COURT OF APPEALS
DECISION
DATED AND FILED

February 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1476

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN EX REL. LARRY J. BROWN,

PETITIONER-APPELLANT,

V.

GARY R. MCCAUGHTRY, WARDEN, AND JOHN C. HUSZ, PAROLE COMMISSION,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dodge County: JOHN R. ST0RCK, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

PER CURIAM. Larry Brown appeals from an order denying his petition for a writ of habeas corpus. The issue is whether Brown is entitled to parole consideration under the rules existing when he was convicted in 1983, rather than the rules that now exist. With one exception, we are unable to

distinguish between the old and new rules in question. Additionally, we reject Brown's contention that applying the one exception violates the *ex post facto* clause of the United States Constitution. We therefore affirm.

The applicable rule in 1983 provided as follows:

> (7) A recommendation for parole and a grant of parole shall be made only after the inmate has:
>
> (a) Become parole-eligible under s. 57.06, STATS., and s. HSS 30.04;
>
> (b) Served sufficient time for punishment, considering the nature and severity of the offense;
>
> (c) Demonstrated satisfactory adjustment to the institution and program participation at the institution;
>
> (d) Developed an adequate parole plan; and
>
> (e) Reached a point at which, in the judgment of the board, discretionary parole would not pose an unreasonable risk to the public.

WIS. ADM. CODE § HSS 30.05(7) (1982).

The applicable rule is now WIS. ADM. CODE § PAC 1.06. It reads:

> (7) recommendation for parole and a grant of parole shall be made only after the inmate has:
>
> (a) Become parole-eligible under s. 304.06, STATS., and s. PAC 1.05;
>
> (b) Served sufficient time so that release would not depreciate the seriousness of the offense[;]
>
> (c) Demonstrated satisfactory adjustment to the institution and program participation at the institution;
>
> (d) Developed an adequate parole plan; and
>
> (e) Reached a point in which, in the judgment of the commission, discretionary parole would not pose an unreasonable risk to the public.

WIS. ADM. CODE § PAC 1.06(7) (1995). We conclude that the two versions of the rules set forth above are virtually identical. Brown cannot reasonably contend that his parole applications are treated differently under the newer rule.[1]

In addition to the minor changes set forth in WIS. ADM. CODE § PAC 1.06(7), the newly created WIS. ADM. CODE § PAC 1.06(9)(a) provides that the parole commission shall provide an opportunity for direct input from a victim before recommending parole for certain offenses, including Brown's. Applying that provision, however, does not violate the *ex post facto* clause, because the latter does not apply to administrative rules governing parole. *See* ***Bailey v. Gardebring***, 940 F.2d 1150, 1156-57 (8th Cir. 1991). Additionally, the record does not show that the creation of § PAC 1.06(a) has changed the manner in which the board has reviewed Brown's parole applications. The last review of record, in 1996, resulted in denial because of the nature and seriousness of the crimes (first degree sexual assault and armed robbery), poor institutional adjustment, and continued need for treatment.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)(5), STATS.

[1] Although the record does not clearly establish that the parole board applied the new rules to Brown's recent parole reviews, we will assume that to be the case.