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The Saga of Pennsylvania's "Willie Horton"
and the Commutation of Life Sentences in the
Commonwealth

Regina Austin*

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I have included the names of the participants in the McFadden Project in a footnote. I will poll everyone when the draft is being revised for publication.

The Saga of Pennsylvania's "Willie Horton"
and the Commutation of Life Sentences in the Commonwealth

I. Introduction

Reginald McFadden is Pennsylvania's Willie Horton, only worse!

Willie Horton is the black Massachusetts lifer who sank the fortunes of 1988 Democratic presidential nominee Governor Michael Dukakis. On his tenth weekend furlough, Horton absconded and wound up in Maryland, where he raped a white woman, assaulted her boyfriend, and made off with the man's car.¹ Governor Dukakis did not create the furlough program but supported it. Horton's crimes were nonetheless used against Dukakis first by Democratic presidential candidate Al Gore and then by Lee Atwater, the political operative, and George H.W. Bush, the Republican nominee for president. Included in the independent PAC-sponsored political ad entitled "Weekend Passes," Horton's wild-looking photograph came to personify the threat black criminals posed to law-abiding white America.² Even "Willie" "play[ed] on racial stereotypes: big, ugly, dumb, violent, black"-- according to Horton himself, whose given name is William.³ Now in his late 60s, Horton remains incarcerated in Maryland.

Reginald McFadden is the black Pennsylvania juvenile lifer whose 1994 commutation sank the political ambitions of Lieutenant Governor Mark Singel. McFadden was convicted of the 1969 murder of Sonia Rosenbaum, an elderly Philadelphia woman, and was sentenced to life without the possibility of parole (or "LWOP"). In Pennsylvania, a person serving an LWOP sentence can achieve release from prison only through death or commutation of her or his sentence to life with the possibility of parole. In 1992, McFadden received a recommendation of commutation by a 4-1 vote

¹ BETH SCHWARTZAPFEL & BILL KELLER, THE MARSHALL PROJECT, WILLIE HORTON REVISITED, May 5, 2015, <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited>.

² Horton maintains the photo was taken after he had spent several weeks in solitary confinement, while he was recovering from gunshot wounds and multiple surgeries. *Id.*

³ Jeffrey M. Elliot, *The "Willie" Horton Nobody Knows*, THE NATION, Aug. 23, 1993, at 201.

of the Board of Pardons, with the Board's chair, Mark Singel, joining the majority. After a delay of almost two years, Governor Robert Casey approved the commutation of McFadden's sentence. In 1994, he was released to serve out his parole in New York State without spending any time in a transitional or community corrections facility as the Board of Pardons and the Governor expected. McFadden, then 41, had not lived outside of a correctional institution since he was 16. Within a matter of three months, McFadden had killed two people, raped and kidnapped a third, and likely murdered a fourth. He remains imprisoned in New York State.

That same year, Mark Singel became the Democratic nominee for Pennsylvania's governor. His opponent, Republican Tom Ridge, seized on Singel's vote in favor of McFadden. The Democratic frontrunner slumped in the polls. Ridge ran on a "life-means-life" platform and won by over 200,000 votes. As predicted, McFadden proved to be Singel's "Willie Horton."⁴

Singel's defeat and Ridge's election were catastrophic for lifers in Pennsylvania. The conditions of their incarceration were harshened and their hopes of release through commutation, dashed.⁵ Moreover, Republicans achieved changes in the composition and procedures of the Board of Pardons through an amendment of the state constitution that was approved by popular referendum.⁶ Foremost among them was the

⁴ See Mario F. Cattabiani & Megan O'Matz, *McFadden Could Become Singel's Willie Horton*, MORNING CALL (Allentown, PA), Oct. 16, 1994, at A1.

⁵ For example, at SCI Graterford, lifers who had lived in a separate structure located on the prison campus that was known as the "Outside Services Unit" or "OSU" were brought back within the walls. JOSHUA DUBLER, *DOWN IN THE CHAPEL: RELIGIOUS LIFE IN AN AMERICAN PRISON* 69 (2013) (an ethnographic study of religious life at a Pennsylvania maximum-security facility). The OSU consisted of a farm, a dairy, and a powerhouse. In October of 1995, Graterford was raided by state police. Residents were stripped searched, cells and the mosques were ransacked, employees were fired, and almost two dozen residents, primarily community leaders, were transferred. *Id.* See also notes *infra* 139-143 and accompanying text.

⁶ PA. CONST., art. IV, § 9. The measure was unsuccessfully challenged as unconstitutional in federal court. See *Pennsylvania Prison Society v. Cortes*, 622 F.3d 215 (3d Cir. 2010) (finding no violation of the Ex Post Facto Clause because the unanimity requirement did not increase the risk of prolonged sentences for lifers, nor change the definition of, or increase the penalty for, their crimes).

provision that commutation of life sentences requires a unanimous vote of the Board. Thus, any board member has the unilateral power to veto an applicant.

Between the administration of Governor Ridge, which began in 1995, and the present, only 25 lifers have had their sentences commuted, 19 of them by the current second-term governor, Tom Wolf.⁷ In the 25 years before 1995, Pennsylvania governors commuted 380 life sentences. The recidivism rate for freed lifers has been quite low (between 1% and 3%).⁸ Even after the enactment of reforms intended to address mistakes made in McFadden's case, the state's foremost elected public officials who contemplate running for office again, *i.e.*, the governor, lieutenant governor and attorney general, have been extremely reluctant to risk allowing rehabilitated lifers to be released from prison through commutation accompanied by lifetime parole.⁹ The unanimity requirement has eliminated the possibility that more than a handful of lifers will obtain commutation. Decades after McFadden's crime spree, he is still mentioned in news articles about the commutation of LWOP sentences in Pennsylvania¹⁰ and remains a specter hovering over the process. The "Willie Horton Effect" lives on in Pennsylvania.

⁷ Pa. Board of Pardons, *Statistics on Commutations of Life Sentences (1971-Present)*, <https://www.bop.pa.gov/Statistics/Pages/Commutation-of-Life-Sentences.aspx> [<https://perma.cc/22GD-HFSF>].

⁸ See JUSTICE POLICY INSTITUTE, *THE UNGERS, 5 YEARS AND COUNTING* (Nov. 2018) (reporting a recidivism rate of 3% for a group of roughly 200 parole-eligible lifers whose average age was 64 and whose average length of incarceration was 39 years freed because of an erroneous jury instruction after being denied parole multiple times); Wide Angle Youth Media, *The Ungers: A Matter of Time* (2019), <https://www.youtube.com/watch?v=E3-oAk-61IU&feature=youtu.be> (last visited 02/08/2020) (interviewing two Ungers about their re-entry from incarceration). See also Samantha Melamed, *200 Elderly Lifers Got Out of Prison En Masse. Here's What Happened Next.*, *Phila. Inquirer*, Dec. 12, 2018) (suggesting that the experience of the Ungers should be instructional for reform in Pennsylvania).

⁹ P.S. Ruckman, Jr., *Preparing the Pardon Power for the 21st Century*, 12 U. ST. THOMAS L.J. 446, 463 (2016) (reasoning that Willie Horton teaches executives that there is "little advantage" and the possibility of "enormous negative consequences" to their exercising their pardoning power).

¹⁰ *The Why, A Narrow Path to Freedom: Why Commutations for Pa. Lifers Are So Rare*, WHYY, (Mar. 20, 2019), <https://whyy.org/episodes/pas-narrow-path-to-freedom/>. For

The impact of McFadden's commutation will only be reduced when we know more about what happened in his case, why it happened, and whether the odds of its happening again have been meaningfully reduced. A seminal article in *The New York Times*, written by Joseph Berger in 1995, concluded that Reginald McFadden's release was attributable to "fatal misjudgments of Mr. McFadden's character, bureaucratic errors and fundamental flaws in Pennsylvania's pardons process."¹¹ While McFadden is primarily to blame for his post-commutation crimes, it is important to consider the role that the Pennsylvania Department of Corrections, the Board of Pardons, and the Board of Probation and Parole had in the tragedy. If Berger's conclusions are correct, then the burden of McFadden's disastrous commutation should not be borne primarily by Pennsylvania's lifer population under a misguided notion of collective responsibility.

Drawing on facts available in the public record and documents obtained from the Pennsylvania State Archives in Harrisburg or through Right-to-Know requests, this Article will explore how, why, and on what terms Pennsylvania authorities released McFadden and transferred him to New York State where, although under parole supervision, he was able to commit rapes and murders. However, fulfillment of the goal of examining what can be known about the context surrounding the commutation of Reginald McFadden is subject to two caveats.

First, many of the documents related to the bureaucratic actions connected with McFadden's commutation were, are, or should be in the possession of the Pennsylvania Department of Corrections (sometimes referred to as the "PDOC"), the Board of Pardons, and the Pennsylvania Board of Probation and Parole (sometimes referred to herein as the "PBPP"). Access to these documents is governed by the Pennsylvania Right to Know Law (sometimes referred to herein as "RTKL") which contains extensive exemptions for materials that are private, confidential and privileged, relate to investigations of law enforcement or related agencies, threaten the

Pennsylvania lifers' perspective on the commutation process prior to the election of Lieutenant Governor Fetterman, see *Second Looks, Second Chances for Pennsylvania Lifers: Commutation by the Numbers*, YouTube (Oct. 26, 2017), https://www.youtube.com/watch?v=khWB6_hThOw.

¹¹ Joseph Berger, *Accused Serial Killer and 92 Days of Freedom*, N.Y. TIMES, Apr. 4, 1995, at B1.

security of persons identified in the information, or no longer exist.¹² Because of these exemptions, the government documents on which this Article draws generally relate to public actions and public statements made by public officials. Accounting for any mistaken judgments made by Pennsylvania officials about McFadden's character or his psychological wellbeing, on the other hand, is impossible. Without complete access to McFadden's PDOC, pardon board, and parole board files, it is not feasible to determine the soundness of the fateful conclusion of state authorities that he merited commutation and immediate release.

Second, no account of McFadden's commutation would be complete without input from former and current lifers who served time with him and encountered him in the course of their incarceration. I have enlisted a small network of communicants (with whom I have spoken on the phone or in person) and correspondents (with whom I have exchanged letters, written answers to a set of questions, and emails) in a collaboration that I call "The McFadden Project."¹³ The Project does not satisfy the criteria for a sound ethnographic study; that may come later. The methods of recruiting lifers for the Project, restrictions on the means of communicating with them, and opportunities for evaluating the information they have shared are restricted by the incarceration of most of the participants. Where possible, facts provided have been verified by consulting other sources.

The Project provides an opportunity for some of those most profoundly impacted by the disaster that was McFadden's commutation and the shutdown of the commutation process that followed to participate in the investigation. Many of them maintain that they predicted that McFadden's release was a mistake that would haunt them all because of what they knew about the man. The participants have been most generous in sharing their recollections and opinions about McFadden's commutation, which, of

¹² 65 PA. CONS. STAT. §§ 67.101 et seq. (2019).

¹³ The Participants in the McFadden Project are Wayne Battle, Francis Boyd, Ezra Bozeman, Freddy Butler, Charles Coley, Scott C. Davis, Calvin Logan, Kevin Mines, Marie Scott, James Taylor, Hugh Williams, Floyd Wilson, and Andre Wright. Their written correspondence and notes of conversations with the author are on file with the author.

course, are impacted by the dynamic context of their confinement within the PDOC system as it existed at that time and since.

In keeping with the nature of the documentation available, the Article divides its analysis of the commutation of Reginald McFadden into two segments. The first segment, Part II of this Article. Is devoted to a chronological discussion of the events surrounding and following his release, including the weaknesses in the pardon process, the bureaucratic mistakes that affected the terms and conditions of his release, the catastrophic nature of McFadden's crimes, and the executive and legislative reactions that sealed the fate of the lifers McFadden left behind. Part III will then consider possible explanations for the Department of Corrections' support of his release, including the institutional biases that likely influenced its judgment in favor of McFadden's commutation. This section of the Article is more speculative than Part II. The assessment of the PDOC's actions will benefit from the opinions of some of the lifers who interacted with McFadden and followed his career as fellow blacks, urbanites, and adherents of the Muslim faith. The section will end with a discussion of whether another McFadden is likely in light of constitutional and legislative changes in the commutation process and changes in correctional practice and the environment of PDOC facilities. The Article will end with a consideration of structural reforms in the commutation process that address the "Willie Horton Effect," that is the reluctance of high-level elected officials and persons likely to run for office to support commutations.

The saga of the commutation of Reginald McFadden is a tortuous story of blunders, coincidences, and numerous instances of tempting fate by governmental officials over whom lifers had no control. It has the makings of a serial true-crime podcast. Throughout the country, there are groups of lifers who are unfairly paying the price for the actions of one man for who likely should never have been released. Demystifying with substance the specter conjured up by the mere mention of McFadden's name should support restoring greater vigor to the mechanism that was intended to permit the merciful release of rehabilitated individuals otherwise doomed to die in prison.

II. The Bizarre Events Surrounding the Commutation of Reginald McFadden

A. McFadden's Long But Eventual Path to Commutation

According to his own account, Reginald McFadden's involvement with the criminal justice system began at age 12.¹⁴ He was arrested 18 times over the next four years. On December 7, 1969, at the age of 16 years, 10 months, he and three other adolescents broke into the house of Sonia Rosenbaum, age 60, with the intent of committing a burglary.¹⁵ Unexpectedly finding her at home, they tied her down to her bed naked, gagged her with a washcloth secured with adhesive tape, and pinned her legs further with a desk. As a result, she suffocated.¹⁶

McFadden was arrested on December 11, 1969, and questioned for 22½ hours during which time he confessed verbally and in writing. He was arraigned on December 12, 1969 (a date that will become important 24 years later) and charged with first-degree murder, burglary, aggravated robbery, larceny, and conspiracy. His co-defendants pled guilty to second-degree murder and accepted offers of sentences of roughly 10-to-20 years. McFadden, on the other hand, went to trial twice. He won a new trial after the judge concluded that use of his written confession was reversible error.¹⁷ McFadden maintained that he then wanted to plead guilty, but that the District Attorney offered only 20-to-40 years and not the 10-to-20 years his co-defendants got. A second trial resulted in a conviction on all charges and a sentence of LWOP for the murder and concurrent sentences for the rest. On appeal, the Supreme Court ruled that, despite his age and his having ingested heroin, the oral statements he made less than an hour

¹⁴ Reginald McFadden, Application for Clemency, submitted to the Pa. Board of Pardons, No. B-998, Session Aug. 1992, dated Feb. 28, 1992 [hereinafter "McFadden, Application for Clemency"].

¹⁵ *Comm. v. McFadden*, 369 A.2d 1156, 1157 (Pa. 1977).

¹⁶ Frank Dougherty & Ed Griffenberg, *3 Teen Boys Charged in Slaying of Wynnefield Woman*, PHILA. DAILY NEWS, Dec. 11, 1969, at 4; Acel Moore & John Clancy, *3 Youths Arraigned in Strangulation of Wynnefield Woman*, PHILA. INQUIRER, Dec. 13, 1969, at 21 (providing details of the murder of Mrs. Rosenbaum).

¹⁷ *McFadden*, 369 A.2d at 1157 n.1.

after his interview began were “not the product of illegal police conduct” and therefore were “voluntary.”¹⁸

The Supreme Court rejected McFadden’s petition for a rehearing in March of 1977.¹⁹ Around the same time, his quest for commutation began. Between 1977 and 1994, he filed a total of eight applications for commutation, secured a positive recommendation from the Board of Pardons four times, and was turned down by governors three times before finally being granted commutation in 1994.²⁰

On August 28, 1992, the Board of Pardons approved McFadden’s eighth application for commutation by a 4-1 vote. Attorney General Ernie D. Preate dissented. He characterized Mrs. Rosenbaum’s death as “agonizing” and “the senseless taking of a human life.” He noted the vehement opposition of the victim’s family and the Philadelphia District

¹⁸ *Id.* at 1161.

¹⁹ *Id.* at 1156.

²⁰ The record of McFadden’s quest for commutation is as follows:

Denied by the Board on October 20, 1977

Approved by the Board on October 19, 1978; denied by Governor Shapp on October 23, 1979

Approved by the Board on March 13, 1980; denied by Governor Thornburgh on September 3, 1980

Approved by the Board on September 17, 1981; denied by Governor Thornburgh on March 23, 1983

Denied by the Board on June 28, 1984

Denied by the Board on October 10, 1985

Denied by the Board on December 17, 1987

Approved by the Board on August 28, 1992; granted by Governor Casey on March 15, 1994

Pa. Historical & Museum Comm., Div. of Archival & Rec. Mgmt. Serv., Records of the Office of Lieutenant Governor, Board of Pardons Minutes Feb. 14, 1974-June 3, 1999, available at <https://goo.gl/m3x9iy> (1999) [hereinafter “Board of Pardons Minutes, 1974-1999”]. The drastic reduction in the number of commutations awarded lifers began “with the tenure of Republican Governor Thornburgh, a former prosecutor who went on to become the Attorney General of the United States. See NYU Center on the Administration of Criminal Law, State Clemency Project, *The Demise of Clemency for Lifers in Pennsylvania 4-6* (2019) (accounting for the commutation record of Governor Thornburgh), [https://www.law.nyu.edu/sites/default/files/CACL%20Clemency-PA_Final%20\(1\).pdf](https://www.law.nyu.edu/sites/default/files/CACL%20Clemency-PA_Final%20(1).pdf).

Attorney whose representative expressed a sentiment with which Preate agreed, *i.e.*, “that we remember the victim of this horrible crime and continue to express society’s outrage at those who prey on our elderly.” A majority vote of 4-1, however, was sufficient to get McFadden to the next level of review.

From the Board of Pardons, his file went to the Governor’s Counsel. A memorandum to Governor Casey from Richard D. Spiegelman, Executive Deputy General Counsel, dated May 28, 1993 (the “Memorandum”), laid out the case for approval of McFadden’s application.²¹ One paragraph in his Memorandum is worth quoting in its entirety because it provides insight into McFadden’s history in the prison system and perhaps his character:

While serving over 22 years of his life sentence, McFadden has been subject to numerous assaults and threats, resulting in several institutional transfers. In 1977, McFadden was transferred from SCI-Pittsburgh to SCI-Graterford because he testified against several inmates in an attempted murder of a corrections officer. In 1988, he was transferred to SCI-Camp Hill to separate him from inmates who had threatened him. In 1989, prior to the SCI-Camp Hill riot, he cooperated with the Department of Corrections in an investigation into the Fruits (sic) of Islam (FOI). Following the riots, he was placed in the federal system at Leavenworth, Kansas, for approximately two years, and in 1991, was returned to SCI-Camp Hill. In October 1991 he was transferred to SCI-Rockview, again for separational purposes. McFadden attributes his difficulties to his lifestyle. He stresses that he has embraced a non-violent humanitarian belief system, which has been at odds with the "inmate code" and has placed his life in considerable danger.²²

²¹ Memorandum from Richard D. Spiegelman, Executive Deputy General Counsel to Governor Robert P. Casey, on the Commutation Request of Reginald McFadden (May 28, 1993), available at <https://bit.ly/2Zck4pJ>.

²² *See id.*

It appears that McFadden was transferred from facility to facility ostensibly for his own protection.²³ The reference to “social problems with other inmates” suggests that he was not highly respected by his peers who allegedly adhered to a code of conduct that placed McFadden in such physical jeopardy that he had to relocate.²⁴ McFadden had proven himself to be useful to prison authorities on at least two occasions by providing information about fellow residents that related to the safety and security of correction officers and staff. This likely provoked aggression from his fellow residents and approval from PDOC staff in a position to supply favorable recommendations in support of McFadden’s commutation. Indeed, in seeking commutation, McFadden had the support of the staff at SCI Rockview, the Commissioner of Corrections, and his sentencing judge.

The Memorandum outlines mitigating evidence that casts McFadden’s involvement in the murder of Sonia Rosenbaum in a sympathetic light. McFadden was abused as a child and was using drugs at the time of the offense. Mrs. Rosenbaum’s death “was not intentional.” The sentencing judge emphasized the fact that his co-defendants, who plead guilty to second-degree murder, had already been released on parole. Second degree or felony murder at that time in Pennsylvania did not carry a mandatory minimum of life without the possibility of parole, as it does today.²⁵

B. Governor Casey’s Excusable Delay in Acting on McFadden’s File: He Was Dying

By mid-June 1993, the Board of Pardons’ August 28, 1992 recommendation in favor of McFadden’s commutation had not been acted upon and would

²³ McFadden’s Moves Report confirms that he served time at SCI Pittsburgh (Western State), SCI Dallas, SCI Graterford, SCI Rockview, SCI Camp Hill, USP Lewisburg (and from there apparently to Leavenworth, KS), SCI Camp Hill (again) and SCI Rockview (again). He also served stints in the Allegheny County jail and the Philadelphia prison system in connection with “court matters” and a “previous county sentence.” Pa. Dep’t of Corrections, Moves Report for Reginald McFadden, AF4784, dated May 14, 2019, at 3:96:17 PM.; Memorandum from Andrew Filkosky to the author, dated Sept. 14, 2019, at 8:36 AM (providing explanation of codes used in McFadden’s Moves Report in response to RTKL request 0949-19).

²⁴ See *infra* notes 102-108 and accompanying text.

²⁵ 18 PA. CONS. STAT. § 1102 (b) (2018).

not be for almost another year. The delay complicated McFadden's eventual release, as will be discussed shortly. The New York media particularly criticized Casey for his lack of prompt action, but it was likely attributable to his medical condition.²⁶ He was extremely ill, if not dying, at the time. In the summer of 1993, Governor Casey was told by his doctors that he needed an immediate heart and liver transplant because of organ damage caused by hereditary amyloidosis (a condition that produces the abnormal buildup of amyloid protein in the tissues and organs).

After less than 24 hours on the transplant waiting list, Casey was in surgery. The donor was Michael Lucas, a 34-year-old black man from a depressed Pennsylvania community who was beaten to death by a dozen or so members of a gang who erroneously believed that he had stolen drugs from them. Lucas's story was told in a poignant piece published in the *Washington Post*, which described him as "a man marked by every scourge of his times – violence, drugs, joblessness, racism."²⁷ Nothing reflected the odds against which Lucas struggled better than "the contrast between the treatment he and Casey received when they needed medical care."

Casey was flown to Pittsburgh in a state plane and driven by state police car to the University of Pittsburgh Medical Center, where reporters waited to record every step in his treatment.

Lucas's mother had to call the Monessen police twice before an officer arrived -- the only black officer on the force, usually detailed on calls from the black community. Lucas was writhing in pain on the kitchen floor from the beating, his head bloody and bludgeoned. The policeman would not call an ambulance, Frances Lucas said, though the officer claimed that that was because Lucas wouldn't let him. In the end, Frances Lucas took her bleeding, moaning son to the hospital in her own car.

²⁶ Berger, *supra* note 11; Andrew Smith, *An Unpardonable Oversight? What Went Wrong with McFadden Case*, *NEWSDAY*, Oct. 21, 1994, at 7, 1994 WLNR 414710.

²⁷ Dale Russakoff, *The Heart That Didn't Die: One Evening, Mike Lucas Lay Beaten on the Ground. A Week Later, the Governor Was Saved*, *WASH. POST*, Aug. 9, 1993, at B1.

The speed with which Casey received the organs led to speculation that he was the beneficiary of favoritism, but the transplant establishment squelched that. According to *The New York Times*, “Though most organ recipients have lengthy waits, Gov. Casey’s case was expedited because he fit two criteria for high priority: he needed multiple organs, and doctors said that he was near death.” There was also grumbling because the organs for potential black transplant donees were in short supply, although Lucas’s kidneys were donated to two black men from Pittsburgh.

Casey transferred power to Lieutenant Governor Mark Singel on June 14, 1993, and officially returned to office on December 21, 1993. Thereafter, the Office of the General Counsel sent Casey a second letter regarding McFadden, which was identical to the first but dated January 11, 1994. Casey granted McFadden commutation on March 15, 1994. Because no allowances were made for delays attributable to the governor’s illness, McFadden had by then completed his minimum sentence.

C. How Three Pennsylvania Agencies Botched McFadden’s Release

The dates are important because McFadden was supposed to spend all or part of two years under PDOC supervision in a transitional or community corrections facility before being released on lifetime parole.

In the Executive Summary regarding Reginald McFadden submitted on April 20, 1992, to Lt. Governor Singel, the Commissioner of the Department of Correction recommended “a post-dated minimum set two years in the future for Mr. McFadden . . . [which] will allow him to be returned to the community through the auspices of a Community Corrections Center which would help him to readjust to the community which he has been removed from since he was 16 years of age.”²⁸ The memorandum also stated that “he poses little risk to the community at this time.”

According to the Minutes, the Board of Pardons met and approved the commutation of Reginald McFadden on August 28, 1992.²⁹ Furthermore,

²⁸ Pa. Department of Corrections Executive Summary re: Reginald McFadden, AF-4784, from Joseph D. Lehman, Commissioner to Hon. Mark Singel, Chairman of the Board of Pardons, dated Apr. 20, 1992.

²⁹ Minutes of the Board of Pardons for the August 1992 Session, in Board of Pardons Minutes, 1974-1999, *supra* note 20, at 791-792.

the record of hearing results attached to the Minutes indicates that the Board recommended a minimum sentence of 24 years.³⁰ “The Secretary [of the Board] was instructed to prepare the necessary warrants and charters for proper execution.”³¹

In a formal document bearing the caption *In Re Application of McFadden, Reginald, No. B-998, August Session, 1992*, the Board of Pardons recommended that “the sentence of Reginald McFadden . . . be commuted from LIFE IMPRISONMENT to a term of imprisonment of 24 Years to Life expiring on December 12, 1993 (computed from December 12, 1969), . . . “³² The recommendation further provides as follows:

Mr. McFadden has strong community support and plans to live with his spiritual advisor in New York, if his request is granted. Both the staff at [SCI] Rockview and the Commissioner of Corrections believe that a commutation is warranted. They suggest a two year post-dated minimum.

We recommend a commutation with a post-dated minimum.

As indicated earlier, December 12, 1969 was the date on which McFadden was arraigned for the murder of Sonia Rosenbaum. The period between August 28, 1992 and December 12, 1993 was only one year and 106 days, not two years. Also, there was no change in the wording of the Pardon Board's documents after Governor Casey delayed in acting on the matter on account of his illness.

³⁰ Pa. Board of Pardons Public Hearing Results for August 27, 1992, in Board of Pardons Minutes, 1974-1999, *supra* note 20, at 793.

³¹ John A. Lord, Jr. was Secretary of the Board of Pardons at the time. He retired from the Board in March of 1995 after the election of Governor Ridge and died of respiratory failure in April of that year. *Obituary of John A. Lord, Jr.*, PHILA. INQUIRER, Apr. 27, 1995, at 49. It was reported that “[d]uring the gubernatorial race, Lord was besieged by reporters after paroled killer Reginald McFadden was arrested for rape and murder charges in New York.” The article concluded that “he supervised the Board of Pardons through a crisis” *Ex-Pardons Board Official Dies at 36*, MORNING CALL (Allentown, Pa.), Apr. 22, 1995, at 15.

³² The document, which is undated, bears the signature of the four Board Members who voted in favor of commutation and the signature of approval of Governor Casey.

Governor Casey executed McFadden's Charter of Pardon on March 15, 1994. The Charter provides in part as follows:

I have commuted the sentence of imprisonment of the said Reginald McFadden from life imprisonment to the minimum term of 24 Years to Life expiring on December 12, 1993 so that if he be released on parole in accordance with law which shall remain on parole the balance of his natural life unless returned to the correctional institution for violation of parole and that sentence of imprisonment is thereby commuted accordingly, *so that he may be eligible for pre-release consideration at the discretion of the Dept. of Corrections.*

The Charter is a pre-printed form. The italicized and underlined data filled in blanks on the form. The italicized data that is not underlined was typed at the end of the printed text. The document does not specify what "pre-release consideration" is. On the day that the Charter was executed by Governor Casey, Reginald McFadden had already served out his new 24-year minimum term by three months and three days.

The language in the documents from the Board of Pardons and the Governor's Office do not clearly indicate the course of action required of the PDOC and the Board of Probation and Parole, which left officials with the latter agency in a quandary.³³ Should McFadden be immediately released on parole or sent to a community corrections facility? The PBPP was not obligated to release McFadden on parole despite his having served his minimum sentence.

On June 30, 1994, the Pennsylvania Board of Probation and Parole rendered the following decision in McFadden's case. He was paroled "to the Intensive Supervision Diversion Release Program . . ." "to give effect to the commutation only . . ." by which Governor Robert E. Casey on March 15, 1994, "commuted his minimum sentence from life to 24 years."³⁴ McFadden had to "abide by all the supervision requirements in the

³³ Berger, *supra* note 11. It is not clear whether the parole officials conferred with the PDOC or the Board of Pardons before making their decision.

³⁴ Pa. Board of Probation and Parole, Notice of Board Decision in the Case of Reginald McFadden, Parole No. 9646J, Recorded June 23, 199, Issued June 30, 1994.

Intensive Supervision Diversion Release Program [ISDR].” According to a directive issued by the chairman of the Parole Board in September of 1991, the program was “designed for inmates who are considered high risk at the time of parole.”³⁵ Clients in the diversion program were subject to the following supervision requirements:

- 2 parole field contacts a month, a least a week apart, one of which must be the parolee's home;
- 1 collateral field contact each month;
- 1 collateral police contact each month; and
- the use of electronic monitoring, where available.

Furthermore, “[c]lients placed in any Board diversion program [were] required to remain in the program for a minimum of 3 months, and may be continued in the program as long as necessary” “A former parole officer who with the Parole Board at that time indicated that “intensive supervision was always an option especially for those deemed higher risk . . . [as] determined by a risk assessment instrument administered prior to the Board hearing.”³⁶

But McFadden never received the level of oversight required by the ISDR because he had requested that his supervision be transferred to the New York State Division of Parole. Under the terms of the Interstate Compact for the Supervision of Parolees and Probationers, he would receive only the level of supervision similarly situated New York State parolees would receive.³⁷ Pennsylvania authorities confirmed that McFadden would have support and transferred his supervision to New York. On July 7, 1994, they transported him to New York and released him to his supporters. At that time, he was 41 years old and had lived inside a Pennsylvania correctional institution for 25 years or since he was 16.

The explanations for the action of the Pennsylvania Parole Board in releasing McFadden and transferring him to New York State, where he

³⁵ Pa. Board of Probation and Parole, Chairman's Directive 91-3, Intensive Supervision Diversion Program (Sept. 6, 1991).

³⁶ Email from James Smith to Joan Porter, Official SCI Phoenix Visitor, Pa. Prison Society (Sept. 22, 2019, 2:30 EDT).

³⁷ See *infra* notes 53-58 and accompanying text.

would not be subject to intensive oversight, are confidential and undiscoverable through Right-to-Know Law requests. As discussed more fully below, in one of the many bizarre twists in the saga of Reginald McFadden's commutation, members of the Pennsylvania Senate were able to inquire into New York's reasons for agreeing to his transfer when the Director of the New York State Division of Parole appeared at confirmation hearings in 1995 as the nominee for the position of Commissioner of the Pennsylvania Department of Corrections.³⁸

D. Inadequate Supervision and the Havoc McFadden Wrought In 92 Days of Freedom

There is a great deal of information about McFadden's life after he was transferred to the Empire State because of extensive investigative reporting about his crimes, arrest, and trials.

In his commutation application, McFadden stated that "[m]y friends i.e. Mr. Charles I. Campbell, his wife, and many others, stand ready to assist me while at the Halfway House." Charles Campbell, the 71-year old owner of a small Manhattan Islamic bookstore from which McFadden ordered books, had supported McFadden's campaign to win commutation for over 16 years.³⁹ Campbell, retired schoolteacher Paul Ehrlich, his wife Isobel, and others were members of a loose-knit Shia Islamic group known as Irfan (which means knowledge in Arabic)⁴⁰ or Irfan the Way of God⁴¹ which was interested in the rehabilitation of prisoners. There is no other available public information about this group.

Members of the group corresponded with McFadden, talked with him on the phone, and traveled to Pennsylvania to meet him.⁴² They were

³⁸ See *infra* notes 53-59 and accompanying text.

³⁹ Henry Frederick, *Man Who Befriended McFadden Says Paroled Killer Fooled Everybody*, ROCKLAND JOURNAL-NEWS (NY), Oct. 14, 1994, at A1; Helen Peterson, *Con's Grim 2d Chance*, DAILY NEWS (N.Y.), Apr. 9, 1995, at 33.

⁴⁰ Berger, *supra* note 11.

⁴¹ According to a newspaper report, Irfan, the Way of God, had a Palisades, New York postal address. Henry Frederick, *Ex-Convict Charged in Brutal Rape*, ROCKLAND JOURNAL-NEWS (NY), Oct. 8, 1994, at A1, A9.

⁴² Andrew Smith, Yolanda Rodriguez & Joe Haberstroh, *Warning Signs: Pardon of Convict Raises Questions after His Arrest*, NEWSDAY (NY), Oct. 17, 1994, at A5 [hereinafter Smith et al., *Warning Signs*].

convinced of the sincerity of his conversion to Islam and his rehabilitation. They pledged to support him through his reentry. However, they had not expected that he would be sent to New York directly from prison without spending any time in a post-release facility. His supporters found him a job, an apartment, and “a beat up 1977 Cadillac, which required expensive repairs, [and] put him under financial pressure.” He worked in Campbell’s bookstore for several days but left because its small quarters felt like a prison to him. He worked at a deli. He began work as a counselor at a facility for troubled youth about two weeks before he was arrested.⁴³

Thus, instead of going to a halfway house, McFadden was, in the words of Pennsylvania Attorney General Ernie Preate, “dumped into the lap of a retired New York teacher . . . who was unprepared, and unable to handle him.”⁴⁴ Mr. Ehrlich said that “rehabilitating somebody into the world. . . . is a job for younger and wiser people.”⁴⁵ His wife, Dr. Isobel Ehrlich, maintained that they did not know him before he was released and had little contact with him thereafter.⁴⁶ “I met him and there was something I didn’t like. I saw more to him than I had seen before.” Charles Campbell said that “he could see that McFadden struggled with life on the outside, much like a stubborn teen-ager resisting parental control. . . . It was as if he went back in time once he got out of prison. ‘He was a case of arrested development – a 16-year-old in a 41-year-old body.’”⁴⁷ Thus, the well-being of New Yorkers and the hopes of Pennsylvania lifers rested in the hands of “well-intentioned but inexperienced volunteers—three of them over 65 years old.”⁴⁸

⁴³ Kate Boylan, *Edwin Gould Academy Halts Felon-Hiring Program*, ROCKLAND JOURNAL-NEWS (NY), Oct. 14, 1994, at A10; Editorial, *Killer’s Hiring Fell Through Cracks*, ROCKLAND JOURNAL-NEWS (NY), Oct. 14, 1994, at A14.

⁴⁴ Statement by Attorney General Ernie Preate Jr. to the Board of Pardons (Oct. 20, 1994), in Board of Pardons Minutes, 1974-1999, *supra* note 20, at 942, 947 [hereinafter Statement by Preate to Board of Pardons].

⁴⁵ Smith et al., *Warning Signs*, *supra* note 42.

⁴⁶ Berger, *supra* note 11.

⁴⁷ Frederick, *supra* note 39, at

⁴⁸ Berger, *supra* note 11.

McFadden was also subject to supervision by New York parole officers.⁴⁹ The New York authorities maintained that their oversight was sufficient and that their efforts were essential to his capture.

McFadden's freedom did not last long. Released on July 7, 1994, he was back in custody on October 6, 1994, after only 92 days. In the interim, he murdered 42-year-old Robert Silk of Elmont, NY and stole his car; he raped, kidnapped, and robbed 55-year-old Jeremy Brown of South Nyack, NY; and raped and murdered 78-year-old Margaret Kierer of Floral Park, NY, stole her car and used her ATM card. McFadden was sentenced to two terms of 25-to-life for the murders and 37½ -to-75 years for the rape and kidnapping to run consecutively.⁵⁰ McFadden is now confined in Attica Correctional Facility. His earliest release date is August 2, 2084. Although under the terms of his commutation he is still subject to a life sentence in Pennsylvania for the murder of Sonia Rosenbaum, he is unlikely ever to return to Pennsylvania to complete that sentence.

In addition, there was evidence linking McFadden to the murder of Dana DeMarco of Rockland County, NY, a 39-year-old artist and drifter, but he was never tried for that crime.⁵¹ The former district attorney claims that there was insufficient evidence to convict McFadden of the murder; others maintain that the D.A. forwent prosecution because McFadden already had long sentences and was a difficult inmate to manage and transport, as well as a difficult defendant who represented himself in court.

E. McFadden Sinks "A Good Man" Running for Higher Office and the Lifers Who Were Counting on Him

Meanwhile, back in Pennsylvania, McFadden's arrest had an immediate impact on the 1994 gubernatorial election which pitted Democratic Lieutenant Governor Mark Singel against Republican U.S. Representative

⁴⁹ Andrew Smith, *Prison Error Officials: Suspect Needed Halfway House*, NEWSDAY, Oct. 20, 1994, at A7, 1994 WLNR 435395.

⁵⁰ For information on Reginald McFadden, Inmate # 95-A-6279, see <http://nysdoccslookup.doccs.ny.gov/GCA00P00/WIQ1/WINQ000> (last visited 01/25/2020).

⁵¹ "Reginald McFadden," Lohud's Crime Scene Podcast, at <https://soundcloud.com/lohud-crime-scene/crime-scene-mcfadden?fbclid=IwAR1LUeZ6L1yq4Uefiowf6zcQ0VEXAdKq3YmhmROIzZU4IwNR1DjEOb6jXFQ>.

Tom Ridge. Ridge's campaign ran a series of ads depicting Singel as soft on crime for voting to commute the sentences of lifers.⁵² Ridge adopted the stance of "Life Means Life." He won. As Governor, he nominated Martin F. Horn to be Commissioner of the Department of Corrections and made good on his promise to convene a special legislative session on crime, which resulted in significant changes in the commutation process.

As indicated earlier, before being picked to lead the PDOC, Horn headed the New York State Division of Parole, the agency that was responsible for supervising McFadden and that played a leading role in his identification and capture. During his confirmation hearing, Martin Horn was asked about the transfer of McFadden to New York. Horn said that under the terms of the then prevailing interstate compact on the transfer of parole supervision, New York "had no choice" but "to accept supervision of McFadden, provided that he had an acceptable residence and employment program."⁵³ Acceptance of McFadden's transfer would have been mandatory if McFadden had been a resident of New York before the murder of Sonia Rosenbaum or if he had relatives in New York at the time of his parole.⁵⁴ The Pennsylvania Supreme Court's opinion in his case

⁵² Ridge's ads were reminiscent of the Willie Horton ad produced by media consultant Larry McCarthy. Peter Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars Are Still Fresh*, N.Y. TIMES, Dec. 3, 2018, <https://www.nytimes.com/2018/12/03/us/politics/bush-willie-horton.html>. See also Howard Kurtz, *Ads Use Crimes' Pain for Candidates Gain*, WASH. POST, Nov. 2, 1994, https://www.washingtonpost.com/archive/politics/1994/11/02/ads-use-crimes-pain-for-candidates-gain/a7e868b4-0516-4125-afa6-ad22de0551d3/?utm_term=.2ab05e9100e5 (describing ads by gubernatorial candidates Jeb Bush, George Pataki, and Tom Ridge featuring crime victims in criticizing soft-on-crime decisions of opponents).

⁵³ Hunter T. George, *Ridge Nominee Grilled on Parole Case*, INDIANA (PA) GAZETTE, Mar. 15, 1995, at 6.

⁵⁴ The Compact involving transfer of supervision provided that "[a] resident of the receiving state . . . is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state, and has not resided within the sending state more than six continuous months immediately preceding the commission of the offense for which he has been convicted." Interstate Compact for the Supervision of Parolees and Probationers § 61 Pa. Cons. Stat. § 321 (repealed 2002). See Michael L. Buenger & Richard L. Master, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, 9 ROGER WILLIAMS U.L.REV. 71 (2003) (describing problems with the ICPP and the approach of its replacement, the Interstate Compact for Adult Offender Supervision or ICAOS).

indicates that McFadden had some prior connection to New York. He had been arrested and incarcerated in New York on a stolen car charge, but his mother had bailed him out; he was apprehended at his mother's home in Philadelphia.⁵⁵ New York, of course, would have been free to reject the transfer. An individual who was a Pennsylvania parole officer at that time said that acceptance of interstate transfers was "more or less taken for granted."⁵⁶ Horn stood by the decisions made by the New York Bureau, including allowing McFadden to take a position working with troubled children.⁵⁷

Regardless, under the terms of the then-prevailing compact for interstate transfer of parolee supervision, New York was not obligated to provide more rigorous monitoring for out-of-staters than it provided its own parolees. New York generally did not send long-serving persons to halfway houses if they had a job and a place to live.⁵⁸

Democrats also wanted to know if, as was rumored, Horn supplied Ridge with the information about McFadden's crimes that Ridge used successfully against Singel in the gubernatorial campaign and whether Horn was being rewarded with the commissioner's job in return. Horn said that he applied for the position on his own and was not recruited. Moreover, Horn did not know Governor Ridge or any of the Pennsylvanians involved in the hiring process. He denied that there was any connection between his nomination and McFadden.⁵⁹ In the absence of proof otherwise, Horn's appointment has to be chalked up to his superior credentials and coincidence.

⁵⁵ *Comm. v. McFadden*, 369 A.2d 1157 n. 3. Around the same time in 1969, McFadden's mother was informed by Philadelphia juvenile court officers that McFadden was being sought on a bench warrant; Mrs. McFadden assumed that it was this bench warrant that brought officers to her home at 4:30 a.m. She warned Reginald to flee, but he was caught when he jumped off the porch roof. *Id.* at 1157-158.

⁵⁶ Email from James Smith to Joan Porter, *supra* note 36.

⁵⁷ George, *supra* note 53.

⁵⁸ Smith, *supra* note 49.

⁵⁹ *Id.*, Scott Heimer & Ron Goldwyn, *Corrections Chief Brings Tough Reputation*, PHILA, DAILYNEWS, Oct. 25, 1995, at 6. Among PDOC staffers, it was rumored that Horn and Ridge were linked through their wives who attended school together. The author has no evidence to support such an assertion.

In 1995, Governor Ridge convened a Special Session of the General Assembly on Crime, which held public hearings that yielded a proposal to amend the Pennsylvania Constitution to put a victim advocate on the Board of Pardons and require a unanimous vote for commutation of life sentences. Amending the Constitution required “a majority vote of two consecutive sessions of the General Assembly and an affirmative vote by the electorate.”⁶⁰ The General Assembly considered the changes in 1995⁶¹ and 1997.⁶²

Opposition to the amendments came mainly from Philadelphia and Allegheny County legislators. With the lieutenant governor and attorney general already on the Board, the opponents were concerned about the politicization of the process and feared that “personal, individual political considerations [would] enter into . . . serious deliberations of whether someone would continue to serve a life sentence or not.” They unsuccessfully offered an amendment to replace the elected officials.⁶³ The opponents further maintained that the altered composition of the board and the unanimity requirement would likely do away with commutations all together.⁶⁴ The proponents responded that the electorate trusted the decisions of the public officials and the possibility of their running for office again translated into responsibility.⁶⁵ Furthermore, the unanimity requirement was as equitable as the one that produced the jury verdicts that led to the life sentences and still allowed the pardon process to work for “the right kind of person.”⁶⁶

Reginald McFadden was, of course, mentioned during the debates by both the proponents and opponents of the amendments. For example, Senator Vince Fumo of Philadelphia who opposed the measures argued that the Senate “was allowing the criminal justice policies of the Commonwealth to

⁶⁰ PA. CONST., art. XI.

⁶¹ Senate Bill SB4.

⁶² Senate Bill SB156.

⁶³ Pa. Legis. J. (Senate), 1st Special Sess., No. 9, 46-49 (rejecting amendment by Senator Schwartz by a vote of 40-9).

⁶⁴ *Id.* at 47-47, 53, 54.

⁶⁵ *Id.* at 47.

⁶⁶ *Id.* at 52.

be basically dictated by one Reginald McFadden, a murderer, a dumb one at that, who got a pardon and blew it.”

The referendum on the changes reportedly caught lifers and their supporters by surprise. The lifers hastily organized a letter-writing campaign and raised money for a voter outreach effort. A coalition of prisoner rights groups led by the Pennsylvania Prison Society campaigned against the referendum and pursued litigation to have the amendments declared unconstitutional under the Pennsylvania and U.S. Constitutions.⁶⁷ Bringing suit in Commonwealth Court, the coalition petitioned to block the referendum, but the judge refused to stay the vote. The measure was approved by a majority of 1,182,067 to 811,701 on November 4, 1997, during an off-year election.⁶⁸

The litigation, which began in 1997, was finally unsuccessfully concluded in 2011. It proceeded on two different tracks, one based on state resolved by state courts, and the other based mainly on federal claims decided by federal courts.⁶⁹ It was the arguments under the Ex Post Facto Clause in the

⁶⁷ In addition to the Pennsylvania Prison Society, the coalition of groups involved in challenging the referendum measures included Fight for Lifers, Pennsylvania Abolitionists United Against the Death Penalty, and the Pennsylvania Coalition Against Domestic Violence, as well as persons sentenced to LWOP, their friends, and their families. The Pennsylvania Bar Association was involved in the litigation. See *Pennsylvania Prison Society Pardons Experts Say “No” to Ballot Proposal*, PR Newswire, Oct. 24, 1997 (quoting a former governor and the lawyer and penologist who would be replaced under the proposed amendment); Frank Reeves, *Pardon My Board*, PITTSBURGH POST-GAZETTE (PA), Oct. 26, 1997 at C2, 1997 WLNR 2922259; Lawrence Walsh, “*Other Two*” Issues Head to Approval, PITTSBURGH POST-GAZETTE (PA), Nov. 5, 1997; Todd R. Weiss, *Pardon Referendum Stirs Debate*, LANCASTER (PA.) NEW ERA, Nov. 1, 1997 (citing local police chief agreeing with activists on grounds that the amendments were not needed and will only make a pardon harder to achieve). The major newspapers in the state also took editorial stances against the amendments.

⁶⁸ Lee Cary, *The [No} Mercy Rule: Clemency and the Pennsylvania State Constitution*, Dec. 3, 2014, BEST OF COMMEDIA NEWS, <http://commmedia.psu.edu/special-coverage/story/best-of-commmedia/mercy-rule-clemency-and-the-pennsylvania-state-constitution> (last visited 01/25/2020).

⁶⁹ After the changes were approved by referendum, Pennsylvania removed the case to federal court. The plaintiffs added federal claims to their complaint. The district court sent the state claims back to Pennsylvania’s Commonwealth Court and held the rest in abeyance until the state claims were resolved. Reversing the Commonwealth Court, the Pennsylvania Supreme Court held in 2001 that the referendum measures which

U.S. Constitution that went to the heart of the concerns of Pennsylvania lifers. From their point of view, the increased impact of politics attributable to the Pardon Board's altered membership and the veto power given to every member by the unanimity requirement retroactively increased their punishment by effectively destroying what had been a tangible likelihood that many of them would one day win commutation of their sentences through the exercise of the governor's executive power. Rather than being a gatekeeper, the changes turned the Board of Pardons into a roadblock. In 2010, the Third Circuit Court of Appeals held that the amendments did not violate the Ex Post Facto Clause of the U.S. Constitution because they did not alter the life-sentenced defendants' substantive rights or increase the severity of their punishment; instead, they imposed only procedural "disadvantages" in a commutation process that always was and remained essentially *ad hoc*.⁷⁰ The following year, the U.S. Supreme Court rejected certiorari and left standing the decision of the Third Circuit.

*F. Two Key Proponents of Changes in the Commutation Process
Subsequently Change Their Positions*

Two of the most outspoken critics of McFadden's release and ardent advocates for tightening the commutation process came to reconsider, if not regret, their prior positions.

In 1994, Republican Attorney General Ernie Preate Jr. voted against McFadden's release. He went on to call for a legislative probe of the "breakdown of the commutation and parole system"⁷¹ and a unanimity requirement that would have prevented McFadden's release but also the release of many lifers who won a majority vote of the Board of Pardons and successfully negotiated life outside of Pennsylvania's penal institutions.

First elected in 1988 and reelected in 1992, Mr. Preate did not serve out his full second term in office. He resigned in 1995 after being charged with accepting \$20,000 in secret contributions from video poker operators and

entailed at least four different changes did not violate the separate vote requirement of the state constitution. *Pa. Prison Society v. Cortes*, 622 F.3d 215 (3rd Cir. 2010).

⁷⁰ *Id.* at 234, 244-247.

⁷¹ Frank Reeves, *Preate Wants Probe of McFadden Release*, PITTSBURGH POST-GAZETTE (PA), Oct. 21, 1994, at A1, 1994 WLNR 2251680.

filing false campaign finance reports.⁷² He pled guilty to mail fraud and served 14 months in federal prison.⁷³ He was succeeded as attorney general by Tom Corbett who became governor in 2011. During his one-term tenure as the state's chief executive, Corbett granted no commutations.

After Preate was released from prison, he joined the campaign to defeat the referendum vote approving the Pardons Board amendments and was involved in the litigation brought by the Pennsylvania Prison Society challenging them on state and federal constitutional grounds.⁷⁴ When he was disbarred, his brother, a member of the family firm, appeared on behalf of the claimants. Ernie Preate was listed as an attorney for the appellees in the Third Circuit decision that ended the case.⁷⁵

When asked to explain why he joined the opposition after having advocated for the reforms before his conviction, Preate said his support had been based on a naïve miscalculation that a unanimity requirement would not bring the process to a virtual halt.⁷⁶ When he served on the Board of Pardons roughly 80% of pardons were approved by a unanimous vote. Although Preate was a Republican, a former prosecutor, and a supporter of the death penalty, he was able to find common ground in most cases with Mark Singel, who was a liberal Democrat and a “bleeding heart.” Preate assumed that Board members would examine the records presented to them and continue to operate with such comity. Instead, the unanimity requirement gave one person a veto, whereas the governor was supposed to have the decisive vote. Also, the commutation process had become so political that some members were refusing to vote in favor of mercy for anyone. This state of affairs upset Preate enough that he switched sides.

⁷² Gary Fields, *Attorney General Pleads Guilty to Fraud*, USA TODAY, June 14, 1995, at 3, 1995 WLNR 2572243.

⁷³ See John Myers, *Duluth Federal Prison Camp Seeking More Inmates*, DULUTH NEW-TRIB. (Duluth, Minn.), Mar. 19, 1997, 1997 WLNR 7560155 (noting that Ernie Preate, former Pennsylvania Attorney General, had served 14 months at the camp).

⁷⁴ Telephone Interview with William Dimascio, Esquire (July 18, 2019). See *Pennsylvania Prison Society v. Rendell*, 419 F. Supp.2d 651 (M.D. Pa. 2006), *rev'd*, *Pennsylvania Prison Society v. Cortes*, 622 F.3d 215 (3d Cir. 2010).

⁷⁵ *Cortes*, *id.*

⁷⁶ Telephone Interview with Ernest D. Preate, Jr. (July 18, 2019).

In 1995, Samantha Broun, daughter of Jeremy Brown, the New York woman whom McFadden beat, raped, and kidnapped, was able to describe her mother's ordeal and its consequences at a time when her mother could not speak out because charges were pending against McFadden.⁷⁷ Testifying before the Pennsylvania Senate Judiciary Committee, Ms. Broun described how her mother, a drug and alcohol counselor in her 50s, was assaulted and abducted by McFadden over a period of five hours. Ms. Broun suggested amendments to the pardon process, some of which were already in proposed legislation.

Roughly two decades later, in 2016, Samantha Broun, now a reporter for Atlantic Public Media, along with Jay Allison, produced a podcast focused on the lasting trauma suffered by her, her mother, and her brother because of McFadden's crimes. The podcast was broadcast nationally on the NPR program "This American Life."⁷⁸ The podcast includes excerpts of Ms. Broun's senate committee testimony. In addition, Ms. Broun and her mother Jeremy give accounts of McFadden's cruelty that are chilling and of its aftermath that are profoundly sad. The podcast reveals that, because McFadden was permitted to act as his own lawyer, Jeremy Brown had to endure being cross-examined by him about his reprehensible conduct.⁷⁹

In hindsight, Samantha Broun was aware that her testimony might have played a role in bringing commutations in Pennsylvania to a virtual halt. She expressed her remorse as follows:

I don't know what it will take to undo what's been done in Pennsylvania. . . . Unfortunately, success stories of lifers . . . don't create the same fervor that crimes like Reginald McFadden's do. But after spending the past 2 and ½ years investigating the effects of this crime, I want to tell you this. When I testified in Harrisburg back in 1995, I spoke from a place

⁷⁷ Mario F. Cattabiani, *Victim's Daughter Questions Pardon in McFadden Case*, MORNING CALL (Allentown Pa.), Feb. 7, 1995, at A1, 1995 WL 2008677.

⁷⁸ *This American Life: 20 Years Later*, WBZE CHICAGO RADIO (Dec. 9, 2016), at <https://www.thisamericanlife.org/604/20-years-later> (last visited 01/24/2020).

⁷⁹ Debra West, *Rape Victim Takes Spotlight and Aims It at Parole System*, N.Y. TIMES, Aug. 25, 1995, at A1 (detailing post-trial statements of Jeremy Brown about the parole of Reginald McFadden, a "psychopath" murderer who should never have been released, and his cross-examination of her).

of fear and anger. I didn't notice the political forces poised to capitalize on that. I didn't have the distance I have now to see what my testimony would be used for, what the consequences might be.

My testimony equates all lifers with Reginald McFadden and that's not fair. Look, I don't speak for all victims. I don't even speak for my whole family, but to set the record straight, I do believe in the possibility of second chances.⁸⁰

Broun visited Pennsylvania prisons to play her podcast and engage in dialogue with lifers. She explained her decision to do so as follows:

“My purpose in doing this is two-fold: I've felt connected to everyone in what happened,” she said, referring to the attack on her mother, “and the people who are behind bars as a result of all the changes made in Pennsylvania since then. So I see this as an opportunity to have a discussion from multiple perspectives, and to raise the question of whether those were ultimately good changes. Second, we live in such a segregated society and world in that it's really easy for somebody like me to be really disconnected from people who are in prison. This makes it more real to me, and connects us in a way that may bring about change.”⁸¹

Given the popularity of “tough-on-crime” and “law-and-order” measures that existed among Republicans at the time of Broun's Pennsylvania Senate testimony, she can deflect some of the blame for the plight of the LWOP-sentenced PDOC residents of today. The change of position by Preate and Broun and the criticism of the politics of “law-and-order” suggest that the

⁸⁰ *This American Life: 20 Years Later*, *supra* note 78, <https://www.thisamericanlife.org/604/transcript>. For more on the backstory of the podcast, see *A Life Sentence: Victims, Offenders, Justice, And My Mother*, TRANSOM.ORG, (MAR. 1, 2016), <https://transom.org/2016/a-life-sentence-victims-offenders-justice-and-my-mother/>.

⁸¹ Dana DiFilippo, *Stepping Back from Vengeance; Seeking Reformatory Justice*, WHYY NEWSLETTER, Nov. 1, 2016, <https://whyy.org/articles/stepping-back-from-vengeance-seeking-reformatory-justice/> (discussing interview with Samantha Broun).

decision to commute Reginald McFadden and the reforms that followed in its wake ought to be reexamined by contemporary state officials.

G. Conclusion

The bureaucratic snafus that sent McFadden directly to New York without spending any time in community corrections or being under intense parole management and that allowed him to be supervised by well-intentioned amateurs who had neither the experience nor resources to support McFadden's integration into society have ostensibly been corrected by the amendments approved by the voters in 1997 and subsequent laws and bureaucratic regulations requiring more assessments and in-person interviews of applicants. Considering that the commutation process has until recently been in a state of near-paralysis, it is not possible to conclude that the reforms have prevented the release of another McFadden. Given the slow pace of grants of commutation, it appears that the reforms have not assured Pennsylvania public officials that they can vote to commute a lifer without endangering the good people of the Commonwealth or jeopardizing their own political careers.

The analysis undertaken so far has not considered the soundness of the decision to commute McFadden made by Pennsylvania officials connected with the PDOC, the Board of Pardons, and the PBPP.

Without access to McFadden's complete corrections, pardon, and parole records, it is impossible to identify errors that might have infected the decisions that produced McFadden's release from custody. No doubt, the judgments were based partly on intangible factors incapable of objective assessment. Then too, there is the possibility that an applicant like McFadden could have tricked or conned decisionmakers into believing that he was rehabilitated and posed little danger to his fellow citizens. Alternatively, the public officials might have convinced themselves that McFadden deserved commutation for reasons of their own. Either alternative is enough to keep the example of Reginald McFadden a reason for caution.

Evaluating the decisions reflected in official statements and actions by relying on information that is publicly available or was obtained from public sources, as well as the recollections and opinions of the participants

in the McFadden Project, is an exercise in second-guessing. There is little choice but to use the available data to consider whether, in hindsight, the decisions reasonably fulfill the purposes that commutation was meant to serve.

III. The Soundness of the Decision of the PDOC to Support McFadden's Commutation

A. Finding Standards in the Policy Reasons to Commute or Not

Executive clemency in the form of commutation of life sentences is grounded in the belief that people who break the law can come to see the error of their ways, change for the better, and seek and gain society's mercy and forgiveness. Commutation is an expression of societal generosity and compassion for the prisoner. In addition, commutation is used to rectify miscarriages of justice. Punishments that seemed entirely justified when meted out may prove to be harsh and excessive in hindsight because of changes in the law and the goals of punishment.⁸² Typically, a successful petitioner exhibits strong evidence of rehabilitation, although rehabilitation has mostly been abandoned as a goal of incarceration. Finally, commutation can be used to manage the prison population by controlling its size and creating incentives for good behavior, paying or repaying political favors, and rewarding conduct by prison residents that benefits the interests of corrections' department leadership and staff.⁸³

The number of commutations granted across the country is declining. The drop is likely attributable to refinements in the sentencing process, the end of rehabilitation as a goal of criminal punishment, and the victims' rights movement.⁸⁴ Then, too, there is the "Willie Horton Effect." Governors and

⁸² Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U.CHI. L. REV. 1, 17 (2015) (describing the "bedrock clemency claim" as the sentence no longer fits either who the person has become or contemporary notions of a proportionate sentence).

⁸³ See Barkow & Osler, *id.* at 4; John Dinan, *The Pardon Power and the American State Constitutional Tradition*, 35 POLITY 389, 394 (2003); Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 849-50, 852 (2016); William W. Smithers, *The Use of the Pardoning Power*, 52 ANNALS AM. ACAD. POL. & SO. SCI. 61 (1914).

⁸⁴ Larkin, *supra* note 83, at 856.

other members of the executive branch of government involved in the pardon or commutation process (such as lieutenant governors, attorney generals, district attorneys, and secretaries or commissioners of corrections) generally have little to gain from commutations and much to lose should the risk of recidivism materialize and a released commuttee commit a highly visible crime.⁸⁵ Commutations smacking of favoritism generate public cynicism and undermine the legitimacy of the pardon power; they do little for the executive's reputation. For these reasons, commutations are very cautiously granted.

Nonetheless, commutations must be awarded to maintain the fairness and equity of the criminal justice system. As William W. Smithers of the Pennsylvania Bar argued in 1914, a governor's promise to faithfully execute the laws of her or his state applies to the constitutional or legislative provisions pertaining to clemency:⁸⁶

If the power of pardon is being abused today it is in the failure of executives to act upon their own motion and apply the rational theories of criminology to the many prisoners throughout the country who were years ago incarcerated under the system of rigid impersonal and mechanical criminal laws. An intelligent investigation would reveal that many inmates could and ought to be set free⁸⁷

Critical analysis of the decision to commute McFadden must take into consideration the policy justifications for and criticisms of the exercise of the power of commutation.

B. McFadden, the Juvie Lifer (The Best-Case Scenario)

⁸⁵ See Thomas L. Austin & Don Hammer, *The Effect of Legal and Extra-Legal Variables in the Recommending and Granting of a Pardon*, 22 L. & POL'Y 49, 63 (2000) (reporting on the results of an empirical study of pardons in Pennsylvania between 1990 and 1991 indicating that grants occurred when the victim was not likely to object, the media had little interest in the case, and there would be no public outcry).

⁸⁶ Smithers, *supra* note 83, at 63 .

⁸⁷ *Id.* at 65.

McFadden's status as a juvenile lifer (a "juvie lifer") and unfair aspects of his conviction were part of the official explanation for his commutation. Indeed, they are the best justifications for the decision in his favor.

McFadden addressed his juvenile lifer status in several ways in his 1992 commutation application, which is a strategic work of self-advocacy.⁸⁸ Although he asserted and then dismissed in several places the relevance of his "rotten social background,"⁸⁹ he nonetheless provided a description of the adults in his life: a drunken stepfather who beat him with an extension cord, a mother who did not protect him because she needed help raising 10 children, a father who was in and out of a Veterans Administration Hospital, and a caring grandmother whose death he associated with his first arrest at age 12. He began using drugs and alcohol at 13 and was fully addicted by 15. He committed crimes with other delinquent youths because of his addiction. McFadden concluded the account of his formative years as follows: "When I look back at the early days of my life, I never got into serious trouble, I would go to school and help people in my community. Where did I go wrong?" He ended by expressing regret for being the cause of someone losing her life and vowed to be a cause of others saving their lives.

The merit of McFadden's claim to mercy based on his juvenile status at the time of his crimes and arrest is supported, retrospectively, by the U.S. Supreme Court's decision in *Miller v. Alabama*, which held that the Eighth Amendment's cruel and unusual punishment clause forbids the sentencing

⁸⁸ McFadden, Application for Clemency, *supra* note 14.

⁸⁹ *Id.* McFadden argued, in an addendum to his answer to question #20 which asked that he state why he believed that his plea for mercy should be granted, "It is my earnest hope that though I am not asking for my past behavior to be excused – which would be an injustice to the victim. I am asking that you take into consideration my history preceding my arrest for this crime, beyond my long juvenile arrest records." In his conclusion, he makes similar assertions: "It would be unfair and insulting to request that my actions be excused due to circumstances of age, ignorance or poverty, because, that would not uplift the spirit of justice."

Though he denied that the circumstances of his childhood should excuse his involvement in Mrs. Rosenbaum's murder, he nonetheless wanted credit for disclosing them. "Allow me to tell you my youthful history through my eyes, that brought me to commit crimes. Mind you, this revelation has never been told in depth, because, I was in the state of denial."

of juvenile offenders to mandatory terms of life in prison without the possibility of parole.⁹⁰ Juveniles' "diminished culpability and heightened capacity for change" warrant that their individual mitigating circumstances, particularly their environmental vulnerability, be considered in sentencing. An obligatory sentence of life without the possibility of parole carries "too great a risk of disproportionate punishment."

McFadden also relied on the circumstances of his crime and conviction to support his commutation. There was no evidence of "malice and desire to cause the death of the victim." Having served more than the maximum sentence of his young partners in crime, he was being unjustly punished for not pleading guilty and going to trial. Moreover, the law of felony murder had been modified since he was convicted and was no longer a crime of the first degree carrying a sentence of life without the possibility of parole. He further maintained, "I have repented for my sin, reformed my actions so such a crime could ever (sic) be committed again."

I came to prison when I was only sixteen years old, I am now 39 years old, in all things there is an expiration; a time when what was fair and just at one time becomes unfair and unjust at another time; must records be read as though the crime happen just yesterday, failing to take into consideration the ability of human beings to change. I am not just older, grayer, balder and taller, I am a wiser and more capable human being, who takes his responsibilities very seriously and keeps his vows, promises and word.

As McFadden does throughout his application, he invokes a religious source to support his case:

In the Jewish Holy Book, it says:

"If you feel shame over having sinned, Heaven immediately forgives you."(Brachot 12b/Hagiga 5a)

⁹⁰ *Miller v. Alabama*, 567 U.S. 460, 479 (2012). See also *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) (holding that *Miller v. Alabama* applies retroactively to cases on state collateral review).

I believe this to be, so my sin must have been forgiven a million times over, because, I have felt the shame of my crime, a million times.

By the time McFadden applied for commutation in February 1992, he was a seasoned filer. Although he received favorable votes from the Board of Pardons in 1978, 1980, and 1981, he was unable to win the approval of Governors Shapp and Thornburgh. Back then, he was young for a commutee (under 30 years of age) and had served relatively little of his LWOP sentence. The victim's family and the Philadelphia District Attorney opposed his release. Governor Thornburgh, who went on to become Attorney General of the United States, granted only seven commutations between 1979 and 1986.

The circumstances of McFadden's conviction and his history with the commutation process were sources of frustration for him. In 1984, he tried to arrange an escape from SCI Rockview. McFadden states in his 1992 commutation application that he "lost faith in the process of commutation" and was subject "to external pressures." He continued, "[A] member of the staff (knowing of my plan) convinced me to try the commutation process again." He felt that the criminal justice system had betrayed him, and his resentment persisted after he was released.⁹¹

Pennsylvania did McFadden no favors when it finally released him in 1994 without a stay in community corrections and intense parole supervision. When his transition to civilian life became rocky and his supporters failed to deliver on what he thought they had promised, he committed a homicide and rape and kidnapping, which bore hallmarks of the murder of Mrs. Rosenbaum. According to a report in *Newsday*, McFadden "grapple[d] with the question of how he was expected to cope with the first freedom he had ever enjoyed as an adult." "There's a lot of people in jail like me," McFadden said. "Lock us in jail for twenty-five years and expect us to act like civilized human beings?"

⁹¹ *Criminal Mindscape: Reginald McFadden – Second Chance Killer* (MSNBC television broadcast Nov. 15, 2007) (containing an interview with McFadden conducted by former FBI profiler Mark Safarik). See also Berger, *supra* note 1111 (reporting on an interview in which "McFadden accused his patrons of mistreating him, abandoning him, and . . . [playing] a role in his "undoing."")

It possible that the circumstances that made McFadden a sympathetic, almost successful candidate for commutation at the beginning of his life sentence became the source of his undoing. A participant in the McFadden Project speculates that McFadden was motivated to direct his energies toward getting out of prison as soon as possible rather than building the resiliency and maturity he would need to cope with life if he ever won his freedom. His resentment and frustration festered in a way that made him a less fit candidate for commutation over time. If this scenario is true, we can only wonder if the PDOC failed to pick up on or ignored clues that resulted in its misjudgment of McFadden's character.

C. McFadden, Informant or "Snitch"? (A Plausible Case Scenario)

Ask long-serving lifers in the PDOC system about Reginald McFadden and they will tell you right off that he got commuted because he was a snitch. At the very least, his cooperation likely bolstered his chances of securing commutation.

The General Counsel's Memorandum to Governor Casey mentions several instances of "informing" or "snitching" by McFadden and violence directed at him by his fellow prisoners.⁹² There is little public information about his role in the prosecution of two residents of SCI Pittsburgh for the attempted murder of a corrections officer in the mid-1970s; rumor has it that the residents were charged with pushing a laundry cart off an elevated walkway onto the officer, but were found not guilty. Counsel's Memorandum does not indicate how reliable or useful McFadden's testimony ultimately was. There is some proof, however, of what he might have done at SCI Camp Hill between 1988 and 1989.

The Camp Hill population was frustrated by overcrowding and the understaffing of the facility, and the staff had doubts that the prison administration was acting to assure its safety.⁹³ Changes in the Family Day policy, which prevented visitors from bringing food into the prison and in the sick-line policy increased the tensions.⁹⁴ As a result, SCI Camp Hill was

⁹² See *supra* notes 21-22 and accompanying text.

⁹³ Jack A. Goldstone & Bert Useem, *Prison Riots as Microrevolutions: An Extension of State-Centered Theories of Revolution*, 104 AM. J. SOC. 985, 1008-010, 1013, 1017 (1991).

⁹⁴ Arlin M. Adams et al., *The Final Report of the Governor's Commission to Investigate Disturbances at Camp Hill Correctional Institution*, Dec. 21, 1989, at 12. In addition to

the subject of two riots that extended over three days, October 25, 26, and 27, 1989.

Prior thereto, McFadden had cooperated with the prison's investigation of the Fruit of Islam (FOI), the security arm of the Nation of Islam, commonly referred to as the "Black Muslims" or the "NOI." In his application, McFadden indicated that he withdrew from the Nation of Islam in 1975 and suggested in numerous ways his disdain for the sect and its views on criminal responsibility.⁹⁵

A commission headed by former Third Circuit judge Arlin Adams, then a law firm partner in private practice, investigated the riot.⁹⁶ In a chronology of events leading up to the disturbances, the commission's report indicated that the staff received warnings of an impending uprising from resident informants.⁹⁷ They conveyed hints to some correction officers and staff that they should take time off, while others were told not to report to work on a specific day.⁹⁸ Several residents engaged in behavior that was out of the ordinary for them. The report states, "Some inmates reportedly told corrections officers that the instigators behind the plan were members of a Muslim sect known as Fruits (sic) of Islam ('FOI'). The Commission's interviews with inmates and staff, *and information from other investigations*, suggest that the FOI had been attempting to organize a disturbance among the general population for some time."⁹⁹

Exactly what McFadden did or experienced during the Camp Hill riots themselves is the subject of varying accounts. There was a rumor that McFadden had rescued a corrections officer; some participants in the McFadden Project maintain that the rescue rumor was true. The Memorandum to Governor Casey, however, makes no mention of it. While McFadden claimed in his commutation application that the rioters

Judge Adams, the commission consisted of George M. Leader, former Governor of Pennsylvania, and K. Leroy Irvis, a black legislator from Pittsburgh and a former Speaker of the Pennsylvania House of Representatives.

⁹⁵ McFadden, Application for Clemency, *supra* note 14.

⁹⁶ ADAMS et al., *supra* note 94.

⁹⁷ *Id.* at 12-14.

⁹⁸ *Id.* at 13.

⁹⁹ *Id.* at 12-13 (italics added).

assaulted him,¹⁰⁰ some Project participants assert that he was sought by the rioters because of his snitching but was not caught and beaten.¹⁰¹

McFadden was shipped off to USP Lewisburg and from there to USP Leavenworth, presumably because he was not a rioter.

It seems reasonable that the PDOC would look favorably upon applicants for commutation whose assistance protected its corrections officers, other staff members, and visitors from threats of danger. There is no reason why commutation should not be a reward for acting in accordance with the interests and values of the law-abiding world. That is unless, of course, the commuttee would pose a danger to her or his fellow citizens if released into the outside world.

Rewarding informants or snitches might adversely impact the commutation process, however, in that it “institutionalizes secret official decision-making and an arbitrary rewards system in which similarly situated individuals are treated differently depending on their personal relationships with and usefulness to law enforcement actors.”¹⁰² A career informant might have her or his record scrubbed of infractions or receive favorable treatment along the way.¹⁰³ Her or his ultimate commutation package would be more favorable than true as a result. Moreover, prison authorities might conclude that the value of an informant's service outweighs any threat to her or his fellow citizens should commutation be awarded. The lack of thoroughness, objectivity, or truthfulness in the PDOC file of an applicant would handicap the Board of Pardons and the Governor in determining whether she or he should be released.

¹⁰⁰ McFadden stated that he “was held down by a group of inmates during the Camp Hill riots, bounded (sic), gagged and threatened.” He claims that such victimization allowed him to appreciate his victim's predicament.

¹⁰¹ There is evidence that residents of Camp Hill who were transferred to other facilities, including Graterford, were beaten up by guards whether or not they were actually among the rioters. Erich Smith, *Graterford Guards Charged with Attacks on Camp Hills Inmates*, AP, Oct. 30, 1991, <https://apnews.com/f20a33e3ccc52789baf89afab276cb39>.

¹⁰² Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U.CIN. L. REV. 645, 694 (2004).

¹⁰³ Of course, the data on which an assessment of McFadden's risk of recidivism was based that might have been included in his PDOC and PBPP files would be exempt from disclosure under the RTKL.

At the same time, residents of PDOC facilities might be less tolerant of an informant's disclosure of information that the prison administration considers valuable for the maintenance of control and security of a facility. Sociologists report that there is an "inmate code of conduct,"¹⁰⁴ which is the product of "the folkways, mores and customs, and general culture" of the incarcerated population.¹⁰⁵ The code allows the residents of a correctional facility to "control their environment by curbing disruptive behavior," and by "positioning the inmate as an active agent in his or her social world."¹⁰⁶ Subject to exceptions in which speaking with prison authorities is "a necessary evil," the code promotes "silence" by condemning snitching or reporting and encouraging residents to handle their problems personally or within their groups.¹⁰⁷ Snitching promotes lying about fellow residents, distrust among residents, and related violence.¹⁰⁸ As one of the McFadden Project lifers put it, "When you reward people to lie, they will tell you what you want to hear."

The code does not entirely repress the existence of dissenting opinions. Some of McFadden's fellow PDOC residents found his behavior forgivable. Joshua Dubler, a Princeton-trained scholar of religion, conducted an ethnographic study of the chapel at SCI Graterford, one of the most ecumenical sites of worship in the state.¹⁰⁹ When asked about McFadden,

¹⁰⁴ REBECCA TRAMMELL, ENFORCING THE CONVICT CODE: VIOLENCE AND PRISON CULTURE 5-6 (2012). The Governor's Counsel's Memorandum on McFadden refers disparagingly to "the inmate code" as a source of McFadden's troubles with other PDOC residents. See *supra* note 21.

¹⁰⁵ Brett Garland & Gabrielle Wilson, *Prison Inmates' Views of Whether Reporting Rape Is the Same As Snitching: An Exploratory Study and Research Agenda*, 28 J. INTERPERSONAL VIOLENCE 1201, 1203 (2012). The authors considered whether "the inmate code of conduct" regarding snitching was imported into prisons from the outside or was a response to the deprivations of incarceration. *Id.* at 1205. They concluded that the latter was the more likely explanation given that "frustration is curbed by the creation of a code which if followed gives inmates a sense of stability and control over their lives." *Id.*

¹⁰⁶ TRAMMELL, *supra* note 104, at 5.

¹⁰⁷ *Id.* at 105. Trammell's research largely focused on the racial and ethnic divisions among California's prison population.

¹⁰⁸ *Id.* at 127. See also M. Dyan McGuire, *Doing the Life: An Exploration of the Connections Between the Inmate Code and Violence Among Female Inmates*, 2011 J. INST. JUST. & INT'L STUD. 145.

¹⁰⁹ DUBLER, *supra* note 5.

one of Dubler's interlocutors,¹¹⁰ who worked in the office of the Catholic chaplain, "express[ed] sympathy for McFadden, who was only sixteen when he was sentenced to prison for a black-on-white murder, and then snitched his way to a commutation. 'He didn't know any better,' Mike says. 'You know? What do you expect from someone who was raised here from the time he was a kid? He learns to deal.'"¹¹¹

A participant in the McFadden Project expressed a similar view. He had served time with McFadden at Rockview after McFadden returned to the PDOC system from USP Leavenworth. McFadden told the participant a fantastic story about having connections with terrorists that led the latter to consider McFadden "a nut." After reading a news article about McFadden's commutation and arrest in New York, the participant thought the following:

I believed that the DOC took a maladjusted kid, and transformed him into what he became, by not attending to his needs, but using him as a tool. He needed some therapy from the way he was talking to me. So he wouldn't have been my choice of a candidate for commutation.

Thus, the assessment of McFadden's character and the thoroughness of his PDOC record were possibly impacted by the value the PDOC attached to his cooperation. It might even be said that the incentive structure of the PDOC system shaped his character. Thus, the role that he played as an informant or snitch intent on securing commutation might have been a source of false or faulty estimations by the PDOC of his true disposition and proclivities.

D. McFadden and his "Jive Commutation Con" (The Worst-Case Scenario)

Apart from his snitching, there was nothing about McFadden that made him a superior candidate for commutation.

¹¹⁰ Dubler uses the term "interlocutor" in lieu of "the classical anthropological term *informant*." *Id.* at 8, 328 note 7. This article might have done the same but for the fact that "interlocutor" is also defined as the "man in the middle of the line in a minstrel show who questions the end men and acts as leader." MERRIAM WEBSTER AMERICAN DICTIONARY.

¹¹¹ DUBLER, *supra* at 5, at 303.

After voting against commuting McFadden, Ernie Preate wrote a dissent to the vote of the majority of the Board. He submitted a further memorandum that was included in the minutes of a Pardon Board meeting held after McFadden's arrest. In the latter document, Preate set forth his criteria for commutation of lifers which McFadden did not satisfy:

When a jury and a judge sentence someone to life in prison, that sentence should be a life sentence unless and until the prisoner has served punishment in excess of 20 years and demonstrated sincere remorse, has rehabilitated himself educationally, mentally and spiritually, has been a model prisoner relatively free of major misconducts, showing a maturity and respect for the law, and has developed a strong support system of family and friends while in prison that will be ready, willing and able to help him, guide him and keep him from going astray. This support system must be clearly identifiable, credible and capable of much support.¹¹²

This statement includes benchmarks the Board has consistently looked for in identifying meritorious candidates for commutation. Proof of McFadden's general fitness for life on the outside, as reflected in family support, social skills, and educational credentials, was weak.¹¹³ He had not always been a model prisoner. A press report indicates that early in his

¹¹² Statement by Preate to the Board of Pardons, *supra* note 44, at 942, 943-44. Preate's fellow Board member, Ronald J. Harper, Esq., also wrote a memorandum to the full Board, in which he said, "The recent events have convinced me of the need not to abandon the hope for humanity provided by the Board of Pardons and yet consider how we can make for improved consideration of applications, especially involving lifers." He argued that an unanimity requirement would give Board members too much individual power and interfere with the governor's ability to serve the purposes of pardoning. Furthermore, it would "not create a fail safe." Statement by Ronald J. Harper, Esq. to the Board of Pardons (Oct. 19, 1994), in Board of Pardons Minutes, 1974-1999, *supra* note 20, at 941.

¹¹³ Cary, *supra* note 68. According to the Memorandum to the Governor, McFadden earned a G.E.D., an associate degree from an obscure Kansas college, a barber's license, and certificates in adult basic education, drug and alcohol information, and stress management; he also received training in typewriter and business machine repair, (college-level) nursery crops production and plan reading—building construction and estimating. He did not use any of the skills he acquired while incarcerated in the jobs he held during his 90 plus days of freedom.

confinement McFadden “had at least 12 misconducts in prison, including assault, threatening another inmate, lying and conspiring to escape.”¹¹⁴ Counsel’s Memorandum acknowledges that his “making arrangements to attempt to escape” in 1984 constituted “serious misconduct.” The only other infraction noted, however, was possession of contraband (a sandwich) for which he was reprimanded.

Ernie Preate, in a 2014 interview, pointed to McFadden’s lack of participation in organizations with other lifers as a justification for his vote against McFadden:

McFadden had no associations within any of the prison’s lifer organizations. [Preate] had hoped to find that McFadden was in a choir or was working as a postmaster in the prison, because he said those activities teach “get-along” skills. . . . “That’s what living in society is all about . . . if you can exist in a lifer group with a bunch of other murderers, and get along, and obey courtesy, and respect rules.” Preate said. “But I didn’t see that in McFadden. He was a loner.”¹¹⁵

Commutees have pointed to their solidarity with and concern for the lifers they left behind as a check on their behavior. They know that if they recidivate, it may impact the opportunity of other lifers to gain commutations.¹¹⁶

McFadden must have known that he did not fit the profile of the meritorious rehabilitated lifer and that his sincerity might be doubted. So he argued in his application for a favorable assessment of himself by emphasizing his exceptionalism vis-à-vis his peers. At no point in his application did he express kind regard for anyone with whom he served time. He blamed others for his inability to live in peace within the prison system and for his behavior as a youthful offender. He constructed,

¹¹⁴ Peterson, *supra* note 39.

¹¹⁵ Cary, *supra* note 68.

¹¹⁶ Regina Austin, “*Second Looks, Second Chances*”: *Collaborating with Lifers Inc. on a Video about Commutation of LWOP Sentences*, 22 U. PA. J. LAW & SOC. CHANGE 71, 88 (2019) (citing an interview with commuttee Tyrone Werts in the *video Second Looks, Second Chances*, *supra* note 10).

through his words, an image of uniqueness or individuality that distanced him from other black urban Muslim lifers by exploiting the cultural biases and myopia of the decisionmakers who controlled his commutation decision. While he may have chosen to do good rather than bad, he offers no proof that he did anything out of the ordinary to contribute to the community inside or outside the PDOC system.

For example, in responding to questions posed by the application, McFadden proclaimed his sincerity eight times. McFadden wrote, “[M]y appeal is sincere, and from a repented heart, reformed mind, actions and motives, and a deep desire to live the rest of my life peaceful and meaningful among law-abiding citizens.” He goes on to argue that his transcripts and other documents were evidence that his pursuit of “academic and vocational goals” that had “been continuous despite many obstacles and discouragements” and “sincere.” He could have “reverted back to [his] old youthful way of dealing with obstacles and that is to turn to drugs and some kind of aggressive behavior.” He maintained further that “[i]f he was not sincere,” he would not have gone “without commissary for months” in order to pay the tuition for correspondence courses” which would improve his life. “If he was not sincere,” he would not have spent his time taking courses; rather he would have played basketball and watched gangster movies. As a result, he “was mocked and isolated by inmates, because [he] sought education.”

McFadden had ambitions of working with troubled youth.¹¹⁷ He said:

My studies of social issues and my experience in prison can both be used in helping to solve some of the problems confronting delinquent youths. No! I am not some hoped for “Messiah”, but rather a *sincere* repentant who sees the answer to his own life intertwined (sic) with the lives of others; by helping others, I will be helping myself.”¹¹⁸

¹¹⁷ Reginald McFadden did secure a position with a facility for troubled youth in foster care right before he was arrested. See George, *supra* note 53; *Killer's Hiring Fell Through the Cracks*, ROCKLAND (NY) JOURNAL NEWS, Oct. 14, 1994, at A14 (expressing dismay that the NY Division of Parole considered McFadden, a convicted murderer, a suitable counselor for troubled young people at the Edwin Gould Academy).

¹¹⁸ Emphasis added.

Unlike other men who were commuted before him,¹¹⁹ McFadden offered no proof of a history of working with or mentoring his fellow residents through any formal program or on an informal basis.

McFadden's most significant communal involvement related to his practice of the Muslim faith. In his commutation application, McFadden said that he joined the Nation of Islam out of fear for his safety and "to prevent sexual harassment." Constant drilling turned him into a programmed zombie. Once he saw its true worth and began to blame himself for his crimes, rather than his circumstances, he said, "I embraced repentance like a nursing child embraces its mother's breast, I willingly drunk and with it, the nurturing desire for true reform grew, the awakening consciousness made me realize the depth of my problems." He likened his on-going "struggle to be at peace with all men without violating one's religious belief" to "the debate over the separation of State and Church which brought many wars during the Dark Ages, the Renaissance and the Reformation eras" and "the continuous question of secularism among Christians, Jews and Muslims." He said, near the end of his discussion, "I beseech the friendship of all men, based on cooperation, respect and co-existence." After that, he likens himself to Ghandi (sic) and Dr. King in that he chose not "the path of violence, but, the path of non-violence."¹²⁰

McFadden's arguments did not fool Ernie Preate or so he said. In October of 1994, after McFadden was arrested, Preate was quoted as characterizing

¹¹⁹ See Howard Goodman, *More lifers in Pa. Are Receiving Commutation*, PHILA. INQUIRER, Mar. 31, 1991, at 5E (noting that one of two lifers commuted by Governor Casey was "an exemplary inmate, active as a literacy teacher and a leader of the prison Muslim community, "while the second "teaches other inmates about computers").

¹²⁰ In a later passage in his commutation application, McFadden returns to the subject of his rejection of the NOI and offers a more common assessment of the sect:

Everything is not what it appears to be, that one must look beyond the golden tongue of people like Louis Farakhan, whose racist ideas are not new to the written history of mankind: A racist is a racist, no matter what you call it. I learned to judge people by the contents of their character and not the color of their skin. Many wolves come in sheep clothing, often disguised as religious teachers like Mullahs, whose views are more political than the religious faith that they claim to represent.

McFadden, Application for Clemency, *supra* note 14.

McFadden's application as "glib."¹²¹ Furthermore, he said, "There wasn't enough remorse. It was a lot of words strung together. It didn't sound sincere. He was being ambiguous and patronizing."¹²²

McFadden's critique of the Nation of Islam, however, mirrored the assessment long held by many in the criminal justice system that the Nation of Islam was a militant black nationalist, anti-white gang that was at best a cult or sham religion.¹²³ His critique, no doubt, won him points. After rejecting the NOI, McFadden did not follow the path of other disenchanted incarcerated believers by becoming a Sunni. He gravitated toward more marginal sects and was championed by white, middle-class New York Islamists who resided in Palisades and Carmel, New York.

McFadden's outside supporters seemed convinced of the fervor of his religious beliefs, at least until he was released into their supervision. According to letters written in 1980-81 and addressed to Governor Thornburgh who was then considering one of his earlier commutation applications, McFadden maintained a lively and extensive exchange of letters and phone calls with communicants in other states and other parts of the world. One, who taught McFadden in "a non-credit correspondence writing course, wrote: "His deep commitment to Islam—he is a Muslim, not a Black Muslim—undoubtedly explains his ability to withstand the rough forces of prison life. His humor, resilience, self-possession, and his profound sense that his life is meaningful—all seem to stem from his religious conviction." McFadden suggested that his risk of recidivism was low because he had "a competent support system that stands ready to assist me in a proper adjustment back into society, they consist of professionals in the field of behavioral science, who are friends and have my trust and love."

¹²¹ *Id.*

¹²² *Id.*

¹²³ Khaled A. Beydoun, *Islam Incarcerated: Religious Accommodation of Muslim Prisoners Before Holt v. Hobbs*, 84 U.CINN. L. REV. 99 (2016); Garrett Felber, "Shades of Mississippi": The Nation of Islam's Prison Organizing, the Carceral State, and the Black Freedom Struggle, *J. AM HIST.*, June 2018, at 71 (describing the prison activism of the NOI and the punitive measures like transfers and solitary confinement imposed by prison authorities who considered the NOI "a hate group masquerading under the auspices of a religion").

When some of his New York supporters actually interacted with him after his release, they reconsidered the accuracy of their prior assessments.¹²⁴ One of them concluded that McFadden's release was an "unavoidable mistake" because he did not see how "anyone could fool an entire universe—the parole board, the governor, the prison administrations, the district attorney."¹²⁵

In black culture, "jive" or "jive-ass" is a derogatory epithet applied to a person who, because of his rhetoric and demeanor, is considered disingenuous, deceitful, unreliable, insincere, arrogant or pretentious.¹²⁶ The adjective sometimes precedes a noun, such as dude, turkey, negro or n---r. The expression is employed most widely in the context of intra-black relations. In the interracial context, it may be applied to a black person who takes on the role of a trickster figure to deal with the domination and subjugation of black existence. In "playing" or fooling others, the 'jive-ass' talker may forget that he is only posturing and wind up being played himself.

Perhaps, if the decisionmakers who approved McFadden's commutation without ever meeting him had been more attuned to black rhetorical styles, they might have questioned the earnestness of his assertions. That is unless McFadden's mode of expression was standard in commutation petitions, in which case, that is another reason why he was not an especially meritorious candidate for commutation. Given McFadden's denunciation of the Nation of Islam, the insincerity of much of his rhetoric likely did not matter.

Others were in a better position to observe and evaluate the authenticity of McFadden's claim to exceptionalism as expressed in his behavior while incarcerated in Pennsylvania. They had even more at stake if his

¹²⁴ See notes 46-48 *supra* and accompanying text.

¹²⁵ Smith et al., *Warning Signs*, *supra* note 42.

¹²⁶ Green, GREEN'S DICTIONARY OF SLANG (Digital edition 2020), <https://bit.ly/2FdCjiQ>; Eric Partridge, THE NEW PARTRIDGE DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH: J-Z 1107 (2006); Eric Partridge, THE ROUTLEDGE DICTIONARY OF MODERN AMERICAN SLANG AND UNCONVENTIONAL ENGLISH 568 (2009).

commutation proved to be a mistake. They were the lifers who served time with him.

E. The McFadden Project Participants and Unanswered Questions About McFadden's Commutation

There are still many lifers in Pennsylvania prisons, as well as a few who are free because of commutation or resentencing, who encountered Reginald McFadden between 1974 and 1994 when he was in the PDOC system. The Project participants are among them. Most of them had direct contact with him or were privy to contemporaneous information about his activities because, as lifers, black men, Philadelphians, and Muslims, he and they were members of the same affinity groups within the prison population. Members of such groups shared material circumstances, culture, and communal activities. Members of such groups interacted with McFadden in settings that were not strictly supervised by frontline prison staff and administrators. Members acquired information about McFadden that staff and administrators, especially those in the higher ranks, did not know. Moreover, the members were privy to information transmitted by group members who were transferees from other PDOC facilities or players on opposing extramural sports teams that traveled among facilities.

Project participants use various adjectives to describe McFadden: “weird, but not offensive,” “off the hook,” “paranoid,” “smart enough to be a chameleon of sorts,” “bad news,” and “an intelligent schemer who exploited loopholes and methodically pursued his goal of getting out of prison.”¹²⁷ Because they saw little that set McFadden above the average

¹²⁷ Assessments of McFadden offered in hindsight, even if said to reflect what foresight predicted at the time of his release, are likely affected by the magnitude of the crimes McFadden committed after he was released. The decision to commute McFadden additionally proved to have a devastating impact on Pennsylvania lifers who hoped to have their sentences converted to “life with the possibility of parole” one day. It is impossible to distinguish fact from legend in accounts of the man. The Project participants are not in complete agreement about what he said and what he did when he and they were in the same facilities. It is certainly not the intent of this Article to perform a psychological post-mortem of him. It is possible, however, to explore situations in which the residents might have had a different or better opportunity to assess McFadden than the prison officials who supported his commutation.

PDOC resident, news of his release and subsequent crimes generated surprise among the PDOC population, followed by pain and bitterness. After Governor Shapp left office, commutations become scarce. There was a fear that a commutation gone wrong might dry up a dwindling source of release for lifers. And so it did.

An account of how McFadden situated himself as “exceptional” in his religious activity comes from the period between 1978 and 1988 when he resided at SCI Graterford (now Phoenix), before being transferred to Camp Hill.

In 1976, Wallace (Warith) Deen Mohammad, who succeeded his father as head of the NOI, attended a banquet sponsored by the Muslims at Graterford at which he announced that his followers had permission to build a masjid in the basement of the chapel.¹²⁸ Financed by the residents' resources and built with their own labor, the mosque was completed the following year and became the hub of Islamic life at the facility. It was beautiful.¹²⁹ It also had a beautiful garden. Other residents, in addition to Muslims, contributed to it. There was a painting of Medina by Christian residents of A Block. People traveled to Graterford to see the masjid that was constructed entirely with inmate resources and labor. Graterford sat on a creek and rising water would flood the basement. Every couple of years the masjid would have to be rebuilt. This gave a new group of brothers a sense of accomplishment and the right to claim that they too had built the masjid.

The basement masjid was shared space. The former NOI members adopted Sunni Islam and took the name Masjid Warith Deen Muhammad.¹³⁰ At the same time, an expanding group of more orthodox Sunnis went by the name Masjid Sajdah and later came to be identified as Salafi.¹³¹ While the former ran programs that were secular and “geared to engender the tools necessary for economic and social uplift,”¹³² the latter's programs were “exclusively religious.” The Salafi eventually outnumbered the Warith

¹²⁸ DUBLER, *supra* note 5, at 149.

¹²⁹ Photographs of the Masjid are on file with the author.

¹³⁰ DUBLER, *supra* note 5, at 150.

¹³¹ *Id.* at 151.

¹³² *Id.* at 152.

Deen adherents and came to dominate Islamic life at Graterford. Smaller Muslim groups shared a third smaller room in the mosque which McFadden, accompanied by a small group of followers, came to control at some point.

According to several Project participants, this third space was designated Masjid Taubah¹³³ and was used by at least three different Islamic groups, the Shias, the Ahmadiyya, and members of the Moorish Science Temple. Domination or control of the space fluctuated as the population of each group in the prison ebbed and flowed. Though McFadden was widely believed to be Shia, one of the McFadden Project correspondents suggests that McFadden was either Ahmadiyya or “weaseled his way” into controlling the space after the once-dominant Ahmadiyya had dwindled to a mere handful. The Ahmadiyya are considered radical by other Muslims in terms of their theology, not their politics. According to Dubler, “Sunni Muslims today would indeed regard Ahmadiyya as a heresy (since they claim a prophet after the Prophet Muhammad), but it remains contested, and was more contested back in McFadden's day.”¹³⁴ McFadden likely asked outside Ahmadiyya to support the mosque. The correspondent reports that he attended Eid meals with Pakistanis at the invitation of McFadden. One of Dubler’s interlocutors indicated that any group that came up with a “gimmick” that could be “vouched for” as Muslim by outsiders (“someone in the street”) would receive recognition.¹³⁵ Outside Muslim groups were eager to comply with such requests and to supply volunteers and resources to gain adherents among the burgeoning prison population. External support was treasured by the residents, according to one of my communicants.

One McFadden Project participant indicates that supervision of the masjid was relatively relaxed:

¹³³ *Id.* at 343 n. 40. Dubler indicated that he learned little about Masjid Taubah because he never met anyone who belonged to it. See also email from Joshua Dubler, Assoc. Prof., Univ. of Rochester, to author (9/17/2019, 09:01 EDT)(on file with author)(citing an interlocutor who connected McFadden with Masjid Taubah).

¹³⁴ Email from Joshua Dubler, Assoc. Prof., Univ. of Rochester, to author (9/13/2019, 11:34 EDT)(on file with author).

¹³⁵ DUBLER, *supra* note 5, at 343 n. 40.

The chapel was open seven days a week, morning, noon, and night. As long as a chaplain of any faith was on duty, Muslims had access to their respective places of worship. At that time, there were no Islamic chaplains, and Muslims, for the most part, were permitted to conduct services and classes without interference, much like the honor system.

A commuted lifer whose tenure overlapped with McFadden's at Graterford had the following recollections of him:

There was much friction around the Shia group which was accused of abusing the privilege of being a recognized religious group using its status as a means to bring drugs and women into the prison. . . . [McFadden] was radical, belligerent, opportunistic, and irreverent. Many of the Muslims felt that he was desecrating the Masjid and a threat to the Islamic movement in the prison.

Another participant, however, doubted that he would have violated the masjid with women and drugs because he used his religiosity to convince his outside supporters and prison authorities of his redemption. It is unclear, though, how they would have known about such activities.

Religion scholar Dubler is leery of critics who summarily conclude that "prisoners' religion is fundamentally insincere" or who dismiss the expression of "religious piety as a performance" or "a con" and "jailhouse Islam' . . . [as] a smokescreen for gangsterism or for seditious politics."¹³⁶ In choosing to adopt such opinions second hand, he maintains that it is wise to know the standard by which one judges the spiritual sincerity of another person. According to Dubler,

[T]he truth of a man's professed faith is measured by how he conducts himself on the block, in the showers, on the chow line. Does he act with dignity and humanity, or does he lumber naked to the shower, screw other men, and in summer, when it's precious, hoard more than his share of the ice? If in such

¹³⁶ DUBLER, *supra* note 5, at 31.

adverse conditions a man manages to somehow act like a man, then his religion might be real. But if he doesn't--and most fail this test--then religiously he is a fraud, and perhaps, considering what else he's seen doing, he's a hustler, a huckster, or a gangster too.¹³⁷

Furthermore, according to Dubler, it was “a common trope . . . (among staff and prisoners alike) that these small groups exist in the service of some leader's petty hustle, but my hunch is always that that knock largely indexes those groups' lack of social capital more than anything else.”¹³⁸

The negative assessment by co-adherents of a common faith might be less biased because they have more than a competition over social capital at stake. Tension among the Muslim groups occupying space in the masjid at Graterford existed when McFadden was in residence and continued after he was transferred elsewhere because of concerns that the “liberties” (mundane and criminal) being taken in the name of religion might interfere with the freedom of religion that Muslims prisoners who were primarily black had fought to secure.

In October 1995, after McFadden's commutation resulted in calamity in New York and the election of Tom Ridge as governor of Pennsylvania, hundreds of state troopers and correction officers from throughout the system raided Graterford.¹³⁹ The Masjid was trashed and eventually closed down. Its garden was destroyed along with all the other inmate gardens, although they, their gardeners, and their tools had never been a problem. In a report to the Pennsylvania Senate, Martin Horn, Tom Ridge's new Commissioner of Corrections,¹⁴⁰ claimed that “at Graterford. . . the liberal and humanitarian innovations of the 1970s, left unchecked for a quarter of a century, had festered.”¹⁴¹ The Commissioner took it as his mission to “sanitize” Graterford which was “long known for drug use, violence and

¹³⁷ *Id.* at 32.

¹³⁸ Email from Joshua Dubler to author, *supra* note 134.

¹³⁹ DUBLER, *supra* note 5 (describing the raid of Graterford).

¹⁴⁰ *See* notes 53-55 *supra* and accompanying text.

¹⁴¹ DUBLER, *supra* note 5, at 69.

corruption, and to 'weed out' employees who deal drugs or tolerate it."¹⁴² News reports suggested that the leader (not an imam) of Masjid Warith Deen Muhammad was involved in smuggling drugs and prostitutes into the prison; this was denied by persons familiar with the leader and the Masjid.¹⁴³

The lifers who encountered McFadden in prison likely never saw his application, but they might have been familiar with his rhetoric. Some might have appreciated the depth of his introspection, his erudition regarding matters of religion, or his skill as a self-advocate, or they might have dismissed his prose as shallow, facile, and meant to impress persons in authority should they be so gullible. Those who knew he was an informant or a snitch distrusted him already. While he might have been dismissed as a jive talker in the ghetto context, in the prison context he was dangerous. According to the McFadden Project participants, his fellow residents feared that the prison authorities did not realize how dangerous he was.

The consequences that the failure of McFadden's commutation would have on other lifers were either not foreseen or not given much consideration by the relevant authorities, nor were they a matter of concern to McFadden himself. Commuted lifers today seem aware of their responsibility to live law-abiding lives of purpose to protect the opportunity of other lifers to receive commutation. Because politicians who believe in second chances are in control of the executive branch of the state government, more lifers will pursue commutation. It should be clear that those currently serving LWOP sentences have a collective stake in the fair and accurate assessment of individual applicants. One consequence of the "Willie Horton Effect" is

¹⁴² Ron Goldwyn, *Raid at Graterford: Prison Swept for Drugs*, Phila. DAILY NEWS, Oct. 25, 1995, at 7.

¹⁴³ *Compare* Kitty Caparella & Marianne Costantinou, *Inmate Throne for Loss: Prisoner's "Kingdom" Toppled*, PHILA. DAILY NEWS (PA), Oct. 26, 1995, at 5 (charging that Ameen Jabaar (a/k/a Robert "Nudie" Mims) arranged for prostitutes and contraband to enter Graterford through visitors "posing as Muslim faithful") *with* Marianne Costantinou, *Prison Raid Takes Potshots: Value of Graterford Shakedown Questioned*, PHILA. DAILY NEWS, Oct. 27, 1995, at 3 (quoting a commuted lifer who asserts that Jabbar was respected and feared by inmates and guards and kept the peace).

to make the misfeasance of one lifer, a burden borne by all. This is collective responsibility.

E. Another McFadden?: The Likelihood of It Happening Again

Participants in the McFadden Project argue that another McFadden is unlikely today. Prison administration is more liberal and diverse in race and gender. Facilities provide more psychological services, and there is more of an emphasis on rehabilitation and restorative justice. There are more opportunities for residents to be members of resident-controlled cultural, educational, recreational, and social service organizations that provide opportunities for residents to mature and develop and for their behavior and social skills to be judged by their peers and the staff members tasked with not only supervising activities but weighing in on evaluations for commutation.

The Islam being practiced in today's carceral facilities is more peaceful, more consistent to the tenets of conventional Islam, and not tied to a domestic political agenda. Religion is not a source of tension between the PDOC administration and the population the way it was in the last century. As one McFadden Project participant put it, "The Muslim population by all appearances is nearly identical to the Christian population."

Pennsylvania's current Lieutenant Governor is actively working to prepare and present the cases of applicants who can win affirmative votes from the members of the Board of Pardons. The current Secretary of the Board of Pardons is himself a commuttee,¹⁴⁴ and he has hired two respected, recent commutees to work with potential applicants.¹⁴⁵ The current staff of the Board is more likely to be aware of the kind of manipulation that McFadden employed to win commutation. The process has become more rigorous in terms of assessments and face-to-face interviews at every level

¹⁴⁴ See Will Bunch, *Freed from Prison Nine Years Ago, Brandon Flood Is New Secretary of Pa's Pardon Board*, PHILA. INQUIRER, Apr. 7, 2019, available at <https://bit.ly/2NcZhee> (reporting that new overseer of operations of pardon board had felony convictions for drug dealing and gun possession commuted shortly before assuming office).

¹⁴⁵ John L. Micek, *Fetterman Hires Two Former Lifers to Assist in Commutations Applications*, PA. CAPITAL-STAR, Nov. 4, 2019, available at <https://bit.ly/2FCjsho> (reporting on the hiring of commutees to work with lifers in the two women's facilities and at SCIs Phoenix and Dallas).

of the process, including with the Board itself.¹⁴⁶ Finally, a stay in community corrections before release from PDOC control is now mandatory.¹⁴⁷ Services intended to facilitate the “reentry” of citizens leaving prison have achieved system-wide favor, if not sufficient funding to fulfill the need.

The criteria for obtaining commutation are clearer, as are the categories of lifers with the best odds of making it through the process. Persons convicted of Second Degree or Felony Murder who can claim innocence or never to have killed anyone stand the best chance of winning commutation. Others who are viewed sympathetically include those whose sentences are excessive compared with contemporary practice, whose convictions were based on physical evidence that is now considered of questionable scientific or technological value, and whose crimes have been downgraded in degree.

Lifers are grateful, but not entirely satisfied, with the effort to revive commutation as a source of release for rehabilitated residents who have served decades behind bars. The process is exceedingly burdensome and slow (taking up to 3 years from application to hearing and a sign off by the governor). The lifer population is aging. The unanimity requirement ensnares some deserving applicants who make it to the public hearing stage of the process only to be opposed by the single vote of a public official. Lifers are pushing for the passage of legislation that will convert LWOP sentences to life with the possibility of parole.

IV. Restoring Efficacy to the Commutation Process and Countering the “Willie Horton Effect” Too

In the civil law of torts, there are fault-based wrongs that penalize intentionally hurtful misconduct or unreasonably dangerous behavior, and strict liability wrongs that are actionable because an actor's conduct has harmed another person even though the actor is not guilty of errors in any way. If the “Willie Horton Effect” is fault-based, i.e., aimed at deterring or

¹⁴⁶ See generally DEP'T OF CORR., COMMONWEALTH OF PA., PUB. NO. 11.4.1, § 9, CASE SUMMARY PROCEDURES MANUAL (2013).

¹⁴⁷ 61 PA. CONS. STAT. § 6137(a)(4)(i) (2017).

punishing voting based on wrong or flawed reasoning by a politician, it might be curbed either by decision criteria that prevent him or her from making such decisions or by post-release mechanisms that reduce the risk of recidivism. If the Effect arises from the mere exercise of the pardon power that proves to cause harm, then mechanisms that deflect blame from political actors by shifting decision making to some other entity or decisionmaker might cure or reduce the Effect. Indeed, pardon boards and pardon attorneys were initially intended to perform this function.

Articulated criteria for commutation, such as those set out by Ernie Preate in his dissent to McFadden's Pardon Board vote,¹⁴⁸ might add a measure of objectivity and impartiality to executive decision making in this area.¹⁴⁹ A statistical assessment tool that measures the risk of recidivism could provide some cover for politicians when a decision to commute goes awry. The PDOC is likely already using one. However, guidelines and algorithms can hamper an executive's ability to exercise discretion to make more liberal decisions that depart from the numerical score. Reliance on defective statistical tools in deciding who gets released might prevent perfectly justified commutations from happening. Such supposedly "evidence-based" tools are fraught with problems.¹⁵⁰ One prominent study, for example, found that a widely used assessment tool erroneously predicted that blacks pose a higher risk of recidivism and whites, a lower risk than actual experience proved.¹⁵¹ Hence, the tool embodied a bias against the very population from which a disproportionate number of Pennsylvania's lifers come, namely young urban minority males.

The introduction of a neutral arbiter who works with and vouches for applicants could provide a shield for the politician who signs off on a commutation. The arbiter could be a government bureaucrat, although a representative of a nongovernmental organization might provide more insulation between the executive and a decision that proves harmful. Of course, the private arbiter would have to have immunity from suit and

¹⁴⁸ See note 112 *supra* and accompanying text.

¹⁴⁹ Ruckman, *supra* note 9, at 469 (proposing use of professional bureaucrats acting pursuant to "articulated goals," "systematized norms," and "fairness.")

¹⁵⁰ Partners on AI, Report on Algorithmic Risk Assessment Tools in the U.S. Criminal Justice System, Apr. 26, 2019.

¹⁵¹ Julia Angwin et al, *Machine Bias*, PRO PUBLICA, May 23, 2016.

liability insurance. Greater transparency through full disclosure of commutation files or mandatory public hearings would allow for a more thorough hindsight examination of commutation decisions and enable the executive to construct a better good faith, due care defense.

There is also the option of legislation converting all LWOP sentences to 20, 30 or 40-to-life, which would have the effect of making every lifer eligible for parole after serving a minimum of between 20 and 40 years.¹⁵² Voting for such a measure would involve an exercise of political courage, but the risk of recidivism by a paroled lifer to political careers would be shared by dozens of legislators and the non-elected members of the parole board. Of course, the governor who signs such legislation and appoints members of the parole board would stand out from the others.¹⁵³ We may still have to count on executives who are in the second half of their second and final term and have no intention of ever running for higher office again to

¹⁵² State Senator Sharif has introduced legislation which would make persons convicted of second degree or felony murder eligible for parole after serving 25 years and persons convicted of first degree or intentional murder eligible for parole after serving 35 years. The law would apply to 519 and 546 persons respectively. See Aaron Moselle, *A Chance of Freedom? New Bill Could Release 1,000 People Sentenced to Life in Pa. Prisons*, WHYY, Sept. 16, 2019, https://whyy.org/articles/a-chance-of-freedom-new-bill-could-release-1000-people-sentenced-to-life-in-pa-prisons/?utm_source=email&utm_medium.

¹⁵³ The Pennsylvania parole system already has its “Willie Horton.” His name was Robert “Mudman” Simon. See David Kocieniewski, *Death Row Inmate Said to Beat and Kick Another to Death in New Jersey Prison*, N.Y. TIMES, Sept. 8, 1999. In 1974, he killed his girlfriend after she refused to have sex with other members of the Warlocks motorcycle gang. While incarcerated for that crime, he killed a fellow resident but was cleared on the basis of self-defense. Simon qualified for parole by bribing staffers at Graterford to remove misconducts and failed drug tests from his file. Simon was also a beneficiary of many flaws in the parole system itself. See D. Michel Fisher, *Changing Pennsylvania's Sentencing Philosophy Through the Elimination of Parole for Violent Offenders*, 5 WIDENER J. PUB. L. 269, 286-92 (1996) (describing deficiencies in the parole decision making process exposed by the release of Simon). He was released on parole in 1995 after serving 12 years of a 10-to-20-year sentence and allowed to live in New Jersey. Eleven weeks later, Simon and an accomplice were stopped for a traffic violation that was connected to their commission of a burglary and killed a police officer. In 1999, Simon was beaten to death by a black fellow Death Row inmate who successfully claimed self-defense too.

display the greatest amount of bravery moving forward legislation that will lead to the release of long-serving rehabilitated lifers.

Finally, there is the possibility of going back to the voters of the Commonwealth to reform the commutation process once again. Adding members to the Board of Pardons who represent a broader spectrum of interests or who bring technical expertise to the task (like a public defender, prisoners' rights advocate, or formerly incarcerated person) and returning to a majority rule standard might moderate the "Willie Horton Effect." Even if the Board's composition remained the same, but a 4-1 vote sufficed, a Board member concerned about running for office could vote against commutation and still not block relief for a deserving lifer. The adoption of that approach has been proposed.¹⁵⁴ Of course, the Board includes both the Lieutenant Governor and the Attorney General, both of whom may aspire to run for higher office. There may always be the possibility of another Pennsylvania politician will be felled by the "Willie Horton Effect." "Willie Horton" may be with us forever.

V. Conclusion

This Article may not have definitively answered the question of who is responsible for Reginald McFadden's release and subsequent crimes, but it has problematized the way in which his specter is invoked as a justification for denying the merciful granting of commutation to long-serving, rehabilitated lifers.

McFadden's release was without a doubt the product of bureaucratic mistakes by the Board of Pardons, the Governor's Office, and the Board of Probation and Parole in drafting and interpreting the orders regarding the timing and conditions of his release and in the failing to consider the impact of the governor's illness on their enforcement. McFadden should have been placed in a re-entry facility and not have been released and immediately shipped off to New York State, where he was subject to less

¹⁵⁴ Samantha Melamed, *A Record 21 Lifers Are Up for Commutation in Pa. Does This Presage a New Era for the Board of Pardons?*, PHILA. INQUIRER, Sept. 10, 2019, <https://www.inquirer.com/news/pennsylvania-board-of-pardons-lieutenant-governor-john-fetterman-commutation-life-sentence-20190910.html>.

strict oversight than even the Commonwealth would have imposed because of the terms of the then-existing compact on the interstate supervision of parolees. Some of the blame for what occurred lies with the New York Parole authorities and the well-meaning lay co-religious adherents who were not up to the task of controlling McFadden and managing his course through the harsh world of law-abiding adult responsibility and struggle that faces many ex-offenders.

Lastly, McFadden was a PDOC snitch and that may have affected the record that it sent the Board of Pardons and the Governor who agreed to his release. Moreover, his criticism of the Nation of Islam and his embrace by his white suburban New York Islamic supporters contributed to the impression that he was ready to be released without a stay in community corrections. If they were “fooled” by McFadden in that regard, their uncritical biases might be partly to blame. The results were tragic for his victims and their families. Lifers like the participants in the McFadden Project, who had first-hand information and a critical assessment of McFadden, had no direct ability to weigh in on the decision. They did, however, lose the possibility of earning their freedom through meritorious behavior when McFadden’s commutation went off the rails.

McFadden’s release and crime spree provided an opening for the imposition of repressive measures in Pennsylvania’s prisons and in the commutation process in the furtherance of a national political ideology of “Law and Order,” which was understood to target minority citizens. To prevent another McFadden, the General Assembly changed the pardon board’s composition and implemented a unanimity requirement through the amendment of the state constitution. The reforms did not specifically address the sources of the mistakes, blunders, and misjudgments that occurred in McFadden’s case, although subsequent legislation did. It was predicted at the time that the unanimity requirement would stifle the merciful release of meritorious lifers. It was argued at the time that the measures were unnecessary because it was easy enough for a governor alone to end commutations since he/she had the last word on the matter. The unanimity requirement’s only real purpose was to hamstring the power of liberal successors.

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Reginald McFadden destroyed the possibility that reasonable mistakes in releasing a person who recidivates after having successfully negotiated a series of extensive evaluations and in-person interviews followed by a stay in community corrections would be treated as an isolated, unexpectable, and random occurrence. The present system holds lifers collectively responsible, in contravention of notions of due process, for the conduct of McFadden and any other future commuttee who might act in a way that defies prediction. That is cruel punishment indeed.