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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF PABLO COSTELLO,

Appellant,

-against-

No. 140

NEW YORK STATE BOARD OF PAROLE,

Respondent.

20 Eagle Street
Albany, New York 12207
June 5, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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1 CHIEF JUDGE LIPPMAN: Number 140, Matter of
2 Costello.

3 One second, counsel, we have some people
4 leaving. Give it a minute.

5 Okay, counselor, they're just about gone.
6 Let's get started. Do you want any rebuttal time,
7 counselor?

8 MR. O'CONNOR: Three minutes, please.

9 CHIEF JUDGE LIPPMAN: Three minutes. Go
10 ahead, counsel.

11 MR. O'CONNOR: May it please the court.
12 Alfred O'Connor for Pablo Costello. The belated
13 victim impact statements were not new information
14 justifying rescission of petitioner's parole release.

15 CHIEF JUDGE LIPPMAN: What were they,
16 counsel? What - - - what were the - - -

17 MR. O'CONNOR: Well, it was - - -

18 CHIEF JUDGE LIPPMAN: - - - the belated
19 family - - -

20 MR. O'CONNOR: The statements expressed
2:1 love and loss, profound grief, that one would expect
22 from the - - - the nature of the crime here.

23 CHIEF JUDGE LIPPMAN: You're saying that
24 the Board knew about all of that beforehand, or this
25 was more in depth of something that they knew

1 beforehand? What - - -

2 MR. O'CONNOR: I - - -

3 CHIEF JUDGE LIPPMAN: How do you
4 characterize - - -

5 MR. O'CONNOR: What I would - - - I would
6 say is - - -

7 CHIEF JUDGE LIPPMAN: I hear what you that
8 it's not; what is it?

9 MR. O'CONNOR: I would say our
10 understanding of the family's loss was enriched by
11 these statements, certainly. We didn't even know the
12 names of the children. That was appropriately
13 excluded from the pre-sentence report. And so we
14 learned things; we heard their story. But - - -

15 CHIEF JUDGE LIPPMAN: What evidence did the
16 Board need to change the - - - the outcome?

17 MR. O'CONNOR: Well, I think the - - - what
18 we look for, in this situation, where there's a
19 belated victim impact statement, is some statement
20 that the harm was more severe than we would have
2:1 naturally understood - - -

22 JUDGE SMITH: You are - - - you can't
23 really - - - you said we learned things, so you can't
24 say there was literally no new information.

25 MR. O'CONNOR: Well, I'm not saying that at

1 all, no. No.

2 JUDGE SMITH: You're saying that the new
3 information is not sufficiently material to change
4 the result.

5 MR. O'CONNOR: The standard is significant
6 new information.

7 JUDGE GRAFFEO: It was the legislature's
8 intent, though, in providing for victim impact
9 statements, was not just to provide the Board with
10 additional information - - -

11 MR. O'CONNOR: That's right.

12 JUDGE GRAFFEO: - - - but they also wanted
13 to give a vehicle for the families and the relatives
14 to be able to assert their experiences.

15 MR. O'CONNOR: Yes.

16 JUDGE GRAFFEO: Correct? So - - -

17 MR. O'CONNOR: There's a right to be heard
18 here, an important - - -

19 JUDGE GRAFFEO: I - - - I think - - -

20 MR. O'CONNOR: - - - right to be heard.

2:1 JUDGE GRAFFEO: - - - there's a dual
22 purpose to the - - - to the statute.

23 MR. O'CONNOR: We agree. And - - - and we
24 think that the standard that we're advocating here
25 would encourage the acceptance of statements, even if

1 they're like - - -

2 CHIEF JUDGE LIPPMAN: Was it okay that they
3 opened - - - reopened the hearing - - -

4 MR. O'CONNOR: Yes.

5 CHIEF JUDGE LIPPMAN: - - - in order to get
6 those statements?

7 MR. O'CONNOR: Yes.

8 CHIEF JUDGE LIPPMAN: You're not - - -
9 you're not challenging that.

10 MR. O'CONNOR: We're not challenging that
11 at all.

12 CHIEF JUDGE LIPPMAN: You're saying, okay,
13 then it's what comes in that is determinative, if
14 it's new information that's material?

15 MR. O'CONNOR: That's right.

16 JUDGE ABDUS-SALAAM: Yeah, but what is - -
17 -

18 MR. O'CONNOR: We're actu - - -

19 JUDGE ABDUS-SALAAM: - - - the standard of
20 review - - -

2:1 MR. O'CONNOR: Yes.

22 JUDGE ABDUS-SALAAM: - - - that we should
23 use, counsel?

24 MR. O'CONNOR: Well, I think it should be
25 an objective - - - if you're talking about the

1 standard of review for this court, it's substantial
2 evidence. That was conceded by the Board below - - -

3 JUDGE ABDUS-SALAAM: Well, they're saying -
4 - -

5 MR. O'CONNOR: - - - in their answer - - -

6 JUDGE ABDUS-SALAAM: But they're saying
7 that we should give them deference for how they
8 interpret that term "substantial evidence" here.

9 MR. O'CONNOR: Well, there is no
10 administrative interpretation here, so I think
11 they're confusing - - - the Board is confusing; when
12 there's an admin - - - longstanding administrative
13 interpretation of a rule, the courts can give
14 deference to it, if it's reasonable. There is no
15 longstanding interpretation here. What we have are
16 conflicting decisions of the Appellate Division. We
17 have the Third Department with their actual
18 subjective experience standard. We have the Fourth
19 Department, which has applied a standard, if the
20 information was readily inferable from information
2:1 that was available to the - - -

22 JUDGE RIVERA: Can we - - - yeah, let's
23 explore this bec - - - I want to hear more from you
24 on this. So in terms of the standard that they apply
25 on the hearing, what are you suggesting is the

1 language that we should look to that's already in the
2 regulations, or do you say we should not even look to
3 the regulations?

4 MR. O'CONNOR: Well, I think it's a matter
5 of what's the - - - what is the definition of "new
6 information". And we - - - we contend that new
7 information - - -

8 JUDGE RIVERA: Yeah, but why do we start
9 there?

10 MR. O'CONNOR: Well, because that's what
11 the regulation says; significant - - -

12 JUDGE RIVERA: Which part of the regulation
13 says that?

14 MR. O'CONNOR: That's right.

15 JUDGE RIVERA: No, no; which part of the
16 regulation? I'm asking you.

17 MR. O'CONNOR: Oh, the one that provides
18 that a basis for temporary rescission or final
19 rescission, as significant information which existed
20 prior to the release decision, where such information
2:1 was not known by the Board.

22 JUDGE RIVERA: Um-hum. I thought that
23 provision was - - - only dealt with the hearings, but
24 you're saying that also deals with the actual
25 determination at the hearing?

1 MR. O'CONNOR: Yes, that's - - - for the
2 Board - - -

3 JUDGE RIVERA: So the - - -

4 MR. O'CONNOR: - - - to rescind, it has to
5 satisfy that standard.

6 JUDGE RIVERA: The provision in the
7 regulations that deal with substantial evidence is
8 just the quantity of what's in this other section?
9 Is that what you're saying? Is that the way you're
10 interpreting those regulations?

11 MR. O'CONNOR: Well, this was an
12 evidentiary hearing - - -

13 JUDGE RIVERA: Yes.

14 MR. O'CONNOR: - - - as provided by law, as
15 provided by the regulation. And so under 7803,
16 subdivision (4), it's subject to substantial-evidence
17 review. Again, that was conceded by the Board in
18 their answer.

19 JUDGE SMITH: Maybe the question is
20 substantial evidence of what. And you're saying
2:1 substantial evidence of significant information which
22 - - - which was not previously known by the Board.

23 MR. O'CONNOR: Yes, and there's an
24 additional point here, because it has to relate to
25 the - - - to the basis for parole release decision

1 making. And so the determination here was these
2 statements, now having reviewed these statements, the
3 Board - - - the rescission panel came to the
4 conclusion that to release Mr. Costello now, in light
5 of these statements, would so deprecate the
6 seriousness of the crime as to undermine respect for
7 the law.

8 JUDGE GRAFFEO: Maybe you could clarify
9 what your position is, if you could give us some
10 examples. What kinds of things, hypothetically,
11 could be in a victim impact statement that you think
12 would justify a change of a parole - - -

13 MR. O'CONNOR: I think - - -

14 JUDGE GRAFFEO: - - - determination.

15 MR. O'CONNOR: - - - any information
16 dealing with the nature of the criminality.

17 Sometimes these statements reveal that the
18 criminality was more serious than was initially
19 presented in a pre-sentence report. I think - - -

20 JUDGE GRAFFEO: Like if there was sub - - -
2:1 like if there was lengthy torture of a victim and
22 that was not - - -

23 MR. O'CONNOR: Right.

24 JUDGE GRAFFEO: - - - apparent in the pre-
25 sentencing report?

1 MR. O'CONNOR: I think so, yes.

2 JUDGE GRAFFEO: But nothing that deals with
3 the impact on the family?

4 MR. O'CONNOR: I think so. And - - - and I
5 think that unexpected things sometimes come up. You
6 know, for example, in an assault case where someone
7 was shot, and later on, two, three, five years later,
8 had medical complications directly related to that
9 injury and lost a limb or became paralyzed, that's
10 something, of course, the Board would want to know -
11 - -

12 CHIEF JUDGE LIPPMAN: Well, what about - -
13 -

14 MR. O'CONNOR: - - - and want to - - -

15 CHIEF JUDGE LIPPMAN: - - - are you saying
16 it's the directness of the consequence rather than a
17 remote consequence of the - - - of the crime? In
18 other words - - -

19 MR. O'CONNOR: Yes.

20 CHIEF JUDGE LIPPMAN: - - - the crime
2:1 happens, and then things happen to the family that
22 would have been different if the loved one was still
23 there. That doesn't change the result, in your mind,
24 but - - -

25 MR. O'CONNOR: No - - - no, it doesn't. I

1 think that there can be circumstances where - - -

2 CHIEF JUDGE LIPPMAN: Right, but - - - but
3 following up on - - - on the - - - I think that Judge
4 Graffeo just asked you - - - but if it's more a
5 direct consequence that the crime happened and - - -
6 and as a direct offshoot of that, as you said, or
7 whatever the example was - - -

8 MR. O'CONNOR: Right.

9 CHIEF JUDGE LIPPMAN: - - - somebody then
10 died later, directly, that would be a direct
11 consequence. The other thing is just life moving on.
12 I mean, is - - - I'm trying to - - -

13 MR. O'CONNOR: I think so. One of the
14 examples we gave is a - - - a survivor, who is just
15 so distraught, commits suicide. I mean, certainly
16 that's something the Board would want to know.

17 JUDGE ABDUS-SALAAM: Counsel, what about in
18 this case, the example of - - - well, this happened
19 before your client was released on parole, but the
20 victim's brother having a heart attack after hearing
2:1 the news. Would you say that would be something, if
22 it hadn't been known before?

23 MR. O'CONNOR: It - - - perhaps - - -

24 JUDGE ABDUS-SALAAM: If that had not made
25 it into the - - -

1 MR. O'CONNOR: Right.

2 JUDGE ABDUS-SALAAM: - - - the probation
3 statement, but came up, even though it's now years
4 later?

5 MR. O'CONNOR: Well, I think - - - I think
6 that we're getting into the area where we would want
7 to look into it. I - - - I think there, the question
8 would be was that heart attack related to the stress,
9 and you might have medical opinion about that, but
10 certainly, yes. But of course, as you pointed out,
11 Judge Abdus-Salaam, this was known; that was
12 something that was known to the - - -

13 CHIEF JUDGE LIPPMAN: But if the heart
14 attack had no relationship to that, not - - -

15 MR. O'CONNOR: Right.

16 CHIEF JUDGE LIPPMAN: So that's the
17 distinction you're trying to make.

18 MR. O'CONNOR: That's right.

19 JUDGE READ: So you're saying - - - so I'm
20 just going to call it emotional distress and being
2:1 upset and continuing to be upset, as the victim said
22 here, over the crime, that's not enough? There has
23 to be something objective, like somebody has to
24 commit suicide?

25 MR. O'CONNOR: Well, no, I don't - - - I

1 don't think it's - - - I don't think we - - - I think
2 there are other things. I think people can be so - -
3 - I mean, there are - - - there's something called
4 persistent complex bereavement syndrome in the DSM.
5 Someone - - - severe depression that interferes with
6 people's ability to sort of get on with - - - with
7 their life.

8 CHIEF JUDGE LIPPMAN: As opposed to I miss
9 him even more now, twenty years later? Is that the -
10 - -

11 MR. O'CONNOR: I think - - - I think the -
12 - - the statements here of love and loss are the
13 kinds of statements that anyone who has suffered this
14 kind of devastating - - -

15 JUDGE ABDUS-SALAAM: What about the - - -

16 MR. O'CONNOR: - - - harm - - -

17 JUDGE ABDUS-SALAAM: - - - the grandson,
18 who grew up without a father, because his father had
19 a traumatic accident - - -

20 MR. O'CONNOR: Right.

2:1 JUDGE ABDUS-SALAAM: - - - that took him
22 out of the picture. But if his grandfather had been
23 there, he would have had some - - - a father figure
24 instead. So you're saying that's not something - - -

25 MR. O'CONNOR: Well, I'm saying that's not

1 harm caused by this 1978 crime. That's harm that is
2 principally attributable to the 1995 car accident
3 that resulted in his father's disability.

4 CHIEF JUDGE LIPPMAN: Well, if that harm -
5 - - if that kind of harm mattered, in this context,
6 the - - - the person would never get out, right?

7 MR. O'CONNOR: Yep, that's right.

8 CHIEF JUDGE LIPPMAN: I mean, so you're - -
9 - I think what you're trying to say, if - - - I used
10 the term before - - - if it's life continuing, and
11 your life changes and - - - and goes in all kinds of
12 directions, and it - - - it would have been better if
13 I still had my father or my grandfather, or whatever
14 it is, not - - - not the kind of - - - it doesn't
15 change the outcome. On the other hand, again,
16 however you define "direct consequence", it might.
17 So it's - - - it's a hard concept to get your - - -
18 that's a hard distinction to get your arms around.

19 JUDGE READ: You're trying to sort of like
20 distinguish, what I'll say is grief, from something
2:1 more, something plus.

22 MR. O'CONNOR: Well - - -

23 JUDGE GRAFFEO: How would you - - -

24 MR. O'CONNOR: I think that's right, and I
25 think - - -

1 JUDGE GRAFFEO: - - - define that, because
2 I'm wondering how do we - - - how do we craft an
3 opinion here that's going to give guidance, not only
4 to the Board of Parole, but also to the Appellate
5 Divisions and the judges who review these cases?

6 MR. O'CONNOR: Well, I think the standard
7 is, as we've suggested, that "information of a kind
8 or degree that could not have been reasonably
9 anticipated or foreseen", based on the information
10 that the panel - - - the parole-granting panel had
11 before it.

12 JUDGE PIGOTT: How often does this happen?

13 JUDGE GRAFFEO: There isn't something a
14 little further that we could say to explain this - -
15 -

16 MR. O'CONNOR: Well, you could give - - -

17 JUDGE GRAFFEO: - - - family situation?

18 MR. O'CONNOR: You could give examples, the
19 kinds of things we've been talking about.

20 I - - - you know, I - - - let me say this.
2:1 I think this is a modest standard, because there is a
22 substantial-evidence requirement, and this is only a
23 threshold question as to whether there's enough
24 information to go to a hearing. So I think it's an
25 appropriately modest standard, but it has to be more

1 than grief, because as the amici point out, that's ev
2 - - - that's every case. I mean, the Board - - -

3 JUDGE PIGOTT: How often does this happen?
4 Do you have a - - - within - - - within the penal of
5 the State of New York that we have these - - -

6 MR. O'CONNOR: Rescission based on belated
7 impact victim statements is rare.

8 JUDGE PIGOTT: How about rescission - - -
9 rescission - - -

10 MR. O'CONNOR: Well, they're - - - they're
11 rare because, you know, it's - - - it's misconduct
12 that occurs after the release decision, and usually
13 it's about a month between the time that you - - -

14 JUDGE PIGOTT: I - - - I looked at it - - -
15 what I did is I turned the facts around here, and
16 let's assume, for a minute, that Mr. Costello comes
17 up and none of - - - none of what he had accomplished
18 during his time in prison had been brought before the
19 Parole Board. I realize that's probably impossible;
20 I just don't know. But then he says, wait a minute,
2:1 you know, you didn't get all of this. Your argument
22 would be that he ought to be able to put that in,
23 right?

24 MR. O'CONNOR: Well, if he were denied
25 parole? No, I'm - - - actually, there is no re - - -

1 you know, re - - -

2 JUDGE PIGOTT: There is no reconsideration
3 of time?

4 MR. O'CONNOR: No, there isn't any
5 reconsider in that circumstance.

6 If I may, I just want to switch gears here
7 for a minute and talk about point two here, which is
8 the substantial evidence point. Even if, for some
9 reason, you were to conclude that this is new
10 evidence, there has to be substantial evidence that
11 this information now supports the conclusion that to
12 release Mr. Costello would so deprecate the
13 seriousness of the crime as to undermine respect for
14 the law.

15 As I mentioned, there was a concession that
16 substantial evidence is the appropriate standard
17 here, and the Board no longer makes that contention.
18 They do not contend here that the evidence meets that
19 standard. What they say now is, contrary to what
20 they've argued in Supreme Court and in the Appellate
2:1 Division, that the standard is rationality. They
22 can't do that.

23 JUDGE READ: Well, whatever the standard
24 is, don't we have to give some deference?

25 MR. O'CONNOR: Well, their argument about

1 deference is, I think, mis - - - misguided. They
2 don't get deference to their legal pleadings.
3 Whatever deference they're due is - - - is embedded
4 within the substantial-evidence standard. That's not
5 preponderance of the evidence.

6 JUDGE ABDUS-SALAAM: But doesn't that go
7 back to what I said before about how they interpret
8 their own regulation on substantial evidence?

9 MR. O'CONNOR: Well, where have they
10 interpreted it, other than in the pleadings in
11 response to Mr. Costello? They don't get deference
12 to what they say in their pleadings; they get
13 deference to administrative interpretations - - -
14 official administrative interpretations, and there
15 haven't - - - there hasn't been any.

16 CHIEF JUDGE LIPPMAN: Does it - - - and I
17 know this is a hard question, but what - - - what
18 weight is it - - - and in this case, you know, there
19 was a public outcry about it - - -

20 MR. O'CONNOR: Well, there wasn't a public
2:1 outcry; there was a targeted outcry.

22 CHIEF JUDGE LIPPMAN: There was controversy
23 in the papers, whatever. Does that matter? What I
24 mean in the - - - in the - - - in the sense of when
25 you talk about respect for the - - - the law and the

1 verdict and the sanctity of it all, or - - - or
2 promotes a lack of confidence. Does it - - - is it
3 significant, is it important that - - - that there's
4 a to-do about it, you know, that - - -

5 MR. O'CONNOR: I - - -

6 CHIEF JUDGE LIPPMAN: Do you follow - - - I
7 understand it's a difficult question.

8 MR. O'CONNOR: No, I think it's the focus
9 of the amicus brief here, and that is that there has
10 to be some law that guides the Board in this kind of
11 circumstance because they are - - - they can be
12 exposed. I mean, they can't defend themselves
13 publically on this, and - - - and you know, it can be
14 pretty ugly, as we've seen in this case.

15 CHIEF JUDGE LIPPMAN: Okay, thank you.

16 JUDGE RIVERA: May I - - -

17 CHIEF JUDGE LIPPMAN: Oh, I'm sorry.

18 JUDGE RIVERA: May I just ask - - - I'm
19 sorry.

20 CHIEF JUDGE LIPPMAN: Judge Rivera.

2:1 JUDGE RIVERA: Just going back to something
22 you said, counsel, when you said there's been no
23 interpretation. I - - - I thought they had
24 interpreted 8002.5(b) and (d) to mean that there had
25 to be substantial evidence that - - - of new

1 information; let's just stay with the new information

2 - - -

3 MR. O'CONNOR: Well, yeah, but that's - - -

4 JUDGE RIVERA: Let's just stay - - -

5 MR. O'CONNOR: - - - that's the word of the
6 statute.

7 JUDGE RIVERA: No, but that's not my point
8 - - - the new information for one moment, that - - -
9 that if they would have had that information, they
10 would not have granted parole in the first place. I
11 thought that was their interpretation of their own
12 regs. Are you saying that that's not the case?

13 MR. O'CONNOR: I - - - I'm saying that no,
14 they've never issued an interpretation of this, and
15 that's - - - of course, that's - - - that's - - -

16 JUDGE RIVERA: Well, no, but - - -

17 MR. O'CONNOR: - - - the basis of
18 rescission is we would not have done this if we had
19 known this information - - -

20 JUDGE SMITH: But was that - - -

2:1 JUDGE RIVERA: No, no, but I think - - - I
22 thought their point was that, in your client's case,
23 they interpreted the regs this way. Perhaps you're
24 arguing that they've never historically interpreted
25 the regs this way; I can appreciate that. I just - -

1 - but you said there have been no interpretations - -
2 -

3 MR. O'CONNOR: Interpretations to the - - -

4 JUDGE RIVERA: - - - and that's what I'm
5 trying to - - -

6 MR. O'CONNOR: - - - decision in this
7 particular case.

8 JUDGE RIVERA: Um-hum.

9 MR. O'CONNOR: It has to be - - -

10 JUDGE SMITH: Whether it's what they're
11 saying or not, is it an appropriate interpretation of
12 - - - of the rescission rule that you can rescind if,
13 having seen the new evidence, you would come out
14 differently?

15 MR. O'CONNOR: That is - - - that is the
16 basis for rescission, right. And I guess I don't
17 understand your question. Is that - - - is that a
18 reasonable interpretation - - -

19 JUDGE SMITH: Well - - -

20 MR. O'CONNOR: - - - of the facts here?

2:1 JUDGE SMITH: Well, yeah, I mean, I guess -
22 - - I guess what I'm struggling with is, if you can -
23 - - you're not going to say it's impossible that if
24 the Board had had these statements before it the
25 first time, they might have denied parole.

1 MR. O'CONNOR: I am say - - - I am saying
2 that. We know that the Board found that he was not
3 likely to reoffend, that he was appropriate for
4 release - - -

5 JUDGE SMITH: Okay. Well, try - - -

6 MR. O'CONNOR: - - - and now - - -

7 JUDGE SMITH: But before you explain, try a
8 yes or no to that question. Are you saying - - - are
9 you saying it would be impossible or irrational for
10 them to have denied parole with these statements
11 before them?

12 MR. O'CONNOR: If they had denied parole,
13 we wouldn't know the basis for it.

14 JUDGE SMITH: I understand.

15 MR. O'CONNOR: And so we wouldn't know - -
16 -

17 JUDGE SMITH: But could a rational - - -
18 the question is could a rational parole board reach
19 one decision without the - - - without this
20 information and another one with it?

2:1 MR. O'CONNOR: Let me answer it this way.
22 If the Board had said, expressly, you're suitable for
23 parole in every way, but because the family has - - -
24 of the victim has expressed opposition and grief, we
25 are denying you parole release, then we could have

1 challenged it under a rationality standard. Because
2 this is a rescission hearing, we are subject to a
3 substantial-evidence standard. I don't think it
4 meets either one.

5 CHIEF JUDGE LIPPMAN: Okay, counselor,
6 thanks. Counselor, you'll have rebuttal.

7 Counsel?

8 MS. SPIEGEL: Thank you, Your Honor. May
9 it please the court.

10 CHIEF JUDGE LIPPMAN: Counselor, what did
11 the Board find out that justified changing the result
12 in this - - - in this - - - in relation to this
13 particular defendant?

14 MS. SPIEGEL: Your - - - Your Honor, what -
15 - - I think it's important to bear in mind here that
16 the original determination to release him on parole
17 was not only a two-to-one decision, but if you look
18 at the - - -

19 CHIEF JUDGE LIPPMAN: Yeah, but what's the
20 answer to my question. Why - - - why did the outcome
2:1 change? What did - - - what did the Board - - -

22 MS. SPIEGEL: The outcome changed because -
23 - -

24 CHIEF JUDGE LIPPMAN: - - - learn that
25 warranted, supported by sufficient evidence, a change

1 in the outcome?

2 MS. SPIEGEL: What happened here, as a
3 result of the additional information of the victim's
4 - - -

5 CHIEF JUDGE LIPPMAN: The family, yeah.

6 MS. SPIEGEL: - - - that gave the Board - -
7 - it augmented the Board's understanding of the
8 seriousness of the offense.

9 CHIEF JUDGE LIPPMAN: Did it augment the
10 seriousness of the offense, or it gave them a better
11 understanding of the grief of the family?

12 MS. SPIEGEL: Well, those are not
13 necessarily mutually exclusive. When you look at the
14 - - -

15 CHIEF JUDGE LIPPMAN: They aren't
16 necessarily the same thing either.

17 MS. SPIEGEL: Perhaps not, but what - - - I
18 wanted to point out to you something, a comment from
19 Commissioner Grant at the original release interview.
20 And he was one of the commissioners who voted to
2:1 release petitioner.

22 CHIEF JUDGE LIPPMAN: Right.

23 MS. SPIEGEL: He said, at the end of that
24 interview, that this was a difficult and very close
25 case. Now he, ultimately, voted to release

1 petitioner. But what I'm suggesting is he found it a
2 close and difficult case, even without the - - -

3 CHIEF JUDGE LIPPMAN: Yeah, yeah, but - - -

4 MS. SPIEGEL: - - - victim impact
5 statement.

6 CHIEF JUDGE LIPPMAN: - - - but I think
7 that's a different question than - - - than I'm
8 asking you.

9 MS. SPIEGEL: I'm sorry, Your Honor.

10 CHIEF JUDGE LIPPMAN: I understand that
11 these are difficult decisions, and that, based on
12 what you have in front of you, you make a decision.
13 But there is a test, right? Something has to come
14 in, once you have this new hearing, that warrants
15 changing the outcome. I guess what I'm asking you is
16 does understanding better - - - let's assume - - -
17 you know, we were going into this thing with your
18 adversary about direct consequences versus grief.
19 Let's assume that we're talking about that we have a
20 better understanding of the grief of the family; is
2:1 that enough to change the result and change the
22 outcome?

23 MS. SPIEGEL: I think in this case it was,
24 and the reason I say that refers back to the
25 legislative intent in requiring the Board to take

1 into account these victim impact statements. The
2 impact statements are one of the factors that the
3 legislature had li - - - has listed, that the Board
4 must take into account.

5 CHIEF JUDGE LIPPMAN: You don't think the
6 Board - - -

7 MS. SPIEGEL: That must mean - - -

8 CHIEF JUDGE LIPPMAN: You don't think the
9 Board, in this particular case, knew that the family
10 had suffered because of this crime? I mean, is - - -

11 MS. SPIEGEL: Of course.

12 CHIEF JUDGE LIPPMAN: Is there something
13 that wasn't foreseeable by the Board?

14 MS. SPIEGEL: Your Honor, I would say that
15 it would be presumptuous for the members of the
16 Parole Board to say, oh, we don't really need to hear
17 from the victim - - -

18 CHIEF JUDGE LIPPMAN: No, no, they - - -

19 MS. SPIEGEL: - - - because we know - - -

20 CHIEF JUDGE LIPPMAN: They did hear - - -
2:1 no, no, no - - -

22 MS. SPIEGEL: - - - we know how badly they
23 must feel.

24 CHIEF JUDGE LIPPMAN: But they didn't say
25 that. They did hear, and your adversary is not

1 contesting the fact that the hearing was reopened, or
2 whatever the technical term is. The question is what
3 went on in that new hearing, was it sufficient to
4 change the outcome, and what's the legal test that we
5 could try to determine whether it's sufficient. What
6 does it have to be? Does it have to be something new
7 that wasn't forbe - - - foreseeable? Does it have to
8 be you learn more in depth of what you surmised
9 before? What's the legal test? There's got to be
10 some basis in which they made the determination and
11 in which we make our determination. That's what I'm
12 trying to get at. What is the test?

13 MS. SPIEGEL: I - - - I understand what
14 you're asking, Your Honor. The problem in answering
15 it is that we are talking about a discretionary
16 determination.

17 JUDGE PIGOTT: You say rational basis, and
18 your opponent is saying that you've switched, that up
19 for a while it was substantial evidence, and now all
20 of a sudden - - -

2:1 MS. SPIEGEL: Well, to a certain extent, I
22 plead guilty. What happened is - - - and I think we
23 can trace this back to the Board's regs - - -
24 unfortunately, the Board's regs used the words
25 "substantial evidence", and I think that, in a sense,

1 is what sent many lawyers and - - - and some of the
2 courts, up to now, off the rail.

3 JUDGE SMITH: Am I misremembering? I
4 thought the definition of substantial evidence was
5 such evidence that would justify a rational mind in
6 reaching a conclusion.

7 MS. SPIEGEL: Your Honor, substantial
8 evidence is a legal standard of judicial review.
9 It's not a standard that an administrative decision
10 maker employs at a hearing. And it's unfortunate
11 that the - - -

12 JUDGE RIVERA: Okay. So counsel, I'm - - -

13 JUDGE SMITH: Neither is rationality.

14 MS. SPIEGEL: I beg your pardon?

15 JUDGE SMITH: Neither is rational - - - I
16 mean, they don't say I'll do it if it's rational;
17 they'll say I'll do it - - - the initial - - -

18 MS. SPIEGEL: No, that's - - -

19 JUDGE SMITH: The initial decision maker
20 said he'll do it if it's right.

2:1 MS. SPIEGEL: That rationality is also a
22 standard of judicial review. What I am saying - - -

23 JUDGE SMITH: In fact - - -

24 MS. SPIEGEL: - - - is that both - - -

25 JUDGE SMITH: - - - they're pretty much the

1 same standard, aren't they?

2 MS. SPIEGEL: - - - both - - - both the
3 initial determination here that petitioner was to be
4 released, and the subsequent determination to rescind
5 that and to deny him parole, are both discretionary
6 determinations - - -

7 JUDGE RIVERA: Okay.

8 MS. SPIEGEL: - - - on the part of the
9 Parole Board.

10 JUDGE RIVERA: Okay. So counsel, I'm glad
11 to hear I'm not the only one who found the regs less
12 than clear, but I'm just - - - if you could please
13 clarify. I understand that you're saying these are
14 discretionary decisions, but there is some cabining;
15 that's the whole point of the regulations. What is
16 the standard the Board applies in these hearings, and
17 the source of those standards, if - - - it's the
18 language in this reg, or is it some other source?

19 MS. SPIEGEL: The - - - I believe that the
20 interpretation that the court should be looking to -
2:1 - -

22 JUDGE RIVERA: Um-hum.

23 MS. SPIEGEL: - - - is the one that is
24 embodied in the administrative determination here.
25 I'm not - - -

1 JUDGE RIVERA: In Mr. Costello's
2 determination?

3 MS. SPIEGEL: Yes.

4 JUDGE RIVERA: Okay.

5 MS. SPIEGEL: And if you look at other
6 determinations, I think you will find similar
7 language. What the Board has done, it has
8 interpreted its own reg to mean that - - -

9 JUDGE RIVERA: This section? We're talking
10 about this section, 8002.5?

11 MS. SPIEGEL: Subdivision (d).

12 JUDGE RIVERA: 8002.5, but only (d)?

13 MS. SPIEGEL: Well, right now that's what
14 we're talking about - - -

15 JUDGE RIVERA: Okay. I just - - -

16 MS. SPIEGEL: - - - because that's where -
17 - -

18 JUDGE RIVERA: I'm just trying to clarify
19 the source. Go ahead.

20 MS. SPIEGEL: Yes, because that's - - -
2:1 that's where - - - that's the - - - the provision
22 that contains the - - - the standard. And I think if
23 the Board had said if we - - - you know, if the Board
24 finds, by a preponderance of the evidence, if the
25 Board finds by clear and convincing evidence;

1 unfortunately, the language they used was substantial
2 evidence.

3 JUDGE RIVERA: No, but counsel, I'm sorry.
4 That's - - - that's quantity - - - "substantial
5 evidence was presented at the hearing to form a basis
6 for rescinding the grant of release". But - - - but
7 what is it that - - - I can't - - - substantial
8 evidence of what?

9 MS. SPIEGEL: Well, that's precisely the
10 point. I mean, that's why I think that it was simply
11 inartful drafting.

12 JUDGE RIVERA: Okay. But - - - all right,
13 but fine, but what is it that the Board then - - -

14 MS. SPIEGEL: What the Board - - -

15 JUDGE RIVERA: - - - looks to?

16 MS. SPIEGEL: What the Board looks to is to
17 see whether the information that has been presented
18 to them, that they did not have before - - -

19 JUDGE RIVERA: Okay. All right.

20 MS. SPIEGEL: - - - whether it is
2:1 substantial, whether it is significant, whether it is
22 information that was not known to the Board when it
23 made its original decision, and that had it known,
24 the original decision would have come out
25 differently.

1 JUDGE SMITH: Whether - - - whatever the
2 standard is, let's go - - - can you go through an
3 exercise? Pretend you're a Parole Board member,
4 originally voted to release Mr. Costello, and then
5 you received this information, and it persuades you
6 to change your mind; what persuaded you to change
7 your mind?

8 MS. SPIEGEL: What's hard, Your Honor, is,
9 again - - - and I'm repeating myself - - - this is a
10 discretionary determination.

11 JUDGE SMITH: Okay. But - - -

12 MS. SPIEGEL: It's a combination of a lot
13 of factors.

14 JUDGE SMITH: But what made you exercise
15 your discretion one way last week and another way
16 this week?

17 MS. SPIEGEL: I'm sorry, I didn't hear you.

18 JUDGE SMITH: What caused you, as a Parole
19 Board member, or hypothesize a rational or
20 substantial, or any kind of Parole Board member you
2:1 want, what persuaded him or her to think one way
22 before he - - - before the information was before
23 her, and the other afterwards?

24 CHIEF JUDGE LIPPMAN: And let me add to the
25 judge's question what I asked you right at the

1 beginning: Is the family's grief enough? You
2 follow? Judge Smith is saying what is it, and I'm
3 just adding on to it, is that enough? Is that - - -
4 is that good enough? Because that's really at the
5 heart of what we're looking at.

6 MS. SPIEGEL: I understand. I understand.
7 And it is not an easy question to answer. What we
8 are concerned with is the impact. The impact can be -
9 - - can have a number of different forms. It could
10 be - - - for example, some people after - - - even
11 after suffering a tragic loss like this, some of them
12 get on with their lives. Sometimes widows remarry.
13 That didn't happen here. Officer Guttenberg's widow
14 never remarried.

15 JUDGE SMITH: But are you - - - I
16 understand that point, but is it really imaginable
17 that a Parole Board member is sitting there saying,
18 well, I thought the widow might have remarried, but
19 now that I know that she didn't - - -

20 MS. SPIEGEL: No, of course not.

2:1 JUDGE SMITH: - - - I'm going to rescind
22 parole?

23 MS. SPIEGEL: I think there's an overlay
24 here too of - - - that you have to bear in mind,
25 which is the legislative intent and the legislative

1 policy behind giving victims the right to address the
2 Parole Board.

3 CHIEF JUDGE LIPPMAN: But counsel, you're
4 not really answering our questions. We don't know
5 what the answer is.

6 JUDGE READ: Are you saying that it was a
7 really close question in the minds of these people to
8 begin with, and then they got this other information,
9 that was just enough to tip it?

10 MS. SPIEGEL: Yes.

11 JUDGE GRAFFEO: Because I think what we're
12 looking for is an assurance that the Board doesn't
13 just alter its determination because of a public
14 outcry or public criticism. So we're asking what is
15 it in this particular record - - -

16 MS. SPIEGEL: Well, may - - -

17 JUDGE GRAFFEO: - - - that would - - - that
18 could have possibly justified their exercise of their
19 discretionary determination to deny the parole
20 instead of granting the parole.

2:1 MS. SPIEGEL: Judge Graffeo, let me - - -
22 let me start by just addressing that point about
23 public outcry and public pressure. I would point out
24 that at the end of the rescission hearing,
25 Commissioner Hernandez and Commissioner Smith both

1 addressed that directly, and they both were very
2 clear that that sort of extraneous stuff would have
3 no impact - - - has had no impact, and would have no
4 impact on their decision.

5 CHIEF JUDGE LIPPMAN: Yeah, but what we're
6 trying to zone in on is we understand it's
7 discretionary; what we're saying is there any artic -
8 - - can you articulate, in any way, what the basis
9 for that exercise of discretion is, what the - - -
10 the test is that - - - it's discretionary the first
11 time, it's discretionary the second time. What's the
12 basis for - - -

13 MS. SPIEGEL: This time - - -

14 CHIEF JUDGE LIPPMAN: - - - the exercise?

15 MS. SPIEGEL: - - - the second time - - -

16 CHIEF JUDGE LIPPMAN: There's got to be
17 some legal standard or some shape or form - - -

18 MS. SPIEGEL: I'm try - - - I will try to
19 help as best I can.

20 CHIEF JUDGE LIPPMAN: Go ahead.

2:1 MS. SPIEGEL: The difference is that the
22 first time, they had no information about one of the
23 factors that the statute requires them to consider.

24 JUDGE ABDUS-SALAAM: So essentially, the
25 victims, who had never spoken before, you're saying,

1 these are victims who are now speaking up that you
2 never heard from before.

3 MS. SPIEGEL: That's correct.

4 JUDGE ABDUS-SALAAM: Okay. So but what, in
5 their statements, did you focus on, or did the Board
6 focus on, that made it so important to rescind the
7 parole?

8 MS. SPIEGEL: Well, the - - - in a few
9 places, the Board used the word "compelling", and if
10 you ask me, well, what does that mean, I'm - - - I'm
11 not sure that I can define it beyond the ordinary
12 usage of the term. And by their nature, these kinds
13 of determinations are not amenable to neat
14 categorization and neat rules.

15 CHIEF JUDGE LIPPMAN: Yeah, but we have a
16 legal proceeding here - - -

17 MS. SPIEGEL: We do.

18 CHIEF JUDGE LIPPMAN: - - - that has to go
19 to say they exercised their discretion on the basis
20 of. It can't just be I exercised my discretion, or
2:1 we exercised it. Do you know what I'm saying?

22 MS. SPIEGEL: Well - - -

23 CHIEF JUDGE LIPPMAN: That's what we're
24 trying to - - -

25 MS. SPIEGEL: I do.

1 CHIEF JUDGE LIPPMAN: Something that would
2 also apply, as Judge Graffeo said before, that would
3 give some guidance in these kind of situations, which
4 I would bet may come up again and again. What's the
5 guidance? What's the basis upon which you can - - -

6 MS. SPIEGEL: I think - - -

7 CHIEF JUDGE LIPPMAN: - - - it's okay to
8 legally change your mind or to exercise it?

9 MS. SPIEGEL: I'm not so sure, frankly,
10 that their - - - that that's the right focus, Your
11 Honor.

12 CHIEF JUDGE LIPPMAN: What is the focus?

13 MS. SPIEGEL: I think the focus should be
14 if this information had been before the Board, in the
15 first instance, and they had made the determination
16 that they made here, would that have been rational.

17 JUDGE PIGOTT: Well, may I - - -

18 MS. SPIEGEL: And - - -

19 JUDGE PIGOTT: May I ask - - -

20 MS. SPIEGEL: If I may - - -

2:1 CHIEF JUDGE LIPPMAN: Yes, Judge Pigott?

22 MS. SPIEGEL: - - - Judge Pigott, you asked
23 a question before about how often these rescission
24 proceedings occur. And I have information on that.
25 In 2013, there were fifty rescission hearings. Now,

1 mind you, the Board made over 12,000 release
2 decisions, ordered over 3,000 people released, and in
3 fifty cases they did hold rescission hearings, and in
4 two-thirds of those cases, parole was not rescinded.

5 JUDGE SMITH: Could I - - -

6 MS. SPIEGEL: So this is not something - -

7 -

8 JUDGE SMITH: Could I go back to what you
9 said a minute ago? You say the question is whether
10 if this information had been before the Board the
11 first time, would the decision to deny parole have
12 been rational; that's the test?

13 MS. SPIEGEL: I think that's one way of
14 framing it - - -

15 JUDGE SMITH: Doesn't - - - but that - - -

16 MS. SPIEGEL: - - - to the court.

17 JUDGE SMITH: But in many, many cases,
18 probably most cases, the decision would have been
19 rational the first time, so all information would
20 qualify. And zero information would qualify on that
2:1 test.

22 MS. SPIEGEL: I'm sorry, Your Honor.

23 JUDGE SMITH: In other words - - -

24 MS. SPIEGEL: I really didn't follow that
25 train - - -

1 JUDGE SMITH: - - - you're say - - - let's
2 say you make a decision where you could go either
3 way, and you decide to grant parole, and you have a
4 hearing, at which no new information whatever is
5 presented - - -

6 MS. SPIEGEL: Um-hum.

7 JUDGE SMITH: - - - and you deny parole.
8 That's - - - it would have been rational the first
9 time.

10 MS. SPIEGEL: But there wouldn't be a
11 hearing because - - -

12 JUDGE SMITH: Okay. But how can - - -
13 isn't the standard that you suggest a standard that
14 will - - - a complete nonstandard? It will - - - it
15 permits no review whatever?

16 MS. SPIEGEL: I - - - no, Your Honor, I - -
17 - I don't agree with that. I mean, courts review,
18 you know, parole determinations all the time.

19 JUDGE PIGOTT: Mr. O'Connor had suggested
20 one, I think, and he'd taken it out of a case, but he
2:1 - - - but new information would be "the kind or
22 degree that could not reasonably have been
23 anticipated or foreseen by the parole-granting
24 panel".

25 MS. SPIEGEL: Well - - -

1 JUDGE PIGOTT: Is that a good standard, in
2 your view?

3 MS. SPIEGEL: No, Your Honor, and in fact,
4 I'm not even sure that - - - even assuming that there
5 is a difficulty here, I fail to see how his proposed
6 standard would help. He talks about the degree.
7 Well, what does that mean? Who decides it at what
8 point? I mean, he concedes, in his brief, that
9 sometimes victim impact statements could be properly
10 - - - could result in a - - - in a change. But how
11 does that - - -

12 JUDGE RIVERA: I guess, counsel, at what
13 point - - - I think you said that - - - that here
14 it's enough because it's compelling. When - - - when
15 would victim's griefs not be compelling? I'm not - -
16 - that's what I'm not clear. What are, really, the
17 contours of the standard?

18 MS. SPIEGEL: Well, even using Mr.
19 O'Connor's standard, the - - - the Board could
20 readily have found that the degree of impact on this
2:1 family that's resonating through the years, over the
22 decades, is beyond what one would be - - - one would
23 normally infer or, you know - - -

24 JUDGE RIVERA: But isn't that his
25 foreseeabi - - -

1 MS. SPIEGEL: - - - even expect.

2 JUDGE RIVERA: But isn't that his
3 foreseeability standard? You couldn't foresee that
4 type of reaction?

5 MS. SPIEGEL: I just don't see how it - - -
6 it would, in any way, solve the - - - the progr - - -
7 the problem that he thinks exists which we don't
8 think exists in the first place.

9 CHIEF JUDGE LIPPMAN: Counsel, let me give
10 Judge Pigott the last question, and then we'll go to
11 rebuttal.

12 JUDGE ABDUS-SALAAM: Can I - - -

13 CHIEF JUDGE LIPPMAN: Judge - - - oh, I'm
14 sorry.

15 JUDGE PIGOTT: I have to cede it to Judge
16 Abdus-Salaam.

17 CHIEF JUDGE LIPPMAN: You're going to cede
18 to Judge Abdus-Salaam. Go ahead.

19 JUDGE ABDUS-SALAAM: You don't agree with
20 the petitioner's standard, but what standard would
2:1 you propose that we adopt?

22 MS. SPIEGEL: I - - - I don't mean to be,
23 you know, nonresponsive, but the standard that I
24 think is appropriate is the one that was articulated
25 by the Board here: if it's information that, if we

1 had had it originally, would have led to a different
2 discretionary determination.

3 CHIEF JUDGE LIPPMAN: Okay, counsel, thank
4 you. Let's hear rebuttal from your adversary.

5 Counselor?

6 MR. O'CONNOR: Well, just to pick up on
7 that last point, I mean, that's conclusory. It
8 doesn't address itself to the nature of the - - - of
9 the new information.

10 JUDGE PIGOTT: I'm surprised that - - -
11 maybe you can answer this. I forget how many times
12 this particular defendant had been in front of a
13 Parole Board; do you remember?

14 MR. O'CONNOR: This - - - he was paroled on
15 his fourth Board appearance.

16 JUDGE PIGOTT: Right. Now, on the other
17 three, were there no victim impact statements, no
18 family - - - no one asked? I mean, isn't there a
19 statute now that requires the district attorney to
20 produce it?

2:1 MR. O'CONNOR: No, no one - - - no one's
22 required to produce it. The district attorney is
23 required to notify - - -

24 JUDGE PIGOTT: Okay.

25 MR. O'CONNOR: - - - crime victims. And if

1 - - - if I may, just on that point - - -

2 JUDGE SMITH: Is he supposed to notify
3 every time the guy comes up for parole?

4 MR. O'CONNOR: No, initially, and that can
5 be years - - -

6 JUDGE SMITH: Back in 1980 he was supposed
7 to notify?

8 MR. O'CONNOR: Well, there wasn't a statute
9 back in 1980.

10 JUDGE SMITH: Or when the statute was
11 passed?

12 MR. O'CONNOR: Yes. And - - -

13 JUDGE GRAFFEO: Was this the first time the
14 family had actual notification?

15 MR. O'CONNOR: We don't know that. We just
16 don't know.

17 CHIEF JUDGE LIPPMAN: What's the practice
18 today now, today? They're the - - - is the family
19 always notif - - -

20 MR. O'CONNOR: Now - - - now that we have
2:1 the Internet, there is - - - there is a process. The
22 Board is very proactive in - - - in prov - - - in
23 facilitating this. You can go on the Web site and
24 you just type in a name and it comes up.

25 CHIEF JUDGE LIPPMAN: I see.

1 MR. O'CONNOR: And so it's easier now.

2 And just to - - - just to pick up on that
3 point as to who notifies, that was a conscious policy
4 choice that the legislature has made to make it the
5 district attorney, because what I learned on this
6 point is that it can be traumatic, years later,
7 decades later, to get a notification from the Parole
8 Board. And the choice was made that district
9 attorneys should - - - should do that notification.
10 I know there was some criticism of that below.

11 I just want to talk about this substantial
12 evidence point again. The reason that that is used
13 is because usually the basis for rescission is some
14 kind of accusation that your criminality was more
15 serious than we understood, that you've engaged in
16 some kind of misconduct, you've engaged in improper
17 contact with the victims, and so it's sort of in the
18 nature of a trial, and so you have a - - -

19 JUDGE ABDUS-SALAAM: But counsel - - -

20 MR. O'CONNOR: - - - a standard of review
2:1 in that way.

22 JUDGE ABDUS-SALAAM: - - - this didn't come
23 up before, but what about the lack of an apology to
24 the family?

25 MR. O'CONNOR: He is prohibited - - -

1 inmates are prohibited, and rightly so, from
2 communicating with victims.

3 JUDGE ABDUS-SALAAM: But isn't there some
4 sort of repository in the prison that you can make an
5 apol - - -

6 MR. O'CONNOR: There is. There is
7 something called an apology bank repository, and I
8 learned about that - - - and I'm pretty involved in
9 these kind of issues; I learned about that when I was
10 writing this brief. It's not publicized. My client
11 didn't know about it. Very few people know about it.
12 If he had known about it, he would have sent a
13 letter.

14 CHIEF JUDGE LIPPMAN: Okay.

15 MR. O'CONNOR: Thank you.

16 CHIEF JUDGE LIPPMAN: Thank you both.
17 Appreciate it.

18 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Pablo Costello v. New York State Board of Parole, No. 140, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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