
Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

JAMES EXTALE,

Defendant-Appellant.

**BRIEF FOR THE DISTRICT ATTORNEYS
ASSOCIATION OF THE STATE OF NEW YORK
AS AMICUS CURIAE**

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BRIEF FOR AMICUS CURIAE
DISTRICT ATTORNEY'S ASSOCIATION OF THE STATE OF NEW YORK
PRELIMINARY STATEMENT

Pursuant to Rule 500.23 of the Rules of this Court, the District Attorney's Association of the State of New York ("DAASNY") submits this brief as amicus curiae in the above-captioned appeal. By permission of the Honorable Victoria A. Graffeo, granted on March 11, 2011, defendant James Extale appeals from a November 12, 2010 order of the Appellate Division, Fourth Department, which affirmed a February 28, 2008 judgment of the Monroe County Court (Richard A. Keenan, J.). By that judgment, defendant was convicted, after a jury trial, of one count of Assault in the Second Degree and sentenced to seven years in prison plus five years of post-release supervision.

INTEREST OF AMICUS CURIAE

DAASNY is a statewide organization composed of elected District Attorneys from throughout New York State, the Special Narcotics Prosecutor of the City of New York, and their nearly 2900 assistants. In their capacity as public officers charged with enforcing the laws of New York State, DAASNY members are agents of the Executive branch of government and are afforded significant discretion in determining how to conduct the State's business of prosecuting criminal offenders. DAASNY members' experience on issues relating to the exercise of such discretionary authority places DAASNY in a position to assist this Court's resolution of the specific issue of statewide concern raised by this appeal: whether, consistent with the separation of powers doctrine and traditional principles of prosecutorial discretion, the People may elect to withdraw, prior to the commencement of trial, a charge voted by the grand jury.

INTRODUCTION

After defendant hit a police officer with his pickup truck, a Monroe County grand jury indicted him for, among other things, Assault in the First Degree and Vehicular Assault in the First Degree. At defendant's first trial, the jury convicted him of those crimes and several others. On appeal, the Appellate Division, Fourth Department, vacated defendant's conviction as to the first-degree assault and vehicular assault counts because those two crimes required different mental states

such that, under the circumstances, defendant could not have committed them both. Prior to defendant's second trial, the People moved to withdraw the vehicular assault charge and proceed solely on the charge of first-degree assault. The court granted the motion and dismissed the vehicular assault charge over defendant's objection.

That ruling was correct. As this Court has observed, district attorneys enjoy "broad discretion in determining when and in what manner to prosecute a suspected offender." People v. Di Falco, 44 N.Y.2d 482, 486 (1978). Similarly, the United States Supreme Court has declared that prosecutors -- as agents of the Executive branch -- are vested with "exclusive authority and absolute discretion to decide whether to prosecute a case." United States v. Nixon, 418 U.S. 683, 693 (1974).

The Appellate Division did no more than recognize those well-settled principles when it affirmed the trial court's decision to grant the People's pretrial motion. Nonetheless, defendant maintains that the dismissal was improper because the prosecutor had no express authority under the Criminal Procedure Law to withdraw a charge that had been voted by the grand jury.

Amicus joins in respondent's request for an order affirming the Appellate Division's decision and determining that district attorneys -- in accordance with the historical function of the grand jury, the discretion traditionally reposed in the public prosecutor, and the separation of powers doctrine -- are vested with the authority to discontinue criminal proceedings when doing so furthers prosecutorial policy or strategy.

QUESTION PRESENTED

Consistent with the separation of powers doctrine and traditional principles of prosecutorial discretion, and absent any limitation imposed by the Criminal Procedure Law, may a district attorney elect, prior to the commencement of trial, to withdraw a charge voted by the grand jury?

POINT

DISTRICT ATTORNEYS ENJOY BROAD DISCRETION IN DETERMINING WHICH CRIMES TO PROSECUTE AND, ABSENT ANY LIMITATION IN THE CRIMINAL PROCEDURE LAW, MAY ELECT, PRIOR TO THE COMMENCEMENT OF TRIAL, TO WITHDRAW CHARGES RETURNED AGAINST A DEFENDANT BY A GRAND JURY.

After defendant had been tried and convicted of, among other things, Assault in the First Degree and Vehicular Assault in the First Degree, the Appellate Division vacated those convictions and remanded the case for a new trial on the ground that the guilty verdicts of those counts were inconsistent with one another: the conviction for first-degree assault required a finding that defendant had intentionally injured the victim, and the conviction for first-degree vehicular assault required a finding that defendant had injured the victim through criminal negligence. People v. Extale, 42 A.D.3d 897, 897-98 (4th Dep't 2007); see Penal Law §§ 120.10(1); 120.04. Prior to defendant's retrial, the prosecutor moved to withdraw the vehicular assault count and try defendant only for first-degree assault. The prosecutor contended that the People

are not “constrained” to try the “indictment that the grand jury voted,” but rather “can choose what charges to go forward on” (Defendant’s Appendix: 28-29). The court accepted that reasoning and dismissed the vehicular assault charge over defendant’s objection (*id.* at 29). The judge ultimately instructed the jury on first-degree assault and, as a lesser-included offense, second-degree assault. The jury convicted defendant of second-degree assault.

The Appellate Division unanimously affirmed the conviction. The court found that the People acted within the bounds of their authority by withdrawing the vehicular assault charge prior to trial. Specifically, the court held that the People “have broad discretion in determining when and in what manner to prosecute a suspected offender, including the discretion to reduce a charge when they deem it appropriate.” People v. Extale, 78 A.D.3d 1519, 1520 (4th Dep’t 2010), citing People v. Urbaez, 10 N.Y.3d 773 (2008); Di Falco, 44 N.Y.2d at 482 (internal quotation marks omitted). Moreover, the court pointed out, there exists no provision in CPL Article 210 prohibiting the People from withdrawing a count in an indictment, and absent such a limitation, “decisions concerning the manner in which to prosecute a defendant are within the prosecutor’s broad discretion.” *Id.* (internal quotation marks omitted).

The Appellate Division was correct. Of course, because indictments are filed with the court and not with the district attorney’s office, only the court has the ministerial ability to dismiss an indictment or a count thereof. However, it does not

follow, as defendant mistakenly believes (Defendant's Brief: 14-15), that he is entitled to be tried on every count of an indictment voted by the grand jury. Rather, consistent with the historical function of the grand jury, the role and inherent authority of the prosecutor, and overarching principles of separation of powers between the Executive and Judicial spheres of government, district attorneys -- in the absence of a CPL provision limiting their authority -- are vested with broad discretion to discontinue criminal proceedings when doing so furthers prosecutorial policy or strategy or otherwise advances the public good. When the People move to dismiss a count of an indictment, a court cannot compel the People to prosecute and has no general supervisory authority over the district attorney's exercise of discretion. Rather, leaving aside the possibility of a finding of extraordinary circumstances involving a bad-faith betrayal of the public interest on the prosecutor's part, a court must grant such a motion.

A.

Our grand jury system can be traced back to 12th Century England, when, in 1164, the Crown established the first criminal grand jury. Note, The Grand Jury As An Investigatory Body, 74 HARV. L. REV. 590, 590 (1961) [hereinafter "Grand Jury Note"], citing 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 312 (7th ed. Rev. Goodhart & Hanbury 1956); see Costello v. United States, 350 U.S. 359 (1956) (the English grand jury was "brought to this country by the early colonists and incorporated in the Constitution by the Founders"). At its inception, the grand jury

was composed of twelve knights charged with accusing “those who according to public knowledge . . . had committed crimes.” Grand Jury Note, supra, at 590, citing 2 POLLOCK & MATTLAND, THE HISTORY OF ENGLISH COMMON LAW 642 (2d ed. 1959). However, as time passed and the grand jury “became an established institution,” it evolved into a body that “came also to protect the accused by its power not to indict those whom the government wished to punish.” Grand Jury Note, supra, at 590. By the end of the 17th Century, the grand jury had developed a “reputation ‘as a bulwark against oppression and despotism of the Crown.’” Robert L. Misner, In Partial Praise of Boyd: The Grand Jury as a Catalyst for Fourth Amendment Change, 29 ARIZ. ST. L.J. 805, 829 (1997), quoting YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, AND QUESTIONS, 689-90 (8th ed. 1994).

The grand jury was “brought without significant change to England’s American colonies,” Grand Jury Note, supra, at 590, where it continued to function “as an ‘institution designed to prevent oppression.’” Misner, supra, at 831, quoting RICHARD DAVIS YOUNGER, THE PEOPLE’S PANEL: THE GRAND JURY IN THE UNITED STATES 1634-1941, at 2 (1963). Indeed, “[i]t was this power -- the ability to thwart government persecution of innocent citizens -- that the framers sought to preserve in the Constitution.” Fields v. Soloff, 920 F.2d 1114, 1117 (2d Cir. 1990). Today, the “primary function” of the grand jury “is to investigate crimes and determine whether sufficient evidence exists to accuse a citizen of a crime and subject him or her to

criminal prosecution.” People v. Valles, 62 N.Y.2d 36, 38 (1984) (citation omitted). In other words, the grand jury exists “to protect citizens from having to defend against unfounded accusations,” id.; to prevent “overzealous prosecut[ions],” Misner, supra, at 830, citing United States v. Sells Eng’g., Inc., 463 U.S. 418, 423-24 (1983); and to “afford [defendants] a safeguard against oppressive actions of the prosecutor or a court,” United States v. Cox, 342 F.2d 167, 170 (5th Cir. 1965). In short, “[t]he constitutional provision is not to be read as conferring on or preserving to the grand jury, as such, any rights or prerogatives. The constitutional provision is, as has been said, for the benefit of the accused.” Id.

In fulfilling its function as “the gatekeeper to the criminal justice system,” Kevin K. Washburn, Restoring the Grand Jury, 76 FORDHAM L. REV. 2333, 2351 (2008), the grand jury’s role in a given case ends after it decides whether criminal proceedings should be initiated against a defendant. Cox, 342 F.2d at 171 (“The role of the grand jury is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed”). Thus, when a prosecutor receives an indictment from a grand jury but subsequently decides to abandon the prosecution, she need not return to the grand jury in order to have the indictment withdrawn. Rather, absent a statute limiting her authority to do so, the prosecutor may make a unilateral decision to terminate criminal proceedings by entering a writ of nolle prosequi (or, in short form, “nol pros”). See People v. Douglass, 60 N.Y.2d 194, 201-02 (1983).

The doctrine of nolle prosequi -- meaning literally, in Latin, “not to wish to prosecute,” Black’s Law Dictionary [2d. pocket ed.], p. 477 -- finds its roots in 16th Century English common law. Comment, Nolle Prosequi – Trial Court Has Power to Dismiss for Want of Prosecution, 41 N.Y.U. L. REV. 996, 997 (1966) [hereinafter “N.Y.U. Comment”], citing Stretton & Taylor’s Case, 1 Leon. 119, 74 Eng. Rep. 111 (K.B. 1588). Under the law as it existed then, although criminal suits were brought in the name of the King, they were prosecuted exclusively by private citizens rather than public officials. Note, The Proposed Court-Appointed Special Prosecutor: In Quest of a Constitutional Justification, 87 YALE L.J. 1692, 1715 (1978) [hereinafter “Yale Note”]; N.Y.U. Comment, supra, at 997. Without centralized governmental oversight, prosecutions could be “initiated by individuals seeking vengeance” rather than justice. Yale Note, supra, at 1715. Nolle prosequi thus emerged “as a check on the abuses of [that] system” and was intended to be used “when the private system failed the public good.” Id. In such a circumstance, the King’s Attorney General could enter a writ of nolle prosequi to quash the suit. Id.; N.Y.U. Comment, supra, at 997. The Attorney General alone held this power; a court could neither refuse the Attorney General nor enter a writ of nolle prosequi on its own motion. Id.; see Douglass, 60 N.Y.2d at 201-02.

In 1879, Parliament passed the Prosecution of Offenses Act, which permitted the Crown -- in addition to private individuals -- to prosecute criminal cases. See Note, Nolle Prosequi, 1958 Crim. L. Rev. 573, 577 (1958). Armed with this new

power, the Attorney General began to use nolle prosequi in new ways. For example, the writ could be used to “dispose of technically imperfect proceedings instituted by the Crown” to “clear[] the way for the return of [indictments] capable of supporting convictions,” John F. Wirenius, A Model of Discretion: New York’s “Interests of Justice” Dismissal Statute, 58 ALB. L. REV. 175, 178 (1994); N.Y.U. Comment, supra, at 997, to “prevent a case from proceeding to trial, while protecting [the Crown’s] authority to commence a future prosecution of the defendant for the same offense,” N.Y.U. Comment, supra, at 997, or to “prevent oppressive prosecutions” by private citizens or overzealous state prosecutors. Id.

Meanwhile, as common law developed in the United States, American courts upheld the use of nolle prosequi by district attorneys and ruled that “public prosecutors had the same right to enter a nol pros as did the Attorney General in England.” N.Y.U. Comment, supra, at 997; Douglass, 60 N.Y.2d at 201-02 (the power of nolle prosequi was “delegated to District Attorneys who represented the Attorney-General in nearly all criminal proceedings”); People v. McLeod, 25 Wend. 483, 489 (1841) (the common-law right to enter a nolle prosequi “was alone vested in the district attorney or attorney general”); see, e.g., United States v. Cadarr, 197 U.S. 475, 478 (1905) (recognizing the common-law right of the government to enter nolle prosequi); Confiscation Cases, 74 U.S. 454, 457 (1868) (recounting the common-law rule that a district attorney could enter nolle prosequi at any time before the start of trial); Barker v. People, 3 Cow. 686, 687 (1824) (acknowledging that “the District

Attorney . . . entered a nolle prosequi on the fifth count”); People v. Barrett, 1 Johns. 66, 69 (1806) (general reference to nolle prosequi).¹ However, recurring scandals involving “abusive dismissals” led to concerns that prosecutors were exercising their nolle power unjustly. Sheila Kles, Criminal Procedure II: How Much Further is the Furtherance of Justice?, 1989 Ann. Surv. Am. L. 413, 415 (1991); see N.Y.U. Comment, supra, at 997. Specifically, a prosecutor could harass a defendant by charging a crime, dismissing it without having placed the defendant in jeopardy, and then recharging (or threatening to recharge) the same crime later on. See Rinaldi v. United States, 434 U.S. 22, 29 n.15 (1977). These concerns led at least some state courts to “gradually limit[] the absolute discretion of the prosecutor to ‘nol pros’ an action by adding the requirement of court approval.” Kles, supra, at 415. Eventually, some state legislatures codified that requirement by “enact[ing] statutes either abolishing the nolle prosequi, or directing that the court must approve the entry.” N.Y.U. Comment, supra, at 997-98.

New York was no exception. Prior to 1828, the prosecuting authority of this State had plenary power, as a matter of common law, to nolle a case prior to the commencement of trial without seeking judicial approval. See McLeod, 25 Wend. at 489, 573; McDonald v. Sobel, 187 Misc. 728, 729-30 (Kings Co. Sup. Ct. 1946). In

¹ Citations to reporters abbreviated as Cow., Johns., and Wend., refer to decisions of this Court (then called the Supreme Court) that predate the New York Reporter.

that year, however, the Legislature superseded the common-law rule by providing: “It shall not hereafter be lawful for any district attorney to enter a nolle prosequi upon any indictment . . . without leave of the court.” 2 Revised Statutes of New York, part IV, ch. II, tit IV, § 54, at 728 (1st ed. 1829); see Douglass, 60 N.Y.2d at 202; McLeod, 25 Wend. at 572-73 (“before the Revised Statutes we had no right to give such direction”).² Notably, though, at this juncture, courts were granted only a “veto power” against a prosecutor’s decision to dismiss a charge; the court possessed no “positive power to compel a discontinuance.” Douglass, 60 N.Y.2d at 202.

This remained the law for about 50 years, until, in 1881, the Legislature enacted the Code of Criminal Procedure. Under Section 671 of the Code, which by implication repealed Section 54 of the Revised Statutes,³ the court was granted the

² Defendant contends that “[t]he District Attorney had no inherent authority at common law to enter nolle prosequi to an indictment or to any count thereof and only acquired the authority to do so by statute in 1828” (Defendant’s Reply Brief: 6). That is incorrect, as the above-cited case law makes clear (see pages 10-11, supra). Of course, as a matter of English common law, only the Attorney General could nolle a case. However, as American common law developed in a system under which district attorneys “represented the Attorney-General in nearly all criminal proceedings,” district attorneys gained the authority to enter writs of nolle prosequi as well. Douglass, 60 N.Y.2d at 201-02; see McLeod, 25 Wend. at 489; Barker, 3 Cow. at 687. In fact, even the language of Section 54 itself makes this point in stating, “It shall not hereafter be lawful for any district attorney to enter a nolle prosequi” without judicial approval. Revised Statutes § 54 (emphasis added).

³ In the Seventh Edition of the Revised Statutes, published in 1882, Section 54 of part IV, ch. II, tit IV, was omitted with a note that it, along with the rest of the sections between 53 and 69, had been “superseded” by “Code Crim. Proc., §§ 300 et seq., § 671, 611, etc.”). 3 Revised Statutes of New York, part IV, ch. II, tit. IV, at 2567 (Montgomery H. Throop ed., 7th ed. 1882) (1829). In an introductory comment regarding “peculiar features” of the Seventh Edition, the editor asserted that omitted sections had been “repealed by implication” by the Code of Criminal Procedure. 1 Revised Statutes of New York at page *v*.

power to, “either of its own motion, or upon the application of the district attorney, and in furtherance of justice, order an action, after indictment, to be dismissed.” Furthermore, Section 672 of the Code provided, “The entry of a nolle prosequi is abolished; and neither the attorney-general, nor the district attorney, can discontinue or abandon a prosecution for a crime, except as provided in [Section 671].” Code of Criminal Procedure §§ 671-72 (1881). See Douglass, 60 N.Y.2d at 203-04. This legislative progression addressed the “primary concern” with the prosecution’s unfettered discretion to nolle a case: “that of protecting a defendant from harassment, through a prosecutor’s charging, dismissing without having placed a defendant in jeopardy, and commencing another prosecution at a different time or place deemed more favorable to the prosecution.” United States v. Ammidown, 497 F.2d 615, 620 (D.C. Cir. 1973); see Rinaldi, 434 U.S. at 29 n.15; United States v. Rosenberg, 108 F. Supp. 2d 191, 205 (S.D.N.Y. 2000); United States v. Greater Blouse, Skirt & Neckwear Contractors Ass’n, 228 F. Supp. 483, 486-87 (S.D.N.Y. 1964).

Many other states adopted similar rules, and, in 1944, the federal government followed suit with Rule 48 of the Federal Rules of Criminal Procedure [hereinafter “FRCRP”]. See Advisory Committee Notes to Rule 48. That statute reads, in relevant part, “The government may, with leave of the court, dismiss an indictment.”

FRCRP 48(a).⁴ The Advisory Committee explicitly acknowledged that this new rule superseded the existing Federal common-law rule “that the public prosecutor may enter a nolle prosequi in his discretion, without any action by the court.” Advisory Committee Notes to Rule 48, citing Confiscation Cases, 74 U.S. at 457.

This change in the law sparked constitutional concerns regarding the separation of powers between the Executive and Judicial branches of government. Of course, under our Constitution, “[t]he executive power is vested in the President of the United States, who is required to take care that the laws be faithfully executed,” and the “judicial power of the United States is vested in the federal courts, and extends to prosecutions for violations of the criminal laws of the United States.” Cox, 342 F.2d at 171, citing U.S. CONST. ART. II §§ 1, 3; ART. III. Traditionally, a prosecuting attorney -- as an agent of the Executive branch -- is vested with “exclusive authority and absolute discretion to decide whether to prosecute a case,” Nixon, 418 U.S. at 693, and under the separation of powers doctrine, “the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.” Cox, 342 F.2d at 171. On the other hand, Rule 48(a) apparently authorizes such interference by requiring leave of the court before a prosecutor can dismiss a charge.

⁴ Subsection B of the same Rule gives the court authority to dismiss an indictment sua sponte in the case of certain “unnecessary delay[s].” FRCRP 48(b).

Although the Supreme Court of the United States has never delineated the instances in which a trial court may withhold leave under this Rule, circuit courts have recognized that, consistent with separation-of-powers principles, such discretion is limited to only two specific circumstances: when, upon a defendant's objection, the court finds evidence of prosecutorial harassment; and when a dismissal would be "clearly contrary to the manifest public interest." United States v. Jacobo-Zavala, 241 F.3d 1009, 1012 (8th Cir. 2001), citing In re Richards, 213 F.3d 773, 786-87 (3d Cir. 2000); United States v. Gonzalez, 58 F.3d 459, 461 (9th Cir. 1995); United States v. Hamm, 659 F.2d 624, 629 (5th Cir. 1981).

Addressing the former, a court may prevent the government from dismissing an indictment in response to a defendant's objection only in order to "safeguard [the defendant's] rights" in the face of "harassment" by the prosecutor. Gonzalez, 58 F.3d at 461-62. Specifically, such discretion should be exercised only when the court is convinced that the prosecutor is seeking to engage in a practice of "charging, dismissing, and recharging" the same defendant for the same crime. Rinaldi, 434 U.S. at 29 n.15; see Gonzalez, 58 F.3d at 461; Hamm, 659 F.2d at 629.

In order to bar dismissal on the ground of "manifest public interest," a court must find that the dismissal "is not based in the prosecutor's good faith discharge of her duties." Jacobo-Zavala, 241 F.3d at 1013. A "trial court [cannot] properly deny the prosecutor's motion" on public interest grounds unless dismissal motion is "tainted with impropriety." Hamm, 659 F.2d at 629, citing Rinaldi, 434 U.S. at 30

(internal quotation marks omitted). Such a finding cannot properly be based merely on a prosecutor's "strategic decisions," such as "what penalty the defendants ought to face" or "whether defendants ought to be tried in a federal [or state] forum"; rather, a court may withhold leave only where the "circumstances indicat[e] [a] 'betrayal of the public interest,' such as bribery, inconvenience to the prosecutor, or personal dislike for the victim of a crime." Jacobo-Zavala, 241 F.3d at 1013, quoting Hamm, 659 F.2d at 629-30.

Like the Federal Constitution, our State Constitution provides that the governor "shall take care that the laws are faithfully executed," and vests in the judiciary the authority to try "crimes prosecuted by indictment." NEW YORK CONST. ART. IV § 3; ART. VI § 7(a). Accordingly, similar separation-of-powers concerns would arise under a statutory scheme that conditioned upon judicial approval the prosecution's decision to withdraw a criminal charge. Undoubtedly realizing this, the Legislature took care when drafting our current Criminal Procedure Law to balance the roles of the Executive and Judicial branches while safeguarding a defendant's right to be free from prosecutorial harassment.

In 1970, the Legislature repealed the Code of Criminal Procedure and replaced it with the new Criminal Procedure Law. L. 1970 ch. 996 §§ 1, 4 (effective Sept. 1, 1971). In so doing, the Legislature retained the essence of Section 671 of the old Code by enacting CPL 210.40. Specifically, where Section 671 allowed the court to, "either of its own motion, or upon the application of the district attorney, and in

furtherance of justice, order an action, after indictment, to be dismissed,” its CPL analog provides that “[a]n indictment or any count thereof may be dismissed in furtherance of justice” on motion of the defendant, the People, or the court itself. CPL 210.40(1), (3); People v. Clayton, 41 A.D.2d 204, 206 (2d Dep’t 1973) (“CPL 210.40 is a successor to section 671 of the Code of Criminal Procedure”).

On the other hand, the Legislature repealed Section 672 of the Code -- which had abolished nolle prosequi and provided that no prosecutor could “discontinue or abandon a prosecution for a crime, except as provided in [Section 671]” -- without carrying forward into the CPL any similar prohibition. Instead, the Legislature wrote into another section of Article 210 a provision that obviated the danger of abuse associated with common-law nolle: if an indictment or a count thereof is dismissed for any reason other than those set forth in CPL 210.20(1)(a), (b) (c), or (i), “the dismissal constitutes a bar to any further prosecution of such charge.” CPL 210.20(4). This provision serves to prevent the People from “harass[ing]” a defendant by “charging, dismissing, and recharging” the same defendant for the same crime. Rinaldi, 434 U.S. at 29 n.15.

Today, as in 1970, the repeal of the abolition of nolle prosequi remains in effect, and “[a]lthough there is no provision in CPL article 210 authorizing the People to withdraw a count in an indictment, there is also no provision prohibiting the People from doing so.” Extale, 78 A.D.3d at 1520.

B.

In the context of that legal history, the Appellate Division correctly determined that the People, in exercising their “broad discretion in determining when and in what manner to prosecute a suspected offender,” lawfully withdrew the vehicular assault count of the indictment in this case over defendant’s objection. Extale, 78 A.D.3d at 1520, quoting Di Falco, 44 N.Y.2d at 486 (internal quotation marks omitted). Indeed, a district attorney is entitled to withdraw a charge voted by the grand jury as a common-law mode of dismissal supplementing those outlined in the CPL, on the judicially-enforceable condition that the charge is forever forfeit and may not be brought against the defendant again.

This result derives from settled principles of statutory construction. The applicable rule has been simply stated: “In the case of the repeal of a statute, . . . the repeal revives the common law as it was before the statute.” 2B SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 50:1, at 165-67 (Singer & Singer, 7th ed., Thompson-West) (2008). Prior to 1828, New York common law permitted nolle prosequi prior to trial without judicial approval. See Douglass, 60 N.Y.2d at 201-02; McLoed, 25 Wend. At 489; Barker, 3 Cow. at 687 Barrett, 1 Johns. at 69. The Legislature codified nolle prosequi with the added requirement of judicial leave in that year, and then abolished nolle entirely in 1881 when it enacted Section 672 of the Code of Criminal Procedure. However, Section 4 of Chapter 996 of the Laws of 1970 explicitly repealed the entire Code of Criminal Procedure, including Section 672.

When Section 672 was repealed, common-law nolle prosequi was revived by operation of law “as it [existed] before the statute” that abolished it. 2B SUTHERLAND, supra § 50:1, at 167; see 4 W. LAFAVE ET. AL., CRIMINAL PROCEDURE § 13.3(c) n.37 (3d ed. Thompson-West) (2007) (“Amendment of these provisions to remove such restraints [on nolle prosequi] in some cases or under some circumstances merely returns to the prosecutor his common law authority and thus is constitutionally permissible”).⁵

Nothing in or about the CPL undermines that inescapable conclusion (cf. Defendant’s Reply Brief: 5-11). First, it is well settled that “[n]o statute is to be construed as altering the common law, further than its words import . . . [or] as making any innovation upon the common law which it does not fairly express. 3 SUTHERLAND, supra § 61:1, at 318, quoting Shaw v. Railroad Co., 101 U.S. 557, 565 (1879) (internal quotation marks omitted). Indeed, under our own State’s principles of statutory construction, “[t]he courts presume that a radical change in the common law by statute will be expressed with the clearness which the importance of the subject demands, . . . [and] [t]he courts will not construe a statute as abolishing a common-law right in the absence of a clear intention on the part of the Legislature.”

⁵ The repeal of Section 672 of the Code of Criminal Procedure did not revive Section 54 of the Revised Statutes because “the repeal . . . of any provision of a statute, which repeals any provision of a prior statute, does not revive such prior provision.” McKinney’s Cons. Laws of NY, Book 1, Statutes [hereinafter “McKinney’s Statutes”] § 378, quoting General Construction Law § 90.

McKinney's Statutes § 153. Of course, that is not to say that a statute cannot abrogate or modify a common law right, "but courts presume that the legislature has no such purpose," and "[i]f a common-law right is to be taken away, it must be noted clearly by the legislature." 3 SUTHERLAND, supra § 61:1, at 325-26. In 1881, the Legislature "noted clearly" its desire to abolish common-law nolle prosequi by enacting Section 672 of the Code of Criminal Procedure. By repealing that statute in 1970 and failing to include a similar provision in the new CPL, the Legislature -- "presumed to have been acquainted with the common law," McKinney's Statutes § 301 -- presumptively wished to restore nolle prosequi, albeit with the added protection against prosecutorial harassment afforded by Section 210.20(4), as a vehicle for the dismissal of criminal charges "cumulative" to those set forth in the new CPL (2B SUTHERLAND, supra § 50:5, at 189).

Indeed, even a "comprehensive system of laws" such as the CPL (Defendant's Reply Brief: 4) leaves room for supplementary common-law rules. Despite defendant's contrary suggestion (see Defendant's Reply Brief: 3-4, 10), "the comprehensiveness of a statute is not always a safe criterion for judging legislative intent [b]ecause of the [Legislature's] inability to comprehend in advance every situation which may be affected by a statute." 2B SUTHERLAND, supra § 50:5, at 188. Rather, where a new statute and existing common law cover similar ground, "[t]here is a presumption that [the] statute is consistent with the common law, and so a statute creating a new remedy or method of enforcing a right which existed before is

regarded as cumulative rather than exclusive of the previous remedies.” Id., at 189 (emphasis added). Thus, following the repeal of the statute abolishing common-law nolle prosequi, and in the absence of express language in the CPL reinstating or continuing such an abolition, this Court should reject defendant’s unsupported assertion (Defendant’s Brief: 27; Defendant’s Reply Brief: 8-9) that the Legislature meant to abolish the common-law right of a district attorney to decline to prosecute a charge. See 3 SUTHERLAND, supra § 61:1; McKinney’s Statutes §§ 153, 301.

People v. Bachert, 69 N.Y.2d 593 (1987), is instructive on this point. There, following his unsuccessful direct appeal, the defendant “sought to attack his judgment collaterally” by raising a claim of ineffective assistance of appellate counsel under CPL 440.10. Id. at 595. The trial court rejected the claim on the ground that the CPL did not explicitly grant defendant that right, id., even though the right had existed at common law via a writ of error coram nobis. The Appellate Division reversed, held that CPL 440.10 must have been intended to encompass common-law coram nobis relief for ineffective assistance of appellate counsel, and directed the trial court to review the matter pursuant to the procedural rules governing claims arising under Article 440 of the CPL. Id. This Court reversed that order and sent the case back to the Appellate Division, holding that coram nobis existed not as a part of the CPL, but as a cumulative common-law right, which survived the enactment of the CPL, and which required that the post-judgment proceeding originate in the Appellate Division. Id. at 596. As this Court explained, although the “codification of criminal procedures

in this State in 1971 subsumed most of the common-law postconviction collateral remedies under CPL 440.10, [] the Legislature did not expressly abolish the common-law writ of *coram nobis* or necessarily embrace all of its prior or unanticipated functions within CPL 440.10.” *Id.* at 599. The same can be said of common-law nolle prosequi: the 1971 legislation neither “expressly abolish[ed]” it nor embraced all of its “prior or unanticipated functions” regarding the dismissal of criminal charges in CPL 210.40. Accordingly, just as coram nobis exists today as a right supplemental to those codified in CPL 440.10, prosecutors may invoke nolle prosequi today as a vehicle for dismissing criminal charges supplemental to the method codified in CPL 210.40.

The separation of powers doctrine not only supports, but requires, this result. As discussed, a prosecuting attorney -- as an agent of the Executive branch -- is vested with “exclusive authority and absolute discretion to decide whether to prosecute a case.” *Nixon*, 418 U.S. at 693. Indictments, though, are filed with the court, not the prosecutor’s office, because “our criminal law tradition insists on public indictment, . . . [as] [t]ransparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused. *Smith v. Doe*, 538 U.S. 84, 99 (2003); see *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) (“Without monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings”); *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (“Public access to

judicial records and documents allows the citizenry to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system”) (internal quotation marks omitted). Thus, as a ministerial matter, since the court holds the indictment, only the court can dismiss it, in whole or in part. Nonetheless, even after an indictment is filed, the prosecutor is “presumptively the best judge of whether a pending prosecution should be terminated.” United States v. Cowan, 524 F.2d 504, 512 (5th Cir. 1975). Indeed, any other rule would allow the judiciary to effectively commandeer the Executive branch’s exclusive authority to “ensure that the laws be faithfully executed,” U.S. CONST. ART. II § 3; see NEW YORK CONST. ART. IV § 3, by forcing the prosecutor to proceed on charges that she either cannot or does not wish to pursue.

Since the New York common-law rule revived by the repeal of the Code of Criminal Procedure is similar to FRCRP 48(a), federal law on the interplay between the Executive and Judicial branches of government in the context of prosecutorial dismissals is instructive. As discussed (see supra at 15-16), consistent with the separation of powers doctrine, a federal trial court may prevent a prosecutor from dismissing an indictment or count thereof prior to trial only to prevent “harassment” by the prosecutor, Gonzalez, 58 F.3d at 461-62, or to prevent “betrayal of the public interest” in the event that a prosecutor seeks a dismissal for reasons inconsistent with the faithful discharge of her duties. See Jacobo-Zavala, 241 F.3d at 1013 (citing, as

examples, a prosecutor who is taking bribes, is “inconvenience[d]” by the prosecution, or harbors a “personal dislike for the victim of [the] crime”).

In New York, prosecutorial harassment can never be a concern, because the CPL squarely prevents prosecutors from engaging in the sort of “harassment” that pure common-law nolle permitted: the practice of “charging, dismissing without having placed a defendant in jeopardy, and commencing another prosecution at a different time or place deemed more favorable to the prosecution.” Ammidown, 497 F.2d at 620; see Rinaldi, 434 U.S. at 29 n.15; see Gonzalez, 58 F.3d at 461; Hamm, 659 F.2d at 629. To that end, CPL 210.20(4) severely limits the circumstances under which the People may be permitted re-submit charges to “the same or another grand jury” following a dismissal. Under that law, a prosecutor may seek court authorization to re-submit charges only if an indictment or count thereof is dismissed because: “[s]uch indictment or count is defective”; the evidence before the grand jury was legally insufficient to establish the charged offenses; the grand jury proceeding was defective; or dismissal was required “in the interest of justice.” CPL 210.20(1), (4). In the event of a dismissal for any other reason, including a nolle prosequi dismissal on the prosecutor’s motion, no new charges for the same crime may ever be brought. See id. Given the implementation of that safeguard, the Legislature’s decision to discontinue the abolition of nolle prosequi in the CPL is hardly surprising.

Although New York courts have not had occasion since 1971 to demarcate the extent of judicial authority to protect the People against abuse of their attorney’s

common-law power to withdraw a charge prior to trial, the sole remaining reason a New York court could have for disallowing the exercise of that power is to protect the “manifest public interest.” See Jacobo-Zavala, 241 F.3d at 1013.⁶ Importantly, though, such public interests are not implicated when the prosecutor seeks dismissal of a charge based on “strategic decisions,” such as “what penalty the defendants ought to face.” Id. Those kinds of decisions fall squarely within the realm of the Executive’s authority and are “particularly ill-suited to judicial review,” because they are closely tied to the government’s power to decide what charges to bring in the first place. Wayte v. United States, 470 U.S. 598, 607 (1985); see Cox, 342 F.2d at 171-72. Indeed, in commencing criminal proceedings, prosecutors often elect to present the grand jury with evidence of every crime that the defendant had committed because,

⁶ Notably, though, at present, at least twenty other States have either codified the prosecutor’s plenary authority to dismiss proceedings before trial without seeking judicial approval, or else recognize a prosecutor’s continuing common-law right to invoke nolle prosequi, either without judicial approval or with judicial supervision limited to narrow circumstances similar to those recognized by the federal courts. See Alaska R. Crim. P. 43 (Alaska); Conn. Gen. Stat. Ann. § 54-56b, interpreted by State v. Lloyd, 440 A.2d 867, 868-69 (Conn. 1981) (Connecticut); State v. Aguilar, 987 So. 2d 1233, 1234-35 (Fla. Dist. Ct. App. 2008) (Florida); People v. Gill, 886 N.E.2d 1043, 1046-47 (Ill. App. Ct. 2008) (Illinois); Ind. Code Ann. § 35-34-1-13 (Indiana); State v. Rowland, 239 P.2d 949, 952 (Kan. 1952) (Kansas); La. Code Crim. Proc. Ann. art. 691 (Louisiana); Me. R. Crim. P. 48 (Maine); Md. Rule 4-247 (Maryland); Mass. R. Crim. P. 16 (Massachusetts); State v. Honeycutt, 96 S.W.3d 85, 89 (Mo. 2003) (Missouri); State v. Allen, 837 A.2d 324, 327 (N.H. 2003) (New Hampshire); State v. Gaffey, 456 A.2d 511, 514 (N.J. 1983) (New Jersey); N.M. R. Mag. Ct. RCRP Rule 6-506A, interpreted by State v. Heinsen, 121 P.3d 1040, 1048 (N.M. 2005) (New Mexico); N.C. Gen. Stat. Ann. § 15A-931 (North Carolina); R.I. R. Super. Ct. RCRP Rule 48 (Rhode Island); State v. Ridge, 236 S.E.2d 401, 402 (S.C. 1977) (South Carolina); S.D. Codified Laws § 23A-44-2 (South Dakota); State v. Dopp, 255 A.2d 190, 191 (Vt. 1969) (Vermont); State v. Kenyon, 270 N.W.2d 160, 164 (Wis. 1978) (Wisconsin).

“at [that] stage of the proceedings, the prosecutor’s assessment of the proper extent of prosecution may not have crystallized.” See United States v. Goodwin, 457 U.S. 368, 381 (1982). However, after subsequent investigation, the government may develop and wish to implement a different prosecutorial strategy. At that point, a prosecutor’s decision to dismiss charges it does not wish to place before a petit jury merely restores the status quo ante, and the separation of powers doctrine restrains the court from intervening. See Cox, 342 F.2d at 171 (“as an incident of the constitutional separation of powers, [] the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions”).

Of course, the prosecutor does not retain this plenary power indefinitely; rather, the balance of power shifts when a trial commences. Indeed, even at common law, the district attorney was empowered only to “enter a nolle prosequi at any time before the jury [was] empanelled for the trial of the case.” The Confiscation Cases, 74 U.S. at 457 (emphasis added); cf. In re Rider, 3 City H. Rec. 93, 95 (Gen. Sess. 1818) (court denied prosecutor’s “request[]” to “permit a nolle prosequi to be entered . . . after testimony ha[d] been adduced on both sides”). That dividing line makes sense given the dynamic shift that occurs at the onset of trial: where the slow pace of the litigation in the pretrial phase allows the parties to referee themselves as they seek discovery and file motions according to a precise set of codified rules, once the trial begins, the brisk and unpredictable nature of the proceedings calls for an increase in

judicial supervision in order to prevent unfair surprise. Thus, for instance, while a defendant may unilaterally decide to present an alibi or insanity defense before her trial begins, afterwards, she must be granted judicial permission to do so. See CPL 250.10, 250.20. The dismissal of charges operates the same way: before trial, the People may elect to withdraw charges on their own; however, once the trial has begun, that decision ultimately falls to the judge, in the form of power to either deny a prosecutor's discretionary request for dismissal, elect to not submit a charge to the jury under CPL 300.40(6), or dismiss a charge in the interest of justice under CPL 210.40. In addition, once the presentation of evidence has revealed weaknesses in the proof or flaws in the prosecution's theory of criminal liability, the nolle power could be misused merely to deprive the defendant of the public vindication associated with a jury acquittal or to avoid a potentially embarrassing public repudiation of the prosecutor. See Rider, 3 City H. Rec. at 95. Thus, once trial commences, dismissal of charges is properly subject to judicial approval.

A trial judge's authority under CPL 300.40(6) further informs this analysis. Under that statute, so long as the People consent, the court can decide not to charge the jury on any count of the indictment except a lesser-included crime of a count that will be submitted. CPL 300.40(6)(a). Importantly, though, the exception covers only counts that meet the narrow statutory definition of lesser-included crimes; a defendant has no right to insist that the jury consider other related crimes that stemmed from the same transaction, even though her tactical reasons for seeking

consideration of such crimes may be the same as her motivation to have lesser-included crimes submitted to the jury. This bright-line rule squares with the common-law notion that a judge could “bar a nolle when the effect would be to withdraw from the jury a lesser included offense, but the same is not true as to a lesser related offense, about which the judge may not instruct if the offense is not charged.”

4 LAFAVE, supra § 13.3(c) n. 36 (internal citations omitted) (emphasis in original).

The reasoning behind this rule implicates the separation of powers doctrine once again, because it relates to a prosecutor’s decision to initiate charges in the first instance. By seeking to indict a defendant for a given crime, a prosecutor implicitly acknowledges that the defendant may have also committed all lesser included crimes and knows that those lesser included crimes may be submitted to the jury if the trial evidence supports them. Because a lesser included crime is packaged with the greater in that manner, if the prosecutor proceeds to verdict on the greater, she cannot exclude the lesser, just as she could not have chosen to exclude the lesser from her presentation to the grand jury. On the other hand, a lesser related crime stands alone and is not bound to the greater in any way; thus, the prosecutor could have chosen in the first instance to seek charges on the greater crime but not the lesser one. That being so, it makes sense that the prosecutor holds the exclusive authority -- derived from her function as an agent of the Executive branch -- to ask that the lesser related count, although supported by legally sufficient evidence, not be submitted to the jury.

This reinforces the prosecutor's role in directing the prosecution and choosing, as a matter of executive policy, how to conduct the government's business in a given case.

Moreover, a district attorney's power to dismiss cases via the entry of nolle prosequi is vital to her ability to fulfill her prosecutorial duties ethically and effectively. Indeed, it hardly strains the imagination to envision a host of scenarios in which a prosecutor would reasonably wish to dismiss a charge without explaining her grounds in open court or without citing "the interest of justice." For example, where a key witness becomes unavailable after indictment but before trial such that the defendant's guilt can no longer be proven, the prosecutor must dismiss the charge because, under the Rules of Professional Conduct, "[a] prosecutor or other government lawyer shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause." Rule 3.8(a). However, there may be circumstances under which the prosecutor would not want to discuss the witness's unavailability on the record, or where making such information public would conflict with the prosecutor's other responsibilities. For instance, where a witness had been placed in a witness protection program and then fled, disclosing that fact could place the witness in mortal danger. Such ethical dilemmas are easily avoided by acknowledging the common-law rule that a prosecutor can simply withdraw a charge prior to trial.

So, too, might a prosecutor wish, as a matter of strategy, to dismiss a charge without making a detailed record. For instance, in a case involving State secrets, the prosecution may elect to dismiss charges without announcing why in order to protect those secrets and preserve public safety. See Cox, 342 F.2d at 182 (Brown, J., concurring). Similarly, a prosecutor who decides to “flip” a defendant into a witness on a more serious case might wish to dismiss charges circumspectly so as to protect the personal safety of that defendant. Additionally, where several codefendants had committed a crime together, the prosecution may decide, as a matter of strategy, to dismiss charges against one or more codefendants in order to increase the likelihood of securing a conviction against a more morally culpable codefendant. Id.; see Jacobo-Zavala, 241 F.3d at 1013 (discussing “strategic” reasons in general). Finally (although the list could continue on), a prosecutor who believes that, as a matter of policy, a defendant deserves a certain sentence for her criminal actions may dismiss a charge in order to increase the likelihood of that sentence being imposed. See id.

That final scenario bears directly on this case. Although she did not explain her reasoning in open court, the prosecutor’s decision to dismiss the class D non-violent felony and proceed against defendant only on the class B violent felony plainly stemmed from her determination that defendant had committed a serious violent crime and should be sentenced accordingly. Defendant, on the other hand, obviously wanted for tactical reasons to give the jury the option of striking a middle ground between the top count and an outright acquittal by finding him guilty of a lower grade

(though not a lesser included) crime. But, as discussed, neither the defendant nor the trial judge holds the power to make that decision; that authority -- at least before the trial begins -- is vested in the prosecutor alone.

At bottom, until the commencement of trial, when the need for judicial oversight outweighs the prosecutor's executive right to near-absolute control over its prosecution, a New York court may not prevent a district attorney from dismissing a charge, except possibly in extraordinary circumstances involving a bad-faith betrayal of the public interest. Cowan, 524 F.2d at 512. Such a rule "preserve[s] the essential judicial function of protecting the public interest in the evenhanded administration of criminal justice without encroaching on the primary duty of the Executive to take care that the laws are faithfully executed." Id. at 512-13. Undue judicial examination of pretrial dismissal decisions "delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the government's enforcement policy." Wayte, 470 U.S. at 607. Because the CPL eliminates the danger of abuse of common-law nolle by precluding the government from reindicting defendants on dismissed charges, the defendant in a given case sustains no constitutional harm from the government's "strategic decisions" to dismiss charges prior to trial. Furthermore, unless the "circumstances indicat[e] [a] 'betrayal of the public interest,'" such as "bribery," dismissal due to "inconvenience to the prosecutor," or dismissal stemming from the prosecutor's "personal dislike for the

victim of a crime,” no harm to the public arises from a prosecutor’s discretionary withdrawal of charges. Jacobo-Zavala, 241 F.3d at 1013, quoting Hamm, 659 F.2d at 629-30.

* * *

In sum, the Appellate Division correctly upheld the trial court’s dismissal of the first-degree vehicular assault count on the ground that the People have broad discretion in choosing how to prosecute a given defendant.

CONCLUSION

The order of the Appellate Division should be affirmed.

Respectfully submitted,

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