1998 WL 34088963 (C.A.2) (Appellate Brief)
United States Court of Appeals,
Second Circuit.

Andrew RUSSO, Petitioner-Appellant,

v.

D. HASTY, Warden, Metropolitan Correctional Center, Respondent-Appellee.

No. 98-2578.
1998.

On Appeal from the United States District Court for the Southern District of New York

Brief for Petitioner-Appellant

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***1** *ISSUES PRESENTED FOR REVIEW*

1. Whether there was insufficient evidence presented at the parole revocation hearing where the hearing officer made no finding that Russo knew Cacace prior to May 20, 1996, or that Russo was aware on May 20, 1996 that the person he allegedly met was Cacace?

2. Whether the hearing officer's conclusion that no notice of action was ever received and that Russo received notice on 10/13/94 can support a violation of a modification allegedly made on 11/9/94 or 11/10/94 where notice, if any, was impermissibly vague and ambiguous?

***2** 3. Whether an isolated seven (7) minute street encounter constitutes "association" as a matter of law?

4. Whether the record of the local parole revocation hearing demonstrates legally sufficient grounds to support the required finding of "good cause" to exceed the rescission guidelines of 0-8 months proscribed for the alleged technical violation?

***3** *PRELIMINARY STATEMENT*

This is an appeal from an opinion and order of the Honorable John F. Keenan, U.S. District Judge, dated May 7, 1998, denying petitioner-appellant ("Russo") relief requested pursuant to 28 U.S.C. §2241 (A-427). [1] Notice of Appeal was filed on June 24, 1998 (A-444).

Footnotes

INTRODUCTION

Andrew Russo was charged with violating a special condition of his parole which was imposed over his objection by Notice of Action dated November 9, 1994. That Notice of Action was never served upon him. [2]

1 Numerical references are to pages in the Appendix filed herewith.

When first released on parole, as of July 29, 1994, Russo was made aware by his Probation Officer, Eileen Kelly, that pursuant to the general conditions of parole he could not associate with anyone engaged in criminal activity or who had a criminal record. On October 13, 1994, Kelly, at the behest of the FBI, presented Russo with a list of "Members and Associates of the Colombo Crime Family" ***4** that she had obtained from the FBI. She attempted to extract a waiver from Russo as to any hearing regarding modification of his then existing parole conditions. Russo objected to the list and exercised his right to withhold his consent to any modification of his conditions. Kelly thereafter noted his objection in writing on the face of the form.

Officer Kelly contacted the Regional Commissioner of the Parole Commission seeking modification of Russo's parole by implementation of this "special condition." On November 9, 1994, a Notice of Action (NOA) was faxed from the Regional Commissioner's office in Chevy Chase, Maryland to Officer Kelly in Long Island. It purportedly modified Russo's parole conditions by ordering that Russo not meet with the "members" of an attached list of "Colombo family members and associates" (A-236-238). No designation was made on the list as to which individuals were "members" and which were "associates." Russo received neither an original nor a copy of the NOA (or the imposed list). Instead, Kelly merely discussed it.

On September 13, 1996, Probation Officer George Gonzalez wrote to the Regional Commissioner requesting an emergency issuance of a warrant for Russo's arrest based on an alleged May 20, 1996 street encounter between Russo and Joel Cacace, a/k/a Joe Waverly. Cacace was an individual whose name appeared on the FBI list of "Colombo Members and Associates." The list did not specifically designate him as a member or associate of the Colombo Organized Crime Family.

***5** According to Yvonne Graham, a Special Agent of the FBI, Russo had been observed meeting with Cacace for a period of no more than seven (7) minutes during the evening of May 20, 1996 within a half-block area in the vicinity of East 49th Street and Third Avenue in Manhattan. Graham testified that she observed Russo at night from inside her car. Russo was purportedly in front of a restaurant separated from Graham by six (6) lanes of traffic. Russo allegedly spoke to Cacace and an unidentified individual for approximately three (3) minutes. Then, Russo and Cacace purportedly crossed to the northwest corner of East 49th street and 3rd Avenue and walked west on 49th Street, crossed to the south side of 49th Street and walked up the stairs into the Doral Hotel at 49th and Lexington Avenue. This part of the supposed street encounter was approximated by the agent to have lasted four (4) minutes. She overheard no conversation. Despite the ready availability of surveillance equipment to take photos, none were taken (A-94-95).

It was based upon this alleged observation, that four (4) months later, Officer Gonzalez requested by letter an emergency warrant from the Regional Commissioner. Based on that letter, the Regional Commissioner found probable cause to believe that Russo had violated the special parole condition that was purportedly imposed by the Notice of Action dated November 9, 1994.

Russo was arrested on September 11, 1996 due to an unrelated indictment that emanated from the Eastern District of New York. ***6** The parole warrant for the violation of the special condition was lodged as a detainer but not executed until March 13, 1997.[3]

2 Russo had been incarcerated after a RICO conspiracy conviction for which he was sentenced to a prison term of fourteen (14) years on November 17, 1986. Expiration of that term was to occur on June 12, 2000. Russo was released via "mandatory release" on July 29, 1994.

A local revocation hearing was held and Russo was held accountable for the alleged violation. The fact that Russo was not served with the Notice of Action which modified his parole conditions or the list attached to that Notice of Action was held to be of no consequence. The meeting with Cacace was a technical violation at best which made Russo a Category I offender with a salient factor score of six (6) resulting in a maximum guideline term of eight (8) months (A-131). Nevertheless, Russo's guidelines were enhanced because Special Agent Donald McCormick of the FBI had reportedly read a newspaper article which speculated that Russo had become the "Acting Boss" of the Colombo Crime Family. Yet, this allegation was never raised during the entire revocation hearing (A-58-130) and McCormick was not produced to substantiate the allegation or information. In addition, no informant was ever identified or even mentioned as the basis for that information nor was Russo given any notice that he would face any enhancements. He was given no opportunity to demand the production of adverse witnesses, the least of which would have been McCormick. ***7** The Regional Commissioner sustained these findings and by Notice of Action delivered to Russo twenty three (23) days after the panel recommendation was issued, ordered Russo continued to the expiration of his sentence (A-131).

STATEMENT OF THE CASE

The Parole Revocation Proceedings The Charge

The Hearing Officer did not understand the nature of the charge and was confused from the outset about the scope of the specific charge. The following colloquy accurately depicts her misunderstanding (A-69-70):

Beale: "There is only one charge and it is association with a person having a criminal record, criminal activity."

Santangelo: "Hold it. That's not the charge."

Beale: "Association with a person having a criminal record."

Santangelo: "That's not the charge."

Beale: "Violation of special condition prohibiting association with members or associates of the Colombo crime family. This is based on information and [P.O.] Gonzale[z's] letter of 9-13-96 which indicates that on or about May 20, 1996, Mr. Russo associated with a Joel Cascade [sic] a/k/a Joe Waiverly [sic], ... and information in the F.B.I. surveillance records- indicating that on or about 5/20/96 at approximately 9:30-10:07 [p.m.][4] meeting with Joel Cascade [sic] at the corner of East 49th Street between Third Avenue and Lexington Avenue in Manhattan. I ask you do you deny or admit the charges?"

Santangelo: "First of all, even after going over the charges, I am unclear as to what you Ms. Beale believe the charges to be. The charge as I understand it is that Mr. Russo violated a special condition of his parole. Now, that special condition as ordered by the Parole Commission on November 9th 1994, that he was, now I'm going to read from it, I'm now reading from a copy of the November 9th 1994 Notice of Action of the US Parole Commission which states... ['']You shall not associate with the attached list of individual[s] who have been identified as made members of the Colombo Crime Family. See Attached list. ['] Now, that is the order of the Parole Commission and that I assume is what he is charged with having violated...."

Santangelo: "But, I don't think that's what that says in the charges. It says, the charge say[s] that he was ordered not to associate with members and associates, that's not [it], the Notice of Action doesn't say that. So I would like to clear up the charges."

Beale: "The charge is that he was associating with Joel Cacades [sic]."

Santangelo: "I'm sorry but that's not the charge."

Beale: "That's the information that I have here on the warrant application. Are you looking at the warrant application[?]"

Santangelo: "Charge [is] violation of the special condition. Now, I['m] just trying to clear up right here what the special condition was."

Beale: "That he not associate with anyone in the Colombo Crime Family. This person is."

Santangelo: "... that's not what it [Notice of Action] says."

Beale: "I'm only telling you what the charge is on the warrant application which is what I will be considering here today."

3 The warrant was supplemented on April 14, 1997 with an additional charge imposed based on the facts and allegations contained in the Eastern District indictment. A Notice of Action was later sent suspending the second charge until conclusion of the trial in the Eastern District. The Notice of Action directed that a local revocation hearing be held regarding only the "association charge."

***10** *Objection to the Charge*

Counsel noted his objection to the charge as it did not track the specific language used in the November 9, 1994 Notice of Action and did not delineate specifically who on the list were "members" and who were "associates." Specifically, Santangelo stated (A-70-72):

"The charge as contained in the warrant application does not track the [P]arole [C]ommission's [N]otice of [A]ction and modified condition. As I said [,] the modified condition as modified on November 9th, ordered Mr. Russo [] to not associate with the attached list of individual[s] who have been identified as made members of the Colombo Crime Family. The charge says that he violated a condition not to associate with made members and associates of the organized crime family. Now, I want to know if that is a violation of some other condition that we don't know about, or this condition that doesn't include associates[?]"

Beale: "I believe that it does. It says violation of condition prohibiting the association[] with members or associates of the Colombo Crime Family...."

***11** Santangelo: "Now, the list states, is identified as a list of Colombo family members and associates."

Beale: "OK"

Santangelo: "Now, which are the members and which are the associates?"

Beale: "That's a technicality, I'm gonna move forward."

Santangelo: "No, no, no, w[ai]t.... The [N]otice of [A]ction only prevents him from associating with members, not associates. It says nothing about associates in the [P]arole [C]ommission's [N]otice of [A]ction."

Beale: "It's just a term, members or associates. I don't know if it makes much difference."

Santangelo: "There is a lot of difference. According to the testimony of many, many people, both before the [P]arole [C]ommission and before many juries and judges without juries, that there is a vast difference between members and associates of organized crime and the [P]arole [C]ommission is [] very aware of the difference between members and associates and when the [Parole Commission] uses only the word members and ***12** the list says members and associates, it seems to me that there is a distinction between members and associates which was not made, which was not made. Now, I also add that the [N]otice of [A]ction was never given to Mr. Russo."

It is clear from this colloquy that Officer Beale understood neither the modified condition nor the charge.

THE TESTIMONY

Special Agent Graham

Special Agent Graham originally testified at Russo's bail hearing on November 18, 1997, before Judge Hurley of the Eastern District of New York about her observation of the alleged street encounter between Cacace and Russo (A-78). She testified that from her car she observed Cacace, Russo, and an unidentified male briefly convene on the Northeast corner of 49th and Third Avenue in front of Smith and Wollensky's restaurant beginning at about 10:00 p.m. She continued observing this meeting from her car located three (3) car lengths north of the Northwest corner of 49th Street for approximately three (3) minutes. According to her, Cacace and Russo crossed westwardly to the Northwest corner of 49th Street, paused momentarily, then proceeded west on 49th Street. She testified that she could observe Russo and Cacace in her rearview ***13** and side view mirrors, without adjusting them, while they crossed and stood on the Northwest corner of Third Avenue. When they continued westwardly, she left her car and proceeded to follow them on foot on 49th Street (A-78-82).

Before Judge Hurley, she testified that approximately half way up the block Russo and Cacace then crossed from the north to the south side of 49th Street and walked up three (3) stairs that were covered by a grey awning and into the Doral Hotel (A-82). AUSA Cecilia Gardner [5] wrote Judge Hurley three (3) days later that after conferring with Agent Graham about her testimony. Graham claimed to have been confused while on the stand. According to Gardner, Graham now recalled that Cacace and Russo re-crossed from the south side of 49th Street back to the north side and entered ***14** the Doral Hotel through the entrance to the Equinox Cafe on 49th Street (A-142). The Cafe is immediately adjacent to the hotel. Her surveillance of the alleged street encounter was terminated at approximately 10:07 p.m., seven (7) minutes after its commencement (A-94).

4 However, both the ultimate version offered by Agent Graham and the actual surveillance logs reveal that the alleged street encounter between Russo and Cacace began at 10:00 p.m. and ended at 10:07 p.m. (A56-57). Graham had first reported that the street encounter had taken place between 9:33 p.m. and 9:40 p.m. (A-77).

Special Agent Graham's testimony before Hearing Officer Beale was similarly fraught with errors and material inconsistencies. For instance, first she testified that her initial surveillance of Russo occurred at 9:33 p.m. and lasted until 10:07 p.m. (A-76-77). After speaking to AUSA Gardner during the Hearing she changed her testimony to the effect that the meeting occurred between 10:00 and 10:07 p.m. (A-76). Graham lost sight of Russo and Cacace for approximately twenty (20) seconds while they walked westward on 49th Street towards Lexington Avenue. This was due to putting her surveillance log down, exiting, and locking the car before purportedly resorting to foot surveillance. She estimated that the walk from the Northwest corner at Third Avenue to the Northeast corner of 49th Street and Lexington Avenue took Cacace and Russo about four (4) minutes (A-78-79).

Graham's repeatedly failed to correctly state the facts of her observations and correctly identify the locations at which she allegedly observed Russo and Cacace. While she claimed to be familiar with the location of the Doral Hotel, she failed to accurately identify its location on the Northeast corner of 49th ***15** and Lexington Avenue. Rather, she originally testified that it was located on the Southeast corner, a place occupied by the Marriott Hotel. The grey awning that covered the three (3) steps that she allegedly witnessed them walk up was in fact a covering for the steps to a fire door of the Marriott (A-35-39,42-43).

Although she could not have viewed the individuals walking up the steps into the Doral Hotel (A-38), she swore before Judge Hurley that she saw them walk up the steps into the Doral. Further, at the revocation hearing, Graham stated that Russo and Cacace had supposedly entered the Doral through the Equinox Cafe that is adjacent to the Hotel (A-87). This is a fact that the agent had previously failed to impart to Judge Hurley or AUSA Gardner. In addition, Special Agent Graham was unable to recognize several photographs of the Doral Hotel with its red awning or the Equinox Cafe, in part due to an admitted eyesight deficiency (A-83-88); (A-87) (Yvonne Graham: "I cannot see ... I need reading glasses").

When she discovered that the Doral was on the north side of 49th Street, Agent Graham changed her testimony so that she now said she observed Russo and Cacace recrossing 49th Street from south to north and entering the Doral which was on the north side of the street -- the side where she allegedly stood and made her observations. The change in her testimony, however, left her with the unexplained circumstance that it was physically impossible to see the steps of the Doral from her vantage point (A-38). Thus, her ***16** fabrication was exposed and should have resulted in the conclusion that her alleged observations of Russo and Cacace did not take place. Her version that she saw Russo and Cacace enter the Doral on the south side of 49th Street is incredible because the Doral is not on the south side. The steps leading to the fire door of the Marriott are on the south side and are visible(A-35-38). The steps of the Doral, on the north side, are not visible. *Id*.

Officer Kelly

In October of 1994, at the direct urging of the FBI, Officer Kelly requested that the parole conditions governing Russo's supervision be modified (A-351). According to her testimony, she believed that this modification was superfluous because she felt "...that the condition is addressed in the general conditions, but the [FBI] asked [her] to do it so [she] did it....[although] it [wa]s not [her] standard practice" (A-100).

Kelly's interpretation of the general parole condition is crucial because she believed that she had discretionary power to allow or disallow Russo from associating with virtually anyone. The following passages illuminate her perceived powers over Russo:

Kelly:	"I believe that associations with members of the Colombo Organized Crime family is inherent in the general conditions, including associations."
Santangelo:	"That's assuming that Mr. Cacace is a member?"
Kelly:	"Well, no. Knowing that Mr. Cacace is a member and has been convicted of a crime."
Santangelo:	"Well, he is not being charged with associat[ing] with someone who has been convicted of a crime. You know that?"

Kelly: "I know that the charge is the special condition[,] but I tell you that it[']s all inherent in the general conditions..." (A-100) ...

Santangelo: "You also told him, did you not, that he was not to work in the carting industry?"

Kelly: "Yes I did."

Santangelo: "That wasn't a special condition of his parole was it?"

Kelly: "That wasn't a special condition of his parole, but I felt it would be putting him in a position and I suggested it and he agreed and he subsequently asked and I did refuse him because I felt it would put him back associated with the people that are involved in organized crime because [o]f the history of the industry."

Santangelo: "Now, you had no order or authority from the [P]arole [C]ommission to change his standard conditions to prohibit him from working in the carting industry, did you?"

Kelly: "No, but it[']s a general supervision issue, where he's working, it[']s a third party risk."

Santangelo: "You took it upon yourself[.]"

Kelly: "It[']s a condition on a third party risk, somebody should not engage in something that could be bad for the community and I felt that would be ... Part of my position and his conditions, I told him he could not go back to carting" (A-100-102).

***18** After Russo objected to the list that Kelly obtained from the FBI, Kelly testified that "I expressed to him that he could not associate with these people regardless but we were going to pursue a special condition" (A-97). [6]

5 Present at the local revocation hearing were Russo, his attorneys, George Santangelo and David Holland, Hearing Officer Beale, and Assistant United States Attorneys Cecilia Gardner and Paul Weinstein. Santangelo objected to the presence of Gardner and Weinstein as "observers." They were prosecuting the case that is pending against Russo in the Eastern District of New York. The supplemental charge to the parole warrant is the same as the charges contained in the Eastern District indictment. Their presence served only to intimidate the adverse witnesses that were called; Probation Officer Eileen Kelly, Officer George Gonzalez, and Special Agents Lynch and Graham of the FBI. Santangelo further objected to Gardner's presence because she had conferred with Special Agent Graham on November 18, 1996, after Graham gave testimony earlier that day about her alleged May 20, 1996 surveillance. After conferring with Gardner, Graham substantially altered her testimony. Via unsworn statements told only to Gardner, Gardner informed the Eastern District Judge by letter of the alteration and the proposed testimony that Graham would give if recalled to the stand. Beale ruled that the Assistant United States Attorneys could remain throughout the hearing as "observers" (A-60-63).

Both in the supervision chronology (A-342-388) and in a sworn affidavit submitted by Kelly, it is reflected that she did not provide Russo a copy of the November 9, 1994 Notice of Action, but she merely discussed the prohibition with Russo (A-240-241).

Officer Kelly completely misunderstood and misinstructed Russo regarding the ambiguous modification contained in the unserved Notice of Action. This is demonstrated in the following colloquy ***19** about various entries made by Kelly in her chronological report:

Santangelo: "Subject indicated that he would like to go on 12/7 [1994] to hear arguments on his son's case...."

Kelly: "Jo-Jo, yes" (A-104).

....

Santangelo: "And after he asked you that, you say, he was told he is entitled to go, but he is not to be associating with anyone while he is there.... Now, you meant anyone, regardless of who [it] was in the courtroom?"

Kelly: "No, Colombo associates or members"

Santangelo: "That [is] not clear in the chrono is it?"

Kelly: "Well, that[']s what was understood" (A-104-106).

What is clear from the excerpted colloquy is that Kelly, like the Hearing Officer, did not understand the clear language of the modification order that prohibited Russo from "associating" with "members" of the Colombo Crime Family. Therefore, she continually misadvised him as to the exact proscription that had been imposed.

Further, since Kelly admittedly did not furnish Russo with a copy of the Notice of Action (or the final imposed list attached thereto) and did not adequately or accurately advise him of the ***20** conditions imposed, there was no way that Russo had true notice of the "special" restrictions imposed on him. This is evident from Kelly's testimony(A-107):

Kelly: "I did show him the [N]otice of [A]ction[.] Apparently, by the time I did the chrono, I failed to mention it, but I did show it to him...."

Santangelo: "And did you translate the order to Mr. Russo in your own language?"

Kelly: "I told him [] the special conditions I requested and he opposed []. In my own language, I told him he could not associate with the persons on the list."

Santangelo: "What was the order of the Commission? Now as you sit here, tell us what it was."

Kelly: "A special condition prohibiting associati[on] with made members of the Colombo Crime Family that are on the attached list."

The above passage illuminates the problem created for Russo by Kelly's failure to serve him with a copy of the Notice of Action or the final list attached thereto. She did not know or understand exactly what the condition was. She explained to Russo in her "own language" what she thought the imposed condition was. But, as can be readily seen, when asked at the hearing to explain the ambiguous ***21** condition, Kelly stated, in her own words, that the restriction only pertained to "members" of the Colombo Crime Family "that are on the attached list" (A-107). This explication directly contradicts her prior explanation to Russo that the restricted list pertained to "members and associates." Kelly never specified which persons were "members" and which were "associates."

Moreover, Russo was denied his right to appeal the special condition imposed by the unserved Notice of Action. At the bottom of the Notice of Action is an explanation that the imposition of the special condition was appealable pursuant to 28 C.F.R. §2.26 (A-236) (fineprint) ("The above decision is appealable to the National Appeals Board under 28 C.F.R. §2.26"). Officer Kelly admittedly failed to notify Russo as to this absolute right of appeal or as to the procedure for appealing the special condition (A-109):

Santangelo: "Did you give him a copy of the Notice of Action that advised him of his right to appeal?"

Kelly: "I stated that I never received it to give to him."

Santangelo: "So that when you showed it to him, as you say you showed it to him, but there [is] no indication that you showed it to him and advised him that he had a right to appeal?"

Kelly: "No."

***22** *Recommendation to Continue to Expiration*

The Parole Commission found that aggravating factors warranted the enhancement of Russo's guidelines of 0-8 months and continued Russo to the expiration of his sentence. By Notice of Action dated July 2, 1997, these aggravating factors were enumerated as follows:

"Your association with a member/associate of the Colombo Crime Family. Additionally, an FBI informant has advised that you were made boss of the Colombo Crime Family after your release from prison in 1994." (A-131) [7]

6 Kelly had no authority to instruct Russo that he "could not associate with these people". The general restrictions on a parolee are that he or she may not knowingly associate with a felon or anyone engaged in criminal activity. Kelly could not arbitrarily compile a list and prohibit Russo from associating with anyone on that list without squarely running afoul of inviolate constitutional protections.

The existence of an informant was never disclosed to Russo or counsel before or during the hearing. Therefore, Russo had no opportunity to request either the production of the informant or redacted statements. More problematic is the question of when did Officer Beale or the Parole Commission received the informant's hearsay information. If it happened before the hearing or after, then there was an illegal *ex parte* contact made by the Government to influence the impartiality of the Hearing Officer and the decision-making of the Commission. Either way, Russo was absolutely denied the ability to even remotely counter this unfounded assertion.

***23** The National Appeals Board examined the appeal taken from the Regional, rejected reliance on informant information to establish Russo's alleged leadership role in the Colombo crime family and substituted reliance on *dicta* from U.S. District Judge Hurley's opinion in *United States v. Hickey,* No. 96-CR-693 (DRH) (court order dated February 18, 1997 granting bail). *See* Notice of Action on Appeal (A-178-179).

It is clear from the record of the hearing that there existed no evidence that Russo is or was the boss or acting boss of the Colombo Crime Family during the period of time while he was on parole (July 29, 1994 - September 10, 1996). The best that was offered to Judge Keenan by AUSA Sean Cenawood was AUSA Gardner's purported conversations with FBI agents who allegedly had obtained information from unidentified confidential informants (A-419). Judge Keenan had no information to support the aggravating factor and made no independent finding that Russo was a boss. All of the available evidence points to the belief that Andrew Russo was not believed to be the head of the Colombo family. [8]

7 FBI Special Agent McCormick made his statement about Russo's alleged status in the Colombo Crime Family as a result of reading a newspaper article. Thus, any FBI informant information may have equally little probative value since the FBI clearly cannot substantiate any of the information on their own(A-367).

***24** First, the parole supervision chronology described Russo as a "Colombo capo." Additionally, the RICO indictment pending before Judge Hurley specifically characterizes him as "a captain in the Colombo Crime Family" (A-184). Moreover, Myron Holowchuk, a Special ***25** Agent with the DEA, swore on January 26, 1996 before District Court Judge Raggi that "Alphonse Persico is universally identified as the acting boss of the Colombo crime family" (A-425).
On November 18, 1997, a Verified Petition was filed requesting that the District Court release the petitioner ("Russo") from custody pursuant to 28 U.S.C. §2241 (A-5).

A review of the "Revocation Hearing Summary" reveals that the hearing officer made "Evidentiary Findings," "Findings of Fact and Basis," and an "Evaluation" (A-333-341).

The hearing officer recommended that the charge be sustained "based on the testimony of Special Agent Grahm [sic] at the hearing today" (A-338) while noting that the testimony contained "errors" and "conflicts" (A-335,A-340). Examiner Beale concluded that "on 10/13/94 [Russo] and USPO Kelly met in her office for the purpose of discussing the imposition of the special condition that the subject be prohibited from association with made members or associates of the Colombo Crime Family.... [Russo] was observed associating with Joel Cacace whose name appears on the list" (A338). Finally, "[t]he Examiner f[ound] that [Russo] committed the following violation(s): Charge No. 1. Violation of Special Condition (Prohibiting Association With Members or Associates of the Colombo Crime Family). Basis: Testimony of Special Agent Grahm [sic], Special Agent Lynch on 6/10/97 and information contained in USPO Gonzalez's letter dated 9/13/96" (A-338).

***26** The hearing examiner stated: "USPO Kelly concluded that if no copy of the NOA in question was found in the chronos it is more likely than not that she never received it. However, she stated that during an 10/94 meeting she showed [Russo] a list which indicated specific names of made members and associates of the Colombo Crime Family who were on the street that he should not associate with" (A-340).

ARGUMENT

I

THERE WAS NO EVIDENCE AT THE HEARING AND THE HEARING OFFICER MADE NO FINDING THAT RUSSO KNEW CACACE AS OF MAY 20, 1996, OR THAT RUSSO WAS AWARE ON MAY 20, 1996 THAT THE PERSON HE WAS ALLEGEDLY MEETING WAS CACACE

At no time during the hearing was any evidence presented that Russo knew Cacace as of May 20, 1996. Nor was there any evidence presented that Russo was aware on May 20, 1996 that he was meeting with Cacace. This is clear from the evidentiary findings and the basis for those findings. Agent Graham's testimony, as detailed in the hearing officers "Review of Charges," contains no mention of evidence that Russo knew Cacace at any time. Moreover, since Graham testified that she neither heard any conversation between Russo and Cacace, nor had any prior warning that Russo would meet Cacace at that time, the hearing officer could not and did not conclude that Russo became aware on May 20, 1996 that he was with Cacace. ***27** Thus, the conclusion of the hearing officer that

"[Russo] was observed associating with Joel Cacace whose name appears on the list"

(A-338) is insufficient to find him in violation. Something more should have been proven, i.e., that when observed, [Russo] knew he was associating with Joel Cacace. The hearing officer failed to conclude that Russo previously knew Cacace because there was *no evidence* on record to support such a finding.

The chronology of the parole supervision of Russo is also barren of any evidence that any of his Probation Officers determined that Russo knew Cacace. The record is undisputed that Russo had been continuously in prison from November 1981 to April 1985 and from June 1986 to July 1994. Cacace was never imprisoned with Russo. The district court relied on the following proof to sustain the decision of the Parole Commission (A-404-405):

MR. CENAWOOD: Furthermore, your Honor, the evidence indicates that Officer Kelly discussed this prohibition with petitioner on numerous occasions, and that on each such occasion[] petitioner made clear that he understood the prohibition and that he was familiar with the individuals listed on that list of prohibited associations.

THE COURT: Where is that in the record, the last thing you just said, that he is familiar with the people on the list?

MR. CENAWOOD: On page 8 of the hearing summary, the hearing officer states that, "Officer Kelly stated that on numerous occasions the subject questioned her as to whether or not it would ***28** be a violation if he attended court hearings in regards to his son, and that she advised that he could but was warned that he could not associate with known family members or associates." And it also states that, "In support of the testimony, that the subject was aware of the names of made members and associates that he could not --"

THE COURT: Read that a little slower, that the subject indicated he was aware?

MR. CENAWOOD: "...of the names of made members and associates that he could not associate with."

THE COURT: Okay, go ahead. So that's the evidence that he knew Cacace.

The Parole Commission's decision was rendered without a contemporaneous rational basis to sustain the charge. The record is devoid of any rational basis to allow the conclusion that Russo knew Cacace's identity or current physical resemblance on or about May 20, 1996, the date of the alleged seven (7) minute impromptu street encounter. Indeed, Russo, who had been continuously incarcerated since 1986, specifically denied the charge(A-13) ("The releasee stated that he had not seen Joel Cacace in approximately 16 to 17 years, and might not even recognize him if he did see him.").

Even assuming *arguendo* that Russo might have acknowledged the existence of a "list" of names, a fact which we do *not* concede, that cannot lead to the inference that Russo acknowledged familiarity with the identity or physical resemblance of all

of the men on the so-called "list." Russo's *unfamiliarity* with Cacace is ***29** convincingly supported by the irrefutable fact of his long-term incarceration since 1981. The agency's and the district court's adept exercise in *post hoc* rationalization cannot salvage the baseless decision rendered by the Parole examiner. *See Marshall v. Lansing*, 839 F.2d 933, 943 (3d Cir. 1988) (federal parole case) ("Moreover, when reviewing an administrative 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.") (citation omitted).

II

THE HEARING OFFICER'S CONCLUSION THAT (a) NO NOTICE OF ACTION WAS EVER RECEIVED OR SERVED AND (b) THAT RUSSO RECEIVED NOTICE ON 10/13/94 CANNOT SUPPORT A VIOLATION OF A MODIFICATION OF CONDITIONS ALLEGEDLY MADE ON NOV. 9 or 10, 1994. MOREOVER ANY NOTICE WAS IMPERMISSIBLY VAGUE AND AMBIGUOUS

Based on USPO Kelly's conclusion that "if no copy of the NOA in question was found in the chronos it is more likely than not that she never received it" (A-340), the hearing officer relied on a meeting between USPO Kelly and Russo on October 13, 1994 to establish his supposed awareness that he was not to associate with Cacace. The meeting of October 13, 1994 did not however establish ***30** any modification of Russo's conditions. In fact, the chronological entries ("chronos") demonstrate that on October 5, 1994, when told that the FBI may have generated a list of people who Russo was not to associate with, USPO Kelly wrote:
"Hence, undersigned may need to see subject regarding waiving association condition" (A-351).

And, on October 7, 1994, Kelly noted in the chronos as follows:

"[FBI Agent] Fanning ... advised that he put together a formal list of all made Colombo members which subject should not be able to associate with. Undersigned put that on the waiver for subject to waive his right to a hearing to add that condition, otherwise the case will be made to the Parole Commission" (A-351).

Finally, the chronos state that on October 13, 1994, Kelly "went over the association list. [Russo] objected to the condition" (A-352). Thus, as of October 13, 1994, no greater "association" restrictions had been imposed other than the existing general conditions, violation of which Russo is not charged with. Russo did *not* waive his right to object or appeal any modification. No hearing was held regarding Russo's objection. On November 10, 1994, the chronos stated with respect to service of the Notice of Action imposing the special condition: "original notices awaited" (A-354). None ever arrived, and, as USPO Kelly admitted, she never served Russo with the NOA as required nor advised him of his right to appeal the modification of parole conditions (A-109-111). Among the ***31** fundamental procedural rights infringed by the conceded failure of USPO Kelly to serve the NOA upon Russo are (1) the right to present meaningful objections before a final decision to impose a special parole condition is made, 28 C.F.R. §2.40(b); and (2) the right to appeal any modification of conditions, 18 U.S.C. §4215 and 28 C.F.R.§ 2.40(g) (applying appeal procedure codified at 28 C.F.R. § 2.26). Indeed, no evidence exists in the record that there were ever "original" notices of action imposing the modified condition. The fact that USPO Kelly said she received a fax is irrelevant to whether there indeed was ever a NOA promulgated on or about November 9, 1994. In fact, Kelly testified: "I stated I never received it [the NOA] to give it to him" (A-109).

In any event, even if such a NOA had been promulgated, reliance on that meeting of October 13, 1994, at which time Russo objected to the condition, to support the conclusion that he allegedly knew his conditions had been modified constitutes a clear abuse of discretion. The evidence merely supports the view that Russo knew of and objected to USPO Kelly's expressed intention to apply for a modification. There is no evidence in the record that, in fact, Russo was aware that his general conditions had been modified except for vague and ambiguous "discussions" which Officer Kelly claimed she had with Russo on November 10, 1994. However, the chronological entries for November 10, 1994 (A-353-354) support the conclusion that Russo was not told on November 10 that his ***32** supervision conditions had actually been modified. No mention is made in the chronos of such an important matter because no such discussions took place.

Even if notice of the modified condition had been somehow conveyed to Russo, what was purportedly communicated orally and the condition imposed is too vague and ambiguous to support a violation. The unserved Notice of Action prohibited Russo from associating with an attached list of individuals who had been identified as "members" of the Colombo Crime Family (A-270). USPO Kelly testified that she told Russo that the Parole Commission had decided to prohibit him from associating with "made members" of the Colombo Crime Family whose names appeared on an attached list (A-107). Her specific testimony as to the scope of the modification of conditions omitted any mention of "associates" (A-107). Yet, the list which was supposedly given to Russo was a list of "members and associates" (A-271-272) and included names of deceased people, names of members of his biological family, and non-Italo-American names who could not, of necessity, have been "made members" of an LCN family. The name of Joel Cacace, a/k/a Joe Waverly (A-271) (list referring to "street name" as "a/k/a"), was not identified on the list as a "member" or "associate." Moreover, no effort was made to determine whether Russo knew the identity or physical resemblance of the person attached to the listed name or was merely "aware" of the name. Russo was unreasonably left to determine, at his own ***33** peril,whether anyone he met, momentarily or unexpectedly, matched a name on the list[9] and whether that person was or was not a "member" of the Colombo Crime Family. The condition, as imposed, was patently vague and ambiguous,[10] and therefore cannot support the fundamental concept of fair notice required to deprive Russo of his liberty.

8 In addition to the positive evidence that Andrew Russo is not a boss, unreliable confidential information regarding Russo was shown to the Court below to have been spread all over the parole officer's chronology. For example:
- On 3/24/95, the FBI advised P.O. Kelly had left the state. Kelly called upon him at home and he answered the phone (A-358).
- On 4/3/95, Andrew Russo was incorrectly identified by a CI as "Vinny" Russo. He was supposed to have met with the "Warner brothers who own carting in Suffolk along with Frank Rutundo who owns Bayside Carting." That information is false and has never been corroborated. "Vinny" is identified as a "made Colombo soldier," not a boss, and finally, Mancuso is identified as a Colombo [soldier] whereas he is alleged to be a Gambino soldier in the indictment (A-359).
- On 4/5/95, "it was discussed who was going to take over the Colombo family." Russo is not named as a boss. Obviously, the identity of the boss was unknown at this time (A-359-360).
- On 5/1/95, a CI said Russo was to meet "some guys from the Bronx and Brooklyn tomorrow in Sheepshead Bay" regarding "a gambling business." Surveillance on 5/3/95, 5/4/95, and 5/5/95 proved the CI was misinformed (A-363).
- On 10/3/95, it was believed that Russo "is the owner of [Hickey's] Carting Company" because he was at trial everyday with Dennis Hickey, Maria Hickey, Hickey's attorney, and he was "carrying the records." Agent McCormick told P.O. Kelly that Russo "in fact, was a witness for the defense." Indeed, he was not a witness at all. McCormick was mistaken again. Russo was at the trial with P.O. Kelly's permission (A-369).
- On 11/20/95, P.O. Kelly noted that according to the FBI, Russo was "being investigated as the head of the COLOMBO family, in addition to a number of other individuals." Thus, even after the newspaper article published on or about 9/6/95 (A-182) reported that investigators believed Russo was the boss, the FBI was investigating "a number of other individuals" (A-373).
- On 3/13/96, the FBI reported that there were photos of Russo meeting with Peter Gotti. On 3/15/96, Bruce Mowe of the Gambino squad confirmed that the report had been false. Special Agent Cicero, the head of the Colombo squad, expressed his disappointment "as he would like nothing more but to violate [Russo]" (A-378).
- On 5/7/96, Agent McCormick stated that confidential information again was wrong about alleged meetings between Russo and others, since surveillances on two separate weekends did not corroborate the CI (A-380).
- On 5/20/96, McCormick mistakenly stated that Russo did not attend the wedding of his nephew when, in fact, videotapes show Russo at the church. Moreover, McCormick mistakenly said he would monitor the wedding during the weekend of 5/27/96 when, in fact, the wedding occurred on 5/19/96 (A-381).

9 The Notice of Action on Appeal dated 11/12/97 (A-178-179), memorializing the final agency action in this matter, relied upon the assertion that "[t]his list was found with other personal papers that pertained to [Russo], including mandatory release supervision papers, indicating that [Russo] had received it.... [Russo] ha[s] failed to substantiate the claim that the papers seized by FBI Agent Lynch from the Hickey premises, including the copy of the list of Col[o]mbo members/associates, were unlawfully taken." However, on August 12, 1998, in a well-reasoned opinion, U.S. District Judge Hurley recently entered an order suppressing the entirety of the fruits of the search conducted of the Hickey premises which.produced the so-called "list" purportedly given to Russo by USPO Kelly. *See United States v. Hickey,* 1998 U.S.Dist. LEXIS 12728 (Hurley, D.J.) (decided August 12, 1998). Since the record reflects the agency's exclusive reliance upon the list as providing notice to Russo (in lieu of the requisite service of the Notice of Action

modifying conditions), there exists *no* rational basis to assert that Russo was provided with any meaningful notice. *See also Russo v. D. Hasty,* 1998 U.S.Dist. LEXIS 6659 (Keenan, D.J.) (decided May 7, 1998) ("officer Kelly also gave Russo a copy of the list of the prohibited associations, which was later found among his personal effects.") (A-437). In any event, the vague and ambiguous oral "notice" purportedly given by USPO Kelly is fatally defective as herein demonstrated.

***34 III**

AN ISOLATED SEVEN (7) MINUTE STREET ENCOUNTER DOES NOT CONSTITUTE "ASSOCIATION" AS A MATTER OF LAW AND THEREFORE THERE EXISTS NO RATIONAL BASIS FOR A VIOLATION OF THE SPECIAL CONDITION

Even if this Court were to find that the Parole Commission provided sufficient notice of the modification imposing the special condition prohibiting certain "associations," a fatally flawed contention vigorously contested by Russo with respect to identification and method of notice, *see* Arguments I & II, *supra,* at pp.26-33, the isolated, coincidental street encounter [11] lasting, by the government's own admission, no more than seven (7) minutes within a half-block area in midtown Manhattan, does not constitute an "association" as that concept has been defined by the controlling case law in this limited parole context.

10 *Cf.* Ambiguities should be construed in favor of the person whose liberty interests are affected. This logical conclusion is compelled by an extension of the "rule of lenity," which requires that in a criminal case any ambiguity in a statute be resolved in favor of the defendant. To the extent that the statutory scheme requiring notice to parolees as to any modification of parole conditions spawns ambiguity, any doubts should be resolved in favor of requiring that a strict standard of personal service be observed akin to the procedure set forth under Fed.R.Civ.P.4.

In *Rastelli v. Warden, Metropolitan Correctional Center,* 610 F.Supp. 961 (S.D.N.Y. 1985), the Court clearly distinguished a chance encounter from the type of contact deemed to constitute a prohibited "association," in accordance with the interpretations offered by the courts. *See Arciniega v. Freeman,* 404 U.S. 4 (1971); *see also Birzon v. King,* 469 F.2d 1241 (2d Cir. 1972).

***35** In *Arciniega v. Freeman,* 404 U.S. 4 (1971), the Supreme Court granted *certiorari* to interpret the term "associate" as used in a federal parole condition. The Court held that the condition was not "intended to apply to *incidental contacts*..." (Emphasis added). Following suit, with respect to the term "associate" as used within the parole setting, the Second Circuit has held that "the meaning that would more often occur to men of ordinary intelligence is something more than merely a fleeting or casual acquaintance... This is reflected and supported by the general definition given to 'associate' in Webster's *Third New International Dictionary* which defines 'associate' as follows: *To join often,* in a loose relationship as a partner, fellow worker, colleague, friend, companion or ally." *Birzon v. King,* 469 F.2d at 1243 & n.3 (2d Cir. 1972) (emphasis added) (citations omitted).

In *Rastelli, supra,* the district court confronted the case of Philip Rastelli, considered to be the "boss" or "head" of the Bonnano LCN Crime Family, *see Rastelli,* 610 F.Supp. at 970,972, who had been mandatorily released from prison. As part of his general parole conditions, Rastelli was specifically prohibited from knowingly associating with individuals who had criminal records, *see* 28 C.F.R. §2.40(a)(10), and prohibited from knowingly associating with individuals engaged in criminal activity. *See* 28 C.F.R. §2.40(a)(6). The Parole Commission ultimately charged him with knowingly associating with seven (7) identified individuals ***36** who had criminal records on ten (10) separate occasions over an approximate one (1) year period. Rastelli was also charged with additional "associations" with both named and unnamed individuals, who were suspected of being engaged in criminal activity.

The alleged pattern of association with these individuals persisted throughout the relevant parole period as purportedly confirmed by periodic surveillance conducted by Rastelli's parole officer and members of law enforcement. Although supposedly warned repeatedly about his continued history of association with individuals engaged in criminal activity and with persons having a criminal record, Rastelli allegedly elected to disregard these conditions of his release. *Rastelli,* 610 F.Supp. at 967.

After a formal revocation hearing, the examiners found that Rastelli had violated his parole in that he had repeatedly associated with persons having a criminal record. No inculpatory findings were entered as to the second charge related to association

with individuals suspected of engaging in criminal activity. As in *Russo,* the examiner panel in *Rastelli* recommended that the parolee's mandatory release be revoked and that he be imprisoned until the expiration of his original sentence with credit for the time spent on supervision. The recommendation to find a violation was sustained at the Regional and National levels of the Parole Commission. The Commisioners also decided to uphold the reimprisonment of Rastelli through the expiration of his term.

***37** On *habeas* review, the district court in *Rastelli* affirmed only one (1) of the five (5) charges on which Rastelli had been found accountable by the Parole Commission, out of more than ten (10) alleged incidents. The sole surviving charge alleged that, in one (1) occasion during the spring of 1984, Rastelli had met with James "Jimmy" Napoli at a Brooklyn restaurant. Rastelli, who had been incarcerated at the U.S. Penitentiary at Lewisburg during the same time as Napoli, admitted both the meeting with Napoli and his knowledge of Napoli's criminal record. He had claimed, however, that his encounter with Napoli at the restaurant was "wholly fortuitous," and that he had only spoken to Napoli about purely social matters. As to all of the remaining persons with whom Rastelli had allegedly met, he maintained that he was unaware of their criminal backgrounds, and that all of the alleged contacts had resulted from unexpected social encounters. On this basis, the district court found that Rastelli had committed only a single administrative violation of his parole, i.e., the meeting with Napoli. The Court specifically held that the Parole Commission had reasonably concluded that the approximate one-hour meeting between Rastelli and Napoli inside an apparently private social club constituted an "association." *Rastelli,* 610 F.Supp. at 976. In stark contrast, Rastelli's encounter with another individual (who also had a criminal record) was held to be an "incidental" or "fleeting" contact and therefore insufficient evidence to find a ***38** violation of his parole on this basis. *Id.* at 978 (*citing Arciniega v. Freeman,* 404 U.S. 4 (1971) and *Birzon,* 469 F.2d at 1243).

Here, assuming *arguendo,* that Russo and Cacace did encounter each other for no more than seven (7) minutes on 49th street in the vicinity of a busy midtown restaurant, as per the account of FBI Agent Yvonne Graham, the isolated incident does not constitute sufficient contact under the controlling case law to support a finding of "association." *Rastelli,* 610 F.Supp. at 978 (citing cases). The unproven allegations that Russo occupies a leadership role in the Colombo family does not transform a "fleeting encounter" standing alone into a prohibited "association." *Id., Rastelli* at 978. Agent Graham acknowledged in her testimony that (1) the surveillance of Russo had been accidental inasmuch as he was not her intended target; (2) no conversation was overheard; and (3) she deliberately chose not to photograph the alleged seven (7) minute street encounter despite the admitted availability of the necessary equipment (A-94-96). In light of the inappropriate animus against Russo expressed by FBI Agent Cicero, head of the so-called Colombo squad, who had been on record as stating that "he would like nothing more than to violate [Russo]"(A-117,A-378) by developing a "pattern" of prohibited associations (A-117,A-381), and the unholy alliance fostered between the FBI and the U.S. Probation Office,[12] it is shocking to the conscience that, months ***39** after the alleged isolated encounter of May 20, 1996, a violation warrant was sought and obtained notwithstanding the utter failure of the combined agency efforts to establish the desired "pattern" of "association."

11 As to the coincidental nature of the brief midtown street encounter allegedly observed by FBI Agent Yvonne Graham, it is important to note that the surveillance had not targeted Russo at all (A-94) (testimony of Agent Graham before parole examiner Beale stating that "the subject of [her] surveillance that day was *not* Mr. Russo [nor Mr. Cacace]... He [Russo] was in the wrong place at the wrong time...") (emphasis added).

IV

NO LEGALLY SUFFICIENT "GOOD CAUSE" HAS BEEN DEMONSTRATED TO EXCEED THE PRESCRIBED GUIDELINES OF 0-8 MONTHS

As the *Rastelli* holding explains, "[t]he finding of [a] violation[] is only a first step. The second, and more crucial, determination is whether the violation[] warrant[s] returning the parolee to prison. Due process must attend both stages of the inquiry." *Id.,* 610 F.Supp. at 978 (citations omitted). As in the instant case under review, the parolee in *Rastelli* had already served the maximum time provided in the guidelines for reparole. The question which necessarily arises, therefore, is whether the Commission's decision to continue Russo to expiration was arbitrary, capricious, or an abuse of discretion. *Id.*

The Commission is entitled to depart from its guidelines provided it can demonstrate "good cause." 18 U.S.C. § 4206(c). In its formal decision announced via NOA, the Commission pointed to certain "aggravating factors" that ostensibly justified imposing approximately triple the maximum term of the recommended range of 0-8 months: the very same "association" which constituted the ***40** underlying violative behavior alleged and the unproven assertion made by an unidentified informant that Russo had become the "boss," or "head" of the Colombo family after his release from prison in 1994 (A-131,A-178-179).

However, the misuse of the alleged "association" itself to support a departure constitutes impermissible "double counting" of the underlying conduct to simultaneously set the offense severity level and serve the function of "aggravating factor" justifying imposition of a reparole date beyond the applicable guideline range. *See Hearn v. Nelson,* 496 F. Supp. 1111, 1115 (D. Conn. 1980) ("double counting" amounts to due process violation). As to the latter "factor" articulated, the purported leadership role of Russo within the Colombo family, it constitutes rank "triple hearsay" at a minimum (A-419) (letter from AUSA Cenawood to Judge Keenan memorializing that information proffered by AUSA Gardner to Judge Hurley in the *Hickey* matter was based on attorney's conversations with FBI agents who, in turn, had obtained information from unidentified confidential informants). To the extent that the source of the information emanated from newspaper articles as suggested by the hearing record (A-118-119,A-367), it is well-settled law that such sources are inherently unreliable and inadmissible as rank hearsay. Under either scenario, "[t]his was hearsay run riot." *Rastelli v. Warden,* 622 F.Supp. 1387, 1395 (S.D.N.Y. 1985) (*Rastelli II*).

***41** As further explicated in *Rastelli II,* "[w]hile the Supreme Court has acknowledged that the admission of hearsay evidence in parole revocation hearings is not *per se* a due process violation, the admission of unsubstantiated or unreliable hearsay as substantive evidence at revocation hearings [] would certainly eviscerate the safeguards the Court has created. Although parole revocation hearings are concededly intended to be informal proceedings in which the full panoply of rights due a defendant in a criminal prosecution do not apply, the admission of entirely unsubstantiated double and triple hearsay as the sole foundation for a finding of parole violations crosses the line which separates informality from irrationality" (internal quotations and citations omitted). Here, double and triple hearsay has served as the exclusive underpinnings for a decision to depart upward from the guideline range of 0-8 months prescribed for the isolated technical violation alleged, continuing Russo's imprisonment through the expiration of his sentence. *Rastelli II,* 622 F.Supp. 1387, 1395 (S.D.N.Y. 1985). Moreover, Russo received no notice before or during the revocation hearing that his alleged status as "boss" of the Colombo family would be utilized as an "aggravating factor" in support of an upward departure from the undisputed parole guideline range of 0-8 months and therefore was unable to defend against the unsubstantiated claim. *Cf. Burns v. United States,* 501 U.S. 129 (1991) (fundamental fairness requiring that advanced notice be given ***42** defendants of potential aggravating factors before upward departure from sentencing guidelines can be imposed).

In *Rastelli,* the three (3) "aggravating factors" advanced to justify continuing the parolee through the expiration of his original sentence -- "repeated warnings" not to associate; a "pattern of flagrant disregard"; and "the manner in which [Rastelli] violated the conditions" -- were rejected outright as insufficient grounds for the decision. If Rastelli had in fact legitimately been found to have engaged in all the associations charged, then the "pattern" factor would have been a substantial basis. *Id.,* 610 F.Supp. 979. However, of the ten (10) incidents first alleged against Rastelli, the examiners only proposed recommended findings with respect to five (5) purported "associations," the Commission only issued a decision with respect to four (4) of those, and the district court rejected all but one (1) validly established violation occurring over a supervision period of approximately one (1) year. The singular prohibited "association" may have justified a finding that Rastelli violated the conditions of his release. The Court held that it even justified revoking his parole for the period normally set out by the prescribed violator guidelines. However, the district court granted *habeas* relief since the sole transgression could not alone justify incarcerating Rastelli for two (2) additional years. *Id.* ***43** As in *Russo,* the government submissions in *Rastelli* made clear its ulterior motivation for continuing to expiration: the belief that the particular parolee was the "boss" of ah LCN family. *Rastelli,* 610 F.Supp. at 979.

However, the instant record clearly establishes that the Parole Commission has acted arbitrarily and capriciously, and has abused its discretion in deciding to exceed the prescribed guidelines upon recommitment and to incarcerate Russo for the remainder of his original sentence, a period in excess of two (2) years, for an isolated seven (7) minute street encounter allegedly occuring within an approximate two (2) year period of supervision (July, 1994 mandatory release date; May 20, 1996 alleged violation date). The Court should hold that the evidence presented at the time of the revocation hearing, far from supporting the

"association" charge by a preponderance of the evidence, *see* 28 C.F.R. §2.19(c), failed to provide a rational basis for sustaining the allegation brought against Russo. Moreover, the Commission has failed to offer any justification for its erroneous view that a violation finding may be predicated upon a tenuous showing of membership in an organization believed by enforcement authorities to be engaged in criminal activity. *Rastelli II*, 622 F.Supp.1387, 1394 (S.D.N.Y. 1985).

A comparison of the NOA issued by the Regional Commissioner (A-131) and the NOA lateer issued on appeal (A-178-179) readily ***44** reflects that reliance on tentative *dicta* uttered by Judge Hurley in the unappealed Order granting Russo bail was supplanted in the place formerly occupied by reliance on an unidentified informant source as an aggravating factor. As explained above, however, the proffer made to Judge Hurley by AUSA Gardner as to Russo's leadership role is a classic example of double, if not triple, hearsay (A-419). *See Misasi v. Parole Commission*, 835 F.2d 754(10th Cir. 1987) (reversing parole decision to exceed guidelines range due to reliance upon unsupported allegations). Moreover, since the record of the revocation hearing is devoid of any discussion of the purported leadership role (beyond a passing allusion to a newspaper article) occupied by Russo within the Colombo family, whatever *ex parte* submission led to the unilateral supplementation of the record is clearly inappropriate. The prisoner is guaranteed the right to disclosure of any information presented in aggravation of the charges and the opportunity to dispute that information under 28 C.F.R. § 2.19(c). In sum, "good cause" was not shown.

CONCLUSION

For all of the foregoing reasons, appellant Russo is clearly entitled to *habeas corpus* relief and to have his liberty restored forthwith. Moreover, the decision to continue Russo's imprisonment through the expiration of his sentence due to an unsubstantiated leadership role in the Colombo family is patently arbitrary and capricious and should be overturned.

12 The imposition of the special "association" condition itself was elicited by the FBI (A-100,A-351).

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