

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RANDY JOE STAHL,

Petitioner,

ORDER

v.

04-C-0785-C

WARDEN, Oregon Correctional Center,

Respondent.

On October 27, 2004, Randy Joe Stahl's habeas petition was dismissed with prejudice as to petitioner's claim that the state trial court erred in denying petitioner's motion to suppress statements allegedly protected by the attorney-client privilege for failure to state a constitutional claim and without prejudice as to four other claims for petitioner's failure to exhaust his state court remedies. Petitioner has filed a motion pursuant to Fed. R. Civ. P. 60(b), seeking vacation of the October 27, 2004 order and issuance of a new order dismissing his entire petition without prejudice.

Having considered the arguments made by petitioner in support of his motion, I am granting the motion. I agree with petitioner that it was error to rule on the merits of the exhausted claim while dismissing the unexhausted claims without prejudice. Instead, the entire petition should have been dismissed without prejudice, in accordance with Rose v. Lundy, 455 U.S. 509, 510 (1982), on the sole ground that the petition was a "mixed"

petition. Accordingly, I will direct the clerk of court to vacate the previous judgment and enter a new judgment to that effect. Moreover, because it was error to review the merits of petitioner's attorney-client privilege claim, any discussion of that claim in the court's order of October 27, 2004 is merely dicta.

ORDER

IT IS ORDERED that:

1. Petitioner's motion brought pursuant to Fed. R. Civ. P. 60(b) is GRANTED.
2. The judgment entered October 27, 2004 is VACATED in its entirety.
3. The clerk of court is directed to enter a new judgment dismissing Randy Joe Stahl's petition for a writ of habeas corpus in its entirety without prejudice pursuant to Rose v. Lundy, 455 U.S. 509 (1982).

Entered this 29th day of September, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge