

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

KENNETH FRIEDMAN,  
#80952

Plaintiff,

13 vs.  
14 OFFICE OF THE FEDERAL  
PUBLIC DEFENDER, *et al.*

## Defendants.

3:10-cv-00776-RCJ-RAM

## ORDER

This is a prisoner civil rights action. On February 4, 2011, the court dismissed plaintiff's complaint with prejudice for failure to state a claim for which relief may be granted (docket #5). Judgment was entered on February 7, 2011 (docket #7). Plaintiff has filed a "notice to the court of supplemental cause to amend or supplement case" (docket #8). However, this case is closed, and to the extent that this is a motion to amend his complaint, it must be denied. Also before the court is plaintiff's motion for district judge to reconsider the screening order (docket #9), which the court now reviews.

Where a ruling has resulted in final judgment or order, a motion for reconsideration may be construed either as a motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e), or as a motion for relief from judgment pursuant to Federal Rule 60(b). *School Dist. No. 1J*

1       1 *Multnomah County v. AC&S, Inc.*, 5 F.3d 1255, 1262 (9<sup>th</sup> Cir. 1993), *cert. denied* 512 U.S. 1236 (1994).

2       2       Under Fed. R. Civ. P. 60(b) the court may relieve a party from a final judgment or order  
3       3       for the following reasons:

4       4       (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly  
5       5       discovered evidence which by due diligence could not have been  
6       6       discovered in time to move for a new trial under Rule 59(b); (3) fraud  
7       7       (whether heretofore denominated intrinsic or extrinsic),  
8       8       misrepresentation, or other misconduct of an adverse party; (4) the  
9       9       judgment is void; (5) the judgment has been satisfied, released, or  
10      10      discharged, or a prior judgment upon which it is based has been reversed  
11      11      or otherwise vacated, or it is no longer equitable that the judgment should  
12      12      have prospective application; or (6) any other reason justifying relief  
13      13      from the operation of the judgment.

14      14      Motions to reconsider are generally left to the discretion of the trial court. *See Combs v. Nick Garin*  
15      15      *Trucking*, 825 F.2d 437, 441 (D.C. Cir. 1987). In order to succeed on a motion to reconsider, a party  
16      16      must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior  
17      17      decision. *See Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986),  
18      18      *aff'd in part and rev'd in part on other grounds* 828 F.2d 514 (9<sup>th</sup> Cir. 1987). Rule 59(e) of the Federal  
19      19      Rules of Civil Procedure provides that any "motion to alter or amend a judgment shall be filed no later  
20      20      than 28 days after entry of the judgment." Furthermore, a motion under Fed. R. Civ. P. 59(e) "should  
21      21      not be granted, absent highly unusual circumstances, unless the district court is presented with newly  
22      22      discovered evidence, committed clear error, or if there is an intervening change in the controlling law."  
23      23      *Herbst v. Cook*, 260 F.3d 1039, 1044 (9<sup>th</sup> Cir. 2001), *quoting McDowell v. Calderon*, 197 F.3d 1253,  
24      24      1255 (9<sup>th</sup> Cir. 1999).

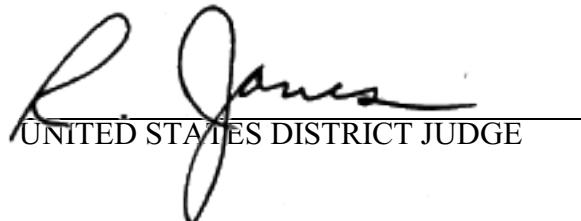
25      25      In its order of February 4, 2011, the court noted that plaintiff brought a "mixed" 42  
26      26      U.S.C. § 1983 and Bivens complaint, because he named federal and state defendants. In plaintiff's  
27      27      motion to reconsider, he points out that the court applied the § 1983 standard to the federal public  
28      28      defenders he named as defendants. Plaintiff is correct that the court inadvertently referred to the  
29      29      defendant federal public defenders as if they were state public defenders. However, the analysis is  
30      30      identical. In an action brought pursuant to *Bivens v. Six Unknown Agents of Federal Bureau of*  
31      31      *Narcotics*, 403 U.S. 388 (1971), plaintiff must plead and prove that defendants were federal officers

1 acting under the color of federal law when they allegedly violated his civil rights. Thus the only  
2 difference between a *Bivens* action and a § 1983 action is that a *Bivens* action is against a federal officer  
3 and a 1983 action is against a state officer. In either case, action under color of law is a jurisdictional  
4 requisite. If a public defender does not act under color of state law in representing an indigent defendant  
5 in a state criminal proceeding, it follows that a public defender does not act under color of federal law  
6 in performing the identical functions as a lawyer to an indigent defendant. *Cox v. Hellerstein*, 685 F.2d  
7 1098, 1099 (1982). Accordingly, the court clarifies that the federal public defenders named in this case  
8 may not be sued in a *Bivens* action. *See id.*, (determining that plaintiff's *Bivens* action against his federal  
9 public defender "suffer[ed] from a fatal jurisdictional defect which require[d] dismissal"). Plaintiff sets  
10 forth other arguments, such as that the court misconstrued his claims, that are without merit. Therefore,  
11 plaintiff has failed to make an adequate showing under either Rule 60(b) or 59(e) that this court's order  
12 dismissing the action should be reversed.

13 **IT IS THEREFORE ORDERED** that plaintiff's motion/notice to the court of  
14 supplemental cause to amend or supplement case (docket #8) is **DENIED**.

15 **IT IS FURTHER ORDERED** that plaintiff's motion for district judge to reconsider  
16 screening order (docket #9) is **DENIED**.

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18 **DATED: This 30th day of March, 2011.**

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21 **UNITED STATES DISTRICT JUDGE**

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