

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**WADE PAINTER,**  
Petitioner,

v.

**Docket No. 14-1266**

**DAVID BALLARD, Warden,**  
Mt. Olive Correctional Complex,  
Respondent.

**RESPONDENT'S SUMMARY RESPONSE**

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**WEST VIRGINIA ATTORNEY GENERAL**

**By:**

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## SUMMARY OF ARGUMENT

The Respondent, David Ballard, Warden of the Mt. Olive Correctional Complex (“Mt. Olive”), files the present Summary Response and submits that the Kanawha County Circuit Court’s “Final Order” in Painter v. Ballard, 14-P-520, which granted the Respondent’s Motion to Dismiss, should be upheld on the following grounds:

1. Judge Wilkes of the Circuit Court of Berkeley County, West Virginia, ordered that restitution in State v. Painter, 06-F-24, be paid from monies contained within any prison account or any assets of the Defendant/Petitioner. The Petitioner effectively sought the Kanawha County Circuit Court to set aside or to interpret the intent of another Circuit Court’s Sentencing Order regarding restitution. The “Final Order” was correct in determining that it lacked venue and jurisdiction and that dismissal was required pursuant to West Virginia Rules of Civil Procedure, 12(b)(1) and (3).

2. West Virginia Code, § 25-1-3c does not limit a Circuit Court’s order of restitution to only those sources of a prisoner’s assets, which have been defined as “earnings” by the West Virginia Division of Corrections (“Corrections”) in Policy Directive 111.06. West Virginia Code, § 25-1-3c does not provide Corrections with the sole authority to interpret the code’s provisions or to disregard a lawful interpretation of the statute by a Circuit Court. West Virginia Code, § 25-1-3c, moreover, does not limit the Circuit Court’s general authority under West Virginia Code, § 61-11A-4 to order restitution and to have such restitution collected from an inmate by the West Virginia Division of Corrections. The “Final Order” correctly ruled that Policy Directive 111.06 did not require the Respondent to disregard a Circuit Court’s lawful order of restitution and that dismissal was warranted under West Virginia Rules of Civil Procedure, Rule 12(b)(6).

3. The Petitioner failed to file his Brief within the deadline established by the Court's Scheduling Order.

### **STATEMENT OF FACTS AND CASE**

The Petitioner is serving sentences for burglary, grand larceny, daytime burglary with breaking, petit larceny, possession of a stolen vehicle, and murder in the first degree without mercy (two counts), State v. Painter, 06-F-24, Circuit Court of Berkeley County, West Virginia. The Petitioner will be in the custody of Corrections for the remainder of his life. The Petitioner, as part of his sentences, was ordered by the Berkeley County Circuit Court to pay restitution of \$4,472.00, \$2,520.00, and \$12,000.00. The sums of \$4,472.00 and \$12,000 were intended to reimburse the widow (and the Crime Victims' Fund) for the costs of burying her husband and son, both killed by the Petitioner, and for repairing the damage the Petitioner did to the widow's property. The Sentencing Order specified in all three restitution amounts that "said restitution shall be paid from monies contained within any prison account or any assets of the defendant."

At the time of the Respondent filed its "Respondent's Motion to Dismiss and Memorandum in Support" ("Motion to Dismiss"), the Petitioner was earning from his job assignment \$51 dollars per month and, based solely upon forty percent of those earnings, the Petitioner would pay off his restitution in approximately 931 months (77.6 years) or in 2085. Absent an expansive definition of "earnings" and sources of restitution, the Berkeley County Circuit Court's order of restitution could not effectively carry out its intent to have the Petitioner reimburse the victim or the state.<sup>1</sup>

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<sup>1</sup> While in prison, the Petitioner's basic needs, including medical care, food, shelter and security, will be provided to him at taxpayer expense. A Circuit Court may reasonably find that an inmate should devote a portion of monies sent to him by friends and family to restitution as opposed to his personal expenditures.

As confirmed in Mt. Olive's response to his grievance number 14-MOCC-ST-126, Mt. Olive has been acting, and will continue to act, in a manner consistent with his Sentencing Order regarding restitution. The Petitioner, however, disagreed with Mt. Olive's decision and filed a Petition for Writ of Mandamus in the Kanawha County Circuit Court, in Painter v. Ballard, 14-P-520, seeking to limit Mt. Olive's deductions to pay restitution under the Sentencing Order of the Berkeley County Circuit Court, to only that money in his prison accounts, which was defined as "earnings" by Corrections' Policy Directive 111.06. The Petitioner, in his Petition, essentially claimed that any money sent from family and friends could only be for the use and benefit of the Petitioner, and could not be used for purposes of reimbursing the State, or his victims, for the costs of his crimes. In addition to an Order limiting the amount of restitution to be deducted to his prison job wages, the Petitioner further sought the return of any monies previously paid out from his prison accounts, which would effectively require taxpayers on behalf of Corrections to subsidize part of the Petitioner's already paid restitution.

In support of his position, the Petitioner argued that Corrections' Policy Directive 111.06 was binding state law, and its terms limited a Circuit Court's overall authority to order restitution where it is ordered in a manner inconsistent with the Policy Directive. Thus, where a Policy Directive was inconsistent with an otherwise lawful Circuit Court order,<sup>2</sup> the Respondent would be required to disregard the Court's order, here, the Berkeley County Circuit Court's Sentencing Order regarding restitution.

The Respondent disagreed with the Petitioner's claim and filed a Motion to Dismiss in Painter v. Ballard, 14-P-520. The Motion to Dismiss was granted by the Kanawha County Circuit Court in its "Final Order" issued on October 29, 2014. It is from this Final Order that the

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<sup>2</sup> The Respondent is unaware of any prior successful appeal of the Petitioner's Sentencing Order to the West Virginia Supreme Court of Appeals.

Petitioner appeals.

## ARGUMENT

**I. The Petitioner necessarily challenges the validity of his Sentencing Order regarding restitution and/or the Respondent's interpretation of that Sentencing Order regarding restitution. Where the Petitioner seeks to invalidate part of a Sentencing Order, jurisdiction and venue would lie with the sentencing court.**

Where the Petitioner's legal claims are related to his sentencing, venue and jurisdiction is in the Circuit Court, which issued the sentencing order. See W.Va. Code, § 53-1-2 (Jurisdiction of writs of mandamus and prohibition ... shall be in the circuit court of the county in which the record or proceeding is to which the writ relates). The Petitioner's challenge in his Petition for Writ of Mandamus was related to his conviction and sentencing in State v. Painter, 06-F-24. Here, the Petitioner sought an Order from the Kanawha County Circuit Court requiring the Respondent to disregard a portion of the Berkeley County Circuit Court's Sentencing Order.

The clear intent of the Sentencing Order was for the Petitioner, while in prison, to pay restitution from any asset, including monies sent to him from friends and family while he is in prison, and not just from monetary assets/earnings as defined in Corrections' Policy Directive 111.06. The Petitioner is serving an overall sentence of life without mercy – any restitution he pays pursuant to his Sentencing Order will be made while he is in prison. The Berkeley County Circuit Court, in full knowledge of the effect of its sentence, ordered that restitution shall be paid from any prison account or any asset of the Petitioner's. The Petitioner, when he claimed that Mt. Olive could not take certain funds from his inmate accounts to pay restitution, which had been ordered by the Berkeley County Circuit Court, necessarily sought to invalidate, in part, the

Berkeley County Circuit Court's Sentencing Order.

While a civil action seeking a general legal ruling or declaratory judgment on whether Corrections and its facilities are required to follow a Policy Directive, would fall under the venue and jurisdiction of the Kanawha County Circuit Court pursuant to West Virginia Code, § 14-2-2,<sup>3</sup> this case does not seek a general ruling, but instead asks the Kanawha County Circuit Court to necessarily pass on the legality and or interpretation of another Circuit Court's order, an act over which it lacks jurisdiction. Venue and jurisdiction for a Circuit Court were with the Berkeley County Circuit Court, which was in the best position to address the legality of its Order and the interpretation of its Order. Dismissal was warranted pursuant to West Virginia Rules of Civil Procedure, Rule 12(b)(1) and (3).

**II. West Virginia Code, § 25-1-3c does not limit the authority of a Circuit Court to have lawfully ordered restitution collected from an inmate to the terms set forth by the West Virginia Division of Corrections in Policy Directive 111.06.**

A Circuit Court may include money sent to an inmate from friends and family as part of inmate assets subject to the forty percent deduction under West Virginia Code, § 25-1-3c.

West Virginia Code, § 25-1-3c(c)(1) does not define the term "earnings" subject to having restitution deducted by the prison facility, and does not cite any particular inmate monetary asset which cannot, as a matter of law, be considered to be "earnings." Earnings, in its common sense definition, can mean any type of monetary asset which has been acquired as a result of a person's effort, actions or behavior. Earnings may legitimately include monetary

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<sup>3</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 involving state agencies. In the present case, an Order from the Kanawha County Circuit Court in favor of the Petitioner would not have resolved the controversy, but instead would have provided Corrections with two contradictory, but valid, Circuit Court Orders and no way for Corrections to follow both Orders.

assets sent from a friend or family. The transfer of monetary assets from friends and family may very well be part of a business or financial transaction, for example sale of property, in which the inmate had an interest or involvement. Such transfers of money, even if not the result of a business or financial transaction, are still the result of the recipient's effort, actions or behavior – they are not the product of some random act of kindness to a stranger, but have been earned in some manner. Under West Virginia Code, § 25-1-3c, it is well within a Court's authority and discretion to find that the term "earnings" includes more than income earned at a prison job assignment. See State v. Roger D. Smith, docket number 11-0758, West Virginia Supreme Court of Appeals (unpublished opinion).<sup>4</sup>

Moreover, while Corrections' Policy Directive 111.06 provides a definition of "earnings," it is not controlling in the event the sentencing court provides a narrower or broader definition of what assets or earnings are subject to its restitution order. West Virginia Code, § 25-1-3c, does not authorize the Commissioner of Corrections to develop, on behalf of West Virginia's Circuit Courts, a legally controlling definition of "earnings" for purposes of the statute or to restrict a circuit court's authority to order restitution. Corrections' Policy Directive 111.06 represents Corrections' directives to itself as an agency as to how it will define "earnings" and how it will apply West Virginia Code, § 25-1-3c *absent* more specific direction from the sentencing court regarding restitution.

West Virginia Code, § 61-11A-4 provides a Circuit Court with the authority to order restitution from any of source and to require the Defendant to pay restitution immediately.

Even assuming West Virginia Code, § 25-1-3c does not authorize a Court to have Corrections handle an inmate's restitution obligations using the money sent to an inmate by

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<sup>4</sup> A copy of this unpublished opinion is being provided to the Petitioner.

friends and relatives, the general provisions of West Virginia Code, § 61-11A-4 (“Restitution; when ordered”) still govern restitution and give a Circuit Court wide power in the ordering of restitution. West Virginia Code, § 61-11A-4 does not limit restitution to only those sources and assets set forth in Corrections’ Policy Directive 111.06 or in West Virginia Code, § 25-1-3c, and would 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. Moreover, pursuant to the provisions for payment of court ordered restitution under West Virginia Code, § 61-11A-4(f), if the Circuit Court does not require that the Defendant make restitution within a specified period or in specified installments, “restitution shall be made immediately.” Under West Virginia Code, § 61-11A-4, the Berkeley County Circuit Court has the inherent authority to require an inmate through his inmate trustee account to pay forty percent or more of any assets, whether “earnings” or not, as these assets come to be acquired by the inmate.

In the present case, Mt. Olive and Corrections was presented with two possible interpretations of the Berkeley County Circuit Court’s Order:

1. That the Sentencing Order intended all of the money in the Petitioner’s inmate accounts be part of his “earnings” under West Virginia Code, § 25-1-3c, of which forty percent will be deducted to pay restitution; or
2. That the Sentencing Order does not intend to refer to West Virginia Code, § 25-1-3c, and that the Order either seeks for restitution to be collected from all inmate accounts in a manner consistent with the forty percent deduction pursuant to West Virginia Code, § 25-1-3c, or is silent on the rate of payment and that all monies, which do not qualify as “earnings” under Policy Directive 111.06, are to be paid immediately pursuant to West Virginia Code, § 61-11A-4(f). Under the later, one hundred percent of those assets are to be paid out of the Petitioner’s

trustee account as they are received at Mt. Olive, until restitution is satisfied.

Here, Mt. Olive has interpreted the Sentencing Order in the manner which is most beneficial to the Petitioner, as well as, most likely to encourage repayment of the restitution.<sup>5</sup> Moreover, given that West Virginia Code, § 25-1-3c applies to inmate restitution, the Respondent's interpretation that the Sentencing Order seeks repayment for all inmate assets in a manner consistent with the statute, as opposed to having several different rates of repayment depending upon the source of the money in the Petitioner's inmate account, is reasonable and gives full effect to the intent of the Berkeley County Circuit Court. In as much as the Petitioner would claim Mt. Olive's interpretation of the restitution order is in error, venue and jurisdiction for such a claim would be with the Berkeley County Circuit Court.

**III. The Petitioner did not file his Brief within the deadlines set forth in the Scheduling Order.**

The Scheduling Order sets forth "[t]he deadline for perfecting the appeal is March 2, 2015, with the filing of the petitioner's brief and appendix. The Petitioner may perfect the appeal at any time on or before the deadline for perfecting the appeal. If the appeal is not perfected on or before March 2, 2015, the appeal will be dismissed." According to the certificate of service on the "Petitioner's Brief on Appeal," the Brief was mailed to the West Virginia Supreme Court of Appeals on March 26, 2015 – twenty-four days after the deadline for perfecting the appeal.

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<sup>5</sup> Immediate payment or a one hundred percent deduction would most likely cause friends and relatives to send in no money to the petitioner as long as the restitution obligation remains to be paid.

**CONCLUSION**

Wherefore the Respondent respectfully requests that the Court refuse the above-styled appeal, deny the relief pertaining thereto and provide such additional relief as the court deems just and proper.

**RESPECTFULLY SUBMITTED,  
DAVID BALLARD,  
By Counsel,**

**PATRICK MORRISEY  
WEST VIRGINIA ATTORNEY GENERAL**

  
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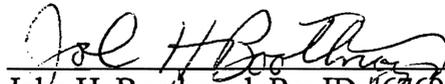
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DAVID BALLARD, Warden,  
Mt. Olive Correctional Complex,  
Respondent.

Certificate of Service

I John H. Boothroyd Assistant Attorney General do hereby Certify that on this 24th day of April 2015, I served the foregoing and hereto attached **RESPONDENT'S SUMMARY RESPONSE** upon the Petitioner by mailing a true copy thereof U.S. first class postage prepaid to the following addresses:

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

  
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John H. Boothroyd, Bar ID #6769  
Assistant Attorney General