IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2025 Term

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No. 23-189

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FILED

June 6, 2025

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C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

v.

DELIEZHA DAVONTE GRAVELY,
Defendant Below, Petitioner.

Appeal from the Circuit Court of Mercer County
The Honorable William J. Sadler, Judge
Case Nos. CC-28-2022-F-169 & CC-28-2022-F-186

REVERSED, IN PART, AND REMANDED

Submitted: April 9, 2025
Filed: June 6, 2025

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JUSTICE BUNN delivered the Opinion of the Court.

JUSTICE ARMSTEAD concurs in part and dissents in part and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus point 1, *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817 (2019) (quoting Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)).

2. "In order for the State to prove a conspiracy under [West Virginia Code §] 61-10-31(1), it must show that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy." Syllabus point 2, *State v. Less*, 170 W. Va. 259, 294 S.E.2d 62 (1981).

3. When considering whether a defendant's predicate offense for a violation of West Virginia Code § 61-7-7(b) is a "felony crime of violence against the person of another," a court must examine the statutory elements of the predicate offense and determine whether an element requires a violent act against another person. The court may not consider the specific conduct of the defendant in committing the predicate offense.

4. A conspiracy conviction under West Virginia's general conspiracy statute, West Virginia Code § 61-10-31, is not a "felony crime of violence against the person of another" for the purposes of West Virginia Code § 61-7-7(b)(1) (eff. 2016).

BUNN, Justice:

Petitioner Deliezha Davonte Gravely appeals the Circuit Court of Mercer County's March 19, 2023 order sentencing him to imprisonment relating to his felony convictions of unlawful possession of a firearm by a prohibited person and carrying a concealed firearm by a prohibited person. Relevant to this appeal, a jury convicted Mr. Gravely of violations of (1) West Virginia Code § 61-7-7(b), a felony that prohibits a person previously convicted of a "felony crime of violence against the person of another" from possessing a firearm; and (2) West Virginia Code § 61-7-7(e), a separate felony offense for a person carrying a concealed firearm if that person is also prohibited from possessing a firearm pursuant to § 61-7-7(b). Mr. Gravely alleges that the circuit court erred by ruling that the predicate offense underlying his felony firearm convictions, conspiracy to commit first-degree robbery, qualified as a "felony crime of violence against the person of another." We agree because the elements of conspiracy do not require an act of violence against a person. Therefore, we reverse these convictions and the circuit court's sentencing order, in part, relating to these convictions.[1]

[1] Mr. Gravely also appeals his convictions based on the sufficiency of the evidence, arguing that the State failed to prove that he possessed a firearm that satisfied the statutory definition of "firearm" contained in West Virginia Code § 61-7-2(7), which, in part "means any weapon which will expel a projectile by action of an explosion." He argues that the State presented no evidence that the firearm had fired or been test fired. Because we vacate his firearms convictions for lack of a predicate offense that meets the requirements of West Virginia Code § 61-7-7(b), we do not address his argument regarding the sufficiency of the evidence.

I.

FACTUAL AND PROCEDURAL HISTORY

On March 25, 2022, a police officer with the Bluefield Police Department pulled over a vehicle driven by Mr. Gravely for speeding. During the stop, the officer learned Mr. Gravely drove while his license was revoked for a DUI and placed him under arrest. While arresting Mr. Gravely for this offense, officers found what appeared to be a loaded firearm in his pocket.

On June 14, 2022, a grand jury returned a five-count indictment against Mr. Gravely that charged him with the following crimes: (1) felony unlawful possession of a firearm by a prohibited person, previously convicted of a felony crime of violence;[2] (2) felony carrying a concealed firearm by a prohibited person, previously convicted of a felony crime of violence;[3] (3) driving on a revoked license for DUI;[4] (4) speeding;[5] and (5) simple possession of marijuana, a schedule I controlled substance.[6] The prior crime of

[2] *See* W. Va. Code § 61-7-7(b).

[3] *See* W. Va. Code § 61-7-7(e).

[4] *See* W. Va. Code § 17B-4-3(b).

[5] *See* W. Va. Code § 17C-6-1(b).

[6] *See* W. Va. Code § 60A-4-401(c). The State dismissed Count 5, simple possession of marijuana, before trial.

violence identified in the two firearms counts was Mr. Gravely's previous 2022 conviction for conspiracy to commit first-degree robbery.

Prior to trial, the State filed a motion asking the circuit court to take judicial notice that "Conspiracy to Commit Robbery – First Degree" is a crime of violence. Mr. Gravely opposed the motion, arguing that, when a court evaluates a prior conviction to determine if it is a "felony crime of violence against the person of another" for purposes of West Virginia Code § 61-7-7(b), the court must examine only the elements of the prior conviction. The circuit court ruled in favor of the State, finding that conspiracy to commit robbery is a crime of violence.

At trial, two police officers testified for the State and described the traffic stop and Mr. Gravely's arrest, as well as how they discovered the firearm, a .40 caliber Glock, in his sweatshirt pocket. To establish Mr. Gravely's prior conviction for a felony crime of violence against another person, the State introduced a plea and sentencing order, and a related redacted indictment, which the circuit court admitted into evidence.[7] The

[7] The State introduced these exhibits through a clerk from the Mercer County Circuit Clerk's Office. The redacted trial exhibits were not included in the appendix filed with this Court, but unredacted copies attached to other filings before the circuit court were included. Regarding the circumstances of the underlying conviction, a grand jury substantively charged Mr. Gravely with (1) first-degree murder, (2) first-degree robbery and, (3) in the same count, conspiracy to commit first-degree robbery and first-degree murder. He pled guilty only to Count Three, conspiracy. While the parties here appear to agree that the underlying crime at issue is conspiracy to commit first-degree robbery, we

order adjudged Mr. Gravely guilty of the offense of conspiracy, as alleged in Count Three of the redacted indictment. Count Three asserted that Mr. Gravely committed felony conspiracy and included felony first-degree robbery as one of the objects of the conspiracy.

The State rested. Mr. Gravely then moved for a judgment of acquittal and filed a corresponding memorandum, arguing again, in relevant part, that conspiracy to commit first-degree robbery is not a crime of violence. The circuit court denied the motion and again found that conspiracy to commit first-degree robbery is a crime of violence. When the circuit court instructed the jury, it advised them that "'Conspiracy to Commit Robbery, First Degree,' is a crime of violence against the person of another and is punishable by imprisonment for a term in excess of [one] year."

The jury convicted Mr. Gravely of Counts One through Four. Mr. Gravely filed a written motion for a judgment of acquittal notwithstanding the verdict or for a new trial, arguing again that conspiracy to commit robbery is not a crime of violence; the circuit court denied the motion.[8] After the State filed a recidivist information and the court held a recidivist trial, a jury also found, in relevant part, that Mr. Gravely was the same person

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note that the plea and sentencing order stated that he pled guilty to Count Three generally, and did not distinguish between the purported objects of the charged conspiracy.

[8] The circuit court also denied Mr. Gravely's motion for a judgment of acquittal based on a sufficiency of the evidence argument.

who previously committed conspiracy to commit first-degree robbery.[9] The circuit court, via final order dated March 19, 2023, sentenced Mr. Gravely to five years imprisonment for Count One, unlawful possession of a firearm by a prohibited person, and three years imprisonment for Count Two, carrying a concealed firearm by a prohibited person, with those sentences to run consecutively; and six months imprisonment for Count Three, driving on a revoked license for DUI, to run concurrently to Counts One and Two. Because he was a second time habitual criminal offender, the Court "enhanced" his sentence by five years, to run at the end of his eight years of incarceration, pursuant to West Virginia Code § 61-11-18(b).[10] Mr. Gravely now appeals this final order dated March 19, 2023.

[9] Mr. Gravely renewed his motion for judgment of acquittal, or for a new trial, which was again denied.

While the jury found Mr. Gravely was the same person who committed two prior felonies, conspiracy to commit first-degree robbery and fleeing from an officer while driving under the influence, the circuit court ultimately determined that fleeing from an officer while driving under the influence was not a qualifying offense for recidivism pursuant to West Virginia Code § 61-11-18.

[10] West Virginia Code § 61-11-18(b) provides that the court must add five years to a person's sentence if the person is "convicted of a qualifying offense," receives a sentence for "definite term of years," and has previously been convicted of a crime punishable by imprisonment. *See also* W. Va. Code § 61-11-19 (providing procedure).

II.

STANDARD OF REVIEW

Here, we consider whether a particular crime qualifies as a predicate felony for a violation of West Virginia Code § 61-7-7(b), a question of law that we review de novo: "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. pt. 1, *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817 (2019) (quoting Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)).

III.

DISCUSSION

The specific question before this Court is whether conspiracy to commit first-degree robbery is a crime of violence for the purposes of West Virginia Code § 61-7-7(b). West Virginia Code § 61-7-7(b) prohibits a person previously convicted of a "felony crime of violence against the person of another" from possessing a firearm. W. Va. Code § 61-7-7(b); *see generally State v. Mills*, 243 W. Va. 328, 844 S.E.2d 99 (2020) (analyzing West Virginia Code § 61-7-7(b)). In relevant part, West Virginia Code § 61-7-7(b) states:

> (b) . . . 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 . . .

> (2) . . . and who possesses a firearm as such is defined in section two of this article shall be guilty of a felony and, upon conviction thereof, shall be confined in a state correctional facility for not more than five years or fined not more than $5,000, or both.

W. Va. Code § 61-7-7(b). This subsection also prohibits the possession of a firearm by a person who has committed a felony sexual offense or certain drug offenses. *See id.*

As a separate offense, West Virginia Code § 61-7-7(e) prohibits the person prohibited from possessing a firearm pursuant to § 61-7-7(b) from carrying a *concealed* firearm. West Virginia Code § 61-7-7(e) states:

> As a separate and additional offense to the offense described in subsection (b) of this section, and in additional to any other offenses outlined in this code, any person prohibited by subsection (b) of this section from possessing a firearm who carries a concealed firearm is guilty of a felony and, upon conviction thereof, shall be confined in a state correctional facility for not more than ten years or fined not more than $10,000, or both.

Mr. Gravely asserts that the circuit court erred by denying his motion for acquittal or new trial by ruling that his predicate felony, conspiracy to commit first-degree robbery, was a "felony crime of violence against the person of another," because the elements of conspiracy do not require an act of violence. We agree and reverse Mr. Gravely's convictions for unlawful possession of a firearm by a prohibited person and carrying a concealed firearm by a prohibited person. *See* W. Va. Code § 61-7-7(b) and (e).

We employ an elements test to determine whether a predicate offense is a "felony crime of violence against the person of another" for the purposes of West Virginia Code § 61-7-7(b).[11] *Mills*, 243 W. Va. at 337-38, 844 S.E.2d at 108-09 (setting forth the elements test). To apply the elements test, a court "must only look to whether the statutory elements of the predicate offense constitute a 'felony crime of violence against the person of another.'" *Id.* In other words, a court considering whether a particular conviction can be the predicate crime of violence required by West Virginia Code § 61-7-7(b) is "confined to looking at the fact of conviction and the elements required for conviction," rather than "the specific conduct of [a] particular offender." [12] *Id.* at 338, 844 S.E.2d at 109 (quoting *United States v. Davis*, 875 F.3d 592, 596-97 (11th Cir. 2017)) (alteration in original). A violent act against another person must be an element of the underlying crime. *See id*. at 336, 844 S.E.2d at 107 (analyzing the constitutionality of § 61-7-7(b) and recognizing that "a statute that requires an analysis of whether the prior crime 'has *as an element*,' a violent act, is not deemed unconstitutionally vague" (emphasis in original) (quoting *Johnson v. United States*, 576 U.S. 591, 596, 135 S. Ct. 2551, 2557, 192 L. Ed. 2d 569 (2015)).

[11] West Virginia Code § 61-7-7 does not define a "felony crime of violence against the person of another."

[12] Although we use the term "elements test" throughout the opinion for clarity, federal courts also call this analysis the "categorical approach." *See State v. Mills*, 243 W. Va. 328, 335, 844 S.E.2d 99, 106 (2020); *Johnson v. United States*, 576 U.S. 591, 596, 135 S. Ct. 2551, 2557, 192 L. Ed. 2d 569 (2015) ("Under the categorical approach, a court assesses whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'" (citation omitted)).

In *Mills*, the Court applied the elements test when considering whether the defendant's felony conviction in Kentucky for first-degree wanton endangerment was "a felony crime of violence against the person of another" that could be the predicate offense for purposes of West Virginia Code § 61-7-7(b). *Id.* at 338, 844 S.E.2d at 109. The Court examined the specific language of the Kentucky statute, noting that "[a] person is guilty of wanton endangerment in the first degree when, 'under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.'" *Id.* (quoting Ky. Rev. Stat. Ann. § 508.060). Considering both prongs of the first-degree wanton endangerment statute, the Court concluded that the "statutory definition of the elements of first-degree wanton endangerment answers the question at issue" and determined that the defendant "committed a violent felony against another person." *Id.* at 338-39, 844 S.E.2d at 109-10. Thus, the *Mills* defendant's prior conviction met the requirement for a violation of West Virginia Code § 61-7-7(b). *Id.* at 339, 844 S.E.2d at 110.

Applying the elements test set forth in *Mills* to evaluate Mr. Gravely's prior felony conspiracy conviction, we consider whether the elements of conspiracy set out in West Virginia Code § 61-10-31, West Virginia's general conspiracy statute, include a violent felony act against another person. *See id.* at 337-38, 844 S.E.2d at 108-109. West Virginia Code § 61-10-31, in relevant part, provides that "It shall be unlawful for two or more persons to conspire (1) to commit any offense against the State . . . if . . . one or more

of such persons does any act to effect the object of the conspiracy."[13] The elements of conspiracy were memorialized in Syllabus point 2 in *State v. Less*:

> In order for the State to prove a conspiracy under [West Virginia Code §] 61-10-31(1), it must show that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy.

170 W. Va. 259, 294 S.E.2d 62 (1981). In other words, two elements are required to convict a person of conspiracy in violation of West Virginia Code § 61-10-31(1):

> (1) The defendant agreed with at least one other person to "commit an offense against the State;" and
> (2) A conspiracy member committed an overt act to effect the conspiracy's object.

Syl. pt. 2, in part, *id.* The *elements* of conspiracy do not change based upon its object. *See id.* (analyzing conspiracy to commit robbery elements). Furthermore, only one person in the conspiracy must commit an overt act, not each person in the conspiracy. *Id.* at 265, 294 S.E.2d at 67.

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[13] Syllabus point 1 of *State v. Less*, 170 W. Va. 259, 294 S.E.2d 62 (1981), explains that West Virginia Code § 61-10-31(1) "is a general conspiracy statute and the agreement to commit any act which is made a felony or misdemeanor by the law of this State is a conspiracy to commit an 'offense against the State' as that term is used in the statute." Thus, an agreement to commit first-degree robbery is a conspiracy to commit an offense against the State, as first-degree robbery is a felony pursuant to West Virginia Code § 61-2-12(a)(1). *See* Syl. pt. 1, *Less*, 170 W. Va. 259, 294 S.E.2d 62.

Although the indictment did not specify between subsections one and two of § 61-10-31, subsection two of West Virginia Code § 61-10-31 relates to defrauding the State and is not an issue here.

Considering these two elements of the underlying crime of conspiracy, an agreement and an overt act, we determine that they do not require an act of violence against a person. Even if the *object* of the conspiracy is considered violent, such as first-degree robbery, the *elements and acts* required to be convicted of the conspiracy necessitate no violence. To be convicted of conspiracy to commit robbery, "[t]he overt act element for conspiracy is undefined and could include actions which are not crimes of violence." *United States v. Cooper*, 410 F. Supp. 3d 769, 771 (S.D.W. Va. 2019) (examining the elements of West Virginia's general conspiracy statute as they related to an application of the United States Sentencing Guidelines). "For example, an overt act could include giving someone money to buy a gun[,]" which involves no act of violence against a person. *Id.* at 771.[14] Applying the elements test, conspiracy simply does not meet the definition of a "felony crime of violence against the person of another" for the purposes of West Virginia Code § 61-7-7(b).

[14] The district court further recognized that "[o]ther states have found overt acts for conspiracy can include innocuous and nonviolent activities." *United States v. Cooper*, 410 F. Supp. 3d 769, 771-72 (S.D.W. Va. 2019); *see also United States v. Robinson*, 627 F.3d 941, 958 (4th Cir. 2010) (recognizing that a conspiracy conviction under a federal statute does not require "proof the substantive crime was actually committed"). Relatedly, this Court has determined that "conspiracy and the underlying substantive offense are separate and distinct offenses for double jeopardy purposes." *State v. Johnson*, 179 W. Va. 619, 631, 371 S.E.2d 340, 352 (1988).

Even though the State recognizes that we should examine only the elements of the underlying offense, the State, in an attempt to muddy *Mills*' clear waters, proposes a number of ways that this Court could determine that conspiracy to commit first-degree robbery is a crime of violence. These various suggestions include that this Court should examine other definitions of a "crime of violence" in the West Virginia Code to decide the meaning of "felony crime of violence against the person of another" for the purposes of West Virginia Code § 61-7-7(b).[15] The State also submits that a risk of harm analysis could be an appropriate standard, referencing the recidivist statute and noting that "[i]n other contexts, this Court looks to the degree of risk or harm that might be expected to arise[.]" The State also discusses the crimes of attempt and conspiracy, declaring that a conspiracy cannot be divorced from its violent objective. However, the State's proposals, which regard other contexts such as evaluating the proportionality of a recidivist sentence and other statutory definitions, have no bearing on our inquiry here. These suggested approaches reject *Mills*; this Court cannot apply a "holistic assessment" of the underlying crime, as the State suggests, for the purposes of this statute. As this Court aptly explained in *Mills*, doing

[15] The State suggests we should refer to the enumerated offenses that are not eligible for expungement, which includes robbery as a "felony offense of violence against the person." *See* W. Va. Code § 61-11-26(c)(1), (p)(3) (referencing the robbery and attempted robbery statute, W. Va. Code § 61-2-12, as a "felony crime of violence against the person"). The State further recommends that we examine the solicitation statute, West Virginia Code § 61-11-8a, which also references the robbery statute. Relatedly, the State also asks us to consider that the recidivist statute provides that a "qualifying offense" also includes conspiracy and attempt to commit the qualifying offense. *See* W. Va. Code § 61-11-18(a).

so would cause West Virginia Code § 61-7-7(b)(1)'s provision regarding a "felony crime of violence against the person of another" to be unconstitutionally vague under the Supreme Court of the United States' analysis in *Johnson* and its progeny. *See generally Mills*, 243 W. Va. 328, 844 S.E.2d 99 (discussing *Johnson* and related cases).

In *Mills*, the Court found West Virginia Code § 61-7-7(b)(1)'s "felony crime of violence against the person of another" clause was constitutional in light of a series of recent United States Supreme Court cases finding certain language relating to violent felonies and force unconstitutionally vague. *See generally Mills*, 243 W. Va. 328, 844 S.E.2d 99. The *Mills* Court explained the Supreme Court's findings in *Johnson*, *Sessions v. Dimaya*, 584 U.S. 148, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018), and *United States v. Davis*, 588 U.S. 445, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019), that portions of certain federal statutes were unconstitutional, noting that these cases show that:

> a statute containing a catch-all residual clause that "asks whether the [prior] crime '*involves conduct*' that presents too much risk of physical injury," is unconstitutionally vague under the Fourteenth Amendment's Due Process Clause, and by implication, the Due Process Clause in the West Virginia Constitution.

243 W. Va. at 336, 844 S.E.2d at 107 (quoting *Johnson*, 576 U.S. at 596, 135 S. Ct. at 2557, 192 L. Ed. 2d 569) (alteration and emphasis in original). The Court specifically noted, however, that "a statute that requires an analysis of whether the prior crime 'has *as*

an element,' a violent act, is not deemed unconstitutionally vague." *Id.* at 336, 844 S.E.2d at 107 (quoting *Johnson*, 576 U.S. at 596, 135 S. Ct. at 2557, 192 L. Ed. 2d 569).

In finding West Virginia Code § 61-7-7(b)(1) constitutional, the *Mills* Court determined that the statute's "plain language . . . makes it a crime for a person previously convicted under a statute whose *elements* constitute a 'felony crime of violence against the person of another' to possess a firearm." *Mills*, 243 W. Va. at 337, 844 S.E.2d at 108 (emphasis added). The crime of violence clause in § 61-7-7(b) is constitutional, unlike the provisions found unconstitutional in the United States Supreme Court cases, because it "relates to the statutory elements of the previously committed crime, *rather than a catch-all term relating to the risk of violent conduct caused by that crime.*" *Id.* (emphasis added).

Although much of *Johnson*'s analysis was already addressed in *Mills*, we briefly discuss *Johnson* to illustrate the imprudence of the State's suggested approaches to evaluating whether conspiracy is a crime of violence. In *Johnson*, the Supreme Court addressed a sentencing enhancement pursuant to the Armed Career Criminal Act that increased prison terms for offenders with "three or more earlier convictions for a 'serious drug offense' or a 'violent felony[.]'" *Johnson*, 576 U.S. at 593, 135 S. Ct. at 2555, 192 L. Ed. 2d 569 (quoting 18 U.S.C. § 924(e)(1)). The Act defined "violent felony" as

> any 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; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*.

18 U.S.C. § 924(e)(2)(B) (emphasis added); *Johnson*, 576 U.S. at 593-94, 135 S. Ct. at 2555-56, 192 L. Ed. 2d 569 (same emphasis added) (quoting same). When federal courts examined the elements of crimes to determine whether the crimes met the requirements of the above-italicized phrase in 18 U.S.C. § 924(e)(2)(B), known as the "residual clause," courts had to determine "whether the crime '*involves conduct*' that presents too much risk of physical injury." *Johnson*, 576 U.S. at 596, 135 S. Ct. at 2557, 192 L. Ed. 2d 569 (emphasis in original); *see also Mills*, 243 W. Va. at 335, 844 S.E.2d at 106 (quoting same). Ultimately, the *Johnson* Court decided that the residual clause was unconstitutional, resolving that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." *Johnson*, 576 U.S. at 597, 135 S. Ct. at 2557, 192 L. Ed. 2d 569; *Mills*, 243 W. Va. at 335, 844 S.E.2d at 106 (quoting same).[16]

[16] *See also Mills*, 243 W. Va. at 335-36, 844 S.E.2d at 106-07 (discussing Supreme Court's related findings of unconstitutionality in *Sessions v. Dimaya*, 584 U.S. 148, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018), and *United States v. Davis*, 588 U.S. 445, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019)). *Dimaya* regarded deportation under the Immigration and Nationality Act, recognizing that there was vague language in part of the definition of "aggravated felony," and finding unconstitutionally vague the portion of the definition of a "crime of violence" in 18 U.S.C. § 16(b) that used the following language: "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 584 U.S. 148, 138 S. Ct.

Likewise in *Davis*, for example, the Supreme Court found language "unconstitutional as void for vagueness because 'imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined "ordinary case."'" *Mills*, 243 W. Va. at 336, 844 S.E.2d at 107 (quoting *Davis*, 588 U.S. at 452, 139 S. Ct. at 2326, 204 L. Ed. 2d 757).

By asking this Court to essentially examine the *risk* involved in a predicate felony offense to determine whether it is a "felony crime of violence against the person of another," rather than analyzing the specific elements of the underlying crime to determine whether the elements include a violent act, the State invites this Court to read a residual clause into West Virginia Code § 61-7-7(b)(1). We refuse this request to effectively create an unconstitutional residual clause, rather than applying the constitutional elements test set forth in *Mills*. If the State seeks a different or more expansive definition for crime of violence for the purposes of West Virginia Code § 61-7-7(b), such a change in the law requires legislative, not judicial, action.

1204, 200 L. Ed. 2d 549. *Davis* examined language relating to a "crime of violence" in 18 U.S.C. § 924(c)(3), finding the definition "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" unconstitutionally vague. 588 U.S. 445, 139 S. Ct. 2319, 204 L. Ed. 2d 757.

The *Mills* Court's directive is not, as the State suggests, confusing or difficult to apply, and we decline the State's invitation to depart from it in this case. For these reasons, we now hold that when considering whether a defendant's predicate offense for a violation of West Virginia Code § 61-7-7(b) is a "felony crime of violence against the person of another," a court must examine the statutory elements of the predicate offense and determine whether an element requires a violent act against another person. The court may not consider the specific conduct of the defendant in committing the predicate offense. Additionally, a conspiracy conviction under West Virginia's general conspiracy statute, West Virginia Code § 61-10-31, is not a "felony crime of violence against the person of another" for the purposes of West Virginia Code § 61-7-7(b)(1) (eff. 2016).

Applying this holding, because the elements of conspiracy require no act of violence against a person, conspiracy is not a crime of violence pursuant to West Virginia Code § 61-7-7(b)(1), and Mr. Gravely's convictions of West Virginia Code § 61-7-7(b) and § 61-7-7(e), with conspiracy as the predicate offense, cannot stand. We accordingly reverse his convictions as to those counts.[17]

[17] To the extent that there may be some argument that West Virginia Code § 61-7-7(a), which prohibits a person "convicted in any court of a crime punishable by imprisonment for a term exceeding one year" from possessing a firearm, punishable as a misdemeanor, is a lesser-included offense of Mr. Gravely's vacated convictions, we note that the State did not request that any of Mr. Gravely's convictions be reversed and remanded for resentencing on any potential lesser-included offense.

IV.

CONCLUSION

For the reasons stated above, we reverse Mr. Gravely's convictions of unlawful possession of a firearm by a prohibited person and carrying a concealed firearm by a prohibited person in violation of West Virginia Code § 61-7-7(b) and § 61-7-7(e). We further reverse, in part, the March 19, 2023 order of the Circuit Court of Mercer County sentencing Mr. Gravely to imprisonment on those counts and remand for resentencing on his remaining convictions.

Reversed, in part, and
remanded.