16-2918

To Be Argued By:
ELIOT LAUER

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JONATHAN J. POLLARD,

Petitioner-Appellant,

—against—

UNITED STATES PAROLE COMMISSION, J. PATRICIA WILSON SMOOT, solely in her capacity as Chair of the United States Parole Commission, UNITED STATES PROBATION OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK, MICHAEL J. FITZPATRICK, solely in his capacity as Chief United States Probation Officer,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PETITIONER-APPELLANT

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PRELIMINARY REPLY STATEMENT

In its opposition brief, the U.S. Parole Commission (the "Commission") constructs a superficial veneer designed to generate the impression that there is a rational basis for the Special Conditions[1] imposed on Appellant Jonathan J. Pollard. The Commission points to evidence that some of the information accessed by Pollard during 1984-1985 remains classified, and to allegations that, the Commission says, justifies its conclusion that Pollard cannot be trusted to maintain such information in confidence. The Commission reasserts its conclusion that without the Special Conditions in place, there is risk that Pollard will disclose still-classified information to a foreign government.

The Commission's Notice of Action dated March 2, 2016 repeatedly emphasizes that the rationale for the Special Conditions – most particularly, the Computer Monitoring Condition – is to deter and prevent further disclosure of classified information:

- "Your plea agreement requires you to refrain from *unauthorized disclosure of any type of classified information* … The Commission is responsible for your parole supervision to deter you from further crimes and to protect the public and the Commission finds that monitoring of your computers (both home and work, to include any smart phones) will assist in carrying out this obligation and assist in the continued enforcement of the terms of the plea agreement."

[1] All capitalized terms used herein have the meaning ascribed to them in the *Brief and Special Appendix for Petitioner-Appellant*, dated November 14, 2016 [ECF No. 21].

- "[I]t is necessary to monitor your home and business computers while you are in the community … *to ensure that information is not delivered to unauthorized sources*."

- "[T]he Commission finds that monitoring of your computer and other electronic means of communication are needed *to deter further unauthorized disclosure of Top Secret and Secret information*."

(A. 216-217) (emphasis added).

There is no claim that after 30 years in prison Pollard has any classified *documents*. The only conceivable way, therefore, that Pollard could be in a position to disclose still-classified information to anyone would be if he still remembers it.

Certain types of information, such as lines of computer code, signals intelligence manuals, and aerial photographs, are intrinsically not of the type that can be remembered by a human being, much less retained mentally for 31 years. Only if Pollard accessed still-classified information of a *type* that can be remembered after 31 years could there even be a theoretical possibility that Pollard would be in a position to disclose such information to anyone. If no information of such type exists, the risk of disclosure of still-classified information is literally zero.

As an initial matter, the Commission's claimed concern about disclosure is shown to be disingenuous by the fact that the Commission has not even attempted to prevent Pollard from communicating with anyone via non-

internet means such as telephone, hard mail, or face-to-face. The Special Conditions leave these obvious scenarios unaddressed. And while it may be that not every gap in parole conditions necessarily renders them void, a deficiency of this magnitude raises serious doubts as to the genuineness and rational basis for the Special Conditions.

More importantly, the Commission, which has the formidable resources of the U.S. intelligence agencies behind it, *has mustered no evidence that Pollard accessed any still-classified information of a type that can be remembered after 31 years.*

If the Commission had a genuine concern that Pollard currently retains such information in his head, it would have proceeded with its initial proposal, accepted by the district court, to submit its classified evidence in support of the Special Conditions on an *in camera*, *ex parte* basis, in order to demonstrate that Pollard accessed information of this type, and therefore poses a risk of disclosure. After litigating vigorously and successfully for the right to make such a showing on an *ex parte* basis, the Commission made no such submission.

At the very least, the Commission's declarant Jennifer L. Hudson, director of the Information Management Division within the Office of the Director of National Intelligence, should have represented to the district court that a review was conducted of the still-classified information accessed by Pollard during 1984-

1985, and that the review revealed that *some* of that information is of a type Pollard could still retain in his head. There was no such representation, presumably because it could not be made. The Commission therefore failed to prove up the essential factual predicate upon which the Special Conditions rest.

In the absence of any evidence that Pollard accessed still-classified information *of this type*, there is no factual basis to conclude (i) that Pollard has any such information in his head, or (ii) that he is in a position to remit such information to anyone.

In sum, the Commission's conclusion that there is a risk of disclosure of still-classified information, and the resulting imposition of the Special Conditions, are not rationally-based, and cannot be allowed to stand. The district court erred in deferring to the Commission's conclusions.

This Court should reverse the district court's Order and direct the Commission to vacate the Special Conditions.

REPLY ARGUMENT

THE SPECIAL CONDITIONS SHOULD BE VACATED BECAUSE THEIR ESSENTIAL FACTUAL PREDICATE IS NON-EXISTENT

Strikingly absent from the record below and from the Commission's opposition brief is any attempt to demonstrate the existence of even a scintilla of still-classified information that Pollard – or any human being – could conceivably retain in his head after 31 years. Not only does the Commission fail to identify any

such information, the Commission has bent over backwards to sidestep its responsibility to identify such information.

As a threshold matter, the Commission asserts, in effect, that it has no obligation to have factual support for its imposition of the Special Conditions, and is entitled to declare in *ipse dixit* fashion that Pollard poses a risk of disclosing still-classified information, regardless of the lack of any evidence of such risk. (Opp. Br. pp. 44-49). That is not correct.

Under the controlling regulations, the Commission must determine, *first*, that the parole conditions are "reasonably related to the nature and circumstances of [the] offense or [the parolee's] history and characteristics," and *second*, that they are reasonably related to "at least one of the following purposes of criminal sentencing: The need to deter [the parolee] from criminal conduct; protection of the public from further crimes; or the need to provide [the parolee] with training or correctional treatment or medical care." 28 C.F.R. § 2.40(b).

Here, aside from whether the Special Conditions satisfy the first requirement (which Pollard does not concede), they cannot satisfy the second requirement unless Pollard is actually in a position to engage in further criminal conduct, *i.e.*, if he has still-classified information in his head that he could potentially disclose. While it may not be possible to determine what information remains in Pollard's head after 31 years, it is possible to determine whether any of

the still-classified information accessed by Pollard 31 years ago is of a type that can still be remembered. Unless there is such information, the second regulatory requirement is lacking, as there is no possibility of further criminal conduct. The Commission has not shown that there is such information. There is therefore no basis on which to satisfy the second regulatory requirement.

In addition to the regulatory deficiency, the Commission's position would enable any government agency to make entirely conclusory determinations that have no factual basis, and to have those determinations insulated from judicial review merely because the Commission accepted them as true.

That is not the law, and should not become the law. To the contrary, "the Commission may not base its judgment as to parole on an inaccurate factual predicate." *Feist v. Shartle*, No. 12-3572 (NLH), 2013 U.S. Dist. LEXIS 84391, at *6 (D.N.J. June 17, 2013). Moreover, the Court's obligation to review the Commission's ruling "cannot be fulfilled without making some inquiry into the evidence relied on" by the Commission. *Zannino v. Arnold*, 531 F.2d 687, 691 (3d Cir. 1976). Tellingly, the Commission's opposition brief fails to cite, much less address, either of these cases, even though both cases were cited in Appellant's opening brief.

It is undisputed that after serving 30 years in prison, Pollard has no classified *documents* that he might transmit to a foreign government. Thus,

whatever putative risk the Commission invokes is based entirely on what Pollard still retains in his head from 1984-1985. While the Commission argues that it cannot possibly determine what Pollard still retains in his head (Opp. Br. p. 46), the Commission need not read minds in order to meet its burden. Neither the Commission, nor its backers in the intelligence agencies, have pointed to an iota of still-classified information accessed by Pollard during 1984-1985 that is of a type that he, or any human being, could possibly retain in his head after 31 years.

For a time, the district court required the Commission to show "what information [Pollard] was able to access and therefore may carry in his head." (A. 252). The phrase "may carry in his head" is pivotal, as it necessarily requires a showing that Pollard accessed information of a *type* that may be carried in someone's head. The Commission never came forward with such a showing. Nevertheless, the district court erroneously upheld the Special Conditions.

No one would seriously claim that after more than 31 years, any person could mentally retain lines of computer code, a signals intelligence manual, or aerial photographs. Absent proof that any of the still-classified documents accessed by Pollard 31 years ago contain the *type* of information a person can retain mentally – and there is no such proof – the predicate for the Commission's purported concern about disclosure falls away.

Whatever the Commission alleges about Pollard's past behavior and attitude (much of which remains strongly disputed) that alleged behavior and attitude are irrelevant *unless* the Commission can show that Pollard had access to classified information of a type that could still be remembered after 31 years.

Pollard, of course, does not concede that he would divulge still-classified information even if he still retained any in his head. But the critical issue on this appeal – which the Commission has studiously avoided facing at every stage of this case – is not whether Pollard is likely to engage in such conduct but rather whether he *could* do so if he wanted to. There is no proof that he could.

The Commission originally acknowledged its obligation to provide the district court with evidence justifying the Special Conditions. (A. 229). The Commission proposed doing so on an *ex parte* basis. (*Id.*). In response, Pollard's security-cleared counsel insisted on being permitted to view the Commission's promised classified submission under seal, so that they could directly address the issue of whether the materials presented by the Commission were of the type a person could remember after 31 years, and so that they could determine whether the information (even if still classified) has been publicly disseminated by others. (A. 233-236, A. 245-246). The Commission insisted, however, that its submission be *ex parte*, and in a Memorandum Opinion, the district court agreed. (A. 265). The district court merely required the Commission to disclose the "general

substance" of its submission to Pollard's counsel, and to provide an explanation of the reason Pollard's counsel did not need to see the materials. (A. 266).

After specifically litigating for and being granted the opportunity to submit its classified evidentiary materials to the district court on an *ex parte* basis, the Commission retreated, and never submitted any such evidence. Instead of allowing the district court to evaluate whether any of the still-classified information was of a type that could be remembered after 31 years, the Commission shifted gears and submitted the unclassified Hudson Declaration. (A. 371-80). The Hudson Declaration states generally that "some" of the information believed to have been compromised by Pollard remains classified. (A. 376-379). The Hudson Declaration says nothing at all about whether any of that information was of a type that could still be remembered. The Hudson Declaration does not even represent that the declarant reviewed the still-classified materials accessed by Pollard in 1984-1985 and determined that some of those materials are of a type that could still be remembered.

Nor does the letter from James R. Clapper, then-Director of National Intelligence, fill the Commission's factual void. The Clapper Letter states that information compromised by Pollard during 1984-1985 "remains classified at the Top Secret and Secret levels, and future unauthorized disclosure of the information could risk harm to the national security of the United States." (A. 203). Again,

that says nothing about whether any of that information is of a type that Pollard could remember after 31 years.

The Commission argues that it cannot be expected to disclose to Pollard the very information it claims to be shielding from foreign governments, and suggests there is no other way to determine what is in Pollard's head. (Opp. Br. p. 46). That make-weight argument is presented by the Commission as a smokescreen for its failure to address the central issue. No one has suggested that the Commission or the intelligence agencies should disclose any classified information to Pollard, and the district court ruled that even Pollard's security-cleared counsel would not be given access to the Commission's *in camera* submission. Nevertheless, the Commission made no *ex parte* submission of classified information for the district court's review. The Commission did not even describe in general terms the type of information at issue.

In its opposition brief, the Commission argues that "[t]he district court rightly rejected Pollard's argument that the Commission had to prove that Pollard actually remembered classified information of value, as the law imposes no such burden." (Opp. Br. pp. 26, 44). But the Commission itself repeatedly invoked the risk of disclosure as its rationale for the Special Conditions (A. 216-217), and therefore cannot say it need not have any factual basis for doing so.

Moreover, in support of its argument, the Commission points to only one case, *Roberts v. Carrothers*, 812 F.2d 1173, 1179 (9th Cir. 1987), which it cites for the proposition that the Commission must consider "evidence taken as a whole." (Opp. Br. p. 45). Even if that is true as a general principle, it does not excuse a glaring deficiency in the evidentiary predicate on which the Special Conditions rest. It is one thing to allow a holistic approach to *evidence* in support of parole conditions; it is quite another thing to say the Commission may proceed with *no evidence* that supports its critical factual predicate. Indeed, the *Roberts* case expressly says, "*[w]here the Commission properly has evidence before it, . . .* the evaluation of that evidence is almost entirely at its discretion." *Roberts*, 812 F. 2d at 1179-80 (emphasis added). Here, the Commission had no evidence before it on the critical factual issue of whether Pollard accessed still-classified information of a type that could be remembered after 31 years. Holistic analysis cannot compensate for a complete lack of evidence in support of the most salient factual allegation.

* * *

Instead of enabling Pollard to work at a job consistent with his education and intelligence, the crippling Special Conditions are designed to have precisely the opposite effect, and to keep Pollard from reintegrating into society

and becoming a productive citizen.[2] In light of the absence of evidence that Pollard accessed information of a type that can be remembered after 31 years, the Special Conditions are not rationally-based, and cannot possibly be motivated by a *sincere* concern about preventing disclosure. Rather, the Special Conditions serve solely as vindictive punitive measures, cruelly imposed against a man who has served his time as a model prisoner for 30 years, based on the pretext that Pollard is in a position to disclose still-classified information and that the Commission is genuinely concerned that might happen.[3]

[2] The Commission's feigned expression of disbelief that an employer would actually care whether the government monitors its computer system (Opp. Br. pp. 11, 42) was aptly brushed aside by the district court. (A. 217).

[3] Although this reply brief focuses primarily on the most critical issue on appeal, Appellant is not waiving any argument raised in his opening brief. Moreover, contrary to Appellees' assertion (Opp. Br. n. 11), Appellant has not abandoned his claims against the Probation Office or Chief Probation Officer Michael J. Fitzpatrick, who remain principally responsible for the implementation of the unfair Special Conditions imposed by the Commission.

CONCLUSION

The Court should reverse the district court Order and direct the Commission to vacate the Special Conditions.

Dated: February 27, 2017
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 2,740 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14-point font.

Dated: February 27, 2017
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Respectfully submitted,

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