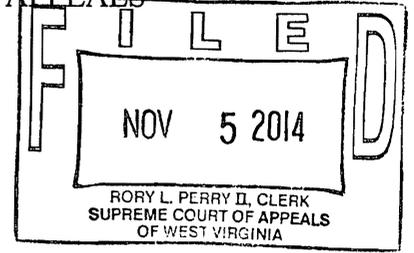


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 14-1043

**STATE EX REL. JIM RUBENSTEIN,  
COMMISSIONER OF THE WEST VIRGINIA  
DIVISION OF CORRECTIONS,**



Petitioner,

v.

**HONORABLE JUDGE LOUIS BLOOM,** Judge of the  
Circuit Court of Kanawha County, West Virginia, and  
**TRACIE DENNIS,**

Respondents.

---

*From the Circuit Court of Kanawha County, West Virginia*

---

**RESPONDENT TRACIE DENNIS'S  
BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF PROHIBITION**

J. Timothy DiPiero (W.Va. I.D. No. 1021)  
Lonnie C. Simmons (W.Va. I.D. No. 3406)  
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*Counsel for Respondent Tracie Dennis*

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        (b) after considering the defendant’s motion for work release and evidence presented in a subsequent hearing, entered an order, pursuant to W.Va.Code §62-11A-1(c), finding the defendant was suitable for work release;

        (c) required the defendant until December 1, 2014, to remain in the South Central Regional Jail, permitting the defendant to go to and from work to earn money to pay the restitution obligation. Once the sentence is suspended, the defendant would be placed on probation, but would continue working and paying restitution; and

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**RESPONDENT TRACIE DENNIS'S  
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**I.**

**Question presented**

**Whether the trial court acted within its jurisdiction when it:**

**(a) accepted a criminal defendant's guilty plea to one count of embezzlement; sentenced the defendant to the indeterminate term of not less than one nor more than ten years, as required by W.Va.Code §61-3-20, and W.Va.Code §61-3-13(a), resulting in the defendant's immediate incarceration in the South Central Jail; and used its discretion, pursuant to W.Va.Code §62-12-3, to suspend the sentence as of December 1, 2014, conditioned on the defendant making restitution;**

**(b) after considering the defendant's motion for work release and evidence presented in a subsequent hearing, entered an order, pursuant to W.Va.Code §62-11A-1(c), finding the defendant was suitable for work release;**

(c) required the defendant until December 1, 2014, to remain in the South Central Regional Jail, permitting the defendant to go to and from work to earn money to pay the restitution obligation. Once the sentence is suspended, the defendant would be placed on probation, but would continue working and paying restitution; and

(d) specifically held, “The Court notes that the Defendant is in the custody of the Division of Corrections, and it is not intended that this grant of work release should serve as any impediment to the Division in its decisions regarding the timing of placement of the Defendant in a facility of its choosing.”

## II.

### Statement of the case

Petitioner Jim Rubenstein, Commissioner of the West Virginia Division of Corrections, asserts this Court must issue an order prohibiting the enforcement of the August 15, 2014 **ORDER** issued by Respondent Judge Louis Bloom, claiming Respondent Bloom exceeded his jurisdiction in placing Respondent Tracie Dennis on work release. For the Court to conclude Respondent Bloom acted well within his discretion and jurisdiction, the Court need only review the July 29, 2014 **SENTENCING ORDER, MOTION FOR WORK RELEASE**, which was not included in the appendix, but which is attached, and the **ORDER** entered August 15, 2014.

In the **SENTENCING ORDER**, Respondent Dennis, based upon her guilty plea to one felony count of embezzlement, was “sentenced to the penitentiary of this State for an indeterminate term of not less than one (1) nor more than ten (10) years, plus court costs.” This sentence is mandated by W.Va.Code §61-3-20, which provides:

If any officer, agent, clerk or servant of this state, or of any county, district, school district or municipal corporation, or of any banking institution, or other corporation, or any officer of public trust in this state, or any agent, clerk or servant of any firm or person, or company

or association of persons not incorporated, embezzles or fraudulently converts to his own use, bullion, money, bank notes, drafts, security for money, or any effects or property of any other person, which shall have come into his possession, or been placed under his care or management, by virtue of his office, place or employment, **he shall be guilty of the larceny thereof.** (Emphasis added).

When the larceny involves more than one thousand dollars, such conviction is governed by W.Va.Code §61-3-13(a), which provides:

If a person commits simple larceny of goods or chattels of the value of one thousand dollars or more, such person is guilty of a felony, designated grand larceny, **and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one nor more than ten years,** or, in the discretion of the court, be confined in jail not more than one year and shall be fined not more than two thousand five hundred dollars. (Emphasis added).

Respondent Bloom remanded Respondent Dennis to the South Central Regional Jail and the Department of Corrections on July 29, 2014. The **SENTENCING ORDER** further provides that:

[S]aid sentence be suspended on the 1<sup>st</sup> day of December, 2014 for a period of five (5) years probation with the following conditions:

1. Restitution in the amount of five hundred dollars (\$500.00) per month;
2. A supervision fee of five dollars (\$5.00) per month; and
3. A community corrections fee of five dollars (\$5.00) per month.

Respondent Dennis filed **MOTION FOR WORK RELEASE**, which motion was not noticed and heard by Respondent Bloom until the August 14, 2014 hearing. In this **MOTION**, Respondent Dennis sought to be released from incarceration pursuant to a work release program because she was employed and her continued employment would provide the funds necessary for her to pay the restitution ordered.

As noted in the August 15, 2014 **ORDER**, after considering additional evidence, Respondent Bloom “FINDS that the Defendant is a suitable candidate for work release, upon specific terms and conditions.” This **ORDER** goes on to explain the hours Respondent Dennis is permitted to leave the South Central Regional Jail to work, the time when she must return to the jail, and the details regarding her restitution obligations. For this initial time period until her sentence is suspended on December 1, 2014, “the net income paid to Tracie Dennis, after all lawfully required deductions are taken from her paycheck by her employer, shall be paid by the Defendant by the close of business on the following day to the Circuit Clerk of Kanawha County during this period of work release, all of which shall be first applied to restitution and not to any court costs or fees.” Thus, for the initial period of work release, all of Respondent Dennis’s net income is to be paid toward restitution and after December 1, 2014, the restitution amount is reduced to \$500 a month. Clearly, Respondent Bloom determined the interests of justice would best be served by having Respondent Dennis continue working during the day while remaining incarcerated at the South Central Regional Jail at night. If Respondent Dennis had not been placed on work release, she would not have been able to earn the money necessary to pay the restitution.

To make sure Petitioner, which had custody of Respondent Dennis, was able to carry out its obligations, Respondent Bloom also noted:

The Court notes that the Defendant is in the custody of the Division of Corrections, and it is not intended that this grant of work release should serve as any impediment to the Division in its decisions regarding the timing of placement of the Defendant in a facility of its choosing.

Instead of doing whatever Petitioner deems necessary under these facts to carry out its own obligations, Petitioner has filed a petition for a writ of prohibition claiming Respondent Bloom has exceeded his authority. Furthermore, despite this explicit language in this **ORDER**, noting Petitioner

was free to carry out its duties, Petitioner also asserts somehow Respondent Bloom has interfered with Petitioner's ability to carry out its classification procedures.

### III.

#### Summary of argument

West Virginia Code §62-11A-1, must be liberally construed to carry out the Legislature's remedial purposes.

West Virginia Code §62-11A-1(a), authorizes a trial court to place a person convicted of a misdemeanor on work release in the initial sentencing order prior to the person ever being incarcerated.

A cardinal rule of statutory interpretation is that code sections are not to be read in isolation but construed in context. Furthermore, statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded *in pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly.

When subsection (c) is liberally construed and is read *in pari materia* with the other provisions contained in W.Va.Code §62-11A-1, clearly the Legislature never intended to limit the authority of a trial court to place a convicted person on work release only to those persons convicted of a misdemeanor. For subsection (c) to be triggered, the person first has to be convicted, sentenced to ordinary confinement, and then make a request asking the trial court to consider placing the person on work release.

Alternatively, under W.Va.Code §31-20-31(a), Petitioner is required to determine the eligibility of inmates in its custody to be placed in a work release program and to consent to such placement. In the present case, as far as the record indicates, Petitioner has never stated Respondent Dennis is not an appropriate qualified inmate for work release nor has Petitioner asserted the work release program set out in the August 15, 2014 **ORDER** somehow is improper. Petitioner's argument simply is the decision to place Respondent Dennis on work release should have been made by Petitioner, not Respondent Bloom. More importantly, Petitioner has failed to carry out its mandatory duty (Petitioner "**shall** first determine eligibility of such inmate for participation in the work program authorized by this section and consent to such inmate's participation therein") and instead has filed this petition for a writ of prohibition.

#### IV.

##### **Statement regarding oral argument and decision**

Respondent Bloom's actions are so clearly within the jurisdiction afforded by the Legislature to trial courts in this State to use their discretion to place convicted criminals on work release, Respondent Dennis respectfully submits the petition should be denied immediately without any oral argument because Petitioner's assertions that Respondent Bloom acted outside his jurisdiction have no basis in fact or law.

#### V.

##### **Argument**

##### A.

**Under W.Va.Code §62-11A-1(c), trial courts have the authority to place a person convicted of a felony in a work release program**

In this case, Petitioner assumes incorrectly that trial courts do not have any authority or jurisdiction to place a defendant convicted of a felony on work release. In support of this argument, Petitioner relies upon the language in W.Va.Code §62-11A-1(a), which does give trial courts the authority to place a person convicted of a misdemeanor on work release in the initial sentencing order, prior to the person being incarcerated. Petitioner also cites some general language in *State v. Kerns*, 183 W.Va. 130, 394 S.E.2d 532 (1990), which is a case involving a person convicted of a misdemeanor, as somehow limiting work release only to cases involving misdemeanors.

Even a cursory reading of W.Va.Code §62-11A-1, demonstrates the fallacy of Petitioner's arguments. Before going through the relevant subsections, this Court made it clear in *Kerns*, 183 W.Va. at 134, 394 S.E.2d at 536, this statute must be liberally construed to carry out the Legislature's remedial purposes:

Being remedial in nature, statutory provisions relating to criminal procedure are to be construed liberally. 3 N. Singer, [*Sutherland on Statutes and Statutory Construction* §§ 59.09, 60.05 (Sands 4th ed. rev. 1986) (collecting cases). The Court has stated in a similar fashion that a remedial statute should be construed liberally to accomplish the purpose for which it was enacted. *Willis v. O'Brien*, 151 W.Va. 628, 634, 153 S.E.2d 178, 181 (involving a statute on venue in a criminal case), *cert. denied*, 389 U.S. 848, 88 S.Ct. 71, 19 L.Ed.2d 116 (1967). The purpose of *W.Va.Code*, 62-12-4 [1943] was to extend to courts of record, such as circuit courts, more flexibility in sentencing than magistrate courts (formerly justice of the peace courts), so that the guilty person could have his or her sentence reviewed and made less restrictive by a court of record, without appealing the conviction itself.

Subsection (a) provides, in relevant part, “When a **defendant** is sentenced or committed for a term of one year or less by a court of record having criminal jurisdiction, the court may in its order grant to the defendant the privilege of leaving the jail during necessary and reasonable hours for any of the following purposes.” (Emphasis added). The statute goes on to describe work release and

other circumstances for permitting a convicted person to avoid jail for very specific reasons. Notice in subsection (a), the Legislature used the word “defendant,” rather than “inmate,” meaning the defendant does not have to first be incarcerated before the trial court enters such an order.

In contrast, under W.Va.Code §62-11A-1(c), a trial court has the authority to place any inmate on work release, provided the other requirements are met:

An **inmate** sentenced to ordinary confinement may petition the court at any time after sentence for the privilege of leaving jail under this section and may renew his or her petition in the discretion of the court. The court may withdraw the privilege at any time by order entered with or without notice. (Emphasis added).

Subsection (c) does not limit itself only to persons convicted of misdemeanors, so there is no reason to read such a limitation into this provision. Thus, as applied in the present case, Respondent Dennis was convicted of a felony, she was incarcerated and sentenced to ordinary confinement, and she filed a motion asking Respondent Bloom to use his discretion to place her on work release. After hearing some evidence and argument of counsel, Respondent Bloom entered the August 15, 2014 **ORDER**, finding Respondent Dennis was a suitable candidate for work release and spelling out the terms and conditions of such release. Using the required liberal interpretation of subsection (c), “the privilege of leaving jail under this section” refers to the authority of a trial court to place an inmate on work release, which is described in more detail in subsection (a).

In addition, it is clear from the statutes cited in subsection (g) that this section is not a statute that is applicable to misdemeanors only. Specifically, W.Va.Code §62-11A-1(g), provides:

In every case wherein the defendant has been **convicted of an offense, defined in section twelve, article eight, chapter sixty-one of this code or in article eight-b or eight-d of said chapter against a child**, the defendant shall not live in the same residence as any minor child, nor exercise visitation with any minor child and shall have no contact with the victim of the offense: *Provided*, That the defendant

may petition the court of the circuit wherein he or she was so convicted for a modification of this term and condition of this probation and the burden shall rest upon the defendant to demonstrate that a modification is in the best interest of the child. (Emphasis added).

The specific criminal statutes referenced in subsection (g) include incest (W.Va.Code §61-8-12), sexual offenses (W.Va.Code §§61-8B-1, *et seq.*), and child abuse (W.Va.Code §§61-8D-1, *et seq.*). Many of these crimes are felonies, yet this statute provides authority for a trial court to issue orders impacting the living and visitation restrictions of such criminal defendants. Thus, once again, W.Va.Code §62-11A-1, is not limited to misdemeanor convictions.

In Syllabus Points 2 and 3 of *In re: Estate of Lewis*, 217 W.Va. 48, 614 S.E.2d 695 (2005), this Court explained two basic rules of statutory construction applicable in this case:

2. A cardinal rule of statutory interpretation is that code sections are not to be read in isolation but construed in context.

3. “Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly.” Syllabus Point 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d 907 (1975).

Thus, when subsection (c) is read *in pari materia* with the other provisions contained in W.Va.Code §62-11A-1, clearly the Legislature never intended to limit the authority of a trial court to place a convicted person on work release only to those persons convicted of a misdemeanor. For subsection (c) to be triggered, the person first has to be convicted, sentenced to ordinary confinement, and then make a request asking the trial court to consider placing the person on work release.

Because Respondent Bloom's actions merely followed the language dictated by the Legislature in W.Va.Code §62-11A-1, clearly he acted within his jurisdiction. In Syllabus Points 2 and 3 of *State v. Georgius*, 225 W.Va. 716, 696 S.E.2d 18 (2010), this Court summarized the deference given to sentences issued by trial courts:

2. "The Supreme Court of Appeals reviews sentencing orders ... under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syllabus Point 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997).

3. "Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syllabus Point 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).

By following the applicable statutes, Respondent Bloom has acted within the statutory constraints and, therefore, the sentence issued in this case is not subject to appellate review.

#### B.

**Alternatively, nothing in Respondent Bloom's order prevents Petitioner from carrying out its mandatory obligations under W.Va.Code §31-20-31(a), to determine Respondent Dennis is eligible for work release and to consent to such classification**

Alternatively, in the event the Court decides to strictly construe W.Va.Code §62-11A-1, and holds a trial court can grant work release only in cases involving misdemeanor convictions, then Respondent Dennis respectfully submits the Court should focus on the language included in the August 15, 2014 **ORDER** explicitly stating that nothing in the order was designed to interfere with or prevent Petitioner from carrying out its statutory obligations.

As noted by Petitioner, W.Va.Code §31-20-31(a), provides Petitioner has to determine if an inmate is eligible for work release and then Petitioner has to consent to such work release program:

The executive director is authorized to establish at each regional jail facility a work program for qualified inmates and to establish at each regional jail facility under his or her jurisdiction an inmate trustee account. The authority shall establish guidelines and qualifications to allow inmates sentenced to a regional jail facility to be gainfully employed with local businesses and governmental entities as part of a job program: ***Provided, That with regard to an inmate sentenced to the Division of Corrections that is domiciled at a regional jail facility under the supervision of the authority, the Commissioner of the Division of Corrections or designee shall first determine the eligibility of such inmate for participation in the work program authorized by this section and consent to such inmate's participation therein. A qualified inmate does not include an inmate convicted of a sexual offense or a violent felony.*** (Emphasis added).

This statute provides further evidence that a person convicted of a nonviolent felony is eligible for work release. In the present case, Respondent Dennis clearly was convicted of a nonviolent felony, so under this statute, she is an inmate qualified for work release.

Once Petitioner concedes Respondent Dennis is eligible to participate in a work release program, it then is up to Petitioner to consent to such participation. In the present case, as far as the record indicates, Petitioner has never stated Respondent Dennis is not an appropriate qualified inmate for work release nor has Petitioner asserted the work release program set out in the August 15, 2014 **ORDER** somehow is improper. Petitioner's argument simply is the decision to place Respondent Dennis on work release should have been made by Petitioner, not Respondent Bloom. More importantly, Petitioner has failed to carry out its mandatory duty (Petitioner "**shall** first determine eligibility of such inmate for participation in the work program authorized by this section and consent to such inmate's participation therein") and instead has filed this petition for a writ of prohibition.

This case could have been resolved already if Petitioner simply had carried out its statutory obligations. Respondent Bloom did not take any action to preclude or interfere with Petitioner

performing the analysis and classification necessary to determine whether or not Respondent Dennis is qualified for work release and whether or not Petitioner would consent to such work release program.

The Legislature clearly has provided authority to trial courts and to Petitioner to address the details regarding the incarceration of inmates in this State. Respondent Bloom simply has carried out his authority, as defined in the statutes cited above, and specifically made it clear Petitioner should go forward and take whatever actions it deems appropriate with respect to Respondent Dennis.

## VI.

### Conclusion

For the foregoing reasons, Respondent Tracie Dennis respectfully moves this Court to deny the petition for a writ of prohibition filed by Petitioner Jim Rubenstein, Commissioner of the West Virginia Division of Corrections.

**TRACIE DENNIS**, Respondent,

--By Counsel--



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J. Timothy DiPiero (W. Va. I.D. No. 1021)  
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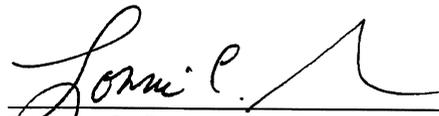
**CERTIFICATE OF SERVICE**

I, Lonnie C. Simmons, do hereby certify a copy of the foregoing **RESPONDENT TRACIE DENNIS'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION** was served on counsel of record on the 5<sup>th</sup> day of November, 2014, through the United States Postal Service, postage prepaid, to the following:

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\_\_\_\_\_  
Lonnie C. Simmons (W.Va. I.D. No. 3406)

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

2014 JUL 28 PM 4:21

v.

CATHY B. BLOOM, CLERK  
KANAWHA COUNTY CIRCUIT COURT Criminal Case No: 14-F-312(I)  
Judge Louis Bloom

TRACIE DENNIS

MOTION FOR WORK RELEASE

Defendant, by counsel, pursuant to W. Va. Code § 62-11A-1, moves this Court to order that she be released on work release during the time period she is incarcerated. As grounds for this motion defendant asserts that she has been employed since 2011 with Enerfab Electric Company in Dunbar, West Virginia. Enerfab would like to continue to hire Defendant, but Enerfab is unable to keep her job open until December 1, 2014 when Defendant will be placed on probation. Defendant respectfully requests work release so that she may be able to keep her job, and pay restitution as ordered by the Court. Defendant respectfully requests that she be released on work release from 7:30 to 5:00 p.m. Monday through Friday.

WHEREFORE, Defendant respectfully requests that this court order that she be released in order to work at her employment.

TRACIE DENNIS

By:



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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v.

TRACIE DENNIS

2014 JUL 28 PM 4:21

CATHY S. GIBSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT  
Criminal Case No: 14-F-312(I)  
Judge Louis Bloom

**CERTIFICATE OF SERVICE**

I, Olubunmi T. Kusimo-Frazier, counsel for the defendant herein, do hereby certify that a true and correct copy of the foregoing was served upon the following counsel of record VIA FACSIMILE and by placing same in the United States Mail, postage prepaid, this 28<sup>th</sup> day of July, 2014, and addressed as follows:

Mr. Dan Holstein  
Assistant Prosecuting Attorney  
301 Virginia Street East  
Charleston, WV 25301

  
Olubunmi T. Kusimo-Frazier