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ORIGINAL JURISDICTION APPEAL SUMMARY

NAME: Gambino, Rosario **REG. NO.** 06235-050 **INST:** Terminal Island FCI

OFFENSE: Conspiracy to distribute heroin, use of a communication facility to distribute heroin, possession with intent to distribute heroin.

TERM:	45 year RA	**DOB:**	[redacted]
BEGAN:	12/6/1984	**MOS AT APPEAL:**	181
MOS AT REL:	276	**DAYS JT:**	265
DAYS INOP:	0	**PE DATE:**	03/15/1994
MR DATE:	06/12/2014	**2/3 DATE:**	3/15/2014
FT DATE:	03/15/2029	**G/L:**	100+
OFS SEV:	Category Eight	**SFS:**	9

RKP 4/9/99 NOTE see corrected summary RKP 4/14/99

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LAST COMMISSION ACTION:

Subject received a special reconsideration hearing on October 30, 1998. Following that hearing, the Commission ordered subject to continue to a presumptive parole date after the service of 276 months on March 14, 2007. This was an advancement from the prior decision to continue subject to a 15-year reconsideration hearing.

The Commission found that the offense should be rated Category Eight because subject sold 460 grams of heroin and directed a conspiracy to sell 10 kilograms of heroin. The Commission also found that in furtherance of the conspiracy, subject approved an offer to make two kilograms immediately available with the actual sale of one-half kilogram to demonstrate the quality of the heroin.

The Commission also found, in a corrected Notice of Action dated January 20, 1999, that a decision more than 48 months above the minimum guideline range was warranted because subject is a sophisticated professional criminal who is unlikely to abandon a career in organized narcotics trafficking in the manner of an organized crime family and whose methods included the deliberate cultivation of a reputation for readiness to inflict death upon those who might introduce undercover informers to the organization. The Commission also concluded that through subject's underlings, subject expressed the ability to distribute 10 kilograms of heroin each month on an on-going basis and that subject was the leader because he set the price for the heroin to be distributed and determined who would be involved in each transaction. Finally, subject approved the guarantee to deliver 10 kilograms of heroin per month and the Commission found that this indicated that he had an established involvement with wholesale narcotics distributors.

The Commission also rejected subject's contention that his offense was a one-time involvement in crime and his claim that he did not direct the activities of his codefendant Erasmo Gambino as inconsistent with the information in the record.

RECOMMENDED ACTION:

EXHIBIT 36

Affirmation of the previous decision.

RECOMMENDED REASONS:

The Full Commission has reviewed the grounds you raise in your appeal and affirms the prior Commission decision.

Your first claim on appeal is that it was a violation of your due process rights for the Commission not to adopt the recommendation of the hearing examiner. You argue that since the hearing examiner that conducted the hearing recommended that the offense should be rated Category Six and that you should be paroled, that the Commission was required to adopt this recommendation or else order another hearing. You cite the district court opinion of Flores v. Stock, 715 F. Supp. 1468 (C.D. Cal. 1989). First, your case is clearly distinguishable from the circumstances in Flores. Flores involved a parole revocation case where the credibility of the testimony of a witness was central to a finding of whether or not the alleged parole violator had violated the conditions of parole. The due process rights afforded a parolee at a revocation hearing are greater than the due process rights afforded a prisoner applying for release on parole since a person on parole has a greater liberty interest in maintaining that status. When a prisoner seeks parole, due process requires only that he be apprised of the information on which the Commission may rely and have an opportunity to refute that information, either at the parole hearing or upon administrative appeal. Roberts v. Corrothers, 812 F.2d 1173, 1179 (9th Cir. 1987). In your case, you are not on parole and the issue is not your credibility but a hearing examiner's assessment of the record and recommendation to the Commission. Applying procedural requirement found necessary in Flores to the parole release decision-making process would transfer the parole decision-making authority to the hearing examiners at the expense of the Commissioners. The parole statute clearly vested the parole decision-making authority in the Commissioners and not the examiners and the statute was created in the context of hearing examiners conducting hearings and making recommendations to the Commissioners. See Reynolds v. McCall, 701 F.2d 810 (9th Cir. 1983); Lynch v. United States Parole Comm'n, 768 F.2d 491, 496 (2d Cir. 1985); Liberatore v. Story, 854 F.2d 830, 837-38 (6th Cir. 1988).

Second, the Commission believes that Flores was incorrectly decided and notes that Flores conflicts with the circuit court opinion of Moore v. DuBois, 848 F.2d 1115 (10th Cir. 1988), and appears to conflict with the Ninth Circuit's decision in Standlee v. Rhay, 557 F.2d 1303 (9th Cir. 1977). In Rhay, the Ninth Circuit found that a parolee was not denied due process where a key alibi witness was not present at a final revocation hearing. The Ninth Circuit stated that "parole revocation proceedings are not part of the criminal process and are not protected by the full panoply of due process rights." 557 F.2d at 1307. The Ninth Circuit went on to conclude that the examiner's reliance on transcripts in lieu of live testimony was appropriate and had been expressly approved by the Supreme Court citing Gagnon v. Scarpelli, 411 U.S. at 783 n. 5. The Ninth Circuit in Rhay stated that "[a]t the very least, . . . [petitioner] would have to show prejudice resulting from the use of the transcript." Id. (citations omitted). You have alleged no prejudice from your claimed deprivation of your due process right to another hearing and there is none evident in the record. The issue of whether your offense should be rated Category Six or Category Seven is based on written information in the record that has been available to you prior to the most recent special reconsideration

hearing. You were clearly on notice that the Commission might rate your offense Category Eight as the Commission had done so in the past and you had every opportunity to present your arguments to the Commission.

Finally, it is clear to the Full Commission that the hearing examiner was applying a clear and convincing evidence standard to the information in the record rather than a preponderance of the evidence standard to determine the appropriate offense severity rating. The question to be resolved did involve witness credibility. Rather, it was a question of the weight of the information in the record. The Full Commission can identify no substantive due process right under the circumstances of this case that would preclude additional examiners and the Commissioners from assessing the weight of the record information without requiring a pro forma additional hearing.

Your second claim on appeal challenges the Commission's finding that your offense behavior should be rated Category Eight. You argue, in addition to the argument that the hearing examiner that conducted the hearing made a contrary finding, that the decision in your case resulted in unwarranted codefendant disparity. The Full Commission has reviewed information in your file and concludes your offense was properly rated Category Eight. Assuming that the same information was presented in your codefendant's cases, then it appears that there may have been an error in their cases if they were not also rated Category Eight. The Commission may reconsider the decision in the case of Erasmo Gambino since he has not been released. (In fact, even if the appearance of disparity exists in the rating of the offense, there is no actual disparity since Erasmo Gambino has been denied parole). The Commission will not compound an error made in the cases of your codefendants by incorrectly rating your offense behavior as well. Moreover, the Full Commission is aware that your challenge to the rating of your offense in a habeas corpus petition was recently rejected by the United States District Court for the Central District of California.

The Full Commission finds that you were the most culpable of all the offenders in this conspiracy and notes that the information in your file supports the conclusions of the Commission. The information supports the conclusion that it was you that provided the assurance that 10 kilograms of heroin could be delivered.

Your claim that you did not have the ability to distribute 10 kilograms of heroin has been reviewed. You argue that the other codefendants, Anthony Spatola and Antonio Gambino, told the FBI that they could not provide that much heroin. However, the Full Commission finds that your role was significantly more culpable than these two codefendants and that you had the ability to make good on your assurances.

Your claim that the Third Circuit on direct appeal from the conviction noted that the issue of whether or not the conspirators could provide additional amounts of heroin was never resolved. However, the Commission could, and has, resolved this issue.

The Full Commission has reviewed the grounds you raise for a more lenient decision. The Full Commission has reviewed your institutional record including your participation in a group that counsels youthful offenders. The Full Commission concludes that the seriousness of the offense and the risk to the community outweigh the mitigating factors you present.

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Regarding the issues you raise in your supplement to the appeal, the Full Commission agrees with you that your rescission behavior should be rated as an administrative violation rather than an illicit drug-related infraction, but notes that it does not affect your parole guideline range and the Full Commission finds that an earlier release date is not warranted.

Your claim of a disparate presumptive release date with codefendant Erasmo Gambino is disingenuous. The Commission has not set a presumptive parole in Erasmo Gambino's case. The Commission has ordered him to continue to expiration and any release from his sentence earlier than your presumptive parole date is the result of the fact that Erasmo Gambino's sentence is shorter than yours.

The Full Commission finds no merit to your claim that the decision in your case was the result of discrimination based upon national origin. A review of the record reveals that it was an error for you to have received a special reconsideration hearing. Your hearing should have been a statutory interim hearing where the question of the offense severity rating should not have been an issue. Nevertheless, the Full Commission notes that this resulted in a more favorable decision and affirms the prior commission decision.

NOTES:

Rosario Gambino, is currently an inmate at the Federal Correctional Institution, Terminal Island, California. He is serving a 45-year regular adult sentence to be followed by a 20-year special parole term imposed by the United States District Court for the District of New Jersey for possession with intent to distribute heroin and conspiracy to distribute heroin on December 6, 1984.

According to information contained in the presentence investigation report and the government's version of the offense, subject was the most culpable offender in a large heroin distribution conspiracy whose conduct during the negotiations with codefendants reflected an unusual amount of sophistication in the business. Subject is related to codefendant Erasmo Gambino, not only as a cousin but a brother-in-law as Erasmo Gambino married subject's sister. Subject is related to codefendant Anthony Spatola as a cousin and Anthony Spatola is a cousin to codefendant Antonio Gambino. (See PSI at p. 18).

According to the government version of the offense, codefendants Antonio Gambino and Anthony Spatola had numerous contacts with an undercover agent with regard to the sale of heroin to this undercover agent. Antonio Gambino expressed caution to the undercover agent that he had to be careful about who he introduced to his organization because if he introduced an undercover agent to one of his coconspirators it could result in his death. (PSI at p. 7). These comments to the undercover agent made it clear that persons who would be supplying the heroin were deeply entrenched in the heroin network and suggested that the people from whom Antonio Gambino would be getting the heroin from would provide high quality heroin. (PSI at pps. 7-8). Antonio Gambino suggested that no heroin deals would be any less than one kilogram and repeatedly referred to the persons who supplied the heroin as being members of his family. (PSI at p. 8).

The wiretap suggested that Antonio Gambino was trying to impress his suppliers (including subject, Rosario Gambino) so that he could be accepted within the criminal organization. (PSI at p. 9). The apparent clearing house for large heroin transactions was the Caffe Milano in Brooklyn where subject, Rosario

Gambino, and Erasmo Gambino were frequently found. (See PSI at p. 11). The government viewed the evidence that the coconspirator's use of code words in reference to petitioner indicated that petitioner was the most culpable codefendant. (PSI at pps. 12-14). The comments of Erasmo Gambino clearly suggest that there were other customers in an organized distribution network that involved more than just the deal that Anthony Spatola and Antonio Gambino were attempting to conclude with the undercover agent. (See PSI at p. 15). Subject was the source of the heroin that was ultimately provided to Anthony Spatola and Antonio Gambino as part of their deal with the undercover agent. (PSI at p. 16).

Subject's coconspirator, Antonio Gambino, repeatedly made reference to the source of his supply as heroin as his "family" and that he was very secretive about his family name. (PSI at p. 17). Antonio Gambino suggested to the agents that if they knew their (the coconspirators') last name they would be proud to be dealing with them and they could feel 100% secure in their transactions, and boasted that his family was "really big, big" and that "we can give you all the guarantee you want." (PSI at p. 17). It is clear from the information provided by the government that subject is connected by family or marriage to all of his coconspirators. (PSI at p. 18).

During the course of the negotiations, the undercover agents indicated to Anthony Spatola and Antonio Gambino that they were interested in up to ten kilograms of heroin per month to which Anthony Spatola stated that he would find out and drove to subject's house. (PSI at p. 18). At a later recorded conversation between Antonio Gambino and Anthony Spatola, it was revealed that subject had the authority to determine who would be actively involved in the heroin negotiations and how the profits would be divided among the participants. (PSI at p. 19). On January 19, 1984, Anthony Spatola and Giovanni Bosco met with Erasmo Gambino who subsequently met with subject. (PSI at p. 19). In a conversation intercepted that evening between Anthony Spatola and Antonio Gambino, it was clear that they received an affirmative response that they would be able to proceed with the request for a guarantee of ten kilograms of heroin per month. (PSI at p. 20). It was this guarantee to Antonio Gambino and Anthony Spatola that the Commission determined that petitioner's offense behavior involved a conspiracy to distribute in excess of six kilograms of heroin of unknown purity.

Although Anthony Spatola and Antonio Gambino would ultimately tell the special agent that three kilograms of heroin were immediately available that month (PSI at p. 20), this did not mean that subject had not authorized Antonio Gambino and Anthony Spatola to proceed with the larger conspiracy to distribute ten kilograms of heroin. In a later meeting with the undercover agent, Antonio Gambino indicated that although there was some trouble in providing the heroin immediately, he had received a ten kilogram guarantee from subject. (PSI at p. 21).

As further indication that subject and his coconspirators were experienced heroin traffickers, Erasmo Gambino told Antonio Gambino that this was a "nutty business" and that snags in the delivery of heroin should be expected. (PSI at p. 22). This comment supports the conclusion that it was not a "one time" event as claimed by subject in a later habeas petition that he lost. Furthermore, Erasmo Gambino's offer of assistance in securing bail money and attorneys for others who were arrested in a heroin transaction unrelated to this offense

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further supports the notion that subject and Erasmo Gambino were experienced and entrenched drug traffickers. (See PSI at p. 23). Finally, subject's and Erasmo Gambino's concern about the impact of the arrest in the unrelated conspiracy prompting them to be more cautious in the dealings with the undercover agents suggests trafficking savvy. (PSI at p. 24).

Finally, the government's information indicated that on March 16, 1984, subject was arrested and a search warrant of his home was executed. (PSI at p. 29). In that search, two-$100 bills that had been part of the prerecorded buy money were found in subject's bedroom. (PSI, pps. 29-30). Additionally, the search revealed a secret compartment in the closet in which $20,000 in cash was discovered. (PSI at p. 30). Finally, and most revealing, the search also resulted in the seizure of confidential New York City Police Intelligence files regarding subject, including surveillance notes relating to the Caffe Milano. (PSI A at p. 30). The fact that these surveillance files were illegally passed onto subject by a detective of the New York City Police Department support the conclusion that subject was a sophisticated narcotics trafficker who was capable of conducting counter-surveillance. (PSI at p. 30). (Subject denies that he had obtained these files illegally.)

Subject's presentence investigation report also indicates that subject had been arrested in March of 1980, along with his brother Giuseppe Gambino, for participating in an international heroin smuggling operation wherein 41.5 kilograms of heroin were seized in Italy that was destined for the United States. (PSI at p. 31). Subject was apparently acquitted of this charge.

Since subject was serving a 45-year regular adult sentence, he would not become eligible for parole until after he had served ten years of that sentence. During that time, subject received one incident report for institutional misconduct relating to prescription pills that he was not authorized to have in his possession. Aside from this incident report, subject's conduct has been clear.

Subject received an initial parole hearing on February 16, 1995. At that hearing, subject denied any involvement in narcotic trafficking, however, he admitted that he was having financial difficulty during that period of time and was in need of some money. In view of this denial of guilt, there was little discussion of the offense behavior at the hearing. The hearing examiner (Mr. Dwyer) focussed on subject's eventual release plans to California as subject had brought his son, wife, and mother to the hearing. Following that hearing, the hearing examiner recommended that subject's offense be rated Category Eight because it involved a conspiracy to distribute more than six kilograms of heroin, and recommended that subject continue to a presumptive parole after the service of 148 months. This recommendation was never made a panel recommendation (two concurring hearing examiners) and was later repudiated by hearing examiner Dwyer at a later reconsideration hearing. Of the three examiners and six commissioners that have reviewed subject's case following the initial hearing, none supported this parole date.

The recommendation of the examiner was reviewed by the Regional Administrator (Mr. Sicoli) who concurred with the offense severity rating of Category Eight, however, believed that petitioner was criminally oriented and likely to violate the law when released and recommended that subject continue to expiration. The case was refereed to a third hearing examiner (Mr. Robertson) who concurred with

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the Regional Administrator forming a panel recommendation to the Commission. It is interesting to note that Mr. Robertson now advocates an offense severity rating of Category Six, a position clearly inconsistent with his earlier vote in March of 1995 supporting the Category Eight finding.)

The third examiner also concurred with the referral for original jurisdiction consideration. Subject's case was referred by the Acting Regional Commissioner to the National Commissioners on March 13, 1995, with a recommendation that subject's offense be rated Category Eight because subject had offered guarantees to his coconspirators to supply ten kilograms of heroin per month.

After review by three additional Commissioners, all concurred in the recommendation to continue subject to expiration after rating his offense Category Eight. Although Category Eight offenses have no upper limit to their guidelines, the Commission's practice is to provide relevant case factors for any decisions that could result in the service of more than 48 months above the minimum of that guideline range. These pertinent case factors are distinct from reasons for departures from the guideline range. For the pertinent case factors indicated by the Commission in subject's case, the Notice of Action stated that a decision "more than 48 months above the minimum guideline range is found to be warranted because you are a member of an organized criminal group, criminally oriented and likely to violate the law upon your release from custody."

After the Notice of Action was issued, Commission staff realized that the Commission should have ordered subject to continue to a 15-year reconsideration hearing rather than to expiration, pursuant to 28 C.F.R. § 2.14(c)(1). A corrected Notice of Action continuing subject for a 15-year reconsideration hearing was issued on April 24, 1995. Subject appealed this decision to the Commission's National Appeals Board arguing, among other things, that it was improper for him to receive a one person hearing, that his offense was incorrectly rated Category Eight, and that the Commission incorrectly concluded that he was a member of organized crime.

While reviewing this appeal, the full Commission decided it was appropriate to remand subject's case for a de novo hearing to consider, in particular, whether there was any available evidence to support a finding that he was a member of organized crime. In returning subject's file to the Regional Commissioner for a new hearing, a Commission attorney (Mr. Chickinell) indicated that the Commission wanted further information to determine if subject was a member of organized crime.

In response to a Commission request, the U.S. Probation Office forwarded to the Commission a copy of a State of New Jersey Commission of Investigation regarding subject as well as a 1980 report of the Pennsylvania Crime Commission that suggested subject was a member of organized crime in a letter dated October 23, 1995. These documents were disclosed to subject prior to his reconsideration hearing.

Subject received a de novo initial hearing on December 12, 1995. At that hearing, subject admitted a minor role in the offense but indicated that he was being treated unfairly by the Commission and the courts and argued that the Commission should not consider his in absentia conviction in Italy. Subject also argued that his other codefendants were treated much more leniently. The hearing examiner noted that the presentence report did not contain any

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information that subject was involved in organized crime.

[Subject's codefendant, Erasmo Gambino, challenged the Commission's finding that he was a member of an identified LCN family in the United States District Court for the District of New Jersey. The District Court denied the petition and Erasmo Gambino appealed to the Third Circuit which reversed the district court finding. Erasmo Gambino has since had another hearing where significant information relating to his ties to organized crime were considered. After reviewing the files of subject's codefendants in response to the codefendant disparity issue subject raised in earlier litigation in 1997, it became clear that the government's sentencing memorandum was not part of the record in subject's file even though it was available in the case of his codefendant Erasmo Gambino. This sentencing memorandum gives significantly more detail of the government's assessment of subject's involvement in criminal conduct. (See Sentencing Memorandum dated November 27, 1984). This memorandum was prepared after subject's presentence investigation report was prepared on November 20, 1984. This sentencing memorandum has not yet been considered by the Commission until the most recent reconsideration hearing in 1998].

At the first reconsideration hearing in December 1995, the examiner noted that there was insufficient evidence in the Pennsylvania Crime Commission report to indicate that subject was a member of an unidentified organized crime family based upon the information then available to the Commission. The examiner (Mr. Dwyer), however, recommended that subject's offense be rated Category Eight. The examiner found subject's conviction in absentia in Italy for a large-scale heroin offense involving 40 kilograms of heroin to be significant and recommended that subject receive the maximum continuance. The Regional Administrator concurred with the recommendation to continue subject to a 15-year reconsideration hearing on December 26, 1995, forming a panel recommendation to the Commission. The Regional Commissioner, Carol Getty, adopted the recommendation on December 26, 1995. The Regional Commissioner then referred the case to the National Commissioners for original jurisdiction consideration and the Regional Commissioner noted that subject's involvement in the instant heroin offense along with his conviction in absentia in Italy for distribution of 40 kilograms of heroin are strong indicators that subject was criminally oriented and likely to violate the law if released.

Meanwhile, subject's representative forwarded a memorandum to the Commission objecting to the Commission's consideration of the conviction in absentia in Italy. This prompted one of the National Commissioners (Mr. Clay) to refer the case to the Commission's general counsel for an opinion regarding the Regional Commissioner's consideration of the in absentia conviction in Italy in a memorandum dated January 31, 1996. Three National Commissioners (Gaines, Clay and Fechtel) concurred with the recommended statement of reasons suggested by the general counsel, and the Commission issued a Notice of Action ordering subject to continue to a 15-year reconsideration hearing in a Notice of Action dated February 2, 1996.

Subject appealed this decision raising numerous issues including the issue of codefendant disparity. Subject attached to his appeal copies of the Commission decisions in his codefendants' cases. The full Commission reviewed the grounds subject raised in his appeal and affirmed the prior Commission decision in a Notice of Action on Appeal dated July 12, 1996. Although two of the same Commissioners (Clay and Gaines) voted to affirm the prior Commission decision,

the decision to affirm the prior Commission decision was voted on by two additional Commissioners that had not participated in the decision on appeal, (Reilly and Simpson).

IMPORTANT RECENT PROCEDURAL HISTORY

Subject was scheduled for a statutory interim hearing in 1998, NOT a special reconsideration hearing. A prehearing assessment was prepared by hearing examiner Chait who reviewed the sentencing memorandum that had not yet been considered and specifically noted that the sentencing memorandum had not been disclosed. (Subject and his representative had actually received a copy of the sentencing memorandum in October 1997 when the United States responded to the habeas corpus petition subject had filed in the Central District of California. Subject recently lost this habeas petition and the Court's decision is attached.)

The first attempt to conduct the SIH was on February 18, 1998. At that time, examiner Dwyer noted that subject claimed that had only a brief time to review the sentencing memorandum and that his representative had not had time to review it. Examiner Dwyer then recommended a continuance to the May 1998 docket so that subject would have ample time to review the material. There is no information in the file to explain why subject did not receive a hearing on the May docket. Nevertheless, subject was heard on the June 1998 docket.

An SIH was conducted by hearing examiner Robertson on June 1, 1998. It appears that subject again claimed that he did not receive disclosure of the sentencing memorandum (which is contradicted by the record). Mr. Robertson reviewed the sentencing memorandum and concluded that it shed little new light on subject's case. Subject's attorney informed Mr. Robertson of a recent Third Circuit decision in Erasmo Gambino's case. Subject's attorney also stated that the information found in subject's house that suggested that he had contacts with the police was information subject had obtained from his attorney. In the typewritten hearing summary, examiner Robertson complained that the case was "simply not ready for a hearing," and that a comprehensive prehearing assessment needed to be prepared. The typewritten summary does not call for a special reconsideration hearing under § 2.28(f). In an undated, handwritten addendum (see flag), Examiner Robertson states:

> In as much as there appears to be significant information that has never been formally considered at any of the Prisoners hearings and considering there appears to be other new information in the form of a Circuit Court Decision, this examiner is recommending the case be reopened for a special reconsideration hearing.

In a discussion with Mr. Robertson, he indicated that he wrote the addendum within a week or so after the hearing. The file contains no order forms from examiner Robertson to this effect. However, in a discussion on April 9, 1999, with Mr. Robertson, he stated that he had prepared an order form and does not know what became of it. A search of the computer records in "View" indicates that there was no Notice of Action issued ordering a special reconsideration hearing and there is no order in the file suggesting that the Commission agreed that a special reconsideration hearing be conducted.

Nevertheless, a special reconsideration hearing was conducted. After the "new

adverse information" was considered, examiner Robertson recommended that the offense severity rating be lowered from Category Eight to Category Six and that subject be released on parole in April 1999. The original order forms from this unauthorized "special reconsideration hearing" are missing. It appears that the order forms were recreated by Administrative Hearing Examiner Raymond Essex. (I did not have an opportunity to speak with Mr. Essex as he has been on leave this past week). Mr. Essex disagreed with the recommendation of Mr. Robertson and recommended that subject's offense be rated Category Eight and recommended a presumptive parole date of March 14, 2007, after the service of 276 months (rather than "no change in 15-year reconsideration hearing" as would have been the likely result from an SIH).

A second examiner (Shoquist) agreed with the recommendation of Mr. Essex as did Commissioners Simpson and Reilly. A Notice of Action dated January 20, 1999, resulted and it is from this decision that subject appeals.

Subject's appeal raises several issues.

The first issue is that the overruling of the hearing examiner's recommendation violated his due process rights. He argues that since the hearing examiner that conducted the hearing (Robertson) found that the offense should be rated Category Six and that subject should be paroled, that it was a violation of his due process rights if the Commission rejected this finding without another in-person hearing. Subject bases this argument on a district court opinion of Flores v. Stock, 715 F. Supp. 1468 (C.D. Cal. 1989). Although there is a serious question of whether Flores was correctly decided and it should not go unnoticed that it conflicts with a circuit court opinion of Moore v. DuBois, 848 F.2d 1115 (10th Cir. 1988). Additionally, the Ninth Circuit's decision in Candlee v. Rhay, 557 F.2d 1303 (9th Cir. 1977), also suggests that Flores was wrongly decided.

This case is clearly distinguishable from the circumstances in Flores. First, Flores involved a parole revocation case where the credibility of the testimony of a witness was central to a finding of whether or not the alleged parole violator had violated the conditions of parole. The due process rights afforded a parolee at a revocation hearing are greater than the due process rights afforded a prisoner applying for release on parole. In this case, subject is not on parole and the issue is not subject's credibility but a hearing examiner's assessment of the record. Second, applying the dubious procedural requirement found necessary in Flores to the parole release decision-making process would give undue decision-making authority to the hearing examiners to make parole release decisions at the expense of the Commissioners. The parole statute clearly vested the parole decision-making authority in the Commissioners and not the examiners and the statute was created in the context of hearing examiners conducting hearings and making recommendations to the Commissioners. Finally, petitioner has not demonstrated any prejudice from the claimed deprivation of his procedural due process rights to an additional hearing and there is none evident in the record. The issue of whether the offense should be rated Category Six or Category Seven is based on written information in the record that was available to subject prior to the most recent special reconsideration hearing. Subject was clearly on notice that the Commission might rate his offense Category Eight as the Commission had done so in the past and subject had every opportunity to present his arguments to the Commission.

Moreover, it is clear to this analyst that the hearing examiner (Robertson) was applying a clear and convincing evidence standard to the information in the record rather than a preponderance of the evidence standard to determine the appropriate offense severity rating. It was not a question of witness credibility, but a question of the weight of the information in the record. I can identify no substantive due process right under the circumstances of this case that would preclude additional examiners and the Commissioners from assessing the weight of the record information without requiring some sort of pro forma additional hearing.

Next, subject challenges the finding that the offense should be rated Category Eight. He argues, in addition to the argument that the hearing examiner that conducted the hearing made a contrary finding, that the decision results in unwarranted codefendant disparity. I believe that Erasmo Gambino's offense was incorrectly rated Category Six and that the Commission should not compound that error my rating subject's offense incorrectly as well. Subject was clearly the most culpable of all the offenders in this conspiracy.

Subject disputes the conclusion that he had an ability to distribute 10 kilograms of heroin. He argues that the other codefendants, Anthony Spatola and Antonio Gambino, told the FBI that they could not provide that much heroin.

Subject notes that the Third Circuit on direct appeal from the conviction noted that the issue of whether or not the conspirators could provide additional amounts of heroin was never resolved. The Commission could, and has, resolved this issue with regard to subject. I believe that the Commission properly concluded that subject was willing and able to provide additional amounts of heroin and that the offense was properly rated Category Eight.

While it is true that the Commission did not dispute the offense severity rating of Category Six for Erasmo Gambino, it should be noted that the history of the case is different. The prehearing assessment prepared by examiner Rogers preassessed the offense Category Eight based on the record information. At the initial hearing, the examiner, Rogers, apparently agreed with the argument of Erasmo Gambino's attorney that the additional amounts was nothing more than a boast. Once the Commission agreed with this conclusion with regard to Erasmo Gambino, there never was an occasion to challenge the rating. I believe that the rating for Erasmo Gambino was an error and that the additional amounts were not mere boasting and that the Commission should consider reopening Erasmo Gambino's case and conduct a hearing to determine if Category Eight would be more appropriate. I realize that this is not a pressing issue since Erasmo Gambino was continued to expiration based on his unacceptable risk for parole finding that Erasmo Gambino was a sophisticated career criminal with a high degree of dependency on organized crime.

Next, subject objects to the conclusion that he should be held accountable for incomplete and unsuccessful negotiations of Antonio Gambino and Anthony Spatola claiming that he was not present during these negotiations and that there is no evidence that he had knowledge of these negotiations. Subject emphasizes the "no evidence" in his appeal. However, the Commission could make a reasonable inference that subject had knowledge of the negotiations of his codefendants since the information in the record clearly establishes his salient role in the offense and there was little, if any, room for the less culpable codefendants to operate outside of subject's purview. I view subject as an unrepentant,

serious, sophisticated criminal with close ties to organized crime.

Subject argues that there are compelling reasons for an earlier release decision. He argues that he has an outstanding institutional record and has participated in a group that counsels youthful offenders. He also notes that he has not continued any criminal activity and criminal associations while he has been incarcerated. I believe the seriousness of the offense and the risk to the community outweigh the claimed superior programming.

Subject argues that his strong family ties warrant an earlier release date. I do not believe that he has demonstrated that he is closer to his family than most other prisoners or than this ground warrants an earlier release date.

In an addendum, subject argues that he should not have been sanction for a drug related infraction. I agree but it makes no difference to his guidelines since he is a Category Eight. I do not believe that the information is significant enough to warrant an earlier release date.

Subject also complains that Erasmo will be released earlier. Since Erasmo has been continued to expiration, his release is a function of his shorter sentence, not a result of Commission action.

Finally, subject complains about the reference to his immigrant status by Mr. Stover in a prior OJ appeal summary. This reference does not indicate any prejudice to subject as a result of national origin. Moreover, the decision currently on appeal is a more lenient decision and is completely unrelated to the prior OJ appeal. Moreover, this claim was rejected by the district court in subject's habeas petition noting that the "discrimination claim. . . is utterly contrived." And that subject's attempt to "play the bias card" was belied by his own codefendant disparity argument. (See Final Report and Recommendation dated March 12, 1999, at page 4).

I recommend that the prior decision be affirmed.

rkp RKP 4/9/99

Memorandum

Subject

GAMBINO, Rosario
Reg. No. 06235-050

Date

March 13, 1995

To

National Commissioners
U.S. Parole Commission

From

Jasper R. Clay
Acting Regional Commissioner
North Central Regional Office
U.S. Parole Commission

A. This case is referred pursuant to 28 CFR 2.17(b)(3) & (b)(4) - Designated *Original Jurisdiction* due to the unusual attention drawn to the case and the long-term sentence imposed.

B. <u>Regional Commissioner's Evaluation, Order and Vote</u>:

Mr. Gambino is serving a 45 year term with 20 years SPT to follow for Conspiracy and Possession with Intent to Distribute Heroin.

Although he was not convicted of racketeering or continuing criminal enterprise, the New Jersey and Pennsylvania crime commission reports indicate that Mr. Gambino is a soldier and descendant in the Organized Crime Family of the late mob boss, Carlo Gambino. The PSI further indicates that he, along with his brother, Giuseppe, owned and operated pizza parlors in New York, Pennsylvania and Southern New Jersey to facilitate a continuing criminal enterprise which is described by one ATF agent as using a pattern of threats, coercion, violence and arson to facilitate illegal activities in the states of Pennsylvania and New Jersey.

The current conviction surrounds Mr. Gambino's heroin distribution activities between October 1983 and March 1984. The PSI indicates that our subject was the most culpable, holding a high managerial role in this scheme which centered around six individuals, all of whom were related. Mr. Gambino had the authority to determine who would be actively involved in the heroin negotiations and transactions and how the profits would be divided among the participants.

Specifically, he was involved in the arrangements to deliver 1/2 kilogram of heroin to undercover agents on two occasions. Also, 3 kilograms and later 2 kilograms of heroin were made available during negotiations and subject and his co-conspirators offered guarantees to supply 10 kilograms of heroin per month to the agents.

Ex. F

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Mr. Gambino has a previous conviction for heroin trafficking in 1980. He and his brother, Giuseppe, were arrested in their Cherry Hill Restaurant for allegedly participating in an International heroin smuggling operation after police in Milan, Italy confiscated 41.5 kilograms of heroin destined for the United States. He was acquitted in the U.S. but convicted in absentia in Italy with a term of 20 years imposed and a fine of $150 million lire imposed. According to a treaty with the Italian Government, Mr. Gambino is subject to extradition.

Mr. Gambino has now served 131 months and the panel is recommending that he be continued to expiration, which will require service of 30 years. I agree with the panel's recommendation. Subject's involvement with organized crime and his repetitive involvement in the sale of heroin, are strong indicators that he is criminally oriented and likely to violate the law when he is released. Therefore, I vote as follows:

1. Refer to the National Commissioners for Original Jurisdiction consideration.

2. Continue to Expiration.

REASONS:

Your offense behavior has been rated as Category EIGHT severity because it involved Conspiracy to Distribute, Distribution, and Possession with Intent to Distribute 6 kilograms of heroin or more. Your salient factor score (SFS-81) is 9. You have been in Federal custody as a result of your behavior for a total of 131 months. Guidelines established by the Commission indicate a range of 100+ months to be served for cases with a good institutional adjustment and program achievement. In addition, you have committed rescission behavior classified as administrative. Guidelines established by the Commission indicate a range of 0-8 months per drug-related infraction. You have committed 1 drug-related infraction. Your aggregate guideline range is 100+ months to be served. After review of all relevant factors and information presented, a decision more than 48 months above the minimum guideline range is found warranted because you are a member of an organized criminal group, criminally oriented and likely to violate the law upon your release from custody.

As required by law, you have also been scheduled for a statutory interim hearing during March 1997.

tys

Ex. F
p. 2

U.S. Department of Justice
U.S. Parole Commission

ORDER

Name Gambino, Rosario

Register Number 06235-050 *Institution* FCI TI

In the case of the above-named, the Commission has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release status is hereby ordered:

Continue to a 15-year reconsideration hearing in March, 2010.

Carol Pontoch [illegible] 4/13/95
Jasper R. Clay Jr. 4/18/95
Dirk Fechter 4-19-95
Michael J. Gaines 4-21-95

Date

Date

(Date Notice sent) (Region-specify)

National Appeals Board (check)

National Commissioners (check)

Full Commission (check)

USPC/Gambino-00480

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*BOPCODE-TRM>

ORIGINAL JURISDICTION APPEAL SUMMARY
(On Petition for Reconsideration)

NAME: Gambino, Rosario **REG. NO.** 06235-050 **INST:** Terminal Island FCI

OFFENSE: Conspiracy to Distribute Heroin
TERM: 45 years (+20 SPT)
BEGAN: 12/6/84
MOS AT REL: N/A
DAYS INOP: 0
MR DATE: 6/2/2014
FT DATE: 3/15/2029
OFS SEV: Category Eight

DOB: [redacted]
MOS AT APPEAL: 148
DAYS JT: 265
PE DATE: 3/15/94
2/3 DATE: 3/15/2014
G/L: 108+
SFS: 9

- -

LAST COMMISSION ACTION:

Continue to a 15-year reconsideration hearing in March 2010.

RESPONSE:

After thorough consideration of your case, the Commission has reached the conclusion that, although there is insufficient evidence to support a finding that you were a member of an international heroin importation conspiracy run by organized crime, you are nonetheless a sophisticated professional criminal who clearly played a leadership role in an organized heroin distribution conspiracy in the New York-New Jersey area. Following your most recent parole hearing, the Commission rejected the allegations of the Pennsylvania Crime Commission with regard to your alleged membership in the Carlo Gambino/Lucchese Crime Organization, as well as the significance of your conviction in absentia in Italy. However, the Commission cannot ignore the evidence in your record that you are a career offender who operated a local heroin distribution conspiracy in the manner of an organized crime family boss, and had been doing so for an extended period of time. The presentence report gives clear evidence that Antonio Gambino and Anthony Spatola were subordinates in a conspiracy headed by you and Erasmo Gambino, and that the description of this organization and its heroin supply capability provided by these individuals was a truthful reflection of that operation. Moreover, the presentence report describes serious negotiations, both with the undercover agents and among the members of your organization, sufficient to warrant a finding that you and your subordinates conspired to distribute 10 kilograms of heroin. Your leadership role in this operation is clear from the description of events (specifically the wire-tapped telephone conversations) provided in the presentence report. As a co-conspirator, you cannot disassociate yourself from the statements and actions of Antonio Gambino and Anthony Spatola.

The Commission has not relied upon any undisclosed information. The presentence report provides the information that, at the time of your arrest, you had in your possession recent police surveillance documents relating to your case. Although you are correct that there is no evidence as to how you have these records, the Commission may reasonably view these rec

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circumstantial evidence that you had a sophisticated ability to penetrate police operations. Your extreme caution in dealing with the undercover agents supports this inference.

In sum, the record in your case, limited to the circumstances of your local criminal operation, persuades the Commission that you are a professional criminal who would be unlikely to abandon a career in the organized narcotics trade if released on parole. You maintained a high standard of living despite lacking legitimate employment or business since 1979, and displayed all the characteristics of a career crime boss. In particular, the Commission is most concerned about the reputation for violence deliberately cultivated by your subordinate Antonio Gambino in dealing with the police undercover agents. Given the high degree of direction Antonio Gambino needed from you during the course of this offense, the Commission declines to interpret these statements as coming from Antonio Gambino's imagination.

Finally, the Commission rejects your argument that its decision in your case reflects unjustified codefendant disparity. The fact that Antonio Gambino and Anthony Spatola have been released from prison reflects their subordinate role. Erasmo Gambino, also in a leadership position, has been continued to the expiration of his 34-year sentence, which will require him to serve 272 months in prison. Although Erasmo Gambino was rated as Category Six severity (based upon the actual heroin distributed) the Commission did not see fit to grant him a parole, citing in particular the fact that the body of an execution murder victim was found in the trunk of his automobile on November 15, 1982. It is appropriate for the Commission to rate the offense of the leader of the organization in question according to the total amount of heroin that the organization conspired to distribute. Thus, it is not unjust that your offense behavior should be rated as Category Eight to reflect the full distribution capability of the operation you controlled.

In this respect, the Commission agrees with the sentencing court, which gave you the longest sentence of all the codefendants who were convicted in this case. Denial of parole at this time is found necessary to prevent the probable resumption of the criminal career of an offender who cultivated the methods and lifestyle of a crime boss for too long for the Commission to assume his conversion to a law-abiding lifestyle if paroled.

RECOMMENDATION:

Deny reconsideration of decision dated February 2, 1996.

REASONS:

Approved.

NOTES:

The Commission's consideration of this case has been difficult because of the distraction posed by a report from the Pennsylvania Crime Commission linking Rosario Gambino to the larger Carlo Gambino/Lucchese Crime Family. It would appear that Rosario Gambino certainly has more extensive ties to organized criminals than his own circle of codefendants, but his status as a member of "organized crime" is not sufficiently clear to support a finding by the Parole

Commission. His conviction in absentia in Italy in connection with a 41.5 kilogram heroin importation conspiracy suggests a great deal, but does not supply the Commission with a solid basis in fact. Thus, the Commission remanded this case for a de novo hearing to redetermine Rosario Gambino's case.

The outcome was that the Commission was persuaded that Rosario Gambino was, within his own circle, a traditional organized crime boss who operated through a reputation for violence, through evident corruption of local police, and through subordinates with close family ties of loyalty. He clearly must have had good connections with wholesale heroin importers to negotiate seriously for a 10-kilogram sale to the undercover agents.

As to whether Gambino should be confined for 312 months (at least) based upon the Commission's finding that he is unlikely to abandon a career in crime if released on parole, this is close question. Gambino certainly has the background and behavioral characteristics of the career organized criminal, and it is reasonable to suppose that he knows no other way to succeed in life than through his "family business". His connections within the world of organized crime would probably still be extensive upon release, and Gambino shows nothing in his makeup that would distinguish him from the familiar type of Mafioso who is not deterred even by long imprisonment from continuing the only career he knows. In particular, as long as Gambino continues to file appeals in which he denies his leadership role, and portrays himself as a simple first offender, it will be difficult for the Commission to find any basis for deciding that Gambino has the capacity to shake off his past, and discover a law-abiding way to make a living. He has an offer of employment with his son's company in Los Angeles, California upon release. The premise that a "crime boss" father would completely break with his extensive criminal background, and become a fully rehabilitated citizen by working for his own son is a doubtful one, from a psychological point of view. Gambino appears to come from an immigrant background in which family connections are simply exploited (as in the current offense) to get around the law.

DMJ MOS

Memorandum

FYI

Subject	Date
GAMBINO, Rosario Reg.No. 06236-050	December 30, 1997

To	From
Marie Ragghianti Chief of Staff U.S. Parole Commission	Thomas C. Kowalski Manager Case Operations U.S. Parole Commission

Rosario Gambino was sentenced to a 45 year Regular Adult sentence plus a 20 year special parole term on 12/6/84 for Conspiracy and Possession With Intent to Distribute Heroin. A $105,000 fine was also imposed. The jury in this case found that Rosario Gambino, Anthony Spatola and Antonio Gambino were members of a heroin trafficking conspiracy apparently able to supply 10 kilos of uncut heroin on a monthly basis. The facts showed that Rosario Gambino and Erasmo Gambino were not merely independent contractors but rather were key links between the distribution level and the supply level in an international heroin trafficking organization. These defendants guaranteed the undercover agents 10 kilos of over 90% pure heroin each month! The government produced evidence that Rosario Gambino was the person who supervised the activities of the remaining defendants. This current conviction was not the first time the subject was accused of serious criminal activities. In 1979, 6 kilos of heroin were seized at JFK Airport after an unsuccessful attempt which made use of Alitalia airline employees. After the seizure, there was no publicity so the purchasers here suspected that the airline employees had stolen the heroin. Employees were threatened with death and in one case, physically tortured. During this time, Rosario Gambino surfaced allegedly to settle the matter. One of the airline employees met with Rosario Gambino and was finally able to convince him that the heroin was seized. Rosario Gambino was indicted and eventually tried. The trial resulted in a hung jury and when retried, he was acquitted.

Following the seizure of the 6 kilos mentioned above, the airline employee met with a Gambino associate (Emanuel Adamita) in another effort to smuggle heroin from Italy. The airline employee negotiated his financial arrangement with Rosario Gambino's brother Guiseppe. The employee and Adamita travelled to Italy. The DEA and Italian authorities agreed that the heroin would be permitted to leave Italy so that prosecution could occur in the USA. When Italian authorities discovered that the group intended to smuggle 40 kilos, the Italian authorities declined to permit such a massive amount of heroin to leave the country, Adamita and others were arrested. Rosario Gambino was tried in absentia

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and convicted of criminal association with the purpose of trafficking in narcotics. He was sentenced on 6/6/83 to 20 years imprisonment.

Rosario Gambino's criminal activities also extend to arson and extortion. In 1980, the ATF presented a report of its investigation into a series of arsons which included incriminating evidence against Rosario Gambino. Notable among these arsons were two which appear related to efforts by Rosario and his brother Guiseppe Gambino to take over a pizza franchise in Cherry Hill, NJ. Rosario and his brother were observed at the scene of a pizza restaurant following the arson and shortly thereafter, the manager received a call and told to close the store and return to New York. Two days later, the manager's automobile was destroyed by a firebomb. Two days later, the manager received a telephone call and threatened with death.

There is also evidence that Rosario Gambino participated in the harboring of Michele Sindona while he was a fugitive. Sindona was charged in 1979 with bank fraud and embezzlement in conjunction with the collapse of the Franklin National Bank, a fraud involving $400 million.

In addition, during a search of Rosario Gambino's residence in 3/84, agents seized photocopies of intelligence files of the NY City Police Department. The investigation revealed that a NY City detective provided these intelligence files to Gambino.

Subject had his initial parole hearing at the FCI Terminal Island on 2/16/95 after having served 148 months in custody. At the hearing, he denied involvement in any narcotic trafficking but acknowledged that he was having financial problems and in need of money. He says that the $100 bills found in his possession (part of the bait money used during the sale of heroin) was received from gambling rather than any involvement in the drug deal. The offense severity was rated as Category Eight because it involved conspiracy to distribute 6 kilos or more of heroin. The SFS was 9 and the guidelines were 100+ months to be served. He was provided a 15 year reconsideration hearing in 3/2010. A decision more than 48 months above the minimum guidelines was warranted because of his status as a member of organized crime. Mr. Rosario was represented by the U.S.C. Law Center who prepared an appeal to the initial decision. The National Appeals Board remanded the case back for re-hearing to obtain information relating to the allegation that the subject was a member of organized crime.

A rehearing was conducted on 12/12/95 at the FCI Terminal Island. Copies of the 1980 Pennsylvania Crime Commission Report and the New Jersey Report from the Commission of Investigation were included to support his involvement with organized crime. The examiner however, concluded that there was not sufficient information available to conclude that Rosario Gambino is a member of organized crime. The examiner did recommend that the 15 year reconsideration hearing be maintained and new reasons were provided to support a decision more than 48 months above the minimum guidelines. The National Appeals Board issued a Notice dated 2/2/96 which provided for a 15 year recon

hearing in 3/2010. The U.S.C. Law Center again represented the subject on appeal. The NAB denied reconsideration of the decision of 2/2/96 (the 15 year recon hearing).

The subject was scheduled for a SIH hearing in 11/97 at the FCI Terminal Island but waived.

The Sentencing Memorandum and documents in the file clearly depict the subject as an individual deeply involved in organized criminal activity.

MEMORANDUM

TO: SHARON GERVASONI
DESIGNATED AGENCY ETHICS OFFICER

FROM: MICHAEL J. GAINES

DATE: JANUARY 30, 1996

SUBJECT: ROSARIO GAMBINO

On January 16, 1996, I was contacted by Commissioner Getty regarding Rosario Gambino, an original jurisdiction case. She said NCRO had received calls from Roger Clinton concerning Mr. Gambino's parole. She said he was in Kansas City and planned to come to the NCRO office either January 17, or 18, to voice his support of Mr. Gambino's parole.

Commissioner Getty said Mr. Clinton knew the office was closing and that she might not remain as commissioner much longer. She expressed concern that he had this information, and asked if I had been in contact with Mr. Clinton and given this information to him. I advised Ms. Getty that to my knowledge I have never spoken with Roger Clinton.

She said she was not going to meet with him, but would have him meet with staff to give a statement that could be typed up and included in the file. It was my understanding from our conversation that Mr. Clinton was not acting as Mr. Gambino's representative.

Following the conversation, I called, as a matter of courtesy, the Office of Counsel at the White House and advised that Mr. Clinton had been in contact with NCRO on behalf of an inmate.

On January 17, 1996, I received another call from Comm. Getty. She said Mr. Clinton called again and spoke to Hearing Examiner Sam Robertson. She said Mr. Clinton told him he would not be coming in, but would instead be in contact with the USPC office in Maryland. She said the OJ file was being sent here.

Prior to taking any action, I request an opinion as to whether I should recuse.

I would note the following:

1. I do not know Roger Clinton, and I have not spoken to him about this matter;

2. I am aware of Roger Clinton's attempt to speak with me on January 30, 1996. Because of my understanding of legal prohibitions in my discussing a pending

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case, I referred the call to the Office of General Counsel. I am aware of the conversation subsequently held between Mr. Clinton and General Counsel Stover, and I agree with the advice given by Mr. Stover that Mr. Clinton should submit his views in writing;

3. I have reviewed the case file and I am prepared to follow the hearing examiner's recommendation; and

4. My decision would be based solely on the contents of the file.

Memorandum

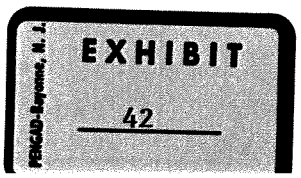
Subject	Date
Gambino, Rosario Reg. No. 06235-050	January 31, 1996

To	From
The File	Michael A. Stover General Counsel U.S. Parole Commission

On January 30, 1996, I was asked by Commissioner Gaines for advice as to how to proceed with regard to a telephone message that had been taken down for him by the NAB secretary. The message purported to be from Roger Clinton, brother of the President. The message was that Roger Clinton had a "very important" matter to discuss, and that his brother had recommended meeting with Commissioner Gaines. Commissioner Gaines was reluctant to return this telephone call because the case was pending a decision by the National Commissioners under 28 C.F.R. § 2.17. Given the ethical and legal implications of this telephone message, and the impropriety of a National Commissioner accepting telephone calls about a case pending review, I volunteered to return the call for Commissioner Gaines, and to advise his caller as to the Commission's procedures.

With Deputy DAEO Sharon Gervasoni present, I thereupon returned Roger Clinton's telephone call at [redacted] I spoke with a man who introduced himself as Roger Clinton, and who began the conversation by informing me that his brother "...is completely aware of my involvement." Roger Clinton stated that his brother had recommended to him that he not meet with Commissioner Getty (as Roger Clinton had originally sought to do) because Commissioner Getty's Kansas City Regional Office was about to be closed. Roger Clinton informed me that his brother suggested that he contact Commissioner Gaines instead. (I knew about the previous contact with Commissioner Getty's office, and that Roger Clinton is apparently a friend of Rosario Gambino's son Thomas, who also lives in California.)

I informed Roger Clinton that I was returning the telephone call on behalf of Commissioner Gaines, and that the Privacy Act of 1974 prohibited Commissioners and staff of the U.S. Parole Commission from discussing any case with a member of the public without a signed waiver from the inmate in question authorizing disclosure of file material. I further informed Roger Clinton that Commissioner Gaines could not meet with him because, even if Roger Clinton were an authorized representative of the inmate, he would have to appear before the hearing examiners at a regularly-scheduled parole hearing. (Roger Clinton had a copy of the hearing summary in this case, and was aware that a



hearing had just been held in December.) I explained the Commission's procedures whereby hearing examiners make recommended decisions after hearing presentations on the record, and that Commissioners vote and make their decisions without meeting with prisoners' representatives. I explained that, in this respect, the Commission operates like a court of law.

Roger Clinton evinced his strong disappointment upon learning that he could not meet with Commissioner Gaines about this case. He complained that he had been given inconsistent advice, because he had already set up a meeting with Hearing Examiner Sam Robertson in the Kansas City office, who allegedly promised him that Commissioner Getty would be there. I informed him that such a meeting would not have been appropriate. Roger Clinton then asked me how it could be that the President would be misinformed as to the law, and emphasized that the President had suggested that he should meet with Commissioner Gaines, "...a friend of ours from Arkansas." Roger Clinton professed his bewilderment as to how the President would not be knowledgeable as to the law with regard to the propriety of this suggested meeting. He stated that he would have to inform his brother that his brother had been wrong. I replied that it would be an honor for me to be advising the President of the United States, directly or indirectly, as to the law. Roger Clinton again stated that he would have to report this information to his brother, who would be "glad to know" what I had said. During this colloquy, however, Roger Clinton's voice rose, and betrayed the fact that he was upset with what I was saying.

I concluded the conversation by informing Roger Clinton that the proper course for him to take would be to submit a letter to the Commission, addressed to Vice Chairman Clay, presenting his views as to how the Commission should decide Mr. Gambino's case. I informed Roger Clinton that any interested member of the public could do this. I also informed him that the Commission could grant parole, deny parole and schedule a rehearing at the normal time, or remand the case for another hearing if information requiring a remand were brought to their attention. I told Roger Clinton that he could ask the Commission to remand the case for another hearing, and that if such a hearing were ordered, that he (Roger Clinton) could appear and be heard, if he were to be selected by the inmate as his authorized representative.

At several points in the above conversation, Roger Clinton stated that he wished only to know what the correct procedures were, and to do everything in the proper way. However, both the Deputy DAEO and I are disturbed at the tactic employed by Roger Clinton of repeatedly invoking his brother as having (allegedly) recommended that he meet with Commissioner Gaines on the basis of that Commissioner being "...a friend of ours from Arkansas." The U.S. Parole Commission must not permit itself to be subjected to improper attempts to exercise political influence over its procedures. (Roger Clinton did not address himself to the merits of the case itself.) If Roger Clinton sends the Commission a letter that repeats these suggestions of political influence, I intend that the letter be referred immediately to the Deputy DAEO for review rather than admit it into the record. Although Roger Clinton is a member of the public who has the right to communicate his views to the Parole Commission, the Commission should not allow the fairness of its deliberations to be placed in doubt through inclusion in the record of any communication

that gratuitously introduces the factor of a potential political influence into the case. My preference is for the Commission to vote a decision based only on the facts of the Gambino case, and without reference to this episode.

Finally, I have discussed the situation with Commissioner Gaines, who agrees that the Commission should be shielded, if at all possible, from the unwelcome intrusion of a man who would appear to have nothing to contribute to the Commission's deliberations in the Gambino case but a crude (and I hope unauthorized) effort to exercise political influence. Commissioner Gaines is prepared to vote on the Gambino case, as scheduled, based solely on the file information. Neither I nor the Deputy DAEO find any reason for Commissioner Gaines to recuse himself in this matter, given his correct refusal to permit Roger Clinton to speak or meet with him.

MAS/ae

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Roger Clinton
Very Important
([redacted]
ASAP -
Re: Brother Recommended
Meeting -

ROSARIO GAMBINO
Reg. No. 06235-050
F.C.I. Terminal Island
P.O. Box 3007
Terminal Island, CA 90731

January 9, 1997

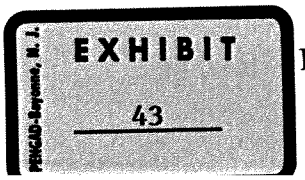
Dear Mr. :

I am writing this letter to you as my last hope to get justice. I feel that the systems has been turned inside out in my case, and I now seek your help in the hope that you can right the wrong that is being done to me. What I am asking for is that my punishment be based on the crime that I did, and not on my name.

The reason I am asking for your help is because my son knows your brother, and my son has told me that your brother is a good and honorable man; I know such traits run in families, and I have heard that you are also such a man. Because of the trust and respect that my son has for your family, he suggested that I write this letter to you to explain my situation in more detail. So please let me take a few lines to explain my case.

In 1984 I was sentenced to 45 years in prison for conspiracy to distribute less than one kilogram of heroin. There was no "organized crime" or "RICO" charged involved in this case. Under the law I became eligible for parole after service of 10 years of my sentence, and I had my initial parole hearing after service of 11 years.

At my initial parole hearing in February 1995 my case was heard by a single experienced hearing examiner. In most cases, his recommendation is followed by the U.S. Parole Commission. At my hearing he examined my case file and asked me questions, which I answered. He asked me how I had become involved in the activity and I told him the truth: I had been diagnosed with throat cancer just before the conspiracy started in 1984 and was never the same. I told the examiner about my depression, the medication I was taking, the stress from the knowledge that I would have to have surgery, and my family responsibilities for a wife and four small children. While I had a business, I could not afford all of my expenses, and so I needed to make money to make up the difference. I first tried to get insurance, but was refused. That is when I got involved, and only after the government agents approached my codefendants. After telling these facts to the parole hearing examiner, and after assessing my involvement based upon the Parole Commission case file, he told me that he was recommending a parole date in July 1996 after service of 12 years, 4 months. [A copy of the transcript of my initial parole hearing is attached.]



However, because of my name, the case was referred to the entire Parole Commission in Washington. The recommendation was rejected and I received back an order denying parole because of alleged "Organized Crime" ties, and telling me to come back for reconsideration in the year 2010, after service of 26 years!

I appealed this decision and won a new hearing because the Commission admitted there was no evidence in my file to support such a finding.

In December 1995, after delays occasioned so that the Commission could try and obtain new information, I had a new hearing in front of the same hearing examiner. At this new hearing he asked a lot of questions about my alleged ties to "Organized Crime." After hearing my responses, and after reviewing all of the old and new evidence on that subject, he made a finding that I **was not** connected to "Organized Crime." [A copy of the transcript of the second parole hearing, and the examiner's findings in his Review Hearing Summary are attached.] However, he denied parole anyway based upon a **new** reason. I did not understand this since both my representative and I had thought that the only reason for the "de novo" hearing was to ascertain if I had ties to organized crime. The new excuse was based upon information in my Presentence Report that I had been convicted in Italy **in absentia** (and without representation) for my alleged involvement in a 1980 heroin importation conspiracy. However, the Presentence Report detailed that I **had been found not guilty** of involvement in that crime after I was tried for the exact same conspiracy in New York federal court in 1983. It is clear that the examiner was grasping for an excuse because he didn't want to go against his bosses in Washington; this **same** information had been know and discussed at my first hearing, after which the **same** examiner had **not** seemed to believe it was grounds for denial of parole.

When his new recommendation was sent to the Commission even they realized it was wrong and when I got the Notice of Action back from them in February 1996 they had a **different** set of excuses for denying parole; this was the third set. I then appealed that decision. Unfortunately, the administrative appeal was heard by the **same** Commissioners who had issued the February 1996 Notice of Action. When I was given notice of the appeal decision of July 12, 1996, denying parole and continuing me for reconsideration in 2010, the notice set forth **another set of excuses** that had never been given before. This was the forth set of excuses, all of which were based upon the **same** information that was available at my initial hearing in February 1995 when I had received the recommendation to be parole in July 1996!

When I was sentenced in 1984 the probation officer made a guidelines calculation of my sentence as being 40-52 months under Parole Commission rules. I have already served almost three times those guidelines. Even if I had been sentenced under the current "Sentencing Guidelines", which were designed to be much harsher on drug offenders, I would have already served the entire sentence less good time. And my institutional record is very good, where I have good work reports, I completed my GED, I completed a drug program, I completed a screenwriting program, and have other commendations. [A copy of the material that was submitted to the Commission is enclosed.] All of these things show that I have made a commitment to change my life and be a positive member of the community. That is why I don't understand how the notice of action denying parole can claim that I will repeat my crimes, or that I was a "career offender." **This was my first offense.** The Commission has no idea how much I have suffered because of what this has done to my family, nor has the Commission considered how much their arbitrary action is making my family suffer. I would <u>never</u> even think of doing any crime again.

At this point I don't believe I'm receiving fair treatment. My codefendants who did the negotiations, obtained and delivered the drugs have already been paroled. Only my brother-in-law and I are still in prison. I feel that they are punishing my name, and not my crime.

Sir, in my years in prison I have met people convicted of far greater drug crimes and convicted of violent crimes, who have gotten far shorter sentences, and who have served far less time. I have never seen anyone with a sentence of 45 years for less than one kilogram of heroin, or someone who has been made to serve this much time for that amount of drugs. I offer no excuses for my criminal acts in 1984; I admit I was wrong and deserved to be punished for what I did. However, I have now served almost 13 years for my involvement in a conspiracy to distribute less than a kilogram of heroin. This is far longer than anyone else would serve for the same crime.

At this point I only ask that I be treated like any other person sentenced to prison for a similar crime. I ask that I be given the opportunity to get back with my family and make a new life for us all. As I have been moved from prison to prison over the years, they have moved to stay close to me and they now live in the Los Angeles area. My wife and my children have literally grown up in prison with me; they have served these 13 years with me. The punishment is now worse for them that it is for me. There greatest concern is my continuing medical problems. They know that I do not get the quality of treatment I need for the reoccurring cancer.

I now ask your help because I don't know where else to turn. I you can assist in getting the original recommendation of parole reinstated I would be deeply indebted to you and your family.

If you have any questions, or need any more information, please let me know.

Very truly yours,

Rosario Gambino

ROSARIO GAMBINO

Encl:

Memorandum

Subject

Visit by Roger Clinton

Date

December 24, 1997

To

Michael J. Gaines
Chairman
U.S. Parole Commission

From

Thomas C. Kowalski
Manager
Case Operations
U.S. Parole Commission

Thru: Marie Ragghianti
Chief of Staff

On Tuesday, December 23, 1997, at approximately 8:30 a.m., Roger Clinton came to the office to speak with Chief of Staff Ragghianti. Since his visit involved case discussion, Ms. Ragghianti asked that I sit in with her during the discussion. Mr.Clinton had notes on three cases which he wanted to discuss.

1. The first case involved John Ballis #59856-079 who is serving at the FPC Beaumont and received his initial hearing during the week of December 15, 1997. Ballis is serving three cases from the S/TX. He was sentenced to probation on one case, 10 years Regular Adult and 30 months SRA running consecutive on another case and 41 month SRA concurrent on the last case. The offenses involve making false statements and reports in order to fraudulently receive bank loans.

   Mr. Clinton knew that the examiner had made a tentative decision to release the subject and was asking whether a furlough was possible for the holidays. First we advised him that the examiner's recommendation was only a recommendation and that the Commissioner would have to review and concur with the recommendation. He was advised that the recommendation could change. We then advised him that the Commission had no jurisdiction in the matter of furlough and any request would have to made to the Warden of the institution where he was confined.

   The examiner recommendation was for a parole effective date on 3/26/98 (parole eligibility) to the consecutive sentence. We did not have this information at the time of the interview.

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2. The second case involved a man who had served federal time had been released in the mid 1980's. The request was for a pardon. He was advised that the materials regarding requests for pardon needed to be forwarded to the Pardon Attorney.

3. The last case involved Rosario Gambino, a notorious organized crime figure. Mr. Clinton made it clear that he was personally interested in this case and in no way was he representing his brother, the President. He is acquainted with the prisoner's son, Tommy Gambino and has been supporting a release for this subject for some time. He mentioned that he met with Commissioner Getty in Kansas City, MO about this case at some time in the past. Mr. Clinton had several FOIA documents from the file which he used as his notes. He basically believes that the Commission has been much too harsh in this case and that Rosario Gambino is not an organized crime boss as the Commission has considered him to be. If anything, he believes that he is only on the fringes of organized crime and he is being discriminated against because his name happens to be "Gambino". He used the Original Jurisdiction Appeal Summary by Michael Stover as his primary source of information. He specifically named Michael Stover as being discriminatory in his description of the prisoner and was particularly incensed by the statement in the summary which states, "Gambino appears to come from an immigrant background in which family connections are simply exploited (as in the current offense) to get around the law". In discussing this case, he was actually quite animated and argued rather emotionally about how the Commission is being too harsh with the prisoner.

Ms. Ragghianti and I merely listened throughout the session since we did not have file nor did Mr. Clinton have a signed release from the subject. He was advised that the case would be reviewed and no further promises were given.

After the interview, I secured the file and interestingly, Mr. Gambino was scheduled for a SIH review at the FCI Terminal Island the week of November 17, 1997 but waived the hearing.

For the File

From: Marie Ragghianti
Chief of Staff
USPC

Marie Ragghianti

Date: December 23, 1997

Re: Roger Clinton Office Visit

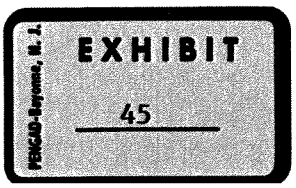
On this date Mr. Roger Clinton visited the office. He arrived at about 8:30 am, and visited with Tom Kowalski, Case Operations Manager, and myself.

He was seeking advice about how to proceed in three matters: a case involving an inmate named John Ballis; a pardon matter; and an inmate named Rosario Gambino.

In the Ballis case, he was hoping to assist the family in obtaining a furlough. It appears that Ballis was recently recommended for a tentative parole date of October 1998. Tom advised him that the decision to furlough is one made by the warden.

In the second matter, we advised Mr. Clinton that he should contact Roger Adams, the recently appointed new Pardon Attorney.

Regarding Rosario Gambino, who apparently has been denied parole by this Commission, Mr. Clinton asked for any possible reconsideration of the matter. He pointed out that Gambino has served nearly 15 years, has at least 2 potential job opportunities, and also the support of a loving son, Tommy (Mr. Clinton's friend), and his wife and other children. We explained to him that the Commission takes a hard line in matters perceived as related to organized crime. Tom did offer to review the history of the case and write a summary (which will be sent to me). At that time, with the approval of the Commission or its legal department, I will notify Mr. Clinton of Tom's summary, as (or if) appropriate. *

Mr. Clinton was articulate. His questions and comments were thoughtful and appropriate, which is to say that he in no way came across as wishing to capitalize on his name. Instead, he apologized for taking our time. He appeared to be a genuinely caring person, not only for the 3 individuals he was seeking advice for, but in general. He thanked us for listening.

9-17-98 note: I never discussed Tom's summary at any time w/ Mr Clinton (nor did he ask me to). Mgr