



money returned to the Bank by the FBI. Specifically, LaFortune argued that the \$6,691.00 restitution order should be reduced by \$4,035.86 for a new restitution order in the amount of \$2,830.14. At the time LaFortune filed his motion, he was subject to an amended judgment. This amended judgment featured a sentence of 97 months imprisonment and an obligation to pay restitution to two of the victims. With regard to the amount of restitution, the amended judgment stated:

IT IS FURTHER ADJUDGED that the defendant make restitution to Car Quest, in the amount of \$175.00, and to Bangor Savings Bank, in the amount of \$6,691.00, for a total of \$6,866.00, to be paid on a joint and several basis with the other defendant in this case ... It is understood that the proceeds of this robbery that were seized from the defendants (\$4,035.86), now in possession of the Federal Bureau of Investigation, will be returned to the bank after all appeals have been exhausted, at which time the restitution amount will be reduced accordingly. Any amount that the defendant is unable to pay immediately shall be due in installments to commence 30 days after the date of this judgment. Payment shall be due during the period of incarceration. After release from incarceration and during his period of supervised release, any remaining amount owed shall be paid in monthly installments to be determined in amount by the [probation] officer.

(Am. Mem. of Sentencing J., Jan. 12, 1999, at 3-4.) The Court sentenced Morgenstern to the same amount of restitution. For both Defendants, payment of restitution was due in full immediately. On May 25, 1999, the FBI transferred the \$4,035.86 to the Bank. On July 19, 2000, having received no response from the Government, the Court granted LaFortune's motion and entered a second amended judgment on behalf of LaFortune, with a new restitution order in the amount of \$2,830.14.

Subsequent to the Court issuing the seconded amended judgment for Defendant LaFortune, his co-defendant, Morgenstern, filed his own motion for modification of the order of restitution for the same reasons. This time, the United States responded. The Government claims that it never received a copy of Defendant LaFortune's motion due to

an internal administrative error. Therefore, the Government's attorneys were unaware of the motion until after the Court issued the second amended judgment of LaFortune.

Now, the Government objects to Defendant Morgenstern's motion and moves to vacate Defendant LaFortune's second amended judgment.

## II. DISCUSSION

The Government moves to vacate pursuant to Fed. R. Crim. P. 36, which allows the Court to correct clerical mistakes at any time. Arguing that it was improper for the Court to grant Defendant LaFortune's motion, the Government correctly points out that 18 U.S.C. § 3663(g), the statute upon which LaFortune's motion was based, was repealed in 1996. Furthermore, the Government contends that it amounts to a clerical mistake for the Court to reduce the restitution order by the amount transferred by the FBI. Rather, that payment of \$4,035.86 has been deposited in a joint and several restitutionary account managed by the Department of Justice on behalf of co-Defendants. "When the full amount of the aggregate loss has been received from all sources and has been distributed to the victims, then the account is closed." (Government's Mem. at 3 (Docket #89).) According to the Government, restitution payments reduce the amount owed to the account, but do not reduce the amount of the actual restitution sentence. This approach seems logical. Otherwise, every time a contribution is made to the restitutionary account, a defendant could move for a reduction of the restitution order. This would be, and is, an unnecessary burden on the Court over an issue of accounting. Furthermore, the FBI had not conveyed any of the recovered funds to the Bank until after the Court rendered judgment against both Defendants.

Instead of countering the Government’s argument that the Court merely made a clerical error, Defendant LaFortune argues that the entire restitution sentence is invalid because the Court did not set out a monthly payment schedule for him, as required by United States v. Kinlock, 174 F.3d 297 (2<sup>nd</sup> Cir. 1999), but instead delegated that responsibility to the probation officer. See id. at 300.<sup>1</sup> Kinlock and the cases upon which it relies, however, only apply to the federal courts within the Second Circuit.<sup>2</sup>

This Court operates within the First Circuit, which has not imposed such a requirement on the district courts. See United States v. Merric, 166 F.3d 406, 409 (1<sup>st</sup> Cir. 1999). In Merric, the First Circuit held that a district court may delegate the responsibility of setting a payment schedule to the probation officer, so long as the Court expressly states that it maintains final authority over any repayment schedule crafted by the probation officer. See id. When reviewing the district court’s judgment in Merric, the First Circuit found such a statement lacking, so the First Circuit remanded it “so that the district judge can insert into the judgment a phrase or sentence making this reservation of authority explicit.” See id. In the present case, this Court has not made

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<sup>1</sup> This requirement, that a judge rather than a probation officer be responsible for establishing restitution payment schedules, is based on statutory language stating:

Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid . . . .

18 U.S.C. § 3664(f)(2). Section 3572(d) reads:

(1) A person sentenced to pay a fine or other monetary penalty, including restitution, shall make such payment immediately, unless, in the interest of justice, the court provides for payment on a date certain or in installments. If the court provides for payment in installments, the installments shall be in equal monthly payments over the period provided by the court, unless the court establishes another schedule.

(2) If the judgment, or, in the case of a restitution order, the order, permits other than immediate payment, the length of time over which scheduled payments will be made shall be set by the court, but shall be the shortest time in which full payment can reasonably be made.

18 U.S.C. § 3572(d).

<sup>2</sup> Other Circuits have adopted rules regarding restitution similar to the Second Circuit’s. See, e.g., United States v. Coates, 178 F.3d 681, 684 (3<sup>rd</sup> Cir. 1999); United States v. Mohammad, 53 F.3d 1426, 1438-39 (7<sup>th</sup> Cir. 1995); United States v. Albro, 32 F.3d 173, 174 (5<sup>th</sup> Cir. 1994).

such a reservation of authority explicit. Therefore, the Court hereby decrees that it withholds final authority over any payment schedules that Defendants' probation officers have implemented or may implement in the future.

As a final matter, Defendant LaFortune contends that it is an injustice that his current payment schedule demands that he contribute 50% of his prison wages to the restitutionary account, when the Second Circuit stated that garnishing 10% of a prisoner's income was satisfactory in Kinlock. See Kinlock, 174 F.3d at 301. Again, Kinlock is not binding on this Court, and in any event, Kinlock does not require district courts to limit repayment fees to no more than 10% of an inmate's income. See id. As an evidentiary issue, Defendant LaFortune's current payment schedule – which he claims appropriates 50% of his earnings – is not before the Court. Moreover, Defendant LaFortune has not actually moved to modify his payment schedule. Rather, LaFortune has raised this as an argument against Government's motion. Because this matter is not properly before the Court, the Court declines to make a decision on whether or not the payment schedule should be altered.

Returning to Defendant LaFortune's initial request, that the Court reduce the amount of his restitution order, LaFortune has not addressed the Government's valid arguments against reducing the restitution amount. Because the Court finds that it made a clerical mistake in the second amended judgment of Defendant LaFortune, the Court shall issue a third amended judgment, clarifying that the correct amount of restitution is \$6,866.00.

It remains the Court's understanding that the outstanding amount owed by the Defendants to their restitutionary account is approximately \$3,028.75. This currently



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