No. 19-1372

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AISHEF SHAFFER, Plaintiff-Appellant, v. JACQUELINE LASHBROOK, CHRISTINE BROWN, AMY CACIOPPO, JAMES BELFORD, PHILLIP BAKER, JOSHUA McDONALD, MICHAEL KABAT, and VIPIN SHAH, M.D., Defendants-Appellees.	)	Appeal from the United States District Court for the Southern District of Illinois No. 3:16-cv-00784-MJR-SCW The Honorable MICHAEL J. REAGAN, Chief Judge Presiding.

BRIEF OF STATE DEFENDANTS-APPELLEES

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Aishef Shaffer's jurisdictional statement is not complete and correct. State Defendants-Appellees Jacqueline Lashbrook, Christine Brown, Amy Cacioppo, James Belford, Phillip Baker, Joshua McDonald, and Michael Kabat (together, State defendants) submit this jurisdictional statement under 7th Cir. R. 28(b).

Shaffer, an inmate in the custody of the Illinois Department of Corrections (Department) at Pinckneyville Correctional Center (Pinckneyville), filed a *pro se* complaint in the district court, citing 42 U.S.C. §§ 1983 and 1988 and alleging that numerous employees of the Department and Wexford Health Sources, Inc. (Wexford), along with other state officials, violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution. Doc. 1 at 1-9, 26-31.[1]

On screening under 28 U.S.C. § 1915A, the district court concluded that four of Shaffer's claims could proceed: (1) excessive force against Kabat; (2) Illinois common-law assault and battery against Kabat; (3) deliberate indifference to serious medical needs against Lashbrook, Cacioppo, Baker, McDonald, and Belford; and (4) deliberate indifference to serious medical needs against Brown and Wexford defendant Dr. Vipin Shah. Doc. 10 at 6-7, 15. The district court dismissed Shaffer's other claims against the other defendants for failure to state a claim. *Id.* at 15-16. The district court had subject matter jurisdiction over Shaffer's federal claims under

[1] This brief cites the district court's docket, which is the record on appeal, as "Doc. ___," this court's docket as "7th Cir. Doc. ___," and Shaffer's opening brief on appeal as "AT Br. ___."

28 U.S.C. § 1331 and supplemental jurisdiction over his state-law claims under 28 U.S.C. § 1367.

In its screening order, the district court also referred the case to a magistrate judge for disposition pursuant to S.D. Ill. Local R. 72.2(b)(2) and 28 U.S.C. § 636(c), if all parties consented to the referral. Doc. 10 at 17. But the parties did not file forms consenting to the magistrate's jurisdiction. *See* 28 U.S.C. § 636(c) (all parties must consent to disposition by magistrate); S.D. Ill. Local R. 72.2(b)(2) ("The Clerk of Court shall supply . . . a consent form which may be used by the parties."). The magistrate thus handled only pretrial proceedings. *See* S.D. Ill. Local R. 72.1(a)(1) (automatically referring "all pretrial motions . . . in accordance with the provisions of Federal Rule of Civil Procedure 72" to magistrate); *see also* 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. (FRCP) 72(a).

On April 12, 2018, the district court dismissed Shaffer's remaining claims "with prejudice" for failure to prosecute under FRCP 41(b). Doc. 83 at 3, thereby disposing of all claims against all parties. Although the district court's screening order had dismissed some of Shaffer's claims without prejudice, *see* Doc. 10 at 6-7, 15-16, that fact does not affect the judgment's finality because the district court ultimately dismissed Shaffer's remaining claims with prejudice under FRCP 41(b), ordered that judgment be entered, and directed the clerk to "close this case as no claims remain," Doc. 83 at 3, thus signaling that it was finished with the case, *see*, *e.g.*, *Hernandez v. Dart*, 814 F.3d 836, 841 (7th Cir. 2016) (dismissal without prejudice was final and appealable where district court told plaintiff to appeal and

stated that case was "terminated," indicating that court "was finished with the case").

On April 13, 2018, the district court entered a separate judgment order pursuant to FRCP 58. Doc. 84. Shaffer did not file a notice of appeal, or any other document in the district court, within 30 days of the judgment, *i.e.*, by May 14, 2018. *See* Fed. R. App. P. (FRAP) 4(a)(1)(A). Nor did he file a motion for an extension of time to file a notice of appeal within 60 days of the judgment, *i.e.*, by June 12, 2018. *See* FRAP 4(a)(5)(A)(i) (district court may extend time to file notice of appeal if "a party so moves no later than 30 days after" time for filing notice of appeal expires).

On May 29, 2018, the district court clerk received a letter from Shaffer labeled, "Motion [for] Change of Address." Doc. 85 at 1, 3. In it, he stated that he was "incarcerated at Stateville Correctional Center," was writing "to inform the court . . . that [he had] a change of address," and he had "been without any legal assistance or way to inform the court." *Id.* at 1. Shaffer included no declaration indicating when he put the letter in the mail, but it was postmarked May 24, 2018. *Id.* at 2.

Although in some circumstances a district court may construe a postjudgment motion as a motion to extend the time to appeal under FRAP 4(a)(5), *see Bell v. McAdory*, 820 F.3d 880, 884 (7th Cir. 2016), there was no basis for treating Shaffer's May 29, 2018 letter as one because he offered no explanation for not filing a timely appeal other than his lack of "legal assistance." Doc. 85 at 1. A lack of legal assistance is not excusable neglect or good cause for an extension under FRAP 4(a)(5)(A)(ii). *See Nestorovic v. Metro. Water Reclamation Dist. of Greater Chi.*, 926

F.3d 427, 432 (7th Cir. 2019) (per curiam) (where *pro se* plaintiff "offered no meaningful explanation for not filing a timely notice of appeal" other than "she was searching for an attorney," district court abused discretion in granting extension of time to appeal). Without excusable neglect or good cause, the district court had no basis to treat the letter as an extension motion, much less grant Shaffer an extension.

And although Shaffer sent the court two other letters in late June and early July 2018 stating that he could not e-file documents, *see* Doc. 86, 88, neither could be construed as a motion to extend the time to appeal because neither was submitted within 60 days of the judgment, as required by FRAP 4(a)(5)(A)(i). And even if these letters could have been so construed, neither included facts suggesting good cause or excusable neglect — both simply referred to Shaffer's lack of counsel and the inaccessibility of e-filing. *See* Doc. 86 at 1; Doc. 88 at 1. The district court, therefore, had no basis to treat these letters as motions to extend the time to appeal.

Because Shaffer failed to file a timely notice of appeal or motion for extension of time to file a notice of appeal from the April 13, 2018 judgment, this court lacks jurisdiction to review it. *See* 28 U.S.C. § 2107(a), (c); *Bowles v. Russell*, 551 U.S. 205, 213-15 (2007).

On July 12, 2018, Shaffer deposited in the prison mail a motion for relief from judgment under FRCP 60(b), Doc. 90 at 1-3, 31, along with a motion "for a certificate of [a]ppeal[a]bility," *id.* at 17-19. *See Taylor v. Brown*, 787 F.3d 851, 858-59 (7th Cir. 2015) (prisoner mailbox rule applies to all district court filings absent exceptional situations). In October 2018, Shaffer filed additional copies of his FRCP 60(b)

motion, *see* Doc. 93, and motion for certificate of appealability, *see* Doc. 94, as well as a motion for a status hearing on those motions, *see* Doc. 95. In December 2018 and January 2019, Shaffer filed motions requesting updates on the status of the motions. Docs. 102-03.

On February 1, 2019, the district court denied Shaffer's FRCP 60(b) motion and all other pending motions. Doc. 105 at 1-2, 6. On February 28, 2019, prison staff e-filed Shaffer's notice of appeal of the denial of his "Rule 60(b) motion to reinstate his civil complaint on [February 1, 2019]." Doc. 106 at 1.[2] Because the notice of appeal was filed within 30 days of the order denying his FRCP 60(b) motion, this court has jurisdiction to review the denial of that motion under 28 U.S.C. § 1291. *See Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 110 (7th Cir. 1985).

But Shaffer's appeal of the denial of his FRCP 60(b) motion did "not bring up the underlying judgment for review." *Browder v. Dir., Dep't of Corrs. of Ill.*, 434 U.S. 257, 263 n.7 (1978). Instead, "an appeal from the denial of a Rule 60(b) motion merely brings up the order denying the motion." *Tango Music, LLC v. DeadQuick Music, Inc.,* 348 F.3d 244, 247 (7th Cir. 2003). Thus, this court is limited to reviewing the district court's February 1, 2019 order denying the FRCP 60(b) motion. *See Jones v. Phipps*, 39 F.3d 158, 162 (7th Cir. 1994).

[2] Although the prisoner mailbox rule has been applied to documents submitted to prison staff for e-filing, *see Taylor*, 787 F.3d at 858-59, Shaffer's notice of appeal did not say when he provided it to prison staff or deposited it in the institutional mail. But regardless of the mailbox rule, Shaffer's notice of appeal was timely even if it is considered filed as of February 28, 2019.

ISSUE PRESENTED FOR REVIEW

Whether the district court did not abuse its discretion in denying Shaffer's FRCP 60(b) motion for relief from judgment because Shaffer ignored his case for eight months and offered an implausible excuse for his failure to update his address with the district court.

STATEMENT OF THE CASE

In July 2016, Shaffer, an inmate in the Department's custody, filed a *pro se* complaint in the district court. Doc. 1 at 1. In the complaint, Shaffer alleged that, while at Pinckneyville, Correctional Officer Kabat assaulted him, *id.* at 10, and Lieutenant Baker and Correctional Officers Belford, Cacioppo, and McDonald ignored his subsequent requests for medical care, *id.* at 11-12. Shaffer also alleged that Dr. Shah refused to treat his injuries, *id.* at 16, and Lashbrook, the prison's warden, and Brown, the prison's Medical Administrator, ignored his grievances requesting medical treatment, *id.* at 19, 24-25.

On screening under 28 U.S.C. § 1915A, the district court allowed some of Shaffer's claims against State defendants and Wexford defendant Dr. Shah to proceed. Doc. 10 at 6-7, 15-16. In the same order, the district court wrote:

> Finally, Plaintiff is **ADVISED** that he is under a continuing obligation to keep the Clerk of Court and each opposing party informed of any change in his address; the Court will not independently investigate his whereabouts. This shall be done in writing and not later than **7 days** after a transfer or other change in address occurs. Failure to comply with this order will cause a delay in the transmission of court documents and may result in dismissal of this action for want of prosecution. *See* Fed. R. Civ. P. 41(b).

Id. at 18 (emphasis in original).

In November 2016, a magistrate judge entered a scheduling order, requiring discovery to be completed by March 1, 2018, and ordering the parties to make all discovery requests "in sufficient time to permit response or compliance by" that date. Doc. 22 at 4. He also ordered dispositive motions to be filed by April 2, 2018. *Id.* Over the next several months, Shaffer actively litigated his case, requesting a

settlement conference, *see* Docs. 27, 29, filing various discovery motions, *see* Docs. 28, 30, and seeking a preliminary injunction, *see* Doc. 45.

On August 29, 2017, Pinckneyville staff scanned Shaffer's motion to compel discovery disclosures for e-filing, although the motion was not uploaded to the district court's docket until September 5, 2017. Doc. 72 at 1. Shaffer's motion asked the court to compel State defendants to turn over any incident and disciplinary reports relevant to his claims. *Id.* at 1-2. He asserted that these documents were necessary "to effectively prosecute" his claims. *Id.* at 2. Alternatively, he asked the district court to recruit "a lawyer, so important discovery documents and information can be obtain[ed]," claiming that his *pro se* "status [was] hindering him to properly persecute [sic] each of [his] claims." *Id.* at 3.

On September 13, 2017, State defendants requested an extension of time to respond to Shaffer's written discovery requests, which Shaffer had sent to them "[o]n or about August 13, 2017." Doc. 74 at 1. Four days later, State defendants requested that Shaffer's motion to compel be denied as moot because they made their initial disclosures to him that day. Doc. 76 at 1. State defendants mailed copies of their extension motion and response to Shaffer at Pinckneyville. Doc. 74 at 3; Doc. 76 at 3.

On October 3, 2017, the magistrate judge denied Shaffer's motion to compel because "initial disclosures have now been provided to [him]." Doc. 79 at 2. The magistrate judge also rejected Shaffer's request for counsel, stating that Shaffer was "capable" of pursuing discovery *pro se*. *Id.*

The next day, State defendants and Dr. Shah filed a joint motion for a rule to show cause why Shaffer's complaint should not be dismissed for failure to update his address with the district court. Doc. 80 at 1. Defendants asserted that they mailed "several discovery responses and court filings to [Shaffer's] address at Pinckneyville" that had "been returned to sender, with indication that [Shaffer] ha[d] been paroled." *Id.* at 2. Defendants also noted that the Department's website showed that Shaffer was placed on mandatory supervised release on August 31, 2017. *Id.* Defendants submitted that Shaffer failed to comply with the court's order to update his address within seven days of being transferred. *Id.* at 1-2.

Nearly five months passed with no activity in the case. On March 1, 2018, Dr. Shah filed a motion to amend the discovery schedule, noting that discovery was set to close that day and that his attorney had received "no communication whatsoever from" Shaffer. Doc. 81 at 1. He asked the district court either to dismiss the case for failure to prosecute or amend the discovery schedule. *Id.*

On April 12, 2018, the district court dismissed Shaffer's action for want of prosecution. Doc. 83 at 3. The court noted that it had reminded Shaffer "that he was under a continuing obligation to keep the [c]ourt informed of any change in his address" and "a failure to update the [c]ourt on his address may ultimately result in a dismissal of his claims." *Id.* at 2. The court also stressed that it had "not received any filings from [Shaffer] since his release from custody," noting that his motion to compel had been scanned by prison staff before his release. *Id.* at 3. The court found that Shaffer's "failure to participate in any way in this case since his release from

prison" showed "that he is no longer interested in pursuing his claims." *Id.* The clerk entered a separate judgment order the next day. Doc. 84.

On May 29, 2018, the district court received a letter entitled, "Motion [for] Change of Address," in which Shaffer said that he was "incarcerated at Stateville Correctional Center" (Stateville) and was writing "to inform the court . . . that [he had] a change of address." Doc. 85 at 1, 3. He added that he had "been without any legal assistance or way to inform the court," providing no further explanation. *Id.*

One month later, the district court received another letter from Shaffer entitled, "Motion: Request for lawyer and change of [a]ddress." Doc. 86 at 1, 3. Shaffer said that he had been "transfer[r]ed to Lawrence Correctional Center" (Lawrence) and was "unable to give the court notice of [his] change of address because there [was] no e-filing at [the] prison." *Id.* at 1. He again asked for counsel because of his lack of "law knowledge" or "money to pay for envelopes or copies." *Id.*

On July 3, 2018, Shaffer mailed a third letter to the district court entitled, "Motion Notice to the Court." Doc. 88 at 1, 2. He asserted that he could not litigate his case properly because "there [was] no e-filing" at Lawrence and he did not "have the money to buy envelopes, [or] pay for copies and postage." *Id.* at 1. He also claimed that, "[d]ue to [his] recent[ ] transfers to different prisons," he had not received "Dockets 80 through . . . 87," which had not been "forward[ed] to [him]." *Id.* Shaffer asked the court to hold "a hearing . . . regarding these issues" and to compel "the defendants to forward [him] their court filings." *Id.*

The magistrate judge concluded that Shaffer's requests for counsel and a hearing were moot because judgment had been entered. Doc. 89. He directed the clerk to provide Shaffer with a copy of defendants' joint motion for a rule to show cause, the district court's order dismissing his complaint for want of prosecution, and the separate judgment order. *Id.*

On July 12, 2018, Shaffer filed a motion for relief from judgment under FRCP 60(b). Doc. 90 at 1. In support, he attached his own affidavit, which stated that he was released from prison on August 31, 2017, to an approved site. *Id.* at 4. Shaffer asserted that the Department maintained "a 'forwarding policy' for offenders transferred and/or released from custody . . . in which all mail is to be forwarded to [an] offender's . . . place of residency (if known)." *Id.* He said that Pickneyville had returned a document to State defendants' counsel even though his "parole place of residency . . . was known." *Id.* at 4-5.

Shaffer also claimed that, on September 6, 2017, he "sent a letter giving notice of [his] change of address" to State defendants' counsel and the district court. *Id.* at 5. He said that he "had the . . . letter [with a] proof of service . . . sent to [him] (copies) to show [that he had] made an attempt to send notice to the courts." *Id.* at 6. And Shaffer asserted that he could "not be held liable for ensuring that mail reaches the courts through [the] U.S. postal services [sic]." *Id.*

Shaffer explained that, "[s]ome time during May of 2018," he violated the terms of his mandatory supervised release and reentered the Department's custody,

when he sent the letters notifying the court that he was at Stateville and Lawrence. *Id.* at 5, 6.

Along with his own affidavit, Shaffer attached a copy of the letter that he claimed to have sent to the district court and defendants' attorneys on September 6, 2017, along with an alleged certificate of service of that letter. *Id.* at 7-10. The letter stated that Shaffer had "been released from Pinckneyville . . . on . . . [m]andatory [s]upervised [r]elease . . . (August 31, 2017)" and listed a new address in Chicago. *Id.* at 9. The certificate of service accompanying the letter stated that Shaffer mailed it on September 6, 2017. *Id.* at 8. It also stated that the letter was sent to State defendants' counsel, Dr. Shah's counsel, and the district court clerk. *Id.* at 7.

Along with his FRCP 60(b) motion, Shaffer filed a motion for a certificate of appealability under FRAP 22(b). Doc. 90 at 17. This motion reiterated Shaffer's claims regarding his attempt to notify the court of his release. *Id.* at 17-19. It also explained why Shaffer had a copy of the September 6, 2017 letter even though he had been re-incarcerated: "I . . . had copies of the letter [and] the proof of service sent in from family/friends to me." *Id.* at 18.

In response, Dr. Shah's counsel asserted that she had not received any letter from Shaffer regarding his release. Doc. 96 at 2. And Dr. Shah argued that Shaffer's motion did not meet any of the reasons for granting relief from the judgment under FRCP 60(b). *Id.*

The district court denied Shaffer's motion because he "failed to credibly prove that he attempted to update the [c]ourt or the [d]efendants with his mailing address

upon release to parole in August 2017." Doc. 105 at 5. The court found Shaffer's claim that the U.S. Postal Service "must have failed to deliver two separate documents (one to the Court and one to Defendants) in September 2017 [was] simply not plausible." *Id.* at 6. The court added that Shaffer's "self-serving" affidavit and copy of the alleged letter were not "helpful" to his claims. *Id.* at 5-6. The court thus found that Shaffer had "not established that his failure to update the parties as to his address was a byproduct of mistake, excusable neglect, or other grounds covered by Rule 60." *Id.* at 6. The court also denied Shaffer's request for a certificate of appealability, noting that such a certificate is relevant only to *habeas* proceedings and Shaffer could have appealed the dismissal of his case "had he been keeping proper tabs on [it]." *Id.*

Shaffer appealed, Doc. 106, which, as explained in the jurisdictional statement, is limited to the denial of his FRCP 60(b) motion. Doc. 106.

SUMMARY OF ARGUMENT

As explained in the jurisdictional statement, this court's review is limited to the denial of Shaffer's FRCP 60(b) motion. Because Shaffer failed to timely appeal the district court's underlying dismissal of his action under FRCP 41(b), this court lacks jurisdiction to consider Shaffer's contention that the district court abused its discretion in dismissing his case for want of prosecution.

Nor can Shaffer establish that the district court abused its discretion in denying his FRCP 60(b) motion. The district court reasonably found that Shaffer failed to show excusable neglect under FRCP 60(b)(1) because he did not monitor his case while he was not in Department custody and on mandatory supervised release, and the court was not required to accept his implausible claim that he tried to inform the court and defendants of his release. Shaffer's arguments under FRCP 60(b)(4) and 60(b)(6) also fail. He did not show that the judgment was void under FRCP 60(b)(4) because the district court had jurisdiction and afforded him due process. FRCP 60(b)(6) was wholly inapplicable in this case and, even if it applied, the district court reasonably found that Shaffer was not faultless.

In sum, Shaffer cannot show that no reasonable person would have reached the same decision as the district court in denying his FRCP 60(b) motion. This court, therefore, should affirm the district court's judgment in favor of State defendants.

ARGUMENT

As explained, this court lacks jurisdiction to review the district court's dismissal of Shaffer's action for want of prosecution. Shaffer did not timely appeal that judgment, and his appeal of the denial of his FRCP 60(b) motion did not bring up the underlying judgment for review. *See Browder*, 434 U.S. at 263 n.7. Thus, this court's review is restricted to whether the denial of Shaffer's FRCP 60(b) motion was an abuse of discretion. *See*, *e.g.*, *Dickerson v. Bd. of Educ. of Ford Heights, Ill.*, 32 F.3d 1114, 1115, 1118-19 (7th Cir. 1994) (limiting review to denial of FRCP 60(b) motion where plaintiff did not appeal dismissal of action under FRCP 41(b)). Accordingly, 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). *See* AT Br. at 9-15.

The district court did not abuse its discretion in denying Shaffer's motion for relief from judgment.

Shaffer cannot show that the district court abused its discretion in denying his FRCP 60(b) motion because he failed to inform the district court of his new address after he was placed on mandatory supervised release and ignored his case while he was not incarcerated. FRCP 60(b) permits a district court to relieve a party from a judgment on several grounds, including mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, or "any other reason that justifies relief." FRCP 60(b). "It is very well established that Rule 60(b) relief is an extraordinary remedy and is granted only in exceptional circumstances." *McCormick v. City of Chi.*, 230 F.3d 319, 327 (7th Cir. 2000) (internal quotation marks omitted).

In his opening brief on appeal, Shaffer contends that he established three different grounds for vacating the judgment under FRCP 60(b): (1) "excusable neglect" under FRCP 60(b)(1); (2) voidness under FRCP 60(b)(4); and (3) other reasons justifying relief under FRCP 60(b)(6). AT Br. at 17. But Shaffer has failed to show that his excuse for ignoring his case satisfied any of these provisions.

A. This court reviews the denial of Shaffer's FRCP 60(b) motion for an abuse of discretion.

This court reviews a denial of a FRCP 60(b) motion "only for an abuse of discretion." *Bakery Mach. & Fabrication, Inc. v. Traditional Baking, Inc.*, 570 F.3d 845, 848 (7th Cir. 2009). And "because a district court's dismissal for failure to prosecute under Fed. R. Civ. P. 41(b) [also] is reviewed only for an abuse of discretion, a court's decision under Rule 60(b) not to reinstate a case dismissed for want of prosecution has been described as discretion piled on discretion." *Dickerson*, 32 F.3d at 1117 (internal quotation marks and citation omitted).

Indeed, "[a]buse of discretion in denying a 60(b) motion is established only when no reasonable person could agree with the district court; there is no abuse of discretion if a reasonable person could disagree as to the propriety of the court's actions." *Bakery Mach. & Fabrication*, 570 F.3d at 848 (internal quotation marks omitted). And this court will affirm the district court's decision "unless . . . there was a substantial danger that dismissal of plaintiff's claims was fundamentally unjust." *McCormick*, 230 F.3d at 327. As detailed below, Shaffer cannot satisfy this highly deferential standard.

B. The district court did not abuse its discretion in finding that Shaffer's eight months of inattention to his case and implausible claim that three separate letters were lost in the mail were not excusable neglect under FRCP 60(b)(1).

The district court did not abuse its discretion in determining that Shaffer's conduct was not "excusable neglect" under FRCP 60(b)(1). *See* Doc. 105 at 6. Under that rule, whether "excusable neglect" exists is "an equitable [inquiry], taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993). Such circumstances include "the danger of prejudice to the [other party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* But in all events, "inattentiveness to the litigation is not excusable" under this rule. *Matter of Plunkett*, 82 F.3d 738, 742 (7th Cir. 1996); *see also Easley v. Kirmsee*, 382 F.3d 693, 698 (7th Cir. 2004) (excusable neglect does not include "inexcusable inattentiveness").

Shaffer's sole reason for vacating the judgment was that he allegedly tried to notify defendants and the district court that he was on mandatory supervised release, but his letters were lost in the mail. *See* Doc. 90 at 5-6. But even if that were true, Shaffer could not establish excusable neglect because, as the district court noted, he failed to "keep[ ] proper tabs on his case." Doc. 105 at 6.

Shaffer was an active litigant while he was incarcerated. *See*, *e.g.*, Docs. 27-30, 45. Indeed, when he was placed on mandatory supervised release on August 31, 2017, he had a motion to compel and recruit counsel pending. *See* Doc. 72. In that

motion, he claimed that defendants were not turning over documents essential to his case and that he was struggling to gather critical evidence without a lawyer. *Id.* at 2-3.

Once he was on mandatory supervised release, however, his interest in his case evaporated. From his release at the end of August 2017 until his re-incarceration in May 2018, Shaffer made no attempt to pursue discovery or check on the status of his pending motions. *See* Doc. 80 at 2; Doc. 81 at 1. If he had, he would have learned that the district court was unaware that he was on mandatory supervised release and lacked means to contact him. And if he had contacted the court during that time, judgment would not have been entered against him. *See* Doc. 83 at 2-3.

Notably, it may have been easier for Shaffer to monitor his case and pursue discovery on mandatory supervised release than while he was incarcerated. Yet, as the district court highlighted, *see* Doc. 105 at 6, he only checked on the status of the case after he was re-incarcerated in May 2018. *See* Docs. 85-86, 88. Nor did Shaffer's being on mandatory supervised release or *pro se* status constitute excusable neglect. After all, neither "incarceration nor lack of an attorney — alone or combined — [is] a sufficient basis upon which to premise either a finding of . . . 'excusable neglect' under Rule 60(b)(1)." *Jones*, 39 F.3d at 163. In light of Shaffer's decision to ignore his case for eight months, the district court did not abuse its discretion in finding that he could not establish excusable neglect.

Shaffer's inattentiveness is especially inexcusable because he continued to ignore his case as the discovery cutoff and dispositive motion deadlines passed. *See*

Doc. 22 at 4; Doc. 81 at 1; *see also Robinson v. Wix Filtration Corp. LLC*, 599 F.3d 403, 413 (4th Cir. 2010) (party's failure to monitor case was inexcusable where "dispositive motions' deadline was fast approaching"). While on mandatory supervised release, Shaffer made no attempt to modify the magistrate judge's scheduling order even though these crucial deadlines approached and passed. In light of Shaffer's past interest in discovery, *see* Doc. 72 at 2-3, the fact that he allowed discovery to end without following up on the documents that he had requested from defendants showed that he was uninterested in prosecuting his case. But such disinterest is not excusable neglect.

And although Shaffer maintained that he tried to inform the court that he was on mandatory supervised release, the district court reasonably found that this was implausible. *See* Doc. 105 at 6. On its face, Shaffer's claim that the U.S. Postal Service lost three separate copies of the letter that he allegedly sent to State defendants' counsel, Dr. Shah's counsel, and to the clerk's office is suspect. And the alleged copy of the letter that Shaffer sent to defendants' attorneys and the district court on September 6, 2017, attached to his FRCP 60(b) motion, *see* Doc. 90 at 7-10, undermined his claim. It made no sense that Shaffer, who asserted that he sent the letter while he was on mandatory supervised release, somehow had a copy of it with him in prison after his re-incarceration in May 2018.

Recognizing this contradiction, Shaffer attested that he "had the . . . letter [with] proof of service . . . sent to [him] (copies) to show [he] made an attempt to send notice to the court[ ]." Doc. 90 at 6. But Shaffer did not have time to ask someone to

send him a copy of the letter after learning of the dismissal. According to Shaffer, he "first received copies of the court order [dismissing his complaint] on July 11, 2018." *Id.* at 6. He executed his affidavit and put his FRCP 60(b) motion in the mail the next day. *Id.* at 6, 31. It was unlikely that, in just one day, Shaffer contacted someone outside the prison, that person mailed him a copy of the letter, and he received it.

Shaffer contends that the district court erred in finding that his affidavit was "self-serving," *see* Doc. 105 at 5, citing cases that have criticized the rejection of affidavits solely because they are self-serving, *see* AT Br. at 18. Those cases have stressed that district courts should not discount such affidavits when they are used to introduce facts on summary judgment. *See Widmar v. Sun Chem. Corp.*, 772 F.3d 457, 459-60 (7th Cir. 2014) ("Self-serving affidavits can indeed be a legitimate method of introducing facts on summary judgment."); *Hill v. Tangherlini*, 724 F.3d 965, 967 (7th Cir. 2013) ("[T]he term 'selfserving' must not be used to denigrate perfectly admissible evidence through which a party tries to present its side of the story at summary judgment."). But even if the district court should not have characterized Shaffer's affidavit as "self-serving," Shaffer cannot show that the district court was required to accept it. After all, even on summary judgment, a district court need not accept a story that "is so 'internally inconsistent or implausible on its face' that 'no reasonable person would believe it.'" *Melton v. Tippecanoe Cty.*, 838 F.3d 814, 819 (7th Cir. 2016) (quoting *Seshadri v. Kasraian*, 130 F.3d 798, 802 (7th Cir. 1997)). As detailed, no reasonable person could believe

Shaffer's story. The district court thus reasonably found that Shaffer "failed to credibly prove" that he attempted to update the court with his current address. Doc. 105 at 5.

Shaffer's inattentiveness also prejudiced State defendants. Although the district court did not expressly refer to the prejudice to defendants when denying Shaffer's FRCP 60(b) motion, the record shows that Shaffer's neglect caused a significant delay. Shaffer had no contact with defendants in the eight months that he was on mandatory supervised release, allowing both the discovery and dispositive motions deadlines to pass. *See* Doc. 22 at 4; Doc. 80 at 2; Doc. 81 at 1. Shaffer's dilatory conduct prevented State defendants from completing discovery, including taking his deposition and gathering other evidence to support a dispositive motion. Although the district court could have reopened discovery, State defendants were forced to allow Shaffer's claims to linger for eight months without any ability to develop their defenses. That delay alone, during which witnesses' memories continued to fade, prejudiced State defendants. *See Hassebrock v. Bernhoft*, 815 F.3d 334, 341 (7th Cir. 2016) (upholding decision not to reopen discovery because it "would prejudice the defendants because the case was old" and reopening discovery "would cause further delay").

Shaffer argues that this court's decision in *Sroga v. Huberman*, 722 F.3d 980 (7th Cir. 2013), "makes clear" that the denial of his FRCP 60(b) motion "was an abuse of discretion," AT Br. at 16. But in *Sroga*, this court did not address the excusable neglect standard of FRCP 60(b)(1) or any other provisions of that rule. *See*

Sroga, 722 F.3d at 982-83. Instead, this court concluded that the district court had failed to consider the "essential factor[s]" relevant to a dismissal for want of prosecution under FRCP 41(b), "such as the frequency and egregiousness of the plaintiff's failure to comply with deadlines, the effect of delay on the court's calendar, and the prejudice resulting to the defendants." *Id.* at 982 (internal quotation marks omitted).

Unlike *Sroga*, this is not a FRCP 41(b) case. As explained, this court lacks jurisdiction to review the propriety of the district court's judgment under FRCP 41(b). This court possesses jurisdiction solely to review the denial of Shaffer's FRCP 60(b) motion. Because *Sroga* was decided under a different — and more lenient — standard, it does not support Shaffer's assertion that the district court here abused its discretion in declining to vacate its judgment. *See Dickerson*, 32 F.3d at 1118-19 (stating that, when court was "reviewing the district court's denial of [plaintiff's] second Rule 60(b) motion rather than her challenge to its invocation of Rule 41(b) . . . , not even an arguable abuse of discretion in applying Rule 41(b) vitiates the court's subsequent refusal to reconsider its denial of [plaintiff's] motion to vacate [under FRCP 60(b)].").

And even if *Sroga* had been decided under FRCP 60(b), it involved fundamentally different facts. In *Sroga*, the district court "summarily dismissed" the plaintiff's lawsuit after he failed to appear for a status hearing. 722 F.3d at 982. The plaintiff claimed that he did not receive notice of the hearing because he was out of town and his mother may have been taking his mail because she did not approve of

his litigation. *Id.* at 982-83. This court held that the district court abused its discretion in dismissing the case because it did not explain "why he doubted [the plaintiff's] explanation" and there was no prejudice to the defendants because they had not even been served when the complaint was dismissed. *Id.* at 983.

In this case, by contrast, the district court did not summarily dismiss Shaffer's case as soon as he failed to update the court about being on mandatory supervised release. In October 2017, defendants informed the court that Shaffer was placed on mandatory supervised release but failed to update his address. *See* Doc. 80. Five months later, on the discovery cutoff date, Dr. Shah's attorney again informed the court that she had heard nothing from Shaffer since his release from prison. *See* Doc. 81. The district court waited another month and a half and, receiving no word from Shaffer, dismissed the case for want of prosecution. *See* Doc. 83. Unlike *Sroga*, where the district court immediately and summarily dismissed the plaintiff's action after one missed status date, the district court here gave Shaffer ample opportunity to update it as to his whereabouts.

Nor was Shaffer's excuse as plausible as the plaintiff's in *Sroga*. As explained, his excuse rested solely on the implausible premise that the U.S. Postal Service lost three separate pieces of mail sent to three different addressees, supported only by an alleged copy of the letter that was of questionable origin. And even if he had sent the letter, Shaffer offered no explanation for his failure to pursue or monitor his case for eight months. Finally, the prejudice to State defendants in this case was greater than in *Sroga*. Unlike *Sroga*, where the defendants had not yet been served with the

complaint, this case was in the midst of discovery when Shaffer was placed on mandatory supervised release and went silent.

In sum, Shaffer cannot show that no reasonable person would have found that he failed to establish excusable neglect. For nearly eight months, Shaffer made no attempts to monitor the status of his case or determine if the district court or defendants had learned of his placement on mandatory supervised release, even though he had been actively pursuing his case before his release. And the district court reasonably rejected Shaffer's claim that three copies of a letter informing the court and defendants of his release were lost in the mail as implausible. The district court, therefore, did not abuse its discretion in denying Shaffer's motion under FRCP 60(b)(1).

C. The district court did not abuse its discretion in finding that Shaffer failed to establish that the district court's judgment was void under FRCP 60(b)(4).

Shaffer's motion fared no better under FRCP 60(b)(4), which permits a district court to vacate a "void" judgment. FRCP 60(b)(4). FRCP 60(b)(4) "applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *United States Air Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010). Indeed, "only rare instances of a clear usurpation of power will render a judgment void." *Id.* (internal quotation marks omitted).

Shaffer's opening brief contains no argument that the district court lacked jurisdiction or violated his due process rights, thus forfeiting any such argument. *See*

Nick's Cigarette City, Inc. v. U.S., 531 F.3d 516, 524 n.2 (7th Cir. 2008). Forfeiture aside, Shaffer cannot meet either standard. Obviously, the district court had jurisdiction over Shaffer's section 1983 claims. *See* 28 U.S.C. § 1331; *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). Nor could Shaffer show any due process violation where he received notice of the judgment, *see* Doc. 90 at 6, and had an opportunity to contest it through his FRCP 60(b) motion, *see Blaney v. West*, 209 F.3d 1027, 1032 (7th Cir. 2000) (due process not violated where plaintiff received copy of judgment and "had ample opportunity after the entry of the judgment to make his case to the district court"). Shaffer failed to show that the district court's judgment was void under FRCP 60(b)(4).

D. FRCP 60(b)(6) was inapplicable and, in any event, the district court did not abuse its discretion in determining that Shaffer failed to establish extraordinary circumstances under that rule.

Finally, Shaffer contends that his case presents "extraordinary circumstances" under FRCP 60(b)(6). *See* AT Br. at 17. Initially, this argument fails because FRCP "60(b)(6) relief is available only when sections (b)(1) through (b)(5) do not apply." *Webb v. James*, 147 F.3d 617, 622 (7th Cir. 1998). As Shaffer recognizes, *see* AT Br. at 17, FRCP 60(b)(1) was the appropriate framework for his motion because he claimed that his letters were lost in the mail, *see Prizevoits v. Ind. Bell Tel. Co.*, 76 F.3d 132, 134 (7th Cir. 1996) ("excusable neglect" may include "lost mail"). Thus, this court should not consider Shaffer's argument under FRCP 60(b)(6).

But even if it does, Shaffer cannot show that the district court abused its discretion in determining no extraordinary circumstances warranted vacating the

judgment. *See* Doc. 105 at 6. "To justify relief under [FRCP 60(b)(6)], a party must show extraordinary circumstances suggesting that the party is faultless in the delay." *Pioneer Inv. Serv.*, 507 U.S. at 393 (internal quotation marks omitted). As explained, Shaffer cannot show that he was faultless. The judgment directly resulted from his failure to notify the district court of his mandatory supervised release status and to make any attempt to check on the status of his case before he returned to prison. Accordingly, Shaffer cannot demonstrate that the district court abused its discretion in denying his motion under FRCP 60(b)(6).

CONCLUSION

For these reasons, Defendants-Appellees Jacqueline Lashbrook, Christine Brown, Amy Cacioppo, James Belford, Phillip Baker, Joshua McDonald, and Michael Kabat request that this court affirm the district court's judgment in their favor.

Respectfully submitted,

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March 13, 2020

CERTIFICATE OF COMPLIANCE WITH PAGE LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2016, in 12-point Century Schoolbook BT font, and complies with Federal Rule of Appellate Procedure 32(a)(7)(A) in that the brief is 27 pages.

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CERTIFICATE OF FILING AND SERVICE

I certify that on March 13, 2020, I electronically filed the foregoing **Brief of State Defendants-Appellees** 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 the other participants in this appeal are CM/ECF users, and thus will be served using the CM/ECF system.

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