No. 98-55895

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTOR BONO,

Petitioner/Appellee

v.

WARDEN MICHAEL BENOV,
UNITED STATES PAROLE COMMISSION,

Respondents/Appellants.

Appeal from the United States District Court
Central District of California
Honorable Consuelo B. Marshall, Judge Presiding

APPELLEE'S BRIEF

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INTRODUCTION

Victor Bono is a 58-year-old man who has served nearly 31 consecutive years in federal prison. The parole process is his only avenue for release. Mr. Bono has assembled an exemplary prison record and an assortment of federal judges, including his own sentencing judge, the Honorable Manuel Real, asked the United States Parole Commission ("Commission") to release him early. Nevertheless, the Commission has repeatedly refused to treat Mr. Bono fairly. The federal courts have ruled three times that the Commission failed to adhere to the Constitution or its own governing statutes and regulations in considering Mr. Bono for parole.

For most of the 12 years preceding the initiation of this habeas corpus petition, Mr. Bono was scheduled for parole by July 17, 1997, which would require him to serve 30 years in custody. Twice during that period, the district court granted Mr. Bono's petitions for habeas corpus relief, and ordered the Commission to consider releasing Mr. Bono **earlier** than 30 years. After the district court granted Mr. Bono's second writ of habeas corpus, the Commission **extended** Mr. Bono's parole date from 30 to 42 years. In doing so, the Commission violated its own regulations and acted vindictively, in violation of the Fifth Amendment's Due Process Clause. On February 27, 1998, the United States District Court for the

Central District of California ruled that the Commission's actions were unconstitutional. In a forcefully worded opinion, the court once again granted Mr. Bono's petition for writ of habeas corpus, but this time ordered him released on parole immediately. The government did not seek a stay of this ruling and, hence, Mr. Bono has successfully re-entered the community. The Commission now appeals the decision of the district court, and seeks the authority to re-arrest Mr. Bono and require him to serve 12 more years in prison.

STATEMENT OF JURISDICTION

Mr. Bono, agrees with the government's statement of jurisdiction and timeliness.

ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW

Issue No. 1: Whether the district court was correct in finding that United States Parole Commission violated the Due Process Clause when, upon remand from the district court's reversal of a prior Commission action, it vindictively extended Victor Bono's parole date by twelve years.

Issue No. 2: Whether the district court was correct in finding that the Commission violated its own regulations when it subjected Mr. Bono to a de novo parole hearing without first following required procedures and making a finding that

such a hearing was warranted.

Issue No. 3: Whether a victim-impact letter could, as a matter of law, constitute "new and significant adverse information," sufficient to empower the Commission to rescind Mr. Bono's long-held parole date and extend his sentence by twelve years.

Standard of Review: With respect to each of the above issues, a district court's decision to issue a writ of habeas corpus is reviewed de novo. Santamaria v. Horsley, 133 F.3d 1242, 1244 (9th Cir. 1998).

STATEMENT OF THE CASE

I. THE NATURE OF THE CASE AND PROCEDURAL HISTORY

Mr. Bono is satisfied with the government's statement of the nature of the case, the course of proceedings below, and the disposition in the court below, except to the extent that the government argues that Mr. Bono asked the Commission to give him a de novo hearing in 1995. See Appellant's Opening Brief ("AOB") at 5. As explained in more detail below, Mr. Bono never sought such a hearing.

II. STATEMENT OF FACTS

A. Facts About Victor Bono

On October 12, 1967, at the age of 26, Victor Bono

pleaded guilty to two counts of murder and two counts of robbery in connection with the deaths of two United States Border Patrol agents. He received two life sentences. GER 4.[1]

During his years in prison, Mr. Bono undertook a remarkable and perhaps unprecedented personal transformation. He entered the Bureau of Prisons convicted of a grave crime, a fact that he earnestly acknowledges. However, in the ensuing decades, Mr. Bono diligently struggled to rehabilitate himself, and his success in that endeavor is disputed by no one, including the Commission and prison officials.

Few, if any, people in federal prison have ever amassed as exemplary a record of achievements and commendations as Mr. Bono.

For many years, the Commission planned to parole Mr. Bono in 1997, which would have required him to serve 30 years in prison. Three federal judges, including Mr. Bono's own sentencing judge, the Honorable Manuel Real, wrote letters to the Commission, urging it to release Mr. Bono **sooner** than 1997. See SER 3-9.[2] As set forth in one of Chief Judge Real's letters to the Commission,

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[1]"GER __" refers to the Government's Excerpts of Record at page __.

[2]"SER __" refers to Appellee's Supplemental Excerpts of Record at page __.

> All the information that I have been able to obtain from the Bureau of Prisons indicates to me that Mr. Bono has reached the maximum in rehabilitation. He has proven himself to those who have the obligation of the daily monitoring of his progress in that effort. I can only concur in their assessment of Mr. Bono as a person ready to resume his position in a free society.

SER 3; see also SER 7-9 (letters from United States District Court Judges James M. Burns and Harold M. Fong).

The Warden of the Federal Correctional Institution at Terminal Island, Mark Henry, appeared before Hearing Examiner Wagner just before the start of Mr. Bono's October 3, 1994 parole hearing. GER 79. Hearing Examiner Wagner recorded that Warden Henry described Mr. Bono "in a very favorable manner." Id.

Many Bureau of Prisons officials have expressed gratitude for Mr. Bono's contributions to their institutions (See SER 10-56), and recommended him for Superior Program Achievement, which is a merit-based advancement of parole release. See 28 C.F.R. § 2.60 (1995). For example, Mr. Bono served as the emergency plumber at FCI, Terminal Island. He toiled through the day and night on numerous occasions, repairing damaged prison infrastructures. See SER 19-20, 23-25, 52-55. On one such occasion, after a fire had destroyed most of the institution's Food Service Department, Mr. Bono worked from early morning until late at night, re-routing water and steam pipes so that the kitchen could resume operations and 1,100

inmates and staff could be fed. SER 23. In a letter recommending early parole, Terminal Island's Food Service Administrator, Steve Massey, noted that Mr. Bono had to breathe smoke and work in water in order to complete the job. Id.

In another letter recommending Superior Program Achievement, Jim Holland, the Maintenance Foreman, labeled Mr. Bono "the most trusted inmate in the institution." SER 24. Mr. Holland recalled that Mr. Bono was the only inmate ever allowed to work in the institution's "Control Center," the "most secure part of the institution," where firearms and keys to all locks are stored; 85 percent of prison **staff** are forbidden to enter the Control Center for lack of security clearance. Id.

Dozens of other memoranda, certificates, and recommendations for extra good time attest to Mr. Bono's sincere efforts to rehabilitate himself. SER 10-56. Mr. Bono once helped save the life of a civilian worker who suffered a severe electric shock. SER 27-28. He spent two months designing and building new recreational facilities, significantly adding to his fellow inmates' quality of life (and saving the Bureau of Prisons thousands of dollars) by contributing his labor and expertise. SER 11, 15-18. Robert Garcia, the Carpentry Foreman, called Mr. Bono "a gifted

coppersmith." SER 10. In sum, BOP personnel have conferred unqualified praise on Mr. Bono and called for his release.

B. Facts About The United States Parole Commission

1. The structure of the Commission

The Commission was created by the Parole Commission and Reorganization Act, 18 U.S.C. §§ 4201-18. The Sentencing Reform Act of 1984, which established the Sentencing Commission and its guidelines, abolished parole. The parole statutes, however, remain applicable to pre-guidelines or "old-law" inmates.[3] At all times relevant in this case, the Parole Act has required that the Commission be composed of nine members: a Chairman and at least three National Commissioners, as well as several Regional Commissioners, who are assigned to the Commission's several regional offices. 18 U.S.C. §§ 4202, 4204(a)(5).[4]

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[3] See Pub. L. No. 98-473, Title II, c. II, § 235(a)(1), Oct. 12, 1984, 98 Stat. 1837, 2031 (abolishing parole). Section 235(b)(1) of the Sentencing Reform Act provided that the Commission would remain in existence for five years for those inmates sentenced for offenses committed before November 1, 1987. The 1992 date has been extended twice. See Pub. L. No. 101-650, § 316, Dec. 1, 1990, 104 Stat. 5089, 5115; Parole Commission Phaseout Act of 1996, Pub. L. No. 104-232, 110 Stat. 3055.

[4] In reality, the Commission's membership has declined to as few as four members, which has prevented it from carrying out some of its duties.

2. The hearing process

The parole process begins with a hearing. All parole hearings are conducted by one or two hearing examiners, who report their recommendations to the Regional Commissioner. 28 C.F.R. § 2.23 (1995). A defendant's first encounter with the Commission is the initial hearing, at which all relevant information about the offender and his crime is considered. See 28 C.F.R. § 2.12-2.13 (1995). Following the initial hearing, the Commission may take one of three actions. It may continue the person to a reconsideration hearing after fifteen years; it may set an effective parole date, if he or she is to be released within nine months; or it may set a presumptive release date. 28 C.F.R. § 2.12(b) (1995).

In calculating release dates, the Commission relies on guideline ranges established by its regulations. 28 C.F.R. § 2.20 (1995). The Commission assigns a person to the appropriate guideline range based on a matrix that combines offense severity with a "salient factor score," which is based on criminal history and is used to evaluate one's prognosis for success once paroled. Id.

The Commission communicates its decisions to inmates through a "Notice of Action." See, e.g., GER 27-33. For prisoners with an offense severity of Level Eight, such as Mr. Bono, the Commission is required to state in its Notice of

Action “pertinent aggravating case factors” if it decides to set a parole date more than 48 months above the lower limit of the guideline range. 28 C.F.R. § 2.20 *Note to Guidelines for Decision-Making (1995).

Once a person receives a presumptive release date, he may expect to be released no later than that date so long as he maintains a clear conduct record, 28 C.F.R. § 2.12(d) (1995), suffers no new criminal convictions, 28 C.F.R. § 2.28(c) (1995), and so long as the Commission obtains no “new and significant adverse information” about him or his offense. 28 C.F.R. § 2.28(f) (1995) (reprinted in the Addendum to this Brief).

A person who possesses a presumptive release date is periodically given interim hearings, known as “statutory interim hearings,” as his release date approaches. For people like Mr. Bono, with sentences of longer than seven years, interim hearings must be conducted every two years. 18 U.S.C. § 4208(h)(2); 28 C.F.R. § 2.14(a)(1)(ii) (1995). Following a statutory interim hearing, the Commission may order no change in its previous decision; advance the presumptive release date; or retard or rescind the presumptive release date for disciplinary infractions. 28 C.F.R. § 2.14(a)(2)(i)-(iii) (1995).

3. The Commission's decisionmaking process

When a person seeks parole, the Commission assigns the case to one of two decision-making paths. The two paths are described here. For convenience, they are also summarized in a chart that was filed in the district court and is reproduced in the Supplemental Excerpts of Record at SER 2.

On the first path, decisions are made for the Commission by a single Regional Commissioner. He or she acts upon the recommendation of a panel of hearing examiners, at least one of whom must actually have conducted a parole hearing. See 28 C.F.R. § 2.23 (1995). A person may appeal the Regional Commissioner's decision to the Commission's National Appeals Board. See 18 U.S.C. § 4215(a). The National Appeals Board is composed of the Commission's three National Commissioners. 28 C.F.R. § 2.1(c)(1995). The National Appeals Board may, upon the concurrence of two members, affirm, modify, or reverse the decision. See 18 U.S.C. § 4215(b); 28 C.F.R. § 2.26(b) (1995).

For high-profile or other unusual cases, the Commission may choose a second path: original jurisdiction. The original jurisdiction regulation, 28 C.F.R. § 2.17 (1995), provides that original jurisdiction cases should be decided initially by a Regional Commissioner, together with the three National Commissioners. A person may then appeal the decision

to the full Commission, pursuant to § 2.17, where a quorum of six Commissioners is required and decisions are made by a majority vote. See 28 C.F.R. § 2.27(a) (1995).[5]

4. The Commission's limited power to rescind or reopen presumptive release dates

The statutes establishing the Parole Commission also set up a system in which the Commission's discretion is curtailed. The Commission acts pursuant to guidelines. See 18 U.S.C. § 4203(a)(1). These guidelines provide for "a more consistent exercise of discretion, and enable fairer and more equitable decision-making." 28 C.F.R. § 2.20(a) (1995). Not surprisingly, in a designed to render consistent and non-arbitrary results, the Commission has also limited its ability to change a parole date once that date is set.

For a person with a clear conduct record and no new criminal convictions, such as Mr. Bono, there is only one mechanism by which the Commission may retard or rescind a presumptive release date. Title 28 C.F.R. § 2.28(f) allows the Commission to reopen a case and conduct a de novo "special reconsideration hearing"[6] if it obtains "new and significant

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[5] The most recent version of this regulation calls this appeals procedure a "petition for reconsideration," with different quorum requirements. See 28 C.F.R. § 2.27 (1996). The most recent version was not applied in Mr. Bono's case.

[6] Special reconsideration hearings are de novo reevaluations of a prisoner's parole status, conducted according to the same regulations that govern initial

adverse information" relating to the prisoner or his offense. The Commission's own published policies explain the Commission's definition of "new and significant adverse information":

> [§ 2.28(f)] is the appropriate mechanism for reopening cases to consider new information about the prisoner's original offense behavior or earlier criminal activities that would have resulted in a different decision had the information been presented to the Commission at the time of the initial parole hearing.

U.S. Parole Commission Rules and Procedures Manual, § 2.28-02(f)(1995) (reproduced in the Addendum to this Brief).

The Commission's regulations also prescribe a specific set of procedures that the Commission must follow before it may order, much less conduct, a de novo hearing based upon new and significant adverse information. A Regional Commissioner who seeks an order for a special reconsideration hearing must refer the case to the National Commissioners, and two National Commissioners must join the Regional Commissioner in voting for a special reconsideration hearing. 28 C.F.R. § 2.28(f). At the same time, the Commission's Manual states that the Commission should furnish the prisoner with a Notice of Action, informing him that the Commission is considering reopening his case. Id. at § 2.28-02(f). If the Commission votes to reopen the case, it must send the prisoner a second

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hearings. 28 C.F.R. § 2.28(f).

Notice of Action, informing him of its decision and "specify[ing] the adverse nature of the new information." Id. Finally, the Commission should furnish the new information to the prisoner prior to the hearing. Id. Only after the Commission has complied with these procedures may it reopen a prisoner's case and decide or rescind a presumptive release date.

C. Mr. Bono's History Before The Parole Commission

This appeal is the culmination of a long series of proceedings dating back at least to December 20, 1984, when the Commission, treating Mr. Bono's case as one of original jurisdiction, first granted him a presumptive parole date of July 17, 1992, which would have required him to serve 25 years in federal custody. GER 231. At that time, Mr. Bono was under detainer from the State of California, where he had a five-year sentence, and the Commission apparently intended for him to serve a combined total of 30 years between the federal and state systems. GER 52-53.

1. Mr. Bono's prevails in his first habeas corpus petition

In 1987, Mr. Bono's state sentence was vacated by a state court. Following Mr. Bono's next statutory interim hearing, the Commission decided to extend Mr. Bono's presumptive parole

date so that he would serve 30 years in federal custody. GER 29-30. However, in so doing, the Commission violated its regulations in a manner similar to its actions in this case. It did not follow the procedures set forth at 28 C.F.R. § 2.28(f), which requires the Commission to vote to reopen a case and then hold a hearing before extending a person's sentence. GER 257. The Commission also failed to tell Mr. Bono that it was considering such an extension, and therefore he was not afforded an opportunity at his hearing to argue that his federal presumptive release date should remain at 1992. GER 258-59.

Mr. Bono filed, pro se, his first petition for a writ of habeas corpus in the U.S. District Court for the Central District of California. GER 213. The court agreed that the Commission failed to comply with its regulations. The court granted Mr. Bono's petition, and ordered that Mr. Bono's 1992 release date be reinstated unless the Commission conducted a new hearing. GER 247-48.

Upon remand from the court, the Commission voted to reopen Mr. Bono's case. GER 176. Though the hearing examiners recommended an earlier release date, the Commission decided, by a Notice of Action dated August 30, 1989, to set Mr. Bono's presumptive release date at July 17, 1997, which would require to serve 30 years. GER 177.

2. **Mr. Bono prevails in his second habeas corpus petition**

Mr. Bono received another statutory interim hearing on June 4, 1991. At the hearing, Mr. Bono argued that, based on his excellent institutional record, the Commission should advance his 30-year parole date under its "Superior Program Achievement" regulation, 28 C.F.R. § 2.60. The Commission, acting through four Commissioners, denied this request and affirmed Mr. Bono's 30-year parole date. GER 118-19. The Commission affirmed this decision on appeal but, because of declining membership, the affirmance was made by only four Commissioners; the original jurisdiction regulation required that appeals be decided by six Commissioners. 28 C.F.R. § 2.27(a) (1995). Moreover, the four Commissioners who affirmed the decision on appeal were the very same four Commissioners who took part in the original decision. GER 72-73, 267-68.

Because this action violated the Commission's governing regulations, Mr. Bono filed his second habeas corpus petition. On May 27, 1994, the district court granted the petition, agreeing that the Commission had again failed to follow its own regulations. The court offered the Commission three suggestions for remedying its error: the Commission could "(1) seek to have additional Commissioners appointed, (2) amend its regulations following APA requirements, or (3) decertify petitioner's case as one of 'original jurisdiction,'

and follow more usual procedures."[7] GER 266. Mr. Bono asked the Court to decide Mr. Bono's appeal itself, instead of remanding the matter back to the Commission, because of the Commission's history of treating Mr. Bono in defiance of the law. GER 59-61. The court declined this request, but noted that if the Commission did not respond to the remand within four months, Mr. Bono should file a new petition. GER 71, 266.

[7] After the district court ruled in favor of Mr. Bono, the Commission amended its regulations, reducing the number of Commissioners who must approve certain decisions. See 61 Fed.Reg. 13763 (1996); 61 Fed.Reg. 55742, 55743 (1996).

3. **The Commission immediately orders a de novo hearing**

The events following the 1994 habeas corpus decision are summarized in a chart that was submitted in the district court and is reproduced in the Supplemental Excerpts of the Record at SER 1. In response to the remand from the district court, the Commission, on July 1, 1994, issued Mr. Bono a Notice of Action, with the order: "Reopen, per court order, and (1) remove from the Commission's original jurisdiction; and (2) schedule for a special reconsideration hearing and **a de novo parole decision** by the appropriate Regional Commissioner." GER 193 (emphasis added). Mr. Bono could not appeal the decision to schedule a de novo hearing because, in a space marked "Appeals Procedure," the notice states, unambiguously: "**THE ABOVE DECISION IS NOT APPEALABLE**." Id. (emphasis added).

Mr. Bono received his hearing on October 3, 1994. GER 78-81. Hearing Examiner Wagner recommended that Mr. Bono's 1997 parole date be advanced 18 months, to January 17, 1996, due to Superior Program Achievement. Id. at 80-81. Though the case had earlier been removed from original jurisdiction status, the Regional Commissioner recommended that Mr. Bono's case once again be returned to original jurisdiction status, as the Commission had gained new members. GER 84. The full Commission then issued a Notice of Action on November 23,

1994, ordering "No change" in Mr. Bono's previous parole date of July 17, 1997. GER 85.

4. Mr. Bono appeals and receives another hearing

The order of "No change" implied that the previous 30-year parole date was still operative. This did not comport with the Commission's earlier Notice of Action, telling Mr. Bono that he was to have a de novo hearing. Mr. Bono appealed this ruling. He did not argue on appeal that he was entitled to a de novo hearing. Rather, he complained that the Commission had told him he would receive a de novo hearing, and he had prepared for one. GER 184-86. Then, after the fact, the Commission instead treated the hearing as a statutory interim hearing, which is a different type of hearing altogether. GER 85; see also 28 C.F.R. § 2.14(a) (1995); 28 C.F.R. § 2.28(f) (1995)(describing the different hearing types).[8]

By a Notice of Action dated March 28, 1995, the Commission agreed that it had given Mr. Bono something other than the de novo hearing specified in its July 1, 1994, Notice of Action. But rather than order a new statutory interim

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[8] The error about which Mr. Bono complained was similar to one of the errors that had led to his first habeas corpus petition. There, Mr. Bono attended what he thought was a statutory interim hearing, but when he received a Notice of Action following the hearing, his case had been reopened and his release date extended. GER 254, 257-58.

hearing with proper notice, the Commission ordered, "[r]emand for a de novo hearing with instructions to contact the victim per the victims [sic] request." GER 86. Mr. Bono received a de novo hearing on June 15, 1995, before Hearing Examiner Dwyer. After evaluating the circumstances of Mr. Bono's case, Hearing Examiner Dwyer recommended that the Commission once again set a presumptive release date of July 17, 1997. GER 91.

5. The Commission solicits and receives the letter and conducts a rehearing

On June 26, 1995, before the Commission reached a decision on the de novo hearing and Examiner Dwyer's recommendation, it received the letter it elicited from the daughter of one of the Border Patrol agents. GER 92. The letter describes some of the daughter's hardships in growing up without a father. GER 92-94.

After receiving the letter, the Commission decided to schedule a rehearing to allow Mr. Bono to respond to the letter. The rehearing took place on October 19, 1995. As Mr. Bono's counsel explained at the hearing, the letter is moving and poignant, but it contains no information that could add to the Commission's understanding of Mr. Bono's offense. GER 99-100.

In his evaluation, Hearing Examiner Dwyer agreed, and

concluded that the letter offers no information that should bear on the Commission's evaluation of Mr. Bono's parole status:

> After careful review of the letter and [sic] while it is a most moving and sensitive letter, this examiner does not believe that it substantially changes the underlying nature of the offense behavior . . . Thus the examiner does not believe that any change should be made on the basis of the most recent letter in terms of subject's presumptive parole date.

GER 100. Because the letter did not contain new adverse information, Examiner Dwyer recommended that Mr. Bono be paroled on July 17, 1997, after serving 30 years. Id.

6. The Commission responds to the letter

Hearing Examiner Dwyer's recommendation was then reviewed by Regional Administrator Sicoli, who expressed confusion as to whether or not the hearing was a de novo proceeding. GER 101. If the hearing was de novo, he recommended continuance to a 15-year reconsideration hearing. Id. If the hearing was not de novo, Mr. Sicoli found that the letter contained no new information that could justify a harsher sentence. GER 102. "The letter itself is new, but I find, as does [Hearing Examiner] Dwyer, that the information contained in it is information that the [Commission] reasonably should have concluded from previously available evidence." Id.

Hearing Examiner Young examined the case as well. He also recommended maintaining the 30-year release date because

“the victim’s letter doesn’t really have new information beyond that which the [Commission] could have previously concluded [sic].” Id.

The case then went to the Regional Commissioner, Carol Pavilack Getty. In a Memorandum to the National Commissioners, dated November 2, 1995, she concluded that the letter was moving, but “new information was not presented.” GER 103. Commissioner Getty referred the case to the National Commissioners with a recommendation that Mr. Bono be paroled on July 17, 1997, after 30 years. Id.

7. **The Commission extends Mr. Bono's sentence, but does not rely upon the letter**

The National Commission issued its decision by a Notice of Action, dated November 16, 1995: "Continue to a 15-year reconsideration hearing in October 2010." GER 105. The notice states that the decision was based on the seriousness of Mr. Bono's offense, and it describes the offense in detail. The Notice of Action makes no mention whatsoever of the letter or any other "new information;" nor does the notice refer to the impact of the offense on the officers' families. Id.

Mr. Bono appealed the decision to the full Commission, under the Commission's original jurisdiction procedures. While his appeal was pending, the Commission lost two of its six members, leaving it once again without a quorum to decide original jurisdiction appeals. GER 229. By a Notice of Action dated May 15, 1996, the Commission voided its earlier decision, declassified Mr. Bono's case from original jurisdiction status, and remanded to the Regional Commissioner for a new decision based on the October 19, 1995, de novo hearing. Id.

On July 9, 1996, the Commission issued another Notice of Action, continuing Mr. Bono to a presumptive release date on July 17, 2009, after service of 42 years. GER 107. Once again, the notice makes no reference to the victim's letter. Just as it had in the earlier Notice of Action continuing Mr.

Bono to a reconsideration hearing in 2010, the Commission states that it based its decision on the severity of Mr. Bono's offense, and the Notice includes a short description of that offense. Id.

Mr. Bono appealed the decision to the Commission's National Appeals Board, raising the same arguments that he later raised in the district court. GER 200-10. The Commission denied Mr. Bono's appeal by Notice of Action dated November 27, 1996. GER 129. The Commission still stated that it based its decision on the severity of Mr. Bono's original offense. This time, however, in response to the allegations of vindictiveness set forth in Mr. Bono's appeal, the Notice makes two vague allusions to the letter. First, the Commission claims to have considered "the ongoing harm" caused by Mr. Bono's offense. Id. Second, the Commission argues that its "consideration of new information from a victim" does not constitute vindictiveness. Id. With the exception of these two oblique references, the Commission makes no mention of the letter, nor does the Commission explain how the letter influenced its decision to add 12 years to Mr. Bono's sentence.

8. Mr. Bono prevails in his third habeas corpus petition

Having exhausted the Commission's internal appeals

process, Mr. Bono filed his third habeas corpus petition. GER 1. The petition was referred to United States Magistrate Judge Rosalyn M. Chapman, who issued a Report and Recommendation ("Report"), recommending that the district court grant the petition. GER 281-305. On February 27, 1998, the district court adopted the Report and granted Mr. Bono's petition. The court, in a detailed and well-considered opinion, agreed that the Commission violated the Due Process Clause by vindictively extending Mr. Bono's parole date. GER 313-37.

The line of cases beginning with North Carolina v. Pearce, 395 U.S. 711 (1969), establishes a presumption of vindictiveness whenever a person's sentence is increased after the original sentence has been reversed by a court. The district court rejected all of the government's arguments that Pearce does not apply to this case. It found that Mr. Bono's second successful habeas corpus petition was the "triggering event" that led to the Commission to retaliate by extending his parole date, GER 327-28, and that the Commission's attempt to use the victim's letter as a justification for the increased sentence was merely a post-hoc rationalization. GER 329-32. The court ruled that the Commission had no authority to order a de novo hearing upon remand from its 1994 decision. GER 320, n.17. Because Mr. Bono's last valid parole date, July 17, 1997, had long expired, the district court ordered

him forthwith released on parole. GER 336.

SUMMARY OF ARGUMENT

Immediately after the district court granted Victor Bono's second habeas corpus petition, the Commission issued a non-appealable Notice of Action ordering a de novo "special reconsideration hearing." This order for a de novo hearing necessarily implied that the Commission was rescinding Mr. Bono's previous release date, July 17, 1998, and was conferring upon itself the discretion to extend Mr. Bono's sentence by any amount it chose. Then, after two years, three hearings, two administrative appeals, and three changes in the decisionmaking procedures applied to Mr. Bono's case, the Commission extended Mr. Bono's parole date from 30 to 42 years.

The district court correctly found that these actions constituted retaliation against Mr. Bono for his successful habeas corpus petition. Under North Carolina v. Pearce, 395 U.S. 711 (1969), there is a presumption of vindictiveness whenever a harsher sentence is imposed after a sentencing body has been reversed by a court, and when the sentencer provides no contemporaneous, on-the-record, valid explanation for the increased sentence. The Pearce presumption squarely applies to the actions of the Commission here, and Mr. Bono's increased sentence is unconstitutional. In its arguments to

the district court, the Commission claimed that the increased sentence was justified by a letter it solicited from a family member of one of the victims of Mr. Bono's offense. As the court held, this was merely a post hoc rationalization and could not serve to rebut the Pearce presumption.

Furthermore, the Commission had no authority to order the de novo hearing that conferred upon it the ostensible authority to extend Mr. Bono's sentence. Under the applicable regulations, before ordering a de novo special reconsideration hearing, the Commission must make a finding that such a hearing is warranted by the existence of "new and significant adverse information." Here, the Commission made no such finding. Rather, it summarily ordered the de novo hearing without authority from the district court or its governing regulations, and well before it solicited, much less received, the letter that it now claims is new information to justify increasing Mr. Bono's sentence.

Finally, this Court should hold, as a matter of law, that the letter contains no new and significant adverse information, and thus cannot serve as a basis for reopening Mr. Bono's case and imposing a harsher sentence. The letter contains no information that could fall under the well-settled definition of "new and significant adverse information."

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE COMMISSION ACTED VINDICTIVELY IN EXTENDING MR. BONO'S PAROLE DATE BY TWELVE YEARS

The Commission's actions, increasing Mr. Bono's sentence by 12 years after he prevailed in a habeas corpus action, violate the Due Process Clause of the Fifth Amendment. In North Carolina v. Pearce, 395 U.S. 711 (1969), the Supreme Court ruled that a presumption of vindictiveness applies whenever a court imposes an increased sentence after a successful challenge to a conviction or sentence, unless valid reasons for doing so "affirmatively appear" on the record. Id. at 726. The Pearce presumption safeguards the right of people to appeal decisions that violate the law, because it frees defendants of the fear that an authority that is reversed by a court will retaliate by imposing a harsher penalty on remand. Id. at 725. As the Court found in Pearce, without the presumption of vindictiveness, the fear of retaliation might chill people from seeking redress in the courts. Id. at 724-25. The district court correctly applied the Pearce presumption here.

A. The District Court Correctly Found That the Pearce Presumption of Vindictiveness Applies to Parole Decisions

1. Cases from this and other circuits suppport the application of the presumption of vindictiveness to parole decisions

The government concedes, as it must, that the Pearce line

of cases applies to parole agencies, including the United States Parole Commission. See AOB at 26. Courts in two circuits have applied Pearce to invalidate parole decisions. See Marshall v. Lansing, 839 F.2d 933, 947-48 (3d Cir. 1988)(applying Pearce and overturning a decision of the U.S. Parole Commission to extend the petitioner's sentence after he successfully petitioned a district court for habeas corpus relief); Thompson v. Armontrout, 647 F.Supp. 1093, 1095-96 (W.D. Mo.), aff'd, 808 F.2d 28 (8th Cir. 1986)(approving a finding that the Missouri Board of Probation and Parole had vindictively refused to parole the petitioner because he twice successfully appealed his convictions). Other circuits have indicated that, under appropriate circumstances, they would apply the Pearce presumption to the Commission. See, e.g., Kindred v. Spears 894 F.2d 1477, 1479-80 (5th Cir. 1990)(discussing Pearce and Marshall); Schiselman v. United States Parole Commission, 858 F.2d 1232, 1239-40 (7th Cir. 1988)(discussing Pearce but reversing on other grounds). This Court has indicated that Commission decisions shall be reversed if they give rise to the presumption of vindictiveness. See Weinstein v. United States Parole Commission, 902 F.2d 1451, 1456 (9th Cir. 1990)(remanding to determine whether or not the Commission had acted vindictively); see also Weaver v. Maass, 53 F.3d 956, 959-60 (9th Cir. 1995)(considering the application of Pearce to the

Oregon Parole Board). Neither this nor any other court has suggested that parole decisions are not subject to the Pearce presumption.

2. The presumption applies to the Commission as an entity, not to individual Commissioners

The government claims that the presumption of vindictiveness should not apply to the Commission in this case because the Commissioners who imposed the increased sentence on Mr. Bono were different from the Commissioners who were reversed by the district court. The district court already found this argument unpersuasive, and so should this Court.

All of the cases applying the presumption of vindictiveness to parole authorities have treated those authorities as a single entity. Both Marshall v. Lansing and Thompson v. Armontrout refer repeatedly to "the Commission" and "the Parole Board," acknowledging that the agency acts as a single entity. See Marshall, 839 F.2d at 947-48; Thompson, 647 F.Supp. at 1095-97. And, as the district court held here, "the Commission, regardless of its membership, acts as a single, distinct entity." GER 328.

Marshall specifically found that the U.S. Parole Commission shares with individual sentencing judges many of the characteristics which render the latter susceptible to vindictive motivations. Just as an individual sentencing

court might resent an appellate reversal, "so too might the Commission look unkindly upon a successful court challenge . . . thus supplying a motive for retaliation." Id., 839 F.2d at 947. Moreover, the Marshall court found, the Commission — like a sentencing judge – is prone to viewing court challenges as "assault[s] on its much-valued discretion." Id. at 947-48 n.19. This makes sense because the Commission makes decisions as an entity. See 18 U.S.C. § 4203(b)(1) (reserving to the Commission, by majority vote, the power to grant or deny parole). Indeed, consistent with the Commission's actions as an entity, none of the Notices of Action Mr. Bono received informed him of the voting alignments of individual Commissioners. See, e.g., GER 105, 107, 129-130. Instead, they merely pronounced, in a unified voice, the decisions of the Commission as a whole.

The Parole Commission, it should also be noted, is not composed only of Commissioners. Rather, the Commission has a large permanent staff of hearing examiners, executive hearing examiners, administrators, and counsel who perform much of the day-to-day work of the Commission and who make many important recommendations and decisions regarding cases. See 28 C.F.R. § 2.23 (delegating to hearing examiners and regional administrators the power to conduct hearings and make recommendations). When a court reverses an action of the Commission, the staff must conduct new hearings and complete

more paperwork. Just as sentencing judges and Parole Commissioners may be motivated towards acts of self-vindication, so might the staff of the Commission resent a prisoner's successful appeals to the courts.

The government relies on two cases, Texas v. McCullough, 475 U.S. 134 (1986), and United States v. Newman, 6 F.3d 623 (9th Cir. 1993), for its assertion that the presumption of vindictiveness does not apply to the Commission as a body. Neither case lends support to the proposition that the presumption of vindictiveness applies only to individual Commissioners. In both cases, courts declined to apply the presumption to increased sentences that were imposed by genuinely different sentencers (in McCullough, a jury, and then a judge; in Newman, two different judges) who provided, on the record, valid explanations for the harsher sentences. McCullough, 475 U.S. at 140-44; Newman, 6 F.3d at 630-33. Neither McCullough nor Newman contains any suggestion that the Commission should not be treated as a single entity for Pearce purposes. The district court was correct in distinguishing these cases. GER 328-29.

It is simply wrong to suggest that the Pearce rule applies only to individual Commissioners, and not to the Commission as a whole. No cases lend support to this novel proposition. Because of the way in which the Commission functions, rendering final decisions with a single definitive

voice, it only makes sense to apply the presumption of vindictiveness to the Commission as a whole.

B. The District Court Correctly Applied the Presumption of Vindictiveness to the Facts of this Case

The Pearce line of cases sets forth two conditions that must be satisfied before the presumption of vindictiveness may apply. First, the petitioner must receive a harsher sentence on remand after a successful court challenge. Weaver, 53 F.3d at 960; Kindred, 894 F.2d at 1479; Marshall, 839 F.2d at 947-48. Second, the harsher sentence must be given "in response to reversal by [the] higher authority." Weaver, 53 F.3d at 960.

As the district court found, both requirements are satisfied here. Mr. Bono undeniably received a harsher sentence when his parole date was extended from July 17, 1997, to July 17, 2009. GER 327. And the district court's order granting Mr. Bono's second habeas corpus petition in May 1994, reversing the decision of the Commission, constituted the "triggering event," which completed the Pearce criteria. GER 327-28.

1. The Commission imposed a harsher sentence after it was reversed by the district court

The government claims that the district court's granting of Mr. Bono's second habeas corpus petition, in May 1994, did not constitute a triggering event because of the long,

confused series of events interposed between the decision of the district court and the Commission's eventual ruling. See AOB at 27. This argument fails to acknowledge, however, that the action that supposedly gave the Commission the authority to extend Mr. Bono's sentence — namely, the decision to conduct a de novo hearing instead of a statutory interim hearing — was taken on July 1, 1994, only one month after the district court granted Mr. Bono's second habeas corpus petition. GER 193. It was this order for a de novo hearing that, according to the Commission, supposedly empowered it to extend Mr. Bono's sentence. That the Commission took this highly unusual step immediately after it was reversed by the district court shows beyond doubt that the district court's decision was a triggering event.

Furthermore, the Commission's inability to abide by its own rules, and Mr. Bono's meticulous insistence that it do so, caused the Commission to take two years to render a final decision. Mr. Bono successfully appealed the results of his first post-remand hearing. This forced the Commission to start the rehearing process over again nearly a year after the remand from the district court. GER 86. The delay was compounded by the fact that the Commission declassified Mr. Bono from original jurisdiction status, reclassified him, and then declassified him once more. GER 77, 84, 106. This repeated oscillation between original jurisdiction status and

ordinary processes forced the Commission, on May 15, 1996, to void its decision to continue Mr. Bono to a 15-year reconsideration hearing. GER 106. The Commission then took six more months to obtain a new ruling and affirm it on appeal. These delays were all caused by the Commission. Had they not taken place, the Commission could have reached a decision soon after the remand from the district court.

The district court rejected the government's argument that the Commission's own two-year delay precluded the application of Pearce. As the court correctly held, because "it was this Commission's own actions that led to the substantial delay between the Court's order and the Commission's action, this argument is without merit." GER 329. The government's claim should similarly be rejected on appeal. To rule that such a lapse in time can preclude the application of the presumption of vindictiveness would allow the Commission to defeat Pearce, simply by causing an inordinate delay between the triggering event and any eventual retaliation.

2. There is no basis for holding that Pearce is inapplicable when the triggering event follows a procedural challenge to the agency

The government asserts that the presumption of vindictiveness should not apply in this case because the appellate reversal that triggered the longer sentence was

procedural, not substantive. The government does not cite any cases to support this proposition, and it appears to have created this claim out of whole cloth. There is no reason why a procedural reversal would be less likely to provoke the Commission into acts of retaliation. Indeed, here the district court's 1994 decision had far-reaching consequences for the Commission. Not only was the Commission forced to declassify Mr. Bono's case from original jurisdiction status, but the Commission had to re-examine its original jurisdiction procedures. Following Mr. Bono's case, the Commission amended 28 C.F.R. § 2.27, the regulation respecting quorum requirements for original jurisdiction cases. The Commission reduced the number of Commissioners who must participate in original jurisdiction appeals. See 61 Fed.Reg. 13763 (1996). This was approximately four months after the Commission voted to continue Mr. Bono's case for 15 years, and three months before it decided to extend his parole date to 2009. GER 105, 107. Mr. Bono's second habeas corpus petition thus had severe implications for the Commission. Given that Mr. Bono forced the agency to amend its own regulations, the government's proposed modification to Pearce simply makes no sense.

3. There is no basis for asserting that the de novo nature of the special reconsideration hearing precludes the application of the presumption of vindictiveness

The government also asserts that "the case law makes clear that the Pearce presumption of vindictiveness does not apply where the decisionmaker handing down the harsher sentence is either conducting a de novo review or has before him different evidence from the first decisionmaker." AOB at 32. The law says no such thing.

First, all retrials and resentencings are de novo proceedings, so if the presumption does not apply to de novo proceedings, it would scarcely apply at all.

Second, the presumption certainly applies when the second sentencer is presented new evidence, if that sentencer fails to explain on the record how such new evidence justifies a harsher sentence. Pearce, 395 U.S. at 726.

The two cases relied upon by the government lend no support to its argument. In Colten v. Kentucky, 407 U.S. 104 (1972), the Supreme Court held that the presumption does not apply to Kentucky's two-tier trial court system, in which a defendant convicted in an inferior county court has an automatic right to a trial de novo in a general criminal trial court. Id. at 116. This holding had nothing to do with the fact that the second trial is de novo, but instead was based on the fact that no appellate reversal was involved, and that completely different courts (not merely different judges) imposed the different sentences. Id. at 116-17.

The government also cites Alabama v. Smith, 490 U.S. 794

(1989), in which the Supreme Court declined to apply the presumption of vindictiveness when the first sentence came after a guilty plea, and the second was imposed after a trial at which new evidence was heard. The government overlooks that the case clearly states that the sentencing judge explained, on the record, that the harsher sentence was based on new evidence that was first presented at the second trial. Id. at 796-97, 801-02. Thus, neither of these cases supports in any way the government's contention. The de novo nature of the hearing cannot defeat Pearce.

C. The Government Has Failed to Rebut the Presumption that the Commission Acted Vindictively

1. The Commission provided no valid, contemporaneous, on-the-record explanation for its decision to increase Mr. Bono's sentence

To escape the presumption of vindictiveness, a sentencing body must provide a valid, on-the-record explanation for its decision to impose an increased sentence. Pearce, 395 U.S. at 726. Pearce holds that the increased sentence must be based upon "identifiable conduct on the part of the defendant occurring after the original sentencing proceeding." Id. at 726. The Supreme Court in Texas v. McCullough, 475 U.S. 134 (1986), modified this rule somewhat, upholding the actions of a judge who made a contemporaneous, on-the-record determination that an increased sentence was justified by

evidence that was not presented at the defendant's first trial, but which provided new insight into the magnitude of the defendant's role in his offense. Id. at 140.

Moreover, critically, to dispel the appearance of vindictiveness, the sentencing judge or agency must explain its decision **at the time it imposes the increased sentence**. As the Marshall court found,

> the body imposing sanctions must explain its decision to impose an increased penalty contemporaneous with that decision; an appellate court is not required to remand to the judge, or to the agency, to seek a post hoc rationalization, nor are we required to speculate as to its reasons.

Id., 839 F.2d at 948 n.20.

Here, the Commission provided no valid explanation for its actions. Following the hearing at which the Commission considered the letter, the Commission provided Mr. Bono with two Notices of Action imposing increased terms in custody. In the first, dated November 16, 1995, the Commission continued Mr. Bono's case to a 15-year reconsideration hearing in October 2010. GER 105. In the second, dated July 9, 1996, and following decertification of Mr. Bono's case from original jurisdiction status, the Commission extended Mr. Bono's presumptive parole date to July 17, 2009. GER 107.

The notices provide no valid explanation for the increased sentences. Neither mentions the letter at all, and neither mentions the impact of Mr. Bono's offense on the

victim's families. Instead, both notices merely recount the details of Mr. Bono's 1967 offense, and state that the increased sentences were based on the severity of that offense. The Commission has had this information and in fact has relied upon it since at least 1978, when Mr. Bono first came before the Commission. GER 168. All of this information is in Mr. Bono's 1967 Presentence Investigation Report. GER 142. Indeed, the Commission's descriptions of the offense in the Notices of Action are essentially the same (albeit, less detailed) as the descriptions that are included in its initial parole determination in 1978, and in its 1984 Notice of Action through which Mr. Bono received a presumptive parole date of 1992. Compare GER 168 (1978 initial hearing summary) with GER 27-28 (1984 Notice of Action).

Instead of providing valid new information justifying Mr. Bono's increased sentence, the Commission, in its contemporaneous, on-the-record explanation of its reasoning, relied upon information that was identical to that which originally led it to impose a 25-year, and then a 30-year parole date. The district court correctly held that the Commission failed to rebut the Pearce presumption because the Commission did not provide a contemporaneous, on-the-record, explanation for the increased sanction. GER 329-32.

2. The Commission did not claim to rely upon the

letter until after Mr. Bono accused it of vindictiveness

It was not until **after** Mr. Bono raised his claim of vindictiveness in his administrative appeal that the Commission even alluded to having relied upon the letter in making its decision. Even so, in the Notice of Action on Appeal, dated November 27, 1996, the Commission states only that it has considered "new information from a victim" of Mr. Bono's crime. GER 129. It makes no specific mention of what information it considered or how that information supposedly influenced its decision. Even if the letter had contained valuable information, such an oblique reference as this surely cannot satisfy the requirement of Pearce that "the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be reviewed on appeal." Id., 395 U.S. at 726.

The Commission's claim that Mr. Bono's increased sentence was justified by the letter defies credulity, especially when viewed in context. For 12 years, the Commission had repeatedly informed Mr. Bono of its plans to release him after 30 years. During this time, the developing circumstances of Mr. Bono's case could only have influenced the Commission to **reduce** his sentence, not **increase** it. Instead, the Commission claims that the letter so radically altered the calculus of

Mr. Bono's case that it decided to increase his sentence by 40 percent, despite that all of the Commission personnel who examined the letter up to the point that Mr. Bono's case was referred to the National Commissioners concluded that it contained no new information.[9] The Commission's argument is less than persuasive, and leaves only the ugly and intolerable inference that the Commission acted vindictively, because it resented Mr. Bono's persistent efforts to demand fair, by-the-book treatment from the Commission.

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[9] Hearing Examiners Dwyer and Young, Regional Administrator Sicoli, and Regional Commissioner Getty all concluded that the letter contained no new information. See Initial Hearing Summary, October 19, 1995 (GER 98, 100); Regional Administrator Sicoli's and Examiner Young's comments (GER 101, 102); Memorandum to National Commissioners from Regional Commissioner Getty (GER 103); Report prepared for National Appeal by Counsel Robert K. Preston (GER 123).

3. **The only proper evidence of the Commission's motivations is contained in the Notices of Action that the Commission issues when it announces its decisions**

The government points to certain internal notes and memoranda the Commission created during the decision-making process of Mr. Bono's case, and argues that they constitute evidence sufficient to rebut the presumption of vindictiveness. AOB at 34-36. In so arguing, the government overlooks its own regulations and misapprehends the application of the Pearce presumption to parole determinations.

The district court correctly held, based on its extensive review of the law, that the Commission may not attempt to rebut the presumption of vindictiveness with evidence not contained in its Notices of Action. See GER 331 ("The Commission . . . cannot now, as a post-hoc rationalization, point to the letter to rebut the presumption of vindictive motivation.").

a. **Statutes and the Commission's regulations require it to state, in its Notice of Action, the reasons for its decision**

The Commission's own governing statutes and regulations require it to state, in its Notice of Action, the reason for a parole decision. Title 18 U.S.C. § 4206(b) requires the Commission to "furnish the eligible prisoner with a written

notice of its determination not later than twenty-one days" after the hearing. The same statute requires the Commission to state "with particularity" the reasons for denying parole or for making a decision outside of its guidelines. 18 U.S.C. §§ 4206(b), (c) (reprinted in the Addendum to this Brief). In addition, the Commission assigned Mr. Bono an offense severity level of Category Eight. GER 105. For people in Category Eight, whenever the Commission imposes a sentence more than 48 months above the lower end of the guideline range, it is required to specify the "pertinent aggravating case factors" that lead it to impose such a sentence. 28 C.F.R. § 2.20, *Note to Guidelines for Decision-Making (1995). The Commission calculated Mr. Bono's guideline range at "110+ months." GER 105. His new release date would require him to serve 504 months. Id. This is more than 48 months above the bottom of the guideline range. Under § 2.20, the Commission was required to specify in its Notices of Action the reasons for its decision. The Commission communicates its decisions and reasons in writing through "Notices of Action." See U.S. Parole Comm'n, Rules and Procedures Manual § 2.13-04(1995)(reasons for granting or denying parole "will be typed on all Notices of Action.")

The Commission did provide a statement of reasons and "pertinent aggravating case factors" in Mr. Bono's Notices of Action. GER 105, 107. Id. Notably, in its July 9, 1996,

Notice of Action, the Commission specifically states that it is presenting reasons why "a decision more than 48 months above the base guidelines is warranted." GER 107. Though it gave specific reasons, as required by law, the Commission did not mention the letter or the impact of the offense upon the officers' families in either Notice of Action. GER 105, 107. Thus, the letter demonstrably played no part in the Commission's decision.

b. The Pearce line of cases precludes the Commission from relying on off-the-record evidence in explaining its decision

Pearce and its progeny require that a body imposing a harsher sentence after appellate reversal must provide, **on the record**, valid reasons for its decision. The only on-the-record indicia of the Commission's reasoning and motivations are contained in its Notices of Action. As already explained, the Commission is required by statute and regulations to explain the reasons for its decisions in its Notices of Action. These Notices of Action represent the Commission's decisions.

Acknowledging that Notices of Action are the Commission's official decisions, courts have steadfastly refused to examine other, off-the-record, evidence in assessing the Commission's rulings. As the court in Marshall held, in refusing to review

the Commission's records for information not contained in its Notice of Action,

> [W]hen reviewing an agency's decision, a court is generally not seeking some hypothetical rational support for the agency's action. A court must review the agency's actual on-the-record reasoning process. **Only a formal statement of reasons** from the agency can provide this explanation, not a post hoc rationalization, or agency counsel's in-court reasoning.

Id. at 943-44 (emphasis added). Other courts have similarly refused to attempt to divine the Commission's reasoning processes from any source other than its Notices of Action. See, e.g., Hodges v. O'Brien, 589 F.Supp. 1225, 1230 (D.Kan. 1984)(finding that the Commission is required to state the reasons for its decisions in its Notices of Action, and stating, "Surely, a federal district court is not obliged to search through unofficial memoranda preceding the final Notice of Action and try to reconcile all preliminary comments with the final notice in order to arrive at the Commission's 'real' reasons."); see also Duckett v. United States Parole Commission, 795 F.Supp. 133, 137 n.2 (M.D.Pa. 1992) ("This rationale was not contained in the notice of action and we cannot consider it.").

Further, the rule that courts may only consider information contained in Notices of Action follows from the Commission's decision making processes. The Commission speaks with one voice. See 18 U.S.C. § 4203(b) (granting to

Commission, by majority vote, power to grant, deny, modify, or revoke parole). There are no provisions in the statutes or regulations for individual Commissioners to file concurring or dissenting opinions. On the contrary, when a sufficient number of Commissioners reach a decision and a Notice of Action issues, the explanations contained in the notice are the formal reasons of the Commission. If the Commission does not consider any preliminary factors to be important enough to include in its Notice of Action, then they are not part of the formal record. The Commission must be precluded from later arguing in court that its on-the-record statement is not the definitive explanation for its actions. Just as the only record of a judge's actions are the judge's written orders and opinions (and not, for example, memos to law clerks or correspondence with other judges), the Commission's only on-the-record statements are those contained in its Notices of Action.

c. **If the Court wishes to consider such off-the-record materials, then the case should be remanded for further proceedings**

If the Court disagrees, and wishes to accept the government's invitation to examine the Commission's pre-decision correspondence for evidence of vindictiveness, the Court should remand the case to the district court for an evidentiary hearing to determine actual vindictiveness. The

district court did not reach the question of actual vindictiveness because it based its decision on the Pearce presumption.

There is authority for such a remand. In Weinstein v. United States Parole Commission, 902 F.2d 1451 (9th Cir. 1990), this Court remanded to the district court for a determination of whether the Commission had acted with vindictiveness. Id. at 1456.

The Commissioners' off-the-record notes, upon which the government heavily relies, were submitted to the district court as an exhibit to the government's objections to the Magistrate Judge's Report and Recommendation. See GER 310-12. They were not filed with the Commission's response to the habeas corpus petition. Mr. Bono has never been afforded the opportunity to respond to these exhibits, or conduct discovery of the internal correspondence of the Commissioners, Administrators, Hearing Examiners, and their staff and counsel. Mr. Bono would be especially interested in obtaining Commission documents relating to its decision to amend 28 C.F.R. § 2.27, the regulation that sets forth quorum requirements for original jurisdiction cases. As discussed above, the Commission amended its quorum requirements in the wake of Mr. Bono's successful challenge to the Commission's ability to decide original jurisdiction cases with its reduced membership. These materials may contain evidence of

resentment or retaliatory motives on the part of Commission members or staff.

II. THE COMMISSION HAD NO AUTHORITY UNDER ITS OWN REGULATIONS TO ORDER A DE NOVO HEARING UPON REMAND FROM THE DISTRICT COURT

In addition to the Due Process Clause violation, the decision below should be affirmed because, as the district court found, "[t]here is absolutely no authority for the Commission to have held a 'de novo' hearing for petitioner in 1994 or 1995." GER 320, n.17. The improper order for a de novo hearing was the crucial first step in the long series of proceedings that led to the Commission's decision to extend Mr. Bono's parole date to 2009. The Commission's actions were barred by its own regulations.

A. The Commission Had No Basis to Order a De Novo Hearing in 1994

When the district court granted Mr. Bono's second habeas corpus petition in May 1994, it found for the second time that the Commission had failed to comply with the law. Immediately upon remand from the court, however, the Commission again violated its own regulations. On July 1, 1994, one month after the district court entered its decision, the Commission ordered a de novo special reconsideration hearing for Mr. Bono. GER 77. It was this decision that supposedly empowered

the Commission to rescind Mr. Bono's long-held parole date and extend it by 12 years.

The Commission plainly lacked the authority to order a de novo hearing. The district court's 1994 decision overturned an administrative appeal from a statutory interim hearing decision. When the district court granted Mr. Bono's petition, the Commission should have declassified Mr. Bono's case from original jurisdiction status and properly proceeded with Mr. Bono's statutory interim proceeding. See GER 265-68. Instead, the Commission, for no explicable and certainly, no justifiable reason, ordered a de novo special reconsideration hearing.

A de novo hearing is very different from a statutory interim hearing. After a statutory interim hearing, the Commission may extend a person's parole date only for new criminal offenses or institutional misconduct. See 28 C.F.R. § 2.14(a)(2)(iii) (1995). A de novo hearing, on the other hand, is conducted according to the same procedures as an initial parole hearing. 28 C.F.R. § 2.28(f) (1995). Any pre-existing parole date is rescinded, and the Commission considers the case anew. Id. It may impose any new parole date it wishes, or it may continue the inmate to a 15-year reconsideration hearing. 28 C.F.R. § 2.12(b) (1995).

Because of the broad discretion afforded to the Commission at a de novo hearing, procedural safeguards require

the Commission to make a finding that a de novo hearing is justified by new and significant adverse information. 28 C.F.R. § 2.28(f) (1995). Section 2.28(f) sets forth clear procedures that the Commission must follow before it may reopen a case and order a de novo special reconsideration hearing: "[u]pon the receipt of new and sigificant adverse information . . . a Commissioner may refer the case to the National Commissioners with his recommendation and vote to schedule . . . a special reconsideration hearing." Id. The regulation further requires that three out of five Commissioners vote to conduct a special reconsideration hearing. Id. Moreover, the Commission's Rules and Procedures Manual states that the Commission should inform the prisoner when it is considering reopening his case, and again once it has formally voted to do so. Id., § 2.28-02(f)(1995), reproduced in the Addendum to this Brief.

The Commission did not follow these requirements when it summarily ordered the de novo hearing for Mr. Bono. There was no reopening under 28 C.F.R. § 2.28(f). Nor could the letter have been deemed new and significant adverse information justifying a de novo hearing, because **when the hearing was ordered, the Commission had not yet solicited, much less received the letter**.

This Court has the authority to overturn a Commission

action that does not conform to its regulations. In Wallace v. Christensen, 802 F.2d 1539 (9th Cir. 1986) (en banc), this Court undertook an extensive review of the federal courts' jurisdiction over the Commission. While many decisions are committed to the discretion of the Commission and are, therefore, unreviewable, actions that violate the Constitution or the Commission's regulations are subject to judicial review. Id. at 1552, n.8.

The language of 28 C.F.R. § 2.28(f) does not confer upon the Commission the discretion to order a de novo hearing without first obtaining three votes in favor of doing so. Because the Commission ordered a de novo hearing without following procedures mandated by its regulations, the decision to extend Mr. Bono's sentence cannot stand.

B. The Government Has Offered No Explanation for the Commission's Decision to Disregard its Regulations and Order a De Novo Hearing

The government cannot seriously contend that the Commission possessed the authority to order a de novo hearing in 1994, and its attempts to do so now are thoroughly unconvincing.

1. There is no basis for asserting that the district court's 1994 decision "required" the Commission to order a de novo hearing

The government makes the patently untrue suggestion that

the district court's 1994 order somehow required the Commission to conduct a de novo hearing. See AOB at 37, n.11. The order did nothing of the sort. Nowhere in the district court's final order or in Magistrate Judge Volney Brown's 1994 Report and Recommendation is there any grant of authority, much less a mandate, for the Commission to order a de novo hearing. See GER 70-73. In fact, there is no mention of a de novo hearing at all.

The government cites Bridge v. U.S. Parole Commission, 981 F.2d 97 (3d Cir. 1992), for the proposition that, "[r]egardless of whether the district court required a de novo hearing, the Commission was not precluded from ordering one." AOB at 37, n.11. There is no hint in Bridge that the Commission may order proceedings that are not permitted by its own regulations. Bridge stands for the proposition that, when a court finds that an administrative agency has exceeded its discretion, it should be left to the agency to decide how to proceed in compliance with the court's findings. Id. at 105. Bridge does not authorize an administrative agency to violate its own regulations. If the Commission truly believes that it may order de novo hearings after any successful court challenge, then the Commission is truly reserving for itself the special authority to treat inmates more harshly whenever they succeed in overturning a Commission decision.

2. Mr. Bono did not invite the Commission to hold a de novo hearing, nor does he have the power to authorize the Commission to disregard its regulations

The government further claims that Mr. Bono himself gave the Commission to conduct the de novo hearing. AOB at 37-38. This claim is also incorrect, as a matter of fact and law. As the district court found, in repudiating this assertion,"respondents' suggestion that [a de novo] hearing was proper because petitioner requested it, and the Commission agreed to it, is bizarre. The actions of the Commission are governed by law, not by whim." GER 320, n.17.

Mr. Bono did not invite the de novo hearing. The decision to hold a de novo hearing was announced by Notice of Action dated July 1, 1994. GER 77. It came right on the heels of the district court's decision, and was made by the Commission alone.

Nor was this an action that the Commission permitted Mr. Bono to appeal; thus, the claim that Mr. Bono "invited" the action cannot stand. The Notice of Action ordering the de novo hearing states: "THE ABOVE DECISION IS NOT APPEALABLE."[10] Id. Mr. Bono appeared at the hearing as ordered, only to find,

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[10] The government argues that Mr. Bono failed to exhaust his administrative remedies in objecting to the de novo hearing. AOB at 38, n.12. But the Notice of Action plainly told Mr. Bono that the decision to hold a de novo hearing was not appealable. Surely the Commission cannot claim that Mr. Bono should have been forced to exhaust his administrative remedies by appealing a non-appealable decision.

when the Commission later announced its decision, that the format of the hearing had been changed to a statutory interim hearing. The change prejudiced Mr. Bono because he had prepared for one type of hearing, but had in fact received another. Mr. Bono filed an administrative appeal, objecting to the Commission's decision to alter the hearing format without notice. The Commission had foreclosed him from appealing the de novo nature of the hearing, so Mr. Bono instead asked for a new hearing at which he would have advance notice of the format. GER 184-185, 192. He did not claim that he was entitled to a de novo hearing.

Finally, even if Mr. Bono was somehow held to "invite" a de novo hearing, it is difficult to understand how he could empower the Commission to violate its own regulations and hold such a hearing. The district court correctly held that there was no basis for the de novo hearing.

C. The Letter Does Not, as a Matter of Law, Contain "New and Significant Adverse Information"

If this Court affirms the district court's decision because the Commission lacked the authority to order a de novo hearing, it should also decide that the letter cannot contain new and significant adverse information, as a matter of law. Ordinarily, if the Court were to invalidate the de novo hearing, the court might remand the case to the Commission for

further proceedings. But there is no reason for a remand here. As a matter of law, the letter does not contain "new and significant adverse information." Moreover, the Commission has unequivocally communicated its intent to extend Mr. Bono's sentence on the basis of the letter. Given the extended history of this case, this Court should not remand the matter back to the Commission.

Title 28 C.F.R. § 2.28(f) (1995) allows the Commission to reopen a person's case and reevaluate his release date if there exists "new and significant adverse" information about the person or his offense. Id. "New and significant adverse information" includes "information not considered by the Commission although it was in existence at the time of decision." Torres-Macias v. United States Parole Comm'n, 730 F.2d 1214, 1217 (9th Cir. 1984)(quoting Williams v. United States Parole Comm'n, 707 F.2d 1060, 1066 (9th Cir. 1983)). Cases that have found information to be new and significant have addressed information that fundamentally altered the Commission's understanding of the offender's behavior or the extent of his participation in his offense. The letter in this case contains no such information.

1. The Commission has always had the same information as is contained in the victim's letter, and the Commission has actually considered it

The information in the letter is not new, because Commission has always known that Mr. Bono's offense would affect the family members of the Border Patrolmen. On at least three occasions, the Commission acknowledged that it was aware that the Border Patrolmen had families.

First, the description of Mr. Bono's offense in the PSI explicitly refers to the fact that the Border Patrolmen had families. SER 57. The PSI states, **"Officer Newton was married and had two children."** Id. (emphasis added). Though the page of the PSI containing this description was omitted from the version of the PSI that is contained in the beginning of the government's excerpts (see GER 8-9), there can be no question that the Commission considered and actually relied on that information. The Hearing Summary from Mr. Bono's initial hearing in 1978 states, "the writer would refer any readers to the presentence investigation material." GER 168.

Second, the Hearing Summary from Mr. Bono's 1984 statutory interim hearing also refers to the presentence report and notes that Mr. Bono discussed his compassion for "the victims and family." SER 62. Following this hearing, where the Commission considered the impact of the offense upon the officers' families, the Commission set a presumptive parole date for Mr. Bono. GER 27-28.

Third, the Commission specifically mentioned the families

in its Return to Mr. Bono's 1987 habeas corpus petition, stating that, "both Border Patrol officers had talked about their families." SER 59-60.

In Schiselman v. United States Parole Commission, 858 F.2d 1232 (7th Cir. 1988), the Commission relied on information in a letter when it decided to extend the petitioner's sentence. The Commission claimed that this information was new, but the Commission had used other information in the same letter to reopen the case on a previous occasion. Id. at 1237. The court found that "the fact that the Commission was aware of the information at the first reconsideration hearing, yet chose not to rely on it, precludes its use at the second reconsideration hearing." Id. at 1238. Thus, the information could not be considered "new and significant" within the meaning of 28 C.F.R. § 2.28(f) because the Commission had already considered and disregarded it in a prior proceeding. Id.

The facts are the same here. The record shows unequivocally that before it set Mr. Bono's original parole date, the Commission was aware and actually considered that the Border Patrolmen had families. The Commission knew that Mr. Bono's offense would have an impact upon them. Indeed, that fact was specifically discussed at the 1984 hearing. The Commission cannot now assert that it has only recently learned

that the offense would have an impact on the officers' families.

2. The information in the letter is not significant enough to warrant the reopening of Mr. Bono's case

The Commission's own Manual states that § 2.28(f) "is the appropriate mechanism for reopening cases to consider new information about the prisoner's original offense behavior or earlier criminal activities that would have resulted in a different decision had the information been in existence at the time of the original parole hearing." U.S. Parole Commission Rules and Procedures Manual § 2.28-02(f)(1995) (reproduced in the Addendum to this Brief). In all of the cases that have approved the reopening of cases for "new and significant" information, the Commission has received information that shed dramatic new light on the offender or his offense, or has revealed a legal error on the part of the Commission. The information in the letter in this case does neither.

This Court sustained the reopening of a case for "new and significant adverse information" in Torres-Macias v. United States Parole Commission, 730 F.2d 1214 (9th Cir. 1984). In that case, the Commission had received powerful new evidence from the Drug Enforcement Agency new about the petitioner, a convicted drug smuggler. Id. at 1215. The information

revealed to the Commission, for the first time, that the petitioner was not merely a “mainline conspirator” in a smuggling operation, as the Commission had previously believed, but was actually the “titular head” of a large drug conspiracy who “controls and runs the organization in every detail.” Id. at 1217. The Commission also learned that the petitioner had been involved in the smuggling operation for a much longer period of time than had been previously thought. Id.

Other circuits have approved the reopening of cases only for information of similar nature. See Frasetto v. Perrill, 955 F.2d 176, 178 (2d Cir. 1992) (Commission reopened case when it learned that petitioner’s offense had caused a death and several injuries); Lewis v. Beeler, 949 F.2d 325, 327 (10th Cir. 1991), cert. denied, 504 U.S. 922 (1992) (Commission reopened case after learning that petitioner wrote letters threatening to kill President Reagan and others); McClanahan v. Mulcrombe, 636 F.2d 1190, 1191 (10th Cir. 1980) (Commission reopened case to correct error in assigning severity rating); Iuteri v. Nardoza, 560 F.Supp. 745, 747 (D.Conn. 1983), aff’d, 732 F.2d 32 (2d Cir. 1984) (Commission reopened case to consider evidence that petitioner had history of homicide, assault, fraud, kidnapping, narcotics, and extortion).

In Mr. Bono’s case, the information simply does not rise

to the level prescribed by the Commission's regulations and approved by the courts. The alleged "new and significant adverse information" provides no new insight into Mr. Bono's offense. The daughter's letter is moving. But, as Hearing Examiner Dwyer found when he considered the letter, "[w]hile the Commission may not have known the exact feelings of the family members of the victims, it was well aware that subject caused the loss of life of two individuals . . . and certainly their deaths had adverse impact upon the lives of both families of the victim." GER 100.[11]

To be sure, the Commission should, under appropriate circumstances, consider the feelings of victim's families. One can even imagine circumstances in which a family member might have new and significant information. For example, a person could come forward with information that a prisoner has been sending threatening letters. Similarly, some family may have firsthand knowledge of an offender's past criminal history. However, to hold that the letter in this case contains information sufficient to reopen a case under § 2.28(f) would allow the Commission to reopen and alter a parole decision whenever it receives any letter from any relative of a victim. Each time a person approaches a parole

[11] As already noted, Hearing Examiner Young, Regional Administrator Sicoli, and Regional Commissioner Getty all concurred with this conclusion.

date, a family member could prevent their release, simply by writing a letter. Veto power over parole is granted neither to sentencing judges, United States v. Addonizio, 442 U.S. 178, 190 (1979), nor to prosecutors. It should not be granted to victim's families.

CONCLUSION

For the foregoing reasons, the order of the district court, granting Mr. Bono's petition for a writ of habeas corpus, should be affirmed.

Respectfully submitted,

Dated: October 30, 1998

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STATEMENT OF RELATED CASES

Counsel for the Appellee, Victor Bono, is unaware of any related cases pending in this Court.

_____
Charles D. Weisselberg

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the Appellee's brief is monospaced, has less than 10.5 characters per inch, and contains 12,868 words, excluding the cover page, tables, statement of related cases, certificate of compliance, proof of service, and addendum.

Dated: October 30, 1998

_____
Charles D. Weisselberg

STATUTORY AND REGULATORY ADDENDUM TO BRIEF

A. 18 U.S.C. § 4206(c) and (d) A-1

B. 28 C.F.R. § 2.13(d)(1995) A-2

C. U.S. Parole Commission, Rules and Procedures Manual (1995), reprinting 28 C.F.R. § 2.28 and Notes and Procedures §§ 2.28-01 to 2.28-03 . . . . . A-3

§ 4206. Parole Determination Criteria

* * *

(b) The Commission shall furnish the eligible prisoner with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.

(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing: Provided, That the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon.

* * *

28 C.F.R. §2.13 (1995) Initial Hearing; procedure.

* * *

(d) In accordance with 18 U.S.C. 4206, the reasons for establishment of a release date shall include a guidelines evaluation statement containing the prisoner’s offense severity rating and salient factor score (including the points credited on each item of such score) as described in § 2.20, as well as the specific factors relied upon for any decision outside the range indicated by the guidelines.

* * *

PROOF OF SERVICE

I, Scott Fleming, declare:

I am employed in the County of Alameda, State of California; that I am over the age of 18 years of age and not a party to the within action; that my business address is University of California, School of Law (Boalt Hall), Berkeley, California 94720-7200.

On October 30, 1998, I served a copy of the attached documents described as APPELLEE'S BRIEF and APPELLEE'S SUPPLEMENTAL EXCERPTS OF RECORD on the parties of record in said cause by placing two true copies of the BRIEF and one true copy of the EXCERPTS enclosed in a sealed envelope addressed as follows:

Edward P. Lazarus
Assistant United States Attorney
1200 United States Courthouse
312 North Spring Street
Los Angeles, CA 90012

I am readily familiar with the office's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed on October 30, 1998, at Berkeley, California.

_____
Scott Fleming