the most effective *coram nobis* presentation possible. See *supra* note 196 and accompanying text.

The purpose of *coram nobis* is to acquaint the court with dispositive facts, but mechanical application of an "only one petition" rule may compel a petitioner to act prematurely at peril of losing all hope of relief. Judicial fears of repeated and frivolous petitions are valid, but they are adequately protected by the requirement of diligence and the procedure for summary denial of petitions which are patently lacking in merit.

293. *People v. Vivian*, 46 Cal. App. 2d 163, 167, 115 P.2d 559, 560-61 (1941); see *People v. Evans*, 270 Cal. App. 2d 594, 597, 75 Cal. App. 2d 902, 904 (1969); *People v. Hales*, 244 Cal. Rptr. 507, 508, 53 Cal. Rptr. 161, 163 (1966).

294. In *People v. Haynes*, 270 Cal. App. 2d 318, 75 Cal. Rptr. 800 (1969), the petitioner had filed a notice of appeal from the judgment before he filed his *coram nobis* petition. The trial court granted his petition and ordered the judgment vacated before the merits of the pending appeal were decided. The reviewing court reversed the order granting the petition. After noting the general rule that "once an appeal has been taken from a judgment . . . the trial court is without jurisdiction to vacate the judgment," it went on to hold that "the taking

tion for *coram nobis* (or, to be more accurate, *coram vobis*)²⁹⁵ filed in an appellate court during the pendency of an appeal will usually be decided before the appeal.²⁹⁶ Any preference in favor of deciding an appeal first is obviously not operative if the judgment becomes final without having been appealed. In that event, the petition must be filed in the court where trial was had and the judgment entered.²⁹⁷

In addition to the myriad procedural and substantive requirements already mentioned, one final obstacle remains. The court which is ruling on the petition has almost complete discretion to

of an appeal terminates *coram nobis* jurisdiction in the trial court." *Id.* at 321, 75 Cal. Rptr. at 802. See *People v. Stanworth*, 11 Cal. 3d 588, 594-95 n.5, 522 P.2d 1058, 1063 n.5, 114 Cal. Rptr. 250, 255 n.5 (1974); *People v. Mort*, 214 Cal. App. 2d 596, 599-600, 29 Cal. Rptr. 650, 651 (1963); *People v. De Sica*, 116 Cal. App. 2d 59, 61, 253 P.2d 75, 76 (1953); but see *People v. Sandoval*, 200 Cal. 730, 254 P. 893 (1927) (order denying *coram nobis* petition to set aside judgment then being appealed affirmed together with judgment). Note that dismissal of the appeal restores the trial court's jurisdiction to rule on a *coram nobis* petition. See *People v. Hales*, 244 Cal. App. 2d 507, 512, 53 Cal. Rptr. 161, 165 (1966); *People v. Tannatt*, 181 Cal. App. 2d 262, 265, 5 Cal. Rptr. 256, 258-59 (1960).

In light of the requirement of diligence in discovering and presenting at the earliest possible opportunity the facts claimed to warrant *coram nobis* relief, see *supra* Part III. B., it may happen that a petition can be filed in the trial court and decided by it prior to expiration of the period for filing a notice of appeal from the underlying judgment. It is thus possible to have simultaneous appeals from both the judgment and from the order denying a petition to set it aside. *People v. Grand*, 16 Cal. App. 3d 27, 93 Cal. Rptr. 658 (1971); *People v. Rhoades*, 1 Cal. App. 3d 442, 81 Cal. Rptr. 701 (1969); *People v. Roessler*, 217 Cal. App. 2d 603, 31 Cal. Rptr. 684 (1963); *People v. Curtis*, 104 Cal. App. 2d 219, 230 P.2d 877 (1951).

295. See *infra* notes 302-22 and accompanying text.

296. See *People v. Westbrook*, 62 Cal. 2d 197, 397 P.2d 545, 41 Cal. Rptr. 809 (1964), discussed at *infra* note 304; *Los Angeles Airways, Inc. v. Hughes Tool Co.*, 95 Cal. App. 3d 1, 156 Cal. Rptr. 805 (1979) (*coram vobis* petition denied before pending appeal decided); *Mort*, 214 Cal. App. 2d 596, 29 Cal. Rptr. 650 (1963) (same); *Rollins v. City & County of San Francisco*, 37 Cal. App. 3d 145, 112 Cal. Rptr. 168 (1974) (motion to augment record on pending appeal treated as petition for *coram vobis*; petition granted and judgment reversed); *contra* *People v. Canada*, 183 Cal. App. 2d 637, 7 Cal. Rptr. 39 (1960) ("premature" *coram nobis* petition denied without prejudice when judgment affirmed on appeal). In *Haynes*, 270 Cal. App. 2d 318, 75 Cal. Rptr. 800 (1969), discussed at *supra* note 294, the court reversed an order granting a *coram nobis* petition to vacate a judgment which was the subject of a pending appeal, stating that "our disposition of the present appeal [from the order] is without prejudice to defendant's applying to this court for *coram nobis* relief while his appeal from the judgment of conviction is pending", *id.* at 322, 75 Cal. Rptr. at 803, without intimating whether such a petition or the appeal would have priority.

297. See *People v. Griggs*, 67 Cal. 2d 314, 316 n.1, 431 P.2d 225, 226 n.1, 61 Cal. Rptr. 641, 642 n.1 (1967).

Prior to the 1949 amendment of Penal Code section 1265, quoted at *supra* note 51, a petition for a writ of *coram nobis* had to be filed in the first instance in the trial court regardless of whether the judgment had been affirmed on appeal. See *In re Lindley*, 29 Cal. 2d 709, 726, 177 P.2d 918, 929 (1947); *In re De La Roi*, 28 Cal. 2d 264, 275, 169 P.2d 363, 370 (1946); see also *Westbrook*, 62 Cal. 2d 197, 397 P.2d 545, 41 Cal. Rptr. 809 (1964), discussed at *infra* note 304.

grant or deny it, and that court's ruling will not be reversed by a reviewing court except for a clear showing of an abuse of that discretion.²⁹⁸ Reversals are and will be rare.²⁹⁹

The order either granting or denying a petition for a writ of error *coram nobis* is ordinarily an appealable order, subject to the same procedural rules governing appeals from a judgment.³⁰⁰ A de-

298. *E.g.*, *People v. Goodspeed*, 223 Cal. App. 2d 146, 156, 35 Cal. Rptr. 743, 749 (1963); *People v. Blevins*, 222 Cal. App. 2d 801, 805, 35 Cal. Rptr. 438, 440 (1963); *People v. Burroughs*, 197 Cal. App. 2d 229, 234, 17 Cal. Rptr. 323, 326 (1961); *People v. Flores*, 147 Cal. App. 2d 243, 246, 305 P.2d 90, 92 (1956); *People v. Bible*, 135 Cal. App. 2d 65, 68, 286 P.2d 524, 525 (1955).

The scope of the review is limited to the showing made before the trial court. *See People v. Crouch*, 267 Cal. App. 2d 64, 67, 72 Cal. Rptr. 635, 637 (1968); *People v. Miller*, 219 Cal. App. 2d 124, 127, 32 Cal. Rptr. 660, 662 (1963); *Bible*, 135 Cal. App. 2d at 69, 286 P.2d at 526; *People v. Croft*, 134 Cal. App. 2d 800, 804, 286 P.2d 479, 481 (1955).

299. *People v. Tucker*, 154 Cal. App. 2d 359, 362, 316 P.2d 417, 419 (1957). In *People v. Thompson*, 94 Cal. App. 2d 578, 211 P.2d 1 (1949), it was made clear just how strong is the reviewing court's deference to the lower court's discretionary power in this matter:

It is only in rare instances that an appellate court will reverse a decision of a trial court on the ground of abuse of discretion; and it cannot be said that discretion has been abused where there is a conflict in the evidence or there is any evidence which supports the judgment of such court.

Id. at 585-86, 211 P.2d at 5 (emphasis added). *See, e.g.*, *Blevins*, 222 Cal. App. 2d at 805, 35 Cal. Rptr. at 440 ("The trial court's denial of the writ of error *coram nobis* is completely within its discretion and cannot be reversed except on a clear showing of an abuse of that discretion . . ."); *People v. Tannehill*, 193 Cal. App. 2d 701, 705-06, 14 Cal. Rptr. 615, 617-18 (1961); *People v. Evans*, 185 Cal. App. 2d 331, 333, 8 Cal. Rptr. 410, 412 (1960) ("The granting of a writ of error *coram nobis* is completely discretionary"); *People v. Crawford*, 176 Cal. App. 2d 564, 567, 1 Cal. Rptr. 811, 813 (1959); *People v. Savin*, 37 Cal. App. 2d 105, 108, 98 P.2d 773, 774 (1940).

Reversals fall into two general categories. The first consists of instances where a trial court grants relief under a misapprehension concerning the nature of *coram nobis* and the attending procedures. *See, e.g.*, *People v. Allenthorp*, 64 Cal. 2d 679, 414 P.2d 372, 51 Cal. Rptr. 244 (1966) (petition presented to and decided by court without jurisdiction); *Haynes*, 270 Cal. App. 2d 318, 75 Cal. Rptr. 800 (1969), discussed at *supra* notes 294, 296 (same); *People v. Gilbert*, 25 Cal. 2d 422, 154 P.2d 657 (1944) (petition erroneously granted on the basis of petitioner presenting false evidence); *People v. Lumbley*, 8 Cal. 2d 752, 68 P.2d 354 (1937) (petition erroneously granted on the basis of matters known to petitioner at the time of trial); *People v. Superior Court*, 4 Cal. 2d 136, 47 P.2d 724 (1935) (same); *People v. Wiedersperg*, 44 Cal. App. 3d 550, 118 Cal. Rptr. 755 (1975), discussed at *supra* note 286 (petition denied by court erroneously believing it was without jurisdiction). The second category involves situations where the trial court has disbelieved uncontradicted allegations that the petitioner pleaded guilty in reliance upon erroneous representations or unkept promises of reliable public officials. *E.g.*, *People v. Wadkins*, 63 Cal. 2d 110, 403 P.2d 429, 45 Cal. Rptr. 173 (1965); *People v. Campos*, 3 Cal. 2d 15, 43 P.2d 274 (1935); *People v. Schwarz*, 201 Cal. 309, 257 P. 71 (1927); *People v. Cortez*, 13 Cal. App. 3d 317, 91 Cal. Rptr. 660 (1970); *People v. Odium*, 91 Cal. App. 2d 761, 205 P.2d 1106 (1949); *People v. Butterfield*, 37 Cal. App. 2d 140, 99 P.2d 310 (1940).

300. *See generally In re Dapper*, 71 Cal. 2d 184, 187, 454 P.2d 905, 907, 77 Cal. Rptr. 897, 899 (1969).

In civil cases, an order either granting or denying the petition is appealable as an order

fendant who has unsuccessfully petitioned for *coram nobis* to vacate the judgment of his or her conviction entered upon a plea of guilty may appeal from the order denying the petition without having to

made after a final judgment which is itself appealable. CAL. CIV. PROC. CODE. § 904.1(b) (West 1986 Supp.); *Page v. Insurance Co. of N. Am.*, 3 Cal. App. 3d 121, 127, 83 Cal. Rptr. 44, 48 (1969); see *In re Dyer*, 85 Cal. App. 2d 394, 399-400, 193 P.2d 69, 72-73 (1948). The only exception to this general rule is that no appeal may be taken from an order on a petition to vacate a judgment which is not itself appealable, such as a judgment entered by consent or pursuant to a stipulation by the parties.

In criminal cases, an order *granting* the petition is one "made after judgment, affecting the substantial rights of the people" within the meaning of Penal Code section 1238, subdivision (5) (West 1982), and therefore appealable by the prosecution. *E.g.*, *Gilbert*, 25 Cal. 2d at 444, 154 P.2d at 668; *Lumbley*, 8 Cal. 2d at 761, 68 P.2d at 359; *Goodspeed*, 223 Cal. App. 2d at 152, 35 Cal. Rptr. at 746. An order denying the petition is ordinarily one which affects the substantial rights of the petitioner within the meaning of Penal Code section 127, subdivision (b) (West 1986 Supp.), and therefore may be appealed by the petitioner. *E.g.*, *Allenthorp*, 64 Cal. 2d at 683, 414 P.2d at 375, 51 Cal. Rptr. at 247; *In re Horowitz*, 33 Cal. 2d 534, 537, 203 P.2d 513, 515 (1949); *People v. Kraus*, 47 Cal. App. 3d 568, 573, 121 Cal. Rptr. 11, 15 (1975); *People v. Perez*, 9 Cal. App. 265, 266, 98 P. 870, 871 (1908).

There are several exceptions to the general rule permitting appeal from an order denying a petition for *coram nobis*. The first is that no appeal may be taken from an order denying a petition which, due to inartful pleading or other defects, fails to establish a prima facie entitlement to relief or to invoke the jurisdiction of the court that denied the petition. See *Kraus*, 47 Cal. App. 3d at 575 n.4, 121 Cal. Rptr. at 16 n.4; *People v. Hemphill*, 265 Cal. App. 2d 156, 160, 71 Cal. Rptr. 397, 400 (1968); *People v. Lampkin*, 259 Cal. App. 2d 673, 681, 66 Cal. Rptr. 538, 543 (1968); *People v. Thornton*, 233 Cal. App. 2d 1, 3, 43 Cal. Rptr. 691, 692 (1965); see also *People v. Tuthill*, 32 Cal. 2d 819, 821, 198 P.2d 505, 506 (1948). Examples of this would be petitions presented to the wrong court or which are based upon matters that could have been reviewed on a direct appeal from the underlying judgment. *E.g.*, *People v. Thomas*, 52 Cal. 2d 521, 527, 529, 342 P.2d 889, 892, 893 (1959); *People v. Thomas*, 45 Cal. 2d 433, 436-37, 290 P.2d 491, 493-94 (1955); *People v. Fleischer*, 213 Cal. App. 2d 481, 483-84, 28 Cal. Rptr. 827, 829 (1963); *People v. Vaitonis*, 200 Cal. App. 2d 156, 159, 19 Cal. Rptr. 54, 56 (1962); *People v. Cantrell*, 197 Cal. App. 2d 40, 43-44, 16 Cal. Rptr. 905, 907-08 (1961) ("Substantial rights' under . . . section 1237 are not affected when defendant's objections concern matters that could have been reviewed on timely appeal from the judgment . . ."); *Tromanhauser v. Municipal Court*, 127 Cal. App. 2d 34, 36-37, 272 P.2d 803, 804 (1954); *People v. Zolotoff*, 48 Cal. App. 2d 360, 363-64, 119 P.2d 745, 747 (1941); see also *People v. Russell*, 139 Cal. App. 417, 419, 34 P.2d 203, 204 (1934); but see *Allenthorp*, 64 Cal. 2d 679, 414 P.2d 372, 51 Cal. Rptr. 244 (1966) (order of denial made by trial court lacking jurisdiction reversed on appeal and re-routed to court which would have jurisdiction). Note, however, that when a petitioner in good faith challenges the underlying judgment in the mistaken belief that the court lacked jurisdiction to render it, the resulting order of denial will be treated as appealable even though the jurisdictional ground could have been considered on a direct appeal from the judgment. See *Thomas*, 52 Cal. 2d at 529, 342 P.2d at 893.

The second class of denial orders which are not appealable are those which deny a petition that is identical to a previously denied petition; in other words, orders denying petitions used as a means to have the court overrule or reconsider the earlier order. See *Vaitonis*, 200 Cal. App. 2d at 159, 19 Cal. Rptr. at 56; *People v. Cantrell*, 197 Cal. App. 2d 40, 43-44, 16 Cal. Rptr. 905, 907-08 (1961); *People v. Agnew*, 81 Cal. App. 2d 408, 411-12, 184 P.2d 167, 170 (1947). Thus, as one court put it, "the appealability of the order may depend on the substance of the facts alleged in or adduced in support of the petition." *People v. Williams*, 238 Cal. App. 2d 585, 587, 48 Cal. Rptr. 67, 69 (1965).

obtain the certificate of probable cause ordinarily required as a condition precedent to the maintenance of an appeal from the judgment itself.³⁰¹

It is now appropriate to consider the little known appellate version of *coram nobis*. Prior to the 1949 amendment of Penal Code section 1265,³⁰² the general rule in all cases was that *coram nobis* relief had to be first sought in the trial court.³⁰³ The directive of that enactment that "if a judgment has been affirmed on appeal no motion shall be made or proceeding in the nature of a petition for a writ of error *coram nobis* shall be brought . . . except in the court

301. As relevant here, the statute governing appeals from a judgment of conviction entered upon a plea of guilty provides in pertinent part:

No appeal shall be taken by [a] defendant from a judgment of conviction upon a plea of guilty or *nolo contendere* . . . except where:

(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings; and

(b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk.

CAL. PENAL CODE § 1237.5 (West 1982); see CAL. R. CT. 31(d).

The courts have exempted appeals from orders in *coram nobis* proceedings from this requirement on the theory that it applies only to appeals from judgments of conviction. See *Kraus*, 47 Cal. App. 3d at 572-77, 121 Cal. Rptr. at 14-17; *People v. Golden*, 245 Cal. App. 2d 512, 512, 54 Cal. Rptr. 91, 92 (1966).

The opposite conclusion was reached in *People v. Chew*, 16 Cal. App. 3d 254, 94 Cal. Rptr. 83 (1971), but it is clearly erroneous. *Chew* was convicted upon his plea of guilty. He appealed from the judgment of conviction, challenging only the formalities of his sentence. He did not obtain a certificate of probable cause. During the pendency of his direct appeal, *Chew* commenced an original proceeding in the reviewing court by filing a *coram nobis* petition attacking the validity of his plea. The court dismissed the petition on the ground *Chew's* non-compliance with Penal Code section 1237.5 "precludes [his] ancillary *coram nobis* attack upon the plea." *Id.* at 257-58, 94 Cal. Rptr. at 84-85. The statute by its own express language applies only to appeals from judgments of conviction in trial courts. "Section 1237.5 is designed to preclude 'frivolous appeals by requiring the defendant to set forth grounds for appeal and, if he does so, by requiring the trial court to rule on the issue of probable cause.'" *In re Brown*, 9 Cal. 3d 679, 683, 511 P.2d 1153, 1155, 108 Cal. Rptr. 801, 803 (1973) (quoting *People v. Ribero*, 4 Cal. 3d 55, 62, 480 P.2d 308, 313, 92 Cal. Rptr. 692, 697 (1971)). *Chew* does not advance this policy by extending it to a situation where the *coram nobis* claim does not figure on any appeal, frivolous or otherwise. Moreover, it would clearly be anomalous to have a trial court involved in evaluating the worth of an original proceeding in a reviewing court concerning issuance of an extraordinary writ, a qualitatively different matter. *Chew* is particularly inexplicable in light of the reviewing court's approval two years earlier of the precise course of action followed by Mr. *Chew*. See *Haynes*, 270 Cal. App. 2d at 322, 75 Cal. Rptr. at 803, discussed at *supra* notes 294, 296. *Chew* is, quite simply, wrong.

In any event, *Chew* can be evaded by petitioning the trial court for *coram nobis* relief prior to filing a notice of appeal from the underlying judgment. See *supra* note 294. *Chew* will not prevent review by appeal from the trial court's ruling on the petition. See *Kraus*, 47 Cal. App. 3d at 575-76, 121 Cal. Rptr. at 16-17.

302. See *supra* note 51.

303. See *supra* note 297 and accompanying text.

which affirmed the judgment on appeal” abrogated this rule in criminal cases and permanently divested the trial court of jurisdiction to entertain a *coram nobis* petition to set aside that judgment.³⁰⁴ If a

304. *Thomas*, 45 Cal. 2d at 436, 290 P.2d at 493; *People v. Sica*, 116 Cal. App. 2d 59, 61, 253 P.2d 75, 76 (1953); *People v. Ponce*, 103 Cal. App. 2d 271, 272, 229 P.2d 77, 77 (1951); *People v. Schunke*, 102 Cal. App. 2d 875, 877, 228 P.2d 620, 622 (1951); see *People v. Stanworth*, 11 Cal. 3d 588, 594-95 n.5, 522 P.2d 1058, 1063 n.5, 114 Cal. Rptr. 250, 255 n.5 (1974); *People v. Brady*, 30 Cal. App. 3d 81, 83, 105 Cal. Rptr. 280, 280 (1973); *People v. Langdon*, 250 Cal. App. 2d 595, 595, 58 Cal. Rptr. 546, 546 (1967); *People v. Morgan*, 148 Cal. App. 2d 871, 872, 307 P.2d 717, 718 (1957).

Notwithstanding the clear language of section 1265, the courts have on occasion evidenced an apparent misappreciation of the division of labor effected by this statute.

In *People v. Westbrook*, 62 Cal. 2d 197, 397 P.2d 545, 41 Cal. Rptr. 809 (1964), the defendant was found guilty of theft. During the course of subsequent proceedings in which he also pleaded guilty to additional charges of theft and forgery, a question arose as to his present sanity. He thereafter filed various documents reciting his desire to appeal and a request to change his pleas to “innocent by reason of insanity.” On appeal from the ensuing judgments of conviction he contended that his requests to change his pleas were in effect petitions for writs of error *coram nobis*. To this the court stated:

It is true that an attempt to change pleas after judgment should be treated as a petition in *coram nobis*, but it is also true that such an application *must be made in the first instance to the trial court* (*People v. Grgurevich*, 153 Cal. App. 2d 806, 810 [315 P.2d 391]; *People v. Wade*, 53 Cal. 2d 322, 339 [1 Cal. Rptr. 683, 348 P.2d 116]). This was not done here, probably because the clerk did not recognize defendant’s plea in propria persona for what it was, and thus did not call it to the attention of the trial judge. Normally we would merely remand all proceedings to the trial court with instructions to pass upon the application for *coram nobis* before proceeding with the appeal. However, the bare request to change pleas contained no express reason, fact or ground sufficient to justify relief. In its present form the trial court could have done nothing but deny it. Therefore, we shall consider the appeals. It should not be inferred from such statement that we are passing upon the merits of the application in the first instance. (See *In re De La Roi*, 28 Cal. 2d 264 [169 P.2d 363], holding that such an application must first be determined in the trial court.) Regardless of our decision on the other issue presented, defendant will not be precluded, when his instant appeals become final, from addressing a proper application for *coram nobis* to the superior court, including the requisite factual allegations.

Id. at 202-03, 397 P.2d at 548, 41 Cal. Rptr. at 812 (emphasis added).

This discussion suffers from several defects. Neither *Grgurevich* nor *Wade* is authority for the court’s statement that a petition for *coram nobis* “must be made in the first instance to the trial court.” The statement is supported by *De La Roi*, see 28 Cal. 2d at 275, 169 P.2d at 370, but that decision preceded the amendment of section 1265, whereas *Grgurevich* and *Wade* followed it. See *supra* note 51. In addition, because Westbrook’s request for *coram nobis* from the trial court was made contemporaneously with his filing a notice of appeal, the trial court had no jurisdiction to act on the request. See *supra* note 294 and accompanying text. Finally, the court’s statement that Westbrook would not be precluded from petitioning the trial court for *coram nobis* “[r]egardless of our decision on the other issue presented” verges on the incomprehensible. If that issue was found to be without merit, with the consequence that the judgments were affirmed, the plain language of section 1265 would require any petition for *coram nobis* to be made to the supreme court.

The other issue raised by Westbrook was, however, determined to require reversal of the judgments. It is therefore possible to construe the court’s language as consistent with section

judgment of conviction has been affirmed, only the court which affirmed it can vacate it: that court's jurisdiction is exclusive.³⁰⁵ A trial court presented with a petition to vacate a conviction which has been affirmed must deny the petition for lack of jurisdiction to take any other action.³⁰⁶ This statutory division of jurisdiction has furnished one basis for retaining the common law writ of error *coram vobis*. Although the common law distinction between *coram nobis* and *coram vobis* was founded upon the status of the court to which the writ was addressed,³⁰⁷ the California practice differentiates upon the basis of the court in which the petition for the writ is filed. Accordingly, in California writs of *coram vobis* issue from appellate courts to correct errors of fact which occurred in inferior courts.³⁰⁸ This can occur either during the pendency of an appeal from a judgment, particularly in civil cases, or after that judgment has been affirmed.

Although the point has never been expressly decided, it is probable that a petitioner seeking to vacate an affirmed civil judgment would be obliged to seek that relief in the first instance from a trial court. This was the rule preceding the amendment of Penal Code section 1265.³⁰⁹ Absent a comparable intervening directive from the Legislature, that rule would appear to remain applicable to challenges in the nature of *coram nobis* upon civil judgments.

The requisites for *coram vobis* are substantially identical to those for *coram nobis*.³¹⁰ There are, however, significant differences in the procedures used by the court in determining whether to grant

1265: because the judgments had not been affirmed, matters were returned to the trial court, which would therefore have jurisdiction to consider a *coram nobis* petition. But the court's statement in *Westbrook* that a petition in whatever form for *coram nobis* "must be made in the first instance to the trial court" is an overly simple dictum that should not be taken as the correct rule of procedure in all circumstances. The same is true for the equally sweeping pronouncement in *In re Watkins*, 64 Cal. 2d 866, 870, 415 P.2d 805, 808, 51 Cal. Rptr. 917, 920 (1966), that "an application for *coram nobis* relief must first be determined in the trial court."

305. E.g., *Thomas*, 45 Cal. 2d at 436, 290 P.2d at 493; *Haynes*, 270 Cal. App. 2d at 320-22, 75 Cal. Rptr. at 801-03; *Sica*, 116 Cal. App. 2d at 61, 253 P.2d at 76; see *People v. Allenthorp*, 64 Cal. 2d 679, 681, 414 P.2d 372, 374, 51 Cal. Rptr. 244, 246 (1966).

306. See *Haynes*, 270 Cal. App. 2d at 322, 75 Cal. Rptr. at 803 (1969); *Ponce*, 103 Cal. App. 2d at 272, 229 P.2d at 77; *Schunke*, 102 Cal. App. 2d at 877, 228 P.2d at 622; *People v. Dunlop*, 102 Cal. App. 2d 314, 318, 227 P.2d 281, 284 (1951).

307. See *supra* note 9.

308. *De La Roi*, 28 Cal. 2d at 276, 169 P.2d at 370; *People v. Black*, 89 Cal. App. 225, 226, 264 P. 346, 346 (1928).

309. See *supra* notes 297, 303 and accompanying text.

310. *People v. Welch*, 61 Cal. 2d 786, 790, 394 P.2d 926, 929, 40 Cal. Rptr. 238, 241 (1964); *In re Imbler*, 60 Cal. 2d 554, 570, 387 P.2d 6, 15, 35 Cal. Rptr. 293, 302 (1963); *In re Lindley*, 29 Cal. 2d 709, 726, 177 P.2d 918, 929 (1947); *De La Roi*, 28 Cal. 2d at 276, 169 P.2d at 370; *In re Wessley W.*, 125 Cal. App. 3d 240, 248, 181 Cal. Rptr. 401 (1981).

or deny a petition for *coram vobis*. The appellate court, like a trial court, can reach a decision based solely on the petition and supporting written materials.³¹¹ Summary denials without hearing are therefore not only proper³¹² but must be expected as the usual means of disposition. Unlike a trial court, an appellate court will not itself conduct an evidentiary hearing if the petitioner makes a prima facie showing of his entitlement to relief. Instead, it may issue an order to show cause why the petition should not be granted, and make the order returnable before itself³¹³ or the court in which the underlying case was tried.³¹⁴ Alternatively, it may appoint a referee (commonly a judge at the trial court level) to hear evidence and make findings.³¹⁵ Finally, it may combine these procedures.³¹⁶ If the appellate court decides to grant a *coram vobis* petition, the form of relief is not limited to vacating the judgment; the court also orders the recall of its own remittitur issued when the judgment was previously affirmed.³¹⁷ If a judgment which is the subject of a pending appeal is also attacked by a *coram vobis* petition, and if favorable action on the petition is not deferred until the appeal is resolved,³¹⁸ the correct procedure requires only the setting aside of the judgment.³¹⁹

The order either granting or denying a petition for a writ of error *coram vobis* is not appealable as of right, but it may be reviewed in the exercise of a higher court's discretionary power.³²⁰ If a

311. See *Welch*, 61 Cal. 2d 786, 394 P.2d 926, 40 Cal. Rptr. 238 (1964) (petition granted); *People v. Brady*, 30 Cal. App. 3d 81, 105 Cal. Rptr. 280 (1973) (petition denied).

312. See *supra* notes 269-70 and accompanying text.

313. This appears to have been the procedure used by the supreme court in *Welch*, 61 Cal. 2d 786, 394 P.2d 926, 40 Cal. Rptr. 238 (1964) and in *In re Busch*, 57 Cal. 2d 536, 370 P.2d 689, 20 Cal. Rptr. 785 (1962). A trial court can issue an order to show cause in connection with a *coram nobis* petition. See *People v. Adamson*, 33 Cal. 2d 286, 201 P.2d 537 (1949).

314. See *In re Kirschke*, 53 Cal. App. 3d 405, 411, 125 Cal. Rptr. 680, 684 (1975).

315. See *In re Rosoto*, 10 Cal. 3d 939, 943, 519 P.2d 1065, 1067, 112 Cal. Rptr. 641, 643 (1974); *People v. Rosoto*, 62 Cal. 2d 684, 687, 401 P.2d 220, 222, 43 Cal. Rptr. 828, 830 (1965); *People v. York*, 272 Cal. App. 2d 463, 464, 77 Cal. Rptr. 441, 442 (1969); *In re Levine*, 122 Cal. App. 2d 192, 193, 264 P.2d 556, 557 (1957); cf. *People v. Wilson*, 106 Cal. App. 2d 716, 719, 236 P.2d 9, 10 (1951) (motion for appointment of referee on appeal from order denying *coram nobis* petition treated as motion for reviewing court to take additional evidence on appeal; motion denied).

316. See *In re Dye*, 73 Cal. App. 2d 352, 354, 166 P.2d 388, 389 (1946).

317. E.g., *Rosoto*, 62 Cal. 2d at 689-90, 401 P.2d at 223, 43 Cal. Rptr. at 831; *Welch*, 61 Cal. 2d at 795, 394 P.2d at 932, 40 Cal. Rptr. at 244; *York*, 272 Cal. App. 2d at 466, 77 Cal. Rptr. at 444.

318. See *supra* note 296 and accompanying text.

319. See *Rollins v. City & County of San Francisco*, 37 Cal. App. 3d 145, 150, 112 Cal. Rptr. 168, 172 (1974).

320. *People v. Allenthorp*, 64 Cal. 2d 679, 682-83, 414 P.2d 372, 375, 51 Cal. Rptr.

petitioner whose judgment was affirmed on appeal is denied *coram nobis* relief by a trial court, an appellate court may treat a purported appeal from the trial court's nonappealable order of denial³²¹ as an original petition for the writ of error *coram vobis*.³²²

V. PRESENT USAGE OF CORAM NOBIS

Allowing for minor variations, the essence of most of the preceding discussion concerning the congerie of rules and restrictions governing *coram nobis* can be stated thusly:

In modern practice, then, the writ of error *coram nobis* may be defined as a common law writ, issuing out of a court of record to review and correct a judgment of its own, relating to some error in fact, as opposed to error in law, not appearing on the face of the record, unknown at the time, without fault, to the court and to the party seeking relief, or not made known because of fraud or duress, but for which the judgment would not have been entered, and for which the statutes in force provide no remedy.³²³

Much attention has been devoted thus far to elucidating what *coram nobis* will not do. It is now appropriate to consider some situ-

244, 247 (1966). Depending on the court which made the order of denial, review may be obtained in the superior court, CAL. CIV. PROC. CODE §§ 117.8, 904.2, 904.5 (West 1980 & Supp. 1986), CAL. R. CT. rules 151-58, 181-91; the court of appeal, CAL. CIV. PROC. CODE § 904.1 (West Supp. 1986), CAL. PENAL CODE §§ 1237, 1238 (West 1982 & Supp. 1986), CAL. R. CT. rules 61-69; or the supreme court, CAL. R. CT. rules 27.5 & 28.

321. See *supra* note 300.

322. See *People v. Brady*, 30 Cal. App. 3d 81, 83, 105 Cal. Rptr. 280, 280 (1973); *People v. Mort*, 214 Cal. App. 2d 596, 599-600, 29 Cal. Rptr. 650, 651 (1963). An interesting variation of this occurred in *People v. Kennedy*, 116 Cal. App. 2d 273, 274, 253 P.2d 522, 523 (1953), where the appellate court dismissed an appeal from the nonappealable order of denial made by the trial court and then treated the petition denied by the trial court and included in the record on the dismissed appeal as if it had been made to the reviewing court in the first instance.

The appellate court may also treat a defective petition for *coram nobis* as an original application for habeas corpus if the requisites for the latter are otherwise satisfied. See *People v. Connor*, 270 Cal. App. 2d 630, 635, 75 Cal. Rptr. 905, 908 (1969); *People v. Vaitonis*, 200 Cal. App. 2d 156, 162-63, 19 Cal. Rptr. 54, 58 (1962); *People v. Dowding*, 185 Cal. App. 2d 274, 277, 8 Cal. Rptr. 208, 210 (1960); *People v. Del Campo*, 174 Cal. App. 2d 217, 220-21, 344 P.2d 339, 341 (1959).

323. Freedman, *supra* note 7, at 370-71 (footnotes omitted).

The variations are that in California (1) issuance of *coram nobis* is not restricted to courts of record, see *People v. Superior Court*, 28 Cal. App. 2d 442, 445, 82 P.2d 718, 719 (1938); see also *Williams v. California M.P. Ass'n*, 136 Cal. App. 172, 28 P.2d 59 (1934), (2) the scope of review permitted is subject to significant limitation, see *supra* notes 93-94, 106-12 and accompanying text, and (3) review is not exclusively confined to errors "not appearing on the face of the record." See *supra* note 165 and accompanying text.

ations that will come within the limited corrective ambit of the writ.

First is the matter of parties. Mention has already been made of the requirement that *coram nobis* will issue only upon a petitioner's demonstration of previously unadjudicated facts amounting to a "valid defense."³²⁴ Insofar as this implies that in criminal cases only the defendant will seek *coram nobis*, it is reflective of the entire corpus of reported authority. If the plaintiff, i.e., the prosecution, prevailed at the trial, it obviously has no interest in reopening the case for the purpose of bolstering its already achieved victory. If the defendant prevailed, *coram nobis* cannot be used by the prosecution because of the double jeopardy prohibition against subjecting the defendant to a second trial.

This is not to say that the prosecution can never apply for *coram nobis*. Suppose that identical twins Johan and Johannes Brahms are charged with committing a murder. Suppose further that the brothers are represented by the same attorney. The prosecutor, believing Johan less culpable than Johannes, agrees with defense counsel to have Johan plead guilty to the lesser offense of manslaughter. But it is Johannes who enters the plea and is sentenced accordingly, remaining silent while the court, the prosecutor, and the defense counsel are unaware of the mix-up. Or assume that Johan actually enters the plea and is sentenced, but that the court clerk erroneously prepares an abstract of judgment in Johannes' name. In each of these situations there is an error of fact concerning the identity of the defendant, which does not appear on the face of the record. The error occurred without the fault of the prosecution which, if it moves promptly and satisfies the remaining prerequisites for *coram nobis*, may be entitled to relief. But such situations, however much they may comport with abstract doctrine, will be conspicuous for their extreme rarity. So as a matter of practical reality, *coram nobis* in criminal cases beckons only for the convicted defendant.

Equivalent certainty cannot be maintained in the context of civil cases. As with criminal cases, *coram nobis* has no attraction for the victor, be it plaintiff or defendant. Lacking the constitutional restraints applicable to criminal actions, there is no impediment to a losing plaintiff petitioning for relief in *coram nobis*. It would be logical to assume that *coram nobis*, with its focus ordinarily limited to demonstrating a single fact, should have greater appeal for a defendant than a plaintiff. In order for the latter to prevail he must satisfy affirmative burdens of proof on a multitude of issues and elements of

324. See *supra* note 218 and accompanying text.

his case. A defendant has only to locate and establish a single chink in the plaintiff's armor to emerge victorious. Nevertheless, *coram nobis* has commonly been sought by disappointed plaintiffs in civil actions.³²⁵ The statements that a petitioner must show a "valid defense," while literally accurate as to the criminal arena, are not vested with equal soundness when transferred to the civil.

Timing is of considerable importance for a person contemplating a petition for a writ of error *coram nobis* to set aside a criminal conviction. This importance has several aspects. First, and most obviously, timing relates to when the petitioner first gains knowledge of the evidence to be claimed as error of fact. If this knowledge was, could have been, or should have been acquired within the period covered by a statutory remedy, it cannot be used.³²⁶ If the evidence is not thus disqualified, the second aspect of timing then comes into play. If the putative petitioner is incarcerated, or if the claim for relief may encompass asserted errors of fact *and* law, consideration should be given to petitioning for habeas corpus. That type of proceeding, like *coram nobis*, will vacate a conviction upon presentation of newly discovered evidence which points unerringly to the petitioner's innocence and which undermines the prosecution's entire case.³²⁷ But unlike *coram nobis*, habeas corpus can also reach claimed errors involving legal and constitutional issues,³²⁸ in addition to permitting consideration of evidence that would be absolutely barred to a *coram nobis* petitioner.³²⁹ *Coram nobis* emerges from

325. See *Los Angeles Airways, Inc. v. Hughes Tool Co.*, 95 Cal. App. 3d 1, 156 Cal. Rptr. 805 (1979); *Rollins v. City & County of San Francisco*, 37 Cal. App. 3d 145, 112 Cal. Rptr. 168 (1974); *Page v. Insurance Co. of N. Am.*, 3 Cal. App. 3d 121, 83 Cal. Rptr. 44 (1969).

326. See *supra* notes 67, 72-73, 189-94 and accompanying text.

327. See *supra* note 213 and accompanying text.

328. See *supra* notes 119-20 and accompanying text.

329. "The grounds upon which may issue a writ of error *coram nobis* or writ of error *coram vobis* are more narrowly restricted than those which allow relief by habeas corpus." *In re Lindley*, 29 Cal. 2d 709, 724-25, 177 P.2d 918, 928 (1947); accord *In re Horowitz*, 33 Cal. 3d 534, 537, 203 P.2d 513, 516 (1949).

A habeas corpus petitioner is not constricted by the *coram nobis* policy of statutory exclusion, see *supra* notes 67-76 and accompanying text, and thus may present exonerating evidence that "either was known or could have been discovered by diligent investigation before trial" together with "any evidence not presented to the trial court and which is not merely cumulative in relation to evidence which was presented at trial." *In re Hall*, 30 Cal. 3d 408, 420, 637 P.2d 690, 695-96, 179 Cal. Rptr. 223, 228-29 (1981) (quoting *In re Branch*, 70 Cal. 2d 200, 214, 449 P.2d 174, 184, 74 Cal. Rptr. 238, 248 (1969) (emphasis in original)). *Hall* is a good example of just how wide ranging the scope of habeas corpus can be. There, a first degree murder conviction was vacated after the supreme court canvassed the issues of misidentification, recanted testimony, alibi, use of materially false evidence, and the competence of Hall's trial attorney.

beneath the shadow of habeas corpus if a person no longer incarcerated wishes to have a conviction set aside solely by virtue of previously unadjudicated errors of fact. The third and final aspect of timing is the petitioner's diligence in presenting the newly discovered evidence as quickly as possible.³³⁰

Issues relating to jurisdiction and party capacity have figured prominently as grounds for *coram nobis* ever since its inception.³³¹ The reason is plain. *Coram nobis* takes no account of peripheral or *de minimis* matters,³³² but instead obliges the petitioner to strike at the jugular. The presence of a fundamental defect such as jurisdiction or capacity provides this sort of target, one so basic that the great mass of evidence presented by the opposing party can be ignored as irrelevant. The nature of these issues also works in the petitioner's favor. The usual type of defense, alibi for instance, involves matters easily understood by a jury and almost always within the personal knowledge of the petitioner.³³³ By contrast, arcane defenses such as the court's jurisdiction or a person's mental state call for specialized information beyond the comprehension of both the trier of fact and the petitioner. Unless expressly put at issue in the original trial, this sort of claim would remain dormant, unconsidered, and undeveloped.

This was the archetypal situation for which *coram nobis* was intended to operate.³³⁴ As Mr. Welch's case demonstrates, it still does.³³⁵ The cognitive process of the human mind is a delicate and

330. See *supra* Part III.B.

331. See *supra* note 14.

332. See *supra* Part III.C.

333. "[A]libi evidence is singularly a fact within the defendant's knowledge." *People v. Trujillo*, 67 Cal. App. 3d 547, 558, 136 Cal. Rptr. 672, 678 (1977) (quoting *People v. Clau-son*, 275 Cal. App. 2d 699, 707, 80 Cal. Rptr. 475, 481 (1969)).

334. See *supra* notes 13-14 and accompanying text.

335.

In the case at bench defendant did not know the facts related in his petition at the time of trial. He was aware that he had been ill as a child, but he did not realize the nature or significance of his childhood illness until after his conviction. . . . [W]e are not dealing with newly discovered evidence "going to the merits of the issues tried" or "issues of fact, once adjudicated" . . . ; rather, the petition presents facts essential to an informed determination of a material issue which, through no fault of defendant, has never yet been tried and adjudicated—*i.e.*, the question of defendant's legal sanity at the time of the commission of the crimes. In the above cited cases denying applications for *coram nobis* or *coram vobis* on the ground of newly discovered evidence, such evidence related only to matters that had been expressly adjudicated at the trial or at least had been put in issue by the accusatory pleading and the defendant's general plea of not guilty. As to those matters the defendant has had his day in court, and considerations of public policy dictate that he be barred from relitigating

mysterious function, one only imperfectly understood. Science and the law are continually pressed to resolve questions of whether liability is affected by currently unaccepted physical and inorganic factors. Examples are not hard to find. The legacy of Vietnam includes the possible effects of Agent Orange and post-traumatic stress syndrome.³³⁶ There are also efforts to have premenstrual disorder recognized as working a reduction of a female defendant's culpability.³³⁷ Whether these attempts succeed is not the point. What is germane is that so long as personal responsibility remains a fundamental touchstone of criminal law, *coram nobis* will have a role to play.

Another situation is very much rooted in present day realities. One of the earliest uses made of *coram nobis* in California was to vacate a conviction based upon a plea of guilty made when the defendant was insane or under the influence of drugs, or if the plea was entered by reason of fraud, ignorance, mistake, coercion, duress, intimidation, or the unfulfilled promise of a responsible state officer.³³⁸ A substantial majority of criminal prosecutions terminate by the accused entering a plea of guilty.³³⁹ As will be seen, the ordinary remedies are either not available or are largely ineffectual. *Coram nobis* thus has an obvious attraction for a person suffering a self-inflicted conviction who is otherwise stymied in his or her efforts to find a means to have it overturned.

The analytical approach for someone contemplating *coram nobis* to set aside a guilty plea conviction would proceed as follows. The initial step is to determine whether the policy of statutory exclu-

them after exhausting (or failing to invoke) his statutory remedies of motion for new trial and appeal. . . . But such policy considerations are outweighed by the interest in individual fairness and justice in a case where, as here, the defendant through no fault of his own was unaware at the time of trial of the existence of such potentially crucial facts as his substantial postencephalic brain damage. The question of defendant's legal sanity at the time of the crimes, of course, was not expressly adjudicated in this trial nor was it even put in issue

People v. Welch, 61 Cal. 2d 786, 791, 794, 394 P.2d 926, 930, 931-32, 40 Cal. Rptr. 238, 242, 243-44 (1964).

336. See *Post Traumatic Stress Disorders*, 1 J. BEHAVIORAL SCI. & L. 25 (1983).

337. See Wallach & Rubin, *The Premenstrual Syndrome and Criminal Responsibility*, 19 UCLA L. REV. 209 (1971).

338. E.g., *People v. Wadkins*, 63 Cal. 2d 110, 113, 403 P.2d 429, 432, 45 Cal. Rptr. 173, 176 (1965); *In re Lindley*, 29 Cal. 2d 709, 725, 177 P.2d 918, 928 (1947); *People v. Phillips*, 263 Cal. App. 2d 423, 426, 427-28, 69 Cal. Rptr. 675, 677-78 (1968); *People v. Williams*, 253 Cal. App. 2d 560, 566, 61 Cal. Rptr. 323, 326 (1967).

339. The latest available statistics show that in fiscal year 1986-87 approximately 92% of the cases in the superior court and 73% of the cases in the municipal and justice courts terminated with guilty pleas. See CAL. JUD. COUNCIL ANN. REP. 94, 135 (1988).

sion aborts the effort at the outset. The would-be petitioner need not linger long over the most common procedures. A person who pleaded guilty cannot make a motion for a new trial.³⁴⁰ Direct appeal is available, but a certificate of probable cause is ordinarily required; even if a certificate is obtained, the appeal is restricted to "reasonable constitutional, jurisdictional, or other grounds going to the legality of the [trial] proceedings."³⁴¹ In general an appeal is thus confined to errors of law evident from the record. There is consequently minimal scope for appeal to overlap *coram nobis*, the latter being addressed to errors of fact which are extrinsic to the record.³⁴² Although there is a statute providing for the court to allow the withdrawal of a guilty plea,³⁴³ this does not impinge upon *coram nobis* if the petition is based on evidence discovered after the judgment was entered. The statute is by its express terms limited to the time before judgment. *Coram nobis* is premised upon the petitioner's ignorance of vital information at all times up to and including entry of the judgment. Moreover, because it may be sought only after judgment,³⁴⁴ *coram nobis* goes beyond the scope of the statute to set aside not only the guilty plea but the ensuing judgment as well.³⁴⁵ *Coram nobis* is in short a post-judgment counterpart of the statute.³⁴⁶ The matter of statutory displacement in this area does not constitute a substantial impediment to the maximum scope of *coram nobis*.

The focus now shifts to what the petitioner intends to put before the court. The point to be developed must be factual, not legal, even though the ultimate determination may resonate with the language of legal conclusion.³⁴⁷ That point of fact must have such power that it impedes the virtual annihilation of the opponent's case. Mobilization of that power is easier for the self-convicted than for almost every other category of *coram nobis* petitioner. This was long ago decided:

340. *People v. Grand*, 16 Cal. App. 3d 27, 30, 93 Cal. Rptr. 658, 660 (1971).

341. CAL. PENAL CODE § 1237.5 (West 1982), *supra* note 301.

342. *See supra* notes 17, 66 and accompanying text.

343. "On application of the defendant at any time before judgment the court may, . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." CAL. PENAL CODE § 1018 (West 1985).

344. *See supra* note 293 and accompanying text.

345. *See supra* note 216.

346. *See People v. Wade*, 53 Cal. 2d 322, 339, 348 P.2d 116, 128, 1 Cal. Rptr. 683, 695 (1959); *People v. Lockridge*, 233 Cal. App. 2d 743, 745, 43 Cal. Rptr. 925, 927 (1965); *People v. Grgurevich*, 153 Cal. App. 2d 806, 810, 315 P.2d 391, 393 (1957); *see also People v. Thomas*, 45 Cal. 2d 433, 439, 290 P.2d 491, 495 (1955).

347. *See supra* note 203 and accompanying text.

It is in those cases where the defendant has been denied a trial upon the merits, in other words, where there has been no trial at all, that relief of this kind has been granted. In such cases . . . in which relief was afforded, were cases where no trial had been had, but a plea had been obtained from the defendant by some character of duress, or the trial was affected by some outside fear.³⁴⁸

This principle effectively nullifies the petitioner's inability to challenge the evidentiary sufficiency of the conviction.³⁴⁹ The petitioner's opposition is hindered because there is no evidence or existing factual adjudications to which deference is ordinarily extended. Vacating a judgment entered upon a guilty plea entails a less drastic loss of already expended judicial resources, a significant consideration underpinning the doctrine of finality, than does setting aside a judgment entered after a full trial. The traditional preference for trial on the merits may be detected in an enhanced judicial willingness to allow matters to be returned to the *status quo ante* the plea.³⁵⁰ This solicitude is evidenced by the manner in which the petitioner's uncontradicted allegations are not subject to unilateral disbelief and summary rejection.³⁵¹

348. *People v. Mooney*, 178 Cal. 525, 529, 174 P. 325, 327 (1918); *accord* *People v. Reid*, 195 Cal. 249, 257, 232 P. 457, 460 (1924); *People v. Schwarz*, 201 Cal. 309, 314-15, 157 P. 71, 73 (1927); *People v. Lyle*, 21 Cal. App. 2d 132, 136, 68 P.2d 378, 380-81 (1937).

349. *See supra* note 155 and accompanying text.

350. "Obviously, where there has been little or no judicial time invested in trial of a cause or an issue, the factor of judicial economy which otherwise weighs in favor of finality is less strong, and the equitable considerations of fair hearing and of penalizing fraud weigh more compellingly." *Los Angeles Airways, Inc. v. Hughes Tool Co.*, 95 Cal. App. 3d 1, 7, 156 Cal. Rptr. 805, 808 (1979).

351. The petitioner must of course comply with the stern requirements for pleading the claim for relief. *See supra* notes 170-74, 241-44 and accompanying text. But once this is done the usual posture for handling the case shifts decisively.

A court examining a *coram nobis* petition is ordinarily vested with the power to disbelieve it in whole or in part. *See supra* notes 256-62 and accompanying text. But in several instances the supreme court has reversed summary denials of petitions in which the petitioner had alleged without contradiction that he had entered a plea of guilty in reliance upon the unkept promises of responsible public officials. *People v. Wadkins*, 63 Cal. 2d 110, 403 P.2d 429, 45 Cal. Rptr. 173 (1965); *People v. Campos*, 3 Cal. 2d 15, 43 P.2d 274, 275-76 (1935); *Schwarz*, 201 Cal. 309, 257 P. 71 (1927). Although the early practice was to reverse the order of denial with directions to permit withdrawal of the plea, as if the allegations had been proven, *see Campos*, 3 Cal. 2d at 19, 43 P.2d at 275-76; *People v. Butterfield*, 37 Cal. App. 2d 140, 147, 99 P.2d 310, 314 (1940), more recent decisions either anticipated the *Shipman* rule regarding summary denial, *see supra* note 253 and accompanying text, or conformed to it by reversing with directions limited to holding a hearing on the merits of the petition. *Wadkins*, 63 Cal. 2d at 115, 403 P.2d at 433, 45 Cal. Rptr. at 177; *People v. Odium*, 91 Cal. App. 2d 761, 772, 205 P.2d 1106, 1113 (1949). In summary, the petitioner's allegations may be said to have a presumption of credibility necessitating a hearing at which this presumption may be deemed

Such solicitude does not, however, exempt the petitioner from establishing full compliance with the diligence requirements. Nor are the numerous pleading and procedural hurdles lowered merely because the petitioner comes from the ranks of the self-convicted. A sloppy or inadequate petition will stand no greater chance of success than one which does not list the petitioner's address as a correctional facility. The extra degree of substantive tolerance extended to this category of petitioner is a function of judicial willingness to see matters returned to square one only because the preference for a trial on the merits was short-circuited. The corollary is that the petitioner, to be successful, must stand ready to participate in a plenary adjudication of the prosecution's case in light of the newly discovered evidence. A petitioner cannot expect to prevail by disputing matters of incidental importance, particularly those pertaining to the plea itself.³⁵²

The petitioner who seeks to have a civil judgment set aside faces difficulties which do not confront someone trying to vacate a criminal judgment. Civil matters, not covered by the constitutional right to a speedy trial, move toward the courthouse at a considerably more relaxed pace. The depth and diversity of discovery permitted between the parties is incontestably greater in civil than in criminal cases. This results in a correspondingly greater scope for assuming that a *coram nobis* petitioner had adequate access to all material evidence before proceeding to trial. There is consequently less room for justifiable ignorance, which is to say that proving diligence in discovering and presenting newly discovered evidence imposes a considerably greater burden for attackers of civil judgments. The nature of most civil disputes also disfavors the sort of dogged attempts at belated vindication which characterize use of *coram nobis* in the criminal realm. If money judgments are affirmed on appeal, they are paid. If declaratory judgments become final, the parties adjust their conduct accordingly. To the loser the dispute, even if not forgotten, ordinarily becomes a matter of history. The loss seldom lingers as a source of festering discontent demanding continued action. In the absence of long-term consequences affecting such vital matters as a person's status,³⁵³ further efforts at victory are generally seen as not worth the trouble. Finally, the less stringent burdens of proof governing most

rebutted by the court acting as the trier of fact. See *People v. Tannehill*, 193 Cal. App. 2d 701, 703-05, 14 Cal. Rptr. 615, 616-18 (1961); *Odlum*, 91 Cal. App. 2d at 772, 205 P.2d at 1113.

352. See *supra* notes 160-63 and accompanying text.

353. Cf. *In re Sprague*, 37 Cal. 2d 110, 230 P.2d 633 (1951) (unsuccessful *coram nobis* attempt to vacate judgment of insanity).

civil actions "indicate[] both society's 'minimal concern with the outcome,' and a conclusion that the litigants should 'share the risk of error in roughly equal fashion.'"³⁵⁴ This last factor reduces the chances for demonstrating that the judgment would not have been entered had the proffered error of fact been known.

These are only partial explanations, albeit not unimportant ones, of why *coram nobis* has found so little outlet on the civil side of the ledger. An additional and related component of the explanation is the wide array of alternative remedies whose availability exerts a substantial reduction of justification for resorting to *coram nobis*.

Once a party is advised—either by return of the jury's verdict or by the intended decision filed by a judge acting as the trier of fact—that the trial is lost, the first and most obvious means of correcting errors of both fact and law is by motion for a new trial.³⁵⁵ This is the statutory remedy responsible for the greatest curtailment of the common law scope of *coram nobis*. The primacy of this remedy is a function of both chronology and comprehensiveness. Chronologically, the fact that the new trial motion is the first in time of the array of means whereby a judgment may be attacked ensures that the dissatisfied party's motivation is at its keenest. No money has yet changed hands. No act or change of position has yet been required. The very recency of the defeat, coupled with disbelief at its occurrence, produces the most reliable incentive for discovery of new evidence. Comprehensively, the corrective ambit of the relief which may be granted in connection with a new trial motion extends from reopening any one issue to returning the entire case to square one.³⁵⁶ In cases tried without a jury, the court is authorized to revise specific factual findings, even if no new trial is ordered.³⁵⁷ In light of the speed by which it can be sought, the adjustable scope of its relief, and the spur of predictable human emotions activated by its availability, the new trial motion is the most formidable statutory displacer

354. *Santorsky v. Kramer*, 455 U.S. 745, 755 (1982) (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

355. In civil cases, a new trial can be ordered for, among other reasons, "[n]ewly discovered evidence material for the party making the application, which could not, with reasonable diligence have [been] discovered and produced at the trial," and "[e]rror in law, occurring at the trial." CAL. CIV. PROC. CODE § 657 (West 1976).

356. "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues . . ." *Id.*

357. See *id.* § 662 (West Supp. 1987); *Pacific Home v. County of Los Angeles*, 41 Cal. 2d 855, 857, 264 P.2d 544, 546 (1953); *Spier v. Lang*, 4 Cal. 2d 711, 713-14, 53 P.2d 138, 139-40 (1935); *Medak v. Cox*, 12 Cal. App. 3d 70, 74, 90 Cal. Rptr. 452, 453-54 (1970); *Warren Southwest, Inc. v. Wicks*, 276 Cal. App. 2d 152, 155, 80 Cal. Rptr. 723, 725 (1969); *Knapp v. City of Newport Beach*, 186 Cal. App. 2d 669, 682, 9 Cal. Rptr. 90, 98-99 (1960).

of the function of *coram nobis* at common law. This remedy has a degree of flexibility conspicuously lacking with appeal, which is the next most frequently mentioned statutory alternative to the writ, but which is ill-suited and unreceptive to the production of new evidence.³⁵⁸ In short, *coram nobis* has no application during the period preceding entry of a judgment within which a new trial motion can be made, and its availability is suspended during the period following entry of a judgment within which a motion is authorized.³⁵⁹ New evidence which either was, could have been, or should have been discovered during those periods is lost as a basis for a subsequent *coram nobis* petition.³⁶⁰

Once a judgment has been entered and the period for making a new trial motion has expired, there is another statutory remedy to be considered. Code of Civil Procedure section 473 vests trial courts with the power to set aside judgments within six months of entry by reason of a party's "mistake, inadvertence, surprise or excusable neglect."³⁶¹ The manner in which these grounds have been interpreted is harmonious with the attention paid to a petitioner's lack of blameworthiness as a prerequisite to obtaining *coram nobis* relief.³⁶² Al-

358. See *Rollins v. City & County of San Francisco*, 37 Cal. App. 3d 145, 112 Cal. Rptr. 168 (1974), where newly discovered evidence was found ineligible for a motion to augment the record on a pending appeal and likewise for a motion to produce additional evidence before the appellate court. The only other means of bringing evidence to the attention of an appellate court is by judicial notice, which would have little or no utility to *coram nobis* petitioners because it is not appropriate for controversial matters of fact. See *Dean W. Knight & Sons, Inc. v. First Western Bank & Trust Co.*, 84 Cal. App. 3d 560, 567-68, 148 Cal. Rptr. 767, 771-72 (1978); see also *People v. Preslie*, 70 Cal. App. 3d 486, 138 Cal. Rptr. 828 (1977) (limitations upon augmentation and judicial notice).

359. See *supra* notes 41-42, 68-77 and accompanying text.

A motion for new trial can be made (1) before the entry of judgment, or (2) within 15 days of the date of mailing notice of entry of the judgment, or (3) within 180 days after the judgment is entered. CAL. CIV. PROC. CODE § 659 (West 1976). If the motion is made before the judgment is entered, there is no diminution of the common law scope of *coram nobis* jurisdiction, which is premised upon the existence of a judgment.

360. See *supra* notes 72-75 and accompanying text.

361.

The court may, upon such terms as may be just, relieve a party or his or her legal representative from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect. Application for such relief . . . must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken

CAL. CIV. PROC. CODE § 473 (West Supp. 1987).

362.

A mistake of fact is when a person understands the facts to be other than they are. . . . Inadvertence is defined as lack of heedfulness or attentiveness, inattention, fault from negligence. . . . The "surprise" referred to in section 473 is

though there is no reported decision explicitly so holding, it would appear that section 473 is another statutory alternative which supplants and excludes *coram nobis* for the six-month period in which the statute is operative.³⁶³ Unlike the new trial remedy, which is still available if an appeal from the judgment is pending,³⁶⁴ a court's power to set aside a judgment pursuant to section 473 terminates if an appeal has been commenced.³⁶⁵ If an appeal is pending, the showing that would be made to the trial court under section 473 must be made to the appellate court's *coram vobis* jurisdiction.³⁶⁶

If the statutory provisions for new trial and relief pursuant to Code of Civil Procedure section 473 either have not or cannot be found to furnish a means by which the judgment can be vacated, the mechanism generally recognized as the final resort for the disappointed civil litigant is the independent suit in equity to set aside the judgment.³⁶⁷ As with *coram nobis*, a suit in equity cannot be used as a means for the idle reexamination of a final judgment. Like *coram nobis*, the suit in equity requires that the party seeking to set aside the judgment have acted with diligence and without any hint of contributory negligence or participation.³⁶⁸ A further requirement is a reasonable prospect that a different judgment would result.³⁶⁹

Strictly speaking, an equitable attack upon a judgment is not derived from statutory authority and thus would not impinge on the

defined to be some "condition in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against." . . . The "excusable neglect" referred to in the section is that neglect which might have been the act of a reasonably prudent person under the same circumstances

Hodge Sheet Metal Prods. v. Palm Springs Riviera Hotel, 189 Cal. App. 2d 653, 656-57, 11 Cal. Rptr. 435, 436 (1961) (quoting Baratti v. Baratti, 109 Cal. App. 2d 917, 921, 242 P.2d 22, 24 (1952)).

363. See *supra* notes 68-77 and accompanying text.

364. Neff v. Ernst, 48 Cal. 2d 628, 634, 311 P.2d 849, 852 (1957); Foggy v. Ralph F. Clark & Associates, Inc., 192 Cal. App. 3d 1204, 1211, 238 Cal. Rptr. 130, 134 (1987); Weisenburg v. Molina, 58 Cal. App. 3d 478, 485-86, 129 Cal. Rptr. 813, 817-18 (1976).

365. E.g., Copley v. Copley, 126 Cal. App. 3d 248, 298, 178 Cal. Rptr. 842, 873-74 (1981); Baresh v. Sovereign Life Ins. Co., 92 Cal. App. 3d 547, 552, 155 Cal. Rptr. 74, 76 (1979).

366. See Rollins v. City & County of San Francisco, 37 Cal. App. 3d 145, 112 Cal. Rptr. 168 (1974); see also *supra* notes 294-96 and accompanying text.

367. Although equitable relief can be sought by simple motion as well as by an independent action, see Olivera v. Grace, 19 Cal. 2d 570, 576, 122 P.2d 564, 567-68 (1942); Rohrbasser v. Lederer, 179 Cal. App. 3d 290, 297-98, 224 Cal. Rptr. 791, 794-95 (1986), the more commonly used designation of "suit in equity" will be employed herein.

368. See Page v. Insurance Co. of N. Am., 3 Cal. App. 3d 121, 128-30, 83 Cal. Rptr. 44, 48-50 (1969).

369. *Id.*

scope of *coram nobis*. The attraction of the independent suit is its frank appeal to considerations of equity and fairness. It also has the advantage of not being so firmly hedged about by technical restrictions as is *coram nobis*. The disadvantage is that it is premised upon a showing of fault on the part of someone other than the petitioner, a requirement not counted among the prerequisites for *coram nobis*.³⁷⁰ Given the commonality of their requirements, it is unsurprising that *coram nobis* is almost completely overshadowed by the more familiar equitable remedy. The crucial factor favoring the suit in equity is that, unlike *coram nobis*, its availability is not premised on the certainty of a different result.³⁷¹

The advantages of the suit in equity give it a decisive and increasing edge over *coram nobis*. Indeed, the likelihood is that it will consign its more venerable counterpart to oblivion. This prospect is best evidenced by the distressing trend of appellate courts to treat *coram nobis* petitions—particularly if they have been granted by trial courts—as if they were in fact suits in equity.³⁷² If this trend continues, the use of *coram nobis* in civil cases is indeed headed for extinction.

In summary, persons contemplating the possibility of using *coram nobis* to vacate a civil judgment must first realize that the passage of time from the judgment's entry increasingly narrows the scope of remedial options. By the time a motion for new trial can no longer be made, the most conventional and comprehensive mode for correcting errors of fact is closed. The outer chronological aperture for the availability of this remedy is approximately co-extensive with that for the next broadest means for rectification, a motion for relief pursuant to Code of Civil Procedure section 473. Because they have

370. See *supra* note 13 and accompanying text.

371. As previously mentioned, the test for *coram nobis* is that the new evidence must be sufficiently dispositive that it "would have prevented the rendition of the judgment." See *supra* note 214 and accompanying text. The standard for success governing a suit in equity is considerably more lenient:

[I]t is suggested by the defendant that the complaint fails to state a cause of action because it does not allege that a different result would have been reached It is a general rule that equity will not interfere with a judgment which is unjust unless it appears that the one whose interests were thus infringed can present a meritorious case. . . . The requirement that the complaint allege a meritorious case does not require an absolute guarantee of victory. . . . It is enough if the complaint presents facts from which it can be ascertained that the plaintiff has a sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary proceeding.

Olivera, 19 Cal. 2d at 579, 122 P.2d at 56-.

372. See *Los Angeles Airways, Inc. v. Hughes Tool Co.*, 95 Cal. App. 3d 1, 8-9, 156 Cal. Rptr. 805, 809-10 (1979); *Page*, 3 Cal. App. 3d at 128-30, 83 Cal. Rptr. at 48-50.

statutory sanction, these remedies enjoy precedence. Each displaces *coram nobis* within the period of its respective applicability. It is only when these statutory remedies are no longer available that *coram nobis* begins to emerge. Even then it must share a large measure of common ground with the independent suit in equity, which threatens *coram nobis* with extinction in civil cases.

VI. CONCLUSION

More than thirty years ago, one commentator posed the rhetorical question whether *coram nobis* is a panacea or a cancer.³⁷³ It is neither. *Coram nobis* is an oddly titled vestige of the common law which has survived to the present day, not out of attachment to an archaic relic, but because it serves a purpose essential to the discovery of truth. The common law scope of the writ has suffered considerable reduction by the provision of statutory alternatives, leaving only a skeletal remnant of its former vitality, which was never robust. Relief may be exceedingly difficult to obtain. Yet the continued availability of *coram nobis*, however atrophied the residuum of its common law powers may be, must not be disparaged. Its very existence, however infrequent its actual use, is a reminder that it is never too late to correct some kinds of errors. *Coram nobis* is the ultimate recognition of fallibility in the adjudicatory process. Its very existence betokens our commitment to the principle that it is never too late to correct some injustices. The presence of *coram nobis* stands as a confirmation of the importance courts profess to place upon that value.

373. Amandes, *supra* note 13.