CA No. 11-10384

District Court No. 2:06-cr-186-PMP

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FREDRICK RIZZOLO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

APPELLEE'S ANSWERING BRIEF

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I.

JURISDICTIONAL STATEMENT AND BAIL STATUS

On June 2, 2006, the United States Attorney for the District of Nevada filed a Criminal Information charging Defendant Fredrick Rizzolo with Conspiracy to Defraud the United States, in violation of 18 U.S.C. § 371. Appellee's Supplemental Excerpt of the Record ("SER") at 1-11. Under 18 U.S.C. § 3231, the district court had original jurisdiction to adjudicate this offense against the laws of the United States. Under 18 U.S.C. §§ 3583(a) and (e)(3), the district court had jurisdiction to adjudicate the revocation of supervised release.

Under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, this Court has jurisdiction to review Rizzolo's challenge to the judgment revoking supervised release and sentenced him to nine months' imprisonment, followed by 24 months of supervised release. Appellant's Excerpts of Record ("ER") at 375, 386-90.

Rizzolo is currently serving nine months' imprisonment, with a projected release date of June 12, 2012. *See* www.bop.gov.

II.

ISSUE PRESENTED FOR REVIEW

Whether the district court acted within its discretion in permitting civil plaintiffs' counsel to present argument at Rizzolo's supervised release revocation, where the court: (1) recognized that the plaintiffs were not "victims" under 18 U.S.C. § 3771, but still had an interest in the outcome of the revocation proceeding; (2) found that the evidence established that Rizzolo had structured his post-release financial dealings in an attempt to avoid his restitution obligation to the civil plaintiffs and others; and (3) applied 18 U.S.C. § 3553(a)'s sentencing factors and did not rely on civil counsel's argument in imposing a within-guidelines sentence.

III.

STATEMENT OF THE CASE

On June 1, 2006, Rizzolo pled guilty to Count Two of a Criminal Information charging Conspiracy to Defraud the United States (18 U.S.C. § 371). District Court Docket Number ("DC Doc. No.") 10.[1]

On January 26, 2007, the district court sentenced Rizzolo to 12 months and one day of imprisonment, followed by three years of supervised release. SER at 12-17.

On April 4, 2008, Rizzolo was released from custody and began his term of supervised release. Appellant's Excerpts of Record ("ER") 270.

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[1] As discussed below, Rizzolo's closely-held corporate co-defendant – "The Power Company, Inc.," d/b/a "Crazy Horse Too" – pled guilty to Count One of the Information, charging a racketeering conspiracy under 18 U.S.C. § 1962(d). SER 2-5.

On January 3, 2011, the United States Probation Office filed a petition for revocation of supervised release, alleging that Rizzolo had violated Standard Condition No. 2 and Special Condition No. 4. ER 270-71.

On April 1, 2011, the Probation Office filed an addendum setting forth additional violations of the above-referenced conditions, as well as 12 violations of Special Condition No. 6. ER 289-91.[2]

On March 29, May 9, May 10, and May 11, 2011, the district court conducted evidentiary hearings on the petition for revocation of Rizzolo's supervised release. DC Doc. Nos. 428, 441, 442 and 443 (transcripts).

On July 20, 2011, the district court found that Rizzolo violated the three supervised release conditions identified by the Probation Office. ER 374; *see also*

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[2] The supervised release conditions at issue in the revocation proceedings required that Rizzolo:

(1) "shall submit a truthful and complete written report" to his probation officer each month (Standard Condition No. 2);

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

(3) "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.)

SER 14-15.

ER 363-84 (partial transcript of hearing), DC Doc. No. 459 (minute order). The court revoked Rizzolo's supervised release and sentenced him to nine months' imprisonment, to be followed by two years of supervised release. ER 375; *see also* ER 386-90 (Judgment in a Criminal Case). The court ordered Rizzolo to surrender to the Bureau of Prisons ("BOP") on September 14, 2011. ER 381.

On July 28, 2011, Rizzolo filed this notice of appeal. DC Doc. No. 462.[3]

IV.

STATEMENT OF FACTS

A. Summary of Appeal

On appeal, Rizzolo asserts that the district court abused its discretion when it heard argument from counsel for the civil plaintiffs in *Kirk Henry, et al. v. Fredrick Rizzolo, et al*., No. 2:08-cv-635-PMP (D. Nev.) (the "Henrys' civil case"). Rizzolo claims that because the civil plaintiffs were not statutorily-recognized "victims" under 18 U.S.C. § 3771 (the Crime Victims' Rights Act, "CVRA"), they "had no

[3] On September 2, 2011, Rizzolo filed an "Emergency Motion to Stay Surrender . . . Pending Appeal of Revocation of Supervised Release." DC Doc. No. 472. After the district court denied that motion and the motion for reconsideration, DC Doc. No. 476, 478, Rizzolo (who had already surrendered to BOP) filed an "Emergency Motion for Release Pending Appeal" in this Court. Court of Appeals Docket Number ("CA Doc. No.") 4 (Sep. 16, 2011). On October 27, 2011 – after limited remand, the district court's supplemental order denying Rizzolo's motion, and additional briefing on appeal – this Court denied Rizzolo's emergency motion. CA Doc. No. 13.

right" to speak at his revocation proceeding, and the district judge (who also presides over the civil case) "had no discretion to permit [the Henrys' attorney] to do so." Appellant's Opening Brief (CA Doc. No. 14) ("OB") at 14. Rizzolo further claims prejudice based on plaintiffs' counsel's characterization of him as a "gangster" who should go "back to jail." OB at 9, 11, ER 312. Rizzolo thus asks this Court to vacate the revocation order and remand this case to "a different district court judge without input from Mr. and Mrs. Henry or their counsel." OB at 14-15.[4]

B. Facts underlying Original Conviction – the Assault of Kirk Henry in Rizzolo's Club and the Subsequent Civil Damages Suit

The undisputed chronology illustrates the close connection between the Henrys financial interests and Rizzolo's supervised release violations. In 2001, at a Las Vegas strip club called the Crazy Horse Too, Kirk Henry was beaten into a quadriplegic condition by the club's employees. Civ. Doc. No. 536 at 2 (district court order). At that time, Rizzolo owned and operated the Crazy Horse Too through a closely-held corporation, The Power Company, Inc. *See id.* The month

[4] In restricting his challenge to plaintiffs' counsel's comments, Rizzolo has apparently abandoned the other issues he indicated that he intended to raise on appeal. *See* CA Doc. No. 4 at 8-9 (listing abandoned issues, including "whether the evidence adduced at the evidentiary hearing was sufficient to establish the violations of supervised release by a preponderance of the evidence").

after the beating, Kirk Henry and his wife, Amy, sued Rizzolo and The Power Company in Nevada state court. *Id.*

Rizzolo had long known that his strip club operation and other activities were the focus of federal law enforcement agents. *See* SER 28-29 (Deposition Transcript (Aug. 17, 2010) (Ex. 3 to DC Doc. No. 357, at 88-89) (Rizzolo admits he received notice, "probably [in] the 80s," that he had been picked up on a federal wiretap); *see also* Civ. Doc. No. 536 at 2 (district court finds that "[a]s early as the 1980s, both Rick Rizzolo and his wife . . . were aware that [his] reputed ties to organized crime had become a subject of interest to the [FBI]"). Two years after Kirk Henry's beating, law enforcement agents conducted a warrant-based search of the Crazy Horse Too, seizing "records, cash registers, and credit card machines." *Id.* (describing search in 2003); *see also* SER 30-31 (denying contact with organized crime, Rizzolo suggests that law enforcement's interest in him derived from the fact that he "was Italian and . . . in the topless club business").

C. The Federal Tax Fraud and Racketeering Charges Against Rizzolo and his Corporate Co-Defendant

While the 2003 search produced no immediate federal charges, the United States Attorney ultimately filed the instant Criminal Information in 2006, charging Rizzolo with tax fraud conspiracy under 18 U.S.C. § 371 (Count Two), and charging the Power Company with racketeering under 18 U.S.C. § 1962 (Count

One). SER 1-11. The facts underlying these charges showed that the female dancers at Rizzolo's club overcharged male patrons for various services; that if the patrons complained, the "dancers contacted the shift manager or other male employees at the Crazy Horse Too;" and that the male employees threatened to assault – or, in Kirk Henry's case, *did* assault – the protesting patrons unless they paid the amounts claimed by the dancers. SER 3 (employees "assisted the dancers in the commission of the fraud by extorting payment from patrons through explicit or implicit threats of violence, or through actual use of force and physical violence against the patrons to coerce the patrons to pay the disputed sums.").

On June 1, 2006, Rizzolo pled guilty to tax fraud pursuant to a written plea agreement. SER 32-46. He admitted that the dancers at the Crazy Horse Too worked as "independent contractors" who were required to pay the club's employees a percentage of the cash they collected from the male patrons. SER 42, at § IV(6). Rizzolo admitted that he "fail[ed] to report or record the cash payments to the club's employees," and that he was "able to avoid Federal Insurance Contributions Act [FICA] taxes . . . ." SER 43, at 12, ¶(IV)(7). He further admitted that Crazy Horse Too's management "knowingly caused the preparation and delivery of numerous inaccurate Internal Revenue Service W-2 forms . . . ." SER 43, at 12, ¶¶(IV)(8)-(9). As part of his plea agreement, Rizzolo agreed to pay

$1,734,000 in restitution to the IRS. SER 35-36 (also forfeited $4,250,000.00, in proceeds from maintenance of a property in violation of 18 U.S.C. § 1962).

Rizzolo's criminal plea agreement had a significant impact on the Henrys financial well-being. Rizzolo promised in his plea agreement that the Power Company would pay "$10 million as compensation for injury and damages to Kirk and Amy Henry, with one million due immediately upon entry of the [Power Company's] plea . . . and the remainder . . . from the proceeds of the sale of the Crazy Horse Too . . . ." ER 124. Based on that term in the plea agreement, the Henrys agreed to release their state court claims against Rizzolo. Civ. Doc. No. 536 at 2. After Rizzolo made the initial, one million dollar payment to the Henrys, ER 124, the district court accepted Rizzolo's guilty plea and sentenced him, in January 2007, to 12 months and one day of imprisonment, followed by three years' supervised release. SER 13.

D. Rizzolo Violates Supervised Release Through Undisclosed Financial Transactions, Failure to Repay Taxes, and Failure to Furnish Truthful Probation Reports

Rizzolo completed his custodial sentence on April 4, 2008. ER 270. Upon release, he immediately began violating his conditions of supervised release, particularly those conditions restricting his unauthorized financial transactions. Thus, in its 2011 revocation petition (ER 270-73), the Probation Office alleged that

Standard Condition Number 2 had been violated in May 2008, when Rizzolo's monthly supervision report "failed to mention receiving [from the "Lions Club"] $1,000,000 and failed to mention the distribution of the money." ER 270; *see also* SER 24 (Rizzolo admits at August 2010 civil deposition that he is still driving a Mercedes "titled to" the Lions Club).

The revocation petition also alleged violations of Special Condition Number 4, based on Rizzolo's admission that on April 3, 2008 (i.e., one day before his release), he received $1,000,000 from the Lions Club; deposited this unreported sum in a Limited Partnership account; and then transferred $990,000 "to RLR Trust, which is an offshore account." ER 271 (also citing 2009 violation stemming from failure to disclose Amendment to Purchase of Limited Partnership Agreement, which (the Probation Officer assumed) "resulted in Rizzolo receiving the 1 million dollars previously mentioned"). According to the Probation Office, the totality of Rizzolo's violations amounted to a

> clear[] . . . attempt to avoid the pending scrutiny of supervised release conditions. The offender was successful and received one (1) million dollars one day prior to his release. The fact that the money was placed in an offshore account and that the cost to open that account

> amounted to $10,000 lends credence to the assertion that Rizzolo was committing a breach of trust with the Court.

ER 273.

In an addendum to the petition (ER 289-91, Apr. 1, 2011), the Probation Office set forth additional violations involving Rizzolo's unauthorized, unreported money transfers. ER 289 at ¶1 (violations of Standard Condition Number 2, based on failure of seven monthly supervision to "list all expenditures over $500 . . . in 2008); ER 289 at ¶2 (violations of Special Condition Number 4, based on: (1) Rizzolo's undisclosed execution of authorizations which, in April 2008, "allowed the payment of approximately $900,000 in funds to" various relatives and attorneys; and (2) Rizzolo's undisclosed assignment, in April 2009, of "the first $789,000 . . . in payments due from [a limited partnership] . . . to the offender's father, Bart Rizzolo").

The addendum also set forth violations of Special Condition Number 6, which required Rizzolo repay the IRS and to "show proof of service of same to the probation officer." ER 290-91 (four of 12 violations cite Rizzolo's: (1) "failing to use any portion of approximately $990,000 in proceeds that the offender received in April 2008 to pay his taxes;" (2) "using offshore accounts and third party accounts to hold and transfer the offenders's assets;" (3) "closing bank accounts and conducting all financial transactions on a cash basis after the IRS levied on the

offender's bank accounts" in 2008; and (4) failing to disclose to IRS in August 2010 "that [he] would potentially receive . . . $57,000 a month . . . starting in or about November 2010").

This post-release conduct violated Rizzolo's supervised release conditions *and* stymied the Henrys' attempts to recover any portion of the monies Rizzolo still owed them. As Rizzolo notes in his opening brief, his duty to pay the Henrys the nine million dollar balance was conditioned on the sale of the Crazy Horse Too, ER 90, and that property did not sell until 2011. DC Doc. No. 461 at 5. Nevertheless, as the Probation Office correctly observed, Rizzolo remained "obligated to make the victim as whole *as possible*." ER 273 (emphasis added). Yet Rizzolo has paid the Henrys almost nothing since he was released in April 2008 and – after the Henrys were forced to file a second civil action, this time in federal court – Rizzolo employed evasive discovery practices to further frustrate the Henrys' recovery. *See, e.g.*, Civ. Doc. No. 536 at 5 (magistrate judge finds that "Rizzolo's discovery responses . . . regarding his interests in testamentary or inter vivos trusts were *clearly deceptive* . . . . [The] [factfinder] may conclude that Mr. Rizzolo's false or deceptive answers to interrogatories *demonstrate an ongoing attempt to conceal his assets or the disposition of those assets*.") (emphasis added), 8 (denying ex-wife's motion for summary judgment, district court holds that "a reasonable jury *could*

find that the division of property in the divorce was done with the *actual intent to hinder, delay, or defraud the Henrys*") (emphasis added). Against this backdrop, the Henrys' civil attorney sought to address the court at Rizzolo's supervised release hearing in 2011.

E. After Days of Hearings and Brief Argument by Plaintiffs' Counsel, the District Court Revokes Supervised Release and Imposes Within-Guidelines Custodial Sentence

The evidentiary hearings on Rizzolo's revocation spanned four days in 2011. DC Doc. Nos. 428, 441, 442 and 443 (transcripts from March 29, May 9, May 10, and May 11, 2011). Eight different witnesses testified, and the district court received several dozen exhibits. *Id.* At the end of hearing on May 11, 2011, the court ordered the parties to review the "mounds" of evidence and to "be prepared to argue [the case] to me" at the judgment and sentencing hearing. DC Doc. No. 443 at 98-99, 101.

Counsel for the Henrys (who was present on May 11, 2011) then asked if he could, pursuant to 18 U.S.C. § 3771, "be heard" at the forthcoming judgment and sentencing hearing. DC Doc. No. 443 at 102 (discussing CVRA). The district court ordered the parties to file briefs addressing whether the Henrys qualified as "victims" with a right under Section 3771 to be heard in Rizzolo's revocation proceedings. *Id.* at 104. The parties timely filed their briefs. *See* DC Doc. Nos.

449 (Henrys' claim "victim" status under CVRA, demand to be heard), 450 (Rizzolo argues that Henrys are not statutory "victims" because they were not directly and proximately harmed as a result of the conduct underlying Rizzolo's federal charges), 452 (Henrys' reply insists they are "victims" under CVRA).[5]

On July 20, 2011, the district court held Rizzolo's judgment and sentencing hearing. ER 297-384. The district court first ruled that, as Rizzolo had urged, the Henrys were not "victims" within the meaning of 18 U.S.C. § 3771. ER 300-01 ("[T]he Henrys are not 'victims' of the crime of conviction which brings the case before the Court, the . . . conspiracy to defraud the United States of tax revenue, basically."). The court nevertheless found that, because Rizzolo's criminal plea agreement expressly promised to pay the Henrys a total of ten million dollars to settle their civil claims, the Henrys' enjoyed a "kind of hybrid, unusual status" in Rizzolo's revocation proceedings. ER 301. The court thus ruled: "I am going to allow the filing that they made . . . and I will also allow [their attorney] . . . to briefly address the matter to state the Henrys position in a few minutes . . . ." *Id.*

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[5] The CVRA provides "victims" the "right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole hearing." 18 U.S.C. § 3771(a)(4); *see also United States v. Burkholder*, 590 F.3d 1071, 1074 (9th Cir. 2010) (statutory "victim" is a "person directly and proximately harmed as a result of the commission of a Federal offense") (quoting 18 U.S.C. § 3771(e)).

Heeding the court's admonition to keep it brief, the Henrys' attorney presented statements that covered four pages of transcript. ER 311-15. Counsel claimed that Rizzolo's post-release acts had "ridden roughshod over the . . . supervised release procedure" and deprived the Henrys (and the IRS) of their payments. ER 311. Agreeing that the Henrys should "have priority over the IRS," counsel then used the word that draws Rizzolo's specific objection on appeal:

> [T]he first order of business is to send this gangster back to jail. It's the only thing he understands. If he understood the rules of law in a regulated society, he wouldn't have hidden the Cook Islands money from probation and forced [another plaintiffs' attorney] to uncover it in a deposition.

ER 312; *see also* ER 313 (urging court to "ensur[e] that the Henrys will have priority). After again urging the court to impose a custodial sentence, counsel stated he would pursue Rizzolo "through the gates of hell to get the Henrys their money." ER 312; *see also* ER 313-14 (remaining remarks deal with proposed language for order). After the Henrys' counsel concluded, the Government and Rizzolo presented lengthy arguments in support of their respective positions. *See* ER 315-31 (Government's argument in favor of nine months' imprisonment), 331-59 (repeatedly claiming he received "mixed signals" regarding payment obligations (ER 332, 341, 346, 355, 357), Rizzolo seeks non-custodial sentence and extension of supervised release).

Without ever referring to the Henrys' counsel's brief statements, the district court then made detailed factual findings based on the evidence from the four hearings. ER 368-70 (court finds that, in violating reporting requirements, Rizzolo: (1) "concealed relevant financial information relating to the October 2007 purchase agreement . . . which he entered into . . . through his ex-wife acting on a power of attorney;" (2) "failed to disclose" an interest "subsequently assigned to [his] father;" (3) failed to "disclose payments totaling $900,000, which he authorized in his April 24, 2008 letters" to his bank; court adds that "[e]ven if [he] were . . . not obligated to report his initial receipt of $990,000 . . . because the transaction occurred a day or so prior to . . . supervised release, he was unquestionably obligated . . . to disclose the disposition of these funds *on or after* April 4, 2008 and he failed to do so") (emphasis added), ER 371-73 (court finds, with regard to violation of unapproved financial transactions: (1) that Rizzolo "failed to obtain permission . . . before authorizing the Cook Islands trustee to pay out $900,000 in cash proceeds as repayment of debt and services rendered;" (2) that when Rizzolo sought reporting exemption, Probation Officer "was not aware that defendant Rizzolo had recently received and deposited nearly a million dollars into" one another one of his accounts; (3) that Rizzolo "failed to obtain permission" before "executing the assignment of the first $789,000 of the sale proceeds to his father . . . on April 2008,

and again, when in April 2009, he executed a second amendment . . . that sum of money directly, rather than through the defendant;" and (4) that Rizzolo failed to obtain prior approval for his April 2008 payments to his father, his ex-wife, and his law firm, which "effectively concealed . . . the means by which he carried out his financial dealings"), ER 373-74 (finding that Rizzolo "can't claim ignorance" of duty to repay IRS, and that his financial "dealings, structuring, [and] machinations consistently frustrated the ability of the Probation Office to supervise him . . . and effectively defeated the ability to ensure compliance with his obligations not only to the IRS directly but *also to the Henrys*") (emphasis added).

Based on these findings, the district court – without mentioning the Henrys' attorney's statements – revoked Rizzolo's supervised release:

> Since his commencement on supervised release, the Defendant has paid very little in the way of restitution to anyone to whom he owed restitution, *including the Henrys and the [IRS]. He has consistently structured and concealed his financial dealings in such a manner as to frustrate, effecting [sic] the restitution and tax obligations he was ordered to comply with . . . .*
>
> [I] think . . . that Mr. Rizzolo can't claim ignorance; that he understood his obligations to cooperate with his Probation Officer to discharge his obligations to the [IRS] is really – I mean, it's pellucid. It's just crystal clear the very crime that Mr. Rizzolo pled guilty to involved conspiracy to defraud revenue obligations owed to the United States. *And the Court finds that he acted knowingly and willfully in doing so.*

> So, in a nutshell, *the Court finds that each of the three Grade C violations alleged in the petition and the addendum have been sustained . . . by a preponderance of the evidence . . . .*

ER 373-74 (emphasis added).

The district court turned to the issue of fashioning a reasonable sentence based on an advisory guidelines range of 3-9 months' imprisonment. ER 317. Again without mentioning the Henrys' attorney's statements, the court considered the sentencing factors in 18 U.S.C. § 3553(a), the "necessary guidance" provided by the advisory guidelines, and whether the "failure to take action" would "deprecate the seriousness of the violation and render less effective the ability of the [Probation Department] to carry out its responsibilities." ER 374-75. The court then sentenced Rizzolo to nine months' imprisonment, followed by 24 months of supervised release. ER 374-75, 386-90.

Rizzolo timely appealed his conviction and sentence. DC Doc. No. 462.

V.

SUMMARY OF ARGUMENT

The district court acted well within its discretion when – after four days of evidentiary hearings on Rizzolo's supervised release violations – it permitted the Henrys' civil attorney to present a brief argument in favor of incarceration. As is clear from the record and the district court's careful findings, the decision to revoke

supervised release and impose a within-guidelines sentence derived from the unchallenged record evidence, not from civil counsel's characterization of Rizzolo or counsel's opinion that Rizzolo should go "back to jail." ER 312, 369-74.

Rizzolo wrongly believes that district courts lack discretion to entertain statements from persons who do not qualify as "victims" under the Crime Victims' Rights Act (18 U.S.C. § 3771). The Eighth Circuit recently rejected such a restrictive approach, emphasizing that ample statutory and precedential bases exist to allow interested parties to be heard, even if they are not "CVRA victims." *See United States v. Straw*, 616 F.3d 737, 741 (8th Cir. 2010) ("Even though 18 U.S.C. § 3771(a) grants a crime victim the right to be heard at public proceedings, the statute does not operate to *exclude* others from being heard at such proceedings.") (emphasis in original).

The Henrys had a clear interest in Rizzolo's supervised release proceeding – Rizzolo promised to pay them ten million dollars as part of his plea agreement, and the Henrys' civil case against him sought the same assets Rizzolo had been hiding since he commenced his term of supervised release. ER 301 (because Rizzolo's criminal plea agreement "rolled into the [Henrys'] civil litigation," the Henrys "have a kind of hybrid, unusual status"). Because the district court acted within its

discretion in entertaining plaintiffs' counsel's statements, this Court should affirm Rizzolo's judgment and sentence.

VI.

ARGUMENT

A. Standards of Review

The district court's decision to revoke a term of supervised release is reviewed for abuse of discretion. *United States v. Harvey*, ___ F.3d ___, 2011 WL 5223593 (9th Cir., Nov. 3, 2011) at *1. This Court also reviews for abuse of discretion a district court's consideration of particular evidence at a supervised release revocation. *United States v. Schmidt*, 99 F.3d 315, 320 (9th Cir. 1996).

B. The District Court Acted Within its Discretion in Allowing the Henrys' Attorney to Address the Court

Rizzolo does not challenge the district court's findings that he committed the acts (and, engaged in the omissions) established at the evidentiary hearings. ER 369-74 (district court's findings in support of violations). Nor does Rizzolo 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) ("preponderance of the evidence" standard); *United States v. Denton*, 611 F.3d 646, 650 (9th Cir. 2010) (citing 18 U.S.C. § 3583(e)(3)). The gist of Rizzolo's appeal (apart from his

specific objection to the "gangster" remark, ER 312) is that once the district court found the Henrys to be non-victims under the CVRA, there remained "*no authority* for the district court to . . . permit[]" their lawyer to speak on their behalf. OB at 11 (emphasis added).

This argument – which would strip sentencing courts of discretion to hear from anyone who did not qualify as a CVRA "victim" – finds no support in the precedent and contravenes a recent decision from another circuit. Thus, in *Straw*, a white-collar fraudster argued on appeal that the district court had improperly allowed a "non-victim" to address the court shortly before it "varied upward and imposed a sentence of 180 months' imprisonment." *Straw*, 616 F.3d at 740 (court allows "brief statement" from cousin of woman defrauded by Straw in unrelated state case). The Eighth Circuit rejected the defendant's narrow reading, emphasizing a person's inability to qualify as a "CVRA victim" did not bar allocution under 18 U.S.C. § 3661:

> Even though 18 U.S.C. § 3771(a) grants a crime victim the right to be heard at public proceedings, the statute does not operate to *exclude* others from being heard at such proceedings. Congress has provided 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." 18 U.S.C. § 3661. Furthermore, in sentencing, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of

> information he may consider, *or the source from which it may come*[.]" *United States v. M.R.M.*, 513 F.3d 866, 870 (8th Cir.2008) (quoting *United States v. Tucker*, 404 U.S. 443, 446, 92 S. Ct. 589, 30 L. Ed.2d 592 (1972)) (emphasis added). Therefore it was not plain error for the district court to hear Hansen's statement because the statement concerned Straw's background, character, and conduct.

Id. at 741 (emphases in original).

Under these principles, the district court had discretion to entertain argument from the Henrys – even if (as Rizzolo points out) they had no statutory "right" to be heard. *See, e.g.*, OB at 13 (arguing that "counsel for the Henrys clearly had no right [under CVRA] to address the sentencing court in these criminal revocation proceedings"). Having presided over Rizzolo's guilty plea in 2006 (in which he promised to make the Henrys whole), and the Henrys' civil case since 2008, the district judge knew, by 2011, that the Henrys' civil claims were closely tied to the asset-concealing conduct alleged in Rizzolo's supervised release proceeding. Under such circumstances, the district court agreed to hear briefly from Henrys' attorney:

> [G]iven the highly unusual nature of the plea agreement in this case . . . which rolled into the civil litigation that was then pending in state court or at least in part did so, and sought to resolve claims entirely as regards the Henrys and Mr. Rizzolo and the . . . Power Company . . . I think that they have a kind of hybrid, unusual status. I am going to allow the filing that they made [in support of being heard]

> . . . and I will also allow [their attorney] . . . to briefly address the matter to state the Henrys position in a few minutes . . . .

ER 301.

In making this decision, the district court implicitly – and correctly – recognized that it could still hear from the Henrys as interested parties, even though they were not victims under Section 3771. *See Straw*, 616 F.3d at 741 ("Even though 18 U.S.C. § 3771(a) grants a crime victim the right to be heard at public proceedings, the statute does not operate to *exclude* others from being heard at such proceedings.") (emphasis in original); *see also Nichols v. United States*, 511 U.S. 738, 747 (1994) ("As a general proposition, a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.") (internal quotation omitted); *United States v. Jones*, 114 F.3d 896, 898 (9th Cir. 1994) ("[U]nder 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.'") (citing U.S.S.C. § 1B1.4); *United States v. Borrero-Isaza*, 887 F.2d 1349, 1352 (9th Cir. 1989) (court may consider a "wide, largely-unlimited variety of information at sentencing") (per curiam). The district

court thus acted within its discretion when it permitted counsel to argue for Rizzolo's incarceration.

Even if the district court erred in permitting counsel's argument, Rizzolo cannot establish that this error caused him prejudice. OB at 9, 13. At no point in its revocation determination (ER 369-74) or sentencing determination (ER 374-75) did the district court mention counsel's argument, the word "gangster," or even Rizzolo's reputed ties to organized crime. The court's findings derived not from counsel's rhetorical flourishes, but from the four days of hearings and evidence – unchallenged on appeal – that detailed Rizzolo's evasive reporting, secret financial transactions, and pattern of non-disclosure. ER 369-74; *see United States v. Hall*, 419 F.3d 980, 986 (9th Cir. 2005) (in appeal alleging due process violation based on admission of unreliable hearsay at revocation hearing, Court holds: "Because the nonhearsay evidence introduced at the evidentiary hearing alone was sufficient to sustain the domestic violence allegation, the hearsay evidence could not have significantly affected the court's ultimate finding."); *United States v. Frazier*, 26 F.3d 110, 114 (11th Cir. 1994) (affirming revocation even where district court improperly considers hearsay; Court finds that the remaining, "properly considered evidence overwhelmingly demonstrated that [the defendant] breached the terms of his supervised release.").

There is thus no possibility that prejudice affected what was, in essence, a bench trial by an experienced district judge on the issue of supervised release. *See E.E.O.C. v. Farmers Bros. Co.*, 31 F.3d 891, 898 (9th Cir. 1994) ("[I]n a bench trial, the risk that the verdict will be affected unfairly and substantially by the admission of irrelevant evidence is far less than in a jury trial."); *Hollinger v. United States*, 651 F.3d 636, 640 (9th Cir. 1981) ("In non-jury cases, the district court is given great latitude in the admission or exclusion of evidence . . . . We have held that a district judge sitting without a jury has discretion to receive evidence that might be inadmissible in a jury trial.") (citations omitted); *see generally United States v. Gale*, 468 F.3d 929, 941 (6th Cir. 2006) ("It is fair to say that if an appellate court cannot rely on a lower court to do its duty by reviewing the factual record, our system of justice will collapse of its own weight.").

Rather than identify actual prejudice, Rizzolo speculates that "there is no accounting for the impact" that counsel's argument might have had on the district court's decision. OB at 13. This Court should reject Rizzolo's speculation. Setting to one side the fact that the district court never mentioned counsel's argument, Rizzolo selectively reproduces the district court's remarks as follows: "Indeed, in doing so [i.e., in revoking supervised release and imposing a custodial sentence], the district court stated that 'the Defendant has paid very little in the way of

restitution to . . . the Henrys' – despite the fact that Mr. Rizzolo has in fact paid the Henrys a million dollars to date." OB at 13 (ellipses in original). What the district court actually stated was: "*Since his commencement on supervised release*, the Defendant has paid very little in the way of restitution . . . ." ER 373 (emphasis added).

Read in full, the district court's statement is correct – while Rizzolo did pay the Henrys one million dollars as a condition of his guilty plea in 2006, he has paid them "very little" since his commencement on supervised release in April 2008. By omitting the clause, "Since his commencement on supervised release," Rizzolo tries to create the illusion that the district judge – its sound judgment somehow skewed by a snippet of rhetoric – forgot about Rizzolo's initial payment to the Henrys. That judge, however, did not forget. *See* ER 124 (court correctly states in April 2011: "[I] believe that [i.e., Rizzolo's initial payment] was satisfied."). Accordingly, even if the district court abused its discretion in permitting counsel to present argument, that error caused no prejudice. Rizzolo's judgment and sentence should thus be affirmed.[6]

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[6] In any event, the remedy Rizzolo seeks ("reversal" of the revocation and sentence, OB at 9) does not correspond to the error assigned on appeal. Rizzolo essentially challenges the admissibility of the Henrys' attorney's sentencing

(continued...)

VII.

CONCLUSION

For the foregoing reasons, this Court should affirm Rizzolo's supervised release violations and sentence.

DATED this 26th day of January, 2012.

Respectfully submitted,

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/s/ Peter S. Levitt
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[6](...continued)
argument, *not* whether the record evidence fell short of the "preponderance of the evidence" standard. Accordingly, were this Court to find that the district court abused its discretion in permitting counsel to argue, and further find that that argument resulted in prejudice, this Court should remand for the limited purpose of determining if counsel's argument played any part in the court's decision to impose a within-guidelines term of incarceration.

VIII.

CERTIFICATE OF RELATED CASES

In accordance with the provisions of Rule 28-2.6 of the Rules of the Ninth Circuit Court of Appeals, the United States advises the Court that it knows of no prior or related cases.

/s/ Peter S. Levitt
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IX.
BRIEF FORMAT CERTIFICATION

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/S/ Peter S. Levitt
PETER S. LEVITT
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X.

CERTIFICATE OF SERVICE

UNITED STATES OF AMERICA,	)	
	)	CA No. 11-10384
Plaintiff-Appellee,	)	DC No. 2:06-cr-186-PMP
vs.	)	
	)	
FREDRICK RIZZOLO,	)	
	)	
Defendant-Appellant	)	

I hereby certify that on January 26, 2012, I electronically filed the foregoing Appellee's Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Terrie Murray
TERRIE MURRAY
Legal Assistant