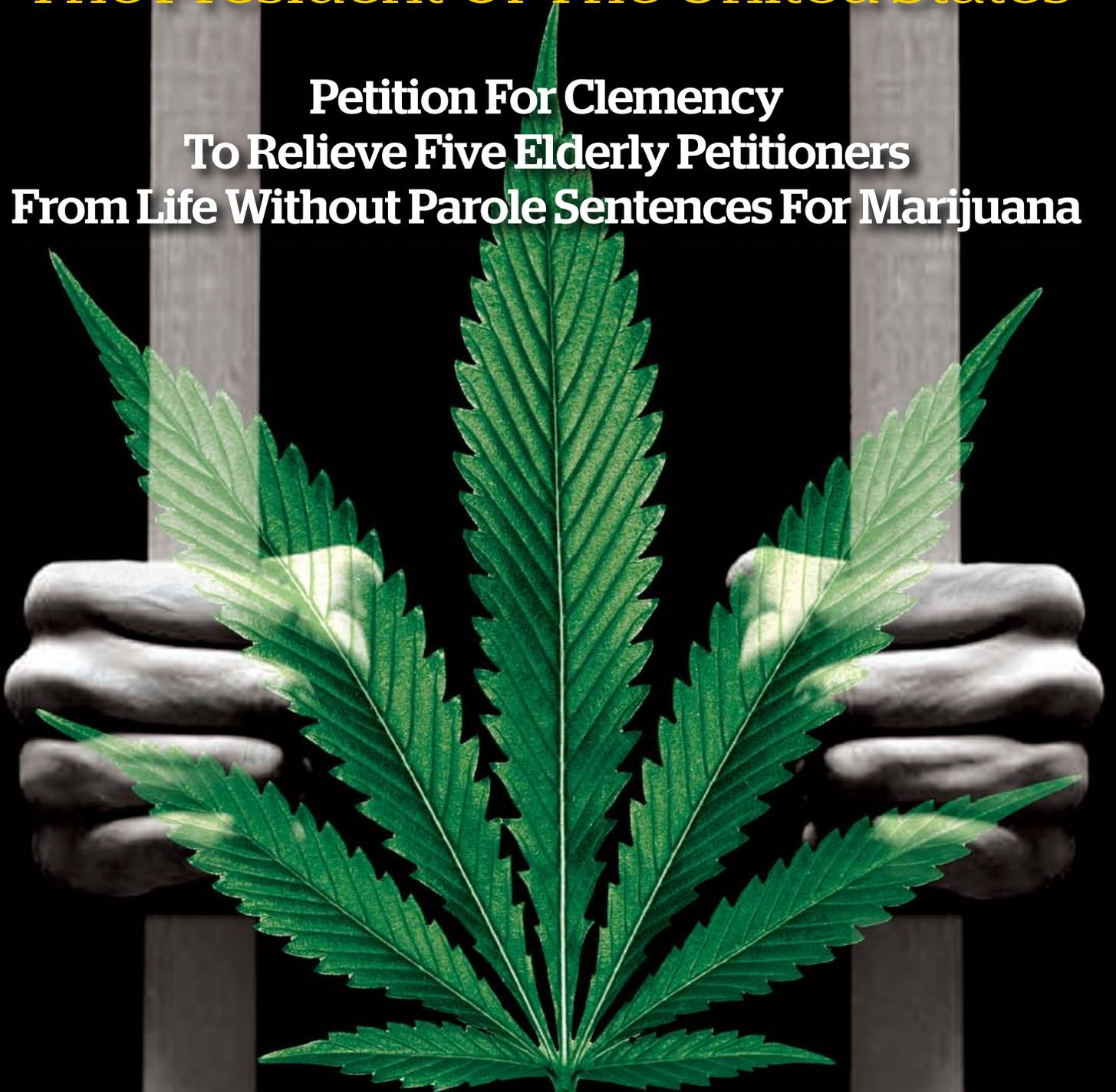


To  
The President Of The United States

**Petition For Clemency  
To Relieve Five Elderly Petitioners  
From Life Without Parole Sentences For Marijuana**



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**November 12, 2012**

**President Barack Obama  
The White House  
1600 Pennsylvania Avenue N.W.  
Washington, D.C. 20500**

**PETITION FOR CLEMENCY AND COMMUTATION OF LIFE-WITHOUT-PAROLE SENTENCES ON BEHALF OF JOHN KNOCK, PAUL FREE, WILLIAM DEKLE, LARRY DUKE AND CHARLES CUNDIFF, WHICH IS THE ONLY HOPE AND LEGAL RECOURSE THESE FEDERAL PRISONERS HAVE OF NOT DYING IN PRISON FOR THEIR COMMON CRIME: SELLING MARIJUANA**

Dear Mr. President,

Petitioners are each serving life sentences without possibility of parole for **their common crime: selling marijuana**. These crimes in common and the criminal histories of these men involve absolutely no allegations of violence. Petitioners are well into their sixties, the age of normal retirement. Each has served at least 15 years in prison, exclusively for selling marijuana. Indeed, the average length of incarceration each of the five Petitioners has endured is 19 years. Without Presidential Clemency, each will die in prison.

Article II, Section 2 of the Constitution bestows upon you, and you alone, Mr. President, the power to grant reprieves and pardons for these marijuana conspiracy offenses committed against the United States except those involving impeachment. In discussing the grant of such constitutional power by the People to the President, Alexander Hamilton wrote that:

“[h]umanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.” (“Federalist #74”)

To be sure, your exercise of clemency and commutation would not be correcting “unfortunate guilt.” Petitioners were each found guilty after unrelated trials of marijuana distribution conspiracy offenses. Your grant of clemency would correct and cure the “unfortunate,” draconian, unnecessary and barbaric sentences of life without parole that each of them is serving. Society and the sentences imposed under today’s practices under the advisory nature of the U.S. Sentencing Guidelines warrant your grant of such extraordinary relief without repercussion or embarrassment.

That ability to grant clemency, granted by the people, gives you the exclusive power of mercy over federal prisoners. That power is the only hope and last prayer these five prisoners have of not dying in jail. All available legal proceedings to redress these life/death sentences have been exhausted.

## ARGUMENT SUMMARY

In the last 15 years since these sentences of life without parole (LWOP) were imposed, the fundamentals of law, society and governance have changed extraordinarily. These LWOP sentences for marijuana have become irreconcilable with our present sense of basic fairness and justice, because of the sea change in attitudes toward life sentences without parole and the change in societal beliefs about the benefits of marijuana and its potential for harm.

Looked at through the present prism of the historic rise in prison populations; the unaffordable, burgeoning costs of LWOP sentences; the disproportionality of sentencings for drugs; the growing public sense that the drug wars have been a public policy disaster; and, among the majority of Americans, a sense of the relative harmlessness of marijuana, these LWOP sentences are legally and factually unjustifiable.

Clemency is the only solution to what has become an abiding injustice.

## ISSUES NOT IN DISPUTE CONCERNING THIS PETITION:

1. These men were convicted of conspiracy to violate federal laws against the possession and distribution of marijuana, and they have no other relevant criminal history;
2. Each Petitioner was sentenced to at least one life term of imprisonment without the possibility of parole and cannot be considered for parole, absent a grant of clemency from the U.S. President;
3. There was no violence in their marijuana crimes;
4. Each has served no fewer than 15 years in prison for his marijuana dealings;
5. Each has been a model prisoner and has participated in prison programs designed to improve himself and his fellow inmates, i.e. exhibited actual rehabilitation;
6. Each Petitioner has met and surpassed any reasonable standard of rehabilitation;
7. None of these men poses any threat or danger to himself or anyone else, or to society at all, if released;
8. Each of these men has a stable home environment, job possibility and family awaiting him, if released;
9. Each is over 60 years of age and has health issues that will make it substantially ever more expensive to keep him imprisoned;
10. None of the sentencing judges had any discretion but to sentence these men to a mandatory minimum of anything other than life imprisonment without possibility of parole;
11. Each of these men will die in prison without the exercise of Presidential Clemency.

## WHAT THIS JOINT PETITION FOR CLEMENCY IS NOT ABOUT:

1. Guilt or innocence: Petitioners all accept personal responsibility for having violated the federal conspiracy law against the possession and distribution of marijuana;

1. Legal errors in procedural or substantive law; these issues have already been legally adjudicated against Petitioners;
2. There being any legal alternative available to them other than petitioning the President for clemency. Sadly, the federal courts no longer have jurisdiction to change these sentences. “A district court may not generally modify a term of imprisonment once it has been imposed.” *United States v. McGee*, 533 F3d 225, 226 (2d Cir, 2009); see also *US v. Forbes* 389 Fed Appx 57 (2d Cir, Aug 10, 2010). With marijuana, such a severe sentence does not seem to “advance the goals of the criminal justice system in some way.” *Ewing v. California*, 538 US at 28, citing *Solem v. Helm* 463 US 277, 297, n. 22 (1983). Lacking any other avenue of redress, the Petitioners herein seek presidential commutation to create parity among their sentences and those handed down for marijuana-only distribution conspiracies under today’s sentencing guidelines and practices.

## WHAT PRECISELY DOES THIS PETITION ASK THE PRESIDENT OF THE UNITED STATES TO DO?

Exercise the President’s constitutionally vested power of clemency by commuting Petitioners’ sentences to time served, which would make said Petitioners immediately eligible for release consideration.

President John F. Kennedy set a precedent for mass pardons with drug crimes and had his Attorney General state that the President pardoned all first-time offenders convicted of crimes under the Narcotics Control Act of 1956, which effectively nullified a legislative Act of Congress. The Attorney General would later report that:

“[t]he commutation of sentences granted during the past year included many long-term narcotic offenders who, by statute, were not eligible for parole but whose sentences were felt to be considerably longer than the average sentences imposed for such crimes.” (63 A.G. Report)

President Abraham Lincoln also saw the equity and efficacy of granting group pardons, and he issued more than a hundred of them for the very reasons that 18 U.S.C. §3553 codifies: 101 of those issued were based upon “good conduct during confinement,” 61 based upon the petitioner’s repentance, 20 because the offense was a petitioner’s first, 20 due to declining health while incarcerated, 15 due to old age, and 14 for confessing or pleading guilty. Ruckman, P.S., Jr., and Kincaid, David, “Inside Lincoln’s Clemency Decision Making,” Northern Illinois University, p. 17.

Certainly the Petitioners, whose personal transformations in prison to becoming educators, nonviolent conflict resolution strategists, literacy volunteers, and crafts and trade teachers, would well fall within the matrix of these redemptive factors employed by Lincoln.

THE FUNDAMENTAL QUESTION RAISED BY THIS PETITION

**IS THERE ANY INTEREST OF AMERICAN SOCIETY, LAW OR GOVERNANCE THAT IS FURTHERED BY THE CONTINUED INCARCERATION OF THESE FIVE FELONS SERVING LIFE SENTENCES WITHOUT PAROLE FOR THEIR NONVIOLENT, MARIJUANA-ONLY OFFENSES?**

The answer is **NO**.

**THESE ARE THE CHANGED CIRCUMSTANCES IN AMERICAN LAW, SOCIETY AND GOVERNANCE IN THE LAST 15 YEARS THAT MAKE THESE LWOP SENTENCES FOR MARIJUANA UNJUSTIFIABLE:**

Two highly significant historical events have caused a sea-change in relevant circumstances and public attitudes regarding marijuana, since these men were sentenced to life in prison without the possibility of parole.

- a. The U.S. Government, through its Attorney General, as empowered by the Controlled Substances Act (21 USC §801, et. seq.), under which these men were convicted and imprisoned, and 18 states and the District of Columbia have given de jure status to a de facto reclassification of the medical benefits and value of marijuana by decriminalizing medical marijuana.

By the U.S., through its Department of Justice (“Ogden”) Memorandum (“Investigations and Prosecutions in States Authorizing Medical Use of Marijuana”, October 19, 2009), acknowledging the legitimacy of states’ medical marijuana laws and affirming the fact that the DOJ would not prosecute state actors dealing with marijuana, who were in compliance with their state medical marijuana laws.

See also July 1, 2011 (“Cole Memorandum”), which only impacts large-scale commercial sales, not the issue of legitimacy of medical marijuana itself.

By the states, 18 of which legalized marijuana by state statutes, and the District of Columbia, legalizing medical marijuana for legitimate doctor-prescribed medicinal uses against an enumerated list of public illnesses and diseases, thereby factually discrediting the underlying,

although never proven, rationale for marijuana's illegality: that marijuana was supposed to be a harmful, addictive, dangerous drug that was entirely devoid of any medicinal value; i.e., marijuana is not addictive, harmful or dangerous, and it was a mistake to originally classify it as a dangerous drug.

On November 6, 2012, the states of Colorado and Washington legalized possession of marijuana, when by referendum they passed "recreational" marijuana decriminalization law, which will treat marijuana like alcohol.

"Recreational" marijuana is exactly what Petitioners conspired to distribute. There is no suggestion in these cases that their distribution of marijuana was for medical use. The point is that the legalization of medical marijuana by 18 states and the legalization of marijuana by two states (since these men were sentenced) provide compelling evidence that time has changed public attitudes toward both medical and recreational use of marijuana.

- a. Since the underlying marijuana convictions herein were handed down in the mid-1990s, more than 50% of our citizenry (see Gallup poll graph attached] have come to believe marijuana should be legalized, regulated and taxed, or decriminalized entirely. Additionally, over three-quarters of the U.S. population favor allowing marijuana to be used as legitimate medicine. See Pew Research Center for People and Press, April 1, 2010 Report; <http://www.People-press.org/2010/04/01/public-support-for-legalizing-medical-marijuana/>

Because marijuana now enjoys broad public acceptance as a medicine, the fear, ignorance and theoretical harmfulness underlying its illegality have been profoundly discredited. There is no scientific evidence and little public support for the old perceived wisdom that marijuana is harmful, addictive, dangerous or devoid of medicinal value.

Obviously, that marijuana is a "public menace" no longer has any scientific resonance, and public belief that it is harmful and that those who sell it are causing harm to the users of marijuana for medicinal or recreational purposes has waned.

Inasmuch as societal and governmental views about marijuana have gone through such a radical change in the last 15 years, is it unfair, Mr. President, for us to look anew at the most draconian prison sentences that could ever be imposed, to wit: life/death sentences without a possibility of parole against these five prisoners for having done nothing worse than distribute marijuana in violation of our fundamentally misguided and now mindless anti-marijuana laws?

**Additional compelling reasons for commuting these sentences:**

1. The LWOP sentences are grossly disproportionate to the minimal potential threat to the public good that marijuana sales present; Human Rights Watch (H.R.W.) in its 2012 report “Old Behind Bars . . .” has among its conclusions:

“To attempt to justify any period of incarceration, let alone imprisonment for life . . . (as in Petitioners’ cases) . . . without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as a means to an end.” With examples cited of retribution, incapacitation, deterrence, rehabilitation or pure political calculations. [http://www.hrw.org/sites/default/files/reports/usprisons0112\\_brochure\\_web.pdf](http://www.hrw.org/sites/default/files/reports/usprisons0112_brochure_web.pdf); See also “Disproportionate Sentences as Human Rights Violations,” *The Modern Law Review*, vol. 67, no. 4 , July 2004.

2. No public good, policy or interest is furthered by the continued incarceration of these fully rehabilitated, long-suffering prisoners and their families; HRW 2012 Report: “Elder prisoners are costly to care for, yet research indicates that many of these older inmates represent a relatively lower risk of reoffending and show high rates of parole success.”

Our society gets nothing of value from the millions of dollars spent on protracting the suffering of these old men and their families. In fact, both the actual and the opportunity costs of wastefully warehousing these men cannot possibly be worth the zero-sum game of life in prison for mere marijuana; the Project for Older Prisoners (POPS) of the George Washington University School of Law and the ACLU have reported that elderly prisoners are the fastest-growing (estimated elderly prison population will be 10% of total by 2013 per HRW Report) segment of the prison population, primarily because of tough sentencing laws, and are three times more expensive to incarcerate than younger inmates. According to Human Rights Watch, between 1995 and 2010, the number of state and federal prisoners age 55 and older nearly quadrupled to 124,400 inmates (an increase of 282%), while the overall prisoner population grew by less than half (increase of 42%). [http://www.hrw.org/sites/default/files/reports/usprisons0112\\_brochure\\_web.pdf](http://www.hrw.org/sites/default/files/reports/usprisons0112_brochure_web.pdf) at p. 6.

3. It costs \$72,000 to house an elderly inmate for one year as compared to \$24,000 per year for a younger prisoner. See HRW and ACLU reports, *supra*.

1. As a matter of both fact and policy, our national “War on Drugs” has been an unmitigated disaster and an abject failure: Marijuana is more broadly available and cheaper than at any time in our nation’s history;
2. Among the societal and collateral victims of our marijuana “Drug Wars,” obviously including these five prisoners, are our court system, our penal system and all of our public service organizations that have been defunded, neglected or abandoned in order to pay for these costly “wars”;
3. Perhaps the most profound societal loss stemming from the Drug Wars is the criminalization of huge segments of our country, as well as the corruption and cynical disrespect for all law and authority that bad law and policy—e.g., marijuana prohibition—have generated in rending the fabric of our society. The corruption, moral decay and alienation caused by this unholy war have reduced our country’s moral vibrancy more than all of our real wars put together.

**THE COMMONALITIES AMONG THESE PETITIONERS OF NONVIOLENT, MARIJUANA-ONLY CRIMES—LIFE SENTENCES WITHOUT PAROLE, MORE THAN 15 YEARS IN PRISON ALREADY SERVED AS MODEL PRISONERS, ADVANCED AGE AND HEALTH ISSUES—MAKE THIS JOINT PETITION APPROPRIATE FOR COLLECTIVE AND INDIVIDUAL CLEMENCY CONSIDERATION.**

Petitioners are five men in their sixties who seek clemency and commutation from their LWOP sentences. Time is running out for these men. As geriatric inmates, they are gradually becoming prisoners of their jail beds as they approach the end of their lives. All were condemned to life without parole—effectively unabated death sentences—for their involvement in unrelated, nonviolent, marijuana-distribution conspiracies.

While the Petitioners are chronologically in their sixties, physiologically prisoners are much older (at least seven years). See HRW and ACLU reports, *supra*. So a 60-year-old prisoner needs the care of a person who is nearly 70, due to poor diet, stressful prison life and poor medical care. This reality is compounded by the perversity of the fact that while geriatric prisoners need special care and attention, which they most likely will not receive to an adequate degree, age is known to be the most reliable predictor of recidivism: Older prisoners are less likely by a factor of one half to reoffend than younger prisoners.

## THE PETITIONERS

### **JOHN KNOCK**

#11150-017, U.S. Penitentiary Allenwood, White Deer, PA 17887.

John Knock, now 65 years of age, has been incarcerated for more than 16 years following his extradition from France. He was convicted at trial of having participated in a conspiracy to import and distribute marijuana in violation of 21 U.S.C. 841 et seq. At sentencing, Judge Maurice Paul of the Northern District of Florida, applying the U.S. Sentencing Guidelines, imposed two life-without-parole terms plus an additional 20 years for money laundering. This is the longest sentence given to a first-time, nonviolent, marijuana-only offender. The double life sentences were upheld by the 11th Circuit Court of Appeals. See 71 Fed. Appx. 821 (Table). Certiorari was denied by the U.S. Supreme Court. See 129 S.Ct. 1655, 173 L.Ed.2d 1026 (2009).

John has chronic sinus problems as a result of an untreated fracture of his zygomatic arch. He has circulatory problems and one ankle swells to twice its normal size. His vision problems and dental needs go untreated.

John Knock has been a model prisoner. He has taught courses to other inmates in conventional and nonconventional home building and on physical education, and has devised programs to address nonphysical conflict resolution for fellow inmates. Though John has been incarcerated for 16 years, his ex-wife; his son, Aaron; and his two sisters and brother all make great efforts to visit him in prison with regularity. Were John's sentence to be commuted, he is assured immediate employment and a home where he will enjoy the love and support of his family.

### **PAUL FREE**

#42235-198, U.S. Penitentiary Atwater, Atwater, CA 95301

Paul is 62 years old and has spent the last 18 years as a model prisoner for his role in a marijuana-only distribution conspiracy. Following his conviction in the U.S. District Court, Eastern District of Michigan, in 1994, Paul Free was sentenced to the Sentencing Guidelines' mandatory minimum of life in prison with no parole. His direct appeal to the 6th Circuit was denied. See *U.S. v. Gaitan-Acevedo*, 148 F.3d 577 (6th Cir., 1998), cert. denied, 525 U.S. 912, 119 S.Ct. 258 (1998), rehearing denied, 525 U.S. 998, 119 S.Ct. 467 (1998). His efforts to obtain a Writ of Certiorari from a collateral appeal before the United States Supreme Court were denied. 543 U.S. 1084, 125 S.Ct. 322, 160 L.Ed.2d 243 (2004), rehearing denied, 543 U.S. 1084, 125 S.Ct. 955 (2005). Clemency remains his only recourse against dying in prison.

Prior to his incarceration, Paul Free earned a bachelor of science degree in marine biology at San Diego State University. Just before his arrest, he was organizing a school and teaching English in Mexico. During his incarceration he has become a respected literacy instructor, assisting inmates in preparing for their General Equivalency Diploma tests. Prison officials have told Paul Free that his students have the highest graduating rate of any inmates in the prison system.

Paul has multiple medical issues, including degenerative joint disease and poor eyesight. One of his legs is shorter than the other, requiring shoe inserts, and he suffers from chronic sinus problems and allergies. Paul has had 11 skin cancers removed. Paul is supported by friends and family who visit him and have developed web pages and social networking sites on his behalf.

## **LARRY RONALD DUKE**

#40734-019, Jesup Federal Correction Institution, Jesup, GA 31599

Larry Duke is 65 years old and has served 23 years in federal prisons as a model prisoner since 1989. He was also convicted of a marijuana-only conspiracy in the U.S. District Court for the Northern District of Georgia and sentenced to two life terms in prison without parole. His conviction was affirmed by the 11th Circuit Court of Appeals. See 954 F.2d 668 (11th Cir. 1992), appeal after remand, 59 F.3d 1180 (1995), cert. denied, 517 U.S. 1157, 116 S.Ct. 1546, 134 L.Ed.2d 649 (1996). Larry is the longest-serving nonviolent, marijuana-only inmate in the country.

Prior to his imprisonment, Larry had been a union carpenter and a decorated Marine with multiple tours in Vietnam. Larry was diagnosed, still suffers from and is being treated for serious post-traumatic stress disorder (PTSD) caused by the casualties and loss of his friends and fellow Marines in Vietnam.

While serving his life sentence, Larry obtained a federal patent for a water-delivery system that he is trying to market to the U.S. Department of Defense. He continues to work on design concepts with patentable and marketable prospects for the general public.

Larry is strongly supported by his wife, Judy Duke, and his children, Ronald Wayne Duke and Ronald Justin Duke. He has two grandsons, and his two brothers and one sister have created a very large extended family of nieces and nephews who are supportive of Larry and visit him regularly. They all want him to come home and be part of their lives and dreams.

**WILLIAM DEKLE**

#04327-018, U.S. Penitentiary Big Sandy, Inez, KY 41224

William Dekle is 63 years of age; the last 22 of which he has spent in prison after being convicted in the U.S. District Court for the Northern District of Florida of conspiracy to distribute marijuana. He was sentenced to two life terms without parole. This conviction and sentences were upheld on appeal to the 11th Circuit Court of Appeals. See 768 F.2d 1257 (1985).

Despite his chronic knee injury and slowly staggering gait, he remains a model prisoner who has participated in more than 30 courses while in prison and has counseled many of his prison mates.

Billy has a wife, two daughters, and grandchildren, all of whom have kept in touch with “Papa Billy” during his decades in prison. They will ensure that Billy has a stable home environment to which he will return should clemency be granted.

Before prison, Billy was an FAA-licensed pilot with certifications for commercial flying, as well as for instrument flying and multiengine aircraft. Billy also served in the U.S. Marines and was honorably discharged.

**CHARLES “FRED” CUNDIFF**

#09400-017, Federal Correctional Institution, Coleman Medium, Coleman, FL 33521

Charles “Fred” Cundiff is a 66-year-old inmate who has been incarcerated since 1991. He was convicted of a nonviolent, marijuana-only offense and went to trial. His conviction was upheld on appeal. 16 F.3d 1231 (Table)(11th Cir., 1994), rehearing denied, 29 F.3d 643 (Table)(11th Cir., 1994).

Before his arrest he worked in construction and retail, and at a plant nursery.

As an inmate, Charles worked for Unicor (Federal Prison Industries) for 12 years but had to stop due to his declining health. He has had battles with skin cancer, disintegration of orbital bone around the eye due to chronic infection, spinal surgery for severely arthritic discs, and vision problems. He ambulates via a walker and is visited regularly by two friends from his youth.

**THE SENTENCING PRINCIPLES ENUNCIATED BY U.S. ATTORNEY GENERAL ERIC HOLDER IN HIS MEMORANDUM OF MAY 19, 2010.**

The fundamental principle of all sentencings is that “persons who commit similar crimes and have similar culpability, should to the extent possible, be treated similarly.” See Holder Memorandum to All Federal Prosecutors: “Department Policy on Charging and Sentencing” May 19, 2010, p. 1. <http://www.justice.gov/oip/holder-memo-charging-sentencing.pdf>.

Neither disparity in sentencing for similar offenses nor disproportionality between sentence and crime are to be tolerated in federal sentencing.

Obviously these Petitioners were treated similarly, although disproportionately to their marijuana-only, nonviolent conspiracies.

**THE LWOP SENTENCES THESE MEN ARE SERVING ARE GROSSLY DISPROPORTIONATE** not only to the present lack of seriousness ascribed to marijuana offenses but also to the sentences meted out in similar cases over the last 20 years. As an example of the ever-evolving sentencing trends in the U.S. under the U.S. Sentencing Guidelines, a sentence of life without parole would be rarely if ever handed down these days for a marijuana-only distribution conspiracy, and would certainly not be imposed in a case involving no violence.

For instance, Bruce Perlowin, who was described by the St. Petersburg Times (Aug. 9, 1983) as the “leader of an international organization importing and distributing multi-ton shipments” and later arrested, was decried by FBI Agent Chuck Ladding as “by far the largest smuggler the FBI was aware of.” Perlowin, nicknamed “The King of Pot,” was sentenced, prior to the passage of the federal Sentencing Guidelines, to just eight years in prison. (U.S. Bureau of Prisons Inmate Locator) In 1988, Robert Colflesh was arrested in what the Coast Guard called the “biggest maritime marijuana arrest on the West Coast” (Spokane Review, July 28, 1998); despite the enormity of his marijuana distribution ring, he was released by the U.S. Bureau of Prisons after serving only four years of his 10-year sentence. (U.S. Bureau of Prisons Inmate Locator) In 1996, federal prosecutors claimed Gregory Antonakos the “mastermind of a multimillion-dollar marijuana ring.” See <http://searcerzandriopelle.com/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=14&cntnt01returnid=65>. He was released in 2004 after only serving eight years. (U.S. Bureau of Prisons Inmate Locator) Brian P. Daniels was arrested in the midst of a marijuana transaction and was later described by DEA Agent Gary Leming as a “major supplier of marijuana in the United States” and the “primary source of marijuana in the western United States.” Daniels received a 25-year sentence under the Sentencing Guidelines and was released in 2009 after serving 19 years. (U.S. Bureau of Prisons Inmate Locator) Arthur Torsone had described himself as one of the “biggest marijuana smugglers on the planet” when he was indicted in 1998. (Torsone, A. R., Herb Trader, “A tale of treachery and espionage in the global marijuana market,” <http://www.amazon>.

com/dp/B00305GPGK ) Torson was released in 2004 after serving eight years. (U.S. Bureau of Prisons Inmate Locator) Pseudo-celebrity Howard “Mr. Nice” Marks, branded the “largest smuggler of marijuana in the world,” was sentenced to 25 years in 1998. (Marks, Howard, Mr. Nice, Secker & Warburg, 1996, p. 496) He was released seven years later to seek fame as he hawked his book, Mr. Nice, recounting his exploits and life as a marijuana dealer. (Marks, Howard, Mr. Nice, Secker & Warburg, 1996)

All of these ex-convicts were involved in marijuana distribution conspiracies dwarfing or comparable to the criminal conspiracies of which these Petitioners stand convicted. Some of these examples were litigated before, and some after, the adoption of the U.S. Sentencing Guidelines. Yet each of these arch-marijuana criminals received a definite (as opposed to indefinite) sentence and was allowed to return to society, theoretically rehabilitated. These Petitioners, though not branded as the biggest or the best or the worst, were given sentences that could only be terminated by their deaths, which are inevitable but the dates of which cannot, of course, be determined.

**Under 18 U.S.C. 3553 and the Holder Memo (above), the appropriate considerations for sentencing are:**

**1. Seriousness of the offense:** Conspiring to distribute marijuana, in light of the legal and social acceptance of marijuana described above, can no longer be considered among those serious offenses for which LWOP sentences are usually given, e.g., murder, kidnapping, or terrorism. Of the hundreds of thousands of inmates in our prison system for drug offenses, these are the only five we can find over the age of 62 who were given LWOP sentences after trial for nonviolent, marijuana-only conspiracy violations under federal law and who gave us permission to seek clemency on their behalves. All were convicted after trial of engaging in conspiracies. The vast majority of marijuana offenders with no history of violence currently receive sentences ranging from probation to a few years in prison. These Petitioners’ crimes do not warrant the seriousness of forfeiting their lives and permanent freedom for mere marijuana.

**2. Promote respect for the law:** Indeed, these disproportionate sentences and the Drug Wars that fostered them can cause and will do potentially long-lasting damage to our criminal justice system and promote disrespect for our laws and institutions.

**3. Provide just punishment:** Justice is a dynamic. What was “just” 15 years ago may not seem so today, in light of changing dynamics of public attitudes, generational differences in values and interests, scientific breakthroughs, advances in education and tolerance, erosion of Victorian mores and sensibilities, economic considerations, population growth and overcrowding, extended life spans, and conceptual changes in problem solving and dispute resolutions. It is hard to imagine that LWOP sentences would be found appropriate in this age of greater tolerance for marijuana, when the futility of drug prohibition has become more apparent with each passing year.

**4. Afford deterrence:** Although the verdict remains mixed on the reality of deterrence, it can hardly be gainsaid that a life term as punishment for nonserious offenses would likely have some deterrent effect. However, a cost-benefit analysis reveals that there seems little doubt that the exquisite costs of LWOP would outweigh any imagined benefit to society. Our changing views on the efficacy of the death penalty make this point with increasing regularity and authority.

**5. Protect the public:** This is an absolute must in the calculus of any punishment, probably one of the most enduring principles of criminal jurisprudence. Do we really believe that—after 15 years of punishing confinement, the attainment of retirement age and the absolute lack of any history of violence among these model prisoners, whose only crime is peddling a substance, the harmfulness, addictiveness or dangerousness of which has never been satisfactorily established, either anecdotally or scientifically—there exists any part of our society that needs protection from the Petitioners?

**6. Offer defendant an opportunity for effective rehabilitation:** These model prisoners have been afforded an average of 19 years of rehabilitation, presumptively effective, because even though they knew they would never be eligible for parole they availed themselves of every course, program or activity within the prison system that could help them help themselves and help their fellow inmates and conducted themselves in exemplary fashion throughout their long prison ordeals.

In sum, none of the principles of punishment has been dishonored by these prisoners, and no principle of criminal jurisprudence would be served by continuing their now undeniably excessive sentences. Clemency is justice in these circumstances, because life without parole is, in fact, a death sentence. But rather than have our government execute the condemned man, he is warehoused until he dies of “natural causes,” doubtless accelerated by the deprivations of decades in prison. See *Hamerlin v. Michigan*, 501 U.S. 957, 997-1001 (1991): “Life sentence is the second most severe sentence.”

The sentencing judges in Petitioners’ cases may have had reservations about meting out such severe punishment, but under the Sentencing Guidelines, the judges had no discretion, arguably a Balance of Powers constitutional infirmity; LWOP sentences were mandatory under the Guidelines at the time of these sentences; LWOP was a mandatory minimum at that time. With sentences imposed and direct appeals exhausted, and with the sentences actually commenced, the law offers no way to correct this disparity between the mandatory life sentences of Petitioners and these similar marijuana cases, other than through presidential clemency by commutation of the sentences. This disparity has not been addressed by Congress. Instead it appears that federal prosecutors have learned to create charges that do not require mandatory life minimums for marijuana trafficking, and judges are no longer required to impose mandatory life sentences under the Guidelines. However the Guidelines have still not been formally amended to take LWOP out of the potential punishments for marijuana.

Although Congress acted to take the disparity out of the sentences for crimes involving crack cocaine, they have not reformed the marijuana guidelines. Therefore, clemency and commutation remain the only hope these men have of avoiding death in prison.

Parenthetically, “cocaine kingpins” who were involved in cocaine trafficking—which became synonymous with sustained violence and the destruction of neighborhoods, wherein both the drug and its trafficking caused unspeakable harm—were sentenced to far less severe terms of imprisonment than were these Petitioners, who had no violence or harm to the public associated with their marijuana conspiracies.<sup>1</sup>

## **PROPOSED SOLUTIONS TO THE DEVASTATING REALITIES AND PERVERSITIES OF THE EXPONENTIAL GROWTH AND COSTS OF THE GRAYING OF THE AMERICAN PRISON POPULATION**

The American Law Institute, the acknowledged leader in criminal justice reform, has encapsulated its conclusions and recommendations, particularly on sentencing reform in the second draft of its Model Penal Code: Sentencing dated March 25, 2011. See also The Sentencing Project, “No Exit: The Expanding Use of Life Sentences in America,” by Ashley Nellis and Ryan S. King, July 2009, particularly pp. 36–40.

Among the findings, conclusions and recommendations that are particularly relevant to the Petitioners’ plight, ALI recommends:

- a universal review of all sentences after the convicted has served 15 years in prison, noting that the actual percentage of convicts serving more than 15 years is in the low single digits; still a significant number of souls, in light of the burgeoning prison population of almost 2,380,000 inmates nationwide;
- all long or life prison terms be closely restricted to those who pose real dangers to society;
- recidivism risks be carefully assessed in all long prison terms, noting especially that “lifers,” when they do get out, have far and away the lowest recidivism rates of any other grouping; and the establishment of a comprehensive framework for good time and earned time reductions to sentences served.

<sup>1</sup> Ricky Donnell Ross was released after serving 20 years of his life sentence for his role in a \$3 million-per-day cocaine ring. <http://us.mg5.mail.yahoo.com/neo/launch?.rand=d43n79oenjthq>. Heroin and cocaine kingpin Felix Gallardo, whose case was associated with the ignominious torture and murder of undercover DEA Agent Enrique Camerana, only served four years total despite the size and lucrative earnings of his violent cocaine distribution network. <http://www.pbs.org/wgbh/pages/frontline/shows/mexico/etc/arellano.html>. Manuel Filipe Salazar-Espinosa was identified by federal law enforcement as the “world’s most significant kingpin” before he was sentenced to a 30-year term. Jorge Aprilla-Perea was sentenced to just 30 years in 2007, even though he was called the “world’s biggest drug kingpin responsible for billions of dollars of drugs.” <http://www.justice.gov/usao/nys/pressreleases/February07/asprilla-pereasantencngpr.pdf>. Jorge Mario Paredes-Cordova, the “world’s most significant drug kingpin convicted of a massive armed cocaine conspiracy,” received just 31 years for his crimes. <http://www.justice.gov/usao/nys/pressreleases/November09/paredescordovahorgemarioverdictpr.pdf>.

- ALI further notes that throughout the 19th and most of the 20th century, prison populations remained relatively modest, but from 1970 to 2000 incarceration rates quadrupled. This mass incarceration explosion is 5 times greater than that in the United Kingdom, 6.5 times greater than Canada's, 9 times more than Germany's, 10 times more than Norway's or Sweden's and 12 times more than Japan's, Finland's and Denmark's. It is expected that 2010 to 2019 will become the most punitive decade in U.S. history. American prison rates remain at an all-time high despite the fact that crime rates have been falling throughout the U.S.

ALI Model Penal Code 305.6: “resentencing . . . after 15 years served there is a presumption that much new information about the prisoner will have accumulated, new criminological knowledge may exist about the offenders’ rehabilitation, broader societal values (as with marijuana) may have shifted. . . . If the offender presents a continuing danger to the community, the sentence can remain undisturbed on incapacitation grounds (i.e., incapable of being law abiding). Where (as with these Petitioners) there are no reasonable grounds to believe the prisoner presents a danger to public safety, incapacitation does not apply, e.g., progress in correctional treatment programs and behavior while institutionalized can now support a low assessment of recidivism risk; in which case there is no sound rationale for continued incarceration.” (emphasis added)

Additional conclusions by ALI, pertinent to Petitioners: (underlined emphasis added)

Page 86: “. . . sentence modification on proportionality grounds may be warranted if the opprobrium attached to certain criminalized conduct has diminished (à la marijuana) over a long period of time . . . When a subject is controversial and the public’s attitudes are in flux, there is a possibility that ‘a new consensus’ as to offense gravity is emerging. . . .” Herein ALI singles out marijuana as an example.

Drug offenses have no identifiable victim. (page 89)

Page 93 covers some studies of long-termers and the change in criminal propensity over the life course.

The ALI concludes that the most severe sanction in criminal law should be life in prison with a meaningful possibility of release before the prisoner’s natural death. This is the “Second Look” called for by the ALI. Service of more than 15 years would constitute “exceptional circumstances,” raising a presumption in favor of release, along with advanced age, physical or mental infirmity, or exigent family circumstances justifying a modification of the life penalty.

## CONCLUSION

Abraham Lincoln famously said: “As President, I am clothed in enormous power. . . .” That power includes the ultimate power to say who lives and who dies in prison. As you approach your second term, Mr. President, these five men and their families ask you to save their lives as only you can. We respectfully say to you without hesitation or equivocation that no conceivable good for our country can come from causing these marijuana miscreants to die in prison.

Respectfully Submitted,

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