HB 5

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2020AP1394

State of Wisconsin ex rel. Victor Ortiz, Jr.,
Petitioner-Respondent,
v.
Cathy Jess,
Respondent-Appellant.

Appeal No. 2020AP1394

BRIEF AND APPENDIX OF PETITIONER-RESPONDENT APPELLANT.

APPEAL FROM THE ORDER ENTERED IN THE DANE COUNTY CIRCUIT COURT ON JULY 23,2020, THE HONORABLE PETER C. ANDERSON, PRESIDING.

Victor Ortiz,Jr
Pro Se

Address:

Stanley Correctional Institution
100 Corrections Drive.
Stanley, Wisconsin 54768

TABLE OF CONTENTS.

TABLE OF AUTHORITIES

STATUTES AND OTHER SOURCES

INTRODUCTION

When the Legislature adopted 2015 Wisconsin Act 355, it intended to allow restitution to be collected from inmates of the Department of Corrections. However, the DOC took part of the language in Act 355 as an invitation to fundamentally alter the way in which funds held in trust by the DOC are disbursed to pay certain financial obligations. The changes to the DOC's collection effort and policies are unfair and leave many inmates facing the complete depletion of any funds earned or gifted held by the DOC. Through it's actions, the DOC is violating well established principles of administrative law to recoup funds lost by the changes made in Act 355 and violating the Wisconsin Administrative Procedure Act.

Further, the DOC is applying this expansive collection effort without regard to Ortiz's Judgment of Conviction, and others with similar language, that sets the rate of collection for debt. The Court should step in to remind the DOC that it does not have unfettered power to handle matters related to prisoners in the State of Wisconsin and that it needs to act in accordance with the Wisconsin Administrative Procedure Act.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION.

Ortiz agrees with the DOC that publication is necessary and appropriate to provide guidance to Circuit Courts and administrative agencies with the issues presented in this appeal. Ortiz, however, disagrees with the DOC that oral argument is unnecessary. Ortiz believes oral argument is necessary because it will fully present the issues and relevant legal authority. It must be noted that in **State of Wisconsin Ex.Rel. Marcus Kerby v. Jon Litscher, Appeal No.2018AP 284**, this Court granted oral argument on the same issues presented in this case. Unfortunately, for Ortiz and other inmates in similar situations, this Court dismissed the DOC's appeal in Kerby because Kerby was released from prison before the issues could be addressed, which made the appeal moot.

STATEMENT OF THE CASE.

Supplemental Statement of Facts.

Prior to the enactment of Act 355, the DOC would collect financial obligations listed under Wis.Stat.§973.045 at a rate of 25% of the inmates trust account balance. After the enactment of Act 355, the DOC began collecting Restitution and all other obligations at a rate of 50% of the inmates trust account balance. The DOC announced this change in a memo to all inmates. The new policy depleted and substantially alter the way in which the DOC undertakes collection efforts.

Ortiz, Pro Se, filed an action challeging the new collection effort, arguing that: (1) the new collection rate of 50% was in violation of his Judgment of Conviction; and (2) that the newly enactment of Act 355 & newly implemented restitution statutes, Wis.Stat.§973.20(11)(c) does not run retroactively to inmates that were sentenced before the enactment of Act 355 & Wis.Stat.§973.20(11)(c). Ortiz asked for relief under Certiorari review, The Circuit Court granted Ortiz's request for relief and reversed the secretary's decision in Ortiz's complaint. The Circuit Court held that the new collection rate of 50% was in violation of Ortiz's Judgment of Conviction. The Judge stated that the DOC lacked the authority to modify or void valid Court orders such as in Ortiz's J.O.C. The Circuit Court also held that Act 355 does not apply to Ortiz's case because ortiz was convicted and sentenced prior to the enactment of Act 355.

The DOC appealed the Circuit Court order rejecting the DOC's claim that the Department has authority to deduct funds from Ortiz's inmate trust account at a rate of 50% percent to pay his court ordered restitution obligation. Specifically, the Court held that the secretary is correct that the DOC has substantial authority over inmates trust account and that the DOC has the power to set the rate at which prison trust account are dispersed for statutory mandated surcharges or other prisoner obligations, including restitution. The Circuit Court however, also stated that based on the Courts review of the statutes and case law, that power is not exclusive.

On April 11,2016, the Legislature enacted 2015 Wisconsin Act 355. The new law was published the next day and took effect on July 1,2016. Act 355 altered Wis.Stat.§§301.32 §973.20(11)(c), to require and allow

the DOC to collect restitution obligations from inmates trust account at a rate deemed reasonable by the DOC.

Act 355 also added "Victim Restitution under §.973.20(11)(c)" to Wis.Stat.§301.32 as one of the listed surcharges or expenses that the superintendent or warden could pay from an inmate's trust account. It is undisputed that until the enactment of Act 355, the DOC would collect the surcherges and other expenses listed under Wis.Stat.§301.32 at a rate of 25%.

Prior to the effective date of Act 355, and in direct response to it the DOC sent a memo to all inmates regarding its revision to the DOC policy governing deduction from inmates trust account. (DAI policy 309.45.02). The memo announced that the DOC adopted a new "Policy" that allowed for collection of restitution, statutory surcharges, and court costs at a rate of 50%.

The DOC memo, in pertinent part, stated that Act 355 requires that it change its collection methods, because the new law "requires that restitution is paid in full prior to paying a victim witness surcharge (VWS), Deoxyribonucleic Acid Analysis Surcharge (DNA), Child pornography surcharge, or Court Costs. Nothing in Act 355 requires that restitution be paid in full prior to the deduction of the other specified surcharges and court costs. Other than passing reference to Act 355, the DOC memo does not cite any statutory authority that justifies its substantial change in collection policy. Furthermore, the DOC did not comply with the requirements to adopt a new rule or guidance documents under the Wisconsin Administrative Procedure Act.

STANDARD OF REVIEW

The interpretation of a statute and application of a statute to undisputed facts are issues of law to be reviewed de novo. **L.G. by Chippewa Family Servs.,v. Aurora Residential Alternative, Inc.,2019 WI 79,¶7,387 Wis.2d 724,929 N.W. 2d 590.** The de novo standard also applies to the statutory interpretation of Administrative agencies. **Tetra Tech EC, Inc. v. Wisconsin Dep't of revenue, 2018 WI 75,¶¶3,84,382 Wis.2d 49, 914 N.W.2d 21.**

ARGUMENT

I. THE DOC DOES NOT HAVE AUTHORITY TO DEDUCT FUNDS FROM ORTIZ'S INMATE TRUST ACCOUNT AT A RATE OF 50 PERCENT TO PAY HIS COURT-ORDERED RESTITUTION OBLIGATIONS.

A. THE DOC DOES NOT HAVE LEGAL AND EXCLUSIVE STATUTORY AUTHORITY TO COLLECT COURT-ORDERED RESTITUTION AT A RATE GREATER THAN THE RATE SPECIFIED IN ORTIZ'S JUDGMENT OF CONVICTION.

The DOC argues that sentencing courts do not have the authority to set Restitution debt collection rates for the DOC and that setting the collection rate in a Judgment of Conviction impermissibly places a limit on the exclusive authority over the care of prisoner's that the legislature has vested in the DOC. Ortiz contends that the DOC is bound by the language of his J.O.C and may only withhold money for Restitution from his prison wages at a 25% rate.

The DOC is correct that the DOC has substantial authority over inmate trust accounts. It is also true that the DOC has the power to set the rates at which prison trust accounts are dispersed for statutority mandated surcharges or other prisoner obligations, including restitution. Based on the Review of the statutes and case law, however, that power is not exclusive.

When imposing a sentence or ordering probation for any crime, Circuit Courts are required to order full or partial Restitution to any victim of a crime considered at sentencing unless the court finds substantial reason not to do so and states the reason on the record. **Wis. Stat. §973.20(1r); State v. Evans, 2000 WI App 178, ¶ 13, 238 Wis. 2d 411, 617 N.W.2d 220.** The Court may require that Restitution "be paid immediately, within a specified period or in specified installments." **Wis.Stat. §973.20(10).** The sentencing court retains exclusive authority to impose Restitution. See **Bartus v. Wisconsin Dept. of Health social services, 176 Wis.2d 1063, 1077, 501 N.W. 2d 419 (1993).**

State v. Baker, 2001 WI App.100, 243 Wis. 2d 77, 626 N.W. 2d 862, is informative in this case. In Baker, the petitioner argued that the trial Court had no authority to order that Restitution be

withheld from his prison wages, **2001 WI App 100, ¶14.** Central to Baker's reasoning was **Wis.Stat. §303.01,** Which provides guidelines for the use and distribution of prison wages. **Id.¶17.** The statute enumerates the purposes for which the wages, providing: " The [DOC] shall distribute earnings of an inmate or resident... for the crime victim and witness assistance surcharge..., for the [DNA] analysis surcharge... and may distribute earnings for the support of the inmate's or resident's dependent's and for other obligations either acknowledged by the inmate or resident in writing or which have been reduced to Judgment that may be satisfied according to law."

Wis.Stat. §303.01(8)(b)(emphasis added). This Court noted that while **Wis.Stat. §973.20** contains several provision that bestow the trial courts with the authority to fashion restitution orders, it lacks a provision specifically allowing for distributions from prison wages for Restitution, **Baker, 2001 WI App 100 ¶¶ 15, 17.** Notwithstanding this lack of a specific provision for prison wages, this court concluded that a J.O.C including an order to pay Restitution is an " other obligation[]... Reduced to judgment that may be satisfied according to law" under **§303.01 (8)(b). Id. ¶ 17.** " Therefore, §303.01(8)(b) gives the trial court the authority to order Restitution be dispersed from prison wages." **Id.**

Thus, this Court in **Baker** found that despite a lack of express statutory language, the Circuit Court nevertheless had the authority to order Restitution be disbursed from prison wages to achieve the goals of the Restitution statute. **Id.¶ 15, 17.** Following the reasoning in **Baker,** this Court should find that the Circuit Court has the authority to set the collection rate for restitution. Simply, the restitution provision of chapter 973 do not perfectly spellout the manner in which Courts might craft Restitution orders. Absent a clear limitation by the legislature concerning sentencing courts authority on this topic, this Court should not assume there is such a limitation or that a J.O.C like Ortiz's is facially invalid.

Moreover, it stands to reason that Circuit Courts have the authority to specify the rate at which Restitution is collected given **Wis.Stat. §973.20(10)(a)**'s language permitting sentencing courts to order that Restitution be "paid Immediately, within a specified period or in specified installments. " If courts are authorized to specify restitution be

paid in specified installments, it would seem the court necessarily has the authority to specify the amount and timing of each installment. This Court should not be persuaded by any of the DOC's argument that a Court's setting the collection rate for restitution would be improper when a court may otherwise order Restitution be paid in specific installments.

Further, **§973.20(10)(a)** does not expressly direct sentencing courts to order restitution be paid in a specific manner when a defendant is sentenced to imprisonment rather than probation or extended supervision. The statute only states " If the defendant is placed on probation or sentenced to imprisonment, the end of a specified period shall not be later than the end of any period of probation, extended supervision or parole. Had the legislature intended to further limit the manner in which sentencing courts order restitution be paid, it could have done so. In this case, however, Ortiz is unaware of any statutory provision that prohibits sentencing courts from specifying the rate at which restitution is paid over a specific period of time.

B. THE DOC LACKS AUTHORITY TO MODIFY OR VOID VALID COURT ORDERS.

The DOC lacks the authority to modify or void court orders. See **Bartus, 176 Wis. 2d at 1082.** Even if Circuit Courts exceed their own authority in imposing a particular collection rate for restitution debt, the DOC does not have the authority to ignore a facially valid J.O.C. **State ex Rel. Lindell v. Litscher, 2005 WI App. 39, ¶ 20, 280 Wis. 2d 159, 694 N.W. 2d 396** ("[The DOC] could not independently determine the propriety of the Restitution Order, and they could not reverse the dictates of the original order absent receipt of a corrective order..."): See also **Pasadena City Bd. of Ed. v. Spangler, 427 U.S. 424, 439 (1976)** (" It is for the Court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."):;**Beese v. Liebe, 153 F. Supp. 2d 967, 969 (E.D. Wis 2001)**("[O]nce the district Court

entered an order under the PLRA, a warden must comply, even an invalid judicial order must be obeyed until it is stayed or set aside on appeal.") (emphasis in original).

Bartus, Beese, State ex Rel. Lindell stand for the principle that once a court order has been entered, even an invalid order, the decision is to be respected until corrected by orderly review. The DOC fails to show why the DOC has the authority to void Ortiz's J.O.C. in this case. It was not the DOC's duty to " Independently determine the propriety" of Ortiz's J.O.C. **State ex rel. Lindell, 2005 WI App 39, ¶ 20. If** the DOC believed the Circuit Court erroneously set the restitution collection rate for Ortiz at 25% from his prison wages, or that it exceeded its Jurisdiction in doing so, the DOC should have sought a corrective order. There is no record in regards to the DOC seeking a corrective order in Ortiz's J.O.C. Regarding the restitution order.

II. THE DOC'S COLLECTION IN EXCESS OF 25% of ALL INMATE FUNDS VIOLATES ORTIZ'S J.O.C.

The DOC cannot deny that Ortiz's amended J.O.C. expressly limits the amount the DOC can collect from his inmate account for Restitution, no matter how hard they try to twist the language around to validate them taking 50%. The amended J.O.C. in regards to Restitution specifically states; "Court ordered Restitution to be paid from 25% of prison wages." (See Amended J.O.C. order attached as Appendix 101-102). In the DOC's brief, the DOC states, "ON it's face, this language does not restrict the Department, which controls Ortiz's prison wages from deducting more than 25% of his wages. "While the sentencing court did not use the phrases" only from 25% of prison wages" or "from up to 25%", as the DOC argues in its brief, that does not mean it gives them the authority to deduct more. The DOC is drawing at straws trying to twist the meaning of the language "from 25% of prison wages." to validate that they can deduct 50% for restitution and be in violation of the J.O.C. order. (See also, Ortiz's sentencing transcript, page 84 attached as Appendix 103). It states "25% of his prison wages to go towards Restitution." I suppose the DOC can twist these words too, so its an advantage to them.

Not only does the J.O.C. place a cap on the amount that can be deducted, but it also limits the source of the funds that can be taken to "Prison Wages". The DOC deducted not only 50% of Ortiz's prison wages, but also 50% of gifted money that was sent to him from family and loved ones. There is no language in Ortiz's J.O.C. that allowed the DOC to take 50% of all gift money placed on Ortiz's account from family and friends.

The language contained in the Judgment of Conviction is unequivocal, yet the DOC ignored it in favor of its own policy--not a formal administrative rule--created after the legislature expanded the DOC's authority to collect funds to include Victim restitution in Act 355. Thus, the question becomes a matter of hierarchy: does an agency policy supersede an express Court Order?.

The DOC contends that it has unfettered authority to determine the amount it can take from inmate accounts under Wis.Stat. §301.32. In reality, that section is silent as to the amount the DOC can take. The only formally adopted DOC rule addressing the amount that can be taken is stated in Wis Admin. Code DOC §309.465, which expressly limits the amount the DOC can take to pay an unpaid Crime Victim and Witness Surcharge to 25%. Wis. Admin. Code DOC §309.465. That rule expressly refers to Wis.Stat. §973.045, which provides at subsection(4):

> (4) If an inmate in a State Prison or a person sentenced to a state prison has not paid the Crime victim and Witness assistance Surcharge under this section, the department shall assess and collect the amount owed from the inmate's wages or other money. Any amount collected shall be transmitted to the Secretary of administration.

Nothing in Wis.Stat. §301.32 or any other statute authorizes the DOC to announce and apply policies that violates the express term of the Judgment of Conviction. The DOC's contention that Wis.Stat. §301.32 authorizes it to ignore the clear law of the case has no basis in law. The DOC's action violates the hierarchy of law, and respect for the separation of power that form the bedrock of the basic function of our government and rule of law.

Moreover, the DOC contends that it can take 50% of the funds from Ortiz's account because it is "For the benefit of" Ortiz under Wis.Stat.§301.32(1) to pay down his unpaid restitution. Wis.Stat. §301.32(1) provides, in pertinent part: "that money,"delivered to an employer of any State Correctional Institution for the benefit of a prisoner...may be used...under the direction and with, the approval of the superintendant or warden and for...the benefit of the prisoner."

The DOC cites this Court's decision in **State ex.Rel. Markovic v. Litscher, 2018 WI.App 44, 383 Wis. 2d 576, 2019 WI 8, ¶ 37-38, 385 Wis. 2d 207, 923 N.W. 2d 162, and Review denied Sub Norm. Markovic v. Litscher, 2019 WI 8, ¶ 37-38, 385 Wis. 2d 208, 923 N.W. 2d 163,** to bolster there claim that resolves any doubt about the breadth of the Departments authority to deduct funds from an inmate trust account for restitution payment. Ortiz disagrees that the Markovic case bolster there claim.

First & foremost, as stated earlier in this brief, there is no language in Wis.Stat. §301.32 or any other statute that authorizes the DOC to announce and apply policies that violates the express terms of the Judgment of Conviction. Ortiz's Judgment of Conviction states "from 25% of prison wages." There is also no language in Wis.Stat. §301.32 or any other statute that authorizes the DOC to raise the restitution to 50% and totally ignore and violate the order Stated in the Judgment of Conviction..

Furthermore, the Markovic case that the DOC cites is distinguishable from Ortiz's case. Markovic did not raise the issue that the DOC was violating his J.O.C. order. Markovic argued that the DOC was not allowed to collect for unpaid Restitution because he already discharged from his Judgment of Conviction in his case.

Moreover, this Court acknowledge in the Markovic case that the provision "for...the benefit of the prisoner" is broad. This Court did not define the full scope of what might be for the benefit of a prisoner The DOC, however, took the "for...the benefit of the prisoner" language and went crazy with it.The DOC has taken 50% of funds from inmates' account, and then take 50% of what is in an inmate's account for each category set forth in Wis.Stat. §301.31(1). As a result, an account containing $100 can be reduced to $50, to $25, to $12.50, to $6.25 ad infinitum until the inmate has no funds whatsoever. How is that for

"benefit to the prisoner." Nothing in the statute or in the Markovic case they cite suggest that the Legislature intended such gross over reach by the DOC. In fact, the DOC's own rule mandates that at least 10% of the $100 be set aside in an inmate release fund:

> ...the Institution business office shall deduct 10% of all income earned by or received for the benefit of the inmate, except from work release and study release funds under ch.DOC 324, until $5,000 is accumulated, and shall deposit the funds in a Release account in the inmate's name.

Wis Admin. Code § DOC 309.466. The DOC's current practice is violating it's own established rule.

Lastly, Act 355 that went into effect on July 1,2016, made several changes to the statute governing restitution and the DOC's authority to withdraw money from prison trust account to pay prison debt. In regards to restitution, the Act added Subsection (11)(c) to Wis.Stat. §973.20, which provides:

> "If a defendant who is in a state prison or who is sentenced to a state prison is ordered to pay restitution, the court order shall require the defendant to authorize the department to collect, from the defendant's wages and from other money held in the defendant's prison account, an amount or a percentage the department determines is reasonable for payment to victims." (Wis.Stat. §973.20(11)(c).

The DOC contends that Act 355 was not applied to Ortiz when they started collecting 50% of all his funds for unpaid restitution. That is simply not true. In the Secretary's decision to affirm the Corrections Complaint Examiner's decision to dismiss, the Secretary quotes the 2nd page of Ortiz's Amended J.O.C., which quotes Wis.Stat. §973.20(11)(c) as the reason why the DOC had the legal Statutory authori

to collect restitution at a rate of 50%. (See Attached Decision from the secretary as Appendix 105).

While it is true that it quotes Wis.Stat. §973.20(11)(c) on the second page of Ortiz's J.O.C., it should have never been added to the amended J.O.C. In Ortiz's original J.O.C., order, it did not states how the restitution was to be paid. (See Original J.O.C. attached as Appedix 106-107). So, when the DOC started collecting 50% of Ortiz's prison wages and gift money, Ortiz filed a Motion to amend the Judgment of Conviction to state 25% percent of his prison wages to go towards restitution, which is consistent with what the Judge Ordered at sentencing. (See Appendix 103).

The Clerk of Circuit Court issued an amended J.O.C. that incorporated the language, "Restitution to be paid from 25% of prison wages" which is consistent with what the Judge stated at sentencing. The Clerk of Circuit Court, however, also incorporated the language of Wis.Stat. §973.20(11)(c), in the amended J.O.C. This should not have been incorporated for several reasons.

First & foremost, a Clerk of Circuit court may not change a written Judgment of Conviction when the change can be **Characterized** as a "Judicial decision" See **State v. Prihoda, 239 Wis. 2d 244, ¶22.** A Judicial decision includes even the correction of a clerical error. See **Id. ¶23.** Adding a mandate to a J.O.C. plainly constitute a Judicial decision. Accordingly, the Clerk of Circuit Court could not take such action independent of the Circuit Court. See **Id. ¶26.**

Secondly, the mandate at issue in the amended J.O.C. was not part of the sentencing court's pronouncement but was derived from Wis.Stat. §973.20(11)(c) This provision took affect on July 1,2016, long after the Circuit Court sentenced Ortiz in 2010. See **State v. White, Appeal No 2018AP154-CR.**

Lastly, and most important, there is no language in Act 355 which states such newly created amendment to Wis.Stat. §973.20 (§973.20(11)(c)) shall apply retroactively to include those sentenced before July 1,2016, nor could it because it would violate Due Process and implicate the Double Jeopardy Clause of both the United States and Wisconsin Constitution. Significant ex post facto concerns would also

arise if §973.20(11)(c) was applied to Ortiz.

As stated earlier in this brief, the DOC claims that Act 355 & the newly implemented §973.20(11)(c) was not applied to Ortiz, that is simply not true. Before the enactment of Act 355, the DOC was not collecting 50% of Ortiz's prison wages and gift money. As soon as Act 355 was enacted, the DOC started taking 50% of Ortiz's prison wages and gift money, which was in violation of Ortiz's J.O.C. order. How the DOC can say that Act 355 was not the reason as to why they started taking 50% of Ortiz's prison wages & gift money is insulting and appalling. There is no doubt that the DOC applied Act 355 and the newly implemented restitution statute, Wis.Stat. §973.20(11)(c) to validate that they could take 50% of Ortiz's prison wages and gift money for unpaid restitution that Ortiz was ordered by the sentencing court to pay. The DOC applied this expansive collection effort without regard to Ortiz's J.O.C. order, statutes, and case law that is in favor of Ortizs argument that the DOC has no legal statutory authority to deduct funds from Ortiz's account at a rate of 50%.

III. THE DOC ACTED IN CONTRAVENTION OF WISCONSIN'S ADMINISTRATIVE PROCEDURE ACT AND LACKS AUTHORITY TO ADOPT A POLICY THAT COLLECTS FUNDS AT A RATE OF 50%

The DOC spends much of its brief arguing that it has broad authority to adopt a policy that allows it to collect funds at a rate of 50%. However, the DOC's argument fails to address how and why the DOC is authorized to pronounce such a sweeping change through the use of a "Memo" that anounces a new "Policy". The DOC provides no basis, other than what it argues are broad statutory dictates that give it, according to it, unfettered ability and discretion to dispose and disburse of inmates funds as it wishes. The DOC makes no attempt to explain how it was able to make such a sweeping shift in its statutory interpretation through the use of a memo, instead of the formal process outlined in Wisconsin's Administrative Procedure Act.

It is not suprising that the DOC is attempting to gloss over that issue in its brief because the legislature has repeatedly tried to reign

in and provide oversight over administrative agency's actions because those actions are done by unelected state agency personnel who promulgate Rules, and, in this case, "Policies" that have the full force and effect of laws. As part of the legislature oversight effort, the Legislature, on May 23,2011, adopted 2011 Wisconsin Act 21, which adopted additional Restrictions and legislative and executive oversight over a State agency's ability to adopt new rules. The DOC's actions in this case should be invalidated because it did not follow the Wisconsin Administrative Procedure Act.

The DOC's new collection "Policy" is a rule as defined by the Wisconsin Administrative Procedure Act. Chapter 227 of the Wisconsin statutes provides strict guidelines for the adoption of a new rules by an administrative agency. The Act requires that the administrative agency follow certain steps when adopting a new rule, including preparing a statement of scope, then initial drafting, then external review, then final agency review, then legislative review, and finally publication. Wis.Stat.§§227.135, 227.19, 227.20 and 227.21. The Wisconsin Legislative council estimates that it takes an administrative agency between seven and a half to thirteen months for a new rule to be adopted. See Wisconsin legislative council, January 2017, (https://docs.legis.wisconsin.gov/misc/lc/misc/rule_making_process_flow chart.pdf). It is undisputed in this case that the DOC did not take any of these steps when announcing the new collection policy. In fact, the new "Policy" was announced by memo just days before it went into effect. (See Memo, dated June 21,2016 attached as Appendix 104).

The question then becomes whether the new DOC "Policy" is a rule as defined by the Wisconsin Administrative Code. Section 227.10(1), Stats., provides that "Each agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which is specifically adopts to govern its enforcement or administration of that statute." (emphasis added). Under Wis.Stat. §227.10(2m), "No agency may implement or enforce any standard, requirement, or threshold... unless that standard, requirement, or threshold is explicitly permitted by statute or by rule that has been promulgated in accordance with this Subchapter..."

The DOC's "Policy" fits the definition and dictates in Wis.Stat.

§227.10(1) that the agency should have promulgated its broad new "Policy as a rule under the Wisconsin Administrative Procedure Act. That conclusion is reasonable when considering the strong legislative intent expressed in Act 21 which reinforces the desire of the Legislature to oversee the administrative agency Rule-making process. Furthermore, in this case, it is reasonable that the input of all affected would be sought when announcing a "Policy", that has such deep consequences. A "Policy" which leaves many inmates with little to no money in their inmate trust account.

Support for the conclusion that the new DOC collections "Policy" is a rule under Wisconsin Administrative Procedure Act can be found in the DOC's own regulations. Under Wis. Admin. Code DOC §309.465, the DOC adopted a rule that requires the collection of the crime victim and witness surcharge at a rate of 25% of all income earned by or received for the benefit of the inmate until the surcharge is paid in full." The DOC has previously adopted rules pursuant to the Wisconsin Administrative Procedure Act and provides no legitimate basis for not followin the procedures in the Act for adopting the new collections rule at issue in this case. This fact further support that the DOC collection "memo" is inconsistent with the dictates of Chapter 227 of the Wisconsin Statutes.

Furthermore, while Act 355 allowed the DOC to adopt a rule in relation to the amount it could collect to pay restitution, the addition of Wis.Stat. §973.20(11)(c) does not provide a basis for the DOC to act in contravention of the Wisconsin Administrative Procedure Act. Section 973.20(11)(c), Stat., is also silent in relation to the DOC determining a reasonable percentage to pay any of the other surcharges. The DOC also changed the rate of collection for inmates who do not even owe restitution such administrative action is the definition of arbitrary. In the absence of direct authorization, the DOC cannot act outside the scope of the authority given to it by the Legislature; Particularly in an area where the Legislature has clearly defined that it has only given certain powers to determine the rate of collection as it relates to restitution.

There are also serious problems with the way in which the collections memo was released, which underscores the need for a formal rule-

making process. In the memo (See memo as Appendix 104), as justification for this drastic change, the DOC stated that Act 355 "Requires that Restitution is paid in full prior to paying a Victim Witness Surcharge (VWS), Deoxyribonucleic Acid (DNA), Child Pornagraphy Surcharge, or court cost." Nothing in Act 355 or the statutes sets forth such a change. If this rule required the DOC to go through the process outlined in the Wisconsin Administrative Procedure Act, then those corrections can be made and the true basis for the drastic change in "Policy" could be considered fully, along with the serious consequences for such a change.

Therefore, the collection "Policy" should be deemed void as not being consistent with the Requirements of the Wisconsin Administrative Procedure Act.

CONCLUSION.

If this Court addresses the merits of the issues in this case, then this Court should hold that the DOC acted in violation of Ortiz's Judgment of Conviction, and that the DOC's deduction of Ortiz's inmate trust account at a 50% rate does conflict with Ortiz's J.O.C. order and the law. This Court should also hold that the DOC violated the Wisconsin Administrative Procedure Act when it announced its drastic change in collection policy, thereby rendering such administrative action void.

Dated this 20 day of January, 2021

RESPECTFULLY SUBMITTED

BY: Victor Ortiz Jr

Victor Ortiz, Jr
Pro Se

Address:
Stanley Correctional Institution
100 Corrections drive.
Stanley, wi 54768

CERTIFICATION

I hereby certify that this brief conforms to the Rules contained in Wis.Stat. §809.19(8)(b) and (c) for a brief produced with a Proportional serif font. The lenght of this brief is 27 pages.

Dated this 20 day of January, 2021.

Victor Ortiz Jr
Pro Se

CERTIFICATE OF MAILING

I hereby certify that 5 copies of Petitioner-Respondents brief has been deposited in the United States mail, properly addressed and postage pre-paid for delivery to the Court of Appeals on 1.20.21. I further certify that a copy of Petitioner-Respondent's brief was deposit in the United States mail, properly addressed and postage pre-paid, for delivery to A.D.A. Steven C. Kllpatrick, Wisconsin Dept. of Justice, P.O.Box 7859, Madison, WI 53707-7857 on 1.20.21.