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OF WEST VIRGINIA

BUNN, Chief Justice, concurring, joined by Justice Trump:

I agree with the majority's conclusion that Petitioner Thomas Valentine's convictions and sentence should be affirmed. However, I write separately because I would have taken this opportunity to modify the constitutional proportionality analysis of a life recidivist sentence, abandoning the problematic *Hoyle*[1] test in favor of implementing a gross disproportionality analysis. Applying a gross disproportionality analysis, I would find Mr. Valentine's life recidivist sentence not grossly disproportionate. Therefore, I concur.[2]

As discussed in the majority opinion, a jury found Mr. Valentine guilty of multiple offenses: (1) conspiracy to manufacture, deliver or possess with intent to manufacture or deliver not less than five grams but fewer than fifty grams of methamphetamine; (2) possession with the intent to deliver methamphetamine; (3) conspiracy to commit a felony controlled substance offense; (4) possession with intent to deliver fentanyl/Tramadol; (5) carrying a concealed firearm by a prohibited person; and

[1] Syl. Pt. 12, *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817 (2019).

[2] I also agree with the majority's opinion regarding Mr. Valentine's first assignment of error challenging the sufficiency of the evidence to support his underlying convictions.

(6) possession of a firearm by a prohibited person. The State then filed a recidivist information based upon a prior 2019 felony conviction for fleeing in a vehicle with reckless indifference for the safety of others and a 2019 felony conviction for strangulation. Following a recidivist trial, a jury found Mr. Valentine was the person found guilty of these prior offenses. The circuit court then sentenced Mr. Valentine for each of the above offenses, including imprisonment for life, based on the West Virgina recidivist statute, for possession of a firearm by a prohibited person—his third qualifying and triggering felony.

On appeal, Mr. Valentine contends that his life recidivist sentence is constitutionally disproportionate under the West Virginia Constitution which expressly requires that sentences must be proportionate: "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.'" Syl. Pt. 8, *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980).[3]

[3] *See* W. Va. Const. art. III, § 5 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offence. No person shall be transported out of, or forced to leave the State for any offence committed within the same; nor shall any person, in any criminal case, be compelled to be a witness against himself, or be twice put in jeopardy of life or liberty for the same offence."). This Court ordinarily limits proportionality reviews 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).

Prior to 2020, the West Virginia recidivist statute provided that when an individual had been convicted of three felonies, that individual "shall be sentenced" to life imprisonment. W. Va. Code § 61-11-18(c) (2000). However, this Court tempered the application of the statute by applying an analysis to ensure that the life sentence was constitutionally proportionate. As discussed more fully below, the Court crafted a violence-focused test to determine whether a recidivist sentence is proportionate. However, application of that test has led to inconsistencies. In 2020, the Legislature amended the recidivist statute to enumerate specific qualifying offenses that would trigger an enhanced sentence. W. Va. Code § 61-11-18(a) (2020). Generally, under the statute, when one has been convicted of three qualifying offenses, the individual is subject to a sentence of life imprisonment. W. Va. Code § 61-11-18(d) (2021).[4]

[4] Because Mr. Valentine committed the act resulting in his triggering conviction on February 10, 2022, we apply the version of West Virginia Code § 61-11-18 in effect at that time of his offense. The recidivist statute provides that,

> [w]hen it is determined, as provided in § 61-11-19 of this code, that such person shall have been twice before convicted in the United States of a crime punishable by imprisonment in a state correctional facility which has the same or substantially similar elements as a qualifying offense, the person shall be sentenced to imprisonment in a state correctional facility for life[.]

W. Va. Code § 61-11-18(d) (2021).

The Court has developed various ways to evaluate the constitutionality of sentences of life imprisonment. In *Wanstreet v. Bordenkircher*, we noted the importance of objective standards in the context of a proportionality analysis: "The utilization of a series of objective standards to determine whether a particular sentence violates our constitutional concept of proportionality is designed to prevent sentencing patterns that merely reflect the personal predilections of individual judges." 166 W. Va. 523, 531, 276 S.E.2d 205, 210 (1981). Furthermore, "[s]uch objective standards also ensure that appellate courts will not inject their personal views as to appropriateness of a given sentence unless the sentence can be shown to have violated the objective criteria of constitutional proportionality." *Id.*, 276 S.E.2d at 210-11.

In examining a life recidivist sentence to determine whether it is constitutionally proportionate, this Court engages in a complex analysis that considers the nature of the prior offenses and the third triggering offense:

> When we analyze a life recidivist sentence under proportionality principles, we are in effect dealing with a punishment that must be viewed from two distinct vantage points: first, the nature of the third offense and, second, the nature of the other convictions that support the recidivist sentence. This duality is occasioned by the fact that the punishment for the third felony conviction is an automatic life sentence regardless of the nature of the penalty for the underlying third felony.

Wanstreet, 166 W. Va. at 533, 276 S.E.2d at 212. When evaluating recidivist life sentences, the "sole emphasis can[not] be placed on the character of the final felony which triggers the life recidivist sentence" because this penalty enhancement is "designed to enhance the

penalty for persons with repeated felony convictions, i.e., the habitual offenders." *Id.* at 533-34, 276 S.E.2d at 212. However, we place particular focus on the third felony, as it "is entitled to more scrutiny than the preceding felony convictions since it provides the ultimate nexus to the sentence." *Id.* at 534, 276 S.E.2d at 212. Accordingly, the Court held that

> [i]n 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.[5]

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[5] The Court has employed a two-part test utilizing both subjective and objective factors to evaluate constitutional proportionality for sentences that are not life recidivist sentences, but which are not subject to a statutory maximum:

> 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):
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> > 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.

Shortly after issuing the *Wanstreet* factors for proportionality, this Court crafted a proportionality test specific to life recidivist sentences and added a violence component to the analysis:

> The appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5, will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to the other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute.

Syl. Pt. 7, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981). More recently, but prior to the Legislature's amendment of the recidivist statute, this Court explained the constitutional proportionality analysis of a life recidivist sentence as follows:

> For purposes of a life recidivist conviction under West Virginia Code § 61-11-18(c), two of the three felony convictions considered must have involved either (1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results. If this threshold is not met, a life recidivist conviction is an unconstitutionally disproportionate punishment under Article III, Section 5 of the West Virginia Constitution.

Syl. Pt. 12, *Hoyle*, 242 W. Va. 599, 836 S.E.2d 817.

These violence-focused proportionality tests, including *Hoyle*, have proven difficult to apply, and often lead to unpredictable and inconsistent results. The *Hoyle* test's

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

focus on violence alone does not fully capture the nature and purpose of recidivist sentences. As the United States Supreme Court has explained, recidivist statutes focus on deterrence and protection:

> [t]he purpose of a recidivist statute . . . is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society or an extended period of time.

Rummel v. Estelle, 445 U.S. 263, 284 (1980). This Court has likewise stated that the main purpose of our life recidivist statute is to "deter felony offenders, meaning persons who have been convicted and sentenced previously on a penitentiary offense, from committing subsequent felony offenses. The statute is directed at persons who persist in criminality after having been convicted and sentenced once or twice, as the case may be, on a penitentiary offense." Syl. Pt. 3, in part, *State v. Jones*, 187 W. Va. 600, 420 S.E.2d 736 (1992).

Deterrence need not only focus on violence. As other courts have found, "[s]ociety's interest in deterring criminal conduct or punishing criminals is not always determined by the presence or absence of violence." *People v. Ingram*, 48 Cal. Rptr. 2d 256, 268 (Cal. App. Ct. 1995), *disapproved on other grounds by People v. Dotson*, 941 P.2d 56 (Cal. 1997). *See also Rummel*, 445 U.S. at 275 ("But the presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal."). West Virginia's recently amended recidivist

statute enumerates many examples of crimes that, while technically non-violent, have the potential to result in great harm to individuals and society as a whole.[6] The statute now includes the following crimes, among others, as qualifying offenses: (1) felony embezzlement; (2) falsifying accounts; and (3) felony obtaining money, property[,] and services by false pretenses; disposing of property to defraud creditors.[7] *See* W. Va. Code § 61-11-18 (2026). As a general matter, we give deference to the Legislature's authority to set the sentence for a particular crime, with the caveat that the judiciary has the authority to determine whether a particular sentence is unconstitutional. *See State v. Johnson*, 709 So. 2d 672, 676 (La. 1998) ("[I]t is apparent that the Legislature's determination of an appropriate minimum sentence should be afforded great deference by the judiciary. This does not mean, however, that the judiciary is without authority to pronounce a constitutional sentence if it determines that a mandatory minimum sentence is excessive in a particular case.").

While the *Hoyle* test includes an alternative justification for a life recidivist sentence that extends past violence when evaluating proportionality, instructing courts that

[6] Abandoning a violence-focused test is especially important now that there is a recidivist statute that specifically enumerates qualifying offenses rather than a statute that sweeps in all felonies together.

[7] *See also* W. Va. Code § 61-11-18 (2026) (listing the following offenses as qualifying offenses: felony embezzlement by misuse of power of attorney or other fiduciary relationship; felony embezzlement by carrier or other person; and felony attempted or fraudulent use, forgery, traffic of credit cards, possession and transfer of credit cards and credit card making equipment, false or fraudulent use of telephonic services).

they may consider the "substantial impact upon the victim such that harm results"—in addition to threat of violence or actual violence, this alternative typically does not assist courts in conducting the required constitutional analysis because if a crime has been committed, it generally results in some form of harm.[8] Moreover, following *Hoyle*, despite the included language of substantial impact, the Court has reiterated its reliance on a violence requirement. For example, in *State v. Dunmire*, the Court stated that "a sentence cannot be enhanced unless the triggering (most recent) offense and at least one of the predicate offenses involved 'actual or threatened' violence." No. 19-1086, 2020 WL 7391153, at *7 (W. Va. Dec. 16, 2020) (memorandum decision).[9]

In practice, the test has been difficult to apply and led to unpredictable outcomes regarding the proportionality analysis. One example of such varied results is apparent in the Court's consideration of whether breaking and entering is a crime of

[8] *But see Hoyle*, 242 W. Va. at 615-16, 836 S.E.2d at 833-34 (finding that second offense failure to register as a sex offender did not have a "substantial impact imposed on a victim" because the victim was the State and that "depriving the State of accurate, updated contact information" was important, "the lack of that information [wa]s not so substantial as to be comparable to actual or threatened violence.").

[9] *See also State v. Rich*, No. 21-0638, 2022 WL 17444786, at *2 (W. Va. Dec. 6, 2022) (memorandum decision) ("A court evaluates the felonies for violence in determining whether the resultant life recidivist sentence is unconstitutionally disproportionate."); *State v. Flanders*, No. 19-0566, 2020 WL 2912033, at *5 (W. Va. June 3, 2020) (memorandum decision) ("This Court has determined that a sentence cannot be enhanced unless the triggering (most recent) offense and at least one of the underlying predicate offenses involved 'actual or threatened' violence. Thus, whether petitioner's life sentence is constitutional turns on whether his felony convictions are 'qualifying convictions' such that at least one predicate offense involved violence or a threat of violence.").

violence. In *State v. Vance*, the Court stated that it "believe[d] the crime of breaking and entering carries the potentiality of violence and danger to life as well as to property." 164 W. Va. 216, 233, 262 S.E.2d 423, 432 (1980). Then, a few years later, the Court stated that, for purpose of the life recidivist proportionality analysis, "[n]either delivery of a controlled substance nor breaking and entering is per se a crime of violence." *State ex rel. Boso v. Hedrick*, 182 W. Va. 701, 709, 391 S.E.2d 614, 622 (1990) (per curiam). Instead, the Court examined the specific facts of the triggering and underlying crimes to determine whether it was violent: "Furthermore, the night-time burglary was committed in an unoccupied dwelling. There is nothing in the record to indicate that any weapons were used in these crimes or that there was a threat of violence to any person." *Id*.

Moreover, in *State v. Housden*, the Court concluded that the petitioner's "convictions for burglary and grand larceny were crimes that *by their very nature* involved the threat of harm or violence to innocent persons." 184 W. Va. 171, 175, 399 S.E.2d 882, 886 (1990) (emphasis added). However, the Court, in a different case, considering grand larceny, looked to the facts of the underlying crime and found that the habeas court did not err in finding a life recidivist sentence constitutionally disproportionate. *Terry v. Lambert*, No. 17-0788, 2018 WL 4909890, at *3 (W. Va. Oct. 10, 2018) (memorandum decision).[10]

[10] In *Terry*, the Court specifically identified the lack of a record when affirming the habeas court because "[c]ritically, other than testimony that respondent's grand larceny conviction stemmed from his stealing of tools from an unoccupied construction site at night, the record was devoid of evidence as to whether respondent's commission of the prior crimes was violent in nature or in actuality." No. 17-0788, 2018 WL 4909890, at *3. *See also State v. Blackburn*, No. 19-0962, 2021 WL 1232088, at *3 (W. Va. Mar. 2, 2021)

These cases demonstrate the difficulty of applying a violence-based proportionality test. The Court has at times looked only at the crime itself to determine whether the offense was inherently violent, and at other times it has looked beyond the crime of conviction to the specific facts of the case before it.

Furthermore, in the context of evaluating life recidivist sentences when the triggering offense is a drug crime, the Court's use of a violence-based test has resulted in patently inconsistent findings regarding proportionality. In considering a conviction resulting from delivery of a controlled substance—heroin, the Court reasoned that "due to the nature of heroin itself, heroin trafficking clearly warrants application of the recidivist statute." *State v. Norwood*, 242 W. Va. 149, 158, 832 S.E.2d 75, 84 (2019). It further concluded that "[t]he delivery and ultimate use of heroin carries with it an inherent risk of violence to a person." *Id*. However, in the same term, the Court reversed a defendant's life recidivist sentence where the third felony was delivery of oxycodone because it was not a crime of violence, finding that "the facts surrounding the final triggering offense . . .—the delivery of four [o]xycodone pills—did not involve any actual or threatened violence," and further explaining that "[t]here was no testimony or evidence, whatsoever, to support any type of violence or even perceived violence surrounding the controlled buys of [o]xycodone." *State v. Lane*, 241 W. Va. 532, 539, 826 S.E.2d 657, 664 (2019). As I have previously stated, "[i]n examining the proportionality of the individual petitioners'

(memorandum decision) (utilizing the specific facts of the triggering crime to find it involved the threat of harm or violence).

sentences, this Court treated the crimes of delivering heroin and delivering oxycodone differently for the purposes of the recidivist statute in effect at the time." *Norwood v. Frame*, No. 23-79, 2024 WL 3721358, at *4 (W. Va. Aug. 7, 2024) (memorandum decision) (Bunn, J., dissenting).

While I believe that violence-focused tests, including *Hoyle*, are no longer an appropriate mechanism for evaluating sentences under the amended recidivist statute, it is clear that the Court must employ some analysis to ensure that sentences are constitutionally proportionate. As explained below, I believe the appropriate test is whether the sentence is grossly disproportionate.

The United States Supreme Court addressed the proportionality principle in a series of cases beginning with *Rummel* in 1980. In *Rummel*, the Supreme Court held that a three-time offender's sentence to life in prison with the possibility of parole did not violate the Eighth Amendment. 445 U.S. at 284-285. The Supreme Court noted that it had "on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." *Id*. at 271. Once again, the Supreme Court examined proportionality principles three years later in *Solem v. Helm*, 463 U.S. 277 (1983). The *Solem* Court reiterated the Eighth Amendment's ban on cruel and unusual punishments, including "sentences that are disproportionate to the crime committed." *Id*. at 284. The Court identified three factors that may be relevant to a determination of whether a sentence is so disproportionate that it violates the Eighth Amendment: "(i) the gravity of

the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292.

Several years following the Supreme Court's decision in *Solem*, it again considered a constitutional proportionality issue but, in effect, narrowed the consideration. In *Harmelin v. Michigan*, the Supreme Court rejected a defendant's claim that his sentence was so disproportionate that it violated the Eighth Amendment. 501 U.S. 957, 996-997 (1991). However, a majority could not agree on why his proportionality argument failed. Justice Kennedy recognized that "[t]he Eighth Amendment proportionality principle also applies to noncapital sentences." *Id.* at 997 (Kennedy, J., concurring in part and concurring in judgment).[11] He then identified four principles of proportionality review: (1) "the primacy of the legislature," (2) "the variety of legitimate penological schemes," (3) "the nature of our federal system," and (4) "the requirement that proportionality review be guided by objective factors." *Id.* at 1001. Each of these principles "inform the final one" as to whether the sentence is proportionate: "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* (citing *Solem*, 463 U.S. at 288).

[11] *Harmelin* was a plurality decision. However, Justice Kennedy's concurring opinion is considered the controlling opinion because it concurred in the judgment on the narrowest grounds. *See Close v. People*, 48 P.3d 528, 535 (Colo. 2002), *abrogated on other grounds by Wells-Yates v. People*, 454 P.3d 191 (Colo. 2019) (noting that Justice Kennedy's concurring opinion is widely viewed as "the rule of *Harmelin*").

Justice Kennedy reiterated the *Solem* Court's proportionality test but condensed it to a two-step approach in an effort to consider whether the sentence was grossly disproportionate. The first step instructed courts to consider (1) the gravity or seriousness of the offense and (2) the harshness of the penalty. Then, in step two, a court may compare the challenged sentence to sentences for other crimes in the same jurisdiction and sentences for the same crime in other jurisdictions. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in judgment). However, Justice Kennedy clarified that this approach is not "a rigid" test requiring consideration of step two in every case; rather, step two's comparative analysis within and between jurisdictions is appropriate "only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id*. Consequently, the purpose of any comparative analysis of sentences in step two "is to validate an initial judgment" in step one "that a sentence is grossly disproportionate to a crime." *Id*.

Several other state courts have adopted similar gross disproportionality tests under their respective state constitutions. For example, the Supreme Judicial Court of Maine has adopted a gross disproportionality analysis. Like the West Virginia Constitution, the Maine Constitution requires that "all penalties and punishments shall be proportioned to the offense[.]" Me. Const. art. I, § 9. While Maine "conduct[s] a proportionality review that is broader than the proportionality review that derives from the Eighth Amendment's prohibition against cruel and unusual punishment," it still utilizes a gross disproportionality

analysis. *State v. Stanislaw*, 65 A.3d 1242, 1251 (Me. 2013). Specifically, Maine courts use a two-part test: first, the courts "compare the gravity of the offense [with] the severity of the sentence." *Id*. (quotations and citation omitted) (alteration in original). Then, "if this comparison results in an inference of gross disproportionality [the courts] then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction." *Id*. (quotations and citation omitted).[12]

The gross disproportionality test outlined by Justice Kennedy and the similar tests adopted by several of our sister states emphasize the seriousness of the offense and the harm caused, rather than myopically focusing on violence. As demonstrated by our own case law, the violence-focused proportionality tests have led to inconsistent outcomes and unpredictably. Consequently, I would adopt a version of the gross disproportionality test.[13]

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[12] *See also State v. Lobato*, 603 So. 2d 739, 752 (La. 1992) (finding that a sentence was not constitutionally grossly disproportionate "[g]iven the seriousness of the offense, the volume of narcotics involved and the value thereof"); *Wilson v. State*, 830 So. 2d 765, 778 (Ala. Crim. App. 2001) (discussing the Alabama Appellate Court's adoption of a gross disproportionality test); *People v. Kennedy*, 580 P.3d 1167, 1170-71 (Colo. 2025) (discussing Colorado's gross disproportionality test, stating that a court first "compares the gravity or seriousness of the offense to the harshness of the penalty" and "if that comparison *does* give rise to an inference of gross disproportionality, the court conducts a comparative analysis between the defendant's sentence and sentences for other crimes in the same jurisdiction and sentences for the same crime in other jurisdictions").

[13] Moreover, a gross disproportionality test is more akin to our current proportionality analysis for sentences that are not life recidivist sentences but which are not subject to a statutory maximum, which utilizes a similar two-part test rather than a violence focused test. *See Cooper*, 172 W. Va. at 272, 304 S.E.2d at 856-57 ("However, we need not decide this case on disparity principles because this sentence shocks our sense of justice and is on its face grossly disproportionate to [the defendant's] crime, age, and prior record.").

In applying any version of the gross disproportionality analysis to the facts of this case, Mr. Valentine's triggering offense of prohibited person in possession of a firearm and his predicate offenses of strangulation and fleeing in a vehicle with reckless disregard satisfy the test. Here, the triggering and predicate crimes each are enumerated qualifying offenses pursuant to the 2021 recidivist statute. *See* W. Va. Code § 61-11-18(d) (2021). Considering the three offenses together and, the gravity of the offenses, against the life-recidivist sentence, creates no inference of gross-disproportionality. I am authorized to state that Justice Trump joins me in this concurrence.

For these reasons, I respectfully concur.