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*** CURRENT THROUGH CHANGES RECEIVED DECEMBER, 2004 ***

RULES GOVERNING SECTION 2255 PROCEEDINGS

USCS Sec 2255 Proc R 2 (2005)

Review Court Orders which may amend this Rule.

Rule 2. The Motion

(a) Applying for relief. The application must be in the form of a motion to vacate, set aside, or correct the sentence.

(b) Form. The motion must:
(1) specify all the grounds for relief available to the moving party;
(2) state the facts supporting each ground;
(3) state the relief requested;
(4) be printed, typewritten, or legibly handwritten; and
(5) be signed under penalty of perjury by the movant or by a person authorized to sign it for the movant.

(c) Standard form. The motion must substantially follow either the form appended to these rules or a form prescribed by a local district–court rule. The clerk must make forms available to moving parties without charge.

(d) Separate motions for separate judgments. A moving party who seeks relief from more than one judgment must file a separate motion covering each judgment.

HISTORY:
(As amended Sept. 28, 1976, P.L. 94–426, § 2(3), (4), 90 Stat. 1334; eff. Aug. 1, 1982.)
(As amended Dec. 1, 2004.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:
1976. Act Sept. 28, 1976, in subdiv. (b), added "substantially", and deleted "The motion shall follow the prescribed form." after "upon their request."; and substituted subdiv. (d) for one which read:
"(d) Return of insufficient motion. If a motion received by the clerk of the district court does not comply with the requirements of rule 2 or 3, it may be returned by the clerk to the movant with a statement of the reason for its return, and it shall be returned if the clerk is so directed by a judge of the court. The clerk shall retain a copy of the motion.".

Other provisions:
Notes of Advisory Committee on Rules. Under these rules the application for relief is in the form of a motion rather than a petition (see rule 1 and advisory committee note). Therefore, there is no requirement that the movant name a respondent. This is consistent with *28 USC § 2255*. The United States Attorney for the district in which the judgment under attack was entered is the proper party to oppose the motion since the federal government is the movant's adversary of record.
If the movant is attacking a federal judgment which will subject him to future custody, he must be in present custody (see rule 1 and advisory committee note) as the result of a state or federal governmental action. He need not alter the nature of the motion by trying to include the government officer who presently has official custody of him as a pseudo–

respondent, or third–party plaintiff, or other fabrication. The court hearing his motion attacking the future custody can exercise jurisdiction over those having him in present custody without the use of artificial pleading devices.

There is presently a split among the courts as to whether a person currently in state custody may use a § 2255 motion to obtain relief from a federal judgment under which he will be subjected to custody in the future. Negative, see *Newton v United States, 329 F Supp 90 (SD Texas 1971);* affirmative, see *Desmond v The United States Board of Parole, 397 F2d 386 (1st Cir 1968),* cert denied, *393 US 919 (1968);* and *Paalino v United States, 314 F Supp 875 (CD Cal 1970).* It is intended that these rules settle the matter in favor of the prisoner's being able to file a § 2255 motion for relief under those circumstances. The proper district in which to file such a motion is the one in which is situated the court which rendered the sentence under attack.

Under *rule 35, Federal Rules of Criminal Procedure,* the court may correct an illegal sentence or a sentence imposed in an illegal manner, or may reduce the sentence. This remedy should be used, rather than a motion under these § 2255 rules, whenever applicable, but there is some overlap between the two proceedings which has caused the courts difficulty.

The movant should not be barred from an appropriate remedy because he has mistyled his motion. See *United States v Morgan, 346 US 502, 505 (1954).* The court should construe it as whichever one is proper under the circumstances and decide it on its merits. For a § 2255 motion construed as a rule 35 motion, see *Heflin v United States, 358 US 415 (1959);* and *United States v Coke, 404 F2d 836 (2d Cir 1968),* For writ of error coram nobis treated as a rule 35 motion, see *Hawkins v United States, 324 F Supp 223* (ED Texas, Tyler Division 1971). For a rule 35 motion treated as a § 2255 motion, see *Moss v United States, 263 F2d 615 (5th Cir 1959); Jones v United States, 400 F2d 892 (8th Cir 1968),* cert denied, *394 US 991 (1969);* and *United States v Brown, 413 F2d 878 (9th Cir 1969),* cert denied, *397 US 947 (1970).*

One area of difference between § 2255 and rule 35 motions is that for the latter there is no requirement that the movant be "in custody." *Heflin v United States, 358 US 415, 418, 422 (1959); Duggins v United States, 240 F2d 479, 483 (6th Cir 1957).* Compare with rule 1 and advisory committee note for § 2255 motions. The importance of this distinction has decreased since *Peyton v Rowe, 391 US 54 (1968),* but it might still make a difference in particular situations.

A rule 35 motion is used to attack the sentence imposed, not the basis for the sentence. The court in *Gilinsky v United States, 335 F2d 914, 916 (9th Cir 1964),* stated, "a Rule 35 motion presupposes a valid conviction. . . .[C]ollateral attack on errors allegedly committed at trial is not permissible under Rule 35." By illustration the court noted at page 917: "a Rule 35 proceeding contemplates the correction of a sentence of a court having jurisdiction. . . .[J]urisdictional defects . . . involve a collateral attack, they must ordinarily be presented under *28 USC § 2255.*" In *United States v Semet, 295 F Supp 1084 (ED Okla 1968),* the prisoner moved under rule 35 and § 2255 to invalidate the sentence he was serving on the grounds of his failure to understand the charge to which he pleaded guilty. The court said:

As regards Defendant's Motion under Rule 35, said Motion must be denied as it presupposes a valid conviction of the offense with which he was charged and may be used only to attack the sentence. It may not be used to examine errors occurring prior to the imposition of sentence. *295 F Supp at 1085.*

See also: *Moss v United States, 263 F2d at 616; Duggins v United States, 240 F2d at 484; Migdal v United States, 298 F2d 513, 514 (9th Cir. 1961); Jones v United States, 400 F2d at 894; United States v Coke, 404 F2d at 847;* and *United States v Brown, 413 F2d at 879.*

A major difficulty in deciding whether rule 35 or § 2255 is the proper remedy is the uncertainty as to what is meant by an "illegal sentence." The Supreme Court dealt with this issue in *Hill v United States, 368 US 424 (1962).* The prisoner brought a § 2255 motion to vacate sentence on the ground that he had not been given a *Fed R Crim P 32(a)* opportunity to make a statement in his own behalf at the time of sentencing. The majority held this was not an error subject to collateral attack under § 2255. The five–member majority considered the motion as one brought pursuant to rule 35, but denied relief, stating:

[T]he narrow function of Rule 35 is to permit correction at any time of an illegal *sentence,* not to re–examine errors occurring at the trial or other proceedings prior to the imposition of sentence. The sentence in this case was not illegal. The punishment meted out was not in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect. *368 US at 430.*

The four dissenters felt the majority definition of "illegal" was too narrow.

[Rule 35] provides for the correction of an "illegal sentence" without regard to the reasons why that sentence is illegal and contains not a single word to support the Court's conclusion that only a sentence illegal by reason of the punishment it imposes is "illegal" within the meaning of the Rule. I would have thought that a sentence imposed in an illegal manner—whether the amount or form of the punishment meted out constitutes an additional violation of law or not would be recognized as an "illegal sentence" under any normal reading of the English language. *368 US at 431–432.*

The 1966 amendment of rule 35 added language permitting correction of a sentence imposed in an "illegal manner."

However, there is a 120–day time limit on a motion to do this, and the added language does not clarify the intent of the rule or its relation to § 2255.

The courts have been flexible in considering motions under circumstances in which relief might appear to be precluded by *Hill v United States. In Peterson v United States, 432 F2d 545 (8th Cir 1970),* the court was confronted with a motion for reduction of sentence by a prisoner claiming to have received a harsher sentence than his codefendants because he stood trial rather than plead guilty. He alleged that this violated his constitutional right to a jury trial. The court ruled that, even though it was past the 120–day time period for a motion to reduce sentence, the claim was still cognizable under rule 35 as a motion to correct an illegal sentence.

The courts have made even greater use of § 2255 in these types of situations. In *United States v Lewis, 392 F2d 440 (4th Cir 1968),* the prisoner moved under § 2255 and rule 35 for relief from a sentence he claimed was the result of the judge's misunderstanding of the relevant sentencing law. The court held that he could not get relief under rule 35 because it was past the 120 days for correction of a sentence imposed in an illegal manner and under Hill v United States it was not an illegal sentence. However, § 2255 was applicable because of its "otherwise subject to collateral attack" language. The flaw was not a mere trial error relating to the finding of guilt, but a rare and unusual error which amounted to "exceptional circumstances" embraced in § 2255's words "collateral attack." See *368 US at 444* for discussion of other cases allowing use of § 2255 to attack the sentence itself in similar circumstances, especially where the judge has sentenced out of a misapprehension of the law.

In *United States v McCarthy, 433 F2d 591, 592 (1st Cir 1970),* the court allowed a prisoner who was past the time limit for a proper rule 35 motion to use § 2255 to attack the sentence which he received upon a plea of guilty on the ground that it was induced by an unfulfilled promise of the prosecutor to recommend leniency. The court specifically noted that under § 2255 this was a proper collateral attack on the sentence and there was no need to attack the conviction as well.

The court in *United States v Malcolm, 432 F2d 809, 814, 818 (2d Cir. 1970),* allowed a prisoner to challenge his sentence under § 2255 without attacking the conviction. It held rule 35 inapplicable because the sentence was not illegal on its face, but the manner in which the sentence was imposed raised a question of the denial of due process in the sentencing itself which was cognizable under § 2255.

The flexible approach taken by the courts in the above cases seems to be the reasonable way to handle these situations in which rule 35 and § 2255 appear to overlap. For a further discussion of this problem, see C. Wright, Federal Practice and Procedure: Criminal §§ 581–587 (1969, Supp 1975).

See the advisory committee note to rule 2 of the § 2254 rules for further discussion of the purposes and intent of rule 2 of these § 2255 rules.

Notes of Advisory Committee on Aug. 1, 1982 amendments. Rule 2(b). The amendment takes into account *28 U.S.C. § 1746,* enacted after adoption of the § 2255 rules. Section 1746 provides that in lieu of an affidavit an unsworn statement may be given under penalty of perjury in substantially the following form if executed within the United States, its territories, possessions or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)." The statute is "intended to encompass prisoner litigation," and the statutory alternative is especially appropriate in such cases because a notary might not be readily available. *Carter v. Clark, 616 F.2d 228 (5th Cir. 1980).* The § 2255 forms have been revised accordingly.

Notes of Advisory Committee on 2004 amendments. The language of Rule 2 has been amended as part of general restyling of the rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic and no substantive change is intended, except as described below.

Revised Rule 2(b)(5) has been amended by removing the requirement that the motion be signed personally by the moving party. Thus, under the amended rule the motion may be signed by movant personally or by someone acting on behalf of the movant, assuming that the person is authorized to do so, for example, an attorney for the movant. The Committee envisions that the courts would apply third–party, or "next–friend," standing analysis in deciding whether the signer was actually authorized to sign the motion on behalf of the movant. *See generally Whitmore v. Arkansas, 495 U.S. 149 (1990)* (discussion of requisites for "next friend" standing in habeas petitions). *See also 28 U.S.C. § 2242* (application for state habeas corpus relief may be filed by the person who is seeking relief, or by someone acting on behalf of that person).

The language in new Rule 2(c) has been changed to reflect that a moving party must substantially follow the standard form, which is appended to the rules, or a form provided by the court. The current rule, Rule 2(c), seems to indicate a preference for the standard "national" form. Under the amended rule, there is no stated preference. The Committee understood that the current practice in some courts is that if the moving party first files a motion using the national form, that courts may ask the moving party to supplement it with the local form.

Current Rule 2(d), which provided for returning an insufficient motion has been deleted. The Committee believed that

the approach in *Federal Rule of Civil Procedure 5(e)* was more appropriate for dealing with motions that do not conform to the form requirements of the rule. That Rule provides that the clerk may not refuse to accept a filing solely for the reason that it fails to comply with these rules or local rules. Before the adoption of a one–year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the moving party suffered no penalty, other than delay, if the motion was deemed insufficient. Now that a one–year statute of limitations applies to motions filed under § 2255, see *28 U.S.C. § 2244*(d)(1), the court's dismissal of a motion because it is not in proper form may pose a significant penalty for a moving party, who may not be able to file another motion within the one–year limitations period. Now, under revised Rule 3(b), the clerk is required to file a motion, even though it may otherwise fail to comply with the provisions in revised Rule 2(b). The Committee believed that the better procedure was to accept the defective motion and require the moving party to submit a corrected motion that conforms to Rule 2(b).