

Appendix

1 Before: CHIN and DRONEY, *Circuit Judges*, and RESTANI, *Judge*.**

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3
4 Appeal from a judgment of the United States District Court
5 for the Southern District of New York (Oetken, J.) denying a motion
6 filed pursuant to 28 U.S.C § 2255, and upholding Petitioner's
7 sentence under the Armed Career Criminal Act (ACCA). Petitioner
8 contends that his prior convictions under subsections (3) and (4) of
9 the New York first degree robbery statute, N.Y. Penal Law § 160.15,
10 do not categorically qualify as violent felonies under the ACCA. We
11 conclude that Petitioner's convictions satisfy the intent requirement
12 for ACCA predicate offenses under the ACCA's "elements" clause.
13 Accordingly, we **AFFIRM** the judgment of the district court.

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16 MATTHEW B. LARSEN, Federal
17 Defenders of New York, New York,
18 NY, *for Petitioner-Appellant*.

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22 Assistant United States Attorney, *of*
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25 Southern District of New York, New
26 York, NY, *for Respondent-Appellee*.

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** Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

1 DRONEY, *Circuit Judge*:

2 In 2007, Sean Stuckey was convicted in the United States
3 District Court for the Southern District of New York of possession of
4 a handgun by a previously convicted felon in violation of 18 U.S.C.
5 §§ 922(g)(1) and 924(e). At sentencing, the district court imposed a
6 sentence of 188 months and ten days' imprisonment. Part of that
7 sentence was the mandatory minimum sentence of 180 months
8 required by the Armed Career Criminal Act (ACCA), 18 U.S.C.
9 § 924(e). The ACCA requires such a sentence for violations of 18
10 U.S.C. § 922(g)(1) if the defendant has three previous convictions in
11 state or federal court for "serious drug offense[s]" or "violent
12 felon[ies]."¹ 18 U.S.C. § 924(e)(1).

13 In 2016, Stuckey filed a motion in the district court under 28
14 U.S.C. § 2255 to "vacate, set aside, or correct" his sentence, relying
15 on recent Supreme Court decisions that narrowed the types of

¹ 18 U.S.C. § 922(g)(1) provides for a maximum sentence of incarceration of ten years, and no mandatory minimum. *See* 18 U.S.C. §§ 922(g), 924(a)(2).

1 crimes that qualify as predicate offenses under the ACCA. 28 U.S.C.
2 § 2255(a).

3 In the district court's proceedings concerning his § 2255
4 motion, Stuckey contended that two of his prior first degree New
5 York robbery convictions were not violent felonies under the
6 ACCA.² Stuckey argued that under *Leocal v. Ashcroft*, 543 U.S. 1
7 (2004), a defendant must intend the degree of "physical force"
8 required by 18 U.S.C. § 924(e)(2)(B)(i) for the penalties imposed by
9 the ACCA to apply. Stuckey reasoned that his prior New York first
10 degree robbery convictions cannot categorically qualify as violent
11 felonies under the ACCA because New York law imposes strict
12 liability on accomplices who do not engage in the particular conduct
13 that elevates the statutory offense to a first degree robbery.

² Stuckey conceded that his third prior conviction, for second degree assault under New York law, *see* N.Y. Penal Law § 120.05, qualified as a violent felony under the ACCA.

1 The district court rejected this argument, concluding that the
2 robbery statute's intent requirement satisfies *Leocal's* intent
3 requirement without the need for additional proof that the
4 defendant intended to commit the aggravating acts necessary to
5 elevate the crime to first degree robbery. We agree with the district
6 court that the intent requirement for an offense to qualify as an
7 ACCA predicate was satisfied by Stuckey's two prior first degree
8 robbery convictions. Accordingly, we **AFFIRM** the judgment of the
9 district court.

BACKGROUND

11 In March 2006, Sean Stuckey was on New York state parole
12 and visited his parole office to report that he was having a “problem
13 in his neighborhood.” *United States v. Stuckey*, No. 06-cr-339, 2007
14 WL 2962594, at *2 (S.D.N.Y. Oct. 10, 2007). Because his parole officer
15 was not able to see him at that time, the officer visited Stuckey that
16 evening at his rented room in the Bronx. *Id.* During the visit, the

1 officer entered Stuckey's room and saw a loaded handgun on top of
2 Stuckey's nightstand, in violation of his parole conditions. *Id.* at *3.
3 Officers from the New York City Police Department arrived and
4 took Stuckey into custody. *Id.* Stuckey was then indicted in the
5 United States District Court for the Southern District of New York
6 for possession of a handgun and ammunition by a felon, in violation
7 of 18 U.S.C. § 922(g)(1) and § 924(e)(1). *Id.* at *6. He was found guilty
8 on July 30, 2007, following a jury trial. *Id.*

9 At his sentencing on January 10, 2008, the district court
10 (Patterson, Jr., J.) sentenced Stuckey to 188 months and 10 days'
11 imprisonment, applying the mandatory minimum of 180 months
12 required by the ACCA, 18 U.S.C. § 924(e)(1). At the time, Stuckey
13 did not contest that three of his prior New York state convictions
14 (one for second degree assault and two for separate first degree
15 robberies) subjected him to enhanced penalties as an armed career
16 criminal. The court determined that Stuckey was subject to the

1 mandatory minimum sentence because these three prior convictions
2 counted as violent felonies under 18 U.S.C. § 924(e)(2)(B).

3 Following his conviction and sentencing, Stuckey appealed to
4 this Court. On appeal, Stuckey raised various arguments regarding
5 his competency, the suppression and admission of evidence, the
6 constitutionality of 18 U.S.C. § 922(g), the lawfulness of the ACCA
7 after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and the district
8 court's consideration of the 18 U.S.C. § 3553(c) sentencing factors. He
9 did not challenge the treatment of his prior New York convictions in
10 calculating his sentence under the ACCA. We affirmed. *United States*
11 *v. Stuckey*, 317 F. App'x 48 (2d Cir. 2009) (summary order). In 2016,
12 Stuckey filed his motion under 28 U.S.C. § 2255 to vacate his
13 sentence.

14 During his hearing before the district court on his § 2255
15 motion, Stuckey argued that recent Supreme Court decisions
16 rendered his two previous first degree robbery convictions not

1 violent felonies under the ACCA. The district court (Oetken, J.)
2 denied the motion, holding that the two New York state first degree
3 robbery convictions were violent felonies under the ACCA.
4 Following that decision, the district court issued a certificate of
5 appealability. App. 5–6. This appeal followed.

6 DISCUSSION

7 On appeal, Stuckey argues that his New York first degree
8 robbery convictions are not categorically violent felonies under the
9 ACCA because he must have personally intended the particular
10 enhanced conduct under the two subsections of the New York first
11 degree robbery statute under which he was convicted to qualify the
12 convictions as ACCA predicates. Stuckey relies on two Supreme
13 Court precedents: *Leocal v. Ashcroft*, 543 U.S. 1 (2004), which requires
14 a threshold level of intent for ACCA predicate crimes, and *Johnson v.*
15 *United States*, 559 U.S. 133 (2010), which clarifies the degree of force
16 necessary for an ACCA predicate. “We review *de novo* the district

1 court's determination of whether a prior offense is a 'violent felony'
2 under the ACCA," *United States v. Lynch*, 518 F.3d 164, 168 (2d Cir.
3 2008), and conclude that Stuckey's first degree robbery convictions
4 satisfy the ACCA's intent requirement.

5 **I. New York First Degree Robbery**

6 The New York robbery statute sets forth the following as to
7 the aggravating circumstances that elevate the offense to first degree
8 robbery:

9 A person is guilty of [first degree] robbery . . . when he
10 forcibly steals property and when, in the course of the
11 commission of the crime . . . he *or another participant* in
12 the crime: 1) Causes serious physical injury to any
13 person who is not a participant in the crime; or 2) Is
14 armed with a deadly weapon; or 3) Uses or threatens
15 the immediate use of a dangerous instrument; or
16 4) Displays what appears to be a . . . firearm

17
18 N.Y. Penal Law § 160.15 (emphasis added). Both Stuckey and the
19 government agree that the statute does not require that all co-
20 participants in the robbery commit the particular aggravating
21 conduct in order to be convicted of the crime; only one of the co-

1 participants needs to have committed the aggravating conduct.³ See
 2 Appellee's Br. 25.

3 The New York Court of Appeals explained the statute's intent
 4 requirement in *People v. Miller*, 661 N.E.2d 1358 (N.Y. 1995). There,
 5 the court drew a distinction between the "core robbery offense" and
 6 the aggravating circumstances necessary for a first degree robbery.
 7 661 N.E.2d at 1362.⁴ To prove the "core robbery offense," the state
 8 must establish "[t]he culpable mental state." *Id.* Under the statute,
 9 "[i]t is the robber's intent . . . to permanently deprive the victim of
 10 property by compelling the victim to give up property or quashing
 11 any resistance to that act that is prohibited by law." *Id.* In contrast,
 12 "strict liability attaches to an aggravating circumstance." *Id.* at 1363.

³ First degree robbery is a class B felony under New York law, N.Y. Penal Law § 160.15, while second degree robbery is a class C felony, *id.* § 160.10. Class B felonies provide for imprisonment up to 25 years, while class C felonies provide for up to 15 years' imprisonment. N.Y. Penal Law § 70.00(2).

⁴ In *Miller*, the New York Court of Appeals dealt with subsection (1) of the first degree robbery statute, which requires serious injury to a victim. 661 N.E.2d at 1360.

1 The statute “imposes [this] strict liability” where “an attendant
2 circumstance to the robbery [occurs] . . . , subjecting the robber to
3 harsher punishment because of the additional grievous
4 consequences produced by the intended forcible taking.” *Id.* at
5 1362–63.

6 Here, Stuckey was convicted of the New York first degree
7 robbery statute twice: once under subsection (3), and once under
8 subsection (4).⁵ Thus, we must determine whether a conviction for
9 these particular offenses—which require the use, threat, or display
10 of a dangerous instrument or firearm—satisfies the intent
11 requirement for ACCA predicates for all of the crime’s participants
12 in light of the strict liability component of the statute.

⁵ Stuckey initially argued that his convictions were not crimes of violence because the government had not shown under which subsections of New York’s first degree robbery statute he was convicted. However, the government then produced certificates of disposition clarifying that Stuckey’s convictions were for violations of subsections (3) and (4) of N.Y. Penal Law § 160.15. App. 4. Stuckey no longer disputes that he was convicted under those subsections. As we detail in Part II, these dispositions require us to determine whether his convictions under these particular subsections are violent felonies.

1 **II. Categorical and Modified Categorical Approaches**

2 To determine which prior convictions qualify as violent
3 felonies under the ACCA, we apply a “categorical” approach that
4 asks whether the least of conduct made criminal by the state statute
5 falls within the scope of activity that the federal statute penalizes.
6 *United States v. Acosta*, 470 F.3d 132, 135 (2d Cir. 2006). In this case,
7 we therefore must inquire whether Stuckey’s prior first degree
8 robbery convictions categorically qualify as “violent felonies” as
9 defined by 18 U.S.C. § 924(e)(2)(B).

10 This inquiry requires a two-step analysis. We must first
11 identify the “elements of the statute forming the basis of the
12 defendant’s conviction.” *Descamps v. United States*, 133 S. Ct. 2276,
13 2281 (2013). In doing so, we examine what is “the minimum criminal
14 conduct necessary for conviction under [that] particular [state]
15 statute,” *Acosta*, 470 F.3d at 135, mindful that “there must be a
16 ‘realistic probability . . . that the State would apply its statute to

1 conduct” that constitutes the minimal criminal activity necessary
2 for a conviction, *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013)
3 (quoted *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

4 Second, we then compare the minimum conduct necessary for
5 a state conviction with the conduct that constitutes a “violent
6 felony” under the ACCA. 18 U.S.C. § 924(e)(2)(B). If the state statute
7 “sweeps more broadly”—i.e., it punishes activity that the federal
8 statute does not encompass—then the state crime cannot count as a
9 predicate “violent felony” for the ACCA’s fifteen-year mandatory
10 minimum. *Descamps*, 133 S. Ct. at 2283.

11 In some instances, an additional step is required because a
12 “statute[] . . . ha[s] a more complicated (sometimes called ‘divisible’)
13 structure” *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016).
14 These statutes “list elements in the alternative, and thereby define
15 multiple crimes.” *Id.* at 2249. When a court encounters a statute that
16 might be violated using alternative elements, a court may “look[] to

1 a limited class of documents (for example, the indictment, jury
2 instructions, or plea agreement and colloquy) to determine what
3 crime, with what elements, a defendant was convicted of.” *Id.* The
4 court then applies the categorical approach as it normally would,
5 having determined that a statute “list[s] . . . multiple crimes,” and
6 having established the particular subsection under which the
7 defendant was convicted. *Id.* This approach is known as the
8 modified categorical approach.

9 Here, the modified categorical approach applies. New York’s
10 first degree robbery statute lists four different aggravating
11 circumstances, or different ways of committing the offense. Both the
12 government and Stuckey agree that he was convicted under N.Y.
13 Penal Law § 106.15 (3) and (4), and thus we must apply the
14 categorical approach only as to these subsections. [A 10] Stuckey has
15 not argued that convictions under these subsections do not meet the

1 threshold of violence required by *Johnson v. United States*, 559 U.S.
 2 133 (2010). *See* App. 10–11.⁶

3 As to the ACCA’s intent requirement, we must assume that
 4 Stuckey himself did not commit or intend to commit the aggravated
 5 conduct that elevated the offenses to first degree robbery. Rather,
 6 because of the categorical analysis, we must assume that he was
 7 held responsible for the aggravating acts of an accomplice. “[O]ur
 8 focus on the minimum conduct criminalized by the state statute”
 9 compels this assumption.⁷ *Moncrieffe*, 569 U.S. at 191. Accordingly,
 10 the only question before us is whether the strict liability aspect of
 11 New York first degree robbery causes the statute to “sweep too

⁶ We need not address in this opinion the question of whether *all* New York robberies qualify as a “violent felony” under the ACCA—i.e., whether just “forcible stealing” requires the degree of force mandated by the 2010 *Johnson* decision.

⁷ We note that there is a “realistic probability,” *Moncrieffe*, 569 U.S. at 191, that New York would actually apply this statute to co-participants who never intended an aggravating factor to occur during the robbery. *See, e.g., People v. Fingall*, 24 N.Y.S.3d 704, 705 (2d Dep’t 2016). (“The court properly instructed the jurors that the prosecution was not required to prove that the defendant had prior knowledge of another perpetrator’s intent to display an operable firearm, because such knowledge was not an element of robbery in the first degree.”).

1 broadly,” criminalizing conduct that the ACCA does not penalize.

2 *Descamps*, 133 S. Ct. at 2283

3 **III. The Armed Career Criminal Act**

4 The ACCA imposes a fifteen-year mandatory minimum

5 sentence on individuals who are convicted of a violation of 18 U.S.C.

6 § 922(g), and who have “three previous convictions . . . for a violent

7 felony.” 18 U.S.C. § 924(e)(1). A “violent felony” is defined as

8 any crime punishable by imprisonment for a term

9 exceeding one year . . . that – (i) has as an element the

10 use, attempted use, or threatened use of physical force

11 against the person of another; or (ii) is [one of several

12 enumerated offenses], or otherwise involves conduct

13 that presents a serious potential risk of physical injury

14 to another

15

16 *Id.* § 924(e)(2)(B). This case concerns only 18 U.S.C. § 924(e)(2)(B)(i),

17 which is known as the “force,” or “elements” clause.⁸

⁸ Although the “violent felony” definition has two separate parts, courts typically treat this language as containing three different clauses. As noted above, the first clause is the “elements” or “force” clause, which comprises all of 18 U.S.C. § 924(e)(2)(B)(i). Section 924(e)(2)(B)(ii) has two separate clauses—clauses two and three of the ACCA. The second clause is the “enumerated offenses” clause, which lists specific types of crimes that count as ACCA predicates. It does not, however, list robbery. The last clause is the residual clause, which the Supreme

1 Two Supreme Court decisions interpreting the ACCA's
 2 elements clause provide particular guidance to us here. The first is
 3 *Leocal v. Ashcroft*, 543 U.S. 1 (2004). In *Leocal*, the Court addressed the
 4 “crime of violence” provision at 18 U.S.C. § 16, which uses language
 5 identical to the elements clause of the “violent felony” definition in
 6 18 U.S.C. § 924(e)(2)(B)(i).⁹ *Leocal* involved a conviction under a
 7 Florida statute criminalizing driving under the influence of alcohol
 8 (DUI) and causing serious bodily injury that did not have a *mens rea*
 9 requirement. The government argued in *Leocal* that 18 U.S.C. § 16
 10 does not require a predicate offense to have a *mens rea* requirement,
 11 and that the DUI offense was therefore a crime of violence under the

Court declared unconstitutionally vague in 2015. *See Johnson v. United States*, 135 S. Ct. 2551 (2015). The Court later held that this holding applies on collateral review. *See Welch v. United States*, 136 S. Ct. 1257 (2016).

⁹ As we have previously observed, cases involving the “crime of violence” definition under U.S.S.G. § 4B1.2(a) are “highly persuasive” in interpreting the ACCA’s “violent felony” provision, and vice versa. *United States v. Reyes*, 691 F.3d 453, 458 n.1 (2d Cir. 2012); *see also United States v. Walker*, 595 F.3d 441, 443 n.1 (2d Cir. 2010). Similarly, the identical language of the elements clauses of 18 U.S.C. § 16(a) and § 924(e)(2)(B)(i) means that cases interpreting the clause in one statute are highly persuasive in interpreting the other statute. *See Johnson*, 559 U.S. at 140 (noting that 18 U.S.C. § 16 is “very similar to § 924(e)(2)(B)(i)”).

1 federal statute. 543 U.S. at 9. The Court held, however, that the
 2 elements clause of 18 U.S.C. § 16 “most naturally suggests a higher
 3 degree of intent than negligent or merely accidental conduct.” *Id.* In
 4 reaching this conclusion, the Court emphasized that the word “use”
 5 in the elements clause connotes “active employment.” *Id.* Thus, by
 6 “giv[ing] words their ‘ordinary or natural’” meaning, the Court
 7 reasoned that an offense qualifying as a “crime of violence” must
 8 require that the defendant acted more than merely negligently in
 9 committing that offense. *Id.* (quoting *Smith v. United States*, 508 U.S.
 10 223, 228 (1993)).

11 The second Supreme Court decision is *Johnson v. United States*,
 12 559 U.S. 133 (2010).¹⁰ *Johnson 2010* concerned a Florida state criminal
 13 statute for battery. Under the Florida statute, a defendant could face
 14 conviction for “‘actually and intentionally touch[ing]’” a victim. 559

¹⁰ We refer to this *Johnson* case as *Johnson 2010* so as not to confuse it with the 2015 *Johnson* decision, which involved the constitutionality of the ACCA’s residual clause. See *Johnson 2015*, 135 S. Ct. at 2555-63.

1 U.S. at 136 (alteration omitted) (quoting Fla. Stat. § 784.03(1)(a)). The
2 government contended that a conviction under this statute could
3 nevertheless qualify as an ACCA “violent felony.” *Id.* at 139. The
4 government reasoned that the ACCA’s “physical force” requirement
5 included the “merest touching,” because that is how “force” was
6 defined at common law. *Id.*

7 The Court, however, determined that the “physical force”
8 required by the ACCA’s elements clause is more demanding. *Id.* The
9 Court stated that it must “interpret[] the phrase ‘physical force’ as
10 used in defining . . . the statutory category of ‘violent felon[ies].’” *Id.*
11 at 140 (second alteration in original) (quoting 18 U.S.C. §
12 924(e)(2)(B)); *see also id.* (noting that 18 U.S.C. § 16 and the ACCA
13 “suggest[] a category of violent, active crimes” (quoting *Leocal*, 543
14 U.S. at 11)). The Court concluded that “the phrase ‘physical force’
15 means *violent* force—that is, force capable of causing physical pain
16 or injury to another person.” *Id.* More recently, the Court confirmed

1 that certain “[m]inor uses of force” do not rise to the level of
2 violence that the ACCA requires. *United States v. Castleman*, 134 S.
3 Ct. 1405, 1410–12 (2014).

4 Thus, ACCA predicate convictions must satisfy these two
5 requirements: (1) intent (as required by *Leocal*) and (2) sufficiently
6 violent conduct (as required by *Johnson 2010*).

7 **IV. Application of *Leocal*, *Johnson 2010*, and the Modified**
8 **Categorical Approach**

9
10 Stuckey argues that we should read *Leocal*’s intent
11 requirement in tandem with the *Johnson 2010* degree of force
12 requirement. Under this approach, Stuckey’s New York convictions
13 would qualify as ACCA predicates only if Stuckey intended the
14 increased uses of force, that is, the aggravating conduct of
15 subsections (3) and (4) of the robbery statute. The district court
16 summarized this argument as “encourag[ing] the Court to combine
17 *Leocal* and *Johnson 2010* to hold that in order for an individual’s prior
18 conviction to be deemed a violent felony under the ACCA, that

1 individual must have intended the use of violent force.” *Stuckey v.*
2 *United States*, 224 F. Supp. 3d 219, 227 (S.D.N.Y. 2016). The district
3 court, however, rejected this argument, reasoning that the “ACCA
4 requires only that a crime satisfy *Leocal*’s minimum intent threshold
5 and that it separately clear *Johnson 2010*[’s] ‘violent force’ bar to be
6 deemed a violent felony—nothing more.” *Id.* at 228.

7 We again note that Stuckey does not contest that his first
8 degree robbery convictions satisfy the force requirement described
9 in *Johnson 2010*. The “[u]se[] or threaten[ed] . . . immediate use of a
10 dangerous instrument,” N.Y. Penal Law § 160.15(3), or “[d]isplay
11 [of] what appears to be a [firearm],” *id.* § 160.15(4), in the course of a
12 robbery well exceeds the degree of violent physical force the ACCA
13 requires. Such actions satisfy the plain text of the ACCA, which
14 mandates only that the predicate offense have “as an element the
15 use . . . of physical force.” 18 U.S.C. § 924(e)(2)(B)(i). The ACCA’s
16 text “focuses only on aspects of the crime itself,” *Stuckey*, 224 F.

1 Supp. 3d at 228, and mandates that a conviction for the predicate
2 offense require proof of “us[ing] . . . physical force,” 18 U.S.C.
3 § 924(e)(2)(B)(i); *see also Mathis*, 136 S. Ct. at 2252 (noting that
4 “Congress indicated [through the ACCA’s text] that the sentencer
5 should ask only about whether ‘the defendant had been convicted of
6 crimes falling within certain categories,’ and not about what the
7 defendant had actually done” (quoting *Taylor v. United States*, 495
8 U.S. 575, 600 (1990))).

9 The intent requirement as to the use of force must also satisfy
10 *Leocal*, however. But, we agree with the district court that the intent
11 and force requirements outlined in *Leocal* and *Johnson 2010* are
12 examined separately. Under New York’s first degree robbery
13 statute, the state must first prove that the defendant “inten[ded] . . .
14 to permanently deprive the victim of property by compelling the
15 victim to give up property or quashing any resistance to that act.”
16 *Miller*, 661 N.E.2d at 1362. This “requisite intent remains the same”

1 regardless of whether the state charges a first, second, or third
2 degree robbery. *Id.* The statute then imposes strict liability for any
3 aggravating circumstances, “subjecting the robber to harsher
4 punishment because of the additional grievous consequences
5 produced by the intended forcible taking.” *Id.* at 1363. “This
6 gradation of robbery offenses embodies a legislative determination
7 that the presence of one of the enumerated ‘aggravating factors’
8 exacerbates the core criminal act and increases the danger of serious
9 physical injury to . . . a non-participant, thus warranting harsher
10 punishment for the robber.” *Id.* at 1361. “The enhanced severity of
11 the crime is therefore reflected in the statutory designation of the
12 degree of the offense.” *Id.*

13 The New York statute reflects the principle of criminal law
14 that a defendant may be held responsible for actions taken by an
15 accomplice to certain crimes. *See United States v. Peoni*, 100 F.2d 401,
16 402 (2d Cir. 1938) (recounting the history of criminal liability for the

1 acts of other individuals); Francis Bowes Sayre, *Criminal*
2 *Responsibility for the Acts of Another*, 43 Harv. L. Rev. 689, 702–04
3 (1930). Indeed, certain federal offenses also embody this principle.
4 See *Pinkerton v. United States*, 328 U.S. 640 (1946); *United States v.*
5 *Parkes*, 497 F.3d 220, 232 (2d Cir. 2007).

6 Stuckey’s objection is that a co-participant to the robbery
7 might brandish or discharge a firearm without the accomplice
8 knowing, planning, or at all intending for such additional violence
9 to occur. But the ACCA requires only a threshold intent to engage in
10 criminal conduct. The New York statute satisfies this standard
11 because the state must first establish the defendant’s intent to
12 commit robbery, and separately establish that during that robbery, a
13 member of the robbery committed one of the aggravating acts for an
14 enhanced penalty to apply.

15 *Leocal* does not compel a different result. Commission of a first
16 degree robbery in New York meets the requirement that a defendant

1 have “a higher degree of intent than negligent or merely accidental
2 conduct.” 543 U.S. at 9. Although the New York statute allows an
3 individual to be held strictly liable for the display of a weapon, the
4 defendant must *intend* to engage in “forcible stealing.” N.Y. Penal
5 Law § 160.15; *see also People v. Chessman*, 429 N.Y.S.2d 224, 229 (2d
6 Dep’t 1980) (noting defendant must have intent as to the forcible
7 stealing). Thus, the state must prove that “in using or threatening
8 physical force, [the] defendant’s ‘conscious objective’ was either to
9 compel [the] victim to deliver up property or to prevent or overcome
10 resistance to the taking.” *People v. Gordon*, 16 N.E.3d 1178, 1184 (N.Y.
11 2014) (alterations in original) (internal quotation marks omitted).
12 The defendant must therefore actively and intentionally engage in
13 the commission of the robbery—precisely what *Leocal* requires, and
14 what was not required by the Florida statute at issue in that case.

15 Decisions from other circuits support this conclusion. For
16 example, in *United States v. Ramon Silva*, the Tenth Circuit

1 determined that it is sufficient that the predicate ACCA offense
2 require general intent as to the conduct constituting the crime. 608
3 F.3d 663, 673–74 (10th Cir. 2010). The court rejected the argument
4 that a defendant must have a specific intent to “injure or induce
5 fear,” which the dissent argued was required by *Leocal*. *Id.* at 679.
6 Rather, the court explained, it was sufficient for the defendant to
7 intentionally engage in “apprehension causing” conduct that
8 threatened the use of physical force—even if the defendant did not
9 intend to cause injury. *Id.* at 673; *see also United States v. Am*, 564 F.3d
10 25, 33–34 (1st Cir. 2009) (holding that general intent as to a crime
11 involving use of physical force meets the requirements for an ACCA
12 predicate offense). So too here: the defendant need not commit the
13 aggravating conduct, but rather need only intend to engage in the
14 conduct of the underlying robbery.

15 Furthermore, *Rosemond v. United States* does not affect our
16 conclusion, as Stuckey suggests. 134 S. Ct. 1240 (2014). In that case,

1 the defendant, Rosemond, was involved in a “drug deal gone bad”
2 when either he or an accomplice shot at a would-be drug buyer after
3 the buyer stole drugs from Rosemond and his fellow drug sellers. *Id.*
4 at 1243. The government charged Rosemond with aiding and
5 abetting a violation of 18 U.S.C. § 924(c),¹¹ which “provides that ‘any
6 person who, during and in relation to any crime of violence or drug
7 trafficking crime[,] . . . uses or carries a firearm,’ shall receive a five-
8 year mandatory-minimum sentence, with seven- and ten-year
9 minimums applicable, respectively, if the firearm is also brandished
10 or discharged.” *Id.* (alterations in original) (quoting 18 U.S.C.
11 § 924(c)). The district court provided jury instructions that stated
12 Rosemond could be found guilty of aiding and abetting under 18
13 U.S.C. § 2 if he (1) participated in the crime, and (2) knew his cohort
14 used a firearm during the crime. *Id.* at 1244.

¹¹ The government also charged Rosemond with a direct violation of 18 U.S.C. § 924(c) on the theory that Rosemond discharged the firearm. Only the aiding and abetting portion of *Rosemond* concerns us here.

1 Rosemond contended that these instructions were insufficient,
2 and the Supreme Court agreed, holding that a “defendant’s
3 knowledge of a firearm must be advance knowledge” to result in
4 aiding and abetting liability under 18 U.S.C. § 924(c). *Id.* at 1249. To
5 reach this conclusion, the Court relied on the principle that “a
6 person aids and abets a crime when . . . he intends to facilitate that
7 offense’s commission.” *Id.* at 1248. Thus, “for purposes of aiding and
8 abetting law, a person who actively participates in a criminal scheme
9 knowing its extent and character intends that scheme’s
10 commission,” a principle that, under *Rosemond*, extends to the
11 decision whether or not the commission of the crime will involve a
12 firearm. *Id.* at 1249.

13 *Rosemond*, however, simply interpreted the intent requirement
14 for aiding and abetting liability. It thus does not bear on the question
15 of whether a state offense that provides enhanced penalties for a
16 defendant for violent aggravating circumstances under a “strict

1 liability” regime requires additional intent as to the aggravating
2 factor to count as an ACCA predicate offense. As we have explained,
3 the intent to commit the underlying robbery in the New York statute
4 is sufficient for ACCA purposes.

5 Thus, having determined that *Leocal* and *Johnson 2010* impose
6 separate thresholds for force and intent in evaluating potential
7 ACCA predicate convictions, we conclude that Stuckey’s first degree
8 robbery convictions satisfy the modified categorical approach.
9 Stuckey’s convictions meet *Leocal*’s intent requirement because the
10 state was required to prove the robber’s “intent . . . to permanently
11 deprive the victim of property by compelling the victim to give up
12 property.” *Miller*, 661 N.E.2d at 1362.

13 CONCLUSION

14 For the foregoing reasons, Stuckey’s prior convictions under
15 subsections (3) and (4) of the New York first degree robbery statute,
16 N.Y. Penal Law § 160.15(3)–(4), constitute violent felonies under the

- 1 ACCA's elements clause. Accordingly, we **AFFIRM** the judgment of
- 2 the district court.

**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 16th day of March, two thousand eighteen.

Sean Stuckey,

Petitioner - Appellant,

v.

United States of America,

Respondent - Appellee.

ORDER

Docket No: 16-4133

Appellant, Sean Stuckey, 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

A circular official seal of the United States Court of Appeals for the Second Circuit is positioned over the signature. The seal features the text "UNITED STATES" at the top, "SECOND CIRCUIT" in the center, and "COURT OF APPEALS" at the bottom, with stars on either side of the center text.