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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,	) 2:06-CR-186-PMP (PAL)
Plaintiff,	)
v.	)
FREDERICK RIZZOLO, et al.,	)
Defendants.	)

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT RIZZOLO'S EMERGENCY MOTION TO STAY SURRENDER TO DESIGNATED CORRECTIONAL FACILITY PENDING APPEAL OF REVOCATION OF SUPERVISED RELEASE

COMES NOW the United States of America by and through its attorneys, Daniel G. Bogden, United States Attorney, and Eric Johnson, Chief, Organized Crime Strike Force, and responds in opposition to defendant's Emergency Motion to Stay Surrender to Designated Correctional Facility Pending Appeal of Revocation of Supervised Release. (Doc. #472)

Defendant Rizzolo requests release pending his appeal of the Court's revocation of his supervised release. Defendant seeks release under Title 18, United States Code, Section 3142(b). However, Section 3142(b) is inapplicable in this situation where the defendant has been revoked and sentenced to imprisonment. In United States v. Bell, 820 F.2d 980 (9th Cir. 1987), the Ninth Circuit held that Sections 3141, et seq. are not applicable to appeals from probation revocations. The Ninth Circuit found that "release pending appeal from an order revoking probation is proper only upon a showing of exceptional circumstances." The Ninth Circuit reaffirmed the Bell decision in the context of revocation of supervised release in United States v. Loya, 23 F.3d 1529 (9th Cir.

1994). In Loya, the Court explained that there are "sound practical" reasons for the "extremely demanding" Bell test:

> The test adopted in Bell, the "exceptional circumstances" test, is substantially stricter than the provisions of 18 U.S.C. 3143. Cf. United States v. Koon, 6 F.3d 561, 564 (9th Cir. 1993)(Rymer, J., conc.). In Bell, the defendant was found to have violated a condition of probation. It is proper then to reserve bail only for an extraordinary case.

Id. at 1531. I n Bell, the Court explained that when a defendant seeks release pending appeal base on the legal challenges the defendant intends to put forward in his appeal, the defendant has the burden of showing that he raises "substantial claims upon which the appellant has a high probability of success."

In the instant case, defendant does not raise any claims which are substantial, much less have a high probability of success. Title 18, United States Code, Section 3583, provides that the Court may revoke a defendant's supervised release upon finding by a preponderance of the evidence that the defendant has violated a condition of supervised release. The Court found that the defendant violated three conditions of supervised release. Defendant's violation of any one of these three conditions would justify the Court's imposition of the sentence in this case. As to each violated condition, the Court made factual findings of multiple violations of the condition. Again, any one of the Court's factual findings would justify revocation of his supervised release and sentence.

Defendant Rizzolo's first appeal ground challenging the sufficiency of the evidence to establish the violations by a preponderance of the evidence does not raise the high probability of success necessary for him to justify release pending appeal. The Court of Appeals will view the evidence in the light most favorable to the government and will accept this Court's findings of fact unless they are clearly erroneous. United States v. Stanley, --- F.3d ----, 2011 WL 3275959 (9th Cir. 2011); see also United States v. Portalla, 985 F.2d 621, 622 (1st Cir.1993). A court's finding is "clearly erroneous" if it is (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record. United States v. Hinkson, 585 F.3d 1247, 1262 (9th

Cir.2009) (en banc) (quoting Anderson v.City of Bessemer City, 470 U.S. 564, 577 (1985)); see also United States v. Guerrero, 595 F.3d 1059 (9th Cir. 2010). Under the clear error standard of review, if a district court's factual findings are plausible in light of the record viewed in its entirety, the appellate court cannot reverse even if it is convinced it would have found differently. United States v. McCarty, --- F.3d ----, 2011 WL 3319428 (9th Cir. 2011).

The evidence of defendant's violation of the three conditions of his supervised release is overwhelming. There is little likelihood that the Ninth Circuit will find insufficient evidence to support the Court's findings in this case.

Defendant's other grounds for appeal are also factual determinations falling under the clearly erroneous standard. The Court thoroughly considered defendant Rizzolo's arguement that he was "given affirmative erroneous advise and instruction by his probation officer with respect to the violations." Probation Officer Eric Christiansen testified as to his meetings and discussions with defendant. The Court found that Officer Christiansen's statements to defendant did not mislead defendant as to his obligations to accurately report to the Probation Office, to obtain permission from Probation for financial transactions and to cooperate with the IRS in the payment of his taxes. Defendant declined to testify. Consequently, defendant submitted no contradictory evidence as to his understanding and intent concerning his compliance with his supervised release conditions. While defendant argued that he unintentionally violated his conditions due to conflicting signals, defendant's argument was merely argument, not evidence. United States v. Working, 224 F.3d 1093, 1102 (9th Cir. 2000) (en banc) ("'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'")(quoting Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985); see also Anderson, 470 U.S.at 575 (holding that when a "trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error").

Likewise, the Court considered Rizzolo's contention that his "failure to pay tax arrearages was attributable to the failure of the Internal Revenue Service to provide Mr. Rizzolo with proper notice and demand for payment." The Court found that defenant's attorney's opinion of required notice and demand did not mislead defendant as to his obligations to cooperate and pay taxes he knew were due and owing to the IRS, and certainly did not mislead him as to his obligation to pay his 2006 taxes which were not part of the plea agreement and settlement agreement with the IRS. Again, defendant declined to testify as to what he was told about the issue of notice and demand and his understanding of his tax obligations. Consequently, again, defendant submitted no contradictory evidence as to his understanding and intent concerning his compliance with this condition. The Court heard defendant's argument as to the hypothetical impact the notice and demand issue may have had on defendant's intent to violate the supervised release condition, and concluded that the evidence did not support such a finding, choosing instead to make the factual finding that defendant sought to violate the condition. Consequently, defendant Rizzolo's appeal grounds challenging his probation officer's statements and the impact of the notice and demand issue on his cooperation with the IRS do not have the high probability of success necessary for him to justify release pending appeal of his revocation.

Defendant Rizzolo raises on appeal a new argument that his "failure to pay tax arrearages was due to financial inability on his part attributable to the willful or reckless failure of the government to preserve and sell the Crazy Horse 2 (sic) gentlemen's club as required by the plea agreement in this case." Defendant did not make this argument at the hearing and did not put on any evidence that the government engaged in willful or reckless misconduct concerning the sale of the Crazy Horse Too. More significant, however, the government did not charge defendant with violating his conditions of release because he simply failed to pay his taxes. The government charged that the defendant took affirmative steps and actions to avoid cooperating with the IRS and paying his taxes from potential available assets. The fact that defendant did not receive any funds from the Crazy Horse Too is irrelevant to the charges in the revocation petition.

Finally, defendant's suggestion that the Court's allowing of the Henrys' counsel to address the Court somehow prejudiced defendant likewise lacks merit. Supervised release revocation proceedings are not subject to the Federal Rules of Evidence and the Court has broad discretion to consider any information it believes helpful and reliable in determining the facts and deciding on a sentence. The Court provided a detailed explanation of its basis for decision and sentence, which was not based on information or comments unique to the Henrys' counsel. Defendant does not have a high probability of success on appeal with this issue.

Because: 1) the Court had to find for revocation of supervised release by a preponderance of the evidence; 2) the standard of review for the Court's factual finding is the clearly erroneous standard; and 3) the defendant's appeal grounds are essentially factual challenges, the defendant has failed to meet his burden of demonstrating "substantial claims upon which the appellant has a high probability of success." Consequently, defendant has failed to meet the extremely demanding Bell test and has not demonstrated that his case presents an extraordinary circumstance justifying his release pending appeal of his supervised release revocation. Defendant's motion should be denied.

Dated September 7, 2011.

DANIEL G. BOGDEN
United States Attorney

/S/
ERIC JOHNSON
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