

## **FEDERAL POST-VERDICT MOTIONS - AN UPDATE**

By: Mark M. Baker\*

In an article published just over two years ago, entitled “Post-Verdict Motions Under State and Federal Criminal Practice,”<sup>1</sup> I noted that a motion for a new trial in federal court following a verdict of guilt which is “grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty, or within such further time as the court sets during the 7-day period.”<sup>2</sup> It was emphasized that under then existing case law “[t]his seven day deadline is jurisdictional and cannot be extended by the court if first requested beyond the seven period.”<sup>3</sup> Recent decisions of the Supreme Court and the Second Circuit compel a re-visiting of these once seemingly inviolate propositions.

### **Eberhart v. United States**<sup>4</sup>

On October 31, 2005, the Supreme Court, relying on Kontrick v. Ryan,<sup>5</sup> cautioned that there is “a critical difference between a rule governing subject-matter jurisdiction and an inflexible claim-processing rule...’Rule 33 is an example of the latter.”<sup>6</sup> In Eberhart, the defendant had initially moved for a new trial within the seven day period provided by Rule 33, raising a single ground. After almost six months, he filed a “supplemental memorandum” which, absent any objection by the Government, raised two additional grounds which the district court later included as the basis for its granting of the motion.

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\* Mark M. Baker is of Counsel to the Manhattan criminal defense firm of Brafman and Associates, P.C., concentrating in appellate and motion litigation.

Taking an appeal, the Government raised the issue of the untimeliness of the supplemental memorandum for the first time. Agreeing with the Government, and citing Supreme Court precedent in United States v. Robinson<sup>7</sup> and United States v. Smith,<sup>8</sup> the Seventh Circuit reversed, holding that the district court had lacked the jurisdiction to entertain the supplemental motion.<sup>9</sup>

Upon granting the petition for certiorari and summarily reversing the Court of Appeals in a per curiam opinion, the Supreme Court initially discussed its Kondrick ruling. In that recent case it had “determined that defenses made available by the time limitations of Federal Rules of Bankruptcy Procedure 4004 and 9006 may be forfeited.”<sup>10</sup> As a consequence, noted the Eberhart Court, such defenses in bankruptcy proceedings “are not ‘jurisdiction [al],’ but are instead ‘claim-processing rules,’ that may be ‘unalterable on a party's application’ but ‘can nonetheless be forfeited if the party asserting the rule waits too long to raise the point.’”<sup>11</sup>

According to the Court, the parallel in post-verdict criminal motion practice is clear. For, “[l]ike] a defendant wishing to move for a new trial under Federal Rule of Criminal Procedure 33, a creditor wishing to object to a debtor's discharge in Chapter 7 liquidation proceedings has a set period of time to file with the court (measured, in the latter context, from ‘the first date set for the meeting of creditors’).”<sup>12</sup> As a consequence, explained the Court, “[i]t is implausible that the Rules considered in Kontrick can be nonjurisdictional claim-processing rules, while virtually identical provisions of the Rules of Criminal Procedure can deprive federal courts of subject-matter jurisdiction. Nothing in Rules 33 or

45 or our cases requires such a dissonance.”<sup>13</sup> Instead, noting that its “most recent decisions have attempted to brush away confusion introduced by our earlier opinions[,]” the Eberhart Court stressed that “[w]e break no new ground in firmly classifying Rules 33 and 45 as claim-processing rules, despite the confusion generated by the ‘less than meticulous’ uses of the term ‘jurisdictional’ in our earlier cases.”<sup>14</sup>

Significantly, the Eberhart Court felt no need to overrule either Robinson or Smith, upon which the Seventh Circuit had relied in holding Rule 33's 7-day rule as implicating subject matter jurisdiction. Rather, the Court simply concluded that “[t]he net effect of Robinson, viewed through the clarifying lens of Kontrick, is to admonish the Government that failure to object to untimely submissions entails forfeiture of the objection, and to admonish defendants that timeliness is of the essence, since the Government is unlikely to miss timeliness defects very often.”<sup>15</sup>

**United States v. Robinson**<sup>16</sup>

Just days ago, the Second Circuit also had occasion to consider this precise issue. In this new Robinson case, the defendant, well outside the 7-day period following the verdict, had made a request for a second extension of time to file a Rule 33 motion. As in Eberhart, the Government did not object on timeliness grounds and only opposed the application on the merits. Ultimately, the district court granted a new trial with respect to two of the four counts upon which the defendant had been convicted.

Thereafter, the Government moved for reconsideration. For the first time, in addition to challenging the district court’s holding on the merits, it argued that the grant of

the second extension had been unauthorized by Rules 33 and 45. The Government contended, therefore, that the district court had lacked jurisdiction to entertain the motion. The district court rejected this argument, noting that the second extension had been “with the Government’s consent.”<sup>17</sup>

Thereafter, on appeal, addressing the Government’s renewed argument that the district court had been bereft of jurisdiction to entertain the Rule 33 motion, the Court of Appeals indicated that “[o]ur case falls squarely under the holding of Eberhart. Just as in Eberhart, the government forfeited its objection to the untimeliness of Robinson's motion by failing to raise the objection in a timely fashion and not raising the issue until after the court had granted Robinson's motion for a new trial.”<sup>18</sup> For, as the Second Circuit noted, “[a]lthough the Supreme Court and our court have in the past characterized the time limits for such motions as ‘jurisdictional,’ the Supreme Court in Eberhart,[] recently clarified that they are not jurisdictional and can be waived.”<sup>19</sup> Likewise upholding the district court on the merits, the Circuit court affirmed the grant of a new trial.

### **Revised Rules 33 and 45**

Apart from the issue of Governmental forfeiture addressed by the Supreme Court and the Second Circuit, as Robinson itself observed, “[b]y reason of changes to Rules 29, 33, and 45, which took effect December 1, 2005, the [district] court now has greater latitude to extend the time for such motions.”<sup>20</sup> Specifically, owing to recent amendments, Rule 45 no longer provides that a court may only grant any extensions to file post verdict motions for a new trial within the initial 7-day period. Rather, a district court can now

authorize such filings even beyond that initial time frame, regardless of the Government's position.

To be sure, Rules 29, 33 and 34 of the Federal Rules of Criminal Procedure still provide that such post-verdict motions -- other than a request for a new trial upon newly discovered evidence -- must be filed within 7 days after a verdict. In the first instance, therefore, to be timely and not subject to Governmental challenge, a defendant must file a post-verdict motion within that period.

On the other hand, effective December 1, 2005, the former language in each of those rules (*viz.*, "or within such further time as the court sets during the 7-day period") has been deleted. Read in conjunction with newly circumscribed Rule 45(b)(2), which now directs that "[t]he court may not extend the time to take any action under Rule 35, except as stated in that rule[,]"<sup>21</sup> the result is that, notwithstanding the Government's objection, a district court now has the power to grant an extension to file a post-verdict motion at *any* time prior to sentence.

Otherwise stated, even in the face of the Government's protest, untimely motions can still be considered if there is demonstrated "excusable neglect."<sup>22</sup> That is because the elimination of references to Rule 29, 33 and 34 from the "exceptions" heretofore delineated in former Rule 45(b)(2) allows for the "excusable neglect" criterion earlier extant in Rule 45(b)(1)(B) to apply henceforth to those types of applications as well. As explained by the revisers, "the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to act on

a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.”<sup>23</sup>

### **Conclusion**

Prior decisions concluding that a district judge had no power to grant an extension to file a Rule 29, 33 or 34 motion, based on the view that the 7-day rule had been “jurisdictional,” are not to be understood as effecting subject matter jurisdiction. Rather, there is a clear distinction between that concept and a provision which is merely a “claim-processing rule.” Although the latter may be indeed enforceable if the government raises an objection, it will be forfeited in the face of governmental silence.

Absent good cause to be tardy, therefore, prudence certainly dictates that a convicted defendant move for post-verdict relief, or even seek an extension to do so, within the prescribed 7-day period. If not, such individual acts perilously since it is most likely that the Government – certainly in the wake of Everhart and Robinson – will object. On the other hand, if the Government does not challenge what might otherwise be an untimely application to bring such post-verdict motions, it cannot complain afterwards. In such instance, the Government’s misgivings will be forfeited and the court retains the “jurisdiction” to address the merits of the convicted defendant’s claims.

Regardless, if within the 7-day period a convicted defendant fails to bring either a Rule 33 motion for a new trial, a Rule 29 ( c ) motion for a judgment of acquittal or a Rule 34 motion in arrest of judgment, such individual is not without any remedy. The district court may still entertain a post-verdict motion under the revised rules if it determines

that the failure to file on time was the result of “excusable neglect.”<sup>24</sup>

1. N.Y.L.J, August 4, 2003.
2. Citing former Fed. R. Crim P. Rule 33(b)(2). *See also* former Fed. R. Cr. P. 45(b)(2) (“The court may not extend the time to take any action under Rules 29, 33, 34, and 35, except as stated in those rules”).
3. Citing United States v. McCarthy, 271 F.3d 387, 399 (2d Cir. 2001); United States v. Moreno, 181 F.3d 206, 212 (2d Cir.), *cert. denied*, 528 U.S. 977 (1999).
4. 126 S. Ct. 403 (2005) (Per Curiam).
5. 540 U.S. 443 (2004).
6. United States v. Eberhart, 126 S. Ct. 403 (2005), quoting Kondrick v. Ryan, 540 U.S. 443, 456 (2004).
7. 361 U.S. 220, 229 (1960).
8. 331 U.S. 469, 474, n. 1 (1947).
9. 388 F.3d 1043 (7<sup>th</sup> Cir. 2004).
10. 126 S. Ct. at 404, citing 540 U.S. at 458-460.
11. 126 S. Ct. at 404, citing 540 U.S. at 456.
12. 126 S. Ct. at 405.
13. *Id.*
14. *Id.* citing 540 U.S. at 454.
15. 126 S. Ct. at 406-407.
16. \_\_F.3d\_\_, 2005 WL 3277921, 04-0889 (2d Cir., decided December 5, 2005) (No apparent relation to United States v. Robinson, 361 U.S. 220 [1960]).
17. 2005 WL 3277921, at \*3 (quoting United States v. Robinson, 303 F. Supp. 2d 231, 234 [N.D.N.Y. 2004]).
18. *Id.*, at \*5.
19. *Id.* at \*4 (citing United States v. Robinson, 361 U.S. 220, 229 [1960] and United States v. McCarthy, 271 F.3d 387, 399 [2d Cir.2001]).
20. *Id.*, at \*5, n. 3.

21. Former Rule 45(b)(2) of the Federal Rules of Criminal Procedure stated that “[t]he court may not extend the time to take any action under Rules 29, 33, 34 and 35, except as provided in those rules.” Emphasis added.

22. Fed. R. Cr. P. 45(b)(1)(B),

23. *See* Report of the Advisory Committee on Criminal Rules, May 18, 2004, App. B.

24. Rule 45(b)(1)(B),