Nos. 18-1290 & 18-1459

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Fabian Greyer,
Plaintiff-Appellant,

v.

Illinois Department of Corrections, et al.,
Defendants-Appellees.

Michael Johnson,
Plaintiff-Appellant,

v.

Jason Dalke, et al.,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Western Division
Case Nos. 1:17-cv-07840-PGR & 3:17-cv-50384-PGR

The Honorable Philip G. Reinhard

CONSOLIDATED BRIEF OF COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENTS AT ISSUE

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-1290 & 18-1459

Short Caption: Fabian Greyer v. Illinois Department of Corrections, et al. & Michael Johnson v. Jason Dalke, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Mary H. Schnoor, Court-appointed amicus curiae in support of decisions at issue in these appeals

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Jones Day

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Louis K. Fisher Date: 12/21/2018

Attorney's Printed Name: Louis K. Fisher

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Kenton J. Skarin Date: 12/21/2018

Attorney's Printed Name: Kenton J. Skarin

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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Court-appointed amicus curiae in support of the district court's decisions at issue in these appeals

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Jones Day

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Mary H. Schnoor Date: 12/21/2018

Attorney's Printed Name: Mary H. Schnoor

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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JURISDICTIONAL STATEMENT

Appellant Fabian Greyer's jurisdictional statement is not complete and correct. The district court entered a final order dismissing Greyer's civil case with prejudice on December 19, 2017. Greyer then sent a letter to the district court on January 5, 2018, which the district court interpreted as a Federal Rule of Civil Procedure 59(e) motion to alter or amend the judgment. On January 11, 2018, the district court denied the motion.

In a civil case brought by an inmate, the notice of appeal must be filed or deposited in the prison's internal mail system accompanied by a notarized statement within 30 days after entry of the judgment or order appealed from. Fed. R. App. P. 4(a)(1)(A) & 4(c)(1)(A). If a party files a timely motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), the time to file an appeal runs from the entry of the order disposing of the last such remaining motion. Fed. R. App. P. 4(a)(4)(A)(iv). Greyer mailed a timely and notarized notice of appeal to the U.S. District Court for the Northern District of Illinois on February 2, 2018. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291, because it is an appeal from a final judgment.

Appellant Michael Johnson's jurisdictional statement is not complete and correct. The U.S. District Court for the Northern District of Illinois had subject matter jurisdiction over Michael Johnson's § 1983 complaint pursuant to 28 U.S.C. § 1331. The district court entered a final order dismissing Johnson's complaint with prejudice on February 15, 2018. Johnson filed a timely notice of appeal with the U.S. District Court for the Northern District of Illinois. *See* Fed. R. App. P. 3(a). This Court has jurisdiction to review the district court's dismissal of Johnson's suit pursuant to 28 U.S.C. § 1291, which grants jurisdiction of "all final decisions of the district courts of the United States" to the courts of appeal.

STATEMENT OF ISSUES

1. Does a district court act within its substantial discretion when, faced with a prisoner plaintiff who materially misrepresented his litigation history despite clear warning that doing so may result in summary dismissal, the district court dismisses the plaintiff's suit with prejudice after giving the plaintiff an opportunity to explain his misrepresentation and determining that a lesser sanction would be inadequate?

2. When a prisoner plaintiff's complaint materially misrepresents his litigation history despite clear warning that misrepresentation may result in summary dismissal, does the district court clearly err by rejecting the plaintiff's unsubstantiated assertion that the misrepresentation was due to mistake or misunderstanding?

STATEMENT OF THE CASE

I. Plaintiff-Appellant Fabian Greyer Fails to Disclose Prior Litigation or to Provide Justification for Doing So When Asked.

Plaintiff-Appellant Fabian Greyer is an Illinois prisoner serving a 25 year sentence for four counts of attempted murder. In October 2017, Greyer filed a *pro se* civil action against the Illinois Department of Corrections, Dixon Correctional Center, and various correctional officers. *See* Complaint, *Greyer v. Illinois Dep't of Corrections*, No. 1:17-cv-07840 (N.D. Ill. Dec. 19, 2017), ECF No. 1 ("Greyer Compl."). Greyer asserted a laundry list of supposed Eighth Amendment violations against numerous defendant correctional officers, including, among other things, complaints about access to dryers for his laundry, food going missing from his cell, dayroom restrictions, and correctional officers' allegedly unfair treatment of him because of the number of grievances he had filed. Greyer Compl. at 3-8.[1]

[1] The complaint also included an out-of-time claim for a single purported incident of sexual assault by a correctional officer. The incident supposedly occurred on August 6, 2014, over four years before Greyer filed his complaint. *See* Greyer Compl. at 7, 11. The statute of limitations for a § 1983 action in Illinois is two years. *See* 735 Ill. Comp. Stat. 5/13-202 (two-year statute of limitations for personal injury claims); *Wallace v. Kato*, 549 U.S. 384, 387 (2007) (length of the statute of

The same day, Greyer filed another *pro se* complaint against the Illinois Department of Corrections, the Graham Correctional Center, the Pinckneyville Correctional Center, and various other correctional officers. Both complaints were filed in the U.S. District Court for the Southern District of Illinois, whose clerk timestamped both "October 20, 2017." *See* Greyer Compl. at 1; Complaint at 1, *Greyer v. Illinois Dep't of Corrections*, No. 1:17-cv-01133 (S.D. Ill. Nov. 5, 2018), ECF No. 1. However, the court's electronic filing system indicates that both complaints were filed on October 23, 2017.

One section of the court-provided form complaint, with the heading "PREVIOUS LAWSUITS," asked: "Have you begun any other lawsuits in state or federal court relating to your imprisonment? [If] YES, describe each lawsuit in the space below." GA.1.[2] Directly underneath that instruction, the form included a prominent, underlined warning: "Failure

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limitations for a § 1983 action is determined by looking to the personal injury laws of the state in which the injury occurred).

[2] References to "GA.__" refer to the Required Short Appendix attached to Plaintiff-Appellant Greyer's brief. References to "JA.__" refer to the Required Short Appendix attached to Plaintiff-Appellant Johnson's brief.

to comply with this provision may result in summary denial of your complaint." GA.1.

In spite of this warning, Greyer checked "No." GA.1. In response to eight further questions asking for descriptions of each lawsuit, Greyer wrote "N/A" for each one. GA.1. Along with his complaint, Greyer filed a motion for leave to proceed *in forma pauperis* and a motion for recruitment of counsel. *See Greyer v. Illinois Dep't of Corrections*, No. 1:17-cv-07840 (N.D. Ill. Dec. 19, 2017), ECF Nos. 2 & 3. The case was soon transferred from the U.S. District Court for the Southern District of Illinois to the U.S. District Court for the Northern District of Illinois, the proper venue. *See* Order Transferring Case to Other District, *Greyer v. Illinois Dep't of Corrections*, No. 1:17-cv-01132 (S.D. Ill. Oct. 30, 2017), ECF No. 5.

The district court granted Greyer's motion for leave to proceed *in forma pauperis* but, on its own motion, provided Greyer an opportunity to "show good cause in writing why the court should not summarily dismiss" the case. GA.2-3. The district court explained that it had found "at least two prior actions" that Greyer failed to disclose. GA.3 (citing *Greyer v. Chandler* No. 07-cv-2010 (C.D. Ill.) (a habeas petition) and

Greyer v. Illinois Dep't of Corrections, No. 17-cv-1133 (S.D. Ill.) (discussed *supra* at 5)). The court explained that the consequence for not providing an adequate explanation for the failure to comply with the requirement to disclose these lawsuits by the appointed deadline would be summary dismissal. GA.3.

Greyer responded in a two-page filing that asserted without elaboration or evidentiary support that he was mentally ill, had limited literacy, and had entrusted the preparation of his filings to another inmate. GA.4-5. The filing did not dispute that his earlier cases were required by the form's instructions or provide any justification for why the cases were omitted. GA.4-5.

After evaluating this filing, the district court concluded that Greyer's failure to disclose his litigation history constituted fraud. The court reiterated that Greyer had "failed to disclose at least two prior actions." GA.6. The court acknowledged Greyer's "professed mental illness and limited ability to read and write" but found that Greyer's response to its order to show cause ultimately "offered no explanation for failing to disclose his prior lawsuits." GA.6-7. The district court noted that it had considered lesser sanctions but, having deemed them

inadequate, concluded that dismissal with prejudice was the proper penalty. GA.7. Because it dismissed the suit as a sanction for fraud, the district court determined that it did not need to reach the question whether the suit was alternatively subject to dismissal on the ground that the complaint was frivolous. GA.7; *see* 28 U.S.C. § 1915A (instructing courts to screen prisoner civil complaints and dismiss any complaint that "is frivolous, malicious, or fails to state a claim upon which relief may be granted").

Greyer then sent a letter to the district court, reiterating the assertions from his earlier response and attributing his omission to a lack of understanding. GA.8. The district court interpreted the letter as a Federal Rule of Civil Procedure 59(e) motion to alter or amend the judgment. GA.9. The district court explained that Greyer's repetition of his earlier excuses "provide[d] no basis for the court to revisit its prior ruling," and admonished Greyer to, in the future, "review all court submissions before filing to ensure that they are wholly accurate and complete." GA.10. It therefore denied the motion. GA.10.

II. Plaintiff-Appellant Michael Johnson Fails to Disclose Prior Litigation or to Provide Justification for Doing So When Asked.

Plaintiff-Appellant Michael Johnson is also an Illinois prisoner. He is serving sentences of ten years for armed home invasion, three years for aggravated battery of a peace officer, and five and a half years for a second aggravated battery of a peace officer. On December 18, 2017, Johnson filed a *pro se* civil action against nine Illinois Department of Corrections correctional officers, claiming that they violated his Eighth Amendment rights by taking approximately three months to replace an allegedly unsanitary mattress assigned to him upon entering Dixon Correctional Center and by allegedly denying his requests for dental hygiene products. *See* Complaint, *Johnson v. Dalke*, No. 3:17-cv-50384 (N.D. Ill. Feb. 15, 2018), ECF No. 1. His court-provided form complaint, which was slightly different from that used by Greyer, instructed: "List ALL lawsuits you (and your co-plaintiffs, if any) have filed in any state or federal court." JA.1. At the bottom of the page, in bold font, with all capital letters, the form admonished: "**YOU WILL NOT BE EXCUSED FROM FILLING OUT THIS SECTION COMPLETELY, AND FAILURE TO DO SO MAY RESULT IN DISMISSAL OF YOUR CASE**." JA.1. Johnson listed and described eight lawsuits he had previously filed.

JA.1-8. Along with his complaint, Johnson filed a motion for leave to proceed *in forma pauperis* and a motion for recruitment of counsel. *See Johnson v. Dalke*, No. 3:17-cv-50384 (N.D. Ill. Feb. 15, 2018), ECF Nos. 4 & 5.

As with Greyer, the district court granted Johnson's motion for leave to proceed *in forma pauperis* but asked Johnson to "show good cause in writing why the court should not summarily dismiss" the case. JA.9-10. The court acknowledged that Johnson had listed eight lawsuits on his complaint form but explained that it had discovered at least three additional lawsuits that Johnson failed to disclose. JA.10.[3] As with Greyer, the Court explained that the consequence for not providing an adequate explanation for the failure to comply with the requirement to disclose these lawsuits by the appointed deadline would be summary dismissal. JA.10.

In a one-page response, Johnson claimed that he "simply made a mistake [and] forgot to put the proper information unintentionally."

[3] One of the omitted suits, which Johnson had voluntarily discontinued, involved claims identical to those made in Johnson's complaint in this case, based on the allegedly unsanitary mattress and alleged deprivation of dental hygiene products. *See* Complaint, *Johnson v. Dalke*, No. 17-cv-50265 (N.D. Ill. Nov. 6, 2017), ECF Nos. 1 & 10.

JA.11. Even though he had filed at least ten prior suits, Johnson asserted that he was not experienced with how the legal system works. JA.11.

The district court evaluated Johnson's explanation and concluded that it did not justify his failure to comply with his duty to provide accurate information to the court in his initial filing. Observing that two of the missing cases were filed "at or around the same time as several of the listed cases," the court reasoned that complying with the disclosure requirement "should not have been difficult." JA.13. From Johnson's substantial litigation history, the court also inferred that he understood the importance of providing complete information in response to court requests. JA.13. In view of these facts, the court was "not persuaded by [Johnson's] excuse that he 'simply forgot' to include all of his previous cases." JA.13. The court recognized that it had discretion to impose "appropriate sanctions," up to and including dismissal, for this violation. JA.13. Emphasizing the importance of the disclosure requirement in easing the court's burden of researching whether a prisoner plaintiff's prior lawsuits add up to the "three strikes" that would preclude him from proceeding *in forma pauperis*, the court determined that the "severe sanction of dismissal" was needed "to send a strong message about the

obligation to be truthful, ethical, and forthright during the litigation process." JA.13.

SUMMARY OF THE ARGUMENT

Whenever a prisoner plaintiff seeks to bring a civil suit *in forma pauperis*, a district court must determine at the outset whether the plaintiff is barred from proceeding *in forma pauperis* under the PLRA's "three strikes" provision, 28 U.S.C. § 1915(g). Section 1915(g) generally forbids a prisoner from proceeding *in forma pauperis* if, on three or more prior occasions, he has brought an action or appeal in federal court that was dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." *Id.* To enable courts to accurately enforce the "three strikes" provision without an inordinate expenditure of time and resources—for a prisoner may have filed suits in any federal district court, or under a different name—district courts require any *pro se* prisoner plaintiff bringing a civil action under 42 U.S.C. § 1983 to disclose his complete litigation history on a court-provided prisoner civil rights complaint form. These complaint forms include a prominent, to-the-point warning that a plaintiff's failure to disclose his complete litigation history may result in summary dismissal of his case.

Under this Court's precedent, a district court has discretion to sanction with dismissal a prisoner plaintiff who materially misrepresents his litigation history "because a district court relies on a party's description of his litigation history to manage its docket" and enforce the PLRA. *Hoskins v. Dart*, 633 F.3d 541, 544 (7th Cir. 2011) (*per curiam*). This allocation of responsibility enables courts to evaluate large numbers of *pro se* prisoner plaintiff filings efficiently, to the benefit of the judiciary and meritorious claims alike. Indeed, this Court explained that it chose to publish its decision in *Hoskins* "[b]ecause of the importance of affirming a district court's discretion to impose sanctions, including dismissal, against litigants who intentionally misrepresent their litigation history." *Id.* All this Court requires, when a court has found that a prisoner plaintiff materially and intentionally misrepresented his litigation history despite the complaint form's clear warning, is that the district court "consider lesser sanctions before dismissing a complaint with prejudice." *Id.*

In the cases at issue, both Plaintiff-Appellants omitted multiple cases from their court-provided complaint form. In each case, the district court discovered the omissions and gave each Plaintiff-Appellant an

opportunity to explain why the misrepresentation did not warrant dismissal. The district court considered each Plaintiff-Appellant's excuses but found that they did not justify the omission or were unpersuasive. Having determined that lesser sanctions would be inadequate, the district court then dismissed each case. Under a straightforward application of *Hoskins*, the district court acted within its discretion when it dismissed each case at issue.

Furthermore, the district court did not err when it found that each Plaintiff-Appellant's omission of his litigation history was "both material and intentional, and thus fraudulent." *Id.* at 543. Under the applicable "clear error" standard of review, it is not enough for Plaintiff-Appellants to demonstrate that another jurist might reasonably draw a different conclusion. Rather, the district court's decision must be upheld unless, after reviewing "the entire evidence," this Court "is left with the definite and firm conviction that a mistake has been committed." *Pinkston v. Madry*, 440 F.3d 879, 888 (7th Cir. 2006) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985)).

When a litigant submits a complaint, the court may infer that the litigant's statements and omissions in the complaint were made

intentionally. *See Hoskins*, 633 F.3d at 543. Additionally, a court can infer that a litigant is aware of his own lawsuits, absent persuasive evidence to the contrary. In each case at issue, the district court found that the Plaintiff-Appellants had not complied with a direct, simple instruction to disclose their litigation history to the best of their knowledge, in spite of a prominent warning that incomplete disclosure would result in dismissal. This appropriately led to an inference that each Plaintiff-Appellant intentionally omitted his litigation history—perhaps for the purpose of appearing less litigious and therefore more credible to the court. At the very least, it was not entirely implausible (that is, a clear error for the district court to find) that the Plaintiff-Appellants intentionally omitted their cases.

Turning to materiality, a district court is hindered in its work of checking whether the plaintiff has accumulated three PLRA "strikes" whenever the plaintiff fails to put the court on notice of the existence of one or more of his prior cases, regardless of whether any of those cases are ultimately found to be "strikes." The omission of one or more *cases* therefore falls comfortably within "material" territory. *See Hoskins*, 633 F.3d at 542-543 (complete omission of cases, where court has made it

clear that "ALL lawsuits" are required, is material). In the cases at issue here, where each plaintiff omitted one or more prior cases, the district court did not err in determining that the misrepresentations were "material."

In sum, because the district court did not clearly err in finding that each Plaintiff-Appellant's misrepresentation was "both material and intentional, and thus fraudulent," *id.* at 543, and because the district court did not abuse its discretion in dismissing each Plaintiff-Appellant's case as a sanction for that fraud, the judgments at issue should be affirmed.

ARGUMENT

I. The District Court Acted Within Its Discretion When It Dismissed Plaintiff-Appellants' Cases as a Sanction for Their Material Misrepresentations.

A district court's determination that the sanction of dismissal is appropriate is reviewed for abuse of discretion. *See Hoskins*, 633 F.3d at 543. This court has remarked that the "difficulty of the task litigants face when challenging a district court's choice of sanctions" "cannot [be] understate[d]," for abuse of discretion is shown "only when it is clear that no reasonable person would agree [with] the trial court's assessment of

what sanctions are appropriate." *Marrocco v. Gen. Motors Corp.*, 966 F.2d 220, 223 (7th Cir. 1992).

In *Hoskins*, this Court affirmed that district courts have discretion to impose sanctions, including dismissal with prejudice, on a prisoner plaintiff seeking to proceed *in forma pauperis* when the plaintiff has misrepresented his litigation history despite clear warning that doing so risked dismissal. *Hoskins*, 633 F.3d at 544. So long as the district court considers lesser sanctions, this Court held, it does not abuse its discretion in imposing a dismissal sanction. *Id.*

A. District courts enjoy significant leeway in selecting sanctions for violations of orders, particularly when the violations hinder a court's ability to manage its docket.

District courts necessarily have considerable discretion in protecting their dockets from improper behavior by litigants. "In general, courts may impose appropriate sanctions, including dismissal or default, against litigants who violate . . . rules and orders designed to enable judges to control their dockets and manage the flow of litigation." *Hoskins*, 633 F.3d at 543. *See also, e.g.*, *Ammons v. Gerlinger*, 547 F.3d 724, 725 (7th Cir. 2008) (*per curiam*) (dismissing appeal when litigant deceived court about eligibility to appeal *in forma pauperis*).

The option to sanction by dismissal is particularly important in civil suits brought by prisoners seeking to proceed *in forma pauperis* (*i.e.*, without prepayment of fees). *See* 28 U.S.C. § 1915. Under the Prison Litigation Reform Act ("PLRA"), such suits must be screened by the district court "before docketing, if feasible or, in any event, as soon as practicable after docketing" to determine whether the complaint should be dismissed on the ground that it is frivolous, malicious, fails to state a claim, or seeks monetary relief from a defendant immune from such relief. *See id.* § 1915A. At or before that initial screening, a district court also determines whether the prisoner plaintiff is barred from proceeding *in forma pauperis* under the PLRA's "three strikes" provision, § 1915(g). Section 1915(g) generally forbids a prisoner from proceeding *in forma pauperis* if, on three or more prior occasions, he has brought an action or appeal in federal court that was dismissed "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." *Id.* § 1915(g).

As a practical matter, district courts require any *pro se* prisoner plaintiff bringing a civil action under 42 U.S.C. § 1983 to disclose his complete litigation history on a court-provided prisoner civil rights

complaint form. *See, e.g.*, Local Rule 81.1 of the Local Court Rules of the U.S. District Court for the Northern District of Illinois; U.S. District Court for the Southern District of Illinois, Instructions for Filing a Pro Se Civil Complaint for Civil Rights Violations or Other Civil Claims by a Person in Custody, https://www.ilsd.uscourts.gov/Forms/PrisonerInstructionSheet.pdf (last visited Feb. 2, 2019) ("You are required to disclose any other lawsuits you filed while you were in prison or jail . . . . FAILURE TO DISCLOSE YOUR LITIGATION HISTORY, INCLUDING 'STRIKES,' MAY RESULT IN SANCTIONS THAT INCLUDE DISMISSAL OF THIS ACTION.").[4] The premise of this requirement is that a prisoner is in the best position to know all the suits that he has commenced in federal court, while the district court is best positioned to evaluate which of those suits bear on his eligibility to proceed *in forma pauperis*. This division of duties allows courts to evaluate the *in forma pauperis* eligibility of large numbers of *pro se* prisoner plaintiffs efficiently. Instead of being spent searching dockets coast to coast (a

[4] The complaint form provided by the U.S. District Court for the Northern District of Illinois is available at: https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_online/1983Complaint.pdf (last visited Feb. 2, 2019).

dubious exercise at best, particularly when litigants have common names like Plaintiff-Appellant Michael Johnson here), scarce judicial resources can be directed toward resolving the disputes properly before the court.

Efficiency is critical in this area. Prisoner suits in federal court raising civil rights and prison conditions claims comprise a substantial percentage of the federal court system's docket. *See Jones v. Bock*, 549 U.S. 199, 203 (2007) ("Prisoner litigation . . . account[s] for an outsized share of filings in federal district courts." (internal quotation marks omitted)). In just the single year ending March 31, 2017, prisoners filed 31,183 such suits. *See* United States Courts, Federal Judicial Caseload Statistics (Mar. 31, 2017), tbl. C-2, https://www.uscourts.gov/sites/default/files/data_tables/fjcs_c2_0331.2017.pdf (last visited Feb. 2, 2019). That number was over 40% of all prisoner petitions filed, far exceeding even the number of habeas petitions filed, which amounted to only 17,311 (or just under 23%). *Id.* More broadly, the 31,183 federal prisoner petitions raising civil rights and conditions of confinement claims amounted to over 10% of all civil cases of any type commenced. *Id.* By comparison, *every single other civil rights suit* in the United States (including voting, employment, housing, welfare, ADA, and

education cases) amounted to 37,802 civil suits filed in the same time period. *Id.*

Not surprisingly, therefore, binding precedent of this Court recognizes that the dismissal sanction is permissible when a prisoner materially misrepresents his litigation history "because a district court relies on a party's description of his litigation history to manage its docket" and enforce the PLRA. *See Hoskins*, 633 F.3d at 544; *see also Rivera v. Drake*, 767 F.3d 685, 686-87 (7th Cir. 2014) (recognizing that financial penalties are ineffective as a sanction for indigent litigants). The district court's "three-strikes" assessment occurs before any defendants have been served, for, if the prisoner's request to proceed *in forma pauperis* is granted, it is the responsibility of the officers of the court—not the prisoner—to issue and serve all process. *See* 28 U.S.C. § 1915(d). For this reason, the district court cannot rely on the usual adversarial system of justice. Without opposing filings, the court has recourse only to the prisoner's disclosure and its own expenditure of time and resources to search for other suits brought by the same prisoner—which may have been filed in any federal district court, or under a different name. *Cf. Sloan v. Lesza*, 181 F.3d 857, 858 (7th Cir. 1999)

("The federal judiciary needs (but lacks) a central database of litigants to whom § 1915(g) applies."). The possibility of a dismissal sanction incentivizes litigants to be thorough in disclosing their litigation history, thereby making district court enforcement of the PLRA's "three strikes" provision not only more efficient but also more effective.

In addition to promoting the rule of law, effective enforcement of the "three strikes" provision helps to ensure that judicial resources are available for prisoners with meritorious claims. As the Supreme Court has recognized: "Our legal system . . . remains committed to guaranteeing that prisoner claims of illegal conduct by their custodians are fairly handled according to law. The challenge lies in ensuring that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit." *Jones*, 549 U.S. at 203. The PLRA's "three strikes" reform was designed to aid courts in "filter[ing] out the bad claims and facilitat[ing] consideration of the good," *Coleman v. Tollefson*, 135 S. Ct. 1759, 1764 (2015) (quoting *Jones*, 549 U.S. at 204) (internal quotation mark omitted), based on the assumption that past behavior is reasonably predictive of future behavior—at least when it comes to filing frivolous lawsuits. *See also* 141 Cong. Rec. 35,797 (Dec.

7, 1995) (statement of Sen. Hatch) (noting in discussion of PLRA that "[t]he crushing burden of . . . frivolous [prisoner] suits is not only costly, but makes it difficult for courts to consider meritorious claims."); 141 Cong. Rec. 38,276 (Dec. 21, 1995) (statement of Sen. Kyl) ("If we achieve a 50-percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners.").

B. The fact that a court *may* impose a lesser sanction, or even choose to overlook a misrepresentation, does not mean that it *must* do so.

Sometimes courts do excuse omissions of litigation history, but they recognize that such leniency is "the exception, not the norm." *Isby v. Brown*, 856 F.3d 508, 521 (7th Cir. 2017). For example, in *Isby*, a prisoner plaintiff failed to disclose his complete litigation history. *Id.* at 512. Not realizing that the plaintiff had already accumulated three "strikes" for filing frivolous suits or appeals, the district court granted the plaintiff's request to proceed *in forma pauperis*. *Id.* The existence of the three strikes did not come to light until two days before the oral argument in his appeal. *Id.* Despite the plaintiff's fraud, this Court exercised its discretion to hear the merits of his appeal, in view of his counsel's

payment of all fees owed and the serious concern that the plaintiff had been kept in solitary confinement for over a decade pursuant to a constitutionally deficient procedure. *Id.* at 512, 521, 529.

But the fact that a court, having found fraud, might use its discretion to decline to impose a dismissal sanction does not mean that it abuses its discretion when it imposes the sanction. *See Hoskins*, 633 F.3d at 543 ("Having found fraud, the district court had the discretion to dismiss Hoskins' cases as a sanction."). Indeed, this Court explained that it chose to publish its decision in *Hoskins* "[b]ecause of the importance of affirming a district court's discretion to impose sanctions, including dismissal, against litigants who intentionally misrepresent their litigation history." *Id.* at 544. All this Court requires is that the district court "consider lesser sanctions before dismissing a complaint with prejudice." *Id.* Moreover, a district court satisfies this obligation so long as the court demonstrates in some way that it found lesser sanctions inadequate—the lesser sanctions considered need not be expressly mentioned. *See id.* ("We view the court's citation of *Oliver* [*v. Gramley*, 200 F.3d 465 (7th Cir. 1999),] as demonstrating that it considered lesser sanctions.").

Under a straightforward application of this Court's precedent, the district court did not abuse its discretion when—in each of the two cases at issue—it determined that dismissal with prejudice was an appropriate sanction for the Plaintiff-Appellant's intentional misrepresentation of his litigation history. In Greyer's case, the district court expressly stated that it "consider[ed] other inadequate sanctions" and cited this Court's explanation, in *Rivera*, 767 F.3d at 686-87, that financial penalties are ineffective as a sanction for indigent litigants. GA.7. In Johnson's case, the district court cited this Court's discussion in *Hoskins* of the discretion courts have to "impose appropriate sanctions, including dismissal" before explaining that "the severe sanction of dismissal [was] warranted" to "send a strong message" to the plaintiff about his obligation to be truthful during litigation, particularly because of the burden on the court to scour online databases if it cannot count on the plaintiff to be forthright. JA.13. Thus, in each case, the district court demonstrated that it considered lesser sanctions but found them inadequate.

C. Having found fraud and considered lesser sanctions, the district court had discretion to dismiss the cases without making any additional findings.

Under this Court's precedent, a district court has discretion to dismiss a prisoner plaintiff's suit as a sanction for submitting a fraudulent litigation history without making the additional finding of "willfulness, bad faith, or fault" that this Court has required in other contexts, such as when a litigant has missed a deadline or violated a discovery rule. *Compare Hoskins*, 633 F.3d at 544 (concluding that there was no abuse of discretion on the grounds that the court considered lesser sanctions and the form's warning was prominent), *with Long v. Steepro*, 213 F.3d 983, 987 (7th Cir. 2000) ("[D]ismissal as a sanction is only appropriate when 'the noncomplying party acted with wi[l]lfulness, bad faith, or fault.'" (quoting *Marrocco*, 966 F.2d at 224)). This makes perfect sense, because intentionally and materially omitting one's litigation history in the face of a clear complaint form instruction reflects at least "fault."

"Fault" is determined objectively: it "doesn't speak to the noncomplying party's disposition at all, but rather only describes the reasonableness of the conduct—or lack thereof—which eventually

culminated in the violation." *Marrocco*, 966 F.2d at 224. In other words, a noncomplying party acts with "fault" so long as he has engaged in "objectively unreasonable behavior." *Long*, 213 F.3d at 987.

A reasonable person, faced with the complaint form's clear and prominent warning that anything other than complete disclosure risked summary dismissal of his suit, would err on the side of over-disclosure. If he was not certain that he recalled every case he had filed, he would at least include a note to that effect. For example, in *Montague v. Williams*, No. 16-cv-02609, 2017 WL 2345561 (N.D. Ill. May 30, 2017), an inmate plaintiff disclosed only one of the five suits he had previously filed. *Id.* at *2. Yet the plaintiff noted on the litigation disclosure page "that he was unable to retrieve other information [but] that it 'should be a matter of the record.'" *Id.* Here, neither Plaintiff-Appellant made any attempt to put the court on notice that his disclosure obligation might be incomplete. Knowing what was at stake, it was objectively unreasonable for each Plaintiff-Appellant to be less than fully forthcoming.

D. The district court afforded Plaintiff-Appellants an ample opportunity to be heard.

Far from denying Plaintiff-Appellants an adequate opportunity to be heard, the district court provided even *more* process than was legally

required. In *Hoskins*, this Court upheld a district court's dismissal of a prisoner plaintiff's suit as a sanction for misrepresenting his litigation history without even giving the plaintiff any opportunity to explain himself. *See Hoskins*, 633 F.3d at 544 ("[D]ismissal was permissible without further warning or opportunity to cure in light of the warning of the complaint form and the district court's finding of fraud."). In both cases at issue here, by contrast, the district court notified the plaintiffs of the omitted cases it had found and then gave them an opportunity to explain why the misrepresentation should not be sanctioned with dismissal. Each Plaintiff-Appellant's contention that he was entitled to still more procedure should accordingly be rejected.

1. Johnson contends that the district court abused its discretion by not "interpreting [Johnson's complaint and subsequent show-cause letter] in the light most favorable to Johnson." Johnson Br. 9-10. Because Johnson is a prisoner plaintiff, he urges, the district court was required to "liberally credit" his explanation or else give him "an opportunity to substantiate allegations through additional proceedings." Johnson Br. 19-20. In effect, Johnson would have this Court hold that a district court cannot disbelieve a prisoner's allegation of mistake without

first holding a hearing over the telephone. Johnson Br. 10, 20-21. Johnson cites no law supporting the imposition of such an intrusive procedural requirement on district courts' docket management.[5] The district court acted well within its discretion when it gave Johnson an opportunity to explain his omission, found his asserted excuse unpersuasive under the circumstances, and then dismissed the suit.

2. Greyer, invoking *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), goes so far as to suggest that the district court violated his due process rights by not giving him an "opportunity to be heard at a meaningful time and in a meaningful manner" before it dismissed his case. But the record plainly contradicts that notion. The district court took a measured approach that afforded Greyer precisely the opportunity to be heard that he claims he was denied. It first explained to Greyer what sanction it was considering and why, with citations to the

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[5] Johnson's invocation of the principle that *pro se* filings are to be "liberally construed," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)), is inapt. The established principle that *pro se* complaints and motions are "held to less stringent standards than formal pleadings drafted by lawyers," *id.*, and so not dismissed or denied simply for being inartful, does not imply that a district court presumptively must ignore or excuse a *pro se* litigant's noncompliance with a court's clear instruction—in this case, an instruction particularly directed to *pro se* litigants. *See supra*, at 19-20.

apparently omitted cases. *See* GA.2-3; *see also* JA.9-10. Then, it gave him an opportunity to explain the apparent omissions. *See* GA.2 (giving plaintiff a month to respond); *see also* JA.9 (same). Finally, the court considered Greyer's explanations and explained why he found them insufficient. *See* GA.6 (instead of explaining why his omissions were not misrepresentations justifying dismissal, Greyer "assert[ed] that he has a viable claim" and requested that counsel be appointed because of his "professed mental illness and limited ability to read and write"). Greyer's contention that the district court was required to afford him more process than it did is therefore unfounded. As with Johnson's case, the district court acted well within its discretion, indeed providing *more* of an opportunity to be heard than this Court has found adequate in similar circumstances.

In sum, having found fraud in each case at issue, the district court did not abuse its discretion when it gave each Plaintiff-Appellant an opportunity to explain himself, found that the Plaintiff-Appellant's explanation did not justify his misrepresentation, and determined that the sanction of dismissal was warranted. The district court's judgments should therefore be affirmed.

II. The District Court's Determination That Each Plaintiff-Appellant's Omission Was Fraud on the Court Was Not Clear Error.

A prisoner plaintiff's omission of his litigation history from his civil complaint is fraudulent if the omission is intentional and material. *See Hoskins*, 633 F.3d at 543. This Court reviews a district court's determination that an omission of litigation history was "both material and intentional, and thus fraudulent," for clear error. *Id.* Clear error is a "deferential standar[d] of review and, as a practical matter, similar or even identical to [review for abuse of discretion] in the amount of leeway [it] give[s] the district judge." *Thomas v. Gen. Motors Acceptance Corp.*, 288 F.3d 305, 308 (7th Cir. 2002). Under this standard of review, it is not enough for Plaintiff-Appellants to demonstrate that another jurist might reasonably draw a different conclusion. Rather, the district court's decision must be upheld unless, after reviewing "the entire evidence," this Court "is left with the definite and firm conviction that a mistake has been committed." *Pinkston*, 440 F.3d at 888 (quoting *Anderson*, 470 U.S. at 573).

A. The district court did not err, much less clearly err, when it found that the Plaintiff-Appellants' omissions were intentional.

1. When a litigant submits a complaint with a signed certification that "the facts stated in this [c]omplaint are true to the best of my knowledge, information and belief," the court may infer that the litigant's statements and omissions in the complaint were made intentionally. *See Hoskins*, 633 F.3d at 543 (district court "was within its rights in rejecting [plaintiff's] claim of innocence and finding fraud" when "he signed the complaints, and the signature page . . . advised him that his signature certified the truth of the entire complaint, including the litigation-history section"). Additionally, a court may infer that a prisoner plaintiff is aware of the cases he himself has commenced, absent persuasive evidence to the contrary. *See, e.g.*, *Thompson v. Taylor*, 473 F. App'x 507, 509 (7th Cir. 2012) (district court did not err in inferring that misrepresentation was intentional despite plaintiff's assertion that it was "an oversight because he was never assessed filing fees nor did he receive an order from the court disposing of th[e] uncited case").

Here, the district court found that the Plaintiff-Appellants had not complied with a direct, simple instruction to disclose their litigation

history to the best of their knowledge, in spite of prominent warnings that incomplete disclosure would result in dismissal. The court gave both Plaintiff-Appellants a chance to explain, but found neither Plaintiff-Appellant's asserted excuses sufficient to justify his omission. This appropriately led to an inference that each Plaintiff-Appellant intentionally omitted his litigation history.

Plaintiff-Appellants urge that different inferences could plausibly be drawn. It was plausible, Greyer contends, that he forgot about his 2007 suit and didn't realize the instructions called for the disclosure of a suit he filed the same day. *See* Greyer Br. 17. It was plausible, Johnson contends, that "he simply forgot to include [the omitted cases]." Johnson Br. 16. Plausible is not the question. The question is whether it is entirely implausible (that is, a clear error for the district court to find) that the Plaintiff-Appellants intentionally omitted their cases.

2. Perhaps realizing that their primary argument depends on misstating the standard of review, Plaintiff-Appellants search for a reason why they might definitively be said to have lacked intent. Such a reason proves elusive.

The fact that Johnson disclosed part of his litigation history does not conclusively establish his intent to disclose his complete litigation history. The complaint form he used clearly stated—in bold font, with all capital letters—"**REGARDLESS OF HOW MANY CASES YOU HAVE PREVIOUSLY FILED, YOU WILL NOT BE EXCUSED FROM FILLING OUT THIS SECTION COMPLETELY, AND FAILURE TO DO SO MAY RESULT IN DISMISSAL OF YOUR CASE**." JA.1. Two cases that Johnson omitted, which were identified by the district court in its order to show cause, were filed recently—within three years of Johnson's complaint in this case. *See* JA.10 (citing *Johnson v. Dalke* No. 17-cv-50265 (N.D. Ill.) and *Johnson v. Bennett*, No. 14-cv-01210 (C.D. Ill.)).[6]

[6] The district court also identified a third case, *Turner v. Wexford*, No. 13-cv-03072 (C.D. Ill. Mar. 14, 2013). As Johnson explains for the first time in his brief in this appeal, *see* Johnson Br. 16, n.8, Johnson was named as one of three plaintiffs in the complaint in this case but, not having signed the complaint, was terminated a day after the complaint was docketed. *See* Order, *Turner v. Wexford*, No. 13-cv-03072 (C.D. Ill. Mar. 14, 2013), ECF No. 6. However, there is no basis for inferring that the district court's inclusion of this case had any bearing on its ultimate conclusion that Johnson materially misrepresented his litigation history. Johnson does not dispute that the district court properly identified the two other cases listed in the show cause order. Moreover, the district court's order dismissing Johnson's case listed an additional omitted case filed the same day as Johnson's complaint in this case. *See* JA.13 (citing *Johnson v. Haenitsch*, No. 3:17-cv-50383 (N.D. Ill. Feb. 15, 2018)). Johnson contends that he was "not obligated to disclose" this

Indeed, one omitted suit involved claims identical to those made in Johnson's complaint in this case, based on the allegedly unsanitary mattress and alleged deprivation of dental hygiene products. *See* Complaint, *Johnson v. Dalke*, No. 17-cv-50265 (N.D. Ill. Nov. 6, 2017), ECF No. 1. A reasonable inference is that Johnson was aware of the cases he omitted, and aware that the instructions told him to list them, yet intentionally did not do so. Perhaps, one might reasonably infer, he omitted this information to hide the fact that he had previously commenced and then voluntarily discontinued an identical suit. On this record, the district court at the very least did not clearly err in inferring that the omission was intentional.

Similarly, the instructions on Greyer's complaint form do not render implausible the inference that his omissions were intentional. Greyer was asked: "Have you begun any other lawsuits in state or federal court relating to your imprisonment?" GA.1. Greyer "began" one omitted suit the same day he filed this complaint. *See supra* at 5. A reasonable inference is that he intentionally omitted any mention of that suit,

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contemporaneously filed case either, Johnson Br. 16, n.8, but it was not clear error for the district court to conclude that the instructions did elicit it.

perhaps to seem less litigious. At the very least, the district court did not clearly err in determining that Greyer intentionally did not disclose his litigation history.

3. Plaintiff-Appellants' remaining arguments regarding the district court's findings of intentional omission are unavailing. Greyer contends that the district court clearly erred because it "completely ignored" his "explanation . . . as to why the omission was a mistake." Greyer Br. 12. This assertion rests on a strained reading of the district court's opinion. As discussed, *supra* at 31, the district court summarized Greyer's statement and explained why, in the court's view, it did not justify Greyer's omission. In context, the district court's remark that Greyer offered "no explanation" for why he failed to disclose his litigation history in no way suggests that the court did not consider Greyer's written statement. To the extent Greyer contends otherwise, his argument amounts to a request that this Court micromanage the district court's opinion writing.

Johnson, on the other hand, proposes that the Court adopt a rule that "if there is no strikeout to hide, there could not be intent to defraud." *See* Johnson Br. 9, 17. As an initial matter, Johnson himself admits that

this Court has, on multiple occasions, upheld district court findings of fraud when the cases omitted by a prisoner plaintiff did not bear on his eligibility to proceed *in forma pauperis*. *See* Johnson Br. 15. In addition to *Hoskins*, this Court upheld a dismissal for fraud in *Thompson*, when the prisoner plaintiff had only one "strike" and thus would have been eligible to proceed *in forma pauperis*. *See Thompson*, 473 F. App'x 507, 509. Second, Johnson ignores that plaintiffs may have other motivations for omitting their complete litigation history, such as hiding duplicative litigation to avoid preclusion or hiding a prolific litigation history to seem more credible to the court.[7]

B. The district court did not err, much less clearly err, when it found that the Plaintiff-Appellants' omissions were material.

Under this Court's precedent, the complete omission of one or more cases from a complaint form is material, regardless of whether any of the omitted cases is a PLRA "strike," when the court has made clear that the litigant must disclose *all* of his cases. *See Hoskins*, 633 F.3d at 543 (upholding fraud determination when plaintiff omitted prior federal civil

[7] Greyer too ignores this latter motivation when he asserts that a litigant stands to gain nothing if his omission does not consist of a PLRA strike or duplicative claims. *See* Greyer Br. 9.

rights cases, even though none would qualify as a PLRA "strike"). As Plaintiff-Appellants recognize, this Court has otherwise not delineated when a prisoner plaintiff's misrepresentation of his litigation history is "material" and when it is not.

A rule that the omission of one or more cases falls comfortably within "material" territory makes good sense. For purposes of determining whether a prisoner plaintiff is eligible to proceed *in forma pauperis* under 28 U.S.C. § 1915, what is material to the district court is knowing of *each* of a litigant's prior cases, to check whether the plaintiff has accumulated three PLRA "strikes." As explained *supra* at 19-21, the way district courts have implemented their task of enforcing the PLRA's "three strikes" provision sensibly divides responsibility between the prisoner plaintiff and the court. The plaintiff is asked to disclose *facts* available to him (that is, what suits he has filed), while the district court is responsible for applying the law to those facts (that is, determining whether the "three strikes" provision makes the plaintiff ineligible to proceed *in forma pauperis*). The district court is hindered in its work whenever the plaintiff fails to put the court on notice of the existence of one or more of his prior cases, regardless of whether any of those cases

are ultimately found to be "strikes." Misrepresentations with such an effect are plainly "material." In the cases at issue here, where each plaintiff omitted one or more prior cases, the district court did not err in determining that the misrepresentations were "material."

Neither Plaintiff-Appellant disputed the materiality of his omission in the district court. Although this Court has "discretion to consider arguments raised for the first time on appeal," *Allen v. City of Chicago*, 865 F.3d 936, 944 (7th Cir. 2017), in civil cases, in most circumstances, "a ground not raised in the district court cannot be used to reverse that court," *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 749 (7th Cir. 1993). This Court should apply its usual rule and decline to consider arguments that were never raised in district court.

In any event, the heightened materiality standard that Plaintiff-Appellants propose is unsupported by either this Court's precedent or common sense. *Hoskins* notwithstanding, Plaintiff-Appellants ask for a rule that a misrepresentation of litigation history cannot be "material" unless it conceals a plaintiff's ineligibility to proceed *in forma pauperis* or hides duplicative litigation. Greyer Br. 17-18; Johnson Br. 15. Imagine such a rule in practice. Any prisoner plaintiff unsure whether

his litigation history might prevent him from proceeding without prepayment of fees or lead the court to dismiss his case as duplicative would have every incentive to omit his prior cases. If the court located the omitted cases (and if they did not amount to three "strikes"), it would be unable enter a sanction for the nondisclosure. Why, then, would he run the risk of disclosing a litigation history that *might* be disqualifying? In sum, under Plaintiff-Appellants' proposed materiality standard, the prisoner plaintiffs whose cooperation with the disclosure requirement would most aid the district court in administering the PLRA's "three strikes" provision would no longer have an incentive to be forthcoming.

C. The district court applied the correct legal standard for fraud.

Finally, Greyer attempts to persuade this Court apply a *de novo* standard of review to his case. He offers two arguments: (1) "the district court did not apply this Court's legal standard for when a prisoner's omission constitutes fraud," and (2) "the district court did not find any facts supporting its conclusion that Mr. Greyer committed a fraud." Greyer Br. 15. Neither should persuade this Court to depart from the clear-error standard of review.

1. *A district court's application of the law to the facts before it is reviewed for clear error even if the court omits a lengthy description of the legal standard.*

As an initial matter, *Montaño v. City of Chicago*, 535 F.3d 558 (7th Cir. 2008), which Greyer himself cites, demonstrates that the clear-error standard of review applies to the district court's finding of fraud. This is so even if, as Greyer alleges, the court "did not address either intentionality or materiality [the elements of fraud, as articulated in *Hoskins*] and made no factual findings as to either element." Greyer Br. 11. In *Montaño*, this Court, reviewing a district court's determination that the plaintiffs' testimony amounted to perjury, observed that the district court "failed to apply or even identify *any* legal definition of perjury." *Montaño*, 535 F.3d at 564. Nonetheless, the Court reviewed the perjury finding under a clear-error standard. *Id.* at 566.

Further, Greyer's assessment of whether the district court applied "this Court's standard for fraud as articulated in *Hoskins*" is mistaken. Greyer Br. 11. His argument is based on an incorrect understanding of the extent to which courts of appeals police the thoroughness of district court opinions. A glance at the district court's opinion in *Hoskins* demonstrates that the district court need not exhaustively lay out the

legal standard for fraud or expressly include the factual findings it makes on the way to the ultimate determination of "fraud." *See Hoskins v. Dart*, No. 10-cv-00677, 2010 WL 11545927, at *2 (N.D. Ill. Feb. 26, 2010), *aff'd* 633 F.3d 541 (making no express factual finding as to materiality and, for intentionality, concluding simply that "his failure to identify any of the previous lawsuits cannot be attributed to inadvertence or mistake"). *See also, e.g.*, *Thompson*, 473 F. App'x 507, 509 (applying clear-error standard and upholding determination that misrepresentation was "fraudulent" with no reference to intermediate findings regarding intentionality and materiality).

2. *The district court found fraud by a preponderance of the evidence before it.*

Greyer's argument that the district court made insufficient factual findings for clear-error review to apply—or for the district court's finding of fraud to be upheld—fares no better. There is no reason to doubt that the district court found fraud by a preponderance of the evidence in both cases at issue. In each case, the district court laid out the evidence before it and, from that evidence, made a finding that the Plaintiff-Appellant's omission amounted to fraud. In Greyer's case, the evidence noted by the court included: (1) that the complaint form, in simple language, asked the

plaintiff whether he had "begun any other lawsuits in state or federal court relating to your imprisonment"; (2) that the plaintiff had checked "No"; (3) that the court had found two cases that the plaintiff had commenced; and (4) that the plaintiff's response to his show-cause order did not negate the inference that the plaintiff's omission was intentional and material. *See* GA.6-7. In Johnson's case, the evidence noted by the court included: (1) that the complaint form, in simple and clear language, asked the plaintiff to "List ALL lawsuits you . . . have filed in any state or federal court in the United States"; (2) that the form also included a prominent warning that failure to completely disclose one's litigation history "MAY RESULT IN DISMISSAL OF YOUR CASE"; (3) that the plaintiff failed to disclose multiple lawsuits, two of which "were filed at or around the same time as several" of the cases the plaintiff had disclosed; and (4) that the plaintiff's "significant litigation history informs the court that plaintiff . . . understands the importance of providing complete information" in court filings." *See* JA.12-13.

Greyer contends that the district court's "fact-finding duty is especially important when a court makes a finding of fraud." Greyer Br. 11, n.3. Johnson echoes this notion of a "high bar for fraud." Johnson Br.

12. However, in *Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772 (7th Cir. 2016), this Court rejected the proposition that a finding of fraud in the course of civil litigation must be supported by a heightened evidentiary standard. *See id.* at 780-81. The Court reasoned that the consequence of dismissal for "fraud" in this context, "the loss of the opportunity to win money damages," *id.* at 781, did not warrant departure from the usual civil standard of "proof by a preponderance of the evidence," *id.* at 778.[8]

Contrary to Plaintiff-Appellants' arguments, no presumption of fraud was applied or is needed to reasonably conclude from the available evidence that Plaintiff-Appellants' omissions were intentional and material. Rather, it is Plaintiff-Appellants who ask for a special presumption—a presumption, in the context of a prisoner plaintiff's disclosure of his litigation history, that any misrepresentation was unintentional. Plaintiff-Appellants point to no law that requires such a

[8] Section 1983 cases may, of course, vindicate important civil rights. But, as discussed *supra* at 24-25, a finding of fraud in the context of a prisoner plaintiff's litigation history disclosure only gives the court *discretion* to dismiss the suit; it does not require dismissal.

presumption.[9] Moreover, a presumption that any prisoner plaintiff's misrepresentation of his litigation history was purely accidental would contradict the well-established standard of review while also undermining district courts' ability to manage their dockets. Make no mistake: Plaintiff-Appellants' demands would effectively require district courts to schedule and hold a hearing before sanctioning any prisoner plaintiff who, though not subject to the "three strikes" bar, omitted his litigation history. The district court did not err when it did not start from a presumption that the Plaintiff-Appellants' omissions were unintentional and that their statements in response to the show-cause order were to be credited.

In sum, because the district court applied the correct legal standard for fraud, its findings should be reviewed for clear error. Under that standard, the district court did not clearly err in finding that each Plaintiff-Appellant's misrepresentation was "both material and

[9] Certainly the principle that *pro se* filings are to be liberally construed, *see* Greyer Br. 21, Johnson Br. 18, requires no such presumption. *See supra* at 30, n.5.

intentional, and thus fraudulent," *Hoskins*, 633 F.3d at 543. Consequently, those findings should be upheld.

CONCLUSION

The decisions at issue should be affirmed.

Dated: February 4, 2019

Respectfully submitted,

s/ Mary H. Schnoor
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned attorney for Appellant certifies that the foregoing brief

(i) complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(c) because it contains 9,049 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Century Schoolbook.

Dated: February 4, 2019

s/ Mary H. Schnoor
Mary H. Schnoor

CERTIFICATE OF SERVICE

In accordance with Circuit Rule 25(a), I hereby certify that on February 4, 2019, I electronically filed the foregoing 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 the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 4, 2019

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