

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA,</b>	)	
	)	
	)	
<b>v.</b>	)	<b>CRIMINAL NO. 95-29-P-H</b>
	)	<b>(Civil No. 99-299-P-H)</b>
<b>THOMAS J. BARTELHO,</b>	)	
	)	
<b>DEFENDANT</b>	)	

**ORDER ON MOTION UNDER 28 U.S.C. § 2255 TO  
VACATE, SET ASIDE, OR CORRECT SENTENCE**

On November 9, 1995, a jury convicted Thomas Bartelho of three counts of armed bank robbery, three firearm counts and one Hobbs Act robbery of a jewelry store. This was the second trial on those charges. An earlier trial resulted in a mistrial when the jury deadlocked during deliberations. Bartelho has unsuccessfully appealed his conviction to the Court of Appeals for the First Circuit, see 129 F.3d 663 (1st Cir. 1997), and to the United States Supreme Court (which denied certiorari, see 119 S. Ct. 241 (1998)).

Now, Bartelho has brought this motion under 28 U.S.C. § 2255 to vacate his convictions. Bartelho has three contentions: that he was denied procedural due process by my appointment of the jury foreperson; that he was denied the effective assistance of counsel by a stratagem that led to his testimony being stricken from the record and the jury being instructed to disregard it; and that he was denied effective assistance of counsel by his lawyer's use of out-of-court statements of an accomplice, Gerald Van Bever. I conclude that there is no need for an evidentiary hearing and that all the claims must be rejected as a matter of law.

## CHOICE OF JURY FOREPERSON

I chose the jury foreperson at the outset of the trial, as I do in every case. That practice is clearly permitted. See United States v. Cannon, 903 F.2d 849, 857 (1st Cir. 1990); United States v. Machor, 879 F.2d 945, 956 (1st Cir. 1989) (“We find this argument to be totally without merit.”). Indeed, it is the custom in this Circuit. See Cannon, 903 F.2d at 857.

## INEFFECTIVE ASSISTANCE

Bartelho claims that his lawyer rendered him ineffective assistance of counsel and that his convictions therefore must be vacated. To succeed on such a claim, Bartelho must show both that his lawyer’s performance was deficient (an objective standard of reasonable effectiveness) and that the lawyer’s performance was so deficient as to prejudice the defense and undermine confidence in the trial outcome. Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

### (a) *Striking out Defendant’s Testimony*

In both trials Thomas Bartelho, the defendant, took the stand himself and testified in a lengthy direct examination giving his own, exculpatory, story. In both trials the Assistant United States Attorney cross-examined him. Part of Bartelho’s exculpatory testimony in both trials was his explanation of how he supported himself (*i.e.*, that he did not need to rob banks and a jewelry store). Specifically, he claimed to have been a drug dealer and to have been involved with accomplice Van Bever in that connection. In each trial the prosecutor asked him the source of his drugs and in each instance he refused to answer. In the first trial the prosecutor simply moved on, but in the second trial when Bartelho refused to answer where he obtained his drugs, the prosecutor moved to have his

testimony stricken. At that point I warned Bartelho clearly that he was at risk of having his testimony stricken for refusing to answer the question. I also permitted him to confer with his lawyer about the choice he confronted. Ultimately, he continued to refuse to answer and I directed the jury to disregard all of his testimony. Now Bartelho argues that it was ineffective assistance of counsel for his lawyer to put him on the stand and ask questions that could permit the government to cross-examine on this area where he did not want to answer.

I reject Bartelho's argument. First, Bartelho makes much of the fact that his lawyer said to me when the crisis erupted that he had never confronted such a situation before and that he did not know that the testimony could be stricken. I have been sitting as a trial judge for many years and have never before confronted such a situation myself. Most criminal defendants do not take the witness stand. Those who do undergo a full range of cross-examination without refusing to answer questions.

Second, the crisis and the consequences here are all of Bartelho's own making in refusing to answer the questions about his drug source. There was no privilege at stake. He had already testified on direct examination to the crime of drug distribution. He then asserted his own particular sense of ethics, that he would not implicate others. But this was no inadequate performance by his lawyer. If Bartelho had answered the questions, his lawyer could have used the testimony in closing to argue that Bartelho was not guilty of the crimes charged. There is no evidence that the lawyer knew in advance that, whatever the consequence, Bartelho—having freely testified to drug distribution—would then draw the line at where he got the drugs.<sup>1</sup> Bartelho made a choice—after

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<sup>1</sup> Bartelho asserts in his § 2255 motion that his lawyer did know, but that assertion is not itself admissible evidence, and nowhere does it appear that Bartelho has admissible proof. See Barrett v. United  
(continued...)

being advised of the consequences—to refuse to answer. It is his problem, not his lawyer’s nor the court’s. Moreover, in the first trial Bartelho succeeded with this stratagem—the government did not press the issue. It was therefore not “ineffective” for defense counsel to attempt the same gambit again in the second trial.

Finally, the consequence of Bartelho’s refusal to answer was only to have the jury disregard his testimony. It did not change any of the other testimony or cross-examination in the trial. Thus, if Bartelho is saying that his lawyer should never have put him on the stand in the first place, that is exactly what the striking of testimony accomplished. Bartelho seems to be saying that his lawyer should have put him on the stand and asked him questions about all the topics except the source of his money. To have done so would certainly have raised questions in the jury’s mind. Moreover, once Bartelho took the stand and gave exculpatory testimony, I surely would have permitted the government to inquire about his income sources. Thus, the crisis would have occurred in any event. There was no inadequate performance by the lawyer.

**(b) *Out-of-court Statements by Accomplice***

At the first trial, the government called accomplice Van Bever believing he was a cooperating witness. After Van Bever answered some preliminary questions, however, he made an outburst and refused to testify further. When it was Bartelho’s turn to put on his defense case, his lawyer called Van Bever to testify, but Van Bever continued to refuse to testify. Van Bever’s out-of-court statements were then admitted in redacted form. Before that, I first inquired specifically of both the defense lawyer and Bartelho himself whether they appreciated the risks of the strategy being pursued.

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<sup>1</sup> (...continued)  
States, 965 F.2d 1184, 1195 (1st Cir. 1992).

We discussed the risks on the record. Bartelho told me that he had talked with his lawyer at length about the strategy and agreed with it. I then held an *ex parte* conference with defense counsel, with the government's approval, where I asked defense counsel to explain further the strategy defense counsel was employing in using these statements, which were at least in significant part incriminating, although in other respects they were contradictory and exculpatory. The statements then were admitted.

At the second trial, the lawyers at first agreed that Van Bever's out-of-court statements could be read to the jury, as at the first trial. Later during the second trial, however, defense counsel reported that his client would not stipulate that Van Bever was unavailable. Because defense counsel had told the Assistant United States Attorney that Van Bever need not be called, he had not been transported from his out-of-state place of imprisonment. He was, therefore, "unavailable" in terms of the trial time. Nevertheless, I arranged for a telephone conference with Van Bever (in prison in Lewisburg, Pennsylvania), and with government counsel, defense counsel and Van Bever's counsel (present in court). In response to questions, Van Bever stated twice that he would not testify even if brought to Portland. I then ruled that he was unavailable. Bartelho's lawyer sought, along with the Assistant United States Attorney, to have Van Bever's out-of-court statements admitted into evidence. I admitted them after redaction.<sup>2</sup> Bartelho contends that his lawyer's performance here was deficient and deprived him of Sixth Amendment rights to confront and cross-examine Van

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<sup>2</sup> Two statements were the subject of disagreement between the government and the defendant, and I admitted them over objection. Bartelho challenges their use here, but the short and final answer to that challenge is that the First Circuit has already held that admission of these particular Van Bever statements was harmless to the trial's outcome. See Bartelho, 129 F.3d at 669-70. If admission of the statements was harmless, then even if the lawyer's conduct was below the standard of adequacy, it was not prejudicial to the defendant. See Strickland, 466 U.S. at 687.

Bever. He contends that his lawyer should have objected to all the Van Bever out-of-court statements on the basis that they were untrustworthy and unreliable and because Van Bever was not unavailable under Fed. R. Evid. 804(a)(2).

The record is clear that Bartelho wanted Van Bever's out-of-court statements to come in and only now that he is convicted does he regret that earlier tactical decision. I explored with Bartelho and his lawyer at the first trial the risks of the trial strategy being pursued. The lawyer assured me then that he had consulted fully with his client about it and that they had very few options available in the defense case. Bartelho affirmatively stated to me his agreement with this strategy on the record at the first trial. Tr. at Supp. Vol. II-A at 7 120-8 12. Bartelho's argument, therefore, fails for two reasons: first, he voluntarily agreed to the procedure, and second, it was a conscious and reasonably chosen trial strategy. See Strickland, 466 U.S. at 687, ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"). It was a risky strategy, but the odds were stacked heavily against Bartelho, and his lawyer needed whatever he could get to provide room for argument to the jury. Included within the Van Bever statements were many contradictions and inconsistencies that he could use in closing argument, notwithstanding the fact that Van Bever also corroborated the government's case against the defendant as testified to by many other witnesses.

I make the following additional observation. Van Bever was in fact unavailable. He had not been transported into Maine from his Pennsylvania prison location because the government reasonably relied upon the defendant lawyer's assertion that he would not require his presence. That was not ineffective assistance of counsel. Van Bever had refused to testify at the first trial in the face of a direct order from me. At that trial Bartelho knew and acquiesced in the procedure of providing

the written out-of-court statements and his lawyer could reasonably expect the same procedure would be acceptable at the second trial. Once he learned that Bartelho would not stipulate to the unavailability of Van Bever, he notified the government and the court. At that point I was confronted with a situation where Van Bever had twice refused my direct order to testify at the first trial (contempt was hardly a realistic sanction given the length of the prison sentence he was already serving). Before I took emergency measures—if they were even available—to get him to the second trial or consider a mistrial, I wanted to know whether the situation had changed. What I learned in the conference call directed to Van Bever in Lewisburg, Pennsylvania, was that he had not changed his position about refusing to testify. I concluded, therefore, that the unavailability standard had been met. Bartelho has offered no basis upon which to question that conclusion, except to suggest that I should have imposed a penalty the first time Van Bever refused to testify and that the Assistant United States Attorney was somehow involved in procuring Van Bever's unavailability because Van Bever in the conference call referred to needing his lawyer to speak to AUSA Murphy. That is too slim a reed upon which to rest any assertion that the government procured Van Bever's unavailability. In fact, the government called Van Bever at the first trial and confronted in obvious surprise his unwillingness to testify. Live testimony from Van Bever would have been better for the government's case than the redacted out-of-court statements.

I conclude, therefore, that Thomas Bartelho is not entitled to relief on any of the grounds asserted and that no evidentiary hearing is required. Bartelho had a fair trial. His lawyer worked tirelessly to defend him, but the evidence was overwhelming and damning. He was properly and fairly convicted. The motion is **DENIED**.

**SO ORDERED.**

**DATED THIS 3RD DAY OF JANUARY, 2000.**

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**D. BROCK HORNBY**  
**UNITED STATES CHIEF DISTRICT JUDGE**