No. _______

In the Supreme Court of the United States

JERMAINE WALKER, PETITIONER

v.

CITY OF CHICAGO, S.E. COLEMAN, AND P.R. JOSEPHS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Hudson v. Michigan*, 547 U.S. 586 (2006), the Court relied on the availability of a damage remedy under 42 U.S.C. § 1983, with a concomitant award of attorneys' fees under 42 U.S.C. § 1988, as an important mechanism to enforce the Fourth Amendment.

Outside of the Second Circuit, the lower federal courts have approved jury verdicts in false arrest cases awarding nominal damages, even when, as in this case, the false arrest resulted in twelve hours of detention.

In at least six circuits, an award of nominal damages in a false arrest case would result in an award of fees under 42 U.S.C. § 1988. The Seventh Circuit takes a narrower view of *Farrar v. Hobby*, 506 U.S. 103 (1992) and bars fees after an award of nominal damages unless the case has "established an important precedent." *Hyde v. Small*, 123 F.3d 583, 584 (7th Cir. 1997). This has been an unattainable standard in false arrest cases.

The questions presented in this case are:

1. Should the Court adopt the Second Circuit's position in *Kerman v. City of New York*, 374 F.3d 93 (2d Cir. 2004) that freedom is not worthless and nominal damages are therefore impermissible in a false arrest case?

2. Is a plaintiff who prevails on a false arrest case by obtaining an award of nominal damages presumptively entitled to fees under 42 U.S.C. § 1988?

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In the Supreme Court of the United States

Jermaine Walker

v.

City of Chicago, S.E. Coleman, and P.R. Josephs

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Jermaine Walker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is not officially reported but is available at 2013 WL 1098397 (7th Cir. 2013). The written (App., infra, 10a-11a, 23a-25a) and oral (App., *infra*, 12a-15a, 17a-22a) opinions of the district court are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves 42 U.S.C. § 1983 and 42 U.S.C. § 1988, which are reproduced in the App., *infra*, 26a.

STATEMENT

On November 30, 2008, Chicago police officers S.E. Coleman and P.R. Joseph arrested petitioner for three traffic offenses and for a misdemeanor charge of obstructing a peace officer. Petitioner was held in a detention cell for 12 hours following his arrest.

The prosecution dropped all charges at petitioner's first court appearance Thereafter, petitioner instituted this action under 42 U.S.C. § 1983, asserting that he had been the victim of a false arrest. The complaint sought twenty five thousand dollars as compensatory damages and ten thousand dollars as punitive damages.[1] The jury returned a verdict in favor of plaintiff, rejecting the officers' version of the incident.

Officer Coleman testified that he had observed petitioner commit three traffic infractions. One was for a loud radio, another was for obstruction of traffic, and the third was for not wearing a seatbelt. The jury rejected Coleman's testimony about each alleged offense.

Officer Josephs told the jury that he had seen petitioner use his motor vehicle to block a police squad car, and thereby commit the offense of obstructing a peace officer. The jury rejected Josephs' testimony.

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[1] Plaintiff resolved his claim for punitive damages before trial: in exchange for a waiver of any punitive damages, the individual defendants agreed not to seek costs if they prevailed.

Plaintiff did not claim any out of pocket loss from the false arrest and limited his evidence on damages to "physical and mental/emotional pain and suffering." The jury was instructed on damages in accordance with Seventh Circuit Civil Pattern Instruction 7.23 (App., *infra,* 27a), and returned a verdict of zero damages.

The trial judge found that there had been "a reasonable basis in the record for the jury's damage award" (App., *infra,* 11a), and denied petitioner's motion for a new trial on damages. (App., *infra,* 10a-11a.) The district court did, however, increase the award to one dollar. (App., *infra,* 16a.)

The district court also concluded that attorneys' fees were inappropriate under 42 U.S.C. § 1988. (App., *infra,* 20a-22a.) The district judge reached the same result on petitioner's request for Rule 54 costs. (App., *infra,* 22a-23a.)

On appeal, the Seventh Circuit concluded that "the jury's verdict of zero compensatory damages is well support by the record." (App., *infra,* 3a-4a.) The Court of Appeals upheld the denial of attorneys' fees, applying its prior decision in *Hyde v. Small,* 123 F.3d 583 (7th Cir. 1997) that fees should be denied when the plaintiff wins only nominal damages and does not establish important precedent or secures equitable relief. (App., *infra,* 6a.) The Seventh Circuit concluded that the district court had applied an incorrect legal standard in denying Rule 54(d) costs and remanded that issue for reconsideration. (App., *infra,* 7a-8a.)

REASONS FOR GRANTING THE PETITION

The remedy "is damages or nothing" for persons like petitioner who are falsely arrested and innocent of any wrongdoing. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

This case is about the sham remedy of nominal damages devoid of an award of attorneys' fees to a person who was falsely arrested yet innocent of any wrongdoing.

The spurious result approved by the Court of Appeals in this case does not deter violations of the Fourth Amendment. The Court described a genuine remedy in *Hudson v. Michigan*, 547 U.S. 586, 598 (2006), when it identified damages under 42 U.S.C. § 1983, with a concomitant award of attorneys' fees under 42 U.S.C. § 1988, as a mechanism to enforce the Fourth Amendment. The "moral satisfaction of knowing that a federal court concluded that his rights had been violated," *Hewitt v. Helms*, 482 U.S. 755, 762 (1987), does nothing to deter police officers from misusing their office to make arrests without probable cause.

In *Kerman v. City of New York*, 374 F.3d 93 (2d Cir. 2004), the Second Circuit held that nominal damages were impermissible when, as in this case, the arrestee had been held in custody for "at least 10 hours." *Id.* at 129. The Second Circuit viewed loss of liberty as independent of the emotional distress caused by incarceration, and held that it had been "fundamental error" when the jury was not instructed to award damages for the loss of liberty.

Although the Fifth Circuit held in *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1968) that "[a] jury finding that a

man's freedom is worthless is clearly erroneous," *id.* at 798, the lower federal courts outside of the Second Circuit have had little difficulty in upholding zero or nominal awards in false arrest cases.[2]

An award of zero or nominal damages has no place in a false arrest case, where an innocent person has been deprived of his (or her) liberty for many hours. The Court should reject any rule which equates the distress of being locked up with the denial of procedural due process at issue in *Carey v. Piphus*, 435 U.S. 247 (1978). While "a person may not even know that procedures were deficient until he enlists the aid of counsel," *Carey*, 435 U.S. at 263, a person confined in a jail cell knows that he (or she) is not free to leave and is subject to the indignities of incarceration. "Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations." *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 310 (1986). This expectation is frustrated by a rule that freedom is worthless.

In addition to the conflict between the circuits about the propriety of nominal or zero damages in false arrest cases, this case presents the Court with an opportunity to resolve the differing standards applied by the lower

[2] *Davet v. Maccarone*, 973 F.2d 22, 29-30 (1st Cir. 1992); *Velius v. Township of Hamilton*, 466 Fed.Appx. 133 (3d Cir. 2012); *Norwood v. Bain*, 166 F.3d 243 (4th Cir. 1999); *Joseph v. Rowlen*, 425 F.2d 1010 (7th Cir. 1970); *Miller v. Albright*, 657 F.3d 733 (8th Cir. 2011); *George v. City of Long Beach*, 973 F.2d 706, 708 (9th Cir. 1992); *Slicker v. Jackson*, 215 F.3d 1225 (11th Cir. 2000).

federal courts in awarding attorneys' fees under 42 U.S.C. § 1988 in nominal damage cases.

The Court held in *Farrar v. Hobby*, 506 U.S. 103 (1992) that a plaintiff who obtains an award of nominal damages is the prevailing party entitled to a fee award under 42 U.S.C. § 1988. The Court also held in *Farrar* that "in some circumstances, such a 'prevailing party' should still not receive an award of attorney's fees." *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept of Health and Human Resources*, 532 U.S. 598, 603 n.6 (2001). The lower federal courts have applied different standards for the "measured exercise of discretion," *Farrar v. Hobby*, 506 U.S. at 114, in awarding fees in nominal damage cases.

In the Sixth Circuit, the "measured exercise of discretion" required by *Farrar* begins and ends with the degree of success obtained. In *Cramblit v. Fikse*, 33 F.3d 633, 635 (6th Cir. 1994), the jury found that police officers had conducted an unlawful search of the plaintiff's residence, but awarded one dollar in compensatory damages and another dollar as punitive damages. *Id.* at 634. The district court refused to award attorneys' fees and the court of appeals affirmed, relying on the single factor that plaintiff "failed to prove actual, compensable injury." *Id.* at 635.

The First, Second, Third, Fourth, Eighth, and Ninth Circuits employ a more nuanced approach, applying the standards identified by Justice O'Connor in her concurring opinion in *Farrar*, 506 U.S. at 120-22. In these circuits, fees are awarded in Section 1983 cases because of "the importance of providing an incentive to attorneys to represent litigants … who seek to vindicate constitutional rights but whose claim may not result in

substantial monetary compensation." *O'Connor v. Huard*, 117 F.3d 12, 17-18 (1st Cir. 1997). These circuits recognize the role of a nominal damage award in "vindicating rights." *Cabrera v. Jakabovitz*, 24 F.3d 372, 393 (2d Cir. 1994). *See, e.g., Mercer v. Duke University*, 401 F.3d 199, 203-04 (4th Cir. 2005) (applying standards to fees in Title IX discrimination action); *Ollis v. HearthStone Homes, Inc.*, 495 F.3d 570, 576 (8th Cir. 2007) (nominal damage award in religious discrimination claim justifying fee award).

The majority rule is exemplified by the decision of the Third Circuit in *Buss v. Quigg*, 91 Fed.Appx. 759 (3d Cir. 2004). There, the court of appeals upheld an award of fees because, by successfully asserting their Fourth Amendment rights, the plaintiffs obtained "significant relief," even though their recovery was limited to nominal damages. The Third Circuit also relied on "the legal significance of unreasonable search and seizure and the public purpose of deterring such behavior."

The Ninth Circuit reached the same result in *Mahach-Watkins v. Depee*, 593 F.3d 1054 (9th Cir. 2010). There, the plaintiff had prevailed at trial, but secured only nominal damages. *Id.* at 1056. The court of appeals affirmed the award of attorneys' fees, relying on the "general legal importance" of police use of deadly force, and the public goal of deterring police misconduct. *Id.* at 1061-63 (9th Cir. 2010).

The Seventh Circuit takes a far narrower view of the standards identified by Justice O'Connor in her concurring opinion in *Farrar*, limiting fees in nominal damage cases to cases that "established an important precedent." *Hyde v. Small*, 123 F.3d 583, 584 (7th Cir. 1997).

This has proven to be an unattainable standard. *See. e.g., Frizzell v. Szabo*, 647 F.3d 698, 703 (7th Cir. 2011); *Briggs v. Marshall*, 93 F.3d 355, 361 (7th Cir. 1996); *Maul v. Constan*, 23 F.3d 143, 147 (7th Cir. 1994); *Cartwright v. Stamper*, 7 F.3d 106, 110 (7th Cir. 1993); *Willis v. City of Chicago*, 999 F.2d 284, 290 (7th Cir. 1993).

The district court in this case conscientiously applied the Seventh Circuit's rigid standards for fee awards in nominal damage cases. The district judge relied on *Simpson v. Sheahan*, 104 F.3d 998, 1002 (7th Cir. 1997) for the Seventh Circuit's view that the importance of the constitutional claim "is the least significant of the three factors." (App. 21a.) The district judge also applied the Seventh Circuit's rule that a lawsuit "that merely attempts to redress a private injury" does not serve a public goal. (App. 21a.) Application of the Seventh Circuit's narrow rules resulted in the denial of fees.

Petitioner would have received an award of attorneys' fees had his request been judged under the standards applied in the First, Second, Third, Fourth, Eighth, and Ninth Circuits. The Court should resolve this conflict.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

June, 2013

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APPENDIX A

United States Court of Appeals
For the Seventh Circuit

No. 11-3771

Jermaine Walker,

Plaintiff-Appellant,

v.

City of Chicago, a municipal corporation, et. al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 1:09-cv-5132—Gary S. Feinerman, *Judge.*

Argued October 25, 2012—Decided March 13, 2013

Before FLAUM, MANION, and ROVNER *Circuit Judges*

ORDER

In November 2008, Jermaine Walker met up with several of his friends at a gas station on Chicago's South Side. Walker had driven his car to the station and parked it there, and while he was seated in his vehicle waiting for his friends to get gas, he observed the defendants—Officers S. E. Coleman and P. R. Josephs—approach one of his friends, Demetrius Morris, and arrest him. Morris was placed in the back of his own car and Officer Coleman drove that car to the police station. Officer Joseph followed in his squad car.

Several of Morris's friends followed Josephs's squad car to the police station, and Walker likewise followed the squad car in his vehicle. After arriving at the sta-

tion, Walker parked his car on the street near the station and exited his vehicle, and others in his party exited their vehicles as well. Officers Coleman and Josephs then arrested Walker and his companions. Officer Coleman cited Walker for three traffic violations (for having a loud radio, for obstructing traffic, and for not wearing a seatbelt), and Officer Josephs charged Walker with obstructing a police officer.

Walker was taken into custody, along with his friends. He was handcuffed and brought into the station where he complained that the handcuffs were too tight. Walker was then transferred to a holding room along with his friends where his cuffs were removed. While in the holding room, Walker joked among his friends. Walker claimed that they were joking about the fact that Walker would never want to hang out with them again, though after his release Walker stated that they were joking about the situation in which they found themselves. Ultimately, Walker spent approximately 12 hours in custody, and shortly after his release, he appeared in court, where all charges against him were immediately dropped.

After his release and court appearance, Walker claimed that he continued to be "very upset" about his arrest. He claimed to be angry that he was forced to spend 12 hours sitting in jail and then had to go to court, and that afterwards he felt nervous around police and afraid that he might be incarcerated again. However, he did not seek any psychiatric help or counseling. Ultimately, in August 2009 Walker brought a false arrest suit against Officers Coleman and Josephs and the City of Chicago. He sought over $25,000 in compensatory damages and $10,000 in punitive damages. After a trial,

the jury returned a verdict for Walker but awarded him no damages. Walker moved for a new trial on damages, arguing that he was entitled to compensatory damages as a matter of law. The district court denied Walker's motion, and then Walker moved the district court to alter the judgment to include an award of compensatory damages, or at least nominal damages. The district court granted in part and denied in part the motion, and awarded Walker $1 in nominal damages. Walker also moved the court for an award of attorneys' fees and submitted a bill of costs pursuant to Fed. R. Civ. P. 54(d), but the district court denied that motion. Walker now appeals, challenging both the district court's refusal to grant him a new trial and its refusal to grant him costs and attorneys' fees.

We review a district court's denial of a motion for a new trial for abuse of discretion, and will reverse the district court only if "the verdict is against the weight of the evidence, the damages are excessive, or if for other reasons the trial was not fair to the moving party." *Emmel v. Coca-Cola Bottling. Co.*, 95 F.3d 627, 636 (7th Cir. 1996). Because the district court is in a "unique position to rule on a new trial motion" given that it observed the course of the trial, our review is "narrowly circumscribed." *Cefalu v. Vill. of Elk Grove*, 211 F.3d 416, 424 (7th Cir. 2000). We uphold a jury's verdict as long as there exists in the record a reasonable basis to uphold it. *Pickett v. Sheridan Health Care Center*, 610 F.3d 434, 440 (7th Cir. 2010).

Walker argues that the jury's verdict on damages is against the weight of the evidence and that he did suffer actual damages from his false arrest, but the jury's verdict of zero compensatory damages is well supported by

the record and not at all against the manifest weight of the evidence presented at trial. For example, during his trial Walker claimed that he was "very upset" by his arrest and subsequent 12-hour detention and the fact that he had to appear in court (where all charges were dropped), but we have held that "when the injured party's own testimony is the only proof of emotional distress, he must explain the circumstances of his injury in reasonable detail; he cannot rely on mere conclusory statements." *Denius v. Dunlap*, 330 F.3d 919, 929 (7th Cir. 2003). Walker fails to satisfy this burden. Testimony at trial showed that during his detention with his friends, he was joking and laughing with them, which the jury could view as contradicting his assertion that he was "very upset." Such testimony would allow a reasonable jury to find (as it did here) that Walker suffered no emotional distress from his arrest and detention, unlawful though it was. Also, Walker's testimony that his handcuffs were too tight was submitted without physical documentation that he suffered any actual harm from this, and the jury was free to reject his testimony. In light of the evidence presented at trial, a reasonably jury could conclude that Walker did not suffer any actual damages from his false arrest. Thus, the jury's verdict was not "contrary to the manifest weight of the evidence" presented at trial. *Cefalu*, 211 F.3d at 424.

Since Walker cannot satisfy his burden to justify overturning a jury verdict, we now consider Walker's assertion—which is the main thrust of his challenge on appeal—that we should overturn *Joseph v. Rowlen*, 425 F.2d 1010 (7th Cir. 1970), and rule that he is entitled to compensatory damages as a matter of law. In *Rowlen*, we upheld a jury verdict of zero damages in a false arrest case where the plaintiff had been wrongfully de-

tained for approximately 90 minutes. *Id.* at 1010. But Walker offers no compelling reason for overturning *Joseph*, and we decline to do so. *Joseph* accords with our long-held rule that compensatory damages are not presumed but "must be proved in order to be recovered." *Ustrak v. Fairman*, 781 F.2d 573, 579 (7th Cir. 1986). The jury instruction Walker tendered, and the district court gave, instructed the jury to consider the "physical and mental/emotional pain and suffering that plaintiff has experienced" and "no other." Walker failed to show that he suffered any physical and mental or emotional pain, and the jury was precluded from considering any damages that he might have suffered from his loss of liberty.[1] For these reasons, the district court did not err

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[1] Walker cites to a relatively recent Second Circuit decision, *Kerman v. New York*, 374 F.3d 93 (2d Cir. 2004), where that court held that a victim of a false arrest "is entitled to compensatory, not merely nominal, damages." Id. at 124. Walker takes *Kerman* out of context; *Kerman* did not abrogate the plaintiff's need to show that some injury was actually suffered. As the Second Circuit explained, "where the jury has found a constitutional violation and there is no genuine dispute that the violation resulted in some injury to the plaintiff, the plaintiff is entitled to an award of compensatory damages as a matter of law." *Id.* Here, the jury did find that Walker's arrest was a constitutional violation, but did not find that Walker was injured by it and accordingly was not awarded compensatory damages. Furthermore, Walker's contention that his "loss of liberty" was an injury as a matter of law is unavailing; his own instructions precluded the jury from considering Walker's "loss of liberty" when determining damages

when it declined to grant Walker a new trial for damages.

We now turn to Walker's contention that the district court erred in denying his motion for costs and attorney fees. We review an order denying costs or attorney fees for abuse of discretion. *Rivera v. City of Chicago*, 469 F.3d 631, 636 (7th Cir. 2006); *Cruz v. Town of Cicero*, 275 F.3d 579, 591 (7th Cir. 2001). "An abuse of discretion occurs when no reasonable person could take the view adopted by the trial court." *Rivera*, 469 F.3d at 636. 42 U.S.C. § 1988 allows the district court to award attorney fees to the prevailing party in a § 1983 action. The Supreme Court has noted, however, that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief . . . the only reasonable [attorney] fee is usually no fee at all." *Farrar v. Hobby*, 506 U.S. 103, 115 (1992). *Farrar* suggested three factors a district court should consider in awarding attorney fees to a prevailing party: (1) the difference between the amount of damages sought and the amount actually awarded; (2) the "legal significance" of the issue being litigated; and (3) the public purpose (if any) of the litigation. *Id.* at 121-22 (O'Connor, J., concurring); *see also Briggs v. Marshall*, 93 F.3d 355, 361 (7th Cir. 1996). The district court properly considered these factors and found that Walker's victory did not merit an award of attorney fees, and we see no abuse of discretion in that ruling. To put it bluntly, Walker "asked for a bundle and got a pittance," *Farrar*, 506 U.S. at 120, and the district court was well within its discretion to conclude that the disparity between the amount sought and the amount received weighed against awarding attorney fees. *See Hyde v. Small*, 123 F.3d 583, 584 (7th Cir. 1997) (where a plain-

tiff wins only nominal damages, a reasonable fee is "especially likely to be zero" unless the case establishes important precedent or awards equitable relief).

The district court's analysis for denying costs, however, was incorrect. Rule 54(d) generally creates a presumption in favor of awarding costs to the prevailing party. *See Mother & Father v. Cassidy*, 338 F.3d 704, 708 (7th Cir. 2003) (there are "only two situations in which the denial of costs might be warranted": "misconduct of the party seeking costs," and "indigency of the party against whom they are sought"); *Weeks v. Samsung Heavy Indus. Co.*, 126 F.3d 926, 945 (7th Cir. 1997) (the "court must award costs unless it states good reasons for denying them"); *Congregation of the Passion, Holy Cross Province v. Touche, Ross & Co.*, 854 F.2d 219, 222 (7th Cir. 1988) ("unless the losing party affirmatively shows that the prevailing party is not entitled to costs, the district court must award them.").

Here, Walker prevailed at trial but was awarded no damages. At the hearing on Walker's post-trial motions, the district court, having concluded that Walker was not the prevailing party under the *Farrar* test and that only the prevailing party can recover attorney fees, denied Walker's request for fees. Similarly, the district court also denied costs because only a prevailing party can recover costs. In its minute entry after the hearing, however, the district court correctly observed that Walker *was* the prevailing party (the jury found in his favor, after all, even if it did not award him damages) and awarded him nominal damages of $1. The district court noted that *Farrar* provided a separate test applicable to the attorney fees determination, and Walker still failed that test even with the award of nominal damages. But

although the court corrected its error and noted that the *Farrar* balancing test applied to the determination of whether to award attorney fees to the prevailing party, it should also have corrected its analysis of whether to award costs. The district court did not explain why Walker was not entitled to costs. It appears that the court applied the *Farrar* test to both attorney fees and costs, which was error because the determination of whether to award costs requires a different analysis than the determination of whether to award attorney fees.

Our case law exhibits different standards for each determination. Section 1983's fees provision uses more stringent language than Rule 54's costs provision. *Compare* 42 U.S.C. § 1988 ("In any action or proceeding to enforce a provision of section[] . . . 1983 . . . the court, in its discretion, may allow the prevailing party attorneys' fees . . . . (emphasis added)), *with* Fed. R. Civ. P. 54(d)(1) ("Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." (emphasis added)). The former imposes a stricter balancing test (currently the *Farrar* balancing test) to determine whether a prevailing party should be awarded fees, while the latter suggests a stronger presumption in favor of a prevailing party being awarded costs. Thus, the district court erred in its analysis of whether to award costs under Rule 54(d).

For the reasons set forth above, we AFFIRM the district court's orders denying a new trial and denying the award of attorney fees. But, as noted above, unless there is some exceptional reason for not awarding costs to the prevailing party, the court must award costs. Be-

cause the district court erred in its determination of whether to award costs to Walker, we REMAND for further proceedings consistent with this order.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Jermaine Walker,	)	
Plaintiff,	)	
-vs-	)	No. 09 C 5132
S.E. Coleman and P.R.	)	
Joseph	)	
Defendants.	)	

Docket Entry Text

For the reasons stated in open court and those set forth below, Plaintiff's motion for a new trial on damages [104] is denied.

Statement

After hearing two days of testimony, the jury returned a verdict (Doc. 100) finding for Plaintiff Walker and against Defendants Coleman and Joseph on Walker's false arrest claim, but awarding compensatory damages of zero dollars. The jury was not asked to award punitive damages because Walker waived punitive damages in exchange for Defendants waiving costs should they prevail. Doc. 72 at 9. Walker has moved under Federal Rule of Civil Procedure 59(a) for a new trial on damages. He does not contend that the award of zero compensatory damages is inconsistent with the jury's liability finding; nor could he, as injury is not an element of a false arrest claim. Walker does not challenge the jury instructions on damages; nor could he, as the court gave his proposed instruction and, erring on the side of caution, accepted his view that the jury should not receive a nominal damages instruction. Instead, Walker argues that the jury's damage award cannot be reconciled with the manifest weight of the evidence.

On a manifest weight challenge under Rule 59(a), the court "will uphold a jury's verdict as long as there is a reasonable basis in the record to support it." *Frizzell v. Szabo*, __ F.3d __, 2011 WL 3132267, at *4 (7th Cir. July 27, 2011). As the court articulated at the 8/8/2011 motion hearing, there is a reasonable basis in the record for the jury's damage award. Walker was arrested and spent the evening and early morning, about twelve hours, in the police station lock-up. Walker testified that he suffered physical discomfort and some modest emotional distress as a result of the arrest and detention. But the jury was not required to believe that testimony. Walker spent his time in the lock-up with acquaintances with whom he had social plans that evening. At least two witnesses testified that Walker and the others were joking around in the lock-up. Walker acknowledged joking around, but explained that the jokes were not about being locked up, but rather about the surrounding circumstances -- this was the first time Walker had social plans with these individuals, whom he knew from the neighborhood, and (according to Walker) the joke was that Walker would not be making any more plans with them in the future. The jury could have believed that testimony. But, again, it did not have to. Instead, the jury reasonably could have concluded that the joking around demonstrated that Walker was not suffering any distress, and thus did not suffer any compensable physical or emotional harm, from the arrest and detention.

Accordingly, Walker's motion for a new trial is denied.

Dated: August 8, 2011

/s/ Gary Feinerman
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Jermaine Walker,	)	
Plaintiff,	)	
-vs-	)	No. 09 C 5132
S.E. Coleman and P.R.	)	
Joseph	)	
Defendants.	)	

EXCERPT OF
TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE GARY FEINERMAN
August 8, 2011

The Court:

[7] All right. Thank you, counsel.

I'm going to deny the motion for a new trial on damages. The instruction that was given was what the plaintiff's – was the plaintiff's instruction, and so – and I don't see the motion as challenging the instruction on damages, nor could there be such a challenge.

I think the jury could have come out either way on the subject of emotional damages. And I think that Ms. Davenport fastened on the testimony that I'm thinking about when – I first thought about when I received and read the plaintiff's motion, and that is, the plaintiff – there [8] was testimony from at least a couple of witnesses that the plaintiff was laughing while in custody.

Now, the plaintiff said – Mr. Kulis is right. The

plaintiff – so, let me step back.

The fact that the plaintiff was laughing while in custody could indicate to a reasonable juror that here was no emotional distress at all, that this was just – that the plaintiff just didn't suffer any compensable damages, and the jury could have reached that conclusion in applying the instruction.

Now, I acknowledge that Mr. Walker said, "Yes, I was laughing, but I was laughing essentially at the irony of the situation, which is that this is the first night I've hung out with this group of people and, look, I end up in jail. And one of them said, 'Oh, I bet you'll never hang out with us again,' and I was laughing at the irony of the situation."

And I think the jury could have bought that. And had the jury bought that, the jury would have awarded damages, because it was an explanation for the laughter and the jury would have concluded that there actually was emotional distress.

But the jury didn't have to buy that explanation of the laughter, and it could – the jury could have – a reasonable jury could have found that there was a false arrest, that Mr. Walker did spend 12 hours in jail, but that [9] the 12 hours in jail or in the lock-up did not have any compensable impact on him because of the laughter and that the laughter was not just because of the irony of the situation, but that the laughter reflected the fact that Mr. Walker was not bothered at all by the time that he spent in the lock-up.

So, I believe that the – for that reason, a new trial on damages is not warranted. And Mr. Kulis is right that in granting – in agreeing with his instruction ra-

ther than the defendants' instruction on damages, in particular rejecting the defendants' suggestion that I have a nominal damages instruction, I did make an evaluation of the evidence and indicated that in light of the evidence, I didn't want to give a nominal damages instruction.

At that point, I was erring on the side of caution. I had – I know that Judge Zagel had a similar situation in the past where the jury came in – he gave the nominal damages instruction over the plaintiff's objection in a false arrest type situation. I think it involved somebody who was arrested in a mall. The jury came in with nominal damages, and then Judge Zagel, on reflection, said, "You know what, I shouldn't have given the nominal damages instruction because it just wasn't" – given the evidence, he thought it was inappropriate.

And I didn't want there to be any cloud – if I did give that instruction and there was a nominal damages verdict [10] given, I didn't want there to be a cloud over the verdict that would – that might warrant a new trial and that might have led me to conclude that – that the giving of the instruction prejudiced the plaintiff.

But looking back in retrospect, I think it would have been – I don't think it was in error to not give the instruction. I don't think it would have been in error to give the instruction, because I do believe that a reasonable jury could have reached the conclusion that it gave.

And I'll mention one more thing. There could have been damages in this case. Even if the jury found no compensable – compensatory damages, there could

have been punitive damages for the jury to punish – the jury obviously believed that defendants did something wrong. And in that situation, if the jury believed that the behavior was egregious enough, the jury could have awarded punitive damages. In one of the three 1983 cases that I've tried, the jury did come in with punitive damages for false arrest, and it was a situation comparable to this one.

But prior to trial, the parties agreed that they would exchange costs for punitive damages, and that's – and that's a choice that the plaintiff has to live with. Again, it doesn't go to – it doesn't go directly to the issue of a new trial on compensatory damages, but it does shed some light and some background on why there were no damages at all in [11] this case.

So, I understand the motion. I understand the basis for it. And I'm going to deny the motion.

***

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Jermaine Walker,	)	
Plaintiff,	)	
-vs-	)	No. 09 C 5132
S.E. Coleman and P.R.	)	
Joseph	)	
Defendants.	)	

ORDER

This docket entry was made by the Clerk on Thursday, November 10, 2011:

MINUTE entry before Honorable Gary Feinerman: Motion hearing held. For the reasons stated in open court, Plaintiff's motion to alter the judgment [111] is granted in part and denied in part. The judgment is amended to award Plaintiff nominal damages of $1.00. Enter modified judgment order. Plaintiff's motion for attorney fees [113] and Plaintiff's bill of costs [106] are entered and continued.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Jermaine Walker,	)	
Plaintiff,	)	
-vs-	)	No. 09 C 5132
S.E. Coleman and P.R. Joseph	)	
Defendants.	)	

EXCERPT OF
TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE GARY FEINERMAN
November 10, 2011

The Court:

[7] All right. I'm going to deny the motion insofar as it asks for me to enter – alter the judgment to enter compensatory damages. In terms of the discomfort and harm that Mr. Walker says that he sustained, the jury – in terms of the discomfort and the emotional pain and suffering, as I held in denying the motion for a new trial on damages, the jury could have found that Mr. Walker didn't suffer at all from being in jail for 12 hours. They could have found that this – he went out for a night on the town, and this was just simply a change of venue for him. Instead of being at the nightclub, he was in jail.

And there was testimony from at least two witnesses where Mr. Walker was laughing in jail or in the lock-up; and the jury could have concluded from that that he didn't really suffer any emotional distress based upon the false arrest, and, therefore, there was

no compensation owed for that emotional – alleged emotional distress.

In terms of the offensive physical touching that is attendant to any arrest, I think that argument is defeated by *Frizzell versus Szabo*, where the Court upheld a nominal damages – the Seventh Circuit upheld a nominal damages verdict where the defendant had been tased and then pepper-sprayed and then jumped on. And the way the court rationalized the excessive force liability verdict with the [8] nominal damages finding is by holding that the jury could have found that the tasing was justified and not excessive, but that the pepper spray and the jumping on the chest was excessive, but that there was no harm from that.

So, if the Seventh Circuit believes that there's – that nominal damages – or no compensatory damages is acceptable for a situation where a defendant was pepper-sprayed and had his chest jumped on, then I think the jury in this case was entitled to find no compensatory damages based upon whatever physical touching happened to Mr. Walker, which I believe, based on the evidence, is less than the physical touching that was involved in Frizzell.

Another argument that the plaintiff made is that the jury's award, the zero compensatory damage award is inconsistent with its determination of liability. That's not correct. Injury and damage is not an element of false arrest, so there's nothing inconsistent about the finding of liability and the zero compensatory damage award.

The only hard issue here is whether I enter a judgment of nominal damages. And when we were here last, I asked Ms. Davenport about the two cases

that the plaintiff cited that I found to be on point, which is *Gauger versus Hendle*, 349 F.3d 354, and *Wallace* – I'm sorry, and – well, I guess it's just *Gauger v. Hendle.*

Actually, I take that back. The case I was [9] referring to are *Gates versus Towery*, which is 430 F.3d 429 at 431, and *Calhoun versus Detello*, which is 319 F.3d 936 at 942, which stand for the proposition that if there is a constitutional violation, the plaintiff is entitled to nominal damages.

Now, the question I had was: Did the plaintiff waive the right to nominal damages by objecting to a nominal damages instruction that the defendant had proposed? And I guess the question I asked Ms. Davenport is: Is it even waivable? Are nominal damages waivable in this situation? Even if the jury doesn't award nominal damages, does the Court have to?

And these cases seem to say that I do have to. And I have not received a brief from Ms. Davenport, and Ms. Davenport is not here to argue the matter. So, I will find that the defendants have forfeited the issue of whether nominal damages can be waived.

And that's under *Alioto versus Town of Lisbon*, a Seventh Circuit case, I don't have the cite, which holds that a party can forfeit or waive a particular issue in a particular case by not responding.

So, I find that the issue has been forfeited. Even putting aside the forfeiture, I do believe those two cases I cited require an entry of nominal damages. So, I'm going to deny the motion to alter the judgment in large part. I'm going to grant it only insofar as [10] I'm going to enter nominal – an award of nominal

damages, which I guess is one dollar.

The second motion is the motion for attorney's fees, and then there's also the bill of costs. And when we were here last, I asked Mr. Kulis if he'd be able to – if he was familiar with the Frizzell case, and he said yes, because that was – came out of his office. And then I asked him if he could distinguish it? And he leveled some criticism at the Frizzell case.

I reminded Mr. Kulis of the court that I was sitting on and the court that had issued the Frizzell case. And I said you're going to have to file – I can't disagree with Frizzell. You're going to have to find a way to distinguish it. Maybe it can't be distinguished. So, let me ask you to give it your best shot.

***

[15] All right. I'm going to deny the motion for attorney's fees and for costs. The prevailing – the question here is whether Mr. Walker was the prevailing party, and that's – the analysis is the same under Section 1988 for fees as it is under Rule 54(b) – I'm sorry, 54(d) and Section 1920 for costs. And there's three factors that prevail in this circuit as to – that bear on whether the plaintiff is the prevailing party.

[16] The first factor is the difference between judgment recovered and the recovery sought. And here, the judgment recovery is one dollar, and the recovery sought in the complaint was $35,000, and that's relevant under Frizzell, which is page 703.

And while Mr. Kulis didn't – even if I accept his view that he didn't give a hard number to the jury in closing, he did throw out 5,000, 10,000, and 15,000. And the difference between $35,000 in the complaint

or 5, 10, $15,000 referenced to the jury and one dollar is very substantial; and it's an order of magnitude on par with what the Seventh Circuit was dealing with in Frizzell. So, I think that factor weighs against finding that Mr. Walker was the prevailing party.

The second factor is the significance of the legal issue on which Mr. Walker prevailed. In *Frizzell*, the court noted that the plaintiff had won only on one of his two claims, and then on one of the claims, the claim on which he won was only a partial victory and then there were no damages. Here, Mr. Walker did better than Mr. Frizzell did. He did prevail on the only claim that he had against the defendants. But again, the – the victory was marginal because the jury found no compensatory damages.

So, Mr. Walker has a better showing than Mr. Frizzell on the second factor, but it's not – it's not going to tip [17] the balance, because as the Seventh Circuit has instructed in *Simpson versus Sheehan*, 104 F.3d 998 at 1002, and *Briggs versus Marshall*, 93 F.3d 355 at 361, the second factor is the least important of the three factors.

The third factor is the public purpose served by the suit; and I understand that there's a public policy expressed in the Constitution of the United States that people ought not to be arrested without probable cause, but Frizzell is very instructive here. It says, "The third prong addresses whether the relief sought evinces a public purpose, rather than merely attempts to redress a private injury, and whether victory entails something more than merely a determination that a constitutional guarantee was infringed."

It goes on to say – the Seventh Circuit went on to say that Frizzell's suit, "did nothing more than try to apply a common sense rule to an isolated incident in an attempt to redress his private injury."

And that's what we have here with Mr. Walker.

He – he was falsely arrested, and he attempted to get redress for his private injury. So, the third factor, too, weighs against finding that Mr. Walker was a prevailing party.

And when I take into account all three factors, I think it's clear under *Frizzell* and under *Briggs versus Marshall* that Mr. Walker is not the prevailing party, and, therefore, he's not entitled to either fees or costs.

***

[19] I think the Seventh Circuit has held that the prevailing party analysis is the same regardless of the statutory basis, and that's *Robinson Farms Company versus D'Aquisto*, 962 F.2d 680 at 682. It says, "Regardless of the statutory basis, the standards for finding the prevailing party are the same."

But I will – let me – I think you're wrong, but I'm not sure so I'm going to take a closer look at this. And so I will – I'm going to deny fees. I'm going to alter the judgment to one dollar of nominal damages. I'm going to reserve on costs and take a look – take a look at the law.

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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Jermaine Walker,	)	
Plaintiff,	)	
-vs-	)	No. 09 C 5132
S.E. Coleman and P.R.	)	
Joseph	)	
Defendants.	)	

Docket Entry Text

Plaintiff's motion for leave to file, instanter, additional authority in support of plaintiff's bill of costs [132] is granted. Plaintiff's bill of costs [106] denied. Plaintiff's motion to petition for attorney's fees pursuant to §1988 and to stay all deadlines governing exchange of fee materials imposed by Local Rule 54.3 pending ruling [113] is denied. Motion hearing scheduled for 11/21/2011 [133] is stricken.

Statement

Plaintiff's motion for attorney fees is denied for the reasons set forth on the record, although those reasons are modified in the following respect. The court stated on the record that Plaintiff was not the "prevailing party" within the meaning of 42 U.S.C. § 1988. That statement was incorrect. *See Farrar v. Hobby*, 506 U.S. 103, 112 (1992). However, even though the award of nominal damages makes Plaintiff the "prevailing party" under Section 1988, an attorney fee award is inappropriate under the three-part test set forth and applied in *Frizzell v. Szabo*, 647 F.3d 698, 702-03 (7th Cir. 2011), as explained on the record.

The court declines to award costs to Plaintiff for the reasons stated on the record, as modified above. Although Plaintiff is the "prevailing party" under Fed. R. Civ. P. 54(d), the court declines to award of costs based on the same facts and circumstances -- in particular, the minimal recovery obtained -- that led the court to deny an attorney fee award. *See Gavoni v. Dobbs House, Inc.*, 164 F.3d 1071, 1075 (7th Cir. 1999) (affirming the denial of costs and stating that "courts have especially broad discretion to award or deny costs . . . [in] cases in which liability was established but recovery was nominal relative to what was sought"); *Richmond v. Southwire Co.*, 980 F.2d 518, 520 (8th Cir. 1992) (affirming the denial of costs to plaintiffs who obtained a nominal damage award, explaining that "[a]n award of costs may be reduced or denied because the prevailing party obtained only a nominal victory").

[2] Finally, and as an aside, the court notes that Plaintiff's predicament -- a victory on liability, but recovery only of nominal damages, and thus no recovery of attorney fees and costs -- may be of his own making. Prior to trial, the parties agreed that Plaintiff would waive punitive damages in exchange for Defendants waiving costs in the event of a defense verdict. Had Plaintiff not entered into that agreement, it is possible that the jury would have awarded punitive damages, which are permitted even absent a compensatory damage award. See *Erwin v. Cnty. of Manitowoc*, 872 F.2d 1292, 1299 (7th Cir. 1989) ("Although state law may not allow punitive damages without a compensatory award, under federal law, when a jury finds a constitutional violation under a § 1983 claim, it may award punitive damages even when it does not award compensatory damages."). And had the jury awarded punitive damag-

es, Plaintiff would have had a far more persuasive claim for attorney fees and costs.

Dated: November 15, 2011

/s/ Gary Feinerman
United States District Judge

APPENDIX G

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988(b) provides:

In any action or proceeding to enforce a provision of sections *** 1983 *** the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity such officer shall not be held liable for any costs, including attorney’s fees, unless such action was clearly in excess of such officer’s jurisdiction.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Jermaine Walker,	)	
Plaintiff,	)	
-vs-	)	No. 09 C 5132
S.E. Coleman and P.R.	)	
Joseph	)	
Defendants.	)	

Instruction No. 27

If you find in favor of Plaintiff, then you must determine the amount of money that will fairly compensate Plaintiff for any injury that you find he sustained as a direct result of the false arrest.

Plaintiff must prove his damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

You should consider the following types of compensatory damages, and no others:

The physical and mental/emotional pain and suffering that Plaintiff has experienced. No evidence of the dollar value of physical or mental/emotional pain and suffering has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount that will fairly compensate Plaintiff for the injury he has sustained.