Art. 78 Petitioner's Reply - FUSL000123 (2019-03-25)

STATE OF NEW YORK
COUNTY OF DUTCHESS SUPREME COURT

In the Matter of
[redacted],

Petitioner.

-against-

REPLY AFFIRMATION

CPLR ARTICLE 78

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

Index No: [redacted]

Respondent.

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

1. In Paragraph 8 of the Answer Respondent refers to eight *arrests* in Illinois, including one for "robbery/murder." However, it can be seen from Exhibit 3 to the Answer – the "Out of State Criminal Record" - that the date of arrest for the "robbery/murder," June 5, 1970, is the same as the date of arrest for the Criminal Trespass/Auto Theft charge, for which Petitioner was sentenced to 1 year probation. (See also Page 2 of the FBI Criminal History Record, likewise included in Exhibit 3.)

2. Upon information and belief, this was all one case where several people were initially charged with robbery/murder, but it was learned that Petitioner was not involved in a robbery or murder, and so he was allowed to plead guilty to criminal trespass/auto theft and got one year probation. When he tried to clear this up, knowing that the arrest for "robbery/murder" was still appearing in his criminal history, he received a letter from Cook County Circuit Court stating that no record was found. (See Petitioner's Exhibit "B" at 3)

3. Upon information and belief, no record was found because Petitioner (DOB

4/5/53) had just turned 17 years old at that time, which means the case would have gone to juvenile court in Illinois, and the records were likely sealed as a result. In any event, no weight should be given to a mere *arrest*, especially under these circumstances. Only convictions can be considered, and the IL record is extremely old, and at a time when Petitioner, *now 65*, was very young, and had dealt with the recent death of both his mother and his grandmother.

4. In Paragraph 11 of the Answer Respondent claims that the issue of the purported lack of remorse was not raised in the administrative appeal. While this was not a separate argument point in said appeal, it was clearly raised, right on Page 1 of the appeal, which stated "[t]here is absolutely no basis for the Board's statement that his strong, consistent remorse was somehow 'shallow.'" This issue was also discussed in more detail on Pages 19-20 of the argument section of administrative appeal, which stated, at 20:

> "In fact, the interview, not to mention the letter and personal statement he submitted to the Board, actually reveals that [redacted] spent a lot of time talking about the crime, for which he clearly took full responsibility. And the fact that he most strongly expressed his remorse at the end of the interview does not in any way mean it was "shallow." (The Commissioners did not prompt him to discuss remorse; he was simply asked if he had anything to add.)"

5. Respondent states, in Paragraph 23 of the Answer, that (emphasis supplied):

> "…[E]ven uniformly low COMPAS scores would not have placed the onus on the Board to provide countervailing evidence to support its determination. … Indeed, while the Board might, for example, find an inmate sufficiently rehabilitated to satisfy the first prong of the standard – that the inmate *will 'live and remain at liberty without violating the law,'* the Board could also find, in its discretion, *as it did here*, that the inmate's release would be incompatible with the welfare of society or undermine respect for the law by deprecating the severity of the offense."

6. That paragraph flies in the face of a great deal of case law, as well as the 2011 statutory amendments and the recent regulations, all of which speak to the possibility of rehabilitation, rather than mere reliance on the offense of conviction to deny release. Clearly, if

the Board is conceding that the inmate does not pose a risk of offense in the future but still denies release, then the Board is saying that it is permissible to rely only on the severity of the offense to justify denial. And, as noted in the Petition, the Second Department *does not allow that*.

7. Moreover, while Petitioner did not state, contrary to Respondent's claims, that low COMPAS scores provide a presumption of release, it is clear, pursuant to the new regulations, that:

> "…If a Board determination, denying release, departs from the Department Risk and Needs Assessment's scores, the Board shall specify any scale within the Department Risk and Needs Assessment from which it departed and provide an individualized reason for such departure. …" 9 NYCRR 8002.2(a)

8. As noted in the Petition, in *Comfort v. NYS Bd. of Parole,* Index No. 1445/2018, this Court very recently granted a *de novo* interview solely because the Board did not adequately explain its departure from the low COMPAS scores.

9. After this Petition was filed, this Court released *another* decision granting a *de novo* interview (on a motion to reargue) for this same reason. In *Robinson v. Stanford*, Index No. 2392/18, this Court stated:

> "…As the Board's determination denying release departed from [the] risk and needs assessment scores, pursuant to 9 NYCRR 8002.2 *it was required to articulate with specificity the particular scale in any [risk and] needs assessment from which it was departing and provide an individualized reason for such departure.* The Board's conclusory statement that it considered statutory factors, including petitioner's risk to the community, rehabilitation efforts and needs for successful community re-entry in finding that discretionary release would not be compatible with the welfare of society fails to meet this standard. As such, its determination denying parole release was affected by an error of law."

10. As stated in the Petition, as in *Comfort* and *Robinson*, the Decision herein failed to specify the scale(s) from which it departed from the COMPAS findings of low risk, and failed

to explain why it was departing from the COMPAS low risk scores. For that reason alone, there must be a *de novo* interview.

AFFIRMED: March 25, 2019.

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