# VIRGINIA:

***In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 2nd day of May, 2019.***

BEFORE: Chief Justice Lemons, Justice Goodwyn, and Justice Kelsey

In Re: Gregory D. Underwood,
Commonwealth's Attorney
for the City of Norfolk, Petitioner

Record Nos. 190497 and 190498

Upon Petitions for Writs of Mandamus

In these original jurisdiction cases, we consider whether a writ of mandamus lies to compel a circuit court to grant a Commonwealth's Attorney's motion to "enter an order of dismissal" on charges for misdemeanor possession of marijuana. Concluding that a circuit court has no clear and unequivocal duty to do so, we dismiss the petitions for writs of mandamus.*

In May 2018, Zemont O. Vaughan and Ashonti Thomas were each charged by summonses with possessing marijuana, in violation of Code § 18.2-250.1. The men were convicted in general district court, Vaughan upon a guilty plea and Thomas following a trial, and both appealed their convictions to the circuit court. In January 2019, the Commonwealth's Attorney for the City of Norfolk, Gregory D. Underwood ("the Commonwealth's Attorney"), instituted a policy under which his office will not prosecute "simple possession of marijuana" and "will move to *nolle prosequi* or dismiss any marijuana-possession cases that fall within [its] purview." In February 2019, the Commonwealth's Attorney moved to dismiss Vaughan's and Thomas' charges. When the circuit court inquired as to the reasons for the dismissals, he responded, in relevant part, that he was entitled to dismiss the charges without offering any rationale or justification. Unconvinced, the circuit court refused to dismiss Vaughan's and Thomas' charges and continued their trials to June 4, 2019.

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* Pursuant to Rule 5:7(c), we resolve these petitions before the filing of responsive pleadings.

The Commonwealth's Attorney seeks mandamus relief to compel the entry of the dismissal orders and moves to stay certain pending criminal proceedings in the circuit court. Relying primarily on our decision in *Roe v. Commonwealth*, 271 Va. 453 (2006), he contends a circuit court has no discretion to deny his motion to dismiss a criminal charge and, instead, has a "ministerial" duty to enter an order "memorializing" the requested dismissal. The Commonwealth's Attorney believes the circuit court's duty is the same whether the motion seeks dismissal with prejudice or without. He further argues that his unfettered discretion to dismiss criminal charges is inherent in his executive authority to exercise prosecutorial discretion and that constitutional separation of powers principles require that he be allowed to exercise that discretion free from judicial restraint. We disagree on each count.

Mandamus lies to compel a circuit court to complete a purely ministerial act, which is one "perform[ed] in a given state of facts and prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, . . . judgment upon the propriety of the act being done." *In re Commonwealth's Attorney for the City of Roanoke*, 265 Va. 313, 317 (2003) (internal quotation marks omitted); *see also In re Commonwealth's Attorney for Chesterfield Cnty.*, 229 Va. 159, 163 (1985) ("by prescribing a mandatory sentence, the General Assembly . . . divested trial judges of all discretion respecting punishment" and thus mandamus could compel a circuit court to implement a mandatory sentence). Further, mandamus may be a proper remedy in instances where a Commonwealth's Attorney contends a circuit court has acted or refused to act in a manner that improperly curtails or invades the Commonwealth's prosecutorial discretion in ongoing criminal proceedings. *See In re Horan*, 271 Va. 258, 260-65 (2006) (holding mandamus lay where a circuit court improperly exercised an executive function by granting a defendant's motion to prohibit the Commonwealth's Attorney from pursing a death sentence in a capital case); *see also Moreau v. Fuller*, 276 Va. 127, 131, 134-38 (2008) (holding a Commonwealth's Attorney has standing to seek mandamus or prohibition in a matter involving an ongoing criminal prosecution and considering whether a circuit court had a purely "ministerial duty" to "immediately make a final disposition in [a] case"). However, when the act sought to be compelled involves the exercise of any judgment or discretion, it is judicial in nature and cannot be directed by mandamus. *See In re Commonwealth's Attorney for the City of Roanoke*, 265 Va. at 318. Here, the Commonwealth's Attorney has not identified a purely ministerial act the circuit court was required to complete nor has he established the circuit court

improperly transgressed the constitutional boundary between executive and judicial functions.

We begin with the Commonwealth's Attorney's contention that *Roe* creates or recognizes a circuit court's obligation to grant his motion to dismiss a charge. He focuses on two statements from *Roe* to reach this conclusion, first, that "[a] *nolle prosequi* and a motion to dismiss are separate and distinct procedures," and, second, that "[a] dismissal at the request of the Commonwealth does not require a showing of good cause." 271 Va. at 458. However, a closer inspection of the facts and issues *Roe* considered reveals it did not render a binding holding as to the bounds of a Commonwealth's Attorney's power to dismiss a charge in the first instance or a circuit court's discretion to deny such a motion. Instead, *Roe* considered "whether the Commonwealth may prosecute a criminal defendant for certain crimes when the circuit court had previously granted the Commonwealth's motion to dismiss indictments alleging the same crimes." *Id. at* 455. At issue was whether a circuit court had abused its discretion when judging the preclusive effect of a prior order that stated "[t]he attorney for the Commonwealth moved to dismiss the offense[s] indicated below, which motion the Court granted." *Id.* at 456. When rejecting the Commonwealth's assertion that the "dismissal" was in the nature of a non-prejudicial *nolle prosequi*, *Roe* explained that "[a] *nolle prosequi* and a motion to dismiss are separate and distinct procedures." *Id.* at 458. *Roe* cited first that, under Code § 19.2-265.3, the Commonwealth must show "good cause" to obtain a *nolle prosequi*. By contrast, "[a] dismissal at the request of the Commonwealth does not require a showing of good cause." *Id.* at 458. Without citing any authority for that proposition or providing further explanation, *Roe* then identified instances in which the General Assembly had used the terms "dismissed" and "*nolle prosequi*" in various statutes as evidence that a "motion to dismiss" and a "*nolle prosequi*" are not synonymous. *Id.* Having established a general distinction between the two, *Roe* examined the circumstances under which the original charges were dismissed, noted the Commonwealth had "not identif[ied] any circumstances in the record that suggest that the order was entered without prejudice," and concluded the circuit court should have regarded the prior "dismissal" as being "with prejudice," thus barring the subsequent prosecution. *Id.* at 458-59.

Accordingly, the holding, as opposed to the dicta in *Roe*, extended only to the correctness of a circuit court's interpretation of its prior dismissal order and the effect that dismissal had on the Commonwealth's ability to pursue a subsequent prosecution. Because the breadth of the court's discretion to grant the predicate dismissal, whether with or without prejudice, was not

challenged by either party or considered by the Court, *Roe* cannot be read to obligate a circuit court to grant every motion a Commonwealth's Attorney makes to dismiss a charge. *See Jones v. Commonwealth*, 293 Va. 29, 56 (2017) (a lower court's "duty to follow binding precedent" of a higher court is limited to "case-specific holdings, not general expressions in an opinion that exceed the scope of a specific holding"); *Vasquez v. Commonwealth*, 291 Va. 232, 242-43 (2016) (the Court's "duty to follow binding precedent is fixed upon case-specific holdings, not general expressions in an opinion that exceed the scope of a specific holding"); *see also Herchenbach v. Commonwealth,* 185 Va. 217, 221 (1946) (statements "not essential" to the decision of the question involved "were mere *dicta*"); *Harmon v. Peery,* 145 Va. 578, 583 (1926) ("Obiter dicta are such opinions uttered by the way, not upon the point or question pending, . . . as if turning aside, . . . from the main topic of the case to collateral subjects.") (internal citations and quotation marks omitted). In turn, and contrary to the Commonwealth's Attorney's contention, the lack of any legislative response to the portions of *Roe* on which he relies is immaterial.

Further, the Commonwealth's Attorney is mistaken in proposing that *Roe* restated the "longstanding" principle of Virginia law that a Commonwealth's Attorney enjoys an unrestricted ability to dismiss a criminal charge. To the extent the Commonwealth's Attorney believes that ability includes securing a dismissal without prejudice, the well-established and codified practice in Virginia disagrees. For over 200 years, Virginia has required the Commonwealth to obtain judicial consent to the dismissal of a charge by *nolle prosequi*. *See Duggins v. Commonwealth*, 59 Va. App. 785, 790-91 (2012) *citing Anonymous,* 3 Va. (1 Va. Cas.) 139, 139 (1803). The advent of Code § 19.2-265.3 in 1979 codified that requirement and added that a Commonwealth's Attorney must establish "good cause" before a court may grant a "*nolle prosequi*." *See id. citing* (1979 Va. Acts ch. 641). These requirements are presumptively constitutional, and we have found no support for the contention that they permit the judiciary to improperly invade a Commonwealth's Attorney's constitutional or statutory authority to exercise prosecutorial discretion. *See Etheridge v. Medical Ctr. Hosp.,* 237 Va. 87, 94 (1989) (statutes are presumed constitutional). As we have explained, the constitutional requirement that the "great departments of the government" remain "separate and distinct from each other" is not an "absolute and unqualified . . . maxim." *In re Phillips*, 265 Va. 81, 86-87 (2003). To the contrary, it permits "that either department may exercise the powers of another to a limited extent" so long as "the whole power of one of these departments should not be exercised by the

same hands which possess the whole power of either of the other departments." *Id.* Judicial oversight of a Commonwealth's Attorney's ability to dismiss a pending charge certainly does not occupy the whole of the executive power to exercise prosecutorial discretion regarding the timing and selection of charges.

Further, although a Commonwealth's Attorney's "motion to dismiss" a charge may not always be the functional equivalent of a "*nolle prosequi*," we have found the two are indistinguishable where the Commonwealth acts purely of its own volition and seeks to withdraw a charge without an adjudication on the merits or without foreclosing its ability to reprosecute, *i.e.*, without prejudice. *See Brown v. Commonwealth*, 278 Va. 92, 102 (2009) (examining the relevant circumstances and "liken[ing] the dismissals at issue to a nolle prosequi or accord and satisfaction"); *Wortham v. Commonwealth*, 26 Va. (5 Rand.) 669, 677 (1827) (court properly rejected a plea that a prosecution was barred by a prior presentment of offenses, in part, because the "record which was vouched, shewed there was no *retraxit,* but a simple dismission, or *Nolle Prosequi*"); *see also Ward v. Reasor,* 98 Va. 399, 403 (1900) (explaining that, because the dismissal of a charge "amounted to no more than the assent of the [judge] to a cessation of the proceedings, without any examination whatever of the cause upon its merits[,] [i]t was the equivalent of a *nolle prosequi*-nothing more"), *overruled on other grounds by Graves v. Scott,* 104 Va. 372 (1905). That courts and parties have at times used the terms "motion to dismiss" and "*nolle prosequi*" inconsistently or interchangeably when describing such action by the Commonwealth does not alter the authority of the courts or the Commonwealth. *See Moreau*, 276 Va. at 137 (considering whether mandamus lay to compel the actions of a circuit court and explaining that, to do so, the Court had to "penetrate the confusion created by [seemingly interchangeable] descriptive terms and address the underlying conduct to determine what is within the inherent authority of the judiciary and what may be beyond its boundaries"). Because there is no material distinction between a Commonwealth's Attorney's "motion to dismiss a charge without prejudice" and a "*nolle prosequi*," a circuit court must exercise its discretion when it is asked to grant either and, thus, cannot be compelled to do so by mandamus.

For similar reasons, mandamus does not lie to compel a circuit court to grant a Commonwealth's Attorney's motion for the dismissal of a criminal charge with prejudice. Unlike a dismissal without prejudice or a *nolle prosequi*, a dismissal with prejudice conclusively

resolves the dispute between the defendant and the Commonwealth with respect to the subject charges. *Virginia Concrete Co. v. Board. of Supervisors,* 197 Va. 821, 825 (1956) ("The dismissal of an action or proceeding 'with prejudice' commonly implies not only the termination of the particular action or proceeding then before the court but also the right of action upon which it is based."). Accordingly, dismissal with prejudice operates as a judgment of the court because it is a determination "of the rights of the parties upon matters submitted to it in a proceeding." *In re Commonwealth's Attorney for the City of Roanoke*, 265 Va. at 319. As we have explained repeatedly, the act of rendering a binding judgment is a quintessentially judicial function that cannot be compelled by mandamus. *See Starrs v. Commonwealth*, 287 Va. 1, 7-13 (2014) (describing instances in which the Court has concluded a circuit court cannot be compelled to undertake the judicial function of entering "judgment").

Upon consideration whereof, the Commonwealth's Attorney's motions to stay the criminal proceedings in the circuit court are denied.

It is therefore ordered that the petitions be dismissed.

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Teste:

Clerk