

<b>DISTRICT COURT, JEFFERSON COUNTY, COLORADO</b> 100 Jefferson County Parkway Golden, Colorado 80401 Telephone: (303) 271-6130	
<b>In re the Marriage of:</b>  Petitioner: <b>CHRISTY HARRINGTON,   n/k/a     CHRISTY RYAN</b>  and  Respondent: <b>SEAN L. HARRINGTON</b>	
Sean Harrington, <i>Pro Se</i> 197M Boston Post Road, West Suite #151 Marlborough, MA 01752	↑ <b>COURT USE ONLY</b> ↑  Case Number: 99DR3717 Jefferson County Case No. 30-1972795-44-8A
<b>AMENDED MOTION FOR RECONSIDERATION OF MAY 4<sup>TH</sup> ORDER IN          LIGHT OF NEWLY DISCOVERED EVIDENCE AND FOR DISQUALIFICATION          OF BILL FYFE AS SPECIAL ADVOCATE</b>	

**COMES NOW**, the Respondent, pursuant to C.R.C.P. §§59(d)(4) and 60(b)(5), to submit the within AMENDED MOTION FOR RECONSIDERATION OF MAY 4<sup>TH</sup> ORDER and DISQUALIFICATION OF BILL FYFE AS SPECIAL ADVOCATE, and in support thereof, states as follows:

1. This application for relief is brought under C.R.C.P. §60(b), *inter alia*. As such, this motion is both timely and the court has jurisdiction to rule on it:

This Court's jurisdiction to entertain the Rule 60(b) motion is clear, regardless of the current procedural status of this case. In Herring v. Kennedy-Herring Hardware Co., Inc., 261 F.2d 202 (6th Cir. 1958), the Sixth Circuit Court of Appeals stated:

The authority to grant a new trial under Rule 59 or to relieve a party from a final judgment under Rule 60(b), rules of Civil Procedure, rests with the District Court, not the Court of Appeals. In accordance with the procedure in an analogous situation, approved in Smith v. Pollin, 90 U.S.App.D.C. 178, 194 F.2d 349; see also: Metcalf v. Untied States, 6 Cir., 195 F.2d 213, 218; Hamel v. United States, 6 Cir., 135 F. 2d 969; appellant's motion seeking a new trial or relief from final judgment under either of those rules should be addressed to the District Court.

261 F. 2d at 203. Respondent, therefore, may bring his Rule 60(b) motion to the attention of the District Court when it is ripe, notwithstanding the pendency of an appeal in the case. On a *habeas corpus* petition challenging a state court conviction, the Court in Browder v. Dir., Dept. of Corrections of Illinois, 98 S.Ct. 556 (1978), recognized that a motion for relief from judgment is appropriate even after the district court has lost jurisdiction to grant relief on the petition. In Cochran v. Birkel, 651 F.2d 1219, 1221 (6th Cir. 1991), the Sixth Circuit stated that it "*has consistently held that a district court retains jurisdiction to proceed with matters that are in aid of the appeal.*"

The district court is the proper forum to determine in the first instance whether there is sufficient basis to overturn the judgments. Furthermore, litigants who seek Rule 60(b) relief typically cannot wait until an appeal has been concluded to request such relief because the period during which the case is on appeal counts toward determining whether a Rule 60(b) motion is timely filed. For this reason, as the parties agree, litigants must be permitted to file these motions in the district court even while an appeal is pending. Fobian v. Storage Technology Corp., 164 F.3d 887, 889 (4th Cir.1999)(internal citations omitted).

In First Nat'l Bank Salem, Ohio v Hirsch, 535 F.2d 343 (6th Cir. 1976), the Sixth Circuit panel stated: "*If the district judge is disposed to grant the motion, he may enter an order so indicating and the party may then file a motion to remand*" in the Sixth Circuit Court of Appeals if an appeal is pending. *Id.*, 535 F.2d at 346. See, also, Smith v. Lujan, 588 F 2d 1304,1307 (9th Cir. 1979); Carriger v. Lewis, 971 F.2d 329, 332 (9th Cir. 1992).

2. On or about June 7th 2004, Respondent filed a Motion with this court pursuant to C.R.C.P. §§59(d)(5) & (g), which included affidavits that had been submitted on or about June 5th 2004. Both the affidavits and Motion were submitted immediately following the availability of the newly discovered evidence. (See Outcalt v. Johnston, 9 Colo. App. 519, 49 P. 1058 (1897). (If it does not appear from the affidavits in support of a motion for new trial, on the ground of newly discovered evidence, that by the exercise of reasonable diligence such evidence could not have been produced at the trial, the showing is insufficient))

3. This court, apparently, misconstrued the Respondent's Motion described in Paragraph 2, hereinabove, as solely a Motion for Reconsideration. The other component to the combined Motion was an application for relief in the form of the disqualification of Bill Fyfe as Special Advocate based upon the incidents described in the newly discovered evidence.

4. Despite that Respondent's Motion had been brought pursuant to §§59(d)(5) & (g), this trial court denied the Motion under §59(a). Respondent's Motion was not brought under §59(a) and the affidavits in support of the Motion (filed as, Respondent's June 1st 2004 Disclosure of Exhibits) more than satisfied the "verification" requirement noted by this court in its June 21" 2004 order. Further, "A motion to reconsider in light of new circumstances or newly discovered evidence is not subject to the limitations in section (d) of this rule [59]." UIH-SFCC Holdings, L.P. v. Brigato, 51 P.3d 1076 (Colo. App. 2002), which is exactly what the Respondent's Motion was. And, under §60(b)(5), the trial court could have granted relief for any reason justifying relief from the judgment.

5. On May 18<sup>th</sup> 2004, this Respondent had asked the court to reconsider its May 4<sup>th</sup> order. As with all of the Respondent's motions over the past four years (save motions to withdraw a prior pleading), the relief requested was denied.

6. The Motion described in Paragraph 5, hereinabove, was *pro confesso*, because the opposing party filed no response or objection. (see C.R.C.P. 8&(d) Effect of Failure to Deny Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading "; C.R.C.P. §121, District Court Practices, Determinations of Motions: "...Failure of a responding party to file a responsive brief may be considered a confession of the motion. "; A party waives all defenses and objections which he does not present in his answer" Duke v. Pickett, 168 Colo. 215, 451 P.2d 288 (1969); *When an issue is tried before a court without timely objection or motion, the issue shall be deemed properly before the court despite any defect in the pleading.* Butler v. Behaeghe, 37 Colo. App. 282, 548 P.2d 934 (1976)) *If the issue raised by the pleadings is not objected to, the parties' consent is implied.* Tovrea v. Denver & Rio Grande Western R.R. Co., 693 P.2d 1016 (Colo. App. 1984)

7. In Paragraph 33 of the Respondent's May 18th motion, the Respondent stated:

"On or about the 3rd of May, in response to Fyfe's unethical practices, Harrington filed a complaint with the State of Colorado Department of Regulatory Agencies - Mental Health Licensing Section."

And, in Paragraph 34, the Respondent asserted:

"...it would be unlikely [for] a reasonable person to expect that Fyfe could remain impartial with a pending ethics complaint against him by Harrington."

8. On the 25th of May, 2004, just days after the filing of the aforementioned motion for reconsideration, Dr. Fyfe unexpectedly contacted the Respondent by telephone. Although he defended his decision to assess the additional fees in contravention of his contract with the Respondent and the courts earlier [valid] order and, although he mentioned that, "The judge supported me on that," he conceded that the Respondent is, "technically legally correct," and he waived the additional fees in exchange for the Respondent's implied covenant not to sue. He introduced this offer by asking, "Do you want to see your daughter this summer?" He then expressed concern that he believed the Respondent intended to sue him in Federal Court (a mistaken interpretation to a reference in a letter regarding Wilson and Ryan, not the Special Advocate). He continued by explaining that he was nearly finished with his Report and that he would recommend, at a minimum, a provision for the immediate restoration of "some kind of contact" between the Respondent and his daughter. As a caveat, he stated, "but, I need to know that you're not going to sue me." The Respondent filed an affidavit with this court, incorporated herein by reference as, "Exhibit A," in his "June 1st 2003 Disclosure of Exhibits," which attests to this phone call and which the Respondent requests this court to take **judicial notice** of.

9. On the 28th of May, 2004, Dr. Fyfe left a voice-message for the Respondent. In this voice-message, he indicates that he is concerned because he has learned that the Respondent had filed a grievance against him with the state licensing board. He asked the Respondent to retract the complaint and implied that this must happen first, in order for him to continue his court-ordered work in completing his Report. The Respondent filed a sworn transcription of this voice-message with this court, incorporated herein by reference as, "Exhibit B," in his "June 1<sup>st</sup> 2003 Disclosure of Exhibits," which the Respondent requests this court to take **judicial notice** of. The Respondent currently holds a digital archive of this voice-mail.

10. In both instances, described in Paragraphs 8 and 9, hereinabove, Fyfe conditioned the completion of his work (which he stated would result in some kind of immediate restored contact between the Respondent and his daughter) on the Respondent's agreement not to pursue a civil action against him and the forfeiture of the Respondent's First Amendment petitioning rights to pursue a grievance for the unethical fee-related conduct earlier alleged. Fyfe's actions, as evidenced by these instances, even if considered separately from the fee-related ethical allegations, demonstrate clearly that he is not competent or willing to execute responsibilities intimately associated with the court's decision making processes in this case without allowing his personal priorities to compete.

11. Because Fyfe's investigation and his subsequent recommendations are an extension of judicial function, the rules and precedents governing disqualification of judges apply also to those conferred judicial authority and immunity and bias or prejudice or the appearance thereof is sufficient to warrant recusal. (See generally Richard E. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges, Little, Brown & Company, (1996); Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §3542).

12. For the reasons more fully set forth in Paragraphs 1 through 12 hereinabove, Fyfe should be disqualified and the all previous monies paid by Harrington (to date, \$1,422.50, plus costs) refunded by Fyfe or paid directly to Harrington by the Petitioner, who requested an appointment in substitution for the preexisting Special Advocate, Natalie Van Note.

WHEREFORE, Respondent requests that this court vacate its May 4th Order and disqualify Bill Fyfe from the instant case and require that he refund all monies paid by Respondent directly to Respondent within 30 days, and for other such relief as this court may deem proper.

  
Respondent

CERTIFICATE OF MAILING

I hereby certify that on the 27<sup>th</sup> day of July, 2004, I mailed a true and accurate copy of the foregoing document via pre-paid first class mail addressed as follows:

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