NO. 22-5159

In the Supreme Court of the United States

EDDIE LAMONT LIPSCOMB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Table of Authorities II

A. *Garrett* is entitled to no deference here. 4

B. The categorical approach demands certainty. 10

C. The issue is important enough to require Supreme Court intervention. 11

Conclusion 13

TABLE OF AUTHORITIES

Cases

Alexander v. State,
No. 02-15-00406-CR, 2017 WL 1738011 (Tex. App.—Fort Worth May 4, 2017) 7, 10

Bowen v. Massachusetts,
487 U.S. 879 (1988) 4

Burgess v. Seligman,
107 U.S. 20 (1883) 5

Burton v. State,
510 S.W.3d 232 (Tex. App.—Fort Worth 2017, no pet.) 7, 8, 10

Cooper v. State,
430 S.W.3d 426 (Tex. Crim. App. 2014) (Keller, P.J., concurring) 6, 7, 8, 10

Cort v. Ash,
422 U.S. 66 (1975) 5

Descamps v. United States,
570 U.S. 254 (2013) 10

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 4, 6

Hunter v. State,
No. 04-19-00252-CR, 2020 WL
4929796 (Tex. App.—San Antonio
July 29, 2020) 7, 10, 13

Jett v. Dallas Indep. Sch. Dist.,
491 U.S. 701 (1989) 6

Leavitt v. Jane L,
518 U.S. 137 (1996) 5, 6

Loville v. State,
No. 14-12-00297-CR, 2013 WL
1867077 (Tex. App.—Houston [14th
Dist.] May 2, 2013) 7, 8

Martin v. State,
No. 03-16-00198-CR, 2017 WL
5985059 (Tex. App.—Austin Dec. 1,
2017) 7, 10, 13

Mathis v. United States,
579 U.S. 500 (2016) 5, 6, 11, 13

R.R. Comm'n of Tex. v. Pullman Co.,
312 U.S. 496 (1941) 5

Schad v. Arizona,
501 U.S. 624 (1991) 9

Shepard v. United States,
544 U.S. 13 (2005) 10

(Arthur) Taylor v. United States,
495 U.S. 575 (1990) 10

United States v. Bowman,
No. 21-40467, 2022 WL 613466 (5th
Cir. Mar. 2, 2022) 12

United States v. Cantu,
964 F.3d 924 (10th Cir. 2020) 3

United States v. Degeare,
884 F.3d 1241 (10th Cir. 2018) 4

United States v. Garrett,
24 F.4th 485 (5th Cir. 2022) ..... *passim*

United States v. Herrold,
883 F.3d 517 (5th Cir. 2018) 9

United States v. Herrold,
139 S. Ct. 2712 (2019) 9

United States v. Herrold,
941 F.3d 173 (5th Cir. 2019) (en
banc)..... 3, 4, 9

United States v. Jackson,
30 F.4th 269 (5th Cir. 2022) 12

(Curtis) Johnson v. United States,
559 U.S. 133 (2010) 11

United States v. Lopez,
No. 18-10231, 2022 WL 576407 (5th
Cir. Feb. 25, 2022) 12

United States v. Matthews,
No. 18-10235, 2022 WL 317667 (5th
Cir. Feb. 2, 2022) 12

United States v. Perlaza-Ortiz,
869 F.3d 375 (5th Cir. 2017) 9

United States v. Powell,
No. 18-11050, 2022 WL 413943 (5th
Cir. Feb. 10, 2022) 12

United States v. Rodriguez-Flores,
25 F.4th 385 (5th Cir. 2022) 9

United States v. Senegal,
No. 19-40930, 2022 WL 4594608 (5th
Cir. Sept. 30, 2022) 12

United States v. Wilkins,
30 F.4th 1198 (10th Cir. 2022) 12

Van Cannon v. United States,
890 F.3d 656 (7th Cir. 2018) 3

Woodard v. State,
294 S.W.3d 605 (Tex. App.—Houston
[1st Dist.] 2009) 7, 13

Statutes

18 U.S.C. § 924(a)(2) (2018) 11

18 U.S.C. § 924(a)(8) (eff. June 25, 2022) 11

U.S.C. § 924(e) (the "ACCA") 2

Tex. Gov't Code § 22.201(c 13

Tex. Gov't Code § 22.203(a) 13

Tex. Pen. Code § 22.011(b)(1)–(5) 9

Tex. Pen. Code § 22.05(b)(1)–(2) 9

Tex. Pen. Code § 29.02(a) 9

Tex. Pen. Code § 29.03 7

Tex. Pen. Code § 30.02(a)(1)–(3) 8

Tex. Pen. Code § 30.02(a)(3) 3

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The petition and the Government's response present radically different views of a federal sentencing (or appellate) court's purpose and method for examining state decisional law under the categorical approach. That approach governs the analysis of prior convictions under the Armed Career Criminal Act, 18 U.S.C. § 924(e), and other federal recidivism statutes. The lower courts are divided along the same line. It will take a decision from this Court to settle the dispute, and the Government gives no good reason to delay that resolution. In fact, there are strong incentives to settle the conflict sooner, rather than later, and this case presents the issue squarely. This Court can and should resolve the conflict in this case, preferably in this term.

In Mr. Lipscomb's view, a federal court looks to state decisional law for the limited purpose of deciding what can be known *with certainty* about a prior conviction. The Tenth Circuit decision in *United States v. Cantu*, 964 F.3d 924 (10th Cir. 2020), illustrates how this view applies in the context of divisibility: "Oklahoma case law makes it impossible to say *with certainty* that the Oklahoma statute is divisible by individual drug." *Id.* at 930. (emphasis added). The Seventh Circuit's decision in *Van Cannon v. United States*, 890 F.3d 656, 664 (7th Cir. 2018), illustrates how this view applies when identifying the formal elements of a state burglary crime: the ACCA's "elements-based approach does not countenance imposing an enhanced sentenced based on implicit features in the crime of conviction." *Id.* at 664.

In the Government's view, a federal court may rely on its own construction of the state statute to apply the ACCA, even when there are contrary state appellate court decisions. This approach is typified by *United States v. Garrett*, 24 F.4th 485 (5th Cir. 2022), which was decided while Mr. Lipscomb's case was on remand to the Fifth Circuit and foreclosed his argument regarding Texas robbery. App. 3a. The same could be said of *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc), which held on the basis of *dicta*, a commentary, and the court's own construction of Texas Penal Code § 30.02(a)(3) that "Texas law rejects" an interpretation of the statute many Texas courts have embraced. *Id.* at 179.

This reply will focus on *Garrett*'s state-law determination because it is the most recent and most blatant example of a federal appellate court

"interpreting" a state criminal law in a way that conflicts with state-law authorities but preserves an otherwise unlawful ACCA-enhanced sentence.

A. *Garrett* is entitled to no deference here.

The Government argues that *Garrett* and *Herrold* are authoritative interpretations of the Texas burglary and robbery statutes and that this Court should defer to those interpretations because the Fifth Circuit encompasses Texas. Opp. 9 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 908 (1988), and *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004)). The chief problem with the regional-court-deference argument is that it fails to account for the ACCA-specific context in which the Fifth Circuit decided to resolve disputed state-law questions.

1. As an initial matter, this argument is circular—it presumes that the Government's view here is correct. The very question that divides the parties (and the lower courts) is whether a court of appeals *may* or *should* resolve uncertain state-law questions against the defendant in this context. That is exactly what the Fifth Circuit did in *Garrett*: it acknowledged "more than one interpretation" of the robbery statute "among the Texas courts of appeal," but disregarded the more recent authorities that favored Mr. Lipscomb after finding them "unpersuasive." *Id.* at 490. Even if the state-law authorities had been evenly balanced (instead of tilted so heavily in Mr. Lipscomb's favor), it would have been wrong for the Fifth Circuit to resolve the state-law question against him. *United States v. Degeare*, 884 F.3d 1241, 1248 n.1 (10th Cir. 2018) ("[I]f the evidence is merely in equipoise, the

modified categorical approach won't apply. Requiring anything less would be inconsistent with the Court's language in" *Mathis v. United States*, 579 U.S. 500 (2016). In other words, *Garrett*'s decision to resolve the state-law question instead of acknowledging indeterminacy was wrong as a matter of federal sentencing law. That is a reason to overrule *Garrett*, not a reason to defer to that unnecessary (and almost certainly incorrect) determination.

2. This Court's policy of deferring to lower court resolution of uncertain state-law issues presumes that the state-law question was unavoidable. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 499 (1941). Without binding authority, a federal court can only *forecast* the right outcome under state law. *Id.* Forecasts are inherently uncertain, and this Court sometimes assumes that lower-court judges drawn from a state will render more reliable predictions to the extent that they have more experience interpreting and applying the state's law. *Id.*; *see also Cort v. Ash*, 422 U.S. 66, 72 n.6 (1975); *but see Leavitt v. Jane L*, 518 U.S. 137, 145–46 (1996) (rejecting the argument that "panels of circuit judges" are inherently "better qualified" to resolve those issues).

But *Mathis* does not ask sentencing courts to *predict* how a state highest court would resolve the unanimity question "as they also always do in reference to the doctrines of commercial law and general jurisprudence." *Burgess v. Seligman*, 107 U.S. 20, 33 (1883). When applying the ACCA's categorical approach, the court examines state law only to see if there are "definitive[ ]" and "clear" answers about jury unanimity. 579 U.S. at 518. If the legal answer is

unclear, the court may consult state court records to make a case-specific evidentiary determination, but even then the evidence must "speak plainly." *Id.* at 519. In the absence of certainty, *Mathis* teaches, the ACCA does not apply. *Id.*

3. The policy of lower-court deference is not nearly as "firm" or expansive as the Government argues, especially where the lower court decides a federal-law question based on an overreading of nonbinding state-court authority. For example, in *Newdow*, this Court acknowledged the "custom" of deference, but still overruled the Ninth Circuit because the appellate court exaggerated the holdings of "intermediate state appellate cases": "The California cases simply do not stand for the proposition that Newdow has a right to dictate to others what they may and may not say to his child respecting religion." 542 U.S. at 16–17. And in *Leavitt*, 518 U.S. at 145–46, the Court summarily vacated a Tenth Circuit decision because that court's interpretation of Utah law was "plainly wrong."

4. Many cases invoking lower-court deference assume that a circuit court "is in a better position to determine" state law. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 738 (1989); *but see Leavitt*, 518 U.S. at 145–46. Here, the balance of expertise and experience in applying Texas criminal law tips heavily in favor of *Texas* state appellate judges. Since 2014, state judges throughout Texas have consistently recognized that Texas robbery-by-injury and robbery-by-fear are alternative means or methods of proving a single offense. *Cooper v. State*, 430 S.W.3d 426, 434–35 (Tex. Crim. App. 2014) (Keller, P.J., concurring) (Given the ambiguity, "we should accord determinative weight to

the legislature's decision to place these different means of committing robbery in the same statutory section and hold that they are alternative methods of committing the offense."); *id.* at 439 (Cochran, J., concurring) (agreeing with this aspect of Judge Keller's opinion); *Burton v. State*, 510 S.W.3d 232, 237 (Tex. App.—Fort Worth 2017, no pet.) (Unanimity is not required because "causing bodily injury or threatening the victim are different methods of committing the same offense."); *Alexander v. State*, No. 02-15-00406-CR, 2017 WL 1738011, at *7 (Tex. App.—Fort Worth May 4, 2017) (describing and affirming a conviction based on a general verdict to a disjunctive charge submitting both theories); *Martin v. State*, No. 03-16-00198-CR, 2017 WL 5985059, at *3 (Tex. App.—Austin Dec. 1, 2017) (describing an indictment and trial in which both theories were submitted to the jury in the disjunctive and the jury returned a general verdict); *Hunter v. State*, No. 04-19-00252-CR, 2020 WL 4929796, at *2 (Tex. App.—San Antonio July 29, 2020) (recognizing that the theories were "alternative means," properly submitted to the jury in the disjunctive).

Petitioner's counsel has found no Texas appellate decision actually *holding* that the two theories are separate elements for purposes of jury unanimity. *Garrett* cited two pre-*Cooper* decisions: *Woodard v. State*, 294 S.W.3d 605, 608–09 (Tex. App.—Houston [1st Dist.] 2009), and *Loville v. State*, No. 14-12-00297-CR, 2013 WL 1867077 at *8, (Tex. App.—Houston [14th Dist.] May 2, 2013). In both of those cases, the prosecution charged just one alternative. *See Woodard*, 294 S.W.3d at 607 (rejecting a unanimity challenge regarding aggravating factors at Tex. Penal

Code § 29.03 where the indictment alleged four different ways the defendant recklessly injured the victim). In *Loville*, the defendant argued that one of the theories in the indictment could only prove bodily-injury robbery, not fear-robbery, and that this violated the right to jury unanimity. 2013 WL 1867077, at *8. The argument (and the court's response) presumed that "injury" and "fear" were separate crimes, rather than alternative means, but the court had no need to decide the question because "the State chose to pursue robbery by threat." 2013 WL 1867077, at *9.

There is no case after *Cooper* arguing that *Burton* was incorrect—in other words, there is no known decision where a Texas court *reversed* a conviction because the jury returned a general verdict to a disjunctive charge about both kinds of robbery.

5. Finally, the Court should not defer to *Garrett* because the decision explicitly "begin[s]" with a grievous error: because "[t]he pertinent portion of the statute is divided into two separate, numbered subdivisions separated by a semicolon," the two alternatives were, in *Garrett*'s assessment, "conceptually distinct," and there were different *mens rea* requirements in each alternative, the court concluded that they were divisible elements. *Garrett*, 24 F.4th at 489. Critically, none of this reasoning was drawn from *Texas* jurisprudence—it represents this panel's own reaction to the statutory language. In fact, *Garrett* isn't even consistent with prior Fifth Circuit decisions about the divisibility of Texas crimes. The en banc Fifth Circuit rejected nearly identical arguments when holding that the separately numbered disjunctive subsections of burglary, Texas Penal Code

§ 30.02(a)(1)–(3), were indivisible in *United States v. Herrold*, 883 F.3d 517, 527–28 (5th Cir. 2018). This Court vacated that decision on other grounds, 139 S. Ct. 2712 (2019), but the unanimous en banc court reinstated the earlier divisibility analysis on remand. 941 F.3d at 177. And the Fifth Circuit has held that other Texas crimes possessing the same "structural feature"—numbered, disjunctive subsections separated by semicolon(s)—set out indivisible means, not divisible elements. *See*, e.g., *United States v. Perlaza-Ortiz*, 869 F.3d 375, 377–80 (5th Cir. 2017) (deadly conduct, Texas Penal Code § 22.05(b)(1)–(2)); *United States v. Rodriguez-Flores*, 25 F.4th 385, 389 (5th Cir. 2022) (sexual assault, Texas Penal Code § 22.011(b)(1)–(5)).

Aside from that, this Court has recognized "the impossibility of determining, as an *a priori* matter, whether a given combination of facts is consistent with there being only one offense." *Schad v. Arizona*, 501 U.S. 624, 638 (1991). Without heeding those instructions, the Fifth Circuit inexplicably *began* its analysis of Texas Penal Code § 29.02(a) by attempting the impossible. *Garrett*, 24 F.4th at 489. It then found support for its *ad hoc* and *a priori* textual analysis in Texas precedent about another crime—assault—and state court *dicta* assuming that the same analysis would apply.

It may be that the Texas Court of Criminal Appeals—if called upon to decide the unanimity question—would agree with the analysis of *Garrett*, rather than the contrary conclusion embraced by current Court of Criminal Appeals Presiding Judge Keller and former Judges Johnson, Cochran, and

Alcala in *Cooper*, 430 S.W. at 443–44 & 49; the unanimous appellate panels (and the district courts they affirmed) in *Burton*, 510 S.W. at 236–37; *Hunter*, 2020 WL 4929796; *Alexander*, 2017 WL 1738011; and *Martin*, 2017 WL 5985059. But no one would say that outcome is certain, clear, definitive, or free from doubt. And the *Garrett* panel denied the appellant's motion to certify the question to the Court of Criminal Appeals. Until *Garrett* is set aside, the federal courts in the Fifth Circuit are bound to follow a controversial holding about unanimity that is contradicted by the day-to-day decisions in criminal courts throughout the state.

B. The categorical approach demands certainty.

From beginning to end, this Court's precedents interpreting the lawful parts of the "violent felony" definition use the language of essentiality, necessity, and certainty. *See*, e.g., *(Arthur) Taylor v. United States*, 495 U.S. 575, 599, (1990) ("[T]he conviction *necessarily implies* that the defendant has been found guilty of all the elements of generic burglary."); *Shepard v. United States*, 544 U.S. 13, 21, 25 (2005) ("demand for *certainty*," "*certainty* of the record of conviction," and "*certainty* of a generic finding"); *Descamps v. United States*, 570 U.S. 254, 269–70, 272 (2013) ("And the only facts the court can be *sure* the jury so found are those constituting elements of the offense." . . . "A later sentencing court need only . . . determine whether . . . the jury *necessarily* found that he committed the ACCA-qualifying crime."); ("[A]n ACCA penalty may be based only on what a jury

'*necessarily* found' to convict a defendant (or what he *necessarily* admitted.") (all emphases added).

The Government identifies no persuasive reason why that demand for certainty would evaporate when a federal court is interpreting state law. In fact, courts *should be* reluctant to apply the ACCA under doubtful circumstances of any stripe. After all, a failure to apply the enhancement does not allow a guilty person to walk free. Even without the ACCA, unlawful possession of a firearm can be punished very severely—by up to ten or fifteen years in prison, depending on when the crime was committed. *Compare* 18 U.S.C. § 924(a)(2) (2018) *with* § 924(a)(8) (eff. June 25, 2022). But where the ACCA applies, the district court must impose a sentence of at least fifteen years, and may impose up to life in prison.

The Government complains that applying the ACCA's demand for certainty to state-law determinations will be too "rigid." Opp. 9–11. The same complaint could be made about the categorical approach as a whole. *See (Curtis) Johnson v. United States*, 559 U.S. 133, 145 (2010) (recognizing that the rigid evidentiary limitations of the categorical approach "will often frustrate application of the modified categorical approach"); *Mathis*, 579 U.S. at 519 (resolving indeterminacy in favor of the defendant). ref'd)

C. The issue is important enough to require Supreme Court intervention.

There are four reasons why this Court should grant certiorari and resolve this issue now.

First, the stakes are incredibly high for Mr. Lipscomb and countless others. In Mr. Lipscomb's case, the ACCA meant the difference between a ten-year prison sentence and a twenty-year sentence. In *Garrett*, the district court's non-ACCA sentence was seven years in prison. 24 F.4th at 487.

Second, this is not a one-off determination of state law that will affect only a handful of cases. *Garrett*'s dubious divisibility holding is not even one year old, but the Fifth Circuit has already applied it as binding precedent here and in many other ACCA cases predicated on Texas robbery. App. 5a; *see also United States v. Senegal*, No. 19-40930, 2022 WL 4594608, at *1 (5th Cir. Sept. 30, 2022); *United States v. Jackson*, 30 F.4th 269, 275 (5th Cir. 2022); *United States v. Bowman*, No. 21-40467, 2022 WL 613466, at *1 (5th Cir. Mar. 2, 2022); *United States v. Lopez*, No. 18-10231, 2022 WL 576407, at *2 (5th Cir. Feb. 25, 2022); *United States v. Powell*, No. 18-11050, 2022 WL 413943, at *2 (5th Cir. Feb. 10, 2022); and *United States v. Matthews*, No. 18-10235, 2022 WL 317667, at *1 (5th Cir. Feb. 2, 2022).

But it gets worse. The Tenth Circuit's decision in *United States v. Wilkins*, 30 F.4th 1198 (10th Cir. 2022), strongly suggests that *Garrett*'s error will seep into the circuits who would otherwise apply the categorical approach the correct way. Noting that "several other circuits ordinarily" apply the same regional-court deference discussed above, the Tenth Circuit was "reluctant to create a circuit split" with *Garrett*. *Wilkins*, 30 F.4th at 1209. The court ultimately found that any error (in treating Texas robbery as divisible) was not plain. *Id.* at 1209.

Third, allowing circuit panels to definitively resolve disputed questions of state law in favor of the Government risks disrupting state prosecutions. Courts throughout Texas follow *Woodard*'s understanding that fear-robbery and injury-robbery are alternative means or methods of proving a single indivisible crime of robbery. Many of those courts are bound by *Woodard*. *See* Tex. Gov't Code §§ 22.201(c) & 22.203(a) (noting the counties covered by the Fort Worth Court of Appeals). Others have already found its interpretation persuasive. Martin, 2017 WL 5985059 (Austin Court of Appeals and Comal County District Court); *Hunter*, 2020 WL 4929796 (San Antonio Court of Appeals and Bexar County District Court). *Garrett* holds that these courts are all wrong in how they construe the statute.

Fourth, the Government approach risks reintroducing the same unpredictability and "unfairness to defendants" that the categorical approach was designed to prevent. *Mathis*, 579 U.S. at 501.

CONCLUSION

This Court should grant the petition and vacate the judgment of the court of appeals below.

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