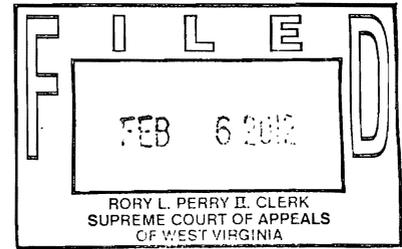


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1352



CARLOS A. LEEPER-EL,

*Petitioner Below,
Petitioner,*

v.

ADRIAN HOKE, WARDEN,
HUTTONSVILLE CORRECTIONAL CENTER,

*Respondent Below,
Respondent.*

SUMMARY RESPONSE TO PETITION FOR APPEAL

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SUMMARY RESPONSE TO PETITION FOR APPEAL

Comes now the respondent, the State of West Virginia, by Michele Duncan Bishop, Deputy Attorney General, pursuant to the West Virginia Revised Rule of Appellate Procedure 10(e) and according to an order of this Honorable Court dated October 3, 2011, and responds to the petition for appeal as follows.

I.

STATEMENT OF THE CASE

The petitioner has filed a petition for appeal from the order of the Circuit Court of Ohio County (Recht, J.) entered September 8, 2011, denying the petition for a writ of habeas corpus. The petitioner avers that he was wrongfully induced to enter a plea of guilty to second-degree robbery, with the understanding that “more likely than not, whatever sentence imposed by the trial judge would run concurrently with his federal parole violation offense.” (Pet. for Appeal at 3.) The

petitioner did not prepare an appendix or attach any supporting materials to his brief. The respondent filed, on November 2, 2011, a motion to proceed on an itemized designated record, but that motion has not been ruled upon by the Court.

The respondent has filed, this day, a motion for leave to file a supplemental appendix, consisting only of the plea agreement entered into by the petitioner and the State prior to the petitioner's offer of his guilty plea. Should that motion be granted¹, the respondent directs the Court's attention to the following relevant portions appearing in the agreement, which agreement was signed by the petitioner:

5. The Defendant, CARLOS A. LEEPER aka, CARLOS A. LEEPEREL, aka CARLOS A. LEEPER-EL, will be permitted to argue his respective position as to sentencing.
6. The Defendant, CARLOS A. LEEPER aka, CARLOS A. LEEPEREL, aka CARLOS A. LEEPER-EL, is aware that the sentence to be imposed upon the Defendant is in the sole and unfettered discretion of the Court.
7. 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.
8. The parties further agree that there have been no representations or promises by the State of West Virginia, its agents or employees or by any law enforcement agency, or by counsel for the State 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.

¹In the event the respondent's motion is not granted, the respondent respectfully requests that the Court strike from this response the material quoted and decide this matter on the existing record. Relevant portions of the plea agreement are quoted in the trial court's order denying the petition, and the petitioner has not disputed the accuracy of those quotations.

9. Entering into this plea agreement the Defendant, CARLOS A. LEEPR aka, CARLOS A. LEEPEREL, aka CARLOS A. LEEPER-EL, agrees that he is waiving the right to challenge the validity of this plea agreement by direct appeal in state or federal court or otherwise challenge the validity of the plea agreement in any legal proceeding of any nature in any court.

(Supp. App. at 2-3.)

II.

ARGUMENT

The trial court judge adequately resolved below the question that the petitioner has presented herein. The key finding was:

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.")

(September 8, 2011, Order at 1.) The trial court found – and the petitioner has presented no evidence to the contrary – that the State made no promise regarding the petitioner's serving of his sentence. Inasmuch as no promise was made to the petitioner, he was not wrongfully or illegally induced into accepting the plea agreement offered to him by the State.

The petitioner argues that the remainder of the lower court's order addresses a "non-issue" that "would be a distraction to the real issues involved herein." But the second portion of that court's order is relevant because the petitioner argues that the "promise" made by the State was somehow "unfulfillable" because the State did not first discuss an arrangement with federal authorities. (Pet. for Appeal at 3.) The trial court judge 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

revocation proceedings against him that resulted in a sentence, he could continue to serve his state sentence while in federal custody.” (September 8, 2011, Order at 2, emphasis in original, 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. at 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 concurrent is 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.

The petitioner has cited no language in the plea agreement that would suggest the State agreed to do anything other than make a recommendation to the state court in the event federal parole violation proceedings were instituted and resulted in a federal sentence. There is no evidence that the State made any representation to the petitioner that it would make any overtures to make such proceedings come about. The petitioner himself does not even argue that the State promised a concurrent sentence. At most, in his words, he was told that he “more likely than not” could serve his state sentence together with a federal sentence (Pet. for Appeal at 3a), but even this assertion is unsupported. 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.” (Plea Agreement at 2.) The State agreed to make a recommendation, and nothing more. The petitioner entered his plea intelligently and voluntarily.

III.

CONCLUSION

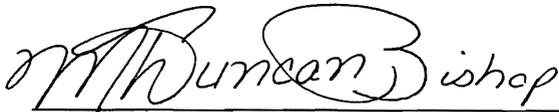
Based on the foregoing, this Court should affirm the order of the Circuit Court of Ohio County.

Respectfully submitted,

State of West Virginia,
Respondent Below, Respondent,

By counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



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Counsel for Respondent

CERTIFICATE OF SERVICE

I, MICHELE DUNCAN BISHOP, Deputy Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *Summary Response to Petition for Appeal* upon Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 6th day of February 2012, addressed as follows:

To: Carlos A. Leeper-El
Dorm G-Unit
Huttonsville Correctional Facility
Post Office Box 1
Huttonsville, West Virginia 26273

Stephen L. Vogrin, Esq.
Assistant Prosecuting Attorney
Ohio County Prosecuting Attorney's Office
1500 Chapline Street
Wheeling, West Virginia 26003

A handwritten signature in cursive script that reads "Michele Duncan Bishop". The signature is written in black ink and is positioned above a horizontal line.

MICHELE DUNCAN BISHOP