

11-1352

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

CIRCUIT COURT
OF OHIO COUNTY

CARLOS A. LEEPER-EL,
PETITIONER

JUN 21 10 4 05
DORIS L. MILLER

CIVIL ACTION NO.: 11-C-188

V.

JUDGE ARTHUR M. RECHT

ADRIAN HOKE, WARDEN
HUTTONSVILLE CORRECTIONAL CENTER,
RESPONDENT

ORDER DENYING PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

The above-captioned matter comes before this Court on a Petition for Writ of Habeas Corpus filed by Petitioner on June 21, 2011, in which he attacks the sentencing order of this Court in *State v. Leeper*, Case No. 05-F-98. Specifically, Petitioner contends his *Alford/Kennedy* plea to the charge of second-degree robbery was unlawfully induced by a promise that he would serve his sentence while serving an anticipated federal sentence for violation of supervised release from federal custody. *See Morris v. Mohn*, 267 S.E.2d 443 (W.Va. 1980) (noting that an unfulfillable promise of concurrency with a federal sentence is an unlawful plea inducement). This Court has reviewed the petition, the official record of the underlying criminal case, and pertinent legal authorities, and has concluded that the petition is without merit, misinterpreting the plain language of the plea agreement in an attempt to circumvent federal policy decisions outside the purview of this Court.

First, Petitioner's plea agreement makes absolutely no promises as to the ultimate determination of his sentence and specifically disclaimed any such promises. *See* Plea Agreement at 2 ("The parties further agree that there have been no representations or promises...as to what the final disposition of this matter will be and further that any recommendation to the Court by the State or counsel for the Defendant is non-binding upon the Court and the sentence imposed by the Court is in the sole and unfettered discretion of the Court."). Thus, unlike in *Morris*, in which the State and Court indicated affirmatively, prior to the Defendant's guilty plea, "The ten years *will* run concurrently with the federal sentence, which

you're already serving," neither the State nor the Court in Petitioner's case induced Defendant to plead guilty with *any* firm promise as to the outcome of his sentencing. Thus, since no promise was made, and therefore could be neither legally unfulfillable nor unfulfilled, the Petition should be dismissed.

Second, even if the State's mere recommendation were construed as a promise, the substance of that recommendation, as evidenced by the plain language of the plea agreement, was that, in the event federal parole officials *were* to bring revocation proceedings against him that resulted in a sentence, he could continue to serve his state sentence while in federal custody. *See* Plea Agreement at 2 (The State and the Defendant agree to recommend to the Court that **any sentence imposed by the Court run concurrent to any Federal sentence imposed by the United States District Court for violation for his supervised release.**) The plain import of this language is that concurrency was made contingent on the bringing of federal parole violation proceedings in the United States District Court. Were federal parole officials to bring violation proceedings, and were a federal sentence imposed, the sentencing order in Petitioner's would permit Petitioner to continue serving his state sentence while in federal custody.¹

Simply put, what Petitioner seeks is to circumvent the Parole Commission's general policy, absent exceptional circumstances, to wait until a parolee satisfies his state sentence before bringing parole revocation proceedings. Whatever the merits of that policy, it does not confront any aspect of the plea agreement in this case, which purported only to *recommend* that he be permitted to continue serving his state sentence *in the event that* federal parole violation charges were brought and resulted in a sentence. The relief sought by Petitioner—a reasonably speedy parole violation charges so that he might achieve his ultimate release at an earlier date—is a matter of federal policy. *Cf. Morris*, at 267 S.E.2d at 446-447 (noting the lack of a procedural due process right to reasonably speedy parole violation and federal regulations indicating the desirability of institutional delay to make sure sentences are run consecutively).

¹ This contingency is still entirely possible, and thus Petitioner may still effectuate the recommendation of the State as accepted by this Court. As the Supreme Court of Appeals noted in *Morris*, the Parole Commission may choose not to bring violation proceedings at all, to bring them immediately upon the parolee's violation, or "postpone the imposition of the remaining underlying sentence...until the parolee completes serving the term for the crime committed while he was on parole." *Morris*, 267 S.E.2d at 446-47.

That policy being neither brought before this court nor within its purview, the Petition should be DISMISSED.

Consequently, this Court does hereby ADJUDGE and ORDER as follows:

1. That Petitioner's Petition for Writ of Habeas Corpus be DISMISSED WITH PREJUDICE
2. That the Circuit Clerk provide copies of this Order to the following:
 - a. Carlos A. Leeper-El
Dorm G-Unit
Huttonsville Correctional Facility
P.O. Box 1
Huttonsville, West Virginia 26273
 - b. Steven L. Vogrin
Assistant Prosecuting Attorney
Ohio County Prosecuting Office
1500 Chapline Street
Wheeling, WV 26003
 - c. Adrian Hoke, Warden
Huttonsville Correctional Facility
P.O. Box 1
Huttonsville, West Virginia 26273

Entered this 8 day of September, 2011.


JUDGE ARTHUR M. RECHT

A copy to be...


Circuit Clerk