

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellant,

4 v.

5 **ISAIAH ANGEL ANTHONY**  
6 **GUTIERREZ,**

7 Defendant-Appellee.

8 **APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**  
9 **Douglas R. Driggers, District Court Judge**

10 Raúl Torrez, Attorney General  
11 Santa Fe, NM  
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14 for Appellant

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18 for Appellee

Court of Appeals of New Mexico

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Mark Reynolds

**No. A-1-CA-42142**

1 **MEMORANDUM OPINION**

2 **HOUGHTON, Judge.**

3 {1} In this appeal, we are asked whether a district court can dismiss a criminal  
4 case with prejudice after a prosecutor files a “nolle prosequi.”<sup>1</sup> We answer that a  
5 district court cannot because once a nolle prosequi is filed, the court loses  
6 jurisdiction. We acknowledge there is an exception allowing district courts to  
7 dismiss a case with prejudice when the nolle prosequi is patently a sham, filed in bad  
8 faith to achieve a barred result. *See State v. Ericksen*, 1980-NMCA-029, ¶¶ 1-2, 9,  
9 94 N.M. 128, 607 P.2d 666. But because there were no such allegations made below,  
10 nor is it obvious that the nolle prosequi was a sham, the district court lacked authority  
11 to enter further orders after the nolle prosequi was filed. Accordingly, we vacate the  
12 district court’s order of dismissal with prejudice.

13 **BACKGROUND**

14 {2} On February 10, 2023, a grand jury indicted Defendant on two counts related  
15 to the death of J.D., a sixteen-year-old pedestrian, after Defendant struck J.D. with  
16 his vehicle. Three days before trial, the State filed a nolle prosequi. In its filing, the  
17 State—citing its special responsibilities as a prosecutor pursuant to Rule 16-308(A)  
18 NMRA—explained that “evidence which has recently become available, which was

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<sup>1</sup>A “nolle prosequi” is “a dismissal of criminal charges filed by the prosecutor, usually without prejudice.” *State v. Ware*, 1993-NMCA-041, ¶ 8, 115 N.M. 339, 850 P.2d 1042.

1 not available at the time of indictment, reveals that probable cause does not exist to  
2 sustain the charges.”

3 {3} At a scheduled pretrial conference later that day, the prosecutor further  
4 explained:

5 After the pretrial conference we had, . . . the State considered new  
6 information and evidence that defense provided. After several hours of  
7 consideration and speaking to nearly everyone in the office, including  
8 [the district attorney], this is the conclusion that we reached this  
9 morning.

10 The district court commended the prosecutor’s professionalism, then ordered sua  
11 sponte (on its own motion) that all charges be dismissed with prejudice. The State  
12 did not object to the district court’s order from the bench and instead thanked the  
13 court. The district court’s written order, filed after the hearing, explained the reason  
14 for its dismissal with prejudice was that “the Nolle Prosequi [was] filed less than  
15 five (5) business days before the commencement of the trial . . . .” The State now  
16 appeals.

## 17 **DISCUSSION**

### 18 **I. Preservation and Standard of Review**

19 {4} Defendant claims the State failed to preserve the question presented on appeal  
20 and that we should not review it as a result. The State concedes that it did not  
21 preserve the issue below by objecting to the district court’s order. However,  
22 “preservation of error for [the] purposes of appeal [is] inapplicable to jurisdictional

1 questions.” *Wilson v. Denver*, 1998-NMSC-016, ¶ 8, 125 N.M. 308, 961 P.2d 153  
2 (citing Rule 12-321(B)(1) NMRA). Despite Defendant’s arguments to the contrary,  
3 we hold that the question on appeal—whether the district court was deprived of  
4 jurisdiction by the filing of a nolle prosequi—is jurisdictional in nature, and  
5 preservation is not required. *See Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 10,  
6 142 N.M. 786, 171 P.3d 300 (“[J]urisdictional issues should always be resolved even  
7 if not preserved below.”).

8 {5} Next, we reject Defendant’s contention that the State either invited the error  
9 or waived the issue by failing to object and thanking the district court after the court  
10 announced it would dismiss with prejudice. Because we hold that the State’s nolle  
11 prosequi stripped the district court of its power to enter further orders in this case,  
12 there was no right for the State to waive, nor error to be invited after jurisdiction was  
13 lost. *See Evans v. Barber Super Mkts., Inc.*, 1961-NMSC-092, ¶ 4, 69 N.M. 13, 363  
14 P.2d 625 (“[J]urisdiction cannot be conferred by waiver or consent of the parties.”).

15 {6} Finally, Defendant urges us to review the district court’s order for an abuse of  
16 discretion. We acknowledge that this Court “reviews dismissal of a criminal case . . .  
17 for an abuse of discretion.” *State v. Candelaria*, 2008-NMCA-120, ¶ 12, 144 N.M.  
18 797, 192 P.3d 792. But we are not deciding whether the district court properly  
19 exercised its discretion to dismiss this case with prejudice. We are deciding whether  
20 the district court had any discretion at all to exercise after the nolle prosequi. That is

1 a jurisdictional question, and “[j]urisdictional questions are questions of law which  
2 this Court reviews de novo.” *El Castillo Ret. Residences v. Martinez*, 2017-NMSC-  
3 026, ¶ 20, 401 P.3d 751.

4 **II. A Nolle Prosequi Generally Divests the District Court of Jurisdiction**

5 {7} Here the State argues that the “district court improperly dismissed the charges  
6 with prejudice when the State had already filed a written nolle prosequi,” while  
7 Defendant contends that the discretion to file a nolle prosequi was subject to the  
8 court’s acceptance. For the reasons that follow, we agree with the State.

9 {8} In New Mexico “[t]he Legislature has vested the district attorney with broad  
10 discretion in its charging decisions.” *State v. Crocco*, 2014-NMSC-016, ¶ 32, 327  
11 P.3d 1068 (omission, internal quotation marks, and citation omitted); *see* NMSA  
12 1978, § 36-1-18(A) (2001) (listing the duties of the district attorney); *see also State*  
13 *v. Surratt*, 2016-NMSC-004, ¶ 14, 363 P.3d 1204 (“[A]s an elected representative of  
14 the people, a district attorney has broad discretion in determining what charges to  
15 bring and what people to prosecute in the best interest of the people of the State of  
16 New Mexico.” (internal quotation marks and citation omitted)). Along with the  
17 broad discretion to pursue charges is a broad discretion not to. *See State v.*  
18 *Santillanes*, 2001-NMSC-018, ¶ 21, 130 N.M. 464, 27 P.3d 456 (“[T]he decision  
19 whether *or not* to prosecute, and what charge to file or bring before a grand jury,

1 generally rests entirely in [the prosecutor’s] discretion.” (emphasis added) (internal  
2 quotation marks and citation omitted)).

3 ¶9) The State’s broad discretion not to pursue charges against a person includes  
4 not doing so in the first instance, as well as abandoning some or all of the charges it  
5 has already filed. *See id.*; *State v. Puckett*, 1935-NMSC-080, ¶ 11, 39 N.M. 511, 50  
6 P.2d 964 (“A nolle prosequi may be allowed as to one of two indictments, or as to  
7 one or more of the several counts of an indictment, or as to part of a count or  
8 indictment which is divisible, or which charges an offense which in itself embraces  
9 another.”). Nolle prosequi, the legal mechanism by which the State exercises its  
10 abandonment of charges, long predates New Mexico’s statehood. *See, e.g., United*  
11 *States v. Aurandt*, 1910-NMSC-011, ¶ 12, 15 N.M. 292, 107 P. 1064 (noting the  
12 impact of filing a nolle prosequi after jeopardy has attached). It is “a common-law  
13 rule that allows the government absolute power to dismiss criminal charges against  
14 an accused without any structured judicial oversight or supervision.” *State v.*  
15 *Gardea*, 1999-NMCA-116, ¶ 5, 128 N.M. 64, 989 P.2d 439. And we have long  
16 acknowledged that our Legislature adopted the common law in criminal matters. *See*  
17 *Ex parte De Vore*, 1913-NMSC-072, ¶ 4, 18 N.M. 246, 136 P. 47 (“In criminal cases,  
18 the common law, as recognized by the United States and the several states of the  
19 Union, shall be the rule of practice and decision.” (internal quotation marks and  
20 citation omitted)); *see also Leitensdorfer v. Webb*, 1853-NMSC-002, ¶ 26, 1 N.M.

1 34 (“The common law, then, at least so far as to control and regulate the proceedings  
2 of the district court in the hearing and determining of causes, has been extended over  
3 this territory . . .”).

4 {10} As a creation of the common law, the State’s authority to file a nolle prosequi  
5 may be modified by rule or statute. *See State v. Armstrong*, 1924-NMSC-089, ¶ 49,  
6 31 N.M. 220, 243 P. 333 (“[T]he common law is in force in New Mexico, except as  
7 modified by statute.” (internal quotation marks and citation omitted)); *State v.*  
8 *Padilla*, 2000-NMCA-090, ¶ 12, 129 N.M. 625, 11 P.3d 589 (recognizing the  
9 modification of common law by rule and subsequent case law). Unlike some other  
10 jurisdictions,<sup>2</sup> we find no authority indicating that the State’s power to file a nolle  
11 prosequi has been circumscribed by statute or rule in our district courts, which are  
12 courts of general jurisdiction. *See State ex rel. Foy v. Austin Cap. Mgmt., Ltd.*, 2015-  
13 NMSC-025, ¶ 7, 355 P.3d 1 (“New Mexico district courts are courts of general  
14 jurisdiction having power to hear all matters not excepted by the constitution and

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<sup>2</sup>*See, e.g.*, Haw. Rev. Stat. Ann. § 806-56 (West 1987) (“No nolle prosequi shall be entered in a criminal case . . . except by consent of the court upon written motion of the prosecuting attorney stating the reasons therefor.”); Ark. Code Ann. § 16-85-713 (West 2005) (“No prosecuting attorney shall enter a nolle prosequi on any indictment . . . without the leave of the court.”); Cal. Penal Code § 1385(a) (West 2024) (same); Ga. Code Ann. § 17-8-3 (West 1989) (same). *But see, e.g., People v. Gossage*, 470 N.E.2d 548, 550 (Ill. App. Ct. 1984) (“The decision to nolle prosequi lies within the nearly unfettered discretion of the [s]tate’s [a]ttorney.”); *State v. Kahmke*, 468 So. 2d 284, 285 (Fla. Dist. Ct. App. 1985) (“Permission of the trial court is not necessary, because the decision to file a nolle pros[equi] is within the sole discretion of the [s]tate.”); La. Code Crim. Proc. Ann. art. 691 (1968) (same).

1 those matters conferred by law.” (internal quotation marks and citation omitted));  
2 N.M. Const., art. VI, § 13. Consequently, in New Mexico “[t]he State has wide  
3 discretion to dismiss criminal charges, and absent an abuse of that discretion, the  
4 trial court will not exercise its control over the movements of a given case.” *State v.*  
5 *Ware*, 1993-NMCA-041, ¶ 8, 115 N.M. 339, 850 P.2d 1042.

6 {11} In our district courts “a nolle prosequi is as final as any other dismissal with  
7 or without prejudice,” *id.* ¶ 9, which functions to strip a court of its jurisdiction over  
8 a case. *See State v. Sweat*, 1967-NMCA-021, ¶ 3, 78 N.M. 512, 433 P.2d 229  
9 (adopting the view that “the court which first acquired jurisdiction when a  
10 prosecution was commenced therein loses jurisdiction by the entering of a nolle  
11 prosequi.” (internal quotation marks and citation omitted)). Upon the State’s filing  
12 of a nolle prosequi, the district court may not then make further rulings or orders  
13 because “a court without jurisdiction to hear a case cannot issue a valid order on the  
14 merits of that case.” *Cordova v. Larsen*, 2004-NMCA-087, ¶ 14, 136 N.M. 87, 94  
15 P.3d 830; *accord Ericksen*, 1980-NMCA-029, ¶¶ 1-2 (“Under ordinary  
16 circumstances” “the judge . . . had no jurisdiction to enter an order dismissing the  
17 charges against [the] defendants . . . with prejudice, after the district attorney had  
18 filed a notice of nolle prosequi dismissing the cause without prejudice.”).

1 **III. The General Rule Is Subject to Limited Exceptions Not Present Here**

2 {12} As discussed above, the common law power to nolle prosequi may be  
3 modified by rule or statute, and our Supreme Court has done so, for example, by  
4 “prescrib[ing] a new procedure for dismissing criminal charges in courts of limited  
5 jurisdiction, and those rules have codified and, in places, modified the common law.”  
6 *Gardea*, 1999-NMCA-116, ¶ 5; *accord* Rule 6-506.1 NMRA (governing  
7 “[v]oluntary dismissal and refiled proceedings” for magistrate courts). As noted  
8 above, no such limitation exists for courts of general jurisdiction.

9 {13} We have also recognized an exception to account for the potential that  
10 prosecutors may “misuse[] their discretionary powers to achieve a barred result.”  
11 *State v. Jurado*, 2024-NMCA-058, ¶ 18, 553 P.3d 514 (alteration, internal quotation  
12 marks, and citation omitted). To that end, this Court has held that a district court  
13 retains jurisdiction to dismiss with prejudice when a nolle prosequi is patently a  
14 sham, filed in bad faith to achieve a barred result. *See Ericksen*, 1980-NMCA-029,  
15 ¶ 9 (“We look past the form of the district attorney’s usual right to file a nolle  
16 prosequi . . . and focus instead upon the substance of such conduct when [there is]  
17 . . . no other impression than that [the district attorney] had deliberately engaged in  
18 game-playing with the rules.”). It is the responsibility of the trial court to “prevent a  
19 district attorney from using a nolle prosequi to circumvent the Rules of Criminal  
20 Procedure.” *Ware*, 1993-NMCA-041, ¶ 8. But *Ericksen*’s exception would not apply

1 here because there is no apparent sham in the mere filing of a nolle prosequi within  
2 five days before trial. Moreover, there were no allegations that the State’s nolle  
3 prosequi was filed in bad faith. To the contrary, the district court commended the  
4 prosecutor’s professionalism, in this and other cases, after entering its order from the  
5 bench.

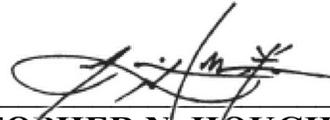
6 {14} To the extent that Defendant now believes the State filed its nolle prosequi in  
7 bad faith, purportedly to grant itself an unsanctioned continuance, Defendant may  
8 pursue that issue should the State refile charges. *See State v. Savedra*, 2010-NMSC-  
9 025, ¶ 8, 148 N.M. 301, 236 P.3d 20 (“[A]ny inquiry into the State’s reasons for  
10 dismissing and refileing in district court should be done within the context of any  
11 speedy trial challenge the defendant may raise after the case is refiled.”).

12 {15} Because we hold that the filing of the nolle prosequi terminated the district  
13 court’s jurisdiction, we need not address the constitutional questions raised by the  
14 State’s alternative argument concerning separation of powers. “We have repeatedly  
15 declined to decide constitutional questions unless necessary to the disposition of the  
16 case.” *Schlieter v. Carlos*, 1989-NMSC-037, ¶ 13, 108 N.M. 507, 775 P.2d 709;  
17 accord *Baca v. N.M. Dep’t of Pub. Safety*, 2002-NMSC-017, ¶ 12, 132 N.M. 282,  
18 47 P.3d 441 (noting that it is proper for courts to avoid reaching unnecessary  
19 constitutional issues).

1 **CONCLUSION**

2 {16} For the reasons above, we vacate the district court’s “Sua Sponte Order on  
3 State’s Nolle Prosequi and Order of Dismissal With Prejudice.”

4 {17} **IT IS SO ORDERED.**

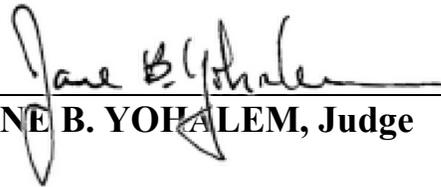


5  
6 **KRISTOPHER N. HOUGHTON, Judge**

7 **WE CONCUR:**



8  
9 **SHAMMARA H. HENDERSON, Judge**



10  
11 **JANE B. YOHALEM, Judge**