

Opinion No. 2013-133

February 3, 2014

The Honorable David Kizzia
State Representative
124 West 2nd Street
Malvern, Arkansas 72104-3708

Dear Representative Kizzia:

You have requested my opinion on a number of questions concerning the meaning and application of Article III, section 6 of the Arkansas Constitution. Specifically, you ask for my opinion on eight enumerated questions that, taken together, have 21 subparts. In the interests of clarity and brevity, I have regrouped and, in some cases, combined your questions into the following:

1. What is an “election law” under Article III, section 6 of the Arkansas Constitution?
2. Does the prohibited conduct encompassed by each of the following sections of the Arkansas Code fall within that constitutional definition of “election law”: A.C.A. §§ 5-55-601, 7-1-103, 7-1-104, 7-1-111(d), 7-1-112(c), 7-3-108(c), 7-5-403(e), 7-5-502, 7-5-616, 7-6-102(c), 7-6-105(b), 7-6-202, 7-9-102(b), 7-9-103(b), 7-9-109(d), and 7-9-403?
3. What does “willful and corrupt” mean under Article III, section 6 of the Arkansas Constitution?
4. What is a “felony” under Article III, section 6 of the Arkansas Constitution?

5. What is an “office of trust or profit in this State” under Article III, section 6 of the Arkansas Constitution? Is this restricted to elected office?
6. Does Article III, section 6 of the Ark. Const. create a criminal offense, a civil prohibition, or both?
7. If the conduct of a person (1) violates a provision of the election laws in the Arkansas Code, (2) does not meet the elements of a criminal violation under the Arkansas Code, and (3) is “willful and corrupt” under the Arkansas Constitution definition, is that conduct sufficient to be adjudged a felony and to disqualify the person from holding any office of trust or profit in this State?
8. Are the current misdemeanor violations of election laws under the Arkansas Code unconstitutional?

RESPONSE

While I will directly answer your individual questions later in this opinion, I will, at this stage, briefly summarize the opinion’s main conclusions. As explained more fully below, Article III, section 6 can be divided into three parts: its scope, its effects, and its operation. In terms of its scope, art. 3, § 6 is limited to persons who have been convicted of an election-law violation where the legislatively-defined offense constitutes an infamous crime. Within that limited scope, art. 3, § 6 states that two effects must follow, by operation of law, from such convictions: (a) the persons must be adjudged guilty of the gravest category of criminal offenses (i.e. a felony) and (b) the persons cannot hold public office in Arkansas. These two effects are put into operation by a judge who must determine whether any particular person has been convicted of a crime within art. 3, § 6’s scope.

DISCUSSION

Article III, section 6 states: “Any persons who shall be convicted of fraud, bribery, or other willful and corrupt violation of any election law of this State, shall be adjudged guilty of a felony, and disqualified from holding any office of trust or profit in this State.”

Many of your questions require overlapping analysis. Thus, to avoid repetition and lend clarity to the matter, I will provide a fairly extensive general analysis of art. 3, § 6 before turning directly to your questions. I must, however, emphasize that there is no authoritative guidance from Arkansas's appellate courts on this provision. Therefore, this opinion attempts to anticipate what a court might say if faced with your questions.

At the most general level, Article III, section 6 can be divided into three parts: its scope, its effects, and its operation. In terms of its scope, art. 3, § 6 is limited to persons who have been convicted of certain crimes, which we will examine in more detail below. With respect to those persons, the provision states that two effects must follow, by operation of law, from such convictions: (a) the persons must be adjudged guilty of a felony and (b) the persons cannot hold any other public office in Arkansas. In terms of its operation, the provision is applied to a particular person by a judge who must "adjudge" the person guilty of the felony and state that the person is disqualified from holding office. To pave the way for responses to your specific questions, I will further unpack each of these three general parts.

A. The scope of Article III, section 6

Article III, section 6 applies to "*any persons*," which indicates that persons who fall within this provision's scope can be any citizen, not just elected officials or public employees. More specifically, art. 3, § 6 applies to any persons "*who shall be convicted of...violation of any election law of this State.*" While the provision does not define the term "election law," the lack of any technical definition indicates that the term must be given a common-sense reading, which would mean it refers to any law that pertains to elections. Further, the term's context limits it to Arkansas's criminal laws.¹ This is apparent because it refers to persons being "convicted" for violating certain laws "of this State."

Finally, it applies to persons convicted of "*fraud, bribery, or other willful and corrupt violation.*" This clause, which is the most difficult clause in the whole provision, clearly serves to further narrow art. 3, § 6's scope. Though it is clear that the clause functions as a limiting criterion, its meaning is less apparent. The clause's meaning seems to turn on an understanding of the phrase "or other willful and corrupt violation," which could be read in one of two general ways: (a) as

¹ *Gatzke v. Weiss*, 375 Ark. 207, 211, 289 S.W.3d 455, 458 (2008) ("The Arkansas Constitution must be considered as a whole, and every provision must be read in light of other provisions related to the same subject matter.").

indicating a certain *mens rea* that must accompany the violation of the particular election law; or (b) as referring to a category of offenses. Though I hold the following conclusion with only a modest degree of certainty, I believe that an Arkansas court faced with interpreting this provision would probably hold that it was intended to refer to a category of offenses.

This conclusion is supported by at least two observations. First, it makes the most sense out of the phrase when read in light of standard rules of interpretation. In my opinion, a court faced with interpreting this clause—i.e. “of fraud, bribery, or other willful and corrupt violation”—would employ the principle of interpretation called *ejusdem generis*, which means “of the same genus” or “of the same kind.” This rule states that when general words follow an enumeration of two or more things, the general words only apply to things of the same genus or class referred to by the earlier terms.² Here, *ejusdem generis* is triggered because the general terms “or other willful and corrupt violation” follow the enumeration of the specific terms “fraud” and “bribery.”

By applying *ejusdem generis*, we can glean two insights. First, the terms “fraud” and “bribery” are distinct crimes in themselves. In general, criminal offenses are composed by specifying the type of prohibited conduct (i.e. the *actus reus*) that must occur together with the type of mental state (i.e. *mens rea*).³ The terms “fraud” and “bribery” refer to entire crimes, not merely to a particular *mens rea*. Thus, these terms indicate that the genus or classification at issue here is that of an *entire criminal offense*, not merely a mental state that accompanies a prohibited act. This observation shows that the general terms “or other willful and corrupt violation” should also be read as referring to a distinct category of criminal offenses.

The second observation takes us a step further. The terms “fraud” and “bribery” signify not merely a complete criminal offense, but a specific subcategory of criminal offenses: crimes that reflect moral turpitude.⁴ This is not the occasion to

² E.g. *Edwards v. Campbell*, 2010 Ark. 398, 5, 370 S.W.3d 250, 253.

³ E.g. 1 Wharton’s Criminal Law § 27 (15th ed.) (“Reduced to its simplest terms, a crime consists in the concurrence of prohibited conduct and a culpable mental state.”).

⁴ As shown below, these two offenses are considered “infamous crimes,” which means they are “indicative of great moral turpitude.” See generally *State v. Oldner*, 361 Ark. 316, 325–26, 206 S.W.3d 818, 822 (2005), quoting *State v. Irby*, 190 Ark. 786, 795–96, 81 S.W.2d 419, 423 (1935)

attempt an exhaustive description of this category of crimes, which are sometimes called “infamous crimes.” Nevertheless, it is clear that fraud and bribery were considered infamous crimes.⁵ While the Arkansas Supreme Court has interpreted the term “infamous crimes” (as it appears in Ark. Const. art. 5, § 9), the Court’s interpretation is not entirely clear.⁶ I will note, however, that the term “infamous crime” has an extensive history in English and American common law.⁷ The federal courts have recently used this history to achieve greater precision and clarity regarding the term’s meaning.⁸ Stated briefly, a crime is “infamous,” when it is a felony or when it requires the prosecutor to prove—as an element of the crime—that the defendant engaged in deceit.⁹

(“The presumption is, that one rendered infamous by conviction of felony, or other base offense, indicative of great moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship.”).

⁵ Bribery appears in Ark. Const. art. 5, § 9’s enumeration of infamous crimes. And fraud has long been considered an infamous crime. See *Black’s Law Dictionary* 428 (Bryan A. Garner, ed., 9th ed., West 2009) (defining “infamous crime”: “At common law, a crime for which part of the punishment was infamy, so that one who committed it would be declared ineligible to serve on a jury, hold public office, or testify. Examples are perjury, treason, and fraud.”).

⁶ See *State v. Cassell*, 2013 Ark. 221, ___S.W.3d___; *Edwards*, 2010 Ark. 398, 370 S.W.3d 250; *State v. Oldner*, 361 Ark. 316, 206 S.W.3d 818 (2005). The court in *Edwards* held that an infamous crime is one that “involves dishonesty.” But the court has not clearly specified what that means. In contrast, the federal courts *have* specifically addressed this issue thereby clarifying their understanding of what the term “involves dishonesty” means. For more on the latter clarification, please see note 8, below. Neither *Edwards* nor *Oldner* indicated an awareness of the history of the term “infamous crimes” and its modern development in the federal rules and case law.

⁷ See Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(A)(2) and the Origins of Crimen Falsi*, 90 J. Crim. L. & Criminology 1087 (2000); Joel Prentiss Bishop, *Commentaries on the Criminal Law* vol. 1, §§ 640–648 (1858); John Henry Wigmore, *A Treatise on the System in Trials at Common Law*, vol. 1, §§ 519–521 (1904); Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. Crim. L.C. & P.S. 347, 350 (1968); Walter Matthews Grant *et al.*, *Special Project: The Collateral Consequences of a Criminal Conviction*, 23 Vand. L. Rev. 931, 943 (1970).

⁸ See Fed. R. Evid. 609, “Committee Notes on Rules—2006 Amendment.” See also Charles Alan Wright, Victor James Gold, Michael H. Graham, *Federal Practice and Procedure* vol. 28, § 6135 (2d ed., West 2013); Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence*, § 6:42 (3d ed., West 2007). For some of the history of infamous crimes, see Green, *supra* n.7.

⁹ See Fed. R. Evid. 609(a)(2); see generally Green, *supra* n.7.

In summary, given that fraud and bribery are infamous crimes, *ejusdem generis* requires us to read the phrase “or other willful and corrupt violation” as referring to the subcategory of criminal offenses known as infamous crimes. In my opinion, therefore, art. 3, § 6’s scope is probably limited to persons who have been convicted of an infamous crime in the area of election law.

B. The effects of Article III, section 6

When a person falls within the art. 3, § 6’s scope as explained above, art. 3, § 6 imposes two consequences, or effects. The person “shall be adjudged guilty of a felony.” And the person is “disqualified from holding any office of trust or profit in this State.” I will discuss the phrase “shall be adjudged” in the subsequent section on art. 3, § 6’s operation. Here, I will focus on the two effects: being guilty of a felony and being disqualified from subsequent offices.

Article III, section 6’s requirement that persons convicted of the foregoing crimes be declared “*guilty of a felony*” seems designed to accomplish two goals. First, the requirement “constitutionalizes” a particular view about the significance of the foregoing crimes. In 1874 (and still today), a felony was the gravest category of criminal offenses. By requiring that persons convicted of the foregoing crimes be declared guilty of a felony, the provision serves as a public statement of the drafter’s view of how serious these convictions were.

In addition, the requirement ensures that the convict is subjected to a range of disabling effects accompanying felony convictions, regardless of the specific punishment enforced upon the defendant. For example, as of 1874, those convicted of a felony were ineligible to serve as jurors,¹⁰ disqualified from serving as witnesses in a court proceeding,¹¹ and barred from voting in any election.¹²

¹⁰ Gant’s Digest of 1874, § 1908 (“Causes [i.e. reasons] of general challenge [to an individual juror’s qualifications to serve] are: *First*. A want of the qualifications prescribed by law. *Second*. A conviction of a felony. *Third*. Unsoundness of mind, or such defect in the faculties of the mind, or organs of the body, as render him incapable of properly performing the duties of a juror.”).

¹¹ See generally *St. Louis, I.M. & S. Ry. Co. v. Harper*, 50 Ark. 157, 159, 6 S.W. 720, 720–21 (1888) (“If Casat had been offered as a witness after his conviction, his testimony could not have been received. The conviction rendered him infamous, and disqualified him to testify. Mansf. Dig. § 2859; *Werner v. State*, 44 Ark. 122 [1884].”). This statement from *Harper* reflects the common-law rule that one convicted of an infamous crime is unable to testify. But by the mid-20th century, most states (including Arkansas) changed this rule to its modern form under which the convicted stopped being the grounds for disqualifying a witness but could be used to impeach him. The modern rule is found in Rule 609 of both the Arkansas and federal rules of evidence.

These additional effects of a felony conviction were not viewed as further punishments.¹³ Rather, they were designed to protect the administration of justice from persons who were, as a consequence of the conviction, considered untrustworthy.¹⁴ The specific disabling effects that attend felony convictions today will vary depending on the statutes in force. While this is not the occasion to list the various disabling effects that exist today, it is sufficient to note that those effects would be applied to a person who was adjudged guilty of a felony pursuant to art. 3, § 6.

An additional observation seems to bolster the view that the art. 3, § 6 is mainly concerned with the significance and disabling effects of a felony conviction. The constitution does not prescribe any specific range of punishments for being convicted of such a felony. This silence suggests that this constitutional provision is primarily aimed at ensuring the application of a felony's disabling effects, not in ratcheting up the statutory punishments associated with the criminal offense.

The second effect of art. 3, § 6 is to render the person “*disqualified from any office of trust or profit in this State.*” This phrase has been interpreted by the Arkansas Supreme Court as it appears in Article V, section 9 of Arkansas Constitution. Given that art. 5, § 9 and art. 3, § 6 deal with the same subject matter—namely, how certain convictions affect one's ability to hold public office—a court would probably give this clause the same interpretation in both

The reasons for the shift are explained in Green, *supra* n.7; Simon Greenleaf, *A Treatise on the Law of Evidence* 3d., vol. 1, §§ 372–78 (1846); John Appleton, *The Rules of Evidence: Stated and Discussed* (T.& J. Johnson & Co. 1860), Chap. 3.

¹² Gant's Digest of 1874, § 1997 (“Every person convicted of bribery or felony shall be excluded from every office of trust or profit, and from the right of suffrage in this state.”).

¹³ *Irby*, 190 Ark. at 794, 81 S.W.2d at 422 (holding that the resulting prohibition on serving in public office “is no more a part of the punishment inflicted for the commission of a crime than...[are the constitutional requirements] that no person shall be eligible to the office of Governor unless a citizen of the United States, thirty years of age, and a resident of this state for seven years.”).

¹⁴ *Id.* at 796, 81 S.W.2d at 423 (agreeing with another court that the resulting prohibition on holding public office must be seen as “a mere disqualification, imposed for protection [of the State] and not for punishment....”).

constitutional provisions.¹⁵ This means that the term would be read to exclude the convicted person from holding any publicly elected office at any level of government in Arkansas.¹⁶

C. The operation of Article III, section 6

Article III, section 6 says that a person who falls within its scope “*shall be adjudged* guilty of a felony....” The phrase “shall be adjudged” sheds some light on how the provision is supposed to operate or be applied to any particular person. The term “adjudged” refers to a judicial procedure (i.e. adjudication) in which a judge pronounces a verdict.¹⁷ Thus, Article III, section 6 is directed toward the adjudicatory process, not toward the legislative process. The provision is simply saying that, when a given crime falls within art. 3, § 6’s scope, a judge must declare the defendant guilty of a felony regardless of whether the General Assembly has classified the crime as a felony or a misdemeanor. Accordingly, we could say that the provision “constitutionalizes” the requirement that certain election-related crimes be classified as felonies. This has important implications (which I will discuss below) for your questions regarding the constitutionality of certain statutes.

I. Application to Specific Questions

Now that we have a general understanding of art. 3, § 6’s scope, effects, and operation, we can turn to your specific questions.

¹⁵ E.g. *Central Okla. Pipeline, Inc., v. Hawk Field Svcs., LLC*, 2012 Ark. 157, 19, 400 S.W.3d 701, 712 (reiterating the ancient rule that “[s]tatutes relating to the same subject matter are said to be *in pari materia* and should be read in a harmonious manner....”). This rule applies when construing constitutional provisions. *Gatzke v. Weiss*, 375 Ark. 207, 211, 289 S.W.3d 455, 458 (2008) (“The Arkansas Constitution must be considered as a whole, and every provision must be read in light of other provisions related to the same subject matter.”).

¹⁶ **City level:** *State v. Oldner*, 361 Ark. 316, 206 S.W.3d 818 (2005); **county level:** *Campbell v. State*, 300 Ark. 570, 781 S.W.2d 14 (1989); **state level:** *Ridgeway v. Catlett*, 238 Ark. 323, 379 S.W.2d 277 (1964), *Irby v. Barnett*, 204 Ark. 682, 163 S.W.2d 512 (1942).

¹⁷ Henry Campbell Black, *A Dictionary of Law* 37 (West 1891): “To pass upon judicially; to decide, settle, or decree; to sentence or condemn.” Alexander M. Burrill, *A New Law Dictionary and Glossary* (1850) defines “adjudication” as “the act of giving judgment, or pronouncing a sentence or decree.” Vol. 1, p. 39.

Question 1: What is an “election law” under Article III, section 6 of the Arkansas Constitution?

Because this term is undefined, it should be understood in the nontechnical, general sense of any law relating to elections. But as explained above (pp. 2–5), art. 3, § 6’s scope is more limited. To fall within that scope, the election law must be criminal in nature and the offense must qualify as an infamous crime.

Question 2: Does the prohibited conduct encompassed by each of the following sections of the Arkansas Code fall within that constitutional definition of “election law”: A.C.A. §§ 5-55-601, 7-1-103, 7-1-104, 7-1-111(d), 7-1-112(c), 7-3-108(c), 7-5-403(e), 7-5-502, 7-5-616, 7-6-102(c), 7-6-105(b), 7-6-202, 7-9-102(b), 7-9-103(b), 7-9-109(d), and 7-9-403

Before directly addressing the statutes you cite, I need to address two preliminary matters. First, to reiterate, when art. 3, § 6 refers to “fraud, bribery, or other willful and corrupt violation of any election law of this State,” it is not merely referring to certain “prohibited conduct” as your question states. Rather, as discussed above, it seems that the provision is referring to certain crimes (as defined by the General Assembly) that constitute “infamous crimes.” As noted in footnotes 4–9 and their accompanying text, while there may be some difficulty in determining the precise boundaries of the term “infamous crimes,” the term does have a clear core meaning. It refers to all felonies and all misdemeanors that require the prosecutor to prove (or the defendant to admit)—as an element of the offense—that the defendant engaged in deceit.

The second preliminary matter flows out of the first. In what follows, I will not address the statutes that classify the criminal offense as a felony, for two reasons. First, such statutes describe criminal offenses that already fall within another constitutional provision—Ark. Const. art. 5, § 9. Thus, a person convicted of a felony is already disqualified from holding public office. So any further discussion of whether those statutes fall within the election-specific context of art. 3, § 6 would be, for all practical purposes, superfluous. Second, your questions are mostly focused on how art. 3, § 6 applies to statutes that classify conduct as misdemeanors. Therefore, I will not address the following statutes: A.C.A. §§ 7-1-104, 7-1-112(c), 7-5-403(e), 7-6-102(c), 7-9-109(d). In addition, the lengthiness of A.C.A. § 7-1-103—which continues for four pages listing offense after offense—makes it impracticable for me to address each of its subsections in this opinion. If,

after reading this opinion, you still have a question about a specific subsection, I am happy to respond.

Turning to the specific statutes you cite, we can apply the foregoing framework to determine whether they fall within the scope of art. 3, § 6. As noted above, a statute falls within that scope if it (1) pertains to an election law, and (2) establishes a criminal offense that, (3) qualifies as an infamous crime. Section 5-55-601 clearly meets these criteria. In contrast, A.C.A. §§ 7-1-111 and 7-6-105 clearly do not fall within art. 3, § 6's scope because they are not infamous crimes (thus lacking criterion (3)).

One group of statutes you cite falls outside the scope of art. 3, § 6 because they all lack criterion (2), which is to say that they do not establish a criminal offense. For example, section 7-5-502 states that “[a]ll laws of this state applicable to elections where voting is done in any manner other than by machines and all penalties prescribed for violation of these laws shall apply to elections and precincts where voting machines are used insofar as they are applicable.” This is more of a “housekeeping statute” than one that establishes a criminal offense. Several other statutes that you cite fall into this category: A.C.A. §§ 7-5-616, 7-6-202, 7-9-403.

Finally, the other statutes you cite fall into a category that depends on the nature of the charge. For example, A.C.A. § 7-9-102 makes it a misdemeanor for an election official to “knowingly and willfully fail or refuse to perform his or her duty” or to “knowingly and willfully *commit a fraud* in evading the performance of his or her duty.” The knowing and willful failure to perform one's duty does not rise to the level of an infamous crime. But the knowing and willful commission of fraud in order to evade one's duty would rise to the level of an infamous crime because it requires deceit. So whether a person convicted under this statute would fall within art. 3, § 6's scope depends on the nature of the conviction. Another statute you cite, section 7-3-108(c), might also fall into this category.

Question 3: What does “willful and corrupt” mean under Article III, section 6 of the Arkansas Constitution?

As explained more fully above, when this phrase is read in context, it seems to refer to a category of criminal offenses that reflect moral turpitude in the person convicted thereof. This category of criminal offenses—sometimes referred to as “infamous crimes”—is somewhat amorphous, though it has a clear core: crimes that require the prosecutor to prove that the defendant engaged in deceit.

Question 4: What is a “felony” under Article III, section 6 of the Arkansas Constitution?

As noted above, the term “felony” refers to the gravest category of criminal offenses. In 1874, a person convicted thereof was subject to several ancillary effects, including being disqualified from jury service, barred from being a witness in a trial, and prohibited from voting. The ancillary effects of felony convictions at any given time will always be dependent on the state of the law at that time.

Question 5: What is an “office of trust or profit in this State” under Article III, section 6 of the Arkansas Constitution? Is this restricted to elected office?

As noted above, this phrase has been interpreted by the Arkansas Supreme Court in a slightly different context. For reasons explained above, that interpretation would probably also apply here. Thus, the phrase is best read as being restricted to elected office.

Question 6: Does Article III, section 6 of the Ark. Const. create a criminal offense, a civil prohibition, or both?

None of the above. As noted above, art. 3, § 6 has two effects. First, it heightens the classification (from misdemeanor to felony) of certain *convictions*. Thus, far from “creating” a criminal offense, this first effect depends on one having already been convicted under a statute that defines a criminal offense. The second effect disqualifies a person from holding any publically elected office in Arkansas. This places into the constitution the longtime effect of a felony conviction.

Question 7: If the conduct of a person (1) violates a provision of the election laws in the Arkansas Code, (2) does not meet the elements of a criminal violation under the Arkansas Code, and (3) is “willful and corrupt” under the Arkansas Constitution definition, is that conduct sufficient to be adjudged a felony and to disqualify the person from holding any office of trust or profit in this State?

No, because your second criterion takes the violation out of art. 3, §, 6’s scope. As explained, the constitutional provision only contemplates violations of election laws that are *criminal* in nature. Your second criterion specifically states that the person did not violate a criminal statute: “does not meet the elements of a criminal

violation under the Arkansas Code.” Thus, the person does not fall within art. 3, § 6’s scope.

Question 8: Are the current misdemeanor violations of election laws under the Arkansas Code unconstitutional?

No, because—as noted in the foregoing section on art. 3, § 6’s operation—the provision is directed toward judges, not toward the legislature. The kind of statute envisioned in your question—i.e. a misdemeanor election-law violation—would still be the basis for the conviction. It would still establish the mental state (*mens rea*) that must occur together with the prohibited conduct (*actus reus*). But the constitutional requirement that the conviction be classified as a felony would supplant the statutory classification.

Assistant Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL
Attorney General

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