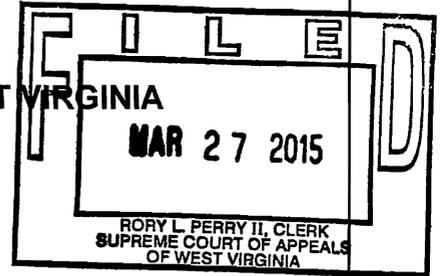


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**Wade Painter,**  
**Petitioner**

**v.**

**Supreme Court Case No.: 14-1266**

**David Ballard, Warden**  
**Mount Olive Correctional Complex**  
**Respondent**

---

**Petitioner's Brief On Appeal**

---

**Prepared by Petitioner, *pro se*:**

**Wade Painter, DOC # 46300**  
**Mt. Olive Correctional Complex**  
**One Mountainside Way**  
**Mt. Olive, WV 25185**

## TABLE OF CONTENTS

<b>ASSIGNMENTS OF ERROR</b> .....	1
<b>STATEMENT OF CASE</b> .....	2
<b>SUMMARY ARGUMENT</b> .....	4
<b>STATEMENT REGARDING ORAL ARGUMENT AND DECISION</b> .....	5
<b>ARGUMENTS</b> .....	6-11
<b>Error 1:</b> .....	6
<b>Error 2:</b> .....	8
<b>CONCLUSION</b> .....	12
<b>RELIEF REQUESTED</b> .....	14

## TABLE OF AUTHORITIES

<b><u>Case Law:</u></b>	<b><u>Page</u></b>
34 A.L.R. 4 <sup>th</sup> 438 (1982) .....	14
<i>Chandos, Inc. v. Samson</i> , 150 W. Va. 428, 432, 146 S.E.2d 837 (1966) .....	11
<i>Craig v. Marshall</i> , 175 W. Va. 72, 331 S.E.2d 510 (1985) .....	10
<i>Nelson v. West Va. Publ. Employees Ins. Bd.</i> , 171 W. Va. 445, 300 S.E.2d 86 (1982)	14
<i>Smith v. West Virginia Human Rights Comm'n</i> , 216 W. Va. 2, 602 S.E.2d 445 (2004) .....	8
<u><i>State ex rel. McGraw v. Zakaib</i></u> , 192 W. Va. 195, 451 S.E.2d 761 (1994) .....	14
<i>State ex rel. West Va. Highlands Conservancy v. State Div. Of Env'tl. Protection</i> , 193 W. Va. 88, 458 S.E.2d 88 (1995) .....	13
<i>W. Va. Health Care Cost Review Auth. v. Boone Mem'l Hosp.</i> , 196 W. Va. 326, 338, 472 S.E.2d 411, 423 (1996) .....	9, 10
<b><u>West Virginia Statute:</u></b>	
90 CSR 1 .....	8
West Virginia Code § 14-2-2 .....	7
West Virginia Code § 25-1-3c .....	8
West Virginia Code § 29A-1-2(d) [1982] .....	8
West Virginia Code § 53-1-2 .....	6
West Virginia Code § 61-11A-4 .....	9

## **ASSIGNMENTS OF ERROR**

1. The court erred in establishing that the Petitioner is challenging his sentencing order and obligation to pay restitution when in fact the petitioner is seeking a general legal ruling on whether the Department of Corrections and its facilities are permitted to follow restitution orders which impose additional restitution requirements beyond “earnings” as defined in its Policy Directive 111.06. This claim falls under the venue and jurisdiction of the Kanawha County Circuit Court pursuant to West Virginia Code § 14-2-2.
2. The court erred in establishing that West Virginia Code § 25-1-3c does not limit the authority of a circuit court to have restitution collected from an inmate to the terms set forth by the West Virginia Division of Corrections Policy Directive (PD) 111.06. Policy Directive 111.06, a legislative rule, has the force and effect of law and is legally controlling in this case. Moreover, West Virginia Code § 61-11A-4 does limit the authority of a circuit court and only permits the sentencing court to determine the amount of restitution and the time frame in which to pay it.

## STATEMENT OF CASE

After exhausting the grievance process through Mt. Olive Correctional Complex Department of Corrections, the petitioner initially filed a Writ of Mandamus in Fayette County Circuit Court concerning the Mt. Olive Correctional Complex's disobedience of its own Policy Directive 111.06. The petitioner has received no money from family since his incarceration (08/01/08), however, ONLY SINCE January 2011, 40% for restitution has been deliberately deducted from monies from family and friends, although it was in direct violation of MOCC's own Policy Directive 111.06.

The Fayette County Circuit Court denied the Writ and stated that Kanawha County is the proper venue to file a Writ of Mandamus against a State Institution, which is the Mt. Olive Correctional Complex.

Subsequently, the petitioner filed a Writ of Mandamus in the Kanawha County Circuit Court, however, it also was denied. This court stated that Berkeley County, the proper venue, would be the proper venue to file. The petitioner, however, is NOT challenging the Sentencing Order but rather MOCC to follow its own policy.

The issue with the Writ of Mandamus is that Mt. Olive Correctional Complex is deducting 40% for Restitution from monies received from family and friends. Policy Directive 111.06 expressly prohibits any deductions from monies received from family and friends. Mt. Olive Correctional Complex's position is that the Sentencing Order overrides the Policy Directive, which has the force and effect of law. The Sentencing Order, however, does not state for Mt. Olive Correctional Complex to violate its own policy and deduct monies from family or friends for Restitution. In fact, the sentencing order states:

"Said restitution shall be paid from monies contained within any prison account or any assets of the defendant."

This statement within the order does not impose additional restitution

## **ASSIGNMENTS OF ERROR**

1. The court erred in establishing that the Petitioner is challenging his sentencing order and obligation to pay restitution when in fact the petitioner is seeking a general legal ruling on whether the Department of Corrections and its facilities are permitted to follow restitution orders which impose additional restitution requirements beyond "earnings" as defined in its Policy Directive 111.06. This claim falls under the venue and jurisdiction of the Kanawha County Circuit Court pursuant to West Virginia Code § 14-2-2.
2. The court erred in establishing that West Virginia Code § 25-1-3c does not limit the authority of a circuit court to have restitution collected from an inmate to the terms set forth by the West Virginia Division of Corrections Policy Directive (PD) 111.06. Policy Directive 111.06, a legislative rule, has the force and effect of law and is legally controlling in this case. Moreover, West Virginia Code § 61-11A-4 does limit the authority of a circuit court and only permits the sentencing court to determine the amount of restitution and the time frame in which to pay it.

## STATEMENT OF CASE

After exhausting the grievance process through Mt. Olive Correctional Complex and the Department of Corrections, the petitioner initially filed a Writ of Mandamus in the Fayette County Circuit Court concerning the Mt. Olive Correctional Complex's deliberate disobedience of its own Policy Directive 111.06. The petitioner has received monies from family since his incarceration (08/01/08), however, ONLY SINCE January 2013, 40% for restitution has been deliberately deducted from monies from family and friends, although it was in direct violation of MOCC's own Policy Directive 111.06.

The Fayette County Circuit Court denied the Writ and stated that Kanawha County is the proper venue to file a Writ of Mandamus against a State Institution, which was Mt. Olive Correctional Complex.

Subsequently, the petitioner filed a Writ of Mandamus in the Kanawha County Circuit Court, however, it also was denied. This court stated that Berkeley County, the sentencing county, would be the proper venue to file. The petitioner, however, is NOT challenging the Sentencing Order but rather MOCC to follow its own policy.

The issue with the Writ of Mandamus is that Mt. Olive Correctional Complex is deducting 40% for Restitution from monies received from family and friends. Policy Directive 111.06 expressly prohibits any deductions from monies received from family and friends. Mt. Olive Correctional Complex's position is that the Sentencing Order supersedes the Policy Directive, which has the force and effect of law. The Sentencing ORDER, however, does not state for Mt. Olive Correctional Complex to violate its own policy and deduct monies from family or friends for Restitution. In fact, the sentencing order states:

"Said restitution shall be paid from monies contained within any prison account or any assets of the defendant."

This statement within the order does not impose additional restitution

requirements beyond earnings. MOCC has erroneously interpreted the sentencing order. They have come up with their own interpretation instead of following the law.

THEREFORE, the petitioner now appeals the Kanawha County Circuit Court's ORDER.

## SUMMARY ARGUMENT

The lower court made two findings in its final order dismissing the petition for a writ of mandamus:

- (1) venue for the petition lies with Petitioner's sentencing court, and not the court of the place of incarceration; and
- (2) West Virginia Code § 25-1-3c does not limit the authority of a Circuit Court to have restitution collected from an inmate to the terms set forth by the West Virginia Division of Corrections Policy Directive (PD) 111.06.

Petitioner, therefore, assigns two errors - one for each finding - in his appeal of the final order.

In the FINAL ORDER (Kanawha County D.R. Pg. 46) denying the petitioner's Writ of Mandamus filed in Kanawha County, the lower court suggested that the petitioner is "[c]hallenging his Sentencing Order..." which is completely erroneous. The petitioner is NOT challenging his sentencing order to pay the restitution but rather challenging Mt. Olive Correctional Complex's authority to override the Department of Correction's own Policy Directive 111.06 to deduct funds from family and friends.

THEREFORE, the petitioner, NOT challenging the sentencing order, avers that the proper venue to address the error is Kanawha County and that Policy Directive 111.06 is in full force and effect of law as a legislative rule established by the Department of Corrections and authorized by the West Virginia Legislature. Thereby, no circuit court can override the authority given to the Department of Corrections by a Legislative Rule.

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to R.A.P 18(a)(4), petitioner feels the facts and legal arguments are adequately presented within the brief and record on appeal, and the decisional process would not be significantly aided by oral argument.

## ARGUMENTS

- 1. The court erred in establishing that the Petitioner is challenging his sentencing order and obligation to pay restitution when in fact the petitioner is seeking a general legal ruling on whether the Department of Corrections and its facilities are permitted to follow restitution orders which impose additional restitution requirements beyond “earnings” as defined in its Policy Directive 111.06. This claim falls under the venue and jurisdiction of the Kanawha County Circuit Court pursuant to West Virginia Code § 14-2-2<sup>1</sup>.**

In its first finding, the lower court erroneously assumed that the petitioner is challenging his sentencing order and his obligation to pay restitution. The lower court cited W. Va. Code § 53-1-2 to conclude from this assumption that Berkeley County, the county where petitioner was sentenced, has jurisdiction of his petition for a writ of mandamus. Petitioner argues that this is error.

In reaching its conclusion, the lower court ignores two important facts.

First, petitioner is NOT challenging his obligation to pay restitution. Rather, he is asking the court to direct the respondent to follow the law (as embodied in PD 111.06 - see second assignment of error) in making restitution deductions from his prison trust account. That is the purpose of the mandamus. While it is true that the warden uses the petitioner’s sentencing order as a cover to disobey PD 111.06, the petitioner is NOT challenging the sentencing order. The petitioner avers that the respondent routinely ignores some sentencing orders that are contrary to law; e.g., when a circuit court orders that a prisoner be housed in a specific prison, contrary to the law vesting the authority for such placement in the Division of Corrections. In the instant case, the law (PD 111.06) compels the warden to do other than what was directed in the petitioner’s sentencing order, and the petitioner is focused solely on the respondent’s legal obligation to follow that law regardless of the sentencing order - as the respondent has done in other cases.

---

<sup>1</sup> The venue provisions of W. Va. Code § 14-2-2 prevent the possibility of having multiple contradictory rulings from the 31 circuit courts in West Virginia on the same issue.

Second, the lower court stated in its final order that in “the event the petitioner would seek a general ruling on whether Corrections and its facilities are permitted to follow restitution orders which impose additional restitution requirements beyond ‘earnings,’ as defined in its Policy Directive, the claim would fall under the venue and jurisdiction of the Kanawha County Circuit Court pursuant to West Virginia Code § 14-2-2.” In seeking mandamus relief, petitioner is, indeed, asking the court to make a general ruling in that MOCC is NOT permitted to follow petitioner’s restitution order (as the respondent interprets it), beyond the requirements defined in PD 111.06. Petitioner is asking the court to direct the respondent to follow the law, as embodied in PD 111.06, and not the restitution order, as they already do with many other orders that violate Policy Directives. Thus, the **lower court’s own words suggests that Kanawha County is the proper venue.**

Moreover, the lower court correctly cites W. Va. Code § 14-2-2(a): “The following proceedings shall be brought and prosecuted only in the Circuit Court of Kanawha County: (1). Any suit in which the Governor, any other state officer, or a state agency is made a party defendant, except as garnishee or suggestee....” The petitioner brought suit, in the form of a petition for mandamus, against the respondent, a state officer. This statute clearly indicates that it should be prosecuted in the Kanawha County Circuit Court.

Kanawha County Circuit Court DOES HAVE jurisdiction.

2. The court erred in establishing that West Virginia Code § 25-1-3c does not limit the authority of a circuit court to have restitution collected from an inmate to the terms set forth by the West Virginia Division of Corrections Policy Directive (PD) 111.06. Policy Directive 111.06, a legislative rule, has the force and effect of law and is legally controlling in this case. Moreover, West Virginia Code § 61-11A-4 does limit the authority of a circuit court and only permits the sentencing court to determine the amount of restitution and the time frame in which to pay it.

Policy Directive 111.06 has the force and effect of law. There is no argument that West Virginia Code § 25-1-3c is law. That law (§25-1-3c(c)(1)) states

“The warden shall deduct from the earnings of each inmate, legitimate court-ordered financial obligations. The warden shall also deduct child support payments from the earnings of each inmate who has a court-ordered financial obligation. **The Commissioner of the Division of Corrections shall develop a policy that outlines the formula for the distribution of the offender’s income and the formula shall include a percentage deduction, not to exceed forty percent in the aggregate, for any court ordered victim restitution, court fees and child support obligations owed under a support order, including an administrative fee not to exceed one dollar...**” (Emphasis Added)

The Commissioner developed such a policy in the form of PD 111.06. Moreover, the W. Va. Division of Corrections Policy Directives Manual was incorporated as a legislative rule in 90 CSR 1, effective September 9, 1987. This Court has held that a legislative rule has the force and effect of law. “A regulation that is proposed by an agency and approved by the Legislature is a ‘legislative rule’ as defined by the State Administrative Procedures Act, W. Va. Code § 29A-1-2(d) [1982], and such a legislative rule has the force and effect of law.” Syl. Pt. 5, *Smith v. West Virginia Human Rights Comm’n*, 216 W. Va. 2, 602 S.E.2d 445 (2004). **It is a syllogism, therefore, that PD 111.06 has the force and effect of law.**

Policy Directive 111.06 defines Earnings as:

“Earnings: All sums of money paid to an inmate on account of any work assignment, or other allowable means by which an inmate may be compensated for work performed or goods sold, including earnings from work in

correctional industries and indigent pay. Earning shall also include 40% of the proceeds from any arts and crafts sale. Earnings shall further include all sums of money received by the inmate on account of a settlement of a lawsuit; civil judgment; or other lawful process, inheritance, bequest, gift, **except funds provided the inmate by family or friends.** Earnings shall not include sums deducted for mandatory savings." (**Emphasis Added**)

Thus, when PD 111.06 exempts funds from the petitioner's family and friends from restitution deductions, THIS IS LAW. The judiciary does not create law - that is the purpose of the legislature. Article V, Section I of the W. Va. Constitution separates these powers. The legislature makes the law, the executive enforces the law, and the judiciary interprets the law. Here, the legislature made PD 111.06 law. *The respondent is part of the executive branch, and is required to enforce this law. The court - through mandamus relief - will hopefully interpret the law to require the respondent to do his duty.*

The lower court states that the definition of earnings in PD 111.06 is not controlling on a circuit court. The lower court states that PD 111.06 is an internal directive for the Division of Corrections "absent more specific direction from the sentencing court regarding restitution." Then the lower court appears to legally justify this conclusion by citing West Virginia Code § 61-11A-4 for the authority of a sentencing court to "permit restitution to be paid from any asset of the defendant, including any inmate account or any gift to the inmate from friends and family."

These are remarkable claims that go contrary to holdings of this Court. "Once a disputed regulation is legislatively approved, it has the force of a statute itself. Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight. As authorized by legislation, a legislative rule should be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious." Syl. Pt. 2, W. Va. Health Care Cost Review Auth. v. Boone Mem'l Hosp., 196 W. Va. 326, 338, 472 S.E.2d 411, 423 (1996). (Underling added for

emphasis). This holding clearly states that PD 111.06, a legislative rule, has the force of a statute itself, that it is entitled to controlling weight, and that it should only be ignored if the Division of Corrections (DOC) has exceeded its constitutional or statutory authority or is arbitrary or capricious. No one has claimed any of these exceptions, so the lower court has no authority to ignore PD 111.06. Clearly, PD 111.06 is no mere “internal directive” waiting for direction from a sentencing court. It has controlling weight, which the sentencing court cannot ignore.

Moreover, West Virginia Code § 61-11A-4 only permits the sentencing court to determine the amount of restitution and the time frame in which to pay it. It is true that the default time frame is “immediate,” but that does not, in itself, authorize a sentencing court to disregard the law governing collection of restitution. In fact, the petitioner avers that (1) many inmates in the DOC owe the default immediate restitution, and that (2) the DOC nonetheless follows PD 111.06 and does NOT deduct 40% from funds provided those inmates by family and friends. That is, the mere fact that the petitioner must pay his restitution immediately does NOT permit DOC to disregard PD 111.06. This is doubtless due to the fact that West Virginia Code § 61-11A-4 does not specify an enforcement procedure for collection of restitution, other than to say in section (h) that an “order of restitution may be enforced by the state or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.”

But this Court has put strict limits on civil actions against incarcerated inmates. “In the absence of an express written waiver of his right to a committee under W. Va. Code § 28-5-36, or a guardian ad litem under Rule 17(c) of the West Virginia Rules of Civil Procedure, a suit cannot be directly maintained against a prisoner.” Syl. Pt. 2, Craigo v. Marshall, 175 W. Va. 72, 331 S.E.2d 510 (1985). “A valid default judgment under Rules 37(d) and 55(b)(2), R. C. P., cannot be entered against a defendant who is at the time of the entry of such judgment an infant, incompetent person or an

incarcerated convict, unless represented by a guardian, guardian ad litem, committee, curator, or other representative, and if a default judgment is entered against a defendant under such disability not properly represented it should be set aside upon proper motion.” Chandos, Inc. v. Samson, 150 W. Va. 428, 432, 146 S.E.2d 837 (1966). Petitioner has not waived his right to a committee, and he has not been represented by anyone else in any proceeding to enforce collection of restitution. His sentencing order, therefore, cannot serve as a valid default judgment, and the DOC has no business treating it as such.

## CONCLUSION

The petitioner exhausted all attempts to remedy this error by following the grievance process, however, all to no avail. The Respondents' are not following the law.

The petitioner is NOT challenging the Sentencing ORDER from Berkeley County. He has accepted the responsibility of paying the restitution ordered by the Court. Instead, the petitioner is challenging the fact that Respondent Mt. Olive Correctional Complex is VIOLATING its own Policy Directive 111.06 in that they are deducting restitution from monies received from family and friends. The policy is clear in that monies are ONLY to be deducted from "Earnings." This is a directive from West Virginia Code § 25-1-3c which states that deductions are to come from "earnings." This policy has the force and effect of law that has been established by the legislature in § 25-1-3c and 90 CSR 1.

Moreover, West Virginia Code § 61-11A-4 only permits the sentencing court to determine the amount of restitution and the time frame in which to pay it. It is true that the default time frame is "immediate," but that does not, in itself, authorize a sentencing court to disregard the law governing collection of restitution.

In addition the petitioner should not be forced to pay the filing fees of an illegal action on the part of the Respondents. "[the] court will weigh the following factors to determine whether it would be fairer to leave the costs of litigation with the private litigant or impose them on the taxpayers: (a) the relative clarity by which the legal duty was established; (b) whether the ruling promoted the general public interest or merely protected the private interest of the petitioner or a small group of individuals; and (c)

whether the petitioner has adequate financial resources such that petitioner can afford to protect his or her own interests in court and as between the government and petitioner. State ex rel. West Va. Highlands Conservancy v. State Div. Of Env'tl. Protection, 193 W. Va. 88, 458 S.E.2d 88 (1995).

The petitioner meets all three factors in that:

- (a) It is CLEAR that the Respondent is violating LAW.
- (b) The ruling affects the general public of Mt. Olive Correctional Complex, therefore, the petitioner is requesting a General Ruling.
- (c) The petitioner is indigent and cannot afford to protect his own interest as well as protect the interest of the other inmates that is being violated.

THEREFORE, the Respondents should be ORDERED to follow the law of their own PD 111.06.

**Relief Requested**

1. This Court to issue a GENERAL Ruling for the Respondents to follow PD 111.06. The Respondents should NEVER place their own interpretation on any sentencing order but rather just follow the law enveloped in PD 111.06.
2. This Court to ORDER the Respondents to cease deductions from monies received from family and friends.
3. This Court to ORDER reimbursement of the monies deducted from money orders received from family and friends.
4. This Court to ORDER the filing fees, as well as any other fees associated with this mandamus, to be awarded<sup>2</sup>

Respectfully submitted,



Wade Painter, *pro se*

---

<sup>2</sup> In mandamus proceedings where a public officer willfully fails to obey the law, attorney fees and costs will be awarded. *Nelson v. West Va. Publ. Employees Ins. Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1982); 34 A.L.R. 4<sup>th</sup> 438 (1982); *State ex rel. McGraw v. Zakaib*, 192 W. Va. 195, 451 S.E.2d 761 (1994)

**CERTIFICATE OF SERVICE**

I the undersigned petitioner, **Wade Painter**, appearing *pro se* do attest that I have caused to be served a True and Exact Copy of the foregoing documents (Petitioner's Brief on Appeal), by placing same in the United States Postal Mail, First-Class, Pre-Paid on this **26<sup>th</sup>** day of **March, 2015**. Parties served include:

West Virginia Supreme Court of Appeals  
Mr. Rory Perry, Clerk  
State Captial, Room E-317  
1900 Kanawha Blvd, East  
Charleston, WV 25305

West Virginia Office of Attorney General  
Mr. Patrick Morrissey, Attorney General  
812 Quarrier Street, 6<sup>th</sup> Floor  
Charleston, WV 25301



---

Wade Painter, *pro se*