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STATE OF NEW YORK
COUNTY OF DUTCHESS

SUPREME COURT

In the Matter of [REDACTED],
Petitioner.

-against-

NOTICE OF MOTION

CPLR ARTICLE 78

**Tina M. Stanford, Chair of the
New York State Parole Board,**

**Index No: [REDACTED]
Hon. Christi J. Acker**

Respondent.

PLEASE TAKE NOTICE that the purpose of this motion is to punish the parole board for a contempt of court, and that such punishment may consist of fine or imprisonment, or both.

WARNING TO RESPONDENT: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT.

[REDACTED], on the annexed Affirmation/Memorandum of Law, through his attorney, Kathy Manley of counsel, will move this Court on **December 1, 2020** at 9:00 a.m., for the following relief:

A. An Order directing Respondent to comply with this Court’s September 17, 2020 Decision and Order which held that in its *de novo* review the Board must: 1) follow 9 NYCRR 8002.2(a) with regard to departing from the low COMPAS scores; 2) not deny release based solely on the seriousness of the offense; and 3) not claim, in the absence of support in the record, that there was a reasonable probability that Petitioner would not live and remain at liberty without again violating the law;

B. An Order holding Respondent in Contempt for its failure (in its October 19, 2020 denial of release) to comply with the September 17, 2020 Decision and Order; and

C. An Order directing Respondent to reimburse Petitioner for reasonable fees and costs associated with this motion.

WHEREFORE, [REDACTED] respectfully requests that the Court grant the above relief, and such other and further relief as this Court deems just and proper.

Dated: November 3, 2020

Kathy Manley
Kathy Manley
Attorney for [REDACTED]
26 Dinmore Road
Selkirk, NY 12158
518-635-4005
Mkathy1296@gmail.com

TO: Clerk, Dutchess County Supreme Court
10 Market Street
Poughkeepsie, NY 12601

Attorney General of New York State
One Civic Center Plaza, Suite 401
Poughkeepsie, NY 12601

Tina M. Stanford,
Chair, NYS Parole Board
Harriman State Campus - Building 2
1220 Washington Avenue
Albany, New York 12226-2050

[REDACTED]
(Address on file)

STATE OF NEW YORK
COUNTY OF DUTCHESS

SUPREME COURT

In the Matter of [REDACTED],
Petitioner.

-against-

**AFFIRMATION/
MEMORANDUM OF LAW
FOR CONTEMPT ORDER**

**Tina M. Stanford, Chair of the
New York State Parole Board,**

**Index No: [REDACTED]
Hon. Christi J. Acker**

Respondent.

Kathy Manley, duly authorized to practice law in the state of New York, affirms:

1. I am the attorney representing Petitioner [REDACTED], and I am making this motion for an Order of Contempt because Respondent failed to follow this Court’s Decision and Order with regard to its denial of release after Mr. [REDACTED]’s *de novo* hearing.

2. In *Matter of Ferrante v. Stanford*, 172 AD3d 31 (2nd Dep’t 2019) the Second Department upheld an order of contempt under very similar circumstances. In September, 2020, this Court held that Respondent Parole Board had acted improperly herein by: 1) failing to identify the COMPAS scale from which it departed, or to identify an individualized reason for said departure; 2) relying “almost exclusively on the serious nature of Petitioner’s crime and its perception that his remorse was ‘shallow’” (a perception not supported by the record); and 3) because its determination that there was a reasonable probability that Petitioner would not remain at liberty without violating the law was unsupported by the record. (September 17, 2020 Decision, at 4-7.)

3. In its October 19, 2020 decision denying release, Respondent made those exact

same legal errors, *not even mentioning any need for a departure from the low risk COMPAS scores*; clearly basing the decision on the seriousness of the offense; and claiming again, without support in the record, that there was a reasonable probability that Petitioner would not remain at liberty without violating the law. (10/19/20 Parole Board Decision, attached as Exhibit “A.”) As a result, this Court should hold Respondent in contempt.

THE FACTS

4. In June, 2019, [REDACTED] (who was sentenced to 25 years to life for stabbing his former girlfriend to death in 1992) appeared before the Parole Board and was denied release for the second time.

5. Mr. [REDACTED] filed an Article 78 Petition in the instant case in March, 2020, and on September 17, 2020 this Court granted a *de novo* interview and review. That Decision stated:

“...[T]he Court finds that although the Board indicates that it chose to depart from the COMPAS, it does not identify the scale from which it departed, nor does it articulate an individualized reason for such departure, in contravention of 9 NYCRR 8002.2(a). Instead, the Board indicates, generically, that it is departing from COMPAS and identifies the reason for the departure is the shallowness of his remorse. Notably, the COMAS Risk Assessment contains twelve categories, none of which involve an offender’s lack of remorse. Thus, the purported ‘individualized’ reason provided by the Board for the departure is unrelated to any scale contained in the COMPAS assessment. ... As the evidence before this Court demonstrates that the Parole Board herein did not comply with the requirements of 9 NYCRR 8002.2(a), judicial intervention is warranted...”

*Although this is basis alone to vacate Respondent’s Decision, the Court finds said Decision should also be vacated because the Board focused almost exclusively on the serious nature of Petitioner’s crime and its perception that his remorse was ‘shallow.’ Although the Board is entitled to place more emphasis on the serious nature of Petitioner’s crime, ‘where the Parole Board denies release to parole solely on the basis of the seriousness of the offense, in the absence of any aggravating circumstance, it acts irrationally.’ *Huntley v. Evans*, 77 AD3d 945, 947 (2nd Dep’t 2010)... In the instant matter, although the Board makes passing reference to Plaintiff’s clean discipline and low COMPAS, it is clear that the Board denied release solely on the basis of the seriousness of the offense. ...*

Finally, the Board’s finding that there is a reasonable probability that Petitioner

would not live and remain at liberty without again violating the law is unsupported by the record, *and would serve as an additional basis to vacate the June, 2019 Decision*. The record demonstrates that Petitioner was rated the lowest possible score in the categories of risk of felony violence, arrest risk and abscond risk in his COMPAS assessment, and had only one disciplinary ticket during his 27-year incarceration.

ORDERED that the matter is remitted to Respondent for a *de novo* parole release interview and review *which complies with all applicable statutes and regulations...*" September 17, 2020 Decision herein, at 4-7, some emphasis supplied.

7. On October 7, 2020, Petitioner did have a *de novo* interview¹, and on October 19, 2020, Respondent denied release, stating:

"A review of your record, interview and deliberation lead the panel to conclude that if released at this time there is a reasonable probability that you would not live and remain at liberty without again violating the law...

Required statutory factors have been considered, together with your institutional adjustment including discipline and program participation, your risk and needs assessment and your needs for successful re-entry in the community.

In the instant offense you were convicted of Murder 2nd. You caused the death of the victim your former girlfriend by cutting her with a knife four times across the neck and then stabbing her after arguing. ...[Y]ou had difficulty expressing why you became so violent and angry. You stated that you took the knife away from the victim, who was considerably younger than you. The panel was disturbed by your admission that after you cut the victim several times you just went home as if nothing happened.

The Bd of Parole commends your personal growth and productive use of time, however discretionary release on parole shall not be granted merely as a reward for good conduct...

The panel acknowledges your parole packet with letters of support, letters of reasonable assurance and achievements. However, your total disregard for human life is a concern to the panel. Furthermore, it is evident that you still need to gain insight into your anger and how it impacts your behavior..." (Exhibit "A" at 1-2)

8. A review of this Court's Decision herein along with the above determination denying release makes it quite clear that Respondent *completely failed to comply with this Court's Decision and Order*. That Decision found three independent reasons for holding that Respondent had violated the law, and each one alone would have warranted a *de novo* interview

¹ The transcript of that interview has been ordered, but has not yet been received.

and review. First, instead of giving an individualized reason for departing from the low risk COMPAS scores, and identifying the scale from which it departed, as required by regulation, Respondent only made passing reference to the risk and needs assessment, and *did not even make any attempt to follow 9 NYCRR 8002.2(a) as directed*. That alone is a clear reason for holding Respondent in contempt. Yet there was more – Respondent again improperly relied solely on the seriousness of the offense, and again claimed, without support in the record, that there was a reasonable probability that Petitioner would not live and remain at liberty without again violating the law. (The conclusory claim that Petitioner still needs “to gain insight into [his] anger” is completely unsupported by the record.) Those are both additional reasons for holding Respondent in contempt.

9. Based on this record, there is absolutely no reason to think that the Parole Board won’t continue to violate the law, and any and all court orders, in the future, and thus it is necessary to hold Respondent in contempt.

THE LAW

10. Courts possess the inherent power to enforce their lawful orders via civil contempt. *McCain v. Dinkins*, 84 NY2d 216 (1994). There are four elements which must be satisfied – by clear and convincing evidence - in order for a civil contempt order to be warranted. *McCormick v. Axelrod*, 59 NY2d 574 (1983). First, the court must determine that there was a lawful court order expressing a clear mandate; secondly, that such order was disobeyed; third, that the party in question had knowledge of the order; and fourth, that the disobedience prejudiced the other party. *McCormick*, supra, at 583; *Matter of Ferrante v. Stanford*, 172 AD3d 31, 36 (2nd Dep’t 2019).

11. This Court made it clear that Respondent had violated the law in three

independent ways (failing to properly depart from the COMPAS scores; relying for denial only on the seriousness of the offense; and claiming a risk of re-offense which was not supported by the record) and this was a clear mandate. The October 19, 2020 denial shows, as discussed above, that Respondent disobeyed that clear mandate. (And the fact that the Parole Board scheduled the proceeding as a *de novo* interview shows that Respondent was well aware of this Court's Decision.) Respondent's Decision prejudiced Petitioner, because, while he may not have a right to release, he has a right to a determination made in accordance with the law.

12. In *Ferrante*, the Second Department upheld a finding that the Parole Board was in contempt when it failed to follow a court decision granting a *de novo* interview, and where the denial after said interview suffered from the same infirmities as the determination vacated by the court. The *Ferrante* Court stated:

“ ‘Once the movant makes the required showing [for contempt] the burden shifts to the alleged contemnor to refute that showing, or to offer evidence of a defense such as an inability to comply with the order’ (*Matter of Mendoza-Pautrat v. Razdan*, 160 AD3d 963, 964...[2018])...

...[T]he [Parole] Board may not deny an inmate parole release based solely on the seriousness of the offense...

Here, under the unique facts of this particular case, we agree with the Supreme Court's exercise of its discretion in granting petitioner's motion to hold the appellant in civil contempt for the Board's failure to comply with the Supreme Court's judgment dated October 2, 2015. In the judgment... Supreme Court, after concluding, among other things, that the Board's determination to deny parole release was not supported by an application of the factual record to the statutory factors set forth in Executive Law 259-I, that the Board's determination was based exclusively on the severity of the petitioner's offense, and that there was no rational support in the record for the Board's determination, remitted the matter to the Board 'to make a *de novo* determination on petitioner's request for parole release'...

...[T]he Board did not appeal from that judgment. Rather, it purported to comply with the judgment by rendering a new determination following a *de novo* interview before a different panel and, in its written decision and in the transcript of the interview, purported to comply with its responsibilities to consider the requisite statutory factors. However, the Supreme Court, after conducting an evidentiary hearing, decided that the Board again denied parole release exclusively on the basis of the underlying conviction

without giving consideration to the statutory factors. Consequently, the Supreme Court held that a finding of civil contempt was warranted.

Mindful that '[e]very contempt application must be decided on the basis of its own unique facts and circumstances' (*Matter of Banks v. Stanford*, 159 AD3d 134, 146) we agree with the Supreme Court that a finding of civil contempt was warranted on the facts of this case. Even though the Board purported to comply with its responsibilities to consider the requisite statutory factors, we agree with Supreme Court's conclusion, made after a hearing, that *the record in this case demonstrates that the Board again denied parole release exclusively on the basis of the underlying conviction* without giving consideration to the statutory factors. ...

In all, the petitioner established, by clear and convincing evidence, that the Board was aware of the judgment dated October 2, 2015; that the judgment was a lawful and unequivocal mandate of the court; that the Board, by failing to give consideration to the requisite statutory factors set forth in Executive Law 259-i(2)(c)(A), disobeyed that mandate; and that prejudice to the petitioner resulted. The appellant failed to meet her burden of rebutting the evidence establishing the elements of civil contempt." *Ferrante*, supra, at 36-39, emphasis supplied.

13. While the Second Department noted that the *Ferrante* holding was limited to its facts, it is submitted that is because, as pointed out therein, at 38, "every contempt application must be decided on the basis of its own unique facts and circumstances." (emphasis supplied)

14. The facts in *Ferrante* show that the Parole Board violated the court mandate in essentially *one way* – by relying exclusively on the seriousness of the offense to deny release. The facts in the instant case show that the Parole Board violated this Court's lawful mandate in *three different ways*: 1) by *completely refusing to follow 9 NYCRR 8002.2(a)* with regard to departing from the low COMPAS scores despite a direction to follow all applicable laws and regulations; 2) by, as in *Ferrante*, denying release based on the seriousness of the offense in contravention to this Court's mandate; and 3) by claiming, in a conclusory manner without support from the record (and contrary to the COMPAS findings) that there was a reasonable probability that Petitioner would not live and remain at liberty without again violating the law.

15. Thus, as in *Ferrante*, the requisite criteria for civil contempt have been met – this Court's Decision and Order was an unequivocal lawful mandate; Respondent had knowledge of

it and violated it; and Petitioner was prejudiced as a result. If this Court agrees that any *one* of the above three violations has been established by the record herein, the burden should shift to Respondent to rebut this showing at a hearing.

CONCLUSION

16. Based on the foregoing, Petitioner respectfully requests that this Court: 1) direct Respondent to hold a new *de novo* hearing to be held within 30 days² before a board with no members on either of the previous two boards - and again specifically direct that Respondent follow this Court's September 17, 2020 Decision and Order; 2) (after giving Respondent an opportunity to rebut the showing of contempt) hold Respondent in civil contempt until such time as a proper interview and review have been held; and 3) award reasonable costs and fees associated with the instant motion, as occurred in *Ferrante*, supra.

Dated: November 3, 2020.

Kathy Manley
Kathy Manley
Attorney for [REDACTED]
26 Dinmore Road
Selkirk, NY 12158
518-635-4005
Mkathy1296@gmail.com

² It is noted that Petitioner's regular parole interview is currently scheduled for December, 2020. If there is no decision on the contempt motion before that time, as seems likely, it is anticipated that Petitioner will postpone his interview for a month or two until there is a decision herein. If this Court holds Respondent in contempt until a proper interview and review are conducted, it seems that the postponed regular interview could instead constitute the required *de novo* interview, as occurred in *Matter of Bottom v. Stanford*, Index No. E2020-745 (Sullivan Co. 2020.)