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Does Proving Predicate Offenses in Arkansas Require Proof Beyond a Reasonable Doubt?

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By Brian R. Gallini ¹ & Britta Stamps ²

Gangs in Arkansas became an increasing problem in the 1990s. A 1994 HBO-produced documentary titled *Gang War: Bangin' in Little Rock* confirmed as much by taking viewers inside the death and destruction caused by warring gang factions. ³ In response to the problem, the Arkansas legislature enacted the Arkansas Criminal Gang, Organization, or Enterprise Act. ⁴

This Article argues that the Arkansas Supreme Court's interpretation of the phrase "predicate criminal offense" in that Act violates the due process clause by allowing the prosecution to prove a substantive criminal offense using a burden of proof below reasonable doubt. Part I briefly discusses the statutory scheme and its background. Part II then outlines the Arkansas Supreme Court's problematic 1998 decision in *Garling v. State*. ⁵ Part III then explains how the union of the Act alongside the *Garling* decision violates due process.

I.

During the 1993 legislative session, Arkansas legislators were deeply concerned with the rise of gang-related criminal activity in Arkansas. ⁶ It therefore enacted Arkansas Code § 5-75-105 (hereafter "Section 105") to combat the problem. ⁷ Titled "Unauthorized use of another person's property to facilitate a crime," the law makes it a Class B felony for a person to "knowingly use[] the property of another person to facilitate in any way the violation of a predicate criminal offense without the owner's knowledge." ⁸ The statute correspondingly defined "predicate criminal offense" as "any violation of Arkansas law that is a crime of violence or a crime of pecuniary gain." ⁹ The General Assembly sought to "focus the state's law enforcement agencies and prosecutors on investigating and prosecuting all ongoing organized criminal activity and to provide for penalties that will punish and deter organized ongoing criminal activity." ¹⁰

That same session, the legislature also promulgated Arkansas Code § 5-74-104 to prohibit "[e]ngaging in a continuing criminal gang, organization, or enterprise." (hereinafter "Section 104"). ¹¹ The statute specifically condemned "three or more individuals committing a continuing series of at least two *predicate criminal offenses*

in concert with each other.”¹² The legislature also separately criminalized first and second-degree iterations of the statute, each of which critically turned on the commission or attempted commission of a felony predicate offense.¹³ Punishment following conviction for any of these offenses is not insignificant.¹⁴

Although the General Assembly ostensibly based section 104 statute on the Federal Continuing Criminal Enterprise statute,¹⁵ the Section 104’s non-existent legislative history does not reveal the statute’s purpose. The legislature’s findings in connection with the passing of the Section 104 does, however, provide some insight into the basis for its enactment: “With increasing frequency, criminals are using the property of another person which has been stolen, borrowed, leased, or maintained in another person’s name to avoid detection and identification.”¹⁶ As the General Assembly also recognized, “[t]his is particularly common among members and associates of criminal gangs, organizations, and enterprises.”¹⁷

The Arkansas Democrat-Gazette dedicated only one article in 1993 to the promulgation and background of Sections 104 and 105.¹⁸ According to that lone article, the proposals for both laws were among a group of “youth crime proposals” that would (1) allow forfeiture of vehicles in drive-by shooting, (2) make furnishing a weapon to a minor in order to cause injury or damage to property a felony, and (3) make bringing weapons on property of any school activity a felony.¹⁹ The article cites a California statute as the blueprint for the Arkansas statutes’ enactments.²⁰ Interestingly, however, the California statute includes no specific reference to the unauthorized use of another’s property to facilitate a crime; in other words, the Section 105.²¹

Moreover, although the California statute refers to “the underlying conviction,”²² Sections 104 and 105 refer to a “predicate criminal offense.”²³ The distinction initially appears inconsequential, but the interpretation of the different phrases by each state’s courts reveals an alarming difference. California state courts require the prosecution to prove “the underlying conviction” beyond a reasonable doubt.²⁴ In other words, California state courts have held that its statute satisfies due process because increased criminal penalties are imposed only when the underlying criminal conduct is proven beyond a reasonable doubt; the prosecution must therefore adhere to that burden of proof when proving defendant’s association with a “criminal street gang” with the “specific intent to promote, further, or assist in any criminal conduct by gang members.”²⁵

Like California state courts, federal courts have also required the prosecution to prove predicate offenses beyond a reasonable doubt in continuing criminal enterprise cases. In *United States v. Kramer*, for example, the Seventh Circuit Court of Appeals held that the “constitutional requirement of juror unanimity in federal criminal offenses is satisfied when each juror in a [continuing criminal enterprise] trial is convinced beyond a reasonable doubt that a defendant charged under the CCE statute committed the two predicate offenses.”²⁶ Arkansas, by contrast, does not require the prosecution to prove the predicate criminal offense beyond a reasonable doubt as a prerequisite to conviction pursuant to Section 104. Moreover, unlike Arkansas, neither federal nor California law includes an offense comparable to Section 105. It therefore remains unclear what law Arkansas legislators used as a basis for enactment of its facilitation offense.

II.

In 1998, the Supreme Court of Arkansas remarkably held that the prosecution is not required to prove a Section 104 predicate offense beyond a reasonable doubt.²⁷ In *Garling v. State*, defendants Jessie and Vincent Garling operated a taxicab business wherein they transported Medicaid recipients to and from their medical providers.²⁸ Between June 1, 1994 and September 30, 1995, the defendants submitted forged vouchers for payment to Medicaid; each voucher fraudulently represented the provision of a separate taxicab ride to a Medicaid provider.²⁹ The scheme enabled defendants to illegally collect hundreds of thousands of dollars from Medicaid.³⁰

A jury found defendants guilty of Medicaid fraud and engaging in a continuing criminal enterprise in violation of § 5-74-104.³¹ On appeal to the Supreme Court of Arkansas, defendants argued in part that the statutory language “predicate criminal offense” in § 5-74-104 applies only to “proven charged offenses *which result in convictions*.”³² The Court responsively noted, “[b]y its plain meaning, the term ‘predicate criminal offense’ does not incorporate a requirement for a conviction.”³³ It reasoned that *Black’s Law Dictionary* defines separately and distinguishes between “offense” and “conviction.”³⁴ It defines an “offense” as “[a] felony or misdemeanor; a breach of the criminal laws; violation of law for which penalty is prescribed,” whereas “conviction” is “the result of a criminal trial which ends in a judgment or sentence that the accused is guilty as charged.”³⁵ According to the court, “the General Assembly, when enacting legislation, knows and understands the critical

difference between a conviction and the commission of a criminal offense.”³⁶

The court further reasoned, in reliance on the federal Continuing Criminal Enterprise statute, that “[t]wo federal courts of appeal have interpreted this statute as not requiring a conviction for the predicate criminal offenses but have held that proof of the commission of an offense is sufficient.”³⁷ Accordingly, it concluded, “a committed offense for purposes of the continuing-criminal-enterprise statute [Section 104] *need not be proved by a conviction or even a formal charge.*”³⁸

III.

The *Garling* court’s interpretation of “predicate criminal offense” has potentially far reaching implications. To begin with, the court wrongly interprets the implications of the federal CCE statute “as not requiring a conviction for the predicate criminal offenses but have held that proof of the commission of an offense is sufficient.”³⁹ It is no doubt true that, at federal law, proof of a predicate does not require proof of a prior conviction.⁴⁰ But the *Garling* court’s language wrongly conflates the *existence* of a prior conviction with the burden of proof required to *obtain* a conviction.⁴¹ Indeed, saying that proof of a predicate offense need not be through a prior formal conviction is a proposition wholly different from requiring the prosecution to prove that predicate beyond a reasonable doubt.⁴²

Due process is not concerned with the former, but governs the latter. Thus, in a prosecution for Section 104, the *Garling* opinion apparently stands for the proposition that, although a defendant must “attempt to commit or solicit[] to commit a [continuing serious of] felony predicate criminal offense[s],”⁴³ the prosecution need not prove that attempt or commission beyond a reasonable doubt.

The implications of *Garling* do not end with Section 104. Although *Garling* was decided in the context of Section 104, Section 105 also critically includes the phrase “predicate criminal offense.”⁴⁴ More specifically, and as noted, Section 105 provides that “[a] person commits the offense of unauthorized use of another person’s property to facilitate a crime if he or she knowingly uses the property of another person to facilitate in any way the violation of a *predicate criminal offense* without the owner’s knowledge.”⁴⁵ As *Garling* instructs, that predicate “need not be proved by a conviction or even a formal charge.”⁴⁶

Thus, if *Garling* applies to Section 105, then prosecutors may charge and prove a violation of that offense (another felony) by something lower than proof beyond a reasonable doubt—and possibly much lower. Remember, the *Garling* opinion also said that proving a predicate did not even require proof of a formal charge.⁴⁷ Taking that to its logical (illogical?) extreme, the state could charge and prove Section 105 by proving—pursuant to a standard below even probable cause—that a defendant used another person’s property to facilitate the violation of a crime of violence or a crime of pecuniary gain.

As a closing note of concern, *Garling*’s reliance on the federal CCE statute for support is misplaced. Indeed, federal courts agree that the government must prove CCE predicates beyond a reasonable doubt.⁴⁸

Conclusion

In Arkansas, it’s possible for a defendant to be convicted of a felony by something less than proof beyond a reasonable doubt. Specifically, the Arkansas Supreme Court’s interpretation of proof requirements for “predicate offenses” in the Arkansas Criminal Gang, Organization, or Enterprise Act enables the prosecution to obtain a conviction pursuant to that Act based on something less than proof beyond a reasonable doubt. That, succinctly stated, violates due process.⁴⁹

Notes:

1. Associate Professor of Law, University of Arkansas-Fayetteville. ↩
2. Candidate, Juris Doctor, May 2015 ↩
3. *Gang War: Bangin’ in Little Rock* (HBO television broadcast Aug. 1994). ↩
4. Arkansas Criminal Gang, Organization, or Enterprise Act, Ark. Code Ann. § 5-74-102(b)(1) (West 2013) (“The General Assembly further finds that the State of Arkansas is experiencing an increase in crime committed by criminal gangs, organizations, or enterprises.”). ↩
5. 975 S.W.2d 435 (Ark. 1998). ↩
6. See Karla M. Burnett, *Criminal Law*, 16 U. Ark. Little Rock L.J. 91, 94-95 (1994). ↩
7. Arkansas Criminal Gang, Organization, or Enterprise Act, Ark. Code Ann. § 5-74-101 et.

- seq. (West 2013). ↩
8. § 5-74-105(a)(1) (emphasis added). ↩
 9. § 5-74-103(4). ↩
 10. § 5-74-102(e)(3). ↩
 11. Arkansas Criminal Gang, Organization, or Enterprise Act, Ark. Code Ann. § 5-74-104(a)(1) (West 2013). ↩
 12. Burnett, *supra* note 2, at 95 (emphasis added). ↩
 13. A person is guilty of the offense in the first degree if he is a gang leader who “commits or attempts to commit or solicits to commit a felony predicate criminal offense.” § 5-74-104. A person is guilty of the offense in the second degree if he is a gang member, not leader, and “commits or attempts to commit or solicits to commit a felony predicate criminal offense.” § 5-74-104. ↩
 14. Compared to other felonies, the legislature heightened the penalty for offenders of the CCE statute: a first-degree offender is guilty of a felony two classifications higher than that of the highest underlying offense and a second-degree offender is guilty of a felony one classification higher than that of the highest underlying offense. § 5-74-104(a)(1). Depending on the predicate, then, it seems a defendant could theoretically be bumped all the way up to a Class Y felony, which is punishable by a range of 10-40 years. § 5-4-401 (a)(1). ↩
 15. *Garling*, 975 S.W.2d at 437 (“Our statute is modeled on the federal ‘kingpin’ statute.” (citing 21 U.S.C. § 848 (2006))). ↩
 16. § 5-74-102(b)(4). ↩
 17. § 5-74-102(b)(5). ↩
 18. Kevin Freking, “LR Hopes Session Brings Stiffer Laws on Gangs, Break from Losses to Fees,” *Ark. Democrat Gazette*, Jan. 13, 1993, at B4. ↩
 19. *Id.* ↩
 20. *Id.* ↩
 21. Street Terrorism Enforcement and Prevention Act, Cal. Penal Code, § 186.22 (West 2013). ↩
 22. § 186.22. ↩
 23. §§ 5-75-104(a)(1)(A), 5-74-105(a)(1). ↩
 24. See, e.g., *People v. Gardeley*, 927 P.2d 713, 720 (Cal. 1996); *People v. Mejia*, 149 Cal. Rptr. 3d 815, 841 (Cal. Ct. App. 2012); *People v. Hill*, 120 Cal. Rptr. 3d 251, 280 (Cal.

Ct. App. 2011). ↩

25. *People v. Loeun*, 947 P.2d 1313, 1319 (Cal. 1997). ↩
26. *United States v. Kramer*, 955 F.2d 279, 486-87 (7th Cir. 1992). ↩
27. *See Garling v. State*, 975 S.W.2d 435, 437 (Ark. 1998). ↩
28. *Id.* at 436. ↩
29. *Id.* ↩
30. *Id.* ↩
31. *Id.* ↩
32. *Id.* ↩
33. *Garling*, 975 S.W.2d at 437. ↩
34. *Id.* ↩
35. *Id.* (quoting Black's Law Dictionary 1081 (6th Ed. 1990)). ↩
36. *Id.* ↩
37. *Id.* ↩
38. *Id.* (emphasis added). ↩
39. *Garling*, 975 S.W.2d at 437. ↩
40. *United States v. Apodaca*, 843 F.2d 421, 428 (10th Cir. 1988); *United States v. Markowski*, 772 F.2d 358, 361 (7th Cir. 1985); *United States v. Young*, 745 F.2d 733, 747 (2d Cir. 1984). ↩
41. *See, e.g., United States v. Carr*, 424 F.3d 213, 224 (2d Cir. 2005) (“[T]he jury must find that the prosecution proved each one of those two or more specifically alleged predicate acts beyond a reasonable doubt.”); *People v. Doubleday*, No. 08CA2433, 2012 WL 3746184, at *1 (Colo. App. Aug. 30, 2012) (“As a matter of first impression, we hold that if the prosecution proves each element of the predicate offense beyond a reasonable doubt, the jury need not necessarily convict the defendant of the predicate offense to convict him of felony murder.”); *State v. Lightner*, 2009 Ohio 544, ¶ 17 (Oh. Ct. App. 2009) (“[P]redicate acts need not be supported by convictions, as long as they are proven beyond a reasonable doubt.”). ↩
42. *See, e.g., United States v. Pepe*, 747 F.2d 632, 661 (11th Cir. 1984) (“A pattern of racketeering activity consists of two predicate acts of racketeering activity, found by the jury beyond a reasonable doubt.”); *Hall v. State*, 788 A.2d 118, 128 (Del. 2000) (“The State must also establish beyond a reasonable doubt that the defendant actually

pleaded guilty to, or was found guilty of, a predicate offense, and not merely that the defendant was charged with one.”); *State v. Spencer*, 725 A.2d 106, 119 (N.J. Super. Ct. App. Div. 1999) (“[T]he trial judge must also instruct the jury that it may not convict defendant of felony murder unless they also convict defendant of the predicate offense or an attempt to commit the predicate offense.”); *Davis v. Commonwealth*, 353 S.E.2d 905, 907 (Va. Ct. App. 1987) (requiring predicate felony to be proven beyond a reasonable doubt in a prosecution for “use of a firearm in the commission of an alleged underlying felony”); Mark E. Wojcik, *Discrimination After Death*, 53 Okla. L. Rev. 389, 429 (2000) (“For a criminal conviction of hate crime under [the Illinois Hate Crime Statute], the prosecutor must prove beyond a reasonable doubt that the defendant committed a predicate offense ‘by reason of’ the actual or perceived membership in a protected classification.”). ↩

43. §§ 5-74-104(a)(1)(A)-(B). ↩

44. § 5-74-105(a)(1). ↩

45. § 5-74-105(a)(1) (emphasis added). ↩

46. *Garling*, 975 S.W.2d at 437. ↩

47. *Id.* ↩

48. See, e.g., *United States v. Edmonds*, 80 F.3d 810, 822 (3d Cir. 1996) (requiring juror unanimity to prove each CCE predicate beyond a reasonable doubt); *United States v. Canino*, 949 F.2d 928, 947 (7th Cir 1991) (holding the “constitutional requirement of juror unanimity in federal criminal offenses is satisfied when each juror in a CCE trial is convinced beyond a reasonable doubt that a defendant charged under the CCE statute committed two predicate offenses”); *United States v. Schuster*, 769 F.2d 337, 345 (6th Cir. 1985) (“The court appropriately charged the jury that it must find such a violation was proved beyond a reasonable doubt.”). ↩

49. See *In re Winship*, 397 U.S. 358, 362 (1970) (“[P]roof of a criminal charge beyond a reasonable doubt is constitutionally required.”). ↩

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