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#### Recommended Citation

Regina Austin, The Saga of Reginald McFadden—"Pennsylvania's Willie Horton" and the Commutation of Life Sentence in the Commonwealth: Part I, 112 J. CRIM. L. & CRIMINOLOGY ONLINE 61 (2022).

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

REGINA AUSTIN\*

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## INTRODUCTION

Reginald McFadden is Pennsylvania’s Willie Horton, but worse!  
Willie Horton is the Black Massachusetts lifer who sank the fortunes of  
1988 Democratic presidential nominee Governor Michael Dukakis. On his

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\* William A. Schnader Professor of Law; Director, Penn Program on Documentaries & the Law. The author would like to thank Joan Porter, Steve Blackburn, David DiGuglielmo, Ann Schwartzman, Joshua Dubler, Douglas Hollis, Yusef Jone, David M. Butts, Andrew Filkowsky, Aaron McWilliams and the staff of the Pennsylvania State Archives, Robert Rolle, Raymond Miller, and the participants in the McFadden Project.

tenth weekend furlough,<sup>1</sup> Horton absconded and wound up in Maryland, where he raped a White woman, assaulted her fiancé, and made off with the man's car.<sup>2</sup> Governor Dukakis did not create the furlough program but supported it. Horton's crimes were nonetheless used against Dukakis first by Democratic presidential candidate Al Gore and then by Lee Atwater, the political operative, and George H.W. Bush, the Republican nominee for president. Included in the independent PAC-sponsored political ad "Weekend Passes," Horton's wild-looking photograph came to personify the threat Black criminals posed to law-abiding White America.<sup>3</sup> Even "Willie" "play[ed] on racial stereotypes: big, ugly, dumb, violent, [B]lack"—according to Horton himself, whose given name is William.<sup>4</sup> Now in his late 60s, Horton remains incarcerated in Maryland.

Reginald McFadden is the Black Pennsylvania juvenile lifer whose 1994 commutation sank the political ambitions of Lieutenant Governor Mark Singel. McFadden was convicted of the 1969 murder of Sonia Rosenbaum, an elderly Philadelphia woman, and was sentenced to life without the possibility of parole (or "LWOP"). In Pennsylvania, a person serving an LWOP sentence can only achieve release from prison through death or commutation of her or his sentence to life with the possibility of parole.<sup>5</sup> In 1992, McFadden received a recommendation of commutation by a 4-1 vote of the Board of Pardons, with the Board's chair, Mark Singel, joining the majority. After a delay of almost two years, Governor Robert Casey approved

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<sup>1</sup> At the time, more than 40 states and the District of Columbia maintained furlough programs that allowed incarcerated persons, even lifers, to leave prison daily or for short periods to work or to establish or maintain relationships in furtherance of their rehabilitation. T.R. Reid, *Most States Allow Furloughs from Prison*, WASH. POST (June 24, 1988), <https://www.washingtonpost.com/archive/politics/1988/06/24/most-states-allow-furloughs-from-prison/ad22836e-111b-4f09-aa6d-6651d2e9a04e/> [<https://perma.cc/WBS3-SPEQ>].

<sup>2</sup> Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, MARSHALL PROJECT (May 13, 2015, 6:37 PM), <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited> [<https://perma.cc/JA3D-UQMA>].

<sup>3</sup> Horton maintains the photo was taken after he had spent several weeks in solitary confinement, while he was recovering from gunshot wounds and multiple surgeries. *Id.*

<sup>4</sup> Jeffrey M. Elliot, *The "Willie" Horton Nobody Knows*, NATION, Aug. 23, 1993, at 204.

<sup>5</sup> See PA. CONST. art. IV, § 9. In Pennsylvania, the parole board's power expressly does not extend to persons sentenced to life imprisonment. 61 PA. STAT. AND CONS. STAT. § 331.21 (West 2008) (repealed 2009). In addition, parole eligibility is triggered when a person has served her or his minimum sentence. *Id.* A determinant life sentence which does not specify a minimum term is a life sentence without the possibility of parole or "LWOP." A person serving an LWOP sentence is only eligible for parole if her or his sentence is commuted to life with the possibility of parole upon the recommendation of the Board of Pardons and the order of the governor pursuant to Article IV, § 9 of the Pennsylvania Constitution. See PA. CONST. art. IV, § 9; Mark Rowan & Brian S. Kane, *Life Means Life, Maybe? An Analysis of Pennsylvania's Policy Toward Lifers*, 30 DUQ. L. REV. 661, 675 (1992).

the commutation of McFadden's sentence. In 1994, he was released to serve out his parole in New York State without spending any time in a transitional or community corrections facility as the Board of Pardons and the Governor expected. McFadden, then forty-one years old, had not lived outside of a correctional institution since he was sixteen. Within a matter of three months, McFadden had killed two people, raped and kidnapped a third, and allegedly murdered a fourth.<sup>6</sup> He remains imprisoned in New York State.

In that same year, Mark Singel became the Democratic nominee for Pennsylvania's governor. His opponent, Republican U.S. Congressman Tom Ridge, seized on Singel's vote in favor of McFadden. The Democratic frontrunner slumped in the polls. Ridge campaigned on a "life means life" platform and won by over 200,000 votes. As predicted, McFadden proved to be Singel's "Willie Horton."<sup>7</sup>

Singel's defeat and Ridge's election were catastrophic for lifers in Pennsylvania. The conditions of their incarceration were harshened and their hopes of release through commutation dashed.<sup>8</sup> Moreover, Republicans achieved changes in the composition and procedures of the Board of Pardons through an amendment of the state constitution that was approved by popular referendum.<sup>9</sup> Foremost among them was the provision that commutation of life sentences requires a unanimous vote of the Board.<sup>10</sup> Thus, any board member has the unilateral power to veto an applicant.

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<sup>6</sup> Marlene Aig, *24 Years, A Convict, He Played the System*, PITTSBURG POST-GAZETTE, May 30, 1995, at C-1.

<sup>7</sup> See Mario F. Cattabiani & Megan O'Matz, *McFadden Could Become Singel's Willie Horton*, MORNING CALL (Oct. 16, 1994), <https://www.mcall.com/news/mc-xpm-1994-10-16-3010884-story.html> [<https://perma.cc/5NH8-UBZZ>].

<sup>8</sup> For example, at SCI Graterford, lifers who had lived in a separate structure located on the prison campus that was known as the "Outside Services Unit" or "OSU" were brought back within the walls. JOSHUA DUBLER, *DOWN IN THE CHAPEL: RELIGIOUS LIFE IN AN AMERICAN PRISON* 69 (2013) (an ethnographic study of religious life at a Pennsylvania maximum-security facility). The OSU consisted of a farm, a dairy, and a powerhouse. In October of 1995, Graterford was raided by state police. Residents were strip searched, cells and the mosques were ransacked, employees were fired, and almost two dozen residents, primarily community leaders, were transferred. *Id.* at 69–70. See Part II.A for discussion of the Graterford riot (forthcoming Feb. 2022).

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

<sup>10</sup> The Pennsylvania Constitution now provides that, "in the case of a sentence of death or life imprisonment," no pardon shall be granted except "on the unanimous recommendation in writing of the Board of Pardons, after full hearing in open session, upon due public notice." PA. CONST., art. IV, § 9.

Between the start of Governor Ridge's administration in 1995 through August 2, 2021, only forty-four lifers have had their sentences commuted, thirty-eight of them by the current second-term governor, Tom Wolf.<sup>11</sup> In the 25 years before 1995, Pennsylvania governors commuted a total of 285 life sentences.<sup>12</sup> The recidivism rate for freed lifers has been quite low.<sup>13</sup> Even after the enactment of reforms intended to address mistakes made in McFadden's case, the state's foremost elected public officials who contemplate running for office again, i.e., the governor, lieutenant governor and attorney general, have been extremely reluctant to risk allowing rehabilitated lifers to be released from prison through commutation accompanied by lifetime parole.<sup>14</sup> The unanimity requirement eliminated the possibility that more than a handful of lifers will obtain commutation. Decades after McFadden's crime spree, he is still mentioned in news articles about the commutation of LWOP sentences in Pennsylvania and remains a specter hovering over the process.<sup>15</sup> The "Willie Horton Effect" lives on in Pennsylvania.

The impact of McFadden's commutation will only be reduced when we know more about what happened in his case, why it happened, and whether

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<sup>11</sup> PA. BD. OF PARDONS, COMMUTATION OF LIFE SENTENCES (1971 - Present), <https://www.bop.pa.gov/Statistics/Pages/Commutation-of-Life-Sentences.aspx> [<https://perma.cc/22GD-HFSF>] (last updated Aug. 2, 2021).

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

<sup>13</sup> See J.J. Prescott, Benjamin Pyle & Sonja B. Starr, *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1669, 1670 (2020) (finding that nearly all studies found the repeat-homicide rates to be at or below 1%); *id.* at 1697–98 n.233 (concluding that, subject to variations as to time, place, and method, "in every study, the vast majority (usually more than 99%) of those convicted of homicide do not commit another homicide upon release"); see also JUST. POL'Y INST., *THE UNGERS, 5 YEARS AND COUNTING* 17 (2018) (reporting a recidivism rate of 3% for a group of roughly 200 parole-eligible lifers whose average age was 64 and whose average length of incarceration was 39 years freed because of an erroneous jury instruction after being denied parole multiple times); Samantha Melamed, *200 Elderly Lifers Got Out of Prison En Masse. Here's What Happened Next.*, PHILA. INQUIRER (Dec. 12, 2018), <https://www.inquirer.com/news/juvenile-lifers-sb-parole-recidivism-mass-incarceration-20181212.html> [<https://perma.cc/LB8U-4TQJ>] (suggesting that the experience of the Ungers should be instructional for reform in Pennsylvania).

<sup>14</sup> See P.S. Ruckman Jr., *Preparing the Pardon Power for the 21st Century*, 12 U. ST. THOMAS L.J. 446, 463 (2016) (reasoning that Willie Horton teaches executives that there is little advantage and the possibility of enormous negative consequences to exercising their pardoning power).

<sup>15</sup> See, e.g., The Why, *A Narrow Path to Freedom: Why Commutations for Pa. Lifers Are Rare*, WHY (Mar. 20, 2019), <https://why.org/episodes/pas-narrow-path-to-freedom/> [<https://perma.cc/6T5J-AJ59>]. For Pennsylvania lifers' perspective on the commutation process prior to the election of Lieutenant Governor Fetterman, see University of Pennsylvania Carey Law School, *Second Looks, Second Chances*, YOUTUBE (Oct. 26, 2017), [https://www.youtube.com/watch?v=khWB6\\_hThOw](https://www.youtube.com/watch?v=khWB6_hThOw) [<https://perma.cc/8GD3-JHJM>].

the odds of it happening again are meaningfully reduced. A seminal article in the *New York Times*, written by Joseph Berger in 1995, concluded that Reginald McFadden's release was attributable to "fatal misjudgments of Mr. McFadden's character, bureaucratic errors and fundamental flaws in Pennsylvania's pardons process."<sup>16</sup> While McFadden is primarily to blame for his post-commutation crimes, it is important to consider the role that the Pennsylvania Department of Corrections, the Board of Pardons, and the Board of Probation and Parole had in the tragedy. If Berger's conclusions are correct, then the burden of McFadden's disastrous commutation should not be borne primarily by Pennsylvania's lifer population in what amounts to a misguided notion of collective responsibility.

The saga of the commutation of Reginald McFadden is a tortuous story of blunders, coincidences, and numerous instances of governmental officials tempting fate. It has the makings of a Serial true-crime podcast. In states throughout the country, there are lifers who are unfairly paying the price for the actions of one person who should never have had her or his life sentence commuted. Challenging and demystifying the specter conjured up by the mere mention of McFadden's name should support restoring vigor to the commutation process which was intended to permit the merciful release of rehabilitated lifers otherwise doomed to die in prison.

This is the first in series of two essays that will explore Reginald McFadden's commutation. This Part is devoted to a chronological discussion of the events surrounding his release and includes an analysis of the weaknesses in the pardon process, bureaucratic mistakes that affected the terms and conditions of McFadden's release, and executive and legislative reactions that sealed the fate of the lifers McFadden left behind. The second Part will consider whether, in hindsight, there was any sound basis for McFadden's release given the policy grounds for commutations. The final Part will describe the ample indications in McFadden's record that his sentence should not have been commuted, the changes in the Pennsylvania's commutation process that make it unlike that the mistakes that led to his release will reoccur, and the further reforms required to restore confidence and efficacy to the commutation process.

The analysis that follows draws on facts available in the public record and documents the author was able to obtain from the Pennsylvania State Archives in Harrisburg or through Right-to-Know requests. Many of the documents related to the bureaucratic actions connected with McFadden's commutation were, are, or should be in the possession of the Pennsylvania

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<sup>16</sup> Joseph Berger, *Accused Serial Killer and 92 Days of Freedom*, N.Y. TIMES, Apr. 4, 1995, at B1.

Department of Corrections (referred to as “PDOC”), the Board of Pardons, and the Pennsylvania Board of Probation and Parole (referred to herein as “PBPP”). However, access to these documents is governed by the Pennsylvania Right to Know Law (referred to herein as “RTKL”) which contains extensive exemptions for materials that are private or confidential and privileged, relate to investigations of law enforcement or related agencies, threaten the security of persons identified in the information, or no longer exist.<sup>17</sup> Because of these exemptions, the government documents on which this series of essays draws generally relate to public actions and public statements made by public officials. They provide little evidence of the sources or motivations underlying the mistaken judgments made by Pennsylvania officials about McFadden’s character or his psychological wellbeing. Without complete access to McFadden’s PDOC, pardon board, and parole board files, it is not feasible to determine a complete accounting of the fateful conclusion of state authorities that he merited commutation, immediate release from prison, and transfer to New York.

Moreover, no account of McFadden’s commutation would be complete without input from former and current lifers who served time with him and encountered him during their incarceration. I have enlisted a small network of communicants (with whom I have spoken on the phone or in person) and correspondents (with whom I have exchanged letters, written answers to a set of questions, and emails) in a collaboration that I call the *McFadden Project*.<sup>18</sup> The Project does not satisfy the criteria for a sound ethnographic study; that may come later. The methods of recruiting lifers for the Project, the means of communicating with them, and opportunities for evaluating the information they have shared are restricted by the incarceration of most of the participants. Where possible, facts provided have been verified by consulting other sources.

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

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<sup>17</sup> 65 PA. CONS. STAT. §§ 67.101 et seq. (West 2008).

<sup>18</sup> The Participants in the McFadden Project are Wayne Battle, Francis Boyd, Ezra Bozeman, Freddy Butler, Charles Coley, Scott C. Davis, Calvin Logan, Kevin Mines, Marie Scott, James Taylor, Hugh Williams, Floyd Wilson, and Andre Wright. Their written correspondence and notes of conversations with the author are on file with the author.

as it existed at that time and since. The author takes responsibility for any inaccuracies in representing the views of Project participants.

In keeping with the nature of the documentation available, this Essay divides its analysis of the commutation of Reginald McFadden into two Sections. The first Section of Part II will consider possible explanations for the Department of Corrections' support of his release, including the institutional biases that likely influenced its judgment in favor of McFadden's commutation. This section of the Essay is more speculative than Part I. The assessment of the PDOC's actions will benefit from the opinions of some of the lifers who interacted with McFadden and followed his career as fellow Blacks, urbanites, and adherents of the Muslim faith. The section will end with a discussion of whether another McFadden is likely considering the constitutional and legislative changes in the commutation process and changes in correctional practice and the environment of PDOC facilities. The series will end with a consideration of structural reforms in the commutation process that address the "Willie Horton Effect," that is the reluctance of high-level elected officials and persons likely to run for office to support commutations.

## I. THE BIZARRE EVENTS SURROUNDING THE COMMUTATION OF REGINALD MCFADDEN

### A. MCFADDEN'S LONG BUT EVENTUAL PATH TO COMMUTATION

According to his own account, Reginald McFadden's involvement with the criminal justice system began at age 12.<sup>19</sup> He was arrested sixteen to eighteen times over the next four years.<sup>20</sup> On December 7, 1969, at the age of 16 years, he and three other adolescents broke into the house of Sonia Rosenbaum, age 60, with the intent of committing a burglary.<sup>21</sup> Unexpectedly finding her at home, they tied her down to her bed naked, gagged her with a washcloth secured with adhesive tape, and pinned her legs further with a desk.<sup>22</sup> Consequently, she suffocated.

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<sup>19</sup> Reginald McFadden, Application for Clemency, submitted to the Pa. Board of Pardons, No. B-998, Aug. Session 1992 (Feb. 28, 1992) at 4 (on file with author) [hereinafter McFadden Application for Clemency].

<sup>20</sup> *Id.*

<sup>21</sup> Commonwealth v. McFadden, 369 A.2d 1156, 1157 (Pa. 1977).

<sup>22</sup> Frank Dougherty & Ed Griffenberg, *3 Teen Boys Charged in Slaying of Wynnefield Woman*, PHILA. DAILY NEWS, Dec. 11, 1969, at 4; Acel Moore & John Clancy, *3 Youths Arraigned in Strangulation of Wynnefield Woman*, PHILA. INQUIRER, Dec. 13, 1969, at 21 (providing details of the murder of Mrs. Rosenbaum).

McFadden was arrested on December 11, 1969 and held for 22.5 hours before being arraigned.<sup>23</sup> During that time he confessed verbally and in writing.<sup>24</sup> He was arraigned on December 12, 1969 (a date that will become important 24 years later) and charged with first-degree murder, burglary, aggravated robbery, larceny, and conspiracy.<sup>25</sup> McFadden was tried twice. He won a new trial after the judge concluded that use of his written confession was reversible error.<sup>26</sup> A second trial resulted in a conviction on all charges and a sentence of LWOP for the murder and concurrent sentences for the rest.<sup>27</sup> On appeal, the Pennsylvania Supreme Court ruled that, despite his age and his having ingested heroin, the oral statements he made less than an hour after his interview began were “not the product of illegal police conduct” and therefore were “voluntary.”<sup>28</sup>

The supreme court denied McFadden’s petition for a rehearing in March of 1977.<sup>29</sup> Around the same time, his quest for commutation began. Between 1977 and 1994, he filed a total of eight applications for commutation, secured a positive recommendation from the Board of Pardons four times, and was turned down by governors three times before finally being granted commutation.<sup>30</sup>

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<sup>23</sup> *McFadden*, 369 A.2d at 1159.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1157–59.

<sup>26</sup> *Id.* at 1157 n.1.

<sup>27</sup> *Id.* at 1157. In his pardon petition, McFadden maintained that he wanted to plead guilty after he was awarded a second trial, but the district attorney only offered a deal of 20 to 40 years. McFadden Application for Clemency, *supra* note 19, at 1. According to McFadden’s clemency application, his three co-defendants who plead guilty to second-degree murder were sentenced to indeterminate sentences with a maximum of 20 years, which made them eligible for parole. *Id.*

<sup>28</sup> *McFadden*, 369 A.2d. at 1161.

<sup>29</sup> *Id.* at 1156.

<sup>30</sup> The record of McFadden’s quest for commutation is as follows:

Denied by the Board on October 20, 1977.

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

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

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

Denied by the Board on June 28, 1984.

Denied by the Board on October 10, 1985.

Denied by the Board on December 17, 1987.

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

Pa. Historical & Museum Comm., Div. of Archival & Rec. Mgmt. Serv., *Office of Lieutenant Governor, Bd. of Pardons Minutes 1974–1999*, <https://digitalarchives.powerlibrary.org/psa/>

On August 28, 1992, the Board of Pardons approved McFadden's eighth application for commutation by a 4-1 vote.<sup>31</sup> In a separate statement, Attorney General Ernie D. Preate dissented.<sup>32</sup> He characterized Mrs. Rosenbaum's death as "agonizing" and "the senseless taking of a human life."<sup>33</sup> He noted the vehement opposition of the victim's family and the Philadelphia District Attorney whose representative expressed a sentiment with which Preate agreed, i.e., "that we remember the victim of this horrible crime and continue to express society's outrage at those who prey on our elderly."<sup>34</sup> A majority vote of 4-1, however, was sufficient to get McFadden to the next level of review.

From the Board of Pardons, his file went to the Governor's Counsel. A memorandum to Governor Casey from Richard D. Spiegelman, Executive Deputy General Counsel, dated May 28, 1993 (the "Spiegelman Memorandum"), laid out the case for approval of McFadden's application.<sup>35</sup> One paragraph in his Memorandum is worth quoting in its entirety because it provides insight into McFadden's history in the prison system and perhaps his character:

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

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islandora/object/psa%3Aolgbpm [https://perma.cc/A764-R8NH] [hereinafter Board of Pardons Minutes, 1974–1999]. The drastic reduction in the number of commutations awarded lifers began with the tenure of Republican Governor Thornburgh, a former prosecutor who went on to become the Attorney General of the United States. *The Demise of Clemency for Lifers in Pennsylvania*, N.Y.U. CTR. ON ADMIN. CRIM. L., 4–6 (2019), [https://www.law.nyu.edu/sites/default/files/CACL%20Clemency-PA\\_Final%20\(1\).pdf](https://www.law.nyu.edu/sites/default/files/CACL%20Clemency-PA_Final%20(1).pdf) [https://perma.cc/B759-LRQM] (accounting for the commutation record of Governor Thornburgh); PA. BOARD OF PARDONS, *supra* note 11.

<sup>31</sup> Board of Pardons Minutes, 1974–1999, *supra* note 30.

<sup>32</sup> Dissent to Commutation Recommendation, Application of Reginald McFadden from Attorney General Ernest D. Preate, Jr. (Sept. 18, 1992) (on file with author).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*; see also Tim Reeves, *Release of Killer Becomes Election Issue*, PITTSBURGH POST-GAZETTE, Oct. 8, 1994, at A1.

<sup>35</sup> Memorandum from Richard D. Spiegelman, Executive Deputy General Counsel to Governor Robert P. Casey, on the Commutation Request of Reginald McFadden (May 28, 1993), available at <https://bit.ly/2Zck4pJ> [hereinafter Spiegelman Memorandum].

his lifestyle. He stresses that he has embraced a non-violent humanitarian belief system, which has been at odds with the “inmate code” and has placed his life in considerable danger.<sup>36</sup>

It appears that McFadden was transferred from facility to facility apparently for his own protection.<sup>37</sup> The reference to “social problems with other inmates” suggests that he was not highly regarded by his peers whose values placed McFadden in such physical jeopardy that he had to relocate.<sup>38</sup> McFadden had, however, proven himself to be useful to prison authorities on at least two occasions by providing information about fellow residents that related to the safety and security of correction officers and staff. This likely provoked scorn from his fellow residents but approval from PDOC staff in a position to supply favorable recommendations in support of McFadden’s commutation.<sup>39</sup>

The Spiegelman Memorandum outlines mitigating evidence that casts McFadden’s involvement in the murder of Sonia Rosenbaum in a sympathetic light. McFadden maintained that he was abused as a child and was using drugs at the time of the offense.<sup>40</sup> Mrs. Rosenbaum’s death “was not intentional.”<sup>41</sup> Furthermore, the judge who sentenced McFadden and supported his application noted that McFadden’s accomplices had been released.<sup>42</sup>

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<sup>36</sup> *Id.* at 2.

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

<sup>38</sup> McFadden’s Moves Report confirms that he served time at SCI Pittsburgh (Western State), SCI Dallas, SCI Graterford, SCI Rockview, SCI Camp Hill, USP Lewisburg (and from there apparently to Leavenworth, KS), SCI Camp Hill (again), and SCI Rockview (again). He also served stints in the Allegheny County jail and the Philadelphia prison system in connection with “court matters” and a “previous county sentence.” Pa. Dep’t of Corr., Moves Report for Reginald McFadden, AF4784 (May 14, 2019, 3:07 PM) (on file with author); e-mail from Andrew Filkosky to author (Sept. 24, 2019, 8:36 AM) (on file with author) (providing explanation of codes used in McFadden’s Moves Report in response to RTKL request 0949-19). In seeking commutation, McFadden had the support of the staff at SCI Rockview and the Commissioner of Corrections. Spiegelman Memorandum, *supra* note 35, at 2.

<sup>39</sup> In seeking commutation, McFadden had the support of the staff at SCI Rockview and the Commissioner of Corrections. Spiegelman Memorandum, *supra* note 35, at 3.

<sup>40</sup> *Id.* at 1.

<sup>41</sup> *Id.* at 3.

<sup>42</sup> *Id.* at 2. It should be noted that McFadden’s accomplices were convicted of second degree or felony murder which at that time in Pennsylvania did not carry a mandatory minimum of life without the possibility of parole; it does today. 18 PA. CONS. STAT. § 1102(b) (2018).

B. GOVERNOR CASEY'S EXCUSABLE DELAY IN ACTING ON  
MCFADDEN'S FILE: HE WAS DYING

By mid-June 1993, the Board of Pardons' August 28, 1992 recommendation in favor of McFadden's commutation had not been acted upon and would not be for almost another year. The delay complicated McFadden's eventual release. The New York media particularly criticized Casey for his lack of prompt action, but it was likely attributable to his medical condition, because he was extremely ill, if not dying, at the time.<sup>43</sup> In June of 1993, Governor Casey was told by his doctors that he immediately needed both a liver and a heart transplant because of organ damage caused by a hereditary liver disease.<sup>44</sup>

After less than twenty-four hours on the transplant waiting list, Casey was in surgery.<sup>45</sup> The donor was Michael Lucas, a 34-year-old Black man from a depressed Pennsylvania community who was beaten to death by roughly one dozen gang members who erroneously believed that he had stolen drugs from them.<sup>46</sup>

After Casey returned to work just before Christmas 1993, the Office of the General Counsel sent Casey a second memorandum regarding McFadden, which was identical to the first but dated January 11, 1994.<sup>47</sup> Casey granted McFadden commutation on March 15, 1994, nearly 18 months after the Board of Pardons had approved his application, and by which time McFadden had completed his newly imposed 24-year minimum sentence.<sup>48</sup>

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<sup>43</sup> See Berger, *supra* note 16; Andrew Smith, *An Unpardonable Oversight? What Went Wrong with McFadden Case*, *NEWSDAY*, Oct. 21, 1994, at A7, [hereinafter Smith, *An Unpardonable Oversight*].

<sup>44</sup> Susan FitzGerald & Robert Zausner, *He Knew He Might Need New Heart*, *PHILA. INQUIRER*, June 15, 1993, at A1. Governor Casey suffered from amyloidosis, a condition that produces the abnormal buildup of amyloid protein in the tissues and organs. *Id.*

<sup>45</sup> Boyce Rensberger, *Pennsylvania's Gov. Casey Has Heart-Liver Transplant*, *WASH. POST*, June 15, 1993, at A1; see also Don Colburn, *Gov. Casey's Quick Double Transplant: How Did He Jump to the Top of the Waiting List?*, *WASH. POST*, June 22, 1993, at 8 (elaborating on complicated and disparate rules used to determine priority on organ transplant waiting lists).

<sup>46</sup> Dale Russakoff, *The Heart That Didn't Die: One Evening, Mike Lucas Lay Beaten on the Ground. A Week Later, the Governor Was Saved*, *WASH. POST*, Aug. 9, 1993, at B1, B6 (describing Lucas as "a man marked by every scourge of his times—violence, drugs, joblessness, racism").

<sup>47</sup> Memorandum from Gregory E. Dunlap, Executive Deputy General Counsel, and Brian Gottlieb, Deputy General Counsel, to Governor Robert P. Casey, on the Commutation Request of Reginald McFadden (Jan. 11, 1994) (on file with author).

<sup>48</sup> Letter from Governor Robert P. Casey to Richard D. Spiegelman, General Counsel, authorizing that the Board of Pardons be advised of grant of requests (Mar. 15, 1994). Board of Pardons Minutes, 1974–1999, *supra* note 30.

The import of the governor's action was unclear because McFadden was supposed to spend all or part of two years under PDOC supervision in a transitional or community corrections facility prior to being commuted and released on lifetime parole.

### C. HOW THREE PENNSYLVANIA AGENCIES BOTCHED MCFADDEN'S RELEASE

In the Executive Summary regarding Reginald McFadden submitted on April 20, 1992, to Lieutenant Governor Singel, the Commissioner of the Department of Correction recommended "a post-dated minimum set two years in the future [which] will allow [Mr. McFadden] to be returned to the community through the auspices of a Community Corrections Center which would help him to readjust to the community which he has been removed from since he was 16 years of age."<sup>49</sup> The memorandum also stated that "he poses little risk to the community at this time."<sup>50</sup>

According to the minutes, the Board of Pardons met and approved the commutation of Reginald McFadden on August 28, 1992.<sup>51</sup> The record of hearing results attached to the minutes indicates that the Board recommended a minimum sentence of 24 years.<sup>52</sup>

In a formal document bearing the caption *In Re Application of McFadden, Reginald, No. B-998, August Session, 1992*, the Board of Pardons recommended that "the sentence of Reginald McFadden . . . be commuted from LIFE IMPRISONMENT to a term of imprisonment of 24 Years to Life expiring on December 12, 1993 (computed from December 12, 1969)."<sup>53</sup> It

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<sup>49</sup> Memorandum from Joseph D. Lehman, Comm'r to Hon. Mark S. Singel, Chairman of the Bd. of Pardons (Apr. 20, 1992) (on file with author).

<sup>50</sup> *Id.*

<sup>51</sup> Minutes of the Bd. of Pardons for the August 1992 Session, in Board of Pardons Minutes, 1974–1999, *supra* note 30, at 791–92.

<sup>52</sup> Pa. Bd. of Pardons Public Hearing Results for August 27, 1992, in Board of Pardons Minutes, 1974–1999, *supra* note 30, at 793. John A. Lord, Jr., who was Secretary of the Board of Pardons at the time, was responsible for completing the documents necessary to execute the Board's recommendations. He retired from the Board in March of 1995 after the election of Governor Ridge and died of respiratory failure in April of that year. *Obituary of John A. Lord, Jr.*, PHILA. INQUIRER, Apr. 27, 1995, at D11. It was reported that "[d]uring [the] gubernatorial race, Lord was besieged by reporters after paroled killer Reginald McFadden was arrested on rape and murder charges in New York" and that "he supervised the Pennsylvania Board of Pardons through a crisis." *Ex-Pardons Board Official Dies at 36*, MORNING CALL, Apr. 22, 1995, at 15.

<sup>53</sup> Pardon Board Recommendation of Reginald McFadden, No. B-998, Aug. Session 1992 (on file with author) (emphasis in original). The document, which is undated, bears the signature of the four Board Members who voted in favor of commutation and the signature of approval of Governor Casey.

was further recommended that the commutation be subject to a post-dated minimum.<sup>54</sup>

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

I have commuted the sentence of imprisonment of the said Reginald McFadden from life imprisonment to the minimum term of 24 Years to Life expiring on December 12, 1993 so that if he be released on parole in accordance with law which shall remain on parole the balance of his natural life unless returned to the correctional institution for violation of parole and that sentence of imprisonment is thereby commuted accordingly, *so that he may be eligible for pre-release consideration at the discretion of the Dept. of Corrections.*<sup>55</sup>

The Charter is a pre-printed form with blanks for information specific to the person being pardoned, such as name, dates, and conditions of the pardon. The italicized and underlined data filled in blanks on the form. The italicized data that is not underlined was typed at the end of the printed text.

The language in the documents from the Board of Pardons and the Governor's Office do not clearly indicate the course of action the PDOC and the Board of Probation and Parole were supposed to take.<sup>56</sup> The documents are ambiguous about the relationship between the pre-release period and the length and expiration date of the minimum sentence. They do not specify how the two-year pre-release period (during which McFadden was expected to be housed in a community corrections facility) and the expiration of the 24-year minimum sentence (when McFadden became eligible for parole) were to be reconciled. The confusion was caused in part by the delays attributable to the Governor's illness. Was McFadden supposed to serve the two-year pre-release period after the Governor signed his Charter and before being released, whatever his new minimum sentence might be? Alternatively, was McFadden to be released upon completion of his minimum sentence, whether he had served any time in a pre-release halfway house or community corrections facility?

On June 30, 1994, the Pennsylvania Board of Probation and Parole paroled McFadden "to the Intensive Supervision Diversion Release Program."<sup>57</sup> McFadden had to "abide by all the [ISDR Program's]

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<sup>54</sup> *Id.* at 2.

<sup>55</sup> GOVERNOR ROBERT CASEY, CHARTER OF CLEMENCY ISSUED TO REGINALD MCFADDEN (March 15, 1994).

<sup>56</sup> See Berger, *supra* note 16. It is not clear whether the parole officials conferred with the PDOC or the Board of Pardons before making their decision.

<sup>57</sup> Pa. Bd. of Probation and Parole, Notice of Bd. Decision in the Case of Reginald McFadden, Parole No. 9646J, (Recorded June 23, 1994, Issued June 30, 1994) (on file with author).

supervision requirements.”<sup>58</sup> According to a directive issued by the chairman of the Parole Board in September of 1991, the program was “designed for inmates who are considered high risk at the time of parole.”<sup>59</sup>

But McFadden was never subject to the level of oversight required by the Pennsylvania parole authorities because he had requested that his supervision be transferred to the New York State Division of Parole. Under the terms of the Interstate Compact for the Supervision of Parolees and Probationers, he would receive only the level of supervision similarly situated New York State parolees would receive.<sup>60</sup> Pennsylvania authorities confirmed that McFadden would have support and transferred his supervision to New York.<sup>61</sup> On July 7, 1994, McFadden was released on parole.<sup>62</sup> At that time, he was 41 years old and had lived inside a Pennsylvania correctional institution for 25 years—since he was 16.<sup>63</sup>

Explanations for the decision of the Pennsylvania Parole Board to release McFadden and transfer him to New York State are confidential and undiscoverable through Right-to-Know Law requests. In one of the many bizarre twists in the saga of Reginald McFadden’s commutation, members of the Pennsylvania Senate were later able to inquire into New York’s reasons for agreeing to his transfer when Martin Horn, Director of the New York State Division of Parole, appeared at confirmation hearings in 1995 as the nominee for the position of Commissioner of the Pennsylvania Department of Corrections.<sup>64</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> Pa. Bd. of Probation and Parole, Chairman’s Directive 91-3, Intensive Supervision Diversion Program (Sept. 6, 1991), Restructuring of the Special Intensive Supervision (SISP), and the Special Early Release Programs (SERP) (Sept. 6, 1991) (on file with author).

<sup>60</sup> Interstate Compact for the Supervision of Parolees and Probationers, § 61 PA. CONS. STAT. § 321 (repealed 2002). See Michael L. Buenger & Richard L. Masters, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, 9 ROGER WILLIAMS U. L. REV. 71 (2003) (describing problems with the ICPP and the approach of its replacement, the Interstate Compact for Adult Offender Supervision or ICAOS). Under the terms of the then-prevailing compact for interstate transfer of parolee supervision, New York was not obligated to provide more rigorous monitoring for out-of-staters than it provided its own parolees. New York generally did not send long-serving persons to halfway houses if they had a job and a place to live. Andrew Smith, *Prison Error Officials: Suspect Needed Halfway House*, NEWSDAY, Oct. 20, 1994, at A7.

<sup>61</sup> Berger, *supra* note 16.

<sup>62</sup> McFadden Moves Report, *supra* note 38.

<sup>63</sup> McFadden’s clemency petition indicates that he was born on February 23, 1953. McFadden Application for Clemency, *supra* note 19, at 1. It should be noted that although McFadden did not spend any time in a halfway house or similar facility, he did work in a nursery beyond the prison with minimum supervision for two years. See Smith, *An Unpardonable Oversight*, *supra* note 41.

<sup>64</sup> See *infra* notes 87–92 and accompanying text.

D. INADEQUATE SUPERVISION AND THE HAVOC MCFADDEN  
WROUGHT IN 92 DAYS OF FREEDOM

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

McFadden converted to Islam in prison.<sup>65</sup> He garnered the backing of Charles Campbell, the 71-year-old owner of a small Manhattan Islamic bookstore from which McFadden ordered books; Campbell supported McFadden's campaign to win commutation for over 16 years.<sup>66</sup> Campbell, retired schoolteacher Paul Ehrlich, his wife Isobel, and others were members of a loose-knit Shia Islamic group known as Irfan (which means knowledge in Arabic),<sup>67</sup> or Irfan the Way of God,<sup>68</sup> which was interested in the rehabilitation of prisoners. Members of the group corresponded with McFadden, talked with him on the phone, and traveled to Pennsylvania to meet him.<sup>69</sup> They were convinced of the sincerity of his conversion to Islam and his rehabilitation. They pledged to support him through his reentry. However, they had not expected that he would be sent to New York directly from prison without spending any time in a pre-release facility. His supporters found him an apartment,<sup>70</sup> and someone gave him "a beat up 1977 Cadillac, which required expensive repairs, [and] put him under financial pressure."<sup>71</sup> He worked in Campbell's bookstore for several days but left because its small quarters felt like a prison to him; he then found work at a

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<sup>65</sup> In his application for commutation, McFadden says that he joined the Nation of Islam while housed in the Eastern State Penitentiary in Philadelphia out of fear for his own safety and "to prevent sexual harassment." McFadden Application for Clemency, *supra* note 19, at 8.

<sup>66</sup> Henry Frederick, *Man Who Befriended McFadden Says Paroled Killer Fooled Everybody*, ROCKLAND J. NEWS (N.Y.), Oct. 14, 1994, at A1 [hereinafter Frederick, *Man Who Befriended McFadden*]; Helen Peterson, *Con's Grim 2d Chance*, DAILY NEWS, Apr. 9, 1995, at 32–33.

<sup>67</sup> Berger, *supra* note 16.

<sup>68</sup> According to a newspaper report, Irfan, the Way of God, had a Palisades, New York postal address. Henry Frederick, *Ex-Convict Charged in Brutal Rape*, ROCKLAND J. NEWS, Oct. 8, 1994, at A1, A9.

<sup>69</sup> Andrew Smith, Yolanda Rodriguez & Joe Haberstroh, *Warning Signs: Pardon of Convict Raises Questions After His Arrest*, NEWSDAY, Oct. 17, 1994, at A5 [hereinafter Smith et al., *Warning Signs*].

<sup>70</sup> Frederick, *Man Who Befriended McFadden*, *supra* note 66, at A13.

<sup>71</sup> Berger, *supra* note 16, at B2.

deli.<sup>72</sup> He secured a position as a counselor at a facility for troubled youth about two weeks before he was arrested.<sup>73</sup>

Thus, instead of going to a halfway house, McFadden was, in the words of Pennsylvania Attorney General Ernie Preate, “dumped into the lap of a retired New York teacher . . . who was unprepared, and unable to handle him.”<sup>74</sup> Mr. Ehrlich said that “rehabilitating somebody into the world . . . is a job for younger and wiser people.”<sup>75</sup> His wife, Dr. Isobel Ehrlich, maintained that they did not know McFadden before he was released and had little contact with him thereafter.<sup>76</sup> “I met him and there was something I didn’t like. I saw more to him than I had seen before.”<sup>77</sup> Charles Campbell said that “he could see McFadden struggled with life on the outside, much like a stubborn teen-ager resisting parental control. . . . It was as if he went back in time once he got out of prison. ‘He was a case of arrested development – a 16-year-old in a 41-year-old’s body.’”<sup>78</sup> Thus, the well-being of New Yorkers and the hopes of Pennsylvania lifers rested in the hands of “well-intentioned but inexperienced volunteers—three of them over 65 years old.”<sup>79</sup>

McFadden’s freedom did not last long. Released on July 7, 1994, he was back in custody on October 6, 1994, only 92 days later.<sup>80</sup> In the interim, he murdered 42-year-old Robert Silk of Elmont, New York and stole his car; he raped, kidnapped, and robbed 55-year-old Jeremy Brown of South Nyack, New York; and raped and murdered 78-year-old Margaret Kierer of Floral Park, New York, stole her car and used her ATM card. McFadden was sentenced to two terms of 25-to-life for the murders and 37½ -to-75 years for

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<sup>72</sup> Frederick, *Man Who Befriended McFadden*, *supra* note 66, at A13.

<sup>73</sup> Kate Boylan, *Edwin Gould Academy Halts Felon-Hiring Program*, JOURNAL NEWS, Oct. 15, 1994, at A10; Editorial, *Killer’s Hiring Fell Through Cracks*, ROCKLAND J. NEWS, Oct. 14, 1994, at A14.

<sup>74</sup> Statement by Attorney General Ernie Preate Jr. to the Board of Pardons (Oct. 20, 1994), in Board of Pardons Minutes, 1974–1999, *supra* note 30, at 942, 947 [hereinafter Statement by Preate to Board of Pardons].

<sup>75</sup> Smith et al., *Warning Signs*, *supra* note 69.

<sup>76</sup> Berger, *supra* note 16. McFadden was also subject to supervision by New York parole officers. The New York authorities maintained that their oversight was sufficient and that their efforts were essential to his capture. Smith, *An Unpardonable Oversight*, *supra* note 39.

<sup>77</sup> Berger, *supra* note 16.

<sup>78</sup> Frederick, *Man Who Befriended McFadden*, *supra* note 66, at A13.

<sup>79</sup> Berger, *supra* note 16. Of course, McFadden was also subject to supervision by New York parole officers. The New York authorities maintained that their oversight was sufficient and that their efforts were essential to his capture. Smith, *An Unpardonable Oversight*, *supra* note 41.

<sup>80</sup> Berger, *supra* note 16.

the rape and kidnapping to run consecutively.<sup>81</sup> McFadden is now confined in Attica Correctional Facility. His earliest release date is August 2, 2084.<sup>82</sup> Because his New York convictions breached the terms of his commutation, McFadden is still subject to a life sentence in Pennsylvania for the murder of Sonia Rosenbaum. He is unlikely ever to be returned to Pennsylvania to complete that sentence.<sup>83</sup>

In addition, there was evidence linking McFadden to the murder of Dana DeMarco of Rockland County, New York, a 39-year-old artist and nomad, but he was never tried for that crime.<sup>84</sup> McFadden already had long sentences and was a difficult inmate to manage and transport, as well as a difficult defendant who represented himself in court.<sup>85</sup>

#### E. MCFADDEN SINKS “A GOOD MAN” RUNNING FOR HIGHER OFFICE AND THE LIFERS WHO WERE COUNTING ON A SHOT AT COMMUTATION

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

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<sup>81</sup> For information on Reginald McFadden, see Inmate Population Info. Search, N.Y. DEP’T CORR. & CMTY. SUPERVISION, <http://nysdoccslookup.doccs.ny.gov/GCA00P00/WIQ3/WINQ130> [<https://perma.cc/ZP3X-Q37F>] (last visited Dec. 14, 2020) (search # 95-A-6279 in DIN field).

<sup>82</sup> *Id.*

<sup>83</sup> GOVERNOR ROBERT CASEY, CHARTER OF CLEMENCY ISSUED TO REGINALD MCFADDEN (March 15, 1994).

<sup>84</sup> Joseph Berger, *Suspect in Murders Traces Troubled Past*, N.Y. TIMES, Mar. 29, 1995, at B1 (reporting on possible link between McFadden and Dana Blaise DeMarco whose body was found in a location near sites of McFadden’s other crimes); Helen Peterson, *Decomposed Body Identified as Missing Woman Artist*, 39, N.Y. DAILY NEWS, March 29, 1995, at 822 (reporting on discovery of the body of Dana DeMarco, a mile from school for troubled youth that employed McFadden); Joseph Colletti, *Opinion: A Life Remembered*, JOURNAL NEWS (Westchester County, NY), Oct. 18, 2003, at 4B (a description of Dana DeMarco, artist and musician, by her cousin); Steve Lieberman, *Mother Grieves for Children Slain in 1994, 1998*, JOURNAL NEWS (Westchester County), Jan. 16, 2000, at 8A (profiling Jo DeMarco who still hoped that McFadden would be tried for her daughter’s death despite the D.A.’s belief that McFadden’s expressed desire to take responsibility for Dana’s death was only meant to garner attention); James Walsh & Helen Peterson, *McFadden Faces Testing*, ROCKLAND JOURNAL-NEWS (White Plains, N.Y.), May 10, 1995, at 1 (reporting on competency exam ordered based on McFadden’s personal hygiene and behavior when in cell or being moved by guards).

<sup>85</sup> News accounts indicate that McFadden, as a prisoner, threw excrement at guards and blocked his toilet; as a person accused of rape, shaved his body to prevent the collection of a hair sample; and as a defendant in court, showed up for a hearing reeking after failing to bath for a month and rubbing feces in his hair. Marlene Aig, *24 Years, A Convict, He Played the System*, PITTSBURG POST-GAZETTE, May 30, 1995, at C-1.

Tom Ridge. Ridge's campaign ran a series of ads depicting Singel as soft on crime for voting to commute the sentences of lifers.<sup>86</sup> Ridge adopted the stance of "Life Means Life." He won. As Governor, he nominated Martin F. Horn to be Commissioner of the Department of Corrections and made good on the promise to convene a special legislative session on crime, which resulted in significant changes in the commutation process.

As indicated earlier, before being picked to lead the PDOC, Horn headed the New York State Division of Parole, the agency that was responsible for supervising McFadden and that played a leading role in his identification and capture. During his confirmation hearing, Martin Horn was asked about the transfer of McFadden to New York. Horn said that under the terms of the then prevailing interstate compact on the transfer of parole supervision, New York "had no choice" but "to accept supervision of McFadden, provided that he had an acceptable residence and employment program."<sup>87</sup> Acceptance of McFadden's transfer would have been mandatory if McFadden had been a resident of New York before the murder of Sonia Rosenbaum or if he had relatives in New York at the time of his parole.<sup>88</sup> McFadden had some prior connection to New York. He had been arrested and incarcerated in New York on a stolen car charge, but he was apprehended at his mother's home in Philadelphia after his mother bailed him out.<sup>89</sup> New

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<sup>86</sup> Ridge's ads were reminiscent of the Willie Horton ad produced by media consultant Larry McCarthy. Peter Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars Are Still Fresh*, N.Y. TIMES (Dec. 3, 2018), <https://www.nytimes.com/2018/12/03/us/politics/bush-willie-horton.html> [<https://perma.cc/JWL5-ZTQ8>]; see also Howard Kurtz, *Ads Use Crimes' Pain for Candidates' Gain*, WASH. POST (Nov. 2, 1994), [https://www.washingtonpost.com/archive/politics/1994/11/02/ads-use-crimes-pain-for-candidates-gain/a7e868b4-0516-4125-afa6-ad22de0551d3/?utm\\_term=.2ab05e9100e5](https://www.washingtonpost.com/archive/politics/1994/11/02/ads-use-crimes-pain-for-candidates-gain/a7e868b4-0516-4125-afa6-ad22de0551d3/?utm_term=.2ab05e9100e5) [<https://perma.cc/RVY7-6GNE>] (describing ads by gubernatorial candidates Jeb Bush, George Pataki, and Tom Ridge featuring crime victims in criticizing soft-on-crime decisions of opponents).

<sup>87</sup> Hunter T. George II, *Ridge Nominee Grilled on Parole Case*, IND. GAZETTE, Mar. 15, 1995, at 6.

<sup>88</sup> The Compact involving transfer of supervision provided that "[a] resident of the receiving state . . . is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state, and has not resided within the sending state more than six continuous months immediately preceding the commission of the offense for which he has been convicted." Interstate Compacts Concerning Parole, 61 PA. STAT. AND CONS. STAT. § 321 (West 1937) (repealed 2002); see Buenger & Masters, *supra* note 60 (describing problems with the ICPP and the approach of its replacement, the Interstate Compact for Adult Offender Supervision ("ICAOS")).

<sup>89</sup> Commonwealth v. McFadden, 369 A.2d 1156, 1157 n.3 (Pa. 1977). Around the same time in 1969, McFadden's mother was informed by Philadelphia juvenile court officers that McFadden was being sought on a bench warrant; Mrs. McFadden assumed that it was this bench warrant that brought officers to her home at 4:30 a.m. *Id.* She warned Reginald to flee, but he was caught when he jumped off the porch roof. *Id.* at 1157–58.

York, of course, would have been free to reject the transfer, although at the time acceptance of interstate transfers was “more or less taken for granted.”<sup>90</sup> Horn stood by the decisions made by the New York Bureau, including allowing McFadden to take a position working with troubled children.<sup>91</sup>

Democrats also wanted to know if, as was rumored, Horn supplied Ridge with the information about McFadden’s crimes that Ridge used successfully against Singel in the gubernatorial campaign and was being rewarded with the commissioner’s job in return. Horn said that he applied for the position on his own and was not recruited. Moreover, Horn did not know Governor Ridge or any of the Pennsylvanians involved in the hiring process. He denied that there was any connection between his nomination and McFadden.<sup>92</sup> In the absence of proof otherwise, Horn’s appointment must be chalked up to his superior credentials and coincidence.

In 1995, on his first full day in office, Governor Ridge called for the convening of a Special Session of the General Assembly on Crime,<sup>93</sup> which held public hearings that yielded a proposal to amend the Pennsylvania Constitution to put a victim advocate on the Board of Pardons and require a unanimous vote for commutation of life sentences.<sup>94</sup> Amending the Constitution required a majority vote of two consecutive sessions of the General Assembly and an affirmative vote by the voters.<sup>95</sup> The General Assembly considered the changes in 1995<sup>96</sup> and 1997.<sup>97</sup>

Opposition to the amendments came mainly from Philadelphia and Alleghany County legislators. With the lieutenant governor and attorney general already on the Board, the opponents were concerned about the politicization of the process and feared that “personal, individual political considerations [would] enter into . . . serious deliberations of whether

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<sup>90</sup> Email from James Smith to Joan Porter, Official SCI Phoenix Visitor, Pa. Prison Society (Sept. 22, 2019, 2:30 PM).

<sup>91</sup> George, *supra* note 87.

<sup>92</sup> *Id.* Scott Heimer & Ron Goldwyn, *Corrections Chief Brings Tough Reputation*, PHILA. DAILY NEWS, Oct. 25, 1995, at 6.

<sup>93</sup> Russell E. Eshleman, Jr. & Robert Moran, *Ridge Orders Lawmakers to Call Session on Crime*, PHILA. INQUIRER, Jan. 19, 1995, at B4.

<sup>94</sup> Russell E. Eshleman, Jr., *House OKs New Pardon Standard*, PHILA. INQUIRER, Apr. 19, 1995, at B1 (reporting on lower house approval of constitutional amendments providing for an unanimity requirement for commutations and a slot for a crime victim on pardon board); Pamela Sampson, *State Senate Passes Variety of Crime Bills*, MORNING CALL, Apr. 26, 1995, at A5 (reporting vote of 45-5 in favor of unanimity standard replacing majority rule for commutations); Associated Press, *Pa. Pardons Must be Unanimous, House Says*, MORNING CALL, Apr. 9, 1997, at A8.

<sup>95</sup> PA. CONST. art. XI, § 1.

<sup>96</sup> S.B. 4, 1995 Leg., 1st Spec. Sess. (Pa. 1995).

<sup>97</sup> S.B. 156, 1997 Leg., Reg. Sess. (Pa. 1997).

someone would continue to serve a life sentence or not.”<sup>98</sup> They unsuccessfully offered an amendment to replace the elected officials.<sup>99</sup> The opponents further maintained that the altered composition of the board and the unanimity requirement would likely do away with commutations all together.<sup>100</sup> The proponents responded that the electorate trusted the decisions of the public officials and the possibility of their running for office again translated into responsibility.<sup>101</sup> Furthermore, the unanimity requirement was as equitable as the one that produced the jury verdicts that resulted in life sentences and still allowed the pardon process to work for “the right kind of person.”<sup>102</sup>

Reginald McFadden was, of course, mentioned during the debates by both the proponents and opponents of the amendments. For example, Senator Vince Fumo of Philadelphia, who opposed the measures, argued that the Senate was “allowing the criminal justice policies of the Commonwealth to be basically dictated by one Reginald McFadden, a murderer, a dumb one at that, who got a pardon and blew it.”<sup>103</sup>

The referendum on the changes reportedly caught lifers and their supporters by surprise. The lifers hastily organized a letter-writing campaign and raised money for a voter outreach effort. A coalition of prisoner rights groups led by the Pennsylvania Prison Society campaigned against the referendum and pursued litigation to have the amendments declared unconstitutional under the Pennsylvania and U.S. Constitutions.<sup>104</sup> Bringing suit in Commonwealth Court, the coalition petitioned to block the

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<sup>98</sup> 9 PA. LEGIS. J., 1st Spec. Sess. at 46–47 (1995) (argument by Senator Schwartz in support of her amendment to remove elected officials from the Board of Pardons because of the proposed unanimity requirement).

<sup>99</sup> *Id.* at 46–49 (rejecting amendment by Senator Schwartz by a vote of 40-9).

<sup>100</sup> *Id.* at 47–47, 53, 54.

<sup>101</sup> *Id.* at 47.

<sup>102</sup> *Id.* at 52.

<sup>103</sup> *Id.* at 50.

<sup>104</sup> In addition to the Pennsylvania Prison Society, the coalition of groups involved in challenging the referendum measures included Fight for Lifers, Pennsylvania Abolitionists United Against the Death Penalty, and the Pennsylvania Coalition Against Domestic Violence, as well as persons sentenced to LWOP, their friends, and their families. The Pennsylvania Bar Association was involved in the litigation. *See Pennsylvania Prison Society Pardons Experts Say “No” to Ballot Proposal*, PR NEWSWIRE, Oct. 24, 1997 (quoting a former governor and the lawyer and penologist who would be replaced under the proposed amendment); Frank Reeves, *Pardon My Board*, PITTSBURGH POST-GAZETTE, Oct. 26, 1997, at C2; Lawrence Walsh, *“Other Two” Issues Head to Approval*, PITTSBURGH POST-GAZETTE, Nov. 5, 1997, at C3; Todd R. Weiss, *Pardon Referendum Stirs Debate*, LANCASTER NEW ERA, Nov. 1, 1997, at B-18 (citing local police chief agreeing with activists on grounds that the amendments were not needed and will only make a pardon harder to achieve). The major newspapers in the state also took editorial stances against the amendments.

referendum, but the judge refused to stay the vote.<sup>105</sup> The measure was approved by a majority of 1,182,067 voters to 811,701 on November 4, 1997, during an off-year election.<sup>106</sup>

The litigation, which began in 1997, was finally unsuccessfully and concluded in 2011. It proceeded on two different tracks, one based on state claims resolved by state courts, and the other based mainly on federal claims decided by federal courts.<sup>107</sup> It was the arguments under the *Ex Post Facto* Clause in the U.S. Constitution that went to the heart of the concerns of Pennsylvania lifers.<sup>108</sup> From their point of view, the increased impact of politics attributable to the Pardon Board's altered membership and the veto power given to every member by the unanimity requirement retroactively increased their punishment by effectively destroying what had been a tangible likelihood that many of them would one day win commutation of their sentences through the exercise of the governor's executive power. Rather than the Board of Pardons being a gatekeeper, the changes turned it into a roadblock. In 2010, the Third Circuit Court of Appeals held that the amendments did not violate the *Ex Post Facto* Clause of the U.S. Constitution because they did not alter the life-sentenced defendants' substantive rights nor increase the severity of their punishment; instead, they imposed only procedural "disadvantages" in a commutation process that always was and remained essentially *ad hoc*.<sup>109</sup> The following year, the U.S. Supreme Court rejected certiorari and left standing the decision of the Third Circuit.

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<sup>105</sup> Robert Moran, *Parole Question Will Remain on Ballot in Pa.*, PHILA. INQUIRER, Nov. 1, 1997, at B.2 (reporting that Commonwealth Court judge refused to enjoin referendum vote or certification of results after election day).

<sup>106</sup> Lee Cary, *The [No] Mercy Rule: Clemency and the Pennsylvania State Constitution*, BEST OF COMMEDIA (Dec. 3, 2014), <http://commmedia.psu.edu/special-coverage/story/best-of-commmedia/mercy-rule-clemency-and-the-pennsylvania-state-constitution> [<https://perma.cc/K746-3HLX>].

<sup>107</sup> After the amendments were approved by referendum, Pennsylvania removed the case to federal court. The plaintiffs added federal claims to their complaint. The district court sent the state claims back to Pennsylvania's Commonwealth Court and held the rest in abeyance until the state claims were resolved. Reversing the Commonwealth Court, the Pennsylvania Supreme Court held in 2001 that the referendum measures which entailed at least four different changes did not violate the separate vote requirement of the state constitution. *Pa. Prison Soc. v. Cortes*, 622 F.3d 215 (3rd Cir. 2010).

<sup>108</sup> Article 1, Section 10 of the U.S. Constitution prohibits states from passing any *ex post facto* law. An *ex post facto* law is one which "punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed." *Bezell v. Ohio*, 269 U.S. 167, 169 (1925).

<sup>109</sup> *Cortes*, 622 F.3d. at 234, 244–47.

The Supreme Court decision did not end the saga of Reginald McFadden. The lessons drawn from his disastrous commutation live on in the constitutionally mandated composition and procedures of the Pennsylvania Board of Pardons and the impact of the “Willie Horton Effect” on politicians who have any role to play in the commutation process. The lifers McFadden left behind are still paying the price attributable primarily to the nearly exclusive focus on McFadden’s post-release behavior. Part II delves deeper and more speculatively into the institutional or correctional context of McFadden’s release based on insights gleaned from the participants of the McFadden Project and draws different lessons about the impact it should have had on the commutation of LWOP sentences in the Commonwealth.