

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION

DANIEL JON PETERKA

Petitioner,

vs.

CASE NO. 3:05cv22-SPM

JAMES CROSBY, JR.,

Respondent.

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**ORDER DENYING MOTION FOR CERTIFICATE OF APPEALABILITY**

This cause comes before the Court on Petitioner's Motion for a Certificate of Appealability (doc. 113) to appeal the denial of his Rule 60(b) motion.

Respondent filed a response in opposition (doc. 114). For the following reasons, the certificate of appealability will be denied.

1. Petitioner's notice of appeal (doc. 111) was not filed within 30 days, as required under Fed. R. App. P. 4(a)(1)(A). Because more than 60 days have passed, Petitioner is not entitled to an extension under Fed. R. App. P. 4(a)(5). Petitioner does not represent that he could qualify for a reopening of the time to appeal under Fed. R. App. P. 4(a)(6).

2. It is appropriate for a Court to grant relief from judgment under Rule 60(b) based on mistakes made by the Court, but the rule is not a substitute for

appeal and “its main application is to those cases in which the true merits of a case might never be considered because of technical error, or fraud or concealment by the opposing party, or the court’s inability to consider fresh evidence.” Fackleman v. Bell, 564 F.2d 734, 736 (5th Cir. 1977). In this case, no mistake has been made. The Court considered the true merits of Petitioner’s claims and rejected them. Thus Rule 60(b) is not the appropriate vehicle for Petitioner to seek relief.

3. A petitioner seeking a certificate of appealability must make a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This standard is met if the petitioner can show that reasonable jurists could differ as to the resolution of the case or if the issues have sufficient merit to deserve encouragement to appeal. Slack v. McDaniel, 529 U.S. 473, 484 (2000). The resolution of Petitioner’s Rule 60(b) motion is not debatable and the issues do not deserve encouragement to appeal. Accordingly, it is

ORDERED AND ADJUDGED: Petitioner’s Motion for a Certificate of Appealability (doc. 113) to appeal the denial of his Rule 60(b) motion is denied.

DONE AND ORDERED this 16th day of December, 2008.

*s/ Stephan P. Mickle*  
Stephan P. Mickle  
United States District Judge