

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE EX REL. CARLOS LEEPER-EL

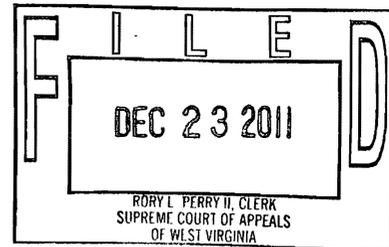
APPELLANT,

V.

CASE NO. 11-1352

**ADRIAN HOKE, Warden,
Huttonsville Correctional Center**

APPELLEE.



PETITION FOR APPEAL

Carlos Leeper-El
#42585 G Unit
Huttonsville Corr. Cnt.
P.O. Box 1
Huttonsville, W.Va. 26273

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE EX REL. CARLOS LEEPER-EL

APPELLANT,

V.

**CASE NO. 11-1352
(Habeas No. 11-C-188)**

**ADRIAN HOKE, Warden,
Huttonsville Correctional Center**

APPELLEE.

FROM THE CIRCUIT COURT OF OHIO COUNTY

PETITION FOR APPEAL

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES this day the above named Appellant, Carlos Leeper-El, pro se, [Hereinafter "Leeper-El"], who submits his petition praying for an appeal of the September 8th, 2011, Order entered by the Circuit Court of Ohio County which denied his pro se application for habeas corpus relief without a hearing or the appointment of counsel.

I.

PROCEDURAL HISTORY

1. On March 8th, 2005, Leeper-El was released on federal parole with 1729 days remaining on his federal conviction.
2. On August 26th, 2005 Leeper-El was arrested by the West Virginia Authorities for Ohio County and charged with the felony offense of first degree robbery.

3. On a former day and time Leeper-El entered into plea negotiations with the Ohio County Prosecutor's Office to a lesser included offense of said indictment, being second degree robbery under W.Va. Code 61-2-12.
4. In accordance with the aforementioned agreement of the parties, the prosecutor agreed, *inter alia*, 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 of his supervised release"(Plea, at 2).¹
5. Based upon the above understanding made of record Leeper-El entered a plea of guilty to the felony offense of second degree robbery.
6. Subsequently, the Court sentenced Leeper-El in accord with the plea bargain to a term of no less than five (5) nor more than eighteen (18) years to run concurrently with any sentenced imposed by the federal jurisdiction due to his federal parole violation.
7. In April of 2007 Leeper-El was transferred to the Huttonsville Correctional Center to begin serving his sentence. He then made numerous attempts to contact the federal authorities in an effort to have his federal probation resolved in order to have

¹ See copy of original plea bargain attached as Appendix-A.

his federal sentence run concurrently with his State conviction as set forth by his plea and sentencing order.

II.

STATEMENT OF FACTS

When negotiating the plea in this case, the Ohio County authorities convinced Leeper-El to accept the plea, to second degree robbery, by telling him that, more likely than not, whatever sentence imposed by the trial judge would run concurrently with his federal probation conviction.

In conformity with the terms of the plea, the trial judge sentenced Leeper-El concurrently with his federal parole violation offense.

The problem for the attorney, prosecutor and judge, in the present case, is that there is clearly established West Virginia precedent which existed at the time of Leeper-El's plea, that prohibited state authorities from entering into plea negotiations with any understanding that such plea would run concurrently to a federal parole violation. The case law directs State authorities not to enter such pleas without making prior arrangements with federal authorities before making such agreements with State prisoners.

In the case at hand, the Ohio County authorities ignored this clear precedent and made Leeper-El believe that he had a chance of concurrent sentencing if he just pleads guilty to robbery.

Because of the misleading nature of the plea entered by Leeper-El, he is now forced to discharge his State sentence before ever receiving any opportunity

to be relinquished into federal custody to deal with his parole violation proceedings there. This has denied him both Equal Protection and Due Process of law because his plea is un-fulfillable, and the same effectively works to give him double the sentence he would have otherwise had.

III.

SUMMARY OF ARGUMENT

When answering Leeper-El's State habeas petition, the Ohio County Circuit Court Judge, without appointing counsel for Leeper-El or requiring the State to respond to his contentions, attempted to place the issue here on whether the Ohio County Circuit Court had jurisdiction to control federal parole policy. Nevertheless, Leeper-El contends that federal parole policy is not an issue at all in this case.

The question here presented is whether the terms of the plea, whether regarded as a promise or recommendation, were fulfillable at the time plea negotiations took place. And if not, whether Leeper-El's due process and/or equal protection rights were violated when the Ohio County authorities entered into a plea with Leeper-El which was impossible to fulfill?

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Leeper-El state's that due to the complicated nature of the issues involved here, appointment of counsel and oral argument may be necessary to resolve this case. For these reasons, Leeper-El hereby reserves his right for argument

under either **Rule 19**, or **Rule 20** for full presentation to this court with the appointment of counsel.

V.

ARGUMENT AND DISCUSSION OF LAW

The first question which has to be answered in this case, i.e., is it relevant to the legal questions presented here, whether the ultimate plea deal is to be considered as a **promise** to the lower court or simply a **recommendation** to the lower court, in regards to final sentencing?

Leeper-El argues that it is inconsequential whether the prosecutor made a promise or recommendation as to sentencing. This is because under West Virginia Law (Rule 11, WVRCP)ⁱ, judges are prohibited from participation in plea negotiations, therefore any promise made by a State prosecutor, legally, can only be regarded as a recommendation to the judge. See, e.g., State v. Sugg, 193 W.Va. 288 (1995); United States v. Bradley, 455 F.3d 453 (2006) – [Prohibiting judicial participation in plea negotiations preserves the judge’s impartiality both during and after the plea negotiations]. In other words, cases referring to the prosecutor’s plea negotiation comments as promises, are meant to trivialize the word promise from its traditional sense, inasmuch as, Under Rule 11 proceedings, a prosecutor’s promise is regarded as nothing more than a recommendation to the court as to its final outcome. Also see, Rule 11(e) (1) (B); for these reasons, Leeper-El asks this court to focus its inquiry solely on

ⁱ Rule 11(d) WVRCP, requires that a judge explore a plea agreement once disclosed in open court, however, it does not license discussion of a hypothetical agreement that he may prefer.

whether the plea entered by the parties was unfulfilled or unfulfillable at the time plea negotiations were had and ultimately when the court announced its final judgment accepting the terms of that plea.

Leeper-El also believes that the lower court's interpretation of Morris, 267 at 445 (W.Va. 1980) is inaccurate.

In denying Leeper-El habeas relief, the lower court reasoned that "*The State 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'*" (Order, at 2). The lower court therefore reasoned that because of the wording of the sentence in the Morris case, that a judgment was made by the sentencing judge there, prior to Morris' ever pleading guilty, to run his sentence concurrently with his federal charges.

Leeper-El argues that a reading of Morris to mean that the judge **promised** Morris a concurrent sentence prior to him ever entering into his plea is an inaccurate reading of the Morris decision. This is because, as previously discussed, judges in West Virginia are prohibited from making promises to criminal defendants as to the ultimate outcome of a guilty plea. See, State v. Sugg, 193 W.Va. 288 (1995) For this reason, taking Morris to mean the judge there was authorized to make a promise to Morris prior to his entry of a guilty plea, is a misreading of Morris and must not be considered in this Court's analysis.

The second question which must be answered in this case is whether Leeper-El's plea was unfulfilled or unfulfillable at the time plea negotiations were entered and at the time the court announced its final judgment on the plea?

The lower courts comments as to federal parole policy is believed to be a non-issue and will not be commented upon any further in this application for relief, inasmuch as, the same would be a distraction to the real issues involved herein.

The West Virginia Supreme Court has found that a guilty plea is made **knowingly** and **voluntarily** only when a criminal defendant is fully aware of the direct, stark consequences of his guilty plea. See, State v. Duke, 200 W.Va. 356 (1997)

Additionally, courts have found were the terms of the plea are unfulfilled or unfulfillable at the time plea negotiations were had, through misrepresentations, false promises, or other inducements, this fact alone may require a reviewing court to reverse the conviction and sentence based thereon. See, Stidham v. Paysour, 225110 (4th Dist., 2011)

VI.

CONCLUSION

In the case at hand, Leeper-El was clearly misled when the Ohio County Prosecutor's office lead him to believe there was a possibility his State Court conviction would run concurrently with his federal parole violation sentence. This is because at the time the plea was entered, clearly established West

Virginia Supreme Court precedent, placed State Court officials on notice that the federal authorities forbade such concurrent sentences with federal parole violation offenses, unless and until arrangements were made prior to entering the plea with the federal government. See, Morris v. Mohn, 262 S.E. 2d 553 (W.Va. 1980)

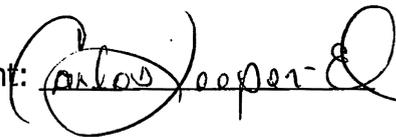
Because no such arrangements were made with the defendant and the federal authorities, prior to the entry of Leeper-El's plea, the Ohio County officials lacked jurisdiction to recommend a sentence which sought to run Leeper-El's State conviction concurrent with any time imposed on a possible federal parole violation offense. Thus, Leeper-El was clearly misled by the State officials who promised him concurrency upon sentencing.

Finally, because the plea in question was unfulfillable at the time plea negotiations were had, this fact alone requires this court to reverse the plea and sentence based thereon.

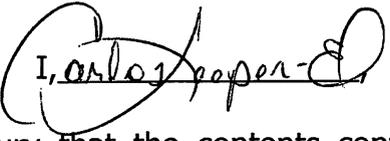
Wherefore, Leeper-El prays that relief will be granted as requested.

Dated this the 22nd, day of December 2011.

Signature of pro se Appellant:

A handwritten signature in black ink that reads "Carlos Leeper-El". The signature is written in a cursive style with a large, looped initial "C" and a distinct "E" at the end.

VERIFICATION

I,  by my signature, verify under the penalty of perjury that the contents contained in the foregoing document are true and correct, and to those items said to be upon information and belief, I believe them to be true.

CERTIFICATE OF SERVICE

I, Carlos Leeper-El, hereby certify that the foregoing PETITION FOR APPEAL, has been served by delivering a copy to the Clerk of the West Virginia Supreme Court, and by placing a copy in the institutional mail, this the 22nd, day of December 2011, addressed to the following parties:

Barbara H. Allen
Managing Deputy Attorney General
Office of the Attorney General
State Capitol, Room 26-E
Charleston, W.Va. 25305