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VIA EMAIL

Catherine O'Hagen Wolfe
Clerk of The Court
United States Court of Appeals
Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: Gayle v. Harry's Nurses Registry, Inc.
Case No. 12-4764
Our File No. 22424

Dear Ms. Wolfe:

We represent the Defendant-Appellants in the above matter. On October 11, 2023, the Defendant-Appellants attempted to file a renewed motion to recall mandate. This filing was rejected, and the following notification appeared on screen: "Not Linked to Case. You do not have permission to file this type of document in case 12-4764." This office was subsequently informed over the phone by the Case Closing department of the Clerk's Office of this Court, that Defendant-Appellants' filing was rejected because this Court does not adjudicate on renewed motions to recall mandates.

Annexed is a copy of this Court's summary order in *United States v. Riggi*, 308 Fed. Appx. 514 (2d Cir. 2009). There, this Court (1) noted that it had previously denied a motion to recall mandate, (2) noted that a "renewed motion to recall mandate" was now before it, and (3) adjudicated on same. *Id.* at 516. A discussion of *Riggi* and other authorities providing for a right to bring Defendant-Appellants' renewed motion to recall mandate is set forth in Point II of same.

Thus, Defendant-Appellants respectfully request that the Court consider their renewed motion to recall mandate.

Respectfully submitted,

s/Marshall B. Bellovin
Marshall B. Bellovin (MB5508)

United States v. Riggi

United States Court of Appeals for the Second Circuit

January 28, 2009, Decided

06-1280-cr

Reporter

308 Fed. Appx. 514 *; 2009 U.S. App. LEXIS 1602 **

UNITED STATES OF AMERICA, Appellee, - v.- GIOVANNI RIGGI, MICHAEL SILVESTRI, GIROLAMO PALERMO, also known as Jimmy Palermo, Defendants, ANTHONY MANNARINO, also known as Anthony Marshmallow, GIUSEPPE SCHIFILLITI, also known as Pino Schifilliti, PHILIP ABRAMO, LOUIS CONSALVO, also known as johndoe8, also known as Louie Eggs, also known as Frank Scarabino, STEFANO VITABILE, also known as Steve Vitabile, Defendants-Appellants.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: Subsequent appeal at United States v. Riggi, 649 F.3d 143, 2011 U.S. App. LEXIS 16498 (2d Cir. N.Y., 2011)

Prior History: United States v. Riggi, 541 F.3d 94, 2008 U.S. App. LEXIS 18905 (2d Cir. N.Y., 2008)

Judges: [**1] PRESENT: HON. DENNIS JACOBS, Chief Judge, HON. GUIDO CALABRESI, HON. ROBERT D. SACK, Circuit Judges.

Opinion

[*515] **SUMMARY ORDER**

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion to recall the mandate is **DENIED**.

Defendant-Appellant Anthony Mannarino has made a motion asking this Court "to rule on the outstanding [*Anders*] pleading currently pending before this Court." We write to clarify the current posture of this case and to explain why Mannarino is not entitled to relief. Mannarino's motion--which we construe as a motion to recall the mandate--is denied.

Mannarino pleaded guilty to one count of conspiring to obstruct justice in violation of 18 U.S.C. § 371. The United States District Court for the Southern District of New York (Mukasey, C.J.) sentenced Mannarino principally to 57 months' imprisonment, the minimum sentence available

under the "Stipulated Sentencing Guidelines Range" of 57-60 months set forth in Mannarino's plea agreement. On November 12, 2004, Mannarino appealed from the judgment.

On March 6, 2007, Mannarino's attorney filed a motion to be relieved as counsel and a brief in accordance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), explaining why no **[**2]** non-frivolous basis existed for challenging the validity of Mannarino's conviction and sentence.

On April 17, 2007, Mannarino *pro se* urged that the *Anders* Brief be denied and that he be granted a sixty day extension to file a supplemental response. This Court granted Mannarino's initial request for an extension--and several additional extensions thereafter. Nonetheless, Mannarino failed to file his supplemental response to the *Anders* Brief until July 1, 2008, nearly a month after this court summarily affirmed his conviction and sentence, and a day after the issuance of the mandate closing the appeal.

On July 3, 2008, the Clerk of the Court advised Mannarino that the mandate had **[*516]** issued in his case and that he would need to submit a motion to recall the mandate. **On August 4, 2008, Mannarino filed a motion to recall the mandate to which he attached a postal receipt indicating that he mailed his supplemental response to counsel's *Anders* Brief before the mandate issued.**

On August 19, 2008, this Court accepted the filing of Mannarino's late brief but denied his motion to recall the mandate. Thereafter, Mannarino filed this motion for a ruling on his response to his attorney's *Anders* Brief. **[3]** Since the mandate has issued, we construe the motion as a renewed motion to recall the mandate.**

The power to recall a mandate "can be exercised only in extraordinary circumstances." *Calderon v. Thompson*, 523 U.S. 538, 550, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998); *see also Nnebe v. United States*, 534 F.3d 87, 91 (2d Cir. 2008) (same). In this case, no "extraordinary circumstances" favor recall of the mandate.

Mannarino argues that the mandate was issued in error because he had mailed his supplemental brief three days before the mandate issued. However, even if Mannarino mailed his supplemental response prior to issuance of the mandate, that would not excuse the delay of more than a year between the filing of the *Anders* Brief and Mannarino's supplemental response, and the delay of nearly a month between this Court's denial of Mannarino's appeal and his filing of the brief.

At the time we summarily affirmed, we had the benefit of Mannarino's initial response to the *Anders* Brief, as well as the *Anders* Brief **[**4]** itself and the government's motion for summary affirmance. Mannarino has failed to identify any extraordinary circumstances warranting vacation of his plea or the sentence to which he explicitly consented in his plea agreement.

We have considered Mannarino's remaining arguments and find them to be without merit. For the foregoing reasons, Mannarino's motion, which we construe as a motion to recall the mandate, is **DENIED**.