No. 11-10384

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	
	)	
v.	)	District Court Case No.
	)	2:06-CR-186-PMP-PAL
FREDRICK RIZZOLO,	)	NEVADA, LAS VEGAS
	)	
Appellant,	)	
_____	)	

APPELLEE'S RESPONSE IN OPPOSITION TO APPELLANT'S "EMERGENCY MOTION FOR RELEASE PENDING APPEAL OF REVOCATION OF SUPERVISED RELEASE"

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UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	APPELLEE'S RESPONSE IN
v.	)	OPPOSITION TO "EMERGENCY
	)	MOTION FOR RELEASE
FREDRICK RIZZOLO,	)	PENDING APPEAL OF
	)	REVOCATION OF
Appellant.	)	SUPERVISED RELEASE"
	)	

Pursuant to Rule 27(a)(3) of the Federal Rules of Appellate Procedure, Appellee United States of America hereby responds to and opposes Appellant's "Emergency Motion for Release Pending Appeal of Revocation of Supervised Release." Court of Appeal Docket Number ("CA Doc. No.") 4 (Sep. 16, 2011) (the "motion for release"). This response is based upon the attached memorandum of points and authorities, and upon the files and records of this case.

Dated this 11th day of October, 2011.

DANIEL G. BOGDEN
United States Attorney
ROBERT L. ELLMAN
Chief, Appellate Division
/s/ Peter Levitt
PETER S. LEVITT
Assistant United States Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

A. Procedural History

On January 25, 2007, after defendant Fredrick Rizzolo had pled guilty to a criminal information charging Conspiracy to Defraud the United States, in violation of 18 U.S.C. § 371, the district court sentenced him to 12 months and one day of imprisonment, to be followed by three years' supervised release. District Court Docket Number ("DC Doc. No.") 42 (Judgment in a Criminal Case, entered Jan. 25, 2007).

Rizzolo's supervised release included the following three conditions:

(1) Rizzolo "shall submit a truthful and complete written report" to his probation officer each month (Standard Condition No. 2, DC Doc. No. 42 at 3);

(2) Rizzolo "shall be prohibited from . . . negotiating or consummating any financial contracts without the approval of the probation officer" (Special Condition No. 4, DC Doc. No. 42 at 4); and

(3) Rizzolo "shall cooperate and arrange with the Internal Revenue Service to pay all past and present taxes," file accurate tax returns and "show proof of service of same to the probation officer." Special Condition No. 6, DC Doc. No. 42 at 4.

On or about April 4, 2008, Rizzolo was released from federal custody and began serving his term of supervised release. DC Doc. No. 389 at 1.

On January 3, 2011, the United States Probation Office filed a petition for summons of offender under supervision. DC Doc. No. 389 (the "petition"). The

petition alleged that Rizzolo had violated Standard Condition No. 2 (requiring truthful written reports each month), and Special Condition No. 4 (requiring approval before any financial contract). *Id.* at 1-2.

On April 1, 2011, the Probation Office filed an addendum to the petition. DC Doc. No. 425 (the "addendum"). The addendum cited seven additional violations of Standard Condition No. 2, and two additional violations of Special Condition No. 4. *See id.* at 1. The addendum also alleged 12 violations of Special Condition No. 6 (requiring cooperation with and accurate reports to IRS). *See id.* at 2.

On March 29, 2011, and from May 9-11, 2011, the district court conducted an evidentiary hearing on petition for revocation of supervised release. *See* DC Doc. Nos. 423 (Mar. 29, 2011), 435 (May 9, 2011), 436 (May 10, 2011), 437 (May 11, 2011) (minute orders).[1]

On July 20, 2011, the district court found by a preponderance of the evidence that Rizzolo had violated the three supervised release conditions set forth in the petition and addendum. DC Doc. No. 461 at 14 (partial transcript of hearing, attached as Exhibit 1); *see also* DC Doc. No. 459 (minute order). The court

[1] The transcripts from the three days of hearings from May 9-11, 2011, are set forth at DC Doc. Nos. 441-43.

revoked Rizzolo's supervised release and sentenced him to nine months' imprisonment, to be followed by two years of supervised release. Ex 1 at 14; DC Doc. No. 460 at 2-3 (Judgment in a Criminal Case). The court ordered Rizzolo (who was not in custody) to surrender to the Bureau of Prisons ("BOP") on September 14, 2011. Ex. 1 at 21; DC Doc. No. 460 at 2.

On July 28, 2011, Rizzolo filed a notice of appeal. DC Doc. No. 462.[2]

On September 2, 2011, Rizzolo filed in district court an "Emergency Motion to Stay Surrender . . . Pending Appeal of Revocation of Supervised Release." DC Doc. No. 472. The Government filed an opposition (DC Doc. No. 474), and, on September 12, 2011, the district court denied without comment Rizzolo's emergency motion for release pending appeal. DC Doc. No. 476.

Later in the day on September 12, 2011, Rizzolo filed in district court an "Emergency Motion for Reconsideration" of the district court's denial. DC Doc. No. 477.

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[2] According to the briefing schedule, the Opening Brief is due October 27, 2011, and the Answering Brief is due November 28, 2011. Court of Appeals Docket Number ("CA Doc. No.") 1. As discussed below, the undersigned will not oppose any motion to expedite either these deadlines or (should this Court deem it necessary) the date set for oral argument.

On September 13, 2011, the district court denied without comment Rizzolo's emergency motion for reconsideration. DC Doc. No. 478.

On September 14, 2011, Rizzolo surrendered to BOP. CA Doc. No. 4 at 5.[3]

On September 16, 2011, Rizzolo filed an "Emergency Motion for Release Pending Appeal . . . ." in this Court. CA Doc. No. 4.

On September 20, 2011, this Court ordered the district court to state the reasons why it had denied Rizzolo's motion, and allowed Rizzolo ten days to file a supplemental memorandum in response to the district court's order. DC Doc. No. 480 (Government then has 10 days to respond; Rizzolo has seven days to reply).

On September 22, 2011, the district court issued an order stating its reasons for denying Rizzolo's motion for release pending appeal. DC Doc. No. 479.

On October 3, 2011, Rizzolo filed his "Supplemental Memorandum in Support of Motion for Bail Pending Appeal . . . ." CA Doc. No. 8.

B. Standard of Review

"In reviewing a district court's denial of release pending appeal we consider the district court's determinations de novo . . . [and] review the district court's

[3] According to the BOP's website (www.bop.gov), Rizzolo's currently projected release date is June 12, 2012.

underlying factual determinations for clear error." *United States v. Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003) (citations omitted).

C. Analytical Framework

Defendants who are convicted and sentenced to imprisonment are presumptively not entitled to release pending appeal. *Garcia*, 340 F.3d at 1015; *United States v. Koon*, 6 F.3d 561, 567 n. 1 (9th Cir. 1993); *United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985); 18 U.S.C. § 3143(b)(1) (absent exception, person convicted and sentenced to imprisonment "*shall* . . . be detained") (emphasis added). To rebut Section 3143(b)(1)'s "decidedly stringent" standard, *United States v. Colletta*, 602 F. Supp. 1322, 1326 (E.D. Pa. 1985) (citing *United States v. Miller*, 753 F.2d 19, 23 (3rd Cir. 1985)), a convicted defendant must establish: (A) by clear and convincing evidence that he "is not likely to flee or pose a danger to the safety of any other person or the community if released[;]" *and* (B) that "the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in . . . reversal." 18 U.S.C. § 3143(b)(1).

But unlike the defendant who seeks release under Section 3143(b)(1) (i.e., release pending appeal from an initial conviction and sentence), Rizzolo has already served his custodial sentence, violated his terms of supervised release, and been sentenced to another term of imprisonment, based on those post-release

violations. Rizzolo, therefore, must rebut a presumption even stricter than Section 3143(b)(1)'s "decidedly stringent" requirements. *Colletta*, 602 F. Supp. at 1326.

In order to secure release pending appeal from his supervised release revocation, Rizzolo must make a "showing of *exceptional circumstances*." *United States v. Bell*, 820 F.2d 980, 981 (9th Cir. 1987) (emphasis added) (adopting standard set forth in *United States v. Lacy*, 643 F.2d 284, 285 (5th Cir. 1981)); *see also United States v. Loya*, 23 F.3d 1529, 1530-31 (9th Cir. 1994) (*Bell*, which specifically applied to bail pending appeal of probation revocation, also applies to bail pending appeal of supervised release revocation). "Examples of exceptional circumstances include: (1) raising [a] substantial claims upon which [b] the appellant has a high probability of success; (2) a serious deterioration of health while incarcerated; and (3) any unusual delay in the processing of the appeal." *Bell*, 820 F.2d at 981 (citation omitted). The "exceptional circumstances" requirement creates a presumption of detention that is "*substantially stricter* that the provisions of 18 U.S.C. § 3143." *Loya*, 23 F.3d at 1531 (emphasis added).

D. Rizzolo Falls Far Short of Establishing the "Exceptional Circumstances" Required For Release Pending Appeal of His Supervised Release Revocation

The "exceptionally demanding test" forecloses Rizzolo's release pending appeal – not of his felony fraud conviction, but of his post-sentence, post-release revocation of supervision. *Loya*, 23 F.3d at 1531 ("exceptional circumstances" requirement yields 'extremely demanding test"). While not claiming his health will "seriously deteriorate" during his nine-month custodial sentence, Rizzolo nevertheless asserts "exceptional circumstances" exist because (1) "he raises substantial claims . . . upon which he has a high probability of success," CA Doc. No. 4 at 10, and (2) some unspecified form of "unusual appellate delay" will result in his having served his entire sentence before appellate disposition. *Id.*; *see also id.* at 10-11 (to support what he calls the "inevitable mootness doctrine," Rizzolo cites *United States v. Duclos*, 382 F.3d 62, 65 (1st Cir. 2004), and *United States v. Pacheco*, 912 F.2d 297, 305 (9th Cir. 1990)).

The district court correctly found that the "circumstances" touted by Rizzolo were far from "exceptional." After a vigorously-contested, four-day evidentiary hearing, the court was confident that Rizzolo had raised nothing that was either "substantial" or that stood a "high probability of success" on the merits:

> The Court denied Defendant Rizzolo's request for bail pending appeal because he failed to meet his burden of demonstrating extraordinary

> circumstances. Rizzolo has not raised substantial claims upon which he has a high probability of success. This Court held an evidentiary hearing and made factual findings regarding three separate violations of Rizzolo's terms of supervised release. The Court needed to find these violations only by a preponderance of the evidence, and the Court's decision to revoke Rizzolo's supervised release will be reviewed for an abuse of discretion. 18 U.S.C. § 3583(e); U.S. v. Perez, 526 F.3d 543, 547 (9th Cir. 2008); U.S. v. Lomayaoma, 86 F.3d 142, 146 (9th Cir. 1996) . . . . Rizzolo failed to meet his burden of establishing extraordinary circumstances making bail pending appeal proper. The Court therefore denied his motion.

DC Doc. No. 479 at 2.

The district court also rejected Rizzolo's attempt to manufacture "unusual delay in the processing of the appeal" (*Loya*, 23 F.3d at 1531), from speculation that he might complete his sentence before this Court resolves his appeal:

> Rizzolo also has not established any unusual delay in the processing of the appeal that amounts to an extraordinary circumstance. Although Rizzolo's appeal may become moot if it is not resolved before his term of incarceration is completed, that is the case for any criminal defendant whose supervised release is revoked but who is not given a lengthy prison term. Rizzolo's position would amount to automatic bail for any violation of supervised release resulting in a relatively short prison term, instead of placing the burden on the violator to overcome the presumption of no bail pending appeal by showing extraordinary circumstances. There is nothing extraordinary about Rizzolo's situation, nor has Rizzolo identified any unusual delay with his appeal. Rizzolo's claim of unusual delay is particularly unavailing where, in this Court's view, the likelihood of prevailing on appeal is low. Furthermore, Rizzolo has other options available to him, such as requesting expedited review from the Court of Appeals.

DC Doc. No. 479 at 2. Based on the totality of the evidence, therefore, the court discerned no "exceptional circumstances" to warrant bail pending appeal of a supervised release revocation. *Id.*

The district court's stated rationale amply supports its conclusion – no "extraordinary circumstances" rebut the strict presumption in favor of Rizzolo's detention. *See Garcia*, 340 F.3d at 1018 (by leaving the term "exceptional reasons" undefined, "Congress placed broad discretion in the district court to consider all of the circumstances of the case before it can draw upon its broad 'experience with the mainsprings of human conduct'") (quoting *Mozes v. Mozes*, 239 F.3d 1067, 1073 (9th Cir. 2001)). To show that his appellate issues are "substantial" despite the district court's contrary assessment, Rizzolo's supplemental memorandum: (1) compares his "sufficiency of the evidence" challenge to the one deemed substantial in *United States v. DiSomma*, 951 F.2d 494 (2d Cir. 1991); and (2) complains that the civil plaintiffs in the underlying litigation were permitted to speak at Rizzolo's sentencing. CA Doc. No. 8 at 4-5. But while the "sufficiency of the evidence" challenge in *DiSomma* "went to the very fact that *caused* [the defendant] to be subject to mandatory detention – that is, whether he actually *committed* a crime of violence," *United States v. Herrera-Soto*, 961 F.2d 645, 647 (7th Cir. 1992) (distinguishing *DiSomma*), Rizzolo summarily

protests that the body of evidence adduced at his four hearings somehow fails to establish, by a simple preponderance, a violation of any *one* of his supervised release conditions. CA Doc. No. 4 at 8 (challenging whether evidence "was sufficient"), 10 ("respectfully submitt[ing]" that these arguments are "substantial" and stand a "high probability of success"); *see also United States v. Spangle*, 626 F.3d 488, 497 n.3 (9th Cir. 2010) ("A court may revoke a term of supervised release and sentence a defendant to a term of imprisonment if the court finds by a preponderance of the evidence that the defendant violated a condition of his supervised release. 18 U.S.C. § 3583(e)(3).").

Moreover, it was perfectly appropriate for the district court – in fashioning a high-end, but within-guidelines sentence – to consider the effect Rizzolo's concealment of assets had upon civil plaintiff Kirk Henry, who is still seeking money damages for the beating he suffered in Rizzolo's strip club over five years ago. *See* DC Doc. No. 461 (transcript of July 20, 2011) at 11 (Rizzolo does not disclose to Probation Officer receipt of $999,000 upon release from prison), 12 (Rizzolo assigns $789,000 to father without advising Probation Officer); *see also United States v. Streich*, 560 F.3d 926, 935 (9th Cir. 2009) ("Justice in sentencing requires that the judge be fully informed about all the aspects of the defendant's history . . . . [The] judge [must] know *who* the defendant *really is*.") (emphasis

added) (citing 18 U.S.C. § 3661) (Kleinfeld, J., concurring). Rizzolo's appeal thus raises nothing that is "extraordinary" – none of his straightforward issues are "substantial," and – given the strong presumption of detention, the moderate "preponderance of the evidence" standard, and the "clearly erroneous" standard that governs the district court's findings – it is unlikely Rizzolo will ever prevail on the merits. *See Spangle*, 626 F.3d at 497 n.3 (under 18 U.S.C. § 3583(e)(3), revocation and imprisonment need be supported only "by a preponderance of the evidence); *Garcia*, 340 F.3d at 1015 (clear error review for fact findings).[4]

Nor can Rizzolo's "inevitable mootness" doctrine prevail. For purposes of release pending appeal of revocation of supervised release, an "extraordinary circumstance" arises only where there is an "unusual delay in the processing of the appeal." *Bell*, 820 F.2d at 981. Rizzolo's appeal was promptly docketed and set for briefing; no continuances have been sought; and the undersigned will not oppose any motion to expedite either these deadlines or (should this Court deem it

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[4] Clear error review will likewise immunize the district court's well-supported finding – evidently destined to become an issue in the Opening Brief (CA Doc. No. 4 at 8-9) – that Rizzolo *knew* he was required to satisfy his tax obligations with the IRS. DC Doc. No. 461 (transcript of July 20, 2011) at 14 (evidentiary hearing makes it "crystal clear" that Rizzolo – who "plead [sic] guilty to . . . conspiracy to defraud the revenue obligations owed to the United States" – "understood his obligations" to cooperate and pay back the IRS); *see also Garcia*, 340 F.3d at 1015 (clear error review for fact findings).

necessary) the date set for oral argument. Rizzolo thus identifies *no* delay – much less an "unusual delay" – that affects "the processing" of his appeal.

Neither *Duclos* nor *Pacheco* strengthen Rizzolo's "inevitable mootness" argument, for those defendants (unlike Rizzolo himself) were no longer in custody by the time their bail challenges reached their appellate courts. CA Doc. No. 4 at 11 (conceding that defendant Duclos "has already been released" and that defendant Pacheco "has already served his term of imprisonment"); *see also* CA Doc. No. 8 at 5-6 (reliance on dissenting comments in *Koon* misplaced, because neither defendant was Class C supervised release violator; 30-month custodial sentences were not, unlike Rizzolo's, "relatively short;" and complex civil rights issues raised on appeal are not susceptible of prompt resolution).

Nor does the non-binding report and recommendation in *United States v. Porter*, 2009 WL 2762818 (CV-09-2142) (E.D.N.Y.) (Aug. 27, 2009), further Rizzolo's claim. *See* CA Doc. No. 4 at 12 (citing *Porter*). *Porter* did not address whether a supervised release violator had demonstrated the requisite "extraordinary circumstance" based on an "unusual delay in the processing of his appeal;" rather, that section of the report (from which Rizzolo selectively quotes) concerned itself with the equitable distribution of CJA funds. It was in that wholly-unrelated context that the *Porter* magistrate reasonably observed:

> The Court is mindful of the fact that the CJA Fund is not without limit and fees must be allocated in a manner that ensures that all defendants who are qualified to receive CJA counsel receive appropriate representation. If the Court was to award the full amount requested here on fairly straight-forward litigation seeking to vacate a relatively short prison sentence, there would be fewer funds available to support the defense of another defendant who comes before this Court. Therefore, the Court respectfully recommends that Ms. Hirsch be compensated for a total of $26,559.33 in attorney's fees. In addition, the Court recommends that Ms. Hirsch be reimbursed for the full amount of costs she requested, $1,847.67, bringing her total compensation to $28,407.00.

Porter, 2009 WL 2762818, slip op. at 9. Extracting a snippet of dicta from an irrelevant, non-binding analysis hardly demonstrates the presumption-rebutting "extraordinary circumstance" required of Rizzolo.

In the unlikely event that disposition of Rizzolo's appeal exceeds his projected release date of June 12, 2012, then Rizzolo can reassert his "mootness" claim at that point. But for now – with his appeal a simple one and his release over a half-year away – that claim is not ripe for resolution and, in any event, furnishes no "extraordinary" reason to rebut the strong presumption of detention. *Loya*, 23 F.3d at 1531 ("exceptional circumstances" requirement yields 'extremely demanding test").

Dated this 11th day of October, 2011.

Respectfully submitted,

DANIEL G. BOGDEN
United States Attorney
ROBERT L. ELLMAN
Chief, Appellate Division

/s/ Peter Levitt
PETER S. LEVITT
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KIRK AND AMY HENRY,	)	
	)	CA No. 11-10384
Plaintiffs,	)	2:08-CV-635-PMP-GWF
	)	
vs.	)	**CERTIFICATE OF SERVICE**
	)	
FREDRICK RIZZOLO, et al.,	)	
	)	
Defendants.	)	

I, Sarah Lauer-Overby, certify that I am an employee of the United States Attorney's Office and a person of such age and discretion as to be competent to serve papers.

That on October 11, 2011, I served a copy of the attached document, via Electronic Case Filing, to all parties of record.

DATED: October 11, 2011

/s/Sarah Lauer-Overby
SARAH LAUER-OVERBY
Paralegal