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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

ROBERT MCDANIEL,)	1: 09 - CV - 0437 AWI DLB (PC)
)	
Plaintiff,)	ORDER DENYING MOTION TO SET
)	ASIDE ORDER ADOPTING FINDINGS
v.)	AND RECOMMENDATIONS
)	
)	ORDER DENYING REQUESTS FOR
W. RIEDEL, et al.,)	CERTIFICATE OF APPEALABILITY
)	AS UNNECESSARY
Defendants.)	
_____)	(Documents #20, #22, & #23)

Plaintiff is a state prisoner who filed a civil rights action pursuant to 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72-302. On October 23, 2009, the court adopted the Magistrate Judge’s Findings and Recommendations, dismissed the action for failing to state a claim pursuant to 42 U.S.C. § 1983, and stated that the dismissal would count as a strike pursuant to 28 U.S.C. § 1915(g).

On November 12, 2009, Plaintiff filed a motion to set aside the Order Adopting the Findings and Recommendations. Plaintiff contends the dismissal should not count as a strike pursuant to 28 U.S.C. § 1915(g).

On November 17, 2009 and November 18, 2009, Plaintiff filed requests for certificates of appealability.

1 Preliminarily, the court will deny Plaintiff's requests for a certificate of appealability.
2 Pursuant to 28 U.S.C. § 2253, certificates of appealability are only needed to appeal final orders
3 in habeas corpus cases. Thus, no certificate is needed to appeal this Section 1983 action, and
4 Plaintiff's requests are unnecessary.

5 Plaintiff also requests reconsideration pursuant to Rule 59 of the Federal Rules of Civil
6 Procedure regarding this court's finding that the court's dismissal of the Section 1983 complaint
7 count as a strike. Pursuant to Rule 59(e), any motion to alter or amend judgment shall be filed
8 no later than ten days after entry of judgment. Rule 59(e), however, is an "extraordinary remedy,
9 to be used sparingly in the interests of finality and conservation of judicial resources." Kona
10 Enterprises, Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir.2000). Amendment or alteration
11 is appropriate under Rule 59(e) if (1) the district court is presented with newly-discovered
12 evidence, (2) the district court committed clear error or made an initial decision that was
13 manifestly unjust, or (3) there is an intervening change in controlling law. Zimmerman v. City of
14 Oakland, 255 F.3d 734, 740 (9th Cir. 2001); School Dist. No. 1J Multnomah County v. ACandS,
15 Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). This showing is a "high hurdle." Weeks v. Bayer, 246
16 F.3d 1231, 1236 (9th Cir. 2001). A judgment is not properly reopened "absent highly unusual
17 circumstances." Id. A district court's denial of a motion for a new trial or to amend a judgment
18 pursuant to Federal Rule of Civil Procedure 59 is reviewed for an abuse of discretion. Far Out
19 Productions, Inc. v. Oskar, 247 F.3d 986, 992 (9th Cir. 2001). A district court abuses its
20 discretion when it bases its decision on an erroneous view of the law or a clearly erroneous
21 assessment of the facts. Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1055 (9th Cir. 1997).

22 Here, the Magistrate Judge found that the claim alleged in the Section 1983 complaint
23 should have been brought in a habeas corpus petition pursuant to Edwards v. Balisok, 520 U.S.
24 641, 644 (1997). Plaintiff does not disagree with this finding and does not argue his Section
25 1983 complaint did state a claim cognizable through Section 1983. Rather, Plaintiff complains
26 that by finding the dismissal for failure to state a claim in a Section 1983 action will count as a
27

1 strike, the court's order was unlawful because it is tantamount to a dismissal with prejudice.
2 Title 28 U.S.C. § 1915(g) does not apply to habeas corpus petitions brought pursuant to 28
3 U.S.C. § 2254. Thus, Plaintiff can proceed with a habeas corpus petition even if the dismissal
4 in this Section 1983 case counts as a strike.

5 Accordingly, the court ORDERS that:

- 6 1. Plaintiff's requests for certificates of appealability are DENIED as
7 unnecessary; and
- 8 2. Plaintiff's motion to set aside the Findings and Recommendations is
9 DENIED.

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11 IT IS SO ORDERED.

12 **Dated: December 23, 2009**

13 /s/ Anthony W. Ishii
14 CHIEF UNITED STATES DISTRICT JUDGE
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