IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:11-CT-3118-D

THOMAS HEYER, Plaintiff, v. UNITED STATES BUREAU OF PRISONS, et al., Defendants.	)	**ORDER**

Thomas Heyer ("Heyer" or "plaintiff") is a sexually dangerous person in the custody of the Bureau of Prisons ("BOP") pursuant to 18 U.S.C. § 4248. See United States v. Heyer, 740 F.3d 284, 291–94 (4th Cir. 2014). Heyer is deaf and filed this action concerning his conditions of confinement at the Federal Correctional Institution in Butner, North Carolina ("FCI-Butner"). See [D.E. 1, 24]. On November 6 and 7, 2017, the court held a bench trial concerning Heyer's claim that the defendants are violating his First Amendment rights by failing to provide him with videophone equipment to allow him to make point-to-point videophone calls [D.E. 190, 193]. On February 12, 2019, the court entered judgment in favor of defendants and against Heyer [D.E. 205].

On March 12, 2019, Heyer moved to alter or amend the court's judgment or, in the alternative, to amend the court's findings [D.E. 207] and filed a memorandum in support [D.E. 208]. On April 2, 2019, defendants responded in opposition [D.E. 209]. On April 16, 2019, Heyer replied [D.E. 210].

Rule 59(e) of the Federal Rules of Civil Procedure permits a court to alter or amend a judgment. See Fed. R. Civ. P. 59(e). "[R]econsideration of a judgment after its entry is an

extraordinary remedy which should be used sparingly." Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998) (quotation omitted); see Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369, 378 (4th Cir. 2012). Whether to alter or amend a judgment under Rule 59(e) rests within the sound discretion of the district court. See, e.g., Dennis v. Columbia Colleton Med. Ctr., Inc., 290 F.3d 639, 653 (4th Cir. 2002); Hughes v. Bedsole, 48 F.3d 1376, 1382 (4th Cir. 1995).

"Rule 59(e) motions can be successful in only three situations: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." United States ex rel. Carter v. Halliburton Co., 866 F.3d 199, 210 (4th Cir. 2017) (quotation omitted); see Mayfield, 674 F.3d at 378; Robinson v. Wix Filtration Corp., 599 F.3d 403, 420 (4th Cir. 2010); Zinkand v. Brown, 478 F.3d 634, 637 (4th Cir. 2007); Ingle ex rel. Estate of Ingle v. Yelton, 439 F.3d 191, 197 (4th Cir. 2006); Bogart v. Chapell, 396 F.3d 548, 555 (4th Cir. 2005); Hill v. Braxton, 277 F.3d 701, 708 (4th Cir. 2002); Pac. Ins. Co., 148 F.3d at 403. When a party seeks relief based on newly discovered evidence, the party must show:

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.

Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989) (quotation omitted); see Quillin v. C.B. Fleet Holding Co., 328 F. App'x 195, 203 (4th Cir. 2009) (per curiam) (unpublished).

Heyer argues that, because of new evidence not available at trial, the court should amend its judgment to provide him with a videophone with which he can make point-to-point videophone calls. Heyer first presents evidence concerning John TC Yeh ("Yeh"), a "deaf male prisoner at FCI

Schuylkill in Pennsylvania." [D.E. 208] 2. Heyer notes that, in February 2018, the United States Department of Justice ("DOJ") concluded, in an administrative proceeding, that Section 504 of the Rehabilitation Act required the BOP to provide Yeh access to a videophone. See id. at 2–3; [D.E. 208-1]. Heyer next presents evidence that the BOP has contracted with Integrio Technologies to install Video Relay Service ("VRS") systems in BOP facilities. See [D.E. 208] 3–4; [D.E. 208-3]; [D.E. 208-5]; [D.E. 208-6]. Heyer argues that the VRS systems could be used to make point-to-point videophone calls. See [D.E. 208] 4.

The evidence that Heyer presents does not warrant the extraordinary remedy of reconsidering the court's judgment. Heyer has not presented new evidence, and Heyer did not exercise due diligence. Additionally, Heyer's evidence merely impeaches the BOP's witnesses' positions concerning security risks. Moreover, Heyer's evidence concerning Yeh and the BOP videophone contracts is not material to whether the First Amendment mandates that the BOP provide Heyer with the requested videophone equipment. Furthermore, Yeh's situation is factually distinguishable from Heyer's situation. For example, the risk that Yeh poses based on his conviction for conspiracy to commit mail fraud based on fraudulent billing is materially different than the risk that Heyer poses based on his status as a sexually dangerous person who is housed with other sexually dangerous offenders. Accordingly, the court denies Heyer's motion to alter or amend the court's judgment.

As for Heyer's motion under Rule 59(a)(2), "a motion for rehearing should be based upon manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons." United States v. Timms, 537 F. App'x 265, 267 (4th Cir. 2013) (per curiam) (unpublished) (quotations omitted); see United States v. Carolina E. Chem. Co., 639 F. Supp. 1420, 1423–24 (D.S.C. 1986); United States v. Turner, No. 5:07-HC-2167-D, 2012 WL 965985, at *1 (E.D.N.C. Mar. 21, 2012) (unpublished). Heyer has not shown any substantial reason to open the judgment.

Accordingly, the court denies Heyer's motion under Rule 59(a)(2).

In sum, the court DENIES Heyer's motion [D.E. 207].

SO ORDERED. This 21 day of June 2019.

JAMES C. DEVER III
United States District Judge