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# FBI Law Enforcement

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**Combating Violence  
A Community Approach**



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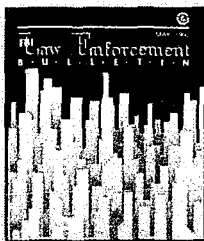
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**Cover:** This issue focuses on the need for police and citizens to join together to fight the violence that plagues communities across this Nation.

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William S. Sessions, Director

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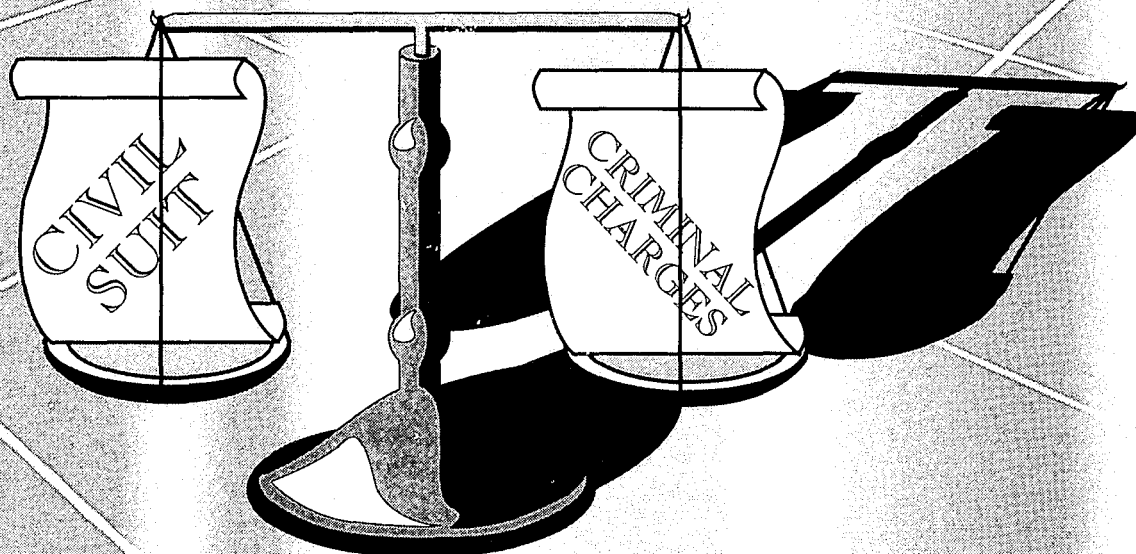
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# The Enforceability of Release-Dismissal Agreements

By  
WILLIAM U. McCORMACK, J.D.



Suppose after a long-term investigation involving pornographic material that officers lawfully seize virtually the entire inventory of a local news store because these publications fit within the judicially accepted definition of pornography. Also assume that the policy of the prosecutor's office concerning the prosecution of pornography cases subsequently changes.

The prosecutor's office then informs the police department that it does not have the time or resources to prosecute the pornography case. The investigating officers believe that the owner of the news store is

likely to file a civil lawsuit against them and their employer, seeking money damages for the seizure of the materials. In such a case, can the officers appropriately request that the prosecutor attempt to get an agreement from the store owner releasing all civil claims that he might have as a result of the investigation and seizure in exchange for the government's dismissal of the case?

This article discusses the enforceability of these agreements, called "release-dismissal agreements," wherein a suspect or defendant agrees not to bring a civil suit concerning police investigative activity in exchange for the govern-

ment agreeing to dismiss charges, not bring criminal charges, or reduce charges. The article also examines recent case rulings on release-dismissal agreements and offers some practical advice to police regarding their use.

## THE SUPREME COURT RULE

Prior to 1987, courts generally disagreed on whether release-dismissal agreements were always against public policy, and thus, unenforceable.<sup>1</sup> However, in its 1987 decision in *Town of Newton v. Rumery*,<sup>2</sup> the U.S. Supreme Court upheld the enforceability of a

release-dismissal agreement, finding that the agreement was voluntarily entered into and was not against the public interest.

### Factual Background

The case arose out of an indictment of David Champy for sexual assault. A friend of Champy's, Bernard Rumery, read about the indictment in a local newspaper and telephoned the alleged victim, who was acquainted with both Rumery and Champy. After the call, the victim reported to police that Rumery tried to force her to drop the charges and threatened her if she did not.

Rumery claimed he only advised her that she did not have to go forward with the sexual assault charges against Champy if she did not want to. After a second call between Rumery and the alleged victim, police obtained an arrest warrant and arrested Rumery for tampering with a witness.

Rumery subsequently hired an attorney, who contacted the prosecutor about the charges. Rumery's attorney and the prosecutor eventually reached an agreement, under which the prosecutor would dismiss the charges against Rumery if he would agree not to sue for any harm caused by the arrest. Rumery's attorney then drafted the written agreement and discussed it with Rumery, who thought about it for 3 days and then signed it. The criminal charges were then dropped.

Ten months later, Rumery filed a civil action, alleging constitutional violations under 42 U.S.C. §1983 and State common law claims as a result of his arrest for the witness-tampering charges. The defendants in the civil suit filed a motion to dismiss the civil suit, relying on the release-dismissal agreement as an affirmative defense.

The district court found that Rumery voluntarily and intelli-

gently signed the agreement and dismissed his lawsuit. Rumery appealed to the U.S. Court of Appeals for the First Circuit, which reversed the district court and held that release-dismissal agreements were *per se* invalid.

The U.S. Supreme Court reversed the appellate court's decision. The Court concluded that while some release-dismissal agreements may infringe important interests of a criminal defendant or of society as a whole, the mere possibility of harm to these interests does not justify a *per se* rule that all such agreements are invalid.<sup>3</sup>

### Public Interests Served

The Court found that release-dismissal agreements can further several significant public interests. First, they can discourage meritless or frivolous lawsuits against law enforcement officers and their employers. The Court noted that even frivolous or marginal civil suits require the time and attention of defendant officials to the detriment of their public duties.<sup>4</sup> Second, prosecutors may have independent and legitimate reasons for dismissing charges related to government enforcement priorities or the relative strength of a particular case. Third, prosecutors need flexibility to decide how to allocate the scarce resources of a criminal justice system that cannot accommodate the litigation of every serious criminal charge.<sup>5</sup>

The Court recognized that release-dismissal agreements might "tempt prosecutors to trump up charges in reaction to a defendant's civil rights claim, suppress evidence



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of police misconduct, and leave unremedied deprivations of constitutional rights." It concluded, however, that a *per se* rule of invalidity "...fails to credit other relevant public interests and improperly assumes prosecutorial misconduct."<sup>6</sup>

The Court found that the prosecutor in *Rumery* had a legitimate reason to make this agreement directly related to his prosecutorial responsibilities. The agreement prevented both a civil and criminal trial concerning Rumery, which spared the alleged sexual assault victim the public embarrassment of having to testify in either of those trials.<sup>7</sup>

#### All Agreements Not Inherently Coercive

Rumery also argued that release-dismissal agreements are inherently coercive, and thus, involuntary and unenforceable. The Court agreed that some release-dismissal agreements may be involuntary, but rejected Rumery's argument that this possibility justified invalidating all such agreements.<sup>8</sup>

The Court stated that "[I]n many cases a defendant's choice to enter into a release-dismissal agreement will reflect a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action."<sup>9</sup> In finding that Rumery's decision to sign the agreement was voluntary, the Court noted that (1) he was a sophisticated businessman; (2) he was not in jail and was represented by an experienced criminal lawyer; (3) he considered the agreement for 3 days

before signing it; and (4) the benefit to him included immunity from criminal prosecution.

The Court concluded the agreement made between Rumery and the prosecutor was enforceable since it was voluntary, there was no evidence of prosecutorial misconduct, and the enforcement of the agreement would not adversely affect the relevant public interests.<sup>10</sup> Finally, the Court suggested that it would be helpful, although not essential, to

Berry had been severely burned on his legs and arms after his non-fire retardant foam mattress caught fire. Eight months later, Berry entered into a covenant not to sue the county or its employees for damages and medical expenses arising from the fire. In exchange, the county agreed to pay his medical expenses, to drop arson charges against him based on the jail fire, and to recommend probation for four pending felony offenses. Nev-

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**...law enforcement officers [should] always have the prosecutor negotiate and enter into a release-dismissal agreement.**

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conclude release-dismissal agreements under judicial supervision.<sup>11</sup>

#### COURTS ENFORCE VOLUNTARY AGREEMENTS IN THE PUBLIC INTEREST

##### *Berry v. Peterson*

Courts construing release-dismissal agreements since *Rumery* have upheld the enforceability of agreements that are in the public interest and voluntary.<sup>12</sup> For example, the U.S. Court of Appeals for the Fifth Circuit upheld a release-dismissal agreement in *Berry v. Peterson*<sup>13</sup> and overturned a \$200,000 jury verdict awarded to Berry, a jail inmate burned in a jail fire.

ertheless, Berry brought suit for his fire-related injuries, alleging constitutional violations under 42 U.S.C. § 1983 and common law tort claims and was awarded a \$200,000 verdict.<sup>14</sup>

The U.S. Court of Appeals for the Fifth Circuit reversed the verdict. It offered three justifications for finding the agreement not to sue enforceable against Berry.

First, the court said the voluntariness of the agreement was supported by the fact that an experienced attorney represented Berry. The attorney discussed Berry's pending criminal charges and the agreement not to sue with Berry's other criminal defense attorneys. Also, there was no evidence that

anyone coerced Berry or his family into the agreement.<sup>15</sup>

Second, the court found no evidence that the prosecutor inflated, mishandled, or trumped up the serious charges pending against Berry when he signed the agreement. Nor did the court find evidence that he had engaged in prosecutorial overreaching.<sup>16</sup>

Third, the court determined that the public interest would be served by enforcing the agreement. Berry received various benefits from the county as part of the agreement, including payment of his medical expenses, assistance from the county in his potential claim against the mattress manufacturer in a products liability suit, and a recommendation from the prosecutor for probation on his pending felony charges. The court found the county likewise benefited from the agreement without forsaking its responsibility to Berry or its citizens.<sup>17</sup>

### ***Hammond v. Bales***

The U.S. Court of Appeals for the 10th Circuit in *Hammond v. Bales*<sup>18</sup> also upheld a release-dismissal agreement. In the case, the plaintiff allegedly entered her father-in-law's home during the course of her marriage dissolution and removed items belonging to her father-in-law, who subsequently initiated criminal charges against her.

Following a probable cause hearing at which plaintiff was bound over for trial, the prosecutor agreed to dismiss the criminal case

in exchange for the plaintiff's waiver of the right to sue her father-in-law.<sup>19</sup> The plaintiff entered into this agreement but later brought suit under 42 U.S.C. §1983 against the prosecutor and her father-in-law. The district court entered a summary judgment for the defendants, and the U.S. Court of Appeals for the 10th Circuit affirmed that decision.

The court stated that release-dismissal agreements should be examined on a case-by-case basis and found four reasons to enforce the agreement against the plaintiff. First, evidence demonstrated that the parties involved voluntarily entered into the agreement. The

Also, the prosecutor properly weighed the costs of a criminal prosecution, the probability of success, and the number of witnesses who would have to be called, many of whom were government employees.<sup>20</sup>

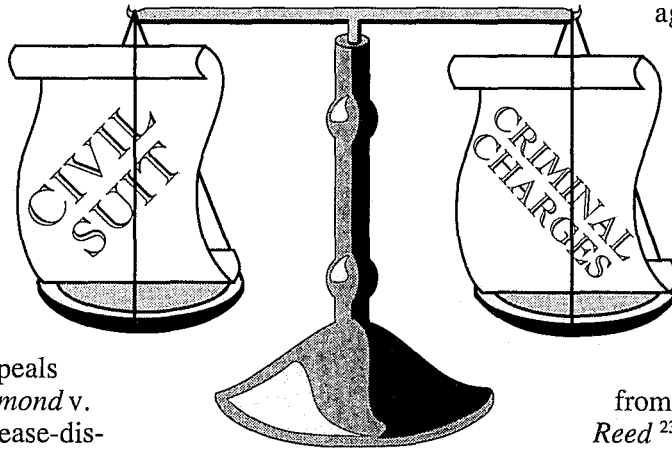
Third, there was no evidence that the State created a frivolous criminal charge to suppress a valid civil complaint. And last, the parties executed the agreement under judicial supervision.<sup>21</sup>

### **PROSECUTORIAL IMMUNITY**

Courts have unanimously held that prosecutors are entitled to absolute immunity for their part in entering into release-dismissal agreements.<sup>22</sup> In *Hammond*, the court granted the defendant-prosecutor absolute immunity for his decision to enter into the agreement. Courts consider a prosecutor's negotiations surrounding release-dismissal agreements to be a prosecutorial function similar to plea bargaining, which is accorded absolute immunity

from civil suits under *Burns v. Reed*<sup>23</sup> and *Imbler v. Pachtman*.<sup>24</sup>

Courts, however, do not afford law enforcement officers absolute immunity. It is, therefore, very important that law enforcement officers always have the prosecutor negotiate and enter into a release-dismissal agreement. If an agreement or the decision to enter into the agreement is later challenged, the prosecutor will be granted absolute immunity from any potential civil claims arising out of the agreement.



plaintiff's defense attorney approached the prosecutor about dropping the charges, and the defense attorney drafted the agreement after consulting with the plaintiff.

Second, legitimate reasons existed for the prosecutor to enter into this agreement. Primarily, a large number of cases overloaded the jury docket, many of which warranted more immediate and serious con-

## LIMITED ROLE FOR OFFICERS

While it may be appropriate for a law enforcement officer to ask a prosecutor to consider the possibility of a release-dismissal agreement in a particular case, the prosecutor should always make the decision and conduct the negotiations. If officers assume the responsibility for entering into a release-dismissal agreement or attempt to get a waiver of potential civil claims in exchange for releasing an arrestee, such an agreement is not likely to be viewed as voluntary by the courts.<sup>25</sup> The officer's attempts to get the waiver may also be viewed as a constitutional tort in the nature of a first amendment violation for retaliatory prosecution.<sup>26</sup>

## LIMITED ENFORCEABILITY FOR CRIMES AGAINST OFFICERS

The enforceability of release-dismissal agreements is more limited where the charges brought against the arrestee involve a police officer.<sup>27</sup> Courts recognize an increased potential for abuse where release-dismissal agreements are used in cases involving crimes against the police, such as disorderly conduct, assault on a police officer, or resisting arrest. This is because there are often no independent witnesses of the event forming the basis for the charge and the objectivity of the police in such cases may be impaired.<sup>28</sup>

For example, where officers have used excessive force, they may have an incentive to arrest on a marginal or nonexistent violation, push for criminal charges, and then re-

quest a release-dismissal agreement. Most cases invalidating or criticizing release-dismissal agreements involve crimes against the police offenses.<sup>29</sup> Although agreements may be enforced in cases in which the criminal charges involve

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police conduct, courts will closely review such agreements to ensure there was no governmental overreaching or an attempt to sweep police misconduct under the rug.

## CONCLUSION

The hypothetical pornography investigation discussed at the beginning of this article would be an appropriate case for the use of a release-dismissal agreement. The prosecutor has legitimate public interest concerns for not bringing a criminal case against the store owner. Primarily, prosecution policies have changed, and the prosecutor's office does not have the time or resources to prosecute such cases.

The store owner would be required to relinquish a civil suit but would benefit by the dismissal of the criminal charges. This win-win proposition for both sides spares the court unnecessary litigation. However, to ensure enforceability, the

pornography store owner should be represented by counsel during the negotiations and should not be coerced into making the agreement.

Courts uphold release-dismissal agreements if they are voluntarily entered into, there is no evidence of prosecutorial misconduct or overreaching, and they are not against the public interest. Release-dismissal agreements can provide a valuable added protection against civil lawsuits and should be considered any time the prosecutor decides the public interest is served by not prosecuting a case.

Officers should remember three basic principles regarding release-dismissal agreements. First, officers should always ensure that the prosecutor negotiates and enters into the agreement. Second, where possible, court approval or judicial supervision of the agreement should be obtained. Third, agreements may not be appropriate in cases where the criminal charges involve a crime against the police and it might be alleged that the government is attempting to cover up police misconduct. ♦

## Endnotes

<sup>1</sup> See *Jones v. Tabor*, 648 F.2d 1201 (9th Cir. 1981) and *Bushnell v. Rossetti*, 750 F.2d 298 (4th Cir. 1984) (upholding release-dismissal agreements) and *Boyd v. Adams*, 513 F.2d 83 (7th Cir. 1975) and *Dixon v. District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968) (declaring release-dismissal agreements invalid).

<sup>2</sup> 480 U.S. 386 (1987).

<sup>3</sup> *Id.* at 389-392.

<sup>4</sup> *Id.* at 395-396.

<sup>5</sup> *Id.* at 396.

<sup>6</sup> *Id.* at 394-395.

<sup>7</sup> *Id.* at 398.

<sup>8</sup> *Id.* at 393.

<sup>9</sup> *Id.* at 394.

<sup>10</sup> *Id.* at 398.

<sup>11</sup> *Id.* at n. 10

<sup>12</sup> *But see Cowles v. Brownell*, 538 N.E.2d 325 (N.Y. 1989) in which the Court of Appeals of New York expressed a strong disfavor of release-dismissal agreements and stated that only a legitimate, genuine, and compelling reason related to prosecutorial functions would overcome the policy considerations against enforcement of such agreements.

<sup>13</sup> 887 F.2d 635 (5th Cir. 1989).

<sup>14</sup> *Id.* at 636.

<sup>15</sup> *Id.* at 640.

<sup>16</sup> *Id.* at 641.

<sup>17</sup> *Id.*

<sup>18</sup> 843 F.2d 1320 (10th Cir. 1988).

<sup>19</sup> *Id.* at 1321.

<sup>20</sup> *Id.* at 1322.

<sup>21</sup> *Id.* at 1323.

<sup>22</sup> *Schloss v. Bouse*, 876 F.2d 287 (2d Cir. 1989); *Haynesworth v. Miller*, 820 F.2d 1245 (D.C. Cir. 1987); *McGruder v. Necaize*, 733 F.2d 1146 5th Cir. 1984); and *Boyd v. Adams*, *supra* note 1. *See also, Arnold v. McClain*, 926 F.2d 963 (10th Cir. 1991) in which a district attorney was granted absolute immunity in connection with his ultimatum to a police officer that the officer resign or be prosecuted for perjury.

<sup>23</sup> 111 S.Ct. 1934 (1991).

<sup>24</sup> 424 U.S. 409 (1976).

<sup>25</sup> *Hall v. Ochs*, 817 F.2d 920 (1st. Cir. 1987) (officer insisted that arrestee sign a waiver of any civil claims or be incarcerated and the waiver was found involuntary).

<sup>26</sup> *Haynesworth v. Miller*, 820 F.2d 1245 (D.C. Cir. 1987).

<sup>27</sup> *See Lynch v. City of Alhambra*, 880 F.2d 1122 (9th Cir. 1989) (finding that the risk of abuse with release-dismissal agreements when police crimes are alleged is great, but holding that each case must be analyzed individually to determine if the public interest is served).

<sup>28</sup> *Id.* at 1127.

<sup>29</sup> *See, e.g., Boyd v. Adams, supra* note 1, and *Hall v. Ochs, supra* note 25.

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*Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.*

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