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**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff - Appellee,</p> <p style="text-align: center;">v.</p> <p>FREDERICK JOHN RIZZOLO, AKA Rick Rizzolo,</p> <p style="text-align: center;">Defendant - Appellant.</p>
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No. 11-10384

D.C. No. 2:06-cr-00186-PMP-  
PAL-2

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Nevada  
Philip M. Pro, District Judge, Presiding

Argued and Submitted March 19, 2012  
Las Vegas, Nevada

Before: CLIFTON, BYBEE, and N.R. SMITH, Circuit Judges.

Frederick Rizzolo appeals the final judgment in his criminal case for violation of the terms and conditions of his probation. The court revoked his supervised release and imposed a sentence of nine months' incarceration followed

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

by twenty-four months of supervised release. We have jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. We affirm.

1. The district court's decision to allow a statement from the Henrys' lawyer on their behalf was not an abuse of discretion, even though the Henrys did not qualify as a statutorily-recognized "victim" under 18 U.S.C. § 3771 (the Crime Victims' Rights Act, "CVRA").

At sentencing, the district court has a wide range of discretion in admitting whatever evidence it deems relevant. *See Nichols v. United States*, 511 U.S. 738, 747 (1994). Indeed, "under the Guidelines, a sentencing judge 'may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise *prohibited* by law.'" *United States v. Jones*, 114 F.3d 896, 898 (9th Cir. 1997) (emphasis added) (quoting U.S.S.G. § 1B1.4).

None of the authorities relied upon by Rizzolo prohibited the Henrys' lawyer from making a statement. The CVRA, 18 U.S.C. § 3771, and Rule 32(i) of the Federal Rules of Criminal Procedure merely mandate situations where the district court must allow individuals to be heard. However, these provisions say nothing about prohibiting individuals from being heard. Therefore, while Rizzolo is correct that the district court was not *required* to allow the Henrys' lawyer to speak

on their behalf as victims under the CVRA, Rizzolo is incorrect when he argues that the district court still had no *discretion* to allow the lawyer to be heard.

The district court carefully explained its reasons for allowing the Henrys' lawyer to make a statement. Because those reasons were not implausible or illogical, the district court did not abuse its discretion. *See United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc).

2. Even if the district court did abuse its discretion, Rizzolo suffered no prejudice from this error. Rizzolo does not challenge the district court's findings that he committed the alleged acts violating the terms and conditions of his probation. Rizzolo also does not claim that these facts were insufficient to support the district court's revocation decision under the "preponderance" standard. *See* 18 U.S.C. § 3583(e). In addition, the record does not indicate that the district court judge relied on the plaintiffs' counsel's statements in making its sentencing

determination. Accordingly, any error Rizzolo suffered regarding this statement was not prejudicial.<sup>1</sup>

**AFFIRMED.**

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<sup>1</sup> Under Federal Rule of Appellate Procedure 28(j), Rizzolo filed a letter arguing that, in *United States v. Grant*, 664 F.3d 276, 282 (9th Cir. 2011), we applied the rule from *Tapia v. United States*, \_\_ U.S. \_\_, 131 S. Ct. 2382 (2011) to prohibit the district court from considering retribution as a purpose for imprisoning someone for violating conditions of supervised release. Rule 28(j) letters may include additional authorities discovered after the filing of the brief. Fed. R. App. P. 28(j). However, a Rule 28(j) letter “cannot raise a new issue” that was not addressed in the briefs. *United States v. LaPierre*, 998 F.2d 1460, 1466 n.5 (9th Cir. 1993). Thus, the issue Rizzolo raised is not properly before us, because it contained additional argument never discussed in either his opening or reply brief.

## United States Court of Appeals for the Ninth Circuit

Office of the Clerk  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding Judgment and Post-Judgment Proceedings (December 2009)

#### **Judgment**

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### **Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)**

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### **Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)**

#### **Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)**

#### **(1) A. Purpose (Panel Rehearing):**

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

#### **B. Purpose (Rehearing En Banc)**

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [under \*Forms\*](#).
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [under \*Forms\*](#).

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [under \*Forms\*](#) or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**United States Court of Appeals for the Ninth Circuit**

**BILL OF COSTS**

**Note:** If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v.  9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk				
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Reply Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	
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\* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.  
 \*\* Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.



**Form 10. Bill of Costs - Continued**

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

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(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk