Different Talk, Familiar Walk: More Medical and Elderly Releases under BOP's Reduction in Sentence Program, but Other Inmates Still Out of Luck

BY ALAN ELLIS AND EJ HURST II

When we last visited the Federal Bureau of Prisons (BOP) reduction in sentence (RIS) program (sometimes erroneously called "compassionate release"), the Justice Department's Office of Inspector General (OIG) had just blasted the BOP. (*See* Alan Ellis & EJ Hurst II, *Federal BOP Puts a Little Compassion in Its Newest Release Program*, 28 Crim. Just., no. 4, Winter 2014, at 41.) There was a dearth of RIS approvals, despite an overabundance of decision makers, and a genuine risk that inmates might not live long enough to run the bureaucratic gauntlet. (*See* DOJ-OIG, I-2013-006, The Federal Bureau of Prisons' Compassionate Release Program (2013), http://tinyurl.com/jc3zsm5 [hereinafter 2013 OIG Report].) So the BOP was making some changes.

The BOP program statement (policy manual) governing RIS decisions has changed three times since the 2013 OIG report. The latest deemphasizes how "sparingly" RIS motions are sought. (*See* BOP, Legal Resource Guide to the Federal Bureau of Prisons: 2014, at 40–41 (2014), http://tinyurl.com/zrv8878 [hereinafter 2014 Legal Resource Guide].)

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In practice, the administrative process has been streamlined, and staff members at every institution and the Central Office are separately charged with monitoring the progress of inmate requests. To the BOP's credit, the RIS process appears to be working more smoothly than in 2013.

Records recently released under the Freedom of Information Act (FOIA, 5 U.S.C. § 552) suggest that more inmates are being approved for RIS motions, but only in the medical and elderly consideration categories. Despite explicitly expanding RIS grounds to include spouse or partner incapacitation, plus certain childcare needs, the BOP has not approved a single inmate on these grounds over two years of specific tracking (2014 and 2015).

Over these 48 months, BOP records show fewer than two dozen RIS requests even reached Central Office on the new, nonmedical grounds.

CHANGES TO THE BOP-SPEAK

The 2013 OIG report was followed by a flurry of guidance memoranda from senior BOP administrators, and two wholesale amendments to the RIS program statement (P.S.). P.S. 5050.49, the second policy revision, expanded medical RIS to inmates within 18 months of death, those completely incapacitated, and those unable to care for themselves more than half of the time. Moreover, elderly inmates—those over 65 years old with debilitating and progressing conditions—can be considered if half their sentence is served and "[c]onventional treatment promises no substantial improvement to their mental or physical condition." The BOP may consider whether the condition existed at the time of sentencing, but preexisting conditions no longer automatically disqualify inmates from RIS consideration. 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. (*See* P.S. 5050.49, CN-1, at 3–5.)

BOP policy now also 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 child; or if spouses or registered partners become incapacitated and only the inmate can give care. (*Id.* at 5–9.)

In 2014, the BOP struck language from the policy manual about the sparing use of RIS authority. (*Compare* BOP, Legal Resource Guide to the Federal Bureau of Prisons: 2008, at 39 (2008), http://tinyurl.com/zredvdn [hereinafter 2008 Legal Resource Guide], *with* 2014 Legal Resource Guide, *supra*, at 40–41.) The BOP now instead emphasizes the many factors considered in the RIS decision-making process. Moreover, the 2008 policy manual also acknowledged that past RIS motions were limited to "inmates suffering from terminal medical conditions, or who are severely and permanently mentally or physically debilitated." (2008 Legal Resource Guide, *supra*, at 39.) The 2014 policy manual instead recognizes that RIS requests might be for "[n]

on-medical circumstances [that] may include elderly inmates; elderly inmates with medical conditions; circumstances in which there has been a death or incapacitation of the inmate's child's caregiver, or the incapacitation of an inmate's spouse or registered partner." (2014 Legal Resource Guide, *supra*, at 40.)

The written changes for a vastly expanded RIS program are in place. But what about the realities of RIS requests?

ACTUAL CHANGES IN BOP PRACTICE

BOP records show that these seemingly profound policy changes have yielded a marginal increase in medical and elderly releases. According to a May 2016 FOIA response, the BOP's director approved RIS requests for just 61 inmates in 2013 (the year of the OIG report). In 2014, the director approved 101 inmates. Last year, 2015, there were 99 inmates approved for RIS motions.

Those 99 inmates approved last year were from among the 191 requests forwarded to Central Office, which were themselves selected from among 676 requests at BOP prisons. We must also include requests carried over from 2014.

Of 261 inmates approved for RIS motions between 2013 and 2015, 178 of them (or 68 percent) raised terminal illness issues. Another 54 inmates (20.7 percent) raised debilitating medical conditions. The other 31 inmates received RIS approval in either 2014 or 2015 (none in 2013), on either "elderly-medical" or "elderly-other" grounds.

The BOP records show zero approvals on partner, spousal, or childcare grounds. Central Office has denied just 21 inmates raising these grounds in 2014 and 2015, the two years so far that these categories have been tracked.

The BOP is approving about four times as many RIS requests annually as reported in the OIG's 2013 report. But 200 approvals over two years (2014 and 2015) still constitutes "sparing" use of the BOP's RIS powers. Moreover, 34 inmates died awaiting a decision over the past three reporting years—19.7 percent of the number approved in 2013, 10.9 percent of approvals in 2014, and 11.1 percent of approvals in 2015.

By comparison, one OIG notation in 2013 was "that approximately 13 percent (28 of 208) of the inmates whose release requests had been approved by a Warden and Regional Director [between 2006 and 2011] died before their requests were decided by the BOP Director." (2013 OIG Report, *supra*, at 11.)

Statistically, the BOP has reduced deaths while waiting by 2 percent. In human terms, about a dozen people die each year while their RIS paperwork is in the Central Office.

Only after the BOP's director approves an RIS request does the court process begin. The U.S. attorney's office in the sentencing district must also agree to the release, or they need not file the motion (though U.S. attorney and U.S. probation officer objections are listed in BOP records as a separate ground for denying RIS requests in Central Office). And in the end, this elaborate process is for naught if the sentencing court refuses the release. But, once an order of release is entered, the authors have anecdotal evidence that BOP staff moves quickly and keeps inmate lawyers well informed.

SENTENCING COMMISSION AMENDS GUIDELINES—BUT ADOPTS BOP'S JARGON

Unless Congress intervenes, the U.S. Sentencing Commission's latest amendments to the U.S. Sentencing Guidelines (USSG) will take effect on November 1. Among the changes is an amended RIS guideline, USSG section 1B1.13. Unfortunately, those changes will effectively just codify the BOP's latest program statement (P.S. 5050.49, CN-1) into the Sentencing Guidelines.

Regrettably, today's available data shows the BOP is not entirely following its own directives. It has made no use of the caregiver and spousal grounds for RIS, and less than 24 such requests have made it to Central Office. Inserting these aspirations into the Sentencing Guidelines, when the BOP doesn't follow through on those aspirations, effectively puts the Sentencing Commission's imprimatur on an incomplete reform.

The Sentencing Commission is certainly not guiding the BOP, as Congress demanded, by simply adopting its unfulfilled policy changes. Congress requires that "[t]he *Commission* . . . shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." (28 U.S.C. § 994(t).) On November 1, it would appear that the Sentencing Commission will let the BOP write the Guideline.

CONCLUSION

The BOP has streamlined its RIS bureaucracy, removed regional directors from the decision chain, and reduced the average wait time for an answer (even if that answer is still almost always "no"). Specific staffers at prison and Central Office are now responsible for tracking RIS requests. And the BOP has approved four times more RIS requests in 2014 and 2015 than it did before the 2013 OIG report.

But four times a miniscule number is still a relatively miniscule number.

The BOP has also marginally expanded its hyper-narrow view of what constitutes "extraordinary" medical circumstances. But our federal jailers have not yet used the nonmedical categories created in response to OIG complaints, let alone adopted a more broad view of what constitutes "exceptional" in all cases. Without a broader view, and hundreds more approved RIS requests each year, the BOP is missing an obvious opportunity to reduce its own medical costs and overcrowding rates at little to no statistical risk to the community. ■