

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

STEPHEN CARMICHAEL,)
)
 Petitioner,)
)
 v.) CIVIL NO. 04-113-B-W
)
 WARDEN, MAINE STATE PRISON,)
)
 Respondent.)

ORDER ON PETITIONER’S MOTION FOR RECONSIDERATION

On November 17, 2004, this Court issued an Order, denying Petitioner Stephen Carmichael’s appeal of Magistrate Judge Kravchuk’s decision, which denied his Motion for Reconsideration and Motion for Appointment of Counsel. Mr. Carmichael has now filed a Motion for Reconsideration of this Court’s November 17, 2004, Order. In the Motion, he states he does not have “any idea what to do or how to even write a motion” and his prior filings have been the work of “the jail house writ [writer].” With the Motion, he submits an Affidavit from David Gordon Fleming, a fellow prisoner. Mr. Fleming avers he, not Mr. Carmichael, has been the true author of “every document that has been filed within this Court.” He states further his actions have violated prison rules and have subjected him to discipline. Finally, he says he is “no longer willing to risk disciplinary punishment.” This Court DENIES Mr. Carmichael’s Motion for Reconsideration.

It is axiomatic that an issue not previously presented cannot be raised for the first time on appeal. *Johnston v. Holiday Inns, Inc.*, 595 F.2d 890, 894 (1st Cir. 1979). Although this rule is not absolute, it is relaxed only “in horrendous cases where a gross miscarriage of justice would occur.” *Newark Morning Ledger Co. v United States*, 539 F.2d 929, 932 (3d Cir. 1976). In

addition, the new ground must be “so compelling as virtually to insure appellant’s success.”
Dobb v. Baker, 505 F.2d 1041, 1044 (1st Cir. 1974).

Here, Mr. Carmichael filed a Motion for Appointment of Counsel on September 8, 2004, arguing he could not understand legal matters “without help.” He appealed Magistrate Judge Kravchuk’s denial of the Motion, citing case law and setting forth the grounds for the appeal. It is only after this Court denied his appeal Mr. Carmichael has revealed he has had “help” all along. He apparently is not the author of any of the pleadings and a “jail house writ [writer]” has been the true author. This information was clearly available to Mr. Carmichael when he originally filed his Motion, since it apparently was not his own work. Mr. Carmichael cannot submit evidence and raise matters on appeal never presented to the Magistrate Judge. *See Borden v. Sec’y of Health & Human Servs.*, 836 F.2d 4, 6 (1st Cir. 1987)(“Parties must take before the magistrate, not only their best shot, but all of their shots.”)(citation omitted).

Accordingly, Mr. Carmichael’s Motion for Reconsideration is DENIED.

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 2nd day of December, 2004.

Petitioner

STEPHEN CARMICHAEL

represented by **STEPHEN CARMICHAEL**
MAINE STATE PRISON
807 CUSHING ROAD
WARREN, ME 04864
PRO SE

V.

Respondent

**WARDEN, MAINE STATE
PRISON**

represented by **CHARLES K. LEADBETTER**
ASSISTANT ATTORNEY
GENERAL
STATE HOUSE STATION 6
AUGUSTA, ME 04333-0006
626-8800
Email: charles.leadbetter@maine.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

DONALD W. MACOMBER
MAINE ATTORNEY GENERAL'S
OFFICE
STATE HOUSE STATION 6
AUGUSTA, ME 04333
626-8800
Email:
donald.w.macomber@maine.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED