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Charlene Bonner
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DECISION

IN THE MATTER OF

ERNEST FERNANDES

W56833

TYPE OF HEARING: Initial Hearing

DATE OF HEARING: April 30, 2015

DATE OF DECISION: August 26, 2015

PARTICIPATING BOARD MEMBERS: Charlene Bonner, Tonomey Coleman, Sheila Dupre, Lee Gartenberg, Ina Howard-Hogan, Tina Hurley, Lucy Soto-Abbe.

DECISION OF THE BOARD: After careful consideration of all relevant facts, including the nature of the underlying offense, criminal record, institutional record, the inmate's testimony at the hearing, and the views of the public as expressed at the hearing or in written submissions to the Board, we conclude by unanimous vote that the inmate is a suitable candidate for parole. Parole is granted to his one year to one year and a day from and after sentence on or after May 14, 2015. The inmate must complete six months in lower security and continue to engage in programming pending release to a long term residential program.

I. STATEMENT OF THE CASE

In July of 1994, after a jury trial in Plymouth County Superior Court, Ernest Fernandes was found guilty of one count of deliberate premeditated murder in the first degree for the murder of Christopher Bender. Fernandes, who committed the murder at the age of 17, was sentenced to life in prison without the possibility of parole.

The facts of the case are derived from *Commonwealth v. Fernandes*, 427 Mass. 90 (1998). Ernest Fernandes and several other men, including Stephen "Stix" Fernandes ("Stix"), Jordan Martel Rice, Tim Lucas, Karl Moore, and others, went to a party in a Brockton home on the night of November 2, 1991. Fernandes and a few of the others were seen carrying guns. Stix remarked that he was "sick" of the victim, Christopher Bender, because the victim "had

pulled a gun on him." Stix said he wanted to go to the east side of Brockton and "(w)et them bitches up," meaning that he wanted to kill the victim and his cousin, Jesse Starks.

In the early morning hours of November 3, the group, totaling ten, went in two cars to a housing project on the east side of Brockton. During the ride, Fernandes and Karl Moore loaded their guns while discussing their concerns about leaving fingerprints on the bullets. While the two drivers waited near the automobiles, the others, including Stix and Fernandes, walked into the project, where they found the victim and Starks smoking marijuana in an automobile. They began shooting at the automobile, killing the victim. Starks was not harmed. The shooters ran back to the waiting automobiles immediately after the shots were fired and drove away.

The group drove to a convenience store. En route, Fernandes asked, "Whose car was that?" Someone told him it was the victim's, to which Fernandes replied, "Well, then, (the victim) got his." Fernandes, who was holding some shell casings, expressed concern that his fingerprints might be on them. He also said that he wanted to wash gunpowder off his hands. When they arrived at the store, a police cruiser sped by with its lights and siren activated. Fernandes told the others not to worry because no one had seen their faces, and that nobody knew his face because he was from Boston.

At the scene, police recovered spent shell casings and projectiles. It was determined that at least three guns were used in the shooting: two nine millimeter handguns and a .22 caliber handgun.

The day after the murder, the group met in Kevin Bynum's bedroom. Fernandes attended this meeting, but apparently did not say anything. Bynum's roommate, William Faria, who was not involved in the shooting, tried to join them but was kept out of the bedroom. From the living room, he was able to overhear the group's discussion about the previous night. Lucas told the others to blame the shooting on some people from Boston. Stix mentioned that Lucas's girlfriend was complaining about guns being in her house. Stix and Lucas suggested either dumping the guns in a river or taking them to Providence. The meeting ended when Stix and Lucas left to retrieve the guns.

On March 16, 1998, the Supreme Judicial Court (SJC) affirmed Fernandes' conviction of murder in the first degree by reason of deliberate premeditation on a theory of joint venture. On December 13, 2000, in Worcester Superior Court, Fernandes was convicted of assault and battery by means of a dangerous weapon. Consequently, he received two state sentences, each for one year to one year and a day, and ordered to be served from and after the life sentence. Fernandes received these sentences for his role in a planned assault on correctional officers occurring in 1998. Accordingly, Fernandes would be paroled from his life sentence to these sentences.¹

On December 24, 2013, the SJC issued a decision in *Diatchenko v. District Attorney for the Suffolk District & Others*, 466 Mass. 655 (2013), in which the Court determined that the statutory provisions mandating life without the possibility of parole were invalid as applied to

¹ A sentence for a crime committed on or after January 1, 1988, which is ordered to run consecutive to a life sentence shall not be aggregated with a life sentence for purposes of calculating parole eligibility on the consecutive life sentence. 120 CMR 200.08(3)(c).

those, like Fernandes, who were juveniles when they committed first degree murder. The SJC ordered that affected inmates receive a parole hearing after serving 15 years. Accordingly, Fernandes became eligible for parole and is now before the Board for an initial hearing.

II. PAROLE HEARING ON APRIL 30, 2015

Fernandes was represented by Attorneys Paul Rudof and Nancy McLean. Fernandes began the hearing by describing the precipitants that changed the course of his life, leading him to murder Christopher Bender. Fernandes offered an apology to Mr. Bender's family, and the community. Fernandes proceeded to identify specific events, and influences that he now recognizes shaped his decision making in his formative years, and led to his eventual desire to change his life.

The Parole Board focused questioning on the relationship between his stage in development, relationships and environmental influences as they related to his offense. Fernandes highlighted the effects of being raised by a mother who was addicted to drugs. He found her overdosed on the bathroom floor when he was approximately 9 years old. Fernandes described the years of transitioning between his father and mother's custody, and the Department of Social Services. He witnessed domestic abuse at the hands of his father, and he described his father as a career criminal who was episodically emotionally and physically abusive toward him as well. Fernandes described his early childhood as "chaotic" and he endured significant parental neglect. Fernandes stated that he started to admire older individuals who were involved in substance abuse and criminal behavior, which led to his own delinquent behavior. Fernandes became court involved by age 15. He stated, "I had no supervision. I had no guidance really and I thought I could do what I wanted. Hang with the cool kids." His only source of positive relationships and conduct came through his success in sports. Unfortunately due to his delinquent behavior, he was inconsistently afforded the opportunity to play on school teams. Eventually it was becoming the victim of a shooting that led to his inability to continue to play sport. Fernandes was shot in the hand and back by individuals unknown to him and he lost the one positive aspect of his life that may have led him down a different path. Fernandes stated following that life changing event, he quickly diverted back to negative influences. He left school, as he saw no point in resuming his education if he could not play sports, and there were no parental influences to convince him otherwise.

Fernandes described his continued path of increased criminal behavior, risk taking behaviors, and a lifestyle that led to his victimization of others. He was 17 years old at this point, had dropped out of school and was "hanging on the street." One of his major influences was his cousin, (co-defendant) who was identified as a member of a local gang, where Fernandes was residing at the time of the murder. Fernandes denied that he was affiliated with the gang, but nevertheless he was associated with his cousin and other gang members. These relationships were the contributing factor that led to a fatal dispute. Fernandes described that period of his life as being without direction, colored by sporadic substance use, and replete with reckless and careless acts.

Fernandes described the precipitants and details of the murder that were consistent with the known facts of the case. Fernandes answered many questions regarding his role, his intent, and his feelings about what he had done both during that period of his life, and now. Board members asked him to describe his conduct following the murder, the course of his trial

and his institutional adjustment. Fernandes was asked how much of a factor he thinks his age played in the murder of Mr. Bender. He stated that he thought his age played a factor, but "I knew what I was doing." He stated it was his peer influences and overall lifestyle that was the primary source of his criminal conduct.

Fernandes acknowledged that after being convicted of premeditated murder in the first degree, he entered the prison system as a scared young man who had no hope. Fernandes also described being taught the prison code and how to survive by other inmates, which led to his continued anti-social conduct and violent acting out. In reference to what he describes as his most serious disciplinary action, assault and battery on a corrections officer for which he received the on and after sentence, Fernandes attributed his youth and learned behavior in the prison system as the primary contributing factors to his actions. He stated, "You have to understand when I first came to prison I was taught that if you have a friend you have to help him regardless of the situation." Fernandes also reported that his time spent in the Disciplinary Detention Unit (DDU) (1999-2003) was another turning point in his life. He stated it was this period of segregation where he realized, despite still believing he would serve the rest of his life in prison, he wanted to change. Fernandes had completed his GED in 1998, but steadily increased his investment in available productive programs and employment.

Once Fernandes decided that he wanted to change, he stated, "I stayed focused and made myself a better person. I am no longer worried about keeping up with the in-crowd, or with what people think of me. As long as I continuously move forward and stay true to who I am, then I will be fine." Fernandes acknowledged that his pursuit to change has been met with many challenges, but attributes his willingness to mature and grow, and the programs he invested in as the source of his transformation. Fernandes provided a description of how various programs helped him, and where he felt he needed more rehabilitation. Fernandes stated after learning he would be afforded the opportunity for parole, he requested and received mental health services as he suddenly began to have overwhelming feelings associated with the possibility he may be able to one day be released to the community. He stated he has a realistic view of how different the world is today, and has tried to prepare himself for such an adjustment. Fernandes also provided the Parole Board with the positive relationships he has maintained with his family, including his mother who is now caring for some of his siblings' grandchildren.

Fernandes had many people attend his hearing. He had the maximum allotted number of people testify on his behalf. Those people included the former prison librarian, Beverly Veglas, who testified that she had 14 years of experience and came to know Fernandes as a frequent patron and then as an employee. Ms. Veglas, given her years of experience, provided the Parole Board with her opinion of Fernandes' genuine growth, his transition to becoming a trusted certified law clerk, and his consistent respectful demeanor. Ms. Veglas testified that she believes he demonstrated the qualities necessary to become a successful and productive member of society. She also added that the average lay person could not begin to understand what Fernandes had to endure in his role given the prison environment. She emphasized that his demonstrated ability to succeed in that environment is a testament to the person he has become.

Also speaking in support of Fernandes' parole was his mother, Gail Fernandes, his brother Nathaniel Fernandes and his aunt Francine Coleman. All family members testified as to

their commitment to assisting Fernandes with his transition. Ms. Fernandes corroborated the traumatic childhood and parental neglect he suffered as a child. Ms. Fernandes stated she is now able to provide him with the support he needs to help him transition.

Robert Kinscherff, Ph.D., Esq., testified as an expert witness in this hearing. Dr. Kinscherff also provided an extensive evaluation, which included validated assessment tools, for the Parole Board's consideration. Dr. Kinscherff highlighted the relationship between Fernandes' stage of development and environmental factors with the murder of Christopher Bender. While not dismissing the relevant factors of planning and organization that took place, he stated, "In my opinion, the circumstances of the crime reflected some degree of immaturity, including recklessness, and vulnerability to peer influences." Dr. Kinscherff also provided the Parole Board with his opinion regarding factors that contributed to Fernandes' early anti-social and violent conduct, the relevance of several traumatic events that he endured, and his capacity for change and rehabilitation. Dr. Kinscherff opined that his desire for meaningful change occurred as a result of his placement in DDU from 1999-2003, and although he continued to incur disciplinary reports, his thinking clearly shifted and he began to accept responsibility for his actions and committed himself to a course of meaningful change. Dr. Kinscherff responded to specific questions regarding his stage of development as it related to his conduct and when and why he made a positive shift. In addition, Dr. Kinscherff stated in his report, "It is notable that this now 40 year old man demonstrated a course of significantly improved institutional adjustment and involvement in work and programming before he could have reasonably anticipated that his sentence of Life Without Possibility of Parole would be subject to review due to decisions by the United States Supreme Court and the Massachusetts Supreme Judicial Court." Dr. Kinscherff provided an interpretation of several risk assessment tools which provide evidence of his low risk level in specific areas, and his opinion regarding his personality profile, strengths and weaknesses. Finally, Dr. Kinscherff provided recommendations, should Fernandes be paroled, to assist him with a successful adjustment in the community.

Speaking in opposition of Fernandes' parole release was Suzanne McDonough from the Plymouth County District Attorney's Office. ADA McDonough testified that the victim witness advocate assigned to this case has spoken with the victim's sister who expressed that her family forgives Fernandes for the murder of their loved one, and although she did not wish to be present, she wanted to learn what Fernandes had done to rehabilitate himself, and wanted to convey via the District Attorney's Office that she believes in second chances. ADA McDonough stated that it is the position of the District Attorney's office that Fernandes is not a suitable candidate for parole and should continue with his rehabilitation. ADA McDonough highlighted the "execution style" facts of the case and the purposeful acts of Fernandes, as well as his prolonged lack of any remorse for committing a senseless murder.

III. DECISION

Ernest Fernandes at the age of 17, acting as a co-venturer, shot and killed 19 year old Christopher Bender. Fernandes has been incarcerated for over 23 years and was granted this parole hearing as a result of the *Diatchenko* decision. At the time of the murder, Fernandes had diverted down a path of self-destruction, self-worthlessness, and reckless abandonment for others. Fernandes, by most accounts known today, did not then fully encompass the capacity for perspective, autonomous choice, and forethought. While his age and stage of development

alone does not excuse his behavior, combined with the traumatic and neglectful experiences he endured at a critical stage in development, it provides some context in which to evaluate Fernandes.

The most important criteria in the analysis of parole suitability concerns whether Fernandes meets the legal standard. The Parole Board regards Fernandes' efforts in his rehabilitation to be both genuine and beneficial. Fernandes has demonstrated through his conduct, insight, and positive support that he has acquired the necessary foundation for a successful transition into society. The Parole Board also considered the expert opinion of Dr. Robert Kinscherff who provided testimony that was also supported by evidence based assessment tools. Dr. Kinscherff described the correlation between Fernandes' stage of development, environmental factors, peer influences, and other relevant factors that contributed to Fernandes' actions. Dr. Kinscherff also provided the Parole Board with his opinion regarding Fernandes' capacity for change, investment in rehabilitation, and what conditions may assist him with successfully transitioning into the community.

The four goals of sentencing – punishment, deterrence, rehabilitation, and public protection – have been met. The standard we apply in assessing candidates for parole is set out in 120 C.M.R. 300.04, which provides that, "Parole Board Members shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." Applying that appropriately high standard, the Parole Board grants parole to Fernandes to his one year to one year and a day from and after sentence on or after May 14, 2015. Fernandes must complete six months in lower security and continue to engage in programming pending release to a long term residential program subject to the special conditions outlined below.

SPECIAL CONDITIONS: Parole to a long term residential program; no drug use or alcohol use, with testing for compliance; one-on-one counseling to address adjustment, transition, and prior abuse; GPS monitoring at the discretion of the Parole Officer; must abide by curfew; no contact with the victim's family; and report to Parole Office on the day of release.

I certify that this is the decision and reasons of the Massachusetts Parole Board regarding the above referenced hearing. Pursuant to G.L. c. 127, § 130, I further certify that all voting Board Members have reviewed the applicant's entire criminal record. This signature does not indicate authorship of the decision.


Michael J. Callahan, General Counsel

August 26, 2015
Date