21-5275 ORIGINAL

No. _____



IN THE

SUPREME COURT OF THE UNITED STATES

ALAN ENDER — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS for ELEVENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ALAN ENDER, REG. # 58940-018
(Your Name)

U.S. PENITENTIARY TUCSON, P.O. BOX 24550
(Address)

TUCSON, AZ 85734
(City, State, Zip Code)

NONE
(Phone Number)

## QUESTION(S) PRESENTED

1. Petitioner filed a Federal Rule of Civil Procedure 60(b)(6) motion for relief from a final judgment based on attorney abandonment after learning that his attorney had not only failed to file a previously agreed upon notice of appeal in the event petitioner's 28 U.S.C. §2255 motion was denied -- and that failure due to counsel's misapprehension that a notice could not be filed since no Certificate of Appealability had issued -- but the attorney further neglected to confer with petitioner about the eleventh-hour decision not to file the notice; nor did the attorney inform him that the §2255 had been denied.

Petitioner explained the same to District Court as necessary to meet the "reasonable time" filing requirement for Rule 60 motions, but the District Court ignored the substantive issue of attorney abandonment which occasioned the default, and converted the Rule 60 motion to one under Federal Rule of Appellate Procedure 4(a)(6), relying also on Federal Rule of Civil Procedure 77(d)(2), to find that petitioner's failure to receive actual notice of the §2255 denial did not affect the time for appeal, and the Eleventh Circuit affirmed.

Did the Eleventh Circuit err when not considering attorney abandonment to be an extraordinary circumstance warranting relief from a final judgment pursuant to Federal Rule of Civil Procedure 60(b)(6)?

## LIST OF PARTIES

[XX] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## RELATED CASES

ALAN GREGORY ENDER V. UNITED STATES OF AMERICA, No. 20-11985 (11TH CA)

ALAN GREGORY ENDER V. UNITED STATES OF AMERICA, 6:16-CV-2067-Orl-22TBS (11TH);
6:13-CR-00173-ACC-LRH-1

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[XX] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[XX] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[XX] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

## JURISDICTION

[XX] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was JUNE 29, 2021.

[XX] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FEDERAL RULE OF CIVIL PROCEDURE - RULE 60 Relief from a Judgment or Order, provides:

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

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

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

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

(4) the judgment is void;

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

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time — and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

FEDERAL RULE OF CIVIL PROCEDURE - RULE 77 Conducting Business; Clerk's Authority; Notice of an Order or Judgment, provides:

(d) Serving Notice of an Order or Judgment.

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

FEDERAL RULE OF APPELLATE PROCEDURE - RULE 4 Appeal as of Right--- When Taken, provides:

(a) Appeal in a Civil Case.

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

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

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

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

The above cited rules can be found in their entirety at APPENDIX C.

## STATEMENT OF THE CASE

Inmate petitioner hired an attorney to prepare and file a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. §2255, and had instructed the attorney to file a notice of appeal in the event the §2255 was denied, and notify petitioner of the same. After having not received any communication from the attorney for a longer-than-usual amount of time, petitioner sent several electronic TRULINCS messages, the primary method of communication previously utilized between the two, but did not hear back from the attorney. Petitioner then sent several type-written letters by USPS, and after nearly 5 months trying to get an update, finally received a single letter from the attorney. In the letter, the attorney explained that the §2255 had been denied the year prior, stating that it was his office's "standard practice to mail everything" as it's received, and was "not sure why [petitioner was] not advised of the status before this." The attorney did not verify any mailing from his file on the matter, but went to excuse his reason for not filing the previously agreed upon notice of appeal: the District Court "denied our request for a Certificate of Appealability so we could appeal said denial [of the §2255]" and "since the District Court denied our request for a Certificate of Appealability, we were unable to proceed further." Petitioner promptly responded by letter citing to Local Florida Rule 22-1(a) and (b), which provide that if the district court denies a COA, it may be sought from the court of appeals, and a timely notice of appeal will be construed as an application to the court of appeals for a COA. In addition to that citation, petitioner stressed his "shock and dismay" with the attorney's failure to do as he had been instructed, and for not conferring with petitioner, or even notifying

him about the denial of the §2255, and further asked the attorney if there were any type of "out-of-time" appeal that could be filed or any other type of motion that could be used as a vehicle to correct the attorney's error and his abandonment of petitioner. The attorney did not respond.

It was not the attorney's decision not to respond at that time which constituted the attorney abandonment as the Eleventh Circuit made it out to be. The attorney abandonment happened long before the attorney's decision to ignore petitioner, when the attorney erroneously decided not to file the previously agreed upon notice of appeal; when he failed to confer with the petitioner about that decision not to take any action, and; when the attorney neglected to inform petitioner about the denial of his §2255.

After researching the issue on his own, petitioner found that Federal Rule of Civil Procedure 60(b)(6) was the appropriate vehicle for obtaining relief as a result of the attorney abandonment. Petitioner then prepared and filed his Rule 60(b)(6) motion uncounseled, with the understanding that the District Court was required to liberally construe it. In petitioner's Rule 60 motion, he articulated as best he could the history of the attorney abandonment — the reason for the default. Whilst preparing his Rule 60 motion, petitioner found that Rule 60(c)(1) required that when filing any Rule 60 motion, a petitioner must comply with showing that he or she was almost entirely without fault for the delay in its filing, and moreover that it was being filed within "reasonable time" -- to mean that it was being filed at the earliest possible time. The District Court, however, focused solely on that showing, and turned the focus of its inquiry on a lack of "actual notice" and ignored the attorney abandonment issue altogether.

Appealing to the Eleventh Circuit, the petitioner explained that it was not a lack of notice issue; rather, it was the attorney's failure to file a

notice of appeal as instructed; to confer with petitioner about that change of mind, and; to notify petitioner of the §2255 denial -- which would have afforded petitioner an opportunity to seek alternative counsel or course of action. The Eleventh Circuit nevertheless found that the District Court did not abuse its discretion, and properly construed petitioner's Federal Rule of Civil Procedure 60(b)(6) motion when converting it into one under Federal Rule of Appellate Procedure 4(a)(6) -- which essentially faulted petitioner for failing to receive actual notice -- when in fact, the fault lay squarely at the attorney's feet whom petitioner had hired, and had no reason to believe the attorney would fail to do what they had agreed upon, and indeed to abandon petitioner altogether.

## REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's holding in the instant case not only creates a conflict between circuits, it also conflicts with previous Supreme Court holdings and opinions. According to the Eleventh Circuit's holding in this case, the Eleventh Circuit has condoned an attorney's abandonment of his or her client, and specifically, as is the case here, at a critical juncture in the proceedings, and thus allows the mantle of blame to fall exclusively upon the unwitting client. Allowing such a holding to stand is to tolerate a manifest injustice, and is a mockery to the spirit and dignity of justice itself.

In Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership, 570 U.S. 380 (1993), the Supreme Court noted that the provisions of Federal Rule of Civil Procedure 60(b)(1) permits courts, on a motion made within 1 year of judgment, to reopen the judgment for reasons of mistake, inadvertence, surprise, or excusable neglect, and Rule 60(b)(6), which empowers courts, even after 1 year has passed to reopen a judgment for "any other reason justifying relief from the operation of the judgment", and that 60(b)(1) and 60(b)(6) are mutually exclusive -- and as such, that after more than a year has passed, a party may not obtain relief based on "excusable neglect" by resorting to Rule 60(b)(6), and that to justify relief under Rule 60(b)(6) after such time, a party must show extraordinary circumstances suggesting that the party is faultless in the delay. Id. Furthermore, Rule 60(c) requires that Rule 60(b) motions "must be made within a reasonable time". See

Fed. R. Civ. P. 60(c).

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

The Supreme Court has also indicated that attorney abandonment is sufficient to constitute the "extraordinary circumstances" necessary to obtain relief from a final judgment under Fed. R. Civ. P. 60(b)(6). See id. at 917, 927 (2012); **Holland**, 130 S. Ct. at 2564; see also **Gonzalez v. Crosby**, 545 U.S. 524, 535 (2005).

Like the Supreme Court in **Maples**, the Ninth Circuit has distinguished between an attorney's "negligence" and his or her "abandonment" of the client. In **Mackey v. Hoffman**, 682 F.3d 1247,

1253 (9th Cir. 2012), the Mackey court explained that the Ninth Circuit had previously held that gross negligence amounting to constructive abandonment could constitute extraordinary circumstances under Rule 60(b)(6). Id. at 1251 (internal citation omitted). "Relief in such a case," the Mackey court explained, "is justified because gross negligence by an attorney, defined as 'neglect so gross that it is inexcusable,' 'vitiat[es] the agency relationship that underlies our general policy of attributing to the client the acts of his attorney.'" Id. (alteration in original). The Mackey court explained that it was granting relief for attorney abandonment under Rule 60(b)(6) rather than for failure to receive notice under Federal Rule of Appellate Procedure 4(a)(6). Id. at 1254.

In the instant matter, petitioner's attorney likewise abandoned him, after being instructed to file a notice of appeal but later chosing not to because of the attorney's erroneous belief that a notice of appeal could not be filed since the District Court had not issued a Certificate of Appealability ("COA"); and also neglected to confer with petitioner about that change of mind, and; did not notify petitioner that the §2255 motion had been denied. After presenting those facts to the District Court for purposes of meeting the required "reasonable time" filing set forth in Rule 60(c), the District Court ignored the attorney abandonment issue altogether, and turned its focus on a "failure to receive actual notice" and thereby converting the Rule 60(b) motion into one under Federal Rule of Appellate Procedure 4(a)(6), much like what had initially occurred in Mackey (supra), but later reversed by the Ninth Circuit.

The District Court misconstrued petitioner's Rule 60(b)(6) motion, finding only that petitioner was claiming "that notice of the Court's denial of the Motion to Vacate was sent to Petitioner's counsel of record, David J. Joffe, who did not notify Petitioner." See Appendix B, page 3, lines 1-3. Whilst ignoring the issue of attorney abandonment, the District Court found that petitioner was "merely fault[ing] his attorney", id. at page 5, and was therefore subject to Fed. R. Civ. P. 77(d)(2) since his attorney had purportedly received notice. Without addressing the constructive attorney abandonment, the District Court then converted the motion to one under Fed. R. App. P. 4(a)(6). In support of that conversion, the District Court relied upon the change to Fed. R. App. P. 4(a)(6) made in 1991, that adoption of the rule and its limitation on "filing an appeal based on lack of notice solely within 180 days of the judgment or order" regardless of any of the relief available under Fed. R. Civ. P. 60(b). See District Court's order at Appendix B, pages 4-6; citing to **Vencor Hosps. Inc. v. Standard Life & Accident Ins. Co.**, 279 F.3d 1306, 1311 (11th Cir. 2002). Vencor is distinguishable as counsel did not abandon them.

Petitioner appealed, but the Eleventh Circuit affirmed. In the Eleventh Circuit's order affirming the District Court, the constructive abandonment is likewise disregarded. Additionally, the Eleventh Circuit cites to **Jackson v. Crosby**, 437 F.3d 1290, 1296 (11th Cir. 2006). In Jackson, the Eleventh Circuit held that petitioner could not use Rule 60(b) to "resuscitate the time to file an appeal", but that holding is wholly distinguishable from the instant matter. Jackson, without identifying any specific subsection of Rule 60(b) on which he relied, was only making an

attempt to "essentially pray[] for the district court to take whatever action would be sufficient to restart the filing period for a notice of appeal", which is not what petitioner in the instant case was trying to do.

Having disregarded the substantive issue of attorney abandonment, the Eleventh Circuit has condoned attorney abandonment and passed the blame upon unwitting clients. The inability to file a timely notice of appeal on the denial of petitioner's §2255 was based solely on his attorney's failure to do as he had been instructed and had agreed to do; the attorney's failure to confer with his client when changing his mind about filing the agreed upon notice -- and that due to the attorney's erroneous belief that the District Court's refusal to issue a COA prevented a notice of appeal being filed -- and neglecting to notify petitioner that the §2255 had been denied, is what occasioned the default. Had counsel not decided against what had been agreed upon, or had counsel conferred with petitioner about the change of mind to file the notice of appeal, or had counsel notified petitioner about the denial of the §2255, petitioner could have taken matters into his own hands and filed a timely notice of appeal, or hired another attorney to do the same. However, since the attorney wholly abandoned petitioner at a critical juncture of the proceedings, petitioner was left without any option, and the Eleventh Circuit wrongfully lays that blame upon him, and in doing so, has departed from holdings and decisions of other circuits, and even the Supreme Court itself. Petitioner, in the hope for justice, and the desire not to see others become victim of attorney abandonment without any recourse, respectfully prays for the Supreme Court's intervention and handling of this issue of national import.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: JULY 26, 2021