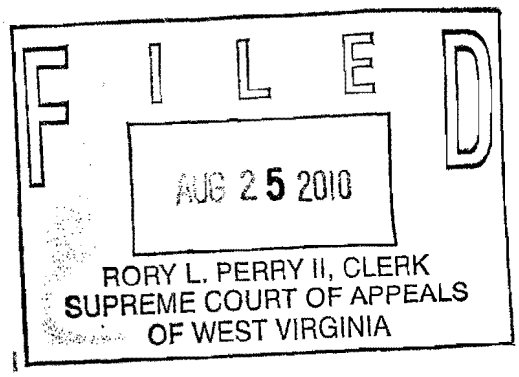
NO. 35557

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

CHARLES J. JAMES,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

ROBERT D. GOLDBERG
ASSISTANT ATTORNEY GENERAL
State Bar ID No. 7370
State Capitol, Room E-26
Charleston, West Virginia 25305
304-558-2021

Counsel for Appellee

TABLE OF CONTENTS

Page

I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW 1

II. STATEMENT OF THE FACTS 3

III. INTRODUCTION 4

IV. ARGUMENT 7

A. WEST VIRGINIA CODE § 62-12-26 DOES NOT VIOLATE EITHER THE STATE OR FEDERAL DOUBLE JEOPARDY CLAUSES 7

1. The Standard of Review 7

2. Since Appellant's Sentence Includes Thirty Years of Post-Incarceration Supervised Release, It Does Not Violate Double Jeopardy 7

3. The Court Need Not Credit "Street Time" Without Running Afoul of the State Double Jeopardy Clause 11

B. THE APPELLANT NEVER RAISED A FACIAL CRUEL AND UNUSUAL CONTEMPLATING ALL OF WEST VIRGINIA CODE § 62-12-26 BELOW 14

1. Standard of Review 14

2. The Appellant Failed to Preserve This Issue for Review 14

3. Because Supervised Release Entails No Actual Time of Incarceration It Does Not Impose A Constitutionally Disproportionate Sentence 16

C. BECAUSE THE STATUTORY MAXIMUM SENTENCE INCLUDES A PERIOD OF SUPERVISED RELEASE *APPRENDI* DOES NOT APPLY TO APPELLANT'S SENTENCE 20

1. Standard of Review 20

2. West Virginia Code § 62-12-26 Does Not Violate *Apprendi* 20

3. West Virginia Code § 62-12-26 Is Not Unconstitutionally Vague 22

D. APPELLANT'S SENTENCE IS CONSTITUTIONALLY PROPORTIONAL 24

1. Standard of Review 24

2. Appellant's Sentence Is Not Constitutionally Disproportionate 25

V. CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES:

Apprendi v. New Jersey, 530 U.S. 466 (2000) 20

Blakely v. Washington, 542 U.S. 296 (2004) 20-21

Chrystal R.M. v. Charlie A.I., 194 W. Va. 138, 459 S.E.2d 415 (1995) 14, 20

Conner v. Griffith, 160 W. Va. 680, 238 S.E.2d 529 (1977) 12, 13

Dickerson v. Napolitano, 604 F.3d 732 (2d. Cir. 2002) 4

Ewing v. California, 538 U.S. 11 (2003) 16, 17

Grayned v. City of Rockford, 408 U.S. 104 (1972) 22

Haislop v. Edgell, 215 W. Va. 88, 593 S.E.2d 839 (2003) 8

Jett v. Leverette, 162 W. Va. 140, 247 S.E.2d 469 (1978) 12

Johnson v. United States, 529 U.S. 694 (2000) 9, 12

Kennedy v. Frazier, 178 W. Va. 10, 357 S.E.2d 43 (1987) 2, 19

Lockyer v. Andrade, 583 U.S. 63 (2003) 17

Loeb v. Trustees of Columbia Township, 179 U.S. 472 (1900) 14

Missouri v. Hunter, 459 U.S. 359 (1983) 9

Monge v. California, 524 U.S. 721 (1998), citing
North Carolina v. Pearce, 395 U.S. 711 (1969) 7

Ohio v. Johnson, 467 U.S. 493 (1984) 8, 9

People v. Szwalla, 61 A.D. 3d 1289, 877 N.Y.S.2d 757 (N.Y.A.D. 2009) 8

Solem v. Helm, 463 U.S. 277 (1983) 17

State ex. rel. Cooper v. Caperton, 196 W. Va. 208, 470 S.E.2d 162 (1996) 15

State ex. rel. Taylor v. Janes, 225 W. Va. 329, 693 S.E.2d 82 (2010) 8

State v. Booth, 224 W. Va. 307, 685 S.E.2d 701 (2009) 25

State v. Buck (II), 173 W. Va. 243, 314 S.E.2d 406 (1984) 26

State v. Cooper, 172 W. Va. 266, 304 S.E.2d 851 (1983) 18, 24, 26

State v. Goodnight, 169 W. Va. 366, 287 S.E.2d 504 (1982) 17

State v. Haagenson, 232 P.3d 367, 372 (Mt. 2010) 9

State v. Heston, 137 W. Va. 375, 71 S.E.2d 481 (1952) 14

State v. Jarvis, 199 W. Va. 635, 487 S.E.2d 293 (1997) 9

State v. Lowery, 765 So. 2d 460 (La. App. 2d. Cir. 2000) 25

State v. Lucas, 201 W. Va. 271, 496 S.E.2d 221 (1997) 24

State v. Redman, 213 W. Va.175, 578 S.E.2d 369 (2003) (*per curiam*) 24, 25

State v. Richardson, 214 W. Va. 410, 589 S.E.2d 552 (2003) 26

State v. Sears, 196 W. Va. 71, 468 S.E.2d 324 (1996) 7

State v. Slater, 222 W. Va. 499, 665 S.E.2d 674 (2008) 21

United States v. Delacruz-Soto, 414 F.3d 1158 (10th Cir. 2005) 17

United States v. DiFrancesco, 449 U.S. 117 (1980) 12

United States v. Huerta-Pimental, 445 F.3d 1220 (9th Cir. 2006) 10, 21

United States v. Johnson, 529 U.S. 53 (2000) 18

United States v. Liero, 298 F.3d 1175 (9th Cir. 2002) 22

United States v. Montenegro-Rojo, 908 F.2d 425 (9th Cir. 1990) 13

United States v. Pettus, 303 F.3d 480 (2d. Cir. 2002) 12

United States v. Soto-Olivas, 44 F.3d 788 (9th Cir. 1995) 10, 12, 21

Wanstreet v. Bordenkirker, 166 W. Va. 523, 276 S.E.2d 205 (1981) 26

Willis v. O'Brien, 151 W. Va. 628, 153 S.E.2d 178 (1967) 5

Zwicker v, Koota, 389 U.S. 241 (1967) 22

CONSTITUTIONAL PROVISIONS:

U. S. Const. VIII amend. 14, 15

W. Va. Const. art. III, § 5 . . . . . 15, 17

STATUTES:

18 U.S.C. § 2252(B)(b) (PROTECT Act) 18

18 U.S.C. § 3583 . . . . . 9, 12

18 U.S.C. § 3583(a) . . . . . *passim*

18 U.S.C. § 3583(e)(3) 11

18 U.S.C. §§ 3583(f), (h), (i) 6

18 U.S.C. § 3583(k) 18

W. Va. Code § 15-12-1 . . . . . 8, 17

W. Va. Code §§ 15-2-1 to 10 (Sex Offender Registration Act) 8

W. Va. Code § 15-12-2(b)(5) 19

W. Va. Code § 61-8-12 5

W. Va. Code § 61-8B, 8C, 8D 5

W. Va. Code § 61-8B-7 22

W. Va. Code § 61-8B-7(a)(1) 2

W. Va. Code § 61-8D-5 19

W. Va. Code § 61-12-27 22

W. Va. Code § 62-12-9 . . . . . 16, 23

W. Va. Code § 62-12-9(5)(b) 23

W. Va. Code § 62-12-26 . . . . . *passim*

W. Va. Code § 62-12-26(a) . . . . . *passim*

W. Va. Code § 62-12-26(b) & (e) 23

W. Va. Code § 62-12-26(b)(1) & (2) 16

W. Va. Code § 62-12-26(b)(1) & (2)(i), (ii), (iii) 7

W. Va. Code § 62-12-26(c) . . . . . *passim*

W. Va. Code § 62-12-26(e) 10, 23

W. Va. Code § 62-12-26(g)(1) 20

W. Va. Code § 62-12-26(g)(3) 11, 14

W. Va. Code § 62-12-26(h), (i), (j) 6

OTHER:

H.R. Rep. No. 108-66 (2003), *reprinted in* 2003 U.S.C.C.A.N. 683 18

S. Rep. No. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3306
(Sentencing Reform Act of 1984) 6

W. Va. R. Crim. P. 11(a)(2) 2

NO. 35557

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

CHARLES J. JAMES,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

The Appellant, Charles J. James (hereinafter the Appellant), is asking this Court to find the supervised release statute, West Virginia Code § 62-12-26, unconstitutional pursuant to both the Federal and State Constitutions. The Appellant claims that West Virginia Code § 62-12-26, on its face, violates both federal and state constitutional prohibitions against double jeopardy, is cruel and unusual punishment, and violates Appellant's right to due process. Appellant also claims that the trial court imposed an unduly harsh, and disproportionate period of supervision.

The Appellant, after waiving his right to prosecution by indictment, pled guilty by information to one count of First Degree Sexual Abuse pursuant to West Virginia Code

§ 61-8B-7(a)(1)[1] and West Virginia Code § 61-8B-1(1)(c).[2] (R. at 1, 37, 38.) The trial court agreed to accept a *Kennedy* plea. *See Kennedy v. Frazier,* 178 W. Va. 10, 357 S.E.2d 43 (1987).[3] Both the trial court and the State also accepted a conditional guilty plea. The plea agreement states, in relevant part, "[t]he parties specifically agree that the Defendant CHARLES JAMES, reserves his right to challenge sentencing in this matter relative to West Virginia Code 62-12-26." (R. at 3.) *See* W. Va. R. Crim. P. 11(a)(2) (with the approval of the court and counsel for the State reserve the right, on appeal from judgment, to review of the adverse determination of any specified pretrial motion).

By order entered September 9, 2009, the circuit court, (Recht, J.), found Appellant's guilty plea knowing, intelligent, and voluntary, and sentenced him to one to five years followed by thirty years of supervised release pursuant to West Virginia Code § 62-12-26(a).

The Appellant appeals this order.

---

[1]"A person is guilty of sexual abuse in the first degree when: (1) Such person subjects another person to sexual contact without their consent, and the lack of consent results from forcible compulsion . . . ."

[2]"Forcible compulsion" means: . . . (c) [f]ear by a person under sixteen years of age caused by intimidation, expressed or implied, by another person who is a least four years older than the victim."

[3]A *Kennedy* plea permits a person charged with a crime to enter a guilty plea without admitting his participation in the offense. *See* Syl. Pt. 1, *Kennedy v. Frazier*, *supra*.

II.

STATEMENT OF THE FACTS

On January 11, 2009, the Appellant, then twenty-five, sexually assaulted his girlfriend's thirteen-year-old sister.[4] (R. at 27-29, 31-32.) The victim, R.D. lived with her mother. R.D. told the investigating officers that she had argued with her mother earlier that day, and had left home to visit her sister. The Appellant was her sister's boyfriend.

While R.D. was at her sister's home, the Appellant told her that, "she was not going to bed sober." (R. at 27.) He proceeded to furnish R.D. with alcohol, and then asked her to go upstairs to have a cigarette. (R. at 27.) When they reached the upstairs bathroom, the Appellant asked R.D. if she would show him her "titties." (R. at 28.) R.D. ignored the Appellant's request, but he continued to ask her. (*Id.*) He then placed his hand up her shirt, fondled her breasts, and massaged her nipples. (R. at 28, 31.)

At about 2:30 p.m. R.D. ran back to her mother's house crying and screaming and jumped in her lap. (R. at 27.) Her mother noticed that R.D. smelled of alcohol. (*Id.*) R.D.'s mother called the police. When they arrived they asked R.D. to recount what had happened to her. At some point the phone rang: it was the Appellant. The officer's told the Appellant that they were going to R.D.'s sister's apartment to interview him. (R. at 28.)

---

[4]In his brief to this Court counsel for the Appellant makes no effort to describe the repugnance of his client's behavior, and his ongoing threat to the community. The thirteen-year-old victim is referred to as a "female juvenile," who made false allegations against the Appellant.

Indeed, a glancing description of his client's misconduct comprises three sentences out of Appellant's thirty-eight page brief.

When they arrived they found that apartment empty except for a small child in a crib. One of the officer's noticed that the back door was partially opened; when he fully opened the door, they found footprints in the snow leading away from the house. (R. at 28.) When R.D.'s sister returned to her apartment, the phone rang: it was the Appellant. One of the investigating officers picked up the phone and asked the Appellant to come back. He responded, "bro pretend that I am Leonard DeCaprio and proof catch me if you can." (R. at 28.) The factual record ends at this point.

III.

INTRODUCTION

Since the Appellant's term of supervised release has yet to commence, his challenge to the constitutionality of West Virginia Code § 62-12-26 is a facial challenge, not a challenge to the statute as applied. His brief is replete with speculation and abstractions. They are "what if" arguments lacking in substance. To adequately respond to these arguments this Court will require a crystal ball, as his "nightmare scenarios" have yet to occur, and are not mandated by the statute. To prove that West Virginia Code § 62-12-26 is unconstitutional, the Appellant bears a heavy burden. First, facial challenges are generally disfavored. In *Dickerson v. Napolitano*, 604 F.3d 732, 741-42 (2d. Cir. 2002), the United States Court of Appeals for the Second Circuit discussed why:

> Facial challenges are generally disfavored. *See e.g., Washington State Grange v. Washington State Republican Party* , 552 U.S. 442, 450 (2008) (recognizing that courts should exercise judicial restraint in a facial challenge.); *Farrell v. Burke*, 449 F.3d 470, 494 (2d Cir. 2006) ("Federal courts as a general allow litigants to assert only their own legal rights and interests, and not the legal rights and interests of third parties.") There are several rationales for limiting such third-party, or *jus tertii,* standing. First, doing so "serves institutional interests by ensuring that the issues before the court are concrete and sharply presented." *Thibodeau v. Portundo*, 486 F.3d 61, 71 (2d Cir. 2007) (internal quotation marks omitted). Second, "[c]laims of facial invalidity often rest on speculation. *Wash.*

> *State Grange*, 552 U.S. at 450. Third, facial challenges "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* (internal quotation marks omitted). Fourth, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from bing implemented in a manner consistent with the Constitution." *Id.* at 451.

In addition to the disfavor which federal courts hold facial challenges, this Court has held that statutes are presumed constitutional:

> A statute is presumed to be constitutional. When the constitutionality of a statute is questioned, every reasonable construction must be resorted to by a court in order to sustain constitutionality and any doubt must be resolved in favor of the constitutionality of the legislative enactment.

Syl. Pt. 3, *Willis v. O'Brien*, 151 W. Va. 628, 629, 153 S.E.2d 178, 179 (1967).

The majority of Appellant's brief addresses issues which have not arisen. There are no concrete legal arguments supporting his positions. As stated above, it is a series of "what ifs." This Court is not in a position to pass on such speculative matters. Indeed, it would be unwise to decide issues, particularly issues of constitutional importance, until there is a real case or controversy before it: It does not have that now. It has an Appellant who has been sentenced, and who might run afoul of the sentence's restrictions. A full and complete review of the real and not speculative circumstances surrounding a potential violation would crystalize the Court's decision.

The provisions of West Virginia Code § 62-12-26 were first enacted during the 2003 Regular Session as S.B. 654. It required that any person convicted of a violation of West Virginia Code 61-8-12 (Incest) or a felony provision of Article 8B, 8C, or 8D of Chapter 61 (First Degree Sexual Assault, Second Degree Sexual Assault, Third Degree Sexual Assault, First Degree Sexual Abuse, Second Degree Sexual Abuse, Third Degree Sexual Abuse, Imposition of Sexual Intercourse of

Sexual Intrusion on Incapacitated Persons, Filming of Sexually Explicit Conduct by Minors, Distribution and Exhibiting of Material Depicting Minors Engaged in Sexually Explicit Conduct, Murder of a Child by a Parent, Guardian or Custodian, Death of a Child by a Parent, Guardian or Custodian by Child Abuse, Child Abuse Resulting in Injury, Female Genital Mutilation, Child Neglect Resulting in Injury, Child Neglect Resulting in Death, Sexual Abuse by a Parent, Guardian or Custodian, respectively) be supervised by the probation office of the court of conviction for up to fifty years upon the completion of any sentence of incarceration, probation, or parole supervision; whichever is the last to expire. W. Va. Code § 62-12-26(c).

The statute's framework is similar to 18 U.S.C. § 3583(a), the federal supervised release statute that has been in place since 1984.[5] The overall structure of both statutes is similar, and there are several identical provisions. *See* 18 U.S.C. §§ 3583(f), (h), (i); *see also* W. Va. Code §§ 62-12-26(h), (i), (j).

The Legislature amended West Virginia Code § 62-12-26 during the First Extraordinary Session of 2006 via S. 101 ("Child Protection Act of 2006"). Among the amendments germane to this Petition were:

1) extending the initial minimum period of supervision from two years to ten for persons convicted of violation of sections three and seven, Article 8B of Chapter 61, with the proviso that a ten year minimum initial period of supervised release may be terminated by the circuit court after two years. W. Va. Code 62-12-26(a).

---

[5]Sentencing Reform Act of 1984. *See* S. Rep. No. 98-225, at 122-24 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3306-07.

2) exacting limitations upon where certain persons on supervised release may live.[6]

IV.

ARGUMENT

A. WEST VIRGINIA CODE § 62-12-26 DOES NOT VIOLATE EITHER THE STATE OR FEDERAL DOUBLE JEOPARDY CLAUSES.

1. The Standard of Review.

A double jeopardy claim is reviewed *de novo*. Syl. Pt. 1, in part,*State v. Sears*, 196 W. Va. 71, 73, 468 S.E.2d 324, 326 (1996).

2. Since Appellant's Sentence Includes Thirty Years of Post-Incarceration Supervised Release, It Does Not Violate Double Jeopardy.

"The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment . . . protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense." *Monge v. California*, 524 U.S. 721, 728 (1998), citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

---

[6] Any person required to be on supervised release for a minimum of ten years or for life . . . shall be . . . prohibited from . . .[e]stablishing a residence or accepting employment within one thousand feet of a school or child care facility or within one thousand feet of the residence of a victim or victims of any sexually violent offenses for which the person was convicted; . . . [e]stablishing a residence of any other living accommodation in a household in which a child under sixteen lives if the person has been convicted of a sexually violent offense against a child unless the person is . . . the child's parent; . . . grandparent; or . . .[t]he child's stepparent and the person was the stepparent of the child prior to [the conviction] . . . .

W. Va. Code § 62-12-26(b)(1)& (2)(i), (ii), & (iii). The trial court retains the discretion to impose additional conditions.

Article III, Section 5 of the West Virginia Constitution also protects defendants against double jeopardy. It states, "[n]or shall any person in any criminal case . . . be twice put in jeopardy of life or liberty for the same offense." "In *State v. Gill,* 187 W. Va. 136, 141, 416 S.E.2d 253, 258 (1992), citing *Connor v. Griffith,* 160 W. Va. 680, 238 S.E.2d 529 (1977), we recognized that our State's double jeopardy clause is 'at least as coextensive as those in the [Fifth Amendment to the United States Constitution].'" *State ex. rel. Taylor v. Janes*, 225 W. Va. 329, 334, 693 S.E.2d 82, 87 (2010).

Appellant claims that West Virginia Code § 62-12-26(a) imposes multiple criminal punishments for the same offense. (Appellant's Brief at 9.) In fact, Appellant argues that he has been sentenced two and one-half times for a single offense: once for the substantive offense; once for the administration regulation requirements of West Virginia Code §§ 15-12-1 to 10[7]; and, again under the supervision requirements of West Virginia Code § 62-12-26. (Appellant's Brief at 9.)

The United States Supreme Court has held that different double jeopardy protections serve different purposes. The bar to retrial following acquittal or conviction ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of erroneous conviction or an impermissibly enhanced sentence. *Ohio v. Johnson*, 467 U.S. 493, 498-99 (1984).

"In contrast to the double jeopardy protection against multiple trials, the final component of double-jeopardy - protection against cumulative punishments - is designed to ensure that the

---

[7]Mandatory registration under the Sex Offender Registration Act is civil and non-punitive in nature. Syl. Pt. 1, in part, *Haislop v. Edgell*, 215 W. Va. 88, 593 S.E.2d 839 (2003). Thus, the Appellant was not sentenced to a criminal term of registration. *See also People v. Szwalla*, 61 A.D. 3d 1289, 877 N.Y.S.2d 757 (N.Y.A.D. 2009) (sex offender registration act does not impose punishment, but is a civil statute.).

sentencing discretion of courts is confined to the limits established by the legislature. Because the substantive power to prescribe crimes and determine punishments is vested with the legislature." *Ohio v. Johnson*, 467 U.S. at 499. Whether punishments are multiple is essentially a question of legislative intent. *Missouri v. Hunter*, 459 U.S. 359, 366-68 (1983).

This Court has held, in interpreting any statute, it looks to the plain language of the statute to determine legislative intent. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 1, *State v. Jarvis*, 199 W. Va. 635, 487 S.E.2d 293 (1997).

West Virginia Code § 62-12-26(a) states, in part,

> Notwithstanding any other provisions of this code to the contrary, any defendant convicted . . . of a violation of section twelve, article eight, chapter sixty-one of this code or a felony violation of the provisions of article eight-b, eight-c or eight-d of said chapter shall, *as part of the sentence imposed at final disposition,* be required to serve, in addition to any other penalty of condition imposed by the court, a period of supervised release of up to fifty years . . . .

(Emphasis added.)

The statute's plain language provides that supervised release is imposed by a trial court as part of the sentence authorized by the fact of the conviction; not as a separate punishment triggered once a criminal defendant's original sentence is terminated. *See Johnson v. United States,* 529 U.S. 694, 700-01 (2000) ("[P]ost revocation sanctions are part of the penalty for the initial offense . . . ."); *State v. Haagenson*, 232 P.3d 367, 372 (Mt. 2010) (revocation of supervised release pursuant to 18 U.S.C. § 3583[8] is a penalty attributable to the original conviction, not a new punishment, and the

---

[8]Title 18 U.S.C. § 3583(a)

> (a) In general.– The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include *as a part of the*

Fifth Amendment's Double Jeopardy Clause is not implicated by such a revocation); *United States v. Huerta-Pimental,* 445 F.3d 1220, 1221 (9th Cir. 2006) (supervised release pursuant to § 3583 is imposed as part of the sentence authorized by the fact of the conviction); *United States v. Soto-Olivas*, 44 F.3d 788, 789-90 (9th Cir. 1995) (by the plain language of 18 U.S.C. § 3583(a) supervised release although imposed in addition to the period of incarceration is a part of the sentence).

Indeed, the Legislature wrote the statute so as to avoid double jeopardy prohibitions. West Virginia Code § 62-12-26(c) clearly states:

> The period of supervised release imposed by the provisions of this section shall begin upon the expiration of any period of probation, the expiration of any sentence of incarceration or the expiration of any period of parole supervision imposed or required of the person so convicted, whichever expires later.

Unlike parole, offenders do not serve terms of supervised release as a substitute for a portion of their sentences of imprisonment. Like state probationers, offenders on supervised release are subject to the jurisdiction of state courts, are monitored by probation officers, and are subject to the same conditions. W. Va. Code § 62-12-26(e). But, unlike probation, supervised release is not punishment in lieu of incarceration. Clearly, a defendant could not be both incarcerated and on supervised release at the same time. Thus, the Legislature triggered supervision upon defendant's

---

> *sentence* a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such term is required by statute, or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(Emphasis added.)

release. But the same can not be said for probation (simply another form of punishment), and parole (punishment meant for prisoners who have already served a part of their sentences).

In all three cases, a defendant would be serving two portions of the same sentence at the same time. Clearly, this would violate the defendant's right against double jeopardy. It would also defeat the purpose of the original sentence. Thus, supervised release does not begin until the punishment, in whatever form, portion of the defendant's sentence has ended.

3. The Court Need Not Credit "Street Time" Without Running Afoul of the State Double Jeopardy Clause.

West Virginia Code § 62-12-26(g)(3) states:

> (g) *Modification of conditions or revocation.* -- The court may:
>
> . . . .
>
> (3) Revoke a term of supervised release and require the defendant to serve in prison all of part of the term of supervised release *without credit for time previously served on supervised release* if the court, pursuant to the West Virginia Rules of Criminal Procedure applicable to revocation of probation, finds by clear and convincing evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this subdivision may not be required to serve more than the period of supervised release[.][9]

(Emphasis added.)

---

[9]The federal statute contains a similar provision. *See* 18 U.S.C.§ 3583(e)(3).

> (e) The court may:
>
> . . . .
>
> (3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release *without credit for time previously served on postrelease supervision*. . . .

(Emphasis added.)

It is the Appellant's position the highlighted portions of this section violate his state and federal protections against double jeopardy.

Federal courts have held that a violation of the conditions of supervised release under 18 U.S.C. § 3583 do not constitute a new crime, and the revocation of supervised release is not properly considered a new punishment. *Johnson v. United States*, 529 U.S. at 700-01. "The requirement that a defendant only be punished once for a particular crime does not mean that this punishment cannot be modified or extended." *United States v. Pettus*, 303 F.3d 480, 487 (2d. Cir. 2002). "The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." *United States v. DiFrancesco*, 449 U.S. 117, 137 (1980).

The United States Supreme Court "attribute[s] postrevocation penalties to the original conviction." *Johnson*, 529 U.S. at 701. In addition West Virginia Code § 62-12-26(a) indicates supervised release is "part of the sentence." *Id. See also United States v. Soto-Olivas* 44 F.3d 788, 789-90 (9th Cir. 1995). Accordingly, a revocation sentence should be seen as part of the initial sentence, rather than a separate or additional punishment for the same offense." *Id.*

In Syl. Pt. 2, *Conner v. Griffith*, 160 W. Va. 680, 238 S.E.2d 529 (1977), this Court held that failure to credit a parolee with street time served prior to revocation constitutes multiple punishments for the same offense thus violating West Virginia's Double Jeopardy Clause. But in *Jett v. Leverette*, 162 W. Va. 140, 247 S.E.2d 469 (1978), this Court ruled that failure to credit time spent on probation against a probationer's sentence after revocation does not violate the Double Jeopardy clause.

As stated above, supervised release is neither probation or parole. Indeed. the federal court adopted it as a replacement for parole.[10] Unlike parole, which is earned by good behavior while incarcerated, a defendant is subject to a period of supervised release no matter what his behavior was while incarcerated. Parole violations neither "furnish an additional punishment" nor "increase the time [a defendant] is subject to serve on the underlying sentence." *Conner*, 160 W. Va. at 690, 238 S.E.2d at 534. It is a substitute for incarceration.

The plain language of West Virginia Code § 62-12-26(a) reveals a legislative intent to render supervised release part of the original sentence, and not a "*new consecutive* sentence operating under a new legal term -- supervised release." (Appellant's Brief at 14; emphasis supplied.) As stated above, West Virginia Code § 62-12-26(a) unambiguously states,

> Notwithstanding any other provision of this code to the contrary, any defendant convicted after the effective date of this section of a violation of section twelve, article eight, chapter-sixty one of this code . . . shall, *as part of the sentence imposed at final disposition*, be required to serve, in addition to any other penalty or condition imposed by the court, a period of supervised release of up to fifty years . . . .

(Emphasis added.)

---

[10]When Congress enacted this supervised release statute it sought "to replace a parole system in which the length of post-incarceration supervision was dependent upon the length of the original prison term with a supervised release system in which the length of such supervision is dependent solely upon the defendant's need for supervision after release from jail." *United States v. Montenegro-Rojo,* 908 F.2d 425, 432 (9th Cir. 1990).

Unlike supervised release, the length of a prisoner's parole is based on the length of his sentence. He is, in effect, serving his sentence outside of prison. Therefore, if the State did not credit a parolee with credit for time served on parole it would be punishing him twice for the same offense. *Connor v. Griffith*, 160 W. Va. at 686, 238 S.E.2d at 532.

Because supervised release is not based upon the length of a sentence of, and the defendant does not begin serving his supervised release until he is done all of his other time, the same cannot be said.

Even if this Court were to find this section of the statute unconstitutional, the result is not fatal to the entire statute:

> A statute may contain constitutional and unconstitutional provisions which may be perfectly distinct and separable so that some may stand and the others will fall: and if, when the unconstitutional portion is rejected, the remaining portion reflects the legislative will, is complete in itself, is capable of being executed independently of the rejected portion, and in all other respects is valid, such remaining portion will be upheld and sustained.

State v. Heston, 137 W. Va. 375, 403, 71 S.E.2d 481, 496 (1952).

The "street time" provision of West Virginia Code § 62-12-26(g)(3) is designed to ensure that defendants on supervised release do not violate the terms and conditions of their release. The Legislature's decision to include this provision as part of the revocation section of the statute evinces its intent. This provision is not so intertwined with the statutes "subject-matter, meaning or purpose, that the good cannot remain without the bad." *Loeb v. Trustees of Columbia Township*, 179 U.S. 472, 490 (1900). Thus, even if this provision is unconstitutional, it may be severed from the statute without the need to revoke the entire statute.

B. THE APPELLANT NEVER RAISED A FACIAL CRUEL AND UNUSUAL CONTEMPLATING ALL OF WEST VIRGINIA CODE § 62-12-26 BELOW.

1. Standard of Review.

Review of questions of statutory interpretation and of the constitutionality of West Virginia Code § 62-12-26 is *de novo*. Syl. pt. 1, *Chrystal R.M. v. Charlie A.l.,* 194 W. Va. 138, 459 S.E.2d 415 (1995).

2. The Appellant Failed to Preserve This Issue for Review.

Appellant next argues that West Virginia Code § 62-12-26, on its face, violates the prohibitions against cruel and unusual punishment contained in the Eighth Amendment of the

Federal Constitution, and Article III, Section 5 of the West Virginia Constitution. A thorough reading of counsel for the Appellant's Motion Requesting Court to Find West Virginia Code § 62-12-26 Unconstitutional,[11] (R. at 6), does reveal that the counsel raised a cruel and unusual issue, but it was nowhere as broad as the one he is arguing before this Court. (R. at 18.) The only issue argued under the cruel and unusual clauses of the Federal and State Constitution is proportionality. (*Id.*) Syl. Pt. 2, *State ex. rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996) ("To preserve an issue for appellate review, a party must articulate it with sufficient distinctiveness to alert a circuit court to a claimed defect.") Appellant did not argue below that the statute was cruel and unusual on its face. (Appellant's Brief at 22-25.) Nor did he take this position at Appellant's August 10, 2009, sentencing hearing. (Tr. at 26-29.)

Even if this Court were to address the merits of Appellant's claim, the outcome would be no different. Initially, his claim is not ripe. The Eight Amendment provides "[e]xcessive bail shall not be required, or excessive fines imposed, nor cruel and unusual punishment inflicted." Article III, Section 5 of the West Virginia Constitution states, in part, that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

It is the Appellant's position the West Virginia Code § 62-12-26 is cruel and unusual *per se*. Appellant then lists a series of potential consequences, claiming that § 62-12-26(a) "acts as an involuntary forfeiture of the Appellant's life, liberty and pursuit of happiness - at lease for the next 30-50 years." (Appellant's Brief at 24.)

Appellant's statement is simply not accurate. Clearly, he is not being asked to forfeit his life. More importantly, the conditions of supervised release are part of Appellant's original sentence, not

---

[11]Submitted four days before the Appellant entered his conditional guilty plea. (R. at 23, 41.)

an additional one. As for the potential consequences, they are nothing but self-serving speculation. West Virginia Code §§ 62-12-26(b)(1) & (2) prohibit the Appellant from accepting employment within 1,000 feet of a school or child care facility, to stay 1,000 feet away from the victim, to live with a child under 16 unless the Appellant is the child's parent, grandparent or stepparent. The statute also imposes the traditional conditions of probation. W. Va. Code § 62-12-9. None of these conditions have ever been held to be cruel and unusual.

Appellant also provides this Court with a form entitled "Sex Offender Conditions." Although the Appellant characterizes all of the conditions contained on this form as mandatory, clearly this is not so. Apart from those conditions statutorily mandated -- registration, staying 1,000 feet from a school or child care facility, and participating in treatment -- all of the other conditions are optional. There are no check marks next to these conditions; indeed, next to any of the conditions. The form is unsigned, although there is a space for counsel.

Apart from supposition, the Appellant has not offered a single case in which these conditions have been deemed cruel and unusual. If they are unreasonable, Appellant's avenue for relief is to challenge the conditions, as they apply to him, in court.

3. Because Supervised Release Entails No Actual Time of Incarceration It Does Not Impose A Constitutionally Disproportionate Sentence.

Appellant next argues that a thirty-year sentence of supervised release upon a guilty plea to one count of First Degree Sexual Abuse which carries an indeterminate penalty of one to five years. is cruel and unusual. "The Eighth Amendment, which forbids cruel and unusual punishments, contains a narrow proportionality principle that applies to noncapital sentences." *Ewing v. California*, 538 U.S. 11, 20 (2003). A sentence violates the Federal Constitution's proscription

against cruel and unusual punishment when the penalty is grossly disproportionate to the severity of the crime. *Lockyer v. Andrade*, 583 U.S. 63, 72 (2003); *Ewing v. California*, 538 U.S. at 20-21. "The Supreme Court has made it clear that '[o]utside the context of capital punishment, successful challenges to the proportionality of sentences [are] exceedingly rare." *Solem v. Helm*, 463 U.S. 277, 289-90 (1983). On Eighth Amendment challenges:

> A reviewing court must make a threshold determination that the sentence imposed is grossly disproportionate to the offense committed and, if grossly disproportionate, the court must consider the sentences imposed on others convicted in the same jurisdiction and the sentences imposed for commission of the same crime in other jurisdictions.

Id.

"In general, a sentence within the limits imposed by statute is neither excessive or cruel and unusual under the Eighth Amendment." *United States v. Delacruz-Soto*, 414 F.3d 1158, 1168 (10th Cir. 2005).

Article III, Section 5 of the West Virginia Constitution states, in part, that "[p]enalties shall be proportioned to the character and degree of the offense." "Sentences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review." Syl. pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504, 505 (1982).

> Under State law there are two tests to determine whether a sentence is so disproportionate to a crime that it violates our Constitution. The first is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test we spelled out in Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981):
>
>> In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the

> offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

State v. Cooper 172 W. Va. 266, 272, 304 S.E.2d 851, 857 (1983).

Although Appellant quotes several cases in support of his proportionality argument; none of them are dispositive. The case-at-bar does not address the constitutionality of a lengthy period of incarceration: it addresses a period of external supervision. Unlike incarceration, supervised release is designed to soften the transition from life inside jail to life on the outside. "Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration." *United States v. Johnson*, 529 U.S. 53, 59 (2000). For example, the House Conference Report on the PROTECT Act (18 U.S.C. § 2252(B)(b)), which authorized the imposition of *lifelong terms* of *supervised release* under 18 U.S.C. § 3583(k)[12] for crimes against minors, states in relevant part:

> This section responds to the long-standing concerns of Federal judges and prosecutors regarding the inadequacy of the existing supervision periods of sex offenders, particularly for the perpetrators of child sexual abuse crimes, whose criminal conduct may reflect deep-seated aberrant sexual disorders that are not likely to disappear within a few years of release from prison. The current length of the authorized supervision periods is not consistent with the need presented by many of these offenders for long term-and in some cases, life-long monitoring and oversight.

H.R. Rep. No. 108-66, at 49-50 (2003), *reprinted in* 2003 U.S.C.C.A.N. 683, 684.

Given its rehabilitative goals, periods of supervised release cannot be considered comparable to sentences of incarceration. A trial court may must modify its approach, attributing factors

---

[12]Title 18 U.S.C. § 3583(k) authorizes a determinate term of supervised release of five years to life for a defendant convicted of several crimes against minor victims including: kidnaping a minor; sex trafficking of minors; aggravated sexual abuse of a minor; sexual abuse of a minor; abusive sexual conduct against a minor; sexual exploitation of children; selling or buying of children; and knowingly transporting child pornography.

relevant to long-term interests of rehabilitation greater weight when deciding appropriate periods of supervised release as opposed to incarceration.

In the case-at-bar the Appellant was originally charged with one count of First Degree Sexual Abuse, and one count of Sexual Abuse by Parent, Guardian or Custodian. *See* W. Va. Code § 61-8D-5 (indeterminate sentence of ten-twenty years). The Appellant struck a plea-bargain with the State which reduced his potential exposure to incarceration from twenty-five years to a maximum of five years.

By virtue of his guilty plea to First Degree Sexual Abuse pursuant to *Kennedy v. Frazier*, 178 W. Va. 10, 357 S.E.2d 43 (1987), for groping the breast, and massaging the nipples of a thirteen-year-old child after first plying her with alcohol, Appellant must register for life as a sexual offender. *See* W. Va. Code § 15-12-2(b)(5). The victim, R.D., was by all accounts under Appellant's supervision and in his custody at the time of the sexual abuse, as she went to the Appellant's residence to stay following an argument with her mother. After the victim repeatedly shunned Appellant's sexual advances, he groped and fondled her, placing her in fear and intimidating her.

Clearly, this victim, as a result of her tender age, falls within a class of victims that the laws of our State seek most to protect; likewise, Appellant's criminal actions fall within a class of conduct that the laws of our State seek to strictly monitor. Citizens in our society expect, if not demand, heightened awareness and restrictions regarding sex offenders, especially those sex offenders who perpetrate crimes on children.

At the sentencing hearing, the trial court judge explained his reasoning for imposing upon the Appellant a period of thirty years of supervised release. Judge Recht relied most heavily on the

victim's age as the guiding factor for the thirty-year duration of supervised release. In so doing the judge indicated that a fifty-year duration would be more appropriate in cases involving sex offenses against infants and toddlers. (Tr. at 33-34.) The trial court sought to and did impose a period of supervised release upon Appellant which took into consideration the crime itself and the victim's age.

The Appellant contends that violation of the terms of his supervised release may extend his sentence of incarceration from a maximum of five years to a maximum of thirty years. Appellant's position is utterly speculative, and unripe. Indeed, the trial court possesses the authority to terminate Appellant's supervised release after two years. (*See* W. Va. Code § 62-12-26(g)(1).)

C. BECAUSE THE STATUTORY MAXIMUM SENTENCE INCLUDES A PERIOD OF SUPERVISED RELEASE *APPRENDI* DOES NOT APPLY TO APPELLANT'S SENTENCE.

1. Standard of Review.

Review of question of statutory interpretation and of the constitutionality of West Virginia Code § 62-12-26 is *de novo.* Syl. pt. 1, *Chrystal R.M. v. Charlie A.l., supra.*

2. West Virginia Code § 62-12-26 Does Not Violate *Apprendi.*

Appellant next argues that West Virginia Code § 62-12-26(a) is unconstitutional because the imposition of a term of supervised release increases the penalty to which the Appellant is exposed under the charged statute without a jury determination in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In *Apprendi* the Supreme Court held that any fact, apart from a prior conviction, that increases a defendant's sentence beyond that statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 489. In *Blakely v. Washington*, 542 U.S.

296, 303 (2004), the Court defined "statutory maximum" for *Apprendi* purposes as the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." West Virginia Code § 62-12-26(a) provides a statutory maximum of fifty years. The Appellant received thirty.

West Virginia Code § 62-12-26(a) does not enhance a defendant's sentence past the statutory maximum; the sentence for the underlying offense and the length of the period of supervised release is the statutory maximum. Indeed, the only discretion the sentencing judge has is to lessen the term of supervised release. *C.f. State v. Slater,* 222 W. Va. 499, 506, 665 S.E.2d 674, 681 (2008) ("This Court has previously explained that West Virginia Code § 61-2-14a [kidnapping] provides a maximum sentence of life without mercy, based on the jury's findings, and that any additional findings of fact made by the trial court operates *to reduce* the defendant's sentence from the maximum sentence as found by the jury."). Appellant repeatedly refers to West Virginia Code § 62-12-26 as a "second prison sentence" and a "second consecutive sentence for the same offense" added on by the trial court without any additional factual findings. "But supervised release is imposed as part of the authorized sentence [under *Apprendi]* by the fact of conviction and requires no judicial fact-finding,[13] it does not violate the Sixth Amendment principles recognized in *Apprendi,* and *Blakely.*" *See United States v. Huerta-Pimental*, 445 F.3d at 1221. *See also United States v. Soto-Olivas*, 44 F.3d at 790 ("By the plain language of [18 U.S.C. § 3583(a)], supervised release [under *Apprendi]*, although imposed in addition to the period of incarceration, is 'a part of the sentence.' . . . Thus, the entire sentence, including the period of supervised release is the

[13]Indeed, the trial court has no discretion and must impose a period of supervised release upon conviction of certain enumerated felonies.

punishment for the original crime. . . . ") (citation omitted); *United States. v. Liero*, 298 F.3d 1175 (9th Cir. 2002) (the statutory language of 3583(a) and supporting case law clearly provide that supervised release, just like a term of imprisonment, is "part of the sentence [under *Apprendi*].").

Thus, the maximum sentence of First Degree Sexual Abuse under West Virginia Code § 61-8B-7 is one to five years, indeterminate, and anywhere from two to fifty years of supervised release. The trial court has no discretion, it must impose a period of supervised release under West Virginia Code § 61-12-26(a). The only discretion it has is as to the length of the period of supervised release. Thus Appellant's sentence of one to five years, followed by thirty years of supervised release is within the statutory maximum. West Virginia Code § 61-12-27 does not violate *Apprendi.*

3. **West Virginia Code § 62-12-26 Is Not Unconstitutionally Vague.**

The Appellant next challenges this statute as unconstitutionally vague on its face. A statute is void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability." *Zwicker v, Koota*, 389 U.S. 241, 249 (1967). A vagueness challenge seeks to vindicate two principles of due process: the need to define prohibited conduct they must avoid, and the need to prevent arbitrary and discriminatory law enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

To argue that West Virginia Code § 62-12-26 "fails to provide adequate notice of prohibited conduct" is without merit. The statute is a sentencing statute, it is not designed to proscribe a certain type of conduct: it is designed to impose punishment. Indeed, the Appellant has not cited to a single sentencing statute that has been struck down as void for vagueness.

Nor is there any need for "uniformity of conditions." Once again the Appellant is presenting this Court with arguments that have no legal support. (Appellant's Brief at 34.) A defendant placed on supervised release is "subject to any and all of the conditions applicable to a person placed upon probation . . . ." *See* W. Va. Code §§ 62-12-26(e); 62-12-9. In addition to the standard terms of probation, the Legislature has afforded the trial court with the flexibility to fashion reasonable conditions necessary for rehabilitation. *See* W. Va. Code § 62-12-9(5)(b). As long as these conditions are clearly communicated to the prisoner, this provision does not make the statute void for vagueness.

Appellant also argues that probation officers will, pursuant to their authority, "create different 'rules' and standards, without providing legislative safeguards against arbitrary and capricious terms, throughout the State potentially yielding varying levels of supervision." (Appellant's Brief at 35.) The Appellant's argument misses the point. The void for vagueness doctrine is designed, in part, to protect the public against laws which are so lacking in legally fixed standards of behavior that it vests virtually complete discretion in the hands of law enforcement, the courts, prosecutors, or juries to determine whether the suspect is innocent or guilty. The potentiality of false or discriminatory enforcement of facially clear statutes does not fit within the doctrine.

West Virginia Code § 62-12-26 clearly sets forth the conditions which a defendant convicted of enumerated offenses against minors must follow. *See* W. Va. Code §§ 62-12-26(b) & -12-26(e). It also requires the trial court to direct that the probation officer provide a list of conditions that "is

sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required."[14]

D. APPELLANT'S SENTENCE IS CONSTITUTIONALLY PROPORTIONAL.

1. Standard of Review.

Subject to certain narrowly drawn exceptions, this Court has consistently held that sentencing decisions rest within the sound discretion of the trial court. "The Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997). The balance struck by the sentencing judge in weighing competing sentencing factors will not be disturbed by this Court unless it is manifestly unsupported by reason. *State v. Redman*, 213 W. Va.175, 181, 578 S.E.2d 369, 375 (2003) (*per curiam*) ("Our system of criminal jurisprudence views a trial court's discretion during sentencing phase of a criminal proceeding as critical component of the process. Circuit court judges have a right to believe that so long as they have not violated a law or acted in a nefariously discriminatory way in imposing sentences, this Court will not sift through the nooks and crannies of their decisions determined on finding that which is not there.") (quoting *State v. Head*, 198 W. Va. 298, 306, 480 S.E.2d 507, 515 (1996)) (Cleckley, J., concurring); *State v. Cooper*, 172 W. Va. 266, 273, 304 S.E.2d 851, 857 (1983). Additionally, when a defendant has pled guilty to an offense which does not adequately describe his conduct or has received a significant reduction in potential exposure to confinement through a plea bargain, "the trial court has great discretion in imposing even the maximum sentence

---

[14]In the case-at-bar, the trial court chose to wait until questions regarding the statute's constitutionality are resolved. (Tr. at 35.)

possible for the pled offense." *Redman*, 213 W. Va. at 81, 578 S.E.2d at 375; *State v. Lowery*, 765 So. 2d 460, 463 (La. App. 2d. Cir. 2000).

2. <u>Appellant's Sentence Is Not Constitutionally Disproportionate</u>.

The Appellant next claims that thirty years of supervised release for a felony which carries a maximum sentence of one-five years is constitutionally disproportionate in violation of the Eighth Amendment's guarantee against cruel and unusual punishment and the proportionality clause of Article III, Section 5 of the West Virginia Constitution. Generally, "[s]entences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not subject to appellate review." Syl. Pt. 2, *State v. Booth*, 224 W. Va. 307, 685 S.E.2d 701 (2009) (citation omitted).

In the case-at-bar the Appellant pled guilty to sexually abusing his girlfriend's thirteen-year-old sister. A factor the trial court judge clearly communicated in his sentencing decision. (Tr. at 34.) The Appellant also plied this thirteen-year-old with alcohol, and repeatedly made sexual advances towards her. He took advantage of her status as a minor, in his custody and under his control. His behavior was repugnant. A thirty-year, post-incarceration period of supervision should not shock the conscience of this Court.

Appellant also alleges that the trial court arbitrarily picked thirty years out of the air: He is wrong. During the plea hearing the trial court sentenced the Appellant after hearing all of the circumstances surrounding the offense. Although the court did not go through a lengthy colloquy before pronouncing sentence, it was not required to. The Appellant's behavior spoke for itself.

Although the Appellant conclusively states that the sentence is disproportionate, he makes no attempt to tell this Court how. He simply incorporates by reference the "cruel and unusual on

its face" argument from earlier in his brief. (Appellant's Brief at 25-28.) He makes no attempt to connect the facts of this case, with his facially unconstitutional position.

Even if this Court were to find Appellant's sentence disproportionate, it is not a justification for declaring the entire statute unconstitutional. Over the years this Court has developed criteria under the disproportionate clause of the West Virginia Constitution and the Cruel and Unusual Clause of the Federal Constitution which it has applied to sentences handed down by trial courts. Over the years, this Court has developed common-law proportionality standards which it has applied to sentences handed down by the trial court. *See State v. Richardson*, 214 W. Va. 410, 415-16, 589 S.E.2d 552, 557-58 (2003) (Davis, J. concurring in part; and dissenting in part) and cases cited therein; Syl. Pt. 4, *Wanstreet v. Bordenkirker*, 166 W. Va. 523, 276 S.E.2d 205 (1981) (proportionality standards usually applied to sentences where there is no fixed maximum set by statute or where there is a life recidivist statute); Syl. Pt. 5, *State v. Cooper,* 172 W. Va. 266, 304 S.E.2d 851 (1983).

If this Court rules that the Appellant's period of supervised release fails either the subjective or objective test articulated by this Court in *Cooper*, the appropriate response would be to remand the matter back to the trial court for determination of a more appropriate sentence, not to throw the entire statute out as unconstitutional. *See State v. Buck (II)*, 173 W. Va. 243, 248, 314 S.E.2d 406, 411 (1984) (Appropriate remedy upon finding that sentence is disproportionate is to remand case to trial court for resentencing).

V.

CONCLUSION

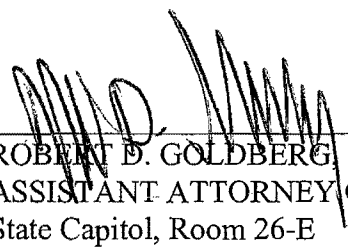
For the foregoing reasons, the judgment of the Circuit Court of Ohio County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

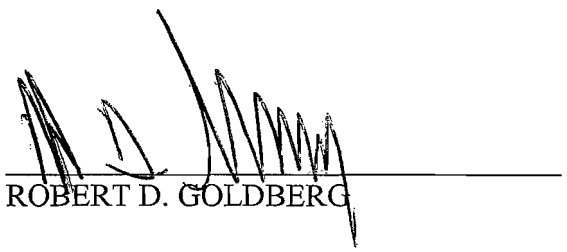


ROBERT D. GOLDBERG, State Bar No. 7370
ASSISTANT ATTORNEY GENERAL
State Capitol, Room 26-E
Charleston, West Virginia 25305
(304) 558-2021

CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, with first-class postage prepaid, on this 25th day of August, 2010, addressed as follows:

To: Shayne M. Welling, Esquire
Board of Trade Building
P.O. Box 347
Wheeling, West Virginia 26003



ROBERT D. GOLDBERG