

A P P E N D I X

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit, <i>Nevia Abraham v. United States</i> , 19-10606 (October 28, 2020)	A-1
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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-10606
Non-Argument Calendar

D.C. Docket Nos 1:16-cv-23062-PCH,
1:03-cr-20129-PCH-1

NEVIA ABRAHAM,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(October 28, 2020)

Before WILSON, GRANT, and LUCK, Circuit Judges.

PER CURIAM:

In February 2018, the district court denied Neviah Abraham's second 28 U.S.C. § 2255 motion and issued a certificate of appealability (COA) on the issue

of whether Abraham could challenge his sentence under the Armed Career Criminal Act (ACCA). At the time, Abraham was represented by the Federal Public Defender's (FPD) office. A copy of the order was mailed to Abraham and counsel in February 2018. Counsel did not file a notice of appeal, nor did she communicate further with Abraham. She ultimately terminated her employment with the FPD's Office in late 2018. In November 2018, Abraham learned that no appeal was pending when he contacted the Clerk in this court seeking to expand the COA. Abraham then filed, through counsel, a motion in district court under Fed. R. Civ. P. 60(b), asserting that a timely notice of appeal was not filed due to excusable neglect. The district court granted the Rule 60(b) motion and reentered its February 2018 order denying Abraham's motion to vacate and granting a COA. Abraham filed a notice of appeal.

We ordered the parties to address whether we have jurisdiction to review the 2019 order granting Abraham's Rule 60(b) motion and reentering the denial of his § 2255 motion. Abraham argues that his attorney abandoned him, and he cannot be held responsible for his attorney's conduct under *Maples v. Thomas*, 565 U.S. 266 (2012). Further, he asserts that the district court relied on Rule 60(b)(6), which, he claims, allows the district court to grant reopening of a final judgment upon a finding of extraordinary circumstances. The government responds that we lack jurisdiction because Rule 60(b) cannot cure an untimely appeal and argues

that *Maples* does not apply to a statutory, jurisdictional deadline. We agree with the government and dismiss the appeal for lack of jurisdiction.

I

We review de novo the interpretation of the rules of federal procedure and jurisdictional issues. *United States v. Lopez*, 562 F.3d 1309, 1311 (11th Cir. 2009). We review for abuse of discretion the grant or denial of a motion for relief from judgment under Rule 60(b). *See Maradiaga v. United States*, 679 F.3d 1286, 1291 (11th Cir. 2012).

II

“Federal Rule of Appellate Procedure 4(a) prescribes strict time limits for filing a notice of appeal after entry of a final judgment or order by the district court.” *Vencor Hosps., Inc. v. Standard Life & Accident Ins. Co.*, 279 F.3d 1306, 1308 (11th Cir. 2002). In a civil case where the United States is a party, the appellant must file a notice of appeal no later than 60 days after the challenged order or judgment is entered on the docket. Fed. R. App. P. 4(a)(1)(B)(i). A district court may not extend the time to file a notice of appeal, except as authorized by Rule 4. Fed. R. App. P. 26(b); *see* Fed. R. App. P. 4(a)(5) (permitting a district court to extend the time to file a notice of appeal for excusable neglect or good cause if a motion is filed within 30 days after the initial period expires); Fed. R. App. P. 4(a)(6) (allowing a district court to reopen the time

to file an appeal if a party entitled to receive notice of the judgment or order fails to receive such notice).

The statutory time limit for filing a notice of appeal is a jurisdictional requirement in civil cases. *Bowles v. Russell*, 551 U.S. 205, 214 (2007). Thus, “[f]ailure to comply with a jurisdictional time prescription . . . deprives a court of adjudicatory authority over the case, necessitating dismissal.” *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 (2017). The Supreme Court has held that courts have “no authority to create equitable exceptions to jurisdictional requirements.” *Bowles*, 551 U.S. at 213–14 (overruling the “unique circumstances” doctrine, which allowed a petitioner to file an untimely notice of appeal if the court affirmatively misled him).

In contrast, procedural default is not jurisdictional, but rather is an affirmative defense that is subject to waiver by the government. *See Howard v. United States*, 374 F.3d 1068, 1073 (11th Cir. 2004) (concluding that a § 2255 movant’s claim was “procedurally barred, unless the government is itself barred from raising that affirmative defense”). In *Maples*, the Supreme Court held that a 28 U.S.C. § 2254 petitioner had presented extraordinary circumstances to excuse the procedural default of his claim because his attorney had completely abandoned him and failed to appeal the denial of his state postconviction relief petition. 565 U.S. at 271, 289.

Rule 60(b) provides that a district court “may relieve a party or its legal representative from a final judgment, order, or proceeding” because of “mistake, inadvertence, surprise, or excusable neglect,” . . . or “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(1), (6). We have acknowledged the “well-recognized rule [that] precludes the use of a Rule 60(b) motion as a substitute for a proper and timely appeal.” *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993); *see also Jackson v. Crosby*, 437 F.3d 1290, 1296 (11th Cir. 2006) (affirming that an appellant generally cannot “gain a second chance at a timely appeal through the use of a Rule 60(b) motion”); *but see Harnish v. Manatee Cty.*, 783 F.2d 1535, 1538 (11th Cir. 1986) (affirming, before the Supreme Court’s decision in *Bowles*, the district court’s grant of a Rule 60(b) motion to reopen the time to appeal, where the parties failed to receive actual notice of the judgment until after the time for appeal had passed, and the moving party had relied upon express assurances from the court that no judgment had been entered).

III

Because the statutory time limit for filing a notice of appeal is jurisdictional, we have no authority to create an equitable exception to that requirement. *See Bowles*, 551 U.S. at 213–14. Thus, Abraham is not entitled to relief under *Maples* based on extraordinary circumstances regarding his counsel’s negligence. *See* 565 U.S. at 289. Moreover, our prior precedent generally prohibits granting relief

under Rule 60(b) solely for the purpose of reentering the judgment and restarting the time to appeal. *See Cavaliere*, 996 F.2d at 1115; *Jackson*, 437 F.3d at 1296. Accordingly, we lack jurisdiction to review the February 2018 denial of Abraham's second § 2255 motion, notwithstanding the district court's February 2019 order granting his Rule 60(b) motion and reentering the judgment. We therefore dismiss Abraham's appeal for lack of jurisdiction.

DISMISSED.

A-2

United States District Court
Southern District of Florida
MIAMI DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE
 (For Offenses Committed On or After November 1, 1987)

v.

Case Number: 03-20129-CR-HUCK**NEVIA KEVIN ABRAHAM**

Counsel For Defendant: Philip Horowitz.
 Counsel For The United States: Bruce Brown, AUSA
 Court Reporter: Lisa Edwards

The defendant was found guilty on Counts 1, 2, 3, 4, and 6 of the Indictment.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

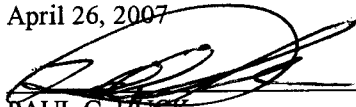
<u>TITLE/SECTION NUMBER</u>	<u>NATURE OF OFFENSE</u>	<u>DATE OFFENSE CONCLUDED</u>	<u>COUNT</u>
18 U.S.C. § 1201(c)	Conspiracy to kidnap a U.S. Postal Service employee.	January 31, 2003	1
18 U.S.C. § 1201(a)(5)	Kidnaping of a U.S. Postal Service employee.	January 31, 2003	2
18 U.S.C. § 924(c)(1)	Use of a firearm during and in relation to a crime of violence.	January 31, 2003	3
18 U.S.C. § 111	Forcible assault of a U.S. Postal Service employee.	January 31, 2003	4
18 U.S.C. § 924(e)(1)	Possession of a firearm by a convicted felon.	January 31, 2003	6

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No. 265-65-2662
 Defendant's Date of Birth: 11/18/64

Date of Imposition of Sentence:
 April 26, 2007


 PAUL C. HUCK
 United States District Judge

April 27, 2007

Def't's U.S. Marshal No.: 69442-004

DEFENDANT: NEVIA KEVIN ABRAHAM
CASE NUMBER: 03-20129-CR-HUCK

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **324 months as to Count 1, 2, 6 and 240 months as to Count 4 and 120 months as to Count 3. Counts 1, 2, 6 and 4 run concurrently. Count 3 runs consecutively to the terms of imprisonment imposed on Counts 1, 2, 4 and 6.**

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

DEFENDANT: NEVIA KEVIN ABRAHAM
CASE NUMBER: 03-20129-CR-HUCK

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years as to Counts 1, 2, 3 and 6 and 3 years as to Count 4, all to run concurrently.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.
The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: NEVIA KEVIN ABRAHAM
CASE NUMBER: 03-20129-CR-HUCK

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days, unless excused by the U.S. Probation Officer. Further, the defendant shall provide documentation, including but not limited to, pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and any other documents requested by the U.S. Probation Office.

The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

DEFENDANT: NEVIA KEVIN ABRAHAM
CASE NUMBER: 03-20129-CR-HUCK

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment

\$500.00

Total Fine

\$

Total Restitution

\$

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: NEVIA KEVIN ABRAHAM
CASE NUMBER: 03-20129-CR-HUCK

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. Lump sum payment of **\$500.00** due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

**U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128**

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

The defendant shall forfeit the defendant's interest in the following property to the United States:

**As set forth in the Final Order of
Forfeiture dated August 5, 2003.**

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.