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Art. 78 Motions to Reinstate Appeal &  
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### Art. 78 Motion to Reinstate Appeal/Opposition - FUSL000114 (2021-03-22)

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NEW YORK STATE SUPREME COURT

APPELLATE DIVISION

SECOND DEPARTMENT

In the Matter of

██████████,

Petitioner.

**NOTICE OF MOTION  
SEEKING REINSTATEMENT  
OF APPEAL**

-against-

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

**CPLR ARTICLE 78**

**Docket No. ██████████**

Respondent.

PLEASE TAKE NOTICE, that ██████████, through his attorney, Kathy Manley, will move this Court on April 19, 2021 for an Order reinstating the appeal in this case.

WHEREFORE, ██████████ respectfully requests that the Court enter an Order granting the above relief and granting such other and further relief as this Court deems just and proper.

Dated: March 22, 2021

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NEW YORK STATE SUPREME COURT

APPELLATE DIVISION

SECOND DEPARTMENT

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**In the Matter of**

████████████████████

Petitioner.

**AFFIRMATION SEEKING  
REINSTATEMENT OF APPEAL**

-against-

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

Respondent.

**CPLR ARTICLE 78**

**Docket No. ██████████**

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Kathy Manley, duly authorized to practice law in the State of New York, hereby affirms the following under the penalties of perjury:

1. This appeal, filed in November, 2020, challenged the Dutchess County Supreme Court's denial of Mr. ██████████'s Article 78 Petition which alleged that the Parole Board had improperly denied release.
2. The appeal argued that the lower court had erred in not granting a *de novo* parole interview where the Parole Board had, *inter alia*, violated 9 NYCRR 8002.2(a) by failing to adequately justify the departure from the COMPAS instrument herein, and by failing to specify which COMPAS scale the departure was based on.
3. Shortly before the Answer was due, Respondent requested that Appellant agree to a dismissal of the appeal in return for the Parole Board giving Appellant a *de novo* interview in February, 2021.
4. However, the Stipulation of Discontinuance stated that the Parole Board agreed that the *de novo* consideration would "compl[y] with the requirements of the Executive Law and all

applicable rules and regulations.” (Stipulation attached as Exhibit “A”)

5. Appellant’s *de novo* interview occurred on February 16, 2021, and the Parole Board again denied release, in a February 23, 2021 Decision which *again violated 9 NYCRR 8002.2(a)* by failing to adequately justify the departure from the COMPAS instrument herein, and by failing to specify which COMPAS scale the departure was based on. (Decision attached as Exhibit “B”)

6. The Decision stated:

“...The Board has determined 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 and that your release is incompatible with the welfare and safety of society.

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...COMPAS indicates you are low risk for felony violence, arrest and absconding. Your criminal history, history of violence and prison misconduct are low. You are also unlikely for reentry substance abuse. Despite your overall low risk COMPAS scores the panel departs from the COMPAS for these factors must be weighed against the magnitude of your crime, which involved your stabbing your victim/girlfriend over 140 times causing her death which also left lifetime suffering and pain to the victim’s family, especially to the 4 year old child who was deprived of her mother to a senseless killing. ...” (Exhibit “B” at 3)

7. While it appears that this Court has not yet had the opportunity to weigh in on the interpretation of the regulations contained in 9 NYCRR 8002.2(a), every lower court which has done so<sup>1</sup> (at least whose decision undersigned counsel is aware of) has found that a decision which fails to state the COMPAS scale departed from, and/or which attempts to explain a departure from low COMPAS scores *only by referring to the offense of conviction*, is in violation of the regulations. *Matter of Jennings v. Stanford*, Index No. 2020-51294 (Dutchess Co. 2020); *Matter of Voii v. Stanford*, Index No. 2020-50485 (Dutchess Co. 2020); *Matter of Bottom v. Stanford*, Index No. E2020-745 (Sullivan Co. 2020); *Phillips v. Stanford*, Index No. 52579/19

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<sup>1</sup> The Dutchess County Supreme Court Decision in the instant case did not mention the regulations contained in 9 NYCRR 8002.2(a) .

(Dutchess Co. 2019); *Comfort v. NYS Bd. of Parole*, Index No. 1445/2018 (Dutchess Co. 2018); *Sullivan v. NYS Bd. of Parole*, Index No. 100865/2018 (NY Co. 2019); *Robinson v. Stanford*, Index No. 2392/18 (Dutchess Co. 2018); *Diaz v. Stanford*, Index No. 2017-53088 (Dutchess Co. 2018.) (The Decisions in *Jennings*, *Voii*, *Phillips*, *Comfort*, *Sullivan* and *Robinson* are attached as Exhibit “C”.)

8. In *Voii*, supra, the court held that the Board had exhibited irrationality bordering on impropriety in its departure from the COMPAS findings, and noted that reliance on the circumstances of the offense does *not* suffice, stating:

“...Respondent Board expressly stated that it was departing from Petitioner’s COMPAS assessment. Accordingly, 9 NYCRR 8002.2(a) requires that it specify the scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure. Respondent Board failed to do so.

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...Respondent Board’s interpretation of the regulation is flawed. ...[T]he regulation does not tie the requirement to explain departures to any particular category in Executive Law 259-i(2)(c)(A), Rather, it clearly indicates that a departure requires the Board to identify any scales from which it departs and provide an individualized reason [Emphasis added]. The fact that Respondent Board here relied upon the other two standards in denying release does not excuse the Board from complying with 9 NYCRR 8002.2(a).

Moreover ... the explanation given for the departure is not ‘individualized.’ The Board asserts that it is departing from COMPAS because of the ‘tragic reckless nature of the crimes themselves.’ *However, the COMPAS Risk Assessment contains twelve categories, none of which involve the nature of the underlying crimes.* Thus the alleged ‘individualized’ reason provided by the Board for the departure is unrelated to any scale contained in the COMPAS Assessment.” *Voii*, supra, at 5-7, emphasis supplied unless noted otherwise.

9. In *Comfort*, the court granted a new interview where the Parole Board failed to specify which COMPAS scale the departure was based on, stating:

“...[T]he only claim Petitioner raises is that the board failed to comply with the new regulation that requires an identification and reason for any departures from the COMPAS risk and needs assessment instrument.

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... Petitioner’s COMPAS instrument clearly identifies Petitioner as the lowest possible risk (1) in the following three categories – risk of felony violence, arrest risk and abscond risk. ... Accordingly, the parole board’s finding that it was likely that Petitioner would reoffend is a departure from the COMPAS instrument. With such a departure,

NYCRR 8002.2(a) *requires Respondent to specify the scale from which it departed and provide an individualized reason for such departure. A review of the ... decision demonstrates that the parole board did not do so.*

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The Court acknowledges, and does not minimize, that this case involves the death of a New York State police officer, as well as very significant injuries to another officer. A murder conviction is surely among the most serious of crimes. Nevertheless, this Court's responsibility is to ensure that Petitioner's application for parole release be appropriately evaluated according to all applicable laws and regulations..." *Comfort*, supra, at 3, 5-6, emphasis supplied.

10. Finally, In *Robinson*, supra, the court also ordered a new hearing for this reason, and also pointed out that the low COMPAS scores contradict the claim (also made herein) that release would not be compatible with the welfare of society, stating:

"...[The COMPAS] assessment gave the petitioner the lowest possible rating in categories for risk of felony violence, re-arrest, absconding and for criminal involvement... Petitioner correctly asserts that *the Parole Board's finding that discretionary release would not be compatible with the welfare of society directly contradicts these scores* in his COMPAS assessment. As the Board's determination denying release departed from these risk and needs assessment scores ... it was required to articulate with specificity the particular scale in any needs and [risk] assessment from which it was departing and provide an individualized reason for such departure. The Board's conclusory statement ... fails to meet this standard..." *Robinson*, at 2, emphasis supplied

11. Therefore, because it seems clear that the Parole Board violated 9 NYCRR 8002.2(a) in connection with the February, 2021 *de novo* consideration, and thus violated the Stipulation of Discontinuance, this Court should grant the instant motion to reinstate the appeal.

AFFIRMED: March 22, 2021.

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