

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 85-1449

**TITLE** TOWN OF NEWTON, ETC., ET AL., Petitioners V.  
BERNARD E. RUMERY, JR.

**PLACE** Washington, D. C.

**DATE** December 8, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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TOWN OF NEWTON, ETC., ET AL., :  
Petitioners, : No. 85-1449  
v. :  
BERNARD E. RUMERY, JR. :  
- - - - - :

Washington, D.C.  
Monday, December 8, 1986

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:53 o'clock a.m.

APPEARANCES:  
DONALD E. GARDNER, ESQ., Manchester, N.H.; on behalf of  
the petitioners.  
CHARLES P. BAUER, ESQ., Concord, N.H.; on behalf of the  
respondent.

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1 P R O C E E D I N G S

2 (10:53 a.m.)

3 CHIEF JUSTICE REHNQUIST: You may proceed  
4 whenever you are ready, Mr. Gardner.

5 MR. GARDNER: Mr. Chief Justice, and may it  
6 please the Court:

7 On behalf of the town of Newton, New  
8 Hampshire, I appear before you today because a gentleman  
9 by the name of Bernard Rumery reached an agreement in  
10 conjunction with the dismissal of a valid criminal  
11 prosecution against him. Mr. Rumery agreed that he  
12 would not pursue a civil action against the town, the  
13 arresting officer, or any of the town's public servants.

14 Subsequently, Mr. Rumery breached that  
15 agreement. The Federal District Court, Justice Martin  
16 Laughlin, ruled that Mr. Rumery's agreement should be  
17 enforced.

18 The Court specifically found that Mr. Rumery  
19 voluntarily, knowingly and deliberately waived his right  
20 to bring a subsequent action and that when he did so, he  
21 did so thinking and knowing that it was in his best  
22 interest. Mr. Rumery now seeks to escape the  
23 consequences of his agreement by asking this Court to  
24 apply a per se prohibition against the type of agreement  
25 that he entered on that day in 1983.



1           If the Court accepts the arguments offered by  
2 Mr. Rumery and allows him to revoke his agreement, then  
3 this Court not only will be providing Mr. Rumery with a  
4 benefit but will also be denying all present and future  
5 defendants in a situation like Mr. Rumery, they will in  
6 effect be prevented from taking upon themselves an  
7 opportunity like that which was presented by Mr. Rumery.

8           I therefore suggest to the Court that  
9 application of a per se rule in this case offends common  
10 sense, basic justice, and fair play.

11           QUESTION: The argument that you are  
12 preventing future people from engaging in it is not  
13 terribly persuasive. You could say the same thing  
14 about, if you -- if we didn't enforce promises made to  
15 blackmailers we would be denying people in the future  
16 the opportunity to prevent blackmailers from doing the  
17 terrible things they are threatening to do by making a  
18 promise to them.

19           MR. GARDNER: I would agree, Your Honor, the  
20 difference being --

21           QUESTION: So if, indeed, there is some  
22 overreaching here, and it is a bad thing to have cities  
23 or anybody doing this sort of thing -- it's hardly  
24 something to be worried about, that we're preventing it  
25 from happening in the future.

1 MR. GARDNER: If in fact it were overreaching,  
2 I would agree, Your Honor. The suggestion that a  
3 blackmailer in the town might be engaging in a similar  
4 type of conduct as regards this type of a situation, I  
5 would suggest, is not appropriate.

6 This is a case where the County Attorney, as  
7 opposed to a town -- an actual town representative --  
8 entered in to an agreement when he was concerned about a  
9 prosecution, concerned about the principal witness, the  
10 complaining witness, and the fact that she was also the  
11 victim of a rape and that she may not be willing to  
12 testify in this subsequent action, he entered into an  
13 agreement at that point in time to dismiss the  
14 prosecution, conditioned upon the police officer, the  
15 public servants, and the town being somewhat protected,  
16 or being protected against a civil action.

17 This is a case where a man made a voluntary,  
18 knowing and deliberate choice. This is a case where a  
19 man gave up a right to a civil remedy, and it's a case  
20 that I would suggest, also --

21 QUESTION: He also gave up the right to defend  
22 himself in court, too, I suppose. The thing that really  
23 is on the table is whether he wanted to stand trial on a  
24 criminal charge.

25 MR. GARDNER: He had a choice. He chose not

1 to stand trial on a criminal charge, but in a sense  
2 chose to have his day in court when he had nothing to  
3 lose, apparently, be reneging on his agreement and  
4 thereafter --

5 QUESTION: Do you think there are very many  
6 cases in which the defendand would say, I'd much rather  
7 go to trial on the criminal charge, than just have you  
8 dismiss the charges?

9 MR. GARDNER: Commonly, I would expect that a  
10 defendant who is assured of his innocence will do that.  
11 I expect in a plea bargain situation --

12 QUESTION: Assured of his innocence, he'd  
13 still want to go to trial, even though you know nothing  
14 is all that certain in trials?

15 MR. GARDNER: Well, I would expect, Justice  
16 Stevens, that that's very similar to the plea bargaining  
17 situation and we see people who stand trial despite plea  
18 bargain offers on a daily basis.

19 I would suggest in that situation --

20 QUESTION: Those are a choice between one of  
21 two different criminal trials. The plea bargain is  
22 never one where you get total exoneration in exchange  
23 for a bargain.

24 MR. GARDNER: Well, there are plea bargains  
25 which are very near total exoneration, situations in New

1 Hampshire, for instance, where an individual can plead  
2 to a lesser included misdemeanor and suffer a  
3 conditional discharge which allows him an automatic  
4 annulment of his record in one year.

5 If in this particular case --

6 QUESTION: It's still fairly serious.

7 MR. GARDNER: It is certainly not going to  
8 jail, for instance, and it's something that if it were  
9 done in this case, we would not be here today over it.

10 I'm not suggesting particularly that Mr.  
11 Rumery would or would not have entered into an agreement  
12 like that. But I am suggesting that the distinction  
13 between that and what happened in this case is not all  
14 that great and that in effect all that's happened here  
15 is, the state has given up a criminal prosecution but in  
16 doing so, in a case involving arrest, a question of the  
17 propriety of the arrest, not a question of abuse of  
18 force, a question of arrest, and in this case all tht  
19 was at issue was whether the arrest was proper.

20 QUESTION: Do you suppose a bargain would be  
21 enforceable if the prosecutor said, we'll dismiss the  
22 charges if you give \$1,000 to the police benefit fund?

23 MR. GARDNER: If you give \$1,000 to the police  
24 benefit fund -- I would liken that to the blackmail that  
25 Justice Scalia --



1 QUESTION: Well, why is that any different  
2 from this?

3 MR. GARDNER: Well, because in that case the  
4 prosecutor is doing something that's wholly outside his  
5 ambit.

6 QUESTION: You mean he has a duty to prosecute  
7 if he thinks there's prima facie evidence?

8 MR. GARDNER: He has a duty to prosecute, but  
9 his duty is not solely to convict. His duty is to serve  
10 society and the best interests of society, and there are  
11 many cases that --

12 QUESTION: Don't you think the police benefit  
13 fund serves society?

14 MR. GARDNER: Not as directly as the  
15 prosecutor's activities on behalf of society in judging  
16 whether or not in a particular case --

17 QUESTION: Well, here you can settle a loss to  
18 it for less than \$1,000, if it's a frivolous case.  
19 What's the difference? I don't understand.

20 MR. GARDNER: Well, the distinction, I would  
21 suggest, Your Honor, is that again the prosecutor in the  
22 situation where he garnered \$1,000 for the police  
23 benefit society would in fact be outside the ambit of  
24 proper prosecutorial discretion, whereas in this  
25 situation, I would suggest, he was well within the

1 proper area of prosecutorial discretion.

2 QUESTION: -- garnered the release for two or  
3 three police officers who otherwise might be subjected  
4 to personal liability.

5 MR. GARDNER: The prosecutor in this case,  
6 Your Honor, did not -- there is no evidence that the  
7 prosecutor in this case demanded a release. The  
8 evidence is in this case that the defending attorney,  
9 Attorney Woods, called the prosecuting attorney and  
10 said, you'd better dismiss the case against my client  
11 and if you don't, we're going to sue afterwards and  
12 we're going to win.

13 He then knew, having thrown down the gauntlet,  
14 as he testified to in his deposition, that the only way  
15 this case could be resolved is if a release were  
16 executed. It's important to realize that never did the  
17 defendant speak with the police --

18 QUESTION: In other words, it was settled on  
19 the assumption that there was a meritorious 1983 claim  
20 that would otherwise be filed, is that it?

21 MR. GARDNER: It was not -- I would not  
22 suggest that it was settled on the assumption that there  
23 was a meritorious claim. I would suggest that it was  
24 settled on the assumption that any claim brought, a 1983  
25 claim or other, a false arrest state claim, has a

1 settlement value in that it causes the person who is  
2 sued a considerable inconvenience.

3 It causes the person against whom suit is  
4 brought to have to defend that action. The cost --

5 QUESTION: Why is that inconvenience to the  
6 individual police officer any different from the benefit  
7 to my police fund?

8 MR. GARDNER: Because the police officer in  
9 the criminal justice system is a public servant. The  
10 prosecutor is acting on behalf of the state. The police  
11 officer, when he arrested Mr. Rumery, was not making --  
12 he was not taking action on his own behalf. He was  
13 acting for the state.

14 He was, in effect, an agent of the state. As  
15 a matter of fact, in bringing the 1983 action, the  
16 plaintiff must so plead, that he was a state actor.

17 QUESTION: Mr. Gardner, if the 1983 suit has a  
18 dollar settlement value, how is the case different from  
19 just having the police say, if the respondent will pay  
20 the city \$1,000 it will dismiss the charges?

21 MR. GARDNER: I would suggest, Your Honor,  
22 that not all cases have a dollar settlement value on  
23 account of their inherent value.

24 QUESTION: You said this one probably did.

25 MR. GARDNER: I was suggesting that I have a

1 file cabinet full of releases in cases which I don't  
2 believe are meritorious, that have been settled because  
3 the settlement value -- the nuisance value of the case --

4 QUESTION: Well, let's suppose there is a  
5 dollar settlement value. How is it different from just  
6 saying, you pay us "X" number of dollars and we'll drop  
7 the charges?

8 MR. GARDNER: Well, a dollar settlement value,  
9 as I understand it, if this were a case that were being  
10 pursued, would run to Mr. Rumery rather than vice  
11 versa. I think your example suggests that Mr. Rumery is  
12 going to pay money to the state.

13 QUESTION: Well, he is giving up his suit,  
14 something of value.

15 MR. GARDNER: And he is also -- he is  
16 voluntarily waiving something which he knows, because he  
17 has been advised by counsel, he's thought about it. In  
18 fact, in Mr. Rumery's case his counsel testified that he  
19 spent a half hour to an hour with him. They discussed  
20 it. He went home. He thought about it over the weekend.

21 He was gaining something in return. He was  
22 gaining the dismissal of the criminal prosecution  
23 against him.

24 QUESTION: Well, isn't that very fact  
25 something that makes it different from plea bargaining



1 because here the city has something else it's concerned  
2 about other than just the operation of the process of  
3 the enforcement of the criminal law in reaching this  
4 agreement? There's another element at stake, to wit,  
5 the city's or the officer's own liability.

6 MR. GARDNER: In the plea bargaining context,  
7 he's obviously pleading to a reduced offense, even to  
8 the point of a reduced offense that is perhaps not going  
9 to cause him any disability for any great period of time  
10 into the future.

11 QUESTION: And what was the motive of the  
12 prosecutor, or the reason --

13 MR. GARDNER: In our case there were several  
14 motives, I think. I think it's appropriate prosecutorial  
15 discretion to look at the situation, and I would suggest  
16 to the Court that you have to look at the totality of  
17 the circumstances and determine whether it was  
18 voluntary, just, deliberate.

19 QUESTION: Do you think determining whether --  
20 should a factor in determining whether to dismiss the  
21 case be that this will protect some public official?

22 MR. GARDNER: The factor in determining  
23 whether to -- well, that should be a factor. I think  
24 it's appropriate and it's within -- it should be within  
25 his discretion that that be a factor, yes, Your Honor.

1 I would suggest that when he -- because what  
2 he's effectively doing, in an arrest case --

3 QUESTION: Well, what that means to me is that  
4 you would otherwise pursue the criminal case if it  
5 weren't for this factor?

6 MR. GARDNER: If that were the only factor.

7 QUESTION: Well, no, but if you say it's a  
8 factor, there are bound to be some cases where that's  
9 the factor that determines whether you will try the case  
10 or not.

11 MR. GARDNER: I would suggest that if that  
12 were the factor --

13 QUESTION: So you think that you're justified  
14 in trading off the public interest in having this  
15 criminal case tried, against releasing the public  
16 official?

17 MR. GARDNER: I would suggest that if that  
18 were the only factor, Justice White, what we would be  
19 talking about is a coercive situation, inherently  
20 coercive, and I would trust the trial court to find that  
21 it wasn't a voluntary waiver.

22 QUESTION: But you say it can always be a  
23 factor.

24 MR. GARDNER: If it's the only factor, I would  
25 suggest that in that particular case, it was clearly a

1 coercive situation.

2 QUESTION: Well, here's a case where you had  
3 otherwise tried -- there has to be some situations like  
4 this that you would otherwise try, but you did not  
5 because there is this factor of possibly gaining the  
6 release of a public official?

7 MR. GARDNER: I would suggest, Your Honor,  
8 that there is absolutely no evidence in this case that  
9 it would otherwise have been tried. I don't know -- in  
10 fact, the prosecutor said, if there had not been a  
11 release, I don't know what I would have done.

12 There hadn't even been a probable cause  
13 hearing in this case. This man had been arrested and  
14 bailed, and that was it.

15 QUESTION: Mr. Gardner, I think the issue in  
16 this case is whether a per se rule is appropriate. In  
17 other words, what's at issue in this case is the whole  
18 file cabinet full of releases you've obtained in all  
19 those other cases, because that's -- we have a general  
20 rule.

21 We have to presume that all of those other  
22 cases would have been dismissed, or would not have been  
23 dismissed, without this release?

24 MR. GARDNER: Well, if there's going to be a  
25 per se rule, then obviously that's what we have to do.

1 The Court is either going to have to presume that all of  
2 the cases would have been dismissed or not dismissed,  
3 and that's the difficult--

4 QUESTION: Which do you think is the correct  
5 presumption? If you've got, say 150 releases in your  
6 drawer and dismiss cases, do we assume there was merit  
7 to all those cases or no merit to all those cases?

8 MR. GARDNER: I would suggest, Your Honor,  
9 that this Court have faith in the prosecutors of America  
10 and assume that those cases, if they were not  
11 meritorious, would have been dismissed despite the  
12 release, or the obtaining of a release.

13 I would suggest also, Your Honor, that in an  
14 arrest --

15 QUESTION: Then really, there's no  
16 consideration for the release except that the defendant  
17 got out of a meritless criminal trial, and I suppose  
18 there's a lot of pressure on a defendant to give a  
19 release in that situation if he's faced with a trial,  
20 even if he thinks he's going to win it.1

21 MR. GARDNER: Well, I wouldn't say that he was  
22 getting out of a meritless criminal trial, just because  
23 the prosecutor determines that he's not going to  
24 prosecute the case. Prosecutors have compassion. Mr.  
25 Rumery was a middle aged man. He was a businessman. He



1 had a reputation. He had had no contacts with the law.

2 The prosecutor was concerned that in this case  
3 the complaining witness might not be willing to testify.

4 QUESTION: We can't really assume, in other  
5 words, that all the cases that are dismissed are  
6 necessarily meritless cases. You often dismiss cases  
7 that have merit, I take it.

8 MR. GARDNER: I'm not a prosecutor, Your  
9 Honor, but I would suggest that there are --

10 QUESTION: And many cases that have merit are  
11 never brought.

12 MR. GARDNER: Many cases that have merit are  
13 never brought. Many cases that are merited cases are  
14 dismissed.

15 QUESTION: But what you're saying is that a  
16 case that has merit but nonetheless, despite its merit,  
17 might otherwise be dismissed because a witness would  
18 have to, as in this case, a woman in a rape case who  
19 didn't want to testify would have to be called, that  
20 otherwise the prosecutor might dismiss the case;  
21 nonetheless would have to go forward to it despite the  
22 inconvenience to this raped witness, unless the  
23 prosecutor could be sure that by dismissing it, he was  
24 not letting the city in for an enormous suit for false  
25 prosecution.

1 MR. GARDNER: I'm saying that in each --

2 QUESTION: You're not saying that?

3 MR. GARDNER: What I'm saying is that in each  
4 case you have to look at the case when the decision has  
5 to be made, and determine whether at that time the  
6 situation resulted from a voluntary, knowing, deliberate  
7 waiver of the right to bring the action by the  
8 individual.

9 QUESTION: Can the motive of saving the city  
10 from a suit, or individual policemen from a suit, also  
11 exist when a prosecutor accepts a plea bargain to a  
12 lesser offense, so that in some cases where the  
13 prosecutor might otherwise consider dismissing the  
14 charge entirely, he insists upon accepting a plea to a  
15 lesser charge in order to be sure that the city wouldn't  
16 be subject to suit for false prosecution subsequently?

17 MR. GARDNER: Well, that certainly could  
18 happen, and it's obvious that --

19 QUESTION: Does pleading guilty to a lesser  
20 included offense eliminate the possibility of bringing a  
21 false arrest or false prosecution action later?

22 MR. GARDNER: To my understanding, it does,  
23 Your Honor.

24 QUESTION: Mr. Gardner, what is the source of  
25 law in this area? You've been giving a lot of answers

1 and you've got a lot of questions.

2 Is it federal law?

3 MR. GARDNER: To my understanding, Your Honor,  
4 the First Circuit applied federal law --

5 QUESTION: But you're here now in the Supreme  
6 Court. You don't have to take the word of the First  
7 Circuit any more.

8 MR. GARDNER: In that I'm very pleased because  
9 they decided the case against me, Your Honor. What I  
10 would suggest is that the law here is a question of  
11 public policy, as was suggested below, and what the  
12 Court has to --

13 QUESTION: Well, but public policy is  
14 ordinarily a matter for state courts to decide in New  
15 Hampshire.

16 MR. GARDNER: Except when it affects  
17 constitutional rights.

18 QUESTION: Well, is the source of law here the  
19 federal common law, basically because it's a 1983  
20 action, like immunity in 1983 is a federal law, or the  
21 validity of a release is also a federal question?

22 MR. GARDNER: There is a suggestion, or I  
23 would suggest, Your Honor, that the First Amendment, the  
24 right to petition for redress of grievances, might  
25 arguably be applied and the suggestion might be that an

1 individual who waives his right to seek redress or  
2 through the civil rights remedy for a deprivation of his  
3 constitutional rights has in effect waived his right to  
4 petition the Court for redress of grievances.

5 It is my understanding that that was the  
6 interpretation of the First Circuit. There is also a  
7 due process argument to the effect that if he didn't  
8 waive it voluntarily, he was deprived of due process.

9 The fact in this case, and the fact that is  
10 vital to this case, is that the question of the  
11 voluntariness of the release has been found in this case.

12 QUESTION: But where do we look? Are there  
13 other lines of cases that you think are relevant? I  
14 mean, do we just kind of sit down and talk about it and  
15 think --

16 MR. GARDNER: I think, in order to determine  
17 what test to apply, I think the Court should look to  
18 what test it has applied in interpreting waivers of  
19 constitutional rights. And if you look to the  
20 constitutional rights cases, the Miranda cases, the plea  
21 bargaining cases, you see that in each of those cases  
22 the Court has looked to the question of whether the  
23 release or -- excuse me, the waiver was signed or agreed  
24 to after informed and voluntary consideration.

25 So, I would suggest that, given the totality



1 of the circumstances, a trial court be trusted to  
2 examine the -- I know what you are going to say, Justice  
3 Scalia.

4 QUESTION: I mean, informed or voluntary. You  
5 know, there --

6 MR. GARDNER: I think that it's important to  
7 look at -

8 QUESTION: The thief comes up and says, your  
9 money or your life, you know, and --

10 MR. GARDNER: I think that's coercive.

11 QUESTION: You know, there used to be a Jack  
12 Benny story, and he'd say, hmm, you know, he'd pause for  
13 a couple of minutes.

14 You don't have to pause. It's informed and  
15 knowledgeable. You give him your money. But does that  
16 make it all right? It certainly doesn't.

17 If that's the kind of influence that's being  
18 exerted here, it has to be bad, whether it's intelligent  
19 to do it or not, right?

20 MR. GARDNER: I agree, and I would suggest  
21 that the trial court is the best court to determine  
22 that, and the best way to have that determined is to  
23 give the trial court the latitude to look at whether the  
24 release was signed voluntarily after deliberation and in  
25 an informed manner.

1           We have to recall that Mr. Rumery in this case  
2 deliberated over the weekend, that Mr. Rumery had the  
3 advice of a very competent attorney, as found by the  
4 trial court.

5           QUESTION: Yes, but in Justice Scalia's  
6 example, I suppose that if the lawyer was with the man  
7 that he'd give him the same advice?

8           QUESTION: Right, he turns to the lawyer and  
9 he says, should I give him my money or my life? The  
10 lawyer says, give him the money.

11          QUESTION: It's an intelligent decision,  
12 right, and --

13          QUESTION: And it's voluntary..

14          MR. GARDNER: There are three prongs to the  
15 test, and I would suggest that is not voluntary. I  
16 would suggest that any time circumstances are coercive  
17 -- I would suggest, for instance, in a situation unlike  
18 this case where a substantial amount -- or any undue  
19 force was used on a criminal defendant in the course of  
20 his arrest or subsequent --

21          QUESTION: Isn't the reason the holdup is  
22 involuntary is that the victim runs the risk of  
23 substantial harm if he doesn't hand over the money, and  
24 a man who elects to stand trial in a public criminal  
25 proceeding may also run the risk of substantial harm to

1 his reputation?

2 MR. GARDNER: The man who refuses to accept a  
3 plea to second degree and stands trial to murder in the  
4 first degree, stands a substantial risk of capital  
5 punishment in some states. I'd say that's an extreme  
6 harm, which this Court has found to be an acceptable  
7 situation in plea bargaining cases where the Court has  
8 found that it was voluntary and informed.

9 And, I would suggest to the Court that those  
10 are the tests that must be applied in these cases, and  
11 that no blanket prohibition is appropriate. After all,  
12 Justice Holmes, I think, is the one who said, universal  
13 distrust creates universal incompetence. And I would  
14 suggest that a per se blanket rule --

15 QUESTION: Can I get back to the Chief Judges  
16 in question. What is the constitutional violation that  
17 you urge this Court to find in this case, specifically?

18 MR. GARDNER: I urge the Court not to find a  
19 constitutional violation in this case. I would suggest  
20 that there has been none.

21 QUESTION: Well, how has your client been  
22 harmed? Let me try that one.

23 MR. GARDNER: By the First Circuit's opinion,  
24 Your Honor. I would suggest --

25 QUESTION: What did it do?

1 MR. GARDNER: In that it found that a per se  
2 rule would be applied in every case, and our facts in  
3 this case demonstrate --

4 QUESTION: Denied your client what?

5 MR. GARDNER: That denied my client the  
6 benefit of the release which Mr. Rumery had executed.

7 QUESTION: And that violated what section of  
8 the Constitution?

9 MR. GARDNER: I'm not sure. It's our  
10 contention that --

11 QUESTION: Well, if it doesn't, why -- where  
12 do we get jurisdiction? Where does this Court get  
13 jurisdiction?

14 MR. GARDNER: Well, it seems to me, Your  
15 Honor, that jurisdiction is the question of whether or  
16 not the Court accepts jurisdiction on the basis of the  
17 respondent's claim that his constitutional rights have  
18 been violated, and the Court accepted cert because of  
19 the discrepancy of the decisions of the various circuits  
20 on this question.

21 QUESTION: Mr. Gardner, I understood that you  
22 were denying that there was any violation of  
23 constitutional rights.

24 MR. GARDNER: I have taken the position that  
25 my client, who is the town of Newton, New Hampshire,



1 entered into an agreement --

2 QUESTION: I understand that, but you are  
3 saying that there has been no violation of  
4 constitutional rights in this case?

5 MR. GARDNER: That's correct, Your Honor. Mr.  
6 Rumery says the contrary.

7 QUESTION: It seemed to me that you were not  
8 making that entirely clear.

9 MR. GARDNER: I'm sorry. It's my position  
10 that there have been no constitutional rights violated.  
11 Mr. Rumery takes the contrary position.

12 The First Circuit adopted a rule which says,  
13 in every case these releases are going to be held void,  
14 no matter what the facts are, and I'm here to tell this  
15 Court that in my opinion -- and to suggest to this Court  
16 that the facts are such, in our case, that the release  
17 dismissal agreement should be enforced.

18 QUESTION: Mr. Gardner, may I just ask this.  
19 Under the First Circuit holding, they say the release is  
20 void. Is that just as to the 1983 federal claim? What  
21 about the ancillary state law claims for malicious  
22 prosecution?

23 MR. GARDNER: The First Circuit didn't reach  
24 that.

25 QUESTION: I suppose that one could view the

1 opinion as allowing those -- the release to still be  
2 valid and binding as to state law claims?

3 MR. GARDNER: I would expect so. The  
4 difficulty is, of course, that in the particular case i  
5 it is binding as to the state law claims, it creates a  
6 very difficult situation because then he can't prove the  
7 false arrest in the state tort and the constitutional  
8 violation on the other side seems to want to follow  
9 that, at least in my mind, Your Honor.

10 QUESTION: The constitutional issue -- did the  
11 First Circuit decide a constitutional question?

12 MR. GARDNER: Well, the First Circuit  
13 determined that it violated Mr. Rumery's right under the  
14 First Amendment to seek redress of grievances by virtue  
15 of his signing this document.

16 QUESTION: Where does it say that? All I can  
17 find here is that it held that the covenant not to sue  
18 was void, as against public policy.

19 Where was there any suggestion that it was  
20 void under the Constitution?

21 MR. GARDNER: I would certainly suggest, Your  
22 Honor, that it was briefed on both sides and --

23 QUESTION: Well, I had been briefed, but where  
24 does the Court of Appeals say that it was void, the  
25 covenant was void, under the First Amendment?

1 QUESTION: The Court of Appeals didn't cite a  
2 single Supreme Court decision, as I recall.

3 QUESTION: It just said that this wasn't a  
4 good defense to a 1983 action, which they certainly  
5 decided the federal question and which --

6 MR. GARDNER: And which both sides took as a  
7 finding that under the First Amendment, he was  
8 entitled. I suppose that we're guilty on both sides of  
9 assuming that that was the basis of the First Circuit's  
10 finding.

11 QUESTION: You suggested earlier, did you not,  
12 Mr. Gardner, that there was perhaps a due process claim  
13 here?

14 MR. GARDNER: Well, again I'm in the unusual  
15 circumstance of --

16 QUESTION: Your adversary should be arguing  
17 this, not you, I guess.

18 MR. GARDNER: That's correct, Your Honor.

19 It's our position that nothing that happened  
20 here is inappropriate, and it's our position that the  
21 best way to determine whether something inappropriate  
22 happened is to let each case stand on its own, to trust  
23 the prosecutor to do a good job, to trust the trial  
24 court to do a good job, and then to trust the  
25 individual, Mr. Rumery, to do a good job and determine

1 for himself whether it's just, whether he ought to enter  
2 into the agreement.

3 I'd like to reserve the balance of my time.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
5 Gardner.

6 We'll hear now from you, Mr. Bauer.

7 ORAL ARGUMENT OF CHARLES P. BAUER

8 ON BEHALF OF THE RESPONDENT

9 QUESTION: Mr. Bauer, would you pick up on  
10 this constitutional question and tell us why you think  
11 we have a constitutional question before us?

12 MR. BAUER: I certainly will, Your Honor.

13 QUESTION: And it is true, isn't it, that the  
14 First Circuit did not cite a single United States  
15 Supreme Court decision?

16 MR. BAUER: That is true, Your Honor.

17 QUESTION: It didn't mention the Constitution  
18 of the United States?

19 MR. BAUER: No, it did not, Your Honor.

20 QUESTION: It did not?

21 MR. BAUER: That's correct.

22 Mr. Chief Justice, and may it please the  
23 Court, we represent Mr. Bernard E. Rumery, the  
24 respondent in this case, and we ask that the Court  
25 affirm the First Circuit Court of Appeals decision.



1 With regard to the constitutional source of  
2 law that has been inquired, it is the respondent's  
3 position that the individuals Fourth Amendment rights,  
4 through the Fourteenth Amendment, those rights have been  
5 violated as to the merits, the underlying merits of this  
6 litigation.

7 Furthermore, there are significant 1983 rights  
8 which have been prevented, chilled by the use of this  
9 covenant not to sue. I am hopeful that that speaks to  
10 the underlying constitutional requirement that brings  
11 this issue before the federal jurisdiction.

12 QUESTION: Specifically, what provision of the  
13 Constitution?

14 MR. BAUER: Specifically, Your Honor, the  
15 Fourth Amendment; that is, the unreasonable search and  
16 seizure including the unreasonable arrest, the tension,  
17 intimidation and coercion that was used against this  
18 individual by an agent or an arm of the state through  
19 the Fourteenth Amendment.

20 QUESTION: Would that not present a factual  
21 question, whether or not there was coercion?

22 MR. BAUER: With regard to the underlying  
23 merits, Your Honor, yes. But we are not here for the  
24 underlying merits of this case.

25 Whether there was or was not a constitutional

1 violation of this man's rights under the Fourth and  
2 Fourteenth Amendments, that is a jury determination and  
3 we are not --

4 QUESTION: Do you want a retrial?

5 MR. BAUER: Yes. Your Honor -- well, we have  
6 not had a trial as of yet. If I may, I'd like to take a  
7 few moments just to go through some of the facts of the  
8 underlying case that may put the case in perspective, if  
9 I may.

10 Mr. Rumery is a rock-solid citizen of the  
11 State of New Hampshire. He has lived all of his life in  
12 a small New England town, in New Hampshire. He was an  
13 insurance agent and married, and never having any prior  
14 contact with the criminal justice system.

15 He was arrested for tampering with a witness  
16 in an underlying rape case. He was arrested and charged  
17 with a Class B felony for tampering with a witness,  
18 which in New Hampshire brings a maximum of seven years'  
19 imprisonment.

20 QUESTION: Would your case be any different if  
21 this were a misdemeanor charge -- not this particular  
22 alleged action, but suppose it were a misdemeanor?

23 MR. BAUER: No, Your Honor. It would make no  
24 difference at all.

25 QUESTION: You would still be here?

1 MR. BAUER: Yes, Your Honor. Our position is  
2 that the clash of using the criminal justice system to  
3 extract a civil benefit for third party interests is  
4 void, as against public policy, as a matter of law. So,  
5 it makes no difference whether this is a felony,  
6 underlying felony, or misdemeanor charge.

7 Now, prior to the arrest --

8 QUESTION: Is that a matter of some federal  
9 contract law principle, or what? The defense in the  
10 1983 action raised by the city and the defendants was  
11 the existence of a valid contractual release.

12 So, what principles govern the validity of  
13 that release? Do we look to state law, or the validity  
14 of the agreement?

15 MR. BAUER: No, Your Honor. You do not look  
16 to state law. You look to federal law.

17 You look specifically to the intent of 42  
18 U.S.C. Section 1983 which provides --

19 QUESTION: You mean, if state law requires two  
20 witnesses to such an agreement, we could simply say, you  
21 don't need two witnesses? Why?

22 This is not an agreement. The federal  
23 government's not a party to this agreement at all.

24 MR. BAUER: No, Your Honor. If state law  
25 would require two witnesses, this issue still is

1 meritorious under the federal Constitution.

2 QUESTION: But Justice O'Connor's question  
3 didn't go to this issue, as I understood it. It went  
4 to, what law governs the contract between the town and  
5 your client.

6 MR. BAUER: That's correct.

7 QUESTION: And what law -- you assert that's  
8 federal law?

9 MR. BAUER: Yes, Your Honor. The reason it is  
10 federal law is because it's not federal contract law. I  
11 do not mean to suggest that it is federal contract law.

12 What I mean to suggest is that the rights  
13 afforded under 1983 protect federal rights articulated  
14 through the Constitution, and if there is a waiver of  
15 those rights through an inherently coercive --

16 QUESTION: Well, now, wait a minute, 1983  
17 doesn't create the federal right. It provides some kind  
18 of a statutory remedy.

19 MR. BAUER: Yes.

20 QUESTION: And it would seem to me that what  
21 was at issue below was the validity of a covenant or  
22 agreement viewed in terms of state law. This isn't a  
23 direct waiver of constitutional rights.

24 This case, it seems to me anyway, involves a  
25 covenant to give up some statutorily created right to



1 sue.

2 MR. BAUER: Well, Your Honor, I think it is a  
3 direct waiver of constitutional rights. It is, I think,  
4 a direct waiver of the right of an individual to  
5 petition his or her government to have his or her day in  
6 court, to at least go to a jury to decide whether his or  
7 her individual rights under the Fourth Amendment through  
8 the Fourteenth Amendment have been violated or not.

9 And, if you have the state, through the arm of  
10 the state, that is the prosecution or the police taking  
11 away that right, I think it is a direct deprivation.

12 QUESTION: You take away all covenants not to  
13 sue?

14 MR. BAUER: No, Your Honor. Only in the  
15 individual situation where an individual, prior to  
16 conviction, is presented with the dilemma of giving up  
17 civil rights, federally guaranteed civil rights, in  
18 exchange for a nolle pros, or dismissed with criminal  
19 charges.

20 QUESTION: Well, that covers an awful lot of  
21 covenants not to sue.

22 QUESTION: Most of them.

23 MR. BAUER: It really does not, I don't  
24 believe. It does in the context of pre-conviction  
25 release dismissal practices.

1 I will submit that this practice, although not  
2 widely reported in the appellate decisions, this  
3 practice is apparently being utilized to a fair extent.

4 QUESTION: Tell me what's so bad about it.

5 MR. BAUER: What's so bad about it?

6 QUESTION: Yes. Why is it so contrary to  
7 public policy?

8 MR. BAUER: What's so bad about this is that  
9 the public interest is being subverted, Your Honor. The  
10 public interest of --

11 QUESTION: You mean, the prosecutor is giving  
12 up a perfectly good criminal prosecution that he  
13 shouldn't give up just in order to protect a public  
14 official?

15 MR. BAUER: That may be, yes.

16 QUESTION: Well, is that what you're talking  
17 about?

18 MR. BAUER: That is what I'm talking about.  
19 That's one of the public interests that's --

20 QUESTION: Even though if the prosecutor has a  
21 good case, he might put your client in jail?

22 MR. BAUER: Yes, Your Honor. Once the  
23 prosecutor makes a decision to nolle pros a criminal  
24 charge, regardless of the underlying reasons once that  
25 decision has been made that this case does not warrant

1 criminal prosecution, with the interest of the public in  
2 mind, then we say it is improper for that prosecutor to  
3 refuse to nolle pros.

4 QUESTION: Well, why is that a concern of  
5 federal law, to encourage the prosecutor that way? It  
6 seems to me the concerns of federal law here would be  
7 exhausted when you're sure that the putative defendant  
8 is treated fairly.

9 Just like in an FELA release case, where there  
10 are federal standards, you don't worry about how it's  
11 going to help the railroad, basically, so long as the  
12 defendant is treated fairly.

13 MR. BAUER: The reason I believe, Chief  
14 Justice, that it is a matter of federal law is that in  
15 addition to the required waiver of 1983 rights there is  
16 also an unequal protection --

17 QUESTION: I'm not questioning, that the  
18 ultimate question is to be decided by federal law. But  
19 I'm just saying, why does federal law factor in this  
20 concern that the prosecutor not -- or fail to prosecute  
21 as much as he should?

22 It doesn't seem to me that's the concern of  
23 the federal law. The federal concern here is that in  
24 1983, plaintiff not be unfairly euchered out of his  
25 right to sue.

1 MR. BAUER: Yes, Your Honor. I would agree  
2 with that.

3 There is a clash here between the systems, and  
4 the clash is the use of the criminal justice system in  
5 order -- against the individual by the arm of the state,  
6 against the individual to extract a waiver of rights for  
7 the benefit of not the public --

8 QUESTION: Mr. Bauer, I think there is some  
9 difference between your position and the position of the  
10 Court of Appeals, if I'm not mistaken.

11 I read their opinion as merely holding that  
12 the waiver was unenforceable as to the 1983 federal  
13 claim, but it said nothing that persuaded me they  
14 intended to hold unenforceable the waiver of state law  
15 claims such as -- you had about five or six state law  
16 claims.

17 But the argument you're making now, that there  
18 is a constitutional compulsion to hold it void would  
19 also invalidate the entire covenant not to sue. Is that  
20 the position you intend to maintain?

21 MR. BAUER: Yes, it is, Your Honor.

22 QUESTION: I see. Do you want us to go beyond  
23 the holding of the First Circuit?

24 MR. BAUER: I don't believe that it is  
25 required to go beyond for the purposes of deciding this



1 case and deciding whether this covenant is void as  
2 against public policy. I don't believe that it's  
3 necessary to go beyond.

4 But, yes, I agree with you, Justice Stevens,  
5 that the First Circuit identified the covenant not to  
6 sue as void as against public policy, and stopped right  
7 there. It did not go on to speak to the pendant state  
8 claims.

9 QUESTION: See, one can read their decision as  
10 just a statutory construction decision, thinking this is  
11 necessary to make the remedy, the 1983 remedy, an  
12 effective federal remedy.

13 Your position is a much broader one and says  
14 that the whole covenant is unconstitutional, as I  
15 understand your argument, because it was obtained -- I  
16 don't know, I'm not quite clear on your theory of  
17 unconstitutionality.

18 QUESTION: Don't you really say that you can  
19 have a covenant not to sue for everything under the sky  
20 except 1983? Isn't that what your position is?

21 MR. BAUER: No, Your Honor.

22 QUESTION: If not, what is it?

23 MR. BAUER: My position is that if the  
24 covenant not to sue deprives an individual of federally  
25 guaranteed rights to petition a court for redress, to be

1 treated fairly and equally under the law, to have his  
2 liberty interests adjudicated by a jury, if that is the  
3 ultimate decision or impact of the covenant not to sue,  
4 then yes.

5 QUESTION: Well, that's all covenants not to  
6 sue. That's just about all of them.

7 MR. BAUER: Within this context, Your Honor.

8 QUESTION: I mean, you don't have a covenant  
9 not to sue unless you've given up something.

10 MR. BAUER: Within this context, yes.

11 QUESTION: Right. So, you say you can't give  
12 up anything.

13 MR. BAUER: Well --

14 QUESTION: Is that what you said?

15 MR. BAUER: I just want to make sure --

16 QUESTION: Didn't you say that if you sign a  
17 covenant not to sue, you don't give up your federal  
18 rights?

19 MR. BAUER: Well --

20 QUESTION: Yes or no?

21 MR. BAUER: Yes, you do. You are forced to.  
22 You are forced to under this circumstance.

23 QUESTION: You are forced to give up your  
24 federal rights?

25 MR. BAUER: Yes, Your Honor.

1 QUESTION: And you can't covenant to give them  
2 up?

3 MR. BAUER: You shouldn't -- yes, you can't be  
4 forced by the government to give up those rights, yes.

5 QUESTION: Well, how are you forced to?

6 MR. BAUER: Well, I'm glad you asked that.  
7 You are forced to because the prosecutor and the police,  
8 having the threat of criminal prosecution ranging from  
9 arrest all the way through punishment, has an inherently  
10 unequal bargaining position and that's the way that you  
11 -- an individual is forced.

12 QUESTION: The police?

13 MR. BAUER: No. The way you remedy that, Your  
14 Honor, is for this Court to send a clear signal to  
15 police and prosecutors that these kinds of covenants  
16 will not be tolerated, that an individual --

17 QUESTION: Do you have to give up plea  
18 bargaining?

19 MR. BAUER: No, Your Honor.

20 QUESTION: What's the difference?

21 MR. BAUER: The significant difference, Your  
22 Honor, between plea bargaining and this context is that  
23 in plea bargaining there is not a confusion of the two  
24 systems. You have plea bargaining solely within the  
25 criminal context and there is a mutuality of advantage

1 to the state and to the criminal defendant.

2 Moreover, the public interest in the plea  
3 bargaining situation, the public interest is being  
4 served. That is, there is -- the state is obtaining a  
5 plea to a guilty charge and there is a conviction on  
6 that guilty charge.

7 QUESTION: Well, the state would argue that  
8 here there's a public interest being served as well,  
9 that the prosecutor, given his other business, has  
10 decided that this case, on reflection, is not worth his  
11 resources. So, he wants to get rid of it but at the  
12 same time he doesn't want to leave the municipality open  
13 to a 1983 suit. That's perfectly reasonable.

14 Or, as also is alleged to have happened in  
15 this case, the prosecutor has decided in light of the  
16 reluctance of the rape victim to testify, justice would  
17 be disserved by putting her through all that and going  
18 ahead with this proceeding.

19 Why aren't those valid interest of the state?

20 MR. BAUER: Most of what you've just  
21 articulated, Justice, are valid. However, using the  
22 proper discretion that you just described, of the  
23 prosecutor, he or she may nolle pros that charge.

24 But to go one step further, and to say to the  
25 individual, now, in addition to my public interest duty



1 which has been served in weighing whether to go through  
2 with this criminal prosecution, I want to extract from  
3 you your right to sue and to exercise your federal  
4 rights.

5 My position is, Your Honor, that for the  
6 prosecutor to protect individual police officers, to  
7 protect individual witnesses, to protect the  
8 municipality, is not within the ambit --

9 QUESTION: So, you want him to say, the only  
10 way -- and he can't even consider that in deciding to go  
11 ahead with the prosecution?

12 MR. BAUER: That's correct, Your Honor.

13 QUESTION: He can't have in mind that, "If I  
14 don't go ahead -- I think it's a valid prosecution but I  
15 think -- you know, other things being equal I would  
16 think it's not worth doing for a number of reasons, one  
17 of which is I have better things to do. Nonetheless,  
18 since I'm aware that if I dismiss it the city will be  
19 subjected to an enormous amount of suits."

20 Do you expect the prosecutor nonetheless to  
21 dismiss?

22 MR. BAUER: To dismiss, yes.

23 QUESTION: Without bearing in mind that  
24 although it's a meritorious case he's going to have to  
25 litigate this thing in civil matters?

1 MR. BAUER: Yes. If he or she uses proper  
2 prosecutorial discretion to dismiss.

3 QUESTION: But the time he's saving in the  
4 criminal prosecution, he's losing in having to litigate  
5 the civil case. So, he saves nothing.

6 MR. BAUER: The civil case, Your Honor -- let  
7 me back up if I may.

8 The public, the public interest is, if there  
9 has been a misuse of public official action, the public  
10 interest has an interest in exposing that misconduct to  
11 the air of light and to correct it if necessary.  
12 Furthermore --

13 QUESTION: I understand, but he denies that  
14 there has been any. He thinks this has been a good  
15 arrest, a good prosecution, and, "If I went ahead with  
16 it I'd win it, but it's not worth it. I have other  
17 things, and there is a rare victim that has expressed  
18 her reluctance and I don't want to put her through the  
19 wringer."

20 Now, he can't take those things into account,  
21 you say?

22 MR. BAUER: No. What I'm saying is that he  
23 can take those things into consideration but he cannot  
24 take into consideration whether I should get a civil  
25 release in order to protect my --

1 QUESTION: But the only way to take them into  
2 account, and the only way to protect them is to get the  
3 release. Because the rape victim doesn't care whether  
4 she's put on the stand in a criminal prosecution or in a  
5 subsequent civil suit.

6 It's going to be just as bad for her. And his  
7 time is going to be as much wasted in the civil suit as  
8 it would be in the criminal prosecution. So, you're  
9 just telling him there's really no way that he can do  
10 anything about this?

11 MR. BAUER: Your Honor, I would respond by  
12 saying that there are already safeguards for police,  
13 prosecutors, towns. We have absolute immunity in some  
14 circumstances. We have qualified immunity in other  
15 circumstances. We have good faith defenses, and it is  
16 not the proper role of the prosecutor --

17 QUESTION: I'm worried about his waste of  
18 time. You tell me how his waste of time is preserved,  
19 unless he gets the release.

20 He has just decided, "I have too much  
21 business. I have other criminal prosecutions that are  
22 more important. I'd rather dismiss this one. On the  
23 other hand, if I know that the time I save in trying the  
24 criminal case is going to be wasted in a civil suit, I'd  
25 rather try the criminal case and get this guy because he

1 deserves it."

2 MR. BAUER: Your Honor, if only the waste of  
3 time is the consideration, then it's our position that  
4 that is not a proper prosecutorial decision because that  
5 so-called waste of time does not serve the public, does  
6 not serve the public.

7 QUESTION: Why shouldn't that be for New  
8 Hampshire to decide here, whether they want their  
9 prosecutors wasting time or not and whether that sort of  
10 thing serves the public interest?

11 I mean, why is that particular aspect of this  
12 argument something that should be decided by a federal  
13 court?

14 MR. BAUER: Your Honor, I would tend to agree  
15 with you that that particular aspect, that issue or  
16 sub-issue, does not really cry to this Court for  
17 adjudication. But it is grafted onto the issue of  
18 federally guaranteed rights, civil rights versus the  
19 threat of hanging in criminal prosecution or a nolle  
20 pros over an individual's head.

21 I would submit that what individual, faced  
22 with that dilemma, facing the criminal charge on the one  
23 hand and giving up civil rights with a nolle pros on the  
24 other hand, what individual would not sign such a  
25 covenant?



1 I submit that each and every one of us would  
2 sign and --

3 QUESTION: Suppose a prosecutor comes up and --

4 MR. BAUER: Your Honor, not if he was  
5 innocent. There are certainly risks and uncertainty.

6 QUESTION: You want us to put a wall up  
7 against all of it by saying, you just can't sign a  
8 covenant not to sue, and I don't see any authority under  
9 the sun that you have for that.

10 MR. BAUER: Your Honor, I'm not saying that --

11 QUESTION: We've had covenants not to sue  
12 since we've had courts.

13 MR. BAUER: Certainly in the civil context, we  
14 have, Your Honor, where one civil --

15 QUESTION: Well, now we're going to exchange  
16 all of that and we're going to make one little narrow  
17 exception, that you can covenant not to sue on every  
18 statute in the world except 1983. That's what you are  
19 asking us for.

20 MR. BAUER: Your Honor, what I'm asking for is  
21 not whether an individual may or may not sign a  
22 covenant. What I am asking this Court to declare is  
23 that the state, through the police and prosecutor, can't  
24 use that as a threat, the dropping of a criminal charge  
25 as a threat to extract the covenant not to sue.

1                   That's the process that I see.

2                   QUESTION: Well, Mr. Bauer, who initiated the  
3 suggestion of dropping --

4                   MR. BAUER: I'm sorry, Your Honor. I didn't  
5 hear the --

6                   QUESTION: In this case, was it you or your  
7 client who initiated the discussion with the city about  
8 dropping the 1983 liability?

9                   MR. BAUER: Your Honor, I did not represent  
10 the respondent in the criminal charge below.

11                   QUESTION: Did the respondent or his then  
12 lawyer initiate this covenant?

13                   MR. BAUER: To the best of the recollection of  
14 the criminal defense attorney, it is his belief that the  
15 prosecutor first brought up the subject. But there is  
16 question about that.

17                   Neither individual, neither the prosecutor or  
18 a criminal defense attorney, can actually remember who  
19 actually brought it up first. But the criminal defense  
20 attorney's best recollection is that the state brought  
21 it up first.

22                   QUESTION: Do you concede that in this case,  
23 at least, Mr. Rumery and his attorney very much wanted  
24 to enter into the agreement and thought it was in their  
25 best interest to do so?

1 MR. BAUER: Your Honor, Mr. Rumery had no  
2 other choice and Mr. Rumery's criminal defense attorney  
3 had no other choice. What other recommendation would  
4 his criminal defense attorney give, other than to say,  
5 "Bernie, sign it."

6 QUESTION: Mr. Bauer, what about the situation  
7 which I understand is pretty frequent, where a  
8 prosecutor is thinking of filing an assault charge  
9 against an individual and ultimately it's worked out  
10 that the prospective defendant agrees to pay the medical  
11 expenses of the party that was injured, and if he does  
12 so the whole thing's dropped?

13 Now, things like that happen all the time.  
14 Isn't that person under the same kind of compulsion,  
15 shall we set aside those -- is that prosecutorial  
16 misconduct as well? I mean, is there any way to avoid  
17 this, you know, what you say is hanging over the head of  
18 the defendant?

19 Of course there's something hanging over his  
20 head.

21 MR. BAUER: Your Honor, if there is a  
22 conviction, if there is a conviction or a plea of guilty  
23 to a charge with restitution as part of the punishment --

24 QUESTION: No, that's not the deal. The deal  
25 is, lock, the complainant says, "I'll drop the

1 charges." And the prosecutor says, "I'll drop the  
2 charges if you pay the medical expenses that this guy  
3 incurred."

4 Now, the defendant still says, "I didn't do  
5 it, but nonetheless, I'll pay the expenses." Now, isn't  
6 that the same kind of coercion? Should all of those  
7 things be viewed unfavorably as well?

8 MR. BAUER: No, Your Honor, because in that  
9 hypothetical the individual is not being forced to waive  
10 his federal rights to sue, under 1983, Your Honor.

11 QUESTION: We're only talking about money  
12 here, aren't we? I mean, that's all we're talking about  
13 is money.

14 MR. BAUER: No, we're not, Your Honor.

15 QUESTION: What is he going to get in his 1983  
16 suit besides money?

17 MR. BAUER: Besides money, Your Honor, the  
18 public has an interest in that 1983 action. If in fact  
19 there was misconduct, the public has an interest of  
20 exposing that misconduct and correcting it, and the  
21 public also has the interest to give this individual his  
22 or her day in court, to petition his government for  
23 redress if in fact his government has caused him civil  
24 harm.

25 So, it is not just --



1 QUESTION: -- there can be the most outrageous  
2 violation of somebody's Fourth Amendment rights and then  
3 a trial at which he is found guilty and there isn't much  
4 you can do about the false arrest, is there?

5 MR. BAUER: No, there is not, Your Honor --  
6 after the finding of guilty, yes, bukt --

7 QUESTION: The prosecutor can protect the  
8 grossest false arrest by going ahead and trying the case  
9 and winning it.

10 MR. BAUER: And winning it, yes, and we submit  
11 that the prosecutor -- if this Court does not declare  
12 such covenants void, that the prosecutors and police  
13 will incorporate this type of covenant into their  
14 standard operating procedure and thereby prevent --  
15 virtually prevent any 1983 action --

16 QUESTION: Not so, not so. That statement  
17 must rest on the idea that it's impossible to sort out  
18 the good ones from the bad ones.

19 MR. BAUER: Your Honor, with regard to the  
20 District Court, I think that you're referring to the  
21 sorting out, to the trial level. We submit that when  
22 you have the clash of the criminal justice system being  
23 used against an individual to extract a civil benefit,  
24 there cannot be a voluntary waiver. So, therefore,  
25 there is no need to even go through the ad hoc, case by

1 case balancing.

2 I would also, by analogy, suggest that a  
3 private attorney --

4 QUESTION: I understand your position. I know  
5 that's your argument, but can't you really identify  
6 those cases where there might be prosecutorial  
7 overreaching?

8 MR. BAUER: No, because the voluntary,  
9 deliberate and informed standard, Your Honor, only looks  
10 to the individual. Did he have time to think about it?  
11 Did he deliberate? Was he informed? Did he have a  
12 criminal defense attorney? Was it voluntary?

13 Our position is that once you have the threat  
14 of the criminal justice system being used to extract the  
15 civil benefit, it cannot be voluntary. The voluntary,  
16 deliberate standard does not look to the motives of the  
17 prosecutor. It does not look to the conduct of the  
18 police department.

19 It only looks to the individual. It's only  
20 one side of the equation. And our position is that with  
21 that imbalance, with that unequal bargaining position,  
22 such a covenant cannot as a matter of law be voluntary.

23 QUESTION: Mr. Bauer, suppose instead of a  
24 covenant the prosecutor said he wanted the defendant to  
25 stipulate there was probable cause for the arrest, even

1     though he wasn't prepared to prove that the man was  
2     guilty beyond a reasonable doubt, and presumably in this  
3     case there's probable cause if the woman told the police  
4     officers what the record suggests.

5             Would that kind of a stipulation as to the  
6     facts be invalid, in your view?

7             MR. BAUER: Yes, Your Honor, yes, and there is  
8     a case on point on that type of matter where a trial  
9     court participated in that request for a stipulation as  
10    to probable cause. And I believe the case is Dixon  
11    versus D.C., 1968, when Chief Justice Bazelon indicated  
12    that the problem with these covenants, or these kind of  
13    tacit agreements, is not necessarily -- I see that my  
14    time is up.

15            I thank you very much for your time.

16            CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bauer.

17            Mr. Gardner, do you have anything else?  
18    You've got three minutes.

19            MR. GARDNER: Thank you. Just briefly, Your  
20    Honor.

21            ORAL ARGUMENT OF DONALD E. GARDNER  
22            ON BEHALF OF THE RESPONDENT - REBUTTAL

23            MR. GARDNER: Since Justice Frankfurter in his  
24    absence is getting a lot of air time today, I thought  
25    I'd --

1 QUESTION: Not this case.

2 MR. GARDNER: Impart a bit of his wisdom in  
3 this case also.

4 QUESTION: He may be here, Mr. Gardner.

5 (Laughter.)

6 MR. GARDNER: He said in Adams, a case that  
7 was decided in 1942, Adams versus the United States,  
8 that to imprison a man and his privileges -- or to say  
9 that a man cannot voluntarily waive his constitutional  
10 rights is to imprison a man and his privileges and call  
11 it the Constitution.

12 Obviously, a man has to be able to choose to  
13 waive his constitutional rights. Otherwise his rights  
14 are, in a sense, not really good to him. And I would  
15 suggest, Your Honor, that it's quite clear in this case  
16 that's what happened.

17 The Court so found, he voluntarily waived his  
18 right. The Court also found that at the time --

19 QUESTION: I don't really believe -- that is  
20 an exorbitant argument. What about, for instance, his  
21 right not to be sold into slavery? I mean, slavery's  
22 been outlawed.

23 Are you saying that right is no good unless he  
24 can sell it, right? That means we have to allow slavery  
25 in this country because otherwise the right to be free



1 from slavery isn't worth anything.

2 MR. GARDNER: It certainly suggests, Your  
3 Honor, that in the best exercise of your rights you  
4 ought to be able to, on occasion, waive them. Obviously  
5 there are public interest limitations at the very  
6 extremes to that kind of an application.

7 QUESTION: And that's what your opponent's  
8 arguing.

9 MR. GARDNER: And obviously that is, but in  
10 this case we don't have a man who sold himself into  
11 slavery. We have a man who gave up money, as the Court  
12 aptly pointed out.

13 You know, my opponent suggests to the Court  
14 that what has happened in this case is that this man has  
15 been deprived of his constitutional rights. But what we  
16 all realize is that if instead of signing a release he  
17 got a check, we wouldn't be here today.

18 QUESTION: You would solve all these cases by  
19 the voluntary and intelligent formula, wouldn't you?

20 MR. GARDNER: That's correct.

21 QUESTION: And without any regard at all to  
22 the prosecutor's conduct?

23 MR. GARDNER: Well, if the prosecutor's  
24 conduct was coercive, then the release wouldn't be  
25 voluntary.

1 QUESTION: Well, when is tht?

2 MR. GARDNER: In this particular case --

3 QUESTION: Whenever the prosecutor's got a  
4 lousy case, that he'd never try in a hundred years?

5 MR. GARDNER: No. If he threatened to go on  
6 with the prosecution solely in order to coerce the  
7 release, I would suggest that that's clearly coercive.  
8 In this case the prosecutor never spoke to Mr. Rumery at  
9 all.

10 QUESTION: Does that mean that your rule would  
11 cover every case, you'd say, "Well, we've got everything  
12 agreed and we're going to dismiss; the one last thing,  
13 you've got to sign this release before we do it," that  
14 would be bad?

15 MR. GARDNER: No. What I'm suggesting is that  
16 when we're talking about a prosecutor who has good cause  
17 within his discretion for other reasons to dismiss a  
18 case --

19 QUESTION: Well, like he hasn't got any  
20 evidence?

21 MR. GARDNER: Well, I wouldn't suggest that's  
22 good cause, but for reasons other --

23 QUESTION: That's one of the best reasons  
24 known to man.

25 MR. GARDNER: Reasons other than guilt or

1 innocence, I would suggest, Your Honor, reasons other  
2 than guilt or innocence.

3 Prosecutorial discretion, as this Court knows,  
4 is very, very broad. And the reason it's very, very  
5 broad --

6 QUESTION: Well, what if -- well, my time is  
7 up.

8 (Laughter.)

9 CHIEF JUSTICE REHNQUIST: Your time has  
10 expired, Mr. Gardner. The case is submitted.

11 (Whereupon, at 11:50 o'clock a.m., the case in  
12 the above-entitled matter was submitted.)  
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# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-1449 - TOWN OF NEWTON, ETC., ET AL., Petitioners V.

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BERNARD E. RUMERY, JR.

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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