

**IN THE  
MISSOURI SUPREME COURT**

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<b>STATE OF MISSOURI,</b>	)	
	)	
<b>Appellant,</b>	)	
	)	
<b>vs.</b>	)	<b>No. SC 92450</b>
	)	
<b>JEFFREY D. ANDERSON,</b>	)	
	)	
<b>Respondent.</b>	)	

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**APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI  
31st JUDICIAL CIRCUIT, DIVISION 5  
THE HONORABLE CALVIN HOLDEN, JUDGE**

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**RESPONDENT'S BRIEF**

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## **JURISDICTIONAL STATEMENT**

Respondent, Jeffrey D. Anderson, was charged with second degree burglary and stealing, §§ 569.170 and 570.030, RSMo 2000.<sup>1</sup> (LF 10). The trial court sustained his motion to dismiss the case with prejudice, due to the State's failure to commence prosecution within the time allowed by the statute of limitations, and due to the unconstitutionality of § 556.036.5, RSMo Supp. 2009, which provides that a felony prosecution is commenced by the filing of a complaint. (LF 5). The State filed a notice of appeal on March 2, 2012. (LF 21-22). This Court has original jurisdiction over challenges to the validity of a Missouri statute. Mo. Const., Art. V. § 3 (as amended 1982).

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<sup>1</sup> All statutory references are to RSMo 2000 cumulative through the most recent supplement, unless otherwise stated.

## STATEMENT OF FACTS

On March 12, 2008, Corporal Kevin Cantrell of the Springfield Police Department received an alarm call concerning Greg's Automotive, a local business. (LF 8). A window to the business had been broken, and the owner stated that a money bag had been taken from inside. (LF 8). Officers collected two blood samples from the ground underneath the broken window, which were sent to the State's crime lab. (LF 8).

In September of 2009, Officer Cantrell received a certified report from the lab, which indicated that the samples tested positive for blood. (LF 8-9). A DNA profile was developed, which was entered into the Combined DNA Index System (CODIS). (LF 9). In October of 2009, Officer Cantrell received another report from the lab indicating that a "hit" occurred in CODIS that listed Jeffrey Anderson, Respondent, as a possible source of the DNA. (LF 9).

Officer Cantrell determined that Mr. Anderson was incarcerated in Fulton for an unrelated offense. (LF 9). Even though Cantrell had information that suggested Anderson's DNA was found at the crime scene, and even though he knew where Anderson could be located in October of 2009, the officer did not take any further action. (LF 9). No charges were filed against Anderson at any time during the remainder of 2009, or in 2010.

Officer Cantrell researched the case again in February of 2011, and learned that Anderson had been released from prison. (LF 9). On February 25, 2011, Officer Cantrell submitted his probable cause statement. (LF 8-9). This was attached to a

Felony Complaint filed on February 28, 2011, almost three years after the alleged offense had occurred. (LF 6, 8).

Mr. Anderson was arraigned and posted bond with the associate circuit court prior to obtaining counsel. (LF 1-2). Appointed counsel entered his appearance on March 16, 2011. (LF 2). On May 2, 2011, the case was bound over for arraignment in the circuit court. (LF 2). The prosecutor filed a Felony Information on May 6, 2011, which alleged that Anderson committed burglary and stealing on March 12, 2008. (LF 10-11). The prosecutor did not allege any facts to explain why the State was filing charges after the expiration of the applicable three-year statute of limitations. § 556.036.2, RSMo Supp. 2009.

Defense counsel filed a motion to dismiss the case with prejudice, and to declare § 556.036.5 unconstitutional. (LF 12-13). Counsel argued that since § 556.036 provides that a felony prosecution may be commenced by the filing of a complaint, it directly violates Article I, § 17 of the Missouri Constitution, which expressly provides that no person shall be prosecuted for a felony except by indictment or information. (LF 12-13). Since the prosecutor failed to file an indictment or information before the expiration of the three-year statute of limitations, the defense argued that the case should be dismissed with prejudice. (LF 12-13).

The prosecutor conceded that § 556.036.5 allows a felony prosecution to be commenced by complaint, but argued that this was only for the purposes of the statute of limitations, and that the statute does not violate any constitutional provisions. (LF 18-19). He argued that the legislature was obligated to enact criminal procedures, and

that § 556.036 was merely a procedural scheme that was set up to satisfy Article I, § 17, and asked for the circuit court to deny the motion to dismiss. (LF 18-19). A hearing was held and arguments were presented, but the circuit court did not keep any record of the hearing. (LF 4-5).

On February 27, 2012, the circuit court sustained Mr. Anderson's motion to dismiss by docket entry. (LF 5). The State's appeal followed.

## ARGUMENTS

### I.

The trial court did not err in sustaining Respondent's motion to declare § 556.036.5 unconstitutional, because the plain language of the statute conflicts with Article I, § 17 of the Missouri Constitution, in that § 556.036.5 provides that a felony prosecution is commenced by the filing of a complaint or indictment, but the Constitution provides that no person shall be prosecuted for a felony except by information or indictment, which furthers substantive rights that are not available until the prosecution has commenced and a person is accused by the filing of a felony charge. A complaint does not constitute a criminal charge, and it does not commence prosecution or cause prosecution to be pending against the accused. The trial court did not err in determining that the statute directly conflicts with the Missouri Constitution, and that prosecution was not pending until the information was filed, which was after the expiration of limitations period.

#### *Standard of Review*

This Court interprets statutes and constitutional provisions according to their plain, ordinary, common sense meaning. *State on inf. Dalton v. Dearing*, 263 S.W.2d 381, 384 (Mo. banc 1954). Statutory construction should not be subject to “philosophical acuteness or judicial research” that will change the ordinary and common sense meaning of each word in the law. *See Id.* at 484. This rule is equally

applicable to constitutional interpretation, except that constitutional laws are given broader construction. *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895, 899 (Mo. banc 2006). When a disputed term is not defined in the constitution or in law, this Court looks to the plain meaning of the terms as they are commonly defined in the dictionary. *Id.*

It is presumed that statutes are constitutional and this Court will not find otherwise unless the law clearly contravenes a constitutional provision. *State v. Vaughn*, 366 S.W.3d 513, 517 (Mo. banc 2012). If at all feasible, the statute must be interpreted to be consistent with constitutional provisions. *Id.*, citing *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007). Whether a statute is constitutional is an issue of law that is reviewed *de novo*. *Vaughn*, 366 S.W.3d at 517.

### ***Argument***

The Missouri Constitution's Bill of Rights provides that no person shall be prosecuted for a felony except by indictment or information. Mo. Const., Art. I, § 17. It also provides that in all criminal prosecutions the accused has the right to demand the nature and cause of the accusation, and provides other rights to persons accused of a criminal offense. Mo. Const., Art. I, § 18(a). These are substantive rights, and the legislature does not have the authority to enact laws that interfere with these rights.

There is no essential difference in the function or consequence of an indictment and an information. *Schook v. United States*, 337 F.2d 563, 567 (8th Cir. 1964). The differences arise in the manner they are filed or issued. In one instance, a prosecutor

is taking individual action by initiating felony prosecution with the charging of an information, after the court determines that there is probable cause to do so. *Id.* at 567; Rule 22.09. In the other instance, the group action of the grand jury causes an indictment to be issued after sufficient evidence is presented to warrant the charge. *Schook*, 337 F.2d at 567. However, the primary purpose of both an information and indictment is to provide notice to the accused of specific charges filed against him for the alleged violation of a criminal law. *Id.*; *State v. Higdon*, 774 S.W.2d 498, 500 (Mo. App. E.D. 1989).

The rights that are furthered by requiring the State to prosecute a felony only by information or indictment include informing the accused of the charges against him so that he may prepare an adequate defense and be protected from double jeopardy. *State v. Simpson*, 846 S.W.2d 724, 728 (Mo. banc 1993). These charging methods allow the court to determine if the facts alleged are, as a matter of law, sufficient to support a conviction, or to withstand motions (such as to dismiss). *State v. McCollum*, 63 S.W.3d 242, 249 (Mo. App. S.D. 2001); *Russell v. United States*, 369 U.S. 749, 765–70 (1962); *State v. O'Connell*, 726 S.W.2d 742, 746 (Mo. banc 1987). This is in alignment with our State Constitution's guarantee that the accused has the right to demand the nature and cause of the accusation. *State v. Isa*, 850 S.W.2d 876, 878 (Mo. banc 1993), *citing* Mo. Const., Art. I, § 18(a).

The purposes and consequences of a complaint are not the same as an indictment or information. Most importantly, a complaint does not constitute an actual criminal charge. *State v. Caffey*, 438 S.W.2d 167, 171 (Mo. 1969)

(constitutional rights invoked in Article I “contemplate a pending charge and not merely a pending complaint.”). It is merely a way to initiate felony proceedings, which do not necessarily lead to a criminal charge. *Moton v. State*, 772 S.W.2d 689, 691 (Mo. App. E.D. 1989); Rule 22.01, 22.09. The State is never authorized to file a felony charge by information until the accused is given the opportunity for a preliminary hearing. § 544.250; 22.09. The purpose of the preliminary hearing is to allow a judge, as opposed to a grand jury, to determine if there is probable cause to believe the defendant has committed a felony. Rule 22.09. If the judge does not find probable cause, then the person will be discharged before any prosecution is commenced. *Id.*

The requirements for a complaint are not the same as that of an information. A complaint does not need to be supported by oath or information of the prosecuting attorney. Rule 22.02. It does not have to be as specific as an information, because it does not constitute a criminal charge or begin a prosecution. Rule 22.02; *Caffey*, 438 S.W.2d at 171; *State ex rel. Morton v. Anderson*, 804 S.W.2d 25, 26 (Mo. banc 1991). A complaint is not required to contain any facts or details to distinguish multiple counts, does not need to contain facts for enhanced punishments, and does not need to list material witnesses. Rule 22.02 and 23.01. It does not need to cite to the actual criminal statute alleged to be violated, or the statutes fixing punishment or penalty. Rules 22.02, 23.01. This does not comply with constitutional requirements of adequate notice to the accused. Mo. Const., Art. I, § 17.

Certain substantive rights are triggered when the State files a felony charge by information, which are not available during proceedings initiated by a complaint. For instance, the defendant does not have the right to any discovery unless an information is filed, because this is not available until they are charged. Rule 25.01. The filing of a complaint does not trigger the constitutional right to a speedy trial, because, once again, it does not initiate a criminal prosecution. *Caffey*, 438 S.W.2d at 171; *Dillard v. State*, 931 S.W.2d 157, 161 (Mo. App. W.D. 1996). A complaint does not require an individual to take any action to defend himself; a person cannot be called upon to defend themselves against a felony charge when there is no actual charge filed. *Dillard*, 931 S.W.2d at 161.

Initiating felony proceedings by complaint is authorized by Rule 22.01 and Article I, § 17, which does not prevent arrests or preliminary examination before the State charges the accused by information or indictment. *Moton v. State*, 772 S.W.2d 689, 691 (Mo. App. E.D. 1989). Initiating a felony “proceeding” is not the same as initiating a felony “prosecution.” *Id.* A pending complaint represents ‘a mere possibility that a criminal charge will be filed.’” *Id.*, citing *Caffey*, 438 S.W.2d at 171. Since a complaint does not constitute a criminal charge, it does not commence a prosecution or cause one to be pending, and it does not toll the limitations period. § 556.036.6(3). The United States Supreme Court and many courts of appeals have recognized that the statute of limitations is the only protection against pre-indictment delay. *United State v. Marion*, 404 U.S. 307, 305 (1971).

The State argues that § 556.036 does not authorize prosecution by complaint, but instead, merely provides that the three-year limitations period will be tolled by the filing of a complaint. App. Br. 14. The State’s interpretation is not supported by the plain language of the statute. The law expressly states that a felony “prosecution is commenced” when the complaint or indictment is filed. § 556.036.5. The filing of an indictment is a constitutionally proper way to commence a felony prosecution. Mo. Const., Art. I, § 17. The filing of a complaint is not. *Id.*; *Caffey*, 438 S.W.2d at 171.

In *State ex rel. Woods v. Ratliff*, this Court cited to Court Rules, not statutes, when determining that depositions, which are allowed “in any criminal case pending in any court,” are not available upon the filing of a complaint. 322. S.W. 864 (Mo. banc 1959); Rule 25 12. This Court stated, “a criminal case is not instituted or pending until an information is filed or an indictment returned.” *Id.* So, whether or not a prosecution is “pending” for the purposes of the statute of limitations is an issue that has been determined based on constitutional provisions and court rules of procedure, not just § 556.036.6. *Id.*; *cited with approval in Morton*, 804 S.W.2d at 26. The State’s argument twists the plain meaning of the statute in a manner that would make it inconsistent with other rules and laws.

The State’s argument that Article I, § 17 does not define when a prosecution “commences,” but merely requires the State to file an information at some point in order to “constitutionally accomplish” a prosecution, is irreconcilable. App. Br. 16. The State focuses on the word “commence,” as opposed to the vital term in these laws – “prosecution,” “prosecutions,” and “prosecuted.” Mo. Const., Art. I, § 17; §

556.036. In its plain and ordinary meaning, a “criminal prosecution” is “a criminal proceeding in which an accused person is tried.” Black’s Law Dictionary 382, 1237 (7th Ed. 2004). A complaint does not give the court authority to hold trial, and does not cause a person to be “accused.” *State v. Black*, 587 S.W.2d 865, 873 (Mo. App. E.D. 1979); *Hayes v. State*, 301 S.W.3d 542, 546 (Mo. App. W.D. 2010). A complaint does not toll the statute of limitations, which only occurs when a prosecution is pending against the accused. § 556.036.5; *Morton*, 804 S.W.2d at 26. This can only occur by information or indictment, and not by complaint. The express terms of subsection 5 of § 556.036 violate Article I, § 17 of the Missouri Constitution, and the trial court was correct to determine this.

The State argues that this Court’s opinion in *Morton v. Anderson*, *supra*, since it was issued before the 2006 enactment of § 556.036, is inapplicable. App. Br. 21. This is not so. In *Anderson*, like here, the State filed a felony complaint against the putative defendant within the limitations period, but did not file an information until after the limitations period expired. 804 S.W.2d 25, 26 (Mo. banc 1991). The Court declared that prosecution does not commence until an information or indictment is filed, citing to numerous cases in which it had held the same. *Id.* (internal citations omitted). Cases prior to the enactment of § 556.036 held that an information or indictment must be filed within the applicable limitations period, or it must allege facts negating the operation of the statute. *See e.g., State v. Bithorn*, 278 S.W. 685, 686 (Mo. 1925). At least one other appellate court held that the limitations period is not tolled by the filing of a complaint, and that a felony prosecution is pending only

upon the filing of an information or indictment, and issued its opinion after the 2006 amendment in § 556.036.6. *State v. Corley*, 251 S.W.3d 416 (Mo. App. S.D. 2008).

The State concedes that an information is required at some point in order to “constitutional accomplish” a felony prosecution, and to provide notice of the charges as required by due process. App. Br. 16. But the State proposes that prosecutors should be allowed to file a complaint, which does not provide notice of the charges and does not trigger substantive rights available to those who have been charged, and as such, is not a constitutional method of prosecuting a felony, and that this should be treated as a pending prosecution in order to extend the statute of limitations for an indefinite period of time. § 556.036.6. These arguments are untenable.

§ 556.036.5 directly conflicts with Article I, § 17 of the Missouri Constitution, and the trial court was correct in determining this and sustaining the motion to dismiss.

## II.

The trial court did not err in dismissing the case with prejudice due to the State's failure to file felony charges within the statutory limitations period, because the prosecutor did not allege any facts in the Information to negate the operation of § 556.036.2 or explain to the circuit court why the State filed the Information more than three years after the commission of the alleged offenses. Further, § 556.036.5, which allows felony prosecution by complaint, directly conflicts with Article I, § 17 of the Missouri Constitution, which guarantees felony prosecution only by indictment or information. § 556.036.6 provides that the limitations period is tolled if a prosecution is pending against the accused, but since a complaint cannot operate to do so, the State did not commence prosecution or cause a prosecution to be pending until after the Information was filed, which was after the expiration of the three-year limitations period.

### *Standard of Review*

The primary rule of statutory interpretation is to effectuate legislative intent through the plain and ordinary meaning of the language. *State v. Graham*, 204 S.W.3d 655, 656 (Mo. banc 2006). If statutory language is subject to more than one reasonable interpretation, then the statute is ambiguous. *Id.*, citing *State v. Rowe*, 63 S.W.3d 647 (Mo. banc 2002). Any ambiguity in a penal statute must be strictly construed against the government or party seeking penalty and in favor of the person against whom penalties are sought to be imposed. *Graham*, 204 S.W.3d at 656. Any

ambiguity as to the applicability of statutes of limitation in a criminal case must be interpreted “in favor of repose.” *Id.*, citing *Toussie v. United States*, 397 U.S. 112, 115 (1970). The applicability of a statute of limitations is a question of law that is reviewed *de novo*. See *State v. Rains*, 49 S.W.3d 828, 831 (Mo. App. E.D. 2001). Similarly, whether or not a statute is constitutional is also an issue of law reviewed *de novo*. *State v. Vaughn*, 366 S.W.3d 513, 517 (Mo. banc 2001).

### *Argument*

Under Missouri law, the prosecution of certain felonies, including the felony that the State attempted to charge against Jeffrey Anderson, must be commenced within three years. § 556.036, RSMo Supp. 2009; (LF 10). The limitations period begins to run on the day after the alleged offense is committed. § 556.036. In Jeffrey Anderson’s case, the State alleged that the offense occurred on March 12, 2008. (LF 10).

The State did not commence felony prosecution, which is only authorized by the filing of an information or indictment, within three years. Mo. Const., Art. I, § 17; (LF 10). As discussed in Point I, § 556.036.5, which allows prosecution by complaint, directly violates constitutional provisions that do not allow this. Mo. Const., Art. I, § 17. Respondent incorporates the argument here, as this issue is inextricably intertwined with whether the applicable statute of limitations had expired, barring prosecution. The law provides that the limitations period is tolled when a prosecution is “pending” against the accused. § 556.036.6. A prosecution cannot be

pending unless it has been validly commenced. § 556.036.5. The Missouri Constitution does not authorize felony prosecution by a “complaint.” Mo. Const., Art. I, § 17.

An information or indictment must be filed within the applicable limitations period, or it must allege facts negating the operation of the statute. *State v. Bithorn*, 278 S.W. 685, 686 (Mo. 1925). The State did not allege any such facts here. The prosecutor did not file an information until May of 2011, although he alleged that Mr. Anderson committed the offenses in March of 2008. (LF 10). The State did not include any facts to show the limitations period had been tolled, or to explain why the Information was filed after it had expired. A criminal offense must have been committed within the applicable statute of limitations, and the indictment or information must at least allege enough to bring the offense charged within that period; a failure to allege this is consequently fatal. *State v. Sumpter*, 335 Mo. 620, 625, 73 S.W.2d 760, 762 (Mo. 1934); *State v. Hardy*, 21 S.W.2d 229, 230 (Mo. App. 1929).

The general rule is that where an indictment or information shows on its face that it is barred by the applicable limitations period, it is necessary to allege facts which would negate that bar. *State v. Drum*, 217 S.W. 23, 24 (Mo. 1919) (citing to multiple cases in accord); *State v. Bithorn*, 278 S.W. 685, 686 (Mo. 1925). The information or indictment must be filed within three years of the commission of the offense, and the prosecution is not commenced by the filing of a complaint. *Id.*; § 556.036.2. Here, the State filed the Information over three years past the date of the

commission of the alleged offenses, and the prosecutor did not allege any facts within it to explain why the charge was filed after the expiration of the limitations period. (LF 10).

The State argues that the statute “explicitly provides” that the limitations period is tolled by the filing of a complaint or indictment. App. Br. 14. This does not comport with the plain language of the statute. The statute provides, in relevant part, that a felony prosecution is “commenced” by complaint or indictment, then provides that the limitations period does not run if there is a “pending” prosecution against the accused. § 556.036.5. The legislature does not have the authority to define when prosecution commences in a manner that directly conflicts with the State’s Constitution. Mo. Const., Art. I, § 17. The prosecution was not pending against Mr. Anderson until the Information was filed. *Bithorn*, 278 S.W. at 686; *State v. Corley*, 251 S.W.3d 416, 418 (Mo. App. S.D. 2008).

Also, the State did not allege any facts in the Information that support its argument here. The Information does not allege that a complaint had been filed, or when, nor does it allege that the filing of a complaint operated to toll the limitations period. There is nothing within the Information that shows that the State had any authority to prosecute the alleged felony charges. (LF 10); *Drum*, 217 S.W. at 24; *Bithorn*, 278 S.W. at 686.

The trial court was correct in dismissing the case with prejudice. Respondent respectfully requests this Court affirm the trial court’s judgment.

## **CONCLUSION**

For the reasons presented in Points I and II, Respondent respectfully requests this Court affirm the ruling of the trial court.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I, Alexa I. Pearson, 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, and this certificate of compliance and service, the brief contains 4,351 words, which does not exceed the 27,900 words allowed for a respondent's brief.

On this 13th day of August, 2012, an electronic copy of this Respondent's Brief was placed for delivery through the Missouri e-Filing System to Evan Buchheim, Assistant Attorney General, at [Evan.Buchheim@ago.mo.gov](mailto:Evan.Buchheim@ago.mo.gov)

*/s/ Alexa I. Pearson*

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