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RELEASE-DISMISSAL AGREEMENT VALIDITY—FROM PER SE INVALIDITY TO CONDITIONAL VALIDITY, AND NOW TURNING BACK TO PER SE INVALIDITY

I. INTRODUCTION

For many years, the judicial system has encouraged disposing of legal disputes outside the courtroom.¹ Release-dismissal agreements have become a commonly-used devise for the resolution of legal disputes between a prosecuting attorney and a criminal defendant.² In such agreements the prosecutor seeks from the defendant a waiver of the right to bring a civil action.³ In exchange, the prosecutor assures the defendant that criminal charges will be dismissed.⁴ Release-dismissal agreements have recently


⁴ See, e.g., Town of Newton v. Rumery, 480 U.S. 386 (1987) (stating prosecutor agreed to drop charges of tampering with witness if criminal defendant agreed in exchange to drop charges alleging town and officers violated defendant's constitutional rights); Livingston v. North Belle Vernon Borough, 12 F.3d 1205 (3d Cir. 1993) (stating prosecutor orally agreed to move for judgment of acquittal for charges of terrorist threats and assault and to pay medical and household damage bills in exchange for defendant's release of all civil claims); Hill v. City of Cleveland, 12 F.3d 575 (6th Cir. 1993) (stating that city prosecutor agreed to dismiss criminal charges for obstructing official justice, aggravated disorderly conduct and resisting arrest in exchange for criminal defendant's waiver of civil claim against city and officers); Cain v. Darby Borough, 7 F.3d 377 (3d Cir. 1993) (stating prosecutor agreed to dismiss criminal charges following defendant's completion of Accelerated Rehabilitative Disposition Program in exchange for release of civil rights action stemming from alleged police misconduct during defendant's arrest), cert. denied, 114 S. Ct. 1303 (1994); Vallone v. Lee, 7 F.3d 196 (11th Cir. 1993) (recounting that assistant district attorney agreed to discharge jail detainee after being imprisoned for misdemeanor charges, if detainee signed agreement releasing sheriff from any liability or damages); Coughlen v. Coots, 5 F.3d 970 (6th Cir. 1993) (recounting that prosecutor agreed to dismiss charges of assault of police officer, resisting arrest and public intoxication in exchange for defendant's release of civil rights action, alleging unlawful arrest, excessive force and malicious
generated great controversy. Critics claim that these agreements conflict with two basic goals of the American justice system: punishing criminals and protecting private citizens' civil rights. In the context of release-dismissal agreements, these goals would be achieved by a prosecutor bringing criminal charges and a private citizen bringing suit under § 1983 of the Civil Rights Act of 1871 (section 1983), respectively. Critics of release-dismissal agreements; Woods v. Rhodes, 994 F.2d 494 (8th Cir. 1993) (explaining prosecutor agreed to drop criminal charges in exchange for defendant's release of civil claims against city); Berry v. Peterson, 887 F.2d 635 (5th Cir. 1989) (stating county agreed to pay medical bills, drop arson charges and recommend probation for four felony offenses pending in exchange for defendant's release of civil suit against county, county board of supervisors and sheriff); Lynch v. City of Alhambra, 880 F.2d 1122 (9th Cir. 1989) (stating district attorney agreed not to initiate criminal charges against arrestee if arrestee agreed not to bring civil action against city); Jones v. Taber, 648 F.2d 1201 (9th Cir. 1981) (noting criminal defendant signed release waiving right to bring civil action against county); Boyd v. Adams, 513 F.2d 83 (7th Cir. 1975) (stating Deputy Assistant State's Attorney agreed to dismiss criminal charges of disorderly conduct and resisting police officer in exchange for civil rights action based on illegal arrest and search, unlawful imprisonment and physical brutality).

5. Erin P. Bartholomy, Note, An Ethical Analysis of the Release-Dismissal Agreement, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 331, 331 (1993) (stating release-dismissal agreements, as well as variations, have been controversial topic for several years, and identifying supporters' and opponents' positions on issue).


7. Section 1983 states, in pertinent part:
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.

8. See Rogan, supra note 6, at 526 (noting that Congress sought to create forum for redress of constitutional rights violations). The courts have recognized that the public prosecutor aids in assuring that criminal offenders do not escape justice and that innocent persons do not suffer. Id. at 522 (citing Berger v. United States, 295 U.S. 78, 88 (1935)). In order to achieve these goals, the government must prosecute those who have not adhered to state and federal laws. Id. The legislature enacted the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983, to curb state officials from depriving individuals of their constitutional rights. Id. at 525-26; see also Rumery, 480 U.S. at 395 (emphasizing that § 1983 was enacted to vindicate constitutional rights and expose police misconduct); Allen v. McCurry,
discharge agreements assert that the agreements may both hinder criminal punishment and prevent vindication of civil rights violations. By contrast, proponents of release-dismissal agreements argue that the agreements promote efficiency and cost-effectiveness in the legal system by reducing criminal and civil litigation.


Representative Shellabarger of Ohio, the sponsor of § 1983, stated that the section was adopted to enforce Fourteenth Amendment protections. Richard A. Matasar, Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis, 40 ARK. L. REV. 741, 769 (1987) (quoting Rep. Shellabarger, CONG. GLOBE, 42d Cong., 1st Sess., app. 68 (1871)). The goal of the Act was to preserve human rights and liberties. Id. Ultimately, the purpose of § 1983 was to create a remedy for official misconduct. Francis, supra note 3, at 511.

In 1961, the United States Supreme Court interpreted the language of § 1983 broadly to include official misconduct violative of state law. Monroe, 365 U.S. at 180. As a result of such a broad interpretation, the number of § 1983 suits alleging official misconduct such as unlawful arrest, unlawful search and seizure, and excessive force, have increased since 1961. Leading Cases, supra note 2, at 310; see also Jon O. Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 YALE L.J. 447, 452 (1978) (noting different types of police misconduct); Project, Suing the Police in Federal Court, 88 YALE L.J. 781, 781 n.3 (1979) (noting increase in § 1983 claims against police officers).

9. Rumery, 480 U.S. at 409 (Stevens, J., dissenting) (stating criminal defendant is not yet proven guilty, nor is private citizen guaranteed to win civil rights claim). In these cases criminal punishment and civil rights vindication cannot be hindered. Id. But see Patzer v. Burkett, 779 F.2d 1363 (8th Cir. 1985) (recounting that paraplegic was unconstitutionally arrested in home without warrant, handcuffed and dragged to police car); Stone v. City of Chicago, 738 F.2d 896, 898 (7th Cir. 1984) (noting after police car hit plaintiff, police pushed plaintiff, verbally abused him and physically beat him); Garrick v. City & County of Denver, 652 F.2d 969, 970 (10th Cir. 1981) (noting that police stopped plaintiff for traffic violation, searched plaintiff's car for drugs, then shot plaintiff); Kreimer, supra note 1, at 851 n.112 (stating legitimate § 1983 claims abound); Bartholomy, supra note 5, at 335 n.170 (stating many legitimate constitutional violation claims associated with arrest exist, using "Rodney King" issue as example); Rogan, supra note 6, at 531 (stating that "[i]n situations where a release agreement is negotiated with an innocent criminal defendant who had a civil rights claim, society's interests are once again forfeited")

10. Francis, supra note 3, at 496. In the case of release-dismissal agreements, the criminal defendant usually waives his or her right to bring a § 1983 claim alleging police misconduct in exchange for the dismissal of criminal charges. Id. Release-dismissal agreements result in the reduction of litigation. Id.

Federal courts have also been in conflict on this issue. Although many courts criticized release-dismissal agreements in the past, federal courts currently accept their use in certain instances. This Casebrief dis-

(1978) (Rehnquist, J., dissenting) (criticizing Monroe as "fountainhead of the torrent of civil rights litigation of the last 17 years"). Trivial claims continue to find their way into the federal courts more and more quickly. Susannah M. Mead, Evolution of the "Species of Tort Liability" Created by 42 U.S.C. § 1983: Can Constitutional Tort be Saved from Extinction?, 55 Fordham L. Rev. 1, 12-13 (1986). Nevertheless, § 1983 is still needed to protect essential civil rights. Id. at 13. Even those who desire a per se rule of invalidity concede that release-dismissal agreements contribute "fiscal and administrative savings." See Bartholomy, supra note 5, at 351 (noting Justice O'Connor, in calling for invalidity of release-dismissal agreements, recognized cost-effectiveness); see also Rogan, supra note 6, at 531 (acknowledging fiscal and administrative savings as only benefit of release-dismissal agreements). But see Rumery v. Town of Newton, 778 F.2d 66, 70 (1st Cir. 1985) (commenting that courts will have to expend increasing amounts of resources to critique validity of each release-dismissal using case-by-case analysis method), rev'd, 480 U.S. 386 (1987); Leading Cases, supra note 2, at 316 (stating that "empirical evidence shows . . . that the concern with the number of section 1983 claims on federal dockets is misplaced; the burden created by the statute appears neither inordinate nor unmanageable"); Theodore Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 Cornell L. Rev. 482, 524 (1982) (finding total number of § 1983 claims filed in Central District of California in certain years was not overabun-
dant); William Bennett Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610, 637 (1979) (reporting many prisoner § 1983 claims are summarily dismissed and therefore do not overburden fed-
cial courts). See generally Frank W. Miller, Prosecution: The Decision to Charge A Suspect with a Crime 179-212 (1969) (discussing reasons to discontinue pro-
ceedings so as to reduce cost to criminal system).

12. See, e.g., Oliveri v. Thompson, 803 F.2d 1265, 1278 (2d Cir. 1986) (dic-
tum) (noting cases condemning release-dismissal agreements), cert. denied, 480 U.S. 918 (1987); Rumery, 778 F.2d at 71 (stating particular release-dismissal agreement is per se void); Lusby v. T.G. & Y. Stores, Inc., 749 F.2d 1423, 1431 (10th Cir. 1984) (stating release-dismissal agreements deprive criminal defendants of due process), cert. denied, 474 U.S. 818 (1985); Boyd v. Adams, 513 F.2d 83, 88 (7th Cir. 1975) (holding agreement void as against public policy); Dixon v. District of Columbia, 394 F.2d 966, 969 (D.C. Cir. 1968) (holding agreement compelling appellant to abandon § 1983 claim void even if district did not prosecute appellant's outstanding violations).

13. See, e.g., Rumery, 480 U.S. at 391 (O'Connor, J., concurring) (stating case-
by-case determination is needed to decide if release-dismissal is valid and stating that "wide variety of factual situations . . . can result in release-dismissal agree-
ments"); Livingston v. North Belle Vernon Borough, 12 F.3d 1205, 1211 (3d Cir. 1993) (stating release-dismissal agreement may be valid depending upon facts and circumstances surrounding case and quoting Erie Telecommunications, Inc. v. City of Erie, 853 F.2d 1084, 1095 (3d Cir. 1988)); Hill v. City of Cleveland, 12 F.3d 575 (6th Cir. 1993) (upholding release-dismissal agreement); Cain v. Darby Borough, 7 F.3d 377, 380 (3d Cir. 1993) (holding that although Rumery rejected view stating release-dismissal agreements were per se adverse to public interest, "[w]e see no reason to embrace the opposite extreme that voluntary release-dismissal agreements are per se beneficial to the public interest"), cert. denied, 114 S. Ct. 1903 (1994); Vallone v. Lee, 7 F.3d 196, 199 (11th Cir. 1993) (noting Rumery clarified that not all release-dismissal agreements are invalid); Coughlin v. Coots, 5 F.3d 970, 975 (6th Cir. 1993) (listing instances when release-dismissal would be valid prosecutorial tool); Woods v. Rhodes, 994 F.2d 494, 499 (8th Cir. 1993) (citing Justice O'Connor's observation that courts must engage in case-by-case analysis in
discusses the development of the law concerning release-dismissal agreements. First, Part II examines the early resistance to the use of release-dismissal agreements. Part III explains the criteria the United States Supreme Court established, in *Town of Newton v. Rumery*, to determine the validity of release-dismissal agreements. Next, Part IV addresses the circuit courts of appeals’ interpretations of the *Rumery* criteria. Part V discusses the United States Court of Appeals for the Third Circuit’s recent interpretation of this criteria. Lastly, Part VI analyzes the effect of the *Rumery* criteria and of the circuit courts’ interpretations of that criteria on future Third Circuit decisions.

II. THE TREND IN LOWER COURTS PRIOR TO *TOWN OF NEWTON V. RUMERY*

Before the Supreme Court addressed the validity of pre-conviction release-dismissal agreements, the lower courts tended to invalidate the agreements. For instance, in 1968, the United States Court of Appeals for the District of Columbia was one of the first circuits to address the validity of release-dismissal agreements. The D.C. Circuit found that the determining whether release-dismissal agreement is valid in *Rumery*; Berry v. Peterson, 887 F.2d 635, 641 (5th Cir. 1989) (enforcing release-dismissal agreement); Lynch v. City of Alhambra, 880 F.2d 1122, 1129 (9th Cir. 1989) (holding release-dismissal agreement enforceable if in public's best interest).

14. For a discussion of the past prejudice against release-dismissal agreements, see infra notes 20-75 and accompanying text.
16. For a discussion of the criteria that the United States Supreme Court established in *Rumery*, see infra notes 76-109 and accompanying text.
17. For a discussion of the circuit courts of appeals’ interpretations of the criteria in determining whether a release-dismissal agreement is valid, see infra notes 110-34 and accompanying text.
18. For a discussion of the Third Circuit’s evaluations of criteria used in determining whether a release-dismissal agreement is valid, see infra notes 135-72 and accompanying text.
19. For a discussion of the effect the criteria will have on future Third Circuit cases, see infra notes 173-94 and accompanying text.
20. For a discussion of the *Rumery* decision, see infra notes 76-109. Post-conviction release-dismissal agreements should be distinguished from pre-conviction agreements. Bushnell v. Rossetti, 750 F.2d 298, 301 (4th Cir. 1984) (holding release in exchange for post-conviction sentencing recommendation is not against public policy, but pre-conviction release-dismissal agreements are *per se* invalid); Jones v. Taber, 648 F.2d 1201, 1203 (9th Cir. 1981) (allowing post-conviction release-dismissal agreement when voluntary, deliberate and informed).
21. See, e.g., Rumery v. Town of Newton, 778 F.2d 66, 71 (1st Cir. 1985) (holding release-dismissal agreement *per se* invalid), rev'd, 480 U.S. 386 (1987); Boyd v. Adams, 513 F.2d 83, 88 (7th Cir. 1975) (holding release-dismissal agreement void as against public policy); Dixon v. District of Columbia, 394 F.2d 966, 969 (D.C. Cir. 1968) (holding invalid appellant's agreement not to proceed with § 1983 claim, even if prosecutor did not prosecute appellant's outstanding violations); see also Bartholomy, supra note 5, at 334-35 (stating that at least one court has held release-dismissal agreements are never valid).
22. Dixon, 394 F.2d at 969.
agreements were against public policy, and thus, per se invalid because the agreements forced criminal defendants to waive their rights to a civil action.\textsuperscript{23} Similarly, two years later, the United States Court of Appeals for the Ninth Circuit held release-dismissal agreements void.\textsuperscript{24} Shortly thereafter, the United States Court of Appeals for the Seventh Circuit followed suit and also held pre-conviction release-dismissal agreements void.\textsuperscript{25} In addition, other district and state courts have concluded that pre-conviction release-dismissal agreements are invalid.\textsuperscript{26}

The circuit courts have invalidated pre-conviction release-dismissal agreements based on several public interests.\textsuperscript{27} First, the circuit courts have noted that release-dismissal agreements hinder citizens from expressing legal complaints against police misconduct because the agreements

\textsuperscript{23} Id. The police stopped a man for alleged traffic violations. Id. at 968. Subsequent to the arrest, the police neither arrested nor charged the man. Id. The prosecutor pressed charges only after the man breached a tacit agreement that the prosecutor would not proceed if the man arrested did not bring a civil complaint against the police that stopped him. Id. at 968-69. The court held the agreement was void even if the district did not prosecute the man’s outstanding violations. Id.

\textsuperscript{24} MacDonald v. Musick, 425 F.2d 373 (9th Cir.), cert. denied, 400 U.S. 852 (1970).

\textsuperscript{25} Boyd, 513 F.2d at 88. Police stopped a car in which the plaintiff was a passenger and violently arrested her and placed her in jail. Id. at 85. The plaintiff was charged with disorderly conduct and resisting arrest. Id. She had a miscarriage soon after her arrest. Id. The plaintiff claims that on her court date she was forced to release the police and city from liability in return for a dismissal of the criminal charges against her. Id.


\textsuperscript{27} See, e.g., Rumery v. Town of Newton, 778 F.2d 66 (1st Cir. 1985) (holding release-dismissal agreements per se void as against public policy because they promote prosecutorial misconduct, prevent vindication of civil rights and release criminals from just punishment), rev'd, 480 U.S. 386 (1987); Cain v. Darby Borough, 7 F.3d 377, 380 (3d Cir. 1993) (holding that although Rumery rejected view declaring release-dismissal agreements per se adverse to public interest, "[w]e see no reason to embrace the opposite extreme that voluntary release-dismissal agreements are per se beneficial to the public interest"), cert. denied, 114 S. Ct. 1303 (1994); Jones v. Taber, 648 F.2d 1201, 1204-06 (9th Cir. 1981) (noting possible existence of unfair coercion to sign release-dismissal agreement against will); Boyd v. Adams, 513 F.2d 83, 88 (7th Cir. 1975) (stating release-dismissal agreements are inherently coercive and deter people from exercising their right to protest official misconduct); Dixon v. District of Columbia, 394 F.2d 966, 969 (D.C. Cir. 1968) (stating release-dismissal agreements set criminals free and prevent citizens from achieving redress for police misconduct); see also Bartholomy, supra note 5, at 351-35 (stating reasons that release-dismissal agreements are against public policy).
bar potentially meritorious section 1983 claims. Second, the circuit courts have stated that release-dismissal agreements promote potential prosecutorial misconduct. Specifically, the circuit courts have been concerned with the inflation or invention of criminal charges, the protection of government agents from personal liability and the lack of public disclosure of official misconduct.

A. The Importance of Section 1983 Claims

Many circuit courts have determined that release-dismissal agreements prevent citizens from complaining about police misconduct. Commentators claim that this result is constitutionally unjust and defeats the purposes of section 1983. Because of such harmful results, both courts and commentators have voiced arguments against validating release-dismissal agreements.

The most basic premise against release-dismissal agreements remains that they advocate constitutionally invalid state action. The state action in implementing release-dismissal agreements is constitutionally invalid because the agreements hinder the right to litigate legitimate section 1983

28. Boyd, 513 F.2d at 88-89; Dixon, 394 F.2d at 969.
29. MacDonald v. Musick, 425 F.2d 373, 375 (9th Cir.) (stating prosecutor may not use criminal prosecution to forestall civil proceedings against police), cert. denied, 400 U.S. 852 (1970); North Am. Cold Storage v. County of Cook, 531 F. Supp. 1003, 1009-10 (N.D. Ill. 1982); Francis, supra note 3, at 497.
30. MacDonald, 425 F.2d at 375 (holding prosecutor's attempt to use weak case to prevent possible civil claim against police unethical and improper).
32. Id.
33. Cain v. Darby Borough, 7 F.3d 377, 380 (3d Cir. 1993), cert. denied, 114 S. Ct. 1303 (1994); Rumery v. Town of Newton, 778 F.2d 66, 69 (1st Cir. 1985), rev'd, 480 U.S. 386 (1987); Boyd v. Adams, 513 F.2d 83, 88-89 (7th Cir. 1975); Dixon v. District of Columbia, 394 F.2d 966, 969 (D.C. Cir. 1968). See generally Kreimer, supra note 1, at 865-931 (arguing release-dismissal agreements bar legitimate § 1983 claims); Bartholomy, supra note 5, at 358-62 (same); Francis, supra note 3, at 497 (same); Rogan, supra note 6, at 525-26 (same).
34. Owen v. City of Independence, 445 U.S. 622, 650-52 (1980); see also Kreimer, supra note 1, at 865-931 (addressing alleged benefits of release-dismissal agreements for accused); Bartholomy, supra note 5, at 358-62 (interpreting § 1983 and its legislative purposes); Francis, supra note 3, at 491 (addressing alleged benefits of release-dismissal agreements for accused); Rogan, supra note 6, at 525-26 (same). For a discussion of the content, history and purpose of § 1983, see supra notes 6-7 and accompanying text.
35. Cain, 7 F.3d at 383 (holding release-dismissal agreement valid only when public interest requirement met); Rumery, 778 F.2d at 71 (holding release-dismissal agreement per se void); Jones v. Taber, 648 F.2d 1201, 1203 (9th Cir. 1981) (stating release-dismissal agreement only valid if entered into voluntarily); Boyd, 513 F.2d at 88 (holding release-dismissal agreements void as against public policy); Dixon, 394 F.2d at 969 (same). See generally Kreimer, supra note 1, at 865-931 (arguing against use of release-dismissal agreements); Bartholomy, supra note 5, at 358-62 (same); Francis, supra note 3, at 515-16 (same); Rogan, supra note 6, at 521-31 (same).
36. Kreimer, supra note 1, at 894.
claims. Historically, the United States Supreme Court has recognized the right of access to the courts in order to exercise First Amendment rights to petition for redress of grievances. As a result, states cannot prosecute the act of bringing a civil rights action as a criminal offense. Therefore, commentators argue that prosecutors cannot constitutionally use release-dismissal agreements to prevent a criminal defendant from bringing a civil action.

In addition, the Supreme Court has found that release-dismissal agreements defeat the congressional purposes behind section 1983. Section 1983 has two major purposes. First, section 1983 provides citizens a federal remedy against officials who, through the power of their official positions, have deprived those citizens of constitutional rights. Second, section 1983 deters police misconduct against citizens.

37. In re Primus, 436 U.S. 412, 426 (1978) (citing United Transportation Union v. Michigan Bar, 401 U.S. 576, 585 (1971)) (stating First Amendment protects fundamental right to meaningful access to courts); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (declaring right of petition includes access to courts); Brotherhood of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1, 7 (1964) (holding state statute that indirectly bars union members from vindicating legal rights in court impairs First Amendment right to petition in court); Terral v. Burke Constr. Co., 257 U.S. 529, 532 (1922) (holding state may not exact waiver of constitutional right to access federal courts); see also Kreimer, supra note 1, at 893 (stating every person should have right to litigate legitimate claim).

38. See In re Primus, 436 U.S. at 438-39 (holding attempt to discipline attorney for approaching prospective client to encourage bringing civil rights suit violated First Amendment); NAACP v. Button, 371 U.S. 415, 444 (1963) (holding state statute that hinders NAACP attorneys seeking legal redress violates First Amendment).

39. Kreimer, supra note 1, at 894.

40. Owen v. City of Independence, 445 U.S. 622, 651-52 (1980); Kreimer, supra note 1, at 917-18; Bartholomy, supra note 5, at 358-62; Francis, supra note 3, at 494-96; Rogan, supra note 6, at 525-26. For a discussion of § 1983 generally, see supra notes 6-8 and accompanying text.

41. Owen, 445 U.S. at 651-52; Bartholomy, supra note 5, at 358-62; see also Kreimer, supra note 1, at 917 (noting that Congress sought to provide federal judicial forum); Francis, supra note 3, at 495 (observing that Congress' power for enacting § 1983 lay in protecting citizens from "unconstitutional action under color of law"); Rogan, supra note 6, at 526 (noting Congress' intent to "create civil liability for wrongful state actions" and to provide forum for citizens denied constitutional rights). For a discussion of § 1983 generally, see supra notes 6-8 and accompanying text.


43. Owen, 445 U.S. at 650-52. Congress wanted to provide a federal remedy to private individuals. Id. This wish stemmed partially from the Southern states' gov-
The first congressional purpose of section 1983 allows individuals to exercise a federal right to freely air complaints against public officials. 44 The Supreme Court has recognized that in signing release-dismissal agreements, citizens exchange their constitutional right to a federal remedy for their freedom from criminal charges. 45 Thus, after criminal defendants enter into a release-dismissal agreement, they contractually waive the fundamental right to redress of complaints against officials that section 1983 provides. 46 In *Town of Newton v. Rumery*, the Supreme Court determined that Congress never intended such an outcome. 47

The second purpose underlying section 1983 is to deter police misconduct toward citizens. 48 The Supreme Court found that release-dismissal agreements actually foster police misconduct. 49 Prosecutors, working closely with police officers, generally feel a loyalty and duty to protect government failure to enforce the laws protecting minority citizens from constitutional rights violations. *Id.; see Allen v. McCurry, 449 U.S. 90, 98-99 (1980) (asserting primary reason for enactment of § 1983 was to deter government and police officials who were Ku Klux Klan sympathizers); Monroe v. Pape, 365 U.S. 167, 170-76 (1961) (acknowledging state courts had not been protecting federal rights to civil actions); Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?,* 60 N.Y.U. L. REV. 1, 6 (1985) (stating "unwillingness of the States to protect the freedman or citizens of States" made § 1983 necessary); *Developments in the Law—Section 1983 and Federalism, 90 HARV. L. REV. 1133, 1154-55 (1977) (stating "full reading of the debates compels the conclusion that the Act [§ 1983] was aimed at least as much at the abdication of law enforcement responsibilities by Southern officials as it was at the Klan's outrages"); see also Rogan, supra note 6, at 521, 525-26 (discussing purposes for enacting § 1983). For a general discussion of § 1983, see supra notes 6-8 and accompanying text.


45. For a further discussion of the procedure and function of release-dismissal agreements, see supra notes 2-4, 7-8 and accompanying text.


49. *Boyd v. Adams*, 513 F.2d 83, 89 (7th Cir. 1975) (stating official misconduct should be "thoroughly aired in a free society" through § 1983 claims and quoting Dixon v. District of Columbia, 394 F.2d 966, 968-69 (D.C. Cir. 1968)).
lice officers. The Court noted that police officers, with confidence in the prosecutors' protection, are more likely to act beyond the bounds of their positions and engage in police misconduct.

B. The Fear of Prosecutorial Misconduct

Several courts and commentators recognize that in addition to preventing section 1983 claims, release-dismissal agreements create potential for abuse of prosecutorial discretion. These abuses include, first, inflation or creation of criminal charges, second, protection of government agents from personal liability, and third, lack of public disclosure of official misconduct. In order to prevent these abuses, several courts have determined that release-dismissal agreements should be void.

First, courts and commentators have stressed that release-dismissal agreements give rise to the possibility of prosecutors inflating or creating criminal charges. The Supreme Court stated that prosecutors are given "the power to employ the full machinery of the state in scrutinizing any given individual," and consequently, prosecutors retain broad discretion to press and drop charges. Nonetheless, courts and commentators

50. Francis, supra note 3, at 511. For a discussion of prosecutors' use of release-dismissal agreements to protect government officials, see supra notes 29-32 and accompanying text.

51. Bartholomy, supra note 5, at 359 n.158.

52. Francis, supra note 3, at 497. See, e.g., MacDonald v. Musick, 425 F.2d 373, 375 (9th Cir.) (reprimanding prosecutors who use release-dismissal agreements for illegitimate purposes such as forestalling civil proceeding by defendant against police), cert. denied, 400 U.S. 852 (1970). See generally Miller, supra note 11, at 293-345 (discussing prosecutor discretion generally); Kreimer, supra note 1 (same); Bartholomy, supra note 5 (arguing release-dismissal agreements are unethical); Francis, supra note 3 (same); Rogan, supra note 6 (discussing prosecutor discretion generally).

53. MacDonald, 425 F.2d at 375 (holding prosecutor's use of release-dismissal agreement to protect police unethical and improper).

54. Francis, supra note 3, at 500. For a discussion of prosecutors' use of release-dismissal agreements to protect government officials, see supra notes 29-32 and accompanying text.


56. Cain v. Darby Borough, 7 F.3d 377, 380 (3d Cir. 1993) (holding release-dismissal agreement invalid), cert. denied, 114 S. Ct. 1303 (1994); Rumery v. Town of Newton, 778 F.2d 66, 69 (1st Cir. 1985) (holding release-dismissal agreement per se void), rev'd, 480 U.S. 386 (1987); Boyd v. Adams, 519 F.2d 89, 88-89 (7th Cir. 1975) (same); Dixon v. District of Columbia, 394 F.2d 966, 969 (D.C. Cir. 1968) (same); see also Bartholomy, supra note 5, at 352-58 (explaining ethical reasons why release-dismissal agreements should be per se void).

57. MacDonald, 425 F.2d at 375.


59. Wayte v. United States, 470 U.S. 598, 607-08 (1985) (concluding that passive enforcement policy did not violate the First or Fifth Amendment); United
counterargue that prosecutors also have a public duty to use their discretion to enforce criminal laws and to maintain order in the community. Therefore, constraints on prosecutorial power must—and do—exist. These limitations force prosecutors to administer the criminal laws fairly.

The Ninth and D.C. Circuits have determined that to enforce laws fairly, prosecutors should not be permitted to forestall a criminal defendant’s civil proceeding against law enforcement officers. Both circuits state that this constraint should apply even if the criminal charges are based on the same events as the civil suit. Also, these courts noted that

States v. Goodwin, 457 U.S. 368, 373 (1982) (holding facts did not warrant presumption of prosecutorial vindictiveness); MacDonald, 425 F.2d at 375; Brian A. Grosman, The Prosecutor 37-40 (1969) (discussing prosecutors’ power to withdraw charges); Rogan, supra note 6, at 521-25 (stating “courts and legislatures have granted the criminal prosecutor a great deal of discretion” including “deciding who, when and how to prosecute”). But see ABA Standards For Criminal Justice 3-1.2(c) (3d ed. 1993) (stating prosecutor’s duty is to “seek justice, not merely to convict”); Ed Hagan & David M. Nissman, The Prosecution Function 10 (1982) (stating “[s]ound discretion must be used in the pursuit of justice which must override the mere desire to convict”).

Rumery v. Town of Newton, 480 U.S. 386, 412, 415 (1987) (Stevens, J., dissenting) (stating prosecutor’s primary duty is to “represent the sovereign’s interest in evenhanded and effective enforcement of its criminal laws” and “[t]here will be cases in which the prosecutor has a plain duty to obtain critical testimony despite the desire of the witness to remain anonymous or to avoid a courtroom confrontation with an offender”); see also Berger v. United States, 295 U.S. 78, 88 (1935) (stating U.S. Attorney represents government and his or her interest is that justice be served in criminal cases); Hagan & Nissman, supra note 59, at 11 (maintaining prosecutor has duty to investigate crimes committed in jurisdiction but has sole discretion regarding decision to bring charges); Miller, supra note 11, at 295 (stating prosecutor makes “charging decisions which reflect community values ... accurately and effectively”); Rogan, supra note 6, at 521 (noting prosecutor has broad discretion so he can “accomplish the objective administration of state laws”).

Bordenkircher v. Hayes, 434 U.S. 357, 362-63 (1978) (stating threats to reindict defendant on more serious charges if he refused to plead guilty were constitutionally improper and citing North Carolina v. Pearce, 395 U.S. 711, 725 (1969)); Rogan, supra note 6, at 521 (stating “discretion afforded the prosecutor is not absolute”); see also Model Rules of Professional Conduct Rule 3.8(a) (1993) (requiring prosecutor to “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause”); Model Code of Professional Responsibility DR 7-103 (1993) (stating “public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause”); Model Code of Professional Responsibility EC 7-14 (1993) (stating “government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair”). But see Bartholomy, supra note 5, at 354 (stating Code of Professional Responsibility “is largely silent on the special duties of prosecutors”).

Berger, 295 U.S. at 88; Rogan, supra note 6, at 521-22 (explaining prosecutor must stay within proper scope of authority).

MacDonald, 425 F.2d at 375; Dixon v. District of Columbia, 394 F.2d 966, 969 (D.C. Cir. 1968) (holding that court is not foreclosed from granting immunity from prosecution in order to deter blatant government misconduct).

MacDonald, 425 F.2d at 375; Dixon, 394 F.2d at 969.
the prosecutor should not be allowed to "trump up charges" to use later in bargaining for suppression of a section 1983 complaint. The Supreme Court has emphasized that the limitations of prosecutorial power would help ensure equal and fair enforcement of the laws without personal bias or sympathy.

Secondly, commentators have noted that because prosecutors often work closely with police officers, they may improperly shield those officers from liability for civil rights violations. Accordingly, prosecutors may abuse the prosecutorial discretion inherent in release-dismissal agreements in order to protect police officers. Critics retort that this protection remains unnecessary because public officials are generally immune to civil liability when the circumstances justify sovereign immunity. Therefore, these commentators have found that government officials do not need the additional shield from liability that release-dismissal agreements provide. Nevertheless, this immunity does not apply where "a reasonable person would see that a clearly established statutory or constitutional right has been violated."

Finally, some courts have recognized that release-dismissal agreements encourage the concealment of information concerning police misconduct. Public disclosure of such misconduct would clearly substantially embarrass those police officers involved, as well as their fami-
lies. Thus, prosecutors may be tempted to stop criminal defendants from litigating claims of police misconduct. In fact, federal courts have concluded that the potential exists for prosecutors to use release-dismissal agreements to suppress information concerning police misconduct from public knowledge.

III. **Town of Newton v. Rumery: The Supreme Court Changes the Trend**

In *Town of Newton v. Rumery*, the United States Supreme Court reversed the judicial trend of holding release-dismissal agreements *per se* invalid. In *Rumery*, the prosecutor pressed charges against Rumery, the criminal defendant, for tampering with a witness. Later, the prosecutor offered to dismiss the charges against Rumery, if Rumery would waive his right to a civil claim against the police. The United States Court of Appeals for the First Circuit followed the trend in the lower courts and declared pre-conviction release-dismissal agreements *per se* invalid. On appeal, the Supreme Court overturned the First Circuit decision. In a five to four decision, the plurality held that *per se* invalidation of release-dismissal agreements should not be the standard; instead, each case should be decided on its unique facts.

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73. Id.
74. Id.
75. Id.
76. For commentaries discussing *Town of Newton v. Rumery*, see Brian L. Fiellkow, 42 U.S.C. § 1983—Buying Justice: The Role of Release-Dissmissal Agreements in the Criminal Justice System, 78 J. CRIM. L. & CRIMINOLOGY 1121 (1988); Kreimer, supra note 1; Bartholomy, supra note 5; Francis, supra note 3; Rogan, supra note 6.
78. Id.
79. Id.
82. Id. at 387-88. The Supreme Court did not decide *Town of Newton v. Rumery* unanimously. Id. The five to four plurality decision contained a strong dissenting opinion. Id. Justice Stevens wrote the dissenting opinion with Justices Brennan, Marshall and Blackmun joining. Id. at 403 (Stevens, J., dissenting).
83. Id. at 392. Justice Powell stressed “a wide variety of factual situations” could exist concerning release-dismissal agreements. Id. Justice O’Connor stated more bluntly that in future cases a blanket rule should not decide a release-dismissal agreement’s invalidity, but “that a case-by-case approach appropriately balances the important interests on both sides of the question of the enforceability of these agreements.” Id. at 399-403 (O’Connor, J., concurring). Even the dissent agreed “[i]t may well be true that a full development of all the relevant facts would provide a legitimate justification for enforcing the release-dismissal agreement.” Id. at 417 (Stevens, J., dissenting).
A. The Plurality and Concurrence

Concluding that release-dismissal agreements should not be invalidated per se, a plurality of the Court established three criteria to ascertain the validity of release-dismissal agreements. The Court stated that enforceability of a release-dismissal agreement depends on whether the facts show that: (1) the criminal defendant entered into the agreement voluntarily; (2) the prosecutor had legitimate reasons for entering into the agreement; and (3) the agreement ultimately does not violate public policy.

The Rumery Court first required that a criminal defendant enter into a release-dismissal agreement voluntarily. The Court reasoned that because in other instances, such as plea bargaining, criminal defendants could validly relinquish constitutional rights, they should also be able to choose whether to enter into release-dismissal agreements. Nonetheless,

84. Id.
85. Id. at 387. Justice Powell stated that voluntary entry into a release-dismissal agreement "reflect[s] a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action." Id.
86. Id. at 394-97.
87. Id. at 392-94.
88. Id. Justice O'Connor emphasized that the party relying on the release-dismissal agreement holds the burden of showing that the other party entered into the agreement voluntarily. Id. at 399, 401 (O'Connor, J., concurring).
89. Id. at 393. Plea bargaining represents the process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty to a lesser offense or to only one or some of the counts of a multi-count indictment in return for a lighter sentence.

90. Rumery, 480 U.S. at 393 (citing examples: Santobello v. New York, 404 U.S. 257, 264 (1971) (Douglas, J., concurring) (finding that prosecution is unit and each member is presumed to know commitments any other member has made); Brady v. United States, 397 U.S. 742, 752-53 (1970) (holding that not every guilty plea is invalid under the statute, even if fear of death was factor); Hoines v. Barney's Club, Inc., 620 P.2d 628, 694 (Cal. 1980) (listing similarities between plea bargaining and release-dismissal agreements: (1) circumstances that do not require full criminal penalty; (2) criminal defendant's desire to avoid risk of more severe penalty at trial; and (3) state's desire to save time trial would require); see also Corbitt v. New Jersey, 499 U.S. 212, 218-19 (1978) (holding "not every burden
the plurality conceded that cases may arise in which the risk, publicity and expense of a criminal trial may intimidate defendants into waiving their rights to bring seemingly meritorious claims. Thus, the plurality explained that the facts of each case must be closely scrutinized to ensure the defendant in fact decided voluntarily. The concurrence specified factors to consider in determining whether the decision was voluntary: the knowledge and experience of the criminal defendant; the presence of counsel; the nature of the pending criminal charges; the time the defendant had to review the agreement; and, the presence of judicial supervision.

As the second element in validating a release-dismissal agreement, the Rumey Court mandated an absence of prosecutorial overreaching. The Court conceded that the First Circuit concerns in Rumery v. Town of Newton that prosecutors may “trump up charges in reaction to a defendant’s civil rights claim, [and] suppress evidence of police misconduct” were warranted. The Court stated, however, that voiding all release-dismissal agreements wrongfully assumes that prosecutors would otherwise seize the opportunity for wrongdoing. Therefore, the Court concluded that

on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid. Specifically, there is no per se rule against encouraging guilty pleas.” (footnote omitted); McGautha v. California, 402 U.S. 183, 213 (1971) (noting criminal defendant may have constitutional right, but Constitution does not always forbid requiring the defendant to choose whether to exercise that right); Fielkow, supra note 76, at 1137 (discussing similarities between plea bargaining and release-dismissal agreements); Sigler, supra note 89, at 67 (stating criminal defendants enter into plea bargains voluntarily and therefore courts should not interfere with plea bargains unless prosecutor has “unfairly burden[ed] ... defendant’s decision-making process”) (citing Brady v. United States 397 U.S. 742 (1970)). But see Rumery, 480 U.S. at 393 n.3, 400 (recognizing analogy between plea bargains and release-dismissal agreements is not complete when stating that plea bargaining benefits are immediate and tangible while release-dismissal agreements are less so and that generally judges supervise plea bargains) (O’Connor, J., concurring); Fielkow, supra note 76, at 1136-37 (discussing Court’s analogy to plea bargaining and its faults); Bartholomy, supra note 5, at 341 (same).

91. Rumery, 480 U.S. at 392-94. But see id. at 392 (stating mere possibility of these risks fails to justify per se invalidation of release-dismissal agreements).
92. Id. at 393.
93. Id. at 391-98.
94. Id. Although not specifically listing these factors as requirements, the plurality used these factors in analyzing the specific facts of the Rumery case. Id. Justice O’Connor stressed that judicial supervision at the negotiations and signing of the release-dismissal agreement would strongly support its validity. Id. at 402.
95. Id. at 398.
96. Id. at 394 (quoting Rumery v. Town of Newton, 778 F.2d 66, 69 (1st Cir. 1985), rev’d, 480 U.S. 386 (1987)).
97. Id.
98. Rumery, 480 U.S. at 395. The Court noted disciplinary rules for prosecutors who acted improperly were already in effect. Id. at 395 n.4 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-105 (1980) (providing that “lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter”)).
although it cannot be presumed that a prosecutor acted improperly when entering into a release-dismissal agreement, a showing of prosecutorial misconduct will invalidate a release-dismissal agreement.99

Finally, the Supreme Court stated that to be valid, a release-dismissal agreement cannot compromise public interests.100 The Court conceded that release-dismissal agreements may prevent some meritorious section 1983 claims from vindicating constitutional violations.101 Nevertheless, the Court emphasized that courts must consider other public interests,102 such as the expense of litigation and the distraction of defendant officials from their public duties.103 These factors may override other public interests, depending on the factual circumstances of each case.104

B. The Dissent

Relying on reasons similar to those the circuit courts used before the Rumery decision, the dissent suggested a strong presumption against the validity of release-dismissal agreements.105 Although the dissent did not

99. Id.; cf. Haines v. Barney's Club Inc., 620 P.2d 628, 633 (Cal. 1980) (stating prosecutor has never been held to have compounded crime with promise to dismiss criminal charges in exchange for criminal defendant's release of civil rights). This conclusion is consistent with decisions holding that courts must defer to prosecutorial decisions and must presume prosecutors have acted properly. See, e.g., Wayte v. United States, 470 U.S. 598 (1985); United States v. Goodwin, 457 U.S. 368 (1982); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (stating if prosecutor has probable cause to believe that criminal defendant committed crime, prosecutor may decide whether or not to proceed). See generally Miller, supra note 11, at 294 (explaining that public has no better alternative than to place confidence in public prosecutor) (quoting 1 Davis, Administrative Law 257 (1958)). The concurrence disagreed, however, suggesting that the party desiring to uphold the release-dismissal must show an absence of prosecutorial misconduct. Rumery, 480 U.S. at 401 (O'Connor, J., concurring) (noting prosecutor must show lack of prosecutorial misconduct, and absence of prosecutorial misconduct cannot be assumed as majority implies).

100. Rumery, 480 U.S. at 395.

101. Id. In addition, however, the majority stated that the individual defendant is not responsible for public interests. Id. Each individual may bring a civil action on his or her own behalf, not on that of the general public. Id. Therefore, each citizen may choose whether or not to bring a civil action. Id.

102. Id. at 395.

103. Rumery, 480 U.S. 386, 395-96 (1986). In Rumery, the public interest was the potential that the key witness in another case would be unwilling to testify to aid in the conviction of an alleged sex offender. Id. at 389. The Court held that the public interest in assisting in the conviction of an alleged felon outweighed the importance of protecting the public from a person who had allegedly tampered with a witness. Id.

104. Id. at 399-403 (O'Connor, J., concurring). For instance, in some cases litigation will continue for many years. Id. Preparing for and defending oneself at a trial compels time and attention. Id. As a result, police officers and other officials involved in a § 1983 claim will be less able to perform their jobs effectively. Id.

105. For a discussion of the reasons offered by courts to justify the per se invalidity of release-dismissal agreements, see supra notes 20-75 and accompanying text.
adhere to the *per se* invalidation of release-dismissal agreements, the opinion stated that release-dismissal agreements are "inherently coercive,"\(^{106}\) prosecutors have conflicts of interests\(^ {107}\) and that courts should weigh public interest more strongly against release-dismissal agreements than the majority opinion suggests.\(^ {108}\) Because of these factors, the dissenters advocated a case-by-case approach to determine whether a release-dismissal agreement is valid, but with a presumption of invalidity.\(^ {109}\)

### IV. The Effect of the Supreme Court's Decision

After the revolutionary Supreme Court decision in *Town of Newton v. Rumery*,\(^ {110}\) the circuit courts were forced to stop the trend of *per se* invalidation. In discussing the coerciveness ever-present in release dismissal agreements, the Court stated that a criminal defendant's voluntariness and rationality were insufficient to validate release-dismissal agreements. *Id.* (Stevens, J., dissenting). The dissent concluded that requiring only voluntariness would allow the price of the release to equal the price of the dismissal. *Id.* (Stevens, J., dissenting). Justice Stevens further stated that the release certainly was not equal in price to the dismissal. *Id.* The dissent illustrated this idea by stating such a basis would allow the enforceability of a promise to pay a state trooper $20 in exchange for not issuing a ticket for a traffic violation. *Id.* at 408 (Stevens, J., dissenting). Many courts previously used the term "inherently coercive" when describing release-dismissal agreements. See, e.g., Hall v. Ochs, 817 F.2d 920, 923-24 (1st Cir. 1987) (finding prosecutor's repeated suggestion to criminal defendant to enter into release-dismissal agreement and threat of continued imprisonment showed coercion); Hoines v. Barney's Club, Inc., 620 P.2d 628, 637 (Cal. 1980) (Toibriner, J., dissenting) (recognizing threat of imprisonment coerces criminal defendants into signing release-dismissal agreements, because such agreements are only way to attain freedom). See generally Fielkow, supra note 76, at 1141-42 (discussing coerciveness inherent in release-dismissal agreements); Bartholomy, *supra* note 5 (same). For a discussion of the majority's reasoning that a showing of voluntariness must be evident in order for a release-dismissal agreement to be valid, see *supra* notes 85, 88-94 and accompanying text.

\(^ {106}\) *Rumery*, 480 U.S. at 411 (Stevens, J., dissenting). In discussing the coerciveness ever-present in release dismissal agreements, the Court stated that a criminal defendant's voluntariness and rationality were insufficient to validate release-dismissal agreements. *Id.* (Stevens, J., dissenting). The dissent concluded that requiring only voluntariness would allow the price of the release to equal the price of the dismissal. *Id.* (Stevens, J., dissenting). Justice Stevens further stated that the release certainly was not equal in price to the dismissal. *Id.* The dissent illustrated this idea by stating such a basis would allow the enforceability of a promise to pay a state trooper $20 in exchange for not issuing a ticket for a traffic violation. *Id.* at 408 (Stevens, J., dissenting). Many courts previously used the term "inherently coercive" when describing release-dismissal agreements. See, e.g., Hall v. Ochs, 817 F.2d 920, 923-24 (1st Cir. 1987) (finding prosecutor's repeated suggestion to criminal defendant to enter into release-dismissal agreement and threat of continued imprisonment showed coercion); Hoines v. Barney's Club, Inc., 620 P.2d 628, 637 (Cal. 1980) (Toibriner, J., dissenting) (recognizing threat of imprisonment coerces criminal defendants into signing release-dismissal agreements, because such agreements are only way to attain freedom). See generally Fielkow, supra note 76, at 1141-42 (discussing coerciveness inherent in release-dismissal agreements); Bartholomy, *supra* note 5 (same). For a discussion of the majority's reasoning that a showing of voluntariness must be evident in order for a release-dismissal agreement to be valid, see *supra* notes 85, 88-94 and accompanying text.

\(^ {107}\) *Rumery*, 480 U.S. at 412 (Stevens, J., dissenting). In *Rumery*, the dissent stated that conflicting prosecutorial interests exist because the prosecutor is always representing both public and police interests. *Id.* at 413 (Stevens, J., dissenting). As a result of these conflicts, prosecutorial abuses may occur. *Id.* (Stevens, J., dissenting). For instance, a prosecutor may make criminal charges that probable cause does not support, although Rule 3.8 of the ABA Model Rules of Professional Conduct requires a prosecutor to have probable cause before that prosecutor brings charges. *Id.* (Stevens, J., dissenting). For a further discussion of the prosecutor's function and the potential for abuse of discretion, see *supra* notes 50-71 and accompanying text.

\(^ {108}\) *Rumery*, 480 U.S. at 404 (Stevens, J., dissenting). The dissent emphasized that public interests generally cause the release-dismissal agreements to be void. *Id.* at 418 (Stevens, J., dissenting). The congressional intent in § 1983 demanded that there exist a "strong presumption against validity." *Id.* (Stevens, J., dissenting). In addition, Justice Stevens repeatedly stated that the criminal defendant remains innocent as a matter of law. *Id.* at 404, 409 (Stevens, J., dissenting). For a discussion of legislative intent of § 1983, see *supra* notes 6-8, 54, 40-51 and accompanying text. For a discussion of the plurality and concurring opinions' weighing of the public interests, see *supra* notes 100-04 and accompanying text.

\(^ {109}\) *Rumery*, 480 U.S. at 405-07.

\(^ {110}\) 480 U.S. 386 (1986).
tion of release-dismissal agreements. As a result, courts began permitting the use of some release-dismissal agreements, depending on the facts of the case. In evaluating the validity of release-dismissal agreements, the circuit courts employed the Rumery Court criteria: presence of voluntariness, absence of prosecutorial misconduct and weight of public interests.

A. Voluntariness

The Supreme Court mandated a showing of voluntariness when signing the release-dismissal agreement. Although the concurrence listed some factors indicating voluntariness, the plurality gave little indication on how voluntariness should be determined. As a result, circuit courts further defined voluntariness by noting factors dependant on the facts of each case that indicated the absence or presence of voluntariness. These factors include elements evidencing the criminal defendant's state of mind, such as: (1) absence of coercion; (2) lack of un-
willingness; \( 119 \) (3) sophistication of the signer; \( 120 \) (4) lack of freedom of the signer at the time of signing; \( 121 \) and (5) time constraints on the signer. \( 122 \) In addition, courts considered outside elements: (1) competence of counsel; \( 123 \) (2) signer's receipt of a benefit versus the cost; \( 124 \) (3) clarity and fairness of the release-dismissal agreement; \( 125 \) (4) supervision.

119. Id. at 639-40; see also Woods, 994 F.2d at 500.

120. Rumery, 480 U.S. at 394; Woods, 994 F.2d at 499; Berry, 887 F.2d at 639 (considering literacy of criminal defendant as indication of voluntariness). But see Hill, 12 F.3d at 578 (determining lack of sophistication of criminal defendant was off-set by knowledge and experience of defendant's attorney); Lynch v. City of Alhambra, 880 F.2d 1122, 1127 (9th Cir. 1989) (considering criminal defendant's familiarity with criminal process when determining presence of voluntariness); U.S. DEP'T JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 31-32, 39 (1988) [hereinafter JUSTICE DEP'T REPORT] (reporting criminal suspects tend to be young and uneducated).

121. Rumery, 480 U.S. at 394; Hill, 12 F.3d at 578; Vallone v. Lee, 7 F.3d 196, 199 n.5 (11th Cir. 1993) (determining defendant being in jail at time of signing release-dismissal agreement showed involuntariness); Woods, 994 F.2d at 499; Lynch, 880 F.2d at 1127 (stating criminal defendant not being in custody aided in showing voluntariness); Hall v. Ochs, 817 F.2d 920, 923-24 (1st Cir. 1987) (holding signing involuntary when criminal defendant was forced to sign release in order to get out of jail); see also Miranda v. Arizona, 384 U.S. 436, 465 (1966) (stating "compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant" to waive his Fifth Amendment rights).

122. Rumery, 480 U.S. at 394; Hill, 12 F.3d at 578 (noting that considering agreement for two months indicates voluntariness); Vallone, 7 F.3d at 199 n.5 (holding defendant's lack of deliberation aided in showing his involuntariness when signing the release-dismissal agreement); Woods, 994 F.2d at 499-500 (stating whether or not defendant was in custody is factor when considering voluntariness element of release-dismissal agreement); Lynch, 880 F.2d at 1127 (noting criminal defendant considered agreement for four weeks before signing it, indicating voluntariness).

123. Berry, 887 F.2d at 639-40; see also Rumery, 480 U.S. at 394; Hill, 12 F.3d at 578 (holding unsophisticated client entered into agreement voluntarily because competent attorney represented him); Vallone, 7 F.3d at 199 n.5 (stating defendant's lack of representation indicated involuntariness when signing release-dismissal agreement); Woods, 994 F.2d at 499 (listing sophistication of criminal defendant as consideration in determining voluntariness); Lynch, 880 F.2d at 1127 (considering competent representation of criminal defendant indication of voluntariness). But see JUSTICE DEP'T REPORT, supra note 120, at 57 (commenting that most criminal defendants are not represented by zealous private attorneys, instead, over 50% of all felony defendants are eligible for legal service representation because of poverty level); R. MICHALOWSKI, ORDER, LAW, AND CRIME 213 (1985) (declaring indigent criminal defendants do not have benefit of "skilled and experienced counsel" as a result of chronic underfunding and understaffing of public defender offices).

124. Rumery, 480 U.S. at 394; Woods, 994 F.2d at 499; Berry, 887 F.2d at 639.

125. Berry, 887 F.2d at 640; see also Vallone, 7 F.3d at 199 (holding that defendant had right to be let out on bail regardless of voluntariness shown when he signed agreement exchanging release on bail for waiver of civil rights); Woods, 994 F.2d at 500 (considering fairness of agreement to be factor when considering voluntariness of criminal defendant); Lynch, 880 F.2d at 1127 (considering criminal defendant's counsel drafting release-dismissal agreement to be indication of voluntariness).
by the court;126 and (5) severity of the charges against the defendant.127

B. Public Interests Including Prosecutorial Overreaching

The circuit courts have followed the Rumery decision holding that release-dismissal agreements are not *per se* void as against public policy.128 In interpreting Rumery, the circuit courts have listed policy justifications for a prosecutor to enter into release-dismissal agreements.129 These justifications include, but are not limited to, the following situations: (1) the prosecutor cannot uncover the truth surrounding the allegations; (2) the prosecution cost outweighs the benefit resulting from a conviction; (3) the evidence is weak even though the criminal charges were filed in good faith; (4) the witnesses or evidence are no longer available; (5) evidence subsequently found points to the defendant’s innocence in the criminal case; and (6) the criminal charges are not the product of prosecutorial misconduct and both sides benefit substantially from a balanced settlement by avoidance of exposure to potential liability.130

Like the Supreme Court, the circuit courts require a showing of an absence of prosecutorial overreaching to uphold a release-dismissal agreement.131 Nevertheless, only the United States Sixth Circuit Court of Appeals has required an actual demonstration that criminal charges were not

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126. *Hill*, 12 F.3d at 578 (noting state judge supervision of release-dismissal agreement); *see also Rumery*, 480 U.S. at 399-403 (O’Connor, J., concurring) (stating court supervision of release-dismissal agreements would show record indicating voluntariness or lack thereof).

127. *Hill*, 12 F.3d at 578.

128. *See, e.g., Rumery*, 480 U.S. at 391 (stating release-dismissal agreements may be valid in some circumstances); *Livingstone v. North Belle Vernon Borough*, 12 F.3d 1205, 1210-11 (3d Cir. 1993) (quoting *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1095 (3d Cir. 1988) and stating release-dismissal agreement may be valid depending upon facts and circumstances surrounding that case); *Hill*, 12 F.3d at 578 (upholding release-dismissal agreement); *Cain v. Darby Borough*, 7 F.3d 377, 380 (3d Cir. 1993) (holding that although Rumery rejected view that release-dismissal agreements were *per se* adverse to public interest, "[w]e see no reason to embrace the opposite extreme that voluntary release-dismissal agreements are *per se* beneficial to the public interest"), *cert. denied*, 114 S. Ct. 1303 (1994); *Vallone*, 7 F.3d at 199 (noting Rumery clarified that not all release-dismissal agreements are invalid); *Coughlen v. Coots*, 5 F.3d 970, 973-75 (6th Cir. 1993) (listing instances when release-dismissal would be valid prosecutorial tool); *Woods*, 994 F.2d at 499 (citing Justice O’Connor’s observation that courts must engage in case-by-case analysis in determining whether release-dismissal agreement is valid in Rumery); *Berry*, 887 F.2d at 636 (enforcing release-dismissal agreement); *Lynch*, 880 F.2d at 1122 (9th Cir. 1989) (holding release-dismissal agreement enforceable if it remains in public interest).

129. *Hill*, 12 F.3d at 578; *Coughlen*, 5 F.3d at 973-75.

130. *Hill*, 12 F.3d at 578; *Coughlen*, 5 F.3d 973-75.

131. *Hill*, 12 F.3d at 578; *Coughlen*, 5 F.3d at 973-74; *Berry*, 887 F.2d at 642.
Exhibiting a broader approach, the United States Court of Appeals for the Fifth Circuit stated that when no evidence of prosecutorial misconduct exists, criminal charges are assumed valid. The majority of the circuit courts, however, have not directly addressed prosecutorial misconduct, but instead have considered prosecutorial misconduct in determining whether release-dismissal agreements violate public policy.

V. THE THIRD CIRCUIT INTERPRETATION

Recently, the United States Court of Appeals for the Third Circuit addressed for the first time the validity of release-dismissal agreements in two cases. The Third Circuit focused on the voluntariness aspect in Livingstone v. North Belle Vernon Borough and on the public policy question in Cain v. Darby Borough. In both cases, the court analyzed the facts using the criteria the Supreme Court set forth in the Rumery decision.

A. Voluntariness Element Restricted

In Livingstone, the criminal defendant had allegedly taken her grandchild, locked herself in a room, and resisted the police when they came to retrieve the child. Thereafter, the police charged the defendant with disorderly conduct, aggravated assault, terroristic threats, resisting arrest and interference with custody. The criminal defendant claimed that during her arrest the police hit her, dragged her through the mud and shot her in the vagina with a tranquilizer gun. The prosecutor arranged a release-dismissal agreement to which the criminal defendant agreed. The agreement stated that Washington Township would pay any medical or household damage bills that the criminal defendant incurred during her arrest if she waived her right to a civil suit against the township and police. Questioning the validity of the release-dismissal

132. Hill, 12 F.3d at 578. The court stated that the evidence showed that the prosecutor made criminal charges before he discovered that the criminal defendant was filing a civil suit. Id.
133. Berry, 887 F.2d at 640-41. The release-dismissal agreement itself represented the only evidence of prosecutorial misconduct. Id. In Rumery, the release-dismissal agreement also constituted the only evidence of prosecutorial overreaching. Id. Both courts held that the release-dismissal agreement alone does not establish prosecutorial misconduct. Id.
134. Id.
136. Livingstone, 12 F.3d at 1210-11.
137. Cain, 7 F.3d at 380.
138. Livingstone, 12 F.3d at 1210-11; Cain, 7 F.3d at 377.
139. Livingstone, 12 F.3d at 1207.
140. Id.
141. Id.
142. Id.
143. Id. at 1208.
agreement in the pursuant trial, the district court interpreted *Rumery* broadly and upheld the validity of the release-dismissal agreement.144

Although the district court upheld the release-dismissal agreement, the Third Circuit reversed.145 The Third Circuit noted that although release-dismissal agreements are not *per se* invalid, if the criminal defendant entered into the agreement involuntarily, the agreement is void.146 In this case, the Third Circuit decided the release-dismissal agreement was invalid because the criminal defendant had not voluntarily agreed to the terms of the agreement.147 The Third Circuit based its conclusion on factors similar to those other circuits have used.148 In determining that the release-dismissal agreement was invalid, the most influential factors for the Third Circuit were that the agreement, although made before a judge,149 was oral,150 and that the criminal defendant contemplated the agreement for only ten minutes.151 Because the United States Supreme Court in *Rumery* determined that release-dismissal agreements are not *per se* invalid but must be decided on a case-by-case analysis, the facts of each case prejudice the outcome of that particular case.152 When interpreting *Rumery*, the Liv-

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144. Id.
145. Id. at 1211.
146. Id. at 1210-11.
147. Id. at 1211.
148. Id. at 1210-11. For a discussion of the factors of voluntariness used in other courts, see supra notes 112-27 and accompanying text.
150. *Livingstone*, 12 F.3d at 1212. The court noted it was not holding that oral release-dismissal agreements can never be valid. *Id.* Nevertheless, no circuit court had yet upheld or even considered an oral release-dismissal agreement. *Id.* Courts prefer written agreements because modification can be made, deliberation is facilitated and bargaining is more evident. *Id.* In addition, the Supreme Court and other courts often refer to the “signer” and the “signing” of the agreement, suggesting that it is written. *Id.*
151. Id. at 1214-15. The court compared these facts to those in *Rumery* and concluded that the facts differed substantially. *Id.* In *Rumery*, the criminal defendant made a voluntary decision to enter into the agreement. *Id.* In that case, the Court held the decision was voluntary because the criminal defendant was sophisticated, he was not in jail, and he had three days to consider the agreement. *Id.* For a discussion of the voluntariness issue in *Rumery*, see supra notes 88-94 and accompanying text.
152. See, e.g., *Rumery*, 480 U.S. at 391 (stating case-by-case determination is needed to decide if release-dismissal agreement is valid and stating that “wide variety of factual situations . . . can result in release-dismissal agreements") (O’Connor, J., concurring); *Livingstone*, 12 F.3d at 1211 (quoting Erie Telecommunications, Inc. v. City of Erie, 853 F.2d 1084, 1095 (3d Cir. 1988) and stating that release-dismissal agreement may be valid depending upon facts and circumstances surrounding case); *Hill v. Cleveland*, 12 F.3d 575, 578 (6th Cir. 1993) (upholding release-dismissal agreement based on its facts); *Vallone v. Lee*, 7 F.3d 196, 199 (11th Cir. 1993) (noting that *Rumery* clarified that not all release-dismissal agreements are invalid depending on facts); *Coughlen v. Coots*, 5 F.3d 970, 973-75
The *Livingstone* court began its analysis by stating that voluntariness requires more than an absence of coercion—it compels an assent that *Rumery* described as voluntary, deliberate and informed. In *Livingstone*, the Third Circuit emphasized that two factors demonstrate the criminal defendant entered into the agreement involuntarily. First, the agreement was oral. Second, the criminal defendant had very little time to reflect on the terms of the release-dismissal agreement. Based on these factors showing an absence of voluntariness, the court struck down the release-dismissal agreement.

**B. Public Policy Element Stressed**

In *Cain v. Darby Borough*, the Third Circuit emphasized the *Rumery* public policy requirement. In *Cain*, the criminal defendant waived her right to bring a suit under section 1983 against three municipalities, their respective police departments and a number of individual police officers in exchange for admission into the Accelerated Rehabilitation Disposition Program (ARD). The Third Circuit held that the public policy require-
ment had not been fulfilled and therefore the release-dismissal agreement was invalid.\textsuperscript{163}

Following the \textit{Rumery} decision, the \textit{Cain} court found that a case-by-case approach remains appropriate when considering whether public policy interests outweigh the need to enforce release-dismissal agreements.\textsuperscript{164} In arguing that public policy concerns outweigh the benefits of this specific release-dismissal agreement, the \textit{Cain} court addressed both the waiver of the section 1983 claim and the dismissal of the criminal charges.\textsuperscript{165}

The Third Circuit maintained that the availability of section 1983 actions contains strong public policy interests because the actions make whole those whose constitutional rights have been violated.\textsuperscript{166} Because release-dismissal agreements may bar citizens' colorable section 1983 claims, the agreements are against the public interest.\textsuperscript{167} Therefore, the party seeking to uphold a release-dismissal agreement must show that other public interests favor enforcement and that the prosecutor has entered into the release-dismissal agreement for those public policy reasons.\textsuperscript{168}

In \textit{Cain}, the court held that the release-dismissal agreement adversely impacted public concerns because of the prosecutor's blanket policy that all criminal defendants who enter the ARD programs must sign a release form.\textsuperscript{169} Thus, the prosecutor's policy disrupted social interests because it was motivated by a desire for blanket immunity from suit, not a desire to encourage government thrift and providence by preventing frivolous litigation.\textsuperscript{170} The Third Circuit concluded the prosecutor must consider whether the result of allowing admission of the criminal defendant in the ARD program constituted a potential risk to society and whether the criminal defendant possessed a likelihood of rehabilitative success.\textsuperscript{171} Because the prosecutor did not consider these factors, but instead used a blanket

\begin{itemize}
\item \textsuperscript{163} \textit{Id.} at 383.
\item \textsuperscript{164} \textit{Id.} at 380.
\item \textsuperscript{165} See generally \textit{Fielkow}, supra note 76 (considering both dismissal of criminal charges and release of right to bring civil action); Kreimer, \textit{supra} note 1 (same); Bartholomy, \textit{supra} note 5 (same); Francis, \textit{supra} note 3 (same); Rogan, \textit{supra} note 6 (same).
\item \textsuperscript{166} \textit{Cain}, 7 F.3d at 380.
\item \textsuperscript{167} \textit{Id.} at 380-81. The court declared that citizens who bring meritorious § 1983 claims to vindicate constitutional rights advance social interests by preventing future official misconduct. \textit{Id.} at 381.
\item \textsuperscript{168} \textit{Id.} The Third Circuit noted that in \textit{Rumery}, the prosecutor had a reason to pursue an agreement independent of any other reason and legitimately related to his duties as a prosecutor. \textit{Id.}
\item \textsuperscript{169} \textit{Id.} at 379.
\item \textsuperscript{170} \textit{Id.}
\item \textsuperscript{171} \textit{Cain v. Darby Borough}, 7 F.3d 377 (3d Cir. 1993), \textit{cert. denied}, 114 S. Ct. 1303 (1994).
\end{itemize}
policy, the *Cain* court held that the release-dismissal agreement was invalid as against public policy.172

VI. IMPACT ON FUTURE THIRD CIRCUIT DECISIONS

Because courts will consider each case on its facts, and every factual situation will vary, predicting the outcome of each case remains difficult.178 Nonetheless, courts develop tendencies. As a result, practitioners should consider previous factual circumstances to determine potential arguments for their clients.174 In addition, attorneys representing potential litigants should note the considerations various courts have stressed in the past.175

Significantly, the Third Circuit has never upheld a release-dismissal agreement.176 Therefore, concluding that the Third Circuit determines the validity of release-dismissal agreements conservatively would be appropriate. Nevertheless, the Third Circuit has only decided two cases relating to the validity of release-dismissal agreements.177 Both of these cases contained one extreme factor weighing against the validity of the release-dismissal agreement in question: (1) in *Livingstone*, the agreement was oral, and (2) in *Cain*, the agreement was based on a blanket policy.178

When considering the voluntariness factor, the Third Circuit interpreted the *Rumery* Court's criteria as requiring a strong showing of voluntariness to validate the release-dismissal agreement.179 For example, in *Livingstone*, the court maintained that written agreements readily demonstrate voluntariness because they provide evidence of deliberation, modification and bargaining power.180 Nonetheless, the *Livingstone* court specifically noted that it was not holding as a matter of law that all oral

172. *Id.*

173. For a discussion of case-by-case analysis, see *supra* notes 93, 109, 111, 152 and accompanying text.

174. For a discussion of various fact patterns in cases following *Rumery*, see notes 116-34 and accompanying text.

175. For a discussion of the factors courts have used in the past to determine the validity of release-dismissal agreements, see *supra* notes 116-34 and accompanying text.


177. *Livingstone*, 12 F.3d at 1210-11; *Cain*, 7 F.3d at 377.

178. *Livingstone*, 12 F.3d at 1210-12; *Cain*, 7 F.3d at 377.

179. *Livingstone*, 12 F.3d at 1210-12.

180. *Id.* at 1212-13. Courts stress the time elapsed to consider release-dismissal agreements when determining if voluntariness existed. *See*, e.g., *Town of Newton v. Rumery*, 480 U.S. 386, 394 (1987) (considering criminal defendant had extended time to review release-dismissal agreement); *Hill v. City of Cleveland*, 12 F.3d 575, 578 (6th Cir. 1993) (considering time element in determining existence of voluntariness); *Vallone v. Lee*, 7 F.3d 196, 199 n.5 (11th Cir. 1993) (noting defendant's lack of deliberation aided in showing his involuntariness when signing release-dismissal agreement); *Woods v. Rhodes*, 994 F.2d 494, 497, 499-500 (8th Cir. 1993) (considering fact that signer reviewed release-dismissal agreement for
release-dismissal agreements are void; the court merely stressed that oral agreements compel an "even more scrupulous review by the courts" than written agreements.181 Thus, the Third Circuit has strongly manifested its unwillingness to uphold an oral release-dismissal agreement.

Furthermore, the Third Circuit also failed to weigh heavily factors that other courts have considered significant elements for validating release-dismissal agreements.182 For example, in Livingstone, even the presence of a judge during the making of the release-dismissal agreement did not sufficiently demonstrate voluntariness.183 By contrast, in other cases, a judge presiding over agreements strongly indicated voluntariness.184 As a result, in future determinations of the validity of release-dismissal agreements, the Third Circuit may not consider the presence of a judge at all during the formation of an agreement, or other elements relevant in other jurisdictions.

Moreover, the Third Circuit additionally interpreted the public interest issue conservatively.185 In denying the validity of a blanket release-dismissal agreement, the Third Circuit construed the Rumery criteria as requiring a prosecutor to individually assess each release-dismissal agree-
The prosecutor must evaluate the assessment in light of its effect on the public, instead of the policy as a whole. This determination indicates that prosecutors must tailor all such future policies to address all relevant factors surrounding particular criminal defendants' situations. Blanket policies, such as the ARD policy in Cain, fail to validate the public interest requirement for release-dismissal agreements. Consequently, the Third Circuit will probably mandate the government show that the prosecutor entered into a release-dismissal agreement due to a belief that a release-dismissal agreement would best remedy the individual situation.

As a result of Livingstone and Cain, the Third Circuit will most likely require the prosecutor to present strong evidence of voluntariness and of best interests of the public in each particular case. In doing so, the Third Circuit appears to be side-stepping the criteria the Rumery decision imposed. The Third Circuit has evaluated release-dismissal agreements by using only the Rumery criteria that will lead to a determination of invalidity. Thus, the Third Circuit has blatantly ignored other factors that other jurisdictions have used to uphold release-dismissal agreements. The Third Circuit's form of bias analysis is practically a Third Circuit ruling of per se invalidity of release-dismissal agreements.

Because the Third Circuit approach is so inherently conservative, the Supreme Court may again hear the controversial issue of release-dismissal agreements' constitutional validity. If the Third Circuit's judicial conservatism spreads, the per se rule of invalidity may be reinstated; or prosecutors may continue to reduce the use of release-dismissal agreements.

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186. Id.
187. Id.
188. Id.
189. Id.
190. For a discussion of these criteria, see supra notes 84-104 and accompanying text.
191. See, e.g., Livingstone v. North Belle Vernon Borough, 12 F.3d 1205 (3d Cir. 1993); Cain v. Darby Borough, 7 F.3d 377 (3d Cir. 1993), cert. denied, 114 S. Ct. 1303 (1994). For a detailed analysis of these cases, see supra notes 135-72.
192. For a discussion of factors used by various jurisdictions, see supra notes 116-34 and accompanying text.
194. See generally Kreimer, supra note 1 (discussing decline in several area prosecutors' usage of release-dismissal agreements).