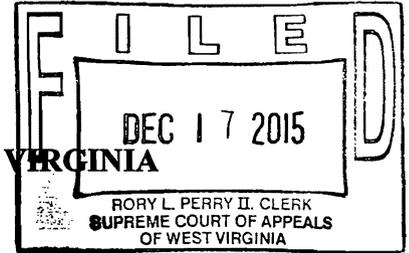


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



**WADE PAINTER,**  
**Petitioner,**

v.

**Docket No. 14-1266**

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

**RESPONDENT'S RESPONSE TO SUPPLEMENTAL BRIEF OF PETITIONER**

**PATRICK MORRISEY**  
**WEST VIRGINIA ATTORNEY GENERAL**

**By:**

**John H. Boothroyd Bar Id #6769**  
**Assistant Attorney General**  
**1409 Greenbrier St.**  
**Charleston, WV 25311**  
**(304)558-2036**  
**email: John.H.Boothroyd@wv.gov**

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## **QUESTIONS PRESENTED/ASSIGNMENTS OF ERROR BY THE PETITIONER**

I. The Circuit Court erroneously held that venue is improper in Kanawha County.

Because the petition in this case is for a writ of mandamus to compel a public official, the Respondent Warden, to comply with West Virginia law, venue is not only proper in Kanawha County, it is mandatory.

II. The Circuit Court erroneously held that in criminal cases the court has the inherent power to order a third party, the Respondent Warden, to collect restitution from a prisoner's trust account, including collecting restitution from funds that a prisoner receives as gifts from family and friends. In criminal cases, the inherent authority of the Circuit Court involves conduct and procedure within the courtroom and does not extend to orders directing third parties to collect restitution.

III. The Circuit Court erroneously held that the statute authorizing the Respondent Warden to deduct money from a prisoner's "earnings" also authorizes the Warden to deduct money from a prisoner's gifts. The word "earnings" has a clear and precise meaning under West Virginia law and does not include gifts.

## **STATEMENT OF THE CASE**

The Respondent, David Ballard, Warden of the Mt. Olive Correctional Complex ("Mt. Olive"), files the present Response to Supplemental Brief of the Petitioner. This Response is in addition to the Respondent's Summary Response and addresses the additional issues raised in the Supplemental Brief of the Petitioner.<sup>1</sup> A detailed Statement of Facts and Case was set forth in

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<sup>1</sup> The Supplemental Brief does not address any claim that the West Virginia Division of Corrections has misinterpreted the order of the Berkeley County Circuit Court. A claim that the West Virginia Division of

the Respondent's Summary Response and is not repeated in the present Response.

### **SUMMARY OF ARGUMENT**

The Respondent is obliged to follow a Circuit Court's lawful order. In determining whether an order is lawful and must be followed, the Circuit Court must have jurisdiction over the subject matter and case, and the Order cannot exceed the Circuit Court's lawful authority. West Virginia Code, § 25-1-3c does not give the West Virginia Division of Corrections exclusive authority to interpret what constitutes an inmate's "earnings" and "income" for purposes of restitution. West Virginia Code, § 25-1-3c does not exclude the sentencing court from interpreting and determining what constitutes an inmate's "earnings" and "income" for purposes of restitution. Where there is a conflict between the West Virginia Division of Corrections and the sentencing court's Order as to "earnings" and "income," West Virginia Code, § 25-1-3c does not intend to have the West Virginia Division of Corrections usurp the sentencing court's general constitutional powers to interpret statutes and to adjudicate individual cases. Restitution is a matter for the sentencing court to decide and, outside of following the Court's order, the Respondent and the West Virginia Division of Corrections have no cognizable interest in determining the amount of restitution or the sources for such restitution.

Once the Respondent concludes that the sentencing Circuit Court has jurisdiction and has the authority to interpret and determine "earnings" and "income" for purposes of West Virginia Code, § 25-1-3c, the Respondent lacks the constitutional authority to review and overturn the

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Corrections simply misinterpreted the intent and terms of the Berkeley County Circuit Court would require the Kanawha County Circuit Court to interpret another Circuit Court's sentencing order. Such a claim is outside the authority and jurisdiction of the Kanawha County Circuit Court and was properly dismissed.

Order on the grounds that it may exceed the Court's authority. West Virginia Code, § 25-1-3c interchangeably uses the terms "earnings" and "income," and the Berkeley County Circuit Court did not abuse its discretion or authority by ordering restitution come from monies contained within any prison account or any asset of the Petitioner. In as much as Circuit Courts have the discretion to determine restitution to be collected under West Virginia Code, § 25-1-3c, the Kanawha County Circuit Court lacks venue and jurisdiction to consider whether the Berkeley County Circuit Court abused its discretion or authority in the present matter.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Court has already ordered that "this matter be scheduled for oral argument under Rule 20 of the Rules of Appellate Procedure on a later date during the January 2016 Term of Court." The Respondent initially filed a Summary Response in this matter, which is a consent to waive oral argument. Given this Court's order, the Respondent intends to participate in oral argument.

### **ARGUMENT**

**I. West Virginia Code, § 25-1-3c does not give the West Virginia Division of Corrections exclusive authority to define "earnings" or "income" and to determine the sources of an inmate's assets, from which it shall deduct up to forty percent on behalf of the state to pay for restitution obligations.**

The first issue is whether the Berkeley County Circuit Court had the legal authority to interpret "earnings" and "income," and order, pursuant to West Virginia Code, § 25-1-3c, that the West Virginia Division of Corrections deduct money from "earnings" and "income," as

designated by the Court, from the petitioner's trustee account. The West Virginia Division of Corrections is required to obey all Circuit Court orders, unless the Court lacked jurisdiction to issue the order or the order exceeds the Court's authority. See *State ex rel. Askin v. Dostert*, 170 W.Va. 562, 569, 295 S.E.2d 271, 278 (1982). If the Court had jurisdiction and did not exceed its authority, the West Virginia Division of Corrections will and must carry out the Court's order. In the present case, the West Virginia Division of Corrections asserts that the Berkeley County Circuit Court had jurisdiction to issue the restitution order in State v. Painter, 06-F-24, and the authority to define and designate "earnings" and "income" under West Virginia Code, § 25-1-3c.

A. The Berkeley County Circuit Court had the authority to order restitution in State v. Painter, 06-F-24.

Under West Virginia Code, § 61-11A-4, the Berkeley County Circuit Court had the statutory authority to order the petitioner to pay restitution to reimburse for both the loss and or damages to property caused by the petitioner and for funeral and related services. W.Va. Code, §§ 61-11A-4(b)(1)(B), (b)(3), and (e).<sup>2</sup> This order of restitution qualified as a court ordered obligation for purposes of West Virginia Code, § 25-1-3c(a)(1) and is subject to deductions from the Petitioner's trustee account under West Virginia Code, § 25-1-3c(c).

B. The terms of West Virginia Code, § 25-1-3c do not give the West Virginia Division of Corrections exclusive authority to define "earnings" or "income," and do not prohibit the sentencing court from defining and designating "earnings" or "income" under its provisions.

West Virginia Code, § 25-1-3c is silent on what is meant by "earnings" or what entity

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<sup>2</sup> The Petitioner does not challenge that the restitution amount or obligation is itself unlawful.

may define “earnings.” Subsection (c)(1) simply provides that “[t]he Warden shall deduct from the earnings of each inmate, legitimate court-ordered financial obligations” and “[t]he Warden shall deduct child support payments from the earnings of each inmate who has a court-ordered financial obligation.” Subsection (c)(1) then provides “[t]he 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 obligation owed under a support order, including an administrative fee not to exceed one dollar, consistent with the provisions of subsection (c), section four hundred six, article fourteen, chapter forty-eight of this code, to support the Division of Correction’s administration of this financial service.”

Subsection (c)(1) does not authorize the West Virginia Division of Corrections to statutorily define or interpret “earnings” or “income.” It requires the Commissioner to outline the formula for the distribution of the offender’s “income” (as opposed to “earnings”) for any of the various legitimate financial obligations set forth in the statute. The Commissioner’s actual statutory authority is to determine what percentage up to forty percent will be deducted from the inmate’s income and what percentages of that deduction will go to the various financial obligations. The statute does not intend for the West Virginia Division of Corrections to develop interpretations of “earnings” and “income,” which are binding upon Circuit Courts. Subsection (c)(1) does not require the West Virginia Division of Corrections to develop a “legislative rule,” it only requires it to develop a “policy.” A policy is created by the Commissioner and requires no legislative review or approval. It can be changed at will and at any time by the Commissioner. See *State ex rel. Anstey v. Davis*, 203 W.Va. 538, 547, 509 S.E.2d 579, 588 (1998). A policy is not intended to have the force of law against other persons

and entities. A Circuit Court's actions and orders are not constrained by a correctional policy.

C. Courts are generally charged with interpreting the terms of a statute.

West Virginia Code, § 25-1-3c does not expressly authorize the West Virginia Division of Corrections to define or interpret either "income" or "earnings." The role of interpreting the terms of a statute generally belongs to the courts. See *State ex rel. Barker v. Manchin*, 167 W.Va. 155, 167, 279 S.E.2d 622, 630 (1981) ("Generally speaking, the Legislature enacts the law, the Governor and various agencies of the executive branch implement the law, and the courts interpret the law, adjudicating individual disputes arising thereunder."); and Syl. Pt. 1, *Appalachian Power Co. v. State Tax Department of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995) ("Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review."). This traditional role of interpreting statutes, as well as adjudicating individual cases, such as a criminal case involving restitution, is not a role lightly set aside. As stated by the West Virginia Supreme Court of Appeals, "[w]here one branch of our state government seeks to exercise or to impinge upon the powers conferred upon another branch, we are compelled by this mandate [Article V, section 1 of the West Virginia Constitution] to restrain such action, absent a specific constitutional provision permitting such interference." *State ex rel. Barker*, 167 W.Va. at 167, 279 S.E.2d at 630. West Virginia Code, § 25-1-3c simply does not authorize the West Virginia Division of Corrections to usurp the sentencing court's constitutional power to interpret statutes and to adjudicate individual cases.

D. Restitution is traditionally determined and administered by Courts

The amount of restitution due after a criminal conviction is set by the sentencing court and never by the West Virginia Division of Corrections. W.Va. Code, § 61-11A-4. The manner in which such restitution may be collected is determined by the sentencing court, the state or the

victim. See W.Va. Code, § 61-11A-4(f), (g), (h) and (i). Other than the fact that the West Virginia Division of Corrections maintains a trustee account on behalf of the petitioner,<sup>3</sup> it has no cognizable interest in either the amount of restitution ordered, the manner in which restitution is paid, or what asset sources will be used by the inmate to pay restitution. The West Virginia Division of Corrections defines the term earnings in its Policy Directive 111.06 only because it needs to have some identification of the “income” before it can distribute the “income” to the inmate’s court ordered obligations.

The clear intent of the statute is to encourage and have inmates meet their legitimate court ordered financial obligations. W.Va. Code, § 25-1-3c(a). The statute was presumably enacted, not because the West Virginia Division of Corrections wanted to take on the time intensive and costly obligation to collect restitution on behalf of courts, but because the Courts and the state wanted to bypass the existing cumbersome collection methods in order to get an inmate to pay restitution. An interpretation that the West Virginia Division of Corrections may control and cut off possible sources for restitution or is the legal entity, which will determine when a Court and the state can avail itself of the collection provisions of West Virginia Code, § 25-1-3c, is contrary to the statutory intent. The petitioner’s proposed statutory interpretation would cut out the Court and the state, which are the entities who should decide, and traditionally have decided, the scope and sources of restitution in criminal matters.

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<sup>3</sup> West Virginia Code, § 25-1-3a

**II. The West Virginia Division of Corrections does not have the authority to ignore the Berkeley County Circuit Court's order, if the Court's interpretation of "earnings" and "income" is not an abuse of discretion or is not in excess of the Court's authority.**

A. West Virginia Code, § 25-1-3c does not provide a singular definition for "earnings" and "income," and allows for discretion in the designation of "earnings" and "income."

The final issue is whether there exists one fixed, legal definition of "earnings" and "income" for purposes of West Virginia Code, § 25-1-3c, or does a sentencing court have discretion and flexibility to determine the sources of potential restitution by an inmate, as long as the sources reasonably fit within what is commonly considered "earnings" or "income"? West Virginia Code, § 25-1-3c does not provide a definition of either "earnings" or "income" to reasonably guide Courts to a fixed, specific definition. Given the many possible sources of restitution, which could reasonably be considered either "earnings" or "income," it would seem likely that guidance would have been considered and provided by the legislature. Had the legislature intended for a specific definition of "earnings" or "income" to apply in all cases, it could have provided such definitions as it did in West Virginia Code, §§ 48-1-223 and 228. The statute, however, does not provide definitions and is inconsistent with having one, fixed definition to be followed by all courts and by the West Virginia Division of Corrections.<sup>4</sup> The general statutory schemes for restitution provide courts with discretion and flexibility in determining amounts and sources of assets. A review of West Virginia Code, § 25-1-3c shows

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<sup>4</sup> In as much as the petitioner insists that the West Virginia Division of Corrections has the sole authority to define "earnings" and "income," West Virginia Code, § 25-1-3c provides for the Commissioner to use a Policy Directive, which is changeable at will, and is not fixed.

that where the West Virginia Division of Corrections is to develop policy, including a default designation of distributable “income,” it has been given discretion and is permitted to adjust policy as deemed appropriate. A review of West Virginia Code, § 61-11A-4 shows a statutory scheme in which the sentencing court has discretion in ordering restitution in criminal matters, including the amount of restitution and the manner, in which restitution will be paid.<sup>5</sup> A legislative intent to give sentencing courts reasonable discretion to determine what assets are included as “earnings” and “income” is consistent with West Virginia Code, § 25-1-3c and with restitution in criminal matters under West Virginia Code, § 61-11A-4.

B. The Berkeley County Circuit Court did not clearly abuse its discretion in requiring deductions by the Warden from all monies in the petitioner’s trustee account.

“The Supreme Court of Appeals reviews sentencing orders ... under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997).” Syl. Pt. 1, *State v. James*, 227 W.Va. 407, 710 S.E.2d 98 (2011).

West Virginia Code, § 25-1-3c, subsection (c)(1) uses the term “income” and “earnings” interchangeably. The statute requires the Commissioner to outline the formula for the distribution of the offender’s “income” (as opposed to “earnings”) for any of the various

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<sup>5</sup> West Virginia Code, § 61-11A-4(a) allows for partial restitution.

West Virginia Code, § 61-11A-4(d) provides that restitution order shall be as fair as possible to the victim.

West Virginia Code, § 61-11A-4(f) allows for the Court to order the defendant to make restitution within a specified period or in specified installments.

West Virginia Code, § 61-11A-4(g) requires for restitution to be made a condition of probation or parole unless Court or Parole Board determine it to be impractical and allows Court to revoke probation or parole for failure to pay restitution.

West Virginia Code, § 61-11A-4(h) allows for enforcement of restitution by the state or victim in the same manner of as a judgment in a civil action.

West Virginia Code, § 61-11A-4(i) allows the Court to, in lieu of restitution, provide hours of service to a local crime victim’s assistance program or juvenile mediation program.

legitimate financial obligations set forth in the statute. The assumption that the legislature did not intend to use the term “income,” and really meant that only “earnings” be distributed by the West Virginia Division of Corrections, requires this Court to improperly ignore a part of the statute. In interpreting statutes, Courts give meaning to all terms and provisions found in the statute’s language. Syl. Pt. 3, *Osborne v. United States*, 211 W.Va. 667, 567 S.E.2d 677 (2002); Syl. Pt. 7, *Ex parte Watson*, 82 W.Va. 201, 95 S.E.2d 648 (1918).<sup>6</sup> “Gross Income” or income under the same Chapter 48, covering domestic relations (including child support) and cited by the Petitioner, includes gifts as potential income. See W.Va. Code, 48-1-228 (Gross Income Defined).<sup>7</sup> Given the legislature’s use of the term “income,” in addition to the term “earnings,” it is not clear and precise that “gifts” cannot be a possible source of restitution under West Virginia Code, § 25-1-3c. Gifts are often and reasonably considered part of income. Indeed, Policy Directive 111.06, which the Petitioner seeks to have the West Virginia Division of Corrections follow, includes as earnings “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 provide the inmate by family and friends.” (bold added). Policy Directive 111.06 does treat gifts as “earnings” or as a restitution source for purposes of West Virginia Code, § 25-1-3c. Conversely, Policy Directive 111.06 does not require all “earnings” to be a source for restitution. The realities of the inmate trustee account is that the inmate simply receives money from outside

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<sup>6</sup> “It is presumed the legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms so used to be effective, wherefore an interpretation of a statute which gives a word, phrase or clause thereof no function to perform, or makes it, in effect, a mere repetition of another word, phrase or clause thereof, must be rejected as being unsound, if it be possible so to construe the statute as a whole, as to make all of its parts operative and effective.”

<sup>7</sup> West Virginia Code, § 48-1-228(a) notes that income means “gross income” unless otherwise qualified. West Virginia Code, § 48-1-228(c) allows for courts to include gifts as income, depending upon the circumstances of the particular case.

friends and family without any explanation of why it is sent. The sent money does not indicate whether it is a “gift,” or a payment for past services, investments or other business transactions. Money sent by family as payment for a past service is not treated by the West Virginia Division of Corrections as a source for restitution, even though it would clearly be an “earning.” A Circuit Court could treat such money as potential earnings and certainly as income. An Order requiring restitution be taken from all monies in the Petitioner’s inmate account is reasonable under the circumstances of the Petitioner’s case and reasonably comports with common sense understandings of earnings and income, which are subject to deductions for restitution.

C. The Respondent does not have a clear legal duty to ignore the Berkeley County Circuit Courts Order.

In the present case, the Berkeley County Circuit Court’s Order for restitution to be taken from all prison accounts and assets of the petitioner was not an abuse of discretion or outside the terms of the statute. See State v. Roger D. Smith, docket number 11-0758, West Virginia Supreme Court of Appeals (unpublished opinion). The Respondent does not have a clear legal obligation or duty to the Petitioner to ignore the Berkeley County Circuit Court’s Order, and instead follow Policy Directive 111.06 regarding the inmate’s assets subject to West Virginia Code, § 25-1-3c. As such a writ of mandamus against the Respondent does not lie.

D. The Kanawha County Circuit Court did not have venue and jurisdiction to review the Berkeley County Circuit Court’s Order.

Once the Kanawha County Circuit Court determined that the Berkeley County Circuit Court did have jurisdiction and authority to enter an order designating what is “earnings” and “income” under West Virginia Code, § 25-1-3c, it lacked jurisdiction and authority to review such an Order and determine whether it is in error. W.Va. Code, § 51-2-2.

**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**

  
\_\_\_\_\_  
John H. Boothroyd, Bar ID #6769  
Assistant Attorney General  
1409 Greenbrier St.  
Charleston, WV 25311  
(304)558-2036

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

**WADE PAINTER,**  
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v.

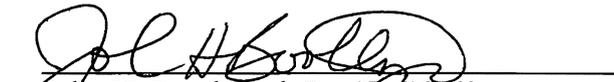
**Docket No. 14-1266**

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

**Certificate of Service**

I John H. Boothroyd Assistant Attorney General do hereby Certify that on this 17th day of December 2015, I served the foregoing and hereto attached **RESPONDENT'S RESPONSE TO SUPPLEMENTAL BRIEF OF PETITIONER** upon the Petitioner by mailing a true copy thereof U.S. first class postage prepaid to the following addresses:

George Castelle  
Senior Counsel  
Kanawha Public Defender Office  
P.O. Box 2827  
Charleston, WV 25330  
*Counsel for Petitioner*

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