GROUNDED ON NEWLY DISCOVERED EVIDENCE

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INTRODUCTION

The Supreme Court recently highlighted the "duty of the judiciary . . . to seek and to find the proper balance between the necessity for fair and just trials and the importance of finality of judgments."[1] In Federal Rule of Criminal Procedure 33, adopted as part of the original Rules in 1944 and amended several times since, the Court has sought to find such a balance. Rule 33, which authorizes a district court to grant a motion for new trial "if the interest of justice so requires," provides a multi-year period to file a motion "grounded on newly discovered evidence," but requires a motion "grounded on any [other] reason" to be filed within days.[2] Several amendments since 1944 have modified the precise time periods and when the multi-year period begins to run, but they have preserved the significant difference in treatment of the two categories of motions. Rule 33(b)(1) now provides that a new trial motion grounded on newly discovered evidence may be filed within three years of the verdict, whereas Rule 33(b)(2) requires that a motion grounded on any other reason be filed within fourteen days.

Although Rule 33 does not define "interest of justice" and "the courts have had little success in trying to generalize its meaning,"[3] they agree that the phrase at least permits the grant of a new trial, pursuant to a motion filed within fourteen days of the verdict, because (1) the verdict is against the weight of the evidence[4] or

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1. Weaver v. Massachusetts, 137 S. Ct. 1899, 1913 (2017).

2. Rule 33 currently provides:

> (a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.
>
> (b) Time to File.
>
> (1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.
>
> (2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

FED. R. CRIM. P. 33.

3. United States v. Kuzniar, 881 F.2d 466, 470 (7th Cir. 1989).

4. *See* 3 CHARLES ALAN WRIGHT & SARAH N. WELLING, FEDERAL PRACTICE & PROCEDURE CRIMINAL § 582, at 41–42 (4th ed. 2011); United States v. Knight, 800 F.3d 491, 504 (8th Cir. 2015) (trial court may grant new trial if the evidence preponderates heavily against the verdict); United States v. Ferguson, 246 F.3d 129, 133 (2d Cir. 2001) ("The district court must strike a balance between weighing the evidence and credibility of witnesses and not 'wholly usurp[ing]' the role of the jury." (quoting United States v. Autuori, 212 F.3d 105, 120 (2d Cir. 2000))).

(2) substantial legal error occurred at trial.[5] Important questions remain unresolved, however, about motions under Rule 33(b)(1) grounded on newly discovered evidence.[6] Most courts have treated the presentation of newly discovered evidence not as a gateway to invoking the standard applicable when a new trial is sought within fourteen days of the verdict, but as a separate basis for a new trial.[7] It is settled that new trial motions grounded on newly discovered evidence can rest on evidence of innocence, or evidence that the prosecution violated its constitutional duty under *Brady v. Maryland*[8] to disclose exculpatory information or its constitutional duty under *Napue v. Illinois*[9] not to present false evidence (and to correct such evidence when it appears). But what other kinds of claims, if any, can be presented under the rule? And what standard must be met to obtain a new trial?

The case law does not provide uniform answers to these questions. The First,[10] Tenth,[11] and District of Columbia[12] Circuits apparently interpret Rule 33(b)(1) to permit consideration of any newly obtained evidence demonstrating legal error

5. *See, e.g.*, United States v. Munoz, 605 F.3d 359, 373 (6th Cir. 2010) ("Rule 33's 'interest of justice' standard allows the grant of a new trial where substantial legal error has occurred"); United States v. Wall, 389 F.3d 457, 474 (5th Cir. 2004) ("[A]ny error of sufficient magnitude to require reversal on appeal is an adequate ground for granting a new trial." (quoting 3 CHARLES ALAN WRIGHT & SARAH N. WELLING, FEDERAL PRACTICE & PROCEDURE CRIMINAL § 556 (3d. ed 2004))); *Kuzniar*, 881 F.2d at 470 (stating that Rule 33 relief is available where "the substantial rights of the defendant have been jeopardized by errors or omissions during trial"). Some decisions construe the "interest of justice" standard as conferring broad authority to grant a new trial. *See, e.g.*, United States v. Vicaria, 12 F.3d 195, 198 (11th Cir. 1994) ("The basis for granting a new trial under Rule 33 is whether it is required 'in the interest of justice.' That is a broad standard. It is not limited to cases where the district court concludes that its prior ruling, upon which it bases the new trial, was legally erroneous."); United States v. Narciso, 446 F. Supp. 252, 304 (E.D. Mich. 1977) ("[T]he very words of the rule—'interest of justice'—mandate the broadest inquiry into the nature of the challenged proceeding."); *id.* at 306 ("The question is, not whether any actual wrong resulted . . . but whether [there was] created a condition from which prejudice might arise or from which the general public would suspect that the jury might be influenced to reach a verdict on the ground of bias or prejudice." (quoting Stone v. United States, 113 F.2d 70, 77 (6th Cir. 1940))), *quoted with approval*, United States v. Bowen, 969 F. Supp. 2d 546, 577 (E.D. La. 2013), *aff'd*, 799 F.3d 336 (5th Cir. 2015), *reh'g en banc denied*, 813 F.3d 600 (2016).

6. Although Rule 33 was not divided into subsections (a), (b)(1), and (b)(2) until 2002 (a change that was intended to be stylistic only, *see* FED. R. CRIM. P. 33 advisory committee's note to 2002 amendment), for convenience this article refers to motions under the rule's "newly discovered evidence" provision as Rule 33(b)(1) motions regardless of whether the motions were filed before or after the division into subsections.

7. *See, e.g.*, United States v. Herrera, 481 F.3d 1266, 1270 (10th Cir. 2007); United States v. Smith, 62 F.3d 641, 648 (4th Cir. 1995); United States v. Bascaro, 742 F.2d 1335, 1344 (11th Cir. 1984); United States v. Williams, 613 F.2d 573, 575 (5th Cir. 1980); *but see* United States v. Bowen, 799 F.3d 336, 349 (5th Cir. 2015) (objecting that "[t]he dissent seems to disconnect Rule 33(b)(1), governing the timing of a new trial for newly discovered evidence, from the overarching principle that for any new trial motion, 'the interest of justice' must be considered."), *reh'g en banc denied*, 813 F.3d 600 (2016).

8. 373 U.S. 83 (1963).

9. 360 U.S. 264, 269 (1959); *see* Giglio v. United States, 405 U.S. 150, 153–55 (1972).

10. *See* United States v. Lipscomb, 539 F.3d 32, 42 (1st Cir. 2008); United States v. Tibolt, 72 F.3d 965, 971–73 (1st Cir. 1995).

11. *See Herrera*, 481 F.3d at 1270; United States v. Miller, 869 F.2d 1418, 1422 (10th Cir. 1989); Rubenstein v. United States, 227 F.2d 638, 642–43 (10th Cir. 1955).

12. *See* United States v. Kelly, 790 F.2d 180, 133–36 (D.C. Cir. 1986); United States v. Thompson, 475 F.2d 931, 932 (D.C. Cir. 1973) (per curiam); Caldwell v. United States, 205 F.2d 879, 880–81 (D.C. Cir. 1953); United States v. Coplon, 191 F.2d 749, 756–57 (D.C. Cir. 1951).

that could not have been discovered earlier through due diligence.[13] The Fifth Circuit[14] shares that interpretation, except that it requires new evidence of ineffective assistance of counsel (IAC) to be presented under 28 U.S.C. § 2255 (the analogue for federal prisoners of the federal habeas corpus statute[15] permitting state prisoners to pursue collateral attacks on their convictions).[16] The Second,[17] Fourth,[18] and Ninth[19] Circuits also have barred assertion of IAC claims in Rule 33 (b)(1) motions. The rationale offered by those three circuits—principally that Rule 33(b)(1) is purportedly limited to evidence of innocence—has much broader implications, but in later decisions involving other kinds of claims, those circuits have not carried that rationale to its logical conclusion. They have instead entertained claims of juror misconduct during voir dire,[20] incompetency to stand trial,[21] erroneous failure of the trial judge to grant recusal,[22] and admission at trial of evidence that should have been suppressed under the Fourth Amendment.[23]

Recent Eighth Circuit precedent seemingly makes Rule 33(b)(1) unavailable for many categories of claims that other circuits would entertain. In *United States v. Rubashkin*,[24] the Eighth Circuit held the rule inapplicable to newly obtained evidence bearing on whether the trial judge was required to recuse herself.[25] Its rationale was that the rule is limited to evidence that "probably will result in an acquittal" at a new trial.[26]

Until recently, the Seventh Circuit adhered to a uniquely restrictive reading of Rule 33(b)(1). In its 2000 decision in *United States v. Evans*,[27] it held that, unless

13. *Cf.* United States v. Scrushy, 721 F.3d 1288, 1304–08 (11th Cir. 2013) (reviewing claims presented in Rule 33(b)(1) motion that government deprived defendant of constitutional right to disinterested prosecutor, and stating that evidence of "judicial misconduct" and "evidence that goes to prosecutorial misconduct or the impartiality of the jury" could support relief under Rule 33(b)(1), but holding that claim of selective prosecution was not cognizable because it "has no bearing on the integrity of the trial or the verdict"); United States v. Campa, 459 F.3d 1121, 1151 (11th Cir. 2006) (en banc) ("Newly discovered evidence need not relate directly to the issue of guilt or innocence to justify a new trial, 'but may be probative of another issue of law.' For instance, the existence of a *Brady* violation, as well as questions regarding the fairness or impartiality of a jury, may be grounds for a new trial." (footnote omitted) (quoting United States v. Beasley, 582 F.2d 337, 339 (5th Cir. 1978) (per curiam))); *id.* at 1151–52 (considering on merits claim of prosecutorial misconduct).

14. *See Bowen*, 799 F.3d at 349 ("Newly discovered evidence need not relate only to guilt or innocence but may be relevant to any controlling issue of law."); *Beasley*, 582 F.2d at 339.

15. 28 U.S.C. § 2254 (2012).

16. *See* United States v. Medina, 118 F.3d 371, 372 (5th Cir. 1997) (per curiam); United States v. Ugalde, 861 F.2d 802 (5th Cir. 1988).

17. *See, e.g.*, United States v. Mayo, 14 F.3d 128, 132 (2d Cir. 1994).

18. *See, e.g.*, United States v. Smith, 62 F.3d 641, 648 (4th Cir. 1995).

19. *See, e.g.*, United States v. Hanoum, 33 F.3d 1128, 1130–31 (9th Cir. 1994).

20. *See* United States v. Parse, 789 F.3d 83, 110 (2d Cir. 2015).

21. *See* United States v. McCarthy, 54 F.3d 51, 55 (2d Cir. 1995).

22. *See* United States v. Agnew, 147 F. App'x 347, 352–53, 353 n.3 (4th Cir. 2005) (unpublished).

23. *See* United States v. Mazzarella, 784 F.3d 532, 534, 537–42 (9th Cir. 2015).

24. 655 F.3d 849 (8th Cir. 2011).

25. *Id.* at 858.

26. *Id.* (quoting United States v. Baker, 479 F.3d 574, 577 (8th Cir. 2007)); *see also* United States v. Winters, 600 F.3d 963, 970 (8th Cir. 2010).

27. 224 F.3d 670 (7th Cir. 2000).

the defendant's new trial motion was filed within the short time allotted for filing a notice of appeal,[28] the rule applied only if the motion (i) contended that newly obtained evidence "supports a claim of innocence"[29] but (ii) did "*not contend* that the conviction or sentence violates the Constitution or any statute."[30] According to *Evans*, a defendant who maintained "that he ha[d] new evidence of a constitutional violation" necessarily was making a motion under § 2255[31]—a motion not entertained until after any pending appeal has been decided.[32]

In 2016, the Seventh Circuit overruled *Evans*. "We now clarify," the court wrote in *United States v. O'Malley*,[33] "that a motion for a new trial based on newly discovered evidence that demonstrates constitutional or statutory error may indeed be brought under Rule 33 . . . ."[34] "[W]hen overlapping remedies are available, a prisoner is permitted to choose which to invoke,"[35] the court explained, and thus "a postjudgment motion based on newly discovered evidence which happens to invoke a constitutional theory can be brought under Rule 33(b)(1) or § 2255."[36]

But at the same time the Seventh Circuit tore down one barrier, it seemed to erect another. It said in *O'Malley* that Rule 33(b)(1) "encompasses all claims based on newly discovered evidence *which likely would lead to acquittal whether or not because of actual innocence*."[37] That likelihood-of-acquittal test is demonstrably overbroad: Settled law establishes that a likelihood of acquittal need not be shown when newly obtained evidence establishes a *Brady* violation or a *Napue* violation.[38] The test is also inconsistent with the many decisions recognizing that newly acquired evidence of extraneous influence upon the jury can support the grant of a new trial under Rule 33(b)(1).[39] And the test is unsound in principle. Newly acquired evidence that does not suggest the defense would probably win a retrial may nonetheless show that the first trial was completely unfair.

The Seventh Circuit's now-overruled decision in *Evans* is only one of many decisions construing Rule 33(b)(1) that have contained skimpy

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28. *See id.* at 673. In federal criminal cases, a notice of appeal must be filed within fourteen days of the judgment. FED. R. APP. P. 4(b). When *Evans* was decided in 2000, the period was ten days. *See* FED. CRIM. CODE & RULES 372 (West 2016 Revised Ed.) (describing 2009 amendment).

29. *Evans*, 224 F.3d at 674.

30. *Id.* at 673–74 (emphasis added).

31. *Id.* at 674.

32. *See* United States v. Deeb, 944 F.2d 545, 548 (9th Cir. 1991); United States v. Davis, 604 F.2d 474, 484–85 (7th Cir. 1979).

33. 833 F.3d 810.

34. *Id.* at 815.

35. *Id.*

36. *Id.* at 813.

37. *Id.* at 814 (emphasis added).

38. *See infra* text accompanying notes 308–16. In a post-*O'Malley* decision, the Seventh Circuit, itself, affirmed the grant of a new trial, without requiring proof of a likelihood of acquittal, where newly obtained evidence demonstrated a *Brady* violation. *See* United States v. Ballard, 885 F.3d 500, 504 (7th Cir. 2018).

39. *See infra* text accompanying notes 100–111.

reasoning[40] or relied upon broad propositions that contradict settled law to one extent or another.[41] In light of the Seventh Circuit's abrupt reversal of direction, the problems with the new test it suggested, and the bar on IAC claims that several circuits have imposed for reasons they have not applied to other claims, a re-examination of the rule is warranted.

Part I of this article discusses the treatment of motions based on newly discovered evidence before the Federal Rules of Criminal Procedure were adopted and examines the drafting history of Rule 33. Part II shows that, until thirty years ago, the federal courts widely agreed that evidence newly obtained after trial, and not available earlier through due diligence, could be presented in a Rule 33(b)(1) motion without regard to whether it was relevant to innocence or to a violation of the defendant's rights. Part III explains that, beginning in 1989, several circuits read IAC claims out of Rule 33(b)(1); that the Seventh Circuit in *Evans*, to broaden the impact of restrictions Congress imposed in 1996 on § 2255 motions, then barred assertion of constitutional or statutory claims in any Rule 33(b)(1) motion filed after the short window for filing an appeal; and that the Eighth Circuit in *Rubashkin* later closed off the rule for evidence that, although relevant to whether the defendant's rights were violated, would not be admissible at a new trial. Part IV discusses the Seventh Circuit's 2016 decision in *O'Malley*, which overruled *Evans* and permitted defendants to raise constitutional and statutory claims in Rule 33(b)(1) motions. Finally, Part V maintains that Rule 33(b)(1) should be construed to allow defendants to seek a new trial based on any evidence that, even if it does not bear on innocence, tends to demonstrate a violation of the accused's constitutional rights, was obtained by the defense after trial, and could not reasonably have been obtained earlier through due diligence. Part V further argues that in many circumstances defendants claiming constitutional violations should not be required to show a probability of acquittal at a new trial.

I. THE BACKGROUND AND DRAFTING HISTORY OF RULE 33

Motions for a new trial resting on newly discovered evidence long predated the adoption of the Federal Rules of Criminal Procedure. In 1789, the first Congress authorized new trials for "reasons for which new trials have usually been granted in courts of law."[42] Federal courts soon recognized that their authority to grant new

40. *See, e.g.*, *Mayo*, 14 F.3d at 132 (summarily stating that "[t]he longer period provided by the Rule for a motion based on newly discovered evidence . . . applies only to motions that address the issues raised by the criminal charges, not to motions that raise collateral issues such as the effectiveness of trial counsel").

41. *See, e.g.*, *Rubashkin*, 655 F.3d at 858 (stating that "[t]he rule *requires* that the newly discovered evidence 'probably will result in an acquittal,'" but disregarding, among other decisions, *Giglio*, which ordered new trial because prosecution's silence allowing false evidence to stand uncorrected requires relief if there is any reasonable likelihood it affected jury's verdict (quoting *Baker*, 479 F.3d at 577)).

42. Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83.

trials extended to criminal cases,[43] and one of the grounds for granting new trials in such cases was newly discovered evidence.[44]

The leading nineteenth-century decision concerning motions for new trial based on newly discovered evidence was *Berry v. Georgia*,[45] decided by the Supreme Court of Georgia in 1851. Citing civil as well as criminal cases from around the country,[46] the *Berry* court found "a pretty general concurrence of authority" that "a party who asks for a new trial, on the ground of newly discovered evidence," is required to show the following:

> 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 . . . . 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.[47]

The third element of the *Berry* standard—that the new evidence would probably result in an acquittal at a new trial—is a difficult hurdle to clear.[48] With minor variations, the *Berry* standard continues to be followed today for the typical motion for a new trial based on newly obtained evidence allegedly demonstrating innocence.[49]

In 1928, the Seventh Circuit held in *United States v. Larrison*[50] that a different standard applies to newly obtained evidence that a government witness committed perjury.[51] *Larrison* held that a new trial is warranted if, without the perjured testimony, "the jury *might* have reached a different conclusion."[52] Most circuits, however, have rejected *Larrison*,[53] and in 2004 the Seventh

43. *See* Sparf v. United States, 156 U.S. 51, 175 (1895) (Gray, J., dissenting) (citing cases).

44. *See* Herrera v. Collins, 506 U.S. 390, 408 (1993).

45. 10 Ga. 511 (1851); *see* United States v. Johnson, 327 U.S. 106, 110 n.4 (1946) (referring to "the frequently quoted and followed rule announced in *Berry v. Georgia*").

46. *Berry*, 10 Ga. at 527–28.

47. *Id.* at 527.

48. *See* United States v. Agurs, 427 U.S. 97, 111 (1976) (describing that element of "the standard applied to the usual motion for a new trial based on newly discovered evidence" as a "severe burden").

49. *See, e.g.*, United States v. McGee, 763 F.3d 304, 321 (3d Cir. 2014); United States v. Moore, 709 F.3d 287, 290–94 (4th Cir. 2013); United States v. Hanna, 661 F.3d 271, 297 (6th Cir. 2011); United States v. Dogskin, 265 F.3d 682, 685 (8th Cir. 2001); United States v. Williams, 233 F.3d 592, 593 (D.C. Cir. 2000) ("Under our usual Rule 33 standard, a defendant is not entitled to a retrial on the basis of newly discovered evidence unless he can show that 'a new trial would *probably* produce an acquittal.' This formulation, common throughout the federal courts, has been used for nearly a century and a half." (citation omitted) (quoting Thompson v. United States, 188 F.2d 652, 653 (D.C. Cir. 1951))); United States v. Freeman, 77 F.3d 812, 816–17 (5th Cir. 1996).

50. 24 F.2d 82 (7th Cir. 1928).

51. *Id.* at 87–88.

52. *Id* at 87.

53. *See, e.g.*, *Williams*, 233 F.3d at 594; United States v. Huddleston, 194 F.3d 214, 217–21 (1st Cir. 1999); United States v. Provost, 969 F.2d 617, 622 (8th Cir. 1992); United States v. Petrillo, 237 F.3d 119, 123 (2d Cir.

Circuit overruled it.[54] In most circuits today, unless the government knew or should have known of the perjury, a defendant seeking a new trial based on new evidence of perjury must show, depending upon the circuit, either that without the perjured testimony the jury probably would have reached a different verdict,[55] or that the defendant probably would be acquitted at a retrial without the perjured testimony.[56]

The reported decisions predating the adoption of the Federal Rules of Criminal Procedure in December 1944 reflect few federal prosecutions in which the defendant moved for a new trial based on newly obtained evidence relating to an issue other than the merits of the charges. One such case was *Paddy v. United States*,[57] a capital case decided by the Ninth Circuit shortly before the Supreme Court adopted the Rules. In a trial in federal court in Alaska, then a federal territory, William James Paddy was found guilty of murder and sentenced to be hanged.[58] He later moved for a new trial based on newly acquired evidence that physical evidence introduced against him at trial had been obtained in an unconstitutional search.[59] In June 1944, six months before the adoption of the Federal Rules, the Ninth Circuit considered that contention on the merits, but held that any error in admitting the physical evidence had been harmless.[60]

Another pertinent case predating the Federal Rules, *Ewing v. United States*,[61] arose from the prosecution of a former member of the Democratic National Committee. Orman Ewing was charged with raping a nineteen-year-old government stenographer from his home state of Utah who had been staying at a rooming house Ewing operated in the District of Columbia.[62] Ewing was found guilty by a jury in 1942 but was spared the death penalty.[63]

New counsel entered the case while a new trial motion was pending;[64] at the time, such motions had to be filed within three days of verdict unless based on newly discovered evidence, in which case they could be filed within sixty days

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2000); United States v. Sinclair, 109 F.3d 1527, 1532 (10th Cir. 1997); United States v. Krasny, 607 F.2d 840, 844–45 (9th Cir. 1979); United States v. Stofsky, 527 F.2d 237, 246 (2d Cir. 1975). *But see* United States v. Lofton, 233 F.3d 313, 318 (4th Cir. 2000); United States v. Willis, 257 F.3d 636, 642–45 (6th Cir. 2001); United States v. Wallace, 528 F.2d 863, 866 (4th Cir. 1976); Gordon v. United States, 178 F.2d 896, 900 (6th Cir. 1949).

54. United States v. Mitrione, 357 F.3d 712, 718 (7th Cir. 2004).

55. *See*, *e.g.*, *Stofsky*, 527 F.2d at 246.

56. *See*, *e.g.*, *Williams*, 233 F.3d at 594–95.

57. 143 F.2d 847 (9th Cir. 1944).

58. *Id.* at 848.

59. *Id.* at 848, 849–50.

60. *Id.* at 853. Proceeding *pro se*, Paddy filed a petition for certiorari, which the Supreme Court denied, with Justice Murphy dissenting. 324 U.S. 855 (1945). President Roosevelt later commuted Paddy's sentence to life imprisonment. Averil Lerman, *Capital Punishment in Territorial Alaska: The Last Three Executions*, 9 FRAME OF REFERENCE 1, 6, 19 n.15 (1998).

61. 135 F.2d 633 (D.C. Cir. 1942).

62. *See Ewing Convicted of Rape; Escapes Death Penalty*, CHI. TRIBUNE, Feb. 22, 1942, at 20.

63. *See id.*

64. *Ewing*, 135 F.2d at 636.

after final judgment.[65] In an amendment to the new trial motion, Ewing's new counsel contended that Ewing's trial counsel "conducted the trial in this case incompetently."[66] Available records do not reflect whether the new contention was entertained because it was deemed to be based on newly discovered evidence, or because the amendment was deemed to relate back to the time the new trial motion was filed. In either case, the challenge to counsel's performance was decided on the merits: The trial court "heard testimony and argument," denied a new trial, and "filed a memorandum which . . . [gave] the court's reasons for concluding that [trial counsel] did not show incompetence."[67] On appeal, the District of Columbia Circuit also addressed the issue concerning counsel on the merits and decided it in the government's favor.[68] The court's opinion, handed down in December 1942, was written by Wiley Rutledge, then a judge of the circuit court but soon to be nominated to the Supreme Court.

The adoption of the Federal Rules of Criminal Procedure in 1944 followed a lengthy process that began in 1941 when the Supreme Court appointed an Advisory Committee to draft proposed rules.[69] In a second preliminary draft of proposed rules in November 1943, the Committee proposed that ordinarily a motion for a new trial would be due within five days after verdict (or within an extended time set by the court within the five-day period),[70] but that "at any time before or after final judgment" a defendant could move for a new trial on either of two grounds.[71] The first was "newly discovered evidence."[72] The second was "that the defendant had been deprived of a constitutional right."[73] The inclusion of the second ground was prompted by the then-existing practical problems that arose when a federal criminal defendant challenged his conviction through a habeas corpus petition.[74] Such a petition had to be filed in the district of confinement, even though the relevant evidence often would be far more accessible in the district of

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65. *See* Rule II(2) & (3), RULES OF PRACTICE & PROCEDURE, AFTER PLEA OF GUILTY, VERDICT OR FINDING OF GUILT, IN CRIMINAL CASES BROUGHT IN THE DISTRICT COURTS OF THE UNITED STATES AND IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, 292 U.S. 661, 662 (May 7, 1934) [hereinafter 1934 Rules]. In a capital case, which the prosecution of Ewing no longer was when he sought a new trial, an amendment approved in 1938 allowed a motion for new trial grounded on newly discovered evidence to be made at any time. *See* Herrera v. Collins, 506 U.S. 390, 408 (1993).

66. *Ewing*, 135 F.2d at 637; *see* Br. for the United States in Opp'n, Ewing v. United States, 318 U.S. 776 (1943) (No. 661), at 7 n.3 ("[Petitioner's] present counsel did not enter the case until after the motion for new trial had been filed. . . . [P]resent counsel [then] filed an amendment to the motion for new trial in which he set forth, in support of the motion, that petitioner had been denied effective assistance of counsel." (citations omitted)).

67. *Ewing*, 135 F.2d at 637.

68. *Id.*

69. *See* Order of Feb. 3, 1941, 312 U.S. 717.

70. 6 DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 129 (Madeleine J. Wilken & Nicholas Triffin eds., 1991) [hereinafter DRAFTING HISTORY].

71. *Id.*

72. *Id.*

73. *Id.*

74. *See* United States v. Hayman, 342 U.S. 205, 213 n.17 (1952).

prosecution.[75] These proposals also appeared in the Committee's final draft, which it submitted to the Supreme Court in July 1944.[76]

The Supreme Court rejected the notion that there should be no time limit for filing a motion for new trial grounded on newly discovered evidence. Writing on behalf of the Court, Chief Justice Stone observed:

> 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 court in its discretion, for good cause shown, allows the motion to be filed. Is it not desirable that at some point of time further consideration of criminal cases by the court should be at an end, after which appeals should be made to Executive clemency alone?[77]

In the rules adopted by the Court in December 1944, the Court provided that, on the defendant's motion, the court may grant a new trial "if the interest of justice so requires."[78] It adopted the proposed five-day period for new trial motions grounded on any reason other than newly discovered evidence, but it required motions for new trial grounded on newly discovered evidence to be filed within two years of judgment.[79] No separate language relating to a motion for new trial on the ground of a deprivation of a constitutional right was included; instead, the problem of habeas corpus actions being brought in the district of confinement was addressed in 1948 with the enactment of § 2255, which required that motions under it be brought in the district of prosecution.

The Federal Rules became effective in 1946. In 1966, the five-day period for new trial motions not based on newly discovered evidence was extended to seven days.[80] In 1998, Rule 33 was amended so that the time to move for a new trial on the ground of newly discovered evidence begins running upon a "verdict or finding of guilty," as opposed to "final judgment," but the time period for filing the motion was lengthened from two years to three years.[81] A 2005 amendment eliminated the requirement, applicable to motions not based on newly discovered evidence, that any extension of time for filing be granted within the seven-day period for filing such motions; and in 2009, the period for filing such motions was enlarged from seven to fourteen days.[82]

75. *See id*. at 213.
76. 7 DRAFTING HISTORY 165.
77. 7 DRAFTING HISTORY 7.
78. FED. R. CRIM. P. 33, 327 U.S. 821, 855 (effective March 21, 1946).
79. *Id*. at 855–56.
80. *See* FED. CRIM. CODE & RULES 147 (Thomson Reuters revised ed. 2018).
81. *See id*.
82. *See id*.

II. THE INTERPRETATION OF THE RULE BEFORE 1989

Until thirty years ago, Rule 33(b)(1) was almost uniformly construed to permit a defendant to seek a new trial based on newly obtained evidence relevant to the merits of the charges, an alleged violation of the defendant's rights, or both. When the evidence showed a violation of the defendant's rights, the courts, with rare exception, did not make the grant of relief contingent upon a showing of a likelihood of acquittal at a new trial.

The first reported decision to grant a new trial on the ground of newly acquired evidence under Rule 33(b)(1) involved new evidence of improper influence upon the jury. In *United States v. Rakes*,[83] during a trial on charges of violating the National Banking Act, a juror was approached by a man who offered him money if he would cause the jury to "hang."[84] The juror reported the offer to the trial judge, who, without informing the defense of what had been reported, allowed the juror to remain on the jury but instructed him not to communicate with anyone about what had happened. The jury later returned a guilty verdict. Months after the trial, the defense learned of the approach to the juror and learned that, contrary to the judge's instruction, the juror had discussed the episode with five other jurors. When the defendants moved for a new trial, the trial judge recused himself, and his replacement concluded that a new trial should be granted.[85] On the defendants' motion, the Fourth Circuit then remanded the case "to the end that a new trial may be granted."[86]

New evidence relating to the fairness of the proceedings was also the government's undoing in the case of the first American convicted of espionage during the Cold War. Judith Coplon had worked in the Internal Security Section of the Department of Justice.[87] During her trial in Washington, D.C., defense counsel asked FBI agents on cross-examination whether Coplon's phone calls had been tapped.[88] The agents did not deny it but said only that they had "no knowledge" of such tapping.[89] Coplon was found guilty and sentenced to prison.[90] While her appeal was pending, evidence disclosed in the prosecution against her in New York on related charges revealed that, both before and during the trial in Washington, FBI agents had intercepted conversations between Coplon and her attorney.[91] The District of Columbia Circuit stayed the appeal to permit the district court to entertain a motion for new trial based on this new evidence.[92] The district court denied the motion, but the District of Columbia Circuit then held that Coplon

83. 163 F.2d 771 (4th Cir. 1947).
84. *See* United States v. Rakes, 74 F. Supp. 645, 646 (E.D. Va. 1947).
85. *See id*. at 647–48.
86. *Rakes*, 163 F.2d at 773.
87. United States v. Coplon, 191 F.2d 749, 750–51 (D.C. Cir. 1951).
88. MARCIA MITCHELL & THOMAS MITCHELL, THE SPY WHO SEDUCED AMERICA 88–89 (2002).
89. *Id*. at 89, 211, 213.
90. *Coplon*, 191 F.2d at 750.
91. *Id*. at 757; MITCHELL & MITCHELL, *supra* note 88, at 214.
92. *Coplon*, 191 F.2d at 756.

was entitled to an evidentiary hearing to determine whether her conversations with her counsel had been intercepted—and to a new trial if they had been.[93] "[A]n accused does not enjoy the effective aid of counsel," said the court, "if he is denied the right of private consultation with him."[94] Because in the New York proceedings "the government's own witnesses testified that they had intercepted at least fourteen conversations between the defendant and counsel,"[95] the decision doomed Coplon's espionage conviction.[96]

Similarly, in its 1955 decision in *Rubenstein v. United States*,[97] the Tenth Circuit held that the defendant was entitled under Rule 33(b)(1) to a hearing to determine whether the conduct of Treasury Department agents "did affect or reasonably tend to affect the full and free exercise of the calm and informed judgment of any member or members of the jury."[98] In moving to vacate a conviction for tax evasion, the defendant had pointed to new evidence that members of the venire had been questioned by Treasury Department agents investigating whether jurors in an earlier tax prosecution had been approached by the defense in that prosecution.[99] Once again, a federal appellate court applied Rule 33(b)(1) to evidence that concerned the fairness of the trial.

The Fourth Circuit followed suit five years later in *Holmes v. United States*.[100] There, the defense learned after trial that, before jury deliberations had begun, a juror had asked a deputy marshal where the two defendants were staying and had been told that one was staying at a nearby jail serving a six-year sentence.[101] The defendants filed a motion for a new trial after the deadline for motions not based

93. *Id.* at 757–60.

94. *Id.* at 757.

95. MITCHELL & MITCHELL, *supra* note 88, at 297.

96. *See* Coplon v. United States, 342 U.S. 926 (1952) (denying the government's petition for certiorari). Coplon was found guilty in the New York trial, but that conviction was set aside on appeal on the ground that her arrest was illegal. United States v. Coplon, 185 F.2d 629 (2d Cir. 1950). The government kept both the Washington case and the New York case alive for several years, but in 1957 Attorney General Brownell admitted that the cases were "dead." MITCHELL & MITCHELL, *supra* note 88, at 304. Ultimately the government moved to dismiss both cases. *See id.* at 305. The Supreme Court has since established that interference with the right to counsel, as opposed to outright denial of counsel, is subject to harmless-error analysis. *See* United States v. Morrison, 449 U.S. 361, 365 (1981). Two years after it decided *Coplon*, the District of Columbia Circuit relied upon that decision in reversing the conviction of another defendant because of a similar government intrusion. Caldwell v. United States, 205 F.2d 879, 881 (D.C. Cir. 1953). This time, the improper access had been gained not by wiretapping, but by a government agent who "became intimately acquainted with [the defendant] and his then counsel" and soon "was solicited to work for the defense." *Id.* at 880. The court deemed *Coplon* controlling, and it ruled that the defendant's motion under Rule 33(b)(1) "should have been granted." *Id.* at 881; *see also* United States v. Kelly, 790 F.2d 130, 133–38 (D.C. Cir. 1986) (remanding for evidentiary hearing where defendant filed Rule 33(b)(1) motion alleging government agent invaded defense strategy sessions and stole relevant and important documents).

97. 227 F.2d 638 (10th Cir. 1955).

98. *Id.* at 643.

99. *Id.* at 640.

100. 284 F.2d 716 (4th Cir. 1960).

101. *Id.* at 718.

on newly discovered evidence had passed. The district court denied the motion, but the Fourth Circuit reversed in an opinion by Judge Clement Haynsworth.[102]

"[I]n every sense," Judge Haynsworth wrote, "the evidence was newly discovered after the trial . . . ."[103] "When the newly discovered evidence bears upon the substantive issue of guilt," he acknowledged, "we are necessarily concerned with its admissibility upon a subsequent trial and its probable effect upon the result of that trial."[104] In the present case, however, "[t]he applicable standards . . . are not those which would govern our decision if the new evidence bore upon the substantive issue of guilt. It bears instead upon the integrity of the jury's verdict . . . ."[105] This brought into play "a different set of standards to determine its sufficiency to support a timely motion."[106]

Between the 1960s and the 1980s, the Third, Fifth, and Ninth Circuits also recognized that new evidence of improper influence upon the jury can be presented in a Rule 33(b)(1) motion.[107] For example, in *Richardson v. United States*,[108] a defense motion asserted that during trial the main prosecution witness had "engaged in a private conversation with a member of the trial jury in a corridor adjacent to the courtroom."[109] The Fifth Circuit held that the motion "rests squarely upon newly discovered evidence within the purview of Rule 33."[110] It remanded the case "with directions to hold a hearing to determine whether the incident complained of . . . occurred as alleged and, if so, was harmful to [the defendant]."[111]

In other cases decided between the 1950s and the 1980s, circuit courts considered, or directed district courts to consider, claims based on newly obtained evidence that in a tax evasion case the prosecution had used the IRS to inspect the tax returns of members of the venire and had used at trial the fruits of illegal wiretapping and an illegal mail watch,[112] that the police and the FBI had engaged in misconduct,[113] that defense counsel had a conflict of interest,[114] that the government had violated the defendant's Sixth Amendment right to privacy in his

102. *Id.* at 720.
103. *Id.*
104. *Id.*
105. *Id.* at 720.
106. *Id.*
107. *See* United States v. Endicott, 869 F.2d 452, 457 (9th Cir. 1989); Gov't of V.I. v. Joseph, 685 F.2d 857, 863 n.3 (3d Cir. 1982); United States v. Jones, 597 F.2d 485, 488 (5th Cir. 1979); Richardson v. United States, 360 F.2d 366, 368 (5th Cir. 1966); *see also* United States v. Williams, 613 F.2d 573, 575 (5th Cir. 1980) (new evidence of *ex parte* communication between judge and jury); *cf.* United States v. Gainey, 380 U.S. 63, 68 (1965) ("Our Constitution places in the hands of the trial judge the responsibility for safeguarding the integrity of the jury trial . . . .").
108. 360 F.2d at 366.
109. *Id.* at 368.
110. *Id.*
111. *Id.* at 369.
112. *See* United States v. Costello, 255 F.2d 876, 879–84 (2d Cir. 1958).
113. *See* United States v. VanMaanen, 547 F.2d 50, 53–54 (8th Cir. 1976).
114. *See* United States v. McLain, 823 F.2d 1457, 1463–64 (11th Cir. 1987).

communications with his counsel,[115] that the trial judge had engaged in misconduct,[116] and that authorization for a wiretap had been obtained through a false affidavit and therefore the fruits of the wiretap should have been suppressed under the Fourth Amendment.[117] In these cases, too, the new evidence was presented to establish a violation of the defendant's rights, rather than to prove innocence. Frequently the courts did not reach the question of what showing was required to obtain a new trial. But when they did, most did not require the defense to demonstrate a likelihood of acquittal at a new trial.[118]

During this period, courts also interpreted Rule 33(b)(1) to reach evidence that *both* related to guilt or innocence *and* suggested a constitutional violation. In a 1978 case, *United States v. Beasley*,[119] the Fifth Circuit explained that newly discovered evidence "need not relate only to the question of innocence but may be probative of another issue of law, such as the existence of a *Brady* violation."[120] That proposition was also implicit in the Supreme Court's opinions in *Giglio v. United States*,[121] decided in 1972, and *United States v. Agurs*,[122] decided four years later.

After John Giglio was found guilty of passing forged money orders and given a five-year prison term,[123] his attorney "discovered new evidence indicating that the Government had failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government."[124] When Giglio moved for a new trial under Rule 33(b)(1),[125] the government admitted that it had made such a promise.[126] The lower courts denied relief, but, citing the prosecution's constitutional obligation under *Napue* not to present false evidence (or let such evidence go uncorrected), the Supreme Court reversed by a vote of seven to

115. *See* United States v. Rosner, 485 F.2d 1213, 1223–28 (2d Cir. 1973).

116. *See* United States v. LaFuente, 991 F.2d 1406, 1408–09 (8th Cir. 1993). In United States v. Conforte, 624 F.2d 869 (9th Cir. 1980), *aff'g* 457 F. Supp. 641 (D. Nev. 1978), then-Circuit Judge Anthony Kennedy wrote for the court in affirming on the merits the denial of a Rule 33(b)(1) motion which had asserted that new evidence showed that the trial judge had been biased and prejudiced against the defendants. *See* 624 F.2d at 878–82.

117. United States v. Bascaro, 742 F.2d 1335, 1344 (11th Cir. 1984).

118. *Compare McLain*, 823 F.2d at 1463–64 (vacating defendant's conviction in part because he learned after trial of facts establishing that his attorney had labored under conflict of interest), *Rosner*, 485 F.2d at 1227–28 (explaining that relevant question was "whether the defendant was prejudiced in fact"), *and Costello*, 255 F.2d at 884 (holding that inspection of tax returns of members of venire did not justify new trial because there was no indication that jurors selected were biased or prejudiced against defendant), *with Bascaro*, 742 F.2d at 1344 (stating that where new evidence called into question existence of probable cause for search, defense had to show probability of acquittal at new trial and thus at minimum had to show new evidence would warrant suppression of evidence obtained from search).

119. 582 F.2d 337 (5th Cir. 1978) (per curiam).

120. *Id.* at 339.

121. 405 U.S. 150 (1972).

122. 427 U.S. 97 (1976), *rev'g* 510 F.2d 1249 (D.C. Cir. 1975).

123. *Giglio*, 405 U.S. at 150.

124. *Id.* at 150–51.

125. *Id.*

126. *Id.* at 152.

zero.[127] Significantly, although Giglio had presented proof of the government's promise to the witness in a Rule 33(b)(1) motion, the Court did not ask whether the undisclosed evidence made it likely that Giglio would be acquitted at a new trial. Instead, the Court, relying on the standard set forth in *Napue*, asked whether "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury."[128]

Agurs, decided in 1976, also involved a Rule 33(b)(1) motion based on newly obtained evidence that the government allegedly had been remiss in not disclosing. Linda Agurs, an alleged prostitute, had killed a man in a motel room with a knife.[129] At trial, her self-defense claim was rejected.[130] Her new trial motion cited newly obtained proof that the deceased had two prior convictions for offenses involving knives.[131] Although the Supreme Court held on the merits that Agurs was not entitled to a new trial, its opinion implicitly assumed that her motion, which presented new evidence relevant to both innocence and to an alleged constitutional violation, was properly brought under Rule 33(b)(1).[132]

Moreover, the Court was explicit that Agurs did not have to satisfy the demanding standard applicable to the typical motion for new trial based on newly discovered evidence. The Court distinguished among three situations "involv[ing] the discovery, after trial, of information which had been known to the prosecution but unknown to the defense":[133] (1) information showing that the prosecution presented testimony that it knew or should have known was perjurious;[134] (2) information showing that the prosecution failed to disclose exculpatory evidence that defense had specifically requested;[135] and (3) information showing that the prosecution failed to disclose exculpatory evidence where, as in *Agurs*, there was either no request for such evidence or simply a general request for *Brady* material.[136] The Court determined that, even in the third situation, failure to disclose exculpatory evidence is *not* to be judged by "the standard applied to the usual motion for a new

127. *Id.* at 153–55. The duty not to present false evidence or, "although not soliciting false evidence, allow it to go uncorrected when it appears," Napue v. Illinois, 360 U.S. 264, 269 (1959), is recognized in a line of cases dating back to the 1930s, in which the Supreme Court has held that a prosecutor must not seek a conviction using evidence he or she knows or should know is false. *See, e.g.*, Pyle v. Kansas, 317 U.S. 213, 216 (1942); Mooney v. Holohan, 294 U.S. 103, 112 (1935).

128. *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271).

129. *Agurs*, 427 U.S. at 98–99.

130. *Id.* at 100.

131. *Agurs*, 510 F.2d at 1251.

132. Early in the oral argument before the Justices, Deputy Solicitor General Andrew Frey, in answering a question from Justice Rehnquist, clarified that the case has been before the court of appeals in the posture of a claim that the district court had erroneously denied a motion for new trial on the ground of newly discovered evidence. Transcript of Oral Argument at 6–7, United States v. Agurs, 427 U.S. 97 (1976) (No. 75-491).

133. *Agurs*, 427 U.S. at 103.

134. *Id.* at 103–04.

135. *Id.* at 104–06.

136. *Id.* at 106–07.

trial based on newly discovered evidence,"[137] and thus "[t]he defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal."[138] In short, the Court did not apply the standard governing the typical motion under Rule 33(b)(1) to Agurs's motion, but, instead, applied the standard it deemed appropriate in light of the substance of her constitutional claim. Although the Court has since abandoned the tripartite approach of *Agurs*,[139] it is still the law that, when a failure to disclose exculpatory evidence is asserted in a Rule 33(b)(1) motion, the claim is not subject to the probable-acquittal requirement that applies to the ordinary motion for a new trial based on newly discovered evidence.[140]

United States v. Cronic is a third significant Supreme Court decision from the period when Rule 33(b)(1) was liberally interpreted.[141] In *Cronic*, the defendant advanced two independent theories in support of an IAC claim. First, he complained that the young lawyer appointed to represent him after his first attorney withdrew was afforded insufficient time (twenty-five days) to prepare for trial, mainly practiced real estate law, and had never before handled a jury trial.[142] Second, citing what he said was newly obtained evidence, he challenged the lawyer's performance.[143] That evidence was presented to the district court in a motion under Rule 33(b)(1), which the district court refused to entertain while the appeal was pending, and the Tenth Circuit allowed the evidence to be added to the appellate record.[144] With the Rule 33(b)(1) motion still pending, the Tenth Circuit then reversed the conviction, but solely because of the limited time counsel had been afforded to prepare for trial and his lack of experience; the Tenth Circuit did not assess his performance.[145]

Before the Supreme Court, the government, besides arguing that the limited time to prepare and counsel's inexperience did not support the IAC claim, urged the Justices to defer the separate issue of defense counsel's performance to a later motion under § 2255.[146] The Court agreed with the government about the lack of

137. *Id.* at 111.

138. *Id.*

139. Kyles v. Whitley, 514 U.S. 419, 433–34 (1995) (explaining that United States v. Bagley, 473 U.S. 667 (1985), "abandoned the distinction between the second and third *Agurs* circumstances, i.e., the 'specific-request' and 'general- or no-request' situations. *Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different'" (quoting *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.))).

140. See *infra* text accompanying notes 311–16.

141. 466 U.S. 648 (1984).

142. *Id.* at 663, 665.

143. *Id.* at 652, 662 n.6.

144. *Id.* at 652.

145. *See id.*

146. *Id.* at 652.

time to prepare and counsel's inexperience, and it therefore reversed and remanded.[147] In a footnote, however, it firmly rejected the government's argument that the claim of inadequate performance could be considered only under § 2255, and, relying on authority that a Rule 33(b)(1) motion can be filed even while a case is on appeal, noted the district court's error in saying it lacked jurisdiction to consider that motion:

> The Government argues that a defendant can attack the actual performance of trial counsel only through a petition for postconviction relief under 28 U.S.C. § 2255, and not through direct appeal, because ineffective assistance claims are generally not properly raised in the District Court nor preserved for review on appeal. Whatever the merits of this position as a general matter, in this case [defendant] did raise his claim in the District Court through his motion for new trial under Federal Rule of Criminal Procedure 33. The District Court denied that motion for lack of jurisdiction because the case was pending on direct appeal at the time, but that ruling was erroneous. The District Court had jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which could then entertain a motion to remand the case. The Court of Appeals did not reach this claim of actual ineffectiveness, since it reversed the conviction without considering counsel's actual performance. Accordingly *this claim remains open on remand*.[148]

In a different case, the Tenth Circuit later observed that in *Cronic* "[t]he Supreme Court implicitly recognized that a motion for a new trial on the ground of newly discovered evidence is a proper vehicle for assertion of an [IAC] claim."[149]

Thus, until thirty years ago, the case law under Rule 33(b)(1) broadly allowed defendants to seek a new trial based on newly obtained evidence, without regard to whether it pertained to the merits of the charges, an alleged violation of the defendant's rights, or both.

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147. *Id*. at 667.

148. *Id*. at 667 n.42 (emphasis added).

149. United States v. Miller, 869 F.2d 1418, 1422 (10th Cir. 1989). Nearly two decades after *Cronic*, the Supreme Court again dealt with a procedural question concerning IAC claims, although this time it did not involve Rule 33(b)(1). In Massaro v. United States, 538 U.S. 500 (2003), the Court rejected the Second Circuit's holding that, when a convicted defendant is represented by new counsel on appeal and his claim that trial counsel was ineffective is based solely on the trial record, the claim must be raised on direct appeal or will be deemed procedurally defaulted for purposes of any later motion under § 2255. *Id*. at 503. The Supreme Court concluded that an IAC claim "may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal." *Id*. at 504. In such a proceeding, the Court noted, "[t]he court may take testimony from witnesses for the defendant and from counsel alleged to have rendered the deficient performance." *Id*. at 505. The Court cautioned, however, that

> We do not hold that [IAC] claims must be reserved for collateral review. There may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court *sua sponte*.

Id. at 508. The Court made no mention of Rule 33(b)(1) motions.

III. THE DECISIONS SINCE 1989 RESTRICTING THE SCOPE OF "NEWLY DISCOVERED EVIDENCE"

In the past three decades, many of the circuits have imposed new restrictions on the types of claims that can be raised in Rule 33(b)(1) motions.

A. Decisions Barring Assertion of IAC Claims

Although the Supreme Court in *Cronic* concluded that the defendant could continue to pursue his motion for a new trial based on newly obtained evidence concerning his counsel's performance—and some circuit courts allow IAC claims to be presented in Rule 33(b)(1) motions[150]—four circuit courts have held since *Cronic* that IAC claims cannot be presented in such motions, even if based on facts that the defendant neither knew nor should have known at the time of trial.[151]

The legal backdrop for these decisions barring assertion of IAC claims under Rule 33(b)(1) was a changed constitutional standard that had made it easier—though far from easy—for defendants to prevail on such a claim. In the 1960s, to obtain relief a convicted defendant complaining of counsel's performance had to show that the proceedings had been rendered a "farce" or a "mockery of justice,"

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150. *See* United States v. Johnson, 12 F.3d 1540, 1548 (10th Cir. 1993) ("[W]here the facts relevant to ineffective assistance are *not* known to defendant until after trial, they may be raised on a 'newly discovered evidence' motion under Rule 33."); United States v. Lema, 909 F.2d 561, 566 (1st Cir. 1990) ("Lema may bypass Rule 33's seven-day time limit only if his claim that his counsel failed to discover and/or review the tapes was based on information unavailable to the defendant at the time of trial."); United States v. McLain, 823 F.2d 1457, 1463–64 (11th Cir. 1987) (reversing one defendant's conviction in part because he demonstrated in Rule 33(b)(1) motion that he learned after trial of facts establishing that his attorney had labored under conflict of interest).

151. One can put aside IAC claims resting on evidence that was known to the defendant during trial but whose significance he or she purportedly did not understand. Although courts have acknowledged that "most defendants cannot and do not realize the inadequacies of trial counsel's performance until well after trial," United States v. Dukes, 727 F.2d 34, 39 (2d Cir. 1984), the great weight of authority treats evidence concerning counsel's performance of which the defendant was aware as not "newly discovered." *See, e.g.*, United States v. Laird, 948 F.2d 444, 446 (8th Cir. 1991) ("At the time of trial, appellant was aware of all the information upon which the [IAC claim] is based. Thus, the information about the performance of defense counsel was not 'newly discovered evidence' . . . ."); United States v. Seago, 930 F.2d 482, 489 (6th Cir. 1991) ("[E]vidence of [IAC] is not newly discovered evidence for purposes of a motion for new trial where the facts supporting the claim were within the defendant's knowledge at the time of trial."); *Lema*, 909 F.2d at 566 ("[An IAC claim] is not newly discovered for the purposes of Rule 33 when based on facts known to the defendant at the time of trial."); *Miller*, 869 F.2d at 1421 ("[IAC] may not serve as the basis for a new trial on the ground of newly discovered evidence under Rule 33 where the facts alleged in support of the motion were within the defendant's knowledge at the time of trial."); *Dukes*, 727 F.2d at 38–40 ("newly discovered evidence" provision of Rule 33 did not extend to defendant's complaints about four errors allegedly made in open court by his court-appointed attorney, as "these alleged errors go to the tactical decisions made by Dukes's lawyer as to how to handle the evidence already in his possession at trial"); United States v. Lara-Hernandez, 588 F.2d 272, 275 (9th Cir. 1978); United States v. Ellison, 557 F.2d 128, 133 (7th Cir. 1977). The District of Columbia Circuit at first concluded that IAC assistance claims could be raised in motions under Rule 33(b)(1) without regard to whether the facts relied upon were unknown to the defendant at the time of trial. *See* United States v. Brown, 476 F.2d 933, 935, 935 n.11 (D.C. Cir. 1973) (per curiam). Ultimately, however, it reversed course and held that "where a defendant knows the facts supporting his [IAC] claim at the time of trial, those facts are not 'newly discovered.'" United States v. Torres, 115 F.3d 1033, 1037 (D.C. Cir. 1997).

or both.[152] In 1970, however, the Supreme Court, in *McMann v. Richardson*,[153] for the first time described the Sixth Amendment right to counsel as the right "to *the effective assistance* of *competent counsel*."[154] Following *McMann*, the federal courts relaxed their standards governing IAC claims,[155] and in *Strickland v. Washington*,[156] decided in 1984, the Supreme Court definitively superseded the "farce" and "mockery of justice" standards. The two-pronged *Strickland* test requires a defendant to show, first, that counsel's representation fell below an objective standard of reasonableness, and, second, that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[157] A "reasonable probability" does not mean that that a different result would have been more likely than not; rather, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome."[158]

Ultimately, it has proved to be hard to prevail on an IAC claim under the *Strickland* standard.[159] But in the aftermath of the relaxation of the constitutional standard governing IAC claims, several circuits, conscious of the proliferation of IAC claims and apparently unaware of the Supreme Court's treatment of the defendant's Rule 33(b)(1) motion in *Cronic*, read such claims out of Rule

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152. For example, in a 1967 case, the Eighth Circuit stated that "a charge of inadequate representation can prevail 'only if it can be said that what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court.'" Cardarella v. United States, 375 F.2d 222, 230 (8th Cir. 1967) (quoting O'Malley v. United States, 285 F.2d 733, 734 (6th Cir. 1961)); *accord* Root v. Cunningham, 344 F.2d 1, 3 (4th Cir. 1965) ("Ordinarily, one is deprived of effective assistance of counsel only in those extreme instances where the representation is so transparently inadequate as to make a farce of the trial."); Williams v. Beto, 354 F. 2d 698, 704 (5th Cir. 1965) ("It is the general rule that relief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation.").

153. 397 U.S. 759 (1970).

154. *Id.* at 771 (emphasis added).

155. *See, e.g.*, Marzullo v. Maryland, 561 F.2d 540, 544 (4th Cir. 1977); United States v. Easter, 539 F.2d 663, 665–67 (8th Cir. 1976); United States ex rel. Williams v. Twomey, 510 F.2d 634, 641 (7th Cir. 1975); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974); Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974).

156. 466 U.S. 668 (1984).

157. *Id.* at 694.

158. *Id.* The *Strickland* opinion thus necessarily rejected the argument of the United States, advanced in its amicus brief, that the element of the *Berry* standard requiring "that the evidence probably would produce an acquittal in the event of a retrial . . . defines the showing of prejudice required in an ineffective assistance case based on counsel's failure to investigate and produce evidence." Br. of United States as Amicus Curiae Supporting Petitioners at 20–21, Strickland v. Washington, 466 U.S. 668 (1984) (No. 82-1554).

A "reasonability probability" of a different outcome need not be shown in all cases of alleged ineffective assistance of counsel. "[P]rejudice is presumed when counsel is burdened by an actual conflict of interest." *Strickland*, 466 U.S. at 692.

159. *See* Jenna C. Newmark, Note, *The Lawyer's Prisoner's Dilemma: Duty and Self-Defense in Postconviction Ineffectiveness Claims*, 79 FORD. L. REV. 699, 705 (2010) ("It is extremely difficult and uncommon for one to prevail on an ineffectiveness claim under the standard announced in *Strickland v. Washington*.").

33(b)(1).[160] Four circuits concluded that even an IAC claim resting on facts of which the defendant had neither actual nor imputed knowledge could not be presented in a motion under Rule 33(b)(1). This line of cases began with *Ugalde*,[161] a 1989 decision in which Judge Patrick Higginbotham wrote for the Fifth Circuit.

Months after Raymond Ugalde was convicted of offenses relating to the currency transaction reporting laws, he unsuccessfully filed a Rule 33(b)(1) motion asserting an IAC claim.[162] On appeal, the Fifth Circuit concluded that Ugalde did not meet the standard applicable to "*any*" motion based on Rule 33(b)(1)[163] because "[n]one of the evidence which Ugalde contends is 'newly discovered' would have remained unknown to him had he diligently sought such information."[164] The court also opined, however, that "facts about counsel's performance not known to the defendant at the time of trial"[165] cannot be "newly discovered evidence" *in any event*.[166]

Observing that "[c]riminal procedure seeks results that are fair, final, and speedily obtained," Judge Higginbotham emphasized that these interests "may at times cut in different directions." [167] He described Rule 33(b)(1) as a "narrow, specific remedy."[168] While acknowledging that prior decisions had entertained motions based on new evidence of improper influence upon the jury,[169] he posited the existence of a "general rule that 'newly discovered evidence' means evidence going to the issue of the defendant's innocence," and said the question was "whether to create a new exception" to that rule.[170] No such exception should be created, he concluded, as it "would greatly expand the opportunities to make a late request for a new trial" and "allow defendants to 'delay . . . the enforcement of just sentences.'"[171] Judge Higginbotham also reasoned that "defendants prejudiced by ineffective assistance of counsel have a ready remedy,"[172] a "collateral challenge . . . as allowed by 28 U.S.C. § 2255."[173]

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160. *See* United States v. Smith, 62 F.3d 641, 648 (4th Cir. 1995); United States v. Hanoum, 33 F.3d 1128, 1130 (9th Cir. 1994); United States v. Mayo, 14 F.3d 128, 132 (2d Cir. 1994); United States v. Ugalde, 861 F.2d 802, 807–10 (5th Cir. 1988).

161. 861 F.2d at 807–10.

162. *Id.* at 804.

163. *Id.* at 810.

164. *Id.* at 809.

165. *Id.* at 807.

166. *Id.* at 807–10.

167. *Id.* at 807.

168. *Id.* at 808.

169. *Id.*

170. *Id.* at 809.

171. *Id.* (quoting United States v. Johnson, 327 U.S. 106, 112 (1946)).

172. *Id.*

173. *Id.* The Fifth Circuit applied *Ugalde* in United States v. Medina, 118 F.3d 371 (5th Cir. 1997) (per curiam). *Id.* at 372. *But cf.* United States v. Bolton, 908 F.3d 75, 98–99 (5th Cir. 2018) (considering on merits claim raised in Rule 33(b)(1) motion that counsel labored under conflict of interest), *aff'g* No. 2:16-CR-7-KS-MTP, 2017 WL 2844171 (S.D. Miss. July 3, 2017).

Five years later, the Ninth Circuit extended *Ugalde* to an IAC claim based in part on facts that defense counsel was alleged to have deliberately concealed from his client. In *United States v. Hanoum*,[174] the Ninth Circuit quoted with approval Judge Higginbotham's warning against "greatly expand[ing] the opportunities to make a late request for a new trial," since "[d]efendants could easily search out some fact about their lawyer's pre-trial preparation."[175] The court proceeded to hold that Rule 33(b)(1) was unavailable even though the defendant's "claim is based on facts *not* known to the accused at the time of trial, because he had been deliberately misled by his own attorney."[176] Noting that an IAC claim can be presented in a § 2255 motion,[177] the Ninth Circuit barred the assertion of such a claim under Rule 33(b)(1) because the rule, in its view, is confined to new evidence going to the merits of the charges:

> We hold that a Rule 33 motion based upon "'newly discovered evidence" is *limited to where the newly discovered evidence relates to the elements of the crime charged*. Newly discovered evidence of [IAC] does not directly fit the requirements that the evidence be material to the issues involved, and indicate that a new trial probably would produce an acquittal.[178]

The same year that the Ninth Circuit decided *Hanoum*, the Second Circuit held in *United States v. Mayo*[179] that a district court could not consider an IAC claim presented in a Rule 33(b)(1) motion.[180] Its brief rationale was that the rule "applies only to motions that address the issues raised by the criminal charges, not to motions that raise collateral issues such as the effectiveness of trial counsel."[181]

Finally, the Fourth Circuit relied in part on *Ugalde* when it held in *United States v. Smith*,[182] a 1995 decision, that "a motion for a new trial predicated on [IAC] must be brought, if at all, within seven days of judgment"—the then-existing time limit for a new trial motion resting on a ground other than newly discovered evidence—"regardless of when the defendant becomes aware of the facts which suggested to her that her attorney's performance may have been constitutionally

174. 33 F.3d 1128 (9th Cir. 1994).

175. *Id.* at 1131 (quoting *Ugalde*, 861 F.2d at 809).

176. *Id.* at 1130. Some of the alleged deception related to the attorney's performance. *See id.* The attorney had also allegedly hidden from his client his theft of assets belonging to the client's family and his sexual relationship with the client's wife. *See id.*

177. *Id.* at 1131.

178. *Id.* at 1130 (emphasis added). Other Ninth Circuit decisions also treat IAC claims as outside the scope of Rule 33(b)(1). See United States v. Ross, 338 F.3d 1054, 1057 (9th Cir. 2003) (per curiam); United States v. Allen, 153 F.3d 1037, 1045 (9th Cir. 1998); United States v. Mett, 65 F.3d 1531, 1533–34 (9th Cir. 1995). *But cf.* United States v. Ford, No. CR-06-0083-EFS, 2009 WL 799672, at *10 (E.D. Wash. Mar. 24, 2009).

179. 14 F.3d 128 (2d Cir. 1994).

180. *Id.* at 132.

181. *Id.*; *accord* United States v. Castillo, 14 F.3d 802, 805 (2d Cir. 1994).

182. 62 F.3d 641 (4th Cir. 1995).

inadequate."[183] The Fourth Circuit offered the surprising explanation that "information supporting an [IAC] claim is not 'evidence' within the meaning of Rule 33."[184]

Thus, by the mid-1990s, decisions in four circuits barred the assertion of IAC claims in Rule 33(b)(1) motions.[185]

B. *The Seventh Circuit's Novel Reading of Rule 33(b)(1) in Evans*

In its 2000 decision in *United States v. Evans*,[186] the Seventh Circuit took a much larger bite out of Rule 33(b)(1). It held that, except in very limited circumstances, a motion asserting a constitutional or statutory error of any kind cannot be brought under Rule 33(b)(1). The apparent motivation for this decision—which conflicted with *Giglio*, *Agurs*, and *Cronic* as well as numerous circuit court decisions—was to force a high percentage of post-trial attacks on convictions into § 2255 proceedings, where they would be subject to the restrictions on § 2255 motions imposed by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).[187] AEDPA tightly limits the circumstances in which a defendant can file a second or successive § 2255 motion, and it requires permission from the circuit court to file such a motion.[188] It mandates that a defendant obtain a certificate of appealability from a circuit judge or a Supreme Court Justice to appeal from the denial of a § 2255 motion.[189] And, with some exceptions, it shortens the time for filing a § 2255 motion, to one year from the date the defendant's conviction becomes final.[190]

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183. *Id.* at 648; *accord* United States v. Russell, 221 F.3d 615, 619, 619 n.5 (4th Cir. 2000). In *Smith*, the Fourth Circuit "accept[ed] as true that Smith did not learn of [defense] Investigator Livingston's employment with the sheriff's department—and therefore of his attorney's potential conflict of interest—until after trial." 62 F.3d at 648.

184. *Smith*, 62 F.3d at 648.

185. A brief discussion in a 2010 Sixth Circuit decision similarly indicated that IAC claims are not cognizable under Rule 33(b)(1), United States v. Munoz, 605 F.3d 359, 367 (6th Cir. 2010) ("Munoz does not assert that his [IAC] claim is based on 'newly discovered evidence,' and, in any event, that argument is foreclosed in this circuit."), even though the earlier Sixth Circuit decision relied upon was limited to cases "where the facts supporting the claim were within the defendant's knowledge at the time of trial." United States v. Seago, 930 F.2d 482, 489 (6th Cir. 1991); *see also* United States v. Chorin, 322 F.3d 274, 282 n.4 (3d Cir. 2003) ("[T]his Court has expressed a preference that ineffective assistance of trial counsel claims be brought as collateral challenges under 28 U.S.C. § 2255, rather than as motions for new trials or on direct appeal because '[a]ttempting to shoehorn such [an ineffective assistance of counsel] claim into a Rule 33 newly discovered evidence motion is not an easy task.'" (alteration in original) (quoting United States v. DeRewal, 10 F.3d 100, 104 (3d Cir. 1993))).

186. 224 F.3d 670 (7th Cir. 2000).

187. Pub. L. No. 104–132, tit. I, §§ 102, 105, 110 Stat. 1214, 1217, 1220 (1996) (codified at 28 U.S.C. §§ 2253, 2255(f)).

188. 28 U.S.C. § 2255(h) (2012).

189. 28 U.S.C. § 2253(c)(1)(B) (2012); *see* United States v. Cepero, 224 F.3d 256, 258–59 (3d Cir. 2000) (en banc).

190. 28 U.S.C. § 2255(f).

Marcus Evans was convicted of offenses involving the sale of cocaine and sentenced to life imprisonment.[191] After his conviction was affirmed on direct appeal,[192] he moved under § 2255 to set it aside.[193] In a subsequent Rule 33(b)(1) motion, Evans sought a new trial based on newly obtained evidence, which purportedly showed that the government had violated its *Brady* obligations by withholding information that the defense could have used to impeach an important government witness as "a drug user" who "was featured in a police report as a suspect in an armed robbery."[194] The district court denied both the § 2255 motion and the new trial motion.[195]

The Seventh Circuit refused to issue a certificate of appealability as to the denial of the § 2255 motion but, because no such certificate is required to appeal from the denial of a Rule 33 motion, Evans was able to appeal from the latter denial.[196] This was to no avail, however, as the Seventh Circuit held that the district court lacked jurisdiction to reach the merits of his Rule 33(b)(1) motion.[197] Judge Frank Easterbrook wrote the opinion, which was joined by Judges Richard Posner and Diane Wood. It was a very distinguished panel, but the opinion would lead the Seventh Circuit astray for many years.

The Seventh Circuit held that, to be valid, a motion under Rule 33(b)(1) cannot allege a constitutional or statutory violation, unless the motion is filed before the deadline for noticing an appeal. "A *bona fide* motion for a new trial on the basis of newly discovered evidence falls outside § 2255 ¶ 1" and thus can be filed under Rule 33(b)(1), Judge Easterbrook reasoned, "because it does *not* contend that the conviction or sentence violates the Constitution or any statute."[198] Judge Easterbrook did not cite support for that proposition in any decision, treatise, law review article, or other authority. He also made no mention of the Supreme Court's decisions in *Giglio*, *Agurs*, or *Cronic*; the Seventh Circuit's own decision in a 1989 case in which it had reached the merits of an appeal from the denial of a Rule 33(b)(1) motion that had asserted a *Brady* claim and had been filed long after the deadline for appealing from the defendant's conviction;[199] or any of the many decisions

191. United States v. Evans, 92 F.3d 540, 541 (7th Cir. 1996).
192. *Id.* at 546.
193. *Evans*, 224 F.3d at 673.
194. *Id.* at 674.
195. *Id.*
196. *Id.* at 673.
197. *Id.* at 674.
198. *Id.* at 673–74 (emphasis added). The first paragraph of § 2255 provides:

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

28 U.S.C. § 2255(a).

199. United States v. Douglas, 874 F.2d 1145, 1161–64 (7th Cir. 1989).

in other circuits (including *Coplon*) that had decided the merits of constitutional or statutory claims presented in Rule 33(b)(1) motions filed after the time for appeal.[200]

The corollary of this unprecedented reading of Rule 33(b)(1) was that "[a] defendant whose argument is . . . that he has new evidence of a constitutional violation . . . is making a motion under § 2255 . . . no matter what caption he puts on the document,"[201] provided that the defendant's motion is "filed after the expiration of the time for direct appeal."[202] Applying its new standard to the facts, the court explained that both Evans's *Brady* claim and a second claim presented "classic grounds of collateral attack" that are governed by § 2255.[203] The court concluded that, "because Evans already has had a collateral attack, [those claims] may be pursued only with advance appellate approval."[204]

A year later in *Ruth v. United States*,[205] the Seventh Circuit, speaking through Judge Wood, applied the *Evans* standard. This time, the court concluded that the defendant had *properly* invoked Rule 33(b)(1) because he had *not* asserted a constitutional violation. It held that Ruth's motion invoking Rule 33(b)(1) had been *bona fide* because it asserted that "his new evidence . . . supported his claim of innocence," and "[h]e did not argue that the government violated *Brady* by failing to disclose this information . . . ."[206]

A decade after *Evans*, the same panel that had decided that case again applied its holding, with Judge Easterbrook again writing for the court. Like *Evans*, *United States v. Rollins*[207] involved a defendant convicted of offenses involving distribution of cocaine.[208] After his conviction was affirmed on appeal, the defendant moved under Rule 33(b)(1) for a new trial. The motion presented a *Brady* claim, an IAC claim, a claim that a government agent had given perjured testimony in the grand jury, and a claim that the government's arguments to the petit jury had

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200. *Evans*, 224 F.3d at 674. Judge Easterbrook cited Herrera v. Collins, 506 U.S. 390 (1993), for the proposition that "a conviction does not violate the Constitution (or become otherwise subject to collateral attack) just because newly discovered evidence implies that the defendant is innocent." *Id.* This proposition sheds no light on the meaning of Rule 33(b)(1), which is not a vehicle for collateral attack. The only other authority Judge Easterbrook cited in support of his reading of Rule 33(b)(1) was Guinan v. United States, 6 F.3d 468 (7th Cir. 1993), in which the court had remarked that "[t]he purpose of granting a new trial on the basis of newly discovered evidence is not to correct a legal error, but to rectify an injustice . . . ." *Id.* at 470. That comment did not at all imply that constitutional claims must be excluded from a motion under Rule 33(b)(1), since many constitutional claims do seek to correct injustices. Because the opinion in *Evans* did not contain any substantial discussion of the pertinent case law, the court's announcement of a new interpretation of Rule 33(b)(1) was more characteristic of rulemaking than adjudication.

201. *Evans*, 224 F.3d at 674.

202. *Id.* at 673.

203. *Id.* at 674.

204. *Id.*

205. Ruth v. United States, 266 F.3d 658 (7th Cir. 2001).

206. *Id.* at 661.

207. 607 F.3d 500 (7th Cir. 2010), *vacating* 2009 WL 1010524 (S.D. Ill. Apr. 15, 2009).

208. *United States v. Rollins*, 544 F.3d 820, 825 (7th Cir. 2008).

reflected racial bias.[209] Rule 33(b)(1) did not apply, the Seventh Circuit concluded, because it "deals with contentions that evidence discovered after trial shows that the accused is innocent," and "Rollins did not advance an argument of this kind."[210] Instead, the assertions he made were "standard contentions under 28 U.S.C. § 2255."[211]

C. The Eighth Circuit's Holding that Even Evidence of an Alleged Violation of the Defendant's Rights Must Demonstrate a Probability of Acquittal at a New Trial

In 2011, the Eighth Circuit also adopted an extremely narrow reading of Rule 33(b)(1). In *United States v. Rubashkin*,[212] it held that "[t]he rule *requires* that the newly discovered evidence 'probably will result in an acquittal.'"[213] The defendant's new evidence in *Rubashkin* concerned circumstances that purportedly required the district judge to recuse herself under 28 U.S.C. § 455(a), which mandates recusal "in any proceeding in which [the judge's] impartiality might reasonably be questioned." The Eighth Circuit held that, because the new evidence did not bear on the probability of acquittal at a new trial, it could not support a new trial; and the court therefore did not have to "consider whether Rubashkin met the other requirements of Rule 33."[214]

Sholom Rubashkin managed a company that operated a large kosher meatpacking plant in Iowa.[215] In 2008, Immigration and Customs Enforcement (ICE) conducted a raid at the plant and arrested hundreds of its employees for immigration violations.[216] Federal prosecutors also notified Rubashkin that he was the target of an investigation into financial and immigration offenses.[217] Rubashkin was later tried and convicted of false statements to a bank, money laundering, willfully violating orders of the Secretary of Agriculture, and bank, wire, and mail fraud.[218] The district judge imposed a twenty-seven-year prison sentence.[219]

At approximately the time of sentencing, Rubashkin obtained records (requested under FOIA more than a year earlier) that reflected meetings about the raid at the plant between the district judge and ICE personnel. Representatives of the United

209. *See Rollins*, 2009 WL 1010524, at *1–2.
210. *Rollins*, 607 F.3d at 504.
211. *Id.*
212. 655 F.3d 849 (8th Cir. 2011). The *Rubashkin* decision is criticized by Ellen Rigler Tighe in *Reconcilable Differences: Coordinating the Aims of Rule 33 and Judicial Recusal When Newly Discovered Evidence Speaks to a Trial's Fundamental (Un)Fairness*, 26 GEO. J. LEGAL ETHICS 1029 (2013).
213. 655 F.3d at 858 (quoting United States v. Baker, 479 F.3d 574, 577 (8th Cir. 2007)).
214. *Id.*
215. *Id.* at 853.
216. *Id.* at 854.
217. *Id.*
218. *Id.*
219. *Id.* at 853.

States Attorney's Office were also present.[220] ICE employees had prepared minutes of the meetings, and, according to the minutes of one meeting about the planned raid, the judge had said that she was "willing to support the immigration operation in any way possible."[221] Other minutes stated that the judge attended a meeting that included "an overview of charging strategies."[222] Contending that these minutes showed that the judge had been required to recuse herself, Rubashkin moved under Rule 33(b)(1) for a new trial.[223] The district judge denied the motion.[224]

The Eighth Circuit affirmed Rubashkin's conviction, sentence, and the denial of his Rule 33(b)(1) motion. Its principal rationale was that Rubashkin failed to satisfy the element of its general standard for Rule 33(b)(1) motions requiring, as other versions of the *Berry* standard do, a showing that "the newly discovered evidence . . . probably will result in an acquittal."[225] The court rejected Rubashkin's "argu[ment] that [this] element . . . does not apply to Rule 33 motions when they are based on a trial's fairness as opposed to potential innocence."[226] It distinguished cases involving *Brady* issues on the ground that "such cases are far more likely to result in an acquittal than the court's meetings about facilities for the expected arrestees."[227] Despite the critical importance of an unbiased judge, the court distinguished *Holmes*, the Fourth Circuit's decision involving evidence of improper communication with a juror, on the ground that there "the new evidence bore 'upon the integrity of the jury's verdict,'"[228] whereas "Rubashkin has not shown here that the court's pretrial meetings prejudiced the jury's verdict."[229]

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220. *Id.* at 855–56.

221. *Id.* at 856.

222. Brief for Appellant at 18, United States v. Rubashkin, 655 F.3d 849 (8th Cir. 2011) (No. 10-2487) (quoting Joint Appendix 278).

223. *Rubashkin*, 655 F.3d at 856.

224. *Id.* at 857.

225. *Id.* at 857 (quoting *Baker*, 479 F.3d at 577).

226. *Id.*

227. *Id.*

228. *Id.* (quoting Holmes v. United States, 284 F.2d 716, 720 (4th Cir. 1960)).

229. *Id.* at 857–58. In a petition for certiorari filed by former Solicitor General Paul Clement, Rubashkin asked the Supreme Court to decide whether Rule 33(b)(1)

> requires a criminal defendant with newly discovered evidence that goes not to guilt or innocence but to the fundamental fairness of his criminal trial—here, that the trial judge should have been recused under 28 U.S.C. § 455(a)—to show nonetheless that the new evidence would probably lead to his acquittal.

Petition for Writ of Certiorari, Rubashkin v. United States, 568 U.S. 927 (2012) (No. 11-1203). Rubashkin's petition, which also raised an issue about his lengthy sentence, was supported as to both issues by an amicus brief filed on behalf of eighty-six former federal judges and Department of Justice officials. Brief for 86 Former Attorneys General, Senior Department of Justice Officials, United States Attorneys, and Federal Judges as Amici Curiae Supporting Petetitioner, Rubashkin v. United States, 568 U.S. 927 (2012) (No. 11-1203). The Supreme Court denied certiorari, however, with Justice Kagan not participating, presumably because she had had some involvement with the case during her tenure as Solicitor General. 568 U.S. 927. In December 2017, after Rubashkin had been imprisoned for more than eight years, President Trump commuted his sentence. *See* Mitch Smith, *Meatpacking Plant Owner In '08 Iowa Raid Is Freed*, N.Y. TIMES, Dec. 21, 2017, at A21; Luke Nozicka,

Thus, as of 2011, the Seventh and Eighth Circuits had each adopted extremely restrictive readings of Rule 33(b)(1), and four other circuits had barred defendants from raising IAC claims under the rule.[230]

IV. THE SEVENTH CIRCUIT'S ABOUT-FACE IN *O'MALLEY*

The case law under Rule 33(b)(1) then remained largely unchanged until 2016, when the Seventh Circuit decided *United States v. O'Malley*.[231] The *O'Malley* panel consisted of Chief Judge Diane Wood and Judges Richard Posner and Ilana Rovner.[232] Both Chief Judge Wood and Judge Posner had joined the opinions in *Evans* and *Rollins*. Judge Wood had also written the opinion in *Ruth*. In contrast, two decades before *O'Malley*, Judge Rovner had dissented from a decision, written by Judge Posner, that affirmed the dismissal, without any discovery, of a habeas corpus petition filed by two prisoners tried and convicted before a state court judge who took bribes around the same time in other cases.[233] The Supreme Court granted review in that habeas corpus case and reversed.[234] It was probably Judge Rovner's presence that led to the unanimous opinion in *O'Malley*, which she wrote, that abandoned the rule—adopted in *Evans* and applied in *Ruth* and *Rollins*—that a motion under Rule 33(b)(1) cannot assert a constitutional or statutory violation unless the motion is filed before the deadline for noticing an appeal.

Duane O'Malley was found guilty, under the Clean Air Act, of improperly removing and disposing of insulation containing regulated asbestos and was sentenced to ten years' imprisonment.[235] He later moved for a new trial on the basis of newly obtained evidence discrediting a key witness against him.[236] In part, O'Malley's motion rested on information, purportedly withheld by the government in violation of its *Brady* obligations, that the witness was cooperating with federal authorities investigating the witness's involvement in organized crime.[237] O'Malley also pointed to evidence purportedly showing that the witness had steered him to violate the Clean Air Act unintentionally, and to an appraisal of the witness's property allegedly contradicting the witness's testimony.[238] Relying upon *Evans*, *Ruth*, and *Rollins*, the district court ruled that only the appraisal could be presented under Rule 33(b)(1), and that the other evidence implicated the

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President Trump commutes sentence of Sholom Rubashkin, ex-Iowa slaughterhouse executive, DES MOINES REGISTER, Dec. 20, 2017, https://www.desmoinesregister.com/story/news/crime-and-courts/2017/12/20/president-trump-commutes-sentence-sholom-rubashkin-ex-iowa-slaughterhouse-executive/971291001/.

230. *See supra* text accompanying notes 161–229.

231. 833 F.3d 810 (7th Cir. 2016).

232. *Id.* at 811.

233. Bracy v. Gramley, 81 F.3d 684, 696 (7th Cir. 1996).

234. Bracy v. Gramley, 520 U.S. 899 (1997).

235. *O'Malley*, 833 F.3d at 811.

236. *Id.* at 812.

237. *Id.*

238. *Id.*

constitutional protection recognized in *Brady* and therefore had to be presented under § 2255.[239]

The Seventh Circuit vacated and remanded with directions to allow O'Malley to proceed under Rule 33(b)(1).[240] Speaking through Judge Rovner, the court held that "a postjudgment motion based on newly discovered evidence which happens to invoke a constitutional theory can be brought under Rule 33(b)(1) or § 2255."[241] Effectively overruling *Evans*, the court "disavow[ed]" the proposition that "a theory of constitutional or statutory error established through newly discovered evidence could *never* be brought under Rule 33."[242] Instead, "[a] theory that newly discovered evidence establishes the defendant's innocence is one, not the only, theory that would support relief under Rule 33 . . . ."[243] Although some of the evidence cited by O'Malley was allegedly "withheld by the government in violation of the rule of *Brady* and *Giglio*" and thus could have been cited in support of a § 2255 motion, that was no obstacle to invoking Rule 33 because, "when overlapping remedies are available, a prisoner is permitted to choose which to invoke."[244]

Judge Rovner inserted into her opinion, however, a surprising and troublesome formulation describing the reach of Rule 33(b)(1). She wrote that "the rule encompasses *all claims based on newly discovered evidence which likely would lead to acquittal whether or not because of actual innocence*."[245] Yet at least some categories of newly obtained evidence, including evidence offered to show a *Brady* violation or a *Napue* violation, indisputably do *not* require showing a likelihood of acquittal at a retrial.[246]

V. A PROPOSED INTERPRETATION OF RULE 33(B)(1)

At present, three circuits (the First, Tenth, and District of Columbia Circuits) do not restrict the types of claims of legal error that can be presented under Rule 33(b)(1), and do not require a showing of a probability of acquittal at a new trial, unless the claim is of the kind involved in *Berry*;[247] four circuits (the Second, Fourth, Fifth, and Ninth Circuits) appear to exclude only IAC claims, and similarly do not require a showing of a probability of acquittal at a retrial, unless the claim is of the

239. *Id*. at 812, 814.

240. *Id*. at 816.

241. *Id*. at 813.

242. *Id*. at 815.

243. *Id*. at 814.

244. *Id*. at 815; *see also id*. at 816 ("[T]he sequence of events in O'Malley's case allowed him the option of filing a timely Rule 33 motion *or* a timely § 2255 motion, and he several times said that he wanted to use Rule 33 instead of § 2255.").

245. *Id*. at 814 (emphasis added).

246. Ultimately, O'Malley failed in his bid for a new trial. United States v. O'Malley, No. 10-20042, 2018 WL 1173002 (N.D. Ill. Mar. 6, 2018), *appeal dismissed*, 754 F. App'x 462 (7th Cir. 2019) (nonprecedential).

247. *See supra* text accompanying notes 10–12; United States v. Herrera, 481 F.3d 1266, 1270 (10th Cir. 2007); United States v. Tibolt, 72 F.3d 965, 971–72 (1st Cir. 1995); United States v. Kelly, 790 F.2d 180, 138 (D.C. Cir. 1986); Rubenstein v. United States, 227 F.2d 638, 643 (10th Cir. 1955); Coplon v. United States, 191 F.2d 749, 757–60 (D.C. Cir. 1951).

kind involved in *Berry*;[248] and the Seventh and Eighth Circuits, except as to a small category of claims, apparently do require a showing of a probability of acquittal.[249]

As discussed below, the three circuits that neither restrict the types of claims of legal error that can be presented under Rule 33(b)(1), nor require a showing of a probability of acquittal at a retrial, have correctly interpreted the rule. The text of the rule, the Supreme Court's understanding when it adopted the rule, the fundamental nature of most constitutional rights—these and other considerations support the approach taken by those three circuits and support *O'Malley* insofar as it held that newly acquired evidence of a constitutional violation can be presented under Rule 33(b)(1). Moreover, given the critical importance of representation by competent, conflict-free counsel, there is no adequate justification for singling out IAC claims and barring their assertion under the rule. And as to the ultimate standard governing the grant or denial of a Rule 33(b)(1) motion, there is, despite what is said in *Rubashkin* and *O'Malley*, no one-size-fits-all standard applicable to all types of claims.

A. Why Rule 33(b)(1) Should Be Construed To Encompass Evidence of an Alleged Constitutional Violation

All constitutional claims based on newly obtained evidence (assuming the evidence could not have been obtained earlier through due diligence) should be deemed to be cognizable under Rule 33(b)(1) for five reasons.

First, as Judge Rovner pointed out in *O'Malley*, "nothing in the text of Rule 33 excludes claims of newly discovered evidence that rely on a constitutional theory."[250] Testimonial or documentary proof of a constitutional violation is "evidence" just as much as testimonial or documentary proof of an alibi is, for example. If proof of a constitutional violation was obtained for the first time after trial and could not have been obtained earlier with due diligence, it fits comfortably within the language of the rule.[251]

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248. *See supra* text accompanying notes 13–23; United States v. Parse, 789 F.3d 83, 110 (2d Cir. 2015); United States v. Bowen, 799 F.3d 336, 351, 358 (5th Cir. 2015), *reh'g en banc denied*, 813 F.3d 600 (2016); United States v. Mazzarella, 784 F.3d 532, 538, 541, 542 (9th Cir. 2015); United States v. McCarthy, 54 F.3d 51, 55 (2d Cir. 1995); United States v. Endicott, 869 F.2d 452, 457 (9th Cir. 1989); United States v. Rosner, 485 F.2d 1213, 1227–28 (2d Cir. 1973); Richardson v. United States, 360 F.2d 366, 369 (5th Cir. 1966); Holmes v. United States, 284 F.2d 716, 720 (4th Cir. 1960); United States v. Costello, 255 F.2d 876, 884 (2d Cir. 1958).

249. *See supra* text accompanying notes 225–26, 245.

250. *O'Malley*, 833 F.3d at 813.

251. In *United States v. Lipscomb*, 539 F.3d 32, 42 (1st Cir. 2008), the First Circuit rejected the government's argument that new evidence of an alleged constitutional violation somehow was not "evidence" under Rule 33(b)(1). *Id.* at 42. The defendant had moved for a new trial based on newly obtained information that the courtroom had been closed for part of the closing arguments, allegedly in violation of his Sixth Amendment right to a public trial. *Id.* at 41. "The Government argue[d] . . . that Lipscomb's Sixth Amendment argument is not based on 'newly discovered evidence,' because it is not 'evidence' in the context of Rule 33(b)(1)." *Id.* at 42. Rejecting the argument, the First Circuit pointed out that it was incongruous for the government to advocate for purposes of Rule 33(b)(1) "a narrow definition of 'evidence' that is limited to evidence pertaining to guilt or innocence, as opposed to evidence relating to collateral issues," even though the government admitted that the information

Second, interpreting Rule 33(b)(1) to extend beyond evidence of innocence is consistent with the original understanding of the rule. In *United States v. Johnson*,[252] a case decided the same year the Federal Rules of Criminal Procedure went into effect, the Supreme Court, in an opinion by Justice Black, explained that the "extraordinary length of time" for filing a motion grounded on newly discovered evidence "is designed to afford relief where, despite the fair conduct of the trial, it later clearly appears to the trial judge that, because of facts unknown at the time of trial, *substantial justice was not done*."[253] The phrase "substantial justice," then in common use, connoted a concern with whether there had been prejudice, as opposed to a focus on technical errors, but it also contemplated a broader inquiry than one confined to an assessment of whether the fact-finder had reached the correct result.[254] *Johnson* was governed by a rule adopted by the Supreme Court in 1934 that provided a shorter time period than Rule 33 for motions based on newly discovered evidence: It required such motions to be filed within sixty days of judgment, or, in the event of an appeal, at any time before final disposition by the appellate court.[255] Nevertheless, the opinion sheds light on the Supreme Court's view of such motions when it adopted Rule 33.

A further indication that the Court did not take a narrow view of grounds for motions based on newly discovered evidence is provided by this statement in a 1947 decision, *United States v. Smith*:[256]

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would have constituted evidence for purposes of Rule 33(b)(2), which permits the grant of a new trial "in the interest of justice" based on a new trial motion filed shortly after the verdict. *Id.* The First Circuit proceeded to decide the Sixth Amendment claim on the merits. *Id.* at 42–43.

252. 327 U.S. 106 (1946).

253. *Id.* at 112 (emphasis added). The Seventh Circuit had determined in *Johnson* that six defendants were entitled to a new trial because evidence they obtained after trial showed that a government witness had perjured himself. *See id.* at 110. Without deciding the correctness of the *Larrison* standard for cases involving perjury, *id.* at 110 n.4, the Supreme Court reversed because the district court had rejected the allegation of perjury, and some evidence supported its ruling. *Id.* at 111–112 ("While the appellate court might intervene when the findings of fact are wholly unsupported by evidence, it should never do so where it does not clearly appear that the findings are not supported by any evidence.") (citation omitted).

254. *See, e.g.*, NLRB v. Cowell Portland Cement Co., 108 F.2d 198, 203 (9th Cir. 1939) ("Nor is there merit in the contention that the A. F. of L. employees may be deprived of their property rights because what the Board calls 'substantial justice' has been done. We do not perceive the validity of such a conclusion before the A. F. of L. employees or their union have been afforded an opportunity to present their case. Substantial injustice may be done if the laborer is not permitted to defend his contract."); Sims v. Chi. Transit Auth., 129 N.E.2d 23, 29 (Ill. App. Ct. 1955) ("Where the error [in instructing the jury] charged has to do with the character of the proof required, there is a strong tendency toward reversal. . . . [U]nless the reviewing court can say that on retrial the result could not be otherwise, the cause must be remanded toward the end that the party bringing error may secure substantial justice."); Smith v. Commonwealth, 190 S.E. 91, 94–95 (1937) (quoting Va. Ry. & Power Co. v. Smith & Hicks, 105 S.E. 532, 535 (Va. 1921)) (reversing murder conviction and remanding for new trial despite sufficiency of evidence to support conviction, under statute barring reversal "for any error . . .where . . . the parties have had a fair trial on merits, and substantial justice has been done," because of failure to instruct that prior statements of witnesses were admissible for purposes of impeachment only).

255. Rule II(3), 1934 Rules, 292 U.S. at 662.

256. 331 U.S. 469 (1947).

> New trials . . . may be granted for error occurring at the trial *or for reasons which were not part of the court's knowledge at the time of judgment*. For the latter, the Rules make adequate provision. Newly-discovered evidence may be made ground for motion for new trial within two years after judgment.[257]

The Court referred generally to "reasons which were not part of the court's knowledge at the time of judgment," rather than specifying one or a limited number of bases for relief.

When the Federal Rules of Criminal Procedure were adopted by the Supreme Court in December 1944, there was also a recent capital case decided by the Ninth Circuit, *Paddy v. United States*,[258] in which newly obtained evidence bearing on the lawfulness of a seizure, rather than innocence, was presented in a motion for a new trial under the predecessor of Rule 33, which also provided a longer time period for motions based on "newly discovered evidence"; and the claim based on the evidence about the seizure was decided on the merits.[259] Although it is less clear, the longer time period allowed for such motions under the predecessor of Rule 33 also may well explain why, in *Ewing v. United States*,[260] another case decided shortly before the adoption of the Federal Rules of Criminal Procedure, the district court and the District of Columbia Circuit decided on the merits an IAC claim presented in an amendment to a new trial motion.[261] The Supreme Court was familiar with *Ewing* when it adopted the Rules because it had considered and denied a petition for certiorari[262] in that case twenty-one months earlier. Justice Rutledge, who was a member of the Court when it adopted the Rules, had written the circuit court opinion in *Ewing* before his nomination to the Supreme Court.[263] In light of *Paddy* and *Ewing*, it is unlikely that, when the Supreme Court adopted Rule 33, it viewed the phrase "newly discovered evidence" as limited to evidence going to the merits of the charges.

Third, where newly obtained evidence is presented to demonstrate a violation of a constitutional right, construing Rule 33(b)(1) to reach beyond evidence of innocence makes sense because, with rare exception, constitutional rights are *fundamental* rights. As the Supreme Court observed in *McDonald v. City of Chicago*,[264] beginning in the 1960s the Court, in deciding whether a right guaranteed by the Bill of Rights applies to the States through the Due Process Clause of the Fourteenth Amendment, "inquired whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice."[265] As the

257. *Id.* at 475 (emphasis added).
258. 143 F.2d 847 (9th Cir. 1944).
259. *See id.* at 849–51; *supra* text accompanying note 60.
260. 135 F.2d 633 (D.C. Cir. 1942).
261. *See id.* at 634–37; *supra* text accompanying notes 67–68.
262. *Ewing v. United States*, 318 U.S. 776 (1943).
263. *Ewing*, 135 F.2d at 633.
264. 561 U.S. 742 (2010).
265. *Id.* at 764 (emphasis omitted) (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

McDonald Court also noted, "[t]he Court eventually incorporated almost all of the provisions of the Bill of Rights."[266] Thus, if a Rule 33(b)(1) motion asserts a constitutional violation, in most instances it is asserting a violation of a guarantee deemed fundamental to the country's scheme of ordered liberty and system of justice.[267] A defendant who has acquired new evidence of a violation of so important a right presumptively ought to be able to present such evidence promptly and not have to await the conclusion of his or her appeal.

Fourth, the opportunity in a criminal case to seek a new trial on the basis of newly obtained evidence of a constitutional violation is vitally important because the opportunity for pretrial discovery is far more limited in criminal cases than in civil cases. "There is no general constitutional right to discovery in a criminal case."[268] Although the prosecution has a constitutional duty to disclose exculpatory information and information that could be used to impeach prosecution witnesses, the decision whether to disclose such evidence is almost exclusively within the prosecutor's control.[269] Whereas discovery depositions are routine in civil cases, in criminal cases there is a "general prohibition on taking depositions for discovery purposes,"[270] and rarely are exceptions made.[271] "In . . . the federal system the disclosure of the witness list is generally within the discretion of the trial court."[272] Although Federal Rule of Criminal Procedure 16(a)(1)(E) entitles a defendant to discovery of documents "material to preparing the defense," the Supreme Court

266. *Id.*

267. In *McDonald*, the Court identified five rights that had not been fully incorporated. *Id.* at 765 n.13. One of them, the Seventh Amendment right to jury trial in civil cases, has no application to criminal cases and thus could not be the basis for a Rule 33(b)(1) motion. A second right, the Eighth Amendment right not to be subject to an excessive fine, also could not be the basis of such a motion but in any event recently has been incorporated. *See* Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019). That leaves only (i) the other three rights identified in *McDonald*, the Third Amendment protection against quartering of soldiers, the Fifth Amendment grand jury requirement, and the Sixth Amendment right to a unanimous jury verdict; (ii) the Sixth Amendment's requirement of trial in the district where the crime was committed, which most courts have held does not apply to the States, *see* Stevenson v. Lewis, 384 F.3d 1069, 1071 (9th Cir. 2004) (citing cases); Caudill v. Scott, 857 F.2d 344, 345–46 (6th Cir. 1988); Cook v. Morrill, 783 F.2d 593, 594–96 (5th Cir. 1986); Zicarelli v. Dietz, 633 F.2d 312, 320–26 (3d Cir. 1980); and (iii) rights based on provisions of the Constitution other than the Bill of Rights. Very seldom have any of these rights been the basis of a motion under Rule 33(b)(1).

268. Weatherford v. Bursey, 429 U. S. 545, 559 (1977).

269. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("[T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached."); *see also* Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1535 (2010) ("[T[he ideals of *Brady* have not gained much traction in practice."); Eugene Cerruti, *Through the Looking-Glass at the* Brady *Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 211 (2006) ("*Brady* . . . has never actually required the prosecutor to do what is so manifestly the right thing to do").

270. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U.L.Q. 1, 12 (1998).

271. *See* United States v. Zuno-Arce, 44 F. 3d 1420, 1424 (9th Cir. 1995) ("In criminal cases, depositions may be taken only in 'exceptional circumstances.'" (quoting FED. R. CRIM. P. 15(a))).

272. Nora R. Demleitner, *Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options*, 46 AM J. COMP. L. SUPP. 641, 647 (1998); *see also* Brennan, *supra* note 270, at 13 ("The argument that disclosure may lead to witness intimidation has proved a major obstacle to discovery of witness lists . . . .").

held in *United States v. Armstrong*[273] that "defense" in this Rule "means the defendant's response to the Government's case in chief"[274] and thus does not require disclosure of documents material to whether the government engaged in selective prosecution. "A selective-prosecution claim is not a defense on the merits to the criminal charge itself," the Court wrote, "but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution."[275] In light of *Armstrong*, whether a defendant is entitled under Rule 16(a)(1)(E) to obtain documents relating to other constitutional defenses not going to the merits of the charge is highly uncertain.

Finally, as demonstrated in the next Section, there is no justification for carving IAC claims out of Rule 33(b)(1).

B. Why IAC Claims Should Be Entertained Under Rule 33(b)(1)

As the Supreme Court said in *Cronic*, "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."[276] Indeed, the Court has recognized that "[e]ven the intelligent and educated layman . . . requires the guiding hand of counsel in every step in the proceedings against him," and that "*[w]ithout it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence*."[277] The right to competent assistance from conflict-free counsel goes directly to the ability of the trial process to produce trustworthy results. As the Court observed in *Strickland v. Washington*,[278] "[a]n [IAC] claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable . . . ."[279] Perhaps an argument could be made for not entertaining Fourth Amendment claims under Rule 33(b)(1), on the grounds, *inter alia*, that they do not implicate the reliability of the trial process.[280] But the reasons courts have given for reading IAC claims out of Rule 33(b)(1) are not sound.

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273. 517 U.S. 456 (1996).

274. *Id.* at 462.

275. *Id.* at 463.

276. United States v. Cronic, 466 U.S. 648, 654 (1984) (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)); *see* Martinez v. Ryan, 566 U.S. 1, 12 (2012) ("The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. . . . [T]he right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged.").

277. Powell v. Alabama, 287 U.S. 45, 69 (1932) (emphasis added).

278. 466 U.S. 668 (1984).

279. *Id.* at 694; *see* Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) ("The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process. The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.") (citation omitted).

280. *See* Withrow v. Williams, 507 U.S. 680, 691 (1993) (explaining that Fourth Amendment exclusionary rule "'is not a personal constitutional right,' but serves to deter future constitutional violations," and cannot "be

1. The Fear of Delay in the Enforcement of Sentences

Judge Higginbotham wrote in *Ugalde* that entertaining IAC claims in Rule 33 (b)(1) motions would "allow defendants to 'delay . . . the enforcement of just sentences.'"[281] Seldom, however, does a Rule 33(b)(1) motion permit a defendant to remain out on bail. If the motion is filed after sentencing but before any decision on direct appeal, in all probability the defendant will be in prison (or will soon have to report to prison) and will remain there unless and until the appeal succeeds or the motion is granted. In Judge Boudin's words:

> Under the Bail Reform Act of 1984, there is no presumption in favor of release pending appeal; on the contrary, even when the conviction does not involve a crime of violence or drug offense, detention (following conviction and sentencing) is mandatory unless the judicial officer finds *inter alia* "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in" a reversal, new trial, or reduced term of imprisonment that would expire during the expected duration of the appeal process.[282]

Similarly, if a defendant files a Rule 33(b)(1) motion after his or her conviction has been affirmed on appeal, the filing of the motion will not entitle the defendant to release on bail.

Only in limited circumstances is a Rule 33(b)(1) motion likely to delay the commencement of a prison sentence. That could occur if the defendant was granted bail earlier in the case, was permitted to remain on bail after being found guilty at trial,[283] and moved for a new trial under Rule 33(b)(1) before sentencing. Pending dispositive motions usually should be ruled on before sentencing unless the motions were filed very shortly before the date set for sentencing.[284] But taking the time necessary to consider a Rule 33(b)(1) motion is entirely appropriate and should not be regarded as unwarranted delay. The interest in finality cannot come into play before there is a final judgment,[285] which in a criminal case does not

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thought to enhance the soundness of the criminal process by improving the reliability of evidence introduced at trial . . . [T]he evidence excluded . . . 'is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.'" (quoting Stone v. Powell, 428 U.S. 465, 486, 490 (1976))).

281. United States v. Ugalde, 861 F.2d 802, 809 (5th Cir. 1988) (quoting United States v. Johnson, 327 U.S. 106, 112 (1946)).

282. United States v. Colon-Munoz, 292 F.3d 18, 20 (1st Cir. 2002) (quoting 18 U.S.C. § 3143(b)(1) (1994)).

283. Under the Bail Reform Act, prior to sentencing generally a defendant found guilty of an offense for which the applicable guideline recommends a term of imprisonment is to be detained unless found by clear and convincing evidence not to be a flight risk or to pose danger. *See* 18 U.S.C. § 3143(a)(1) (2012). Bail is much harder to obtain for those convicted of a crime of violence or a drug offense. *See* 18 U.S.C. §§ 3142(f)(1)(A)–(C), 3143(a)(2) (2012).

284. *See, e.g.*, United States v. Jackson, 572 F.2d 636, 642 (7th Cir. 1978); United States v. Bell, 572 F.2d 579, 581 (7th Cir. 1978).

285. *See, e.g.*, United States v. Brown, 623 F.3d 104, 113 (2d Cir. 2010) (holding, in case in which IAC claim was presented in new trial motion under Rule 33(b)(2), that, "when [an IAC claim] is first raised in the district court prior to the judgment of conviction, the district court may, and at times should, consider the claim at that

occur until sentencing.[286]

2. The Fear of Vastly Expanding Chances To Make a Late Bid for a New Trial

In *Ugalde*, Judge Higginbotham reasoned that permitting the assertion of IAC claims in Rule 33(b)(1) motions "would greatly expand the opportunities to make a late request for a new trial."[287] But the Supreme Court struck a balance between finality and the interest in setting aside improperly obtained judgments, both when it adopted Rule 33(b)(1) with its original two-year time limit, and when it adopted an amendment in 1998 extending the limit to three years, but making the time run from the verdict rather than from final judgment.[288] The Court did not regard as "late" motions grounded on newly obtained evidence, which could not have been obtained at the time of trial by due diligence, if the motions were filed within the limits it specified. In light of the balance struck by the Court, the reach of the Rule should not be curtailed on the theory that motions resting on certain kinds of newly obtained evidence are "late" even if filed within the specified time limit.

3. The Purported Adequacy of a § 2255 Motion as an Alternative Remedy

The opinions in *Ugalde*, *Hanoum*, and *Smith* point to the availability of a § 2255 motion as a reason not to entertain IAC claims under Rule 33(b)(1).[289] Even when those cases were decided, however, a § 2255 motion often was not an adequate substitute for a motion under Rule 33(b)(1). If a district court states that it intends to grant a motion for a new trial based on newly discovered evidence, the defendant may move the court of appeals to remand the case so that the district court can grant a new trial.[290] In contrast, a § 2255 motion will not be entertained while an appeal from the defendant's conviction is pending[291] and cannot be brought before sentencing.[292] IAC claims become harder to prove with the passage of time following trial.[293] An indigent defendant in a noncapital case also must rely upon the

point in the proceeding"); United States v. Steele, 733 F.3d 894, 897 (9th Cir. 2013) (citing *Brown* with approval); *see also* United States v. Ortiz-Vega, 860 F.3d 20, 30 (1st Cir. 2017) (same).

286. *See* Berman v. United States, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence.").

287. *Ugalde*, 861 F.2d at 809.

288. *Cf.* United States v. Munchak, 338 F. Supp. 1283, 1291 (S.D.N.Y. 1972) ("Motions for a new trial bring into play two factors, one that there should be finality of judgments and the other that a defendant must not be deprived of a fair trial.").

289. United States v. Smith, 62 F.3d 641, 649 (4th Cir. 1995); United States v. Hanoum, 33 F.3d 1128, 1130 (9th Cir. 1994); *Ugalde*, 861 F.2d at 809.

290. *See* FED. R. CRIM. P. 33(b)(1).

291. *See, e.g.*, United States v. Deeb, 944 F.2d 545, 548 (9th Cir. 1991); United States v. Davis, 604 F.2d 474, 484–85 (7th Cir. 1979).

292. *See, e.g.*, United States v. Stockstill, 26 F.3d 492, 497 n.10 (4th Cir. 1994).

293. *See* Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, CRIM. JUST., Fall 2009, at 6, 7 ("A defendant's ability to reinvestigate the case and demonstrate that the trial attorney was ineffective dwindles with time. Witnesses die or disappear. Evidence is lost. Memories fade.").

court's discretion in seeking appointment of counsel in § 2255 proceedings,[294] but in the original proceedings a defendant is entitled by statute to counsel "at every stage of the proceedings from his initial appearance . . . through appeal,"[295] and many motions under Rule 33(b)(1) are filed in that time period.[296] And because in many jurisdictions a high percentage of collateral attacks lack merit, compelling a defendant to litigate a claim in a collateral attack rather than under Rule 33(b)(1) is bound to make it harder to prevail. As Justice Jackson observed in the context of federal collateral attacks on state convictions pursuant to 28 U.S.C. § 2254, "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."[297]

After *Ugalde*, *Hanoum*, and *Smith* were decided, the enactment of AEDPA in 1996 made § 2255 motions inferior to Rule 33(b)(1) motions in other respects as well. First, whereas denials of Rule 33 motions are appealable as of right, under AEDPA a denial of a § 2255 motion is appealable only if a circuit justice or judge issues a certificate of appealability (COA).[298] The standard governing issuance of a COA requires a showing that "reasonable jurists could debate whether . . . the [motion] should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'"[299] In some circumstances, the need to obtain a COA can be a major obstacle even for a prisoner with a substantial claim. For example, in *Miller-El v. Dretke*,[300] a federal habeas corpus case decided in 2005, the Supreme Court overturned a capital murder conviction, accepting an argument that the Fifth Circuit believed did not even warrant issuance of a COA.[301] More generally, in an analysis of several years of

294. *See* 18 U.S.C. § 3006A(a)(2) (2012) (permitting appointment of counsel if the court "determines that the interests of justice so require . . . for any financially eligible person who . . . is seeking relief under section . . . 2255 of title 28"). When the court determines that an evidentiary hearing is required, appointment of counsel is mandatory. RULES GOVERNING SECTION 2255 CASES IN UNITED STATES DISTRICT COURT, R. 8(c).

295. 18 U.S.C. § 3006A(c).

296. Courts disagree as to whether the Sixth Amendment right to counsel applies to a Rule 33(b)(1) motion filed while the defendant's appeal from his conviction is pending. *Compare* United States v. Williamson, 706 F.3d 405, 415 (4th Cir. 2013) ("[A]fter an appeal has been filed and the window has closed on the record of conviction, Rule 33 'newly discovered evidence' proceedings in the district court are truly collateral proceedings to which the Sixth Amendment right to counsel does not attach."), *with* Kitchen v. United States, 227 F.3d 1014, 1019 (7th Cir. 2000) ("[B]ecause Kitchen's motion for a new trial [grounded on newly discovered evidence] was decided before our decision in his direct appeal, it may not be deemed a 'collateral attack' on his conviction, and Kitchen had a right to counsel in prosecuting such a motion and in taking an appeal from its denial.").

297. Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in the result).

298. *See* 28 U.S.C. § 2253(c)(1)(B) (2012); United States v. Cepero, 224 F.3d 256, 258–59 (3d Cir. 2000) (en banc). Before 1996, denials of § 2255 motions were appealable as of right. *See* 28 U.S.C. § 2253 (1951); *Cepero*, 224 F.3d at 258.

299. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983))).

300. 545 U.S. 231 (2005); *see also, e.g.*, Tennard v. Dretke, 542 U.S. 274 (2004).

301. The Justices had overturned the denial of a COA in an earlier decision in the same case. *Miller-El*, 537 U.S. 322.

decisions beginning on January 1, 2011 in federal habeas corpus cases brought by petitioners under sentence of death, it was determined that the Fifth Circuit denied a COA on all claims 58.9% of the time.[302]

Second, whereas Rule 33(b)(1) does not limit the number of motions a defendant may file,[303] under AEDPA a defendant may file a second § 2255 motion only in two narrow circumstances and only if the circuit court certifies that one of those circumstances is applicable.[304] Yet important new evidence may not be unearthed until after a § 2255 motion has been filed.

In sum, there are compelling reasons to permit all constitutional claims, if based on newly obtained evidence that could not have been obtained earlier through due diligence, to be presented under Rule 33(b)(1), and no adequate reasons for excluding IAC claims.[305]

C. The Standards Governing the Entitlement to Relief

Determining what standards should govern the ultimate grant or denial of Rule 33(b)(1) motions is more difficult, but the Seventh and Eighth Circuits went astray on this subject. The Seventh Circuit wrote in *O'Malley* that Rule 33(b)(1) "encompasses all claims based on newly discovered evidence which likely would lead to acquittal whether or not because of actual innocence."[306] The Eighth Circuit rested its decision in *Rubashkin* on the premise that "[t]he rule *requires* that the newly discovered evidence 'probably will result in an acquittal.'"[307] Yet it is demonstrably wrong to suggest that in all circumstances relief under Rule 33(b)(1) is dependent upon showing that the defendant probably would be acquitted at a retrial.

One need look no further than the Supreme Court's decisions in *Giglio* and *Agurs* to appreciate that the likelihood-of-acquittal standard does not apply across the board. The Court ordered a new trial in *Giglio*, on the basis of evidence the defense presented in a Rule 33(b)(1) motion, because the evidence showed that the government had stood by when its principal witness falsely denied having been

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302. *See* Brief for Petitioner 1a–34a, Buck v. Davis, 137 S. Ct. 759 (2017) (No. 15-8049).

303. *See* United States v. O'Malley, 833 F.3d 810, 812 n.1 (7th Cir. 2016).

304. *See* 28 U.S.C. § 2255(h) (2012).

305. Occasionally defendants seek relief under Rule 33(b)(1) on the basis of newly obtained evidence, not of an alleged constitutional violation, but of an alleged violation of a statute or of a standard adopted by the Supreme Court in the exercise of its supervisory power over the federal courts. *See, e.g.*, United States v. Rubashkin, 655 F.3d 849, 857–59 (8th Cir. 2011) (evidence that allegedly required district judge to recuse herself under 28 U.S.C. § 455(a)); United States v. Agnew, 147 Fed. Appx. 347, 352–53, 353 & n.3 (4th Cir. 2005) (unpublished) (same); Holmes v. United States, 284 F.2d 716, 717–20, 718 n.2, 719 n.5 (4th Cir. 1960) (evidence of improper communication with a juror requiring relief in part because of Supreme Court decision in Marshall v. United States, 360 U.S. 310 (1959), exercising supervisory power). As long as the legal principle involved is intended in substantial part to protect defendants, the claim should be entertained, if the evidence is newly obtained and could not have been obtained earlier through due diligence. The happenstance that the evidence was unavailable to the defense earlier does not justify denial of relief.

306. 833 F.3d at 814.

307. 655 F.3d at 858 (quoting United States v. Baker, 479 F.3d 574, 577 (8th Cir. 2007)); *see also* United States v. Winters, 600 F.3d 963, 970 (8th Cir. 2010).

promised he would not be prosecuted if he testified for the government. The standard the Court referred to focused on whether "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury."[308] The Court readily determined that the defendant was entitled to relief because the credibility of the witness in question was "an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility."[309] The Court did *not* attempt to determine whether acquittal would be likely at a retrial. Similarly, in *Agurs*, which involved a Rule 33(b)(1) motion asserting a failure to disclose exculpatory information, in alleged violation of *Brady*, the Court made clear that the defendant did not have to carry "the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal," a burden the Court aptly described as part of "the standard applied to *the usual* motion for a new trial based on newly discovered evidence."[310]

The circuit courts also uniformly recognize that, when the government fails to disclose exculpatory evidence, or knowingly presents false evidence (or allows such evidence to go corrected), a Rule 33(b)(1) motion presenting evidence of the government's breach of duty need not demonstrate a likelihood of acquittal at a new trial. In the words of the Sixth Circuit in *United States v. Frost*:[311]

> [W]hen the defendant asserts that the new evidence at issue is exculpatory evidence which the government failed to turn over in violation of *Brady*, . . . the defendant must show only that the favorable evidence at issue was "material," with "materiality" defined according to opinions interpreting the *Brady* doctrine.[312]

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308. Giglio v. United States, 405 U.S. 150, 154 (1972) (quoting Napue v. Illinois, 360 U.S. 264, 271 (1959)); *accord* United States v. Stein, 846 F.3d 1135, 1147 (11th Cir. 2017) (explaining, on review of denial of Rule 33 (b)(1) motion, that defendant would be entitled to relief upon proof that "(1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) . . . that there is any reasonable likelihood that the false testimony could have affected the judgment."); United States v. Shepard, 462 F.3d 847, 869–70 (8th Cir. 2006) ("[Appellants] contend that the Government withheld information from them . . . and that the district court should have granted them a new trial based on this newly-discovered evidence. . . . If the conviction was obtained through the prosecution's knowing use of perjured testimony, . . . the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."); United States v. Wong, 78 F.3d 73, 81 (2d Cir. 1996) ("If newly discovered evidence indicates that testimony given at trial was perjured, the grant of a new trial depends on the materiality of the perjury to the jury's verdict and the extent to which the prosecution was aware of the perjury. Where the prosecution knew or should have known of the perjury, a new trial is warranted if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.") (citation omitted); United States v. Endicott, 869 F.2d 452, 456 (9th Cir. 1989) (holding on appeal from denial of Rule 33(b)(1) motion that, "assuming the government knowingly failed to disclose the use of false testimony, [defendant's] conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury verdict") (footnote omitted); United States v. O'Dell, 805 F.2d 637, 641 (6th Cir. 1986).

309. *Giglio*, 405 U.S. at 155.

310. United States v. Agurs, 427 U.S. 97, 111 (1976) (emphasis added).

311. 125 F.3d 346 (6th Cir. 1997).

312. *Id.* at 382 (citation omitted).

The First Circuit puts it this way: "The standard applied to new trial motions based on *Brady* violations is . . . more favorable to defendants . . . ."[313] When a District of Columbia Circuit panel that included Judge Antonin Scalia remanded for an evidentiary hearing on a Rule 33(b)(1) motion asserting a *Brady* claim, the panel explained that "the usual standards for a new trial are not controlling."[314] There are comparable decisions by almost all of the other circuits[315]—including the Seventh and Eighth Circuits.[316]

Although this body of precedent establishes that *O'Malley* and *Rubashkin* are erroneous insofar as they assume that likelihood of acquittal is a general requirement for relief under Rule 33(b)(1), it might be argued that applying a less demanding standard to Rule 33(b)(1) motions based on *Brady* and *Napue* violations reflects the government's responsibility, when such a violation is demonstrated, for the fact that the evidence was not disclosed earlier, and that, therefore, the application of a less demanding standard to such motions does not hold significance for other kinds of claims presented under Rule 33(b)(1). When the Court concluded in *Agurs* that the likelihood-of-acquittal requirement should not apply, it emphasized that "the fact that evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial."[317] There are, however, many situations not involving *Brady* violations or *Napue* violations in which a Rule 33(b)(1) motion rests on evidence that the government has endeavored to keep secret from the defense. In *Coplon*, for example, the new trial motion, which was supported by affidavits, asserted that the government had intercepted telephone conversations between the defendant and her attorney,[318] and that the defense had not learned of the interceptions until after trial.[319]

There is another reason, however, that the likelihood-of-acquittal requirement does not have the broad application that the *O'Malley* and *Rubashkin* courts

313. United States v. Josleyn, 206 F.3d 144, 152 (1st Cir. 2000).

314. United States v. Kelly, 790 F.2d 130, 135 (D.C. Cir. 1986).

315. *See, e.g.*, United States v. Vallejo, 297 F.3d 1154, 1164 (11th Cir. 2002) (To obtain a new trial based on a *Brady* claim of newly discovered evidence, "the defendant must show that: (1) the government possessed favorable evidence to the defendant; (2) the defendant does not possess the evidence and could not obtain the evidence with any reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to the defendant, there is a reasonable probability that the outcome would have been different."); United States v. Perdomo, 929 F.2d 967, 972 (3d Cir. 1991); United States v. Shaffer, 789 F.2d 682, 689 (9th Cir. 1986).

316. United States v. Ballard, 885 F.3d 500, 504 (7th Cir. 2018); United States v. Beckman, 787 F.3d 466, 492–93 (8th Cir. 2015); United States v. Librach, 602 F.2d 165, 166–67 (8th Cir. 1979). Likewise, when newly obtained evidence allegedly demonstrates a violation of the Jencks Act, 18 U.S.C. § 3500, the Eighth Circuit applies its own established standard for alleged violations of that statute, rather than asking whether there is a probability of acquittal at a retrial. *Beckman*, 787 F.3d at 492–93.

317. *Agurs*, 427 U.S. at 111.

318. *See* Coplon v. United States, 191 F.2d 749, 757 (D.C. Cir. 1951), *rev'g* 91 F. Supp. 867, 868 (D.D.C. 1950).

319. *See id.* at 756–57.

assumed. That requirement is an element of the usual standard for new trial motions based on newly discovered evidence, which "presupposes," as the Supreme Court explained in *Strickland*, "that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged."[320] Wholly apart from *Brady* violations and *Napue* violations, many violations revealed by evidence obtained by defendants for the first time after trial may directly undermine that assumption.

For example, "the criminal trial of an incompetent defendant violates due process."[321] In the Supreme Court's words,

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.[322]

The prohibition against trying incompetent defendants is "fundamental to an adversary system of justice."[323] To stand trial, a defendant must have "the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense."[324] When the defense obtains after trial new evidence that the defendant lack such capacity at the time of trial, that evidence necessarily calls into question whether "all the essential elements of a presumptively accurate and fair proceeding were present."[325]

The Second and Ninth Circuits have considered the standard that should govern Rule 33(b)(1) motions based on new evidence of incompetence to stand trial. Both circuits have sensibly concluded that a likelihood of acquittal need not be shown, and that, instead, the proper inquiry is whether the new evidence demonstrates that the defendant lacked the abilities that the Supreme Court has said a defendant must possess in order to be competent.[326]

Confirmation that a likelihood of acquittal need not be shown to obtain relief under Rule 33(b)(1) is provided by the many decisions recognizing that newly obtained evidence of improper communications with a juror,[327] or misconduct by a

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320. Strickland v. Washington, 466 U.S. 668, 694 (1984).

321. Medina v. California, 505 U.S. 437, 453 (1992).

322. Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) (quoting Riggins v. Nevada, 504 U.S. 127, 139–40 (1992) (Kennedy, J., concurring)).

323. Drope v. Missouri, 420 U.S. 162, 172 (1975).

324. *Id.* at 171.

325. *Strickland*, 466 U.S. at 694.

326. *See* United States v. McCarthy, 54 F.3d 51, 55 (2d Cir. 1995) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam)); United States v. Herrera, 481 F.3d 1266, 1270 (10th Cir. 2007) (quoting *McCarthy* with approval).

327. *See, e.g.*, United States v. Endicott, 869 F.2d 452, 457 (9th Cir. 1989); Gov't of V.I. v. Joseph, 685 F.2d 857, 863 n.3 (3d Cir. 1982); United States v. Williams, 613 F.2d 573, 575 (5th Cir. 1980); United States v. Jones, 597 F.2d 485, 488 (5th Cir. 1979); Richardson v. United States, 360 F.2d 366, 368 (5th Cir. 1966); Holmes v. United States, 284 F.2d 716, 720 (4th Cir. 1960).

juror,[328] may be presented in a Rule 33(b)(1) motion. Such evidence, of course, does not demonstrate a likelihood of acquittal at a new trial; and the courts have not demanded such a showing.[329]

Denying relief under Rule 33(b)(1) to any defendant unable to demonstrate a likelihood of acquittal at a retrial also would produce arbitrary results. For example, it would preclude relief based on newly obtained evidence that all twelve jurors had been paid bribes in return for agreeing to find the defendant guilty. Such evidence would demand a new trial to preserve basic fairness and the right to jury trial, but it would not make it likely that a new trial would end in an acquittal.

The Seventh and Eighth Circuits were thus mistaken in *O'Malley* and *Rubashkin* when they treated likelihood of acquittal at a new trial as a hurdle that all defendants seeking a new trial under Rule 33(b)(1) must clear.

CONCLUSION

"There is a tide in the affairs of men."[330] In the 1960s, the Warren Court brought about a "'revolution' in American criminal procedure."[331] Among other things, the Court held that indigent defendants are entitled to have counsel appointed to defend them,[332] extended the Fourth Amendment exclusionary rule to the states,[333] recognized new protections against coercive interrogation of suspects[334] and against interrogation[335] or lineups[336] absent counsel after adversarial proceedings have begun, and adopted new procedural standards facilitating post-conviction

328. United States v. Noel, 905 F.3d 258, 266 (3d Cir. 2018) (entertaining claim based on new evidence that juror provided false information on voir dire); United States v. Parse, 789 F.3d 83, 110 (2d Cir. 2015) (same).

329. *See Parse*, 789 F.3d at 110 ("Where the newly discovered evidence concerns materially false information provided by a prospective juror in response to clear and unambiguous questions on voir dire, the court should grant the new-trial motion where the juror's false responses 'obstructed the voir dire and indicated an impermissible partiality on the juror's part[.]'" (quoting United States v. Colombo, 869 F.2d 149, 151 (2d Cir. 1989))); *Endicott*, 869 F.2d at 457 ("Because neither Endicott nor the court were previously aware of the improper juror contact, this evidence can be considered 'newly discovered' for the purposes of Rule 33. If improper juror-witness contact does not prejudice the defendant, a new trial need not be ordered.") (citations omitted); *Williams*, 613 F.2d at 575 ("[A]ppellant's evidence goes to the fairness of the trial rather than to the question of guilt or innocence. . . . [F]or this case, a corollary to the [probability-of-acquittal] requirement . . . would be that the newly discovered evidence would 'afford reasonable grounds to question . . . the integrity of the verdict.'" (quoting S. Pac. Co. v. Francois, 411 F.2d 778, 780 (5th Cir. 1969))); United States v. Pratt, 807 F.3d 641, 645 (5th Cir. 2015) (following holding in *Williams*); Holmes v. United States, 284 F.2d 716, 720 (4th Cir. 1960), discussed *supra* text accompanying notes 100–06.

330. WILLIAM SHAKESPEARE, JULIUS CAESAR act 4, sc. 3.

331. Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 3 (1995).

332. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

333. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

334. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

335. *See* Massiah v. United States, 377 U.S. 201 (1964).

336. *See* United States v. Wade, 388 U.S. 218 (1967).

challenges to federal and state convictions.[337] Toward the end of the 1960s, however, events including urban riots and disorder on college campuses "combined to create an atmosphere that, to say the least, was unfavorable to the continued vitality of the Warren Court's mission in criminal cases."[338] The Court's composition also changed. Eventually, the Court moved in a different direction. In the 1970s and 1980s, it narrowly interpreted protections recognized in the 1960s[339] and erected new barriers to collateral attacks on federal and state convictions.[340] Beginning with *Ugalde* in 1989, numerous circuits reflected this new view of post-trial remedies in decisions limiting the reach of Rule 33(b)(1).

Yet a number of the decisions narrowly construing Rule 33(b)(1) have failed to take account of relevant Supreme Court decisions or important circuit court precedents, or both. Several of the decisions barring the assertion of IAC claims under the rule have relied upon the purported adequacy of a § 2255 motion as a substitute for a new trial motion, a premise that was always highly suspect but became much more so after the enactment of AEDPA in 1996. Now that the Seventh Circuit has radically altered its interpretation of Rule 33(b)(1), it is to be hoped that other circuits also will take a closer look at the rule. With powerful proof having emerged in recent years of the fallibility of the criminal justice system,[341] a rule providing an important post-trial remedy should not lightly be given a narrow construction.

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337. *See, e.g.*, Sanders v. United States, 373 U.S. 1 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Fay v. Noia, 372 U.S. 391 (1963). Describing *Fay v. Noia*, Professor Francis Allen remarked that "[t]he Court, having wearied in its efforts to penetrate the thicket of state procedural law, brushed aside those concepts that had traditionally inhibited the administration of the federal habeas corpus remedy . . . and held the writ available to any state prisoner who had not 'deliberately bypassed' the assertion of his federal rights." Francis Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L. F. 518, 528 (1975).

338. Allen, *supra* note 337, at 539.

339. *See, e.g.*, United States v. Ash, 413 U.S. 300 (1973) (indicted defendant has no right to have lawyer present when prosecution witness is shown photographic display containing picture of defendant and asked if witness can identify offender); Kirby v. Illinois, 406 U.S. 682, 684 (1972) (plurality op.) (suspect had no right to counsel at police station showup that took place before he had been indicted or otherwise formally charged).

340. *See, e.g.*, Teague v. Lane, 489 U.S. 288 (1989); Rose v. Lundy, 455 U.S. 509 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976); Tollett v. Henderson, 411 U.S. 258 (1973); Davis v. United States, 411 U.S. 233 (1973).

341. *See, e.g.*, *Summary View*, National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Feb. 1, 2019); Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395 (2015); Jon. B. Gould et al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471 (2014); Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133 (2013); BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011).