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### **The Saga of Reginald McFadden—"Pennsylvania's Willie Horton" and the Commutation of Life Sentences in the Commonwealth: Part II**

Regina Austin

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# **THE SAGA OF REGINALD MCFADDEN— “PENNSYLVANIA’S WILLIE HORTON” AND THE COMMUTATION OF LIFE SENTENCES IN THE COMMONWEALTH: PART II**

**REGINA AUSTIN\***

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#### 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 1992, Republican Attorney General Ernie Preate Jr. voted against McFadden’s release.<sup>1</sup> After McFadden’s arrest in New York, Preate called for a legislative probe of the “breakdown of the commutation and parole system.”<sup>2</sup> He also argued for the adoption of a unanimity requirement that would have prevented McFadden’s release, but also the release of the lifers who before him won commutation after 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 his full second term in office. He resigned in 1995 after being charged with accepting \$40,000 in secret contributions from video poker operators and filing false campaign finance reports.<sup>3</sup> He pled guilty to mail fraud and served fourteen months in federal prison.<sup>4</sup> He was succeeded as attorney general by

<sup>1</sup> Minutes of the Board of Pardons for the August 1992 Session (Aug. 28, 1992), in PA. BD. OF PARDONS, MINUTES 1992, 40, [https://digitalarchives.powerlibrary.org/psa/islandora/object/psa%3Aolgbpm\\_1215?overlay\\_query=RELS\\_EXT\\_isMemberOfCollection\\_uri\\_ms%3A%22info%3Afedora/psa%3Aolgbpm%22](https://digitalarchives.powerlibrary.org/psa/islandora/object/psa%3Aolgbpm_1215?overlay_query=RELS_EXT_isMemberOfCollection_uri_ms%3A%22info%3Afedora/psa%3Aolgbpm%22) [<https://perma.cc/MX8D-ZPEP>]; Board of Pardons Public Hearing Results (Aug. 27, 1992), in PA. BD. OF PARDONS, MINUTES 1992, 42, [https://digitalarchives.powerlibrary.org/psa/islandora/object/psa%3Aolgbpm\\_1215?overlay\\_query=RELS\\_EXT\\_isMemberOfCollection\\_uri\\_ms%3A%22info%3Afedora/psa%3Aolgbpm%22](https://digitalarchives.powerlibrary.org/psa/islandora/object/psa%3Aolgbpm_1215?overlay_query=RELS_EXT_isMemberOfCollection_uri_ms%3A%22info%3Afedora/psa%3Aolgbpm%22) [<https://perma.cc/MX8D-ZPEP>]; Ernest D. Preate, Jr., Dissent to Commutation Recommendation, Application of Reginald McFadden (Sept. 18, 1992) (on file with author).

<sup>2</sup> See Statement by Ernie Preate Jr., Att’y Gen, to Bd. of Pardons (October 20, 1994), in PA. BD. OF PARDONS, MINUTES 1994, 47–56, [https://digitalarchives.powerlibrary.org/psa/islandora/object/psa%3Aolgbpm\\_995?overlay\\_query=RELS\\_EXT\\_isMemberOfCollection\\_uri\\_ms%3A%22info%3Afedora/psa%3Aolgbpm%22](https://digitalarchives.powerlibrary.org/psa/islandora/object/psa%3Aolgbpm_995?overlay_query=RELS_EXT_isMemberOfCollection_uri_ms%3A%22info%3Afedora/psa%3Aolgbpm%22) [<https://perma.cc/MX8D-ZPEP>]; Frank Reeves, *Preate Wants Probe of McFadden Release*, PITT. POST-GAZETTE, Oct. 21, 1994, at A1.

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

<sup>4</sup> See John Myers, *Wisconsin Prisoners in Duluth? Federal Camp Eyed*, DULUTH NEWS TRIB., Mar. 19, 1997, at 1A, WLNR 7560155 (noting that Ernie Preate, former Pennsylvania Attorney General, had served fourteen months at the camp).

Tom Corbett, who became governor of Pennsylvania in 2011.<sup>5</sup> During his one-term tenure as the state's chief executive, Corbett granted no commutations.<sup>6</sup>

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.<sup>7</sup> His license to practice law had been suspended so he could not appear on behalf of the claimants at that time.<sup>8</sup> However, Ernie Preate Jr. is listed as an attorney for the plaintiffs in the district court opinion that was ultimately reversed by the Third Circuit decision that ended the case in 2010.<sup>9</sup>

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.<sup>10</sup> When he served on the Board of Pardons, roughly 80% of pardons were approved by a unanimous vote.<sup>11</sup> 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 Lieutenant Governor Mark Singel, who was a liberal Democrat and a “bleeding heart.”<sup>12</sup> Preate assumed that Board members would examine the records presented to them and continue to operate with such comity.<sup>13</sup> Instead, the unanimity requirement allowed one Board member to veto the majority's recommendation of commutation, whereas the governor was supposed to have the decisive vote. Also, the commutation process had become so

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<sup>5</sup> Tom Barnes, *Corbett Takes the Reins; Shaler Republican Sworn in As Pennsylvania's 46th Governor*, PITT. POST-GAZETTE, Jan. 19, 2011, at A1.

<sup>6</sup> *Commutation of Life Sentences (1971–Present)*, PA. BD. OF PARDONS, <https://www.bop.pa.gov/Statistics/Pages/Commutation-of-Life-Sentences.aspx> [<https://perma.cc/3L6T-K3S2>] (reporting that during Corbett's tenure as governor the Board heard two petitions and recommended none; consequently, Corbett granted none).

<sup>7</sup> Telephone Interview with William DiMascio, Former Exec. Dir., Pa. Prison Soc'y (July 18, 2019); see *Pa. Prison Soc'y v. Rendell*, 419 F. Supp. 2d 651 (M.D. Pa. 2006), *rev'd*, *Pa. Prison Soc'y v. Cortes*, 622 F.3d 215 (3d Cir. 2010).

<sup>8</sup> Frank Scholz, *Preate 'Grateful' License Suspended*, TIMES-TRIB., June 24, 1999, at 1 (reporting that Preate was not disbarred and was eligible to seek reinstatement in August 2000).

<sup>9</sup> *Pa. Prison Soc'y v. Cortes*, No. 1-CV-97-1731, 2009 WL 1653543 (M.D. Pa. June 11, 2009).

<sup>10</sup> Telephone Interview with Ernest D. Preate, Jr. (July 18, 2019).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

political that some members were refusing to vote in favor of mercy for anyone.<sup>14</sup> This state of affairs upset Preate enough that he switched sides.

In 1995, Samantha Broun, the daughter of 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.<sup>15</sup> Testifying before the Pennsylvania Senate Judiciary Committee, Broun described how her mother, a drug and alcohol counselor in her fifties, was assaulted and abducted by McFadden over a period of five hours.<sup>16</sup> Broun suggested amendments to the pardon process, some of which were already in proposed legislation.<sup>17</sup>

Roughly two decades later, in 2016, 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."<sup>18</sup> The podcast includes excerpts of Broun's senate committee testimony. 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.<sup>19</sup>

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:

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<sup>14</sup> *Id.* As attorney general, Tom Corbett indicated that he would commute a life sentence only under "extraordinary circumstances." Mark Houser, *Lookout Caught in Pa.'s Proclivity for Mandatory Life*, PITT. TRIB.-REVIEW (June 4, 2007, 12:00 AM), <http://archive.triblive.com/news/lookout-caught-in-pa-s-proclivity-for-mandatory-life-2/> [<https://perma.cc/YV8G-GWEV>].

<sup>15</sup> Mario F. Cattabiani, *Victim's Daughter Questions Pardon in McFadden Case*, MORNING CALL (Feb. 6, 1995), <https://www.mcall.com/news/mc-xpm-1995-02-07-3022213-story.html> [<https://perma.cc/3EZC-LZS8>].

<sup>16</sup> *Id.*

<sup>17</sup> Ms. Broun proposed the following requirements for commutation: a unanimous vote of the Board of Pardons, applicant attendance at Board hearings as well as submission to an interview by Board members, and completion of a pre-release program at a halfway house. *Id.*

<sup>18</sup> This American Life, *20 Years Later*, WBEZ CHI. RADIO (Dec. 9, 2016), <https://www.thisamericanlife.org/604/20-years-later> [<https://perma.cc/UC3X-WLXF>].

<sup>19</sup> *Id.*; see also 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).

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 two-and-a-half 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 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.<sup>20</sup>

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 [to my 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.<sup>21</sup>

#### G. THE REAL DEAL: STIFLING THE ABILITY OF FUTURE GOVERNORS TO GRANT COMMUTATIONS

McFadden's release and subsequent crime spree provided an opening for the imposition of repressive measures in Pennsylvania's prisons and in the commutation process. 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.<sup>22</sup> These reforms did not specifically address the sources of the mistakes, blunders, and misjudgments that occurred in McFadden's case, although subsequent legislative and regulatory changes did.<sup>23</sup> The press predicted at

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<sup>20</sup> This American Life, *supra* note 18, at 54:45. For more on the backstory of the podcast, see Samantha Broun & Jay Allison, *A Life Sentence: Victims, Offenders, Justice, and My Mother*, TRANSOM (Mar. 1, 2016), <https://transom.org/2016/a-life-sentence-victims-offenders-justice-and-my-mother/> [<https://perma.cc/59P5-HWCP>].

<sup>21</sup> Dana DiFilippo, *Stepping Back from Vengeance; Seeking Reformative Justice*, WHY (Nov. 1, 2016), <https://why.org/articles/stepping-back-from-vengeance-seeking-reformative-justice/> [<https://perma.cc/L7DZ-83H8>] (discussing interview with Samantha Broun).

<sup>22</sup> An account of the events surrounding the amendment of the provisions of the Pennsylvania Constitution on the commutation process appears in Part I of this Article. Regina Austin, *The Saga of Reginald McFadden—"Pennsylvania's Willie Horton" and the Commutation of Life Sentences in the Commonwealth: Part I*, 112 J. CRIM. L. & CRIMINOLOGY ONLINE 61, 79–81 (2022).

<sup>23</sup> See *infra* notes 1564–158 and accompanying text.

the time that the unanimity requirement would stifle the merciful release of meritorious lifers.<sup>24</sup> Furthermore, recent history showed that it was easy enough for a governor alone to end commutations since he or she had the last word on the matter.<sup>25</sup> The unanimity requirement's real impact was to hamstring the power of Ridge's successors to determine on whom they would bestow a grant of commutation.

### III. THE SOUNDNESS OF THE DECISION TO COMMUTE MCFADDEN'S LIFE SENTENCE

#### A. RETROSPECTIVELY ACCOUNTING FOR THE DECISION TO COMMUTE MCFADDEN'S LIFE SENTENCE

The analysis undertaken so far has not considered the soundness of the decision to commute and release McFadden made by Pennsylvania officials. At least four state agencies played a role in the matter: the Pennsylvania Department of Corrections (PDOC), the Board of Pardons, the Office of Governor Casey's General Counsel, and the Pennsylvania Board of Probation and Parole.

Without access to McFadden's complete corrections, pardon, and parole records, it is impossible to identify errors that might have infected the decisions that led to McFadden's commutation. No doubt, the judgments were based partly on intangible factors that were 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 that advanced interests of their own.

Evaluating the decisions that resulted in McFadden's commutation by relying on public information as well as the recollections and opinions of the participants in the McFadden Project is an exercise in second-guessing. It is nonetheless useful to engage in such speculation in order to assess whether subsequent reforms in the commutation process have reduced or eliminated possible risks to the people of the Commonwealth and the political careers of

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<sup>24</sup> Editorial, *Pardons Amendment Unnecessary*, MORNING CALL, Feb. 15, 1995, at A14 (arguing the unanimity requirement would "make pardons a nullity," especially with public officials on the pardon board).

<sup>25</sup> Todd R. Weiss, *Pardon Referendum Stirs Debate; Police Chief, DA, Others at Odds About Whether Proposal Is Fair*, LANCASTER NEW ERA, Nov. 1, 1997, at 30 (reporting that Gov. Ridge had not signed any pardon requests since taking office in 1995 and that the DA conceded that the referendum would have little effect as commutation was already so difficult to obtain).

their elected officials. The analysis that follows will show that there are ample reasons to reject Reginald McFadden as the justification for denying meritorious applicants for commutation a merciful release from confinement under a substantially altered commutation process.

#### B. FINDING STANDARDS IN THE POLICY JUSTIFICATIONS FOR COMMUTATIONS

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.<sup>26</sup> Commutation is an expression of societal generosity and compassion for the prisoner. In addition, commutation is used to rectify miscarriages of justice.<sup>27</sup> 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 interpretation of facts, as well as the goals of punishment.<sup>28</sup> Typically, a successful petitioner exhibits strong evidence of rehabilitation, although rehabilitation has mostly been abandoned as a goal of incarceration.<sup>29</sup> 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.<sup>30</sup>

The number of commutations granted across the country is declining.<sup>31</sup> The drop is likely attributable to myriad reasons, including refinements in the

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<sup>26</sup> Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 842–51 (2016) (tracing the mercy justification for clemency through history); see also Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 3–4 (2015) (explaining that presidents may have various standards for clemency which the federal process may be poorly structured to accommodate).

<sup>27</sup> John Dinan, *The Pardon Power and the American State Constitutional Tradition*, 35 POLITY 389, 394 (2003) (noting that, in addition to “tempering justice with mercy,” pardons “remedy injustice”).

<sup>28</sup> Barkow & Osler, *supra* note 26, at 6–7, 17 (describing the “bedrock clemency claim” as the sentence no longer fits either who the person has become or contemporary notions of a proportionate sentence).

<sup>29</sup> *Id.*

<sup>30</sup> See *id.* at 4; Larkin, *supra* note 26, at 851–52.

<sup>31</sup> See John Gramlich, *Trump Used His Clemency Power Sparingly Despite a Raft of Late Pardons and Commutations*, PEW RSCH. CTR. (Jan. 22, 2021), <https://www.pewresearch.org/fact-tank/2021/01/22/trump-used-his-clemency-power-sparingly-despite-a-raft-of-late-pardons-and-commutations/> [https://perma.cc/Y5V3-DM8L] (presenting a chart showing the



process of convicting and sentencing criminal defendants, the end of rehabilitation as a goal of criminal punishment, and the victims' rights movement.<sup>32</sup> Then too, there is the "Willie Horton Effect." The Effect refers to the fear that deters members of the executive branch from agreeing to furloughs, pardons, or commutations because a single mistaken or failed release in an otherwise successful early release program can sink their political fortunes.<sup>33</sup> The governors, lieutenant governors, attorneys general, or pardon attorneys generally have little to gain from early releases and much to lose should the risk of recidivism materialize and a released individual commit a highly visible crime.<sup>34</sup> In addition, commutations smacking of favoritism generate public cynicism and undermine the legitimacy of the pardon power; they do little for the executive's reputation.<sup>35</sup> 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, governors' promises to faithfully execute the laws of their states also apply to the constitutional or legislative provisions pertaining to clemency:<sup>36</sup>

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 of prisons could and ought to be set free . . . .<sup>37</sup>

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decline in presidential commutations beginning with Kennedy, but with Johnson and Obama breaking the pattern with more than 1,000 grants).

<sup>32</sup> Larkin, *supra* note 26, at 856–82 (recounting and criticizing possible explanations for the decline in presidential pardons).

<sup>33</sup> The "Willie Horton Effect" is discussed extensively in Part I of this Article. Austin, *supra* note 22.

<sup>34</sup> Cf. 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).

<sup>35</sup> Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1195–204 (2010) (discussing presidential pardons issued to Marc Rich and Scooter Libby).

<sup>36</sup> William W. Smithers, *The Use of the Pardoning Power*, 52 ANNALS AM. ACAD. POL. & SOC. SCI. 61, 62–63 (1914).

<sup>37</sup> *Id.* at 65.

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.

### C. MCFADDEN, THE JUVENILE LIFER (THE BEST-CASE SCENARIO)

McFadden was sixteen years old when Sonia Rosenblum was murdered.<sup>38</sup> Moreover, his three co-defendants, who confessed to murder in the second degree, had completed their sentences by the time the Board of Pardons made its affirmative decision.<sup>39</sup> McFadden's status as a juvenile lifer (a "juvie lifer") and the possibly unfair aspects of his conviction and sentence were 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.<sup>40</sup> Although he asserted and then dismissed in several places the relevance of his "rotten social background,"<sup>41</sup> 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 ten children, a father who was in and out of a Veterans Administration hospital,

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<sup>38</sup> Memorandum from Richard D. Spiegelman, Exec. Deputy Gen. Couns., to Robert P. Casey, Governor (May 28, 1993) (regarding the commutation request of Reginald McFadden) (on file with author) [hereinafter Spiegelman Memorandum].

<sup>39</sup> *Id.*; Commonwealth of Pa. Bd. of Pardons, In re Application of Reginald McFadden (1992) (on file with author) (bearing the signature of the four Board Members who voted in favor of commutation and the signature of approval of Governor Casey).

<sup>40</sup> See generally Reginald McFadden, Application for Clemency 4 (Feb. 28, 1992) (on file with author) [hereinafter McFadden Application for Clemency].

<sup>41</sup> *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." *Id.* at 11. 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." *Id.* at 13. 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." *Id.* at 11. The term "rotten social background" refers to the circumstances of a criminal defendant's upbringing that are introduced in support of sentence mitigation. See generally Mythri A. Jayaraman, *Rotten Social Background Revisited*, 14 CAP. DEF. 327 (2002). Consideration of defendant's mental or intellectual development or childhood deprivation or trauma supports individualized sentencing through consideration of the defendant's ability to "appreciate fully the wrongfulness of [their] behavior" and to "conform . . . to general social norms." *Id.* at 344.

and a caring grandmother whose death he associated with his first arrest at age twelve.<sup>42</sup> He began using drugs and alcohol at thirteen and was fully addicted by fifteen.<sup>43</sup> He committed crimes with other delinquent youths because of his addiction.<sup>44</sup> 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?”<sup>45</sup> 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.<sup>46</sup>

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 United States Supreme Court’s decision in *Miller v. Alabama*. It held that the Eighth Amendment’s Cruel and Unusual Punishment Clause forbids the sentencing of juvenile offenders to mandatory terms of life in prison without the possibility of parole.<sup>47</sup> Juveniles’ “diminished culpability and heightened capacity for change” warrant that their individual mitigating circumstances, particularly their environmental vulnerability, be considered in sentencing.<sup>48</sup> An obligatory sentence of life without the possibility of parole carries “too great a risk of disproportionate punishment.”<sup>49</sup>

McFadden referred to the circumstances of his crime and sentence. There was no evidence of “malice and desire to cause the death of the victim.”<sup>50</sup> Having served more than the maximum sentence of his young partners in crime, he suggested that he was unjustly punished for going to trial rather than pleading guilty.<sup>51</sup> He argued that the pardon board should give due regard to his rehabilitation and reformation:

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<sup>42</sup> McFadden Application for Clemency, *supra* note 40, at 11 (Answer to Question 20(d)).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Miller v. Alabama*, 567 U.S. 460, 479 (2012); *see also* *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016) (holding that *Miller v. Alabama* applies retroactively to cases on state collateral review).

<sup>48</sup> *Miller*, 567 U.S. at 465, 479, 473.

<sup>49</sup> *Id.* at 479.

<sup>50</sup> McFadden Application for Clemency, *supra* note 40, at 3 (Conclusion).

<sup>51</sup> *Id.*

I have repented for my sin, reformed my actions so such a crime could ever [[sic]] be committed again.<sup>52</sup> 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.<sup>53</sup>

As McFadden does throughout his application, he invoked 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)

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.<sup>54</sup>

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 Milton Shapp and Richard Thornburgh.<sup>55</sup> The victim’s family and the Philadelphia District Attorney opposed his release.<sup>56</sup> Governor Thornburgh, who went on to become Attorney General of the United States, granted only seven commutations between 1979 and 1986.<sup>57</sup>

The circumstances of McFadden’s conviction and his history with the commutation process were apparently sources of frustration for him. In 1984, he tried to arrange an escape from State Correctional Institution (SCI) Rockview. McFadden states in his 1992 commutation application that he

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See Austin, *supra* note 22, at 68 n.30 (listing the history of McFadden’s applications for clemency). Born on February 23, 1953, he was under thirty years of age in 1981; in custody since 1969, he had served only a dozen years of his life without parole (LWOP) sentence in 1981. McFadden Application for Clemency, *supra* note 40, at 1 (Personal Data). Thus, Governors Shapp and Thornburgh might have considered McFadden’s applications for release premature.

<sup>56</sup> See Letter from Dr. Jerry Rosenbaum to Governor Dick Thornburgh (June 1, 1983) in PA. HISTORICAL & MUSEUM COMM’N, PA. STATE ARCHIVES, CORRESPONDENCE AND SUBJECT FILES OF GOVERNOR RICHARD THORNBURG (MG/404/1) (urging that his mother’s convicted killer not be granted “premature release”).

<sup>57</sup> *Commutation of Life Sentences (1971– Present)*, *supra* note 6 (reporting that during Thornburgh’s tenure as governor, the Board heard 375 petitions and recommended seventy-five applicants; Thornburgh commuted only seven).

“lost faith in the process of commutation” and was subject “to external pressures.”<sup>58</sup> He continued, “[A] member of staff (unknowing of my plan) convinced me to try the commutation process again.”<sup>59</sup> He felt that the criminal justice system had betrayed him, and his resentment persisted after he was released.<sup>60</sup>

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 a rape and kidnapping, which bore similarities to the murder of Mrs. Rosenbaum.<sup>61</sup> 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.”<sup>62</sup> “There’s a whole 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?”<sup>63</sup>

It is 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. 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.<sup>64</sup> His resentment and frustration festered in a way that made him a less fit candidate for commutation over time.

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<sup>58</sup> McFadden Application for Clemency, *supra* note 40, at 5 (Answer to Question 22).

<sup>59</sup> *Id.*

<sup>60</sup> *Criminal Mindscape: Reginald McFadden – Second Chance Killer* (MSNBC television broadcast Nov. 15, 2009) (containing an interview with McFadden conducted by former FBI profiler Mark Safarik); *see also* Joseph Berger, *Accused Serial Killer and 92 Days of Freedom*, N.Y. TIMES, Apr. 4, 1995, at B2 (reporting on an interview in which “McFadden accused his patrons of mistreating him, abandoning him, and . . . [playing] a role in his ‘undoing.’”).

<sup>61</sup> Andrew Smith, Yolanda Rodriguez & Joe Haberstroh, *Warning Signs; Pardon of Convict Raises Questions After His Arrest*, NEWSDAY, Oct. 17, 1994, at A5 (reporting that all three of McFadden’s female victims were “bound, gagged, robbed and wrapped up” as well as sexually assaulted).

<sup>62</sup> *Id.* (reporting on questionable aspects of the commutation decision in light of McFadden’s history).

<sup>63</sup> *Id.*

<sup>64</sup> Group Interview with Lifers at SCI Phoenix (Sept. 19, 2019) (describing McFadden as “obsessed with getting out,” “determined to get out,” and setting “up things methodically to get out”) (notes on file with author).

D. MCFADDEN, THE INFORMANT OR “SNITCH” (A PLAUSIBLE 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 with prison officials likely bolstered his chances of securing commutation.

The General Counsel’s Memorandum to Governor Casey on McFadden’s commutation mentions several instances of “informing” or “snitching” by McFadden and violence directed at him by his fellow prisoners.<sup>65</sup> 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.<sup>66</sup> Counsel’s memorandum does not indicate how reliable or useful McFadden’s testimony ultimately was.

There is more circumstantial evidence about what McFadden 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.<sup>67</sup> Changes in the Family Day policy, which prevented visitors from bringing food into the prison, and in the sick-line policy increased the tensions.<sup>68</sup> As a result, SCI Camp Hill was the subject of two riots that extended over three days, October 25–27, 1989.<sup>69</sup>

Before the riots, the prison investigated the Fruit of Islam (FOI), the security arm of the Nation of Islam (NOI), which was commonly referred to as the “Black Muslims.”<sup>70</sup> In his application, McFadden indicated that he

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<sup>65</sup> Spiegelman Memorandum, *supra* note 38, at 2.

<sup>66</sup> See Pamela Sampson, *Inmate Snitched to Win His Freedom*, PITT. POST-GAZETTE, Jan. 8, 1995, at B3 (reporting that McFadden and an Allegheny County prosecutor informed the pardon board of McFadden’s cooperation in a prosecution related to an assault on guard).

<sup>67</sup> Jack A. Goldstone & Bert Useem, *Prison Riots as Microrevolutions: An Extension of State-Centered Theories of Revolution*, 104 AM. J. SOCIO. 985, 1008–10, 1013, 1017 (1991).

<sup>68</sup> ARLIN M. ADAMS, GEORGE M. LEADER & K. LEROY IRVIS, THE FINAL REPORT OF THE GOVERNOR’S COMMISSION TO INVESTIGATE DISTURBANCES AT CAMP HILL CORRECTIONAL INSTITUTION 12 (1989).

<sup>69</sup> ADAMS, LEADER & IRVIS, *supra* note 68, at 1–5. The Pennsylvania Department of Corrections has a website devoted to the Camp Hill riots. *Oral Histories Commemorate 30th Anniversary of the 1989 SCI Camp Hill Riot*, PA. DEP’T OF CORR., <https://www.cor.pa.gov/About%20Us/1989-SCI-Camp-Hill-Riot/Pages/default.aspx> [https://perma.cc/ZCG9-QA U5].

<sup>70</sup> See Garrett Felber, “Shades of Mississippi”: *The Nation of Islam’s Prison Organizing, the Carceral State, and the Black Freedom Struggle*, 105 J. AM. HIST. 71, 72 n.1 (2018) (attributing origins of the term “Black Muslims” to C. Eric Lincoln and its wider usage to the effort to marginalize the NOI relative to Orthodox Islam).

withdrew from the NOI in 1975 and suggested in numerous ways his disdain for the sect and its views on criminal responsibility.<sup>71</sup>

A commission headed by former Third Circuit Judge Arlin Adams, then a law firm partner in private practice, investigated the riot.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> 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')."<sup>75</sup> "The Commission's interviews with inmates and staff, *and information from other investigations*, suggest[ed] that the FOI had been attempting to organize a disturbance among the general population for some time."<sup>76</sup>

Exactly what McFadden did or experienced during the Camp Hill riots is the subject of varying accounts. There was a rumor that McFadden rescued a corrections officer; some participants in the McFadden Project maintain that the rescue rumor was true.<sup>77</sup> The memorandum to Governor Casey, however, makes no mention of it.<sup>78</sup> While McFadden claimed in his commutation application that the rioters assaulted him,<sup>79</sup> some project participants assert that he was sought by the rioters because of his snitching, but was not caught and beaten.<sup>80</sup> McFadden was shipped off to United States

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<sup>71</sup> McFadden Application for Clemency, *supra* note 40, at 5, 8 (Answer to Question 20(c)).

<sup>72</sup> Jodi Enda & Russell E. Eshleman, Jr., *Five Inmates Missing in Count at Camp Hill*, PHILA. INQUIRER, Oct. 31, 1989, at 1 (reporting on appointment of three-person commission to investigate riots at Camp Hill). In addition to Judge Adams, the commission consisted of George M. Leader, former Governor of Pennsylvania, and K. Leroy Irvis, a former Speaker of the Pennsylvania House of Representatives from Pittsburgh. *Id.*

<sup>73</sup> ADAMS, LEADER & IRVIS, *supra* note 68, at 12–14.

<sup>74</sup> *Id.* at 13.

<sup>75</sup> *Id.* at 12.

<sup>76</sup> *Id.* at 12–13 (emphasis added).

<sup>77</sup> Group Interview with Lifers at SCI Phoenix, *supra* note 64.

<sup>78</sup> Spiegelman Memorandum, *supra* note 38.

<sup>79</sup> McFadden stated that he "was held down by a group of inmates during the Camp Hill riots, bounded [sic], gagged and threatened . . ." McFadden Application for Clemency, *supra* note 40, at 6 (Answer to Question 19). He claims that such victimization allowed him to appreciate his victim's predicament. *Id.*

<sup>80</sup> There is evidence that residents of Camp Hill transferred to other facilities, including SCI Graterford, were beaten up by guards whether or not they were actually among the rioters.

Penitentiary (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 secretive 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.”<sup>81</sup> A career informant might have her or his record scrubbed of infractions or receive favorable treatment along the way.<sup>82</sup> 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.

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”<sup>83</sup> which is the product of “the folkways, mores, customs, and general culture” of the incarcerated

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Erich Smith, *Graterford Guards Charged With Attacks on Camp Hills Inmates*, AP NEWS (Oct. 30, 1991), <https://apnews.com/f20a33e3ccc52789baf89afab276cb39>

<sup>81</sup> Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 694 (2004).

<sup>82</sup> Of course, any data on which an assessment of McFadden’s risk of recidivism was based that might have been in his PDOC and Pennsylvania Board of Probation and Parole files would be exempt from disclosure under the Pennsylvania Right-to-Know Law (RTKL). See Austin, *supra* note 22, at 65–66.

<sup>83</sup> REBECCA TRAMMELL, ENFORCING THE CONVICT CODE: VIOLENCE AND PRISON CULTURE 56 (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 Spiegelman Memorandum, *supra* note 38, at 2.



population.<sup>84</sup> 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.”<sup>85</sup> 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.<sup>86</sup> Snitching promotes lying about fellow residents, distrust among residents, and related violence.<sup>87</sup> As a resentenced former juvenile lifer put it, “When you reward people to lie, they will tell you what you want to hear.”<sup>88</sup>

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.<sup>89</sup> When asked about McFadden, one of Dubler’s interlocutors,<sup>90</sup> who worked in the office of the Catholic chaplain,

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<sup>84</sup> 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.* at 1206.

<sup>85</sup> TRAMMELL, *supra* note 83, at 5.

<sup>86</sup> M. Dyan McGuire, *Doing the Life: An Exploration of the Connection Between the Inmate Code and Violence Among Female Inmates*, 11 J. INST. JUST. & INT’L STUD. 145, 151 (2011) (reporting physically traumatic assault not even spoken of as snitching); TRAMMELL, *supra* note 83, at 105. Trammell’s research largely focused on the racial and ethnic divisions among California’s prison population.

<sup>87</sup> Telephone Conversation with Douglas Hollis, Resentenced Juvenile Lifer (May 10, 2019) (notes on file with author); TRAMMELL, *supra* note 83, at 127; McGuire, *supra* note 86, at 151.

<sup>88</sup> Telephone Conversation with Douglas Hollis, Resentenced Juvenile Lifer (May 10, 2019) (notes on file with author).

<sup>89</sup> *See generally* JOSHUA DUBLER, *DOWN IN THE CHAPEL: RELIGIOUS LIFE IN AN AMERICAN PRISON* (2013). Dubler went further in telling his Princeton advisors that the chapel was “arguably the most religiously eclectic sliver of real estate in the history of the world.” *Id.* at 9 (italics and footnote omitted).

<sup>90</sup> Dubler uses the term “interlocutor” in lieu of “the classical anthropological term *informant*.” *Id.* at 8, 328 n.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.” *Interlocutor*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/interlocutor> [<https://perma.cc/WE8N-5FAS>].

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.”<sup>91</sup>

Similar views were expressed by a current PDOC resident who served time with McFadden at SCI Rockview after McFadden returned to the PDOC system from USP Leavenworth. McFadden told a fantastic story about having connections with terrorists which led the listener to consider McFadden “a nut.” After reading a news article about McFadden’s commutation and arrest in New York, he concluded the following about McFadden:

[I believe] 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.<sup>92</sup>

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 prison system shaped his character. 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 maturity and potential for violence.

#### E. MCFADDEN, THE “JIVE”<sup>93</sup> COMMUTATION PETITIONER (THE WORST-CASE SCENARIO)

Apart from his snitching, there was nothing about McFadden that made him an objectively superior candidate for commutation. After voting against commuting McFadden, Ernie Preate wrote a dissent to the decision of the majority of the Board.<sup>94</sup> He submitted a further memorandum that was included in the minutes of a pardon board meeting held after McFadden’s

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<sup>91</sup> DUBLER, *supra* note 89, at 303 (footnote omitted).

<sup>92</sup> Response to Written Questionnaire by Current Lifer 1–3 (Apr. 28, 2019) (on file with author).

<sup>93</sup> In Black culture, “jive” is a derogatory epithet applied to a person who, because of his rhetoric and demeanor, is considered disingenuous, deceitful, unreliable, insincere, arrogant, or pretentious. *Jive*, GREEN’S DICTIONARY OF SLANG, <https://greensdictofslang.com/entry/7qvsfya> [<https://perma.cc/X66J-KP6R>]; 2 THE NEW PARTRIDGE DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH: J–Z 1272 (Tom Dalzell & Terry Victor eds., 2d ed. 2013); ERIC PARTRIDGE, THE ROUTLEDGE DICTIONARY OF MODERN AMERICAN SLANG AND UNCONVENTIONAL ENGLISH 568 (Tom Dalzell ed., 2009).

<sup>94</sup> Preate, *supra* note 1.

arrest.<sup>95</sup> 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.<sup>96</sup>

Proof of McFadden's general fitness for life on the outside based on these benchmarks was weak. He had not always been a model prisoner. A press report indicates that early in his confinement McFadden "had at least 12 misconducts in prison, including assault, threatening another inmate, lying and conspiring to escape."<sup>97</sup> Counsel's Memorandum to Governor Casey acknowledges that his "making arrangements to attempt to escape" in 1984 constituted "serious misconduct."<sup>98</sup> The only other infraction noted, however, was possession of contraband (a sandwich) for which he was reprimanded.<sup>99</sup>

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:

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<sup>95</sup> Statement by Ernie Preate, Jr., Att'y Gen., to the Bd. of Pardons (Oct. 20, 1994), in Pa. BD. OF PARDONS, MINUTES 1994, 47–56, [https://digitalarchives.powerlibrary.org/psa/islandora/object/psa%3Aolgbpm\\_995?overlay\\_query=RELS\\_EXT\\_isMemberOfCollection\\_uri\\_ms%3A%22info%3Afedora/psa%3Aolgbpm%22](https://digitalarchives.powerlibrary.org/psa/islandora/object/psa%3Aolgbpm_995?overlay_query=RELS_EXT_isMemberOfCollection_uri_ms%3A%22info%3Afedora/psa%3Aolgbpm%22) [<https://perma.cc/MX8D-ZPEP>].

<sup>96</sup> *Id.* at 48–49. 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." Memorandum from Ronald J. Harper to the Bd. of Pardons (Oct. 19, 1994), in BD. OF PARDONS, MINUTES 1994, 46, [https://digitalarchives.powerlibrary.org/psa/islandora/object/psa%3Aolgbpm\\_995?overlay\\_query=RELS\\_EXT\\_isMemberOfCollection\\_uri\\_ms%3A%22info%3Afedora/psa%3Aolgbpm%22](https://digitalarchives.powerlibrary.org/psa/islandora/object/psa%3Aolgbpm_995?overlay_query=RELS_EXT_isMemberOfCollection_uri_ms%3A%22info%3Afedora/psa%3Aolgbpm%22) [<https://perma.cc/MX8D-ZPEP>]. 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. *Id.* Furthermore, it would "not create a fail safe." *Id.*

<sup>97</sup> Helen Peterson, *Con's Grim 2d Chance*, DAILY NEWS, Apr. 9, 1995, at 32.

<sup>98</sup> Spiegelman Memorandum, *supra* note 38, at 2.

<sup>99</sup> *Id.*

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."<sup>100</sup>

McFadden's most significant communal involvement related to his Muslim faith. In his commutation application, McFadden said that he joined the NOI out of fear for his safety and "to prevent sexual harassment."<sup>101</sup> Constant drilling turned him into "a programmed z[o]mbie[.]"<sup>102</sup> 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."<sup>103</sup> He likened his ongoing "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."<sup>104</sup> He said, near the end of his discussion, "I beseech the friendship of all men, based on cooperation, respect and co-existence."<sup>105</sup> After that, he likens himself to Gandhi and Dr. King in that he chose not "the path of violence, but, the path of non-violence."<sup>106</sup>

McFadden's criticism of the NOI, however, mirrored the assessment long held by many in the criminal justice system that the NOI was a militant

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<sup>100</sup> Lee Cary, *The [No] Mercy Rule: Clemency and the Pennsylvania State Constitution*, COMMEDIA NEWS (Dec. 3, 2014), <http://commmedia.psu.edu/special-coverage/topic/best-of-commmedia> [<https://perma.cc/F558-9EWT>].

<sup>101</sup> McFadden Application for Clemency, *supra* note 40, at 7 (Answer to Question 8).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* 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 [sic], 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. *Id.* at 8 (Answer to Question 20(c)).

Black nationalist, anti-White gang that was at best a cult or sham religion.<sup>107</sup> His views, no doubt, won him points with the prison authorities and with the White, middle-class Islamists who resided in Palisades and Carmel, New York and supported his release from prison.<sup>108</sup>

McFadden's outside supporters seemed convinced by the fervor of his religious beliefs, at least until he was released into their supervision. According to letters written between 1980–81 and addressed to Governor Thornburgh, who was then considering one of McFadden's earlier commutation applications, McFadden maintained a lively and extensive exchange of letters and phone calls with persons 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."<sup>109</sup> 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."<sup>110</sup>

McFadden must have known that he did not fit the profile of the meritorious rehabilitated lifer. So, he argued in his application for a favorable assessment of himself by emphasizing his exceptionalism vis-à-vis his peers.<sup>111</sup> McFadden blamed his inability to live in peace within the prison system on the Black Muslims and his behavior as a youthful offender on his

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<sup>107</sup> See Khaled A. Beydoun, *Islam Incarcerated: Religious Accommodation of Muslim Prisoners Before Holt v. Hobbs*, 84 U. CIN. L. REV. 99, 134 (2016); Felber, *supra* note 70, at 81 (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").

<sup>108</sup> Berger, *supra* note 60, at B1 (describing McFadden's New York suburban sponsors); Austin, *supra* note 22, at 75–76 (describing the Irfan group's involvement with McFadden). Correspondence from Professor Patrick Quinlan of Colorado's Regis College, with whom McFadden took a correspondence course, refers to McFadden's "deep commitment to Islam" and says in support that "he is a Muslim, not a Black Muslim." Letter from Patrick Quinlan, Asst. Prof. Regis Coll., to Governor Richard Thornburg (Dec. 10, 1981) (on file with author).

<sup>109</sup> Letter from Dr. Patrick Quinlan, *supra* note 107 (describing McFadden as "a fine man and a good friend" as well as "a remarkable man" who has a "deep commitment to Islam").

<sup>110</sup> McFadden Application for Clemency, *supra* note 40, at 7 (Answer to Question 20(b)).

<sup>111</sup> *Id.*

family circumstances.<sup>112</sup> He constructed, through his words, an image of uniqueness or individuality by exploiting the cultural biases and interests of his supporters and 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.

To squelch suspicions that his creed might be a sham, 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.”<sup>113</sup> He goes on to argue that his transcripts and other documents were evidence that his pursuit of “academical and vocational goals” had “been continuous despite many obstacles and discouragements” and “sincere.”<sup>114</sup> 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.”<sup>115</sup> 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.<sup>116</sup> “If he was not sincere,” he would not have spent his time taking courses; rather he would have played basketball and watched gangster movies.<sup>117</sup> As a result, he “was mocked and isolated by inmates, because [he] sought education.”<sup>118</sup>

McFadden had ambitions of working with troubled youth.<sup>119</sup> He said:

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<sup>112</sup> McFadden Application for Clemency, *supra* note 40, at 7, 10–11 (Answers to Questions 8, 20(c), and 20(d)).

<sup>113</sup> *Id.* at 9.

<sup>114</sup> *Id.* at 10.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Reginald McFadden did secure a position with a facility for troubled youth in foster care right before he was arrested. See Hunter T. George, *Ridge Nominee Grilled on Parole Case*, IND. GAZETTE, Mar. 15, 1995, at 6; *Killer's Hiring Fell Through the Cracks*, ROCKLAND J. 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).

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”, [sic] but rather a *sincere* repentant who sees the answer to his own life intertwine [sic] with the lives of others; by helping others, I will be helping myself.<sup>120</sup>

However, unlike other men who were commuted before him,<sup>121</sup> McFadden offered no proof of a history of reaching out to or mentoring his fellow residents through any formal program or on an informal basis. At no point in his application did he express kind regard for anyone with whom he served time. Commutees have pointed to their solidarity with and concern for the lifers they left behind as a check on their behavior.<sup>122</sup> They know that if they recidivate, it may impact the opportunity of other lifers to gain commutations.<sup>123</sup> At no point in his application did he express kind regard for anyone with whom he served time. Other commutees have pointed to their solidarity with and concern for the lifers they left behind as a check on their behavior.<sup>122a</sup> They know that if they recidivate, it may impact the opportunity of other lifers to gain commutations.<sup>122b</sup> McFadden neither expressed nor exhibited any such sentiment.

When some of his New York supporters interacted with him after his release, they reconsidered the accuracy of their prior assessments.<sup>124</sup> 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.”<sup>125</sup>

McFadden’s arguments did not fool Ernie Preate. In October of 1994, after McFadden was arrested, Preate was quoted as characterizing McFadden’s application as “glib.”<sup>126</sup> Furthermore, he said, “There wasn’t

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<sup>120</sup> McFadden Application for Clemency, *supra* note 40, at 7 (Answer to Question 20(b)) (emphasis added).

<sup>121</sup> 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”).

<sup>122</sup> See 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 University of Pennsylvania Carey Law School, *Second Looks, Second Chances*, YouTube (Oct. 6, 2017), [https://www.youtube.com/watch?v=khWB6\\_hThOw](https://www.youtube.com/watch?v=khWB6_hThOw) [<https://perma.cc/AL4B-2U45>]).

<sup>123</sup> *Id.*

<sup>124</sup> See Austin, *supra* note 22, at notes 76–78 and accompanying text.

<sup>125</sup> Smith, Rodriguez & Haberstroh, *supra* note 61.

<sup>126</sup> *Id.*

enough remorse. It was a lot of words strung together. It didn't sound sincere. He was being ambiguous and patronizing."<sup>127</sup>

Perhaps, if the decisionmakers who approved McFadden's commutation had met him and heard him speak, they might have questioned the earnestness of his assertions, unless McFadden's mode of expression was standard for commutation petitioners at that time, in which case that is another reason why he was not an especially meritorious candidate for commutation.

Others were in a different position to observe his behavior while he was incarcerated in Pennsylvania and to evaluate the authenticity of McFadden's claim to exceptionalism. They had much at stake if his commutation proved to be a mistake. They were the lifers who served time at the same time that he did.

#### F. MCFADDEN'S CONTEMPORARIES AND UNANSWERED QUESTIONS ABOUT HIS COMMUTATION

There are still many lifers in Pennsylvania prisons, as well as a few who are free because of commutation or resentencing, who were aware of Reginald McFadden when he was in the PDOC system between 1974 and 1994.<sup>128</sup> Some had direct contact with him or were privy to contemporaneous

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<sup>127</sup> *Jive*, GREEN'S DICTIONARY OF SLANG, <https://greensdictofslang.com/entry/7qvsfya> [<https://perma.cc/X66J-KP6R>]; 2 THE NEW PARTRIDGE DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH: J-Z 1272 (Tom Dalzell & Terry Victor eds., 2d ed. 2013); ERIC PARTRIDGE, THE ROUTLEDGE DICTIONARY OF MODERN AMERICAN SLANG AND UNCONVENTIONAL ENGLISH 568 (Tom Dalzell ed., 2009).

<sup>128</sup> McFadden moved around the system between December 1974 and August 1994. PA. DEP'T OF CORR., MOVES REPORT FOR REGINALD MCFADDEN 1 (2019) (on file with author). As of December 19, 2019, the latest date for which PDOC statistics are available, McFadden's incarceration for murder began roughly 45 years earlier and ended with his release roughly 25 years earlier. *Id.* As of December 19, 2019, there were 5,447 persons serving life sentences in the Commonwealth. PA. DEP'T OF CORR., 2019 ANNUAL STATISTICAL REPORT 23 tbl.24 (2019), <https://www.cor.pa.gov/About%20Us/Statistics/Documents/Reports/2019%20Annual%20Statistical%20Report.pdf> [<https://perma.cc/AQ5N-5EHG>] (showing the number of inmates serving life sentences). Any of the lifers who was incarcerated between 25 and 45 years of that date might have served time with, heard about, or been impacted by McFadden. A total of 2,184 lifers had served 25 or more years and 423 of them had served 40 or more years. *Id.* at 25 tbl.27 (indicating the number of inmates serving life sentences grouped by time served). Female lifers would not have served time in the same facilities as the men but might have been aware of McFadden's commutation and certainly suffered the consequences of its disastrous failure. Women lifers represented only 4% of the total. *Id.* at 19 tbl.19 (indicating the number of inmates grouped by offense and gender). Though chronological age as of December 19, 2019, is not necessarily an indicator of age at the time that a person entered the system, it should be noted that, of the over 5,000 persons serving life sentences at the end of



information about his activities because, as lifers, Black men, Philadelphians, and/or Muslims, he and they were members of the same affinity groups within the prison population.<sup>129</sup> As such, they shared material circumstances, culture, and communal activities. Group members interacted with McFadden in settings that were not strictly supervised by frontline prison staff and administrators. They acquired information about McFadden that staff and administrators, especially those in the higher ranks, did not know. Moreover, they were privy to information transmitted by transferees from other PDOC facilities or players on opposing extramural sports teams that traveled among facilities.

I have communicated with a dozen or so lifers who fell into such groups about their recollections of McFadden, the conditions and culture of PDOC facilities when he was incarcerated, and the impact of his post-commutation crimes on the lifers who remained in prison. Our communications occurred over the phone, via e-mail, in written correspondence sent through the mail, and in group meetings about the video work the program I direct has undertaken on commutation, compassionate release, and parole eligibility. Some of these lifers have gained commutation and remain on lifetime parole. Others have achieved release by being resentenced for offenses committed when they were juveniles. Most are still incarcerated and are seeking, or intend to seek, commutation. I solicited their recollections and impressions to provide context or background for my analysis of the documentary record of McFadden's fateful commutation. None of them is responsible for my interpretation of the information they shared with me. I am unable to judge whether the security and standing of those still in PDOC custody might be jeopardized because of their communications with me. Therefore, I have chosen to attribute direct quotes only to named individuals who are no longer incarcerated and to use descriptions of the status of others. Records of the communications are in the possession of the author.

The lifers with whom I have communicated used 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

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2019, 568 lifers were between 60 and 64 years old and 761 lifers who were 60 and older. *Id.* at 26 tbl.26 (indicating the number of inmates serving life sentences categorized by age). The numbers are indicative of the growing concern that life without parole is a sentence of death by incarceration.

<sup>129</sup> As of December 31, 2019, Philadelphians were 48.7% of all persons serving life sentences. PA. DEP'T OF CORR., 2019 ANNUAL STATISTICAL REPORT, *supra* note 129, at 24 tbl.25. Black inmates were roughly 63% of all persons serving time for first degree murder and 68% of those serving time for second degree murder, the two offenses carrying life terms. *Id.* at 19 tbl.19.

schemer who exploited loopholes and methodically pursued his goal of getting out of prison.”<sup>130</sup> Because they saw little that set McFadden above the average 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 became scarce.<sup>131</sup> 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 his fellow PDOC residents became skeptical of McFadden’s attempt to situate himself as “exceptional” through his religious activity comes from the period between 1978 and 1988 when he resided at SCI Graterford (now SCI Phoenix), before being transferred to SCI Camp Hill.

In 1976, Muslims at Graterford received permission to build a *masjid* (mosque) in the basement of the chapel.<sup>132</sup> 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.<sup>133</sup> Non-Muslim residents contributed to it.<sup>134</sup> The *masjid* was beautiful and had a beautiful garden.<sup>135</sup> Every couple of years the *masjid* would have to be rebuilt because of flooding; this gave a new group of brothers a sense of accomplishment and the right to claim that they too had built the *masjid*.<sup>136</sup>

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<sup>130</sup> See Austin, *supra* note 22, at 66–67 (describing interaction with members of the McFadden Project). 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 lifers with whom I have communicated are not in complete agreement about what McFadden 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 evaluation 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.

<sup>131</sup> Six of Shapp’s eight successors (Governors Thornburgh, Casey, Ridge, Schweiker, Rendell, and Corbett) commuted a total of only six life sentences. *Commutation of Life Sentences (1971–Present)*, *supra* note 6.

<sup>132</sup> DUBLER, *supra* note 89, at 149.

<sup>133</sup> *Id.* at 149–50, 152–53.

<sup>134</sup> E-mail from Steven Blackburn to author (Apr. 1, 2019, 1:00 PM) (stating that the three-dimensional painting at the entrance of the *masjid* was painted by White Christian residents of Graterford) (on file with author).

<sup>135</sup> Photographs of the *masjid* are on file with the author.

<sup>136</sup> Telephone Conversation with Steven Blackburn (Mar. 20, 2019) (notes on file with author). Steven Blackburn’s sentence was commuted in 1991 and he was paroled in 1992.

The two large rooms of the *masjid* were allocated to the two Sunni sects, one being the successor to the NOI.<sup>137</sup> Smaller Muslim groups shared a small room in the mosque which McFadden, accompanied by a small group of followers, came to control.<sup>138</sup> McFadden was widely believed to be Shia and he was able to obtain outside support and to host outside guests.<sup>139</sup>

Supervision of activities in the *masjid* was relatively relaxed:

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.<sup>140</sup>

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 . . . [F]rom the information I could authenticate . . . [McFadden's] educational and social involvement was nil. He 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.<sup>141</sup>

Another participant, however, doubted that McFadden 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.

Religion scholar Dubler offers a cautionary warning about 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 "'jail-house Islam' . . . [as] a smokescreen for gangsterism or for seditious politics."<sup>142</sup> In choosing to adopt such opinions secondhand, he maintains that it is wise to know the standard by which one judges the

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Howard Goodman, *Second Chance for "Model Prisoner,"* PHILA. INQUIRER (New Jersey Metro ed.), Mar. 7, 1991, at B2 (reporting on the circumstances of Steven Blackburn's commutation by Governor Casey).

<sup>137</sup> DUBLER, *supra* note 89, at 150–51; Telephone Conversation with Steven Blackburn, *supra* note 136.

<sup>138</sup> DUBLER, *supra* note 89, at 343 n.40.

<sup>139</sup> E-mail from Joshua Dubler, Assoc. Prof., Univ. of Rochester, to author (Sept. 17, 2019, 9:01 AM) (reporting that informant confirmed that McFadden was Shia and led Masjid Taubah).

<sup>140</sup> Preliminary Statement In Re: McFadden Project by current PDOC Resident, to author (Apr. 20, 2019); *see also* DUBLER, *supra* note 89, at 151–52.

<sup>141</sup> E-mail from Steven Blackburn to author (Feb. 28, 2019, 7:31 PM) (on file with author).

<sup>142</sup> DUBLER, *supra* note 89, at 31.

spiritual sincerity of another person.<sup>143</sup> 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.”<sup>144</sup>

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 Muslim prisoners, who were primarily Black, had fought to secure.<sup>145</sup>

Those concerns were ultimately realized. In October 1995, after McFadden’s commutation resulted in calamity in New York and the election of Tom Ridge as governor in Pennsylvania, hundreds of state troopers and correction officers from throughout the system raided Graterford.<sup>146</sup> The *masjid* was trashed and eventually closed.<sup>147</sup> In a report to the Pennsylvania Senate, Martin Horn, Tom Ridge’s new Commissioner of Corrections,<sup>148</sup> claimed that “at Graterford . . . the liberal and humanitarian innovations of the 1970s, left unchecked for a quarter of a century, had festered.”<sup>149</sup> The Commissioner took it as his mission to “sanitize” Graterford which was “long known for drug use, violence and corruption, and to ‘weed out’ employees who deal drugs or tolerate it.”<sup>150</sup>

McFadden proved to be more dangerous than the prison authorities realized. While they and some of his peers may have appreciated the depth of his introspection, his erudition regarding matters of religion, or his skill as

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<sup>143</sup> *Id.* at 32.

<sup>144</sup> E-mail from Joshua Dubler, Assoc. Prof., Univ. of Rochester, to author (Sept. 13, 2019, 11:34 AM) (on file with author).

<sup>145</sup> E-mail from Steven Blackburn to author, *supra* note 134 (asserting that friction arose among Muslim sects around accusations that McFadden’s group was bringing “drugs and women into the prison”). The state made similar accusations concerning activities in the mosques to justify its massive raid at Graterford in 1995 and subsequent assertion of carceral control over Muslim religious observances at the prison. See DUBLER, *supra* note 89, at 67–74.

<sup>146</sup> DUBLER, *supra* note 89, at 66–74 (describing the raid of Graterford and its repercussions).

<sup>147</sup> *Id.* at 70.

<sup>148</sup> The story of Martin Horn’s appointment as head of the Pennsylvania Department of Corrections is discussed in Part I of this essay. Austin, *supra* note 22, at 72, 78–79 nn.87–92.

<sup>149</sup> DUBLER, *supra* note 89, at 69.

<sup>150</sup> Ron Goldwyn & Gloria Campisi, *Prison Swept for Drugs Cell-by-Cell Search Aims to “Sanitize” It*, PHILA. DAILY NEWS, Oct. 25, 1995, at 7.

a self-advocate, others dismissed his rhetoric and behavior 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. While he might have been dismissed as a jive talker in the “ghetto context,” in the prison context he was dangerous.

Commuted lifers today are aware of their responsibility to live law-abiding lives of purpose to protect the opportunity of other lifers to receive commutation.<sup>151</sup> 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 to make the misfeasance of one lifer a burden borne by all. This is collective responsibility.

#### G. ANOTHER MCFADDEN? THE UNLIKELIHOOD OF IT HAPPENING AGAIN

The lifers with whom I have communicated argue that another McFadden is unlikely today because of changes in the composition of the PDOC administration and changes in the commutation process. There are more opportunities for lifers to be members of resident-controlled cultural, educational, and social service organizations.<sup>152</sup> They provide opportunities for lifers to develop as leaders and to have their conduct and social skills witnessed by their peers and by staff members who will evaluate the lifers for commutation.<sup>153</sup>

Pennsylvania’s current Lieutenant Governor and Chairman of the Board of Pardons, John Fetterman, is actively working to prepare and present the cases of applicants for commutation who can win affirmative votes from the

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<sup>151</sup> See *supra* note 110 and accompanying text.

<sup>152</sup> See, e.g., *Coal Township Inmate Organizations Support St. Joseph’s Center*, CORRECTIONAL NEWSFRONT BLOG (Pa. Dep’t of Corr., Mechanicsburg, Pa.), Dec. 21, 2021, 12:00 AM, <https://www.cor.pa.gov/CorrectionalNewsfront/pages/Article.aspx?post=1678> (reporting that the resident-run groups Triumph and Lifeline each donated \$6,500 to “a home for severely disabled people”); *Phoenix Inmate Organizations Step Up During Covid-19, Support Local Organizations*, CORRECTIONAL NEWSFRONT BLOG (Pa. Dep’t of Corr., Mechanicsburg, Pa.), June 17, 2021, 12:00 AM, <https://www.cor.pa.gov/CorrectionalNewsfront/Pages/Article.aspx?post=1520> (reporting on activities benefitting those within and without the institution by LACEO (Latin American Cultural Exchange Organization), the NAACP Chapter, the LIFERS, the Gray Panthers, and the United Community Action Network—Fathers and Children Together); *Waymart Inmates Hold Ceremony, Banquet*, CORRECTIONAL NEWSFRONT BLOG (Pa. Dep’t of Corr., Mechanicsburg, Pa.), Feb. 22, 2019, 12:00 AM, <https://www.cor.pa.gov/CorrectionalNewsfront/Pages/Article.aspx?post=344> (reporting that WINGS (Waymart Inmates Nurturing Growth and Stability) held fundraisers and donated over \$2,500 to charity).

<sup>153</sup> *Id.*

Board.<sup>154</sup> He appointed as Secretary of the Board a commuttee.<sup>155</sup> In addition, two respected recent commuttees were hired by Fetterman to work with potential lifer applicants.<sup>156</sup> The current staff of the Board is more likely to produce genuine appraisals of the meritoriousness of candidates for commutation than was true in McFadden's time. The process has become more rigorous in terms of assessments and face-to-face interviews at every level of the process, including with the Board itself.<sup>157</sup> Finally, a stay in community corrections before commuttees are released from PDOC control is now mandatory.<sup>158</sup> 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 that they are either innocent, or that they never took a life, stand the best chance of winning commutation.<sup>159</sup>

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<sup>154</sup> Samantha Melamed, "They Don't Deserve to Die in Prison": Gov. Wolf Grants Clemency to 13 Lifers, PHILA. INQUIRER (Feb. 11, 2021), <https://www.inquirer.com/news/commutation-pennsylvania-gov-wolf-fetterman-board-pardons-evans-horton-brothers-2021-0211.html> [<https://perma.cc/TZY2-XNCC>] (reporting that Lt. Gov. John Fetterman, who has pushed to expand access to commutations, characterized commutation of thirteen lifers "a career highlight"); Samantha Melamed, *Convincing Pennsylvania Prison Lifers to Apply for Clemency is Lt. Gov. John Fetterman's Toughest Campaign Yet*, PHILA. INQUIRER (Oct. 16, 2019), <https://www.inquirer.com/news/pennsylvania-lieutenant-governor-john-fetterman-commutation-board-pardons-life-without-parole-prison-20191016.html> [<https://perma.cc/2884-LDVJ>] (reporting on Fetterman's interaction with skeptical lifers at a PDOC facility).

<sup>155</sup> See Will Bunch, Opinion, *Freed from Prison Nine Years Ago, Brandon Flood Is New Secretary of Pa.'s Pardon Board*, PHILA. INQUIRER (Apr. 7, 2019), <https://www.inquirer.com/columnists/attytood/brandon-flood-former-inmate-pennsylvania-new-pardons-secretary-john-fetterman-20190407.html#loaded> [<https://perma.cc/5YKH-5BYN>] (reporting that the new overseer of operations of the pardon board had felony convictions for drug dealing and gun possession commuted shortly before assuming office). Flood was succeeded by Celeste Trusty, who was formerly a Pennsylvania policy director and regional organizer with FAMM (Families Against Mandatory Minimums). *Board Secretary*, PA. BD. OF PARDONS, <https://www.bop.pa.gov/Board-Information/Pages/Board%20Secretary.aspx#:~:text=Celeste%20Trusty%20is%20honored%20to%20serve%20as%20Secretary,Chair%20of%20the%20Board%20and%20Board%20members.%20Ms> [<https://perma.cc/C5Q8-P6NL>].

<sup>156</sup> John L. Micek, *Fetterman Hires Two Former Lifers to Assist in Commutations Applications*, PA. CAPITAL-STAR (Nov. 4, 2019, 10:39 AM), <https://www.penncapital-star.com/blog/fetterman-hires-two-former-lifers-to-assist-in-commutations-applications/> [<https://perma.cc/E4M5-7QCX>] (reporting on the hiring of commuttees to work with lifers in the two women's facilities and at SCIs Phoenix and Dallas).

<sup>157</sup> See generally COMMONWEALTH OF PA. DEP'T OF CORR., POLICY STATEMENT 11.4.1: CASE SUMMARY § 9 (2013).

<sup>158</sup> 61 PA. CONS. STAT. § 6137(a)(4)(i) (2017).

<sup>159</sup> For example, of the thirteen lifers commuted by Governor Wolf in February of 2021, nine were convicted of murder in the second degree. *Gov. Wolf Signs 13 Commutations for People Who Were Sentenced to Life*, PA.GOV (Feb. 12, 20221), <https://www.governor.pa.gov/>

Lifers are grateful for, 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 three years from application to hearing and a sign off by the governor.<sup>160</sup> 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.<sup>161</sup> Lifers are pushing for the passage of legislation already introduced that will convert LWOP sentences to life with the possibility of parole.<sup>162</sup>

#### IV. RESTORING EFFICACY TO THE COMMUTATION PROCESS AND COUNTERING THE “WILLIE HORTON EFFECT”

There are several ways of reducing the impact of the “Willie Horton Effect” on commutations of LWOP sentences. In the law, there are two categories of wrongs: fault-based wrongs that penalize intentional harmful or unreasonably dangerous behavior, and strict liability wrongs that are actionable solely because an actor’s conduct has caused another person harm. If the “Willie Horton Effect” is fault-based, the reduction of the Effect would entail adoption of measures that deter decisions based on wrong or flawed reasoning by a politician. If the Effect arises from the mere exercise of the pardon power that proves to cause harm, then mechanisms that deflect blame

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newsroom/gov-wolf-signs-13-commutations-for-people-who-were-sentenced-to-life/ [https://perma.cc/42BU-ZUYW]; see also Austin, *supra* note 122, at 83.

<sup>160</sup> Katie Meyer, *A Pardoned Man Died in Prison Before Gov. Wolf Signed His Commutation—Spurring Talk of Reforms*, WHYY (Feb. 12, 2021), <https://whyy.org/articles/a-pardoned-man-died-in-prison-before-gov-wolf-signed-his-commutation-spurring-talk-of-reforms/> [https://perma.cc/PFZ5-FGZK] (arguing that the “extensive and exhaustive” process keeps “people who have been given such a rare glimmer of hope in limbo . . .”).

<sup>161</sup> See Nick Trombola, *Protestors Want Shapiro to Approve More Commutations*, PITT. POST-GAZETTE (Feb. 26, 2020), <https://www.post-gazette.com/news/crime-courts/2020/02/25/attorney-general-Pa-Josh-Shapiro-protest-commutation/stories/202002250140> [https://perma.cc/2T6W-GPPV] (reporting that the attorney general as a member of the pardon board voted against twenty-four of forty-one cases in 2019).

<sup>162</sup> State Senator Sharif Street and State Representative Jason Dawkins have introduced bills (S.B. 942 and H.B. 135) that would give persons serving LWOP parole eligibility after serving a fixed number of years. Jason Dawkins, *Dawkins, Street Call for Life-Without-Parole Reform in Pa.*, PA. HOUSE DEMOCRATS (June 26, 2019), <https://www.pahouse.com/InTheNews/NewsRelease/?id=108192> [https://perma.cc/9UD7-AH7U]; see also Sarah Anne Hughes, *2,700 Philadelphians Are Serving Life Without Parole. Will They Get a Chance at Redemption?*, BILLYPENN (Oct. 3, 2018, 11:15 AM), <https://billypenn.com/2018/10/03/2700-philadelphians-are-serving-life-without-parole-will-they-get-a-chance-at-redemption/> [https://perma.cc/89NK-2QH6] (reporting on status of bills introduced by legislators Street and Dawkins).

from political actors or spread the blame among several decisionmakers might cure or reduce the Effect, as would measures that reduce the harm's impact. 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 Pardons Board vote,<sup>163</sup> might add a measure of objectivity and impartiality to executive decision making in this area and increase its accuracy.<sup>164</sup> 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.<sup>165</sup> One prominent study, for example, found that a widely used assessment tool erroneously predicted that Blacks who offend pose a higher risk of recidivism and Whites who offend a lower risk than actual experience proved.<sup>166</sup> Hence, the tool embodied a bias against the very population from which a disproportionate number of Pennsylvania's lifers come, namely young urban Black and Latino 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 liability insurance. Greater transparency through full disclosure of

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<sup>163</sup> See *supra* notes 94-95 and accompanying text.

<sup>164</sup> P.S. Ruckman, Jr., *Preparing the Pardon Power for the 21st Century*, 12 U. ST. THOMAS L.J. 446, 469 (2016) (proposing the use of professional bureaucrats acting pursuant to "articulated goals," "systematized norms," and "fairness.").

<sup>165</sup> See generally PARTNERSHIP ON AI, REPORT ON ALGORITHMIC RISK ASSESSMENT TOOLS IN THE U.S. CRIMINAL JUSTICE SYSTEM (2019) (identifying problems with tools that are not accurate in predicting past experience, valid for use in the particular context, calculated so as to mitigate bias, easily interpretable, reflective of public policy goals, accessible for independent research and scrutiny, and subject to post-implementation evaluation, monitoring, and auditing).

<sup>166</sup> Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/VR7Z-Z3TY>].



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.

Another option is legislation converting all LWOP sentences to twenty, thirty, or forty-to-life sentences, which would have the effect of making every lifer eligible for parole consideration after serving a minimum of between twenty and forty years.<sup>167</sup> Voting for such a measure may take 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.<sup>168</sup> We may still have to count on executives who are in the second half of their final term and have no intention of ever running for higher office again to display the greatest amount of bravery in 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 by amending the state's constitution 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, a prisoners' rights advocate, or a formerly

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<sup>167</sup> For example, in 2019 State Senator Sharif Street 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. If enacted, the law would have applied 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*, WHY (Sept. 16, 2019), [https://why.org/articles/a-chance-of-freedom-new-bill-could-release-1000-people-sentenced-to-life-in-pa-prisons/?utm\\_source=email&utm\\_medium=https://perma.cc/C67L-RLU5](https://why.org/articles/a-chance-of-freedom-new-bill-could-release-1000-people-sentenced-to-life-in-pa-prisons/?utm_source=email&utm_medium=https://perma.cc/C67L-RLU5).

<sup>168</sup> 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, at B5. In 1974, he killed his girlfriend after she refused to have sex with other members of the Warlocks motorcycle gang. *Id.* While incarcerated for that crime, he killed a fellow resident but was cleared on the basis of self-defense. *Id.* Simon qualified for parole by bribing staffers at Graterford to remove misconducts and failed drug tests from his file. *Id.* 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 twelve years of a ten-to-twenty-year sentence and allowed to live in New Jersey. Kocieniewski, *supra*. 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. *Id.* In 1999, Simon was beaten to death by a Black fellow death row inmate who successfully claimed self-defense too. *Id.*

incarcerated person) and returning to a majority rule standard might moderate the “Willie Horton Effect.” Even if the Board’s composition remained the same, a four-to-one vote would suffice to send an applicant’s file on to the governor with an affirmative recommendation. Then, 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.<sup>169</sup> Of course, the Board includes the lieutenant governor and the attorney general, both of whom may aspire to run for higher office. There may always be the possibility that another Pennsylvania politician will be felled by the “Willie Horton Effect.” Willie Horton may be with us forever.

#### CONCLUSION

There is so much more injustice attributable to Reginald McFadden’s impact on the commutation of life sentences in Pennsylvania than anyone could have imagined. Although this Article may not have definitively answered the who and why of the decision to let McFadden loose to engage in a crime spree in New York, it has hopefully problematized the extreme measure of amending the state constitution to supposedly prevent its repetition and the frequent invocation of “McFadden” 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 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 released and immediately shipped off to New York State, where he was subject to less strict oversight than the Commonwealth would have imposed. Some of the blame for his crime spree lies with the New York Parole authorities and the well-meaning lay co-religious adherents who were not up to the task of supervising McFadden who was ill-prepared to negotiate the real world of law-abiding adult responsibility..

Lastly, McFadden’s role as a prison informant may have affected the record that the Department of Corrections sent the Board of Pardons and the governor who agreed to his release. Moreover, his criticism of the NOI and

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<sup>169</sup> 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> [<https://perma.cc/V9QG-GDW4>].

embrace by white suburban New York Islamic supporters contributed to the impression he stoked of being an exceptional inmate who he was ready to be released without a stay in community corrections. If those who supported his release were “fooled” by McFadden’s conduct and disingenuous rhetoric, their uncritical biases might be partly to blame. The outcome was tragic for his victims and their families. It was also distressing for lifers like the participants in the McFadden Project, who had first-hand information and a critical assessment of McFadden but no direct ability to weigh in on the decision. They effectively lost the possibility of earning their freedom through meritorious behavior when McFadden’s commutation went off the rails.

The commutation process has changed since the fateful decision in Reginald McFadden’s case. Successful applicants for such sentencing mitigation today must negotiate a series of extensive evaluations and in-person interviews at every level from the prison to the Governor’s Office followed by a stay in community corrections. Still, commutations are few and far between. 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 under a more stringent regime. That is unfair punishment indeed.