No. 99-278

In the Supreme Court of the United States

JOSE DANIEL RUIZ CORONADO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States properly may demand that a property owner release liability against the government and its officials in exchange for the government's dismissal of a forfeiture action against the property owner.

2. Whether the government may adopt a policy requiring that the terms of a settlement of a forfeiture case must include a "hold harmless" provision and general waiver of Federal Tort Claims Act and *Bivens* claims.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. A9-A14) is unpublished, but the decision is noted at 182 F.3d 936 (Table). The order of district court (Pet. App. A2-A8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1999. The petition for a writ of certiorari was filed on August 16, 1999. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a citizen of the Republic of Colombia. According to petitioner's amended complaint, federal

agents seized petitioner's bank account at BankAtlantic in Miami, Florida, upon suspicion of money laundering. Federal agents at the same time also seized about 1,100 other accounts. Pet. 4; Pet. App. A10.

Petitioner filed a timely claim and cost bond pursuant to 19 U.S.C. 1608 in order to trigger judicial condemnation proceedings. Petitioner also filed a claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, by submitting a demand letter seeking damages resulting from the seizure and the government's access to his financial information. The demand letter alleged that the seizure violated the Electronic Communications Privacy Act of 1986, 18 U.S.C. 2516, 2518, and 2703(a), and the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.* See Pet. App. A10; Pet. 4-5.

A few months later, and in apparent ignorance of petitioner's demand under the FTCA, the Special Assistant United States Attorney (SAUSA) assigned to the BankAtlantic seizure cases offered to forgo a forfeiture action and return petitioner's money. The offer of settlement required that petitioner release any claim against the government or its agents regarding the seizure. Responding through counsel, petitioner notified the SAUSA of the pending FTCA demand but accepted the settlement, including the terms of the release. The government and petitioner agreed on the actual amount seized and the government returned the money with interest. Pet. App. A10-A11.

2. Nearly a year later, petitioner filed this suit against the government, seeking a declaratory judgment that the release was unconscionable and unenforceable. The district court granted the government's motion to dismiss the complaint. Pet. App. A1-A8.

The district court found that the settlement agreement "was neither substantively nor procedurally

unconscionable." Pet. App. A7. The district court explained that petitioner had entered into the settlement knowing that he was waiving his right to sue the government; that he understood that the civil forfeiture law provided him with an alternative avenue for recovery of his seized property; that he was represented by counsel when he made his choice; and that he admitted he received a benefit from his decision to settle his claim, including interest on his funds and a quick resolution of the proceedings. *Id.* at A7-A8. Consequently, the court concluded, petitioner had failed "to demonstrate that [he] lacked a meaningful choice when he agreed to settle his claims with the government." *Id.* at A8.

3. The court of appeals affirmed. Pet. App. A9-A14. The court of appeals observed that this Court's decision in *Town of Newton* v. *Rumery*, 480 U.S. 386, 394 (1987), made clear that public policy "does not per se bar voluntary agreements between a prosecutor and a defendant to swap dismissal of pending charges for a release of public officials from any liability arising from an arrest or charges." Pet. App. A12. The court of appeals held that petitioner had not alleged any facts that demonstrated that the release in this case involved "coercion, or even overreaching" that would render the agreement unenforceable. *Ibid.*

The court of appeals rejected petitioner's contention that the alleged prosecutorial misconduct in the underlying seizure necessarily meant that the petitioner involuntarily executed the release. The court explained that petitioner's allegation simply "shows * * * that [petitioner] may have had an arguable claim to release" and that petitioner "was * * * fully aware of his rights" and "pursuing them when he entered the release." Pet. App. A12-A13. The court similarly found

unpersuasive petitioner's argument that the government's holding petitioner's property "hostage" rendered acceptance of the agreement involuntary. *Id.* at A13. The court of appeals explained that, because the Court in *Rumery* found that a threat to a citizen's liberty interest in facing criminal charges was insufficient to invalidate a release, "then a threat to mere property interests is also insufficient" to render a release involuntary. *Id.* at A14.

ARGUMENT

1. a. In *Town of Newton* v. *Rumery*, 480 U.S. 386, 398 (1987), this Court upheld a "release-dismissal" agreement in which a prosecutor agreed to dismiss criminal charges against an individual who in return agreed to release any claims against the town or its officials. The Court concluded that the agreement was voluntary; there was no evidence of prosecutorial misconduct; and the enforcement of the agreement would not adversely affect the public interest. *Id.* at 398.

In reaching those conclusions, the Court in *Rumery* rejected the notion that release-dismissal agreements are subject to a per se bar. 480 U.S. at 392, 394. The Court reasoned that such agreements are not "inherently coercive," observing that "[i]n other contexts criminal defendants are required to make difficult choices that effectively waive constitutional rights." *Id.* at 393. Moreover, the Court explained, "[i]n many cases a defendant's choice to enter into a release-dismissal agreement will reflect a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action." *Id.* at 394. In determining that "Rumery's voluntary decision to enter this agreement ex-

emplifie[d] such a judgment," the Court observed that

> Rumery [was] a sophisticated businessman. He was not in jail and was represented by an experienced criminal lawyer, who drafted the agreement. Rumery considered the agreement for three days before signing it. The benefits of the agreement to Rumery are obvious: he gained immunity from criminal prosecution in consideration of abandoning a civil suit that he may well have lost.

Ibid.

The circumstances surrounding petitioner's execution of the release agreement in this case are far less coercive than those in *Rumery*. Rumery had been arrested and accused of tampering with a witness in violation of state criminal law. See 486 U.S. at 390. The choice he faced was "a choice between facing criminal charges and waiving his right to sue under § 1983." *Id.* at 393. As the court of appeals explained, if, as *Rumery* holds, "a threat to a citizen's liberty interests is insufficient to invalidate a release, then a threat to mere property interests is also insufficient." Pet. App. A14.

Furthermore, like Rumery, petitioner was not in jail and "was represented by sophisticated counsel" who negotiated the agreement on his behalf, Pet. App. A11; and petitioner took nearly a month to consider the offer before accepting it.[1] As in *Rumery*, "[t]he benefits of

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[1] The offer of settlement was memorialized in letter from the SAUSA to petitioner's attorney on January 19, 1997. C.A. R.E. Exh. A. On January 24, 1997, petitioner, through his attorney, made a counteroffer, disputing only the amount actually seized by the government. *Id.* Exh. C. On January 31, 1997, the SAUSA reiterated the January 19 offer, after the amount actually seized

the agreement to [petitioner] are obvious." 480 U.S. at 394. In consideration for abandoning his FTCA claims, petitioner obtained the return of his money, with interest, and without incurring the costs, efforts, and risks of litigation.

Indeed, petitioner does not argue in this Court that he involuntarily released his claims against the government. Rather, he contends (Pet. 10-14) that the release is unenforceable because the SAUSA abused his public office in shielding public officials from personal liability. Petitioner offers no evidence or basis, however, for concluding that the SAUSA actually sought to use his office for private gain in connection with the execution of the release in this case. See *Rumery*, 480 U.S. at 395 n.5 (plurality opinion) ("the constituency of an elected prosecutor is the public, and such a prosecutor is likely to be influenced primarily by the general public interest").

In seeking the release, the SAUSA was acting pursuant to the Department of Justice's *Asset Forfeiture Policy Manual*, which directs government attorneys seeking to settle civil forfeiture cases to secure a release of claims from the property owner.[2] The

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had been resolved to the satisfaction of both parties. *Id.* Exh. D. Petitioner then accepted the January 31 offer on February 25, 1997. *Id.* Exh. E.

[2] The *Asset Forfeiture Policy Manual* states, in pertinent part:

> The following requirements must be met where a claim and a cost bond have been filed and the case has been referred to the United States Attorney but a settlement is reached before a civil judicial complaint has been filed:
>
> (a) The terms of the settlement should be reduced to writing by the United States Attorney and include:

SAUSA complied with that directive and reasonably settled the forfeiture action to avoid the cost and burden of litigating the forfeiture proceeding against petitioner (which was only one of many such proceedings the SAUSA was handling) and simultaneously to foreclose the possibility of a civil suit by petitioner. See *Rumery*, 480 U.S. at 398 (noting prosecutor "had an independent, legitimate reason to make this agreement directly related to his prosecutorial responsibilities").

b. Petitioner's attempts (Pet. 13-14) to distinguish this case from *Rumery* are unpersuasive. Petitioner first asserts (Pet. 13) that the prosecutor in this case "realized he had no basis for forfeiture of the Petitioner's account," based on the fact that the SAUSA settled petitioner's case along with a large number of other related forfeiture cases. Those facts, however, do not demonstrate that the prosecutor lacked any basis for the seizure of petitioner's property. Indeed, the seizing agents had followed prescribed procedures and obtained judicial authorization prior to effecting the seizure. Gov't C.A. Br. 3. Moreover, the application for seizure was supported by a sworn affidavit containing information derived from court-authorized electronic surveillance and from grand jury information whose disclosure had been approved by a federal district judge. *Ibid.*

Petitioner next asserts (Pet. 13) that the claims released in *Rumery* arose under 42 U.S.C. 1983, while the

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* * * * *

> (6) A "hold harmless" provision and a general waiver of Federal Tort Claims Act rights and *Bivens* actions, as well as other actions based on the Constitution * * *.

U.S. Dep't of Justice, *Asset Forfeiture Policy Manual* 3-8 to 3-9 (1996).

actions petitioner wishes to pursue arise under the Right to Financial Privacy Act and the Electronic Communications Privacy Act. The Court in *Rumery*, however, did not rest its decision on the type of claim released, or whether the claims arose under constitutional or statutory law. In fact, the release in *Rumery* extended to all claims against the city or its officials. 480 U.S. at 390-391.

Petitioner also errs in contending (Pet. 14) that *Rumery* is distinguishable because in this case "there was no judicial supervision of the settlement agreement." The Court in *Rumery* expressly acknowledged that release-dismissal agreements, unlike plea bargains, generally are not subject to judicial oversight. 480 U.S. at 393 n.3. The Court nonetheless determined that release-dismissal agreements do not "pose a more coercive choice" than plea bargains in which defendants waive substantial constitutional rights. *Id.* at 393.

2. Petitioner also argues (Pet. 14-17) that the policy embodied in the Justice Department's *Asset Forfeiture Policy Manual* requiring government attorneys to include a "hold harmless" provision and general waiver in civil forfeiture settlements (see note 2, *supra*) contravenes public policy because prosecutors have a duty to return property wrongfully withheld. The validity of the government's general settlement policy, however, was not addressed by the court of appeals. This Court ordinarily does not consider questions not specifically passed upon by the courts below. *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957).

In any event, petitioner's contention lacks merit. The government's policy does not require prosecutors to retain property "for which there is *no basis for forfeiture*," unless the property owner executes a release.

Pet. 15 (emphasis added). Rather, the policy explicitly mandates that, with respect to any settlement, "[t]here must be a statutory basis for the forfeiture of the property and sufficient facts stated in the settlement documents to satisfy the elements of the statute." U.S. Dep't of Justice, *Asset Forfeiture Policy Manual* 3-2 (1996). Thus, the government's policy does not prohibit a prosecutor from exercising his judgment to return property rightfully belonging to his owner, even if the owner refuses to release the government from claims arising out of the forfeiture.

This case is therefore unlike the situation that confronted the court of appeals in *Cain* v. *Darby Borough*, 7 F.3d 377 (3d Cir. 1992) (en banc), cert. denied, 510 U.S. 1195 (1994), relied upon by petitioner (Pet. 16-17). In *Cain*, the court of appeals invalidated a county district attorney's office policy that required every criminal defendant to execute a release-dismissal agreement before the district attorney would approve the defendant's participation in a program known as "Accelerated Rehabilitative Disposition" (ARD). 7 F.3d at 382-383. The ARD program permitted a prosecutor to move the court to place the defendant on probation without trial and to dismiss criminal charges against him upon successful completion of the program. *Id.* at 379. The court observed that the ARD program was primarily designed to rehabilitate first-time offenders by offering them a clean record if they successfully completed the program. *Id.* at 382. The court concluded that the blanket policy requiring a defendant to sign a release-dismissal agreement to be eligible for ARD was "wholly and patently unrelated to the goals of ARD," because the policy "[did] not seek to rehabilitate those who are deemed capable of it, nor

[did] it seek to protect society from those who are not." *Id.* at 383.

The policy at issue in this case is entirely different. Whereas the defendants who did not sign a release in *Cain* lost the opportunity to participate in the ARD program, here property owners always retain the right to seek return of their property through judicial forfeiture proceedings if they want to retain the right to sue government actors. Moreover, the government's forfeiture settlement policy specifically requires a prosecutor to have a factual and legal basis for the forfeiture before requiring the property owner to execute a release. Thus, the government's policy does not pose the danger that prosecutors will make arbitrary judgments unrelated to legitimate prosecutorial duties. See *Rumery*, 480 U.S. at 395 (plurality opinion) (noting potential danger that release-dismissal agreements "may tempt prosecutors to bring frivolous charges"); see also 480 U.S. at 400 (O'Connor, J., concurring).[3] Petitioner therefore has not shown that the government's policy is contrary to public policy.

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[3] Nor does the government's policy create an incentive for prosecutors "to dismiss meritorious charges." *Rumery*, 480 U.S. at 395 (plurality opinion); see also *id.* at 400 (O'Connor, J., concurring). The policy does not require prosecutors to settle any forfeiture action in which a civil complaint is threatened or filed; the policy simply requires prosecutors to include a release in those instances in which the prosecutor has made a judgment that settlement otherwise advances the public interest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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