

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

RANDY GAINES,

Petitioner,

ORDER

v.

06-C-0220-C

LISA AVILA, Superintendent,
Sturtevant Transitional Facility,

Respondent.

Randy Gaines has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the five dollar filing fee. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

Gaines is challenging a March 2002 conviction in the Circuit Court for Dane County for three counts of sexual assault of a child on the ground that he was denied his Sixth Amendment rights to effective counsel and a speedy and public trial. On April 3, 2006, this court dismissed a nearly identical petition without prejudice at Gaines's request after Gaines conceded that he had not exhausted his state court remedies. In a letter submitted with his latest petition, Gaines concedes that he still has not exhausted his claims in state court; he asserts that he cannot afford to pay the filing fee necessary to file a habeas petition in state

court. He asserts that he is willing to “give up” his right to a state habeas corpus petition in order for this court to hear his claims.

To excuse a petitioner from the exhaustion requirement, the court must find that “there is an absence of available State corrective process” or “circumstances exist that render such process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B)(i) and (ii). I am unable to make either finding in this case. In particular, Gaines can present his claims to the state court by filing a postconviction motion pursuant to Wis. Stat. § 974.06. Such a motion “is part of the original criminal action, is not a separate proceeding and may be made at any time.” Wis. Stat. § 974.06(2). Because the motion is part of the original criminal action, no filing fee is required.

Accordingly, the petition is DISMISSED WITHOUT PREJUDICE for petitioner’s failure to exhaust his state court remedies.

Entered this 1st day of May, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge