IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EUGENE L . CHERRY,

Petitioner,

v.

GERALD BERGE, PETER HUIBREGTSE,
JOHN SHARPE and BRIAN KOOL,

Respondents.

ORDER

05-C-38-C

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Petitioner brought this action in 2005, contending that prison officials had violated his Eighth Amendment right to be free from cruel and unusual punishment by placing him in the "behavior management plan" for approximately two weeks at the Wisconsin Secure Program Facility. In an order dated May 17, 2005, I dismissed the case for petitioner's failure to state a claim upon which relief may be granted. Judgement was entered in favor of defendants the same day. Petitioner did not appeal the decision.

Now, petitioner has filed a "motion for reconsideration," which I construe as a motion for relief from judgment under Fed. R. Civ. P. 60. In his motion, petitioner argues that the court should reconsider its decision in light of Gillis v. Litscher, 468 F.3d 488 (7th

Cir. 2006), in which the court concluded that summary judgment was inappropriate on the Eighth Amendment claim of another prisoner who had been subjected to the same program.

Although I am sympathetic to petitioner's situation, it is too late for him to benefit from Gillis. Rule 60 provides a basis for relief only when new *factual* information is discovered; a change in the law is not sufficient. Gleash v. Yuswak, 308 F.3d 758, 761 (7th Cir. 2002). Norgaard v. DePuy Orthopaedics, Inc., 121 F.3d 1074, 1076 (7th Cir. 1997), was a case like this one in which the plaintiff sought relief from judgment under Rule 60 after the Supreme Court changed the law governing the circuit. The court of appeals concluded that Rule 60 did not allow the plaintiff to take advantage of the change. The court explained:

> If new developments of this kind permitted revisiting of old judgments, finality would be impossible to achieve. Courts also would find it hard to handle new cases, if they could never deem the old ones closed. . . .
> . . . Litigants who want to take advantage of the possibility that the law may evolve – or who seek to precipitate legal change – must press their positions while they have the chance. If the law of the circuit is against a litigant . . . the party still may appeal and ask the court to modify or overrule the adverse decision, or ask the Supreme Court to reverse the court of appeals.

Id. at 1077.

The same is true here. Plaintiff could have appealed the decision but chose not to do so. Accordingly, his motion for relief from judgment under Rule 60 must be denied.

Legal error *is* an appropriate ground for a motion under Fed. R. Civ. P. 59(e) to alter

or amend the judgment. But the time for filing a Rule 59 motion has long since passed: a losing party has only 10 days from the entry of judgment in which to file such a motion. Thus, there is no relief that this court can grant petitioner at this time.

ORDER

IT IS ORDERED that petitioner Eugene Cherry's motion for relief from the judgment is DENIED.

Entered this 16th day of March, 2007.

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