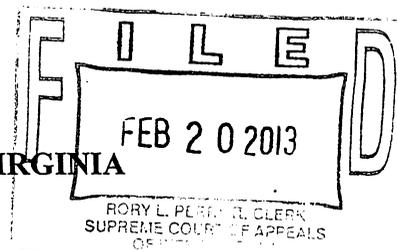


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1352



CARLOS A. LEEPER-EL,

*Petitioner Below,
Petitioner,*

v.

**ADRIAN HOKE, WARDEN,
HUTTONSVILLE CORRECTIONAL CENTER,**

*Respondent Below,
Respondent.*

**BRIEF IN RESPONSE TO THE PETITIONER'S
SUPPLEMENTAL BRIEF**

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

II. SUMMARY OF ARGUMENT 2

III. ORAL ARGUMENT 2

IV. ARGUMENT 3

 A. Standard of Review 3

 B. The petitioner’s appeal and the issues raised therein are moot under West Virginia law because the petitioner has been released from incarceration and paroled into the custody of federal authorities 3

 C. This Court should affirm the habeas court’s order denying the petitioner’s appeal. 6

V. CONCLUSION 8

TABLE OF AUTHORITIES

CASES	Page
<i>Hoover v. Blankenship</i> , 199 W. Va. 670, 487 S.E.2d 328 (1997)	4
<i>Jones v. Hoke</i> , No.11-0396 (W. Va. Supreme Court, September 4, 2012)	4
<i>Kemp v. State</i> , 203 W. Va. 1, 506 S.E.2d 38 (1997)	3
<i>McCoy v. Siefert</i> , No. 11-1636 (W. Va. Supreme Court, February 11, 2013)	3
<i>Mathena v. Haines</i> , 219 W. Va. 417, 633 S.E.2d 771 (2006)	3
<i>State ex rel. Goff v. Merrifield</i> , 191 W. Va. 473, 446 S.E.2d 695 (1994)	4
<i>State ex rel. Lilly v. Carter</i> , 63 W. Va. 684, 60 S.E. 873 (1908)	6
<i>State ex rel. McCabe v. Siefert</i> , 220 W. Va. 79, 640 S.E.2d 142 (2006)	3, 4, 5
<i>State ex rel. Morris v. Mohn</i> , 165 W. Va. 145, 267 S.E.2d 443 (1980)	7
<i>State v. Eddie "Tosh" K.</i> , 194 W. Va. 354, 460 S.E.2d 489 (1995)	4
<i>State v. James</i> , 227 W. Va. 407, 710 S.E.2d 98 (2011)	5-6
STATUTES	
W. Va. Code § 53-4A-1(a) [1967]	3

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Comes now the respondent, Adrian Hoke, Warden, by counsel, Marland L. Turner, Assistant Attorney General, pursuant to the Court's December 7, 2012, scheduling order, and files the within Brief in Response to the Petitioner's Supplemental Brief.

I.

STATEMENT OF THE CASE

The petitioner, in his supplemental brief, presents the Court with an accurate recitation of the procedural history in this case. In addition, the State notes that the petitioner was released on parole into the custody of federal officials on October 2, 2012. (Supp. App. 1-4.) After the petitioner submitted his supplemental brief, the Supreme Court, on its own motion directed, that counsel for both parties file a supplemental brief on or before March 15, 2013 addressing: (a) whether, under W. Va. Code § 53-4A-1. *et seq.* or under the common law, relief in habeas corpus is available to

persons who are no longer incarcerated; and (b) whether a petition for post-conviction habeas corpus relief is rendered moot if the defendant is paroled at any point after the petition has been filed.¹

II.

SUMMARY OF ARGUMENT

Prior rulings by this Court and the plain language of West Virginia Code § 53-4A-1. *et seq.* demonstrate that a petition for post conviction habeas corpus relief is rendered moot when the defendant is released on parole because such a defendant is no longer incarcerated. However, the facts of this case do not require the Court to affirmatively decide this issue at this time. The habeas petition in the case *sub judice* is moot not because the petitioner has been paroled, but rather, because the petitioner is not currently being detained or restricted by any action of the State of West Virginia while he is in the custody of federal officials. Should this Court determine that the issues presented in the habeas petition remain proper for appellate review, the State asserts the prosecuting attorney only agreed that he would recommend that the state court sentence would run concurrent to any federal sentence imposed for violation of his supervised release.

III.

ORAL ARGUMENT

This matter has been set for oral argument pursuant Rule 19 of the West Virginia Revised Rules of Appellate Procedure by this Court via a December 7, 2012, scheduling order. Should this Honorable Court determine this matter remain appropriate for oral argument, the State wishes to participate in such argument.

¹The respondent will file a supplemental brief pursuant the Court's February 7, 2013 order at a later date.

IV.

ARGUMENT

A. Standard of Review

The standard of review applicable to habeas appeals was stated recently in *Mathena v. Haines*:

In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.

Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

B. **The petitioner's appeal and the issues raised therein are moot under West Virginia law because the petitioner has been released from incarceration and paroled into the custody of federal authorities.**

Pursuant to the plain language of West Virginia Code § 53-4A-1 *et. seq.*, post-conviction habeas corpus relief in State court is only available to prisoners who are incarcerated. W. Va. Code § 53-4A-1(a) [1967] (“any person convicted of a crime and incarcerated” may petition the circuit court or this Court for habeas corpus relief); *See State ex rel. McCabe v. Siefert*, 220 W. Va. 79, 85, 640 S.E.2d 142, 148 (2006)(per curiam) (finding a habeas petition moot because of, in part, “[the petitioner’s] release from incarceration”); *also see Kemp v. State*, 203 W. Va. 1, 506 S.E.2d 38 (1997)(per curiam) (stating “[w]e find that because the appellant has already been released, his request for a writ of habeas corpus is moot”); *also see McCoy v. Siefert*, No. 11-1636 (W. Va. Supreme Court, February 11, 2013)(memorandum decision) (stating “[a]s there is no dispute that petitioner is not incarcerated, this Court finds that the circuit court order granting the State’s motion for summary judgment is proper.”)

An incarcerated person may file a petition for habeas corpus and that same person may prosecute a petition, but only so long as that person remains incarcerated, that is “. . . shut up in prison, . . . in confinement; . . . imprison[ed].” *Hoover v. Blankenship*, 199 W. Va. 670, 673, n.2, 487 S.E.2d 328, 331 n.2 (1997) (citation omitted); *see also State ex rel. Goff v. Merrifield*, 191 W. Va. 473, 477, 446 S.E.2d 695, 699 (1994) (citation omitted) (emphasis deleted) (“Incarceration is defined as ‘confinement in a jail or [in a] penitentiary’”); *see also, State v. Eddie “Tosh” K.*, 194 W. Va. 354, 363 n.10, 460 S.E.2d 489, 499 n.10 (1995) (per curiam) (noting that the petitioner who is not currently incarcerated is unable to petition for habeas corpus relief.)

This Court has strongly suggested that “incarcerated” for purposes of habeas corpus relief under W. Va. Code § 53-4A-1 *et. seq.* does not include defendants who have been released on parole. *Jones v. Hoke*, No.11-0396 (W. Va. Supreme Court, September 4, 2012) (memorandum opinion). In *Jones*, the circuit court dismissed the petitioner’s habeas petition as moot after the petitioner was released on parole. *Id.* On appeal, Jones argued that the circuit court erred because the Supreme Court had yet to authoritatively decide whether a habeas petition is rendered moot because of an inmate’s release on parole. *Id.*; *see State ex rel. McCabe v. Siefert*, 220 W. Va. 79, 85, 640 S.E.2d 142, 148 (2006) (declining the State’s invitation to decide the issue). Nevertheless, this Court specifically held that the circuit court did not err in dismissing the habeas petition as moot upon the petitioner’s release on parole. *Id.*

In light of this Court’s decision in *Jones v. Hoke*, along with the case law discussed above, and the plain language of the habeas statute, the State invites this Court to dismiss the petitioner’s habeas petition and hold that persons released on parole have no remedy under W. Va. Code § 53-4A-1 *et. seq.*

Even assuming, *arguendo*, that habeas corpus relief is available to persons on parole, a decision in the petitioner's favor would avail him nothing because he has been paroled to federal custody and has not challenged the terms of his parole agreement. *See State ex rel. McCabe v. Siefert*, 220 W. Va. 79, 85, 640 S.E.2d 142, 148 (2006). In finding the petitioner's habeas petition moot, in part, because the petitioner had been paroled and had not raised any issues concerning the terms of his parole agreement, the *McCabe* court noted the following:

Here, as in *Kemp*, the aspects of confinement or "incarceration" due solely to parole are not before this Court. McCabe has not sought to amend his petition for appeal to challenge the terms set forth in his parole agreement or the nature of his supervision. Rather, he raises the uncertainty as to the termination date of his parole brought about by the discrepancy between the December 11, 2000, sentencing order and the plea agreement. Thus, as in *Kemp*, McCabe's focus in this habeas proceeding is upon matters occurring prior to his release from incarceration.

Id.

Here, as in *McCabe*, "the aspects of confinement or 'incarceration' due solely to parole" are not before this Court. *Id.* at 85, 640 S.E.2d at 148. The petitioner has not raised any issues with his parole agreement or the nature of his supervision. Indeed, while the petitioner is held in federal confinement, the terms of the petitioner's parole agreement are practically innocuous.² (Supp. App. at Pg. 4) (Pursuant to the Parole Reporting Instructions, the petitioner will continue on parole status from West Virginia, but he will not be required to submit monthly parole reports.) Any collateral consequences alleged as a result of the petitioner's parole status would clearly be hypothetical at this time.³ *See State v. James*, 227 W. Va. 407, 421, 710 S.E.2d 98, 112 (2011). Inasmuch, the

²On its face, the rules and regulations of the parole agreement are inapplicable to an incarcerate in a foreign jurisdiction.

³In *James*, the Court noted the following:

(continued...)

petitioner's freedom is not currently restricted by the State, his habeas petition is rendered moot. *See* Syl. Pt. 1, *State ex rel. Lilly v. Carter*, 63 W. Va. 684, 60 S.E. 873 (1908), "Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court."

Therefore, even if this Court declines to expressly decide the applicability of the habeas statute to individuals on parole, this Court should, nevertheless, dismiss the petitioners's habeas petition as moot for the reasons stated above.

C. This Court should affirm the habeas court's order denying the petitioner's appeal.

If this Court determines that the issues presented in the petitioner's habeas petition remain proper for appellate review, the State respectfully asks this Court to affirm the lower court's order. The State concedes that the Court's determination of this issue would be aided by the transcripts of the sentencing hearing and plea hearing. Without the transcripts, the State reasserts the arguments presented set forth in the Summary Response to Petition for Appeal.

The trial court judge correctly and plainly explained in his order that the only representation made by the State was that it would recommend, "in the event federal parole officials *were* to bring

³(...continued)

As we observed in *Harshbarger v. Gainer*, 184 W. Va. 656, 659, 403 S.E.2d 399, 402 (1991), "state and federal . . . [courts] have continuously maintained that they will not give 'advisory opinions.'" Relying on the U.S. Supreme Court decision in *Fleming v. Rhodes*, 331 U.S. 100, 67 S.Ct. 1140, 91 L.Ed. 1368 (1947), we went on to note in *Harshbarger* that litigants may only challenge the constitutionality of a statute insofar as it affects them. *Id. Accord State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W. Va. 525, 533 n. 13, 514 S.E.2d 176, 184 n. 13 (1999) (recognizing that "this Court cannot issue an advisory opinion with respect to a hypothetical controversy").

State v. James, 227 W. Va. 407, 421, 710 S.E.2d 98, 112 (2011)

revocation proceedings against him that resulted in a sentence, he could continue to serve his state sentence while in federal custody.” (App. at 18, citing Plea Agreement at 2.) Such a scenario is not a legal impossibility as the petitioner suggests, but is dependent on the institution of federal parole violation proceedings. This is quite different, as the trial court explained, from the situation presented in *State ex rel. Morris v. Mohn*, 165 W. Va. 145, 267 S.E.2d 443 (1980), where the prosecutor and the court represented to the defendant that his state and federal sentences *would* run concurrently, though federal revocation proceedings were not immediate. The *Morris* court wrote that “[t]here can be little doubt that a guilty plea entered pursuant to a plea bargain which promises a concurrent sentence must be set aside where the promise of concurrency not fulfilled.” *Id.* at 152, 267 S.E.2d at 448 (1980). *Morris* does not represent that a state sentence could never run concurrently to a federal parole violation sentence, but instead explains that a federal parole revocation may not occur until after the state sentence is served. *Id.* at 150, 267 S.E.2d at 446 (1980).

The petitioner herein was not promised a concurrent sentence, but was promised the recommendation of a concurrent sentence. While the commitment order might provide some evidence of the terms of the agreement, the language of the plea agreement itself is most instructive in this case. The plea agreement, not the commitment order, is the written manifestation of the accord reached between the State, defense counsel, and the petitioner. The trial court, not the State or defense counsel, has absolute dominion over final sentencing; therefore, the commitment order should only be construed as some evidence of the parties’ intentions.⁴

⁴If this Court finds error with the petitioner’s sentence as it is presented in the commitment order, then such issue can be easily resolved on remand to circuit court.

Again, the sentencing transcripts would be helpful, but without those, one must assume that the State's intentions were clearly conveyed in the plea agreement. That is, the State agreed that it would recommend that the State court sentence would "run concurrent to any [f]ederal sentence imposed . . . for violation of his supervised release." (App. at 3.) The State agreed to make a recommendation, and nothing more. The petitioner entered his plea intelligently and voluntarily.

V.

CONCLUSION

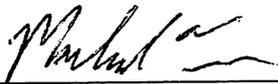
Therefore, based upon the foregoing arguments of law, and recitations of fact, the State of West Virginia, by counsel, respectfully requests that this petition for appeal be denied.

Respectfully submitted,

STATE OF WEST VIRGINIA
Respondent Below, Respondent,

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CERTIFICATE OF SERVICE

I, MARLAND L. TURNER, Assistant Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the *BRIEF IN RESPONSE TO THE PETITIONER'S SUPPLEMENTAL BRIEF* upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 20 day of February, 2013, addressed as follows:

To: Christopher J. Prezioso, Esq.
Luttrell & Prezioso, PLLC
116 West Washington Street, Suite 2E
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MARLAND L. TURNER