**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**No. 23-189**

**STATE OF WEST VIRGINIA,**

**Plaintiff Below/Respondent,**

**v.**

**DELIEZHA DAVONTE GRAVELY,**

**Defendant Below/Petitioner.**

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**Appeal from the Circuit Court of Mercer County**
**Case Nos. CC-28-2022-F-169; CC-28-2022-F-186**

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# PETITIONER'S REPLY BRIEF

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## ASSIGNMENTS OF ERROR

1. The circuit court erred in denying the Petitioner's motion for judgment of acquittal or new trial by ruling that the predicate felony of "Conspiracy to Commit Robbery – First Degree" for the charged offenses of W. Va. Code §§ 61-7-7(b) and 61-7-7(e) was a felony crime of violence against the person of another.

2. The Circuit Court further erred in denying Defendant's Motion for judgment of acquittal for lack of sufficient evidence.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument pursuant under Rule 18(a) is not necessary because the dispositive issues have been authoritatively decided and dictate that Petitioner is entitled to relief.

Petitioner also asserts that this matter should be set for Rule 19(a) argument because this case involves assignments of error in the application of settled law and a claim of insufficient evidence.

## ARGUMENT

In its Response, the State ignores this Court's holding in *State v. Mills*. *See* 243 W. Va. 328, 844 S.E.2d 99 (2020). In *Mills,* this Court held that W. Va. Code § 61-7-7(b)(1) contained (1) an elements clause which prohibits firearms possession by felons with a prior conviction of a felony crime of violence against the person and (2) an enumerated offense clause which prohibits possession of firearms by those previously convicted of a felony sexual offense. *Id*., 844 S.E.2d 99, 108.

This Court has also held that the categorical approach must be applied to the elements clause of W. Va. Code § 61-7-7(b)(1) to determine whether a predicate offense is a crime of violence against the person of another. The categorical approach works here because the elements clause is not an unconstitutionally vague residual clause with "catch-all" language that "asks

whether the [prior] crime 'involves conduct' that presents too much risk of physical injury." *Mills*, 844 S.E.2d at 107, quoting *United States v. Davis*, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019).

The State argues that the categorical approach requires courts to determine if an element of an offense "causes or risks causing serious harm to others." Such an analysis turns the elements clause of § 61-7-7(b)(1) into a residual clause. In *Mills*, this Court applied the categorical approach by confining itself to "the fact of conviction and the elements required for conviction." 844 S.E.2d 99, 108, (citations omitted). The only elements required to convict an offender of Conspiracy, W. Va. Code § 61-10-31, are an agreement to commit a crime in the future, and a step towards that crime by a party to that agreement. A perpetrator can hypothetically be guilty of conspiracy by an agreement alone. Because the only element required for conviction by any offender is an agreement to commit a crime, Conspiracy or Conspiracy to Commit Robbery is not a crime of violence.

The State also argues that this Court should look to other offenses or code sections in the West Virginia Code to determine the definition of a crime of violence against the person. However, those other code sections are not applicable here. Those code sections enumerate the offenses which constitute crimes of violence according to each particular section. This Court has held that W. Va. Code § 61-7-7(b)(1) only enumerates sexual offenses as offenses that will prohibit someone from possessing a firearm. *See Mills*, 844 S.E.2d 99. The term "felony crime of violence against the person of another" in W. Va. Code § 61-7-7(b)(1) is an elements clause. The fact that other code sections enumerate Robbery, W. Va. Code § 61-2-12, as a crime of violence is irrelevant to this case because the elements clause requires use of the conduct-neutral categorical approach.

The State further argues that Conspiracy to Commit Robbery is an inchoate offense that cannot be analyzed separately from Robbery. Even if Conspiracy in this case cannot be looked at

separately from its connected or underlying crime of Robbery, the categorical approach requires a finding that Conspiracy to Commit Robbery is not a violent offense. As stated above, the minimum action required to meet the statutory elements of Conspiracy to Commit Robbery is an agreement to commit Robbery in the future. No violence against another person is required to be found guilty.

The State also cites to certain cases where other courts have found Conspiracy to Commit Robbery to be a crime of violence. However, each of these cases analyzes a different issue than the instant issue. This case is about whether using the categorical approach, the crime of Conspiracy to Commit Robbery fits the elements clause of W. Va. Code § 61-7-7(b)(1).

Finally, the State points to circumstantial evidence that does not establish that Mr. Gravely was in possession of an operable firearm beyond a reasonable doubt.

## I. Conspiracy or Conspiracy to Commit Robbery, W. Va. Code § 61-10-31, is not a crime of violence for purposes of W. Va. Code § 61-7-7(b)(1).

### A. The elements clause of 61-7-7(b)(1) requires application of the categorical approach, where courts look only to the elements required to convict the predicate offense.

In *State v. Mills*, this Court determined that W. Va. Code § 61-7-7(b)(1) was not void for vagueness under the Due Process Clauses in the United States and West Virginia Constitutions. Syl. Pt. 10, 844 S.E.2d 99. To come to that determination, the Court recognized the Supreme Court of the United States's opinions holding residual clauses unconstitutionally vague. *See Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)*; Sessions v. Dimaya*, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018); *United States v. Davis*, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019).

These three opinions recognize that certain statutes define "crimes of violence" through (1) an elements clause—which categorizes crimes by the elements required for conviction, (2) an enumerated crimes clause—which specifically categorizes violent crimes by listing them, and/or

(3) a residual clause—which categorizes violent crimes with catch-all language stating a court should consider the risk of physical injury produced by a particular offense. See *Mills*, 844 S.E.2d 99, 106. The cases also generally find that residual clauses are unconstitutionally vague when containing language that "'asks whether the [prior] crime involves conduct that presents too much risk of physical injury . . ." *Id.*, 844 S.E.2d at 107, quoting *Johnson*, 135 S. Ct. at 2557.[1]

Importantly, this Court quoted the elements clauses at issue in *Johnson*, *Dimaya*, and *Davis*, as stating that a "crime of violence" is "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . ." *Id.*

W. Va. Code § 61-7-7(b) states

> ". . . any person: (1) *Who has been convicted in this state or any other jurisdiction of a felony crime of violence against the person of another* or **of a felony sexual offense** . . . (2) . . . and possesses a firearm as such as defined in [W. Va. Code § 61-7-2] shall be guilty of a felony . . .

In *Mills*, this Court determined that the clause above in italics—relating to violent offenses—was an elements clause, and the clause bolded above—relating to sexual offenses—was an enumerated crimes clause. Otherwise, W. Va. Code § 61-7-7(b)(1) would be unconstitutionally vague. "Conversely, a statute that requires an analysis of whether the prior crime '*has as an*

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[1] As an example, the text of the statute in question in the *Johnson* case defined felony crime of violence as

> [A]ny crime punishable by imprisonment for a term exceeding one year ... that—
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another [**the elements clause]**; or
> (ii) is burglary, arson, or extortion, involves use of explosives, **[the enumerated crimes clause]** or otherwise involves conduct that presents a serious potential risk of physical injury to another **[the residual clause]**.

18 U.S.C. § 924(e)(2)(B) (notations added by Petitioner).

The statutes in *Dimaya* and *Davis*, differ in form, but are substantively similar to the above. *See Mills*, 844 S.E.2d at 106-107

*element,*' a violent act, is not deemed unconstitutionally vague. *Mills*, 844 S.E.2d at 107, quoting *Johnson*, 135 S. Ct. at 2557.

The State remarks that 61-7-7 does not define a "felony crime of violence" and that this Court should therefore look to other statutes in the West Virginia Code as guidance in defining that term. However, this Court has determined that looking at other statutes is unnecessary because the felony crime of violence described in 61-7-7(b)(1) is an unambiguous elements clause. *See Mills*, above. And "[w]here the language of a statute is plain and unambiguous, there is no basis for application of rules of statutory construction; but courts must apply the statute according to the legislative intent plainly expressed therein." Syl. Pt. 7, *Mills*, 844 S.E.2d 99 (citation omitted). In other words, "[w]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. Pt 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970). Courts must "look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995).

"Undefined words used in a legislative enactment will be given their common, ordinary and accepted meaning." Syl. Pt. 4, *State v. Butler*, 239 W. Va. 168, 799 S.E.2d 718 (2017) quoting in part, Syl. Pt. 6, *State ex rel. Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171 (1984).

The common meaning of the term "violence" is the deliberate use of physical force:

> The primary definition of "violence" in the dictionary *requires physical force*. Black's Law Dictionary defines "violence" as "[t]he use of physical force, [usually] accompanied by fury, vehemence, or outrage; [especially] physical force unlawfully exercised with the intent to harm." Black's Law Dictionary (10th ed. 2014) (emphasis added). The Oxford English Dictionary similarly defines "violence" as "[t]he deliberate exercise of physical force against a person, property, etc.; physically violent behaviour or treatment;" and "the

> unlawful exercise of physical force, intimidation by the exhibition of such force." Oxford English Dictionary (3d ed. 2014) (emphasis added).

*United States v. Acevedo-De La Cruz*, 844 F. 3d 1147, 1151 (9th Cir. 2017) (emphasis added).

Put simply, the elements clause in W. Va. Code § 61-7-7(b)(1) should be looked at as identical to the elements clause referred to in *Johnson*, *Davis*, and *Dimaya*. *See Mills*, above.

This court should determine if Conspiracy to Commit Robbery has, as an element, a violent act. *Mills*, 844 S.E.2d at 107.

The State argues that this Court should not look to the cases cited by Petitioner in his brief, which clearly support the idea that Conspiracy to Commit Robbery is not a crime of violence because it can be accomplished absent a violent act. However, *Mills* clearly shows that this Court should look to those cases, as they accurately apply the categorical approach as it should be applied to the elements clause of W. Va. Code § 61-7-7(b)(1).

**i. The only elements required to commit Conspiracy to Commit Robbery are an agreement to commit a robbery at a future time. Because no violent act is required to be convicted of Conspiracy to Commit Robbery, it is not a crime of violence against the person for purposes of 61-7-7(b)(1).**

Petitioner has already submitted several examples showing that Conspiracy to Commit Robbery cannot be a crime of violence if analyzed under the categorical approach. However, a hypothetical from Justice Gorsuch's opinion in *United States v. Taylor* further illustrates Petitioner's point:

> Suppose Adam tells a friend that he is planning to rob a particular store on a particular date. He then sets about researching the business's security measures, layout, and the time of day when its cash registers are at their fullest. He buys a ski mask, plots his escape route, and recruits his brother to drive the getaway car.

> Finally, he drafts a note— "Your money or your life"—that he plans to pass to the cashier. The note is a bluff, but Adam hopes its implication that he is armed and dangerous will elicit a compliant response. When the day finally comes and Adam crosses the threshold into the store, the police immediately arrest him. It turns out Adam's friend tipped them off.
>
> There is little question the government could win a lawful conviction against Adam for attempted Hobbs Act robbery. After all, he intended to take property against the cashier's will by threat of force, and his actions constituted a substantial step toward that goal. *At the same time, this example helps show why attempted Hobbs Act robbery does not qualify as a crime of violence under the elements clause*.
>
> Adam did not "use" physical force. He did not "attempt" to use such force—his note was a bluff and never delivered. And he never even got to the point of threatening the use of force against anyone or anything. He may have intended and attempted to do just that, but he failed. Simply put, no element of attempted Hobbs Act robbery requires proof that the defendant used, attempted to use, or threatened to use force.

142 S. Ct. 2015, 2021 (2022) (spacing added for clarity) (emphasis added).

In *Taylor*, the Supreme Court of the United States determined that Attempt to Commit Hobbs Act Robbery was not a crime of violence after applying the categorical approach. The fact that Attempt to Commit Hobbs Act Robbery, which requires more action than a simple agreement does not qualify as a crime of violence after applying the categorical approach should be enough to determine that Conspiracy to Commit Robbery is not a crime of violence.

However, one can easily take Justice Gorsuch's example above and apply them to this case. Take Adam and his brother and place them in Bluefield, West Virginia. Assume that the actions described above occur within the city limits of Bluefield. Suppose that upon his arrest by the Bluefield Police Department, Adam, in hopes of securing a better deal for himself, "flips" on his brother. At this point, the police have enough evidence to arrest and potentially convict Adam's brother of Conspiracy to Commit Robbery under W. Va. Code § 61-10-31. *See State v. Less*, 170

W. Va. 259, 294 S.E.2d 62 (1981). Like Adam, Adam's brother has not committed a violent act. All he has done is agree to drive the getaway car after the robbery.[2]

**B. The State argues that 61-7-7(b)(1) should be analyzed like an unconstitutionally vague residual clause, which would require an approach that examines the possible risk of physical injury to determine if an offense is a crime of violence.**

The State asks this Court to hide an unconstitutionally vague residual clause behind the elements clause of W. Va. Code § 61-7-7(b)(1). Specifically, the State asserts that the Court must look to the elements of an offense and "determine whether an element causes or risks causing serious harm to others." Resp. Br. at 9.

This adds an unnecessary step to the categorical approach. The categorical approach requires courts to look only at the fact of conviction and elements required to convict. And elements are simply the "constituent parts" of a crime's legal definition—the things the "prosecution must prove to sustain a conviction." *Mathis v. United States*, 579 U.S. 500 (2016), quoting Black's Law Dictionary 634 (10th ed. 2014).

The State's suggested approach would require courts to go beyond the elements of a crime and look at the risk of physical injury to others. This would effectively make the elements clause of 61-7-7(b)(1) a residual clause. As stated above, this would make 61-7-7(b)(1) unconstitutionally vague. *See* above; *see Mills*, 844 S.E.2d 99.

**C. The State argues that Conspiracy is an inchoate crime that cannot be separated from the accompanying crime of Robbery in this case. Even if true, the categorical approach as applied above shows that Conspiracy to Commit Robbery is not a crime of violence against the person.**

The State also argues that Conspiracy is an inchoate offense that cannot be divorced from its underlying offense, in this case Robbery. Even if this is true, the application of the categorical

[2] The hypothetical above does not state whether Adam's brother actually showed up for the robbery or was Adam's transport to the robbery. It just states he was recruited to drive the getaway car.

approach to Conspiracy to Commit Robbery as described above clearly shows that Conspiracy to Commit Robbery is not a crime of violence.

The only elements necessary to prove Conspiracy to Commit Robbery are an agreement to commit a robbery and a substantial step by a conspirator. No act of violence by any individual is necessary to commit this offense, regardless of whatever the final object of the offense would be.

### D. The State cites to authority that analyzes crimes of violence in a different context than what is required for this case.

#### i. The State asks this Court to use enumerated crimes clauses from other statutes to determine a "felony crime of violence against the person." However, this Court has already stated that that term is an elements clause and not an enumerated crimes clause.

The State cites to other code sections of the West Virginia Code, stating that this Court should look to these statutes to define the term "felony crime of violence." This Court has already determined that courts should apply the categorical approach to the elements clause of 61-7-7(b)(1) to determine if a crime is a crime of violence. *See Mills*, 844 S.E.2d 99.

The statutes referred to in the State's brief do not contain elements clauses. For example, W. Va. Code § 61-11-8A(b)(2) defines "for purposes of this section. . . 'felony crime of violence against the person'" by enumerating the offenses set forth in certain sections of the West Virginia Code. W. Va. Code § 61-11-18(a) enumerates offenses that will trigger West Virginia's Recidivist Statute. W. Va. Code § 61-11-26, like 61-11-8A, defines "for purposes of this section . . . 'felony crime of violence against the person'" by enumerating the offenses set forth in certain sections of the West Virginia Code.

W. Va. Code § 61-7-7(b)(1)'s enumerated crimes clause does not name Conspiracy to Commit Robbery or Robbery. It only enumerates sexual offenses. The Court should therefore only look to the elements clause to determine a crime of violence against the person. The fact that a crime might be a crime of violence against the person for purposes of 61-7-7(b)(1) and not for

purposes of these other statutes should not matter. The legislature chose to draft 61-7-7(b)(1) with an elements clause regarding felony crimes of violence and chose to enumerate felony crimes of violence in other statutes.

The code sections cited by the State highlight these discrepancies. 61-11-26 lists a range of applicable felonies that are enumerated as felony crimes of violence against the person, including child neglect charges in 61-8D-1, et seq., and offenses involving explosives in 61-3E-1, et seq., among others. 61-11-8A specifically enumerates four code sections as containing felony crimes of violence against the person: (1) Murder [§ 61-2-1], (2) Malicious or Unlawful Assault [§ 61-2-9], (3) Malicious or Unlawful Assault of a Government Employee [W. Va. Code § 61-2-10b], and (4) Robbery [§ 61-2-12]. No other crimes are listed as crimes of violence against the person for purposes of 61-11-8A.

So, for example, an offender who has committed "Illegal Possession of Explosive Material" under W. Va. Code § 61-3E-3 is guilty of a felony crime of violence for purposes of 61-11-26. But an offender who solicits another to illegally possess an explosive device is not guilty of 61-11-8A because that crime does not fall within the enumerated crimes of violence for purposes of 61-11-8A.

For purposes of 61-7-7(b)(1), courts should not look to other statutes to define the term "felony crime of violence." Courts should look at that term as an elements clause and apply the categorical approach as this Court held in *State v. Mills*. *See* 844 S.E.2d 99.

**ii. The State refers to cases that do not analyze crimes of violence in the proper context of this matter.**

As has been repeated throughout this Reply and in Petitioner's Brief, this case concerns the application of the categorical approach to the elements clause of 61-7-7(b)(1). The cases referred to by the State involve a myriad of other issues.

In *Clary v. Warden*, the court was considering an offender's petition to amend the terms of his restitution. The court did not address the issue but commented in dicta that it was "apparent" that the offender was "not entitled to relief" because eight of the nine crimes he had been convicted of, like Hobbs Act Robbery absent conspiracy, were crimes of violence under an elements clause. *See* Case No. 1:20-cv-00440 2023 U.S. Dist. LEXIS 175620 at 15 (S.D. W.Va. Aug. 23, 2023).

*United States v. Brown* involved a petitioner challenging a court's finding that he was a career offender under the Federal Sentencing Guidelines. CR 5:16-97-DCR-CJS, 2019 U.S. Dist. LEXIS 171295 (E.D. Ky. Sept. 11, 2019). Generally speaking, application of the residual clause in the Sentencing Guidelines is not subject to the same vagueness challenge raised in the *Johnson/Dimaya/Davis* trilogy and acknowledged by *Mills*. *See* above; *also see Beckles v. United States*, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017). Furthermore, the provisions at issue in *Brown* enumerated "conspiring" to commit violent offenses as also violent. *Brown*, 2019 U.S. Dist. LEXIS 175620 at 16. 61-7-7(b)(1) does not enumerate conspiracy.

The State finally argues that "West Virginia interprets 'crime of violence' more broadly than it is used in federal statutes." Resp. Br. at 11. This argument ignores the fact that West Virginia itself interprets "crime of violence" differently in separate code sections. *See* W. Va. Code §§ 61-11-8A and 61-11-26. The State also points to certain cases that address application of the recidivist statute, but that argument fails because those cases involve the determination of a sentence, not whether a crime of violence has been properly charged. Resp. Br. at 11.

The State's arguments all fail because they ignore the analysis provided by this Court in *Mills*: apply the categorical approach to the elements clause of W. Va. Code §61-7-7(b)(1). Application of the categorical approach clearly demonstrates that Conspiracy to Commit Robbery is not a crime of violence against the person of another.

## II. The State did not present adequate evidence to prove that Mr. Gravely possessed a "firearm" as defined in W. Va. Code § 61-7-2.

The State ignores the plain text of W. Va. Code § 61-7-2(7) which defines a firearm as a weapon that "will" fire. Therefore, the plain text of 61-7-2(7) states that a weapon that "will not" fire is not a firearm for purposes of W. Va. Code §61-7-7.

The State then points to circumstantial evidence provided by the State at trial. But as stated in Petitioner's brief, this evidence does not establish beyond a reasonable doubt that the alleged handgun was a handgun that would have fired at the time of Mr. Gravely's arrest.

## CONCLUSION

For the above reasons, the Petitioner, Deliezha Gravely, respectfully asks this Court to reverse the Circuit Court decision and grant any other relief deemed just and appropriate.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I, Ruperto Y. Dumapit, do hereby certify on the 30th day of October 2023, pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure, I e-filed the foregoing Petitioner's Brief and a true copy was served upon the following Counsel:

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