



March 23, 2012

Molly Dwyer, Clerk of Court  
Office of the Clerk  
U.S. Court of Appeals for the Ninth Circuit  
P.O. Box 193939  
San Francisco, CA 94119-3939

Re: United States of America v. Fredrick Rizzolo  
Appeal No. 11-10384  
Our File Number: 102472-001

Dear Ms. Dwyer:

This letter is in reply to Respondent's "additional authority letter" dated March 22, 2012.

Respondent's letter should be stricken as it fails to comport with the Federal Rules of Appellate Procedure. Specifically, Fed. R. App. P. 28(j) provides that "[i]f pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk. . . ." Rule 28(a)(3) refers to "authorities" as "cases . . . statutes, and other authorities . . . ." The term "authorities" refers to published legal authorities emanating from recognized "authoritative" sources, as contradistinguished from other, non-authoritative sources such as case documents which are part of the record on appeal. See Guggenheim v. City of Goleta, 582 F. 3d 996 (9th Cir. 2009).

Respondent's letter states, "[t]he United States wishes to advise the panel of supplemental record authority," and then "refer[s] the panel to [a document already contained] in [Respondent's] Supplemental Excerpts of Record." Thus, Respondent's reference to a portion of the excerpts of record does not constitute citation to "supplemental authority" within the meaning of Fed. R. App. P. 28(j). Respondent's letter simply reflects an improper attempt to belatedly bolster its oral argument by an improper implementation of the Rule 28(j) mechanism and get a second bite at the apple. As such, the letter should be stricken.

In the event the court entertains Respondent's letter, Mr. Rizzolo offers the following response. Mr. Rizzolo recognizes that in the sentencing order the district court imposed upon him a joint and several obligation, together with The Power Company, Inc., to pay restitution to the Henrys. However, under the terms of the binding plea agreement, the district court was precluded from doing so because The Power Company was solely responsible for paying restitution to the

Gordon Silver

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Henry's. The joint and several liability portion of the restitution obligation exclusively referred to the IRS. Thus, the intent of the parties when drafting the plea agreement was that Mr. Rizzolo would not be individually responsible for providing restitution to the Henry's.

Very truly yours,

GORDON SILVER

A handwritten signature in black ink, appearing to be 'M. Lambrose', written in a cursive style.

MARGARET W. LAMBROSE, ESQ.

MWL/alj