

FILED

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

FEB 11 2010

SUPERIOR COURT OF THE STATE OF CALIFORNIA

ALAN CARLSON, Clerk of the Court

FOR THE COUNTY OF ORANGE

BY J. BOYD DEPUTY

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

Orange County Superior Court
Case Number: M-12910
(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 ORDER¹:

I.

Petitioner is presently serving an indeterminate term of 17 years to life in state
prison with the possibility of parole following his 1986 conviction for second degree
murder [Pen. Code, § 187] committed through the personal use of a firearm [Pen. Code,
§ 12022.5(a)]. The judgment was affirmed on appeal.

On May 13, 2009, the California Board of Parole Hearings deemed petitioner
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
criminal history outside of the commitment offense; 2) committed the offense due to

¹ 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 significant stress built over a period of time; 3) accepts responsibility for his conduct and
2 is remorseful; 4) has an exceptional discipline-free institutional record; 5) has
3 participated in extensive institutional and self-help programs; 6) has secured a favorable
4 psychological assessment; 7) has developed realistic parole plans and understands his
5 need for long-term medication and management of his mental illness; and 8) is a 68
6 year old inmate in poor health who is not likely to commit future crimes.
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8 On October 5, 2009, Governor Schwarzenegger reversed the Board's decision.
9 In concluding that petitioner would pose an unreasonable risk of danger to society if
10 released on parole, the Governor specifically found that:
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- 12 A. The commitment offense was especially grave as it involved a level of
13 premeditation reflecting an exceptionally callous disregard for human
14 suffering;
15 B. Petitioner minimizes his involvement in the murder and has yet to accept
16 full responsibility for his crime; and.
17 C. Petitioner has an extensive history of mental illness and of refusing to
18 seek treatment and medication prior to the commitment offense.
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20 II.

21 Petitioner seeks his release on parole claiming the Governor's decision reversing
22 the Board of Parole Hearings' grant of parole violates his constitutional right to due
23 process because it is without reliable evidentiary support demonstrating that petitioner
24 poses a current unreasonable threat to public safety if released on parole. Petitioner
25 also maintains that his continued imprisonment constitutes impermissible cruel and
26 unusual punishment.
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III.

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

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

“When a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether

1 some evidence confirms the existence of certain factual findings.” (*In re Lawrence*
2 (2008) 44 Cal.4th 1181, 1212.)

3 “Although the Board and the Governor may rely upon the aggravated
4 circumstances of the commitment offense as a basis for a decision denying parole, the
5 aggravated nature of the crime does not in and of itself provide some evidence of
6
7 *current* dangerousness to the public unless the record also establishes that something
8 in the prisoner’s pre- or post-incarceration history, or his or her current demeanor and
9 mental state, indicates that the implications regarding the prisoner’s dangerousness that
10 derive from his or her commission of the commitment offense remain probative to the
11 statutory determination of a continuing threat to public safety.” (*Ibid.* at 1214.)

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

25 IV.

26 Contrary to petitioner’s contention, some evidence supports the Governor’s
27 finding concerning the commitment offense. The circumstances of the commitment
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1 offense support the Governor's characterization of the offense as a premeditated act
2 demonstrating an exceptionally callous disregard for human suffering. (Cal. Code
3 Regs., tit. 15, § 2402(c)(1)(B)(D).)
4

5 Petitioner was a philosophy professor at Cal State Fullerton. Between 1967 and
6 1973, petitioner was hospitalized six different times for acute paranoid schizophrenic
7 reaction, chronic undifferentiated schizophrenia and chronic paranoid schizophrenia.

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

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

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

24 Unlike the Governor's finding concerning the commitment offense, there is no
25 reliable evidence supporting the Governor's finding that petitioner minimizes his
26 involvement in the murder and has yet to accept full responsibility for his crime. Though
27 petitioner denied involvement in the murder shortly after his arrest and has indicated in
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1 the past that he was encouraged or convinced to commit the murder by the victim's
2 spouse, the Governor took such statements out of context and did not consider
3 additional pertinent information demonstrating that petitioner has insight into his actions
4 and accepts full responsibility for the murder.
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6 Petitioner suffered from mental illness at the time of the murder. During the
7 hearing before the Board, petitioner explained that he began to realize what he had
8 done and to feel remorse while being treated at Atascadero State Hospital during and
9 after his trial. He expressed regret for not taking his medication which played a role in
10 petitioner committing the crime. Petitioner repeatedly explained to the Board that his
11 description of the actions taken by the victim's spouse was offered not to blame her or
12 to excuse his conduct but instead to describe his recollection of what caused him to
13 commit the crime. Petitioner accepted full responsibility for the murder and was
14 genuinely remorseful. In an August 2008 psychological assessment, Dr. Robert
15 Sargent opined petitioner possesses an excellent level of insight into his past actions
16 and poses a low risk to engage in future violence. In view of this record, petitioner's
17 selected past statements concerning his involvement in the murder do not constitute
18 reliable evidence demonstrating minimization of responsibility or a failure to accept
19 responsibility for the crime.
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23 No evidence supports a finding that an inmate lacks insight into his crime where
24 the evidence discloses that the inmate understands the reasons for his actions,
25 recognizes individual characteristics that caused him to commit the offense, and has
26 learned to address in socially acceptable ways the anger arising from life's inevitable
27 frustrations. (See, *In re Singler* (2008) 169 Cal.App.4th 1227, 1243.)
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1 Lastly, some evidence in the record supports the Governor's finding that
2 petitioner has an extensive history of mental illness and of refusing to seek treatment
3 and medication for his condition prior to the commitment offense. This same evidence,
4 however, does not support the Governor's ultimate conclusion that petitioner continues
5 to pose an unreasonable risk to public safety if released on parole.
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7 Petitioner was hospitalized numerous times for mental illness between 1967 and
8 1973. He also has admitted that he did not take prescribed medication for ten years
9 prior to the commitment offense believing that he could take care of the problem on his
10 own.
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12 This information is over 25 years old and no longer probative of whether
13 petitioner poses a current threat to public safety in view of more current evidence in the
14 record addressing the issue. During the hearing before the Board, a remorseful
15 petitioner acknowledged his mistake in believing he could handle his mental illness
16 alone. He expressed a detailed understanding of the triggers that could cause him to
17 decompensate as well as an understanding of his need for life-long medication.
18 Petitioner has continuously taken his medication since 1989 and his schizophrenia has
19 been in institutional remission for the past 20 years. Petitioner's parole plans include
20 residing with his wife who is a former psychiatric nurse and who will manage his mental
21 illness with the assistance of the Life Adjustment Team in Orange County. Based on
22 this record, there is no evidence to support the Governor's determination that petitioner
23 poses a current unreasonable threat to public safety due to an extensive history of
24 mental illness and past reluctance to seek treatment and medication for the condition.
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V.

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2 Though the Governor's findings concerning the commitment offense and
3 petitioner's mental illness have evidentiary support, his decision to reverse the Board of
4 Parole Hearings' grant of parole is flawed and cannot be upheld. Specifically, the
5 Governor's decision does not articulate why petitioner's crime and past history of mental
6 illness remain relevant to the question of parole suitability and support his determination
7 that petitioner continues to pose an unreasonable risk of danger to society if released
8 on parole.
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11 Petitioner committed the murder over 25 years ago. Weighing against this factor
12 is an exemplary record of rehabilitation developed over 24 years of imprisonment.
13 Petitioner does not have a criminal record outside of the commitment offense and has
14 not engaged in violence or misconduct while imprisoned. Petitioner is a college
15 professor who has earned vocational certification in radiology and satisfactorily
16 participated in institutional self-help and programming. He has developed realistic
17 parole plans that specifically address his need for life-long management and medication
18 of his mental illness and has been consistently deemed by forensic psychologists for the
19 past twenty years to pose a low risk to engage in future violence or criminal misconduct
20 if released on parole. The record also reveals petitioner is 68 years old and in poor
21 health. Petitioner uses a walker to move around and suffers from chronic obstructive
22 pulmonary disease, diabetes, arthritis and congestive heart failure that required aortic
23 valve replacement in 2007.
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26 In reviewing the Governor's determination, the Court's inquiry necessarily
27 focuses on whether some evidence supports the Governor's decision that petitioner
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1 constitutes a current threat to public safety and not merely whether some evidence
2 supports the existence of certain factual findings. The decision before this Court does
3 not meet this standard.

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5 The Governor “may base a denial-of-parole decision upon the circumstances of
6 the offense, or upon other immutable facts such as an inmate's criminal history, but
7 some evidence will support such reliance *only* if those facts support the ultimate
8 conclusion that an inmate *continues* to pose an unreasonable risk to public safety.” (*In*
9 *re Lawrence, supra*, 44 Cal.4th at 1221.) Under the some evidence standard, a
10 reviewing court reviews the merits of the Governor's decision, and is not bound to affirm
11 a parole decision merely because the Governor has adhered to all procedural
12 safeguards. “This standard is unquestionably deferential, but certainly is not toothless,
13 and due consideration of the specified factors requires more than rote recitation of the
14 relevant factors with no reasoning establishing a rational nexus between those factors
15 and the necessary basis for the ultimate decision-the determination of current
16 dangerousness.” (*In re Lawrence, supra*, 44 Cal.4th at 1210.)

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19 VI.

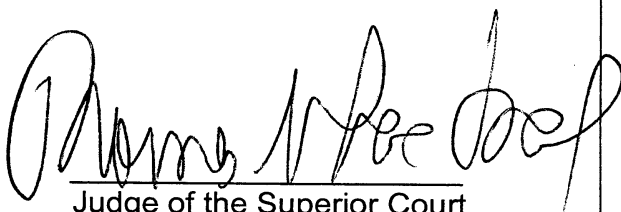
20 There is no evidence to support the Governor's decision to overrule the Board's
21 grant of parole. The record further reveals that the Governor did not afford petitioner
22 individualized consideration based on all relevant factors having a bearing on parole
23 suitability. The Governor's decision omits any consideration of relevant evidence and
24 numerous factors cited by the Board that tend to show suitability, including petitioner's
25 statements during the hearing reflecting insight and remorse, petitioner's parole plans
26 which specifically address the Governor's expressed concern over petitioner's history of
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1 mental illness and past reluctance to seek treatment and medication, and petitioner's
2 advanced age and poor health which render him less of a potential threat to public
3 safety. Under these circumstances, the proper remedy is to vacate the Governor's
4 decision, reinstate the determination made by the Board of Parole Hearings and remand
5 the matter back to the Governor for reconsideration consistent with due process
6 standards. (*In re Smith* (2003) 114 Cal.App.4th 343, 374-375; *In re Capistran* (2003)
7 107 Cal.App.4th 1299, 1306-1307.) In view of the determination reached on petitioner's
8 principal claim of error, it is unnecessary to address his related contention that his
9 continued imprisonment constitutes impermissible cruel and unusual punishment.
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12 The petition for writ of habeas corpus is GRANTED. The Governor's October 5,
13 2009 decision reversing the Board of Parole Hearings' grant of parole is vacated. The
14 Board's May 13, 2009 decision is hereby reinstated and the matter remanded back to
15 Governor Schwarzenegger who, at his discretion, may review the Board's decision and
16 issue a new determination under his constitutional and statutory authority and in
17 accordance with the requirements of due process as established in *In re Lawrence*
18 (2008) 44 Cal.4th 1181.
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22 Dated: 2/11/10



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26 Judge of the Superior Court
27 Thomas M. Goethals



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30 I hereby certify the foregoing is true and correct. (S) (S) (S)
31 to the Clerk of the Court of the County of Orange.
32 ATTEST (DATE) 2-11-10
33 ALAN CARLSON, EXECUTIVE DEPUTY AND CLERK OF THE
34 SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
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