

CHS (hand-carried)
ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JUN 26 2003
FBI - FORT WORTH

UNITED STATES OF AMERICA §
 §
 § NO. 4:03-CR-188-A
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 §
RICHARD MICHAEL SIMKANIN §

**GOVERNMENT’S RESPONSE IN OPPOSITION TO DEFENDANT
SIMKANIN’S SUPPLEMENT TO MOTION FOR NEW TRIAL**

The United States, by and through the undersigned and, hereby responds in opposition to Defendant Simkanin’s Supplement to Motion for New Trial.

On motion of a defendant and in the interest of justice, Rule 33 of the Federal Rules of Criminal Procedure permits a district court to grant a new trial. A new trial motion must be made within seven days after a verdict or finding of guilty or within such further time as the district court may fix during the seven-day period. Fed. R. Crim. P. 33.

However, if a new trial motion is based on the ground of "newly discovered evidence," it may be made within three years after a verdict or finding of guilty. ^{1/} *Id.* The time limits in Rule 33 are jurisdictional. *See Carlisle v. United States*, 517 416 (1996); *United States*

^{1/} In order to prevail on such a Rule 33 motion for a new trial based upon newly discovered evidence, the defendant has the burden of showing that: (1) The evidence is newly discovered and was unknown to the defendant at the time of trial; (2) failure to detect the evidence was not due to a lack of diligence by the defendant; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence introduced at a new trial would probably produce an acquittal. *See United States v. Villarreal*, 324 F.3d 319, 325 (5th Cir. 2003).

v. Erwin, 277 F.3d 727, 731 (5th Cir. 2001); *United States v. Bowler*, 252 F.3d 741, 743 (5th Cir. 2001); *United States v. Brown*, 587 F.3d 187, 189-190 (5th Cir. 1979). Thus, a district court is without discretion to grant a motion for a new trial that is not timely filed.

Id.

A defendant may not amend his motion for a new trial to include additional grounds after the seven-day period has expired, unless the district court granted an extension of time within the original seven-day time period. As held by the Seventh Circuit in *United States v. Holt*, 170 F.3d 698, 702-03 (7th Cir. 1999):

the district court had no discretion to extend the time for filing a motion for a new trial once the 7-day period had expired. The supplemental motion in this case raised two claims, neither of which had been presented in the original motion. [footnote omitted] Holt's argument that we should allow an amended or supplemental motion to relate back to the original date would defeat the express language of [Rule 33], and would create a back door through which defendants could raise additional grounds for a new trial long after the 7-day period had expired. We therefore agree with the district court, and with other circuits that have considered the issue, that a defendant cannot amend his motion for a new trial to include an additional ground after the 7-day period has expired unless the district court granted an extension of time within the original 7-day time period. *Accord United States v. Hall*, 854 F.2d 1269 (11th Cir. 1988); *United States v. Newman*, 456 F.2d 668 (3rd Cir. 1972).

Accord United States v. Nelson-Rodriguez, 319 F.3d 12, 40 (1st Cir. 2003) (“Construing this very late filing (on an entirely separate issue) as an amendment would violate both the letter and spirit of both rules, and create a “back door” for untimely challenges to

verdicts”); *United States v. Flynn*, 196 F.3d 927, 931 (8th Cir. 1999) (“additional grounds for relief raised after a timely-filed motion are procedurally barred”).

The basis for the defendant’s supplement -- that the Court erred in excluding Victoria Osborne as a witness at trial -- was not raised in defendant’s January 14th motion and does not constitute newly discovered evidence. Accordingly, in order to be timely, the supplement was required to be filed within seven days after the guilty verdict. The guilty verdict was returned on January 7th. Excluding weekends and holidays, *see* Fed. R. Crim. P. 45, the seventh day after the January 7th verdict was January 16th. Inasmuch as the Court did not extend the time for filing a new trial motion, the supplement was required to be filed on or before January 16, 2004, in order to be timely. But the supplement was not filed until January 21st. The supplement thus was untimely and the Court lacks jurisdiction to consider it.

CONCLUSION

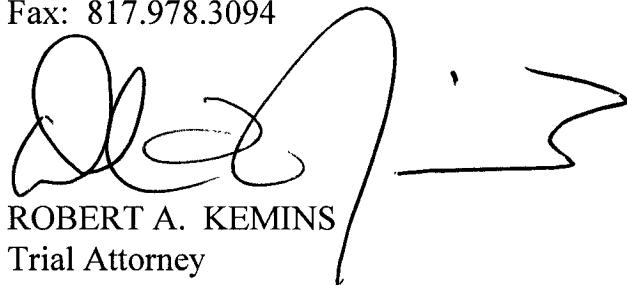
Defendant's supplement to the motion for new trial is untimely and the Court lacks jurisdiction to consider it.

Respectfully submitted,

JANE J. BOYLE
UNITED STATES ATTORNEY



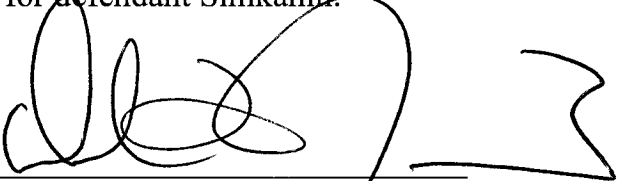
DAVID L. JARVIS
Assistant United States Attorney
Texas State Bar No. 10585500
801 Cherry Street, Suite 1700
Fort Worth, Texas 76102
Tel: 817.252.5200
Fax: 817.978.3094

for 

ROBERT A. KEMINS
Trial Attorney
United States Department of Justice Tax
Division
Massachusetts Bar No. 267330
717 N. Harwood, Suite 400
Dallas, Texas 75201
Tel: 214.880.9781
Fax: 214.880.9741

CERTIFICATE OF SERVICE

This is to certify that on this the 26th day of January, 2004, a true and correct copy of the foregoing Government's legal memorandum was served via facsimile and via the United States Postal Service or Federal Express on Arch McColl, III, 1601 Elm Street, Suite 2000, Dallas, Texas 75201-4761, attorney for defendant Simkanin.



DAVID L. JARVIS
Assistant United States Attorney