

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

April 19, 2012

Elisabeth A. Shumaker
Clerk of Court

CLAUD R. KOERBER,
a/k/a Rick Koerber,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

No. 12-601
(D.C. No. 2:09-CR-00302-CW-SA-1)
(D. Utah)

ORDER

Before **BRISCOE**, Chief Judge, **GORSUCH** and **HOLMES**, Circuit Judges.

On March 27, 2012, Claud R. Koerber filed with this court a “Defendant - Appellant’s Petition Seeking Permission to Appeal.” Mr. Koerber asserts he is seeking leave of this court to appeal a decision of the United States District Court for the District of Utah pursuant to Fed. R. App. P. 5. The order Mr. Koerber seeks leave to appeal was entered in the district court on February 23, 2012. *Doc. 237*. That order denied a motion to quash indictments, disqualify government’s counsel, and to compel discovery in a criminal prosecution.

When the case was opened and initially screened, it did not appear to present the sort of circumstance where Fed. R. App. P. 5, which governs appeals by permission, has

any application. Accordingly, the court issued a show cause order directing the petitioner to explain any basis in law for proceeding under Fed. R. App. P. 5. Mr. Koerber filed a response to that order.

As noted in the show cause order, the situation herein is not one in which a statute or rule gives this court the authority to allow an appeal from an order that would otherwise not be appealable without this court's permission. The district court has not certified the order at issue for a possible interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Nor does this proceeding involve any of the other types of situations where permission from this court is necessary to take an appeal. *See, e.g.*, 28 U.S.C. § 158(d)(2), 28 U.S.C. § 1453(c)(1), Fed. R. Civ. P. 23(f). Mr. Koerber does not dispute any of this.

Rather, petitioner argues that the order he seeks to appeal is immediately appealable as a matter of right either as an exception to the finality rule or under the collateral order doctrine. These arguments may very well be correct, but they miss the point. In the cases cited by the petitioner, the appeals were initiated by filing a timely notice of appeal in the district court, not by coming to this court and asking permission to appeal under Fed. R. App. P. 5.

The court takes no position on whether the order petitioner seeks to appeal is immediately appealable as a matter of right, as the petitioner repeatedly argues. If the order was immediately appealable as a matter of right, however, then Mr. Koerber was obliged to file a timely notice of appeal from the order in the district court in compliance

with Fed. R. App. P. 3 and Fed. R. App. P. 4. Permission from this court to appeal was not necessary. On the other hand, if the order was not immediately appealable as a matter of right (and again, we express no opinion on this question), we have no authority to entertain a Fed. R. App. P. 5 petition because the order was not certified by the district court pursuant to 28 U.S.C. § 1292(b). Either way, Fed. R. App. P. 5 has no application.

In certain circumstances, this court would treat the petition seeking leave to appeal as a misdirected notice of appeal pursuant to Fed. R. App. P. 4(d). However, the petition was not timely as a notice of appeal. In a criminal proceeding, a notice of appeal must be filed within 14 days from the entry of the order or judgment being appealed. Fed. R. App. P. 4(b)(1)(A). Here, the petition was not filed until 33 days after the order petitioner seeks to appeal was entered. *See* Smith v. Barry, 502 U.S. 244, 248-49 (1992) ("If a document filed *within the time specified by Rule 4* gives the notice required by Rule 3, it is effective as a notice of appeal.") (emphasis added); Raley v. Hyundai Motor Co., Ltd., 642 F.3d 1271, 1278 (10th Cir. 2011) ("[W]e also liberally construe what is a notice of appeal, treating *timely filings* that otherwise comply with Rule 3(c) as the 'functional equivalent' of a notice of appeal even when they are not formally denominated as such.") (emphasis added). The court therefore will not treat the petition seeking permission to appeal as a misdirected functional equivalent of a notice of appeal.

Finally, allowing the petitioner every possible sensible construction that might be inferred, the petition could conceivably be construed as requesting an extension of time within which to file a notice of appeal. However, this court has "no authority to do so.

See Fed. R. App. P. 26(b). Only the district court may do so and only under limited circumstances and for a limited time. 28 U.S.C. § 2107(c); Fed. R. App. P. 4(a)(5)."
Alva v. Teen Help, 469 F.3d 946, 950 (10th Cir. 2006).

In his response, petitioner asks in the alternative that he be granted leave to file a petition for a writ of mandamus. The court need not address this question either, as permission from this court is also not necessary to file a petition under Fed. R. App. P. 21, which governs writs of mandamus and prohibition.

The “Defendant - Appellant’s Petition Seeking Permission to Appeal” is procedurally improper and this attempt at seeking permission to appeal is accordingly dismissed.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk



by:
Douglas E. Cressler
Chief Deputy Clerk