

12-852

IN THE ARKANSAS SUPREME COURT

STATE OF ARKANSAS

v.

Case No: 12-852

KENNY WEBSTER CASSELL

APPELLANT

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
OF SEARCY COUNTY

THE HONORABLE DAVID S. CLINGER, ASSIGNED TO THE
20TH JUDICIAL CIRCUIT BY THE ARKANSAS SUPREME COURT
TO HEAR THIS CASE (SUPREME COURT NO. 12-113)

APPELLANT'S ABSTRACT, BRIEF, AND ADDENDUM

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INFORMATIONAL STATEMENT

I. ANY RELATED OR PRIOR APPEAL (Identify)

No.

II. BASIS OF SUPREME COURT JURISDICTION (see Rule 1 2 (a))

Check here if no basis for Supreme Court Jurisdiction is being asserted, or check below all applicable grounds on which Supreme Court Jurisdiction is asserted.

- (1) Construction of Constitution of Arkansas
- (2) Death penalty, life imprisonment
- (3) Extraordinary writs
- (4) Elections and election procedures
- (5) Discipline of attorneys
- (6) Discipline and disability of judges
- (7) Previous appeal in Supreme Court
- (8) Appeal to Supreme Court by law

III. NATURE OF APPEAL

- (1) Administrative or regulatory action
- (2) Rule 37
- (3) Rule on Clerk
- (4) Interlocutory appeal
- (5) Usury

- (6) ___ Products liability
- (7) ___ Oil, gas, or mineral rights
- (8) ___ Torts
- (9) ___ Construction of deed or will
- (10) ___ Contract
- (11) ___ Criminal

Appellee, Kenny Webster Cassell, was elected Sheriff and Collector of Searcy County, Arkansas, in the general election held in November of 2010, and reelected in the general election held on November 6, 2012. On October 31, 2011, Appellant, the State of Arkansas, filed a Petition for Removal from Office against Sheriff Cassell, alleging that on October 9, 1979, Sheriff Cassell pled guilty to a misdemeanor theft violation while he was serving as a Searcy County Deputy Sheriff. *Id.* The State contended that Sheriff Cassell's 1979 conviction of misdemeanor theft by receiving constituted an "infamous crime" under Article 5, Section 9 of the Arkansas Constitution, barring him from holding the office of Searcy County Sheriff and Collector. The State requested an order from the Circuit Court removing Sheriff Cassell from office. Both parties moved for summary judgment, and the Circuit Court held two hearings below. On September 4, 2012, the Circuit Court entered its final order in which the Circuit Court granted

Sheriff Cassell's motion for summary judgment, and dismissed the State's Petition for Removal from Office with prejudice. This appeal followed.

IV. IS THE ONLY ISSUE ON APPEAL WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT?

No.

V. EXTRAORDINARY ISSUES. (Check if applicable, and discuss in PARAGRAPH 2 of the Jurisdictional Statement.)

appeal presents issue of first impression,

appeal involves issue upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court,

appeal involves federal constitutional interpretation,

appeal is of substantial public interest,

appeal involves significant issue needing clarification or development of the law, or overruling of precedent.

appeal involves significant issue concerning construction of statute, ordinance, rule, or regulation.

VI. CONFIDENTIAL INFORMATION

(1) Does this appeal involve confidential information as defined by Section III (A)(11) and VII (A) of Administrative Order 19?

Yes No

(2) If the answer is "yes", then does this brief comply with Rule 4-1(d)?

Yes No

JURISDICTIONAL STATEMENT

1. The issues of law raised on appeal are: (a) whether a misdemeanor theft conviction occurring prior to the convicted person holding office constitutes an “infamous crime” under Article 5, Section 9 of the Arkansas Constitution; (b) whether an “infamous crime” under Article 5, Section 9 of the Arkansas Constitution must be a crime of dishonesty and must also directly impact the convicted person’s ability to serve as an elected public official and impugn the integrity of the office; and (c) whether a convicted person’s disclosure of his or her conviction of an “infamous crime” to voters prior to the person’s election can overcome the person’s disqualification under Article 5, Section 9 of the Arkansas Constitution.

2. I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of legal significance for jurisdictional purposes: (i) whether a misdemeanor theft conviction occurring prior to the convicted person holding office constitutes an “infamous crime” under Article 5, Section 9 of the Arkansas Constitution; (ii) whether an “infamous crime” under Article 5, Section 9 of the Arkansas Constitution must be a crime of dishonesty and must also directly impact the convicted person’s ability to serve as an elected public official and impugn the integrity of the office; and (iii) whether a convicted person’s disclosure of his or her conviction of an “infamous crime” to

voters prior to the person's election can overcome the person's disqualification under Article 5, Section 9 of the Arkansas Constitution.



Colin R. Jorgensen

POINTS ON REVIEW AND PRINCIPAL AUTHORITIES

- I. THE CIRCUIT COURT ERRED BY DENYING THE STATE'S SUMMARY JUDGMENT MOTION AND GRANTING SUMMARY JUDGMENT TO SHERIFF CASSELL, AND RULING THAT A MISDEMEANOR THEFT CONVICTION PRIOR TO HOLDING OFFICE DOES NOT DISQUALIFY A PERSON FROM HOLDING OFFICE UNDER ARTICLE 5, SECTION 9 OF THE ARKANSAS CONSTITUTION.**

State v. Oldner, 361 Ark. 316, 206 S.W.3d 818 (2005)

Edwards v. Campbell, 2010 Ark. 398, 370 S.W.3d 250

Ridgeway v. Catlett, 238 Ark. 323, 379 S.W.2d 277 (1964)

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ABSTRACT

HEARING, JULY 16, 2012:

APPEARANCES:

On behalf of Plaintiff: Hon. Cody Hiland, Prosecuting Attorney

On behalf of Plaintiff: Hon. Chris Carnahan, Deputy Prosecuting Attorney

On behalf of Defendant: Hon. Joe Don Winningham, Attorney at Law

The Court: Now, gentlemen, as we talked about in chambers, there are about two or three motions that are pending. One of them is the Defense motion to dismiss. And as I recall, there's at least two bases; one that the crime in question is not an infamous crime, and, two, failure to state a cause of action. **R. 213.**

Mr. Winningham: Thank you, Your Honor. Your Honor, the two main cases where this issue has come before the Supreme Court are Edwards v. Campbell, 2010 Ark. 398, and 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 [9] 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." The 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. **R. 214.** Mr. Edwards was a public official who perpetrated – and this is the Court talking – “who perpetrated a theft while in office and who now seeks to be reelected to the same office of public trust. By his actions, he was impugned. He has impugned the integrity of the office.”

The State in State v. Oldner, 361 Ark. 316, 2006 S.W.3d 818, a 2005 Supreme Court case, it was a case while in office the mayor was charged with theft, public record tampering, abuse of office, and witness tampering. On page 6 of that opinion, the Court stated “Not only do these crimes involve dishonesty and deceit but are importantly – they directly impact Oldner's ability to serve as an elected official.”

Nothing in their amended petition states anything at all, Your Honor, about the impact – there's nothing in their amended petition as to how Mr. Cassell's 1979 conviction of possession of stolen property of less than \$100 has directly impacted his ability to serve as Sheriff or how he has impugned the integrity of the office of Sheriff. There's nothing in their response to Mr. Cassell's Motion to Dismiss about that issue. And I sent them interrogatories. **R. 215.** In their answer to Interrogatory No. 8: “Please state specific facts that you intend to use at trial to

show the Defendant has impugned the integrity of the Searcy County Sheriff's Office." Their answer was: "All the facts the State will present are listed in Plaintiff's Amended Petition for Removal from Office and Plaintiff's submitted Motion for Summary Judgment." Number 13 I asked: "Please state where the Defendant's 1979 misdemeanor conviction now affects the Defendant's ability to serve as Searcy County Sheriff." Their answer was: "The Defendant is ineligible as a matter of law to serve in any elected capacity, any position of trust or profit per the Constitution."

I also sent them requests for admissions, Your Honor. In those requests for admissions I asked: "Admit or deny that the Defendant's 1979 misdemeanor conviction directly impacts the Defendant's ability to serve as Searcy County Sheriff." The State objected and basically stated it called for a legal conclusion. In Number 2, I asked to "admit or deny that the Defendant's 1979 misdemeanor conviction currently impugns the integrity of the Office of the Searcy County Sheriff." **R. 216.** The 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 Oldner case, stated that it was an issue of first impression because they've never defined infamous crime before. I think it 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 31 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 law is in that before he ran for election he ran an ad telling everybody about his conviction. I think that if you don’t have that two-part test in there, you end up with 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. **R. 217.** All of those crimes can involve dishonesty and deceit. When someone is driving down the road, they know they shouldn’t be drinking and, in fact, could kill somebody. And those are also overt acts where people intentionally go out and do certain things. There’s a difference between being in possession of stolen goods and actually going out and stealing something.

I think that there is that two-part test. There’s been nothing shown to this Court in the pleadings as to how 33 years ago having some frozen chickens of a value of less than a hundred dollars has impacted his ability to serve as Sheriff. The rules are the rules. They have to address that in their response or in the discovery and they also didn’t in their petition. The State is basically saying, “He was convicted of this crime and that’s it.” That’d be the same thing, I guess, if someone was 18 years old and their buddy went and stole a couple pieces of

bubble gum, go outside, throw it in the back, you chew it, and you get convicted. You can't thirty-something years later run for office because technically you could be charged with theft by receiving. **R. 218.** And I guess it could even apply to juveniles because if you wanted to be in law enforcement they could go back and look at juvenile records.

But there's nothing in there. There's that two-part test. There are no facts that the State has presented to show that he has impugned the integrity of the office or that 33 years ago in 1979 that misdemeanor conviction affects his ability to serve as Sheriff. And the people of Searcy County don't believe so because they've elected him four times. Your Honor, that basically is my argument on the Motion to Dismiss. **R. 219.**

Mr. Carnahan: Your Honor, of course we're opposed to what Mr. Joe Don said about the ultimate result. In fact, in Edwards what you had was a current office holder who committed a crime while he was the office holder. And I believe that that is what the Supreme Court was talking about impugning the integrity of the office when he currently held it. Sheriff Cassell, in 1979, although he was a Deputy Sheriff, he didn't hold an elected position. He held an important position but not an elected position. The fact that he was convicted of that crime makes him ineligible to apply to be the Sheriff to begin with, not that he has to have an

opportunity to commit a crime while in office and have that crime impugn the integrity of the office.

As far as Mr. Winningham's argument about whether or not the theft by receiving is dissimilar to theft of property, both of those crimes involve an element of knowing. You have to know what you're doing. You have to know that you're receiving stolen goods just like you have to know that you're stealing stolen property. Additionally, you're having to claim unauthorized control over the property. **R. 220.** Both theft and theft by receiving require both of these elements. And if you look at the Federal statute 18 U.S.C. 569, it requires the same mental elements of knowing that you're taking property. That was the statute that the Sheriff pled guilty to in 1979.

Your Honor, the State's position is that there is just one element for this – one element making the Sheriff ineligible to hold office. And that element is that he committed a crime and that crime that he pled guilty to disqualifies him because it's a crime that is of deceit or dishonesty, which the Supreme Court held in Oldner and Edwards, that that's what is required because it is in fact an infamous crime. Therefore, under Article 5, Section 9, Sheriff Cassell is ineligible to file for Sheriff much less continue to hold the office of Sheriff or seek reelection to it. Thank you.

Mr. Winningham: Your Honor, the Constitution lists specific crimes. It lists forgery. It lists embezzlement of public funds and bribery and then it has this

vague clause of infamous crime. **R. 221.** Until recently it was never even defined. In 1979 nobody even knew what the Supreme Court was going to say as to what an infamous crime was. To me they have a two-part test or they wouldn't say the words "additionally," "and." They keep saying those in those cases, that it's a crime --

The Court: Actually, they say "more importantly."

Mr. Winningham: Yes, sir. I believe it's in the Oldner case they actually say "more importantly" after they get to the fact that he had committed an act of dishonesty or deceit and then say "more importantly." And so the reason that I think that they have this test out there is that if they didn't have that language in there and you do just a bright line that "Well, 33 years ago you got a misdemeanor so you can't run," then you create situations that really are absurd -- it's just not right. I'm getting off the law, but it's just not right that if a man does something when he's twenty years old that's a misdemeanor, it's not a felony -- the pledge that they sign talks about felonies. **R. 222.** People can't vote if they get felonies. They have that two-part test for infamous crime so that you don't create situations -- I mean, I guess you could come up with anything that involves -- any type of breaking the law would involve deceit and dishonesty.

That's why these two cases are distinguishable from Mr. Cassell. Those two gentlemen were in office at the time and committed these crimes while they were

in office and that's why the Court kept talking about what was important is that it impugned the integrity of the office. It affected their ability to serve. There's been nothing in the pleadings, in the discovery, contradicting the fact that the Sheriff – there's nothing out there that that's true for him. That's the difference in this case, Your Honor.

The Court: Well, one of the advantages I have perhaps over you attorneys is that you all have full-time jobs and I get to spend all my time on one case at a time. And I have studied these cases thoroughly trying to glean from them the basis for your respective sides. We're looking now at the Motion to Dismiss. **R. 223.** On the Motion to Dismiss, I'm overruling it. I'm finding that theft by receiving involves dishonesty. Now, I'm also going to overrule that portion of your Motion that says they failed to state a cause of action. I think they have alleged sufficient facts to get this matter brought before a judge or a jury and so the Motion to Dismiss is overruled. That brings up, I believe, the State's motion for summary judgment. I'm ready for argument on that.

Mr. Carnahan: The Motion for Summary Judgment the Supreme Court has held is one where there are no issues of material fact that need to have a determination by a finder of fact, whether it's a judge hearing the case on his own or through a jury. The sole issue of material fact in this case and the only fact that matters is that Kenny Cassell in 1979 pled guilty to an infamous crime, theft of

interstate commerce, and that disqualifies him from holding the office of Sheriff.

R. 224. No other facts are relevant to the determination of this case. And the facts under which the circumstances of the plea to be looked at or all this – no – you’re attacking an original judgment at that point. So the only pertinent fact in this case is does the conviction as a matter of law disqualify Sheriff Cassell from continuing to hold that office. That is the State’s position. I thank you for your time.

Mr. Winningham: Your Honor, in our response, which is part of the file, one thing we argue is that there are outstanding facts due to what the Court said in both the Edwards case and in Oldner. And basically, it goes back to the two-part test. And when the Court stated in the Oldner case and more importantly when it found that the gentleman had committed an act of dishonesty or deceit, I think that in order to meet that test there has to be some facts out there that Mr. Cassell has impugned the integrity of the office. They have not alleged that his actions affect him being able to serve as the Sheriff. **R. 225.**

The State argues that that’s really not part of the test but I respectfully disagree. I think it is part of the test because the term “infamous crime” is just so vague and both cases talk about that. The later case where you had the gentleman from Greenwood, the Court said it must be a crime of dishonesty and deceit and additionally it must impugn the integrity of the office and must impact his ability. I think that the fact that the Sheriff ran an ad telling everyone beforehand, before

he even ran for office, shows that it goes directly opposite against that. I mean, that's what we want in public officials. He didn't try to hide or cover up anything. He told everybody before the election and then he's been elected four times. I'd respectfully disagree with the State and believe that we have an argument that there's facts that have to be presented as to whether or not he's impugned the integrity of the office. It's not just that he was convicted. That's not what the cases say. Thank you, Your Honor. **R. 226.**

Mr. Carnahan: Your Honor, I'm drawing your attention to Exhibit No. 2 that's part of the file which is a copy of the ad that Sheriff Cassell and his campaign ran October/November of 2009. In that he does say that he was convicted of theft by receiving. That's an uncontroverted fact. Both parties agree on that, which I think even helps our position that there are no material facts to be determined in this. But if one wants to take it further, the facts of that conviction weren't gone into by the Sheriff. I mean, he didn't say that he was a Deputy Sheriff taking Cornish game hens off of Tyson trucks as they came through Searcy County. He didn't say that. He said he had a misdemeanor theft by receiving and then he won a political campaign.

I find nothing in anything the Supreme Court has said – or any court reviewing facts similar to these – that says an election is a palliative, that it is holy water that absolves you of your sins. It's one of those things – and maybe it's

something that the Supreme Court made an error on. But the fact of the matter is the Supreme Court has held if you are convicted of a crime that is infamous – and as you’ve just ruled theft by receiving is an infamous crime – then you’re ineligible to hold any position of trust or profit in this state. **R. 227.** That doesn’t mean Mr. Cassell can’t be a law enforcement officer. But what it does mean, he can’t be Sheriff and Tax Collector in this county. Thank you.

The Court: Again, I appreciate the clearness with which both sides have briefed this issue and attempted to make me as aware as possible of what the state of our law is, and it’s a little bit confusing. Unless I’m mistaken, and I stand to be corrected, but I don’t believe any of these cases involve a situation where a person – like we have here. In other words, a person before they’ve even considered the idea of running for office committing a misdemeanor and then later running for office and the State moves to disqualify him or block his election because of this misdemeanor as an infamous crime. Right?

I mean, the only case I remember where there was a crime before the person ran was the Ridgeway case and that was embezzlement of public funds, felony, so cut and dried. **R. 228.** That one kind of threw me when the Supreme Court said that not even a presidential pardon can restore your right to run for office. To me, that’s an odd ruling because I don’t see anything in the Constitution where the framers limited the pardoning power. They showed disqualifying crimes, but they

didn't say anything that limited the Governor's pardon or even more importantly the President.

So anyway, we've got a case, I think, of first impression here and whereas I have specifically found that theft by receiving could classify as an infamous crime, I agree with you, Mr. Winningham, that there's got to be more to it. The language – I thought that Corbin was kind of going off on just a – oh, you know how judges do sometimes. They talk too much and they'll make a ruling and then they'll throw things in that just confuse everybody else later on down the line trying to, “Well, did that – was that part of the ruling? Were they really – ?” Because in this one case, it's Edwards, where they were asked to revisit Oldner and do away with the bright-line rule, and they said, “We refuse to.” **R. 229.** In other words, the way I took it, they said “We're not going to retry the crime.” That's what I thought they were saying, “You can't come back and tell us how pitiful stealing three campaign signs is. He pled guilty or he was found guilty and we're not going to revisit that and we're going to keep a bright-line rule.” And you could read that into saying they're saying simply, “You commit the crime, you do the time,” period.

I didn't read it that way and in this Oldner case, and that was a Dumas mayor and interesting, I thought, in their approach. He was found guilty of two misdemeanors; witness tampering, an A misdemeanor, and then they go into the

facts. They said he asked two city employees to lie; probably to a prosecutor or State Police investigator. It's also then abuse of office because he caused \$1,750 in city money to be used paving a parking lot for some of his family members. And I might say that this is the one in which Corbin is talking about the first impression looking at infamous crime. **R. 230.** And they analyze the prior because then they're saying obviously this reflects on then integrity of his office. It's an abuse of office. It impacts on his ability to appear fair. So they do a factual analysis of what he did. But I think one reason they did was because they could then rule as a matter of law if you're a public official and you do witness tampering or you spend city money illegally, you've compromised yourself. And I'm assuming that's why they did it.

But I can't get away from the language. You cited it and the Supreme Court points out that "The mayor's offenses are of a type that directly impact his moral integrity because they 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 the inclusion of the term 'infamous crime.'" **R. 231.** 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.

He tried to argue the prior term business and they said “No, once disqualified, you’re always disqualified.”

Then we go to the 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 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 go back and retry it. If you’re guilty, you’re guilty.” And he didn’t even appeal, by the way. But that’s one thing that they considered. And then they go on to say, Edwards is saying, “Please consider the totality of the circumstances surrounding the theft charge and conviction on a case-by-case basis.” And they said, “No – we did the bright line and we’re sticking with the bright line.” **R. 232.** But they go on to again cite Oldner, and I don’t think you get away from the fact that they’re looking for more than just the mere fact that the Defendant committed a misdemeanor crime some time in the past. They say, “You got to do the infamous crime.” And they said that theft involves dishonesty, deceit, and “impugn the integrity of the office and directly impact the person’s ability to serve as an elected official.”

Now if the Sheriff had committed this theft while in office, I think I could probably rule as a matter of law. This seems to have been what happened in all

these other cases where we had an elected official committing the crimes. But we don't have that here and I think there's got to be more. There's got to be a showing, I think, under these two landmark cases, that this crime from 1979 – that the public awareness of his having committed this crime impugned the integrity of the office and directly impacted on the Sheriff's ability to serve as an elected official. There's got to be more, in my opinion. So the upshot of this is that I'm overruling the State's Motion for Summary Judgment. **R. 233.**

Now, that means I'm saying there's going to have to be some sort of factual showing to reach the definition of infamous crime. I understand exactly why the Prosecutor filed this charge. I mean, if anybody thinks prosecutors like to prosecute sheriffs, they're crazy. I know. I've done it twice, and I know the fallout that comes from it. But still to have the highest law enforcement officer in the county serving under a cloud is something probably that needs to be cleared up. And I think I may have told both of you gentlemen on the phone when we were trying to schedule a hearing, we're going to make some law here, and I think we are. The Prosecutor may not know whether – I know the Defense has asked for a jury trial. Does the Prosecutor anticipate putting on additional evidence in light of my ruling today?

Mr. Carnahan: Your Honor, I think we have to, if that's your ruling. I don't know if now is a good time to ask you to reconsider that, but, we'd have to

put on either through affidavit forms or – if the other side and you were willing to do that through live testimony. **R. 234.**

The Court: Well, do y'all want to confer on that? About whether you do it by affidavit? I saw all the citizens' names that came to bat for the Sheriff back when he pled guilty. I wouldn't want that many people – the courtroom wouldn't hold – but it looks to me like they'd be trying to prove some sort of impact and you'd be trying to show no impact at all.

Mr. Winningham: Yes, sir.

The Court: They've asked for a jury trial. What's the response to that?

Mr. Carnahan: Your Honor, again, I think these are questions of law and not questions of fact – and I think it'd be the State's position that you would be the proper person to hear the entire case.

The Court: Well, I'm going to confer with the attorneys in chambers for a moment. I'm going to ask the defense to draft an order reflecting my rulings today on these two motions. There's also a motion to strike, but I'm just going to hold that in abeyance right now. **R. 235.** I'm going to meet with the attorneys and we'll talk for a moment and we'll come back and put it on the record. But we need to talk about scheduling our next hearing and the logistics of it. And so let's take a short break and go into chambers and then we'll come back out and make any scheduling notice here in open court.

[brief recess]

The Court: For the information mainly to the audience, we have conferred and there are a couple of things that'll have to be resolved before we can determine what our next hearing will actually be; either be another motions hearing or an actual trial. I'm going to ask the attorneys to get together and pick a time next week where we can talk by phone. **R. 236.** And then whatever we decide, I'll ask one of you to draft an order which will then inform the public on what our next hearing is going to be. And so we'll do that next week and we'll do an order and it will be filed of record so that everybody will know what the next hearing is going to be and when. Now, I asked you to do an order for today. And I also said I'm taking your motion to strike and holding it in abeyance.

Mr. Winningham: Yes, sir.

The Court: Anything else that I need to do here today?

Mr. Carnahan: Not that the State's aware of, Your Honor.

Mr. Winningham: No, sir. **R. 237.**

The Court: Then thank you all and we'll be in recess. **R. 238.**

HEARING, AUGUST 16, 2012:

APPEARANCES:

On behalf of Plaintiff: Hon. Chris Carnahan, Deputy Prosecuting Attorney

On behalf of Defendant: Hon. Joe Don Winningham, Attorney at Law

The Court: We're here today on the Defense's Motion for Summary Judgment. Obviously, looking at the size of the audience here, the people of Searcy County are very interested in this case, and want to see it resolved. And I have to compliment the attorneys for both sides, because on summary judgments, there are some rules, some time constraints, that if both sides hadn't waived those time constraints, it would probably be another month before we could legally hear this case. And so, gentlemen, I appreciate that. I know that both sides are interested in having this matter resolved. All right, we've got the Defense's Motion for Summary Judgment and the State's Response. I've read the pleadings, and I'm ready to hear whatever you want to say. **R. 242.**

Mr. Winningham: Your Honor, procedurally where we're at, we had originally filed a Motion to Dismiss. The State had filed a Motion for Summary Judgment, and we had also filed a Motion to Strike. The Court had ruled in our last hearing, to basically overrule the State's Motion for Summary Judgment, and denied our Motion to Dismiss, and held the Motion to Strike in abeyance. We subsequently filed a Motion for Summary Judgment. The State then filed a reply, and then Mr. Carnahan, and myself, Mr. Highland, sent you copies of those pleadings.

Basically, our argument, Your Honor, is in State v. Oldner, 361 Ark. 316, a 2005 Supreme Court case, the Court kind of considered for the first time what

constitutes an “infamous crime,” disqualifying a person from holding office. In looking at Article 5, Section 9 of the Arkansas Constitution, the State in Oldner stated that they rejected the Mayor’s argument that he should not be disqualified. And the Court stated, “Not only do these crimes involve dishonesty and deceit, but more importantly, they directly impact the mayor’s ability to serve as an elected official.” **R. 243.**

The Court then in a subsequent case, Edwards v. Campbell, 210 Ark. 398, it’s where a current Mayor of Greenwood had been involved in some criminal activity. The Court then went back to the Oldner case in trying to decide that case, and stated that, “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. 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.”

We have filed a Motion for Summary Judgment, basically arguing that the Court had ruled the last time that what Mr. Cassell was convicted of in 1979, was a crime that involved deceit and dishonesty. And then we filed a Motion for Summary Judgment stating, in attached answers to Interrogatories, that the State had given us, that the State had not alleged any – there’s no facts out there. It’s

basically a two-part test. It has to be a crime involving deceit and dishonesty, and it has to directly impact and/or impugn the integrity of the office. **R. 244.** We filed a Motion, stating that the State had not produced any facts to that effect. In our interrogatories, we specifically asked, “Please state the specific facts that you intend to use at trial, to show that the Defendant has impugned the integrity of the office.” And the State replied, “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.”

It’s our argument, Your Honor, that because there are no facts out there that Mr. Cassell had – some way, it affects his ability to serve as Sheriff or has impugned the integrity of the office. We therefore believe our Motion for Summary Judgment should therefore be granted.

The Court: Thank you, Mr. Winningham. Mr. Carnahan?

Mr. Carnahan: Thank you, Your Honor. Your Honor, of course the State opposes Mr. Winningham’s Motion on behalf of Sheriff Cassell. We do so on the basis that all that is needed to be proven in this case, and it’s still our contention, is that the Sheriff, while Deputy Sheriff, committed a theft of property crime. **R. 245.** In this case, he was convicted of theft by receiving, a misdemeanor. With that in and of itself, it’s an infamous crime. That’s all that’s required to remove him from office. Thank you, Your Honor.

The Court: Well, again, we're sort of beating the same horse this time. In the State's Motion for Summary Judgment, these issues were addressed. And, in fact, I'm confident that's why as a result of my rulings in that matter we've got this Motion for Summary Judgment from Mr. Winningham.

Mr. Winningham had attached a transcript of my ruling on July 16, in which I did overrule the State's Motion for Summary Judgment. I made specific findings, attempting to interpret the Arkansas Supreme Court's opinions in Oldner and Edwards v. Campbell, as to when a misdemeanor will be deemed an infamous crime. The findings are found mainly in pages 18 through 23, and I'm adopting and incorporating those findings into today's ruling. **R. 246.**

Back in July we had our hearing, I did rule that theft by receiving involved dishonesty and would qualify as an infamous crime if, as your position Mr. Winningham, it is shown that it directly impacted the Sheriff's ability to serve as an elected official, and impugned the integrity of the office of Searcy County Sheriff. I think all the attorneys are in agreement that this is a fact situation that has not been addressed by the Arkansas Supreme Court. No case has involved a person as sheriff, who years earlier, committed a misdemeanor theft, long before probably, the idea of running for an elected office had ever entered his mind, and then many years later, ran for office and succeeded. And all the other cases involved people who had committed felonies before they were ever elected, or

people who were elected and then committed misdemeanors. And so we've got a unique situation. And I've accepted in part, the Prosecutor's position, but I've also accepted, basically 100 percent, the view of the defense. **R. 247.** And that is, when the misdemeanor that would qualify as an infamous crime is 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, and remove that person from office, or block his reelection bid.

However, I'm ruling today, that when we have a situation such as this, in 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 argued by Mr. Winingham – an issue of fact and law. And therefore, we get to the issues that have been raised by the Motion for Summary Judgment, as 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; and what are they? We've got a fact that in October of 1979, I think when Sheriff Cassell was 20 or 21, he pled guilty to a misdemeanor theft by receiving, property less than \$100.00 in value. That's a fact. Both sides concede that. **R. 248.** The next fact is that in October of 2009, 30 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, I might point out – he advised them that he was running for Searcy County Sheriff. He advised them that 31 years ago or so, he committed a criminal act, and he further stated in the ad, he pled guilty to that charge. And that's a fact. But the State used that paid ad as an exhibit. Both sides conceded that it is undisputed. And then we have another fact, and that is in November of 2010, the citizens of this county elected Sheriff Cassell as Sheriff.

Those are the facts, and they're undisputed, so it's my job to apply the law as I interpret it, and I interpret it in a way I think is consistent with how the Supreme Court will rule when they have to address this; I find that on these facts, I find as a matter of law, that when the people of Searcy County elected Sheriff Cassell as Sheriff, that they were saying at that time, that 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. And that's the way I read it. The people were informed by Sheriff Cassell, and then they elected him. **R. 249.** 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, I think they'll agree with me, that we have no evidence of that nature before the Court at this time.

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, which means, Sheriff, that I am not removing you from office, and I am not striking your name from the November ballot. Now, Mr. Winningham, I'm going to ask you to prepare a precedent, and I want these findings set forth in it. I don't want the Supreme Court having to guess on what I ruled. And if I'm wrong, I'm wrong, and if I'm right, I'm right. **R. 250.** I want you to get Deputy Prosecutor Carnahan's approval of the precedent, and then try to get it to me within 10 days. If you run into problems, if you go back looking for a transcript, then you two attorneys can talk about it and just let me know. But I think we want to get this done as quickly as we can. If you get it to me earlier, I'll sign it and get it back to you.

Mr. Winningham: Yes, sir.

The Court: Now, in all these cases, when we're looking at an elected official usually running for reelection and there's an effort to block that reelection bid, the Supreme Court has shown a willingness to expedite matters. And I feel that if asked to do so by the attorneys, that it will probably do so in this case. Obviously, we've got smart attorneys on both sides that are viewing this situation differently, and I think it's an area that needs to be cleaned up. And, of course, the lawyers are saddled with a Judge that didn't know anything, but I had to rule, so I did. Is there anything else that I need to address at this time, Mr. Carnahan?

Mr. Carnahan: Not from the State's respect, Your Honor. **R. 251.**

The Court: Mr. Winningham?

Mr. Winningham: No, sir.

The Court: All right. Then I'll look forward to getting an approved Order, and we're going to stand adjourned.

STATEMENT OF THE CASE

Appellee, Kenny Webster Cassell (“Sheriff Cassell”) was elected Sheriff and Collector of Searcy County, Arkansas, in the general election held in November of 2010. On October 31, 2011, Appellant, the State of Arkansas (“the State”), filed a Petition for Removal from Office against Sheriff Cassell. (Add. 1; R. 2). In its Petition, the State alleged that on October 9, 1979, Sheriff Cassell pled guilty to a misdemeanor theft violation while he was serving as a Searcy County Deputy Sheriff. *Id.* The State’s Petition also noted that in October of 2009, Sheriff Cassell stated in a paid political advertisement that he had “violated the laws of this land and plead guilty to the mi[s]demeanor charge of theft by receiving[.]” (Add. 2; R. 3). The State contended that Sheriff Cassell’s 1979 conviction of misdemeanor theft by receiving constituted an “infamous crime” under Article 5, Section 9 of the Arkansas Constitution, barring him from holding the office of Searcy County Sheriff and Collector. (Add. 2-3; R. 3-4). The State requested an order from the Circuit Court removing Sheriff Cassell from office. (Add. 4; R. 5). On October 31, 2010, the State also filed a Motion for Summary Judgment (Add. 32; R. 33) and Brief (Add. 35; R. 36) in which the State contended that there were no disputed facts and the only question presented to the Circuit Court was whether Sheriff Cassell’s misdemeanor theft conviction barred him from holding office.

On December 28, 2011, the State filed an Amended Petition for Removal from Office. (Add. 66; R. 68). On February 2, 2012, Sheriff Cassell filed a Motion to Dismiss the Amended Petition (Add. 71; R. 80) and Brief (Add. 73; R. 76), and a Response to the Amended Petition (Add. 77; R. 82). On February 10, 2012, the State filed a Response to Sheriff Cassell's Motion to Dismiss (Add. 81; R. 89) and Brief (Add. 83; R. 87).

On March 15, 2012, an Order of Recusal was entered by the Circuit Judges of the 20th Judicial District of Arkansas, who all found it necessary to recuse from this case due to conflicts of interest. (Add. 85; R. 93). On April 13, 2012, the Chief Justice of the Arkansas Supreme Court assigned Retired Judge David Clinger to hear the case. (Add. 86; R. 95).

On June 19, 2012, the State filed an Amended Motion for Summary Judgment (Add. 87; R. 106) and Brief (Add. 90; R. 109). Sheriff Cassell filed a Response to the State's Amended Motion for Summary Judgment (Add. 97; R. 126) and Brief (Add. 99; R. 128) on July 6, 2012. The State filed a Reply in support of its summary judgment motion on July 10, 2012. (Add. 107; R. 140).

On July 16, 2012, a hearing was held on pending motions. At the hearing, the Circuit Court denied Sheriff Cassell's Motion to Dismiss based upon the finding that "theft by receiving involves dishonesty." (Ab. 8; R. 224). After hearing argument on the State's Motion for Summary Judgment, the Circuit Court

noted that “the state of our law is . . . a little confusing” (Ab. 11; R. 228), and denied the State’s summary judgment motion, explaining:

Now if the Sheriff had committed this theft while in office, I think I could probably rule as a matter of law. This seems to have been what happened in all these other cases where we had an elected official committing the crimes. But we don’t have that here and I think there’s got to be more. There’s got to be a showing, I think, under these two landmark cases, that this crime from 1979 – that the public awareness of his having committed this crime impugned the integrity of the office and directly impacted on the Sheriff’s ability to serve as an elected official. There’s got to be more, in my opinion. So the upshot of this is that I’m overruling the State’s Motion for Summary Judgment.

(Ab. 14-15; R. 233). On August 8, 2012, the Circuit Court entered an Order in which the Circuit Court denied Sheriff Cassell’s Motion to Dismiss and denied the State’s Motion for Summary Judgment. (Add. 159-60; R. 196-97). The Circuit Court wrote the following:

The Court believes that under the cases of Edwards v. Campbell, 2010 Ark. 398, and State v. Oldner, 361 Ark. 316, that [Sheriff Cassell’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. (Add. 159-60; R. 196-97).

On July 26, 2012, Sheriff Cassell filed a Motion for Summary Judgment (Add. 111; R. 150) and Brief (Add. 149; R. 144). The State responded to Sheriff Cassell’s summary judgment motion on August 2, 2012. (Add. 155; R. 192). On August 16, 2012, a hearing was held on Sheriff Cassell’s pending summary

judgment motion. Counsel for Sheriff Cassell conceded, and the Circuit Court had already ruled, that Sheriff Cassell's conviction of misdemeanor theft by receiving constituted a crime of dishonesty and deceit. (Ab. 19; R. 244). However, counsel for Sheriff Cassell argued, and the Circuit Court agreed, that an "infamous crime" under the Arkansas Constitution had to be a crime of dishonesty and deceit *and* there had to be additional evidence that the crime directly impacted the Sheriff's ability to serve as an elected official and impugned the integrity of the office. (Ab. 20-22; R. 244-48). The Circuit Court granted Sheriff Cassell's summary judgment motion, stating: "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, I think they'll agree with me, that we have no evidence of that nature before the Court at this time." (Ab. 23; R. 250).

On September 4, 2012, the Circuit Court entered its final Order in this case. (Add. 163; R. 202). The Circuit Court began by noting its prior ruling "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." (Add. 163; R. 202). The Circuit Court stated that that no Arkansas Supreme Court 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." (Add. 164; R.

203). The Circuit Court then noted the following undisputed facts: (i) that in October of 1979, Sheriff Cassell pled guilty to misdemeanor theft by receiving, property less than \$100.00 in value (*id.*); (ii) that in October of 2009, Sheriff Cassell paid for an advertisement in the local newspaper in which he advised the citizens of Searcy County that he was running for 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” (Add. 164-65; R. 203-04); and (iii) that the citizens of Searcy County elected Sheriff Cassell as Sheriff in November of 2010 (Add. 165; R. 204).

Based upon these undisputed facts, the Circuit Court ruled as follows:

I find as a matter of law, that when the people of Searcy County elected [] 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.

(Add. 165; R. 204). The Circuit Court granted Sheriff Cassell’s Motion for Summary Judgment, and dismissed the State’s Petition for Removal from Office with prejudice. *Id.* The State filed its Notice of Appeal on September 12, 2012. (Add. 167; R. 206).

ARGUMENT

Standard of Review

Appellant, the State of Arkansas (“Appellant” or “the State”), contends that the Circuit Court erred by denying the State’s summary judgment motion, and granting the summary judgment motion filed by Appellee, Kenny Webster Cassell (“Appellee” or “Sheriff Cassell”).

A party is entitled to summary judgment if “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law on the issue set forth in the party’s motion.” Ark. R. Civ. P. 56(c)(2) (2011). The burden of proving that there is no genuine issue of material fact is upon the moving party. *Ryder v. State Farm Mut. Auto. Ins. Co.*, 371 Ark. 508, 268 S.W.3d 298 (2007). On appellate review, we must determine whether the evidence presented by the moving party left a material question of fact unanswered. *Id.* We view the proof in the light most favorable to the party requesting the motion, resolving any doubts and inferences against the moving party, to determine whether the evidence left a material question of fact unanswered. *Id.*

Scottsdale Ins. Co. v. Morrow Land Valley Co., 2012 Ark. 247, *8-9, --- S.W.3d --- (May 31, 2012).

I. THE CIRCUIT COURT ERRED BY DENYING THE STATE'S SUMMARY JUDGMENT MOTION AND GRANTING SUMMARY JUDGMENT TO SHERIFF CASSELL, AND RULING THAT A MISDEMEANOR THEFT CONVICTION PRIOR TO HOLDING OFFICE DOES NOT DISQUALIFY A PERSON FROM HOLDING OFFICE UNDER ARTICLE 5, SECTION 9 OF THE ARKANSAS CONSTITUTION.

The parties agreed that no issues of material fact were in dispute in this case.

The parties agreed that the Circuit Court was presented with a single question of law under the undisputed facts: whether Sheriff Cassell is eligible to serve as the elected Searcy County Sheriff under Article 5, Section 9 of the Arkansas Constitution. The citizens of Searcy County elected Sheriff Cassell as Sheriff in November of 2010. (Add. 165; R. 204). This Court may take judicial notice of the fact that Sheriff Cassell was reelected as Sheriff at the general election held on November 6, 2012, and Sheriff Cassell has held the position of Sheriff continuously since his initial election in November of 2010.

Sheriff Cassell pled guilty to a misdemeanor violation of 18 U.S.C. § 659 on October 9, 1979. A United States District Judge convicted Sheriff Cassell of “[p]ossessing property, of less than \$100.00 in value, the same being part of an interstate shipment, knowing the same to have been embezzled or stolen, in violation of 18 USC 659.” (Add. 8 & 9; R. 9 & 10). Specifically, Sheriff Cassell admitted to possession of stolen property belonging to Tyson Foods, Inc., that was part of an interstate shipment traveling from Springdale, Arkansas, to the State of

Maryland. (Add. 7; R. 8). The federal criminal statute under which Sheriff Cassell was convicted provides, in relevant part:

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, trailer, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air cargo container, air terminal, airport, aircraft terminal or air navigation facility, or from any intermodal container, trailer, container freight station, warehouse, or freight consolidation facility, with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen;

Shall be fined under this title or imprisoned not more than 10 years, or both, but if the amount or value of such money, baggage, goods, or chattels is less than \$1,000¹, shall be fined under this title or imprisoned for not more than 3 years, or both.

18 U.S.C. § 659 (emphasis added). The State contends that under Article 5, Section 9 of the Arkansas Constitution as interpreted by this Court, Sheriff

¹ At the time of Sheriff Cassell's conviction, the lesser penalty provision applied when the value of the stolen or embezzled goods was less than \$100.00.

Cassell's criminal conviction under 18 U.S.C. § 659 permanently disqualifies Sheriff Cassell from serving as Searcy County Sheriff as a matter of law. The Circuit Court erred by denying the State's summary judgment motion, and granting the summary judgment motion filed by Sheriff Cassell. The Circuit Court should be reversed, and this Court should enter an order removing Sheriff Cassell from the office of Searcy County Sheriff.

Article 5, Section 9 of the Arkansas Constitution provides that "[n]o 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." *Id.* This Court has interpreted this constitutional provision on many occasions, including two recent cases where the Court held that misdemeanor crimes involving elements of dishonesty constituted infamous crimes that disqualified offenders from holding public office.

In *State v. Oldner*, 361 Ark. 316, 206 S.W.3d 818 (2005), the Mayor of Dumas, Arkansas, was convicted in October 2003 of one count of misdemeanor witness tampering in violation of Ark. Code Ann. § 5-53-110, and one count of misdemeanor abuse of office in violation of Ark. Code Ann. § 5-52-107. 361 Ark. at 323. On November 7, 2003, the State filed a petition seeking to remove Oldner from the office of Mayor, contending that Oldner had been convicted of infamous crimes that warranted his removal from office pursuant to Article 5, Section 9 of

the Arkansas Constitution. In its petition, the State argued that the term “infamous crime” as used in the Constitution includes felonies and any misdemeanors that involve deceitfulness, untruthfulness, or falsification. *Id.* Oldner argued in response to the petition that he was not convicted of infamous crimes, because neither of his misdemeanor convictions was punishable by more than a year of imprisonment. *Id.* at 324. “Oldner also argued that he could not be removed from office because his actions took place in a prior term and the electorate chose to reelect him despite the charges.” *Id.* The trial court denied the State’s petition for removal, finding that an infamous crime is one that is punishable by more than a year’s imprisonment.

On appeal in *Oldner*, the State again argued that a person is ineligible to hold public office following conviction of any infamous crime, which includes any felony or any misdemeanor that involves deceitfulness, untruthfulness, or falsification. 361 Ark. at 324-325. This Court agreed with the State, holding that Oldner was permanently barred from holding public office because he was convicted of misdemeanor crimes that involved dishonesty and deceit:

Arkansas courts have consistently recognized that a person convicted of a felony or one of the specifically enumerated offenses is disqualified from holding public office under this section. *See Campbell v. State*, 300 Ark. 570, 781 S.W.2d 14 (1989); *Reaves v. Jones*, 257 Ark. 210, 515 S.W.2d 201 (1974); *Ridgeway v. Catlett*, 238 Ark. 323, 379 S.W.2d 277 (1964). In *State v. Irby*, 190 Ark. 786, 795–96, 81 S.W.2d 419, 423 (1935)

(quoting *State ex rel. Olson v. Langer*, 65 N.D. 68, 256 N.W. 377, 386 (1934)), this court further recognized that “[t]he presumption is, that one rendered infamous by conviction of felony, or other base offense, indicative of great moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship.”

While in *Irby* this court spoke of offenses involving moral turpitude, **the precise issue of what constitutes an infamous crime disqualifying a person from holding public office has heretofore not been addressed by this court.**

The plain language of Article 5, Section 9, specifically disqualifies a person from holding public office if convicted of the crimes of embezzlement of public money, bribery, or forgery. Also disqualified is any person convicted of an infamous crime. Infamous crime, however, is not further explained or defined in that provision. According to the State, each of these crimes share the common elements of dishonesty and deception. Those crimes specifically listed are then followed by the phrase infamous crime. This court has recognized that pursuant to 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. *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). Likewise, the doctrine of *noscitur a sociis*, which literally translates to “it is known from its associates,” provides that a word can be defined by the words accompanying it. *Hanley*, 333 Ark. 159, 970 S.W.2d 198; *Boston v. State*, 330 Ark. 99, 952 S.W.2d 671 (1997).

Thus, applying these rules of interpretation, it can be said that the framers in drafting Article 5, Section 9, intended that an infamous crime be one involving elements of deceit and dishonesty.

Here, in order to interpret infamous crime in the manner espoused by Oldner, the court would be required to focus solely on the punishment applicable to the crime and ignore the nature of the crime itself. Oldner argues that this is appropriate, as the modern historical view of what constitutes an infamous crime focuses on the available punishment.

In sum, our case law has recognized that an “infamous crime” is a distinct entity. It has never considered it to be synonymous with the term felony or required a punishment that exceeds imprisonment of one year. There is no support that the drafters of Article 5, Section 9, intended the term to be so narrowly construed, particularly in light of the fact that it is preceded by crimes specifically implicating elements of dishonesty or untruthfulness.

In the instant case, the offenses that Oldner was convicted of, abuse of office and witness tampering, are of a type that directly impact his moral integrity because they are crimes involving dishonesty and deceit. With regard to the offense of witness tampering, Oldner requested that two city employees fabricate testimony in order to cover up alleged wrongdoing on his part. As for the crime of abuse of office, Older used his position as Mayor for his own pecuniary gain by using city funds to pave a parking lot on property owned by his family. **Not only do these crimes involve dishonesty and deceit but, more importantly, they directly**

impact Oldner's ability to serve as an elected public official. In *Campbell*, 300 Ark. 570, 577, 781 S.W.2d 14, 18, this court recognized the effect of criminal convictions on the status of a public office and stated:

[W]e interpret art. 5, § 9 to mean that a public official becomes subject to removal when convicted by a plea of guilty or a verdict of guilty in circuit court of a crime defined by the article. Anything less, we believe, effectively nullifies the provision. We recognize the potential for harm to which this interpretation gives sufferance. However, the risk of harm to an individual must be balanced against the alternative—the loss of public confidence in those who govern which inevitably accompanies the spectacle of office holders who have been found guilty of an offense which disqualifies them for public trust, yet continue to hold the office by resorting to the endless delays to which the criminal justice system is now susceptible.

The integrity of the office of Mayor would be impugned by allowing Oldner to remain in that office. We believe it is this type of situation that the drafters of our Constitution sought to prevent through inclusion of the term “infamous crime” in Article 5, Section 9. For these reasons, the order of the trial court denying the State’s petition to remove Oldner as Mayor of Dumas is reversed.

361 Ark. at 325-26, 326-27, 327-28, 331-32 (emphasis added).

Sheriff Cassell argued below, and the Circuit Court agreed, that under *Oldner*, an “infamous crime” must be a crime of dishonesty *and* must *also* directly impact the official’s ability to serve as an elected public official and impugn the integrity of the office. However, a full reading of the *Oldner* opinion plainly

demonstrates that an “infamous crime” is a crime involving dishonesty and deceit, without further inquiry. The conviction of a crime of dishonesty and deceit is what directly impacts a convicted person’s ability to serve as an elected public official, and allowing a person convicted of a crime involving dishonesty and deceit to serve as an elected official would impugn the integrity of the elected office. Sheriff Cassell’s reasoning would exclude any conviction prior to holding office from the realm of “infamous crime,” contrary to this Court’s opinions in *Oldner, supra* and *infra*, and other cases, *infra*. This Court’s analysis in *Oldner* leads to the inescapable conclusion that Sheriff Cassell’s conviction of theft by receiving, a crime of dishonesty and deceit with an explicit element of knowledge, *supra*, permanently disqualifies Sheriff Cassell from holding office as a matter of law.

In *Edwards v. Campbell*, 2010 Ark. 398, 370 S.W.3d 250, this Court confirmed that misdemeanor theft is a crime of dishonesty and, as such, constitutes an “infamous crime” that disqualifies a person from holding elected office under Article 5, Section 9 of the Arkansas Constitution. In *Edwards*, the Mayor of Greenwood, Arkansas, was found guilty of misdemeanor theft of property in violation of Ark. Code Ann. § 5-36-103. 2010 Ark. 398, *1. Edwards was charged with theft for taking three campaign signs in opposition to a tax extension that Edwards supported. *Id.* A Greenwood District Judge found that Edwards knowingly took or exercised unauthorized control over the signs with the purpose

of depriving the owners thereof. *Id.* at *2. Following Edwards' conviction of misdemeanor theft, a resident and registered voter of Greenwood (Campbell) filed a complaint against Edwards in the Sebastian County Circuit Court, challenging Edwards' eligibility to run for reelection as the Mayor of Greenwood. *Id.* At the conclusion of the hearing on Campbell's complaint against Edwards, the trial court cited this Court's opinion in *Oldner, supra*, and first found that an "infamous crime" as set out in Article 5, Section 9 of the Arkansas Constitution is intended to include crimes involving elements of dishonesty. *Id.* at *3. The trial court next found that theft is a crime that involves dishonesty. As a result, the trial court concluded that Edwards was not eligible under the Arkansas Constitution to run for Mayor of Greenwood. *Id.*

On appeal to this Court, Edwards argued for his sole point on appeal that the trial court erred in determining that he was ineligible because, under the circumstances of his case, misdemeanor theft of property did not constitute an "infamous crime" within the meaning of Article 5, Section 9 of the Arkansas Constitution. 2010 Ark. 398, *3-4. Edwards urged the Court "to consider the totality of the circumstances surrounding the theft charge and conviction and to determine on a case-by-case basis whether a crime fits within the definition of 'infamous crime' . . . rather than adopting a bright-line rule." *Id.* at *4. This Court rejected "Edwards' argument that this court should consider reargument regarding

his conviction in cases such as this[,]" holding that as a matter of law, "misdemeanor theft is a crime of dishonesty and, as such, fits readily within the classification of an 'infamous crime.'" *Id.* at *10, 10-11.

The Court's analysis in *Edwards* leaves no doubt that a misdemeanor theft conviction constitutes a *per se* "infamous crime" under Article 5, Section 9 of the Arkansas Constitution:

It is clear from this court's discussion in *Oldner* that this court has concluded that an "infamous crime" is one that includes elements of deceit or dishonesty.

Yet, this court has not ruled on the specific question on appeal, which is whether misdemeanor theft of property falls within the meaning of an "infamous crime" under article 5, section 9, thus rendering a person ineligible to run for public office. We did, however, early on, hold that calling a man a thief amounted to a charge of larceny, "which is an infamous crime." *Gaines v. Belding*, 56 Ark. 100, 100, 19 S.W. 236, 236 (1892). We have also considered theft to be a crime involving dishonesty in the context of impeachment under Arkansas Rules of Evidence 608 and 609. *See, e.g., Laughlin v. State*, 316 Ark. 489, 872 S.W.2d 848 (1994); *Floyd v. State*, 278 Ark. 86, 643 S.W.2d 555 (1982); *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982); *James v. State*, 274 Ark. 162, 622 S.W.2d 669 (1981).

This court has made a distinction between crimes indicative of untruthfulness under Arkansas Rule of Evidence 608 and those indicative of dishonesty. *See Rhodes*, 276 Ark. at 207, 634 S.W.2d at 110. In *Rhodes*, this court found that the theft in that case, shoplifting, *while probative of dishonesty*, did not directly indicate an impairment of the trait for truthfulness. *Id.* at 209, 634

S.W.2d at 111. Likewise, in *Laughlin*, this court reiterated that under Rule 608(b), inquiries on cross-examination may be made into specific instances of conduct that are clearly probative of truthfulness or untruthfulness but not into conduct that is merely probative of dishonesty. 316 Ark. at 498, 872 S.W.2d at 853. Thus, this court refused to allow cross-examination into specific instances of theft, which were indicative of dishonesty, but did not necessarily evidence a proclivity for untruthfulness. *Id.* at 499, 872 S.W.2d at 854.

In the context of impeachment based on prior convictions involving dishonesty or false statements under Arkansas Rule of Evidence 609, this court has also specifically held that defendants may be impeached with prior convictions for theft because theft is a crime involving dishonesty. *See Floyd*, 278 Ark. at 89, 643 S.W.2d at 556–57 (finding that because the defendant’s prior convictions for burglary and theft were crimes involving dishonesty, they were admissible to impeach under Rule 609); *see also James*, 274 Ark. at 164, 622 S.W.2d at 670 (holding that the defendant’s prior convictions for grand larceny, theft, and forgery were all crimes involving dishonesty and therefore admissible under Rule 609 without weighing the prejudicial effect).

Despite this authority, Edwards makes several arguments in support of his point on appeal. He first claims that there is a strong public policy in favor of preserving eligibility to hold public office. **He urges this court to consider all of the circumstances surrounding the theft charge and his subsequent conviction,** including his argument that he thought at the time and still does today that he had the legal authority to remove the signs. Hence, he contends that what he did does not constitute an “infamous crime” within the meaning of article 5, section 9. He further argues that his conviction for misdemeanor theft of property for three campaign signs is not serious enough to be deemed an “infamous

crime.” Campbell counters that Edwards’s theft-of-property conviction should preclude him from holding office because this court has already determined that infamous crimes involve elements of dishonesty and determined that theft is a crime involving dishonesty. Campbell further argues against adopting a case-by-case analysis and considering the facts and arguments surrounding the conviction because that would be a collateral attack on Edwards’s final judgment for misdemeanor theft.

Campbell is correct. This court has already determined in *Oldner* that an “infamous crime” involves dishonesty. 361 Ark. at 327, 206 S.W.3d at 822. This court, however, has not addressed the precise issue of whether theft is an “infamous crime” for the purposes of preelection eligibility under article 5, section 9. We have done so in the context of impeachment under the rules of evidence and analogized that to a person’s eligibility to hold or run for public office. *See id.* at 330, 206 S.W.3d at 824 (citing Wayne R. LaFave, *Substantive Criminal Law* § 1.6(d) (2d ed.2003)). Furthermore, this court has consistently found that a theft conviction involves dishonesty and is therefore admissible to impeach under Arkansas Rule of Evidence 609. *See Floyd*, 278 Ark. at 89, 643 S.W.2d at 556–57; *see also James*, 274 Ark. at 164, 622 S.W.2d at 670. All of this leads ineluctably to a conclusion that theft constitutes an “infamous crime” in the context of article 5, section 9 of the Arkansas Constitution.

We further do not agree with Edwards’s contention that this court should consider the degree of his theft offense and the resulting punishment to determine whether the crime was infamous. This court in *Oldner* rejected this argument when it found that a crime is not considered infamous based on the available punishment but rather is considered infamous based on the underlying nature of that

crime. 361 Ark. at 329, 206 S.W.3d at 823.

The crime of theft, for which Edwards was convicted, is committed when one knowingly

(1) Takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another person, with the purpose of depriving the owner of the property; or

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

Ark. Code Ann. § 5–36–103(a). The severity of the punishment varies with the value of the property taken, the type of property taken, or the threats used in the taking of the property. *See id.* § 5–36–103(b). The underlying elements of the crime, however, remain the same, no matter how severe the theft was or the punishment imposed. 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 car worth thirty thousand dollars is taken.

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. He asks us specifically to reconsider his arguments that the people who placed the signs opposed his position on the tax extension and the signs were placed to taunt him and that he believed at the time that he had the legal authority to remove the signs because he thought they were in public right-of-ways. These arguments were presented to the district judge, who found them unpersuasive and concluded that

the Court will not consider reargument regarding convictions of infamous crimes, and will not consider case-by-case facts regarding the circumstances of conviction. Under *Oldner* and *Edwards*, there is no doubt that Sheriff Cassell's theft conviction disqualifies Sheriff Cassell from holding office as a matter of law.

Despite the clarity of this Court's opinions in *Oldner* and *Edwards*, Sheriff Cassell argued below that his case is distinguishable from *Oldner* and *Edwards* because his conviction occurred before he held elected office, and because he disclosed his prior conviction to the voters of Searcy County in a newspaper advertisement prior to his election as Searcy County Sheriff. These arguments do nothing to change the fact that Sheriff Cassell is disqualified from holding office due to his conviction of an infamous crime. As a matter of law, conviction of an infamous crime permanently disqualifies a person from holding office, and the disqualification may not be overcome by the will of the electorate.

This Court has held that conviction of an infamous crime disqualifies a person from holding office under Article 5, Section 9 of the Constitution even where the conviction occurs long before the convicted person seeks or holds public office. In *Ridgeway v. Catlett*, 238 Ark. 323, 379 S.W.2d 277 (1964), this Court held that a candidate for nomination to run for the office of Governor in a Democratic primary was ineligible to hold public office under Article 5, Section 9 of the Arkansas Constitution because he had been convicted, *years prior to*

running for office, of embezzling public funds. 238 Ark. at 324 (“[W]e are unanimous of the opinion that Ridgeway is not eligible to hold public office. The language of Article 5, Section 9, is too clear to be misunderstood[.]”). This Court’s decision in *Ridgeway* controls and disposes of Sheriff Cassell’s argument that he should not be disqualified from holding office where his conviction occurred prior to taking office.

Notably, this Court also held in *Ridgeway* that a gubernatorial pardon in 1959 that purported to restore “all civil and political rights which were lost as a result of the conviction” did not restore candidate Ridgeway’s eligibility to hold public office in 1964:

This argument is without merit. **Under the plain language of the Constitution it is the fact of conviction that disqualifies a person from holding public office. There is no intimation whatever that the pardoning power conferred on the Governor by Article 6, Section 8, is intended to permit such an act of clemency to supersede the clear mandate of Article 5, Section 9,** which we have quoted. It is a familiar rule that where there is a specific provision, such as the disqualification that results from conviction of an infamous crime, such a provision must be given effect as against a general clause, such as the grant of the pardoning power.

238 Ark. at 235 (emphasis added). *See also May v. Edwards*, 258 Ark. 871, 876, 529 S.W.2d 647 (1975) (“[It is the fact of conviction that disqualifies one from holding public office under the authority of *Ridgeway v. Catlett*, 238 Ark. 323, 379

S.W.2d 277. This disqualification, under *Ridgeway*, cannot even be removed by pardon.”); *State v. Irby*, 190 Ark. 786, 81 S.W.2d 419, 424 (1935) (holding that executive pardon of infamous crime under Article 5, Section 9 does not render a disqualified candidate eligible to hold office; “We think it self-evident that the issuance and acceptance of a pardon within itself irrevocably acknowledges a conviction of the crime pardoned and has the effect only of restoring civil rights as distinguished from political privileges.”).

If a pardon cannot restore a person’s eligibility to hold office following conviction of an infamous crime, then a convicted person’s election by popular vote certainly does not restore the person’s eligibility to hold office. This Court squarely addressed this issue in *Oldner, supra*, and concluded that disqualification due to conviction of an infamous crime cannot be overcome by the will of the electorate, and disqualification under Article 5, Section 9 is permanent:

Finally, Oldner argues that he cannot be now removed from the office of Mayor because his convictions resulted from acts committed in his previous term of office and despite the pending charges, the electorate voted for him to remain as mayor. This argument is wholly without merit.

It is the fact of conviction that disqualifies a person from holding public office under the authority of *Ridgeway*, 238 Ark. 323, 379 S.W.2d 277. *See May v. Edwards*, 258 Ark. 871, 529 S.W.2d 647 (1975). **Moreover, this type of disqualification cannot even be removed by pardon.** *Id.*; *see also Irby*, 190 Ark. 786, 81 S.W.2d 419. **The court in *May*, 258 Ark. 871, 529**

S.W.2d 647, further explained that the reason a person who has been convicted of an infamous crime is prevented from taking office is because he is thereby rendered ineligible just as he would be if he did not possess other qualifications required by law.

Here, the fact that Oldner was reelected Mayor after the charges were filed against him is irrelevant. Oldner's convictions of infamous crimes disqualify him from holding public office. This is not a disqualification that can be overcome by the will of the electorate. Simply put, he remains ineligible for holding public office in perpetuity. See *Allen v. State*, 327 Ark. 350, 327 Ark. 366A, 939 S.W.2d 270 (1997) (supplemental opinion denying rehearing).

Oldner, 361 Ark. at 332-33 (emphasis added). See also *Allen v. State*, 327 Ark. 350, 357, 939 S.W.2d 270 (1997) (noting that Article 5, Section 9 of the Arkansas Constitution “renders an official found guilty of an ‘infamous crime’ ineligible for holding office in perpetuity.”).

The Court’s logic is sound. If a person were disqualified only by conviction of an infamous crime while in office, then the person could simply run for office again in the future and because the conviction occurred prior to holding office, the person would not be disqualified by the conviction, and the purpose of Article 5, Section 9 would be defeated. If a gubernatorial pardon nullified a candidate’s disqualification due to the conviction of an infamous crime, then the purpose of Article 5, Section 9 could be defeated in that way. Sheriff Cassell’s disqualification due to his conviction of an infamous crime “is not a

disqualification that can be overcome by the will of the electorate[,]” and Sheriff Cassell “remains ineligible for holding public office in perpetuity.” *Oldner, supra*, 361 Ark. at 333.

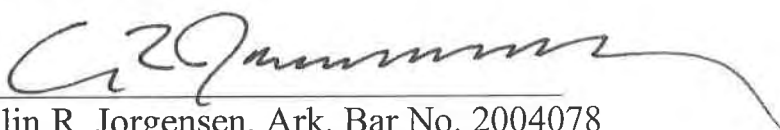
This Court’s opinions leave no doubt that Sheriff Cassell’s theft conviction is a *per se* infamous crime under Article 5, Section 9 of the Arkansas Constitution, which permanently disqualifies him from holding the office of Searcy County Sheriff. The Circuit Court’s order granting summary judgment to Sheriff Cassell should be reversed. This Court should enter an order removing Sheriff Cassell from the office of Searcy County Sheriff.

CONCLUSION

For the reasons discussed above, the State respectfully requests that this Court reverse the judgment of the Circuit Court and issue an order removing Kenny Webster Cassell from the office of Sheriff and Collector of Searcy County, Arkansas.

Respectfully Submitted,

DUSTIN McDANIEL
Attorney General

By: 
Colin R. Jorgensen, Ark. Bar No. 2004078
Assistant Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201-2610
(501) 682-3997
colin.jorgensen@arkansasag.gov

Attorneys for Appellant.

CERTIFICATE OF SERVICE

I, Colin R. Jorgensen, Assistant Attorney General, hereby certify that I have served a copy of the Appellant's Abstract, Brief and Addendum by placing a copy in the United States Mail, postage prepaid, addressed to the following on this 13th day of November, 2012:

Joe Don Winningham
Attorney at Law
564 Locust
Conway, AR 72034



Colin R. Jorgensen

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

STATE OF ARKANSAS

PLAINTIFF

VS.

Case NO. CV *2011-53*

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

PETITION FOR REMOVAL FROM OFFICE

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

I

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]deameanor 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.

II

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.

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.*

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 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.

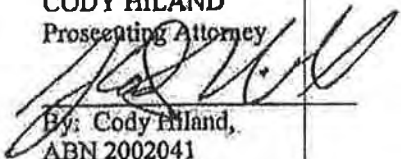
In *Ridgeway v. Catlett*, 238 Ark. 323, 379 S.W.2d 277 (1964), the Supreme Court held that even crimes committed before a person takes office are disqualifying in the terms of Article 5, §9, and not even a pardon can restore a convicted persons right to hold public office (See also, *Allen v. State*, 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

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: Cody Hiland,
ABN 2002041
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 31st day of October, 2011.



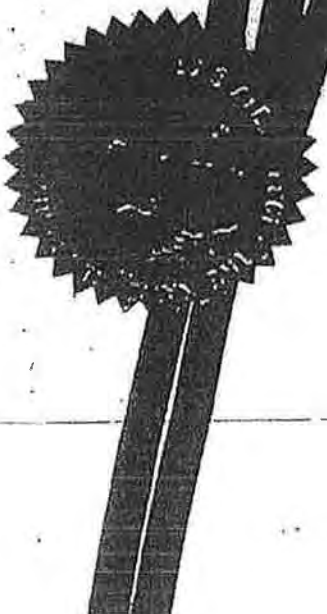
Chris Carnahan,
Deputy Prosecuting Attorney



NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

To all to whom these presents shall come. Greeting:

By virtue of the authority vested in me by the Archivist of the United States, I certify on his behalf, under the seal of the National Archives and Records Administration, that the attached reproduction(s) is a true and correct copy of the documents in his custody.



SIGNATURE <i>Barbara Rust</i>	
NAME Meg Hacker	DATE 10/4/11
TITLE Archives Director	
NAME AND ADDRESS OF DEPOSITORY National Archives and Record Administration 1400 John Burgess Dr. Fort Worth, Texas 76140	

NA FORM 12040 (10-88)

AUG 20 1979

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

Pat W. Graham, Jr., Clerk
By *Marguerite Hanna*
Deputy Clerk

UNITED STATES OF AMERICA)

v.)

Criminal No. 79-30004-01
79-30004-02

KENNY WEBSTER CASSELL)
DAVID LEE WILLIAMS)

INFORMATION

The United States Attorney charges:

That on or about February 4, 1979, in the Western District of Arkansas, KENNY WEBSTER CASSELL and DAVID LEE WILLIAMS, did unlawfully possess property, towit: Cornish Hens, the property of Tyson Food, Inc. and of less than \$100.00 in value, the same being a part of an interstate shipment traveling from Springdale, Arkansas, to the State of Maryland knowing the same to have been ^{OR} embezzled ~~and~~ stolen, in violation of 18 U.S.C. 659.

Larry R. McCord
United States Attorney

By: *Steven N. Snyder*
Asst. U. S. Attorney

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (6/74)

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH	DAY	YEAR
10	09	79

COUNSEL

WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

WITH COUNSEL JACK HOLT, JR.
(Name of counsel)

PLEA

GUILTY, and the court being satisfied that there is a factual basis for the plea, NOLO CONTENDERE, NOT GUILTY

There being a finding/verdict of

NOT GUILTY. Defendant is discharged
 GUILTY.

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense(s) 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, in violation of 18 USC 659.**

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of **one (1) year on the condition that the defendant be confined in a jail-type institution for a period of thirty (30) days, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant placed on probation, with supervision, for a period of eleven (11) months to commence upon the defendant's release from confinement, upon the regular terms and conditions of probation.**

IT IS FURTHER ORDERED that the defendant pay a fine to the United States in the sum of three hundred dollars (\$300.00)

SPECIAL CONDITIONS OF PROBATION

U. S. District Court
Western Dist. Arkansas
FILED
OCT 9 1979

IT IS FURTHER ORDERED that the defendant will surrender himself to the U. S. Marshal no later than 10 days from this sentencing, which is the 19th day of October, 1979.

Pat L. Graham, Jr., Clerk
By *[Signature]*
Deputy Clerk

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer

SIGNED BY

U.S. District Judge

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO:243 (6/73)

In the presence of the attorney for the government the defendant appeared in person on this date

MONTH	DAY	YEAR
10	09	79

COUNSEL
 WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.
 WITH COUNSEL JACK HOLT, JR. (Name of counsel)

PLEA
 GUILTY, and the court being satisfied that there is a factual basis for the plea, NOLO CONTENDERE, NOT GUILTY

There being a finding/verdict of NOT GUILTY. Defendant is discharged.
 GUILTY.

FINDING & JUDGMENT
Defendant has been convicted as charged of the offense(s) 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, in violation of 18 U.S.C. 659.**

SENTENCE OR PROBATION ORDER
The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of **one (1) year on the condition that the defendant be confined in a jail-type institution for a period of thirty (30) days, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant placed on probation, with supervision, for a period eleven (11) months to commence upon the defendant's release from confinement, upon the regular terms and conditions of probation.**

IT IS FURTHER ORDERED that the defendant pay a fine to the United States in the sum of three hundred dollars (\$300.00).

SPECIAL CONDITIONS OF PROBATION
U. S. District Court
Western Dist. Arkansas
FILED
OCT 9 1979
By Pat L. Graham, Jr., Clerk
[Signature]
Deputy Clerk
IT IS SO ORDERED that the defendant will surrender himself to the U. S. Marshal no later than 10 days from the day of sentencing which is the 19th day of October, 1979.

ADDITIONAL CONDITIONS OF PROBATION
In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION
The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
 U.S. District Judge

WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

OCI 9 1979

Pat J. Graham, Jr., Clerk
By *Margaret M. Mason*
Deputy Clerk

UNITED STATES OF AMERICA)
)
VS.)
)
KENNY WEBSTER CASSELL)
DAVID LEE WILLIAMS)

CRIMINAL NO. 79-30004-01
02

PETITION FOR LENIENCY FOR KENNY WEBSTER CASSELL

We, the undersigned residents of Searcy County, are aware of the fact that Kenny Webster Cassell has plead guilty to possessing property of Tyson Foods of a value of less than ONE HUNDRED AND NO/100 (\$100.00) DOLLARS, a misdemeanor, and that he is to be sentenced by this Honorable Court on October 9, 1979, and we would like to go on record with the Court in support of his general reputation for honesty and decency and recommend to the Court.

NAME:

ADDRESS:

<i>L.O. Isaac</i>	<i>Marshall Ark.</i>
<i>Priscilla Kain</i>	<i>Lealia Ark.</i>
<i>Ronnie Harness</i>	<i>Marshall, Ark.</i>
<i>Charles A. Watts</i>	<i>Marshall, Ark.</i>
<i>Clara Wootley</i>	
<i>Artley S. Loggins</i>	<i>Box 9 Marshall Ark.</i>
<i>Janice Loggins</i>	<i>Box 9 Marshall, Ark.</i>
<i>Donna H. Hines</i>	<i>Box 779, Marshall, Ark.</i>
<i>Lora Henson</i>	<i>Box H, Marshall, "</i>
<i>Sachara West</i>	<i>Marshall - (h. 72650</i>
<i>Mylodeen Kumpson</i>	<i>Marshall Ark.</i>
<i>Dwight B. Mansfield</i>	<i>Ap #1, Marshall, Ark.</i>
<i>Shirley Mansfield</i>	<i>Box 1 Marshall Ark.</i>
<i>Richard Eppert</i>	<i>Box 452 Marshall, Ark.</i>
<i>Charles H. Henson</i>	<i>Box 58 Marshall Ark.</i>
<i>Carla Henson</i>	<i>Box 7 Box 58 Marshall, Ark.</i>

Bill England	Pt 7. Box 121 Marshall Ark
Theresa Gardner	Marshall, Ark.
Maui Bussan	Marshall Ark
Lana May	Marshall Ark
Maxine Gray	Marshall Ark
Bobby West	Marshall Ark
Anna West	Marshall Ark
Ben West	Marshall Ark
Bess West	Marshall Ark
Hester O'Neal	Marshall Ark
Florence O'Neal	Marshall Ark
Maudie England	Marshall Ark
Lynda England	Marshall, Ark.
Jan England	Marshall Ark
Beverly Trent	Leslie, Ark.
Bess Trent	Leslie Ark
Donald Watts	Marshall Ark
Garry O'Neal	Marshall Ark
Jim O'Neal	Marshall Ark
Franklin O'Neal	Donald Watts
Betty O'Neal	Marshall, Ark.
William Freeman	Pt. Leslie, Ark.
Rudy Freeman	Pt. Leslie, Ark.
Pat Harris	Box 24, Marshall, Ark.
James Kelley	Pt 8 Marshall, Ark.
James B. Brady	Pt 1 Marshall Ark.
Steve Branscum	Pt 6 Leslie Ark
Phyllis Branscum	Pt 6 Leslie Ark
Nellie Branscum	Pt. 7 Box 113, Marshall, Ark.
Leola Branscum	Pt 7 Box 113 Marshall Ark
Myrtle Glenn	Pt. 7. Box 113 Marshall Ark
Howard O'Neal	Marshall, Ark.
Ethel O'Neal	Marshall Ark.

UNITED STATES OF AMERICA)
)
VS.)
)
KENNY WEBSTER CASSELL)
DAVID LEE WILLIAMS)

CRIMINAL NO. 79-30004-01
02

PETITION FOR LENIENCY FOR DAVID LEE WILLIAMS

We, the undersigned residents of Searcy County, are aware of the fact that David Lee Williams has plead guilty to possessing property of Tyson Foods of a value of less than ONE HUNDRED AND NO/100 (\$100.00) DOLLARS, a misdemeanor, and that he is to be sentenced by this Honorable Court on October 9, 1979, and we would like to go on record with the Court in support of his general reputation for honesty and decency and recommend to the Court.

NAME:

ADDRESS:

<i>Betty B. Loggins</i>	<i>Box 9 Marshall, Ark.</i>
<i>Janice</i>	<i>Box 272 Justice, Ark.</i>
<i>Greene Loggins</i>	<i>Box 5, Marshall, Ark.</i>
<i>Paul Ray Halden</i>	<i>Rt. 5 Marshall, Ark.</i>
<i>Art L. Logan</i>	<i>Box 36 Marshall, Ark.</i>
<i>James Williams</i>	<i>P.O. Box 28 Justice, Ark.</i>
<i>Linda Bush</i>	<i>P.O. Box 1 Marshall, Ark.</i>
<i>Rozee Beener</i>	<i>P.O. Box 187, Marshall, Ark.</i>
<i>Sissy Joe Rind</i>	<i>P.O. Box 321 MARSHALL AR.</i>
<i>Patty Adams</i>	<i>Rt. 3 Box 49 Marshall, Ark.</i>
<i>Bill Johnson</i>	<i>Box 447 Marshall, AR</i>
<i>Rita Broadland</i>	<i>Box 23 Marshall, Ark.</i>
<i>Chris Redding</i>	<i>Harriet AR. 72639</i>
<i>Ronald Rossland</i>	<i>Marshall, Ark</i>
<i>Randy Lasser</i>	<i>Box 9 Marshall Ark</i>
<i>Robert V. Baker</i>	<i>Box 278 Marshall Ark</i>
<i>A J</i>	<i>Box 131 Marshall, Ark.</i>

Y. Baker	Marshall Ark
Martin Trent	Marshall Ark
Stevens Trent	Marshall Ark
Joe Val Jaggins	Marshall Ark
Carl Laggins	Marshall, Ark.
Harry Jaggins	Marshall, Ark.
Al Jaggins	Marshall Ark
Coy England	Marshall Ark
Barton Hester	Leatic Ark
W. H. Hester	
Charles A. Hester	P.O. Box 73 Marshall, Ark.
Jimmy W. Simpson	Box 105 Marshall Ark
Jimmy Hendon	RT 5 Marshall A.R.K.
Donnie Hester	RT 5 Marshall A.R.K.
Bennie Mason	Box 444 Marshall Ark.
Donnie Hester	RT-1 Box 15 Marshall, Ark.
Edna Hester	RT-5 Box 46 Marshall, Ark.
Carol Jackson	RT-5 Marshall, Ark.
Wanda Jackson	RT-5 Marshall, Ark.
Natalie Jackson	Marshall, Ark.
Harris Brannon	Marshall Ark
Laurie Brannon	Marshall Ark.
David Brannon	Marshall, Ark.
Steve McIntire	St. Joe Ark.
Billy Brant	" " "
Bonnie Mason	" " "
Billy Mason	" " "
Beth Hester	" " "
Coy White	St Joe Ark
Bennie McEaster	St " "
Shirley Reones	Marshall Ark
Spurley J. Hester	Marshall, Ark.
W. H. Hester	Marshall, Ark.

1, KENNY WEBSTER CASSELL, DO hereby certify that I am 24 years of age and my wife, LA DONNA GAY is 24 years of age and is now pregnant and expecting on or about January 1, 1980.

I am presently employed by David Treat Wood Products, Marshall, Arkansas, and perform services as a truck driver and hauler. The most part of my work is going to Marianna, Arkansas two or three days per week to pick up loggs, otherwise to haul slabs to a charcoal plant at Harriett. On my runs to Marianna, I usually depart Marshall around 4:00 a.m. and pick up the loggs in Mariana and return to Marshall in the evening. The round trip being approximately 400 miles. My normal work week is a five day week, however, I have been working on Saturdays, due to my present financial circumstances.

Prior to my employment by Mr. Treat, I worked briefly as a truck driver for J.B. Hunt driving tractor-trailers across country. Prior to that time, I served as Deputy Sheriff for some three months for which I received no compensation. I have a claim in for pay but it has been refused.

I presently have approximately \$9,000.00 in debts and of course, my wife will have to terminate her employment soon due to pregnancy and the need to take care of our child when it arrives. This is our first child so my wife is very dependent on me and is in need of my constant companionship. Even though I was making quite a bit of money as a truck driver, one of the main reasons I changed employment was to work in Marshall so that I would be close to her and home at nights and be available whenever she might need me due to her pregnant condition.

In the past, I have also assisted my father, Dalph Cassell, with some of the chores around his place at Cannan. Recently, my father injured himself and is incapable of taking care of his hog lot which requires daily attention and there is nobody else at home other than my mother, who cannot help in this respect either.

If I have to go into daily confinement, I would lose my job. I have no other source of income and I am not in a position to borrow any further from my mother and dad since it was necessary for me to borrow from them to pay legal expenses for the first trial, and for other expenses incurred while I was not being paid as a Deputy Sheriff.

I would be glad to do public work as the Court might require in place of going to jail. If the nature of this offense requires the Court sentence me to some jail time, then I would sincerely appreciate the Court permitting this to be served at nights and on the weekends so that I can support the emotional needs of my wife and likewise, have gainful employment so that I can take care of my wife and child and work on my debts rather than to get further indebted.

Respectfully,

Kenny Webster Cassell

Kenny Webster Cassell

STATE OF ARKANSAS)
)ss:
COUNTY OF PULASKI)

SUBSCRIBED AND SWORN to before me, a Notary Public, this 12th day of October, 1979.

OC

15

11 11

P / M

HARRISON DIVISION

Pat L. Graham, Jr., Clerk
By, *Marguerite Stovner*
Deputy Clerk

UNITED STATES OF AMERICA)
)
VS.) CRIMINAL NO. 79-30004-01
) 02
KENNY WEBSTER CASSELL)
DAVID LEE WILLIAMS)

MOTION FOR MODIFICATION OF SENTENCE

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Kenney Webster Cassell and David Lee Williams, the Defendants in the above-styled and numbered cause, and respectfully files this Motion for Modification of Sentence, said sentence having been heretofore imposed and pronounced against them on October 9, 1979 in the above-styled and numbered cause, and in support thereof would respectfully show this Honorable Court as follows, to-wit:

I

JURISDICTION

Rule 35 of the Federal Rules of Criminal Procedure provides in part, that:

"...the Court may correct an illegal sentence at any time and may correct a sentence imposed in a legal manner within the time provided herein for the reduction of sentence. The Court may reduce the sentence within 120 days after the sentence is imposed..."

In this connection, each Defendant plead guilty to violation of 18 U.S.C. 659.

II

STATEMENT OF CASE

Each Defendant plead guilty to possessing property, of less than ONE HUNDRED AND NO/100 (\$100.00) DOLLARS in value, the same being a part of an interstate shipment, knowing the same to have been embezzled or stolen.

REASONS IN SUPPORT OF
THIS MOTION TO MODIFY SENTENCE

Each Defendant respectfully submits that imprisonment would not be beneficial to himself, his family or society, and that imprisonment on a day in, day out basis for 30 days would place a severe physical, mental and emotional strain on the pregnant wives of each party, and will through loss of employment, during confinement and after, place a severe strain upon each Defendant's family structure.

Because of the unique personal circumstances of each Defendant, more particularly set out and described in the Affidavits filed in support hereof, each Defendant respectfully request the Court to consider total suspension of sentence to confinement, or in the alternative, designate confinement at nights and on the weekends which would permit each Defendant to maintain gainful employment.

If in fact the Court makes its final determination that each Defendant must be placed into a situation of confinement, it is submitted that the goals of justice would be better met if it would be flexible in its sentence by permitting continued employment by the Defendants with evening and weekend confinement.

Likewise, each Defendant, as an alternative to confinement, request this Court to consider sentencing the respective Defendants to perform work for a specified charity and/or public works within his home community; that true justice is circumvented by confinement when in fact each Defendants time and talents could be utilized in fulfillment of social needs rather than merely sitting in a place of confinement.

IV

RELIEF SOUGHT BY
MODIFICATION OF SENTENCE

It is urged that the Court modify each Defendants sentence by granting a full suspended sentence, or, permit each Defendant


alternate sentence, instead of being confined in a jail type institution for a period of 30 days, utilize the same period of time designated for confinement to perform public and/or civic work, under proper supervision, without compensation.

V

CONCLUSION

Defendants urge that while it would be an understatement for each Defendant to say he was sorry, he openly states that the pre-trial confinement after arrest, the severe physical, mental and emotional strain of trial, the extreme anxiety of running twice the gamut of criminal prosecution coupled with the additional expense of Court, and trial and notariety over the offense charged has taught each a lesson which will never be forgotten. Each Defendant has accepted this adversity and has also learned from it. Each urge that no benefit can be derived from imprisonment.

Respectfully submitted,


JACK HOLT, JR.
Suite 116 Evergreen Place
1100 North University
Little Rock, Arkansas 72207

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the above has been mailed to Mr. Steve Snyder, Assistant United States Attorney, at his address, P. O. Box 1524, Fort Smith, Arkansas 72902, this 12th day of October, 1979.


JACK HOLT, JR.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

UNITED STATES OF AMERICA

PLAINTIFF

V. Criminal No. 79-30004-01
-02

KENNY WEBSTER CASSELL
DAVID LEE WILLIAMS

DEFENDANTS

O R D E R

On this October 16, 1979, the Court having considered
defendants' Motion For Modification of Sentence,

IT IS HEREBY ORDERED that said Motion be, and hereby
is denied.


United States District Judge

U. S. District Court
Western Dist. Arkansas
FILED

OCT 16 1979

Paul L. Graham, Jr., Clerk

U.S. 20

Add. 19

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

OCT 17 1979

PAT L. GRAHAM, JR., Clerk
By *[Signature]*
Deputy Clerk

UNITED STATES OF AMERICA)

v.)

Criminal No. 79-30004-01
02

KENNY WEBSTER CASSELL)
DAVID LEE WILLIAMS)

RESPONSE OF UNITED STATES OF AMERICA TO DEFENDANTS' MOTION FOR MODIFICATION
OF SENTENCE

Comes now the United States of America, by and through its attorneys for the Western District of Arkansas, and for its response to defendants' Motion for Modification of Sentence, states:

1. That the defendants have failed to set forth any grounds different from those originally presented to the Court at the time of their sentencing.

2. The fact that a prison sentence imposed upon a defendant might bring greater hardship to his family than to himself, though an unpleasant fact of life, is not such a ground as to require a reduction in sentence. United States v. Del Toro, 405 F. Supp. 1163 (D. C. N. Y. 1975).

3. The sentence of this Court imposed upon the defendants on October 9, 1979, is not overly severe, is within the statutory limits for the offense committed, and should not be disturbed by this Court.

WHEREFORE, PREMISES CONSIDERED, THE UNITED STATES OF AMERICA PRAYS that the defendants' Motion for Modification of Sentence be dismissed.

Larry R. McCord
United States Attorney

By: *[Signature]*
Steven N. Snyder
Asst. U. S. Attorney

CERTIFICATE

I hereby certify that a copy of the foregoing Response of United States of America to Defendants' Motion for Modification of Sentence was mailed to Jack Holt, Jr., Attorney, Suite 116, Evergreen Place, 1100 North University, Little Rock, Arkansas 72207, this 17th day of October, 1979.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

W. L. Graham, Jr., Clerk
By *Marguerite Warner*
Deputy Clerk

UNITED STATES OF AMERICA PLAINTIFF

V. Criminal No: 79-30004-01

KENNY WEBSTER CASSELL DEFENDANT

ORDER AMENDING JUDGMENT

The Judgment entered in the captioned case on October 9, 1979 is amended as follows:

The defendant, Kenny Webster Cassell, is hereby committed to the custody of the Attorney General for a period of one (1) year on the condition that the defendant be confined in a jail-type institution for a period of (30) days, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant placed on probation, with supervision, for a period of eleven (11) months to commence upon the defendant's final release from confinement, upon the regular terms and conditions of probation.

IT IS FURTHER ORDERED that the defendant pay a fine to the United States in the sum of three hundred dollars (\$300.00).

It is recommended the Attorney General designate the Sebastian County Detention Center, Fort Smith, Arkansas, for service of the committed portion of this sentence and the defendant be permitted to surrender himself to said detention center at 9:00 p.m. each Friday for confinement until 7:00 p.m. the following Sunday for a period of ten consecutive weekends. In case of an emergency, verified by the probation officer, and, with the approval of the Court and the Attorney General, the defendant may be excused from one or more weekend confinements, but will be required to serve a total of ten three-day weekends.

IT IS SO ORDERED that the defendant will surrender himself as directed by the U. S. Marshal on October 26, 1979.

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (6/74)

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH	DAY	YEAR
10	09	79

COUNSEL

WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

WITH COUNSEL

JACK HOLT, JR.

(Name of counsel)

PLEA

GUILTY, and the court being satisfied that there is a factual basis for the plea,

NOLO CONTENDERE.

NOT GUILTY

There being a finding/verdict of

NOT GUILTY. Defendant is discharged

GUILTY.

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense(s) 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, in violation of 18 U.S.C. 659.**

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of **one (1) year on the condition that the defendant be confined in a jail-type institution for a period of thirty (30) days, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant placed on probation, with supervision, for a period eleven (11) months to commence upon the defendant's release from confinement, upon the regular terms and conditions of probation.**

IT IS FURTHER ORDERED that the defendant pay a fine to the United States in the sum of three hundred dollars (\$300.00).

SPECIAL CONDITIONS OF PROBATION

IT IS SO ORDERED that the defendant will surrender himself to the U. S. Marshal no later than 10 days from the day of sentencing which is the 19th day of October, 1979.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

U. S. DISTRICT COURT
WESTERN DIST. ARKANSAS
FILED

NOV 7 1979

PAT. L. GRAHAM, JR., Clerk
By *[Signature]*
Deputy Clerk

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualifying officer.

RECEIVED
OCT 17 1979
THIS DATE
[Signature]

SIGNED BY

U.S. District Judge

**GENERAL
CONDITIONS
OF
PROBATION**

Where probation has been ordered the defendant shall, during the period of probation, conduct himself as a law-abiding, industrious citizen and observe all conditions of probation prescribed by the court. **TO THE DEFENDANT - You shall:**

- (1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
- (2) associate only with law-abiding persons and maintain reasonable hours;
- (3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. When out of work notify your probation officer at once and consult him prior to job changes;
- (4) not leave the judicial district without permission of the probation officer;
- (5) notify your probation officer immediately of any change in your place of residence;
- (6) follow the probation officer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on October 26, 1979 to Sebastian County Jail

at Fort Smith, Arkansas, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

U.S. DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH, ARK.

MACK BUYTON

United States Marshal

BY _____

Deputy Marshal

25

WESTERN-ARKANSAS
IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

OCT 19 1979

Pat L. Graham, Jr., Clerk
By *Marguerite [Signature]*
Deputy Clerk

UNITED STATES OF AMERICA

PLAINTIFF

v.

Criminal No. 79-30004-02

DAVID LEE WILLIAMS

DEFENDANT

ORDER AMENDING JUDGMENT

The Judgment entered in the captioned case on October 9, 1979 is amended as follows:

The defendant, David Lee Williams, is hereby committed to the custody of the Attorney General for a period of one (1) year on the condition that the defendant be confined in a jail-type institution for a period of (30) days, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant placed on probation, with supervision, for a period of eleven (11) months to commence upon the defendant's final release from confinement, upon the regular terms and conditions of probation.

IT IS FURTHER ORDERED that the defendant pay a fine to the United States in the sum of three hundred dollars (\$300.00).

It is recommended the Attorney General designate the Sebastian County Detention Center, Fort Smith, Arkansas, for service of the committed portion of this sentence and the defendant be permitted to surrender himself to said detention center at 9:00 p.m. each Friday for confinement until 7:00 p.m. the following Sunday for a period of ten consecutive weekends. In case of an emergency, verified by the probation officer, and, with the approval of the Court and the Attorney General, the defendant may be excused from one or more weekend confinements, but will be required to serve a total of ten three-day weekends.

IT IS SO ORDERED that the defendant will surrender him-

A TRUE COPY

ATTEST: Pat L. Graham, Jr., Clerk

M

self as directed by the U. S. Marshal on October 26, 1979.

- 26

Oct 10 10 09 AM '79

DOCKET NO. 79-30004-01

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (6/71)

In the presence of the attorney for the government the defendant appeared in person on this date

MONTH	DAY	YEAR
10	09	79

COUNSEL

WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

WITH COUNSEL JACK HOLT, JR.
(Name of counsel)

PLEA

GUILTY, and the court being satisfied that there is a factual basis for the plea, NOLO CONTENDERE, NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of NOT GUILTY. Defendant is discharged
 GUILTY.

Defendant has been convicted as charged of the offense(s) 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, in violation of 18 USC 659.**

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of **one (1) year on the condition that the defendant be confined in a jail-type institution for a period of thirty (30) days, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant placed on probation, with supervision, for a period of eleven (11) months to commence upon the defendant's release from confinement, upon the regular terms and conditions of probation.**

IT IS FURTHER ORDERED that the defendant pay a fine to the United States in the sum of three hundred dollars (\$300.00)

SPECIAL CONDITIONS OF PROBATION

IT IS FURTHER ORDERED that the defendant will surrender himself to the U. S. Marshal no later than 10 days from sentencing date of 10-9-79.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends.

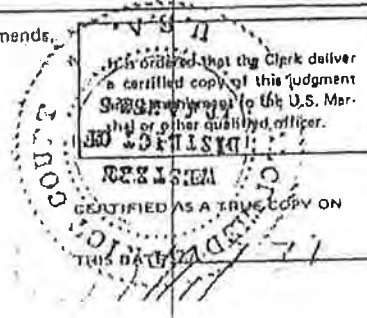
SIGNED BY

U.S. District Judge

U. S. DISTRICT COURT
WESTERN DIST. ARKANSAS
FILED

NOV 7 1979

PAUL L. GUNDA, JR., Clerk
By *[Signature]*



BY MARSHAL (ET TO)
SABAH... ..

**GENERAL
CONDITIONS
OF
PROBATION**

Where probation has been ordered the defendant shall, during the period of probation, conduct himself as a law-abiding, industrious citizen and observe all conditions of probation prescribed by the court. **TO THE DEFENDANT - You shall:**

- (1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
- (2) associate only with law-abiding persons and maintain reasonable hours;
- (3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability (When out of work notify your probation officer at once, and consult him prior to job changes);
- (4) not leave the judicial district without permission of the probation officer;
- (5) notify your probation officer immediately of any change in your place of residence;
- (6) follow the probation officer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

RETURN

as follows:
on _____ to _____

Defendant noted appeal on _____

Defendant released on _____

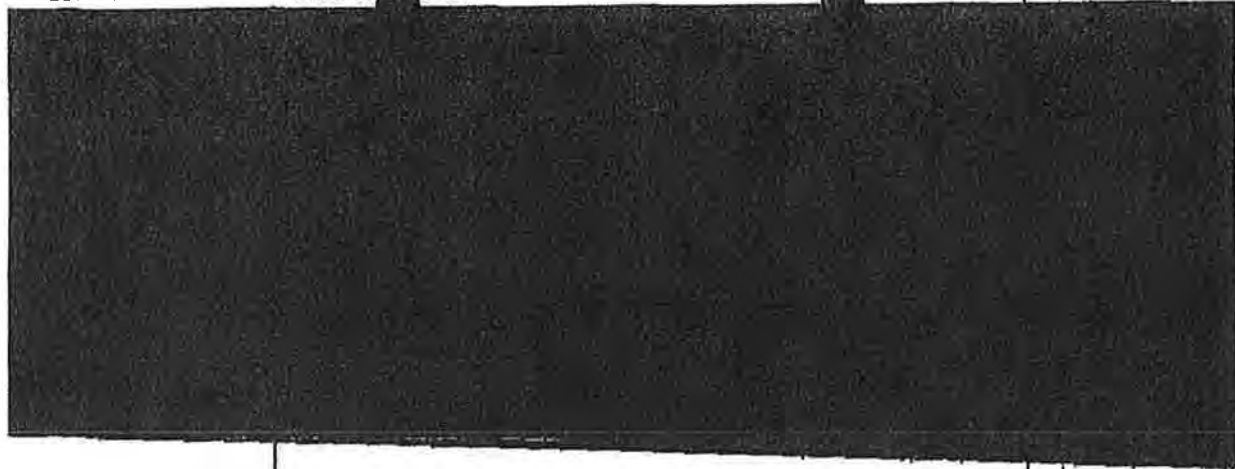
Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on October 26, 1979 to Sebastian County Jail

at Fort Smith, Arkansas, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

WESTERN DISTRICT COURT
NORTHERN DISTRICT
By [Signature] United States Marshal
Deputy Marshal
28



W

ut one over on the
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counted twenty-

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tional churches.
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getting the spirit
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conducting the
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hways used to
d nothing to do
y were milin-

and Sean Bing (grandson
of Harold Bing who also
lives in Gilbert) and while
in Bride they got to attend
a world famous motorcycle
race that takes place on the
Isle of Man each year.

Now the town of Bride
needs to reciprocate by
sending some folks over
here for a visit.

It really is a great program
and there are close to 2,000
community partnerships in
135 countries. Aside from
being known as the coldest
place in the State of Arkan-
sas, Gilbert now has the dis-
tinction of being the small-
est U.S. community ever
recognized by Sister Cities
International.

Anyway...if you want to
learn more about Sister Cit-
ies, just check it out on the
internet or contact Evelyn
or myself, and by all means
consider getting a few cook-
books to use as presents or
perhaps Christmas gifts.

This past week I haven't
had any phone calls regard-
ing news, but I did notice on
Sunday that the fire depart-
ment was over at the Gilbert
Church yard. The trucks
from Gilbert, Pindall and
St. Joe were there as were
several people. There were
hoses laying out all over the
lawn, so I guess it had some-
thing to do with a seasonal

October 15, 2009

Mountain Wave

Page 3

A Message from Kenney Cassell, Republican Candidate for Searcy County Sheriff, to the Citizens of Searcy County.



Honesty and integrity are two qualities that an individual should possess in order to occupy the office of Searcy County Sheriff. The duties of the office demand an individual that the citizens can rely on and put their faith in. If elected as Sheriff I pledge to be open, honest, and up front in carrying out the duties of the office. Therefore, I am going to start my campaign in the same manner.

Thirty-one years ago, when I was twenty-one years of age, I violated the laws of this land and plead guilty to the misdemeanor charge of theft by receiving. I admit that I made a mistake. I paid my debt to society and I have made my peace with God.

I am now fifty-two years old, a husband, a father, and a grandfather, and I try to live a Christian life each day. I don't claim to be perfect but I have made a change for the better in my life.

This is an important election. I am asking you to take these facts, use your judgment, and make your decision. I want to earn your confidence and your vote. I also pledge to work hard for you to make Searcy County a safer and even better place to raise our families.

I look forward to visiting with you during this campaign and answering any questions you may have concerning this election.

Janet Nye stopped by for a visit a few weeks ago and it was good to see her.

Luke and Erica seem due for a visit and hope to ---

Cannada's Celebra



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

Division *2nd*

STATE OF ARKANSAS

PLAINTIFF

VS.

Case NO. CV *2011-53*

KENNY WEBSTER CASSELL (*a.k.a. Kenny Cassell*)

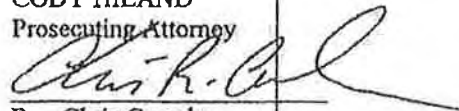
MOTION FOR SHOW CAUSE HEARING

COMES NOW, the State of Arkansas, and for its motion for show cause hearing,
doth respectfully state the following

1. This is an action for the removal of Kenny Webster Cassell as the Sheriff and Collector of Searcy County, Arkansas, arising from his conviction for Theft by Receiving.
2. The case should in a timely manner 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 pursuant to Article 5, §9 of the Arkansas Constitution.

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

Respectfully Submitted.
CODY HILAND
Prosecuting Attorney



By: Chris Carnahan
ABN 2006101
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 Winingham, Attorney at Law, 564 Locust, Conway, AR 72034, on this 31st day of October, 2011.



Chris Carnahan,
Deputy Prosecuting Attorney



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

Division *Lud*

STATE OF ARKANSAS

PLAINTIFF

VS.

Case NO. CV *2011-53*

KENNY WEBSTER CASSELL (*a.k.a. Kenny Cassell*)

MOTION FOR SUMMARY JUDGMENT

COMES NOW, the State of Arkansas, and for its 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 TBD. 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, as a result of his misdemeanor conviction for Interstate Theft, an infamous crime, can hold the office of Sheriff and Collector of Searcy County.

II

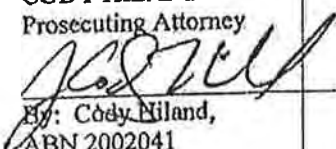
The Supreme Court has stated concerning summary judgment that, "We have ceased referring to summary judgment as a 'drastic' remedy and now simply regard it as

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.

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: Cody Hiland,
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P.O. Box 550
Conway, AR 72033
(501) 450-4927

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Chris Carnahan,
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IN THE CIRCUIT COURT OF SEARCY COUNTY, ARKANSAS
TWENTIETH JUDICIAL DISTRICT
Division *2nd*

STATE OF ARKANSAS

PLAINTIFF

VS.

Case NO. CV *2011-53* _____

KENNY WEBSTER CASSELL (a.k.a. *Kenny Cassell*)

PLAINTIFF'S 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]deameanor 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.

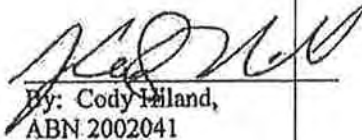
Finally, in *Ridgeway v. Catlett*, 238 Ark. 323, 379 S.W.2d 277 (1964), the Supreme Court held that even crimes committed before a person takes office are disqualifying in the terms of Article 5, §9, and not even a pardon can restore a convicted persons right to hold public office (See also, *Allen v. 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

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: Cody Hiland,
ABN 2002041
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