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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2026 Term

_____

No. 24-102

_____

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

V.

JACQUAIN CRAWFORD,
Defendant Below, Petitioner.

Appeal from the Circuit Court of Marion County
The Honorable David R. Janes, Judge
Criminal Action No. CC-24-2022-F-245

REVERSED, IN PART, VACATED, IN PART,
AND REMANDED

Submitted: September 8, 2026
Filed: November 4, 2026

Lance E. Rollo, Esq.
Morgantown, West Virginia
Attorney for the Petitioner

John B. McCuskey, Esq.
Attorney General
Andrea Nease, Esq.
Deputy Attorney General
Office of the Attorney General
Charleston, West Virginia
Attorneys for the Respondent

JUSTICE KIRKPATRICK delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "This Court applies a de novo standard of review to a circuit court's denial of a motion for judgment of acquittal." Syllabus Point 5, *State v. Thompson*, 253 W. Va. 23, 927 S.E.2d 885 (2026).

2. "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syllabus Point 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

3. "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, *Crystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

4. "In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review." Syllabus Point 3, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000).

5. "'"Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence." Syl. [P]t. 4, *Sanders v. Georgia–Pacific Corp.,* 159 W.Va. 621, 225 S.E.2d 218 (1976).' Syllabus [P]oint 1, *Andrews v. Reynolds Memorial Hospital, Inc.,* 201 W.Va. 624, 499 S.E.2d 846 (1997)." Syllabus Point 1, *Lively v. Rufus,* 207 W. Va. 436, 533 S.E.2d 662 (2000).

6. "'When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case[,] it is the duty of the courts not to construe but to apply the statute.' Syl. Pt. 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959)." Syllabus Point 6, *State v. Jones*, 251 W. Va. 611, 915 S.E.2d 389 (2025).

7. To sustain a conviction under the "use" prong of West Virginia Code § 61-7-15a (2016), the State must show that the defendant actively employed a firearm during the commission of a felony.

8. "Pursuant to *Crawford v. Washington,* 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness." Syllabus Point 6, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006), *holding modified on other grounds by State v. Jako*, 245 W. Va. 625, 862 S.E.2d 474 (2021).

9. "Under the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution,* a testimonial statement is, generally, a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Syllabus Point 8, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006), *holding modified on other grounds by State v. Jako*, 245 W. Va. 625, 862 S.E.2d 474 (2021).

10. The Confrontation Clause of the Sixth Amendment to the United States Constitution and of Section 14 of Article III of the West Virginia Constitution bars admission of a forensic laboratory report made for the purpose of proving a particular fact through the in-court testimony of an expert who did not perform or observe the test reported.

KIRKPATRICK, Justice:

Following a one-day trial, a petit jury in Marion County, West Virginia, convicted the petitioner, Jacquain H. Crawford, of five drug- and firearm-related felonies. After the jury returned its verdict, the petitioner filed a motion for judgment of acquittal notwithstanding the verdict or, in the alternative for a new trial, stating two grounds for relief. First, the petitioner claimed that the evidence presented at trial was insufficient to sustain his conviction for use or presentation of a firearm during the commission of a felony. Second, the petitioner alleged that his Sixth Amendment right of confrontation was violated when the circuit court allowed the State to call a substitute witness who was not the analyst who performed the analysis on the seized controlled substances. By order entered on November 17, 2023, the circuit court denied the petitioner's motion. The petitioner appeals.

Upon review of the parties' briefs[1] and oral arguments, the appendix record, and pertinent legal authority, we find that the circuit court erred in denying the petitioner's motion. First, the evidence was insufficient to prove use or presentment of a firearm during the commission of a felony because the record contains no evidence that the petitioner actively employed a firearm during the commission of a felony. Second, we find that the petitioner's right to confrontation was violated by the State's failure to call the analyst who

[1] Because a new Attorney General took office while this appeal was pending, his name has been substituted as counsel.

analyzed the drugs and prepared the forensic laboratory report. Accordingly, we reverse the circuit court's order denying the petitioner's motion, reverse the petitioner's conviction for use or presentation of a firearm during the commission of a felony, vacate the petitioner's convictions for possession with intent to deliver cocaine and fentanyl, and remand this case for a new trial on the two charges of possession with intent to deliver cocaine and fentanyl.

I.

FACTUAL AND PROCEDURAL HISTORY

On September 9, 2021, the petitioner and a female entered a Walmart in White Hall, West Virginia. A Walmart asset protection employee observed the couple, believed they were shoplifting, confronted them, and eventually called law enforcement, describing to law enforcement the vehicle the petitioner and his female companion were driving when they left Walmart. Law enforcement stopped and searched the vehicle, and the petitioner was arrested and eventually indicted on six counts: (1) possession with intent to deliver a controlled substance, cocaine; (2) possession with intent to deliver a controlled substance, fentanyl; (3) use or presentation of a firearm during the commission of a felony;

(4) possession of a firearm by a prohibited person; (5) conspiracy to commit felony controlled substance offenses; and (6) prohibited person carrying a concealed firearm.[2]

A one-day jury trial commenced on July 19, 2023, and four witnesses testified. The first witness was the Walmart asset protection employee who observed and confronted the petitioner in the Walmart store regarding suspected shoplifting. He testified that the petitioner had a "fanny pack thing over his shoulder," and surveillance videos admitted into evidence showed the petitioner wearing the fanny pack. The witness testified that he called law enforcement and described the vehicle that petitioner and his companion were driving. Based on this information, Sergeant Steve Garrett of the Marion County Sheriff's Department responded to Walmart and stopped the described vehicle while it was still in the Walmart parking lot. Sergeant Garret testified that he approached the female driver of the vehicle and smelled marijuana. He stated that the only other occupant of the vehicle was the petitioner who was in the passenger seat, but he did not interact meaningfully with the petitioner.

The third witness to testify was Sergeant Charles Funk with the White Hall Police Department. He testified that he arrived at the scene after Seargeant Garrett. Based on the smell of marijuana coming from the vehicle, Sergeant Funk searched the vehicle.

[2] A copy of the indictment is not included in the appendix record, but the charges were read by the court at the commencement of the jury trial, the transcript of which is provided in the appendix.

He testified that "[t]ucked under the front passenger seat was a black fanny pack" that appeared to be the same fanny pack seen on the petitioner in the surveillance videos. Sergeant Funk testified that the fanny pack contained various items including a loaded firearm; four separate baggies of a substance believed to be cocaine; and two other baggies, each containing fifteen pills "that were stamped M30, blue in color," and believed to be oxycontin.

On cross-examination, Sergeant Funk testified that "the first time anybody, law enforcement or otherwise, . . . saw the gun" was when he discovered it in the fanny pack that was under the passenger seat of the vehicle. He testified that the petitioner did not present the firearm to anyone and did not use the firearm. On re-direct, the State questioned Sergeant Funk about why, in his experience, people who traffic in controlled substances possess firearms. Sergeant Funk responded: "to protect themselves and merchandise." The prosecutor then asked Sergeant Funk for clarification about what someone is doing with a firearm if they are protecting themselves and their merchandise with that firearm, to which Sergeant Funk responded: "[p]ossessing it." The prosecutor persisted, asking whether such a person is "using the firearm," and Seargeant Funk responded affirmatively. On re-cross, Seargeant Funk conceded that the petitioner did not "deploy a weapon."

The State's final witness was Blake Kinder of the West Virginia State Police Forensic Laboratory. At the time the State called Mr. Kinder, the petitioner raised no

objection to Mr. Kinder testifying or being qualified as an expert. Mr. Kinder's testimony began with a discussion about the process for how items are received and processed at the forensic laboratory. When the State sought to admit the West Virginia State Police Forensic Laboratory Report, prepared by Tiffany A. Neu, Forensic Scientist, and marked as State's Exhibit 7, the prosecution asked Mr. Kinder if those were "[his] findings regarding [his] analysis," and Mr. Kinder responded that the conclusions in the forensic laboratory report were "the findings of the scientist who performed the test." At this point, the petitioner's counsel objected.

Additional questions revealed that Ms. Neu prepared the report but that she "had to relocate" and was no longer employed by the State Police Forensic Laboratory. The following relevant exchange took place:

> Q: And [the report is] signed under authorized by Tiffany Neu; right?
>
> A: Correct.
>
> Q: But it also appears to have the signature of one Blake Kinder on there as well?
>
> A: Yes, that is correct. As part of our peer review process, all case files are one hundred percent administratively reviewed and technically reviewed.
>
> Q: So you were part of this examination and this testing, these results.
>
> A: *While I did not perform the testing that was done in this case, I had the chance to review the data that was generated*. And I came to the same conclusions that Ms. Neu did.

Q: And you, in fact, are what, you're the supervisor of this section or something to that effect?

A: *I am not the supervisor*. I am the technical leader.

Q: The technical leader. So you lead the group that does this analysis?

A: As technical leader my main responsibilities do more with instrument validations, calibrations, things of that nature.

Q: To make sure that the tests are done correctly?

A: Yes.

(Emphasis added). Following this exchange, the petitioner's counsel objected to the fact that Ms. Neu was identified on the witness list, that Mr. Kinder was never disclosed as a witness, and that Mr. Kinder was not the person who performed the tests but was, instead, testifying about the work of Ms. Neu. The State responded that they did not know until "the last 10 days or so" that Ms. Neu was no longer at the forensic laboratory.

The circuit court expressed some hesitation but agreed to permit Mr. Kinder to testify regarding the report and then admitted into evidence the forensic laboratory report, as State's Exhibit 7. The last page of the forensic laboratory report states that it was "Authorized by: Tiffany A. Neu, Forensic Scientist" and is signed by Tiffany A. Neu. Below Ms. Neu's signature and the "Enclosure" notation, is a line that reads: "Reviewed by Blake Kinder." Below that line are hand-written initials, "BAK."

Mr. Kinder continued to testify regarding the forensic laboratory report. During Mr. Kinder's testimony about the report, there were several questions he could not answer with certainty because he had not performed the testing on the seized substances, and his testimony repeatedly referred to Ms. Neu's analysis. Ultimately, Mr. Kinder's testimony established that the baggies of white power, identified in the laboratory report as Items 1.1.1, 1.1.2, and 1.1.3, contained cocaine, and the pills, identified in the laboratory report as Item 1.2.1, contained fentanyl.

At the conclusion of the petitioner's trial, the jury found the petitioner guilty of (1) possession with intent to deliver a controlled substance, cocaine; (2) possession with intent to deliver a controlled substance, fentanyl; (3) use or presentation of a firearm during the commission of a felony; (4) possession of a firearm by a prohibited person; and (5) prohibited person carrying a concealed firearm. The jury found the petitioner not guilty of conspiracy to commit felony controlled substance offenses.

On July 24, 2023, the petitioner filed "Defendant's Motion for Judgment of Acquittal Nothwithstanding the Verdict, or, In the Alternative, Motion for New Trial," arguing (1) that the evidence presented at trial was insufficient to sustain a conviction for the use or presentation of a firearm during the commission of a felony, and (2) that his Sixth Amendment right to confront the forensic scientist who performed the analysis upon which the State relied was violated when the court permitted Mr. Kinder to testify regarding the forensic laboratory report prepared by Ms. Neu. The State responded, and the circuit

court heard arguments on November 1, 2023. By order entered on November 17, 2023, the court denied the petitioner's motion. With respect to the petitioner's use or presentation of a firearm during the commission of a felony, the court found the question of whether the petitioner "used or presented a firearm" during the commission of a felony was a question of fact to be resolved by the jury and that the evidence presented was sufficient to sustain the conviction. With respect to the Confrontation Clause issue, the court found that Mr. Kinder, "as Ms. Neu's supervisor," reviewed and initialed the certification to the laboratory report, and the petitioner's right to be confronted with the analyst who made the certification was satisfied by Mr. Kinder's testimony. The petitioner was sentenced on January 10, 2024, and he now appeals.

II.

STANDARDS OF REVIEW

The petitioner states two assignments of error, both of which arise from the circuit court's denial of the petitioner's motion for judgment of acquittal notwithstanding the verdict or, in the alternative, motion for a new trial.

In his first assignment of error, the petitioner argues that the evidence presented at trial was insufficient to sustain his conviction for use or presentation of a firearm during the commission of a felony. In challenging the sufficiency of the evidence, the petitioner's first assignment of error concerns the denial of his motion to the extent that he moved for judgment of acquittal. *State v. Phillips*, 205 W. Va. 673, 677, 520 S.E.2d

670, 674 (1999) ("The motion for judgment of acquittal challenges the sufficiency of the evidence. 2 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure* 292 (2d ed.1993)."). "This Court applies a de novo standard of review to a circuit court's denial of a motion for judgment of acquittal." Syl. Pt. 5, *State v. Thompson*, 253 W. Va. 23, 927 S.E.2d 885 (2026). In Syllabus Point 1 of *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), this Court explained the standard of review governing evidentiary sufficiency challenges in criminal cases:

> The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Before evaluating the sufficiency of the evidence, however, this Court is required to examine the statute the petitioner was convicted of violating, thereby presenting a purely legal question. Our review of the statutory language is de novo: "[w]here 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, *Crystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

The petitioner's second assignment of error, concerning the alleged Confrontation Clause violation, raises evidentiary and constitutional issues and arises from

the circuit court's denial of the petitioner's motion to the extent that he sought a new trial. Our general standard for reviewing findings and rulings made by the trial court is as follows:

> In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

Syl. Pt. 3, *State v. Vance,* 207 W. Va. 640, 535 S.E.2d 484 (2000). With respect to a circuit court's ruling on a motion for a new trial, we have held that:

> " 'Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence.' Syl. [P]t. 4, *Sanders v. Georgia–Pacific Corp.,* 159 W.Va. 621, 225 S.E.2d 218 (1976)." Syllabus [P]oint 1, *Andrews v. Reynolds Memorial Hospital, Inc.,* 201 W.Va. 624, 499 S.E.2d 846 (1997).

Syl. Pt. 1, *Lively v. Rufus,* 207 W. Va. 436, 533 S.E.2d 662 (2000).

As a general matter, "'[r]ulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' *State v. Louk,* [171 W.Va. 639,] 301 S.E.2d 596, 599 (1983)." Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983). However, the admissibility issue raised in this case alleges constitutional error and, therefore, presents a question of

law. "We review questions of law *de novo.*" *May v. May*, 214 W. Va. 394, 398, 589 S.E.2d 536, 540 (2003); *see also State v. Waldron*, 228 W. Va. 577, 723 S.E.2d 402 (2012) (concluding that alleged violations of the Confrontation Clause are reviewed de novo). With these standards in mind, we proceed to address the parties' arguments.

III.

DISCUSSION

A. Use or Presentation of Firearm

At the conclusion of his trial, the jury convicted the petitioner of five of the six charged felonies, including count three of the indictment, which charged the petitioner with use or presentation of a firearm during the commission of a felony, in violation of West Virginia Code § 61-7-15a (2016). That Code Section provides:

> As a separate and distinct offense, and in addition to any and all other offenses provided for in this code, any person who, while engaged in the commission of a felony,[3] *uses or presents* a firearm shall be guilty of a felony and, upon

[3] In Section B, below, we vacate the predicate felony charges for possession with intent to deliver controlled substances. Although the vacation of predicate felonies would warrant vacation of the petitioner's conviction for use or presentation of a firearm during the commission of a felony, we find it necessary to address the substance of the petitioner's first assignment of error because the two predicate felonies are remanded for a new trial. If we were to decide this first assignment of error solely in reliance on the vacation of the predicate felonies, then the petitioner's conviction for use or presentation of a firearm during the commission of those felonies would also be remanded for a new trial, at which time the issues involving the petitioner's alleged "use" of the firearm would again be presented to the trial court. Therefore, to preclude recurrence of the errors below, we find it necessary to address the merits of the petitioner's first assignment of error.

> conviction, shall be imprisoned in a state correctional facility for not more than ten years.

W. Va. Code § 61-7-15a (emphasis added). In his first assignment of error, the petitioner argues that the evidence presented at trial was insufficient to sustain his conviction for use or presentation of a firearm during the commission of a felony,[4] because the State presented no evidence that he used or presented a firearm, a necessary element under West Virginia Code § 61-7-15a. The petitioner claims that the State seeks to "rewrite the statute . . . to include the element of 'possession' of a firearm" in addition to "uses or presents." He contends that West Virginia Code § 61-7-15a is unambiguous and does not include the word "possession," which the Legislature would have included had it intended or desired for "possession" to satisfy an element of the offense. Therefore, the petitioner maintains that the State was required to prove that he either used or presented a firearm during the commission of a felony, which it failed to do.

[4] The heading of the petitioner's first assignment of error also alleges that the evidence presented was insufficient to sustain a conviction "on several charges," including both "Possession with the Intent to Deliver a Controlled Substance charges." However, the petitioner makes no sufficiency argument regarding any of the charges other than his conviction for use or presentation of a firearm during the commission of a felony. Therefore, we only address the sufficiency of the evidence proffered in support of the petitioner's conviction for use or presentation of a firearm during the commission of a felony. *See State v. Sites*, 241 W. Va. 430, 442, 825 S.E.2d 758, 770 (2019) (declining to address an inadequately briefed issue that failed to comply with the West Virginia Rules of Appellate Procedure).

Implicitly conceding that the petitioner did not "present" a firearm, as used in West Virginia Code § 61-7-15a, the State focuses its arguments on "use." The State contends that the petitioner's "actions [in this case] qualify as 'use' beyond mere possession." The State's theory below was that the petitioner "used" the firearm insofar as he had it to protect himself and "[his] product." Thus, as the State argues here, the firearm was "more than incidentally present; it was a centerpiece of Petitioner's drug enterprise." Therefore, the State claims that the word "uses" in West Virginia Code § 61-7-15a should be read broadly enough to encompass the petitioner's possession of the firearm in this case and that the evidence was sufficient to convict the petitioner of use or presentation of a firearm during the commission of a felony.

We have not previously addressed or defined "use" for purposes of West Virginia Code § 61-7-15a. Beginning with the language of the statute, we find that West Virginia Code § 61-7-15a is not ambiguous and clearly applies to "any person who, while engaged in the commission of a felony, *uses or presents* a firearm." (Emphasis added).[5] "'When a statute is clear and unambiguous and the legislative intent is plain, the statute

[5] We recently held that West Virginia Code § 61-7-15a is clear and unambiguous. Syl. Pt. 7, *State v. Jones*, 251 W. Va. 611, 915 S.E.2d 389 (2025) ("West Virginia's statute prohibiting the use or presentment of a firearm in the commission of a felony, West Virginia Code § 61-7-15a, is clear and unambiguous and applies to all felonies, not specific classes of felonies."). The focus of *Jones* was on the predicate felonies underlying a conviction, rather than on what it means to "use" a firearm. Therefore, we consider the statute again, with our focus on the word "uses."

should not be interpreted by the courts, and in such case[,] it is the duty of the courts not to construe but to apply the statute.' Syl. Pt. 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959)." Syl. Pt. 6, *State v. Jones*, 251 W. Va. 611, 915 S.E.2d 389 (2025). "[I]n so doing, [the statute's] words should be given their ordinary acceptance and significance and the meaning commonly attributed to them. 50 Am.Jur., Statutes, Section 225." *State v. Epperly*, 135 W. Va. 877, 884, 65 S.E.2d 488, 492 (1951); *see also Smith v. United States,* 508 U.S. 223, 228 (1993) (discussing the meaning of the word "use" in 18 U.S.C. § 924(c)(1) and noting that "[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning"). "We are mindful that some interpretation or construction is involved when we assign statutory words their ordinary significance and meaning," but will not impose another meaning on a plain and unambiguous statute under the guise of interpretation. *State v. McMutary*, 250 W. Va. 78, 86, 902 S.E.2d 410, 418 (2024).

The ordinary and natural meaning of the verb "use," as defined in *Black's Law Dictionary*, is "[t]o employ for the accomplishment of a purpose; to avail oneself of." *Black's Law Dictionary* (12th ed. 2024). And in considering what it means to "use" a firearm for purposes of 18 U.S.C. § 924(c)(1) (1994), a federal statute that imposes penalties where a defendant "uses or carries a firearm" during the commission of certain crimes, the United States Supreme Court, in *Bailey v. United States*, 516 U.S. 137 (1995), interpreted "uses" as a verb of action. In *Bailey*, a vehicle search revealed ammunition and

cocaine in the passenger compartment of a vehicle and "a large amount of cash and a bag containing a loaded 9-mm. pistol" in the trunk.[6] *Id.* at 139. As in this case, the prosecution argued "that drug dealers frequently carry a firearm to protect their drugs and money as well as themselves." *Id.* The Court of Appeals for the District of Columbia Circuit affirmed the conviction and found the firearm was sufficiently accessible and proximate to the drugs and drug proceeds that the jury could properly infer that Bailey had used the gun in the trunk to protect his drugs and drug proceeds and to facilitate sales. *Id*.

The Supreme Court found error in the "accessibility and proximity" standard adopted by the Court of Appeals, finding that it "provides almost no limitation on the kind of possession that would be criminalized; in practice, nearly every possession of a firearm by a person engaged in drug trafficking would satisfy the standard[.]" *Bailey*, 516 U.S. at 144. As the Court noted, "[i]f Congress had intended to deprive 'use' of its active connotations, it could have simply substituted a more appropriate term—'possession'—to cover the conduct it wished to reach." *Id.* at 148.[7] The Supreme Court ultimately

[6] The State claims that *Bailey* is factually distinguishable because the firearm in *Bailey* was located in the trunk of the vehicle as opposed to the present case, where it was found in a fanny pack under the passenger seat, which fanny pack had been seen on the petitioner's person. This distinction does not affect our conclusion under the "active-employment" analysis adopted herein and described more thoroughly below.

[7] In response to the *Bailey* opinion, in 1998 Congress added language extending the application of 18 U.S.C. § 924(c)(1) to "any person who . . . in furtherance of any such crime, possesses a firearm." *See* 18 U.S.C. § 924(c)(1) (1998); *see also Watson v. United States*, 552 U.S. 74, 77 n.3 (2007) (noting that "[i]n 1998, Congress responded to *Bailey* by amending § 924(c)(1).").

concluded that "to sustain a conviction under the 'use' prong of § 924(c)(1), the Government must show that the defendant *actively employed* the firearm during and in relation to the predicate crime." *Id.* at 150 (emphasis added). Accordingly, the Supreme Court found that the evidence presented was insufficient to sustain a conviction for "use" of a firearm in the absence of any evidence that the defendant had actively employed the firearm during and relation to the predicate crime. *Id*. at 150-151.

In urging us to adopt a broader construction of the term "use," the State first suggests that "uses" includes inactive possession of a firearm. However, the Legislature did not include the word "possession" in the statute, and we will not read into the statute "that which it does not say." *See State v. Jones*, 251 W. Va. 611, 624, 915 S.E.2d 389, 402 (2025) (refusing to "arbitrarily read into" West Virginia Code § 61-7-15a "that which it does not say" regarding limitations on predicate felonies). As the Supreme Court noted in *Bailey*,

> [h]ad [the Legislature] intended possession alone to trigger liability under [the statute], it easily could have so provided. This obvious conclusion is supported by the frequent use of the term "possess" in the gun-crime statutes to describe prohibited gun-related conduct. *See, e.g.,* [West Virginia Code §§ 61-7-7 (2026), 61-7-8 (2026), 61-7-9 (1989), 61-7-11a (2025)].

Bailey, 516 U.S. at 143.

Second, the State relegates the *Bailey* opinion to a footnote in its response brief and relies, instead, on *Smith v. United States*, 508 U.S. 223 (1993),[8] in which the

[8] The State cited several other cases in support of a broader definition of "use," but none are persuasive. For instance, in *United States v. Hall*, 20 F.3d 1084 (10th Cir. 1994), the Tenth Circuit found that a firearm located in a bedroom closet was not being "used" for purposes of 18 U.S.C. § 924(c)(1). *Hall* applied a pre-*Bailey* standard that considered whether there was "ready access" to a firearm and whether the firearm was an integral part of the criminal undertaking. After *Bailey*, the Tenth Circuit's "broader definition" referred to by the State is no longer good law. *See Smith v. United States*, 516 U.S. 1105 (1996) (remanding decision based on *Hall* to the Tenth Circuit "for further consideration in light of *Bailey*"); *see also United States v. Hager*, 969 F.2d 883 (10th Cir. 1992) (establishing "ready access" standard), *abrogated by Bailey*, 516 U.S. 137.

Likewise, the Eighth Circuit case of *United States v. Lara-Ruiz*, 781 F.3d 919 (8th Cir. 2015) is unpersuasive, as it involved a conviction under 18 U.S.C. § 924(c) where the defendant "had displayed guns to his drug customers and used a handgun to hit another customer in her head and to shoot her unoccupied car." *Id.*, 781 F.3d at 921. The court in that case never discussed the definition of "use," and the language quoted by the State regarding a sufficient nexus between the gun and the drug trafficking offense was from pre-*Bailey* case law. *Id.*, 781 F.3d at 924.

Additionally, the out of jurisdiction state court cases cited by the State are inapplicable. In *Garrett v. State*, 998 S.W.2d 307 (Tex. App. 1999), the court concluded the evidence was sufficient to prove that the defendant used a deadly weapon during the commission of a felony where the victim testified that the defendant had the gun in his hand while he sexually assaulted her and that she yielded to his demands because he had the gun. *Id.* at 312. As discussed in footnote 10, *infra*, this clearly falls within the "active-employment understanding of 'use'" as it was "a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense . . . [and] the silent but obvious and forceful presence of a gun[.]" *Bailey*, 516 U.S. at 149.

Lastly, the defendant in *Fowler v. State*, 375 So.2d 879 (Fla. Dist. Ct. App. 1979) was convicted of "burglary while armed." The lower court reclassified his conviction as a life felony because a firearm was involved, but the appellate court remanded for resentencing because the sentence enhancement statute did not apply to a "felony in which the use of a weapon or firearm is an essential element." The opinion never discussed what it means to "use" a firearm.

Supreme Court found that the exchange of a firearm for narcotics constituted "use" of a firearm during a drug trafficking crime. In reaching its conclusion, the *Smith* Court determined that, "[b]y attempting to trade his [firearm] for the drugs, [the defendant] 'used' or 'employed' it as an item of barter to obtain cocaine; he 'derived service' from it because it was going to bring him the very drugs he sought." *Smith*, 508 U.S. at 229. The holding in *Smith* is not inconsistent with the "active-employment" standard set forth in *Bailey*. Although *Smith* declined to limit "use" to mean that a firearm must be "used as a weapon," the holding still "adhered to an active meaning of the term." *Bailey*, 516 U.S. at 148.[9]

For these reasons, we find the United States Supreme Court's "active-employment" analysis in *Bailey* persuasive and applicable to the term "uses" in West Virginia Code § 61-7-15a. Therefore, we adopt that Court's reasoning and holding and conclude that to sustain a conviction under the "use" prong of West Virginia Code § 61-7-15a (2016), the State must show that the defendant actively employed a firearm during the commission of a felony.

Having articulated what "uses" requires in the context of West Virginia Code § 61-7-15a, we now turn to an examination of the evidence to determine whether the

[9] Interestingly, the Supreme Court addressed the converse factual scenario in *Watson v. United States*, 552 U.S. 74 (2007), where the defendant *received* a firearm in exchange for drugs. In that case, the Supreme Court rejected the government's reliance on *Smith* and concluded that "[g]iven ordinary meaning and the conventions of English, we hold that a person does not 'use' a firearm under § 924(c)(1)(A) when he *receives* it in trade for drugs." *Id.*, 552 U.S. at 83 (emphasis added).

petitioner's conviction for use or presentation of a firearm during the commission of a felony can be sustained. In *Bailey*, the Supreme Court provides practical guidance as to the types of activities that would constitute "use" of a firearm during the commission of a felony:

> The active-employment understanding of "use" certainly includes brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm. We note that this reading compels the conclusion that even an offender's reference to a firearm in his possession could satisfy [§ 61-7-15a]. Thus, a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a "use," just as the silent but obvious and forceful presence of a gun on a table can be a "use."
>
> The example given above—"I *use* a gun to protect my house, but I've never had to *use* it"—shows that "use" takes on different meanings depending on context. In the first phrase of the example, "use" refers to an ongoing, inactive function fulfilled by a firearm. It is this sense of "use" that underlies the [State's] contention that "placement for protection"—*i.e.,* placement of a firearm to provide a sense of security or to embolden—constitutes a "use." It follows, according to this argument, that a gun placed in a closet is "used," because its mere presence emboldens or protects its owner. We disagree. Under this reading, mere possession of a firearm by a drug offender, at or near the site of a drug crime or its proceeds or paraphernalia, is a "use" by the offender, because its availability for intimidation, attack, or defense would always, presumably, embolden or comfort the offender. But the inert presence of a firearm, without more, is not enough to trigger [§ 61-7-15a]. Perhaps the nonactive nature of this asserted "use" is clearer if a synonym is used: storage. A defendant cannot be charged under [§ 61-7-15a] merely for storing a weapon near drugs or drug proceeds. Storage of a firearm, without its more active employment, is not reasonably distinguishable from possession.

Bailey, 516 U.S. at 148–49.[10]

Here, Sergeant Funk testified that the petitioner did not "deploy" the weapon, and there was no evidence he struck anyone with the gun. Further, there was no evidence that the petitioner brandished, displayed, or even referenced the firearm. In fact, the gun was contained in a fanny pack, which itself was "tucked under the front passenger seat." Seargeant Funk stated that "the first time anybody, law enforcement or otherwise, . . . saw the gun" was when he "discovered it under the seat in the fanny pack." In other words, the only evidence was of the petitioner's mere possession of a firearm, which is insufficient to sustain his conviction for use or presentation of a firearm during the commission of a felony.

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[10] This "active-employment" standard is consistent with our existing case law. In *State v. Cain*, 253 W. Va. 435, 931 S.E.2d 835 (2026), we recently affirmed Mr. Cain's conviction for use or presentment of a firearm during the commission of a felony where the evidence established that Mr. Cain had hit the victim on the head with a pistol. As noted in *Bailey*, "[t]he active-employment understanding of 'use' certainly includes . . . striking with . . . a firearm." *Bailey*, 516 U.S. at 149.

Similarly, in *Acord v. Hedrick*, 176 W. Va. 154, 342 S.E.2d 120 (1986), we interpreted language in West Virginia Code § 62-12-2(b) (1981) that denies eligibility for probation to persons who "committed a felony with the use, presentation or brandishment of a firearm." Mr. Acord was one of three assailants. The victim testified that all three assailants sexually assaulted her, and that a gun was held to her head *at all times* during the assaults. *Id.* at 161, 342 S.E.2d at 126. We concluded that West Virginia Code § 62-12-2(b) did not require "that there be evidence that each principal in the first-degree involved in a felony held a gun at all times. As long as there is evidence from which the jury can logically infer that the principal used a gun in the commission of the felony, the principal is subject to the provisions" of the statute. *Id.* The assailants' threatening use of the firearm clearly fits within the "active-employment understanding of 'use'" as it was "a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense . . . [and] the silent but obvious and forceful presence of a gun[.]" *Bailey*, 516 U.S. at 149.

In the absence of evidence that the petitioner "used or presented" the firearm, the jury could not "have found the essential elements of the crime proved beyond a reasonable doubt." *Guthrie*, 194 W. Va. at 663, 461 S.E.2d at 169, Syl. Pt. 1, in part. Consequently, the jury's verdict of guilt on this charge must be set aside. Accordingly, the circuit court erred in denying the petitioner's motion for judgment of acquittal as to the petitioner's conviction for the use or presentation of a firearm during the commission of a felony, and we reverse the circuit court's denial order and vacate the petitioner's conviction for use or presentation of a firearm during the commission of a felony.

B. Confrontation Clause

The petitioner was also convicted on two counts of possession with intent to deliver the controlled substances cocaine and fentanyl. The only evidence that the substances seized from the petitioner were, in fact, cocaine and fentanyl, was the forensic laboratory report prepared by Tiffany Neu. In his second assignment of error, the petitioner alleges that his right to confrontation was violated by the admission of the forensic laboratory report through the testimony of Blake Kinder, who was not the scientist who analyzed the seized substances.[11] The circuit court denied the petitioner's motion for a new

[11] The title of the petitioner's second assignment of error also asserts error in the circuit court permitting the State to call Mr. Kinder as a witness when he was not identified on the State's proposed witness list. However, the petitioner's arguments focus on the Confrontation Clause violation, and we find that issue dispositive. Therefore, it is unnecessary to address the alleged error related to the failure of the State to disclose Mr. Kinder as a witness.

trial on this basis, stating that "Mr. Kinder, as Ms. Neu's supervisor,[12] did indeed review and initial the certification to the lab report and the [petitioner's] right to be confronted with the analyst who made the certification was satisfied by Mr. Kinder appearing and testifying at trial." The petitioner appeals that ruling, arguing that the circuit court's denial of his motion for a new trial was reversible error. We agree.

The Confrontation Clause of the Sixth Amendment to the United States Constitution[13] and Section 14 of Article III of the West Virginia Constitution[14] confer on a criminal defendant the right to confront the witnesses against him. In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court determined that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68. This Court adopted *Crawford* in *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006), holding that:

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[12] Mr. Kinder testified that he was not Ms. Neu's supervisor but was a technical leader, responsible for instrument validations and calibrations.

[13] "The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L.Ed.2d 923 (1965), provides that '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.'" *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009).

[14] Section 14 of Article III of the West Virginia Constitution provides, in relevant part, that "[i]n all [criminal] trials, the accused shall . . . be confronted with the witnesses against him, ..."

> Pursuant to *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.

Id. at 368, 633 S.E.2d at 313, Syl. Pt. 6. The Supreme Court in *Crawford* declined to "spell out a comprehensive definition of 'testimonial,'" but in *Mechling* we held that:

> Under the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution,* a testimonial statement is, generally, a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 368, 633 S.E.2d at 313, Syl. Pt. 8.

Just a few years after *Crawford*, in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Supreme Court determined that the prohibition against testimonial statements from a witness who does not appear at trial applies in full to forensic evidence and to forensic reports. *Id.* at 311 (holding that sworn certificate of analysis attesting to the results of forensic analysis performed on seized substances were testimonial statements for purposes of the Sixth Amendment because they were made under circumstances that would lead an objective witness to believe they would be available for use at a later trial). Therefore, "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that

petitioner had a prior opportunity to cross-examine them, petitioner was entitled to ‘“‘be confronted with’”’ the analysts at trial.” *Id.* (citing *Crawford*, 541 U.S. at 54).

Two years later, in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), the Supreme Court relied upon *Melendez-Diaz* in finding that the testimony of a “surrogate” expert who did not perform or observe the testing was constitutionally insufficient to support introduction of a certified laboratory report made for the purpose of proving a particular fact. *Id.* at 652; *see also State v. Kennedy*, 229 W. Va. 756, 769, 735 S.E.2d 905, 918 (2012) (noting that *Bullcoming* was the first time that the United States Supreme Court addressed “so-called ‘surrogate’ expert testimony to introduce forensic testimonial hearsay”). In *Bullcoming*, the prosecution introduced evidence of the defendant’s blood-alcohol level through the testimony of an analyst who had neither participated in nor observed the testing on the blood sample. The forensic laboratory report certifying the defendant’s blood-alcohol concentration was the principal evidence against the defendant. *Bullcoming*, 564 U.S. at 653–54. The Supreme Court rejected the lower court’s determination that the surrogate witness provided a “fair enough opportunity for cross-examination” and explained that the surrogate witness “could not convey what [the certifying analyst] knew or observed about the events his certification concerned, . . . Nor could such surrogate testimony expose any lapses or lies on the certifying analyst’s part.”[15]

[15] The Supreme Court elaborated on this point in *Smith v. Arizona*, 602 U.S. 779 (2024), described below, explaining that laboratory tests and forensic reports are not Continued . . .

Id. at 661–62. Therefore, the Court concluded that "when the State elected to introduce [the] certification, [its author—and not any substitute] became [the] witness [that the defendant] had the right to confront." *Id.* at 663.

More recently, in 2024, the Supreme Court addressed the testimony of a "surrogate expert" in a situation, much like the present case, involving the identification at trial of controlled substances seized from a defendant. *Smith v. Arizona*, 602 U.S. 779 (2024). Unlike *Bullcoming*, the prosecution in *Smith* did not attempt to introduce the original analyst's certified laboratory report but, instead, had the surrogate expert testify about the original analyst's notes and conclusions, claiming that they were support for his "independent analysis." *Id*. at 790–791. However, the Supreme Court found that "nothing [in the *Melendez-Diaz* and *Bullcoming* analysis] changes if the surrogate . . . presents the [absent analyst's] statements as the basis for his expert opinion" because the absent analyst's report would still be coming into evidence for its truth, which requires that a defendant have the right to cross-examine the analyst who prepared the report or made such

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exempt from the Confrontation Clause as they are subject to manipulation or human error. *Id.* at 785 (citation omitted). To protect from this fallibility, a defendant may cross-examine an analyst by asking about the tests the analyst performed, the risk of error presented in the tests, and an analyst's proficiency in interpreting the test results. *See id.* at 786. Where one individual actually performed the laboratory work and created the applicable reports, a surrogate expert witness, who merely reads that other individual's output, violates the Confrontation Clause. *Id*.

statements.[16] *Id*. at 803. In *Smith*, the Supreme Court found that the bulk of the testifying expert's testimony was impermissible because:

> the State used [testifying expert] to relay what [unavailable analyst] wrote down about how she identified the seized substances. [Testifying expert] thus effectively became [analyst's] mouthpiece. He testified to the precautions (she said) she took, the standards (she said) she followed, the tests (she said) she performed, and the results (she said) she obtained. The State offered up that evidence so the jury would believe it—in other words, for its truth. So if the out-of-court statements were also testimonial, their admission violated the Confrontation Clause. [Petitioner] would then have had a right to confront the person who actually did the lab work, not a surrogate merely reading from her records.

Id. at 800. In conclusion, the Confrontation Clause is violated by the testimony of a surrogate expert who is only able to opine as to the identity of tested substances because "he accepted the truth of what [the unavailable analyst] had reported about her work in the lab." *Id*. at 798.

[16] The Supreme Court rejected the argument that evidentiary rules permitting an expert to disclose the basis of an opinion could insulate such testimony from Confrontation Clause scrutiny. West Virginia Rule of Evidence 703 permits an expert to base an opinion on facts or data that are not themselves admissible in evidence, provided experts in the particular field would reasonably rely on such facts or data. If the underlying facts or data would otherwise be inadmissible, the proponent may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect. However, *Smith* makes clear that these evidentiary rules cannot override the Confrontation Clause. *Smith*, 602 U.S. at 794 (noting that "federal constitutional rights are not typically defined—expanded or contracted—by reference to non-constitutional bodies of law like evidence rules. . . . [so] we conduct an independent analysis of whether an out-of-court statement was admitted for its truth, and therefore may have compromised a defendant's right of confrontation").

Turning to the facts of this case, we are presented with our first opportunity to consider *Bullcoming* and its progeny in the context of surrogate expert testimony regarding a forensic laboratory report identifying controlled substances. The threshold question is whether the laboratory report at issue is a testimonial statement implicating the Confrontation Clause. Here, the State did not contest that the report was testimonial, and it was undeniably "made under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial." *See Mechling*, 219 W. Va. at 368, 633 S.E.2d at 313, Syl. Pt. 8, in part. For instance, the first lines of the forensic report identify the petitioner as a "suspect" related to the crimes of "conspiracy to commit a felony" and "drugs – possession w intent to deliver-distribute a controlled substance," occurring on "09/09/2021." The petitioner was charged with possession with intent to deliver cocaine and fentanyl, and the laboratory report served to establish that the seized substances were cocaine and fentanyl. Therefore, pursuant to *Mechling* and *Melendez-Diaz*, a forensic laboratory report, such as the one introduced by the State in this case, is testimonial.

As a testimonial statement, *Crawford* guarantees the petitioner the right to confront the analyst who prepared the forensic laboratory report that "'bear[s] testimony'" against him. *Crawford*, 541 U.S. at 51 (citation omitted). *Melendez-Diaz* and *Bullcoming*, and our cases decided thereafter, "generally recognize that, to introduce results from forensic testing of physical evidence, the Confrontation Clause requires that the expert who

performed the testing testify at trial." *State v. Dolen*, 252 W. Va. 465, 478, 923 S.E.2d 395, 408 (2025). Therefore, when the State seeks to introduce a forensic laboratory report identifying seized controlled substances in a criminal prosecution, the State must call the analyst who actually performed the testing and prepared the forensic laboratory report, unless that analyst is unavailable and the defendant had a prior opportunity for cross-examination. Here, the State never asserted that Ms. Neu was unavailable, only that she was no longer employed by the State Police Forensic Laboratory; and the petitioner never had an opportunity to cross-examine Ms. Neu. Instead, the circuit court found that Mr. Kinder was an adequate substitute for Ms. Neu and permitted introduction of Ms. Neu's testimonial forensic report through his testimony.

While we have not addressed surrogate testimony regarding laboratory reports identifying controlled substances, we have applied *Bullcoming* in the context of testimonial autopsy reports and consistently found that allowing a surrogate witness to testify to the findings and conclusions of a non-testifying pathologist's report is constitutional error. In *State v. Kennedy*, 229 W. Va. 756, 735 S.E.2d 905 (2012), we found that the defendant's confrontation rights were violated when the testifying pathologist merely "served as a 'transmitter' for [the unavailable physician's] opinions regarding the cause of death by reading or reiterating the conclusions contained from the report." *Id.* at 771–72, 735 S.E.2d at 920–21. We concluded that "such testimony is precisely the type of 'surrogate' testimony that is violative of the Confrontation Clause per *Bullcoming*" and

that the testifying pathologist's "seeming concurrence with the cause of death, does not transform it into his own opinion, capable of cross-examination sufficient for Confrontation Clause purposes."[17] *Id.* at 772, 735 S.E.2d at 921.

In *State v. Frazier,* 229 W.Va. 724, 735 S.E.2d 727 (2012), the State conceded constitutional error in the admission of an autopsy report through the testimony of the Chief Medical Examiner rather than through the testimony of the forensic pathologist who performed the autopsy. *Id.* at 727, 735 S.E.2d at 730. The State argued, however, that the error was harmless. We found that the violation of the defendant's confrontation rights was not harmless, and we emphasized that the surrogate witness did not offer his own conclusions but repeated the absent pathologist's conclusions and opined as to what the absent pathologist did and with whom he spoke. *Id.* at 730–731, 735 S.E.2d at 733–734. The testifying witness acknowledged that he did not personally observe the autopsy, and he was unable to answer certain questions or explain discrepancies between the absent pathologist's notes and the report. *Id.* at 730, 735 S.E.2d at 733. Accordingly, we concluded that "[t]he defendant was prevented from seeking the answer to [his] questions

[17] As we recently noted in *Dolen*, the Supreme Court's more current opinion in *Smith* "echoes [this] reasoning of *Kennedy* in its analysis." *Dolen*, 252 W. Va. at 479, 923 S.E.2d at 409.

because the witness who made the statements/conclusions/findings was not brought before the court as a witness." *Id.*[18]

So too here, based on *Melendez-Diaz* and *Bullcoming*, as well as our application of those cases to testimonial autopsy reports in *Kennedy* and *Frazier*, we now hold that the Confrontation Clause of the Sixth Amendment to the United States Constitution and of Section 14 of Article III of the West Virginia Constitution bars admission of a forensic laboratory report made for the purpose of proving a particular fact through the in-court testimony of an expert who did not perform or observe the test reported.[19] "[S]urrogate testimony of that order does not meet the constitutional

[18] In two other cases, we found the use of surrogate testimony regarding autopsy reports to be constitutional error, but under the facts and circumstances of those cases, the error was found to be harmless because the autopsy reports did not contribute to the verdict. *State v. Blevins,* 231 W.Va. 135, 155–56, 744 S.E.2d 245, 265–66 (2013) (per curiam) (finding chief medical examiner's testimony regarding another pathologist's report "clearly constituted a violation of the Confrontation Clause" but the error was harmless because the testimony did not contribute to defendant's conviction or punishment); *State v. Flack*, 232 W. Va. 708, 716, 753 S.E.2d 761, 769 (2013) (acknowledging it was error for chief medical examiner to testify as a supervisor about a report he did not prepare, but finding the error harmless because the report did not contribute to the verdict and nothing in the chief medical examiner's "testimony implicated the defendant in the homicide, linked him to the crimes charged, or made it more likely or less likely that the defendant committed the murder[.]").

[19] We are cognizant of the burden this holding may place on prosecution. However, we are bound by the precedent of the United States Supreme Court, and in *Melendez-Diaz*, the Court considered and rejected such concerns, stating that "[t]he Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience." 557 U.S. at 325.

requirement." *Bullcoming*, 564 U.S. at 652; *see also Smith*, 602 U.S. at 803 ("Neither may the State introduce [testimonial out-of-court statements of a forensic analyst] through a surrogate analyst who did not participate in their creation."). A defendant's right under *Crawford* is to be confronted with the analyst who conducted the testing and created the report, unless such analyst is unavailable at trial and the defendant had an opportunity to cross-examine the unavailable analyst. *Bullcoming*, 564 U.S. at 652.

Here, the State attempts to distinguish the *Melendez-Diaz* and *Bullcoming* line of cases in two respects. First, the State argues that Mr. Kinder's testimony was not as a "surrogate" witness because of his "personal and substantive involvement" in reviewing Ms. Neu's report. Second, the State suggests that Mr. Kinder reached an independent conclusion on which he could be cross-examined. Neither argument is accurate or persuasive.

First, Mr. Kinder was, indeed, a "surrogate" witness. When the State sought to introduce the forensic laboratory report, Mr. Kinder was asked if the report contained his findings regarding his analysis, and he responded that "[t]hey were the findings of the scientist who performed the test," Ms. Neu. Subsequent questioning revealed that Mr. Kinder did not participate in or observe the testing performed by Ms. Neu. While he did initial Ms. Neu's report as a "reviewer," Mr. Kinder testified that he "did not perform the testing that was done in this case" but only "had the chance to review the data that was generated." Mr. Kinder admitted on cross-examination that he "did not work on this case,"

and during his testimony, he was unable to answer certain questions because he had not handled the seized substances or performed the testing. Accordingly, Mr. Kinder was not an analyst who performed or observed the testing reported, so he was undoubtedly a "surrogate" expert.

Mr. Kinder's "peer review" role does not change this analysis. In *Frazier*, *Blevins*, and *Flack*, we found violations of the Confrontation Clause where the Chief Medical Examiner testified about autopsy reports prepared by associate pathologists whom he supervised. In each of those cases, it was irrelevant that the testifying witness was the absent analyst's supervisor or that he signed off on autopsy reports. We found constitutional violations because "[t]he defendant was prevented from seeking the answer to [his] questions because the witness who made the statements/conclusions/findings [in the report] was not brought before the court as a witness." *Frazier*, 229 W. Va. at 730, 735 S.E.2d at 733. The same reasoning applies here. Mr. Kinder's role as a reviewer does not transform Mr. Kinder into the analyst who performed the testing, and it does not give the defendant the opportunity to cross-examine the person who actually made the observations and drew the conclusions in the report.

The State alternatively argues that the petitioner's right of confrontation was not violated because he was able to cross-examine Mr. Kinder about his conclusions.[20]

[20] In *Kennedy*, we recognized that as long as an expert "is applying his training and experience to the sources before him and reaching an independent judgment, Continued . . .

This argument fails, as well. Mr. Kinder never conducted any independent testing, nor did he reach an independent conclusion.[21] Rather, he merely "review[ed] the data that was generated" by Ms. Neu and "came to the same conclusions that Ms. Neu did." He was "a 'mere conduit' for the opinions" of the unavailable analyst, and his "seeming concurrence with [the analyst's findings], does not transform [those findings] into his own opinion, capable of cross-examination sufficient for Confrontation Clause purposes." *Kennedy*, 229 W. Va. at 772–73, 735 S.E.2d at 921–22. The Confrontation Clause "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Bullcoming*, 564 U.S. at 662.

Based on the foregoing, we find and conclude that Mr. Kinder's testimony regarding Ms. Neu's report is the paradigmatic case of a surrogate acting as a "transmitter." *See Kennedy*, 229 W. Va. at 771, 735 S.E.2d at 920. A review of Mr. Kinder's testimony

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there will typically be no *Crawford* problem. The expert's opinion will be an original product that can be tested through cross-examination." *Kennedy*, 229 W. Va. at 773, 735 S.E.2d at 922 (quoting *United States v. Johnson,* 587 F.3d 625, 635 (4th Cir. 2009)).

[21] Even if Mr. Kinder had reached an independent conclusion, which he did not, his testimony regarding the contents and conclusions in Ms. Neu's report would still violate the Confrontation Clause under *Smith*, because such evidence was being offered to prove the truth of the matter asserted. Mr. Kinder accepted the results determined by Ms. Neu and testified to her results for the truth of the matter asserted—that the seized controlled substances were cocaine and fentanyl. "[A] prosecutor cannot introduce an absent laboratory analyst's testimonial out-of-court statements to prove the results of forensic testing." *Smith*, 602 U.S. at 783.

demonstrates that, although he initialed the forensic laboratory report as a "reviewer," he "had no personal knowledge about [Ms. Neu's] testing of the seized items. Rather, as his testimony makes clear, what he knew on that score came only from reviewing [Ms. Neu's] records." *Smith*, 602 U.S. at 796. For instance, on direct examination, the following exchange took place:

> Q: . . . And are you aware that what you examined came in pill form?
>
> A: Yes. *Ms. Neu took a photo of the pills before testing*.
>
> Q: Let me show you a photographs [sic] of what's been previously marked as State's Exhibit No. 13. Is this what we're talking about, the pills that were tested?
>
> A: It's a little blurry on my screen. These tablets could be the ones tested. *Since I did not look at these directly, I can't speak to that*.
>
> Q: But your report identifies what you tested that's in that package; correct?
>
> A: It identifies what *Ms. Neu tested*. . . .
>
> * * *
>
> Q: So you had two bags of pills and you only tested one of them; right?
>
> A: There were two bags of pills submitted, *Ms. Neu tested* one bag, yes.
>
> * * *
>
> Q: . . . were those fentanyl or were those just laced with fentanyl. What would your response to that type of question be?

A: Based on the *documentation that I reviewed that Ms. Neu produced*, the M30 tablet is traditionally an oxycodone tablet and it is blue in color. The tablets, according to - - the tablets from the picture that Ms. Neu took appeared green in color, which is inconsistent with that.

(Emphasis added). As evidenced by this excerpt, Mr. Kinder could only testify to what Ms. Neu photographed or reported. For instance, his testimony failed to explain the inconsistency between Ms. Neu's report, which identifies the pills tested as being green in color, with the fact that such pills are traditionally blue in color and Sergeant Funk's testimony that the seized pills were "blue in color." Ultimately, Mr. Kinder testified that the baggies of white power, identified in Ms. Neu's laboratory report as Items 1.1.1, 1.1.2, and 1.1.3, contained cocaine, and the pills, identified in the laboratory report as Item 1.2.1, contained fentanyl.

The State relied on the forensic laboratory report prepared by Ms. Neu to prove to the jury that the substances seized from the petitioner were cocaine and fentanyl. Because Ms. Neu performed the testing on the seized controlled substances and created the testimonial forensic laboratory report admitted as State's Exhibit 7, the petitioner had a right to confront Ms. Neu, "not a surrogate merely reading from her records." *Smith*, 602 U.S. at 800. Therefore, we find that the petitioner's right to confrontation was violated by the State's failure to call Ms. Neu, the analyst who performed the analysis on the drugs.

Accordingly, we find that the circuit court abused its discretion in denying the petitioner's motion for a new trial as to the two charges of the indictment for

(1) possession with intent to deliver a controlled substance, cocaine, and (2) possession with intent to deliver a controlled substance, fentanyl. The circuit court clearly acted under a misapprehension of confrontation clause principles, requiring us to reverse its order denying the petitioner's motion for a new trial. *See Lively*, 207 W. Va. at 438, 533 S.E.2d at 664, Syl. Pt. 1. We, therefore, vacate the petitioner's convictions on (1) possession with intent to deliver a controlled substance, cocaine, and (2) possession with intent to deliver a controlled substance, fentanyl, and remand the matter for a new trial on those charges.

IV.

CONCLUSION

Based on the foregoing, we reverse the Circuit Court of Marion County's November 17, 2023, order denying the petitioner's motion for judgment of acquittal, or, in the alternative, motion for new trial; we reverse the petitioner's conviction for use or presentation of a firearm during the commission of a felony; and we vacate the petitioner's convictions on (1) possession with intent to deliver a controlled substance, cocaine, and (2)

possession with intent to deliver a controlled substance, fentanyl.[22] The matter is remanded for a new trial on the charges of possession with intent to deliver cocaine and fentanyl.[23]

Reversed, in part, vacated, in part, and remanded.

[22] The petitioner's convictions for possession of a firearm by a prohibited person and prohibited person carrying a concealed firearm are unaffected by this opinion.

[23] We note that the insufficiency of the evidence to support the petitioner's conviction for use or presentation of a firearm during the commission of a felony invokes the principles of double jeopardy. *See* Syl. Pt. 4, *State v. Frazier*, 162 W. Va. 602, 252 S.E.2d 39 (1979) ("The Double Jeopardy Clause of the Federal and this State's Constitutions forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."). Therefore, the petitioner may not be retried on the charge of use or presentation of a firearm during the commission of a felony. However, the petitioner's convictions for possession with intent to deliver cocaine and fentanyl are vacated based on trial error, which does not trigger double jeopardy. *Id.* at 626, 252 S.E.2d at 52; *see also Burks v. United States*, 437 U.S. 1, 15-16 (1978) (noting that trial error, as distinguished from evidentiary sufficiency, does not invoke double jeopardy because it "does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant."). Accordingly, this matter is remanded only for a new trial on the charges of possession with intent to deliver cocaine and fentanyl.