



Charles D. Baker
Governor

Karyn Polito
Lieutenant Governor

Daniel Bennett
Secretary

The Commonwealth of Massachusetts
Executive Office of Public Safety and Security

PAROLE BOARD

12 Mercer Road
Natick, Massachusetts 01760

Telephone # (508) 650-4500

Facsimile # (508) 650-4599



Charlene Bonner
Chairperson

DECISION

IN THE MATTER OF

JOHN NICHYPOR

W47457

TYPE OF HEARING: Initial Hearing

DATE OF HEARING: March 26, 2015

DATE OF DECISION: June 17, 2015

PARTICIPATING BOARD MEMBERS: Dr. Charlene Bonner, Tonomey Coleman, Sheila Dupre, Lee J. 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, the age of the inmate at the time of 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 not suitable candidate for parole. The inmate will have a review hearing three years from the date of the initial hearing.

I. STATEMENT OF THE CASE¹

On November 21, 1989, after a jury trial in Essex County Superior Court, John Nichypor was found guilty of one count of first degree murder and was sentenced to life in prison without the possibility of parole. Nichypor and his co-defendants murdered David McLane.²

¹ To the extent that there are factual inconsistencies between the description of the crime in this record of decision and that of co-defendant Joshua Halbert, it must be noted that the facts of the Board's March 12, 2015 record of decision for Halbert were derived from *Commonwealth v. Halbert*, 410 Mass. 534 (1991). As noted by the SJC in that decision, those facts were taken largely from a confession Halbert made while in police custody.

² John Nichypor's co-defendants were Kevin Pierce, who is currently serving his first degree life sentence without the possibility of parole at MCI-Concord and Halbert (also a juvenile at the time of the murder), who became eligible to see the Parole Board after the *Diatchenko* ruling. As reflected in his March 12, 2015 record of decision, Halbert was denied parole and given a four year review date, and is currently serving his sentence at MCI-Shirley.

On December 24, 2013, the Massachusetts Supreme Judicial Court (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 those, like John Nichypor, who were juveniles when they committed first degree murder. The SJC ordered that affected inmates receive a parole hearing after serving 15 years in prison. Accordingly, Nichypor became eligible for parole and is now before the Board for an initial hearing. Nichypor is currently serving his sentence at MCI-Norfolk, where he has been incarcerated for the last seven years.

The facts of this case are derived from *Commonwealth v. Nichypor*, 419 Mass. 209 (1994), a decision on appeal in which the SJC affirmed Nichypor's conviction of first degree murder and declined to enter a lesser degree of guilt. The SJC determined that the jury could conclude that Nichypor was engaged in a joint venture and that his participation in the crime constituted cruelty.

On September 28, 1988, Nichypor telephoned Kevin Pierce. The two men talked about "rolling a fag" that evening. Shortly after their telephone conversation, Nichypor and Pierce went to a restaurant in Gloucester, accompanied by Joshua Halbert. Pierce then telephoned the victim, David McLane. Pierce told Nichypor and Halbert that McLane was homosexual.

McLane picked the three men up and drove them to his apartment in Gloucester. The four men drank alcohol and watched pornographic movies at McLane's apartment. During the movie, Halbert and Pierce went into the kitchen. Nichypor remained in the living room with McLane. When Halbert and Pierce reentered the room, Pierce said that he, Halbert, and Nichypor were homosexual. McLane, who was sitting on a couch still watching the television, asked Halbert, "Josh, what do you want to do?" Interpreting the question as a sexual overture, Halbert responded, "I'm not into that stuff." Then, Pierce approached McLane from behind and locked his arm around McLane's neck. Pierce choked the victim until his face turned purple. During this struggle, Nichypor "threw one punch" at the victim, and Halbert clubbed the victim in the head and groin with an empty whisky bottle stating, "You're going to get hurt, cause I'm not queer."

Halbert then pulled a razor blade from his back pocket and cut the victim's throat several times. Pierce went into the kitchen and grabbed a steak knife, which he thrust into the victim's left temple. Halbert ran to the kitchen and grabbed a second knife, which he placed on the couch. Either Pierce or Halbert picked up the second knife and thrust that through the victim's left temple. One knife was flush with the skin surface with its tip protruding from the right side of the victim's neck; the other knife was out approximately three inches from the skin on the left temple. Pierce repeatedly said, "Die faggot. Die faggot." The victim was "making strange noises." Pierce told Nichypor to put a cushion over the victim's face to keep him quiet and muffle his moans. In compliance, Nichypor placed a couch cushion over the victim's face. All three men then knelt down in the victim's blood and prayed for forgiveness.

After the attack, Nichypor, Pierce, and Halbert took a framed, uncut sheet of dollar bills and a box of coins from the apartment. Nichypor took a share of the stolen property. The three men also tried to remove any fingerprints that they left in the apartment. One of the men found the victim's automobile keys. After being asked by Pierce and Halbert to drive the victim's automobile, Nichypor got into the driver's seat but could not start the automobile. The

three men then left the scene on foot. Several days after the killing, the police arrested Nichypor. Nichypor gave a signed statement to the police. Microscopic traces of blood were found on Nichypor's hands, forearms, and the pants he wore on the night of the killing, as well as on the driver's side of the victim's automobile.

II. PAROLE HEARING ON MARCH 26, 2015

John Nichypor, now 44-years-old, appeared for his initial parole hearing represented by Attorney Edward Hayden. Following the SJC's *Diatchenko* decision, affected inmates such as Nichypor obtained parole eligibility after serving 15 years. Nichypor has been incarcerated for 26 years.

In his opening remarks, Nichypor began by apologizing to the victim's family, friends, and the community. He admitted that David McLane was murdered because he was gay and that he takes full responsibility for his "inexcusable actions." Nichypor has been incarcerated since 1988 and described his 26 years in prison as follows: "I came to prison a lost and broken human being. My adjustment has been rocky. I am always trying to better myself and improve. I have been involved in rehabilitative programming and plan to build on these skills to strengthen my recovery." He has incurred multiple disciplinary reports, with the most serious occurring in 2001, 2002, 2006, and 2007 for fighting. Nichypor has also received disciplinary reports for being out of place, possessing a weapon, lying to staff, and possessing contraband, which included unauthorized medication, stamps, razors, and gambling paraphernalia.

The Parole Board reviewed pertinent information with Nichypor regarding his childhood. As Nichypor was 17-years-old at the time he committed this offense, the Parole Board inquired about any developmental or social issues that may have played a role in the commission of such a gruesome and heinous crime. Nichypor described in detail a childhood that included physical and emotional abuse from his father and step-father, behavioral problems, addiction, and criminal behavior that resulted in a commitment to the Department of Youth Services (DYS).

Nichypor testified that his father drank alcohol excessively, smoked marijuana, and physically and emotionally abused both him and his mother, resulting in his parents' divorce. Nichypor described his family as "a mess," and noted that when his mother remarried "in the beginning," his step-father treated him "like his own son." He stated that as his step-father and mother abused alcohol, he and his mother suffered physical abuse at the hands of his step-father. He stated that his step-father "beat the crap out of me" and was "more violent" than his own father. Nichypor advised that he had sustained multiple head injuries, having been "knocked unconscious" by his step-father. He acknowledged that his unstable living arrangements, abusive environment, and substance abuse engendered behavioral problems that plagued him throughout his adolescence. At age 13, Nichypor was prescribed Ritalin for his difficulties with attention and impulsivity, but ceased taking the medication approximately a year later for reasons he said he did not know. Although Nichypor denied abusing this medication, he did admit that, at age 13, his substance abuse accelerated and he smoked marijuana weekly, drank alcohol on weekends, and experimented with LSD, hash, and cocaine. He acknowledged that his drug use negatively affected his behavior, resulting in him "hanging out with kids who were trouble makers" and committing criminal offenses, which included selling drugs. At age 16, he was arrested for malicious destruction of property for "slashing tires with a group of kids" and was eventually committed to the DYS after arrests for armed

assault and robbery and assault and battery with a dangerous weapon. He stated that he "pulled out a knife over a disagreement over a girl." At the time of the murder, Nichypor was unemployed, residing with his girlfriend's family, and abusing drugs and alcohol.

Responding to questions from the Board, Nichypor described his participation in the murder of Mr. McLane and categorized his role as being a follower of his co-defendants. He admitted that he and his co-defendants targeted the victim due to his sexual orientation. Nichypor acknowledged that when they agreed to "roll a fag," that meant "to beat up a gay person." Nichypor insisted that the plan was to go to Mr. McLane's home and "just beat him up." He denied any intent to kill or rob Mr. McLane. He stated that "the robbery was an afterthought." He admitted that he "threw a punch" at Mr. McLane, but hit Kevin instead. He further admitted that after "someone said put a pillow over his head," he put a pillow over Mr. McLane's head. He denies that he attempted to drive Mr. McLane's car after the murder. After this account, Board Members questioned Nichypor extensively about the inconsistencies in his prior statements, his co-defendant's accounts, as well as his own confession in 1988.

Nichypor adamantly denied any intent to rob Mr. McLane, yet in his confession and trial testimony, he stated that he understood "roll a fag" to mean they were going to "rip [someone] off" or conversely "getting drunk, going out, and picking a fight with someone who wanted to fight." As recently as 2014, in his Department of Correction (DOC) Classification appeal, Nichypor describes the offense as "a robbery gone horribly wrong." When questioned by the Board about his description of the offense, his improbable response was that another inmate wrote the appeal and he had not read it. In his 1988 confession, Nichypor admitted that he and his co-defendants went through the house after the murder, wiping it up and taking things. Additionally, in Nichypor's confession, he admitted to putting a cushion over McLane's face to "to keep him quiet and muffle his moans," but testified at trial that he used the cushion after McLane was dead as an act of compassion in order to cover his face.

Nichypor is currently housed at MCI-Norfolk, where he is employed in Industries and upholsters furniture. He reports actively participating in the Jericho Circle program and Wiccan study groups. He feels that he has "rehabilitated himself" and "has addressed his substance abuse and anger issues." He advised, "I am a lot more sure of myself then when I came in" and noted that he has gained insight through programs, particularly the Emotional Awareness program and the Correctional Recovery Academy, where he learned his "triggers." Nichypor stated that, in 2006, he had an epiphany about how his behavior in prison affected others, which was something he had never taken into consideration. He admits that his biggest weakness is his "addiction" and that he will "always have to address my addiction." Nichypor was asked by the Board about his issues with anger during his incarceration that resulted in several disciplinary reports for fighting. He advised the Board that his anger "was always a struggle" and that he has "overcome" his anger via the various programs he completed while in custody.

In 2000, at age 30, Nichypor began programming to address his violent behavior by completing the Anger Management program. He remained program involved and addressed his issues with anger resulting in his completion of the Violence Reduction program (2003 and 2004) and the Alternatives to Violence Program in 2006 (Basic), 2009 (Trainer), 2011 (Advanced), 2013 (Basic), and 2014 (Advanced). Despite his insistence of overcoming his anger issues via programming, Nichypor's disciplinary reports for fighting (after completing

these programs) is evidence otherwise. His last fight occurred in 2007, at age 37. Nichypor admitted that he "did not apply the things" he learned in Alternatives to Violence and stated, "I made a poor decision." Nichypor's continued poor decision making resulted in a disciplinary report associated with gambling in 2012, at age 42. Nichypor admitted that he was involved in a gambling ring and that he was one of the individuals "who holds the stamps collected from inmates who owed them for losses." He advised the Board that he no longer gambles since he realized that "it's an addiction, like substance abuse." Throughout the hearing, Board Members expressed concerns about the extent of Nichypor's rehabilitation in light of his institutional behavior.

Nichypor had several people speak in support of parole including his mother, step-father, childhood friend, and an advocate from the Committee for Public Counsel Services (CPCS). They testified to Nichypor's rehabilitation and release plan, including the support he would receive if released to the community. The Board reviewed the Memorandum submitted by Attorney Hayden, "John Nichypor's Memorandum in Support of Parole," which included an independent psychiatric evaluation of John Nichypor by Dr. Elizabeth Davis. Dr. Davis' report outlined Nichypor's history: current medications and medical history, mental functioning, clinical impressions relevant to parole, and recommendations for further treatment.

Speaking in opposition to Nichypor's parole were members of the victim's family; his sisters and brother-in-law. Essex County Assistant District Attorneys Andrew Camelio and Catherine Semel strongly opposed parole. They described how Nichypor continues to blame others for his problems. They also noted Nichypor's inconsistent stories in regard to his disciplinary reports, Nichypor's blame of his co-defendant for the murder of Mr. McLane, and his characterization of the murder as "a robbery gone bad" as indicated in the DOC classification appeal as evidence of his lack of rehabilitation.

III. DECISION

David McLane was brutally beaten and stabbed to death by John Nichypor and his co-defendants. They targeted Mr. McLane because he was a homosexual and then savagely kicked and beat him. Mr. McLane was found with two steak knives protruding from his temple that were inserted so deep, that the handles were nearly flush with the skin surface. Mr. McLane suffered immeasurable pain. The Parole Board questioned Nichypor at length regarding his role, his intent, and the precipitating factors that led to his participation in such a heinous crime.

The four goals of sentencing – punishment, deterrence, rehabilitation, and public protection – have not 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 has determined that Nichypor does not meet the legal standard for parole. Just last year in an appeal of his classification, Nichypor describes this heinous crime as "a robbery gone horribly wrong," notwithstanding the fact that he continues to deny any intent to rob Mr. McLane. Despite evidence to the contrary, Nichypor minimizes his role in this brutal murder. Most concerning to the Board is Nichypor's continued lack of control of his impulses

while incarcerated, which has resulted in violent and criminal behavior. Although he insists that he has no issues with anger, his several disciplinary reports for fighting particularly after completing programming to address anger issues suggest otherwise. The Parole Board acknowledges that his last disciplinary report for fighting was received in 2007, yet a longer period of positive institutional adjustment is warranted to evidence his rehabilitation. He is encouraged to engage in further programming. He will have a review hearing in three years from the date of the hearing.

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.



Peter Mimmo, Staff Attorney

6/17/2015

Date