

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 31, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1137

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**STATE OF WISCONSIN EX REL.
DAVID S. FREDERICK,**

Petitioner-Appellant,

v.

**COLUMBIA CORRECTIONAL INSTITUTION,
JEFFREY P. ENDICOTT, SUPERINTENDENT,
MARK HEISE, PROGRAM COORDINATOR,**

Respondents-Respondents.

APPEAL from an order of the circuit court for Columbia County:
DANIEL GEORGE, Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Sundby, JJ.

PER CURIAM. David S. Frederick appeals from an order dismissing his petition for *writ of habeas corpus*. The circuit court held that it lost subject matter jurisdiction when Frederick failed to comply with § 13.56, STATS., by serving the Joint Committee for Review of Administrative Rules (JCRAR)

within sixty days of filing his complaint. We conclude that whatever the procedural status of the appeal, Frederick would lose on the merits. Accordingly, we affirm.¹

BACKGROUND

In 1987, Frederick was convicted of three crimes and sentenced to thirty-nine years' imprisonment. In 1988, WIS. ADM. CODE § DOC 302.14 was changed by adding a fifteenth subsection. Under subsection 15, an inmate's security classification is set, taking into account, "[t]he inmate's risk rating as high risk, moderate risk or low risk, determined by employing the department's risk rating system...."²

Under WIS. ADM. CODE § DOC 302.14 as it existed before amendment, Frederick alleges that he would be more leniently classified than he is under subsection 15. Because the amendment post-dates his conviction, he argues that subsection 15 is an *ex post facto* law as applied to him.

¹ It is immaterial that we affirm on a different ground than the circuit court's decision. See *State v. Alles*, 106 Wis.2d 368, 391, 316 N.W.2d 378, 388 (1982).

² WISCONSIN ADM. CODE § DOC 302.14(15) reads in full as follows:

The following factors may be taken into consideration in assigning a security classification to an inmate:

...

- (15) The inmate's risk rating as high risk, moderate risk or low risk, determined by employing the department's risk rating system. Under the risk rating system, if one or more factors are rated high risk, the risk rating is high risk. If one or more factors are rated moderate risk and no factors are rated high risk, the risk rating is moderate risk. If all factors are rated low risk, the risk rating is low risk. In this subsection, "risk rating system" means the interpretive guidelines, procedures and forms used to assess the risk that an inmate presents to public safety and to the security and management of the correctional institution.

This identical argument was raised before the United States District Court for Wisconsin's Eastern District. *Payton v. Fiedler*, 860 F. Supp. 606 (E.D. Wis. 1994). In rejecting the argument, the court set forth a two-part test:

1. Whether § DOC 302.14 applies retroactively; and
2. Whether § DOC 302.14 constitutes punishment.

If § DOC 302.14 applies retroactively and constitutes punishment, it would violate the *ex post facto* clause.³

The court concluded that § DOC 302.14 does apply retroactively, thus triggering the first part of the test. However, the court concluded the punishment part of the test was not triggered. Even if the condition of imprisonment is made more difficult for a particular prisoner, § DOC 302.14(15) evinces no punitive intention because there is no evidence it was intended to be a "component of punishment." 860 F. Supp. at 608. The court therefore concluded § DOC 302.14(15) is not an *ex post facto* law. 860 F. Supp. at 609.

Because we adopt this analysis, we conclude that Frederick could not prevail on the merits. Accordingly, we need not consider whether Frederick's claim fails for failure to comply with § 13.56, STATS., or whether the State did, or could, waive service on JCRAR. See *Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

By the Court. – Order affirmed.

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

³ "The *ex post facto* clause, U.S. Const. Art. I, § 10, cl. 1, prohibits the state from 'retrospective[ly]' imposing or increasing 'punishment.'" *Payton v. Fiedler*, 860 F. Supp. 606, 608 (E.D. Wis. 1994) (citing *Weaver v. Graham*, 450 U.S. 24, 28 (1981)).