IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40428 & 94-41027

Summary Calendar

UNITED STATES OF AMERICA,

Respondent-Appellee,

versus

JOHN HALL THOMAS,

Petitioner-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(6:93-CV-419 (TY-86-46-CR) & 6:93-CV-419 (6:82-CR-46))

(February 23, 1995)

Before POLITZ, Chief Judge, and HIGGINBOTHAM and DeMOSS, Circuit Judges.

PER CURIAM:*

John Hall Thomas argues that the district court erred by denying his petition for the writ of coram nobis. The writ is an extraordinary remedy, available to a petitioner who is no longer in custody. See United States v. Morgan, 346 U.S. 502 (1954). For a petitioner to obtain the extraordinary writ, he must demonstrate (1) that he is suffering a civil disability as a consequence of his

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

criminal conviction and (2) "'that the challenged error is of sufficient magnitude to justify the extraordinary relief.'" United States v. Castro, 26 F.3d 557, 559 (5th Cir. 1994) (quoting United States v. Marcello, 876 F.2d 1147, 1154 (5th Cir. 1989)).

Thomas's challenge does not justify granting the writ.

We have affirmed without opinion a district court ruling that "newly discovered evidence affords no entree to said writ." United States v. Carter, 319 F. Supp. 702, 705 (M.D. Ga. 1969), aff'd, 437 F.2d 444 (5th Cir. 1971). The district court in that case relied upon dicta from a 1914 Supreme Court opinion stating that "[i]n cases of . . . newly discovered evidence . . . the remedy is by a motion for a new trial," not by a petition for coram nobis. United States v. Mayer, 235 U.S. 55, 69 (1914). See also Reid v. United States, 149 F.2d 334 (5th Cir. 1945) (per curiam) (denying coram nobis petition based upon new evidence because it was essentially an untimely motion for a new trial); Buie v. United States, 84 F.2d 565 (5th Cir. 1936) (denying coram nobis petition construed as an untimely motion for new trial on ground of newly discovered evidence). Indeed, the Eleventh Circuit has read our precedents to bar consideration of newly discovered evidence in a coram nobis proceeding. See Moody v. United States, 874 F.2d 1575, 1577 (11th Cir. 1989), cert. denied, 493 U.S. 1081 (1990).

While we have never explicitly stated that newly discovered evidence cannot be grounds for coram nobis relief, other circuits have held that it can. See, e.g., Klein v. United States, 880 F.2d 250, 253-54 (10th Cir. 1989); United States v. Scherer, 673 F.2d

176, 178 (7th Cir.), cert. denied, 457 U.S. 1120 (1982). Those circuits have held that a coram nobis petition based on newly discovered evidence may succeed if it demonstrates that the evidence could not, in due diligence, have been revealed before trial and that the evidence likely would have produced a different result at trial.

We do not pursue the issue further because Thomas has not demonstrated that his new evidence would have changed the result of his criminal proceeding. His new evidence consists of four items: (1) a transcript of a Texas Board of Medical Examiners hearing of June 1982; (2) a released portion of the Board's investigative file on him; (3) his medical records; (4) and Freedom of Information Act files from the Texas Department of Public Safety. Thomas states in conclusory fashion that his newly discovered evidence shows that the inculpatory tape was fabricated, but he never tells us how his newly discovered evidence supports that defense.

To the contrary, he argues in his appellate briefs that he believes that the tape was fabricated because the voice on the tape does not sound like his. The evidence supporting this argument is not the new evidence produced in his coram nobis petition; rather, it is the old evidence of the tape recording itself. Thomas listened to the tape recording with his attorney on or about September 24, 1982, shortly after his arraignment, according to his own affidavit attached to his coram nobis petition. As he states in that affidavit, he told his attorney at that time that he "did not talk, speak or act like the person on the tape recording."

Because Thomas makes the same argument here without the added support of any new evidence, Thomas's writ of coram nobis was rightly denied.

Accordingly, the decision of the district court is AFFIRMED.