

No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

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BURT W. NEWSOME AND NEWSOME LAW, LLC ,  
*Petitioners*,  
v.

CLARK ANDREW COOPER; BALCH & BINGHAM, LLP;  
JOHN W. BULLOCK, JR.; CLAIBORNE PORTER SEIER;  
AND DON GOTIER ,  
*Respondents.*

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**On Petition for Writ of Certiorari to the  
Supreme Court of Alabama**

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**PETITION FOR WRIT OF CERTIORARI**

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July 17, 2021

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## **QUESTIONS PRESENTED**

1. Whether a release-dismissal order entered in a criminal case is enforceable under the standards set forth in *Newton v. Rumery* wherein said order waives a litigant's right to bring forth both criminal claims and civil claims against non-governmental persons and entities.
2. Whether a litigant's due process rights are violated when the court gives deferential treatment to an implicit holding regarding an unfiled order depriving a litigant of his right to full appellate review.

## **LIST OF DIRECTLY RELATED PROCEEDINGS**

1. *Burt W. Newsome and Newsome Law, LLC v. Clark Andrew Cooper, Balch & Bingham, LLP, John W. Bullock, Jr., Claiborne Porter Seier, and Don Gottier*, Circuit Court Case No. CV-2015-900190.00, Circuit Court of Jefferson County, Alabama (rendering an order and judgment granting dismissal of defendant Don Gottier on June 15, 2018; rendering separate orders and judgments to the remaining defendants granting summary judgment to each on June 15, 2018; and rendering an order and judgment of attorneys' fees on December 7, 2018).
2. *Burt W. Newsome and Newsome Law, LLC v. Clark Andrew Cooper, Balch & Bingham, LLP, John W. Bullock, Jr., Claiborne Porter Seier, and Don Gottier*, Supreme Court of Alabama, Consolidated Case Nos.: 1180252 and 1180302 (unpublished decision affirming the Circuit Court judgments entered on December 18, 2020 and denying Petitions for Rehearing on the consolidated cases on February 19, 2021).

## **CORPORATE DISCLOSURE STATEMENT**

Petitioner Newsome Law, LLC is an Alabama limited liability company wholly owned by Petitioner Burt W. Newsome. It does not have any parent companies, and no entity or other person has any ownership interest in it.

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**PETITION FOR WRIT OF CERTIORARI**

Petitioners Burt W. Newsome and Newsome Law, LLC respectfully petition for a writ of certiorari to review the decision and judgment of the Supreme Court of Alabama in this case, or in the alternative, Petitioners respectfully request that this Honorable Court summarily reverse the decision and judgment of the Supreme Court of Alabama pursuant to Supreme Court Rule 16.

**OPINIONS BELOW**

The Supreme Court of Alabama issued its unpublished opinion on December 18, 2020 and is reproduced at App.5-45. The opinion of the Supreme Court of Alabama is available at *Newsome v. Cooper*, Nos. 1180252, 1180302, 2020 Ala. LEXIS 185 (Dec. 18, 2020). The Supreme Court of Alabama summarily denied Petitions for Rehearing without rendering an opinion on February 19, 2021. App.1-4. The Circuit Court of Jefferson County, Alabama Birmingham Division issued an order and judgment on a motion dismiss on June 15, 2018 and it is reproduced at App.46-47. The Circuit Court of Jefferson County, Alabama Birmingham Division issued individual orders and judgments on motions for summary judgment as to each defendant on June 15, 2018, and they are reproduced at App.48-77. The Circuit Court of Jefferson County, Alabama Birmingham Division issued an order and judgment awarding attorneys' fees on December 7, 2018 and is reproduced at App.81-92.

## **JURISDICTION**

The Supreme Court of Alabama issued its opinion in the consolidated appeals on December 18, 2020. Petitioners filed timely Petitions for Rehearing with the Supreme Court of Alabama and the Supreme Court of Alabama denied the Petitions for Rehearing on February 19, 2021. On March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. §1257.

## **RELEVANT CONSTITUTIONAL PROVISIONS**

The Fourteenth Amendment of the United States Constitution provides in relevant part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

## **STATEMENT OF THE CASE**

### **1. Factual and Procedural History**

Petitioner Burt W. Newsome is an attorney in the State of Alabama who owns and operates Newsome Law, LLC. App.6. As part of his legal practice,

Petitioner Newsome represents banks in collection actions. App.8.

In 2012, Petitioner Newsome on behalf of his banking client obtained a judgment against a Ms. Lawson and began collection efforts. Brief<sup>1</sup>, p. 5. After noticing Ms. Lawson's post-judgment deposition and garnishing her wages, Ms. Lawson's common-law husband, Alfred Seier threatened Petitioner Newsome. Brief, pp. 5-6. In January 2012, Alfred Seier parked his vehicle adjacent to Petitioner Newsome's vehicle in the parking lot of Petitioner Newsome's law practice. Brief, p. 6. When Petitioner Newsome went to his vehicle, Alfred Seier pointed a gun at Petitioner Newsome and told him "never to f\*\*k with his wife again." Brief, p. 6. Petitioner Newsome was unarmed and escaped by dodging behind his vehicle and running to the back door of his office. Brief, p. 6. Petitioner Newsome immediately called the authorities and filed charges against Alfred Seier. Brief, p. 6.

Thereafter, Alfred Seier's brother Claiborne Seier, who is also an attorney, called Petitioner Newsome's office insisting that Petitioner Newsome drop the criminal charges against his brother explaining that his brother was dying from cancer. Brief, p. 6. Petitioner Newsome refused to drop the charges making Claiborne Seier angry. Brief, p. 6. During this time, Petitioner Newsome's banking client went on lockdown fearing that their employees could be killed

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<sup>1</sup> References to "Brief" refers to the Brief of Appellants Burt W. Newsome and Newsome Law, LLC filed in the Supreme Court of Alabama.

by Alfred Seier. Brief, p. 7. The bank, thereafter, sold the debt of Ms. Lawson to Claiborne Seier at a discounted rate. Brief, p. 7. At the criminal trial of Alfred Seier, Claiborne Seier again urged Petitioner Newsome to drop the charges against his brother. Brief, p. 7. When Petitioner Newsome refused, Claiborne Seier threatened Petitioner Newsome that “he was going to get him.” Brief, p. 7. Alfred Seier was convicted of menacing and died a few months later. Brief, p. 7.

Later that year, in December 2012, Petitioner Newsome found himself in an eerily similar situation to the events that unfolded with Alfred Seier. App.7. Petitioner Newsome’s law office shares a parking lot with a dental office. App.6. Defendant John Bullock arrived at the parking lot at 6:30 a.m. Brief, p. 11. Defendant Bullock purportedly arrived an hour and half early for a dental appointment. Brief, p. 11. While initially not parked by Petitioner Newsome’s vehicle, by 7:30 a.m., John Bullock’s vehicle was parked adjacent to Newsome’s vehicle in a manner identical to the Alfred Seier gun threat incident. Brief, p. 11. When Petitioner Newsome went to his car, Defendant Bullock quickly opened his car door blocking Newsome from getting into his car. Brief, p. 11. The parking and the way Bullock exited his vehicle was identical to the events that unfolded with Alfred Seier. Brief, p. 11. Feeling threatened, Petitioner Newsome pulled out a handgun, held it by his side and instructed Bullock to return to his vehicle until Newsome left the parking lot. Brief, p. 11. Defendant Bullock moved out of the way and Newsome got in his car and left for court. Brief, p. 11.

John Bullock's testimony as to the events thereafter is unclear. Brief, p. 12. Bullock at one point testified that he called the police when he went into the dentist office, but later stated that he called the police after he came out of his dental appointment. Brief, p. 12. According to the police report, Bullock stated he did not know Newsome and identified Newsome after being shown a driver's license photograph. Brief, p. 12. Immediately after the incident, however, Bullock told his dentist that Newsome was his assailant. Brief, p. 12. Approximately, one month after the incident, on January 14, 2013, Bullock filed a criminal complaint against Newsome for menacing. Brief, p. 13.

A few months later, on May 2, 2013, Newsome was stopped for speeding, and was arrested on the menacing warrant. Brief, p. 14. Newsome was taken into custody and released later that day. Brief, pp. 14-15. Shortly after Newsome was released and returned to his office, Defendant Claiborne Seier called Newsome's law office. Brief, p. 15. There was no apparent reason for the call. Brief, p. 15.

Two days after Newsome's arrest, Defendant Clark A. Cooper, emailed a representative of a bank about Newsome's arrest. Brief, p. 15. Defendant Cooper is an attorney who was a partner at the law firm of Defendant Balch & Bingham, LLP. App.6. Defendant Cooper and his former firm represent some of the same banking clients as Petitioner Newsome. Brief, p. 15. This email was sent to a client both Newsome and Cooper represented. Brief, p. 15. Cooper insinuated that the arrest could affect Newsome's legal license. In one email, Cooper emailed a copy of Newsome's

mugshot and stated, “Have you seen this? Not sure how it’s going to affect his law license. Bizarre.” Brief, p. 15. In a second email, Cooper quoted the menacing statute and stated, “It is a class B misdemeanor. Not sure how this will affect his law license.” Brief, p. 15. This resulted in the bank representative questioning Petitioner Newsome’s ability to practice law and he stopped sending Newsome case files for a period of time. Brief, p. 15.

In the underlying proceedings, Defendant Cooper had differing stories as to how and when he learned of Newsome’s arrest. Brief, p. 16. In an unsworn affidavit, he stated he learned of the arrest on the Saturday that he sent the emails to the bank representative. Brief, p. 16. In a sworn deposition, he claimed he learned of the arrest on either Thursday or Friday which would have been the day of the arrest or the day after. Brief, p. 16. In another unsworn affidavit, Cooper claimed he learned of the arrest by seeing Newsome’s mugshot on a publicly available website. Brief, p. 16. In a sworn deposition, however, Cooper claimed he learned the information from a paralegal at Balch & Bingham who either sent him a copy or printed the information for him. Brief, p. 17.

In November 2013, Petitioner Newsome appeared in the District Court of Shelby County for his criminal trial. Brief, p. 17. The judge instructed the parties to discuss the case in a separate room. Brief, p. 17. Petitioner Newsome set forth that during the discussions Defendant Bullock told everyone in the room he was simply going to a dentist’s appointment when the incident took place. Brief, p. 17. Newsome

asserted that although Bullock wanted Newsome to plead guilty, Newsome refused. Brief, p. 17. Thereafter, Bullock asserted he was dropping the charges. Brief, p. 17. Relying on Bullock's claim that he was simply going to a dentist's appointment, Newsome signed a Dismissal & Release form provided. Brief, p. 17. The form order states "STATE OF ALABAMA V. Burton Wheeler Newsome. CASE NO. DC 2013-1434. This matter comes before the Court by specific AGREEMENT of the parties." App.95. John Bullock is not a named party in the criminal case. App.95. The form order contains four alternate dispositional paragraphs. App.95-96. The only paragraph checked in this criminal case provided that the case was continued until April 2014 and then to be dismissed with prejudice provided that the defendant had no further arrests. App.95-96. The paragraphs regarding pre-trial diversion and the paragraphs regarding restitution were not checked as they were not applicable to Newsome's dismissal agreement. App.96. The form order also contained a release of all of Newsome's civil and criminal claims against countless governmental entities as well as non-governmental entities, complainants and potential witnesses. App.97. On April 4, 2014, the district court dismissed the criminal case against Newsome with prejudice. Brief, p. 20.

On January 14, 2015, Petitioner Newsome filed a civil lawsuit from which this Petition arises. Brief, p. 20. Petitioner Newsome and his law firm Newsome Law, LLC sued attorney Clark A. Cooper, Mr. Cooper's former law firm Balch & Bingham, LLP, John W. Bullock, and Claiborne Seier in the Jefferson Circuit

Court “alleging that the defendants combined to have Newsome arrested on a false charge with the intent of damaging his reputation and law practice.” App.6. During discovery, Petitioners through an amended complaint named Don Gottier as an additional defendant. Petitioners alleged, “as later amended, malicious prosecution, abuse of process, false imprisonment, the tort of outrage, defamation, invasion of privacy, and multiple counts of conspiracy and intentional interference with a business relationship.” App.9. Petitioners alleged that the Defendants conspired “to set Newsome up to be arrested so that Cooper could then take Newsome’s clients on behalf of Balch and Seier could get revenge upon Newsome for filing a menacing charge against Alfred.” App.9-10. On February 13, 2015, Defendant Seier filed a motion to dismiss arguing that Petitioner’s claims had no factual basis and “the claims were barred by the release clause in the D&R [Dismissal & Release] order because the claims were related to Newsome’s menacing case.” App.10.

A few days later, Petitioner Newsome filed a motion to expunge his criminal case. App.10. Both the State of Alabama and Defendant Bullock filed objections to the expungement. App.10. In his objection to the expungement, Bullock argued that Petitioner Newsome had filed a civil action against him, and that the expungement should not be permitted because purportedly Newsome breached the terms of the release contained in the D&R order. App.103-107. Newsome, the government and Bullock appeared for a hearing on the motion. App.101-107. Initially, the court denied the expungement. App.10. Petitioner

Newsome filed a timely motion to reconsider. App.105. Defendant Bullock again submitted opposition papers and the judge granted Newsome's motion and entered an order of expungement. App.105. Shortly thereafter, the judge who ordered the expungement retired from the bench. App.118.

While the parties were litigating the expungement in the criminal action pending in Shelby Circuit Court, the Jefferson Circuit Court granted Defendant Seier's motion to dismiss in this civil action. App.10. In the civil action, the court also granted a motion to dismiss filed by Defendant Bullock and motions for summary judgment filed by Defendant Cooper and Balch & Bingham, LLP based upon the overbroad release. App.10. After Petitioner Newsome was granted the expungement, he filed motions to reconsider in the civil action arguing, among other things, that because his case had been expunged, under Alabama law, the Defendants could not rely on the release contained in the D&R order. App.10-11. The civil court granted Newsome's motion and vacated the judgments issued to the Defendants in the civil action. App.11

Thereafter, Defendant Bullock filed papers in the criminal action seeking to use the records in Petitioner Newsome's expunged file. App.117. Defendant Seier, who was not the complainant in the criminal case, filed papers to have Petitioner Newsome's expungement reversed. App.117-118 Defendant Seier argued that Petitioner Newsome supposedly obtained the expungement based on false pretenses because he checked the boxes on the expungement form stating that he complied with all the conditions imposed by the

court order of dismissal. App.110-112. Petitioner Newsome opposed the application arguing that Seier had no standing to seek a reversal of his expungement because he was not a party and was not even the complainant in the criminal action. App.110-112. Petitioner Newsome also argued that Defendant Bullock had apprised the judge of the civil action in opposition papers and at a hearing regarding the motion for expungement. App.111. Petitioner Newsome also argued that Defendant Seier's motion was untimely and improper because the conditions imposed by the judge were the imposition of paying court costs and having no further arrests and the release, pursuant to the law, was distinct from the court-imposed conditions. App.109-111.

Defendant Bullock's motion to use the expunged records and Defendant Seier's motion to reverse the expungement were presented to a new judge because the judge who issued the previous orders retired. App.118. At the hearing on the motions, Defendant Bullock claimed to join in Defendant Seier's procedurally improper motion. App.117-118. During the hearing, the government appeared but stated it was unsure if it was even a party to the action. App.101. It was also noted that because the case had been expunged Petitioner Newsome could not file papers in the action with the clerk but was forced to hand them to the judge on the hearing date. App.101-102. Surprisingly, the papers submitted by Defendant Seier, who was not involved in the criminal case in any manner, had been accepted by the clerk for filing in the expunged action even though Petitioner Newsome, who

was a party to the criminal case, was precluded from filing papers with the clerk. App.101-102.

After the hearing, the new judge noted that he did not believe Defendant Seier had standing to seek the reversal of expungement and noted that given the procedural posture of the case his order may be reversed. App.114-116. Nevertheless, he asked that a proposed order be sent to him for his review. App.116. Thereafter, the judge purportedly issued an order, dated June 8, 2016, reversing Petitioner Newsome's expungement. This purported order, however, was never file stamped and never entered in the State Judicial Information System ("SJIS") in Alabama as required by Alabama law. App.25. Petitioner Newsome sought a Writ of Mandamus from the Alabama Court of Criminal Appeals arguing that the court order that the judge vacate the purported order because it was void based on numerous grounds including, Defendant Seier's lack of standing to bring the motion to reverse the expungement, the motion was not brought in a timely or procedurally proper manner, and the fact that it was never formally filed made the order a nullity. App.22-25. The Court of Criminal Appeals noted that a Writ of Mandamus is reviewed under the abuse of discretion standard and denied the Writ based on this standard of review. Petitioner Newsome then filed a Writ of Certiorari, or in the alternative, a Writ of Mandamus with the Supreme Court of Alabama. App.12. On April 27, 2018, the Supreme Court of Alabama denied the Writ and ordered that the June 8, 2016 order be entered in the SJIS system. App.126. This was a hotly debated matter whereas two judges provided dissenting

opinions. One dissenting Justice wrote, “by instructing the trial court to enter its June 8, 2016, order into the SJIS, this Court invades the province of the trial court to determine whether – and, if so, when – that order should be made effective.” App.130. This Justice also stated the impropriety of the Supreme Court’s order was demonstrated by the fact that no party requested that the order be entered into the SJIS, and stated, that the order “remains within the control of the signer and that signer, the judge, is free to alter it, postpone its entry, or decide not to cause it to be entered at all.” App.130.

While the expungement issues were being litigated, the Defendants Bullock, Cooper, Balch and Seier filed motions for summary judgment while Defendant Gottier filed a motion to dismiss. App.14. The Defendants provided self-serving attestations that, except for Cooper and Balch, the Defendants did not know one another and were not involved in any conspiracy. App.14. The Defendants asserted that there was no issue of material fact because a Verizon representative was deposed who stated a telephone number that appeared on the telephone records of Defendants Cooper, Bullock and Seier was purportedly a routing number used to connect calls from outside a caller’s home area and was not assigned to any individual customer. App.13. The Verizon representative, however, provided no documentary evidence regarding these statements. Brief, pp. 53-57. The telephone records indicate, however, that these Defendants all received phone calls from this number “on dates surrounding notable events in this case, including the date of Newsome and Bullock’s

confrontation in the parking lot, the date of Newsome's arrest, the date Cooper sent the email with Newsome's mug shot to [the bank] executive, and the date the Newsome plaintiffs filed their complaint initiating the underlying action." App.12. Defendant Gottier, who was brought into the lawsuit by amended complaint, asserted that this telephone number did not belong to him even though internet searches indicated that the telephone number did belong to him. App.13. Defendant Gottier asserted that he was a victim of identity theft regarding the telephone number. App.13. Newsome filed opposition papers which included an affidavit from the director of the North American Numbering Planning Agency in Washington, D.C. who attested that the telephone number belonged to Ciera Networking Systems, Inc. and an affidavit from a former Vice President of Sales at Ciera who stated the telephone number has a CIC code 9 which indicates it is a code for Ciera Networking Systems, Inc. and indicates that the telephone calls were from a prepaid phone card. Brief, pp. 41-46. Defendants made a motion to strike these affidavits. App.133-134.

During the pendency of the motions for summary judgment, Petitioners moved to recuse the judge in the civil action. App.14. When the judge denied the motion, Petitioners sought a Writ of Mandamus from the Supreme Court of Alabama which was ultimately denied. App.14.

In rendering its decision on the Defendants' motion, the lower court judge struck the affidavits submitted by Petitioners in their opposition papers and rendered summary judgment in favor of the Defendants Bullock,

Cooper, Balch and Seier on June 15, 2018. App. 48-77; 133-134. The lower court also granted Defendant Gottier's motion to dismiss on the same date. App.46-47. The Petitioners moved to alter, amend or vacate these orders and the motion was denied on November 27, 2018. App.78-80. The Petitioners timely appealed these orders. Thereafter, on December 7, 2018, the lower court also awarded the Defendants attorneys' fees and costs pursuant to the Alabama Litigation Accountability Act, § 12-19-270 et seq., Ala. Code 1975. App.81-92. The Petitioners moved to alter, amend or vacate this order and the lower court denied the relief on December 18, 2018. App.93-94. The Petitioners timely appealed. The Supreme Court of Alabama consolidated the appeals and issued a decision affirming the judgments of the lower court on December 18, 2020. App.5-45, Petitioners filed timely Petitions for Rehearing with the Supreme Court of Alabama and the Supreme Court of Alabama denied the Petitions for Rehearing on February 19, 2021. App.1-4.

**2. How the federal questions sought to be reviewed were raised.**

Petitioners argued that the release was void under federal law pursuant to this Honorable Court's precedent in *Newton v. Rumery*, 480 U.S. 386 (1987), which requires that the party relying on the release must prove the release is valid. The Circuit Court improperly determined that the release was valid without applying the *Rumery* factors. App.51, 89. On appeal, the Supreme Court of Alabama addressed “[w]hether the release clause is void under federal law”

and improperly applied the *Rumery* factors in contravention of this Honorable Court's precedent. App.32-33.

Petitioners argued that the lower court could not rely on an unfiled order which was void pursuant to law. The Circuit Court did not address this issue. On appeal, the Supreme Court of Alabama addressed the issue in its opinion but violated the Petitioners' due process rights to appellate review by relying on an implicit holding the court had previously rendered regarding the unfiled order. App.22-25.

#### **REASONS FOR GRANTING THE WRIT**

The Supreme Court of Alabama's decision is the ideal vehicle to address whether a release-dismissal agreement pursuant to this Honorable Court's guidelines can encompass non-governmental persons and entities which were never contemplated in the seminal holding of *Newton v. Rumery*, 480 U.S. 386 (1987). Further, this Honorable Court must address whether these increasingly overbroad release-dismissal agreements can waive a litigant's right to pursue a criminal prosecution. The Supreme Court of Alabama's decision is also an ideal vehicle to address whether a state court judge can withhold the formal filing of a final decision/order and still be in accord with due process principles established by our Constitution.

**I. This Honorable Court's seminal holding in *Newton v. Rumery* does not allow the government to insulate non-governmental individuals and entities from all civil and criminal liability in release-dismissal agreements entered in a criminal action.**

In *Newton v. Rumery*, 480 U.S. 386 (1987), this Honorable Court held that release-dismissal agreements entered in a criminal action could not be deemed *per se* valid nor *per se* invalid but instead must be decided on a case-by-case approach. *Id.* In *Rumery*,<sup>2</sup> this Honorable Court established that this case-by-case approach required the defendant seeking to enforce a release-dismissal agreement prove that the agreement was entered into voluntarily, free from prosecutorial misconduct and was not offensive to relevant public interests. *Id.* at 399.

This Honorable Court's holding in *Rumery* has resulted in government overreach in the use of release-dismissal agreements warranting this Court's intervention. Since the *Rumery* decision, the use of release-dismissal agreements in criminal cases in Alabama have evolved beyond permissible use. Rather than simply waiving any civil claims against the government, the release-dismissal agreement in this action waives all civil and criminal claims against countless non-governmental individuals. This unconstitutional, overbroad release reads as follows:

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<sup>2</sup> Throughout our state and federal courts, the holding in *Newton v. Rumery* has routinely been referred to as the *Rumery* holding or standard.

The Defendant does hereby grant a full, complete and absolute Release of all civil and criminal claims stemming directly or indirectly from this case to the State of Alabama, its agents and employees, including but not limited to the District Attorney for Shelby County, Alabama, his agents and employees; to Shelby County, Alabama, its agents and employees, including, but not limited to the Sheriff of said County, his agents and employees, to any other law enforcement or investigative agencies, public or private, their agents and employees; to any other complainants, witnesses, associations, corporations, groups, organizations or persons in any way related to this matter, to also include the Office of the Public Defender of Shelby County, Alabama, its agents and employees, from any and all actions arising from the instigation, investigation, prosecution, defense, or any other aspect of this matter. The Defendant freely makes this release knowingly and voluntarily. In exchange for this release, this case will be either dismissed immediately, or pursuant to conditions noted above. App.97.

Petitioners correctly argued that the holding in *Rumery* should be applicable to the instant case and that this release-dismissal agreement was unenforceable as a matter of law pursuant to the holding in *Rumery*. Additionally, the public policy reasons set forth by this Honorable Court for not invalidating all release-dismissal agreements as void because of the government's interests in protecting itself by use of a release, are simply unavailable to non-

governmental individuals and entities. Further, *Rumery* never allowed for the waiver of criminal claims against any individuals. By extending the release to include “any other complainants, witnesses, associations, corporations, groups, organizations or persons in any way related to this matter,” the government, through the prosecutor’s office, impermissibly violated the constitutional rights of the Petitioners. App.97.

In deciding the instant action, the Supreme Court of Alabama upheld the lower court’s granting of summary judgment for the defendants stating that “Newsome is bound by the release clause in the D&R order.” App.15. The Supreme Court of Alabama simply failed to properly apply the *Rumery* factors to the dismissal-release at issue. The Supreme Court of Alabama stated “[t]he D&R order indicates on its face that Newsome voluntarily agreed to its terms. Moreover, there is no evidence, or even an allegation, of prosecutorial misconduct, and enforcing the D&R order according to its terms would not adversely affect any public interest.” App.33. The Supreme Court of Alabama improperly flipped the burden of proof set forth in *Rumery* onto the Petitioners. The proper burden of proof was on the defendants to show that the release obtained was voluntary, free from prosecutorial misconduct and did not affect the public interest. Defendants did not even attempt to meet this burden, yet each defendant was granted a motion for summary judgment despite the clear legal burden placed upon defendants to prove the elements established by the holding in *Rumery*. The defendants never met the legal burden required by *Rumery*.

The Supreme Court of Alabama's knee jerk reaction to summarily agree to the purported enforceability of the release-dismissal agreement is a common error that inflicts the state and federal courts. Our courts are under the erroneous notion that these agreements are presumptively valid – they are not. *Ohnemus v. Thompson*, 594 F. App'x 864, 868 (6th Cir. 2014). Further, since the *Rumery* holding many courts have failed to employ the “critical eye” required by *Rumery*. *Cuba-Diaz v. Town of Windham*, 274 F. Supp. 2d 221, 226 (D. Conn. 2003). Clearly, the Alabama courts have forgotten that the party seeking to enforce these release-dismissal agreements must show “absence of prosecutorial misconduct.” *Patterson v. City of Akron*, 619 F. App'x 462, 476 (6th Cir. 2015). This was a legal impossibility in this case whereas it is fundamentally illegal (and of course unconstitutional) to have a party waive a right to a criminal prosecution. *Raia v. Goldberg*, 33 Ala. App. 435, 439, 1948 Ala. App. LEXIS 506, \*10, 34 So. 2d 620; *Y.W. by & Through Smith v. Nat'l Super Mkts.*, 876 S.W.2d 785, 791 (Mo. Ct. App. 1994). Further, the preprinted dismissal-release order here will never meet the exacting standard set forth by *Rumery* wherein a blanket policy by a prosecutor's office does not meet the *Rumery* test. *Cuba-Diaz v. Town of Windham*, 274 F. Supp. 2d 221, 227 (D. Conn. 2003). The Alabama courts not only failed to apply the prosecutorial misconduct factor correctly, but also believed that these agreements are de facto beneficial and valid. Such a belief is a gross distortion of the *Rumery* test whereas these dismissal-release agreements are not presumptively valid nor are they per se beneficial to the public interest. *Ohnemus v. Thompson*, 594 F. App'x 864, 868 (6th Cir. 2014); *Cain*

*v. Darby Borough*, 7 F.3d 377 (3d Cir. 1993). Many counties and courts have discarded the *Rumery* factors and are requiring criminal defendants to agree to overbroad, illegal and unconstitutional agreements to secure their freedom. This is not the job of a prosecutor. Also, these release-dismissal agreements place a prosecutor in the dangerous role of perverting the criminal process to favor one litigant over another. The courts have routinely forewarned it is against legal ethics and standards to use the criminal process to gain an advantage in a civil case. *MacDonald v. Musick*, 425 F.2d 373, 376 (9th Cir. 1970). This ridiculous, dangerous release was used as a security blanket to protect many people and entities not associated with this case – including one of Alabama’s largest law firms.

By failing to apply the *Rumery* factors and flipping the burden of proof on the Petitioners in contravention of the law, the Alabama courts violated Petitioners’ due process rights. This violation of Petitioners’ due process rights was only compounded by disposing of the action on summary judgment. Causes of action have been established as a property right protected under the constitutional guarantee of due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). The Fifth Amendment firmly establishes an individual’s constitutional guarantee that “[n]o person shall...be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V. This Court has stated “[t]o suppose that ‘due process of law’ meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.” *Malinski v. New York*, 324 U.S. 401, 415

(1945). “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). This Honorable Court has established that there is a denial of due process where an absence of fairness fatally inflicts a trial because “fundamental fairness [is] essential to the very concept of justice.” *Lisenba v. California*, 314 U.S. 219, 236 (1941). “A litigant in civil proceedings is entitled to a fair hearing, imbued with the protections of due process.” *D.N. v. K.M.*, 61 A.3d 150, 156 (N.J. Super. Ct. App. Div. 2013). Throughout this action and the underlying criminal proceedings relating to the expungement of Petitioner Newsome’s criminal record, Petitioner Newsome was not afforded these cherished constitutional due process protections.

In filing the civil lawsuit, Petitioners clearly placed the voluntariness of the release at issue. Petitioner Newsome stated that when he signed the release, he was unaware of the conspiracy to have him arrested in order to ruin his reputation and take his book of business. Petitioner Newsome specifically alleged that the release was procured by the fraudulent conduct of the defendants and was therefore not voluntary. App.30. Petitioner Newsome’s claims of fraud were summarily rejected by the Alabama courts on a summary judgment motion. While the Supreme Court of Alabama acknowledged “that a release obtained by fraud is void,” the court improperly stated there were no issues of fact by giving carte blanche acceptance to the defendants’ self-serving attestations in support of their motions. App.31.

Also, Petitioners clearly set forth that summary judgment was inappropriate because the defendants did not and could not meet their burden of proof regarding the public policy requirements under *Rumery*. Petitioners established that the release-dismissal order used in Mr. Newsome's criminal case was on a preprinted form. Petitioners established that the preprinted release-dismissal form is used in all criminal dismissals in Alabama as part of a blanket policy. The defendants offered no testimony from the prosecution as to its reasoning why it believed the release was necessary in this case - as was their evidentiary burden.<sup>3</sup> Courts that have addressed the issue of form releases as part of a blanket policy of a prosecutor's office have found these releases to be unenforceable as a matter of law. *Cain v. Darby Borough*, 7 F.3d 377 (3d Cir. 1993); *Kinney v. City of Cleveland*, 144 F. Supp. 2d 908 (N.D. Ohio 2001). These courts have reasoned the public interest showing required under *Rumery* simply fails as matter of law when prosecutors rely on a blanket policy of requiring releases in exchange for dismissals. *Cain*, 7 F.3d at 383; *Kinney*, 144 F. Supp. 2d at 918-19. In *Cain*, the court explained, “[t]he standard for determining whether a release meets the public interest requirement is an objective one, based upon the facts known to the prosecutor when the agreement was reached. Additionally, the public interest reason

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<sup>3</sup> Indeed, in the defendants' attempt to vacate Mr. Newsome's expungement, the prosecution was present at the hearing and interestingly, the prosecution made no attempt to address the validity of the release and its effect on non-parties to the criminal case. App.99-116.

proffered by the prosecutor must be the prosecutor's *actual reason* for seeking the release." *Id.* at 381. Furthermore, the court stressed that in determining public policy "the issue is not what the prosecutor might or could have thought; it is what actually motivated him or her in seeking a particular release." *Id.* In the instant action, the defendants provided no testimony regarding why the prosecution sought the release. In contrast, Petitioners established that the release was part of a blanket policy by the prosecutor's office. As a matter of law, the Supreme Court of Alabama's decision is in contravention of this Honorable Court's precedent.

Furthermore, this case gives this Honorable Court the opportunity to address whether these overbroad releases would violate public policy even when they are not part of a blanket policy of the prosecutor's office. These types of purported agreements impermissibly blur the line between criminal and civil actions. In order to satisfy the public policy showing in *Rumery*, the prosecutor would need to investigate and determine that any and all civil claims between the defendant, complainant, and all potential witnesses are meritless. This is not the function of the prosecutor's office and injects too many variables into criminal cases. Additionally, by utilizing the prosecutor's office to preclude all civil claims against non-governmental entities, the State becomes a de facto witness in all civil actions as to the validity of the release. While this might not be unduly burdensome in an action against the government, it would be a waste of government resources to have prosecutors testify as to the reasons behind requiring a release of claims that have nothing

to do with the government. These overbroad releases would overburden any prosecutor's office.

The release in the instant action also releases all criminal claims against individuals in any way related to the events at issue. This is illegal and unenforceable. *Raia v. Goldberg*, 33 Ala. App. 435, 439, 1948 Ala. App. LEXIS 506, \*10, 34 So. 2d 620; *Y.W. by & Through Smith v. Nat'l Super Mkts.*, 876 S.W.2d 785, 791 (Mo. Ct. App. 1994). *Rumery* never stood for the proposition that the government could make criminal defendants release their criminal claims against individuals. The release of criminal claims in release-dismissal agreements is simply a non-starter as it makes prosecutors the judge and jury. This would bypass almost every constitutional protection afforded to individuals.

Additionally, this type of overbroad release simply creates a dangerous situation. Blanket general releases in criminal release-dismissal orders create an incentive to bring criminal charges in order for individuals to insulate themselves from civil liability. This would forever pervert the criminal justice system. Individuals who are arrested face an impossible situation wherein they can either sign a dismissal-release agreement waiving all civil and criminal claims against the person who filed charges, or they are forced to defend against a criminal case that could take months, if not years, in order to preserve any claims they may have against the person who filed charges.

The patently bizarre situation Petitioner Newsome was subjected to only highlights the absurdity and overreach of this blanket dismissal-release. In seeking

an expungement of a criminal charge that was dismissed with prejudice, a defendant in this civil action sought a reversal of Petitioner Newsome's expungement of his criminal record. Purported rights under this overbroad release were deemed a basis for individuals to intervene in the expungement of Petitioner Newsome's criminal record. This absurd situation was created by a release which simply should have been deemed overbroad and unenforceable. The judge who ordered that Petitioner Newsome's criminal expungement be vacated impermissibly created an untenable situation for Petitioner Newsome. If Petitioner Newsome did not want to be bound by the Release, Petitioner Newsome had to vacate his dismissal and go to trial. App.108, App.113, App.115. *Rumery* does not allow for this type of extortion. *Rumery* allows for either the enforcement of a release or the striking of a release. It does not allow courts to demand criminal prosecution be reinstated upon the challenge of a release. Criminal prosecutions were never supposed to become bargaining chips in civil actions. There is no legitimate public policy argument for any individual to release all criminal and civil claims against individuals potentially related to a criminal action. The end result is dangerous - criminal cases become bargaining chips in civil litigation.

The courts in Alabama also granted and affirmed an award for attorneys' fees related to Petitioner Newsome's challenge to the overbroad, illegal release that purportedly waived Newsome's civil and criminal claims even against non-governmental parties. App.42. Burt Newsome was well within his right to file a lawsuit in his home state and consequently challenge

the enforceability of this suspect release. Indeed, the courts have routinely reminded the legal community that these releases must be reviewed on a case-by-case basis. *Ohnemus v. Thompson*, 594 F. App'x 864, 868 (6th Cir. 2014). Further, courts must review a purported release with a critical eye. *Cuba-Diaz v. Town of Windham*, 274 F. Supp. 2d 221, 226 (D. Conn. 2003). The adequacy of a dismissal-release is always reviewed in a case specific manner wherein “each case involves unique facts and policy considerations.” *Lynch v. Alhambra*, 880 F.2d 1122, 1128 (9th Cir. 1989). Additionally, in order to enforce a dismissal-release, it is incumbent on the party seeking its enforceability to meet the three factors set forth in the *Rumery* test. As a result, an action cannot be frivolous whereas a fact dependent test was required to analyze whether a dismissal-release was valid under the exacting standard set forth by *Rumery*. A challenge to this release was not unexpected nor was it frivolous – especially a release that illegally waives criminal claims and attempts to shield non-governmental actors and entities. In challenging this legally infirm release, Petitioner Newsome was attempting to pursue his property right via a legal action. Finally, allowing attorneys’ fees to be awarded for challenging this type of release creates a chilling effect on the right to challenge these releases which actually requires a critical eye by the reviewing court. As a result, the award for attorneys’ fees should be vacated as a matter of law.

**II. Due Process does not allow for courts to give deferential treatment to implicit holdings and unfiled orders because it deprives a litigant of his right to full appellate review.**

This Honorable Court has held if a state provides a process for appellate review, “the procedures used must comply with constitutional dictates of due process.” *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St. 3d 80, 84, 523 N.E.2d 851, 855 (1988)(citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). Our system of justice demands that litigants be afforded the right to an open and fair court system. This Honorable Court has noted that once a state provides appellate review “these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 111 (1996).

On appeal, the Petitioners argued that “the expungement-reversal order is invalid because it is not in the SJIS.” App.25. The Supreme Court of Alabama claimed this argument was without merit because “[w]hen this Court directed the Shelby Circuit Court to enter the expungement-reversal order into the SJIS in April 2018, we implicitly held that that order was valid and that the evidence supported the court’s exercising its discretion to reverse the expungement order. We expressly confirm that now.” App.25. This *implicit* holding, however, is based upon an abuse of discretion standard of review that applied to a Writ of Mandamus proceeding, and not the *de novo* review required in this direct appeal.

Indeed, when the Supreme Court of Alabama denied the Writ and ordered that the June 8, 2016 order be

entered in the SJIS system, two judges provided dissenting opinions. One dissenting Justice wrote, “by instructing the trial court to enter its June 8, 2016, order into the SJIS, this Court invades the province of the trial court to determine whether – and, if so, when – that order should be made effective.” App.130. This Justice further explained that the order “remains within the control of the signer and that signer, the judge, is free to alter it, postpone its entry, or decide not to cause it to be entered at all.” App.130.

The appellate courts throughout our nation make abundantly clear that “[p]arties are entitled to clear communication from the orders issued by all courts, including courts of limited jurisdiction...[t]he rights of litigants and the integrity of our system of justice depend on a reasonable level of certainty in recording the final decisions of our courts.” *State v. Montoya*, 2008-NMSC-043, ¶ 21, 144 N.M. 458, 463-64, 188 P.3d 1209, 1214-15; *State v. Lohberger*, 2008-NMSC-033, ¶ 34, 144 N.M. 297, 304, 187 P.3d 162, 169. Our appellate courts have additionally noted that an appeal has no value unless proper notice of the final order is clearly expressed and filed with the clerk. *Swander Ditch Landowners' Ass'n v. Joint Bd. of Huron & Seneca Cty. Comm'r's*, 51 Ohio St. 3d 131, 133, 554 N.E.2d 1324, 1327 (1990); *State v. Lohberger*, 2008-NMSC-033, ¶ 34, 144 N.M. 297, 304, 187 P.3d 162, 169. A clear, final order is important to the administration of justice because “uncertainty about whether or when a final order has been filed may unintentionally forfeit a party's right to appellate review.” *State v. Lohberger*, 2008-NMSC-033, ¶ 25, 144 N.M. 297, 302, 187 P.3d 162, 167.

Sadly, this is what tragically unfolded in Petitioner Newsome's matter whereas he was unable to engage in comprehensive appellate review of the whether the order is void. Petitioner Newsome did file a Writ of Mandamus to challenge the order, but this was not the appropriate vehicle to review a final order and the unnecessary legal maneuver changed the reviewable standard from *de novo* to the more deferential standard of abuse of discretion. This was a clear violation of the due process of law. Indeed, the Alabama courts have noted "a writ of mandamus is not a substitute for an appeal." *Dixon v. City of Mobile*, 859 So. 2d 462, 464 n.1 (Ala. Crim. App. 2003).

As a matter of law, Petitioners had a due process right to *de novo* review of whether the unfiled order is void as a matter of law. In relying on its implicit holding on Petitioner Newsome's Writ of Mandamus, the court impermissibly relied on the inappropriate abuse of discretion standard. Due process does not allow for Petitioner Newsome to be subject to an implicit holding on an order which remains unfiled.

## **CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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