The Universal Remedy for Attorney Abandonment: Why Holland v. Florida and Maples v. Thomas Give All Courts the Power to Vacate Civil Judgments Against Abandoned Clients by Way of Rule 60(b)(6)

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I. INTRODUCTION

Imagine that you are in a car accident, and the other driver sues you for negligence. Not knowing any lawyers, you search the Internet and hire a local attorney who describes himself as the best defense attorney in the state, is not terribly expensive, and seems to be a nice enough guy. You sit back, relax, and try to be as patient as possible while your new lawyer clears your name.

However, just as you start to feel confident that your case will finally come to a favorable conclusion, you receive a letter in the mail from the county courthouse alerting you that you owe $50,000 in damages to the person who sued you. You try to contact your attorney to see what happened—when hired, he assured you that he would take care of everything and that you needn’t worry about the proceedings—but he can no longer be found. You finally drive to the courthouse and ask the clerk why you owe so much money. The clerk informs you that the opposing party filed a motion for summary judgment seeking $50,000, but your attorney did not appear on your behalf at the hearing on the motion. Consequently, the judge entered a default judgment against you, and you are forced to pay the damages sought by the opposing party.

You try to sue your attorney for malpractice, but upon inspection, you find out that he has no insurance. So, in a last-ditch effort to stem the tide of impending debt, you hire new counsel and ask a judge to vacate the default judgment on the grounds that your previous attorney did not sufficiently represent you. The judge upholds the default judgment, and you confusedly ask your new attorney exactly how the judge could rule that way.

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1. A default judgment is “[a] judgment entered against a defendant who has failed to plead or otherwise defend against the plaintiff’s claim.” BLACK’S LAW DICTIONARY 480 (9th ed. 2009).

2. Courts can vacate judgments and orders by utilizing Federal Rule of Civil Procedure 60(b). FED. R. CIV. P. 60(b). This topic will be taken up in more detail in Part II.B–C.
“The judge couldn’t do anything about it,” your new attorney responds. “The law says that you are bound by your first attorney’s actions since you voluntarily chose to hire him. I’m sorry, but you have to pay that money.”

Although a court ruling such as this may seem to be unfair and an overly literal interpretation of the principles of a society that values an adversarial legal system, it is not entirely uncommon. Some courts have held that an attorney’s misconduct can never be used as a basis for vacating a civil judgment, and, as such, that a client is always bound by the acts of an attorney who has represented him. Moreover, other courts have explicitly refused to address the question whether attorney misconduct can provide a ground for vacating civil judgments, often leaving clients in the same position they would have been in had the court explicitly stated that they were bound by their attorneys’ actions. The result is that many clients are left without a remedy they can resort to in order to get relief from judgments entered against them when they had been represented by terribly deficient attorneys.

The Supreme Court, however, recently decided two cases that give hope to clients afflicted with incompetent attorneys. In Holland v. Florida and Maples v. Thomas, cases involving two different habeas corpus petitioners, the Court outlined a standard known as “attorney abandonment,” which effectively states that clients are not bound by the acts or omissions of attorneys who have abandoned them. Although created in a criminal procedure context, attorney abandonment must logically extend to the civil realm, a consequence that means all federal courts in civil cases must necessarily have the power to relieve abandoned clients from the conduct—or lack thereof—of their absent attorneys. This Article argues that Federal Rule of Civil Procedure 60(b)(6) (Rule 60(b)(6)) is the only remedy that courts can always rely on to enforce this power.

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3. See, e.g., cases cited infra Part II.C.2.
4. See infra Part II.C.2.
5. See infra Part II.C.4.
6. See, e.g., Bakery Mach. & Fabrication, Inc. v. Traditional Baking, Inc., 570 F.3d 845, 848 (7th Cir. 2009) (“[A]ll of the attorney’s misconduct . . . becomes the problem of the client.”).
9. See infra Part IV.
10. See infra Part V.
11. See infra Part V.
of this statutory rule, which states that courts can vacate judgments against parties “for any . . . reason that justifies relief,”12 ensures that courts can safeguard clients from the conduct of attorneys who have abandoned them.13

Part II of this Comment provides an overview of the distinct models the Supreme Court has utilized to evaluate attorney misconduct and the circumstances that bind clients to that misconduct.14 Part II also describes in detail the uses of Rule 60(b)(6) and the circuit split prior to Holland and Maples concerning the interaction between Rule 60(b)(6) and attorney misconduct.15 Part III thoroughly analyzes Holland, Maples, and the attorney abandonment standard these two cases jointly created.16 Part IV contends that the Supreme Court likely intended for this attorney abandonment standard to apply in the civil context.17 Part V consequently argues that whenever a court finds that a client was abandoned in a civil suit, Holland and Maples mandate that the court must necessarily have the power to vacate any judgment against that client by utilizing Rule 60(b)(6).18 Part VI returns to the circuit split described in Part II, shows how the circuit split is cured when courts always have the ability to vacate judgments against abandoned clients by utilizing Rule 60(b)(6), and outlines how each of the circuits must alter their jurisprudence to reflect Holland and Maples.19 Part VII acknowledges some lingering questions that Congress and future courts must answer because of Holland and Maples.20 Part VIII concludes.21

II. A BRIEF HISTORY OF ATTORNEY MISCONDUCT, RULE 60(b)(6), AND THE CIRCUIT SPLIT CAUSED BY THEIR INTERACTION

A. The Historical Models for Attorney Misconduct in the Supreme Court

The Supreme Court has traditionally employed two distinct analytical
models when deciding issues of attorney misconduct\textsuperscript{22}: the performance-based model\textsuperscript{23} and the relationship-based model.\textsuperscript{24} Generally, the Court has used the performance-based model only when a criminal defendant is guaranteed the right to counsel under the Sixth Amendment.\textsuperscript{25} Conversely, when a person is not guaranteed this right to counsel—including any person that is a party to a civil lawsuit—the Court has used the relationship-based model.\textsuperscript{26}

1. The Performance-Based Model

The performance-based model “evaluates the level and quality of work an attorney has done on a client’s behalf.”\textsuperscript{27} The focal point of this model is just as it sounds: the performance of the client’s attorney.\textsuperscript{28} If the attorney’s conduct falls below a certain level of reasonable acceptability,\textsuperscript{29} then the client will no longer be bound by the attorney’s actions.\textsuperscript{30} If, however, the

\textsuperscript{23} See infra Part II.A.1.
\textsuperscript{24} See infra Part II.A.2.
\textsuperscript{25} Zupac, supra note 22, at 1332. Because the right to counsel only attaches to criminal defendants, the performance-based model is outside the scope of this Article: Rule 60(b)(6) only applies to civil lawsuits, where a party does not have a guaranteed right to counsel. See U.S. CONST. amend. VI. For that reason, this Article will only briefly discuss the performance-based model. See infra Part II.A.1.
\textsuperscript{26} Zupac, supra note 22, at 1332.
\textsuperscript{27} Id. at 1335.
\textsuperscript{28} Id. at 1337.
\textsuperscript{29} This level of reasonable acceptability was first described in Strickland v. Washington, 466 U.S. 668, 687 (1984). The Strickland standard states the following:

A convicted defendant’s claim that counsel’s assistance was so defective . . . has two components. First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

\textsuperscript{30} Zupac, supra note 22, at 1337; see also Strickland, 466 U.S. at 687 (holding that when criminal defendants meet both requirements of the Strickland standard, they will not be bound by the deficient conduct of their attorneys).
attorney’s conduct is not sufficiently deficient, then the client will remain bound by the attorney’s actions.31

The Supreme Court has only used the performance-based model when a defendant is guaranteed the right to counsel under the Sixth Amendment of the United States Constitution.32 Because the Sixth Amendment only applies to criminal defendants,33 the Court has held that the right to counsel—and therefore the performance-based model—only applies in a very limited number of situations.34 Notably, this means that the Court has never, and will never, use the performance-based model to decide matters of attorney misconduct in civil cases.35

2. The Relationship-Based Model

On the other hand, the relationship-based model “examines the nature of the relationship between the lawyer and the client.”36 It is based on agency

31. Zupac, supra note 22, at 1337; see also Strickland, 466 U.S. at 687.

32. Zupac, supra note 22, at 1332; see also Murray v. Carrier, 477 U.S. 478, 488 (1986) (“So long as a defendant [who is guaranteed the right to counsel] is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland v. Washington, we discern no inequity in requiring him to bear the risk of attorney error.” (citation omitted)).

33. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” (emphasis added)).

34. A criminal defendant has a right to counsel in all felony cases and in his first appeal of right. See Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (“[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”); Douglas v. California, 372 U.S. 353, 357 (1963) (“But where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.”). However, a criminal defendant does not have a right to counsel in “appeals to the state’s highest court or in filing a petition for certiorari to the United States Supreme Court.” Zupac, supra note 22, at 1334; see also Ross v. Moffitt, 417 U.S. 600, 616–17 (1974) (“This Court’s review, much like that of the Supreme Court of North Carolina, is discretionary . . . .”). Furthermore, a criminal defendant can mount a “collateral attack” in a state trial court for postconviction relief and also petition for a writ of habeas corpus in the appropriate federal district court. Zupac, supra note 22, at 1334. In these situations, the criminal defendant is also not guaranteed a right to counsel under the Sixth Amendment. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (“We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions . . . .”).

35. See Zupac, supra note 22, at 1332. This has bearing on Rule 60(b)(6) because the Federal Rules of Civil Procedure only apply in civil lawsuits. FED. R. CIV. P. 60(b)(6). Accordingly, Rule 60(b)(6) will never implicate the performance-based model. See infra Part II.A.2 (describing how the relationship-based model will always govern in civil cases).

36. Zupac, supra note 22, at 1335.
law and premised on the fact that the attorney is the agent of the client. Therefore, under this model, clients traditionally remain bound by their attorney’s conduct regardless of the degree of the attorney’s negligence.

The relationship-based model was first articulated in *Link v. Wabash Railroad Co.*

Prior to the Court’s decisions in *Holland* and *Maples*, attorney abandonment was available to relieve clients from the conduct of their negligent attorneys under the relationship-based model in only some circuits. See infra Parts II.C.1, II.C.3, III. As such, before these two decisions, and depending on the court, clients were sometimes completely bound by their attorneys’ conduct in situations where the relationship-based model governed. See infra Part II.C.

37. *Id.* at 1137; see also Restatement (Third) of Agency § 1.01 (“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”).

38. Prior to the Court’s decisions in *Holland* and *Maples*, attorney abandonment was available to relieve clients from the conduct of their negligent attorneys under the relationship-based model in only some circuits. See infra Parts II.C.1, II.C.3, III. As such, before these two decisions, and depending on the court, clients were sometimes completely bound by their attorneys’ conduct in situations where the relationship-based model governed. See infra Part II.C.2.


40. See *id.* at 633–34. *Link* involved a collision between Link’s car and one of Wabash’s trains. *Id.* at 627. Six years after this collision, the district court scheduled a pretrial conference to take place on October 12. *Id.* At 10:45 a.m. on the day of the pretrial conference, Link’s attorney phoned Wabash’s attorney and told him that he would not be at the pretrial hearing because he was in Indianapolis “preparing papers to file with the (Indiana) Supreme Court.” *Id.* at 627–28. Link’s attorney did, however, notify both the opposing attorney and the court that he could be available the next day if the pretrial conference could be rescheduled. *Id.* at 628. After waiting for two hours, the district court dismissed the action because Link’s counsel failed to provide a reasonable basis for not appearing. *Id.* at 628–29. The United States Court of Appeals for the Seventh Circuit affirmed the dismissal. *Id.* at 629.

41. *Id.* at 633–34.

42. 501 U.S. 722 (1991). Roger Coleman was convicted of rape and capital murder in Buchanan County, Virginia, and he was sentenced to death. *Id.* at 726–27. The Virginia Supreme Court affirmed both the conviction and sentence, and the Supreme Court of the United States denied certiorari. *Id.* at 727. Thereafter, Coleman filed a collateral attack in Buchanan County Court alleging several habeas corpus claims. *Id.* After several days of review, the court ruled against
where it held that agency principles—and therefore the relationship-based model—apply in cases where the Sixth Amendment’s right to counsel does not arise. In so ruling, the Court noted that using a performance-based model in such situations “would be contrary to well-settled principles of agency law.” Consequently, the Coleman ruling, combined with the underlying reasoning in Link, established a relationship-based model for measuring attorney misconduct in all civil cases and in criminal appeals where the Sixth Amendment’s right to counsel does not apply.

The Link and Coleman decisions, however, have not been received without scrutiny. In fact, many circuit courts have tried to lessen the

Coleman on each claim. Id. Coleman filed a notice of appeal to the Virginia Supreme Court, but Coleman did so thirty-three days after the Buchanan County Court entered judgment. Id. The Virginia Supreme Court rules mandated that notices of appeal must be filed within thirty days of a judgment. Id. For that reason, the Virginia Supreme Court dismissed the appeal. Id. After filing another petition for a writ of habeas corpus in federal court, Coleman’s case eventually came before the United States Supreme Court, which established the rule described above in the accompanying text. Id. at 728–29, 753.

43. See supra notes 36–38 and accompanying text for a discussion of the principles of the relationship-based model.

44. Zupac, supra note 22, at 1342; see also Coleman, 501 U.S. at 753 (“Attorney ignorance or inadvertence is not ‘cause’ because the attorney is the petitioner’s agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must ‘bear the risk of attorney error.’” (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986))). Once again, Coleman involved a situation where the client did not have a right to counsel under the Sixth Amendment. See supra note 42. Accordingly, it can reasonably be inferred that the Coleman Court meant for the relationship-based model to apply only in cases where the Sixth Amendment’s right to counsel does not arise, especially because the Court explicitly mentioned Murray and its use of the performance-based model. See Coleman, 501 U.S. at 754 (“[A]s [Murray] explains, ‘if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State.’ In other words, it is not the gravity of the attorney’s error that matters, but that it constitutes a violation of petitioner’s right to [effective assistance of] counsel . . . .” (emphasis added) (citation omitted)).

45. Coleman, 501 U.S. at 754 (citing Restatement (Second) of Agency § 242 (1958)).

46. See supra text accompanying note 41.

47. A relationship-based model will therefore apply, for example, in collateral attacks and petitions for a writ of habeas corpus. See supra note 34.

48. In Link, Justice Black strongly dissented to the majority’s ruling because he believed it was too extreme and inflexible. See Link v. Wabash R.R. Co., 370 U.S. 626, 644–55 (1962) (Black, J., dissenting) (“One may readily accept the statement that there are circumstances under which a client is responsible for the acts or omissions of his attorney. But it stretches this generalized statement too far to say that he must always do that.”). Furthermore, Justice Blackmun authored a strong dissent against the majority opinion in Coleman, stating that “the Court’s determination that ineffective assistance of counsel cannot constitute cause of a procedural default in a state postconviction proceeding is patently unfair.” 501 U.S. at 774 (Blackmun, J., dissenting).
seemingly inflexible nature of the relationship-based model and the often-unjust effects it has on clients by resorting to the courts’ equitable powers.\textsuperscript{49} The weapon of choice employed by these courts is Federal Rule of Civil Procedure 60(b)(6).\textsuperscript{50}

B. Rule 60(b)(6) as a Potential Tool

Federal Rule of Civil Procedure 60(b) gives a court the power to “relieve a party or its legal representative from a final judgment, order, or proceeding.”\textsuperscript{51} Obviously, such a broad grant of power, if unchecked, could be a potential ground for abuse and could give judges too much discretion in the outcome of a case.\textsuperscript{52} Therefore, Rule 60(b) provides that relief from a judgment is only appropriate for one of six 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);\textsuperscript{53} (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.\textsuperscript{54}

While courts have the power to vacate judgments under Rule 60(b), they

\textsuperscript{49} Zupac, supra note 22, at 1362; see also infra Parts II.C.1, II.C.3.

\textsuperscript{50} Zupac, supra note 22, at 1362; see also infra Parts II.B–C.1, II.C.3.

\textsuperscript{51} F ED. R. CIV. P. 60(b).

\textsuperscript{52} See Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5th Cir. 1981) (“This is not to say that final judgments should be lightly reopened. The desirability of order and predictability in the judicial process calls for the exercise of caution in [Rule 60(b)] matters.” (citing Fackelman v. Bell, 564 F.2d 734, 736 (5th Cir. 1977))).

\textsuperscript{53} Federal Rule of Civil Procedure 59(b) states that “[a] motion for a new trial must be filed no later than 28 days after the entry of judgment.”

\textsuperscript{54} F ED. R. CIV. P. 60(b). In addition to proving one of these six categories, the moving party must file the motion for relief within a reasonable time. F ED. R. CIV. P. 60(c) (“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.”). For the purposes of this Article, however, a discussion of this time requirement is unnecessary.
are not mandated to do so. 55 Indeed, the rule itself was created so that courts could balance “the conflicting principles that litigation must be brought to an end and that justice should be done.” 56 That being the case, courts generally apply Rule 60(b) liberally when it involves a case that has not been heard on its merits or when the movant has a meritorious defense. 57

But a much stricter standard applies when the sixth clause of Rule 60(b) is at issue. 58 A type of “catchall” provision, 59 Rule 60(b)(6) gives a court the power to vacate a judgment “whenever that action is appropriate to accomplish justice.” 60 It was added as part of the 1948 amendments to the Federal Rules of Civil Procedure, 61 and it has been described as “an unprecedented addition to the Rules” because of its broad reach. 62 This broad reach, however, is counteracted by a stringent standard for use entitled the “extraordinary circumstances” test. 63 Essentially, the test requires that if relief would have initially been available under one of the first five clauses of Rule 60(b), then Rule 60(b)(6) cannot be used unless the movant can show that extraordinary circumstances are present. 64

55. See FED. R. CIV. P. 60(b) (“On motion and just terms, the court may relieve a party or its legal representative . . . .” (emphasis added)). Therefore, situations arise where it would be inequitable to either grant or deny relief. See, e.g., W. Union Tel. Co. v. Dismang, 106 F.2d 362, 364 (10th Cir. 1939) (“An application to open, vacate, or set aside a judgment is within the sound legal discretion of the trial court and its action will not be disturbed by an appellate court except for a clear abuse of discretion. It is an abuse of discretion, however, to open or vacate a judgment where the moving party shows no legal ground therefor or offers no excuse for his own negligence or default.”); Hopkins v. Coen, 431 F.2d 1055, 1059 (6th Cir. 1970) (“Where verdicts in the same case are inconsistent on their faces, indicating that the jury was either in a state of confusion or abused its power, a motion to alter or amend a judgment, for new trial, or for relief from the judgment, if timely made, is not discretionary.”).

56. 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2851 (3d ed. 2014).
57. Id. § 2857.
58. See infra notes 63–64 and accompanying text.
59. WRIGHT, supra note 56, § 2857.
60. Id. § 2864.
61. Id.
63. WRIGHT, supra note 56, § 2864.
64. Id. To be even more precise, the Supreme Court’s jurisprudence in this area is much more nuanced than the “extraordinary circumstances” test suggests. See id. First, the “extraordinary circumstances” test generally only applies when relief is sought a year after a judgment has been entered. Id. This is due to the fact that it is generally not difficult to apply Rule 60(b) when relief is sought within a year because “it is not important to decide whether the motion in fact comes under clause (6) or under one of the earlier clauses.” Id. However, because the time requirement of Rule
What constitutes “extraordinary circumstances” has been a source of disagreement among the courts. It is a fairly unclear standard that has been found to apply in only several situations. One of the biggest examples of such a disagreement to emerge among the courts is whether attorney misconduct can qualify as an extraordinary circumstance justifying relief under Rule 60(b)(6). On one hand, Rule 60(b)(6) would seem to be an ideal tool for such a situation because it would relieve helpless clients from judgments that resulted from the incompetent acts of their attorneys. On the other hand, the relationship-based model established by the Supreme Court uses: it also employs the “other reasons” test. See id. The “other reasons” test, unlike the “extraordinary circumstances” test, states that “if the movant clearly demonstrates some ‘other reason’ justifying relief outside of the earlier [five] clauses in the rule, then the ‘extraordinary circumstances’ test is not invoked.” Id. In other words, the “extraordinary circumstances” test arises when one of the earlier five clauses of Rule 60(b) is invoked, but the “other reasons” test applies when one of the earlier five clauses is not invoked. See id. In reality, however, the difference between these two tests is likely a legal fiction: the “other reasons” that courts have found to satisfy the “other reasons” test “are more likely egregious forms of conduct covered under another clause of Rule 60(b).” Id. That is, these “other reasons” are simply the most extraordinary of the extraordinary circumstances. See id. For example—and highly relevant to this Article—one of these “other reasons” that courts have found is attorney abandonment. Id. A regular attorney blunder would generally “fit readily within the grounds of mistake, inadvertence, and excusable neglect set out in clause (1)” of Rule 60(b). Id. However, when attorney misconduct becomes so egregious so as to constitute abandonment, some courts have held that Rule 60(b)(6) is a ground for relief. See infra Parts II.C.1, II.C.3. Viewed from this perspective, attorney abandonment is simply an extension of a mistake under Rule 60(b)(1) that evolved into an extraordinary circumstance warranting relief under Rule 60(b)(6). See WRIGHT, supra note 56, § 2864. Therefore, for the sake of simplicity and consistency, this Article assumes that only the “extraordinary circumstances” test governs because, in reality, it is essentially the same as the “other reasons” test. See id.

60 is outside the scope of this Article, see supra note 54, this Article will assume for the purposes of simplicity that any ground for relief under Rule 60(b), regardless of whether or not it was brought within a year, invokes the extraordinary circumstances test. For a more detailed discussion of the time requirements of Rule 60(b)(6), see WRIGHT, supra note 56, § 2864.

Second, the “extraordinary circumstances” test is not the only test that the Supreme Court uses: it also employs the “other reasons” test. See id. The “other reasons” test, unlike the “extraordinary circumstances” test, states that “if the movant clearly demonstrates some ‘other reason’ justifying relief outside of the earlier [five] clauses in the rule, then the ‘extraordinary circumstances’ test is not invoked.” Id. In other words, the “extraordinary circumstances” test arises when one of the earlier five clauses of Rule 60(b) is invoked, but the “other reasons” test applies when one of the earlier five clauses is not invoked. See id. In reality, however, the difference between these two tests is likely a legal fiction: the “other reasons” that courts have found to satisfy the “other reasons” test “are more likely egregious forms of conduct covered under another clause of Rule 60(b).” Id. That is, these “other reasons” are simply the most extraordinary of the extraordinary circumstances. See id. For example—and highly relevant to this Article—one of these “other reasons” that courts have found is attorney abandonment. Id. A regular attorney blunder would generally “fit readily within the grounds of mistake, inadvertence, and excusable neglect set out in clause (1)” of Rule 60(b). Id. However, when attorney misconduct becomes so egregious so as to constitute abandonment, some courts have held that Rule 60(b)(6) is a ground for relief. See infra Parts II.C.1, II.C.3. Viewed from this perspective, attorney abandonment is simply an extension of a mistake under Rule 60(b)(1) that evolved into an extraordinary circumstance warranting relief under Rule 60(b)(6). See WRIGHT, supra note 56, § 2864. Therefore, for the sake of simplicity and consistency, this Article assumes that only the “extraordinary circumstances” test governs because, in reality, it is essentially the same as the “other reasons” test. See id.

65. See WRIGHT, supra note 56, § 2851 (noting that cases decided under Rule 60(b)(6) have been in conflict and inconsistent). Even more frustrating is that courts have muddled the jurisprudence of the first five clauses under Rule 60(b) with the jurisprudence that should have been restricted to clause Rule 60(b)(6) alone. Id. § 2857. As a result, the entire case law surrounding Rule 60(b) is a rather confusing area for courts. See id.

66. These situations include, for example, “cases in which there was inaction by the government and unusual delays by the courts, and when there is a strong public interest in the case and the conduct of the parties is egregious.” Id. § 2864; see also, e.g., Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 864 (1988); Menier v. United States, 405 F.2d 245, 248 (5th Cir. 1968); Bros, Inc. v. W.E. Grace Mfg. Co., 320 F.2d 594, 609–10 (5th Cir. 1963).

67. See infra Part II.C.

68. See FED. R. CIV. P. 60(b)(6).
Court in Link and Coleman would seem to stand, at least at first glance, as a firm roadblock to such relief. As a result, the circuit courts have developed four distinct approaches to tackle this problem.

C. The Circuit Split over Rule 60(b)(6) as a Remedy for Attorney Misconduct

1. The Gross Negligence Circuits

Some circuit courts have held that gross attorney negligence satisfies Rule 60(b)(6). The reasoning of these courts is that in situations where the first five clauses of Rule 60(b) should apply but cannot, extreme misconduct by an attorney that exceeds ordinary negligence and goes so far as to qualify as “gross negligence” is sufficiently “extraordinary” to qualify for relief under clause (6). Notably, attorney abandonment is not a

69. See supra Part II.A.2.
70. See infra Part II.C.
71. See, e.g., Cmty. Dental Servs. v. Tani, 282 F.3d 1164, 1170 (9th Cir. 2002); Boughner v. Sec’y of Health, Educ., & Welfare, 572 F.2d 976, 978 (3rd Cir. 1978) (“We reverse, however, on the basis that the motion to vacate should have been granted under Rule 60(b)(6). The conduct of [the lawyer] indicates neglect so gross that it is inexcusable.” (emphasis added)); Jackson v. Wash. Monthly Co., 569 F.2d 119, 122 (D.C. Cir. 1977) (holding that relief under Rule 60(b)(6) is appropriate when an attorney acts “grossly rather than just mildly negligent toward his client”). It is also likely that the Sixth Circuit follows this standard even though it does not explicitly use the term “gross negligence.” See Fuller v. Quire, 916 F.2d 358, 359, 361 (6th Cir. 1990) (holding that the trial court did not abuse its discretion in granting relief for plaintiff under Rule 60(b)(6) for the “inexcusable misconduct of his attorney” when the lawyer did not appear on behalf of the client at hearings and would not respond to the client’s inquiries). The Fourth Circuit, meanwhile, has never explicitly vacated a judgment under Rule 60(b)(6) based on alleged attorney misconduct, but it has suggested that it would likely follow the gross negligence standard if it did. See Smith v. Bounds, 813 F.2d 1299, 1304–05 (4th Cir. 1987) (holding that an attorney’s neglect was so deplorable that it would likely warrant relief under Rule 60(b)(6), but denying relief on different grounds).
72. This would mainly be in a situation where the one-year statute of limitations under Rule 60(c) had run in full and a client could no longer seek relief under Rule 60(b)(1) for her attorney’s misconduct. See supra note 54. However, as previously stated, the time requirement is outside the scope of this Article, so it will be taken for granted that the first step of the “extraordinary circumstances” test is satisfied. See supra note 64.
73. Gross negligence arises when “the element of culpability which characterizes all negligence is magnified to a high degree as compared with that present in ordinary negligence.” 57A AM. JUR. 2d Negligence § 227 (2014).
74. WRIGHT, supra note 56, § 2864; see also infra notes 78–88 and accompanying text.
requirement per se in these circuits.75 While verdicts granting relief under Rule 60(b)(6) in these courts can and often do involve attorney abandonment, these courts can also theoretically grant relief under Rule 60(b)(6) where the attorney acted grossly negligent but did not abandon his client.76 In this regard, these circuit courts have the most flexible approach to the interaction between attorney misconduct and Rule 60(b)(6).77

In Community Dental Services v. Tani,78 for instance, the Ninth Circuit joined the majority of the other circuits and held that an attorney’s gross negligence is an extraordinary circumstance that is a ground for equitable relief under Rule 60(b)(6).79 Tani involved a lawsuit for trademark infringement by Community Dental Services (CDS) against Stuart Tani.80 Tani’s counsel repeatedly failed to give a copy of Tani’s answer to the complaint to CDS, missed court-ordered conference calls, and failed to file a written memorandum in opposition to CDS’s motion for a default judgment.81 As a result of this non-responsiveness, the trial court granted a default judgment against Tani.82 Tani subsequently sought out a new lawyer

75. See, e.g., Tani, 282 F.3d at 1169 (holding that a client need only “demonstrate[] gross negligence on the part of his counsel” to qualify for relief under Rule 60(b)(6)). To be sure, the court made no mention that a party must prove attorney abandonment in any form, see id., even though in this particular case the court decided that the attorney “virtually abandoned” his client. Id. at 1170; see also infra notes 78–90 and accompanying text.

76. See, e.g., Jackson, 569 F.2d at 122. In Jackson, the court held that the fact that the attorney “misled the client by reassuring him that the litigation was continuing smoothly when in fact it was suffering severely from lack of attention” was a factor that supported granting relief under Rule 60(b)(6). Id. The court never characterized this conduct as any type of “abandonment,” but it still found that the lawyer acted in a grossly negligent manner that demanded relief. Id. at 122–23.

However, this distinction between gross negligence and attorney abandonment is likely only a legal fiction because, in reality, any type of gross attorney negligence that justifies relief under Rule 60(b)(6) can also be characterized as attorney abandonment. Compare id., with Tani, 282 F.3d at 1170–71 (holding that an attorney “virtually abandoned” his client when the lawyer told the client that the case was proceeding properly when, in reality, it was proceeding abysmally). The implications of these holdings in light of Holland and Maples are discussed in further detail in Part VI.A.

77. See infra Part II.C.2–3 for a discussion of stricter approaches.

78. This case was chosen because of its clear and detailed reasoning of the court’s decision to allow Rule 60(b)(6) as grounds for relief for egregious attorney misconduct. See infra notes 85–90 and accompanying text. Cases from other circuits have held similarly and are also insightful. See supra note 71.

79. 282 F.3d at 1169.

80. Id. at 1166.

81. Id. at 1167.

82. Id.
and brought a new lawsuit seeking relief from the default judgment. The district court denied relief, reasoning that “the acts and omissions of counsel . . . were chargeable to Tani.”

In reversing the decision of the trial court, the Ninth Circuit noted that “judgment by default is an extreme measure” and that cases should be decided on the merits whenever possible. More importantly, the court explicitly referenced Link and held that it “does not serve as a barrier to establishing the rule that gross negligence by a party’s counsel may constitute ‘extraordinary circumstances’ under Rule 60(b)(6).” According to the court, this was because “the [Link] Court expressly declined to state whether it would have held that the district court abused its discretion if the issue had arisen in the context of a motion under Rule 60(b).” The Tani court thus took advantage of the Supreme Court’s indecision regarding equitable relief and explicitly held that Rule 60(b)(6) can be used by a client for relief from her attorney’s conduct so long as that conduct was grossly negligent. Applying this new rule to the case at hand, the court noted that the attorney’s gross negligence was so extreme that he “virtually abandoned” Tani. The Ninth Circuit, therefore, held that the default judgment should be vacated.

2. The No Relief Circuits

The Seventh Circuit, on the other hand, has held that Rule 60(b)(6) is not an appropriate basis for relief from attorney misconduct no matter how egregiously the attorney has acted. The logic behind this is that even if an
attorney’s performance is abysmal, the relationship-based model outlined in *Link* and *Coleman* bars any consideration of Rule 60(b)(6) as an avenue to relief.92

The first time the Seventh Circuit explicitly expressed this view was in *United States v. 7108 West Grand Avenue*.93 In this case, the Federal Government began forfeiture proceedings against three parcels of property belonging to a husband and wife.94 The attorney retained by the couple failed to file timely claims on behalf of the husband for any of the three properties and only filed a timely claim on behalf of the wife for one of the properties.95 The situation worsened when the trial court granted a motion for default judgment against the couple after neither the lawyer nor the wife appeared at the hearing for the motion.96 Accordingly, the couple, with the help of new counsel, attempted to seek relief from the default judgment by utilizing Rule 60(b) and claiming that their previous attorney had acted in a grossly negligent manner.97

The Seventh Circuit affirmed the trial court’s decision not to allow the

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92. See, e.g., *7180 W. Grand Ave.*, 15 F.3d at 634 (citing *Link*, 370 U.S. at 633–34) (“The clients are principals, the attorney is an agent, and under the law of agency the principal is bound by his chosen agent’s deeds. So much is clear for an attorney’s wilful misconduct.”).

93. Id. at 635. However, even before this case was decided, the Seventh Circuit had many suspicions about using Rule 60(b)(6) to grant relief for attorney misconduct. See, e.g., *Nelson v. City Colls. of Chi.*, 962 F.2d 754, 756 (7th Cir. 1992) (“We do not definitively address whether a diligent client would be entitled to relief under Rule 60(b) for the gross negligence of his counsel . . . . Nevertheless, we continue to cast serious doubt on the theory that an attorney’s gross negligence warrants relief under Rule 60(b).”); *United States v. Di Mucci*, 879 F.2d 1488, 1496 (7th Cir. 1989) (“It seems clear to us that the law in this circuit is that an attorney’s conduct must be imputed to his client in any context.”).

94. *7108 W. Grand Ave.*, 15 F.3d at 633.

95. Id.

96. Id.

97. Id.
use of Rule 60(b) to provide relief for the attorney’s gross misconduct.98 In so deciding, the court, citing Link, noted that both simple negligence and intentional acts of an attorney are imputed to a client based on agency principles;” therefore, attempting to use Rule 60(b) to draw a line between simple negligence and gross negligence was unnecessary because “the answer [would] not make any difference.”100 The result of this decision was that the Seventh Circuit effectively precluded gross attorney negligence from being considered as an extraordinary circumstance justifying relief under Rule 60(b)(6).101

In Bakery Machinery & Fabrication, Inc. v. Traditional Baking, Inc.,102 the Seventh Circuit reaffirmed its holding from 7108 West Grand Avenue and extended it past gross negligence to include situations of intentional attorney deception.103 The case involved an attorney representing Bakery Machinery & Fabrication, Inc. (BMF) who repeatedly told BMF for nine months that things were “going well” in an ongoing lawsuit with Traditional Baking, Inc. (TBI).104 In reality, things were not going well: the attorney failed to make appearances at hearings, repeatedly neglected to respond to court filings and motions presented to BMF by TBI, and refused to comply with court orders in the lawsuit.105 The district court entered a default judgment against BMF, which moved to vacate the judgment under Rule 60(b)(6) once it discovered the attorney’s deception.106

In upholding the district court’s denial of the motion to vacate,107 the Seventh Circuit held that the ruling in 7108 West Grand Avenue that

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98. Id. at 634–35.
99. Id. at 634.
100. Id. at 635. The court further expressed a policy concern that using Rule 60(b) to shield clients from the conduct of their attorneys “would create a land office business in gross negligence.” Id. at 634. In other words, the court feared that using Rule 60(b) in attorney-misconduct cases would create an incentive for attorneys to act negligently. See id. (quoting Tolliver v. Northrop Corp., 786 F.2d 316, 319 (7th Cir. 1986)) (“If the lawyer’s neglect protected the client from ill consequences, neglect would become all too common. It would be a free good—the neglect would protect the client, and because the client could not suffer the lawyer would not suffer either.” (internal quotation marks omitted)).
101. Id. at 635.
102. 570 F.3d 845 (7th Cir. 2009).
103. Id. at 848.
104. Id. at 847.
105. Id. at 846–47.
106. Id. at 847.
107. Id.
mistakes of an attorney are imputed to the client goes so far as to apply to situations in which the attorney intentionally deceived the client.\textsuperscript{108} Indeed, the court stated that “all of the attorney’s misconduct (except in the cases where the act is outside the scope of employment or in cases of excusable neglect) becomes the problem of the client.”\textsuperscript{109} While the court recognized BMF’s dire position,\textsuperscript{110} the court also viewed the fact that “BMF voluntarily chose [the attorney]” as dispositive.\textsuperscript{111}

3. The Strict Abandonment Circuits

Several circuit courts have adopted an intermediate approach that requires a stricter standard than gross negligence but does not preclude relief entirely like the Seventh Circuit mandates.\textsuperscript{112} Specifically, these circuits require attorney abandonment in order to find a basis for relief under Rule 60(b)(6).\textsuperscript{113} The result is that decisions in these courts are often the same as those in the “gross negligence” courts, but the reasoning that is used to get to those decisions is different.\textsuperscript{114}

For example, consider the Second Circuit’s decision in \textit{United States v. Cirami}, in which the United States brought an action against a couple for collection of unpaid taxes.\textsuperscript{115} While the couple’s attorney filed a very brief answer to the Government’s initial complaint, he failed to show up at the hearing on the Government’s motion for summary judgment.\textsuperscript{116} The

\textsuperscript{108} Id. at 848.

\textsuperscript{109} Id. As will be seen, the Seventh Circuit’s reasoning, as evidenced by this quote in particular, left a small but clear opening for attorney abandonment to take root as an exception to the general rule that clients are bound by the acts of their attorneys. \textit{See infra} Part VI.B.

\textsuperscript{110} Specifically, the court noted that BMF could not seek an alternative redress by directly suing the attorney because the attorney lacked malpractice insurance. \textit{Bakery Mach.}, 570 F.3d at 849.

\textsuperscript{111} Id.

\textsuperscript{112} \textit{See, e.g.}, \textit{Heim v. Comm’r of Internal Revenue}, 872 F.2d 245, 248–49 (8th Cir. 1989) (holding that the gross negligence of an attorney does not satisfy Rule 60(b)(6) but “leaving his clients unrepresented” would); \textit{Primbs v. United States}, 4 Cl. Ct. 366, 370 (1984) (“The usual understanding of the attorney-client agency relationship, however, should not bar relief under Rule 60(b) when the evidence is clear that the attorney and his client were not acting as one.” (emphasis added)); \textit{United States v. Cirami}, 563 F.2d 26, 34 (2d Cir. 1977).

\textsuperscript{113} \textit{See cases cited supra} note 112; \textit{see also infra} notes 120–25 and accompanying text. Compare this with the “gross negligence” courts, which do not require a client to prove attorney abandonment. \textit{See supra} notes 75–76 and accompanying text.

\textsuperscript{114} \textit{See supra} note 76 and accompanying text.

\textsuperscript{115} \textit{Cirami}, 563 F.2d at 29.

\textsuperscript{116} Id.
Government’s motion was thereby granted, and the couple, with the help of new counsel, brought a Rule 60(b)(6) motion to vacate the judgment. Upon review, the district court determined that the previous attorney had been suffering from a mental disorder that affected his representation of the couple and that the couple had unsuccessfully attempted to contact him several times about the status of the motion for summary judgment. Even with these facts, the trial court refused to grant the Rule 60(b)(6) motion.

The Second Circuit reversed the decision of the trial court and held that Rule 60(b)(6) relief was appropriate. In so doing, it noted the “unique fact of what we may term the ‘constructive disappearance’ of [the couple’s] attorney” because his mental disorder “led him to neglect almost completely his clients’ business.” The court stated that it was this constructive disappearance that set the couple’s situation apart from the general rule established in Link. The court explained that the couple’s “allegations set up an extraordinary situation which cannot fairly or logically be classified as mere neglect.” Notably, the court never mentioned “gross negligence” in any context in explaining its decision. Instead, it focused on attorney abandonment—a concept that it labeled “constructive disappearance”—as the necessary standard that a party must prove to exempt itself from the acts of its attorney.

4. The Unclear Circuits

Finally, the Fifth, Tenth, Eleventh, and Federal Circuits have never ruled on attorney misconduct and its interplay with Rule 60(b)(6), and it is unclear what standard they would follow if they were ever to do so. For

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117.  Id.
118.  Id. at 31.
119.  Id.
120.  Id. at 33.
121.  Id. at 34.
122.  Id. at 35 (quoting Klapprott v. United States, 335 U.S. 601, 613 (1940)) (internal quotation mark omitted).
123.  See id. at 33–35 (omitting any discussion of gross negligence).
124.  See, e.g., Adams v. Thaler, 679 F.3d 312, 320 (5th Cir. 2012) (ignoring the question of whether attorney misconduct satisfied Rule 60(b)(6) because the governing question was whether a “change in decisional law” from the time of conviction to the time of appeal constituted an
instance, consider the case of Solaroll Shade & Shutter Corp., Inc. v. Bio-
Energy Systems, Inc., in which Solaroll Shade and Shutter Corporation, Inc. (Solaroll) brought a trademark infringement action against Bio-Energy Systems (BES). The case settled, but several years later Solaroll filed a motion to reinstate the action on the grounds that BES was not complying with the settlement agreement. BES, however, never responded to this motion or appeared at the hearing on the motion, and the court therefore granted the motion in default. With the help of new counsel, BES sought to vacate the default judgment under Rule 60(b)(6) by alleging attorney misconduct. The district court denied the motion to vacate.

On appeal, the Eleventh Circuit affirmed the district court’s ruling and held that even though some courts had vacated judgments under Rule 60(b)(6) based on gross attorney negligence, the attorney’s conduct in the case at hand had not risen to that level. Therefore, the court did not decide whether Rule 60(b)(6) could be used for attorney error because the result would not matter. The court did not even indicate what standard it might apply if Rule 60(b)(6) could be used.

III. ACKNOWLEDGING ATTORNEY ABANDONMENT: HOW THE SUPREME COURT LAID THE GROUNDWORK THAT WILL SOLVE THE CIRCUIT SPLIT

While the Supreme Court has not directly ruled on whether attorney misconduct can satisfy Rule 60(b)(6), it has ruled on attorney misconduct and its effect on clients in the criminal context. In two recent decisions, extraordinary circumstance); Solaroll Shade & Shutter Corp., Inc. v. Bio-Energy Sys., Inc., 803 F.2d 1130, 1133 (11th Cir. 1986); Thunder Mountain Custom Cycles, Inc. v. Thiessen Prods., Inc., No. 06-cv-02527-PAB-BNB, 2008 WL 5412463, at *4 (D. Colo. Dec. 24, 2008) (“[T]he Tenth Circuit has not spoken on the issue of Rule 60(b)(6) relief for gross and inexcusable neglect by a party’s attorney . . . .”). It seems that the Federal Circuit never even addressed the concepts prior to Holland and Maples.

127. Solaroll Shade, 803 F.2d at 1131.
128. Id.
129. Id.
130. Id.
131. Id.
132. Id. at 1133.
133. See id.
134. See id. (omitting any discussion of what standard the court would likely apply if Rule 60(b)(6) could be used for attorney misconduct).
Holland v. Florida and Maples v. Thomas, the Court acknowledged and established a concept known as “attorney abandonment” for habeas corpus petitioners. Essentially, this doctrine mandates that a client who was effectively abandoned by her attorney should not be held responsible for the attorney’s actions. As will be seen, the rulings in these two Supreme Court cases effectively eliminate the circuit split over attorney misconduct and its application to Rule 60(b)(6).

A. Holland v. Florida

Holland v. Florida involved a man named Albert Holland who was convicted of first-degree murder in 1997. After the Supreme Court denied Holland’s petition for certiorari, Holland had exactly one year to file for postconviction relief in either state or federal court. To facilitate this process, Florida appointed counsel to represent Holland in these postconviction proceedings. With only twelve days remaining in the one-year statute of limitations, the state-appointed counsel filed a motion for postconviction relief in state court. This motion remained pending in state court for three years. During this time, Holland wrote his attorney letters indicating his desire that the attorney preserve any and all claims he might have for subsequent federal habeas corpus review and to update him on any proceedings in his case. Over this three-year period, however, the attorney responded to Holland’s requests only three times and did so only in writing. Holland, frustrated with this sparse communication, twice

136. See infra Part III.A–B.
138. See infra Parts IV–VI.
139. Holland, 560 U.S. at 635.
142. Id. at 636. This meant that if Holland’s claim for postconviction relief was unsuccessful in state court, he would have only twelve days left to file a claim for postconviction relief in federal court. See id. at 638. In other words, the one-year statute of limitations period does not “restart” upon denial of relief in state court. See id.
143. Id. This included proceedings at both the Florida trial court level and at the Florida Supreme Court. Id. at 636–38.
144. Id. at 636.
145. Id.
petitioned the Florida Supreme Court pro se to remove the attorney from his case and to appoint new counsel. In response, the Florida Supreme Court told Holland that he “could not file any pro se papers with the court while he was represented by counsel, including papers seeking new counsel.”

Once the Florida Supreme Court denied Holland any postconviction relief, his counsel had only twelve days to file a habeas corpus petition in federal court. Not surprisingly, his counsel failed to file the proper paperwork within this time period. Holland was unaware that a final decision had been rendered in his case until five weeks after the statute of limitations had expired; nevertheless, he submitted his federal habeas petition pro se as soon as he became informed of the Florida Supreme Court’s final decision. The federal district court denied this petition on the grounds that it had not been filed within the proper statute of limitations period. The Eleventh Circuit affirmed the district court’s denial.

The Supreme Court held that federal habeas corpus petitions could be equitably tolled to overcome the one-year statute of limitations and that Holland’s habeas petition may have been timely if there were extraordinary circumstances that justified equitable tolling. In so deciding, the Court

146. Id. at 637.
147. Id.
148. Id. at 638; see also supra note 142 and accompanying text.
150. Id. at 639.
151. Id. at 643–44.
152. Id. at 644.
153. Id. at 649. Equitable tolling “allows a plaintiff to initiate an action beyond the statute of limitations deadline” if doing so is necessary to accomplish justice based on the specific circumstances of the case. 51 A M. JUR. 2D Limitation of Actions § 153 (2013). Generally, a habeas petitioner seeking equitable tolling must establish that he has been diligently pursuing his rights and that some extraordinary circumstance made it impossible for him to enforce them. 39 A M. JUR. 2D Habeas Corpus § 121 (2013). It should be noted that equitable tolling is not a pertinent issue to this Article overall. See supra Part I. Nonetheless, because the Supreme Court began to mold its concept of attorney abandonment in the framework of a case mainly concerned with equitable tolling, it is of importance in the specific context of Holland v. Florida. See Holland, 560 U.S. at 654–60 (Alito, J., concurring) (discussing the interaction between attorney abandonment and equitable tolling); see also infra notes 158–65 and accompanying text.

Furthermore, the Supreme Court declined to “state [its] conclusion in absolute form” because it recognized that it is a court of review and not a court of first impression. Holland, 560 U.S. at 653 (emphasis added). Indeed, the majority wrote:

Because the District Court erroneously relied on a lack of diligence, and because the Court of Appeals erroneously relied on an overly rigid per se approach, no lower court has yet considered in detail the facts of this case to determine whether they indeed
held that “professional misconduct . . . could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling”154 and that it could not “read Coleman as requiring a per se approach in this context.”155 With this in mind, the Court observed that Holland’s attorney failed to file a federal habeas petition despite Holland’s letters insisting that he do so, failed to research the proper filing date of the petition, failed to inform Holland about the ongoing proceedings in his case, and failed to communicate with Holland.156 Viewing these facts as a whole, the Court held that the conduct of Holland’s attorney might have been an extraordinary circumstance that properly excused Holland from meeting the one-year statute of limitations.157

More important, however, was Justice Alito’s concurring opinion.158 Noting that the majority had not established a criterion for determining what constitutes extraordinary circumstances,159 Justice Alito began to outline a rough standard of attorney abandonment that the Supreme Court eventually adopted in *Maples v. Thomas*.160 In so doing, Justice Alito noted that attorney neglect, whether ordinary or gross, “is not an extraordinary circumstance warranting equitable tolling.”161 Instead, he distinguished

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constitute extraordinary circumstances sufficient to warrant equitable relief . . . . Thus, because we conclude that the District Court’s determination must be set aside, we leave it to the Court of Appeals to determine whether the facts in this record entitle Holland to equitable tolling, or whether further proceedings, including an evidentiary hearing, might indicate that respondent should prevail.

*Id.* at 653–54. Put differently, while the Supreme Court definitively held that AEDPA’s one-year statute of limitations, see *supra* note 140, is subject to equitable tolling, it declined to state whether the particular facts of the case satisfied the elements of equitable tolling. *See 39 AM. JUR. 2D, supra at § 121 (describing how a habeas petitioner establishes equitable tolling).*

155. *Id.*
156. *Id.* at 652.
157. *Id.* at 652–54.
158. *See infra* Part III.B for a discussion of the majority opinion in *Maples*, which adopts Justice Alito’s reasoning from his concurring opinion in *Holland*.
159. *Holland*, 560 U.S. at 654 (Alito, J. concurring); *see also supra* note 154 and accompanying text.
160. *Holland*, 560 U.S. at 559–60 (Alito, J., concurring); *see also infra* Part III.B.
161. *Holland*, 560 U.S. at 655 (Alito, J. concurring). Justice Alito noted that making a boundary distinguishing between ordinary and gross negligence would establish “a basis for arguing that tolling is appropriate in almost every counseled case involving a missed deadline.” *Id.* at 658. He predicted that this would not only burden the federal district courts but would also make the availability of tolling reliant upon “the highly artificial distinction between gross and ordinary negligence.” *Id.*
gross negligence from attorney abandonment and found that the difference was paramount.  

He reasoned that while “attorney negligence, however styled, does not provide a basis for equitable tolling . . . attorney misconduct that is not constructively attributable to the petitioner” is an extraordinary circumstance that justifies equitable tolling. “Common sense,” he argued, “dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.” Finding that Holland’s attorney abandoned him, Justice Alito agreed with the majority’s conclusion that Holland’s one-year habeas corpus deadline could be equitably tolled.

B. Maples v. Thomas

The Supreme Court returned to a similar issue in Maples v. Thomas, wherein the Court explicitly adopted Justice Alito’s concurrence from Holland outlining attorney abandonment as the new governing standard. Cory R. Maples was a death-row inmate in Alabama who was represented in his postconviction proceedings by two attorneys who worked at the same law firm and were serving pro bono. During the pendency of these proceedings in Alabama state court, both of the attorneys left their firm, thereby ending their representation of Maples. Neither attorney told Maples or the Alabama trial court that they would no longer be representing him, nor did they appoint substitute counsel to take over his representation. Consequently, when the Alabama trial court denied Maples’ petition for postconviction relief and mailed copies of the order to the law firm, the orders were returned to the clerk of the Alabama court unopened. This resulted in Maples missing the deadline to appeal the

162. Id. at 658–59.
163. Id. at 659 (emphasis added).
164. Id.
165. Id. Justice Scalia and Justice Thomas dissented to the majority ruling on the grounds that a close reading of AEDPA precludes any concept of equitable tolling and that Holland would not qualify for it even if it were not precluded. Id. at 660–73 (Scalia, J., dissenting).
167. See infra notes 175–80 and accompanying text.
169. Id. at 919.
170. Id.
171. Id. at 919–20.
Alabama trial court’s ruling through no fault of his own.\textsuperscript{172} Thereafter, Maples petitioned for a writ of habeas corpus in federal court.\textsuperscript{173} Both the district court and the Eleventh Circuit denied his petition on the grounds that Maples’ failure to appeal the trial court’s order meant that he had not exhausted his procedural remedies in Alabama state court.\textsuperscript{174}

The Supreme Court reversed both the district court’s and Eleventh Circuit’s rulings and held that Maples should not be bound by his procedural default in the Alabama state court.\textsuperscript{175} The Court, citing Justice Alito’s concurrence in \textit{Holland}, reasoned that “under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him”\textsuperscript{176} and that an attorney who has abandoned his client has “severed the principal-agent relationship.”\textsuperscript{177} The Court, though, was still careful to note that the general rule established in \textit{Coleman} that clients were bound by the acts of their attorneys still governed.\textsuperscript{178} Thus, the Court, once again citing Justice Alito’s concurrence in \textit{Holland}, recognized that there is an “essential difference between a claim of attorney error, however egregious, and a claim that an attorney had essentially abandoned his client.”\textsuperscript{179} Applying this newly-formed standard to Maples’ situation, the Court concluded that Maples was effectively abandoned by the two attorneys because they did not tell Maples they would no longer be representing him, they did not seek permission to withdraw from representation, and they did not appoint substitute counsel to take their place as representatives of Maples.\textsuperscript{180}

\textbf{IV. ATTORNEY ABANDONMENT IN THE CIVIL CONTEXT}

The combined \textit{Holland} and \textit{Maples} decisions, therefore, definitively established an exception for attorney abandonment in the factual contexts of

\begin{itemize}
\item \textsuperscript{172} \textit{Id.} at 920.
\item \textsuperscript{173} \textit{Id.} at 921.
\item \textsuperscript{174} \textit{Id.}.
\item \textsuperscript{175} \textit{Id.} at 927–28.
\item \textsuperscript{176} \textit{Id.} at 924.
\item \textsuperscript{177} \textit{Id.} at 922–23.
\item \textsuperscript{178} \textit{Id.} at 922.
\item \textsuperscript{179} \textit{Id.} at 923. This is referring to the difference between gross attorney negligence and attorney abandonment. \textit{See id.}
\item \textsuperscript{180} \textit{Id.} at 924–26.
\end{itemize}
postconviction proceedings for two criminal defendants. At first glance, this may seem like the Court only meant for attorney abandonment to apply in the criminal context. This is incorrect: The Supreme Court likely intended and expected the attorney abandonment doctrine to spread to the civil realm. This is true for two principal reasons. 

First, and most apparently, the Court never specifically limited its holdings to the criminal context. In fact, the Court did not reference “defendants” or “criminals” being abandoned by their attorneys, but instead repeatedly referenced “clients,” “petitioners,” and “litigants.” None of these terms are confined to parties in criminal proceedings. One would think that if the Court had wanted to limit the concept of attorney abandonment to criminal defendants, it would have been much more explicit in doing so.

181. See supra notes 139–80 and accompanying text.
182. Put differently, some people might initially think the Court intended this to be a very narrow holding.
183. See infra notes 185–98. While the Supreme Court probably meant for attorney abandonment to be available in civil cases, it did not necessarily mean for Rule 60(b)(6) to be universally available as a remedy for attorney abandonment. This is a distinct difference: civil cases could plausibly implicate attorney abandonment without implicating Rule 60(b)(6). However, the consequence of the availability of attorney abandonment in the civil arena is that Rule 60(b)(6) is always available as a remedy. This argument is taken up in more detail in Parts V–VI.
184. See infra notes 185–98.
186. See, e.g., Maples, 132 S. Ct. at 922–23 (“A markedly different situation is presented, however, when an attorney abandons his client without notice . . . . Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client’s representative.” (emphasis added)); id. at 923 (“In a concurring opinion in Holland, Justice Alito homed in on . . . [when] an attorney had essentially abandoned his client.” (emphasis added)); id. at 924 (“[U]nder agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him.” (emphasis added)); Holland, 560 U.S. at 650 (“[A] petitioner “must “bear the risk of attorney error.”’” (emphasis added) (citations omitted)); id. at 659 (Alito, J., concurring) (“Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.” (emphasis added)).
187. A client is “[a] person or entity that employs a professional for advice or help in that professional’s line of work.” BLACK’S LAW DICTIONARY 289 (9th ed. 2009). A petitioner is “[a] party who presents a petition to a court or other official body, esp. when seeking relief on appeal.” Id. at 1262. A litigant is “[a] party to a lawsuit.” Id. at 1017. Notably, none of these terms are limited to criminal contexts. See id. at 289, 1017, 1262.
188. This is especially true given the Court’s language in Maples that there should not be a distinction between equitable tolling contexts and procedural default contexts when considering the
Second, and most importantly, even though *Holland* and *Maples* were rooted in the criminal procedure context, the proceedings in which these cases arose were governed by the same standard that governs attorney misconduct in civil cases: the relationship-based model. The performance-based model only controls in cases where a defendant is guaranteed the right to counsel. Because a defendant is not guaranteed the right to counsel in federal habeas corpus proceedings or in state collateral attack proceedings—the proceedings at issue in *Holland* and *Maples*—claims alleging attorney misconduct in these contexts are tested using the relationship-based model. This same model controls in civil cases because parties to civil proceedings are also not guaranteed counsel. Therefore, because the Supreme Court explicitly outlined attorney abandonment in a proceeding governed by the relationship-based model, it would seem obvious that the Court expected attorney abandonment to be available in all proceedings governed by the relationship-based model, including proceedings implicating Rule 60(b)(6). Put differently, the important distinction is between situations where there is and is not a right to counsel, not between criminal and civil proceedings. Again, if the Court had wanted the distinction to be between criminal and civil cases, it would have likely said so.

Consequently, the Supreme Court likely intended to establish attorney abandonment as a concept that must be recognized in both civil and criminal contexts that implicate the relationship-based model. If so, every circuit
court must now recognize attorney abandonment in the civil arena in some way or another because Supreme Court precedent constitutes mandatory authority that the courts of appeals must follow.  

V. SOLVING THE SPLIT: THE INTERACTION BETWEEN RULE 60(b)(6) AND ATTORNEY ABANDONMENT IN LIGHT OF HOLLAND AND MAPLES

The interesting consequence of mandating that circuit courts recognize attorney abandonment in civil cases will be how attorney abandonment will eventually come up in such contexts. While the Supreme Court ruled on what attorney abandonment is and that lower courts must acknowledge it, it did not mandate how the circuit courts must apply it. With just a few logical steps, however, this Article will show that there is one consequence that must necessarily exist because of attorney abandonment even though the

924 (2012).

200. Of course, one could make the argument that there are other distinct differences between civil and criminal proceedings that would make the Holland and Mapsles attorney abandonment standard inapplicable in the civil context. For instance, litigants in civil cases generally stand to lose money if they do not prevail, whereas defendants in criminal cases lose their liberty and ability to live freely if they do not prevail. The latter is clearly a more worrisome result, so one could argue that the Supreme Court only had criminal contexts in mind when deciding Holland and Mapsles because the Court would realize it is more important to have a remedy for attorney abandonment in a criminal context than in a civil context. Nonetheless, the Supreme Court’s consistent use of the relationship-based model in postconviction relief proceedings—the same model it uses in the civil realm—prior to Holland and Mapsles weighs heavily against such an interpretation. See supra notes 189–98 and accompanying text.

One could likewise argue that, even if the Supreme Court did intend to have attorney abandonment apply in civil contexts, this is not mandatory authority that lower courts must follow because the Court never explicitly stated such a rule in either of its opinions. A “mandatory rule,” however, is “[a] legal rule that is not subject to a contrary agreement,” BLACK’S LAW DICTIONARY 1446 (9th ed. 2009), and the embedded term “rule” is “an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation.” Id. (emphasis added). Here, the Supreme Court’s likely intention of having attorney abandonment apply in civil cases, although not explicitly stated, can be considered a “principle” or “guiding conduct” that can be distilled as a logical conclusion from what the court did explicitly state. In other words—and in accordance with the definition of “mandatory rule”—necessary conclusions that derive from stated rules have the same power and authority as the stated rules themselves. Therefore, as long as lower courts can correctly reach this same conclusion about the Supreme Court’s intent regarding attorney abandonment—if they do not, these courts may very well be applying incorrect law—this intent is necessarily mandatory authority.

201. See Mapsles, 132 S. Ct. at 922–24 (outlining attorney abandonment but omitting any discussion of how lower courts must apply it).
Supreme Court did not address that consequence.\(^{202}\) Namely, if a civil court determines that a party was abandoned by his attorney, that court must have the power to vacate the judgment under Rule 60(b)(6).\(^{203}\)

To start, consider the Supreme Court’s statement in *Maples* that “a client cannot be charged with the acts or omissions of an attorney who has abandoned him,”\(^{204}\) which is a strict and explicit mandate.\(^{205}\) In essence, the Court is saying that when attorney abandonment exists, there must be some type of remedy for the client that immunizes him from any judgment against him.\(^{206}\) If this were not the case, and it was not a requirement that there must be some type of remedy for the client, the result would be inconsistent with what the *Maples* Court held because it would not make sense for a court to be unable to provide complete relief for an abandoned party if it is true that an abandoned party “cannot be charged” with the acts of his attorney.\(^{207}\)

Although a court must necessarily provide complete relief to an abandoned client, the client must conform with, and is constrained by, the Federal Rules of Civil Procedure when seeking such relief.\(^{208}\) Notably, the Federal Rules of Civil Procedure list three ways that a client could potentially obtain complete relief from the conduct of her attorney: Rule 55(c),\(^{209}\) Rule 59,\(^{210}\) and Rule 60(b)(6).\(^{211}\)

Rule 60(b) gives a court the power to vacate judgments, orders, or proceedings.\(^{212}\) Rule 55(c), on the other hand, states that a “court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).”\(^{213}\) As illustrated by some of the cases in Part II.C above,\(^{214}\) many cases of attorney abandonment involve default judgments, so, at first glance, Rule 55(c) would seem to be an ideal

\(^{202}\) See infra notes 204–32 and accompanying text.

\(^{203}\) See infra notes 204–32 and accompanying text.

\(^{204}\) 132 S. Ct. at 924 (emphasis added).

\(^{205}\) See id.

\(^{206}\) See id.

\(^{207}\) See id.

\(^{208}\) FED. R. CIV. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts . . . .”); see also supra text accompanying notes 204–07.

\(^{209}\) FED. R. CIV. P. 55(c).

\(^{210}\) FED. R. CIV. P. 59.

\(^{211}\) FED. R. CIV. P. 60(b)(6).

\(^{212}\) Id.; see also supra Part II.B.

\(^{213}\) FED. R. CIV. P. 55(c).

\(^{214}\) See supra Part II.C.
mechanism for relief in such situations. But two main problems with Rule 55(c) exist that make it insufficient as a remedy for attorney abandonment. First, an entry of default is different than a default judgment, and Rule 55(c) makes a distinction between the two. As such, “good cause” is not enough for a court to set aside a default judgment; instead, it must use Rule 60(b). Second, even if the argument could be made that a default judgment could be set aside for good cause, there has been no indication by the Supreme Court that situations of attorney abandonment must involve default judgments. Granted, many cases of attorney abandonment involve default judgments, but this is not an explicit requirement. These two problems show that Rule 55(c) cannot be used in every situation which goes against the unyielding mandate that clients “cannot be charged” with the conduct of attorneys that abandoned them. On the other hand, satisfying the requirements of Rule 60(b) is more difficult than satisfying the requirements of “good cause,” so Rule 60(b)(6) could be used to set aside both default judgments and entries of default. For this reason, Rule 60(b) is not solely limited to certain

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215. See supra Part II.C.
216. See infra notes 217–26 and accompanying text.
217. See William H. Danne, Jr., Annotation, What Constitutes “Good Cause” Allowing Federal Court to Relieve Party of His Default Under Rule 55(c) of Federal Rules of Civil Procedure, 29 A.L.R. FED. 7 § 2[a] (1976) (“[T]he majority of courts have recognized that Rule 55(c) ‘good cause’ is a standard exclusively governing requests for relief from default entries, the grounds enumerated in Rule 60(b) becoming applicable when the default has ripened into a default judgment which is sought to be set aside.”) (emphasis added)).
218. FED. R. CIV. P. 55(c).
219. See id.
221. See, e.g., cases cited supra Part II.C.
223. Specifically, it could not be used in situations of attorney abandonment where there was no default judgment. This could occur, for example, if an attorney did not communicate with a client or respond to court documents for months at a time but still showed up at a hearing on a motion to dismiss and lost. This would not be a default judgment because the attorney showed up at the hearing; however, a good argument could still be made that the attorney had abandoned the client by his previous lack of diligence and communication.
224. 132 S. Ct. at 924.
225. In other words, if a party were to satisfy the requirements of Rule 60(b), that party would necessarily satisfy the requirements of “good cause.” See Danne, supra note 217, § 2[a] (“[C]ourts have generally acknowledged that ‘good cause’ is a broader and more liberal standard than anything found in Rule 60(b), and that, consequently, something less may be required to warrant the opening
situations in the way that Rule 55(c) is. 226

Additionally, Federal Rule of Civil Procedure 59 gives a court the power to “grant a new trial on all or some of the issues” that are in dispute. 227 In theory, this could completely relieve an abandoned client from the conduct of his attorney: the client could get a new lawyer; obtain a new, different verdict; and not be bound by the unfair initial verdict. 228 Rule 59, however, is plagued by the same problem that plagues Rule 55(c): there is no requirement that attorney abandonment can only be alleged at trial. 229 For this reason, Rule 60(b) is the only Federal Rule of Civil Procedure that can guarantee in all situations that a client will not be bound by the acts of his attorney. 230

Therefore, if a civil court finds that an attorney has abandoned his client,

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226. See id. One could also make the argument that courts could use Rule 55(c) for instances of default and use Rule 60(b)(6) when a default is not at issue. If so, the Maples requirement that a client “cannot be charged” with the acts of his attorney would still be satisfied, albeit through two separate, combined mechanisms. Such an approach, however, is inappropriate: This Article is alleging that judgments must be vacated if there is attorney abandonment, and Rule 55(c) explicitly makes a distinction between defaults and default judgments. As stated above, one can only use the “good cause” standard of Rule 55(c) if a default is at issue, not a default judgment. See supra text accompanying notes 217–19. As such, even if a court wanted to utilize Rule 55(c) in cases of default judgments, the text of Rule 55(c) would direct the court to utilize Rule 60(b) instead and not to use the “good cause” standard. Therefore, Rule 60(b)(6) remains the sole tool that can be used to vacate judgments tainted by attorney abandonment.

227. FED. R. CIV. P. 59.

228. See id.


230. See supra notes 202–09 and accompanying text. An additional reason—although outside the scope of this Article—that Rule 59 cannot always be used is because of its time requirement. Rule 59 allows for a new trial only if a motion is filed 28 days after the entry of the judgment. FED. R. CIV. P. 59. As shown above in note 64, though, Rule 60(b)(6) and the extraordinary circumstances test are invoked only after a year has passed since a judgment has been entered. Furthermore, as seen by the vast majority of the cases discussed in this Article, allegations of attorney abandonment are usually brought a year after judgment. Thus, by the time clients realize that they are entitled to relief from judgment on the grounds of attorney abandonment—usually later than a year after judgment—the time to bring a Rule 59 motion will almost always have long since passed and Rule 60(b)(6) will be the only avenue for relief. In the event that a client alleges attorney abandonment after 28 days but within a year of judgment being entered, other provisions of Rule 60(b)—specifically, Rule 60(b)(1)—can be used to vacate the judgment instead of Rule 60(b)(6). In the unlikely scenario that an allegation of attorney abandonment is brought within 28 days after a judgment is entered, either Rule 60(b)(1) or Rule 59 could apply. However, as also stated in note 64, time requirements are not within the scope of this Article, so it will be assumed that Rule 60(b)(6) will apply regardless of whether a litigant brings a claim within a year.
that court must necessarily have the power to use Rule 60(b)(6) to vacate any judgment that has been rendered against that client. 231 Because a client “cannot be charged with the acts or omissions of an attorney who has abandoned him,” this is the only remedy that can guarantee a client complete relief from judgment in any situation—whether a default judgment, a trial, or something else entirely. 232

VI. CHANGES IN JURISPRUDENCE THAT THE CIRCUITS MUST MAKE

As this Article has shown thus far, the Supreme Court’s recent decisions in Holland and Maples necessarily give each and every federal court the power to grant relief to abandoned clients in civil cases through Rule 60(b)(6). 233 As shown above, however, 234 not all of the circuit courts had adopted such a view prior to these two decisions. 235 Therefore, of the four different approaches that the circuit courts use, three require a shift in jurisprudence regarding Rule 60(b)(6) and its interaction with attorney misconduct. 236

A. The Gross Negligence Circuits

The circuit courts that have adopted the view that an attorney’s gross negligence can satisfy Rule 60(b)(6) must slightly change their jurisprudence. 237 Specifically, these courts must acknowledge that attorney abandonment can satisfy Rule 60(b)(6)—as they already do—but they must also acknowledge that gross negligence cannot satisfy it. 238 This change comes from the Supreme Court’s holding in Maples that there is an

231. See supra notes 212–30 and accompanying text.
232. Maples, 132 S. Ct. at 924; see also supra notes 212–30 and accompanying text. To be sure, a court may choose to employ Rule 55(c) and Rule 59 as remedies in cases involving default judgments or trials. However, in other proceedings—a motion for summary judgment, for instance—where the attorney has abandoned his client, neither 55(c) or Rule 59 could be utilized. Thus, a court must necessarily have Rule 60(b)(6) as a tool to vacate judgments because it is the only remedy available in situations where there has not been a default judgment or a trial.
233. See supra Parts IV–V.
234. See supra Part II.C.
235. See supra Parts II.C.2, II.C.4.
236. See infra Part VI.A–D.
237. See infra notes 238–41 and accompanying text.
238. See infra notes 239–40 and accompanying text.
“essential difference between a claim of attorney error, however egregious, and a claim that an attorney had essentially abandoned his client.”239 In other words, the Court made a distinction between gross negligence and attorney abandonment, the necessary implication being that the latter satisfies Rule 60(b)(6) but that the former does not.240 As such, the “gross negligence” circuits must follow suit.

Practically, this will have very little impact on the outcome of most cases in these circuits because what these courts consider gross negligence can often be labeled as attorney abandonment.241 Their case law, though, still must change in order to preclude a situation where an attorney was grossly negligent but could not reasonably be considered to have abandoned the client.242 For instance, reconsider the Ninth Circuit’s decision in Tani.243 In that case, the Ninth Circuit ruled that the attorney at issue was grossly negligent and that his former client therefore deserved relief under Rule 60(b)(6) because the attorney was almost completely non-responsive to the client.244 Importantly, the court noted that this non-responsiveness constituted conduct so grossly negligent that the attorney had “virtually abandoned” his client.245 After the Supreme Court’s decision in Holland and Maples, the Ninth Circuit would now have to say that the Tani attorney’s abandonment qualified his former client for relief under Rule 60(b)(6),246 but it could not say that the attorney’s gross negligence was a basis for relief.247 This may seem like a nuanced distinction, but it is quite significant. Had the attorney, for example, remained in constant contact with his client but filed court documents that were egregiously lacking in substance and preparation, an argument could be reasonably made that this qualified as being grossly negligent but not as attorney abandonment. If this were the case, Rule 60(b)(6) could not be used to remedy such conduct after the Supreme Court’s decision in Holland and Maples.

240. See supra Parts III, V.
241. See supra note 76 and accompanying text.
242. See infra notes 243–48 and accompanying text.
243. Cmty. Dental Servs. v. Tani, 282 F.3d 1164 (9th Cir. 2002); see also supra Part II.C.1.
244. Tani, 282 F.3d at 1167, 1170.
245. Id. at 1170.
246. See supra Part V.
Court’s decisions in *Holland* and *Maples*.  
While this change in jurisprudence as required by *Holland* and *Maples* has at least been recognized in several recent decisions by the Ninth Circuit, the Ninth Circuit does not yet seem to appreciate the significance of this change. For example, in *Mackey v. Hoffman*, the Ninth Circuit noted that the Supreme Court in *Maples* held that there was a difference between negligence and attorney abandonment. However, the *Mackey* court went on to say that “when a federal habeas petitioner has been inexcusably and grossly neglected by his counsel in a manner amounting to attorney abandonment in every meaningful sense that has jeopardized the petitioner’s appellate rights, a district court may grant relief pursuant to Rule 60(b)(6).” This is somewhat misleading: the Ninth Circuit is still trying to equate gross negligence with attorney abandonment, while *Holland* and *Maples* made it clear that there is a distinct separation between the two. The “gross negligence” circuits still need to distinguish more completely the difference between gross negligence and attorney abandonment.

B. The No Relief Circuits

Out of all the different circuit approaches, the approach taken by the

248. See id.
250. See infra text accompanying notes 252–54.
251. 682 F.3d 1247 (9th Cir. 2012).
252. Id. at 1252–53 (“[T]he [Supreme] Court noted that, although an attorney is normally the prisoner’s agent, and the principal typically bears the risk of negligent conduct on the part of his agent under well-settled principles of agency law, ‘[a] markedly different situation is presented, however, when an attorney abandons his client without notice, and thereby occasions the default.’”).
253. Id. at 1253 (emphasis added). It is interesting to note that the court in this case actually applied Rule 60(b)(6) in the context of a habeas corpus petitioner. Id. The Ninth Circuit was able to do this because the Supreme Court decided in *Gonzalez v. Crosby* that Rule 60(b)(6) can apply to habeas corpus proceedings. 545 U.S. 524, 534 (2005) (“Rule 60(b) has an unquestionably valid role to play in habeas cases.”).
255. See *Mackey*, 682 F.3d at 1253 (discussing agency and client abandonment).
Seventh Circuit is in the most obvious need of change. Specifically, the Seventh Circuit needs to overturn its prior holdings that attorney misconduct cannot satisfy Rule 60(b)(6). The interesting part is that it does not need to explicitly overrule any case in order to do so.

The reasoning for this is in the language the Seventh Circuit used in Bakery Machinery & Fabrication, Inc. v. Traditional Baking, Inc. The Seventh Circuit held in Bakery Machinery that “all of the attorney’s misconduct (except in the cases where the act is outside the scope of employment or in cases of excusable neglect) becomes the problem of the client.” Thus, the Seventh Circuit ruled that attorney misconduct could never satisfy Rule 60(b)(6) unless an attorney was acting outside of his scope of authority for one reason or another. The Seventh Circuit, however, never once considered when or what actions would cause the attorney to “act . . . outside the scope of his employment.” To illustrate, it is as if the Seventh Circuit created a hole that, if filled, would allow a client to seek relief under Rule 60(b)(6) for the acts of his attorney that were outside the scope of the attorney’s employment. The problem was that prior to Holland and Maples, the Seventh Circuit never had any instrument to fill this hole; indeed, it never even considered the possibility that attorney misconduct itself could sever the attorney-client employment

256. See supra Part II.C.2.
257. See supra Part II.C.2.
258. See infra notes 259–69 and accompanying text.
259. 570 F.3d 845, 848 (7th Cir. 2009).
260. Id. (emphasis added).
261. See id.
262. See id. (omitting any discussion of what brings an attorney outside the scope of his employment).
263. See id.
264. The Seventh Circuit has actually identified a form of attorney abandonment, but it has only done so in situations where a defendant is guaranteed a right to counsel under the Sixth Amendment. See Kusay v. United States, 62 F.3d 192, 196 (7th Cir. 1995) (“A lawyer who deserts his client does not foist the burdens of self-representation on the defendant; instead the lawyer brings shame (and professional discipline) on himself, and the defendant is entitled to a new proceeding with the aid of a competent, ethical lawyer.” (emphasis added)). As such, this form of attorney abandonment could never be used—and has never been used—as an instrument to fill the hole from Bakery Machinery; it was only brought up in the context of the performance-based model, so it cannot be utilized in contexts governed by the relationship-based model (such as civil cases). See also Part II.A (describing the performance-based and relationship-based models, when they are used, and the crossover between them).
The Supreme Court’s reasoning in *Holland* and *Maples* changes all of this. In these cases, the Court held that attorney abandonment severs the principal-agent relationship—that is, the attorney-client relationship. Therefore, the hole established in *Bakery Machinery* now has an instrument to fill it: attorney abandonment. The result is that the Seventh Circuit does not actually need to change any of its case law in order to allow attorney abandonment to qualify for relief under Rule 60(b)(6) because *Bakery Machinery* and the *Holland* and *Maples* decisions fit together like two pieces of a puzzle. One recent Seventh Circuit decision actually alluded to the attorney abandonment standard outlined in *Maples*, but it did not answer whether it would satisfy Rule 60(b)(6). In *Nash v. Hepp*, the Seventh Circuit noted that “[i]n *Maples* counsel abandoned the petitioner without warning.” The Seventh Circuit, however, refused to decide whether abandonment applied because *Maples* had been decided after the district court’s decision in *Nash*. Indeed, the Seventh Circuit stated that “a change in law showing that a previous judgment may have been incorrect is not an ‘extraordinary circumstance’ justifying relief under Rule 60(b)(6).” Even with this indecision, it is likely that the Seventh Circuit’s acknowledgement of the *Maples* standard shows a potential shift in its jurisprudence toward a recognition that Rule 60(b)(6) must be available as a tool to remedy attorney abandonment.

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265. *Bakery Mach.*, 570 F.3d at 848.
266. See infra notes 267–69 and accompanying text.
269. Upon reflection, one wonders why the Seventh Circuit would leave such a blatant opening in its case law if, as has been proven, this opening had the potential to destroy the circuit’s intention to always bind clients with the conduct of their attorneys. See *Bakery Mach.*, 570 F.3d at 848.
270. See *Nash v. Hepp*, 740 F.3d 1075, 1079 (7th Cir. 2014).
271. *Id.*
272. *Id.*
273. *Id.*
274. See id.; see also supra Part V (explaining why Rule 60(b)(6) is the universal remedy for attorney abandonment in civil cases).
C. The Strict Abandonment Circuits

The “strict abandonment” circuits constitute the one approach to the interaction between attorney misconduct and Rule 60(b)(6) that does not need to change. These circuits hold that only attorney abandonment—not gross negligence—can provide a basis for relief under Rule 60(b)(6), a philosophy which is in exact accordance with Holland and Maples. Therefore, Holland and Maples have no real impact on these courts other than to reaffirm the fact that gross negligence cannot provide a basis for relief.

D. The Unclear Circuits

Notably, up until Holland and Maples, the Fifth, Tenth, Eleventh, and Federal Circuits had never determined what would happen if a client tried to obtain relief from judgment by alleging attorney misconduct under Rule 60(b)(6). After these two Supreme Court decisions, however, these circuits are forced to recognize that attorney abandonment qualifies a party for relief under Rule 60(b)(6). To illustrate, consider the case Solaroll Shade & Shutter Corp., Inc. v. Bio-Energy Systems, Inc., where the Eleventh Circuit held that it was not going to decide if an attorney’s gross negligence satisfied Rule 60(b)(6) because the attorney’s conduct in the case did not rise to that level and, therefore, the result would not matter. If this same case had been decided after Holland and Maples, the Eleventh Circuit would necessarily have had to hold that attorney abandonment—but not gross negligence—could warrant relief under Rule 60(b)(6) regardless of

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275. See infra notes 276–78 and accompanying text.
276. See supra Part II.C.3.
278. There have been no decisions thus far from either the Second Circuit, Eighth Circuit, or Court of Federal Claims in light of Holland and Maples reaffirming the holdings that only attorney abandonment can satisfy Rule 60(b)(6). Nonetheless, as previously discussed, this is the only possible interpretation these courts could make. See supra Part V.
279. See supra Part II.C.4.
280. See supra Part V.
281. 803 F.2d 1130 (11th Cir. 1986); see also supra Part II.C.4.
282. Solaroll Shade, 803 F.2d at 1133.
whether that result was of consequence to the facts at hand.\textsuperscript{283} Indeed, the Eleventh Circuit has actually started to change its jurisprudence to reflect these new requirements set by \textit{Holland} and \textit{Maples}.\textsuperscript{284} In \textit{Cadet v. Florida Department of Corrections}, the Eleventh Circuit held that “[i]n light of the Supreme Court’s \textit{Maples} decision, we hold that attorney negligence, however gross or egregious, does not qualify as an ‘extraordinary circumstance’ for purposes of equitable tolling; abandonment of the attorney-client relationship . . . is required.”\textsuperscript{285} Granted, this holding did not reference Rule 60(b)(6).\textsuperscript{286} Nonetheless, the fact that the Eleventh Circuit held that only attorney abandonment is an extraordinary circumstance for purposes of equitable tolling lends credence to the idea that it would also consider only attorney abandonment to be an extraordinary circumstance \textit{for purposes of Rule 60(b)(6)}.\textsuperscript{287} Regardless of the significance of this decision, though, all of the “unclear circuits” will eventually have to fully extend the holdings of \textit{Holland} and \textit{Maples} to

\begin{itemize}
\item \textsuperscript{283}See supra Part V.
\item \textsuperscript{284}See \textit{Cadet v. Fla. Dep’t of Corr.}, 742 F.3d 473, 481 (11th Cir. 2014).
\item \textsuperscript{285}Id. In another case, the Eleventh Circuit considered a situation where a prisoner challenged the district court’s denial of his Rule 60(b)(6) motion. \textit{Ryder v. Sec’y, Dep’t of Corr.}, 521 F. App’x 817, 818 (11th Cir. 2013). However, the Eleventh Circuit never got to the merits of the Rule 60(b)(6) claim and whether attorney misconduct could satisfy it because it determined that the prisoner did not file the Rule 60(b)(6) motion within the proper statute of limitations. \textit{Id.} at 820. Although the court discussed \textit{Maples}, attorney abandonment, and Rule 60(b)(6), it did so without considering how they interact with each other; the case, therefore, is not overly helpful in parsing out the Eleventh Circuit’s jurisprudence post-\textit{Maples}. See \textit{id}.
\item \textsuperscript{286}See \textit{Cadet}, 742 F.3d at 481 (omitting any discussion of Rule 60(b)(6)).
\item \textsuperscript{287}See \textit{Maples v. Thomas}, 132 S. Ct. 912, 923 n.7 (2012) (”\textit{Holland v. Florida} involved tolling of a federal time bar, while \textit{Coleman v. Thompson} concerned cause for excusing a procedural default in state court. \textit{We see no reason, however, why the distinction between attorney negligence and attorney abandonment should not hold in both contexts.”} (emphasis added) (citations omitted)); \textit{see also supra} Part IV (discussing how the attorney-abortion standard from \textit{Holland} and \textit{Maples}—a concept that was first formulated by Justice Alito in the equitable tolling context—applies in situations where Rule 60(b)(6) governs); \textit{supra} note 153 (discussing the definition and significance of equitable tolling).
\end{itemize}

The Federal Circuit, Fifth Circuit, and Tenth Circuit have reached holdings similar to the Eleventh Circuit. \textit{Sneed v. Shinseki}, 737 F.3d 719, 728 (Fed. Cir. 2013) (”The Supreme Court held in \textit{Maples} and \textit{Holland} that habeas petitioners may benefit from equitable tolling in cases of attorney abandonment, and this court concludes that the same protection extends to veterans.”); \textit{Manning v. Epps}, 688 F.3d 177, 184 n.2 (5th Cir. 2012) (holding that “attorney abandonment can qualify as an extraordinary circumstance for equitable tolling purposes”); \textit{Ulrey v. Zavaras}, 483 F. App’x 536, 541 (10th Cir. 2012) (citing \textit{Maples} in holding that equitable tolling applies “when a habeas petitioner’s failure to file timely objections is occasioned by counsel’s unnoticed abandonment of the case”).

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situations where Rule 60(b)(6) governs.\textsuperscript{288}

VII. SOME POTENTIAL DIFFICULTIES BROUGHT ABOUT BY \textit{HOLLAND AND MAPLES}

As noted above in Part V, the Supreme Court’s decisions in \textit{Holland} and \textit{Maples} effectively require that Rule 60(b)(6) must always be available as a tool to cure attorney abandonment in civil cases.\textsuperscript{289} This result creates two important consequences that need to be addressed.\textsuperscript{290}

First, the holdings from \textit{Holland} and \textit{Maples} form an inherent tension with the language of Rule 60(b)(6).\textsuperscript{291} Rule 60(b)(6) says a “court may relieve a party . . . from a final judgment, order, or proceeding” for “any other reason that justifies relief,”\textsuperscript{292} but, as shown above, the consequence of \textit{Holland} and \textit{Maples} is that courts \textit{must} grant relief in some way when it finds attorney abandonment.\textsuperscript{293} Obviously, this is not entirely consistent.

The easiest way to reconcile this difference would be to create a statutory analogue to the Supreme Court’s holdings in \textit{Holland} and \textit{Maples}. The way Rule 60(b)(6) is currently written makes it seem as though courts have the ability to decline relief to clients who were abandoned by their attorneys.\textsuperscript{294} Some court could conceivably reference the language in 60(b)(6)—that is, the language saying a “court may relieve a party” from judgment—to justify a ruling that it could still hold an abandoned client liable for the acts of her attorney.\textsuperscript{295} In order to avoid such a situation and to remain faithful to \textit{Holland} and \textit{Maples}, Congress should consider implementing a permanent statutory exception that \textit{requires} courts to vacate

\begin{itemize}
\item \textsuperscript{288} See supra Part V.
\item \textsuperscript{289} See supra Part V.
\item \textsuperscript{290} See infra notes 291–301 and accompanying text.
\item \textsuperscript{291} \textit{Compare Maples}, 132 S. Ct. at 924 (holding that abandoned clients can never be bound by their attorney’s actions), and \textit{Holland v. Florida}, 560 U.S. 631, 659–60 (2010) (Alito, J., concurring) (same), with \textit{FED. R. CIV. P. 60(b)(6)} (granting courts the discretion to vacate judgments).
\item \textsuperscript{292} \textit{FED. R. CIV. P. 60(b)(6)} (emphasis added).
\item \textsuperscript{293} \textit{Maples}, 132 S. Ct. at 924; \textit{Holland}, 560 U.S. at 659–60 (Alito, J., concurring). Relief could be granted under Rule 55(c) if the underlying judgment was a default judgment or under Rule 59 if the underlying judgment occurred at a trial, but FRCP 60(b)(6) is the only mechanism that can always grant relief. \textit{See supra Part V}.
\item \textsuperscript{294} \textit{FED. R. CIV. P. 60(b)(6)}.
\item \textsuperscript{295} \textit{See id.} (emphasis added). Because statutory language is generally superior to case law, this is not an entirely implausible situation.
\end{itemize}
a judgment or order in some way if it finds that the attorney abandoned the client. Such a statute would preclude any court from ever trying to deny relief to an abandoned client.

Second, even though Holland and Maples definitively created an exception for attorney abandonment, the Supreme Court did not describe in great detail how lower courts should go about distinguishing gross negligence from attorney abandonment. To be sure, all the Court said was that attorney abandonment severs the attorney-client relationship. Beyond that, it only noted evidence from the specific cases in front of it that tended to show attorney abandonment existed.

For instance, in Holland, Justice Alito found that abandonment existed as “evidenced by counsel’s near-total failure to communicate with petitioner or to respond to petitioner’s many inquiries and requests over a period of several years.” Does this mean that communication between the client and attorney is the main factor that matters in abandonment? Or could there be a situation where a client is still in regular contact with his attorney but could still be considered abandoned? Furthermore, Justice Alito also thought abandonment occurred in Holland partially due to the fact that the client “made reasonable efforts to terminate counsel due to his inadequate representation.” In situations where Rule 60(b)(6) governs, does this mean that all clients must be reasonably diligent in trying to either contact his attorney or end the attorney’s representation, or is this factor limited to habeas corpus petitioners alone? Granted, finding attorney abandonment is inherently a fact-heavy analysis, but this is an area of law that will need to be more fully fleshed out by the circuit courts in the near future. Indeed, the Supreme Court may even find itself revisiting the topic in order to more clearly define the differences between gross negligence and attorney abandonment.

296. Maples, 132 S. Ct. at 923 (omitting any detailed discussion of how lower courts should go about determining attorney abandonment); Holland, 560 U.S. at 658–60 (Alito, J., concurring) (same).
299. Holland, 560 U.S. at 659.
300. Id.
301. Zupac, supra note 22, at 1363.
302. See supra Part VI.A–D.
The Supreme Court’s recent decisions in *Holland* and *Maples* are godsend for clients unfortunate enough to be burdened with attorneys who, for one reason or another, are so lacking in their representation that their actions cannot be fairly attributed to the client.303 Without explicitly doing so, the Supreme Court cured a four-way circuit split in a manner that will allow abandoned clients to be released from the shackles of any undeserved judgments against them.304 No longer will parties to a civil lawsuit have no recourse to turn to once their attorney’s misconduct causes them loss and damages.305 Instead, once every circuit comes to acknowledge that Rule 60(b)(6) is always available as a remedy for attorney abandonment, these parties will have a potential avenue for relief.306 As a result, American law will move one small step closer toward its goal of enacting justice in everything that it does.307 So, the next time you are in a car accident, sued for negligence, and abandoned by your attorney, rest assured knowing that you will not have to pay that $50,000 judgment308—unless, of course, you were actually at fault.

Stephen White*

303. *See supra* Part III.
304. *See supra* Parts V–VI.
305. *See supra* Parts II.C.2, II.C.4.
306. *See supra* Parts V–VI.
307. *See supra* Part VII (describing some of the setbacks that might accompany this small step forward).
308. *See supra* Part I.

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