No. 16-

In the Supreme Court of the United States

CHARLES MURPHY,

Petitioner,

V.

ROBERT SMITH AND GREGORY FULK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a prisoner obtains a monetary judgment in a suit under 42 U.S.C. § 1983 and the prisoner's lawyer is awarded attorney's fees, "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. § 1997e(d)(2). The defendant pays the remainder of the attorney's fees.

The question presented is whether the parenthetical phrase "not to exceed 25 percent" means *any amount up to 25 percent* (as four circuits hold), or whether it means *exactly 25 percent* (as the Seventh Circuit holds).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Murphy respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit is published at 844 F.3d 653 (7th Cir. 2016). App 1a. The opinion of the District Court is unpublished. App. 17a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1997e(d)(2) provides in relevant part: "Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant."

STATEMENT

Under the Prison Litigation Reform Act, when a prisoner obtains a monetary judgment under 42 U.S.C. § 1983 and the prisoner's lawyer is awarded attorney's fees, "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. § 1997e(d)(2). Four circuits have adopted a literal interpretation of the parenthetical

phrase "not to exceed 25 percent." In these circuits, when the district court awards attorney's fees, the district court has the discretion to determine what portion of the judgment will be applied to the attorney's fees, so long as that portion does not exceed 25 percent of the judgment. The en banc Seventh Circuit, by contrast, has adopted a non-literal interpretation of the phrase "not to exceed 25 percent." In the Seventh Circuit, district courts must apply exactly 25 percent of the judgment toward the attorney's fees.

This Court should grant certiorari and reverse.

1. Petitioner Charles Murphy was a prisoner at the Vandalia Correctional Center in Illinois. App. 2a. Respondents Robert Smith and Gregory Fulk were officers of the prison. App. 2a. Respondents beat Murphy so badly that they crushed his eye socket. App. 3a. Murphy had surgery, but his vision remains doubled and blurred. App. 3a.

Murphy filed this section 1983 suit against Smith, Fulk, and two other officers. App. 3a. The jury found Smith liable for an unconstitutional use of force and a state law battery. App. 3a. The jury found Fulk liable for deliberate indifference to a serious medical need under the Eighth Amendment. App. 3a. The jury awarded $241,001 in damages against Smith and $168,750 in damages against Fulk. App. 3a. The District Court reduced the combined award to a total of $307,733.82. App. 3a.

The District Court awarded attorney's fees of $108,446.54. App. 28a. The District Court determined that under the Prison Litigation Reform Act,

42 U.S.C. § 1997e(d)(2), 10 percent of the judgment should be applied to the attorney's fees. App. 27a. The District Court accordingly ordered that Murphy pay $30,773.48 of the attorney's fees from the judgment, and that the balance of the attorney's fees be paid by the respondents. App. 28a.

2. The Seventh Circuit affirmed as to respondents' liability but reversed as to the apportionment of the attorney's fees.[1] The court noted that the District Court's allocation of 10 percent of the judgment toward attorney's fees "is consistent with decisions of other circuits, which allow such discretion." App. 13a (citing *Boesing v. Spiess*, 540 F.3d 886, 892 (8th Cir. 2008), and *Parker v. Conway*, 581 F.3d 198, 205 (3d Cir. 2009)). But the court continued:

> We have read the statute differently. In *Johnson v. Daley*, 339 F.3d 582, 585 (7th Cir. 2003) (en banc), we explained that § 1997e(d)(2) required that "attorneys' compensation come[ ] first from the damages." "[O]nly if 25% of the award is inadequate to compensate counsel fully" does the defendant contribute more to the fees.

App. 13a. This interpretation, the court held, "is the most natural reading of the statutory text. We do not think the statute contemplated a discretionary decision by the district court. The statute neither uses

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[1] In a portion of the Seventh Circuit's opinion not relevant to this certiorari petition, the Seventh Circuit rejected respondents' argument that state-law sovereign immunity barred Murphy's state-law claims. App. 4a-12a.

discretionary language nor provides any guidance for such discretion." App. 13a.

The Seventh Circuit accordingly required Murphy to pay exactly 25 percent of the attorney's fees from the judgment—$76,933.46—rather than the $30,773.48 ordered by the District Court. App. 13a-14a.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit understated the magnitude of the circuit conflict. Four circuits, not two, read 42 U.S.C. § 1997e(d)(2) to give district courts discretion to apply any percentage of the judgment, not exceeding 25 percent, toward the attorney's fees. The Seventh Circuit is the only circuit that reads the statute to deny district courts this discretion, and to require that exactly 25 percent of the judgment be applied toward attorney's fees. Because the Seventh Circuit has adopted this view en banc, the conflict is unlikely to be resolved without this Court's intervention.

The Court should intervene now. This issue arises almost every time a prisoner is awarded damages in a section 1983 suit. The Seventh Circuit's interpretation directly contradicts the text of the statute. The Seventh Circuit's non-literal view denies district courts the discretion Congress intended them to have, and leaves prisoners whose constitutional rights have been violated with smaller net recoveries than Congress intended them to receive.

I. The circuits are split 4-1 over whether "not to exceed 25 percent," as the phrase appears in 42 U.S.C. § 1997e(d)(2), means "any amount up to 25 percent" or "exactly 25 percent."

Four circuits—the Second, Third, Sixth, and Eighth—read the statute literally. In these circuits, district courts have the discretion to apply any percentage of the judgment, "not to exceed 25 percent," toward the attorney's fees.

In *Shepherd v. Goord*, 662 F.3d 603, 607 (2d Cir. 2011), the Second Circuit held that the statute "requires the district court to apply some part of the monetary judgment awarded to plaintiff, 'not to exceed 25 percent,' against any fee award." The Second Circuit accordingly approved the District Court's decision to apply 10 percent of the judgment toward the attorney's fees. *Id.* at 610.

In *Parker v. Conway*, 581 F.3d 198, 205 (3d Cir. 2009), the Third Circuit likewise held that "[t]he PLRA's 25-percent provision does not require a district court to apply 25 percent of the judgment to satisfy an attorney's fee award when the attorney's fee award exceeds 25 percent of the judgment." The court explained that "a district court may apply less than 25 percent of the judgment (as long as it applies *some* portion of the judgment) to satisfy the attorney's fee award." *Id.* The Third Circuit thus approved the District Court's decision to apply approximately 18% of the judgment toward the attorney's fees. *Id.* at 201, 206.

In *King v. Zamiara*, 788 F.3d 207, 218 (6th Cir. 2015), the Sixth Circuit observed: "Neither the statute nor our cases provide guidance to assist the district courts in determining the appropriate percentage. However, some courts have determined that requiring plaintiffs to pay as little as $1 in attorney fees from the judgment is appropriate." The Sixth Circuit accordingly instructed the District Court "to exercise its discretion to apply some percentage of the judgment, not to exceed 25 percent, to attorney fees." *Id.*

Finally, in *Boesing v. Spiess*, 540 F.3d 886, 892 (8th Cir. 2008), the Eighth Circuit held that "the phrase 'not to exceed 25 percent' clearly imposes a maximum, not a mandatory, percentage." The court observed that "the plain language of 42 U.S.C. § 1997e(d)(2) does not require the district court to automatically apply 25 percent of the judgment to pay attorney's fees. Instead the PLRA gives the district court discretion to apply a lower percentage." *Id.* The Eighth Circuit thus concluded that "the district court did not abuse its discretion by applying one percent ($250) of the $25,000 judgment to satisfy Boesing's attorney's fee award." *Id. See also Kahle v. Leonard*, 563 F.3d 736, 743 (8th Cir. 2009) ("A district court has discretion to apply between zero and 25 percent of the damages award towards attorneys' fees.").

By contrast, the Seventh Circuit requires district courts to apply 25 percent of the judgment toward the attorney's fees. "As we read subsection (2)," the en banc court explained, "attorneys' compensation comes *first* from the damages, as in ordinary tort lit-

igation, and only if 25% of the award is inadequate to compensate counsel fully may defendant be ordered to pay more under [42 U.S.C.] § 1988." *Johnson v. Daley*, 339 F.3d 582, 584-85 (7th Cir. 2003) (en banc).

In the opinion below, the Seventh Circuit relied on its en banc opinion in *Johnson*. Taking the view that "the most natural reading of the statutory text" imposes a mandatory 25 percent, the Seventh Circuit prohibited the District Court from exercising its discretion to apply 10 percent of the judgment toward attorneys' fees. App. 13a. The Seventh Circuit instead required the District Court to apply 25 percent. App. 13a-14a.

In its opinion below, the Seventh Circuit acknowledged that its view conflicts with that of other circuits. App. 13a. Respondents likewise acknowledged the conflict in their Seventh Circuit brief. Resp. C.A. Br. 25 ("Some federal courts of appeals have held that the 25% provision is a discretionary ceiling. That was error.") (citations omitted) (referring to *Parker* and *Boesing*). *See also Sutton v. City of Yonkers*, 2017 WL 105022, *8-9 (S.D.N.Y. 2017) (noting the conflict between the Seventh Circuit and the other circuits). This conflict is very unlikely to be resolved without this Court's intervention, because the Seventh Circuit has already decided the issue in an en banc opinion.

II. This issue arises almost every time a prisoner wins damages in a section 1983 suit.

District courts frequently confront the Question Presented, because it arises almost every time a prisoner wins damages under 42 U.S.C. § 1983. In recent years, prisoners have filed approximately 22,000 civil rights suits in federal court each year. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153, 157 (2015). Prisoners win approximately 10 percent of these suits—more than 2,000 cases per year. *Id.* at 164. There do not appear to be any published data on how many of these prevailing prisoners are awarded damages, but a sample of cases decided in 2012 indicates that a large majority of these cases involve damage awards. *Id.* at 168 (finding that 50 of 57 sampled cases involved damage awards). There also do not appear to be published data on the fraction of prevailing plaintiffs who are awarded attorney's fees, but that fraction is likely to be very high. Estimating extremely conservatively, if 2,000 prisoners win civil rights cases each year, 80 percent of them are awarded damages, and only half of the prevailing prisoners' attorneys are awarded attorney's fees, the Question Presented in this case recurs 800 times per year.

It is thus unsurprising that the district courts have had frequent occasion to write opinions addressing the issue. *See, e.g.*, *Sutton v. City of Yonkers*, 2017 WL 105022, *7-10 (S.D.N.Y. 2017); *Kensu v. Buskirk*, 2016 WL 6465890, *5 (E.D. Mich. 2016); *Perry v. Roy*, 2016 WL 1948823, *7 (D. Mass. 2016);

Wilson-El v. Mutayoba, 2015 WL 1944000, *2 (S.D. Ill. 2015); *Rodriguez v. Cty. of Los Angeles*, 96 F. Supp. 3d 1012, 1026 (C.D. Cal. 2014); *Berrian v. City of N.Y.*, 2014 WL 6604641, *4 (S.D.N.Y. 2014); *Gevas v. Harrington*, 2014 WL 4627616, *3 (S.D. Ill. 2014); *Hernandez v. Goord*, 2014 WL 4058662, *13 (S.D.N.Y. 2014); *Cleveland v. Curry*, 2014 WL 789098, *3 (N.D. Cal. 2014); *Harris v. Hobbs*, 2013 WL 6388626, *1-2 (N.D. Fla. 2013); *Kemp v. Webster*, 2013 WL 6068344, *5-6 (D. Colo. 2013); *Blake v. Maynard*, 2013 WL 3659421, *2 (D. Md. 2013); *Jellis v. Veath*, 2013 WL 1689061, *2 (S.D. Ill. 2013); *Tanner v. Borthwell*, 2013 WL 1148411, *1 (E.D. Mich. 2013); *Wilkins v. Gaddy*, 2012 WL 5872937, *6 (W.D.N.C. 2012); *Ford v. Bender*, 903 F. Supp. 2d 90, 101 (D. Mass. 2012), *rev'd on other grounds*, 768 F.3d 15 (1st Cir. 2014); *Prater v. Sahota*, 2012 WL 1641890, *3 (E.D. Cal. 2012); *Carter v. Wilkinson*, 2010 WL 5125499, *10 (W.D. La. 2010); *Thompson v. Torres*, 2010 WL 4919058, *2 (D. Mass. 2010); *Cornell v. Gubbles*, 2010 WL 3937597, *1-2 (C.D. Ill. 2010); *Shatner v. Cowan*, 2009 WL 5210528, *3-4 (S.D. Ill. 2009); *Collins v. Chandler*, 2009 WL 3459454, *2-3 (D. Del. 2009); *Barnard v. Piedmont Regional Jail Authority*, 2009 WL 3416228, *2 (E.D. Va. 2009); *Dykes v. Mitchell*, 2009 WL 3242006, *1-*2 (E.D. Mo. 2009); *Hall v. Terrell*, 648 F. Supp. 2d 1229, 1236-37 (D. Colo. 2009); *Miranda v. Utah*, 629 F. Supp. 2d 1256, 1257 (D. Utah 2009); *Murphy v. Gilman*, 2008 WL 2139611, *1-2 (W.D. Mich. 2008); *Norwood v. Vance*, 2008 WL 686901, *4 (E.D. Cal. 2008), *vacated on other grounds*, 591 F.3d 1062 (9th Cir. 2009); *Berberena v. Pesquino*, 2008 WL 68671,

*1 (S.D. Ill. 2008); *Baez v. Harris*, 2007 WL 4556911, *1 (N.D.N.Y. 2007); *Livingston v. Lee*, 2007 WL 4440933, *2 (N.D.N.Y. 2007); *Siggers-El v. Barlow*, 433 F. Supp. 2d 811, 822-23 (E.D. Mich. 2006); *Hightower v. Nassau Cty. Sheriff's Dep't*, 343 F. Supp. 2d 191, 193 (E.D.N.Y. 2004); *Farella v. Hockaday*, 304 F. Supp. 2d 1076, 1080-82 (C.D. Ill. 2004); *Jackson v. Austin*, 267 F. Supp. 2d 1059, 1071-72 (D. Kan. 2003); *Sutton v. Smith*, 2001 WL 743201, *2 (D. Md. 2001); *Morrison v. Davis*, 88 F. Supp. 2d 799, 811 (S.D. Ohio 2000); *McLindon v. Russell*, 108 F. Supp. 2d 842, 849 (S.D. Ohio 1999), *rev'd on other grounds*, 19 F. App'x 349 (6th Cir. 2001); *Searles v. Van Bebber*, 64 F. Supp. 2d 1033, 1042 (D. Kan. 1999), *vacated on other grounds*, 251 F.3d 869 (10th Cir. 2001); *Beckford v. Irvin*, 60 F. Supp. 2d 85, 89-90 (W.D.N.Y. 1999); *Roberson v. Brassell*, 29 F. Supp. 2d 346, 355 (S.D. Tex. 1998); *Collins v. Algarin*, 1998 WL 10234, *10 (E.D. Pa. 1998).

III. The Seventh Circuit's non-literal interpretation of the statute is incorrect.

The text of the statute provides that the portion of the judgment to be applied to attorney's fees is "not to exceed 25 percent." 42 U.S.C. § 1997e(d)(2). The Seventh Circuit is simply wrong in interpreting this language to mean "exactly 25 percent."

"Statutory interpretation, as we always say, begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Here, the text is so clear that interpretation should end with the text as well. "Not to exceed" does not mean "exactly." The text provides an upper limit of 25 percent, but it does not provide any

lower limit. It gives courts discretion to decide what percentage of the judgment should go toward attorney's fees, so long as that amount is no greater than 25 percent.

The Seventh Circuit reasoned that exactly 25 percent "is the most natural reading of the statutory text." App. 13a. But the Seventh Circuit's interpretation requires rearranging and rephrasing the statute. The only mandatory language in the statute is the word "shall." But "shall" modifies "be applied," not the percentage. The district court must apply *some* portion of the judgment toward the attorney's fees. But the statute leaves the percentage to the discretion of the court, so long as that percentage does not exceed the 25 percent ceiling. The Seventh Circuit reads the parenthetical phrase in the statute—"not to exceed 25 percent"—as if it said "which shall be 25 percent."

The Seventh Circuit's error becomes even clearer when one considers how its view would apply to uses of the phrase "not to exceed" in other contexts. For example, this Court often directs parties to file briefs "not to exceed" a certain number of words. *See, e.g.*, *Amgen Inc. v. Sandoz Inc.*, No. 15-1195, 2017 WL 358624 (Jan. 25, 2017) (ordering petitioner to file a brief "not to exceed 15,000 words"). On the Seventh Circuit's view, a brief of 14,999 words would violate this order, but to our knowledge the Court has never rejected a brief for being too short. Likewise, when a district court orders restitution in a criminal case, the court must "set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. § 3664(d)(5). On the Seventh Cir-

cuit's view, the district court could not set the date sooner than the 90th day. But this Court has sensibly interpreted "not to exceed 90 days" as a "90-day deadline," not a 90-day requirement. *Dolan v. United States*, 560 U.S. 605, 608 (2010).

Given the clarity of the statutory text, there is no occasion to examine the purpose of the statute, but if there were, that purpose would also expose the Seventh Circuit's error. The provision at issue was enacted as part of the Prison Litigation Reform Act. The purpose of the PLRA was to ensure "that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit." *Jones v. Bock*, 549 U.S. 199, 203 (2007). Congress gave district courts the discretion to "filter out the bad claims and facilitate consideration of the good." *Id.* at 204.

Section 1997e(d)(2) is a provision that applies only to the claims with merit. Before it becomes relevant, the jury has already determined that the defendants have violated the plaintiff's constitutional rights. Once section 1997e(d)(2) is at issue, the PLRA is meant to deter misconduct by prison guards, not to discourage prisoners from holding guards accountable. Congress's evident purpose was to allow district courts to apportion attorney's fees in a just manner, so long as the prevailing prisoner gets to keep at least 75 percent of the damages. Where the defendant's conduct is particularly egregious, the court has discretion to apportion less than 25 percent of the judgment to attorney's fees, *see, e.g.*, *Blake*, 2013 WL 3659421 at *2, but where the defendant's conduct is less egregious, the court has discretion to apportion

the full 25 percent, *see, e.g.*, *Harris*, 2013 WL 6388626 at *2. The Seventh Circuit erroneously withholds from the district courts the discretion that Congress intended them to have.

CONCLUSION

The petition for a writ of certiorari should be granted. Because the decision below is so clearly wrong, the Court may wish to reverse summarily. In the alternative, the case should be set for argument.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
Seventh Circuit.

Charles Murphy, Plaintiff–Appellee,
v.
Robert Smith and Gregory Fulk, Defendants–Appellants.

No. 15-3384

Decided December 21, 2016

Appeal from the United States District Court for the Southern District of Illinois, No. 3:12-cv-00841-SCW—Stephen C. Williams, Magistrate Judge.

Before Bauer, Manion, and Hamilton, Circuit Judges.

Hamilton, Circuit Judge.

Plaintiff Charles Murphy was an inmate in the Vandalia Correctional Center in Illinois. On July 25, 2011, correctional officers hit Murphy, fracturing part of his eye socket, and left him in a cell without medical attention. Murphy sued under 42 U.S.C. § 1983 and state-law theories. A jury awarded him damages on some of those claims, including some state-law claims, and the district court awarded attorney fees under 42 U.S.C. § 1988. Two of the defendants now appeal and challenge two aspects of the judgment. They argue that state-law sovereign immunity bars the state-law claims and that the Prison Litigation Reform Act requires that 25 percent of the damage award be used to pay the attorney fee award.

We affirm on the sovereign immunity defense. The Illinois doctrine of sovereign immunity does not

apply to state-law claims against a state official or employee who has violated statutory or constitutional law. See *Leetaru v. Board of Trustees of University of Illinois*, 392 Ill. Dec. 275, 32 N.E.3d 583 (Ill. 2015). Murphy alleged and ultimately proved such violations here. On the attorney fee issue, however, we reverse. Under 42 U.S.C. § 1997e(d), the attorney fee award must first be satisfied from up to 25 percent of the damage award, and the district court does not have discretion to reduce that maximum percentage. We remand for entry of a modified judgment.

I. Factual and Procedural Background

We recount the facts in the light reasonably most favorable to the verdict, which defendants do not challenge on the merits. On July 25, 2011, plaintiff Charles Murphy was a prisoner at the Vandalia Correctional Center. His assigned seat at mealtime that day had food and water on it. When he reported the mess, Correctional Officer Robert Smith first told him to clean it up himself and later told Murphy to leave the dining area. A different officer handcuffed Murphy, and Officer Smith escorted him to a segregation building. When they got there, a third officer asked Murphy what unit he normally stayed in, but Murphy ignored him. Officer Smith began moving his finger in and out of Murphy's ear, while asking Murphy if he was deaf and repeating the phrase "you can't hear, you can't hear." While this was happening, Lieutenant Gregory Fulk entered the building and saw what was happening.

Now escorted by three officers, Murphy was taken further into the segregation unit. Murphy did not struggle with the officers as they walked, although he taunted Officer Smith, promising what would

happen the next time he "ain't got no handcuffs on." Hearing that, Officer Smith hit Murphy in the eye and then applied a choke hold with his arm around Murphy's throat. Murphy lost consciousness. When he came to, Lieutenant Fulk and Officer Smith were pushing him into a cell. With his hands still cuffed behind his back, Murphy fell face-first into the cell and hit his head on its metal toilet. The officers took off his clothes and handcuffs and left without having checked his condition.

Thirty or forty minutes later, a nurse came to see Murphy, who was ultimately sent to a hospital. His orbital rim—part of his eye socket—had been crushed and needed surgery. He had that surgery but did not recover completely. As of January 2015, his vision remained doubled and blurred.

In July 2012, Murphy filed suit in the Southern District of Illinois. After two rounds of complaint amendments and a partial grant of summary judgment for defendants, the case was tried to a jury. The jury found for plaintiff Murphy on four claims against two defendants—Lieutenant Fulk and Officer Smith, the appellants here. The jury found Officer Smith liable on two claims of state-law battery and one federal claim of unconstitutional use of force under the Eighth Amendment. The jury also found Lieutenant Fulk liable on a federal Eighth Amendment claim of deliberate indifference to a serious medical need. All told, the jury awarded $241,001 in compensatory and punitive damages against Officer Smith and $168,750 against Lieutenant Fulk. The district court reduced the combined award to a total of $307,733.82. That reduction is not at issue in this appeal. The district court also awarded attorney fees

and ordered that 10 percent of the damages awarded be put toward paying those fees. Officer Smith and Lieutenant Fulk have appealed.

II. Sovereign Immunity

The defendants argue first that state-law sovereign immunity bars Murphy's state-law claims. The district court found, and Murphy contends on appeal, that defendants waived their state-law sovereign immunity defense. We find no waiver but find that state-law sovereign immunity does not shield these defendants from liability.

A. Sovereign Immunity in Illinois

Illinois is protected against civil suits in federal court by two relevant doctrines. First, the "Eleventh Amendment immunizes unconsenting states from suit in federal court." *Benning v. Board of Regents of Regency Universities*, 928 F.2d 775, 777 (7th Cir. 1991); see also *Alden v. Maine*, 527 U.S. 706, 712–13, 119 S. Ct. 2240, 144 L.Ed.2d 636 (1999) (explaining broader concept of sovereign immunity for which "'Eleventh Amendment immunity ... is convenient shorthand'"). Second, an Illinois statute provides, with exceptions not relevant here, that "the State of Illinois shall not be made a defendant or party in any court." 745 Ill. Comp. Stat. 5/1. Under the *Erie Railroad* doctrine, that statute governs claims in federal court arising under state law. *Benning*, 928 F.2d at 777, citing *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). While both doctrines are often referred to as "sovereign immunity," they are not the same. See, e.g., *Beaulieu v. Vermont*, 807 F.3d 478, 485–86 (2d Cir. 2015) (distinguishing between Eleventh Amendment immuni-

ty and broader state sovereign immunity under Vermont law). As we explain below, important differences between the federal and state doctrines are decisive in this case.

B. Waiver

Before addressing the merits of the state-law sovereign immunity defense, we first address plaintiff Murphy's argument that defendants waived the defense. "[S]overeign immunity is a waivable affirmative defense." *Park v. Indiana University School of Dentistry*, 692 F.3d 828, 830 (7th Cir. 2012) (Eleventh Amendment), citing *Board of Regents of University of Wisconsin System v. Phoenix International Software, Inc.*, 653 F.3d 448, 463 (7th Cir. 2011); see also *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613, 624, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002) (state's voluntary removal to federal court waived Eleventh Amendment immunity). If a state does not raise the immunity defense, "a court can ignore it." *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 389, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998). Because the defendants never relied and still do not rely on Eleventh Amendment immunity, they waived that defense. See *Park*, 692 F.3d at 830 (finding waiver where the state "never once raised the issue ... before the district court" and declined to raise the issue "even when prompted by this court at argument").[1]

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[1] Like the parties, we rely on Eleventh Amendment case law to address waiver. This is our usual approach under the *Erie* doctrine because procedural issues are governed by federal law in federal courts, and waiver is generally treated as procedural. See *Herremans v. Carrera Designs, Inc.*, 157 F.3d 1118, 1122–23 (7th Cir. 1998). Even if Illinois law governed the waiver is-

State-law sovereign immunity, however, is a defense the defendants raised at least five times: in their answer, in the final pre-trial conference, in the jury instruction conference, in the defendants' post-trial motion, and on appeal. Those references were explicitly to state-law sovereign immunity. The answer, for example, claimed protection under "statutory sovereign immunity," and in both the post-trial motion and the briefs before this court, the defendants relied on the Illinois State Lawsuit Immunity Act.

Plaintiff Murphy has not cited nor have we found any comparable case finding a waiver of a sovereign immunity defense. Cf. *Board of Regents*, 653 F.3d at 467 (finding waiver where state filed suit in federal district court); *Hill v. Blind Industries & Services of Maryland*, 179 F.3d 754, 756 (9th Cir. 1999) (finding waiver when defendant "participat[ed] in extensive pre-trial activities and wait[ed] until the first day of trial before objecting ... on Eleventh Amendment grounds"). Other circuits hold that equal or less robust efforts to raise the immunity defense do not waive it. See, e.g., *Union Pacific Railroad Co. v. Louisiana Public Service Comm'n*, 662 F.3d 336, 339–40 (5th Cir. 2011) (no waiver when defendant raised is-

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sue, there would be no waiver. Illinois appears to permit sovereign immunity waivers only by statute, not by litigation conduct. See *Township of Jubilee v. State*, 355 Ill. Dec. 668, 960 N.E.2d 550, 555 (Ill. 2011) ("[E]fforts by legal counsel for the State to defend itself ... will not result in a waiver or forfeiture of the State's statutory immunity. That is so because only the legislature itself can determine where and when claims against the state will be allowed."), citing *People ex rel. Manning v. Nickerson*, 184 Ill. 2d 245, 234 Ill. Dec. 375, 702 N.E.2d 1278, 1280 (1998).

sue for first time on appeal, after prevailing on a motion for summary judgment on the merits); *Ashker v. California Dep't of Corrections*, 112 F.3d 392, 394 (9th Cir. 1997) (no waiver when defendants raised issue "in their answer and pretrial statement ... and ... in their briefs filed in this court"). We reach the same conclusion here.

Plaintiff Murphy relies on the defendants' apparent willingness to defend this case on the merits. See *Neinast v. Texas*, 217 F.3d 275, 279 (5th Cir. 2000) ("Courts have found waiver ... where the state ... evidenced an intent to defend the suit against it on the merits."). But in this case the significance of that willingness is at best equivocal. Both the defendants and the district court seemed at times to blend the state-law immunity question with the merits of plaintiff's claims. For example, the district court said that sovereign immunity did not shield the defendants because the jury, in ruling on the battery claim, necessarily determined that they acted outside their authority. *Murphy v. Smith*, No. 3:12–cv–00841–SCW, slip op. at 17–18 (S.D. Ill. Sept. 25, 2015).

That blending would be confusing under federal immunity law, whether under the Eleventh Amendment or doctrines of absolute immunity. As we explain below, though, the blending of state-law immunity and the merits under Illinois law accurately reflects state law. When a plaintiff sues a state official or employee, the Illinois case law links state-law immunity to the merits. If a plaintiff adequately alleges and ultimately proves that an Illinois official violated a statute or the Constitution, Illinois courts hold that the immunity statute does not apply to claims against the individual official. Because of that

linkage of immunity to the merits, the defense of the case on the merits is quite consistent with defendants' assertion of state-law sovereign immunity.

C. Illinois Sovereign Immunity for Individual Employees

The Illinois sovereign immunity statute protects the State against being "made a defendant or party in any court." 745 Ill. Comp. Stat. 5/1. Murphy argues that he has not sued the State of Illinois but only Illinois state employees. Whether the statute covers such state-law claims is a matter of state law. Our role is to decide questions of state law as we predict the state supreme court would decide them. E.g., *Rodas v. Seidlin*, 656 F.3d 610, 626 (7th Cir. 2011) ("When interpreting state law, a federal court's task is to determine how the state's highest court would rule."); *Barger v. State of Indiana*, 991 F.2d 394, 396 (7th Cir. 1993) ("State courts are the final arbiters of state law.").

Naming state employees as defendants would be too simple an evasion of the statute, which "cannot be evaded by making an action nominally one against the servants or agents of the State when the real claim is against the State of Illinois itself and when the State of Illinois is the party vitally interested." *Sass v. Kramer*, 72 Ill. 2d 485, 21 Ill. Dec. 528, 381 N.E.2d 975, 977 (1978). A substantial body of Illinois case law addresses when and under what circumstances the immunity statute applies to claims against state employees. See *Benning*, 928 F.2d at 779–80.

A claim against a state official or employee is a claim against the state when

> "there are (1) no allegations that an agent or employee of the State acted beyond the scope of his authority through wrongful acts; (2) the duty alleged to have been breached was not owed to the public generally independent of the fact of State employment; and (3) where the complained-of actions involve matters ordinarily within that employee's normal and official functions of the State."

Healy v. Vaupel, 133 Ill.2d 295, 140 Ill. Dec. 368, 549 N.E.2d 1240, 1247 (1990), quoting *Robb v. Sutton*, 147 Ill. App. 3d 710, 101 Ill. Dec. 85, 498 N.E.2d 267, 272 (1986). That analysis can be a difficult one, and the state cases guiding it have "not always been consistent." *Leetaru v. Board of Trustees of University of Illinois*, 392 Ill. Dec. 275, 32 N.E.3d 583, 602 (Ill. 2015) (Burke, J., dissenting). Compare *Healy*, 139 Ill. Dec. 780, 549 N.E.2d at 313 (applying immunity in part because the "relationship between the plaintiff and the defendants would not have had a source outside the employment status of the defendants"), with *Jinkins v. Lee*, 209 Ill. 2d 320, 282 Ill. Dec. 787, 807 N.E.2d 411, 420 (2004) (rejecting a "but-for" state employment immunity analysis).

This case is governed by an important exception to sovereign immunity in suits against state officials or employees. If the plaintiff alleges that state officials or employees violated "statutory or constitutional law," "[s]overeign immunity affords no protection." *Healy*, 140 Ill. Dec. 368, 549 N.E.2d at 1247. "This exception is premised on the principle that while legal official acts of state officers are regarded as acts of the State itself, illegal acts performed by the officers are not." *Leetaru*, 392 Ill. Dec. 275, 32

N.E.3d at 596. That exception distinguishes Illinois's sovereign immunity rule from federal law immunity doctrines, which usually apply to bar claims regardless of their potential merit. See, e.g., *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 92–93, 120–21, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (reversing on Eleventh Amendment immunity grounds a judgment on the merits for plaintiffs).[2]

Fritz v. Johnston, 209 Ill. 2d 302, 282 Ill. Dec. 837, 807 N.E.2d 461 (2004), shows the Illinois exception in operation and shows how state-law immunity depends on the merits of the plaintiff's claims. In that case, the plaintiff alleged that state employees conspired to force him to retire from his own state job by falsely telling the police that he had been making threats. Plaintiff alleged civil conspiracy and intentional interference with employment. The Illinois Supreme Court reversed dismissal of the case, holding that sovereign immunity did not apply because the plaintiff's factual allegations matched the crimi-

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[2] The Illinois exception for illegal acts by state officials resembles the federal rule under *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), but has much broader effects. *Ex parte Young* allows federal suits for injunctive and declaratory relief to require state officials to comply with federal law. The Illinois exception also allows suits for damages against state employees in their individual capacities. Compare *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323, 337 (7th Cir. 2000) ("the *Ex parte Young* doctrine allows private parties to sue individual state officials for prospective relief to enjoin ongoing violations of federal law"), with *Fritz v. Johnston*, 282 Ill. Dec. 837, 807 N.E.2d at 468 ("Whenever a state employee performs illegally [or] unconstitutionally ... a suit may still be maintained against the employee in his individual capacity[.]"), quoting *Wozniak v. Conry*, 288 Ill. App. 3d 129, 223 Ill. Dec. 482, 679 N.E.2d 1255, 1259 (1997).

nal offense of disorderly conduct. *Id.*, 282 Ill. Dec. 837, 807 N.E.2d at 467, citing 720 Ill. Comp. Stat. 5/26-l(a)(4) (West 1998).

This court's Illinois sovereign immunity cases have acknowledged this exception to sovereign immunity but most often have found that the exception did not apply. See, e.g., *Turpin v. Koropchak*, 567 F.3d 880, 884 (7th Cir. 2009) ("Nothing in Turpin's complaint alleges a violation of the State constitution or a statute, so this exception is off the table."). In particular, *Richman v. Sheahan*, 270 F.3d 430 (7th Cir. 2001), cabined the exception. We noted that the plaintiff had alleged a constitutional violation, but we found that sovereign immunity applied nonetheless because the plaintiff's state-law claims were "not dependent on the alleged constitutional violation." *Id.* at 442. *Richman*, however, preceded *Fritz*, which permitted state-law claims that did not depend on constitutional or statutory violations. *Fritz*, 282 Ill. Dec. 837, 807 N.E.2d at 467.

Richman also preceded *Leetaru*, which just last year reaffirmed the exception in broad terms, over a dissent that would have narrowed it to a scope closer to the federal *Ex parte Young* doctrine. *Leetaru*, 392 Ill. Dec. 275, 32 N.E.3d at 611–12 (Burke, J., dissenting). Despite the force of the dissent, our role under *Erie* is to take the *Leetaru* majority opinion at its word: the exception applies whenever "agents of the State have acted in violation of statutory or constitutional law." *Id.*, 392 Ill. Dec. 275, 32 N.E.3d at 597 (majority opinion).

In this case, Murphy alleged and then proved that the defendants' actions violated the United States Constitution. He also alleged and proved the factual

elements of the Illinois criminal offense of aggravated battery. That statute requires (1) "a battery, other than by the discharge of a firearm," and (2) that the defendant "knowingly ... [c]auses great bodily harm." 720 Ill. Comp. Stat. 5/12-3.05(a)(l) (West Supp. 2016) (effective July 1, 2011). Murphy alleged and proved to the jury that Officer Smith punched his face and head and choked him, then threw him into a cell with such force that he hit his face on a metal toilet. Officer Smith did so "without justification." Cf. 720 Ill. Comp. Stat. 5/12-3(a) (West 2002) (defining criminal battery as contact "without legal justification"). Murphy suffered "serious and permanent injury" and required reconstructive surgery. Since Murphy alleged and proved that Smith and Fulk acted "in violation of statutory or constitutional law," sovereign immunity does not bar his state-law claims. *Fritz*, 282 Ill. Dec. 837, 807 N.E.2d at 467, quoting *Healy*, 140 Ill.Dec. 368,549 N.E.2d at 1247.[3]

III. Attorney Fee

The Prison Litigation Reform Act sets limits on attorney fees awarded to prisoners who prevail in

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[3] We emphasize that Murphy both alleged *and proved* the violations in this case. Most Illinois cases dealing with this exception to sovereign immunity focus on the plaintiff's allegations because the appeals have arisen from motions to dismiss on the pleadings. We believe Illinois also requires a plaintiff ultimately to prove the alleged violations. For example, *Leetaru* explained that "sovereign immunity affords no protection when agents of the State *have acted* in violation of statutory or constitutional law or in excess of their authority," and in reversing dismissal on the pleadings, the court allowed defendants on remand to show their conduct was not "*in fact*" unauthorized, illegal, or in violation of plaintiff's rights. See 392 Ill. Dec. 275, 32 N.E.3d at 597 (emphasis added).

civil rights cases. 42 U.S.C. § 1997e(d). Whenever such a prisoner receives a monetary judgment, "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." § 1997e(d)(2).

The district court interpreted that language to permit it to exercise its discretion in choosing the percentage of the damage award that should go toward the attorney fee, so long as the choice was no greater than 25 percent. The court allocated 10 percent of the damage award to satisfy the attorney fee award. That interpretation is consistent with decisions of other circuits, which allow such discretion. See *Boesing v. Spiess*, 540 F.3d 886, 892 (8th Cir. 2008) ("plain language of 42 U.S.C. § 1997e(d)(2) does not require the district court to automatically apply 25 percent of the judgment to pay attorney's fees"); *Parker v. Conway*, 581 F.3d 198, 205 (3d Cir. 2009) (agreeing with *Boesing*).

We have read the statute differently. In *Johnson v. Daley*, 339 F.3d 582, 585 (7th Cir. 2003) (en banc), we explained that § 1997e(d)(2) required that "attorneys' compensation come[ ] first from the damages." "[O]nly if 25% of the award is inadequate to compensate counsel fully" does the defendant contribute more to the fees. *Id.* We continue to believe that is the most natural reading of the statutory text. We do not think the statute contemplated a discretionary decision by the district court. The statute neither uses discretionary language nor provides any guidance for such discretion.

Accordingly, we REMAND the case to the district court to modify its judgment to require Murphy to pay from the judgment the sum of $76,933.46 toward

satisfying the attorney fee the court awarded. In all other respects the judgment is

AFFIRMED.

Manion, Circuit Judge, concurring.

I join the court's opinion. I write separately to address the scope of Illinois' sovereign immunity defense for state employees sued in their individual capacities, which has been a difficult issue for the Illinois state courts. Because the plaintiff in this case prevailed on federal constitutional claims as well as state claims, only a small portion of the judgment is at stake in this appeal. Yet the case still presents an important issue of state law: to what extent Illinois' State Lawsuit Immunity Act and the Court of Claims Act confines intentional tort claims against state employees to the Illinois Court of Claims.

The State Lawsuit Immunity Act prohibits the State of Illinois from being named as a defendant in any court, with limited exceptions. 745 ILCS 5/1. One of those exceptions is the Court of Claims Act, which created that court as the "exclusive forum for resolving lawsuits against the state." *People ex rel. Manning v. Nickerson*, 184 Ill. 2d 245, 234 Ill. Dec. 375, 702 N.E.2d 1278, 1280 (1998) (internal quotation marks omitted). It provides in relevant part that the Court of Claims has exclusive jurisdiction over "[a]ll claims against the State for damages sounding in tort." 705 ILCS 505/8(d). In effect, the State's limited waiver of sovereign immunity gives it home-court advantage when it defends tort claims for damages. See *Loman v. Freeman*, 229 Ill. 2d 104, 321 Ill. Dec. 724, 890 N.E.2d 446, 458 (2008) (no right to a jury trial in the Court of Claims); *Reichert*

v. Court of Claims, 203 Ill. 2d 257, 271 Ill. Dec. 916, 786 N.E.2d 174, 177 (2003) (no right to appeal the merits of a Court of Claims decision).

The dispositive question here is whether state-law portions of this suit (the battery claims) against the defendant prison guards are really "against the State" for the purposes of these statutes. The most natural reading of the statute seems to preclude any court other than the Illinois Court of Claims from exercising jurisdiction over the plaintiff's intentional tort claim. Battery is a tort and the defendants here were acting in the scope of their state employment when they (according to the jury) battered the plaintiff. Had they not been doing so, the Illinois Attorney General's office would not have appeared on their behalf, as it did in the district court and in this court. 5 ILCS 350/2(a) & (e) (providing that the Illinois Attorney General will appear on behalf of a state employee sued for something "arising out of any act or omission occurring within the scope of the employee's State employment" and indemnify upon judgment against the employee in such cases). In every practical sense, this is a judgment that "could operate to control the actions of the State or subject it to liability." *Currie v. Lao*, 148 Ill. 2d 151, 592 N.E.2d 977, 980 (1992).

However, the Illinois Supreme Court has construed "against the State" more narrowly in suits against state employees. See, e.g., *Leetaru v. Bd. of Trs.*, 392 Ill. Dec. 275, 32 N.E.3d 583, 596 (Ill. 2015); *Loman*, 321 Ill.Dec. 724, 890 N.E.2d at 462.[1] That

[1] Several opinions of Illinois' intermediate appellate court read the Court of Claims Act more broadly; their reasoning would bring the plaintiff's battery claims within the exclusive juris-

court would hold that the defendants here acted outside their authority and therefore that immunity does not apply. We are bound to follow that court's holdings and reasoning. Therefore, I join the opinion of the court in full.

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diction of the Court of Claims. See, e.g., *Grainger v. Harrah's Casino*, 385 Ill. Dec. 265, 18 N.E.3d 265, 273–75 (Ill. App. Ct. 2014); *Sellers v. Rudert*, 395 Ill. App. 3d 1041, 335 Ill. Dec. 241, 918 N.E.2d 586, 591–92 (2009); *Welch v. Illinois Supreme Court*, 322 Ill. App. 3d 345, 256 Ill. Dec. 350, 751 N.E.2d 1187, 1194 (2001); *Campbell v. White*, 207 Ill. App. 3d 541, 152 Ill. Dec. 519, 566 N.E.2d 47, 53 (1991). However, we are bound only by the opinions of Illinois' highest court.

APPENDIX B

In the United States District Court
for the Southern District of Illinois

CHARLES MURPHY, Plaintiff,

vs.

ROBERT SMITH, et al., Defendants

Case No. 12-cv-0841-SCW

ORDER

WILLIAMS, Magistrate Judge:

Factual and Procedural Background

Plaintiff originally filed this suit on July 25, 2012, alleging six counts: 1) excessive force pursuant to 42 U.S.C. § 1983; 2) deliberate indifference to serious medical needs pursuant to 42 U.S.C. § 1983; 3) intentional infliction of emotional distress pursuant to Illinois state law; 4) battery pursuant to Illinois state law; 5) conspiracy pursuant to 42 U.S.C. § 1983; and 6) conspiracy pursuant to Illinois state law. (Doc. 2). On October 9, 2014, the Court denied in part and granted in part Defendants' motion for summary judgment, dismissing the § 1983 conspiracy claim and dismissing the state law conspiracy claim to the extent that they were based on an agreement to use excessive force or refuse to intervene. (Doc. 92). However, after further briefing from the parties, the Court permitted the state law conspiracy claims based on the alleged cover-up on the theory that the Defendants agreed to intentionally inflict emotional distress. (Doc. 92) (Doc. 114). Thus five claims proceeded to trial.

After the close of Plaintiff's case, Defendants moved for judgment as a matter of law on Plaintiff's claim for intentional infliction of emotional distress, which the Court granted. (Doc. 133). The Court dismissed Defendant Stewart at that time because that was the only claim against him. (Doc. 133). The jury verdict form divided the case into six counts: 1) use of unconstitutional force against Defendant Smith; 2) battery against Defendant Smith; 3) use of unconstitutional force against Defendants Fulk and Smith; 4) failure to intervene against Defendant Ritchey; 5) battery against Defendant Fulk and Smith; and 6) deliberate indifference to serious medical needs against Fulk, Smith and Richey. (Doc. 142.) The jury found in favor of Plaintiff and against Smith on Counts 1 and 2 in the amount of $40,000 for medical care, $7,500 for pain and suffering and $168,000 for punitive damages. (Doc. 140). It further found in favor of Defendants Fulk and Smith on Count 3, and in favor of Ritchey in Count 4. (Doc. 140). On Count 5, the jury found in favor of Defendant Fulk, but against Defendant Smith in the amount of $1.00 for medical care, $500.00 pain and suffering, and $168,000 for punitive damages. (Doc. 140).

Judgment was entered on February 2, 2015. (Doc. 143). All told, the jury awarded Plaintiff $409,750. (Doc. 143). Defendants filed a post-trial Motion, which the Court granted in part, reducing the award to Plaintiff to $307,733.82. (Doc. 175).

On February 14, 2015, Plaintiff filed a Motion for Attorney Fees Pursuant to 42 U.S.C. § 1988. (Doc. 149). Plaintiff's counsel also submitted an exhibit in support of his motion that alleged that he spent approximately 522.78 hours on this case and requested

a rate of $350.00 an hour, for a total of $182,973.00. (Doc. 150). On March 2, 2015, Defendants filed the aforementioned post-trial motion, to which Plaintiff drafted a response. (Doc. 156) (Doc. 159). Defendants filed an objection to Plaintiff's Motion for fees and costs on March 9, 2015. (Doc. 158). Plaintiff filed a Response to the Objection on March 23, 2015. (Doc. 161). On April 17, 2015, Plaintiff filed a Motion to Supplement his earlier fee petition and requested reimbursement for an additional 83 hours of labor spent responding to Defendants' motion and objections. (Doc. 165). Defendants filed an objection to this Motion to Supplement on May 1, 2015. (Doc. 166). Plaintiff filed a Response on May 3, 2015, (Doc. 167), but subsequently filed a "Corrected Version" on May 4, 2015. (Doc. 168). That objection states that Plaintiff spent an additional 6.5 hours preparing the response and requests a total of $214,298.00. (Doc. 168).

Analysis

Section 1988 provides: "In any action or proceeding to enforce a provision of section … 1983 … the court, in its discretion may allow the prevailing party … a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. Generally, a party seeking attorney's fees is required to show 1) that it is a prevailing party and 2) that its request is reasonable. *Farrar v. Hobby*, 506 U.S. 103, 109-14 (1992). The appropriate fee under § 1988 is the market rate for the legal services reasonably devoted to the successful portion of the litigation. *Richardson v. City of Chicago*, 740 F.3d 1099, 1103 (7th Cir. 2014).

The basic means of calculating a reasonable attorney's fees under the *Hensley* or lodestar approach

is to multiply the number of hours reasonably expended by a reasonable attorney's rate. *Spellan v. Board of Educ. for Dist. 111*, 59 F.3d 642, 645 (7th Cir. 1995) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 430 n. 3 (1983)). The district court may then adjust the award after making such a calculation based on:

> the time and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal services properly; the preclusion of employment by the attorney due to acceptance of the case; the customary fee; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the amount involved and the results obtained; the experience, reputation, and ability of the attorneys; the 'undesirability' of the case; the nature and length of the professional relationship with the client; and awards in similar cases.

Id.

The District Court has broad discretion in setting an appropriate attorney's fee, and may adjust the level of the award as it sees fit. *See Hensley*, 461 U.S. at 437.

1. Reasonable Rate

The first step then, is to determine a reasonable rate. Any award of attorney's fees should be tied to the going market rate for legal services. *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989); *People Who Care v. Rockford Bd. of Educ., School Dist. No. 205*, 90 F.3d 1307, 1311 (7th Cir. 1996). The lodestar approach applies even in cases where counsel has proceeded after accepting a contingent fee arrangement.

Blanchard v. Bergeron, 489 U.S. 87, 94 (1989); *Pickett v. Sheridan Health Care Canter*, 664 F.3d 632 (7th Cir. 2011).

The Prison Litigation Reform Act provides a further limitation on the ability of a prisoner to recover attorney's fees. The fee must be "directly and reasonably incurred in proving an actual violation of Plaintiff's rights." 42 U.S.C. § 1997e(d)(1)(A). Further, the fee must be "proportionally related to the court ordered relief for the violation." 42 U.S.C. § 1997e(d)(1)(B)(i). The statute caps the hourly rate at 150 percent of the rate for court-appointed counsel under 18 U.S.C. § 3006A, and total amount cannot exceed 150 percent of the judgment. 42 U.S.C. § 1997e(d)(3). Finally, the statute requires that a portion of attorney's fees, not to exceed 25 percent, be paid directly out of the monetary judgment. 42 U.S.C. § 1997e(d)(2).

Here, plaintiff has requested a rate of $350 per hour. Defendants counter that pursuant to the PLRA, Plaintiff's counsel is limited to a rate of 150% of the rate chargeable by court-appointed counsel. Those rates were $125 from the period January 1, 2010 until August 31, 2013; $110 from September 1, 2013 until February 28, 2014; $126 from February 28, 2014 until December 31, 2014; and $127 from January 1, 2015 to the present. That would entitled Plaintiff's counsel to a rate of $187.50 for work performed between July 15, 2012 and August 31, 2013; $165 for work performed from September 1, 2013 until February 28, 2014; $189 for work performed from February 28, 2014 until January 1, 2015; and $190.50 for work performed from January 1, 2015 until present. Plaintiff did not contest this point or

these figures in his response to Defendants' objection, so the Court will use them as the correct figures.

2. Reasonable Hours Expended

Having determined the rates, the next step is to determine the appropriate number of hours worked. Defendants argue that they are entitled to a reduction in hours because Plaintiff did not succeed on all of his claims. As pointed out by Defendants, Plaintiff's federal conspiracy claim was dismissed out on summary judgment. Further, the Court granted judgment as a matter of law on Plaintiff's state law conspiracy claim, dismissing that claim at trial, and Defendant Stewart with it. Plaintiff prevailed on Counts 1 and 2 against Defendant Smith, but Fulk and Smith prevailed against Plaintiff on Count 3, as did Ritchey on Count 4. Plaintiff secured another victory against Smith on Count 5, but prevailed only against Fulk, and not Defendants Smith and Ritchey on Count 6.

Less than complete success on all claims is relevant to the Court's analysis of the reasonableness of the attorney's fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A plaintiff may only receive compensation for work performed on claims legally and factually related to the claim on which Plaintiff prevailed. *Id.* at 436. A court must consider whether the fee is reasonable in light of the results obtained, and may adjust an award up or down. *Sottoriva v. Claps*, 617 F.3d 971, 973 (7th Cir. 2010) (citing *Hensley*, 461 U.S. at 440). Downward adjustments that identify specific hours that should be eliminated may be reasonable when a Plaintiff prevails only on specific claims. *Id.* But, *Hensley* author-

ized a prevailing plaintiff to recover fees for time spent on claims where they shared a "common core of facts" or are "based on related legal theories." 461 U.S. at 435. The Seventh Circuit has applied this reasoning to pendant state claims in a federal action. *Zabkowicz v. West Bend Co. Civ. of Dart Industries, Inc.*, 789 F.2d 540, 551 (7th Cir. 1986). The proper inquiry is into the "interrelated nature of the lawsuit as a whole." *Id. See also Munson v. Milwaukee Bd. of School Directors*, 969 F.2d 266, 272 (7th Cir. 1992) ("Separating out the legal services rendered for the federal and pendent claims would be futile …"). The Court must also consider whether the plaintiff's success makes the hours expended a satisfactory basis for making the fee award. *Hensley*, 461 U.S. at 434. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Id.* at 435.

Based on Plaintiff's success record, the Court finds that he is not able to recover for the time spent on his conspiracy claims because they do not share the same legal basis as Plaintiff's other claims and because Plaintiff did not ultimately succeed in showing that he had a legal basis to bring those claims. One of those claims was dismissed out on summary judgment and Plaintiff did not make his case at trial as to the other claim. Additionally, the Court found the pleadings so thin as to conspiracy claim as to require additional briefing prior to trial to determine the nature of the claim. The Court therefore cuts time it finds related exclusively to the conspiracy claim.

Plaintiff only brought conspiracy claims against Defendant Stewart; he was not implicated on the ex-

cessive force, battery, or deliberate indifference claims. Therefore, in calculating the lodestar amount, the Court excludes 2 hours from December 5, 2012 for "consider adding Russell Stewart as Defendant based on his report." The court also excludes 4 hours from December 8, 2012 for drafting and filing the amended complaint, which named Stewart. The Court further excludes entries from February and March 2013 related to Stewart's waiver of service, and time from April 2013 for reviewing Stewart's answer and motion to join the pending summary judgment motion. The Court will not consider time spent researching conspiracy affirmative defenses on April 10, 2013 either. The Court excludes time spent reviewing and responding to Defendants' motion for summary judgment between June 11, 2014 and July 14, 2014, and time spent in November and December of 2014 on preparing a trial brief on that issue.

The Court declines to reduce the lodestar amount of hours to account for Plaintiff's success on the state law battery claims. Defendants cite no authority for their argument that § 1988 precludes recovery on related state law claims. Here the Court finds that the battery claims were virtually indistinguishable from the unconstitutional use of force claims because they both addressed the same course of conduct and common core of facts. Plaintiff raised those counts against the same defendants, and witness testimony relevant to one count would be relevant to the other. Excessive force and battery are also similar legal theories that raise similar issues. The Court also finds that the state law battery claims are distinguishable from the conspiracy claims, which is an

entirely separate legal theory. For that reason, the Court declines to cut out preparation on the state claims out of the lodestar.

There are other billing entries that the Court declines to cut from the lodestar because it finds that they supported Plaintiff's overall case and cannot be separated from Plaintiff's success. Plaintiff's counsel did other work related to Stewart, but the Court finds this was time reasonably spent, as Stewart witnessed part of the events at issue and Plaintiff was obligated to investigate what Stewart knew as part of trial preparation. The same logic applies to Defendant Ritchey. Although the jury found in Ritchey's favor at trial, he was a key witness to the events at issue. The time Plaintiff's counsel spent investigating Ritchey's knowledge and presenting him as a witness was therefore reasonable. Likewise, the mixed results with regards to Defendants Smith and Fulk make it difficult for the Court to cull billing entries related to the unsuccessful claims because it is not clear, given the interrelated nature of the claims, what billing entries could be attributed to the successful claims against them as opposed to the unsuccessful. Plaintiff's success against those two Defendants, although partial, represents an extraordinary verdict in a prisoner case. The undersigned cannot recall any other prisoner case he has tried where a prisoner has secured a six figure verdict. For these reasons, the Court declines to eliminate other billing entries from the lodestar.

Defendants argue that several other billing entries should also be excluded from the lodestar calculation. Specifically, Defendants request that the Court cut time for a May 23, 2012 entry where

Plaintiff's counsel called Plaintiff's girlfriend to discuss Plaintiff's case. The Court agrees with Plaintiff that Defendants' characterization of this event is ambiguous, and finds that client contact is a reasonable billing entry. The Court also finds that time spent trying to facilitate client calls at the prison is reasonable time. The Court is aware that attorneys in other cases have been told that their phone lines cannot receive previously-scheduled collect calls from prisoners and that this difficulty is an ongoing and time-consuming issue in prisoner litigation generally. The Court finds these expenses reasonable as well. Defendants also complain that Plaintiff's counsel billed for research he did on conflict of interest and deciding whether to file a formal motion to remove the Attorney General's Office from the case. However, the billing entries document that Plaintiff had great difficulty in securing certain discovery from the Illinois Department of Corrections, that he received conflicting answers from the attorneys involved in those disputes, and that Defendants' counsel was not helpful in that regard. Plaintiff's attempts to explore avenues for getting his discovery when he perceived that Defendants' counsel had a conflict were reasonable. Finally, Defendants complain that Plaintiff billed for time to fix prior mistakes. The Court agrees with Defendants that this is not reasonable. *See Hensley v. Eckerhart*, 461 U.S. at 424 ("Hours that are not properly billed to one's *client* are not properly billed to one's *adversary* pursuant to statutory authority.") (quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980)). Those hours will also be excluded.

3. PLRA § 1997e(d)(2)

Thus, after eliminating certain billing entries as discussed above, and using 150% of the CJA rates during the relevant time periods as the correct hourly rate, the Court has determined that the lodestar for this case would be $108,446.54. Defendants next request that pursuant to the PLRA, Plaintiff be required to pay 25% of his judgment towards the award of attorney's fees. Although defendants cite to *Johnson v. Daley* for this proposition, other cases interpreting that case have found that the language suggesting that the full 25% allowed by the PLRA must come first from the judgment is dicta. *See, e.g.*, *Gevas v. Harrington*, No. 10-cv-493-SCW, 2014 WL 4627616 *3 (S.D. Ill. September 16, 2014) (awarding 10% of the judgment). The Court sees no reason to depart from its own prior practice of making a discretionary decision here. Defendants also make an argument based on the fact that Plaintiff has a fee agreement with his counsel. That is not relevant here. *See Pickett v. Sheridan Health Care Center*, 664 F.3d 632, 640 (7th Cir. 2011) (finding reversible error where district court considered contingent fee agreement). Plaintiff shall pay 10% of the judgment or $30,773.48 towards the attorney's fees.

4. Costs

Defendants also contest some of Plaintiff's costs, in particular, his bills for a rental car and reimbursement for $1,311.00 for lodging, including the night of January 29, 2015, the day the verdict was reached. The Court finds it reasonable to stay overnight the night of the jury verdict, as the verdict came back after the close of business and Plaintiff's counsel had a long drive back to Chicago. However,

Plaintiff's hotel bill was $279 a night. The government per diem rate for the St. Louis area in January 2015 was $115 a night. The Court therefore finds Plaintiff's hotel rate excessive and reduces it to $115 per night for a total of $460. Defendants also challenge $418.45 for a rental car, but do not explain why that is not reasonable other than it is not listed under the statute. The Court finds that travel is the kind of expense frequently billed to clients and thus a reasonable inclusion in a fee petition. The Court reduces the costs submitted by Plaintiff to $2,197.12.

Conclusion

Plaintiff's Motion to Supplement is **GRANTED**. (Doc. 165). Plaintiff's Motion for Attorney's Fees is **GRANTED in part and DENIED in part**. (Doc. 149). Plaintiff's counsel is entitled to attorney's fees of $108,446.54 and litigation costs in the amount of $2,197.12. Plaintiff shall pay his attorney $30,773.48 towards the costs of the attorney's fees from the judgment. All other costs and fees shall be borne by Defendants.

IT IS SO ORDERED

Date: September 25, 2015

/s/ Stephen C. Williams
Stephen C. Williams
United States Magistrate Judge

APPENDIX C

In the United States District Court
for the Southern District of Illinois

CHARLES MURPHY, Plaintiff,

vs.

ROBERT SMITH, SHAWN RITCHEY, GREGORY FULK, RUSSELL STEWART, Defendant(s).

Case No. 12-841-SCW

JUDGMENT IN A CIVIL CASE

Defendant RUSSELL STEWART was dismissed with prejudice on January 28, 2015, by an Order entered Magistrate Judge Stephen C. Williams at the close of Plaintiff's case. (Doc. 132 and 133).

The claims against the remaining Defendants were submitted to the jury at the close of trial. The issues have been tried and the jury has rendered its verdict. (Doc. 142).

THEREFORE, judgment is entered in favor of Defendant RUSSELL STEWART and against Plaintiff. Judgment is entered in favor of Defendant SHAWN RITCHEY and against Plaintiff. Judgment is entered in favor of Plaintiff and against Defendant ROBERT SMITH in the amount of two hundred forty-one thousand and one dollars ($241,001.00). Judgment is entered in favor of Plaintiff and against Defendant GREG FULK in the amount of one hundred sixty-eight thousand seven hundred fifty dollars ($168,750.00).

DATED this 2nd day of February, 2015

Justine Flanagan, Acting Clerk

By: s/ / Angela Vehlewald

Deputy Clerk

Approved by s/ / Stephen C. Williams
United States Magistrate Judge
Stephen C. Williams