No. _____

In The
SUPREME COURT OF THE UNITED STATES

_____

WILLIAM THROWER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

_____

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WILLIAM THROWER,	:	
	:	04-CR-0903 (ARR)
Petitioner,	:	
	:	
-against-	:	OPINION AND ORDER
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	
	:	

ROSS, United States District Judge:

Petitioner William Thrower brings this motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255(a). In 2005, Thrower was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), an offense that, on its own, carries a maximum penalty of 10 years' imprisonment, *see id.* § 924(a)(2). Because I determined that Thrower had three previous convictions for violent felonies, he was subject to a mandatory minimum of 15 years' imprisonment under the Armed Career Criminal Act ("ACCA"), *see id.* § 924(e)(1). Thrower argues that his 15-year sentence is no longer valid in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme Court struck down the ACCA's residual clause as unconstitutionally vague. *Id.* at 2257. According to Thrower, he no longer has three qualifying predicate offenses because I may have relied on the residual clause in classifying one or more of his convictions as violent felonies. Without three qualifying convictions, Thrower is subject to a maximum prison sentence of 10 years, which he has already served. For the reasons explained below, Thrower's motion is granted.

BACKGROUND

In April 2005, Thrower was convicted by a jury of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Compl., Dkt. #1;[1] Minute Entry, Dkt. #28. At the time of sentencing, in 2008, Thrower had the following five prior felony convictions: (1) a 1981 conviction for first degree robbery, in violation of New York Penal Law § 160.15; (2) a 1981 conviction for third degree burglary, in violation of New York Penal Law § 140.20; (3) a 1993 conviction for fourth degree larceny, in violation of New York Penal Law § 155.30; (4) a 1994 conviction for attempted third degree robbery, in violation of New York Penal Law § 160.05; and (5) a 2000 conviction for third degree robbery, in violation of New York Penal Law § 160.05. I determined that at least three of these convictions were for "violent felonies" within the meaning of the ACCA, such that Thrower was subject to a mandatory minimum sentence of 15 years' imprisonment, *see* 18 U.S.C. § 924(e)(1). Sentencing Tr. at 3–6, 16, Gov't's First Opp'n Ex. B, Dkt. #92-2. I did not specify during the sentencing hearing which of the five felonies served as the three predicates under the ACCA, though I did refer to the 1981 robbery as the "first predicate violent felony." *Id.* at 5. Additionally, I noted that "the statute specifically identifies . . . burglary," which was "precisely [the] crime for which defendant was convicted [in 1981]." *Id.* at 5–6. I sentenced Thrower to the mandatory minimum 15-year prison term. *Id.* at 16.

Thrower appealed his conviction and sentence, and the Second Circuit affirmed. *United States v. Thrower*, 584 F.3d 70, 75 (2d Cir. 2009) (per curiam). On direct appeal, Thrower argued that he did "not have the requisite number of offenses necessary to qualify for the ACCA." *Id.* at 72. Specifically, Thrower asserted "that two of his offenses [did] not count

[1] Unless otherwise noted, the citations to docket entries are in case number 04-cr-903.

because he received a Certificate of Relief from Disabilities that restored his civil rights, and that a third conviction—larceny in the fourth degree—[did] not qualify as a violent felony." *Id.* The Second Circuit concluded that fourth degree larceny under New York law "qualif[ied] as a violent felony under the residual clause for purposes of the ACCA." *Id.* Accordingly, "Thrower ha[d] three eligible convictions that support[ed] the district court's ACCA enhancement," and the court did "not [need to] reach the Certificate of Relief from Disabilities issue." *Id.*

In October 2011, Thrower filed a petition for a writ of habeas corpus under § 2255, arguing that his counsel had been ineffective. *See* Mot. to Vacate, Set Aside or Correct Sentence, No. 11-cv-4858, Dkt. #1. I concluded that Thrower's claims lacked merit and thus denied the petition. *See* Order at 2, No. 11-cv-4858, Dkt. #21. Thrower requested a certificate of appealability from the Second Circuit, which the Second Circuit denied. *See* Mandate, No. 11-cv-4858, Dkt. #25.

In June 2016, Thrower sought leave from the Second Circuit to file the instant successive § 2255 petition on the grounds that his 15-year sentence is no longer valid in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See* Mot. for an Order Authorizing the District Court to Consider a Successive or Second Mot. to Vacate, Set Aside or Correct Sentence at 5–7, Dkt. #82-1. On August 26, 2016, the Second Circuit granted the motion. Mandate, Dkt. #82.

Thrower filed the instant motion *pro se* on September 9, 2016. *See* First Pet., Dkt. #83. On January 6, 2017—after the government had responded to Thrower's *pro se* petition, but before Thrower filed his reply—I appointed counsel for Thrower, and his petition was subsequently fully re-briefed.[2] *See* Orders (Jan. 6, 2017). The fully briefed petition is now before the court.

[2] I cite to Thrower's *pro se* petition, Dkt. #73, as "First Pet.", and to his counseled brief, Dkt. #97, as "Second Pet." Likewise, I cite to the government's opposition to Thrower's *pro se* petition, Dkt. #92,

STANDARD OF REVIEW

28 U.S.C. § 2255(a) allows a prisoner to move to vacate, set aside, or correct his sentence "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Even if the petitioner is able to show that the sentencing court committed a constitutional error, the error cannot be redressed through a § 2255 petition unless it had a "substantial and injurious effect" that resulted in "actual prejudice" to the petitioner. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citations omitted); *see also Underwood v. United States*, 166 F.3d 84, 87 (2d Cir. 1999) (applying *Brecht*'s harmless error standard to § 2255 petition). The petitioner bears the overall burden of proving by a preponderance of the evidence that he is entitled to relief. *Alli-Balogun v. United States*, 114 F. Supp. 3d 4, 50 (E.D.N.Y. 2015).

DISCUSSION

18 U.S.C. § 922(g)(1) prohibits any person who has been convicted of a felony from possessing a firearm. On its own, this crime is punishable by a maximum of 10 years' imprisonment. *Id.* § 924(a)(2). However, the ACCA mandates a minimum 15-year sentence for a defendant who illegally possesses a firearm in violation of 18 U.S.C. § 922(g) "and has three previous convictions . . . for a violent felony." *Id.* § 924(e)(1). The statute defines "violent felony" as follows:

> [A]ny crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or

as "Gov't's First Opp'n," and to the government's opposition to Thrower's counseled brief, Dkt #100, as "Gov't's Second Opp'n."

> destructive device that would be punishable by imprisonment for such term if committed by an adult, 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 the use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another* . . . .

Id. § 924(e)(2)(B) (emphasis added). I will refer to subsection (i) as the "force clause," to the nonitalicized portion of subsection (ii) as the "enumerated offense clause," and to the italicized portion of subsection (ii) as the "residual clause." As stated above, in *Johnson v. United States*, 135 S. Ct. 2251 (2015), the Supreme Court struck down the residual clause as unconstitutionally vague. *Id.* at 2557. The Court held that this ruling applied retroactively on collateral review of convictions in *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016).

To prevail on his motion, Thrower must first demonstrate that the court committed constitutional error. *See United States v. Diaz*, No. 16-cv-0323, 2016 WL 4524785, at *5 (W.D.N.Y. Aug. 30, 2016). Thrower can satisfy this requirement by showing that the court may have relied on the residual clause during sentencing. *See id.* Once Thrower has demonstrated constitutional error, he then bears the burden of proving that the error was prejudicial. *See id.* Thrower can meet this burden by showing that, absent the residual clause, he no longer has three convictions for violent felonies. *See id.* at *6. For the reasons explained below, Thrower has met his burden of proving both constitutional error and prejudice.

A. Thrower Has Met His Burden of Demonstrating Constitutional Error

The parties dispute what burden Thrower must meet to demonstrate constitutional error at sentencing. The government argues that Thrower "bears the burden of demonstrating that the district court *in fact relied* on the residual clause in sentencing him under the ACCA." Gov't's First Opp'n at 4, Dkt. #92 (emphasis added). According to Thrower, he need only show that the

court *may have relied* on the residual clause. Second Pet. at 5–7, Dkt. #97. As explained below, I agree with Thrower's position.

In support of its argument regarding the burden of proof, the government cites *In re Moore*, 830 F.3d 1268 (11th Cir. 2016). In *Moore*, the Eleventh Circuit stated that a petitioner bringing a § 2255 motion bears the "burden of showing that he is entitled to relief" and that a petitioner cannot meet that burden in a *Johnson* case "unless he proves that he was sentenced using the residual clause." *Id.* at 1273. Thus, "[i]f the district court cannot determine whether the residual clause was used in sentencing and affected the final sentence—if the court cannot tell one way or the other—the district court must deny the § 2255 motion." *Id.* The government also cites a Second Circuit case that generally states that a petitioner bears the burden of proving that he is entitled to relief under § 2255. *See Zovluck v. United States*, 448 F.2d 339, 341 (2d Cir. 1971) (stating that, in an appeal from the district court's denial of a habeas petition, "[t]here is no doubt but that appellant had the burden of proof").[3]

I find *Moore* unpersuasive. First of all, it is not settled law even in the Eleventh Circuit. In an opinion published one week after *Moore*, the Eleventh Circuit stated that the "commentary [in *Moore*] undoubtedly is dicta." *In re Chance*, 831 F.3d 1335, 1339 (11th Cir. 2016). The court proceeded to say that the "dicta . . . also seems quite wrong." *Id.* First, the *Chance* court reasoned that a district court following *Moore*'s dicta could avoid determining whether a crime actually qualifies as a violent felony under either the enumerated offense clause or the force clause "unless the sentencing judge uttered the magic words 'residual clause.'" *See id.* at 1340. Second, the court noted that "[n]othing in the law requires a judge to specify which clause . . . it

[3] This point is not contested, and it does not answer the specific question at issue here: whether a petitioner can meet his burden of demonstrating constitutional error under *Johnson* where the sentencing record does not reveal on which ACCA clause a district court relied.

relied upon in imposing a sentence." *Id.* Thus, if a sentencing judge happened to specify that she was relying on the residual clause during one sentencing hearing and not another, the dicta in *Moore* would subject similarly situated defendants to different treatment "based solely on a chance remark." *Id.* at 1341.

I agree with the *Chance* court's reasoning. Indeed, as Thrower points out, the vast majority of the district courts that have considered the issue have decided that a petitioner meets his burden of proving constitutional error if the record is unclear and the petitioner shows that the sentencing court *may have relied* on the residual clause in calculating his sentence. *See* Second Pet. at 5 n.4, Dkt. #97 (collecting cases). These courts have rejected the proposition that, in order to succeed on a § 2255 petition under *Johnson*, a petitioner must show that the sentencing court actually relied on the residual clause during sentencing. *See, e.g.*, *United States v. Ladwig*, 192 F. Supp. 3d 1153, 1159 (E.D. Wash. 2016) ("Because [petitioner] has shown that the Court might have relied upon the unconstitutional residual clause in finding that his . . . convictions qualified as violent felonies, the Court finds that he has established constitutional error."); *Shabazz v. United States*, No. 3:16-cv-1083, 2017 WL 27394, at *5 (D. Conn. Jan. 3, 2017) ("I find compelling the arguments from other courts that . . . a silence in the record should be read in favor of the petitioner because the Residual Clause, written to be a capacious catch-all, was the most direct and efficient route to establishing an ACCA predicate at the time. . . . Moreover, requiring a petitioner to make an affirmative showing on a record that . . . was made at a time when I had no reason to identify on which ACCA clause his sentence relied would be inequitable and would render 2015 *Johnson* relief virtually impossible to obtain."); *Curry v. United States*, Nos. 16-CV-22898, 05-CR-20399, 2016 WL 6997503, at *3 (S.D. Fla. Nov. 30, 2016) ("The Court finds *Chance* persuasive and declines to follow *Moore*'s suggestion that successive

petitioners must prove the Court relied upon the ACCA residual clause 'in fact' at sentencing."); *United States v. Wolf*, No. 04-CR-347-1, 2016 WL 6433151, at *4 (M.D. Pa. Oct. 31, 2016) ("We agree with the Eleventh Circuit's well-reasoned decision in *Chance*, which has been followed by the majority of other district courts who have addressed the issue."); *United States v. Winston*, --- F. Supp. 3d ---, No. 3:01-cr-00079, 2016 WL 4940211, at *6 (W.D. Va. Sept. 16, 2016) ("*Chance* convincingly explains why *Moore* is wrong. . . . [C]ourts have held that—when unclear on which ACCA clause the sentencing judge rested a predicate conviction—the petitioner's burden is to show only that the sentencing judge may have used the residual clause."); *Andrews v. United States*, No. 2:16-cv-00501, 2016 WL 4734593, at *5 (D. Utah Sept. 9, 2016) ("If, post-*Johnson*, a petitioner's sentence is no longer authorized by law, 'proof of what the judge said or thought' is irrelevant." (quoting *Chance*, 831 F.3d at 1341)); *Diaz*, 2016 WL 4524785, at *5 (concluding that petitioner "demonstrated constitutional error simply by showing that the court might have relied on an unconstitutional alternative" (alteration omitted) (quoting *Ladwig*, 192 F. Supp. 3d at 1159)).

I agree with the approach taken by these courts. Adopting the government's position regarding Thrower's burden of proof would mean that Thrower's petition would fail simply because I did not, during the sentencing proceeding, specify on which ACCA clauses I was relying. This was simply not an issue at the time, when neither I nor the parties could have predicted that one of the clauses would be found unconstitutional seven years later. It cannot be the case that my lack of specificity means that Thrower's sentence should be upheld regardless of whether it is still lawful. Accordingly, I conclude that a petitioner can meet his burden of proving constitutional error by demonstrating that his sentence *may have been* based on the residual clause.

Thrower has met his burden here. It is not entirely clear from the sentencing record which of Thrower's five felony convictions served as the three ACCA predicates, or which clause, or clauses, of the ACCA I relied on in deciding that they were proper predicates. During the sentencing hearing, I did refer to the 1981 robbery as the "first predicate violent felony" and noted that "the statute specifically identifies . . . burglary," which was "precisely [the] crime for which defendant was convicted." Sentencing Tr. at 5–6, Gov't's First Opp'n Ex. B, Dkt. #92-2. Thus, the record reflects that I determined that first degree robbery and third degree burglary were violent felonies, and that I classified burglary as a violent felony under the enumerated offense clause. Still, two points remain unclear: (1) which conviction served as the third predicate, and (2) which clause, or clauses, I relied on to classify the first degree robbery and the third conviction as violent felonies. Thrower did not raise any specific arguments on these points at sentencing, so I did not see a need to specify my reasoning further. *See id.* at 4–6. As a result, I cannot say based on the record, or on any independent recollection, that I did not rely on the residual clause in sentencing Thrower.

Because Thrower has met his burden of demonstrating constitutional error, I must determine whether this error was prejudicial.[4]

B. The Constitutional Error Was Prejudicial

To prove that any reliance on the residual clause during sentencing was prejudicial, Thrower must demonstrate that, absent the residual clause, he does not have three previous

[4] A minority of district courts in this circuit have determined that harmless error review should not be conducted in this context because a "*Johnson* error is a structural error not amenable to *Brecht*'s harmless error review." *Shabazz v. United States*, No. 3:16-cv-1083, 2017 WL 27394, at *6 (D. Conn. Jan. 3, 2017) (citing *Villanueva v. United States*, 191 F. Supp. 3d 178 (D. Conn. 2016)). Because I conclude that, in any event, my possible reliance on the residual clause was not harmless, I need not resolve the question of whether a *Johnson* error is a structural error.

convictions for violent felonies for purposes of the ACCA. *See Diaz*, 2016 WL 4524785, at *6. As stated above, Thrower had five previous felony convictions when he was sentenced. The government does not contend that Thrower's larceny conviction qualifies as a violent felony.[5] Nevertheless, the government claims that any reliance on the residual clause was harmless because Thrower's burglary conviction qualifies as a violent felony under the ACCA's enumerated offense clause, and his three robbery convictions qualify as violent felonies under the force clause. Gov't's First Opp'n at 4, 7, Dkt. #92. For the reasons explained below, I conclude that Thrower's convictions for third degree robbery and attempted third degree robbery are not qualifying violent felonies under the ACCA's force clause. Without the third degree robbery convictions, Thrower has at most two convictions for violent felonies (the burglary conviction and the first degree robbery conviction), which means that he is not subject to the ACCA's 15-year mandatory minimum and is instead subject to a maximum of 10 years' imprisonment.[6] *See* 18 U.S.C. §§ 924(a)(2), 924(e)(1). Any reliance on the residual clause in sentencing Thrower was thus not harmless.

In reaching this conclusion, I first decide that I must look to current law, and not the law at the time of Thrower's sentencing, to determine whether Thrower's third degree robbery convictions are violent felonies under the force clause. I then conclude that third degree robbery under New York law does not qualify as a violent felony.

[5] The government likely does not rely on Thrower's larceny conviction because, when upholding Thrower's sentence on direct appeal, the Second Circuit specified that larceny qualified as a violent felony under the ACCA's residual clause. *Thrower*, 584 F.3d at 72.

[6] Accordingly, I need not decide whether third degree burglary and first degree robbery are qualifying violent felonies.

1. In Deciding Whether Any Constitutional Error Was Harmless, the Court Applies Current Law

The parties dispute whether I should look to current law, or try to ascertain the law as it stood at the time of Thrower's sentencing, in order to determine whether Thrower has three convictions for violent felonies without the residual clause, such that any reliance on the residual clause was harmless. The government contends that Thrower may not rely on cases decided after his sentencing to argue that robbery does not qualify as a violent felony under the force clause because such an argument is not based on *Johnson*, and because "Thrower is not entitled at this stage to the benefit of changes in statutory interpretation that have occurred over the years since he was sentenced." Gov't's First Opp'n at 4–5, Dkt. #92. Thrower responds that "the determination whether there are three prior felonies that qualify as predicates . . . is properly based on the law as it is interpreted today." Second Pet. at 7, Dkt. #97. For the reasons explained below, I conclude that I must look to current case law to determine whether third degree robbery is a violent felony under the ACCA's force clause.

a. Thrower's Argument Is Properly Based on *Johnson*

First, I reject the government's assertion that Thrower's argument—that robbery is not a violent felony under the force clause—is not actually based on *Johnson* because that case struck down only the residual clause and left the force clause unaffected. Though, as stated above, there is no evidence in the sentencing record elucidating whether I found robbery to be a violent felony under the force clause or the residual clause, prior to *Johnson*, Thrower "had no viable challenge to his predicate robbery convictions because, even if he could have established that robbery in New York did not qualify under the ACCA's force clause, his prior convictions for third-degree robbery . . . likely would have qualified under the residual clause." *Diaz*, 2016 WL 4524785, at *5. Accordingly, "[i]t is only as a result of . . . *Johnson*'s voiding of the residual

clause that [Thrower] could 'reasonably argue that he is no longer eligible for the ACCA enhancement.'" *Id.* (quoting *Ladwig*, 192 F. Supp. 3d at 1159–60); *see also Shabazz*, 2017 WL 27394, at *6 ("[T]he availability of [the petitioner's force clause] argument . . . is wholly a product of the new rule announced in 2015 *Johnson*. Prior to 2015 *Johnson*, [petitioner] would not have had a viable challenge to his predicate robbery convictions because the [r]esidual clause would have picked up wherever the [force] clause left off."). I am thus unpersuaded by the government's position that Thrower's challenge to the classification of his robbery convictions as predicate violent felonies is not based on *Johnson*.

The government cites *Stanley v. United States*, 827 F.3d 562 (7th Cir. 2016), in support of the proposition that a challenge to the classification of a conviction as a violent felony is unrelated to *Johnson*. Gov't's First Opp'n at 5, Dkt. #92. In *Stanley*, however, the Seventh Circuit was able to determine conclusively that each of the petitioner's prior convictions was unaffected by *Johnson*. *Stanley*, 827 F.3d at 564. Specifically, the petitioner had a drug conviction, which is not implicated by the definition of a violent felony. *Id.*; *see also* 18 U.S.C. § 924(e) (stating that 15-year mandatory minimum applies to "a person who . . . has three previous convictions . . . for a violent felony *or a serious drug offense*" (emphasis added)). Second, the petitioner had a conviction for illegal possession of a firearm, which was not a proper predicate felony "not because of *Johnson*, but because . . . [t]he Sentencing Commission has concluded that a felon's possession of a gun . . . is not a crime of violence . . . ." *Stanley*, 827 F.3d at 565. Finally, the petitioner had a conviction for aggravated battery of a police officer, which "[t]he district court counted . . . under the [force] clause." *Id.* Thus, the petitioner in *Stanley* did not have a viable argument that his sentence was affected by the residual clause. Here, by contrast, I may have relied on the residual clause in concluding that Thrower had three

convictions for violent felonies. Indeed, as Thrower points out, courts routinely relied on the residual clause pre-*Johnson* in order to classify robbery offenses as violent felonies. *See, e.g.*, *Washington v. United States*, Nos. 12-CR-6072, 16-CV-6008, 2016 WL 1572005, at *1 (W.D.N.Y. Apr. 19, 2016); *Lynch v. United States*, Nos. 03 Crim. 928, 14 Civ. 4687, 2015 WL 9450873, at *1 (S.D.N.Y. Dec. 8, 2015). Accordingly, *Stanley* does nothing to advance the government's argument. Thrower's challenge to the classification of his robbery convictions as violent felonies is based on *Johnson* and is thus cognizable on collateral review.

b. Both Precedent and Policy Considerations Weigh in Favor of Applying Current Law on Harmless Error Review

Analogous case law, as well as important policy considerations, weigh in favor of applying current law in determining whether Thrower's third degree robbery convictions satisfy the force clause, and thus whether any reliance on the residual clause during sentencing was harmless.

The Eastern District of Washington explained the relevant public policy considerations as follows:

> Attempting to recreate the legal landscape at the time of a defendant's conviction is difficult enough on its own. But in the context of *Johnson* claims, the inquiry is made more difficult by the complicated nature of the legal issues involved. . . . An inquiry that requires judges to ignore intervening decisions that, to some degree, clear the mire of decisional law seems to beg courts to reach inconsistent results. Current case law has clarified the requisite analysis and applying that law should provide greater uniformity, helping to ensure that like defendants receive like relief.

Ladwig, 192 F. Supp.3d at 1160.

The concerns for fairness and consistency articulated in *Ladwig* echo the Supreme Court's rationale for applying current law retroactively "for purposes of determining whether a party has demonstrated prejudice" in the context of ineffective assistance of counsel claims under

Strickland v. Washington, 466 U.S. 668 (1984). *See Mosby v. Senkowski*, 470 F.3d 515, 524 (2d Cir. 2006) (citing *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)). In reaching its determination that current law should apply to the prejudice analysis in *Strickland* claims, the Supreme Court reasoned that "the 'prejudice' component of the *Strickland* test . . . focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart*, 506 U.S. at 372. Such "[u]reliability or unfairness . . . result[s] if the ineffectiveness of counsel . . . deprive[s] the defendant of [a] substantive or procedural right to which the law entitles him," that is, a substantive or procedural right provided by current law. *Id.* Here, too, it would be unreliable and unfair to habeas petitioners if courts were to ignore case law clarifying statutory definitions when determining whether the petitioners' sentences are lawful.

Accordingly, numerous district courts that have considered the issue agree that courts should look to current law in deciding whether a crime constitutes a violent felony when a petitioner challenges his sentence under § 2255. *See, e.g.*, *Ladwig*, 192 F. Supp. 3d at 1161 ("Because there is precedent for doing so, and in consideration of the . . . problems raised by applying old law, the Court will apply current case law to determine whether [petitioner's] convictions qualify as predicate felonies without the residual clause."); *Diaz*, 2016 WL 4524785, at *5 ("[B]oth Supreme Court and Second Circuit precedent support the proposition that a court can and should apply current case law when determining whether a constitutional error was harmless or prejudicial in the habeas context."); *United States v. Hamilton*, --- F. Supp. 3d ---, No. 06-CR-188, 2017 WL 368512, at *4 (N.D. Okla. Jan. 25, 2017) ("Once *Johnson* permits Defendant to collaterally challenge his sentence based on a residual-clause error, the Court must apply current law on the enumerated offense clause to determine if that error was injurious or

harmless."); *Curry v. United States*, Nos. 16-CV-22898, 05-CR-20399, 2016 WL 6997503, at *3 (S.D. Fla. Nov. 30, 2016) ("The Court finds untenable the Government's position that the Court should ignore current binding precedent and instead apply the law at Curry's 2005 sentencing to determine whether Curry's burglary convictions qualified as 'crimes of violence' under the enumerated clause."); *Johnson v. United States*, No. 4:16-cv-00649, 2016 WL 6542860, at *2 (W.D. Mo. Nov. 3, 2016) ("In a § 2255 proceeding, the Court must apply current case law to determine whether the prejudice prong of *Strickland* is applicable. [Current case law] would also be applicable for purposes of harmless error calculation." (citations omitted)); *United States v. Harris*, --- F. Supp. 3d ---, No. 1:CR-06-0268, 2016 WL 4539183, at *9 (M.D. Pa. Aug. 31, 2016) ("Defendant can proceed to establish that his prior convictions do not qualify him as a career offender under the ACCA under the [force] clause or enumerated-offenses clause. . . . And he can rely on current law in doing so." (citations omitted)).

In support of its position that the court should disregard current law, the government relies on *United States v. Belk*, No. 16-765, 2016 WL 1587223 (2d Cir. Apr. 19, 2016). In *Belk*, a petitioner moved for leave to file a successive § 2255 motion arguing that, in light of *Johnson*, "his New York State robbery convictions no longer qualif[ied] as predicate offenses for ACCA purposes." *Id.* at *1. The Second Circuit denied petitioner's motion in an unpublished disposition, stating that "[t]here [was] no evidence that Petitioner's sentence was enhanced under the provision of the ACCA that was found unconstitutional in *Johnson*. In any event, at the time of his sentencing, it was clearly established in this Circuit that Petitioner's robbery convictions qualified as ACCA predicates under § 924(e)(2)(B)(i)," *id.*, which is the force clause. The court thus seemed to assume, without any analysis—or any citations—that the proper inquiry on a § 2255 motion is whether robbery qualified as a violent felony at the time of sentencing, and not

when the petitioner brought his motion. Because this unpublished, non-precedential disposition contradicts the reasoned analysis undertaken by many district courts across the country, I do not find the government's reliance on it to be persuasive.

The government also argues that the decisions on which I rely below, which clarify the definition of "violent felony" and "crime of violence,"[7] involve statutory interpretation and are thus not "retroactive." This argument misses the mark. New rules are generally not retroactive on collateral review, unless they are substantive rules or watershed rules of criminal procedure, *see Welch*, 136 S. Ct. at 1261, but decisions that shed light on statutory meaning do not announce "new rules." Rather, "[a] judicial construction of a statute is an authoritative statement of what the statute meant *before as well as after* the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994) (emphasis added). Thus, case law that has clarified the meaning of "violent felony" under the ACCA simply tells us how we ought to read the statute at issue. *Cf. Hamilton*, 2017 WL 368512, at *4 (stating that although *Mathis v. United States*, 136 S. Ct. 2243 (2016), which affected whether the petitioner's "convictions . . . qualify as violent felonies under the enumerated offense clause," did "not announce a new rule of law or have retroactive application to cases on collateral review," the court was required to apply it in deciding whether "residual-clause error . . . was injurious or harmless").

Thus, I agree with the district courts that have concluded that courts should look to current law when deciding whether possible reliance on the residual clause was harmless, as this

[7] The definition of a "crime of violence," the phrase used in U.S.S.G. § 4B1.2(a), "is identical in all material respects to" the definition of "violent felony" in the ACCA. *United States v. Reyes*, 692 F.3d 453, 458 n.1 (2d Cir. 2012).

approach "is soundly based on existing precedent and important policy concerns." *Diaz*, 2016 WL 4524785, at *5.

2. Under Current Law, Third Degree Robbery Is Not a Violent Felony

I next analyze whether Thrower's third degree robbery convictions qualify as violent felonies for purposes of the ACCA. Because robbery is not an enumerated felony in the ACCA, *see* 18 U.S.C. § 924(e)(2)(B)(ii), these convictions would have to satisfy the statute's "force clause" in order for Thrower's sentence to be lawful. The force clause provides that a crime is a "violent felony" if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." *See id.* § 924(e)(2)(B)(i). I must apply the categorical approach to determine whether third degree robbery under New York law necessarily satisfies this requirement. *See United States v. Hill*, 832 F.3d 135, 139 (2d Cir. 2016) ("To determine whether an offense is a crime of violence, courts employ . . . the 'categorical approach.'" (citation omitted)); *United States v. Johnson*, --- F. Supp. 3d ---, No. 15-CR-32, 2016 WL 6684211, at *5 (E.D.N.Y. Nov. 12, 2016) (explaining the categorical approach for determining whether a crime satisfies the force clause). "Under the categorical approach, [courts] focus on the intrinsic nature of the offense rather than on the circumstances of the particular crime. Consequently, only the minimum criminal conduct necessary for conviction under a particular statute is relevant." *United States v. Acosta*, 470 F.3d 132, 135 (2d Cir. 2006). In other words, if it is possible to commit third degree robbery *without* "the use, attempted use, or threatened use of physical force against the person of another," then third degree robbery is not categorically a violent felony. For the reasons explained below, I conclude that third degree robbery does not qualify as a violent felony under the force clause.

The government correctly notes that, before 2010, the Second Circuit held in binding,

published decisions that robbery is a violent felony under the force clause. *See, e.g.*, *United States v. Brown*, 52 F.3d 415, 426 (2d Cir. 1995). However, a 2010 Supreme Court decision, *United States v. Johnson*, 559 U.S. 133 (2010) ("*Curtis Johnson*"), changes this analysis. In *Curtis Johnson*, the Supreme Court decided that a Florida battery offense was not categorically a violent felony under the ACCA. *Id.* at 137–39. In so deciding, the Court defined the term "physical force" as it is used in § 924(e)(2)(B)(i). *See id.* at 138–39. The Court decided "that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. The Court reasoned that, "[e]ven by itself, the word 'violent' in § 924(e)(2)(B) connotes a substantial degree of force. . . . When the adjective 'violent' is attached to the noun 'felony,' its connotation of strong physical force is even clearer.'" *Id.* (citations omitted). I must thus analyze whether third degree robbery under New York law necessarily involves the use of "violent force," as defined in *Curtis Johnson*.

New York law states that "[a] person is guilty of robbery in the third degree when he forcibly steals property." N.Y. Penal Law § 160.05. The law further explains as follows:

> A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:
>
> 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
>
> 2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

N.Y. Penal Law § 160.00.

I look to New York state court decisions for binding interpretations of this statute. *See Curtis Johnson*, 559 U.S. at 138. Case law from the Appellate Division shows that defendants

can be convicted of robbery without using violent force. *See, e.g.*, *People v. Bennett*, 631 N.Y.S.2d 834, 834 (N.Y. App. Div. 1995) (defendant guilty of robbery in the second degree where "he and three others formed a human wall that blocked the victim's path as the victim attempted to pursue someone who had picked his pocket, allowing the robber to get away"); *People v. Lee*, 602 N.Y.S.2d 138, 138 (N.Y. App. Div. 1993) (defendant guilty of second degree robbery where he "bumped his unidentified victim, took money, and fled while another forcibly blocked the victim's pursuit"); *People v. Patton*, 585 N.Y.S.2d 431, 431 (N.Y. App. Div. 1992) (defendant guilty of second degree robbery where "codefendant actually stole [a] chain and medallion" from the victim, while defendant "acted as a blocker" by "stepp[ing] in front of [the victim] and persistently shov[ing] him back"); *People v. Safon*, 560 N.Y.S.2d 552, 552 (N.Y. App. Div. 1990) (defendant guilty of third degree robbery where "store clerk grabbed the hand in which defendant was holding . . . money and the two tugged at each other until defendant's hand slipped out of the glove holding the money" because this was "sufficient to prove that defendant used physical force for the purpose of overcoming the victim's resistance to the taking").

Each of these cases involves the use of a degree of force than is lesser than "force capable of causing physical pain or injury to another person," *see Curtis Johnson*, 559 U.S. at 140, namely, blocking a victim's path, bumping or shoving the victim, and tugging at a victim's hand. Thus, under New York law, a defendant can be convicted of robbery when he uses force sufficient to overcome a victim's resistance without necessarily putting the victim at risk of pain or injury. Other courts have so held.[8] *See Johnson*, 2016 WL 6684211, at *6 (concluding that "Appellate Division decisions demonstrate that robbery in New York does not necessarily

[8] A Second Circuit panel has analyzed New York case law to come to this same conclusion, *see United States v. Jones*, 830 F.3d 142 (2d Cir. 2016), though the decision was vacated and held in abeyance pending the Supreme Court's disposition on issues unrelated to this case.

involve force 'capable of causing physical pain or injury to another,' as is required under [*Curtis Johnson*]"); *United States v. Moncrieffe*, 167 F. Supp. 3d 383, 403 (E.D.N.Y. 2016) (stating that "New York courts have explained that the 'physical force' threatened or employed [to commit a robbery] can be minimal, including a bump, a brief tug-of-war over property, or even the minimal threatened force exerted in 'blocking' someone from pursuit by simply standing in their way").

The government cites a number of New York cases to argue that robbery under New York law necessarily involves the level of violent force described in *Curtis Johnson*. *See* Gov't's Second Opp'n at 4, Dkt. #100. However, as the government seems to acknowledge in its explanation of the cases, they show only that "the crime of robbery in New York cannot be accomplished by mere unwanted touching or a sudden and stealthy seizure." *Id.* Of course, the fact that robbery cannot be accomplished by these means does not necessarily lead to the conclusion that robbery requires force capable of causing pain or injury. *See Johnson*, 2016 WL 6684211, at *6 ("All that [*People v. Jurgins*, 46 N.E.3d 1048 (N.Y. 2015),] stands for is that a 'stealthy seizure or snatching' does not fall within Penal Law § 160.05. It does not tell us whether there are other acts that might fall within it, but would not constitute force that is 'capable of causing physical pain or injury,' as [*Curtis Johnson*] requires.").

The government also cites a number of Second Circuit cases in support of its contention that robbery under New York law remains a violent felony after *Curtis Johnson*. Gov't's First Opp'n at 5, Dkt. #92; Gov't's Second Opp'n at 2–3, Dkt. #100. However, each of the cases that the government cites was either decided prior to *Curtis Johnson*, or is a non-precedential summary order that does not analyze robbery in light of *Curtis Johnson*'s definition. The only published post-*Curtis Johnson* decision that the government cites does not squarely address this

issue because the defendant in that case *conceded* that third degree robbery was a violent felony under the force clause, and the Second Circuit merely acknowledged that it had so held in the 1995 *Brown* case cited above. *See United States v. Miles*, 748 F.3d 485, 490 (2d Cir. 2014) (citing *Brown*, 52 F.3d at 425–26).

"Lower courts are bound by Second Circuit precedent 'unless it is expressly or implicitly overruled' by the Supreme Court or an en banc panel of the Second Circuit." *In re S. African Apartheid Litig.*, 15 F. Supp. 3d 454, 459 (S.D.N.Y. 2014). I conclude that the Second Circuit precedent holding robbery to be a violent felony under the force clause has been implicitly overruled by the Supreme Court's definition of "violent felony" in *Curtis Johnson*, because, as explained above, it is possible to commit third degree robbery without using "force capable of causing physical pain or injury to another person," *see Curtis Johnson*, 559 U.S. at 140.

Thus, I conclude that third degree robbery and attempted third degree robbery under New York law do not necessarily involve the use of "violent force." As a result, those crimes cannot be predicate violent felonies under the ACCA's force clause. Because Thrower does not have three qualifying violent felony convictions, any reliance on the residual clause during Thrower's sentencing could not have been harmless, and Thrower's § 2255 motion must be granted. *See, e.g.*, *Curry*, 2016 WL 6997503, at *4 ("[Petitioner] is entitled to relief if he can establish by a preponderance of the evidence that: (1) the record does not refute his assertion that the sentencing Court may have relied on the residual clause in applying the ACCA enhancement, in violation of *Johnson*, and (2) under current binding precedent . . . his . . . convictions no longer qualify as ACCA 'crimes of violence.'"). Thrower is thus entitled to resentencing. *See McKnight v. United States*, Nos. 6:16-cv-6396, 6:05-cr-6024, 2016 WL 6663349, at *1 (W.D.N.Y. Nov. 11, 2016). Without three qualifying convictions for violent felonies, Thrower is

subject to a maximum sentence of 10 years' imprisonment, *see* 18 U.S.C. § 924(a)(2), which he has already served.

CONCLUSION

For the foregoing reasons, Thrower's 28 U.S.C. § 2255 motion is granted. Thrower's immediate release is ordered because he has now served more than the statutory maximum for the offense of conviction. *See Lynch v. United States*, 03 Crim. 928, 14 Civ. 4687, 2015 WL 9450873, at *3 (S.D.N.Y. Dec. 8, 2015). This order will become effective 48 hours after filing in order to allow the government to seek a stay of the decision from the Second Circuit. An Amended Judgment will be entered, reducing Thrower's term of imprisonment from 180 months to 120 months. Thereafter, the Clerk of Court is respectfully requested to close this case.

SO ORDERED.

/s/ ARR
Allyne R. Ross
United States District Judge

Dated: February 13, 2017
Brooklyn, New York

17-445-pr
United States v. Thrower

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

_____

August Term, 2017

(Submitted: April 19, 2018 Decided: January 31, 2019)

Docket No. 17-445-pr

_____

UNITED STATES OF AMERICA,

Petitioner-Appellee,

–v.–

WILLIAM THROWER,

Respondent-Appellant.[*]

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Before:

WESLEY and CHIN, *Circuit Judges*, and COTE, *District Judge*.[†]

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[*] The Clerk of the Court is directed to amend the caption as set forth above.

[†] Judge Denise Cote, of the United States District Court for the Southern District of New York, sitting by designation.

The Government appeals from a judgment of the United States District Court for the Eastern District of New York (Ross, *J.*) reducing the defendant's sentence from 180 months to 120 months and ordering his immediate release on time served. The Government argues that the district court erred in concluding that the defendant's prior convictions for the New York offenses of robbery in the third degree and attempted robbery in the third degree do not qualify as predicate "violent felonies" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1).

We agree with the Government. Accordingly, we REVERSE the district court's grant of Thrower's § 2255 petition, VACATE the amended judgment, and REMAND for the district court to reinstate Thrower's original sentence.

Amy Busa, Alexander Mindlin, Assistant United States Attorneys, *for* Richard P. Donoghue, United States Attorney for the Eastern District of New York, *for Appellant*.

Jane Simkin Smith, Millbrook, NY, *for Defendant-Appellee*.

PER CURIAM:

The Government appeals from a February 13, 2017 judgment of the United States District Court for the Eastern District of New York (Ross, *J.*) reducing defendant William Thrower's sentence from 180 months to 120 months and ordering Thrower's immediate release on time served. The Government argues that the district court erred in concluding that Thrower's prior convictions for the New York offenses of robbery in the third degree and attempted robbery in the

third degree do not qualify as predicate "violent felonies" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), an enhancement that mandates a minimum sentence of 180 months.

We agree with the Government. Accordingly, we REVERSE the district court's grant of Thrower's § 2255 petition, VACATE the amended judgment, and REMAND for the district court to reinstate Thrower's original sentence.

BACKGROUND

In 2005, William Thrower was convicted of possessing a firearm while previously having been convicted of a "violent felony," in violation of 18 U.S.C. § 922(g)(1). A conviction under § 922(g)(1) carries a mandatory-minimum sentence of 120 months. During sentencing in 2008, the district court additionally found that Thrower qualified as an "armed career criminal" under ACCA, 18 U.S.C. § 924(e)(1), which mandates a minimum sentence of 180 months for anyone convicted of § 922(g)(1) who also has three prior "violent felony" convictions. The district court noted that Thrower's criminal history included the following felony offenses: (1) a 1981 conviction for first-degree robbery, N.Y. Penal Law § 160.15; (2) a 1981 conviction for third-degree burglary, N.Y. Penal Law § 140.20; (3) a 1993 conviction for fourth-degree larceny, N.Y. Penal Law § 155.30; (4) a 1994 conviction

for attempted third-degree robbery, N.Y. Penal Law §§ 160.05 and 110.00; and (5) a 2000 conviction for third-degree robbery, N.Y. Penal Law § 160.05. Without specifying which of Thrower's prior convictions constituted the three predicate "violent felonies" or which ACCA clause(s)—the force clause, the enumerated-offenses clause, or the residual clause—it relied upon in determining that the convictions so qualified, the district court found Thrower subject to the ACCA enhancement and consequently sentenced him to 180 months' incarceration.

The Supreme Court subsequently struck down ACCA's residual clause as unconstitutionally vague, *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) ("*Johnson II*"); *see also Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (holding that *Johnson II* applies retroactively), calling into question Thrower's sentence. Consequently, Thrower challenged the ACCA enhancement in a 28 U.S.C. § 2255 petition for a writ of habeas corpus, which the district court granted.[1] The district court agreed with Thrower that neither New York robbery in the third degree nor New York attempted robbery in the third degree qualifies as a "violent felony"

[1] In adjudicating Thrower's petition under § 2255, the district court concluded that when sentencing Thrower in 2008, it had relied, at least in part, on the now-unconstitutional residual clause to determine that ACCA's mandatory sentencing provision applied. It therefore analyzed anew whether at least three of Thrower's prior convictions qualified under the two remaining ACCA clauses. Because they did not, the district court found that the prior error was prejudicial.

under ACCA's force clause.[2] Because the Government no longer claimed that fourth-degree larceny qualified without the residual clause, only two of Thrower's prior convictions remained as potential ACCA predicates—a number insufficient to subject him to the ACCA enhancement. Seeing, therefore, no need to determine whether first-degree robbery or third-degree burglary qualifies as a "violent felony," the district court ordered Thrower immediately released on time served.

The Government timely appealed, arguing that because robbery in the first and third degrees and attempted robbery in the third degree qualify as ACCA predicates, the district court erred in granting Thrower's § 2255 petition.

DISCUSSION

We review *de novo* whether the offenses of New York robbery in the first and third degrees and attempted robbery in the third degree qualify as ACCA "violent felonies." *See United States v. Brown*, 629 F.3d 290, 293 (2d Cir. 2011) (*per curiam*). They do.

[2] The Government did not contend that either offense satisfies the requirements of the enumerated-offenses clause.

1. Armed Career Criminal Act

ACCA mandates a minimum 180-month term of imprisonment for any person convicted of possessing a firearm in violation of 18 U.S.C. § 922(g)(1) who also has three prior "violent felony" convictions. *Id.* § 924(e)(1). Under the force clause, a "violent felony" is "any crime punishable by imprisonment for a term exceeding one year, . . . that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* § 924(e)(2)(B)(i). As the Supreme Court has explained, "'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson I*") (emphasis in original); *see also Stokeling v. United States*, 139 S. Ct. 544, 554 (2019) (explaining that "*Johnson* [*I*] . . . does not require any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality").

Courts apply a "categorical approach" to determine whether a prior conviction qualifies as a "violent felony." *See, e.g.*, *United States v. Hill*, 890 F.3d 51, 55–56 (2d Cir. 2018). Under the categorical approach, "courts identify 'the minimum criminal conduct necessary for conviction under a particular statute.'"

Id. at 55 (quoting *United States v. Acosta*, 470 F.3d 132, 135 (2d Cir. 2006) (*per curiam*)). In so doing, they "look only to the statutory definitions—*i.e.*, the elements—of the offense, and not to the particular underlying facts." *Id.* (quoting *Descamps v. United States*, 570 U.S. 254, 261 (2013) (alterations omitted)). If the state-law offense categorically requires the elements listed in § 924(e)(2)(B)(i), it may serve as a predicate "violent felony."

2. New York Robbery in the First and Third Degrees

Thrower argues that the New York offense of robbery in the third degree does not qualify as a "violent felony" because the requisite force for the offense "can be something less than 'force capable of causing physical pain or injury.'" Appellee Br. 17 (quoting *Johnson I*, 599 U.S. at 140). We disagree.

The New York offense of robbery in the third degree occurs when a person "forcibly steals property." N.Y. Penal Law § 160.05. Forcible stealing—common to every degree of robbery in New York State[3]—is defined as:

> when, in the course of committing a larceny, [a person] uses or threatens the immediate use of physical force upon another person for the purpose of: 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or 2. Compelling the owner of such property or another

[3] *See* N.Y. Penal Law § 160.05; *id.* § 160.10; *id.* § 160.15; *see also People v. Miller*, 87 N.Y.2d 211, 214 (1995) ("The essence of the [New York] crime of robbery is forcible stealing.").

> person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

Id. § 160.00.

By its plain language, the New York robbery statute matches the ACCA definition of a "violent felony." Predicate offenses under ACCA include those that have as an element "the use . . . or threatened use of physical force." 18 U.S.C. § 924(e)(2)(B)(i). New York requires the "use[] or threaten[ed] . . . immediate use of physical force." Additionally, the New York robbery statute, like ACCA's force clause, is modeled on the common law definition of robbery. As the Supreme Court recently explained in *Stokeling*, "the term 'physical force' in ACCA encompasses the degree of force necessary to commit common-law robbery," defined as "the amount of force necessary to overcome a victim's resistance." *Stokeling*, 139 S. Ct. at 555. Like the Florida robbery statute at issue in *Stokeling*, the New York robbery statute uses the term "physical force." The New York Court of Appeals has explained that "if a statute uses a word which has a definite and well-known meaning at common law, it will be construed with the aid of common-law definitions, unless it clearly appears that it was not so intended." *People v. King*, 61 N.Y.2d 550, 554–55 (1984). Far from evincing a clear intent to stray from the common law understanding of robbery, the robbery statute explicitly incorporates

the common law definition by explaining that "physical force" means enough force to "[p]revent[] or overcom[e] resistance to the taking . . . or . . . [to c]ompel[] the owner . . . to deliver up the property." N.Y. Penal Law § 160.00; *see also People v. Jurgins*, 26 N.Y.3d 607, 614 (2015).

None of the cases to which Thrower cites convince us that New York courts interpret the force required for New York robbery as less than that required under ACCA. In *People v. Lee*, 197 A.D.2d 378 (1st Dep't 1993), a New York intermediate court of appeals found the force element of § 160.05 satisfied where the defendant "bumped his unidentified victim, took money, and fled while another forcibly blocked the victim's pursuit," because the act of blocking was a form of overcoming the victim's resistance, *id.* at 378 (citing *People v. Patton*, 184 A.D.2d 483, 483 (1st Dep't 1992) ("[A]ct[ing] as a blocker [is a form of] *overcoming the victim's resistance* to the robbery within the meaning of Penal Law § 160.00(1)." (emphasis added))).[4] Similarly, in *People v. Safon*, 166 A.D.2d 892 (4th Dep't 1990),

[4] *See also United States v. Pereira-Gomez*, 903 F.3d 155, 166 (2d Cir. 2018) (explaining that a "'human wall' [is] no mere obstacle to the victim's pursuit of the robber; it constitute[s] a threat that pursuit would lead to a violent confrontation" and therefore holding that New York attempted robbery in the second degree qualifies as a "crime of violence" under the identically worded force clause of application note 1(B)(iii) to Section 2L1.2 of the 2014 Sentencing Guidelines); *see also* U.S.S.G. § 2L1.2 cmt. 1(B)(iii) (2014) (defining a "crime of violence" as having "as an element the use, attempted use, or threatened use of physical force against the person of another").

a New York intermediate appellate court affirmed a third-degree robbery conviction where the evidence showed that the defendant and the victim "tugged at each other until defendant's hand slipped out of the glove holding the money" because this "was sufficient to prove that defendant used physical force for the purpose of *overcoming the victim's resistance* to the taking," *id.* at 893 (emphasis added).

We therefore conclude that the New York offense of robbery in the third degree, which like every degree of robbery in New York requires the common law element of "forcible stealing," is a "violent felony" under ACCA. By extension, New York robbery in the first degree is also a "violent felony" under ACCA.[5]

3. New York Attempted Robbery in the Third Degree

Thrower next argues that the New York offense of attempted robbery in the third degree does not qualify as a "violent felony" because a person may be convicted of attempted robbery by merely attempting *to threaten to use* physical

[5] Thrower argues that his conviction for first-degree robbery does not qualify as an ACCA predicate because he received a Certificate of Relief from Civil Disabilities from the State of New York that restored his civil rights. Although Thrower is correct that a conviction with respect to which civil rights have been restored cannot serve as an ACCA predicate, this exception applies only where the Certificate does not prohibit the possession of firearms. *See* 18 U.S.C. § 921(a)(20). Thrower has not shown that his Certificate lacks such a prohibition. *See United States v. Bullock*, 550 F.3d 247, 250 (2d Cir. 2008).

force, falling short of the requirement of attempting *to use* physical force. We again disagree.

As above, the New York attempted robbery statute, by its own terms, matches the ACCA definition of a "violent felony." Predicate offenses under ACCA include those that have as an element the "attempted use . . . of physical force." 18 U.S.C. § 924(e)(2)(B)(i). Under federal law, "[a] person is guilty of an attempt to commit a crime if he or she (1) had the intent to commit the crime, and (2) engaged in conduct amounting to a 'substantial step' towards the commission of the crime." *United States v. Martinez*, 775 F.2d 31, 35 (2d Cir. 1985).

New York requires that, "with intent to commit a crime . . . [a person] engage[] in conduct which tends to effect the commission of such crime." N.Y. Penal Law § 110.00. The New York Court of Appeals has clarified that an attempt requires that the action taken by an accused be "so near to its accomplishment that in all reasonable probability the crime itself would have been committed but for timely interference." *People v. Rizzo*, 246 N.Y. 334, 337 (1927); *see also People v. Denson*, 26 N.Y.3d 179, 189 (2015) ("[F]or a defendant to be guilty of an attempted crime, the defendant must have engaged in conduct that came dangerously near commission of the completed crime." (quotation marks and citation omitted)).

Where a statute requires that a person be so "dangerously near" forcibly stealing property "that in all reasonable probability" she would have completed the robbery but for interference, the statute categorically requires that a person take a "substantial step" toward the use of physical force. *See People v. Acosta*, 80 N.Y.2d 665, 670 (1993) (explaining that New York's attempt statute is "more stringent" than the "'substantial step' test . . . adopted by [the Second Circuit]"); *United States v. Farhane*, 634 F.3d 127, 146 (2d Cir. 2011) (noting that the federal "substantial step" test "ushered in a broader view of attempt" than that employed at common law).

Nothing from New York's courts leads us to conclude otherwise. Though Thrower posits that a defendant might be convicted of attempted robbery in New York for an attempt to threaten to use physical force—as distinct from an attempt to use physical force or a threat to use physical force—he fails to "at least point to his own case or other cases in which the state courts in fact did apply the statute in the . . . manner for which he argues."[6] *See Gonzales v. Duenas–Alvarez*, 549 U.S.

[6] Even if Thrower could cite to such an example, we would not come out differently on this issue. An attempt to threaten to use force by, for example, attempting to use a threatening note, itself constitutes a "threatened use of physical force."

183, 193 (2007). As such, we are left with the text of the New York attempted robbery statute, which plainly matches ACCA's definition of a "violent felony."

We therefore conclude that the New York offense of attempted robbery in the third degree is a "violent felony" under ACCA.

CONCLUSION

Robbery in the first and third degrees and attempted robbery in the third degree, in violation of N.Y. Penal Law §§ 110.00, 160.05, 160.15, are "violent felonies" under the force clause of ACCA. Because Thrower therefore has three qualifying "violent felony" convictions under ACCA, the district court erred by not sentencing him to the applicable 180-month mandatory minimum term of incarceration.

We REVERSE the district court's grant of Thrower's § 2255 petition, VACATE the amended judgment, and REMAND for the district court to reinstate Thrower's original sentence.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of March, two thousand nineteen.

United States of America,

Plaintiff - Appellant,

v.

William Thrower,

Defendant - Appellee.

ORDER

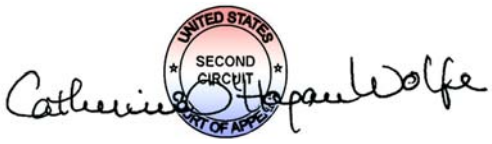
Docket No: 17-445

Appellee, William Thrower, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk



§ 70.02. Sentence of imprisonment for a violent felony offense.

1. Definition of a violent felony offense. A violent felony offense is a class B violent felony offense, a class C violent felony offense, a class D violent felony offense, or a class E violent felony offense, defined as follows:

(a) Class B violent felony offenses: an attempt to commit the class A-I felonies of murder in the second degree as defined in section 125.25, kidnapping in the first degree as defined in section 135.25, and arson in the first degree as defined in section 150.20; manslaughter in the first degree as defined in section 125.20, aggravated manslaughter in the first degree as defined in section 125.22, rape in the first degree as defined in section 130.35, criminal sexual act in the first degree as defined in section 130.50, aggravated sexual abuse in the first degree as defined in section 130.70, course of sexual conduct against a child in the first degree as defined in section 130.75; assault in the first degree as defined in section 120.10, kidnapping in the second degree as defined in section 135.20, burglary in the first degree as defined in section 140.30, arson in the second degree as defined in section 150.15, robbery in the first degree as defined in section 160.15, sex trafficking as defined in paragraphs (a) and (b) of subdivision five of section 230.34, sex trafficking of a child as defined in section 230.34-a, incest in the first degree as defined in section 255.27, criminal possession of a weapon in the first degree as defined in section 265.04, criminal use of a firearm in the first degree as defined in section 265.09, criminal sale of a firearm in the first degree as defined in section 265.13, aggravated assault upon a police officer or a peace officer as defined in section 120.11, gang assault in the first degree as defined in section 120.07, intimidating a victim or witness in the first degree as defined in section 215.17, hindering prosecution of terrorism in the first degree as defined in section 490.35, criminal possession of a chemical weapon or biological weapon in the second degree as defined in section 490.40, and criminal use of a chemical weapon or biological weapon in the third degree as defined in section 490.47.

(b) Class C violent felony offenses: an attempt to commit any of the class B felonies set forth in paragraph (a) of this subdivision; aggravated criminally negligent homicide as defined in section 125.11, aggravated manslaughter in the second degree as defined in section 125.21, aggravated sexual abuse in the second degree as defined in section 130.67, assault on a peace officer, police officer, firefighter or emergency medical services professional as defined in section 120.08, assault on a judge as defined in section 120.09, gang assault in the second degree as defined in section 120.06, strangulation in the first degree as defined in section 121.13, burglary in the

second degree as defined in section 140.25, robbery in the second degree as defined in section 160.10, criminal possession of a weapon in the second degree as defined in section 265.03, criminal use of a firearm in the second degree as defined in section 265.08, criminal sale of a firearm in the second degree as defined in section 265.12, criminal sale of a firearm with the aid of a minor as defined in section 265.14, aggravated criminal possession of a weapon as defined in section 265.19, soliciting or providing support for an act of terrorism in the first degree as defined in section 490.15, hindering prosecution of terrorism in the second degree as defined in section 490.30, and criminal possession of a chemical weapon or biological weapon in the third degree as defined in section 490.37.

(c) Class D violent felony offenses: an attempt to commit any of the class C felonies set forth in paragraph (b); reckless assault of a child as defined in section 120.02, assault in the second degree as defined in section 120.05, menacing a police officer or peace officer as defined in section 120.18, stalking in the first degree, as defined in subdivision one of section 120.60, strangulation in the second degree as defined in section 121.12, rape in the second degree as defined in section 130.30, criminal sexual act in the second degree as defined in section 130.45, sexual abuse in the first degree as defined in section 130.65, course of sexual conduct against a child in the second degree as defined in section 130.80, aggravated sexual abuse in the third degree as defined in section 130.66, facilitating a sex offense with a controlled substance as defined in section 130.90, labor trafficking as defined in paragraphs (a) and (b) of subdivision three of section 135.35, criminal possession of a weapon in the third degree as defined in subdivision five, six, seven, eight, nine or ten of section 265.02, criminal sale of a firearm in the third degree as defined in section 265.11, intimidating a victim or witness in the second degree as defined in section 215.16, soliciting or providing support for an act of terrorism in the second degree as defined in section 490.10, and making a terroristic threat as defined in section 490.20, falsely reporting an incident in the first degree as defined in section 240.60, placing a false bomb or hazardous substance in the first degree as defined in section 240.62, placing a false bomb or hazardous substance in a sports stadium or arena, mass transportation facility or enclosed shopping mall as defined in section 240.63, and aggravated unpermitted use of indoor pyrotechnics in the first degree as defined in section 405.18.

(d) Class E violent felony offenses: an attempt to commit any of the felonies of criminal possession of a weapon in the third degree as defined in subdivision five, six, seven or eight of section 265.02 as a lesser included offense of that section as defined in section 220.20 of the criminal procedure law, persistent sexual abuse as defined in section 130.53, aggravated sexual abuse in the fourth degree as defined in section 130.65-a, falsely reporting an incident in the second degree as defined in section 240.55 and placing a false bomb or hazardous substance in the second degree as defined in section 240.61.

2. Authorized sentence.

(a) [Eff until Sept 1, 2020] Except as provided in subdivision six of section 60.05, the sentence imposed upon a person who stands convicted of a class B or class C violent felony offense must be a determinate sentence of imprisonment which shall be in whole or half years. The term of such sentence must be in accordance with the provisions of subdivision three of this section.

(a) [Eff Sept 1, 2020] The sentence imposed upon a person who stands convicted of a class B or class C violent felony offense must be an indeterminate sentence of imprisonment. Except as provided in subdivision five of section 60.05, the maximum term of such sentence must be in accordance with the provisions of subdivision three of this section and the minimum period of imprisonment under such sentence must be in accordance with subdivision four of this section.

(b) Except as provided in paragraph (b-1) of this subdivision, subdivision six of section 60.05 and subdivision four of this section, the sentence imposed upon a person who stands convicted of a class D violent felony offense, other than the offense of criminal possession of a weapon in the third degree as defined in subdivision five, seven or eight of section 265.02 or criminal sale of a firearm in the third degree as defined in section 265.11, must be in accordance with the applicable provisions of this chapter relating to sentencing for class D felonies provided, however, that where a sentence of imprisonment is imposed which requires a commitment to the state department of corrections and community supervision, such sentence shall be a determinate sentence in accordance with paragraph (c) of subdivision three of this section.

(b-1) Except as provided in subdivision six of section 60.05, the sentence imposed upon a person who stands convicted of the class D violent felony offense of menacing a police officer or peace officer as defined in section 120.18 of this chapter must be a determinate sentence of imprisonment.

(c) Except as provided in subdivision six of section 60.05, the sentence imposed upon a person who stands convicted of the class D violent felony offenses of criminal possession of a weapon in the third degree as defined in subdivision five, seven, eight or nine of section 265.02, criminal sale of a firearm in the third degree as defined in section 265.11 or the class E violent felonies of attempted criminal possession of a weapon in the third degree as defined in subdivision five, seven, eight or nine of section 265.02 must be a sentence to a determinate period of imprisonment, or, in the alternative, a definite sentence of imprisonment for a period of no less than one year, except that:

> **(i)** the court may impose any other sentence authorized by law upon a person who has not been previously convicted in the five years immediately preceding the commission of the offense for a class A misdemeanor defined in this chapter, if the court having regard to the nature and circumstances of the crime and to the history and character of the defendant, finds on the record that such sentence

would be unduly harsh and that the alternative sentence would be consistent with public safety and does not deprecate the seriousness of the crime; and

(ii) the court may apply the provisions of paragraphs (b) and (c) of subdivision four of this section when imposing a sentence upon a person who has previously been convicted of a class A misdemeanor defined in this chapter in the five years immediately preceding the commission of the offense.

3. Term of sentence. The term of a determinate sentence for a violent felony offense must be fixed by the court as follows:

(a) For a class B felony, the term must be at least five years and must not exceed twenty-five years, provided, however, that the term must be: (i) at least ten years and must not exceed thirty years where the sentence is for the crime of aggravated assault upon a police officer or peace officer as defined in section 120.11 of this chapter; and (ii) at least ten years and must not exceed thirty years where the sentence is for the crime of aggravated manslaughter in the first degree as defined in section 125.22 of this chapter;

(b) For a class C felony, the term must be at least three and one-half years and must not exceed fifteen years, provided, however, that the term must be: (i) at least seven years and must not exceed twenty years where the sentence is for the crime of aggravated manslaughter in the second degree as defined in section 125.21 of this chapter; (ii) at least seven years and must not exceed twenty years where the sentence is for the crime of attempted aggravated assault upon a police officer or peace officer as defined in section 120.11 of this chapter; (iii) at least three and one-half years and must not exceed twenty years where the sentence is for the crime of aggravated criminally negligent homicide as defined in section 125.11 of this chapter; and (iv) at least five years and must not exceed fifteen years where the sentence is imposed for the crime of aggravated criminal possession of a weapon as defined in section 265.19 of this chapter;

(c) For a class D felony, the term must be at least two years and must not exceed seven years, provided, however, that the term must be: (i) at least two years and must not exceed eight years where the sentence is for the crime of menacing a police officer or peace officer as defined in section 120.18 of this chapter; and (ii) at least three and one-half years and must not exceed seven years where the sentence is imposed for the crime of criminal possession of a weapon in the third degree as defined in subdivision ten of section 265.02 of this chapter;

(d) For a class E felony, the term must be at least one and one-half years and must not exceed four years.

4.

(a) Except as provided in paragraph (b) of this subdivision, where a plea of guilty to a class D violent felony offense is entered pursuant to section 220.10 or 220.30 of the criminal procedure law in satisfaction of an indictment charging the defendant with

an armed felony, as defined in subdivision forty-one of section 1.20 of the criminal procedure law, the court must impose a determinate sentence of imprisonment.

(b) In any case in which the provisions of paragraph (a) of this subdivision or the provisions of subparagraph (ii) of paragraph (c) of subdivision two of this section apply, the court may impose a sentence other than a determinate sentence of imprisonment, or a definite sentence of imprisonment for a period of no less than one year, if it finds that the alternate sentence is consistent with public safety and does not deprecate the seriousness of the crime and that one or more of the following factors exist:

(i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or

(ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or

(iii) possible deficiencies in proof of the defendant's commission of an armed felony.

(c) The defendant and the district attorney shall have an opportunity to present relevant information to assist the court in making a determination pursuant to paragraph (b) of this subdivision, and the court may, in its discretion, conduct a hearing with respect to any issue bearing upon such determination. If the court determines that a determinate sentence of imprisonment should not be imposed pursuant to the provisions of such paragraph (b), it shall make a statement on the record of the facts and circumstances upon which such determination is based. A transcript of the court's statement, which shall set forth the recommendation of the district attorney, shall be forwarded to the state division of criminal justice services along with a copy of the accusatory instrument.

§ 70.04. Sentence of imprisonment for second violent felony offender.

1. Definiton of second violent felony offender.

(a) A second violent felony offender is a person who stands convicted of a violent felony offense as defined in subdivision one of section 70.02 after having previously been subjected to a predicate violent felony conviction as defined in paragraph (b) of this subdivision.

(b) For the purpose of determining whether a prior conviction is a predicate violent felony conviction the following criteria shall apply:

(i) The conviction must have been in this state of a class A felony (other than one defined in article two hundred twenty) or of a violent felony offense as defined in subdivision one of section 70.02, or of an offense defined by the penal law in effect prior to September first, nineteen hundred sixty-seven, which includes all of the essential elements of any such felony, or in any other jurisdiction of an offense which includes all of the essential elements of any such felony for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed;

(ii) Sentence upon such prior conviction must have been imposed before commission of the present felony;

(iii) Suspended sentence, suspended execution of sentence, a sentence of probation, a sentence of conditional discharge or of unconditional discharge, and a sentence of certification to the care and custody of the division of substance abuse services, shall be deemed to be a sentence;

(iv) Except as provided in subparagraph (v) of this paragraph, sentence must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted;

(v) In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration;

(vi) An offense for which the defendant has been pardoned on the ground of innocence shall not be deemed a predicate violent felony conviction.

2. [Eff until Sept 1, 2020] Authorized sentence. When the court has found, pursuant to the provisions of the criminal procedure law, that a person is a second violent felony offender the court must impose a determinate sentence of imprisonment which shall be in whole or half years. Except where sentence is imposed in accordance with the provisions of section 70.10, the term of such sentence must be in accordance with the provisions of subdivision three of this section.

2. [Eff Sept 1, 2020] Authorized sentence. When the court has found, pursuant to the provisions of the criminal procedure law, that a person is a second violent felony offender the court must impose an indeterminate sentence of imprisonment. Except where sentence is imposed in accordance with the provisions of section 70.10, the maximum term of such sentence must be in accordance with the provisions of subdivision three of this section and the minimum period of imprisonment under such section must be in accordance with subdivision four of this section.

3. [Eff until Sept 1, 2020] Term of sentence. The term of a determinate sentence for a second violent felony offender must be fixed by the court as follows:

(a) For a class B felony, the term must be at least ten years and must not exceed twenty-five years;

(b) For a class C felony, the term must be at least seven years and must not exceed fifteen years; and

(c) For a class D felony, the term must be at least five years and must not exceed seven years.

(d) For a class E felony, the term must be at least three years and must not exceed four years.

3. [Eff Sept 1, 2020] Maximum term of sentence. The maximum term of an indeterminate sentence for a second violent felony offender must be fixed by the court as follows:

(a) For a class B felony, the term must be at least twelve years and must not exceed twenty-five years;

(b) For a class C felony, the term must be at least eight years and must not exceed fifteen years; and

(c) For a class D felony, the term must be at least five years and must not exceed seven years.

(d) For a class E felony, the term must be at least four years.

4. [Eff Sept 1, 2020] Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate sentence for a second violent felony offender must be fixed by the court at one-half of the maximum term imposed and must be specified in the sentence.

§ 160.10. Robbery in the second degree

A person is guilty of robbery in the second degree when he forcibly steals property and when:

1. He is aided by another person actually present; or

2. In the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

(a) Causes physical injury to any person who is not a participant in the crime; or

(b) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or

3. The property consists of a motor vehicle, as defined in section one hundred twenty-five of the vehicle and traffic law.

Robbery in the second degree is a class C felony.

§ 160.15. Robbery in the first degree

A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

1. Causes serious physical injury to any person who is not a participant in the crime; or

2. Is armed with a deadly weapon; or

3. Uses or threatens the immediate use of a dangerous instrument; or

4. Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime.

Robbery in the first degree is a class B felony.

INTRODUCTORY CHARGE TO ROBBERY
PENAL LAW 160.00
(Revised April 2003 and June 2015)[1]

[*NOTE: The Introductory Charge to Robbery must be given once and prior to giving an instruction on one or more of the degrees of robbery.]*

The (*specify*) count(s) [charges / charge] a degree of Robbery.

Under our law, Robbery is defined as forcible stealing. Thus, each degree of robbery, which I will define for you, will include "forcible stealing" as the first element of the crime.

The term "forcible stealing" has its own special meaning. I will give you the meaning of that term by first defining the term "stealing," which the law also calls "larceny," and then the term "forcible stealing." [2]

A person **STEALS** property and commits **LARCENY** when, with the intent to deprive another of property or to appropriate the property to himself or herself [*or* to a third person], such person wrongfully takes, obtains, or withholds property from the owner of

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[1] The purpose of the 2003 revision was to conform the definition of larceny with the revision of that definition made at the same time in the charges defining larceny. *See, e.g.*, CJI2d [NY] Penal Law § 155.25.

The purpose of the 2015 revision was to simplify the first two paragraphs of the charge and to incorporate the holding of *People v Smith*, 79 NY2d 309 (1992), explained in footnote four, in the definition of "forcibly steals."

[2] The following summary definition of larceny should be used unless the circumstances of the case suggest the need for, or a party requests, a complete explanation of one or more of the terms used in the definition of larceny. In that event, you must use the standard charge on larceny or the appropriate portion thereof set forth in the charge of Petit Larceny (*see People v Blacknall*, 63 NY2d 912 [1984] [failure of the trial judge to include in the jury charge, *as requested*, the statutory definitions of 'deprive' and 'appropriate'...was reversible error in this attempted larceny case"]).

the property.[3]

A person **FORCIBLY STEALS** property and commits robbery when, in the course of committing a larceny, such person uses or threatens the immediate use of physical force upon another person for the purpose of, meaning with the intent of [4]:

Select appropriate alternative(s) and if multiple alternatives apply, renumber them accordingly:

[one:] compelling the owner of such property [*or* another person] to deliver up the property; [or]

[two:] preventing or overcoming resistance to the taking of the property; [or]

[three:] preventing or overcoming resistance to the retention of the property, immediately after the taking; [or]

[four:] compelling the owner of such property to engage in other conduct which aids in the commission of the larceny.

INTENT means conscious objective or purpose. Thus, a person acts with the intent to engage in such conduct when that person's conscious objective or purpose is to do so.[5]

I will now define for you the degree(s) of Robbery charged in this case, specifically (list the crime[s] of robbery that are being submitted to the jury):

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[3] *See* Penal Law § 155.05 (1).

[4] *See People v Smith*, 79 NY2d 309, 312-314 (1992) ("Logically, a defendant cannot act with a specified purpose unless an intent is formed to carry out that purpose. Thus, courts in this state have uniformly read the 'for the purpose' language as an intent element of the statute....thus, the plain language of the statute...establishes that 'for the purpose of' was intended by the legislature to be a mens rea element").

[5] *See* Penal Law § 15.05 (1).

ROBBERY IN THE THIRD DEGREE
Penal Law § 160.05
(Committed on or after Sept. 1, 1967)

[NOTE: Before instructing a jury on any specific robbery charge, read once the introductory Robbery charge found at the beginning of this chapter.]

The (*specify*) count is Robbery in the Third Degree.

Under our law, a person is guilty of Robbery in the Third Degree when that person forcibly steals property.

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case beyond a reasonable doubt, the following element:

That on or about *(date)*, in the county of *(county)*, the defendant, *(defendant's name)*, forcibly stole *(specify)* from *(specify)*.

If you find the People have proven that element beyond a reasonable doubt, you must find the defendant guilty of this crime.

If you find the People have not proven that element beyond a reasonable doubt, you must find the defendant not guilty of this crime.

ATTEMPT TO COMMIT A CRIME
PENAL LAW § 110.00

The (*specify*) count is attempt to commit the crime of *(attempted crime)*.

I shall instruct you first on the definition of the crime of *(attempted crime)*. Then I shall define for you an attempt to commit a crime. Finally, I shall put both definitions together and list for you the elements of attempt to commit the crime of *(attempted crime)*.

[*NOTE: Here read statutory definition of crime and any defined terms as set forth in CJI for that crime.]*

Under our law, a person is guilty of an attempt to commit a crime when, with intent to commit a crime, he or she engages in conduct which tends to effect the commission of such crime.[1]

The following terms used in that definition have a special meaning:

INTENT means a conscious objective or purpose. Thus, a person acts with intent to commit a crime when his or her conscious objective or purpose is to commit that crime.[2]

Conduct which TENDS TO EFFECT the commission of a crime means conduct which comes dangerously close or very near to the completion of the intended crime.

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[1] *See* Penal Law §110.00.

[2] *See* Penal Law § 15.05(1). If necessary, an expanded definition of "intent" is available in the section on Instructions of General Applicability under Culpable Mental States.

If a person intends to commit a crime and engages in conduct which carries his or her purpose forward within dangerous proximity to the completion of the intended crime, he or she is guilty of an attempt to commit that crime. It does not matter that the intended crime was not actually completed.

The person's conduct must be directed toward the accomplishment of the intended crime. It must go beyond planning and mere preparation, but it need not be the last act necessary to effect the actual commission of the intended crime. Rather, the conduct involved must go far enough that it comes dangerously close or very near to the completion of the intended crime.[3]

[*NOTE: Add where factual or legal impossibility is an issue:*

It is no defense in a prosecution for an attempt to commit a crime that the intended crime was, under the circumstances, factually or legally impossible to commit, if such crime could have been committed had the circumstances been as the defendant believed them to be.][4]

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[3] *See People v. Mahoubian,* 74 N.Y.2d 174 (1989); *People v. Warren,*66 N.Y.2d 831 (1985).

[4] *See* Penal Law § 110.10.

NOTE: Select one of the following two conclusions: [5]

I

[If intent applies to every element of the crime, conclude as follows:

In order for you to find the defendant guilty of an attempt to commit the crime of *(specify)*, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, both of the following two elements:

1. That on or about *(date)*, in the county of *(county)*, the defendant, *(name of defendant)*, intended to commit the crime of (*specify)*; and

2. That the defendant engaged in conduct which tended to effect the commission of that crime.

If you find the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of this crime.

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[5] *People v. Miller,* 87 NY2d 211 (1995), held that a defendant could be guilty of an attempt to commit Robbery in the First Degree, under PL §§ 20.00 and 160.15(1), provided he intended to forcibly steal property, even though he did not intend the serious physical injury to a non-participant which resulted; intent applied only to the "core" crime of robbery, not the non-intentional "aggravating element"). When intent applies to every element of the attempted crime, use or adapt the first alternative in the text. In the *Miller* situation, where a defendant may be guilty of an attempt although his intent does not encompass every element of the crime, use or adapt the second alternative.

II

[If there are some elements of the attempted crime to which intent does not apply, conclude as follows:

In order for you to find the defendant guilty of an attempt to commit the crime of *(specify)*, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, each of the following three elements:

1. That on or about *(date)*, in the county of *(county)*, the defendant, *(name of defendant)*, intended to commit the crime of *(specify core crime)*;

2. That the defendant engaged in conduct which tended to effect the commission of that crime; and

3. That *(specify strict liability element which raises degree of intended crime)*.[6]

If you find the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of this crime.

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[6] For example, for Attempted Robbery in the First Degree under Penal Law §§ 20.00 and 160.15(1), the "core crime" in the first element would be "robbery" and the third element would read:

> **3. That in the course of the attempted commission of the crime [*or* of immediate flight therefrom], the defendant [*or* another participant in the crime] caused serious physical injury to *(specify)*, and *(specify)* was not a participant in the robbery.**