

Fordham Law School

## FLASH: The Fordham Law Archive of Scholarship and History

---

Art. 78 Responses

Article 78 Litigation Documents

---

### Art. 78 Response - FUSL000051 (2020-07-21)

Follow this and additional works at: [https://ir.lawnet.fordham.edu/art78\\_response](https://ir.lawnet.fordham.edu/art78_response)

---

STATE OF NEW YORK  
SUPREME COURT COUNTY OF ONONDAGA

-----  
In the Matter of the Application of

[REDACTED],

Petitioner,

-vs-

**SUPPLEMENTAL  
VERIFIED ANSWER AND  
RETURN**

**Index No.:** [REDACTED]  
**Hon. Scott J. Delconte**

NEW YORK STATE DEPARTMENT OF  
CORRECTIONS AND COMMUNITY SUPERVISION,  
ANTHONY J. ANNUCCI, ACTING COMMISSIONER,  
TINA STANFORD CHAIRWOMAN, BOARD OF PAROLE,

Respondents.

For a Judgment Pursuant to Article 78 of  
the Civil Practice Law and Rules

-----  
Respondent, by its attorney, LETITIA JAMES, Attorney General of the State of New York,  
Ray A. Kyles, of Counsel, answering the Petition in the above entitled proceeding alleges as  
follows:

**PETITIONER’S ASSERTION THAT THE BOARD FAILED TO  
CITE ANY AGGRAVATING FACTORS IN DENYING PAROLE  
RELEASE IS WITHOUT MERIT**

1. The Petitioner claims that the Board decision is based upon the instant offense only,  
that no aggravating factors exist, that the Board is saying the killing of a police officer means the inmate  
will never, ever be paroled.

2. The Board decision cites the fact the Petitioner still has an uncontrollable temper. That  
is 2020, not 1972, and is not based upon the instant offense. The Board may take note that the murder  
was premeditated, and carried out with anger. *Gaston v. Berbary*, 16 A.D.3d 1158, 791 N.Y.S.2d 781  
(4<sup>th</sup> Dept 2005). The Parole Board may state the inmate needs to further reflect on why he singled out  
this particular victim. *Campbell v. Stanford*, 173 A.D.3d 1012, 105 N.Y.S.3d 461 (2<sup>nd</sup> Dept 2019). By

not telling the Board the entire truth about what happened concerning mitigating factors, the Board may emphasize the inmate's failure to take responsibility for the criminal offense. *Cruz v. Alexander*, 67 A.D.3d 1240, 890 N.Y.S.2d 656 (3<sup>rd</sup> Dept 2009); *Abdur-Raheem v. New York State Board of Parole*, 78 A.D.3d 1412, 911 N.Y.S.2d 257 (3<sup>rd</sup> Dept. 2010); *Khatib v. New York State Board of Parole*, 118 A.D.3d 1207, 988 N.Y.S.2d 286 (3<sup>rd</sup> Dept 2014); *Crawford v. New York State Board of Parole*, 144 A.D.3d 1308, 46 N.Y.S.3d 228 (3<sup>rd</sup> Dept 2016).

3. As for a lack of aggravating circumstances, that is incorrect. The Board decision cited the senseless nature of the crime. The facts are the Petitioner engaged in friendly conversation with the police, luring them into a false sense of security. He then approached one from behind and in a totally unprovoked manner stabbed him to death. Petitioner then tried to escape. So, aggravating factors do exist. And as for the *Johnson* case, this only applies if there is nothing else. Well, in this matter the Petitioner gave a poor account in front of the Parole Board concerning his violent temper. That is a current factor. So, the aggravating factor equation doesn't even apply.

4. The Board may take note of the inmate's disregard for the life of another human being. *Hakim v. Travis*, 302 A.D.2d 821, 754 N.Y.S.2d 600 (3<sup>rd</sup> Dept 2003); *Angel v. Travis*, 1 A.D.3d 589, 767 N.Y.S.2d 290 (3<sup>rd</sup> Dept 2003). The Board may consider the inmate's blatant disregard for the law and the sanctity of human life. *Campbell v. Stanford*, 173 A.D.3d 1012, 105 N.Y.S.3d 461 (2<sup>nd</sup> Dept 2019).

5. In this instance, the record reflects that the Board properly considered the required factors and adequately set forth its reasons for denying parole. The Board is not required to give each factor equal weight and may place greater emphasis on the gravity of the inmate's offense. *Matter of Jones v. New York State Dep't of Corr. & Cmty. Supervision*, 151 A.D.3d 1622, 57 N.Y.S.3d 265 (4<sup>th</sup> Dept 2017); *Matter of Kenefick v. Sticht*, 139 A.D.3d 1380, 31 N.Y.S.3d 367 (4<sup>th</sup> Dept 2016); *Matter*

of *Fischer v. Graziano*, 130 A.D.3d 1470, 12 N.Y.S.3d 756, 756 (4<sup>th</sup> Dept), *lv. denied*, 132 A.D.3d 1331, 17 N.Y.S.3d 344 (2015); *Matter of Delacruz v. Annucchi*, 122 A.D.3d 1413, 997 N.Y.S.2d 872 (4<sup>th</sup> Dept 2014); *Matter of Freeman v. Fischer*, 118 A.D.3d 1438, 988 N.Y.S.2d 780 (4<sup>th</sup> Dept 2014). “[T]he record establishes, although the Parole Board placed heavy emphasis on the severity of petitioner’s offense, it did not solely consider that factor” and “it cannot be said that the Parole Board’s determination that petitioner is not yet suitable for release was ‘so irrational under the circumstances as to border on impropriety.’” *Matter of Freeman v. Fischer*, 118 A.D.3d 1438, 988 N.Y.S.2d 780 (4<sup>th</sup> Dept 2014) (citation omitted). “The decision to deny parole may be based upon the seriousness of the crime and its violent nature.” *Matter of Putland v. Herbert*, 231 A.D.2d 893, 648 N.Y.S.2d 401 (4<sup>th</sup> Dept 1996), *lv. denied*, 89 N.Y.2d 806, 654 N.Y.S.2d 716 (1997).

6. The Board may deny parole release without the existence of any aggravating factors, no matter how exemplary the institutional record is. *Hamilton v. New York State Division of Parole*, 119 A.D.3d 1268, 1272, 990 N.Y.S.2d 714 (3<sup>rd</sup> Dept 2014).

7. One can also argue that the *Johnson* aggravating factor decision was impliedly overruled in *Karlin v. Cully*, 104 A.D.3d 1285, 960 N.Y.S.2d 827 (2013).

8. Even if the Board felt the severity of the crime was enough to deny parole does not mean the Board was biased. *Garcia v. New York State Division of Parole*, 239 A.D.2d 235, 657 N.Y.S.2d 415 (1<sup>st</sup> Dept 1997).

9. Nothing in the Board’s decision indicates a permanent denial of parole consideration. *Hodge v. Griffin*, 2014 WL 2453333 (SDNY 2014).

CONCLUSION

10. Although the Parole Board focused on the "serious" nature of petitioner's crimes, it "also considered petitioner's program accomplishments, risk and needs assessment and low scores in making its decision. *see Matter of Silmon v. Travis*, 95 NY2d at 476-477). Further, the Board's challenged decision was made in accordance with the pertinent statutory requirements and, therefore, it exercised proper discretion in denying Petitioner early release on parole. *Matter of Rhoden v. New York State Div. of Parole*, 270 AD2d 550 (3<sup>rd</sup> Dept 2000), *leave dismissed*, 95 NY2d 898 (2000); *Matter of Barrett*, 242 AD2d

WHEREFORE, the Respondent respectfully requests judgment dismissing the Petition or an Order transferring this proceeding to the Appellate Division, Fourth Department and for such other and further relief as to the court seems just and proper.

DATED: July 21, 2020  
Syracuse, New York

LETITIA JAMES  
Attorney General  
State of New York  
Attorney for State Defendant  
*/s/ Ray A. Kyles*  
RAY A. KYLES  
Assistant Attorney General  
New York State Office of the Attorney General  
300 South State Street, Suite 300  
Syracuse, New York 13202  
Telephone: 315-448-4800  
Email: [ray.kyles@ag.ny.gov](mailto:ray.kyles@ag.ny.gov)

**VERIFICATION**

I, RAY A KYLES, ESQ., hereby affirm pursuant to CPLR 2106 that:

I am of counsel to LETITIA JAMES, Attorney General of the State of New York, and the person to whom the above-entitled lawsuit has been assigned for preparation of the defense and trial.

I have read the foregoing **SUPPLEMENTAL ANSWER AND RETURN** and know its contents. The matters therein are stated on information and belief and I believe them to be true. The grounds for my belief as to all matters not stated upon my knowledge are correspondence and other material maintained in the file in this action in my office.

DATED: July 21, 2020  
Syracuse, New York

*/s/ Ray A. Kyles*  
RAY A. KYLES