The Demise of Clemency for Lifers in Pennsylvania

Pennsylvania law automatically imposes life imprisonment for first- and second-degree murder, including felony murder, which requires no intent to kill. It is also one of only five states that categorically excludes lifers from parole consideration; the only way for a lifer to be released is by clemency. For a time, the State's harsh sentencing policies were tempered by a practice of commuting several dozen life sentences each year. That changed around 1980, when commutations in Pennsylvania fell off dramatically. With few exceptions, clemency in the Keystone State remains in a state of a disuse.

Commutation, a form of executive clemency,[1] is the act of shortening a custodial sentence imposed by a court. This report examines the historical and structural reasons for clemency's decline in Pennsylvania. Like many other states, Pennsylvania has a Board of Pardons that vets clemency petitions and submits recommendations to the Governor, who makes the final decision. The Board thus acts as "gatekeeper;" its approval is necessary but not sufficient for clemency to be granted.

Two political events set the stage for clemency's demise in Pennsylvania. First was the 1979 election of Governor Dick Thornburgh, who personified a broader shift toward retributive justice that swept the nation in the 1980s. Under Thornburgh, the annual number of sentence commutations granted to lifers fell from roughly 30 to near zero. Commutations rebounded modestly in the early 1990s, until a former lifer named Reginald McFadden committed a spate of highly publicized violent crimes, which evoked nightmares of Willie Horton from the 1988 presidential election. McFadden would be viewed as evidence that supporting clemency could exact grave political costs. As one former Pennsylvania Attorney General admitted, "[n]obody wants to have that against them in their political careers."[2]

Pennsylvania's clemency system is hampered by the Board's institutional design. In 1997, following the McFadden debacle, legislators amended the state constitution to require that lifers seeking commutation receive unanimous Board approval. This requirement has thwarted many petitioners who would have been approved by the Board for commutation under the pre-1997 rules. A second problem relates to the Board's composition. Among the five-member Board are the publically-elected Attorney General and the Lieutenant Governor, whose presence undermines the political insulation normally associated with pardon boards. Haunted by

1 Other forms of executive clemency, which are beyond the scope of this paper, include pardons, reprieves, and remission of fines. *See* Pa. Const. Art. 4, § 9.

2 *See* Cary, *infra* note 4.

the possibility of another Reggie McFadden, these officials are often unwilling to accept the political risks of voting to recommend clemency, particularly for individuals convicted of violent crimes.

There are, however, reasons for cautious optimism. After granting only two commutations since assuming office in 2015, Governor Wolf granted four commutations between December 2018 and March 2019. Newly elected Lieutenant Governor John Fetterman seems intent on achieving significant clemency reform. Fetterman recently appointed a formerly incarcerated person, Brandon Flood, to serve as the Board's secretary. Whether Flood and Fetterman successfully revitalize clemency will depend in part on their ability to collaborate with local prosecutors, who have become outspoken opponents of commutation in recent years.

Figure 1: Life Sentences / Lifer Population (1967-2018)

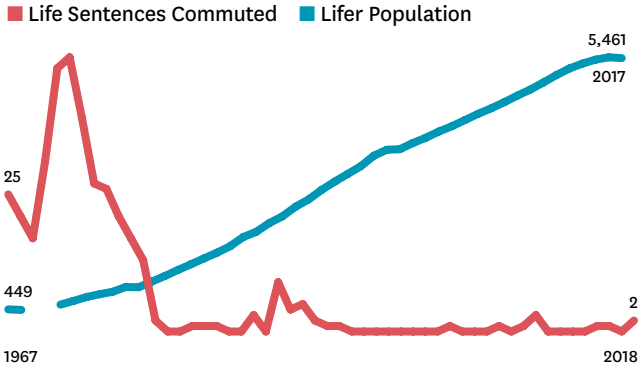
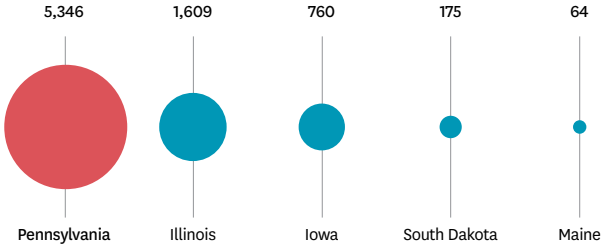


Figure 2: Lifer population in states with no parole for lifers



1. Procedures for Granting Clemency in Pennsylvania

The Pennsylvania Constitution establishes a mixed administrative model of clemency, in which a Board of Pardons makes a non-binding recommendation to the Governor.[3] Like the President in the federal system, the Governor has authority to grant pardons and commute sentences in all cases except impeachment. Before the Governor may pass on an application, a majority of the five-member Board of Pardons must vote in favor of clemency. Pursuant to a 1997 constitutional amendment, however, the Board's vote must be unanimous in order to recommend clemency for a lifer. (Of the nine states that use the same "gatekeeper" model as Pennsylvania, no other state requires a unanimous Board vote to send an application forward to the Governor.[4]) The 1997 Amendment also created a place on the Board for a crime victim. The other four positions are occupied by a corrections expert, a medical professional, the Lieutenant Governor, and the Attorney General. The three unelected Board members are nominated by the Governor and confirmed by the state Senate to six-year terms.

As illustrated on the following page, each application submitted to the Board of Pardons is screened for completion by the Secretary of the Board, then circulated to the sentencing judge and district attorney in the county where the prosecution took place. The judge and prosecutor indicate whether they favor clemency for the petitioner.[5] The Board of Pardons relies on the Parole Board to conduct an investigation into the petitioner's background and his or her disciplinary record while incarcerated.

After assembling all necessary information, the Board of Pardons conducts a public merit review to determine whether the application warrants a full public hearing. For people sentenced to life imprisonment or to death, a majority vote is required in order to grant a full public hearing. For all other cases, two votes are required.

3 Pa. Const. Art. 4, § 9.

4 Lee Cary, *The [No] Mercy Rule: Clemency and the Pennsylvania state constitution*, COMMmedia News (Dec. 3, 2014) http://commmedia.psu.edu/news/story/mercy-rule-clemency-and-the-pennsylvania-state-constitution.

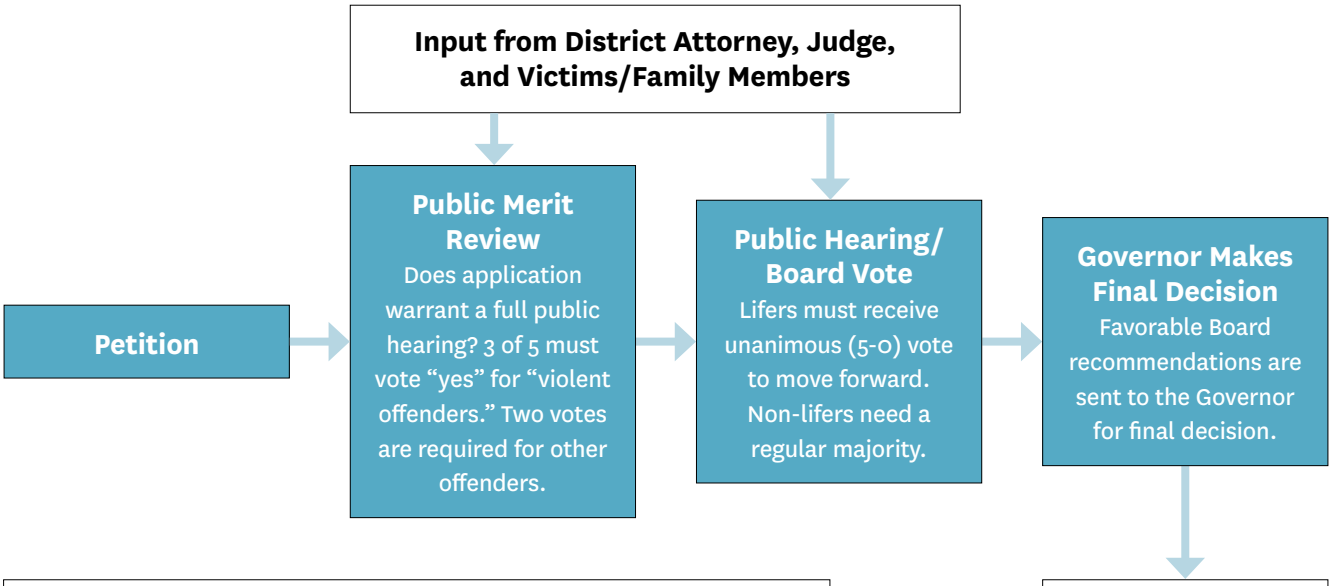
5 Documents containing input from district attorneys and trial judges are not publically available. *See* 37 Pa. Code § 81.304.

A public hearing may occur up to three years after filing of the clemency application. At the hearing, 15 minutes is allotted for presentation by the applicant and by anyone opposing clemency, such as the victim's family. The Board then votes. A favorable vote causes a written recommendation to be sent to the Governor, who then grants or denies the application. An unfavorable vote ends the process without formal written explanation and triggers a one- or two-year waiting period before a subsequent application may start the process anew.

Transparency in Pennsylvania's clemency process is mixed. Unlike in most states, the Board has no formal reporting requirement to the state legislature. As of 1991, however, Board votes are no longer anonymous; the public can see how each Board member voted on a particular application. On one hand, this rule makes Board members accountable to the public; on the other, it threatens to politicize the Board by subjecting members to public criticism based on individual votes.

When a petition is successful, the Governor sets an expiration date two years from the date of commutation in order to allow for participation in a pre-release program. The first year is normally spent in a Community Corrections Center. The individual is then released on parole and usually remains under the jurisdiction of the Parole Board indefinitely.

Procedures for Granting Clemency in Pennsylvania



Factors Considered by the Board*

1. Does the applicant have appeals pending in court?
2. Is the applicant eligible for parole or will he/she be within a reasonable time?
3. Has an appropriate period of incarceration been served based on the circumstances of the offense?
4. Has the applicant maintained an appropriate conduct record for consideration of clemency?
5. Has the applicant had a successful work record and/or availed himself/herself of the programming opportunities for self-improvement available at the correctional facility?
6. What is the impact on the victim(s) of the offense(s)? Victims or next of kin must be notified and given opportunity to appear at hearing or make confidential written submission.

* https://www.bop.pa.gov/application-process/Pages/Factors-Considered-by-the-Board.aspx

2.

The Demise of Clemency for Lifers in Pennsylvania

Historically, the Board of Pardons was guided by a presumption that individuals are capable of rehabilitation. Because lifers are ineligible for parole in Pennsylvania, executive clemency has been the only lifeline for generations of individuals incarcerated there. Throughout the 20th century, lifers were routinely granted clemency after 10 to 20 years of incarceration. The Board reviewed prison disciplinary records and reports by corrections officials to identify evidence of positive change. If a person demonstrated evidence of rehabilitation and could point to a coherent post-release plan, the Board was often willing to recommend that the Governor offer that person a second chance at freedom.

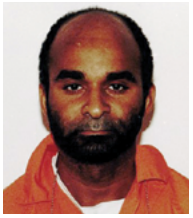
This all changed around 1980, when clemency entered a period of steep decline. Annual reports issued by the Department of Corrections show that in the 35-year period between 1932 and 1967, 607 lifers were released on parole following sentence commutation.[6] In the following 35 years, only 380 commuted lifers were released on parole, a vast majority (345) between 1967 and 1979. The same general trend is true with respect to the total number of persons (lifers and non-lifers) paroled post-commutation. As many as 70 or more incarcerated persons were paroled following commutation each year during the 1960s; by Governor Ridge's administration in the late 1990s, *there were years in which not a single commutation was granted*.

The rate of decline in sentence commutations tracks two key political events. *See* Figure 3. The first occurred in 1979, when Pennsylvania elected Dick Thornburgh as its 41st Governor. A former federal prosecutor who later became United States Attorney General under Presidents George H.W. Bush and Ronald Reagan, Thornburgh personified the 'tough-on-crime' ethos of his time and often spoke publically about restricting clemency. Thornburgh commuted just seven lifers during his eight years in office, compared to the 251 commutations of life sentences granted by predecessor Milton Shapp. Thornburgh's hardline approach to crime-control belonged to a broader shift toward retributive justice at the expense of rehabilitation.

PA's Exploding Lifer Population

Like other states, Pennsylvania sustained a dramatic increase in its prison population beginning in the 1970s and 1980s. Meanwhile, it saw a disproportionate increase in people serving life in prison without the possibility of parole. The lifer population grew from 449 in 1967, to 2275 in 1991, to 5346 in 2017. Lifers now account for roughly 10 percent of Pennsylvania's prison population, the highest rate in the country. Philadelphia has contributed disproportionately to the increase. The Abolitionist Law Center recently reported that there were more people serving life without parole in Philadelphia (2,694) than all but four states.[7] Because all lifers are ineligible for parole in Pennsylvania, the only way to provide hope for these individuals is commutation. Yet, in the 1980s and 1990s, as the lifer population increased and the need for relief became more urgent, executive clemency was brought to virtual standstill.

Dick Thornburgh



Reginald McFadden

A second downturn occurred in 1994, when a former lifer named Reginald McFadden, whose sentence had been commuted in 1992 by Governor Robert Casey, murdered two people and raped a third person in New York. Media coverage of McFadden, "Pennsylvania's Willie Horton," likely influenced the 1994 gubernatorial election by stoking public fears of violent crime, which peaked in the early 1990s. McFadden's crimes precipitated changes to the State's constitution—specifically the Board's unanimous voting requirement—that made clemency virtually unobtainable for lifers. Between 1967 and 1994, over 360 life sentences were commuted. Only ten have been commuted since.

Photos: Dick Thornburgh: http://paterno.com/Expert-Bios/Dick-Thornburgh.aspx#.XKYqCZhKjct; Reginald McFadden: https://www.lohud.com/story/news/crime/2015/02/03/reginald-mcfadden-multiple-murders-rape-rockland-crime-scene/22798247/

6 Jon E. Yount, Pennsylvania: Parole and Life Imprisonment, 30 (Feb. 2004), available at https://www.prisonpolicy.org/scans/yount/.

7 *A Way Out: Abolishing Death by Incarceration in Pennsylvania*, Abolitionist Law Center, 29 (2018)

Figure 3: Commutations of Life Sentences in PA (1967-2018)

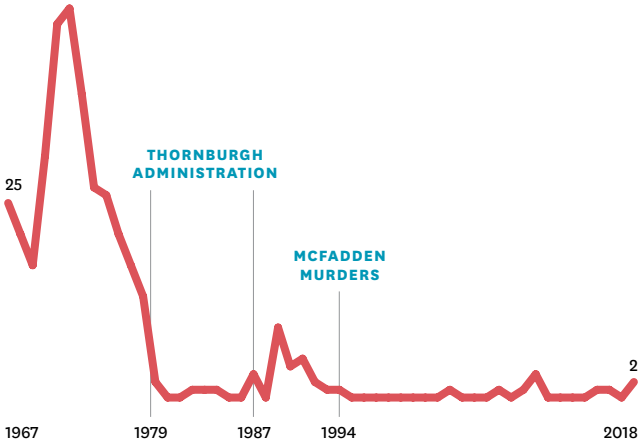


Figure 4: All Individuals Paroled After Commutation

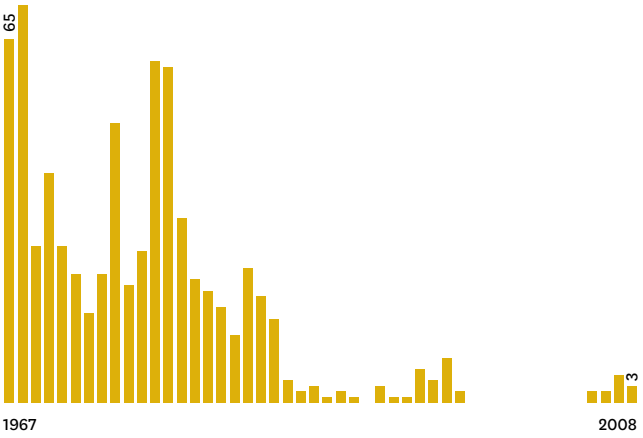
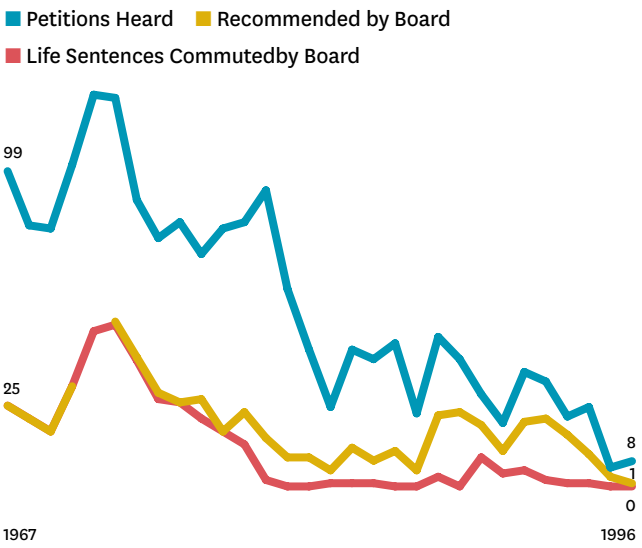


Figure 5: Life Sentences Commuted



Dick Thornburgh: The Beginning of the End of Clemency for Lifers in Pennsylvania

Elected in 1979, Governor Dick Thornburgh brought an end to Pennsylvania's robust clemency process. Having campaigned as a "former U.S. attorney and law-and-order champion,"[8] Thornburgh personified the Reagan-era crusade against violent crime. He prioritized the establishment of "tough new standards in reviewing pardon and commutation requests," particularly for lifers. Whereas Governor Milton Shapp commuted 251 life sentences out of the 264 recommended to him for clemency by the Board from 1971 to 1978, Thornburgh granted clemency in just seven of 75 favorable Board recommendations. The success rate for all clemency petitioners (accounting for both pardons and commutations) fell from 8.2% in 1978 to 0.1% in 1981.

During Thornburgh's tenure, the population of lifers surged to unprecedented levels. The impact was immediately apparent to corrections officials. A 1985 Report of the Pennsylvania Commission on Crime and Delinquency made the following observations about the growing lifer population and its effect on overcrowding:[9]

> The use of clemency would particularly affect inmates in the DOC sentenced to life imprisonment. This lifer population has been an increasingly larger portion of the total prison population and now accounts for approximately 10 percent of the population...therefore it could be assumed that the DOC's population could be reduced significantly by increasing the use of clemency for these individuals.

A 1988 Publication of the National Institute of Corrections noted that 10 states reported using clemency to mitigate prison overcrowding.[10] Rather than attempt to reduce prison populations by means of commutation or otherwise, Thornburgh constructed more prisons and leveraged public anxiety about rising crime to justify a major reduction in clemency. He presented clemency as little more than an undue threat to public safety. The following excerpt comes from a reelection

8 Rod Snyder, *Few Criminals Get Commutation Under Thornburgh Focus on Prison Sentences*, The Morning Call, Aug. 11, 1985.

9 Prison and Jail Overcrowding Task Force, *A Strategy to Alleviate Overcrowding in Pennsylvania's Prisons and Jails*, 32 (Feb. 12, 1985).

10 The National Governors' Association Center for Policy Research, *Guide to Executive Clemency Among the American States*, 3 (March 1988).

campaign speech Thornburgh delivered to the Pennsylvania Rural Electric Association in July of 1982:

> We in Pennsylvania are paralyzed by indecision in dealing with violent criminals, who prey on innocent people on our streets and in our homes. Today we have tough, new, minimum, mandatory sentencing law for violent offenders. Tough, new standards imposed by my office on the granting of pardons and clemency and major expansions underway in the commonwealth prison system. We are determined to put fear to work for the law abiding citizens and not for the criminals.[11]

Thornburgh's "tough, new standards" were never concretely defined, suffice it to say he took a "less is more" approach to clemency. The high rate of disagreement between Thornburgh and his Board suggests that he failed to develop coherent standards for commutation. Before Thornburgh, a lifer who was favorably recommended by the Board was commuted by the Governor in almost 100% of cases. *See* Figure 7. In contrast, Thornburgh granted commutations to a mere 9% of the lifers recommended for clemency by the Board. The gatekeeping model of clemency employed in Pennsylvania only functions properly if the Governor and the Board collaborate; by rejecting more than 9 of 10 favorable recommendations, Thornburgh undermined the structure's capacity for efficient and informed decision-making.

Thornburgh's opposition to clemency reflected a more general shift from rehabilitative to retributive justice that occurred around 1980. According to Thornburgh:

> Pardons and commutations should be issued in only extraordinary circumstances to prevent an injustice... They are not good-conduct medals. I also believe that a judge who passes a sentence on a criminal is in the best position to determine the appropriate sentence. Given these views, it should come as no surprise that the numbers of commutations and pardons approved by me have been substantially below the number granted during the Shapp administration.[12]

Thornburgh's explanation rings hollow, at least insofar as it relates to life sentences. In Pennsylvania, a life sentence is automatically triggered when someone is convicted of first- or second-degree murder, and the District Attorney controls this charging decision. Thornburgh's notion that the "judge who passes a sentence on a criminal is in the best position to determine the appropriate sentence" ignores the reality of Pennsylvania's sentencing statutes. For anybody convicted of first or second degree murder in Pennsylvania—who constitute 99% of those serving life sentences—judicial expertise plays no role in the sentencing outcome.

Figure 6: Average Annual Number Life Sentences Commuted by Governor

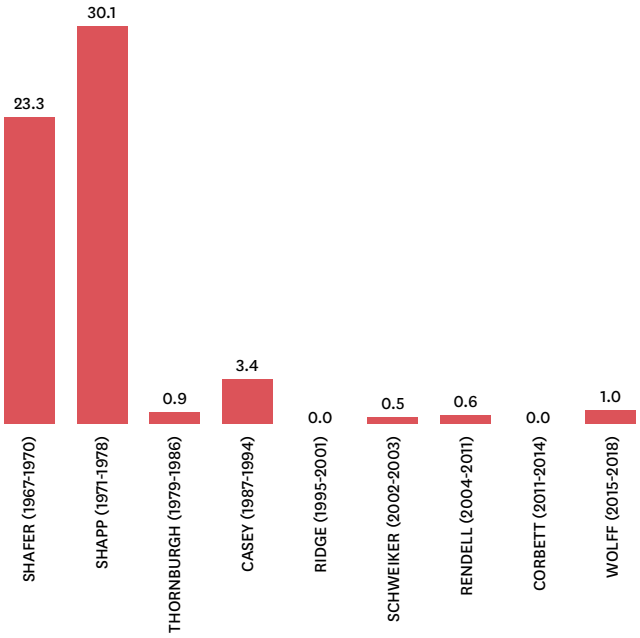
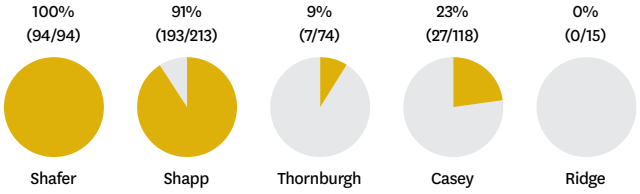


Figure 7: Success of Petitioners Recommended by Board



"Thornburgh made the statement when he went in there that ain't nobody going out. So there ain't no use in bothering the man about that."

Charles Miller
***Philadelphia Inquirer* (April 2, 1984)**

11 Speech to Pennsylvania Rural Electric Association, Champion, PA (July 8, 1982).

12 Snyder *supra* note 8, at 1.

Thornburgh's antagonism toward clemency had a chilling effect on the number of persons in prison applying for clemency. *See* Figure 5. An April 1984 article published by the Philadelphia Inquirer documented a marked decline in the number of applications for commutations during the early years of Thornburgh's administration. Even as the lifer population increased, the number of applications resulting in formal hearings continued to decrease, *see* Figure 8, and the number of Bureau of Corrections employees responsible for representing persons in prison at Board hearings was reduced from three to one.[13]

Figure 8: Lifers Receiving Public Hearings

The Board itself also became more stringent under Thornburgh. The percentage of lifers who received favorable recommendations between 1980 and 1985 dropped from 35% to 19%. According to Marion Damick, chairperson of the citizens' advisory committee to the Board of Pardons, applications favorably recommended by the Board often languished for years on the Governor's desk. "[T]he recommendations just sit on the governor's desk," she told one newspaper. Damick suggested that Governor Shapp "may have gone overboard, but on the other side Governor Thornburgh has gone overboard [too]." Thornburgh, who had proposed eliminating parole,[14] was not merely trying to curtail executive clemency—he was trying to get rid of it.

Thornburgh was rewarded politically for his "tough" approach to crime, flawed as it was. Following a 14-percent drop in statewide crime during the first three years of his administration, Thornburgh received the National Crime Prevention Coalition's State Award for "outstanding state crime prevention program," presented to him by United States Attorney General William French Smith.[15] His approval rating ahead of the 1982 reelection stood at 65%. Thornburgh's reputation as a crime-stopper led to his appointment as Attorney General of the United States under Presidents Reagan and George H.W. Bush.

Reginald McFadden and the "Willie Horton Effect"

The availability of clemency depends largely on the unique perspective of the sitting Governor. After declining precipitously under Thornburgh, commutations rose modestly under Governor Bob Casey. Then, in 1994, the crime spree of Reginald McFadden completely derailed the State's clemency system. The long-term impact of McFadden on Pennsylvania's clemency structure is best understood by analogy to Willie Horton and Michael Dukakis.

The story of Willie Horton is well-known to those who study the criminal justice system, but essential to understanding the relationship between media, identity politics, and crime. Horton was serving a life sentence for murder in Massachusetts when he was released on weekend furlough in 1986. He failed to return, and in 1988, in the midst of a heated presidential race, Horton viciously raped a woman after attacking her fiance.

Democratic nominee Michael Dukakis had been Governor of Massachusetts when Horton was furloughed. Bush used the publicity surrounding Horton to attack Dukakis as soft on crime, even though Dukakis was not involved in the decision to release Horton. A political action committee called Americans for Bush ran an inflammatory television ad featuring a grim mug shot of Horton, followed by the words "kidnapping," "stabbing," and "raping." The ad has become emblematic of the fear-mongering exploitation of race and crime in American politics. Many commentators flagged this moment as a turning point in Bush's election campaign.

13 John Woestendiek, *Imprisoned until death—PA. lifers lose hopes for parole*, Philadelphia Inquirer, A1, Apr. 2, 1984.

14 Wendell Rawls, Jr., *Pennsylvania Shapes Prison Law to Cut Crime*, The New York Times, July 8, 1982, https://www.nytimes.com/1982/07/08/us/pennsylvania-shapes-prison-law-to-cut-crime.html.

15 Press Release, Governor's Press Office, Commonwealth of Pennsylvania (June 29, 1984).

The lesson that politicians learned from Dukakis's downfall was that early-release policies are not worth the risk of one bad apple. No matter how many individuals successfully reenter society, the media is bound to divert public attention toward sensational acts of violence committed by formerly incarcerated persons, however rare.

Among those who voiced public disdain for the Massachusetts furlough program was Pennsylvania Attorney General Ernie Preate, an *ex officio* member of the five-member Board of Pardons. Along with criticizing Massachusetts' handling of Horton, Preate told one local newspaper: "Horton never would have received clemency in Pennsylvania. He had only served 10 or 12 years. It was a revolving door up there."[16]

Preate was soon proven wrong. After serving 25 years of a life sentence in Pennsylvania for a homicide he committed as a juvenile, Reginald McFadden received a commutation from Governor Bob Casey in 1992. Following his release in the summer of 1994, the 42-year-old McFadden traveled to New York, where he murdered two people and raped and kidnapped a third. The Board had approved McFadden's application by a vote of 4-1, with Preate as the only dissenter and Mark Singel, then Lieutenant Governor, voting with the majority. Although McFadden was only the second of 900 paroled lifers since 1930 to commit first-degree murder, his crime provoked a fevered backlash against Pennsylvania's use of executive clemency.

The episode had two major repercussions for Pennsylvania's clemency system. First, polling records suggest that McFadden may have affected the outcome of the 1994 gubernatorial election in favor of Republican Tom Ridge. Like Bush did with Willie Horton, Ridge used the McFadden episode to exploit voters' fears about public safety and to attack opponent Mark Singel for being soft on crime.[17] Second, McFadden's crimes precipitated structural changes to Pennsylvania's clemency process that made commuting life sentences extraordinarily difficult. These changes, including the requirement that the Board vote unanimously before recommending commutation of a life sentence, are discussed in more detail below.

Statement of Attorney General Ernie Preate Jr., Board of Pardons, October 20, 1994

[T]he McFadden case obliges us to reevaluate the process, to determine what can be done to lessen the likelihood of a recurrence.

I have publicly suggested and now do officially call for this Board to endorse a change in the State Constitution. By letter dated Friday, Oct. 14, 1994, I have submitted to each member of the Board proposed language to amend Article IV, Section 9, of the State Constitution.

Under this amendment, the Governor would not be able to pardon or commute a life sentence, or a death penalty, unless all five members of this Board unanimously recommended that he do so. Currently, of course, only a majority vote is required to send a recommendation to the Governor…

In fact, Senator Mark Fisher will join me at a news conference following this meeting to announce that he is introducing legislation to begin the process of amending the constitution.

With prompt legislative action, this measure could go before the voters next year. That is none too soon.

We have to reassure the people of Pennsylvania that the pardons and commutation process is what we have said it is: That our compassion is matched by our caution, and our mercy is tempered by exacting standards. I cannot, in all honesty, say that today.

McFadden's Impact on the 1994 Gubernatorial Election

One prescient 1991 newspaper article called the Board "a potential time bomb" for Singel and Preate, who were both viewed as ascendant political figures. By the time of the McFadden fallout, Preate's bid for Governor had been spoiled by federal wire fraud charges, and Tom Ridge emerged as the leading Republican candidate.

16 Tim Reeves, The Morning Call, *Board can give new lease on life*, Apr. 21, 1991.

17 Joseph Berger, The New York Times, *Accused Serial Killer and 92 Days of Freedom*, Apr. 4, 1995.

Singel held a commanding lead in the race for Governor through the summer of 1994, but his advantage in statewide polls rapidly disintegrated as news of McFadden's crimes spread. The Pittsburgh Post-Gazette surveyed 699 registered voters between October 3 and October 6 and found Singel with a seven-point lead over Ridge (38% for Singel versus 31% for Ridge).[18] On October 6, police in New York arrested McFadden for rape.

A few weeks later, as news of McFadden's crimes stoked outrage in Pennsylvania and across the country, the Greensburg Tribune-Review surveyed 367 registered voters and found Ridge with a one-point lead over Singel (37% for Ridge versus 36% for Singel). That poll was released on November 7, 1994.[19] Ridge won the governorship the next day by a margin of 45% to 40%. He did not commute a single life sentence as Governor.

Pennsylvania's 1997 Constitutional Amendment

Article 9 of the Pennsylvania State Constitution was amended in 1997 to require that the Board vote unanimously before recommending a lifer for commutation. The bill was sponsored by state senator (and current federal judge) Mike Fisher, approved by the General Assembly, and then ratified by public referendum. Predicting (correctly) that commutations for lifers would become virtually unobtainable, opponents of the amendment sued to enjoin its implementation, but the effort failed.

Meanwhile, legislators failed to address a bureaucratic oversight leading up to McFadden's release. Standard practice had long been for commuted lifers to spend "one or two years" in a Community Corrections Center (CCC) to facilitate reintegration. McFadden, however, was inexplicably released directly to the streets. Rather than overhaul the Board's voting procedures, a more measured response would have implemented checks to ensure that commuted lifers would not skip this crucial stage of reentry.

As expected, the 1997 amendment had a profound impact on the ability of lifers to seek clemency in Pennsylvania. Out of 26 lifers granted full hearings by the Board since 1998, 11 received the unanimous vote required for the Board to recommend clemency. Of the other 15 petitioners, 8 received a non-unanimous majority of votes, which would have caused a favorable recommendation under the old rules.[20] In other words, under the pre-1997 rules, 19 of the 25 applicants would have been recommended for commutation, instead of just 11.[21]

Mark Singel votes to free a convicted murderer. The man Mark Singel voted to release is arrested for rape and murder... Mark Singel...bad judgment... too liberal on crime...How can we ever trust him again?...There's a better choice. Tom Ridge. The judgment and character we trust.

TV Ad Run by Ridge Campaign
(www.pbs.org/wgbh/frontline)

The amendment also changed the Board's composition by substituting a crime victim or family member in for a member of the bar. Certainly there is nothing wrong with including a victim advocate on the Board. To maintain a balance of interests, however, a seat should also be reserved for someone who represents the voice of incarcerated persons. Adding one without the other likely compounded the Board's institutional bias against petitioners.

Board Composition and Politics

One advantage of clemency boards is that they insulate governors from political recriminations. In Pennsylvania, however, several members of the Board—the Lieutenant Governor and Attorney General—are themselves directly elected. These offices are often occupied by individuals who seek higher office, or at the very least seek reelection. The potential public-relations nightmare created by a Reginald McFadden or Willie Horton is a powerful deterrent for officials who might otherwise consider supporting petitions for clemency. As told by Ernie Preate, who championed the 1997 amendment,

18 C-Span, 13:50, October 16, 1994, https://www.c-span.org/video/?60882-1/campaign-almanac&start=3364.

19 C-Span, 31:10, November 7, 1994, https://www.c-span.org/video/?61378-1/campaign-almanac.

20 An additional application received a 2-2 vote; it is likely that under the old rules, the application would have been held in abeyance until the fifth member could cast the deciding vote for or against commutation.

21 Most recently, in 2017, Robert Swartworth and Craig Datesman were denied commutation by a vote of 3-2.

"[n]obody wants to have that against them in their political careers…So that's why you get everybody saying, 'Ah, I'm not going to vote for the guy.'" Moreover, allowing a single board member to block commutation creates an opportunity for enterprising board members to use their votes to make affected political statements.

The Office of the Attorney General has served as a political springboard since it became publicly-elected in 1980. Excluding acting and interim Attorneys General, the office has been occupied by Tom Corbett, who became Pennsylvania's 46th Governor; Mike Fisher, who ran unsuccessfully for Governor in 2002 and now sits as a federal appeals court judge on the Third Circuit; Jerry Pappert, a federal district court judge; Kathleen Kane, who considered running for U.S. Senate until her career was derailed by scandal in 2016; and current Attorney General Josh Shapiro, who many see as a future candidate for Governor or national political office.[22]

The Shifting Role of Prosecutors in Pennsylvania's Clemency System

The Governor and Board of Pardons are not the only parties involved in the clemency process in Pennsylvania; prosecutors also play an important role. When someone applies for commutation, the Board must notify the district attorney of the county in which the petitioner was prosecuted. If the DA wishes to support or oppose a petition, he or she may appear before the Board to articulate the county's position. Soon after Thornburgh took office in 1979, the Board published a report that emphasized the importance of consulting prosecutors before a decision on recommending clemency is reached:

> The District Attorney is [] contacted for his views, as he is the chief prosecutor of the county and is responsible for the enforcement of its laws. His office has personal knowledge regarding the facts concerning the commission of the criminal act and what kind of affect [sic] this act has had on the community. Being an elected official, he should know the attitudes of the community regarding the convicted individual.[23]

Unlike the Department of Justice, prosecutors' offices generally do not promulgate guidelines for prosecutor testimony at clemency hearings.[24] It is apparent, however, that Pennsylvania prosecutors are less willing to support clemency today than in previous decades. One study examined the opinions of district attorneys and trial judges for 368 petitioners convicted of first and second degree murder who received favorable Board recommendations between 1950 and 1958.[25] The study found that district attorneys either favored or "did not oppose" clemency in 57 percent of the cases. In a three-year sample that included all sentence commutations (not limited to homicide cases), 63 percent of favorable Board recommendations were supported or unopposed by district attorneys.

Written Board recommendations show that this trend continued into the 1960s and 1970s.[26] From a sample of 228 favorable recommendations received by lifers between 1967 and 2003, prosecutors supported clemency on the record in 53.5% of the petitions. These were cases in which a prosecutor either advocated for clemency or expressly declined to oppose clemency.

Between June 1967 and May 1971, district attorneys favored or passively supported 62 of 89 successful clemency applications, or roughly 70%. But prosecutorial support for clemency petitions declined over time. Beginning in the late 1970s, support from prosecutors waned; after 1990, prosecutors rarely offered their support on record.

3.

Moving Forward: Restoring Clemency in Pennsylvania

Four decades have passed since Pennsylvania had a robust clemency system. Fortunately, there are reasons for optimism. Governor Wolf, who commuted two sentences during his first four years in office, commuted three life sentences in December 2018[27] and another in March of 2019. Having secured

22 Wes Venteicher, *Josh Shapiro driven by ambition, desire to tackle big problems*, Trib Live, Aug. 26, 2018, https://triblive.com/state/pennsylvania/14013772-74/josh-shapiro-driven-by-ambition-desire-to-tackle-big-problems.

23 Gerald A. Gillingham, Secretary of The Board of Pardons of the Commonwealth of Pennsylvania, *The Board of Pardons: Functions, Duties, Responsibilities*, (revised 1979), made available by the National Criminal Justice Reference Service.

24 Standards for Consideration of Clemency Petitions; Section 9-140.11—*Role of the Prosecuting Component in Clemency Matters*, available at https://www.justice.gov/pardon/about-office-0.

25 Marvin E. Wolfgang, *Murder, The Pardon Board, and Recommendations by Judges and District Attorneys*, 50 J. Crim. L. & Criminology 338, 342-43 (1959).

26 The state archives contain only those recommendations leading to clemency grants.

27 One of these was actually a "virtual" life sentence of 125 to 129 years for distribution of cocaine and marijuana.

a second term in office, Governor Wolf is free to exercise his clemency power without concern for reelection. Meanwhile, there seems to be interest in back-end reform among state legislators. The 2018 "Clean Slate" Bill removes barriers to housing and employment for individuals convicted of certain misdemeanors (though it does nothing to aid those who are currently incarcerated).

Clemency in Pennsylvania has new, reform-minded leaders. Voters recently elected John Fetterman as the State's 34th Lieutenant Governor, an office which comes with the responsibility of chairing the Board of Pardons. Mr. Fetterman is an unconventional politician who has expressed interest in criminal justice reform. One of his first acts was to appoint as Secretary of the Board a 38-year-old formerly incarcerated person named Brandon Flood. So far, Fetterman and Flood have emphasized the use of pardons to mitigate collateral consequences; they should extend their efforts to the commutation process.

Revitalizing clemency will require that Fetterman and Flood work effectively with the State's district attorneys, who have great influence over the Board's decision-making process. By law, prosecutors are notified whenever an individual prosecuted in their county petitions for clemency, and they are invited to appear before the Board in person or in writing to express their office's position. District attorneys should establish guidelines for line prosecutors who testify at clemency hearings.[28] Certain comments—for instance, sensational descriptions of crimes committed decades earlier—are uninformative and prejudicial. Nor is it helpful for prosecutors to speculate on an individual's rehabilitation, which is a clinical question more appropriate for psychologists. Better use of prosecutorial expertise would be to explain the influence of plea-bargaining on a petitioner's sentence or to advise how a person convicted of the same crime might be punished differently today. In 2017, for example, former Dauphin County District Attorney John Cherry supported the successful application of Tina Brosius by explaining to the Board that Brosius might have pled to third-degree murder (which does not carry a life sentence) but for a breakdown in plea negotiations.[29]

Ensuring the long-term availability of clemency for lifers will require institutional change. Legislators should consider revisiting the 1997 constitutional amendment that requires a unanimous Board recommendation for individuals serving life sentences. That policy does not improve the Board's decision-making or guarantee that individuals who receive commutations do not recidivate; instead, it makes commutation virtually inaccessible for lifers and discourages people from petitioning for clemency.

Finally, the legislature should designate a position on the Board for somebody who represents the interests of incarcerated persons and their families. Recently-appointed Board Secretary Brandon Flood brings this valuable perspective to the current Board, but he will not be in that position forever. A permanent position for a formerly incarcerated person would help shield the process from future administrative changes.

Conclusion

A healthy criminal justice system requires mechanisms for discretionary release. Pennsylvania is one of only five states that excludes all lifers from parole eligibility. The only legal mechanism for releasing these people is commutation, which has been virtually impossible to obtain since 1980. Since then, the lifer population has grown from roughly 850 to over 5,400; many have been incarcerated since youth—some for crimes not involving intentional killing. These sentences would be viewed as draconian in almost any other country.

The Board of Pardons and Governor have a broad mandate to exercise clemency. They should act on it, and should enlist the support of prosecutors and law enforcement in doing so. A sentence that once seemed appropriate may later prove excessive, either because the person sentenced has undergone positive change, or because society no longer adheres to the logic underlying the sentence originally imposed. ●

28 A useful template can be found in Title 9 of the DOJ's Justice Manual, "Role of the Prosecuting Component in Clemency Matters." Justice Manual, 9-140.111 – Role of the Prosecuting Component in Clemency Matters (added April 2018), available at https://www.justice.gov/jm/jm-9-140000-pardon-attorney.

29 Samantha Melamed, First woman lifer in 27 years up for commutation in Pennsylvania, Sept. 15, 2017, available at https://www.philly.com/philly/news/crime/woman-lifer-commutation-pennsylvania-tina-brosius-clemency-infant-drowned-20170915.html.

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Tina Brosius

Sentence: Life
Incarcerated Since: 1994
Commuted: December 2018

Tina Brosius, 43, was the first woman to receive commutation in Pennsylvania since 1990. She was convicted of first degree murder as an 18-year-old after the drowning of her infant child. According to the Philadelphia Inquirer, current District Dauphin County District Attorney Ed Marsico opposed commutation based on several factors, including that she is still within childbearing years. However, the DA who prosecuted Brosius, John Cherry (now a judge), supported her petition and explained that Brosius received a life sentence only after the breakdown of negotiations to plead to third-degree murder.

William Smith

Sentence: Life
Incarcerated Since: 1968
Commuted: March 2019

William Smith, age 77, was sentenced to first-degree under the felony murder doctrine after his accomplice to a robbery fatally shot a store owner. Smith has significant health problems. He initially failed to receive the Board's unanimous approval after Attorney General Josh Shapiro cast the lone dissenting vote. Shapiro changed his position at a rehearing six months later, after Philadelphia District Attorney stated his office no longer opposed clemency.