



The Commonwealth of Massachusetts  
Executive Office of Public Safety



PAROLE BOARD

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**DECISION**

**IN THE MATTER OF**

**ROBERT FOXWORTH**

**W52274**

**TYPE OF HEARING:** Review Hearing

**DATE OF HEARING:** September 17, 2013

**DATE OF DECISION:** July 31, 2014

**PARTICIPATING BOARD MEMBERS:** Dr. Charlene Bonner, Tonomey Coleman, Sheila Dupre, Ina Howard-Hogan, Lucy Soto-Abbe, Josh Wall

**DECISION OF THE BOARD:** After careful consideration of all relevant facts, including the nature of the underlying offense, institutional record, the testimony of the inmate at the hearing, the views of the public as expressed at the hearing or in written submissions to the Board, we conclude by a unanimous vote that the inmate is not a suitable candidate for parole at this time. Parole is denied with a review in five years.

**I. STATEMENT OF THE CASE**

The facts of the case have been developed by reference to *Foxworth v. St. Amand*, 570 F.3d 414, (1<sup>st</sup> Cir. 2009), a decision by United States Appeals Court for the First Circuit, and related police reports.

On May 23, 1991, at approximately 6:00 p.m., a witness observed a man run out of a building located at Brookford Street in Roxbury. The man yelled: "Those people are crazy." Shortly thereafter, the victim, Kenneth McLean, age 26, rushed out of the building in a confused and disorderly manner. McLean, who resided in a second floor apartment in the building, was observed to have blood on his mouth and tape on his arm, and wearing only a T-shirt.

Witnesses then observed a man, who was later identified as Robert Foxworth, then age 22, emerge from the apartment building with a gun and fire three or four shots at McClean. McClean, who suffered from gunshot wounds to his right chest and rear back, fell to the ground and was later pronounced dead from the gunshot wounds at an area hospital.

Earlier that evening, Foxworth and two other men, Troy Logan and Ronald Christian, apparently agreed to go to McLean's apartment. According to a statement Troy Logan made to police, he and Christian wanted to buy cocaine from McClean, while Foxworth accompanied them because he believed McLean owed him money as a result of a prior sale of "bad" cocaine. Shortly after the group's arrival, Foxworth and McLean argued, and Foxworth left the premises. Logan opted to do likewise. As he made his way downstairs, Logan saw Foxworth coming back upstairs and noticed that he had a gun tucked into his waistband.

There was an apparent struggle in McLean's second floor apartment, as police discovered blood splatters in the living room, duct tape on the floor, and some furniture had been knocked around.

Foxworth and his two codefendants, Logan and Christian, were tried in the Superior Court on indictments charging each of them with murder in the first degree. Foxworth moved unsuccessfully before trial to sever his case from his codefendants on the ground that he would be prejudiced by the introduction of a statement one of his codefendants, Troy Logan, had given to the police. At trial, Logan's statement was introduced in evidence (over Foxworth's timely objection) through a police detective.

On March 31, 1992, in Suffolk Superior Court, Foxworth was convicted by a jury of second degree murder for the shooting death of McLean. Logan and Christian were both charged with first degree murder. The trial judge ordered a directed verdict of acquittal for Christian, and the jury acquitted Logan.

## **II. HABEAS CORPUS & FEDERAL PROBATION SUPERVISION**

Foxworth filed numerous appeals of his conviction in both state and federal court. One of the grounds of his appeals was the admission of Logan's statement to police, which Foxworth contended was improper. On September 10, 2003, Foxworth filed a petition for *habeas corpus* in the United States District Court for the District of Massachusetts. Lengthy proceedings in the Federal courts ensued. On August 17, 2006, a District Court judge granted Foxworth's petition on the basis of the claimed *Bruton*<sup>1</sup> violation, vacated his conviction, and ordered the Commonwealth to retry Foxworth within sixty days or release him. On appeal by the Commonwealth, the First Circuit remanded the case to the District Court judge to address Foxworth's claim of insufficient evidence. On remand, in May of 2008, that judge concluded that the evidence was insufficient to support Foxworth's conviction and ordered his release. The Commonwealth again appealed to the First Circuit.

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<sup>1</sup> *Bruton v. United States*, 391 U.S. 123 (1968), a United States Supreme Court decision holding that the admission of codefendant's confession (Logan) that implicated defendant (Foxworth) at a joint trial constituted a prejudicial error. Where the codefendant's confession was admitted at joint trial and codefendant did not take the stand, defendant was denied his ability to cross examine the codefendant and thus his constitutional right of confrontation.

Foxworth was released pending appeal on March 11, 2008. He was supervised by Boston Federal Probation. As a result of his behavior on probation a warrant was issued on October 15, 2009, Foxworth was arrested on October 20<sup>th</sup>, and probation was revoked on October 29, 2009.

According to this motion to revoke probation filed by the United States Assistant Attorney General on October 29, 2009, Foxworth was unable to comply with the conditions of probation, although Foxworth's probation officer "tried to work with him on several occasions." Foxworth reportedly failed to properly confirm his employment with Down South Construction, deposited fraudulent money orders to Sovereign Bank and at the time had an outstanding assault charge out of Quincy District Court.

The probation officer also highlighted the problems Foxworth had in complying with his curfew on 27 different occasions. He also reportedly abused the emergency leave system, which allowed him to leave his residence only for 911 medical emergencies. At the time of the petition, Foxworth was also set to go to trial within a few days in Norfolk Superior Court for charges related to his attempting to smuggle drugs into MCI-Cedar Junction in 2007.

In April 2008, Foxworth was arrested in Randolph for a warrant out of Norfolk Superior Court related to charges brought against Foxworth for his activities while incarcerated.

Also, while under probation supervision Foxworth was arraigned in Quincy District Court for assault on September 23, 2009. It appears this arrest stems from a report of a fight on July 6, 2009. This case was eventually dismissed in March 2010.

On July 22, 2010, the United State Court of Appeals, First Circuit, reversed the decision on the Commonwealth's appeal of the district court and directed the entry of a judgment denying and dismissing the underlying habeas corpus petition.

### **III. CRIMINAL & INSTITUTIONAL HISTORY**

In February 1988, Foxworth had been convicted of knowingly receiving stolen property and sentenced in Dorchester District Court to one year of probation. The sentence was revoked in August 1988 and revised to 1 year committed. Foxworth was under probation supervision at the time of the governing offense which resulted in his probation surrender and commitment in July 1991 for assault with a dangerous weapon.

Prior to his 2008 post-conviction release, Foxworth accumulated at least 115 disciplinary reports for violent and drug related infractions in prison. In 2009, Foxworth was convicted of a drug related conspiracy charge, an offense he committed while incarcerated. Foxworth sought to introduce heroin in to the prison through an elaborate scheme involving his own mother and a fellow inmate.

As a result of the above activity, Foxworth was charged with delivering drugs to a prisoner, conspiracy, receiving an article from a prisoner, possession to distribute a class A substance, and conspiracy to violate the drug laws. Foxworth was arraigned on these charges during his period in the community while under federal probation supervision. On November 5, 2009, in Quincy District Court, Foxworth pleaded guilty to one count of conspiracy and received

a one year sentence.<sup>2</sup> Upon his return to prison in 2010, Foxworth accumulated an additional disciplinary report for attempting to punch an officer, hitting another and then violently struggling with other officers.

In 2012, Foxworth participated in programming and completed Moving Forward, Cognitive Skills, and Violence Reduction. In 2004, he was employed in the kitchen for just a few weeks. He was employed as a unit runner in 2011 and 2012. Foxworth is currently unemployed. Records indicate that he received his GED in 1999.

#### **IV. SEPTEMBER 17, 2013 PAROLE HEARING**

Robert Foxworth was denied parole after his initial hearing in 2006. He continues to maintain that he did not commit the murder, but does not provide information to support innocence. He was released from prison in 2008 when a federal district court judge granted his post-conviction motion and placed him on bail. He was in the community for twenty months in 2008 and 2009. While on bail, he was under federal probation supervision. The federal probation officer reported that Foxworth regularly failed to follow the conditions of bail, was a difficult person to supervise, and eventually bail was revoked after Foxworth was charged with assault and battery in Quincy District Court. The First Circuit of Appeals reversed the lower court ruling in 2010 and reinstated the conviction of second degree murder. Foxworth resumed serving his life sentence, and became eligible for his second parole hearing.

Foxworth provided information about his background. He grew up in Mattapan. His father was a barber and his mother worked as a respiratory therapist. Foxworth said, "I had an excellent upbringing; my mother and father always provided for us and taught us well." He left school in the tenth grade. He completed the Massachusetts Barber's School but reports that he did not obtain a license because "I didn't pass the test." He said that after leaving school he did work "helping my father at the barber shop."

A positive upbringing with family support was not enough to keep Foxworth on the right path. He began dealing drugs, both marijuana and cocaine. He said, "My lifestyle was out of control; I wasn't living life right; I was hanging with the wrong crowd and selling drugs; I had a reputation of someone not to mess with probably because they knew they'd get hurt; I was known to carry a gun." His criminal record reflects his negative and antisocial behavior, which includes convictions for knowingly receiving stolen property (motor vehicle), possession of firearm without permit on two occasions, assault with a dangerous weapon (a shotgun), and while incarcerated Foxworth accumulated additional convictions for assault and battery on a correctional institution guard that was guilty filed, and the conviction for conspiracy to violate the drug laws involving his own mother and another inmate.

Board Members were interested in Foxworth's activities in prison and his time spent recently in community while on bail and under federal probation supervision. The federal probation officer recorded a difficult and unsuccessful period of supervision which included 27 curfew violations and an arrest for domestic assault and battery, a case which was later

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<sup>2</sup> Foxworth's mother received three years' probation for delivering articles to prison (controlled substance), and conspiracy to deliver controlled substance.

dismissed. Foxworth acknowledged that "it was hard for me after doing so much time; my mother kept telling me to go see somebody" for counseling. Foxworth adamantly maintained that he was treated unfairly and harshly by his federal probation officer and that every problem documented by the probation officer was done so either unfairly or falsely. He explained every curfew violation as related to his work schedule or stemming from critical family commitments. He said the criminal charge resulted from a false allegation made by an ex-girlfriend who was retaliating for his decision "to move on."

Foxworth has a terrible institutional record which includes extensive violent and antisocial conduct with little productive activity. Foxworth said he is not enrolled in any rehabilitative programs and does not attend AA/NA. He took a Spectrum cognitive behavioral program in 2012 but has no other rehabilitative programming on his record. He obtained a GED in 1999. He is not employed in the institution. He stated that, "I am not on the waitlist for any programs or for employment; I haven't requested any programs at Shirley."

Foxworth's record of conduct in prison shows violence, substance abuse, incorrigibility, and insolence. His bad behavior includes impulsive acts as well as planned misconduct. He has at least 115 disciplinary reports, several of them for recent serious incidents. In January 2010, he assaulted two corrections officers which resulted in a placement in the Disciplinary Detention Unit. In 2008, investigators discovered that Foxworth was owed \$9,000 by an inmate due to a gambling debt, and Foxworth had arranged for the inmate's father to send the \$9,000 to his mother. In October 2007, Foxworth organized a plot to introduce heroin into MCI – Cedar Junction: Foxworth instructed his mother to hide heroin in a package containing a legal brief; after hiding the heroin, she mailed the package to a criminal defense lawyer; the lawyer was caught in the prison as he prepared to deliver the envelope to his client; 4.83 grams of 26% pure heroin was recovered from the package. Foxworth and his mother were criminally convicted for the heroin scheme. In 2003, Foxworth was involved with an inmate who was selling heroin in the institution. Foxworth told the Board that he was not personally selling heroin, and that the inmate who sold heroin turned the money over to Foxworth in payment of a gambling debt. He has received multiple disciplinary reports for possessing home brew or being under the influence and multiple reports for fighting.

Board Members questioned Foxworth about his terrible institutional conduct. He did admit to some of the conduct, including that, "the first two times I went to DDU [Disciplinary Detention Unit] I was guilty; the third time I wasn't." He did not, however, show much understanding or concern about the behavior and how clearly it shows lack of rehabilitation.

After his initial parole hearing in 2006, the Board issued a short written decision consisting of one paragraph. It included one sentence that referred to the facts of the murder: "Mr. Foxworth is serving a life sentence for a murder in which one victim was killed and another was shot." In fact, the murder of Kenneth McLean did not involve a second victim. The mistake in the parole decision occurred when its author repeated inaccurate information that existed in the Department of Correction Official Version. Foxworth filed an appeal of the parole decision based on that error in the decision. In his appeal, he did not rely just on the error in the written decision. In addition, he asserted that at the hearing, Board Members questioned him about the wrong statement of facts and asked him to admit to the incorrect statement of facts, and then denied his parole because he denied committing the crimes contained in the

incorrect version. He also added that the assistant district attorney who testified confirmed the incorrect version.

In his written appeal of the 2006 parole decision, Foxworth makes several false statements. The tape of the 2006 hearing records the following events, which all conflict with Foxworth's appeal assertions. Foxworth opened the hearing by saying that, "I can't speak to the definition of the case because a legal matter is still pending in this matter. If there's anything else the Board wants to ask me about anything else besides that I'd be glad to answer." Only the Chairwoman asked questions of Foxworth. She did not ask him about the crime and did not ask him whether he accepted responsibility. She did not state any facts, correct or incorrect, pertaining to the crime. When the assistant district attorney testified, he provided the correct facts for the murder of Kenneth McLean. He made no reference to a second victim. He also stated that, "I have given the Board copies of the pertinent police reports." The hearing tape, therefore, documents that there was no confusion at the hearing about the facts and that Foxworth was never asked to discuss the facts or admit to the incorrect facts. An internal Parole Board memo documents that parole staff became aware of the error in the DOC official version before the hearing and made the appropriate corrections to the Parole Board's documents. The Board denied the appeal, and informed Foxworth that the "correct version of facts was discussed at the 2006 hearing and relied on for the vote."

Foxworth's manipulation of a scrivener's error in the written decision reflects untrustworthiness and is related to ongoing criminal thinking. At this hearing, Foxworth continued to maintain that he was correct in his description of the 2006 hearing. He insisted that, in 2006, Board Members discussed the wrong facts and asked him to admit to those incorrect facts, and that the assistant district attorney contributed to the problem by stating the wrong facts. The 2006 tape disproves all of those claims. Foxworth appears not to have addressed issues of manipulation, criminal thinking, and dishonesty that he has demonstrated in this sequence of events related to the scrivener's error.

Four family members of the inmate, including his mother who was convicted of conspiring with Foxworth to introduce heroin into the prison, testified in support of parole. His mother said that "he worked hard" when he lived in her home in 2008-09. She said, "He was so institutionalized; he was paranoid; he sat in the basement with knives." Suffolk Assistant District Attorney Charles Bartoloni opposed parole, and said, "He's a leader in prison; he runs a gambling ring; he sends drugs into the prison; he had a leadership role in a major disturbance and a leadership role in a work stoppage plan in the prison; the criminal attitude and the criminal mentality are still there."

#### **IV. DECISION**

Given the fact of wrongful convictions in our criminal justice system, the Parole Board does not have a policy that admission of guilt is an absolute requirement for parole and nowhere does the law impose such a requirement. Robert Foxworth does have to establish, however, that he meets the legal standard for parole that requires that he is unlikely to commit a new crime if paroled and that his release is compatible with the welfare of society. Mr. Foxworth has not used his time productively in prison; he is unemployed and not involved in positive activities. He has avoided rehabilitative programming during most of his sentence, and instead has engaged in criminal activity, substance abuse, considerable violence towards staff and inmates, destructive and dangerous organized group activities, and the defiance of

reasonable requests and rules that accompanies antisocial behavior in the institution. Based on Mr. Foxworth's record of violent and antisocial behavior in prison, the Parole Board concludes that he is not rehabilitated and presents a considerable risk for violence and criminal conduct if released.

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 standard, Mr. Foxworth is not a suitable candidate for parole due to lack of rehabilitation. The review will be in five years, during which Mr. Foxworth needs to reject the antisocial conduct and criminal thinking that he has embraced for years, and make a commitment to rehabilitation through the hard work of reflection and reform.

*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.*

*Josh Wall*

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Josh Wall, Chairman

*July 31, 2014*

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Date