Federal BOP Puts a Little Compassion in Its Newest Release Program

BY ALAN ELLIS AND EJ HURST II

Recent criticism from the Fourth Estate and even the Justice Department's (DOJ's) Office of Inspector General (OIG) highlighted that "compassionate release" did not accurately describe the Federal Bureau of Prisons' (BOP's) reduction-in-sentence (RIS) program. (*See, e.g.*, Carrie Johnson, *Federal "Compassionate" Prison Release Rarely Given*, Nat'l Pub. Radio (Nov. 29, 2012), http://tinyurl.com/d5983cb; Office of Inspector Gen., U.S. Dep't of Justice, I-2013-006, The Federal Bureau of Prisons' Compassionate Release Program (Apr. 2013) [hereinafter BOP Compassionate Release Program], www.justice.gov/oig/reports/2013/e1306.pdf.) But recent changes might just bring some compassion to BOP decisions, while reducing federal prison overcrowding and giving taxpayers relief.

Reductions in sentence are authorized under 18 U.S.C. § 3582(c)(1)(A). In RIS decisions, the sentencing court must weigh, in addition to the normal 18 U.S.C. § 3553(a) factors, whether:

- extraordinary and compelling reasons warrant sentence reduction; or
- the defendant is at least 70 years of age, has served at least 30 years in prison for the instant offense, and the BOP director has determined that the defendant is not a danger to any other person or the community; and
- the sentence reduction is consistent with applicable Sentencing Commission policy statements.

Before a court decides anything, though, the BOP director must file a motion through the prosecuting United States Attorney's Office.

History of a Flawed Program

Focusing on the first prong, "extraordinary and compelling reasons," the DOJ first promulgated its "compassionate release" regulations at 28 C.F.R. part 571, subpart G (§§ 571.60–.64). The BOP then further interpreted and applied the law—the last time before the most recent changes was in 1998 with Program Statement 5050.46, Compassionate Release; Procedures for Implementation of 18 U.S.C. 3582(c)(1)(A) & 4205(g) (May 19, 1998).

While the 1998 program statement offered no real guidance for RIS decision making (*see* U.S. Sentencing Guidelines Manual § 1B1.13), a 1994 memorandum to executive staff offered "guidelines" and noted that inmates with less than a year to live *might* qualify for RIS approval (BOP Compassionate Release Program, *supra*, app. III, at 67–68). The 1994 internal memorandum also gave guidelines for considering offense, offender, sentence length, and public safety in deciding medically based requests. It gave no guidance at all about nonmedical requests. (*Id.* at 12.)

If the regulations offered no real guidance, they did create a bureaucratic nightmare. Inmates requested relief from the prison's warden, explaining what extraordinary circumstances existed, where the inmate expected to live and work if released, and (if the request was for medical reasons) how the inmate would get and pay for medical care. (28 C.F.R. § 571.61 (effective 1994).) The warden could either deny the request or refer the packet and a recommendation to the prison's regional director. (*Id.* § 571.62(a)(1).) If the regional director concurred, the packet and both recommendations moved to the general counsel's office. (*Id.* § 571.62(a)(2).) If the general counsel concurred, the general counsel solicited opinions from "either the Medical Director or the Assistant Director, Correctional Programs Division depending upon the nature of the basis of the request." (*Id.* § 571.62(a)(3).) With all recommendations in hand, the general counsel's office would finally decide whether to seek the director's consideration. (*Id.*)

Only after agreeing with all recommendations did the director consult with the prosecuting United States Attorney's Office—and, though not required by regulation, with the DOJ's Office of Deputy Attorney General. (BOP Compassionate Release Program, *supra*, at 22–24.) Only after everyone

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agreed would the director finally decide—in his or her own good time—whether to file an RIS motion. (28 C.F.R. § 571.62(a)(4) (effective 1994).) If the request was denied at any point, the inmate could appeal through the BOP's administrative remedy program—a process of up to four stages, which itself takes months to complete and is called "The Long, Slow No" for a very good reason.

The Inspector General's Report

In an April 2013 audit, the DOJ's OIG "concluded that the implementation of the [RIS] program is inconsistent and results in ad hoc decision making by the BOP in response to inmate requests." (BOP Compassionate Release Program, *supra*, at 11.) Worse, of the 208 requests reviewed by the BOP's central office over the six years of the audit (2006–2011), the OIG "found that approximately 13 percent (28 of 208) of the inmates whose release requests had been approved by a Warden and Regional Director died before their requests were decided by the BOP Director." (*Id.*) But, these numbers—about 36 director decisions per year—excluded an unknown number of requests denied by a warden or regional director, and also the "eligible candidates for release not being considered." (*Id.*) On average, the BOP released just 24 inmates each year. (*Id.* at 72.)

The OIG identified four fundamental failures in the BOP's program management:

- First, the BOP has failed to provide adequate guidance to staff regarding the medical and nonmedical criteria for compassionate release consideration.
- Second, the BOP has no timeliness standards for reviewing compassionate release requests, and timeliness standards for inmate appeals do not consider the special circumstances of medical compassionate release requests.
- Third, the BOP does not have formal procedures to inform inmates about the compassionate release program.
- Fourth, the BOP does not have a system to track compassionate release requests, the timeliness of the review process, or whether decisions made by institution and regional office staff are consistent with each other or with BOP policy.

(*Id.* at 11.)

To its credit—and despite the DOJ's previous, senior-level obstruction—the BOP accepted these criticisms and began to change its policies.

The BOP Responds

Before the OIG's report was even released, the BOP was changing its policies. In February 2013, an interim rule amended 28 C.F.R. § 571.62(a)(1) and removed the regional director from the RIS chain of decisions. Wardens' recommendations now go straight to the general counsel's office instead. (*See* 78 Fed. Reg. 13,478 (Feb. 28, 2013).) Program Statement 5050.48 (Apr. 23, 2013) incorporated this policy change—the BOP's first in 15 years.

On April 30, 2013, a general counsel's memorandum gave the first specific guidance for medically based RIS requests. (*See* Memorandum from Kathleen M. Kenney, Assistant Dir./Gen. Counsel, Office of Gen. Counsel, Fed. Bureau of Prisons, to Chief Executive Officers, Guidance for Use of the Bureau of Prisons' Reduction in Sentence Authority for Medical Cases (Apr. 30, 2013), *available at* http://tinyurl.com/m56d8lp.) Inmates with less than 18 months to live were deemed eligible, as was any inmate who "is either completely disabled . . . or is capable of only limited self-care and is confined to a bed or chair more than 50% of waking hours." (*Id.* at 2.) The April 30 memo also clarified that the general counsel's office would contact the prosecuting assistant United States attorney about sentence reduction, and would relay the attorney's views to the director.

By August, the BOP had wholly revised its RIS program statement. (Program Statement (P.S.) 5050.49, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g) (Aug. 12, 2013), *available at* http://tinyurl.com/pj6ju4t.) The statement added:

- Criteria regarding requests based on medical circumstances.
- Criteria regarding requests based on non-medical circumstances for elderly inmates.
- Criteria regarding requests based on non-medical circumstances in which there has been the death or incapacitation of the family member caregiver of an inmate's child.
- Criteria regarding requests based on non-medical circumstances in which the spouse or registered partner of an inmate has become incapacitated.
- A list of factors that should be considered for all requests.
- Information regarding the electronic tracking database.

(*Id.* at 2.)

Program Statement 5050.49 incorporated the April 30 memo, expanding medical RIS to inmates within 18 months of death, those completely incapacitated, or those unable to care for themselves more than half of the time. (*Id.* at 3.) Moreover, elderly inmates—those over 65 years old with debilitating and progressing conditions—can be

considered if they have served more than half of their sentences and "[c]onventional treatment promises no substantial improvement to their mental or physical condition." (*Id.* at 4.) The BOP may still consider whether the condition existed at the time of offense or sentencing, but unlike before, preexisting conditions do not automatically disqualify inmates from RIS consideration.

Even elderly inmates without debilitating conditions can be considered for RIS motions, if they have served the greater of 10 years or 75 percent of their sentences. (*Id.* at 4.) In any elder-release case, the inmate's age during the offense conduct is important. A 65-year-old imprisoned for an offense committed at 60 is less likely to get an RIS motion than one who committed the offense at 40, or even 50.

Most surprisingly—and despite opposition from the DOJ's Office of Legal Policy *before* the inspector general's criticisms—BOP policy now allows RIS consideration for family caregiving reasons. Relief may lie if a minor child's caregiver dies or becomes incapacitated, and no one else remains to care for the inmate's child. (*Id.* at 5–7.) Similar relief may lie if spouses or registered partners (language suggests the BOP will not distinguish between heterosexual and homosexual relationships) become incapacitated, and no one but the inmate is available as a caregiver. (*Id.* at 7–9.) Some of the factors considered in these cases include whether any other person can provide the essential care; how involved the inmate was in the child's, spouse's, or registered partner's life before offense and imprisonment; whether the inmate engaged in domestic abuse before incarceration; and whether the inmate is an alien deportable to a country other than where the child, spouse, or registered partner lives. Thus, aliens subject to deportation from the United States would not be eligible for RIS releases to care for US-resident children or partners.

In every case, P.S. 5050.49 considers a list of factors to assess whether the RIS request presents extraordinary and compelling circumstances, including the defendant's age (at offense, sentencing, and time of the request); criminal and violence histories; victim commentary; disciplinary history (including while on prior supervised release, and in prison); and—always a huge hurdle in DOJ eyes—"[w]hether release would minimize the severity of the offense." (*Id.* at 10.)

To address the inspector general's case-tracking criticisms, wardens now appoint an institution RIS coordinator (IRC). (*Id.* at 13.) The IRC is responsible for monitoring inmates' RIS requests and reasons, how long individual requests have been pending, and where in the process each inmate's application stands. At the BOP's central office, three other RIS coordinators—one each with the Office of General Counsel, the Health Services Division, and the Correctional Programs Division—also track the progress of RIS requests.

By interim rule effective December 5, 2013, the BOP finally codified the general counsel's request for input from the prosecuting US Attorney's Office. But, it may have also limited the BOP director's decision making—statute notwithstanding—by making the director's decisions "subject to the general supervision and direction of the Attorney General and Deputy Attorney General." (78 Fed. Reg. 73083-84 (Dec. 5, 2013) (amending 28 C.F.R. § 571.62), *available at* http://tinyurl.com/qygldlz.)

Conclusion

For decades, and even though Congress encouraged these motions, the BOP—to some degree, under orders from the DOJ—released as few inmates as possible under the RIS program. The changes answering the inspector general's criticisms are good steps toward not just more eligible inmates receiving relief, but also more reasons for relief being considered. Moreover, by tracking RIS requests from submission to decision, the BOP will have the tools to make more timely decisions, and fine-tune the program's criteria. If actual decision making follows the expanded regulations and program statement—something we will know only with time and experience—the BOP may finally use an important cost-cutting and space-saving program it previously ignored. But, if the new interim rule actually requires that Justice Department superiors approve of the RIS decisions, then these efforts may directly conflict with 18 U.S.C. § 3582(c) itself (requiring "motion of the Director of the Bureau of Prisons," without reference to the attorney general or deputy attorney general). ■