United States v. Cooper: The Writ of Error Coram Nobis and the Morgan Footnote Paradox

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In the federal courts, *coram nobis* is a post-conviction remedy available in the district court to challenge a criminal conviction; in certain situations, it is the only relief available to avoid the collateral consequences of a federal conviction. In *United States v. Cooper*, a recent case before the Fifth Circuit, involved an appeal from a district court order denying what the circuit court construed as petitions for writs of error *coram nobis*. The *Cooper* court's opinion represents the latest and most developed argument in a twenty-year old dispute among the circuits over the fundamental nature of the writ of error.

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1. United States v. Morgan, 346 U.S. 502, 510-11 (1954); United States v. Loschiavo, 531 F.2d 659, 662 (2d Cir. 1976); Grene v. United States, 448 F.2d 720, 720-21 (5th Cir. 1971) (per curiam); Owensby v. United States, 353 F.2d 412, 416 (10th Cir. 1965), *crt. denied*, 383 U.S. 962 (1966); *see also infra* notes 38-45 and accompanying text (discussing the modern status of *coram nobis* in the federal courts).

2. *Coram nobis* is the only post-conviction remedy available when the petitioner no longer is in custody. 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 596, at 470-71 (2d ed. 1982 & Supp. 1989); *see also infra* notes 38-43 and accompanying text (discussing custody and the availability of different post-conviction remedies).

3. *See Note, The Need for Coram Nobis in the Federal Courts*, 59 YALE L.J. 786, 786-87 & nn.1-5 (1950). The collateral consequences of a federal conviction include ineligibility for naturalization, military service, and certain civil rights such as voting or holding office; expulsion from or denial of access to such professions as law and medicine; and sentence enhancement for recidivism in both the federal and state courts. *Id.* at 786-87. An additional consequence is the social stigma of a felony conviction. An excellent example that has produced several petitions for *coram nobis* is the convictions of Japanese Americans for violating curfew and internment orders during World War II. *See generally* Iyeki, *The Japanese American Coram Nobis Cases: Exposing the Myth of Disloyalty*, 13 N.Y.U. REV. L. & SOC. CHANGE 199, 209-14 (1984) (discussing Japanese Americans' use of *coram nobis* to challenge convictions for violating World War II military internment orders as unconstitutional, to remove the stigma of disloyalty associated with such convictions).

4. 876 F.2d 1192 (5th Cir. 1989) (per curiam).

5. Cooper sought to overturn two federal felony convictions after serving his sentences. *Id.* at 1193. In 1967, Cooper pled guilty to conspiracy to steal government property and theft of government property in the Southern District of Texas. Again in 1967, before a different judge of the same court, he pled guilty to interstate transportation of a firearm from which the serial number had been removed. Cooper served sentences of five and two years respectively for these convictions. *Id.* He later filed two actions in the sentenc-
coram nobis: whether a coram nobis motion is essentially a
civil or criminal proceeding.  

The fundamental nature of coram nobis is significant be-
cause it determines which rules of procedure generally apply to
coram nobis motions at the district and appellate levels. Although designating a coram nobis motion as essentially civil
or criminal does not require blanket application of the civil or
criminal rules to all aspects of the proceeding (the question is
not whether coram nobis is purely civil or criminal), the
designation does serve as a basic guide for determining which
rules are proper in specific circumstances.

The particular issue in Cooper was whether the criminal or
civil time limit for filing a notice of appeal applies to coram

ing court challenging his convictions. The Southern District of Texas denied
relief. Id. Cooper then appealed to the Fifth Circuit. Id.

The Fifth Circuit construed Cooper's original actions in the district court
as petitions for writs of error coram nobis. Id. According to the Fifth Circuit,
the district court and Cooper had assumed mistakenly that the actions were
motions to vacate sentence under 28 U.S.C. § 2255. See infra notes 53-60 and
accompanying text (discussing § 2255 motions). Yet § 2255 was unavailable to
Cooper, because a person must be in custody to bring such a motion, and
Cooper already had served his sentences. Coram nobis, however, has no cus-
tody requirement. Id. (citing United States v. Hay, 702 F.2d 572, 573-74 (5th
Cir. 1983)).

6. Cooper, 876 F.2d at 1193-94.

1989); C. WRIGHT, supra note 2, § 592, at 433 (2d ed. 1982 & Supp. 1989); 18 AM.

8. Classification of a post-conviction remedy as purely civil or criminal is
inexact and, therefore, inappropriate. STANDARDS FOR CRIMINAL JUSTICE 22-
1.2 commentary at 22.10 (2d ed. 1980)[hereinafter STANDARDS]. The ABA
Standards for Criminal Justice provide that rules governing post-conviction
remedies should reflect the particular attributes of the remedy and not the la-
bel “civil” or “criminal.” Id. The Supreme Court has held, for example, that
the description of habeas corpus as purely civil is inexact. Habeas corpus is a
classifying a post-conviction remedy as generally criminal in nature may be
reasonable to the degree the remedy is an extenson of the original criminal
proceeding. STANDARDS, supra, Standard 22-1.2 commentary at 22.10. This
general classification provides the court a reference point for analyzing the at-
tributes of a post-conviction remedy. See id. at 22.10-.11. For example, the
courts consider a motion for new trial on newly discovered evidence or a mo-
tion to withdraw a guilty plea as generally criminal proceedings. Id. at 22.10.

9. The essential quality of the proceeding, not the label, determines what
rules apply. STANDARDS, supra note 8, Standard 22-1.2 commentary at 22.10-
.11. For example, certain constitutional guarantees associated with criminal
prosecutions, such as right to counsel, would not apply necessarily to coram
nobis proceedings even if they were generally criminal in nature. Id. A post-
conviction remedy criminal in nature is distinguishable from a criminal prose-
cution. See id.
If a coram nobis motion is a civil proceeding, Federal Rule of Appellate Procedure 4(a)(1) governing civil cases applies, and the time limit would be 60 days. In contrast, if a coram nobis motion is a criminal proceeding, Rule 4(b) governing criminal cases applies, and the time limit would be 10 days. The Cooper court concluded that the civil time limit applies to coram nobis appeals because a coram nobis motion is a civil proceeding comparable to a motion to vacate sentence under 28 U.S.C. § 2255, and the rules governing civil appeals apply to section 2255 appeals.

This Comment analyzes the Cooper court’s conclusion that a coram nobis motion is a civil proceeding and that the rules governing section 2255 motions should serve as a model for coram nobis motions. Part I examines the history and prior interpretations of coram nobis and section 2255. Part II discusses the Cooper decision and its reasoning. Part III criticizes the Cooper court’s conclusion and argues in favor of the opposite one. The Comment concludes that the Fifth Circuit’s comparison of a coram nobis motion to a section 2255 motion is flawed because a coram nobis motion is essentially criminal, not civil. Although the mixture of criminal and civil rules governing section 2255 motions at the district court level may serve as a model for coram nobis proceedings, the civil rules governing section 2255 motions at the appellate court level are not properly applicable to coram nobis appeals.

10. Cooper, 876 F.2d at 1193-94.
11. Id. at 1193 (citing FED. R. APP. P. 4(a)(1)).
12. Id. at 1193-94 (citing FED. R. APP. P. 4(b)).
13. Id. at 1194 (citing United States v. Hayman, 342 U.S. 205, 209 n.4 (1952) (stating that the civil rules apply to § 2255 appeals); RULES GOVERNING § 2255 PROCEEDINGS IN THE U.S. DIST. CTS. 11 (applying the civil time limit for a notice of appeal to § 2255 appeals)).
14. A special mixture of civil and criminal rules governs § 2255 proceedings at the district court level. RULES GOVERNING § 2255 PROCEEDINGS IN THE U.S. DIST. CTS. 1 advisory committee’s note; see infra notes 95-99 and accompanying text.
15. Designating a coram nobis motion as essentially criminal does not require blanket application of the criminal rules. See supra notes 8-9 and accompanying text.
16. The civil rules govern all aspects of § 2255 proceedings in the appellate courts. Hayman, 342 U.S. at 209 n.4; see infra notes 89-99 and accompanying text.
I. HISTORY AND INTERPRETATION OF CORAM NOBIS AND SECTION 2255

A. CORAM NOBIS IN THE FEDERAL COURTS


The writ of error coram nobis emerged in sixteenth-century England. The writ was one of two common law writs available to correct errors of fact not appearing on the record that would have precluded the court's judgment had the court known of the error when it rendered judgment. Coram nobis, along with the writ of error coram vobis, was available to attack both civil and criminal judgments. Each writ directed a particular law court to examine its own judgment. Coram nobis, meaning "before us," lay in the King's Bench; coram vobis, meaning "before you," lay in the Court of Common Pleas. This common law distinction lost its significance in the
United States and "coram nobis" has emerged as the predominant term.

2. Recognition of *Coram Nobis* in the Federal Courts

Before 1954, the availability of *coram nobis* to challenge criminal convictions in federal district courts was unsettled. The Supreme Court had declined to rule on the question and the circuit courts were divided. In 1948, an amendment to Rule 60(b) of the Federal Rules of Civil Procedure expressly abolished *coram nobis*, conceivably in both criminal and civil...
Furthermore, the Supreme Court promulgated Rule 35 of the Federal Rules of Criminal Procedure in 1946, allowing a district court to correct an illegal sentence at any time, and Congress enacted 28 U.S.C. § 2255 in 1948, providing for a motion to attack sentence "in the nature of the ancient writ of error coram nobis." In 1954, the Supreme Court finally resolved the dispute over the availability of coram nobis in United States v. Morgan. The Morgan Court held that the writ of error coram nobis bills in the nature of a bill review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." Id. Rule 60(b) has a criminal counterpart promulgated in 1944, Rule 36 of the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 36 advisory committee note. Rule 36 authorizes courts to correct clerical mistakes and errors "arising from oversight or omission," traditional coram nobis functions, but does not expressly abolish coram nobis. FED. R. CRIM. P. 36.

28. Kerschman, 201 F.2d at 684; see supra note 26.
29. FED. R. CRIM. P. 35. Rule 35 fulfills a similar procedural role as coram nobis. The federal courts followed the common law rule that a trial court could correct a judgment only within the same term. This rule prevented trial courts from disrupting appeals by altering judgments while the appeals were pending. L. YACKLE, supra note 7, § 37, at 167. The rule was potentially unjust when an error did not appear on the record. The trial court could not correct the error after the end of the term and the appellate court could not correct the error, because it did not appear on the record. Id. Coram nobis also provides relief in such situations. Id. at 167-68.

Rule 35 gave district courts power to correct illegal sentences (sentences not authorized by a proper judgment of conviction) after the court's term had expired. Id. at 168. Yet Rule 35 did not allow correction of sentences illegally imposed (sentences authorized by an improper judgment of conviction). Id. Nonetheless, a preliminary draft of the rule specifically stated that the Rule does not affect the availability of coram nobis in federal courts.

No express provision is made with respect either to providing for relief or to barring relief under the common law writ of error coram nobis . . . [nor is the] existing power of the court to grant any type of relief from judgments or orders which is not expressly provided for in the rules [limited].

FED. R. CRIM. P. 35 (Second Preliminary Draft 1944), quoted in Note, supra note 3, at 791 n.22.
32. 346 U.S. 502 (1954) (5-4 decision). Morgan petitioned the District Court for the Northern District of New York for coram nobis to remove a federal conviction. Id. at 503. The district court, treating his petition as a § 2255 motion, denied relief because Morgan was no longer in custody and a § 2255 motion is available only when the petitioner is in custody. Id. at 504. The Second Circuit reversed. United States v. Morgan, 202 F.2d 67, 68 (2d Cir. 1953), aff'd, 346 U.S. 502 (1954).
nobilis existed as an independent post-conviction remedy in federal district courts. The Court rejected the government's arguments that Rule 60(b) abolished coram nobis in criminal as well as civil cases, that Rule 35 rendered it unnecessary, or that section 2255 replaced coram nobis with an exclusive statutory remedy. Instead, the Court held that coram nobis was available to challenge criminal judgments under the all writs section of the Judicial Code.


In the federal courts today, coram nobis is available by motion in the sentencing district court to challenge criminal convictions. The modern scope of coram nobis as a post-conviction remedy in the federal district courts is much broader than its traditional common law scope. Movants may use coram nobis to correct constitutional or other fundamental errors as well as traditional errors of fact. In general, the fed-

33. Morgan, 346 U.S. at 511. The Morgan Court concluded that coram nobis was available by motion in the sentencing district court. Id. at 511-12. Commenting on the Supreme Court's decision, the Seventh Circuit stated: “the ancient writ of error coram nobis rose phoenix-like from the ashes of American jurisprudence through the benign intervention of the Supreme Court in United States v. Morgan.” United States v. Balistrieri, 606 F.2d 216, 219 (7th Cir. 1979) (citation omitted), cert. denied, 446 U.S. 917 (1980).

34. Morgan, 346 U.S. at 505 n.4. The Morgan Court held that a coram nobis motion challenging a criminal judgment was a “step in the criminal case” and, therefore, Rule 60(b) did not abolish it. Id.

35. Id. at 505-06. Coram nobis was still necessary, because Rule 35 applied only to illegal sentences, sentences the judgment of conviction did not authorize. Id. at 506.

36. Id. at 510-11. The government argued that § 2255 codified the remedy in the nature of coram nobis and limited it to situations in which the petitioner was still in custody. Id. The Supreme Court held that Congress enacted § 2255 to meet the difficulties associated with administration of habeas corpus and thus the section did not occupy the field of remedies in the nature of coram nobis. Id.; see infra notes 61-73 and accompanying text.


38. See cases cited supra note 1.

39. C. WRIGHT, supra note 2, § 592, at 429. At common law, the scope of the writ was very limited. Laughlin v. United States, 474 F.2d 444, 451 n.10 (D.C. Cir.), cert. denied, 412 U.S. 941 (1972); Donnelly, Unconvicting the Innocent, 6 VAND. L. REV. 20, 24-25 (1952); Note, supra note 3, at 788. “[I]t generally covered only clerical errors, coverture, infancy, death of a party before judgment, and insanity at time of plea.” Id.

eral courts have held that the scope of coram nobis is as broad as a section 2255 motion to vacate sentence. Yet coram nobis is available only when section 2255 motions and other forms of relief, such as common law habeas corpus, are not. This situation usually occurs when the petitioner is not in custody, because unlike section 2255 and habeas corpus, coram nobis has no custody requirement. Because the collateral consequences of a federal conviction can be extremely severe, coram nobis is an important part of the federal scheme of post-conviction relief.

41. Although the Morgan Court stated that courts should allow review of judgments through "this extraordinary remedy only under circumstances compelling such action to achieve justice" and to correct errors "of the most fundamental character," Morgan, 346 U.S. at 511, 512 (quoting United States v. Mayer, 235 U.S. 55, 69 (1914)), several circuit courts have held that the scope of coram nobis as a post-conviction remedy is as broad as the scope of § 2255, United States v. Little, 608 F.2d 296, 299 (8th Cir. 1979), cert. denied, 444 U.S. 1089 (1980); United States v. Travers, 514 F.2d 1171, 1173 n.1 (2d Cir. 1974); Laughlin, 474 F.2d at 452. But cf. United States v. Darnell, 716 F.2d 479, 481 n.5 (7th Cir. 1983) (holding scope of coram nobis based on Morgan more limited than scope of § 2255), cert. denied, 465 U.S. 1083 (1984).

Based on the first paragraph of § 2255, the Supreme Court has stated the grounds for relief under § 2255:

(1) "that the sentence was imposed in violation of the Constitution or laws of the United States;" (2) "that the court was without jurisdiction to impose such sentence;" (3) "that the sentence was in excess of the maximum authorized by law;" and (4) that the sentence "is otherwise subject to collateral attack."

Hill v. United States, 368 U.S. 424, 426-427 (1962) (quoting 28 U.S.C. § 2255 (1988)). Because a § 2255 motion is a substitute for habeas corpus, see notes 77-80 and accompanying text, the grounds for a § 2255 motion also include the grounds for a habeas corpus petition. Houser v. United States, 508 F.2d 509, 512 (8th Cir. 1974).

42. E.g., United States v. Brown, 413 F.2d 878, 879 (9th Cir. 1969), cert. denied, 397 U.S. 947 (1970); Adam v. United States, 274 F.2d 880, 882 (10th Cir. 1960); L. YACKLE, supra note 7, § 36, at 165; C. WRIGHT, supra note 2, § 592, at 433.

43. L. YACKLE, supra note 7, § 36, at 165; see, e.g., Morgan, 346 U.S. at 510-11; Byrnes v. United States, 408 F.2d 599, 602 (9th Cir.), cert. denied, 395 U.S. 986 (1969); Azzone v. United States, 341 F.2d 417, 419 (8th Cir.), cert. denied, 381 U.S. 943 (1965); United States v. Lavelle, 306 F.2d 216, 217 (2d Cir. 1962); C. WRIGHT, supra note 2, § 596, at 470-71. Some courts consider a modern coram nobis motion a § 2255 motion without a custody requirement. See cases cited supra note 41.

Although in most common post-conviction situations the movant still is in custody, coram nobis is the only remedy available aside from a presidential pardon when the movant is not in custody. See Note, supra note 3, at 789-90. The concept of "custody" under § 2255 is extremely broad. Any conditions significantly confining the petitioner will suffice (e.g., a petitioner on parole, probation, or suspended sentence still is in custody). C. WRIGHT, supra note 2, § 596, at 471-73. Yet once the government unconditionally releases the petitioner, coram nobis is the only collateral remedy available. See id. at 470-71.

44. See supra note 3.
remedies.45

4. The Morgan Footnote Paradox

At common law, a petition for writ of coram nobis was an independent civil proceeding governed by civil rules,46 but footnote four to the Supreme Court’s opinion in Morgan47 has rendered uncertain its modern status as a civil or criminal proceeding in the federal courts.48 In the first part of footnote four, the Supreme Court concluded that, as amended, Rule 60(b) did not abolish coram nobis in criminal cases, because a coram nobis proceeding is “a step in the criminal case and not . . . the beginning of a separate civil proceeding.”49 According to some courts, this description of coram nobis meant that coram nobis was criminal in nature and the criminal rules governed coram nobis proceedings.50 In the second part of the same footnote, however, the Court stated that a coram nobis proceeding “is of the same general character as [a motion] under 28 U.S.C. § 2255.”51 According to other courts, this statement indicated that coram nobis was civil in nature, because at the time courts viewed section 2255 motions as civil proceedings and applied the civil rules to section 2255 motions.52 Whether a coram nobis motion is a civil or criminal proceeding turns on the solution to the Morgan footnote’s paradoxical language.

45. See generally Note, supra note 3, at 789-91 (arguing absence of coram nobis in federal courts constituted unreasonable and unfair discrimination against ex-prisoners). The Morgan Court probably revived coram nobis mainly to provide relief in warranted circumstances otherwise barred by the custody requirement. L. YACKLE, supra note 7, § 51, at 226.

46. L. YACKLE, supra note 7, § 36, at 164.

47. Morgan, 346 U.S. at 505 n.4. Footnote four reads:

Such a motion is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding. While at common law the writ of error coram nobis was issued out of chancery like other writs, the procedure by motion in the case is now the accepted American practice. As it is such a step, we do not think that Rule 60(b), expressly abolishing the writ of error coram nobis in civil cases, applies. This motion is of the same general character as one under 28 U.S.C. § 2255.

Id. (citations omitted).

48. See generally L. YACKLE, supra note 7, § 36, at 165 (discussing the paradoxical nature of the Morgan footnote); infra notes 110-19 and accompanying text (detailing circuit split).

49. Morgan, 346 U.S. at 505 n.4.

50. See Yasui v. United States, 772 F.2d 1496, 1499 (9th Cir. 1985); United States v. Mills, 430 F.2d 526, 528 (8th Cir. 1970), cert. denied, 400 U.S. 1023 (1971).

51. Morgan, 346 U.S. at 506 n.4.

52. See United States v. Keogh, 391 F.2d 138, 140 (2d Cir. 1968).
B. Section 2255

The Morgan footnote cannot be addressed without first examining section 2255. Congress enacted section 2255 in 1948, providing federal prisoners with a motion to vacate sentence, which when available, supersedes common law habeas corpus as a means of post-conviction relief. As enacted, a section 2255 motion was distinct from habeas corpus. In practice,

54. 28 U.S.C. § 2255 (1988) provides:

Federal custody; remedies on motion attacking sentence

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

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Id.

55. A § 2255 motion directly supersedes habeas corpus as a post-conviction remedy. If adequate relief is possible under § 2255, it is the exclusive remedy and the prisoner is barred from seeking habeas corpus. See Thornton v. United States, 398 F.2d 822, 825 & n.5, 826 (D.C. Cir. 1968); 28 U.S.C. § 2255 (1988); C. WRIGHT, supra note 2, § 591, at 425-26; L. YACKLE, supra note 7, § 30, at 154.

56. See C. WRIGHT, supra note 2, § 591, at 423-28. The language of § 2255
however, the motion quickly evolved into the equivalent of habeas corpus,\footnote{57} replacing it.\footnote{58}

A section 2255 motion resembles the basic form of coram nobis, as opposed to habeas corpus, in that the movant seeks relief in the sentencing district, not the district of confinement.\footnote{59} Yet courts have interpreted a section 2255 motion as the substantive equivalent of habeas corpus in the sentencing district.\footnote{60} The following discussions examine the legislative history and judicial interpretation of section 2255 and the rules of procedure applicable to section 2255 motions.

1. Legislative History of Section 2255

Section 2255 originated as a bill that the Judicial Conference of Senior Circuit Judges\footnote{61} proposed to correct serious ad-

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57. See infra notes 77-85 and accompanying text (detailing analysis that led to this conclusion).

58. In practice, a § 2255 motion is rarely unavailable or inadequate to test the legality of the conviction. Section 2255 motions effectively have replaced habeas corpus as a post-conviction remedy for federal prisoners. C. Wright, supra note 2, § 591, at 426-27; L. Yackel, supra note 7, § 30, at 154. One commentator even suggested that every decision granting habeas corpus on the grounds that a § 2255 motion is inadequate or unavailable appears to have been decided incorrectly. C. Wright, supra note 2, § 591, at 427-28. Section 2255 effectively has become statutory habeas corpus for federal convictions. See L. Yackel, supra note 7, § 30, at 152-55.


ministrative problems associated with habeas corpus. By the middle of the twentieth century the number of habeas corpus applications had risen dramatically. The district courts entertained many claims that appeared meritorious on their face, but were actually repetitious or frivolous. In addition, the trial records, located in the sentencing district, often were not readily available to the habeas corpus court located in the district of confinement. Finally, habeas corpus petitions were concentrated in the few federal districts with federal prisons.

The Judicial Conference's recommendation for solving these administrative problems included a bill creating a distinct collateral attack in the sentencing court (jurisdictional bill). Although this new remedy was in the nature of coram nobis because it originated in the sentencing district, the judicial conference intended it to be broader than coram nobis, as broad as habeas corpus. The purpose of the jurisdictional bill was to


62. Hayman, 342 U.S. at 219. In 1942, the Judicial Conference created the Committee on Habeas Corpus Procedure to address these problems and recommend changes. JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES, REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 18 (1942).

63. Hayman, 342 U.S. at 212. The annual volume of applications tripled in the years before adoption of § 2255 in 1948. The Hayman Court cited figures from 1936 to 1945 showing an increase in habeas corpus applications filed in the district courts from an annual average of 310 to 845, while the number of prisoners released only increased from an annual average of 22 to 26. Id. at 212 n.13.

64. Id. at 212-13.

65. Id. The Court noted that up to 40% of habeas corpus applications between 1943-45 were repetitious. Id. (citing Speck, Statistics on Federal Habeas Corpus, 10 OHIO ST. L.J. 337, 352 (1949)).

66. Id. at 213-14. The Court indicated that 5 of 84 judicial districts received 65% of the habeas corpus applications in the 6 years before enactment of § 2255. Although habeas corpus trials averaged only 3% of all trials in all the districts, they ranged from 20% to 65% in the 5 districts. Id. (citing Speck, supra note 65, at 352).

67. Id. at 214-15. The Judicial Conference's recommendation also included another bill containing procedural changes to prevent abuse of habeas corpus (procedural bill). Id. at 215.

68. Statement from Judicial Conference Committee on Habeas Corpus Procedure to Chairmen of House and Senate Judiciary Committees (1944) [hereinafter Judicial Conference Statement], quoted in Hayman, 342 U.S. at 217 & n.25. The Judicial Conference Committee on Habeas Corpus Procedure prepared the Statement describing the necessity and purpose of the bills at the request of the chairpersons of the House and Senate Judiciary Committees. Hayman, 342 U.S. at 215-16. In reference to § 2 of the jurisdictional bill, the Statement reads:

This section applies only to Federal sentences. It creates a statutory remedy consisting of a motion before the court where the movant
relieve pressure on districts with federal prisons\textsuperscript{69} by effectively replacing habeas corpus in the district of confinement with this new motion in the sentencing district.\textsuperscript{70}

The Senate eventually passed the Judicial Conference’s jurisdictional bill, but the House did not and the bill never became law.\textsuperscript{71} Instead, Congress incorporated the jurisdictional bill into a comprehensive revision of Title 28 of the United States Code as section 2255 (comprehensive bill).\textsuperscript{72} Although the language differed slightly, section 2255 was essentially the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{69}\textsuperscript{69} Judicial Conference Statement, \textit{supra}, quoted in Hayman, 342 U.S. at 217.
\item \textsuperscript{70} Hayman, 342 U.S. at 219. See Parker, \textit{Limiting the Abuse of Habeas Corpus}, 8 F.R.D. 171, 175 (1949).
\item \textsuperscript{71} Both of the Judicial Conference’s recommended bills were introduced in the House of Representatives and the Senate during the first session of the 79th Congress. 91 Cong. Rec. 9210 (1945) (procedural bill: H.R. 4233, 79th Cong., 1st Sess. (1945), jurisdictional bill: 4232, 79th Cong., 1st Sess. (1945)); \textit{id} at 9225 (procedural bill: S. 1452, 79th Cong., 1st Sess. (1945), jurisdictional bill: S. 1451, 79th Cong., 1st Sess. (1945)). Neither house took action on either bill. \textit{id} index at 789, 910 (history of bills and resolutions). The jurisdictional bill was reintroduced with minor changes in the House during the second session, 92 Cong. Rec. 6617 (1946) (H.R. 6723, 79th Cong., 2d Sess. (1946)), but the House took no action, \textit{id} index at 657 (history of bills and resolutions). This version of the jurisdictional bill would have limited the time within which prisoners could move to vacate sentence. The prisoner would have to move within one year after the effective date of the Act, discovery of new facts that serve as the basis for relief, or changes of law that serve as the basis for relief. H.R. 6723, 79th Cong., 2d Sess. (1946).
\item During the 80th Congress, the procedural bill and the jurisdictional bill were again reintroduced in the Senate. 93 Cong. Rec. 125 (1947) (procedural bill: S. 20, 80th Cong., 1st Sess. (1947), jurisdictional bill: S. 21, 80th Cong., 1st Sess. (1947), 94 Cong. Rec. 7710 (1948)). The Senate passed the procedural and jurisdictional bills, \textit{id} at 7709-10, and forwarded them to the House, which once again took no action, \textit{id} index at 513 (history of bills and resolutions).
\item Hayman, 342 U.S. at 218; see Act of June 25, 1948, ch. 646, § 2255, 62 Stat. 869, 957; H.R. REP. No. 2846, 79th Cong., 2d Sess. 7 (1946). In the 79th Congress, the House Committee on the Revision of the Laws proposed a comprehensive revision of Title 28. 92 Cong. Rec. 9936 (1946) (H.R. 7124, 79th Cong., 2d Sess. (1946)). The House referred the comprehensive bill to the Committee of the Whole House, \textit{id}, and took no further action, \textit{id} index at 677 (history of bills and resolutions). The comprehensive bill was reintroduced in the House during the 80th Congress. 93 Cong. Rec. 1154 (1947) (H.R. 2055, 80th Cong., 1st Sess. (1947), substituted in committee by H.R. 3214, 80th Cong., 1st Sess. (1947)). The House passed the comprehensive bill and sent it to the Senate. \textit{id} at 8932. The Senate passed the bill with certain amendments, \textit{id}.
\end{enumerate}
\end{footnotesize}
same as the second section of the jurisdictional bill.\textsuperscript{73}

Congressional committee reports on the Judicial Conference's proposed jurisdictional bill and on the comprehensive bill shed some light on the nature of a section 2255 motion and the motion's relationship to \textit{coram nobis}.\textsuperscript{74} The Senate report at 7930, none of which affected § 2255, see \textit{id}. at 7929. The House later concurred in the Senate amendments. \textit{id}. at 8501.

Congress has made only one minor amendment to § 2255 since its enactment. The amendment substituted "court established by Act of Congress" for "court of the United States," clarifying that § 2255 applied to federal courts in U.S. territories as well as states. Act of May 24, 1949, ch. 139, § 114, 63 Stat. 105.


Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, or that the court was without jurisdiction, or that the sentence was in excess of the maximum prescribed by law or otherwise open to collateral attack, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Such court shall thereupon cause notice of the motion to be served upon the United States attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was in excess of the maximum prescribed by law or otherwise open to collateral attack, or that there were errors in the sentence which should be corrected, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the circuit court of appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons.


\textsuperscript{74} These reports include: the House report accompanying the comprehensive bill introduced in the 80th Congress, H.R. REP. No. 308, 80th Cong., 1st Sess. A180 (1947), \textit{reprinted} in 1948 U.S. CODE CONG. & ADMIN. NEWS 1692, 1908; the Senate report accompanying the jurisdictional bill introduced in the 80th Congress, S. REP. No. 1526, 80th Cong., 2d Sess. 2 (1948); and the Senate
on the jurisdictional bill indirectly described the motion under section two of the bill, the section 2255 prototype, as a step in the criminal process as opposed to an independent civil action. The report distinguished the motion from habeas corpus, which "is a separate civil action and not a further step in the criminal case in which petitioner is sentenced." The House report accompanying the comprehensive bill included reviser's notes explaining each section of the bill. The reviser's note to section 2255 described the section as a substitute for habeas corpus "in the nature of the ancient writ of error coram nobis."

2. Judicial Interpretation of Section 2255

In interpreting section 2255, the Supreme Court has emphasized its purpose as a substitute for habeas corpus more than its form in the nature of coram nobis. In 1952, the Court considered a challenge to section 2255 as an unconstitutional denial of habeas corpus in United States v. Hayman. The report accompanying the amended comprehensive bill, S. REP. No. 1559, 80th Cong., 2d Sess. 8-10, reprinted in 1948 U.S. CODE CONG. & ADMIN. NEWS 1675, 1683. 75. S. REP. No. 1526, 80th Cong., 2d Sess. 2 (1948) (citations omitted). This language is quite similar to the language the Morgan Court used to describe coram nobis, "a step in the criminal case." United States v. Morgan, 346 U.S. 502, 505 n.4 (1954).

76. H.R. REP. No. 308, 80th Cong., 1st Sess. A180 (1947), reviser's note (§ 2255), reprinted in 1948 U.S. CODE CONG. & ADMIN. NEWS 1692, 1908. The reviser's note stated in pertinent part: "This section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis. It provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus." Id. The Senate report to the comprehensive bill also acknowledges the influence of the Judicial Conference. S. REP. No. 1559, 80th Cong., 2d Sess. 8-10, reprinted in 1948 U.S. CODE CONG. & ADMIN. NEWS 1675, 1683.

77. 342 U.S. 205 (1952). Hayman brought a § 2255 motion attacking a sentence he was serving for forging government checks and related violations of federal law. Hayman claimed he had been denied the right to effective counsel in violation of the 6th amendment because his counsel also represented a key prosecution witness against related charges in a separate trial. Id. at 208-09.

The district court denied Hayman's motion to vacate his sentence and grant a new trial. Id. On appeal, the Ninth Circuit raised sua sponte the constitutionality of § 2255. Hayman v. United States, 187 F.2d 456, 457-58 (9th Cir. 1951), vacated, 342 U.S. 205 (1952). Although the Ninth Circuit decided the case on other grounds, id. at 466, it questioned whether § 2255 was an unconstitutional denial of habeas corpus, because a petitioner could not bring habeas corpus if a motion under § 2255 was available or denied, id. at 462. The Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.
Hayman Court avoided the constitutional question by indicating that a section 2255 motion was substantively the same as habeas corpus. The Hayman Court placed great emphasis on the origin of section 2255 as a solution to the administrative problems associated with habeas corpus, concluding that the sole purpose of section 2255 was to minimize these difficulties by providing the same rights as habeas corpus in a more convenient forum, the sentencing district. The Court placed far less emphasis on the reviser's note to section 2255, rejecting the government's argument that the reviser's note indicated section 2255 was a statutory enactment of common law coram nobis. Instead, the phrase "in the nature of the ancient writ of error coram nobis" merely meant that, like a coram nobis motion, a section 2255 motion is an independent action in the sentencing court.

In 1959, the Supreme Court refined its interpretation of a

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78. Hayman, 342 U.S. at 219, 223. The Hayman Court indicated that a § 2255 motion was the substantive equivalent of habeas corpus, id. at 219, then declined to address the constitutional question because Hayman failed to demonstrate that § 2255 motion was "inadequate or ineffective" to challenge the legality of his conviction, id. at 223. By indicating that a § 2255 motion was the substantive equivalent of habeas corpus, the Supreme Court avoided addressing the constitutionality of § 2255. Section 2255 could not be a denial of habeas corpus, because a § 2255 motion was effectively the same remedy. See L. Yackle, supra note 7, § 30, at 155; Kelley, Objectivity and Habeas Corpus: Should Federal District Judges Be Permitted to Rule upon the Validity of Their Own Criminal Trial Conduct?, 10 U. Mich. J.L. Ref. 44, 45 (1976). Although the Hayman Court officially declined to address the constitutionality of § 2255, the Court's analysis indicated that § 2255 was constitutional. C. Wright, supra note 2, § 591, at 424. The Supreme Court confirmed this conclusion in Swain v. Pressley, 430 U.S. 372, 381 (1977).
80. The Hayman Court concluded that:

Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.

Id. at 219 (citing Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171, 175 (1948) (Judge Parker served as chairperson of the Judicial Conference Committee on Habeas Corpus Procedure)). The Supreme Court affirmed this position in Hill v. United States, 388 U.S. 424, 427 (1962).
81. Hayman, 342 U.S. at 221 n.36. Note 36 reads in pertinent part:

Congress did not adopt the coram nobis procedure as it existed at common law, the Reviser's Note merely stating that the Section 2255 motion was "in the nature of" the coram nobis writ in the sense that a Section 2255 proceeding, like coram nobis, is an independent action brought in the court that entered judgment.

Id. (citation omitted).
82. Id.
section 2255 motion in *Heflin v. United States*.\(^{83}\) The *Heflin* Court specifically described a section 2255 motion as an independent civil action comparable to habeas corpus.\(^{84}\) In a footnote, the *Heflin* Court stated that a section 2255 motion, like a petition for habeas corpus, "is not a proceeding in the original criminal prosecution but an independent civil suit."\(^{85}\)

The judicial interpretation of a section 2255 motion as an independent civil action comparable to a petition for habeas corpus potentially conflicts with the legislative description of section 2255 as a step in the criminal process.\(^{86}\) Nonetheless, the interpretation of section 2255 in *Hayman* and *Heflin* represents the authoritative judicial interpretation of section 2255.\(^{87}\) Until adoption of special rules governing section 2255 motions in 1976, this interpretation of section 2255 controlled the rules of procedure applicable to section 2255 motions.\(^{88}\)

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84. Id. at 418 n.7. In *Heflin*, a prisoner was convicted on two separate counts for feloniously taking and for feloniously receiving the same property. Heflin brought a § 2255 motion, challenging the conviction for receiving the property. He asserted that he could not be lawfully convicted of both taking and receiving the same property. Id. at 416-17. Heflin's sentences were consecutive and he had begun serving the one for taking the property, but not the one for receiving it. Id. at 417.

The Supreme Court rejected Heflin's § 2255 motion, holding that a prisoner can only bring a § 2255 motion to attack a sentence under which he is in custody. Heflin was not "in custody" under the sentence he challenged because he had not begun serving it. Id. at 418. The Court cited McNally v. Hill, 293 U.S. 131, 138 (1934), in which it held that a prisoner may not use habeas corpus to attack a sentence that he has not begun to serve. *Heflin*, 358 U.S. at 418.

Although the Supreme Court has not expressly overruled *Heflin*, the *Heflin* Court's interpretation of the § 2255 custody requirement is no longer valid. In Peyton v. Rowe, 391 U.S. 54 (1968), the Court overruled *McNally*, holding that a prisoner serving consecutive sentences is "in custody" under any one sentence for habeas corpus purposes. Id. at 67. The Sixth Circuit, in turn, has held that Peyton's reasoning applies to § 2255 motions, effectively overruling *Heflin*. Ward v. Knoblick, 738 F.2d 134, 139 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985).

85. *Heflin*, 358 U.S. at 418 n.7. Footnote 7 reads in pertinent part "a motion under § 2255, like a petition for a writ of habeas corpus, is not a proceeding in the original criminal prosecution but an independent civil suit." Id. (citations omitted).


88. C. Wright, *supra* note 2, § 590, at 421.
3. Rules Governing Section 2255 Proceedings

Before 1976, federal courts applied the civil rules of procedure to section 2255 motions at both the district and appellate levels. The courts reasoned that a section 2255 motion was an independent civil action comparable to habeas corpus. In *Hayman*, the Supreme Court indicated that the rules of appellate procedure governing habeas corpus, the civil rules, also apply to section 2255 motions. The Court stated that the time limits for appeals from final judgments in habeas corpus govern section 2255 motions. The Court supported its conclusion by citing the First Circuit's decision in *Mercado v. United States*. The First Circuit had stressed that the purpose of section 2255 was to provide a substitute for habeas corpus and that section 2255 explicitly permitted a movant to take appeals as in habeas corpus.

In 1976, the rules governing section 2255 proceedings at the district court level changed significantly. Congress approved special "Rules Governing Section 2255 Proceedings in the United States District Courts" (Section 2255 Rules), which ap-

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89. Id.; see, e.g., United States v. Hayman, 342 U.S. 205, 209 n.4 (1952) (citing Mercado v. United States, 183 F.2d 486, 487 (1st Cir. 1950)); United States v. Somers, 552 F.2d 108, 110 n.6 (3d Cir. 1977); Ferrara v. United States, 547 F.2d 861, 862 (5th Cir. 1977).

90. C. WRIGHT, supra note 2, § 590, at 420-21; see, e.g., Hill v. United States, 368 U.S. 424, 427 (1962); Heflin v. United States, 358 U.S. 415, 418 n.7 (1959); Hayman, 342 U.S. at 209 n.4 (citing Mercado v. United States, 183 F.2d 486, 487 (1st Cir. 1950)); Ballistrieri, 606 F.2d at 220; Somers, 552 F.2d at 110 n.6; Ferrara, 547 F.2d at 862.

91. Hayman, 342 U.S. at 209 n.4 (citing Mercado, 183 F.2d at 487).

92. Id. Footnote 4 reads: "The appeal was timely. Appeals from orders denying motions under Section 2255 are governed by the civil rules applicable to appeals from final judgments in habeas corpus actions." Id.

93. 183 F.2d 486 (1st Cir. 1950). The First Circuit did not decide whether a § 2255 motion is a civil or criminal proceeding, but merely concluded that the civil rules governing habeas corpus appeals applied to § 2255 appeals. Id. at 487.

94. Id. (citing 28 U.S.C. § 2255 (1988)).


The Court recommended the § 2255 Rules along with rules governing habeas corpus actions under 28 U.S.C. § 2254 (habeas corpus for state prisoners) in response to growing confusion over the exact procedural rules governing habeas corpus and § 2255 motions. Clinton, Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules En-
plied a mixture of civil and criminal rules to section 2255 proceedings in the district courts.\textsuperscript{96} The advisory committee's note to Rule 1 of the new Section 2255 Rules justified the change by describing a section 2255 motion as a step in the criminal case and not an independent civil suit like habeas corpus.\textsuperscript{97} In addition, the Section 2255 Rules provide the sentencing judge with wide discretion to apply civil or criminal rules of procedure when the Section 2255 Rules do not specifically prescribe which set of rules applies.\textsuperscript{98} In contrast to drastically changing the rules governing section 2255 motions at the district level, the Section 2255 Rules did not affect the rules governing section 2255 appeals.\textsuperscript{99}

\textbf{C. THE COURTS OF APPEALS' INTERPRETATIONS OF THE MORGAN FOOTNOTE}

The complex history of section 2255 is reflected in the circuit courts' interpretations of the Morgan footnote's description of a coram nobis motion as "a step in the criminal case," yet also as "of the same general character as [a motion] under 28 U.S.C. \textsection 2255."\textsuperscript{100} Several circuits have addressed the apparently contradictory language of the Morgan footnote's first and second parts and are divided as to whether a petition for coram nobis is generally a civil or a criminal proceeding.\textsuperscript{101}

\textit{abbing Acts}, 63 IOWA L. REV. 15, 21-22 (1977). The confusion resulted in part from \textsc{Fed. R. Civ. P. 81(a)(2)}, which states that the rules of civil procedure apply to habeas corpus motions only to the extent that they conform to the rules previously governing habeas corpus motions. \textit{Id.} at 19. Lack of information concerning habeas corpus practice before 1938, when the rules of civil procedure became effective, left the courts uncertain as to the proper procedure. Recognizing this uncertainty, the Court exercised its rulemaking authority to clarify the situation. \textit{Id.} at 19-22.

\textsuperscript{96} \textsc{Rules Governing \textsection 2255 Proceedings in the U.S. Dist. Cts.} 3 (no filing fee), 4(b) (availability of files, etc., relating to judgment), 6 (availability of discovery under civil and criminal procedure rules), 11 (no extension of time for appeal), 12 (applicability of federal civil and criminal rules).

\textsuperscript{97} \textit{Id.} Rule 1 advisory committee's note. The Advisory Committee based its conclusion on the description of the prototype of \textsection 2255 contained in the Senate report to the jurisdictional bill. \textit{Id.} (quoting \textsc{S. Rep. No. 1526, 80th Cong., 2d Sess. 2 (1948)}); \textit{see supra} notes 74-75 and accompanying text.

\textsuperscript{98} \textsc{Rules Governing \textsection 2255 Proceedings in the U.S. Dist. Cts.} 12.

\textsuperscript{99} \textit{Id.} Rule 11. This conforms with the explicit language of \textsection 2255 permitting petitioners to take appeals in the same manner as appeals in applications for habeas corpus. \textit{See 28 U.S.C. \textsection 2255 (1988)}.

\textsuperscript{100} \textit{United States v. Morgan,} 346 U.S. 502, 505 n.4; \textit{see supra} notes 46-52 and accompanying text.

\textsuperscript{101} \textit{Yasui v. United States,} 772 F.2d 1496, 1499 (9th Cir. 1985) (holding a coram nobis motion criminal in nature and applying the criminal rules);
The Second and Eighth Circuits addressed the fundamental nature of coram nobis before the enactment of the Section 2255 Rules. In 1958, the Second Circuit held that a coram nobis motion was a civil proceeding and applied the civil time limit to coram nobis appeals in United States v. Keogh. The Keogh court interpreted the first part of the Morgan footnote narrowly, concluding that it merely indicated the abolition of coram nobis under Rule 60(b) was limited to civil cases. The court declined to read the footnote as indicating that a coram nobis motion itself was a criminal proceeding. Instead, the court emphasized the second part of the footnote. Because a section 2255 motion is a civil proceeding subject to the time limit governing civil appeals, the same time limit also should apply to comparable coram nobis appeals. Moreover, the court noted that the policy considerations supporting a short period for notice of appeal in criminal cases were absent in coram nobis cases.

The Eighth Circuit reached the opposite conclusion on the

United States v. Balistrieri, 606 F.2d 216 (7th Cir. 1979), cert. denied, 446 U.S. 917 (1980) (holding a coram nobis motion a hybrid remedy and applying the § 2255 Rules, which contain a mixture of civil and criminal rules, to coram nobis motions); United States v. Mills, 430 F.2d 526, 528 (8th Cir. 1970), cert. denied, 400 U.S. 1023 (1971) (holding a coram nobis motion criminal and applying the criminal rules); United States v. Keogh, 391 F.2d 138, 140 (2d Cir. 1968) (holding a coram nobis motion civil in nature and applying the civil rules to coram nobis motions).

102. 391 F.2d 138 (2d Cir. 1968). Keogh, a Justice of the Supreme Court of New York for Kings County, was convicted of conspiracy to influence, obstruct, or impede justice. Facing disbarment for the conviction, Keogh brought a coram nobis motion. Id. at 139-40. The district court denied relief, dismissing Keogh's motion. United States v. Keogh, 271 F. Supp. 1002, 1017 (S.D.N.Y. 1967). Keogh appealed the decision 27 days after entry of the dismissal. The United States contended that Keogh appealed too late because criminal rules of procedure should govern coram nobis. Keogh, 391 F.2d at 140.

103. Keogh, 391 F.2d at 140.

104. Id. The Second Circuit's assertion that the Supreme Court did not need to view a coram nobis motion as criminal in nature to avoid application of Rule 60(b) to coram nobis in criminal cases is reasonable. Rule 60(b) plausibly did not eliminate coram nobis as a civil remedy in both civil and criminal cases, because the Federal Rules of Civil Procedure apply only to civil cases. See Fed. R. Civ. P. 1. Rule 60(b) could only eliminate coram nobis, regardless of its nature as a motion, as a remedy from final orders in civil cases. Consequently, a coram nobis motion conceivably could be civil in nature, but still available as a remedy from a final order in a criminal case.

105. Keogh, 391 F.2d at 140.

106. Id. The Second Circuit did not elaborate on these policy considerations. Presumably, the court was referring to the government's interest in resolving criminal litigation as expeditiously as possible.
question two years later. In United States v. Mills,\textsuperscript{107} the Eighth Circuit held that a coram nobis motion was a criminal proceeding, and applied the ten-day criminal time limit for appeals.\textsuperscript{108} Ignoring the second part of the Morgan footnote, the Mills court simply noted that the first part of the footnote described a coram nobis motion as “a step in a criminal case.”\textsuperscript{109}

The Seventh and Ninth Circuits examined the basic nature of coram nobis after the enactment of the Section 2255 Rules. In 1979, the Seventh Circuit took a slightly different approach than the Keogh court, but also applied the rules governing section 2255 motions to coram nobis motions. In United States v. Balistrieri,\textsuperscript{110} the Seventh Circuit held that a coram nobis motion was a hybrid motion: a step in the criminal case that is also civil in nature. Following the Second Circuit’s analysis, the court ruled that coram nobis is an extension of section 2255, available when the applicant is no longer in custody.\textsuperscript{111} Because coram nobis is comparable to section 2255, it is civil as well as criminal.\textsuperscript{112} Consequently, coram nobis proceedings are subject to the rules governing section 2255 proceedings, which incorporate aspects of both the civil and criminal rules.\textsuperscript{113}

In 1985, the Ninth Circuit joined the Eighth Circuit and held that coram nobis is criminal in nature. The court applied the criminal time limit to coram nobis appeals in Yasui v. United States.\textsuperscript{114} As the Eighth Circuit had done earlier, the

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\textsuperscript{107} 430 F.2d 526 (8th Cir. 1970), cert. denied, 400 U.S. 1023 (1971).
\textsuperscript{108} Id. at 528. Mills sought coram nobis, challenging his convictions for escape and conspiracy to escape on the grounds that he was not mentally competent to stand trial. The district court denied relief. Mills appealed the decision, but filed his appeal beyond the 10-day limit under the criminal rules. Id. at 527-28.
\textsuperscript{109} Id. at 528.
\textsuperscript{111} Id. at 220-21 (citing Heflin v. United States, 358 U.S. 415, 418 n.7 (1959)). The Seventh Circuit also cited the new § 2255 Rules as support for its comparison of coram nobis and § 2255 and its contention that coram nobis is a hybrid remedy. Id. at 221.
\textsuperscript{112} Id. The Seventh Circuit concluded that the district court was within its authority to limit Balistrieri’s discovery requests to those available under the rules of criminal procedure, because Rule 6 of the § 2255 Rules allows the district court to do so in § 2255 proceedings. Id.
\textsuperscript{113} 772 F.2d 1496 (9th Cir. 1985). Yasui sought coram nobis to vacate his
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Ninth Circuit emphasized the first part of the *Morgan* footnote. Because a *coram nobis* proceeding is a step in a criminal case in which the petitioner seeks to set aside a criminal conviction, the court concluded that, absent an express congressional command to the contrary, the criminal time limit applies.\(^{115}\) The circuit court rejected a comparison of a *coram nobis* motion to a section 2255 motion, because section 2255 has a unique relationship to habeas corpus. Section 2255 provides a special statutory remedy replacing habeas corpus, and explicitly authorizes taking appeals as in habeas corpus cases. *Coram nobis*, in contrast, has no such relationship with habeas corpus.\(^{116}\)

To summarize, whether a *coram nobis* motion is a civil or criminal proceeding and hence, whether the criminal or civil rules govern *coram nobis* appeals, turns on the paradoxical language of the *Morgan* footnote.\(^{117}\) The varying legislative and judicial descriptions of a section 2255 motion as a step in the criminal process\(^{118}\) and as an independent civil action\(^{119}\) complicate the problem. As a result, the circuits are divided sharply over the basic nature of a *coram nobis* proceeding and consequently, whether to apply the civil or criminal rules to *coram nobis* appeals.

**II. THE COOPER DECISION**

In *United States v. Cooper*,\(^{120}\) a federal convict appealed a district court order denying what the Fifth Circuit construed as petitions for writs of error *coram nobis*.\(^{121}\) The court considered whether the convict's notices of appeal were timely\(^{122}\) and whether the documents the convict filed constituted valid notices of appeal.\(^{123}\) The circuit court held that the notices of appeal were valid.

\(^{115}\) *Id.* at 1498. Yasui appealed, but filed his appeal beyond the 10-day limit for criminal appeals. *Id.*

\(^{116}\) *Id.*

\(^{117}\) *See supra* notes 46-52.

\(^{118}\) *See supra* notes 74-76.

\(^{119}\) *See supra* notes 77-85.

\(^{120}\) 876 F.2d 1192 (5th Cir. 1989) (per curiam).

\(^{121}\) *See supra* note 5 and accompanying text (describing procedural history of Cooper).

\(^{122}\) *Cooper*, 876 F.2d at 1193-94.

\(^{123}\) *Id.* at 1194-96. Cooper appealed two district court orders, each denying *coram nobis* for an earlier conviction. For each appeal, Cooper filed documents entitled "Motion for Rehearing and Notice of Appeal" and "Motion for
The notices of appeal were timely but that it could not determine the validity of the notices from the record. The court consequently remanded the case to the district court for a factual determination.

In concluding that the notices of appeal were timely, the *Cooper* court held that Rule 4(a)(1) of the Federal Rules of Appellate Procedure, governing the time limit for notice of appeal in civil cases, applies to a *coram nobis* motion, because such a motion is a civil proceeding. The court based its holding on the *Morgan* footnote's comparison of a *coram nobis* motion to a

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124. *Id.* at 1194. The *Cooper* court applied the FED. R. APP. P. 4(a)(1) 60-day limit for notice of appeal in civil cases. *Id.*

125. *Id.* at 1196. The *Cooper* court held that the documents entitled "Motion for Rehearing and Notice of Appeal" were invalid notices of appeal. *Id.* at 1194. The Fifth Circuit followed a previous decision in which it held such a motion an invalid notice of appeal because the motion does not clearly demonstrate an intention to appeal as opposed to an intention to move for rehearing. The court stated that a motion for rehearing and notice of appeal "cannot be a valid notice of appeal because it does not 'clearly evince' the party's intent to appeal." *Id.* (citation omitted).

The *Cooper* court also rejected the claim that Cooper's appellate briefs were adequate notices of appeal. *Id.* at 1196. Although the briefs otherwise met the requirements of FED. R. APP. P. 3 and 4, the court held that the rules envisioned the notice of appeal and the appellate brief as two separate filings. Allowing parties to file only an appellate brief would eliminate the requirement to file a notice of appeal. *Id.*

The *Cooper* court did hold that Cooper's documents entitled "Motion for Leave to Proceed In Forma Pauperis" were equivalent to notices of appeal and sufficient to invoke appellate jurisdiction. *Id.* at 1194-95. These "notices of appeal," however, were potentially invalid as premature. The court noted that under FED. R. APP. P. 4(a)(4), a notice of appeal is invalid if filed before disposition of a timely motion for rehearing under FED. R. CIV. P. 59(e). *Id.* at 1195. Because Cooper's failed motions for notice of appeal also were motions for rehearing under Rule 59(e) and he filed his motions for leave to proceed in forma pauperis before disposition of these motions, his notices of appeal were invalid as premature if his motions for rehearing were timely. *Id.* With certain limitations not relevant in Cooper, a motion for rehearing served within 10 days is timely. *Id.* Because the record does not indicate when Cooper served his motions for rehearing, the Fifth Circuit could not determine whether these motions were timely and hence whether Cooper's motions for leave to proceed in forma pauperis were valid notices of appeal. *Id.* The court remanded the issue to the district court to determine the timeliness of Cooper's motions for rehearing. *Id.* at 1196.

126. *Id.*

127. *Id.* at 1194. The *Cooper* court concluded that "[s]ince the *coram nobis* motion is a civil proceeding 'of the same general character as one under 28 U.S.C. § 2255,' the same civil appeal rule of FED. R. APP. P. 4(a)(1) applies. Thus, Cooper had 60 days to file this appeal." *Id.* (quoting United States v. Morgan, 346 U.S. 502, 506 n.4 (1954)).
section 2255 motion, noting that the rules governing civil appeals govern section 2255 appeals. 128

The Cooper court asserted that the first part of the Morgan footnote simply distinguished habeas corpus from coram nobis by the different districts in which the two proceedings initiated. As an independent civil action, habeas corpus originates in the district of confinement, while as “a step in the criminal case,” coram nobis originates in the sentencing district. 129

The Cooper court supported its comparison of a coram nobis motion to a section 2255 motion by citing the Section 2255 Rules. 130 The advisory committee’s note to Rule 1 describes a section 2255 motion as “a further step in the movant’s criminal case and not a separate civil action.” 131 The Cooper court stressed the similarity of this description of a section 2255 motion to the Supreme Court’s description of a coram nobis motion in the first part of the Morgan footnote, as well as the explicit comparison of coram nobis to section 2255 in the second part of the footnote. 132 The court concluded that a coram nobis motion was a civil proceeding comparable to a section 2255 motion, 133 and thus the rules of appellate procedure for civil cases

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128. Id. The Cooper court stated that coram nobis is civil in nature, like § 2255. This language is potentially confusing since the enactment of the § 2255 Rules, applying both criminal and civil rules to § 2255 proceedings. The Cooper court simply concluded that like a § 2255 motion, the civil rules of appellate procedure govern coram nobis. The court did not address whether the combination of civil and criminal rules in the § 2255 Rules or the civil rules would apply to coram nobis at the district level. See id.
129. Id. at 1194.
130. Id.
131. RULES GOVERNING § 2255 PROCEEDINGS IN THE U.S. DIST. CTs. 1 advisory committee’s note (quoting S. REP. No. 1526, 80th Cong., 2d Sess. 2 (1948)). The Senate report read in pertinent part:

[One of the] main advantages of such motion remedy over the present habeas corpus [is that] habeas corpus is a separate civil action and not a further step in the criminal case in which petitioner is sentenced. It is not a determination of guilt or innocence of the charge upon which petitioner was sentenced. . . . Even under the broad power in the statute “to dispose of the party as law and justice require,” the court [or] judge is by no means in the same advantageous position in habeas corpus to do justice as would be so if the matter were determined in the criminal proceeding. For instance, the judge (by habeas corpus) cannot grant a new trial in the criminal case. Since the motion remedy is in the criminal proceeding, this section 2 affords the opportunity and expressly gives the broad powers to set aside the judgment and to “discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.”

S. REP. No. 1526, 80th Cong., 2d Sess. 2 (1948) (citations omitted).
132. Cooper, 876 F.2d at 1194.
133. Id.
should govern coram nobis appeals because such rules govern section 2255 appeals.¹³⁴

III. THE LANGUAGE OF THE MORGAN FOOTNOTE INDICATES THAT CORAM NOBIS IS A CRIMINAL PROCEEDING

Unlike with section 2255, the Supreme Court has neither directly addressed the basic nature of coram nobis nor specifically indicated which rules of procedure apply to coram nobis proceedings.¹³⁵ The only guide the lower courts have is the paradoxical Morgan footnote.¹³⁶

The answer to whether coram nobis is civil or criminal in nature, therefore, turns on the solution to the Morgan footnote paradox. A proper interpretation of the basic nature of coram nobis would reconcile the apparently contradictory language of the first and second parts of the Morgan footnote. An interpretation of coram nobis as a civil proceeding fails because the first part of the Morgan footnote must be read as indicating that coram nobis is criminal in nature. Yet an interpretation of coram nobis as a criminal proceeding succeeds. The second part of the Morgan footnote need not be read as indicating that coram nobis is a civil proceeding. Furthermore, policy considerations underlying the administration of post-conviction remedies support an interpretation of coram nobis as a criminal proceeding, because it is an extension of the original criminal case.

A. THE COOPER COURT'S INTERPRETATION OF CORAM NOBIS AS A CIVIL PROCEEDING

The circuit court interpretations of the Morgan footnote prior to Cooper¹³⁷ failed to reconcile both of its parts. The Sec-

¹³⁴ Id.
¹³⁵ See L. Yackle, supra note 7, § 36, at 165.
¹³⁶ See id. § 36, at 163-65. Yackle notes that Morgan’s holding as well as footnote four is paradoxical. The Supreme Court held that § 2255 did not supersede coram nobis, but described a coram nobis motion as having the same general character as a § 2255 motion. Id. at 165. Furthermore, the Supreme Court’s interpretation of a § 2255 motion as an independent civil action comparable to habeas corpus renders the Morgan footnote indirectly self-contradictory. Id. The Morgan Court distinguished a coram nobis motion from habeas corpus, then compared a coram nobis motion to a § 2255 motion, which the Court earlier held was the substantial equivalent of habeas corpus in Hayman. Thus the Morgan Court effectively stated that a coram nobis motion is both different from and the same as habeas corpus. Id.
¹³⁷ See supra notes 100-16 and accompanying text.
ond Circuit read the first part narrowly, virtually ignoring its language, and emphasized the second part in concluding that a *coram nobis* proceeding is civil.\textsuperscript{138} The Seventh Circuit acknowledged the contradictory nature of the different parts of the footnote and simply declared a *coram nobis* motion both civil and criminal in nature.\textsuperscript{139} Finally, the Eighth and Ninth Circuits stressed the first part of the footnote and completely

\textsuperscript{138} United States v. Keogh, 391 F.2d 138, 140 (2d Cir. 1968). The Second Circuit reasoned:

\begin{quote}
The problem to which the [Morgan] footnote was addressed was that F[ed]. R. Civ. P. 60(b) had abolished writs of error *coram nobis* in favor of the motion procedure there provided. The answer was that the abolition effected by Rule 60(b) cannot fairly be extended beyond the "suits of a civil nature" to which alone, under the general provision of Rule 1, the Rules of Civil Procedure apply. We do not read the quoted statement as intending more than that. Indeed the footnote ends by characterizing a motion for *coram nobis* as "of the same general character as one under 28 U.S.C. § 2255," which, as indicated above, is under the civil rules as regards time for appeal.
\end{quote}

\textit{Id.} (citations omitted).

\textsuperscript{139} United States v. Balistrieri, 606 F.2d 216, 221 (7th Cir. 1979), cert. denied, 446 U.S. 917 (1980). The Seventh Circuit stated that "to the extent that a *coram nobis* motion is like a § 2255 motion, the former is also civil in nature." \textit{Id.} at 220-21. Apparently, then, a *coram nobis* motion is a step in a criminal proceeding, yet is also civil in nature and subject to the civil rules of procedure. \textit{Id.} at 221. The Seventh Circuit quoted Judge Scott in United States v. Tyler, 413 F. Supp. 1403 (M.D. Fla. 1976):

\begin{quote}
Coram nobis is, then, a hybrid action: quasi-civil and quasi-criminal. It is a remedy available in a criminal case to correct fundamental errors that render that proceeding irregular and its judgment invalid. Nevertheless, because it is a postjudgment attack upon a conviction by a defendant no longer in any form of custody, and insofar as it is still governed by civil rules, forms and pleadings, its character reflects the vestiges of its civil origins: the intrinsic all-writs jurisdiction of the Court.
\end{quote}

\textit{Id.} at 1404-05 (citations omitted), \textit{quoted in Balistrieri}, 606 F.2d at 221.

The Seventh Circuit also emphasized that the § 2255 Rules incorporate aspects of both the civil and criminal rules at the district level, strengthening its conclusion that *coram nobis* is comparable to § 2255 and is a hybrid remedy. \textit{Id.}

Although the Seventh Circuit's description of *coram nobis* as a hybrid remedy differs from the Second Circuit's, in practice this difference affects only district level procedure. Following the § 2255 Rules, the Seventh Circuit applied criminal rules to certain aspects of a *coram nobis* proceeding at the district level. \textit{Id.} at 220-21 (holding it within district court discretion to apply the criminal rules of discovery to a *coram nobis* proceeding). At the appellate level, the Seventh Circuit's position is consistent with the Second Circuit. Judge Scott, and in turn the Seventh Circuit, actually based his analysis on the Second Circuit's decision in *Keogh*, concluding that *coram nobis* was quasi-civil because the civil rules applied to *coram nobis* appeals. \textit{See Tyler}, 413 F. Supp. at 1404 (citing *Keogh*, 391 F.2d at 140). Thus the Seventh Circuit is consistent with the Second Circuit in respect to *coram nobis* appeals. The civil rules of procedure apply to *coram nobis* appeals. \textit{See Balistrieri}, 606 F.2d at 220-21.
ignored the second part in concluding that a coram nobis motion is criminal in nature.\textsuperscript{140}

The Fifth Circuit’s opinion in Cooper represents the first attempt to reconcile the language of both parts of the Morgan footnote. On its face, the Cooper court’s analysis appears to succeed.\textsuperscript{141} Yet on closer examination, the court’s reasoning breaks down. The Cooper court’s approach fails to acknowledge the unique relationship of section 2255 to habeas corpus resulting from the purpose of section 2255 to replace habeas corpus for federal prisoners.

1. The Cooper Court’s Interpretation of the Language of the First Part of the Morgan Footnote

According to the Cooper court, the first part of the Morgan footnote simply distinguished habeas corpus, which originates in the district of confinement, from coram nobis, which originates in the sentencing district.\textsuperscript{142} Examined by itself, however, the language of the first part of the footnote describing a coram nobis motion as “a step in the criminal case” does not support such a narrow reading.

Although the Cooper court’s narrow interpretation is plausible considering only the footnote’s relationship to Rule 60(b), the interpretation is not plausible considering the footnote’s text as well. In contending that the phrase “a step in the criminal case” does not imply that a coram nobis motion is a criminal proceeding, the circuit court takes a questionable position.

\textsuperscript{140} United States v. Mills, 430 F.2d 526, 528 (8th Cir. 1970), cert. denied, 400 U.S. 1023 (1971); Yasui v. United States, 772 F.2d 1496, 1499 (9th Cir. 1985). The Eighth Circuit simply concluded that “[the criminal] rule seems to cover the instant proceeding, since coram nobis is deemed a step in a criminal case.” Mills, 430 F.2d at 528. The Ninth Circuit’s analysis was deeper than the Eighth Circuit’s, but still was very limited. It stated that coram nobis is “as the Supreme Court stated in Morgan, ‘a step in the criminal case.’ The purpose of the petition is the setting aside of the petitioner’s criminal indictment and conviction. Absent an express congressional command to the contrary, the criminal time limit should therefore apply.” Yasui, 772 F.2d at 1499.

\textsuperscript{141} The Cooper court’s comparison of the language of the first part of the Morgan footnote, describing a coram nobis motion as “a step in the criminal case,” to the advisory committee’s note to Rule 1 of the § 2255 Rules, describing a § 2255 motion as “a further step in the movant’s criminal case,” transforms the standard interpretation of the footnote. Under the Fifth Circuit’s analysis, the first part of the Morgan footnote supports a comparison of coram nobis to § 2255, indicating that coram nobis is civil, not criminal. United States v. Cooper, 876 F.2d 1192, 1194 (5th Cir. 1989) (per curiam). Thus both the first and the second parts of the footnote imply the same conclusion: a coram nobis motion is a civil proceeding.

\textsuperscript{142} See id. at 1194.
As the Ninth Circuit noted, a proceeding that is a "step in the criminal case" normally would be criminal, not civil.143 Furthermore, the Cooper court's analysis completely fails to address another phrase from the first part of the Morgan footnote. The Morgan Court states that coram nobis is "not... the beginning of a separate civil proceeding."144 Again the natural inference of this language is that coram nobis is criminal, not civil, in nature.145

Had the Supreme Court intended to distinguish between coram nobis and habeas corpus based on the different districts in which they originate, presumably the Court would have used language contrasting the districts. Yet the Morgan Court did not use such language.146 Instead, the Court contrasted the nature of coram nobis with the nature of habeas corpus.147 The footnote's language, "a step in the criminal case and not, like habeas corpus... the beginning of a separate civil proceeding," indicates that the distinction between coram nobis and habeas corpus was that a coram nobis proceeding is criminal as opposed to civil in nature, not that a coram nobis proceeding originates in the sentencing district as opposed to the district of confinement.148

The Cooper court attempted to overcome the plain language of the first part of the Morgan footnote and reconcile it with the second part by quoting the advisory committee's note to Rule 1 of the Section 2255 Rules. The note describes a section 2255 motion as "a further step in the movant's criminal case and not a separate civil action."149 Although a section 2255 motion is a step in the criminal case and the criminal rules govern many aspects of section 2255 proceedings at the district level, the civil rules still govern section 2255 appeals.150

143. Yasui, 772 F.2d at 1499. The ABA also has criticized the Supreme Court's classification of § 2255, an extension of the criminal proceeding, as civil in nature. "[I]t is anomalous to have an extension of a criminal proceeding characterized as purely civil." STANDARDS, supra note 8, Standard 22-1.2 commentary at 22-10.
145. Yasui, 772 F.2d at 1499.
146. See Morgan, 346 U.S. at 505 n.4.
147. Id.
148. See generally Yasui, 772 F.2d at 1499 (applying the criminal time limit because the Morgan footnote expressly states that a coram nobis motion is "a step in the criminal case").
149. United States v. Cooper, 876 F.2d 1192, 1194 (5th Cir. 1989) (per curiam) (quoting RULES GOVERNING § 2255 PROCEEDINGS IN THE U.S. DIST. CTS. 1 advisory committee's note).
150. RULES GOVERNING § 2255 PROCEEDINGS IN THE U.S. DIST. CTS. 11.
ing for a moment that this description of section 2255 is valid, the first and second parts of the Morgan footnote are no longer paradoxical. The language of the first part of the Morgan footnote does not necessarily indicate that the criminal rules should govern coram nobis proceedings. Instead, the language actually supports the comparison between coram nobis and section 2255 motions in the second part of the Morgan footnote. Thus both parts of the footnote indicate that the civil rules should govern coram nobis as well as section 2255 appeals.

The Cooper court’s description of a section 2255 motion as a step in the criminal case is a flawed basis for interpreting the Morgan footnote, however, because the courts viewed a section 2255 motion as a civil proceeding when the Supreme Court decided Morgan. The advisory committee note’s description of a section 2255 motion, and hence the Cooper court’s, is based on the Senate report discussing the Judicial Conference’s proposed jurisdictional bill, the prototype of section 2255. The Senate report may have described the prototype as a step in the criminal process, but the federal judiciary consistently interpreted a section 2255 motion, from the enactment of section 2255 to the adoption of the current Section 2255 Rules, as an independent civil action comparable to habeas corpus, not as a step in the criminal case. Moreover, the courts applied the civil rules to

151. The words “a step in the criminal case” do not necessarily imply that the criminal rules should apply to coram nobis appeals because a § 2255 motion is “a further step in the movant’s criminal case,” yet the civil rules govern § 2255 appeals. Therefore, the description of a coram nobis motion as “a step in the criminal case” does not preclude applying the civil rules to coram nobis appeals.

152. The first part of the Morgan footnote now complements the second part, because both a coram nobis and a § 2255 motion are steps in the criminal process.

153. See Cooper, 876 F.2d at 1194. The language of both the first and the second part of the Morgan footnote supports a comparison between a coram nobis motion and a § 2255 motion. Because the civil rules govern § 2255 appeals, both parts of the footnote support application of the civil rules to coram nobis appeals.


155. See cases cited supra note 90. Whether a § 2255 motion is civil or criminal in nature was not originally clear. Mercado v. United States, 183 F.2d 486, 486-87 (1st Cir. 1950). The First Circuit noted that the relationship of § 2255 to coram nobis suggests that § 2255 might be criminal (assuming that coram nobis is criminal, which was itself uncertain), while its relationship to habeas corpus suggests that it is civil. Id. at 487.
section 2255 motions based on this comparison to habeas corpus.\textsuperscript{156}

Although the Supreme Court did not explicitly state that section 2255 was an independent civil action comparable to habeas corpus until 1959 in \textit{Heflin v. United States},\textsuperscript{157} as early as 1952 in \textit{United States v. Hayman}, the Court described section 2255 as “an independent and collateral inquiry into the validity of the conviction.”\textsuperscript{158} Furthermore, to avoid addressing whether section 2255 was an unconstitutional denial of habeas corpus,\textsuperscript{159} the \textit{Hayman} Court effectively held that a section 2255 motion was the equivalent of habeas corpus, only “affording the same rights in another and more convenient forum,” the sentencing district instead of the district of confinement.\textsuperscript{160}

\textsuperscript{156} United States v. Hayman, 342 U.S. 205, 209 n.4 (1952) (citing \textit{Mercado}, 183 F.2d at 486).

\textsuperscript{157} 358 U.S. 415 (1959). In \textit{Heflin}, the Supreme Court explicitly confirmed that a § 2255 motion is an independent civil action. \textit{Id.} at 418 n.7.

\textsuperscript{158} \textit{Hayman}, 342 U.S. at 222.

\textsuperscript{159} \textit{See} Hayman v. United States, 187 F.2d 456, 466 (9th Cir. 1951), \textit{vacated}, 342 U.S. 205 (1952).

\textsuperscript{160} \textit{See Hayman}, 342 U.S. at 219. The Supreme Court held that § 2255 effectively provided the same rights as habeas corpus, only in a different forum.

Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners’ rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum. \textit{Id.} Although the Court did not reach the constitutional challenge, \textit{id.} at 223, this analysis clearly would have refuted it. Section 2255 could not be a denial of the very rights it embodied. Consequently, \textit{Hayman} effectively established the constitutionality of § 2255. C. \textit{Wright}, supra note 2, § 591, at 424. The Supreme Court confirmed the constitutionality of § 2255 in \textit{Hill v. United States}, 368 U.S. 424, 427 (1962), stating that “the historic context in which § 2255 was enacted [indicates] that the legislation was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined.” \textit{Id.}

\textit{Hayman} and \textit{Hill} directly conflict with the Senate report on the precursor to § 2255. The Senate report clearly describes a motion to attack sentence as a step in the criminal case, S. \textit{Rep.} No. 1526, 80th Cong., 2d Sess. 2 (1948), yet \textit{Hayman} refers to it as an independent collateral inquiry, \textit{Hayman}, 342 U.S. at 222. Furthermore, the Senate report distinguishes the proposed motion from habeas corpus and describes it as superior to habeas corpus in criminal proceedings (a judge only could release a petitioner in habeas corpus, while she could adjust the sentence in a motion to attack sentence). S. \textit{Rep.} No. 1526, 80th Cong., 2d Sess. 2 (1948). Yet \textit{Hill} explicitly describes the two actions as equivalent remedies. \textit{Hill}, 368 U.S. at 427. The advisory committee’s note to Rule 1 of the § 2255 Rules that describes § 2255 as a step in the criminal process based on the Senate report, reflects this conflict between the legislative history and judicial interpretation of § 2255. \textit{See} RULES GOVERNING § 2255 PROCEEDINGS IN THE U.S. DIST. CTS. 1 advisory committee’s note; \textit{see also} C.
The Supreme Court's interpretation of section 2255 as an independent civil action like habeas corpus precludes the Cooper court from using the legislative description of a section 2255 motion as a step in the criminal case as a basis for interpreting the Morgan footnote. As such, the Fifth Circuit's attempt to explain the paradoxical language of the footnote fails. The language of the first part of the Morgan footnote still implies that a coram nobis proceeding is criminal in nature, contradicting the second part of the footnote, which implies that a coram nobis proceeding is civil.

2. Unique Relationship of Section 2255 to Habeas Corpus

Even if the Cooper court's description of a section 2255 motion as a step in the criminal case is not historically accurate, the description still might conceivably serve as a basis for interpreting the words "a step in the criminal case." The advisory committee's note to Rule 1 of the Section 2255 Rules does describe section 2255 as "a further step in the movant's criminal case," yet the Section 2255 Rules apply the civil time limit to section 2255 appeals. This implies that application of civil rules to a proceeding that is a step in the criminal process is not necessarily contradictory.

This description of a section 2255 motion, however, is misleading as a guide for interpreting the Morgan footnote. The Supreme Court first applied the civil rules to section 2255 appeals, and the civil rules still apply to such appeals under the current section 2255 rules, because of a unique relationship be-

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WRIGHT, supra note 2, § 590, at 422 (questioning significance of Senate report compared to longstanding judicial interpretation as basis for rules governing § 2255 proceedings).

Yackle suggests that a desire to avoid the Ninth Circuit's constitutional challenge to § 2255 may have motivated the Hayman Court to interpret § 2255 as the equivalent of habeas corpus. See L. YACKLE, supra note 7, §§ 30, 32.

Regardless of whether the Supreme Court's interpretation of § 2255 in Hayman was accurate or skewed as a result of the constitutional challenge, it reflects the Court's position on § 2255 at the time it decided Morgan. The Supreme Court almost certainly viewed § 2255 as an independent civil action comparable to habeas corpus when it decided Morgan. See id. § 32.

161. See supra notes 143-48 and accompanying text.

162. Application of civil rules to § 2255 appeals under the § 2255 Rules still appears to indicate that the civil rules could apply to coram nobis appeals.

163. RULES GOV'NING § 2255 PROCEEDINGS IN THE U.S. DIST. CTs. I advisory committee's note.

164. Id. Rule 11. Aside from Rule 11, the § 2255 Rules only govern district court procedure. See id. Rules 1-10, 12.
tween section 2255 and habeas corpus. Coram nobis has no comparable relationship with habeas corpus.

The unique relationship between section 2255 and habeas corpus is evident in the legislative history of section 2255. The advisory committee’s note based its description of a section 2255 motion on the Senate report accompanying the proposed jurisdictional bill. Although the language of the jurisdictional bill and the final version of section 2255 were generally comparable, the two differed significantly respecting appeals. The jurisdictional bill stated that “[a]n appeal from an order granting or denying the motion shall lie to the circuit court of appeals.” Neither the bill nor the report indicated how a circuit court should handle such appeals. In contrast, the final version of section 2255 did. It read: “[a]n appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.”

This reference to habeas corpus appeals in the final version of section 2255, not the basic nature of a section 2255 motion, apparently served as the basis for the Supreme Court’s application of the civil rules to section 2255 appeals. In Hayman, the Court indicated in a footnote that the civil rules apply to section 2255 appeals. The footnote adopted the reasoning of Mercado v. United States, in which the First Circuit examined whether the civil or criminal time limit for taking an appeal applied to section 2255 appeals. Although the govern-

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165. Yasui v. United States, 772 F.2d 1496, 1499 (9th Cir. 1985); C. Wright, supra note 2, § 590; L. Yackle, supra note 7, § 36.
166. Yasui, 772 F.2d at 1499.
168. Compare supra note 73 (language of jurisdictional bill) with supra note 54 (language of § 2255).
173. 183 F.2d 486 (1st Cir. 1950). Mercado had pled guilty to transportation of a revolver and to transportation of ammunition for the revolver. The district court sentenced him to two consecutive two-year sentences for the convictions. Id. at 486. Mercado brought a § 2255 motion seeking to vacate his sentence for the second conviction on the grounds that the two convictions constituted one offense for the purpose of sentencing. Id. The district court denied relief and the First Circuit affirmed, holding that the offenses were separate and distinct and that separate sentences were proper. Id. at 489-87.
174. Id. at 486.
ment contended that the criminal time limit applied because a section 2255 proceeding was criminal in nature. The First Circuit refused to resolve whether a section 2255 motion was a civil or criminal proceeding. Instead, the court cited the language of section 2255 and concluded that Congress clearly had indicated that the rules applicable to appeals from habeas corpus, the civil rules, apply to section 2255 appeals. Thus, regardless of whether a section 2255 motion was criminal or civil in nature, the law required application of the civil time limit.

The express language of section 2255 also explains why the current Section 2255 Rules do not apply the criminal time limit to section 2255 appeals. The history of the Section 2255 Rules indicates that the criminal rules probably would apply to section 2255 appeals absent the express language in section 2255 to the contrary. When Congress enacted the Section 2255 Rules in 1976, the rules did not specify whether the civil or criminal time limit for appeals applied to section 2255 appeals. The advisory committee's note to Rule 1 describing a section 2255 motion as "a further step in the movant's criminal case" suggested that the criminal time limit might apply. To clarify the situation, the Supreme Court amended Rule 11 to state expressly that the civil rule applied. The advisory committee's

175. Id.
176. Id. at 487. The First Circuit stated that "[f]or present purposes, however, we see no occasion to consider whether the instant proceeding is criminal or civil in nature, or whether perhaps it is by nature a sort of hybrid." Id.
177. Id. The First Circuit reasoned that "if Congress had intended its words to have the limited construction contended for we think it would, as it easily could, have used appropriate language to express that limited meaning." Id.
178. Id. The First Circuit emphasized that Congress intended § 2255 to replace habeas corpus in most cases, and as such § 2255 should be interpreted consistently with habeas corpus whenever possible. Id.
180. See RULES GOVERNING § 2255 PROCEEDINGS IN THE U.S. DIST. CTS. 11 advisory committee's note. Shortly after the enactment of the § 2255 Rules in 1976, a general survey of federal post-conviction remedies assumed that the criminal time limit applied to § 2255 appeals under the § 2255 Rules. See infra note 205.
note to amended Rule 11 indicates that the amendment follows the Hayman Court's interpretation of section 2255, which was based indirectly on the language of section 2255 itself.182

Because the unique relationship between section 2255 and habeas corpus does not exist between coram nobis and habeas corpus, the Cooper court's description of section 2255 as "a further step in the movant's criminal case" cannot serve as a model for applying the civil rules to coram nobis appeals. The civil rules apply to section 2255 appeals simply because the judicial code specifically requires such rules to apply.183 This requirement reflects the purpose of section 2255 as a replacement for habeas corpus. Unlike section 2255, coram nobis has no special relationship to habeas corpus. It is not a replacement for habeas corpus and has no statutory form expressly allowing ap-

these rules is as provided in Rule 4(a) of the Federal Rules of Appellate Procedure. Nothing in these rules shall be construed as extending the time to appeal from the original judgment of conviction in the district court." Id. The amendment became effective August 1, 1979. Id. at 1004.

182. RULES GOVERNING § 2255 PROCEEDINGS IN THE U.S. DIST. CTs. 11 advisory committee's note. The advisory committee's note reads:

Prior to the promulgation of the Rules Governing Section 2255 Proceedings, the courts consistently held that the time for appeal in a section 2255 case is as provided in Fed. R. App. P. 4(a), that is, 60 days when the government is a party, rather than as provided in appellate rule 4(b), which says that the time is 10 days in criminal cases. This result has often been explained on the ground that rule 4(a) has to do with civil cases and that "proceedings under section 2255 are civil in nature." E.g., Rothman v. United States, 508 F.2d 648 (3d Cir. 1975). Because the new section 2255 rules are based upon the premise "that a motion under § 2255 is a further step in the movant's criminal case rather than a separate civil action," see Advisory Committee Note to rule 1, the question has arisen whether the new rules have the effect of shortening the time for appeal to that provided in appellate rule 4(b). A sentence has been added to rule 11 in order to make it clear that this is not the case.

Even though § 2255 proceedings are a further step in the criminal case, the added sentence correctly states current law. In United States v. Hayman, 342 U.S. 205 (1952), the Supreme Court noted that such appeals "are governed by the civil rules applicable to appeals from final judgments in habeas corpus actions." In support, the Court cited Mercado v. United States, 183 F.2d 486 (1st Cir. 1950), a case rejecting the argument that because § 2255 proceedings are criminal in nature the time for appeals is only 10 days. The Mercado court concluded that the situation was governed by that part of 28 U.S.C. § 2255 which reads: "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." Thus, because appellate rule 4(a) is applicable in habeas cases, it likewise governs in § 2255 cases even though they are criminal in nature.

Id.

peals as in habeas corpus. Absent such a relationship, the Morgan Court's description of a coram nobis motion as "a step in the criminal case," indicates that the criminal rules should apply to coram nobis motions.

3. The Cooper Court's Interpretation of Coram Nobis Fails to Solve the Morgan Footnote Paradox

The Cooper court's attempt to reconcile both parts of the Morgan footnote under an interpretation of a coram nobis proceeding as civil in nature fails. The Morgan Court did not consider section 2255 a step in the criminal case, and even if such a characterization were accurate, the reasons for applying the civil rules to section 2255 appeals despite its description as a step in the criminal case do not apply to coram nobis. Consequently, the first part of the Morgan footnote still indicates that a coram nobis motion is criminal in nature, while the second part of the footnote indicates that a coram nobis motion is civil.

B. An Interpretation of Coram Nobis as a Criminal Proceeding

The Cooper court's failure to reconcile the paradoxical language of the Morgan footnote under an interpretation of a coram nobis motion as civil in nature, does not, by itself, demonstrate that the footnote's language is reconcilable under an interpretation of a coram nobis motion as criminal in nature. Reconciliation is possible only if the second part of the Morgan footnote, comparing a coram nobis motion to a section 2255 motion, does not necessarily indicate that a coram nobis motion is a civil proceeding. The second part of the Morgan footnote then would be compatible with the first part, describing coram nobis as "a step in the criminal case."

184. Yasui v. United States, 772 F.2d 1496, 1499 (9th Cir. 1985). The Ninth Circuit held that § 2255 "establishes a special, statutory remedy with its own particular procedural requirements and limitations, and explicitly authorizes the taking of appeals as in habeas corpus cases. No such structure surrounds the coram nobis writ." Id.

185. Id.

186. The Morgan footnote's language simply may be contradictory.

187. Whether the second part of the Morgan footnote implies that a coram nobis motion is a criminal proceeding or simply implies nothing about the motion's nature, the second part of the footnote would be compatible with the first part, which implies that coram nobis is a criminal proceeding. In either situation, together, the two parts would indicate that a coram nobis motion is criminal.
1. An Interpretation of the Language of the Second Part of the Morgan Footnote

The second part of the Morgan footnote, comparing a coram nobis motion to a section 2255 motion, merely reflects that a coram nobis motion, like a section 2255 motion, originates in the sentencing district as opposed to the district of confinement. Although this analysis resembles the Cooper court's interpretation of the first part of the Morgan footnote, the analysis is more applicable to the second part of the footnote. The first part of the Morgan footnote explicitly describes habeas corpus as an independent civil action, but the second part does not discuss the basic nature of a section 2255 motion. As such, the language of the second part simply may reflect the jurisdictional similarity between the two motions.

The legislative history of section 2255 supports the conclusion that section 2255 is similar to coram nobis only to the extent that both originate in the sentencing district. Section 2255 is a substitute for habeas corpus in the sentencing district whether or not it is interchangeable with habeas corpus. Although the reviser's note to section 2255 stated that section 2255 "restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis," the Statement of the Judicial Conference Committee on Habeas Corpus Procedure described the remedy contained in the jurisdictional bill, the prototype of section 2255, as "in the nature of, but much broader than, coram nobis." The Statement concluded that

188. This is, of course, a very limited reading of the language of the second part of the Morgan footnote. Yet other commentators have argued that the similarity between coram nobis and § 2255 ends with the common district of origin. Note, supra note 3, at 791 n.24; Donnelly, supra note 39, at 27 n.33.

189. The Cooper court held that the distinction between coram nobis and habeas corpus contained in the first part of the Morgan footnote only reflects the different districts in which the two actions originate. United States v. Cooper, 876 F.2d 1192, 1194 (5th Cir. 1989) (per curiam).


191. This reading also reflects a § 2255 motion's unique relationship to a petition for habeas corpus, a relationship that a coram nobis motion does not have with a petition for habeas corpus. A § 2255 motion is like a coram nobis motion in that it originates in the sentencing district. Yet in all other respects, a § 2255 motion is comparable to a petition for habeas corpus. See generally United States v. Hayman, 342 U.S. 205, 219 (1952) (holding that § 2255 is the substantive equivalent of habeas corpus in the sentencing district instead of the district of confinement).

192. See Hayman, 342 U.S. at 210-19.

"[a]s a remedy, it is intended to be as broad as habeas corpus." Thus section 2255 was in the nature of \textit{coram nobis} only to the extent that, like \textit{coram nobis}, it is brought in the sentencing district.

The judicial interpretation of section 2255 also supports this narrow reading of the second part of the \textit{Morgan} footnote. Aside from the district of origination, the Supreme Court consistently has interpreted a section 2255 motion as the equivalent of habeas corpus, not a \textit{coram nobis} motion. The Supreme Court's analysis of the reviser's note's description of section 2255 in \textit{Hayman} supports this conclusion as well. The \textit{Hayman} Court concluded that the reviser's note to section 2255 did not indicate that Congress had adopted \textit{coram nobis} procedure as it existed at common law. Instead, the reviser's note merely indicated "that the Section 2255 motion was ‘in the nature of’ the \textit{coram nobis} writ in the sense that a Section 2255 proceeding, like \textit{coram nobis}, is an independent action brought in the court that entered judgment." The language of the \textit{Hayman} footnote indicates that when the Court decided \textit{Morgan}, it considered a \textit{coram nobis} motion similar to a section 2255 motion in a limited fashion only — both motions originated in the same district.

196. \textit{See Hayman}, 342 U.S. at 221 n.36.
197. \textit{Id.} For pertinent text of the footnote, see \textit{supra} note 81.
198. \textit{Hayman}, 342 U.S. at 221 n.36. The \textit{Hayman} footnote may appear to preclude a limited reading of the second part of the \textit{Morgan} footnote and actually indicate that a \textit{coram nobis} motion is civil in nature. In the footnote, the Court specifically refers to \textit{coram nobis} as "an independent action." \textit{Id.} The \textit{Hayman} Court's use of similar language, "an independent and collateral inquiry," to describe § 2255 indicates that the Court considered § 2255 an independent civil action. \textit{Id.} at 222. \textit{See supra} notes 157-58 and accompanying text. Consequently, the \textit{Hayman} footnote appears to indicate that the comparison between \textit{coram nobis} and § 2255 in the second part of the \textit{Morgan} footnote extends to the characterization of the two actions as civil.

The \textit{Hayman} footnote, however, refers to the common law form of \textit{coram nobis}, which was civil in nature, not the modern federal form. \textit{Id.} at 221 n.36. Thus, the language of the \textit{Hayman} footnote does not preclude the conclusion that the modern federal form of \textit{coram nobis} is criminal in nature.

199. Consequently, this reading of the \textit{Morgan} footnote, unlike the \textit{Cooper} court's reading, is consistent with the Supreme Court's interpretation prior to \textit{Morgan} of a § 2255 motion as a civil proceeding. \textit{See supra} notes 157-58 and accompanying text.
2. Change in Rules Governing Section 2255 Proceedings

Furthermore, contrary to the Cooper court's analysis, the current Section 2255 Rules also support the conclusion that coram nobis is criminal in nature.200 The Section 2255 Rules described a section 2255 motion as "a further step in the movant's criminal case"201 and in opposition to longstanding judicial practice,202 applied the criminal rules in part to section 2255 proceedings at the district level.203 This description of a section 2255 motion raised the question whether the time limit for criminal appeals applied to section 2255 appeals.204 One general survey of federal post-conviction remedies published shortly after the enactment of the original Section 2255 Rules stated that the criminal time limit did apply to section 2255 appeals.205 The Supreme Court finally resolved the issue, based on Hayman, by amending the Section 2255 Rules to specify that the civil time limit applied to section 2255 appeals.206

The change in rules governing section 2255 motions displays a natural relationship between the concept of a motion as a step in the criminal case and the application of the criminal rules.207 As such, it reinforces the conclusion that application of the civil rules to section 2255 appeals reflects the unique po-

200. The Cooper court argued that advisory committee's note to Rule 1 of the § 2255 Rules describing a § 2255 motion as "a further step in the movant's criminal case," supported the conclusion that a coram nobis motion, like a § 2255 motion, is a civil proceeding. United States v. Cooper, 876 F.2d 1192, 1194 (5th Cir. 1989) (per curiam). The Seventh Circuit also relied on a similar analysis. The court argued that application of both civil and criminal rules to § 2255 and the conclusion that coram nobis is a hybrid remedy. United States v. Balistrieri, 606 F.2d 216, 220-21 (7th Cir. 1979), cert denied, 446 U.S. 917 (1980).

201. RULES GOVERNING § 2255 PROCEEDINGS IN THE U.S. DIST.CTS. 1 advisory committee's note.

202. See C. WRIGHT, supra note 2, § 590 at 420-22.


204. RULES GOVERNING § 2255 PROCEEDINGS IN THE U.S. DIST. CTS. 1 advisory committee's note.

205. Mills & Herrmann, supra note 40, at 80. The survey asserted that because "a section 2255 proceeding is part of the original criminal proceeding, the time for appeal is governed by Federal Rule 4(b) of Appellate Procedure. An appeal must be filed within ten days after entry of the judgment or order appealed from." Id.

206. See supra notes 179-82.

207. See infra notes 214-20 and accompanying text.
position of section 2255 as a substitute for habeas corpus. Because *coram nobis* does not share this relationship to habeas corpus, the basic nature of *coram nobis* as a step in the criminal case indicates that the criminal rules should govern *coram nobis* appeals.

3. The Proposed Interpretation of *Coram Nobis* Solves the Morgan Footnote Paradox

The proposed attempt to reconcile the first and second parts of the *Morgan* footnote succeeds. To the extent that the second part of the *Morgan* footnote merely reflects that a *coram nobis* motion, like a section 2255 motion, originates in the sentencing district as opposed to the district of confinement, it does not indicate whether a *coram nobis* motion is civil or criminal in nature. Under the proposed interpretation, therefore, the second part of the *Morgan* footnote does not conflict with the first part, and together the two parts indicate that a *coram nobis* motion is a criminal proceeding.

C. POLICY CONSIDERATIONS

This Comment has concentrated on the language of the *Morgan* footnote, as opposed to policy considerations, to determine whether *coram nobis* is a civil or criminal proceeding, because the courts of appeals have done so. Although one circuit court opinion included a policy argument, the decision did not turn on a policy analysis. Instead, the court mentioned policy largely in passing as support for the outcome of its interpretation of the *Morgan* footnote's language. To a certain extent, however, the policy considerations involved may be more important and compelling in resolving the question than the footnote's language. The policy considerations underly-

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208. *See supra* notes 165-82 and accompanying text.
209. *See supra* notes 100-34 and accompanying text.
210. United States v. Keogh, 391 F.2d 138, 140 (2d Cir. 1968) (observing that the “policy considerations supporting prescription of a very short time for appeal in a criminal case are notably absent in *coram nobis*”).
211. *Id.*
212. Although the courts and this Comment have focused on whether *coram nobis* is a civil or criminal proceeding based on the *Morgan* footnote, a more fundamental question is whether *coram nobis* ought to be a civil or criminal proceeding. Strictly speaking, the *Morgan* footnote is controlling on lower courts. To the degree that the footnote's language clearly supports a particular interpretation of *coram nobis*, policy considerations are irrelevant to a lower court's analysis. Yet imposing an interpretation of *coram nobis* based on the *Morgan* footnote that conflicts with relevant policy considerations would ap-
ing the administration of post-conviction remedies support an interpretation of a coram nobis motion as a criminal proceeding and the application of the criminal rules to coram nobis appeals.\textsuperscript{213}

The current American Bar Association Standards for Criminal Justice (ABA Standards)\textsuperscript{214} address the relevant policy considerations. The ABA Standards stress that the function, not the label “civil” or “criminal,” of a post-conviction remedy should determine the applicable procedure.\textsuperscript{215} In light of their obvious function, the ABA Standards state that the courts should view post-conviction remedies as an extension of the original criminal case and, to that extent, treat such remedies as part of the criminal process.\textsuperscript{216} Referring directly to a section 2255 motion, the ABA Standards explain that “it is anomalous to have an extension of a criminal proceeding characterized as purely civil.”\textsuperscript{217} The ABA Standards indicate that the procedure for processing appeals from post-conviction appeals and direct appeals from criminal judgments ought to be the same.\textsuperscript{218} In particular, the ABA Standards state that the

\begin{itemize}
  \item \textsuperscript{213} See STANDARDS, supra note 8, Standard 22-1.2 commentary at 22.10.
  \item \textsuperscript{214} The ABA Standards serve as a general model for both state and federal criminal justice systems.
  \item \textsuperscript{215} STANDARDS, supra note 8, Standard 22-1.2 commentary at 22.10.
  \item \textsuperscript{216} Id. Standard 22-1.2 reads:
    \begin{quote}
      The procedural characteristics of the post-conviction remedy should be appropriate to the purposes of the remedy. While the post-conviction proceeding is separate from the original prosecution proceeding, the post-conviction stage is an extension of the original proceeding and should be related to it insofar as feasible.
    \end{quote}
  \item \textsuperscript{217} Id. Standard 22-1.2.
  \item \textsuperscript{218} The ABA Standards do not suggest that all the rules applicable to criminal prosecutions should also apply to post-conviction proceedings. Certain rules protecting constitutional rights in criminal prosecutions do not necessarily apply to post-conviction proceedings even though post-conviction proceedings are extensions of the criminal prosecution. The commentary to Standard 22-1.2 states:
    \begin{quote}
      Removing the “civil” characterization from post-conviction procedure and relating that remedy more to the criminal process should not produce constitutional questions. Recognition of the criminal nature of litigation does not warrant attachment to a post-conviction proceeding of the constitutional limitations applicable to the prosecution phrase. Whether the applicant must be present at a prehearing conference, for example, is not determined by the unquestioned right of a defendant to be present at all stages of the prosecution.
    \end{quote}
  \item \textsuperscript{219} See id. Standard 22-5.3 commentary at 22.61 & n.1 (advocating flexible
rules of procedure applicable to initiating direct criminal appeals, including the time limit for filing notice of appeal, also should apply to post-conviction remedies.\textsuperscript{219} This follows from the concept of a post-conviction remedy as an extension of the original criminal case.\textsuperscript{220}

This policy strongly supports the application of the criminal time limit to \textit{coram nobis} appeals in federal courts.\textsuperscript{221} Although application of the mixture of civil and criminal rules governing section 2255 motions at the district court level would not undermine this policy, the application of the civil rules governing section 2255 motions at the appellate level would. Application of the section 2255 rules to \textit{coram nobis} motions in the procedures for appeals concerning post-conviction remedies and cross-referencing to procedures recommended for direct criminal appeals).

\textsuperscript{219} Id. Standards 22-5.1 to 22-5.2 commentary at 22.57-.59. The commentary to Standard 22-5.1 states that the longer time limit for civil appeals is “not necessarily appropriate to post-conviction cases” and concludes that “[i]n keeping with the principle that the post-conviction proceeding is an extension of the criminal prosecution phase, it is better to use the same procedure for appellate review whether on direct appeal from conviction or at a post-conviction stage.” Id. Standard 22-5.1 commentary at 22.58.

\textsuperscript{220} Id.

\textsuperscript{221} In contrast to the ABA Standards, the Second Circuit argued that the policy considerations supporting the short time for criminal appeals under the Federal Rules of Appellate Procedure do not apply to \textit{coram nobis} appeals. United States v. Keogh, 391 F.2d 138, 140 (2d Cir. 1968). The Second Circuit did not discuss these considerations, but presumably the court reached this conclusion because a \textit{corum nobis} petitioner already has served her sentence. See id. Although the commentary to the ABA Standards acknowledges that the 10-day criminal time limit under the Federal Rules of Appellate Procedure is “exceptionally short” and that a longer period is needed, the commentary to Standards 22-5.1 and 22-5.2 still indicate that the 60-day civil time limit is inappropriate. \textit{STANDARDS, supra} note 8, Standards 22-5.1 to 22-5.2 commentary at 22.57-.59. The commentary emphasizes that the criminal rules are preferable to the civil rules, because a post-conviction proceeding is an extension of the original criminal proceeding. Id.

The policy favoring application of the same procedural rules to post-conviction appeals as to criminal appeals outweighs the Second Circuit’s policy concerns. The potential need in post-conviction cases for a time limit longer than the standard 10-day limit for criminal appeals does not require application of the 60-day limit for civil appeals. \textit{FED. R. APP. P. 4(b)} allows a district court to grant up to a 30-day extension of the time limit for a criminal appeal, effectively providing up to a 40-day limit. This provision is not meaningless in practice. The Ninth Circuit has permitted a \textit{coram nobis} petitioner to apply for such an extension, Yasui v. United States, 772 F.2d 1496, 1500 (9th Cir. 1985), and the Eighth Circuit has implied that it is available, United States v. Mills, 430 F.2d 526, 528 (8th Cir. 1970). Thus the federal courts should apply Rule 4(b) to \textit{coram nobis} appeals to conform to the view that a \textit{coram nobis} motion is part of the original criminal prosecution, and should not impose an unreasonably short time limit for such appeals.
district court would not undermine the concept of a *coram nobis* motion as an extension of the criminal prosecution, because such a concept does not require the blanket application of the criminal rules.\(^{222}\) In contrast, the application of the civil rules to *coram nobis* appeals would undermine this concept by drawing a sharp distinction between appellate review on direct appeal from a conviction and on appeal from a post-conviction stage.\(^{223}\) Thus the application of the civil time limit to *coram nobis* appeals undermines the policy of treating post-conviction remedies as an extension of the original criminal prosecution.

A different policy consideration, however, uniformity of process among post-conviction remedies, might favor application of the civil rules to *coram nobis* appeals. In many respects, such as grounds for relief and rules of procedure in the district court, the federal courts treat a *coram nobis* and a section 2255 motion in essentially the same manner.\(^{224}\) This suggests that courts should treat *coram nobis* and section 2255 appeals in the same manner as well, for the sake of uniformity.\(^{225}\) Although the ABA Standards provide that the criminal rules ought to apply to post-conviction remedies in theory, arguably the civil rules should apply in practice.

This analysis places form over substance. Application of the proper rules to a particular post-conviction remedy when possible is more important than uniformity among post-conviction remedies.\(^{226}\) Although the ABA Standards affirm that uniformity in post-conviction remedies is a desirable goal,\(^{227}\) the ABA Standards emphasize that blanket application of civil

\(^{222}\) See *STANDARDS*, supra note 8, Standard 22-1.2 commentary at 22.10.

\(^{223}\) See *id.*, Standard 22-5.2 commentary at 22.58. *Coram nobis* would become an independent civil action, divorced from the original criminal prosecution.

\(^{224}\) See L. YACKLE, supra note 7, § 36, at 167, § 38, at 173; C. WRIGHT, supra note 2, § 592, at 433.

\(^{225}\) Such uniformity would simplify the system of post-conviction remedies for federal convictions. Section 2255 and *coram nobis* effectively would become the same remedy. The only difference would be the custody requirement. Section 2255 would apply when the petitioner is in custody and *coram nobis* would apply when the petitioner is not in custody.

\(^{226}\) Although applying the civil rules to *coram nobis* appeals would simplify the federal scheme of post-conviction remedies, this simplification is largely uniformity for uniformity’s sake. The ABA Standards demonstrate that the criminal rules should apply to appeals in post-conviction cases, because such proceedings are an extension of the original criminal case. See *STANDARDS*, supra note 8, Standard 22-5.2 commentary at 22.58.

\(^{227}\) *Id.* Standard 22-1.1. Standard 22-1.1 recommends a single, comprehensive post-conviction remedy. *Id.*
rules to post-conviction appeals is improper. The language of section 2255, however, requires courts to apply the civil rules to section 2255 appeals. Coram nobis, without any statutory basis, has no such restraint. The statutorily imposed application of the civil rules to section 2255 motions does not justify applying the civil rules to coram nobis appeals when such an application is not required and would be otherwise improper. Limited application of appropriate rules is preferable to universal application of inappropriate ones.

Furthermore, even if uniformity is the paramount goal, it does not necessarily imply that courts should apply the civil rules to coram nobis appeals. Because the propriety of applying the civil rules to section 2255 motions is questionable, the goal of uniformity reasonably suggests amending section 2255 to allow the application of the criminal rules to section 2255 appeals rather than applying the civil rules to coram nobis appeals. Thus uniformity, as well as the concept of a post-conviction remedy as an extension of the original criminal prosecution, effectively supports application of the criminal rules to coram nobis appeals.

CONCLUSION

In United States v. Morgan, the Supreme Court revived the common law writ of error coram nobis, but the Court's paradoxical footnote demonstrated that the modern federal form differed from the traditional common law form. This footnote has left the circuit courts split over the fundamental nature of the writ, and in turn, the proper rules to apply to it. Although

228. Id. Standard 22-1.2 commentary at 22.10.
229. Id. Standards 22-5.1 to 22-5.2 commentary at 22.57-59.
230. See supra text accompanying notes 165-82.
231. The civil rules apply to § 2255 appeals simply because of the specific language of § 2255. The advisory committee's note to Rule 11 of the § 2255 Rules indicates that absent this language, the criminal rules potentially would apply to § 2255 appeals. See Rules Governing § 2255 Proceedings in the U.S. Dist. Cts. 11 advisory committee's note. No comparable reason exists to apply the civil rules to coram nobis motions. See supra notes 179-85 and accompanying text.
232. See supra notes 214-20 and accompanying text.
233. Such an amendment to § 2255, however, may revive the question whether § 2255 is an unconstitutional denial of habeas corpus. See generally supra notes 77-78 and accompanying text (discussing original constitutional challenge to § 2255 in Hayman).
the Fifth Circuit’s opinion in Cooper represents the most comprehensive attempt at interpreting the Morgan footnote, the Cooper court’s interpretation fails to solve the Morgan footnote paradox. The apparently contradictory language of the Morgan footnote is inherently irreconcilable under an interpretation of a coram nobis motion as a civil action. Only an interpretation of coram nobis as criminal in nature permits a coherent reading of the footnote. Furthermore, such an interpretation is consistent with the policy considerations underlying the administration of post-conviction remedies. The basic criminal nature of a coram nobis motion indicates that the mixture of civil and criminal rules governing section 2255 motions in the district courts may serve as a guide for coram nobis proceedings, but that the civil rules governing section 2255 appeals may not. Instead, the basic nature of coram nobis requires application of the rules governing criminal appeals.

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