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Upstate Panel Finds Board Had Right to Rescind Parole

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ALBANY - The state parole board was within its rights when it rescinded parole in a felony murder case because survivors came forward, after parole had already been granted, to voice their opposition to the offender's release, a divided appellate panel held yesterday.

But in disagreeing over whether belatedly submitted victim impact statements constitute new evidence, the justices of the Appellate Division, Third Department, framed an issue that may well be headed to the Court of Appeals.

[Matter of Costello v. New York State Board of Parole](#), 514282, was viewed as a key test of the parole board's rescission power, especially since six former commissioners submitted a joint amicus brief urging the Third Department to set a higher standard ([NYLJ, Nov. 26](#)). A dissenting judge, expressing concerns mirroring those of the amici, said after-the-fact victim impact statements rarely qualify as new evidence sufficient to withdraw parole release.

Matter of Costello involves Pablo Costello, a now 56-year-old man who was involved in a 1978 robbery at a Brooklyn auto parts store that left a police officer dead.

Records show that Costello was the lookout while his accomplice robbed the proprietor at gunpoint. While the robbery was under way, Police Officer David Guttenberg saw Costello's double-parked car outside and walked toward the store to find the operator. Costello fled when he saw Guttenberg approaching. After Costello left the scene, his accomplice shot and killed Guttenberg, a 49-year-old father of four.

Costello turned down a plea bargain that would have resulted in a five-to-15-year sentence and ended up with a 25-year-to-life term. After serving 31 years, Costello was granted release in a 2-1 parole board decision that noted his good disciplinary record, his completion of numerous educational and vocational programs and the fact that he had job offers and a stable place to live.

That set off a flurry of criticism from the New York Daily News and the New York City Patrolmen's Benevolent Association, prompting Guttenberg's widow, four children and other survivors to submit victim impact statements to the parole board. Based on those statements, Costello's release was revoked.

At issue on appeal was whether the impact statements constituted "significant information not previously known" to the board.

The 4-1 Third Department majority, led by Justice John Lahtinen ([See Profile](#)), concluded that the statements were new evidence properly taken into consideration by the board. He noted that the victims had not provided statements prior to

Costello's three previous appearances before the board and said the pre-sentence report provided little information on the impact the murder had on Guttenberg's family.

"Review of the record reveals that this is not a situation of rehashing or simply embellishing previously provided victim statements," Lahtinen said. "The victims' voices had been virtually unheard before October 2009."

Lahtinen said the 1980 pre-sentence report did not include any direct statement on the effect Guttenberg's murder had on his widow or children.

"In contrast, the October 2009 statements from the officer's wife and children (as well as many other family members) set forth directly for the first time the many different and devastating impacts, some of which are ongoing, suffered by the family," Lahtinen wrote in an opinion shared by Justices Robert Rose ([See Profile](#)), E. Michael Kavanagh ([See Profile](#)) and William McCarthy ([See Profile](#)). The panel heard arguments on Nov. 14.

Justice Edward Spain ([See Profile](#)) dissented.

Spain acknowledged that survivors' subjective experience is "certainly an appropriate factor for the Board to consider in the determination of whether parole should be granted," and has joined decisions where a belated victim impact statement was held to constitute new evidence (see [Matter of Diaz v. Evans](#), 90 AD3d 1371 [2011]). But in this case, he said the statements added nothing of substance that wasn't known to the parole board when it approved Costello's release

"In my view, while the recent statements of the ongoing grief of the officer's family are undeniably compelling, indeed heartbreaking, they are not the type of 'new' information that was 'unknown' to the Board at the time it granted parole," Spain wrote. "Clearly, [the widow's] ongoing loss and grief and that of their children and other family members cannot be said to have been unknown, unanticipated or, unfortunately, unusual for a surviving family member."

Spain said the Brooklyn District Attorney's Office had apparently failed to notify the Guttenberg family of their right to submit victim impact statements, and he bemoaned the lack of any rule requiring the parole board to notify victims that an offender is under consideration for parole. Justice Rose expressed the same concern in 2005 in [Matter of Pugh v. New York State Board of Parole](#), 19 AD3d 991.

"The troubling practice followed here of failing to notify a deceased victim's family of an inmate's appearance before the Board, and of foregoing providing victim impact statements until parole has been granted after a hearing, subverts the entire process," Spain wrote. "Courts should be loathe to condone what could become a trend in the parole process in which certain victim impact statements are held back until after a decision to grant parole is made, forcing the Board to confront unabashed media frenzy, public pressure and familial outrage, and to then entertain newly drafted but belated victim impact statements aimed at undoing considered Board decisions awarding parole."

Finally, Spain implicitly took aim at the PBA and other groups that oppose parole release of anyone convicted in the killing of a police officer, even those who did not directly kill the officer and were convicted of felony murder, such as Costello. He noted that a life-without-parole term, which the PBA advocates in lieu of a death penalty for those labeled "cop killers," "was not and is not the law."

In September, the PBA launched a online initiative called "Keep Cop-Killers in Jail," where people who oppose parole for a particular offender or all 64 on the list can instantly make their opposition known to the board. PBA officials have said the initiative has resulted in hundreds of thousands letters to the board opposing release of "cop killers."

Costello was represented on the appeal by Alfred O'Connor of the New York State Defenders Association and Norman Effman, executive director of the Wyoming County-Attica Legal Aid Bureau. O'Connor said he plans to seek leave to the Court of Appeals.

"The majority decision authorizes rescission virtually any time a belated victim impact statement is submitted, thereby offering no guidance about appropriate exercise of the power," O'Connor said. "Justice Spain's dissent rightly focuses on the legal standard of foreseeability. 'Significant new information' should be defined as information of a kind or degree that could not have been reasonably anticipated by the parole-granting panel."

Assistant Solicitor General Frank Walsh represented the parole board.

Scott Chesin, a partner at Mayer Brown, and law intern Jed Glickstein represented the amici: former commissioners Robert Dennison, Vernon Manley, Thomas Grant, Barbara Treen, Theodore Kirkland and Edward Hammock. There was no immediate reaction from the state.

'Tainted Letters'

Spain was also on a panel that last week ordered a new parole interview for a drug dealer who was inaccurately targeted as a cop killer by the New York State Troopers Police Benevolent Association.

[Matter of Comfort](#), 514995, involves a defendant serving a 20-year-to-life term for first-degree criminal sale of a controlled substance, first-degree criminal possession of a controlled substance and attempted first-degree escape.

Larry Comfort was denied parole by a board that noted "significant opposition" to the offender's release.

"Apparently, this opposition was in the form of letters that were submitted in response to a solicitation made by the State Troopers Police Benevolent Society, which incorrectly claimed that petitioner was criminally liable for his brother's shooting of a police officer," Justice Bernard Malone Jr. ([See Profile](#)) wrote for the panel. "It was error for the Board to credit those tainted letters."

Records show that the troopers association in 2011 urged other police groups to write the board in opposition to Comfort's release. The group alleged Comfort was an "accomplice" to the fatal 1980 shooting in Corning of investigator Robert Van Hall Jr. and the wounding of another officer by Comfort's brother, Joseph Comfort. But Larry Comfort was never found criminally liable for either shooting, Malone said in a decision joined by Spain, McCarthy, Leslie Stein ([See Profile](#)) and Thomas Mercure ([See Profile](#)). The panel heard arguments on Nov. 16.

Thomas Mungeer, president of the troopers' PBA, said his group intends to run another letter-writing campaign opposing Comfort's release when he re-appears before the parole board.

"I will choose my words more carefully, but there is no denying the fact that [Larry Comfort] was with his brother that day when two of my troopers were shot, one fatally," Mungeer said.

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