C.A. No. 11-10384
D.C. No. 2:06-CR-186-PMP/PAL

UNITED STATES OF AMERICA,
Plaintiff/Appellee,
vs.
FREDRICK RIZZOLO aka RICK RIZZOLO,
Defendant/Appellant.

APPELLANT'S REPLY BRIEF

Appeal from Judgment in a Criminal Case for Revocation of Probation or Supervised Release of the United States District Court for the District of Nevada

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GORDON SILVER
Dominic P. Gentile, Esq.
Paola M. Armeni, Esq.
Margaret W. Lambrose, Esq.
3960 Howard Hughes Parkway
Ninth Floor
Las Vegas, Nevada 89169
Tel. (702)796-5555
FAX (702)369-2666
Attorneys for Defendant/Appellant
FREDRICK RIZZOLO aka RICK RIZZOLO

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

1.

ARGUMENT

I.

THE EIGHTH CIRCUIT CASE SOLELY RELIED UPON BY THE GOVERNMENT IS NOT ONLY READILY DISTINGUISHABLE FROM THE CASE AT BAR, BUT IS ALSO INCONSISTENT WITH THE JURISPRUDENCE OF OTHER FEDERAL COURTS IN THEIR INTERPRETATION AND APPLICATION OF THE CVRA WITH RESPECT TO NON-VICTIM ALLOCUTION AT CRIMINAL SENTENCING PROCEEDINGS .

In its Answering Brief, the government places its reliance upon a single panel decision of another circuit which is not only readily distinguishable on many bases from the case at bar, but which is also inconsistent with the decisions of other federal courts which have considered the precise issue presented in this case, to wit: *United States v. Straw*, 616 F.3d 737 (8th Cir. 2010). AB[1] at 20-22.

In that case, the defendant was convicted of wire fraud; mail fraud; making, possessing, and uttering a forged security; and money laundering. At sentencing, the district court received victim impact statements from a number of complainants, including the defendant's own cousin, Jodie Hansen, who spoke in a representative capacity on behalf of their mutual grandmother, *who died since having been victimized by the defendant*; and therefore, like Kirk Henry in the case at bar, was not herself a "victim" of the defendant's crimes of conviction within the meaning of the Crime Victim's Rights Act (codified at 18 U.S.C. Section 3771). 616 F.3d at 740-741. The defendant in *Straw* was sentenced to a term of

[1] References herein to Appellee's Answering Brief shall be designated "AB."

imprisonment and – as has Appellant Rizzolo in this case – challenged the district court's receipt and consideration of that non-victim impact statement on appeal.

However, it was undisputed in *Straw* that the defendant's grandmother, the *deceased family member* on behalf of whom Ms. Hansen had addressed the sentencing court, was indeed "a person directly and proximately harmed" as the result of federal criminal conduct attributed to the defendant; and therefore, a "crime victim" as contemplated by the Act. *Id.* See *United States v. Burkholder*, 590 F.3d 1071 (9th Cir. 2010); AB page 13, footnote 5.[2] By contrast, in this case, it is undisputed – *and the district court so expressly found* – that Kirk Henry was *not* the victim of the Appellant's crime of conviction. [ROA, Docket Entry No. 475 pages 6-8]; AB page 2, 6-7, 13. *Nor is it disputed here that Henry was not the subject of any conduct of the Appellant constituting a basis for the revocation of his supervised release with respect thereto*. AB page 3 and footnote 2, page 8-page 11, paragraph 1. And this critical fact is not altered by the government's spurious claims that there is a "close connection between the Henrys [sic] financial interests and Rizzolo's supervised release violations," (AB page 5, paragraph 20, and that "Rizzolo's criminal plea agreement had a significant impact on the Henrys [sic] financial well-being." AB page 8, paragraph 2. Nor is it changed by what Appellant would characterize, with due respect, as the lower court's indulgence in a form of "judicial legislation" by finding that the Henrys enjoyed a "kind of hybrid, unusual status" in purportedly *approximating* "crime victims' as actually

[2] See also *e.g.*, *Pann v. Warren*, ___ F. Supp. 2d ___, 2010 WL 2836879 (E.D. Mich. 2010) ("The Court finds that the Applicants, ***the victim's family members***, are 'crime victims' under the CVRA who are entitled to the rights provided to crime victims under the CVRA[ ] . . . . The direct victim of the crime has been declared ***deceased*** and her family members have been victimized by the crime given the loss of their loved one") (emphasis added).

defined by Congress in the CVRA. See AB page13.[3] For as reiterated *infra*, only the Power Company, Inc. – a separate and distinct corporate person – promised to pay any restitution whatsoever to the Henrys pursuant to its separate and distinct plea agreement. "See *e.g.*, *Jimenez v. State of Illinois*, ___ F.3d ___, ___, 2012 WL 174772, No. 11-cv-4707 (N.D. Ill. Jan. 18, 2012) ("Rotheimer fails to meet any definition of a crime victim under this Act. Rotheimer is the victim's mother: she was not the victim in the 2002 sexual assault case against Desario, and she was not the victim of Desario's alleged parole violation in 2009. Therefore, Rotheimer had no right under the Illinois Constitution or the Rights of Crime Victims and Witnesses Act to make a statement at Desario's sentencing or during his 2009 parole proceedings").[4]

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[3] With all due respect, Appellant would submit that such is a hallmark; indeed, the epitome of an abuse of discretion.

[4] Moreover, this is *not* the test for victim status under the CVRA. For as this Court pointed out in *United States v. Burkholder*, 590 F.3d 1071, 1074 (9th Cir. 2010), in unanimity with all of the reported federal jurisprudence on this issue: "The CVRA defines 'crime victim' as 'a person ***directly and proximately harmed*** as a result of the commission of a Federal offense.'" (Quoting 18 U.S.C. Section 3771(e).) (Emphasis added.) *Accord e.g.*, *In Re Rendon Galvis*, 564 F.3d 170, 175 (2d Cir. 2009) ("As in *Sharp*, 'there are too many questions left unanswered concerning the link between the Defendant's federal offense and [the petitioner's harm]); *In Re Antrobus*, 519 F.3d 1123 (10th Cir. 2008); *United States v. Sharp*, 463 F. Supp. 2d 556, 566 (E.D. Va. 2006).

Nor is the fact that the Henrys' civil counsel "[h]eed[ed] the court's admonition to keep it brief, [resulting in] the Henrys' attorney present[ing] statements that covered four pages of transcript" of any moment whatsoever. See AB page 14, paragraph 1. For the court also "allow[ed] the filing that they made" as the government expressly acknowledges. AB page 13, paragraph 2. And, in any event, it is undisputed that the CVRA is not drafted in terms of the brevity of oration but in terms of who may be heard.

Moreover, as the court of appeals pointed out in *Straw*: in *contradistinction* to the case at bar, "***Straw failed to object to Hansen's testimony at the sentencing hearing***." 616 F.3d at 740. (Emphasis added.) And accordingly, as the Eighth Circuit emphasized in that case: "we review under the ***plain error*** standard." *Id.* (Emphasis added.) And thus, the *Straw* court simply held that "it was not ***plain error*** for the district court to hear Hansen's statement . . . ." 616 F.3d at 741. (Emphasis added.)

By contrast, in the instant case, it is undisputed that Appellant Rizzolo did indeed challenge Henry's request to allocute by and through his civil counsel both before and at the disposition and sentencing with respect to the instant supervised release revocation proceedings, both orally and in writing. [ROA, Docket Entry Nos. 312, 450, 475 pages 4-5]; AB pages 12-13.[5] And accordingly, Appellant respectfully submits that – unlike the defendant in *Straw* – he is entitled in this appeal to the benefit of the stricter scrutiny of review *de novo*, albeit for abuse of discretion.[6] And pursuant thereto, the circumstances in *Straw* are clearly distinguishable from those of the case at bar.

Thus, as the *Straw* court explained:

> While the court and the prosecutor did refer to the cousin as a "victim" ***in passing***, it is clear ***all parties were aware of who she was and who she represented***. The district

[5] As this Court very recently observed in the tangentially-related case of *United States v. Kimsey*, ___ F.3d ___, ___, No. 10-16800 (9th Cir. February 8, 2012): " In 2008, Frederick Rizzolo ("Rizzolo") became embroiled in a contentious, scorched-earth lawsuit . . . which . . . . Plaintiffs Kirk and Amy Henry ("the Henrys") initiated . . . ."

[6] See *e.g., United States v. Kimsey*, ___ F.3d ___, ___ (9th Cir. February 8, 2012) ("By reserving his right to a jury trial, Kimsey not only made an adequate 'demand therefor,' 18 U.S.C. Section 3691, but also adequately raised this issue before the district court so as to merit de novo review on appeal").

> court spoke at length to explain the sentence ***and did not mention the prior conduct related to Straw's grandmother***. 616 F.3d at 741. (Emphasis added.)

Here, in stark contradistinction, both civil counsel for Henry, as well as the lower court, consistently treated Henry as though he were in fact a "crime victim" in this case within the meaning of 18 U.S.C. Section 3771 (the "Crime Victim's Rights Act") – which he clearly was *not*. Indeed, characterizing Mr. Rizzolo as a "***gangster***" and a "***professional criminal***" hell-bent on "cheat[ing] the squares," Henry's attorney *passionately* urged the district court to order the revocation of the Appellant's supervised release and "***send [him] . . . back to jail***;" vowing to "pursue him through this ***and on through the gates of hell to get the Henrys their money***." [ROA, Docket Entry No. 475, pages 18-19. See AB page 14. (Emphasis added.) And Appellant respectfully submits that such a display of vitriol can hardly be honestly assessed as a "refer[ence] in passing" to Henry's purported "crime victim" status in this case within the contemplation of *Straw*.[7]

Moreover, here, by contrast, in ordering just what Henry's lawyer asked for in revoking Mr. Rizzolo's supervised release and imposing upon him another term of imprisonment, the district court *specifically and expressly relied upon the former's assessment that Mr. Rizzolo "****ha[d] paid very little in the way of restitution to . . . the Henrys***," ([ROA, Docket Entry No. 461, page 13]) – *even though this was not one of the bases upon which Rizzolo's revocation rested*.

Further, Appellant Rizzolo continues to maintain that under the express terms of the binding plea agreement in this case, *Mr. Rizzolo was not even*

[7] Moreover, as this Court also recently observed in the related *Kimsey* case (referred to *supra* at footnote 3: "the government characterized Kimsey as a charlatan. Whether that is so or not, our legal system does not punish people simply because they have been proven unscrupulous in the past and are continuing to engage in dubious activities."

obligated to pay restitution to the Henrys in the first place and that that commitment was binding *solely* upon the Power Company, Inc. – *an independent person both in contemplation of law and under the terms of the plea agreements in this case*. And the government's repeated characterization of that corporation as "closely held" does nothing to change that fact. See AB page 2, footnote 1, page 5, paragraph 2.

Appellant further submits, with due respect, that the government's related recourse to linguistic "sleight-of-hand" are equally unavailing in its effort to evade the terms of the bargain *actually struck* by the parties in this regard. Thus, in a patently transparent "play-on-words," the government purports to represent to this Court that "***Rizzolo promised in his plea agreement that the Power Company would pay*** [8] '$10 million as compensation for injury and damages Kirk and Amy Henry, with one million due immediately upon entry of the [Power Company's] plea . . . and the remainder of the proceeds of the sale of the Crazy Horse Too . . . ." AB page 8, paragraph 2. (Emphasis added.) And Appellant would request that the Court contrast this round about misrepresentation with the government's honest and forthright selection of language (with which Appellant is in full agreement) that "[a]s part of his plea agreement, Rizzolo agreed to pay $1,734,000 in restitution to the IRS . . . . [and] also forfeited $4,250,000.00 . . . ." AB pages 7-8.

Appellant would also urge the Court to note that the government makes no effort *whatsoever* to deny or even *qualify* in any manner or to any extent *whatsoever* Appellant's observations as set forth in his opening brief that

> "the club was seized by the government with the Appellant's acquiescence in order to permit the

[8] Which entered into an entirely separate and distinct plea agreement of its own; in the absence of any finding of "alter ego" by the court or even any argument whatsoever by the government to that effect.

> government to sell the business for the benefit of the Henrys. [ROA, Docket Entry No. 8, page 8, lines 10-18]; AA, p. 76.
> The government thereupon assumed that right and corresponding obligation but thereafter failed to timely renew the privileged adult use and tavern licenses of the business; and as a result, the area in which the club was located was thereafter re-zoned by the City of Las Vegas so as to prohibit "adult" uses; and the club became unsellable, fell into disrepair, and has since been foreclosed upon by the mortgagee. [See ROA, Docket Entry Nos. 54-75, 82, 84, 86, 88-115, 117-237, 241-256, 260, 283, 292-297, 300, 305-308, 310-311, 315-317, 319-320, 322, 331, 334-336, 341-345, 349, 356, 382-387, 394-396, 399-401, 405-407, 411, 414-415, 421, 446]. And consequently, the "Crazy Horse Too" was never sold. [ROA, Docket Entry No. 475, p. 13-14]; AA, pp. 307-308." Appellant's Corrected Opening Brief page 7.

See AB page 11, paragraph 2.

This is certainly a matter of no small moment for this is undoubtedly the type of assertion that one would expect to be met with righteous refutation; indeed, indignation, if it were in fact untrue. And Appellant reiterates, with due respect that this was the true and proximate reason that the Henrys have yet to be made whole in this case. For it is undisputed that absent the negligence; indeed, deliberate indifference, demonstrated during the government's receivership of the Crazy Horse Too – theretofore a multi-million dollar enterprise – as a direct and un-attenuated result of which slipshod stewardship this very valuable asset was allowed to waste into worthlessness, a proper sale of the club would have netted sufficient proceeds to very easily and timely compensate the Henrys as anticipated by all concerned, with change left over.

Likewise, the government completely fails to offer any response *whatsoever* in its Answering Brief to the observation of Appellant's Opening Brief that the

procedure permitted by the lower court in the case at bar in allowing counsel for a civil creditor in an unrelated case to whom a criminal defendant has not in fact been ordered to pay criminal restitution to harangue the court in a vociferous effort to see to it that the latter is jailed for non-payment of that civil debt for the express purpose of coercing him to do so by and through the pain of physical confinement "raises the specter of the debtor's prison this country long ago outlawed." *Securities and Exchange Commission v. Moss*, 644 F.2d 313, 317-318 (4th Cir. 1981). See Appellant's Corrected Opening Brief pages 13-14.

II.

THE ALLOCUTION OF THE HENRYS' CIVIL COUNSEL CANNOT BE SUSTAINED IN THE ALTERNATIVE UNDER THE GENERAL PROVISIONS OF 18 U.S.C. SECTION 3661.

The government suggests that even if the allocution offered at the Appellant's revocation disposition by civil counsel for the Henrys was in fact unauthorized by the CVRA, codified at 18 U.S.C. Section 3771, as Appellant urges this Court to conclude, the same may be justified, in the alternative, pursuant to the pre-CVRA provisions of 18 U.S.C. Section 3661.

That section provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

However, as the court pointed out in *United States v. Atlantic States Cast Iron Pipe Company*, 612 F. Supp. 2d 453, 501, footnote 52 (D. N.J. 2009):

> There is also a common-sense due process limitation on the scope of information the court may allow, even under the broad discretion conferred by 18 U.S.C. Section 3661. "[A]s a matter of due process, factual matters may

> be considered as a basis for sentence only if they have some minimal indicium of reliability beyond mere allegation" and "bear some rational relationship to the decision to impose a particular sentence." *United States v. Baylin*, 696 F.2d 1030, 1040 (3d Cir.1982), *superseded by statute on other grounds,* Sentencing Reform Act of 1984, Pub.L.No. 98-473, 98 Stat.1987, *as recognized in United States v. Essig*, 10 F.3d 968, 970 (3d Cir.1993). This principle was applied in a recent district court decision in our circuit, where the court granted defendant's motion to exclude a letter that contained "40 year old uncorroborated allegations" against defendant by a person who undisputedly did not qualify as a CVRA crime victim in the case, and the information lacked sufficient indicia of reliability. *United States v. Forsyth*, No. 06-00429, 2008 WL 2229268, at *1-*2 (W.D.Pa. May 27, 2008).

Thus, as the Seventh Circuit specifically emphasized in *United States v. Serhant*, 740 F.2d 548, 552 (7th Cir. 1984) the victim-impact statements challenged in that case were presented "***in a dignified and non-inflammatory manner***," and for that reason, withstood attack. (Emphasis added.) However, suffice it to say that Appellant Rizzolo respectfully submits that, when it comes to the acerbic rant of the Henrys' civil counsel at the revocation disposition proceeding conducted in this case, nothing could be further from the truth.

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III.

THE GOVERNMENT'S SPECULATION THAT APPELLANT WAS NOT PREJUDICED BY THE LOWER COURT'S IMPROPER RECEIPT AND CONSIDERATION OF THE NON-VICTIM IMPACT STATEMENT OF HENRY'S CIVIL COUNSEL IS NOT ONLY UNFATHOMABLE, BUT IS ALSO AFFIRMATIVELY BELIED BY THE RECORD.

The government very presumptuously purports to divine, and thereupon pontificate, that in revoking Mr. Rizzolo's supervised release and imposing upon him another term of imprisonment, the lower court "did not rely on civil counsel's argument," (AB page 2); that "the district court's . . . decision to revoke supervised release and impose a . . . sentence [of imprisonment] derived . . . not from civil counsel's characterization of Rizzolo or counsel's opinion that Rizzolo should go "back to jail," (AB pages 17-18); and "derived not from counsel's rhetorical flourishes." AB page 23. Incredibly, the government presumes to go so far as to unqualifiedly intuit that "[t]here is ***no possibility*** that prejudice affected [the disposition of this matter owing to the remarks of Henry's lawyer]." AB page 24. (Emphasis added.) And this, of course, is nothing more than recourse to *rank speculation* on the government's part.

The government presumably purports to predicate this proposition upon its repetitious, myopic assertions that in rendering its disposition, "the district court [did so] [w]ithout ever referring to the Henrys' counsel's . . . statements," (AB page 15); "without mentioning the Henrys' attorney's statements," (AB pages 16, 17); without "mention[ing] counsel's argument, the word 'gangster,' or even Rizzolo's reputed ties to organized crime." AB page 23.

Not only are the foregoing claims materially misleading in view of what the district court *did* expressly state in connection with its disposition in this matter regarding its assessment of the insufficiency of restitution payments made to the Henrys to date,[9] but they also both ignore the equal and opposite inference attributable to the fact that the lower court likewise did not *disavow* reliance upon civil counsel's rant and entirely fail to take into account the practical reality of the effective influence of such improper input on a *sub silentio* basis.

And, with due respect, Appellant submits that the forgoing contentions betray either a profound naivete on the part of the author of the government's Answering Brief or that, in this regard, the government is being deliberately obtuse. Thus, it is not the Appellant's intention whatsoever in connection with this argument to "create the illusion" that the district court "forgot about" the initial one million dollar payment in fact made to the Henrys as the government inexplicably suggests in transparently interposing this "red herring" into the mix. See AB page 25. Rather, it is simply the Appellant's purpose in this regard to remind this Court that *the lower court did indeed expressly rely upon the subject of civil counsel's improper "victim" impact statement – which was extraneous to the bases for the Appellant's revocation in the disposition of these supervised proceedings*.

2.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Appellant respectfully prays that this Honorable Court reverse the decision and sentence of the district court and

[9] *Mr. Rizzolo* "has paid very little in the way of restitution to . . . the Henrys." [ROA, Docket Entry No. 461, page 13]. Mr. Rizzolo has not satisfied his purported "[financial] obligations . . . to the Henrys." See AB page 16.

for such further and other relief as the Court deems fair and just in the premises.

DATED this 13th day of February, 2012.

Respectfully submitted,

/s/ Dominic P. Gentile

DOMINIC P. GENTILE
PAOLA M. ARMENI
MARGARET W. LAMBROSE
GORDON SILVER
3960 Howard Hughes Parkway
Ninth Floor
Las Vegas, Nevada 89169.5978
(702) 796-5555
Attorneys for Defendant/Appellant

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 08-17302

I certify that:

1. Pursuant to Fed. R. App. 32(a) (7) (C) and Ninth Circuit 32-1, the attached Appellant's Reply Brief is:

Proportionately spaced, has a typeface of 14 points, and contains 3,425words.

DATED this 13th day of February, 2012.

/s/ Dominic P. Gentile
DOMINIC P. GENTILE
PAOLA M. ARMENI
MARGARET W. LAMBROSE
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 13th day of February, 2012, she served a copy of the Appellant's Reply Brief, by, and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

PETER S. LEVITT
Assistant United States Attorney
333 Las Vegas Boulevard South, #5000
Las Vegas, NV 89101

/s/ Adele L. Johansen
An employee of Gordon Silver