

**IN THE  
MISSOURI SUPREME COURT**

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<b>STATE OF MISSOURI,</b>	)	
	)	
	)	<b>Appellant,</b>
	)	
<b>vs.</b>	)	<b>No. SC 92230</b>
	)	
<b>GRANT MIXON,</b>	)	
	)	
	)	<b>Respondent.)</b>

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**APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI  
THIRTY-FIRST JUDICIAL CIRCUIT  
THE HONORABLE JASON BROWN, JUDGE**

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**RESPONDENT'S BRIEF**

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## JURISDICTIONAL STATEMENT

Respondent was charged with receiving stolen property, § 570.080, RSMo 2000. The trial court granted respondent's motion to dismiss, holding that §556.036.5, Cum Supp. 2011, which provides that a prosecution is commenced with the filing of a complaint, was unconstitutional and therefore the statute of limitations had expired. The state brought this appeal. This Court has original jurisdiction over challenges to the validity of a statute of Missouri. Article V, Section 3, Mo. Const. (as amended 1982).

## STATEMENT OF FACTS

On January 25, 2011, the state filed a felony complaint against respondent in the Circuit Court of Greene County, Associate Division, charging him with receiving stolen property on May 2, 2008 (L.F. 1, 5-6). On November 2, 2011, respondent filed a motion to 1) dismiss the proceedings for failing to commence prosecution within the time allowed by the statute of limitations and 2) declare § 556.036.5 RSMo Cum. Supp. 2011 unconstitutional (L.F. 12-14).

Respondent claimed that the three year statute of limitations had expired (L.F. 12). He acknowledged that under § 556.036.5, “[a] prosecution is commenced ... for a felony when the complaint or indictment is filed,” but argued that this provision violated Article I, § 17 of the Missouri Constitution (L.F. 13).

The trial court held a hearing on respondent's motion to dismiss (Tr. 1-9). The state offered no explanation for its failure to file an information or indictment within the three-year limit (L.F. 7-11).

The trial court granted respondent's motion and entered judgment declaring the statute to be unconstitutional (L.F. 15-17). The court reasoned that “under the structure of our criminal procedure as set out in our Supreme Court rules that the filing of a complaint to initiate proceedings does not commence prosecution in the manner required by the Constitution” (L.F. 4). The state brought this appeal (L.F. 18).

**POINT RELIED ON**

**The trial court did not err in declaring § 556.036.5 unconstitutional and dismissing the proceedings against respondent, because § 556.036.5 contravenes Art. I, § 17 of the Missouri Constitution, in that it authorizes prosecutions to proceed by complaint while the Constitution provides that a person may not be prosecuted “otherwise than by indictment or information.”**

*State ex rel. Morton v. Anderson*, 804 S.W.2d 25 (Mo. banc 1991);

*Dillard v. State*, 931 S.W.3d 157 (Mo. App., W.D. 1996);

*United States v. Lovasco*, 431 U.S. 783 (1977);

Mo. Const., Art. I, § 17; and

Rules 22.01, 22.09 and 23.03.

## ARGUMENT

**The trial court did not err in declaring § 556.036.5 unconstitutional and dismissing the proceedings against respondent, because § 556.036.5 contravenes Art. I, § 17 of the Missouri Constitution, in that it authorizes prosecutions to proceed by complaint while the Constitution provides that a person may not be prosecuted “otherwise than by indictment or information.”**

The trial court properly dismissed the complaint filed against respondent. Section 556.036.5, providing that a felony prosecution commences with the filing of a complaint, by its terms directly contradicts the Missouri Constitution. Moreover, it cannot be harmonized with the language of the Constitution. It is an alternative, directly competing provision and is unconstitutional.

### *Standard of review*

This Court reviews issues of law *de novo*. *State v. Justus*, 205 S.W.3d 872, 878 (Mo. banc 2006). A ruling granting a motion to dismiss presents an issue of law. *State v. Rousseau*, 34 S.W.3d 254 (Mo. App., W.D. 2000).

Statutes are presumed to be constitutional. *Suffian v. Usher*, 19 S.W.3d 130, 134 (Mo. banc 2000). This Court resolves all doubt in favor of a statute’s validity and makes every reasonable intendment to sustain the constitutionality of the statute. *State v. Vaughn*, 366 S.W.3d 513, 517 (Mo. banc 2012). If a statutory

provision can be interpreted in two ways, one constitutional and the other unconstitutional, the constitutional construction shall be adopted. *Id.*

***Section 556.036.5 Contravenes the Missouri Constitution***

Section 556.036 establishes statutes of limitations for felony and misdemeanor prosecutions. Until 2008, § 556.036.5 provided that a prosecution commenced, thereby concluding the limitations period, “either when an indictment is found or an information filed.” In 2008, this statute was amended to provide that a felony prosecution is commenced at the time an indictment or *complaint* is filed.

Because statutes are presumed constitutional, they will be upheld unless they “clearly contravene” a constitutional provision. *State v. Pribble*, 285 S.W.3d 310, 313 (Mo. banc 2009). “Contravene” is “a strong word, defined as “[t]o violate or infringe; to defy” or “to be contrary to.” BLACK'S LAW DICTIONARY 352 (8th ed. 2004). *DeGroot v. DeGroot*, 939 A.2d 664, 670 (D.C. 2008).

Article I, § 17 of the Missouri Constitution provides in pertinent part, “That no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, but this shall not be applied ...to prevent arrests and preliminary examination in any criminal case.” Section 556.036.5 provides that “[a] prosecution is commenced for a felony when the complaint or indictment is filed.”

The constitutional provision prohibits a prosecution absent information or indictment; the statute decrees that a felony prosecution commences with the filing of a complaint. By its terms, the statute contravenes—is contrary to—the Missouri Constitution.

Appellant argues, however, that the statute does not in fact contravene Article I, § 17. First, it argues that this section does not specify when a prosecution commences, but “merely requires the filing of an information or indictment to prosecute a defendant” (App.Br. 12). Second, it argues that the statute does not dispense with the necessity of an information but “only identifies the filing of a felony complaint as the triggering event that tolls the statute of limitations” (App.Br. 12). Thirdly, the state claims that the legislature has the prerogative to determine the length and triggering event of the statute of limitations (App.Br. 12).

### I.

First, it is argued that the statute “does not purport to define when a felony prosecution commences for all purposes; it simply identifies the date that a complaint or indictment is filed as the commencement of prosecution purely for statute-of-limitations purposes” (App.Br. 16). The legislature intended to provide for tolling the statute of limitations, not to repeal a constitutional provision (App.Br. 16).

This argument raises the question of whether, consistent with Article I,

§ 17, the legislature may declare that a prosecution commences with filing of a complaint, solely for statute of limitations purposes. Article I, § 17 outlines several exceptions to its general requirement--in the case of war and public danger—and by its terms is not to be applied so as to proscribe arrests and preliminary examinations. But the provision admits of no exceptions related to the statute of limitations. The legislature is not authorized to contravene the Constitution even for this limited purpose, which results in a piecemeal evisceration of Article I, § 17.

## II.

Next, it is argued that “the constitutional provision that was supposedly violated does not attempt to identify when the ‘commencement’ of a criminal prosecution occurs,” and it “does not define the ‘commencement’ of a criminal prosecution as the date when an information or indictment is filed” (App.Br. 16). It is true that the word “commence” does not explicitly appear in Article I, § 17. Nevertheless, under a plain reading, insofar as there can be no prosecution without an information, it follows that a complaint cannot commence a prosecution.

Article I, § 17 by its terms “shall not be applied...to prevent arrests and preliminary examinations in any criminal case.” It may be, as is argued, that this provision is an acknowledgement that “the criminal process is generally already underway by the time an information or indictment is filed” (App.Br. 17). The “criminal process” that is contemplated, however, is not a prosecution, nor its

equivalent. The issue is not a linguistic one, but rather the logical import of a statute that contradicts the Constitution in this way.

Article I, § 17 utilizes the understood meaning that a “prosecution” is “a criminal proceeding in which an accused person is tried.” BLACK'S LAW DICTIONARY 1258 (8th Ed. 2004). A complaint does not initiate a criminal prosecution. *Dillard v. State*, 931 S.W.3d 157, 161 (Mo. App., W.D. 1996) [citing *State v. Black*, 587 S.W.2d 865 (Mo. App., E.D. 1979)] (right to speedy trial not triggered by the filing of a complaint)

The constitution authorizes preliminary examinations to determine probable cause. *See* Rule 22.09 (App.Br. 15). This is not the equivalent of a determination of guilt. This is an important distinction. It is only after the preliminary hearing that the defendant is required to plead in response to the charge, Rule 23.03, and it is then and only then that a prosecution is undertaken in a court with the authority to deprive the defendant of a liberty interest. The constitutional sanction of “arrests and preliminary examinations in any criminal case” does not authorize *prosecution* upon a complaint.

It is true that the ultimate objective of the complaint is to move the case toward a conviction, and the complaint process may be a necessary component of moving toward a prosecution. But the proceedings upon a complaint cannot obtain this result; the fact that it is necessary does not mean that it is sufficient. Appellant's reasoning conflates the criminal proceedings (initiated by complaint) with the criminal prosecution (initiated by information).

The procedural scheme contemplated by the Constitution and rules was elucidated in *State ex rel. Morton v. Anderson*, 804 S.W.2d 25 (Mo. banc 1991). Analyzing Rule 22.01, the Court noted that “[t]hough the complaint may *initiate* felony *proceedings*, it is merely a prelude to felony *prosecution*, for in felony cases the complaint serves as a precursor to the preliminary hearing required by § 544.250.” *Id.* at 26 (emphasis in original). Thus, “[a]n information instigates a *prosecution* against an alleged felon, and the mere filing of a complaint does not confer jurisdiction upon a court to adjudicate the offense.” *Id.*<sup>1</sup>

Admittedly, *Anderson* was decided under the now-repealed statute. That particular statute specified that “a prosecution is commenced either when the indictment is found or an information filed.” To the extent that *Anderson* relied upon that statute, it is no longer authoritative.

But that does not mean that *Anderson* “has no application in this case.” The Court’s interpretation of Article I, § 17 and the rules of court remains valid, as

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<sup>11</sup> This Court’s decision in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009), does not alter the principle that a court may not adjudicate guilt upon a complaint. Such a reading would contravene Art. I, § 17. The court has subject matter jurisdiction of matters filed in the court, *Dorris v. State*, 360 S.W.3d 260, 265 (Mo. banc 2012), but a complaint nevertheless remains insufficient to form the basis of a determination of guilt. *State ex rel. Martin v. Berrey*, 560 S.W.2d 54, 57 (Mo. App., K.C.D. 1977).

those provisions have remained unchanged. The Court recognized that the now-repealed statute “[met] the requirements of,” and gave proper effect to, Art. I, § 17 of the Missouri Constitution. 804 S.W.2d at 26.

An indictment or information serves as the basis for a criminal trial; a complaint does not. An indictment or information allows the court to determine liability for an offense; a complaint does not. A complaint does not require the accused to take action to defend himself. *Dillard, supra*. A criminal defendant receives discovery in the course of a prosecution; a complaint does not give rise to this right in Missouri. Consequently, it is only when an indictment or information is filed that a prosecution commences.

It is argued that under § 556.036.5, the state is still required to obtain an indictment or information against the accused, and that Article I, § 17 does not “purport to mandate the point in which these filings must occur during the criminal process” (App.Br. 16-17). This argument might be tenable if Article I, § 17 provided that no person shall be *convicted* of, instead of *prosecuted for*, a felony without an indictment or information. However, it does not.

There may be vagaries of the criminal process, involving whether an arrest precedes a complaint and whether probable cause is found (App.Br. 18), but there are none associated with the commencement of a prosecution. Article I, § 17 is clear. Prosecution for a felony begins when an indictment or information is filed.

Logic dictates that a given procedure is either a prosecution, or it is not. The artificial split into “prosecution” for statute of limitations purposes, as

opposed to prosecution as authorized constitutionally, is without basis other than to circumvent the obvious constitutional requirement.

### III.

Finally, it is argued that the legislature had authority to legislate matters of statutes of limitations. The circuit court did not deny the legislature's prerogative to amend § 556.036.5, but held that it must do within constitutional boundaries.

It being conceded that the legislature possesses the authority to amend the statute of limitations (although that authority is limited by due process considerations, *United States v. Lovasco*, 431 U.S. 783, 789 (1977)), nevertheless the amendment in this case is problematic on other grounds. As seen before, *Dillard, supra*, there is no right to speedy trial under Article I, § 18 upon the filing of a complaint, because the complaint does not "initiate a criminal prosecution." But statutes of limitations are the primary protection for delays prior to commencement of prosecution. *Lovasco*, 431 U.S. at 789.

If the prosecution commences with a complaint, but the right to a speedy trial does not attach at that time, the accused is left in limbo with no constitutional or statutory remedy for inordinate delay between the filing of a complaint and information. This important right is implicated by § 556.036.5, and it is a right that Article I, § 17 was designed to protect. In reality, the effect of the statute is not as benign as it advocates argue. The statute contravenes the Constitution in its effect, as well as in its plain language.

As Article I, § 18 appears immediately after § 17, the two should be read together. Section 18 contemplates rights attendant to a proceeding to obtain a conviction. The meaning of “prosecution” in § 17 is therefore a similar meaning.

The hypothetical situation proposed in appellant's brief is also troubling. A hypothetical is proposed in which a complaint is filed against an accused, but at a preliminary hearing the court does not find probable cause (App.Br. 23). It is argued that if no probable cause is found, then “no further prosecution can take place and the defendant is discharged” (App.Br. 23).

Respondent’s case is also similar, as a complaint was filed and the proceedings dismissed. The question arises, has respondent been prosecuted? Assumedly has been prosecuted, because under § 556.036 he was prosecuted when a complaint was filed against him. But this cannot be so, because under the Missouri Constitution the he could not be prosecuted “otherwise than by indictment or information...” And his right to a speedy trial did not attach, nor did he have a right to any discovery.

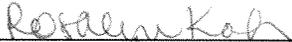
Section 556.036.5 took away his right to the protection of the statute of limitations by redefining “prosecution” while simultaneously withholding rights that adhere when a prosecution is filed. This twisting of the meaning of a word when it suits the state’s interest results in an unavoidable contradiction an incoherent procedural scheme. The law cannot be interpreted in such a way as to harmonize with Article I, § 17.

Section 556.036.5 contravenes the Missouri Constitution. The trial court's judgment so finding should be affirmed. Additionally, the court's order dismissing the action should also be affirmed.

**CONCLUSION**

For the reasons presented, respondent respectfully requests that the ruling of the Circuit Court dismissing the charges against him be affirmed.

Respectfully submitted,

  
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**Certificate of Compliance and Service**

I, Rosalynn Koch hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 2,856 words, which does not exceed the 27,900 words allowed for a respondent's brief.

I hereby certify that on this 10<sup>th</sup> day of August, 2012, an electronic copy of the foregoing was sent through the Missouri e-Filing System to Evan Buchheim at [Evan.Buccheim@ago.mo.gov](mailto:Evan.Buccheim@ago.mo.gov).

  
\_\_\_\_\_  
Rosalynn Koch