UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CHARLES T. DAVIS,	) Case No.: 1:10-cv-01184-LJO-SAB (PC)
Plaintiff,	)
v.	) ORDER DENYING PLAINTIFF'S MOTION TO CERTIFY ISSUES FOR APPELLATE REVIEW
CLARK J. KELSO, et al.,	) [ECF No. 70]
Defendants.	)

Plaintiff Charles T. Davis is appearing pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.

Now pending before the Court is Plaintiff's motion for the Court to certify certain issues for appellate review, filed February 5, 2014.

Plaintiff contends the Magistrate Judge's order dismissing his complaint with leave to amend for failure to state a cognizable claim (which was upheld by the denial of Plaintiff's motion for reconsideration) was in direct contradiction of the holding in Crawford-El v. Britton, 523 U.S. 579 (1998). Plaintiff requests the Court certify this issue for appellate review. Plaintiff's request must be denied.

"When a Notice of Appeal is defective in that it refers to a non-appealable interlocutory order, it does not transfer jurisdiction to the appellate court. . . . " Nascimento v. Dummer, 508 F.3d 905, 908 (9th Cir. 2007). In this instance, Plaintiff's motion to appeal the Magistrate Judge's December 16,

2013, order dismissing Plaintiff's complaint with leave to amend, is not immediately appealable, <u>see</u> <u>WMX Techs. v. Miller</u>, 104 F.3d 1133, 1137 (9th Cir. 1997) (dismissal with leave to amend is not a dismissal of the underlying action); <u>see also</u> <u>Montes v. United States</u>, 37 F.3d 1347, 1350 (9th Cir. 1994) (noting distinction between dismissal of a complaint and dismissal of the underlying action; <u>De</u> <u>Tie v. Orange County</u>, 152 F.3d 1109, 1111 (9th Cir. 1998) (same), and Plaintiff's motion to certify the above-mention issue for appellate review must be DENIED.

IT IS SO ORDERED.

Dated: **February 6, 2014**   **/s/ Lawrence J. O'Neill**
UNITED STATES DISTRICT JUDGE