No. 15-187

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.

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

REPLY BRIEF FOR PETITIONER

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The district court granted Perez relief under Rule 4(a)(6) because his attorney abandoned him by ceasing work on his case without ever telling him that his habeas petition was denied. Respondent (the "State") never appealed that order. Yet the Fifth Circuit, in conflict with the Third and Sixth Circuits, took it upon itself to review and invalidate the order so as to take away Perez's own right of appeal. The State's effort to deny that circuit split is disproven by the courts' express recognition of it.

That direct conflict is reason enough for the Court to grant certiorari. But the Fifth Circuit also placed

itself in direct opposition to the Ninth Circuit in holding that the equitable power of Rule 60(b)(6) can never, under any circumstances, be employed to revive an appeal otherwise lost due to attorney abandonment. Since this Court denied certiorari on that issue in *Perez I*, the conflict has only become deeper and more pronounced, with the Sixth Circuit rejecting the Fifth Circuit's view.

This case requires the Court's intervention. The only judge to have opined on the merits of Perez's appeal found it to be meritorious. But the Fifth Circuit majority was determined to make sure that appeal would never be heard, despite the State's own failure to appeal and conflicting precedent from other circuits and this Court. Perez's life is at stake, and the Fifth Circuit's effort to short-circuit the appellate process should not stand unreviewed.

I. THERE IS A CLEAR CIRCUIT CONFLICT ON WHETHER A COURT OF APPEALS CAN REVIEW AND REVERSE AN UNAPPEALED ORDER EXTENDING THE TIME TO APPEAL.

The district court issued an order under Fed. R. App. P. 4(a)(6) extending the time for Perez to appeal the March 27, 2012 judgment denying habeas relief. Perez timely perfected his appeal the next day, giving the Fifth Circuit jurisdiction. *See* 28 U.S.C. § 2107(c)(2) (court may "reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal"). And the State never appealed the Rule 4(a)(6) order, cementing its validity. Yet the Fifth Circuit took it upon itself to *sua sponte* review and reverse that unappealed order. Pet. App. 7a. In the Third and Sixth Circuits (but not in the Tenth), the panel would have lacked

jurisdiction to review the Rule 4(a)(6) order because the State never appealed it, and Perez's appeal would be heard. The Court should resolve the persistent conflict over that issue.

The State's attempt to deny the circuit split is belied by the decisions expressly recognizing it. The State notes that courts of appeals may examine their own jurisdiction *sua sponte*. Opp. 1. Of course they can. But the question here—expressly dividing the circuits—is whether a circuit court has jurisdiction to *sua sponte* review and reverse an appeal-extending order where no appeal was taken from that order.

The State cannot meaningfully distinguish *Amatangelo* v. *Borough of Donora*, 212 F.3d 776 (3d Cir. 2000), in which the Third Circuit held it lacked jurisdiction to consider whether a Rule 4(a) order extending the time to appeal was invalid, because that order was never appealed. Even though the Third Circuit found the order was improperly issued (because the appellees had no opportunity to respond), it held that "we will not dismiss the appeal because the appellees did not appeal from the order granting the extension of time to appeal." *Id.* at 780.

The State notes that the appellant's appeal in *Amatangelo* "had no jurisdictional defect because it was filed within the time permitted by Rule 4(a)(5)." Opp. 14. But the same is true here. Contrary to the State's blithe assertion that "Perez did not file a timely notice of appeal," Opp. 14-15, Perez unquestionably filed a timely appeal, like the appellant in *Amatangelo*. Perez noted his appeal within a day of the district court's extension order, well within the 14-day period authorized by 28 U.S.C. § 2107(c)(2) and Rule 4(a)(6). The only way the Fifth Circuit was able to dismiss the appeal was

by *sua sponte* reviewing and then invalidating the unappealed Rule 4(a) order—exactly what the Third Circuit held it lacked jurisdiction to do.

The State's other attempt to deny the circuit split is no more availing. Without having raised the argument below, the State argues that there is no conflict involving *United States* v. *Burch*, 781 F.3d 342 (6th Cir. 2015), or *United States* v. *Madrid*, 633 F.3d 1222 (10th Cir. 2011), because those cases involved extension orders under Fed. R. App. P. 4(b), which governs criminal appeals and is not itself jurisdictional. Opp. 12. Neither of these courts, however, found that this distinction made any difference, and it does not. *Burch* observed that "[t]wo circuits have considered the situation and have come to different views," and it expressly contrasted *Amatangelo*, a civil case involving Rule 4(a), with *Madrid*, a Rule 4(b) case. *Burch*, 781 F.3d 343. The Sixth Circuit "agree[d] with the Third Circuit" (the civil case), and attributed no significance to whether Rule 4(a) or Rule 4(b) was jurisdictional. To the contrary, it held that an extension order is "like anything else that the district court did and thus something that must be challenged through a notice of appeal." *Id.* at 344.

Likewise, *Madrid* expressly recognized that "[t]here is authority for the proposition that an appellee challenging such an extension of time should file a cross-appeal," and pointed to *Amatangelo*. 633 F.3d at 1224-25. Rather than distinguishing the Third Circuit's decision as irrelevant civil authority, the Tenth Circuit concluded that it was "not persuaded" by *Amatangelo* and reached the opposite result. *Id*. at 1225.

The courts did not note or rely on the State's invented distinction because it makes no difference to the issue. As the State admits, even though the criminal rule is not jurisdictional, the Sixth Circuit has held that it has the authority in criminal cases—just as in civil cases—to dismiss late-filed appeals *sua sponte*. Opp. 13 (citing *United States* v. *Gaytan-Garza*, 652 F.3d 680, 681 (6th Cir. 2011)). But under *Burch*, that authority cannot be exercised when an appellant has timely appealed a judgment pursuant to an unchallenged extension order. While courts may always dismiss appeals for lack of jurisdiction, "in none of those settings is the moving party seeking to reverse a district court order." *Burch*, 781 F.3d at 344-45. But that is exactly what the Fifth Circuit did here: even though Perez satisfied every jurisdictional requirement for his appeal, the court *sua sponte* reviewed and invalidated a district court order from which no appeal was ever taken.

Not only did the Fifth Circuit deepen a circuit split on this issue, it went out of its way to excuse the State's failure to appeal the Rule 4(a)(6) order so as to preclude consideration of claims that could save Perez's life, even though he unquestionably filed a timely appeal pursuant to that unchallenged order. That decision warrants this Court's review.

II. THE GROUNDS FOR REVIEWING *PEREZ I* ARE STRONGER THAN EVER.

A. The Circuit Split Is Clear And Growing.

The State does not dispute that the Court can review *Perez I* despite the prior denial of certiorari. *See* Pet. 18 n.8; Opp. 15-23. Since that time, the need for this Court's intervention has only become more pressing. In *Tanner* v. *Yukins*, 776 F.3d 434,

442 (6th Cir. 2015), the Sixth Circuit recently recognized that *Perez I* "created a circuit split" over whether Rule 60(b)(6) can be employed to revive an appeal lost due to extraordinary circumstances such as attorney abandonment, and the court took a position contrary to the Fifth Circuit's. The State therefore cannot hide behind the Court's earlier, non-precedential denial of certiorari.

When the issue is considered afresh, the State's claim of "consensus" among the circuits, Opp. 15, is easily refuted. The State's dismissal of *Mackey* v. *Hoffman*, 682 F.3d 1287 (9th Cir. 2012), as a mere "intra-circuit" conflict with *In re Stein*, 197 F.3d 421 (9th Cir. 1999), *see* Opp. 19, is unavailing. In *Mackey*, the Ninth Circuit expressly considered and distinguished *Stein*. *See* 682 F.3d at 1252 ("Unlike the appellants in *In re Stein*, Mackey is not seeking to utilize Rule 60(b)(6) to cure a Rule 77(d) 'lack of notice' problem"). *Stein* involved a functioning counsel who never received notice of a judgment—a circumstance expressly addressed by Rule 4(a)(6)—not a counsel who abandoned her client by ceasing work without telling him he lost his case or that appellate deadlines were running. And the Ninth Circuit continues to faithfully apply *Mackey* in cases of abandonment. *See* Pet. 20-21. If Perez's case were in the Ninth Circuit, the district court would not have been barred from employing Rule 60(b)(6) to remedy the extraordinary circumstance of attorney abandonment.

In *Tanner*, the Sixth Circuit recognized and deepened this circuit split. *See* 776 F.3d at 442 (recognizing that *Perez I* "created a circuit split" with *Mackey*). Although Tanner was prevented from appealing by prison guards' constitutional violations,

not by attorney abandonment, the underlying rationale for using Rule 60(b)(6) was exactly the same. The Sixth Circuit did not create an exception to Rule 4(a)(6). Rather, like the Ninth Circuit, it upheld judicial power to "revive a lost right of appeal" under Rule 60(b)(6) when that right was lost through misconduct that amounted to "extraordinary circumstances." 776 F.3d at 443-44 (quoting *Lewis* v. *Alexander*, 987 F.2d 392, 396 (6th Cir. 1993)); *Mackey*, 682 F.3d at 1252-53. The Fifth Circuit's ruling in this case is directly to the contrary.

None of the State's other cited decisions (Opp. 16-17) address whether Rule 60(b)(6) authorizes a court to vacate a judgment where an appeal was missed due to attorney abandonment. And all pre-date *Maples*, and therefore do not address (as *Mackey* does) whether *Maples*' agency principles support equitable relief under Rule 60(b)(6). Not even the Fifth Circuit majority denied that conflict, noting that "[t]he exception is the Ninth Circuit." Pet. App. 43a (citing *Mackey*); *see also* Pet. App. 47a (Dennis, J., dissenting) (majority "erroneously creates a circuit split" with *Mackey*). Rather than distinguishing *Mackey*, the panel majority viewed the decision as incorrect. *See* Pet. App. 43a-44a.

B. *Perez I* Is Contrary To *Maples*.

The State contends that the Fifth Circuit's decision does not conflict with *Maples* because that precedent should not apply beyond the state procedural default context. Opp. 23-24. That view is directly contrary to *Mackey*, and it turns federalism on its head to hold that there is an equitable remedy if attorney abandonment prevents an appeal in state court, but not if precisely the same conduct occurs in federal court. *See* Pet. 23-25, 33; *Ramirez* v. *United States*,

799 F.3d 845, 854 (7th Cir. 2015) ("We see no reason to distinguish between actions at the state level that result in procedural default and the consequent loss of a chance for federal review, and actions at the federal level that similarly lead to a procedural default that forfeits appellate review.") (citing *Mackey* and *Washington* v. *Ryan*, 789 F.3d 1041, 1047-48 (9th Cir. 2015)). As the petition explains (*see* Pet. 28), the Court's longstanding precedent in *Hill* v. *Hawes*, 320 U.S. 520 (1944), recognizes an equitable remedy in these circumstances. The State's failure to even cite *Hill*, much less distinguish it, speaks volumes.

C. *Perez I* Erroneously Holds That Rule 60(b)(6) Can Never Be Employed To Restore An Appeal, Regardless Of Whether Abandonment Has Occurred.

In the guise of identifying a "vehicle" problem, the State argues there was no attorney abandonment in this case. Opp. 27-30. But *Perez I* expressly declined to reach that question. Given the Fifth Circuit's categorical holding that Rule 60(b)(6) can ***never*** be employed to rectify attorney abandonment that prevents an appeal, no matter the circumstances, the court expressly held that "we have no occasion to address what the parameters of 'attorney abandonment' are." Pet. App. 36a n.5. Thus, the rule in the Fifth Circuit is that district courts are powerless to redress attorney abandonment that results in a failure to appeal—even in the precise circumstances of *Maples*—when it occurs in federal

rather than state court. That question is squarely presented for this Court's review.[1]

At most, the State's "no abandonment" contention would be an alternative argument for affirmance that the Court could reach after it reverses the Fifth Circuit on the second question presented. But there would be no cause to disturb the district court's fact-based abandonment finding. *Cf. Holland* v. *Florida*, 560 U.S. 631, 654 (2010) (determination of "equitable circumstances" in tolling case is an "equitable, often fact-intensive inquiry") (internal quotation omitted). Regardless of whether (or why) Khan allegedly made a "decision not to appeal," Opp. 29-30—without ever consulting Perez or informing him he had lost his case—even the Fifth Circuit recognized that the decision was "not hers to make." Pet. App. 36a n.5. Rather, the decision belonged to the client, and the client alone. *See Jones* v. *Barnes*, 463 U.S. 745, 751 (1983) (defendant has the "ultimate authority" on "whether * * * to take an appeal"); Pet. App. 57a-59a (Dennis, J., dissenting). The abandonment occurred when Khan unilaterally ceased communication with Perez and stopped work on the case. She had no obligation to represent him on appeal; but she could not simply walk away from the case without even telling Perez of the adverse judgment, thereby preventing him from appealing on his own or enlisting new counsel. As Judge Dennis concluded,

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[1] In *Perez II*, the Fifth Circuit separately found that Khan's conduct did not justify the district court's Rule 4(a)(6) order. Pet. App. 15a. The court had no jurisdiction to reach that issue, *see supra* at 2-5; Pet. 13-18, and its decision contravened *Maples*, Pet. 29-32. But in any event, *Perez I* independently held that Rule 60(b)(6) relief is categorically unavailable regardless of the conduct that prevented an appeal.

"Khan abandoned Perez right when he needed her most." Pet. App. 50a.

III. THE DENIAL OF RULE 4(a)(6) RELIEF IN *PEREZ II* CONFLICTS WITH *MAPLES*.

Certiorari is also warranted because *Perez II* conflicts with *Maples*' agency principles. *See* Pet. 29-32. The State does not dispute that notice to an attorney who has abandoned her client cannot be imputed to the client under Rule 4(a)(6). Pet. 30-31. Instead, the State rests on its flawed contention that the notice to Khan must be imputed to Perez because she purportedly made a unilateral "decision" to stop work without notifying him. That contention is wrong for the reasons noted above. From Perez's perspective, Khan's behavior was identical to that of the *Maples* lawyers, who left their firm without notice. Just as in *Maples*, fundamental agency principles preclude imputation of her notice to Perez.

The State also argues that even if Khan abandoned her client, the district court improperly invoked Rule 4(a)(6) because Perez purportedly filed his motion too late. *See* Opp. 30-32. This argument, however, has been waived because it was not raised below at any time during the three years in which Perez has attempted to reinstate his appeal. *See Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). The State now argues that Perez's Rule 4(a)(6) motion was untimely because it was filed more than 14 days after Khan mailed the habeas denial order to Perez on June 25, 2012. Opp. 30-31. But in the district court, the State opposed that motion by relying solely on the imputation of notice of the judgment through Khan, not on any untimeliness from Khan mailing the judgment to Perez. In fact, the State argued that "[f]or the purposes of Rule 4(a)(6), Perez's failure to

receive notice of entry of judgment personally until after June 25, 2012, is immaterial." R. 723, 744.

Because it granted Rule 60(b)(6) relief, the district court simultaneously dismissed the alternative Rule 4(a)(6) motion without ruling on it. Pet. App. 75a. After the Fifth Circuit vacated that order in *Perez I*, Perez then re-urged the district court to grant his Rule 4(a)(6) motion, which was pending again in light of that vacatur. R. 828.[2] Once again, the State made no argument that the motion was untimely because it was filed more than 14 days after Khan's mailing. *Cf.* Opp. 30-31. Nor did the State make the argument to the Fifth Circuit in *Perez II*. Indeed, the State forfeited any argument that the Rule 4(a)(6) order was invalid by failing to appeal the order. *See supra* at 3-5.

In any event, the State's new-found arguments are meritless. First, Perez filed his alternative Rule 4(a)(6) motion on August 29, 2012, within 180 days of the March 2012 Judgment. Contrary to the State's mischaracterization (Opp. 30), Perez did not file a new Rule 4(a)(6) motion in October 2014. Rather, Perez "re-urged" the district court to grant the still-pending—and unquestionably timely—motion that had been filed in August 2012. R. 826.

Second, Khan's mailing of the judgment to Perez was not the notice required under Rule 4(a)(6), which requires a motion to be filed "within 14 days after the moving party receives notice under Federal Rule

[2] In *Perez I*, the Fifth Circuit "VACATE[D] the Civil Rule 60(b)(6) order and reentered judgment (therefore leaving in place the original March 27 judgment) * * *." The Rule 60(b)(6) order dismissed as moot Perez's Rule 4(a)(6) motion. Thus, when that order was vacated in its entirety, the Rule 4(a)(6) motion was once again pending and ripe for decision.

of Civil Procedure 77(d) of the entry." Fed. R. App. P. 4(a)(6)(B). Rule 77(d), in turn, refers to notice from the ***court clerk*** under Fed. R. Civ. P. 5(b). *See* Fed. R. Civ. P. 77(d)(1). Thus, Khan's mailing of the judgment to Perez was not proper notice under Rule 4(a)(6). And as the district court held in its unappealed order, the clerk's notice to Khan cannot be imputed to the client she abandoned and Perez's Rule 4(a)(6) motion was therefore timely filed within 180 days of the judgment.

CONCLUSION

The petition should be granted and the judgment below reversed.

Respectfully submitted,

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