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9
 10 UNITED STATES DISTRICT COURT
 11 DISTRICT OF NEVADA

13 UNITED STATES OF AMERICA

14 Plaintiff,

15 vs.

16 FREDRICK RIZZOLO aka RICK RIZZOLO

17 Defendant.

CASE NO. 2:06-CR-186-PMP/PAL

**EMERGENCY MOTION FOR
 RECONSIDERATION OF ORDER
 DENYING
 MOTION TO STAY SURRENDER TO
 DESIGNATED CORRECTIONAL
 FACILITY PENDING APPEAL OF
 REVOCATION OF SUPERVISED
 RELEASE**

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 21 COMES NOW Defendant, Fredrick Rizzolo aka Rick Rizzolo, by and through his
 22 attorneys of record, Dominic P. Gentile, Esq., Paola M. Armeni, Esq., and Margaret W.
 23 Lambrose, Esq., of the law firm of Gordon Silver and hereby respectfully requests on an
 24 emergency basis that this Honorable Court reconsider its Order of September 12, 2011 denying
 25 Defendant's Emergency Motion to Stay Surrender to Designated Correctional Facility Pending Appeal of
 26 Revocation of Supervised Release.

27 This Motion is made and based upon all pleadings and papers on file herein, the attached
 28 Memorandum of Points and Authorities, and such argument as the Court may require at a hearing on this

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matter.

Dated this 12th day of September, 2011.

GORDON SILVER

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 RIZZOLO

MEMORANDUM OF POINTS AND AUTHORITIES

ARGUMENT

**DUE TO THE RELATIVELY SHORT SENTENCE
IMPOSED PURSUANT TO THE REVOCATION OF THE**

**SURRENDER PENDING APPEAL WILL BE TO MOOT
ELY, AND THIS**

**WITHIN THE MEANING OF *UNITED STATES V. BELL*, 820
F.2d 980 (9th Cir. 1987).**

On September 12, 2011, this Court entered an Order denying the Defendant’s Emergency Motion to Stay Surrender to Designated Correctional Facility Pending Appeal of Revocation of Supervised Release. Therein, the Court set forth no findings of fact or conclusions of law upon which the Order was predicated.

However, in his Motion, the Defendant raised as an independent ground in support thereof, the fact that “it is highly likely that Mr. Rizzolo will have served the entire nine (9) month term of imprisonment before the Court of Appeals renders a decision on his appeal, which will therefore

1 be rendered moot . . . unless a stay of surrender is granted.” Emergency Motion to Stay Surrender to
2 Designated Correctional Facility Pending Appeal of Revocation of Supervised Release page 5, lines 4-7.
3 And in its Opposition thereto, the government offered no countervailing argument whatsoever with
4 respect to this issue. And therefore, in the event that the Court may have inadvertently pretermitted the
5 point raised by the Defendant in this regard, he respectfully seeks reconsideration in view thereof as
6 follows.

7 While it is true that, in *United States v. Bell*, 820 F.2d 980 (9th Cir. 1987), the United States Court
8 of Appeals for the Ninth Circuit held that “[i]n order to evaluate a motion for bail pending the appeal
9 from the revocation of probation, we adopt the [strict] standard set forth in *United States v. Lacy*, 643
10 F.2d at 285 [u]nder . . . [which] standard, release pending appeal from an order revoking probation is
11 proper only upon a showing of exceptional circumstances.” 820 F.2d at 981. However, as the Ninth
12 Circuit expressly pointed out in that case: “Examples of exceptional circumstances include: (1) raising
13 substantial claims upon which the appellant has a high probability of success; (2) a serious deterioration
14 of health while incarcerated; and (3) any unusual delay in the processing of the appeal.” *Id.* (Emphasis
15 added). And the Defendant respectfully submits that this independent textual caveat clearly contemplates
16 that *inevitable mootness* of an appeal displaces application of the *Bell - Lacy* standard.

17 The operation of this exceptional circumstance is exemplified in context with particularity by
18 *United States v. Duclos*, 382 F.3d 62 (1st Cir. 2004), wherein the defendant “finished serving the term
19 of imprisonment imposed in the judgment revoking his supervised release. [And] . . . was freed,
20 therefore, approximately two weeks before appellate oral argument.” *Id.* at 64. Thus, as the
21 United States Court of Appeals for the First Circuit observed in that case:

22 The threshold, and as it appears, determinative, issue here is
23 whether Duclos' completion of his sentence moots his appeals.
24 *Garcia-Velazquez v. Frito Lay Snacks Caribbean*, 358 F.3d 6, 8
25 (1st Cir.2004) (“In every case, we are required to satisfy ourselves
26 of jurisdiction.”) (citation omitted). We hold that it does.

27 Article III, Section 2 of the United States Constitution limits our
28 subject-matter jurisdiction to live cases or controversies. *See*
Spencer v. Kemna, 523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed.2d 43
(1998). This “case-or-controversy requirement” means that parties
“‘must continue to have a personal stake in the outcome’ ” through

1 all the stages of judicial proceedings, trial and appellate. *See id.*
 2 (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78,
 3 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990)). An appellant must have
 4 “suffered, or be threatened with, an actual injury traceable to the
 defendant and likely to be redressed by a favorable judicial
 decision.” *Lewis*, 494 U.S. at 477, 110 S.Ct. 1249.

5 In his bail appeal, Duclos requested that he be released from
 6 custody on bail during the pendency of his appeal. As Duclos has
 7 been released, the relief requested in his bail appeal has become
 8 extraneous. Accordingly, his bail appeal no longer satisfies the
 case-or-controversy requirement, having become altogether moot.
 382 F.3d at 65.

9 Thus, in *United States v. Porter*, 2009 WL 2762818 (CV-09-2142) (E.D.N.Y.) (Aug. 27,
 10 2009), the defendant – like Defendant Rizzolo in the case at bar – “[had] timely appealed . . . to
 11 the Circuit th[e] [district] court’s . . . order that violated the conditions of his supervised release.”
 12 *Id.* at page 9. In that case – as in this one – the court therein imposed a sentence of exactly nine
 13 (9) months of imprisonment. And the district court therefore granted relief pending appeal from
 14 that order on the precise ground urged by Rizzolo here; observing that “**in light of the relatively**
 15 **short length of the sentence, the appeal may become moot by the time it is heard; if petitioner’s**
 16 **nine month sentence has already been completed he would be left with no opportunity to**
 17 **contest that sentences legality.**” *Id.* (Emphasis added). See also *e.g.*, *United States v. Pacheco*,
 18 912 F.2d 297, 305 (9th Cir. 1990) (“In his supplemental pro se brief, Pacheco argues that this
 19 court's denial of his motion for bail pending appeal and this court's denial of his motion for
 20 reconsideration of this denial violated his rights to due process and equal protection. However,
 21 ***since Pacheco has already served his term of imprisonment and has been released from***
 22 ***custody, his complaint regarding the denial of bail pending appeal is moot.*** See *Murphy v.*
 23 *Hunt*, 455 U.S. 478, 481–82, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982)”). *Cf., e.g.*, *United*
 24 *States v. Harper*, 729 F.2d 1216, 1220-21 (9th Cir. 1984) (“The only other criminal case in which
 25 the Court has thus far recognized a right to an interlocutory appeal involved the right to be
 26 released on bail pending appeal. See *Stack v. Boyle*, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 1 (1951).
 27 The ‘crucial characteristic’ of an order denying bail, the Court has observed, is that any
 28 challenge to it would become moot if review awaited conviction and sentence. See *Flanagan*,

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