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November 17, 2016

Barack Obama
President of the United States of America
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear President Obama,

We urge you to expand your use of the clemency power to address some of the continuing injustices faced by people in federal prison serving extremely long sentences. During your presidency you have shown how your power to commute sentences can help to reduce the harms of outdated and unfairly harsh federal sentences. You have commuted 944 sentences as of today, more than the last 11 US presidents combined.

Congress, on the other hand, has failed to do its part. While in 2010 it did pass the Fair Sentencing Act to attempt to address racial disparities in sentences involving crack cocaine offenses, Congress left those unfair sentences in place for those already in prison. Congress also stalled on passing any other significant sentencing reform for the next six years. The opportunities for addressing unfairly long sentences in 2017 appear bleak, as President-elect Trump publicly criticized your commutations grants during his campaign. With this in mind, we urge you to expand your consideration of potential sentence commutations before your term ends.

First, we recognize that many of your commutations involve people in prison who were left behind by Congress when it did not make the Fair Sentencing Act retroactive. You should continue this effort and commute the sentences of all people still in prison serving unfair sentences that predate passage of the Act.

We also believe you should extend your clemency power to:

- 1) People serving disproportionately long sentences for drug offenses due to §851 enhancements;
- 2) People serving disproportionately long sentences for drug offenses due to “gun stacking”; and

3) Elderly people in prison due to drug offenses.

Long sentences due to §851 enhancements:

Under current federal law, people charged with drug offenses can face mandatory 20-year or life sentences depending on prior drug convictions. Federal prosecutors have complete control as to whether to apply these sentencing enhancements (also referred to as §851 enhancements because of the statutory provision that authorizes them)—judges have no choice but to apply the enhancement upon conviction.

Minor or old convictions can open the door for these enhancements. Congress apparently intended the prior felony enhancements to ensure professional drug traffickers with long criminal records received sufficient punishment. But the statute only requires that the prior convictions were punishable by one year or more—the defendant may never have actually served any time. And it does not require the prior offenses to be serious. In one case, prosecutors sought to enhance a defendant’s sentence because he had a state conviction for simple possession of marijuana. Moreover, the prior convictions could have happened decades ago: in another recent case, prosecutors sought to enhance a cocaine dealer’s sentence based on a marijuana selling conviction that was more than 25 years old.

Your administration has previously expressed concern about the expansive power prosecutors currently wield via these enhancements. We therefore urge you to consider commuting all federal sentences based on §851 enhancements so as to mirror the reforms proposed in the various major Congressional sentencing reform proposals (e.g. the Smarter Sentencing Act, the SAFE Justice Act, and the Sentencing Reform and Corrections Act).

Long sentences due to “gun stacking”:

Under 18 USC §924(c), federal prosecutors can file charges that dramatically increase a person’s sentence if a gun was involved in the drug offense. The first §924(c) conviction imposes a mandatory five-year sentence consecutive to the sentence imposed for the underlying drug crime; second and subsequent convictions each carry 25-year consecutive sentences—resulting in grotesquely long sentences for drug defendants, sentencing results often referred to as “gun stacking”. In 2004 for example, Marnail Washington, a 22-year-old with no criminal history, was sentenced to 40 years after conviction of possession with intent to distribute crack cocaine and two §924(c) counts based on possessing, but not using, guns in connection with his drug offenses. For Washington, 30 years of his 40-year sentence were on gun counts.

The judge who was required to impose this “shockingly harsh” mandatory sentence said it was “the worst and most unconscionable” he had given in 23 years on the

federal bench. Again, prosecutors have complete discretion whether or not to pursue §924(c) charges, but judges have no choice but to impose the mandatory increase if they do. We urge you to use your clemency power to commute the sentences of people who are serving sentences enhanced by §924(c) so that their enhancements—at minimum—are concurrent instead of consecutive.

The elderly in federal prison:

Approximately 19,700 people in federal prison, around 10 percent of the total population, are over the age of 55. Many of these people have already spent years and even decades behind bars. Research indicates that even those who have committed violent crimes are unlikely to re-offend if released to their families or nursing homes. Neither justice, fiscal prudence, nor public safety may be served by the continued incarceration of the people whose minds and bodies have been whittled away by age and illness. While some people in prison who are aging may still merit continued incarceration due to the severity of their crime and lack of rehabilitation, we urge you to consider granting clemency to elderly people in prison serving sentences for drug offenses.

Thank you for your continued commitment to alleviating some of the harms of unfairly long federal sentences. If you have any questions, please contact our senior criminal justice researcher, John Raphling, at 310-477-5540.

Sincerely,

Handwritten signatures of Alison Parker and Maria McFarland in cursive ink.

Alison Parker and Maria McFarland, Co-Directors
US Program
Human Rights Watch