At a term of Supreme Court held in and for the County of Wyoming, at Attica, New York, on the 3rd day of May, 2007.

PRESENT: HONORABLE MARK H. DADD
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT : COUNTY OF WYOMING

In the Matter of the Application of
FLETCHER RUMPH, #95-B-2675, *Petitioner*

v.

Index No. 20,437-07

GEORGE ALEXANDER, Acting Chairman,
New York State Division of Parole, *Respondent*

For the Petitioner
WYOMING COUNTY-ATTICA LEGAL
AID BUREAU, INC.
Norman P. Effman, Director
14 Main Street
Attica, New York 14011

For the Respondent
ANDREW M. CUOMO, Attorney General
by Paul Volcy
Assistant Attorney General
Statler Towers, Fourth Floor
107 Delaware Avenue
Buffalo, New York 14202

MEMORANDUM AND JUDGMENT

By petition pursuant to Article 78 of the CPLR verified on March 9, 2007, Fletcher Rumph seeks review of a parole release hearing conducted on March 15, 2006. Petitioner appeared with counsel assigned by an order to show cause dated March 13, 2007 and contended that he should be granted a de novo hearing. Respondent requests that the petition be denied upon the answer dated April 20, 2007 and the record of confidential information submitted to the Court.

The petition is without merit. The Board of Parole could cite the petitioner's criminal history, including the violent conduct underlying his latest conviction for robbery,

as sufficient grounds for denying release (see Matter of Fuchino v. Herbert, 255 A.D.2d 914 [1998]; Matter of Scott v. Russi, 208 A.D.2d 931 [1994]; Matter of Putland v. Herbert, 231 A.D.2d 893 [1996], motion for leave to appeal denied 89 N.Y.2d 806; People ex rel Justice v. Russi, 226 A.D.2d 821 [1996]; Matter of Fortune v. Russi, Supreme Court of Wyoming County, Index No. 17,207, Memorandum and Judgment dated July 22, 1994, annexed, affirmed 219 A.D.2d 869 [1995]). The commissioners had discretion to place greater weight on these factors than they placed on his program performance, institutional adjustment and proposed release plans (see Matter of Ristau v. Hammock, 103 A.D.2d 944 [1984], motion for leave to appeal denied 63 N.Y.2d 608; Matter of Rentz v. Herbert, 206 A.D.2d 944 [1994], motion for leave to appeal denied 84 N.Y.2d 810). Furthermore, their decision did not have to specifically mention every factor weighed in reaching a determination (see Matter of Mackall v. New York State Board of Parole, 91 A.D.2d 1023 [1983], motion for leave to appeal denied 58 N.Y.2d 609; Matter of Davis v. New York State Division of Parole, 114 A.D.2d 412 [1985]). Petitioner has not demonstrated that the commissioners failed to give fair consideration to all of the relevant statutory factors pursuant to Executive Law §259-i(2)(c) (see Matter of Zane v. Travis, 231 A.D.2d 848 [1996]; People ex rel Thomas v. Superintendent of Arthur Kill Correctional Facility, 124 A.D.2d 848 [1986], leave denied 69 N.Y.2d 611). Thus, judicial intervention is precluded in this matter because the petitioner has failed to establish that the respondent's decision was made in violation of the law or not supported by the record and tainted by "irrationality bordering on impropriety" (see Matter of Russo v. New York State Division of Parole, 50 N.Y.2d 69, 77 [1980]; Matter of Despard v. Russi, 192 A.D.2d 1076 [1993], motion for leave to appeal denied 82 N.Y.2d 652).

Upon review of the entire record, the Court further finds that the petitioner is not entitled to relief upon his claim that this disposition was "excessive" (see Matter of Pell v. Board of Education, 34 N.Y.2d 222, 233 [1974]; Matter of Madlock v. Russi, 195 A.D.2d 646 [1993]).

NOW, THEREFORE, it is hereby

ORDERED that the petition is denied.

DATED: May 3, 2007
Warsaw, New York

Acting Supreme Court Justice

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At a term of the Supreme Court held in and for the County of Wyoming, at Attica, New York, on the 8th day of July, 1994.

PRESENT: **HONORABLE MARK H. DADD**
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT : COUNTY OF WYOMING

In the Matter of the Application of
ANTHONY FORTUNE, #77-A-3778, Petitioner

v. **Index No. 17,207**

RAUL RUSSI, Chairman, New York State Division of Parole
et al, Respondents

FOR RELIEF PURSUANT TO ARTICLE 78 CPLR

For the Petitioner
WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC.
Norman P. Effman, Director
14 Main Street
Attica, New York 14011

For the Respondents
G. OLIVER KOPPELL
Attorney General
by Mary Jo Lattimore-Young
Assistant Attorney General
65 Court Street
Buffalo, New York 14020

MEMORANDUM AND JUDGMENT

By petition pursuant to Article 78 of the CPLR verified on May 20, 1994, Anthony Fortune seeks review of a parole release hearing conducted on October 28, 1993. Petitioner appeared with counsel assigned by an order to show cause dated May 25, 1994 and contended that he should be granted a de novo hearing. Respondents request that relief be denied upon the answer dated June 27, 1994 and the record of confidential information submitted to the Court.

The Board of Parole issued the following statement upon considering the petitioner's suitability for parole release: "[p]arole is again denied due to the extreme gravity of your controlling conviction for Murder 2°, wherein during the course of an in concert robbery, you shot the owner of a butcher shop in the head". Petitioner's counsel primarily argues that this statement was a "simple generalization" and insufficient to justify the denial of release because the Board failed to specify why this particular crime should preclude release.

Petitioner relies upon a recent decision by the Appellate Division for the First Department in challenging the adequacy of the Board's decision. In Matter of King v. New York State Division of Parole (190 A.D.2d 423 [1993]), the Appellate Division affirmed a Supreme Court order annulling a Parole Board decision to deny release based upon the serious nature of an inmate's felony murder conviction for the killing of an off-duty police officer. Much of the opinion was concerned with inappropriate comments of a commissioner at the hearing which, according to the Appellate Division, showed that "the decision of the Parole Board was based upon a fundamental misunderstanding of its role and its power..." (p. 430). These remarks were interpreted as showing that the Board had failed to properly consider relevant statutory standards and had instead proceeded "on the assumption that its primary duty was to determine, in the abstract, the appropriate penalty for murder in today's society" (pp. 431-432).

The Appellate Division also criticized the manner in which the Parole Board had applied one of the factors relevant to its decision: the seriousness of the inmate's crime. The Court noted that the legislature "has not defined 'seriousness of [the] crime' in terms of specific categories of either crimes or victims and it is apparent that in order to preclude the granting of parole exclusively on this ground there must have been some significantly aggravating or egregious circumstances surrounding the commission of the particular crime (citation omitted). Certainly every murder

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conviction is inherently a matter of the utmost seriousness since it reflects the unjustifiable taking and tragic loss of a human life. Since, however, the Legislature has determined that a murder conviction per se should not preclude parole, there must be a showing of some aggravating circumstances beyond the inherent seriousness of the crime itself" (p. 433). The Appellate Division further criticized the Board for failing "to examine the evidence at trial" and only taking into account the death of the police officer to evaluate the severity of the criminal conduct (p. 433). Petitioner's counsel relies upon this holding to support his contention that the instant decision of the Board failed to specify why the petitioner's crime was so serious as to preclude release.

The New York Court of Appeals affirmed the Appellate Division's order which remanded the case to the Board for a de novo hearing (see Matter of King v. New York State Division of Parole, 83 N.Y.2d 788 [1994]). The Court of Appeals, however, did not do so on the Appellate Division's decision. The Court of Appeals issued its own opinion which focused upon the commissioner's inappropriate comments on the record. The Court concluded that the record included evidence "that petitioner was not afforded a proper hearing because one of the Commissioners considered factors outside the scope of the applicable statute, including penal philosophy, the historical treatment of individuals convicted of murder, the death penalty, life imprisonment without parole, and the consequences to society if those sentences are not in place. Consideration of such factors is not authorized by Executive Law §259-i" (p. 791). The Court expressed no opinion as to how the seriousness of an offense is to be determined but merely noted that it was a mandatory factor for consideration under the statute (p. 790).

It thus appears that the New York Court of Appeals did not adopt the First Department's condemnation of the manner in which the Board of Parole evaluated the serious nature of an offense. This Court, therefore, would not be bound by the First

Department's decision if there is contrary appellate authority in another Department.

The Court is of the opinion that the First Department's opinion in Matter of King v. New York State Division of Parole (supra) is inconsistent with the decisions in the Fourth Department and other appellate decisions which have interpreted the Board's authority to deny release under the Executive Law and the prior similar statutory authority under the Correction Law. These decisions have approved the denial of release based upon a similar reference to the serious nature of the type of crime at issue (see Matter of Watkins v. Caldwell, 54 A.D.2d 42 [1976], motion for leave to appeal dismissed 40 N.Y.2d 986; Matter of Gonzague v. New York State Board of Parole, 58 A.D.2d 707 [1977]; Matter of Ristau v. Hammock, 103 A.D.2d 944 [1984], motion for leave to appeal denied 63 N.Y.2d 608; Matter of Fusco v. Chairman, Board of Parole of the State of New York, 59 A.D.2d 973 [1977], leave denied 43 N.Y.2d 648; Matter of Ittig v. New York Board of Parole, 59 A.D.2d 972 [1977], leave denied 43 N.Y.2d 648; Matter of Rentz v. Herbert, __ A.D.2d __, decision filed by the Appellate Division for the Fourth Department dated July 15, 1994).

Petitioner admitted before the Board of Parole that his criminal conduct had been "extremely serious" (transcript, p. 5). The Board had discretion to place primary reliance upon this factor and attach less significance to his performance in institutional programs (see Matter of Ristau v. Hammock, 103 A.D.2d 944 [1984], motion for leave to appeal denied 63 N.Y.2d 608; Matter of Ortiz v. Hammock, 96 A.D.2d 735 [1983]; Matter of Sinopoli v. New York State Board of Parole, 189 A.D.2d 960 [1993]; Matter of Walker v. Russi, 176 A.D.2d 1185 [1991], appeal dismissed 79 N.Y.2d 897; Matter of Salcedo v. Ross, 183 A.D.2d 771 [1992]). Thus, judicial intervention is precluded in this matter because the petitioner has failed to establish that the respondents' decision was made in violation of the law or not supported by the record and tainted by "irrationality bordering on impropriety" (see Matter of Despard v.

Russi, 192 A.D.2d 1076 [1993], motion for leave to appeal denied 82 N.Y.2d 652).

Upon review of the entire record, the Court further finds that the petitioner is not entitled to relief upon his claim that the disposition was "excessive" (see Matter of Pell v. Board of Education, 34 N.Y.2d 222, 233 [1974]; Matter of Madlock v. Russi, 195 A.D.2d 646 [1993]).

NOW, THEREFORE, it is hereby

ORDERED that the petition is denied.

DATED: July 22, 1994
Warsaw, New York

Acting Supreme Court Justice

STATE OF NEW YORK
Wyoming County Clerk's Office

ss.

I, Jean M. Krotz, Clerk of the County of Wyoming, of the County Court of said County, and the Supreme Court, both Courts being Courts of Record having a common seal, do hereby certify that I have compared the annexed copy of Judgment with the original entered 7/23/94 in this office, and that the same is a correct transcript thereof and of the whole of said original. In Testimony whereof, I have hereunto set my hand and affixed the seal of said County and Courts, at Warsaw, N.Y. MAY 24 1995

Jean M. Krotz, Clerk