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ARTICLE

WITHOUT LIMIT: WHY TEXAS'S CRIMINAL STATUTES OF LIMITATIONS VIOLATE THE STATE CONSTITUTION'S SEPARATION OF POWERS CLAUSE

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I. INTRODUCTION

In *Meshell v. State*,[1] the Texas Court of Criminal Appeals issued a groundbreaking ruling, holding that the Texas Speedy Trial Act[2] violated the state Constitution's Separation of Powers Clause[3] because it unduly interfered with the discretion of state prosecutors to prepare their cases for trial.[4] Nearly twenty years later, in *Ex parte Young*,[5] the court reaffirmed that holding by declaring unconstitutional the legislature's attempt to force prosecutors to present charging instruments within a specified time. In so doing, it outlined the circumstances under which statutes will pass constitutional muster when they place time limits on presenting or prosecuting charges lest those charges be forever barred.[6] In a first attempt to address this topic, this Essay argues that, under the reasoning of *Meshell* and *Young*, among other cases, Texas's criminal statutes of limitations[7] cannot be reconciled with the Separation of Powers Clause.

1. Meshell v. State, 739 S.W.2d 246 (Tex. Crim. App. 1987).
2. TEX. CODE CRIM. PROC. ANN. art. 32A.02.
3. TEX. CONST. art. II, § 1.
4. *Meshell*, 739 S.W.2d at 257–58. The Act's then-effective enforcement provision, TEX. CODE CRIM. PROC. ANN. art. 28.061 (amended 1997), was also declared unconstitutional.
5. *Ex parte* Young, 213 S.W.3d 327 (Tex. Crim. App. 2006).
6. *Id.* at 331–32.
7. TEX. CODE CRIM. PROC. ANN. arts. 12.01–02.

In Part II, this Essay will discuss the Separation of Powers Clause and the cases that have reviewed statutes that placed time limits on when charges could be presented or brought to trial. Part III will argue why the state statutes of limitations cannot survive constitutional scrutiny. Part IV will then discuss and refute arguments on how the statutes of limitations could survive a separation-of-powers challenge. Finally, Part V explains why declaring the limitations statutes unconstitutional would not run afoul either the Ex Post Facto or Due Process Clauses.

II. THE SEPARATION OF POWERS CLAUSE AND CASES REVIEWING WHETHER THE LEGISLATURE MAY PLACE LIMITS ON WHEN CHARGES MAY BE PRESENTED OR BROUGHT TO TRIAL

A. *The Texas Constitution's Separation of Powers Clause*

Unlike the United States Constitution, the Texas Constitution contains an explicit separation-of-powers clause.[8] That clause provides:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.[9]

Such a clause has been present in every Texas constitution since it gained independence from Mexico.[10] The "except in the instances herein expressly

8. 1 THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 89 (George Braden ed., 1977), https://www.sll.texas.gov/assets/pdf/braden/the-constitution-of-the-state-of-texas-an-annotated-and-comparative-analysis.pdf [https://perma.cc/6NEC-G9PB]; State v. Condran, 977 S.W.2d 144, 145 (Tex. Crim. App. 1998) (Keller, J., dissenting from Court's dismissal of petition for discretionary review as improvidently granted) (analysis later adopted by *Young*, *supra*).

9. TEX. CONST. art. II, § 1.

10. 1 THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 89 (George Braden ed., 1977), https://www.sll.texas.gov/assets/pdf/braden/the-constitution-of-the-state-of-texas-an-annotated-and-comparative-analysis.pdf [https://perma.cc/6NEC-G9PB]; ("The separation-of-powers concept in Texas is traceable to both Anglo and Mexican influences."); *id.* ("The importance of the concept in the history of government in the United States is well known, but both the Mexican National Constitution of 1824 (Art. II, Sec. 1, para. 3) and the Coahuila Constitution of 1827 (Sec. 29) contained specific separation-of-powers

permitted" provision, which prevents the clause from acting as a straitjacket in the furtherance of functional government, made its first appearance in the 1845 state Constitution.[11]

The Court of Criminal Appeals has viewed the clause "as generally susceptible to violation in one of two ways."[12] First, "when one branch of government assumes or is delegated a power 'more properly attached' to another branch."[13] Second, "when one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers."[14] As outlined below, the court relies on the latter category when invalidating statutes that impose time limits on the presentment or hearing of criminal charges.

B. Meshell *Declares the Speedy Trial Act Unconstitutional*

The Texas Speedy Trial Act required a trial court to set aside a charging instrument (e.g., an indictment) if the State was not ready for trial within specified time periods.[15] Dismissal under the Act was with prejudice, meaning the State could not pursue the charges further.[16]

The State charged Fred Meshell with the felony offense of theft of property valued between $200 and $10,000.[17] A Freestone County grand

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statements similar to the one that appeared in Article I, Section 1, of the 1836 Constitution of the Republic of Texas.").

11. *Id.* For a more in-depth discussion of Article II's history and development, the philosophy underlying it, discussions of caselaw, and other topics, see 1 THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 89 (George Braden ed., 1977), https://www.sll.texas.gov/assets/pdf/braden/the-constitution-of-the-state-of-texas-an-annotated-and-comparative-analysis.pdf [https://perma.cc/6NEC-G9PB].

12. *Ex parte* Lo, 424 S.W.3d 10, 28 (Tex. Crim. App. 2014) (per curiam) (op. on reh'g), *superseded on other grounds by* TEX. CONST. art. V, § 32.

13. *Id.*

14. *Id.*

15. TEX. CODE CRIM. PROC. ANN. art. 32A.02 (repealed 2005). Relevant to Meshell's case, an indictment needed to be set aside if 120 days had passed between the time the indictment was filed and when the State was ready for trial. *Id.* art. 32A.02(1).

16. *Meshell*, 739 S.W.2d at 250 (citing TEX. CODE CRIM. PROC. ANN. art. 28.061). At that time, Article 28.061 provided,

> If a motion to set aside an indictment, information, or complaint for failure to provide a speedy trial [as required by Article 32A.02] is sustained, the court shall discharge the defendant. A discharge under this article is a bar to any further prosecution for the offense discharged and for any other offense arising out of the same transaction.

Acts 1977, 65th Leg., ch. 787, § 4, eff. July 1, 1978.

17. *Meshell*, 739 S.W.2d at 248.

jury indicted him on July 21, 1983, but he was not actually arrested until August 6, 1984.[18] He moved to dismiss the indictment under the Act, but the trial court denied that motion because it found the Act to be unconstitutional.[19] The Tenth Court of Appeals affirmed.[20]

The Court of Criminal Appeals, after concluding that the State's delay did indeed violate the Act,[21] agreed with the lower courts that the Act was unconstitutional. It reasoned that Article V, Section 21, of the Texas Constitution[22] established the State's various prosecuting authorities,[23] whose primary function is "to prosecute the pleas of the state in criminal cases."[24] The court continued, "[a]n obvious corollary to a district or county attorney's duty to prosecute criminal cases is the utilization of his own discretion in the preparation of those cases for trial."[25] "Therefore, under the separation of powers doctrine, the Legislature may not remove or abridge a district or county attorney's exclusive prosecutorial function, unless authorized by an express constitutional provision."[26]

18. *Id.* at 249.

19. *Id.*

20. *Id.* at 248, 251. The court of appeals affirmed on the theory that the Speedy Trial Act had a defective title or caption in violation of Article III, Section 35, of the Texas Constitution. *Id.* The Court of Criminal Appeals, while ultimately agreeing that the Act was unconstitutional, concluded that the court of appeals' opinion regarding the caption was moot because of changes to the Texas Constitution. *Id.* at 251. It still reached the separation-of-powers issue, however, because the court of appeals had considered and rejected the State's arguments on that ground. *Id.* at 252.

21. *Id.* at 250–51.

22. TEX. CONST. art. V, § 21.

23. Texas has three categories of prosecutors: county attorneys, district attorneys, and criminal district attorneys. TEX. CONST. art. V, § 21; Saldano v. State, 70 S.W.3d 873, 876 (Tex. Crim. App. 2002); TEX. GOV'T CODE ANN. § 41.101. The difference between the three can be a bit confusing, but, basically, "a criminal district attorney is a district attorney within the meaning of the Constitution." Hill County v. Sheppard, 178 S.W.2d 261, 263 (Tex. 1944). In the absence of a district attorney or criminal district attorney, the county attorney represents the State in all state trial courts. Neal v. Sheppard, 209 S.W.2d 388, 390–91 (Tex. App.—Texarkana 1948, writ ref'd). But if the Legislature has provided a county with a criminal district attorney, then there is no county attorney because the former exercises the constitutional duties of the latter. *Id.* If, however, there is merely a district attorney—as opposed to a *criminal* district attorney—then he or she shares authority with the county attorney as the Legislature may direct. *Id.*; TEX. CONST. art. V, § 21. Importantly, as discussed herein, regardless of the type of prosecutor, the Legislature cannot unduly intrude on his or her constitutional responsibility to prosecute criminal cases. *Meshell*, 739 S.W.2d at 254.

24. *Meshell*, 739 S.W.2d at 254 (quoting Brady v. Brooks, 89 S.W. 1052, 1056 (Tex. 1905)).

25. *Id.*

26. *Id.* at 254–55.

The *Meshell* Court then considered whether Article V, Section 25, of the state Constitution[27] was such a provision. That provision provided, "The Supreme Court shall have power to make and establish rules of procedure not inconsistent with the laws of the State for the government of said court and the other courts of this State to expedite the dispatch of business therein."[28] The "not inconsistent with the laws of the State" language gave ultimate authority to the legislature to establish procedural rules of court.[29] Thus, the Legislature had the authority to pass laws regulating the "means, manner, and mode" of asserting defendants' rights in court.[30]

But the court noted that, as a prerequisite to the Legislature's power to act under Article V, Section 25, there must first be "a right for which the Legislature can provide procedural guidelines."[31] Otherwise, "the procedural legislation would itself create a substantive 'right,' and exceed the grant of power in Article V, § 25, . . . thereby encroaching upon another department."[32] The Speedy Trial Act purported "to provide procedural guidelines for statutory enforcement of a defendant's constitutional right to a speedy trial,"[33] but it was "not directed at providing procedural guidelines for the speedy *commencement of trial*."[34] Instead, it was "directed at speeding the *prosecutor's preparation and ultimate readiness for trial*."[35] Thus, it differed from the federal and state Speedy Trial Clauses[36] because they "are directed at assuring speedy *commencement of trial*."[37]

Moreover, both Speedy Trial Clauses required showings (elaborated on below) that the Act did not, meaning the Act could not be said to implement the rights of defendants.[38] Specifically, the Speedy Trial Clauses guarantee a speedy start to trial by concentrating on four factors: "(1) the length of the delay before trial, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial and (4) any prejudice to a defendant resulting

27. TEX. CONST. art. V, § 25 (repealed Nov. 5, 1985). Article V, Section 25, was replaced by Article V, Section 31, which, for the purposes of this discussion, is substantively identical to its predecessor. TEX. CONST. art. V, § 31.

28. *Meshell*, 739 S.W.2d at 255 (emphasis omitted).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10.

37. *Meshell*, 739 S.W.2d at 256.

38. *Id.* at 256–57.

from that delay in trial."[39] The Act, on the other hand, made "few distinctions" for why there was a delay.[40] In other words, negligent delays by the State weighed just as heavily as deliberate delays.[41] Furthermore, under the Act, a defendant did not need to request a speedy trial before seeking relief, whereas under the Clauses, failure to do so was entitled to "strong evidentiary weight."[42] Finally, "and probably most critically," the Act did not require a defendant to show any prejudice.[43]

Therefore, "[b]y failing to show some deference to [the foregoing] factors and by focusing upon a prosecutor's readiness for trial, the Legislature ha[d] not created an Act that assure[d] [defendants] a speedy trial."[44] Instead, the Act "only guaranteed . . . dismissal[s] with prejudice" when there were delays in obtaining the presence of an accused.[45] That guarantee, however, deprived the prosecution of its "exclusive prosecutorial discretion in preparing for trial in the absence of any constitutional authorization."[46] Consequently, in granting defendants "such an overly broad power to control [prosecutors'] exclusive discretion in preparing for trial, the Legislature ha[d] exceeded its authority to protect [defendants'] substantive right to a speedy trial through procedural legislation."[47] And, because no other constitutional provision supported the Act, it and its then-existing enforcement provision—Article 28.061 of the Code of Criminal Procedure[48]—were unconstitutional and inoperative.[49]

C. *The Ramifications of* Meshell

Following *Meshell*, the Court of Criminal Appeals confronted several attempts to extend its holding. For example, George Jones "was indicted for murder and capital murder and his combined bail on these two offenses was set at $550,000.00."[50] Thereafter, his bail was reduced to $105,000, but

39. *See id.* at 256 (citing Barker v. Wingo, 407 U.S. 514, 530–33 (1972)).
40. *Id.*
41. *Id.* (citing Santibanez v. State, 717 S.W.2d 326 (Tex. Crim. App. 1986)).
42. *Id.* (quoting *Barker*, 407 U.S. at 531–32).
43. *Id.*
44. *Id.* at 257.
45. *Id.*
46. *Id.*
47. *Id.*; 42 GEORGE E. DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 28:3, at 661–62 (3d ed. 2011).
48. Acts 1977, 65th Leg., R.S., ch. 787, 1977 Tex. Gen. Laws 1970–73 (amended 1987) (current version at TEX. CODE CRIM. PROC. ANN. art. 28.061).
49. *Meshell*, 739 S.W.2d at 257–58.
50. Jones v. State, 803 S.W.2d 712, 713 (Tex. Crim. App. 1991).

he remained incarcerated.[51] The court of appeals concluded, under Article 17.151 of the Code of Criminal Procedure,[52] the trial court had erred in not reducing his bail to an amount the record demonstrated he could afford because the State had failed to demonstrate that it was ready for trial within ninety days of Jones's detention.[53] However, relying on *Meshell*, the court of appeals also concluded Article 17.151 violated the Separation of Powers Clause and therefore denied Jones relief.[54]

The Court of Criminal Appeals disagreed. First, it concluded the Legislature had the "plenary power" to grant detained suspects the right to release if the State was not ready for trial within a statutorily designated time.[55] Thus, the only remaining question was whether Article 17.151 unduly interfered with the prosecution's discretion in preparation of its cases.[56] Concluding it did not, the Court stated,

> Article 17.151 actually represents far less of a constraint upon prosecutorial discretion than did [the Speedy Trial Act]. A prosecutor unprepared within the time limits of [that Act] stood to have the prosecution set aside. By contrast, a prosecutor who is for whatever reason unprepared within the time allotted by Article 17.151 may nevertheless proceed with his case unmolested.[57]

The Court also noted that when a prosecution was set aside under the Speedy Trial Act, it was "with prejudice."[58]

Later, in *State v. Williams*,[59] the Court of Criminal Appeals "addressed whether a speedy trial provision contained in the Interstate Agreement on Detainers Act (IADA) was unconstitutional."[60] "The IADA imposes

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51. *Id.*

52. TEX. CODE CRIM. PROC. ANN. art. 17.151.

53. *Jones*, 803 S.W.2d at 713–14.

54. *Id.* at 714.

55. *Id.* at 716.

56. *Id.*

57. *Id.*

58. *Id.* at 716 n.2 (Tex. Crim. App. 1991); *see also* State v. Condran, 977 S.W.2d 144, 145 (Tex. Crim. App. 1998) (Keller, J., dissenting) (acknowledging the Court's observation in *Jones* that dismissals under the Speedy Trial Act were "with prejudice").

59. State v. Williams, 938 S.W.2d 456 (Tex. Crim. App. 1997).

60. *Condran*, 977 S.W.2d at 145 (Keller, J., dissenting). The IADA is codified at TEX. CODE CRIM. PROC. ANN. art. 51.14. As explained by a leading treatise,

> The [IADA], adopted in Texas in 1975 following its adoption by the federal government in 1970, reflects an agreement between all states and jurisdictions joining in the agreement, for the

deadlines for commencing trial after receiving an out-of-state prisoner. If those deadlines are not met, the trial court is instructed to dismiss the prosecution with prejudice."[61] The *Williams* Court "held that the prosecutor, by obtaining a prisoner through the IADA, submitted to a contract, in which he relinquished some of his power in exchange for the benefit of obtaining custody of the out-of-state prisoner."[62] The *Williams* Court "further held that the Separation of Powers Clause did not prevent such a contractual relinquishment of authority."[63]

Another issue that had been percolating following *Meshell* was whether the Legislature's attempts to reinstate the Speedy Trial Act violated the Separation of Powers Clause.[64] Soon after *Meshell*—which, as noted, voided former Article 28.061 of the Code of Criminal Procedure—the Legislature passed a new version of Article 28.061, which stated,

> If a motion to set aside an indictment, information, or complaint for failure to provide a speedy trial is sustained, the court shall discharge the defendant. A discharge under this article *or Article 32.01 of this code* is a bar to any further prosecution for the offense discharged and for any other offense arising out of the same transaction, other than an offense of a higher grade that the attorney representing the state and prosecuting the offense that was discharged does not have the primary duty to prosecute.[65]

> expeditious and orderly disposition of criminal charges of member jurisdictions, evidenced by detainers based on untried indictments, informations, or complaints, against prisoners already in custody in other member jurisdictions.
>
> The [IADA] allows prosecutors in one jurisdiction to acquire the presence of prisoners imprisoned in other jurisdictions for trial prior to the expiration of their sentences. The Act prescribes procedures by which a member state may obtain for trial a prisoner incarcerated in another member jurisdiction and by which the prisoner may demand the speedy disposition of certain charges pending against him in another jurisdiction. The IADA may be invoked by either the prisoner or the State.

22 Tex. Jur. 3d *Criminal Procedure: Pretrial Proceedings* § 47 (2017) (footnotes omitted); *see also* 35 C.J.S. *Extradition and Detainers* § 91 (May 2022) (summarizing the IADA).

61. *Condran*, 977 S.W.2d at 145 (Keller, J., dissenting).

62. *Id.*

63. *Id.* at 145–46.

64. Moore v. State, 532 S.W.3d 400, 404 (Tex. Crim. App. 2017) (per curiam) (recognizing that the statute at issue in *Ex parte Young* was an attempt "by the Legislature to codify the Speedy Trial Act").

65. Acts 1987, 70th Leg., ch. 383, § 1, eff. Sept. 1, 1987 (amended 1997) (emphasis added).

Article 32.01 of the Code of Criminal Procedure, in turn, required dismissal of the prosecution against a defendant in custody or on bail if charges were "not presented against the defendant on or before the last day of the next term of the court which is held after the defendant's commitment or admission to bail."[66]

Read together, if a prosecuting authority failed to bring charges against a defendant within the specified time period, then any subsequent charging instrument was dismissed with prejudice.[67] In other words, prosecution of the alleged offense was forever barred.

Whether the then-effective enforcement provision in Article 28.061 violated the Separation of Powers Clause remained unresolved by the Court of Criminal Appeals for many years despite the issue being before it on at least two occasions.[68] However, in 2006, the court finally addressed it in *Ex parte Young*.[69]

Edward Young was arrested for murder and released on bond in September 1991, but he was not indicted until February 1993.[70] Therefore, under the above-quoted version of Article 28.061, he was entitled to have the prosecution dismissed with prejudice.[71] Following a complicated procedural history,[72] Young was re-indicted for the same murder, and he thereafter filed a pretrial writ of habeas corpus asserting that the indictment should be dismissed with prejudice due to the then-applicable version of Article 28.061.[73] The trial court, however, denied relief based on a finding

66. TEX. CODE CRIM. PROC. ANN. art. 32.01(a) (amended 2015).

67. In 1997, Article 28.061 was amended to remove the "or Article 32.01 of this code" language, Act of May 6, 1997, 75th Leg., R.S., ch. 289, § 1, art. 28.061, 1997 Tex. Gen. Laws 1304, meaning only dismissals for constitutional speedy-trial violations bar further charges. Dismissals under the current version of Article 32.01, then, are without prejudice. *Ex parte* Seidel, 39 S.W.3d 221, 224 (Tex. Crim. App. 2001) ("[E]ven if a defendant is entitled to discharge from custody under Article 32.01, that defendant is not free from subsequent prosecution.").

68. State v. Condran, 977 S.W.2d 144, 144 (Tex. Crim. App. 1998) (per curiam) (dismissing petition for discretionary review as improvidently granted); *Ex parte* Norton, 969 S.W.2d 3, 3 (Tex. Crim. App. 1998) (per curiam) (dismissing petition for similar reasons).

69. *Ex parte* Young, 213 S.W.3d 327 (Tex. Crim. App. 2006).

70. *Id.* at 329.

71. *Id.*

72. This Article will not attempt to outline the full procedural history of the case, as it is not relevant to the discussion. Briefly, after failing to gain relief in the state courts, Young eventually received federal habeas relief for ineffective assistance of counsel, and his case was remanded to the state trial court for further proceedings. *Id.* at 329–32. Thereafter, "the State obtained another indictment charging [him] with the same murder as the one charged in the earlier indictment." *Id.* at 331.

73. *Id.*

that the enforcement provision in that version of Article 28.061 violated the Separation of Powers Clause.[74] The Court of Appeals, however, disagreed and ordered the lower court to dismiss the indictment.[75]

Finding that the applicable version of Article 28.061 violated the Separation of Powers Clause, the Court of Criminal Appeals reversed.[76] In so doing, it adopted Presiding Judge Sharon Keller's analysis from her opinion in *State v. Condran*, where she dissented to the dismissal of the petition for discretionary review as improvidently granted.[77] There, Presiding Judge Keller reviewed *Meshell*, *Jones*, and *Williams*, discussed above, and concluded that legislatively imposed deadlines for prosecutorial action violate the Separation of Powers Clause if the following three conditions are met: "(1) the remedy for failing to meet the deadline seriously disrupts the ability of prosecutors to perform their duties, (2) the deadline cannot be justified as necessary to effectuate a superior constitutional interest, and (3) the prosecutor did not contractually submit to the deadline."[78]

Applying that test to Article 28.061, Presiding Judge Keller stated:

> To the extent that it attaches the remedy of dismissal with prejudice to the failure to meet the deadline established in Article 32.01, former Article 28.061

74. *Id.*

75. *Id.*

76. *Id.* at 331–32.

77. *Id.* at 331; State v. Condran, 977 S.W.2d 144, 144–47 (Tex. Crim. App. 1998) (Keller, J., dissenting) (dissenting from Court's dismissal of petition for discretionary review as improvidently granted). Presiding Judge Keller did not become the Court's presiding judge until 2001, over two years after her *Condran* analysis. However, since she had ascended to that position by the time *Young* was decided, this article will refer to her by that title.

78. *Condran*, 977 S.W.2d at 146; *see also Ex parte Young*, 213 S.W.3d at 331–32. Presiding Judge Keller noted that, "[i]n *Jones*, condition (1) was not true because the remedy of releasing the prisoner on bail did not seriously disrupt the prosecutor's ability to perform his duties." *Condran*, 977 S.W.2d at 146 (Keller, J., dissenting). Moreover, "[i]n *Williams*, condition (3) was not true because the prosecuting authorities had submitted to the deadline by requesting a prisoner under the IADA." *Id.* In *Meshell*, on the other hand, "all three . . . conditions were true." *Id.* Finally, Presiding Judge Keller concluded:

> The remedy for a violation of the Speedy Trial Act was dismissal with prejudice—a remedy which necessarily causes a serious disruption in a prosecutor's ability to perform his duties by conclusively terminating the prosecution. The only constitutional interest arguably involved, the right to a speedy trial, was not effectuated by the Speedy Trial Act because the *Barker* factors were not included. And, the prosecuting authorities did not contractually submit to the deadlines established.

Id. As shall be explained, the same is true of the statutes of limitations.

> is like the Speedy Trial Act in all relevant respects. Both carry the remedy of dismissal with prejudice and neither involves contractual submission to the deadline by the prosecuting authorities. And, as with the Speedy Trial Act, former Article 28.061 is not shown to be necessary to effectuate a superior constitutional interest. Essentially, Article 32.01 creates a right to a speedy indictment. To the extent that the Legislature was concerned that a person might be held for an inordinately long time in jail or on bail, Article 32.01 *alone* would satisfy that concern; the enforcement mechanism contained in former Article 28.061 would be unnecessary.[79]

She continued, "The only constitutional right that is arguably implicated—to which a remedy of dismissal with prejudice would attach—is the Due Process Clause's guarantee against prejudicial preindictment delay."[80] She explained that "[t]o determine whether the Due Process Clause has been violated, a court must consider the actual prejudice to the defendant caused by the delay and the reasons for delay."[81] But, "[l]ike the Speedy Trial Act, the speedy-indictment provision [did] not require a showing of prejudice," nor did it call "for considering the reasons for delay. Hence, as in *Meshell*, the provision in question [did] not incorporate the constitutionally relevant factors."[82] Accordingly, former Article 28.061's enforcement provision violated the Separation of Powers Clause of the Texas Constitution.[83]

Thus, the Court of Criminal Appeals has concluded that a statute imposing a time limit on presenting or prosecuting a criminal case will not pass constitutional muster if the three above-outlined conditions are met. With the foregoing principles established, this Essay will now review the state criminal limitations statutes and outline why they violate the Separation of Powers Clause.

79. *Id.*
80. *Id.* (citing United States v. Marion, 404 U.S. 307, 324 (1971)).
81. *Id.* (citing *Marion*, 404 U.S. at 324; United States v. Lovasco, 431 U.S. 783, 789–90 (1977)).
82. *Id.*
83. *Id.*; *Ex parte* Young, 213 S.W.3d 327, 331–32 (Tex. Crim. App. 2006).

III. TEXAS'S CRIMINAL LIMITATIONS STATUTES VIOLATE THE SEPARATION OF POWERS CLAUSE

A. *Statutes-of-Limitations Basics*

The common law recognized no limitations periods.[84] Instead, the maxim *Nullum tempus occurrit regi*—or "time does not run against the king"—prevailed in English courts, allowing for criminal charges at any point after the offense date.[85] Despite that, statutes of limitations have been a feature of American law since the seventeenth century.[86] The First Congress adopted a statute of limitations in 1790,[87] which continues in a much more complex form to this day.[88] But, notwithstanding our nation's long history of adopting statutes of limitations, they are not required by the federal Constitution.[89] In fact, most states have no limitations period for serious felonies (such as murder), a handful provide no limitations period for any felony, and a few set no criminal limitations period whatsoever.[90]

84. Doggett v. United States, 505 U.S. 647, 667 (1992) (Thomas, J., dissenting); Proctor v. State, 967 S.W.2d 840, 844 (Tex. Crim. App. 1998) ("[A]t common law there was no limitation as to the time within which offenses could be prosecuted."); 40 GEORGE E. DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 6:1, at 246 (3d ed. 2011).

85. *Doggett*, 505 U.S. at 667–68 (Thomas, J., dissenting) (citing 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 1, 2 (1883); F. WHARTON, CRIMINAL PLEADING AND PRACTICE *668 § 316, at 209 (8th ed. 1880); 1 H. WOOD, LIMITATION OF ACTIONS § 28, at 117 (4th ed. 1916)).

86. Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 631 n.7 (1954).

87. *Id.* at 631 n.8.

88. *See generally* 18 U.S.C.A. §§ 3281–3301 (West).

89. *Doggett*, 505 U.S. at 668 (Thomas, J., dissenting); *see also Ex parte* Edwards, No. PD-1092-20, 2022 WL 1421507, at *4 (Tex. Crim. App. May 4, 2022) (explaining appellant's limitations claim is "not a constitutional one whose underlying rights require vindication before trial"). The Constitution comes into play in one specific situation, namely, if there has been an ex post facto extension of an already-time-barred offense. Stogner v. California, 539 U.S. 607, 632–33 (2003). Thus, while a limitations period is not constitutionally mandated, if one is provided it cannot be extended once the applicable time has already run. *Id.* at 632–33. If, however, the limitations period has not run, then the legislature is permitted to extend or eliminate the limitations period without running afoul the Constitution. *Id.* at 618–19; Richardson v. State, 631 S.W.3d 269, 278–79 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd).

90. SYDNEY GOLDSTEIN, CRIMINAL STATUTES OF LIMITATIONS: TIME LIMITS FOR STATE CHARGES, LAWINFO.COM (last updated June 2, 2022), https://www.lawinfo.com/resources/criminal-defense/criminal-statute-limitations-time-limits.html [https://perma.cc/AW49-ZEBH] (listing South Carolina and Wyoming as states with no criminal statute of limitations).

Accordingly, a jurisdiction's statute of limitations is merely a legislative "act of grace."[91]

B. *Texas's Statutes of Limitations*

Texas has had a criminal statute of limitations since at least the 1870s.[92] Articles 12.01 and 12.02 of the Code of Criminal Procedure constitute Texas's modern felony and misdemeanor limitations statutes, respectively.[93] Felonies have a variety of limitations periods, ranging from two years to none at all.[94] The default felony limitations period, however, is three years.[95] All misdemeanors carry a limitations period of two years.[96] The code chapter in which the time limits appear also outlines a variety of related procedural rules regarding attempts, conspiracies, aggravated offenses, computation, presentment, and tolling, among other provisions.[97]

The objectives of Texas's statutes of limitations have been recognized as (1) protecting defendants from having to defend themselves against charges when the basic facts may have become obscured by time, (2) preventing prosecution of those who have been law-abiding for some years, and (3) lessening the possibility of blackmail.[98] Other recognized objectives include encouraging law-enforcement officials to promptly investigate suspected criminal activity,[99] and avoiding prosecution "when the community's retributive impulse has ceased."[100]

91. *Edwards*, 2022 WL 1421507, at *4; *Ex parte* Heilman, 456 S.W.3d 159, 166 (Tex. Crim. App. 2015); Proctor v. State, 967 S.W.2d 840, 843 (Tex. Crim. App. 1998); 22A C.J.S. *Criminal Procedure and Rights of Accused* § 589 (2021); *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, *supra* note 86, at 630 n.1.

92. *See* Bingham v. State, 2 Tex. Ct. App. 21 (1877) (reversing conviction because charge was not brought within applicable limitations period).

93. TEX. CODE CRIM. PROC. ANN. arts. 12.01–.02.

94. *Id.* at art. 12.01; *see also* State v. Schunior, 506 S.W.3d 29, 31 (Tex. Crim. App. 2016) (holding limitations period for aggravated assault is two years).

95. TEX. CODE CRIM. PROC. ANN. art. 12.01(8).

96. *Id.* at art. 12.02.

97. *Id.* at arts. 12.03–.07

98. Proctor v. State, 967 S.W.2d 840, 843 (Tex. Crim. App. 1998) (citing W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 18.5(a) (2d ed. 1992)).

99. Toussie v. United States, 397 U.S. 112, 115 (1970).

100. W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 18.5(a) (4th ed. 2020); *see also The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution, supra* note 86, at 632–35 (discussing the purposes underlying statutes of limitations).

A limitations claim is a defense to prosecution, meaning it is forfeited unless raised by the defendant either before or during trial.[101] If a defendant successfully asserts a limitations defense, then the charge is dismissed with prejudice regardless of any justifiable reasons for the delay or any showing of prejudice by the defendant.[102] The statutes' express language allowing charges to be filed within the applicable limitations period but "not afterward" demonstrates the absolute nature of the bar to prosecution.[103]

C. *Application of the* Young/Condran *Test to the Statutes of Limitations*

Application of *Ex parte Young*'s three conditions[104]—as elaborated upon by Presiding Judge Keller's *Condran* dissent, which was adopted by the *Ex parte Young* Court[105]—to Articles 12.01 and 12.02 demonstrates that those statutes run afoul the Separation of Powers Clause.

First, the remedy for missing the limitations deadline is dismissal of the charges with prejudice, which is a remedy that "necessarily causes a serious disruption in a prosecutor's ability to perform his duties by conclusively terminating the prosecution."[106] The same was true of both the Speedy

101. *Ex parte* Heilman, 456 S.W.3d 159, 168–69 (Tex. Crim. App. 2015); *Proctor*, 967 S.W.2d at 844 ("Before trial, a defendant may assert the statute of limitations defense by filing a motion to dismiss . . . ."); *id.* ("At trial, the defendant may assert the defense by requesting a jury instruction on limitations if there is some evidence . . . that the prosecution is limitations-barred. If there is some such evidence and the defendant requests a jury instruction on the limitations defense, then the State must prove beyond a reasonable doubt that the prosecution is not limitations-barred."); GEORGE E. DIX & JOHN M. SCHMOLESKY, *supra* note 84, at 246. Furthermore, if the defendant was charged with a non-time-barred offense but ultimately convicted of a lesser-included time-barred offense, then there is the possibility of raising a limitations defense post-conviction via a motion in arrest of judgment. *See generally* Fuecher v. State, 24 S.W. 292 (Tex. Crim. App. 1893); TEX. R. APP. P. 22.2.

102. *See Ex parte* Smith, 178 S.W.3d 797, 802 (Tex. Crim. App. 2005) ("Limitations is an absolute bar to prosecution."); *see generally* State v. Ojiaku, 424 S.W.3d 633, 640 (Tex. App.—Dallas 2013, pet. ref'd); *see generally Ex parte* Zain, 940 S.W.2d 253, 254 (Tex. App.—San Antonio 1997, no pet.); GEORGE E. DIX & JOHN M. SCHMOLESKY, *supra* note 84, at 246 n.4.

103. TEX. CODE CRIM. PROC. ANN. arts. 12.01–.02. Article 12.05 states that the time during which the accused is absent from the state or during the pendency of a charging instrument "shall not be computed in the period of limitation." *Id.* at art. 12.05. Thus, it is not that the limitations period is extended past the deadline; rather, those time periods are treated as if the time has ceased to flow altogether. In other words, the applicable time limit remains constant.

104. *Ex parte* Young, 213 S.W.3d 327, 331–32 (Tex. Crim. App. 2006).

105. *Id.* at 331 ("[W]e adopt now Presiding Judge Keller's analysis of this issue in her opinion dissenting to the dismissal of the discretionary review petition as improvidently granted in *Condran*, 977 S.W.2d at 144–47 (Keller, J., dissenting).").

106. State v. Condran, 977 S.W.2d 144, 146 (Tex. Crim. App. 1998) (Keller, J., dissenting).

Trial Act and the defective version of Article 28.061.[107] Conversely, in *Jones v. State*,[108] the State's contention that Article 17.151 was unconstitutional was rejected because "a prosecutor who is for whatever reason unprepared within the time allotted by Article 17.151 may nevertheless proceed with his case unmolested."[109]

Furthermore, placing a time limit on when charges can be brought interferes with a prosecutor's discretion in preparing a case for trial. As recognized in *Meshell*, such discretion is an "obvious corollary" to a prosecutor's constitutional duty to pursue criminal charges.[110] Sometimes cases take a long time to investigate because of their complexity. For instance, the offense may involve many different parties, some of whom pose a greater societal threat than other actors. The prosecution, then, may want to hold off charging anyone until enough evidence is gathered to prove all the cases beyond a reasonable doubt.[111] Moreover, key witnesses or pieces of evidence might be hidden from detection or go missing, and victims and other witnesses are also sometimes reluctant to cooperate with investigators.[112] Thus, while an objective of the statute of limitations is encouraging law enforcement to promptly investigate suspected criminal activities,[113] that is not always possible or wise.

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107. *Ex parte Young*, 213 S.W.3d at 329 n.1; Meshell v. State, 739 S.W.2d 246, 250–51 (Tex. Crim. App. 1987); *Condran*, 977 S.W.2d at 146 (Keller, J., dissenting).

108. Jones v. State, 803 S.W.2d 712 (Tex. Crim. App. 1991).

109. *Id.* at 716.

110. *Meshell*, 739 S.W.2d at 254–55.

111. *See* United States v. Lovasco, 431 U.S. 783, 792–93 (1977) (stating an immediate arrest could potentially be harmful).

> [C]ompelling a prosecutor to file public charges as soon as the requisite proof has been developed against one participant on one charge would cause numerous problems in those cases in which a criminal transaction involves more than one person or more than one illegal act. In some instances, an immediate arrest or indictment would impair the prosecutor's ability to continue his investigation, thereby preventing society from bringing lawbreakers to justice. In other cases, the prosecutor would be able to obtain additional indictments despite an early prosecution, but the necessary result would be multiple trials involving a single set of facts. Such trials place needless burdens on defendants, law enforcement officials, and courts.

Id.

112. *See id.* at 791–92 ("From the perspective of law enforcement officials, a requirement of immediate prosecution upon probable cause is equally unacceptable because it could make obtaining proof of guilt beyond a reasonable doubt impossible by causing potentially fruitful sources of information to evaporate before they are fully exploited.").

113. *See* Toussie v. United States, 397 U.S. 112, 115 (1970) ("Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.").

Therefore, because the limitations statutes terminate the case entirely and interfere with a prosecutor's discretion on when charges should be brought, the first *Ex parte Young* condition is satisfied.

Next, unlike the Interstate Agreement on Detainers Act[114]—upheld in *State v. Williams*[115]—which requires prosecutors to agree to commence trial within a specified time in exchange for the benefit of extraditing out-of-state prisoners, prosecutors do not enter into any agreement to receive a benefit under the statutes of limitations. In other words, just as with the Speedy Trial Act and the previously applicable version of Article 28.061, prosecutors do not contractually submit to the limitations deadlines.[116] Instead, those deadlines are statutorily imposed upon prosecutors with no reciprocity whatsoever. Accordingly, the third *Ex parte Young* condition is met as well.

Finally, the statutory deadlines "cannot be justified as necessary to effectuate a superior constitutional interest."[117] As explained above, statutes of limitations are not constitutional requirements; rather, they are acts of legislative grace, with some states forgoing limitations periods either altogether or for serious offenses.[118] Indeed, if they were constitutionally required, then the provisions of Article 12.01(1) dispensing with a limitations period[119] would themselves be unconstitutional.

Furthermore, the limitations periods are not necessary to effectuate defendants' speedy-trial and due-process rights. The state and federal Speedy Trial Clauses require courts to consider, among other things, any reasons justifying delay between charge and trial and prejudice suffered by the accused resulting from such delay.[120] The statutes of limitations, on the other hand, require consideration of neither factor. Instead, reasons for any delay are irrelevant, and the accused is not required to demonstrate any prejudice he may have suffered.[121] The only question is whether the applicable limitations period has run. If it has run, the trial court is required to dismiss the charging instrument with prejudice when the issue is raised

114. TEX. CODE CRIM. PROC. ANN. art. 51.14.

115. *Williams*, 938 S.W.2d at 459.

116. *See Condran*, 977 S.W.2d at 146 (Keller, J., dissenting) (disagreeing with the Court's dismissal of petition for discretionary review as improvidently granted).

117. *Id.*

118. *See supra* notes 89–91 and accompanying text.

119. TEX. CODE CRIM. PROC. ANN. art. 12.01(1).

120. *See* Meshell v. State, 739 S.W.2d 246, 256 (Tex. Crim. App. 1987) (listing four factors the Speedy Trial Clauses focus on related to commencement of trial).

121. *See supra* notes 102–03 and accompanying text.

by the defendant.[122] Accordingly, because the statutes of limitations, like the Speedy Trial Act, do not take into consideration the factors that establish a violation of the speedy-trial right, they cannot be said to effectuate that right.[123]

Moreover, like the Speedy Trial Act, the limitations statutes have nothing to do with the speedy commencement of trial—which is the focus of the Speedy Trial Clauses[124]—because the statutes do not dictate that trial commence within a certain time after the charging instrument is presented.[125] Indeed, because of the nonexistent or especially long limitations periods for certain offenses,[126] they cannot even be said to create "a right to a speedy indictment,"[127] let alone a speedy commencement of trial.

The limitations statutes also do not effectuate defendants' due process rights. The Due Process Clauses of the federal Constitution[128] have limited roles to play in protecting against stale criminal charges.[129] In Texas, in order to establish such a due-process violation, "a defendant must demonstrate that the delay: (1) caused substantial prejudice to his right to a fair trial, and (2) was an intentional device used to gain a tactical advantage over the accused."[130] Again, the statutes of limitations require a showing of neither. In that sense, they are substantively identical to the version of Article 28.061 found unconstitutional in *Ex parte Young*.[131] Thus, the

122. *See supra* notes 101–03 and accompanying text.

123. *Meshell*, 739 S.W.2d at 256–57. Moreover, if the statute was truly designed to effectuate the right to a speedy trial, then every offense would have an applicable limitations period because no offense is exempt from a speedy-trial claim. *Cf.* Barker v. Wingo, 407 U.S. 514, 516–18 (1972) (analyzing a prosecution for murder). But that is not the case. TEX. CODE CRIM. PROC. ANN. art. 12.01(1) (dispensing with limitations period for numerous offenses, including murder).

124. *See Meshell*, 739 S.W.2d at 255–56 (describing the Act as not providing guidelines for a speedy commencement of trial).

125. *See* TEX. CODE CRIM. PROC. ANN. arts. 12.01–.02 (remaining silent on specific time periods of trial commencement).

126. *See id.* at art. 12.01(1), (2), (6) (dispensing with a limitations period altogether or setting a ten-year limitations period for certain serious felonies).

127. State v. Condran, 977 S.W.2d 144, 146 (Tex. Crim. App. 1998) (Keller, J., dissenting).

128. U.S. CONST. amends. V, XIV, § 1.

129. State v. Krizan-Wilson, 354 S.W.3d 808, 813–14 (Tex. Crim. App. 2011) (citing United States v. Marion, 404 U.S. 307, 322–324 (1971); United States v. Lovasco, 431 U.S. 783, 789 (1977)).

130. *Krizan-Wilson*, 354 S.W.3d at 814–15.

131. *Ex parte* Young, 213 S.W.3d 327, 331–32 (Tex. Crim. App. 2006); *Condran*, 977 S.W.2d at 146 (Keller, J., dissenting) ("Like the Speedy Trial Act, the speedy indictment provision does not require a showing of prejudice. Nor does the provision call for considering the reasons for delay.

statutes cannot be said to be a legitimate legislative effort to effectuate defendants' due process right against oppressive pre-charge delay.[132] Therefore, all three conditions of the *Ex parte Young/Condran* test are met, meaning the statutes of limitations violate the Separation of Powers Clause.

This Article will now evaluate and rebut potential counterarguments, which might be made to save the statutes of limitations from a separation-of-powers challenge.

IV. COUNTERARGUMENTS ARE UNAVAILING

Two potential arguments that Articles 12.01 and 12.02 do not run afoul the Separation of Powers Clause could be made: (1) the Texas Constitution implicitly empowers the legislature to enact criminal limitations periods; and (2) the running of a limitations periods undermines a trial court's jurisdiction to hear a criminal case. Both contentions will be discussed and refuted below.

A. *No Provision of the Texas Constitution Empowers the Legislature to Enact Criminal Limitations Periods*

The Texas Constitution's Separation of Powers Clause contains a significant caveat, namely, that the Constitution itself can empower one branch to exercise or interfere with the powers of another.[133] Article V, Section 32, offers a perfect example of the "except" clause in action. That Section provides:

> Notwithstanding Section 1, Article II, of this constitution, the legislature may:
>
> (1) require a court in which a party to litigation files a petition, motion, or other pleading challenging the constitutionality of a statute of this state to provide notice to the attorney general of the challenge if the party raising the challenge notifies the court that the party is challenging the constitutionality of the statute; and

Hence, as in *Meshell*, the provision in question does not incorporate the constitutionally relevant factors.").

132. *See Meshell*, 739 S.W.2d at 255–57 (discussing the interplay between the Speedy Trial Act and constitutional protections).

133. TEX. CONST. art. II, § 1.

(2) prescribe a reasonable period, which may not exceed [forty-five] days, after the provision of that notice during which the court may not enter a judgment holding the statute unconstitutional.[134]

That Section was enacted in 2017 as a direct response to *Ex parte* Lo,[135] which held that Section 402.010 of the Government Code[136] violated the Separation of Powers Clause.[137] In fact, as can be seen, it directly references Article II.[138]

But no corresponding constitutional provision empowers the legislature to enact a statute of limitations. The only instance in which criminal limitations are mentioned in the Constitution is in Article III, Section 56.[139] That provision prohibits the legislature from passing "any local or special law" in a variety of listed categories.[140] The intention behind this provision is "to prevent the granting of special privileges and to secure uniformity of law throughout the State as far as possible."[141] Thus, by its plain language, that provision prohibits the legislature from passing criminal limitations statutes that are applicable to only certain localities or special classes of persons.

But it does not follow that the legislature is empowered to enact generally applicable limitations periods in the first instance because, to overcome the Separation of Powers Clause, there would have to be a specific authorization to do so. For example, the legislature is also prohibited by Article III, Section 56(a), from passing local or special change-of-venue laws.[142] But Section 45 of that same article empowers the legislature to enact such laws on a statewide basis.[143] Accordingly, even though such statutes encroach

134. *Id.* at art. V, § 32.

135. *Ex parte* Lo, 424 S.W.3d 10 (Tex. Crim. App. 2014) (per curiam) (op. on reh'g).

136. TEX. GOV'T CODE ANN. § 402.010.

137. *Ex parte Lo*, 424 S.W.3d at 27–30.

138. *See* TEX. CONST. art. V, § 32 (providing an explicit exception to Article II).

139. *Id.* at art. III, § 56(a)(28).

140. *Id.* at art. III, § 56(a). Subsection (b) also prohibits local or special laws "in all other cases where a general law can be made applicable" except in two specific situations delineated therein. *Id.* at art. III, § 56(b).

141. Miller v. El Paso Cnty., 150 S.W.2d 1000, 1001 (Tex. 1941).

142. TEX. CONST. art. III, § 56(a)(4).

143. *Id.* at art. III, § 45. Like limitations, "[v]enue is a creature of legislative grace, and because a change of venue was unknown to the common law, the power to make venue changes is purely statutory." Polaris Inv. Mgmt. Corp. v. Abascal, 892 S.W.2d 860, 862 (Tex. 1995) (orig. proceeding) (per curiam); *see also* Buchanan v. Crow, 241 S.W. 563, 565 (Tex. App.—Austin 1922, no writ) ("[A] change of venue was unknown to the common law; the power to make such change is purely statutory, and must be found in legislation, either in the Constitution or the statutes.").

on the authority of prosecutors to try cases in their home jurisdictions,[144] they do not run afoul of the Separation of Powers Clause because the legislature is specifically empowered to enact them. But because the Constitution contains no statute-of-limitations equivalent to Article III, Section 45, and because statutes of limitations unduly interfere with the constitutional authority of prosecutors,[145] Article III, Section 56(a)(28), cannot be said to implicitly authorize the legislature to enact generally applicable criminal limitations periods. Indeed, "[e]xceptions to the constitutionally mandated separation of powers are never to be implied in the least; they must be 'expressly permitted' by the Constitution itself."[146]

B. *Statutes of Limitations Are Not Jurisdictional*

Dismissal with prejudice does not violate the Separation of Powers Clause if failure to bring charges by a set date deprives the trial court of jurisdiction to hear a prosecution. For instance, Aaron Jacob Moore committed aggravated sexual assault of a child when he was sixteen years old.[147] Charges were not filed, however, until after he turned eighteen because the investigating detective had a heavy caseload and mistakenly believed that Moore was only seventeen when the case was forwarded to the district attorney's office.[148] Because of Moore's age, the State, pursuant to Section 54.02 of the Family Code,[149] filed a petition for discretionary transfer from juvenile court to criminal district court,[150] i.e., "adult" court. The trial court granted the petition and transferred the case upon finding that, for reasons beyond the State's control, "it was not practicable to proceed in juvenile court before" Moore's eighteenth birthday.[151] Thereafter, in adult court, Moore pled guilty and was placed on five years' deferred-adjudication probation.[152]

The court of appeals vacated the trial court's judgment, holding that the juvenile court lacked jurisdiction to transfer the case because the State did not meet its burden of showing that the detective's heavy caseload and

144. TEX. CONST. art. V, § 21.

145. *See generally supra* Part III.

146. State v. Stephens, No. PD-1032-20, 2021 WL 5917198, at *4 (Tex. Crim. App. Dec. 15, 2021) (quoting Fin. Comm'n of Tex. v. Norwood, 418 S.W.3d 566, 570 (Tex. 2014)).

147. Moore v. State, 532 S.W.3d 400, 401 (Tex. Crim. App. 2017) (per curiam).

148. *Id.* at 402.

149. TEX. FAM. CODE ANN. § 54.02.

150. *Moore*, 532 S.W.3d at 401.

151. *Id.* at 402.

152. *Id.*

mistake as to Moore's age were reasons beyond its control.[153] Accordingly, the juvenile court was deprived of jurisdiction to transfer the case, and thus the adult court never acquired jurisdiction.[154]

At the Court of Criminal Appeals, the State argued that Section 54.02 violated the Separation of Powers Clause because it required dismissal of the charges with prejudice without a showing of unconstitutionally oppressive delay by the defendant.[155] The court rejected that argument and affirmed the court of appeals.[156] It noted that the Juvenile Justice Code "requires the State to proceed against a juvenile while he is still a juvenile, or show that, for a reason beyond the control of the State it was not practicable to proceed in juvenile court before his [eighteenth] birthday . . . ."[157] If the defendant is no longer a juvenile and the State failed in its impracticable-to-proceed showing, then the juvenile court must dismiss the case for lack of jurisdiction.[158] "This is meant to limit the prosecution of an adult for an act he committed as a juvenile if his case could reasonably have been dealt with when he was still a juvenile."[159] Accordingly, Section 54.02 "is not an inadequate attempt to codify the constitutional right to a speedy trial" because "it does not impose an arbitrary deadline for prosecutorial action."[160] Without that deadline, the juvenile court would lose its authority to proceed—that is to say, it would lack jurisdiction.[161]

Thus, as outlined in *Moore*, if the State's failure to bring charges before a certain deadline would deprive the trial court of jurisdiction, then that deadline would not violate the Separation of Powers Clause as it is not arbitrary but, rather, necessary to effectuate the right to a speedy trial.[162] But, as explained below, failure to bring charges within the applicable limitations period does not deprive the trial court of jurisdiction.

153. *Id.*

154. *Id.*

155. *Id.* at 402–03.

156. *Id.* at 405.

157. *Id.* at 404 (citing TEX. FAM. CODE ANN. § 54.02(j)(4)(A)); *see also* TEX. FAM. CODE ANN. §§ 51.02(2), 51.03(a)–(b), .51.04(a) (defining "child," "delinquent conduct," "conduct indicating a need for supervision," and the jurisdictional scope of related proceedings).

158. *Moore*, 532 S.W.3d at 405.

159. *Id.*

160. *Id.* at 404.

161. *Id.* (citing TEX. FAM. CODE ANN. § 51.04(a); TEX. GOV'T CODE ANN. § 23.001).

162. *Id.* at 405.

"Statutes of limitation were formerly considered jurisdictional in nature."[163] Thus, "[t]he error committed was fundamental and could be raised for the first time on appeal."[164]

However, in 1985, the state Constitution was amended to read in pertinent part, "The practice and procedures relating to the use of indictments and informations, including their contents, amendment, sufficiency, and requisites, are as provided by law. The presentment of an indictment or information to a court invests the court with jurisdiction of the cause."[165] Pursuant to that provision, Article 1.14 of the Code of Criminal Procedure provides that if a "defendant does not object to a defect, error, or irregularity of form or substance" of a charging instrument before the trial date, he forfeits the claim and may not raise it on appeal.[166] Taken together, these provisions overruled any cases that held trial courts lacked jurisdiction after the limitations period had run; instead, a limitations claim

163. Tita v. State, 230 S.W.3d 885, 887 (Tex. App.—Houston [14th Dist.] 2007), *rev'd on other grounds*, 267 S.W.3d 33 (Tex. Crim. App. 2008); *see also Ex parte* Edwards, No. PD-1092-20, 2022 WL 1421507, at *2 (Tex. Crim. App. May 4, 2022) (explaining that, historically, charges barred by limitations deprived trial courts of jurisdiction); *see also Ex parte* Dickerson, 549 S.W.2d 202, 203 (Tex. Crim. App. 1977) ("[I]f the pleading, on its face, shows that the offense charged is barred by limitations the complaint, information, or indictment is so fundamentally defective that the trial court does not have jurisdiction and habeas corpus relief should be granted."); *see also* 40 GEORGE E. DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 6:62, at 285–86 (3d ed. 2011) (outlining the law of statutes of limitations in Texas before the 1985 constitutional amendment and legislation).

164. State v. Yount, 853 S.W.2d 6, 8 (Tex. Crim. App. 1993); *see also* DIX & SCHMOLESKY, *supra* note 163, § 6.62 at 285–86 (noting the availability of the issue on appeal).

165. TEX. CONST. art. V, § 12(b). Prior to the 1985 amendment, Article V, Section 12, read in pertinent part, "The style of all writs and process shall be, 'The State of Texas.' All prosecutions shall be carried on in the name and by authority of the State of Texas, and shall conclude: 'Against the peace and dignity of the State.'" The impetus behind the amendment was to reduce the number of conviction reversals due to technical violations in charging instruments. *See* S. Comm. on Crim. Just., Bill Analysis, Tex. S.J.R. 16, 69th Leg., R.S. (1985) (discussing the purpose behind the Section 12 amendment).

> By omitting the Constitutional language in an indictment, this bill allows for fewer technical conviction reversals if it has been mistakenly omitted from an indictment or information. In addition, the language of an indictment, and other requisites will be amendable by the legislature as the needs of the criminal justice system change. Thereby speeding the trial process and avoiding reversals of cases for mere technicalities that do not affect the substantive rights of defendants.

Id.

166. TEX. CODE CRIM. PROC. ANN. art. 1.14(b).

is now a defense that has to be raised before or during trial or else it is forfeited.[167]

It is true that in *Ex parte Smith*[168] the Court of Criminal Appeals stated that "when the face of the pleading shows that the offense charged is barred by limitations, that pleading 'is so fundamentally defective that the trial court does not have jurisdiction and habeas relief should be granted.'"[169] But *Ex parte Smith*'s language on that point was completely irrelevant to the court's holding that a defendant could not challenge the sufficiency of a tolling allegation in a pretrial writ of habeas corpus.[170] Indeed, later, in *Ex parte Doster*,[171] a unanimous court acknowledged that *Smith*'s language was dicta, and noted that *Ex parte Smith* itself provided a "but see" citation to *Proctor*.[172] In any event, following *Ex parte Heilman*, it is clear that a limitations violation does not affect the trial court's jurisdiction.[173]

167. *See Ex parte* Edwards, No. PD-1092-20, 2022 WL 1421507, at *2, 4 (Tex. Crim. App. May 4, 2022) (explaining the effect the 1985 constitutional amendment had on courts' limitations jurisprudence, stating claims of limitations violations do not "call into question the trial court's jurisdiction," and noting that such a defense may be raised in a motion to dismiss or at trial); *Ex parte* Heilman, 456 S.W.3d 159, 168 (Tex. Crim. App. 2015) ("[A] statute-of-limitations defense lacking any *ex post facto* component does not attack the jurisdiction of the trial court. . . . Instead, a limitations defense standing alone is merely a procedural 'act of grace' by the legislature that can be forfeited."); *see also* Proctor v. State, 967 S.W.2d 840, 844 (Tex. Crim. App. 1998) (holding a limitations defense "is forfeited if not asserted at or before the guilt/innocence stage of trial"); *see also* Yount, 853 S.W.2d at 8 ("[A]n indictment which charges the commission of an offense barred by limitations still confers jurisdiction upon the trial court, such that the defendant must bring the defect to the attention of the trial court in order to preserve any error."); *see also* DIX & SCHMOLESKY, *supra* note 163, § 6.63 at 286 (summarizing the approach taken by the Court of Criminal Appeals after the 1985 changes).

168. *Ex parte* Smith, 178 S.W.3d 797 (Tex. Crim. App. 2005) (per curiam).

169. *Id.* at 802 (quoting *Ex parte* Dickerson, 549 S.W.2d 202, 203 (Tex. Crim. App. 1977)).

170. *Id.* at 799.

171. *Ex parte* Doster, 303 S.W.3d 720 (Tex. Crim. App. 2010).

172. *Id.* at 725 (citing *Ex parte* Smith, 178 S.W.3d at 802 n.19).

173. *Ex parte Heilman*, 456 S.W.3d at 168; *see also* Harber v. State, 594 S.W.3d 438, 442 (Tex. App.—San Antonio 2019, pet. ref'd) ("[T]he statute of limitations is not jurisdictional and is not an absolute, systemic requirement; rather, it creates a defense that must be implemented upon request and is forfeited if not asserted at or before trial.").

V. FINDING THE STATUTES OF LIMITATIONS UNCONSTITUTIONAL WOULD NOT CONSTITUTE EITHER AN EX POST FACTO OR DUE PROCESS VIOLATION

As noted previously,[174] extending or eliminating a limitations period after it has already run violates the Ex Post Facto Clause.[175] The question arises, then, whether a judicial declaration that the limitations periods are unconstitutional—thereby removing them as a prosecutorial impediment—would violate the Clause in cases where they have already run. The answer is "no" as "[o]nly the legislature can violate either the federal or state *Ex Post Facto* Clause because . . . both are 'directed at the Legislature, not the courts.'"[176]

However, "[c]ourts can still violate the Due Process Clause of the Fifth Amendment through an 'unforeseeable judicial enlargement of a criminal statute, applied retroactively.'"[177] That is because due process is rooted in the "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime."[178] Thus, when the judiciary seeks to achieve through statutory construction that which the legislature would be prohibited from doing—namely, a retroactive change to a statute—due

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174. *See supra* note 89 and accompanying text.

175. *See* Stogner v. California, 539 U.S. 607, 609 (2003) (invalidating California's attempt to revive previously time-barred prosecutions).

176. *Ex parte Heilman*, 456 S.W.3d at 163 (quoting Ortiz v. State, 93 S.W.3d 79, 91 (Tex. Crim. App. 2002)); *see also* Rogers v. Tennessee, 532 U.S. 451, 460 (2001) (discussing the constitutionality of limitations periods).

> The *Ex Post Facto* Clause, by its own terms, does not apply to courts. Extending the Clause to courts through the rubric of due process thus would circumvent the clear constitutional text. It also would evince too little regard for the important institutional and contextual differences between legislating, on the one hand, and common law decision making, on the other.

Rogers, 532 U.S. at 460.

See also Marks v. United States, 430 U.S. 188, 191 (1977) ("The *Ex Post Facto* Clause is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government."); *Ex parte Heilman*, 456 S.W.3d at 165 ("A legislature cannot escape the strictures of either the Texas or federal *Ex Post Facto* Clause by mere delegation [to another government entity]. But a defendant must be able to point to a legislative origin of the alleged violation . . . .").

177. *Ex parte Heilman*, 456 S.W.3d at 166 (quoting *Marks*, 430 U.S. at 192).

178. *Rogers*, 532 U.S. at 457 (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964)); *see also* Proctor v. State, 967 S.W.2d 840, 845 (Tex. Crim. App. 1998):

> [T]he principle on which the [*Ex Post Facto*] Clause is based—that persons have, at the time they engage in conduct, a right to fair warning of what conduct will give rise to which criminal penalties—is fundamental to our concept of constitutional liberty and is, therefore, protected against judicial action by the Due Process Clause.

process is implicated.[179] But determining whether the limitations statutes violate the state Constitution does not involve interpreting those statutes at all, let alone judicially enlarging them.[180] Instead, it involves determining whether they were valid statutes in the first instance as "an unconstitutional statute in the criminal area is to be considered no statute at all."[181]

Admittedly, by declaring the statutes inoperative, the courts would be depriving defendants of a defense they could otherwise have relied upon.[182] But that would not run afoul the Due Process Clause for three reasons. First, the same could be said of striking the Speedy Trial Act and Article 28.061, both of which vested defendants with the benefit of dismissal with prejudice,[183] yet due process apparently posed no impediment to doing so.

Second, the Supreme Court has sanctioned judicial abolition of limitations periods. In *Rogers v. Tennessee*,[184] the Supreme Court considered whether the Supreme Court of Tennessee violated the Due Process Clause when it abolished the year-and-a-day rule,[185] thereby upholding the defendant's second-degree murder conviction.[186] The Court explained that the year-and-a-day rule "served as a statute of limitations" on bringing an action against someone for murder.[187] But, despite the rule acting as a limitations period, the Court affirmed its abolition by the state court.[188] While *Rogers* was different in that the year-and-a-day rule was court-created, whether abolishing a common-law rule or striking a statute as incompatible with the state constitution, the result is the same, namely, a limitations defense made unavailable due to a judicial declaration. Therefore, because the former does not violate the Due Process Clause, neither does the latter.

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179. *See Ex parte Heilman*, 456 S.W.3d at 164 (discussing the rule outlined in *Bouie v. City of Columbia*).

180. *Cf. id.* at 166.

181. Smith v. State, 463 S.W.3d 890, 895 (Tex. Crim. App. 2015) (internal quotation marks omitted).

182. *See supra* note 167 and accompanying text; *see also* Harber v. State, 594 S.W.3d 438, 442 (Tex. App.—San Antonio 2019, pet. ref'd) (noting that the statute of limitations "creates a defense that must be implemented upon request . . . .").

183. *See supra* Part II.

184. Rogers v. Tennessee, 532 U.S. 451 (2001).

185. The year-and-a-day rule is the "common-law principle that an act causing death is not homicide if the death occurs more than a year and a day after the act was committed." *Year-and-a-Day Rule*, BLACK'S LAW DICTIONARY (11th ed. 2019).

186. *Rogers*, 532 U.S. at 453–54.

187. *Id.* at 463.

188. *Id.* at 466–67.

Finally, declaring the statutes of limitations unconstitutional will not deprive defendants of "fair warning of what conduct will give rise to which criminal penalties" because such a holding would not retroactively alter the definition of any criminal statute, its range of punishment, or the substantive defenses—e.g., necessity,[189] self-defense,[190] etc.—that were available with respect to it.[191] That is because the limitations period does not define what constitutes criminal conduct as it is not a substantive portion of any offense and can be extended or abolished before it has run,[192] which is obviously untrue of a crime's substantive elements.[193] Likewise, the limitations defense is not "an affirmative defense of justification or excuse" which limits "the scope of a criminal prohibition . . . ."[194] Thus, because the limitations defense does not alter "'the legal definition of the offense' or 'the nature or amount of the punishment imposed for its commission,'"[195] finding the limitations statutes unconstitutional after they have run would not constitute "legal changes altering the definition of an offense or increasing a punishment."[196]

VI. CONCLUSION

Statutes of limitations serve important purposes in our criminal-justice system. But, like every other law, they must be authorized by the state's foundational law. Because such statutes seriously disrupt prosecutors' ability to perform their duty to seek justice, cannot be justified as necessary to effectuate any superior constitutional interest, and have not been contractually submitted to by the relevant prosecuting authorities, they run afoul the Texas Constitution's Separation of Powers Clause. Unless and

189. TEX. PENAL CODE ANN. § 9.22.

190. *Id.* § 9.31.

191. Proctor v. State, 967 S.W.2d 840, 845 (Tex. Crim. App. 1998).

192. *See supra* note 89 and accompanying text.

193. *See* U.S. CONST. art. I, § 10 cl. 1 (barring states from passing ex post facto laws); *see also* TEX. CONST. art. I, § 16 (mimicking the U.S. Constitution's bar on ex post facto laws).

194. Collins v. Youngblood, 497 U.S. 37, 49 (1990).

195. *Id.* at 50 (quoting Beazell v. Ohio, 269 U.S. 167, 170 (1925)).

196. *Id.* at 49; *see also id.* at 50 (overruling Kring v. Missouri, 107 U.S. 221 (1883).

> The 'defense' available to Kring under earlier Missouri law was not one related to the definition of the crime, but was based on the law regulating the effect of guilty pleas. Missouri had not changed any of the elements of the crime of murder, or the matters which might be pleaded as an excuse or justification for the conduct underlying such a charge; it had changed its law respecting the effect of a guilty plea to a lesser included offense.

Id.

until a constitutional amendment is passed specifically authorizing such statutes, courts should decline to enforce them in the face of a challenge by the State.