

IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

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 Winningham, 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,

such averment 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.

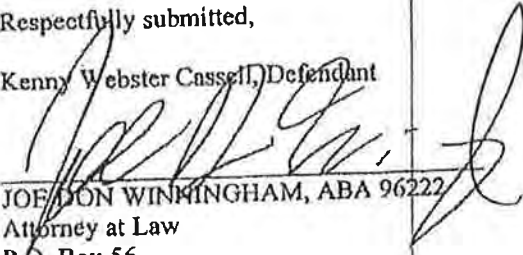
5. Also, in its Petition, the State, in an apparent attempt to erase the distinction between theft and possession of stolen goods, refers to the statute at issue as "18 U.S.C. § 659 Embezzlement or Theft of Interstate of Interstate or Foreign Shipments by Carrier." While Chapter 31 of Title 18 is entitled "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 WINKINGHAM, ABA 96222
Attorney at Law
P.O. Box 56
Conway, Arkansas 72033

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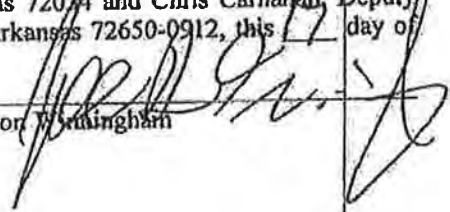
U. 43

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 72074 and Chris Carnahan, Deputy Prosecuting Attorney, P.O. Box 912, Marshall, Arkansas 72650-0912, this 17 day of November, 2011.

Joe Dorning



IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

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

pertain, and are not necessary, to 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.

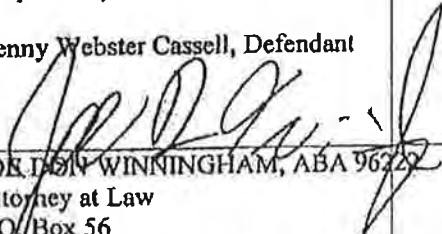
Also, in its Petition, the State, in an apparent attempt to erase the distinction between theft and possession of stolen goods, refers to the statute at issue as "18 U.S.C. § 659 Embezzlement or Theft of Interstate or Foreign Shipments by Carrier." While Chapter 31 of Title 18 is entitled "Embezzlement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

statutory section, 18 U.S.C. § 659, 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,

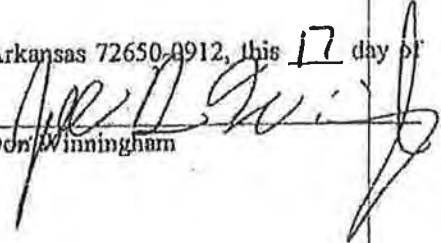
Kenny Webster Cassell, Defendant


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

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 17 day of
November, 2011.


Joe Don Winningham



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IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

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).

6. 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; . . .”

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.

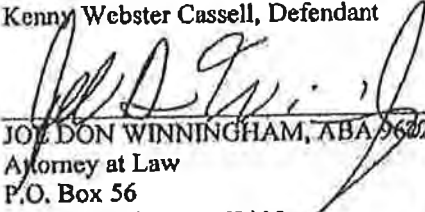
9. Pursuant to Ark. R. Civ. P. 12(a)(2), if this Court denies the instant motion or postpones its disposition until the trial on the merits, “the responsive pleading shall be filed within 10 days after notice of the court’s action.” In accordance with Rule 12(a)(2), Sheriff Cassell will file a responsive 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.

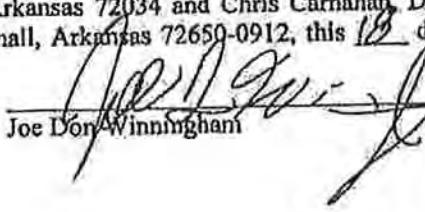
Respectfully submitted,

Kenny Webster Cassell, Defendant


JOE DON WINNINGHAM, ABA 96222
Attorney at Law
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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 18 day of November, 2011.


Joe Don Winningham



IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

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

(20) days of service upon him. Thus, 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.

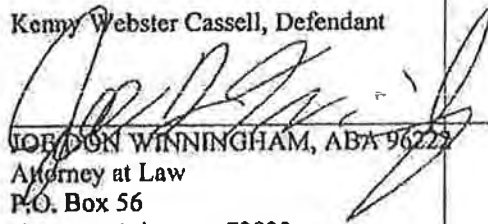
Additionally, in its Petition, the State fails to present its claims in numbered paragraphs, as required by Ark. R. Civ. P. 10(b). Rule 10(b) provides that "[a]ll averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to 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

respond to each *numbered* claim. See James v. Williams, 372 Ark. 82, 270 S.W.3d 855 (2008).

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.

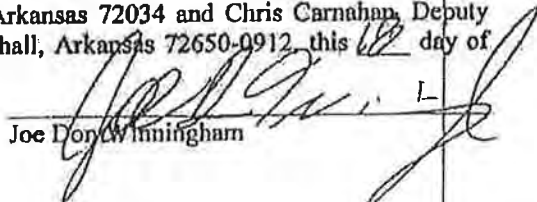
Respectfully submitted,

Kenny Webster Cassell, Defendant


JOE DON WINNINGHAM, ABA 96223
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501-513-4930 Fax 501-513-4931

CERTIFICATE OF SERVICE

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Joe Don Winningham



IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

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.

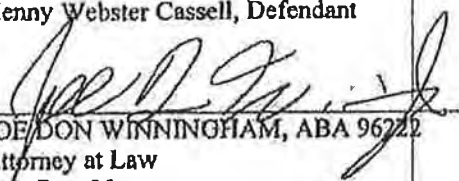
3. In the event that this Court ignores the requirement set out in Rule 56(a) that the State cannot file a motion for summary judgment until twenty (20) days after this action is properly commenced and the requirement that parties be allowed to complete discovery prior to consideration of a summary-judgment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

WHEREFORE, the defendant, Kenny Cassell, prays that the motion for summary judgment be denied; and for all 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

CERTIFICATE OF SERVICE

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Joe Don Winningham



IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

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

action or after service of a motion 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

appropriate until Sheriff Cassell is 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.

Such evidence is also inadmissible 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"

Article 5, Section 9 of the 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

the context of Article 5, Section 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

Oldner case, the Court concluded 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

constitutional provision in such a manner."). 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


JOE DON WINNINGHAM, ABA 96222

Attorney at Law

P.O. Box 56

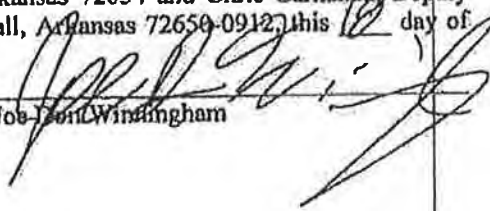
Conway, Arkansas 72033

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 12 day of November, 2011.

Jobi Lynn Windingham



IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

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 Winningham, 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 . . ."

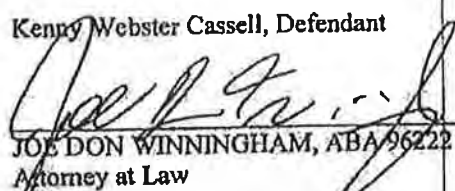
2. Hearings to show cause are special statutory proceedings adopted by the General Assembly in specific situations. The essence of a show cause hearing is to place the burden of proof on the summoned party. See e.g., Bob Cole Bonding v. State, 340 Ark. 641, 13 S.W.3d 147 (2000) (holding summoned bonding 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.

WHEREFORE, the defendant, 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.

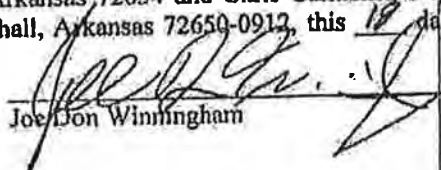
Respectfully submitted,

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 18 day of November, 2011.


Joe Don Winingham



IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
TWENTIETH JUDICIAL DISTRICT
Division II

STATE OF ARKANSAS

PLAINTIFF

VS.

Case NO. CV 2011-53

KENNY WEBSTER CASSELL
(a.k.a. Kenney Cassell)

AMENDED PETITION FOR REMOVAL FROM OFFICE

COMES NOW, the State of Arkansas, and for its petition for removal from office
doth respectfully state the following:

1. On October 9, 1979, Kenny Webster Cassell pled guilty to a misdemeanor violation of 18 USC §659 Embezzlement or Theft of Interstate or Foreign Shipments by Carrier. The Honorable Paul X. Williams, United States District Judge, found that Cassell had "[p]ossessed 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, ..." This conviction followed a Harrison Division, District Court Jury Trial for a felony violation of the same statute which resulted in a mistrial (see Exhibit I, United States District Court Transcript from the National Archives).
2. Cassell was sentenced by Judgment and Probation/Commitment Order and Order Amending Judgment to supervision by the United States Attorney General of one year on condition that Cassell be confined in a jail-type institution for a period of thirty (30) days, with eleven (11) months suspended incarceration, probation after his release from incarceration and a three

hundred dollar (\$300.00) fine. This crime occurred while Cassell was serving as a Searcy County Deputy Sheriff. *Id.*

3. In the October 15, 2009, edition of the *Marshall Mountain Wave*, Cassell in a paid political advertisement entitled "A Message from Kenny Cassell, Republican Candidate for Searcy County Sheriff, to the Citizens of Searcy County," admitted, "[t]hirty-one years ago, when I was twenty-one years of age, I violated the laws of this land and plead guilty to the mi[s]deameanor charge of theft by receiving," (Exhibit II).
4. Mr. Cassell was elected Sheriff and Collector of Searcy County in the November General Election of 2010, and is currently serving in that capacity.
5. Article 5, §9 of the Arkansas Constitution states concerning the effect of a criminal conviction of a public officer:

"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."

6. The Arkansas Supreme Court in *State v. Oldner*, 361 Ark. 316, 327, 206 S.W.3d 818, 822 (2005) decided that "an infamous crime" under Article 5, §9 of the Arkansas Constitution includes crimes involving the elements of deceit or dishonesty. Also, the Court found 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. *Id.* At 332, 206 S.W.3d at 826-27. Mayor Oldner had been convicted by a jury of witness tampering and the Prosecuting Attorney sought his removal from office following this conviction. *Id.*

7. In *Edwards v. Campbell*, 2010 Ark. 398, 2010 Ark. Lexus 489 (2010), the Mayor of Greenwood, who had been convicted in District Court of theft of property for the removal of campaign signs of a group opposed to the mayor's position for a tax increase, argued that a bright-line test of eligibility to hold office upon conviction should be rejected in place of a totality of the circumstances test. *Id at* *10, **13-14. The Court found this argument to be unpersuasive and held that misdemeanor theft "is a crime of dishonesty and, as such, fits readily within the classification of an 'infamous crime.'" *Id at* *10-11, **14-15. Furthermore the Count stated:

"In short, a person exhibits dishonesty when he or she knowingly takes unauthorized control of someone else's property or obtains that property through deception or threat with the purpose of depriving the owner of the property, whether three campaign signs worth two dollars are taken or a case worth thirty thousand dollars is taken."

Id at *10, **13.

8. In *Ridgeway v. Catlett*, 238 Ark. 323, 379 S.W.2d 277 (1964), the Supreme Court held that even crimes committed before a person takes office are disqualifying in the terms of Article 5, §9, and not even a pardon can restore a convicted persons right to hold public office (See also, *Allen v. State*, 327 Ark. 350, 357, 939 S.W.3d 270, 274 (1997), holding that one found guilty of an infamous crime is disqualified from holding public office in perpetuity.).

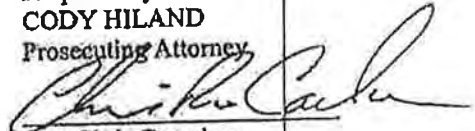
CONCLUSION

9. Mr. Cassell's 1979 conviction of misdemeanor theft , an infamous crime, bars him from holding the office of Searcy County Sheriff and Collector. Because

of this conviction, the Arkansas Constitution mandates that Mr. Cassell be removed from the office of Searcy County Sheriff, and this Court should issue an order of removal without delay.

WHEREFORE, the State of Arkansas respectfully requests this Court order the removal of Defendant Kenny Webster Cassell from the Office of Searcy County Sheriff and Collector; and for all other relief to which the State may be Entitled

Respectfully Submitted,
CODY HILAND
Prosecuting Attorney

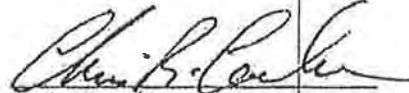


By: Chris Carnahan
ABN 2006101
Deputy Prosecuting Attorney
P.O. Box 550
Conway, AR 72033
(501) 450-4927



CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was transmitted by hand delivery to Joe Don Winningham, Attorney at Law, 564 Locust, Conway, AR 72034, on this 28th day of December, 2011.


Chris Camahan,
Deputy Prosecuting Attorney

JC 72

Add. 70

IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

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. In his Amended Petition for Removal from Office, the Prosecuting Attorney alleges that Sheriff Cassell is barred from holding the office of Sheriff and Collector of Searcy County based on a 1979 misdemeanor conviction of possession of stolen property. See Amended Petition for Removal from Office.

2. Because the Prosecuting Attorney's petition fails to state a claim upon which relief can be granted, dismissal is proper pursuant to Ark. R. Civ. P. 12(b)(6).

3. In considering what type of convictions are "infamous crimes" disqualifying individuals from holding public office pursuant to Art. 5, § 9, the Arkansas Supreme Court has recognized a two-part test. Convictions must involve involve dishonesty and deceit comparable to the crimes listed in the constitutional provision, and they must directly impact the official's ability to serve. See State v. Oldner, 361 Ark. 316, 206 S.W.3d 818 (2005); Edwards v. Campbell, 2010 Ark. 398.

4. Because the conviction at issue does not involve the same overt acts of deceit and dishonesty as the crimes listed in Art. 5, § 9, or as the crimes of abuse of office and witness tampering, or theft considered in the Oldner and Edwards cases, the 1979 conviction cannot be considered an "infamous crime" such that the Prosecuting

Attorney's petition for removal must be dismissed for failure to state a claim upon which relief can be granted. See Ark. R. Civ. P. 12(b)(6).

5. Dismissal is also proper because the Prosecuting Attorney fails to allege that the 1979 conviction directly impacts Sheriff Cassell's ability to serve as an elected public official.

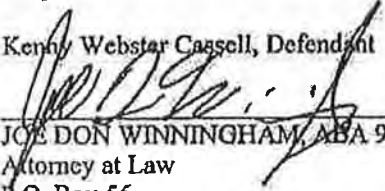
6. Moreover, even if the Petition did include such allegation, dismissal is still proper. Sheriff Cassell's 1979 conviction upon a plea of guilty to possession of stolen goods neither impugns the integrity of the office nor impacts his ability to serve as an elected public official, particularly in light of his publication of his conviction prior to the 2010 election.

7. A brief in support of this motion is contemporaneously filed herewith.

WHEREFORE, the defendant, Kenny Webster Cassell, prays that his motion to dismiss 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
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 2nd day of February, 2012.


Joe Don Winningham

IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

CASE NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

MEMORANDUM BRIEF IN SUPPORT OF MOTION TO DISMISS

In his Amended Petition for Removal from Office, the Prosecuting Attorney alleges that pursuant to Article 5, Section 9 of the Arkansas Constitution, Sheriff Kenny Webster Cassell is barred from holding the office of Sheriff and Collector of Searcy County based on a 1979 misdemeanor conviction of possession of stolen property. See Amended Petition for Removal from Office. Article 5, Section 9 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 or trust or profit in this State.

In considering what type of convictions are "infamous crimes" disqualifying individuals from holding public office pursuant to Art. 5, § 9, the Arkansas Supreme Court has recognized a two-part test. See State v. Oldner, 361 Ark. 316, 206 S.W.3d 818 (2005), which provides as follows:

Not only do these crimes [of abuse of office and witness tampering] involve dishonesty and deceit but, more importantly, they directly impact Oldner's ability to serve as an elected public official. . . . The integrity of the office of Mayor would be impugned by allowing Oldner to remain in that office.

See also Edwards v. Campbell, 2010 Ark. 398, which provides 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.

In considering the first part of the test, the Court has applied the doctrine of *ejusdem generis*, "when general words follow specific words in a statutory enumeration the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words," and the doctrine of *noscitur a sociis*, which "provides that a word can be defined by the words accompanying it," to interpret the meaning of "infamous crimes." Based on these rules of interpretation, the Court held that because the crimes listed in Art. 5, § 9 share the common elements of dishonesty and deception, "infamous crimes" must be crimes involving elements of deceit and dishonesty. State v. Oldner, supra (holding abuse of office and witness tampering involve dishonesty and deceit). See also Edwards v. Campbell, supra (holding theft involves dishonesty and deceit).

Applying these same rules of interpretation to determine whether possession of stolen goods can be considered an "infamous crime," the conviction at issue does not involve the same overt acts of deceit and dishonesty as the crimes listed in Art. 5, § 9, or as the crimes of abuse of office and witness tampering, or theft. Thus, the 1979 conviction cannot be considered an "infamous crime" such that the Prosecuting Attorney's petition for removal must be dismissed for failure to state a claim upon which relief can be granted. See Ark. R. Civ. P. 12(b)(6).

Secondly, the Arkansas Supreme Court has held that in order for a crime to be considered an "infamous crime," the conviction must "directly impact [the official's] ability to serve as an elected public official," or "impugn the integrity of the office." State v. Oldner, supra. Because the Prosecuting Attorney fails to allege that the 1979

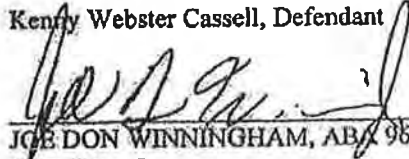
conviction directly impacts Sheriff Cassell's ability to serve as an elected public official, his Petition must be dismissed for failure to state a claim upon which relief can be granted. See Ark. R. Civ. P. 12(b)(6). Moreover, even if the Petition did include such an allegation, dismissal is still proper. Sheriff Cassell's 1979 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 conviction prior to the 2010 election. Unlike the Mayor of Greenwood in the Edwards case or the Mayor of Dumas in the Oldner case, 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 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 constitutional provision in such a manner.").

In sum, a conviction of possession of stolen goods cannot be considered an "infamous crime" barring Sheriff Cassell from serving as Sheriff and Tax Collector of Searcy County. Unlike the crimes listed in Art. 5, § 9, possession of stolen goods is not an overt act of dishonesty and deceit such that it cannot be classified as an "infamous crime." Moreover, the Prosecuting Attorney fails to allege that the second part of the test for determining "infamous crimes" has been met. Thus, dismissal of the Prosecuting Attorney's petition is proper for failure to state a claim upon which relief can be granted.

Finally, even if the petition did address the second part of the test and included an allegation that Sheriff Cassell has impugned the integrity of the office, dismissal is still proper because based on the allegations in the complaint and Arkansas law, the conviction at issue does not impugn the integrity of the office.

Respectfully submitted,

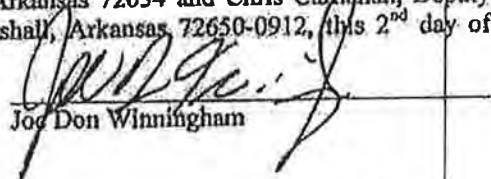
Kenny Webster Cassell, Defendant



JOE DON WINNINGHAM, ABX 98222
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 Carrigan, Deputy Prosecuting Attorney, P.O. Box 912, Marshall, Arkansas 72650-0912, this 2nd day of February, 2012.



Joe Don Winningham



IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

CASE NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

RESPONSE TO AMENDED PETITION FOR REMOVAL FROM OFFICE

Comes now the defendant, Kenny Webster Cassell, by and through his attorney, Joe Don Winningham, and for his Response to Amended Petition for Removal from Office does state as follows:

1. Sheriff Cassell admits that on October 9, 1979, he entered a plea of guilty to a misdemeanor violation of 18 U.S.C. § 659. Based on argument raised in the contemporaneously filed Renewed Motion to Strike and Brief in Support, he denies that the heading of this statutory section is Embezzlement or Theft of Interstate or Foreign Shipments by Carrier. He does not deny or admit that this conviction followed a jury trial for a felony violation of the same statute which resulted in mistrial on the basis that such averment must be stricken due to being irrelevant and immaterial, as argued in the contemporaneously filed Renewed Motion to Strike and Brief in Support.
2. Sheriff Cassell admits the allegations in Paragraph 2.
3. Sheriff Cassell admits the allegations in Paragraph 3.
4. Sheriff Cassell admits the allegations in Paragraph 4.
5. Article 5 § 9 of the Arkansas Constitution, referenced by the State in Paragraph 5, speaks for itself.
6. State v. Oldner, 361 Ark. 316 (2005), referenced by the State in Paragraph 6, speaks for itself.

7. Edwards v. Campbell, 2010 Ark. 398 (2010), referenced by the State in Paragraph 7, speaks for itself.

8. Ridgeway v. Catlett, 238 Ark. 323, 379 S.W.2d 277 (1964) and Allen v. State, 327 Ark. 350 (1997), referenced by the State in Paragraph 8, speak for themselves.

9. Sheriff Cassell denies the allegations in Paragraph 9, including but not limited to a denial that he was convicted of misdemeanor theft, as argued in the contemporaneously filed Renewed Motion to Strike and Brief in Support.

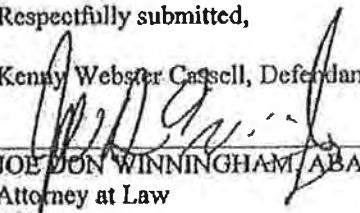
10. Pursuant to Ark. R. Civ. P. 12(b)(6), the petition must be dismissed for failure to state a claim upon which relief can be granted. A motion to dismiss based on Rule 12(b)(6) and brief in support is contemporaneously filed herewith.

11. Sheriff Cassell hereby requests a jury trial based on the issues of fact to be decided in this matter.

WHEREFORE, the defendant, Kenny Webster Cassell, prays that the Amended Petition for Removal from Office be denied; and for all 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

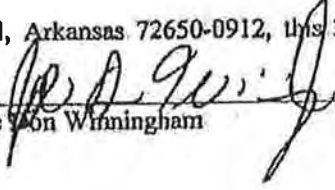
Conway, Arkansas 72033

501-513-4930 Fax 501-513-4931

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 2nd day of February, 2012.


Joe Don Winningham



IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

CASE NO. CV 2011-53

KENNY WEBSTER CASSELL

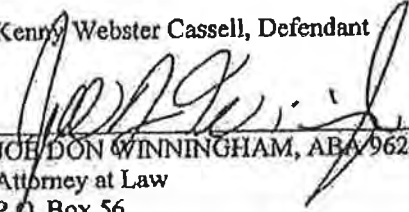
DEFENDANT

RENEWED MOTION TO STRIKE AND BRIEF IN SUPPORT

Comes now the defendant, Kenny Webster Cassell, by and through his attorney, Joe Don Winningham, and for his Renewed Motion to Strike and Brief in Support does hereby state that he renews and reiterates each and every argument raised in his Motion to Strike and Brief in Support as to the State's Amended Petition for Removal from Office, which reiterates word for word the State's initial Petition for Removal.

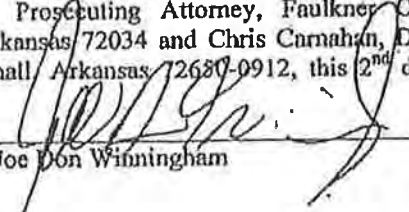
Respectfully submitted,

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

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Joe Don Winningham



IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

STATE OF ARKANSAS

PLAINTIFF

V.

CASE NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

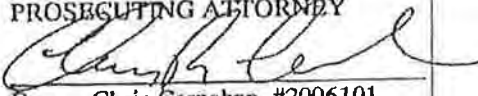
**STATE'S RESPONSE TO DEFENDANT'S
MOTION TO DISMISS**

Comes now the State of Arkansas and for its Response to Defendant's Motion states:

1. The State of Arkansas admits paragraph one of Defendant's Motion.
2. The State of Arkansas denies paragraph two of Defendant's Motion.
3. The State of Arkansas admits that "infamous crimes" disqualifies any individual convicted of theft as being disqualified from holding public office, but denies that the Supreme Court has required a finding that the Constitutional bar to holding office requires that the dishonesty and deceit involved in the crime must impact the official's ability to serve. Therefore, paragraph three of Defendant's Motion is denied.
4. The State of Arkansas denies paragraph four of Defendant's Motion.
5. The State of Arkansas denies paragraph five of Defendant's Motion.
6. The State of Arkansas denies paragraph six of Defendant's Motion.
7. The brief in opposition to Defendant's Brief in Support of Defendant's Motion to Dismiss is incorporated hereto, and is filed with this Response.

WHEREFORE, the State of Arkansas requests that the Court deny Defendant's Motion to Dismiss and for all other proper relief.

CODY HILAND
PROSECUTING ATTORNEY


By: Chris Carnahan, #2006101
Deputy Prosecuting Attorney
P. O. Box 912



Marshall, Arkansas 72650

(870) 448-5630

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing pleading was served upon all attorneys of record for each of the parties to this action, in the following manner:

- By hand delivering a copy to the attorney;
- by Facsimile;
- By mailing a copy of the pleading by U.S. Mail to the following attorney(s):

Mr. Joe Don Wittingham
P.O. Box 56
Conway, Arkansas 72033

on this 10th day of February, 2012.

by: CC 

IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

STATE OF ARKANSAS

PLAINTIFF

V.

CASE NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

STATE'S BRIEF IN RESPONSE TO DEFENDANT'S
MOTION TO DISMISS

Article 5, §9 of the Arkansas Constitution states:



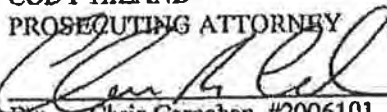
"No person hereafter convicted of embezzlement of public money, bribery, forgery or other infamous crime shall be eligible to the General Assembly or capable of holding any office of trust or profit in this State."

In *Edwards v. Campbell*, 2010 Ark. 398, 2010 Ark. Lexus 489 (2010), the Mayor of Greenwood, Kenneth Edwards, had been convicted in Greenwood District Court of theft of property for the removal of campaign signs of a group opposed to the mayor's position for a ballot initiative concerning a local tax increase. Edwards argued a conviction for misdemeanor theft of property was not an infamous crime under the Arkansas Constitution, and that even if a conviction for theft of property was found to be an infamous crime, that the court should reject a bright-line test of eligibility to hold office upon conviction and instead utilize a totality of the circumstances test in dealing with such convictions. *Id at *10, **13-14*. The Court found these arguments to be unpersuasive and held that misdemeanor theft "is a crime of dishonesty and, as such, fits readily within the classification of an 'infamous crime.'" *Id at *10-11, **14-15*. Furthermore, the Court stated:

"In short, a person exhibits dishonesty when he or she knowingly takes unauthorized control of someone else's property or obtains that property through deception or threat with the purpose of depriving the owner of the property, whether three campaign signs worth two dollars are taken or a case worth thirty thousand dollars is taken." *Id at 10, **13*.

Defendant was convicted of a theft crime involving dishonesty. Therefore,
Defendant is ineligible to hold any position of trust or profit in this state.

CODY HILAND
PROSECUTING ATTORNEY


By: Chris Carnahan, #2006101
Deputy Prosecuting Attorney
P. O. Box 912
Marshall, Arkansas 72650

(870) 448-5630

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing pleading was served upon all attorneys of record for each of the parties to this action, in the following manner:

By hand delivering a copy to the attorney;

by Facsimile;

By mailing a copy of the pleading by U.S. Mail to the following attorney(s):

Mr. Joe Don Winningham
P.O. Box 56
Conway, Arkansas 72033

on this 20th day of February, 2012.

by: 

IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
2ND DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

65CV-11-53

KENNY WEBSTER CASSELL

DEFENDANT

ORDER OF RECUSAL

The undersigned, all Judges sitting in the Twentieth Judicial District for the State of Arkansas, have found it necessary, due to conflicts of interest, to recuse from any further action in reference to the above styled matter.


We hereby recuse and request that a Special Judge from outside the district be appointed to dispose of the above case.

DATED this 21st day of February, 2012.


HONORABLE DAVID L. REYNOLDS
FIRST DIVISION


HONORABLE DAVID CLARK
FOURTH DIVISION


HONORABLE MICHAEL MAGOO
SECOND DIVISION


HONORABLE RHONDA WOOD
FIFTH DIVISION


HONORABLE CHARLES CLAWSON
THIRD DIVISION



SEARCY COUNTY & CIRCUIT CLERK
RECORDED and CERTIFIED

In Book Circuit 72
Page 259 this 15th day
of March 2012
Debbie Leggins Clerk
by Kandyce Regland D.C.

SUPREME COURT OF ARKANSAS

No. 12-113

STATE OF ARKANSAS

PLAINTIFF

VS.

KENNY WEBSTER CASSELL

DEFENDANT

Opinion Delivered: April 13, 2012

MOTION FOR ASSIGNMENT OF
JUDGE, TWENTIETH JUDICIAL
CIRCUIT, SEARCY COUNTY,
ARKANSAS
CASE NO. 65CV 2011-53

GRANTED.

ORDER

Under the authority vested in the Chief Justice of the Supreme Court of Arkansas by Act 496 of 1965 as amended, and Ark. Const. Amend. 80, and in response to the written request of Hon. Michael A. Maggio, Judge David Clinger, Retired, is hereby assigned to the 20th Judicial Circuit to hear the following case:

State of Arkansas v. Kenny Webster Cassell
Searcy County Circuit Court Case No. 65CV 2011-53

This assignment includes all ancillary proceedings which may arise in connection with said cause, and proceedings subsequent thereto shall be held at such time or times as shall be directed and ordered by Judge Clinger.

This order made and entered this 13th day of April, 2012.

FILED

APR 13 2012

**LESLIE W. STEEN
CLERK**

J. Harrell
Chief Justice



IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
TWENTIETH JUDICIAL DISTRICT
SECOND DIVISION



STATE OF ARKANSAS

PLAINTIFF

VS.

Case NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

AMENDED MOTION FOR SUMMARY JUDGMENT

COMES NOW, the State of Arkansas, and for its amended motion for summary judgment, doth respectfully state the following:

I

This is an action for the removal of Kenny Webster Cassell as the Sheriff and Collector of Searcy County, Arkansas.

This case is set for hearing on June 21, 2012. The State has filed herein a certified copy of the United States District Court, Harrison Division, Judgment and Probation/Commitment Order and Order Amending Judgment, from the National Archives (Exhibit I) and a copy from the October 15, 2009, edition of the *Marshall Mountain Wave*, "A Message from Kenny Cassell, Republican Candidate for Searcy County Sheriff, to the Citizens of Searcy County" (Exhibit II).

The State does not intend to offer any additional evidence. There is only the question of whether Mr. Cassell can hold the office of Sheriff and Collector of Searcy County as a result of his misdemeanor conviction for 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, an infamous crime.

II

The Supreme Court has stated concerning summary judgment that, "We have ceased referring to summary judgment as a 'drastic' remedy and now simply regard it as one of the tools in a trial court's efficiency arsenal . . . The purpose of summary judgment is not to try the issues, but to determine whether there are any issues to be tried." *Laird v. Shelnut*, 348 Ark. 632, 74 S.W.3d 206 (2002).

There are no factual issues to be decided in this case other than the fact of Mr. Cassell's conviction for violating 18 USC §659 Embezzlement or Theft of Interstate or Foreign Shipments by Carrier. This conviction is conclusively established by the District Court transcript, and the only disputed issue is the legal effect of the conviction. The fact that Defendant knowingly possessed stolen goods directly impacts Defendant's ability to serve in any position of trust or profit under the Arkansas Constitution. The crime committed, while Defendant was a Deputy Sheriff, demonstrates the very lack of fitness for the office that Defendant currently holds and manifestly holds in disrepute the duties of the chief law enforcement officer and the collector of tax moneys in Searcy County.

Additionally, Defendant's argument that telling the electors of Searcy County that he had gotten in some trouble when he was younger should act as some cleansing palliative resulting in their election of Defendant fails on several fronts. Defendant was not forthcoming in his 2009 add in the local newspaper, rather he was deliberately vague (See Exhibit 2). Additionally, there can be no ratification by election for his previous acts. The Arkansas Supreme Court has held that not even a pardon can overcome the effect of being convicted of an infamous crime *Ridgeway v. Catlett*, 238 Ark. 323, 324-25, 379 S.W.2d 277, 278-79 (1964). Because there is not a specific provision in the Constitution, nor a demonstration some legal precedent, elections are not a restorative to

one's privilege to hold public office. Rather the opposite is true, conviction of any infamous crime, especially crimes involving the deceit or dishonest displayed by Deputy Sherriff Kenny Cassel in 1978 in receiving Cornish game hens that he knew to be stolen, is a complete bar to holding the office of Sheriff and Collector of Searcy County.

WHEREFORE, the State of Arkansas respectfully requests this Court grant summary judgment ordering the removal of Defendant Kenny Webster Cassell from the Office of Searcy County Sheriff and Collector; and for all other relief to which the State may be entitled.

Respectfully Submitted.
CODY HILAND
Prosecuting Attorney



By: Chris Carnahan, ABN 2006101
Deputy Prosecuting Attorney
P.O. Box 550
Conway, AR 72033
(501) 450-4927

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was transmitted by hand delivery to Joe Don Winningham, Attorney at Law, 564 Locust, Conway, AR 72034, on this 15th day of June, 2012.



Chris Carnahan,
Deputy Prosecuting Attorney

IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
TWENTIETH JUDICIAL DISTRICT
SECOND DIVISION



STATE OF ARKANSAS

PLAINTIFF

VS.

Case NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

PLAINTIFF'S AMENDED BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

FACTS

On October 9, 1979, Kenny Webster Cassell pled guilty to a misdemeanor violation of 18 USC §659 Embezzlement or Theft of Interstate or Foreign Shipments by Carrier. The Honorable Paul X. Williams, United States District Judge, found that Cassell had "[p]ossessed 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, ..." This conviction followed a Harrison Division, District Court Jury Trial for a felony violation of the same statute which resulted in a mistrial (see Exhibit I, United States District Court Transcript from the National Archives).

Cassell was sentenced by Judgment and Probation/Commitment Order and Order Amending Judgment to supervision by the United States Attorney General of one year on condition that Cassell be confined in a jail-type institution for a period of thirty (30) days, with eleven (11) months suspended incarceration, probation after his release from incarceration and a three hundred dollar (\$300.00) fine. This crime occurred while Cassell was serving as a Searcy County Deputy Sheriff. *Id.*

In the October 15, 2009, edition of the *Marshall Mountain Wave*, Cassell in a paid political advertisement entitled "A Message from Kenny Cassell, Republican Candidate for Searcy County Sheriff, to the Citizens of Searcy County," admitted, "[t]hirty-one years ago, when I was twenty-one years of age, I violated the laws of this land and plead guilty to the mi[s]deamnor charge of theft by receiving," (Exhibit II).

Mr. Cassell was elected Sheriff and Collector of Searcy County in the November General Election of 2010, and is currently serving in that capacity.

ARGUMENT

Article 5, §9 of the Arkansas Constitution states concerning the effect of a criminal conviction of a public officer:

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.

In *State v. Oldner*, 361 Ark. 316, 323-24, 206 S.W.3d 818, 819-21 (2005), the Mayor of Dumas, Clay Oldner, had been convicted by a jury of witness tampering and the Prosecuting Attorney sought his removal from office following this conviction. Argument before the Court centered on whether witness tampering was "an infamous crime" under Article 5, §9 of the Arkansas Constitution. *Id.* The Court held that "infamous crimes include crimes involving the elements of deceit or dishonesty. *Id.* at 331. Also, the Court found 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. *Id.* at 332, 206 S.W.3d at 826-27.

In *Edwards v. Campbell*, 2010 Ark. 398, 2010 Ark. Lexus 489 (2010), the Mayor of Greenwood, Kenneth Edwards, had been convicted in Greenwood District Court of

theft of property for the removal of campaign signs of a group opposed to the mayor's position for a tax increase. Edwards argued a conviction for misdemeanor theft of property was not an infamous crime under the Arkansas Constitution, and that even if a conviction for theft of property was found to be an infamous crime, that the court should reject a bright-line test of eligibility to hold office upon conviction and instead utilize a totality of the circumstances test in dealing with such convictions. *Id at* *10, **13-14. The Court found these arguments to be unpersuasive and held that misdemeanor theft "is a crime of dishonesty and, as such, fits readily within the classification of an 'infamous crime.'" *Id at* *10-11, **14-15. Furthermore the Court stated:

"In short, a person exhibits dishonesty when he or she knowingly takes unauthorized control of someone else's property or obtains that property through deception or threat with the purpose of depriving the owner of the property, whether three campaign signs worth two dollars are taken or a case worth thirty thousand dollars is taken."

Id at *10, **13.

Additionally, the Court refused to adopt a totality of the circumstances test in dealing with misdemeanor convictions. *Id at* **13-14. Edwards did not appeal the misdemeanor conviction in his criminal trial. *Id at* **3. Thus, the Court held that any attempt to revisit the circumstances surrounding a conviction post-judgment was a collateral attack on the final judgment of the lower court, and as such the Court would not reconsider the arguments properly held at trial. *Id at* 14.

There are no factual issues to be decided in this case other than the fact of Mr. Cassell's conviction for violating 18 USC §659 Embezzlement or Theft of Interstate or Foreign Shipments by Carrier. This conviction is conclusively established by the District Court transcript, and the only disputed issue is the legal effect of the conviction. The fact

that Defendant knowingly possessed stolen goods directly impacts Defendant's ability to serve in any position of trust or profit under the Arkansas Constitution. The crime committed, while Defendant was a Deputy Sheriff, demonstrates the very lack of fitness for the office that Defendant currently holds and manifestly holds in disrepute the duties of the chief law enforcement officer and the collector of tax moneys in Searcy County.

Additionally, Defendant's argument that telling the electors of Searcy County that he had gotten in some trouble when he was younger should act as some cleansing palliative resulting in their election of Defendant fails on several fronts. Defendant was not forthcoming in his 2009 add in the local newspaper, rather he was deliberately vague (See Exhibit 2). Additionally, there can be no ratification by election for his previous acts.

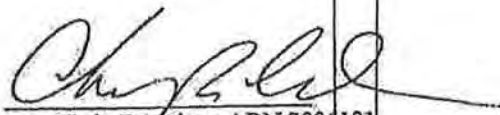
Also, in *Ridgeway v. Catlett*, 238 Ark. 323, 379 S.W.2d 277 (1964), the Supreme Court held that even crimes committed before a person takes office are disqualifying in the terms of Article 5, §9, and not even a pardon can restore a convicted persons right to hold public office (See also, *Allen v. State*, 327 Ark. 350, 357, 939 S.W.3d 270, 274 (1997), holding that one found guilty of an infamous crime is disqualified from holding public office in perpetuity.).

Because there is not a specific provision in the Constitution, nor a demonstration some legal precedent, elections are not a restorative to one's privilege to hold public office. Rather the opposite is true, conviction of any infamous crime, especially crimes involving the deceit or dishonest displayed by Deputy Sherriff Kenny Cassel in 1978 in receiving Cornish game hens that he knew to be stolen, is a complete bar to holding the office of Sheriff and Collector of Searcy County.

CONCLUSION

Mr. Cassell's 1979 conviction of misdemeanor theft, an infamous crime, bars him from holding the office of Searcy County Sheriff and Collector. Because of this conviction, the Arkansas Constitution mandates that Mr. Cassell be removed from the office of Searcy County Sheriff, and this Court should issue an order of removal without delay.

Respectfully Submitted.
CODY HILAND
Prosecuting Attorney



By: Chris Carnahan, ABN 2006101
Deputy Prosecuting Attorney
P.O. Box 550
Conway, AR 72033
(501) 450-4927

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was transmitted by hand delivery to Joe Don Winningham, Attorney at Law, 564 Locust, Conway, AR 72034, on this 15th day of June, 2012.



Chris Carnahan,
Deputy Prosecuting Attorney

IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
TWENTIETH JUDICIAL DISTRICT
SECOND DIVISION



STATE OF ARKANSAS

PLAINTIFF

VS.

Case NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

PLAINTIFF'S RESPONSE TO MOTION TO STRIKE

COMES NOW the State of Arkansas and for its response to Defendant's Motion to Strike doth state:

Defendant seeks to strike statements made in the petition, none of which are particularly relevant to the legal issues that control this case.

Defendant appears to concede that he was initially charged with a felony that went to jury trial that ended in a mistrial. The statement that the defendant complains about is a true statement. In other pleadings filed in this case, the defendant seeks to minimize his conduct and argue that the conduct does not reflect upon his ability to serve in public office. If the defendant is permitted to minimize the defendant's conduct, then the state should be permitted to put his conduct in proper context with a truthful statement regarding the initial felony charge.

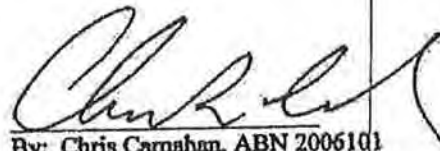
The State's ultimate position is that this case presents a question of law, not of fact. However, if the Court permits introduction of evidence by the defendant that attempts to minimize his conduct, the State should be permitted to put his conduct in proper context with truthful statements like that which the defendant seeks to strike from the petition.

Additionally, the defendant seeks to strike reference to the title of the federal statute under which the defendant was charged with a felony. After the guilty plea, the defendant was sentenced under the same statute. A debate about what the title of the statute is does not contribute to the resolution of the legal question before the court; neither does the title to the statute rise to the level of impertinent or scandalous matter required by the Rule 12(f).

The defendant's motion should be denied. In the alternative, the Court should rule on the legal issues before it, resolution of which would render the motion to strike moot.

Respectfully Submitted.

CODY HILAND
Prosecuting Attorney



By: Chris Carnahan, ABN 2006101
Deputy Prosecuting Attorney
P.O. Box 550
Conway, AR 72033
(501) 450-4927

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was transmitted by hand delivery to Joe Don Winningham, Attorney at Law, 564 Locust, Conway, AR 72034, on this 15th day of June, 2012.



Chris Carnahan,
Deputy Prosecuting Attorney

IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

CASE NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

RESPONSE TO AMENDED MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, Kenny Webster Cassell, by and through his attorney, Joe Don Winningham, and for his Response to Amended 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. Following defective service, the State filed an Amended Petition and Amended Motion for Summary Judgment.

2. Summary judgment is not proper with regard to whether Sheriff Cassell must be removed from office based on a 1979 conviction entered on a plea of guilty to possession of stolen goods of less than \$100.00 in value. Based on Article 5, Section 9 of the Arkansas Constitution, and the cases interpreting this Section, Sheriff Cassell is eligible to hold the office to which he was elected.

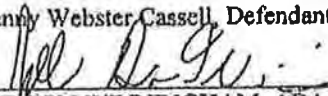
3. A brief in further support of this response to amended motion for summary judgment is contemporaneously filed herewith.

WHEREFORE, the defendant, Kenny Cassell, prays that the amended motion for summary judgment be denied; and for all other proper relief to which he is entitled.

Respectfully submitted,



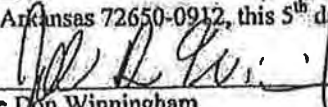
Kenny Webster Cassell, Defendant



JOE DON WINNINGHAM, ABA 96722
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 5th day of July, 2012.



Joe Don Winningham

IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

CASE NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

MEMORANDUM BRIEF IN SUPPORT OF
AMENDED 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.

Due to defective service of process, the State subsequently filed an Amended Petition and Amended Motion for Summary Judgment in which it restated its allegations and arguments. During the pendency of the instant case, the voters of Searcy County again elected Sheriff Cassell to hold the office of Sheriff of Searcy County in the May, 2012 primary election.



I. Evidence to be properly considered in summary judgment

Rules of evidence must be recognized in analyzing the State's summary judgment motion such that inadmissible evidence must be excluded from analysis of the motion. 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.

Such evidence is also inadmissible 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.

II. Summary Judgment motion must be denied on 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"

Article 5, Section 9 of the 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.

The cases, Ridgeway v. Catlett, 238 Ark. 323, 379 S.W.2d 277 (1964) and Allen v. State, 327 Ark. 350, 939 S.W.3d 270 (1997), cited in the State's brief, are of limited precedential value in the instant case because these cases involved the issue of eligibility when a candidate had been convicted of embezzlement, a disqualifying crime listed in Article 5, Section 9.

In State v. Oldner, 361 Ark. 316, 327, 206 S.W.3d 818 (2005), the Arkansas Supreme Court, considering for the first time what constitutes an "infamous crime" disqualifying a person from holding office, 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 the context of Article 5, Section 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. Such an interpretation is further supported by the rule of law that constitutional restrictions on holding office must be liberally construed. See e.g., State v. Jacobson, 558 P.2d 292 (Wash. App. Div. 2 1976) ("A strong public policy that exists in favor of eligibility for public office such that the constitution, where language and context allow, should be construed as to preserve eligibility."). 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 (emphasis supplied). 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 Oldner case, the Court concluded 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 so that the first part of the test is not satisfied. Moreover, the second part of the test is not satisfied because 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 constitutional provision in such a manner."). 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 definition and interpretation of "infamous crime" in Article 5, Section 9 based on the degree of punishment, intent of the General Assembly, and facts of the case, as raised in the Edwards case, is proper.

C. Remaining genuine issues of material fact

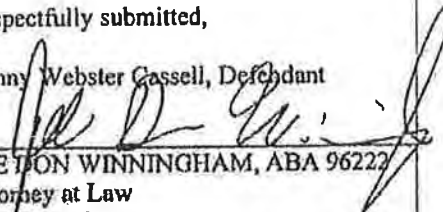
Genuine issues of material fact exist with regard to the public's knowledge and trust in Sheriff Cassell as well as his abilities in serving as an elected official. A finder of fact must determine whether Sheriff Cassell impugned the integrity of his office. Accordingly, summary judgment cannot be properly granted.

IV. Conclusion

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. 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 definition and interpretation of "infamous crime" in Article 5, Section 9 is proper.

Respectfully submitted,

Kenny Webster Cassell, Defendant



JOE DON WINNINGHAM, ABA 96222

Attorney at Law

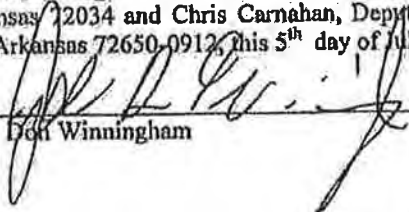
P.O. Box 56

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 5th day of July, 2012.



Joe Don Winningham

IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
TWENTIETH JUDICIAL DISTRICT
SECOND DIVISION

STATE OF ARKANSAS

PLAINTIFF

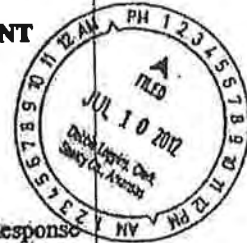
VS.

Case NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE
TO MOTION FOR SUMMARY JUDGMENT



COMES NOW the State of Arkansas and for its Reply to Defendant's Response to Motion for Summary Judgment doth state:

Pursuant to 18 U.S.C. § 659, "[w]hoever...has in his possession any such money, baggage, goods or chattels knowing (emphasis added) the same to have been embezzled or stolen" shall be fined under Title 18 or imprisoned not more than 10 years or both, except that if the value of such property is less than \$1,000.00, he shall be fined and imprisoned for not more than one year. Defendant in his Memorandum Brief in Support of Amended Response to Motion for Summary Judgment ("Response") concedes that he pled guilty to "possessing property, of less than 100.00 in value, knowing the same to have been embezzled or stolen." See Response at page 1.

In *Edwards v. Campbell*, 2010 Ark. 398 __S.W.3d__ (2010), the Arkansas Supreme Court found that theft of property was an "infamous crime" because it involved the requisite elements of deceit and dishonesty. The Arkansas theft statute, Ark. Code Ann. § 5-36-103 (a) states, "A person commits theft of property if he or she knowingly (emphasis added) (1) takes or exercises unauthorized control over or makes an unauthorized transfer of an interest in property of another person with the purpose of

depriving the owner thereof; or (2) Obtains the property of another person by deception or by threat with the purpose of depriving the owner of the property.”

The question before the Court is whether the conduct prohibited by 18 U.S.C. § 659 is an infamous crime. The requisite mental state to establish a violation of 18 U.S.C. § 659 is “knowing” that property is stolen. Similarly, the Arkansas theft of property statute, held to be an infamous crime by the Arkansas Supreme Court, requires the mental state of “knowingly”. The conduct prohibited is also similar. 18 U.S.C. § 659 prohibits the possession of goods, knowing them to have been stolen. Ark. Code Ann. § 5-36-103 prohibits knowingly exercising control of property of another with the purpose to deprive the owner of the property. The conduct prohibited by the two statutes is not identical, but is very similar. The conduct prohibited is so similar that this Court should find that the federal crime committed by the Defendant is an infamous crime, just as the Arkansas Supreme Court has found theft of property to be an infamous crime.

The Defendant’s conduct might not constitute theft of property under Arkansas law, only because theft by receiving is a separate statute. Ark. Code Ann. § 5-36-106 provides that “[a] person commits the offense of theft by receiving if he or she receives, retains, or disposes of stolen property of another person (1) knowing (emphasis added) that the property was stolen or (2) having good reason to believe the property was stolen. There is no rational basis for a court to conclude that theft of property involves deceit and dishonesty, but theft by receiving does not involve deceit and dishonesty, yet that is what the Defendant is asking this Court to do.

The defendant also suggests that the Arkansas Supreme Court established a two-part test for removal from office. First, the defendant must have committed an infamous

crime, and second, the crime must impugn the integrity of his office. This argument is without merit. Section 5 of Article 9 of the Arkansas Constitution makes those convicted of an "infamous crime" ineligible to hold public office. There is no requirement that a Defendant's conduct further impugn the office for that defendant to be ineligible. The fact that the defendant in *Edwards v. Campbell* held public office does not change the rule stated by the court in that case. The Defendant in this case did not hold public office, it is therefore impossible for his crime to have impugned his office.

The rule in *Edwards v. Campbell* is not limited to conduct committed while in office. No issues of material fact offered by the defendant relate to whether the defendant committed an infamous crime, factual issues relate only to whether the office was impugned. Neither the Arkansas Constitution nor the Arkansas Supreme Court require an office to be held and impugned before a person is ineligible to hold office. The Defendant's argument is without merit. There are no genuine issues of material fact to be decided. This Court should grant the State's motion for summary judgment.

WHEREFORE, the State of Arkansas again respectfully requests this Court grant summary judgment ordering the removal of Defendant Kenny Webster Cassell from the Office of Searcy County Sheriff and Collector; and for all other relief to which the State may be entitled.

Respectfully Submitted.

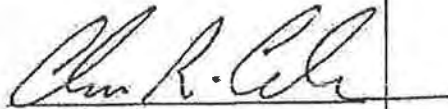
CODY HILAND
Prosecuting Attorney



By: Chris Carnahan, ABN 2006101
Deputy Prosecuting Attorney
P.O. Box 550
Conway, AR 72033
(501) 450-4927

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was transmitted by hand delivery to Joe Don Winningham, Attorney at Law, 564 Locust, Conway, AR 72034, on this 9th day of July, 2012.



Chris Carnahan,
Deputy Prosecuting Attorney

IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

CASE NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, Kenny Webster Cassell, by and through his attorney, Joe Don Winningham, and for 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 solely based on a 1979 conviction entered on a plea of guilty to possession of stolen goods of less than \$100.00 in value. Following defective service, the State filed an Amended Petition and Amended Motion for Summary Judgment to which Sherriff Cassell filed a timely response.

2. Following a July 16, 2012 hearing, this Court denied the State's motion for summary judgment based on its finding that pursuant to the cases interpreting Ark. Const. Art. 5, § 9, removal of Sherriff Cassell from office is not proper solely based on the 1979 misdemeanor conviction. Rather, this Court found that based on these cases, the State must additionally prove facts showing that Sherriff Cassell's crime impugned the integrity of the office and directly impacted his ability to serve as an elected official. See Transcript of Motion Hearing, dated July 16, 2012, which is attached hereto as Exhibit A.

3. Because the State is unable to present any facts to support a finding that the


aforementioned requirement has been satisfied, summary judgment in favor of Sherrif Cassell is proper. See Plaintiff's Answers to Defendant's First Set of Interrogatories and Requests for Production of Documents Propounded to the Plaintiff, attached hereto as Exhibit B.

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

WHEREFORE, the defendant, Kenny Cassell, prays that his motion for summary judgment be granted; and for all other proper relief to which he is entitled.

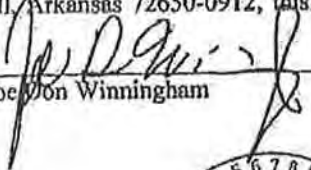
Respectfully submitted,

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

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 26 day of July, 2012.


Joe Don Winningham



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IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

STATE OF ARKANSAS

PLAINTIFF

vs. CV-2011-53

KENNY WEBSTER CASSELL

DEFENDANT

MOTION HEARING

BEFORE
THE HONORABLE DAVID CLINGER
SPECIAL JUDGE
20th Judicial District
Marshall, Arkansas

July 16, 2012

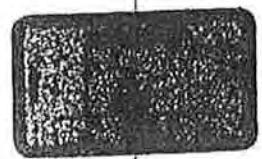
Appearances:

On behalf of Plaintiff:

HON. CODY HILAND
Prosecuting Attorney
HON. CHRIS CARNAHAN
Deputy Prosecuting Attorney
609 Locust Street
Conway, AR 72034

On behalf of Defendant:

HON. JOE DON WINNINGHAM
Attorney at Law
564 Locust Street
Conway, AR 72034



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(Call to the Order of the Court.)

THE COURT: This is State versus Ken Cassel. Am I saying that right?

MR. WINNINGHAM: Cassell.

THE COURT: Cassell.

Is the State ready to proceed?

MR. CARNAHAN: The State is ready, Your Honor.

THE COURT: The Defense ready?

MR. WINNINGHAM: Yes, sir, Your Honor.

THE COURT: All right.

Now, gentlemen, as we talked about in chambers, there are about two or motions that are pending. One of them is the Defense motion to dismiss. And as I recall, there's at least two basis; one that the crime in question is not a infamous crime --

MR. WINNINGHAM: Yes, sir.

THE COURT: -- and, two, failure to state a cause of action.

MR. WINNINGHAM: Yes, sir.

THE COURT: All right. Are you ready to --

MR. WINNINGHAM: Yes, sir.

THE COURT: -- speak your peace?

MR. WINNINGHAM: Yes, sir.

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THE COURT: Okay, go ahead.

MR. WINNINGHAM: Thank you, Your Honor.

Your Honor, the two main cases where this issue has come before the Supreme Court is Edwards v. Campbell, 2010 Ark. 398, and the State v. Oldner, 361 Ark. 316.

In Edwards v. Campbell, that was a declaratory judgment action. There was a current mayor. He was currently the mayor running for reelection. He was found guilty of theft.

In that case, the Supreme Court in citing the Oldner Case stated that Article 5, Section 5 states that "No person here and after 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."

This Court concluded citing the Oldner Case and stated that "An infamous crime included crimes involving deceit and dishonesty. Additionally, this Court embraced in Oldner that infamous crimes are those that impugn the integrity and directly impact the person's ability to serve as an elected official."

"Mr. Edwards was a public official who perpetrated --" and this is the Court talking "-- who perpetrated

1 a theft while in office and who now seeks to be
2 reelected to the same office of public trust. By his
3 actions, he was impugned. He has impugned the
4 integrity of the office."

5 The State in State v. Oldner, 361 Ark. 316, 2006
6 SW3d, 818, a 2005 Supreme Court Case, it was a case
7 while in office the mayor was charged with theft of --
8 theft, public record tampering, abuse of office, and witness
9 tampering.

10 On Page 6 of that opinion, the Court stated "Not only
11 do these crimes involve dishonesty and deceit but are
12 importantly -- they directly impact Oldner's ability to
13 serve as an elected official."

14 Nothing in their amended petition states anything at
15 all, Your Honor, about the impact -- there's nothing in
16 their amended petition as to how Mr. Cassell's 1975 (sic)
17 conviction of possession of stolen property of less
18 than \$100, nothing in there states as to how that has
19 directly impacted his ability to serve as sheriff or
20 how he has impugned the integrity of the office of the
21 sheriff.

22 There's nothing in their response in Mr. Cassell's
23 motion to dismiss about that issue. And I sent them
24 interrogatories. In their interrogatories their answer
25 to Number 8: Please state specific facts that you

1 intend to use at trial to show the defendant has
2 impugned the integrity of the Searcy County Sheriff's
3 Office.

4 The answer was: All the facts the State will
5 present are listed in Plaintiff's amended petition for
6 removal from office and Plaintiff's submitted motion
7 for summary judgement.

8 Number 13 I asked: Please state where the
9 Defendant's 1979 misdemeanor conviction now affects the
10 Defendant's ability to serve the Searcy County -- as
11 Searcy County Sheriff.

12 Their answer was: The Defendant is ineligible as
13 a matter of law to serve in any elected capacity, any
14 position of trust or profit per the Constitution.

15 I also sent them request for admissions, Your
16 Honor. In those request for admissions I asked: Admit
17 or deny that the Defendant's 1979 misdemeanor
18 conviction directly impacts the Defendant's ability to
19 serve as a Searcy County Sheriff.

20 The State objected and basically stated it called
21 for a legal conclusion.

22 I asked to admit or deny -- in my Number 2 -- that
23 the Defendant's '79 misdemeanor conviction currently
24 impugns the integrity of the Office of the Searcy
25 County Sheriff.

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State objected, stated that it calls for a legal conclusion.

Our argument based on that motion, Your Honor, is that the Court, in defining infamous crime in the earlier case that I cited, the Oldner Case, the Court stated that it was a case of first impression because they've never defined infamous crime before.

I think that is important with the Court saying "and additionally." It has to be a crime involving deceit or dishonesty.

And the Court says, "Additionally, it must impugn the integrity of the office or impact his ability to serve as sheriff."

In the past thirty-one years the Sheriff has been mainly in drywall. He's been elected four times. He did basically just the opposite of what I think the intent of the law is in that before he ran for election he ran an ad telling everybody about this conviction.

I think that if you don't have that two-part test in there, you end up with the results that -- and you end up real -- with really a very bad slippery slope. I mean, you have crimes such as battery 3rd, DWI, voyeurism, sexual assault 4th, contributing to the delinquency of a minor buying alcohol for minors. All of those crimes can involve dishonesty and deceit.

1 When someone is driving down the road, they know
2 they shouldn't be drinking and, in fact, could kill
3 somebody. And those are also overt acts where people
4 intentionally go out and do certain things. There's a
5 difference between being in possession of stolen goods
6 than actually going out and stealing something.

7 I think that there is that two-part test. There's
8 been nothing shown to this Court in the pleadings as to
9 how 33 years ago having some frozen chickens of a value
10 of less than a hundred dollars has impacted his ability
11 to serve as sheriff.

12 The rules are the rules. They have to address
13 that in their response or in the discovery and they
14 didn't also in their petition. The State is basically
15 saying, "He was convicted of this crime and that's it."

16 That'd be the same thing, I guess, if someone was
17 18 years old and their buddy went and stole a couple of
18 pieces of bubble gum, go outside, throw it in the back,
19 you chew it, and you get convicted. You can't forty --
20 thirty-something years later run for office because
21 technically you could be charged with theft by
22 receiving.

23 And I guess it could even apply to juveniles cause
24 I believe juvenile records -- if you were thirteen you
25 could -- if you wanted to be in law enforcement they

1 could go back and look at the juvenile records.

2 But there's nothing in there -- there's that two-
3 part test. There's nothing to show -- there's no facts
4 that the State has presented to show that he has
5 impugned the integrity of the office or that 33 years
6 ago in 1979 that misdemeanor conviction affects his
7 ability to serve as sheriff. And the people of Searcy
8 County don't believe so because they've elected him
9 four times.

10 Your Honor, that basically is my argument on my
11 motion to dismiss.

12 THE COURT: All right.

13 MR. WINNINGHAM: And, Your Honor, I believe I
14 sent you those two cases.

15 THE COURT: I think both of you sent me those
16 cases.

17 MR. WINNINGHAM: Yes, sir.

18 MR. CARNAHAN: May I, Your Honor?

19 THE COURT: Yes, sir.

20 MR. CARNAHAN: Your Honor, of course we're
21 opposed to what Mr. Joe Don said about the ultimate
22 result. In fact, in Edwards what you had was a current
23 office holder who committed a crime while he was the
24 office holder. And I believe that that is what the
25 Supreme Court was talking about impugning the integrity

1 of the office when he currently held it.

2 Sheriff Cassell, in 1979, although he was a deputy
3 sheriff, he didn't hold an elected position. He held
4 an important position but not an elected position. The
5 fact that he was convicted of that crime makes him
6 ineligible to apply to be the sheriff to begin with,
7 not that it -- he has to have an opportunity to commit
8 a crime while in office and have that crime impugn the
9 integrity of the office.

10 As far as Mr. Winningham's argument about whether
11 or not the theft by receiving is dissimilar to theft of
12 property, both of these crimes involve an element of
13 knowing. You have to know what you're doing. You have
14 to know that you're receiving stolen goods just like
15 you have to know that you're stealing stolen property.

16 Additionally, you're having to claim unauthorized
17 control over the property. Both of these -- both theft
18 and theft by receiving require both of these elements.
19 And if you look at the Federal Statute 18 USC 569, it
20 requires the same mental elements of knowing that
21 you're taking property. That was the statute that the
22 sheriff pled guilty to in 1979.

23 The fact of the matter is, Your Honor, the State's
24 position is there is just one element for this -- one
25 element making the Sheriff ineligible to hold office.

1 And what that element is is that he committed a crime
2 and that crime that he pled guilty to disqualifies him
3 because it's a crime that is of deceit or dishonesty,
4 which the Supreme Court held in Oldner and in Edwards,
5 that that's what's required because it is in fact an
6 infamous crime. Therefore, under Article 5, Section 9,
7 Sheriff Cassell is ineligible to file for sheriff much
8 less continue to hold the office of sheriff and seek
9 reelection to it. Thank you.

10 THE COURT: Yes, sir.

11 You're rebuttal?

12 MR. WINNINGHAM: Your Honor, the only thing I
13 would say, the Constitution lists specific crimes. It
14 lists forgery. It list embezzlement of public funds
15 and bribery and then it has this vague clause of
16 infamous crime. Until recently it was never even
17 defined. In 1979 nobody even knew what the Supreme
18 Court was going to say as to what an infamous crime
19 was.

20 I mean, it -- they came up -- to me they have a
21 two-part test or they wouldn't say the words
22 "additionally," "and". They keep saying those in those
23 cases, that it's a crime --

24 THE COURT: Actually they say, "more
25 importantly."

1 MR. WINNINGHAM: Yes, sir.

2 I believe it's in the -- I can't -- I believe it's
3 in the Oldner Case they actually say "more importantly"
4 after they get to the fact that he had committed this
5 -- an act of dishonesty or deceit and then say "more
6 importantly".

7 And so the reason that I think that they have this
8 test out there is that if you do -- if you do just a
9 bright line -- if they didn't have that language in
10 there and you do a bright line that, "Well, 33 years
11 ago you got a misdemeanor so you can't run," then you
12 create situations that really are absurd that -- it's
13 just not right.

14 I mean, I'm getting off the law, but it's just not
15 right that a man can -- when -- if he does something
16 when he's twenty years old that's a misdemeanor, it's
17 not a felony, that -- the pledge that they sign talks
18 about felonies. People can't vote if they get
19 felonies. They have that two-part test for infamous
20 crime so that you don't create situations -- I mean, I
21 guess, you could come up with anything that involves --
22 any type of breaking the law would involve dishonesty
23 or deceit.

24 That's why those two cases are distinguishable
25 from Mr. Cassell. Those two gentlemen were in office

1 at the time and committed these crimes while they were
2 in office and that's why the Court kept talking about
3 what was important is that it impugned the integrity of
4 the office. It affected their ability to serve.

5 There's been nothing in the pleadings, in the
6 discovery, contradicting the fact that the sheriff --
7 there's nothing out there that that's true for him.
8 That's the difference in this case, Your Honor.

9 THE COURT: Well, one of the advantages I have
10 perhaps over you attorneys that you all have full-time
11 jobs and I get to spend all my time on one case at a
12 time. And I have studied these cases thoroughly trying
13 to glean from them the basis of your respective sides.

14 We're looking now at the motion to dismiss. On
15 the motion to dismiss, I'm overruling it. I'm finding
16 that theft by receiving involves dishonesty.

17 Now, I'm also going to overrule that portion of
18 your motion that says they failed to state a cause of
19 action. I think they have alleged sufficiently --
20 alleged sufficient facts to get this matter brought
21 before a judge or a jury and so the motion to dismiss
22 is overruled.

23 MR. WINNINGHAM: Yes, sir.

24 THE COURT: That brings up, I believe, the
25 State's motion for summary judgement.

1 MR. CARNAHAN: Correct, Your Honor.

2 THE COURT: All right. I'm ready for argument on
3 that.

4 MR. CARNAHAN: And, Your Honor, I'll try to be
5 brief.

6 In effect, the motion for summary judgement the
7 Supreme Court has held is one where there no issues of
8 material fact that are alleged to be out there that
9 need to have a determination by a finder of fact,
10 whether it's a judge hearing the case on his own or
11 through a jury.

12 The sole issue of material fact in this case and
13 the only fact that matters is that Kenny Cassell in
14 1979 pled guilty to an infamous crime, theft of
15 interstate commerce, and that disqualifies him from
16 holding the office of sheriff. No other facts are
17 relevant to the determination of this case.

18 Are there facts under which the circumstances of
19 the plea to be looked at or all this -- no, that --
20 you're attacking an original judgement at that point.
21 So the only fact, the only pertinent fact in this case
22 is does the conviction as a matter of law disqualify
23 Sheriff Cassell from continuing to hold that office.
24 That is the State's position. I thank you for your
25 time.

1 THE COURT: All right.

2 MR. WINNINGHAM: Your Honor, in our response,
3 which is part of the file, one thing we argue is there
4 are outstanding facts due to what the Court said both
5 in the Edwards Case and in Oldner. And basically
6 saying -- it goes back again to the two-part test.
7 And when the Court stated, I believe, in the Oldner
8 Case and more importantly when if found that the
9 gentlemen had committed an act of dishonesty or deceit,
10 there's -- I think that in order to meet that test
11 there has to be some facts out there that Mr. Cassell
12 has impugned the integrity of the office. They have
13 not alleged any -- I mean, they -- or that he -- his
14 actions affect him being able to serve as the sheriff.

15 The cases -- the State argues that that's really
16 not part of the test but I respectfully disagree. I
17 think it is part of the test because the term "infamous
18 crime" is just so vague and both cases talk about that.

19 The later case where you had the gentleman from
20 Greenwood, the Court said it must be a crime of
21 dishonesty and deceit and additionally it must impugn
22 the integrity of the office and must impact his
23 ability.

24 I think that there's a -- the fact that the
25 Sheriff ran an ad telling everyone beforehand, before

1 he even ran for office, shows that it goes directly
2 opposite against that. I mean, that's what we want in
3 public officials. He didn't try to hide or cover up
4 anything. He told everybody before the election and
5 then he's been elected four times.

6 I'd respectfully disagree with the State and
7 believe that there are -- we have an argument that
8 there's facts that have to be presented as to whether
9 or not he's impugned the integrity of the office. It's
10 not just that he was convicted. That's not what the
11 cases say. Thank you, Your Honor.

12 THE COURT: Yes, sir.

13 Rebuttal?

14 MR. CARNAHAN: Your Honor, I'm drawing your
15 attention to Exhibit No. 2 that's part of the file
16 which is a copy of the ad that Sheriff Cassell and his
17 campaign ran October/November of 2009.

18 In that he does say that he was convicted of theft
19 by receiving. That's an un-controverted fact. Both
20 parties agree on that, which I think even helps our
21 position that there is not -- there are no material
22 facts to be determined in this. But if one wants to
23 take it further, the facts of that conviction weren't
24 gone into by the Sheriff. I mean, he didn't say that
25 he was a deputy sheriff taking Cornish game hens off of

1 Tyson trucks as they came through Searcy County. He
2 didn't say that. He said he had a misdemeanor theft by
3 receiving and then he won a political campaign.

4 I find nothing in anything the Supreme Court has
5 said -- or any court reviewing facts similar to these
6 that says an election is a palliative, that is is holy
7 water that absolves you of your sins. It's one of
8 those things -- and maybe it's something that the
9 Supreme Court made an error on. But the fact of the
10 matter is the Supreme Court has held if you are
11 convicted of a crime that is infamous -- and as you've
12 just ruled theft by receiving is an infamous crime --
13 then you're ineligible to hold any position of trust or
14 profit in this state. That doesn't mean Mr. Cassell
15 can't be a law enforcement officer. But what it does
16 mean, he can't be sheriff and tax collector in this
17 county. Thank you.

18 THE COURT: Again, I appreciate the clearness
19 with which both sides have briefed this issue and
20 attempted to make me as aware as possible of what the
21 state of our law is, and it's a little bit confusing.

22 Unless I'm mistaken -- and I stand to be
23 corrected, but I don't believe any of these cases
24 involve a situation where a person -- like we have
25 here. In other words, a person before they've even

1 considered the idea of running for office committing a
2 misdemeanor and then later running for office and the
3 State moves to disqualify him or block his election
4 because of this misdemeanor as an infamous crime.
5 Right?

6 I mean, the only case I remember that -- where
7 there was a crime before the person ran was the
8 Ridgeway Case and that was a embezzlement of public
9 funds, felony, so cut and dried.

10 MR. WINNINGHAM: Yes, sir.

11 THE COURT: All that one stood for -- this one
12 kind of threw me when the Supreme Court said that not
13 even a pardon -- and not even a presidential pardon can
14 restore your right to run for office. That's -- to me,
15 that's an odd ruling because I don't see anything in
16 the Constitution where the framers limited the
17 pardoning power. They gave the -- they showed
18 disqualifying crimes, but they didn't say anything that
19 limited the governor's pardon or even more importantly
20 the president.

21 So anyway, we've got a case, I think, of first
22 impression here and whereas I have specifically found
23 that theft by receiving is a -- could classify as
24 infamous crime, I agree with you, Mr. Winningham that
25 there's got to be more to it.

1 The language -- I thought that Corbin was kind of
2 going off on just a --oh, you know how judges do
3 sometimes. They talk too much and they'll make a
4 ruling and then they'll throw things in that look --
5 that just confuse everybody else later on down the line
6 trying to, "Well, did that -- was that part of the
7 ruling? Were they really --"

8 Because in this one case, I think it might have
9 been Oldner -- no, it's Edwards where they were asked
10 to revisit Oldner and do away with the bright-line
11 rule, and they said, "We refuse to." Even though -- in
12 other words, the way I took it, they said, "We're not
13 going to go retry the crime." That's what I thought
14 they were saying, "You can't come back and tell us
15 that, you know, the -- how pitiful stealing three
16 campaign signs is. He pled guilty or he was found
17 guilty and we're not going to revisit that and we're
18 going to keep a bright-line rule."

19 And you could read that into saying they're saying
20 simply, "You commit the crime, you know, you do the
21 time," period.

22 I didn't read it that way and just -- in this
23 Oldner Case, and that was a Dumas mayor and --
24 interesting, I thought, in their approach. They -- he
25 was found guilty of two misdemeanors; witness

1 tampering, an A misdemeanor, and then he -- they go
2 into the facts. They said he asked two city employees
3 to lie; probably to a prosecutor or state police
4 investigator.

5 It also then abuse of office because he caused
6 \$1,750 in city money to be use paving a parking lot for
7 his folks so -- for some of his family members.

8 The -- and I might say that this is the one in
9 which Corbin is talking about -- talking about the
10 first impression looking at infamous crime. And they
11 analyze the prior because then they're saying obviously
12 this impacted on his -- it reflects on the integrity of
13 his office. It's an abuse of office. It impacts on
14 his ability to appear fair. So they do a factual
15 analysis of what he did.

16 But I think one reason they did was because they
17 could then rule that as a matter of law if you're a
18 public official and you do witness tampering or you
19 spend city money illegally, you've compromised
20 yourself. And I get that -- I'm assuming they were --
21 that's why they did it.

22 But the -- I can't get away from the language.
23 You cited it and I think that it's -- the Supreme Court
24 points out that "The mayor's offenses are of a type
25 that directly impact his moral integrity because they

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are crimes involving dishonesty and deceit. But more importantly they directly impact the mayor's ability to serve as an elected public official."

It goes on: "The integrity of the office of mayor would be impaired by allowing Oldner to remain in that office. We believe this is the type of situation that the drafters of our Constitution sought to prevent through inclusion of the term 'infamous crime'."

And the -- of course, we also know that that case stood for the idea that even though he had been indicted by the prosecutor, he was reelected. They said -- he tried to argue the prior term business and they said, "No, once it -- once disqualified, you're always disqualified."

Then we go to that Edwards Case. And, again, it is a sitting Greenwood Mayor and he was convicted of misdemeanor theft, the three campaign signs. They did this during his current term. He filed for reelection and a citizen moved to block it. And they -- Edwards -- I guess Edwards got removed and on his appeal he said, "This isn't an infamous crime under the circumstances of this case," that's three campaign signs.

And they said, "We're not going to let -- we're not going back and retry it. If you're guilty, you're

1 guilty." And he didn't even appeal, by the way. But
2 that's one thing that they considered.

3 And then they go on to say, "Please --" Edwards is
4 saying, "Please consider the totality of the
5 circumstances surrounding the theft charge and
6 conviction on a case-by-case basis."

7 And they said, "No, we're -- we did the bright
8 line and we're going to stick with the bright line."

9 But they go on to again cite Oldner, and I don't
10 think you get away from the fact that they're looking
11 for more than just the mere fact that the Defendant
12 committed a misdemeanor crime some time in the past.
13 They say, "You got to do the infamous crime." And they
14 said that theft involves dishonesty, deceit, and
15 "impugn the integrity of the office and directly impact
16 the person's ability to serve as an elected official."

17 Now if the Sheriff had -- if the Sheriff had
18 committed this theft while in office, I think I
19 probably could rule as a matter of law. This seems to
20 have been what happened in all these other cases where
21 we had an elected official committing the crimes. But
22 we don't have that here and I think there's got to be
23 more. There's got to be a showing, I think, under
24 these two landmark cases that this -- this crime from
25 '79 -- that was the first year I was a prosecutor, long

1 time ago -- anyway, that the public awareness of his
2 having committed this crime impugned the integrity of
3 the office and directly impacted on the Sheriff's
4 ability to serve as an elected official. There's got
5 to be more, in my opinion.

6 So the upshot of this is that I'm overruling the
7 State's motion for directed verdict, -- for summary
8 judgement.

9 Now, that means that I -- I'm saying that there's
10 going to have to be some sort of factual showing to
11 finish out -- to reach the definition of infamous
12 crime.

13 I understand exactly why the prosecutor filed this
14 charge. I mean, if anybody thinks prosecutors like to
15 prosecute sheriffs, they're crazy. I know. I've done
16 it twice. So -- and I know the fallout that comes from
17 it. But still to have the highest law enforcement
18 officer in the county serving under a cloud is
19 something probably that needs to be cleared up.

20 And I think I may have told both of you gentlemen
21 on the phone when we were trying to schedule a hearing,
22 we're going to make some law here, and I think we are.

23 The prosecutor may not know whether -- I know the
24 defense has asked for a jury trial. Does the
25 prosecutor anticipate putting on additional evidence in

1 light of my ruling today?

2 MR. CARNAHAN: Your Honor, I think we have to, if
3 that's your ruling. I don't know if now is a good time
4 to ask you to reconsider that, but -- anyway, we'd have
5 to put on either through affidavit forms or -- if the
6 other side and you were willing to do that -- or
7 through live testimony.

8 THE COURT: Well, I'm ready to -- do y'all want
9 to confer on that? About whether you do it by
10 affidavit? I saw the -- all the citizens' names that
11 came to bat for the Sheriff back when he pled guilty.
12 I wouldn't want that many people -- we couldn't hold --
13 the courtroom wouldn't hold -- but it looks to me like
14 they'd be trying to prove some sort of impact and you'd
15 be trying to show no impact at all.

16 MR. WINNINGHAM: Yes, sir.

17 THE COURT: They've asked for a jury trial.
18 What's the response to that?

19 MR. CARNAHAN: Your Honor, again, I think these
20 are questions of law and not questions of fact but --
21 and I think it'd be the State's position that you would
22 be the proper person to hear the entire case.

23 THE COURT: Well, I'm going to confer with the
24 attorneys in chambers for a moment. I'm going to ask
25 the defense to draft an order --

1 MR. WINNINGHAM: Yes, sir.

2 THE COURT: -- reflecting my rulings today on
3 these two motions.

4 MR. WINNINGHAM: Yes, sir.

5 THE COURT: There's also a motion to strike, but
6 I'm just going to hold that in abeyance right now.

7 MR. WINNINGHAM: Yes, sir.

8 THE COURT: I'm going to meet with the attorneys
9 and we'll talk for a moment and we'll come back and put
10 it on the record. But we need to talk about scheduling
11 our next hearing and you might say the logistics of it.

12 And so let's take a short break and go into
13 chambers and then go -- we'll come back out and I'll --
14 we'll make any scheduling notice here in open court.

15 MR. WINNINGHAM: Yes, sir.

16 MR. CARNAHAN: Thank you, Your Honor.

17 (Whereupon, a brief recess was taken, after which
18 the following proceedings were had in open court, to
19 wit:)

20 THE COURT: For the information mainly to the
21 audience, we have conferred and there are a couple of
22 things that'll have to be resolved before we can
23 determine what our next hearing will actually be;
24 either be another motions here or be an actual trial.
25 And what I'll -- I'm asking the attorneys to get

1 together and pick a time next week where we can talk by
2 phone. And then whatever we decide, I'll ask one of
3 you to do -- draft an order which will then inform the
4 public on what our next hearing is going to be.

5 One of our problems is as you folks know, this
6 isn't my courtroom. It's Judge Maggio's. So we have
7 to coordinate with his case coordinator to determine
8 when I can actually have a courtroom to hear -- have
9 hearings or have a trial.

10 And so we'll do that next week and then we'll do
11 an order and it will be filed of record so that
12 everybody will know what the next hearing is going to
13 be and when.

14 Now, I asked you to do an order for today.

15 MR. WINNINGHAM: Yes, sir.

16 THE COURT: Anything that -- and I also said I'm
17 taking your motion to strike and holding it in a
18 abeyance.

19 MR. WINNINGHAM: Yes, sir.

20 THE COURT: All right.

21 Anything else that I need to do here today?

22 MR. CARNAHAN: Not that the State's aware of,
23 Your Honor.

24 MR. WINNINGHAM: No, sir.

25 THE COURT: All right. Tell me how to say the

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sheriff's last name again.

MR. WINNINGHAM: Cassell.

THE COURT: Cassell?

MR. WINNINGHAM: Yes, sir.

THE COURT: Okay, all right.

Then thank you all and we'll be in recess.

(WHEREUPON, these proceedings were concluded.)

1 STATE OF ARKANSAS
2 COUNTY OF FAULKNER
3 COURT REPORTER'S CERTIFICATE
4

5 I, MARY ELIZABETH (BETH) VINT, Official Court Reporter for
6 the Circuit Court of the Twentieth Judicial District of Arkansas
7 of which Faulkner County is a part, do hereby certify that I
8 reported the proceedings by Voice Writing in the case of STATE
9 of ARKANSAS vs. KENNY WEBSTER CASSELL, Searcy County Circuit No.
10 CV-2011-53, July 16, 2012, before the Honorable David Clinger,
11 Special Judge thereof, at Marshall, Arkansas; that said
12 proceedings have been reduced to transcription by me; and that
13 the foregoing pages numbered 1 through 27 constitute a true and
14 correct transcription of the proceedings held to the best of my
15 ability.

16 I FURTHER CERTIFY, that the cost incurred by Mr. Joe Don
17 Winningham, Counsel for the Defendant, for the preparations
18 thereof is \$114.80.

19
20 WITNESS MY HAND AND SEAL as such Court Reporter on this 17th
21 day of July, 2012.

22
23 CERTIFIED COURT REPORTER
MARY E. VINT
ARKANSAS SUPREME COURT NO. 366

M E Vint

24 MARY ELIZABETH (BETH) VINT, CCR, CVR
25 CERTIFICATE NO. 366

IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

CASE NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

**PLAINTIFF'S ANSWERS TO DEFENDANT'S FIRST SET OF
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS
PROPOUNDED TO THE PLAINTIFF**

COMES NOW the Plaintiff, the State of Arkansas, by and through its attorney,
Cody Hiland, and for its Answers to Defendant's First Set of Interrogatories and Requests
for Production of Documents Propounded to the Plaintiff, doth state the following:

Plaintiff is to read, interpret and answer these Interrogatories and Requests for Production
of Documents in accordance with the following definitions and instructions:

1. "You" or "Your" - Plaintiff; your attorney; or any person acting
on behalf of you;
2. "Communicate" or "Communication" - Every manner or means of
disclosure, transfer or exchange, and every disclosure, transfer or exchange of
information, whether orally or by document, or whether face-to-face, by telephone, mail,
personal delivery or otherwise;
3. "Document" - Each original, non-identical copy and draft, whether printed,
typewritten, recorded, handwritten or whether contained in any computer or word
processing system or any disk or other means of information (with a written description
of the steps to follow to retrieve the stored information), of the following items: files,
correspondence, memoranda, records, summaries of records, summaries of personal

conversations or interviews, minutes or records of meetings or conferences, opinions, reports of consultants, projections, statistical statements, drafts, contracts, agreements, telegrams, telexes, books, notes, reports, logs, diaries, tape recordings, charts, photographs, films, videotapes, notebooks, drawings, plans, checks, deposit or withdrawal slips, financial entries or records of any kind;

4. "Identify" -

(i) as to a person (as defined): name, business and residence address(es), business and residence telephone numbers, occupation, job title and dates so employed; and if not an individual, state the type of entity, the address of its principal place of business, and the name of its officers and directors;

(ii) as to a document: the type of document (letter, memo, etc.), the identity of the author or originator, the date authored or originated, the identity of each person to whom the original or copy was addressed or delivered, the identity of the person known or reasonably believed by you to have present possession, custody or control thereof, and a brief description of the subject matter thereof, all with sufficient particularity to request its production under Rule 34, Arkansas Rules of Civil Procedure;

(iii) as to a communication: the date of the communication, the type of communication (telephone conversation, meeting, etc.), the place where the communication took place, the identity of the person who made the communication, the identity of each person who received the communication and of each person present when it was made, and the subject matter discussed;

(iv) as to a meeting: the date of the meeting, the place of the meeting, each person invited to attend, each person who attended and the subject matter discussed.

INSTRUCTIONS

I. If any Interrogatory or Request for Production of Documents is not answered because of the claim of privilege, set forth the privilege claimed and the facts upon which you rely to support the claim of privilege.

II. If any document requested herein is withheld on the basis of a claim of privilege, supply a written description of each document, including:

- A. Identification of the person who prepared or wrote the document(s) and, if applicable, the person or persons to whom the document was sent or shown;
- B. The date on which the document was prepared or transmitted;
- C. The subject matter of the document;
- D. The nature of the document (i.e., telex, letter, memorandum, report, etc.);
- E. A statement of the type of privilege claimed; and A reference to the paragraph or paragraphs of the Request for Production of Documents to which the document is responsive

PLAINTIFF'S DEFINITIONS

20th Judicial Prosecuting Attorney's office – means Cody Hiland, who assumed office on January 1, 2011, and his deputy prosecutors.

INTERROGATORY NO. 1: Identify each person who assisted in the preparation of the Answers to these Interrogatories.

ANSWER: Cody Hiland, Chris Carnahan, and Ted Thomas.

INTERROGATORY NO. 2: Identify each fact witness whom you may call at the trial of this matter, and for each include their address and telephone number and state the subject matter of his/her testimony.

ANSWER: None. This is a question of law therefore the State will have no witnesses other than custodians of records, for a judgment of conviction that is attached Plaintiff's Amended Petition for Removal from Office and Plaintiff's Amended Motion for Summary Judgment.

REQUEST FOR PRODUCTION NO. 1: Produce each document that will be introduced at trial or relied upon by each fact witness identified in response to the preceding interrogatory.

ANSWER: None other than the documents attached Plaintiff's Amended Petition for Removal from Office and Plaintiff's Amended Motion for Summary Judgment.

REQUEST FOR PRODUCTION NO. 2: Please attach each chart, graph, Document, exhibit, and/or any type of physical or real evidence/exhibit to be displayed and/or introduced at trial.

ANSWER: None other than the documents attached Plaintiff's Amended Petition for Removal from Office and Plaintiff's Amended Motion for Summary Judgment.

INTERROGATORY NO. 3: Identify each expert witness whom you may call to testify at the trial of this matter and for each (1) state the subject matter on which he/she is expected to testify; (2) state the substance of the facts and opinions to which he/she is expected to testify; and (3) summarize the grounds for each opinion.

ANSWER: None.

REQUEST FOR PRODUCTION NO. 3: Produce curriculum vitae for each expert witness identified in response to the preceding interrogatory.

ANSWER: Not applicable, see Request for Production No. 2.

REQUEST FOR PRODUCTION NO. 4: Produce each report by each expert identified above and each document relied upon by each expert identified above.

ANSWER: Not applicable, see Request for Production No. 2.

INTERROGATORY NO. 4: Please list any legal treaties, briefs, notes, legal cases whether they are from State Courts or Federal Courts, and any State or Federal statues, and Constitutions the Plaintiff intends to rely on at trial per the Plaintiff's Petition for Removal from Office.

ANSWER: See cases cited in Plaintiff's Amended Petition for Removal from Office and Plaintiff's Amended Motion for Summary Judgment.

REQUEST FOR PRODUCTION NO. 5: Please attach hereto any legal treaties, briefs, notes, legal cases whether they are from State Courts or Federal Courts, any State or Federal statues, and any Constitutions the Plaintiff intends to rely on at trial per the Plaintiff's Petition for Removal from Office.

ANSWER: Plaintiff has provided Defendant with all relevant case material.

INTERROGATORY NO. 5: Please state whether or not anyone from the 20th Judicial Prosecuting Attorney's office or any Federal Agency has run a criminal background check on the Defendant and if so please state the name of the person who run such criminal background check on the Defendant and state the legal authority for doing said background check.

ANSWER: Deputy Prosecuting Attorney Chris Carnahan ran a criminal background check on or about May of 2011, upon hearing repeated rumors that Defendant had been convicted of a felony in the 1970's, thus making him ineligible to hold office. No such conviction was found. Deputy Prosecuting Attorney Chris Carnahan is authorized by Arkansas Code Annotated §12-12-1009, Dissemination of conviction information for noncriminal justice purposes, to review said information to ensure compliance with qualifications to hold office under the Constitution of the State of Arkansas. It is beyond Plaintiff's knowledge whether any Federal Agency ran a background check of Defendant's criminal past.

INTERROGATORY NO. 6: Please state whether the Defendant was given notice of any criminal background check run on the Defendant.

ANSWER: Plaintiff has provided no notice to Defendant other than the answer to Interrogatory No. 5. As for the actions of any Federal Agency, it is beyond the knowledge of the Plaintiff if any notice of a possible federal query was given to Defendant.

INTERROGATORY NO. 7: Please state how the 20th Judicial District Prosecuting Attorney's office learned of the Defendant's 1979 misdemeanor conviction and please state the name of the person, and or agency of the source such information, and when such information was obtained by the 20th Judicial District Prosecuting Attorney's office.

ANSWER: Plaintiff learned of Defendant's 1979 misdemeanor conviction from United States Treasury, Alcohol, Tobacco, and Firearms Agent Warren Newman on or about June of 2011, which was confirmed with the United States Attorney's Office for

the Western District of Arkansas, Assistant U. S. Attorney Steven N. Snyder. A certified copy was obtained from the National Archives after repeated attempts in October of 2011, and it has been attached to Plaintiff's Amended Petition for Removal from Office and Plaintiff's Amended Motion for Summary Judgment.

INTERROGATORY NO. 8: Please state the specific facts that you intend to use at trial to show that the Defendant has impugned the integrity of the Searcy County Sheriff's office.

ANSWER: All the facts the State will present are listed in Plaintiff's Amended Petition for Removal from Office and Plaintiff's Amended Motion for Summary Judgment.

INTERROGATORY NO. 9: Please state when the 20th Judicial District Prosecuting Attorney became first aware of the Defendant's newspaper advertisement the Defendant placed in the Marshall Mountain Waive Newspaper stating that he had been convicted of a misdemeanor in 1979.

ANSWER: On or about September 2011.

INTERROGATORY NO. 10: Please state whether or not a conviction for Theft is different from a conviction of possession of stolen goods.

ANSWER: Not for purposes of this case because both involve dishonesty. Because both above-mentioned crimes involved dishonesty, they are infamous crimes per Article 5 §9 of the Arkansas Constitution.

INTERROGATORY NO. 11: If the answer to the preceding Interrogatory is "yes" please state the reasons for such answer. If the answer to the preceding Interrogatory is "no" please state the reasons for such answer.

ANSWER: See reasons stated in Interrogatory No. 10.

INTERROGATORY NO. 12: Please state whether or not you think the Defendant is entitled to a jury trial in this matter and if the answer is "no" please state the specific reasons for such answer.

ANSWER: The Defendant is not entitled to a trial by jury on questions of law.

INTERROGATORY NO. 13: Please state whether the Defendant's 1979 misdemeanor conviction now affects the Defendant's ability to serve as the Searcy County Sheriff.

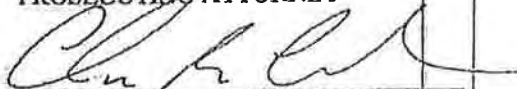
ANSWER: The Defendant is ineligible, as a matter of law, to serve in any elected capacity (i.e. any position of "trust or profit"), per Article 5 §9 of the Arkansas Constitution.

INTERROGATORY NO. 14: If the answer to the preceding Interrogatory is "yes" please state specific facts as to how the Defendant's 1979 misdemeanor conviction directly affects the Defendant's ability to serve as the Searcy County Sheriff.

ANSWER: See answer to Interrogatory No. 13.

Plaintiff shall comply with the Arkansas Rules of Civil Procedure as to Plaintiff's continuing duty to disclose the information that is the subject of this request.

CODY HILAND,
PROSECUTING ATTORNEY



By: Chris Carnahan, ABN: 2006101
Deputy Prosecutor
P.O. Box 607
Conway, AR 72032

IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

CASE NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

MEMORANDUM BRIEF IN SUPPORT OF
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 misdemeanor 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 contended 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.

Due to defective service of process, the State subsequently filed an Amended Petition and Amended Motion for Summary Judgment in which it restated its allegations and arguments. During the pendency of the instant case, the voters of Searcy County again elected Sheriff Cassell to hold the office of Sheriff of Searcy County in the May, 2012 primary election.

Following a July 16, 2012 hearing, this Court denied the State's motion for summary judgment based on its finding that pursuant to State v. Oldner, 361 Ark. 316, 206 S.W.3d 818 (2005) and Edwards v. Campbell, 2010 Ark. 398, the two cases interpreting the "infamous crime" clause in Ark. Const. Art. 5, § 9, removal of Cassell from office is not proper solely based on the 1979 misdemeanor conviction. Rather, this Court found that based on these cases, the State must additionally prove facts showing that Sheriff Cassell's crime impugned the integrity of the office and directly impacted his ability to serve as an elected official. See Transcript of Motion Hearing, dated July 16, 2012, which is attached to the Motion for Summary Judgment as Exhibit A. Because the State is unable to present any facts to support a finding that the aforementioned requirement has been satisfied, no genuine issue of material fact remains as to whether Sheriff Cassell must be removed from office pursuant to Ark. Const. Art. 5, § 9 such that summary judgment in favor of Sherriff Cassell is proper. See Dodson v. Taylor, 346 Ark. 443, 57 S.W.3d 710 (2001) ("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. 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.").

In State v. Oldner, 361 Ark. 316, 327, 206 S.W.3d 818 (2005), the Arkansas Supreme Court considered for the first time what constitutes an "infamous crime" disqualifying a person from holding office. Applying Article 5, Section 9, the Arkansas Supreme Court 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 (emphasis supplied). 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, § 9. Edwards v. Campbell, supra. In the Edwards case, the Arkansas Supreme Court, finding that the Mayor was ineligible to stand for re-election, 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 (emphasis supplied).

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. Because there is no evidence that Sheriff Cassell's misdemeanor conviction upon a plea of guilty to possession of

stolen goods has impugned the integrity of the office or impacted 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, he is entitled to judgment as a matter of law that removal is not proper. 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. Furthermore, the State has failed to produce any such evidence when directly asked during the discovery process.

INTERROGATORY NO. 8: Please state the specific facts that you intend to use at trial to show that the Defendant has impugned the integrity of the Searcy County Sheriff's Office.

ANSWER: All the facts the State will present are listed in Plaintiff's Amended Petition for Removal from Office and Plaintiff's Amended Motion for Summary Judgment.

* * * * *

INTERROGATORY NO. 13: Please state whether the Defendant's 1979 misdemeanor conviction now affects the Defendant's ability to serve as the Searcy County Sheriff.

ANSWER: The Defendant is ineligible, as a matter of law, to serve in any elected capacity (i.e. any position of "trust" or "profit"), per Article 5, Section 9 of the Arkansas Constitution.

See Plaintiff's Answers to Defendant's First Set of Interrogatories and Requests for Production of Documents Propounded to the Plaintiff, attached to the Motion for Summary Judgment as Exhibit B.

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

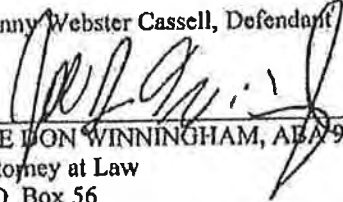
State v. Oldner, 361 Ark. at 329 ("Just as we will not interpret statutory provisions so as to reach an absurd result, neither will we interpret a constitutional provision in such a manner."). Finally, to the extent that precedent must be overturned to avoid the absurd result of removal of Sheriff Cassell from office, such reconsideration of the definition and interpretation of "infamous crime" in Article 5, Section 9 based on the degree of punishment, intent of the General Assembly, and facts of the case, as raised in the Edwards case, is proper.

CONCLUSION

Following a July 16, 2012 hearing, this Court found that removal of Sheriff Cassell from office is only proper in the event that the State can prove facts showing that his 1979 misdemeanor conviction impugned the integrity of the office and directly impacted his ability to serve as an elected official. Because the State is unable to present any such facts, no genuine issue of material fact remains as to whether Sheriff Cassell must be removed from office pursuant to Ark. Const. Art. 5, § 9 such that summary judgment in favor of Sheriff Cassell is proper.

Respectfully submitted,

Kenny Webster Cassell, Defendant


JOE DON WINNINGHAM, ABA 95222
Attorney at Law
P.O. Box 56
Conway, Arkansas 72033
501-513-4930 Fax 501-513-4931

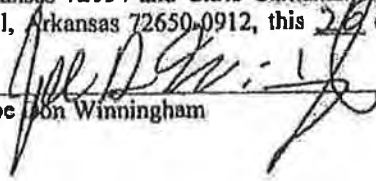
CERTIFICATE OF SERVICE

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Add. 153

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 26 day of July, 2012.


Joe Don Winningham



Searcy
IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS
THIRD DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

KEN CASSEL

DEFENDANT

STATE'S RESPONSE TO MOTION FOR SUMMARY
JUDGMENT AND INCORPORATED BRIEF IN SUPPORT

COMES NOW the State of Arkansas, by and through Chris Carnahan, Deputy Prosecuting Attorney of and for the Twentieth Judicial District, and for its Motion for Continuance states:

Ark. Const. Art. V, § 9 provides that 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.

In *Edwards v. Campbell*, 2010 Ark. 398; 2010 Ark. LEXIS 489, the Arkansas Supreme Court stated:

In 2005, this court, in the case of *State v. Oldner*, addressed for the first time what constitutes an "infamous crime" for the purpose of removing an elected official from public office due to lack of eligibility under article 5, section 9. 361 Ark. at 323, 206 S.W.3d at 819. When considering how to interpret the meaning of "infamous crime," we recognized in *Oldner* the doctrine of *eiusdem generis*, which provides that "when general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id.* at 327, 206 S.W.3d at 822 (citing *Hanley v. Arkansas State Claims Comm'n*, 333 Ark. 159, 970 S.W.2d 198 (1998); *McKinney v. Robbins*, 319 Ark. 596, 892 S.W.2d 502 (1995)). This court also looked in *Oldner* to the doctrine of *noscitur a sociis*, which allows for a word to be defined by the words accompanying it.

Based on these rules of interpretation, this 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. Id. at 327, 206 S.W.3d at 822. 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. Id. at 332, 206 S.W.3d at 826 (emphasis added).

By definition an "infamous crime" impugns the integrity of the office.

The Supreme Court specifically rejected the argument that a court should explore the nature of the circumstances surrounding a crime to decide on a case by case basis that such crime is "infamous." Instead, the Supreme Court adopted a bright line test that theft of property, regardless of the circumstances, is an infamous crime. By definition, theft of property impugns the integrity of the office because it is a crime that involves dishonesty. The Supreme Court stated:

Edwards asks this court not to adopt a bright-line rule for all theft convictions but to consider the circumstances surrounding the theft and his conviction.

The Supreme Court then declined to consider arguments related to the mitigating circumstances surrounding Edward's misdemeanor conviction, instead holding that every misdemeanor theft conviction is an infamous crime which renders the person who committed that crime ineligible to serve in public office. The Supreme Court did not permit consideration of mitigating circumstances; it created a bright-line test which does not involve factual determinations regarding mitigating circumstances.

The two-part test adopted by the Court is incorrect. Once the determination is made that the federal crime the defendant was convicted of is an "infamous crime" the mitigating circumstances offered as an argument that the defendant's conduct did not impugn the integrity of his office should not be considered by the Court.

There is no basis found in the Arkansas Constitution, *Oldner* or *Edwards* to conclude that a defendant must have committed the crime while in office. A two-part test

in effect requires that an act be committed while in office before a defendant can be removed as provided in the Arkansas Constitution. How can any act committed prior to service in office impugn the character of an office not yet held?

The facts that show that the defendant's office was impugned are before the Court as Exhibit "P" to the original petition filed in this case. The Supreme Court held in *Edwards* that the facts associated with the conviction cannot be re-litigated by the defendant in litigation regarding whether previous conduct constitutes an infamous crime:

The general rule is that a defendant who does not appeal a criminal conviction cannot collaterally attack a final judgment. See *Camp v. State*, 364 Ark. 459, 463, 221 S.W.3d 365, 367 (2005). To have this court reconsider these arguments now, and, in light of them, find that his theft conviction and its punishment are not serious enough to be considered an "infamous crime" would not only run contrary to our decision in *Oldner* but would be in the nature of a collateral attack on the final judgment rendered by the district court.


Facts in the record include that the defendant was a deputy sheriff when the crime occurred. The defendant's conduct does impugn his office and the Court should enter an order removing the defendant from the office of Sheriff of Searcy County Arkansas.

Additionally in order to let there be an accurate record, Mr. Cassel has yet to be re-elected to serve a second term of office, he is a candidate in the November 2012 General Election where he will be one of four candidates.

The state respectfully requests that the Court deny the Defendant's Motion for Summary Judgment.

WHEREFORE, the State of Arkansas respectfully requests that its motion be granted.

Respectfully Submitted,
Cody Hiland
Prosecuting Attorney
20th Judicial District
State of Arkansas

By: 
Chris Carnahan
Deputy Prosecuting Attorney
P.O. Box 550
Conway, AR 72033

Certificate of Service

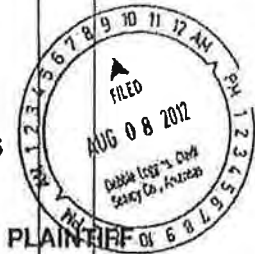
This is to certify that I have on this 1st day of August, 2012, served a copy of this document via first class US Mail, postage prepaid upon the following:

Don Winningham
1315 Main Street
Conway, AR 72034


Chris Carnahan



IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION



STATE OF ARKANSAS

VS.

CASE NO. CV-2011-53

KENNY WEBSTER CASSELL

PLAINTIFF

DEFENDANT

ORDER

Now on this 16th day of July, 2012, appeared before the Court, the Plaintiff represented by Mr. Cody Hilland, Prosecuting Attorney for the 20th Judicial District and Mr. Chris Carnahan, Deputy Prosecuting Attorney for the 20th Judicial District. The Defendant, Mr. Kenny Cassell, appeared in person and by and through his attorney, Mr. Joe Don Winningham. Before the Court is the Plaintiff's Amended Motion for Summary Judgment and the Defendant's Response thereto, the Defendant's Motion to Dismiss and the Plaintiff's Response thereto, and the Defendant's Motion to Strike.

After hearing the prospective arguments of counsel on each Motion before the Court the Court Orders as follows:

1. This Court has jurisdiction over the persons and subject matter of this cause and venue is proper in this Court.
2. The Court overrules the Defendant's Motion to Dismiss. The Court finds that theft by receiving involves dishonesty. The Court overrules that portion of the Defendant's Motion that says the Plaintiff failed to state a cause of action. The Plaintiff has alleged sufficient facts to get this matter brought before a Judge or a Jury.
3. The Court overrules the Plaintiff's Motion for Summary Judgment. The Court believes that under the cases of Edwards vs. Campbell, 2010 Ark. 398, and State vs. Oldner, 361 Ark. 316, that the Defendant's crime must have impugned the integrity of

the office and directly impacted on the Sheriff's ability to serve as an elected official. There has to be more.

4. The Defendant's Motion to Strike shall be held in abeyance by the Court at this time.

IT IS SO ORDERED.

David A Clinger

HONORABLE DAVID CLINGER
SPECIAL CIRCUIT JUDGE

DATE: 8-1-12

Prepared by:

Joe Don Winningham
Joe Don Winningham, ABA#98222
Attorney for Defendant
P.O. Box 56
Conway, AR 72033
(501) 513-4930

Chris Carnahan

Chris Carnahan
Deputy Prosecuting Attorney for the
20th Judicial District
P.O. Box 912
Marshall, AR 72650-0912

SEARCY COUNTY & CIRCUIT CLERK
RECORDED and CERTIFIED

In Book Circuit 73
Page 179 this 8th day
of Aug 2012
Dobbie Pappas
by *Carole Ragland*

IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION



STATE OF ARKANSAS

PLAINTIFF

VS.

CASE NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

ORDER FOR CONTINUANCE

Now on this 25 day of June, 2012, comes before the Court the Defendant's Motion for Continuance. The Plaintiff being represented by Mr. Chris Carnahan, Deputy Prosecutor for the 20th Judicial District and the Defendant, being represented by Joe Don Winningham, the Court Orders as follows:

1. This Court has jurisdiction over the persons and subject matter of this cause and venue is proper in this Court.
2. Upon good cause shown and over the objection of the Plaintiff the Court hereby grants the Defendant's oral Motion for Continuance.
3. This matter shall be continued from June 21, 2012, and rescheduled for July 16, 2012, at 1:00 p.m. in the Circuit Court of Searcy County, Arkansas.

IT IS SO ORDERED.

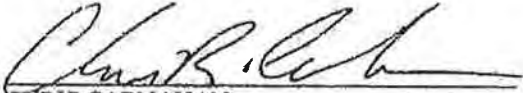
David A. Cinger
HONORABLE DAVID CINGER
SPECIAL CIRCUIT JUDGE

DATE: 8-2-12 *nunc protunc*
to 6-25-12

Prepared by:

Joe Don Winningham
JOE DON WINNINGHAM, ABA 90222
Attorney for Defendant
P.O. Box 56
Conway, Arkansas 72033
501-513-4930 Fax 501-513-4931

Approved by:



CHRIS CARNAHAN
Deputy Prosecutor for the 20th Judicial District
Attorney for Plaintiff

SEARCY COUNTY & CIRCUIT CLERK
RECORDED and CERTIFIED

In Book *Circuit 43*

Page *178* this *8th* day

of *District 12*

District 12
by *Carol Ragland* Clerk

IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
SECOND DIVISION

STATE OF ARKANSAS

VS.

CASE NO. CV-2011-53

KENNY WEBSTER CASSELL



PLAINTIFF

DEFENDANT

ORDER

Now on this 16th day of August, 2012, appeared before the Court, the Plaintiff represented by Mr. Cody Hiland, Prosecuting Attorney for the 20th Judicial District and Mr. Chris Camahan, Deputy Prosecuting Attorney for the 20th Judicial District. The Defendant, Mr. Kenny Cassell, appeared in person and by and through his attorney, Mr. Joe Don Winningham. Before the Court is the Defendant's Motion for Summary Judgment and the Plaintiff's Response thereto.

After hearing the prospective arguments of counsel on the Defendant's Motion for Summary Judgment before the Court the Court Orders as follows:

1. This Court has jurisdiction over the persons and subject matter of this cause and venue is proper in this Court.
2. In a previous hearing held on July 16, 2012, I made specific findings, attempting to interpret Arkansas Supreme Court's opinions in Oldner and Edwards vs. Campbell, as to when a misdemeanor will be deemed an infamous crime. And, today, I'm incorporating pages 18 through 23 of the transcript of the July 16, 2012 hearing, and I'm adopting those findings in today's ruling. I did rule that theft by receiving involved dishonesty, and would qualify as an infamous crime if it is shown that it directly impacted the Sheriff's ability to serve as an elected public official, and impugned the integrity of the office of Searcy County Sheriff.

3. Facts:

This is a case of which the fact situation has not been addressed by the Arkansas Supreme Court. No case has involved a person as the Sheriff, who years earlier, committed a misdemeanor theft, and then many years later, ran for office and succeeded. The other cases involved people who have committed felonies before they were ever elected, or people who were elected and then committed misdemeanors.

I have accepted in part, the Prosecutor's position, but I've also accepted basically, one hundred percent, the view of the Defense. When the misdemeanor that would qualify as an infamous crime was committed by an office holder while in office, that the Court can rule as a matter of law, once the Court finds it qualifies as an infamous crime, could make a ruling based on law, and remove that person from office, or block his reelection bid.

However, when we have a situation such as this, which the crime was committed many years ago, before the person ever even thought about running for office, that the issue then of whether that crime is an infamous crime, does become as an issue of fact and law. Both sides concede, if the facts are undisputed, and if the Court can figure out what the law is, Summary Judgment is appropriate. The facts here are not disputed. It is a fact that in October of 1979, I think when Sheriff Cassell was twenty or twenty-one, pled guilty to a misdemeanor theft by receiving, property less than \$100.00 in value. That is a fact. Both sides concede that.

The next fact is that in October of 2009, thirty years later, in the process of running for Sheriff, Sheriff Cassell paid for an ad in the local newspaper, in which he

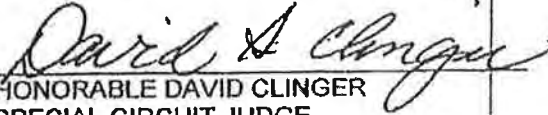
advised the citizens of Searcy County, many of whom hadn't even been born back in 1979, he advised them that he was running for Searcy County Sheriff and that thirty-one years ago or so, he committed a criminal act, and he further stated in the ad, he pled guilty to that charge, that is a fact. But the State used that ad as an Exhibit. Both sides conceded; that is undisputed.

In November of 2010, the citizens of this County elected Sherriff Cassell as Sheriff. Those are the facts, and they're undisputed, so it's my job to apply the law as I interpret it.

I find as a matter of law, that when the people of Searcy County elected the Sheriff Cassell as Sheriff that they were saying, at that time, his previous crime did not directly impact on his ability to serve as Sheriff, or that it impugned the integrity of his office. Those are the only facts we have. The people were informed by Sheriff Cassell, and then they elected him. If it is important to the Supreme Court that there be evidence in addition to a crime, that it impacted on the person's ability to carry out his job, or impugned the integrity of his office, we have no evidence of that nature before the Court at this time.

4. The Defense's Motion for Summary Judgment is hereby granted, and the State's Petition to Remove Sheriff Cassell from office is hereby dismissed with prejudice.

IT IS SO ORDERED.


HONORABLE DAVID CLINGER
SPECIAL CIRCUIT JUDGE

DATE: 8-28-2012

Prepared by:

Joe Don Wingham

Joe Don Wingham, ABA #96222
Attorney for Defendant
P.O. Box 56
Conway, AR 72033
(501) 613-4930

Chris Carnahan

Chris Carnahan
Deputy Prosecuting Attorney for the
20th Judicial District
P.O. Box 912
Marshall, AR 72650-0912

SEARCY COUNTY & CIRCUIT CLERK
RECORDED and CERTIFIED

In Book Circuit 73
Page 222-223 this 4th day

of Sept. 20 12

Debbie Jiggins Clerk
by *Kandice Ragland* D.C.

IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
TWENTIETH JUDICIAL DISTRICT
SECOND DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

Case NO. CV 2011-53

KENNY WEBSTER CASSELL

DEFENDANT

NOTICE OF APPEAL AND DESIGNATION OF RECORD

Notice is hereby given this 5th day of September, 2012, that the State of Arkansas, Plaintiff, appeals to the Supreme Court of the State of Arkansas per Rule 1-S2(a) from the Judgment of September 4, 2012, granting Defendant's Motion for Summary Judgment. Appellant designates the entire record and all proceedings, exhibits, evidence and testimony. The Plaintiff states that financial arrangements have been made with the Court Reporters and the Clerk of Court to prepare the transcript. The Plaintiff abandons any pending but unresolved claim in this matter.



Respectfully Submitted,

CODY HILAND
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Chris Carnahan".

By: Chris Carnahan, ABN 2006101
Deputy Prosecuting Attorney
P.O. Box 550
Conway, AR 72033
(501) 450-4927

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was transmitted by hand delivery to Joe Don Winningham, Attorney at Law, 564 Locust, Conway, AR 72034, on this 6th day of September, 2012.

A handwritten signature in black ink, appearing to read "Chris Carnahan".

Chris Carnahan,
Deputy Prosecuting Attorney

