

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2025 Term

No. 22-938

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

v.

CODY BRAUTIGAM,
Defendant Below, Petitioner.

FILED

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Appeal from the Circuit Court of Ohio County
The Honorable David J. Sims, Judge
Case No. CC-35-2013-F-31

AFFIRMED, IN PART; VACATED, IN PART; AND REMANDED

Submitted: September 16, 2025
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JUSTICE BUNN delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. “Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: ‘Penalties shall be proportioned to the character and degree of the offence.’” Syllabus Point 8, *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980).

2. “A criminal sentence may be so long as to violate the proportionality principle implicit in the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution.” Syllabus Point 7, *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980).

3. “Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.” Syllabus Point 5, *State v. Cooper*, 172 W. Va. 266, 304 S.E.2d 851 (1983).

4. “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.” Syllabus Point 5, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981).

5. To calculate the maximum amount of time a court may order as an additional term of supervised release after ordering a term of imprisonment upon a revocation, a court must first determine the authorized term of supervised release, then subtract *any* revocation term of imprisonment since the defendant’s initial term of supervised release began. This calculation must subtract both the term of imprisonment on the instant revocation, as well as any previous terms of imprisonment resulting from supervised release revocations. W. Va. Code § 62-12-26(j) (eff. 2021).

BUNN, Justice:

Petitioner Cody Brautigam appeals the Circuit Court of Ohio County's July 1, 2022 order revoking his term of supervised release and sentencing him to imprisonment for twenty-five years, with credit for time served on his underlying convictions, and an additional twenty-five-year term of supervised release. Mr. Brautigam alleges that the sentence is constitutionally disproportionate and the length of the additional term of supervised release violates West Virginia Code § 62-12-26(j), which addresses when a court may include a term of supervised release after a revocation sentence of imprisonment. While we find that his sentence of imprisonment is not constitutionally disproportionate, we further determine that the circuit court erred by requiring a term of supervised release in excess of the time permitted by West Virginia Code § 62-12-26(j).¹ Therefore, we affirm his sentence, in part, vacate his sentence relating to the term of supervised release that begins after the revocation sentence of imprisonment, and remand for resentencing on that issue.

¹ Because we find error in the length of Mr. Brautigam's additional term of supervised release, we do not address whether the portion of his sentence creating an additional term of supervised release is constitutionally disproportionate.

I.

FACTUAL AND PROCEDURAL HISTORY

In April 2013, Mr. Brautigam pled guilty via information to two counts of third-degree sexual assault,² one count involving a nine-year-old girl and one count involving an eight-year-old girl, with the offenses occurring in mid-2012. As part of the plea agreement, the State and Mr. Brautigam agreed to request alternative sentencing and to recommend that the circuit court place him at the Anthony Correctional Center (“Anthony Center”) and that he be required to complete the West Virginia Division of Corrections Sex Offender Program there. The plea agreement also noted Mr. Brautigam’s understanding “that upon release, he will be subject to the requirements of supervised release pursuant to West Virginia Code § 62-12-26.”

At the plea and sentencing hearing, which occurred on the same day, the circuit court accepted Mr. Brautigam’s guilty plea and sentenced him to two consecutive terms of one to five years of imprisonment. The court then suspended his sentence and ordered his placement at the Anthony Center and also ordered that he serve a twenty-five-year term of supervised release after his discharge from probation, incarceration, or parole.

² See W. Va. Code § 61-8B-5(a)(2).

Mr. Brautigam reported to the Anthony Center in May 2013. By late July 2013, the warden sent notice to the circuit court that Mr. Brautigam was “unfit to remain” there, later detailing to the circuit court that Mr. Brautigam had “significant behavior problems” at the Anthony Center, including assault of another offender. In early August 2013, the court committed Mr. Brautigam to the West Virginia Division of Corrections. Mr. Brautigam discharged his sentence of imprisonment on September 27, 2017, and on that day, he began his term of supervised release.

Since his initial term of supervised release began, the circuit court has revoked Mr. Brautigam’s supervised release four times, including the revocation at issue before this Court. A summary of those revocations assists our consideration of his appeal.

Less than a year after Mr. Brautigam’s term of supervised release began, on April 25, 2018, his probation officer filed the first petition requesting revocation of supervised release and alleging four rule violations. As part of his supervised release terms and conditions, Mr. Brautigam was (1) precluded from residing with or visiting with any minor child; (2) required to report “incidental contact” with minors to his probation officer within twenty-four hours; (3) required to notify probation of the “establishment of any dating, intimate, and/or sexual relationship”; and (4) precluded from engaging in “a dating, intimate, or sexual relationship” with a person with minor children. The petition detailed how he violated these rules, as Mr. Brautigam “invited a minor child into his residence” on

six days in April 2018 and failed to report this contact within twenty-four hours. He also established a “dating, intimate, and/or sexual relationship” with a seventeen-year-old minor and failed to provide notice. Finally, Mr. Brautigam developed a romantic relationship with a woman who had a minor child. On March 26, 2018, he was told to have no further contact with the woman, but by the date of the petition, he had made seven outgoing phone calls and six Skype calls to her. At the revocation hearing on May 4, 2018, Mr. Brautigam stipulated to these violations and the circuit court sentenced him to sixty days imprisonment, with credit for time served since his arrest.³ The court also ordered that on release, the probation office was permitted to monitor Mr. Brautigam by GPS.

On June 12, 2019, Mr. Brautigam’s probation officer filed a second petition for revocation of supervised release, alleging another six violations. Although Mr. Brautigam was not permitted to reside with or visit with any minor child, the petition alleged that he violated that provision by contacting a thirteen-year-old girl via an “unreported Facebook Messenger.” The petition further alleged that he “had nude photos and obscene videos” on his Messenger account, purportedly from a “female” with whom “he was in an unreported relationship[,]” despite being prohibited from possessing obscene matter or child pornography. As in the first revocation, the petition alleged he again failed

³ The circuit court noted that it sentenced Mr. Brautigam pursuant to the graduated sanction set forth in West Virginia Code § 62-12-10(a)(2), which concerns violations of probation requiring “a period of confinement up to sixty days” for a first violation of probation.

to notify his probation officer that he had a “romantic relationship,” this time with at least six different women, and he had again developed a romantic relationship with a woman who had a minor child. The petition further alleged that Mr. Brautigam admitted to deleting an unreported Messenger account “to avoid detection by his probation officer[,]” in violation of a computer use condition prohibiting him from altering or destroying records of such use. Finally, while he was required to “obtain prior written permission” to access “any external lines of communication” on the internet, the petition alleged that he “created an unreported [M]essenger account” under another name. At the revocation hearing, Mr. Brautigam stipulated to the violations, and the court revoked his supervised release, sentencing him to two years’ imprisonment. The court also ordered him to continue supervised release after his release from his two-year term of imprisonment.⁴

The probation officer filed a third petition for revocation in February 2021, alleging that Mr. Brautigam violated three conditions of his supervised release by (1) associating with a known or suspected drug user; (2) associating with a person who had a criminal record; and (3) failing to tell his probation officer that he had established dating, intimate or sexual relationships. All three alleged violations involved the same woman, and

⁴ The order did not include a specific length of time for this term of supervised release, rather, it stated that “the length of the Defendant’s term for supervised release shall not exceed the term of supervised release authorized by [the prior version of West Virginia Code § 62-12-25(j)] less any term of imprisonment that was imposed upon the prior revocation of supervised release.”

the probation officer had previously told Mr. Brautigam he could not be in a relationship with her due to her drug history and felony record. At the revocation hearing, Mr. Brautigam again stipulated to the violations. The circuit court ordered him to serve one year of imprisonment but did not address supervised release after completion of his term of imprisonment.

In April 2022, Mr. Brautigam's probation officer filed the fourth, underlying petition for revocation of supervised release. The petition recited details regarding his three previous revocations and alleged that Mr. Brautigam discharged the previous "period of incarceration" on September 16, 2021. The petition further explained that because Mr. Brautigam could not find housing in Ohio, Brooke, or Hancock Counties, his supervision was transferred to Kanawha County so he could be placed at the Roark-Sullivan Lifeway Center in Charleston, Kanawha County, West Virginia. That center discharged him on November 24, 2021, for violating program rules. On December 1, 2021, Mr. Brautigam admitted to his probation officer that he had been using methamphetamine, and his supervising probation officer directed him to attend in-patient drug treatment at Pretera Center. After Pretera Center discharged him for "a pattern of policy violations" his probation officer directed him to attend in-patient drug treatment at Lotus Recovery Centers, where he was discharged on April 1, 2022, for "inappropriate sexual boundaries

with women and continued intrusion into female rooms.” Following this discharge, he failed to contact his probation officer for thirteen days.

The petition also alleged that Mr. Brautigam violated five terms and conditions of his supervised release including admitted possession of methamphetamine and repeatedly missing his 11:00 p.m. curfew at the Roark-Sullivan Lifeway Center. Although prohibited from associating with people with criminal records, petitioner’s cell phone records showed that he contacted inmates and placed money on their jail accounts. The petition further alleged that he again deleted photos, texts, and emails without the approval of his probation officer in violation of the computer use policy and again failed to disclose two dating or intimate relationships to his probation officer.

At the revocation hearing, where he appeared via video conference, Mr. Brautigam admitted the allegations in the petition and apologized to the court. Arguing that Mr. Brautigam was a “disturbed individual who need[ed] treatment[,]” his lawyer stated that “[m]aybe it’s more mental hygiene treatment than drug treatment[,]” and asked the circuit court to be “as lenient as possible to allow this person to come out and perhaps, as part of his supervised release, go into a mental institution[.]”

The State called Mr. Brautigam’s probation officer from the First Judicial Circuit to testify, who explained that Mr. Brautigam had attractions to minors, hid

relationships, and used methamphetamine, which causes hypersexuality. The probation officer asked that the circuit court sentence Mr. Brautigam to twenty-five years' imprisonment and, in response to a question from the State, acknowledged that he had not previously dealt with anyone as dangerous as Mr. Brautigam. The State also requested a twenty-five-year "sanction" of imprisonment, contending that Mr. Brautigam had an "unfortunate and frightening pattern of conduct[,]" and also asked that the circuit court "extend" his term of supervised release after serving his term of imprisonment.

The circuit court sentenced Mr. Brautigam to twenty-five years' imprisonment, with five years' credit for custodial time served on the original sentence for his underlying convictions, as well as credit for time served since his arrest on the fourth petition. The court noted that Mr. Brautigam "has a long history," and recognized that his attorney "mentioned the mental health issues." The court reasoned that Mr. Brautigam had issues with pedophilia, had "been given opportunities to get cleaned up in rehab and failed to do so[,]" and had "been removed [from drug treatment] because of behaviors that are inappropriate." At the hearing, the court also ordered that his term of supervised release "extend" for another twenty-five years. In the order following the hearing, the court noted that, "pursuant to West Virginia Code § 62-12-26(j) and on motion of the State of West

Virginia, . . . upon his release from incarceration,” Mr. Brautigam “shall be subject to supervised release for an additional twenty-five (25) years.”

This appeal followed.⁵

II.

STANDARD OF REVIEW

On appeal, we consider the constitutional proportionality of Mr. Brautigam’s sentence of imprisonment upon revocation of supervised release, then address whether the

⁵ Mr. Brautigam’s attorney at the time filed a brief pursuant to Rule 10(c)(10)(b) of the West Virginia Rules of Appellate Procedure, indicating that the attorney “lacks a good faith belief that an appeal is reasonable and warranted under the circumstances[.]” W. Va. R. App. P. 10(c)(10). In that brief, Mr. Brautigam argued that his twenty-five-year term of supervised release exceeded the maximum allowable *additional* term of supervised release authorized by West Virginia Code § 62-12-26(j). Mr. Brautigam also filed a pro se brief, where he argued that “the extent of the punishment was excessive and forced by the prosecuting attorney” and that the twenty-five-year additional term of supervised release was “excessive and outside of the bounds” of the statute. After receiving the State’s response to the briefs, the Court ordered the parties to file supplemental briefs “addressing the issue of proportionality and the calculation of the maximum term of supervised release[.]” and both Mr. Brautigam and the State complied.

In his supplemental brief, Mr. Brautigam raised the issue that the order revoking his supervised release on the *third* petition for revocation failed to include a term of supervised release as part of his sentence. Because this issue was not raised in his initial appeal, and because that order is not on appeal to this Court, we do not consider his argument here.

We note that Mr. Brautigam’s attorney during the briefing stage of the appeal later filed a motion to withdraw due to new employment, and new counsel was appointed for Mr. Brautigam.

portion of his sentence ordering an additional term of supervised release exceeded the circuit court’s statutory authorization. As both issues are questions of law, our review is de novo. Syl. Pt. 1, in part, *State v. White*, 249 W. Va. 532, 896 S.E.2d 698 (2023) (“When reviewing an order modifying or revoking a defendant’s supervised release under West Virginia Code § 62-12-26(h), . . . we review questions of law and interpretations of statutes de novo.”). Relatedly, “[w]here the issue involves the application of constitutional protections, our review is de novo.” *State v. Patrick C.*, 243 W. Va. 258, 261, 843 S.E.2d 510, 513 (2020).

III.

DISCUSSION

We first address whether Mr. Brautigam’s sentence of imprisonment was constitutionally proportionate. Next, we consider the propriety of the circuit court’s calculation of the term of supervised release to be imposed following completion of his revocation sentence of imprisonment.

A. The Proportionality of the Revocation Sentence of Imprisonment

Mr. Brautigam’s revocation sentence of twenty-five years’ imprisonment is not constitutionally disproportionate.⁶ As we have often recognized, “Article III, Section 5

⁶ As stated previously, because we find error in the circuit court’s calculation of the additional term of supervised release, and vacate and remand that portion of his sentence, we do not address the proportionality of that part of his sentence here. *See supra* n.1.

of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: ‘Penalties shall be proportioned to the character and degree of the offence.’” Syl. Pt. 8, *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980). In turn, “[a] criminal sentence may be so long as to violate the proportionality principle implicit in the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution.” Syl. Pt. 7, *id.* Generally, we limit our review of proportionality to sentences “where there is either no fixed maximum set by statute or where there is a life recidivist sentence.” Syl. Pt. 4, in part, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981). Still, we have examined the constitutionality of sentences issued upon the revocation of supervised release and do so here. *See, e.g., State v. Hargus*, 232 W. Va. 735, 743-45, 753 S.E.2d 893, 901-03 (2013) (analyzing the proportionality of five-year and two-year revocation sentences of imprisonment and the balance of a term of supervised release); *but see State v. Shingleton*, No. 23-193, 2025 WL 1165884, at *2 (W. Va. Apr. 22, 2025) (memorandum decision) (affirming ten-year revocation sentence of imprisonment on a second petition for revocation without reviewing proportionality).

In determining that Mr. Brautigam’s supervised release sentence of imprisonment upon revocation of supervised release is not constitutionally disproportionate, we employ two tests—a subjective and an objective test. *Hargus*, 232

W. Va. at 743, 753 S.E.2d at 901. For the subjective test, this Court considers whether the sentence is “so disproportionate to the crime” that it “shocks the conscience and offends fundamental notions of human dignity” compared to the “character and degree of an offense.” Syl. Pt. 5, in part, *State v. Cooper*, 172 W. Va. 266, 304 S.E.2d 851 (1983). In full, our subjective test explains:

Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.

Syl. Pt. 5, *id.* We only proceed to the objective test if the sentence is not subjectively disproportionate. *See id.* at 272, 304 S.E.2d at 857. To determine whether a sentence is objectively disproportionate, we examine the nature of the offense, the punishment’s purpose, and comparisons of that punishment both in West Virginia and other places:

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.

Syl. Pt. 5, *Wanstreet*, 166 W. Va. 523, 276 S.E.2d 205.

Here, Mr. Brautigam argues that his sentence is both subjectively and objectively disproportionate, particularly as his underlying crimes involved sentences

punishable only by one to five years imprisonment each. The purpose of supervised release—considered alongside Mr. Brautigam’s actions while on supervised release that resulted in multiple revocations—demonstrates that the circuit court’s sentence of imprisonment resulting from the fourth petition for revocation was not disproportionate under either test.

The legislative rationale behind supervised release informs our analysis under both tests. In explaining the legislative motive behind supervised release, the Court has noted that “to adequately protect society,” individuals who commit crimes subject to supervised release in West Virginia “require community-based supervision and treatment over and above incarceration.” *State v. James*, 227 W. Va. 407, 416, 710 S.E.2d 98, 107 (2011). Supervised release also “address[es] the seriousness of these crimes to the public welfare and . . . provide[s] treatment during the transition of offenders back into society with the apparent goal of modifying the offending behavior.” *Id.* The United States Supreme Court recently discussed supervised release in the federal context, explaining that “[s]upervised release is “a form of postconfinement monitoring” that permits a defendant a kind of conditional liberty by allowing him to serve part of his sentence outside of prison,’ subject to conditions on his behavior.”⁷ *Esteras v. United States*, ___ U.S. ___, ___, 145

⁷ Federal supervised release is applicable to more types of federal crimes than West Virginia supervised release, which only applies to certain offenders. See W. Va. Code § 62-12-26(a) (listing applicable offenses). Federal sentencing courts are authorized to

S. Ct. 2031, 2039 (2025) (quoting *Mont v. United States*, 587 U.S. 514, 523 (2019)). Supervised release, rather than being “a punishment in lieu of incarceration,” “fulfills rehabilitative ends” and “provides individuals with postconfinement assistance.” *Id.* at ___, 145 S. Ct. at 2041 (citations omitted). The Supreme Court has also described supervised release as “encourag[ing] rehabilitation *after* the completion of [a defendant’s] prison term.” *United States v. Haymond*, 588 U.S. 634, 652 (2019) (plurality opinion);⁸ *White*, 249 W. Va. at 540, 896 S.E.2d at 706 (quoting *United States v. Coston*, 964 F.3d 289, 295 (4th Cir. 2020) (also quoting *Haymond*)).

Revocation sentences for violations of the terms of supervised release reflect the nature and purpose of supervised release. While supervised release permits conditional

sentence all defendants convicted of felonies to supervised release, typically for terms of one to five years, but federal defendants convicted of certain sex offenses may be sentenced to lifetime supervision. *Compare* 18 U.S.C. § 3583(b) (noting general authorized terms of supervised release up to five years), *with* 18 U.S.C. § 3583(k) (listing offenses subject to up to lifetime supervision). Still, the Court has recently followed federal considerations relating to supervised release, including when addressing a defendant’s challenge to the constitutionality of his supervised release sentence. *See State v. White*, 249 W. Va. 532, 540-42, 896 S.E.2d 698, 706-08 (2023) (analyzing *United States v. Haymond*, 588 U.S. 634 (2019), and its discussion of constitutionality of certain federal supervised release statutes in the West Virginia supervised release setting); *State v. Raymond B.*, No. 20-0605, 2021 WL 2580715, at *2-3 (W. Va. June 23, 2021) (memorandum decision) (same).

⁸ The Seventh Circuit Court of Appeals has explained that “[t]he main goal of supervised release is ‘to prevent recidivism and foster the offender’s re-entry into society.’” *United States v. Fifer*, 863 F.3d 759, 769 (7th Cir. 2017) (quoting *United States v. Jones*, 798 F.3d 613, 619 (7th Cir. 2015)) (affirming district court’s imposition of lifetime supervised release and certain terms for defendant convicted of multiple counts of producing child pornography).

liberty, violations of supervised release breach the court’s trust. *See White*, 249 W. Va. at 541, 896 S.E.2d at 707 (recognizing that typical federal sentences for supervised release violations are a sanction for a “breach of trust” (quoting *Haymond*, 558 U.S. at 658 (Breyer, J., concurring))). West Virginia’s supervised release scheme for certain offenders is similar, although not identical, to the federal system of supervised release, and federal courts have recognized that revocation sentences should focus on a defendant’s breach of trust, “the seriousness of the underlying violation,” and the defendant’s criminal history. *United States v. Sosa*, 642 F. App’x 948, 953 (11th Cir. 2016) (per curiam) (quoting U.S. Sent’g Guidelines Manual ch. 7, pt. A, introductory cmt. 3(b) (U.S. Sent’g Comm’n date omitted)); *see also Haymond*, 558 U.S. at 658 (Breyer, J., concurring).⁹ Justice Breyer, in his concurrence in *Haymond*, explained the reasoning behind sanctions for violations of supervised release:

The consequences that flow from violation of the conditions of supervised release are first and foremost considered sanctions for the defendant’s “breach of trust”—his “failure to follow the court-imposed conditions” that followed his initial conviction—not “for the particular conduct triggering the revocation as if that conduct were being sentenced as new federal criminal conduct.”

Haymond, 558 U.S. at 658 (Breyer, J., concurring) (quoting U.S. Sent’g Guidelines Manual ch. 7, pt. A, introductory cmt. 3(b) (U.S. Sent’g Comm’n 2018)). In other words, “any

⁹ Justice Breyer’s concurrence was the controlling opinion in *Haymond*. *White*, 249 W. Va. at 541, 896 S.E.2d at 707 (explaining *Haymond*’s plurality vote and how Justice Breyer’s opinion controlled on the narrowest grounds).

consequences that flow from a violation of supervised release are not additional punishments for the underlying conviction.” *United States v. Fernandez*, 152 F.4th 124,134 (2d Cir. 2025). Rather, the “consequences are sanctions for the ‘breach of trust’ that occurs when the defendant does not comply with the terms of supervised release that were imposed as part of his original sentence.” *Id.* (quoting *Haymond*, 588 U.S. at 658 (Breyer, J., concurring)). The view that revocation sentences are consequences for the breach of trust, rather than additional punishment for the original conviction, aligns with the Court’s determination that “a post-revocation sanction simply is a continuation of the legal consequences of a defendant’s original crime[,]” and “is not an additional penalty resulting from the defendant’s initial conviction.” *Hargus*, 232 W. Va. at 743, 753 S.E.2d at 901. Consequently, when considering supervised release violations and subsequent revocations, “[i]t is not unreasonable for a more serious violation of the court’s trust to be met with a more severe sentence.” *Sosa*, 642 F. App’x at 953.

With these considerations in mind, we turn to our proportionality tests. First, Mr. Brautigam’s twenty-five-year sentence of imprisonment following his fourth revocation of supervised release is not subjectively disproportionate, as it does not shock the conscience. *See* Syl. Pt. 5, *Cooper*, 172 W. Va. 266, 304 S.E.2d 851. Mr. Brautigam’s original convictions of third-degree sexual assault, which gave rise to his term of

supervised release, were serious and involved young victims.¹⁰ The circuit court gave him multiple attempts to comply with its supervised release requirements since he began supervision in 2017. The court also imposed lenient imprisonment sentences on his three prior revocations—sentences of sixty days, one year, and two years—even after his unsuccessful stint at the Anthony Center as part of his original sentence. Still, Mr. Brautigam repeatedly engaged in multiple activities that failed to conform with the applicable terms and conditions of his supervised release. And, by repeatedly engaging in unacceptable behavior that breached the circuit court’s trust, he squandered multiple opportunities to demonstrate his ability to rehabilitate and safely reenter society.

Particularly troubling, he persisted in dishonest behavior designed to hide his supervised release violations, including destroying communication records and hiding relationships from his probation officer. *See Hargus*, 232 W. Va. at 744, 753 S.E.2d at 902 (recognizing a “technical” supervised release violation resulting in a revocation sentence does not shock the conscience when the “violation indicates a pattern of dishonesty”).

¹⁰ The State urges us to consider Mr. Brautigam’s uncharged conduct related to the underlying 2013 convictions. On the other hand, Mr. Brautigam argues that his underlying convictions were subject to much shorter terms of imprisonment, making his revocation sentence comparatively disproportionate. Certainly, we recognize the seriousness of the offenses to which Mr. Brautigam pled and was convicted. Still, when evaluating the proportionality of his revocation sentence of imprisonment, we turn our primary focus on his conduct on supervised release since the convictions.

Moreover, his hiding of romantic relationships endangered the public, especially given his underlying convictions of third-degree sexual assault of young girls.

The numerous revocations, and corresponding multiple chances to improve, including at least two opportunities for drug treatment, demonstrate his continued inability to conform his behavior on supervised release to the circuit court's requirements. In sum, Mr. Brautigam's violations, both on the fourth revocation petition and earlier petitions, which he readily admitted, demonstrate serial—and serious—breaches of trust with the circuit court. Although the circuit court provided him with multiple occasions to comply with the terms and conditions of supervised release, he has unfortunately shown an inability to “transition . . . back into society” or “modify[] the offending behavior.” *James*, 227 W. Va. at 416, 710 S.E.2d at 107. His resulting sentence of imprisonment on the fourth revocation was not disproportionate, as it does not shock the conscience based on Mr. Brautigam's pattern of violations.

Furthermore, Mr. Brautigam's sentence is not objectively unreasonable pursuant to the *Wanstreet* factors: “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.” Syl. Pt. 5, in part, *Wanstreet*, 166 W. Va. 523, 276 S.E.2d 205. As we previously noted, supervised release attempts to provide offenders with treatment and rehabilitation, while still protecting the public. *See*

James, 227 W. Va. at 416, 710 S.E.2d at 107. Mr. Brautigam repeatedly violated the terms and conditions of his supervised release, and his violations included dishonesty and hiding relationships from the probation office. His resulting revocation sentence of imprisonment reflects the legislative purpose behind the supervised release—protecting the public—and addressing his breach of the court’s trust.

Regarding punishments in this and other jurisdictions related to supervised release violations, we do not find that his sentence is objectively unreasonable under those comparisons. He acknowledges that other jurisdictions allow supervised release terms but recognizes that “the length or severity” of supervised release is determined on a case-by-case basis, yet he does not address sentences on a supervised release revocation. Still, he points to West Virginia cases where the Court has affirmed shorter revocation sentences of imprisonment, including *State v. Roger G.*, No. 14-1200, 2015 WL 5125486, at *2 (W. Va. Aug. 31, 2015) (memorandum decision), which affirmed a ten-year revocation sentence of imprisonment. He also contrasts his sentence with the revocation sentences affirmed in *Hargus*, where one defendant received a five-year revocation sentence of imprisonment for failing to register as a sex offender, and another defendant received a two-year revocation sentence of imprisonment after admitting he violated the terms of his supervised release by having “contact with the victim of his underlying crimes, including sexual intercourse[.]” 232 W. Va. at 743-45, 753 S.E.2d at 901-03. Mr. Brautigam argues that his sentence is,

instead, “a substantial break from the norm” and is disproportionate compared to similar cases.

However, as the State notes, the Court recently affirmed a fifty-year sentence of imprisonment resulting from a revocation of supervised release in *State v. Marlow P.*, where the defendant, previously convicted of first-degree sexual abuse “stemming from contact with his six-year-old cousin[,]” violated the terms of supervised release where he only “tested positive for marijuana and was involuntarily terminated from his mandated sex offender treatment program.” No. 22-691, 2024 WL 313770, at *1 (W. Va. Jan. 25, 2024) (memorandum decision). These behaviors on supervision are arguably less serious than Mr. Brautigam’s numerous violations over many years, but with a lengthier revocation sentence of imprisonment.

Also, more similar to the facts of this case, the Court affirmed a circuit court’s twenty-four-year sentence of imprisonment in *State v. Payne* resulting from the defendant’s third supervised release revocation when the defendant demonstrated escalating behaviors while on supervision. No. 17-0195, 2018 WL 1444287, at *1-2 (W. Va. Mar. 23, 2018) (memorandum decision). There, the third petition for revocation alleged that the defendant, while on supervised release, established internet usage without approval, received pornographic images, and provided false information to his probation officer, among other things. *Id.* at *2. The *Payne* defendant “admitted to many of the violations . . . , including

using a new cell phone without providing notice, e-mailing without permission, and using the internet without permission.” *Id.* The circuit court recognized the defendant’s “prior supervised release revocations for similar behaviors” as well as the risk that the defendant posed to society because he denied being a sex offender. *Id.* When Mr. Brautigam’s sentence of imprisonment is considered in light of the sentences affirmed in *Marlow P.* and *Payne*, we do not find his sentence to be objectively unreasonable.

For these reasons, particularly in regard to the legislative purpose behind the punishment and a comparison of other revocation sentences in West Virginia, Mr. Brautigam’s sentence of imprisonment was not disproportionate under the objective test. While we find that his sentence of imprisonment was not disproportionate under either the subjective or objective test, we next turn to the propriety of the term of supervised release imposed following completion of Mr. Brautigam’s term of imprisonment.

B. Calculating a Term of Supervised Release Following a Revocation Sentence of Imprisonment

Mr. Brautigam also challenges the portion of his sentence that imposes an additional twenty-five-year term of supervision to begin after he completes his term of imprisonment. He argues that the further supervised release term, when added to the fourth revocation imprisonment sentence and his previous revocation sentences of imprisonment,

exceeds the maximum additional term of supervised release allowable under West Virginia Code § 62-12-26(j). We agree.

To assist in this analysis, we first address *when*, after revoking a defendant's term of supervised release and ordering a term of imprisonment, circuit courts may order a new, additional term of supervised release. West Virginia Code § 62-12-26(j) provides the following:

(j) ***Supervised release following revocation.*** — When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of supervised release authorized under § 62-12-26(a) of this code, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of the term of supervised release shall not exceed the term of supervised release authorized by this section less any term of imprisonment that was imposed upon revocation of supervised release.^[11]

(footnote added). First, before ordering a term of supervised release after imposing a term of imprisonment on a revocation, a court must determine the maximum term of supervised release authorized. *See* W. Va. Code § 62-12-26(j). Here, the maximum term of supervised release applicable to Mr. Brautigam, both at the time of his original sentencing and the time

¹¹ At the time of Mr. Brautigam's initial offense of conviction and sentence, the supervised release statutory provision regarding a term of supervised release following a revocation sentence of a term of imprisonment was found in West Virginia Code § 62-12-26(i) (eff. 2011). Now this provision is found in West Virginia Code § 62-12-26(j) (eff. 2021). Because the statutory language at issue is substantively identical, and the parties refer to § 62-12-26(j), we refer to the more recent version of the statute.

of his fourth revocation, was a fifty-year term of supervised release. W. Va. Code § 62-12-26(a) (eff. 2011); § 62-12-26(a) (eff. 2021). Then, if the term of imprisonment “is less than the maximum term of supervised release,” the court may impose an additional “term of supervised release after imprisonment.” W. Va. Code § 62-12-26(j). Because Mr. Brautigam’s new twenty-five-year term of imprisonment, imposed pursuant to his fourth revocation, was less than the fifty-year maximum term of supervision authorized in § 62-12-26(a), the statute permitted the circuit court to order an additional term of supervised release to begin after the imprisonment on the revocation. *See* W. Va. Code § 62-12-26(j). The court was, therefore, within its authority to order it. However, the court was still obligated to keep its sanction confined to the time limitations outlined in the statute.¹²

¹² The sentencing order sentenced Mr. Brautigam to “twenty-five (25) years[.]” While the circuit court gave “credit” for Mr. Brautigam’s initial custodial time on the *underlying* offenses, the circuit court was under no statutory obligation to provide this credit, and we do not address this credit here, as the sentence was for “twenty-five (25) years” in the sentencing order on appeal. *See generally* W. Va. Code § 62-12-26. We reject the State’s argument to consider this “credit” as reducing the ordered term of imprisonment on the fourth revocation. Further, in keeping with the assignments of error properly brought before the Court, our review of that part of the sentence is expressly limited to an evaluation of its proportionality.

We now turn to whether the additional term of supervised release exceeded the maximum term allowable by statute.¹³ Subsection (j) commands that this additional term of supervised release, if ordered by the circuit court, “shall not exceed the term of supervised release authorized by this section *less any term of imprisonment that was imposed upon revocation of supervised release.*” W. Va. Code § 62-12-26(j) (emphasis added). “Less any term of imprisonment that was imposed upon revocation of supervised release” by its plain language requires that, when a court calculates the maximum allowable term of supervised release to follow a term of imprisonment on a revocation, the court must account for *any* time that the court imposed as a term of imprisonment on all revocations. Thus, this calculation must subtract both the term of imprisonment on the instant revocation, as well as any previous terms of imprisonment resulting from supervised release revocations. However, the statute does not require the circuit court to subtract any sentence of imprisonment on the underlying offense or offenses. *See State v. Winning*, No. 17-0921, 2018 WL 4944416, at *4 (W. Va. Oct. 12, 2018) (memorandum decision) (rejecting a defendant’s position that he was “entitled to credit for time served” for his ten-year imprisonment sentence on his underlying offense when serving a twenty-year supervised release revocation sentence). This subsection means, and we now hold, to calculate the maximum amount of time a court may order as an additional term of

¹³ We recognize that a circuit court has discretion regarding whether to order an additional term of supervised release and the circuit court is not bound to order the *maximum* additional term. *See* W. Va. Code § 62-12-26(j) (stating that the court “may” order a term of supervised release after imprisonment).

supervised release after ordering a term of imprisonment upon a revocation, a court must first determine the authorized term of supervised release, then subtract *any* revocation term of imprisonment since the defendant's initial term of supervised release began. This calculation must subtract both the term of imprisonment on the instant revocation, as well as any previous terms of imprisonment resulting from supervised release revocations. W. Va. Code § 62-12-26(j) (eff. 2021).

Applying this holding to Mr. Brautigam's sentence of an additional term of supervised release, we find that the circuit court erroneously imposed a sentence outside the timeframe authorized by the statute. As we earlier recognized, West Virginia Code § 62-12-26(a) authorized a fifty-year term of supervised release for Mr. Brautigam. The court imposed four separate terms of imprisonment resulting from his four supervised release revocations, and West Virginia Code § 62-12-26(j) requires the court to subtract those four terms of imprisonment from the fifty-year authorized term of supervised release found in § 62-12-26(a). Instead, the circuit court sentenced him to twenty-five years' imprisonment and an additional term of twenty-five years of supervised release, equaling the maximum authorized term of supervised release. In imposing the latter, however, the circuit court failed to subtract *all* of Mr. Brautigam's prior revocation sentences—particularly the first, second, and third revocation sentences. In other words, the circuit court ignored the statute's requirement that, for Mr. Brautigam, the maximum allowable additional term of supervised release is fifty years, minus any term of imprisonment

imposed upon revocation of supervised release. We therefore vacate and remand the sentencing order to the circuit court for an accurate calculation and resentencing on the additional term of supervised release.

IV.

CONCLUSION

For the reasons stated above, we affirm the constitutionality of Mr. Brautigam's revocation sentence of imprisonment, as it was not disproportionate. However, we vacate and remand the portion of the sentence addressing Mr. Brautigam's term of supervised release for recalculation in accordance with this opinion and resentencing on that issue.

Affirmed, in part, vacated in part, and
remanded.