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Recommended Citation
Mary Ellen Brennan, Interpreting the Phrase "Newly Discovered Evidence": May Previously Unavailable Exculpatory Testimony Serve as the Basis for a Motion for a New Trial Under Rule 33?, 77 Fordham L. Rev. 1095 (2008).
Available at: https://ir.lawnet.fordham.edu/flr/vol77/iss3/4

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Cover Page Footnote
J.D. Candidate, 2009, Fordham University School of Law; B.A., 2005, Barnard College. I would like to thank Professor Bruce Green for his insight during the Note-writing process and my parents, grandparents, and brothers for their kindness and support.
NOTES

INTERPRETING THE PHRASE “NEWLY DISCOVERED EVIDENCE”: MAY PREVIOUSLY UNAVAILABLE EXCULPATORY TESTIMONY SERVE AS THE BASIS FOR A MOTION FOR A NEW TRIAL UNDER RULE 33?

Mary Ellen Brennan*

Rule 33 of the Federal Rules of Criminal Procedure permits a federal court to grant a new trial to a criminal defendant if the “interest of justice so requires,” specifying as one potential basis the availability of “newly discovered evidence.” The federal circuit courts have disagreed as to whether postconviction testimony proffered by a codefendant who had remained silent at trial may serve as the basis for a Rule 33 motion grounded on newly discovered evidence. A majority of the federal circuits, including, most recently, the U.S. Court of Appeals for the Second Circuit, have held that, while a codefendant’s posttrial offer of exculpatory testimony may constitute “newly available evidence,” it does not constitute “newly discovered evidence,” as Rule 33 requires. Conversely, the U.S. Court of Appeals for the First Circuit has concluded that Rule 33’s reference to newly discovered evidence does include a codefendant’s newly available testimony. The history of Rule 33 and the conflict among the circuit courts regarding the interpretation of the phrase “newly discovered evidence” reveals a tension between courts’ desire to protect legitimate convictions against posttrial attack based on unreliable or false testimony and the need to exonerate the wrongly convicted. In view of these conflicting policies, this Note advocates an approach that aligns with the history, purpose, and text of Rule 33 and yields fair and efficient results.

INTRODUCTION

In 2004, Special Agents Joe Doherty and Chris Oksala of the Drug Enforcement Administration (DEA) stopped Lance Edgar Owen as he

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drove a truck on the outskirts of the Bronx, New York.\textsuperscript{1} When the agents asked to look in the truck, Owen agreed.\textsuperscript{2} The agents found four hundred pounds of marijuana\textsuperscript{3} hidden among clothing and furniture in the back of the truck.\textsuperscript{4} Though the agents later testified that they could detect a "strong scent of marijuana" as soon as they opened the truck's door,\textsuperscript{5} Owen claimed that he did not know that the drugs were there.\textsuperscript{6} Owen told the agents that he was a part-time mover who had been hired to transport furniture from New York to Florida.\textsuperscript{7} The agents had been following Owen that day because a confidential source had informed them that a man named Paul Samuels was using a Bronx warehouse to load marijuana into vehicles for transporting.\textsuperscript{8} The DEA placed the warehouse under surveillance, and, hours before Owen's arrest, Special Agent Eric Baldus watched as Samuels directed Owen's truck into the loading area.\textsuperscript{9} Baldus saw Owen exit the driver's side of the truck and enter the warehouse with Samuels.\textsuperscript{10} For the next hour, Baldus could see only a portion of the truck and not the men.\textsuperscript{11} However, Baldus could see the truck shake back and forth, "as if it was being loaded or unloaded," during that time.\textsuperscript{12} After the hour had elapsed, Baldus saw Owen, Samuels, and a third man, Paul Baroody, leave the warehouse together.\textsuperscript{13} Owen then reentered the truck and drove off while Samuels locked the warehouse and left in a car with Baroody.\textsuperscript{14} The agents followed Owen.\textsuperscript{15} First, Owen drove to his mother's home, going inside for fifteen to twenty minutes while leaving the truck unlocked.\textsuperscript{16} Owen then drove to a bank with his mother and, again, left the vehicle unattended while he went into the bank with her.\textsuperscript{17} After Owen

\begin{footnotes}
\footnote{1. United States v. Owen, 500 F.3d 83, 85 (2d Cir. 2007), \textit{cert. denied}, 128 S. Ct. 1459 (2008).}
\footnote{2. \textit{Id.}}
\footnote{4. \textit{Owen}, 500 F.3d at 85.}
\footnote{5. \textit{Id.}}
\footnote{6. \textit{Id.} at 86 ("Owen's defense was that he had been duped into transporting the marijuana . . . . In his safety valve proffer, Owen maintained his innocence . . . . Owen claimed . . . that at no point did he suspect he was engaged in unlawful activity.").}
\footnote{7. \textit{Id.}}
\footnote{8. \textit{Id.} at 84.}
\footnote{9. \textit{Id.}}
\footnote{10. \textit{Id.}}
\footnote{11. \textit{Id.}}
\footnote{12. \textit{Id.}}
\footnote{13. \textit{Id.} at 85.}
\footnote{14. \textit{Id.}}
\footnote{15. \textit{Id.}}
\footnote{16. Petition for Panel Rehearing and Rehearing En Banc at 2, \textit{Owen}, 500 F.3d 83 (Nos. 06-1078-cr(L), 06-1331-cr(XAP)).}
\footnote{17. \textit{Id.}}
\end{footnotes}
returned his mother to her home and drove away. Doherty and Oksala stopped him.

When the agents asked if there were any guns, bombs, or drugs in the truck, Owen replied that there were not. Doherty asked Owen if the agents could look in the back of the truck, and Owen agreed. In addition to a washing machine, a refrigerator, bed boards, beds, and box springs, the agents discovered the marijuana. The government charged Owen, Samuels, and Baroody with conspiring to distribute in excess of one hundred kilograms of marijuana and with distributing and possessing with intent to distribute approximately one hundred seventy-five kilograms of marijuana. The jury convicted all three men of both charges.

Beginning with the time Owen first spoke to the agents when they pulled him over, he insisted that he had been hired only to transport household items to Florida for $1800. All three defendants asserted their Fifth Amendment rights not to testify at trial. At trial, Owen's attorney argued that either Samuels or Baroody had deceived Owen by hiring him for a moving job without disclosing the existence of the drugs.

After trial, but prior to Samuels's sentencing, Samuels told the court that Owen was innocent. Samuels stated,

I know Mr. Owen for a long time. Your Honor, I hired him for a job, and that's about it. He didn't know anything about drugs. Mr. Owen has been a good friend and good brother to me, your Honor. Maybe I was wrong not to take the stand—maybe he was wrong not to take the stand, but he didn't have anything to do with it, your Honor.

Based on this statement, Owen moved for a new trial on the ground of newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure. Rule 33 allows a court to grant a new trial on a defendant's motion "if the interest of justice so requires." Generally, a motion for a new trial must be filed within seven days of the verdict, but Rule 33 states that a motion for a new trial based on "newly discovered evidence" may be filed within three years of the verdict. Owen argued

18. Id.
19. Owen, 500 F.3d at 85.
20. Id.
21. Id.
22. Id.
23. Id. at 84
24. Id. at 86.
25. Id. at 85.
26. Id. at 86.
27. Id.
28. Id.
30. Id. at 87.
31. FED. R. CRIM. P. 33(a).
32. Id. 33(b)(1).
that Samuels's potential testimony constituted newly discovered evidence because the testimony was unavailable to Owen at trial. The district court agreed, explaining,

[T]here is no evidence that Owen knew the entire contents of Samuels' statement before Samuels made it at the sentencing hearing . . . [Samuels] had a right to exercise his Fifth Amendment privilege to remain silent at trial . . . Owen could not have forced Samuels to provide that testimony at or prior to trial. Therefore, defense counsel could not have discovered the evidence that Samuels would provide . . . before or during trial.

The court stated that it had a "real concern that an innocent person may have been convicted" and granted Owen's motion.

In United States v. Owen, the U.S. Court of Appeals for the Second Circuit reversed the district court's order. The Second Circuit concluded that Owen's postconviction offer of exculpatory testimony by his codefendant did not constitute grounds for a new trial based on newly discovered evidence. The court reasoned that, even though Owen's codefendant had availed himself of his Fifth Amendment privilege and declined to testify at trial, Owen was or should have been aware even before trial of the substance of Samuels's potential testimony. Thus, the Second Circuit explained, the evidence was merely "newly available," not "newly discovered," and "may not serve as the basis for granting a new trial."

This opinion—that postconviction exculpatory testimony by a codefendant who had remained silent during trial is not newly discovered evidence—is widely, but not unanimously, held by the federal appellate courts. Eleven other federal circuits have agreed with the Second Circuit in Owen, but the U.S. Court of Appeals for the First Circuit has taken an

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33. Owen, 500 F.3d at 84.
35. Id. at *4 (citing United States v. Sanchez, 969 F.2d 1409, 1414 (2d Cir. 1992)).
36. 500 F.3d 83.
37. Id. at 84.
38. Id. at 92.
39. Id. at 91.
40. Id. at 90.
41. While this Note analyzes and discusses the conflict that exists in the federal courts, it is worth noting here that the states—all fifty of which provide for a motion for a new trial based on newly discovered evidence, see Daniel S. Medwed, Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts, 47 Ariz. L. Rev. 655, 675 (2005)—also have split on this issue. See Jones v. Scurr, 316 N.W.2d 905, 908–10 (Iowa 1982) (discussing the split in courts over the issue and explaining its finding that the "line of authority,holding that exculpatory evidence that was unavailable, but known, at the time of trial is not newly discovered evidence, represents the better resolution"); compare, e.g., State v. Jackson, 648 N.W.2d 282, 293 (Neb. 2002) ("We now determine that when a codefendant . . . who has chosen not to testify subsequently comes forward to offer testimony exculpating a defendant, . . . the evidence is not newly discovered." (citing United States v. Moore, 221 F.3d 1056 (8th Cir. 2000))), with Whitmore v. State, 570 S.W.2d 889, 896 (Tex. Crim. App. 1976) ("This Court has long recognized that newly available evidence is the same as newly discovered evidence.").
42. See infra note 166.
opposing view. The First Circuit does regard such postconviction testimony by a codefendant as newly discovered and has authorized trial courts to exercise discretion to order new trials in appropriate cases. The First Circuit has reasoned that, if a codefendant has asserted the right to silence, making any exculpatory testimony unavailable at trial, it is immaterial whether the defendant knew of the testimony at trial. According to the First Circuit, Rule 33’s reference to newly discovered evidence includes a codefendant’s newly available exculpatory testimony.

An examination of the disagreement among the circuit courts regarding the interpretation of the phrase “newly discovered evidence” reveals a tension between two competing interests—courts’ desire to protect legitimate convictions against posttrial attack based on unreliable or even false testimony versus courts’ recognition of the need to exonerate the wrongly convicted. In Part I, this Note explores the history of and the policies behind the new trial motion. Part I also discusses the standard that courts have used to evaluate new trial motions based on newly discovered evidence. Part II provides an overview of the split in the federal circuits regarding a convicted defendant’s ability to move for a new trial on the basis of exculpatory testimony by an already convicted codefendant and examines the rationales offered by the courts on both sides of the dispute. Part III advocates an approach that best aligns with the spirit, text, and purpose of Rule 33. Part III also questions whether, in view of the history of new trials and the present law regarding new trials, the majority of circuits have taken too restrictive a position by categorically excluding a particular type of exculpatory evidence from a remedy created by judges as a safety valve.

I. The Development of the New Trial Motion: Desire for Both Justice and Finality

The development of the law of new trials, first in England and then in America, reveals the ongoing conflict between the disinclination to disturb jury verdicts and the desire to ensure that cases are decided fairly. In England, courts initially were reluctant to grant new trials for reasons other than juror misconduct. This hesitance grew out of the concern that judges

43. United States v. Hernández-Rodríguez, 443 F.3d 138 (1st Cir. 2006).
44. United States v. Montilla-Rivera, 115 F.3d 1060, 1065–66 (1st Cir. 1997).
45. See id. at 1067.
46. See id. at 1065–66.
47. United States v. Reyes-Alvarado, 963 F.2d 1184, 1188 (9th Cir. 1992) (“It would encourage perjury to allow a new trial once co-defendants have determined that testifying is no longer harmful to themselves. They may say whatever they think... knowing they are safe from retrial. Such testimony would be untrustworthy and should not be encouraged.”).
48. Newsom v. United States, 311 F.2d 74, 79 (5th Cir. 1962) (“Every practicable precaution should be taken to insure that the verdict really speaks the truth, for if it does not an innocent man may be imprisoned for years.”).
49. See David Graham, A Treatise on the Law of New Trials, in Cases Civil and Criminal 2 (2d ed. 1855); Renée B. Lettow, New Trial for Verdict Against Law: Judge-
arbitrarily might set aside jury verdicts.\textsuperscript{50} However, English judges eventually began to exercise discretion to grant new trials for erroneous verdicts in particular cases.\textsuperscript{51} Early American courts were also wary of motions for new trials, particularly those based upon the ground of newly discovered evidence.\textsuperscript{52} American courts addressed this concern by developing a strict threshold test by which to screen such motions.\textsuperscript{53}

A. The First New Trials in England: Initial Reluctance and Eventual Faith in Judicial Discretion

In his treatise on the history and practice of granting new trials, David Graham explains that it is impossible to pinpoint precisely when the English courts began to grant new trials at common law: "When, in what court in particular, and for what causes new trials originated, are subjects involved in impenetrable obscurity by the lapse of ages."\textsuperscript{54} Before the practice of granting new trials clearly was established, English judges controlled jury verdicts by other means.\textsuperscript{55} As early as the fourteenth century, the English courts used a proceeding called a \textit{venire de novo}, in which a new jury was summoned and the matter reheard,\textsuperscript{56} but only in cases in which juror misconduct or jury tampering allegedly had occurred.\textsuperscript{57}

Graham explains that there is no record of English courts before the seventeenth century granting new trials based on erroneous verdicts, verdicts against evidence, or "any other cause than gross misbehavior of jurors, or of the parties."\textsuperscript{58} As Graham notes, an English court in 1648 refused to grant a new trial following an allegedly erroneous verdict on the grounds that doing so would be "too arbitrary"; according to the court, "attaint against the jury" was the only legal remedy when a party was...
dissatisfied with a verdict.  Even the King's Bench's 1655 decision to grant a new trial in *Wood v. Gunston*, which has been cited as the first instance in which an English court granted a new trial based on the merits of a case, was based on suspicions of juror corruption.

By 1700, English judges had begun to use discretion to grant new trials not only to remedy juror misconduct or corruption, but also to guard against unjust verdicts. In Renée B. Lettow's article, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth Century America*, Lettow discusses *Ash v. Ash*, a 1697 English case in which the jury awarded two thousand pounds in damages against Lady Ash, who had been sued for allegedly imprisoning her own daughter for no more than three hours. The court ordered a new trial, reasoning that "the jury are to try causes with the assistance of the Judges" and that "if they go upon any mistake, they may be set right." Lettow argues that the *Ash* case, in which there was no apparent juror misconduct, persuaded subsequent judges to grant new trials when they believed the verdict was erroneous or against the evidence, regardless of juror corruption. Indeed, in the eighteenth century, the motion for a new trial in a criminal misdemeanor case in

59. *Graham*, supra note 49, at 3; see Slade's Case, (1648) 82 Eng. Rep. 592, 593 (K.B.) ("[T]he defendant prayed, that this judg[ment might be arrested, and that there might be a new [trial] . . . But [the court] held, it ought not to be stayed . . . for it was too arbitrary for them to do it, and you may have your attaint against the jury, and there is no other remedy in law for you . . . ").


62. *Wood v. Gunston* was a defamation case in which the court found that the jury had awarded excessive damages. In ordering the new trial, the court stated, "[A] jury may sometimes by indirect dealings be moved to side with one party, and not to be indifferent betwixt them." 82 Eng. Rep. at 867.

63. In *Edmondson v. Machell*, the court described the new trial process as an exercise in using judicial discretion to ensure just results: "An application for a new trial is an application to the discretion of the Court, which ought to exercise that discretion in such a manner as will best answer the ends of justice." (1787) 100 Eng. Rep. 2, 3 (K.B.); see also *Wood*, 82 Eng. Rep. at 867 ("It is in the discretion of the Court in some cases to grant a new [trial], but this must be a judicial, and not an arbitrary discretion . . . "). David Graham discusses the development: "That relief which had been hitherto regarded as unreasonable to ask, and too arbitrary to grant, became a favorite with the judges, and a system of judicial decision gradually followed, built up upon liberal and enlightened principles, greatly tending to the advancement of justice." *Graham*, supra note 49, at 3; see also *Lettow*, supra note 49, at 512. According to William Renwick Riddell, the judges who had the power to use discretion to grant new trials in early England were judges sitting on appellate panels, rather than the judges who had presided over the first trials. Riddell, supra note 55, at 57 ("The application for a new trial, however, was not made to the court sitting for the trial of a case or cases at Bar, but to the court sitting in term, en banc . . . . It must, I think, be admitted that Blackstone is quite accurate in saying 'if any defect of justice happened at the trial by surprise, inadvertence or misconduct, the party may have relief in the court above by obtaining a new trial.'") (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES *386)).


65. Id. at 526; see also *Lettow*, supra note 49, at 512.


England could be based on a number of grounds, including "errors in the exclusion or admission of evidence, improper instructions, a verdict against the weight of the evidence, or the furtherance of the ends of justice." In his *Commentaries*, Blackstone lists the grounds on which judges based the granting of new trials in eighteenth-century England and includes the following:

> [I]f it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith; or if they have given exorbitant damages; or if the judge himself has misdirected the jury, so that they found an unjustifiable verdict: for these, and other reasons of the like kind, it is the practice of the court to award a new, or second, trial.\(^{70}\)

In *A History of the Criminal Law of England*, Sir James Fitzjames Stephen acknowledges the particular importance of granting new trial motions on the basis of newly discovered evidence in criminal cases. Stephen quotes a draft criminal code that he prepared for a Royal Commission in 1879. The draft noted that both civil and criminal courts in England granted motions for new trials based on newly discovered evidence and recommended that the criminal courts relax the standards by which they evaluate these motions:

> No matter at what distance of time the innocence of a convicted person appeared probable,—no matter how grossly a man (suppose under sentence of death) had mismanaged his case, it would be impossible to refuse him a fresh investigation on the ground of such lapse of time or mismanagement. Cases in which, under some peculiar state of facts, a miscarriage of justice takes place, may sometimes though rarely occur; but when they occur it is under circumstances for which fixed rules of procedure cannot provide.\(^{71}\)

**B. Early Distrust of the Motion for a New Trial Based on Newly Discovered Evidence in the United States**

Though the U.S. Constitution does not provide expressly a right to move for a new trial,\(^{72}\) the first Congress established this right in the Judiciary Act of 1789.\(^{73}\) That Act specifies that new trials may be granted for

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\(^{68}\) Beginning in the seventeenth century, new trials were permitted in England in criminal cases, but only in misdemeanor cases. See Orfield, *supra* note 58, at 304. New trials were not permitted in felony cases, though the writ of *coram nobis* was available to rectify an error of fact. *Id.; see also* Riddell, *supra* note 55, at 58 ("In cases of felony there was no power anywhere to grant a new trial . . . .").

\(^{69}\) Orfield, *supra* note 58, at 304.

\(^{70}\) *See* 3 *BLACKSTONE*, *supra* note 63, at *387–88.*

\(^{71}\) *STEPHEN*, *supra* note 56, at 316–17 (quoting *JAMES F. STEPHEN, REPORT OF CRIMINAL CODE COMMISSION: THE DRAFT CODE (1879)*) (internal quotation marks omitted).

\(^{72}\) *See* Herrera v. Collins, 506 U.S. 390, 408 (1993); Orfield, *supra* note 58, at 305 ("[T]here seems to be no constitutional right to a new trial.").

\(^{73}\) Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73, 83. With respect to new trial practice in colonial America, William Renwick Riddell stated,
"reasons for which new trials have usually been granted in the courts of law." The early federal courts relied on this statute in cases in which a criminal defendant sought a new trial after conviction. The courts applied the rule to felony convictions as well as misdemeanors.

As the vague language of the new trial rule in the Judiciary Act of 1789 might suggest, the granting of new trials in America relied on judicial discretion. Like the new trial practice that developed in England, American courts provided for a mechanism by which judges may grant new trials when they perceive that the jury rendered an unjust verdict. The American system bestowed discretion on the judges who had presided over the original trials. In his article, New Trial in Present Practice, William Renwick Riddell discusses this characteristic of American practice: "[T]he trial judge (at least in most cases) sat as the court and not as a mere commissioner; and he it was to whom the application for a new trial was made."

The common law of England became the common law of the United States as it had been the common law of the thirteen colonies: while there is no report of any decision in the colonies before the Revolution granting a new trial, there is no doubt that the courts of general jurisdiction exercised the power of granting new trials in proper cases.


74. § 17, 1 Stat. at 83.
75. See, e.g., United States v. Harding, 26 F. Cas. 131 (C.C.E.D. Pa. 1846) (No. 15,301); United States v. Fries, 9 F. Cas. 826 (C.C.D. Pa. 1799) (No. 5126); see also Orfield, supra note 58, at 306.
76. See Harding, 26 F. Cas. at 136–37; Orfield, supra note 58, at 306.
77. See United States v. Keen, 26 F. Cas. 686, 689 (C.C.D. Ind. 1839) (No. 15,510) ("In cases of misdemeanor, it is admitted that both in this country and in England new trials may be granted."); Orfield, supra note 58, at 306.
78. See supra note 74 and accompanying text.
79. See supra notes 63–69 and accompanying text.
80. Riddell, supra note 73, at 360.
81. Id. Judges and legal scholars have pointed out the particular advantage of entrusting the task of evaluating a new trial motion to the original trial judge. See Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 337 (1967) ("A trial judge who has heard the evidence in the original case has a vast store of information and knowledge about it that the appellate court cannot get from a cold, printed record. Thus... the trial judge can base the broad discretion granted him in determining factual issues of a new trial on his own knowledge of the evidence and the issues ‘in a perspective peculiarly available to him alone.’" (quoting Cone v. W. Va. Pulp & Paper Co., 330 U.S. 212, 216 (1947))); United States v. Quintanilla, 193 F.3d 1139, 1152 (10th Cir. 1999) ("[T]he trial judge who presided at the trial of the case and later presided at the hearing on the motion for a new trial, had first-hand knowledge of the entire matter and is in a much better position than we, as an appellate court, to judge the merits of the motion.""); Reed v. Phila., Bethlehem & New England R.R. Co., 939 F.2d 128, 133 (3d Cir. 1991) ("In matters of trial procedure... the trial judge is entrusted with wide discretion because he is in a far better position than we to appraise the effect of the [admission of evidence]."); State v. Wynn, 34 P.2d 900, 901 (Wash. 1934) ("The determination of such matters rests in the sound discretion of the trial court... The trial judge is in a peculiarly advantageous position, under the prevailing circumstances, to pass upon the showing made for a new trial.
He had the benefit of observing the witnesses at the time of the trial, is able to appraise the variable weight to be given to their subsequent affidavits, and can often discern and assay the incidents, the influences, and the motives that prompted the [witness’s testimony]. He is,
While courts granted new trials on the ground of newly discovered evidence in some early cases, American courts in the eighteenth and early nineteenth centuries generally disfavored motions for new trials based on newly discovered evidence. Graham discusses the need for circumspection in evaluating motions based on newly discovered evidence, acknowledging the possibility that parties who move on such grounds may be guilty of "abuse, practicing with the witnesses, careless preparation in the first instance, and harassing the court with unfounded applications." Consequently, Graham explains, motions based on newly discovered evidence were subject to "very strict regulations."

This cautious attitude led early American courts, both federal and state, to adopt a nearly uniform test to evaluate a motion for a new trial based on newly discovered evidence. Courts often have referred to this as the "Berry rule," or "Berry test," because of an 1851 decision, Berry v. State, in which the Supreme Court of Georgia laid out the test and used it to deny the defendant's motion for a new trial. In Berry, the defendant James Berry, after being convicted of larceny, moved for a new trial and sought to introduce an affidavit alleging that the prosecution had hired a witness to befriend Berry in an attempt to elicit evidence of Berry's guilt. The court denied the motion, explaining that Berry knew about the facts in the affidavit during his trial and that the testimony in the affidavit was not material to Berry's conviction at trial. The Berry court enumerated the requirements for a successful motion for a new trial on the basis of newly discovered evidence:

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83. E.g., Berry v. State, 10 Ga. 511, 527 (1851) ("Applications for new trials on account of newly discovered evidence, are not favored by the Courts."); see also Casey v. United States, 20 F.2d 752, 754 (9th Cir. 1927) (stating that "new trials upon this ground are not favored"); Medwed, supra note 41, at 667 ("[T]he notion that the discovery of new evidence could theoretically provide the foundation for a new trial in early American courts belied the reality that such claims were embraced by neither the judiciary nor the legislature."); Orfield, supra note 58, at 324.
84. GRAHAM, supra note 49, at 462.
85. Id.
86. 3 CHARLES ALAN WRIGHT, NANCY J. KING & SUSAN R. KLEIN, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 557 (3d ed. 2004); Orfield, supra note 58, at 325.
87. WRIGHT ET AL., supra note 86, § 557 (citations omitted). Not all courts refer to the test used to evaluate newly discovered evidence motions as the Berry rule. For example, the U.S. Court of Appeals for the Third Circuit named its version of the Berry test after one of its own decisions, United States v. Iannelli, 528 F.2d 1290 (3d Cir. 1976). See United States v. Jasin, 280 F.3d 355, 362 (3d Cir. 2002) (referring to the first prong of the "Iannelli test"). However, the elements of each circuit's test are essentially the same. See infra note 98 and accompanying text. Thus, for the sake of uniformity, this Note will refer to the test as the "Berry test" throughout.
88. 10 Ga. 511.
89. Id. at 531.
90. Id. at 516.
91. Id. at 528, 531.
Upon the following points there seems to be a pretty general concurrence of authority . . . that it is incumbent on a party who asks for a new trial, on the ground of newly discovered evidence, to satisfy the Court, 1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. That it is so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only—viz; speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness.92

Courts continue to apply the essential elements of the Berry test today.93 However, courts no longer include the fifth requirement—“[t]hat the affidavit of the witness himself should be produced”94—and have added the requirement that the evidence will likely change the result.95 Though some courts separate the Berry requirements into a five-pronged test96 and others combine the “material” and “cumulative” requirements into a single prong of a four-pronged test,97 the actual elements of the Berry test are nearly uniform throughout the circuits.98

92. Id. at 527.
93. See Wright et al., supra note 86, § 557; infra note 131 and accompanying text.
94. Berry, 10 Ga. at 527.
95. See infra note 99 and accompanying text.
98. See Owen, 500 F.3d at 87–88 (“Our sister circuits are in substantial agreement on the essential elements to be considered in evaluating a defendant’s motion for a new trial pursuant to Rule 33, and a majority has articulated a nearly uniform test. Each essentially requires that: (1) the evidence be newly discovered after trial; (2) facts are alleged from which the court can infer due diligence on the part of the movant to obtain the evidence; (3) the evidence is material; (4) the evidence is not merely cumulative or impeaching; and (5) the evidence would likely result in an acquittal” (citing United States v. Jasim, 280 F.3d 355, 361 (3d Cir. 2002); United States v. Theodosopoulos, 48 F.3d 1438, 1448 (7th Cir. 1995); Glover, 21 F.3d at 138; United States v. Reyes-Alvarado, 963 F.2d 1184, 1188 (9th Cir. 1992); United States v. DiBernardo, 880 F.2d 1216, 1224 (11th Cir. 1989); United States v. Gustafson, 728 F.2d 1078, 1084 (8th Cir. 1984); United States v. Metz, 652 F.2d 478, 479 (5th Cir. 1981)); see also Wright et al., supra note 86, § 557 (“In the Berry case the rule was broken down into six elements, and many federal courts today state the test as having five parts, but there is no difference in substance in the number of factors into which the formulation is divided.” (citations omitted)). The First Circuit’s and the U.S. Court of Appeals for the Tenth Circuit’s Berry tests do not require that the evidence be cumulative, and the First Circuit’s test does not require that the evidence not be impeaching. See United States v. Hernández-Rodriguez, 443 F.3d 138, 143 (1st Cir. 2006) (explaining that defendant must establish that “the evidence was: (i) unknown or unavailable at the time of trial, (ii) despite due diligence, (iii) material, and (iv) likely to result in an acquittal upon retrial.” (quoting United States v. Montilla-Rivera, 115 F.3d 1060, 1064–65 (1st Cir. 1997))); United States v. LaVallee, 439 F.3d 670, 700 (10th Cir. 2006) (listing requirements that “(1) the evidence was discovered after trial, (2) the failure to learn of the evidence was not caused by [the defendant’s] own lack of diligence, (3) the new evidence is not merely impeaching, (4) the new evidence is material to the principal issues involved, and (5) the new evidence is of
practice and procedure, Charles Alan Wright, Nancy J. King, and Susan R. Klein list the requirements of the present-day Berry test, setting forth the factors that must exist before a court grants a new trial motion based upon newly discovered evidence:

A motion based on newly discovered evidence must disclose (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal; and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant. 99

C. The Federal Rules of Criminal Procedure: Balancing the Demands of Justice and Finality

Rule 33 of the Federal Rules of Criminal Procedure addresses the same competing concerns that motivated the courts in early England and America to develop the motion for a new trial—protecting the innocent from erroneous verdicts 100 and preserving legitimate verdicts from unjustified challenges. 101 Rule 33 provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." 102 Rule 33 embodies several different policies: the promotion of both justice and efficiency in criminal procedure, faith in judicial discretion, and the desire to provide defendants with an adequate mechanism to overturn wrongful convictions without compromising the integrity of legitimate verdicts. Three aspects of the Federal Rules reflect these policies—Rule 2's explicit statement of the "Purpose and Construction" of the Federal Rules, 103 Rule 33's "interest of justice" standard, 104 and Rule 33's extension of the time limit within which defendants may file newly discovered evidence motions. 105

In laying out the "Purpose and Construction" of the Federal Rules of Criminal Procedure, 106 Rule 2 provides a gloss on the way Rule 33 should be interpreted and applied, and it emphasizes the goals of both just results such a nature that in a new trial it would probably produce an acquittal"). Further, the First Circuit has specified that the evidence must be "unknown or unavailable at the time of trial," while the other circuits, like the U.S. Court of Appeals for the Second Circuit in Owen, simply state in their tests that the evidence be "newly discovered after trial" or "in fact, newly discovered" and do not include the term "unavailable." Compare Owen, 500 F.3d at 88, with Hernández-Rodríguez, 443 F.3d at 143. Part II of this Note explores the conflict in the circuits regarding whether defendants may move for a new trial based on so-called newly available evidence.

99. See WRIGHT ET AL., supra note 86, § 557 (citations omitted).
100. See supra notes 63–71 and accompanying text.
101. See supra notes 58–59, 82–85 and accompanying text.
102. FED. R. CRIM. P. 33(a).
103. See infra notes 106–11 and accompanying text.
104. See infra notes 112–15 and accompanying text.
105. See infra notes 116–30 and accompanying text.
106. FED. R. CRIM. P. 2.
and efficient operation. Though the drafters of the Federal Rules of Criminal Procedure\textsuperscript{107} purposely chose not to provide exacting definitions of every term in each rule,\textsuperscript{108} Rule 2 sets out the purpose of the Rules and dictates how the sixty rules should be construed.\textsuperscript{109} The first sentence of Rule 2 states that the Rules are intended to lead to the "just determination of every criminal proceeding."\textsuperscript{110} The second provision of Rule 2, in setting out the construction of the Federal Rules, highlights the importance of both fairness and efficiency, specifying that the Rules should be applied to "secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."\textsuperscript{111}

Rule 33 relies on a trial judge's ability to use discretion to decide when the circumstances of a given case merit a new trial. The rule provides that "[u]pon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires."\textsuperscript{112} Like the first American new trial rule established in the Judiciary Act of 1789,\textsuperscript{113} Rule 33 does not lay out specific grounds (besides the ground of newly discovered evidence) on which a defendant may move for a new trial.\textsuperscript{114} Instead, Rule 33 directs the court to grant the defendant's motion when the court determines that the "interest of justice" requires it to do so.\textsuperscript{115}

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107. The U.S. Supreme Court appointed an Advisory Committee on Rules of Criminal Procedure (Advisory Committee) of eighteen members "of the legal profession—former judges and prosecutors, educators and private practitioners—chosen from all parts of the country" to draft the Rules of Criminal Procedure. Tom C. Clark, \textit{Foreword to 6 FEDERAL RULES OF CRIMINAL PROCEDURE, WITH NOTES AND INSTITUTE PROCEEDINGS}, at iii, iii (Alexander Holtzoff ed., 1946) [hereinafter NOTES AND INSTITUTE PROCEEDINGS]. Before and during the drafting of the Rules, the Advisory Committee received and considered suggestions from individual "[m]embers of the bench and bar," as well as from "cooperating committees" drawn from judges in "each judicial district and circuit" and from state and city bar associations. See Arthur T. Vanderbilt, Chairman, Supreme Court Advisory Comm., Remarks at the Proceedings of the Institute on Federal Rules of Criminal Procedure (Feb. 15, 1946), \textit{in NOTES AND INSTITUTE PROCEEDINGS, supra}, at 109, 117–18. In an article discussing the drafting of the Federal Rules of Criminal Procedure, former attorney general Homer Cummings commented on the collaborative nature of the drafting process: "These rules are a triumph of the democratic process in that they represent the thought and labor of the legal profession as a whole." Homer Cummings, \textit{The New Criminal Rules—Another Triumph of the Democratic Process}, 31 A.B.A. J. 236, 236 (1945).

108. See Vanderbilt, \textit{supra} note 107, at 117 ("By and large there are very few terms which are defined in our Rules. . . . Our thought was concentrated throughout not on the minutiae of practice but on such rules as will insure all the elements of a fair trial.").


110. \textit{Id.}

111. \textit{Id.; see also Orfield, supra} note 58, at 544 (explaining that one of the objectives of the Federal Rules of Criminal Procedure was "the simplification of procedure through elimination of unnecessary work, expense and delay").

112. \textit{FED. R. CRIM. P.} 33(a).

113. See \textit{supra} notes 73–74 and accompanying text.

114. \textit{FED. R. CRIM. P.} 33.

115. \textit{Id.}
Rule 33 altered previous American new trial practice by extending the time limit within which a defendant may file a motion for a new trial based on newly discovered evidence, and this change reflects the drafters' desire that the Rules provide a remedy for erroneous verdicts while safeguarding the integrity of legitimate verdicts. The drafting history of the Federal Rules of Criminal Procedure reveals that the U.S. Supreme Court Advisory Committee on Rules of Criminal Procedure (Advisory Committee) wanted to remove any time limitation on newly discovered evidence motions in an effort to provide defendants with an adequate remedy for erroneous verdicts while safeguarding the integrity of legitimate verdicts.

116. When the Rules were enacted, Rule II of the Criminal Appeals Rules of 1933 provided that a new trial in a criminal case could be granted on the basis of newly discovered evidence within sixty days of the verdict. See id.; see also United States v. Johnson, 327 U.S. 106, 112 (1946) ("Rule II(2) of the Criminal Appeals Rules requires that motions for new trial generally must be made within three days after verdict or finding of guilt . . . . But motions for new trial on the ground of newly discovered evidence have been more liberally treated. They can under Rule II(3) be made at any time within sixty days after judgment, and in the event of an appeal, at any time before final disposition by the Appellate Court."); Orfield, supra note 58, at 293 ("When the drafting of the Federal Rules of Criminal Procedure was commenced, there were in effect title 28, section 391, authorizing federal courts to grant new trials in both civil and criminal cases, and rule II of the Criminal Appeals Rules of the United States Supreme Court providing for new trials in criminal cases. Also in operation was rule 59 of the Federal Rules of Civil Procedure providing for new trials in civil cases.").

117. See Fed. R. Crim. P. 33 advisory committee's note ("This rule enlarges the time limit for motions for new trial on the ground of newly discovered evidence, from 60 days to two years. . . . Otherwise it substantially continues existing practice."); Orfield, supra note 58, at 294–301.

118. Arthur T. Vanderbilt alluded to the drafters' mindfulness of the "necessity all along the line of maintaining a nice balance between protecting the public interest on the one side and safeguarding the legal personal, particularly the constitutional, rights of the defendant on the other side." Vanderbilt, supra note 107, at 116.


Though the Advisory Committee published and distributed only two preliminary drafts, Vanderbilt, who served as chairman of the Advisory Committee, explained that the committee completed "ten separate drafts" over the four years spent crafting the Rules. Vanderbilt, supra note 107, at 118; see also Lester B. Orfield, The Federal Rules of Criminal Procedure, 33 Cal. L. Rev. 543, 543–44 (1945) ("The Advisory Committee prepared at least ten drafts."). According to Lester B. Orfield, a member of the Advisory Committee, all but the first two of the Advisory Committee's ten drafts placed no time limit on filing a motion for a new trial based on newly discovered evidence. Orfield, supra note 58, at 293–
mechanism for setting aside erroneous convictions. In the article New Trial in Federal Criminal Cases, Lester B. Orfield, a member of the Advisory Committee, points to a transcript of a memorandum written during the drafting of the Federal Rules, in which a majority of the Advisory Committee explained that they wanted to abolish the time limit because "experience has shown" that trials can yield unjust verdicts and that newly discovered evidence can prove that a verdict was unjust. In the event of such injustice, the memorandum explained, an executive remedy like clemency is inadequate and defendants should be afforded some form of judicial redress. While some "members of the bench and bar" who

96; see U.S. SUPREME COURT ADVISORY COMM. ON FED. RULES OF CRIMINAL PROCEDURE, UNPUBLISHED PRELIMINARY DRAFT OF RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (1942), in 1 DRAFTING HISTORY, supra, at 33, 102 ("A motion for a new trial solely on the ground of newly discovered evidence may be made at any time after final judgment . . ."). For a fuller explanation of the progression of published drafts of the Rules, see Editor's Note, Federal Rules of Criminal Procedure—the Various Drafts, 43 MICH. L. REV. 407, 407-08 (1944).

120. See infra notes 121-22 and accompanying text.

121. Orfield, supra note 58, at 297 ("[E]xperience has shown that in fact cases have occurred in which new evidence was discovered a considerable time after conviction and that such evidence led to the conclusion that a miscarriage of justice had resulted"); see also Robert F. Maguire, Proposed New Federal Rules of Criminal Procedure, 23 OR. L. REV. 56, 64 (1943) (praising the proposed removal of the time limit as a "very decided improvement" and making particular note of the measure's applicability to "those cases where a defendant has been unable to produce the necessary witness or finds that . . . there are other witnesses who can establish his innocence"); James V. Bennet, Dir., Fed. Bureau of Prisons & Sec'y, Criminal Law Section, Am. Bar Ass'n, Remarks at the Proceedings of the Institute on Federal Rules of Criminal Procedure (Feb. 16, 1946), in NOTES AND INSTITUTE PROCEEDINGS, supra note 107, at 203, 230 ("It is not infrequent for one in my business to find out that people—few people—really are innocent and get into the penitentiary; and they can't get the case up or get it to attention until some time more than two years.").

122. Orfield, supra note 58, at 297 ("It seemed to the Committee that judicial redress should be afforded in such cases and that executive clemency was neither a satisfactory nor adequate remedy from the standpoint of the Government or from the point of view of the defendant."). In an address at an annual meeting of the American Bar Association, former U.S. Attorney General Homer Cummings, who served as chairman of the Committee of the Section of Criminal Law on Federal Rules of Criminal Procedure and who had been "largely instrumental" in the passage of the act authorizing the promulgation of the Federal Rules of Civil Procedure, see Vanderbilt, supra note 107, at 118, echoed the sentiments expressed by the majority of the committee in the memorandum. Cummings explained in his address that, however rare, wrongful convictions do occur, and, thus, a judicial remedy should be available to defendants in those inevitable cases:

The Committee has proposed the abolition of time limitations on motions for a new trial on the ground of newly discovered evidence. This is a courageous and commendable step. The conviction of an innocent person in a federal court is a rarity. Yet, as all human institutions are fallible, such miscarriages of justice have occurred. During my term of office as Attorney General I have known of it in a few instances and was obliged to take steps to retrieve the wrong either by confessing error, if it was not too late to do so, or by securing a pardon. Executive clemency in such an instance is, however, inadequate and unsatisfactory. A judicial remedy should always be available. Such a remedy, in fact, is now open if the newly discovered evidence exculpating the defendant becomes available within a certain time limit. Unfortunately, such evidence is apt to come to light at a later
provided suggestions to the Advisory Committee\textsuperscript{123} expressed concern that removing a time limit would create inefficiency or leave verdicts too vulnerable to undeserving defendants,\textsuperscript{124} the Advisory Committee believed that the "sound judgment of the district judge was sufficient protection against frivolous and ill-founded motions."\textsuperscript{125} The criticisms leveled by attorneys and judges who offered suggestions to the Advisory Committee\textsuperscript{126} echoed the sentiments of early American judges who emphasized that motions for new trials based on newly discovered evidence should be evaluated cautiously.\textsuperscript{127} Against this background, the Supreme Court objected to a complete removal of a time limit,\textsuperscript{128} and the final rule for

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date. There is no reason in logic, in justice, or in expediency, for limiting the time during which a court may grant a new trial in such cases.

Moreover, as Orfield discusses, attorneys in the U.S. Department of Justice who had suggested at the early stages of drafting that the committee remove all time limits on a motion for new trial based on newly discovered evidence expressed concern that potentially innocent defendants would have no adequate recourse once the time limit expired: "Under existing law the only recourse is a pardon. Pardon is neither a satisfactory nor a logical solution." Orfield, sup\textit{ra} note 58, at 294.

\textsuperscript{123} See sup\textit{ra} note 107.

\textsuperscript{124} E.g., Letter from Hon. James P. Alexander, Chief Justice of the Supreme Court of Tex., to Alexander Holtzoff, Sec'y, U.S. Supreme Court Advisory Comm. on Fed. Rules of Criminal Procedure (Aug. 31, 1943), \textit{in} 1 COMMENTS, RECOMMENDATIONS AND SUGGESTIONS CONCERNING THE PROPOSED FEDERAL RULES OF CRIMINAL PROCEDURE, \textit{reprinted in} 2 DRAFTING HISTORY, sup\textit{ra} note 119, at 1, 198 [hereinafter COMMENTS, RECOMMENDATIONS & SUGGESTIONS] (raising the possibility that a defendant could purposely "wait until all of the State's witnesses have died and then raise the question of newly discovered evidence"); Letter from Edwin R. Holmes, U.S. Circuit Judge for the Fifth Circuit (Aug. 21, 1943), \textit{in} COMMENTS, RECOMMENDATIONS & SUGGESTIONS, sup\textit{ra}, at 197 (expressing concern that such a rule would hinder the "speedy determination" of criminal cases by allowing a wealthy defendant to "keep up the procedure in court" for as long as he chooses); Letter from Hon. Walter T. Lindley, U.S. Dist. Judge for the E. Dist. of Ill., to James J. Robinson, Chairman, Criminal Law Section, Am. Bar Ass'n (Aug. 6, 1943), \textit{in} COMMENTS, RECOMMENDATIONS & SUGGESTIONS, sup\textit{ra}, at 197 ("If I understand the proposed rule, the courts will be open always, after conviction, for presentation and hearing of such motion. Years may lapse, witnesses may die and other events occur so as to alter completely the nature of the proof and the result of the trial."); see also Alexander Holtzoff, Sec'y, Supreme Court Advisory Comm., Remarks at the Proceedings of the Institute on Federal Rules of Criminal Procedure (Feb. 16, 1946), \textit{in} NOTES AND INSTITUTE PROCEEDINGS, sup\textit{ra} note 107, at 203, 230 ([T]here was considerable opposition to having no time limit . . . .").

\textsuperscript{125} Holtzoff, sup\textit{ra} note 124, at 230; see also Orfield, sup\textit{ra} note 58, at 294 ("Such cases would be rare and courts would not abuse the power conferred."); Cummings, sup\textit{ra} note 122, at 656 ("I, for one, am not afraid that the courts will be inundated by a flood of frivolous motions of this kind. We may well rely on the good sense of federal judges not to grant such motions except upon sufficient cause.").

\textsuperscript{126} See sup\textit{ra} note 124 and accompanying text.

\textsuperscript{127} See sup\textit{ra} notes 83--85 and accompanying text.

\textsuperscript{128} Memorandum from the U.S. Supreme Court to the U.S. Supreme Court Advisory Comm. on Rules of Criminal Procedure 3 (Apr. 11, 1944), \textit{in} 7 DRAFTING HISTORY, sup\textit{ra} note 119, at 5, 7 ("It is suggested that there should be a definite time limit within which motions for new trial based on newly discovered evidence should be made, unless the trial
motions for new trial based on newly discovered evidence contained a time limit of two years.\textsuperscript{129} The rule was amended in 1998, and in its current form, the newly discovered evidence provision of Rule 33 provides that "[a]ny motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty."\textsuperscript{130}

D. Courts' Application of the Rule 33 Motion for a New Trial Based on Newly Discovered Evidence

To determine whether evidence introduced after the conclusion of a trial constitutes newly discovered evidence under Rule 33, the federal courts still use the Berry test.\textsuperscript{131} In applying the Berry test, judges have continued to exercise caution about setting aside verdicts on the ground of newly discovered evidence.\textsuperscript{132}

\textsuperscript{129} FED. R. CRIM. P. 33(b)(1) (amended 1998).
\textsuperscript{130} Id.
\textsuperscript{131} See, e.g., United States v. Lowery, No. 08-2709, 2008 WL 4417216, at *1 (3rd Cir. Oct. 1, 2008) (evaluating a Rule 33 motion based on newly discovered evidence by describing and applying elements of the Third Circuit's test, which requires that "(a) the evidence must be[,] in fact, newly discovered, i.e., discovered since trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) evidence relied on] must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal’" (alteration in original) (quoting United States v. Jasin, 280 F.3d 355, 361 (3d Cir. 2002))); United States v. Owen, 500 F.3d 83, 87 (2d Cir. 2007), cert. denied, 128 S. Ct. 1459 (2008) ("A new trial pursuant to Rule 33 based on newly discovered evidence may be granted ‘only upon a showing that the evidence could not with due diligence have been discovered before or during trial, that the evidence is material, not cumulative, and that admission of the evidence would probably lead to an acquittal.'" (quoting United States v. Alessi, 638 F.2d 466, 479 (2d Cir. 1980))); United States v. Campa, 459 F.3d 1121, 1177–78 (11th Cir. 2006) (listing elements); United States v. LaVallee, 459 F.3d 670, 700 (10th Cir. 2006) (same); United States v. Harrington, 410 F.3d 598, 601 (9th Cir. 2005) (same); United States v. Fulcher, 250 F.3d 244, 249 (4th Cir. 2001) (articulating test applied to new trial motions based on newly discovered evidence as requiring that evidence be "in fact, newly discovered," that facts must be alleged that allow the court to infer diligence on the part of the defendant, that the evidence is not cumulative or impeaching, that the evidence is material, and that the evidence would "probably produce an acquittal"); United States v. Anderson, No. 97-3176, 1998 WL 388366, at *1 (D.C. Cir. May 12, 1998) (listing elements); see also WRIGHT ET AL., supra note 86, § 557; Penny J. White, Newly Available, Not Newly Discovered, 2 J. APPL. PRAC. & PROC. 7, 10 (2000) ("[A] motion for a new trial based on newly discovered evidence will be granted if the new evidence is discovered after trial, the defendant by exercise of due diligence could not have discovered the evidence during trial, the evidence is material and is not merely cumulative or impeaching evidence, and most critically, the evidence would probably produce a different verdict if offered in a new trial."); supra text accompanying notes 93, 99.
\textsuperscript{132} See Campa, 459 F.3d at 1151 ("Motions for a new trial based on newly discovered evidence are highly disfavored... and should be granted only with great caution."); supra text accompanying notes 93, 99.
In applying the first prong of the test for newly discovered evidence, which requires that the evidence actually be newly discovered, the court considers whether the evidence was known to both the defendant and the defendant's counsel during the trial. In United States v. Seago, the U.S. Court of Appeals for the Sixth Circuit stated, "The first prong of the... test for a Rule 33 motion based on newly discovered evidence] requires the newly discovered evidence to be evidence not known by the defendant at the time of trial." In analyzing the first prong, the Seago court discussed whether the defendant was "aware" of the evidence and whether the evidence was "within the defendant's knowledge at the time of trial." The Sixth Circuit affirmed the district court's denial of D.G. Seago's motion based on the finding that the facts supporting Seago's proffered new evidence—an ineffective assistance of counsel claim—were "known by the defendant at the time of trial." An example of a case in which the defendant's motion failed to satisfy the "newly discovered" prong of Berry is United States v. Wilson. In Wilson, the U.S. Court of Appeals for the Eleventh Circuit found that evidence that a codefendant cooperated with the government was not newly discovered evidence where defendants had notice that the codefendant was cooperating with the government at midtrial and at the time of plea.

The second prong of the Berry test requires that the defendant have exercised due diligence to uncover the evidence during trial. Courts have found that posttrial testimony of witnesses failed the diligence prong of the caution.

133. Although the Berry test is uniform throughout the circuits in that all courts' tests contain the same essential elements, courts list the elements in varying numerical orders. For the purpose of clarity, this Note will refer to the elements in the order in which they are listed in the Owen opinion. See supra note 98.

134. Seago, 930 F.2d at 488; United States v. Bujese, 371 F.2d 120, 125 (3d Cir. 1967) ("It is... well settled that evidence is not 'newly discovered' when it was known or could have been known by the diligence of the defendant or his counsel... ")); Wright et al., supra note 86, § 557 (citations omitted).

135. Seago, 930 F.2d at 488.

136. Id. at 489.

137. Id.

138. 894 F.2d 1245 (11th Cir. 1990).

139. Id. at 1251–52.

140. Wright et al., supra note 86, § 557.
test when defense counsel knew about a witness and could have investigated his possible testimony before the time of trial but did not, and when the defendant’s efforts to locate a witness before trial consisted only of stopping at a few bars that the witness was known to frequent—without attempting to locate the witness’s home, place of employment, friends, family, or relatives, issue a subpoena for the witness, or seek a continuance.

The third element of the Berry test requires that the evidence must be “material.” Courts have stated that new evidence is material if it has the potential to alter the outcome of the lawsuit under the applicable legal rules. In one instance, the U.S. Court of Appeals for the District of Columbia Circuit found newly discovered evidence to be material when it was revealed after trial that the alleged victim of a homicide had an open knife in his pocket. In another case, the U.S. Court of Appeals for the Fourth Circuit found that new evidence was not material where the new evidence revealed that a park manager had provided false testimony that weapons possession regulations had been posted. The court found that the evidence was not material because notice of the prohibition of weapons possession was not an element of the crime.

The fourth requirement imposed by the Berry test specifies that the testimony may not be cumulative. The U.S. Court of Appeals for the Fifth Circuit has explained that newly discovered evidence is cumulative where it is substantially the same as evidence that was presented at trial. For instance, in United States v. Coleman, a letter sent to the court and to both parties’ counsel by a material witness repudiating his trial testimony was found to be cumulative where the witness testified at trial and already had been discredited during cross-examination at trial.

The fifth and final requirement of the Berry test questions whether the newly discovered evidence will likely produce an acquittal. In Grace v. Butterworth, the First Circuit commented on the high standard imposed

142. United States v. Oliver, 683 F.2d 224, 228 (7th Cir. 1982).
143. WRIGHT ET AL., supra note 86, § 557.
144. See., e.g., United States v. Hernández-Rodríguez, 443 F.3d 138, 145 (1st Cir. 2006); United States v. Gresham, 118 F.3d 258, 268 (5th Cir. 1997) (explaining that the proffered evidence would not affect the “ultimate issue” of the defendant’s guilt); United States v. Frost, 61 F.3d 1518, 1527 (11th Cir. 1995) (stating that, even if the proffered evidence could impeach a government witness, the evidence did not relate to whether the defendant was guilty).
146. United States v. Lofton, 233 F.3d 313 (4th Cir. 2000).
147. Id. at 318.
148. WRIGHT ET AL., supra note 86, § 557.
150. 460 F.2d 1038 (8th Cir. 1972).
151. Id. at 1040.
152. WRIGHT ET AL., supra note 86, § 557.
153. 586 F.2d 878 (1st Cir. 1978).
by this prong of the *Berry* test.\(^{154}\) The opinion clarified that the defense carries the burden of proof of establishing that newly discovered evidence satisfies this element.\(^{155}\) The *Grace* court explained that the district court properly inquired whether the new evidence probably would have resulted in a new verdict and not whether the new evidence was useful to the defense. In other words, the evidence should not satisfy this prong even if the evidence could have bolstered the defense’s case at trial if the district court determines that the evidence would not have changed the verdict in the case.\(^{156}\) The Fifth Circuit also alluded to the particularly high hurdle posed by the “likelihood of acquittal” prong, noting that that the likelihood of change in the jury’s decision must rise considerably above a level of speculation in order to justify a new trial.\(^{157}\)

II. **DOES POSTCONVICTION EXCULPATORY TESTIMONY BY A CODEFENDANT CONSTITUTE NEWLY DISCOVERED EVIDENCE?**

The federal circuit courts have disagreed about whether a codefendant’s postconviction offer of exculpatory testimony may constitute newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure.\(^{158}\) This disagreement concerns whether a motion asserting that a codefendant’s exculpatory testimony is newly discovered evidence satisfies the “newly discovered” prong of the *Berry* test.\(^{159}\)

Customarily, a court considers each prong of the *Berry* test when evaluating a Rule 33 motion for a new trial based on newly discovered evidence.\(^{160}\) To qualify as newly discovered evidence, the motion must

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154. *Id.* at 880–81.
155. *Id.* at 881.
156. *Id.*; see also United States v. Gresham, 118 F.3d 258, 268 (5th Cir. 1997) ("[G]iven the weight of the evidence amassed against Gresham, [the proffered evidence] is not sufficient to raise a reasonable doubt.").
158. Compare United States v. Owen, 500 F.3d 83, 89 (2d Cir. 2007), *cert. denied,* 128 S. Ct. 1459 (2008) (holding that “Rule 33 does not authorize district courts to grant new trials on the basis of [postconviction exculpatory evidence offered by a codefendant] since it is not newly discovered, but merely newly available"), with United States v. Montilla-Rivera, 115 F.3d 1060, 1065–66 (1st Cir. 1997) (holding that “exculpatory affidavits from codefendants who did not testify at trial because they exercised their Fifth Amendment privileges” may qualify as “newly discovered evidence within the meaning of Rule 33”).
159. See, e.g., United States v. Jasín, 280 F.3d 355, 362 n.7 (3d Cir. 2002) (specifying that the court’s holding is premised on the fact that the testimony in question did not constitute “newly discovered evidence” under the first prong of the Third Circuit’s five-prong test); *Montilla-Rivera,* 115 F.3d at 1066 (explaining that the first prong of its “four part test” for newly discovered evidence motions inquires “whether the evidence ‘was unknown or unavailable to the defendant at time of trial’” (quoting United States v. Wright, 625 F.2d 1017, 1019 (1st Cir. 1980))).
160. See, e.g., *Owen,* 500 F.3d at 87 (“A new trial pursuant to Rule 33 based on newly discovered evidence may be granted ‘only upon a showing that the evidence could not with due diligence have been discovered before or during trial, that the evidence is material, not cumulative, and that admission of the evidence would probably lead to an acquittal.’” (quoting United States v. Alessi, 638 F.2d 466, 479 (2d Cir. 1980))); *Jasín,* 280 F.3d at 361 (“To determine whether a new trial based on ‘newly discovered evidence’ should be granted,
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satisfy every prong. Although federal courts have denied motions based on postconviction testimony by a codefendant for failure to satisfy different prongs, including the “diligence” prong and the “likelihood of acquittal” prong, the conflict in the circuit courts concerns the courts’ applications of the “newly discovered” prong to the testimony.

The federal appeals courts have disagreed about whether the posttrial testimony of a codefendant who invoked the Fifth Amendment at trial can satisfy this first prong of the 

Berry test, which inquires whether the evidence was indeed newly discovered. The majority of circuits have held that, even though a codefendant’s testimony was previously unavailable, the motion fails that first prong because the defendant was aware of the codefendant’s testimony or ability to testify at trial and, thus,

161. E.g., United States v. Hernández-Rodriguez, 443 F.3d 138, 143 (1st Cir. 2006) (“[W]e have no discretion to grant a motion for a new trial if any one of the four factors is lacking.”); United States v. Freeman, 77 F.3d 812, 816–17 (5th Cir. 1996) (explaining that “[t]he Fifth Circuit applies the ‘Berry’ rule to motions for new trial based on newly discovered evidence” and that “[i]f the defendant fails to demonstrate any one of [the] four factors, the motion for new trial must be denied” (citing United States v. Peña, 949 F.2d 751, 758 (5th Cir. 1991))); United States v. Metz, 652 F.2d 478, 479 (5th Cir. 1981) (“In order to prevail on a motion for new trial, the defendant must satisfy all of the . . . four prerequisites [of the U.S. Court of Appeals for the Fifth Circuit’s four-pronged test].”); see also Wright et al., supra note 86, § 557 (“Regardless of how the factors are numbered, it is clear that the defendant has the burden of establishing all of them.”).

162. E.g., United States v. Rocco, 587 F.2d 144, 148 (3d Cir. 1978) (denying a motion for a new trial based on the posttrial affidavit of a convicted codefendant because “the defense never discharged its responsibility to act diligently in procuring the evidence on which it now seeks to base its motion for a new trial” and also because the defendant “has not satisfied the weighty burden of convincing the district court that the newly discovered evidence would probably produce an acquittal” (internal quotation marks omitted)).

163. Compare Jasin, 280 F.3d at 368–69 (holding that a Rule 33 motion based on “a codefendant’s testimony known to the defendant at the time of trial” fails “to satisfy the first requirement” of the Third Circuit’s five-pronged test “regardless of the codefendant’s unavailability during trial because of invocation of his Fifth Amendment privilege”), United States v. Theodosopoulos, 48 F.3d 1438, 1448 (7th Cir. 1995) (holding, in part, that defendant’s Rule 33 motion based on previously unavailable exculpatory testimony from a convicted codefendant fails to satisfy the first prong of the U.S. Court of Appeals for the Seventh Circuit’s four-pronged test), United States v. Glover, 21 F.3d 133, 138 (6th Cir. 1994) (explaining that Glover’s codefendant’s posttrial offer of exculpatory testimony was “discovered after the trial,” and, thus, Glover had “fail[ed] to carry his burden of proof” as to the first element of the four-part test), and United States v. Munoz, 957 F.2d 171, 173 (5th Cir. 1992) (“Although Garcia’s testimony arguably did not become available to Appellant until the end of trial, Appellant has failed to show that the evidence was newly discovered. . . . [H]e cannot pass even the first step of the newly discovered evidence test.” (citing Metz, 652 F.2d at 480)), with Hernández-Rodriguez, 443 F.3d at 144 (1st Cir. 2006) (“[W]e are satisfied that the [offer of postconviction exculpatory testimony from a codefendant who had taken the Fifth Amendment at trial] was unavailable at trial—and thus sufficient to satisfy the first prong . . . .”).
the evidence was not newly discovered after trial.\footnote{164} In contrast, the First Circuit has held that postconviction testimony by a codefendant who had taken the Fifth Amendment may satisfy the "newly discovered" prong because, no matter what the defendant knew at the trial stage, he could not have forced the codefendant to relinquish his Fifth Amendment rights and testify at trial.\footnote{165}

A. The Majority View: Newly Discovered, Not Newly Available

When the Second Circuit decided \textit{Owen} in 2007, it joined a majority of circuits in holding that a postconviction exculpatory statement by a codefendant does not constitute newly discovered evidence under the "newly discovered" prong of the \textit{Berry} test.\footnote{166} While courts that hold the majority view have differed in their analyses of this issue, they have reached the same ultimate conclusion—that the unavailability at trial of postconviction exculpatory testimony offered by a codefendant who had declined to testify at trial does not qualify such evidence as newly discovered under the first prong of \textit{Berry}.\footnote{167} Moreover, these courts...
generally have cited two major reasons for refusing to regard such testimony as newly discovered: (1) the fact that a given defendant was aware of the evidence at the trial stage and (2) the risk that a codefendant’s posttrial statements lack credibility.

First, most courts in the majority have found that, because the defendant had been “aware” of the exculpatory evidence at the time of trial, that evidence cannot be considered newly discovered. These courts concluded that the language of the phrase “newly discovered evidence” in Rule 33 requires such a conclusion. Courts holding the majority view have provided varying explanations of what “aware” means in relation to whether evidence should be considered newly discovered under Rule 33. In decisions from the U.S. Courts of Appeals for the Fifth and Seventh Circuits, the courts concluded that a codefendant’s postconviction offer of testimony was not newly discovered evidence because of the defendants’ awareness at the trial stage of the specific content of the codefendant’s possible testimony. In these cases, the defendants had communicated
with their codefendants through counsel before or during trial and learned particularized facts about what the codefendant could say on the stand.\textsuperscript{173} In other cases, such as the Second Circuit’s opinion in \textit{Owen}, courts pointed to the defendant’s own subjective knowledge.\textsuperscript{174} Those courts suggested that a defendant’s knowledge of his own dealings with a codefendant or of his own innocence makes that defendant necessarily aware that a codefendant has the capacity to exculpate him, even if the defendant has never communicated with the codefendant about possibly testifying.\textsuperscript{175}

The second rationale that courts adhering to the majority view have espoused in refusing to regard codefendants’ postconviction exculpatory statements as newly discovered evidence relates to the suspect nature of postconviction testimony by an already convicted codefendant.\textsuperscript{176} Courts have observed that the codefendant realistically has nothing to lose by providing the testimony and may have little to lose in committing perjury.\textsuperscript{177}

While most courts adhering to the majority view have explained their decisions in some way based on one or both of these two reasons—that the defendant was aware at trial of the codefendant’s evidence and that the offered testimony is inherently suspect—those courts have weighed the significance of these two reasons in a variety of ways. Three of those decisions—\textit{United States v. Metz},\textsuperscript{178} \textit{United States v. Jasin},\textsuperscript{179} and \textit{Owen}\textsuperscript{180}—illustrate the main analyses used by courts and highlight the

\begin{footnotesize}
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\item[\textsuperscript{173}]. Theodosopoulos, 48 F.3d at 1448; Metz, 652 F.2d at 480; see infra notes 190–93 and accompanying text.
\item[\textsuperscript{174}]. E.g. Owen, 500 F.3d at 91 (asserting that it could not be true that Owen “was unaware” of his codefendant’s ability to exculpate him, given that Owen was aware of “what he did and did not speak with Samuels and Baroody” on the days in which the crimes occurred); Azuogu, 105 F.3d 652 (“Azuogu cannot claim he was unaware, at the time of trial, of a conversation in which he took part.”); see \textit{infra} notes 240, 260–66 and accompanying text.
\item[\textsuperscript{175}]. Owen, 500 F.3d at 90; Azuogu, 105 F.3d at 652.
\item[\textsuperscript{176}]. E.g., United States v. Reyes-Alvarado, 963 F.2d 1184, 1188 (9th Cir. 1992). Numerous opinions by courts that hold the view that postconviction exculpatory evidence by a codefendant does not constitute newly discovered evidence quote Judge Henry J. Friendly’s statement in dicta in \textit{United States v. Jacobs}, in which he warned that courts should act cautiously in evaluating this kind of evidence: “[A] court must exercise great caution in considering evidence to be ‘newly discovered’ when it existed all along and was unavailable only because a co-defendant, since convicted, had availed himself of his privilege not to testify.” United States v. Jacobs, 475 F.2d 270, 286 n.33 (2d Cir. 1973); see, e.g., Owen, 500 F.3d at 89 (quoting \textit{Jacobs}, 475 F.2d at 286 n.33); United States v. Jasin, 280 F.3d 355, 365 (2d Cir. 2002) (quoting \textit{Jacobs}, 475 F.2d at 286 n.33); United States v. Glover, 21 F.3d 133, 138–39 (6th Cir. 1994) (quoting \textit{Jacobs}, 475 F.2d at 286 n.33); United States v. Dale, 991 F.2d 819, 839 (D.C. Cir. 1993) (quoting \textit{Jacobs}, 475 F.2d at 286 n.33).
\item[\textsuperscript{177}]. Reyes-Alvarado, 963 F.2d at 1188.
\item[\textsuperscript{178}]. 652 F.2d 478; see \textit{supra} Part II.A.1.
\item[\textsuperscript{179}]. 280 F.3d 355; see \textit{supra} Part II.A.2.
\item[\textsuperscript{180}]. 500 F.3d 83; see \textit{supra} Part II.A.3.
\end{enumerate}
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challenging issues presented by a motion for a new trial based on the exculpatory testimony of a codefendant.

1. United States v. Metz: Particularized Awareness and No Blanket Proposition

Defendant Walter Metz moved for a new trial on the basis of newly discovered evidence after being sentenced to twelve years in prison for a drug conspiracy offense. In support of his motion, Metz offered exculpatory affidavits of his convicted coconspirators, including Ronald Schiller, a codefendant in Metz’s trial. The district court denied Metz’s motion, and the Fifth Circuit affirmed.

Before Metz’s trial, Metz moved to sever his trial from Schiller’s, and his motion was denied. Metz claimed in this severance motion that Schiller would testify that Metz was not involved in the drug conspiracy.

After Metz’s conviction, he moved again, this time for a new trial based on newly discovered evidence. He attached two affidavits from Schiller, attesting to exculpatory facts similar to those that Metz had identified in his pretrial severance motion. The affidavits stated that

(i) Metz was not present at his townhouse when Schiller was there on December 14, 1977, (ii) Metz knew nothing about the cocaine deal, (iii) the origin of the cocaine was not Metz’s townhouse, (iv) Schiller had carried the cocaine into Metz’s house and had prepared it for sale there without Metz’s knowledge and (v) the purpose of his three visits to the [Metz] residence was to go Christmas shopping with Metz’s wife.

In upholding the district court’s denial of Metz’s motion for a new trial, the Fifth Circuit first reasoned that the evidence was not newly discovered because Metz had not “cleared the hurdle of showing that the evidence was unknown to him at the time of trial.” The opinion explained that William

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181. Metz, 652 F.2d at 478–79.
182. Id. at 479.
183. Id. at 478–79.
184. Id. at 481.
185. Id. at 479.
186. Id. The government offered the following as evidence against Metz at his trial: Ronald Schiller visited Metz’s townhouse three times on December 14, 1977, the day on which Schiller negotiated with undercover DEA agents regarding the sale of forty pounds of cocaine; on one of those visits, a DEA agent saw Metz at the front door; Schiller had told the agents that the cocaine was at a “stash pad,” and Schiller was seen at Metz’s townhouse “just prior to the time Schiller delivered a pound of cocaine to a DEA agent”; physical evidence “consisting of cocaine residue and [a] weighing apparatus was found at Metz’s residence.” Id. Metz’s motion to sever stated that if Schiller was tried first, after Schiller was either acquitted or convicted, he would testify that the three visits to Metz’s house on December 14 were Schiller’s only contact with Metz and that “neither Metz nor his wife ever agreed to or had any knowledge of, use or control over the cocaine.” Id.
187. Id.
188. Id.
189. Id.
190. Id. at 480.
Moran, Metz's trial counsel, had averred in an affidavit that "the entire substance of Schiller's affidavit [was] consistent with what Schiller and/or Schiller's counsel had relayed" to Moran before Metz's trial. The court concluded that the evidence was not "unknown to the defendant at the time of trial" and, thus, not "in fact newly discovered" because the court had sworn statements asserting that Metz knew the substance of what Schiller would say before Metz's trial.

The Metz opinion also discussed the dangers inherent in motions based on testimony by a codefendant who may have nothing to fear by providing the testimony. The court observed that it is appropriate for a trial judge to consider whether the offered testimony is "contrary to [the codefendant's] own penal interest" when evaluating a motion based on such testimony. The Metz court quoted from an earlier decision by the Fifth Circuit in a case in which a defendant had attempted to exculpate his codefendant: "His effort to absolve his co-defendant cost him nothing. It is not unusual under such circumstances for the obviously guilty defendant to try to assume the entire guilt." The Metz court then pointed out that

191. Id.
192. Id. at 479 ("In order to prevail on a motion for a new trial, the defendant must [demonstrate that] . . . the evidence was unknown to the defendant at the time of trial and is in fact newly discovered . . . ." (citing United States v. Geders, 625 F.2d 31, 32-33 (5th Cir. 1980))).
193. Id. at 480; see also United States v. Theodosopoulos, 48 F.3d 1438, 1448 (7th Cir. 1995) (holding that the court could conclude that the defendant knew of the evidence during trial because, "[p]rior to the commencement of trial, defense counsel interviewed [the codefendant]" and, at trial, defense counsel laid out what statements the codefendant could provide if he testified).
194. Metz, 652 F.2d at 480-41.
195. Id. at 480 (quoting United States v. Alejandro, 527 F.2d 423, 428 (5th Cir. 1976)). While the Metz court stated that it is appropriate for a trial judge to consider whether a codefendant's testimony is contrary to the codefendant's penal interest, the opinion did not specify whether that consideration should fall under the "newly discovered" prong of Berry. The Metz opinion seemed to associate this inquiry with the "newly discovered" prong, as that is the only element of Berry that the Metz opinion addressed: "[W]e find that the Court did not abuse its discretion in denying the motion for new trial since Metz had failed to satisfy one of the required elements." Id. However, a more recent decision by the Fifth Circuit indicated that an inquiry into whether a codefendant's offer of testimony contradicts the codefendant's own interest could also appropriately fall under the Berry prong that requires the evidence to "probably produce acquittal," in that such a consideration addresses the witness's credibility. United States v. Freeman, 77 F.3d 812, 817-18 (5th Cir. 1996). In United States v. Freeman, the Fifth Circuit stated that it was appropriate for the district court to take into account that Vasquez had nothing to lose by her testimony when it was discussing the "probably produce acquittal" prong. Id. (citing Alejandro, 527 F.2d at 428). The court discussed the likelihood that Irene Vasquez could be impeached—Vasquez "had nothing to lose" by providing testimony and was "a personal friend of Freeman's"—in determining that Vasquez's testimony lacked credibility and, thus, that the district court did not abuse its discretion in holding that the motion should be dismissed because a new trial would be unlikely to lead to an acquittal. The court stated, "In view of the . . . questionable credibility of Vasquez's testimony, the district judge held that even if the evidence were newly discovered, a new trial would probably not result in Freeman's acquittal. This holding is not a clear abuse of discretion." Id. at 818.
196. Metz, 652 F.2d at 481 (quoting Alejandro, 527 F.2d at 428).
Metz's codefendant Schiller had "nothing to lose" by exculpating Metz, presumably because Schiller had already been convicted and sentenced at the time.\(^{197}\)

The Metz court also addressed Metz's argument that the Fifth Circuit's previous rulings in Newsom v. United States\(^{198}\) and Ledet v. United States\(^{199}\) had established "the proposition that a previously silent co-defendant's post-conviction willingness to testify constitutes 'newly discovered' evidence warranting a new trial."\(^{200}\) In fact, the Fifth Circuit had granted new trials to defendants who had offered postconviction exculpatory testimony from their previously unavailable codefendants in Newsom\(^{201}\) and Ledet.\(^{202}\) In Newsom, the Fifth Circuit had stated, in

\(^{197}\) Id.

\(^{198}\) 311 F.2d 74 (5th Cir. 1962).

\(^{199}\) 297 F.2d 737 (5th Cir. 1962).

\(^{200}\) Metz, 652 F.2d at 480.

\(^{201}\) Lavonne Newsom was indicted along with Travis Dale Linton on two counts involving the sale of marijuana to undercover government agents. Newsom, 311 F.2d at 75. While the judge granted Linton a mistrial because of a prejudicial statement made by a juror, the trial court eventually convicted Newsom and sentenced him to five years in prison. Id. Throughout trial, Newsom, who was present when Linton gave a government agent a package in a Waffle House parking lot but did not actively take part in the transaction, "denied any knowledge of any marijuana transaction." Id. at 77. Newsom testified that Linton, his friend's brother, had approached Newsom at a bar and asked to borrow Newsom's car. Id. Newsom refused but told Linton that he would drive Linton where Linton needed to go. Id. Newsom then drove Linton to Linton's house and to the Waffle House where the drug transaction took place. Id. After Newsom was convicted and sentenced, Linton, who had pled guilty to the indictment during his retrial, told the court that Newsom "had no knowledge" of the transaction and signed an affidavit corroborating Newsom's own testimony. Id. at 78. Newsom filed a newly discovered evidence motion based on Linton's affidavit, and the Fifth Circuit reversed the district court's denial of the motion and granted a new trial to Newsom. Id. In so ruling, the Fifth Circuit explained that the evidence of Newsom’s guilt at trial had been weak, that the detrimental statement made against Linton by a juror may have unfairly influenced the jury’s opinion of Newsom, and that Newsom "could not avail himself on his trial of the testimony of Linton." Id. at 79. Thus, the Fifth Circuit granted the motion, albeit noting the "peculiar circumstances of this case." Id.

\(^{202}\) Loyal S. Ledet was a passenger in his codefendant Anderson A. Bourg's car when customs agents searched the vehicle shortly after the car had crossed the border from Mexico into Texas. The agents found forty-one grams of heroin under the seat that Ledet had occupied. Ledet, 297 F.2d at 738. Upon arrest, both defendants claimed that they had not known of the heroin's presence in the automobile. Id. While Bourg refused to testify at trial, Ledet testified that he had gone on a trip with Bourg, that the two had visited several "night spots," and that he, Ledet, "knew nothing of the heroin." Id. After both defendants were convicted and sentenced, Bourg offered an affidavit asserting that Bourg bought the narcotics in Mexico "after cautioning his source in Mexico not to let Ledet know anything about the transaction" and that Ledet did not know about the drugs. Id. at 739. Ledet moved for a new trial based on newly discovered evidence, and the district court denied his motion. Id. at 737. The Fifth Circuit reversed the denial. Id. As in Metz, the Fifth Circuit acknowledged the particularly suspect nature of the kind of testimony at issue in Ledet: "We must also bear in mind that it is not unusual for one of two convicted accomplices to seek to assume the entire fault and thus exculpate his co-defendant by the filing of a recanting affidavit." Id. at 739. Also, like the Newsom opinion, the Ledet opinion stated that the "peculiar circumstances of this case"—including ambiguous facts about who had bought the heroin and the fact that "total and complete possession by Bourg, the owner and driver of the
support of its holding, "Every practicable precaution should be taken to insure that the verdict really speaks the truth, for if it does not an innocent man may be imprisoned for years."203

In response to Metz’s argument based on Fifth Circuit precedent, the Metz court announced that, even though it had granted new trials to Lavonne Newsom and Loyal S. Ledet, it would not adopt a “blanket proposition” that a codefendant’s postconviction exculpatory offer of evidence constitutes newly discovered evidence.204 The court explained that its earlier decisions in Newsom and Ledet did not warrant such a proposition.205 The court distinguished the testimony offered in Newsom from that in Metz on the basis that Newsom’s codefendant Linton had “exculpated Newsom at the sentencing stage of trial,” whereas Metz’s codefendant Schiller had provided his affidavit only after his own sentencing.206 Thus, the court implied that Linton’s testimony may have been more trustworthy as it presumably was made against Linton’s penal interest, while Schiller had nothing to lose when he offered his testimony to Metz.207 Furthermore, the Metz court pointed out the significance of the “particular circumstances” of the two older cases, including the possibly biased jury panel in Newsom and what it deemed “the ambiguous fact situation” in Ledet.208

While the Metz court, in its 1981 opinion, chose not to adopt a “blanket proposition” that would allow a codefendant’s postconviction exculpatory testimony to be deemed newly discovered for purposes of a Rule 33 motion, the court, interestingly, did not state that its holding established a contrary proposition that categorically would prevent such proof from being considered newly discovered even though it was unavailable at trial.209 Nevertheless, more recent opinions by the Fifth Circuit,210 as well as opinions by the other circuits that hold the majority view regarding motions for new trials based on a codefendant’s postconviction exculpatory

automobile would be entirely consistent with Ledet’s complete innocence or knowledge of, or dominion over, the narcotics”—required that a new trial be granted. Id.

203. Newsom, 311 F.2d at 79.
204. Metz, 652 F.2d at 480.
205. Id.
206. Id.
207. Id. But see United States v. Owen, 500 F.3d 83, 90 (2d Cir. 2007), cert. denied, 128 S. Ct. 1459 (2008) (rejecting defendant’s argument that “courts should distinguish between pre- and post-sentence exculpatory statements” in determining whether evidence is newly discovered); supra notes 270–74 and accompanying text.
208. Metz, 652 F.2d at 480; see also supra notes 201–02 and accompanying text.
209. See generally Metz, 652 F.2d 478.
210. E.g., United States v. Freeman, 77 F.3d 812, 817 (5th Cir. 1996) (“When a defendant is aware of a codefendant's proposed testimony prior to trial, it cannot be deemed newly discovered under Rule 33 even if the codefendant was unavailable because she invoked the Fifth Amendment.”).
testimony, have gone further than the court in Metz, all but closing the door to motions based on such testimony.211


In Jasin, the U.S. Court of Appeals for the Third Circuit addressed for the first time the issue of whether posttrial exculpatory statements by a codefendant who used the Fifth Amendment privilege may constitute newly discovered evidence under Rule 33.212 The court ruled that exculpatory proof from Richard Clyde Ivy, the codefendant in Jasin, could not form the basis for a Rule 33 motion based on newly discovered evidence because it failed the "newly discovered" prong of the Third Circuit's five-pronged version of the Berry test.213 The Jasin court used the same two rationales cited by the Metz court: that the defendant Thomas P. Jasin was "aware of the substance" of his codefendant's testimony during trial214 and that courts should be wary of exculpatory statements from a convicted codefendant with nothing to lose.215

However, unlike the Fifth Circuit's decision in Metz,216 the Jasin court's finding that Jasin was "aware" of his codefendant's testimony was not premised on the fact that Jasin knew the specifics of what Ivy would say if he were to testify.217 Also, while the Metz court did not make any "blanket propositions" regarding the viability of a Rule 33 motion based on postconviction testimony by a codefendant,218 the Third Circuit in Jasin established a "straightforward bright-line rule" that "a codefendant's testimony known to the defendant at the time of trial cannot be considered 'newly discovered evidence' under Rule 33, regardless of the codefendant's unavailability during trial because of invocation of his Fifth Amendment privilege."219

Jasin had been convicted of conspiring to evade the international arms embargo against South Africa by transferring millions of dollars worth of military weapons and components to and from South Africa in violation of the Arms Export Control Act, the Comprehensive Anti-Apartheid Act, and

211. E.g., Owen, 500 F.3d at 89 ("Rule 33 does not authorize district courts to grant new trials on the basis of [evidence that existed during trial but was unavailable because a codefendant had availed himself of his Fifth Amendment privilege] since it is not newly discovered, but merely newly available."); United States v. Diggs, 649 F.2d 731, 740 (9th Cir. 1981), overruled on other grounds by United States v. McConney, 728 F.2d 1195 (9th Cir. 1984) ("When a defendant who has chosen not to testify subsequently comes forward to offer testimony exculpating a co-defendant, the evidence is not 'newly discovered.'"); see infra notes 214–15, 241, 246–50 and accompanying text.


213. Id. at 369.

214. Id. at 367–69.

215. Id. at 365.

216. See supra notes 190–93 and accompanying text.

217. Compare supra notes 190–93 and accompanying text, with infra notes 235–40 and accompanying text.

218. See supra notes 204–09 and accompanying text.

219. Jasin, 280 F.3d at 368.
federal money laundering statutes. The government accused him of participating in the conspiracy while working as a "high-ranking officer" at an equipment company. At trial, Jasin testified that he was aware of American-made products being sent to South Africa, but that he had been advised that his employers had received authorization from Washington to send them.

About a year after Jasin's conviction, his former supervisor and codefendant, Ivy, who had pleaded guilty, signed an affidavit that stated that Jasin had no knowledge of the conspiracy. At trial, Jasin subpoenaed Ivy to testify, but Ivy invoked the Fifth Amendment. After being convicted, Jasin hired an investigator to question Ivy. Jasin later obtained an exculpatory affidavit from Ivy. Relying on Ivy's affidavit, Jasin moved for a new trial on the ground of newly discovered evidence. The district court denied the motion.

Affirming the district court's ruling, the Third Circuit stated that Jasin had been aware of Ivy's possible testimony at trial, and, thus, the language of Rule 33 required that his motion be denied. The court reasoned that even though Jasin had no way of introducing Ivy's testimony at trial, the "unambiguous language" of Rule 33 "contemplates granting of a new trial on the ground of 'newly discovered evidence' but says nothing about newly available evidence." The court concluded that the phrase "newly discovered" in Rule 33 requires that a moving defendant have been unaware of the evidence at trial. The court wrote that its holding "is premised entirely on the conclusion that Jasin was aware of the substance of Ivy's testimony at trial." If, instead, Ivy had offered evidence of which Jasin

220. Id. at 357.
221. Id.
222. Id. at 358.
223. Id. at 359.
224. Id. (explaining that Ivy signed an affidavit in which he stated that he told Jasin that the company's export of the components "had Washington's approval" and that Jasin had even warned him that, in exporting components to South Africa, the company "needed to be cautious that South Africans not obtain windtunnel data from tests").
225. Id.
226. Id. The court in United States v. Jasin explained that, according to the investigator, "Ivy stated that Jasin had no knowledge of the illegal conspiracy and never attended any meetings where the conspiracy had been discussed." Id.
227. Id.
228. Id.
229. Id.
230. Id. at 368 ("[S]uch an approach... is anchored in the plain meaning of the text of Rule 33.").
231. Id.
232. Id. at 368–69 (affirming the district court's denial of Jasin's Rule 33 motion based on the fact that Jasin failed to satisfy the "first requirement" under the Third Circuit's Berry test, "for it is undisputed that Jasin knew of the substance of Ivy's testimony before trial").
233. Id. at 362 n.7.
“had no knowledge” at trial, the opinion stated, the testimony could satisfy the “newly discovered” prong of the test for Rule 33 motions.\textsuperscript{234}

Even though the opinion did not indicate that Jasin had spoken to Ivy about the substance of possible testimony at the trial stage (as Metz had spoken to Schiller), the court in \textit{Jasin} supported its notion that Jasin was aware of Ivy’s testimony before trial by stating that “nowhere in his briefs or the record” did Jasin indicate that he was unaware of the substance of Ivy’s statements.\textsuperscript{235} The Third Circuit wrote that it was “undisputed that Jasin knew of the substance of Ivy’s testimony before trial.”\textsuperscript{236} However, in claiming that Jasin was aware of the substance of Ivy’s testimony, the court did not refer to Jasin’s knowledge of particulars of what Ivy could say, but merely to Jasin’s general awareness that Ivy could exonerate him: “Jasin was aware of the substance of Ivy’s testimony—namely, that Jasin was not involved in or aware of the conspiracy.”\textsuperscript{237} The \textit{Jasin} court claimed that its decision, which noted that Jasin had not disputed that he had known at trial “the substance” of Ivy’s testimony,\textsuperscript{238} does not rule out the possibility of basing a Rule 33 motion on posttrial exculpatory testimony by a codefendant where the defendant “had no knowledge” of such evidence at trial.\textsuperscript{239} However, by specifying that Jasin’s awareness may have consisted merely of cognizance that Ivy knew that “Jasin was not involved in or aware of the conspiracy,” the opinion implicitly suggested that a defendant’s general awareness that his codefendant has the ability to exculpate him is enough to require the denial of the motion.\textsuperscript{240}

The Third Circuit in \textit{Jasin} announced the adoption of a “bright-line rule” that excludes all posttrial exculpatory testimony from a codefendant whenever the defendant was aware during trial that the codefendant could exculpate him, regardless of whether that testimony is available at trial.\textsuperscript{241} The Third Circuit extolled the value of the “bright-line rule,” suggesting that it would have the practical effect of safeguarding convictions from

\begin{footnotesize}
\begin{enumerate}
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\item Id.
\item Id.
\item Id. at 368–69. \textit{But see id.} at 369 (Ambro, J., concurring) (“The record does not show that Jasin knew at trial what Ivy would have testified.”).
\item Id. at 367 (majority opinion).
\item Id. at 368 n.10, 362 n.7.
\item Id. at 362 n.7.
\item Id. at 367. \textit{But see id.} at 369 (Ambro, J., concurring). Judge Thomas L. Ambro disagreed with the Third Circuit’s conclusion that Jasin was aware of Richard Clyde Ivy’s testimony before trial. Ambro reasoned that a defendant’s “general awareness” that his codefendant could exonerate him should not be sufficient grounds on which to conclude that the defendant was aware at trial of his codefendant’s testimony:
\begin{quote}
In my view, this case survives the first... prong because Jasin not only lacked the statements in Ivy’s affidavit at his trial, he did not even have particularized knowledge of what Ivy would say... [T]he only ‘evidence’ that existed in 1992 was Jasin’s general awareness that Ivy knew the extent of his involvement in the conspiracy. Such awareness cannot substitute for particularized information.
\end{quote}
\item Id. at 368 (majority opinion).
\end{enumerate}
\end{footnotesize}
exculpatory proof that is "inherently suspect." The court explained the rationale for "casting a skeptical eye" on a codefendant's postconviction exculpatory testimony.243 Such a codefendant, the Third Circuit explained, has little or nothing to lose and, thus, may be willing to make false exculpatory statements.244 The court quoted United States v. Reyes-Alvarado, in which the U.S. Court of Appeals for the Ninth Circuit explained the dangerous characteristics of testimony offered by already convicted codefendants:

It would encourage perjury to allow a new trial once co-defendants have determined that testifying is no longer harmful to themselves. They may say whatever they think might help their co-defendant, even to the point of pinning all the guilt on themselves, knowing they are safe from retrial. Such testimony would be untrustworthy and should not be encouraged.245

While the Third Circuit claimed that the Jasin holding did not impose a "per se" ban on newly available codefendant testimony and, rather, banned such testimony "only if the defendant was aware of the substance of the testimony at trial,"246 arguably, the U.S. Courts of Appeals for the Eighth and Ninth Circuits have drawn bright-line rules that seem to impose categorical bans. In United States v. Diggs,247 the Ninth Circuit's language suggested that postconviction exculpatory testimony offered by a codefendant could never constitute newly discovered evidence: "[W]hen a defendant who has chosen not to testify subsequently comes forward to offer testimony exculpating a co-defendant, the evidence is not 'newly discovered.'"248 Subsequent Eighth and Ninth Circuit decisions have quoted that statement from Diggs when denying motions for new trials based on offers of postconviction testimony from codefendants.249

242. Id. at 365 ("The rationale for casting a skeptical eye on such exculpatory testimony is manifest."); id. at 368 ("[T]here are compelling practical reasons to reject [Jasin's] argument."). But see Jerome Hall, Objectives of Federal Criminal Procedure Revision, 51 YALE L.J. 723, 729 (1942) (discussing the fallacy of implementing rules based on the fact that "the probabilities are . . . great that the accused committed the crimes charged against them"). Jerome Hall states, "If we cleave to the ethics of civilized peoples, we must reject statistics, or rather use them where they function, and protect each individual accused person by traditional safeguards and recognized canons of fairness." Id. at 729; see also White, supra note 131, at 14 ("Surely finality and quickness must take a back seat to fairness and accuracy. The challenge for appellate courts is to determine how to assure that the fundamental fairness prevails over procedural rigidity.").


244. Id.

245. Id. (quoting United States v. Reyes-Alvarado, 963 F.2d 1184, 1188 (9th Cir. 1992)) (internal quotation marks omitted).

246. Id. at 368 n.10.

247. 649 F.2d 731 (9th Cir. 1981), overruled on other grounds by United States v. McConney, 728 F.2d 1195 (9th Cir. 1984).

248. Id. at 740.

249. E.g., United States v. Lofton, 333 F.3d 874, 875-76 (8th Cir. 2003); Reyes-Alvarado, 963 F.2d at 1188.
3. United States v. Owen: The "Textual Limits" of Rule 33

Unlike the Fifth Circuit in Metz, but like the Third Circuit in Jasin, the Second Circuit in Owen did create a form of a "blanket proposition" or a "bright-line rule," holding that Rule 33 does not authorize district courts to grant new trials on the basis of evidence that "existed all along and was unavail[able] only because a co-defendant . . . had availed himself of his privilege not to testify."250 As the Third Circuit had in Jasin, the Second Circuit qualified its rule regarding newly available testimony by specifying that such testimony only fails the requirements of the Berry test when "a defendant knew or should have known, that his codefendant could offer material testimony as to the defendant's role in the charged crime."251 However, the Owen court took the concept of a defendant's awareness of his codefendant's testimony a step further than the court had in Jasin, finding the requisite awareness in Owen's subjective knowledge of his own innocence, despite Owen's insistence that he had been unaware of his codefendant's ability to exculpate him.252 In addition, the Second Circuit disagreed with the Metz court's proposition that a codefendant's presentence exculpatory statement may deserve less skepticism than one made after the court has already imposed sentence.253

The Second Circuit relied on what it called the "plain meaning" of the text of Rule 33 to deny Owen's motion.254 The court grounded its holding—that "previously known, but newly available, evidence is not newly discovered within the meaning of Rule 33"255—in the concept that the "words employed" in a statute must be taken as the "final expression" of meaning, as long as the language of the statute is clear.256 To establish that meaning, the court quoted the Webster's dictionary definition of "discover": "to make known (something secret, hidden, unknown, or previously unnoticed)."257 According to the court, to hold that a defendant could "'discover' evidence after trial that [the defendant] was aware of prior to trial" would stretch the meaning of the word "discover" beyond its dictionary definition and "common understanding."258 Therefore, the

251. Id. at 91.
252. Id.
253. Id. at 90-91; see United States v. Metz, 652 F.2d 478, 480 (5th Cir. 1981) (distinguishing a Fifth Circuit decision granting a new trial motion based on a postconviction exculpatory statement by a convicted codefendant on the basis that the particular circumstances of the case—specifically, the fact that the codefendant provided the exculpatory testimony before he was sentenced—justified granting the motion); supra notes 206-07 and accompanying text.
254. Owen, 500 F.3d at 90.
255. Id.
256. Id. at 89 (citing United States v. Mo. Pac. R.R. Co., 278 U.S. 269, 278 (1929)).
257. Id. at 90 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 647 (2002)) (internal quotation marks omitted).
258. Id. at 89-90.
Second Circuit concluded that it was "not inclined to expand the scope of Rule 33 beyond its textual limits."\textsuperscript{259}

Once the court in \textit{Owen} established that the text of Rule 33 excludes from the category of newly discovered evidence any proof of which the defendant was "aware" at trial, the court considered the meaning of the word "aware."\textsuperscript{260} The court defined awareness differently than the courts did in \textit{Metz} and \textit{Jasin}, where the defendants admitted or failed to deny that, at trial, they had been aware, to some extent, of their codefendants' statements.\textsuperscript{261} In \textit{Owen}, the court based its finding—that Owen was aware of the proffered evidence—on what Owen "knew or should have known," based on Owen's subjective experience, even though Owen claimed that he was unaware at trial of his codefendant Samuels's testimony.\textsuperscript{262} The \textit{Owen} court implied that a defendant is aware of testimony as long as that defendant was aware that the codefendant had the capacity to offer it, regardless of whether the defendant actually knew what the codefendant would say.\textsuperscript{263} In response to Owen's argument that he had been unaware at trial of Samuels's ability to exculpate him, the Second Circuit responded that Owen himself was "aware of what he did and did not speak [about] with Samuels and Baroody."\textsuperscript{264} Thus, the opinion asserted, if Owen truly had not spoken to his codefendants about transporting marijuana, Owen would have known before trial that his codefendants "could have attested to this fact."\textsuperscript{265} In other words, Owen's awareness of Samuels's testimony came from Owen's subjective awareness of his own personal experiences with Samuels: "[T]he substance of Samuels's testimony was known to Owen from the day he met Samuels at the Bronx warehouse and took possession of the drugs . . . ."\textsuperscript{266}

In addition to basing its holding on the language of Rule 33 and its view of Owen's awareness at trial of the exculpatory evidence, the Second

\textsuperscript{259} Id. at 90.
\textsuperscript{260} Id. at 91.
\textsuperscript{261} United States v. Jasin, 280 F.3d 355, 362 n.7 (3d Cir. 2002) ("[N]owhere in his briefs or the record does Jasin intimate that he was unaware of the substance of Ivy's statements at trial."); United States v. Metz, 652 F.2d 478, 480 (5th Cir. 1981) ("In an affidavit . . . Metz's former trial counsel, William Moran, avers that the entire substance of Schiller's affidavit is consistent with what Schiller and/or Schiller's counsel had relayed to him prior to their trial . . . .'').
\textsuperscript{262} Owen, 500 F.3d at 91.
\textsuperscript{263} Id.; see also United States v. Sims, 72 F. App'x 249, 252 (6th Cir. 2003) (concluding that defendant Sims knew of his codefendant's exculpatory testimony based on the fact that the defendant knew that his codefendant was involved in the crime, stating, "since Defendant asserts that he was not involved in this transaction, then he certainly knew that Hinkle, as a party to the transaction, was in possession of exculpatory information"); United States v. Glover, 21 F.3d 133, 138 (6th Cir. 1994) (noting that Glover was "well aware of [his codefendant] Morgan's testimony prior to trial" based on the fact that Glover's attorney "knew that he (Morgan) existed" and had unsuccessfully attempted to subpoena Morgan before trial).
\textsuperscript{264} Owen, 500 F.3d at 91.
\textsuperscript{265} Id.
\textsuperscript{266} Id. at 91 n.5.
Circuit joined other courts\textsuperscript{267} in expressing skepticism of any codefendant’s postconviction exculpatory testimony.\textsuperscript{268} The court quoted Judge Henry J. Friendly, who had advised that courts “must exercise great caution in considering evidence to be ‘newly discovered’ when it existed all along and was unavail[able] only because a co-defendant, since convicted, had availed himself of his privilege not to testify.”\textsuperscript{269}

Though the Fifth Circuit had implied in \textit{Metz} that it might be willing to order a new trial based on postconviction exculpatory testimony provided by a codefendant before that codefendant has been sentenced,\textsuperscript{270} the \textit{Owen} court asserted that it did not matter that Samuels came forward before he was sentenced.\textsuperscript{271} The \textit{Owen} court did acknowledge that most cases in which courts have held that posttrial exculpatory statements by codefendants do not constitute newly discovered evidence have involved statements made after the codefendant was sentenced.\textsuperscript{272} At the same time, the \textit{Owen} court observed that “not a single circuit has indicated that a presentence statement could be considered newly discovered because it is more reliable.”\textsuperscript{273} In rejecting Owen’s argument that the timing of Samuels’s statement was significant, the \textit{Owen} court reiterated its ban on newly available testimony of which the defendant was aware at trial: “Our holding that previously known, but newly available, evidence is not newly discovered within the meaning of Rule 33 is rooted in the plain meaning of the Rule’s text. If a codefendant’s testimony is not in fact ‘newly discovered,’ the timing of its delivery is irrelevant.”\textsuperscript{274}

Toward the end of the \textit{Owen} opinion, the court noted that the possibility of severance provides a remedy for a defendant like Owen, who “is denied the benefit of any potentially exculpatory testimony the codefendant might

\marginnote{267. \textit{See}, e.g., United States v. Jasin, 280 F.3d 355, 365 (3d Cir. 2002) (“The rationale for casting a skeptical eye on such testimony is manifest.”); United States v. Reyes-Alvarado, 963 F.2d 1184, 1188 (9th Cir. 1992); \textit{see also supra} notes 176–77, 242–45 and accompanying text.}

\marginnote{268. \textit{Owen}, 500 F.3d at 89.}

\marginnote{269. \textit{Id.} (alteration in original) (quoting United States v. Jacobs, 475 F.2d 270, 286 n.33 (2d Cir. 1973)).}

\marginnote{270. \textit{See United States v. Metz}, 652 F.2d 478, 480 (5th Cir. 1981); \textit{supra} notes 205–06 and accompanying text.}

\marginnote{271. \textit{Owen}, 500 F.3d at 90 (“We also reject Owen’s argument that, in determining whether exculpatory statements by codefendants constitute newly discovered evidence, courts should distinguish between pre- and post-sentence exculpatory statements.”).}

\marginnote{272. \textit{Id.}}

\marginnote{273. \textit{Id.}}

\marginnote{274. \textit{Id.} The \textit{Owen} court did point out that while a presentence statement’s implication of “reliability or trustworthiness” has no bearing on whether evidence satisfies the “newly discovered” prong of the \textit{Berry} test, such “reliability or trustworthiness . . . is something that may be considered under other elements in light of the totality of the circumstances in a particular case.” \textit{Id.} at 90 n.3; \textit{see also supra} note 195 (noting that in \textit{United States v. Freeman}, 77 F.3d 812 (5th Cir. 1996), the Fifth Circuit stated that it had been appropriate for the district court to consider whether Freeman’s codefendant served her own interest by testifying when the court evaluated the codefendant’s credibility under the “likelihood of acquittal” prong of the \textit{Berry} test).}
have provided." The court explained that the district court may grant a severance if it is persuaded that the defendant's inability to introduce the codefendant's testimony would prejudice the defendant. The Second Circuit observed that the court could conduct the codefendant's trial first or that the prosecutor could confer limited immunity on the codefendant so that he may testify truthfully without incriminating himself. Acknowledging that a court may be unwilling to sever, the Second Circuit commented that, in such a case, the defendant's "remaining option is to take the stand and convey to the jury himself any facts—including dealings with codefendants—that would support a not guilty verdict."

B. The Minority View: Newly Discovered and Newly Available

Not all agree with the reasoning of the circuits that take the majority position. The First Circuit has concluded that postconviction exculpatory statements by codefendants may constitute newly discovered evidence. In United States v. Montilla-Rivera, the First Circuit explained that it based its position on the policy that courts will better serve the "interest of justice," in accordance with Rule 33, by interpreting the first prong of the Berry test as encompassing both newly discovered and newly available evidence. The First Circuit in Montilla-Rivera specifically addressed the majority's concern that exculpatory evidence from a codefendant is

275. Owen, 500 F.3d at 91. The court in Owen also pointed out that a defendant's failure to move for a severance can "manifest a lack of diligence in procuring the admission" of testimony. Id. at 91 n.5. However, the U.S. Court of Appeals for the Second Circuit emphasized that even if Owen had satisfied the diligence prong of Berry, the district court's ruling still would have been erroneous because the testimony was not in fact newly discovered. But see United States v. Lofton, 333 F.3d 874, 876 (8th Cir. 2003), where the U.S. Court of Appeals for the Eighth Circuit implied that Richard Lofton's failure to move for a severance could factor into a finding that the evidence on which Lofton based his new trial motion failed the "newly discovered" prong of the Berry test. Lofton moved for a new trial based on postconviction testimony by his codefendant, Fabian Espinosa. The district court denied his motion based on the "newly discovered" prong of the Eighth Circuit's Berry test. Affirming the district court, the Eighth Circuit stated, "The district court denied the new trial motion on the ground that Espinosa's testimony would not qualify as evidence newly discovered after trial, one of the facts Lofton must establish to warrant a new trial on the basis of newly discovered evidence." Id. at 875. In supporting its decision, the Eighth Circuit explained that Lofton could have called Espinosa to testify at trial and that if Espinosa pleaded the Fifth Amendment, "Lofton could have moved to sever his trial from Espinosa's, which would have tested whether Espinosa's unavailable testimony would deprive Lofton of a fair trial." Id. at 876.

276. Owen, 500 F.3d at 91.

277. Id. at 92.

278. Id.; see, e.g., United States v. Metz, 652 F.2d 478 (5th Cir. 1981) (involving a defendant who was convicted and moved for a new trial after his motion for a severance at the trial stage was denied).

279. Owen, 500 F.3d at 92.

280. See United States v. Hernández-Rodríguez, 443 F.3d 138 (1st Cir. 2006); United States v. Montilla-Rivera, 115 F.3d 1060, 1066 (1st Cir. 1997).

281. 115 F.3d 1060.

282. Id. at 1066.
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inherently untrustworthy; the court responded that allowing a codefendant’s postconviction exculpatory statements to satisfy the first prong of Berry would not make courts vulnerable to untrustworthy motions because such motions would still be required to pass muster under the other prongs of the Berry test. In addition, in a concurring opinion in Jasin, Judge Thomas L. Ambro of the Third Circuit disagreed with the majority and posited that Rule 33’s “newly discovered evidence” phrase does not proscribe the evaluation of postconviction exculpatory testimony from a codefendant under the newly discovered evidence provision Rule 33.

1. First Circuit: Cautious Evaluation Under Berry

In Montilla-Rivera, Fernando Montilla-Rivera applied for a new trial after he was convicted of aiding and abetting in the distribution of two kilograms of cocaine within one thousand feet of a school. At trial, the government claimed that Montilla-Rivera had acted as the “lookout” in the drug deal, while Montilla-Rivera countered that he was merely present during a drug deal that occurred at his job site and was not involved in any way. Officers arrested Montilla-Rivera after an undercover informant purchased drugs from Montilla-Rivera's codefendant, Miguel Calderon-Salmiento, at Montilla-Rivera’s workplace, in Montilla-Rivera’s presence. Two days before the arrest of Calderon-Salmiento and Montilla-Rivera, the informant had engaged in a taped conversation with Calderon-Salmiento, which, according to the Montilla-Rivera opinion, “was clearly about arranging a drug purchase.” During this phone conversation, Calderon-Salmiento told the informant, “Come on down here ... to go over to the mechanic at 12.” The opinion points out that, at the time of the conversation, “the mechanic working at the mechanic’s shop to which Calderon[-Salmiento] referred was Montilla[-Rivera].” Montilla-Rivera claimed at trial that Calderon-Salmiento instead had been referring to Ramon Zorilla, a third codefendant.

Montilla-Rivera attempted to call both Calderon-Salmiento and Zorilla at trial, but both codefendants, who had pleaded guilty, refused to testify. After Montilla-Rivera was convicted and his codefendants were sentenced, Calderon-Salmiento and Zorilla submitted affidavits claiming that Montilla-
Rivera was not involved in the drug deal. Montilla-Rivera moved for a new trial on the basis of these affidavits.

In discussing whether Montilla-Rivera’s motion satisfied the requirements of Rule 33, the court focused on precedent, pointing out that the First Circuit “has, for almost twenty years, held that the ‘newly discovered’ language of Rule 33” and the first prong of its “four part” Berry test “encompass[] evidence that was ‘unavailable.” Unlike courts that adhere to the majority view and categorically reject evidence as not newly discovered where the defendant was aware of that evidence at trial, courts in the First Circuit may classify evidence as newly discovered if it was unavailable to the defendant at trial, even if the defendant knew about it before or during trial. The Montilla-Rivera opinion attributed its holding to Vega Pelegrina v. United States, a previous First Circuit decision. In reaching its holding in Vega Pelegrina, the First Circuit indicated that a court could consider testimony to be newly discovered if that testimony was unavailable to a defendant at trial, even if the defendant knew at trial that the witness existed: “The fact that Santiago’s existence was known to movant does not . . . indicate that Santiago’s present account of the drug transaction is not newly discovered evidence; Santiago had indicated to Rodriguez that he would not testify in the defendants’ behalf at trial . . . .” The Montilla-Rivera opinion explained that the first prong of its four-part test for newly discovered evidence requires that the evidence be “‘unknown or unavailable to the defendant at [the] time of trial.’”

The court in Montilla-Rivera also asserted that Rule 33 encompasses both newly discovered and newly available evidence because of the

293. Id.
294. Id.
295. Id. at 1066 (citing Vega Pelegrina v. United States, 601 F.2d 18, 21 (1st Cir. 1979)).
296. See, e.g., United States v. Owen, 500 F.3d 83, 89 (2d Cir. 2007), cert. denied, 128 S. Ct. 1459 (2008) (joining “the majority of circuits” in holding that “Rule 33 does not authorize district courts to grant new trials” on the basis of “evidence that was known by the defendant prior to trial, but became newly available after trial” because such evidence “is not newly discovered, but merely newly available”); United States v. Muldrow, 19 F.3d 1332, 1339 (10th Cir. 1994) (“If a former codefendant who originally chose not to testify subsequently comes forward and offers testimony exculpating a defendant, the evidence is not newly discovered if the defendant was aware of the proposed testimony prior to trial.”); see also supra note 166 and accompanying text.
297. Montilla-Rivera, 115 F.3d at 1066 (explaining that the “first question” of the U.S. Court of Appeals for the First Circuit’s “four part test” inquires “whether the evidence ‘was unknown or unavailable to the defendant at time of trial’” (quoting United States v. Wright, 625 F.2d 1017, 1019 (1st Cir. 1980))).
298. 601 F.2d 18 (1st Cir. 1979).
299. The circumstances in Vega Pelegrina v. United States were different than those in United States v. Montilla-Rivera. Vega Pelegrina involved a government informant who refused to testify at trial, not a codefendant who had asserted the Fifth Amendment at trial. Id. at 20.
300. Id. at 21.
301. Montilla-Rivera, 115 F.3d at 1066 (quoting United States v. Wright, 625 F.2d 1017, 1019 (1st Cir. 1980)).
"interest of justice" standard of Rule 33.\textsuperscript{302} The court reasoned that, if Rule 33 directs judges to grant new trials when "the interest of justice" so requires, "there seems little distinction" between evidence that a defendant could not present because he did not know about it and evidence that a defendant could not present because it was unavailable.\textsuperscript{303}

The First Circuit addressed the concern expressed by the majority of circuits that allowing such testimony to be classified as newly discovered will leave courts vulnerable to unreliable testimony from codefendants who have nothing or little to lose by testifying.\textsuperscript{304} The First Circuit acknowledged the need for caution in evaluating new trial motions based on postconviction exculpatory evidence.\textsuperscript{305} However, the Montilla-Rivera court stated that, even in view of its holding that motions based on so-called newly available evidence should satisfy the first prong of the Berry test, courts could guard against unreliable evidence by ensuring that the other three prongs of the First Circuit's four-part test for evaluating Rule 33 motions had been met.\textsuperscript{306}

\textsuperscript{302} Id.; see supra notes 113–15 and accompanying text. But see United States v. DiBernardo, 880 F.2d 1216, 1224 (11th Cir. 1989) (interpreting the "interest of justice" standard of the rule as a separate and distinct ground for a new trial from that of newly discovered evidence).

\textsuperscript{303} Montilla-Rivera, 115 F.3d at 1066.

\textsuperscript{304} Id.; see United States v. Reyes-Alvarado, 963 F.2d 1184, 1188 (9th Cir. 1992); supra text accompanying notes 176–77.

\textsuperscript{305} Montilla-Rivera, 115 F.3d at 1066.

\textsuperscript{306} Id. ("We believe the better rule is not to categorically exclude the testimony of a codefendant who asserted his Fifth Amendment privilege at trial under the first prong but to consider it, albeit with great skepticism, in the context of all prongs of our four part test."). In fact, in many cases in which a defendant has brought a new trial motion based on postconviction exculpatory testimony from a codefendant, the motion would fail to satisfy a prong of the Berry test other than the "newly discovered" prong. For instance, in many cases in which defendants were denied new trials because of the court's position that postconviction exculpatory testimony cannot satisfy the first element of Berry, defendants' motions probably also would have failed the "diligence" prong of Berry. E.g., United States v. Owen, 500 F.3d 83, 91 & n.5 (2d Cir. 2007), cert. denied, 128 S. Ct. 1459 (2008) (explaining that Owen's failure to move to sever his trial from Samuels and Baroody's manifests "a lack of diligence in procuring the admission of Samuels'[s] testimony"); United States v. Lofton, 333 F.3d 874, 876 (8th Cir. 2003) (noting that Lofton could have called his codefendant to the stand at trial and moved to sever if the codefendant refused to testify); United States v. Zarate, 39 F. App'x 523, 524–25 (9th Cir. 2002) ("Zarate failed timely to develop Sample's testimony. Though Zarate knew Sample had information pertinent to her defense, she never interviewed him, subpoenaed him, or inquired into his willingness to testify at her trial. Nor did Zarate inform the judge that she was having trouble locating Sample . . . . Zarate did not seek immunity for Sample to testify and . . . she did not seek a continuance in order to investigate Sample's assistance with her defense. Such failures exhibit a lack of due diligence in uncovering exculpatory evidence." (citation omitted)); United States v. Quintanilla, 193 F.3d 1139, 1147 (10th Cir. 1999) ("Defendant's counsel employed no diligence in attempting to gather this information. Counsel did not call Viveros as a witness at trial, nor did counsel adduce any testimony outside the jury's presence that Viveros would assert his Fifth Amendment rights and not testify . . . ."); United States v. Theodosopoulos, 48 F.3d 1438, 1449 (7th Cir. 1995) ("Even if we assume (however unlikely it may be) that Ghanayem had no knowledge of Shunnarah's potential testimony, Ghanayem
The First Circuit’s decisions after Montilla-Rivera—its decision in a subsequent appeal brought by Montilla-Rivera after the district court denied his Rule 33 motion on remand and its 2007 decision in United States v. Hernández-Rodríguez—have been consistent with the First Circuit’s assertion that courts can exercise caution by carefully considering the other three prongs of its four-part Berry test. On remand, the district court denied Montilla-Rivera’s motion for a new trial based on the finding that Montilla-Rivera’s codefendants’ testimony was not credible and, thus, unlikely to lead to an acquittal. The First Circuit affirmed that denial on appeal. Confronted again with a new trial motion based on a codefendant’s postconviction exculpatory testimony in Hernández-Rodríguez, the First Circuit reiterated the importance of proceeding carefully in evaluating such motions. The opinion noted that the First Circuit has highlighted the “need for ‘great skepticism’ in such cases” because convicted, sentenced codefendants have little to lose and may even have something to gain by their testimony. The court adhered to its holding in Montilla-Rivera that the evidence offered by José Ramón Hernández-Rodríguez satisfied the “newly discovered” prong of Berry, but emphasized the necessity of proceeding through the remaining three prongs “with the appropriate caution.” Accordingly, the First Circuit in Hernández-Rodríguez remanded the case, instructing the lower court to evaluate the credibility of the evidence to determine whether the evidence would likely change the result.

cannot demonstrate that he exercised the requisite ‘due diligence.’ He took no steps to secure Shunnarah’s testimony.

Other such motions would have been denied because of the fact that the testimony probably would not have led to an acquittal, even if the courts had deemed the evidence newly discovered under the first prong of Berry. E.g., United States v. Jasin, 280 F.3d 355, 369 (3d Cir. 2002) (Ambro, J., concurring) (“I do not believe that Jasin can satisfy the fifth ... prong—that the new evidence would probably result in his acquittal.”); United States v. Freeman, 77 F.3d 812, 818 (5th Cir. 1996) (“In view of the overwhelming circumstantial evidence and the questionable credibility of Vasquez’s testimony, the district judge held that even if the evidence were newly discovered, a new trial would probably not result in Freeman’s acquittal.”); United States v. Glover, 21 F.3d 133, 139 (6th Cir. 1994) (“Even if Glover were able to demonstrate that Morgan’s testimony was newly discovered, he cannot prove that the evidence would likely produce an acquittal if the case were retried. ... We find it highly unlikely that ... testimony from a readily-impeachable convicted drug dealer like Morgan would convince a jury otherwise.”); United States v. Muldrow, 19 F.3d 1332, 1339-40 (10th Cir. 1994) (“Defendant has failed to establish any newly discovered evidence. Further, the portion of Mr. Sevart’s trial testimony proffered as newly discovered evidence would not have changed the result of either the suppression hearing or the trial. It did not exculpate Defendant.”); United States v. Offutt, 736 F.2d 1199, 1202 (8th Cir. 1984) (“Sinor’s testimony would probably increase the chances of conviction rather than an acquittal in a new trial.”).

307. 443 F.3d 138 (1st Cir. 2006).
309. United States v. Montilla-Rivera, 171 F.3d 37, 42 (1st Cir. 1999).
310. Hernandez-Rodriguez, 443 F.3d at 144 (citing Montilla-Rivera, 115 F.3d at 1066).
311. Id.
312. Id. at 148.
2. Judge Ambro’s Concurrence in *Jasin*: The Text of Rule 33

In his concurring opinion in the Third Circuit’s decision in *Jasin*, Judge Ambro offered a linguistic interpretation of Rule 33 that differed from the Second Circuit’s analysis in *Owen*. Ambro proposed that the words “discovered” and “evidence” must be considered together as part of the rule’s “newly discovered evidence” phrase. Ambro questioned both the majority’s proposition that *Jasin* was “aware” of the substance of his codefendant’s testimony at trial and the majority’s “implicit conclusion” that the “evidence” in question even existed at the time of *Jasin*’s trial.

First, Ambro disagreed with the majority’s conclusion that the evidence could not be considered “discovered” because *Jasin* was “aware” of his codefendant Ivy’s testimony during trial. Ambro explained that *Jasin*’s “general awareness” that Ivy knew that *Jasin* was not involved in the conspiracy did not substitute for a “particularized” awareness of Ivy’s testimony. According to Ambro, “[T]his case survives the [newly discovered] prong because *Jasin* not only lacked the statements in Ivy’s affidavit at his trial, he did not even have particularized knowledge of what Ivy would say.”

Ambro also called attention to the importance of the word “evidence” in the phrase “newly discovered evidence.” Ambro reasoned that, regardless of whether *Jasin* was aware of Ivy’s possible testimony, no exculpatory admissible evidence from Ivy even existed at trial because Ivy had asserted his right to silence. *Jasin* did not possess admissible evidence, Ambro stated, until after Ivy expressed his willingness to testify and *Jasin* knew what that testimony would be. Thus, *Jasin* could not have discovered the exculpatory evidence at trial, because that evidence—that is, admissible testimony—did not exist until after trial.

III. PROPOSING DISCRETIONARY EVALUATION OF RULE 33 MOTIONS BASED ON POSTCONVICTION EXCULPATORY TESTIMONY UNDER THE BERRY TEST

This Note questions whether the pendulum has swung too far in favor of guarding the integrity of verdicts at the expense of protecting the innocent. The overwhelming majority of federal appeals courts now apply a bright-line rule that requires that district judges automatically deny motions for a
new trial based on newly discovered evidence brought by defendants who allegedly were aware at trial that their codefendants had the capacity to exonerate them, even when such defendants could not have presented the testimony at trial. However, this “bright-line rule” contravenes the spirit of Rule 33—a law that historically developed and consistently has been applied as an exercise of judicial discretion to remedy unjust convictions. This Note proposes that the First Circuit’s approach comports with the history, spirit, and language of Rule 33 and also results in a practical application of Rule 33 that, by restoring discretion to the trial judge, both provides a safety valve for wrongly convicted defendants and—through the Berry test—screens out meritless motions.

A. The Development of the New Trial Rule as an Exercise in Judicial Discretion

The origin and history of the motion for a new trial reflects the desire to promote justice by permitting judges to overturn wrongful convictions. From seventeenth-century England to modern-day America, judges have had discretionary authority to order new trials in the event that they decide that the specific circumstances of such trials led to erroneous verdicts. In America, this authority has been held largely by trial judges. Judges and legal scholars have pointed out the particular importance of the new trial motion in criminal cases, where the wrong verdict could put an innocent person in jail.

The Federal Rules of Criminal Procedure—particularly Rule 33—are grounded in the faith that trial judges will exercise their discretion prudently. Members of the Advisory Committee chose to forego defining each term in the Rules to allow leeway for local practice and expressed faith that judges would interpret the Rules appropriately. More
specifically, Rule 33's "interest of justice" standard requires judges to decide for themselves what grounds may merit new trials.\textsuperscript{331} In discussing whether to place a time limit on newly discovered evidence motions, members of the Advisory Committee and of the regional committees expressed the belief that the "good sense" of district judges would prevent guilty defendants from successfully exploiting the new trial rule to overturn justified convictions.\textsuperscript{332}

To apply Rule 33 faithfully, a trial judge confronted with a new trial motion based on postconviction exculpatory testimony would have to consider the specific facts of the case and determine, in the exercise of the judge's discretion, whether those facts meet the requirements of Berry. The trial judge, having observed the defendants and seen and heard the evidence firsthand, is in the best position to decide whether the proffered exculpatory testimony is truthful and material.\textsuperscript{333}

The trial judge certainly has the ability to discern between deserving new trial motions and undeserving ones. Despite fears expressed in many opinions of the threat posed by the untrustworthy nature of new trial motions based on the postconviction testimony of codefendants,\textsuperscript{334} judges in the United States generally have wielded their ability to grant new trials sparingly, especially when faced with motions based on newly discovered evidence.\textsuperscript{335} A bright-line rule barring judges from even considering a certain category of new trial motions contravenes the trust historically placed in trial judges and overlooks the prudence with which judges typically have wielded their discretion.

\textsuperscript{331} See supra notes 113–15 and accompanying text.
\textsuperscript{332} See supra note 125 and accompanying text.
\textsuperscript{333} See supra note 81.
\textsuperscript{334} See supra notes 176–77, 194–97, 242–45, 267–69 and accompanying text.
\textsuperscript{335} See supra notes 82–85, 132, 169 and accompanying text.
B. Honoring the Spirit of Rule 33 by Serving the Ends of Justice

Some might argue that even if courts can rely on judicial discretion to guard against undeserving new trial motions, a bright-line rule offers efficiency given that the vast majority of new trial motions based on postconviction exculpatory testimony lack merit. This argument overlooks the spirit and the purpose of Rule 33—to do justice. Although Rule 2 of the Federal Rules directs that the Rules be construed to “secure simplicity in procedure” and “the elimination of unjustifiable expense and delay,” it also instructs—in its first sentence—that the Rules are intended to lead to “the just determination of every criminal proceeding.” Speaking at the proceedings of the Institute on Federal Rules of Criminal Procedure, Arthur T. Vanderbilt, Chairman of the Advisory Committee, noted that Rule 2 of the Federal Rules of Criminal Procedure encapsulates “the spirit that is intended to motivate the application of all the sixty rules promulgated by the Supreme Court.” To be true to the spirit of Rule 33, courts should interpret the newly discovered evidence provision of the rule in a way that best incorporates both of the goals that the Federal Rules espouse—justice and efficiency.

Even though the policy requiring courts automatically to deny new trial motions based on postconviction exculpatory testimony may be efficient, the cost of that efficiency is the removal—in an entire class of cases—of the trial judge’s historical authority to protect an innocent person from an unjust conviction. Courts still may welcome the practicality of a bright-line approach, given the lack of merit of most motions based on a codefendant’s offer of postconviction exculpatory testimony. However, wrongful convictions can occur, and it is conceivable that a codefendant honestly

336. See supra notes 110–11 and accompanying text.
337. Vanderbilt, supra note 107, at 120–21.
338. A bright-line rule certainly saves time. Instead of evaluating the defendant’s proffered proof under each prong of Berry, courts that adhere to the majority view can simply refuse to address motions based on postconviction exculpatory testimony by a codefendant, as long as there is reason to believe that the defendant was aware at the trial stage that the codefendant had the capacity to exonerate him.
339. See supra note 176. Many of the motions that courts denied by using a bright-line rule clearly would have failed even if the court had considered the evidence to be “newly discovered” under the first prong of Berry. See supra note 306.
340. See Samuel R. Gross et al., Exonerations in the United States 1989 Through 2003, 95 J. CRIM. L. & CRIMINOLOGY 523, 551 (2005) (“We can’t come close to estimating the number of false convictions that occur in the United States, but the accumulating mass of exonerations gives us a glimpse of what we’re missing. We have located 340 exonerations from 1989 through 2003 . . . . Almost all the individual exonerations that we know about are clustered in two crimes, rape and murder. They are surrounded by widening circles of categories of cases with false convictions that have not been detected . . . . robberies, for which DNA identification is useless; murder cases that are ignored because the defendants were not sentenced to death; assault and drug convictions that are forgotten entirely.”); Hall, supra note 242, at 730 (“We know that under present safeguards, innocent persons are convicted, and the recent federal provision for compensation implies that their number is not negligible.” (footnote omitted)); White, supra note 131, at 7 n.1 (“The recent revelation that the guilt of convicted defendants . . . has been refuted or substantially questioned by newly-
could exculpate another defendant, even when that innocent defendant had failed to procure the exculpatory testimony at trial after trying diligently to do so.\textsuperscript{341} Automatically closing the door to this innocent defendant for the sake of judicial efficiency seems unjust, especially given Rule 2's clear directive that the Federal Rules are intended to "provide for the just determination of every criminal proceeding"\textsuperscript{342} and the fact that, in crafting Rule 33, the drafters of the Federal Rules of Criminal Procedure intended to provide adequate recourse to the wrongly convicted.\textsuperscript{343} Even if a bright-line rule saves time and draws a more discernable boundary than a case-by-case approach, courts should not sacrifice justice for the sake of efficiency;\textsuperscript{344} instead, courts should find an approach that allows them to apply Rule 33 in an efficient way without altogether foreclosing the ability to challenge an unjust verdict to a particular class of defendants.\textsuperscript{345}

C. A Fair and Efficient Solution: Considering the Facts of Each Motion Under Berry

Carefully evaluating new trial motions based on postconviction exculpatory testimony under \textit{Berry} should yield the desirable result of allowing potentially innocent defendants to bring new trial motions based on postconviction exculpatory evidence without making verdicts vulnerable to undeserving motions. By applying the \textit{Berry} test faithfully, trial courts can do justice to motions based on a codefendant's postconviction exculpatory testimony—by denying those based on false or unreliable testimony while granting those few that, in the trial judge's informed judgment, have merit.

Proper application of the \textit{Berry} test's "likelihood of acquittal" prong should help to dispense with the majority's concern that postconviction testimony from a codefendant is "inherently suspect" and "should not be encouraged."\textsuperscript{346} Under the "likelihood of acquittal" prong, courts must consider the potential unreliability of testimony.\textsuperscript{347} Judges applying this
“likelihood of acquittal” prong have denied motions because the proffered evidence was not credible enough to make an acquittal seem likely. In making a credibility determination, judges may take into account the “knowledge [they] gain[] from presiding at trial” and a potential testifying witness’s prior criminal record. The “likelihood of acquittal” inquiry places a substantial burden on defendants. If judges faced with new trial motions based on postconviction exculpatory testimony from a codefendant were to apply the Berry test strictly—armed with the awareness that convicted codefendants “may say whatever they think might help their co-defendant, even to the point of pinning all the guilt on themselves, knowing they are safe from retrial”—they would be able to identify and deny motions based on dubious testimony on the ground that the motions would not be likely to lead to an acquittal.

Faithful adherence to the Berry test should also encourage defendants to try to obtain and present any exculpatory evidence at trial, rather than waiting until after a conviction. Courts in the majority might be concerned that the opposite could occur—that permitting motions based on postconviction exculpatory testimony might encourage defendants to wait to present evidence until after the testifying codefendant has been convicted and sentenced. However, the Berry test affirmatively requires the moving defendant to demonstrate that he exercised diligence to obtain the proffered evidence before or during trial. By requiring the defendant to exercise diligence before and during trial, the Berry test provides an incentive for defendants to make every effort to obtain and present their exculpatory evidence before the verdict. Courts applying Berry have suggested that a defendant who believes that a codefendant could exculpate him must call that codefendant to testify and, if the codefendant refuses to testify, to apply for a new trial, deciding in the first instance whether the defendant’s proffered “new evidence” is credible (citing United States v. Gonzalez, 933 F.2d 417, 447 (7th Cir. 1991))).

348. See McCullough, 457 F.3d at 1166-67 (affirming a district court decision to deny a defendant’s motion on the ground that, even though the proffered evidence would probably produce an acquittal if it were believed by a jury, the evidence, which consisted of affidavits from nine prison inmates impeaching the testimony of government witnesses, was not credible); United States v. Williams, 153 F. App’x 983, 984 (8th Cir. 2005) (affirming a district court decision holding that “the sister’s testimony . . . was so lacking in credibility that it was not likely to produce an acquittal”).

349. See WRIGHT ET AL., supra note 86, § 557 (citations omitted).

350. See supra notes 153–57 and accompanying text.

351. United States v. Jasin, 280 F.3d 355, 365 (3rd Cir. 2002) (quoting United States v. Reyes-Alvarado, 963 F.2d 1184, 1188 (9th Cir. 1992)).

352. Indeed, many of the new trial motions brought on the basis of newly available postconviction testimony from a codefendant that were denied because the court held that the evidence failed the “newly discovered” prong would likely have failed to meet the requirements of the “likelihood of acquittal” prong. See supra note 306. After holding in Montilla-Rivera that the “newly discovered” prong of Berry encompassed newly available testimony and remanding, the First Circuit affirmed the district court’s subsequent denial of a new trial to Montilla-Rivera based on the “likelihood of acquittal” prong of Berry. See supra notes 308–09 and accompanying text.

353. See supra notes 140–42 and accompanying text.
for a severance. If the defendant does not exercise diligence, then the court must deny the defendant’s motion.

D. The Language of Rule 33: Reconsidering the Second Circuit’s Textual Analysis

Even though a careful evaluation of a codefendant’s posttrial exculpatory testimony under Berry would align best with the history of and policies behind the new trial rule and provide a method that is both fair and efficient, the majority of the circuit courts have concluded that the text of Rule 33 prohibits the granting of a motion based on so-called newly available testimony when the defendant was aware at trial that the codefendant had the ability to exculpate him. These courts have reasoned that, because the defendant was aware during the trial of the existence of the exculpatory evidence, that evidence clearly is not newly discovered, as the express language of Rule 33 requires, but only newly available.

However, as Judge Ambro pointed out in his concurring opinion in Jasin, such reasoning is flawed in two ways. First, the courts in the majority have interpreted the word “discovered” in a way that equates a defendant’s awareness of his own innocence with his awareness of a codefendant’s exculpatory testimony. Second, while interpreting the phrase “newly discovered evidence,” courts in the majority have focused on the word “discovered,” neglecting to give equal consideration to the meaning and significance of the word “evidence.”

Decisions like Jasin and Owen have interpreted the word “discovered” too broadly. By concluding that a defendant who has any reason to believe that a codefendant may possess exculpatory knowledge about the defendant necessarily has “awareness” of exculpatory testimony and has, therefore, “discovered” it by the time of trial, courts erroneously equate a defendant’s awareness of his own experience with a defendant’s awareness of specific proof. For example, the Second Circuit’s suggestion—that if Owen knew that he himself was innocent, he consequently must have known about Samuels’s exculpatory testimony—is not supported by the

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354. See supra note 275.
355. Many of the defendants who applied for a new trial based on previously unavailable testimony by a codefendant have made no showing that they even tried to procure the codefendant’s testimony before or during trial. If the courts had allowed newly available testimony to pass muster under the first prong of Berry, the courts still could have denied the motions under the “diligence” prong. See supra note 306.
356. See supra Part III.A–C.
357. See supra notes 231–32, 254–57, 259 and accompanying text.
360. See supra notes 236–37, 263–66 and accompanying text.
361. See supra notes 264–66.
facts described in the court's opinion. If Owen truly had been tricked into transporting marijuana under the guise of moving furniture, he may not have known whether Samuels and Baroody had been duped as well. Owen could have thought that a fourth person—unknown to Owen—had led Samuels and Baroody to believe that the three men were helping to load a truck with furniture and clothing. Furthermore, even if Owen did know that Samuels had the ability to exonerate him, Owen may not have known specifically what Samuels would say or whether Samuels would even tell the truth.

The existence of these various possibilities demonstrates the unreliability of a conclusion that a defendant's personal knowledge of his own innocence and of his pretrial dealings with a codefendant—without more—constitutes awareness and discovery of the posttrial exculpatory testimony.

Instead, the phrase "newly discovered" in the text of Rule 33 authorizes and, perhaps, requires trial judges to evaluate the circumstances of each case to determine whether, at trial, the defendant was truly aware of the particulars of what the codefendant would say if called to testify at trial. Comparing the facts in Metz, Jasin, and Owen shows how a defendant's level of awareness differs from case to case. The potential variations call for a case-by-case determination of whether a defendant truly was aware and, thus, had discovered the exculpatory evidence by the time of trial.

In addition to interpreting the term "discovered" broadly when textually interpreting Rule 33, the majority rationale also fails to address the significance of the word "evidence." Judges who have concluded that the phrase "newly discovered" necessarily excludes the testimony at issue in cases like Owen have focused on the meaning of the word "discovered,"


363. Concurring in Jasin, Judge Ambro stated his belief that it is unsound to conclude that a defendant knew the "substance" of a codefendant's testimony simply because the defendant and codefendant "shared a common experience." Jasin, 280 F.3d at 369 (Ambro, J., concurring).

364. As Judge Ambro wrote, "general awareness" that a codefendant knew of a defendant's role in a crime "cannot substitute for particularized information." Id. Even a defendant like Jasin, who admittedly was aware that his codefendant Ivy "knew the extent of his involvement in the conspiracy," id., nevertheless may not have become aware of the particular testimony the codefendant could provide or the codefendant's willingness to testify truthfully. For example, Jasin may have had many conversations with various coworkers about the legality of the company's actions and may not have remembered the details of his specific interaction with Ivy. In addition, before Ivy actually provided testimony, Jasin may not have known what Ivy remembered about their interaction. Under such circumstances, Jasin may have suspected that Ivy had the capacity to testify on his behalf, but Jasin would not have been aware of how Ivy would testify if called to do so. Judge Ambro stated, "The record does not show that Jasin knew at trial what Ivy would have testified." Id.

365. See supra Part II.A.

366. See supra notes 231–32, 257–58 and accompanying text.
without discussing whether what was discovered constituted "evidence." A trial judge might find that the defendant was aware before trial of what a codefendant could say; still, that information does not rise to the level of evidence if it cannot be used as evidence.

To do justice to the plain meaning of Rule 33, courts must consider the meaning of the word "evidence" as well as that of the term "discovered." Although the Owen opinion invoked the Webster's Dictionary definition of the word "discovered" to argue that Samuels's testimony did not constitute newly discovered evidence, it made no mention of Webster's definition of the word "evidence." In fact, the relevant definition of evidence provided by Webster's is "something that furnishes proof: testimony; specifically: something legally submitted to a tribunal to ascertain the truth of the matter." Judge Ambro pointed to the significance of the meaning of the word evidence in his Jasin concurrence, stating that evidence is "something tangible, such as testimony or documents, that a litigant can present to a factfinder." In and of itself, mere awareness or supposition that a codefendant has the capacity to exonerate the defendant is not "evidence." Certainly, a codefendant's assertion of the Fifth Amendment right to silence prevents the defendant from possessing admissible evidence, regardless of what the defendant knows at trial. Under those circumstances, evidence—meaning admissible testimony or documents—does not exist and, thus, could not have been discovered.

**CONCLUSION**

Given the facts of the Owen case, it is easy to conclude that Owen was guilty and that Samuels was lying. First, it is hard to believe that Owen was not aware that the boxes contained illegal marijuana: Owen was present at the Bronx warehouse when the truck was loaded, presumably with boxes of marijuana; the marijuana in the truck weighed four hundred pounds; Owen spent time driving in the truck; and the DEA officers noticed the "strong scent of marijuana" when they opened the back door of the truck. Second, there is other evidence of Owen's guilt: the investigators determined that the address and phone number Owen possessed for his supposed client did not exist; Owen was to receive $1800 for the moving job, but he would have had to pay more than $1200 for rental and gas.

367. See supra note 257 and accompanying text.
368. See generally United States v. Owen, 500 F.3d 83 (2d Cir. 2007), cert. denied, 128 S. Ct. 1459 (2008).
371. See supra notes 8–13 and accompanying text.
372. See supra note 3 and accompanying text.
373. See supra notes 14–18 and accompanying text.
374. See supra note 5 and accompanying text.
fees; and a witness described the furniture in the truck as "'old stuff that was pretty much garbage.'" Finally, Samuels waited until the court had convicted him, when he no longer had much to lose, before he offered to exculpate Owen. All things considered, the facts seem to lend credence to the majority courts' caution that guilty codefendants may use the "newly discovered evidence" provision of Rule 33 unscrupulously to try to exonerate an equally guilty defendant.

However, closely examined, the facts in Owen do not weigh unequivocally in favor of Owen's guilt. With the marijuana in the truck, Owen stopped at his mother's house and at the bank, leaving the truck unlocked and unattended. It seems unlikely that Owen would have acted so cavalierly had he known that the truck contained a large and valuable quantity of illegal marijuana. It is also conceivable that Owen needed money and accepted Samuels's offer of a moving job without considering the expenses he would have to incur out of his own pocket. Owen said that he was willing to take the trip to Florida for only $1800 because the use of the rented truck allowed him to pick up his children, who lived with their mother in Atlanta, and to bring them to his home for their summer vacation. This evidence could raise a reasonable doubt, and, despite the danger posed by unreliable testimony, if Owen truly was a hapless victim of circumstance, it would be unjust if he could not file a Rule 33 motion solely because he was aware of his own innocence and Samuels's guilt at trial.

Thus, the question of whether to allow defendants to file Rule 33 motions based on postconviction exculpatory evidence implicates the conflicting concerns behind Rule 33—the need to protect courts from motions founded on untrustworthy testimony and the importance of overturning unjust convictions. To balance those concerns, the federal courts have developed a method that allows a trial judge to use knowledge gained from presiding at trial to determine whether evidence discovered after trial merits granting a defendant's Rule 33 motion—the Berry test. Unfortunately, the majority of federal circuits have all but eliminated the Berry procedure when the new evidence supporting a Rule 33 motion consists of testimony proffered after trial by the defendant's convicted codefendant who had remained silent at trial; but those courts need not choose between the option of leaving verdicts vulnerable to untrustworthy testimony and that of completely closing their doors to potentially innocent defendants. Trial judges can use Berry to deny ill-founded motions and to grant those few motions that do have merit.

The safeguard of the properly applied Berry test, along with the history and language of Rule 33, give the majority reason to reconsider. Allowing the district courts to evaluate new trial motions based on posttrial

376. See id.; supra note 25 and accompanying text.
377. Owen, 500 F.3d at 85.
378. See supra notes 16–17 and accompanying text.
379. See Owen, 500 F.3d at 86.
exculpatory testimony under *Berry*, as the First Circuit does, would restore discretion to the trial judge, honor the drafters’ intention that defendants be provided with a judicial remedy for wrongful convictions, comport with the language of the phrase “newly discovered evidence,” and allow courts to achieve a balance between exercising caution and promoting justice.
Notes & Observations