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"BUY ONE GET ONE FREE": HOW REINDICTMENT POLICIES PERMIT EXCESSIVE SEARCHES

Katie Carroll*

INTRODUCTION

When the government decides to stop prosecuting a case, it files a nolle prosequi with the court.[1] Nolle prosequis are slightly different from motions to dismiss. Unlike a motion to dismiss with prejudice,[2] a prosecutor may later reindict a defendant with the same crime without a double jeopardy issue arising after dropping the same case through nolle prosequi.[3] Furthermore, many states do not require judicial approval for a nolle prosequi.[4] Therefore, prosecutors can gain a number of advantages by using nolle prosequi, like avoiding speedy trial deadlines or having a second chance to win important evidentiary hearings.[5]

The advantages of nolle prosequi, however, can also extend to the police. Because police will need to rearrest the defendant following a reindictment, they can conduct a new search of the defendant at the time of the arrest. Since the defendant is being rearrested, the police have an arrest warrant.[6] This makes any search substantially more likely to be found constitutional because the arrest warrant gives the police probable cause for any search incident to arrest; the police therefore do not need a reasonable suspicion to search the defendant normally required for a traditional

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[1] *See* FED. R. CRIM. P. 48(a) advisory committee's note to 1944 adoption; 22A C.J.S. *Criminal Procedure and Rights of Accused* § 280 (2019) ("The nolle prosequi of a charging document (or of a count) constitutes a final disposition of that particular charging document or count, and there can be no further prosecution under the nol prossed charging document or count unless the nolle prosequi is subject to a condition that is later violated. Subject to dismissal on other grounds, the entry of a nolle prosequi causes the matter to lie dormant unless (and until) the prosecutor elects to proceed on a new indictment, information or other charging document. Thus, the state's dismissal of a case by nolle prosequi does not bar a later prosecution." (internal citations omitted)).

[2] FED R. CRIM. P. 48(a).

[3] *See* 22A C.J.S. *Criminal Procedure and Rights of Accused* § 280.

[4] *See infra* note 188 and accompanying text.

[5] *See* discussion *infra* Section IV.B.

[6] *See* FED. R. CRIM. P. 9(a).

stop-and-frisk search.[7] Furthermore, searches incident to arrest are substantially more invasive than stop-and-frisk searches.[8]

Allowing prosecutors to file motions for nolle prosequi can create an evidentiary loophole where a defendant is charged with a separate crime that was only discovered through the second arrest, that the defendant could never be convicted of initially.[9] For example, a defendant could initially be arrested for a crime that is only supported by inadmissible evidence. After the defendant wins a motion to suppress that inadmissible evidence, the prosecutor drops the case, and later recharges the defendant with the same crime.[10] When the police go to rearrest the defendant, they find evidence of a new, separate crime while searching through his possessions. The defendant can now be charged with two crimes. Although the initial crime, which the defendant was rearrested for, remains solely supported by inadmissible evidence, the new crime is not. Because the evidence supporting the second crime was found through a search following a valid arrest warrant, the search is also valid.[11] Therefore, the evidence supporting the second crime was legally obtained and can be used to prosecute the defendant.[12] Furthermore, since the defendant is substantially likely to be convicted of the second crime, the prosecutor can now drop the original case because the evidence supporting the first crime is likely to be suppressed again.[13]

It is difficult to determine how frequently this loophole is being used. These types of searches are not typically appealed because there is no legal argument to support an appeal.[14] However, reindictments are used frequently by the criminal justice system.[15]

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[7] *See generally* Annotation, *Right of Search and Seizure Incident to Lawful Arrest Without a Search Warrant*, 82 A.L.R. 782 (2019) (describing in detail many cases wherein searches are broadened significantly because of the context of a specific arrest).

[8] *See* discussion *infra* Section III.C.

[9] *See* Joyner v. State, 678 N.E.2d 386, 393 (Ind. 1997); discussion *infra* Section I.B; *see also* discussion *infra* Part III. *See generally* United States v. Saruis, 560 F.2d 494 (2d Cir. 1977) (illustrating the extent of a search incident to arrest).

[10] *See, e.g.*, Joseph A. Thorp, Nolle-*and-Reinstitution: Opening the Door to Regulation of Charging Powers*, 71 N.Y.U. ANN. SURV. AM. L. 429, 433 (2016). For an explanation on the history of the prosecutor's power to nolle pros, see generally Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 19 (2009).

[11] *Cf.* Thorp, *supra* note 10, at 430.

[12] *See generally* Herring v. United States, 555 U.S. 135 (2009) (highlighting the extent the Court is willing to admit evidence).

[13] *Cf. id.*

[14] *See supra* notes 9–12 and accompanying text.

[15] A simple search of news articles using the word "reindictment" returns dozens of recent and ongoing cases where the prosecution reindicted the defendant. *See, e.g.*, Lorraine Longhi, *Scottsdale Schools' Ex-CFO Reindicted on 12 Felony Charges of Fraud, Conflicts of Interest*, ARIZ. REPUBLIC (Jan. 28, 2019), https://www.azcentral.com/story/news/local/scottsdale-education/2019/01/28/scottsdale-unified-school-district-ex-cfo-laura-smith-re

Although nolle prosequi creates a plethora of prosecutorial advantages, as well as granting police another search via rearrest, little has been done to restrict it.[16] Most jurisdictions have created a rule requiring the prosecutor to get judicial approval to drop a case via nolle prosequi;[17] however, this addresses the problem at the wrong stage. Courts are less likely to be critical of prosecutors when charges are being dropped because the government does not violate a defendant's rights by dropping charges and dropping charges lightens the burden of a busy docket.[18] Instead, the courts should be more critical of rearresting a defendant.

This Note examines the problems inherent in the current nolle prosequi standards. First, it explains why nolle prosequi was created, as well as its advantages and disadvantages.[19] Next, it considers the scope of police searches and how they are expanded through searches incident to arrest.[20] This Note then examines the current safeguards put in place to limit prosecutorial misconduct and why they fail.[21] Finally, it proposes some possible solutions to correct the inherent problems within nolle prosequi.[22]

I. PROSECUTORS MAY DROP A CASE VIA NOLLE PROSEQUI

Nolle prosequi is the "usual method of dismissing an indictment or stopping a criminal prosecution at common law."[23] Nolle prosequi can be defined as a "voluntary withdrawal by the prosecuting authority of present proceedings on a particular bill."[24]

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indicted-12-felony-charges/2701431002/ [https://perma.cc/E48K-VFHB]; Mark Reagan, *Second Arrest Made in Medicaid Fraud Re-Indictment*, MONITOR (Sept. 1, 2019), https://www.themonitor.com/2019/09/01/second-arrest-made-medicaid-fraud-re-indictment/ [https://perma.cc/R6BQ-NPHW]; Julia Tullos, *$1.5 Million Bond for Suspect Charged in Triple Murder on Cleveland's West Side*, CLEVELAND19 NEWS (Dec. 13, 2019), https://www.cleveland19.com/2019/12/13/million-bond-suspect-charged-triple-murder-clevelands-west-side/ [https://perma.cc/PN9U-KHZ2]; Jon Wilcox, *Lavaca County Grand Jury Hands Down Murder, Arson, Corpse Tampering Indictments for Former Victoria County Jailer*, VICTORIA ADVOC. (Nov. 25, 2019), https://www.victoriaadvocate.com/counties/lavaca/lavaca-county-grand-jury-hands-down-murder-arson-corpse-tampering/article_abbe4e9a-0fca-11ea-a9bf-bfdddbe19cfa.html [https://perma.cc/94EJ-TJMQ].

[16] *See* Thorp, *supra* note 10, at 430–31 (describing how the historical evolution of modern prosecution laid the ground work for many of the modern issues with prosecutorial forum shopping and harassing prosecutions).

[17] *See infra* note 189 and accompanying text. *But see infra* note 188 and accompanying text.

[18] *See* Thorp, *supra* note 10, at 461.

[19] *See infra* Section I.A.

[20] *See infra* Part III.

[21] *See infra* Part IV.

[22] *See infra* Part V.

[23] Annotation, *Power of Court to Enter Nolle Prosequi or Dismiss Prosecution*, 69 A.L.R. 240, § 1 (1930).

[24] *Id.* (quoting 2 FRANCIS WHARTON, A TREATISE ON CRIMINAL PROCEDURE § 1310, at 1770 (10th ed. 1918)).

Congress codified nolle prosequi under Rule 48 of the Federal Rules of Criminal Procedure.[25] The rule states: "The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent."[26] This allows prosecutors to drop cases they do not want to take to trial.

A prosecutor can only file a motion for nolle prosequi before a trial has commenced because once it has begun, "the defendant has a right to insist on a disposition on the merits and may properly object to the entry of a nolle prosequi."[27]

Once a prosecutor drops a case by nolle prosequi, he can later reinstate the same charges against the same defendant.[28] "*Nolle*-and-reinstitution" gives prosecutors a number of strategic advantages, including: "shop[ping] for better forums, dodg[ing] discovery sanctions, evad[ing] trial court orders, circumvent[ing] speedy trial limitations, and coerc[ing] guilty pleas."[29] However, nolle-and-reinstitution is a necessary part of the criminal justice system.[30] "A blanket prohibition against reinstitution would unjustifiably reward the robber and harm society. It might also encourage prosecutors to persist in prosecutions without hope of conviction as a way of keeping the defendant in custody."[31]

A. Why Nolle Prosequi Exists in the First Place

The history of nolle prosequi can be traced back to sixteenth-century England, where it "was a procedural device that the royally appointed Attorney General could use to terminate an ongoing criminal prosecution."[32] The Attorney General used nolle prosequi to dismiss frivolous prosecutions or prosecutions that were contradictory to royal interests.[33] Historically, most criminal prosecutions were initiated and managed by private citizens in England.[34] Therefore, the nolle prosequi was the "only form of 'prosecutorial discretion' exercised by a public figure."[35] This power acted as a check against criminal claims made by private citizens.[36]

American prosecutors, however, used nolle prosequi to terminate prosecutions that they originally brought.[37] Therefore, in America nolle prosequi is "one of many

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[25] *See* FED. R. CRIM. P. 48(a).
[26] *Id.*
[27] FED. R. CRIM. P. 48(a) advisory committee's note to 1944 adoption.
[28] Krauss, *supra* note 10, at 7 n.30; Thorp, *supra* note 10, at 430.
[29] Thorp, *supra* note 10, at 430.
[30] *See id.* at 438.
[31] *Id.*
[32] Krauss, *supra* note 10, at 16.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 17.

procedural devices that public officials used to control criminal prosecutions."[38] Justice Marshall argued that the administering of criminal judgment was a duty of the government: "It is a duty to be performed at the demand of the nation, and with which the nation has a right to dispense."[39]

There are some common-sense reasons demonstrating the necessity for nolle prosequi. For example, if police find evidence that conclusively rules out a defendant from having committed a crime, there is no reason to go to trial. It would be both a waste of money and a miscarriage of justice to put an innocent person in jeopardy of going to jail. Nolle prosequi allows prosecutors to end the case instead of waiting for the defendant to file a motion to dismiss. Because a prosecutor understands the state's argument better than the defense, he is in a better position to know that there is not enough evidence to go to trial. Ultimately, it is better that he dismisses the case without forcing the defense attorney to write a motion to dismiss and have the judge rule on the motion.

Conversely, the modern nolle prosequi does not allow courts to dismiss a case with prejudice and therefore bar the prosecutor from reindicting the defendant for the same charges based on the same fact pattern.[40] Filing for a motion to dismiss is superior to a nolle prosequi for a defendant because the judge can permanently dismiss the case.[41] Because the prosecutor can move to reinstate the case, a nolle prosequi does not give the defendant the same peace of mind that a motion to dismiss with prejudice does.

Although reindicting a case after a nolle prosequi is sometimes a justifiable necessity, it does not mean that this prosecutorial power should be left unregulated.[42] The Supreme Court has heard several cases involving reinstatement after nolle prosequi but has never truly addressed this use of power directly, instead focusing on behavior of specific prosecutors.[43] As a result, "the Court has not only failed to meaningfully regulate nolle-and-reinstitution, it has also failed to identify nolle-and-reinstitution as an adversarial charging power problem."[44]

B. Prosecutorial Advantages to Nolle Prosequi

There are a number of advantages that a prosecutor can gain by nolle prosses a case and later reindicting. Because prosecutors can reinstate a case later, they essentially have the ability to "reset" a case should the prosecution be at a disadvantage for trial.

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[38] *Id.*
[39] *Id.* at 18 (quoting 6 ANNALS OF CONG. 615 (1800)).
[40] *Compare* FED. R. CRIM. P. 48(a), *with* FED. R. CRIM. P. 12(a).
[41] *See* discussion *supra* notes 1–2 and accompanying text.
[42] Thorp, *supra* note 10, at 438.
[43] *Id.* at 451–52.
[44] *Id.* at 451.

Nolle prosequi therefore allows prosecutors "to shop for a litigation advantage, such as a better judge or a more favorable jurisdiction."[45]

Furthermore, the prosecution can control the timing of the criminal charge by resetting the trial whenever the prosecutors nolle prosses a case.[46] This is one of the more common reasons a prosecutor might maliciously use nolle prosequi, to grant himself an unauthorized continuance.[47] Through delaying the case, the prosecutor can accomplish a series of goals, including: "locat[ing] an essential witness, punish[ing] a defendant for demanding a trial, or coerc[ing] a plea bargain."[48]

When a charge is reindicted, any ruling from the original case does not carry over to the new cases: "The dismissal 'free[s] the proceedings of the unfavorable ruling,' so that the issue in contention can 'be reargued before a different judge with the chance that this new judge might be persuaded by the prosecutor's argument.'"[49] Therefore, any motions that would put the prosecution at a disadvantage can be relitigated without the finality of a binding appellate doctrine.[50]

For example, in *Joyner v. State*, the court held that because rulings on pretrial motions are "not necessarily final," a decision on a motion in the original case does not preclude the reindictment court from making an individual decision on the same issue and coming to the opposite conclusion.[51] In that case, prosecutors initially tried Joyner for murder in the county where the victim's body was found.[52] The original court granted Joyner's motion to suppress a video of the police interrogating him.[53] After the motion to suppress, the State dismissed the case, which was then refiled in the county where Joyner lived.[54] Joyner again filed a motion to suppress the video; however, the second court denied the motion to suppress.[55] The Supreme Court of Indiana held that because Joyner never went to trial, double jeopardy did not attach, and, therefore, "the State's dismissal of criminal charges does not preclude it from refiling and prosecuting a charge for the identical offense."[56] Because the prosecution was able to get this evidence in, Joyner was ultimately found guilty of murder.[57]

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[45] *Id.* at 439.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 440 (footnotes omitted).

[49] *Id.* at 441 (quoting People v. Walls, 324 N.W.2d 136, 138 (Mich. Ct. App. 1982)).

[50] *Id.* ("In contrast, the outcome of an appeal would be binding in the case at bar and might establish precedent for future cases. Little wonder then that prosecutors prefer to take their chances on finding a better forum.").

[51] 678 N.E.2d 386, 393 (Ind. 1997).

[52] *Id.* at 388–89.

[53] *Id.* at 393.

[54] *Id.* at 388.

[55] *Id.* at 393.

[56] *Id.*

[57] *Id.* at 388–89. Joyner's conviction was ultimately overturned for unrelated reasons—the trial court excluded relevant evidence that implicated another person of the murder. *Id.* at 390.

The United States Supreme Court has created a presumption that prosecutors acted in good faith stemming from a long line of cases.[58] "This presumption 'supports . . . prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."' This presumption of regularity all but guarantees that defendants' challenges to inquisitorial charging powers will fail."[59]

All of these advantages, however, occur within a courtroom after the reindictment. Because the defendant needs to be rearrested following a reindictment the prosecution, by extension of the police, gains a completely separate advantage in the rearrest, which can lead to new evidence discovered that would strengthen the original charge or potentially lead to a separate, unrelated charge. In both of these instances, the evidence gathered is likely admissible because an arrest warrant broadens the scope of a warrantless search.

II. HOW A DEFENDANT IS REARRESTED

A. Nolle Prosequi Circumvents Protections Provided by Arrest Warrants

Following a nolle prosequi, if the prosecution wants to retry the case, they will have to secure an arrest warrant and rearrest the defendant.

The Fourth Amendment, as interpreted in *Coolidge v. New Hampshire* by the Supreme Court, requires that an arrest warrant be issued by "a neutral and detached magistrate."[60] An arrest warrant can be issued by a grand jury's finding that probable cause existed for an indictment.[61] If there is no grand jury indictment, an arrest warrant may still be issued if there is an adequate basis for finding probable cause on the face of the criminal complaint pursuant to which an arrest warrant is issued.[62]

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[58] Thorp, *supra* note 10, at 465–66 (first citing United States v. Chem. Found., Inc., 272 U.S. 1, 6 (1926); then citing United States v. Nix, 189 U.S. 199, 205 (1903); then citing United States v. Page, 137 U.S. 673, 679–80 (1891); and then citing Confiscation Cases, 87 U.S. 92, 108 (1873)).

[59] Thorp, *supra* note 10, at 466 (quoting United States v. Armstrong, 517 U.S. 456, 464 (1996)); *see* Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 276–78 (2001) ("[C]ourts restrict defendants' challenges [to the use of prosecutorial discretion] and employ a standard of review that is favorable to prosecutors. . . . 'The prosecutor's decision to institute criminal charges is the broadest and least regulated power in American criminal law. The judicial deference shown to prosecutors generally is most noticeable with respect to the charging function. . . . [T]he charging decision is *virtually immune from legal attack*.'").

[60] *See* Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971); *see also* U.S. CONST. amend. IV.

[61] Giordenello v. United States, 357 U.S. 480, 487 (1958).

[62] *Id.*

However, regardless of whether the grand jury has indicted the defendant or if there is a presumption of probable cause, the arrest warrant requirement remains.[63]

In *Shadwick v. City of Tampa*, a unanimous Supreme Court held that the authority to issue arrest warrants does not need to "reside exclusively in a lawyer or judge."[64] In that case, a clerk of the municipal court was authorized to issue arrest warrants for people charged with breaching municipal ordinances.[65] The Supreme Court upheld this practice because it was consistent with the constitutional requirement that: "[A]n issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search."[66] The clerk is neutral and detached when "he is removed from prosecutor or police and works within the judicial branch subject to the supervision of the municipal court judge."[67] Furthermore, a clerk of the court is capable of making the relatively simple judgments called for in municipal ordinance cases, such as "whether there was probable cause to believe a citizen guilty of impaired driving, breach of peace, drunkenness, trespass, or the multiple other common offenses covered by a municipal code."[68]

The test established in *Shadwick* is used to determine who can issue an arrest warrant.[69] Obviously, police officers and prosecuting attorneys do not meet the *Shadwick* test.[70] That being said, in some cases, the prosecutor does become involved in the warrant-issuance process before the arrest warrant is presented to the judge.[71] However, if a warrant request has been signed by a prosecutor but was not actually reviewed by him, it "should not affect the independent review undertaken by the judicial officer."[72] Therefore, this prosecutorial interference does not invalidate the arrest warrant if it is later issued by a judge.[73]

It should be noted that "[i]f an arrest is made pursuant to a previously issued arrest warrant, it does not necessarily follow that the arrest is valid. For one thing, an arrest may not be made pursuant to the warrant if in the interim the police learn of additional information exculpatory in nature."[74]

In *Whiteley v. Warden*, the Supreme Court held an arrest was unlawful only after finding that the arrest warrant was found defective and that the arresting officers were

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[63] United States v. Jarvis, 560 F.2d 494, 497 (2d Cir. 1977).

[64] 407 U.S. 345, 349 (1972); *see* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1(h) (5th ed. 2018).

[65] *Shadwick*, 407 U.S. at 345.

[66] *Id.* at 350.

[67] *Id.* at 351.

[68] *Id.*

[69] LAFAVE, *supra* note 64, § 5.1(h).

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* (footnotes omitted).

not independently possessed of facts amounting to probable cause.[75] This is because "[w]here probable cause for a warrantless arrest exists, the arrest is not invalidated because it was made pursuant to a warrant that turned out to be invalid."[76]

In cases of reinstatement, particularly if the defendant was initially arrested with a warrant, the "presumption of probable cause" is not hard to find.[77] The police were already able to successfully arrest the defendant and the prosecution was able to bring charges. Even in cases where the charges were nolle prossed after evidence favorable to the prosecution was suppressed, the suppression would not affect the validity of a warrant.[78] Therefore, there is little protection for defendants at the rearrest stage.

III. NOLLE PROSEQUI OPENS DEFENDANTS TO A SEARCH INCIDENT TO ARREST

Following an arrest warrant, the police proceed to arrest the defendant. During the arrest, the police conduct a search incident to arrest. Depending on the location of the defendant, that search can include: the clothes he is wearing,[79] anything he is carrying that is in arm's reach,[80] the room he is in or adjoining rooms,[81] and his car.[82] The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[83]

This protects citizens from unreasonable searches and seizures by police officers.[84] However, the standard for what constitutes an improper search is different depending on how and where the police perform it.[85] Obviously, if the police obtain a valid search warrant and conduct the search within the boundaries specified by the warrant, the

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[75] 401 U.S. 560, 560 (1971).

[76] United States v. Rose, 541 F.2d 750, 756 (8th Cir. 1976).

[77] United States v. Jarvis, 560 F.2d 494, 497 (2d Cir. 1977); *see* Herring v. United States, 555 U.S. 135, 139 (2009) (explaining how the exclusionary rule is not triggered based off of a bad warrant).

[78] *See generally* Joyner v. State, 678 N.E.2d 386 (Ind. 1997).

[79] United States v. Robinson, 414 U.S. 218 (1973).

[80] Chimel v. California, 395 U.S. 752 (1969).

[81] *Id.*; *see also* Maryland v. Buie, 494 U.S. 325 (1990).

[82] Arizona v. Gant, 556 U.S. 332 (2009).

[83] U.S. CONST. amend. IV.

[84] *See, e.g.*, Katz v. United States, 389 U.S. 347, 351–53 (1967).

[85] *See* discussion *infra* Section III.B; *see also infra* note 106.

search is presumably constitutional.[86] Similarly, having an arrest warrant also gives the police more leeway in searching someone they have detained.[87]

Yet, the Supreme Court has held that an arrest warrant does not even have to be valid for a search incident to arrest to be.[88] In *Herring v. United States*, police arrested Herring pursuant to an outstanding arrest warrant in the neighboring county.[89] Herring was arrested and a search incident to arrest found illegal guns and drugs.[90] However, the warrant used to arrest Herring had been recalled five months earlier, but the computer database had never been updated.[91] Herring was ultimately charged with illegal possession of guns and drugs based off of the search.[92] He tried to suppress the search, arguing that the initial arrest was illegal because the warrant was invalid.[93] The trial court denied the motion to suppress, holding that the "officers had acted in a good-faith belief that the warrant was still outstanding. Thus, even if there were a Fourth Amendment violation, there was 'no reason to believe that application of the exclusionary rule here would deter the occurrence of any future mistakes.'"[94] The Supreme Court upheld the lower court's decision stating:

> When a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation. The very phrase "probable cause" confirms that the Fourth Amendment does not demand all possible precision. And whether the error can be traced to a mistake by a state actor or some other source may bear on the analysis. For purposes of deciding this case, however, we accept the parties' assumption that there was a Fourth Amendment violation. The issue is whether the exclusionary rule should be applied.[95]

This holding is particularly significant in cases that are later reindicted after a nolle prosequi. Even if a court ultimately held that a rearrest was invalid, as long as the police believed that they were conducting a valid arrest, any evidence obtained through the search is admissible and can be used to prosecute a separate crime.[96]

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[86] *See, e.g.*, Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326 (1979).
[87] *See generally Gant*, 556 U.S. 332.
[88] Herring v. United States, 555 U.S. 135, 136–37 (2009).
[89] *Id.* at 137.
[90] *Id.* at 138.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 139.
[96] *Cf. id.*

A. Standard for a Search Incident to Arrest

In *Chimel v. California*, the Supreme Court held that:

> [W]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . . [and] to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.[97]

However, the Court did not address why police have a wider scope for their search in *Chimel*.[98]

> In other words, the Court did not answer whether on the one hand, the right to make such searches of the person flows automatically from the fact that a lawful arrest was made, or whether, on the other hand, such searches may be undertaken only when the facts of the individual case indicate some likelihood that either evidence or weapons will be found.[99]

Instead, it took until *United States v. Robinson* for the Supreme Court to determine that a "custodial arrest" permits a "full search of the person" with "no additional justification."[100] The police may use the search incident to arrest to search for "(i) fruits, instrumentalities or other evidence of the crime, or (ii) a weapon or other implement which could be used to escape from custody."[101]

Therefore, police do not need a search warrant if they are arresting someone with an arrest warrant.[102] In *Agnello v. United States*, the Court noted: "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime . . . in order to find and seize things connected with the crime . . . as well as weapons and other things to effect an escape from custody is not to be doubted."[103]

That is not to say that there are not limitations on a search incident to arrest. There must be probable cause that the objects implicating the arrestee are on his

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[97] Chimel v. California, 395 U.S. 752, 762–63 (1969) (citation omitted).

[98] *Id.* at 762–63, 765.

[99] LAFAVE, *supra* note 64, § 5.2.

[100] 414 U.S. 218, 235 (1973); LAFAVE, *supra* note 64, § 5.2(b).

[101] LAFAVE, *supra* note 64, § 5.2(b).

[102] *But see* Steagald v. United States, 451 U.S. 204 (1981) (holding that the police may not conduct warrantless searches of third parties homes to apprehend the subject of an arrest warrant, absent consent or exigent circumstances).

[103] 269 U.S. 20, 30 (1925).

person.[104] Furthermore, when searching the immediate vicinity of the place of arrest, the search must extend only so far as is necessary to find the implicating objects.[105] "[A] search may be incidental to an arrest 'only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest.'"[106] However, it is difficult to define what exactly constitutes the "immediate vicinity."[107]

B. Breadth of Search Incident to Arrest

1. Search on the Person

The Supreme Court has been very clear that the police have the right to search anyone's person incident to arrest.[108] In *Carroll v. United States*, the Court explained: "When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution."[109]

However, this right has been expanded to objects near the arrestee at the time of the arrest. In *Northrop v. Trippett*, the defendant had a duffle bag on his shoulder and placed it on the floor when a police officer approached him.[110] The Sixth Circuit found that the officers did not violate the defendant's Fourth Amendment rights by searching his bag because a search incident to arrest allows police officers to search a bag even if that bag is no longer accessible to the defendant at time of the search.[111] The court held that "[s]o long as the defendant had the item within his immediate control near time of his arrest," the search is valid under a search incident to arrest exception.[112]

Northrop illustrates the extent of a search incident to arrest. In that case, the defendant could no longer remove anything from his bag when he was arrested.[113] Therefore, there was no risk to the officer that the defendant could have harmed him with something within the bag.[114] Additionally, the court found that being within the

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[104] LAFAVE, *supra* note 64, § 5.2(b).

[105] *Id.*

[106] V.G. Lewter, Annotation, *Modern Status of Rule as to Validity of Nonconsensual Search and Seizure Made Without Warrant After Lawful Arrest as Affected by Lapse of Time Between, or Difference in Places of, Arrest and Search*, 19 A.L.R. 3d 727, § 3 (2018) (quoting Stoner v. California, 376 U.S. 483, 486 (1964)).

[107] *Id.*

[108] LAFAVE, *supra* note 64, § 5.2(b).

[109] 267 U.S. 132, 158 (1925).

[110] 265 F.3d 372, 379 (6th Cir. 2001).

[111] *Id.*

[112] *Id.* (citing New York v. Belton, 453 U.S. 454, 461–62 n.5 (1981) (upholding the search of a jacket located in the vehicle where defendant sat just prior to his arrest)).

[113] *See id.*

[114] *See id.*

proximity of the bag, that the defendant could not access during the arrest, was enough to justify a search.[115]

2. Search Within a Residence

For a search of a residence to be considered a search incident to arrest, it must be limited to "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence."[116]

Moreover, in order for a search of a residence to be incidental to the arrest, the arrest must take place within the residence.[117] Conversely, a search of a residence is not incidental to arrest if the arrest was made outside of the residence, regardless of how soon after the arrest the search was made.[118] This extends even to an arrest made just outside of the residence, unless there are "particular circumstances tending to associate the residence with the arrest or the crime for which the arrest is made."[119]

However, there are conflicting cases involving a search of a residence when an arrest occurred on the premises, like in the yard, driveway, or porch.[120] Similarly, there is some debate when an arrest was made inside a building, like hotels or apartment buildings, but not within the arrestee's room or apartment.[121]

When the police arrest a person within his residence, some courts have still limited the right to search the entire house.[122] However, other courts have extended a search incident to arrest to include nearby closets, adjacent rooms, the yard or garage, and in some cases, even the entire residence.[123] Therefore, the outer limits of a residential search have not yet been fully established.[124]

For example, in *United States v. Patterson*, the police had an arrest warrant for Patterson's wife and, during the arrest, the police found a folder in a partially opened kitchen cabinet that was four to six feet away from where she was standing.[125] Specifically, the wife was in between the kitchen/dining room area and the living room.[126] The folder contained a safe deposit key that belonged to someone whose apartment had been burglarized and whose safe deposit box had been accessed.[127] Patterson was charged with intent to commit larceny in a bank and taking of money from a

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[115] *Id.*
[116] Chimel v. California, 395 U.S. 752, 762–63 (1969).
[117] *See* Lewter, *supra* note 106, § 16.
[118] *Id.*
[119] *Id.* § 3.
[120] *Id.* § 26.
[121] *Id.* § 27.
[122] *Id.* § 18.
[123] *Id.* §§ 20–21.
[124] *Id.* §§ 18–21.
[125] 447 F.2d 424, 425 (10th Cir. 1971).
[126] *Id.*
[127] *Id.* at 425–26.

bank in excess of $100 with intent to steal using the key found from the kitchen cabinet.[128] The Tenth Circuit held that the search and seizure was valid as an incident to a lawful arrest because Patterson's wife had access to the kitchen.[129] Therefore, the officer was justified in entering the kitchen in order to remove any weapons, and the envelope was in the officer's plain view.[130]

Similarly, in *United States v. Mulligan*, the Ninth Circuit held that a closet in defendant's house was within his immediate control.[131] In that case, the police had arrested the defendant, who was only wearing pajama shorts at the time, and then took him to his bed so that he could get clothes.[132] The court reasoned that the police officer was justified in looking in the closet because the closet was an area where a person might gain possession of a weapon, and Mulligan was sitting by it after being arrested.[133] However, unlike in *Patterson*, the defendant had twice attempted to get clothes from the closet without police permission.[134]

In *United States v. Ford*, Ford was charged with a drug offense and for being a felon in possession of firearm.[135] Officers entered Ford's mother's apartment with his arrest warrant.[136] They arrested Ford in said apartment and searched the bedroom immediately adjoining the hallway the officers arrested Ford in.[137] The D.C. Circuit Court of Appeals held that the officers could seize a gun clip in plain view on the floor of the bedroom, but they could neither lawfully search under the mattress nor behind window shades.[138] The court held that because these were not spaces from which an attack could be immediately launched, and there were no exigent circumstances justifying a warrantless search of the bedroom, any evidence found under the mattress or behind the shades was seized in violation of the Fourth Amendment and was inadmissible as evidence.[139] However, the court upheld the officers' entrance of the bedroom the defendant was not in, and seizing the gun clip that was in plain view as part of a protective sweep of the house.[140]

These three cases illustrate the scope of immediate proximity for a residential search incident to arrest. Objects do not need to be within arms reach for them to be searchable. Furthermore, they do not even need to be in the same room as the defendant. *United States v. Mulligan* specifically illustrates how police can strategically

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[128] *Id.*
[129] *Id.* at 427.
[130] *Id.*
[131] 488 F.2d 732, 732 (9th Cir. 1973).
[132] *Id.* at 734.
[133] *Id.*
[134] *Id.*
[135] 56 F.3d 265, 265 (D.C. Cir. 1995).
[136] *Id.* at 267.
[137] *Id.*
[138] *Id.* at 270.
[139] *Id.* at 270, 72.
[140] *Id.* at 270.

place an arrestee near an area they wish to search.[141] This allows police to justify a search incident to arrest in areas where they would not otherwise have the justifications to search.

3. Search in a Car

Courts have mostly held that the search of a car is not limited to when the arrestee is actually arrested within the car.[142] Generally, courts have held that searches are valid "if the car is simply nearby when the arrest is made, or if the automobile is in some manner associated with the arrest."[143] Furthermore, some courts have held that there is no constitutional violation if there is a delay in searching the vehicle as long as the police and arrestee remain with the car.[144] However, there is some debate over "whether an officer, remaining at the scene, may search the automobile shortly after the arrested party has been taken away by another officer, or whether the officers may leave the scene entirely and take the prisoner to jail before returning to conduct the search of the automobile."[145]

C. Searches Incident to Arrest Are More Invasive than the Terry *Stop Standards*

The *Terry* stop refers to a "stop-and-frisk" of a person when a police officer is suspicious of the person's activity, but does not have probable cause to actually search the person.[146] This search is narrowly tailored to permit a reasonable search of a person for weapons to protect the police officer when the officer has reason to believe that he is dealing with an armed and dangerous individual.[147] Because this standard is for the officer's safety, it applies regardless of whether he has probable cause to arrest the individual for a crime.[148] The officer does not need to be certain that the person is armed.[149] The Court looks at whether a "reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."[150]

Furthermore, the scope of a "frisk" must be limited to what is necessary to detect a concealed weapon.[151] As long as the frisk was within the permissible scope

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[141] *Cf.* 488 F.2d 732, 734 (9th Cir. 1973) (describing the arrest of the defendant and how the police maneuvered him around).

[142] *See* Lewter, *supra* note 106, §§ 7–9 (internal citations omitted).

[143] *Id.* § 3.

[144] *Id.*

[145] *Id.*

[146] Terry v. Ohio, 392 U.S. 1, 27 (1968).

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.* at 26.

and the police officer only patted down the defendant, the frisk is valid.[152] Furthermore, the officer may only put his hand in the defendants' pockets to remove weapons that he discovered from the pat down.[153]

Under *Terry v. Ohio*, assuming the initial stop was lawful, the Eighth Circuit held that for a stop to be legal, the detention must have been reasonably related to the circumstances that created the police officer's inference in the first place.[154] Therefore, a traffic stop can transform into an investigative stop, as long as the officer has a reasonable suspicion of criminal activity that would expand his investigation, even if his suspicions are unrelated to the traffic offense that served as the basis of the stop.[155]

In *Adams v. Williams*, the Supreme Court held that the permissible scope of a frisk must be limited to what is necessary to protect an officer from a concealed weapon.[156] In *Adams*, the officer had been told by a reliable informant that Williams was carrying a gun.[157] When the officer went to Williams' car and tapped on the car window asking him to open door, he rolled down the window instead, justifying the officer reaching into the car and removing a gun from Williams' waist although it had not been visible from outside the car.[158]

In *United States v. Casado*, the Second Circuit found that the district court erred in denying defendant's motion to suppress drug evidence found in his pants pocket during a *Terry* stop.[159] In that case, a police officer reached into Casado's pocket without patting down the outside of the pocket first.[160] The court held that Casado's refusal to remove his hand from his pocket was the only a reason to initiate a *Terry* search.[161] Furthermore, there was no evidence that a more intrusive alternative to patting down a pocket would have been required in achieving the only stated rationale for the search: the officer's physical safety.[162]

A stop-and-frisk search requires the officer to have probable cause to believe that a crime is happening, about to happen, or just happened.[163] Therefore, the *Terry* standard is substantially less invasive than a search incident to arrest. Because the nolle prosequi allows police to get a valid search warrant, the police already have a much broader scope for what constitutes a valid search.

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[152] *See id.* at 30.

[153] *See id.* at 29–30.

[154] *See* United States v. Serena, 368 F.3d 1037, 1040–41 (8th Cir. 2004) (noting that an officer conducting a traffic stop could ask for license and registration among other things).

[155] *Id.* at 1040.

[156] 407 U.S. 143, 146 (1972) (citing *Terry*, 392 U.S. at 30).

[157] *Id.* at 144–45.

[158] *Id.* at 148.

[159] 303 F.3d 440, 441 (2d Cir. 2002).

[160] *Id.* at 447.

[161] *Id.* at 447–48.

[162] *Id.* at 447.

[163] *See* Terry v. Ohio, 392 U.S. 1, 27 (1968).

Furthermore, because the police officer is rearresting the defendant for the same crime, it is substantially less likely that a defendant would be concealing evidence of that crime. As such, the primary purpose of a search incident to a rearrest would be for the officer's safety.[164] A stop-and-frisk pat down is the appropriate form of search to solely protect an officer's safety because it does not require the same level of suspicion that a search incident to arrest would.[165]

Reindictment after a nolle prosequi leaves defendants in a particularly vulnerable position. Because a reindictment requires the issuance of an arrest warrant,[166] and the *de facto* wider scope of a search incident to arrest,[167] defendants are subjected to a much more invasive search than a traditional stop-and-frisk. The arrest warrant automatically creates probable cause, instead of the arresting officer having to establish it independently.[168]

Furthermore, with an arrest warrant, police can decide when and where the arrest happens, therefore creating the most favorable search conditions. For example, if police believe that evidence can be located in a car, they can wait to pull over the defendant, widening the search to include the car. This is especially concerning if the police had previously been building a new case against the defendant for a separate crime. The nolle prosequi gives the state access to information that it would not have had without the arrest warrant for a separate case.

Finally, because police can collect evidence implicating the defendant of a separate crime, reindictment after a nolle prosequi encourages prosecutors to drop weaker cases in bad faith, with the hope that a second arrest (and subsequent search) will produce stronger evidence either for the original case or a new one. Therefore, the combined prosecutorial powers of reindictment and nolle prosequi need to be restricted more than they currently are to prevent prosecutors from manufacturing conditions that allow police to more easily search defendants and their surroundings, fishing for any criminal wrong-doings.

IV. SAFEGUARDS AGAINST NOLLE-AND-REINSTATE

There are several factors that do restrict the power of nolle prosequi and reindictment. However, they are fairly minimal and do not give the defendant enough protection from abuses of this power.

A. Double Jeopardy Does Not Apply to Nolle Prosequi

The Fifth Amendment protects a person against being prosecuted for the same crime twice: "No person shall be . . . subject for the same offence to be twice put in

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[164] *See* Chimel v. California, 395 U.S. 752, 762–63 (1969).
[165] *See Terry*, 392 U.S. at 25–26.
[166] *See* FED. R. CRIM. P. 48(a).
[167] *See* United States v. Robinson, 414 U.S. 218, 235 (1973); discussion *supra* notes 100–01.
[168] *See Robinson*, 414 U.S. at 235.

jeopardy of life or limb."[169] However, double jeopardy does not protect a person from reindictment after nolle prosequi.[170]

The Supreme Court has held that double jeopardy does not attach until a trial begins.[171] However, there has been some debate over what constitutes the beginning of a trial.[172] The Court has stated that jury trials do not begin until the jury has been "empaneled and sworn."[173] For bench trials, the Court has held that double jeopardy does not attach until the court begins hearing evidence.[174] Regardless, if a case is nolle prosequi, it never reaches trial and is never protected by the Fifth Amendment. This is what allows prosecutors to reindict a defendant.

B. Statutes of Limitations Do Not Do Enough to Protect Against Reindictment

Statutes of limitations restrict the time frame in which a defendant can be charged with a crime; they only begin to run once a crime has been completed.[175] Statutes of limitations are designed to "represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice."[176] Statutes of limitations are designed to promote fairness by "protect[ing] individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time."[177]

Second, they are meant to improve efficiency by encouraging police to promptly "investigate suspected criminal activity."[178] Ultimately, the rules further both parties' interests by making the "circumstances of prosecution more predictable."[179]

In *United States v. Marion*, the Supreme Court has suggested that statutes of limitations offer some protections against reindictment after a nolle prosequi.[180]

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[169] U.S. CONST. amend. V.

[170] *See* Martinez v. Illinois, 572 U.S. 833, 834 (2014) (citing Crist v. Bretz, 437 U.S. 28, 35 (1978)).

[171] *Id.*

[172] *See id.* at 839–41.

[173] *Id.* at 839 (citing *Crist*, 437 U.S. at 35).

[174] Serfass v. United States, 420 U.S. 377, 388 (1975) (citing McCarthy v. Zerbst, 85 F.2d 640, 642 (10th Cir. 1936)).

[175] Toussie v. United States, 397 U.S. 112, 115 (1970) (citing Pendergast v. United States, 317 U.S. 412, 418 (1943)).

[176] United States v. Marion, 404 U.S. 307, 322 (1971).

[177] *Toussie*, 397 U.S. at 114; Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 115–16 (2008).

[178] *Toussie*, 397 U.S. at 115; Powell, *supra* note 177, at 116.

[179] Powell, *supra* note 177, at 116.

[180] 404 U.S. at 317–18 ("The Court has pointed out that '[a]t the common law and in the absence of special statutes of limitations the mere failure to find an indictment will not operate to discharge the accused from the offense nor will a *nolle prosequi* entered by the Government or the failure of the grand jury to indict.' Since it is 'doubtless true that in some cases the power of the Government has been abused and charges have been kept hanging over the heads of

However, this protection is primarily used to address the Sixth Amendment's speedy trial right by preventing prosecutors from using reindictments to "reset clock" on the constitutional requirement.[181] However, statutes of limitations were not "designed to protect against the multifaceted harms of nolle-and-reinstitution."[182] *Marion* did create a standard that would allow a defendant to argue that their rights were violated due to pretrial delay.[183] The defendant must prove that (1) the delay caused prejudice, precluding a fair trial, and (2) that the prosecution intentionally used said delay to gain a tactical advantage over the defendant.[184]

However, not all states have enacted statutes of limitations.[185] Additionally, statutes of limitations have become less popular, resulting in blanket exceptions for many crimes.[186]

Statutes of limitations limit the time frame in which a prosecutor could issue a reindictment after a nolle prosequi. Regardless, "statutes of limitations fail to adequately protect against nolle-and-reinstitution."[187] A pretrial delay claim might protect some defendants from the original prosecution; however, any evidence uncovered during a subsequent arrest would not be protected by a statute of limitation or an undue delay because the secondary crime would be considered new.

C. Leave of the Court Requirements

There have been some attempts by the legislative branch in reigning in the prosecutor's powers derived from nolle prosequi. Although nineteen states still allow the

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citizens, and they have been committed for unreasonable periods, resulting in hardship,' the Court noted that many States '[w]ith a view to preventing such wrong to the citizen . . . [and] in aid of the constitutional provisions, National and state, intended to secure to the accused a speedy trial' had passed statutes limiting the time within which such trial must occur after charge or indictment." (alterations in original) (citations omitted)); *see* United States v. McDonald, 456 U.S. 1, 8 (1982).

[181] *McDonald*, 456 U.S. at 8.

[182] Thorp, *supra* note 10, at 457.

[183] 404 U.S. at 324–25.

[184] *Id.* at 324.

[185] Thorp, *supra* note 10, at 457; *see, e.g.*, Remmick v. State, 275 P.3d 467, 470 (Wyo. 2012).

[186] Powell, *supra* note 177, at 124–28 ("Even against this backdrop of episodic change, the recent fervor with which Congress has been carving out new exceptions to the general rule is unusual. In contrast to the one or two exceptions created every few decades since the rule's inception, and even the unusual number of exceptions created in the 1950s, the past two decades have seen about a dozen new exceptions to the rule, some of them quite sweeping. . . . [For example,] Congress in 2001 eliminated the limitations period for any terrorist offense that 'resulted in, or created a foreseeable risk of, death or serious bodily injury to another person.' Congress explained the provision not with regard to the rationales and interests traditionally understood to underlie limitations periods, but as a necessary step toward '[r]emoving impediments to effective prosecution' of terrorists." (alterations in original) (footnotes omitted)).

[187] Thorp, *supra* note 10, at 457.

prosecutor to nolle prosequi without any limitation,[188] thirty-one states have created some restrictions on when a prosecutor can nolle prosequi, typically requiring the leave of the court.[189] Connecticut has the most defense-friendly standard where the defendant must consent to the dismissal unless the state can show a material witness cannot be found or that material evidence has disappeared or has been destroyed and that a further investigation is therefore necessary.[190]

It appears the primary objective that requiring the leave of the court achieves is that it protects a defendant against prosecutorial harassment.[191] Under the jurisdictions where leave of the court is required, a judge would perform a limited review of the evidence to determine whether the defendant needs protection from prosecutorial harassment.[192] To determine prosecutorial harassment, the court examines "the propriety or impropriety of the Government's efforts to terminate the prosecution—the good faith or lack of good faith of the Government in moving to dismiss."[193] Historically though, any attempts to limit prosecutorial discretion have not been impactful.[194] Judges rarely deny a prosecutor's nolle prosequi.[195] Case law has made prosecutorial discretion unreviewable by grounding the power in a different political branch and

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[188] *See* ALASKA R. CRIM. P. 43; DEL. SUP. CT. CRIM. R. 48; IND. CODE. § 35-34-1-13 (2015); ME. R. UNIFIED CRIM. P. 48; MASS. R. CRIM. P. 16; MINN. R. CRIM. P. 30.01; NEV. REV. STAT. ANN. § 174.085(7) (LEXISNEXIS 2015); N.C. GEN. STAT. ANN. § 15A-931 (WEST 2015); OKLA. STAT. ANN. TIT. 22 § 815 (2015); R.I. SUPP. CT. R. CRIM. P. 48; S.D. CODIFIED LAWS § 23A-44-2 (2016); VT. R. CRIM. P. 48; *see also* State v. Hurd, 739 So. 2d 1226, 1228 (Fla. Dis. Ct. App. 1999); State v. Williamson, 853 P.2d 56 (Kan. 1993); State v. Larce 807 So. 2d 1080, 1081–82 (La. Ct. App. 2002); Ward v. State, 427 A.2d 9008, 9092 (Md. 1981); No rwood v. Drumm, 691 S.W. 2d 238, 238–39 (Mo. 1985); State v. Pond, 584 A.2d 770, 771 (N.H. 1990); State v. Heinsen, 121 P.3d 1040, 1048 (N.M. 2005); Mackey v. State, 595 S.E.2d 241, 242 (S.C. 2004); *In re* Brown, 363 S.E.2d 689, 689 (S.C. 1988).

[189] *See* ALA. CODE § 15-8-130 (2018); ARIZ. R. CRIM. P. 16.4(a); ARK. CODE ANN. § 16 -85-713 (2018); CAL. PENAL CODE §§ 1385–86 (2015); COLO. CRIM. P. 48(a); CONN. GEN. STAT. §§ 54–56b (2018); GA. CODE ANN. § 17-8-3 (2018); HAW. REV. STAT. § 806-56 (2016); IDAHO CODE § 19-3504 (2018); IOWA R. CRIM. P. 2.33(1); KY. RCR. 9.64; MICH. COMP. LAWS § 767.29 (2018); MISS. CODE. ANN. § 99-15-53 (2018); MONT. CODE § 46-13-401 (2015); NEB. REV. STAT. ANN. § 29-1606 (LexisNexis 2018); N.J. CT. R. 3:25-1(a); N.D. R. CRIM. P. 48; OHIO REV. CODE § 2941.33 (2018); OR. REV. STAT. § 135.755 (2018); PA. R. CRIM. P. 585; TENN. R. CRIM. P. 48(a); TEX. CODE CRIM. PROC. ART. 32.02 (2015); UTAH R. CRIM. P. 25(a); VA. CODE ANN. § 19.2-265.3(a) (2018); W. VA. R. CRIM. P. 48; W. R. CR. P. 48(a).

[190] CONN. GEN. STAT. §§ 54–56b (2018).

[191] Rinaldi v. United States, 434 U.S. 22, 29 n.15 (1977); *see also* Korematsu v. United States, 584 F. Supp. 1406, 1412 (N.D. Cal. 1984) ("The purpose of this limited review is to protect against prosecutorial impropriety or harassment of the defendant and to assure that the public interest is not disserved.").

[192] *Korematsu*, 584 F. Supp. at 1412 (citing United States v. Cowen, 524 F.2d 504, 512–13 (5th Cir. 1975)).

[193] United States v. Salinas, 693 F.2d 348, 351 (5th Cir. 1982) (citing *Rinaldi*, 434 U.S. 22).

[194] Krauss, *supra* note 10, at 25.

[195] *Id.*

making the question fall under the separation of powers instead of examining the abuse of powers.[196] This is not an irrational conclusion when examining the majority of courts' opinions discussing nolle prosequi; where courts have focused on "only one particular consequence of reinstitution: delay."[197]

D. Vindictive Prosecution Protections

Finally, courts have struck down some reindictments because prosecutors did so vindictively. The doctrine of vindictive prosecution is designed to protect the defendant from abusive prosecutions.[198] Indeed:

> The doctrine of vindictive prosecution is derived from the Due Process Clause and exists to ensure that criminal defendants can pursue their constitutional rights "without apprehension that the State will retaliate by substituting a more serious charge for the original one." The two elements necessary to establish a claim of vindictive prosecution are: (1) the defendant must exercise some right; and (2) the prosecutor must subsequently use her charging powers to the defendant's detriment. The Court considered whether there was bad faith or malice on the part of the prosecutor; notably, the Court focused purely on the possibility of prosecutorial vindictiveness.[199]

However, the Court has not applied the doctrine of vindictiveness to pretrial use of prosecutorial powers, instead adopting a de facto presumption that protects pretrial charging powers.[200]

The Supreme Court has predominantly focused on the vindictive use of prosecutorial powers for plea bargains. Referred to as "'charge bargaining'. . . prosecutors file a serious initial charge and then . . . offer the defendant a charge reduction in exchange for a plea. Or, alternatively, prosecutors file a less serious initial charge and then . . . threaten to file a more serious charge unless the defendant agrees to plead guilty."[201] This strategy is used to encourage defendants to plead guilty instead of going to trial, where the defendant will face substantially more severe charges.[202] In the cases that the Supreme Court has addressed this abuse of discretion,[203] the

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[196] *Id.*

[197] Thorp, *supra* note 10, at 452.

[198] *Id.* at 468.

[199] *Id.* (citing Blackledge v. Perry, 417 U.S. 21, 27–28 (1974)).

[200] *Id.* at 469.

[201] *Id.* at 469–70.

[202] *Id.* at 470.

[203] *See generally* United States v. Goodwin, 457 U.S. 368 (1982); Bordenkircher v. Hayes, 434 U.S. 357 (1978).

Court has upheld the prosecution using this power because it limits the amount of trials in the system.[204]

There is an argument that the Court refuses to regulate prosecutorial abuse of power because it would violate the separation of powers doctrine.[205] Joseph A. Thorp argued that this is because the Court has a fundamental misunderstanding of the powers of the prosecutor.[206] The Court has failed to distinguish between inquisitorial charging power and adversarial charging power.[207] Inquisitorial charging powers are prosecutorial powers that occur before the indictment including "the authority to decide what, if any, charges to file."[208] Judicial regulation of inquisitorial charging powers is a separation of powers issue.[209] However, adversarial powers can and should be regulated by the judiciary.[210] Adversarial charging powers are prosecutorial powers after a defendant has been indicted.[211] They include "the power to enhance, reduce, dismiss, divert, and *nolle*-and-reinstitute a charge."[212] At this stage the prosecutor is acting as the "party opponent" in an adversarial proceeding, where the judge begins to make rulings.[213]

Thorp argued that because the Court has ignored this distinction, it gives

> prosecutors plenary charging power regardless of when that power is used. *Nolle*-and-reinstitution highlights this error in the Court's jurisprudence and demonstrates the need to differentiate between the use of prosecutorial charging power in the inquisitorial phase and its use in the adversarial phase. *Nolle*-and-reinstitution presents a viable opportunity for the Court to experiment with regulating the prosecution's use of its adversarial charging power.[214]

The combined powers of reindictment and nolle and prosequi are not an essential part of the criminal justice system in the way that plea bargaining is. Therefore,

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[204] *See Bordenkircher*, 434 U.S. at 361–62 ("We have recently had occasion to observe. 'Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned.'" (quoting Blackledge v. Allison, 431 U.S. 63, 71 (1977))).

[205] Thorp, *supra* note 10, at 431.

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.* at 431–32.

[211] *Id.* at 431.

[212] *Id.*

[213] *Id.*

[214] *Id.* at 462 (footnote omitted).

establishing a limit to the use of the power would not bring the system to a screeching halt in the same way the Supreme Court worries limiting plea bargains would.[215] Conversely, limiting reindictments and nolle and prosequi would lower the number of cases the criminal justice system would need to review.

V. PROPOSED SOLUTIONS

Regardless of the inability to properly enforce the leave of the court standard found in both federal and state level rules of criminal procedure, these rules focus too heavily on regulating the prosecutor's ability to dismiss a case. The fact that the Supreme Court is considering the practicality of limiting the scope of prosecutorial power,[216] demonstrates the reason why having judicial oversight at the dismissal phase is ineffective.

Instead, the criminal justice system should make it more difficult to reindict a person for the same crime. Nolle prosequi does not give the defendant the ability to protect his own interests. Through a nolle prosequi, the defendant does not have the option to request a dismissal with prejudice.[217] Therefore, the defendant does not have the chance to protect himself from being recharged with the same crime. Because the defendant does not have an opportunity to defend himself, the prosecutor should have a higher burden if he wishes to reindict the defendant.

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[215] *Id.* at 469 n.208 ("The politics and pragmatics of the overburdened criminal system make it unlikely that the Supreme Court will interfere with charge bargaining powers; limitations on charge bargaining would threaten the entire plea bargaining system. As Professor William Stuntz explained: 'Plea bargaining took on increased importance as crime rates rose. By 1978, criminal dockets were rising, and prison populations were rising with them. Given the massive increase in crime of the preceding generation, it was obvious that further increases were coming. Both the number of felony prosecutions and the number of prison inmates more than doubled in the dozen years after *Bordenkircher*. Rising caseloads were not accompanied by rising prosecutorial budgets.'").

[216] *See id.* at 471 ("The Court acknowledged the potential for abuse of prosecutorial adversarial charging powers but nevertheless refused to address it. To protect the plea bargaining system, the Court simply pretended that prosecutors did not have carte blanche use of their adversarial charging powers. And, while the Court insisted that, 'there are undoubtedly constitutional limits' upon the exercise of that power, the constitutional 'limits' to which the Court referred were wholly illusory: 'It says something about the wide berth the judiciary has given prosecutorial power that the leading case invalidating an exercise of prosecutorial discretion is the nearly century-old decision in *Yick Wo v. Hopkins*.' The result of this magical thinking is an explicit blessing of the prosecutor's practice of threatening increased punishment in pursuit of a guilty plea." (first quoting Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978); then quoting James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1539 (1981))).

[217] *See* CONN. GEN. STAT. §§ 54–56b (2018) (requiring that the defendant must consent to the dismissal unless the state can show that a material witness cannot be found or that material evidence has disappeared or has been destroyed and that a further investigation is therefore necessary).

This heightened standard could be very simple. The criminal justice system could establish a burden that requires the prosecution to establish a reasonableness requirement for reindictment. This would not heavily burden cases where nolle prosequi is properly used. In cases where the charges are changed by amending an information or an indictment, prosecutors already have to get leave of the court and explain what the change entails.[218] In cases where additional evidence has been found, the prosecutor would have a fairly easy explanation for why he wants to reinstate the case, as would a prosecutor who has a new witness agreeing to testify. New evidence can clarify who committed a crime and better build the prosecutor's case.

Furthermore, this would better motivate courts to consider the reason why the prosecution is reindicting the defendant. Because prosecutors would need to explain the reason they are bringing a reindictment, it would better uncover vindictiveness on their part. Therefore, having a review process at the reindictment stage easily resolves many of the unfair prosecutorial advantages that come with reindicting a defendant after a nolle prosequi without unnecessarily burdening the state in legitimate reprosecutions.

Some might argue that this added burden would discourage prosecutors from dropping cases to begin with. Because it is more difficult to reindict a case, it is easier to simply try the case the first time. However, many of the advantages that nolle prosequi provides prosecutors are unavailable during the initial prosecution. Furthermore, undue delay, the primary concern of the courts when examining nolle prosequi cases,[219] is better controlled by the court when the defendant is charged only once.

In addition, the defense would still have the opportunity to file for a motion to dismiss should there not be enough evidence to convict the defendant. Therefore, the court would still have a chance to review the validity of the case before going to trial. This might encourage a prosecutor to better prepare for the case he has instead of restarting the case through nolle prosequi to create the case he wanted.

Critics might also argue that having the court review a reindictment would create a separation of powers issue. Because the Executive Branch is responsible for enforcing laws, which would include choosing who to indict or reindict, the courts should defer to the executive branch. However, a reindictment is different from an initial indictment. The prosecutor has already had a chance to make a plea bargain and bring the case. He has had a chance to present evidence at trial. The prosecution chose to drop the case, which implies that it either did not have enough evidence to properly try the case or, it did not want to try the case. Therefore, the prosecutor should now have an obligation to demonstrate to the judiciary why the court should take the time and energy to allow the case to be reheard.

Another possible solution to limit the power the prosecution has regarding nolle prosequi would be granting the defendant a chance to file a motion to dismiss pursuant to the prosecution issuing a nolle prosequi. This solution would likely involve the least amount of change from the current system. Again, thirty-one states have a judicial

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[218] *See* Thorp, *supra* note 10, at 451.

[219] *See id.* at 440.

review requirement for issuing a nolle prosequi.[220] However, this does not provide the defendant an opportunity to speak, and possibly have the case dismissed with prejudice. Because nolle prosequi can be used as a do-over by some prosecutors for motions that were not decided in their favor, allowing defendants to file a motion to dismiss alongside the prosecutor's nolle prosequi could also help prevent prosecutorial misconduct,[221] instead of requiring the defendant to challenge the reinstatement by showing prosecutorial harassment, bad faith, or fundamental unfairness, which can be difficult to show.[222] Enacting rules, similar to the one in Connecticut,[223] might provide the defendant adequate protection from reindictment.

However, this solution would be applied during the dismissal of the case, and not the reinstatement of the charge. Thus, it would not include the same protections that requiring the prosecution to provide additional evidence for the reindictment would. Again, a court might be less concerned about future injustices, and not consider a defendant's motion to dismiss with prejudice as seriously as it would a reindictment. Requiring the prosecution to take on an additional burden when reindicting a defendant would be the best method to protect defendants from being reindicted for crimes that they could not be convicted of.

CONCLUSION

Nolle prosequi is a vital part of our criminal justice system. When used properly, it allows the government to drop cases that it does not have sufficient evidence to prove. This allows prosecutors to more efficiently use the limited resources they have, reducing the number of cases that must be heard in court, and freeing defendants from the anxiety of a potential criminal conviction.

Currently, however, the United States has given prosecutors too much control over the reindictments after they have dismissed cases without proper judicial oversight. This has created a legal loophole that allows police officers to conduct additional searches on defendants as they are rearrested for the original crime. Therefore, cases can emerge where a defendant is only convicted of a crime found through a rearrest of a crime the defendant could never have been convicted of.

Requiring prosecutors to provide additional evidence at the *reindictment* stage would close this loophole. This requirement would force prosecutors to demonstrate why the reindictment is necessary, and more importantly why the prosecutor is more likely to successfully convict the defendant than when the defendant was originally charged. Furthermore, this additional requirement would not substantially increase the workload of judges or prosecutors; however, it will substantially protect the rights and freedoms of defendants.

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[220] *See supra* note 188 and accompanying text.
[221] *See* Thorp, *supra* note 10, at 451.
[222] *See, e.g.*, State v. Allen, 837 A.2d 324, 327 (N.H. 2003).
[223] *See* CONN. GEN. STAT. §§ 54–56b (2018).