

United States District Court
for the District of Columbia
Washington, D.C. 20001

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02-CR-B

Chambers of
Paul L. Friedman
United States District Judge

March 22, 2002

The Honorable Edward E. Carnes
Chair, Advisory Committee on Criminal Rules
United States Circuit Judge
Frank M. Johnson, Jr. Federal Building
and Courthouse
15 Lee Street
Montgomery, AL 36104

Dear Ed:

A couple of years ago, I suggested as an agenda item for one of our meetings a consideration of Rules 29, 33 and 34 of the Federal Rules of Criminal Procedure relating to motions for judgment of acquittal, new trial and arrest of judgment. All of these rules require not only that a defendant move for an extension of time to file such motions within seven days after verdict but also that the trial judge must grant the motion for the extension of time within that seven-day period. It seemed to me then and still does that these rules work an injustice on defendants when judges themselves may be dilatory or, for example, are on vacation or ill. The matter was ultimately not discussed at the meeting for which it was scheduled because of my absence.

The purpose of this letter is to request that a discussion of those rules be put on the agenda for our April meeting if time permits and, if not, for a meeting as soon thereafter as possible. I will try to do a short memorandum of my concerns and suggestions as soon as possible.

Hope all is well with you. I look forward to seeing you in April.

Sincerely,



Paul L. Friedman

cc: John K. Rabiej
Professor David A. Schlueter

United States District Court
for the District of Columbia
Washington, D.C. 20001

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Chambers of
Paul L. Friedman
United States District Judge

MEMORANDUM

TO: Members, Criminal Rules Advisory Committee
FROM: Judge Paul L. Friedman
RE: Rules 29, 33 and 34 of the Federal Rules of Criminal Procedure
DATE: April 18, 2002

The following is the memorandum I referred to in my letter of March 22, 2002, to Judge Carnes requesting that this item be placed on the agenda for the meeting on April 25-26, 2002. See Advisory Committee on Criminal Rules, Agenda Book for Meeting on April 25-26, 2002, Tab II-D. I am sorry for the delay in submitting it.

Rule 29(c) of the Federal Rules of Criminal Procedure provides that after a jury returns a guilty verdict, "a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." Rule 33 of the Federal Rules of Criminal Procedure provides that "[a] motion for a new trial based on . . . grounds [other than newly discovered evidence] may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period." Rule 34 of the Federal Rules of Criminal Procedure

provides that a "motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea of guilty or *nolo contendere*, or within such further time as the court may fix during the 7-day period." Rule 45(b)(2) of the Federal Rules of Criminal Procedure permits the district court to enlarge the period of time in which to file a motion after the expiration of the specific period of time upon a showing of excusable neglect, "but the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them."

Although strict enforcement of these time limits arguably serves the legitimate interest of finality of criminal convictions, many situations exist in which the 7-day time periods of Rules 29, 33 and 34 work a hardship on criminal defendants and could lead to unfair results. Under these three rules, for example, a defendant may seek an enlargement of time in which to file an appropriate motion but in doing so, defendant must file and the trial court must grant the motion within the 7 days. Thus, even the defendant who has acted promptly by seeking an extension within 7 days may lose his opportunity to move for judgment of acquittal, new trial or arrest of judgment if the trial judge is dilatory or, for example, is on vacation or is ill. In United States v. Hall, 214 F.3d 175, 176 (D.C. Cir. 2000), for example, the trial court received a timely motion for an extension of time in which to file a motion for new trial under Rule 33 but held the motion in abeyance to give the government a chance to respond. The court of appeals held that because the trial court waited over 7 days after the guilty verdict was returned, the trial court lacked jurisdiction to act on the motion, and the *nunc pro tunc* order granting the extension was a nullity. See id. Thus, a defendant who acts appropriately to

preserve his right to seek relief under these rules may forfeit his right to such relief because of the action or inaction of the trial judge.

When trial counsel for a defendant has rendered ineffective assistance at trial, strict construction of the 7-day time period also may unfairly prejudice the defendant. If, for example, a defendant wants to seek a new trial based on his trial counsel's ineffective assistance, he will be forced: (1) to rely on the trial counsel whom he felt was constitutionally deficient to file the motion for a new trial based on his or her own ineffective representation (something which trial counsel may not be able to do),¹ (2) to ask trial counsel to file a motion for an extension of time and to rely on counsel to make sure that the Court acts on the motion within 7 days of the verdict, or (3) to file a *pro se* motion for a new trial. In this context, a defendant is forced to depend on trial counsel whom he believes performed below the constitutional standard for effective counsel to preserve his right to certain types of post-trial relief.

The Advisory Committee Notes do not explain why the drafters thought it appropriate in the case of these particular Rules -- as opposed to countless others with no such requirement -- to require not only that a party file a motion within a particular time frame, but also that the trial judge must act on the motion within that same amount of time or lose jurisdiction. Nor does Professor Wright offer any explanation. See 2A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE §§ 461-70 (3d 2000) (Rule 29); 3 CHARLES

¹ Since the grounds on which the motion is based must be set forth with specificity within the 7-day time frame, see, e.g., United States v. Quintanilla, 193 F.3d 1139, 1148 (10th Cir. 1999), this places a particularly incongruous burden on defense counsel.

ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE §§ 551-59 (2d 1982) (Rule 33); *id.* §§ 571-74 (Rule 34). And judges generally resist such constraints on their discretion. I know from my own experience as chair of our Court's Civil Justice Reform Act Advisory Group, for example, how soundly we were rebuffed by the Court when we suggested a CJRA plan that would require that all pending motions in civil cases be decided within 90 days. Furthermore, while finality is a legitimate goal, the current Rules do not provide it. Under the current version of Rules 29, 33 and 34, there is nothing that prevents the trial court from granting a defendant a significant extension of time so long as this additional time is fixed within 7 days of the verdict. Thus, as the Rules are currently drafted, the merits of a substantive motion under any of these three Rules will not necessarily be dealt with shortly after the jury's verdict is returned. A judge can set a briefing schedule as extensive as he or she thinks appropriate so long as it is set within 7 days.

Rules 29, 33 and 34 could be amended to give the district court jurisdiction to grant motions for an extension of time *nunc pro tunc*. In effect, this rule change would allow defendant to stop the 7-day clock by filing a motion for extension of time in which to file an appropriate motion. This change would eliminate the unfairness to a criminal defendant created when he seeks an extension of time within 7 days, but the trial court fails to act within the allotted amount of time. Furthermore, such a change still would put a burden on defendant to act within 7 days either by filing the appropriate motion under Rules 29, 33 or 34 or by filing a motion for an extension of time. Or the Rules could be written to require that a motion for a new trial, etc. or a motion to extend time for filing such a motion "must be made within 7 days . . ." eliminating the requirement that it also be decided within that period. Alternatively,

Rule 45(b)(2) could be amended by removing the language after the semi-colon which relates to Rules 29, 33, 34 and 35. This change also would eliminate the hardship worked on criminal defendants when the court does not grant the motion for an extension of time within the 7 day period and may help to eliminate the unfairness of forcing a defendant to rely on ineffective trial counsel for post-trial relief. This rule change may be less desirable because a defendant would not necessarily have to file a motion within 7 days, and the trial court could be forced to deal with motions filed well after the jury's guilty verdict is returned.