

**Dear Editor:**

In “The Unconstitutionality of Initiating Prosecutions by Complaint,” [March-April 2010] Dennis Golden asks: “How is it possible for a prosecution to commence at the filing of a complaint if it is unconstitutional to prosecute someone without either an information or an indictment?” His answer: Any such prosecution would be unconstitutional, given article I, Section 17 of the Missouri Constitution, which states: “[N]o 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.” Is Golden right? He is not: The General Assembly’s 2006 amendment defining a prosecution as commencing, solely for purposes of the statute of limitations, is constitutional.

First, a little background, for those unfamiliar with Golden’s article: In 2006, the General Assembly amended Section 556.036 to provide, in subsection 5, that the prosecution of a felony is “commenced,” for purposes of the statute of limitations, not only when an indictment is filed, but also when a complaint is filed. Hitherto, the Missouri Supreme Court had consistently held that, for purposes of the statute of limitations, a criminal prosecution is *not* commenced when a complaint is filed. Why did the General Assembly make this change? Golden gives one possible answer: Given the glut of methamphetamine cases in Missouri and the “tremendous backlog” at crime labs analyzing (alleged) controlled substances seized by the police, the limitations period in drug cases, which usually be-

gins when the crime is committed (and usually when the accused is arrested), would expire in many cases before the drug testing could be completed, requiring dismissal of the charges. If, though, the filing of a complaint would commence a prosecution, for purposes of a statute of limitations, the limitations period in these felony cases would not expire, since the statute of limitations only requires that prosecutions be “commenced” within three years. Section 556.036.2(1), RSMo (2008).

Golden argues that, under the Missouri Constitution, this statute-of-limitations analysis is constitutionally infirm because article I, Section 17 dictates that no person “shall be prosecuted criminally for felony ... except by indictment or information.” Ergo, Golden concludes, it is unconstitutional to commence a prosecution by complaint. Golden’s analysis is flawed in three distinct ways.

(1) Even if Golden is correct (and he is) that a felony prosecution cannot be constitutionally commenced except by way of indictment (or information), his charge of unconstitutionality does not follow. All that follows is that, because the Missouri Constitution trumps any state statutory provision to the contrary, the filing of a complaint in a felony case does not, and cannot, commence a felony prosecution, and so the limitations period will run notwithstanding the filing of the complaint. Once the limitations period expires, the accused can raise the statute of limitations as an affirmative defense, *Longhobler v. State*, 832 S.W.2d 908, 911 (Mo. banc 1992), and have the case dismissed with prejudice, should the prosecutor later file an information or indictment. (As Golden tacitly concedes, no prosecutor believes that filing a complaint is

sufficient to satisfy article I, Section 17.) In sum, Golden’s argument establishes, at most, that some prosecutions will be time-barred notwithstanding the 2006 amendment, not that all prosecutions commenced (for purposes of the statute of limitations) are unconstitutional.

(2) The General Assembly has the power to define when a statutory limitations period stops running. Though Golden is correct that the Missouri Supreme Court has long held that a felony prosecution does not commence when a complaint is filed, but only when an information or indictment is filed, that does not mean, as Golden assumes, that the General Assembly lacks the ability to override that holding.

Statutes of limitations are a matter of “legislative grace.” *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). As Justice Jackson has explained:

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a

public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a “fundamental” right or what used to be called a “natural” right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

*Id.* (internal citations omitted). The General Assembly has no constitutional duty to create statutes of limitations. (In Missouri, there is no limitations period for “murder, forcible rape, attempted forcible rape, forcible sodomy, attempted forcible sodomy, or any class A felony.” Section 556.360.1 RSMo. Supp. (2008). Moreover, the General Assembly has the power to continuously extend the limitations periods it creates (though perhaps beyond a certain point the extensions might give rise to a due process violation), so long as the limitations period has not expired before the passage of the statutory extension. *Stogner v. California*, 539 U.S. 607 (2003); *State v. Casaretto*, 818 S.W.2d 313 (Mo. App. E.D. 1991); *United States v. Madia*, 955 F.2d 538, 540 (8th Cir. 1992). Nor is laches a defense to criminal prosecutions, *Jennings v. Director of Revenue*, 9 S.W.3d 699 (Mo. App. S.D. 1999), though pre-indictment delay can, in very limited circumstances, violate a defendant’s due process rights, *United States v. Marion*, 404 U.S. 307, 324 (1971) (“[T]he Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees’ rights to a fair trial and ... the delay was an intentional device to gain tactical advantage over the accused.”). It would seem to follow, then, though the General Assembly has

no power to define when a prosecution commences for purposes of the Missouri Constitution, it certainly has such a definitional power with respect to the statute of limitations. And that is precisely the power the General Assembly exercised in 2006 when it amended Section 556.035.

Presumably, the statute of limitations did not always include a definition of when a prosecution commenced for purposes of the statute. (Otherwise, the Missouri Supreme Court merely would have applied the statutory definition of “commence.” *State v. Eisenhower*, 40 S.W.3d 916 (Mo. banc 2001) (“Absent a statutory definition, the words used in the statute will be given their plain and ordinary meaning as derived from the dictionary.”)). Hence, the Missouri Supreme Court had no choice but to decide, via statutory interpretation or construction, when a prosecution commences for purposes of the statute of limitations. See *State v. Bithorn*, 278 S.W. 685, 686 (Mo. 1925) (citing Corpus Juris for when a prosecution commences). The Supreme Court thus crafted a common-law rule that prosecution commences *for purposes of the statute of limitations* when a prosecution could be commenced under the Missouri Constitution. (Of course, another possibility is that the case law originally noted the statutory definition of when a prosecution commenced, but subsequent case law “forgot” the source of definition by failing to mention the statutory source, implying that the Missouri Supreme Court had created, common-law fashion, the rule for when a felony prosecution commenced.) This common-law rule most likely reflected the intention of the median legislator that voted for Section 556.036. But the 2006 amendment of Section 556.036 just as certainly reflects a desire to deviate from the common-law rule embraced by the Court. And when there is a conflict between a statute duly passed by the General Assembly and a

common-law rule created by the courts, the common-law rule must give way. Section 1.010, RSMo Supp. 2008 (“[N]o act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that it is in derogation of, or in conflict with, the common law ... but all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.”).

The General Assembly could easily avoid the “commencement” issue raised by Golden. It could change Section 556.036 to eliminate the requirement that prosecutions be commenced within a specified period, creating a new requirement that either a complaint or information or indictment be filed within a specified period after the felony is committed. Alternatively, the General Assembly could declare that the limitations period does not run (i.e., is tolled) once a complaint is filed or does not run for a specific period after a complaint is filed. Cf. Section 556.030.6, RSMo Supp. 2008 (tolling the limitations period, e.g., when “accused is absent from the state”). (Golden nowhere indicates that he has any objection to these statutory tolling provisions.) That the General Assembly could easily avoid the “commencement” issue by any of these statutory changes reveals the hollowness of Golden’s position. After all, no true constitutional infirmity can be avoided merely by changing statutory text without changing the intention, the textual meaning, or the applications or effects of the statute.

Running throughout Golden’s article is the tacit assumption that the word “commenced” has, or must have, the identical meaning in the Missouri Constitution as it does in every Missouri statute. That is incorrect; as noted, the legislature can define when a prosecution commences *for purposes of the statute of limitations*. But even if

the General Assembly's 2006 statutory amendment of the "commence" definition were unclear, Golden's assumption would be a weak one. Though it is presumed that "identical words used in different parts of the same act are intended to have the same meaning, the presumption is not rigid, and the meaning of the same words well may vary to meet the purposes of the law." *U.S. v Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001). See also *Pope v. Atlantic Coast Line Co.*, 345 U.S. 379, 392 (1953) (noting that "the cardinal sin in statutory construction, blind literalness"; Frankfurter, J., dissenting). Even within the same legislative act, "since most words admit of different shades of meaning, susceptible of being expanded or abridged to conform to the sense in which they are used, the presumption readily yields to the controlling force of the circumstance that the words . . . are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent." *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934).

Here, the purposes of article I, Section 17 of the Missouri Constitution and of the statute of limitations (i.e., Section 556.36) are very different – and interpreting "commence" to mean the same in both does little to advance the purposes of either provision.

The purpose of article I, Section 17's requirement of an information or indictment in felony cases is two-fold. Regarding the alternative requirement of an indictment, the "basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or

evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory." *Costello v. United States*, 350 U.S. 359, 362 (1956). Regarding the alternative requirement of an information, the goal was to ensure that, in the absence of a community decision that prosecution was warranted, as with the return of a true bill by the grand jury, then there should be some "prosecution instituted by some officer whose duty it was to prosecute criminal offenses[.]" *State v. Shortell*, 5 S.W. 691, 692 (Mo. 1887). In short, not the police – who lack the training to prosecute a crime (i.e., examine witnesses, give opening statements, etc.) and who lack objectivity – but only professional prosecutors or one's peers should be able to decide whether or not a prosecution should be pursued. That goal is satisfied by prohibiting a conviction or sentence absent the filing, sometime during a criminal case, of an indictment or information.

In contrast, the purpose of Section 556.036 is the same as all statutes of limitations – namely:

to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforce-

ment officials promptly to investigate suspected criminal activity.

*Toussie v. United States*, 397 U.S. 112, 114 (1970). That purpose is fulfilled whether the limitations stops running when a complaint is filed, or only when an information or indictment is filed.

So even if constitutional or statutory purpose could somehow trump statutory text, as in *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) – an archaic form of constitutional interpretation that the Missouri Supreme Court is unlikely to embrace – interpreting "commence" to have a statutory meaning in Section 556.036 varying from its meaning in article I, Section 17 of the Missouri Constitution does not frustrate either statutory or constitutional purpose.

Nor does Golden provide any reasons why the Missouri Constitution should be construed as forbidding statutory definition of when a prosecution commences for purposes of the statute of limitations, besides the tacit – and undefended – assumption that "commence" must mean the same in Section 556.036 as it does in article I, Section 17 of the Missouri Constitution. It certainly is rational for the General Assembly to define the limitations period as stopping once a complaint is filed. As Golden notes, the crime labs in Missouri have been swamped with drug samples to test, caused, in part, by the methamphetamine epidemic that has struck Missouri. But for this backlog, prosecutors would be filing informations or indictments in many felony drug cases within the limitations period. Stopping the limitations period from running when the complaint is filed – a common forerunner to arresting the defendant – prevents these

prosecutions from being dismissed, while at the same time ensuring that the defendants receive notification of the State's intent to prosecute them, assuming the drug tests come back positive, as will happen in almost all cases. Prosecutors cannot be faulted – and should not lose the capability of prosecuting serious (i.e., felony) drug offenses – because they desire to await confirmation that the accused illegally controlled or possessed actual controlled substances before seeking a true bill from a grand jury or before filing an information. The 2006 amendment to Section 556.036 is a rational way to further the State's interest in prosecuting serious drug

offenses, while at the same time ensuring the accuracy of such prosecutions.

3) The consequences of accepting Golden's arguments, to the extent they are relevant, would harm criminal defendants as a class. If the Missouri Supreme Court were to agree that the General Assembly lacked the power to define when a prosecution commences for the purposes of the statutes of limitations, the General Assembly would not throw in the towel in helping save prosecutions from being dismissed because of the backlog of cases at the crime labs. Rather, the General Assembly would respond in one of two ways – either by extending the limitations period for certain

felonies, including drug offenses, or perhaps by abolishing the limitations periods for felonies, or certain felonies, outright. The latter course would be the simplest solution – and also one easiest to defend politically, given that most Missourians likely disapprove of a criminal going free because of the mere lapse of time (without any evidence of harm to the defense, such as the death of a defense witness, or without any evidence of prosecutorial nonfeasance or misfeasance). Criminal defendants should hope that no appellate court agrees with Golden's argument.

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