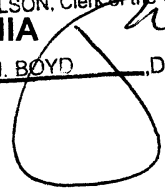


JUN 17 2010

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF ORANGE**

ALAN CARLSON, Clerk of the Court  
BY J. BOYD, DEPUTY



In re RICHARD LEE SMITH, )  
 )  
Petitioner, )  
 )  
ON HABEAS CORPUS )  
\_\_\_\_\_ )

Orange County Superior Court  
Case Number: M-13090  
(C-55210)

**ORDER GRANTING  
HABEAS CORPUS**

**TO THE OFFICE OF THE CALIFORNIA ATTORNEY GENERAL AND COUNSEL FOR  
PETITIONER:**

HAVING CONSIDERED THE ABOVE CAPTIONED PETITION FOR WRIT OF  
HABEAS CORPUS, THE RETURN AND THE TRAVERSE, THE COURT MAKES THE  
FOLLOWING ORDER<sup>1</sup>:

I.

On March 20, 1986, a jury found petitioner guilty of second degree murder [Pen.  
Code, § 187] committed through the personal use of a firearm [Pen. Code, §  
12022.5(a)]. On May 30, 1986, petitioner was sentenced to an indeterminate term of 17  
years to life in state prison with the possibility of parole. The judgment was affirmed on  
appeal.

On May 13, 2009, the California Board of Parole Hearings determined petitioner  
was suitable for release on parole following a subsequent parole consideration hearing.  
In concluding that petitioner would not pose an unreasonable risk of danger to society or  
a threat to public safety if released on parole, the Board found petitioner 1) has no

<sup>1</sup> An evidentiary hearing is not required in this proceeding as petitioner's entitlement to relief does not depend upon resolution of disputed issues of fact. (See, Cal. Rules of Court, rule 4.551(f).)

1 criminal history outside of the commitment offense; 2) committed the offense due to  
2 significant stress built over a period of time; 3) accepts responsibility for his conduct and  
3 is remorseful; 4) has an exceptional discipline-free institutional record; 5) has  
4 participated in extensive institutional and self-help programs; 6) has secured a favorable  
5 psychological assessment; 7) has developed realistic parole plans and understands his  
6 need for long-term medication and management of his mental illness; and 8) is a 68  
7 year old inmate in poor health who is not likely to commit future crimes.  
8

9 On March 15, 2010, Governor Schwarzenegger reversed the Board's decision.<sup>2</sup>  
10

11 In concluding that petitioner would pose an unreasonable risk of danger to society if  
12 released on parole, the Governor specifically found that:

- 13 A. The commitment offense was especially heinous because it was carried  
14 out in a dispassionate, calculated and premeditated manner;  
15  
16 B. Petitioner minimizes his involvement in the murder and has yet to accept  
17 full responsibility for his crime; and.  
18  
19 C. Petitioner has an extensive history of mental illness and of refusing to  
20 seek treatment and medication prior to the commitment offense.

21 II.

22 Petitioner seeks reinstatement of the Board of Parole Hearings' grant of parole  
23 claiming Governor Schwarzenegger violated petitioner's constitutional right to due  
24 process by finding him unsuitable for parole without any reliable evidence establishing  
25

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26 <sup>2</sup> On February 11, 2010, this Court granted petitioner's prior petition for writ of habeas corpus that  
27 challenged Governor Schwarzenegger's October 5, 2009 decision reversing the Board of Parole  
28 Hearings' grant of parole. The Court ordered the Governor's decision vacated and the Board's May 13,  
2009 decision reinstated. The matter was ordered remanded back to the Governor for reconsideration in  
accordance with due process requirements as established in *In re Lawrence* (2008) 44 Cal.4<sup>th</sup> 1181.  
(Orange County Superior Court case number: M-12910) The Governor's decision presently under review  
was issued in response to this court's February 11, 2010 order.

1 that he remains a current unreasonable threat to public safety if released on parole.

2 Petitioner also contends that his continued imprisonment constitutes impermissible cruel  
3 and unusual punishment.  
4

5 III.

6 “Every inmate has a constitutionally protected liberty interest in parole decisions  
7 ordered by the Board and reviewed by the Governor.” (*In re Aguilar* (2008) 168  
8 Cal.App.4<sup>th</sup> 1479, 1486.) The Governor has the authority to review a Board's decision  
9 to parole an inmate convicted of murder. (Cal. Const., art. V, § 8(b); Pen. Code, §  
10 3041.2.) The Governor undertakes an independent, de novo review of an inmate's  
11 suitability for parole. (*In re Smith* (2009) 171 Cal.App.4<sup>th</sup> 1631, 1637.) “The Governor's  
12 decision to reverse a grant of parole by the Board is governed by the same factors that  
13 guide the Board's decision and is based on materials provided by the parole authority.”  
14 (*In re Vasquez* (2009) 170 Cal.App.4<sup>th</sup> 370, 381.) “The Governor has discretion to be  
15 more stringent or cautious in determining whether a defendant poses an unreasonable  
16 risk to public safety.” (*In re Ross* (2009) 170 Cal.App.4<sup>th</sup> 1490, 1505.)  
17

18  
19 “Although due process requires that the Governor's decision be supported by  
20 some evidence in the record, only a modicum of evidence is required and the Governor  
21 has the authority to resolve any conflicts in the evidence and to decide the weight to be  
22 given the evidence.” (*In re Vasquez, supra*, 170 Cal.App.4<sup>th</sup> at 381.) In reviewing a  
23 parole suitability determination made by the Governor, a court views the record in the  
24 light most favorable to that determination. (*In re Morrall* (2002) 102 Cal.App.4<sup>th</sup> 280,  
25 301.)  
26  
27  
28

1           “When a court reviews a decision of the Board or the Governor, the relevant  
2 inquiry is whether some evidence supports the *decision* of the Board or the Governor  
3 that the inmate constitutes a current threat to public safety, and not merely whether  
4 some evidence confirms the existence of certain factual findings.” (*In re Lawrence*  
5 (2008) 44 Cal.4<sup>th</sup> 1181, 1212.)  
6

7           “Although the Board and the Governor may rely upon the aggravated  
8 circumstances of the commitment offense as a basis for a decision denying parole, the  
9 aggravated nature of the crime does not in and of itself provide some evidence of  
10 *current* dangerousness to the public unless the record also establishes that something  
11 in the prisoner’s pre- or post-incarceration history, or his or her current demeanor and  
12 mental state, indicates that the implications regarding the prisoner’s dangerousness that  
13 derive from his or her commission of the commitment offense remain probative to the  
14 statutory determination of a continuing threat to public safety.” (*Ibid.* at 1214.)  
15  
16

17           The precise manner in which the specified factors relevant to parole suitability  
18 are considered and balanced lies within the discretion of the Governor, but the decision  
19 must reflect an individualized consideration of the specified criteria and cannot be  
20 arbitrary or capricious. It is irrelevant that a court might determine that evidence in the  
21 record tending to establish suitability for parole far outweighs evidence demonstrating  
22 unsuitability for parole. As long as the decision reflects due consideration of the  
23 specified factors as applied to the individual prisoner in accordance with applicable legal  
24 standards, the court’s review is limited to ascertaining whether there is some evidence  
25 in the record that supports the decision. (*In re Rosenkrantz* (2002) 29 Cal.4th 616,  
26 677.)  
27  
28

1 IV.

2 Evidence in the record supports the Governor's finding concerning the  
3 commitment offense. The manner in which the offense was carried out by petitioner  
4 reasonably supports the Governor's characterization of the crime as a dispassionate,  
5 calculated and premeditated murder. (Cal. Code Regs., tit. 15, § 2402(c)(1)(B).)  
6

7 Petitioner was a philosophy professor at Cal State Fullerton. Between 1967 and  
8 1973, petitioner was hospitalized six different times for acute paranoid schizophrenic  
9 reaction, chronic undifferentiated schizophrenia and chronic paranoid schizophrenia.  
10

11 In late 1982 or 1983, petitioner fell in love with one of his female students and  
12 began to financially support her and her children despite the fact she was married. The  
13 student and her husband separated in the summer of 1983.

14 In April 1984, petitioner set the husband's car on fire while dressed in  
15 conspicuously mismatched clothes. Around the same time, petitioner acquired a  
16 firearm. Later that same month, petitioner rented a blue Camaro and placed stolen  
17 plates on it. During the early morning hours of May 3, 1984, petitioner confronted the  
18 unarmed husband as he left for work and fatally shot him multiple times before fleeing.  
19

20 Petitioner was arrested by police several days later. The gun and stolen plates  
21 were never found. Petitioner told one psychologist that God directed him to kill the  
22 victim. He later denied having killed the victim to another psychologist. During yet  
23 another interview with a third psychologist, petitioner was intermittingly aware of having  
24 killed the victim.  
25

26 The record, however, does not disclose evidentiary support for the Governor's  
27 finding that petitioner minimizes his involvement in the murder and has yet to fully take  
28

1 responsibility for his crime. Though petitioner denied involvement in the murder shortly  
2 after his arrest and has indicated in the past that he was encouraged or convinced to  
3 commit the murder by the victim's spouse, the Governor takes petitioner's statements  
4 out of context.

5 Petitioner suffered from mental illness at the time of the murder. During the  
6 hearing before the Board, petitioner explained that he began to realize what he had  
7 done and to feel remorse while being treated at Atascadero State Hospital during and  
8 after his trial. He expressed regret for not taking his medication which played a role in  
9 petitioner committing the crime. Petitioner repeatedly explained to the Board that his  
10 description of the actions taken by the victim's spouse was offered not to blame her or  
11 to excuse his conduct but instead to describe his recollection of what caused him to  
12 commit the crime. Petitioner accepted full responsibility for the murder and was  
13 genuinely remorseful. In an August 2008 psychological assessment, Dr. Robert  
14 Sargent opined petitioner possesses an excellent level of insight into his past actions  
15 and poses a low risk to engage in future violence. In view of this record, petitioner's  
16 selected past statements concerning his involvement in the murder do not constitute  
17 reliable evidence demonstrating minimization of responsibility or a failure to accept  
18 responsibility for the crime. Petitioner's past statements also do not have a rational  
19 bearing on whether he currently poses an unreasonable danger to public safety if  
20 released on parole.  
21  
22  
23

24 A lack of insight is probative of parole unsuitability "only to the extent that it is  
25 both (1) demonstrably shown by the record and (2) rationally indicative of the inmate's  
26 current dangerousness." (*In re Calderon* (2010) 184 Cal.App.4<sup>th</sup> 670, 109 Cal.Rptr.3d  
27  
28

1 229, 243.) No evidence supports a finding that an inmate lacks insight into his crime  
2 where the evidence discloses that the inmate understands the reasons for his actions,  
3 recognizes individual characteristics that caused him to commit the offense, and has  
4 learned to address in socially acceptable ways the anger arising from life's inevitable  
5 frustrations. (See, *In re Singler* (2008) 169 Cal.App.4<sup>th</sup> 1227, 1243.)  
6

7 Finally, some evidence in the record supports the Governor's finding that  
8 petitioner has an extensive history of mental illness and of refusing to seek treatment  
9 and medication for his condition prior to the commitment offense. This same evidence,  
10 however, does not support the Governor's ultimate conclusion that petitioner continues  
11 to pose an unreasonable risk to public safety if released on parole.  
12

13 Petitioner was hospitalized numerous times for mental illness between 1967 and  
14 1973. He also has admitted that he did not take prescribed medication for ten years  
15 prior to the commitment offense believing that he could take care of the problem on his  
16 own.  
17

18 This information is over 25 years old and no longer probative of whether  
19 petitioner poses a current threat to public safety in view of evidence in the record  
20 addressing the issue. During the hearing before the Board, a remorseful petitioner  
21 acknowledged his mistake in believing he could handle his mental illness alone. He  
22 expressed a detailed understanding of the triggers that could cause him to  
23 decompensate as well as an understanding of his need for life-long medication.  
24 Petitioner has continuously taken his medication since 1989 and his schizophrenia has  
25 been in institutional remission for the past 20 years. Petitioner's parole plans include  
26 residing with his wife who is a former psychiatric nurse and who will manage his mental  
27  
28

1 illness with assistance from the Life Adjustment Team in Orange County. Based on this  
2 record, there is no evidence to support the Governor's determination that petitioner  
3 poses a current unreasonable threat to public safety due to an extensive history of  
4 mental illness and past reluctance to seek treatment and medication for the condition.  
5

6 The Governor's speculative concern that petitioner may commit additional crimes  
7 while on parole if he again refuses to take his medication and submit to treatment for his  
8 mental illness is not corroborated by evidence in the record and is insufficient to justify  
9 his decision. A Governor's reversal of an indeterminate life prisoner's grant of parole  
10 must be based on some evidence of current dangerousness, not speculation as to  
11 future dangerousness. (*In re Loesch* (2010) 183 Cal.App.4<sup>th</sup> 150, 153.)  
12

13 V.

14 Though the Governor's findings concerning the commitment offense and  
15 petitioner's history of mental illness have evidentiary support, his decision to reverse the  
16 Board of Parole Hearings' grant of parole is flawed and cannot be upheld. Specifically,  
17 the Governor's decision does not articulate why petitioner's crime and past history of  
18 mental illness remain relevant to the question of parole suitability and support his  
19 determination that petitioner continues to pose an unreasonable risk of danger to  
20 society if released on parole.  
21  
22

23 Petitioner committed the murder over 25 years ago. Weighing against this factor  
24 is an exemplary record of rehabilitation developed over 24 years of imprisonment.  
25 Petitioner does not have a criminal record outside of the commitment offense and has  
26 not engaged in violence or misconduct while imprisoned. Petitioner is a former college  
27 professor who has earned vocational certification in radiology and satisfactorily  
28



1 participated in institutional and self-help programming including but not limited to Life  
2 Skills, Men's Advisory Council, Spiritual Awareness group therapy and individual  
3 psychotherapy. He has developed realistic parole plans that specifically address his  
4 need for life-long management and medication of his mental illness and has been  
5 consistently deemed by forensic psychologists for the past twenty years to pose a low  
6 risk to engage in future violence or criminal misconduct if released on parole. Petitioner  
7 is 68 years old and in poor health. Petitioner uses a walker to move around and suffers  
8 from chronic obstructive pulmonary disease, diabetes, arthritis and congestive heart  
9 failure that required aortic valve replacement in 2007.

12 In reviewing the Governor's determination, the Court's inquiry necessarily  
13 focuses on whether some evidence supports the Governor's decision that petitioner  
14 constitutes a current unreasonable threat to public safety and not merely whether some  
15 evidence supports the existence of certain factual findings. The decision before this  
16 Court does not meet this standard.

18 The Governor "may base a denial-of-parole decision upon the circumstances of  
19 the offense, or upon other immutable facts such as an inmate's criminal history, but  
20 some evidence will support such reliance *only* if those facts support the ultimate  
21 conclusion that an inmate *continues* to pose an unreasonable risk to public safety." (*In*  
22 *re Lawrence, supra*, 44 Cal.4<sup>th</sup> at 1221.) Under the some evidence standard, a  
23 reviewing court reviews the merits of the Governor's decision, and is not bound to affirm  
24 a parole decision merely because the Governor has adhered to all procedural  
25 safeguards. "This standard is unquestionably deferential, but certainly is not toothless,  
26 and due consideration of the specified factors requires more than rote recitation of the  
27  
28

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1 relevant factors with no reasoning establishing a rational nexus between those factors  
2 and the necessary basis for the ultimate decision-the determination of current  
3 dangerousness." (*In re Lawrence, supra*, 44 Cal.4<sup>th</sup> at 1210.)  
4

5 VI.

6 The Governor's reversal of the Board's decision to grant parole is not supported  
7 by some evidence and cannot be upheld. Under these circumstances, the proper  
8 remedy is to vacate the Governor's decision and reinstate the determination made by  
9 the Board of Parole Hearings. (*In re Dannenberg* (2009) 173 Cal.App.4<sup>th</sup> 237, 256; *In re*  
10 *Vasquez* (2009) 170 Cal.App.4<sup>th</sup> 370, 386; *In re Burdan* (2008) 169 Cal.App.4<sup>th</sup> 18, 39.)  
11 In view of the determination reached on petitioner's principal claim of error, it is  
12 unnecessary to address his related contention that his continued imprisonment  
13 constitutes impermissible cruel and unusual punishment.  
14

15 The petition for writ of habeas corpus is GRANTED. The Governor's March 15,  
16 2010 decision reversing the Board of Parole Hearings' grant of parole is vacated and  
17 the Board's May 13, 2009 decision is ordered reinstated.  
18

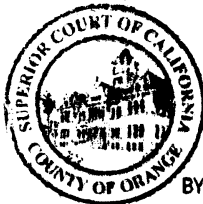
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21 Dated: 6/17/10



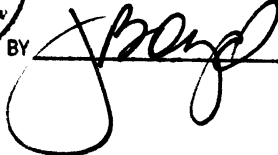
22   
23 Judge of the Superior Court

24 Thomas M. Goethals

25 I hereby certify the foregoing instrument consisting of 10 page(s)  
26 is a true and correct copy of the original on file in this court.



27 ATTEST: (DATE) 6-22-10  
ALAN CARLSON, EXECUTIVE OFFICER AND CLERK OF THE  
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

28 BY  DEPUTY