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**IN THE
SUPREME COURT OF THE UNITED STATES**

BYRON A. WYATT,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether F.R.Crim.P. Rule 33's standard for granting a new trial based on newly discovered evidence "if the interest of justice so requires" cannot be satisfied if there is any evidence sufficient to convict the defendant even though the newly discovered evidence is both material and not merely cumulative or impeaching?

PARTIES TO THE PROCEEDINGS

Byron A. Wyatt was the sole defendant in the prosecution and trial in the United States District Court for the Western District of Louisiana and was the appellant on appeal to the United States Court of Appeals for the Fifth Circuit.

The United States of America, by and through the Office of the United States Attorney for the Western District of Louisiana, was the plaintiff in the prosecution and trial in the United States District Court for the Western District of Louisiana and was the appellee on appeal to the United States Court of Appeals for the Fifth Circuit.

TABLE OF CONTENTS

QUESTIONS PRESENTED	ii
PARTIES TO THE PROCEEDINGS.....	iii
TABLE OF CONTENTS	iv
APPENDIX INDEX	v
TABLE OF AUTHORITIES	vi
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED.....	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE WRIT.....	7
CONCLUSION	10

APPENDIX INDEX

Fifth Circuit Opinion Upholding Guilty Verdict	1
Indictment in the Western District of Louisiana.....	3
Jury Verdict.....	5
Denial of Motion for New Trial.....	6
Judgment in a Criminal Case	11

TABLE OF AUTHORITIES

JURISPRUDENTIAL AUTHORITY

<i>Berry v. Georgia</i> , 10 Ga. 511 (1851).....	7
<i>United States v. Piazza</i> , 647 F.3d 559 (5 th Cir. 2011)	7-8

STATUTORY AUTHORITY

18 U.S.C. § 201(b)(2)(A).....	1
28 U.S.C. § 1254(1).....	1
Fed. R. Crim. P. Rule 33.....	6-9

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Petitioner Byron A. Wyatt respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Fifth Circuit's decision affirming Mr. Wyatt's conviction and sentence, *United States v. Byron A. Wyatt*, No. 19-30696 (5th Cir. 2020), is not published and is set forth at App. 1.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on July 8, 2020. No petition for rehearing was filed. Mr. Wyatt's petition is timely filed pursuant to Supreme Court Rule 13 because this petition is filed within 90 days after the entry of the Fifth Circuit's judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

F.R.CrimP. Rule 33 states, in relevant part:

(a) Defendant's Motion.

Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.

STATEMENT OF THE CASE

Petitioner Byron A. Wyatt was charged by grand jury indictment with two counts of bribery of a public official, that is, a corrections officer at the United States Penitentiary in Pollock, Louisiana on May 6, 2014, and June 10, 2014, in violation of 18 U.S.C. § 201(b)(2)(A). ROA.14-15; App. 3. At trial, the Government presented testimony that Petitioner was a corrections officer at FCI Pollock Medium from March 1, 2009, until his resignation on August 25, 2015. ROA.293-295; Govt. Exs. 1 and 2. Petitioner was assigned as a compound officer at Compound Number 2 and worked from midnight until 8:00 a.m. under the other compound officer, the officer in charge. ROA.300-301. On the midnight shift, compound officers do a fence check and walk around the housing units and pick up count slips. ROA.310. The Compound Number 2 officer has keys to the housing units, including Fox 4, which is unmanned for some period each night. ROA.302.

Inmate Jayvon Gant was admitted to FCI Pollock Medium on November 20, 2013, and remained there until he was transferred to another prison on April 2, 2014. ROA.296-297; Govt. Ex. 5. Gant was housed in the Fox 4 housing during the entirety of his stay at FCI Pollock Medium. ROA.298; Govt. Ex. 5.

Gant, who was serving an 87-month sentence for bank theft at the time of trial and was scheduled to be released within a month, testified on behalf of the Government. ROA.326. He denied that he was made any promises or offers by the trial prosecutors in exchange for his testimony. ROA.328. Gant testified that he first talked to Petitioner in December of 2013 in the dining area of the prison. ROA.329. He next encountered Petitioner in either December of 2013 or January of 2014, after the prison was put on lockdown because of a riot. ROA.330-331. According to Gant, he asked Petitioner to share with him some Taco Bell food that he was eating, and Petitioner gave some to him in a napkin that he slid under the cell door. ROA.331. Thereafter,

according to Gant, his roommate, Dedric Lewis, wrote a letter to Petitioner to see if he would bring them drugs and other contraband into the prison. ROA.333; ROA.361.

In Gant's next encounter with Petitioner a few days later, Petitioner was doing his rounds and Gant, who was locked in his cell, asked Petitioner to bring him something to smoke because they had been locked down too long. ROA.337; ROA.340. Gant testified that Petitioner told him to let him see his penis, which Gant did. ROA.337; ROA.340. A few days later, Petitioner passed Gant some weed in a bag used for meals through the tray slot at the bottom of his cell door. ROA.340-341. Gant testified that he then made arrangements with Petitioner for him to bring pouches of tobacco for \$200 to \$300 each time. ROA.343.

According to Gant, he directed his two girlfriends, Stephanie Marker and Alisha Byrd, to put money on Western Union or Green Dot reloadable cards using a fictitious name and a 14-digit number that he gave, or Marker texted, to Petitioner so that Petitioner could upload the money to his card. ROA.343; ROA.374; ROA.377. Gant claimed that Petitioner brought him contraband tobacco pouches between 35 and 50 times from approximately January of 2014 until he was transferred out of Pollock in early April of 2014, and Gant never got caught with contraband while in prison. ROA.356. Gant also claimed that he told another prisoner, Demetrius Flenory, about his arrangement with Petitioner when Gant was about to transfer to another prison, and Gant told Petitioner that Flenory wanted to continue their arrangement. ROA.345-346.

Alisha Boyd testified that she spoke with Gant by prison phone, and he told her Petitioner would be contacting her so that she could exchange Green Dot numbers and marijuana and pills. ROA.382-383. Boyd, who lived in the Dallas - Fort Worth, Texas area, claimed to have met in person with Petitioner in Louisiana approximately three times to exchange money, Green Dot numbers, and marijuana and pills, as well as numbers from other girls, whose names she could not

remember. ROA.384. She testified that she also sent MoneyGrams and Western Union money to Petitioner. ROA.409.

Green Dot is a nontraditional bank that sells products such as prepaid cards to which money can be added. ROA.427. MoneyPak, another Green Dot product, operates essentially the same way, and MoneyPak money can be transferred to a PayPal account. ROA.429. The company can provide a refund check if the customer does not want to use the Green Dot card. ROA.430. According to Green Dot records, Petitioner cashed three refund checks between May 6 and June 10, 2014. ROA.435-443; Govt. Ex. 7. However, Green Dot records do not indicate who purchased the products. ROA.449-450. Petitioner's bank records show that he made 18 PayPal transfers to his bank account between April 28, 2014 and August 6, 2014. ROA.463-470. Petitioner's bank records also show that he deposited the three Green Dot refund checks in his checking account. ROA.470-473. The bank records also indicate a number of purchases from Taco Bell and Tobacco Plus from January through August, 2014. ROA.461-470.

Case Agent Matt Loux testified that five MoneyPak purchases were made between April 22, 2014, and May 31, 2014, at locations including Fort Worth, Texas, Athens, Georgia and Oklahoma City, Oklahoma, which resulted in the issuance of refund checks to Petitioner, which were deposited or cashed. ROA.495-496; ROA.540; Govt. Exs. 7 and 8. Loux admitted that he could not determine who purchased the MoneyPaks, nor did any Green Dot 14-digit number given him by Gant as Petitioner's prove to be correct. ROA.538; ROA.543. Loux also confirmed that he could not establish that money was sent to Petitioner by Gant or Byrd by Moneygram or Western Union, as she had testified. Loux also could not substantiate that any inmate calls related to the charges against Petitioner. ROA.513-521. He also was not able to get any receipts from Byrd documenting that she had, in fact, been in Louisiana to meet with Petitioner. ROA.544-545.

On redirect, Loux testified that he looked at Petitioner's PayPal account documents and found Green Dot transactions, including deposits made from MoneyPaks, which he included in a spreadsheet summary of the PayPal account. ROA.547. On redirect, these summaries were admitted as Govt. Ex. 15 without objection. ROA.549. According to this exhibit, the MoneyPak payments to Petitioner's PayPal account occurred over the period April 25, 2014 through August 23, 2014.

After a three-day jury trial, Petitioner was found guilty of both counts. ROA.73; ROA.1077; App. 5. Following trial, Petitioner sought an order from the district court requiring the issuance of subpoenas to the Green Dot Corporation, Petitioner's bank, and the PayPal Corporation, which the district court allowed. RAO.94; ROA.104; ROA.114; ROA.685. Petitioner then filed a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure and alleged that, with respect to the PayPal records he subpoenaed, no records were produced which indicated Green Dot transactions as had been set forth in Govt. Ex. 15. ROA.137-138. Rather, the documents produced indicated that the credits were actually PayPal cash transactions. ROA.139; Exs. 2, 3 and 4, attached to Petitioner's motion, ROA.160-165.

At the hearing on the motion for new trial, Petitioner argued that the information from his PayPal account as reflected in Govt. Ex. 15 was different from what Petitioner received post-trial and, with respect to the Government's contention that the references to Green Dot were in other PayPal records of Petitioner, he responded that, nevertheless, he never had an opportunity to investigate the type of Green Dot activity that may have been reflected in his PayPal account. ROA.696-698. Petitioner argued further that, as presented in Govt. Ex. 15 at the conclusion of the Government's case, the information had an unfair impact on the verdict since, prior to the introduction of Govt. Ex. 15 in the Government's redirect of Loux, it was the Government's theory

that Petitioner was paid through five Green Dot refund checks deposited in his bank account. ROA.699-701. Petitioner also argued that the defense was completely deprived of the opportunity to further investigate in order to see how the evidence could be used as exculpatory evidence to challenge the Government's theory. ROA.716.

The district court denied the motion for new trial. ROA.210; ROA.724-725; App. 6. Petitioner was sentenced to imprisonment for 24 months to be followed by 2 years of supervised release. ROA.222; App.11.

On appeal, the Fifth Circuit affirmed the district court ruling, concluding that there was no abuse of discretion. *United States v. Wyatt*, No. 19-30696 (5th Cir. 2020); App. 1. According to the Panel, the trial evidence regarding the Petitioner requesting and depositing the Green Dot refund checks alone was sufficient to convict Petitioner of accepting bribes, and, thus, the introduction of the post-trial PayPal documents, which showed the source of money funding his PayPal account to be cash, would "probably not produce an acquittal." App. 2.

REASONS FOR GRANTING THE WRIT

This petition raises an important issue regarding the proper interpretation and application of F.R.Crim.P. Rule 33's "if the interest of justice so requires" standard for granting a defendant's motion for a new trial based on newly discovered evidence, that is, whether the standard cannot be satisfied if there is any evidence sufficient to convict the defendant even though the newly discovered evidence is both material and not merely cumulative or impeaching?

The district court, in denying Petitioner's motion for new trial applied what is known as the *Berry* rule, referencing *Berry v. Georgia*, 10 Ga. 511 (1851), and the following factors that must be satisfied: (1) the evidence is newly discovered and was unknown to the defendant at the time of the trial; (2) the failure to detect the evidence was not due to the defendant's lack of

diligence; (3) the evidence was not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence, if introduced at a new trial, would probably produce an acquittal. *See also* *United States v. Piazza*, 647 F.3d 559, 565 (5th Cir. 2011).

The district court concluded that Petitioner satisfied all factors under the *Berry* rule except for the last one, concluding that if the new evidence were introduced at trial it would probably not produce an acquittal, since the Government had already introduced Petitioner's receipt of five Green Dot refund checks. ROA.725. The Fifth Circuit affirmed, finding no abuse of discretion and concluding that the "evidence regarding the refund checks was sufficient to convict Wyatt of seeking and accepting bribes," thus the new evidence showing the source of money funding his PayPal account "would probably not produce an acquittal. App. 2.

In addressing whether the "interest of justice" standard of Rule 33 was satisfied, the Panel looked to the sufficiency of the evidence to support the conviction and found it to exist on the basis of five Green Dot refund checks issued in the name of Petitioner between May 6, 2014 and June 10, 2014, the dates referenced in the two bribery counts in the indictment. App. 3. The problem with focusing only on the sufficiency of the evidence and only on the existence of the Green Dot refunds checks received by Petitioner during the period May-June 2014 is that no witness testified as to who purchased the Green Dot products between April 22, 2014 and May 31, 2014 in various states or why those products were purchased. There was certainly no testimony that those particular Green Dot products were purchased to bribe Petitioner as a corrections officer. Nor was any evidence of recorded prison calls, texts or emails introduced to connect the Green Dot products and the resulting refund checks to bribery of Petitioner.

The only testimony supporting that Petitioner had taken bribes as a correctional officer at Pollock came solely from an inmate, Gant, who was transferred out of Pollock in early April before

any of the Green Dot products relied upon by the Government and the Panel were purchased or the refund checks issued in support of the verdict. Thus, Gant’s testimony of Petitioner’s alleged prior misconduct is of no relevance to the circumstances giving rise to those refund checks. While Gant mentioned the names of two inmates who he suggested were interested continuing his so-called “arrangement” with Petitioner, neither of those inmates, nor any other inmate, testified. Moreover, the testimony of Gant’s girlfriend, Byrd, is also of no relevance to the purpose of the Green Dot products and refund checks since she had no knowledge of them and could not even remember the names of other people she claimed to have dealt with or places or dates.

The Government attempted to fill the critical gap in the circumstantial evidence in the case with additional evidence of multiple transfers between April 28, 2014 and August 6, 2014, after Gant transferred out of Pollock, from Petitioner’s PayPal account to his bank account that, according to the Government’s Ex. No. 15 introduced on redirect of its final witness, the case agent, arose from Green Dot MoneyPak transactions.

Given the paucity of evidence connecting Petitioner’s receipt of refund checks in May and June of 2014 to bribery of him as a corrections officer for providing favors to Pollock inmates during that period, however sufficient that evidence may be to convict, the newly discovered material, and not cumulative or impeaching, evidence showing that cash, rather than a Green Dot MoneyPak, was the source of money in Petitioner’s PayPal account supports a new trial “in the interest of justice.” The Fifth Circuit’s opinion affirming the denial of a new trial because evidence Petitioner cashed or deposited Green Dot refund checks, about which the Government witnesses had little or no knowledge, “was sufficient to convict [Petitioner] of seeking and accepting bribes” is contrary to Rule 33’s “in interest of justice” standard and must be reversed.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully prays that this Court grant the writ of certiorari and permit briefing and argument on the issue presented.

RESPECTFULLY SUBMITTED,

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