Petition Appendix

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 16, 2022
Lyle W. Cayce
Clerk

No. 19-11022

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

VERNON LEE WHEELER,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CR-75-1

Before SMITH, BARKSDALE, and HAYNES, *Circuit Judges*.

PER CURIAM:*

Defendant-Appellant Vernon Wheeler pleaded guilty to being a felon in possession of a firearm. At sentencing, the district court determined that Wheeler had at least three prior convictions for violent felonies and subsequently applied the enhancement mandated by the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). The court sentenced Wheeler to 180 months in prison. On appeal, Wheeler argues that the district court

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

erred in applying the enhancement. For the reasons set forth below, we AFFIRM Wheeler's sentence and DENY his motion to file a supplemental brief.

I.

In November 2015, police officers arrested Wheeler for jaywalking. During the arrest, the officers discovered a pistol in his car. Because Wheeler had prior felony convictions, the Government charged him with unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

A felon-in-possession conviction typically carries a maximum 10-year penalty. 18 U.S.C. § 924(a)(2). However, under the ACCA, a person who has been convicted of possessing a gun as a felon is subject to a 15-year mandatory minimum sentence if he has three prior convictions for "violent felon[ies]." *Id.* § 924(e)(1); *see also United States v. Lerma*, 877 F.3d 628, 629 (5th Cir. 2017). The ACCA defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another,"[1] or (2) "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(i)–(ii).

At the time Wheeler committed the underlying offense, he had four previous convictions for aggravated robbery with a deadly weapon in violation of the Texas robbery statute. Accordingly, Wheeler's indictment gave him notice that he was subject to the enhanced penalties of § 924(e). He subsequently pleaded guilty to the felon-in-possession charge but disputed the applicability of the ACCA enhancement, asserting that his

[1] The first portion of the statute, colloquially referred to as the "elements clause," is at issue here.

convictions were not categorically "violent felonies" within the ACCA's elements clause. After conducting a sentencing hearing, the district court agreed with Wheeler and declined to apply the enhancement. The Government subsequently appealed.

Initially, we affirmed. *United States v. Wheeler* ("*Wheeler I*"), 733 F. App'x 221, 222–23 (5th Cir. 2018) (per curiam), *vacated and superseded on reh'g*, 754 F. App'x 282 (5th Cir. 2019) (per curiam) (mem.) ("*Wheeler II*"). But, in light of intervening precedent from our court, we vacated our prior opinion, vacated Wheeler's sentence, and remanded for a full resentencing. *Wheeler II*, 754 F. App'x at 282. In doing so, we instructed the district court to consider the sentence, "in the first instance" based on (1) intervening precedent, (2) "any other new cases," and (3) "arguments about whether applying such cases to Wheeler's sentence [would be] consistent with due process." *Id.* at 283.

At resentencing, the district court concluded it was obligated to apply the ACCA-enhancement and accordingly sentenced Wheeler to 180 months in prison. Wheeler timely appealed.

II.

On appeal, Wheeler challenges the district court's imposition of the ACCA enhancement based on his prior convictions for robbery in violation of the Texas robbery statute. He argues that the district court erred because: (1) his Texas robbery convictions are not categorically "violent felonies" under the ACCA, and (2) due process concerns preclude the imposition of an ACCA-enhanced sentence. We address each argument in turn, reviewing the legal conclusions underlying the district court's application of the ACCA de novo. *United States v. Hawley*, 516 F.3d 264, 269 (5th Cir. 2008).

III.

First, Wheeler maintains that the district court erred in concluding that he was subject to the ACCA-enhancement based on his prior Texas robbery convictions. Wheeler begins by asserting that convictions under the Texas robbery statute are not categorically violent felonies—and we agree with that. The Supreme Court made clear in *Borden v. United States*, 141 S. Ct. 1817 (2021), that crimes which can be committed "with a mens rea of recklessness do not qualify as violent felonies under [the] ACCA . . . [because] [t]hey do not require . . . the active employment of force against another person." *Id.* at 1834. Because an individual may be convicted under the Texas robbery statute without acting with purpose or knowledge, *see* TEX. PENAL CODE ANN. § 29.02(a), we agree that a conviction under the Texas robbery statute would not per se qualify as a violent felony for ACCA purposes.

But whether or not convictions under the Texas robbery statute are categorically violent felonies is not dispositive here. Rather, what matters is whether the Texas robbery statute is "divisible" or "indivisible." *United States v. Garrett*, 24 F.4th 485, 489–90 (5th Cir. 2022). "An indivisible statute sets out a single set of elements to define a single crime. In contrast, a divisible statute lists elements in the alternative, and thereby defines multiple crimes." *Lerma*, 877 F.3d at 631 (internal citation, quotation marks, and brackets omitted). Therefore, a divisible statute can "create multiple, distinct crimes, some violent, some non-violent." *Garrett*, 24 F.4th at 488.

As we explained in *Garrett*, the Texas robbery statute is divisible: it creates multiple crimes, including (1) robbery-by-injury, which may be committed recklessly, and (2) robbery-by-threat, which may be committed intentionally or knowingly. *Id.* at 489–90. Because robbery-by-threat may *only* be committed with an intentional and knowing mens rea, a conviction

under this portion of the statute therefore qualifies as a violent felony under the ACCA. *Id.* at 491. Wheeler devotes much of his appellate briefing trying to convince us otherwise. But we agree with—and are bound by—*Garrett*'s reasoning.

Because the Texas robbery statute is divisible, we then must apply a "modified categorical approach" to determine whether Wheeler's convictions qualify as violent felonies. Under this approach, we consider "a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Lerma*, 877 F.3d at 631.

The record here makes plain that Wheeler's prior convictions were predicated on the robbery-by-threat portion of the statute. Like the evidence in *Garrett*, the record here "recites the statutory language pertaining to robbery-by-threat and makes no mention of robbery-by-injury." *Garrett*, 24 F.4th at 491. For example, the presentence report ("PSR") indicates that Wheeler was convicted of intentionally and knowingly threatening and placing the victims in fear of imminent bodily injury and death. Under our precedent, then, Wheeler's convictions qualify as violent felonies. Therefore, the district court did not err in applying the ACCA enhancement, and in fact, it was obligated to do so.

In an attempt to overcome the binding precedent on this issue, Wheeler asserts that the Government expressly waived the divisibility argument in the prior appeal. Therefore, per Wheeler, the district court erred in considering divisibility when evaluating the ACCA enhancement. Wheeler's argument, though, falls short for several reasons.

First, our remand order directed the district court to conduct a full resentencing, including considering—in the first instance—Wheeler's sentence in light of intervening binding precedent, as well as "*any other new*

cases." *Wheeler II*, 754 F. App'x at 283. Under the mandate rule, the district court was compelled to comply on remand with the dictates of our court. *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004). Our broad mandate required the district court to consider *all* arguments relevant to the ACCA enhancement, including those related to divisibility, and the district court did just that.

Second, and separately, we "may affirm on any basis supported by the record." *United States v. Barlow*, 17 F.4th 599, 602 (5th Cir. 2021) (forgoing "resolution of the waiver issue" and instead affirming on an independent basis). The district court was guided by the PSR in sentencing Wheeler. The PSR independently recommended an ACCA enhancement based, at least in part, on divisibility. Therefore, the PSR, as part of the record, provides an independent basis supporting the ACCA enhancement. We therefore reject Wheeler's waiver contentions.

In sum, we conclude that the district court did not err in concluding that Wheeler was subject to an ACCA-enhanced sentence based on his Texas robbery convictions.

IV.

Wheeler next urges that the district court erred because applying the ACCA enhancement to his sentence would violate due process principles. Per Wheeler, he lacked fair notice that he would be eligible for a sentence longer than ten years because this court's precedent at the time he committed his offense did not make clear that a Texas robbery conviction would qualify as a violent felony. We recognize that our precedent related to the applicability of the ACCA enhancement has not always been well-defined. However, for the reasons discussed below, we are unpersuaded that this amounts to a due process violation.

Generally, "most judicial decisions apply retroactively." *United States v. Jackson*, 30 F.4th 269, 272 (5th Cir. 2022). But due process principles require that individuals have "notice of what conduct is criminal and the punishment that attaches to each crime." *Id.* So, in narrow and limited circumstances, a retroactive application of a judicial decision could violate the Due Process Clause. For example, in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the Supreme Court held that a defendant's due process rights could be violated by a retroactive application of an "unexpected and indefensible" expansion of substantive criminal liability. *Id.* at 354.

In line with that decision, our court has held that such "*Bouie* situation[s]" arise if a judicial opinion (1) is a "stark divergence from the statutory text," (2) "depart[s] from prior caselaw," (3) is "inconsist[ent] with the expectations of the legislature and law enforcement," or (4) criminalizes "otherwise innocent conduct." *Jackson*, 30 F.4th at 272. But *Bouie* situations are exceedingly rare; in fact, this court has never applied *Bouie* to find a due process violation. *See id.* at 274. Because this case does not present any of the hallmarks of an "exceedingly rare" circumstance warranting its application, we similarly decline to do so here.

First, our later precedent establishing that an aggravated robbery conviction could be a violent felony is not in conflict with the ACCA's text. To the contrary, it is in *accord with* the ACCA's text and Congress's intent in enacting the statute. *See Taylor v. United States*, 495 U.S. 575, 581 (1990) (recognizing that "the first version of the sentence-enhancement provision" subjected defendants to a 15-year mandatory minimum term if they had "three previous convictions 'for robbery or burglary.'"). Second, our recent precedent was certainly not "unexpected." Instead, "[i]t merely reconciled [this] circuit['s] precedents with the Supreme Court's decision." *United*

States v. Gomez Gomez, 917 F.3d 332 (5th Cir. 2019),[2] *overruled on other grounds by Gomez v. United States*, 141 S. Ct. 2779 (2021) (mem.). Third, our decisions did not make previously innocent conduct criminal. *See Proctor v. Cockrell*, 283 F.3d 726, 732 (5th Cir. 2002). Possession of a firearm with a prior felony conviction has long been a federal crime. *See* 18 U.S.C. § 922(g)(1). This is in stark contrast to *Marks v. United States*, 430 U.S. 188 (1977), one of the very few instances where the Supreme Court has found a due process violation based on the retroactive application of new judicial precedent. *See id.* at 191. In *Marks*, the Court's opinion redefined "obscenity," thereby criminalizing acts that were wholly legal at the time of the challenged conduct. *See id.* But such is not the case here—Wheeler wasn't participating in wholly innocent conduct, rendered unlawful by a later judicial opinion. He instead illegally possessed a firearm, in violation of a federal law that had long been in effect.

At bottom, none of the *Bouie* hallmarks are present here. We are thus assured that Wheeler had fair notice of the potential sentence authorized. *United States v. Batchelder*, 442 U.S. 114, 123 (1979). As such, we reject Wheeler's challenge and hold that the ACCA-enhanced sentence conforms with due process principles.

V.

For the foregoing reasons, we AFFIRM Wheeler's sentence. Wheeler's motion to file a supplemental brief is DENIED.[3]

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[2] The Supreme Court overruled *Gomez Gomez* on other grounds, *see Gomez*, 141 S. Ct. at 2780, but its reasoning on this point is still true.

[3] Months after the conclusion of briefing and weeks after oral argument in this case, Wheeler moved to file a supplemental brief. His motion sought to make a new argument that his prior convictions did not occur on "different occasions" based on *Wooden v. United States*, 142 S. Ct. 1063 (2022). But Wheeler concedes that "he did not raise any challenge

to the" different occasions determination at the earlier sentencing, the new sentencing, or in his initial brief. Moreover, this precedent was available to Wheeler at the time he filed his reply brief and at oral argument. Yet he failed to raise *Wooden* at any time until now. We thus decline to consider it.

United States Court of Appeals for the Fifth Circuit

No. 19-11022

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

VERNON LEE WHEELER,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CR-75-1

ON PETITION FOR REHEARING EN BANC

Before SMITH, BARKSDALE, and HAYNES, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 1, 2023
Lyle W. Cayce
Clerk

No. 20-11141
CONSOLIDATED WITH
No. 21-10780

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JACKIE PHILLIP SOSEBEE,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District Court of Texas
USDC Nos. 7:16-CV-80, 7:06-CR-22-1, 7:20-CR-41-1

Before HIGGINBOTHAM, DUNCAN, and ENGELHARDT, *Circuit Judges*.

PATRICK E. HIGGINBOTHAM, *Circuit Judge*:

Jackie Sosebee pled guilty to being a felon in possession of ammunition in violation of 18 U.S.C. §§ 921(g)(1) and 922(e)(1) and was sentenced to 15 years' imprisonment pursuant to the Armed Career Criminal Act ("ACCA"), given his multiple prior violent felony convictions. While on supervised release, Sosebee was again convicted of being a felon in possession of ammunition, resulting in revocation of his release as well as a separate conviction and an attendant sentence of 15 years and 3 months, again

enhanced by the ACCA. Sosebee challenges the ACCA sentencing enhancements in both cases. We DISMISS as moot his claim regarding his first federal conviction and sentence, and we AFFIRM the sentence of his second federal conviction.

I.

A.

Prior to the two federal convictions giving rise to this consolidated appeal, Sosebee committed three Texas state crimes. First, a Texas court convicted Sosebee of robbery in 1985. Second, Sosebee pled guilty to burglary of habitation that year. Third, Sosebee pled guilty to another charge of burglary of habitation in 2002.

In 2007, Sosebee pled guilty to being a felon in possession of ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). The district court enhanced Sosebee's sentence under the ACCA and sentenced him to 180 months' imprisonment,[1] the mandatory minimum under the ACCA, as well as three years of supervised release. In July 2019, Sosebee was released from prison and began his term of supervised release.

While on supervised release in January 2021, Sosebee committed another crime: a jury convicted him of being a felon in possession of ammunition in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), resulting in a sentence of 188 months' imprisonment, again enhanced under the ACCA. As a result, the district court revoked Sosebee's term of supervised release and sentenced him to an additional 24 months' imprisonment for the 2007 conviction—commonly referred to as a "revocation term"—which was to run concurrently with the 2021 conviction.

[1] *See* 18 U.S.C. § 924(e)(1).

B.

In 2016, Sosebee filed a § 2255 motion to vacate, set aside, or correct the sentence imposed following his 2007 guilty plea, which the district court denied. In November 2020, Sosebee filed a notice of appeal (the "first action").[2] This Court issued a COA as to "whether Texas *robbery* qualifies as a 'violent felony' under the ACCA."[3]

Sosebee filed a notice of appeal of his 2021 conviction and sentence (the "second action").[4] Sosebee then filed a motion to consolidate the two cases,[5] which was granted.[6]

II.

"Whether an appeal is moot is a jurisdictional matter, since it implicates the Article III requirement that there be a live case or controversy."[7] "Under Article III's case-or-controversy requirement, '[t]o invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'"[8] "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial

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[2] Notice of Appeal, No. 20-11141 (5th Cir., Nov. 13, 2020) (Dkt. No. 1).

[3] Order Granting Motion for Certificate of Appealability, No. 20-11141 (5th Cir. Nov. 10, 2021) (Dkt. No. 37-2) (emphasis added).

[4] *See* Notice of Appeal, No. 21-10780 (5th Cir. Aug. 5, 2021) (Dkt. No. 1).

[5] *See* Unopposed Motion to Consolidate, No. 20-11141 (5th Cir. Dec. 17, 2021) (Dkt. No. 46).

[6] Order, No. 20-11141 (5th Cir. Dec. 20, 2021) (Dkt. No. 51).

[7] *Bailey v. Southerland*, 821 F.2d 277, 278 (5th Cir. 1987).

[8] *United States v. Heredia-Holguin*, 823 F.3d 337, 340 (5th Cir. 2016) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)).

and appellate . . . . The parties must continue to have a personal stake in the outcome of the lawsuit."[9] In other words, "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party."[10] "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot."[11]

Shortly before oral argument, this Court directed the parties to be prepared to address whether Sosebee's appeal of the order denying his § 2255 motion is moot.[12] In response, the Government filed a Rule 28(j) letter detailing additional information regarding Sosebee's incarceration, averring that "Sosebee will have actually served (as of the date of oral argument) 27 months and 19 days on that aggregate sentence—or 3 months and 19 days longer than his 24-month revocation sentence."[13] In other words, Sosebee had completed his "term of imprisonment imposed following the revocation of his supervised release" and had "no remaining supervised release term that may be modified or terminated."[14] As a result, even a favorable determination in this action will have no impact on his sentence, meaning it

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[9] *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis*, 494 U.S. at 477–78).

[10] *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)).

[11] *Id.* (alteration in original) (quoting *Ellis v. Bhd. Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Emps.*, 466 U.S. 435, 442 (1984)).

[12] Order, No. 20-11141 (5th Cir. Nov. 28, 2022) (Dkt. No. 92).

[13] Letter, No. 20-11141 (5th Cir. Nov. 30, 2022) (Dkt. No. 98).

[14] *United States v. Nelson*, 410 F. App'x 734, 735 (5th Cir. 2010) (per curiam) (unpublished); *see also* Order, *In re: Moses Smith*, No. 16-40952 (5th Cir. July 27, 2016) (Dkt. No. 15) (holding that a § 2255 motion was moot where the defendant "is in custody as a result of his violation of the terms of his supervised release," "has completed his term of imprisonment[,] and faces no additional term of supervised release").

is "impossible for [us] to grant any effectual relief" to him.[15] That Sosebee cannot obtain any form of relief stands in stark contrast to other cases in which a defendant had time remaining in their revocation sentences such that, upon prevailing, his sentence could have been reduced pursuant to Bureau of Prisons regulations that "credit" time served beyond what was appropriate in the initial sentence to the revocation sentence.[16] Lacking the ability to provide Sosebee any relief, we dismiss his appeal of the § 2255 order as moot.

III.

The ACCA provides that anyone who "knowingly violates subsection . . . (g) of section 922 shall be fined under this title, imprisoned for not more than 15 years, or both."[17] It also provides that any defendant with "three previous convictions by any court . . . for a violent felony . . . shall be fined under this title and imprisoned not less than fifteen years,"[18] thereby addressing the "special danger" associated with "armed career criminals."[19] The Act defines a "violent felony" as:

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[15] *Knox*, 567 U.S. at 307 (quoting *City of Erie*, 529 U.S. at 287).

[16] *See United States v. Jackson*, 952 F.3d 492, 498 (4th Cir. 2020) (citing BOP PROGRAM STATEMENT § 5880.28, SENTENCE COMPUTATION MANUAL 1–69 (1999)); *see also United States v. Penn*, 788 F. App'x 337, 340 (6th Cir. 2019) (unpublished) (holding a prisoner's case was not moot where there was remaining time left on his revocation sentence because prevailing would shorten his sentence by several years); *Parker v. Sproul*, No. 18-1697, 2022 WL 258586, at *2 (7th Cir. Jan. 27, 2022) (holding that a prisoner's case was not moot where "excess time spent in prison . . . [could] be credited toward a prison term for revocation of the supervised release tied to that crime" (citing *Jackson*, 952 F.3d at 498)).

[17] 18 U.S.C. § 924(a)(8).

[18] *Id.* § 924(e)(1).

[19] *Begay v. United States*, 553 U.S. 137, 146 (2008).

> any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.[20]

"Subsection (i) of this definition is known as the elements clause."[21] The beginning of subsection (ii) is known as the enumerated offenses clause, while "the end of subsection (ii)—'or otherwise involves conduct that presents a serious potential risk of physical injury to another'—is known as the residual clause."[22]

In 2015, the Supreme Court in *Johnson v. United States* struck down the residual clause as unconstitutionally vague while upholding the remaining definitions of the term "violent felony."[23] Last year, the Supreme Court in *Borden v. United States* added another constraint to the definition of a violent felony: an offense with a *mens rea* of recklessness "cannot so qualify."[24] But since *Johnson*, we, along with our sister Circuits, have been adjudicating whether a given criminal act is or is not a "violent felony" for purposes of the ACCA, navigating *Borden* and other applicable Supreme Court precedent.

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[20] 18 U.S.C. § 924(e)(2)(B).

[21] *Welch v. United States*, 578 U.S. 120, 123 (2016).

[22] *Id.*

[23] 576 U.S. 591, 606 (2015).

[24] 141 S. Ct. 1817, 1822 (2021).

Last year, this Court addressed whether a Texas robbery-by-threat conviction is "a valid ACCA predicate for an enhanced sentence" post-*Borden*.[25] In *United States v. Garrett*, we held that we must "look at the statute itself and examine the elements of that crime; that is to say, we apply a categorical analysis to determine whether the statute itself necessarily and invariably requires the 'use . . . or threatened use of physical force.'"[26] The Court reasoned that the Texas robbery statute is "divisible,"[27] meaning that it "create[s] multiple distinct crimes, some violent, some non-violent."[28] We further held that robbery-by-injury did not constitute a violent crime for purposes of the ACCA while robbery-by-threat did.[29]

Sosebee takes issue with *Garrett*'s reasoning, but as the Government correctly notes, "Sosebee's arguments against *Garrett* cannot change that *Garrett* is binding precedent and has been uniformly followed by other panels of this Court since it was decided." Indeed, "[w]e are bound by our precedent 'in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court,' neither of which has occurred."[30] To that end, we have repeatedly relied on *Garrett* to affirm ACCA enhancements predicated upon Texas robbery-by-threat convictions,[31] just as additional published precedent has relied on *Garrett* in

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[25] *United States v. Garrett*, 24 F.4th 485, 487 (5th Cir. 2022).

[26] *Id.* at 488 (quoting *Borden*, 141 S. Ct. at 1822).

[27] *Id.* at 491.

[28] *Id.* at 488 (citing *Mathis v. United States*, 579 U.S. 500, 505 (2016)).

[29] *Id.* at 491.

[30] *United States v. Montgomery*, 974 F.3d 587, 590 n.4 (5th Cir. 2020) (quoting *United States v. Setser*, 607 F.3d 128, 131 (5th Cir. 2010)).

[31] *See, e.g.*, *United States v. Senegal*, No. 19-40930, 2022 WL 4594608, at *1 (5th Cir. Sept. 30, 2022) (per curiam) (unpublished) ("[A] Texas robbery-by-threat conviction satisfies the ACCA's elements clause."); *United States v. Landaverde-Leon*, No. 21-40808,

related retroactivity analysis.[32] Recently, a separate panel of this Court made clear that it "agree[d] with—and are bound by—*Garrett*'s reasoning."[33] So we apply *Garrett*'s modified categorical framework and mimic its process to determine if Sosebee was convicted of robbery-by-injury or robbery-by-threat.

In *Garrett*, we "look[ed] to the indictment and the judicial confession" to show that the defendant's offense "pertain[ed] to robbery-by-threat" rather than robbery-by-injury, meaning the defendant's conviction "is thus a violent felony under the ACCA and may serve as a predicate to an enhanced sentence."[34] The same is true in the instant action. Sosebee's robbery conviction similarly recites the statutory language pertaining to robbery-by-threat—"intent to obtain property . . . and *there intentionally and knowingly threaten and place [the victim] in fear of imminent bodily injury*."[35] By contrast, the Information makes no mention of robbery-

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2022 WL 2208400, at *1 (5th Cir. June 21, 2022) (per curiam) (unpublished) (affirming *Garrett*'s holding vis-à-vis divisibility and the classification of each robbery as an ACCA predicate or not); *United States v. Balderas*, No. 20-10992, 2022 WL 851768, at *1 (5th Cir. Mar. 22, 2022) (per curiam) (unpublished) ("We recently decided that Texas simple robbery, is divisible into robbery-by-injury, which may be committed recklessly, and robbery-by-threat, which may only be committed 'intentionally and knowingly.'" (quoting *Garrett*, 24 F.4th at 589)); *United States v. Lipscomb*, No. 18-11168, 2022 WL 327472, at *1 (5th Cir. Feb. 3, 2022) (per curiam) (unpublished) ("[T]he issue before us on remand is how the *Borden* decision affects [the defendant's] sentence. In light of our recent decision in *United States v. Garrett*, the answer is: not at all.").

[32] *See United States v. Jackson*, 30 F.4th 269, 275 (5th Cir. 2022) (citing *Garrett* favorably when considering retroactivity of ACCA enhancements, *i.e.*, whether it was permissible to apply law as it existed at sentencing rather than as it existed when he committed the crime), *cert. denied*, 143 S. Ct. 252 (2022).

[33] *United States v. Wheeler*, No. 19-11022, 2022 WL 17729412, at *2 (5th Cir. Dec. 16, 2022) (per curiam) (unpublished).

[34] *Id.*

[35] (Emphasis added).

by-injury nor does it cite the language from that divisible crime. Sosebee acknowledges as much, citing to the Information setting forth offense conduct and arguing that this Court should overturn *Garrett*. Plainly, Sosebee does not dispute that he committed robbery-by-threat. Bound by *Garrett*, and on the record facts before us, we affirm Sosebee's ACCA-enhanced sentence.[36]

* * * *

We DISMISS as moot Sosebee's claim regarding his first federal conviction and attendant sentence, and we AFFIRM the sentence attendant to his second federal conviction.

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[36] Months after the conclusion of briefing and more than a week after oral argument in this action, Sosebee moved to file a supplemental brief, seeking to make a new argument premised upon the Supreme Court's decision in *Wooden v. United States*, 142 S. Ct. 1063 (2022), which was issued in March 2022. The Federal Public Defender's Office tried to make this same motion in *Wheeler*, again doing so "[m]onths after the conclusion of briefing and two weeks after oral argument in this case." *Wheeler*, 2022 WL 17729412, at *4 n.3. As the *Wheeler* panel dismissed this motion, so do we:

> [Sosebee] concedes that "he did not raise any challenge to the" different occasions determination at the earlier sentencing, the new sentencing, or in his initial brief. Moreover, this precedent was available to [Sosebee] at the time he filed his reply brief and at oral argument. Yet he failed to raise *Wooden* at any time until now. We thus decline to consider it.

Id.