IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

In re [redacted]	Superior Court [redacted]
Petitioner,	
On Habeas Corpus	

DENIAL TO RETURN TO PETITION FOR WRIT OF HABEAS CORPUS

[redacted]

[redacted]

Attorney for Petitioner

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

In re [redacted]	Superior Court [redacted]
Petitioner,	
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DENIAL TO RETURN TO PETITION FOR WRIT OF HABEAS CORPUS AND SUPPORTING POINTS AND AUTHORITIES

TO THE HONORABLE JAMES C. EMERSON, JUDGE OF THE SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA:

Pursuant to Rule 4.551, subdivision (e) of the California Rules of Court, petitioner, by and through his attorney, [redacted], hereby files this Denial to the Return to the Order to Show Cause.

INTRODUCTION

It is undisputed that the petitioner's behavior since the commission of the crime which landed him in state prison has been exemplary. His crime was committed 17 years ago and he is now eligible for parole. The prison system has had 17 years to observe him. During his time in prison, petitioner has utilized his clerical skills to foster efficient operation of the prison. received numerous laudatory reports from work supervisors. and served in several official capacities like the chair of the Men's Advisory

Council and as an assistant to the Prison Chaplain. Petitioner has even furthered his education by obtaining a paralegal certificate while in prison. The psychological report on petitioner indicates that he is a below average risk compared to others in the community at large in terms of future dangerousness. If paroled he has stable family and social connections, full Social Security benefits, employment opportunities, and an office from which to pursue his tax consulting business. There is nothing else petitioner can do to make himself more suitable for parole than he already is. In fact, at this late stage in petitioner's life (he is a 70–year-old man), the longer he is imprisoned the less capable he will become.

Notwithstanding the absence of any evidence to suggest petitioner would be a danger to the community if release, the Board of Prison Terms found that petitioner was unsuitable. The reasons given by the parole board for denial of parole are flatly contradicted by the record and the Board's own summary of the record during the parole consideration hearing. As has been the regular practice of the Board in such cases, the Board determined petitioner unsuitable for parole based primarily on the crime. However, no reason is given by the Board for its determination that the facts of the crime merit a denial of parole.

In response to this Court's Order to Show Cause, the Board produced statistics that – in conjunction with statistics obtained directly from the Board -- prove the following: (1) The Board grants parole in about 2 percent of all cases in which parole suitability for life inmates is reviewed by the Board; (2) in the year 2003, the Board granted parole to 27 or 28 prisoners serving life sentences for first degree murder and the Governor reversed every parole grant; (3) throughout his tenure as Governor, Governor Davis reversed all but two grants of parole to inmates convicted of first degree murder and the two he has not reversed have involved severely battered women; (4) no man convicted of first degree murder has been paroled during the Davis administration; (5) the

Governor's 100% parole reversal rate for men convicted of first degree murder violates the statutory mandate that parole shall *normally* be granted (Pen. Code, § 3041).

The reasons given by the Board for the denial of parole in this case and other murder cases have become rote and unrelated to the suitability of the individual under consideration for reintegration into society. This case is but another example of a continuing practice. The Governor's unlawful policy and decisions have resulted in fewer suitability findings being made by the Board of Prison Terms. In addition to statistical evidence of a decline in the number of suitability determinations, there is also a growing number of reversals of Board decisions denying parole on the grounds that the decisions are unsupported. In this case, the proof of bias is in the pudding: arbitrary and capricious reasons for the denial of parole. In this case, the Board failed to function as an independent and impartial decision making body when it considered [redacted] suitability for parole denying [redacted] his due process right to a fair hearing by an impartial tribunal. [redacted] submits that there is overwhelming evidence to the effect that if released he would live out the rest of his life as a productive member of society, and that there is no evidence in the record to show that he is currently dangerous.

STATEMENT OF CASE AND FACTS

The circumstances of the commitment offense relied upon by the Board during the hearing are set forth in the Probation Officer's Reports, filed June 17, 1988 and September 3, 1993. (Copies attached to the Return as Exhibits B & E.)[1] At approximately 12:30 a.m. on October 15, 1986, 39-year-old [redacted] ran to the home of a next-door neighbor and reported that her husband, 61-year-old [redacted], had been killed by intruders. The police were summoned and [redacted] indicated in her first

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[1]. Hereinafter, references to exhibits by letter (e.g., "Exh. A") are to the exhibits attached to the Board of Prison Term's Return. Exhibits included with this Denial will be referred to by number (e.g., "Exh. 1").

statement that she was awakened to find a rather large Latino man wearing a stocking mask beating her husband. She was also assaulted, lost consciousness, and awoke partially nude with her hands tied with the belt of her bathrobe and pantyhose. [redacted] was quite hysterical but was able to indicate that a second intruder was involved. (Exh. B, p. 2, Exh. E, p. 3.)

Upon entering the residence, officers found the victim laying face up on the family room floor with massive head injuries. (Exh. B. p. 2.) An autopsy revealed that there were three blows to the head all of which were sufficiently serious to have been fatal. (Exh. E, p. 3.) Further investigation uncovered inconsistencies in Brenda's account of the incident and the physical evidence at the scene. There was no evidence of a burglary. Ashes on the victim's shoes appeared to have been dumped there after the victim was dead. Further, blood stains on the floor beneath overturned items had been deposited before the items were overturned. (Exh. B, p. 3.)

Before marrying [redacted], [redacted] had significant financial problems for years; problems compounded by her habit of spending beyond her means. She had managed to survive with the help of male friends and former boyfriends. She told many people that she wanted to get married so someone would take care of her. (Id. at p. 7.) She talked about narrowing her prospects to three men: a young man ([redacted]) who had no money, an accountant ([redacted]) who also did not have money, and an older man in poor health who would be able to take care of her. (Id. at p. 7.) She decided to marry the older man expecting that he would not live long. (Id. at p. 8.) The man, [redacted] was 61-years-old. (Exh. E, p. 3.) In June 1986, [redacted] had an operation on his left carotid artery. (Id., p. 4.) He had a serious heart condition, high blood pressure, angina, as well as diabetes and complications from diabetes. (Id. at p. 9.) A woman who dated [redacted] prior to [redacted] stated he was impotent but still enjoyed sex. (Id. at p. 9.) He was constantly taking nitroglycerin for his heart. (Id., at p. 6.)

[redacted] demanded cash from [redacted] before she would marry him. She expected that he was going to give her either $25,000 or $50,000 for her daughter's education, a diamond ring and a Mercedes. (Ibid.) While courting [redacted], [redacted] maintained a close relationship with both [redacted] and [redacted]. (Id. at p. 8.) She supposedly told [redacted] that she planned to take [redacted]'s heart medication away from him while they were moving her possessions into his house in hopes it would do him in. (Id. at p. 8.) She also supposedly told [redacted] that if that didn't work, they had another plan. (Ibid.) On September 3, 1986, [redacted] left an envelope with $10,000 with [redacted]s boss to be used for the college education of [redacted]'s children. (Exh. B, p. 3.) On September 4, 1986, [redacted] deposited the check in his bank account and used the money to pay off his debts. He did not make an investment for [redacted]'s daughters. (Exh. E, pp. 7-8.)

On September 8, 1986, [redacted] and [redacted] were married in Hawaii. (Id. at p. 8.) The marriage did not go as either had planned. [redacted] began complaining about her husband's possessiveness. He had been checking up on her when she went to work or went to get her hair done. (Exh. E, p. 8.) [redacted] told others he was distrustful of his younger wife, believing that she was still involved with her previous boyfriend, [redacted]. (Id. at p. 6.) He began taping her telephone conversations and closely monitoring her activities. During a search of the residence, officers recovered a recording device beneath a bed. (Exh. B, p. 2.)

The marriage had taken a heavy toll on [redacted]'s health. (Id., pp. 4-6.) He was kept extremely busy by [redacted] and did strenuous physical work for her at her suggestion. (Id., pp. 6, 9.) [redacted] in turn made numerous calls to [redacted]s office telling him she could not take it anymore. (Exh. E, p. 8.) On Sunday, October 12, 1986, [redacted] and [redacted] drove to [redacted]'s daughter's house to have dinner. [redacted] complained to her daughter that [redacted] was watching her all the time and she had no privacy. [redacted] called [redacted]nd told him she did not "know how much more of this" she could take. (Ibid.)

She was overheard telling Mark, "the garage door will be left unlocked." (Ibid.)

Sometime between 10th and 15th of October 1986, Mark, who had two vehicles in working order, borrowed and returned a car from a client. (Ibid.) One of the people in Mark's office testified that he left the office at 9:15 p.m. on October 14, 1986. A friend of Mark's testified that Mark helped him move a refrigerator that night and did not leave until sometime close to 11:00 p.m. (Id. at p. 9.)

During the investigation of the case, officers learned of a cassette tape of a conversation between Brenda Otto and Mark two days before Joe was killed. The discussion was believed to involve a prior murder attempt which did not materialize due to unusual activity in the area at that particular time. They discussed making a "better plan." (Exh. B, pp. 2-3.)

Mark and Brenda Otto were both arrested on October 15, 1986. (Exh. B, p. 3.) They were charged with first degree murder. The first trial of the case resulted in a first degree murder conviction of both Mark and Brenda Otto. Each defendant was sentenced to the statutory term of 25 years to life. (Exh. A.) In 1992, the California Supreme Court reversed, finding that surreptitious telephone tape recordings made by the victim of Brenda and Mark were improperly admitted into evidence in violation of the federal wiretap act. (*People* v. *Otto* (1992) 2 Cal.4th 1088.) Moments before he was to be released, Mark was detained on the basis of a jailhouse snitch. (Exh. G, p. 7.) Following a remand for a new trial without the use of the tapes, Brenda and Mark were recharged with Joe Otto's murder. During the second trial, the People produced the jailhouse snitch who had been incarcerated with Mark at the Santa Clara County jail before the first trial. The snitch testified that Mark admitted to him that he had taken part in the homicide. (Exh. E, p. 9.) In 1993, a jury found Mark and Brenda guilty of first degree murder and each received a sentence of 25 years to life. (Exh. D.)

Mark was born on July 30, 1934. He has no juvenile criminal history. At

17 years of age. Mark graduated from high school and joined the United States Air Force after having served two years in the National Guard during the Korean War effort. (Exh. G. p. 2.) He held the job of a Russian cryptographer and received an honorable discharge from the Air Force in 1954. (Exh. G. p. 4.) Mark learned bookkeeping and was a financial aid officer for a financial aid society in the military. (Id. at p. 5.) His adult history includes probation for forgery and grand theft when he was 20 years old (May 12, 1955); probation for illegal possession of drugs the same year; and a four or five-year federal prison term for a violation of federal marijuana laws on September 5, 1960. when he was 26 years old. (June 2002 Life Prisoner Evaluation, Exh. G. p. 4; Exhs. H & I.) Mark's troubles at that time stemmed from the use of marijuana and financial difficulties. (Psych. Report, Exh. J, p. 4.)

Following his release from federal prison in 1964, Mark obtained an AA degree and spent the next 22 ½ years in the business of accounting, tax preparation and financial consulting. (Exh. G, p. 4.) He is an enrolled agent for the federal government. (Exh. F. p. 18.) He raised a daughter by himself through her elementary and high school years. (Ibid.) He was arrested for this offense at the age of 52. Mark's Minimum Eligible Parole Date (MEPD) was set at July 15, 2003. (Exh. G. Life Prisoner Evaluation; Exh. F, p. 1.)

While in prison. Mark has had an "exemplary adjustment history." (Exh. J, p. 24 (Board hearing). He has had only one disciplinary infraction (CDC 115) which occurred 12 years ago for purportedly "manipulating staff" so that he could smoke a package of cigars. (See Exh.9 , Rules Violation Report.) Since June 1, 1999, Mark's classification score has been zero, representing the lowest possible security risk within the prison. (See Exh. 9, CDC Reclassification Score Sheet; Cal. Code Regs. [hereinafter "CCR"] tit. 15, §§ 3375.1, subd. (a)(1) & 3377. subd. (a).) He has completed numerous self-help programs, had numerous laudatory chronos for his work and participation in

organizations within the prison, and furthered his career while in prison. (Exh. F, pp. 24, 35.)[2] For instance, in 1988, Mark obtained a paralegal certificate. (Exh. 8.) He served as the Secretary, Vice-Chairman, and President of the Men's Advisory Council for three years. A laudatory chrono dated October 7, 1997, indicates that since being assigned to the advisory council, "Inmate Mark has proved to be a competent, efficient, and dedicated worker. He has performed his assigned duties in a professional manner, and has been courteous in dealing with Staff and other inmates, working with little or no direct supervision. Inmate Mark has worked diligently to seek to improve inmate/staff relations and to promote the general welfare of the inmates at CSP-Corcoran." His work assignments in Yard Crew produced several laudatory chronos with comments like, "he did an outstanding job," "consistently completing assigned tasks with a cheerful attitude and showing politeness to other staff during the course of employment, "he is very competent . . . completing necessary documentation correctly and in the minimum amount of time." (See Exh. 5, Life Prisoner Hearing Packet.) Work crew reports for 1/7/98, 8/2/98, and 12/11/99 show "exceptional grades" in a position that "requires participation during other than normal working hours (10 hrs/day, 4 days a week). (Exh. 5.) Mark had an assignment as a Clerk to the Jewish Chapel with both clerical and religious duties for which he consistently received high marks from the Rabbi. (Exh. 7.) Mark's work supervisor's reports for his job as a library clerk at Folsom for 22 months rated him as "exceptional" in all categories. (Exh. 7.)

Among the self-help programs Mark completed prior to his second documentation hearing were a 12-hour literacy tutor program (10/22/95); California Literacy Award & Certificate of Completion (10/30/95); and Literacy Thinking Life skills self-help (1/22/96). During the second documentation hearing on July 8, 1997, the Board

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2. Mark's prison adjustment is reflected in a spreadsheet included as Exhibit 4 in the accompanying exhibits.

recommended that Mark remain disciplinary free and participate in NA and any other self-help groups, and keep abreast of business and tax laws if he plans to continue accounting trade upon release. (See Exh. 5.) Following this hearing, Mark remained disciplinary free and obtained a certificate of completion of the substance abuse program at Folsom State Prison. (Exh. 8 (3/27/00).)

The Board's recommendations at the fourth and last documentation hearing on June 28, 2000, were to remain disciplinary free, and identify and pursue programs as available. (Exh. 5.) Following this hearing, Mark completed and obtained certificates for several self-help programs including Sensitivity Training in the American's with Disabilities Act (ADA) (9/29/00); a 10-unit (1 ½ hours per unit) Anger Management class for which he received a laudatory chrono ("very active in class participation, and . . . perfect attendance record); and a 21-hour workshop in "Breaking Barriers– A Cognitive Reality Model" (4/15/02) which provided cognitive thinking tools for facilitating change. (Exhs. 5 & 8.) The sensitivity training for ADA was very likely related to the fact that Mark had his eye surgically removed while in prison after being hit with a brick. (Exh. J, Psychological Evaluation, p. 5.) Mark told the Board during the subsequent initial parole suitability hearing that he had exhausted the self-help programming and no further programs were available to him at the prison. (Exh. F, p. 28.)

The May 2002 Psychological Evaluation, written by Dr. Corinne Giantonio, Ph.D., assessed Mark's dangerousness if released to the outside community as follows: "Assessment of dangerousness within the controlled setting of the institution is seen as definitely below average in comparison with other inmates. Assessment of dangerousness, if released to the community, is also seen as definitely below average. There are no significant risk factors in this case. [¶] There is no evidence of psychopathology or mental health problems that would preclude routine release planning in this case. He is well-prepared and organized in his ability to anticipate and think

through what is necessary to achieve a successful parole experience. He is able to demonstrate a healthy blend of self-reliance and, at the same time, to utilize the support of family and friends. He is prepared to transition to a life on parole and is prepared emotionally, strategically, and economically to take on the responsibility of successful participation in community life. There is no need for further therapy or diagnostic evaluation. There are no further psychological recommendations." (Exh. J, p. 8.)

Both the psychologist who examined Mark and the prison counselor, counselor Hickey, who drafted the counselor's report for the Board noted that Mark's parole plans were feasible and included a network of personal support. Six individuals wrote letters of support on Mark's behalf. (Exh. 5.) Mark is entitled to full social security benefits, has a stable home, and prospects for bookkeeping clients supplied by his first wife in Oregon. (Exh. F, pp. 15, 28-30.) Mark's daughter lives and works in Oregon, and Mark has maintained contact with her over the years. (Psychological Report, Exh. J; Exh. F, pp. 15, 28-30.) He is entitled to reside in Oregon under the Oregon compact statute. (Or. Rev. Stats. Ann. § 144.610, subd. (1)(a).)

On June 13, 2002, pursuant to Penal Code section 3041, a panel of the Board conducted a hearing to consider Mark's suitability for parole. The Board denied Mark parole citing the following reasons: the "offense was carried out in an especially cruel and callous manner"; "he failed previous grants of probation and parole, and cannot be counted upon to avoid criminality"; a prior arrest history; the prior prison term did not reform him; and "he needs to shore up his parole plans." (Exh. F, pp. 38-40.) The denial was for three years because the Board did not believe Mark could become suitable for parole at an earlier time. The Panel made the following findings: "the prisoner needs to continue to develop the ability to face, understand and cope with stress in a nondestructive manner. Until significant progress is made, the prisoner continues to be unpredictable and a threat to others." (Id. at p. 40.) The Panel also found that "the

prisoner has not completed necessary programming, which is essential to his adjustment, and needs additional time to gain such programming." (Id. at p. 41.)

On January 21, 2003, Mark filed the instant petition, seeking to have the Board's decision to deny parole set aside on the grounds that (1) the Board's decision finding him an "unreasonable risk" is not supported by the evidence (Petition 3E, 3G); (2) the Board did not follow the due process requirements of *In re Ramirez* (2001) 94 Cal.App.4th 549 (Petition 3F); (3) he was not given a full and fair hearing by an impartial decision maker because of the Governor's no parole policy (Petition 3N); (4) the Board had predetermined his unsuitability before the hearing (Petition 3M); (5) the Governor's policies and the Board's implementation of them violate the *ex post facto* clauses of the state and federal Constitutions (Petition 3I, 3N); and vague and arbitrary recommendation by the Board violate due process in that they make it impossible for him to know what is expected of him to become suitable for parole (Petition 30-3Q).

On April 24, 2003, the Court issued an Order requiring the Attorney General to show cause why the relief prayed for in the petition should not be granted. That Order also required the Attorney General to answer the following specific questions:

1) "The evidentiary support for each of the Board's findings;"

2) "Whether the findings that have evidentiary support, if there are any, are sufficient by themselves to support the Board's unsuitability finding;"

3) "Whether the findings that do not have evidentiary support, if any, require a remand to the Board for hearing;"

4) "Whether the Board is acting pursuant to a no-parole policy (i.e. using arbitrary and capricious standards so as to drastically limit the number of grants that the Governor has to review and reverse);"

5) "Whether the Board is entitled to the 'some evidence' standard of review despite the 'no-parole' policy."

(April 24, 2003, Order to Show Cause, at 3.)

On July 10, 2003, the Attorney General filed a return to the Order to Show

Cause on behalf of the Board.

DENIAL

By this verified denial, petitioner hereby admits, denies and alleges the following facts:

I.

Regarding the allegations of paragraph 1 of the Return, petitioner admits that he is in custody pursuant to a judgment of commitment for first degree murder and was sentenced to 25-years-to-life in state prison pursuant to a judgment entered on June 17, 1988, as reflected in Exhibit A attached to respondent's return. Petitioner denies that this custody is "valid" as he has been unlawfully denied parole by the Board of Prison Terms. Petitioner denies the remaining allegations of this paragraph.

II.

Petitioner admits the allegation of paragraph 2 of the Return that he was received by the California Department of Corrections ["CDC"] on June 18, 1988.

III.

Regarding the allegations of paragraph 3, petitioner admits the California Supreme Court reversed his conviction in *People* v. *Otto* (1992) 2 Cal.4th 1088, because the respondent was allowed to admit an illegally recorded conversation between petitioner and Brenda Otto. Petitioner alleges that his conviction was overturned in 1992 and that moments before his release he was detained on the basis of a statement of a jailhouse snitch. (Exh. J, p. 7.) He admits that the victim was paranoid and that his "distrust of his younger wife, Brenda Sue, bordered on the obsessive." He denies the remaining allegations.

IV.

Petitioner admits the allegations of paragraph 4 that he was convicted upon retrial and sentenced to 25-years-to-life.

V.

Petitioner admits the allegations of paragraph 5 that he is incarcerated at Folsom Prison. He admits that his petition in this matter challenged the Board of Prison Term's ["BPT"] arbitrary and capricious action in finding that he is unsuitable for parole. He denies any implied assertion that the petition was limited to a challenge of the Board's suitability finding. Petitioner respectfully requests that this court take judicial notice of the Petition pursuant to Evidence Code section 452.

VI.

Petitioner admits the allegations of paragraph six except that the initial parole consideration hearing was held on June 13, 2002, and not June 12, 2002.

VII.

Regarding paragraph 7. petitioner admits that the commissioners relied upon the statement of facts concerning the offense set forth by the probation officer in the two probation reports. He admits that Joe Otto tape-recorded his wife's phone calls and that the victim brought a tape-recording to the police regarding an alleged murder plot but that the police felt the tape did not provide enough evidence to take action. He denies the remaining allegations of this paragraph.

VIII.

Regarding the allegations of paragraph eight, petitioner admits that the BPT discussed petitioner's prior criminal history including the fact that he had no juvenile record and three outdated felony convictions for forgery (5/12/55), possession (10/10/55), and transportation of marijuana for which he served a four-year prison term in federal custody (9/5/60). and finally the commitment offense. Petitioner's relatively brief period of criminality from 1955-1960 (when he was between the ages of 21 and 26 years old) occurred following an honorable discharge from military service. (Exh. J, Psychological Evaluation. p. 7.) Petitioner explained to the probation officer that his troubles stemmed

from use of marijuana, his last use of which was 44 years ago. (See Psych Report: , Exh. G, Life Prisoner Evaluation Initial Parole Consideration Hearing, p. 4.) Petitioner alleges that the arrest history cited by respondent in the return for which there was no disposition is irrelevant as there was no adjudication of guilt.

IX.

Regarding the allegations of paragraph 9, petitioner admits the allegation that after "reviewing petitioner's social history, including his work history, the BPT commended petitioner for his behavior in custody." The BPT, in fact, remarked that petitioner had an "exemplary adjustment history." (Exh. F, p. 24.) Petitioner also admits that he had "no CDC 128s and only one CDC 115" for allegedly manipulating staff in July 1991. Petitioner denies any express or implied allegation that the CDC 115 for manipulating staff was an appropriate factor for consideration by the BPT in determining parole suitability. The regulations permit consideration of only "serious misconduct in prison or jail" (15 CCR § 2402, subd. (c)(6)), and manipulating staff does not qualify. Petitioner requests that this court take judicial notice of the order of the court in *In re Marion Franklyn Miller*, On Habeas Corpus (Sacramento County No. 98F09783), finding that CDC regulations do not specifically prohibit manipulation of staff, and that what is prohibited by 15 CCR 3004(b) is an open display of "disrespect or contempt for others in any manner intended to or reasonably likely to disrupt orderly operations within the institutions or to incite or provoke violence." (See Exh. 10, attached hereto.) According to petitioner, the CDC 115 arose when "a box of cigars was sent to the Chaplain and he didn't want them. I asked the C.O. if the Chaplain didn't want them, could I smoke them. C/O Chambers said if it was ok with the chaplain (Father Keaney) it was ok with her. She later recanted and issued the 115 for manipulating staff." (See Exh. 4, p. 6.)

X.

Petitioner denies the allegations of paragraph 10. Petitioner's prison

counselor did not recommend, nor did the BPT make a finding that the counselor recommend petitioner should undergo "additional self-help and therapy programs and though he should remain disciplinary free for a longer period" before being found suitable for parole. In fact, the BPT noted that Counselor Hickey reported that petitioner "would pose a low degree of threat to society if granted parole," and that this opinion was based upon petitioner's "conforming institutional adjustment," participation in "self-help programs and . . . a viable profession as a Tax Accountant upon release." (Exhibit, J, pp. 25-26; Exh. G, p. 6.) Counselor Hickey stated that before "*release*" petitioner could benefit from continuing his disciplinary free record, participation in self-help, and satisfactory work performance. (Exh. G, p. 6.)

XI.

Petitioner admits the allegations of paragraph 11 regarding the psychologist's findings that petitioner's level of dangerousness if released into the community "would also be definitely below average, and there are no risk factors, or significant risk factors in this case." (Exh. F, p. 27.) Petitioner also admits that the doctor reported petitioner is "well prepared and organized in [his] ability to anticipate and think through what is necessary to achieve a successful parole experience. The doctor also writes that you're able to demonstrate a healthy blend of self-reliance, and at the same time, to utilize the support of family and friends. There's no need for any further therapy or diagnostic evaluation, and there are no further psychological recommendations." (Exh. F, p. 27.) Petitioner denies that the Board gave due consideration to this evidence supporting parole suitability.

XII.

Petitioner admits the allegation of paragraph 12 that he would live with his ex-wife in Oregon. The remainder of this paragraph falsely reports petitioner's future income and work prospects as vague. The BPT had letters from his ex-wife Patricia

McDermott and his former brother-in-law James McDermott, a retired fire Lieutenant, who offered him housing and an office space for his tax business. (Exh. F, pp. 28-29, 31; Exh. 5.) The allegation that petitioner did not "have a specific offer of employment" is both misleading and irrelevant. Petitioner is "fully vested in Social Security because of his work history" and will receive Social Security Benefits upon release obviating the need for employment, and otherwise had a "viable profession as a tax accountant upon release." (Exh. G, p. 5; Exh. J, pp. 5, 25.) He spent 23 years as an income tax preparer and financial counselor. (Exh. G.) Further, petitioner had kept up with his "book work" and clerical expertise while in prison. Ms. McDermott reported that people were interested in talking to petitioner about their book work. (Exh. 5.) The allegation that "[p]etitioner had not yet confirmed whether he could parole to Oregon" is incorrect. Petitioner told the Board he had investigated the matter and determined that Oregon was a "compact state." (Exh. F, p. 30.)[3]

XIII.

Petitioner admits the allegation of paragraph 13 that a Deputy District Attorney from Santa Clara County addressed the BPT and opposed release. Petitioner denies that the reasons asserted by the deputy were factually supported, or that even if supported would have justified the denial of parole.

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[3]. Oregon has interstate compact which mandates acceptance of parolees who have a family member residing in the state and who can obtain employment in the state. (Or. Rev. Stats. Ann. § 144.610, subd. (1)(a).) Petitioner's 42-year-old daughter by his first wife, Patricia McDermott, lives and is "gainfully employed" in Oregon (Exh. J, p. 4). The psychological report indicates that petitioner raised his daughter throughout her elementary and high school years and kept in contact with her over the years through letters. Ms. McDermott attested to petitioner's employment opportunities as a bookkeeper/tax consultant for the many retired people living in the community. (Exh. 5.)

XIV.

Petitioner admits that the quoted material in paragraph nine is an accurate account of the Board's statement of decision. Petitioner denies that the reasons recited by the BPT for denying parole were supported by the evidence. Petitioner also denies that the reasons given justified the denial of parole. Petitioner denies that the reasons recited by the Board are accurate and solely the basis for his parole denial.

XV.

Petitioner admits that the BPT's decision became final on July, 16, 2002.

XVI.

Petitioner admits that the BPT denied petitioner's administrative appeal of the BPT's decision denying parole. The BPT declared that its decision was a "final administrative decision on all issues from the decision in question." (Exh. K, p. 6.)

XVII.

Petitioner admits the allegation of this paragraph concerning the filing of a writ of habeas corpus.

XVIII.

Petitioner admits that this court issued an order to show cause.

XIX.

Petitioner denies the allegations of paragraph 19.

XX.

Petitioner denies each and every allegation of paragraph 20.

XXI.

Petitioner denies each and every allegation of paragraph 21.

XXII.

Petitioner denies each and every allegation of paragraph 22.

XXIII.

Except as expressly admitted, Mark hereby denies each and every allegation of the return.

XXIV.

Mark hereby re-alleges each and every allegation in his petition and in its accompanying Points and Authorities, and incorporates them by reference in this denial. Specifically, Mark re-alleges that the Board's decision was based on a predetermined belief and unlawful policy against granting parole to any male prisoner convicted of first degree murder.

XXV.

Mark further re-alleges that the BPT's decision violated his due process rights by failing to give "due consideration" to Mark's suitability for parole and by failing to set forth "some evidence" that shows Mark to be presently dangerous.

XXVI.

Mark re-alleges that the BPT's decision deprives his sentence of the proportionality intended by the Legislature in Penal Code section 3041.

XXVII.

Mark further re-alleges that vague and arbitrary findings and recommendations by the BPT violate due process of law. The vague recommendations give him no guidance as to how he can become suitable for parole in the eyes of the panel.

XXVIII.

Petitioner incorporates by reference all the information contained in this document, including the factual statement, Memorandum of Points and Authorities, and all the exhibits enclosed under separate cover.

PRAYER FOR RELIEF

Mark prays that this Court:

1. Declare the rights of the parties:
2. For this court to conduct independent judicial review of the facts bearing on the issue of suitability and find petitioner suitable for parole:
3. Grant the writ and order the Board of Prison Terms to conduct a parole consideration hearing in accordance with petitioner's constitutional rights and California law as more fully set forth in the accompanying points and authorities:
4. Issue any further relief the Court deems proper, including, but not limited to, an order that a new suitability hearing be conducted by new hearing officers, and that it is anticipated that parole will be granted unless there is new evidence since the last hearing that would justify a denial of parole.

Dated: December 18, 2003.

Respectfully submitted,

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VERIFICATION

I am an attorney admitted to practice before this court and have my office in Monterey County. I am court appointed counsel for petitioner Marvin Mark in this action, who is restrained of his liberty and confined at the Folsom State Prison at Represa, California. I am authorized to file this denial. All facts alleged in the denial, not otherwise supported by citations to the record, exhibits or other documents are true of my own personal knowledge.

I declare under penalty of perjury the above is true and correct. This declaration was executed on December 19, 2003 at Monterey, California.

Respectfully submitted.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Despite his participation in this offense seventeen years ago, Mark has proven himself suitable for parole, and he would have been granted a parole date were it not for the arbitrary and capricious action of the Board in denying parole. There is not a single reason cited by the Board in its recitation of facts and finding and conclusions that is supported by some evidence. Some of the Board's findings go beyond capriciousness and border on absurd and vindictive, such as the finding that Mark had not availed himself of available programming after he informed the Board he had exhausted all programming available to him. The Attorney General expends little effort to support the majority of reasons cited by the Board, and instead relies on the factually and legally unsupported theory that the Board could deny parole based solely upon the gravity of the commitment offense and prior criminality. On the contrary, only an "especially" callous first degree murder qualifies as a factor delaying parole, and the probation officer in this case characterized the crime as "average."

Although there is overwhelming statistical evidence of a no parole policy for any male convicted of first degree murder, the Attorney General argues that there would be no need for a formal parole hearing if there was such a policy. In other words, such a policy would compel the Board members to make it obvious to everyone that they were not doing their job by openly violating the law instead of simply silently undermining it. Petitioner does not have to prove that the Board members are self-destructive. He need only show that the Governor has a no parole policy for males convicted of first degree murder (a fact the statistics prove) and that this policy impacted the Board's decision-making; a fact which petitioner believes is shown conclusively by relevant statistics. Further, if the fact of the former Governor's no-parole policy were not enough, there is ample proof in the record that the Board failed to give petitioner's case

the due consideration required by the due process clause.

ARGUMENT

I.

THE BOARD'S DECISION IS NOT ENTITLED TO THE "SOME EVIDENCE" STANDARD OF REVIEW AS IT WAS OUTCOME DETERMINATIVE RATHER THAN THE RESULT OF "DUE CONSIDERATION" OF THE SPECIFIED STATUTORY FACTORS AS APPLIED TO MARVIN MARK.

"[T]he governing statute provides that the Board must grant parole unless it determines that public safety requires a lengthier period of incarceration for the individual because of the gravity of the offense underlying the conviction. (Pen. Code, § 3041. subd. (b).) And as set forth in the governing regulations, the Board must set a parole date for a prisoner unless it finds, in the exercise of its judgment after considering the circumstances enumerated in section 2402 of the regulations, that the prisoner is unsuitable for parole. (Cal. Code Regs., tit. 15, § 2401.)" (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 654.) "[T]he Board must provide a definitive written statement of its reasons for denying parole." (*Rosenkrantz, supra*, 29 Cal.4th at p. 656.) Further, the Board's decision must reflect due consideration of the specified factors in accordance with applicable legal standards and cannot be arbitrary or capricious. (*Id.* at p. 677.) Additionally, "[t]o insure that a state-created parole scheme serves the public interest purposes of rehabilitation and deterrence, the Parole Board must be cognizant not only of the factors required by state statute to be considered, but also the concepts embodied in the Constitution requiring due process of law." (*Biggs* v. *Terhune* (9th Cir. 2003) 334 F.3d 910. 916.)

The consideration Mr. Mark received in the parole suitability hearing was pro forma rather than the "due consideration" required by due process. (*Rosenkrantz, supra*. 29 Cal.4th at p. 655. 677.) There is no written statement of reasons in the record for the denial of parole in contravention of the requirements of *In re Sturm* (1974) 11

Cal.3d 258, 273. Mark requested the Board provide him with a written statement of reasons and the Board responded with a "Life Prisoner Decision Face Sheet" which lists panel recommendations such as remain disciplinary free and participate in self-help but says nothing about the reasons for the denial of parole. (Exh. 11.) (*In re Morrall* (2002) 102 Cal.App.4th 280, 289 ["if a parole date is not set. . . the Board must provide a written statement setting forth the reason or reasons and suggesting activities in which the inmate might participate. . . ."])

Further, several of the findings made by the Board are "so at odds with the record [as to] support[] [Mark's] claim that his parole hearing was a sham." (*In re Ramirez* (2001) 94 Cal.App.4th 549, 571.) The Board lacked even "some evidence" to support its finding that "the prisoner [Mark] has not completed necessary programming, which is essential to his adjustment, and needs additional time to gain such programming." (Exh. F, p. 41.) In fact, Mark completed three self-help programs in the span of 22 months after the fourth documentation hearing when the Board recommended that Mark identify and pursue programs as available to him. (See Exh. G, p. 5; Exhs. 4, 5 & 8.) The Board noted these and other programs completed by Mark. (Exh. F, pp. 24, 26.) Mark explained to the Board at the time of the hearing that he had exhausted all programs available to him. (Exh. F, p. 28.) The Board's finding that Mark had not completed necessary programming was "an affront" not only to Mark who completed all programming available to him, "but also to the Department of Corrections, which provided the therapeutic programs and found [Mark's] participation in them to be" laudatory. (*In re Ramirez, supra*, 94 Cal.App.4th at p. 571; Exh. G, p. 6.) In light of the Board's actual knowledge that there was no additional programming available to Mark, the finding that he must do additional programming to qualify for parole supports an inference that the Board simply did not care whether its findings were supported by the evidence.

Another example of a blatantly unsupported factual statement by the Board is that Mark "needs to continue to develop the ability to face, understand and cope with stress in a non-destructive manner. Until significant progress is made, the prisoner continues to be unpredictable and a threat to others." (Exh. F, p. 40.) The psychologist who examined Mark prior to the Board hearing found otherwise: "there is evidence that he is able to accept supervision vis-a-vis his successful honorary discharge from the military, and to negotiate the stressors of life in general with his successful 23 years as a business owner." (Exh. J, p. 7.) The Board as much noted during the parole consideration hearing that the psychologist had given him a below average dangerousness assessment and that there was "no need for any further therapy or diagnostic evaluation." (Exh. F, p. 27.) Indeed, Mark had been incarcerated in state prison for 17 years, had an eye put out with a brick while incarcerated, but had never had a disciplinary report for violence. He will be in his 70's at the time of release if granted a parole date, have fully vested social security, a place to live, and supportive social contacts. The "stressors" that purportedly caused him to act out violently in the past are nonexistent in the present.

The finding that Mark "needs to shore up his parole plans" also reflects the Board's disinterest in a fair and impartial hearing. The correctional counselor, psychologist, and Mark all reported to the Board that Mark's parole plans were viable. (Exh. F, pp. 28-30; Exh. G. pp. 5-6; Exh. J, p. 6-8.) The psychologist reported that his "plans are feasible, and he has included a network of personal support." (Exh. J, p. 8.) During the hearing, the Board queried Mark whether Oregon was a compact state that would accept him. Mark informed them that it was. (Exh. J. p. 30.) The failure of the Board to have conducted even a modicum of inquiry into the feasibility of Mark's parole plans indicated that the Board had no intention of granting him parole.

Additionally, the Board's decision fails to comport with the basic procedural due process requirements set forth in *In re Ramirez*, *supra*, 94 Cal.App.4th

549. There in no indication in the record that the Board considered "the gravity and public safety implication of [Mark's] offense[], and in light of the terms prescribed by the Legislature for such offense[]." (*Id.* at p. 572.) Instead, the Board simply concluded that the offense was especially heinous and cruel without any discussion why it disagreed with the probation officer's assessment of the offense or how this offense compared with other first degree murders. Further, there was no discussion or statement of reasons why the circumstances of the offense outweighed the numerous factors supporting a suitability finding. (Cf. *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 682 [absence of misconduct in prison and participation in institutional activities must be considered on an individual basis in determining parole suitability]; *In re Capistran* (2003) 107 Cal.App.4th 1299, 1305 [Governor failed to consider inmates positive institutional behavior in determining to reverse Board's parole decision].) In fact, the only positive factor supporting parole cited by the Board was the "[r]ecent psychiatric report dated 5/6/02 by Dr. Connie Giantonio." (Exh. F, pp. 39-40.) "'Any official or board vested with discretion is under an obligation to consider *all* relevant factors [citation], and the [Board] cannot, consistently with its obligation, ignore postconviction factors unless directed to do so by the Legislature.'" (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 656 quoting *In re Minnis* (1972) 7 Cal.3d 639, 645.)

The behavior of the Board before and during the parole consideration hearing indicate the Board's intention to give Mark nothing more than pro forma consideration of his suitability for parole. The hearing did not comport with due process.[4]

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[4]. This court asked in the OSC whether the Board's decision deserves "some evidence" review despite a "no-parole" policy. The answer is "no" because such a policy violates due process. (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 684.) Some evidence review is also inappropriate because of the Board's failure to afford petitioner a full and fair hearing. (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.)

II.

THE BOARD'S DECISION TO DENY PAROLE IS NOT SUPPORTED BY SOME EVIDENCE THAT MARK CURRENTLY PRESENTS AN UNREASONABLE RISK TO SOCIETY.

A. State and Federal Due Process Requires that the Board's Parole Decision be Set Aside Because It Is Not Supported by "Some Evidence."

The California Supreme Court has recognized that parole applicants possess a "protected liberty interest under the California due process clause." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 660.) Moreover, "the Fifth and Fourteenth Amendments prohibit the government from depriving an inmate of life, liberty, or property without due process of law." (*Biggs* v. *Terhune*, *supra*, 334 F.3d 910, 913.) Thus, the prisoner has a "constitutionally protected interest in freedom from confinement in accordance with the substantive criteria established by the State. . . ." (*McQuillon* v. *Duncan* (9th Cir. 2003) 342 F.3d 1012, 1014; *Biggs* v. *Terhune*. *supra*, 334 F.3d at pp. 914-915.)

It is well settled that courts may review the Board's parole suitability decisions under a deferential standard of review, and must reverse those decisions if there is not "some evidence" to support them. (*In re Ramirez*, *supra*, 94 Cal.App.4th 549, 563-564; *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 657-658; *Biggs* v. *Terhune*, *supra*, 334 F.3d at p. 915.) "It follows that searching the record to determine whether some evidence supports the Board's parole suitability determination is a regular function of deferential review for abuse of discretion." (*Ramirez*, *supra*, 94 Cal.App.4th at p. 563.)

The Board's general mandate states that an inmate may be found unsuitable for and denied parole only if the Board finds that the inmate "will pose an unreasonable risk of danger to society if released from prison." (CCR, tit. 15, § 2402, subd. (a); see also *In re Morrall*, *supra*, 102 Cal.App.4th 280, 299 ["in determining an inmate's suitability for parole, the pivotal consideration is the public safety."]) The individual circumstances tending to show unsuitability must be viewed in that light: whether they do

in fact show that the inmate is *currently* an unreasonable risk of danger. In making that determination, the Board may only consider information that is both relevant and reliable. (CCR. tit. 15. § 2402. subd. (b).) "[T]he evidence underlying the Board's decision must have some indicia of reliability." (*McQuillion* v. *Duncan* (9th Cir. 2002) 306 F.3d 895. 904 quoting *Jancsek* v. *Oregon Bd. Of Parole* (9th Cir. 1987) 833 F.2d 1389. 1390.) And it must "tend logically, and by reasonable inference, to establish a fact relevant to the inmate's suitability for parole." (*In re Morrall*, *supra*, 102 Cal.App.4h 280, 298-299.)

"According to the applicable regulation. circumstances tending to establish unsuitability for parole are that the prisoner (1) committed the offense in an especially heinous, atrocious. or cruel manner: [fn. omitted] (2) possesses a previous record of violence; (3) has an unstable social history; (4) previously has sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison. (Cal. Code Regs., tit. 15, § 2402, subd. [c].)" (*In re Rosenkrantz*, *supra*, 29 Cal.4th at pp. 653-654.) Of these factors, the Board mentions only the first factor (crime committed in an especially heinous or cruel manner) in its decision to deny parole.

1. There is no evidence that Mark committed this crime in an especially heinous, atrocious or cruel manner so as to distinguish this offense from other premeditated first degree murders.

The Board's decision violates the legal requirement that parole must be granted except in the most egregious cases. (Pen. Code, § 3041; *Rosenkrantz*, *supra*, 29 Cal.4th at p. 683; *Ramirez*, *supra*, 94 Cal.App.4th at p. 569.) A prisoner's offense may justify a parole denial only if "the prisoner committed the offense in an especially heinous, atrocious or cruel manner." (*In re Smith* (2003) 109 Cal.App.4th at p. 506; CCR. tit. 15. § 2402. subd. (c)(1).) In making this determination, the prisoner's conduct must be weighted "not against ordinary social norms. but against other instances of the same crime." (*Ramirez*. *supra*. 94 Cal.App.4th at p. 570; *In re McClendon* (2003) 113

Cal.App.4th 315 [6 Cal.Rptr.2d 278, 284].) This is to ensure uniform terms for crimes of similar gravity in respect to their danger to public safety. (*Ibid.*) Indeed, while parole may be denied on the basis of the crime, the Board's fixation on the inmate's commitment offense "should not operate so as to swallow the rule that parole is *normally* to be granted." (*In re Ramirez, supra*, 94 Cal.App.4th at p. 570.) "The law contemplates that persons convicted of murder may eventually become suitable for parole, and it would be contrary to the statutory scheme to deny parole simply because the commitment offense was murder." (*In re Morrall, supra*, 102 Cal.App.4th at p. 301; see also *Ramirez, supra*, at pp. 569-570 ["All violent crime demonstrates the perpetrator's potential for posing a grave risk to public safety, yet parole is mandatory for violent felons serving determinate sentences. [Citations.] And the Legislature has clearly expressed its intent that when murderers - who are the great majority of inmates serving indeterminate sentences - approach their minimum eligible parole date, the Board 'shall normally set a parole release date.'"])

"[P]etitioner's offense did not appear to partake of any of those characteristics that make an offense particularly egregious under the Board of Prison Term's parole eligibility matrix for first degree murders, e.g., torture, the infliction of severe trauma not involving immediate death, or murder for hire. (Cal. Code Regs, tit 15, § 2403, subd. (b).)" (*Rosenkrantz, supra*, 29 Cal.4th at pp. 689-690 [Moreno, conc.]) According to the autopsy report, death could have been caused by the first blow stricken to the head. (Exh. E, p. 3.) Further, with respect to the criteria affecting the decision to grant of deny probation in this case, the probation officer listed as "***average***" "the nature, seriousness, and circumstances of the crime as compared to other instances of the same crime." (Exh. E, "Criteria Affecting Probation" [*italics* added].) This finding by the probation officer indicates that Mark's case falls within the norm requiring a grant of parole. (*In re Ramirez, supra*, 94 Cal.App.4th at p. 570; *In re Ernest Smith* (6th DCA No.

H025304, Dec. 15, 2003) ___ Cal.App.4th ___ [Slip Opn. pp. 24-25].)

The Board's decision here fails to explain how the manner in which this crime was committed demonstrates that this crime was "especially callous" as compared to other first degree murders so as to justify denying parole on this basis. (*In re Ernest Smith, supra.*) The Board merely recites verbatim three of the five statutory factors listed in section 2402 of the Administrative Code: "the offense was carried out in a dispassionate and calculated manner," the "victim was abused and mutilated during the offense," and the "motive for the crime was inexplicable or very trivial in relationship to the offense." (Exh. F, p. 38.)[5] Following this statement, the panel stated that "the

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[5]. Section 2402, subdivision [c] provides as follows:

"(c) Circumstances Tending to Show Unsuitability. The following circumstances each tend to indicate unsuitability for release. These circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. Circumstances tending to indicate unsuitability include:

(1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include:

(A) Multiple victims were attacked, injured or killed in the same or separate incidents.

(B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder.

(C) The victim was abused, defiled or mutilated during or after the offense.

(D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.

(E) The motive for the crime is inexplicable or very trivial in relation to the

conclusion was drawn from the Statement of Facts wherein on October 14, or the early mornings of October 15, the victim, Joseph David Otto, age 61, was murdered, numerous blows to the head was inflicted by a blunt instrument. The circumstances surrounding the offense, his wife went to the neighbor's in a state of hysteria, noting that her husband had been assaulted by someone. Investigation determined that the wife and the prisoner was [sic] responsible for the death of the victim." (Exh. F, pp. 38-39.)

Indeed, the manner of the killing and the circumstances after the killing as recited by the Board show premeditation and planning, but this does not make the crime worse than other first degree murders all of which have the element of premeditation and deliberation. All first degree murders are dispassionate and calculated. The applicable CALJIC instructions requires a jury finding that the killing occurred after careful thought and weighing of considerations for and against killing. (CALJIC No. 8.20.) Thus, the fact that this crime was apparently planned ahead of time does not make it particularly egregious. Further, all first degree murders involve a callous disregard for human suffering as they presuppose cool and calm reflection on the pros and cons of killing. This particular offense seems to have been carried out in a frenzy of violence (3 blows to the head) rather than in an "execution-style killing." (Cf. *In re Ernest Smith, supra*, __ Cal.App.4th ___ [Slip Opn. P. 24] [shooting wife in the head three times could be considered callous, but not "exceptionally callous" so as to distinguish the crime from other second degree murders].) The victim was not mutilated, abused or defiled. Each of the blows was calculated to kill and there was no torture or mutilation of any kind. The Board makes no mention of what it deemed the "motive" was for the crime much less explain how it was trivial in relationship to the crime of murder. The victim was having sex with Mark's girlfriend because Mark could not afford her. Further, the victim's possessiveness and paranoia were abusive to the girlfriend and interfered with Mark's

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offense."

relationship with her. While these circumstances do not provide justification or excuse, they certainly seem to explain why the murder took place.

In this case, the prisoner will be a 70-year-old man in a matter of months. Even if, arguendo, the offense could be considered cruel for a first degree murder, this circumstance standing alone could not justify a continued period of confinement of Mark for further observation. An egregious first degree murder could justify continued incarceration of an individual beyond the MEPD where the individual is of an age where he might commit another violent crime. However, Mark is an old man who is blind in one eye. His prison adjustment has been exemplary with no incidence of violence. He is not presently dangerous nor will the passage of time make him less dangerous than he already is. The passage of time will make him less able to care for himself upon release.

Mark's crime was not especially egregious as compared to other first degree murders. Further, the circumstances of the crime standing alone do not justify his continued incarceration.

2. **Mark's criminal history - including arrests not leading to convictions - is not evidence that he is currently dangerous.**

The Board considered Mark's arrest history in addition to convictions. (Exh. F, p. 38.) The Board erred in doing so. The enabling statute, Penal Code section 3041, subdivision (b) provides that the "panel or board shall set a release date unless it determines that the gravity of the current *convicted* offense or offenses, or the timing and gravity of current or past *convicted offense or offenses*, is such that consideration of the public safety requires a more lengthy period of incarceration." Arrests do not constitute "convicted offenses."

Further, constitutional imperatives require that "'the evidence underlying the board's decision must have some indicia of reliability.'" (*Biggs* v. *Terhune*, *supra*, 334 F.3d 910, 915: see also CCR, tit. 15, § 2402, subd. (b).) Much more than an arrest record is required in order to prove guilt. There was nothing in the record before the

Board to show the factual circumstances of the prior arrests. The parole regulations only allow a parole denial based on criminal history if that history involves "violence," meaning an attempt to inflict serious injury or other assaultive behavior. (CCR, tit. 15, § 2402, subd. (c)(2); *In re Smith*, *supra*, 109 Cal.App.4th at p. 505.) The Board had a rap sheet and that is all. (Exhs. H & I.) Further, the Board has failed to demonstrate the requisite nexus between those ancient offenses and Mark's *current* dangerousness, particularly in light of his exemplary prison adjustment history.

3. Mark's prior criminal conduct and prior performance on probation and parole is not evidence that he is currently dangerous.

As part of its rationale for denying parole, the panel stated that Mark has a "record of an escalating pattern of criminal conduct." "failed previous grants of probation and parole, and cannot be counted upon to avoid criminality," and the prior prison term did not reform him. (Exh. F, pp. 38-39.) "As noted, a determination of unsuitability is simply shorthand for a finding that a prisoner currently would pose an unreasonable risk of danger if released at this time. [Citation.] The [Board's] reasoning implies a finding that there are reasonable grounds to believe that [Mark] *would*" reoffend if released on parole. (*In re Ernest Smith*, *supra*. [Slip Opn. at p. 29] [noting that evidence the prisoner *might* use drugs after his release insufficient to support Governor's finding that the prisoner needs more drug treatment before release].) The factors which led to Mark offending in his 20's were drug addiction and financial difficulties. Neither is a concern at this time given that Mark has been drug free for 44 years and has full social security, a home to live in, and job prospects upon release.

The finding that Mark has an escalating pattern of criminal conduct has no support in the record. In *Biggs*, *supra*, the court determined that there was no evidence to support a finding of an escalating pattern of criminal conduct where the prisoner was incarcerated on a murder charge in 1985 and thereafter remained crime and disciplinary

free for a period of thirteen years. (*Biggs* v. *Terhune*, *supra*, 334 F.3d 910, 916.) Mark has remained crime free for 17 years and disciplinary free for 12 ½ years.

Similarly, there is no evidence to support the finding that Mark failed a previous grant of parole. He was successfully discharged from parole for the federal marijuana offense and remained crime free for 22 years. (Exh. H.) In fact, Mark's avoidance of criminality for such a long period of time is a factor in mitigation. (Cal. Rules of Court, rule 4.423(b)(1) ["the defendant has no prior record, or an insignificant record of criminal conduct, considering the recency and frequency of prior crimes."]) The Board is required to consider the "Sentencing Rules for the Superior Courts." (Cal. Code Regs., tit. 15, § 2401; *In re Ramirez*, *supra*, 94 Cal.App.4th 549, 565.) Mark had one failed period of probation for forgery more than 48 years ago when he was subsequently arrested on a drug possession offense. (Exh. G, p. 4.) The evidence before the Board at the hearing was that Mark has been drug free for 44 years. (See Psych Report, Exh. J; Exh. G. Life Prisoner Evaluation Initial Parole Consideration Hearing, p. 4.) The likelihood of him reoffending for a drug related offense is nugatory.

B. **Even if one or more of the factors cited by the Board are supported by some evidence, the Board's decision must be set aside because it cannot be determined from the record whether the Board would have denied parole absent reliance on unsupported factors.**

The Board's reliance on factually unsupported factors to deny parole requires a new suitability hearing where it cannot be determined from the record whether the Board would have denied parole if it had not relied upon the unsupported factors. (Cf. *In re Rosenkrantz*, *supra*, 29 Cal.4th 616, 677, 682 [where one portion of Governor's decision was not supported by some evidence, the Governor's decision will be overturned unless it can be determined that there is an independent basis for the Governor's decision]; *In re Capistran*, *supra*, 107 Cal.App.4th 1299, 1306 [Governor's decision reversing grant of parole overturned because decision did not exclusively rely on facts supported by some evidence].) Here, there is no indication in the Board's recitation of

reasons for denying parole which, if any, the Board considered determinative.

Confidence in the reliability of the Board's decision is even less certain when one considers that the majority of the statutory factors favoring a finding of suitability for parole are present in this case. "[C]ircumstances tending to establish suitability for parole are that the prisoner: (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his life, especially if the stress has built over a long period of time; (5) committed the criminal offense as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities that indicate an enhanced ability to function within the law upon release. (Cal. Code Regs., tit. 15, § 2402, subd. (d).)" (*In re Rosenkrantz*, *supra*, 29 Cal.4th 616, 654.) Here, there is substantial and uncontroverted evidence that Mark does not possess a record of violent crime, has had a stable family background and stable social relationships (Exh. J, p. 1), is of an age and medical condition that reduce the probability of recidivism, has made realistic plans for living when released, and has engaged in institutional activities that indicate an enhanced ability to function within the law if released. "Most importantly, there is no evidence to suggest the public safety requires a lengthier period of incarceration." (*In re Smith*, *supra*, 109 Cal.App.4th 489, 506.)

The remedy for this due process violation is to require the Board to vacate its order denying parole and conduct a new suitability hearing for Mark in accordance with due process. (*In re Ramirez*, *supra*, 94 Cal.App.4th 549, 572; *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 658.) However, this does not mean that the Board is free to do whatever it wants. In this context, due process requires that this court state specifically in

its order that it has found that the Board's decision is not supported by some evidence. The Board should be informed that mere recitation of the same factors previously relied upon by the Board to deny parole, or the recitation of other factors without supporting explanation, will be insufficient to satisfy due process. The Board should be instructed that due process requires release of the prisoner if there is no new evidence before the Board justifying a denial of parole. (*In re Mark Smith*, *supra*, 109 Cal.App.4th at p. 794 [Board can give a prisoner a new hearing and consider new evidence].) Further, the Board should be directed to consider the factors favoring a grant of parole, to state what those favorable factors are on the record, and to state that it has considered *and* balanced those factors against negative factors, if any, in determining suitability for parole.

III.

MARK WAS NOT AFFORDED HIS DUE PROCESS RIGHT TO AN IMPARTIAL HEARING BODY AS THE MEMBERS OF THE BOARD OF PRISON TERMS HAD A CONFLICT OF INTEREST ARISING FROM THE FORMER GOVERNOR'S NO PAROLE POLICY FOR MEN CONVICTED OF FIRST DEGREE MURDER.

A. **Governor Davis had a policy against granting parole to any inmate convicted of first degree murder except in cases involving battered women where the abuse is especially severe.**

"Admissible evidence indicating that a Governor made a parole decision in accordance with a blanket no-parole policy properly could be considered by a court in determining whether the decision satisfies due process requirements." (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 684.)[6] Indeed, the California Supreme Court has long recognized that a blanket policy to deny parole to a certain class of prisoners "violates the spirit and frustrates the purposes of the Indeterminate Sentence Law and the parole system." (*In re*

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[6]. Respondent argues that this court may not consider statistics because the petition presents no statistics. (Return, p. 18.) This is incorrect. "[T]he traverse may allege additional facts in support of the claim on which an order to show cause has issued. . . ." (*People* v. *Duvall* (1995) 9 Cal.4th 464, 478.) The Order to Show Cause specifically directed the Board to respond to the issue whether the Governor has a no parole policy and its influence on the decision-making of the Board. (OSC p. 3.)

Minnis, supra, 7 Cal.3d 639, 645.) However, the evidence of former Governor Davis's policy against granting parole to those convicted of first degree murder cannot be ignored. The Board argues in its return that the fact that the Board has found 48 murderers suitable for parole in a two-year period militates against a finding of a blanket policy denying parole. (Return, p. 19.) The Board also cites *Rosenkrantz* as support for this conclusion.

In the Order to Show Cause, this court asked if the Governor's policy has had a chilling effect upon the Board resulting in the Board sending fewer cases to the Governor for review. (OSC p. 3.) *Rosenkrantz* offers no guidance on this issue. Further, the factual finding in *Rosenkrantz* is not binding on other courts when additional evidence has been introduced. In fact, the Supreme Court has cautioned that its decisions should not be considered as authority on evidence and issues not considered by that Court. (See *Hartwell Corp.* V. *Superior Court* (2002) 27 Cal.4th 256, 281; *People* v. *Tindall* (2000) 24 Cal.4th 767, 781.) The record before the court in *Rosenkrantz* consisted of the Governor's public statements that he would not release convicted murderers, in addition to his practice of reversing the parole granted to 47 of 48 prisoners whose cases he reviewed under article V, section 8(b) of the California Constitution. (*Rosenkrantz, supra*, at pp. 684-685.) The record before this Court, however, consists of 286 reversals of parole grants to murderers - roughly six times as many as in *Rosenkrantz* - with only seven additional approvals.[7] In addition, the Governor has blocked all 88 cases in which the prisoner was either convicted of a crime other than murder, or was convicted of murder before Governor Davis took office. (See Exh. 2 (Declaration of Bill Sessa).)

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[7]. According to the Lesher article in the Los Angeles Times, former Governor Pete Wilson rejected only 20 parole recommendations during his eight-year tenure. (Lesher, *Davis Takes hard Line on Parole for Killers* (Apr. 9, 1999) Los Angeles Times; attached as Exh. 16.)

This is overwhelming evidence of the Governor's policy against granting parole.[8] The Governor's policy and undisputed practice of denying parole to 98'% of lifers to whom the Board granted parole constitutes an unlawful policy against parole.[9]

The numbers are even starker when one considers first degree murder. Of the 294 murder cases Governor Davis has reviewed, 59 of them have been for first degree murder. Of these 59 cases, Davis reversed 58 decisions, a reversal rate of 98.3%. (See Exh. 12, (list provided by Bill Sessa).) The one case in which no action was taken involved the case of Cheryl Sellers which Davis had approved for parole at the time of the *Rosenkrantz* decision. The Supreme Court in *Rosenkrantz* notes that Davis let the "Board's grant of parole stand for Cheryl Sellers who murdered her husband, who had abused her 'physically, sexually, socially, economically and psychologically over a number of years.'" (*Rosenkrantz, supra*, 29 Cal.4th at p. 685.) Davis let stand one other parole grant for first degree murder, the case of Maria Suarez who was sold into sexual slavery at the age of 16 and was repeatedly raped over the course of five years. She conspired to kill her abuser. Davis had previously reversed the decision to grant Ms. Suarez parole after she spent two decades behind bars, but then in 2003, after a second

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[8]. Davis declared that he had a "no parole" policy. As reported in the Los Angeles Times, Governor Davis declared that "[i]f you take someone else's life, forget it [parole]." (Vogel, *Gov. Paroles Second Killer* (Nov. 27, 2003) Los Angeles Times–http://www.latimes.com/la-me-parole27nov27,1,2385403.story.) Reporter Dave Lesher of the Los Angeles Times reported in April 1999, about the governor's documented statements that "murderers-even those with second-degree convictions-should serve at least a life sentence in prison," and that extenuating circumstances should not be a factor. (Lesher, *Davis Takes Hard Line on Parole for Killers, supra*, Exh. 16.)

[9]. Though the former Governor approved eight paroles of murderers, the Board only grants parole in roughly three percent of eligible cases (3% of 13,000 parole hearings), and the Governor reverses all but two percent of *that* two percent - including murderers and non-murderers - without ever reversing the Board's parole *denials*, making Davis's overall parole granting rate roughly .06%. (See Sessa Declaration; Exh. 2.)

grant of parole, let the decision stand. However, Davis changed the date to add an additional year to Ms. Suarez's prison term. (Sessa Declaration; Exh. 18 [newspaper articles].) Davis has also denied parole to battered women, notably Valerie Boyd as discussed in the *Rosenkrantz* opinion. (*Rosenkrantz* at p. 685.) Thus, it is only in exceptional cases of physical, sexual, economic, and social exploitation of a woman by an individual with power and control over her that Davis will consider a grant of parole if the woman kills her abuser. Davis's showing of a modicum of leniency in cases of severely battered women who killed their abusers indicates that he would grant parole only if it was politically expedient for him to do so. For example, a number of women's organizations took up the cause of Maria Suarez after Davis denied parole the first time around. (See, e.g., http://freebatteredwomen.org/ suarezinfo.htm; http://www.womaninprison.org/; http://womenprisoners.org/news /000091.html [Calif. Coalition for Women Prisoners]; http://www.womensenews.org/ article.cfm/dyn/aid/ 955/context/archive [entitled "Outrage of the Week, Davis Denies Parole to Sex Slave Who Killed Her Abuser"];http://www.womensradio.com/ourworld/ natnews/ Govenor-in-limbo.htm.) Activist groups placed pressure on Governor Davis and the Board with respect to Cheryl Sellers as well. (See, e.g. http://www.womensenews.org/ article.cfm/dyn/aid/911; http://www.womensenews.org/article.cfm/dyn/aid/1517 [noting that Battered Women advocates held protests to keep pressure on Davis]; http://womenprisoners.org/ fire/000147.html [noting mounting pressure on Board to grant parole to domestic violence victims].) Additionally, the Legislature passed legislation in 1993 requesting the Governor to use his constitutional authority to ensure that battered women were given a fair shake in the criminal justice system. (West's Ann. Cal. Codes, Cal. Const., art. V, § 8 [Historical Notes]). There was no such public pressure on the Board in Marvin Mark's case.

In the four years that Davis was in office he did not grant parole to even one

man convicted of first degree murder even through the large majority of those cases reviewed by him involved men. (See Exh 12. [List of parolees].) This is irrefutable evidence that Davis had a no parole policy for men convicted of first degree murder. Further, the bias against men extended beyond those convicted of first degree murder. Men make up 95 percent of the felons sentenced to indeterminate terms who have met their minimum eligible parole date. An Assembly Bill Analysis for AB 1827 reflects that as of December 31, 2001, there were 886 females serving indeterminate life terms with possibility of parole and 286 were eligible for parole. On the other hand, there were 24,427 males serving life with possibility of parole, and 5,477 of them were eligible for parole. (See Assem. Com. On Public Safety, Analysis of Assem. Bill No. 1827 (2001-2002 Reg. Sess.) Pp. 5-6.)[10] Of the eight grants of parole given by Davis, three of these were to men and five to women. (Exh. 2.) Thus, women were eighteen times more likely than men to get parole when serving a life sentence.

B. **Davis's no parole policy and those of his predecessor have had a chilling effect on the number parole grants by the Board.**

Two legislative committee analyses prepared during the Brown administration (1975-1983) indicated that "[a]t the initial parole suitability hearing, which occurs one year before an inmates's minimum eligible parole date (§ 3041), 90 percent of inmates are found unsuitable for parole release. At the second and subsequent parole suitability hearings, approximately 85 percent are found unsuitable." (*In re Jackson* (1985) 39 Cal.3d 464, 473; see also *Cal. Dept. Of Corrections* v. *Morales* (1995) 514 U.S. 499, 510-511 [115 S.Ct. 1597, 1604].) "Statistics for the years 1945 to 1981, . . . indicate that typical (nonrecidivist) male first-degree murderers served between 10 and 15 real years in prison, with 90 percent of all such murderers serving less than 20 real years."

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[10]. This analysis can be found at the California Legislative website at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1801-1850/ab_1827_cfa_20020415_10... (and attached hereto as Exh. 13.)

(*Ewing* v. *California* (2003) 538 U.S. 11 [123 S.Ct. 1179, 1198 [Breyer, diss.].) These statistics indicate that for four decades the great majority of first-degree murderers were found suitable for parole and eventually paroled.

By 1985 during the Deukmejian administration, the parole rate had dropped to 5%, and by 1998 during the Wilson administration, the rate had dropped down to below 1%.[11] As had Governor Davis, former Governor Wilson made his stance against paroling life prisoners well known in the press. (See Albert Leddy Declaration, Exh. 3.) During the eight years of Governor Wilson's tenure, the Board conducted approximately 2,250 parole consideration hearings a year and found 1% (201 individuals) suitable for parole. (See Thomas Remy Declaration, Exh. 15.) In 1989, the year before Wilson came into office, 54 life prisoners were released on parole and by 1998 only 14 life prisoners were paroled. In 1999, the year Governor Davis took office, no life-term inmates were granted parole. (See Legislative Analyst's Office, Analysis of the 2000-01 Budget Bill Board of Prison Terms (5440), at p. 3, attached as Exh. 14; Exh. 12 [Sessa e-mail with attached statistics].) Obviously, the political stance of the Governor on the topic of parole had a drastic and immediate effect upon the number of individuals the Board found suitable for parole.

The Commissioners who serve on the Board of Prison Terms are appointed by the Governor and serve at his direction. Failure to adhere to his views on parole

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[11]. It was alleged by the petitioner in *Hornung* v. *Superior Court* (2000) 81 Cal.App.4th 1095 (cited by the Attorney General in the return), that since 1992, the number of suitability grants declined from about five percent during the Deukmejian administration to less than one percent during the Wilson administration. (*Id.* at p. 1098.) Mark has no information at the present time concerning the accuracy of the figures pertaining to the behavior of the Board during the Deukmejian administration (he has attempted to get them from Thomas Remy (Board of Prison Terms Legal Analyst) with no success), but the figures do not seem to be disputed by the *Hornung* Court.

matters can cause termination of their position as commissioners.[12] Regarding judicial appointments, Governor Davis has made it clear that he expects those he appoints to follow his policies or resign, and has made it clear that those who do not do so will not be elevated to other judicial appointments. (Sample, *Davis to Judges: Do It My Way Governor Says His Appointees Have Duty to Follow His Wishes* (Mar. 1, 2000) Modesto Bee, Sec. A, pg. A8; see also Morain, *Davis Not Making Friends in Bids to Influence People; Politics: Backers Say Governor Has Adopted an Imperial Approach, but Aides Point to his Public Popularity, Successes* (March 6, 2000) Los Angeles Times, Pr. A, p. 1 [attached as Exh. 17.) Unlike Board commissioners, the Governor has no control over judges after they have been appointed. He has no authority to remove them from their office for failure to follow his dictates. Given the combination of the Governor's statements regarding his position on parole and his position on the behavior he expects from his appointees, there is an unacceptable amount of pressure on the Board to follow the Governor's politically expedient parole policy.

C. **The pressure on Board members to reduce the number of parole suitability determinations creates an unacceptable bias depriving Mark of due process of law under the Fifth and Fourteenth Amendments and article 1, section 7 of the California Constitution.**

The minimum requirements of due process include a right to a neutral and detached hearing body. (*People* v. *Vickers* (1972) 8 Cal.3d 451, 457; *Gerstein* v. *Pugh*

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[12]. Albert Leddy, the former District Attorney of Kern County and a Board of Prison Terms Commissioner for nine years was not reappointed by Governor Wilson after he criticized the Board's policy of consistently and unlawfully, in his opinion, denying parole to murderers consistent with Governor Wilson's stated policies. (Leddy Decl, Exh. 3.) Mr. Lesher reported that "Davis noted that all nine members of the prison board were appointed by Wilson, who had a reputation as a conservative crime fighter. Almost mockingly, the governor implied that he will exceed even his predecessor's standards on crime sentencing. 'These are supposed to be Wilson people, and I thought they would be tough-minded,' he said." (Lesher, *Davis Takes Hard Line on Parole for Killers* (Apr. 9, 1999) The Los Angeles Times; attached as Exh. 16.)

(1975) 420 U.S. 103 [95 S.Ct. 854].) "Due process requires that the appearance of justice be satisfied. . . . [O]ur system of law has always endeavored to prevent even the probability of unfairness. . . . This Court has said . . . that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' [Citation.]" (*In re Murchison* (1955) 349 U.S. 133, 136 [99 L.Ed. 942, 946].) "[W]hen the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired." (*Vasquez* v. *Hillery* (1986) 474 U.S. 254, 263 [106 S.Ct. 617]; see also *Bracy* v. *Gramley* (1997) 520 U.S. 899, 904-905; *Cathpole* v. *Brannon* (1995) 36 Cal.App.4th 237, 245 .) This applies with even greater force to administrative adjudication. "[T]he rigidity of the requirement that the trier be impartial . . . applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed." (*NLRB* v. *Phelps* (5th Cir. 1943) 136 F.2d 563.)

In *Haas* v. *County of San Bernardino* (2002) 27 Cal.4th 1017, the California Supreme Court invalidated a county's procedure for selecting administrative hearing officers. Since the county was a party to the administrative hearings for which it was selecting its officers, the hearing officers had an impermissible pecuniary interest in favor of the county because they would not expect the county to rehire a person who did not appear to issue decisions favorable to the county. The court analogized the situation to other cases in which the person or agency paying the adjudicator had a stake in the outcome of the proceedings and had the ability to either hire them for future proceedings or not. The court concluded:

> "Here, as there, while the adjudicator's pay is not formally dependent on the outcome of the litigation, his or her future income as an adjudicator is entirely dependent on the goodwill of a prosecuting agency that is free to select its

> adjudicators and that must, therefore be presumed to favor its own rational self-interest by preferring those who tend to issue favorable rulings. Finally, adjudicators selected and paid in this matter, for the same reason here as there, have a possible temptation not to hold the balance nice, clear and true."

(*Id.* at p. 1029.)

The situation with the Board is identical as that presented in *Haas*. Davis made his position on parole of convicted murderers crystal clear in his statements and practice, as well as his position on what behavior he expected from his appointees. Any reasonable member of the Board would have understood that to send many recommendations to grant parole to the Governor would place that individual in conflict with the Governor and an adverse position with respect to his/her reappointment as a Board Commissioner. In this situation where the commissioners are subject to removal by the Governor, "it would be improper to characterize the commissioner[s] as insulated from political influence." (*DiBlasio* v. *Novello* (2nd Cir. 2003) 344 F.3d 292, 298.) This situation creates an actual bias depriving Mark of due process of law.[13]

D. **In view of the Board's conflict of interest, the Board's decision is not entitled to "some evidence" review.**

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[13]. The Attorney General argues that petitioner waived a claim of bias by failing to object to the panel members at the hearing. (Return, p. 20.) This is incorrect. What is at stake here is the federal constitutional right to due process of law and not a litigant's subjective belief that a particular jurist might be biased against him as grounds for a CCP 170.6 motion. (Cf. *People* v. *Mroczko* (1983) 35 Cal.3d 86, 104 [an actual conflict of interest affecting defense counsel's performance requires reversal despite the absence of an objection]; see also *People* v. *Hinds* (1984) 154 Cal.App.3d 222, 237 [absence of objection may not bar appellate review of a due process violation].) Further, any objection by Mark to the partiality of the hearing officers would have been futile as well as detrimental to his chances of obtaining parole. Since all of the commissioners bore the same bias, it mattered not which hearing officers he had at his hearing. (Cf. *Nunes* v. *Superior Court* (1980) 100 Cal.App.3d 915, 925-926 [where the purpose behind a rule precluding review is not advanced by its application in a particular case, the rule may be dispensed with]; see also Civ. Code. § 3510.)

The "some evidence" review standard applies only to questions of evidentiary sufficiency. (*Edwards* v. *Balisok* (1997) 520 U.S. 641, 648 [117 S.Ct. 1584, 1588].) The Board may not "routinely deny parole for a certain class of prisoners under a blanket policy of the kind condemned in *Minnis*, *supra* and shield itself with a case-by-case invocation of the 'some evidence' standard." (*In re Ramirez*, *supra*, 94 Cal.App.4th at pp. 563-564.)

Given that the Board members who heard Mark's application for parole were biased against him, this court cannot simply remand this case to the same Board members with directions that they proceed in accordance with due process of law. In *Haas*, *supra*, the Supreme Court rejected the argument that the possibility of independent review by an unbiased adjudicator can cure the effect of a biased adjudicator at a lower level. (*Haas*, *supra*, 27 Cal.4th at p. 1035.) Thus, the matter should be remanded to the Board to appoint new hearing officers to hear the case.

CONCLUSION

There is no factual basis in the record before the Board to support the Board's finding that Mark is currently dangerous and therefore ineligible for parole. In fact, the evidence to the contrary is overwhelming. Mark has programmed extraordinarily well in his 17 years in prison and has been disciplinary free for the last 12 years. He has never been violent in prison, has realistic parole plans with his ex-wife and family, and has received unanimous recommendations for parole from the correctional and psychological staff asked to evaluate him for the Board. There is nothing more that he can do to become more suitable for parole than he already is. The Board's stock incantation that Mark must participate in further self-help programming when none is available to him is an insult to Mark and to the Department of Corrections.

The decision of the Board is not entitled to "some evidence" review as the Board failed to give Mark due consideration of his parole application, and because the

former Governor's unlawful practice and policy placed undue influence upon the Board. This court should conduct an independent review of the record, and find that there is nothing in the record to justify a decision that Mark is currently dangerous. As there is no evidence to support a finding that Mark is unsuitable, the Board should be instructed that the court anticipates Mark will be found suitable for parole unless some new evidence has arisen since the date of the initial parole suitability hearing which makes him unsuitable. The matter should be remanded with directions for the Board to appoint new hearing officers to hear the case afresh, and to commence a new suitability hearing within 30 days of the date of filing of the court order. The Board should be directed to render a new determination in strict accordance with both the letter and spirit of the views expressed in this Court's order.

DATED: December 17, 2003

Respectfully submitted,

DAVID CARICO
Attorney for Petitioner

Case Name: In re Marvin Mark. No. 163430

I declare that:

I am employed in the County of Monterey, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is 215 West Franklin Street, Suite 309, Monterey, CA 93940.

On December 19, 2003, I served the attached

DENIAL TO RETURN TO PETITION FOR WRIT OF HABEAS CORPUS

in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Monterey, California, addressed as follows:

County of Santa Clara
Hall of Justice-Criminal Division
Superior Court Building
190 W. Hedding Street
San Jose, CA 95110

Hon. James Emerson, Judge
Hall of Justice
190 W. Hedding Street
San Jose, CA 95110

Research Attorney/Hall of Justice
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Marvin Mark D-87555
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Barbara Fargo
Deputy Public Defender
Office of the Public Defender
120 West Mission Street
San Jose, CA 95110

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Monterey, California, on December 19, 2003.
(Date)

David D. Carico _____
(Typed Name) (Signature)