

No. 05-99009 consolidated with No. 07-15536

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THEODORE WASHINGTON
Petitioner-Appellant

v.

CHARLES L. RYAN
Respondent – Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THIS IS A CAPITAL CASE

PETITION FOR REHEARING EN BANC

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I. STATEMENT FOR REHEARING EN BANC

This case presents a question of exceptional importance which is whether the Federal Rules of Civil and Appellate Procedure provide a remedy to a capital habeas petitioner, with a meritorious appeal, whose appointed habeas counsel, due to a calendaring error, missed the deadline for filing the notice of appeal by a single day and then failed to recognize the problem until the time for curing the deficiency under Appellate Rule 4(a)(5) had passed. Rehearing *en banc* is also necessary because the Panel's decision is at odds with the Sixth Circuit decision in *Lewis v. Alexander*, 987 F. 2d 392 (6th Cir. 1993), which held contrary to the Panel, that relief for an untimely filing is available in the District Court pursuant to Civil Rule 60(b)(1) in cases of excusable neglect. Finally, rehearing *en banc* is necessary because the Panel's decision conflicts this Court's holding in *Mackey v. Hoffman*, 682 F. 3d 1247 (9th Cir. 2012), to the extent that the Panel failed to recognize that Civil Rule 60(b)(6) is an equitable remedy that would afford relief under the circumstances present in this case.

II. OVERVIEW OF THE CASE

Fred Robinson had a tumultuous relationship with his wife Susan Hill. He was abusive and she left him on a number of occasions. On one occasion when she left him, he told her that if she ever did it again, he would kill members of her family. On June 8, 1987, Robinson drove from Banning,

California to Yuma, Arizona to reclaim his wife, who had fled, and was believed to be residing in Yuma with her parents, Ralph and Sterleen Hill. Robinson was accompanied by his friends, Jimmie Lee Mathers and Theodore Washington. At some point, Robinson told Washington and Mathers that they were going to rob a drug dealer. Before their departure for Yuma, Mathers and Robinson were seen placing guns in Robinson's car. Witnesses overheard Mathers saying that they were going to Yuma to "take care of business."

According to the testimony, two men entered the home of Ralph and Sterleen on the evening of June 8th. The men said that they were looking for drugs and money. Ralph and Sterleen were later discovered bound face-down on the floor of their bedroom, with shot gun wounds to the back of their heads. Ralph survived with severe injuries. Sterleen died from her wounds. Neither Mr. Hill nor his son, LeSean, who had been in the house when the intruders arrived, were able to identify the Defendants. However, Mr. Hill testified that one of them was a young black man with a mustache, who was wearing a red bandana.

Theodore Washington is African American and was 27-years-old at the time. Witnesses testified that he was seen leaving Banning earlier that day with Robinson and Mathers, wearing a red bandana. Robinson was arrested in Yuma shortly after the shooting, while attempting to flee in his

car. Following the arrest, a red bandana was recovered from the car. A forensic expert testified that the bandana contained human hairs similar to Mathers but dissimilar to the hair of Washington and Robinson. A shot gun discarded near the scene, but later recovered by the police, belonged to Robinson.

Appellant, Robinson and Mathers were charged with first degree murder in Yuma County Superior Court, convicted in a joint trial, and sentence to death. Evidence presented at trial failed to show which man was the shooter or why the victims were shot.¹ The State failed to present evidence that the shooting was planned. On direct appeal, Mathers' conviction was reversed by the Arizona Supreme Court due to insufficient evidence. *State v. Mathers*, 165 Ariz. 64, 796 P. 2d 866 (1990). Robinson's death sentence was later reversed by this Court due to insufficient evidence to support the statutory aggravating factors. *Robinson v. Schriro*, 595 F. 3d 1086 (9th Cir. 2010).² Although he denied Appellant's State petition for post-conviction relief, the trial judge observed that the evidence against Washington was no more compelling than the evidence against Mathers.

¹ The victims could have been shot in furtherance of a robbery or Robinson could have shot them in order to make good on previous threats to kill his wife's family members.

² Following remand, the State declined to seek the death penalty against Robinson.

Appellant was represented in his federal habeas petition by the Federal Public Defender's Office. After the petition was denied by the District Court, counsel filed the notice of appeal and the motion for certificate of appealability one day late, due to a calendaring error by his paralegal. The District Court granted a certificate of appealability as to three of the Appellant's claims and the notice of appeal was docketed by this Court. Counsel only discovered that the notice of appeal was untimely when this Court issued an order to show cause as to why the appeal should not be dismissed due to untimely filing. By that time, the additional 30-day period allowed for curing the defect under Appellate Rule 4(a)(5) had passed. Thereafter, new counsel was appointed, who filed a motion in the District Court for relief from the judgment under Civil Rule 60(b).³ The motion was denied. Appellant appealed the denial of the Rule 60(b) motion to the Court of Appeals, which consolidated briefing with the appeal on the merits.

On appeal, the Panel held that Appellant's motion for a certificate of appealability could not be construed as a motion to extend time under Appellate Rule 4(a)(5). *Washington v. Ryan*, ___ F. 3d ___, 2015 WL 3756463, (9th Cir. 2015). It therefore dismissed the merits appeal due to lack

³ Original habeas counsel filed a Rule 60(b) motion as soon as he learned of the filing deficiency. However, that motion was stricken because habeas counsel had not sought a remand prior to proceeding in the district court and new counsel was then appointed to pursue a Rule 60(b) motion on Appellant's behalf.

of jurisdiction. The Panel then denied the Civil Rule 60(b) appeal, holding Appellant was not entitled to relief under Civil Rule 60(b)(1) and that the District Court did not abuse its discretion in denying relief under Rule 60(b)(6).

III. ARGUMENT

A. The Panel Erred in Declining to Construe Appellant's Motion for a Certificate of Appealability as a Motion to Extend Time.

Federal courts have liberally construed motions for a certificate of Appealability as a whole variety of pleadings necessary to perfect an appeal. Notably, “Numerous circuits, including our own, have “held that a request for a certificate of probable cause can serve ‘double-duty’ as notice of appeal.” *McMillan v. Barksdale*, 823 F.2d 981, 983 (6th Cir.1987) (collecting cases); *Poe v. Gladden*, 287 F.2d 249, 251 (9th Cir.1961).” *Tinsley v. Borg*, 895 F.2d 520, 523 (9th Cir. 1990); see also *Ortberg v. Moody*, 961 F.2d 135, 137 (9th Cir. 1992); *Knox v. Wyoming*, 959 F.2d 866, 867-68 & n. 1 (10th Cir. 1992); *Bell v. Mizell*, 931 F.2d 444, 444-45 (7th Cir. 1991). *Marmolejo v. United States*, 196 F.3d 377, 378 (2d Cir. 1999). Similarly, courts, including the Ninth Circuit, have construed “request[s] for a certificate of appealability as a request for authorization to file a second or successive petition pursuant to 28 U.S.C. § 2244(b)(3)(A)”, *Cooper v. Calderon*, 274 F.3d 1270, 1275 (9th Cir. 2001).

In addition, federal courts have construed applications for a certificate of appealability as a variety of other appeal-related motions: “a request for a certificate of probable cause” under pre AEDPA law, *Neely v. Newton*, 149 F.3d 1074, 1077 (10th Cir. 1998), *Barber v. Johnson*, 145 F.3d 234, 238 (5th Cir. 1998); a notice of appeal and “a request for leave to proceed in *forma pauperis* on appeal under 28 U.S.C. § 1915,” e.g., *United States v. Burnley*, No. 06-CR-141-JCS, 2010 WL 3394144, at *1 (W.D. Wis. Aug. 26, 2010); “a motion for reconsideration of Court's prior order to deny a certificate of appealability,” *Jackson v. Crosby*, 437 F.3d 1290, 1294, n. 5 (11th Cir. 2006); or “a motion for reconsideration of the Court's prior order to deny her leave to appeal *in forma pauperis*,” *Pettigrew v. Rapelje*, No.2008 WL 4186271, * 1 (E.D.Mich. September 10, 2008).

Recently, in *Mata v. Lynch*, 135 S.Ct.2150, 2156 (2015), the Supreme Court overturned an effort by the Fifth Circuit to decline jurisdiction in an appeal from an order denying a motion to re-open a Board of Immigration Appeals hearing by mischaracterizing the notice of appeal as one wherein the court lacked jurisdiction to hear the merits of the appeal. In so doing, the Supreme Court observed that the Fifth Circuit’s decision was contrary to the long-standing practice of federal courts to re-characterize pleadings in order to offer the possibility of relief. (“If a litigant misbrands a motion, but could

get relief under a different label, a court will often make the requisite change.”). Id.

The Court should so hold here and grant the Appellant’s requested relief. The Panel’s decision that Appellant’s Motion for a COA cannot be construed as a motion to extend time extols form over substance and overlooks the circumstances in which the untimely filing occurred. The Panel reasoned that it could not adopt Appellant’s proposal for re-characterization because the COA motion did not say anything about time. “The motion for a COA does not mention timeliness and does not imply a need for additional time.” *Washington v. Ryan, supra*. However, it was clear from the extensive briefing that habeas counsel filed in support of the COA motion as well as the time when it was filed – one day after the deadline – that Appellant intended to file a timely notice of appeal. At that time, habeas counsel was unaware of the deficiency but the inference is unmistakable that he would have would have acted immediately under Appellate Rule 4(a)(5) to cure the deficiency if he had been aware of the error.⁴ It was readily apparent that the late filing was inadvertent, in all likelihood a clerical or calendaring error. The Panel cited *Bordallo v. Reyes*, 763 F.2d 1098, 1101-02 (9th Cir. 1985) for the proposition that

⁴ Habeas counsel acted immediately to file a Rule 60(b) motion as soon as this Court issued the order to show cause.

“Nomenclature is not controlling...a court must construe whether a motion is appropriate for the relief requested”. If indicium of intent to secure appropriate relief is the touchstone for re-characterization, then there were ample grounds for the District Court to take action on Appellant’s behalf. This is not a situation where a court would have difficulty ascertaining the requisite intent.

To determine whether a party's failure to meet a deadline constitutes excusable neglect, courts apply a four-factor equitable test, examining: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the moving party acted in good faith. *Pioneer Investment Services v. Brunswick Associates Partnership, Ltd.*, 507 U.S.380, 395, 113 S.Ct.1489 (1993); *Ahanchian v. Xenon Pictures, Inc.*, 624 F. 3d 1253, 1260 (9th Cir. 2010). Having concluded that the COA motion could not be construed as a motion to extend, the Panel never reached the question of whether the conduct of Appellant’s counsel constituted excusable neglect. Had it done so, Appellant easily could have shown that he was entitled to relief under Rule 4(a)(5). The State suffered no prejudice, the delay was minimal, the delay was inadvertent, and there is no evidence that counsel intended to cause the delay or used it for tactical advantage. *See Pincay v. Andrews*, 389

F. 3d 853 (9th Cir. 2004), holding that a calendaring error by the lawyer's paralegal could constitute excusable neglect within the meaning of Appellate Rule 4(a)(5).

B. The Panel Erred in Holding that Relief Under Rule 60(b)(1) is Unavailable and the Panel's Decision is at Odds with the Sixth Circuit Decision in *Lewis v. Alexander*, 987 F. 2d 392 (6th Cir. 1993).

In *Bowles v. Russell*, 551 U.S. 205, 127 S. Ct.2360 (2007), the Supreme Court held that the equitable circumstances doctrine could not be employed to extend the time for filing notice of appeal when the appellant did not take advantage of the 14-day grace period provided under Appellate Rule 4(a)(6) for parties who did not receive notice of the judgment from the clerk's office. The majority reasoned that the federal courts exercise jurisdiction only insofar as permitted by Congress and Title 28 United States Code § 2107 precludes a court from exercising jurisdiction over an untimely appeal. *Id.* at 213, 2366.

This Court, in *Mackey v. Hoffman*, 682 F. 3d 1247, 1253 (9th Cir. 2012), distinguished *Bowles*, and held that it does not limit a district court's power to grant relief under Federal Civil Rule 60(b). Title 28 United States Code § 2107(a) expressly operates as a limitation on the jurisdiction of the courts of appeal. It does not speak to the jurisdiction of the district courts. According to the official comment to Rule 60(b), the rule was promulgated

to take the place of certain common law writs which afforded relief from final judgments in civil cases. The federal courts have jurisdiction to issue writs according to the All Writs Act, Title 28 United States Code § 1651. Thus a district court's jurisdiction to grant relief under 60(b) derives from the All Writs Act. Viewed in this light, neither Title 28 United States Code § 2107 nor Appellate Rule 4(a)(5) can operate as a limitation on a district court's power to grant relief from a final judgment, assuming that the moving party establishes specific grounds set forth in the Rule 60(b).

The Sixth Circuit holding in *Lewis v. Alexander*, 987 F. 2d 392 (6th Cir. 1993) is consistent with this analysis. The Court there held that relief under Civil Rule 60(b)(1) was available where the failure to file in a timely manner was the product of attorney error amounting to excusable neglect. Following denial of his habeas petition, the attorney in *Lewis* mailed the notice of appeal to the district court in a timely manner, but the notice was docketed several days late. The attorney later checked the docket to determine if the appeal was timely but failed to notice the deficiency due to an incorrect date stamp. The attorney only became aware that the appeal was untimely after the time for curing the defect under Rule 4(a)(5) had passed. The Court of Appeals held that a district court retains jurisdiction to cure an untimely appeal under Rule 60(b) where the time for curing an

untimely appeal under Appellate Rule 4(a)(5) has lapsed. The *Lewis* holding was recently re-affirmed by the Sixth Circuit in *Tanner v. Yukins*, 776 F. 3d 434, 438 (6th Cir. 2015), which recognized that district courts have residual power to grant equitable relief under Rule 60(b) in the case of an untimely appeal. Id.

In rejecting Appellant's Rule 60(b)(1) claim, the Panel reasoned that Civil Rule 60(b)(1) and Appellate Rule 4(a)(5) cover the same subject matter in that both afford relief for "excusable neglect". *Washington v. Ryan*, *supra*. The Panel held that the rules are mutually exclusive in that they contain conflicting time limits, and therefore the more specific rule, Appellate Rule 4(a)(5), should prevail over the more general rule, Civil Rule 60(b). The Panel's determination that the rules cover the same subject matter is incorrect. While Appellate Rule 4(a)(5) is limited to providing relief in cases of "excusable neglect" or "good cause", a 60(b)(1) applicant may obtain relief on additional grounds, namely "mistake" or "inadvertence", circumstances that were present in this case.

Lewis provides a better rule than the one announced by the Panel – a rule that is more consistent with one's sense of justice. *Lewis* correctly recognizes that from the standpoint of the unsuspecting client who stands to lose his liberty or in this case his life, it make little difference whether his attorney abandons him or is merely negligent in failing to file a timely notice

of appeal. In either case, the net result is the same. To the extent that *Lewis* is at odds with the decision of the Panel, this Court should grant *en banc* review to consider the conflict.

C. The Panel's Decision is at Odds with this Court's Holding in *Mackey v. Hoffman*, 682 F. 3d 1247 (9th Cir. 2012).

Mackey v. Hoffman, 682 F. 3d 1247, (9th Cir. 2012) involved a situation where the habeas petitioner's retained counsel stopped working on the case and failed to file a timely notice of appeal from the dismissal of the petition, ostensibly because he was not getting paid. He also failed to apprise the petitioner of the status of the case, and falsely told the petitioner that an evidentiary hearing had been granted, when it had not. The Court held that attorney abandonment constituted "exceptional circumstances" sufficient to justify relief under Civil Rule 60(b)(6) and remanded to the District Court for a determination as to whether or not abandonment had occurred.

The Panel in this case misunderstood *Mackey* to the extent that it assumed incorrectly that relief under Rule 60(b)(6) is somehow limited to attorney abandonment. Rule 60(b)(6) provides relief from a final judgment for "any other reason that justifies relief." To obtain relief under 60(b)(6), the moving party must demonstrate "extraordinary circumstances which prevented or rendered him unable to prosecute his case." *Lal v. California*,

610 F. 3d 518, 524 (9th Cir. 2010). Rule 60(b)(6) provides an equitable remedy potentially available in a variety of circumstances. In *Klaprott v. United States*, 335 U.S. 601, 69 S. Ct. 384 (1940), the Supreme Court stated:

In simple English, the language of the ‘other reason’ clause, for all reasons except the five particularly specified, vests power in the courts adequate to enable them to vacate judgments **whenever such action is appropriate to accomplish justice.**

Id. at 614, (emphasis supplied).

The Sixth Circuit in *Tanner v. Yukins*, 776 F. 3d 434 (6th Cir. 2015) afforded 60(b)(6) relief to a prisoner whose appeal was untimely because the prison staff obstructed her efforts to deliver the notice of appeal to the mail room on time. In granting relief, the Court explained the nature of the remedy:

Rule 60(b), which dates back to the earliest promulgation of the federal rules, “reflects and confirms the courts’ own inherent power, ‘firmly established in English practice long before the foundation of our Republic’ to set aside a judgment whose enforcement would work inequity.”

Id. at 438, (cites omitted).

A prisoner seeking equitable tolling from the one year limitation period of AEDPA, must likewise demonstrate that “extraordinary circumstances stood in his way.” *Holland v. Florida*, 560 U.S. 631, 649, 130 S. Ct. 2549, 2562-63 (2010). Like Civil Rule 60(b)(6), the equitable tolling

doctrine provides a remedy that is fact specific, is exercised on a case by case basis, and avoids application of mechanical rules. Id.

Referring to its precedents, the Court in *Holland* explained:

Taken together, these cases recognize that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.

Id. at 650.

On limited remand from the Panel, the District Court in this case made a finding that habeas counsel did not abandon the petitioner, and that his conduct was “mere negligence”. According to the Panel, the District Court’s finding ended the inquiry and resulted in a determination that Appellant was categorically ineligible for 60(b)(6) relief. In arriving at this conclusion, the Panel misperceived that nature of the remedy which is fact specific, not subject to mechanical application of fixed rules, and is based upon equitable principals. The panel was likewise wrong in concluding, “Nor has Washington presented any other facts that would constitute ‘extraordinary circumstances’ under Civil Rule 60(b)(6).” Additional facts that Appellant presented but which the Panel incorrectly failed to consider

were: (1) this case involves imposition of the death penalty;⁵ (2) Appellant's case has substantial merit in that similarly situated co-defendants have obtained relief;⁶ (3) Under Title 18 United States Code § 3599(c), Appellant has a statutory right to counsel;⁷ and (4) habeas counsel had reasonable cause to believe that the appeal was timely when the District Court issued a

⁵ Because the sentence of death is qualitatively different than a sentence of life imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). See also *Fahy v. Horn*, 240 F.3d 239, 244 (3rd Cir. 2001), ("In a capital case such as this, the consequences of error are terminal, and we therefore pay particular attention to whether principles of 'equity would make the rigid application of a limitation period unfair'").

⁶ The meritorious claim factor is generally analyzed in the context of default judgments. See *Gregorian v. Izvestia*, 871 F.2d 1515, 1523 (9th Cir. Cal. 1989); see also *TCI Group Life Ins. Plan*, 244 F.3d at 701; *James v. United States*, 215 F.R.D. 590, 594 (E.D. Cal. 2002). This is consistent with the general legal principle that issues should be decided on their merits. "It is well-settled that the Federal Rules of Civil Procedure are to be liberally construed to affect the general purpose of seeing that case are tried on the merits and to dispense with technical procedural problems." *Rogers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983), quoting from *Staten American National Bank and Trust Company of Chicago*, 529 F.2d 1257, 1263 (1976).

⁷ Compare *Calderon v. District Court, (Beeler)*, 128 F.3d 1283 (9th Cir. 1997), (district court could extend AEDPA filing deadline because appointed counsel took a job in another state and newly appointed counsel had a heavy case load) to *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001); *Miranda v. Castro*, 292 F.3d 1063, 10676 (9th Cir. 2002); *Spitsyn v. Moore*, 3456 F.3d 796, n.1 (9th Cir. 2003), (holding that attorney negligence is not grounds for equitable tolling in non-capital cases because there is no statutory right to counsel). Moreover, since there is no Sixth Amendment right to counsel in state post-conviction proceedings, a habeas petitioner cannot claim ineffective counsel as cause for a procedural default. *Coleman v. Thompson*, 501 U.S. 727, 753, 111 S.Ct. 2546 (1991). The situation should be otherwise when a capital habeas petitioner has a statutory right to qualified counsel in a capital case.

COA as to three of his claims and he never received notice that the appeal was untimely until after the 30-day cure period provided in Appellate Rule 4(a)(5) had passed.⁸

Finally, the Panel misapplied *Mackey* in determining that the District Court properly exercised its discretion. In its order denying relief, the District Court ruled that 60(b)(6) is never available to cure an untimely appeal and that even it is, the remedy is available only in the case of default judgments.⁹ Thus the District Court failed to consider any of the factors that a court would ordinarily be required to consider in deciding whether to grant equitable relief. A district court abuses its discretion when it bases its decision on a clearly erroneous view of the law or a clearly erroneous view of the facts. *United States v. Rahm*, 993 F. 2d 1405, 1410 (9th Cir. 1993).

Here, the District Court erred as a matter of law in its misapplication of Rule

⁸ This is not to suggest that habeas counsel's failure to take timely action under Appellate Rule 4(a)(5) is the fault of the Court or the Clerk's office. However, in *Lewis v. Alexander*, 987 F. 2d 392, 397 (6th Cir. 1993), the Court held that one factor to be considered in determining whether an untimely appellant is entitled to relief under CR 60(b)(1) is whether the appellant had notice that the appeal was untimely.

⁹ The District Court relied on *Latshaw v. Trainer Wortham & Company*, 452 F. 3d 1097 (9th Cir. 2006), which limited the Court's earlier holding in *Community Dental Services v. Tani*, 282 F. 3d 1164 (2002) to default judgments. This Court's later rulings extend 60(b) relief to dismissal for failure to prosecute a lawsuit and failure to file a timely notice of appeal. *Lal v. California*, 610 F. 3d 518 (9th Cir. 2010) and *Mackey v. Hoffman*, 682 F. 3d 1247 (9th Cir. 2012). Thus the District Court exercised its discretion on the basis of case law which is has been distinguished by this Court's later decisions.

60(b). The Sixth Circuit in *Tanner v. Yukins*, stated that in considering the merits of a Rule 60(b) motion, a district court is required to intensely balance numerous factors. 776 F. 3d at 443. The Sixth Circuit held that the district court in that case abused its discretion because it failed to intensely balance or even consider the relevant factors and it failed to engage in “meaningful analysis”. *Id.* The District Court in this case abused its discretion in failing to consider relevant factors and in failing to engage in meaningful analysis. The Panel erred in its determination that the District Court properly exercised its discretion and in so doing, misapplied *Mackey*.

IV. CONCLUSION

“In determining whether Rule 60(b) applies, courts should be mindful that the rules are to be construed to achieve the just determination in every action.” *Rogers v. Watt*, 722 F. 2d 456, 459 (9th Cir. 1983). Appellant has meritorious claims and should not be put to death because of a missed deadline that resulted in no prejudice to anyone. This case thus raises the novel and important question of whether the Rules of Procedure provide a remedy in a case of obvious injustice. The Court should grant *en banc* review to address the issues raised in this appeal.

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DATED: August 4, 2015.

/s/Gilbert H. Levy
Gilbert H. Levy, WSBA #4805
Attorney for Appellant

**CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT
RULES 35-4 AND 40-1**

I certify pursuant to Circuit Rule 40-1 that the attached petition for rehearing *en banc* is proportionately spaced, has a typeface of 14 points or more, and contains 3665 words.

DATED: August 4, 2015.

/s/Gilbert H. Levy _____
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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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DATED: August 4, 2015.

/s/Gilbert H. Levy _____
Gilbert H. Levy
Attorney for Appellant

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 05-99009

THEODORE WASHINGTON,
Petitioner/Appellant,
v.
CHARLES L. RYAN, et al.,
Respondents/Appellees.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA

No. CV 95-02460-PHX-JAT

**RESPONSE TO PETITION FOR REHEARING EN BANC
AND TO AMICUS BRIEF IN SUPPORT OF REHEARING EN BANC**

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I. STATEMENT OF THE CASE

In December 1987, a Yuma County, Arizona, jury convicted Washington of the first-degree murder of Sterleen Hill and other crimes related to a home invasion of Hill's residence. The trial court sentenced Washington to death for the murder. The Arizona Supreme Court affirmed Washington's convictions and death sentence and that of Washington's codefendant, Fred Robinson. *State v. Robinson (Robinson I)*, 796 P.2d 853 (Ariz. 1990). In November 1995, after multiple, unsuccessful attempts to obtain post-conviction relief through the Arizona courts and the United States Supreme Court, Washington filed a petition for a writ of habeas corpus with the district court. (Dist. Ct. Dkt. 1.) On April 22, 2005, the district court denied habeas relief. Washington filed a motion to alter or amend the judgment on May 5, 2005; the district court denied that motion on June 8, 2005. (Dist. Ct. Dkt. 115, 117, 118.)

Thirty-three days later, on July 11, 2005, Washington filed an untimely notice of appeal. (Dist. Ct. Dkt. 120.) He also filed a motion for certificate of appealability (COA) on the same day. (Dist. Ct. Dkt. 121.) The district court issued a COA on September 30, 2005, and on the same day it forwarded the notice of appeal and COA to this Court. (Dist. Ct. Dkt. 122, 123.) On October 7, 2005, this Court ordered Washington to show cause why his appeal should not be dismissed as untimely, citing Rule 4 of the Federal Rules of Appellate Procedure

(“FRAP”) and *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 264 (1978). (9th Cir. Dkt. 2.) This Court subsequently granted Washington a stay to allow him to seek relief from the district court pursuant to Rule 60(b). (9th Cir. Dkt. 5.) On February 24, 2006, the district court denied relief. (Dist. Ct. Dkt. 130.) The parties then completed briefing on this Court’s order to show cause. (9th Cir. Dkt. 8, 10, 12, 13.)

On July 18, 2006, this Court struck the briefs filed by the parties and vacated the district court’s ruling on the Rule 60(b) motion, finding it lacked jurisdiction to consider the motion. (9th Cir. Dkt. 15.) This Court remanded the matter to the district court with instructions to remove Washington’s counsel of record, appoint new counsel, and set due dates for briefing on a new Rule 60(b) motion. (*Id.* at 2.) Additionally, the Court *sua sponte* identified a number of new issues and ordered the parties to address them in their briefs to the district court. (*Id.* at 3–6.) Accordingly, on July 26, 2006, the district court removed the Federal Public Defender’s Office as Washington’s counsel of record, appointed current counsel, and ordered counsel to file a new Rule 60(b) motion by October 24, 2006. (Dist. Ct. Dkt. 134.) On February 28, 2007, after receiving the new briefing by the parties, the district court once again denied Washington relief. (Dist. Ct. Dkt. 146.)

A panel of this Court held oral argument on July 11, 2013, addressing both the merits of Washington’s certified claims as well as the jurisdictional issue

caused by Washington's late notice of appeal. (9th Cir. Dkt. 123.) After oral argument, the Court ordered the parties to file supplemental briefs "addressing (1) whether there is tension between *In re Stein*, 197 F.3d 421 (9th Cir. 1999), and *Mackey v. Hoffman*, 682 F.3d 1247 (9th Cir. 2012), and (2) if there is tension whether the panel should *sua sponte* call for a vote on initial hearing en banc." (9th Cir. Dkt. 124, at 1.) After this briefing was completed, the panel remanded the matter to the district court "for the limited purpose of determining whether Washington was effectively abandoned by his attorney." (9th Cir. Dkt. 136, at 1.) After briefing and argument, the district court found that the failure of Washington's habeas counsel to file a timely appeal "did not amount to abandonment." (9th Cir. Dkt. 137, at 1.)

On June 17, 2015, the panel issued its opinion dismissing Washington's appeal of the district court's denial of his habeas corpus petition "because Washington's notice of appeal was not timely filed under [FRAP] 4(a)(1)(A), a mandatory and jurisdictional time limit." (Slip Op. at 4.)¹ The panel also affirmed the district court's denial of Washington's Rule 60(b) motion "because the district court did not abuse its discretion in determining that under the circumstances here, a Rule 60(b) motion is not available for the purpose of extending the time allowed to file an appeal." (*Id.*) Washington has now filed a petition for rehearing en banc

¹ This opinion is reported at 789 F.3d 1041 (9th Cir. 2015). Respondents cite the slip opinion attached to Washington's motion for rehearing en banc.

and the National Association of Criminal Defense Lawyers has filed an amicus brief in support of Washington's petition. Respondents now respond to both the petition for rehearing and to the Amicus' brief in support of that petition.

II. RESPONSE TO PETITION FOR REHEARING

As demonstrated below, the panel's discussion of the availability of Rule 60(b) relief to reopen the time to appeal and its decision affirming the district court's denial of such relief in this case are consistent with Ninth Circuit precedent. Therefore, contrary to Washington's arguments, en banc review is unnecessary to resolve any perceived conflicts between the panel's decision and this Court's precedent. In addition, the panel's decision is consistent with Sixth Circuit precedent, contrary to Washington's claim.

To be sure, two panels of this Court have issued conflicting opinions on the underlying question of whether Rule 60(b) relief is ever available to reopen the time to appeal a judgment. *See Mackey v. Hoffman*, 682 F.3d 1247, 1253 (9th Cir. 2012) (holding that equitable relief under Rule 60(b) is available to reopen the time to appeal a judgment); *In re Stein*, 197 F.3d 421, 425 (9th Cir. 1999) (“[FRAP] 4(a) and Rule 77(d) now form a tessellated scheme, they leave no gaps for Rule 60(b) to fill.”). Further, *Mackey* conflicts with the Supreme Court's holding in *Bowles v. Russell*, 127 U.S. 205 (2007), that equitable remedies are unavailable to create exceptions to the jurisdictional requirement that a notice of appeal be timely filed,

while *Stein* is consistent with that ruling. However, because the panel dismissed Washington's appeal, this inconsistency is not material here and does not provide a basis for granting en banc rehearing in this case.

A. The panel properly held that Washington's motion for a certificate of appealability could not be construed as a motion to extend time to file his appeal.

FRAP 4(a)(1)(A) requires a party appealing a decision of the district court to file a notice of appeal within 30 days after entry of judgment. A district court may extend the time to file only if (1) a party moves for an extension within 30 days of the expiration of time for filing an appeal, and (2) the party demonstrates "excusable neglect or good cause." FRAP 4(a)(5)(A). As the panel noted, the filing requirements of this rule are jurisdictional; failure to comply deprives this Court of jurisdiction over the matter. (Slip Op. at 8); *see Bowles*, 551 U.S. at 214 ("Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement."). Neither the Supreme Court nor this Court has "authority to create equitable exceptions to jurisdictional requirements." *Bowles*, 551 U.S. at 214.

Washington does not dispute that he failed to file either a timely notice of appeal or a motion for extension of the time in which to file the notice. He contends, however, that the panel incorrectly held that his COA motion could not

be construed as a motion for an extension of time to file his appeal.² Washington contends that he “intended to file a timely notice of appeal” and “would have acted immediately under [FRAP] 4(a)(5) to cure the deficiency if he had been aware of the error.” (Petition at 7.) But intent to file a timely appeal is not enough—an appeal must actually be timely filed to invoke this Court’s jurisdiction. In fact, if intent alone were sufficient to construe a pleading as a motion for extension of time, then Washington’s untimely notice of appeal itself arguably could have served as a motion to extend the time to file an appeal. This Circuit has long held, however, that an untimely notice of appeal may not be construed as a motion for extension of time. *See Pettibone v. Cupp*, 666 F.2d 333, 335 (9th Cir. 1981) (“[T]he wording of the Rule . . . expressly requires the filing of a motion for extension of time and it expressly requires that the motion be filed no later than the expiration of the 30-day grace period.”). No logical reason exists to construe the COA motion as a motion for extension of time under FRAP 4(a)(5) when it was clearly not intended as such.

Washington contends that the panel should have ascertained his intent in filing the COA motion to determine whether it would construe that motion as a motion for extension of time under FRAP 4(a)(5). (Petition at 8.) But this is

² Washington did not ask the district court to so construe his COA motion. Instead, the panel *sua sponte* ordered the parties to brief whether the COA motion may be construed as a motion for extension of time. (9th Cir. Dkt. 39, at 2.)

exactly what the panel did when it concluded that the COA motion was *not* intended as a motion to extend time to file an appeal. (Slip Op. at 10.) (“Washington’s motion for a COA here did not indicate that it was intended to serve as a motion for extension of time. . . . The motion for a COA does not mention timeliness and does not imply a need for additional time for any reason.”). Washington admits he was unaware of the untimeliness of his notice of appeal, and he does not dispute the panel’s finding that he did not file his COA motion with the intent to seek an extension of time to file his appeal. (*See* Petition at 7 (stating “habeas counsel was unaware of the deficiency” in the notice of appeal).) Nevertheless, he now asks that this Court construe the COA motion to serve that unintended purpose.

As the panel noted, the COA motion contained none of the indicia of a motion for extension and provided no grounds for granting such a motion. (Dist. Ct. Dkt. 121); *see* FRAP 4(a)(5)(A)(ii) (requiring a party seeking an extension to demonstrate “excusable neglect or good cause” for the extension). Thus, although Washington arguably intended to file a timely notice of appeal, his intent in filing the COA motion was not to extend the time to appeal but to obtain a COA on certain issues. The district court ruled on that motion, granting it in part. (Dist. Ct. Dkt. 122.) There was no reason for the court to address any timeliness issues in the

COA ruling because Washington had not sought an extension of time to file his notice of appeal. Washington does not contend otherwise.

The panel decision is consistent with the rule established in this circuit and others that “an untimely notice of appeal may not be construed as a motion for an extension of time.” (Slip Op. at 9 (citing *Campbell v. White*, 721 F.2d 644, 646 & n.3 (8th Cir. 1983) (gathering cases)).) The panel found “no logical reason to treat motions for a COA as an exception to this well-established rule, and no circuit case to date has done so.” (*Id.*) Had the COA motion contained some reference to the untimeliness of the notice of appeal or presented some reason to excuse that untimeliness, the district court arguably could have construed it as a motion to extend time. But, as the panel held, “even that low bar is not met here.” (*Id.*) To treat a filing as a motion for extension of time when that is clearly not the intent of the filer is to completely nullify the jurisdictional nature of a timely notice of appeal. Washington has cited no case in which a court has taken this step, and the panel correctly declined to do so.³ This Court should deny rehearing on this claim.

³ Had it construed the COA motion as a motion for extension of time, the panel would have had to remand the matter to the district court to determine whether Washington had demonstrated excusable neglect to warrant the extension. This Court may not make such a determination. FRAP 4(a)(5)(A); see *Alva v. Teen Help*, 469 F.3d 946, 950 (10th Cir. 2006) (“Only the district court may [find excusable neglect and extend the time for filing an appeal] and only under limited circumstances and for a limited time.”). Therefore, Respondents do not address Washington’s argument that he could demonstrate excusable neglect for the late filing. (Petition at 8–9.)

B. The panel correctly held that Washington could not obtain relief under Fed. R. Civ. P. 60(b).

Upon learning that his appeal was untimely, Washington filed a motion pursuant to Federal Rule of Civil Procedure 60(b)(1) and (6), asking the district court to vacate and reenter judgment for the sole purpose of making his appeal timely. (Dist. Ct. Dkt. 124.) The district court denied this relief, and the panel affirmed.⁴ (Slip Op. at 11.) The panel held that “where a party files a Rule 60(b) motion solely to render a notice of appeal timely, and the motion seeks relief on grounds identical to those offered by Rule 4(a), Rule 60(b) motions may not be used to escape the time limits for appeal.” (*Id.* at 13.)

1. Washington is not entitled to relief under Rule 60(b)(1).

Rule 60(b)(1) allows a district court to “relieve a party . . . from a final judgment, order, or proceeding” based on “mistake, inadvertence, surprise, or excusable neglect.” Washington asserted below and before the panel that he had demonstrated “excusable neglect” sufficient to warrant relief. (Dist. Ct. Dkt. 139–

⁴ As noted earlier, the panel vacated the district court’s ruling denying Washington’s first Rule 60(b) motion, which sought relief only pursuant to Rule 60(b)(1), finding the district court lacked jurisdiction to consider it. (Dist. Ct. Dkt. 124; Slip Op. at 6–7.) The panel then remanded the matter, ordering the district court to appoint new counsel for Washington and to re-hear the Rule 60(b) motion. In Washington’s second Rule 60(b) motion, he sought relief under both Rule 60(b)(1) and (6). (Dist. Ct. Dkt. 139.) In denying the second motion, the district court adopted its reasoning in the first order with regard to Rule 60(b)(1) and also found that Washington was not entitled to relief under Rule 60(b)(6). (Dist. Ct. Dkt. 146, at 3–6.)

2, at 6–11.) The district court denied relief under this provision, finding it had no authority to vacate the judgment solely to render the notice of appeal timely. (Dist. Ct. Dkt. 130.) The panel agreed that relief under Rule 60(b)(1) was unavailable under this Circuit’s precedent. (Slip Op. at 11–14.) As discussed below, that ruling was correct.

In *Stein*, this Court held that “the exclusive remedies for a failure to file a timely notice of appeal due to a lack of notice of entry of judgment or order were contained in Rule 4(a).” 197 F.3d at 424. The panel held that the same reasoning precluded the use of Rule 60(b)(1) here, even though lack of notice was not at issue. Because Washington sought relief on grounds of excusable neglect, and FRAP 4(a)(5) also offers relief for excusable neglect, the panel reasoned that permitting the use of Rule 60(b)(1) for the sole purpose of rendering a notice of appeal timely “would render the escape hatch already included in Rule 4(a)(5) almost unnecessary, and would also evade the time limits in that rule.” (Slip Op. at 13.) Thus, the panel concluded, “where a party files a Rule 60(b) motion solely to render a notice of appeal timely, and the motion seeks relief on grounds identical to those offered by [FRAP] 4(a), Rule 60(b) motions may not be used to escape the time limits for appeal.” (*Id.*) The panel did not completely foreclose the possibility of relief under Rule 60(b)(1), but held only that such relief is not available when the asserted ground is excusable neglect. (*Id.* at 11 (“[E]ven if the situation is in

fact a case of ‘excusable neglect,’ *that prong of Rule 60(b)(1)* is not an avenue by which a party can extend the time periods allowed for filing a notice of appeal.”) (Emphasis added.)

Washington contends that the panel’s decision conflicts with the Sixth Circuit’s holding in *Lewis v. Alexander*, 987 F.2d 392, 396–97 (6th Cir. 1993), in which the Sixth Circuit affirmed the district court’s grant of Rule 60(b)(1) relief for the sole purpose of reopening the time to appeal a judgment. (Petition at 9–10.) But the *Lewis* court granted relief based on *mistake*, and not excusable neglect. *See FHC Equities, LLC v. MBL Life Assur. Corp.*, 188 F.3d 678, 684 (6th Cir. 1999) (The *Lewis* court “found that the district court did not abuse its discretion in finding that the late appeal resulted from mistake.”). Because the panel here did not hold that Rule 60(b)(1) relief was unavailable for mistake, its opinion does not conflict with *Lewis*.⁵

The Sixth Circuit recently confirmed that “*Lewis* . . . remains good law in this circuit.” *Tanner v. Yukins*, 776 F.3d 434, 441 (6th Cir. 2015). The *Tanner* court itself, however, addressed whether the district court had “improperly determined

⁵ In any event, *Lewis* is an anomaly within the circuits and has been roundly criticized. *FHC Equities*, 188 F.3d at 683 (noting that “[o]ther courts . . . have roundly disagreed with [*Lewis*] and argue that the panel did not address [FRAP] 4(a)(6)”). Further, *Lewis* relied on this Court’s reasoning in *Rodgers v. Watt*, 722 F.2d 456 (9th Cir. 1983), “concerning the propriety of extending the time for appeal through Rule 60(b).” *Lewis*, 987 F.2d at 396. This Court has held that *Rodgers*’ reasoning on that issue was rendered obsolete by FRAP 4(a)(6). *Stein*, 197 F.3d at 426.

that it lacked jurisdiction to rule on Tanner’s Rule 60(b)(6) motion.” *Id.* at 442 (emphasis added). It did not address the availability of Rule 60(b)(1) relief on grounds of excusable neglect to excuse the late filing of an appeal. As discussed below, and the panel acknowledged, this Circuit has held, consistent with *Tanner*, that Rule 60(b)(6) relief may be available to excuse the late filing of an appeal. *See Mackey*, 682 F.3d at 1253. Thus, the panel’s decision that Rule 60(b)(1) relief is unavailable to remedy excusable neglect does not directly contradict the Sixth Circuit’s decision in *Tanner* or *Lewis*.⁶

2. *The panel properly found no abuse of discretion in the district court’s ruling that Washington was not entitled to relief under Rule 60(b)(6).*

Although the panel found that relief on grounds of excusable neglect under Rule 60(b)(1) was unavailable, it noted that “Rule 60(b)(6) can be used to remedy an untimely notice of appeal on a showing of ‘extraordinary circumstances.’” (Slip Op. at 14.) This Circuit has permitted Rule 60(b)(6) relief to extend the time to appeal when an attorney’s “abandonment” results in the late appeal. *See Mackey*, 682 F.3d at 1253 (“[W]hen 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

⁶ Nevertheless, *Lewis* and *Tanner*, like *Mackey*, conflict with the Supreme Court’s ruling in *Bowles* that federal courts “ha[ve] no authority to create equitable exceptions to jurisdictional requirements.” 551 U.S. at 214.

district court may grant relief pursuant to Rule 60(b)(6).”).

The district court in this case, ruling 7 years before *Mackey* was decided, held that “Rule 60(b) cannot be used to circumvent the mandatory and jurisdictional provisions of FRAP 4(a).” (Dist. Ct. Dkt. 146, at 3 (internal quotation marks omitted).) Nevertheless, the district court also alternatively held that, even if Rule 60(b)(6) relief was available, Washington had failed to demonstrate he was entitled to such relief because “his request [was] not grounded in external, extraordinary circumstances not otherwise addressed by Rule 60(b)(1)–(5).” (*Id.* at 5.)⁷

After *Mackey* was decided, the panel remanded this matter for the district court to determine whether Washington’s counsel “effectively abandoned” him by filing the late notice of appeal. (9th Cir. Dkt. 136.) The panel found no error in the district court’s conclusion that Washington was not abandoned and affirmed the court’s determination that “Washington cannot establish extraordinary circumstances” and, more specifically, its finding that Washington’s counsel did not abandon him. (Slip Op. at 14, 16; *see* 9th Cir. Dkt. 137.)

⁷ Washington contends that the district court held that Rule 60(b)(6) relief was only available “in the case of default judgments.” (Petition at 16.) The district court actually held that, “as grounds for relief under 60(b)(6), *gross negligence by counsel* only applies to grant relief from default judgments.” (Dist. Ct. Dkt. 146, at 5 (citing *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1103–04 (9th Cir. 2006) (emphasis added).) In any event, as noted, the district court alternatively held that Washington failed to demonstrate “extraordinary circumstances” justifying relief.

Washington does not contend that the district court abused its discretion by finding that his counsel did not abandon him; rather, he contends the panel “misunderstood” *Mackey* as permitting Rule 60(b)(6) relief only when attorney abandonment is present. (Petition at 12.) The panel, however, held that, generally, “[Rule] 60(b)(6) can be used to remedy an untimely notice of appeal on a showing of ‘extraordinary circumstances,’” which are not limited to attorney abandonment. (Slip Op at 14.) Nevertheless, it held that “[a]ttorney negligence leading to late filing of an appeal is not the type of extraordinary circumstance that warrants relief under Rule 60(b)(6).” (*Id.* at 16.) Thus the panel acknowledged that extraordinary circumstances, not limited to attorney abandonment, could justify relief under Rule 60(b)(6). It further held that Washington did not “present[] any other facts that would constitute ‘extraordinary circumstances’ under 60(b)(6).” (*Id.*)

Washington contends, however, that the panel “failed to consider” the “[a]dditional facts” he presented that warrant Rule 60(b)(6) relief. (Petition at 14.) But the facts he alleges are far from extraordinary:

- (1) this case involves imposition of the death penalty;
- (2) [Washington’s] case has substantial merit in that similarly situated co-defendants have obtained relief;⁸

⁸ This Court granted codefendant Fred Robinson relief on his claim of ineffective assistance of counsel at sentencing and on his claim that the cruelty aggravator was improperly applied to him. *Robinson v. Schriro (Robinson II)*, 595 F.3d 1086, 1099 (9th Cir. 2010). Obviously, this Court’s finding that Robinson’s counsel was ineffective at sentencing does not imply that it would also find Washington’s

(continued ...)

- (3) . . . [Washington] has a statutory right to counsel; and
- (4) habeas counsel had reasonable cause to believe that the appeal was timely when . . . he never received notice that the appeal was untimely until after the 30–day cure period . . . had passed.

(Petition at 15–16 (footnotes omitted).) Not one of these “facts” “prevented or rendered [Washington] unable” to file a timely appeal. *Lal v. California*, 610 F.3d 518, 524 (9th Cir. 2010) (internal quotation omitted); see *Tanner*, 776 F.3d at 436 (“Tanner’s effort to file a timely notice of appeal was thwarted by guards at the prison where she was incarcerated.”); *Mackey*, 682 F.3d at 1253 (abandonment by counsel “causing Mackey to fail to file a timely notice of appeal” justified Rule 60(b)(6) relief). These facts do not, therefore, justify Rule 60(b)(6) relief.

While this Court may be more attentive to cases in which the death penalty has been imposed, the panel understood that the fact that Washington was

(... continued)

counsel ineffective. See *Robinson I*, 796 P.2d at 863 (noting that “Robinson offered no mitigating circumstances” while “Washington argue[d] the presence of four mitigating circumstances”). In finding that the cruelty aggravator was improperly applied to Robinson’s conduct, this Court relied on its conclusion that “no admissible evidence or argument placing Robinson inside the Hills’ home at the time of the murder or evidence tending to prove that Robinson ordered the murder of the Hills” was presented at trial. *Robinson II*, 595 F.3d at 1104. In contrast, “Washington ‘was at least present in the Hills’ home’ when the murder occurred.” *Id.* (quoting *Robinson I*, 796 P.2d at 864); see also *Robinson I*, 796 P.2d at 863–64 (“Evidence at trial showed that Washington carried a .38–caliber handgun into the Hills’ home, helped ransack their home, and did nothing to prevent the killing of Sterleen and the shooting of Ralph. Washington was not a minor participant.”). Therefore, the fact that this Court found that the cruelty aggravator did not apply to Robinson does not mean it would find the same with regard to Washington.

sentenced to death was not grounds to disregard the rules set forth by the Supreme Court for filing appeals and for granting Rule 60(b)(6) relief. Instead, Rule 60(b)(6) and *Mackey* contemplate granting relief when extraordinary circumstances *prevented* the filing of the notice, not excusing a party from a jurisdictional time limit because the case involves the imposition of the death penalty or because a petitioner failed to realize that the appeal was untimely.

III. RESPONSE TO AMICUS BRIEF.

The Amicus sets forth novel arguments in support of its claim that Washington is entitled to relief under Rule 60(b) for his miscalculation of the deadline for filing an appeal. It first contends that the appeal was not, in fact, untimely, because the time to file should run not from the date of judgment, as FRAP 4(a)(1)(A) requires, but from the date the COA issued. The Amicus further blames the district court and this Court for Washington's untimely filing, arguing that the courts should have discovered sooner (while Washington still had time to seek an extension) that the appeal was untimely. The Amicus finally argues that the panel's opinion conflicts with the Sixth Circuit's holdings on the issue, and with *Mackey*. As discussed below, these arguments lack merit.

A. Washington's notice of appeal was untimely.

The Amicus contends, contrary to Washington's own argument, that the notice of appeal filed by Washington was not, in fact, untimely, but premature.

(Amicus Brief at 6–8.) It further blames the district court for Washington’s failure to file a timely appeal, contending that, had the district court forwarded his notice of appeal to this Court sooner, this Court would have discovered the deficiency at a time when Washington could have moved under FRAP 4(a)(5) to extend the time to file an appeal. (*Id.* at 8–10.) As discussed below, however, the district court properly forwarded the notice of appeal to this Court after ruling on Washington’s COA motion, FRAP 22(b)(1) then required. In any event, it is not the burden of this Court or the district court to ensure that capital defendants timely file their appeals.

1. *The time to appeal runs from the date of the judgment being appealed.*

The Amicus’ claim that the notice of appeal was premature, rather than untimely, is easily disposed of by a simple reading of the rules. FRAP 4(a)(1)(A) requires that “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.*” (Emphasis added). Thus, the time to appeal is not measured from the date that the COA is issued, as the Amicus contends.⁹ (Amicus Brief, at 7 (“Without a COA ruling the district court’s June 8[, 2005] order was not an appealable judgment.”)).

⁹ The district court entered its order denying Washington habeas relief on April 22, 2005. (Dist. Ct. Dkt. 115.) Because Washington filed a timely motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59, the time to appeal ran from the date that motion was denied, June 8, 2005. *See* Fed. R. App. P. 4(a)(4)(A)(iv).

Because the COA is not the “judgment or order appealed from,” its issuance had no effect on the time Washington had to file his notice of appeal. Further, at the time the district court ruled on Washington’s habeas petition, the rules provided that, “[i]f an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue.” FRAP 22(b)(1) (1998). Thus, the rules contemplated that the notice of appeal would be filed before any COA issued. The Amicus’ argument that the time to appeal runs from the date a COA is granted lacks merit.

Nor does the case law the Amicus cites support its position. Although the court in *Awon v. United States*, 308 F.3d 133, 139 (1st Cir. 2002), “held the appeal in abeyance pending the issuance of a certificate of appealability,” it did not, by doing so, render timely an untimely notice of appeal. In fact, the court dismissed as untimely petitioner’s notice of appeal of the denial of his motion for new trial. *Id.* Further, in *Clements v. Wainwright*, 648 F.2d 979, 980 (5th Cir. 1981), the Fifth Circuit found that an appeal had been improperly docketed because no certificate of probable cause had been issued or denied by the district court. *Id.* (“When a district court has neither issued nor denied a certificate of probable cause, [the court of appeals] may not make the initial determination of whether a certificate should be granted.”). There is no indication that the notice of appeal in that case was untimely. Finally, in *Cardenas v. Thaler*, 651 F.3d 442 (5th Cir. 2011), the

court similarly held that, under the pre-2009 version of FRAP 22(b)(1) (the same rule in effect when the district court denied Washington’s petition in 2005), an appellate court was deprived of jurisdiction in the absence of the district court’s grant or denial of a certificate of appealability. *Id.* at 443–45.¹⁰ None of these cases support the Amicus’ argument that the time to file a notice of appeal runs from the date of the COA. Rather, they note that a timely notice of appeal must be filed, and that the circuit court lacks jurisdiction over an appeal until the district court rules on a COA motion.

There has never been a dispute that Washington’s notice of appeal was untimely. Rather, the parties, this Court, and the district court have always understood that FRAP 4(a)(1)(A) means what it says—a notice of appeal must be filed “within 30 days of the entry of the judgment or order appealed from.” This Court should reject the Amicus’ argument otherwise.

2. *The district court did not violate FRAP 3(d) by sending the notice of appeal to this Court after it ruled on the COA motion.*

The Amicus also asserts that the district court violated FRAP 3(d) by failing

¹⁰ The *Cardenas* court noted that “the requirement that the district court first decide whether to grant or deny a COA was moved from Rule 22 of the Federal Rules of Appellate Procedure to Rule 11(a) of the Rules Governing § 2254 Cases.” 651 F.3d at 443 n.1. Rule 11(a) now provides that “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” *Id.*

to promptly send the notice of appeal to this Court, thus blaming the district court for Washington's untimely filing. (Amicus Brief, at 8–10.) At the time of Washington's district court habeas proceedings, FRAP 22(b)(1) (1998) provided:

If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. *The district clerk must send the certificate or statement to the court of appeals with the notice of appeal* and the file of the appeal and the file of the district-court proceedings.

(Emphasis added). Consistent with this rule, the district court here forwarded Washington's notice of appeal to this Court only after ruling on his COA motion.¹¹ As *Clements* and *Cardenas* instruct, the notice of appeal could not have been forwarded to this Court before the district court ruled on the COA motion. Upon the court's entry of the ruling granting the COA, the clerk of the court promptly forwarded the notice of appeal, along with the COA and other required documents, to the court of appeals pursuant to FRAP 3(d). (Dist. Ct. Dkt. 122, 123.) The district court did not violate FRAP 3(d)(1), or commit any error, by waiting until the COA issued to forward the notice of appeal to this Court. This Court should

¹¹ Because the district court is now required to grant or deny a COA in its ruling denying habeas relief, the court may send the file and notice to this Court immediately upon the filing of the notice of appeal. See Rule 11(a), Rules Governing § 2254 Cases (added in 2009). Further, even if the court fails to issue or deny a COA with its habeas ruling, that failure “does not alter the timeline set forth in [FRAP] 4(a).” *United States v. Suesue*, 584 Fed. Appx. 705, 706 (9th Cir. 2014) (unpublished) (rejecting petitioner's argument that judgment was not final because the court failed to issue or deny a COA at the time of judgment).

not countenance the Amicus' attempt to blame the district court for Washington's failure to timely file the notice of appeal.

Nor does *Yadav v. Charles Schwab & Co.*, 935 F.2d 540 (2d Cir. 1991) support the Amicus' argument. In *Yadav*, the pro se appellant filed a notice of appeal before the district court decided his motion for reconsideration, which resulted in the notice "ha[ving] no effect," and the Second Circuit dismissed it. *Id.* at 541. The district court had failed, however, to transmit the notice of appeal and documents required by FRAP 3(d), and the circuit court finally received the documents more than 7 months after the notice of appeal was filed and 3 months after the motion for reconsideration was denied, when the appellant hand-carried them to the court. *Id.* Finding that "a court official ha[d] omitted an important step in the appellate process," the Second Circuit reinstated the appeal. *Id.* at 542. Here, no "important step" was omitted. The district court promptly forwarded the notice of appeal, with the COA, to this Court once the COA was issued.¹² FRAP 3(d), 22(b)(1).

Neither the district court nor this Court erred in handling Washington's

¹² The amicus suggests that the district court should have "issued a COA along with its denial [of relief]," thus ensuring that the notice of appeal would have been sent to this Court earlier. (Amicus Brief at 10 n.5.) But at the time FRAP 22(b)(1) (1998) required the court to issue or deny a COA "[i]f an applicant files a notice of appeal." Thus, the district court had no duty to issue a COA upon denying Washington habeas relief. Further, this argument improperly places the burden on this Court, rather than on Washington himself, for ensuring that the notice of appeal was timely filed.

notice of appeal. Only Washington erred by filing an untimely notice of appeal. This Court should not consider the Amicus' argument otherwise.

B. The panel properly ruled that Washington could not obtain relief under the “excusable neglect” prong of Rule 60(b)(1).

The Amicus challenges the panel's holding that Rule 60(b)(1) is unavailable to extend the time Washington had to file his appeal, claiming there is “no principled reason” for permitting relief under Rule 60(b)(6) while precluding it under Rule 60(b)(1). (Amicus Brief, at 12.) As discussed above, however, the panel did not completely foreclose relief under Rule 60(b)(1); instead it only held such relief is unavailable where the grounds asserted are “excusable neglect.” (Slip Op. at 11.)

The Amicus contends that the 70-year-old case of *Hill v. Hawes*, 320 U.S. 520 (1944), established that “there *are* circumstances—including those identified in Rule 60(b)(1)—in which Rule 60(b) can be used to vacate and reenter a judgment to allow a timely appeal.” (Amicus Brief, at 13.) Even if the Amicus is correct, however, the panel decision does not conflict with that conclusion; it too left open the possibility for Rule 60(b)(1) relief to reopen the time to appeal in some circumstances.

The *Hill* court held that the district court's failure to provide notice of the judgment to the parties, as required by Rule 77(d), justified vacating and reentering judgment to allow the petitioner to appeal. *Id.* at 523 (“It may well be that the

effect to be given to [Rule 77(d)] is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule.”). Contrary to the Amicus’ argument, the *Hill* Court did not hold that Rule 60(b) relief was available to vacate and reenter judgment in order to render an appeal timely; instead it merely analogized to that rule:

The Federal Rules of Civil Procedure permit the amendment or vacation of a judgment for clerical mistakes or errors arising from oversight or omission and authorize the court to relieve a party from a judgment or order taken against him through his mistake, inadvertence, surprise or excusable neglect. *See* Rule 60(a)(b). *These rules do not in terms apply to the situation here present*, as the court below held.

320 U.S. at 523–24 (emphasis added).

In any event, FRAP 4(a)(6) now provides the exclusive remedy for reopening the time to appeal. *See Stein*, 197 F.3d at 424 (“[T]he exclusive remedies for a failure to file a timely notice of appeal due to a lack of notice of entry of judgment or order were contained in Rule 4(a).”); *see Bowles v. Russell*, 551 U.S. 205, 208 (2007) (“Rule 4(a)(6) describes the district court’s authority to reopen and extend the time for filing a notice of appeal after the lapse of the usual 30 days.”). Thus, *Hill* has arguably been superseded by FRAP 4(a)(6), and reversed by *Bowles*, which holds equitable relief is no longer available to reopen the time to appeal.

1. *The panel's opinion does not conflict with the Sixth Circuit's holdings in Lewis and Tanner.*

The Amicus contends that the panel's opinion conflicts with the Sixth Circuit's rulings in *Tanner* and *Lewis*. (Amicus Brief, at 13–14.) As explained above, however, the panel here held only that relief based on “excusable neglect” is foreclosed under Rule 60(b)(1). Neither *Lewis* nor *Tanner* held that Rule 60(b)(1) could be used to reopen the time to appeal when a petitioner asserts he is entitled to such relief due to “excusable neglect.” In fact, *Tanner* itself granted relief under Rule 60(b)(6).¹³ *Tanner*, 776 F.3d at 435–36.

2. *The panel did not state it was following a “majority rule” by finding Rule 60(b)(1) relief foreclosed here.*

Contrary to the Amicus' claim, the panel did not state it was following a “majority rule” when it held that relief under Rule 60(b)(1) was not available to reopen the time for Washington to file his appeal.¹⁴ (Amicus Brief at 14; Slip Op.

¹³ While consistent with *Lewis* and *Tanner*, the panel's holding conflicts with other circuits that have held Rule 60(b) is unavailable to remedy the late filing of an appeal. *See Jackson v. Crosby*, 437 F.3d 1290, 1296 (11th Cir. 2006) (“[T]he Petitioner is merely aiming to gain a second chance at a timely appeal through the use of a Rule 60(b) motion. This he cannot do.”); *Dunn v. Cockrell*, 302 F.3d 491, 493 (5th Cir. 2002) (FRAP 4(a)(5) “gives a litigant 30 days to apply for relief from the strict jurisdictional time requirement for filing a notice of appeal due to a party's excusable neglect. Our cases sensibly refuse to allow a litigant to circumvent this specific rule by invoking Rule 60(b) solely for the purpose of extending the time for appeal.”).

¹⁴ The Amicus at times seems to imply that the panel held that all Rule 60(b) relief is foreclosed here. (*See, e.g.,* Amicus Brief, at 13 (“The Panel's holding that 60(b)

(continued ...)

at 12 n.4.) Instead, its “majority rule” comment referred to the rule this Court established in *Stein* that, “because the exclusive remedies for a failure to file a timely notice of appeal due to a lack of notice of entry of the judgment or order were contained in Rule 4(a),” Rule 60(b) relief was unavailable to reopen the time to appeal in those circumstances. (Slip Op. at 11–12 (quoting *Stein*, 197 F.3d at 424).)

The panel correctly stated that a majority of the circuits have held that Rule 60(b) may not be used to circumvent the jurisdictional provisions of FRAP 4(a)(6), at least when a party has missed the time to appeal due to the court’s failure to notify the party of the judgment. (*Id.*) It did not suggest that this was the “majority rule” outside the context of “lack of notice” cases.¹⁵ The panel did, however, extrapolate the reasoning behind the “majority rule” to this case. (*Id.* at 12 (“Though *Stein* explicitly addressed only situations in which a lack of notice of judgment was the ground for the rule 60(b) motion, the case’s logic and the

(... continued)

relief is unavailable conflicts with the Sixth Circuit decisions....”).) But the panel specifically held only that Rule 60(b)(1) relief was unavailable. (Slip Op., at 14 (“Although a showing of excusable neglect under Rule 60(b)(1) cannot be used to render a notice of appeal timely, we have not entirely foreclosed using Rule 60(b) for that purpose.”).) Although it denied relief under Rule 60(b)(6), it recognized that such relief is available if a petitioner can demonstrate extraordinary circumstances.

¹⁵ The State submits that the same reasoning also prevents relief under Rule 60(b)(6), but recognizes, as the panel did, that this circuit has held otherwise.

language of [FRAP] 4(a) and Rule 60(b) support the same conclusion that *Stein* reached.”.) In any event, the Amicus does not contend that Washington established he was entitled to relief under Rule 60(b)(1), even if such relief is available.

3. *The panel correctly concluded that Rule 60(b)(1) relief is unavailable when it would grant relief on the same grounds for which FRAP 4(a)(5) offers relief.*

The Amicus also takes issue with the panel’s conclusion that, when a “motion seeks relief on grounds identical to those offered by FRAP 4(a), Rule 60(b) motions may not be used to escape the time limits for appeal.” (Slip Op. at 13; Amicus Brief at 17.) Noting that Rule 60(b) provides relief on broader grounds than does FRAP 4(a)(5), the Amicus contends that Washington might have asserted “mistake,” “inadvertence,” or “surprise” as grounds for relief, which are not available under FRAP 4(a)(5).¹⁶ (Amicus Brief at 17.) But Washington sought relief under Rule 60(b)(1) based only on “excusable neglect,” for which FRAP 4(a)(5)(a)(ii) also provides relief. (*See* Dist. Ct. Dkt. 139-2, at 11 (arguing that “Petitioner has demonstrated a compelling case for the presence of excusable neglect and is entitled to relief”); Dkt. 50 at 52 (“Petitioner is entitled to relief under Civil Rule 60(b)(1) based on excusable neglect.”).) Thus, there is no support

¹⁶ The Amicus also includes “any other reason that justifies relief” as a possible ground. This language, however, is from Rule 60(b)(6), and the panel did not foreclose relief under that subsection.

in the record for the Amicus' argument that Washington asserted "mistake," "inadvertence," or "surprise" as grounds for relief under Rule 60(b)(1). Because FRAP 4(a) provides relief on the very the grounds Washington asserted for Rule 60(b)(1) relief, the panel correctly held that Rule 60(b)(1) relief was unavailable to Washington.

The Amicus also contends that the panel's ruling precluding relief under Rule 60(b)(1) is "unsupportable where Washington never knew he had a FRAP 4(a)(5) motion to make." (Amicus Brief at 18.) But the panel explained its reasoning, which had nothing to do with whether Washington knew his notice of appeal was untimely:

If we permitted Washington to gain relief under Rule 60(b)(1), it would render the escape hatch already included in [FRAP] 4(a)(5) almost unnecessary, and would also evade the time limits in that rule, because excusable neglect could allow an exemption from the [FRAP] 4(a) time limits up to a year after judgment, far beyond the 30 day extension of the time to appeal that [FRAP] 4(a)(5) allows in cases of excusable neglect.

(Slip op. at 13.) Thus, the Amicus' argument that "Washington never knew he had a FRAP 4(a)(5) motion to make" misses the mark. Rule 4(a)(5) provides the exclusive remedy for extending the time to appeal based on excusable neglect. If the time limits in FRAP 4(a)(5) mean anything, they must foreclose a collateral attempt to reopen the time to file an appeal based on grounds for which that rule

provides relief. The panel correctly held that Rule 60(b)(1) relief was unavailable.¹⁷

4. *Rule 60(b)'s purpose must be discerned in light of the purpose of FRAP 4(a).*

The Amicus finally argues that the panel's ruling that Rule 60(b)(1) relief is unavailable here defeats that Rule's purpose, which is to "accommodate inadvertent errors, mistakes, or unusual circumstances that have arisen in a case that proceeded to judgment." (Amicus Brief at 18.) But, as the panel noted, the Court must also look to the purposes of FRAP 4(a) in setting specific, jurisdictional time limits for filing an appeal.

[T]o allow a party to rely on Rule 60(b) as an alternative to the time constraints of [FRAP] 4(a) would have the substantive effect of nullifying the provisions of [FRAP] 4(a)(5). Competing statutes should not, if at all possible, be interpreted so that the provisions of one will abrogate the provisions of another.

(Slip Op. at 13 (quoting *West v. Keve*, 721 F.2d 91, 96 (3d Cir. 1983).) The panel properly balanced the purposes of both FRAP 4(a) and Rule 60(b) in ruling in this case. This Court should not consider the Amicus' argument otherwise.

¹⁷ Nor need the panel's decision "be reconciled with *Mackey*," as the Amicus contends, because the panel's decision does not conflict with *Mackey*. (Amicus Brief at 18 n.14.) As already noted, in *Mackey* this Court provided relief under Rule 60(b)(6) after finding extraordinary circumstances justified relief. Here, the panel held only that relief under Rule 60(b)(1) is foreclosed, and then only when "excusable neglect" is asserted. The panel further considered whether extraordinary circumstances existed to warrant relief under Rule 60(b)(6), concluding they did not. The Amicus does not challenge this finding.

IV. CONCLUSION.

For the reasons stated above, this Court should deny Washington's petition for rehearing.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 25, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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