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NEW TRIAL IN FEDERAL CRIMINAL CASES

Lester B. Orfield †

Rule 33 of the Federal Rules of Criminal Procedure provides:

"The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within five days after verdict or finding of guilty or within such further time as the court may fix during the five-day period."

I.

History of Drafting of Rule 33.

When the drafting of the Federal Rules of Criminal Procedure was commenced, there were in effect title 28, section 391, authorizing federal courts to grant new trials in both civil and criminal cases, and rule II of the Criminal Appeals Rules of the United States Supreme Court providing for new trials in criminal cases. Also in operation was rule 59 of the Federal Rules of Civil Procedure providing for new trials in civil cases.

In the first draft of the Federal Rules of Criminal Procedure, dated September 8, 1941, rule 59 was modeled largely on the corresponding civil rule of procedure. Subdivision (a) provided that existing grounds for new trial be continued. A new trial might be granted to all or any of the defendants as to all or part of the issues. Subdivision (b) provided that the motion be made not later than three days after the entry

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of judgment, except that a motion on the ground of newly discovered evidence might be made before expiration of the time for appeal. Subdivision (c) fixed the time for serving affidavits. Subdivision (d) provided that the court on its own initiative might order a new trial not later than three days after entry of judgment, and that the order specify the grounds therefor. Rule 60 (b) was modeled on federal rule 60 (b) and contained a sentence impliedly retaining the writ of error coram nobis.

The United States Supreme Court Advisory Committee on Rules of Criminal Procedure had previously received a number of suggestions from judges and lawyers. The Committee for the Southern District of Florida suggested that motions for new trials be permitted to be made orally and taken down in shorthand by the court reporter. Four to five days were to be allowed in which to move, and release from custody pending decision was to be forbidden. Nathan April, of New York, suggested that the rules deal with the subject matter of motions for new trial. Frederick F. Faville, of Iowa, favored a ten-day period for the motion, the appearance bond to be in full force in the meantime. The Committee for the Eastern District of New York also favored at least a ten-day period. The Committee for the District of New Jersey suggested that the scope of the new trial granted at the defendant's request should not be confined to particular offenses of which he was convicted in the first trial if he had been charged with a higher degree of that offense.

Rule 80 of the second draft, dated January 12, 1942, made a number of important changes. Under subdivision (a) motions for new trials were to be "determined promptly." Under subdivision (2) a new trial might be granted "whenever required in the interests of justice." The rule no longer provided for a new trial as to only part of the issues. Under subdivision (c) the motion was to be made "within three days after verdict or finding of guilt." Under subdivision (d) a motion solely upon the ground of newly discovered evidence might be made within one year after final judgment. A suggestion was offered that the Committee ultimately adopt the view that there be no time limit at all. This was the view of a number of lawyers in the Department of Justice. Under existing law the only recourse is a pardon. Pardon is neither a satisfactory nor a logical solution. Such cases would be rare and the courts would not abuse the power conferred. Subdivision (e) provided that the court might order a new trial on its own initiative. Rule 82(b) replacing rule 60(b) was silent as to the possibility of writ of error coram nobis.
Rule 93 of the third draft, dated March 4, 1942, was substantially similar. But subdivision (e) removed all time limits upon the motion for a new trial on the ground of newly discovered evidence. Subdivision (d) allowed extension of time within the three-day period as to the usual motion for a new trial. In regard to coram nobis, rule 91(b) was similar to rule 82(b) of the previous draft.

Rule 48 of the fourth draft, dated May 18, 1942, made no changes except that it omitted the subdivision on granting a new trial on the initiative of the court. Rule 46(b) was like rule 91(b) of the previous draft.

Rule 48 of the fifth draft, dated June 1942, made no changes, except that it referred to the court's vacating judgment instead of opening judgment after trial without a jury. Rule 46(b) was like rule 46(b) of the previous draft in permitting the court to modify or vacate a judgment entered through mistake, inadvertence, surprise, or neglect. This draft was submitted to the Supreme Court for comment by it. The Court as a whole offered no comments or suggestions as to rule 48. A single judge regarded as questionable the language of rule 48(b) providing: "If the trial was without a jury, the court may vacate the judgment if one has been entered, take additional testimony, and direct the entry of a new judgment." As to rule 46 the Court queried: "What is the force of the words 'surprise' and 'inadvertence' and 'neglect: as used in this rule? Does 'mistake' mean mistake of fact or law or both, and should correction of error for mistake be limited to a six-months' period?"

Rule 31(d) of the sixth draft, dated the winter of 1942-1943, was not very different. It omitted the earlier provision calling for prompt determination of motions for a new trial. Its first sentence made it clear that the court might grant a new trial on its own initiative, in providing as follows: "The court may grant a new trial to a defendant whenever required in the interest of justice." Subdivision (b) of rule 31 was designed to continue the practice of the common-law writ of error coram nobis. In full the subdivision read as follows:

"The court may modify or vacate a judgment or an order entered through mistake, inadvertence, surprise, or neglect. This rule does not limit the power of a court to entertain a motion or proceeding to modify or vacate a judgment or order. A motion prescribed by this rule does not affect the finality of a judgment or suspend its operation. The motion is not barred by the affirmance of the judgment by an appellate court. The motion shall be made within a reasonable time but in no case more than six months after the entry of the judgment or order."
The note to rule 31(b) referred to a proposed subdivision (c) prepared by the late Professor George H. Dession entitled "Duress, fraud, prejudicial irregularity" which read as follows:

"On motion the court, upon such terms as are just, may vacate or modify a judgment, order, or proceeding on the ground of duress, fraud, or prejudicial irregularity. The motion shall be made with reasonable diligence after discovery of or convenient opportunity to assert the grounds."

This provision was intended to replace the writ of error coram nobis, but was not adopted by the Committee.

Rule 31(c) of a draft, dated March, 1943, known as the "preliminary draft" between the sixth and seventh drafts was substantially identical with rule 31(d) of the sixth draft. A statement for submission to the Supreme Court was filed by four members of the Advisory Committee, Professors Dession, Glueck, Orfield, and Wechsler, criticizing rule 31(c) for not giving sufficient protection to the criminal defendant because the grounds for a new trial with no time limit were too narrow. The statement was as follows:

"The rule recommended by the Committee provides that the court may grant a new trial 'whenever required in the interest of justice.' A motion for a new trial based solely upon the ground of newly discovered evidence may be made at any time. A motion based upon some other ground must, however, be made within three days after verdict or finding or within such further time as the court may fix during the three-day period.

"We are in full agreement with the rule insofar as it thus provides a broad basis for granting new trials when required in the interest of justice; and, further, insofar as it eliminates a time limit on motions for new trial based upon the ground of newly discovered evidence. We believe, however, that the rule should go further. A conviction of crime should not be permitted to stand at any time if achieved by fraud, duress or other gross impropriety. This, indeed, is substantially the present law, except that the remedy available is the extraordinary writ of habeas corpus (see Waley v. Johnston, 316 U.S. 701 [1942]), there being as yet no authoritative decision by the Supreme Court on the availability of the writ of error coram nobis (Wells v. United States, No. 11, Original, decided March 1, 1943). As a device for correcting gross injustices the motion for a new trial is in our judgment superior to the writ of habeas corpus. The motion would be made in the court by which the judgment was rendered; the writ is ordinarily sought elsewhere. The fact that the writ, if sustained, results in an order of release may conceivably present
double jeopardy problems in the event of a new trial. We think, therefore, that there would be substantial gain if most of the contentions now presented after conviction on habeas corpus could be presented upon a motion for a new trial. To be sure, the elimination of a time limit on motions for new trial based on newly discovered evidence goes a long distance towards meeting the problem. In most cases, evidence of fraud or gross impropriety would, if available, be presented within the time allowed; if not then available the evidence would necessarily be newly discovered. There may, however, be cases in which evidence of duress, and perhaps even of fraud or gross impropriety, is not newly discovered evidence and where by reason of ignorance or neglect the point was not made within the three-day or extended period otherwise permitted for motions for new trial. To permit such cases to be litigated on motion rather than on habeas corpus, we propose that the motion for new trial available without time limitation be extended to include not only motions based upon newly discovered evidence, but also those based 'upon the grounds of fraud, duress or other gross impropriety.'

"To achieve this result we suggest that paragraph (c) of rule 31 be amended as follows:

"(c) For New Trial. The court may grant a new trial to a defendant whenever required in the interest of justice. . . . A motion for new trial based solely upon the ground of newly discovered evidence, fraud, duress, or other gross impropriety may be made at any time before or after final judgment, but if an appeal is pending the trial court may grant the motion only on remand of the case. . . ."

To this proposal a reply memorandum for the majority of the Committee stated:

"The Committee adopted a rule the effect of which is to abolish all time limits on motions for a new trial on the ground of newly discovered evidence. There were two reasons for this action. First, it seemed illogical that there should be a time limit on such an application, since the motion cannot be made until the evidence is discovered. Irrespective of when the evidence comes to light, if it is sufficient to warrant a reopening of the case, such relief should be granted. Second, experience has shown that in fact cases have occurred in which new evidence was discovered a considerable time after conviction and that such evidence led to the conclusion that a miscarriage of justice had resulted. It seemed to the Committee that judicial redress should be afforded in such cases and that executive clemency was neither a satisfactory nor adequate remedy from the standpoint of the Government or from the point of view of the defendant."
"The additional statement while not objecting to the foregoing provision suggests that it should be carried still further, namely, that it should be extended to motions for a new trial based on fraud, duress, or other gross impropriety.

"It was the view of the majority of the Committee that the reasons which warranted an abolition of all time limits on motions for a new trial on the ground of newly discovered evidence, would not apply to motions for a new trial based on fraud, duress, or other gross improprieties, since the evidence of such facts would naturally be known at the time they transpired. Moreover, it seemed that the last mentioned proposal might open the flood gates wide to applications made years after the trial when some of the participants may no longer be available or their recollections may be partially faded."

Rule 31(c) of the First Preliminary Draft, dated May, 1943 (the seventh committee draft) was similar in its provision for new trial. The last sentence of the prior draft, providing in part that "if an appeal is pending the court may grant the motion only on remand of the case made at any time before final judgment" was changed to omit the words "made at any time before final judgment." The Committee Note to rule 31(c) pointed out that Criminal Appeals rule 2(3) was not followed on the subject of remand because the latter limits the time for remand. The proposed rule would drop this limitation because of two other proposed provisions removing time limitations, namely, the provision that a motion for a new trial based solely on newly discovered evidence may be made at any time, and the provision of rule 41(c) as to time. The last sentence of the subdivision also changed the word "entertain" to "grant." Under the existing practice, application for remand would have to be made to the appellate court and the remand granted before the trial court could entertain the motion for a new trial. The provision that if an appeal is pending, the court may grant the motion only on remand was intended to change the existing practice pursuant to which a remand must be secured before the motion for a new trial is made in the trial court. Under the proposed rule a motion could be made without securing a remand. But, if the trial court should decide to grant the motion a remand would be necessary prior to the order granting the motion. The proposed rule thus would eliminate the need of a remand in those cases in which the trial court decided to deny a motion for a new trial. The Committee Note also pointed out that "no express provision is made with respect either to providing for relief or barring relief under the common-law writ of error coram nobis." The language of rule 31(b) of the sixth draft
on modification or vacation of judgments was omitted. None of the drafts after the sixth draft deal with this subject.

Rule 35 of the Second Preliminary Draft, dated February, 1944 (the eighth committee draft), made some changes. A separate rule was now devoted exclusively to new trial. The time for making the motion in the usual case was changed from three to five days and the court could extend the time within such five days. There was to be no time limit either on the ground “that the defendant has been deprived of a constitutional right” or on the ground of newly discovered evidence, and the word “solely” as to the latter was omitted. Rule 35 of the Report of the Advisory Committee, dated July, 1944 (ninth draft), was similar in effect, the third and fourth sentences being transposed in order. But the Supreme Court rejected the provision for no time limit as to newly discovered evidence and deprivation of constitutional right. Only Justice Murphy accepted the committee view. Instead the rule provided that a motion for a new trial “based on the ground of newly discovered evidence may be made only before or within two years after final judgment.” Because two prior proposed rules, rule 15 on pre-trial procedure and rule 16 on notice of alibi, were rejected by the Court, the final rule became rule 33.

The following comments were made to the Advisory Committee on the rule as it appeared in the First Preliminary Draft (seventh draft). Edwin R. Holmes, of the Court of Appeals for the Fifth Circuit, objected to the want of a time limit on new trials because of newly discovered evidence: “Rules like this prevent the speedy determination of any case where the defendant is wealthy enough to keep up the procedure in court.” 1 Judge Harvey M. Johnsena, of the Court of Appeals for the Eighth Circuit, approved of the provision allowing the trial court to entertain a motion for a new trial on appeal without remand. Walter C. Lindley, United States District Judge for the Eastern District of Illinois, subsequently a member of the Court of Appeals for the Seventh Circuit, opposed the unlimited time for a new trial on the ground of newly discovered evidence: “Years may lapse, witnesses may die and other events occur so as to alter completely the nature of the proof and the result of the trial. I am not in favor of such never-ending unsettlement of court judgments.” 2 Former Attorney General Homer Cummings in an address before the American Bar Association defended the rule of no time limit, 3 because evidence

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1. I Comments, Recommendations and Suggestions Received Concerning the Proposed Rules of Criminal Procedure 197 (1943).
2. Ibid.
3. Id. at 198.
is sometimes discovered long after the trial and pardon, an inadequate and unsatisfactory remedy, is the only remedy available under existing law. He was not afraid "that the courts will be inundated by a flood of frivolous motions of this kind. We may well rely on the good sense of federal judges not to grant such motions except upon sufficient cause." Daniel M. Lyons, Pardon Attorney of the Department of Justice, took the same position. Chief Justice James P. Alexander, of the Supreme Court of Texas, was opposed to the removal of time limits, being of the opinion that laches should bar the criminal defendant within a reasonable time. He would permit amendment of a motion for a new trial even after the normal time for moving for a new trial had elapsed. Mr. A. Julius Freiberg, of Cincinnati, Ohio, put this question: "Does the phrase 'finding of guilt' when there is no jury, mean the judgment or does it mean the preliminary 'decision' (oral or written) of the judge who tries the case"? 4 Mr. Jesse Slingluff, of Baltimore, Maryland, pointed out that rule 31 (c) allowed only three days in which to move for a new trial while rule 27(b) provided that a motion for acquittal might be joined with a motion for a new trial within ten days after the jury is discharged. Thus a criminal defendant by a little finagling could file his motion "within ten days after the jury's discharge." 5 Mr. William Scott Stewart, of Chicago, would give the defendant more time in which to apply for a new trial, but would allow a new trial only on motion of the defendant since the trial court should not have the power to grant a new trial on its own initiative. The defendant might fear a worse result on a new trial. "Under the rule as drafted the prosecutor might bring forth some new evidence if he is not satisfied with the sentence, or the conduct of the defendant in prison." 6 Judge H. Church Ford, of the Eastern District of Kentucky, would clarify the rule so as not to be inconsistent with the rule on judgment n.o.v. allowing ten days. The federal judges of Michigan opposed the unlimited time for motion for a new trial in case of newly discovered evidence. Mr. Thomas J. Morrissey, United States Attorney for the District of Colorado, opposed the power of the trial judge within the three-day period to extend the time for a motion for a new trial, for this would produce delay. Mr. Edward M. Curran, United States Attorney for the District of Columbia, favored the no-time-limit provision as to newly discovered evidence and cited an actual case where the new rule would work justice, whereas under the existing rule only

4. Id. at 199.
5. Ibid.
6. Ibid.
a pardon would lie. John T. Metcalf, United States Attorney for the Eastern District of Kentucky, would make the rule consistent with the rule on judgment n.o.v. as to time. He was opposed to there being no time limit as to newly discovered evidence. He also objected that though the defendant must normally move within three days, nevertheless the judge acting on his own initiative could grant the motion at a later time. Victor E. Anderson, United States Attorney for the District of Minnesota, would increase the time limit from three days to five days because in some instances, such as mail fraud cases, three days would be too short a time in which to compile the necessary data. The Committee on Criminal Law and Procedure of the Brooklyn Bar Association would increase the time limit to twenty days: "New trial because of fraud, duress and gross impropriety should not be limited in time." Mr. Stuart H. Steinbrink, of New York, pointed out the need for fixing a similar time limit for new trials in rule 31(c) and in the rule on judgment n.o.v. Judge MacSwinford, of Kentucky, would limit the time for a new trial in all cases so that witnesses might be released, saying also that the trial judge should not have a longer time in which to act on his own initiative than does the criminal defendant, who is given only three days in the usual case. Joseph F. Deeb, United States Attorney for the Western District of Michigan, insisted on a time limit in all cases, saying that the prosecution might be unable to conduct a new trial properly at an indefinite later date, and that pardon is adequate for the rare cases of newly discovered evidence. Mr. Louis J. Castellano, of Brooklyn, New York, favored the minority committee proposal covering not only newly discovered evidence, but also fraud, duress, or other gross impropriety. The Lawyers Club of Los Angeles had some members who also favored the minority proposal, and recommended further study. Mr. James E. Ruffin, of the Criminal Division of the Department of Justice, stated that aside

"from constitutional objections, I do not think the court should be empowered to vacate a judgment in favor of the defendant in a criminal case. I think this is going too far. It will discourage defendants in waiving juries. There is no reason why the court should not take as much time as it needs in the trial of a case, but after judgment is rendered in favor of the defendant I think that should terminate the matter as to that defendant."

The following comments were made on the Second Preliminary Draft. The Judicial Conference of the Seventh Circuit adopted a

7. II id. at 479 (1944).
8. Id. at 480.
9. Id. at 481.
10. Id. at 482.
motion that "it is the sense of this Conference that rule 35 be redrafted so as to prevent presentation of motions for new trial or to vacate a judgment of conviction at any time subsequent to the term at which judgment was entered, for the reason that any rule to the contrary destroys finality of judgments." 11 Judge Evan A. Evans, of the Court of Appeals of the Seventh Circuit, agreed, as did Judge Robert C. Baltzell, of the Southern District of Indiana, and Judge Charles G. Briggle, of the Southern District of Illinois. Judge Briggle would not allow the motion "after the defendant has entered upon the service of his sentence." 12 He admitted, however, that the "writ of habeas corpus would still be open to any defendant under proper circumstances." Judge William J. Campbell, of the Northern District of Illinois, Judge F. Ryan Duffy, of the Eastern District of Wisconsin, and Judge Walter C. Lindley, of the Eastern District of Illinois, all objected to the no-time-limit provision.

At The Judicial Conference of the Second Circuit a motion by Judge Leibell, of the Southern District of New York, fixing a time limit of five years for new trials on the ground of newly discovered evidence was seconded and lost; but his motion fixing a time limit of five years in cases of deprivation of constitutional rights was seconded and carried. 13 Judge Robert C. Bell, of the District of Minnesota, was opposed to no time limit: "In many cases when the convict thinks the Government no longer has evidence to convict, he is going to discover new evidence." 14 Judge John B. Sanborn, of the Court of Appeals of the Eighth Circuit, objected to the provision for no time limit as to newly discovered evidence and denial of constitutional rights. In his opinion, there should be some finality to judgments in criminal cases so that a trial court does not become a perpetual court of review of its own judgments. He felt the proposed rule would not substantially benefit innocent defendants, and that guilty defendants would delay their motions until the Government was no longer able to convict. Innocent men if convicted have every incentive to act promptly. Judgments should become final within a reasonable time after entry. The remedies by way of pardon, commutation of sentence, and parole are adequate, and encourage prisoners to behave well. "In view of existing release procedures, I think it is unnecessary to guard against every possibility that justice may miscarry." 15 One year should be long

11. III id. at 141.
12. Id. at 142.
13. Id. at 143.
14. Ibid.
15. Id. at 144.
enough. The remedies provided by the Rules of Criminal Procedure as to correcting, modifying and setting aside sentences should be made exclusive so that all may know what authority the courts possess. The ancient writ of error coram nobis should not be perpetuated. However, the remedy of habeas corpus cannot and should not be impaired by the rules. Mr. Robert P. Butler, United States Attorney for the District of Connecticut, thought that abolishing the time limitation would result in opening the door to unlimited fraud, as the Government would find it impossible to prove its case a long time after trial. Mr. George E. Q. Johnson, Chairman of a Bar Committee for the Seventh Circuit and a former United States Attorney, opposed the no-time-limit provision and favored a three-year limitation.16 The personnel of a United States Attorney’s office change every five or six years. Thus, no one in the office may have knowledge of a case tried long ago. Usually the files do not disclose all the facts. Frequently there is not available a transcript of the evidence except as to appealed cases. Some criminal practitioners are unscrupulous. Defendants serving time will not hesitate to perjure themselves, and can induce other persons to perjure for them. If there is no time limit witnesses will be hounded by associates of hardened criminals to make affidavits changing their testimony. Witnesses are often hard to obtain for the first trial and will be even harder to get if there is no time limit so that they may be approached by criminal defendants for an indefinite period. Even jurors have been approached for affidavits. After three years executive clemency should be adequate. Mr. Joseph E. Tierney, of Wisconsin, favored a rule providing that when a new trial is granted, such trial would proceed as if there had been no former trial. A Wisconsin statute so provided. Judge George A. Moore, of the Eastern District of Missouri, would provide a reasonable time limitation 17 as would Judge Fred L. Wham, of the Eastern District of Illinois.18 As to newly discovered evidence the proposed rule would encourage lack of diligence as well as delay. As to constitutional rights the rule would encourage late motions in the light of subsequent Supreme Court decisions even though the defendant had not objected at the trial. Where fees were available the rule would encourage replowing of possible constitutional questions. There would be a flood of cases just as there have been a flood of cases in the light of recent expansions of habeas corpus. Judge A. F. St. Sure, of the Northern District of California, favored a time limit of ninety days after final judgment, since habeas corpus has been expanded

16. Id. at 145.
17. Id. at 146.
18. Id. at 147.
to take care of the situations contemplated by the proposed rule. Mr. John E. Byrne, of the Bar Committee of the Seventh Circuit, favored a three-year limit, and made a statement similar to that of Mr. George E. Q. Johnson, Chairman of the Committee. Mr. Harry C. Blanton, United States Attorney for the Eastern District of Missouri, favored a time limit of sixty days as set forth in rule 2(3) of the Supreme Court rules governing criminal cases after verdict.

II.

HISTORY OF NEW TRIAL IN ENGLAND.

New trials in civil cases were granted in England as early as the fourteenth century. But they were not granted in criminal cases until the end of the seventeenth century. After 1673 new trials were granted to criminal defendants in misdemeanor cases. The developing concept of double jeopardy prevented the development of a rule permitting the prosecution to move for a new trial after an acquittal. The grounds for a new trial were extensive in scope and included errors in the exclusion or admission of evidence, improper instructions, a verdict against the weight of the evidence, or the furtherance of the ends of justice. No new trial could be granted in felony cases, though the writ of error coram nobis was available in the limited category of errors of fact.

Motion for a new trial was not made before the judge who tried the case but before the King's Bench sitting en banc. Under section 20 of the Criminal Appeals Act of 1907, the power to grant a new trial was abolished. Even prior to this statute the remedy of new trial was limited in scope except in case of summary jurisdiction since it was available only in cases tried by the King's Bench, and furthermore, it was not available as to felonies.

At the present time a new trial cannot be ordered even though the defendant appears to be clearly guilty, except after an abortive trial.

20. IV id. at 77.
21. Orfield, Criminal Procedure From Arrest to Appeal 495, 496 (1947); Orfield, Criminal Appeals in America 17, 18 (1939).
22. The procedure just before it was abolished is described in Archibald, Pleading, Evidence and Practice in Criminal Cases 291-294 (23d ed. 1905). The defendant might move for an order nisi within eight days after the trial before a divisional court of the King's Bench Division. The court could extend the time in which the motion could be made. The motion was made on the judge's notes of the trial or upon affidavit. The presence of the defendant seems to have been necessary.
23. Kenny, Outlines of Criminal Law 520 (Turner ed. 1952). In Canada the trial court may not order a new trial, but the appellate court may do so. Riddell, New
The English law distinguishes between new trial which is abolished, and *venire de novo* which is retained. A *venire de novo* may be granted: (1) before the completion of the first trial if the judge saw fit to discharge the first jury; (2) where a special verdict has been returned on which the appellate court could not enter judgment for either party; (3) by a court of error in cases of mistrial for treason, felony, or misdemeanor. \(^{24}\)

There has been a movement in recent years to confer on the Court of Criminal Appeal the power to grant a new trial. But an official committee report of April 10, 1954, has opposed it except in cases of newly discovered evidence. \(^{25}\) It seems to have been felt that finality and speedy justice are essential and that a second trial would be prejudicial to the criminal defendant. Though these elements are ignored in case of a mistrial they should not be ignored in other cases. The committee was divided five to three. The minority members were judges, while the majority members were practitioners. It should be noted that the reform movement in England is in the direction of giving the appellate court power to grant a new trial, but of giving no such power to the trial court.

III.

**Grounds for New Trial.**

(a). *History.* The Constitution is silent with respect to any right to a new trial in criminal cases. Only the collateral remedy of habeas corpus is guaranteed, as article I, section 9, provides: “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” Thus, there seems to be no constitutional right to a new trial. As the Supreme Court of Kansas stated: “in no case is it held to be a constitutional grant. It is a privilege offered by the law to the accused, in addition to the guarantees offered by the Constitution.” \(^{26}\) However, Congress, in 1789, promptly provided for new trials. \(^{27}\) Therefore, it has been stated:

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*Trials in Present Practice, 27 Yale L. J. 353, 359-360 (1918). The same is true as to the appellate courts in Australia, New Zealand and Ceylon. Goodhart, *Acquitting the Guilty*, 70 L.Q. Rev. 514, 520 (1954).*

*24. Archibald, Criminal Pleading, Evidence and Practice 342-343 (32d ed. 1949); Roscoe, Criminal Evidence 250, 271, 283, 325 (16th ed. 1952). It is not easy to distinguish mere irregularities in the proceedings resulting in final discharge of the defendant from completely null proceedings resulting in another trial. The Court of Criminal Appeal does not always order a new trial even if the proceedings were a nullity.*


*27. 1 Stat. 73 (1789).*
"The right to move for a new trial, and to have the motion considered upon the reasons presented for it, is an absolute one, and the granting or refusal thereof does not rest in the discretion of the court." 28

The Judiciary Act of 1789 provided for the granting of new trials for "reasons for which new trials have usually been granted in courts of law." 29 This was early held to include cases in which a federal criminal defendant had been convicted and sought a new trial. 30 There was a single contrary decision by Justice Story sitting as a circuit judge. 31 Justice Story thought that the jeopardy provision would be violated, but the other decisions concluded that there would be jeopardy only if there had been an acquittal. The right to a new trial existed even in capital cases, whereas in England it had been confined to misdemeanors.

May the trial court, after conviction, grant a new trial on its own initiative? The wording of rule 33 seems broad enough to permit this. 32 But, if the defendant were to object to the new trial, it would seem that he need not undergo it as he has been in jeopardy and has not waived his jeopardy by moving for a new trial. It has been said that a new trial may not be granted to the prejudice of the defendant. 33 "It may be admitted that the new trial could be granted only with the assent of the prisoner." 34 A new trial should not be ordered even in a capital case if the defendant objects. 35 Likewise a defendant need not accept a pardon. 36

(b). Interest of Justice. The first sentence of rule 33 permits the court to grant a new trial "if required in the interest of justice." This means that the court may grant a new trial if it "reaches the conclusion that a miscarriage of justice has resulted." 37 But "justice" is not a sentimental concept which each person may have as to right or wrong

29. 1 STAT. 73 (1789).
32. At least the trial court may suggest a motion for new trial. Gourdon v. United States, 154 Fed. 453, 460 (7th Cir. 1907).
34. United States v. Keen, 26 Fed. Cas. No. 15510, at 689 (C.C. Ind. 1839). The new trial is granted "for his benefit."
with relation to a given cause, or any duty he may have in connection with it, but it is an impartial, fair and reasonable application of prescriptions of law both vengeful and protective." 38  This provision of the rule is broader in scope as to grounds than that part of the rule allowing a new trial for newly discovered evidence. 39  Insufficient evidence is occasionally referred to as such ground. 40  Judge Jerome Frank has concluded that when, on motion for a new trial, the trial judge has the gravest doubts as to the credibility of a witness, he has the power to grant a new trial as he is then acting "in the interest of justice." 41  The power of the trial court is very great for when it grants a new trial the prosecution can take no appeal, and no other remedy seems available to the prosecution.  However, the cases do not reveal that the federal courts have been guilty of our American "practice of new trial on the slightest provocation." 42

(c).  **Qualifications, bias, and conduct of jury.**  That trial by jury is productive of many new trials may readily be seen by the large number of cases under this heading.

It is not a ground for a new trial that the jury panel was drawn from the whole of the federal district excluding one county when it appears that impartial jurors could not have been obtained from that county. 43  Further, a new trial will not be granted on the ground that the jury panel from which the jury which tried the defendant was drawn was illegally selected, since objection should have been made by challenge to the array before trial. 44

Where the fact of a juror's conviction of violating the National Prohibition Act furnished objection to him as a qualified juror, such objection was mere  *propter defectum* and could not be assigned as ground for a new trial. 45  Furthermore, a disqualification which could have been discovered before verdict by reasonable diligence may not


41.  United States v. Troche, 213 F.2d 401, 404, 405 (2d Cir. 1954) (dissenting opinion).  The case involved newly discovered evidence.


45.  Spivey v. United States, 109 F.2d 181, 185 (5th Cir.),  *cert. denied*, 310 U.S. 631 (1940).  28 U.S.C. § 1861 (1952) now makes a person incompetent to serve as a juror if "he has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty."
be attacked by motion for a new trial. Also the deafness of a juror must be objected to before verdict, as must his alienage or infancy. Misnomer of a juror is not necessarily a ground for a new trial when it appears that the juror who served was the one summoned, and actually attended in good faith.

An improper sustaining of the prosecution's challenge of jurors for cause is not ground for a new trial so long as an impartial jury is obtained. However, where defendant's peremptory challenges have been exhausted, and his challenge for cause is improperly overruled, he may have ground for a new trial. A new trial was granted where, before trial, a juror had expressed the opinion that the defendant should be hanged. It is not ground for a new trial that a sister of one of the jurors was married to an uncle of the Assistant United States Attorney who presented the case. Where an experienced trial judge declares that the jury returning a verdict did not understand the case at all, this, without more, justifies a new trial. The defendant is entitled to a jury possessing sufficient understanding of the case to return a pertinent, adequate, and coherent verdict.

Where a juror repeatedly lunches during the trial with a witness for the prosecution, a new trial may be granted. But a new trial was denied where a juror rode from the courthouse with a prosecuting witness and boarded at the same place during trial. The mere fact that a government witness and a juror winked at each other when the jurors were handed a certain defense exhibit was not ground for a new trial where the defendant failed to move for a mistrial. Bias warranting a new trial is not made out merely on evidence that the jury foreman was unfriendly to two of the defendants because one of them had several times arrested his brother and the other had testified against him, when the foreman denied any bias, and the defendants knowing all the facts accepted the juror without challenge.

47. Chadwick v. United States, 141 Fed. 225, 243 (6th Cir. 1905).
51. Garland v. United States, 182 F.2d 801, 802 (4th Cir. 1950). The court stated: "It is well settled generally that relationship to the prosecuting attorney does not disqualify a juror."
52. United States v. Di Matteo, 169 F.2d 798, 801 (3d Cir. 1948).
53. United States v. Marine, 84 F. Supp. 785, 787 (D. Del. 1949). The court stated that the crucial inquiry is the influence on the juror and not the importance of the witnesses' testimony.
56. Lancaster v. United States, 39 F.2d 30, 33 (5th Cir. 1930).
Bias may arise because of communication between jurors and officers in charge of the jury. However, in a case in which the jury had agreed on verdicts of guilty as to all defendants, and while the foreman was signing the verdicts, the bailiff came to the door of the judge’s chamber and informed him that the jury wanted to know whether all counts had to be accounted for, and the bailiff under direction of the court gave the jury an affirmative answer, and defendants and their counsel were informed but did not object, the court did not abuse its discretion in denying a motion for a new trial. 57

Where there have been communications to the jury during its deliberation it is said that there is a rebuttable presumption of prejudice to the defendant. In some cases this presumption may be overcome by evidence offered by the Government at the hearing on the motion for a new trial. 58 When the jurors testify on the matter the court need not base its conclusion entirely on their testimony. 59 Where the Government admitted that a communication between the jury and the bailiff during the jury’s deliberation had taken place and offered no proof other than the affidavit of the bailiff as to harmlessness, a new trial was granted. 60 Failure to have a bailiff placed in charge of a jury specially sworn is not ground for a new trial even in felony cases. 61

The Supreme Court held many years ago that the reading by the jurors of a newspaper which is adverse to the defendant may be a ground for a new trial. 62 Yet, it was common to say that the “mere fact that jurors have read newspaper accounts of the trial in which they are participants is not ground for a new trial.” 63 If a newspaper account of the trial is read by a juror, but contains nothing prejudicial to the defendant, a motion for a new trial will not be granted. 64

57. United States v. Sorecy, 151 F.2d 899, 903 (7th Cir. 1945), cert. denied, 327 U.S. 794 (1946). Here the better procedure would have been for the jury to be escorted to the judge to receive its instructions directly from him.

58. Chambers v. United States, 237 Fed. 513, 521 (8th Cir. 1916). The court stated that this was the weight of authority and the better reasoning. It cited Holmgren v. United States, 217 U.S. 509, 521-522 (1910); Mattox v. United States, 146 U.S. 140, 149 (1892).


60. Wheaton v. United States, 133 F.2d 522, 526 (8th Cir. 1943). The bailiff is not to serve as an agent of the court to convey instructions to the juror as to how the jury is to proceed in considering the various counts of the indictment. The jury should be brought to the courtroom in the presence of the defendant and the attorneys.


63. Bratcher v. United States, 149 F.2d 742, 746 (4th Cir.), cert. denied, 325 U.S. 885 (1945). It was said to be addressed to the sound discretion of the trial court. Rossi v. United States, 270 Fed. 349, 355 (9th Cir. 1922).

64. United States v. Francis, 144 Fed. 520, 524 (E.D. Pa. 1906).
where the jurors separated and then read the account a new trial was denied. An affidavit of publication of excerpts from newspapers, plus the excerpts themselves, are immaterial without evidence other than that of the jurors, tending to show that they were read by them. But, affidavits of jurors that they read the articles should on principle be admissible.

The fact that the jurors have read newspaper articles hostile to the defendant during the trial is not a ground for a new trial where there is no proof that the jury's misconduct was occasioned by the Government, and where counsel for defendant made no objection at the time though he knew all the facts. However, a failure by the trial court, on request of defendant's counsel, to ask the jurors whether they had read and been influenced by a derogatory newspaper article, has been held to be a ground for a new trial. Where a newspaper published a report of a trial and the statement of the prosecuting attorney, but the two jurors who saw the article stated that they could disregard anything read and base the verdict solely on the evidence, and the court admonished them to so disregard, a denial of the motion for a new trial was not reversed on appeal. The fact that two jurors had read newspaper articles about the case did not warrant a mistrial or a new trial when they swore that they had read only parts of the articles, remembered but little of the contents, and that they would not be influenced by them, especially since the court had instructed the jury to consider only evidence presented in court.

The defendant has the burden of proving that he was prejudiced by reason of the jury's cognizance of a newspaper article which stated that the defendant had been previously acquitted in a prosecution for another crime. There must be some evidence that at least some of the jurors read the articles. In a recent case the government witnesses did not testify in accordance with statements previously made to FBI agents, and, while the prosecution was in progress, the district judge

66. Stewart v. United States, 300 Fed. 769, 788 (8th Cir. 1924).
68. Langer v. United States, 76 F.2d 817, 827 (8th Cir. 1935).
69. Marson v. United States, 203 F.2d 904, 909 (6th Cir. 1953).
72. Gicinto v. United States, 114 F. Supp. 264 (W.D. Mo. 1953), aff'd, 212 F.2d 8 (8th Cir.), cert. denied, 348 U.S. 844 (1954). The newspaper also referred to the fact of an indictment for the same type of offense in another federal district.
on his own motion issued bench warrants for the witnesses charging them with perjury. The action of the judge was publicized in newspapers in the area from which the jurors were taken. It was held that since no instruction was given the jury against possible prejudice from reading newspaper articles the defendant was entitled to a new trial.\textsuperscript{74} The question was not whether any actual wrong resulted, but whether a condition had been created from which prejudice might arise or from which the general public would suspect that the jury might be influenced to reach a verdict through bias or prejudice.

The denial of a motion for a new trial based on the ground that two jurors in a narcotics prosecution visited the defendant's place of business where opium was found was held not reversible on appeal, where the facts showed no prejudice to the defendants.\textsuperscript{75} Where during a recess a juror overhears the remark of an interpreter that the defendant was lying but is not influenced by the remark, the trial court need not grant a new trial.\textsuperscript{76}

Separation of the jury is not always ground for a new trial. For example, during the deliberations of the jury they were taken to dinner by the bailiffs and two of them were taken back because of illness, but they did not communicate with anyone. Denial of a new trial was affirmed.\textsuperscript{77} Even where the jurors separated and read newspapers a new trial was denied.\textsuperscript{78}

Where one of the jurors procured a copy of the federal statutes from the bailiff while the jury was deliberating on the verdict, this was not ground for a new trial where it did not appear that such misconduct influenced the verdict.\textsuperscript{79} Supported only by the statement of the defendant's attorney, a motion for a new trial on the ground that an excused juror, after being excused, entered the jury room and improperly influenced the jury is not ground for a new trial.\textsuperscript{80} Where a juror, who had been offered a bribe by someone to "hang" the jury, although he had been admonished by the trial judge not to disclose

\textsuperscript{74} Briggs v. United States, 221 F.2d 635 (6th Cir. 1955). Furthermore, defendant did not waive his right to a mistrial because he replied in the negative when asked by the trial judge if defendant wanted the judge to question the jurors about reading the articles.

\textsuperscript{75} Ng Sing v. United States, 8 F.2d 919, 922 (9th Cir. 1925); see also Roberts v. United States, 60 F.2d, 871, 872 (4th Cir. 1932).

\textsuperscript{76} Fook v. United States, 164 F.2d 716, 717 (D.C. Cir. 1947), cert. denied, 333 U.S. 838 (1948).

\textsuperscript{77} Bilodeau v. United States, 14 F.2d 582, 586 (9th Cir.), cert. denied, 273 U.S. 737 (1926); see also United States v. Davis, 103 Fed. 457, 467 (C.C.W.D. Tenn. 1900).

\textsuperscript{78} Holt v. United States, 218 U.S. 245, 250 (1910).

\textsuperscript{79} Colt v. United States, 190 Fed. 305, 308 (8th Cir. 1911), cert. denied, 223 U.S. 729 (1912).

\textsuperscript{80} United States v. Gottfried, 165 F.2d 360, 365 (2d Cir.), cert. denied, 333 U.S. 860 (1948).
this to anyone, nevertheless disclosed it to at least five jurors after long
deliberation, and a verdict was then shortly returned, defendant was
titled to a new trial even though the jurors testified that the informa-
tion did not affect their verdict.\footnote{81} A new trial has been granted when
someone has attempted improperly to influence the jury in favor of
the defendant.\footnote{82}

(d). Misconduct of prosecuting attorney. In general, the prosecuting
attorney should abstain from conversation with the jury. However, a
mere mention by the prosecuting attorney to a juror that the jurors
were to get a vacation due to a court recess was not ground for a new
trial where the court admonished against such conduct and the defendant
was invited to move for a mistrial, but declined.\footnote{83} Mere friendly
contact between the prosecuting attorney and a juror, easily ascertain-
able on voir dire is not a ground for a new trial.\footnote{84} Where a new trial is
sought on the basis of private communications between the prosecution
and jurors, such conduct must be closely scrutinized, and the trial judge
should grant a new trial where there is any significant doubt as to
whether the presumption of prejudice has been overcome.\footnote{85}

The conduct of the United States attorney in asking the trial court
to take action when a government witness repudiates a sworn statement
given to government agents is not ground for a new trial when it is
obvious that the witness was not telling the truth.\footnote{86}

While misconduct on summation is more common than misconduct
on opening statement, misconduct as to the latter may also be a ground
for granting a new trial.\footnote{87} In a prosecution for failure to pay an
income tax, argument by the Government that defendant acknowledged
that he openly violated state laws and, therefore, violated the federal
income tax law was improper but did not warrant a new trial.\footnote{87a}

\footnote{82} ibid. But the appellate court expressed no opinion as to the propriety of this
ground. Rakes v. United States, 163 F.2d 771 (9th Cir. 1947).
\footnote{83} United States v. Nystrom, 116 F. Supp. 771, 775 (W.D. Pa. 1953); see Note,
Forensic Misconduct, 54 Colum. L. Rev. 946 (1954).
\footnote{84} Turner v. United States, 222 F.2d 926, 933 (4th Cir. 1955). The prosecuting
attorney gave the juror a ride to court just before the trial, but not during the trial. He
joined the juror's request that he be excused from serving on the jury.
\footnote{85} Ryan v. United States, 191 F.2d 779 (D.C. Cir. 1951), cert. denied, Duncan
v. United States, 342 U.S. 928 (1952). On the particular facts no new trial was
thought necessary as the presumption of prejudice had been rebutted. The court ruled
that the jurors might properly testify whether or not they were biased by the com-
communications which occurred during recesses in the trial.
\footnote{87} Minker v. United States, 85 F.2d 425, 426 (3d Cir. 1936), reversing 12 F.
Supp. 783 (M.D. Pa. 1935). The prosecutor stated that the government would not have
indicted defendant had he not been guilty.
\footnote{87a} United States v. Johnson, 129 F.2d 954, 962 (3d Cir. 1942), aff'd, 318 U.S.
189 (1943). The Supreme Court did not discuss this phase of the case. On improper
Likewise, argument that such defendant had dragged the political party of his county down into the mire and that the jury should save the people of the county from the disgrace of having the defendant as their leader was improper but did not warrant a new trial. There is much authority that argument by the government to the jury must be objected to at once, and cannot be raised for the first time on motion for a new trial.\(^8\)

(e). \textit{Violation of right to counsel.} In general, error in judgment, incompetency or mismanagement of defense by counsel is not a ground for a new trial.\(^9\) Defendant must also show that the purported representation by counsel was such as to make the trial a farce and a mockery of justice. But, the defendant is entitled to effective assistance of counsel.\(^9\) He need not show that the outcome of the trial would have been different if he had had counsel.\(^1\) It should be noted that habeas corpus and the writ of error coram nobis may be available.\(^2\)

Counsel must have adequate time to prepare for trial. Where the facts indicate that such time existed, no new trial will be granted.\(^3\) A refusal by defendant’s counsel to permit the defendant to testify, and the failure to introduce certain other testimony is not of itself a ground for a new trial.\(^4\) Where the motion for a new trial is based on newly discovered evidence, proof of incompetence or negligence of counsel in searching out the evidence may relieve the defendant of the requirement of showing due diligence in the absence of which the motion would have been defeated.\(^5\)

Where defendants, whose interests were allegedly conflicting, had separate counsel, and frequently during the trial one or more attorneys were absent for brief periods, and another of the attorneys was substituted for such periods, and no defendant then objected, it was not summation see Notes, 36 \textit{Colum. L. Rev.} 931 (1936), 54 \textit{Colum. L. Rev.} 946 (1954), 42 J. CRIM. L., C. & P.S. 73 (1951). As to when the harmless error rule applies see Note, 47 \textit{Colum. L. Rev.} 450, 451-453 (1947).


91. \textit{Ibid}.


95. Johnson v. United States, 110 F.2d 562 (D.C. Cir. 1940). Here counsel had been appointed by the court.
necessary to grant a new trial. But, such procedure "is not one to be commended." 96 If the situation requires counsel to present an inconsistent defense for a codefendant, this may be ground for a new trial. 97

(f). Various miscellaneous grounds. A new trial will not be granted for error which did not prejudice the defendant. 98 However, there will be some cases in which the very nature of the error will serve as a ground; that is to say, prejudice will be presumed. Also, there will be other cases where the defendant has the burden of showing that he was actually harmed. Ordinarily a defendant cannot complain of error "which he himself created or invited." 99

If a search warrant is not valid and if the evidence which should have accordingly been suppressed was material, the defendant is entitled to a new trial. 100 A refusal to permit cross-examination of an officer as to the identity of an informer in order to determine the legality of a search by the officer has also been held ground for a new trial. 101 A new trial was granted when the arrest and search without a warrant were both illegal. 102 The matter of improper arrest may be raised by the regular motion for a new trial but not on a motion based on the ground of newly discovered evidence. 103

Failure of the indictment to charge an offense punishable by federal law is not a ground for motion for a new trial, 104 nor is an untimely request for a bill of particulars. 105 The defendant must show that he is injured by a refusal of the bill of particulars. 106

When a codefendant, before impanelling of the jury, requests a severance for trial and the evidence establishes that severance should have been granted to insure a fair trial, a new trial will be granted. 107

96. United States v. Simone, 205 F.2d 480, 483 (2d Cir. 1953). Clarke, J., concurred "with some doubt." Id. at 484.
100. Peckham v. United States, 210 F.2d 693, 697 (D.C. Cir. 1953).
106. Williams v. United States, 93 F.2d 685, 694 (9th Cir. 1937).
In general, refusal of a motion for severance under rule 14 is reversible error only if the trial judge abuses his discretion.\(^{108}\) Where there are several counts on which the defendant is tried, defendant is not entitled to a new trial unless he has asked for severance for trial even though the counts involve different proof.\(^{109}\)

It would seem that want of jurisdiction should be raised by motion in arrest of judgment rather than by motion for a new trial. However, in a decision in which the Supreme Court found that the trial court had jurisdiction over an Indian no criticism of resort to motion for a new trial was offered.\(^{110}\)

The refusal of the trial court to require the Government to inform the defendant as to the order in which his case would be tried with respect to three companion cases was not a ground for a new trial.\(^{111}\)

A trial by court when there has been no valid waiver of trial by jury may be a ground for a new trial.\(^{112}\) The discharge of a juror and trial by eleven jurors without the consent of the defendant and in the absence and without knowledge of the defendant is also a ground for a new trial.\(^{113}\)

Bias of the trial court is not a ground where the motion for a new trial is supported only by the allegation and belief of the defendant, and there is no motion for a change of venue or for a continuance.\(^{114}\) A refusal of the trial judge to disqualify himself where the affidavit of the defendant is clearly sufficient is ground for a new trial, but if it is not sufficient the defendant must show prejudice on appeal.\(^{115}\)

Illness of the trial judge is not a ground for a new trial where the record discloses that the defendant is guilty beyond a reasonable doubt and that no remark of the judge influenced the verdict of the jury.\(^{116}\) The mere supposition that the successor judge might impose a lighter sentence was not a ground when defendant had a fair and impartial trial.\(^{117}\)

\(^{108}\) Petro v. United States, 210 F.2d 49, 53 (6th Cir. 1954); Sharp v. United States, 195 F.2d 997, 999 (6th Cir. 1952).


\(^{110}\) United States v. Thomas, 151 U.S. 557 (1894).


\(^{112}\) Bruno v. United States, 180 F.2d 393 (D.C. Cir. 1950). A valid waiver was found. A new trial was granted in Colts v. District of Columbia, 38 F.2d 535 (D.C. Cir. 1930).


\(^{114}\) United States v. Richards, 1 Alaska 619 (D. Alaska 1902).


\(^{117}\) Id. at 3.
Rule 43 calls for the presence of the defendant at the trial. But not all cases of absence will necessitate a new trial. No new trial was held necessary where the court questioned a juror about a meeting of the wives of the defendant and the juror in the presence of defendant’s counsel, but in the absence of the defendant himself.\textsuperscript{118} Where two defendants are tried together and one of them absents himself after the trial has commenced, neither is entitled to a new trial as the absent defendant is estopped and the other defendant should have objected at once and asked for a continuance.\textsuperscript{119}

Suppose a defendant has been convicted after his plea of double jeopardy has been wrongly overruled. Is he entitled to a new trial? It has been held that he is not where he makes no showing of such jeopardy.\textsuperscript{120} Jeopardy is not a ground for a new trial when it is first raised on motion for a new trial; objection should be made during the trial.\textsuperscript{121}

In general a motion for a new trial does not lie for denial of a continuance unless abuse of discretion is shown.\textsuperscript{122}

Improper denial of a motion for mistrial may be a ground for a new trial.\textsuperscript{123} Failure to move for a mistrial may be ground for denial of a new trial as the defendant may not gamble on a favorable verdict.\textsuperscript{124}

Where the trial court instructs the jury that they may not find a verdict as to some of the defendants, and disagree as to the others, a new trial will be granted.\textsuperscript{125} It has been suggested in a dissenting opinion of the Supreme Court that it is improper for the trial court to instruct the jury as to both murder and manslaughter and then peremptorily tell them that they cannot convict for manslaughter.\textsuperscript{126} In a strongly contested case where the government rests its case largely on the testimony of an informer, there is a ground for a new trial if the trial court expresses a strong opinion that the defendant is guilty.\textsuperscript{127}

Where the request of the defendant for instructions is not timely, the refusal is not a ground for a new trial. There is, therefore, no error

\textsuperscript{118} Lask v. United States, 221 F.2d 237, 241 (1st Cir. 1955).
\textsuperscript{120} Patterson v. United States, 183 F.2d 327 (4th Cir. 1950).
\textsuperscript{121} Brady v. United States, 24 F.2d 399, 405 (8th Cir. 1928). The Supreme Court has held that a state court need not grant a new trial when jeopardy was first raised on a motion for new trial. Durein v. Kansas, 208 U.S. 613 (1908), \textit{affirming}, State v. Durein, 70 Kan. 1, 78 Pac. 152, 156 (1904).
\textsuperscript{122} Hardy v. United States, 186 U.S. 224 (1902); United States v. Yager, 220 F.2d 795, 796 (7th Cir. 1955).
\textsuperscript{123} United States v. Perlstein, 120 F.2d 276, 283-284 (3d Cir. 1941).
\textsuperscript{124} Claunch v. United States, 155 F.2d 261, 263 (5th Cir. 1946).
\textsuperscript{125} Bucklin v. United States, 159 U.S. 682, 686 (1895).
\textsuperscript{126} Sparf v. United States, 156 U.S. 51, 110, 177 (1895) (dissenting opinion).
\textsuperscript{127} Davis v. United States, 227 F.2d 568 (10th Cir. 1955).
in declining to give an instruction filed just before the final argument by the government, and a few minutes before the case was submitted to the jury.\(^\text{128}\)

Where the defendant made no request for instructions and no objection to the charge, and his counsel, at the conclusion of the charge, repeated an unqualified negative response to a query for suggestions or objections, he was not permitted to complain on motion for a new trial that the charge was fatally defective.\(^\text{129}\) But if there had been a great miscarriage of justice, the trial court could have intervened and granted a new trial even though no objections to the charge of the court were made by the defendant.\(^\text{130}\)

The jury’s determination of punishment must be unanimous if the jury is authorized to decide what sentence to impose, and if the jury is not properly instructed as to this, a new trial lies.\(^\text{131}\)

A defendant may not waive his right to a unanimous verdict. If he does so and is convicted, he is entitled to a new trial.\(^\text{132}\) A mistaken impression by jurors that dissenting jurors must yield to the majority favoring conviction is not ground for a new trial when the trial judge instructs the jury that unanimity is required for a verdict but that any juror is free to observe his own convictions.\(^\text{133}\)

Where a deputy marshal in charge of the jury shortly before verdict informed the jury that they had better hurry up, as the judge was leaving the city, a new trial was not necessarily required although it was a circumstance to be considered.\(^\text{134}\)

There was not such improper coercion of the trial jury by the court as to warrant a new trial where the judge was unwilling to reread an instruction on Sunday and the jury requested further opportunity to deliberate, no objection being made, and then returned a verdict in forty minutes.\(^\text{135}\) An inquiry by the trial judge whether or not there is a pronounced majority of the jury in agreement is so coercive as to warrant a new trial.\(^\text{136}\)


\(^{130}\) Id. at 67. United States v. Rappy, 157 F.2d 964, 967 (2d Cir. 1946).

\(^{131}\) Andres v. United States, 333 U.S. 740 (1948).

\(^{132}\) Hibdon v. United States, 204 F.2d 834 (6th Cir. 1953), 37 A.L.R. 1130 (1954).


\(^{134}\) Kriebel v. United States, 8 F.2d 692, 696 (7th Cir. 1925), cert. denied, 269 U.S. 582 (1926).


Inconsistent verdicts as to codefendants charged with conspiracy are not grounds for a new trial; acquittal of one defendant, whether erroneous or not, does not require acquittal of other defendants.\textsuperscript{137} The same is true as to prosecution for consummated crimes.\textsuperscript{138} Where one defendant is tried alone, the verdict need not be consistent as to the various counts of the indictment especially when each count charges a separate offense.\textsuperscript{139}

A conviction on all of the counts charging separate criminal acts in a single transaction, is not a ground for a new trial.\textsuperscript{140} However, an imperfect verdict or one on which no judgment can be entered is a ground for a new trial.\textsuperscript{141}

If the error is in the sentence, even though it makes the sentence void, the proper procedure is not motion for a new trial, but rather for a resentencing of the defendant.\textsuperscript{142} In a conspiracy case sentencing of those codefendants who pleaded guilty in the presence of the jury may be so prejudicial as to warrant a new trial.\textsuperscript{148}

In some cases the death of the court reporter may be a ground for a new trial.\textsuperscript{144}

Surprise has not been a frequent ground for a new trial. Most of the cases in which it is an issue find no surprise present sufficient to warrant a new trial.\textsuperscript{145} In one case a new trial was granted because the trial court was satisfied that the testimony given by a material witness was false and probably affected the verdict and that the defendant was surprised, unable to meet it, and did not learn of the falsity

\textsuperscript{137} Nadl v. United States, 6 F.2d 574 (7th Cir.), \textit{cert. denied}, 269 U.S. 574 (1925). More than two conspirators were involved; see also United States v. Thomas, 52 F. Supp. 571, 579 (E.D. Wash. 1943).

\textsuperscript{138} United States v. Malfetti, 125 F. Supp. 27, 30 (D.N.J. 1954).


\textsuperscript{141} O'Connell v. United States, 235 U.S. 142 (1920); United States v. Bruzzo, 85 U.S. 125 (1873).


\textsuperscript{144} Dowling v. United States, 22 F.2d 264 (6th Cir. 1927), \textit{rehearing denied}, 23 F.2d 671 (6th Cir. 1928). On the facts a new trial was denied as there was an adequate substitute.

\textsuperscript{145} Weiss v. United States, 122 F.2d 675, 691 (6th Cir. 1941) (evidence was within the pleadings); United States v. Noble, 294 Fed. 689 (D. Mont. 1923), \textit{aff'd}, 300 Fed. 689 (9th Cir. 1924) (defendant failed to move for mistrial); Bates v. United States, 269 Fed. 563 (6th Cir. 1920) (no objection taken during trial).
until after the trial. A defendant does not make out surprise when he fails to exercise due diligence to refute false testimony at the trial.\(^{(g)}\) *Rulings on Evidence.* This is a frequent ground of motion for a new trial, particularly in cases tried by jury. The modern trend is to hold that where much evidence is taken covering a wide range of inquiry, a new trial will not be granted for technical errors in the admission of evidence not affecting matters of substance.

Violation of the constitutional privilege against self-incrimination may be a ground for a new trial. The defendant has the right not to testify at the trial. Hence, it was ground for a new trial that the trial court had admitted evidence to the effect that the defendant was given a chance, after his arrest, to explain the presence of marijuana on his premises and that he did not do so.\(^{(148)}\)

It has been held that it is not necessarily reversible error that a trial court heard evidence of a confession in the presence of the jury.\(^{(149)}\) Nevertheless, it is better practice to hear evidence on the admissibility of other evidence out of the presence of the jury, and a new trial may be granted where this is not done.\(^{(150)}\)

A refusal of the trial court to permit the jury to take notes of the testimony and its requiring them to surrender up those previously taken was not ground for a new trial.\(^{(151)}\) One judge has suggested that only in exceptional cases should a juror be stopped by the court from taking notes on his own volition, or the request of the jury to take notes be denied.\(^{(152)}\)

The exclusion of the testimony of a witness who disregards the rule excluding him from the courtroom except when he is testifying is not necessarily a ground for a new trial.\(^{(153)}\) Further, failure to sequester the witnesses is not a ground if there is no prejudice, particularly if the defendant fails to ask for it.\(^{(154)}\)

Where the principal witness for the Government testifies for eight days both as an expert witness and as a factual witness, and the expert

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150. Eierman v. United States, 46 F.2d 46, 49 (10th Cir. 1930).
152. United States v. Campbell, 138 F. Supp. 344, 348 (N.D. Iowa 1956), citing many cases and comments.
154. Witt v. United States, 196 F.2d 285 (9th Cir. 1952); Kaufman v. United States, 163 F.2d 404, 408 (6th Cir. 1947).
testimony is finally stricken as incompetent, this is so confusing to the jury as to warrant a new trial.155

The arrest of a witness in the presence of the jury is not a ground for a new trial when the defendant did not object at the time.156

A trial judge's excessive interjection into the examination of witnesses and his numerous comments to defense counsel sometimes indicating hostility, though under provocation, may indicate such bias and lack of impartiality as to warrant a new trial.157

Improper cross-examination by the Government of a defendant may be ground for a new trial. It was so held where the purpose of the cross-examination was to create the impression that the defendant was linked to a county political leader in a vast criminal scheme.158

It is ground for a new trial that a defendant who took the stand was cross-examined as to convictions other than for felonies or crimes involving moral turpitude.159 It has been held that, if error, it was harmless error for a district trial court sitting without a jury to permit the prosecution to question the defendant on cross-examination as to a former conviction over objection of defendant's counsel.160 In general, "absent a requirement of showing system or intent, evidence of offenses not charged in the indictment is not only inadmissible, but prejudicial if admitted," 161 and warrants a new trial. The evidence should be stricken from the record and the jury instructed to disregard it. Sometimes, such an instruction will not cure the error, and a mistrial must be granted.

In a homicide prosecution in which the defendant pleaded self-defense, discovery of evidence that after the homicide an open penknife was found in the trouser pocket in which the victim had his hand, because it was known to the prosecution but not disclosed to the defendant during trial, was held ground for a new trial.162 Evidence of uncommunicated threats was admissible as bearing on the question of the victim's conduct.

156. Powell v. United States, 35 F.2d 941 (9th Cir. 1929).
157. Peckham v. United States, 210 F.2d 693, 702 (D.C. Cir. 1953) (The court was divided two to one); see also Williams v. United States, 93 F.2d 685 (9th Cir. 1939).
158. United States v. Perlstein, 120 F.2d 276, 283 (3d Cir. 1941).
159. Henderson v. United States, 202 F.2d 400, 405-406 (6th Cir. 1953). Cross-examination was as to defendant's army court-martial record.
162. Griffin v. United States, 183 F.2d 990 (D.C. Cir. 1950); see McCormick, Evidence 573-574 (1954).
When the defendant's counsel was asked if he had any objections to certain testimony and counsel replied in the negative, defendant was not entitled to a new trial on the ground that such testimony was hearsay. Where the question is proper, but the answer is hearsay the defendant should normally object at once. However, when, after a few more questions, the defendant's counsel renewed his objection to the question, and, in a prior side-bar discussion had informed the court that the answer was objectionable as hearsay, a new trial was granted.

A refusal to receive into evidence a dying declaration may be ground for a new trial.

It has been held that a conviction based on the uncorroborated testimony of persons convicted of crime is not a basis for a new trial unless in the judgment of the court the conviction is unjust.

If the Government in its argument to the jury protests that the defendant failed to offer evidence of good reputation, this may be a ground for a new trial. But, the court may cure the error by instructing the jury that the presumption is that the reputation of the defendant is good. Therefore, remarks of the Government in the argument to the jury concerning the absence of character evidence was not a ground for a new trial, where the court in its charge to the jury went to great length to explain that there was a presumption that the reputation of the defendant was good, and that the jury was obliged to accept the presumption as proof. Comment by the prosecution on the failure of the defendant to take the stand is a ground for a new trial. However, mere jury deliberation on the failure of the defendant to take the stand is not a ground.

In a kidnapping prosecution where fingerprinting cards were identified and offered solely as fingerprints, and defendant's counsel and the trial judge were ignorant of the existence of the defendant's criminal history on the reverse side of the cards until after the jury had returned a verdict, the defendant was entitled to a new trial.

163. United States v. Hack, 205 F.2d 723, 726 (7th Cir. 1953).
167. Pierce v. United States, 86 F.2d 949, 953 (6th Cir. 1936); Lowdon v. United States, 149 Fed. 673, 675 (5th Cir. 1906); McKnight v. United States, 97 Fed. 208, 209 (6th Cir. 1899); Note, 54 COLUM. L. REV. 946, 953 (1954).
171. Davis v. United States, 47 F.2d 1071 (5th Cir. 1931).
172. United States v. Dressler, 112 F. 2d 972, 978 (7th Cir. 1940).
Prejudice will be presumed. Similarly, where the jury took to the jury room two indictments on which the defendant had been convicted in a former trial, containing notations of former convictions, a new trial was granted.\(^ {173} \)

A claim that venue has not been sufficiently proven should not be raised for the first time on motion for a new trial.\(^ {174} \)

In general, insufficiency of the evidence cannot be raised for the first time by motion for a new trial. The defendant instead should object by motion for judgment of acquittal under rule 29 or by objection to the instructions to the jury.\(^ {175} \) It was early held that insufficiency of the evidence is a ground for a new trial and that the defendant when tried again cannot complain that he has been in jeopardy because of such insufficiency.\(^ {176} \)

What are the tests of sufficiency of the evidence? Over the years the test seems to have grown more favorable to the defendant as the ensuing cases, listed chronologically, reveal. It was early stated that the trial court will grant a new trial if the verdict is clearly against the evidence, that more latitude is allowed in criminal cases than in civil, and that the court should be well satisfied of the insufficiency of the evidence to convince the jury of the correctness of the verdict.\(^ {177} \) The Supreme Court stated that it is discretionary to grant a new trial on the ground that the verdict is against the evidence, and that it would not review the issue whether the verdict is contrary to the weight of the evidence if there was any evidence proper to go to the jury to support the verdict.\(^ {178} \) The jurors are the exclusive judges of what was proved, and the trial judge will not set aside a verdict because he differs as to the sufficiency of the evidence.\(^ {179} \)

One court has said that it is not the trial judge’s legal duty to grant a new trial when he is not himself satisfied that the evidence establishes guilt beyond a reasonable doubt.\(^ {180} \) He may deny a new trial unless

\(^ {173} \) Ogden v. United States, 112 Fed. 523, 526 (3d Cir. 1902). But, if there is knowledge, the objection should be raised at the trial. Holmgren v. United States, 217 U.S. 509, 520 (1910); United States v. Knopfer, 12 F. Supp. 980, 981 (M.D. Pa. 1935).

\(^ {174} \) Turner v. United States, 259 Fed. 103 (6th Cir. 1919).

\(^ {175} \) Utey v. United States, 5 F.2d 963 (9th Cir. 1925); Lockhart v. United States, 264 Fed. 14, 16 (6th Cir. 1920). \( \text{But see Edwards v. United States, 7 F.2d 357, 359 (9th Cir. 1925) suggesting that the trial court should consider this, though not the court of appeals. See also Orfield, Motion for Acquittal in Federal Criminal Procedure: Successor to Directed Verdict, 28 Temp. L.Q. 400, 419 (1955).} \)

\(^ {176} \) United States v. Keen, 26 Fed. Cas. No. 15510, at 690 (C.C.D. Ind. 1839).

\(^ {177} \) United States v. Daubner, 17 Fed. 793, 807 (E.D. Wis. 1883).

\(^ {178} \) Crompton v. United States, 138 U.S. 361 (1891). It may not be assigned as error that the verdict is against the evidence according to Moore v. United States, 150 U.S. 57, 62 (1893).


\(^ {180} \) Bain v. United States, 262 Fed. 664, 666 (6th Cir. 1920).
he is convinced that reasonable men could not have considered that the
evidence established guilt beyond a reasonable doubt. His duty is not
different from that of an appellate court. However, in his discretion he
may grant a new trial if he thinks that the evidence lacks that degree
of persuasiveness without which there should be no conviction. If, for
example, the defendant has been tried and convicted twice before the
same judge and on the same evidence, he need not grant a new trial.
The Court of Appeals for the Seventh Circuit has gone even further
in protecting the defendant. It has held that the trial judge as well
as the jurors should attentively consider and weigh the evidence as it
is introduced “because in that respect he is sitting as the thirteenth
juror.” 181 And it is the exclusive and unassignable function of the
trial judge to grant or refuse a new trial in cases of conflicting evidence.

It has been said that since a motion for a new trial on the ground
that the verdict is against the weight of the evidence is addressed to
the court’s discretion and it cannot be error to overrule it, the trial
court should consider it “with especial conscientiousness.” 182 The
trial court may grant a new trial although the evidence is conflicting. 183
One trial judge stated: “From these eminent authorities I concede
it to be my duty to grant a new trial unless I am satisfied beyond a
reasonable doubt that the verdict is justified under the evidence.” 184
The Supreme Court has held that the verdict must be sustained if
there is substantial evidence, taking the view most favorable to the
Government, to sustain it. 185

One of the fullest statements by a trial court of how the trial court
should consider the sufficiency of the evidence on a motion for a new
trial after a conviction by a jury is by Judge John W. Murphy:

“In considering the sufficiency of the evidence to sustain the
verdict of the jury, this court must take that view of the evidence
which is most favorable to the Government; must give the Govern-
ment the benefit of all the inferences which reasonably may be
drawn from the evidence; and must refrain from concerning itself
with the credibility of witnesses and the weight of the evidence.
... The verdict must be sustained if there is substantial evi-
dence to support it.” 186

One judge has stated that it is “the right and duty of the court
to grant a new trial in the event that the court feels that the verdict is

181. Applebaum v. United States, 274 Fed. 43, 46 (7th Cir. 1921).
against the evidence." ¹⁸⁷ On motion for a new trial on the ground that
the verdict is against the weight of the evidence, the court may weigh
the evidence and consider the credibility of the witnesses.¹⁸⁸ The
power is broader than on motion for judgment of acquittal.¹⁸⁹ But it
"should be invoked only in exceptional cases in which the evidence
preponderates heavily against the verdict." ¹⁹⁰ The distinction is fair for
the defendant does not go free but is subject to another trial. It is
not a ground for a new trial that the verdict is contrary to the opinion
of an expert psychiatrist, so long as the verdict does not shock the
conscience of the court.¹⁹¹ It will thus appear from the precedents just
considered that a trial judge may find ample precedent when he denies
the motion for insufficiency of the evidence and much precedent when
he grants it.

(h). Newly Discovered Evidence. It was quite common at least in
the earlier cases to say that new trials on the ground of newly discov-
ered evidence "are not favored."¹⁹²

Federal District Judge Chesnut has quoted¹⁹³ with approval the
views of a leading text on federal procedure as to the sufficiency of
newly discovered evidence:

"A motion based on newly discovered evidence must disclose
(1) that the evidence is newly discovered and was unknown to
the defendant at the time of trial; (2) that the evidence is mater-
ial, not merely cumulative or impeaching; (3) that it will
probably produce an acquittal; and (4) that failure to learn of
the evidence was due to no lack of diligence on the part of the
defendant." ¹⁹⁴

When, after conviction, one of several joint defendants recants
testimony tending to connect another with the crime, his recantation

¹⁸⁹ Id. at 10.
¹⁹² Casey v. United States, 20 F.2d 752, 754 (9th Cir. 1927). In 1954 a court
still took the view that such motion "is looked upon with disfavor and distrust." Nilva
v. United States, 212 F.2d 115, 124 (8th Cir. 1954); see also United States v. Hiss,
¹⁹³ United States v. Frankfeld, 111 F. Supp. 919, 922 (D. Md. 1953); see also
¹⁹⁴ 4 BARRON, FEDERAL PRACTICE AND PROCEDURE, § 2882 (1951). Earlier cases
such as Johnson v. United States, 32 F.2d 127, 130 (8th Cir. 1929) quoted similar lan-
guage from 12 Cyc. 734. The latter decision is still quoted in recent cases. United
may be the ground for a new trial of the defendant affected by that testimony. The Seventh Circuit has laid down a separate rule as to newly discovered evidence where there has been a recantation or where it has been proved that false testimony was given at the trial. Under this rule a new trial lies where (a) the court is reasonably well satisfied that the testimony given by a material witness is false, (b) that without it the jury might have reached a different conclusion, and (c) that the defendant was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

The defendant is not entitled to a new trial when a witness for the Government repudiates his testimony and then recants his repudiation. Recantation by the government's main prosecuting witness is not necessarily a ground for a new trial on the ground of newly discovered evidence. But, where an important witness for the prosecution makes an affidavit of mistake as to a material issue, a new trial will be granted. A recantation of a signed statement made by an affiant before trial is not a basis for a new trial when the affiant does not testify at the trial. An evasive and uncertain recantation by a government witness is not a ground for a new trial. In a recent case involving the witness, Harvey Matusow, the court ruled that his recantation was false, hence no new trial was granted. If the defendant would probably be acquitted without the testimony of a codefendant who was convicted of perjury, and the codefendant's statements to the FBI contradicted his testimony, a new trial should be granted.

A new trial on the ground of newly discovered evidence will be granted where a conviction is obtained by the use of evidence poisoned and tainted with wire tapping. Further, new trial as well as habeas

195. Harrison v. United States, 7 F.2d 259, 262 (2d Cir. 1925).
196. United States v. Johnson, 142 F.2d 588, 591 (7th Cir. 1944); Larrison v. United States, 24 F.2d 82, 87 (7th Cir. 1928); see United States v. Hiss, 107 F. Supp. 128, 136 (S.D.N.Y. 1952). The Larrison case is said to have been without authority in 39 MINN. L. REV. 316, 317 (1955).
200. United States v. On Lee, 201 F.2d 722 (2d Cir. 1953). There had been fifteen prior convictions of the affiant.
201. Nilva v. United States, 212 F.2d 115, 123 (8th Cir. 1954).
203. United States v. Miller, 61 F. Supp. 919 (S.D.N.Y. 1945); for a general statement that perjury is a ground see Martin v. United States, 17 F.2d 973, 976 (5th Cir. 1927). On perjured evidence as a want of due process see Note, 5 UTAH L. REV. 92, 96 (1956).
corpus and writ of error coram nobis should be available where the prosecution suppresses evidence favorable to the defendant.\textsuperscript{205}

Newly discovered evidence that a prosecution witness had a criminal record is usually treated as merely cumulative.\textsuperscript{206} This is doubly true if the testimony of the witness at the trial was itself merely cumulative.\textsuperscript{207} A highly unusual ground for a new trial for newly discovered evidence arises when, after the defendant's conviction, a material witness, without whose testimony he could not have been convicted, is indicted and convicted of a crime committed before the trial. If this could have been shown at the trial it would have tended greatly to discredit his testimony.\textsuperscript{208} Suppose the government witness cannot be cross-examined by the defendant as to a conviction of a crime in a state court because the appeal of the conviction has not been determined. When such conviction of the witness has been affirmed on appeal, the defendant may have a new trial and show such conviction.\textsuperscript{209}

On the issue of due diligence a defendant secured a reversal of a denial of a new trial by the trial judge under the following circumstances: Counsel for defendant prior to trial had gone to the police station three times to learn the identity of the officer who had accompanied the complaining witness to a card game at which the witness had been robbed. No record of the incident could be found. Defendant went to the precinct at a change of shifts in an unsuccessful attempt to identify the officer. The testimony of the police officer would have contradicted the testimony of the witness on critical issues.\textsuperscript{210} Where a disinterested witness, who was not available to testify at the trial through no fault of the defendant or his counsel, later becomes available and can supply evidence of vital importance which was not available at the trial except on the testimony of the defendant himself, a new trial should be granted.\textsuperscript{211}

Suppose the newly discovered evidence is an affidavit of another that he had committed the crime. If this affidavit is not contested by

\textsuperscript{205} In United States v. Rutkin, 212 F.2d 641 (3d Cir. 1954), there was a disregard of keenly pertinent evidence but the court held that the evidence must be knowingly suppressed; see Note, Suppressed and Perjured Evidence: a Denial of Due Process, 5 Utah L. Rev. 92 (1956).

\textsuperscript{206} Meyers v. United States, 207 F.2d 413 (4th Cir. 1953); Murphy v. United States, 198 F.2d 87 (D.C. Cir. 1952) (juvenile court record).


\textsuperscript{208} United States v. Senft, 274 Fed. 629 (E.D.N.Y. 1921). The defendant was charged with bribing the witness who was later convicted of extortion.


\textsuperscript{210} Coates v. United States, 174 F.2d 959 (D.C. Cir. 1949). The decision was two to one.

\textsuperscript{211} Amos v. United States, 218 F.2d 44 (D.C. Cir. 1954). The court did not regard such evidence as merely cumulative. The witness was a prisoner in a workhouse.
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the Government it should afford a basis for a new trial. But, if the
evidence clearly shows that the defendant committed the crime, no new
trial will be granted. 212

Evidence showing nothing more than flimsy cumulative support of
an alibi upon which defendant relied at the trial and which could not
have affected the result in view of the positive identification of the
defendant is not sufficient to support a motion for a new trial for newly
discovered evidence. 213 Also, if the newly discovered evidence is merely
hearsay, no new trial need be granted. 214 Where the newly discovered
evidence, in a case under the Smith Act, merely showed the amount
which the government's informant had received as salary while seeking
information against the defendant, and that another witness had been
convicted of drunkenness, no new trial was granted. 215 Acquittal of a
codefendant is not newly discovered evidence. 216 Newly discovered
evidence of an attempt to bribe a member of the trial jury is a basis for
a new trial. 217

In determining the kind and quality of newly discovered evidence
which will warrant a new trial, the federal courts are not bound by the
decisions of the state courts in the state where the trial took place
though such decisions may be more favorable to the defendant. 218

It has been pointed out that the stenographer's minutes of the
trial are preserved so that the defendant can establish the materiality
of, or reliance on, newly discovered evidence by comparing such evidence
with the record. 219

IV.
TIME.

An early case held that a motion for a new trial would not lie if
made after a motion in arrest had been made and passed upon. 219a

212. Jeffries v. United States, 215 F.2d 225 (9th Cir. 1954). The court pointed out
that if a new trial were granted, then the affiant could claim self-incrimination and not
testify, hence there would be no evidence to present to the court. It would seem harsh,
however, to deny a new trial solely on that ground; see 5 Wigmore, Evidence § 1476
(3d ed. 1940).

916 (1949).

214. Wagner v. United States, 118 F.2d 801 (9th Cir. 1941); Boyd v. United
States, 30 F.2d 900, 901 (9th Cir. 1929).

413 (4th Cir. 1953).


218. United States v. Rutkin, 208 F.2d 647, 654 (3d Cir. 1953). But, Kalodner,
J., dissenting, relied on state court decisions of various states. Id. at 657.

219. New York University Institute on Federal Rules of Criminal Pro-
cedure 230-231 (1946).

1878). In this case a motion made three years after trial was held too late.
But, such is not the modern view. Today, the motion may be made before, simultaneously with, or after a motion in arrest. Where the statutes are silent, it has been held that the courts should apply the common-law rule, and hence the motion for a new trial must be made within the same term.\(^ {220} \) In 1914 the Supreme Court adopted this rule.\(^ {221} \) If the motion is made within the term it can be passed upon later. The consent of the Government cannot confer jurisdiction, and the court of appeals can issue a writ of prohibition against trial of the case.

The Criminal Appeals Rules of 1934 provided a three-day period in which to move for a new trial and sixty days for newly discovered evidence.\(^ {222} \) The motion was to be "determined promptly." However, the time fixed was too short and the motions were not necessarily determined promptly.\(^ {223} \) Federal Rules of Criminal Procedure, rule 33, removed some of these defects by allowing five days for the ordinary motion. Under rule 33 a motion for a new trial made seven days after verdict is timely when the seven days includes both a Sunday and a state holiday.\(^ {224} \)

The motion for a new trial may be made after judgment.\(^ {225} \) At common law such a motion was not a part of the record. In fact, there was doubt whether it could be included in a bill of exceptions since it occurred after verdict or after judgment. However, a less technical rule has been applied in the federal courts and there the motion may be incorporated into a bill of exceptions.\(^ {226} \)

The language of the last sentence of rule 33 providing that a motion for a new trial shall be made within five days of "finding of guilty" covers a finding of the trial judge that the defendant is guilty as charged, made and entered in the minutes of the court, and not the subsequent date when sentence is imposed.\(^ {227} \) The argument that the trial court might change its mind before entering judgment is not

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\(^ {220} \) Trafton v. United States, 147 Fed. 513 (1st Cir. 1906).
\(^ {225} \) A new trial may be granted even though the defendant has been sentenced and the sentence was to take effect immediately. Cisser v. United States, 37 F.2d 330 (4th Cir. 1930). The defendant had not entered the penitentiary, nor had he been turned over to the executive department. It was held that the motion lay even though the defendant had entered upon service of sentence. United States v. Guthrie, 11 F. Supp. 1, 2 (W.D. Tenn. 1935).
\(^ {226} \) Harrison v. United States, 7 F.2d 259, 262 (2d Cir. 1925). This case is approved by Justice Brandeis in the Court's opinion in Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 482 (1933).
\(^ {227} \) Pugh v. United States, 197 F.2d 509, 511 (9th Cir. 1952).
acceptable. The finding of the court is treated exactly like a verdict of guilty by a jury. Form 25 of the Federal Rules of Criminal Procedure shows that the making of the finding of guilt is an action of the court preceding and apart from the judgment.

The period fixed in rule 33 for motion for a new trial is jurisdictional. Even though the trial court entertains and passes on an untimely motion, this does not extend the time limit, since rule 45(b) forbids enlargement of time for filing motions for new trials. The time to move for a new trial may not be extended by a supplemental motion made after the time fixed in rule 33 has expired. Hence, a supplemental motion filed after an appealed denial of the original motion for a new trial and more than two years after conviction was affirmed is properly denied as untimely.

The time for motion for a new trial is not extended merely because a void sentence is imposed after a fair trial. Further, the time for newly discovered evidence can not be applied. But, a district court has held that when a void sentence is imposed on the defendant, the time for motion for a new trial does not start to run, for the entire proceedings are then suspended. However, when a correct sentence is later imposed, the time then starts to run even though a period of as much as eight years may have intervened.

The motion for a new trial for newly discovered evidence must be made "within two years after final judgment." What is meant by "final judgment"? Does this mean the date when judgment of conviction and sentence was entered, or does it mean the subsequent date of mandate of affirmance by the court of appeals? In United States v. Hiss, the court found it unnecessary to decide this issue as the motion was made within two years of both, being one day within the former limit. In another case the court clearly held that "final judgment" includes the mandate of affirmance.

228. Lujan v. United States, 204 F.2d 171 (10th Cir. 1953); Drown v. United States, 198 F.2d 999, 1007 (9th Cir. 1952), cert. denied, 344 U.S. 920 (1953); Marion v. United States, 171 F.2d 185 (9th Cir.), cert. denied, 337 U.S. 944 (1949).

229. Odd o. United States, 171 F.2d 854, 858 (2d Cir.), cert. denied, 337 U.S. 943 (1949). Defendant argued that his motion was in reality a motion to reargue the motion for new trial previously denied. The court did not pass on this contention but charitably treated the supplemental motion as a motion for new trial.

230. Howell v. United States, 172 F.2d 213 (4th Cir.), cert. denied, 337 U.S. 906 (1949). Here the sentence was alleged to be void because counsel for defendant was not present when sentence was pronounced. The motion was made more than seven years after conviction.


233. Harrison v. United States, 191 F.2d 874, 876 (5th Cir. 1951). However, the motion seems to have been made within two years after verdict of guilty.
The hardship of the two-year limitation on newly discovered evidence is shown in a case in which the evidence, discovered about twelve years after trial, established that the defendant was innocent and had been the victim of mistaken identity. The only relief possible was a pardon. The motion procedure under 28 U.S.C. section 2255 and coram nobis would not lie.

It may sometimes be to the distinct advantage of a defendant to move for a new trial within the five-day period even though the ground is something like newly discovered evidence. Such early motion "is broader in scope than the limitations which have been held applicable where the motion is based on newly discovered evidence." Thus, where the defendant was convicted of taking indecent liberties with a twelve year old girl, and four days after a verdict of guilty, defendant introduced an affidavit of the girl's mother, who had not testified at the trial, and who had seen and talked with the girl shortly after the alleged offense, contradicting the testimony of the girl in two respects and giving the mother's opinion that nothing had happened to the girl, the trial court erred in denying the motion.

Suppose the trial judge has acted timely in denying or granting a motion for a new trial. May he, at a much later time, reconsider his action, and thus extend the time for granting or denying a motion for a new trial? The Court of Appeals for the Third Circuit held that this could be done validly, and concluded that this was the weight of authority as to state court decisions. On the other hand, if the court reconsiders its denial of the motion within a reasonable time and there is no appeal taken, the court may grant the motion.

After a judgment of conviction has been affirmed by the court of appeals upon an appeal in which the district court's denial of a motion for a new trial was one of the errors assigned, and the defendant has commenced serving his sentence, a federal district court has no

235. Id. at 11-13. For criticism of this case see Donnelly, Unconvicting the Innocent, 6 VAND. L. REV. 20 (1952); Note 36 MINN. L. REV. 533 (1952); see Orfield, Amending the Federal Rules of Criminal Procedure, 24 NOTRE DAME L. REV. 315, 327-330 (1949). There is no time limit in Michigan. Whalen v. Frisbie, 185 F.2d 607, 608 (6th Cir. 1950). In Nebraska the time limit has been increased by statute to three years. 19 Neb. L. B. 152 (1940). See the criticism made forty years ago by Williston, Does a Pardon Blot Out Guilt? 28 HARV. L. REV. 647, 659 (1945).
239. See the dissenting opinion of Biggs, J., in United States v. Smith, 156 F.2d 642, 646, 647, n. 5 (3d Cir. 1946).
power under rule 33 to order a new trial on its own motion.²⁴⁰ Hence, the prosecution is entitled to mandamus and prohibition from the court of appeals to compel the vacating of an order granting a new trial. The rule deprives the judge of power to grant such a motion on request of the defendant, hence it would be anomalous to allow the judge to act on his own initiative. For the judge to act on his own motion would raise serious questions of double jeopardy,²⁴¹ whereas, when the motion is granted on motion of the defendant, the question of jeopardy is obviated. Even when no appeal is taken the power of the court to act on its own motion does not exist indefinitely.²⁴² Clearly the trial court may take "time for reflection." ²⁴³ "It is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as possible, and that a decision be not deferred until the trial's story has taken on the uncertainty and dimness of things long past." ²⁴⁴

V. Affidavits.

Rule 33 does not speak of the necessity of affidavits in support of a motion for a new trial.²⁴⁵ Under rule 47 a motion "may be supported by affidavit." The rule does not say that it must be supported by affidavit.

Where the evidence presented on the motion for a new trial consists of affidavits, the court may deny the motion on the basis of counter affidavits.²⁴⁶ An affidavit stating a mere conclusion will not support a


²⁴¹ 241. The Court stated that it was not necessary to decide whether retrial on the court's own motion would be jeopardy. United States v. Smith, 331 U.S. 474-75 (1947).

²⁴² 242. United States v. Smith, 156 F.2d 642, 647 n. 6 (3d Cir. 1946) (dissenting opinion). Biggs, J. stated that "no appeal being taken, a trial judge might reconsider a motion for a new trial filed by a convicted defendant and grant it after the defendant had served, let us say, three years of a five-year sentence. Under such circumstances it might be necessary to hold that the service of the motion was spent after the lapse of a reasonable time ...." In the same case, in the Supreme Court, Justice Jackson stated that it is not acceptable "that the power of the trial court to grant new trials on its own motion lingers on indefinitely." 331 U.S. 469, 473 (1947). Prior to the rules a new trial could be granted only during the same term. This is now altered by rule 45 (c). Presumably the Supreme Court would also say that the power of the trial court to grant a new trial on the defendant's motion does not linger on indefinitely.


²⁴⁴ 244. Id. at 476.

²⁴⁵ 245. See Note, 37 Iowa L. Rev. 399 (1952). Affidavits have been used in the federal courts because they are widely used in the state courts. NEW YORK UNIVERSITY INSTITUTE ON FEDERAL RULES OF CRIMINAL PROCEDURE 244-45 (1946).

²⁴⁶ 246. Glenberg v. United States, 281 Fed. 816 (6th Cir. 1922). In Blodgett v. United States, 161 F.2d 47, 56 (8th Cir. 1947), the court pointed out that virtually all state court decisions held that the trial court will not be reversed where there are counter affidavits.
motion for a new trial.\textsuperscript{247} Where the motion is on the ground of newly discovered evidence the affidavit must show the relation of the new evidence to the evidence presented at the trial.\textsuperscript{248}

Suppose the affidavit in support of the motion for a new trial is ambiguous. It has been said that where the motion is on the ground of newly discovered evidence the ambiguity should not be resolved in favor of the Government without inquiry of the proposed witness, especially where the sole evidence at the trial is the word of the arresting officer and the Government could have, but refused to offer corroborating evidence.\textsuperscript{249} Vague and indefinite affidavits are likely to result in a denial of a new trial even though they are received by the court.\textsuperscript{250} Where the affidavit offered by the defendant in support of his motion was signed by a young witness while in another state where it was presented to him, and pressure was brought to bear upon him to sign such affidavit, but which was contradicted by a second affidavit, the motion was properly denied as such an affidavit failed to show perjury.\textsuperscript{251}

May the affidavits supporting the motion for a new trial come from members of the jury which convicted the defendant? Frequent statements are made that they may not.\textsuperscript{252} For example, it has been held that a verdict of first-degree murder could not be impeached by affidavits of two jurors that they would not have joined in the verdict had they known that it called for life imprisonment.\textsuperscript{253} Affidavits of jurors supporting charges of misconduct showing the method of arriving at the verdict are also incompetent.\textsuperscript{254} Affidavits or testimony of jurors cannot be received to show, for the prosecution or the defendant, that the jurors did or did not consider documentary or other information which was made available to them in the jury room as part of the record exhibits in the regular course of the trial proceedings.\textsuperscript{255}

\begin{itemize}
\item \textsuperscript{247} Camp v. United States, 16 F.2d 370, 371 (6th Cir. 1926), cert. denied, 274 U.S. 754 (1927).
\item \textsuperscript{248} McConnell v. United States, 26 F.2d 798 (9th Cir. 1928).
\item \textsuperscript{249} Hamilton v. United States, 140 F.2d 679, 681 (D.C. Cir. 1944). The case is cited favorably in United States v. Johnson, 149 F.2d 31, 43 (9th Cir. 1945).
\item \textsuperscript{250} Fullerton v. United States, 8 F.2d 968, 972 (5th Cir. 1925).
\item \textsuperscript{251} Martin v. United States, 17 F.2d 973, 975 (5th Cir. 1927).
\item \textsuperscript{252} But the Supreme Court early stated that no general rule could be laid down. United States v. Reid, 53 U.S. (12 How.) 361, 366 (1851); see also \textsuperscript{253} United States v. Parelus, 83 F. Supp. 617, 618 (D. Hawaii 1949); see also Hendrix v. United States, 219 U.S. 79, 91 (1911) where the jurors thought the penalty was two years instead of life imprisonment.
\item \textsuperscript{254} Lancaster v. United States, 39 F.2d 30, 33 (5th Cir. 1930). It was alleged that a majority of the jury misrepresented the effect of a verdict to the minority. An early case held that jurors may not testify as to what they said to each other in their deliberations. United States v. Daubner, 17 Fed. 793, 802 (E.D. Wis. 1883).
\item \textsuperscript{255} United States v. Dressler, 112 F.2d 972, 979 (7th Cir. 1949).
\end{itemize}
Affidavits or testimony of jurors may be used to show that extraneous matters or influences, such as tampering with the jury, have been introduced into the courtroom. But, a recent case held that affidavits of jurors that they had been influenced by an unauthorized statement of a bailiff that a verdict must be reached were inadmissible. The practice of interviewing jurors after trial as to their state of mind during trial is to be disapproved. Jurors will not be heard "for the purpose of impeaching the verdict returned where the facts sought to be shown are such that they essentially inhere in the verdict." A verdict supported by the evidence cannot be upset by inquiry as to whether it was the result of compromise or mistake. An affidavit by a juror that he has been coerced by other jurors will be received only with great caution. Where affidavits are permitted they may be used in support of the motion for a new trial or in opposition to it.

The trial judge may decide the motion for a new trial on affidavits without the calling of witnesses. In a case involving newly discovered evidence the court of appeals suggested that the trial court "did the right thing in granting a hearing and seeing the witnesses." It has been suggested that new trials based solely on affidavits are not favored. A court of appeals has pointed out: "The affidavits were ex parte, the affiants were not brought into court where they might have been subject to cross-examination, and where the court might have had an opportunity to observe their manner and demeanor."

In the absence of a stipulation by the Government that affidavits alleging the improper constitution of a jury may be accepted as proof in support of a motion for a new trial, it is incumbent on the defendant

256. Mattox v. United States, 146 U.S. 140 (1892); Steiner v. United States, 229 F.2d 745, 748 (9th Cir. 1956); United States v. Dressler, 112 F.2d 972, 979 (7th Cir. 1940); Chambers v. United States, 237 Fed. 513, 520 (8th Cir. 1916); see Note, 54 Mich. L. Rev. 1003 (1956).


259. Hyde v. United States, 225 U.S. 347, 383 (1911); Armstrong v. United States, 228 F.2d 764, 769 (8th Cir. 1956); Rakes v. United States, 169 F.2d 739, 745 (4th Cir. 1948); Young v. United States, 163 F.2d 187, 188 (10th Cir. 1947); Jordon v. United States, 87 F.2d 64, 67 (D.C. Cir. 1936).


262. Casey v. United States, 20 F.2d 752, 754 (9th Cir. 1927).

263. Albiza v. United States, 88 F.2d 138 (1st Cir. 1937).


266. Martin v. United States, 154 F.2d 269, 270 (6th Cir. 1946).
to introduce, or to offer, distinct evidence in support of the motion, since the formal affidavit alone, even though uncontradicted, is not enough. 267

Where the affiants make false affidavits and the defendant urges them to do so, the affiants may be indicted for perjury and the defendant for subornation of perjury. 268

VI.

HEARING AND DETERMINATION OF MOTION.

Is the motion for a new trial a new proceeding, separate from what has gone on before? The Court of Appeals for the District of Columbia has stated that it "is a part of the original proceeding, as is the district court's ruling thereon." 269 At common law the motion for a new trial and the order following it were not a part of the record. 270

Rule 47 of the Federal Rules of Criminal Procedure provides: "A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit." Thus, the motion for a new trial may be made orally and it should state the grounds for the motion.

Rule 33 does not speak of "filing" the motion for a new trial. Speaking of the corresponding Criminal Appeals Rule II(3) one court has stated that the motion "may, within the time allowed by the Rules, be filed as of right without sanction by the judge, and it then becomes his duty to pass upon it. If the clerk improperly refuses to file it, the judge can no doubt compel him to file it, or may entertain the motion without filing. But the movant has no right, the court not being in session, to present such a motion to the judge without filing, or to compel the judge to file it for him with the clerk." 271

Mandamus cannot be used to compel the district court to file the motion for a new trial, as filing is unnecessary, and if it were necessary the clerk should file it.

269. Bruno v. United States, 180 F.2d 393, 394 (D.C. Cir. 1950). But in the first case passed upon by the Supreme Court, Chief Justice Marshall stated that the motion for new trial "is not a part of the proceedings in the cause." United States v. Daniel, 19 U.S. 542, 548 (1821).
271. Young v. Keeling, 130 F.2d 560, 561 (5th Cir. 1942).
There is no obligation on the Government to file a written pleading controverting a motion for a new trial when it controverts the motion in oral argument. The failure to file a written pleading is not an admission of the facts set out in the affidavits supporting the motion.

The defendant is entitled to consideration of his motion. In fact, the older cases often stated that if the court did consider the motion and then denied it, the appellate court would not review the denial. As early as 1892, the Supreme Court made it clear that the trial court must give consideration to the motion and exercise the discretion conferred upon it. What are concrete examples of failure to exercise discretion? Where the trial judge failed to act on a motion for a new trial presented in chambers because he mistakenly thought he lacked authority to grant it except in court, his action constituted a failure to exercise discretion. The court had a mistaken view that it had no jurisdiction. Where the trial judge fails to consider a motion based on recantation of a witness because he thinks that this is not a proper ground, the appellate court will order him to consider the motion. If at the hearing on the motion for a new trial the trial judge excludes competent evidence bearing on the issue raised by the motion, his action is reviewable on appeal. The court referred to the action of the trial judge as a failure to exercise his discretion, but in reality the judge acted positively and erred in his interpretation of the law. Where the trial court refuses to consider the reasons set out in the motion, this is a refusal to exercise discretion. Another instance of failure to exercise discretion is that of misinterpreting the facts of the case. In one case, the court, misunderstanding the facts, took an erroneous view of the purpose and effect of the affidavits offered by the defendant on his motion for a new trial. Believing that the facts were immaterial, it failed to consider the affidavits. The appellate court

273. Firotto v. United States, 124 F.2d 532, 536 (8th Cir. 1942).
276. Harrison v. United States, 7 F.2d 259, 262 (2d Cir. 1925).
279. Harrison v. United States, 7 F.2d 259 (2d Cir. 1925); Ogden v. United States, 112 Fed. 523 (3d Cir. 1902).
ordered a new trial. If the court misunderstood the facts of the case it could not pass on the affidavits properly.

A motion for a new trial may be amended. Such amendment is more likely to occur where there is newly discovered evidence. A supplemental motion has been allowed.

The hearing on the motion may be held in another district of the division. When the former circuit courts existed, the hearing was held before two or three judges. Today, the hearing is before a single judge, normally the judge who tried the case. But, there will be occasions when another judge ought to hear the motion for a new trial. This is true where it might be necessary for the first judge to testify at the hearing on the motion.

When the judge who conducted the first trial withdraws from the case, the motion for a new trial should be heard by a judge designated by the chief judge of the court of appeals. However, if the motion is heard by another judge of the district with the consent of the parties, want of such designation is not reversible error.

Suppose the motion for a new trial is made before the judge who tried the case, but is left undecided by him because of death or incapacity. May another judge rule on the motion? It has been so held in federal civil cases. An early federal criminal case held that where the trial judge died before passing on the motion and before the time to move had expired, his successor could have granted a new trial on the presumption that the trial judge had not been content to enter judgment on the verdict. But, sixty years later it was held that under the federal statutes and under the prior law, the successor could pass on the motion where the evidence was taken by way of stenographic notes or the successor was otherwise satisfied that he could pass on the motion. The court said that there was no conflict with the

281. Johnson v. United States, 149 F.2d 31, 32 (7th Cir. 1945).
285. Bruno v. United States, 180 F.2d 393, 394 (D.C. Cir. 1950). Defendant alleged that there had been no valid waiver of the right to jury trial.
287. Rakes v. United States, 163 F.2d 771 (4th Cir. 1947). The motion was on the ground of newly discovered evidence.
earlier case, as in that case the facts were not preserved. There is no constitutional right to have only the original judge pass on the motion.291 Rule 25, which is concerned with the disability of the presiding judge, makes it possible for another judge to proceed with the case, "but if such other judge is satisfied that he cannot perform these duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial." The death of Federal District Judge Hulen of Missouri is likely to raise the issue very shortly.

The defendant has "no constitutional right to be present at the hearing" of the motion for a new trial.292 The hearing on the motion "is in no sense a part of the criminal trial at which the Constitution requires the presence of the accused." 293 Rule 43 does not call for presence of the defendant.294

What about the right to counsel on a motion for a new trial? The cases are not clear as to the existence of such a right. One case has simply held that if the motion for a new trial is untimely, so that the trial court is deprived of its jurisdiction, a defendant cannot complain if the trial court fails to appoint any of three attorneys requested by the defendant and instead appoints the attorney who represented him at the trial, even though the defendant is now antagonistic toward him.295 The retaining of new counsel does not extend the time in which to move for a new trial even though such counsel is unable to familiarize himself with the record.296 Where a defendant's counsel continues to represent him after trial during the period for moving for a new trial, and counsel fails to move during that period, it must be concluded, in the absence of a showing that any basis existed for such a motion, that the motion would have been unavailing.297 The accused cannot argue later in a habeas corpus proceeding that no counsel was provided to

292. Barker v. United States, 142 F.2d 805, 806 (4th Cir. 1944).
293. Id. at 806; accord, Bell v. United States, 129 F.2d 290, 291 (5th Cir. 1942). Both cases involved applications for the writ of error coram nobis. The defendant was in prison serving his sentence after conviction. For a prior case holding that the defendant has no right to be present at the hearing and determination of his motion for new trial, and that his absence does not invalidate the sentence, see Alexis v. United States, 129 Fed. 60, 64 (4th Cir. 1904).
294. The Committee Note says that the rule "does not apply to hearings on motions made prior to or after trial," and cites United States v. Lynch, 132 F.2d 111 (3d Cir. 1942).
296. Drown v. United States, 198 F.2d 999, 1007 (9th Cir. 1952), cert. denied, 344 U.S. 920 (1953); Pugh v. United States, 197 F.2d 509, 511 (9th Cir. 1952).
297. Errington v. Hudspeth, 110 F.2d 384, 386 (10th Cir.), cert. denied, 310 U.S. 638 (1940); see also De Maurez v. Swope, 104 F.2d 758, 759 (9th Cir. 1939).
move for a new trial. Where the defendant during the criminal proceeding has had counsel who withdrew with his consent and has employed new counsel on the day the trial opened, the denial of a continuance was not a ground for new trial or appeal after the court had pointed out that there would be an adjournment after the selection of the jury, at which time counsel could confer with the defendant.\textsuperscript{298} Where the court appointed counsel for defendant who then pleaded guilty, the court declined to appoint other counsel when defendant moved for a new trial and other relief.\textsuperscript{299}

To what extent must the trial court permit witnesses to testify for the defendant at the hearing on the motion for a new trial? This question has been seldom discussed in the cases. But, in a recent decision of a court of appeals it was held that when the defendant alleged fraud by the principal witness for the Government, the trial court need not have heard a witness summoned by the defendant after he had admitted that the witness could not establish that the principal witness had lied at the trial.\textsuperscript{300} A defendant may not complain of the refusal of the trial court to take oral testimony at the hearing on the motion for a new trial when he himself offers no testimony.\textsuperscript{301}

In practice, testimony of other convicted persons is not likely to win the defendant a new trial on the ground of newly discovered evidence. For example, the court of appeals upheld the district court in denying a new trial based on the testimony of a prison inmate, convicted of five felonies, as to statements by a fellow inmate that he had received certain inducements to testify for the Government.\textsuperscript{302}

May the defendant at the hearing on the motion for a new trial be precluded from presenting evidence by operation of the rules of privilege in the law of evidence? In one case it was held that a telegram from the codefendant’s wife to the codefendant’s former attorney and three letters from the codefendant to such attorney could have been considered by the court when attached to and made part of the defendant’s motion for a new trial, as they were thus made public. The present attorney for the codefendant could not object. It made no

\textsuperscript{298} United States v. Yager, 220 F.2d 795, 796 (7th Cir. 1955), cert. denied, 349 U.S. 963 (1955).


\textsuperscript{300} United States v. Rutkin, 208 F.2d 647, 655 (3d Cir. 1953) (Kalodner, J. dissenting).

\textsuperscript{301} United States v. Marachowsky, 213 F.2d 235, 239 (7th Cir. 1954).

\textsuperscript{302} Goodman v. United States, 97 F.2d 197 (3d Cir. 1938), cert. denied, 305 U.S. 578 (1939). When a group of defendants are tried and they fail to take the stand, they will not be permitted to aid one of their number to secure a new trial by later offering to make statements beneficial to him. McAteer v. United States, 148 F.2d 992 (5th Cir. 1945); Caplin v. United States, 148 F.2d 992 (5th Cir. 1937).
difference that the former attorney of the codefendant might have breached his obligations to his client.\textsuperscript{303}

Where a witness testifies one way at the trial and another way at the hearing on the motion for a new trial, he runs the risk of a perjury prosecution. If the witness is of low intelligence the court may protect him by refusing his testimony at the hearing, yet at the same time assuming that he has in fact changed his story.\textsuperscript{304}

Where a defendant waives his right to present a portion of his defense, and on motion for a new trial states that he would not attempt to establish these facts on a new trial, it should not be granted.\textsuperscript{305} One district judge stated that no "useful purpose could be served in hearing oral argument" on the motion for a new trial since the trial was free from prejudicial error and defendant's counsel had ably presented the defense at the trial.\textsuperscript{306}

Judge Jerome Frank, in a dissenting opinion, argues that the majority of the court in denying a new trial on the ground of newly discovered evidence, which merely impeached the evidence brought out at the trial, in effect holds that the burden of proving innocence is placed on the defendant, and he can obtain a new trial "only by offering affirmative evidence to prove his innocence."\textsuperscript{307} But, the presumption of innocence operates only up to conviction. As another judge has pointed out, a convicted defendant has the burden of demonstrating prejudicial error on motion for a new trial.\textsuperscript{308} It has been held that when the defendant upon his motion alleged misconduct of a juror he had the burden of proving it.\textsuperscript{309} The Supreme Court has stated that the trial judge should not make assumptions in favor of the defendant if the effect is to grant a new trial, but may do so if a denial is involved.\textsuperscript{310}

It would appear that in passing on a motion for a new trial the court has much more discretion than it has in allowing a motion for judgment of acquittal under rules 29(a) or 29(b). As Judge Jerome Frank states in a dissenting opinion:

"A trial judge, before entry of judgment, and if the motion is timely made, has a wide discretion to order a new trial (as

\textsuperscript{303} United States v. Miller, 61 F. Supp. 919, 921 (S.D.N.Y. 1945).
\textsuperscript{304} Winer v. United States, 229 F.2d 944, 950 (6th Cir. 1956).
\textsuperscript{309} United States v. Swett, 28 Fed. Cas. 3 No. 16427 (D. Me. 1879).
\textsuperscript{310} Holt v. United States, 218 U.S. 245 (1910).
distinguished from ordering a directed verdict or entering a judgment n.o.v.). When he exercises his sound discretion to order a new trial, his order is reviewable (if at all) only for 'abuse of discretion'.” 311

In reviewing the record on a motion for a new trial, it has been said that it is particularly important to relive the whole trial imaginatively and not to extract from isolated episodes abstract questions of evidence and procedure.312 In deciding on the motion, the trial judge may utilize the knowledge he gained from presiding at the trial as well as the showing made on the motion.313 The trial court may hear and deny the motion for a new trial without having before it the transcript of testimony given at the trial where counsel for defendant fails to challenge the accuracy of the summaries of testimony offered by the Government.314 The failure of the defendant to take the stand may be considered by the trial court in determining the motion for a new trial and in denying it.315 The court may further consider an issue on the construction of the federal criminal statutes which impose criminal liability though not presented during the trial.316 Prior to the Federal Rules of Criminal Procedure it was held that the fact that the trial judge had considered a probation report in determining the motion was not ground for reversal.317 The court stated that this was common federal practice. The same result would seem likely under the Federal Rules of Criminal Procedure, as rule 32(c)(1) provides merely that the probation report shall not be submitted to the court until the defendant "has been found guilty."

The district court may proceed to make its ruling on the motion immediately after the hearing. It was held not objectionable in one case to have denied the motion “immediately after counsel for the defendants and for the Government had completed their arguments


317. Evans v. United States, 122 F.2d 461, 468 (10th Cir. 1941).
on the motion."

The court may overrule immediately if the motion raises only issues considered during the trial, but not where it raises issues arising after submission of the case to the jury, or where newly discovered evidence is involved. No time limit is fixed in rule 33 as to how late the motion may be ruled upon, but a reasonable time should be permitted.

Rule 33 permits the defendant to move for a new trial on the ground of newly discovered evidence even though an appeal is pending, but the motion may be granted only upon remand by the appellate court. The purpose of this provision is to expedite the proceedings. Where the trial court finds that the motion should be granted, the court of appeals, without itself determining whether the motion should be granted, should remand unless no reasonable basis for the motion exists and the trial court abused its discretion in granting a new trial. When the trial judge rules on a motion for a new trial, must he or should he write an opinion? Judge Maris has pointed out that neither the federal statutes nor the rules cast any light on the power of the trial judge to reconsider his denying or granting of a motion for a new trial.

Where a motion for reargument of the motion for a new trial is made after the time for appeal from the denial of the former motion has passed, denial of the motion for reargument is discretionary, and will be reversed only for abuse of discretion. Where no new matter is alleged, denial of the motion for reargument is proper as granting it amounts to an attempt to extend the time for appeal from the order denying the former motion. If a new trial is granted to some of a group of defendants, this is likely to result in a request for reargument by those denied a new trial.

318. United States v. Marachowsky, 213 F.2d 235, 240 (7th Cir. 1954). The appellate court will not reverse unless prejudice is shown. Stewart v. United States, 300 Fed. 769, 787 (8th Cir. 1924).

319. Gourdain v. United States, 154 Fed. 453, 460 (7th Cir. 1907). There need be no stay of proceedings or extent of deliberation.


321. Ibid.


323. United States v. Smith, 156 F.2d 642, 644 (3d Cir. 1946). But he points out that most state court cases allow reconsideration during the term.

324. United States v. Froehlich, 166 F.2d 84 (2d Cir. 1948).

Where a second motion for a new trial is precisely on the same grounds as the first, the ruling on the first is res judicata.326

When the defendant moved for a new trial and then escaped, one court entered an order striking and dismissing the motion unless the defendant surrendered to the jurisdiction of the court on or before the first day of the next term.327

VII.

EFFECTS OF GRANT OF NEW TRIAL.

Suppose the trial court on its own motion grants a new trial.328 Must an unwilling defendant undergo the second trial? It is to be doubted that he must. Justice Jackson, speaking for the Supreme Court, has stated: "It may be worthy of note that rule 33 provides that a court may grant a new trial to a defendant, and does not say that the court may order a new trial." 329 An early case held that a new trial would not be ordered even in a capital case, if the defendant objected and, the court warned, that a defendant convicted of manslaughter might be convicted of murder on the second trial.330 Thus, it would appear that the trial court may offer a new trial, but may not order it if the defendant objects. In most cases it would be to the defendant's advantage to accept the offer. However, in cases where the second conviction might result in a conviction for a more serious crime or might involve a greater penalty, the defendant should have the right to object.

Mr. Justice Douglas has stated: "In a Sherman Act case, as in other conspiracy cases, the grant of a new trial to some defendants and its denial to others is not per se reversible error." 331


328. The Supreme Court pointed out in United States v. Smith, 331 U.S. 469, 476, n. 5 (1947): "When the draftsmen of the Rules of Civil Procedure, adopted long before the Criminal Rules, wanted to give the trial judge power to grant a new trial on his own initiative, they did so in express words. Rule 5(d), Rules of Civil Procedure."


error as to one defendant in a conspiracy case requires that a new trial be granted him, the rights of his codefendants depend upon whether the error prejudiced them. 332

Where there is an arraignment and plea at the first trial, these are not required at the second trial. 333 If the defendant waives trial by jury at the first trial this does not preclude him from insisting on trial by jury at the second trial. 334 The grant of a new trial vacates a sentence previously given. 335

When the defendant is granted a new trial he may be retried on the whole case. 336 A reversal and remand by an appellate court leaves a trial court free to proceed as if there had been no former trial, hence the trial court may consolidate other indictments for trial with this case. 337 Suppose the defendant was convicted on less than all counts. May he be retried on all the counts? There seem to be no federal cases on this point, but a majority of state courts hold that the defendant may be retried only as to the counts on which he was convicted. This seems to be a sound interpretation of double jeopardy. 338 A more severe sentence may be imposed after the second trial where the second conviction is for the same degree of the offense. 339 The Supreme Court has even held that on the second trial the defendant may be convicted of a higher degree of the crime. 340 This seems harsh because the first verdict has two aspects: it is a conviction of the lesser offense, and, while unreversed, a bar to prosecution for the higher offense. It would thus appear that the defendant, in obtaining a new trial, does not voluntarily waive the benefit he gained from this second phase of the verdict. 341

When the defendant is granted a new trial on the ground of insufficiency of the evidence, he cannot successfully plead double jeopardy

338. See Note, 24 Minn. L. Rev. 522, 537, 538 (1940).
339. Stroud v. United States, 251 U.S. 15, 17 (1919). The sentence after the second trial was for capital punishment.
at the new trial as he himself made the motion for a new trial thereby waiving jeopardy. 842

VIII.

Appeal From Ruling on Motion.

Historically there was no such appeal as exists today after conviction and denial of the motion for a new trial. 843 There was no appeal either to the circuit court or to the Supreme Court, although motions for new trial were often heard by the circuit court sitting en banc. In 1802 a statute made it possible for the circuit court, upon division of opinion, to certify questions to the Supreme Court. However, in 1821 the Supreme Court held that this procedure did not cover a motion for a new trial. 844 But, subsequent cases held that the Supreme Court could review the ruling on the motion when the question went to the merits. 845 In 1891 provision was made for appeal to the courts of appeal and, about the same time, to the Supreme Court. 846

In 1869 Chief Justice Chase stated that the granting of a new trial is a matter of "pure discretion." 847 It has been asserted that ordinarily "denial of a motion for a new trial is not reviewable." 848 In fact, some of the older cases state broadly that the denial of a motion for a new trial is "not assignable as error," 849 or is "not reviewable." 850 The more recent cases give the defendant more protection. For example, it has been stated that "much reliance" must be placed on the judgment of the trial court. 851 The view now seems to be that the

343. OFIELD, CRIMINAL APPEALS IN AMERICA 244 (1939).
346. OFIELD, CRIMINAL APPEALS IN AMERICA 244-246 (1939).
347. United States v. Rosenberg, 74 U.S. 580 (1869). That the Supreme Court would not review a refusal to grant a new trial on writ of error was held in Holmgren v. United States, 217 U.S. 509, 521 (1910); Blitz v. United States, 153 U.S. 308, 312 (1894).
348. Beard v. United States, 82 F.2d 837, 844 (D.C. Cir. 1936); see also Schumacher v. United States, 216 F.2d 780, 787 (8th Cir. 1954); Evans v. United States, 122 F.2d 461, 468 (10th Cir. 1941). It has also been said that ordinarily appeal lies only when the motion is based on newly discovered evidence. Wright v. United States, 295 F.2d 498, 500 (D.C. Cir. 1962). But, an appeal ought to lie after a conviction. Hamilton v. United States, 140 F.2d 679, 682 (D.C. Cir. 1944).
349. Sutton v. United States, 79 F.2d 863, 865 (9th Cir. 1935); Boyd v. United States, 30 F.2d 900, 901 (9th Cir. 1929).
350. Banks v. United States, 147 F.2d 628, 629 (9th Cir. 1945); Joseph v. United States, 145 F.2d 74 (9th Cir. 1944); Langer v. United States, 76 F.2d 817, 828 (8th Cir. 1935); Adler v. United States, 284 Fed. 13, 30 (7th Cir. 1922).
appeal court will review for abuse of discretion or for error of law.\textsuperscript{352} It has been held that denial of a motion on the ground of newly discovered evidence will be reversed only if an abuse of discretion appears.\textsuperscript{354} On such an appeal, the defendant may not reargue the proof of guilt given at the trial.\textsuperscript{355} It has been said that an appeal from a denial of a new trial on the ground of newly discovered evidence is frivolous in the absence of a showing of abuse of discretion by the trial court.\textsuperscript{356} It was common to say in the older cases that while a decision of the trial court on a motion for new trial is not reviewable, a refusal to entertain such a motion, being a deprivation of a right, is reviewable.\textsuperscript{357}

The court of appeals has no jurisdiction to review the denial of a motion for a new trial unless the denial is final.\textsuperscript{358} A question of finality would be raised if the trial court, while formally denying the motion on the record, reserved the right to change its mind after the opinion of an appellate court had been elicited.\textsuperscript{359} A recent civil case has held that granting reargument of a previously denied motion for a new trial reinstates the motion and deprives the judgment of appealable finality.\textsuperscript{360}

In the ordinary case of appeal where there has been a denial of a motion for a new trial, the appeal is taken from the judgment and not from the denial. But in the case of newly discovered evidence appeal

\textsuperscript{352} Battle v. United States, 206 F.2d 440, 441 (D.C. Cir. 1953); Finnegan v. United States, 204 F.2d 105, 115 (8th Cir. 1953); Patterson v. United States, 183 F.2d 327, 328 (4th Cir. 1950); Gage v. United States, 167 F.2d 122, 125 (9th Cir. 1948); United States v. Smith, 156 F.2d 642, 646 (3d Cir. 1946); McAteer v. United States, 148 F.2d 992, 993 (5th Cir. 1945); Lockhart v. United States, 136 F.2d 122, 124 (6th Cir. 1943); United States v. Porter, 96 F.2d 773, 775 (7th Cir. 1938); Pemberton v. United States, 76 F.2d 596 (10th Cir. 1935).

\textsuperscript{353} Harrison v. United States, 191 F.2d 874, 876 (5th Cir. 1951); Cavness v. United States, 187 F.2d 719, 722 (9th Cir. 1951); Crenshaw v. United States, 116 F.2d 737, 741 (6th Cir. 1940).

\textsuperscript{354} United States v. Johnson, 208 F.2d 404, 405 (2d Cir. 1953), cert. denied 347 U.S. 928 (1954); Howell v. United States, 172 F.2d 213, 216 (4th Cir. 1949); McDonnell v. United States, 155 F.2d 297 (D.C. Cir. 1946); United States v. Johnson, 142 F.2d 588, 591 (7th Cir. 1944); Long v. United States, 139 F.2d 652, 654 (10th Cir. 1943); Weiss v. United States, 122 F.2d 675, 691-692 (5th Cir. 1941).

\textsuperscript{355} United States v. Malfetti, 213 F.2d 728, 729 (3d Cir. 1954).

\textsuperscript{356} United States v. Cordo, 186 F.2d 144, 147 (2d Cir. 1951).

\textsuperscript{357} Harrison v. United States, 7 F.2d 259, 262 (2d Cir. 1925). The opinion, by Judge Learned Hand, cited Mattix v. United States, 146 U.S. 140 (1892). That the grant of a new trial is discretionary should not bar review since review is always necessary to determine whether the trial court has exercised its discretion. Note, 32 Mich. L. Rev. 387, 391-392 (1934).

\textsuperscript{358} United States v. Smith, 331 U.S. 469, 474 (1947).

\textsuperscript{359} Ibid.

is from the denial. The reason for the distinction has been well expressed by Judge Arnold:

"The reason for that rule is that the court may consider the evidence and the rulings of the trial on appeal from the judgment itself. A motion for a new trial based on newly discovered evidence rests on a different basis. In such a case the newly discovered evidence does not appear in the record supporting the judgment." 361

Historically, it was often suggested that a review by the appellate court must be denied because writ of error lay only for matters within the record, of which the motion for a new trial was not a part. However, this is not a basis for denial of review today since the record before the appellate court has been enlarged to include in the bill of exceptions the motion for a new trial whether the motion is made before or after judgment. 362 When the defendant appeals on the ground of newly discovered evidence he must furnish the appellate court a record of such content as to show the alleged errors. 363 Where, on appeal from denial of a motion for a new trial, the Government wishes to place the transcript of the oral argument on the motion for a new trial before the court of appeals, application must be made to the court of appeals as the district court has no jurisdiction. 364

The time for appeal from an order denying a motion for a new trial may not be extended by a motion for reargument. 365 An untimely motion for a new trial does not toll the running of the ten-day period for taking an appeal. 366 With respect to the time in which to appeal from a denial of a new trial it should be noted that under rule 37(a)(2) even though the motion for a new trial was not filed within five days after conviction, where such motion is filed within ten days after entry of judgment, appeal from the judgment taken within ten days after the entry of the order denying the motion is timely. 367 Rule 33

361. Hamilton v. United States, 140 F.2d 679, 682 (D.C. Cir. 1944). This case was followed in Wright v. United States, 215 F.2d 498, 500 (D.C. Cir. 1954); accord, United States v. Johnson, 327 U.S. 106, 111 (1946); Balistreri v. United States, 224 F.2d 913, 916 (9th Cir. 1955); Harrison v. United States, 191 F.2d 874, 876 (5th Cir. 1951).


363. Balistreri v. United States, 224 F.2d 913, 918 (9th Cir. 1955).


365. United States v. Froelich, 166 F.2d 84 (2d Cir. 1948).

366. Pugh v. United States, 197 F.2d 509 (9th Cir. 1952); Marion v. United States, 171 F.2d 185, 186 (9th Cir.), cert. denied, 337 U.S. 944 (1949) (motion made five weeks after verdict).

367. Lujan v. United States, 204 F.2d 171 (10th Cir. 1953). Thus, in this unusual situation the trial court could not consider the motion for new trial while the appellate court could, unless there had been an extension during the original five days or unless the ground was newly discovered evidence.
concerns itself only with time for filing a motion for a new trial, while the time for appeal is prescribed in rule 37(a)(2).

Where the defendant reasonably failed to object on the ground of insufficiency of the evidence through motion for acquittal, the court of appeals will look into this subject only far enough to ascertain whether it is reasonably clear that there was a miscarriage of justice.368 It is not enough to raise the issue for the first time by motion for a new trial.369 An early decision by the Supreme Court held that it would not review the question whether the verdict was contrary to the evidence if there was any proper evidence to support the verdict.370

Mr. Justice Douglas has stated: "Certainly, denial of a motion for a new trial on the ground that the verdict was against the weight of the evidence would not be subject to review."371 The Supreme Court, through Justice Murphy, has stated that the verdict must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.372

Suppose the evidence at the hearing on the motion for a new trial consists only of affidavits, depositions, and documents. It has been suggested that the court of appeals is then in as good a position as the trial court to make deductions and conclusions.373

Suppose an appeal is taken from the denial of a motion for a new trial on the ground of newly discovered evidence, and it appears that the only objection is to the trial court's findings on conflicting evidence and that there was evidence to support the findings. The Supreme Court held, a month before the Federal Rules of Criminal Procedure went into effect, that there is then no reviewable issue of law, and the appeal should be dismissed as frivolous.374 The findings of the trial court should remain undisturbed except in most extraordinary circumstances. It is not the province of the federal appellate courts to review

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368. Knight v. United States, 213 F.2d 699, 700 (5th Cir. 1954); Jordan v. United States, 120 F.2d 65, 66 (5th Cir. 1941); Edwards v. United States, 7 F.2d 357, 359 (8th Cir. 1925); Utley v. United States, 5 F.2d 963 (9th Cir. 1925); Feinberg v. United States, 2 F.2d 955, 956 (8th Cir. 1924); Lockhart v. United States, 264 Fed. 14, 16 (6th Cir. 1920).


370. Crumpton v. United States, 138 U.S. 361 (1891). It was held that one cannot assign as error that the verdict is contrary to the evidence. Moore v. United States, 150 U.S. 57, 62 (1893).


373. United States v. Johnson, 149 F.2d 31, 43 (7th Cir. 1945) (dictum).

orders granting or denying new trials when such review is sought on
the ground that the trial court made erroneous findings of fact.

Mr. Justice Douglas has stated that it is a

"well-established rule that neither this Court nor the circuit court
of appeals will review the action of a federal trial court in granting
or denying a motion for a new trial for error of fact, since such
action is a matter within the discretion of the trial court. . . .
Certain exceptions have been noted, such as instances where the
trial court has erroneously excluded from consideration matters
which were appropriate to a decision on the motion." 375

Will the court of appeals consider facts not brought to the attention
of the trial court? Normally it will not. But in one case the court
looked to another case tried in the same court and thus ascertained that
the witness for the Government had not committed perjury.376 As a
result the court affirmed a denial of the motion for a new trial.

Where the trial of a case is by a judge without a jury, the appellate
court is often less likely to reverse for erroneous admissions of evi-
dence since the trial judge may state expressly that he disregarded such
evidence.377

Where a witness for the prosecution makes a written recantation of
his testimony which is produced in evidence after his death and the
trial court denies a new trial, it has been held that the denial is not
reviewable by the court of appeals and that the only recourse is to
executive clemency.378

When, on appeal, the Government confesses error in the introd perme-
tion of certain exhibits, the court of appeals will reverse and remand for
a new trial.379 Where, after conviction in the district court and affir-
mance in the court of appeals, certiorari is granted and the Government
then confesses error, the case will be remanded to the district court with
directions to vacate its denial of a new trial and to grant a new trial.380

The court of appeals has no power itself to entertain a motion for
a new trial.381 But, where the court of appeals is satisfied that the trial

375. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 247 (1940); see also
Cavness v. United States, 187 F.2d 719, 722 (9th Cir. 1951).
376. United States v. Johnson, 208 F.2d 404, 405 (2d Cir. 1953), cert. denied, 347
378. DiCarlo v. United States, 6 F.2d 364, 369 (2d Cir.), cert. denied, 268 U.S.
706 (1925).
380. Fogel v. United States, 335 U.S. 865 (1948). The court of appeals had divid-
ed two to one, 167 F.2d 763 (5th Cir. 1948). The dissenting judge found that the
defendant had exercised due diligence.
381. Wagner v. United States, 118 F.2d 801, 802 (9th Cir. 1941). But, it was sug-
gested that in a small group of cases the appellate court might entertain the motion
court erred in denying a new trial, it may reverse the conviction and
remand the case with a direction to grant a new trial.\textsuperscript{382} When the
case has gone to the Supreme Court, it has remanded to the district
court with a direction to grant a new trial.\textsuperscript{383} The Supreme Court
stated that under the Judiciary Act of 1789 "it has never been questioned
that this court possessed authority upon reversal for error to award a
new trial." \textsuperscript{384} A like power was conferred on the courts of appeal and
the former circuit courts.\textsuperscript{385}

Sometimes reversal by the court of appeals will involve remand to
the district court with a direction to hear a motion for a new trial
though not necessarily to grant it.\textsuperscript{386} Normally, when the appellate
court reverses the judgment of the trial court denying a motion for a
new trial, it reverses the judgment and orders the district court to
grant a new trial. But, it may also vacate the judgment entered on the
verdict and remand the case to the district court with directions to
rehear the motion for a new trial.\textsuperscript{387}

When the trial court denies a motion for a judgment of acquittal
or, in the alternative, for a new trial under rule 29(b) the court of
appeals has the power to reverse and remand for a new trial and is not
required to direct an acquittal. Rule 29 applies to the district court but
not to the court of appeals.\textsuperscript{388} The powers of the appellate court are
governed by 28 U.S.C. section 2106.

An application for a new trial on the ground of newly discovered
evidence after an appeal has been taken must be made in the trial
court; the court of appeals will remand only in the event the trial court
evidences a willingness to grant the motion.\textsuperscript{389}

\textsuperscript{382} Marson v. United States, 203 F.2d 904, 912 (6th Cir. 1953); United States
v. Di Matteo, 169 F.2d 798, 801 (3d Cir. 1948). In one case the appellate court directed
a prompt new trial because the jury tampering was attempted to favor acquittal. Rakes
v. United States, 163 F.2d 771, 773 (4th Cir. 1947).

\textsuperscript{383} Mattox v. United States, 146 U.S. 140, 153 (1892).

\textsuperscript{384} Ballew v. United States, 160 U.S. 167, 199 (1895).

\textsuperscript{385} Id. at 167, 201-202.

\textsuperscript{386} Fryer v. United States, 207 F.2d 134 (D.C. Cir.), cert. denied, 346 U.S. 885
(1953). The right of the defendant to discovery under rule 17(c) had been improperly
denied; but it was not clear to the appellate court that the denial of discovery was
prejudicial.

\textsuperscript{387} Wheaton v. United States, 133 F.2d 522, 527 (8th Cir. 1943). In this case
the parties failed to adduce the correct type of evidence on a motion for new trial.
Affidavits had been relied on exclusively.

\textsuperscript{388} Bryan v. United States, 338 U.S. 552 (1950), 38 Geo. L. J. 680; see Orfield,
Judgment Notwithstanding the Verdict in Federal Criminal Cases, 16 U. Prrr. L.

\textsuperscript{389} Knight v. United States, 213 F.2d 699, 702 (5th Cir. 1954); Smith v. Pollen,
194 F.2d 349 (D.C. Cir. 1952); Zamlock v. United States, 187 F.2d 854 (9th Cir. 1951);
May the trial court grant a motion for a new trial because of newly discovered evidence after affirmance of the conviction by the court of appeals without leave first having been obtained from that court? Prior to the Criminal Appeals Rules of 1933 and the Federal Rules of Criminal Procedure it could not. But since that time it may. The term “final judgment” in rule 33 includes the mandate of affirmance of the court of appeals.

Mandamus may not be used to compel a federal district judge to file a motion for a new trial, as filing is not necessary, or, if it were necessary, such filing would be done by the clerk. But, the Government is entitled to mandamus and prohibition against a district judge to compel vacating of an order on his own motion granting a new trial more than five days after conviction and after affirmance by the court of appeals.

IX.

WRIT OF ERROR CORAM NOBIS.

The courts have occasionally treated an application for coram nobis as tantamount to a motion for a new trial. Thus, an application for coram nobis filed eighteen months after conviction alleging newly discovered evidence in the form of new witnesses to sustain proof of perjury and also alleging admission of testimony of an incompetent witness was treated as a motion for a new trial based on newly discovered evidence. Since it was filed too late under the existing rule as to motion for a new trial, it was denied. In another case, arising after the adoption of rule 33, the court held that an application for coram nobis to vacate a judgment of conviction and grant a new trial so that the applicant might interpose the defense of insanity at the time of the offense as well as the time of the trial, was treated as being in one aspect a motion for a new trial.

United States v. Minkoff, 181 F.2d 538 (2d Cir. 1950); Rakes v. United States, 163 F.2d 771, 772 (4th Cir. 1947). In Heald v. United States, 175 F.2d 878, 883 (10th Cir.), cert. denied, 338 U.S. 859 (1949). The court of appeals entertained and passed on a motion to remand, but failed to discuss the change in the rule. See also Metcalf v. United States, 193 F.2d 213, 218 (6th Cir. 1952).

390. Harrison v. United States, 191 F.2d 874, 875 (5th Cir. 1951).
391. Young v. Keeling, 130 F.2d 560, 561 (5th Cir. 1942).
393. Meredith v. United States, 138 F.2d 772 (6th Cir. 1943).
after conviction, a new trial could not be granted.\textsuperscript{395} Habeas corpus rather than new trial or coram nobis was the proper remedy.\textsuperscript{396}

Where the courts have discussed coram nobis in relation to the Federal Rules of Criminal Procedure they have usually compared it to motion for a new trial under rule 33. But, in a few cases it has been compared to correction of an illegal sentence under rule 35. In one case it was held that a prisoner alleging insanity at the time of his trial and conviction must apply for relief in the sentencing court under rule 35 and that in effect rule 35 codified coram nobis.\textsuperscript{397} However, such an application of coram nobis would not seem to protect an innocent defendant who desires not simply to correct a sentence, but to be relieved of it altogether.\textsuperscript{398} An innocent defendant is usually in no position to raise jurisdictional or constitutional issues. Where rule 35 does apply, happily there is no time limit, since the first sentence of the rule provides: "The court may correct an illegal sentence at any time." A restriction on rule 35 greatly limiting its scope is that the motion under rule 35 presupposes a valid conviction.\textsuperscript{399}

The federal courts early recognized that coram nobis was available in civil cases.\textsuperscript{400} But, rule 60(b) of the Federal Rules of Civil Procedure, as amended in 1948, abolishes it in civil cases. The Supreme Court stated in 1914 that coram nobis, if appropriate at all in criminal cases, might be appropriate only where there were errors of fact so fundamental as to render the whole proceeding void.\textsuperscript{401} It was not until 1944 that a federal court held that coram nobis was available in criminal cases as to the right to counsel.\textsuperscript{402}

But, by the time of the 1948 Revision of the Civil Code, six circuits had held that the writ was available.\textsuperscript{403}

\textsuperscript{395} United States v. Landicho, supra note 394 at 428. The court referred to the history of the drafting of rule 33.
\textsuperscript{396} Id. at 428-429.
\textsuperscript{397} Byrd v. Pescor, 163 F.2d 775, 779 (8th Cir. 1947), cert. denied, 333 U.S. 846 (1948), 1 VAND. L. REV. 292.
\textsuperscript{398} Donnelly, Unconvicting the Innocent, 6 VAND. L. REV. 20, 26 n.31 (1952).
\textsuperscript{399} United States v. Morgan, 346 U.S. 502, 506 (1954); In re Shepard, 195 F.2d 157, 158 (1st Cir. 1952); United States v. Bradford, 194 F.2d 197, 201 (2d Cir. 1952); Cook v. United States, 171 F.2d 567, 570 (1st Cir. 1948), cert. denied, 336 U.S. 926 (1949).
\textsuperscript{401} United States v. Mayer, 235 U.S. 55, 69 (1914). In United States v. Smith, 331 U.S. 469, 475 n.4 (1947) the Court speculated by way of dictum that there was no great need for such a remedy.
\textsuperscript{402} United States v. Steese, 144 F.2d 439 (3d Cir. 1944). But earlier cases admitted its availability in other cases. Tinkoff v. United States, 129 F.2d 21 (7th Cir. 1942); Robinson v. Johnston, 118 F.2d 998 (9th Cir. 1941); Strang v. United States, 53 F.2d 820 (5th Cir. 1931).
\textsuperscript{403} See cases cited in 53 COLUM. L. REV. 737, 738 n.5 (1953). As to the history of the revival of the writ see Orfield, Who Discovered Coram Nobis?, 40 A.B.A.J. 464
That coram nobis is available in federal criminal cases was finally determined by the Supreme Court in 1954. The case raising the issue was most unusual on its facts. In 1939 Robert Morgan pleaded guilty to a charge of mail theft and was sentenced by the federal district court to four years imprisonment. He served his term and was released. In 1950 he was convicted of a crime in a state court of New York and sentenced as a second offender because of his previous federal conviction. In 1952 he made application to the federal district court of original sentence for a writ of error coram nobis to vacate his conviction on the ground that he was not given assistance of counsel and had not waived his right to such assistance. His motion was denied. The court of appeals reversed and remanded for hearing. On certiorari to the Supreme Court it was held in a five to four decision that Morgan was entitled to show by a motion in the nature of error coram nobis that the federal conviction and sentence should be set aside. The power to grant the writ in this case was based on the "all-writs" section of the Code and not on 28 U.S.C. section 2255 through which a prisoner in custody can attack an illegal sentence. The dissenting justices believed that the writ was not "in aid of" the jurisdiction of the district court since its jurisdiction had long since terminated, and was not "agreeable to the usages and principles" of current law since the writ, if it ever existed in the federal courts, was superseded by the motion under section 2255. The decision does not offer much guidance as to when the writ is available. On the facts of the particular case it was held available because of alleged deprivation of the right to counsel when the applicant is not now in custody. The Court says nothing about the former restriction that coram nobis lies only as to errors not treated or passed on at the trial. Seemingly the facts which justify coram nobis procedure need not have been unknown to the judge. As to the restriction that the error must be fundamental in character the Court seems to equate this with deprivation of due process. While at common law an error of fact had to be shown, it would now appear that errors of law may

404. United States v. Morgan, 202 F.2d 67 (2d Cir. 1953), 53 Colum. L. Rev. 737, 66 Harv. L. Rev. 1137, 63 Yale L. J. 115, 123.


406. 28 U.S.C. § 1651 (a) (1952) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The only prior case to base the writ on this statute was the concurring opinion of Biggs, J. in United States v. Steese, 144 F.2d 439, 442, 445 (3d Cir. 1944).
be shown. Error of fact is said to be involved when there is an issue as to whether the right to counsel was waived.

Prior restrictions on the writ as developed by the lower federal courts seem no longer in effect. These restrictions were: (1) the petitioner must show reasonable diligence in making his application; (2) he must allege his innocence and show a meritorious defense of which he was deprived and which could lead to a different result in the event of retrial; and (3) the matter must be raised when he is convicted as a second offender. There is no time limit on the writ or any doctrine of laches. However, it seems reasonably clear that the allegation of innocence has no bearing on the issue of whether procedural due process was accorded in the federal prosecution.

The Morgan case has been construed as not changing the requirement that the motion or supporting affidavits must state, with particularity, sufficient facts to constitute a ground of relief. There must be a direct allegation of the absence of intelligent waiver of counsel. When the Morgan case was considered again on remand, the court of appeals held that the defendant need not establish his innocence and that long delay did not bar the writ of error coram nobis. Where the records show a waiver of counsel and entry of a plea of guilty, coram nobis is not available. If a defendant pleads guilty without requesting assistance of counsel, his waiver, to be effective, must be intelligently made. Coram nobis was allowed to an eighteen-year-old boy who did not intelligently waive assistance of counsel when he pleaded guilty. Where the defendant alleges that he was insane at time of sentence and, therefore, could not intelligently waive his right to counsel, yet fails to show such insanity, coram nobis will be denied. The mere fact that the clerk's records do not contain the name of counsel assigned for petitioner is not a ground for release on coram nobis.

409. Gordon v. United States, 216 F.2d 495, 498 (5th Cir. 1954). The concurring opinion of Judge Rives suggests a doctrine of laches, but the majority opinion seems contra.
Where the defendant’s detention by the state court is in no way affected by his federal conviction, coram nobis is not available.\textsuperscript{416} It is not a ground for coram nobis that a defendant was indicted without a prior arrest or commitment by a United States Commissioner, or that the evidence introduced at the trial was incompetent when that issue had been raised unsuccessfully on an appeal from the conviction.\textsuperscript{417} Where the defendant has two counsel and they both fail to except to the court’s instructions to the jury, coram nobis does not lie.\textsuperscript{418} Coram nobis does not lie to try the contentions of the defendant that he was denied due process of law at the trial because of a fatal variance between proof and allegations of the indictment by reason of an alleged misinterpretation of law by the prosecutor which allegedly deceived the trial court and defendant’s counsel.\textsuperscript{419} A recent case has suggested that coram nobis is not available where sentence has not been served, or where the defendant has not begun to serve the sentence which he attacks. The writ may issue only in aid of the jurisdiction of the court in which the conviction was had.\textsuperscript{420} Absence of counsel at the time of sentencing, if shown, seems to be a ground for coram nobis.\textsuperscript{421} Where the trial court denies coram nobis the court of appeals will not reverse if the findings of the trial court are not clearly erroneous.\textsuperscript{422} It should be noted that almost every case on coram nobis since the\textit{Morgan} decision involved the right to counsel and a defendant charged with multiple offenses who was burdened with a more severe penalty because of a federal conviction alleged to be erroneous. In one of the rare cases not involving a multiple offender, a petition for coram nobis was treated as a motion to vacate under 28 U.S.C. section 2255 where the grounds of the petition were the same as under the statute.\textsuperscript{423}

Lower federal court decisions would seem to warrant coram nobis on a number of other grounds. Insanity at the time of the trial should be a ground;\textsuperscript{424} as should knowing use of perjured testimony;\textsuperscript{425} sup-

\textsuperscript{417} United States v. Tees, 211 F.2d 69, 72 (3d Cir. 1954).
\textsuperscript{418} Lopez v. United States, 217 F.2d 526 (9th Cir. 1955).
\textsuperscript{419} United States v. Aderman, 216 F.2d 564 (7th Cir. 1954). Defendant had been represented by counsel and was himself a lawyer.
\textsuperscript{420} Madigan v. Wells, 224 F.2d 577, 578 n.2 (9th Cir. 1955).
\textsuperscript{421} Mitchell v. United States, 228 F.2d 747 (10th Cir. 1955); Davis v. United States, 226 F.2d 834, 839 (8th Cir. 1955).
\textsuperscript{422} United States v. Norton, 234 F.2d 842 (2d Cir. 1956).
\textsuperscript{423} United States v. Malfetti, 125 F. Supp. 27 (D.N.J. 1954). Representation by incompetent counsel was alleged.
\textsuperscript{424} Allen v. United States, 162 F.2d 193 (6th Cir. 1947); Roberts v. United States, 158 F.2d 150 (4th Cir. 1946); Robinson v. Johnston, 118 F.2d 998, 1001 (9th Cir. 1941).
\textsuperscript{425} Garrison v. United States, 154 F.2d 106 (5th Cir. 1946).
pression of evidence by the prosecution; 426 fraud or duress in obtaining a plea of guilty; 427 mob domination at the trial; 428 and the judge's lack of ability to act intelligently because of mental or physical disability. 429 The federal courts should include within its scope the present grounds under which federal habeas corpus proceedings and a motion under 28 U.S.C. section 2255 may be made. 430 If that were done there would seem to be little need for 28 U.S.C. section 2255. 431

Insufficiency of the indictment is not a ground, 432 nor is the fact that a material witness was later adjudged insane. 433 On the merits it ought to lie where the innocence of the defendant is conclusively proved by newly discovered evidence. 434 A few state courts have permitted coram nobis in such cases. 435 But, the federal courts have denied the writ on this ground. 436 There can be no relief under rule 33 which fixes a time limit of two years, hence the defendant's only relief is a pardon. 437 Granting coram nobis for newly discovered evidence would fill a big gap in rule 33.

In the view of the Supreme Court, the motion for coram nobis is a step in the criminal case, unlike habeas corpus in which relief is sought in a separate case and record, and which is the beginning of a separate

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432. Kelley v. United States, 138 F.2d 489, 490 (9th Cir. 1943).

433. United States v. Gardzielewski, 135 F.2d 271 (7th Cir. 1943).

434. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 524 (1947); Donnelly, Unconvicting the Innocent, 6 VAND. L. REV. 20, 39 (1952); Note, 39 Mich. L. Rev. 963, 969 (1941); Note, 36 Minn. L. Rev. 533, 535-36 (1952).


437. Reid v. United States, 149 F.2d 334, 335 (5th Cir. 1945); Hauck v. Hiatt, 141 F.2d 812, 813 (3d Cir. 1944) (confession of another that he had committed the crime); Figueroa v. Saldano, 23 F.2d 327-28 (1st Cir. 1927), cert. denied, 277 U.S. 574 (1928).
civil proceeding. As such a step it is not governed by rule 60(b) of the Federal Rules of Civil Procedure which expressly abolishes coram nobis in civil cases. It is of the same general character as the motion under 28 U.S.C. section 2255. Rule 35 of the Federal Rules of Criminal Procedure is inapplicable since it applies only to sentences not authorized by the judgment of conviction. The procedure and time limits for taking an appeal from a denial by the district court of an application for coram nobis seem not to have been discussed in the decisions. Many cases have permitted appeals.

The hearing on the writ of error coram nobis may be had on affidavits or other evidentiary matter submitted by the defendant and the Government. It is not necessary that the defendant be brought to the court of sentencing to testify orally. But, unless the affidavits show that the defendant’s contentions are without foundation he should be present at the hearing and be permitted to testify.

A distinct advantage of coram nobis over habeas corpus in cases involving multiple offenders is that there is no requirement of exhausting state remedies.

The holding in the Morgan case seems desirable. No relief under 28 U.S.C. section 2255 is possible as the defendant is not in custody. No relief under rule 33 is possible as the time allowed has elapsed. It is clear now that the adoption of the Federal Rules of Criminal Procedure has not resulted in the abolition of coram nobis. It is also clear that the writ is not granted exclusively under 28 U.S.C. section 2255 as had been suggested by many cases before the Morgan case. The Morgan case makes possible the protection of persons seeking to eliminate the disabilities consequent upon an erroneous federal conviction.


440. United States v. Morgan, 202 F.2d 67, 69 (2d Cir. 1953); see Note, 59 YALE L.J. 786, 792 (1950), suggesting that there be a hearing on the merits unless, as provided in 28 U.S.C. § 2255 (1952), the motions, files and records in the case show that relief is not in order.


442. For an earlier case holding contrary, see Lucas v. United States, 114 F. Supp. 581, 582 (N.D. W.Va. 1948). In United States v. Kerschman, 201 F.2d 682, 684 (7th Cir. 1953), the court seems to say that rule 60(b) of the Federal Rules of Criminal Procedure had abolished error coram nobis even in criminal cases.


444. As to the nature of these disabilities see Notes, 63 YALE L.J. 115 (1953), 59 YALE L.J. 786 (1950).
X.

Motion Under 28 U.S.C. Section 2255 and Habeas Corpus.

Under 28 U.S.C. section 2255 prisoners in custody under a federal sentence who claim the right to be released because of a violation of their constitutional rights, or because of lack of jurisdiction in the sentencing court, or because their sentence is otherwise subject to collateral attack, may make a motion to the sentencing court to have the sentence set aside, vacated, or corrected.445

The procedure under section 2255 is a prerequisite to a federal habeas corpus proceeding by those in federal custody. It was primarily designed to relieve federal district courts in those districts in which federal prisons are located of the very heavy burden of habeas corpus applications.446 Habeas corpus may be used only if the motion is inadequate or ineffective to test the legality of imprisonment. In the rare cases in which habeas corpus will lie it will be brought in the district of confinement of the prisoner.447

The rule against collateral impeachment of the record applied in habeas corpus cases448 does not apply to a motion under section 2255 because the motion is “lodged in the criminal case in which the judgment is being subjected to direct attack.”449 It may be noted that rule 36 of the Federal Rules of Criminal Procedure provides: “Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.”

It would appear that habeas corpus gives the prisoner more prompt relief than the motion under section 2255. As to habeas corpus the courts are required to issue the writ “forthwith”; prison wardens are required to file returns in three days unless additional time is granted; and hearings must start within five days.450 On the other hand sec-

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445. 28 U.S.C. § 2255 (1952) provides in part as follows: “A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

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


448. Riddle v. Dych, 262 U.S. 333, 335-336 (1923). The prisoner was, therefore, not allowed to show that there were only eleven men on the trial jury since the record recited that there was “a jury of good and lawful men.”

449. Snell v. United States, 174 F.2d 580, 582 (10th Cir. 1949). The right to counsel was involved.

tion 2255 places no time limit on the preliminary steps, although it does speak of a “prompt hearing.” The requirement of motion procedure under section 2255 as a prerequisite to habeas corpus slows the speed of granting habeas corpus, but has not been held constitutionally objectionable.

In a habeas corpus proceeding the court upon hearing and deliberation shall “dispose of the matter as law and justice requires.” But under section 2255 the court “shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may be appropriate.” Thus, on such a motion there may be a new trial.

With respect to habeas corpus, “no circuit or district judge shall be required to entertain” an application for habeas corpus

“If it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented or determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.”

But, under section 2255 the sentencing court “shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.” Thus, it would seem easier to obtain habeas corpus. Suppose a second motion under section 2255 presents new grounds and is not entertained, is the “remedy by motion inadequate or ineffective to test the legality” of the detention, within the meaning of section 2255? It would seem that it is.

How does the motion under section 2255 compare with coram nobis and motion for a new trial as to its grounds? In practice coram nobis like habeas corpus has been used in the federal courts chiefly to attack convictions obtained in violation of jurisdictional requirements or other constitutional safeguards. The grounds enumerated in section 2255 seem to be no broader than those for which habeas corpus

453. This is thought to be incongruous in Longsdorf, The Federal Habeas Corpus Acts Original and Amended, 13 F.R.D. 407, 422 (1953).
may issue. But, coram nobis may also be available for less fundamental defects such as insanity of the defendant at the trial. Further, as has been seen, the grounds for a new trial are virtually unlimited since a new trial may be granted "in the interest of justice"; unfortunately, however, there are time limits on granting a new trial.

Chief Judge Parker has stated the following sweeping limitations as to habeas corpus and motion under section 2255:

"It is elementary that neither habeas corpus nor motion in the nature of application for writ of error coram nobis can be availed in lieu of writ of error or appeal to correct errors in the course of a trial, even though such errors relate to constitutional rights. It is only where there has been the denial of the substance of a fair trial that the validity of the proceedings may be thus collaterally attacked or questioned by motion in the nature of a petition for writ of error coram nobis or under 28 U.S.C. 2255." 460

Another case suggests that the motion lies

"where there has been a denial of the right to counsel, or where the assistance of counsel is 'such . . . as to shock the conscience of the court, and make the [trial] a farce and a mockery of justice'; or where a plea of guilty was entered as a result of coercion, or deception, by the prosecution; or where there was mob domination at the trial; or where the prosecution has failed in the duty that it owes to the defendant to refrain from methods that would corrupt the administration of justice as, for example, where the prosecutor has knowingly used false testimony to secure a conviction, or has caused evidence to be suppressed." 460

But, the same case makes it clear that the motion does not lie where the testimony against the prisoners was not wilfully false; or where, if there was perjury, the prosecution did not know of it; nor because


another has confessed and absolved the prisoner, nor because there is newly discovered evidence.\footnote{461}

There are serious limitations on the scope of the grounds for the motion under section 2255.\footnote{462} It has been said that the motion cannot be used to directly attack any matter litigated in the original trial.\footnote{463} For example, new evidence is not a ground for invoking the motion just as it is not a ground for coram nobis.\footnote{464} It cannot be used to review questions of fact.\footnote{465} It cannot be used as a substitute for appeal.\footnote{466} This rule against direct attack of any matter litigated in the original trial is applied despite the conclusiveness of the new evidence on which the attack is based. Thus, a confession by another inmate is not a ground for the motion.\footnote{467} In practice the most common ground alleged is deprivation of counsel.\footnote{468} The motion is rarely granted.\footnote{469}

The motion under section 2255 is to be made in the sentencing court.\footnote{470} To that extent it resembles a motion for a new trial and an application for coram nobis which are to be made in the court which tried the case. It is made to vacate a federal sentence under which the movant is imprisoned. It does not lie after the sentence has been served. In that respect it appears to resemble the motion for a new trial, as the time limit for motion for a new trial will normally have expired after the sentence has been served; the five-day period for the

\footnote{461. Id. at 13. The court did not refer to coram nobis, but does say that avenues of judicial redress are closed here to the defendant, and he can only seek a pardon; see also Taylor v. United States, 229 F.2d 826, 831 (8th Cir. 1956); United States v. Derosier, 141 F. Supp. 397, 401 (W.D. Pa. 1956).


465. United States v. Gallagher, 183 F.2d 342 (3d Cir. 1950), cert. denied, 340 U.S. 913 (1951); Baldwin v. United States, 141 F. Supp. 310, 313 (E.D.S.C. 1956). In United States v. Kaplan, 101 F. Supp. 7, 12 (S.D.N.Y. 1951), Judge Weinfeld stated that "the court is not empowered to review the jury's determination of the facts or to correct errors committed upon the trial." It cannot be used to attack the sufficiency of the evidence.

466. Ford v. United States, 234 F.2d 835 (6th Cir. 1956); Martin v. Hiatt, 174 F.2d 350, 352 (5th Cir. 1949); see Note 61 HARV. L. REV. 657, 667 (1948); Annot., 20 A.L.R.2d 976, 987 (1951).


469. Id. at 978, 982.

470. See Note on the Motion to Vacate, Coram Nobis and Habeas Corpus, HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 1310-1312 (1953).}
normal motion for a new trial will have expired, and often the two-
year period for newly discovered evidence; but doubtless there may be
some cases where the two-year period has not expired, and then it
would seem that motion for a new trial for newly discovered evidence
should be available. 471 As has been seen coram nobis may be available
though the sentence has been served. There is no time limit as to the
motion under section 2255. 472 In this respect it is a much more useful
remedy than motion for a new trial except that it is not available if
the sentence has been served so that the defendant is no longer in
custody under the sentence.

There is no express provision in section 2255 for notice to the
prisoner of a hearing or for requiring or securing his presence, and one
clause of the section states that the court may determine the issues
ex parte. 473 But, the Supreme Court construed the clause providing
for a “prompt hearing” as requiring the presence of the prisoner where
the motion raised “substantial issues of fact as to events in which the
prisoner participated.” 474 Hence, any issues of constitutionality were
avoided. The sentencing court had power under 28 U.S.C. section
1651(a) to order production of the prisoner from another federal
district.

A defendant is not constitutionally entitled to counsel when he
moves under section 2255. 475 It is not clear that there is a right to
counsel when a defendant moves for a new trial, although a criminal
proceeding is then involved while a motion under section 2255 seems
to be a civil action. 476 The cases have not clearly said that there is
a right to counsel when the defendant applies for a writ of error coram
nobis even though this is regarded as a step in a criminal proceeding.

The time for appeal from a motion under section 2255 is different
from that as to an appeal from denial of a motion for a new trial.
Appeal from denial of a motion for a new trial must be made within

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471. United States v. Bradford, 194 F.2d 197, 201 (2d Cir.), cert. denied, 343 U.S.
472. It seems inconsistent to have a time limit in Fed. R. Crim. P. 33 and none in
sentence at any time”; see HART AND WECHSLER, THE FEDERAL COURTS AND THE FED-
ERAL SYSTEM, 1311 (1933).
473. For criticism of the section see Note, 59 YALE L.J. 1183 (1950).
27 NOTRE DAME LAW 465, 100 U. PA. L. REV. 1054; Parks v. United States, 233 F.2d
321 (5th Cir. 1956); Collings, Habeas Corpus for Convicts, 40 CALIF. L. REV. 335
(1952).

In habeas corpus, the presence of the prisoner is required “unless the application
475. Crowe v. United States, 175 F.2d 799 (4th Cir. 1949), cert. denied, 338 U.S.
950 (1950); Motion of Davis, 92 F. Supp. 524 (D. Mont. 1949). The Uniform Post-
Conviction Procedure Act would assure the right to counsel. Note, 69 HARV. L. REV.
1289, 1296 (1956).
ten days, whereas sixty days is allowed on a motion under section 2255. The decisions have not discussed the time and procedure for appeal from a denial of coram nobis.

A motion to vacate judgment under section 2255 if timely made may sometimes be treated as tantamount to a motion for a new trial. But, if not made within the time limits of rule 33 it cannot be so treated. It would seem that a motion under section 2255 might well be treated as a petition for coram nobis in cases where the latter remedy is available and the former is not. A petition for coram nobis has sometimes been treated as a motion under section 2255; and the converse ought to be possible.

In practice, though not necessarily in theory, it would seem that section 2255 has to some extent superseded, or at least overlaps coram nobis. It may have superseded it as to prisoners still in federal custody. However, it has not superseded it as to defendants no longer in custody; as to such defendants coram nobis seems to be the only remedy available. May a prisoner challenging a second sentence which he has not yet begun to serve resort to the motion under section 2255? This seems in doubt. One case held that he may not, on the ground that the statute refers to a prisoner under the sentence which he attacks. The words "at any time" must be read in connection with

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477. Mercado v. United States, 183 F.2d 486 (1st Cir. 1950). The Supreme Court has stated that section 2255 appeals "are governed by the civil rules applicable to appeal from final judgments in habeas corpus actions." United States v. Hayman, 342 U.S. 203, 209 n.4 (1952).


481. Note, 53 Colum. L. Rev. 737, 738 (1953), 96 L.Ed. 244, 246 (1952). That the remedies may be overlapping is indicated in Howell v. United States, 172 F.2d 213, 215 (4th Cir.), cert. denied, 337 U.S. 906 (1949) where the court states: "It is only when there has been the denial of the substance of a fair trial that the validity of the proceedings may be thus collaterally attacked or questioned by motion in the nature of petition for writ of error coram nobis or under 28 U.S.C.A. § 2255." In Bruno v. United States, 180 F.2d 393, 395 (D.C. Cir. 1950) the court stated: "The motion to vacate permitted by the Code section, although in the nature of coram nobis, is not that writ, and its nature and meaning must be ascertained from the terms of the statute." In a case decided after the Morgan case, a petition for coram nobis was treated as a motion to vacate under 28 U.S.C. § 2255 (1952) where the grounds of the petition were the same as under the statute. United States v. Malfetti, 125 F. Supp. 27 (D.N.J. 1954) (representation by incompetent counsel was alleged). A recent case, wrongly concluding that coram nobis is abolished by Fmr. R. Civ. P. 60(b), treated a petition for coram nobis as a motion under 28 U.S.C. § 2255 (1952). United States v. Greco, 141 F. Supp. 829, 830 (M.D. Pa. 1956).


483. Crowe v. United States, 186 F.2d 704, 705 (9th Cir. 1950); see Lopez v. United States, 186 F.2d 707 (9th Cir. 1950); United States v. Greco, 141 F. Supp. 829 (M.D. Pa. 1956); United States v. Young, 93 F. Supp. 76 (W.D. Wash. 1950).
with the related words and clauses which precede it. Under the former law as to habeas corpus one could attack only a present detention. A prisoner serving the first of two consecutive sentences is not serving the second sentence. But, a subsequent decision allowed resort to the motion.484 The decision pointed out that the statute provided that the motion could be made at any time. In an early case a prisoner was permitted to challenge an earlier sentence that he had served on the ground that its invalidity would reduce the time he must serve under his present sentence.485 But, probably because the motion was not available in such a case coram nobis was allowed in the Morgan case.486

The motion procedure under section 2255 seems to have operated reasonably well. Much of the content of the Uniform Post Conviction Procedure Act proposed by the Commissioners on Uniform State Laws and approved by the American Bar Association is derived from it.487 If amendments to Rule 33 of the Federal Rules of Criminal Procedure are made, the example of section 2255 in fixing no time limits might well be considered. However, its confinement to persons in custody should not be followed. Rule 44 of the Uniform Rules of Criminal Procedure drafted by the National Conference of Commissioners on Uniform State Laws in 1952 is modeled very closely on section 2255, as will be indicated in the next part of this article.

XI.

RECENT PROPOSED MODEL REFORMS OF NEW TRIAL.

One of the most notable reforms of motions for a new trial is that found in Chapter Twenty, Sections 361-368 of the American Law Institute Code of Criminal Procedure.488 Under section 361 when the defendant has been convicted the trial court may grant a new trial on motion of the defendant or on motion of the court provided the defendant consents. Under section 362 three days is allowed after

484. Halloway v. United States, 191 F.2d 504, 507 (D.C. Cir. 1951). The court also held that the prisoner could make a motion to correct under Fed. R. Crim. P. 35 before commencing service of the second sentence. The court left the issue open in Hinton v. United States, 232 F.2d 485, 487 (5th Cir. 1956).

485. Griffin v. United States, 175 F.2d 192 (6th Cir. 1949). In United States v. Bradford, 194 F.2d 197, 200 (2d Cir. 1952) the court referred to the Griffin case without necessarily accepting it.


488. ALI, CODE OF CRIMINAL PROCEDURE (1930).
conviction for making the motion. But, where the ground is newly discovered evidence one year after conviction is allowed or the motion may be made "at a later time if the court for good cause so permits." Thus, the rule is more liberal than the federal rule. Under section 363 the motion is to be in writing and filed; it is to state its ground, and notice of the motion is to be given to the prosecution. Under section 364 the trial court "shall" grant a new trial if the jurors decided the verdict by lot, if the verdict is contrary to law or the weight of the evidence, or if there is newly discovered evidence. Under section 365 the trial court "shall" grant a new trial if substantial rights of the defendant have been prejudiced: where the defendant was not present at the proceeding; where the jury has received any evidence out of court (except in the case of a view of the premises); where the jurors have separated without leave of court after retiring to deliberate; where any juror has been guilty of misconduct; where the prosecutor has been guilty of misconduct; where the trial court erred in the decision of any matter of law arising during the trial; and where the court has misdirected the jury or failed to give a proper instruction requested by the defendant. Furthermore, the trial court may also grant a new trial "when from any other cause not due to his own fault the defendant has not received a fair and impartial trial." Under section 366 when the motion calls for a decision of any question of fact affidavits may be used. Under section 367 the court is to make an order granting or refusing a new trial, the order to be entered of record. Under section 368 when a new trial is granted it shall proceed as if there had been no former trial. The former conviction shall not be used or referred to in evidence or argument. There is a serious gap in the code as it makes no effort to have new trial overlap with habeas corpus or the writ of error coram nobis. In Chapter 25, on Appeal, section 427 permits the defendant to appeal from a final judgment but says nothing as to appeal from the denial of a motion for a new trial. Under section 428 the prosecution may appeal from "an order granting a new trial." Under section 463 when judgment is reversed, the appellate court may discharge the defendant "or, if it thinks proper, grant a new trial."

489. "An English critic, accustomed to the procedure of the Court of Assize, might be tempted to regard the three days allowed . . . as unnecessary; it may, at least, cause a definite waste of judicial time on the last day or two of the session." Brunyate, The American Draft Code of Criminal Procedure, 1930, 49 L.Q. Rev. 192, 203 (1931).

490. "It may be questioned whether, after judgment and sentence have been passed and recorded, such a reopening of a decided case ought not properly to be brought before the appellate court." Brunyate, The American Draft Code of Criminal Procedure, 1930, 49 L.Q. Rev. 192, 203 (1931).

491. The prosecution may not take such an appeal in federal criminal cases as no statute provides for it.
Rule 41(a) of the Uniform Rules of Criminal Procedure drafted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association in 1952 adopts the views of the Advisory Committee rather than of the Supreme Court. It fixes no time limit for motions for new trial on the ground of newly discovered evidence. It provides as follows:

"New Trial. Upon motion of a defendant, the court may grant a new trial if required in the interest of justice. If trial was by the court without a jury, the court may vacate the judgment, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made at any time, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other ground shall be made within days after verdict or finding of guilty or within such further time as the court may fix during the day period."

Rule 44 of the Uniform Rules of Criminal Procedure modeled largely on 28 U.S.C. section 2255 solves the problem of the overlapping of new trial with relief through habeas corpus, writ of error coram nobis, etc. It provides as follows:

"Motion to Vacate, Set Aside or Correct Sentence. A prisoner in custody under sentence who claims a right to be released on the ground that the sentence was imposed in violation of the Constitution or statutes of this State or of the United States, or that the court imposing sentence was without jurisdiction to

492. Hamley, The New Uniform Rules of Criminal Procedure, 16 F.R.D. 283, 287-288 (1955). The committee comment on rule 41 (a) was as follows: "See Fed. R. Crim. P. 33; cf. ALI CODE, § 361, 362. The federal rule limits motion for a new trial on the ground of newly discovered evidence to two years after final judgment; the ALI Code, to one year after verdict or finding unless permitted by the court for good cause. New Jersey Rule 2: 7-11 follows the federal rule. However, the Advisory Committee had recommended a rule as proposed above, with no time limit on a motion based on the ground of newly discovered evidence as well as upon denial of a constitutional right. . . . The time limitation in the rule as adopted has been criticized; see Dession, New Federal Rules of Criminal Procedure: II, 56 YALE L.J. 197 (1947); Orfield, Amending the Federal Rules of Criminal Procedure, 24 NOTRE DAME LAW. 314 (1949); FEDERAL RULES OF CRIMINAL PROCEDURE: NOTES AND INSTITUTE PROCEEDINGS 206, 230, 240 (1946). Time for filing motions for new trials varies in different states; see ALI CODE OF CRIMINAL PROCEDURE 1040-1042 (1930)."

493. The Committee Note on rule 44 was as follows: "See 28 U.S.C.A. § 2255 (1952). The Advisory Committee on the Federal Rules recommended that motion for a new trial could be made at any time on the ground of deprivation of a constitutional right as well as on that of newly discovered evidence; see Fed. R. Crim. P. Rule 35 (2d Preliminary Draft). The elimination of this in the Federal Rules as adopted and their failure to provide for relief obtainable by writ of error coram nobis or habeas corpus have been criticized; see Dession, New Federal Rules of Criminal Procedure: II, 56 YALE L.J. 197 (1947); Orfield, Amending the Federal Rules of Criminal Procedure, 24 NOTRE DAME LAW. 314 (1949); Note, Need for Coram Nobis in the Federal Courts, 59 YALE L.J. 786 (1950). Federal rule 35 allows for the correction of an illegal sentence at any time and to this extent overlaps 28 U.S.C.A. § 2255 (1952)."
do so, or that the sentence was in excess of that authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed the sentence to vacate, set aside or correct the same. If the motion and the files and records of the case show to the satisfaction of the court that the prisoner is not entitled to relief, the court shall so determine and enter an order accordingly; otherwise the court shall cause notice thereof to be served on the prosecuting attorney and grant a prompt hearing thereon. If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may be appropriate. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner."