No. 19-1372

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AISHEF SHAFFER,

Plaintiff-Appellant,

v.

JACQUELINE LASHBROOK, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Illinois (East St. Louis)
No. 3:16-cv-00784-MJR-GCS, Judge Michael J. Reagan

REPLY BRIEF OF APPELLANT AISHEF SHAFFER

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April 20, 2020

ORAL ARGUMENT SCHEDULED FOR JUNE 9, 2020

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JURISDICTIONAL STATEMENT

Defendants' lengthy jurisdictional statement does not contradict the jurisdictional statement in Mr. Shaffer's Opening Brief. All parties agree that this Court has jurisdiction to review the district court's denial of Mr. Shaffer's Rule 60(b) motion. *See* 7th Cir. Dkt. 32 (hereafter "Defs.' Br.") at 4–5; *see also* 7th Cir. Dkt. 23 (hereafter "Op. Br.") at 1 (describing the district court's denial of Mr. Shaffer's Rule 60(b) motion). The parties also agree that Mr. Shaffer did not timely appeal the dismissal order or judgment in this case, and that he appeals only the denial of his Rule 60(b) motion. *See* Defs.' Br. at 4–5; Op. Br. at 1; *see also* Dkt. 106 (Notice of Appeal).

The remainder of Defendants' extended jurisdictional statement advances extraneous facts and superfluous arguments. Defendants appear to argue that this Court is barred from reviewing some of Mr. Shaffer's arguments on appeal because they relate to the district court's Rule 41(b) dismissal order. *See* Defs.' Br. at 3–5. But no such bar exists. The arguments this Court can consider on appeal—and how it should weigh those arguments—are relevant to the merits, not to this Court's jurisdiction over the appeal. Further, under this Circuit's precedent, the Court can and should consider the underlying dismissal order in deciding whether the district court erred in denying the Rule 60(b) motion; this is the purpose of asking a court to "reconsider" its dismissal order. *See Sroga v. Huberman*, 722 F.3d 980 (7th Cir. 2013); *see also infra* Section I.

Defendants' attempt to cloak merits arguments in jurisdictional terms thus confuses the Opening Brief's straightforward jurisdictional statement.

This Court has jurisdiction to hear this appeal and consider the arguments in favor of reversal.

INTRODUCTION

Defendants fail to address, much less distinguish, this Court's most relevant precedents, which show that the Court should reverse the district court's denial of Mr. Shaffer's motion for reconsideration and order the district court to reopen the case. The standard for dismissal with prejudice is that "the punishment" of a litigation sanction "must fit the crime." *Johnson v. Chicago Bd. of Educ.*, 718 F.3d 731, 733 (7th Cir. 2013). And on review of a Rule 60(b) order in this context, the reviewing court asks whether there is a "'substantial danger that the underlying judgment was unjust."' *Del Carmen v. Emerson Elec. Co., Commercial Cam Div.*, 908 F.2d 158, 163 (7th Cir. 1990) (citations omitted). This Court's analogous cases—which Defendants largely ignore—show that dismissal on these facts was arbitrary, unjust, and precisely the type of abuse of discretion that Rule 60(b) exists to correct. *See* Op. Br. at 16–19.

In their Response Brief, Defendants instead rely on cases from other contexts, arguing that the Court should not consider the underlying dismissal order in this case (*see* Defs.' Br. at 15) and should instead affirm the denial of the motion for reconsideration because the district court's reconsideration order was "reasonabl[e]" (*see id.* at 19–20). Both arguments are wrong. When a Rule 60(b) motion challenges a dismissal with prejudice for failure to prosecute, this Court's inquiry is whether there is a "substantial danger that the underlying judgment was unjust." *Del Carmen*, 908 F.2d at 161. This

inquiry requires the Court to look to the dismissal order and the circumstances surrounding it, in addition to the additional information presented in the reconsideration motion and briefing. *See id*; *see also Sroga*, 722 F.3d at 982–83.

Moreover, in a case in which a pro se plaintiff's single alleged misstep is a failure to provide a single address update, two years after the start of litigation, dismissal with prejudice flies far afield of this Court's instructions that "the punishment" of a litigation sanction "must fit the crime." *Johnson*, 718 F.3d at 733. In this case, the district court "presume[d]" Mr. Shaffer did not intend to litigate his case (*see* A11)—without issuing a warning or any other order first, without considering lesser sanctions, and without explaining why it found his post-judgment explanations implausible. And when informed in a sworn affidavit that this "presumption" was incorrect and that Mr. Shaffer had not received notice of any problem, the district court nevertheless refused to reconsider it. The district court thus ignored the safeguards this Court has put in place to ensure that the "'extraordinarily harsh sanction"' of dismissal with prejudice is used "'only in extreme situations."' *Kasalo v. Harris & Harris, Ltd.*, 656 F.3d 557, 561 (7th Cir. 2011) (citation omitted). That is an abuse of discretion under this Court's precedent. *See, e.g., Sroga,* 722 F.3d at 982–83 (reversing denial of Rule 60(b) motion for reconsideration); *Del Carmen*, 908 F.2d at 163 (same).

This Court therefore should reverse the district court's denial of Mr. Shaffer's Rule 60(b) motion and remand with instructions to reopen the case.

ARGUMENT

I. Review of a Rule 60(b) Motion to Reconsider a Dismissal Order for Failure to Prosecute Requires Consideration of the Underlying Dismissal Order.

A Rule 60(b) motion is a proper vehicle to correct fundamentally unjust dismissals with prejudice for lack of prosecution. *See, e.g., Sroga*, 722 F.3d at 982; *Del Carmen*, 908 F.2d at 163. As Mr. Shaffer established in his Opening Brief, the district court's denial of his Rule 60(b) motion to reconsider was an abuse of discretion under this Circuit's case law. Op. Br. at 8–9, 16–19.

Defendants appear to argue that, in considering whether the district court abused its discretion in refusing to reconsider its dismissal order, this Court is foreclosed from looking at the district court's dismissal order and the steps the district court took (or failed to take) before issuing it. *See* Defs.' Br. at 15 (arguing that "this court should disregard Shaffer's arguments that the district court abused its discretion in dismissing his case for want of prosecution under FRCP 41(b)"); *id.* at 22 (same). Defendants' own authority shows that this is incorrect, however. *See, e.g.*, *Dickerson v. Bd. of Educ. of Ford Heights*, 32 F.3d 1114, 1117 (7th Cir. 1994) (stating that on review of a Rule 60(b) denial, "the circumstances of the underlying dismissal are examined for the limited purpose of determining whether there is a substantial danger that the dismissal was fundamentally unjust").

Rather, as this Court has explained, the only way to determine on Rule 60(b) review whether an underlying dismissal for failure to prosecute was unjust is to consider the underlying dismissal and the circumstances surrounding it. *See, e.g., Del Carmen*, 908 F.2d at 163 ("In determining whether relief from judgment was warranted in this case, it was incumbent upon the district court to consider whether the record at the time of dismissal supported the imposition of such a severe sanction on the plaintiff."). Thus, review of the denial of the Rule 60(b) motion "is somewhat collapsed into a review of the dismissal" and "also asserts a challenge to the merits of the underlying dismissal necessitating review of the underlying judgment, albeit narrower review." *Id.* at 161–62.

II. The District Court Failed to Follow This Court's Procedural Safeguards Against Abrupt, Fundamentally Unjust, and Arbitrary Dismissals with Prejudice.

As Mr. Shaffer established in his Opening Brief, this Court's Rule 60(b) decisions from appeals presenting similar facts and procedural postures show that reversal is warranted, including because of the fundamental injustice of the dismissal order. *See* Op. Br. at 16–19; *see also Sroga*, 722 F.3d at 982, *Del Carmen*, 908 F.2d at 158, 163.

Even assuming for sake of argument the inference Defendants ask this Court to draw—namely, that Mr. Shaffer failed to submit notice of his first change of address—the district court nevertheless abused its discretion by failing to follow this Court's procedural safeguards to protect against abrupt

and unconsidered dismissals with prejudice. As Mr. Shaffer explained in his Opening Brief, the district court in this case failed at any point to:

- reserve the "extreme" sanction of dismissal with prejudice for egregious cases of "rude, dilatory, evasive, disrespectful … [or] contemptuous" conduct (Op. Br. at 9–10, 12–13; *see also Ball v. City of Chi.*, 2 F.3d 752, 760 (7th Cir. 1993); *Kasalo*, 656 F.3d at 561);
- "explor[e] other options or say[ ] why they would not be fruitful" (Op. Br. at 13; *see also Johnson*, 718 F.3d at 733);
- "fir[e] a warning shot" or issue a specific warning and opportunity to correct alleged errors (Op. Br. at 14, *see also Beyer v. Cormier*, 235 F.3d 1039, 1041 (7th Cir. 2000); *Johnson*, 718 F.3d at 732–33); and
- consider "essential factors," including whether a litigant's mistake was egregious, whether the court's docket is affected, and whether Defendants are prejudiced (Op. Br. at 14–15; *see also Sroga*, 722 F.3d at 982).

Because the district court ignored these safeguards entirely, the dismissal was a fundamentally unjust abuse of discretion. *See* Op. Br. at 13.

Defendants fail to refute any of these arguments. Instead, they urge the Court to disregard the district court's failure to apply the required safeguards for purposes of its Rule 60(b) analysis and argue that Defendants were prejudiced by the delay in docket filings in the case. Defs.' Br. at 21. The former argument is foreclosed by this Circuit's case law. *See* Section I, *supra*. In considering a Rule 60(b) motion to reconsider a dismissal for failure to prosecute, this Court considers whether the dismissal order followed the appropriate safeguards. *See, e.g., Sroga*, 722 F.3d at 982–83; *Del Carmen*, 908 F.2d at 161–63.

Defendants' argument about prejudice also fails. The district court failed to discuss prejudice to Defendants in any of its orders in this case; the first

discussion of prejudice in the record of this case comes from Defendants' Response Brief in this Court. Moreover, Defendants claim prejudice only after arguing that *Sroga's* "essential factor[s]" analysis—the stage at which prejudice is considered—is irrelevant given the posture of this case. Defs.' Br. at 22. And in any event, this Court recently rejected a nearly identical argument, holding that it is an abuse of discretion that "clearly appears arbitrary" to dismiss a case with prejudice based on a six-month delay in docket filings. *Thomas v. Wardell*, 951 F.3d 854, 859 (7th Cir. 2020). This Court also reiterated in *Thomas* that before dismissing a case with prejudice, "a [district] court is required to show … the prejudice that the delay caused the defendant." *Id.* at 862. The district court did not "show," or even discuss, prejudice in its dismissal order or in the denial of Mr. Shaffer's Rule 60(b) motion. A9–11; A1–6.

This Court has reversed district courts that failed to follow any of the above-discussed safeguards in isolation, including in every case the district court cited in its dismissal order here. Op. Br. at 10–11; *Beyer*, 235 F.3d at 1041; *Del Carmen*, 908 F.2d at 161–63; *Johnson*, 718 F.3d at 732–33; *Kruger v. Apfel*, 214 F.3d 784, 786–88 (7th Cir. 2000); *Sroga*, 722 F.3d at 982–83. When these errors are all present in the same case, as they are here, the district court's arbitrary and fundamentally unjust abuse of discretion is especially clear and necessitates relief under Rule 60(b). *See, e.g., Sroga*, 722 F.3d at 982–83 (reversing denial of Rule 60(b) motion for reconsideration in light of

significant procedural errors in the underlying dismissal); *Del Carmen*, 908 F.2d at 161–63 (same).

III. The District Court's Response to Mr. Shaffer's Rule 60(b) Motion Compounded Its Abuse of Discretion.

The district court's denial of Mr. Shaffer's motion to reconsider also was an abuse of discretion for an additional, independent reason: This Court requires district courts faced with such motions to, at the very least, "explain why" they doubt a plaintiff's explanation for litigation missteps that are alleged to constitute a failure to prosecute. *Sroga*, 722 F.3d at 983; Op. Br. at 16. Faced with Mr. Shaffer's motion, however, the district court merely dismissed his explanation that his address update had been lost in the mail as "not plausible" and "self-serving." A5–6. In addition, the district court failed to even mention the other information provided in Mr. Shaffer's sworn affidavit—for example, that he had understood he would receive forwarded mail from the prison and that he had not received notice of any issues until after the case was dismissed—showing that the district court was wrong in presuming that Mr. Shaffer had abandoned his case. *See* SA4–6; *see also* A5–6; A11. This kind of summary rejection of the post-judgment explanation for the conduct about which Defendants had complained runs afoul of this Circuit's precedent. As this Court has held, it is a reversible abuse of discretion for a district court to discredit "reasons [in the Rule 60(b) motion] suggest[ing] that [plaintiff] was not intentionally delaying proceedings or disobeying court orders. … without explaining why he doubted" those reasons. *Sroga*, 722 F.3d at 983.

Defendants' arguments attempting to distinguish this Court's decision in *Sroga* are misplaced. *See* Defs.' Br. at 22 (arguing that *Sroga* was decided under a "different" or "more lenient" standard). In *Sroga*, as in this case, the Court heard an appeal from the denial of a Rule 60(b) motion following a dismissal with prejudice for lack of prosecution. 722 F.3d at 982–83. It thus arose in the same posture as Mr. Shaffer's case: a pro se litigant's case was abruptly dismissed with prejudice, the plaintiff filed a motion for reconsideration after learning of the dismissal, the district court summarily declared his post-judgment explanation implausible, and the dismissal order eventually came before this Court on appeal from a Rule 60(b) motion. *Id.*[1] This Court therefore should follow *Sroga* in holding that the district court abused its discretion in cursorily rejecting the plaintiff's plausible explanation for his alleged misstep. *Id.*; *see also Del Carmen*, 908 F.2d at 163.

Defendants largely ignore this Court's precedent from Rule 60(b) cases involving dismissals for failure to prosecute and instead rely primarily on cases arising in other, inapplicable contexts. *See e.g.,* Defs.' Br. at 17, 25 (*citing Matter of Plunkett*, 82 F.3d 738, 742 (7th Cir. 1996) (examining whether

[1] As the *Sroga* opinion states, the plaintiff in that case first filed a Rule 60(b) motion seeking to vacate the judgment. *Sroga*, 722 F.3d at 982. After the district court denied that motion, the plaintiff filed a second Rule 60(b) motion seeking reconsideration. *Id.* The district court denied that motion, as well. *Id.* The plaintiff then appealed the district court's denial of his Rule 60(b) motions. *See* Notice of Appeal, *Sroga v. Huberman*, No. 1:11-cv-02124 (N.D. Ill. Mar. 2, 2012), ECF No. 22 (appealing only denial of motions to reconsider); *see also* Sroga, 722 F.3d at 982–83 (examining whether the district court erred in rejecting the new information provided in the plaintiff's Rule 60(b) motions). Defendants' statement that *Sroga* was "a FRCP 41(b) case" is wrong. Defs.' Br. at 22.

"excusable neglect" allowed amended filing of claim in bankruptcy case, when a mortgagee failed to amend proof of claim for almost a decade); *Prizevoits v. Indiana Bell Tel. Co.*, 76 F.3d 132, 134 (7th Cir. 1996) (holding that this Court did not have jurisdiction over a late-filed appeal, because a lawyer needing more time to prepare a motion was not "excusable neglect")). But the Court's review is not, as Defendants suggest, limited to a mechanical application of precedent from Rule 60(b) cases arising in other contexts; the Court's review in Rule 60(b) cases involving dismissal for failure to prosecute instead focuses on whether the "severe sanction" of dismissal is warranted by the record at the time of dismissal.[2] *See, e.g., Del Carmen*, 908 F.2d at 161–62 ("[T]he appeal of

[2] As discussed in his Opening Brief, Mr. Shaffer's motion established various grounds for relief available under the particular subsections of Rule 60(b). Op. Br. at 17 (relying on Fed. R. Civ. P. 60(b)(1), (4), and (6)); *see also Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 394 (1993) (holding that "excusable neglect" under Rule 60(b)(1) includes "situations in which the failure to comply with a filing deadline is attributable to negligence"); *Brandon v. Chicago Bd. of Educ.*, 143 F.3d 293, 296 (7th Cir. 1998) (holding that Rule 60(b)(1) was appropriate remedy for errors by district court and neglect by litigants); *Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354, 357–58 (7th Cir. 1997) (holding that missed deadline resulting from carelessness or mistake can be "excusable neglect" under Rule 60(b)(1)); *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 801 (7th Cir. 2000) (recognizing that judgment can be void under Rule 60(b)(4) where "the defendant had never been made aware of it and so had no opportunity to challenge it by means of a direct appeal"); *Grun v. Pneumo Abex Corp.*, 163 F.3d 411, 424 (7th Cir. 1998) (holding dismissal for failure to prosecute was void under Rule 60(b)(4) where plaintiff had not received notice of missed trial date because of court error); *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 832 (7th Cir. 1985) (holding that "the residual category of Rule 60(b)(6) … permits review only when 'the violation created a substantial danger of an unjust result.'") (citation omitted). Contrary to Defendants' argument, in cases seeking reconsideration under Rule 60(b) of a dismissal for failure to prosecute, this Court's analysis often does not emphasize the particular subsection(s) of Rule 60(b) at issue. Rather, in this particular context, the Court's review of a Rule 60(b) motion analyzes whether the underlying dismissal with prejudice was unjust under the circumstances. *See Sroga*, 722 F.3d at 983; *Dickerson*, 32 F.3d at 1117; *Del Carmen*, 908 F.2d at 163.

the denial of the Rule 60(b) motion … also asserts a challenge to the merits of the underlying dismissal necessitating review of the underlying judgment").

Defendants similarly are incorrect in suggesting that the district court's reconsideration order should be upheld because it was "reasonabl[e]." *See, e.g.*, Defs.' Br. at 19. Defendants appear to be arguing that the district court's order was sufficient because the district court *might have* been able to provide a "reasonabl[e]" reason in its order for disbelieving Mr. Shaffer's sworn statements. *See, e.g., id.* That is the wrong question. Rather, under this Court's precedent, the district court was required to actually provide its reasons—in this case, both to explain why it found Mr. Shaffer's sworn statement that he mailed notice of his change of address to be "implausible," and to address the other critical information in Mr. Shaffer's affidavit showing that the district court was wrong to have "presumed" he had abandoned his case. *Sroga*, 722 F.3d at 982–83.[3] This is "legal error" and an abuse of discretion under this Court's precedents. *See Johnson*, 718 F.3d at 732–33; *Sroga*, 722 F.3d at 982; *see also Corporate Assets, Inc. v. Paloian*, 368 F.3d 761, 767 (7th Cir. 2004) (holding that "a court abuses its discretion when its decision is premised on an incorrect legal principle"). Defendants cannot erase the district court's legal error merely by suggesting post hoc explanations for the district court's

[3] Indeed, one of the cases cited by Defendants acknowledges that lost mail can excuse missed filings. *See, e.g., Prizevoits*, 76 F.3d at 134 ("The term 'excusable neglect' as used in Rule 4(a)(5) refers to the missing of a deadline as a result of such things as misrepresentations by judicial officers, lost mail, and plausible misinterpretations of ambiguous rules.").

actions, since the district court failed to justify its actions as this Court has required.

For the same reason, Defendants are wrong to argue that Mr. Shaffer is not entitled to relief under Rule 60(b) because, based upon the time between Mr. Shaffer's docket filings, the district court could assume that Mr. Shaffer was disinterested in pursuing litigation. Defs.' Br. at 17–18. This argument is foreclosed by *Thomas*, *supra*. Moreover, the district court docket does not indicate Mr. Shaffer wanted to abandon his case. During the period of alleged "inattention" of which Defendants complain, no party in the case filed anything for five months. Defs.' Br. at 17–18; *see also* Op. Br. at 13–14. Nor did Mr. Shaffer fail to respond to any court order.

In any event, the district court did not take the required steps to determine whether Mr. Shaffer was disinterested in his case or provide him an opportunity to remedy the alleged misstep at any stage in the litigation. Rather, in its own words, it chose to "presume[]" Mr. Shaffer was no longer interested and conclusively end the case based solely on Defendants' motion. A11. In fact, faced with Defendants' motion for an order to show cause, the district court neither issued an order to show cause nor ordered Mr. Shaffer, a pro se litigant unfamiliar with the seriousness of such an order, to do anything at all. At multiple stages throughout this case, the district court could have taken any number of actions to confirm or disprove its presumption, impose a lesser sanction, or allow Mr. Shaffer to correct his alleged misstep. Instead, it jumped straight to the "extreme" step of dismissing the case outright and refusing to

reconsider that decision in a manner this Court has prescribed. *Kasalo*, 656 F.3d at 561–62; *Sroga*, 722 F.3d at 982–83.

Thus, while the district court abused its discretion in its initial dismissal with prejudice, the district court's summary response to Mr. Shaffer's Rule 60(b) motion was also a reversible abuse of discretion. This Court can and should reverse the district court's denial of Mr. Shaffer's Rule 60(b) motion. Because this Court's inquiry into the Rule 60(b) motion is, by necessity, "somewhat collapsed into a review of the dismissal," the proper remedy for this fundamentally unjust dismissal with prejudice is for this Court to reverse and remand with instructions to reopen the case. *Del Carmen*, 908 F.2d at 161.

CONCLUSION

For the foregoing reasons and for those stated in Mr. Shaffer's Opening Brief, this Court should reverse the district court's judgment of dismissal and denial of the motion for reconsideration and remand with instructions to reopen the case.

Respectfully submitted,

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Dated: April 20, 2020

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This Brief complies with page limitation of Rule 32(a)(7)(A) of the Federal Rules of Appellate Procedure because it does not exceed 15 pages.

2. This Brief complies with the typeface and type style requirements in Rules 32(a)(5) and (6) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 12-point Bookman Old Style font for the main text and 11-point Bookman Old Style font for footnotes.

Dated: April 20, 2020

s/ Sarah M. Konsky
Sarah M. Konsky

CERTIFICATE OF SERVICE

I, Sarah M. Konsky, an attorney, hereby certify that on April 20, 2020, I caused the foregoing **Reply Brief of Plaintiff-Appellant Aishef Shaffer** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to ECF Procedure (h)(2) and Circuit Rule 31(b), and upon notice of this Court's acceptance of the electronic brief for filing, I certify that I will cause 15 copies of the **Reply Brief of Plaintiff-Appellant Aishef Shaffer** to be transmitted to the Court via UPS delivery, postage prepaid, to the address listed below within 7 days of that notice date.

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Dated: April 20, 2020

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