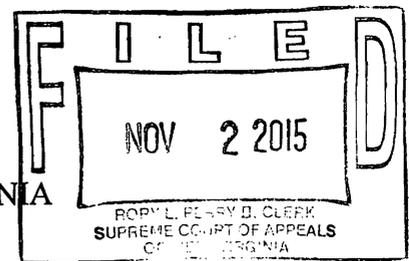


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



WADE PAINTER,
Petitioner Below, Petitioner

v.

No. 14-1266
(Kanawha Co. 14-P-520)

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

SUPPLEMENTAL BRIEF OF PETITIONER

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

SUPPLEMENTAL BRIEF OF PETITIONER¹

ASSIGNMENTS OF ERROR

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

¹This Supplemental Brief was authorized by the Order of this Court of August 25, 2015.

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

This case involves the issue of whether the Warden of Mt. Olive Correctional Complex, in deducting funds from a prisoner's trust account to pay an order of restitution, may deduct funds from money received as gifts from family and friends, or is limited by the statutory authority to deduct funds from the prisoner's earnings alone.

Proceedings in the Circuit Courts of Berkeley, Fayette and Kanawha Counties.

The Petitioner, Wade Painter, was tried by jury in the Circuit Court of Fayette County in September, 2007, on seven counts, including two counts of first degree murder. He was convicted of all seven counts. On September 18, 2007, the Petitioner received the following sentences:

- Count One, daytime burglary: an indeterminate sentence of one to ten years;
- Count Two, grand larceny: an indeterminate sentence of one to ten years;
- Count Three, daytime burglary with breaking: an indeterminate sentence of one to fifteen years;
- Count Four, petit larceny: a determinate sentence of one year;

Count Five, murder in the first degree, without a recommendation of mercy: life without parole;
Count Six, murder in the first degree, without a recommendation of mercy: life without parole; and
Count Seven, possession of a stolen vehicle: an indeterminate sentence of one to five years.

Sentencing Order, *State v. Wade Painter*, No. 06-F-24 (Circuit Court of Berkeley County, Nov. 16, 2007).

The seven sentences were ordered to be served consecutively, for a total sentence of two terms of life without parole, plus five to forty-one years. Sentencing Order, *State v. Wade Painter*, No. 06-F-24 (Circuit Court of Berkeley County, Nov. 16, 2007).

In addition, the sentencing order included a provision that the Petitioner pay restitution in the following amounts:

\$4,472 to the victim Deborah White;

\$2,520 to the victim Carl Norberg;

\$12,000 to the Crime Victim's Fund.

The three awards of restitution combine for a total \$18,992.

For each award of restitution, the circuit court ordered that the restitution "shall be paid from monies contained within *any prison account or any assets of the defendant.*" Sentencing Order, *State v. Wade Painter*, No. 06-F-24 (Circuit Court of Berkeley County, Nov. 16, 2007) [*emphasis added*].

The Petitioner subsequently received from the Division of Corrections a "Notice of Withholding," stating that, in order to meet the Petitioner's financial obligations, as of October 21, 2008, deductions would be drawn from his prisoner trust account in the amount of 40 percent

of his prison earnings. The Notice of Withholding stated that the withholding was in accordance with DOC policy directive 111.06. Notice of Withholding, Division of Corrections, effective Oct. 21, 2008.

The Notice of Withholding defined "earnings" as "all sums of money paid to an inmate on account of any work assignment . . . Earnings shall further include all sums of money received by . . . bequest, gift, *except funds provided the inmate by family or friends*" [*emphasis added*].

The Notice of Withholding further specified that the Petitioner "may dispute these charges by filing a grievance . . ." Notice of Withholding, Division of Corrections, effective Oct. 21, 2008.

On March 13, 2014, as authorized, the Petitioner filed a grievance with the Division of Corrections. The grievance stated that on March 4, 2014, the Petitioner "received a \$25.00 money order from home. Once again, 40% (\$10.00) was taken out of the money order."

The grievance set forth, as authority, the statutory language that "The warden shall deduct from the *earnings* of each inmate, legitimate, court-ordered financial obligations . . ." W.Va. Code § 25-1-3c(c)(1) [*emphasis added*].

On March 24, 2014, on the portion of the grievance form that is reserved for a response, the Petitioner's Unit Manager wrote, "Mr. Painter, per your case as stated by Kathy Dillon our Legal Service Manager money can be taken for any reason for debt owed as restitution."

On March 24, 2014, on the portion of the grievance form reserved for "Action by Warden/Administrator," the line was checked that states, "Affirm unit and/or deny grievance," along with the comment, "We will comply with the Court Order, which overrides Policy

Directive 111.06. We will continue to deduct from any funds in your Trust Account, per the Court Order, which is very clear. You still owe \$18,831.82" [*emphasis in original*].

On July 14, 2014, the Petitioner, *pro se*, filed a Petition for Writ of Mandamus in the Circuit Court of Fayette County. The Petition requested that the court "mandate Mt. Olive Correctional Complex to follow its own Policy 111.06," as well as W.Va. Code § 25-1-3c(c)(1), and "not deduct funds received from family and friends which contravenes with its Policy 111.06." Petition for Writ of Mandamus, *Wade Painter v. David Ballard*, Warden, No. 14C-209, Circuit Court of Fayette County, July 14, 2014, at 1, 4.

On August 15, 2014, the Respondent Warden filed the Respondent's Motion to Dismiss and Memorandum in Support asserting, first, that venue is improper in that the Petitioner, according to the Respondent, is asking the court to "set aside or interpret the intent of another circuit's order." As such, the Respondent asserted that "Venue lies with the sentencing court and not the court of the place of incarceration." Respondent's Motion to Dismiss and Memorandum in Support, *Wade Painter v. David Ballard*, Warden, No. 14C-209, Circuit Court of Fayette County, Aug. 15, 2014, at 1-2.

The Respondent Warden further asserted that, "in the event the petitioner seeks a general ruling on whether Corrections and its facilities are permitted to follow restitution orders which impose additional restitution requirements beyond 'earnings' . . . the claim would fall under the venue and jurisdiction of the Kanawha County Circuit Court pursuant to West Virginia Code § 14-2-2." Respondent's Motion to Dismiss and Memorandum in Support, *Wade Painter v. David Ballard*, Warden, No. 14C-209, Circuit Court of Fayette County, Aug. 15, 2014, at 3.

Finally, the Respondent Warden asserted that "Earnings may legitimately include monetary assets sent from a relative," and, alternatively, that the circuit court has "the inherent authority to require an inmate through his inmate trustee account to pay forty percent of any assets not considered 'earnings' as these assets come to be acquired by the inmate." Respondent's Motion to Dismiss and Memorandum in Support, *Wade Painter v. David Ballard*, Warden, No. 14C-209, Circuit Court of Fayette County, Aug. 15, 2014, at 4-6.

On September 10, 2014, the Circuit Court of Fayette County entered an Order Dismissing for Improper Venue. The Order stated, "If the Petitioner wishes to challenge the manner in which the Division of Corrections carries out the specific orders of the Circuit Courts of West Virginia, or the application of state wide correctional policies, then venue would be proper in Kanawha County Circuit Court." The Order further stated, "Alternatively, if the Petitioner wishes to seek a clarification of the language used in the Sentencing Order, then venue would be proper in the Circuit Court of Berkeley County."

Consequently, the Circuit Court of Fayette County dismissed the Petition without prejudice. Order Dismissing for Improper Venue, *Wade Painter v. David Ballard*, Warden, No. 14C-209, Circuit Court of Fayette County, Sept. 10, 2014.

On October 1, 2014, the Petitioner, again *pro se*, filed a new Petition for a Writ of Mandamus, this time in the Circuit Court of Kanawha County. Petition for Writ of Mandamus, *Wade Painter v. David Ballard*, Warden, No. 14-P-520, Circuit Court of Kanawha County, Oct. 1, 2014.

In addition to the matters set forth in his previous petition in Fayette County, the Petitioner stated that he is currently employed as a janitor at Mt. Olive Correctional Complex and

receives earnings of \$51.00 per month. The Petitioner further stated that, in addition, his family and friends send him "a few dollars, irregularly." The Petitioner explained that the Respondent Warden deducts 40 percent from his inmate trust account for restitution, not only from his earnings, but also from moneys received from family and friends. Petition for Writ of Mandamus, *Wade Painter v. David Ballard*, Warden, No. 14-P-520, Circuit Court of Kanawha County, Oct. 1, 2014, at 3.

In his Petition in the Circuit Court of Kanawha County, the Petitioner again requested that the court compel the Respondent Warden to comply with W.Va. Code § 25-1-3c(c)(1), DOC Policy 111.06, and the Notice of Withholding, and not deduct funds received as gifts from family and friends. Petition for Writ of Mandamus, *Wade Painter v. David Ballard*, Warden, No. 14-P-520, Circuit Court of Kanawha County, Oct. 1, 2014.

On October 24, 2014, the Respondent Warden filed "Respondent's Motion to Dismiss and Memorandum in Support." The Respondent Warden asserted that venue properly lies in Berkeley County as the sentencing court, rather than in Kanawha County. Respondent's Motion to Dismiss and Memorandum in Support, *Wade Painter v. David Ballard*, Warden, No. 14-P-520, Circuit Court of Kanawha County, Oct. 24, 2014, at 2-3.

(This assertion about venue contradicts the Respondent Warden's previous assertion in the Circuit Court of Fayette County, where the Respondent, at least in the alternative, stated the opposite: that is, the Respondent stated in the Circuit Court of Fayette County, "in the event the petitioner seeks a general ruling on whether Corrections and its facilities are permitted to follow restitution orders which impose additional restitution requirements beyond 'earnings' . . . the claim would fall under the venue and jurisdiction of the Kanawha County Circuit Court pursuant

to West Virginia Code § 14-2-2." Respondent's Motion to Dismiss and Memorandum in Support, *Wade Painter v. David Ballard*, Warden, No. 14C-209, Circuit Court of Fayette County, Aug. 15, 2014, at 3.)

As in the Circuit Court of Fayette County, in its filing in the Circuit Court of Kanawha County the Respondent Warden again asserted that "Earnings may legitimately include monetary assets sent from a friend or family" and, alternatively, that the 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." Respondent's Motion to Dismiss and Memorandum in Support, *Wade Painter v. David Ballard*, Warden, No. 14-P-520, Circuit Court of Kanawha County, Oct. 24, 2014, at 6-8.

In Exhibit One of the Respondent's Motion to Dismiss, the Respondent Warden included the Petitioner's work history, listing his "Current Job" as "Custodian 2," with "Base Pay" of \$51.00 (per month). In Exhibit Two, the Respondent Warden set forth Policy Directive 111.06, authorizing deduction of 40% of inmates earnings to be applied to restitution. The Policy Directive defines earnings with the explanation that "Earnings shall further include all sums of money received by . . . bequest, gift, *except funds provided the inmate by family or friends*" [*emphasis added*]. West Virginia Division of Corrections Policy Directive 111.06, Dec. 1, 2006, at 1.

Exhibit Two also contained the DOC form "Notice of Withholding," a form that, as set forth above, also includes the statement from Policy Directive 111.06 that "Earnings shall further include all sums of money received by . . . bequest, gift, *except funds provided the inmate by family or friends*" [*emphasis added*].

On October 29, 2014, the Circuit Court of Kanawha County entered its Final Order, dismissing the Petition and denying relief. In the Order, the court found venue to be improper, holding that, "In as much as the Petitioner seeks this Court to set aside or to interpret the intent of another Circuit Court's Sentencing Order regarding restitution, venue and jurisdiction is improper . . ." The court further held that "a Circuit Court's order of restitution may include all sources of the Defendant/Petitioner's assets and is not limited to those sources of a prisoner's 'earnings.'" Final Order, *Wade Painter v. David Ballard*, Warden, No. 14-P-520, Circuit Court of Kanawha County, Oct. 29, 2014, at 1.

As its rationale, the Circuit Court adopted the Respondent Warden's assertion that "Earnings may legitimately include monetary assets sent from a friend or family." Final Order, at 4. The Circuit Court of Kanawha County further held that "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 . . ." Final Order, at 5-6.

Proceedings in the Supreme Court of Appeals.

On December 9, 2014, the Petitioner, still *pro se*, file his Notice of Appeal, along with a *pro se* motion to extend the time period for filing the Notice of Appeal (designated by the Petitioner, *pro se*, as "Motion to Show Good Cause for Untimely Filing of Notice of Appeal"). Notice of Appeal, *Wade Painter v. David Ballard*, Warden, Supreme Court of Appeals of West Virginia, Dec. 9, 2014.

On December 19, 2014, this Court entered its Scheduling Order. The Order granted the Petitioner's *pro se* motion to file the notice of appeal out-of-time. The Order set forth the dates

of January 9, 2015, for a motion to proceed on a designated record, along with a date of March 2, 2015, to perfect the appeal. Scheduling Order, *Wade Painter v. David Ballard*, Warden, No. 14-1266, Dec. 19, 2014.

On January 20, 2015, the Petitioner, still *pro se*, filed his Motion to Designate Record on Appeal, along with his Motion to File Out-of-Time (that is, his motion to file, out-of-time, the motion to designate the record.) By Order of February 10, 2015, the Court granted the Petitioner's Motion to File Out-of-Time, along with the motion to proceed on the designated record. The Court authorized the Respondent Warden to designate any additional parts of the record by February 17, 2015. The Court further extended the time for perfecting the appeal to March 27, 2015. Order, *Wade Painter v. David Ballard*, Warden, No. 14-1266, Feb. 10, 2015.

On February 17, 2015, the Respondent Warden filed the Respondent's Designation of Record.

On March 27, 2015, the Petitioner, still *pro se*, filed the Petitioner's Brief on Appeal. The Respondent Warden filed its Respondent's Summary Response on April 24, 2015. On May 6, 2015, the Petitioner, still *pro se*, filed the Petitioner's Reply to Respondent's Summary Response.

By Order of August 25, 2015, the Court appointed current counsel for the Petitioner. The Court further directed the parties to file supplemental briefs addressing all appealable issues. The Petitioner's supplemental brief was ordered to be filed on or before November 2, 2015.

Designated Record.

The Petitioner filed his *pro se* Motion to Designate the Record on Appeal on January 25, 2015. In preparing his *pro se* motion, the Petitioner had limited access to the files of the three

circuit courts involved in these proceedings. Consequently, the titles to the designated documents, as set forth in the Petitioner's *pro se* motion, accurately indicate the contents of the documents, but do not strictly match the titles as set forth on the documents themselves. Additionally, some of the relevant documents (such as DOC Policy Directive 111.06, the DOC Notice of Withholding, the Inmate Work Record, and the Inmate Grievance form) are contained as attachments to the designated documents, variously labelled as appendices, attachments, and exhibits.

The Respondent Warden's Designation of Record, filed February 17, 2015, lists documents that are the same as documents previously designated by the Petitioner, but with the full and correct titles. Consequently, the Designated Record in the case consists of the following documents (re-numbered, for clarity, by counsel for the Petitioner, with appendices, attachments, and exhibits indicated under each document):

Berkeley County

1. Sentencing Order and Post Trial Motion Hearing, *State v. Wade Painter*, No. 6-F-24, Circuit Court of Berkeley County, Nov. 16, 2007.

(A copy of the Sentencing Order is attached as Appendix A to both the *pro se* Petition for Writ of Mandamus, *Wade Painter v. David Ballard*, Warden, No. 14-C-209, Circuit Court of Fayette County, July 14, 2014, and the *pro se* Petition for Writ of Mandamus, *Wade Painter v. David Ballard*, Warden, No. 14-P-520, Circuit Court of Kanawha County, Oct. 1, 2014.)

Fayette County

2. Petition for Writ of Mandamus, *Wade Painter v. David Ballard*, Warden, No. 14-C-209, Circuit Court of Fayette County, July 14, 2014 (*pro se*).

Appendix A: Sentencing Order and Post Trial Motion Hearing, *State v. Wade Painter*, No. 6-F-24, Circuit Court of Berkeley County, Nov.

16, 2007.

Appendix B: Wade Painter, W.Va. Division of Corrections Inmate Grievance No. 14-MOCC-ST-26, March 13, 2014.

Appendix C: Notice of Withholding, Wade Painter, effective Oct. 21, 2008.

3. Respondent's Motion to Dismiss and Memorandum in Support, Wade Painter v. David Ballard, Warden, No. 14-C-209, Circuit Court of Fayette County, Aug. 15, 2014.
4. Reply to Respondent's Motion to Dismiss and Memorandum in Support, Wade Painter v. David Ballard, Warden, No. 14-C-209, Circuit Court of Fayette County, Aug. 22, 2014 (*pro se*).
5. Order Dismissing for Improper Venue, Wade Painter v. David Ballard, Warden, No. 14-C-209, Circuit Court of Fayette County, Sept. 10, 2014.

Kanawha County

6. Petition for Writ of Mandamus, Wade Painter v. David Ballard, Warden, No. 14-P-520, Circuit Court of Kanawha County, Oct. 1, 2014 (*pro se*).

Attachment: Sentencing Order and Post Trial Motion Hearing, State v. Wade Painter, No. 6-F-24, Circuit Court of Berkeley County, Nov. 16, 2007.

Attachment: Wade Painter, W.Va. Division of Corrections Inmate Grievance No. 14-MOCC-ST-26, March 13, 2014.

Attachment: Notice of Withholding, effective Oct. 21, 2008.

7. Respondent's Motion to Dismiss and Memorandum in Support, Wade Painter v. David Ballard, Warden, No. 14-P-520, Circuit Court of Kanawha County, Oct. 24, 2014.

Respondent's Exhibit One: DOC Work History, Wade Painter.

Respondent's Exhibit Two: DOC Policy Directive 111.06, Dec. 1, 2006; DOC Notice of Withholding form.

8. Reply to Respondent's Response, Wade Painter v. David Ballard, Warden, No.

14-P-520, Circuit Court of Kanawha County, Oct. 31, 2014 (*pro se*).

9. Final Order, *Wade Painter v. David Ballard*, Warden, No. 14-P-520, Circuit Court of Kanawha County, Oct. 29, 2014.

SUMMARY OF ARGUMENT

The Petitioner filed a Petition for a Writ of Mandamus to compel the Respondent Warden of the Mt. Olive Correctional Complex to comply with the limitations set forth in West Virginia law regarding deductions, for restitution, from inmate trust accounts. West Virginia law limits such deductions to deductions from a prisoner's "earnings," and does not authorize the Respondent Warden to deduct from funds the Petitioner receives as gifts from family and friends.

The Circuit Court of Kanawha County erroneously denied the Petition for a Writ of Mandamus, for three reasons. The Circuit Court found that (1) venue is improper in Kanawha County; (2) the Respondent Warden has the inherent authority in a criminal case to order restitution, and to order the means by which the Respondent Warden collects it; and (3) the West Virginia statute authorizing deduction for restitution from a prisoner's "earnings" includes the authorization to deduct from gifts.

The Circuit Court's rulings are erroneous in all three respects. First, venue is, in fact, proper in Kanawha County, because W.Va. Code § 14-2-2(a), the statute regarding venue in suits involving state officers and agencies, not only permits the suit to be filed in Kanawha County, it requires it.

Second, the Circuit Court is erroneous in holding that the court has inherent authority to order restitution from funds a prisoner receives as a gift. The inherent authority of the Circuit Court involves conduct and procedure within the courtroom and does not extend to ordering

restitution in criminal cases, let alone extending to authorizing the court to order third parties, such as the warden of a penitentiary, regarding how to collect it. Such authority is derived solely from statute.

Third, the authority for the Warden to deduct restitution from prisoner trust accounts is set forth in W.Va. Code § 25-1-3c. Subsection (c)(1) of this statute limits such deductions to a prisoner's "earnings." The word "earnings" has a clear and precise meaning in both the ordinary meaning of the word and as it is used consistently throughout West Virginia law. The word "earnings" does not include gifts.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary because aspects of this case, including the issue of whether the circuit courts have inherent authority to order the warden of a correctional facility to seize assets of inmates to pay restitution, are matters of first impression. Because the issue of the inherent authority of the court is a matter of first impression, argument under Rule 20 is appropriate. (Additionally, this Court's Order of August 25, 2015, directs 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.")

ARGUMENT

I. VENUE IS PROPER IN KANAWHA COUNTY BECAUSE , BY STATUTE AND BY CASE LAW, WHEN AN ACTION IS BROUGHT AGAINST A STATE AGENCY OR STATE OFFICIAL, VENUE IS NOT ONLY PROPER IN KANAWHA COUNTY, IT IS MANDATORY.

A. Standard of Review.

Ordinarily, "this Court's review of a trial court's decision on a motion to dismiss for improper venue is for abuse of discretion." *State v. Chance*, 224 W.Va. 626, 628, 687 S.E.2d 564, 567 (2009); *United Bank, Inc., v. Blosser*, 218 W.Va. 378, 624 S.E.2d 815 (2005).

In this case, however, because the decision regarding venue is a matter of interpretation of W.Va. Code § 14-2-2 (providing for exclusive venue in Kanawha County for suits against state officers), rather than abuse of discretion, the following standard applies: "Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." *State v. Hinchman*, 214 W.Va. 624, 591 S.E.2d 182 (2003), *quoting* Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

B. W.Va. Code § 14-2-2(a), and Decisions of this Court, Require that Actions Against State Officials Be Brought Only in Kanawha County.

Because the Petitioner's case challenges the acts of the Warden of Mt. Olive Correctional Complex, a state official, venue is not only proper in Kanawha County, but venue in Kanawha County is mandatory. In fact, as set forth in the Statement of the Case, above, when this case

was pending in the Circuit Court of Fayette County, the Respondent Warden himself agreed, at least in the alternative, that venue was proper in Kanawha County.

The Circuit Court of Fayette County agreed with the Respondent Warden, stating, "If the Petitioner wishes to challenge the manner in which the Division of Corrections carries out the specific orders of the Circuit Courts of West Virginia, or the application of state wide correctional policies, then venue would be proper in Kanawha County Circuit Court." Consequently, the Circuit Court dismissed the Fayette County petition, without prejudice, thereby allowing the Petitioner the opportunity to re-file the petition in Kanawha County. Order Dismissing for Improper Venue, *Wade Painter v. David Ballard*, Warden, No. 14C-209, Circuit Court of Fayette County, Sept. 10, 2014.

Only upon the Petitioner complying with the ruling of the Circuit Court of Fayette County, and re-filing in Kanawha County, did the Respondent Warden reverse his position and now assert that venue is improper in Kanawha County. Respondent's Motion to Dismiss and Memorandum in Support, *Wade Painter v. David Ballard*, Warden, No. 14-P-520, Circuit Court of Kanawha County, Oct. 24, 2014, at 2-3.

The Respondent Warden's initial position in the Circuit Court of Fayette County, and the ruling of the Circuit Court of Fayette County that venue is proper in Kanawha County, are both correct. W.Va. Code § 14-2-2(a) not only provides for venue of such cases in Kanawha County, but provides that venue is proper *only* in Kanawha County. The Warden of Mt. Olive Correctional Complex is a state official whose position is authorized by statute, W.Va. Code § 25-1-11 (Officers and employees of correctional institutions). As set forth in 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 . . . any . . . state officer, or a state agency is made a party defendant . . . "

In *State v. Chance*, 224 W.Va. 626, 687 S.E.2d 564 (2009), this Court applied W.Va. Code 14-2-2(a) to a suit against one of the superintendents at Mt. Olive Correctional Complex. In *Chance*, a prisoner filed suit against the superintendent on the grounds that the prisoner had been terminated from his inmate job position without cause. In deciding the issue of venue, this Court upheld the transfer of the case from the Circuit Court of Fayette County to the Circuit Court of Kanawha County. In so holding, this Court cited the venue provisions of W.Va. Code 14-2-2(a), along with its holding in *State ex rel. Stewart v. Alsop*, 207 W.Va. 430, 533 S.E.2d 362 (2000), where this Court emphasized, "Actions wherein a state agency or official is named . . . may be brought only in the Circuit Court of Kanawha County."

In the present case, the Petitioner challenges the Respondent Warden's exercise of authority in that, in seizing the Petitioner's assets, the Respondent exercised authority that extends beyond that required by the restitution language in the circuit court's Sentencing Order and extends beyond that authorized by statute (and by the DOC's own policy directive). As set forth in Part III, below, the language in the circuit court Sentencing Order simply states that restitution "shall be paid from monies contained within any prison account or any assets of the defendant." The Sentencing Order does not direct the Warden to collect the funds, let alone direct the Warden to reach beyond the statutory provisions of W.Va. Code § 25-1-3c(c)(1), the statute limiting the Warden's authority to deduct from prisoner trust accounts to "earnings" and specifying how such orders shall be carried out.

Instead, the Respondent Warden determined, on his own, to apply the restitution language of the sentencing order in a manner that violates the statutory restrictions of W.Va. Code § 25-1-3c(c)(1). The relief requested by the Petitioner, if granted, will of necessity result in a general ruling on whether the Respondent can exceed the restitution limitations set forth in W.Va. Code § 25-1-3c(c)(1). For the Respondent to act otherwise, and not apply a ruling favorable to the Petitioner to other prisoners similarly situated, would involve the Respondent, in bad faith, requiring every other inmate affected by the Respondent's restitution practice to file separate petitions in circuit court. The consequence would be repetitious and possibly contradictory rulings throughout the various circuit courts.

Such a practice defeats the very purpose of the venue provision of W.Va. Code § 14-2-2(a), a provision intended to promote judicial economy and the economy of state agencies, as well as promoting consistency of results. As this Court stated in *Hesse v. State Soil Conservation Committee*, 153 W.Va. 111, 119, 168 S.E.2d 293, 298 (1969), quoting *Davis v. West Virginia Bridge Commission*, 113 W.Va. 110, 166 S.E. 819, 821 (1932), "[T]he manifest purpose of the statute [W.Va. Code § 14-2-2] is to prevent the great inconvenience and possible public detriment that would attend if functionaries of the state government should be required to defend official conduct and state's property interests in sections of the commonwealth remote from the capital."

Consequently, not only is venue proper in Kanawha County, venue in Kanawha County is mandatory.

II. IN A CRIMINAL CASE, A JUDGE DOES NOT HAVE THE INHERENT AUTHORITY TO ORDER CIVIL REMEDIES. SPECIFICALLY, IN A CRIMINAL CASE THE JUDGE DOES NOT HAVE THE INHERENT AUTHORITY TO ORDER THIRD PARTIES (SUCH AS THE WARDEN OF A PENITENTIARY) TO COLLECT RESTITUTION FROM PRISONERS. IN CRIMINAL PROCEEDINGS, THE POWER TO ORDER CIVIL RELIEF, AND TO ORDER THE COLLECTION OF RESTITUTION BY THIRD PARTIES, DERIVES SOLELY FROM LEGISLATIVE AUTHORIZATION.

A. Standard of Review.

The scope of the inherent authority of the circuit court is a question of law. "Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." *State v. Hinchman*, 214 W.Va. 624, 591 S.E.2d 182 (2003), *quoting* Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

"A *de novo* standard of review applies to a circuit court's decision to grant or deny a writ of mandamus." *State ex rel. Smith v. Mingo County Commission*, 228 W.Va. 474, 721 S.E.2d 44 (2011).

"Before this Court may properly issue a writ of mandamus, three elements must coexist: (1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of the respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law." *State ex rel. Smith v. Mingo County Commission*, 228 W.Va. 474, 721 S.E.2d 44 (2011), *quoting* *Cooper v. Gwinn*, 171 W.Va. 245, 298 S.E.2d 781 (1981).

B. The Circuit Court's Inherent Authority Applies to the Authority to Regulate Conduct and Procedure within the Courtroom. The Court's Inherent Authority Does Not Extend to Matters Involving Third Parties, Such as the Collection of Restitution by Wardens of Penitentiaries.

In the Respondent's Motion to Dismiss and Memorandum in Support, the Respondent Warden asserted that the circuit court has "the *inherent authority* to require an inmate through his inmate trustee account to pay forty percent or more of any assets" toward fulling the order of restitution [*emphasis added*]. Respondent's Motion to Dismiss and Memorandum in Support, *Wade Painter v. David Ballard*, Warden, No. 14-P-520, Circuit Court of Kanawha County, Oct. 24, 2014, at 7. Similarly, in its Final Order, the Circuit Court adopted, verbatim, the language in the Respondent's Motion to Dismiss and held that the circuit court has "the inherent authority to require an inmate through his inmate account to pay forty percent or more of any assets" toward filling the order of restitution. Final Order, *Wade Painter v. David Ballard*, Warden, No. 14-P-520, Circuit Court of Kanawha County, Oct. 29, 2014, at 5-6.

Neither the Respondent Warden in his Memorandum, nor the Circuit Court in its Final Order, set forth any authority for the assertion that the circuit courts have inherent authority to order restitution in the first place, let alone the inherent authority to order the means by which restitution is collected. (The Memorandum and Final Order cite only the statute regarding restitution, W.Va. Code § 61-11A-4, a statute which contains no reference to inherent authority at all). The reason that neither the Respondent nor the Circuit Court set forth any authority for their assertion about inherent authority is almost certainly because no such authority exists.

The decisions of this Court, and the decisions of courts throughout the country, contain numerous discussions of the inherent authority of the courts. The discussions of inherent

authority focus on the power of the courts to regulate and sanction procedure and conduct within the courtroom. As this Court set forth in *State ex rel. Richmond American Homes v. Sanders*, 226 W.Va. 103, 111, 697 S.E.2d 139, 147 (2010), "When rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power fills the gap," quoting *Shepherd v. American Broadcasting Companies, Inc.*, 62 F.3d 1469, 1474-75 (D.C. Cir. 1995).

In defining the inherent power of the courts, this Court, in quoting *Shepherd*, explained that "The inherent power encompasses the power to sanction attorney or party misconduct, and includes the power to enter a default judgment," 226 W.Va. at 111, 697 S.E.2d at 147, quoting *Shepherd*, 62 F.3d at 1474-75. Finally, this Court concluded that "Other inherent power sanctions available to the courts include fines, awards of attorneys' fees and expenses, contempt citations, disqualifications or suspensions of counsel, and drawing adverse evidentiary inferences or precluding the admission of evidence. 226 W.Va. at 111, 697 S.E.2d at 147, quoting *Shepherd*, 62 F.3d at 1474-75. Similarly, in *State ex rel. Frazier v. Meadows*, 193 W.Va. 20, 31, 454 S.E.2d 65, 76 (1994), this Court held that, in order to "conduct orderly judicial proceedings, the circuit court has the inherent power to select the court's bailiff (in the event of a conflict with the sheriff regarding the selection of the bailiff).

It is significant that the discussions of the inherent authority of the court, as set forth in *State ex rel. Richmond American Homes v. Sanders*, and *State ex rel. Frazier v. Meadows*, above, involve the authority of the court to regulate and sanction procedure and conduct *within the courtroom*. None of the discussions of the inherent authority of the court appear to extend to matters involving third parties, such as collection of restitution from prisoners by the warden of

the penitentiary. By contrast, as set forth below in Part III, such authority is granted solely by statute.

In numerous instances this Court has reversed orders of restitution by circuit judges that, for various reasons, have exceeded the authority to impose restitution as set forth by statute. In none of these instances has this Court taken the position held by the Respondent Warden that the circuit court has inherent authority to impose restitution, and impose a procedure for collecting restitution, beyond that set forth by statute.

In *State v. McGill*, 230 W.Va. 85, 736 S.E.2d 85 (2012), for example, the circuit court ordered restitution to the State in the amount of \$8,261.56 for the costs of pursuing and apprehending a prisoner who had escaped from custody. Rather than upholding the order or in any manner referring to the inherent authority of the court, this Court instead held the State to the strict language of the restitution statute, W.Va. Code § 61-11A-4, and stated, "Clearly, neither damage to society as a whole nor the costs of apprehension and investigation incurred by the government in apprehending criminals are contemplated by this statutory language." 230 W.Va. at 90, 736 S.E.2d at 90.

Similarly, in *State ex rel. Brewer v. Starcher*, 195 W.Va. 185, 465 S.E.2d 185 (1995), the circuit court ordered restitution to the victim in an amount that included \$5,000 for pain and suffering. Rather than approve the award by referencing the inherent authority of the court, this Court reversed, holding the State to the statutory limits of W.Va. Code § 61-11A-4, stating, "a circuit court may not order this form of restitution under the Victim Protection Act of 1984" [W.Va. Code § 61-11A-4]. 195 W.Va. at 198 n.19, 465 S.E.2d at 198 n. 19.

In *State v. Cummings*, 214 W.Va. 317, 589 S.E.2d 48 (2003), the circuit court ordered restitution in the amount of \$48,778.98, an amount which included \$12,000 in lost wages incurred by the victim's attendance at court proceedings. In considering the issue, this Court cited *Taylor v. State*, 45 P.2d 103 (Okla.App. 2002), a case where the restitution statute in the State of Oklahoma specifically authorized restitution for economic losses incurred during attendance at court proceedings. This Court then explained that, "Where the statutory scheme makes no allowance for such restitution, however, courts have not been inclined to expand the scope of statutorily-defined restitution." Consequently, rather than referring to the inherent authority of the court, this Court held that "because the West Virginia statute governing this matter does not include restitution for loss of wages incurred by the victim while attending court proceedings, we conclude that the lower court erred in awarding restitution for the \$12,000 in lost wages asserted by the victim." 177 W.Va. at 53, 589 S.E.2d at 322.

Finally, in *State v. Short*, 177 W.Va. 1, 350 S.E.2d 1 (1986); the circuit court had previously ordered restitution to be paid pursuant to the probation statute, W.Va. Code § 62-12-9. The restitution order was entered in the year 1979, five years before restitution was also authorized under W.Va. Code § Code § 61-11A-4, the Victim Crime Protection Act of 1984. Under the probation statute, the court's power to order restitution was limited to the period of probation. The defendant made regular payments of restitution during his five-year period of probation, but at the time the defendant's probation expired, the defendant still owed \$15,151.30. By that time, however, the Legislature had adopted W.Va. Code § Code § 61-11A-4, the Victim Crime Protection Act of 1984.

Consequently, pursuant to the new legislation, the circuit court entered a new order, requiring the defendant to pay the balance under the new legislation. On appeal, this Court reversed, explaining that the circuit court lacked the authority to enter the order, because "the court's authority under [the probation statute] dissolved at the end of the probation period," and the order of restitution under the new statute was "an ex post facto application of the new law and is therefore void." *State v. Short*, 177 W.Va. at 2, 350 S.E.2d at 2.

This Court's holding in *State v. Short*, along with its holdings in *State v. McGill*, *State ex rel. Brewer v. Starcher*, and *State v. Cummings*, discussed above, confirm that the authority to order restitution is entirely derived by statute and that there is no inherent authority of the courts to deviate or expand beyond this statutory grant of authority.

C. Restitution Is Civil in Nature and, as Such, Is Authorized in Criminal Proceedings Only by Statute.

Instead of arising from the inherent authority of the Court, it is apparent from *State v. Short*, *State v. McGill*, *State ex rel. Brewer v. Starcher*, and *State v. Cummings*, discussed above, that the Legislature, by authorizing restitution and establishing its parameters, introduced into criminal proceedings limited remedies that previously did not exist in criminal cases. The remedies did not previously exist in criminal cases because the remedies are, in fact, civil in nature. As this Court explained in *State v. Lucas*, 201 W.Va. 271, 283 n.12, 496 S.E.2d 221, 234 n.12 (1997), as a consequence of restitution statutes, "courts are increasingly drawn into a hybrid civil-criminal arena. This Court further explained, "Criminal restitution rests with one foot in the world of criminal procedure and sentencing and the other in civil procedure and remedy," 201 W.Va. at 283 n.12, 496 S.E.2d at 234 n.12.

In fact, in order to provide the link between civil law and criminal restitution, and to provide a means for the collection of restitution, the Legislature included the provision in the restitution statute, W.Va. Code § 61-11A-4(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."

Judgments in civil actions, of course, are enforced by the statutory provisions of W.Va. Code § 38-4-1 through 32 (writ of execution); W.Va. Code § 38-5-10 through 19 (suggestion); and W.Va. Code § 38-5A-1 through 13 and W.Va. Code § 38-5B-1 through 14 (suggestee execution). In recognition of the often cumbersome and futile methods of enforcing civil judgments, especially those involving prisoners, the Legislature subsequently enacted W.Va. Code 25-1-3c, authorizing the warden to "deduct from the *earnings* of each inmate, legitimate court-ordered financial obligations . . . not to exceed forty percent . . . for any court ordered victim restitution." W.Va. Code 25-1-3c(c)(1) [*emphasis added*].

As a result, the Legislature has established, by statute, the two means of enforcing the collection of awards of restitution: (1) the traditional method of enforcement of judgment by writ of execution, suggestion, and suggestee execution, and (2) deduction, from the inmate trust account, from the earnings of the prisoner, not to exceed 40 percent of such earnings.

Consequently, the authority of the circuit court to order restitution, and the means of enforcing orders of restitution, are purely a matter of statute. The circuit courts do not have the authority, inherent or otherwise, to exceed this statutory authorization.

III. THE WORD "EARNINGS," AS SET FORTH IN THE STATUTE AUTHORIZING DEDUCTION OF FUNDS FOR RESTITUTION, HAS A CLEAR AND PRECISE MEANING, AND DOES NOT INCLUDE GIFTS. FOR THIS REASON, THE RESPONDENT WARDEN DOES NOT HAVE THE AUTHORITY TO DEDUCT FROM AN INMATE'S TRUST ACCOUNT ANY PORTION OF FUNDS THAT WERE RECEIVED BY THE INMATE AS GIFTS.

A. Standard of Review

"Where the issue on appeal from the circuit court is clearly a question of law or involving the interpretation of a statute, we apply a *de novo* standard of review." *State v. Euman*, 210 W.Va. 519, 558 S.E.2d 319 (2001).

"A *de novo* standard of review applies to a circuit court's decision to grant or deny a writ of mandamus." *State ex rel. Smith v. Mingo County Commission*, 228 W.Va. 474, 721 S.E.2d 44 (2011).

"Before this Court may properly issue a writ of mandamus, three elements must coexist: (1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of the respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law." *State ex rel. Smith v. Mingo County Commission*, 228 W.Va. 474, 721 S.E.2d 44 (2011), quoting *Cooper v. Gwinn*, 171 W.Va. 245, 298 S.E.2d 781 (1981).

B. The Word "Earnings" Has a Clear and Precise Meaning and Does Not Include Gifts.

As set forth above in Part II, above, in a criminal case the circuit courts do not have the inherent authority to order restitution, let alone to order the means by which restitution is collected by third parties. All such authority is set forth by statute.

The statute authorizing restitution in criminal cases, W.Va. Code § 61-11A-4, specifies in subsection (a) that "the court, when sentencing a defendant . . . shall order . . . that the defendant make restitution to any victim of the offense . . ." The statute also provides the means for enforcement of the restitution order stating, in subsection (h) "An order of restitution may be enforced by the state or a victim . . . in the same manner as a judgment in a civil action."

As set forth in Part II, above, in addition to this means of enforcement (that is, by writ of execution, suggestion, or suggestee execution), the Legislature also provided, in W.Va. Code § 25-1-3c, an additional means for enforcing the order of restitution. As subsection (c)(1) provides, "The warden [of a penitentiary] shall deduct from the *earnings* of each inmate, legitimate court-ordered financial obligations" [*emphasis added*]. This subsection further specifies that "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 of the aggregate, for any court ordered victim restitution."

Pursuant to this legislative directive, the DOC adopted Policy Directive 111.06 (Dec. 1, 2006), specifying the manner in which prisoners' earnings will be collected and applied to financial obligations, including restitution. In the Policy Directive, the DOC defined "earnings," in relevant part, as follows:

Earnings: All sums of money paid to an inmate on account of any work assignment . . . Earnings shall further include all sums of money received by the inmate on account of inheritance, bequest, gift, *except funds provided the inmate by family and friends.* [*emphasis added*]

As set forth in the Statement of the Case, above, on March 13, 2014, the Petitioner filed a grievance with the Warden's Office stating that on March 4, 2014, the Petitioner "received a

\$25.00 money order from home. Once again, 40% (\$10.00) was taken out of the money order." Wade Painter, W.Va. Division of Corrections Inmate Grievance No. 14-MOCC-ST-26, March 13, 2014.

Upon the Warden's denial of the grievance, the Petitioner filed his petition for a writ of mandamus, first in the Circuit Court of Fayette County and subsequently in the Circuit Court of Kanawha County. The Petitioner requested the Circuit Court to compel the Respondent Warden to comply with W.Va. Code § 25-1-3c(c)(1), DOC Policy 111.06, and the Notice of Withholding and not deduct funds received as gifts from family and friends. Petition for Writ of Mandamus, *Wade Painter v. David Ballard*, Warden, No. 14-P-520, Circuit Court of Kanawha County, Oct. 1, 2014.

The Respondent Warden subsequently filed the Respondent's Motion to Dismiss and Memorandum in Support. In addition to asserting (1) improper venue (discussed in Part I, above) and (2) the inherent authority of the court (discussed in Part II, above), the Respondent's Motion to Dismiss asserted (3) that, as set forth in W.Va. Code § 61-11A-4, the term earnings "may legitimately include monetary assets sent from a friend or family." Respondent's Motion to Dismiss and Memorandum in Support, *Wade Painter v. David Ballard*, Warden, No. 14-P-520, Circuit Court of Kanawha County, Oct. 24, 2014, at 6.

In its Motion to Dismiss, the Respondent further asserted that "Such transfers of money [that is, gifts] while not part of a binding contract, are 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." Respondent's Motion to Dismiss and Memorandum in Support,

Wade Painter v. David Ballard, Warden, No. 14-P-520, Circuit Court of Kanawha County, Oct. 24, 2014, at 6.

In its Motion to Dismiss, the Respondent Warden set forth no authority for the unfounded and illogical proposition that gifts "are the result of the recipient's effort" and "have been earned in some manner." In reality, the assertion that gifts to prisoners, including birthday and Christmas gifts from family, have been "earned" by the prisoner and thereby constitute his "earnings," is too contrary to the plain meaning of the words and is too illogical to withstand any reasoned analysis.

Despite the lack of logic in the Respondent's position, the Circuit Court in its Final Order adopted the language of the Respondent, verbatim, stating that "Earnings may legitimately include monetary assets sent from a friend or family," and that gifts "are the result of the recipient's effort" and "have been earned in some manner." Final Order, *Wade Painter v. David Ballard*, Warden, No. 14-P-520, Circuit Court of Kanawha County, Oct. 29, 2014, at 4. Just as the Respondent cited no authority for this illogical assertion, neither did the Circuit Court in its Final Order.

There is nothing in the Sentencing Order in this case that compels the Respondent Warden to deduct restitution from funds received as gifts. The Sentencing Order simply states that, for each item of restitution, "said restitution shall be paid from monies contained within any prison account or any assets of the defendant." The Sentencing Order does not direct the Warden to collect the funds. As Warden, however, the Respondent can deduct funds of the Petitioner to the fullest extent authorized by law. And the extent authorized by law is that set forth in W.Va. Code § 25-1-3c(c)(1), authorizing deductions from "earnings" alone.

In reality, unlike in the assertions by the Respondent Warden and the Circuit Court, the word "earnings" has a clear and precise meaning, and does not include gifts. In determining the meaning of a statute, one of the most axiomatic principles of law is that "[g]enerally, words are given their common usage." *State ex rel. Frazier v. Meadows*, 193 W.Va. 20, 23, 454 S.E.2d 65, 68 (1994).

As the Court further pointed out in *State ex rel. Frazier v. Meadows*, "[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation," 193 W.Va. at 24, 454 S.E.2d at 69, *quoting* Syllabus Point 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). The Court added the points that "this Court . . . will not change the plain language employed in framing the statute," and "Courts are not free to read into the language what is not there, but rather should apply the statute as written. If the statute is clear . . . and if the law is within the constitutional authority of the lawmaking body that passed it, then the duty of interpretation does not arise, and the rules for ascertaining uncertain language need no discussion." *State ex rel. Frazier v. Meadows*, 193 W.Va. at 24, 454 S.E.2d at 69 [*internal citations omitted*].

There are some areas of West Virginia law where the Legislature has specifically defined the meaning of the word "earnings." In Chapter 48, for example, covering domestic relations (including child support), the Legislature defined the word "earnings" as follows: "Earnings means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise . . ." W.Va. Code § 48-1-223 (Earnings defined).

The definition of "earnings," for domestic relations purposes, is particularly significant in the present case because the statute in question in this case, W.Va. Code § 25-1-3c, provides for

withholding from inmate trust accounts not just for restitution, but for "child support, restitution, and other financial obligations." W.Va. Code § 25-1-3c(a)(1). It would be a distortion of legislative intent to conclude that, within the same statute, the Legislature meant the word "earnings" to mean one thing for purposes of child support (excluding gifts), while meaning another for purposes of restitution (including gifts). Furthermore, it would be an unreasonably complex and illogical scheme of enforcement if, in instructing the Warden for withholdings from prisoner's trust accounts, withholding from a prisoner's earnings for the purpose of child support was limited to the legislative definition of "earnings," while withholding from the same trust account for the purpose of restitution was expanded, by judicial rulings, to include gifts.

Finally, a ruling by the Court that the statutory term "earnings," at least for purposes of restitution, includes gifts would cause conflict and confusion with other established areas of law where earnings clearly do not include gifts, such as equitable distribution of property, *LaRue v. LaRue*, 172 W.Va. 158, 167, 172-73, 304 S.E.2d 312, 321, 326 (1983) (distinguishing earnings and gifts for purposes of equitable distribution) and tax law, *Tankovits v. Glessner*, 211 W.Va. 145, 151-52, 563 S.E.2d 810, 818-17 (2002) (distinguishing earnings and gifts for purposes of income taxes).

Consequently, the Circuit Court's ruling that the statutory word "earnings" includes gifts is erroneous and should be reversed.

C. The Unpublished Memorandum Decision of *State v. Smith*, 2012 WL 309137 (W.Va. Apr. 16, 2012), Contains No Analysis of Law, Is Contrary to the Principles of Law Set Forth Above, and Should Have No Bearing on the Decision of the Court in This Case.

In contrast to the authority cited above, in 2012 this Court issued an unpublished memorandum decision in *State v. Smith*, 2012 WL 3079137 (W.Va., Apr. 16, 2012), raising an issue similar to the issue in the present case. In *State v. Smith*, the sentencing order stated that restitution shall be paid from "all income, inmate accounts, or from any funds received by the [petitioner], not just earned prison funds." *State v. Smith*, 2012 WL 3079137 at 1. (In the present case, the sentencing order contains less specific language, stating that restitution "shall be paid from monies contained within any prison account or any assets of the defendant." Sentencing Order, *State v. Painter*, No. 06-F-24 (Circuit Court of Berkeley County, Nov. 16, 2007)).

In *State v. Smith*, the prisoner, *pro se*, appealed the sentencing order to the extent that it authorized the deduction from the prisoner's trust account not just from earnings but, as in the present case, also from "funds provided to the inmate by family and friends." *State v. Smith*, 2012 WL 3079137 at 1.

The unpublished memorandum decision in *State v. Smith* stated the positions taken by the petitioner, acting *pro se*, and the State, represented by counsel. Then, with no analysis, and without citing any authority (other than for the standard of review), the memorandum decision simply states, "the Court finds no abuse of discretion was committed by the circuit court. This Court agrees with the circuit court's finding that the amended sentencing order in this matter does

not violate the West Virginia Code, nor does it violate DOC policy directives." *State v. Smith*, 2012 WL 3079137, at 2.

The memorandum decision in *State v. Smith* should not affect the outcome of the present case, for numerous reasons. First, in containing no analysis, the memorandum decision in *State v. Smith* appears to fall short of the constitutional requirement in W.Va. Code Art. VIII, § 4 that, in reversing, modifying or affirming a judgment of a circuit court, "the reasons therefor shall be concisely stated in writing."

Second, because the petitioner in *State v. Smith* was acting *pro se*, in deciding *State v. Smith*, unlike in the present case, the Court did not have before it any of the authority regarding the limits on the inherent power of the court, or the principles regarding the plain language of statutes, let alone the application of these principles to the issue before the Court.

Third, in *State v. McKinley*, 234 W.Va. 143, 151, 764 S.E.2d 303, 311 (2014), this Court pointed out that, under Rule 21(e) of the Rules of Appellate Procedure, "memorandum decisions can be cited to the court," but the Court also pointed out the reasons that "memorandum decisions occupy a lower station on the scale of precedent when compared to published opinions." 234 W.Va. at 151, 764 S.E.2d at 311.

The Court further explained that "memorandum decisions are distinguishable from opinions," and that "[t]hese factors -- when combined with the fact that the decisions are summary in nature, do not contain a syllabus, and are not published in the official reporter -- make clear that a memorandum decision has less persuasive force as legal precedent than a published opinion." 234 W.Va. at 152, 764 S.E.2d at 312.

Additionally, in *State v. McKinley* the Court explained, "while memorandum decisions

may be cited as legal authority, and are legal precedent, their value as precedent is necessarily more limited; where a conflict exists between a published opinion and a memorandum decision, the published opinion controls." Finally, in *State v. McKinley* the Court stated that "Conflicts between memorandum decisions and published opinions should be used by the legal community as a basis to urge this Court to consider and address such conflict." 234 W.Va. at 152, 764 S.E.2d at 312.

Additionally, in *Hammons v. West Virginia Office of the Insurance Commissioner*, 235 W.Va. 577, 775 S.E.2d 458, 475 (2015), the Court stated "[A] precedent-creating opinion that contains no extensive analysis of an important issue is more vulnerable to being overruled than an opinion which demonstrates that the court was aware of conflicting decisions and gave at least some persuasive discussion as to why the old law must be changed."

Because the memorandum decision in *State v. Smith* contained no analysis at all, because it conflicts with the principles regarding the limits on the inherent authority of the courts, and because it conflicts with the principles regarding the plain language of statutes, all as set forth above, it should have no impact on the consideration of the present case.

D. Because the Petitioner Has a Clear Legal Right to Receive Gifts From Friends and Family; Because the Respondent Warden Has a Legal Duty to Comply With W.Va. Code § 25-1-3c(c)(1) and DOC Policy Directive 111.06 and Limit Deductions From the Petitioner's Trust Account to the Petitioner's Earnings; and Because the Petitioner Has No Other Adequate Remedy at Law, the Circuit Court's Denial of the Petition for a Writ of Mandamus Should Be Reversed.

In considering petitions for writs of mandamus, this Court has consistently held that, "[b]efore this Court may properly issue a writ of mandamus, three elements must coexist: (1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on

the part of the respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law." *State ex rel. Smith v. Mingo County Commission*, 228 W.Va. 474, 721 S.E.2d 44 (2011), quoting *Cooper v. Gwinn*, 171 W.Va. 245, 298 S.E.2d 781 (1981).

All three elements exist in this case. Under the Due Process Clause of Article III, Section 10 of the West Virginia Constitution, and under the Due Process Clauses of the 5th and 14th Amendments to the U.S. Constitution, "[i]nmates have a property interest in funds held in prison accounts" and therefore "inmates are entitled to due process with respect to any deprivation of this money." *Reynolds v. Wagner*, 128 F.2d 166, 179 (3d Cir. 1997).

Additionally, under W.Va. Code § 25-1-3a(a), "[t]he warden or administrator of each institution shall receive and take charge of the money . . . of all inmates in his or her institution and all money . . . sent to the inmates . . . while they are domiciled there. The warden or administrator shall credit the money . . . to the inmate entitled to it . . . " [subject to authorized deductions].

Consequently, the first two elements for a writ of mandamus exist because under both the Constitution and W.Va. Code § 25-1-3a(a), the Petitioner has a clear legal right to the funds sent to him by family and friends, and the Respondent Warden has a legal duty, subject only to authorized deductions, to credit the money to the Petitioner.

Finally, the third element exists because the Petitioner has no other adequate remedy at law. The Sentencing Order in this case was entered in 2007. Sentencing Order, *State v. Wade Painter*, No. 06-F-24 (Circuit Court of Berkeley County, Nov. 16, 2007). The Respondent Warden only recently began applying the Sentencing Order in a manner that resulted in the

deduction of funds in violation of W.Va. Code § 25-1-3c, deductions that only began long after the period to appeal the Sentencing Order had expired.

Consequently, all three elements for a writ of mandamus exist in this case, and the writ should be granted.

CONCLUSION

For the above reasons, the Final Order of Kanawha County, denying the Petitioner's Petition for a Writ of Mandamus, should be reversed. The Respondent Warden should be compelled to comply with the provisions of W.Va. Code § 25-1-3c and deduct funds only from "earnings" and such other sources as are provided by statute. The funds deducted from gifts from friends and family should be returned the the Petitioner's account.

Respectfully submitted,

WADE PAINTER,
By counsel



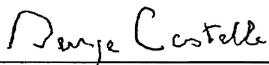
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CERTIFICATE OF SERVICE

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by hand, a copy of the foregoing Supplemental Brief of Petitioner, upon:

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