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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

Adrian Melgoza,

NO. C 06-04861 JW

Petitioner,

**ORDER DENYING PETITIONER'S  
MOTION TO INDICATE WILLINGNESS  
TO ENTERTAIN RULE 60(B) MOTION**

v.

Richard Kirkland, Warden,

Respondent.

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Presently before the Court is Petitioner's Motion for the Court to Indicate Willingness to Entertain Rule 60(b) Motion.<sup>1</sup> (See Docket Item No. 27.) Petitioner seeks an order stating that the Court will entertain a Rule 60(b) motion. Petitioner contemporaneously filed his Rule 60(b) motion to set aside the Court's previous order of dismissal on the ground that he has identified various errors committed by the Court in dismissing his petition. (See Docket Item No. 29.)

In the Ninth Circuit, the "filing of the notice of appeal divests the district court of jurisdiction." Gould v. Mutual Life Ins. Co., 790 F.2d 769, 772 (9th Cir. 1986). When a Fed. R. Civ. P. 60(b) motion is filed in district court after a notice of appeal has been filed, the district court lacks jurisdiction to entertain the motion. See Katzir Floor & Home Designs, Inc. v. M-MLS.com, 394 F.3d 1143, 1148 (9th Cir. 2004); Williams v. Woodford, 384 F.3d 567, 586 (9th Cir. 2004); Carriger v. Lewis, 971 F.2d 329, 332 (9th Cir. 1992). "To seek Rule 60(b) relief during the pendency of an appeal, the proper procedure is to ask the district court whether it wishes to entertain

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<sup>1</sup> To date, Respondent has not filed opposition to this motion.

1 the motion, or to grant it, and then move [the Ninth Circuit Court of Appeals], if appropriate, for  
2 remand of the case.” Williams, 384 F.3d at 586; Carriger, 971 F.2d at 332.

3       Upon review of the Petitioner’s request, the Court declines to entertain Petitioner’s Rule  
4 60(b) motion. Since the Court’s order declining to entertain or grant a Rule 60(b) motion is not a  
5 final determination on the merits, Petitioner is not prejudiced by this Order. See Defenders of  
6 Wildlife v. Bernal, 204 F.3d 920, 930 (9th Cir. 2000). Further, entertaining Petitioner’s motion  
7 would result in further delay in the resolution of Petitioner’s claims.

8       Accordingly, the Court DENIES Petitioner’s Application for Court to Indicate Willingness to  
9 Entertain Rule 60(b) Motion.

10  
11 Dated: January 14, 2009

  
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JAMES WARE  
United States District Judge

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**THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

Jonathan D. Soglin, jsoglin@fdap.org  
Gregory A. Ott, gregory.ott@doj.ca.gov

**Dated: January 14, 2009**

**Richard W. Wieking, Clerk**

By:           /s/ JW Chambers            
**Elizabeth Garcia**  
**Courtroom Deputy**