No. 15-____

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

JONATHAN S. FRANKLIN
Counsel of Record
MARK EMERY
NORTON ROSE FULBRIGHT US LLP
799 9th Street, NW, Suite 1000
Washington, DC 20001
(202) 662-0466
jonathan.franklin@
nortonrosefulbright.com

MARCY HOGAN GREER
ALEXANDER DUBOSE
JEFFERSON & TOWNSEND LLP
515 Congress Avenue
Austin, Texas 78701
(512) 482-9300

Counsel for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a federal court of appeals is authorized to review *sua sponte* and invalidate an order reopening the time to appeal under Federal Rule of Appellate Procedure 4(a)(6), when the appellee never appealed the order.

2. 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 Federal Rule of Civil Procedure 60(b) to reopen the time to appeal when the abandonment caused the failure to appeal a denial of federal habeas relief.

3. Whether notice of the entry of a judgment is imputed to a party for purposes of Federal Rule of Appellate Procedure 4(a)(6) when the party's lawyer receives notice of the judgment, but, instead of notifying the party, abandons him.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

INTRODUCTION 2

STATEMENT OF THE CASE 4

A. District Court Proceedings Leading To *Perez I* 4

B. *Perez I* 7

1. Majority Opinion 8

2. Dissent 9

C. District Court Proceedings Leading To *Perez II* 10

D. *Perez II* 11

1. Majority Opinion 11

2. Dissent 12

REASONS FOR GRANTING THE WRIT 13

I. *PEREZ II* DEEPENS A CIRCUIT SPLIT ON WHETHER A COURT OF APPEALS HAS JURISDICTION TO REVIEW AN UNAPPEALED ORDER EXTENDING THE TIME TO APPEAL 13

II. *PEREZ I* CREATED A GROWING CIRCUIT SPLIT AND CONFLICTS WITH THE COURT'S PRECEDENTS 18

TABLE OF CONTENTS—Continued

Page

A. The Circuits Directly Conflict On Whether Rule 60(b)(6) Can Be Employed To Allow An Appeal In Circumstances Of Attorney Abandonment 19

B. *Perez I* Conflicts With *Maples* 22

C. *Bowles* Does Not Prohibit The Exercise Of Equitable Authority Under Rule 60(b)(6) In Extraordinary Circumstances 26

III. BY IMPUTING NOTICE TO AN ABANDONED CLIENT, *PEREZ II* CONFLICTS WITH MAPLES' AGENCY PRINCIPLES 29

IV. THE ISSUES ARE IMPORTANT 32

CONCLUSION 34

APPENDIX

Appendix A: Opinion and Dissenting Opinion in the United States Court of Appeals for the Fifth Circuit, No. 14-70039 (filed April 22, 2015) ("*Perez II*") 1a

Appendix B: Order of the United States District Court for the Western District of Texas (filed Dec. 11, 2014) 23a

TABLE OF CONTENTS—Continued

		Page
Appendix C:	Opinion and Dissenting Opinion in the United States Court of Appeals for the Fifth Circuit, Nos. 13-70002, 13-70006 (filed Feb. 26, 2014) ("*Perez I*")	32a
Appendix D:	Order of the United States District Court for the Western District of Texas (filed Dec. 18, 2012)	69a
Appendix E:	Order Denying Petition For Rehearing En Banc in No. 14-70039 (filed May 19, 2015)	76a
Appendix F:	Federal Rule of Civil Procedure 60(b)	78a
Appendix G:	Federal Rule of Appellate Procedure 4(a)	79a
Appendix H:	Federal Rule of Civil Procedure 77(d)	84a
Appendix I:	Federal Rule of Civil Procedure 5(b)	85a
Appendix J:	28 U.S.C. § 2107	87a

TABLE OF AUTHORITIES

Page

CASES:

Adefumi v. *Phila. Free Library*, 122 F. App'x 552 (3d Cir. 2004) 14

Amatangelo v. *Borough of Donora*, 212 F.3d 776 (3d Cir. 2000) 11, 13, 14, 18

Arbaugh v. *Y & H Corp.*, 546 U.S. 500 (2006) 17

Bowles v. *Russell*, 551 U.S. 205 (2007) .....*passim*

Christianson v. *Colt Indus. Operating Corp.*, 486 U.S. 800 (1988) 29

Colbert v. *Brennan*, 752 F.3d 412 (5th Cir. 2014) 22

Coleman v. *Thompson*, 501 U.S. 722 (1991) 23, 24, 31

Davis v. *Stephens*, 605 F. App'x 421 (5th Cir. May 29, 2015) 21

FCC v. *Pottsville Broad. Co.*, 309 U.S. 134 (1940) 29

Foley v. *Biter*, --- F.3d ---, No. 12–17724, 2015 WL 4231283 (9th Cir. July 14, 2015) 20, 21

Gonzalez v. *Crosby*, 545 U.S. 524 (2005) 25

Greenlaw v. *United States*, 554 U.S. 237 (2008) 16

Gregg v. *Georgia*, 428 U.S. 153 (1976) 33

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 18

Hertz Corp. v. *Friend*, 559 U.S. 77 (2010) 17

TABLE OF AUTHORITIES—Continued

Page

Hill v. *Hawes*, 320 U.S. 520 (1944) 28

Holland v. *Florida*, 560 U.S. 631 (2010)..... 8, 24

In re Guerrero, 599 F. App'x 137 (5th Cir. Mar. 31, 2015) 21

Indianapolis v. *Chase Nat'l Bank*, 314 U.S. 63 (1941)..... 19

Jennings v. *Stephens*, 135 S. Ct. 793 (2015)..... 16

Klapprott v. *United States*, 335 U.S. 601 (1949)..... 26

Lewis v. *Alexander*, 987 F.2d 392 (6th Cir. 1993) 22

Mackey v. *Hoffman*, 682 F.3d 1247 (9th Cir. 2012) .....*passim*

Mackey v. *Hoffman,* No. C 07–4189, 2012 WL 4753512 (N.D. Cal. Oct. 4, 2012)..... 20

Major League Baseball Players Ass'n v. *Garvey*, 532 U.S. 504 (2001) 18

Maples v. *Thomas*, 132 S. Ct. 912 (2012) ....*passim*

Martinez v. *Ryan*, 132 S. Ct. 1309 (2012)..... 8

Mercer v. *Theriot*, 377 U.S. 152 (1964) 18, 29

Messinger v. *Anderson*, 225 U.S. 436 (1912)..... 29

Tanner v. *Yukins*, 776 F.3d 434 (6th Cir. 2015)..... 2, 8, 19, 22, 29

Toledo Scale Co. v. *Computing Scale Co.*, 261 U.S. 399 (1923) 18

United States v. *Burch*, 781 F.3d 342 (6th Cir. 2015)..... 14, 15, 16, 17

TABLE OF AUTHORITIES—Continued

Page

United States v. *Madrid*, 633 F.3d 1222 (10th Cir. 2011) 14

STATUTES:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2107 ..... 8, 26, 27

RULES:

Fed. R. App. P. 4(a)(1) 5, 27

Fed. R. App. P. 4(a)(5) 5, 6, 22, 27, 28

Fed. R. App. P. 4(a)(6) .....*passim*

Fed. R. App. P. 4(b)(4) 14, 15

Fed. R. Civ. P. 5(b) 30

Fed. R. Civ. P. 60(b)(6) .....*passim*

Fed. R. Civ. P. 77(d) 28, 30, 31

OTHER AUTHORITIES:

1 Restatement (Third) of Law Governing Lawyers § 31 (1998) 31

Advisory Committee on Rules for Civil Procedure, *Report of Proposed Amendments to Rules of Civil Procedure* (June 1946) 28

Wright, et al., 16A Fed. Prac. & Proc. Juris. § 3950.6 (4th ed.) 19

IN THE

Supreme Court of the United States

No. 15-____

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

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

OPINIONS BELOW

The Fifth Circuit's decisions are reported at 745 F.3d 174 ("*Perez I*") and 784 F.3d 276 ("*Perez II*"), and are reproduced at pages 32a and 1a of the Appendix to this petition ("App."). The unpublished orders of the district court are reproduced at App. 69a and 23a.

JURISDICTION

The Fifth Circuit entered judgment in *Perez II* on April 22, 2015, App. 1a, and Perez's petition for rehearing *en banc* was denied on May 19, 2015. App. 76a-77a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

This capital case implicates multiple circuit splits on recurring questions of importance. In each instance, a divided Fifth Circuit panel has gone out of its way to reverse the district court and contravene decisions of sister circuits and this Court—all in order to deprive petitioner Louis Castro Perez of any appellate review of meritorious habeas corpus claims that could, if considered, save his life.

In *Maples* v. *Thomas*, 132 S. Ct. 912, 924 (2012), this Court held that "a client cannot be charged with the acts or omissions of an attorney who has abandoned him" where that abandonment would otherwise prevent a timely appeal. Applying *Maples*, the district court found that Perez was abandoned by his prior counsel, who ceased work on his case without informing him of the denial of his federal habeas petition. The court therefore rectified that abandonment by vacating the denial under Fed. R. Civ. P. 60(b)(6) ("Rule 60(b)(6)") and entering a new order from which an appeal could be filed. But in direct conflict with the Ninth Circuit, *see Mackey* v. *Hoffman*, 682 F.3d 1247 (9th Cir. 2012), the Fifth Circuit held that district courts are powerless to employ Rule 60(b)(6) in these circumstances because doing so would allegedly "circumvent" the appellate deadlines in Fed. R. Civ. P. 4(a). *See* App. 44a; *Tanner* v. *Yukins*, 776 F.3d 434, 442 (6th Cir. 2015)

(recognizing that decision "created a circuit split"); App. 47a, 54a, 56a (Dennis, J., dissenting) (stating that panel majority "erroneously create[d] a circuit split" with the Ninth Circuit on "facts nearly identical" to, and "in a situation materially indistinguishable from," the present case).

Accordingly, when Perez returned to the district court, the court stayed within the contours of Rule 4(a), finding that the abandonment was grounds to reopen Perez's time to appeal from the original habeas denial under Fed. R. Civ. P. 4(a)(6) ("Rule 4(a)(6)"). Respondent (the "State") never appealed or cross-appealed from that order. The same divided Fifth Circuit panel, however, *sua sponte* reviewed and invalidated the district court's Rule 4(a)(6) order, thereby excusing the State's failure to appeal in order to deprive a condemned man of his own right to appeal, even though attorney abandonment had prevented him from learning of the judgment against him. In so doing, the Fifth Circuit placed itself in direct opposition to the Third and Sixth Circuits, which hold that a circuit court has no jurisdiction to review an order extending the time to appeal without a timely appeal from that order. And in denying any possibility of an appeal by Perez—whether under Rule 60(b)(6) or Rule 4(a)(6)—the panel majority contravened the central holding of *Maples* that "a client cannot be charged with the acts or omissions of an attorney who has abandoned him." 132 S. Ct. at 924.

The Fifth Circuit has thus held that the district court is utterly powerless to rectify an attorney's abandonment that prevented the filing of an appeal, and in doing so has excused the State from the jurisdictional requirement of appealing an order of which it indisputably had knowledge. The only

appellate judge to consider the merits of Perez's habeas claims concluded that he made a substantial showing of at least one constitutional error at trial that should be heard on appeal. App. 65a-67a (Dennis, J., dissenting). Certiorari is warranted to bring uniformity to the circuits on these exceptionally important questions and to ensure that Perez—just like the death row petitioner in *Maples*—is not prevented from having these meritorious claims heard simply because he was abandoned by counsel through no fault of his own.

STATEMENT OF THE CASE

A. District Court Proceedings Leading To *Perez I*.

In 1999, Perez was convicted of three homicides and sentenced to death by a Texas trial court. App. 33a.[1] The Texas Court of Criminal Appeals affirmed his conviction and denied his state habeas corpus petition. *Id*.

In 2009, Perez petitioned the district court for a writ of habeas corpus, seeking review of his conviction and sentence. 5th Cir. Record ("R.") 4; App. 33a. In March 2011, before his amended petition was ruled on, Sadaf Khan (now Delaune) was substituted as Perez's attorney. R. 504-05. It was Khan's first habeas and capital case. R. 607.

Khan occasionally consulted with Richard Burr, a resource counsel with the Texas Habeas Assistance and Training Project. R. 676. Burr consulted on up to 150 cases at a given time, preventing him from being in a position to follow and oversee every one of

[1] As the Fifth Circuit concluded, "[t]he facts underlying the conviction are not helpful to understanding this appeal's disposition." App. 33a n.1.

those cases. App. 48a n.1; R. 679. Burr never appeared as Perez's counsel. R. 679; App. 48a n.2.

In December 2011, the magistrate judge issued a Report and Recommendation ("R&R"), recommending denial of the petition. R. 510, 571. Khan consulted with Burr in preparing objections to the R&R. R. 676, 751. After filing the objections on March 5, 2012, Khan fell silent; neither Perez nor Burr heard from Khan again for more than three months. R. 677, 751-52.

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. 597-602 ("March 2012 Judgment"). Khan received notice of the judgment but did not forward it to Perez. R. 608, 752-54. The April 26, 2012 deadline to appeal under Fed. R. App. P. 4(a)(1), and 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. 608, 677.

On June 11, 2012, through a routine docket check, Burr independently learned of the entry of judgment and of Khan's failure to appeal; he immediately urged Khan to act. R. 677. 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. R. 753. She also filed a Rule 4(a)(6) motion. R. 603. On July 3, 2012, the court denied that motion because Khan "received notice of the order and final judgment on March 27, 2012." R. 616-17.

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, relying on *Maples*, to allow Perez time to appeal by vacating and reentering the judgment denying habeas relief under Rule 60(b)(6) or by reopening the time to appeal under Rule 4(a)(6). *See* R. 645-46; App. 35a.[2]

On December 18, 2012, the district court granted Perez's Rule 60(b)(6) motion, vacating the March 27, 2012 Judgment and reentering a new denial from which Perez could appeal. *See* App. 69a-75a ("Rule 60(b)(6) Order"). Applying *Maples* and *Mackey*, the court held that the circumstances of Perez's case "constitute the kind of extraordinary circumstances that warrant relief under Rule 60(b)(6)." App. 72a-73a. The 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

[2] Perez also moved under Fed. R. App. P. 4(a)(5) for an extension of time to appeal the district court's initial denial of the Rule 4(a)(6) motion filed by Khan. R. 660-67. Rule 4(a)(5) relief is not at issue here.

> 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. 74a. *See also* R. 608, 754-55 (Khan's admissions supporting findings).

The district court did not rule on Perez's alternative motions, including his Rule 4(a)(6) motion to reopen the time to appeal. App. 75a. Indeed, the court could not have ruled on the Rule 4(a)(6) motion because the court vacated the March 2012 Judgment that was the subject of that motion. Instead, the district court "dismissed" Perez's alternative claims without ruling on them, App. 75a, while noting that had it not granted Perez's Rule 60(b)(6) motion, it "would have" granted the Rule 4(a)(6) motion 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. 75a n.3.

The district court directed the clerk to reenter the March 2012 Judgment to allow Perez "the opportunity to file a notice of appeal." App. 75a. The new judgment ("December 2012 Judgment") was entered on December 18, 2012. App. 35a; R. 780. On January 16, 2013, Perez timely noticed his appeal from the reentered judgment. R. 781-82; App. 35a. 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. 783-84.

B. *Perez I.*

While Perez briefed his COA application, the State moved to dismiss, arguing that the court lacked jurisdiction because the district court improperly

granted relief under Rule 60(b)(6). On February 26, 2014, the divided panel, over a dissent by Judge Dennis, granted the State's motion to dismiss, and vacated the Rule 60(b)(6) Order. App. 33a-45a.

1. Majority Opinion.

The panel majority viewed itself bound both by Fifth Circuit precedent and the statement 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.'" App. 39a. Even though *Bowles* was "not referring specifically" to Rule 60(b)(6), the court concluded that using Rule 60(b)(6) "to circumvent the exceptions codified in 28 U.S.C. § 2107 runs afoul of *Bowles*' clear language that courts cannot create exceptions to jurisdictional requirements that are statutorily based." App. 40a.

The panel summarily declined to apply *Maples* and similar precedents or opinions 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. 40a-41a (citing *Maples*, *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012), and *Holland* v. *Florida*, 560 U.S. 631 (2010)).

While the majority stated that "[o]ther circuits are in accord" with its view, App. 42a,[3] it acknowledged that the Ninth Circuit's decision in *Mackey*, *supra*,

[3] The opinion cites unpublished decisions of various circuits and district courts and a decision of the D.C. Circuit. App. 42a-43a & n.10. However, none of these cases decides whether attorney abandonment is a valid ground for Rule 60(b)(6) relief. *See also Tanner*, 776 F.3d at 442 n.2 (noting that some cases relied on by *Perez I* are "unpublished and therefore of limited persuasive value").

was an "exception" in holding that Rule 60(b)(6) "could be used to vacate and reenter judgment where attorney abandonment [has been] found." App. 44a. Rather than distinguishing *Mackey* on factual grounds, however, the majority disagreed with the Ninth Circuit's legal conclusion that this procedure "does not run afoul of *Bowles*." *Id.*

The panel vacated the December 2012 Judgment (thereby also vacating the dismissal of Perez's Rule 4(a)(6) motion, which was part of the same order), and dismissed the appeal. App. 35a, 45a.

2. Dissent.

In Judge Dennis' view, the court not only had jurisdiction, but Perez was entitled to a COA. App. 46a-68a. Holding Perez accountable for Khan's conduct "would b[e] contrary to [this 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. 58a-59a (quoting *Maples*, 132 S. Ct. at 922-23).

Judge Dennis disagreed with the majority's conclusion that *Bowles* barred granting Perez relief. App. 47a, 61a-62a. *Bowles* does not address the concern, which *Maples* does address, about the consequences of attorney abandonment. While *Bowles* held that Rule 4(a)(6) "barred courts from creating equitable exceptions to that rule's jurisdictional requirements," App. 62a, Perez sought relief under a different rule—Rule 60(b)(6)—"to cure the problem caused when Khan abandoned him." App. 47a. Therefore, *Bowles* "presents no bar" to Perez's appeal and does not dictate the "unfortunate outcome" reached by the majority. *Id.* Judge Dennis

also concluded that Perez made a "strong showing" that he was entitled to a COA. App. 67a.

This Court subsequently denied Perez's petition for certiorari from *Perez I*. 135 S. Ct. 401.

C. District Court Proceedings Leading To *Perez II*.

Perez I vacated the December 2012 Judgment that "dismissed" the Rule 4(a)(6) motion and revived the March 2012 Judgment denying Perez's habeas petition. App. 34a. Because the March 2012 Judgment was now operative again, the court of appeals' action made it possible for Perez to re-urge his then-pending Rule 4(a)(6) motion. R. 826-37. After this Court denied certiorari, Perez asked the district court to rule on his revived Rule 4(a)(6) motion.[4]

In an order issued on December 11, 2014 ("Rule 4(a)(6) Order"), the court granted Perez's Rule 4(a)(6) motion concluding that, "[a]fter consideration of the case file as a whole, the court agrees with Perez that his previously filed alternative motions remain pending due to the vacating of this court's order by the Fifth Circuit." App. 25a.

Although the court had previously denied the Rule 4(a)(6) motion filed by Khan, it had "not had the opportunity to consider the issue of attorney abandonment" and had therefore "imputed notice received by counsel to Perez." App. 29a-30a. "However," noted the court, "the record in this case is

[4] Perez's petition to this Court noted that relief under Rule 4(a)(6) remained available in the district court even if the Court denied relief under Rule 60(b)(6). *See* Pet. for Certiorari at 8 n.4, 25 n.10, *Perez* v. *Stephens*, No. 13-1406 (filed May 23, 2014); Reply Br. at 11-12 (filed Sept. 29, 2014).

now clear" that Perez did not receive notice of the judgment within 21 days after entry "because he had been abandoned" by Khan, and "[a]s such, notice to K[ha]n should not be imputed to Perez." App. 30a.[5]

D. *Perez II*.

Perez filed a timely notice of appeal from the March 2012 Judgment, as the district court's order authorized. R. 889. The State did not appeal the Rule 4(a)(6) Order, App. 6a, or move to dismiss. Nonetheless, the panel *sua sponte* ordered letter briefing on putative jurisdictional issues and the mandate rule, and dismissed the appeal. *Id*.

1. Majority Opinion.

As a threshold issue, Perez argued that the State waived review of the December 2014 Order by failing to timely appeal. *See Amatangelo* v. *Borough of Donora*, 212 F.3d 776, 778-80 (3d Cir. 2000) (holding review of underlying order waived because appellee failed to cross-appeal). Disagreeing with the Third Circuit, the panel majority deemed it "necessary to review the propriety of the underlying [Rule 4(a)(6)] order to ascertain whether we have jurisdiction." App. 7a (citation omitted).

The panel majority also held that Rule 4(a)(6) relief "is unavailable in a situation such as this one," App. 13a, because *Bowles* precluded any "exceptions" to Rule 4(a). Even if Khan abandoned Perez, *Bowles* precluded the Court from reopening the time to appeal "because [Rule 4(a)(6)'s] terms are not met here, i.e., notice of the judgment was properly given

[5] The district court made other undisturbed findings required by Rule 4(a)(6), including that Perez timely filed his motion within 180 days of the judgment and that the State would not be prejudiced. R. 887.

by the clerk and received by Perez's lawyer." App. 16a.

Given this broad holding, no other holding was necessary to support the judgment. However, the panel majority also concluded that the "mandate rule" barred the district court from granting Rule 4(a)(6) relief. App. 11a. Even though Rule 4(a)(6) was not—and could not have been—at issue in *Perez I*, the majority nevertheless concluded that *Perez I* "held" that Rule 4(a)(6) "did not provide Perez with an alternative avenue for filing a timely notice of appeal." App. 4a. The majority believed it had "unambiguously rejected the December 2012 Order's alternate holding that [Rule 4(a)(6)] was a permissible method of attaining jurisdiction." App. 9a (citing App. 36a n.4). Moreover, Perez's purported "failure to raise" Rule 4(a)(6) in *Perez I* also forfeited relief under that rule, even though Perez could not have raised Rule 4(a)(6) in *Perez I* and was satisfied with the Rule 60(b)(6) relief, and even though the district court had not (and could not have) granted Rule 4(a)(6) relief because it had vacated the judgment that was the subject of that motion. App. 11a-12a.

2. Dissent.

Judge Dennis found that Khan's "egregious breach of [] dut[y]" constituted abandonment, not mere negligence. App. 21a. There was no abuse of discretion in the district court's finding, under *Maples*, that "notice could not be imputed to Perez because Khan had abandoned him" and that the time to appeal could be reopened under Rule 4(a)(6). App. 20a-21a (citing *Maples*, 132 S. Ct. at 924).

Judge Dennis also concluded that *Perez I* "did not include a holding as to FRAP 4(a)(6)," and "any mention of FRAP 4(a)(6) was dictum and therefore not the law of the case" binding on the district court. App. 17a. The Rule 60(b)(6) Order made no "alternate holding" on Rule 4(a)(6). App. 18a-19a. Because only the vacatur of the March 2012 Judgment under Rule 60(b)(6) was before the *Perez I* panel, the majority's Rule 4(a)(6) discussion was "superfluous." App. 19a. And Judge Dennis rejected the view that Perez forfeited Rule 4(a)(6) relief by not raising it in *Perez I*. App. 20a.

Perez petitioned for rehearing *en banc*, which was denied on May 19, 2015. App. 76a-77a.

REASONS FOR GRANTING THE WRIT

I. *PEREZ II* DEEPENS A CIRCUIT SPLIT ON WHETHER A COURT OF APPEALS HAS JURISDICTION TO REVIEW AN UNAPPEALED ORDER EXTENDING THE TIME TO APPEAL.

Perez's appeal should not have been dismissed based on the panel majority's determination of the validity of the Rule 4(a)(6) Order because the court of appeals had no jurisdiction to review that order. Because the State did not appeal it, the Rule 4(a)(6) Order—like other unappealed orders—stands as valid, and Perez's appeal was proper because it was filed well within the time limits of that rule. Nonetheless, the Fifth Circuit went out of its way to review (and invalidate) the unappealed Rule 4(a)(6) Order *sua sponte*, thereby deepening a circuit split on a threshold issue that is dispositive in this case.

In *Amatangelo*, the district court granted an extension of the time to appeal under Rule 4(a). 212

F.3d at 778-79. The appellees did not appeal from the order granting the extension, instead filing a "motion to quash" on jurisdictional grounds. *Id.* at 778, 780. Even though the Third Circuit concluded, in dicta, that the district court erred in granting the Rule 4(a) extension, the Third Circuit refused to dismiss the appeal because "appellees did not appeal from the order granting the extension of time to appeal." *Id.* at 780. *See also Adefumi* v. *Phila. Free Library*, 122 F. App'x 552, 553 (3d Cir. 2004) (same).

In *United States* v. *Madrid*, 633 F.3d 1222 (10th Cir. 2011), the Tenth Circuit disagreed with the Third Circuit's holding. There, a district court extended the time to appeal under Fed. R. App. P. 4(b)(4). *Id.* at 1223-24. Without appealing the extension order, the government moved to dismiss the appellant's appeal on the ground that that order was improperly granted. *Id.* at 1224. The Tenth Circuit held that the government did not need to file a cross-appeal to challenge the order "because an appellee can challenge an extension order by filing a motion to dismiss in this court." *Id.* The court acknowledged "authority for the proposition that an appellee challenging such an extension of time should file a cross-appeal," *id.* (citing *Amatangelo*, 212 F.3d at 780), but was "not persuaded" by, and made no attempt to distinguish, *Amatangelo*. The Fifth Circuit reached the same conclusion here. App. 6a-7a.

In *United States* v. *Burch*, 781 F.3d 342, 344 (6th Cir. 2015), the Sixth Circuit noted the circuit split and rejected the position adopted by the Fifth Circuit in this case.[6] There, a criminal defendant missed the

[6] *Burch* was decided shortly before *Perez II*, but the panel did not address it.

14-day deadline to appeal. 781 F.3d at 343. The defendant received an extension under Fed. R. App. P. 4(b)(4), and timely noted an appeal. *Id.* The government did not appeal or cross-appeal from the extension order, but moved to dismiss for lack of appellate jurisdiction on the ground that that order was improper. *Id.*

The Sixth Circuit noted that the Third and Tenth Circuits "have come to different views," and "[t]he Tenth Circuit took the opposite position" from the Third Circuit. *Id.* at 343, 344. In *Burch*, the Sixth Circuit followed the Third Circuit's view. Writing for the court, Judge Sutton reasoned that "litigants dissatisfied with a district court's judgment or order normally must file an appeal challenging the decision," and therefore "a party dissatisfied with a district court's order is well-served to file one, whether labeled an appeal or cross-appeal, within the relevant timelines." *Id.* at 344 There is nothing "unusual about time-extension orders that suggests a different rule should apply to them." *Id.*

Burch held that an extension order must be treated "like anything else that the district court did and thus something that must be challenged through a notice of appeal." *Id.* "When a party wants an appellate court to reverse a trial court's postjudgment order, it customarily files an appeal with respect to that order." *Id.* (citations omitted). Accordingly, "[t]he government should have appealed from the district court's order if it thought the court abused its discretion" in reopening the time to appeal. *Id.*

Under the rule applied in the Third and Sixth Circuits, the Fifth Circuit could not have dismissed the *Perez II* appeal. The appeal was timely filed well within the 14 days authorized by Rule 4(a)(6). And

because the Rule 4(a)(6) Order was never appealed, that order remains valid and is not subject to review or invalidation by the court of appeals. Indeed, the State's failure to appeal the Rule 4(a)(6) Order is particularly inexcusable given that the State ***did*** timely appeal the Rule 60(b)(6) Order at issue in *Perez I*. App. 35a.

As *Burch* notes, the approach of the Third and Sixth Circuits "respects [this Court's] directives about when a (largely) prevailing party should file an appeal or cross-appeal." 781 F.3d at 344. "'[F]rom its earliest years,' the Court 'has recognized that it takes a cross-appeal to justify a remedy in favor of an appellee,'" *id*. (quoting *Greenlaw* v. *United States*, 554 U.S. 237, 245-46 (2008)), "or to 'attack' a district-court 'decree with a view to * * * lessening the rights of [its] adversary[.]'" *Id*. (quoting *Jennings* v. *Stephens*, 135 S. Ct. 793, 798 (2015)) (additional citation omitted). In *Burch*, the court concluded that the government's motion "attack[ed]" the district court's order "with a view to lessening Burch's rights—indeed his right to appeal at all." *Id*. The government's goal was to "restrict Burch's right to appeal and not to 'support' the rest of the district court's judgment," *id*. (citing *Jennings*, 135 S. Ct. at 798), and therefore "the government should have appealed" the extension order.[7] *Id*.

The same is true in this case. Even though the State never appealed the Rule 4(a)(6) Order, the Fifth Circuit *sua sponte* reviewed—and invalidated—

[7] As noted in *Burch*, the Tenth Circuit "misread" *Jennings*, which "makes clear that a cross-appeal is required when an appellee attacks an order with a view toward 'enlarging his own rights thereunder *or* of lessening the rights of his adversary.'" *Id*. at 345 (quoting *Jennings*, 135 S. Ct. at 798).

that order. App. 16a. Under the approach of the Third and Sixth Circuits, the Fifth Circuit had no jurisdiction to do so and should have addressed the merits of Perez's timely-filed appeal.

As *Burch* notes, a challenge to an unappealed extension order is not (as the Fifth Circuit held here) an attack on the court of appeal's jurisdiction to hear the appeal properly filed pursuant to that order. Where a court of appeals lacks jurisdiction due to a missed notice-of-appeal deadline (which was not true here, because Perez timely filed within 14 days of the Rule 4(a)(6) Order), or because there was no jurisdiction in the trial court, the defect is "not forfeitable." *Id.* at 344 (citing *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514 (2006)). There are also other valid reasons for an appellee to move to dismiss an appeal, but "in none of those settings is the moving party seeking to reverse a district court order." *Id.* at 344-45.

This Court should resolve the clear circuit split and bring certainty to this recurring issue. Certiorari is particularly warranted on this jurisdictional question, because "courts benefit from straight-forward rules under which they can readily assure themselves of their power to hear a case." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). Moreover, this case is an excellent vehicle for deciding the issue, because it is dispositive here. Because the State failed to appeal from the Rule 4(a)(6) Order, that unchallenged order is valid; and because Perez's notice of appeal was timely filed his appeal can proceed on the merits. In other cases, however, the issue may evade this Court's review. If a court of appeals declines to review an extension order without an appeal, this Court could not review that

decision if the appellant loses its appeal. Thus, in *Amatangelo* the Third Circuit affirmed the appeal, 212 F.3d at 780, and the appellee therefore had no basis to seek certiorari review.

II. *PEREZ I* CREATED A GROWING CIRCUIT SPLIT AND CONFLICTS WITH THE COURT'S PRECEDENTS.

Perez I conflicts with decisions of other circuits and with the central rationale of *Maples* on a dispositive issue: whether Rule 60(b)(6) authorizes a court to equitably vacate and reenter judgment to restart the time to appeal that was lost due to the "extraordinary circumstance" of abandonment. Indeed, in the intervening time since *Perez I*, the circuit split has exacerbated, with the Sixth Circuit taking a view contrary to the Fifth Circuit.[8]

---

[8] Although this petition seeks a writ of certiorari from *Perez II*, the Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (citing *Mercer* v. *Theriot*, 377 U.S. 152 (1964) (per curiam) and *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)). The Court has such authority even when it denied a petition for a writ of certiorari from the earlier ruling. *See Mercer*, 377 U.S. at 153-54 ("We now consider all of the substantial federal questions determined in the earlier stages of the litigation, for it is settled that we may consider questions raised on the first appeal, as well as those that were before the court of appeals upon the second appeal."); *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418 (1923) ("Our power to grant writs of certiorari extends to interlocutory as well as final decrees, and a mere denial of the writ to an interlocutory ruling of the Circuit Court of Appeals does not limit our power to review the whole case when it is brought here by our certiorari on final decree."); *Hamilton-Brown*, 240 U.S. at 257-58 ("[I]n now reviewing the final decree by virtue of the writ of certiorari, [the Court] is called upon to

A. The Circuits Directly Conflict On Whether Rule 60(b)(6) Can Be Employed To Allow An Appeal In Circumstances Of Attorney Abandonment.

As Judge Dennis recognized, the panel majority "erroneously create[d] 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. 47a, 54a, 56a. *See also* Wright, et al., 16A Fed. Prac. & Proc. Juris. § 3950.6 at n.42 (4th ed.) (noting split between *Mackey* and *Perez I*). And that circuit conflict continues to grow. In *Tanner*, the Sixth Circuit recently noted that *Perez I* "created a circuit split," and rendered its own decision conflicting with the Fifth Circuit. 776 F.3d at 442.

Andrew Mackey was a federal habeas petitioner with an attorney, LaRue Grim. *Mackey*, 682 F.3d at 1248. Grim filed Mackey's federal habeas petition, but after informing Mackey of the status of his case and requesting payment, "Grim did nothing further." *Id*. Grim subsequently received notification of the denial of the petition, but he neither notified Mackey of that fact nor filed a notice of appeal. *Id*. at 1248-

---

notice and rectify any error that may have occurred in the interlocutory proceedings."); *Indianapolis* v. *Chase Nat'l Bank*, 314 U.S. 63, 74 (1941).

Here, *Perez I*'s vacatur of the December 2012 Judgment revived the March 2012 Judgment. *See* App. 45a. The December 2012 Judgment had dismissed Perez's Rule 4(a)(6) motion to reopen the time to appeal from the March 2012 Judgment. Perez's Rule 4(a)(6) motion therefore "remain[ed] pending" due to the *Perez I* vacatur. App. 25a. Because motions were still pending, *Perez I* was an interlocutory ruling that remains subject to the Court's review.

49. The district court acknowledged that Mackey was deprived of counsel through no fault of his own, that Mackey was not aware 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 made a Rule 60(b)(6) motion to vacate the judgment and reopen the case, which was denied. *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," which "vitiate[es] the agency relationship that underlies our general policy of attributing to the client the acts of his attorney." *Id.* at 1251, 1253 (internal quotation marks omitted). 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 not reaching the factual issue of whether Mackey was abandoned, the Ninth Circuit held that abandonment could constitute the "extraordinary circumstances" warranting Rule 60(b)(6). *Id.* at 1253. On remand, the district court concluded that Grim's conduct constituted abandonment, and subsequently granted Rule 60(b)(6) relief. *See Mackey* v. *Hoffman,* No. C 07–4189, 2012 WL 4753512 (N.D. Cal. Oct. 4, 2012).

Since *Mackey*, the Ninth Circuit has further entrenched its position on facts similar to Perez's. In *Foley* v. *Biter*, --- F.3d ---, No. 12–17724, 2015 WL 4231283 (9th Cir. July 14, 2015), an attorney "forgot

that he represented" a habeas petitioner and never informed the petitioner that his habeas petition was denied, allowing the appeal deadlines to lapse. *Id*. at *1-2. Because the lawyer's "failure to communicate, to preserve [the] ability to appeal, and to withdraw from the case clearly constituted abandonment," the Ninth Circuit held that the district court clearly erred in finding no abandonment and reversed the denial of a Rule 60(b)(6) motion. *Id*. at *4.

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. 72a-73a. In *Perez I*, however, the Fifth Circuit rejected the holding of *Mackey*. 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. 56a (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. While *Mackey* answered the question in the affirmative, 682 F.3d at 1253-54, the Fifth Circuit answered that question in the negative. And the Fifth Circuit's position remains that Rule 60(b)(6) can never be used to "circumvent" Rule 4's deadlines. App. 44(a).[9] The Court should resolve the clear split in authority.

---

[9] The Fifth Circuit has continued to entrench its position. *See*, *e.g.*, *Davis* v. *Stephens*, 605 F. App'x 421, 421 (5th Cir. May 29, 2015) ("A Rule 60 motion may not be used to circumvent the time limits for appealing * * * *."); *In re Guerrero*, 599 F. App'x

Since *Perez I*, yet another circuit has joined the Ninth Circuit in holding that *Bowles* does not preclude using Rule 60(b)(6) to restart the appellate time clock. In *Tanner*, the Sixth Circuit held that a district court abused its discretion in denying a prisoner's Rule 60(b)(6) motion to restore her right to appeal after prison guards violated her constitutional right of access to the courts, resulting in her inability to timely appeal the court's original denial of habeas relief. 776 F.3d at 436, 444. The Sixth Circuit concluded that its own precedent, *Lewis* v. *Alexander*, 987 F.2d 392 (6th Cir. 1993)—which held that "'a district court may employ Rule 60(b) to permit an appeal outside the time constraints of [Rule 4(a)(5)],'" *id.* at 437-38 (quoting *Lewis*, 987 F.2d at 395-96)—remained valid ***after*** *Bowles*. The court thus reentered judgment to remedy the "extraordinary circumstance" of the guards preventing Tanner's timely filing, *id.* at 443, and ***rejected*** exactly the view accepted by the Fifth Circuit—that "no matter what the conduct at issue" and no matter why a court may wish to allow Rule 60(b)(6) relief "an appellate court is not free to do so under any circumstances." *Id.* at 444-45 (Gibbons, J., dissenting) (discussing *Perez I*).

B. *Perez I* Conflicts With *Maples*.

In holding that the district court was powerless to use Rule 60(b)(6) to restore Perez's time to appeal, notwithstanding that he missed his deadline due to

---

137, 138 (5th Cir. Mar. 31, 2015) ("[W]e lack jurisdiction to hear the appeal because 'timely filing of a notice of appeal in a civil case is a jurisdictional requirement.'") (citing *Bowles* and *Perez I*); *Colbert* v. *Brennan*, 752 F.3d 412, 417 (5th Cir. 2014) ("We can no longer make [equitable] exceptions [to Rule 4(a)] in light of *Bowles*.").

attorney abandonment, *Perez I* also conflicts with *Maples*. "To 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. 58a-59a (Dennis, J., dissenting) (citing *Maples*, 132 S. Ct. at 922-23 and *Coleman* v. *Thompson*, 501 U.S. 722, 753 (1991)).

Although this case does not involve the rule for excusing state procedural defaults considered in *Maples*, the facts of abandonment are materially indistinguishable (if not worse in Perez's case), the relevant standards for exercising equitable relief are identical, and the underlying purposes of the exercise of judicial power are the same.

Death row 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 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.*[10] When Maples sought federal habeas relief, the district court and court of appeals denied relief on

[10] Maples also had local Alabama counsel who received 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.

the ground that missing his state court appellate deadline was a procedural default that barred federal habeas review. *Id*.

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

> 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). *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.").

Perez I 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. 74a. 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." *Id.* Yet without finding any clear error in this factual finding, the Fifth Circuit held that this extraordinary circumstance of abandonment could not excuse a missed appeal through Rule 60(b)(6).

The equitable standard employed in *Maples*—whether the petitioner has shown "extraordinary circumstances"—is ***identical*** to the equitable standard applied under Rule 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."). 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. 72a-73a. 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. 36a.

Review is warranted to ensure that the principles announced in *Maples*, which other circuits have correctly implemented through Rule 60(b)(6), are not undermined by the Fifth Circuit's contrary ruling.

C. *Bowles* Does Not Prohibit The Exercise Of Equitable Authority Under Rule 60(b)(6) In Extraordinary Circumstances.

According to the Fifth Circuit, *Maples* and authority applying it are irrelevant in light of *Bowles*' holding that there are no equitable "exceptions" to the time limits of Rule 4 and 28 U.S.C. § 2107. *See* App. 41a, 44a. But nothing the Court said in *Bowles* eliminated federal courts' independent and longstanding ability to exercise their equitable powers under Rule 60(b)(6) to revive an appeal lost due to attorney abandonment. As the Ninth and Sixth circuits have correctly held, *Bowles* does not bar a court from using Rule 60(b)(6) to restart the appellate clock. The Court should ensure that the Fifth Circuit's over-reading of *Bowles* does not vitiate the equitable and agency principles essential to *Maples*' holding, and the judicial power expressly authorized by Rule 60(b)(6).

Rule 60(b)(6) authorizes a district court to relieve a party from a final judgment for "any * * * reason that justifies relief." "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* v. *United States*, 335 U.S. 601, 614-15 (1949) (emphasis added). Commensurate with this broad power, the Court has limited Rule 60(b)(6) relief to "extraordinary circumstances"—the same standard the Court held was met in *Maples*. *See Mackey*, 682 F.3d at 1253.

Bowles, on the other hand, has nothing to do with Rule 60(b)(6). There, 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 implements 28 U.S.C. § 2107(c). *Id.* The district court granted Bowles' motion, but improperly specified that Bowles had 17 days—rather than the 14 days specified in Rule 4(a)(6) and Section 2107(c)—to file the notice of appeal. *Id.* at 207. Bowles filed his notice within 17 days, but after the 14-day period expired. *Id.* The Court found the appeal untimely because the taking of an appeal within the prescribed time is "mandatory and jurisdictional," *id.* at 209, and a court has "no authority to create equitable exceptions to jurisdictional requirements." *Id.* at 214.

Contrary to the Fifth Circuit's belief, nothing in *Bowles* precludes courts from exercising their independent equitable authority under Rule 60(b)(6).[11] 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 "equitable exception" to Rule 4's terms. Indeed, Rule 60(b)(6) does not operate as an "exception" to Rule 4's mandatory requirements at all, and the conflict posited by the Fifth Circuit between those rules 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 4(a)(5) and 4(a)(6) provide limited exceptions where their standards are met. Rule 60(b)(6), by contrast, independently allows a court in "extraordinary

[11] As even the Fifth Circuit majority acknowledged, *Bowles* does "not refer[] specifically to Civil Rule 60(b)." App. 39a. 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.

circumstances" to decide to "relieve a party * * * from a final judgment, order, or proceeding" for "any other reason that justifies relief." Here, the district court exercised the authority expressly granted by Rule 60(b)(6) to vacate and then reenter its judgment, and Perez timely appealed within 30 days of the newly reentered judgment. In doing so, the district court did not "exceed[] the plain scope" of any requirement of Rule 4. App. 62a. (Dennis, J., dissenting).

Had the Court intended for *Bowles* to eliminate this independent grant of authority, the Court would have had to overturn its precedent in *Hill* v. *Hawes*, 320 U.S. 520 (1944). In *Hill*, 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. *Id.* at 521. This Court 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 523-24.[12] 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 Fed. R. Civ. P. 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

[12] 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.*

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. *Bowles* did not hold otherwise.

As two other circuits have concluded, *Bowles* did not require the result in *Perez I*. *Mackey*, 682 F.3d at 1253; *Tanner*, 776 F.3d at 443. The Court should resolve the circuit split, and ensure that Rule 60(b)(6) remains available for federal courts to revive a lost appeal in the extraordinary circumstance of abandonment during federal proceedings, just as the Court enabled federal courts to remedy abandonment during state proceedings in *Maples*.

III. BY IMPUTING NOTICE TO AN ABANDONED CLIENT, *PEREZ II* CONFLICTS WITH *MAPLES*' AGENCY PRINCIPLES.

Certiorari is also warranted to review *Perez II*'s holding that the district court was powerless to reopen the time to appeal under Rule 4(a)(6), even though notice of the deadline-triggering judgment was received by counsel, who abandoned Perez rather than notifying him. App. 15a.[13] By imputing

---

[13] The *Perez II* majority alternatively (and wrongly, *see infra* note 14) held that this issue was resolved by the *Perez I* mandate. But a lower court's determination that a prior ruling is "law of the case" does not preclude this Court from reviewing the prior ruling. *Mercer*, 377 U.S. at 153-54; *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817-18 (1988) ("Most importantly, law of the case cannot bind this Court in reviewing decisions below. A petition for writ of certiorari can expose the entire case to review."); *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 141 (1940) (Court's review "not * * * foreclosed by the interpretation which the Court of Appeals gave to its mandate"); *Messinger* v. *Anderson*, 225 U.S. 436, 444 (1912)

notice, *Perez II* directly conflicts with the agency principles recognized in *Maples*.

Rule 4(a)(6) authorizes a district court to reopen the time to appeal for 14 days after the date when its order to reopen is entered 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.

Fed. R. App. P. 4(a)(6) (emphasis added).

The only "notice" relevant under Rule 4(a)(6) is notice under Rule 77(d), which the clerk of a federal court must serve "immediately after entering an order or judgment," recording such service on the docket. The service must be performed as provided in Fed. R. Civ. P. 5(b), which states that if a party is represented by an attorney, service under the rule must be made on the attorney, unless the court orders service on the party. Ordinarily, when an attorney is served with notice of the entry of

---

(Holmes, J.) (law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power * * * * Of course this [C]ourt, at least, is free when the case comes here.").

judgment in her client's matter, that notice is imputed to the client. *See Coleman*, 501 U.S. at 753.

Maples compels a different result, however, because 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. Unlike attorney negligence, when an attorney abandons his client without notice the attorney's acts or omissions "cannot fairly be attributed to [the client]." *Id*. at 922-23.

Just as in *Maples*, Khan "abandon[ed] h[er] client without notice" and "severed the principal-agent relationship" by no longer acting as the client's representative. *Id*. at 922-23 (citing 1 Restatement (Third) of Law Governing Lawyers § 31, Comment f (1998)). Khan's abandonment was no less egregious than that in *Maples*, where the attorneys simply left their firm. Khan's omissions "severed the principal-agent relationship," and imputing notice to Perez is "contrary to" the Court's directive that the acts of an attorney who has "severed the attorney-client relationship 'cannot fairly be attributed to [the client].'" App. 58a-59a (Dennis, J., dissenting) (quoting *Maples*, 132 S. Ct. at 922-23; *Coleman*, 501 U.S. at 753). No "equitable exception" to Rule 4(a)(6), App. 16a, is necessary. The Court need only conclude that Rule 4(a)(6)'s requirement that a party "[did] not receive notice under Federal Rule of Civil Procedure 77(d)," Fed. R. App. P. 4(a)(6), was met because the notice to Khan cannot be imputed to Perez under *Maples*.

Nor did *Perez* forfeit this issue in *Perez I*. *Cf*. App. 11a-12a. Rule 4(a)(6) was not at issue in *Perez I*,

which involved only the propriety of Rule 60(b)(6) relief. The district court had not, and could not have, granted Rule 4(a)(6) relief given that it vacated the judgment that was the subject of the Rule 4(a)(6) motion and accordingly "dismissed" the motion as moot. App. 75a & n.3. The district court thus made no "alternate holding" on Rule 4(a)(6) and could not have done so. *See* App. 19a (Dennis, J., dissenting). Likewise, having prevailed under Rule 60(b)(6), Perez had no reason to urge his entitlement to Rule 4(a)(6) relief. *Id*. n.2. Perez did not "fail[] to appeal the district court's denial of FRAP 4(a)(6) relief," App. 9a. Far from denying relief, the district court stated it "would have" granted that relief if the court had not ruled under Rule 60(b)(6), App. 75a n.3, and Perez was fully satisfied with that order. Nor could Rule 4(a)(6) have been an alternative source of appellate jurisdiction in *Perez I*, since the district court never authorized a Rule 4(a)(6) appeal from the March 2012 Judgment, instead vacating it and entering a new judgment. *Id*. at 19a n.3, 74a-75a.[14]

IV. THE ISSUES ARE IMPORTANT.

At every juncture, the panel majority went out of its way to ensure that Perez's meritorious appeal

---

[14] Likewise, *Perez I*s discussion of Rule 4(a)(6) was not binding in *Perez II* under the mandate rule. Because only the Rule 60(b)(6) issue was before the *Perez I* panel, the majority's footnote discussion of Rule 4(a)(6), *see* App. 36a n.4, was "superfluous." App. 19a (Dennis, J., dissenting). *Perez I* "did not include a holding as to FRAP 4(a)(6)," and "any mention of FRAP 4(a)(6) was dictum and therefore not the law of the case" and not binding on the district court. App. 17a (Dennis, J., dissenting). In any event, the dicta in *Perez I* merely noted that Rule 4(a)(6) did not "aid" Perez in that appeal, App. 36a n.4, which was correct given that Rule 4(a)(6) could not have been a basis for jurisdiction in *Perez I*.

could not be considered even though his prior attorney abandoned him rather than notifying him of the adverse judgment—even holding that Perez forfeited his appellate rights through no fault of his own while excusing the State from its own failure to appeal a dispositive order. In so doing, the Fifth Circuit created multiple conflicts with other circuits and this Court's precedents and engendered a perverse legal regime. A federal habeas petitioner who misses an appeal deadline due to abandonment during ***state*** proceedings has a remedy under *Maples*, but if he is abandoned during ***federal*** proceedings under precisely the same factual circumstances, there is no remedy under either Rule 60(b)(6) or Rule 4(a)(6). Particularly in matters of life or death, such arbitrary results should not be tolerated. *See Gregg* v. *Georgia*, 428 U.S. 153, 195, 206 (1976) (plurality opinion) ("[M]eaningful appellate review" is vital in capital cases because it "serves as a check against the random or arbitrary imposition of the death penalty.").

Perez, like Maples, was abandoned without warning and missed deadlines "[t]hrough no fault of his own." *Maples*, 132 S. Ct. at 927. By "hold[ing] Perez responsible for Khan's failure," the court "saddle[d] [Perez] with a draconian sanction, namely depriving him of a crucial stage of federal habeas review—appellate consideration." App. 68a (Dennis, J., dissenting). Perez's habeas claims are meritorious, and if this Court does not intervene he will lose the "opportunity to pursue a likely successful COA application." *Id*. These rulings also promise to visit the same injustice on others because they do "little to deter future misconduct by counsel

such as Khan's in abandoning death-row clients at a most crucial stage of their proceedings." *Id*.

CONCLUSION

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

Respectfully submitted,

JONATHAN S. FRANKLIN
Counsel of Record
MARK EMERY
NORTON ROSE FULBRIGHT US LLP
799 9th Street, NW, Suite 1000
Washington, DC 20001
(202) 662-0466
jonathan.franklin@
nortonrosefulbright.com

MARCY HOGAN GREER
ALEXANDER DUBOSE
JEFFERSON & TOWNSEND LLP
515 Congress Avenue
Austin, Texas 78701
(512) 482-9300

Counsel for Petitioner

APPENDIX

APPENDIX
TABLE OF CONTENTS

Appendix A:	Opinion and Dissenting Opinion in the United States Court of Appeals for the Fifth Circuit, No. 14-70039 (filed April 22, 2015) ("*Perez II*")	1a
Appendix B:	Order of the United States District Court for the Western District of Texas (filed Dec. 11, 2014)	23a
Appendix C:	Opinion and Dissenting Opinion in the United States Court of Appeals for the Fifth Circuit, Nos. 13-70002, 13-70006 (filed Feb. 26, 2014) ("*Perez I*")	32a
Appendix D:	Order of the United States District Court for the Western District of Texas (filed Dec. 18, 2012)	69a
Appendix E:	Order Denying Petition For Re-hearing En Banc in No. 14-70039 (filed May 19, 2015)	76a
Appendix F:	Federal Rule of Civil Procedure 60(b)	78a
Appendix G:	Federal Rule of Appellate Procedure 4(a)	79a
Appendix H:	Federal Rule of Civil Procedure 77(d)	84a
Appendix I:	Federal Rule of Civil Procedure 5(b)	85a
Appendix J:	28 U.S.C. § 2107	87a

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
April 22, 2015

Lyle W. Cayce
Clerk

No. 14-70039

LOUIS CASTRO PEREZ,

Petitioner – Appellant

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

---

Before JONES, DENNIS, and HAYNES, Circuit Judges.

PER CURIAM:

In this 28 U.S.C. § 2254 death penalty case, Perez appeals the March 27, 2012, dismissal ("March 2012 Judgment") of his habeas petition and application for a Certificate of Appealability ("COA"). Although Perez failed to file a notice of appeal within 30 days of the judgment as required by Federal Rule of Appellate Procedure ("FRAP") 4(a)(1), in its most recent

ruling in this case, the district court reopened the time to appeal pursuant to FRAP 4(a)(6), and Perez filed an appeal of the March 2012 Judgment following that order.

In Perez's previous appeal of the same ruling, we held, in part, that FRAP 4(a)(6) relief was not viable and dismissed Perez's appeal without remanding to the district court. *Perez v. Stephens*, 745 F.3d 174 (5th Cir.) [hereinafter "*Perez I*"],[1] *cert. denied*, 135 S. Ct. 401 (2014). The district court's order reopening the time to appeal thus conflicts with this court's earlier opinion and is barred by the mandate rule. Additionally, it reflects a misapplication of FRAP 4(a)(6). Accordingly, we DISMISS this appeal for lack of jurisdiction.

I. Background

A Texas jury convicted Perez of capital murder and sentenced him to death. *Perez I*, 745 F.3d at 175. The Texas Court of Criminal Appeals affirmed his sentence on direct appeal and denied his habeas petition. *Id*. at 176. After exhausting his state court remedies, Perez filed a habeas petition in federal court pursuant to 28 U.S.C. § 2254. The district court denied Perez habeas relief and declined to grant a COA. The judgment denying the writ of habeas corpus and a COA was entered on March 27, 2012, meaning Perez had until April 26, 2012, to file his appeal. *See* FRAP 4(a)(1)(A).

Perez's attorney, Sadaf Khan, received notice of the judgment, but decided not to appeal after concluding

[1] "Perez" refers to the petitioner, while "*Perez I*" will denote this court's previous decision.

that an appeal was not in her client's best interest. Khan informed neither Perez nor the consulting attorney, Richard Burr, of the judgment, nor did she consult Perez on whether to file an appeal. Burr only learned of Khan's failure to appeal after the deadline to timely appeal had passed. After Burr informed Khan that death penalty litigants should exhaust all appeals as a matter of course, Khan filed a motion on June 25, 2012, to reopen the time to appeal pursuant to FRAP 4(a)(6). The district court entered an order denying Khan's motion on July 3, 2012, (the "July 2012 Order") reasoning that Khan had received notice of the judgment when it was entered. *See* FRAP 4(a)(6) (providing that the court may only reopen the time to appeal if, inter alia, the moving party did not receive notice under Federal Rule of Civil Procedure 77(d)). The district court also noted that Khan missed the deadline to file a FRAP 4(a)(5) motion. Khan did not appeal the district court's order.

Perez then obtained new counsel who filed FRAP 4(a)(5) and 4(a)(6) motions, as well as a motion under Federal Rule of Civil Procedure ("Civil Rule") 60(b)(6), on August 29, 2012 (collectively, "August 29 Motions"). The district court concluded that Khan had abandoned Perez and granted his Civil Rule 60(b) motion. The court directed the clerk to reenter the March 2012 Judgment denying habeas relief so that Perez could timely appeal. The March 2012 Judgment was reentered on December 18, 2012 ("December 2012 Order"). While the district court dismissed Perez's FRAP 4(a)(5) and FRAP 4(a)(6) motions, it held in the alternative that it would have granted relief under FRAP 4(a)(6) if it had not entered judgment under Civil Rule 60(b). Perez filed

an appeal that would be timely as to the reentered March 2012 Judgment, and the Director timely appealed the grant of Perez's August 29 Motion for Civil Rule 60(b) relief. In that appeal, the Director also filed a motion to dismiss for want of jurisdiction with this court on the grounds that Perez could not render his appeal timely through either Civil Rule 60(b) or FRAP 4(a)(6).

Perez I consolidated both appeals and held that the district court may not allow an otherwise untimely appeal by using Civil Rule 60(b) to reenter a judgment solely to make the appeal timely. 745 F.3d at 181. Because the December 2012 Order reopening the time to appeal was invalid, Perez's appeal of the March 2012 Judgment was untimely. *Id.*

Similarly, we held that FRAP 4(a)(6) did not provide Perez with an alternative avenue for filing a timely notice of appeal. *Id.* at 177 n.4. Perez did not appeal the district court's July 2012 Order or December 2012 Order denying his FRAP 4(a)(6) motions. Nevertheless, the December 2012 Order held in the alternative that FRAP 4(a)(6) was a viable means of relief, while William Stephens, the Director of the Texas Department of Criminal Justice ("the Director"), argued in his motion to dismiss for want of jurisdiction that it was not. In light of this dispute *Perez I* explained:

> 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 al-

> ternate 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.

745 F.3d at 177 n.4. The court vacated the December 2012 Order granting Civil Rule 60(b) relief, "leaving the March 2012 judgment as the 'live' judgment as to which Perez's appeal is, admittedly, untimely." *Id.* at 181. Because neither Civil Rule 60(b) nor FRAP 4(a)(6) rendered Perez's appeal timely, the court "GRANT[ED] the Director's motion to dismiss * * * Perez's appeal, for want of jurisdiction." *Id. Perez I* did not remand to the district court, nor did it purport to vacate or reverse the district court's dismissal of Perez's August 29 Motions for FRAP 4(a)(5) and 4(a)(6) relief.

After this court's disposition of Perez and the Director's appeals and the Supreme Court's denial of certiorari, Perez filed a letter with the district court "Re-urging . . . Pending Motions to Reopen or Extend the Time to File Notice of Appeal." The letter requested that the court grant Perez's August 29 Motions for relief under FRAP 4(a)(5) and 4(a)(6), the two alternative bases the district court had previous-

ly considered and dismissed in its December 2012 Order. Perez reasoned that this court's vacatur of the district court's Civil Rule 60(b) judgment also vacated the district court's dismissal of both motions. Therefore, he argued that both motions remained pending before the district court. The district court seemingly agreed with this contention, and reopened the time to appeal pursuant to FRAP 4(a)(6) on the grounds that Khan, who had received notice of the denial of habeas relief, had abandoned Perez and thus Perez was not on notice of the March 2012 Judgment. The district court's order was entered on December 11, 2014 (the "December 2014 Order"), and Perez then appealed the March 2012 Judgment denying habeas relief and denying a COA, as well as all other adverse orders. In this second round of appeals, the Director did not appeal the district court's reopening of the time to appeal under FRAP 4(a)(6).

The court requested letter briefs from each party addressing this court's jurisdiction to consider this appeal. In response, the parties filed letters addressing whether the district court's December 2014 Order violated the mandate rule and whether the district court lacked the power to grant an extension of the time to appeal the March 2012 Judgment.

II. Discussion

Before addressing why the district court's December 2014 Order reopening the time to appeal under FRAP 4(a)(6) violated *Perez I*'s mandate, we must dispense with Perez's argument that the Director's failure to appeal the district court's FRAP 4(a)(6) Order renders it unreviewable on appeal. Relying on *Amantangelo v. Borough of Donora*, 212 F.3d 776, 778–80 (3d Cir. 2000), Perez argues that the Direc-

tor's failure to appeal the district court's FRAP 4(a)(6) Order effectively forfeits any jurisdictional concerns stemming from the Order.

It is axiomatic that we must consider the basis of our own jurisdiction, sua sponte if necessary. *Wilkens v. Johnson*, 238 F.3d 328, 329–30 (5th Cir. 2001). Jurisdiction cannot be waived or created by consent of the parties, *id.* at 330, and "[a] timely filed notice of appeal is a jurisdictional prerequisite to [appellate] review," *Dison v. Whitey*, 20 F.3d 185, 187 (5th Cir. 1994). Perez filed his notice of appeal pursuant to the December 2014 Order reopening the time to appeal under FRAP 4(a)(6). In such circumstances, this court considers it necessary to review the propriety of the underlying order to ascertain whether we have jurisdiction. *See Wilkens*, 238 F.3d at 330 (holding that an improperly granted FRAP 4(a)(6) motion did not provide appellate jurisdiction even though the nonmoving party attempted to concede jurisdiction). Thus, Perez's argument to the contrary is unavailing.

The question, then, is whether we have jurisdiction to consider Perez's appeal of the March 2012 Order. Because we find that the district court's December 2014 Order reopening the time to appeal violates this court's mandate in *Perez I*, we must dismiss this appeal for want of jurisdiction.

Under law-of-the-case doctrine, "the district court on remand, or the appellate court on a subsequent appeal, abstains from reexamining an issue of fact or law that has already been decided on appeal." *United States v. Teel*, 691 F.3d 578, 582 (5th Cir. 2012). A corollary of the law-of-the-case doctrine is the mandate rule, which "requires a district court on re-

mand to effect [the court's] mandate and to do nothing else." *Gen Universal Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 453 (5th Cir. 2004) (citation and internal quotation marks omitted). "A district court on remand 'must implement both the letter and the spirit of the appellate court's mandate and may not disregard the explicit directives of that court.'" *United States v. McCrimmon*, 443 F.3d 454, 459 (5th Cir. 2006) (quoting *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002)). "Whether the law of the case doctrine foreclose[s] the district court's exercise of discretion on remand and the interpretation of the scope of this court's remand order present questions of law that this court reviews de novo." *United States v. Hamilton*, 440 F.3d 693, 697 (5th Cir. 2006) (citation and internal quotation marks omitted).

To determine whether the December 2014 Order violated the mandate rule, we must assess the scope of *Perez I*'s mandate. As stated above, this court has a duty to examine the basis of its own jurisdiction. *See Wilkens*, 238 F.3d at 329–30. In *Perez I*, we fulfilled that responsibility primarily by addressing whether the district court's grant of Civil Rule 60(b) relief afforded Perez with the opportunity to timely appeal the March 2012 Order dismissing his habeas petition. However, an alternative method of procuring jurisdiction was also presented to the court. The December 2012 Order held, in the alternative, that FRAP 4(a)(6) was a viable method of allowing Perez to timely appeal. The Director disagreed and filed a motion to dismiss for want of jurisdiction with this court, arguing that neither Civil Rule 60(b) nor FRAP 4(a)(6) were permissible bases of establishing jurisdiction. As required, we evaluated whether ei-

ther motion provided Perez with a timely basis for appealing.

Both our holding in *Perez I* and our instructions to the district court unambiguously rejected the December 2012 Order's alternate holding that FRAP 4(a)(6) was a permissible method of attaining jurisdiction. 745 F.3d at 177 n.4. *Perez I* stated that Perez could not reopen the time to appeal under FRAP 4(a)(6) because the "rule does not cover an attorney's decisions that lead to an untimely appeal," and that "Appellate Rule 4(a)(6) does not aid Perez here." 745 F.3d at 177 n.4 (citing *Resendiz*, 452 F.3d at 356). The district court exceeded its authority when it subsequently issued its December 2014 Order coming to the opposite conclusion. *See McCrimmon*, 443 F.3d at 459 (the district court "may not disregard the explicit directives of [this] court").

Perez implicitly argues that his failure to appeal the district court's denial of FRAP 4(a)(6) relief renders our statement in *Perez I* dictum and therefore not law of the case. *See Pegues v. Morehouse Parish Sch. Bd.*, 706 F.2d 735, 738 (5th Cir. 1983). Obiter dictum is defined as "[a] judicial comment * * * that is unnecessary to the decision in the case and therefore not precedential." BLACK'S LAW DICTIONARY 1240 (10th ed. 2014). In light of this court's obligation to assess its jurisdiction, an evaluation of whether FRAP 4(a)(6) provided such jurisdiction is anything but "unnecessary." Both the district court's December 2012 Order, which asserted that FRAP 4(a)(6) relief was available, and the motion to dismiss filed with this court contemplated that FRAP 4(a)(6) might be a basis to establish jurisdiction. *Perez I* necessarily assessed and dismissed this argument

and then granted the Director's motion to dismiss for want of jurisdiction. 745 F.3d at 177 n.4, 181. Instead of being dictum, the disputed language from *Perez I* is more accurately characterized as ruling upon an alternative basis for appellate jurisdiction. *See generally Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991) ("This circuit follows the rule that alternative holdings are binding precedent and not obiter dictum.").

That the district court exceeded the scope of *Perez I*'s mandate is bolstered by our disposition of the case. We addressed all avenues of potential relief Perez possessed and rejected each in turn. *Perez I* vacated the district court's December 2012 Order, reinstated the March 27 Judgment from which a FRAP 4(a)(6) motion would have been untimely, dismissed Perez's appeal as untimely, and did not remand to the district court. Moreover, *Perez I* did not purport to vacate either the district court's December 2012 Order or July 2012 Order denying FRAP 4(a)(6) relief. *See id.* at 181 ("VACAT[ING] the order granting Civil Rule 60(b)(6) relief." (emphasis added)). The totality of these actions clearly manifested an intent to dispense with the case. Quite simply, there was nothing left for the district court to do. While one could argue that the failure to remand likely does not deprive the district court of jurisdiction, *see United States v. Dozier*, 707 F.2d 862, 864 (5th Cir. 1983), the district court's December 2014 Order still failed to heed *Perez I*. *See McCrimmon*, 443 F.3d at 459 ("A district court on remand must implement both the letter and the spir-

it of the appellate court's mandate . . . .") (citation and internal quotation marks omitted)).[2]

Finally, Perez's repeated failure to raise the FRAP 4(a)(6) issue is also dispositive. The mandate rule "bars litigation of issues decided by the district court but foregone on appeal or otherwise waived." *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004) (quotation marks omitted). Indeed, it is well established that the failure to timely raise an issue forfeits that argument. *See United States v. Olano*, 507 U.S. 725, 733 (1993).

This appeal is not the second, but the third attempt by Perez to extend the time to appeal under FRAP 4(a)(6). Despite raising this issue twice before the district court, Perez did not appeal or address either the July 2012 Order denying the relief or the December 2012 Order dismissing FRAP 4(a)(6) relief, including the fact that the latter Order stated that the Rule might provide an alternative method of filing a timely notice of appeal, except to assert that he was not relying on FRAP 4(a)(6). Perez had yet another opportunity to address this issue in *Perez I* in response to the Director's motion to dismiss for want of

---

[2] We typically hold that a district court exceeds the "spirit" of a mandate when we have remanded for a limited purpose but the district court proceeds to consider extraneous issues. *See United States v. Matthews*, 312 F.3d 652, 658 (5th Cir. 2002). This same principle applies by analogy here. *Perez I* took a multitude of actions that are inconsistent with the district court's subsequent decision to reopen the time to appeal under FRAP 4(a)(6). If remanding with limited instructions precludes a district court from considering extraneous issues on remand, then logic suggests that this court addressing the availability of FRAP 4(a)(6) relief and not remanding at all similarly deprives the district court.

jurisdiction, but again failed to do so. *See* 745 F.3d at 177 n.4 ("Perez does not argue that Appellate Rule 4(a)(6) would provide an alternate basis to find his appeal timely."). This neglect is particularly unjustifiable given that the Director's motion to dismiss explicitly placed this issue before the court. *See Lee*, 358 F.3d at 324 (noting that an issue may be waived if there was a reason to raise it in the initial appeal).[3]

The dissenting opinion argues that Perez, as the appellee in *Perez I*, is subject to a more lenient standard and as such his neglect is excusable. *See Tex. Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 206 (5th Cir. 2010). The argument is predicated on the premise that "avoiding piecemeal litigation and conserving judicial resources are less implicated when the party against whom waiver is asserted is the appellee." *Shell Offshore, Inc. v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 122 F.3d 312, 317 (5th Cir. 1997) (citation, alterations, and internal quotation marks omitted). While an appellee's failure to brief an issue may not always raise concerns about judicial economy, Perez's repeated neglect—and the district court's willingness to revive issues that have already been resolved—demonstrate why such concerns are relevant here.

[3] The dissenting opinion suggests there would be no reason to appeal the Rule 4(a)(6) determination, given that the district court stated it would grant this relief and granted Perez Rule 60(b) relief. This argument would not explain Perez's lack of response to the motion to dismiss or his affirmative statement that he was not relying on 4(a)(6). Additionally, it supports our conclusion that this alternative basis for relief was before us in *Perez I* and decided against Perez.

Moreover, the basis for the policy choice applying a more lenient standard to appellees is that, by definition, appellees are unable to choose which issues will be appealed and are unable to file reply briefs. *See Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 954 (Fed. Cir. 1997) (relied upon by this court in *Shell Offshore, Inc.*, 122 F.3d at 317). Those concerns are inapposite here. Questions of appellate jurisdiction are always assessed by this court, so Perez was on notice of this court's inquiry and was not disadvantaged by being the appellee. Furthermore, the Director raised the propriety of the FRAP 4(a)(6) motion in his motion to dismiss for want of jurisdiction—which means Perez had an additional opportunity, usually unavailable to appellees, to address appellant's arguments.

Finally, even if we were to determine that the FRAP 4(a)(6) issue was not precluded by the ruling and events of *Perez I*, we conclude that FRAP 4(a)(6) relief is unavailable in a situation such as this one. FRAP 4(a)(6) provides that "a 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 (1) a party did not receive notice of the entry of the judgment under Federal Rule of Civil Procedure 77(d) within 21 days after entry,[4] and (2) the FRAP 4(a)(6) 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." Civil Rule 77(d), in turn, requires no-

[4] On December 1, 2005, FRAP 4(a)(6) was amended such that "only formal service pursuant to Federal Rules of Civil Procedure 77(d) and 5(b) constitutes notice." *Resendiz*, 452 F.3d at 358 n.3.

tice of judgment to be given under Federal Rule of Civil Procedure 5(b), which mandates service on a party's attorney if the party is represented by counsel. It is undisputed that the clerk complied with Civil Rule 77(d) and that Khan, Perez's attorney, received notice. Thus, FRAP 4(a)(6) is unavailable here, as the district court originally ruled.

While this fact would ordinarily foreclose the availability of relief under FRAP 4(a)(6), Perez and the dissenting opinion maintain that an exception to this rule is warranted because Khan "abandoned" him. Although notice received by an attorney is imputed to the client, *see Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 397 (1993), Perez argues that this principle should not apply when an attorney has abandoned his client. *See Maples v. Thomas*, 132 S. Ct. 912, 917 (2012). This argument has several defects. First, we have previously held that the failure by an attorney to tell her client of a civil judgment in time to file an appeal is not "abandonment." *Resendiz*, 452 F.3d at 362 (declining to "reach the question of whether notice may be imputed to a party who * * * is abandoned by counsel" because attorney negligence does not constitute abandonment).

In *Resendiz*, 452 F.3d at 358, a habeas petitioner's counsel received notice of the entry of judgment against his client but failed to inform his client of the judgment for two months, at which point the client sought to appeal. After the district court denied his appeal as untimely, the petitioner appealed to this court, arguing that notice of the judgment should not be imputed to him "because counsel abandoned him, failing to either timely inform him of the judgment or

to file a notice of appeal." *Id.* at 358–59. The court concluded that counsel's actions amounted to mere negligence and not attorney abandonment. It observed that:

> counsel filed a federal habeas petition on [petitioner's] behalf and, after meeting with [petitioner], moved, albeit untimely, to reopen the period for filing a notice of appeal. If counsel's failure to file a timely notice of appeal constitutes abandonment, then [petitioner's] argument would allow an end run around the requirements set forth in Rule 4(a)(6). Stated another way, the proposed exception would swallow the rule.

Id. at 362.

Khan's actions do not materially differ from the actions of the negligent counsel in *Resendiz*. Like the attorney in *Resendiz*, Khan received notice of an adverse judgment, failed to inform her client, and consequently failed to timely appeal (although in her case, she made the decision not to appeal based upon strategic considerations, which seems even less likely to be "abandonment," *see Perez I*, 745 F.3d at 177 n.5). Perez, like the petitioner in *Resendiz*, cannot use his attorney's failure to inform him as a basis to reopen the time to appeal under FRAP 4(a)(6). *Perez I*, 745 F.3d at 177 n.4.

Further, this argument runs squarely against Supreme Court precedent holding that we are not at liberty to grant exceptions pursuant to 28 U.S.C. § 2107, which is "carrie[d] into practice" by FRAP 4. *See Bowles v. Russell*, 551 U.S. 205, 208, 214 (2007)

(specifically noting that FRAP 4(a)(6) is grounded in § 2107(c)). "[T]he timely filing of a notice of a notice of appeal is a jurisdictional requirement" and "this Court has no authority to create equitable exceptions to jurisdictional requirements." *Id.* *Bowles* expressly addressed FRAP 4(a)(6). By contrast, the "equitable exceptions" crafted by the Court in other cases were directed to non-jurisdictional rules. *See Maples*, 132 S. Ct. at 920-22 (2012) (concerning whether default on a state procedural rule necessarily bars the bringing of a habeas claim to federal court); *Holland v. Florida*, 560 U.S. 631, 645 (2010) (concerning AEDPA's statute of limitations). Thus, even if we concluded that Khan abandoned Perez, which we do not, under *Bowles*, the jurisdictional nature of these statutory requirements precludes us from reopening the time to appeal under FRAP 4(a)(6) because its terms are not met here, i.e., notice of the judgment was properly given by the clerk and received by Perez's lawyer.

III. Conclusion

There are multiple avenues that arrive at the same conclusion—this appeal should be dismissed. The mandate rule barred relitigation of Perez's FRAP 4(a)(6) claim. The district court erred by exceeding the scope of *Perez I*'s mandate, and Perez erred by not raising his FRAP 4(a)(6) argument in a timely fashion. Under any of these circumstances, the district court's December 2014 Order reopening the time to appeal was invalid. Even if the mandate rule did not bar relitigation of Perez's 4(a)(6) claim, the Rule's terms were not met, so no such relief is available here. Accordingly, we again DISMISS Perez's appeal for want of jurisdiction.

JAMES L. DENNIS, Circuit Judge, dissenting:

The majority correctly notes that obiter dictum is not the law of the case, but incorrectly concludes that the *Perez I* majority's discussion of FRAP 4(a)(6) was not dictum. Next, the majority mistakenly concludes that Perez waived the FRAP 4(a)(6) issue by failing to raise it in the prior appeal. Lastly, the majority erroneously holds that the district court's grant of FRAP 4(a)(6) relief was improper on the merits. Because I would hold that the district court did not abuse its discretion by granting Perez's FRAP 4(a)(6) motion, I respectfully dissent.

First, the majority opinion in *Perez I* did not include a holding as to FRAP 4(a)(6)—any mention of FRAP 4(a)(6) was dictum and therefore not the law of the case. *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 351 n.12 (2005) ("Dictum settles nothing, even in the court that utters it."); *Pegues v. Morehouse Parish Sch. Bd.*, 706 F.2d 735, 738 (5th Cir. 1983) (stating that obiter dictum is not law of the case). The district court's December 2012 Order, which was the subject of the prior appeal in *Perez I*, dismissed[1] Perez's FRAP 4(a)(5) motion for extension of time and his 4(a)(6) motion to reopen the time to file an appeal, but granted Perez's Civil Rule 60(b)(6) motion for relief from judgment. The district court then vacated and reentered its earlier judgment denying Perez habeas relief. In a footnote, the district court stated that if it had not granted Perez's Civil Rule 60(b)(6) motion, it would have granted his FRAP 4(a)(6) motion. The Director appealed the dis-

[1] In the district court's place, I would have termed these motions "denied as moot," rather than "dismissed," but I do not believe that this difference in nomenclature is dispositive.

trict court's Civil Rule 60(b)(6) ruling and Perez, as appellee, argued that the court's ruling was correct. Perez did not argue in the alternative that the time to file an appeal should have been reopened under FRAP 4(a)(6). The Perez I majority concluded that Perez's Civil Rule 60(b)(6) motion was improperly granted and also mentioned in a footnote that FRAP 4(a)(6) would not have aided Perez. *Perez v. Stephens*, 745 F.3d 174, 177 n.4 (5th Cir. 2014). In the instant appeal, the majority concludes that that footnote was a holding and therefore binding on the district court. In my view, it was not.

Obiter dictum is "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential." BLACK'S LAW DICTIONARY 1240 (10th ed. 2014); *see also Bohannan v. Doe*, 527 F. App'x 283, 300 (5th Cir. 2013) ("[D]icta involves the consideration of abstract and hypothetical situations not before the court." (internal quotation marks and alterations omitted)). The issue before the *Perez I* panel was whether the district court had properly vacated its own earlier judgment of March 2012 under Civil Rule 60(b)(6). *See* 745 F.3d at 177. Perez did not challenge the district court's dismissal of his FRAP 4(a)(6) motion on appeal, so that issue was not before the panel. *See id*. at 177 n.4. Any comments the *Perez I* panel made as to the merits of a hypothetical FRAP 4(a)(6) argument were nonbinding and not the law of the case. *See Pegues*, 706 F.2d at 738.

To arrive at its conclusion that the FRAP 4(a)(6) issue was properly before the *Perez I* panel, the majority concludes that the district court's December 2012 Order included an "alternate holding" that Perez was

entitled to FRAP 4(a)(6) relief. The district court's holding as to FRAP 4(a)(6), however, was to dismiss Perez's motion for relief under FRAP 4(a)(6). The majority, therefore, reaches the paradoxical conclusion that the district court's December 2012 Order both held that Perez was entitled to FRAP 4(a)(6) relief and denied him such relief. The district court did not maintain these contradictory holdings. Instead, the district court granted Perez's motion to vacate judgment under Civil Rule 60(b)(6), dismissed Perez's alternative motions under FRAP 4(a)(5) and 4(a)(6), vacated the March 2012 Judgment, and entered a new judgment. Perez did not challenge the dismissal of his FRAP 4(a) motions.[2] Only the vacatur of the March 2012 Judgment was before the *Perez I* panel on appeal. The *Perez I* majority's superfluous discussion of FRAP 4(a)(6) therefore did not tie the district court's hands.[3] *See Pegues*, 706 F.2d at 738.

---

[2] I do not suggest that Perez had no reason to appeal the dismissal of his FRAP 4(a)(6) motion merely because the district court stated that it would have granted that motion. Perez had no need to appeal the FRAP 4(a)(6) dismissal because he had succeeded under Civil Rule 60(b)(6).

[3] The majority also suggests that the FRAP 4(a)(6) issue was properly before the *Perez I* panel because this court has an obligation to assess its own jurisdiction. *See United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000). FRAP 4(a)(6) could not have been an alternative source of appellate jurisdiction, however, because the district court vacated the March 2012 Judgment. FRAP 4(a)(6) can extend the time to file a notice of appeal from a judgment, but the March 2012 Judgment—the predicate judgment to which FRAP 4(a)(6) would have applied—had already been vacated. The district court could not simultaneously vacate a judgment and also extend the time to file a notice of appeal from that vacated judgment. As a result, irrespective of

Second, the majority concludes that Perez forfeited his FRAP 4(a)(6) argument by failing to raise it before the *Perez I* panel and, because of the forfeiture, the district court could not grant FRAP 4(a)(6) relief now. For purposes of the FRAP 4(a)(6) issue, Perez was the appellee in *Perez I*. "[W]hen the derelict party is the appellee, who may rely on a favorable ruling by the trial court, it makes sense to construe the 'rule' of forfeiture more leniently." *Tex. Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 206 (5th Cir. 2010); *see also Shell Offshore, Inc. v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 122 F.3d 312, 317 (5th Cir. 1997) (concluding that issue was not forfeited despite appellee's failure to address it in its brief). Moreover, the forfeiture rule is not an absolute or jurisdictional bar to considering issues that were not briefed; it is "a prudential construct that requires the exercise of discretion." *United States v. Miranda*, 248 F.3d 434, 443 (5th Cir. 2001). We should not conclude that Perez forfeited his FRAP 4(a)(6) argument.

Last, the majority holds that the district court was wrong to grant Perez's FRAP 4(a)(6) motion, even if the *Perez I* mandate did not otherwise settle the issue. FRAP 4(a)(6) allows a district court to reopen the time to file a notice of appeal if the court finds that the moving party did not receive notice of entry of judgment. The district court determined that although Khan, Perez's trial attorney, had received notice of the entry of judgment, that notice could not be imputed to Perez because Khan had abandoned him.

---

all merits arguments, FRAP 4(a)(6) could not have supplied an alternative source of jurisdiction (and Perez did not argue that it did).

See Maples v. Thomas, 132 S. Ct. 912, 924 (2012) ("[U]nder agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him."). The district court's conclusion was not an abuse of discretion. *See In re Jones*, 970 F.2d 36, 39 (5th Cir. 1992) (noting that a district court's denial of a FRAP 4(a)(6) motion is reviewed for abuse of discretion).

The majority relies heavily on *Resendiz v. Dretke*, 452 F.3d 356 (5th Cir. 2006), in which we stated that an attorney's failure to file a timely notice of appeal did not constitute abandonment. *Id.* at 362. Because we determined that Resendiz had not been abandoned by counsel, we did "not reach the question of whether notice may be imputed to a party who, though technically represented, is abandoned by counsel." *Id.* *Resendiz*, however, was decided before the Supreme Court's decision in *Maples*, which is indispensable to our current understanding of attorney abandonment. *See Maples*, 132 S. Ct. at 922-28. More importantly, Perez's attorney did more than just negligently miss a filing deadline. As I said in my dissent in *Perez I*, "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." 745 F.3d at 187. Khan's misconduct was so significant that it rose to the level of constructive abandonment. *See Mackey v. Hoffman*, 682 F.3d 1247, 1251 (9th Cir. 2012) ("[G]ross negligence by an attorney, defined as neglect so gross that it is inexcusable, vitiates the agency relationship that under-

lies our general policy of attributing to the client the acts of his attorney." (internal quotation marks and alterations omitted)). The district court thus did not abuse its discretion when it concluded that Khan had abandoned Perez and that the abandonment justified reopening Perez's window to file a notice of appeal under FRAP 4(a)(6).[4]

Because the district court did not abuse its discretion in granting Perez's motion to reopen the time to file an appeal, and because Perez timely filed his notice of appeal within the window that the district court created, we have jurisdiction to hear this appeal. I therefore respectfully dissent from the majority's opinion.

---

[4] The district court's decision does not run afoul of the rule that a court may not "create equitable exceptions to jurisdictional requirements." *See Bowles v. Russell*, 551 U.S. 205, 214 (2007). In *Bowles*, the Supreme Court held that a party could not use the equitable "unique circumstances" doctrine to avoid the time limits prescribed by FRAP 4(a)(6). *Id.* Here, far from creating an equitable exception, the district court merely applied agency principles to conclude that notice could not be imputed to Perez because his counsel had abandoned him.

APPENDIX B

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

LOUIS CASTRO PEREZ,

PETITIONER,

V.

WILLIAM STEPHENS,

RESPONDENT.

FILED
2014 DEC 11 P.M. 3:30
CLERK OF DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____AD___
DEPUTY

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

ORDER

Before the court are Petitioner Louis Castro Perez's "Re-Urging of Pending Motions to Reopen or Extend the Time to File Notice of Appeal" (Clerk's Doc. # 104), Respondent William Stephens's Advisory regarding Perez's motion (Clerk's Doc. # 105), and Perez's own Advisory (Clerk's Doc. #106).

On August 29, 2012, Perez moved to vacate this court's March 27, 2012 judgment and requested the court to render a new judgment so that he may timely appeal the denial of his capital habeas application. Perez explained he had been abandoned by his counsel, who decided not to file a timely appeal without consulting him. Alternatively, Perez moved the court to reopen the time to file a notice of appeal

from the March 27, 2012 judgment and moved the court to extend the time to file a notice of appeal of the court's July 3, 2012 Order denying Perez's previously filed "Request to Reopen the Time to File Notice of Appeal." Respondent opposed the motions. After consideration of the motions, response and reply, on December 18,2012, the court granted Perez's Motion to Vacate the March 27, 2012 Judgment and Enter New Judgment and instructed the clerk of the court to reenter the judgment to allow Perez the opportunity to file a notice of appeal. Because the court granted Perez's motion to vacate, the court dismissed Perez's alternative motions.[1]

Pursuant to the court's order, the clerk reentered the judgment on December 18, 2012. Perez timely filed a notice of appeal within 30 days of the reentered judgment. Respondent appealed from the court's grant of Perez's motion to vacate and reenter judgment and subsequently filed a "Motion to Dismiss Appeal for Want of Jurisdiction." The Fifth Circuit Court of Appeals granted Respondent's motion, vacated this court's order granting Perez's motion to vacate judgment, and dismissed Perez's appeal for want of jurisdiction. *Perez v. Stephens*, 745 F.3d 174 (5th Cir. 2014). The Fifth Circuit noted that vacating this court's order leaves in place the original March 27, 2012 judgment. *Id*. at 176. Perez filed a petition for writ of certiorari, which the Supreme Court denied on October 20, 2014. *Perez v. Stephens*, 135 S. Ct. 401 (2014).

---

[1] The court noted, had it not granted Perez's motion to vacate, it would have granted Perez's motion to reopen time to file a notice of appeal pursuant to Rule 4(a)(6) of the Federal Rules of Appellate Procedure.

Perez now urges the court to consider his previously filed alternative motions. Perez contends, now that the Fifth Circuit has vacated this court's December 18, 2012 order and the Supreme Court has denied review, the alternative motions remain pending.

Respondent suggests this court should take no action and should issue no order. Respondent explains issuing an order would lead to another round of appellate litigation. Respondent maintains the results of such litigation likely would not lead to Perez's receiving relief under Rule 4(a)(5) or (6) of the Federal Rules of Appellate Procedure, but would lead to further delay. Respondent also argues the "mandate rule" requires a lower court to comply with the dictates of the superior court and "forecloses relitigation of issues expressly or impliedly decided by the appellate court." *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 639-40 (5th Cir. 2014). Respondent relies on the Fifth Circuit's note that Perez was not entitled to relief under Rule 4(a)(6) because, after the judgment had been reentered on December 18, 2012, Perez did not file a notice of appeal within 14 days. *Perez*, 745 F.3d at 178 n.4.

After consideration of the case file as a whole, the court agrees with Perez that his previously filed alternative motions remain pending due to the vacating of this court's order by the Fifth Circuit. Contrary to Respondent's contention, the mandate rule does not preclude the court from deciding Perez's pending motions. Because the court dismissed Perez's motion to reopen the time for appeal and did not grant relief pursuant to Rule 4(a)(6), Perez was not required to file a notice of appeal within 14 days of the court's order granting Perez's motion to vacate. Accordingly,

the court revisits the previously filed pending alternative motions.

On March 27, 2012, this 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).[2] 2 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, found Perez's counsel received notice of the order and final judgment on March 27, 2012, the day the order and judgment were entered, and explained because of this notice, the court may not reopen the time to file a notice of appeal pursuant to Rule 4(a)(6).

---

[2] 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 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.

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) 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 moved 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 attorney, 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.

Perez's motion to vacate the judgment and enter a new judgment, filed pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, has been rejected by the Fifth Circuit. Accordingly, the court now considers Perez's request to reopen the time to file a notice of appeal pursuant to Rule 4(a)(6) and Perez's motion pursuant to Rule 4(a)(5) 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 an 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.

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.

Such is the case here. 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 Perez 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.

Rule 4(a)(6) allows the district court to reopen the appeal time when the moving party does not receive notice under Federal Rule of Civil Procedure 77(d), which provides for the court clerk to give each party notice of the entry of judgment. *See* FED. R. APP. P. 4(a)(6). Although this court previously denied Perez's motion to reopen the time to file an appeal filed by Khan, the court had not had the opportunity to

consider the issue of attorney abandonment. Instead, the court imputed notice received by counsel to Perez. Generally, when counsel is given notice of the entry of judgment, that notice in most circumstances is imputed to the client. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 397 (1993) ("each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney") (internal quotation marks omitted); *Resendiz v. Dretke*, 452 F.3d 356, 362 (5th Cir. 2006) (notice received by counsel is imputed to client rendering the Rule 4(a)(6) motion to reopen untimely). However, the record in this case is now clear Perez did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment within 21 days after entry, because he had been abandoned by Kahn. As such, notice to Kahn should not be imputed to Perez. Perez's motion to reopen the time to file an appeal was filed within 180 days after entry of the judgment, and no party will be prejudiced by the reopening of the time to file a notice of appeal. Failing to reopen the time to file an appeal would deprive Perez, who was not aware he had been abandoned during the time period in which he could have filed a notice of appeal, of a crucial stage of federal habeas review.

The court further notes this is a capital case. The court balances the interest of society in executing Perez against the delay of the execution resulting from appellate review of the original conviction and concludes that the harm to Perez by being abandoned by his attorney far outweighs any harm or inconvenience to the public by delaying the execution. To impute Kahn's negligence to Perez to the extent it costs

Perez his life without appellate review deprives him of his right to a meaningful appeal. Accordingly, the court grants Perez's "Renewed Motion to Reopen Time to File Notice of Appeal from March 27, 2012 Judgment." Because the court grants Perez's motion to reopen the time to file an appeal, his Alternative Motion to Extend Time to File Notice of Appeal of July 3, 2012 Order is dismissed.

It is therefore **ORDERED** that the Alternative Renewed Motion to Reopen Time to File Notice of Appeal from March 27, 2012 Judgment filed by Petitioner Perez on August 29, 2012 (Clerk's Doc. #78) is **GRANTED**.

It is further **ORDERED** that the time for appeal is reopened for a period of 14 days from the

date this order is entered.

It is finally **ORDERED** that the Alternative Motion to Extend Time to File Notice of Appeal of July 3, 2012 Order filed by Petitioner Perez on August 29,2012 (contained in Clerk's Doc. #78) is **DISMISSED**.

SIGNED this the 11th day of December 2014.

Lee Yeakel
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

APPENDIX C

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

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 failed to send the required notice to the parties that a judgment had been entered. *See Smith v. Jackson*

---

[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.

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 limited 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

[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).

(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.

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)

[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*.

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 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)

[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.

(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 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

[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)

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

---

[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 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

"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).

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,

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.

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*, 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

---

[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—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

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 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

---

[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.

[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."

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 abandonment 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 Maples'[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.

---

[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.").

> 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 appeal, 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.

---

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

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 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). 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.

---

[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*

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 commentary 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 law-

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

> yer 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, 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

---

[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) ("[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.").

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 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 Perez'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

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

[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

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 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 alle-

[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

gation 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 silent. 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]

---

[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 circumstances. 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] si-

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.

---

lence." 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 D

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

LOUIS CASTRO PEREZ,

PETITIONER,

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

V.

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

RICK THALER,

RESPONDENT.

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 Perez'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

[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.

25,2012. The Court denied the motion on July 3, 2012, finding Perez's counsel received notice of the 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

---

[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.

Judgment," filed by Petitioner Perez on August 29, 2012, is **GRANTED**. The Clerk of the Court is directed 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 E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-70039

LOUIS CASTRO PEREZ,

Petitioner - Appellant

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

---

ON PETITION FOR REHEARING EN BANC

(Opinion 4/22/15, 5 Cir., _____, _____, F.3d _____)

Before JONES, DENNIS, and HAYNES, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT: 5-19-2015

_____[signature]_____
UNITED STATES CIRCUIT JUDGE

APPENDIX F

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 G

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 H

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 I

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 J

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.