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3 UNITED STATES DISTRICT COURT  
4 DISTRICT OF NEVADA

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6 GILBERT DEMETRIUS AGUILAR,

7 Petitioner,

8 v.

9 TIMOTHY FILSON, *et al.*,

10 Respondents.

Case No. 3:12-cv-00397-MMD-WGC

ORDER GRANTING MOTION FOR  
RELIEF FROM JUDGMENT  
(ECF NO. 89)

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12 In this habeas corpus action, Petitioner Gilbert Demetrius Aguilar was previously  
13 represented by court-appointed attorney Mary Lou Wilson. On July 10, 2018, the Court  
14 denied Aguilar's habeas petition and denied him a certificate of appealability, and  
15 judgment was entered. (See ECF No. 79 (Order entered July 10, 2018); (ECF No. 80  
16 (Judgment).) On October 12, 2018, Aguilar, acting *pro se*, filed a notice of appeal (ECF  
17 No. 81). On December 21, 2018, the Ninth Circuit Court of Appeals denied Aguilar's  
18 request for a certificate of appealability because his notice of appeal was untimely. (See  
19 (ECF No. 84 (Order entered December 21, 2018).) The court of appeals stated:

20 The court admonishes Wilson for her failure to notice a timely appeal.  
21 Wilson's performance falls below the level expected of counsel appointed  
22 to represent defendants and petitioners under the Criminal Justice Act. We  
23 refer this matter to the CJA panel administrator for the District of Nevada for  
appropriate action, including whether attorney Wilson should remain on the  
CJA panel and whether replacement counsel should be appointed to assist  
Aguilar with any post-judgment motions.

24 (*Id.* at 2.)

25 On February 8, 2019, Wilson filed a motion requesting leave of court to withdraw  
26 from her representation of Aguilar "based upon the fact that counsel has resigned from  
27 the CJA panel." (See ECF No. 86 (Motion for Withdrawal of Counsel) at 1.) The Court

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1 granted that motion on February 13, 2019, and ordered Wilson discharged from her  
2 representation of Aguilar. (ECF No. 87.)

3 On February 15, 2019, Aguilar, acting *pro se*, filed a Motion for Relief from  
4 Judgment (ECF No. 89). On February 25, 2019, the Court appointed new counsel for  
5 Aguilar, and set a schedule for Aguilar, with counsel, to file any amended motion for relief  
6 from judgment or any other appropriate motion, or a notice that Aguilar will not make any  
7 new filing and will proceed with the motion for relief from judgment filed on February 15,  
8 2019. (See ECF No. 90 (Order entered February 25, 2019).) Aguilar's new counsel,  
9 Thomas Qualls, filed a notice of appearance for Aguilar on March 12, 2019 (ECF No. 93).  
10 On April 25, 2019, Aguilar, through counsel, filed a notice (ECF No. 95) that he did not  
11 intend to file an amended motion for relief from judgment, or any other motion, and would  
12 proceed with the February 15, 2019, motion for relief from judgment. Respondents filed  
13 an opposition to the motion for relief from judgment on June 27, 2019 (ECF No. 102).  
14 Aguilar did not file a reply.

15 On April 22, 2019, this Court received notice (ECF No. 94) that Aguilar filed a  
16 petition for writ of certiorari in the United States Supreme Court on April 15, 2019. That  
17 petition was denied on May 28, 2019 (ECF No. 100).

18 The Court now addresses Aguilar's motion for relief from judgment, and the Court  
19 will grant that motion.

20 Under Federal Rule of Civil Procedure 60(b), a court may relieve a party from a  
21 final judgment if there is a showing of: (1) mistake, inadvertence, surprise, or excusable  
22 neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or  
23 discharged judgment; or (6) any other reason justifying relief. See Fed. R. Civ. P. 60(b).  
24 Aguilar bases his motion on Rule 60(b)(6). Rule 60(b)(6) is "used sparingly as an equitable  
25 remedy to prevent manifest injustice" and "is to be utilized only where extraordinary  
26 circumstances prevented a party from taking timely action to prevent or correct an  
27 erroneous judgment." *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049  
28 (9th Cir. 1993)). A party who moves for such relief must demonstrate circumstances

1 beyond his control that prevented him from proceeding in a proper fashion. *Cnty. Dental*  
2 *Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002). “[G]ross negligence by counsel  
3 amounting to ‘virtual[ ] abandon[ment]’ can be an ‘extraordinary circumstance’” justifying  
4 relief under Rule 60(b)(6). *Mackey v. Hoffman*, 682 F.3d 1247, 1251 (9th Cir. 2012); see  
5 also *Tani*, 282 F.3d at 1169–71. A petitioner who claims he was abandoned by counsel  
6 must show that he diligently pursued his rights, before relief can be granted under Rule  
7 60(b)(6). See *Gonzalez v. Crosby*, 545 U.S. 524, 537–38 (2005); *Foley v. Biter*, 793 F.3d  
8 998, 1004 (9th Cir. 2015).

9 In *Mackey*, a habeas case, the Ninth Circuit Court of Appeals held that a district  
10 court may grant a habeas petitioner relief from a judgment under Rule 60(b)(6) if gross  
11 negligence of his counsel, amounting to abandonment by counsel, caused him to fail to  
12 timely file a notice of appeal. *Mackey*, 682 F.3d at 1248, 1251, 1253 (citing *Maples v.*  
13 *Thomas*, 565 U.S. 266 (2012)). The court of appeals explained: “Relief in such a case is  
14 justified because gross negligence by an attorney, defined as ‘neglect so gross that it is  
15 inexcusable,’ ‘vitiat[es] the agency relationship that underlies our general policy of  
16 attributing to the client the acts of his attorney.’” *Id.* at 1251 (quoting *Tani*, 282 F.3d at  
17 1168, 1171).

18 The Court finds that Aguilar’s counsel’s failure to file a timely notice of appeal on  
19 his behalf amounted to gross negligence and attorney abandonment, and was an  
20 extraordinary circumstance justifying relief under Rule 60(b)(6). After this Court entered  
21 judgment, Aguilar’s counsel did not notify him of the Court’s ruling, and Aguilar did not  
22 learn of it until nearly 60 days after the judgment was entered, somewhat by  
23 happenstance, from an order in another case. (See ECF No. 89 at 10–13 (Exh. A to  
24 Motion for Relief from Judgment)). Then, when Aguilar contacted his counsel about the  
25 matter, his counsel advised him, erroneously, that a notice of appeal is unnecessary, or  
26 even disallowed, if the district court has denied a certificate of appealability. (See ECF  
27 No. 89 at 14–26, 30–31 (Exhs. B, C, E to Motion for Relief from Judgment).) Aguilar’s  
28 counsel later made that erroneous assertion before the court of appeals. (See ECF No.

1 89 at 27–29, 32–36, 42–45 (Exhs. D, F, H to Motion for Relief from Judgment).) Counsel’s  
2 misunderstanding of such a fundamental aspect of federal habeas corpus practice, her  
3 failure to file a timely notice of appeal, and her resulting waiver of Aguilar’s right to an  
4 appeal, was grossly negligent.

5         Aguilar acted diligently to attempt to protect his right to appeal after he learned the  
6 Court had entered judgment and his counsel had not filed a notice of appeal. (See ECF  
7 No. 89 at 14–26, 30–31, 37–41 (Exhs. B, C, E, G to Motion for Relief from Judgment).)

8         “Rule 60(b) permits the district court to vacate and reenter judgment to restore the  
9 right to appeal in limited circumstances.” *Washington v. Ryan*, 833 F.3d 1087, 1091 (9th  
10 Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 1581 (2017). The Court determines that the  
11 extraordinary circumstances in this case warrant the kind of relief sanctioned in  
12 *Washington*. The Court will grant Aguilar’s motion for relief from judgment, will order the  
13 July 10, 2018, judgment vacated, and will direct the Clerk to reenter judgment. The Court’s  
14 intention is to reopen the time for Aguilar to file a timely notice of appeal.

15         It is therefore ordered that Petitioner’s Motion for Relief from Judgment (ECF No.  
16 89) is granted.

17         It is further ordered that the judgment entered July 10, 2018, is vacated.

18         It is further ordered that the Clerk of the Court is directed to enter a new judgment  
19 in this action, denying the Second Amended Petition for Writ of Habeas Corpus (ECF No.  
20 62), and denying Petitioner certificate of appealability.

21         DATED THIS 24<sup>th</sup> day of July 2019.

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25 MIRANDA M. DU,  
26 UNITED STATES DISTRICT JUDGE  
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