

STATE OF ARKANSAS

PLAINTIFF

VS.

CASE NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

RESPONSE TO MOTION FOR SHOW CAUSE HEARING

Comes now the defendant, Kenny Webster Cassell, by and through his attorney, Joe Don Winingham, and for his Response to Motion for Show Cause Hearing does state as follows:

1. On October 31, 2011, the State filed a Motion for Show Cause Hearing along with its Petition for Removal from Office. In its Motion, the State averred that the matter should be set down for hearing to permit Defendant Kenny Webster Cassell to show cause, if any there be, why he should not be removed from office . . .

2. Hearings to show cause are special statutory proceedings adopted by the General Assembly in specific situations. The essence of a show cause hearing is to place the burden of proof on the summoned party. See e.g., Bob Cole Bonding v. State, 340 Ark. 641, 13 S.W.3d 147 (2000) (holding summoned bonding company has burden of proof at hearing to show cause as to why the bail bond should not be forfeited based on procedure set out in Ark. Code Ann. § 16-84-201(a)(1)(A)(B)).

3. There is no statutory or procedural authority for ordering Sheriff Cassell to show cause as to why he should not be removed from office. Because such attempt to shift the burden of proof to Sheriff Cassell is not authorized by Arkansas law, the State's Motion for Show Cause Hearing must be stricken or denied.



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nt, Kenny Cassell, prays that the State s Motion for
Show Cause hearing be stricken or denied; and for all other relief to which he is entitled.

Respectfully submitted,

Kenny Webster Cassell, Defendant

JOE DON WINNINGHAM, ABA 96222
Attorney at Law
P.O. Box 56
Conway, Arkansas 72033
501-513-4930 Fax 501-513-4931

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above pleading was forwarded in the U.S. Mail with sufficient postage to Cody Hiland, Prosecuting Attorney, Faulkner County Courthouse, 609 Locust Street, Conway, Arkansas 72034 and Chris Carnahan, Deputy Prosecuting Attorney, P.O. Box 912, Marshall, Arkansas 72650-0912, this ____ day of November, 2011.

Joe Don Winningham

STATE OF ARKANSAS

PLAINTIFF

VS.

CASE NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, Kenny Webster Cassell, by and through his attorney, Joe Don Winningham, and for his Response to Motion for Summary Judgment does state as follows:

1. On October 31, 2011, the State filed both its Petition for Removal from Office and its Motion for Summary Judgment in which it contended that it is entitled to removal of Sheriff Cassell from office pursuant to Ark. Const. Art. 5, § 9.

2. Because the State filed its motion for summary judgment prior to the proper time designated by Rule 56(a), it must be dismissed as premature. In addition, summary judgment is premature because Sheriff Cassell has not even had the opportunity to begin the discovery process.

3. In the event that this Court ignores the requirement set out in Rule 56(a) that the State cannot file a motion for summary judgment until twenty (20) days after this action is properly commenced and the requirement that parties be allowed to complete discovery prior to consideration of a summary-judgment motion, the State's motion must be denied on its merits.

4. A brief in further support of this response to motion for summary judgment is contemporaneously filed herewith.



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nt, Kenny Cassell, prays that the motion for summary judgment be denied, and for an other proper relief to which he is entitled.

Respectfully submitted,

Kenny Webster Cassell, Defendant

JOE DON WINNINGHAM, ABA 96222
Attorney at Law
P.O. Box 56
Conway, Arkansas 72033
501-513-4930 Fax 501-513-4931

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Joe Don Winningham

STATE OF ARKANSAS

PLAINTIFF

VS.

CASE NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

MOTION TO DISMISS

Comes now the defendant, Kenny Webster Cassell, by and through his attorney, Joe Don Winningham, and for his Motion to Dismiss does state as follows:

1. On October 31, 2011, the State filed a Summons and Petition for Removal of Office in which it alleged that the defendant, Kenny Cassell, Sheriff and Tax Collector of Searcy County, must be removed from office.

2. The summons issued by the Clerk of the Court on October 31, 2011 states that the Defendant is required to file a response within twenty (20) days of service upon him.

3. Rule 4(b) of the Arkansas Rules of Civil Procedure requires that a summons state "the time within which these rules require the defendant to appear, file a pleading, and defend In its *per curiam* Order of June 2, 2011, the Arkansas Supreme Court amended Rule 12(a)(1) of the Arkansas Rules of Civil Procedure to provide that both resident and non-resident defendants shall have thirty (30) days after service of a summons and complaint upon them to file their answer. In Re Arkansas Rules of Civil Procedure, 2011 Ark. 250.

4. Thus, the service of process in the instant case is defective, and there is insufficiency of service of process pursuant to Ark. R. Civ. P. 12(b)(4)(5).

5. In its Petition, the State also fails to present its claims in numbered paragraphs, as required by Ark. R. Civ. P. 10(b).

[a]ll averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; . . .

7. Due to its failure to comply with Rule 10(b), the State is required to file an amended complaint correcting its error so that Sheriff Cassell can effectively respond to each *numbered* claim.

8. A brief in support of motion to dismiss is filed contemporaneously herewith.

9. Pursuant to Ark. R. Civ. P. 12(a)(2), if this Court denies the instant motion or postpones its disposition until the trial on the merits, the responsive pleading shall be filed within 10 days after notice of the court's action. In accordance with Rule 12(a)(2), Sheriff Cassell will file a responsive pleading within ten (10) days of the Court's disposition of this motion; however, he also responds herein with a general denial of all relevant and material allegations in the Petition, with the exception of the averment that he entered a plea of guilty to possessing of property, of less than \$100.00 in value, the same being a part of an interstate shipment, knowing the same to have been embezzled or stolen, in violation of 18 U.S.C. 659. Furthermore, Sheriff Cassell raises the affirmative defenses of estoppel, laches, statute of limitations, and waiver. Demand for jury trial is hereby made.

10. The Motion to Strike, filed by Sheriff Cassell on November 17, 2011 is hereby reserved.

WHEREFORE, Defendant Kenny Cassell prays that his Motion to Dismiss be granted based on the State's failure to comply with Arkansas rules of service and pleading; and for all other relief to which he is entitled.



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Respectfully submitted,

Kenny Webster Cassell, Defendant

JOE DON WINNINGHAM, ABA 96222
Attorney at Law
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Conway, Arkansas 72033
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Joe Don Winningham

STATE OF ARKANSAS

PLAINTIFF

VS.

CASE NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

**MOTION TO STRIKE AVERMENTS IN STATE'S
PETITION FOR REMOVAL FROM OFFICE**

Comes now the defendant, Kenny Webster Cassell, by and through his attorney, Joe Don Wunningham, and for his Motion to Strike Averments in State's Petition for Removal from Office does state as follows:

1. On October 31, 2011, the State filed its Petition for Removal from Office in which it alleged that Kenny Cassell, Sheriff and Tax Collector of Searcy County, should be removed from office due to a 1979 conviction of possessing property, of less than \$100.00 in value, the same being a part of an interstate shipment, knowing the same to have been embezzled or stolen. See Petition for Removal from Office. The conviction stemmed from a guilty plea entered by Sheriff Cassell. See Order and Probation/Commitment Order, attached to the Petition for Removal from Office.

2. In the Petition, the State alleges that Sheriff Cassell was a defendant in a jury trial with felony charges based on the same statute, and that the trial ended in a mistrial.

3. Pursuant to Rule 12(f) of the Arkansas Rules of Civil Procedure, any redundant, immaterial, impertinent or scandalous matter may be stricken from any pleading.

4. The State's reference to the jury trial resulting in a mistrial is neither material nor pertinent to its claim that Sheriff Cassell must be removed from office. Additionally,

ed highly prejudicial to Sheriff Cassell. Accordingly,
any reference to the jury trial and resulting mistrial must be stricken from the Petition.

5. Also, in its Petition, the State, in an apparent attempt to erase the distinction between theft and possession of stolen goods, refers to the statute at issue as 18 U.S.C. § 659 Embezzlement or Theft of Interstate of Interstate or Foreign Shipments by Carrier. While Chapter 31 of Title 18 is entitled Embezzlement and Theft, the heading of the specific statutory section, 18 U.S.C. § 659, is Interstate or foreign shipments by carrier; State prosecutions. The State's inaccurate reference to the heading of 18 U.S.C. § 659 is highly prejudicial and must be stricken from the Petition.

6. In the conclusion of its Petition, the State refers to Sheriff Cassell's 1979 conviction of misdemeanor theft. Again, the Judgment and Probation/Commitment Order attached as an exhibit to the Petition specifically states that Sheriff Cassell was convicted of possessing property, of less than \$100.00 in value, knowing that the same to have been embezzled or stolen in violation of 18 U.S.C. § 659. Thus, any reference to Sheriff Cassell being convicted of misdemeanor theft is a known inaccuracy that must be stricken from the Petition.

WHEREFORE, the defendant, Kenny Cassell, prays that his Motion to Strike be granted; and for all other relief to which he is entitled.

Respectfully submitted,

Kenny Webster Cassell, Defendant

JOE DON WINNINGHAM, ABA 96222
Attorney at Law
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Conway, Arkansas 72033



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Joe Don Winningham

STATE OF ARKANSAS

PLAINTIFF

VS.

CASE NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

**MEMORANDUM BRIEF IN SUPPORT
OF MOTION TO DISMISS**

On October 31, 2011, the State filed its Petition for Removal from Office against Kenny Cassell, Sheriff and Tax Collector of Searcy County. Dismissal of the petition is proper based on the State's failure to comply with Arkansas rules of service and pleading. First, the Summons and Petition for Removal from Office which commenced this action is defective due to insufficiency of service of process. In addition, the State fails to prepare its Petition in compliance with the required form of pleadings.

Rule 4(b) of the Arkansas Rules of Civil Procedure requires that a summons state "the time within which these rules require the defendant to appear, file a pleading, and defend In its *per curiam* Order of June 2, 2011, the Arkansas Supreme Court amended Rule 12(a)(1) of the Arkansas Rules of Civil Procedure to provide that both resident and non-resident defendants shall have thirty (30) days after service of a summons and complaint upon them to file their answer. The *per curiam* Order specifically states that it is to be effective as of July 1, 2011. In Re Arkansas Rules of Civil Procedure, 2011 Ark. 250.

The Summons prepared by the State and issued by the Clerk of the Court on October 31, 2011 states that the Defendant is required to file a response within twenty

us, Sheriff Cassell moves pursuant to Rule 12(b)(5) that the service of process in the instant case is defective under Arkansas law.

It is settled law that, being in derogation of the common law, statutory service requirements are strictly construed and compliance must be exact. Rettig v. Ballard, 2009 Ark. 629. More particularly, the technical requirements of a summons set out in Ark. R. Civ. P. 4(b) must be strictly construed and compliance with those requirements must be exact. Trusclair v. McGowan Working Partners, 2009 Ark. 203, 306 S.W.3d 428. Actual knowledge of a proceeding does not validate defective process. Id. The reason for this rule is that service of valid process is necessary to give a court jurisdiction over a defendant. Id. Strictly construing Rule 4(b), Arkansas appellate courts have consistently held that when a summons misstates the time within which a defendant must respond to a complaint, the summons is defective and there is a failure of service of valid process. Patsy Simmons Ltd Partnership v. Finch, 2010 Ark. 451; Trusclair v. McGowan Working Partners, *supra*. Accordingly, based on the deficiency of the State's summons pursuant to Rule 4(b), this Court lacks jurisdiction and dismissal is proper.

Additionally, in its Petition, the State fails to present its claims in numbered paragraphs, as required by Ark. R. Civ. P. 10(b). Rule 10(b) provides that [a]ll averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; . . .). Due to its failure to comply with Rule 10(b), the State is required to file an amended complaint correcting its error so that Sheriff Cassell can effectively



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(2008).

See James v. Williams, 372 Ark. 82, 270 S.W.3d 855

The aforementioned rules of procedure are mandatory and must be adhered to by all litigants. Thus, based on the State's failure to comply with Arkansas rules of service and pleading, dismissal of its Petition for Removal from Office is proper.

Respectfully submitted,

Kenny Webster Cassell, Defendant

JOE DON WINNINGHAM, ABA 96222
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501-513-4930 Fax 501-513-4931

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Joe Don Winningham

STATE OF ARKANSAS

PLAINTIFF

VS.

CASE NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

**MEMORANDUM BRIEF IN SUPPORT OF MOTION TO STRIKE
AVERMENTS IN STATE'S PETITION FOR REMOVAL FROM OFFICE**

On October 31, 2011, the State filed its Petition for Removal from Office in which it alleged that Kenny Cassell, Sheriff and Tax Collector of Searcy County, should be removed from office due to a 1979 conviction of possessing property, of less than \$100.00 in value, the same being a part of an interstate shipment, knowing the same to have been embezzled or stolen. See Petition for Removal from Office. The conviction stemmed from a guilty plea entered by Sherriff Cassell. See Judgment and Probation/Commitment Order, attached to the Petition for Removal from Office.

In the Petition, the State alleges that Sheriff Cassell was a defendant in a jury trial with felony charges based on the same statute, and that the trial ended in a mistrial. Because such averment is immaterial and impertinent, it must be stricken from the Petition pursuant to Ark. R. Civ. P. 12(f), which provides for the striking of such matters.

Pursuant to Rule 12(f) of the Arkansas Rules of Civil Procedure, any redundant, immaterial, impertinent or scandalous matter may be stricken from any pleading.

Immaterial matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded, or a statement of unnecessary particulars in connection with and descriptive of that which is immaterial. Wright & Miller, *Federal Practice and Procedure* § 1382. Impertinent matter consists of statements that do not

the issues in question. Id. Immaterial and impertinent matters often overlap considerably. Id. Some courts require that, in addition to showing that a matter is immaterial, impertinent, or scandalous, a party moving to strike matter under Rule 12(f) must show that prejudice to the movant will ensue if the court denies the motion to strike. Other courts hold that based on case law and the plain language of Rule 12(f), there is no prejudice requirement. Sundance Svcs., Inc. v. Roach, Civ. No. 10-110 JP/CEG (D. N.M. 6-2-2011). Applying Rule 12(f) and the treatises interpreting the rule to the instant case, the State's reference to the jury trial resulting in a mistrial is neither material nor pertinent to its claim that Sheriff Cassell must be removed from office. The petition for removal is based on the State's contention that Sheriff Cassell's 1979 plea of guilty and subsequent conviction of possessing property that he knew was stolen amounts to a conviction of an infamous crime precluding him from holding office. Thus, allegations and evidence related to the jury trial and its ending in a mistrial, which preceded the guilty plea and conviction at issue, simply have no bearing on whether the judgment entered as a result of Sheriff Cassell's guilty plea is an infamous crime. Additionally, such averment only confuses the issue as to the nature of the crime of which Sheriff Cassell was actually convicted. Such confusion of the issues can only be considered highly prejudicial to Sheriff Cassell. Accordingly, any reference to the jury trial and resulting mistrial must be stricken from the Petition.

Also, in its Petition, the State, in an apparent attempt to erase the distinction between theft and possession of stolen goods, refers to the statute at issue as 18 U.S.C. § 659 Embezzlement or Theft of Interstate or Foreign Shipments by Carrier. While Chapter 31 of Title 18 is entitled Embezzlement and Theft, the heading of the specific

is Interstate or foreign shipments by carrier; State prosecutions. In fact, this section separately addresses the crime of theft and embezzlement of goods which are part of an interstate shipment and the crime of possession of such goods known to have been embezzled or stolen. The State's inaccurate reference to the heading of 18 U.S.C. § 659 is highly prejudicial and must be stricken from the Petition.

Finally, the State, in its Petition, refers to Sheriff Cassell's 1979 conviction of misdemeanor theft. Again, the Judgment and Probation/Commitment Order attached as an exhibit to the Petition specifically states that Sheriff Cassell was convicted of possessing property, of less than \$100.00 in value, knowing that the same to have been embezzled or stolen in violation of 18 U.S.C. § 659. Clearly, Sheriff Cassell was convicted of possession of stolen goods, not misdemeanor theft. Thus, any reference to Sheriff Cassell being convicted of misdemeanor theft is a known inaccuracy that must be stricken from the Petition.

Respectfully submitted,

Kenny Webster Cassell, Defendant

JOE DON WINNINGHAM, ABA 96222
Attorney at Law
P.O. Box 56
Conway, Arkansas 72033
501-513-4930 Fax 501-513-4931

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2, Marshall, Arkansas 72650-0912, this ____ day of

Joe Don Winningham

STATE OF ARKANSAS

PLAINTIFF

VS.

CASE NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

**MEMORANDUM BRIEF IN SUPPORT OF
RESPONSE TO MOTION FOR SUMMARY JUDGMENT**

On October 31, 2011, the State filed a Petition for Removal from Office in which it averred that Kenny Cassell, Sheriff and Tax Collector of Searcy County, must be removed from office based on a 1979 conviction entered on a plea of guilty to possessing property, of less than \$100.00 in value, the same being a part of an interstate shipment, knowing the same to have been embezzled or stolen, in violation of 18 U.S.C. § 659. See Petition for Removal from Office. Also on October 31, 2011, the State filed a Motion for Summary Judgment and Brief in Support in which it basically restated the averments in its Petition and contends that Sheriff Cassell is precluded from holding office pursuant to Ark. Const. Art. 5, § 9, which provides as follows:

No person hereafter convicted of embezzlement of public money, bribery, forgery or other infamous crime shall be eligible to the General Assembly or capable of holding any office of trust or profit in this State.

I. Summary judgment motion is premature

Summary judgment motions must not be filed until the expiration of twenty (20) days after the commencement of the action or after service of a motion for summary judgment by the adverse party. See Ark. R. Civ. 56(a), which provides as follows: [a] party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, after the expiration of 20 days from the commencement of the

for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. Because the State filed its motion for summary judgment prior to the proper time designated by Rule 56(a), it must be dismissed as premature.

In addition, summary judgment is premature because Sheriff Cassell has not even had the opportunity to begin the discovery process. Prior to responding to a motion for summary judgment, a plaintiff is entitled to have the benefit of adequate discovery from the opposing parties as the nature of the case requires. Pledger v. Carrick, 362 Ark. 182, 208 S.W.3d 100 (2005) (quoting First National Bank v. Newport Hospital & Clinic, Inc., 281 Ark. 332, 663 S.W.2d 742 (1984)). Where . . . the decision of a question of law by the Court depends upon an inquiry into the surrounding facts and circumstances, the Court should refuse to grant a motion for summary judgment until the facts and circumstances have been sufficiently developed to enable the Court to be reasonably certain that it is making a correct determination of the question of law. Id.

If the motion for summary judgment is ruled on prematurely, Sheriff Cassell will be denied the benefit of completing discovery that will allow him to develop the necessary proof in this case. A central argument to Sheriff Cassell's defense is that because the intent of the framers in adopting Ark. Const. Art. 5, § 9 was to protect the public trust in their elected officials, the provision should not be applied to preclude Sheriff Cassell from holding office based on the specific facts in this case. Discovery is crucial to exploring issues related to the public's knowledge and trust in Sheriff Cassell prior to electing him to serve as Sheriff and Tax Collector of Searcy County as well as Sheriff Cassell's ability to serve as an elected official. Thus, summary judgment is not



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allowed to complete the discovery that is crucial to his case.

II. Evidence to be properly considered in summary judgment

In the event that this Court does not abide by the rules of civil procedure as promulgated by the Arkansas Supreme Court and prematurely considers the State's motion for summary judgment, it must recognize the rules of evidence in analyzing the motion. Inadmissible evidence must be excluded from a summary judgment analysis. See Bonding v. First Federal Bank, 82 Ark. App. 8, 110 S.W.3d 298 (2003) (The supreme court has excluded hearsay statements from the summary judgment analysis since such statements would be inadmissible at trial.). Thus, in the alternative to striking immaterial, impertinent, and scandalous portions of the Petition pursuant to Rule 12(f), as argued in the Motion to Strike, any evidence of the jury trial on charges for a felony violation of 18 U.S.C. § 659 and its ending in a mistrial must be excluded from a summary judgment analysis pursuant to Ark. R. Evid. 402 and Ark. R. Evid. 403.

Evidence which is not relevant is not admissible. Ark. R. Evid. 402. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ark. R. Evid. 401. Whether Sheriff Cassell was tried by jury as a result of felony violation of 18 U.S.C. § 659 with such trial ending in a mistrial does not make it more probable or less probable that he should be removed from office based on his 1979 conviction of possession of stolen goods under the specific facts of this case. Thus, any evidence related to the jury trial and its ending in mistrial is not relevant and must not be considered in the summary-judgment analysis.

ossible and must not be part of a summary-judgment analysis pursuant to Ark. R. Evid. 403, which provides as follows: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Any probative value related to the jury trial and resulting mistrial is substantially outweighed by the unfair prejudice and confusion of the issues as to the actual nature of Sheriff Cassell s 1979 conviction that would result if such evidence was admitted.

III. Summary judgment motion must be denied on merits

In the event that this Court ignores the requirement set out in Rule 56(a) that the State cannot file a motion for summary judgment until twenty (20) days after this action is properly commenced and the requirement that parties be allowed to complete discovery prior to consideration of a summary-judgment motion, the State s motion must be denied on its merits. The law is well-settled that summary judgment is to be granted only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. Dodson v. Taylor, 346 Ark. 443, 57 S.W.3d 710 (2001) . Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. Id. Because genuine issues of material fact remain as to whether Sheriff Cassell must be removed from office pursuant to Ark. Const. Art. 5, § 9, summary judgment is not proper.

A. Possession of stolen goods is not an “infamous crime”

Arkansas Constitution provides:

NO person hereafter convicted of embezzlement of public money, bribery, forgery, or other infamous crime shall be eligible to the General Assembly or capable of holding any office or trust or profit in this State.

In State v. Oldner, 361 Ark. 316, 327, 206 S.W.3d 818 (2005), the Arkansas Supreme Court held that the framers in drafting Article 5, Section 9, intended that an infamous crime be one involving elements of deceit and dishonesty. Applying Article 5, Section 9, the Arkansas Supreme Court then considered whether the constitutional provision mandated that the Mayor of Dumas be removed from office based on convictions of witness tampering and abuse of office stemming from actions committed while the Mayor was in office. Rejecting the argument that an infamous crime was defined as a conviction punishable by more than a year's imprisonment, the Court concluded that [n]ot only do these crimes involve dishonesty and deceit but, more importantly, they directly impact [the Mayor's] ability to serve as an elected official. State v. Oldner, 361 Ark. at 332. The Court then reversed the trial court's denial of the State's petition to remove Clay Oldner as Mayor of Dumas. Id. Subsequently, in Edwards v. Campbell, 2010 Ark. 398, a case involving a preelection challenge to the Mayor of Greenwood's eligibility to run for reelection, the Arkansas Supreme Court considered whether the Mayor, who, while running for reelection, was convicted of misdemeanor theft of property for taking campaign signs, was ineligible to stand for election based on Article 5, Section 9. Referring to the statutory definition of theft of property to determine whether theft of property involved the requisite elements of deceit and dishonesty, the Court concluded that, in fact, theft constitutes an infamous crime in

9, and that the actions of the Mayor impugned the integrity of the office. Edwards v. Campbell, *supra*.

In its brief in support of its motion for summary judgment, the State avers that Sheriff Cassell was convicted of misdemeanor theft; and that because such conviction is an infamous crime, Ark. Const. Art. 5 § 9 mandates Sheriff Cassell's removal from office. However, the definition of theft of property examined in the Edwards case is not the same crime as Sheriff Cassell's conviction for possession of stolen goods. While perpetrating a theft involves an active pursuit of goods in taking unauthorized control, possession of stolen goods does not require the same action of deceit and dishonesty. Thus, unlike theft, a conviction of possession of stolen goods simply does not fit within the classification of an infamous crime precluding a person from holding office. Thus, summary judgment in favor of the State is not proper.

B. Framers' intent was not to mandate removal from office under the facts of this case

In the Edwards case, the Arkansas Supreme Court set out the standard for determining whether the framers of the Arkansas Constitution intended for a particular crime to be cause for ineligibility to hold office as follows:

[T]his Court concluded in Oldner that the framers of the Arkansas Constitution intended for an infamous crime, when used in article 5, section 9, to include crimes involving elements of deceit and dishonesty. (citation omitted) Additionally, this court embraced the notion in Oldner that infamous crimes are those that impugn the integrity of the office and directly impact the person's ability to serve as an elected official.

Edwards v. Campbell, *supra*. In both the Edwards case and the Oldner case, the Court applied this two-part test in determining whether removal from office or declaration of ineligibility to stand for election was warranted pursuant to Article 5, Section 9. In the

that [n]ot only do these crimes [of witness tampering and abuse of office] involve dishonesty and deceit but, more importantly, they directly impact Oldner s ability to serve as an elected public official. State v. Oldner, 361 Ark. at 332. In the Edwards case, the Court concluded that Edwards is a public official who perpetrated a theft while in office and who now seeks to be reelected to the same position of public trust. By his actions, he has impugned the integrity of that office. We hold that misdemeanor theft is a crime of dishonesty and, as such, fits readily within the classification of an infamous crime. For these reasons, we affirm the circuit court s order declaring Edwards to be ineligible to stand for election . . . Edwards v. Campbell, supra.

As argued herein, possession of stolen goods is distinguishable from theft as a crime involving dishonesty or deceit. Moreover, Sheriff Cassell s conviction upon a plea of guilty to possession of stolen goods neither impugns the integrity of the office nor impacts his ability to serve as an elected public official, particularly in light of his publication of his misdemeanor 1979 conviction prior to the 2010 election. Unlike the Mayor of Greenwood and the Mayor of Dumas, Sheriff Cassell did not commit a crime while in office or use his office for personal gain. Rather than misleading and stating untruths while in office with regard to his conviction, Sheriff Cassell was proactive in informing the electorate of his record. Thus, the framers intent to protect the public trust in their elected officials is not thwarted by Sheriff Cassell s holding of the office of Sheriff and Tax Collector of Searcy County. To find otherwise can only be considered a ridiculous and absurd result. See State v. Oldner, 361 Ark. at 329 (Just as we will not interpret statutory provisions so as to reach an absurd result, neither will we interpret a

anner.). Finally, to the extent that precedent must be overturned to avoid the absurd result of removal of Sheriff Cassell from office, such reconsideration of the interpretation of Article 5, Section 9 is proper.

C. Remaining genuine issues of material fact

Genuine issues of material fact remain with regard to the public's knowledge and trust in Sheriff Cassell as well as his abilities in serving as an elected official. Accordingly, summary judgment cannot be properly granted. Further, such issues of fact must be determined by a jury upon completion of discovery.

IV. Conclusion

Because the State filed its motion for summary judgment prior to the proper time designated by Rule 56(a), it must be dismissed as premature. In addition, summary judgment is premature because Sheriff Cassell has not even had the opportunity to begin the discovery process. If the summary-judgment motion is considered, it must be denied. Unlike theft, a conviction of possession of stolen goods simply does not fit within the classification of an infamous crime disqualifying a person from holding office. Moreover, Sheriff Cassell's conviction upon a plea of guilty neither impugns the integrity of the office nor impacts his ability to serve as an elected public official. To find otherwise can only be considered a ridiculous and absurd result.

Respectfully submitted,

Kenny Webster Cassell, Defendant

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above pleading was forwarded in the U.S. Mail with sufficient postage to Cody Hiland, Prosecuting Attorney, Faulkner County Courthouse, 609 Locust Street, Conway, Arkansas 72034 and Chris Carnahan, Deputy Prosecuting Attorney, P.O. Box 912, Marshall, Arkansas 72650-0912, this ____ day of November, 2011.

Joe Don Winningham