



Billing Code 4410-31

DEPARTMENT OF JUSTICE

Parole Commission

28 CFR Part 2

[Docket No. USPC-2015-01]

Paroling, Recommitting, and Supervising Federal Prisoners:

Prisoners Serving Sentences under the United States and District of Columbia Codes

AGENCY: United States Parole Commission, Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The United States Parole Commission proposes to revise its rules for determining whether a prisoner who was sentenced under the D.C. Code and committed their offense before March 3, 1985 is suitable for release on parole. For these cases, the Commission will apply the regulations of the former District of Columbia Board of Parole that were effective before March 1985. Prisoners who are serving D.C. Code sentences and who committed their offense before March 3, 1985 would be considered under the proposed regulation at their next regularly

scheduled hearing or, if they have not yet received a parole hearing, at their initial parole hearing.

DATES: Submit comments on or before [insert date 60 days after date of publication in the Federal Register].

ADDRESSES: Submit your comments, identified by docket identification number USPC-2015-01 by one of the following methods:

1. Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the online instructions for submitting comments.
2. Mail: Office of the General Counsel, U.S. Parole Commission, attention: USPC Rules Group, 90 K Street, N.E., Washington, D.C. 20530.
3. Fax: (202) 357-1083.

FOR FURTHER INFORMATION CONTACT: Office of the General Counsel, U.S. Parole Commission, 90 K Street, N.E., Washington, D.C. 20530, telephone (202) 346-7030. Questions about this publication are welcome, but inquiries concerning individual cases cannot be answered over the telephone.

SUPPLEMENTARY INFORMATION: The U.S. Parole Commission is responsible for making parole release decisions for District of Columbia felony offenders who are eligible for parole. D.C. Code section 24-131(a). The Commission took over this responsibility on August 5, 1998 as a result of the National Capital Revitalization and Self-Government Improvement Act of 1997 (Public Law 105-33). The Commission immediately promulgated regulations to implement its new duties, including paroling policy guidelines at 28 CFR 2.80. 63 FR 39172-39183 (July 21, 1998). In promulgating the decision-making guidelines, the Commission used

the basic approach and format of the 1987 guidelines of the District of Columbia Board of Parole, but made modifications to the Board's guidelines in an effort to incorporate factors that led to departures from the guidelines. 63 FR 39172-39174. In 2000, the Commission modified the guidelines for D.C. prisoners, creating suggested ranges of months to be served based on the pre- and post-incarceration factors evaluated under the guidelines, which in turn allowed the Commission to extend presumptive parole dates to prisoners up to three years from the hearing date. 65 FR 45885-45903.

Also in 2000, the U.S. Supreme Court decided the case of *Garner v. Jones*, 529 U.S. 244 (2000), indicating that parole rules that allow for the use of discretionary judgment may still come within the proscription of the *Ex Post Facto* Clause of the Constitution. For over twenty years, federal appellate courts had rejected claims that the Commission's use of discretionary guidelines for parole release decisions violated the constitutional ban against ex post facto laws. As a result of the Supreme Court's decision in *Garner*, the U.S. Court of Appeals for the District of Columbia Circuit held that parole release guidelines may constitute laws that are covered by the *Ex Post Facto* Clause. *Fletcher v. District of Columbia*, 391 F.3d 250 (D.C. Cir. 2004) (*Fletcher II*). Following upon the *Fletcher II* decision and the decision in *Fletcher v. Reilly*, 433 F.3d 867 (D.C. Cir. 2006) (*Fletcher III*), the U.S. District Court for the District of Columbia (Huvelle, District Judge) held that the Parole Commission's application of its 2000 paroling guidelines for several D.C. Code prisoners violated the Ex Post Facto Clause. *Sellmon v. Reilly*, 551 F.Supp.2d 66 (D.D.C. 2008). Several other prisoner-plaintiffs were denied relief by the district court, which showed that not every D.C. prisoner must be reconsidered under the 1987 guidelines to avoid *ex post facto* problems. In response to this decision, the Commission promulgated a rule calling for application of the 1987 D.C. Board Guidelines to any offender

who committed his crime between March 4, 1985 (the effective date of the “1987 Guidelines”), and August 4, 1998 (the last day the D.C. Board exercised parole release authority) (“*Sellmon Rule*”). 74 FR 34688 (July 17, 2009) (interim rule, effective August 17, 2009) and 28 CFR 2.80(o) (November 13, 2009) (final rule).

Since the *Sellmon* decision, prisoner-plaintiffs who committed their offenses before March 1985 have sought to have the D.C. Courts make a similar decision with regard to the regulations that the former D.C. Board of Parole promulgated in 1972 and were in effect when they committed their offenses. Because of the broad discretion to grant parole which was vested in the D.C. Board of Parole under the 1972 regulations, federal courts have not found that Commission’s use of its revised guidelines violates the *Ex Post Facto* Clause. However, the Parole Commission has decided to reconsider its use of the 2000 regulations in light of the progression of cases involving *ex post facto* claims and parole guidelines.

If a prisoner has been previously granted a presumptive parole date under the Commission's guidelines at § 2.80(b) through (m), the presumptive date will not be rescinded unless the Commission would rescind the date for one of the accepted bases for such action, i.e., new criminal conduct, new institutional misconduct, or new adverse information.

Executive Order 13132

These proposed regulations will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Under Executive Order 13132, these proposed rules do not have sufficient federalism implications requiring a Federalism Assessment.

Regulatory Flexibility Act

These proposed rules will not have a significant economic impact upon a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 605(b).

Unfunded Mandates Reform Act of 1995

These proposed rules will not cause State, local, or tribal governments, or the private sector, to spend \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. No action under the Unfunded Mandates Reform Act of 1995 is necessary.

Small Business Regulatory Enforcement Fairness Act of 1996 (Subtitle E–Congressional Review Act)

These proposed rules are not “major rules” as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 Subtitle E–Congressional Review Act, now codified at 5 U.S.C. 804(2). The proposed rules will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on the ability of United States-based companies to compete with foreign-based companies. Moreover, these are rules of agency practice or procedure that do not substantially affect the rights or obligations of non-agency parties, and do not come within the meaning of the term “rule” as used in Section 804(3)(C), now codified at 5 U.S.C. 804(3)(C). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 28 CFR Part 2

Administrative practice and procedure, Prisoners, Probation and Parole.

The Proposed Rules

Accordingly, the U. S. Parole Commission proposes to adopt the following amendment to 28 CFR part 2:

PART 2 - PAROLE, RELEASE, SUPERVISION AND RECOMMITMENT OF PRISONERS, YOUTH OFFENDERS, AND JUVENILE DELINQUENTS

1. The authority citation for 28 CFR part 2 continues to read as follows:

Authority: 18 U.S.C. 4203(a)(1) and 4204(a)(6).

2. Amend § 2.80 by revising paragraph (a)(5) to read as follows:

§ 2.80 Guidelines for D.C. Code offenders.

(a) * * *

(5) A prisoner who committed the offense of conviction before March 3, 1985 who is not incarcerated as a parole violator and has not been granted a parole effective date may receive a parole determination using the 1972 regulations of the former District of Columbia Board of Parole (9 DCMR 105.1):

(i) *Factors considered.* Among others, the Commission takes into account some of the following factors in making its determination as to parole:

- (A) The offense, noting the nature of the violation, mitigating or aggravating circumstances and the activities and adjustment of the offender following arrest if on bond or in the community under any pre-sentence type arrangement.
- (B) Prior history of criminality noting the nature and pattern of any prior offenses as they may relate to the current circumstances.
- (C) Personal and social history of the offender, including such factors as his family situation, educational development, socialization, marital history, employment history, use of leisure time and prior military experience, if any.
- (D) Physical and emotional health and/or problems which may have played a role in the individual's socialization process, and efforts made to overcome any such problems.
- (E) Institutional experience, including information as to the offender's overall general adjustment, his ability to handle interpersonal relationships, his behavior responses, his planning for himself, setting meaningful goals in areas of academic schooling, vocational education or training, involvements in self-improvement activity and therapy and his utilization of available resources to overcome recognized problems. Achievements in accomplishing goals and efforts put forth in any involvements in established programs to overcome problems are carefully evaluated.
- (F) Community resources available to assist the offender with regard to his needs and problems, which will supplement treatment and training programs begun in the institution, and be available to assist the offender to further serve in his efforts to reintegrate himself back into the community and within his family unit as a productive useful individual.

(ii) If a prisoner has been previously granted a presumptive parole date under the Commission's guidelines at § 2.80(b) through (m), the presumptive date will not be rescinded unless the Commission would rescind the date for one of the accepted bases for such action, i.e., new criminal conduct, new institutional misconduct, or new adverse information.

(iii) Prisoners who have previously been considered for parole under the 1987 guidelines of the former D.C. Board of Parole will continue to receive consideration under those guidelines.

Dated: June 3, 2015.

J. Patricia Wilson Smoot

Acting Chairman, U.S. Parole Commission

[FR Doc. 2015-13998 Filed: 6/12/2015 08:45 am; Publication Date: 6/15/2015]