

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA, )  
)  
)  
v. ) Criminal No. 98-3-B  
)  
KENNETH MORGENSTERN, )  
)  
Defendant )

**RECOMMENDED DECISION ON PETITIONER'S  
MOTION PURSUANT TO 28 U.S.C. § 2255**

Kenneth Morgenstern, who is serving an 85-month sentence for armed bank robbery and conspiracy, filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 on November 12, 1999. On November 16, 1999, the Magistrate Judge issued a Recommended Decision suggesting that the Motion be dismissed because of an appeal then pending in the First Circuit. Ultimately, the Motion was dismissed. (Docket No. 53.) On December 14, 1999, this Court received the mandate from the First Circuit Court of Appeals dismissing the then pending appeal for lack of jurisdiction as it had not been timely filed. On February 17, 2000, this Court issued an order granting Morgenstern's request that the earlier dismissal of the Motion be reconsidered. (See Docket No. 61.)

On February 2, 2000, I directed Morgenstern to supplement his original § 2255 Motion filed the previous November, which he did on February 14, 2000. (Docket No. 58). In his supplemental Motion, Morgenstern raised the identical five grounds raised in the earlier motion. Morgenstern begins by asserting that his lawyer failed to file an

appeal upon his request. Morgenstern also asserts four other ineffective assistance claims relating to his counsel's handling of the sentencing and other proceedings in the trial court. On July 27, 2000, I held an evidentiary hearing relating solely to ground one, trial counsel's alleged failure to file a requested appeal. The record of that hearing was further supplemented by the Stipulation of the parties filed August 14, 2000. (Docket No. 84.) Based upon the record now before me, I recommend that the District Court adopt the proposed findings of fact and **DENY** the Motion to Vacate in its entirety.

### **Proposed Findings of Fact**

Kenneth Morgenstern, represented by court appointed counsel, was sentenced and judgment entered on November 23, 1998, in the United States District Court in Bangor, Maine. He received a term of imprisonment of 85 months on his convictions for armed bank robbery and conspiracy. Morgenstern has never contested his guilt, but claims that certain issues were not fully developed at his sentencing hearing and that after the hearing his attorney ignored his instruction to take an appeal. Morgenstern admitted that he knew on the day of the sentencing that he had 10 days<sup>1</sup> to file an appeal based upon what the judge told him when his sentence was imposed.

The sentencing hearing in this case was fairly contentious due to an allegation made by the Government concerning a paper mache model of the crime scene allegedly constructed by Defendant while he was incarcerated awaiting sentencing. The Government felt that the model was evidence of the Defendant's state of mind and the

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<sup>1</sup> Although not raised by either counsel, my review of a 1998 calendar suggests that December 9<sup>th</sup> was the eleventh day of the appeal period, excluding Thanksgiving and weekends, as is the procedure under Rule 45(a). The clerk's office routinely allows three additional days for mailing, even on notices of appeal, pursuant to Rule 45(e). Furthermore, pursuant to the Rules of Appellate Procedure, Rule 4(b)(4), the District Court could have extended the time to file up to 30 days upon a finding of either excusable neglect or good cause, even if the time period for appeal had expired on December 9, 1998. For purposes of these findings, I do not find that Morgenstern's right of appeal was entirely foreclosed when he met with his attorney on December 9, 1998.

defense did not think the Court should consider it. This issue is not the subject of this motion, but it does provide the background for the sentencing proceedings. Immediately following those proceedings, which lasted for approximately forty-five minutes, the defense attorney left the courthouse and did not discuss with the Defendant his right to appeal the proceedings. The Defendant never suggested to his attorney that he wanted to take an appeal nor did the defense attorney consult with the Defendant about his right of appeal at this time.

Morgenstern next saw his attorney at his state court proceedings which took place on December 9, 1998. There was no proven contact between the Defendant and his attorney in the interim. The Defendant and his attorney agree that the matter of an appeal of the federal sentence was discussed on December 9<sup>th</sup>. The two disagree about what was said. Defendant's position is that he instructed the attorney to take an appeal of his sentence. He further asserts that the attorney assured him that the time period had not yet elapsed even though Defendant expressed his concern about the 10-day limitation. According to Defendant, the attorney told him that he would file the appeal and that he would investigate how the state conviction would affect the appeal.

According to the defense attorney's version of the December 9<sup>th</sup> meeting, he was never instructed to file an appeal. The attorney agrees that they discussed the state court conviction's impact upon the defendant's criminal history if indeed his case were ever remanded for resentencing under the guidelines. Defendant's attorney did not have a clear memory about what he may have told Defendant regarding whether or not the appeal period had elapsed by December 9<sup>th</sup>. Defendant maintains that defense counsel informed him there was a 30-day appeal period, but Defendant also concedes he knew

this was inaccurate because he remembered the judge had informed him of a 10-day period.

Defense counsel believed Defendant was relatively satisfied with the outcome because the state court sentencing had been delayed until after the federal case, thereby insuring that the sentences would run concurrently. Defense counsel understood that Morgenstern did not wish to pursue a direct appeal of his federal sentence. Based upon subsequent events, most significantly the letter from Defendant to counsel on February 8, 1999, I find counsel's version of events to be credible.

After the state court appearance, Morgenstern was in transit for approximately one month until he was permanently assigned to the federal prison facility in South Carolina. Finally on January 19, 1999, Defendant wrote to his attorney thanking the attorney for his previous service and requesting assistance in obtaining discovery materials. The contents of that first letter are limited as they relate to the issue of an appeal. Defendant wrote "[a]nd with my criminal history category higher no [sic] with those state charges I think the appeal would only hurt me, unless you know something I don't." (Def. Ex. # 1.) No other mention was made of an appeal. There was nothing in the letter to suggest that Morgenstern believed an appeal was pending or that he was directing his attorney to file an appeal at this point in time.

In that letter, Morgenstern made reference to the fact that "towards the end" of the attorney client relationship he and his attorney had become better friends. That reference suggests to me that Morgenstern thought that his relationship with defense counsel was at an end, in contrast to Defendant's testimony at the time of the hearing that when he wrote the letter he thought defense counsel was actively pursuing an appeal of his case. In fact

there had been some initial animosity between the two individuals. At one point in time the attorney had moved to withdraw from the case when the Defendant had requested new counsel. The court refused to allow the withdrawal and apparently the differences were resolved. The differences between the two occurred during the summer of 1998 and were no longer as apparent in November 1998, at the time of the sentencing hearing. The letter certainly suggests that all differences had been resolved.

On February 8, 1999, counsel received a second letter from Defendant unequivocally requesting that an appeal be filed in his behalf. However, Defendant apparently recognized that an appeal might be impossible at that late date, and he also requested counsel file a “2241,” Defendant’s understanding of post-conviction relief. Defense counsel responded to that letter by letter dated February 11, 1999, informing Defendant that he would not be appointed counsel for any such “appeal.”<sup>2</sup> (Def. Ex. # 5.)

During the spring and summer of 1999, counsel communicated sporadically with Defendant. In spite of counsel’s letter of February 11<sup>th</sup>, Defendant continued to inquire about his “appeal.” However, the correspondence also suggests that Defendant confused a direct appeal with a Motion pursuant to § 2255 because he referenced a one year deadline at one point. (Def. Ex. # 3.) In any event, Morgenstern was aware that his co-defendant, Lafortune, had taken a direct appeal.

While incarcerated in the Spring of 1999, Morgenstern’s correspondence and testimony confirm that he spent a great deal of time doing legal research in the prison law library and became more conversant with issues that he might raise on appeal. His

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<sup>2</sup> Pursuant to the practice in this District, defense counsel who was appointed for trial purposes would have continued as court appointed counsel through the appeal period. However, the obligation does not continue indefinitely and counsel was correct in informing Defendant that *at that point in time* he was no longer court appointed counsel in the case.

communications during this time period encompassed not only defense counsel, but also the clerk of courts. It was from the clerk's office that he eventually received a blank notice of appeal in July, 1999. He then filed the untimely appeal to the First Circuit pro se. Until he took that action, no appeal had been filed with any court.

## **Discussion**

### ***1. Failure to File a Notice of Appeal***

Ineffective assistance of counsel claims in general are reviewed under the familiar two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Petitioner must show the Court that counsel's performance was deficient. *See id.* at 687. Petitioner must also show that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *See id.* at 691-92, 694. There is no requirement that the Court analyze these separate prongs in any particular order; a failure to show prejudice will suffice to defeat a particular claim, without reference to the level of counsel's performance. *See id.* at 697.

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

*Id.* at 689.

*Strickland* provides the proper framework for evaluating an ineffective assistance of counsel claim based on counsel's failure to file a notice of appeal. *See Roe v. Flores-Ortega*, 528 U.S. 470, —, 120 S. Ct. 1029, 1034 (2000). Prior to *Flores-Ortega* there was a conflict among the circuits regarding counsel's obligations to file a notice of

appeal. In the First Circuit, counsel's failure to file a notice of appeal without the defendant's knowledge or consent was per se deficient. *See United States v. Tajeddini*, 945 F.2d 458, 468 (1st Cir. 1991). That rule has been abrogated by the United States Supreme Court.

As a preliminary matter, application of either *Tajeddini* or *Flores-Ortega* necessarily implies a situation where the defendant has neither instructed counsel to file an appeal nor asked that no appeal be taken. In the present case, Morgenstern maintains that on December 9, 1998, he instructed defense counsel to take an appeal. If I believed that his assertion were true, the application of the *Flores-Ortega* analysis would be unnecessary. Counsel's failure to follow that explicit instruction would have resulted in the Defendant's forfeiture of his appeal rights. A defendant, by instructing counsel to perfect an appeal, objectively has indicated his intent to appeal and is entitled to a new appeal without any further showing. *See Flores-Ortega*, 120 S. Ct. at 1035 (citing *Rodriquez v. United States*, 395 U.S. 327, 331-332 (1969) and *Peguero v. United States*, 526 U.S. 23, 28 (1999)). I do not find that the December 9<sup>th</sup> meeting between Defendant and defense counsel resulted in an explicit instruction to perfect an appeal. Defendant did not instruct counsel to appeal until the letter of February 8<sup>th</sup>.

At the December 9<sup>th</sup> meeting, the two men discussed the perceived dangers associated with an appeal following state court convictions for other crimes. Defense counsel's "impression" after the December 9<sup>th</sup> meeting was that Morgenstern was relatively satisfied with the outcome in that they had succeeded in delaying the state court charges as long as possible. Morgenstern's conclusion after the December 9<sup>th</sup> meeting was that he did not want to appeal and face the risk of his state court convictions being

used against him. It was only after he conducted his further legal research at the prison law library that he actually decided that he wanted to return to the sentencing court. He was fully aware that the initial appeal period was a 10-day period and he never directly instructed his court appointed attorney to appeal until seventy-two days after judgment was entered.

Pursuant to *Flores-Ortega*, in those cases where defendant neither instructs counsel to file an appeal nor asks that no appeal be taken, the question of whether counsel has performed deficiently by not filing a notice of appeal is first addressed by determining whether counsel ever consulted with Defendant about an appeal. *See Flores-Ortega*, 120 S. Ct. at 1035. In this case that question is undoubtedly answered in the affirmative because both witnesses agreed there was a consultation about an appeal. I have found as a fact that it did not occur until December 9, 1998. Defense counsel skated dangerously close to creating a situation wherein I would have to make a determination as to whether his failure to consult with Defendant about an appeal was “professionally unreasonable.” However, the consultation did take place, albeit at the eleventh hour. There is nothing in the evidence to suggest that if defense counsel had consulted with Defendant about his appeal rights prior to December 9<sup>th</sup> the outcome would have been any different.

Because it would have been permissible for the sentencing judge to enhance the Defendant’s sentence at a new sentencing hearing conducted after a successful appeal if the Defendant were convicted of a state crime while his appeal was pending, I conclude that his counsel appropriately raised this issue with Defendant when they discussed the possibility of appeal. *See Wasman v. United States*, 468 U.S. 559, 560-61 & 571-72

(1984). With that possibility lurking in the background, Defendant chose not to instruct counsel to proceed with the appeal. Therefore, defense counsel's "impression" that there would be no appeal was entirely reasonable. Defendant was of the same mind at that point in time. The fact that Defendant changed his mind in early February does not render counsel's prior conduct ineffective.

## ***2. Other Claims of Ineffective Assistance***

Putting aside the allegations surrounding the notice of appeal, Defendant raises four other claims of ineffective assistance. He argues that counsel was ineffective when he failed to argue that the gun was only brandished, but not otherwise used in the commission of this offense, resulting in an improper sentencing enhancement. Next he argues that counsel should have realized that the weapon used was not considered a firearm under the federal law. Defendant also disputes counsel's failure to challenge the sentence enhancement he received based upon the value of the van used to commit the robbery. Finally, Defendant argues that his lawyer failed to thoroughly research his case. I will address his contentions in the order raised.

### **A. "Brandished" or "Otherwise Used"**

Morgenstern asserts that defense counsel should have objected to the PreSentence Investigation ("PSI") in that the report stated that "the firearm was pointed at several people and was not simply brandished during the robbery." (PSI ¶ 34.) Because of this level of use of a firearm, the base offense level was enhanced by six levels pursuant to the Sentencing Guidelines. Had Morgenstern simply brandished the firearm, the increase would have been only five levels. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(2). The issue he raises is identical to the one raised on appeal by his co-

defendant LaFortune. *See United States v. LaFortune*, 192 F.3d 157, 161-162 (1<sup>st</sup> Cir. 1999). Neither LaFortune nor Morgenstern has ever challenged the bank tellers' recitations of the events of the robbery. Even in his pleading under oath filed in support of this Motion (Docket No. 62, at p. 11), Morgenstern does not describe any additional facts he would have presented to the sentencing judge to demonstrate that the conduct described in the PSI was false.

The failure of Morgenstern's counsel to raise what ultimately turns out to be a meritless argument cannot demonstrate any prejudice. If the First Circuit has already held that the six level enhancement is appropriate for the co-defendant on the identical facts, there is no reasoned application of the law which would make it inapplicable to Morgenstern. His claim should be denied without any further hearing.

#### **B. Weapon Was Not a Firearm**

Morgenstern's next claim is equally unavailing. The evidence in this case established that the gun was a North American Arms black powder, percussion revolver that was small but fully operational. Morgenstern was never charged with possessing a "firearm" so the fact that this weapon does not meet the statutory definition of firearm under certain provisions of the United States Code is irrelevant. Morgenstern was charged solely under 18 U.S.C. §§ 2113(a) and (d), requiring the use of a "dangerous weapon." Even a toy gun can meet the statutory definition of dangerous weapon. *See United States v. Benson*, 918 F.2d 1, 3-4 (1<sup>st</sup> Cir. 1990). Defense counsel cannot be held deficient because he failed to raise an argument that has no merit.

Morgenstern's second argument concerning the "firearm" does have a certain logic to it. He points out that pursuant to Section 2B3.1(b)(2)(B) of the Sentencing

Guidelines he received a six level enhancement because a "firearm" was otherwise used, rather than a four level enhancement pursuant to Section 2B3.1(b)(2)(D) because a "dangerous weapon" was otherwise used. However, the Defendant fails to recognize that the definition of firearm found in the Sentencing Guidelines is not identical to the definition of firearm contained in the Gun Control Act of 1968. *Compare* 18 U.S.C. § 921(a)(3)(D) *and* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1, cmt. 1(e).<sup>3</sup> The Gun Control Act specifically excludes "antique firearms" from its coverage because Congress sought to avoid any undue imposition on gun collectors that the Act might otherwise create. *See United States v. Kirvan*, 86 F.3d 309, 313 (2d Cir. 1996). By contrast, the Guidelines's definition of firearm does not contain an exception for black powder pistols because

[g]iving more lenient sentences to antique-gun-toting defendants would not promote the legislative aim of insulating gun collectors from the regulatory scheme contained in the Gun Control Act. If anything, it might make this the preferred way to commit this type of crime. Quite plainly, armed robbery is not the sort of hobby Congress planned to protect when it exempted antiques from that statute's coverage.

*Id.* at 314.

The issue of the different definitions was mentioned at the time of Morgenstern's sentencing hearing. (Sentencing Tr. p. 13). All parties were aware that the Defendant was not receiving a 60-month consecutive sentence in this case because the weapon did not meet the statutory definition of firearm. However, the Court applied the Guidelines's definition of firearm to impose the enhancement to level six. Counsel's performance in this regard was not deficient because it was apparent that the Code's definition differed from the Guidelines's definition.

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<sup>3</sup> *See also* 18 U.S.C. § 921(a)(16)(C) (defining "antique firearm" to include any muzzle loading pistol designed to use black powder).

### **C. Value of the Stolen Van**

Morgenstern also complains that his defense attorney allowed the court to increase his offense level by one point under the Guidelines because the loss involved was more than \$10,000. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(6)(B). In order to arrive at a figure in excess of \$10,000, the PSI included not only the \$5,000 stolen from the bank, but also the value of the van used in the robbery. Morgenstern admits he stole the van the night before the robbery. He does not dispute that the value of the van was in excess of \$10,000. He also admits that in some circumstances controlling precedent requires the court to include the value of the stolen vehicle in the loss calculus. *See United States v. Cruz-Santiago*, 12 F.3d 1, 2-3 (1<sup>st</sup> Cir. 1993).

Morgenstern's argument is that his case is readily distinguishable from other bank robbery cases that have allowed this one point enhancement because he, unlike the defendant in the *Cruz-Santiago* case, did not abandon the van with the windows rolled down, the door unlocked, and the key in the ignition. Morgenstern left the van carefully parked in a safe apartment building parking lot with the doors locked and the keys nowhere to be found. He asserts that he was sure the vehicle would soon be either towed away or discovered by the police and therefore it would eventually be returned, undamaged, to its rightful owner.

It is true that the facts in *Cruz-Santiago* are different from the facts in this case. In that case the robbers seized the car at gunpoint outside the bank and drove from the scene of the crime to a second getaway car. In this case, the robbers stole the van the night before from the parking lot of a convenience store while the operator was inside the store and used it as their getaway vehicle the next morning when they robbed the bank.

The First Circuit emphasized that the intent to *permanently* deprive the owner of his or her rightful ownership of property was not the crucial factor to consider in assessing the loss calculation. *See Cruz-Santiago*, 12 F.3d at 3. The crucial consideration is that the Guidelines key “punishment to risk of serious loss.” *Id.* The use of the vehicle as the getaway car and its subsequent abandonment, whether locked or unlocked, creates an inherent risk of serious loss.

Defense counsel raised the issue of including the van’s value in the loss calculus at the time he filed objections to the PSI. He then researched the facts and the law on this issue and ultimately conceded that the value should be included. I do not find counsel’s performance to have been deficient and his concession to include the value of the van in the amount of loss did not result in prejudice to Morgenstern’s case.

#### **D. Failed to Thoroughly Research the Case**

Finally, Morgenstern asserts at the end of his petition that his counsel failed to thoroughly research the case. In spite of my admonition that he needed to present facts under oath to support all of his allegations and in spite of the fact that he was given an opportunity to supplement his original motion, (See Docket No. 57), Defendant has not specified how his attorney failed in his research or what he should have discovered had he conducted adequate research. Under the circumstances, this aspect of his claim should be denied as conclusory. *See Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1<sup>st</sup> Cir. 1990).

#### **Conclusion**

Based upon the foregoing, I recommend that the Court **DENY** the Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255.

**NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated: November 29, 2000

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Margaret J. Kravchuk  
U.S. Magistrate Judge

U.S. District Court  
District of Maine (Bangor)

CRIMINAL DOCKET FOR CASE #: 98-CR-3-ALL

USA v. MORGENSTERN  
02/10/98

Filed:

Other Dkt # 1:98-m -00006

Case Assigned to: Judge GEORGE Z. SINGAL

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defendant  
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Pending Counts:

Disposition

18:2113A.F BANK ROBBERY BY  
FORCE OR VIOLENCE  
(1)

Imprisonment of 85 months on  
Count One and 60 months on  
Count Two, to be served  
concurrently. Deft remanded to  
custody of US Marshal;  
Supervised release of 60 months  
on Count One and 36 months  
on Count Two, to be served  
concurrently. Special  
Assessment of \$200; Restitution  
of \$6,866, joint & several  
w/co-deft.  
(1)

18:371.F CONSPIRACY TO DEFRAUD  
THE UNITED STATES  
(2)

Imprisonment of 85 months on  
Count One and 60 months on  
Count Two, to be served  
concurrently. Deft remanded to  
custody of US Marshal;  
Supervised release of 60 months  
on Count One and 36 months  
on Count Two, to be served  
concurrently. Special  
Assessment of \$200; Restitution  
of \$6,866, joint & several  
w/co-deft.  
(2)

Offense Level (opening): 4

Terminated Counts:

NONE

Complaints

Disposition

Bank Robbery - Counts 1 & 2  
[ 1:98-m -6 ]

DAVID HOLIS LAFORTUNE (2)  
aka  
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Pending Counts:

NONE

Terminated Counts:

Disposition

18:2113A.F BANK ROBBERY BY  
FORCE OR VIOLENCE  
(1)

Imprisonment of 97 months on  
Count 1 and 60 months on Count  
2, to be served concurrently.  
Supervised Release of 60  
months on Count 1 and 36 months  
on Count 2, to be served  
concurrently. Special  
Assessment of \$200.  
Restitution of \$10,351.00;  
AMENDED Restitution Amount to  
\$6,866.00; AMENDED  
Restitution to Bangor Savings  
Bank reduced to \$2,  
655.14, for a total of \$2,  
830.14.  
(1)

18:371.F CONSPIRACY TO DEFRAUD  
THE UNITED STATES  
(2)

Imprisonment of 97 months on  
Count 1 and 60 months on Count  
2, to be served concurrently.  
Supervised Release of 60  
months on Count 1 and 36 months  
on Count 2, to be served  
concurrently. Special  
Assessment of \$200.  
Restitution of \$10,351.00;  
AMENDED Restitution Amount to  
\$6,866.00; AMENDED  
Restitution to Bangor Savings  
Bank reduced to \$2,  
655.14, for a total of \$2,

830.14.  
(2)

Offense Level (disposition): 4

Complaints

Disposition

Bank Robbery - Counts 1 & 2  
[ 1:98-m -6 ]

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