

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Art. 78 Petitioners' Replies

Article 78 Litigation Documents

Art. 78 Petitioner's Reply - FUSL000138 (2022-04-27)

Follow this and additional works at: https://ir.lawnet.fordham.edu/art78_replies

STATE OF NEW YORK
COUNTY OF DUTCHESS

SUPREME COURT

In the Matter of

████████████████████,

Petitioner.

-against-

REPLY AFFIRMATION

CPLR ARTICLE 78

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

████████████████████

Respondent.

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

1. Right after quoting from a statement by Petitioner during the Interview, in which he discusses how he has worked hard to better himself over the past 24 years, Respondent states, in Paragraph 13 of the Answer, "...the Petitioner illustrated his moral sense" by realizing he needed help and turning himself in when he knew police were looking for him after the 1996 rape. Respondent then points out that after being released on bail, Petitioner committed one more rape, in 1997.

2. However, Petitioner didn't say he turned himself in as a way to "illustrate his moral sense" back in 1996 – he was simply answering Commissioner Samuels, who had just asked him how he was arrested. (Exhibit "A" at 10) While he may have realized back then on some level that he needed help, Petitioner has been clear that he had no moral sense back in 2006 – that was not developed until later, after the years of hard work he described.

3. In Paragraph 25, Respondent stated that the circumstances of the offense may

outweigh the positive factors, citing 2001 and 2004 Second Department cases which predate the decisions in *Rivera v. Stanford*, 172 AD3d 872 (2nd Dep't 2019) and *Ferrante v. Stanford*, 172 AD3d 31 (2nd Dep't 2019.) As noted in the Petition, those cases held that the circumstances of the offense *may not by themselves* outweigh other factors which are all positive.

4. Respondent goes on to say, in that same Paragraph, that the Board acted appropriately “in determining that petitioner’s self-serving protestations of change, reformation and new-found empathy” did not outweigh the circumstances of the offense and related probation violation. First, *any* “protestations of change” could be claimed to be self-serving, but the claims herein are well-supported by the institutional record, which amply shows Petitioner’s transformation over the past 24 years.

5. Secondly, Respondent, like the Board, is relying *only* on the circumstances of the offense back in the mid-nineties (and the probation violation which itself arose out of the same series of heinous crimes) to justify denial of release, and *that is not permissible*.

6. As to the COMPAS departure, Respondent stated, in Paragraph 29:

“...[W]hen [the Board] chooses to depart from some COMPAS instrument, [it] must merely indicate what scores it is rejecting and articulate its reasons for doing so... Those articulable grounds *need not be defended or justified* since no presumptive reliability and accuracy attaches to them¹ to give them greater weight and utility than the other tools available. Here, the Board articulated its reasons why it believed [the COMPAS] did not adequately reflect the risk of petitioner reoffending when his serial violent rapes were so similar, harmful...[etc]” (emphasis supplied)

7. Respondent cited no authority for the claim that the COMPAS departure grounds *need not be defended or justified*. Nor could he, for it is obvious that the Board may not just

¹ Here, it appears that Respondent was referring to the COMPAS itself, rather than the grounds upon which the departure is based.

make something up and claim it followed 9 NYCRR 8002.2(a). Any departure must be based on individualized reasons which are supported by the record. And, significantly, Respondent's statement flies in the face of the relevant caselaw. *Robinson v. Stanford*, Index No. 2018-2392 (Dutchess Co. 2019); *Phillips v. Stanford*, Index No. 52579/19 (Dutchess Co. 2019); *Matter of Jennings v. Stanford*, Index No. 2020-51294 (Dutchess Co. 2020); *Matter of Voii v. Stanford*, Index No. 2020-50485 (Dutchess Co. 2020.)

8. For example, 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* (which is what occurred herein) *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.

[The regulation] ...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 ... two [statutory] 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. Similarly, in *Jennings*, supra, this Court granted a new hearing and stated:

“...[T]he Court finds that Petitioner has demonstrated that the Board's determination to deny him release evinces irrationality bordering on impropriety. *This is*

most clearly demonstrated with respect to the Board's stated intention to depart from Petitioner's COMPAS. In its Decision, the Board noted Petitioner's 'low risk COMPAS,' however the Decision then states that [the Panel departed based on alleged shallow remorse.]

...[T]he Court finds that although the Board indicates that it chose to depart from the COMPAS... [it did not] 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 that reason for the departure is the shallowness of his remorse. Notably, the COMPAS 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 instrument. ... As the evidence before the Court demonstrates that the Parole Board did not comply with the requirements of 9 NYCRR 8002.2(a), judicial intervention is warranted because this departure from the regulations evinces irrationality bordering on impropriety." *Jennings, supra*, at 3-5, emphasis supplied.

CONCLUSION

10. Based on the foregoing, the Court should grant a *de novo* hearing, and Petitioner respectfully requests that if the Court grants a *de novo* hearing, that the interview occur within 30 days of the decision.

AFFIRMED: April 27, 2022.

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

TO: Hon. Maria G. Rosa
Supreme Court Justice
10 Market Street – 2nd floor
Poughkeepsie, NY 12601

J. Gardner Ryan, Esq.
NYS Attorney General's Office
One Civic Center Plaza, Suite 401
Poughkeepsie, New York 12601

[REDACTED]

[REDACTED]

FUSL000138

[REDACTED]
(Address on file)