

No. 17-_____

In the
Supreme Court of the United States

Sean Stuckey,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether robbery under New York law, which holds a nonviolent defendant strictly liable for a co-participant's violence, is a "violent felony" under the Armed Career Criminal Act.

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OPINION AND ORDER BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 878 F.3d 62 and appears at Pet. App. 1a-30a. The order denying panel rehearing and rehearing *en banc* appears at Pet. App. 31a.

JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 2255 and entered an opinion and order denying relief on December 1, 2016. The Second Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253, affirmed on December 20, 2017, and denied a timely petition for panel rehearing and rehearing *en banc* on March 16, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides, in relevant part:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony . . . committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years. . . .

(2) As used in this subsection— ...

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, . . . that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another.

N.Y. Penal Law § 160.00 provides:

Robbery is forcible stealing. 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 § 160.15 provides, in relevant part:

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: . . .

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.

STATEMENT OF THE CASE

1. A federal defendant convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. § 922(g)(1), faces a statutory sentencing range of 0–10 years. *See* § 924(a)(2). The Armed Career Criminal Act (“ACCA”) increases that range to 15 years to life if the defendant “has three previous convictions” for a “violent felony.” § 924(e)(1).

At the time of Stuckey’s 2008 sentencing, a “violent felony” was a felony that:

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another [the “force clause”];
or
- (ii) is burglary, arson, or extortion, involves use of explosives [the “enumerated offenses”], or otherwise involves conduct that presents a serious potential risk of physical injury to another [the “residual clause”].

§ 924(e)(2)(B).

At issue here are two New York convictions Stuckey sustained in 1994 for conduct when he was 19: robbery in which the defendant “or another participant in the crime . . . [u]ses or threatens the immediate use of a dangerous instrument,” N.Y. Penal Law § 160.15(3), and robbery in which the defendant “or another participant in the crime . . . [d]isplays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm.” § 160.15(4).

At sentencing, the district judge applied ACCA and imposed a prison term of 188 months and 10 days. Stuckey’s projected release date is November 20, 2019.

In 2015, this Court invalidated ACCA’s residual clause, *see Johnson v. United States*, 135 S. Ct. 2551 (2015), and that ruling applies retroactively. *See Welch v. United States*, 136 S. Ct. 1257 (2016).

2. In 2016, Stuckey moved under 28 U.S.C. § 2255 to vacate his sentence. He argued that, without ACCA’s residual clause, his priors are not “violent felony” convictions: robbery is not an enumerated offense, and New York robbery does not fall within ACCA’s force clause.

Stuckey began by explaining that, though all degrees of New York robbery require “forcible stealing,” the force can be less than the “*violent* force” ACCA’s force clause demands. *Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis in original). The district judge agreed, *see Stuckey v. United States*, 224 F. Supp. 3d 219, 225 (S.D.N.Y. 2016), and the panel (Chin and Droney, JJ., and Restani, Judge for the United States Court of International Trade) took no issue with this. *See Pet.*

App. 15a n.6.

Next, Stuckey pointed to the fact that New York's robbery statute permits conviction if it was not he, but "another participant in the crime," who employed a dangerous instrument or what seemed to be a gun. As New York's highest court has held, the statute deems one person "strictly liable for the conduct of another," *People v. Miller*, 661 N.E.2d 1358, 1361 (N.Y. 1995), meaning someone's use of a dangerous instrument or apparent gun results in the conviction of a defendant "regardless of the latter's degree of intent, knowledge or conduct with respect to the aggravating circumstance." *People v. Gage*, 687 N.Y.S.2d 202, 204 (N.Y. App. Div. 1999). Given this, both the district judge and panel noted the realistic chance that Stuckey was convicted based not on his own conduct but on a co-participant suddenly, and without Stuckey's foreknowledge or consent, employing a dangerous instrument or seeming gun. *See Stuckey*, 224 F. Supp. 3d at 231; Pet. App. 15a n.7.

The heart of Stuckey's argument – and the point of disagreement – was his saying such robbery offenses, which reach nonviolent people per an unusual rule of strict liability, are not "violent felony" offenses under ACCA.

He cited this Court's consistently narrow interpretation of ACCA: its residual clause is "unconstitutionally vague," *Johnson*, 135 S. Ct. at 2557, its force clause requires not literally any "force" but, specifically, "violent force," *Johnson*, 559 U.S. at 140 (emphasis in original), and the "use" of force must involve a "higher degree of intent than negligent or merely accidental conduct." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). (Though *Leocal* addressed the force clause at § 16(a), the only difference

between that clause and ACCA's is that § 16(a)'s covers force against property as well as people; and that difference does not affect the meaning of "use" of force.)

Read together, Stuckey argued, these cases mean a "*violent felony*" is a crime that requires the defendant to use or intend *violence*. And New York robbery is not such a crime: the defendant need not have used or intended the use of a dangerous instrument or apparent gun so long as "another participant" did.

In light of ACCA's purpose, Stuckey continued, the only sensible reading is to exclude priors like his. ACCA was written for "a particular type of offender— a violent criminal or drug trafficker [who] possesses a gun." *Begay v. United States*, 553 U.S. 137, 146 (2008). Yet counting strict-liability offenses like his sweeps in people who are not "violent criminal[s] or drug trafficker[s]." *Id.*

Finally, Stuckey said, if there is doubt here – especially given the lack of authority for reading ACCA to include priors like his – the rule of lenity requires a construction in his favor.

3. The Panel made no mention of the rule of lenity; or the fact that no circuit has interpreted ACCA to cover offenses that hold a defendant strictly liable for someone else's violence; or this Court's observation, confirmed by ACCA's legislative history, that the statute is reserved for "violent" recidivists rather than nonviolent people who commit "strict-liability crime[s]." *Begay*, 553 U.S. at 146.

Overlooking all this, and refusing to read this Court's ACCA cases together, the panel said ACCA's "intent and force requirements outlined in *Leocal* and *Johnson 2010* are examined separately." Pet. App. 22a. *See also* Pet. App. 29a

(“*Leocal* and *Johnson 2010* impose separate thresholds for force and intent in evaluating potential ACCA predicate convictions.”).

As to intent, the panel said, “the intent to commit the underlying robbery in the New York statute is sufficient for ACCA purposes,” Pet. App. 29a, even though (as the panel did not deny) the intent to commit a New York robbery does not require the intent to use “*violent* force.” *Johnson*, 559 U.S. at 140 (emphasis in original). And as to such violence, the panel said, it is enough that “*a member* of the robbery committed one of the aggravating acts” – using a dangerous instrument or apparent gun – even if a co-participant like Stuckey joined only the robbery without “knowing, planning, or at all intending for such additional violence to occur.” Pet. App. 24a (emphasis added).

The Second Circuit denied rehearing. Pet. App. 31a.

REASONS FOR GRANTING THE WRIT

“[I]n terms of fundamental fairness,” Congress said in passing ACCA, “the Act should ensure . . . that the same type of conduct is punishable on the Federal level in all cases.” *Taylor v. United States*, 495 U.S. 575, 582 (1990) (quoting S. Rep. 98-190, at 20 (1983)). The Second Circuit’s reading of ACCA thwarts that goal: a nonviolent robber in New York has a “violent felony” prior, but an identical robber in a state without a strict-liability rule does not.

This misreads ACCA, relying on “the vagaries of state law,” *id.* at 588, to sweep in far more than the “violent criminal[s]” ACCA is reserved for. *Begay*, 553 U.S. at 146. Certiorari is warranted.

I. The Panel’s Ruling Requires Inconsistent Application of ACCA.

By labeling, as a “violent felony,” an offense that requires no violence from the defendant so long as “another participant in the crime” exhibits some, the panel subverted one of “ACCA’s twin goals,” which is “incapacitating repeat violent offenders . . . *consistently* notwithstanding the peculiarities of state law.” *Shepard v. United States*, 544 U.S. 13, 35 (2005) (O’Connor, J., dissenting, joined by Kennedy and Breyer, JJ.) (emphasis in original).

New York’s strict-liability rule for robberies is a peculiarity of state law.

It is contrary to the state’s general rule on accomplice liability. *See* N.Y. Penal Law § 20.15 (“Except as otherwise expressly provided in this chapter,” such as regarding robbery, when “two or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of such degree as is compatible with *his own* culpable mental state and with *his own* accountability for an aggravating fact or circumstance.”) (emphasis added).

And it is contrary to the rules of other states. *See, e.g., State v. Henderson*, 908 N.W.2d 868, 876 (Iowa 2018) (“[I]n the context of a first-degree robbery prosecution under the dangerous weapon alternative, the State must prove the alleged aider and abettor had knowledge that a dangerous weapon would be or was being used.”); *State v. Weaver*, 473 S.E.2d 362, 368 (N.C. App. 1996) (reversing armed-robbery conviction because “the evidence indicates that Weaver helped plan the robbery, but does not indicate he approved of, or was even aware of, the plan to point a gun at Ms. Figueroa”); *Ingram v. United States*, 592 A.2d 992, 1003 (D.C.

1991) (“[I]n order to convict an accomplice of armed robbery, it must have been ‘reasonably foreseeable [to the accomplice] that some type of weapon was required.’”) (brackets in *Ingram*; citation omitted); *State v. Bohannon*, 503 A.2d 396, 399 (N.J. Super. Ct. App. Div. 1986) (“[A]n accomplice will be guilty of armed robbery, regardless of whether he actually possessed or used a weapon, only where he had the purpose to promote or facilitate an armed robbery.”); *State v. Ivy*, 350 N.W.2d 622, 630 (Wis. 1984) (To be convicted of “armed robbery, Ivy must have known or believed that the person committing the armed robbery would be armed with a dangerous weapon.”); *Com. v. Watson*, 447 N.E.2d 1182, 1187 n.6 (Mass. 1983) (“Where a defendant is charged as an aider and abettor of an aggravated robbery, requiring proof of use of a dangerous weapon, ‘the Government must show that the accomplice knew a dangerous weapon would be used or at least that he was on notice of the likelihood of its use.’”) (citation omitted).

Thus, someone who participates in a robbery without knowing or intending that his co-participant will use a gun is guilty of armed robbery in New York but of unarmed robbery in, say, Massachusetts. *See Watson*. And unarmed robbery in Massachusetts is not a “violent felony.” *See United States v. Parnell*, 818 F.3d 974, 979 (9th Cir. 2016) (“[R]obbery under Massachusetts law does not satisfy the requirement of physical force under § 924(e)(2)(B)(i),” ACCA’s force clause, because “any force, however slight, will satisfy [the Massachusetts robbery statute] so long as the victim is aware of it. Such force is insufficient under [2010] *Johnson*.”).

Consequently, a nonviolent robber in New York unaware of a co-participant's gun is subject to ACCA while an identical robber in Massachusetts is not. Such inconsistent application bucks Congress's aversion to "the vagaries of state law," *Taylor*, 495 U.S. at 588, and is contrary to Congress's corresponding desire that "the same type of conduct [be] punishable on the Federal level in all cases." *Id.* at 582 (quoting S. Rep. 98-190, at 20 (1983)). *See also id.* at 591 (rejecting reading of ACCA under which "a person imprudent enough to shoplift or steal from an automobile in California would be found . . . to have committed a burglary constituting a 'violent felony' for enhancement purposes— yet a person who did so in Michigan might not").

II. The Panel's Ruling is Wrong.

All statutory interpretation begins with a law's text, but as the district judge noted, ACCA's text does not "speak directly to such crimes" that hold a nonviolent defendant strictly liable for someone else's violence. *Stuckey*, 224 F. Supp. 3d at 226. The text does say a "violent felony" must involve "the use" of force (arguably by any co-participant), but this Court has repeatedly rejected a literal reading of ACCA in favor of a narrow one that ensures the 15-year minimum is reserved for truly "*violent criminal[s]*." *Begay*, 553 U.S. at 146 (emphasis added).

"It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983). For example, the 2010 *Johnson* Court considered ACCA's force clause,

which says a “violent felony” requires only “physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i). The Court rejected a literal reading: “We think it clear that in the context of a statutory definition of ‘*violent* felony,’ the phrase ‘physical force’ means *violent* force.” 559 U.S. at 140 (emphasis in original). “Ultimately,” the Court explained, “context determines meaning, and we ‘do not force [] definitions into contexts where they plainly do not fit and produce nonsense.’” *Id.* at 139-40 (citations omitted). Quoting *Leocal*, where the Court considered 18 U.S.C. § 16’s force clause, which is materially identical to ACCA’s, the Court emphasized: “[W]e cannot forget that we ultimately are determining the meaning of the term ‘crime of violence,’” which “suggests a category of violent, active crimes.” *Id.* at 140 (citation and internal punctuation omitted).

Thus in *Leocal*, the Court also refused a literal reading. Even though § 16’s force clause calls only for any “use” of force (as does ACCA’s), the Court held the use of force requires “a higher degree of intent than negligent or merely accidental conduct,” 543 U.S. at 9— in essence, the intentional use of force.

“As suggested by its title,” the Court confirmed in *Begay*, “the Armed Career Criminal Act focuses upon the special danger created when a particular type of offender – a *violent* criminal or drug trafficker – possesses a gun.” 553 U.S. at 146 (emphasis added). In thus narrowing ACCA to exclude DUI crimes, the Court explained that “crimes involving intentional or purposeful conduct . . . are different from DUI, a strict-liability crime.” *Id.* “We have no reason to believe that Congress intended a 15-year mandatory prison term” based on the latter. *Id.*

Likewise, there's no sign Congress wanted a "violent felony" to include an offense that holds nonviolent people strictly liable for others' conduct. Congress could have worded ACCA to say this, but it didn't. And such a reading, which the panel embraced here, "defeat[s] the plain purpose of the statute." *Bob Jones Univ.*, 461 U.S. at 586.

As the Second Circuit noted even before *Begay*, ACCA was "intended to target recidivists, *i.e.*, those who have engaged in *violent* criminal activity on at least three separate occasions." *United States v. Towne*, 870 F.2d 880, 891 (2d Cir. 1989) (emphasis added). The panel did not acknowledge *Towne* or the other authorities making clear that ACCA's purpose is to punish individuals who repeatedly choose violence, not those ensnared by strict-liability laws. *See also United States v. Crews*, 621 F.3d 849, 856 (9th Cir. 2010) (ACCA "focus[es] not on recidivists *in general*, but on 'repeat *violent* offenders.'") (second emphasis added; citation omitted); *United States v. Balascsak*, 873 F.2d 673, 679-80 (3d Cir. 1989) (en banc) ("The theory of [ACCA] was that 'a small number of repeat offenders commit a highly disproportionate amount of the violent crime plaguing America today.'" It "was so narrowly drawn to apply to only the most repetitive and violent and dangerous offender." It "was meant to apply to 'the most egregious situations' and 'the most extraordinary cases.'" (citations omitted); H.R. Rep. 98- 190, at 2 (1983) (ACCA was written to punish "violent crime committed by hardened and frequent offenders."); H.R. Rep. 98-1073, at 2-3 (1984) (ACCA targets "repeat offenders who commit violent crimes."); Hearing Before the H. Subcomm. on Crime, 98th Cong., 2d

Sess. 10 (1984) (ACCA is for “habitual violent offenders.”) (statement of Chairman William J. Hughes); *id.* at 43 (ACCA will “help get the repeat violent offender off the streets.”) (statement of Rep. Albert Gore, Jr.); Hearing Before the S. Subcomm. on Criminal Law, 99th Cong., 2d Sess. 47 (1986) (ACCA is for “the repeat, multiple, violent offender problem.”) (statement of Ronald D. Castille, Dist. Att’y of Philadelphia, on behalf of the Nat’l Dist. Att’ys Assoc.); *id.* at 58 (ACCA is for “the really violent and bad offenders.”).

ACCA’s purpose is thus to punish intentionally violent recidivists, not nonviolent people tripped up by a strict-liability quirk of state law.

And New York’s quirky rule, besides being an exception to the state’s law and contrary to the robbery statutes of other states, is contrary to the federal rule on accomplice liability. As this Court has explained, someone may be held liable for another’s crime only if “he intends to facilitate th[e] offense’s commission. An intent to advance some different or lesser offense is not, or at least not usually, sufficient: Instead, the intent must go to the specific and entire crime charged.” *Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014) (citations omitted). *Rosemond* thus held a person cannot be held liable for another’s use of a gun during a drug crime unless he “knows that one of his confederates will carry a gun.” *Id.* at 1249.

The panel noted that *Rosemond* did not address the instant “question of whether a state offense that provides enhanced penalties for a defendant for violent aggravating circumstances under a ‘strict liability’ regime” is a “violent felony.” Pet. App. 28a-29a. True enough, but whether Stuckey’s priors are “violent felonies”

under ACCA “is a question of federal law, not state law.” *Johnson*, 559 U.S. at 138. Following the federal rule is thus the better course. As Stuckey would not even be *liable* in federal court for another’s use of a gun absent proof he joined the robbery “knowing it w[ould] involve a firearm,” *Rosemond*, 134 S. Ct. at 1251, he should not receive enhanced punishment in federal court based on New York’s unusual rule.

Finally, and significantly, the panel made no mention of the rule of lenity, which “requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.” *United States v. Santos*, 553 U.S. 507, 514 (2008).

Stuckey argued that, given ACCA’s “text, structure, history, and purpose,” *Barber v. Thomas*, 560 U.S. 474, 488 (2010), a crime not requiring violent acts or intent from the defendant is not a “violent felony.” Though the panel disagreed, there are good reasons to doubt the panel’s reading: the text doesn’t require it, it’s contrary to ACCA’s purpose, and no other circuit has defined a “violent felony” as including an offense that holds the defendant strictly liable for another’s violence. To apply ACCA to such an offense is thus to “guess as to what Congress intended.” *Id.* And it’s a bad guess to say Congress wanted a law for “violent criminal[s],” *Begay*, 553 U.S. at 146, to be used to imprison nonviolent people for 15 years to life. Lenity precludes that reading.

In sum, the panel misconstrued ACCA: a “violent felony” does not include an offense that sweeps in, per a strict-liability quirk of state law, defendants who never use, attempt, threaten or intend violence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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