No. 13-____

IN THE

Supreme Court of the United States

LOUIS CASTRO PEREZ,

Petitioner,

v.

WILLIAM STEPHENS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether attorney abandonment, which *Maples* v. *Thomas*, 132 S. Ct. 912 (2012), held is an "extraordinary circumstance" equitably excusing a resulting failure to appeal a denial of state habeas relief, is likewise an "extraordinary circumstance" warranting reentry of a judgment under Fed. R. Civ. P. 60(b) where the abandonment caused the failure to appeal a denial of federal habeas relief.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Louis Castro Perez respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this capital case.

OPINIONS BELOW

The decision of Fifth Circuit is reported at 745 F.3d 174, and reproduced at page 1a of the Appendix to this petition ("App."). The unpublished order of the district court is reproduced at App. 38a.

JURISDICTION

The judgment of the Fifth Circuit was entered on February 26, 2014. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

INTRODUCTION

In *Maples* v. *Thomas*, 132 S. Ct. 912 (2012), the Court held that attorney abandonment resulting in a failure to appeal the denial of ***state*** court habeas relief is an "extraordinary circumstance" that excuses what would otherwise be a procedural default precluding federal court review. Drawing on agency principles that extend beyond the particular context in which *Maples* was decided, the Court made clear that "a client cannot be charged with the acts or omissions of an attorney who has abandoned him." *Id*. at 924.

Nevertheless, in the decision below, a divided Fifth Circuit panel held that attorney abandonment resulting in a failure to appeal the denial of ***federal*** habeas relief can never be an "extraordinary circumstance" warranting equitable relief under Fed. R. Civ. P. 60(b) that would allow an appeal. In so holding, the court expressly disagreed with a Ninth Circuit decision on the precise question, which squarely holds that the principles announced in *Maples* apply equally to rectify a failure to appeal a federal court habeas denial that results from attorney abandonment. *See Mackey* v. *Hoffman*, 682 F.3d 1247, 1252-53 (9th Cir. 2012).

The Fifth Circuit's erroneous decision warrants certiorari. As the dissenting judge stated, the majority's decision is "contrary to the Supreme Court's directive that the acts and omissions of an attorney who, by abandoning her client, has severed

the attorney-client relationship 'cannot fairly be attributed to [the client].'" App. 28a (Dennis, J., dissenting) (citing *Maples*, 132 S. Ct. at 922-23, and quoting *Coleman* v. *Thompson*, 501 U.S. 722, 753 (1991)). And the majority "erroneously create[d] a circuit split" with the Ninth Circuit, which "applied *Maples*'s reasoning" to allow Rule 60(b)(6) relief based on "facts nearly identical" to, and "in a situation materially indistinguishable from," the present case. App. 16a, 26a, 23a (Dennis, J. dissenting).

Moreover, the decision involves a recurring problem and generates arbitrary results that may result in unlawful executions. If a habeas petitioner cannot appeal a state habeas denial due to the "extraordinary circumstance" of attorney abandonment, that default will be equitably excused under *Maples*, thereby allowing full consideration of his federal claims on the merits. But if the petitioner, like Perez here, has the misfortune to suffer attorney abandonment that results in the failure to appeal a federal habeas denial in the Fifth Circuit, the district court is powerless to equitably remedy the same "extraordinary circumstances" that warranted relief in *Maples*.

The Court's "clear mandate in *Maples*," App. 26a (Dennis, J., dissenting), means that death row inmates should not bear the consequences of their counsels' abandonment—potentially with their lives—whether the abandonment occurs in state or federal court. And nothing in *Bowles* v. *Russell*, 551 U.S. 205 (2007), which the panel majority relied on to reach the contrary result, has any bearing on the consequences of attorney abandonment or the application of Rule 60(b)(6).

As the dissent further recognized, Perez raised significant questions on the merits of his appeal which, if successful, would warrant a new trial. App. at 34a-37a (Dennis, J., dissenting). But under the majority's decision, that appeal cannot be heard due to the abandonment of his prior counsel. Certiorari is warranted to correct this error, bring uniformity to the circuits on this important question, and ensure that Perez—just like the petitioner in *Maples*—is not prevented from having his claims heard simply because he was abandoned by counsel through no fault of his own.

STATEMENT OF THE CASE

A. Proceedings In State Court.

In 1999, Perez was convicted of three homicides and sentenced to death by a Texas trial court. App. 2a.[1] The Texas Court of Criminal Appeals affirmed his conviction and also denied his state habeas corpus petition. *Id*.

B. Proceedings In The District Court.

In 2009, Perez petitioned the district court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, seeking review of his conviction and sentence. R. 4;

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[1] As the panel majority concluded, "[t]he facts underlying the conviction are not helpful to understanding this appeal's disposition." App. 2 n.1. Those facts, as understood by the federal magistrate judge, are set forth in the magistrate judge's Report and Recommendation ("R&R"). *See* District Court Record ("R.") 511-73; *Perez* v. *Quarterman*, No. A-09-CA-081-LY, 2011 WL 6959946, *1-5 (W.D. Tex. Dec. 29, 2011). A statement of the facts, procedural history and state court rulings, as they apply to Perez's federal habeas claims, can be found in Perez's Brief in Support of Application for Certificate of Appealability, filed in the Fifth Circuit on April 29, 2013, and Perez's Reply Brief on that application, filed on June 7, 2013.

App. 2a. In March 2011, before his amended petition was ruled on, the court granted a motion substituting a new attorney for Perez, Sadaf Khan (now Delaune). R. 504-05. It was Khan's first habeas case and her first death penalty case. R. 608.

Khan occasionally consulted with an attorney, Richard Burr, a resource counsel with the Texas Habeas Assistance and Training Project. R. 677. As was typical for resource counsel, Burr consulted with lawyers on up to 150 cases at a given time, and therefore could not meaningfully consult on every case. App. 17a n.1; R. 680. Burr never appeared as counsel on Perez's behalf. R. 680; App. 18a n.2.

In December 2011, the magistrate judge issued his R&R, recommending denial of the petition. R. 511. Initially Khan requested and received consultation with Burr in preparing objections to the R&R. R. 677, 766. After filing the objections on March 5, 2012, however, Khan fell silent; neither Perez nor Burr heard from Khan again for more than three months. R. 678, 766-68.

Meanwhile, on March 27, 2012, the district court issued its order and judgment denying the objections, adopting the R&R, and denying a Certificate of Appealability ("COA"). R. 598-603. Khan received notice of the judgment, but as she later stated in declarations, she encountered personal medical issues that she claims prevented her from forwarding the judgment to Perez (or to Burr). R. 609, 770. As a result, Perez ***never*** knew that his petition had been denied until after it was too late to appeal. R. 609. The April 26, 2012 deadline to appeal under Fed. R. App. P. 4(a)(1), and then the May 29, 2012 deadline for requesting an extension to appeal under Fed. R. App. P. 4(a)(5) both passed while Perez remained

unaware that judgment had been entered and his deadlines were running. R. 609, 678.

On June 11, 2012, through a routine check of dockets, Burr independently learned of the entry of judgment and of Khan's failure to appeal and immediately contacted Khan and urged her to act. R. 678. On June 25, 2012—two months after the appeal time expired—Khan first sent a copy of the judgment to Perez informing him that he had lost his case. She also filed a motion to reopen the time for appeal under Fed. R. App. P. 4(a)(6). R. 604.[2] On July 3, 2012, the court denied the Rule 4(a)(6) motion because Khan "received notice of the order and final judgment on March 27, 2012." R. 617-18.

Perez's current counsel were substituted on August 15, 2012, and soon after moved to rectify Khan's abandonment through several alternative grounds for relief, including a motion, relying on *Maples*, to vacate and reenter the judgment denying habeas relief under Rule 60(b)(6) to allow Perez time to appeal. *See* R. 646-47; App. 4a.

On December 18, 2012, the district court granted Perez's Rule 60(b)(6) motion, vacating the March 27, 2012 judgment and reentering it so as to allow Perez to appeal. *See* App. 38a-44a. Applying *Maples* and the Ninth Circuit's decision in *Mackey*, the district court held that the circumstances of Perez's case "constitute the kind of extraordinary circumstances that warrant relief under Rule 60(b)(6)." App. 41a-

[2] Rule 4(a)(6) provides that the district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if "the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry."

42a. The district court supported that conclusion with the following factual findings:

> [T]he Court finds Perez's attorney also abandoned him and deprived him of his right to personally receive notice without any warning to him so that he could have filed a notice of appeal. Khan admits had she notified Perez of the order and judgment she would have learned he wanted to prosecute an appeal. Khan also admits, during the time period in question, she was dealing with challenging personal circumstances, and absent those circumstances, she would have forwarded the Court's order to Perez and to resource counsel. Because Perez was not aware he had been abandoned during the time period in which he could have filed a notice of appeal, the Court will grant Perez's [Rule 60(b)(6) motion].

App. 43a.[3]

The district court directed the clerk to reenter the March 27, 2012 judgment to allow Perez "the opportunity to file a notice of appeal." App. 43a-44a. The court did not rule on Perez's motions for relief under

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[3] As the district court's order indicates, its findings are supported by, among other evidence, Khan's own admissions. *See* R. 769 ("Had I notified Mr. Perez of the orders during that time [before the deadline to appeal] I would have learned that he wanted to prosecute an appeal of the denial of the COA despite my analysis."); R. 609 ("Due to no fault of Petitioner Mr. Perez and due to an unexpected personal medical issue related to my current pregnancy, I did not notify Mr. Perez of Judge Yeakel's final judgment in time to file a timely Notice of Appeal."); R. 770 ("Absent those [personal] circumstances I would have forwarded the Court's orders to Mr. Perez and Mr. Burr.").

alternative theories. App. 44a.[4] The new judgment was entered on December 18, 2012. App. 4a; R. 795.

On January 16, 2013, Perez timely noticed his appeal from the reentered judgment. R. 796; App. 4; Fed. R. App. P. 4(a)(1)(A). The next day, the State filed its own notice of appeal from the district court's order granting the Rule 60(b)(6) motion, R. 798.

C. Proceedings In The Court Of Appeals.

After the court of appeals set a briefing schedule in Perez's appeal (No. 13-70002) and Perez began to prepare his COA application, the State filed a motion to dismiss for lack of jurisdiction predicated on the argument that the district court had improperly invoked Rule 60(b)(6). The parties then briefed both the State's posited jurisdictional issues and the COA issues, and the court of appeals heard argument on both. The State's appeal was never briefed.

On February 26, 2014, a divided panel (with Judges Haynes and Jones in the majority) issued an

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[4] Perez had also moved, in the alternative, to reopen the time to file a notice of appeal from the March 27, 2012 judgment pursuant to Fed. R. App. P. 4(a)(6), or, pursuant to Fed. R. App. P. 4(a)(5), to extend the time to file a notice of appeal from the July 3, 2012 order denying Perez's initial motion to reopen the time to appeal under Rule 4(a)(6), arguing in each instance that such relief was warranted due to Khan's abandonment of Perez. *See* R. 661-68. Because it granted Rule 60(b)(6) relief, the district court expressly dismissed both of these alternative claims without ruling on them, App. 44a, while noting that had it not granted Perez's Rule 60(b)(6) motion, it would have granted Perez's renewed motion under Rule 4(a)(6) on the ground that "[n]otice to counsel of the March 27, 2012 order and judgment should not be imputed to Perez, because he had been abandoned by counsel." App. 44a n.3. Because the district court did not rule on either of these arguments, they were not a subject of the Fifth Circuit proceedings.

opinion and judgment granting the State's motion to dismiss Perez's appeal for want of jurisdiction, and vacating the district court's Rule 60(b)(6) order. App. 1a-14a.[5] Judge Dennis filed a dissent in which he concluded that the court of appeals had jurisdiction on the grounds identified by the district court, and that Perez had made a sufficient showing to warrant a COA. App. 15a-37a.

1. The Majority Opinion.

Framing the issue as whether the district court had "power to allow an otherwise untimely appeal by using Civil Rule 60(b)(6) to reenter a judgment solely in order to permit such an appeal to become timely," App. 5a, the panel majority viewed itself as bound by both Fifth Circuit precedent and this Court's decision in *Bowles*, which held that the "timely filing of a notice of appeal in a civil case is a jurisdictional requirement." App. 8a (citing *Bowles*, 551 U.S. at 214). Acknowledging that *Bowles* was "not referring specifically" to Rule 60(b)(6), the court nonetheless concluded that "strong language in *Bowles*" does "not permit appellate courts to create exceptions to circumvent the appellate deadlines" in Rule 4(a) and 28 U.S.C. § 2107. App. 9a. While Rule 4 contains "limited exceptions," *see* Fed. R. App. P. 4(a)(5), 4(a)(6), the court stated that "there is no

[5] The majority considered this a jurisdictional issue, on the view that Perez's January 16, 2013 notice of appeal was untimely to appeal the initial March 27, 2012 denial of habeas relief. App. 5a, 13a-14a. Perez, however, did not appeal that initial denial but rather timely appealed the separate December 18, 2012 reentry of judgment. The Fifth Circuit therefore had jurisdiction over the appeal. But it is immaterial to this petition whether the propriety of the court's Rule 60(b)(6) relief is viewed as jurisdictional or instead as going to the validity of the reentered judgment.

'extraordinary circumstances' or similar exception." App. 9a. The majority concluded that "using Civil Rule 60(b)(6) to circumvent the exceptions codified in 28 U.S.C. § 2107 runs afoul of *Bowles*'s clear language that courts cannot create exceptions to jurisdictional requirements that are statutorily based." App. 9a (citing *Bowles*, 551 U.S. at 212-14).

Having determined that *Bowles* categorically precluded relief, the panel majority summarily declined to apply *Maples* and similar precedents of the Court because they "do not involve exceptions to statutory limits on appellate jurisdiction," but only "address equitable exceptions to judge-created procedural bars or non-jurisdictional statutes." App. 10a (citing *Maples*, *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012), and *Holland* v. *Florida*, 560 U.S. 631 (2010)).

While the panel majority stated that "[o]ther circuits are in accord" with its view,[6] it acknowledged there was an "exception"—the Ninth Circuit's decision in *Mackey*, App. 11a, which holds that Rule 60(b)(6) "could be used to vacate and reenter judgment where attorney abandonment has been found." App. 12a. Rather than distinguishing *Mackey* on factual grounds, however, the majority disagreed with the Ninth Circuit's legal conclusion that its rule "does not run afoul of *Bowles*," as well as with the Ninth Circuit's interpretation of Rules 4(a)(5) and 4(a)(6). App. 12a-13a.

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[6] The opinion cites unpublished decisions of the Third, Sixth, Tenth, and Eleventh Circuits, and two district courts, and a decision of the D.C. Circuit. App. 11a-12a & n.10. As explained below, these cases do not in fact decide whether attorney abandonment is a valid ground for Rule 60(b)(6) relief. *See infra* at 17-18.

The panel therefore vacated the district court's order and granted the motion to dismiss Perez's appeal. App. 14a. In so holding, the panel did not disturb the district court's finding that Perez had in fact been abandoned by counsel.

Because the majority concluded, as a matter of law, that the district court lacked "the power to allow an otherwise untimely appeal by using Civil Rule 60(b)(6) to reenter a judgment solely in order to permit such an appeal to become timely," App. 5a, it had "no occasion to address what the parameters of 'attorney abandonment' are." App. 5a n.5.

2. The Dissent.

In Judge Dennis' view, the court of appeals not only had jurisdiction, but Perez was entitled to a COA. App. 15a-37a. Holding Perez accountable for Khan's conduct "would be contrary to the [Supreme Court's] directive that the acts and omissions of an attorney who, by abandoning her client, has severed the attorney-client relationship 'cannot be fairly attributed to [the client].'" App. 28a (quoting *Maples*, 132 S. Ct. at 922-23).

Judge Dennis disagreed with the panel majority's conclusion that *Bowles* barred granting Perez relief. App. 16a; *see also* App. 30a. While *Bowles* held that the time periods in Rule 4(a)(6) are "'mandatory and jurisdictional,'" App. 16a (quoting *Bowles*, 551 U.S. at 209), that rule does not address the concern, which *Maples* does address, about the consequences of attorney abandonment. While *Bowles* held that Rule 4(a)(6)'s express provision "barred courts from creating equitable exceptions to the rule's jurisdictional requirements," App. 31a (citing *Bowles*, 551 U.S. at 214), Perez sought relief under a

different rule—Rule 60(b)(6)—"to cure the problem caused when Khan abandoned him." App. 17a. Therefore, *Bowles* "presents no bar" to Perez's appeal and does not dictate the "unfortunate outcome" mandated by the majority. *Id*.

Judge Dennis also observed that the majority "erroneously creates a circuit split." App. 16a. "Applying *Maples*, the Ninth Circuit, faced with facts identical to those in the present case, held that attorney abandonment constitutes the kind of extraordinary circumstances necessary to trigger relief from judgment pursuant to Rule 60(b)(6)." App. 26a; *see also* App. 23a. Judge Dennis distinguished the Fifth Circuit precedents and out-of-circuit cases relied on by the majority, App. 31a-34a; *see supra* 10 n.6, concluding that no other case "provides that attorney abandonment does not constitute the kind of extraordinary circumstances envisioned by Rule 60(b)(6), permitting the reentry of judgment and a new appeal therefrom when a habeas petitioner is abandoned." App. 34a.

Turning to the merits of the habeas claims, Judge Dennis considered Perez's claim that the prosecutor's comments in closing arguments at his trial were an improper attempt to impeach his trial testimony in violation of his Fifth Amendment right to post-arrest silence. *See Doyle* v. *Ohio*, 426 U.S. 610 (1976). App. 34-36. In the state court trial, Perez testified and explained that he had not previously told his story on advice of counsel. In response, the prosecutor stated that it took Perez "a year to come up with" his story and further opined that "[w]hat he's done is he's worked for a full year on making up a story to fit the evidence." App. 35a. Judge Dennis concluded that this presented "precisely the situation" that the

Court held unconstitutional in *Doyle*. *Id*. Perez had therefore made a "strong showing" that he was entitled to a COA on the issue. App. 36a. But under the majority's decision, Khan's abandonment of Perez "bar[s] his opportunity to pursue a likely successful COA application." App. 37a.

This petition followed.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE IN DIRECT CONFLICT ON THE QUESTION PRESENTED.

Certiorari is warranted because the circuits are in direct conflict on the question presented. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (A "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals."). As Judge Dennis recognized, the majority's decision "erroneously creates a circuit split" with the Ninth Circuit's decision in *Mackey*, which involved "nearly identical" facts and "a situation materially indistinguishable from the present case." App. 16a, 26a, 23a.

Andrew Mackey was a federal habeas petitioner with an attorney, LaRue Grim. *Mackey*, 682 F.3d at 1248. Grim filed a federal habeas petition on Mackey's behalf, but after writing Mackey to inform him of the status of his case and to request payment of his legal bill, "Grim did nothing further." *Id*. When the district court subsequently denied the petition, Grim received notification of the entry of judgment, but neither notified Mackey of the entry of judgment nor filed a notice of appeal. *Id*. at 1248-49.

Eight months after entry of judgment, Mackey inquired with the court about the status of his case,

and learned that judgment had long since been entered. *Id.* at 1249. Grim later stated that Mackey "has been deprived of counsel in this habeas corpus proceeding through no fault of his own" and that Mackey was not aware that his petition had been denied and "therefore, any kind of appeal deadline for appealing from [the] ruling passed without his opportunity to consider it." *Id.* at 1250. Grim then moved the district court under Rule 60(b)(6) to vacate its judgment and reopen the case. *Id.* The district court denied the motion. *Id.*

Relying on *Maples*, the Ninth Circuit reversed, holding that the district court could grant relief under Rule 60(b)(6) in circumstances "amounting to attorney abandonment" that has "jeopardized the petitioner's appellate rights." *Id.* at 1253. Attorney abandonment "vitiate[es] the agency relationship that underlies our general policy of attributing to the client the acts of his attorney." *Mackey*, 682 F.3d at 1251. The court further held that "[g]ranting relief to Mackey is not barred by *Bowles* v. *Russell*" because "Mackey is not receiving relief pursuant to Rule 4(a)(6)" but rather "is seeking relief pursuant to Rule 60(b)(6) to cure a problem caused by attorney abandonment and not by a failure to receive Rule 77(d) notice." *Id.* (citing Fed. R. App. P. 4(a)(6), which allows reopening of appeal time if party did not receive timely notice under Fed. R. Civ. P. 77(d)). Thus, "when a federal habeas petitioner has been inexcusably and grossly neglected by his counsel in a manner amounting to attorney abandonment in every meaningful sense that has jeopardized the petitioner's appellate rights, a district court may grant relief pursuant to Rule 60(b)(6)." *Id.* at 1253 (citing *Maples*, 132 S. Ct. at 924).

Although the Ninth Circuit did not reach the factual issue of whether Mackey was abandoned, it held that abandonment could constitute the "extraordinary circumstances" necessary to warrant Rule 60(b)(6) relief to remedy abandonment during a federal habeas proceeding, *id.* at 1253, and remanded to the district court to determine whether Grim's action or inaction constituted abandonment and to exercise its discretion regarding whether to grant Mackey's requested Rule 60(b)(6) relief. The district court subsequently granted that relief. *See Mackey* v. *Hoffman,* No. C 07–4189 SI, 2012 WL 4753512 (N.D. Cal. Oct. 4, 2012) (determining on remand that Mackey was abandoned by counsel and granting Mackey's Rule 60(b)(6) motion).

Here, the district court expressly followed the Ninth Circuit, holding that "[s]imilar to the court in *Mackey*, this Court is of the opinion the unique circumstances of Perez's case constitute the kind of extraordinary circumstances that warrant relief under Rule 60(b)(6)." App. 41a-42a. In vacating that judgment and dismissing Perez's appeal, the Fifth Circuit reached the diametrically opposite result from the Ninth Circuit. The panel majority did not, and could not, distinguish the Ninth Circuit's decision on its facts because *Mackey*'s facts are "nearly identical" to those of this case. App. 26a (Dennis, J., dissenting). Rather, the decisions rest on a fundamental disagreement on a central point of law: whether Rule 60(b)(6) relief can lie when attorney abandonment causes a federal habeas petitioner to lose his appellate rights.

In *Mackey*, the Ninth Circuit answered that question in the affirmative, holding as a matter of law that Rule 60(b)(6) gives a district court the power to

reenter the judgment to remedy abandonment. 682 F.3d at 1253-54. In this case, the Fifth Circuit answered that question in the negative. Rather than distinguishing *Mackey*, the Fifth Circuit simply disagreed with the Ninth Circuit's understanding of *Bowles*. In the majority's view, *Mackey* "run[s] afoul of *Bowles*" and the Ninth Circuit failed to recognize "that *Bowles* permitted no equitable exceptions and used mandatory, unequivocal language when referring to the statutory grant of civil appellate jurisdiction." App. 13a. Thus, a federal habeas petitioner in the Ninth Circuit may receive Rule 60(b)(6) relief where attorney abandonment has caused a failure to appeal, but an identically-situated petitioner in the Fifth Circuit may not.

The circuit split is thus clear and intractable. *Mackey* considered and rejected the *Bowles*-based arguments on which the Fifth Circuit relied. For the Ninth Circuit, the use of Rule 60(b)(6) to remedy attorney abandonment did not require making an "exception" to Rule 4(a). Mackey did not seek to utilize Rule 60(b)(6) "to cure a Rule 77(d) 'lack of notice' problem" because such notice was given to Mackey's putative counsel. *Mackey*, 682 F.3d at 1252. Rather, Mackey "seeks to utilize Rule 60(b)(6) to cure the problem caused by his being misled and abandoned by his counsel of record." *Id.* If Mackey could demonstrate the "extraordinary circumstances" of abandonment, "justice requires that relief be granted [under Rule 60(b)(6)] so that he may pursue an appeal." *Id.* at 1253 (citing *Klapprott* v. *United States*, 335 U.S. 601, 614-15 (1949)). The Fifth Circuit's decision squarely conflicts with this conclusion as a matter of law.

The panel majority claimed that "[o]ther circuits are in accord" with its holding. App. 11a. But that claim does not survive scrutiny. None of the decisions cited by the panel for this supposed "accord" were cited by the State in this appeal. And for good reason: every decision is "distinguishable and unavailing in the face of *Maples*." App. 33a (Dennis, J., concurring). Most involve either attorney negligence,[7] or an allegation that the judgment was never received,[8] which are circumstances that Rule 4(a)(5) or Rule 4(a)(6) are designed to address. App. 33a.

The only case involving attorney abandonment, *White* v. *Jones,* 408 F. App'x 293 (11th Cir. 2011), involved a petitioner's request for a stay of execution, which was decided on other grounds, *id*. at 294-95. While the court noted a "serious question" as to whether a Rule 60(b) motion may be used to restart the filing period for a notice of appeal, it specifically declined to rule on that basis. *See id*. at 295-96. The remaining case cited by the majority actually runs counter to its decision, noting that a petitioner ***may*** rely on Rule 60(b) to extend the time for filing an appeal in extraordinary circumstances. *See Lacour* v. *Tulsa City–Cnty. Jail*, 517 F. App'x 617, 619 (10th Cir. 2013).

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[7] *See Hall* v. *Scutt*, 482 F. App'x 990, 990 (6th Cir. 2012); *see also Joyner* v. *United States*, No. 3:06-00016, 2011 U.S. Dist. LEXIS 64790, at *6-7 (D.S.C. June 17, 2011) (allegation that pro se notice of appeal was not received by clerk).

[8] *See Cumberland Mut. Fire Ins. Co.* v. *Express Prods., Inc.*, Nos. 11-3919 et al., 2013 WL 3481687, at *2 (3d Cir. June 24, 2013); *In re Sealed Case (Bowles)*, 624 F.3d 482, 482 (D.C. Cir. 2009); *Garrett* v. *Prelesnik*, No. 2:09-CV-11076, 2012 WL 2342461, at *1 (E.D. Mich. May 4, 2012).

In any event, the majority's confusion regarding the import of these cases only underscores the frequency with which the question involving the application of Rule 60(b) to restart appellate deadlines arises and the need for this Court's review. The conflict in the circuits is admitted, direct and intractable, and it will persist unless this Court intervenes to resolve it.

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

A. The Decision Conflicts With *Maples*.

Certiorari is also warranted because the Fifth Circuit's decision conflicts with this Court's decision in *Maples*. *See* Sup. Ct. R. 10(c). In *Maples*, death row habeas petitioner Cory Maples' attorneys abandoned him during his state postconviction proceedings, unilaterally discontinuing their representation without informing either Maples or the court. *Maples*, 132 S. Ct. at 916-17, 919. When the state court subsequently denied Maples' habeas application, notice of the order was sent to the attorneys at their former address and then returned by the firm's mailroom unopened to the trial court clerk. *Id.* at 917. "With no attorney of record in fact acting on Maples' behalf, the time to appeal ran out." *Id.*[9] When Maples sought federal habeas relief, the district court and court of appeals denied relief on the ground that missing his state court appellate

[9] Maples also had local counsel in Alabama who received notice of the order, but the Court concluded that his role was merely to sponsor the New York attorneys and "[a]t no time before the missed deadline was [he] serving as Maples' agent." *Maples*, 132 S. Ct. at 926-27.

deadline was a procedural default that barred federal habeas review. *Id*. at 917.

This Court reversed, holding that Maples' abandonment by his attorneys was an "extraordinary circumstance" constituting "cause" to equitably excuse his procedural default. *Maples*, 132 S. Ct. at 922-23. The Court drew a distinction between mere negligence by a prisoner's postconviction attorney, which does not qualify as "cause," and abandonment, which does. *Id*. at 922. As the Court explained:

> A markedly different situation is presented * * * when an attorney abandons his client without notice, and thereby occasions the default. Having severed the principal–agent relationship, an attorney no longer acts, or fails to act, as the client's representative. His acts or omissions therefore "cannot fairly be attributed to [the client]."

Id. at 922-23 (quoting *Coleman*, 501 U.S. at 753). Under agency principles, "a client cannot be charged with the acts or omissions of an attorney who has abandoned him" and cannot "be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him." 132 S. Ct. at 924. *See also Holland*, 560 U.S. at 659 (Alito, J., concurring) ("Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.").

The decision below conflicts with *Maples* by holding Perez responsible for the conduct of counsel who abandoned him. The district court made an express finding—which the court of appeals did not disturb—

that Perez's counsel "abandoned him and deprived him of his right to personally receive notice without any warning to him so that he could have filed a notice of appeal." App. 43a. *See* App. 4a (recognizing, without disturbing, the "finding that Khan had abandoned Perez"); App. 26a-27a (Dennis, J., dissenting) ("Khan's unilateral decision not to notify Burr or Perez of the district court's judgment and not to pursue an appeal therefrom was an egregious breach of the duties an attorney owes her client and thus constitutes abandonment, not mere negligence for which Perez would ordinarily be responsible" in part because "under the relevant ethical rules, the decision not to appeal was not hers to make"). The district court further found that "Perez was not aware he had been abandoned during the time period in which he could have filed a notice of appeal." App. 43a. Yet the Fifth Circuit held that this extraordinary circumstance of abandonment would not excuse the procedural default because it occurred in federal—rather than state—court.

Although this case does not involve the rule for excusing procedural defaults considered in *Maples*, the equitable standard animating that rule—whether the petitioner has shown "extraordinary circumstances"—is ***identical*** to the equitable standard applied under Fed. R. Civ. P. 60(b)(6) to justify relief from a judgment. *Compare Gonzalez* v. *Crosby*, 545 U.S. 524, 535 (2005) ("[O]ur cases have required a movant seeking relief under Rule 60(b)(6) to show 'extraordinary circumstances' justifying the reopening of a final judgment.") *with Maples*, 132 S. Ct. at 927 ("Maples was disarmed by extraordinary circumstances quite beyond his control."). Accordingly, relying on *Maples*, the district court

held that "the unique circumstances of Perez's case constitute the kind of extraordinary circumstances that warrant relief under Rule 60(b)(6)." App. 41-42.

The Fifth Circuit, however, held that the district court was completely powerless—notwithstanding the undisturbed finding of abandonment—"to allow an otherwise untimely appeal by using Civil Rule 60(b)(6) to reenter a judgment solely in order to permit such an appeal to become timely." App. 5a. As Judge Dennis concluded, "[t]o hold Perez accountable for Khan's unilateral decision not to take an appeal would be contrary to [the Court's] directive [in *Maples*] that the acts and omissions of an attorney who, by abandoning her client, has severed the attorney-client relationship 'cannot fairly be attributed to [the client].'" App. 28a (citations omitted).

Attorney abandonment causing a death-row inmate to lose his right of appeal is an "extraordinary circumstance" that warrants equitable relief, whether the abandonment occurs in state court or federal court. In either case, the putative counsel's failure to act cannot fairly be attributed to the petitioner. Certiorari is warranted because the Fifth Circuit, by failing to apply that straightforward rule, placed itself in conflict with the principles announced by this Court in *Maples*.

B. Applying *Maples* Does Not Require Any "Exception" Forbidden By *Bowles*.

The panel majority rejected any reliance on *Maples* based solely on its view that *Bowles* categorically precludes using Rule 60(b)(6)'s broad equitable power to extend to Perez what this Court extended to the petitioner in *Maples*. This was error.

Rule 60(b)(6), which was neither cited nor discussed in *Bowles*, permits a district court to relieve a party from a final judgment for "any * * * reason that justifies relief." Fed. R. Civ. P. 60(b)(6). "In simple English, the language of the 'other reason' clause * * * vests power in courts adequate to enable them to vacate judgments ***whenever*** such action is appropriate to accomplish justice." *Klapprott*, 335 U.S. at 614-15 (emphasis added); *Adams* v. *Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (Rule 60(b) is a "grand reservoir of equitable power to do justice in a particular case"). But although the language of the rule is broad, the Court has made clear that Rule 60(b)(6) relief is warranted only in "extraordinary circumstances"—the same standard the Court held was met in *Maples*. *See Mackey*, 682 F.3d at 1253.

According to the panel majority, however, the same extraordinary circumstance of attorney abandonment that warranted equitable relief in *Maples* allowed no relief in this case because Rule 60(b)(6) cannot be used to "circumvent" or create an exception to the required jurisdictional timelines and codified exceptions in Fed. R. App. P. 4 and 28 U.S.C. § 2107. App. 9a-10a. The court based this view on "strong language" in *Bowles*, App. 9a, but the Court in *Bowles* never issued such a sweeping pronouncement. *Bowles* involved different issues and facts. In that case, the district court denied Bowles' habeas corpus application, and Bowles failed to file a notice of appeal within 30 days of the entry of judgment. 551 U.S. at 207. He moved to reopen the time to appeal under Rule 4(a)(6), which allows district courts to extend the filing period for 14 days from the day the district court grants the order to reopen, provided certain conditions are met. 28 U.S.C. §

2107(c). The district court granted Bowles' motion, but improperly specified that Bowles had 17 days rather than 14 days to file the notice of appeal. *Bowles*, 551 U.S. at 207. Bowles filed his notice within 17 days, but after the 14-day period allowed by Rule 4(a)(6) and § 2107(c). *Id.*

This Court found the appeal untimely because the taking of an appeal within the prescribed time is "mandatory and jurisdictional," *Bowles*, 551 U.S. at 209, and a court has "no authority to create equitable exceptions to jurisdictional requirements," *id.* at 214. But *Bowles* never addressed attorney abandonment or Rule 60(b)(6). Even the Fifth Circuit majority acknowledged that the Court in *Bowles* did "not refer[] specifically to Civil Rule 60(b)." App. 9a. The Court could not have done so—either specifically or implicitly—because there was no argument that Bowles' attorney had abandoned him or that Rule 60(b)(6) warranted relief. The Court in *Bowles* simply rejected the contention that "excusable neglect" was a ground for extending the jurisdictional deadline of Rule 4(a)(6). 551 U.S. at 214. That holding is entirely consistent with *Maples*, which similarly held that attorney negligence—as distinguished from abandonment—was not an extraordinary circumstance that could excuse the failure to appeal. 132 S. Ct. at 922-23.

The "exception" rejected in *Bowles* was a request to vary the express jurisdictional terms of 28 U.S.C. § 2107, which provides time limits to appeal from orders. Perez seeks no such exception. Perez appealed within 30 days of the reentered order denying habeas relief, and the district court did not "exceed[] the plain scope" of the terms of Rule 4(a)(6) or any other rule. App. 31a. (Dennis, J., dissenting).

To the contrary, the district court initially ***denied*** relief under Rule 4(a)(6) because that rule requires a party to demonstrate that it did not receive notice of the judgment to be appealed under Fed. R. Civ. P. 77(d)(1) and Khan did receive such notice. R. 617-18. Instead, Perez seeks to "cure the problem caused when Khan abandoned him." App. 17a (Dennis, J., dissenting). As Judge Dennis concluded, "*Bowles* presents no bar and does not dictate [the decision's] unfortunate outcome." *Id.*

The conflict posited by the majority between Rule 60(b)(6) and the requirements of Rule 4(a) and 28 U.S.C. § 2107 does not exist. Rule 4(a)(1) implements a statutory, jurisdictional requirement that an appeal must be filed "within 30 days after entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1)(A). Rule 60(b)(6), on the other hand, allows a court in narrow circumstances to decide when a valid judgment has been entered by authorizing the court to "relieve a party * * * from a final judgment, order, or proceeding" for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). The district court's ruling gave effect to both provisions by vacating the March 27, 2012 judgment to remedy the "extraordinary circumstance" of abandonment, thereby allowing Perez to comply with Rule 4(a)'s 30-day deadline to appeal the reentered judgment.

Rules 4(a)(5) and 4(a)(6) similarly implement specific and limited ways to extend or reopen the time to appeal beyond what Rule 4(a)(1) provides, but these rules do not preclude Rule 60(b)(6) relief in other contexts. Rule 4(a)(5) authorizes a motion to extend the time to file a notice of appeal if a party moves within 30 days after the initial time to file

expires and the party "shows excusable neglect or good cause." Fed. R. App. P. 4(a)(5)(A). As *Maples* makes clear, however, attorney abandonment falls into a separate category than mere neglect. And abandonment can (and, as in this case and *Mackey*, usually will) occur without the client being aware of it until after the deadline of Rule 4(a)(5) has passed. Rule 4(a)(6) also deals with different circumstances than attorney abandonment. By its express terms, that rule remedies a clerk's failure to deliver the required notice of judgment to parties.[10]

This Court long ago held that federal courts may vacate and reenter judgments to allow appeals in extraordinary circumstances not otherwise addressed by the rules of procedure. In *Hill* v. *Hawes*, 320 U.S. 520 (1944), the clerk failed to give required notice of a judgment until after the appeal deadline had run, and the trial court vacated and reentered the order to allow an appeal. This Court

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[10] The rule permits a district court to reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered if, among other things, "the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry." Fed. R. App. P. 4(a)(6). Rule 77(d)(1) requires the clerk to serve notice of entry of an order or judgment on each party pursuant to Fed. R. Civ. P. 5(b). Rule 5(b)(1), in turn, permits service to be made on counsel if a party is represented. Together with his Rule 60(b)(6) motion, Perez filed a renewed motion under Rule 4(a)(6), arguing that Perez did not receive notice under Rule 77(d)(1) because counsel's abandonment precluded imputation of notice. The district court did not rule on that motion although it indicated that it would have granted such relief if Rule 60(b)(6) relief were not available. App. 44a n.3. Accordingly, that potential avenue of relief would still exist if the Court were to affirm the Fifth Circuit.

affirmed, holding that although the district court "could not extend the period fixed" for filing an appeal, "it was competent for the trial judge * * * to vacate the former judgment and to enter a new judgment of which notice was sent in compliance with the rules." *Id.* at 524.[11] Two years later, the federal rules were amended to address the specific problem faced in *Hill* through the extension provision that would eventually become Rule 4(a)(5), as well as new language in Rule 77 providing that the clerk's failure to provide notice does not itself extend the appeal time. *See* Advisory Committee on Rules for Civil Procedure, *Report of Proposed Amendments to Rules of Civil Procedure* at 90-91, 94-95, 106-08 (June 1946). But the fundamental principle upon which *Hill* was decided remains valid: courts retain equitable authority to vacate and reenter judgments to allow appeals in extraordinary circumstances not otherwise addressed by the rules of procedure. Nothing in *Bowles* affects this authority recognized and applied in *Hill*.

The Court's review is warranted to resolve the conflict between the decision below and *Maples*, which stems from the panel majority's misreading of *Bowle*s. Applying the principles of *Maples* under Rule 60(b)(6) does not undercut the *Bowles*' rationale. In *Maples*, the Court held that "when a petitioner's postconviction attorney misses a filing deadline"—exactly what happened in *Bowles* where the attorney mistakenly relied on the district court's order rather than the language of Rule 4(a)(6)—"the

[11] At that time, Rule 60 did not contain the provision that is now Rule 60(b)(6), but the Court relied on the inherent ability of a federal court to vacate its judgments during the court's current term. *Id.*

petitioner is bound by the oversight and cannot rely on it to establish cause" to excuse the default. 132 S. Ct. at 922. By contrast, "[a] markedly different situation is presented * * * when an attorney abandons his client without notice, and thereby occasions the default." *Id.* That is because "[h]aving severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative." *Id.* at 922-23.

That "markedly different situation" is what the district court found happened here, where Perez's putative attorney unilaterally ceased all work on his case without ever notifying him that he had lost that case or that she was no longer protecting his rights. Just as in *Maples*, this abandonment deprived Perez of his ability to exercise his personal right of appeal[12] or to secure new counsel who could do so, thereby raising the specter of an erroneous execution. *Compare Maples*, 132 S. Ct. at 927 ("Had counsel of record or the State's attorney informed Maples of his plight before the time to appeal ran out, he could have filed a notice of appeal himself or enlisted the aid of new volunteer attorneys."). Certiorari is therefore warranted to ensure that the equitable principles announced by the Court in *Maples* apply equally whether attorney abandonment results in the failure to appeal a habeas denial in state or federal court.

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[12] *See* App. 13a n.12 (recognition by majority that "[o]ur ruling in no way implies that it would be proper for a lawyer to fail to advise a client of an adverse judgment and the right to appeal. * * * The decision to waive an appeal is for the client.")

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE AN IMPORTANT ISSUE.

A. This Case Involves A Clear Legal Question On Which The Circuits Are Directly Divided.

This case is an ideal vehicle for resolving the question presented because the Fifth Circuit squarely considered and resolved an important question of law in a manner directly contrary to a sister circuit. The Fifth Circuit did not disturb the district court's factual finding that Perez had been abandoned by his attorney, resulting in his failure to exercise his personal right of appeal. Rather, the court adopted a categorical legal rule that attorney abandonment—no matter how or when it occurs—can never constitute grounds for vacating a judgment under Rule 60(b)(6), even though Rule 60(b)(6) is available to rectify extraordinary circumstances. The Ninth Circuit, by contrast, reached the diametrically opposite conclusion while considering virtually identical facts and the same precedents of this Court.

Accordingly, whether abandonment occurs during state or federal proceedings is now outcome determinative in the Fifth Circuit, and if precisely the same facts of attorney abandonment are presented to federal courts in the Fifth and Ninth Circuits, they ***must*** reach different answers. Thus, the petition presents a clear question of law for resolution by this Court.

B. Federal Appellate Review Is Vitally Important In A Capital Case.

This case presents important issues of life and death that warrant this Court's review. Many of the reasons that made *Maples* important for this Court to review also apply here. This is a habeas proceeding in a capital case. The need for the Court's review is at its apex in such cases, because "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion).

In particular, "meaningful appellate review" is vital in capital cases because it "serves as a check against the random or arbitrary imposition of the death penalty." *Id.* at 195, 206. That check has proved vitally important to death penalty defendants. *See Murray* v. *Giarratano*, 492 U.S. 1, 23-24 (1989) (Stevens, J., dissenting) (noting that "[f]ederal habeas courts granted relief in only 0.25% to 7% of noncapital cases * * *; in striking contrast, the success rate in capital cases ranged from 60% to 70%"); James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 Tex. L. Rev. 1839, 1844, 1849 (2000) (federal habeas relief was granted in 40% of cases between 1973 and 1995 in which the judgment remained intact after direct appeal and state post-conviction review).

Perez's claims of constitutional error should not end simply because his attorney abandoned him following the district court's decision, thereby preventing him from appealing or securing new counsel who could do so. This Court has long recognized that a death penalty case "requires the guiding hand of counsel at every step in the

proceedings against him." *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932). But "the facts of this case unquestionably indicate that Khan abandoned Perez right when he needed her most." App. 20a (Dennis, J., dissenting). "Holding Perez responsible for Khan's gross breach of duty is a manifest miscarriage of justice that is not compelled by any precedent of [this Court]," *id.* at 16a, and by "hold[ing] Perez responsible for Khan's failure," the Fifth Circuit's decision has "saddle[d] [Perez] with a draconian sanction, namely depriving him of a crucial stage of federal habeas review—appellate consideration," *id.* at 37a.

As discussed below, such a deprivation would be particularly grievous in this case, because Perez has already made a substantial showing that his trial was tainted by constitutional error that would have entitled him to appellate review absent the panel majority's erroneous threshold ruling. *See* App. 35a-36a (Dennis, J., dissenting). But a similar miscarriage of justice would result in any case in the Fifth Circuit where a district court determines that a right to appeal was lost due to attorney abandonment, because the court of appeals has held that the courts are powerless to do anything about it.

By punishing Perez for Khan's misconduct—potentially with his life—the decision "does little to deter future misconduct" by counsel like Khan, who "abandon[] death-row clients at a most crucial stage of their proceedings." App. 37a (Dennis, J., dissenting). Even the panel majority noted that its "ruling in no way implies that it would be proper for a lawyer to fail to advise a client of an adverse judgment and the right to appeal" because "[t]he decision to waive an appeal is for the client." App.

13a. Yet by erroneously holding that the Federal Rules of Civil Procedure can never rectify the consequences of such misconduct, the majority's decision contravenes this Court's clear admonition that "a client cannot be charged with the acts or omissions of an attorney who has abandoned him." *Maples*, 132 S. Ct. at 924.

Certiorari is also warranted because this case raises a "recurring question on which courts of appeals have divided." *Clay* v. *United States*, 537 U.S. 522, 524 (2003). The Court's review not only is meaningful in this case, but will also provide certainty in other cases in which habeas petitioners may be abandoned by their counsel. As this case and *Mackey* illustrate, habeas petitioners are not only abandoned in state court proceedings, as in *Maples*, but in federal court as well. *See Mackey,* 2012 WL 4753512, *1-2 (holding that Mackey was abandoned by counsel and granting Rule 60(b)(6) relief). And as noted, following *Bowles* the federal courts have repeatedly grappled with the question of when, if ever, Rule 60(b)(6) can be employed to rectify a failure to appeal. *See supra* at 17-18. Even in the short time since this case was decided, the Fifth Circuit has already applied it to deny Rule 60(b)(6) relief to another habeas petitioner. *See Edwards* v. *Stephens*, No. 13-40535, 2014 WL 868835, *1 (5th Cir. Mar. 6, 2014).

This case also presents an added dimension of importance not present in *Maples*. The Fifth Circuit's decision has introduced a marked lack of uniformity between state and federal habeas proceedings. Federal habeas petitioners have a remedy under *Maples* where counsel has abandoned them in state court, but under the decision below, a

petitioner who is abandoned in federal court under precisely the same circumstances has none. The right to appeal in federal habeas cases—and especially in capital cases—should not be subjected to such arbitrary and disparate outcomes. Indeed, the outcome is particularly perverse. "A federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system" and "our habeas jurisprudence embodies this deference." *Miller-el* v. *Cockrell*, 537 U.S. 322, 340 (2003). Yet under the Fifth Circuit's decision, a default occasioned by attorney abandonment in federal court will receive more deference than the identical default in state court.

C. The Court's Ruling Will Determine Whether Perez's Habeas Claims Will Receive The Appellate Review They Merit.

This case also warrants the Court's review because the court of appeals' decision has allowed Khan's abandonment to "bar[] [Perez's] opportunity to pursue a likely successful COA application." App. 37a (Dennis, J., dissenting). The Court's answer to the question presented will determine whether Perez remains barred from raising one or more meritorious constitutional claims that, absent the dismissal of the appeal, would otherwise have been reviewed.

In his state court direct appeal and federal habeas proceedings, Perez raised numerous claims of federal constitutional error, including that the prosecutor's use of Perez's post-arrest silence to impeach his testimony at trial violated his constitutional right to remain silent under *Doyle*, 426 U.S. 610. As noted above, when Perez explained his invocation of that right, the prosecutor repeatedly argued to the jury

that his delay in speaking was because it had taken him so long to concoct a lie. *See supra* at 12-13. Judge Dennis concluded that this case presented "precisely the situation" that the Court confronted in *Doyle*, and Perez "made a strong showing" that warranted a COA. App. 36a.

Thus, the only federal appellate judge to opine on the merits of Perez's habeas claims reasonably found that at least one of them has merit. App. 34a-36a (Dennis, J., dissenting). Accordingly, had the panel majority not dismissed the appeal, Perez could have been able to argue the merits of his claim that the constitutional *Doyle* error entitles him to a new trial. *See Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000) (habeas petitioner entitled to certificate of appealability if "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong").[13]

Particularly given what is at stake in this capital case, Perez should not lose his right to appeal this and other potentially meritorious issues merely because his prior counsel elected to stop working on his case while appellate deadlines lapsed, without ever informing Perez of the decision that had been rendered against him. Just as much as the petitioner in *Maples*, Perez cannot be charged with the acts or omissions of counsel who abandoned him.

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[13] Judge Dennis did not express any views on the other issues Perez had raised on the merits, leaving open the possibility that a COA would be available on those claims as well.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
February 26, 2014

Lyle W. Cayce
Clerk

No. 13-70002
consolidated with
No. 13-70006

LOUIS CASTRO PEREZ,
Petitioner – Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent-Appellee

LOUIS CASTRO PEREZ,
Petitioner - Appellee

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent-Appellee

Appeals from the United States District Court for the
Western District of Texas

No. 13-70002 cons w/ No. 13-70006

Before JONES, DENNIS, and HAYNES, Circuit Judges.

HAYNES, Circuit Judge:

A jury convicted Louis Perez of capital murder for the killings of his ex-girlfriend, her roommate, and the roommate's nine-year-old daughter, and he was sentenced to death.[1] The Texas Court of Criminal Appeals ("CCA") affirmed his conviction and sentence on direct appeal, and subsequently denied his petition for writ of habeas corpus. Perez filed a complaint seeking a writ of habeas corpus in the federal district court after exhausting his state-court remedies pursuant to 28 U.S.C. § 2254 (which is part of the Antiterrorism and Effective Death Penalty Act or "AEDPA"). The magistrate judge issued a Report and Recommendation denying Perez's habeas claims, which the district court adopted in full. The district court then denied Perez's request for a certificate of appealability ("COA").[2]

As more fully discussed below, allegedly without consulting Perez, his attorney decided not to file a timely appeal. Upon motion, the district court vacated and reentered its judgment pursuant to Federal Rule of Civil Procedure 60(b)(6), thereby allowing Perez to file an appeal within thirty days of the reentered judgment, which he did. In a case designated

[1] The facts underlying the conviction are not helpful to understanding this appeal's disposition. A complete recitation of the facts is available in the magistrate judge's Report and Recommendation. *See Perez v. Quarterman*, No. A-09-CA-081 LY, 2011 U.S. Dist. LEXIS 149275 (W.D. Tex. Dec. 29, 2011).

[2] Accordingly, we refer to the magistrate judge's report as that of the district court.

Case No. 13-70006, the Director of the Texas Department of Criminal Justice's Correctional Institutions Division ("Director") appealed from the district court's grant of Perez's motion to vacate and reenter judgment and subsequently filed a "Motion to Dismiss Appeal for Want of Jurisdiction" with this court, which we ordered carried with the case. In Case No. 13-70002, Perez appealed the reentered judgment, requesting a COA on a number of grounds.

We GRANT the Director's motion, VACATE the Civil Rule 60(b)(6) [3] order and reentered judgment (therefore leaving in place the original March 27, 2012 judgment), and DISMISS Perez's appeal (No. 13-70002) for want of jurisdiction.

I. Background

The district court entered judgment denying the application for writ of habeas corpus and a COA on March 27, 2012. Accordingly, the deadline to file notice of appeal was April 26, 2012. *See* FED R. APP. P. 4(a)(1)(A). Perez's attorney, Sadaf Khan, received notice of the order the same day judgment was entered, but, after conducting research, affirmatively decided not to file an appeal. Khan did not notify Perez or the consulting attorney, Richard Burr, of the judgment in time to timely file a notice of appeal, nor did she consult with them about whether to file an appeal. In other words, Khan never obtained Perez's agreement to waive an appeal. Burr learned of the judgment after the deadline to timely appeal had

[3] To avoid confusion, we will use the term "Appellate Rule __" to refer to a specific Federal Rule of Appellate Procedure and "Civil Rule __" to refer to a specific Federal Rule of Civil Procedure.

passed, and he informed Khan that she needed to file an appeal as a matter of course. Accordingly, on June 25, 2012, Khan moved to reopen the time to file a notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(6). The district court denied the motion, finding that Khan received notice of the judgment when it was entered and adding that she missed the May 29, 2012 deadline to file an Appellate Rule 4(a)(5) motion to extend. *See* FED. R. APP. P. 4(a)(5).

Perez secured new counsel who subsequently filed Appellate Rule 4(a)(5) and 4(a)(6) motions, as well as a motion under Civil Rule 60(b)(6), arguing that Perez missed the deadline because Khan abandoned him. On December 18, 2012, the district court—finding that Khan had abandoned Perez—entered judgment granting the Civil Rule 60(b)(6) motion. It then directed the clerk to reenter the March 27 judgment so that Perez could timely appeal. The court noted that it otherwise would have granted Perez's Appellate Rule 4(a)(6) motion. On January 16, 2013, Perez timely appealed the district court's reentered judgment; the Director also timely appealed the district court's grant of Civil Rule 60(b)(6) relief.

II. Applicability of Civil Rule 60(b)(6)

"[We] review[] a district court's decision to grant or deny relief under [Civil] Rule 60(b) for abuse of discretion." *Flowers v. S. Reg'l Physician Servs., Inc.*, 286 F.3d 798, 800 (5th Cir. 2002). "'A district court abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Hesling v. CSX Transp.,*

Inc., 396 F.3d 632, 638 (5th Cir. 2005) (quoting *Kennedy v. Tex. Utils.*, 179 F.3d 258, 265 (5th Cir. 1999)).

The first question before us is a simple one, though the answer is less so. Does the district court have the power to allow an otherwise untimely appeal by using Civil Rule 60(b)(6) to reenter a judgment solely in order to permit such an appeal to become timely?[4] If the answer to the question is "yes," then we must examine under what circumstances the district court could do so.[5] If the answer is "no," then the district court lacked the power to do what it did, and we must vacate the order. The answer to the question requires consideration of some history. Prior to 1991, we allowed the use of Civil Rule 60(b)(6) to circumvent Appellate Rule 4(a) in cases where the clerk

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[4] The district court ruled in the alternative that it would have granted the Appellate Rule 4(a)(6) motion, despite its earlier conclusion that this rule did not apply because Khan received timely notice. Perez does not argue that Appellate Rule 4(a)(6) would provide an alternate basis to find his appeal timely. This rule does not cover an attorney's decisions that lead to an untimely appeal. *See Resendiz v. Dretke*, 452 F.3d 356 (5th Cir. 2006). Even if Appellate Rule 4(a)(6) were an available source of relief in a case such as this one, as suggested by the dissenting opinion, it permits only a fourteen-day reopening of the time for appeal. This appeal was filed twenty-eight days after the district court's Civil Rule 60(b)(6) order. Thus, Appellate Rule 4(a)(6) does not aid Perez here.

[5] Because we answer this question "no," we have no occasion to address what the parameters of "attorney abandonment" are. We note, however, that Khan's decision not to appeal, while not hers to make, was, according to her, based on research and her conclusion that such an appeal would not be "viable" and would detract from her strategy of pursuing an "actual innocence" claim.

failed to send the required notice to the parties that a judgment had been entered. *See Smith v. Jackson Tool & Die, Inc.*, 426 F.2d 5 (5th Cir. 1970). In *Smith*, we stated that while

> [w]e are fully aware that various cases have held that a motion to vacate cannot be granted for the sole purpose of extending the time for appeal nor can it be invoked as a substitute for appeal * * * * [W]e must also recognize that where the net result of adhering to the letter of the rules of procedure is to thwart rather than to promote justice, the Court must be wary of their rigid application.

Id. at 7–8.

In 1991, however, Appellate Rule 4(a) was amended specifically to allow the district court to re-open the appeal time when the moving party does not receive notice under Civil Rule 77(d), which provides for clerks to give parties notice of judgments. FED. R. APP. P. 4(a)(6). That same year, 28 U.S.C. § 2107, which provides the statutory time frame for civil appeals, was amended to allow extensions of time in the same circumstances as those encompassed by Appellate Rules 4(a)(5) and 4(a)(6).

Following these amendments, we held that Civil Rule 60(b)(6) is no longer available in cases that are analogous to *Smith*. *See Matter of Jones*, 970 F.2d 36, 37–39 (5th Cir. 1992) (affirming the denial of a Civil Rule 60(b)(6) motion to vacate and reinstate the judgment where there was no notice because the appellants failed to meet the requirements of Appellate Rule 4(a)(6)); *see also Vencor Hosps. v. Std. Life &*

Accident Ins. Co., 279 F.3d 1306, 1312 (11th Cir. 2002) (same); *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357 (8th Cir. 1994) (same). Prior to 1991, we had decided some cases that hinted (without holding) that it was conceivable that a situation could exist that would allow using Civil Rule 60(b) to extend the time for appeal even in situations not governed by Smith. *See United States v. O'Neil*, 709 F.2d 361, 373 (5th Cir. 1984) (stating "[e]xcept in truly extraordinary cases, Rule 60(b) relief should not be used to extend the time for appeal," and thus implicitly suggesting there might be such a "truly extraordinary case");[6] *see also In re Air Crash at Dall./Fort Worth Airport*, 852 F.2d 842, 844 (5th Cir. 1988) (citing 11 WRIGHT & MILLER § 2864 at 214–15). After the statutory and rule changes of 1991, however, our decisions no longer contained even such "hints."[7]

Instead, in 2002, we decided *Dunn v. Cockrell*, 302 F.3d 491 (5th Cir. 2002). In *Dunn*, we affirmed a district court's denial of a habeas petitioner's Civil Rule 60(b)(1) motion seeking to vacate the original judgment so that he could timely appeal, holding that "[R]ule 60(b) cannot be used to circumvent the lim-

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[6] *O'Neil*'s actual holding was that the "appeal periods in FED. R. APP. P. 4 are mandatory and jurisdictional. . . [Civil] Rule 60(b) cannot be used to circumvent its procedures * * * * This is particularly so where * * * the [Civil] Rule 60(b) motion is made after time for appeal has expired * * * [and] asks only that the order be vacated and reentered." (citations omitted)). 709 F.2d at 373.

[7] One post-1991 case mentioned in a passing footnote that "[w]e have recognized that this rule may yield in truly extraordinary cases." *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1203 n.7 (5th Cir. 1993) (citing *O'Neil*, 709 F.2d at 373).

ited relief available under Federal Rule of Appellate Procedure 4(a)(5), which advances the principle of protecting the finality of judgments." *Id.* at 492–93 (citation omitted). The language used in *Dunn* makes it particularly clear that where the sole purpose of a Civil Rule 60(b) motion is "to achieve an extension of the time in which to file a notice of appeal, it must fail." 302 F.3d at 493; *see also O'Neil*, 709 F.2d at 373 ("[W]here * * * the [Civil] Rule 60(b) motion * * * asks only that the order be vacated and reentered. * * * the [Civil] Rule 60(b) motion is avowedly being used *only* to extend the time for appeal. It hence squarely collides with [Appellate] Rule 4(a)(5).").[8]

Following our decision in *Dunn*, the Supreme Court held in *Bowles v. Russell*, 551 U.S. 205, 214 (2007), that the "timely filing of a notice of appeal in a civil case is a jurisdictional requirement." The Court explained that courts lacked power to carve out equitable exceptions to Appellate Rule 4(a) because the deadlines to appeal are jurisdictional statutory requirements under 28 U.S.C. § 2107. *Id.* *Bowles* unequivocally states that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the 'unique circumstances' doctrine is illegitimate." *Id.* at 214.

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[8] Although *Dunn* addressed Civil Rule 60(b)(1), its reasoning was not limited to subpart 1. 302 F.3d at 493 (where "sole purpose" of motion is not to attack underlying judgment but rather to extend the time for appeal, "it must fail"). The reasoning is equally applicable to subpart 6. *See also* fn.8, *infra*.

The strong language in *Bowles*, while not referring specifically to Civil Rule 60(b), does not permit appellate courts to create exceptions to circumvent the appellate deadlines as set forth in Appellate Rule 4(a) and § 2107. This is particularly true because Appellate Rule 4 "carries § 2107 into practice." *Id*. at 208. According to 28 U.S.C. § 2107(a), a party must appeal within 30 days of the entry of judgment, and district courts have limited authority to grant an extension. The limited exceptions stated in § 2107 are present in Appellate Rule 4; however, there is no "extraordinary circumstances" or similar exception. In fact, 28 U.S.C. § 2107 has been amended twice since the Supreme Court decided *Bowles*. Neither amendment attempts to add an exception for "extraordinary" or "unique" circumstances, suggesting that Congress does not intend for any exceptions, other than the ones already codified, to be used by parties to avoid strict compliance with appellate deadlines. Therefore, using Civil Rule 60(b)(6) to circumvent the exceptions codified in 28 U.S.C. § 2107 runs afoul of *Bowles*'s clear language that courts cannot create exceptions to jurisdictional requirements that are statutorily based. *See* 551 U.S. at 212–14.

Perez and the dissenting opinion point to recent Supreme Court cases using equitable rules in death penalty cases to avoid otherwise harsh results occasioned by improper attorney conduct. In *Maples v. Thomas*, 132 S. Ct. 912, 917 (2012), the Supreme Court held that attorney abandonment constitutes an extraordinary circumstance that can be sufficient "cause" to relieve a federal habeas petitioner from the consequences of a procedural default in state

court. There, during the state post-conviction phase, the defendant's pro bono attorneys left their employment at their law firm and discontinued representation of the defendant without informing either the defendant or the court. *Id*. at 919. No other attorney at the firm took responsibility for the case in any way, and local counsel did not act upon receiving a copy of the dismissal. *Id*. at 919–20. As a result, the time to file an appeal in the state court expired. *Id*. at 920. The district court determined that the procedural error precluded federal habeas consideration, and the Eleventh Circuit affirmed. *Id*. The Supreme Court reversed, distinguishing attorney abandonment, which satisfies the "cause" requirement, from attorney negligence, which does not. *Id*. at 922–23; *see also Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (creating an equitable rule to avoid a procedural default in certain defined situations caused by ineffective assistance of counsel in state proceedings).

The Supreme Court cases Perez and the dissenting opinion cite do not involve exceptions to statutory limits on appellate jurisdiction; they address equitable exceptions to judge-created procedural bars or non-jurisdictional statutes. *See Holland v. Florida*, 560 U.S. 631 (2010) (concluding that AEDPA statute of limitations is not jurisdictional and, therefore, concluding that equitable tolling of the AEDPA limitations period was permissible in the circumstance of attorney abandonment). While the dissenting opinion would read *Bowles* as limited to cases where Appellate Rule 4(a)(6) would govern, its language is not so limited, and its reasoning rests on the statutory nature of these jurisdictional limits under § 2107.

More importantly, even assuming arguendo we were convinced that the current Court would not (or should not) continue to follow *Bowles*, we are not free to disregard *Bowles*. *See Ballew v. Cont'l Airlines*, 668 F.3d 777, 782 (5th Cir. 2012). "We are a strict *stare decisis* court and are in no position to challenge the statutory construction utilized by the Supreme Court * * * * The Supreme Court has sole authority to overrule its own decisions * * * *." *Id*. (citations and internal quotation marks omitted). In other words, we do not "read tea leaves;" we follow the law as it is, respecting the Supreme Court's singular role in deciding the continuing viability of its own precedents.

Other circuits are in accord, with one exception. *See*, *e.g.*, *Lacour v. Tulsa City-Cnty. Jail*, 517 F. App'x 617, 618–19 (10th Cir. 2013) (unpublished) (holding that Civil Rule 60(b) motions cannot toll the time for filing a notice of appeal because, under *Bowles*, the timely filing requirement is mandatory and jurisdictional)[9]; *Cumberland Mut. Fire Ins. Co. v. Express Prod., Inc.*, 529 F. App'x 245, 252 (3d Cir. 2013) (unpublished) ("It is well established that [Civil] Rule 60 is not a proper vehicle for extending the

[9] Contrary to the dissenting opinion's suggestion, *Lacour* does not hold that "a petitioner may rely on [Civil] Rule 60(b) to extend the time for filing an appeal." Instead, it held that Lacour, who was challenging the substance of the judgment, not just seeking resinstatement of his appellate timetable, could not challenge the underlying judgment on appeal because he did not file a timely Civil Rule 59 motion. 517 F. App'x at 619. Instead, the appeal was timely only as to the Civil Rule 60(b) motion's denial. The court held that the district court did not abuse its discretion in denying Civil Rule 60(b) relief.

time to file an appeal that has been rendered untimely by the expiration of the thirty-day time window provided by [Appellate] Rule 4(a)." (citing *Bowles*, 551 U.S. at 206–07)); *Hall v. Scutt*, 482 F. App'x 990, 990–91 (6th Cir. 2012) (unpublished) (same); *In re Sealed Case* (*Bowles*), 624 F.3d 482, 486–87 (D.C. Cir. 2010) (same);[10] *see also White v. Jones*, 408 F. App'x 293, 295–96 (11th Cir. 2011) (unpublished) (While refusing to make a decision on whether Civil Rule 60(b)(6) could ever be used to circumvent Appellate Rule 4(a), the court stated in dicta that *Bowles* likely means that the court would be deprived of jurisdiction if the petitioner failed to comply with a statutory deadline (citing *Dunn*, 302 F.3d at 492)).

The exception is the Ninth Circuit. In *Mackey v. Hoffman*, 682 F.3d 1247 (9th Cir. 2012), it concluded that Civil Rule 60(b)(6) could be used to vacate and reenter judgment where attorney abandonment was

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[10] We also note the persuasive reasoning of two factually similar district court cases from outside our circuit. *Garrett v. Presesnik*, No. 2:09-CV-11076, 2012 U.S. Dist. LEXIS 85411, at *9–11 (E.D. Mich. May 4, 2012) (unpublished) (denying petitioner's Civil Rule 60(b)(6) motion seeking relief to file a timely notice of appeal where petitioner's counsel for the habeas proceedings failed to file the notice of appeal, despite being aware that the petitioner wanted to appeal the denial because, under *Bowles*, Appellate Rule 4(a)'s time limits are "mandatory and jurisdictional," and therefore Civil Rule 60(b) cannot be used to escape Appellate Rule 4(a)'s requirements to re-open the time for appeal); *Joyner v. United States*, No. 3:06-00016, 2011 U.S. Dist. LEXIS 64790, at *6–7 (D.S.C. June 17, 2011) (unpublished) (denying a petitioner's Civil Rule 60(b)(6) motion because, under *Bowles*, the court may not create equitable exceptions to jurisdictional requirements)

found. The Ninth Circuit asserted that its decision does not run afoul of *Bowles* because "Mackey is not receiving relief pursuant to [Appellate] Rule 4(a)(6)." *Id*. at 1253. However, the Ninth Circuit did not address the fact that *Bowles* permitted no equitable exceptions and used mandatory, unequivocal language when referring to the statutory grant of civil appellate jurisdiction. Nor does it address the fact that Appellate Rule 4(a)(5) exists and encompasses "excusable neglect" and "good cause," consistently with § 2107, while a separate "extraordinary circumstances" exception would be inconsistent with § 2107.[11]

In this case, Perez is solely using a Civil Rule 60(b) motion as a means of achieving an untimely appeal. He does not claim he was denied a "full and fair hearing before the district court nor [does he] seek[] by the ruling to have the district court alter its ruling." *Dunn*, 302 F.3d at 493 (citation and internal quotation marks omitted). We conclude under Supreme Court and our precedents that the district court lacked the power to circumvent the rules for timely appeals in the manner it did. Accordingly, we conclude that we must VACATE the order granting Civil Rule 60(b)(6) relief and reentering the judgment.[12] That leaves the March 2012 judgment as the

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[11] Alternatively, one could say that attorney "abandonment," if such occurred, would constitute "good cause" for the failure to timely file such that this circumstance is encompassed by Appellate Rule 4(a)(5) exception for "good cause." Perez's contrary arguments run afoul of *Dunn*.

[12] Our ruling in no way implies that it would be proper for a lawyer to fail to advise a client of an adverse judgment and the right to appeal. *Cf. Burt v. Titlow*, 134 S. Ct. 10, 18 (2013) (holding that the Court's decision declining to set aside state

"live" judgment as to which Perez's appeal is, admittedly, untimely. As a result, we GRANT the Director's motion to dismiss 13-70002, Perez's appeal, for want of jurisdiction.

Civil Rule 60(b)(6) order VACATED (Case No. 13-70006); Perez's appeal DISMISSED (Case No. 13-70002).

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court finding that a lawyer was not ineffective did not exonerate the lawyer from the fact that he "may well have violated the rules of professional conduct"). The decision to waive an appeal is for the client. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT R. 1.02 (client controls general objectives and methods of representation); *See also* TEX. DISCIPLINARY R. PROF'L CONDUCT R. 1.03 (requiring communication with and explanations to a client). In consideration of our duties under Canon 3(B)(5) of the Code of Conduct for United States Judges and recognizing that we do not have all the facts regarding Perez's attorneys' conduct, we raised this issue with both sides' attorneys at oral argument. In a supplemental brief following oral argument, Perez's new attorneys explained that the prior attorney's conduct appears to have been a "one-time occurrence attributable to her medical condition" such that they concluded that referral to disciplinary authorities was not appropriate.

JAMES L. DENNIS, Circuit Judge, dissenting.

I respectfully dissent.

Ordinarily, "the attorney is the prisoner's agent, and under 'well-settled principles of agency law,' the principal bears the risk of negligent conduct on the part of his agent." *Maples v. Thomas*, 132 S. Ct. 912, 922 (2012). However, the Supreme Court has explained that "[a] markedly different situation is presented[] * * * when an attorney *abandons* his client without notice, and thereby occasions the default." *Id.* (emphasis added). "Having severed the principal–agent relationship, an attorney no longer acts, or fails to act, as the client's representative." *Id.* at 922-23. Rather, "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Id.* at 923 (quoting *Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010) (Alito, J., concurring). Therefore, "[u]nder agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him." *Id.* at 924.

As the majority opinion states, the district court denied Perez relief and further denied him a certificate of appealability ("COA"). At that point, time began to elapse for Perez to move for a COA in this court. The majority, in essence, concludes that Perez failed to do so in a timely manner, precluding further review of his conviction and sentence. But to say that *Perez* failed to act in a timely manner is to elide a crucial point. Perez's attorney, Sadaf Khan ("Khan"), timely received notice of the district court's

decision denying Perez relief but she silently, autonomously, and independently chose to take no further action in Perez's case. Without informing or conferring with anyone, including Perez, she deliberately let the time to move for a COA expire. Khan egregiously breached her duty to Perez as his attorney by abandoning him without notice and causing him to lose his right to appeal.

Attorney abandonment, the Supreme Court has indicated, is sufficient to constitute the "extraordinary circumstances" necessary to trigger relief from judgment under Federal Rule of Civil Procedure 60(b)(6). *See id*. at 917, 927 (2012); *Holland*, 130 S. Ct. at 2564; *see also Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). Accordingly, the district court did not abuse its discretion when, considering Khan's serious breach of ethical duty and abandonment of Perez at the precise moment when he crucially needed her counsel and representation, it determined that relief from judgment was warranted and reentered the judgment denying Perez habeas relief in order to permit him, aided by new counsel, to timely file a notice of appeal. Holding Perez responsible for Khan's gross breach of duty is a manifest miscarriage of justice that is not compelled by any precedent of the Supreme Court or this court and erroneously creates a circuit split. *See Mackey v. Hoffman*, 682 F.3d 1247, 1252-53 (9th Cir. 2012).

Nor does *Bowles v. Russell*, 551 U.S. 205 (2007), bar granting Perez relief. In *Bowles*, the Supreme Court held that the time periods contained in Federal Rule of Appellate Procedure 4(a)(6) are "mandatory and jurisdictional." 551 U.S. at 209. Rule 4(a)(6) permits the district court to reopen the time to file an appeal if the moving party demonstrates that he did

not receive notice of the judgment to be appealed under Federal Rule of Civil Procedure 77(d). FED. R. APP. P. 4(a)(6). Perez, however, seeks relief pursuant to Federal Rule of Civil Procedure 60(b)(6) to cure the problem caused when Khan abandoned him. By contrast, at no point in *Bowles* did the petitioner allege that he was entitled to relief because he had been abandoned by his attorney. Moreover, Perez has not argued on appeal that he failed to receive notice of the judgment under Rule 77(d), so *Bowles* presents no bar and does not dictate today's unfortunate outcome. *Cf. Mackey*, 682 F.3d at 1253.

BACKGROUND

On March 27, 2012, the district court entered judgment denying Perez habeas relief and further denying Perez a COA. Accordingly, the deadline to file a notice of appeal was April 26, 2012. *See* FED. R. APP. P. 4(a)(1)(A). According to Khan's affidavit, she received notice of the district court's order the same day that the district court denied Perez relief but determined, apparently without consulting Richard Burr ("Burr"), the consulting attorney,[1] *or her client*,

[1] As the consulting attorney, Burr assisted Khan in representing Perez, with Khan asking Burr case-specific questions from time to time and Burr providing his counsel in response. Burr consulted on Perez's case as part of his work with the Texas Habeas Assistance and Training Project ("the TX HAT Project"). The TX HAT Project is composed of experienced attorneys, each of whom maintains a private practice and directly represents federal capital habeas petitioners from Texas. Additionally, these attorneys consult with counsel appointed to represent Texas capital habeas petitioners, log between 400 and 1000 hours per year in this capacity, and consult on up to 150 cases at any given time. Because of this, Burr explained that he was not able to meaningfully consult on every case—and that he could not force counsel to consult him on every case—

that an appeal would not be successful.[2] In other words, Khan knew of the district court's ruling, unilaterally chose to do nothing, and intentionally and silently allowed Perez's right to request a COA expire by failing to file a notice of appeal by April 26, 2012. In fact, between March 2012, when the district court rendered its decision, and June 2012, Khan did not talk to Burr or Perez at all. The two attorneys spoke only after Burr learned of the district court's March order and called Khan. On June 25, 2012, Khan sent Perez a letter informing him that she had not timely filed an appeal on his behalf.

Thereafter, Burr instructed Khan that she needed to file a notice of appeal; after all, he said, the decision whether to appeal was not hers to make. Accordingly, on June 25, 2012, Khan moved to reopen the time to file a notice of appeal. *See* FED. R. APP. P. 4(a)(6).[3] The district court denied the motion, finding that *Khan* had received notice of the judgment when it was entered and that she had missed the

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and that he would instead focus on the subset of cases in which counsel actively sought his advice.

[2] Burr was not the counsel of record in the case and so he could not sign up to receive PACER notifications. Consequently, he did not receive notice of the district court's judgment. However, even if he had, because he was not counsel of record, he possessed no authority to act on Perez's behalf

[3] That rule permits the district court to "reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered" only if (1) "the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order," (2) "the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice * * *, whichever is earlier," and (3) "the court finds that no party would be prejudiced.

May 29, 2012 deadline to file a Rule 4(a)(5) motion to extend. *See* FED. R. APP. P. 4(a)(5).[4]

Khan withdrew as counsel and Perez secured new counsel who subsequently filed Rule 4(a)(5) and 4(a)(6) motions, as well as a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6), arguing that Perez missed the deadline because Khan had abandoned him. On December 18, 2012, the district court—finding that Khan had abandoned Perez—entered judgment granting the Rule 60(b)(6) motion and directed the clerk to reenter the March 27 judgment so that Perez could timely appeal. The court noted that it otherwise would have granted Perez's Rule 4(a)(6) motion to reopen the time to file his appeal. On January 16, 2013, Perez timely appealed the district court's fresh judgment denying habeas relief and determining that a COA should not issue. The state cross appealed the district court's grant of Perez's motion to vacate and reenter judgment the next day and later moved in this court to dismiss Perez's appeal for want of jurisdiction.

DISCUSSION

I.

Federal Rule of Civil Procedure 60(b)(6) permits a district court to relieve a party from a final judgment for "any * * * reason that justifies relief." FED. R. CIV. P. 60(b)(6). The Supreme Court has explained that only "extraordinary circumstances" justify 60(b)(6) relief. *Gonzalez*, 545 U.S. at 535. Accordingly, we must determine (1) whether attorney aban-

[4] That rule permits the district court to "extend the time to file a notice of appeal if[] * * * a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires."

donment that results in a petitioner's failure to timely file an appeal constitutes "extraordinary circumstances" sufficient to justify relief under Rule 60(b)(6) and (2) whether Khan in fact abandoned Perez. The Supreme Court and the Ninth Circuit have answered the first question in the affirmative, and the facts of this case unquestionably indicate that Khan abandoned Perez right when he needed her most. *See Maples*, 132 S. Ct. at 917, 927; *Holland*, 130 S. Ct. at 2564; *Mackey*, 682 F.3d at 1252-53.

A.

In *Maples v. Thomas*, the Supreme Court held that attorney abandonment constitutes sufficient "cause" to relieve a habeas petitioner, Maples, from the bar to federal review caused by procedural default in state court. 132 S. Ct. at 917; *see also id.* at 927 (describing Maples's abandonment as "extraordinary circumstances"). Maples's pro bono attorneys, during the state postconviction proceedings, left their employment at their law firm and discontinued their representation of the petitioner without informing either the petitioner or the court. *Id.* at 916-17, 919. No other attorney at the firm "entered an appearance on Maples'[s] behalf, moved to substitute counsel, or otherwise notified the court of any change in [the defendant's] representation." *Id.* at 919.

In May 2003, the state court denied Maples's habeas application. *Id.* at 917. "Notice of the court's order were posted to the New York attorneys at the address of the law firm with which they had been associated." *Id.* However, "[t]hose postings were returned, unopened, to the trial court clerk, who attempted no further mailing." *Id.* "With no attorney of record in fact acting on Maples'[s] behalf, the time

to appeal ran out." *Id.* Maples subsequently filed a federal habeas application, but the district court determined that the failure to appeal the trial court's ruling in the state habeas proceeding precluded federal habeas review, and the Eleventh Circuit agreed. *See id.* The Supreme Court, however, reversed, distinguishing between mere "[n]egligence on the part of a prisoner's postconviction attorney[, which] does not qualify as 'cause'" due to the principal-agent relationship between a prisoner and his attorney, and abandonment, which does. *Id.* at 922. Contrasting the former with the latter, the Court explained:

> A markedly different situation is presented[] . . . when an attorney *abandons* his client without notice, and *thereby occasions the default*. Having *severed* the principal–agent relationship, an attorney no longer acts, or fails to act, as the client's representative. His acts or omissions therefore "cannot fairly be attributed to [the client]."

Id. at 922-23 (second alteration in original) (emphasis added) (citation omitted) (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)); *see also Holland*, 130 S. Ct. at 2564 (concluding that attorney abandonment may constitute an "extraordinary circumstance" justifying equitable tolling under 28 U.S.C. § 2244(d)); *id.* at 2568 (Alito, J., concurring) ("Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word."). Thus, the *Maples* Court held that

> under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him.

132 S. Ct. at 924.

Ultimately, the Court concluded that Maples had shown that his attorneys had abandoned him. *See id.* at 924-27. Maples's putative representatives had left their jobs at the firm and had done so without notifying Maples and without withdrawing as counsel of record as required by the relevant local rules. *Id.* at 924. And because the attorneys continued to be listed as counsel of record, Maples was not entitled to receive notice of any order. *Id.* at 925.[5] Moreover, the Court underscored the grave conflict of interest presented by attorneys from the same firm attempting to represent Maples following the procedural default:

> Following the default, the firm's interest in avoiding damage to its own reputation was at odds with Maples'[s] strongest argument—*i.e.*, that his attorneys had abandoned him, therefore he had cause to be relieved from the default. Yet [the firm] did not cede Ma-

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[5] *See* ALA. R. CRIM. P. 34.5 ("[U]pon the entry of any order in a criminal proceeding made in response to a motion, * * * the clerk shall, without undue delay, furnish all parties a copy thereof by mail or by other appropriate means."); ALA. R. CRIM. P. 34.4 ("[W]here the defendant is represented by counsel, service shall be made upon the attorney of record.").

> ples'[s] representation to a new attorney, who could have made Maples'[s] abandonment argument plain to the Court of Appeals. Instead, the firm represented Maples through briefing and oral argument in the Eleventh Circuit, where they attempted to cast responsibility for the mishap on the clerk of the Alabama trial court.

Id. at 925 n.8. Accordingly, the Supreme Court concluded that "[t]here was indeed cause to excuse Maples'[s] procedural default." *Id.* at 927.

> Through no fault of his own, Maples lacked the assistance of any authorized attorney during the 42 days Alabama allows for noticing an appeal from a trial court's denial of postconviction relief. As just observed, he had no reason to suspect that, in reality, he had been reduced to pro se status. Maples was disarmed by extraordinary circumstances quite beyond his control. He has shown ample cause, we hold, to excuse the procedural default into which he was trapped when counsel of record abandoned him without a word of warning.

Id.

The Ninth Circuit has applied *Maples*'s reasoning to grant relief from judgment under Rule 60(b)(6) in a situation materially indistinguishable from the present case. *See Mackey*, 682 F.3d at 1252-53. In *Mackey*, after the district court had denied the petitioner's habeas application on the merits, Mackey's attorney neither notified him nor filed a notice of ap-

peal, despite having inaccurately informed the petitioner that he was awaiting a trial date. *Id.* at 1248-49.[6] Consequently, the time to file an appeal had lapsed, and the district court denied a Rule 60(b)(6) motion to vacate, determining that it lacked discretion to do so. *Id.* at 1250.

Like Supreme Court in *Maples*, the *Mackey* court distinguished between negligence and abandonment. *Id.* at 1253. The court explained that the Ninth Circuit had previously held that gross negligence amounting to constructive abandonment could constitute extraordinary circumstances under Rule 60(b)(6). *Id.* at 1251 (citing *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1169-71 (9th Cir. 2002)). "Relief in such a case," the *Mackey* court explained, "is justified because gross negligence by an attorney, defined as 'neglect so gross that it is inexcusable,' 'viti-at[es] the agency relationship that underlies our general policy of attributing to the client the acts of his attorney.'" *Id.* (alteration in original) (quoting *Tani*, 282 F.3d at 1168, 1171). Thus, the Ninth Circuit held that "when a federal habeas petitioner has been inexcusably and grossly neglected by his counsel in a manner amounting to attorney abandonment in every meaningful sense that has jeopardized the petitioner's appellate rights, a district court may grant relief pursuant to Rule 60(b)(6)." *Id.* at 1253.

As with the attorneys in *Maples*, the Ninth Circuit concluded that Mackey's attorney had failed to observe the relevant local rules requiring him to seek

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[6] Evidently, Mackey's attorney declined—or refused—to take any further action because he had not been paid. *See id.* at 1249

permission to withdraw as counsel of record. *Id*. at 1253.

> Because Grim failed to notify the court of his intention to withdraw, Mackey was deprived of the opportunity to proceed pro se and to personally receive docket notifications from the court. As a result, Mackey, an indigent prisoner who * * * believed that his attorney was continuing to represent him, was wholly unaware that the district court had denied his § 2254 petition.

Id. (citation omitted). However, because the district court had stated that "if it possessed the discretion to vacate and reenter the judgment in order to allow petitioner the opportunity to appeal, [it] would do so," the *Mackey* court, having concluded that the district court possessed such discretion, remanded the case to the district court to determine, as a factual matter, whether Mackey's attorney had in fact abandoned him. *Id*. at 1254 (internal quotation marks omitted).[7]

In sum, the Supreme Court has said that attorney abandonment constitutes the kind of extraordinary circumstance that justifies relief from judgment. *See Maples*, 123 S. Ct. at 917; *Holland*, 130 S. Ct. at 2552, 2562-63; *id*. at 2568 (Alito, J., concurring).

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[7] The court explained that it was granting relief for attorney abandonment under Rule 60(b)(6) rather than for failure to receive notice under Rule of Appellate Procedure 4(a)(6). *Id*. Consequently, the court concluded that "[g]ranting relief to Mackey is not barred by *Bowles v. Russell*." *Id*. "Mackey," the court explained, "[was] seeking relief pursuant to Rule 60(b)(6) to cure a problem caused by attorney abandonment and not by a failure to receive Rule 77(d) notice." *Id*

Applying *Maples*, the Ninth Circuit, faced with facts nearly identical to those of the present case, held that attorney abandonment constitutes the kind of extraordinary circumstances necessary to trigger relief from judgment pursuant to Rule 60(b)(6). In light of this persuasive authority, based on materially indistinguishable circumstances, together with the Supreme Court's clear mandate in *Maples,* the district court correctly concluded that Perez may seek relief from judgment on the grounds that his attorney abandoned him without notice and caused him to lose his right to appeal.

B.

Khan's unilateral decision not to notify Burr or Perez of the district court's judgment and not to pursue an appeal therefrom was an egregious breach of the duties an attorney owes her client and thus constitutes abandonment, not mere negligence for which Perez would ordinarily be responsible. Khan knew of the district court's judgment but elected to do nothing and inform no one despite the fact that, under the relevant ethical rules, the decision not to appeal was not hers to make. *See*, *e.g.*, TEX. DISC. R. PROF. CONDUCT 1.02-1.03.[8] Of particular note is the com-

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[8] *See also Holland*, 130 S. Ct. at 2564 (describing "fundamental canons of professional responsibility, which require attorneys to perform reasonably competent legal work, to communicate with their clients, to implement clients' reasonable requests, to keep their clients informed of key developments in their cases, and never to abandon a client"); Burr Aff. ¶ 19 (consulting attorney stating that "[i]n my more than 30 years of experience in post-conviction proceedings, I have seen exceedingly few instances in which habeas counsel have failed to forward a copy of a deadline-triggering judgment to a death penalty client, failed to consult with a client regarding the client's desire to appeal, and failed to take any action on behalf of a client dur-

mentary to Rule 1.02, which governs the scope and objectives of representation:

> Doubt about whether a client–lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, *the lawyer should advise the client of the possibility of appeal* before relinquishing responsibility for the matter.

TEX. DISC. R. PROF. CONDUCT 1.02 cmt. 6 (emphasis added).[9] This Khan failed to do. Consequently,

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ing an extended period in which jurisdictional appellate deadlines are missed")

[9] *See*, *e.g.*, *Jones v. State*, 98 S.W.3d 700, 703 (Tex. Crim. App. 2003) ("[T]he attorney must ascertain whether the defendant wishes to appeal. The decision to appeal lies solely with the defendant, and the attorney's duty is to advise him as to the matters described above * * * * If the defendant decides to appeal, the attorney must ensure that written notice of appeal is filed with the trial court."); *Ex Parte Axel*, 757 S.W.2d 369, 374 (Tex. Crim. App. 1988) ("[T]rial counsel, retained or appointed, has the duty, obligation and responsibility to consult with and fully to advise his client concerning meaning and effect of the judgment rendered by the court, his right to appeal from that judgment, the necessity of giving notice of appeal and taking other steps to pursue an appeal, as well as expressing his professional judgment as to possible grounds for appeal and their merit, and delineating advantages and disadvantages of appeal."); *Brice v. Denton*, 135 S.W.3d 139, 149 (Tex. App. 2004)

Khan's omissions effectively severed the principal–agent relationship. To hold Perez accountable for Khan's unilateral decision not to take an appeal would by contrary to the Supreme Court's directive that the acts and omissions of an attorney who, by abandoning her client, has severed the attorney–client relationship "'cannot fairly be attributed to [the client].'" *Maples*, 132 S. Ct. at 922-23 (alteration in original) (quoting Coleman, 501 U.S. at 753).

Not only did the decision whether to take an appeal belong to Perez, not Khan, but when Khan unilaterally made this decision for him, she exposed herself to a serious conflict of interest further underscoring the extent of the abandonment. *See Downs v. McNeil*, 520 F.3d 1311, 1314 (11th Cir. 2008) ("[U]nder fundamental tenets of agency law, a principal is not charged with an agent's actions or knowledge when the agent is acting adversely to the principal's interests."); *see also Maples*, 132 S. Ct. at 925 n.8. On discovering the seriousness of her error, Khan should have immediately ceded Perez's representation to new counsel who could have made Perez's strongest argument—that she had abandoned him—as soon as possible. That Khan instead moved, unsuccessfully, to reopen the time to file a notice of appeal underscores this conflict. Why would an attorney argue that she had abandoned Perez when to do so would expose her to significant professional and ethical consequences? This perhaps explains

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("[I]n the absence of a limitation on the scope of appointed counsel's representation in the appointment order, or an order granting appointed counsel's motion to withdraw, we assume that counsel has a continuing obligation to represent a client until the client no longer desires an appointed attorney to appeal the matter.").

why it was months before new attorneys stepped in to represent Perez to assert his only and best argument for relief—that his previous attorney had abandoned him. The professional risk to which Khan exposed herself on failing to consult with her client and thereby abandoning him underscore the extent to which the relationship between Khan and Perez had been severed. Under these circumstances, Perez cannot be held responsible for either the untimeliness of his appeal or the months of dithering before Khan withdrew and permitted unconflicted attorneys to represent Perez.

There is further irony stemming from Khan's abandonment of her client. *Perez* did not receive notice of the judgment, so if he, not Khan, had submitted the motion to reopen the time to file an appeal, he likely would have been successful. *See* FED. R. APP. P. 4(a)(6). In fact, the district court specifically noted that it would have granted Perez's Rule 4(a)(6) motion. Yet at the time, Khan was still purporting to act as Perez's representative. Supposedly represented by counsel, Perez had no way of knowing of the district court's judgment and, in fact, was specifically prohibited from receiving notice under the relevant court rules. *See* S.D. TEX. LOCAL R. 83.3 ("All communications about an action will be sent to the attorney-in-charge who is responsible for notifying associate counsel."); S.D. TEX. LOCAL R. 83.4 ("Notices will be sent only to the address on file."). Even if he had learned about either the judgment or Khan's unilateral decision not to pursue an appeal, those same rules would have barred him from attempting to file a notice of appeal pro se. *Cf.*, e.g., *United States v. Polidore*, 690 F.3d 705, 721 n.19 (5th Cir. 2012) (refusing to consider defendant's pro se motion

because he was represented by counsel (citing 5TH CIR. R. 28.6. ("Unless specifically directed by court order, pro se motions, briefs or correspondence will not be filed if the party is represented by counsel."))).

As the Court explained in *Maples*, "a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him." 132 S. Ct. 924; *see also Hutchinson v. Florida*, 677 F.3d 1097, 1108-09 (11th Cir. 2012) (Barkett, J., concurring) ("A reasonable prisoner would have no cause to file his own pleadings for the simple reason that it is assumed that it is his lawyer's job to do so."). During the period of Khan's deliberate silence and inaction, she was not representing Perez, and yet Perez had no reason to believe that he was not being represented. Although Khan did not move away as did the attorneys in *Maples*, her functionality (or lack thereof) was as if she had. Accordingly, Khan abandoned Perez such that he may not be charged with Khan's omissions in failing to timely appeal. *See Maples*, 132 S. Ct. at 924.

II.

No case from the Supreme Court, this circuit, or any other court disturbs the conclusion that attorney abandonment constitutes the kind of "extraordinary circumstance" envisioned by Rule 60(b)(6), permitting the reentry of judgment and a new appeal. First, in *Bowles v. Russell*, the district court denied habeas relief on September 9, 2003, and Bowles failed to file his notice of appeal within thirty days. 551 U.S. at 207. Instead, on December 12, 2003, *Bowles* moved, pursuant to Rule 4(a)(*6*), to reopen

the period during which he could file his notice of appeal. *Id*. That rule permits a district court to extend the time to file a notice of appeal to fourteen days from the day on which the district court grants a motion to reopen; however, the rule is conditioned on a showing that the moving party *did not receive notice* under Federal Rule of Civil Procedure 77(d). FED. R. APP. P. 4(a)(6)(A); *Bowles*, 551 U.S. at 207. Furthermore, although the district court granted the motion, it "inexplicably gave Bowles *17* days[] . . . to file his notice of appeal." *Bowles*, 551 U.S. at 207 (emphasis added). In other words, the district court exceeded the plain scope of the allowance in Federal Rule of Appellate Procedure 4. And finally, the Court ruled that Rule 4(a)(6)'s express provision barred courts from creating equitable exceptions to that rule's jurisdictional requirements. *Id*. at 214. By contrast, there was no assertion of attorney abandonment in *Bowles* nor is there an express analog in Rule 4 to Rule 60(b)(6)'s allowance for equitable relief under extraordinary circumstances. *See* Fed. R. Civ. P. 60(b)(6); *Crosby*, 545 U.S. at 535. Therefore, *Bowles* is distinguishable.

Second, both *Dunn v. Cockrell*, 302 F.3d 491, 492 (5th Cir. 2002), and *United States v. O'Neill*, 709 F.2d 361, 372-73 (5th Cir. 1983), involved attorney *negligence*, not attorney *abandonment*. For instance, the petitioner in *Dunn* failed to timely appeal as a result of his attorneys' negligence. 302 F.3d at 492. Because the time had expired for him to receive a Federal Rule of Appellate Procedure 4(a)(5) extension based on excusable neglect, Dunn attempted to invoke Rule 60(b)(1), which authorizes a district court to reopen a judgment on the exact same basis—excusable neglect. In other words, he sought to use

Rule 60(b)(1) to circumvent the precise relief afforded Federal Rule of Appellate Procedure 4(a)(5), and so we concluded that the Rule 60(b)(1) motion "squarely collide[d] with Rule 4(a)(5)" and therefore "must fail." *Id.* at 493 (internal quotation marks omitted). The *Dunn* court said nothing about the extraordinary circumstances created when an attorney abandons her client.

And in *O'Neill*, the federal government failed to timely file a notice of appeal of several orders granting summary judgment to the defendants because the government believed those orders were not final. *See* 709 F.2d at 365.[10] Thus, it was in this context that the court affirmed the district court's denial of a Rule 60(b)(1) motion, which asserted mistake as the cause of the government's default, because the requested relief "squarely collide[d]" with Federal Rule of Appellate Procedure 4(a)(5) and was "being used only to extend the time for appeal." *Id.* at 373. Yet the government had been fully aware of the orders from which it sought to appeal but failed to do so timely because of an elementary misunderstanding, not because, thinking they were represented by competent counsel, they were wholly unaware of the rulings. The *O'Neill* court specifically admonished the government for failing to seek clarification with respect to this misunderstanding despite ample opportunity to do so. *See id.* at 374-75. Perez, by comparison, abandoned by his attorney, could not have sought such a clarification. Rather, as the *Maples* Court concluded, attorney abandonment constitutes an "extraordinary circumstance" distinguishing Pe-

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[10] Certain counterclaims against the government remained outstanding, although the district court had severed them. Id

rez's position from that of the government in *O'Neill*. *See* 132 S. Ct. at 927.[11]

And finally, the various out-of-circuit precedents on which the majority relies are distinguishable and unavailing in the face of *Maples*. One runs counter to the majority's conclusion, noting that a petitioner may rely on Rule 60(b) to extend the time for filing an appeal in extraordinary circumstances. *See Lacour v. Tulas City–Cnty. Jail*, 517 F. App'x 617, 619 (10th Cir. 2013) (unpublished). Several predate the Supreme Court's decision in *Maples*. *See White v. Jones*, 408 F. App'x 293, 293 (11th Cir. 2011) (unpublished); *In re Sealed Case (Bowles)*, 624 F.3d 482, 482 (D.C. Cir. 2010); *Joyner v. United States*, Cr. No. 3:06-0016, 2011 WL 2437531, at *1 (D.S.C. June 17, 2011). Several are unpublished, indicating that they were not meant to be precedential and further underscoring that they were not given the fuller treatment that comes with most published cases. *See Lacour*, 517 F. App'x at 617; *Cumberland Mut. Fire Ins. Co. v. Express Prods., Inc.*, Nos. 11-3919, 12-2155, 11-3943, 12-2156, 2013 WL 3481687, at *1 (3d Cir. June 24, 2013) (unpublished); *Hall v. Scutt*, 482 F. App'x 990, 990 (6th Cir. 2012) (unpublished) (per curiam); *White*, 408 F. App'x at 293. All but one involve attorney negligence, *see Hall*, 482 F. App'x at 990, or an allegation that the judgment was never received, *see Cumberland*, 2013 WL 3481687, at *2; *In re Sealed Case*, 624 F.3d at 482; *Garrett v. Prelesnik*, No. 2:09-CV-11076, 2012 WL 2342461, at *1 (E.D. Mich. May 4, 2012), both of which are precise

[11] Thus, *O'Neil* is consistent with the rule announced in Maples because the *O'Neil* court acknowledged that Rule 60(b) relief could be afforded "in truly extraordinary cases." 709 F.3d at 373

circumstances Federal Rule of Appellate Procedure 4 is designed to address.[12] The exception is *White*, the only case cited by the majority that involved an allegation of attorney abandonment, *see White*, 408 F. App'x at 296 (Wilson, J., dissenting), yet that case is inapposite too. In *White*, the petitioner sought a stay of execution, which the panel majority denied principally because he had failed to act with the requisite diligence. *See id.* at 294-95 (majority opinion). Although the *White* court noted a "serious question" regarding whether a Rule 60(b) motion may be used to restart the filing period for a notice of appeal, it specifically declined to decide on this basis, ruling instead that there was no merit to White's underlying § 2254 claims. *See id.* at 295-96.

In sum, no case from the Supreme Court, this circuit, or any other court provides that attorney abandonment does not constitute the kind of extraordinary circumstances envisioned by Rule 60(b)(6), permitting the reentry of judgment and a new appeal therefrom when a habeas petitioner is abandoned. Because Khan abandoned Perez, the district court did not abuse its discretion, and we may consider the merits of Perez's COA application, a question to which I now turn.

III.

A.

At trial, Perez testified that at the time of his arrest, his attorney had instructed him to remain si-

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[12] *Joyner* is slightly different, but nevertheless distinguishable. The petitioner in Joyner alleged that he had timely mailed his notice of appeal to the district court but that the court had never received it. *See* 2011 WL 2437531, at *1

lent. On direct examination, the following exchange occurred:

> Q: And from that moment when [your attorney] told you that to this [day] you've not had an opportunity over the last year, based on your lawyers' advice, to tell anyone what really happened.
>
> A: I have not said a word to anybody. It's been the most painful year of my life, not being able to say anything. Yes, I did leave that house, but I did not kill those people.

During closing argument, the prosecutor stated that it took Perez "a year to come up with" his story and further opined that "[w]hat he's done is he's worked for a full year on making up a story to fit the evidence." The trial court overruled defense counsel's Fifth Amendment objection to these statements.

The Texas Court of Criminal Appeals concluded that there was no constitutional error because "[t]he prosecutor's remarks were merely a summation of and reasonable deduction drawn from [Perez's] testimony." The district court agreed, observing that Perez had "'opened the door' to the prosecutor's comments" and that the prosecutor's comments spoke to Perez's credibility as a witness rather than his right not to testify.

B.

This is precisely the situation that the Supreme Court confronted in *Doyle v. Ohio*, 426 U.S. 610 (1976). The *Doyle* defendants testified that they had been framed. *Id.* at 612-13. On cross-examination, the prosecutor questioned why the defendants had

not presented this story initially, and the trial court overruled defense counsel's objections on self-incrimination grounds. *Id*. at 614. The Supreme Court, however, reversed, explaining that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id*. at 618. The Court therefore held that "the use for impeachment purposes of [a petitioner's] silence at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." *Id*. at 619.

Perez persuasively explains that the state did just what the prosecution sought to do in *Doyle*, namely use "the discrepancy between an exculpatory story at trial and silence at the time of arrest' to create 'an inference that the story was fabricated somewhere along the way' in order to 'fit within the seams of the State's case." *Id*. at 616. Accordingly, Perez has made a strong showing "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner [on this issue] or [at least] that the issues presented were adequate to deserve encouragement to proceed further," *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); see also 28 U.S.C. § 2253(c), entitling him to a COA.[13]

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[13] The district court's reasoning to the contrary is unpersuasive. First, the district court provided only a cursory dismissal of *Doyle*, citing a footnote that addressed circumstances that are inapplicable in this case, namely when "a defendant * * * claims to have told the police the same version [of an exculpatory story told at trial] upon arrest." *See* 426 U.S. at 619 n.11. Second, the district court's citations to *Portuondo v. Agard*, 529 U.S. 61 (2000), and *United States v. Robinson*, 485 U.S. 25 (1988), are misplaced because both involve distinguishable cir-

CONCLUSION

Khan abandoned Perez when, on learning of the district court's judgment but without consulting her client or informing anyone, she made the deliberate and unilateral decision to not inform her client of his right to appeal and to not file a notice of appeal, thus barring his opportunity to pursue a likely successful COA application. The majority's cramped interpretation to the contrary holds Perez responsible for Khan's failure, despite being wholly abandoned, and saddles him with a draconian sanction, namely depriving him of a crucial stage of federal habeas review—appellate consideration. Further, today's decision does little to deter future misconduct by counsel such as Khan's in abandoning death-row clients at a most crucial stage of their proceedings.

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cumstances. For instance, *Portuondo* permits a prosecutor to draw the jury's attention to the fact that a testifying defendant does so after every other witness and therefore has an opportunity to tailor his testimony accordingly, 529 U.S. at 73, but that is not what the prosecutor did here. And in *Robinson*, the Supreme Court permitted prosecutors to "fairly respond[] to an argument of the defendant by adverting to [his post-arrest] silence." 485 U.S. at 34. However, Robinson not only refused to testify at trial but also sought to argue that the prosecution was to blame for his failure to take the stand. *Id.* at 28. Perez did no such thing, so there was no argument to which the prosecution was entitled to respond under *Robinson*

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LOUIS CASTRO PEREZ,

PETITIONER,

V.

RICK THALER,

RESPONDENT.

FILED
2012 DEC 18 A.M. 8:50
CLERK OF DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____OJ___
DEPUTY

Case No. A-09-CV-081-LY

ORDER

Before the Court are Petitioner Louis Castro Perez's "Motion to Vacate March 27, 2012 Judgment and Enter New Judgment, or, Alternatively, Renewed Motion to Reopen Time to File Notice of Appeal from March 27, 2012 Judgment or, Alternatively, Motion to Extend Time to File Notice of Appeal of July 3, 2012 Order," Respondent Rick Thaler's response thereto, and Perez's reply. Perez moves to vacate the Court's March 27, 2012 judgment and requests the Court to render a new judgment so that he may timely appeal the denial of his capital *habeas* application. Alternatively, Perez moves the Court to reopen the time to file a notice of appeal from the March 27, 2012 judgment. In addition, Perez alternatively moves the Court to extend the time to file a notice of appeal of the Court's July 3, 2012 Order, denying Pe-

rez's previously filed "Request to Reopen the Time to File Notice of Appeal." Respondent Thaler opposes the motions. After consideration of the motions, response and reply, Perez's Motion to Vacate March 27, 2012 Judgment and Enter New Judgment will be granted. Because the Court grants Perez's original motion, the Court will dismiss Perez's alternative motions.

On March 27, 2012, the Court rendered an order and judgment denying Perez's application for *habeas corpus* relief. The order and judgment were entered that same day. Accordingly, the deadline to file a notice of appeal was April 26, 2012. *See* FED. R. APP. P. 4(a)(1)(A). Perez failed to file a timely notice of appeal. Instead, on June 25, 2012, counsel for Perez filed a "Request to Reopen the Time to File Notice of Appeal" pursuant to Rule 4(a)(6) of the Federal Rules of Appellate Procedure.[1] Counsel explained Perez had not received notice of the order and judgment, because she had not mailed them to him until June 25,2012. The Court denied the motion on July 3, 2012, finding Perez's counsel received notice of the

[1] Rule 4(a)(6) provides:

The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

order and final judgment on March 27,2012 the day the order and judgment were entered and explaining, because of this notice, the Court may not reopen the time to file a notice of appeal pursuant to Rule 4(a)(6).

The Court also considered whether it could extend the time to file a notice of appeal. The Court concluded counsel could have filed a motion to extend the deadline for filing a notice of appeal pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure but that motion had to have been filed no later than May 29, 2012. Because Perez did not file his motion until June 25, 2012, after the deadline expired, the Court did not extend the time to file a notice of appeal.

On July 30, 2012, counsel filed a motion to withdraw from her representation of Perez. The Court held the motion in abeyance until it could obtain substitute counsel to represent Perez. On August 15,2012, the Court granted counsel's motion to withdraw and appointed substitute counsel. Perez's substitute counsel now moves the Court on three alternative bases for the opportunity to pursue an appeal. All three requests rely on the same basic fact: the failure to appeal the judgment earlier was due to the abandonment of Perez by his former counsel, Sadaf Khan. Perez argues Khan ceased to function as his agent and the notice of judgment that was provided to Khan should not be imputed to Perez so as to deprive him of his right of appeal.

First, Perez moves the Court pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure to vacate the judgment and enter a new judgment that can be appealed. Second, Perez renews his request to reopen the time to file a notice of appeal pursuant

to Rule 4(a)(6) of the Federal Rules of Appellate Procedure. Third, Perez moves the Court pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure to extend the time to file a notice of appeal from the Court's July 3, 2012 order that denied Perez's initial motion to reopen the time for appeal. Perez asserts he relied on counsel to appeal the Court's March 27, 2012 denial of his federal *habeas* application, but counsel abandoned him. Perez contends he was left without any attorney functioning as his agent when his *habeas* application was denied and his appellate deadline expired. Citing *Maples v. Thomas*, 132 S. Ct. 912(2012), Perez maintains, because he was abandoned, the Court has discretion to provide him further opportunity to appeal the denial of his *habeas* application.

Perez first requests relief pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. Rule 60(b)(6) provides that a district court may relieve a party from a final judgment, order, or proceeding, except on other specified grounds, for "any other reason that justifies relief." FED. R. CIV. P. 60(b)(6). To merit relief under Rule 60(b)(6), a party must show the existence of "extraordinary circumstance." *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005). Recently, in *Mackey v. Hoffman*, 682 F.3d 1247 (9th Cir. 2012), the Ninth Circuit Court of Appeals, relying on *Maples v. Thomas*, 132 S. Ct. 912 (2012), authorized a district court to vacate a judgment and enter a new judgment under Rule 60(b)(6) for the purpose of filing a notice of appeal after the *habeas* petitioner had been abandoned by counsel during the federal *habeas corpus* proceedings. Similar to the court in *Mackey*, this Court is of the opinion the unique circumstances of Perez's case constitute the kind of extraordinary

circumstances that warrant relief under Rule 60(b)(6).

In *Maples*, an inmate failed to timely appeal the denial of his state postconviction petition in state court because, unbeknownst to him, his volunteer attorneys had abandoned him after filing the petition. 132 S. Ct. at 926. Therefore, he was never notified of the denial, until the time to appeal had lapsed. *Id.* at 919-20. After an Alabama Assistant Attorney General sent a letter directly to Maples informing him of the missed deadline, Maples moved the trial court to reissue its order, thereby restarting the appeal period. *Id.* at 920. The motion was denied and the Alabama Supreme Court affirmed. *Id.* at 920-21. Thereafter, Maples sought federal *habeas* relief. *Id.* at 921. The district court and the court of appeals denied his request based on the procedural default in state court that Maples had failed to timely appeal the state trial court's denial of his petition for postconviction relief. *Id.*

The Supreme Court held that Maples's abandonment by his attorneys constituted an "extraordinary circumstance[] beyond his control," that justified lifting the state procedural bar to his federal petition. *Id.* at 924, 927. The Court noted that, although an attorney is normally the petitioner's agent, and the principal typically bears the risk of negligent conduct on the part of his agent under well-settled principles of agency law, "[a] markedly different situation is presented, however, when an attorney abandons his client without notice, and thereby occasions the default." *Id.* at 922. "Under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when

he lacks reason to believe his attorneys of record, in fact, are not representing him." *Id*. at 924. In Maples's case, because his attorneys had failed to withdraw as attorneys of record when they had effectively abandoned the case, they deprived Maples of his right to personally receive notice without any warning to him that he "had better fend for himself." *Id*. at 925-27.

In the case at hand, the Court finds Perez's attorney also abandoned him and deprived him of his right to personally receive notice without any warning to him so that he could have filed a notice of appeal. Khan admits had she notified Perez of the order and judgment she would have learned he wanted to prosecute an appeal. Khan also admits, during the time period in question, she was dealing with challenging personal circumstances, and absent those circumstances, she would have forwarded the Court's order to Perez and to resource counsel. Because Perez was not aware he had been abandoned during the time period in which he could have filed a notice of appeal, the Court will grant Perez's "Motion to Vacate March 27, 2012 Judgment and Enter New Judgment."[2]

It is therefore **ORDERED** that the "Motion to Vacate March 27, 2012 Judgment and Enter New Judgment," filed by Petitioner Perez on August 29, 2012, is **GRANTED**. The Clerk of the Court is di-

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[2] The Court recognizes Rule 60(b) cannot be used to circumvent the limited relief available under Federal Rule of Appellate Procedure 4(a)(5) when a notice of appeal is not timely filed due to attorney negligence. *See Dunn v. Cockrell*, 302 F.3d 491, 492-93 (5th Cir. 2002). However, in Perez's case the failure to file a timely notice of appeal was due to attorney abandonment and not simply attorney negligence.

rected to reenter the March 27, 2012 judgment to allow Petitioner Perez the opportunity to file a notice of appeal.

It is further **ORDERED** that Petitioner Perez's request to issue a certificate of appealability is **DISMISSED**, as the Court has already denied Petitioner a certificate of appealability.

It is finally **ORDERED** that the Alternative Renewed Motion to Reopen Time to File Notice of Appeal from March 27, 2012 Judgment[3] and Alternative Motion to Extend Time to File Notice of Appeal of July 3, 2012 Order, filed by Petitioner Perez on August 29, 2012, are **DISMISSED**.

SIGNED this 17th day of December 2012.

Lee Yeakel
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

[3] The Court notes had it not granted Perez's "Motion to Vacate March 27, 2012 Judgment and Enter New Judgment" pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, it would have granted Perez's Alternative "Renewed Motion to Reopen Time to File Notice of Appeal from March 27, 2012 Judgment" pursuant to Rule 4(a)(6) of the Federal Rules of Appellate Procedure. Notice to counsel of the March 27, 2012 order and judgment should not be imputed to Perez, because he had been abandoned by counsel.

APPENDIX C

Federal Rule of Civil Procedure 60(b)

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

APPENDIX D

Federal Rule of Appellate Procedure 4(a)

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58 (a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79 (a); or

(ii) if Federal Rule of Civil Procedure 58 (a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

• the judgment or order is set forth on a separate document, or

• 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79 (a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58 (a) does not affect the validity of an appeal from that judgment or order.

APPENDIX E

Federal Rule of Civil Procedure 77(d)

(d) Serving Notice of an Order or Judgment.

(1) Service. Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b).

(2) Time to Appeal Not Affected by Lack of Notice. Lack of notice of the entry does not affect the time for appeal or relieve—or authorize the court to relieve—a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a).

APPENDIX F

Federal Rule of Civil Procedure 5(b)

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service in General. A paper is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address—in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) sending it by electronic means if the person consented in writing—in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) Using Court Facilities. If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

APPENDIX G

28 U.S.C. § 2107

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit, or proceeding, the time as to all parties shall be 60 days from such entry if one of the parties is—

(1) the United States;

(2) a United States agency;

(3) a United States officer or employee sued in an official capacity; or

(4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including all instances in which the United States represents that officer or employee when the judgment, order, or decree is entered or files the appeal for that officer or employee.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good

cause. In addition, if the district court finds—

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.