

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term, 2017

5
6 (Argued: February 26, 2018 Decided: January 4, 2019)

7
8 Docket No. 17-167

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13 AL-MALIK FRUITKWAN SHABAZZ, fka Edward Levi Singer,

14
15 *Petitioner-Appellee,*

16
17 v.

18
19 UNITED STATES OF AMERICA,

20
21 *Respondent-Appellant.*
22 _____

23
24 Before:

25
26 KATZMANN, *Chief Judge*, LEVAL, *Circuit Judge*, and BERMAN,
27 *District Judge*.*

28
29 The government appeals from the judgment of the United States
30 District Court for Connecticut (Stefan R. Underhill, *J.*) granting petitioner Al-
31 Malik Fruitkwan Shabazz's motion under 28 U.S.C. § 2255 to set aside his
32 sentence imposed under the Armed Career Criminal Act of 1984 ("ACCA"),
33 18 U.S.C. § 924(e), on the ground that his prior convictions for robbery under
34 Con. Gen. Stat. § 53a-133 did not qualify as ACCA predicates under ACCA's
35 Force Clause, mandating a sentence of at least fifteen years imprisonment.

* Judge Richard M. Berman, United States District Court for the Southern
District of New York, sitting by designation.

1 Held, any offense that satisfies the essential elements of robbery under § 53a-
2 133 involves use or threat of force capable of causing pain or injury and thus
3 qualifies as an ACCA predicate. REVERSED.

4
5 CHARLES F. WILLSON, Federal
6 Defender's Office, Hartford, CT, *for*
7 *Petitioner-Appellee*.

8
9 JOCELYN COURTNEY KAOUTZANIS (Marc
10 H. Silverman, *on the brief*), on behalf of
11 Deirdre M. Daly, United States
12 Attorney, District of Connecticut, New
13 Haven, CT, *for Respondent-Appellant*.

14
15 LEVAL, *Circuit Judge*:

16 This is an appeal by the United States from a grant of habeas corpus
17 under 28 U.S.C. § 2255 by the United States District Court for the District of
18 Connecticut (Stefan R. Underhill, *J.*) in favor of petitioner Al-Malik Fruitkwan
19 Shabazz, requiring reduction of Shabazz's sentence. The question presented
20 by the appeal is whether the offense of robbery, as defined by Connecticut's
21 basic robbery statute, Conn. Gen. Stat. § 53a-133, is a "violent felony" as that
22 term is used in the Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C. §
23 924(e). That issue turns on whether robbery, as specified in § 53a-133, has as
24 an essential element the use or threatened use of force that is capable of
25 causing pain or injury. *See Johnson v. United States*, 559 U.S. 133 (2010) ("*2010*
26 *Johnson*").

1 Shabazz was convicted in 2004 in the United States District Court for
2 Connecticut on one count of unlawful possession of a firearm by a convicted
3 felon, in violation of 18 U.S.C. § 922(g)(1). At the time, Shabazz had, among
4 other convictions, four prior Connecticut state-court robbery convictions
5 under § 53a-133. If at least three of those prior convictions were for violent
6 felonies as that term has been defined by the Supreme Court for purposes of
7 the ACCA statute, ACCA mandated a sentence of at least fifteen years
8 imprisonment. In sentencing Shabazz for the firearm violation, the district
9 court concluded that a mandatory fifteen-year sentence was required by
10 ACCA and sentenced Shabazz to 235 months imprisonment.¹

11 Since that time, decisions of the United States Supreme Court and our
12 court have substantially altered the meaning of ACCA. Shabazz brought this
13 petition for habeas corpus contending that ACCA, as currently understood,
14 no longer applies to his robbery convictions because, he argues, one can be
15 convicted of robbery in Connecticut for a theft that does not employ force
16 capable of causing pain or injury. The district court, in a thoughtful, scholarly

¹ The district court started with the mandatory minimum sentence as the baseline and determined, based on aggravating circumstances of Shabazz's offense, that a sentence above that minimum was warranted.

1 opinion, agreed with Shabazz and granted his petition. The court vacated his
2 prior sentence, sentenced him to 120 months imprisonment, and released him
3 from custody because he had completed service of the new sentence. The
4 cornerstone of the district court's ruling was that robbery under § 53a-133
5 does not necessarily involve use of force that is capable of causing pain or
6 injury.

7 The government brought this appeal, arguing that Connecticut's core
8 robbery statute does require force (or threat of force) that is capable of causing
9 pain or injury. If the government is correct, Shabazz had at least three prior
10 violent felonies, and therefore faced a mandatory sentence of at least fifteen
11 years under ACCA.

12 We respectfully disagree with the district court's view that
13 Connecticut's robbery statute does not require at a minimum force that would
14 satisfy the ACCA standard. We think that the threat of force capable of
15 causing pain or injury is inherent in the crime of robbery. Accordingly, we
16 VACATE the judgment.

1 **BACKGROUND**

2 In 2005, Shabazz was convicted of one count of unlawful possession of
3 a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1). *See United*
4 *States v. Singer*, No. 3:04-cr-210-1 (SRU) (doc. 1, 71). In addition to other
5 convictions, Shabazz had four prior Connecticut convictions for various
6 degrees of robbery, each of which included a conviction under § 53a-133.

7 Robbery in Connecticut is defined under a statutory scheme that
8 includes a basic robbery offense under § 53a-133, and additional statutes that
9 define the aggravating factors, such that all robbery convictions must include
10 a conviction under § 53a-133, and any conviction for aggravated degrees of
11 robbery, such as first degree robbery or second degree robbery, requires an
12 additional conviction under the statute that defines the aggravating factors.

13 The basic definition of robbery under § 53a-133 is as follows:

14 A person commits robbery when, in the course of
15 committing a larceny, he uses or threatens the immediate use of
16 physical force upon another person for the purpose of: (1)
17 Preventing or overcoming resistance to the taking of the property
18 or to the retention thereof immediately after the taking or (2)
19 compelling the owner of such property or another person to
20 deliver up the property or to engage in other conduct which aids
21 in the commission of the larceny.

1 ACCA specifies that a person who violates 18 U.S.C. § 922(g)(1)'s
2 prohibition of possession of a firearm by a convicted felon and has three
3 previous convictions "for a violent felony" (or a serious drug offense) is
4 subject to a mandatory minimum sentence of fifteen years. 18 U.S.C. §
5 924(e)(1).² The term "violent felony" is defined to include any crime

² The full text of 18 U.S.C. 924(e) states: (e)(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 or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any 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 destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

1 punishable by imprisonment for a term exceeding one year that falls into any
2 of three categories that are defined in clauses (i) and (ii) of § 924(e)(1)(B). The
3 first of these, known as the Force Clause, set forth in subsection (i), is the
4 subject of this appeal. It specifies that the offense “(i) has as an element the
5 use, attempted use, or threatened use of physical force against the person of
6 another.” 18 U.S.C. § 924(e)(2)(B)(i). The second and third categories, the so-
7 called Enumerated Felonies Clause and the Residual Clause, are set forth in
8 subsection (ii). The Enumerated Felonies Clause includes any offense that “is
9 burglary, arson, or extortion, [or] involves use of explosives.” 18 U.S.C. §
10 924(e)(2)(B)(ii). The Residual Clause includes any offense that “otherwise
11 involves conduct that presents a serious potential risk of physical injury to
12 another.” *Id.* In order to determine whether a prior conviction comes within
13 one of the aggravating categories, the Supreme Court ruled in *Taylor v. United*

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

(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*; and

(C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(The language in italics has been found constitutionally invalid and may not be used for sentencing purposes. *Johnson v. United States*, 135 S.Ct. 2551 (2015).)

1 *States*, 495 U.S. 575, 600 (1990), that the court must employ a “categorical
2 approach,” looking not at the facts of the defendant’s prior crimes but at the
3 statute under which he was convicted to determine whether the essential
4 elements of that statute bring the crime within the ACCA requirements.

5 In sentencing Shabazz on his 2005 conviction for unlawful gun
6 possession, the court concluded on the basis of his prior Connecticut robbery
7 convictions that he was subject to ACCA’s fifteen-year mandatory minimum
8 sentence. The court did not explain which of the clauses of the ACCA statute
9 justified its application to his case. Shabazz timely appealed his conviction
10 without contesting the applicability of ACCA, and our court affirmed the
11 judgment by summary order. *United States v. Singer*, 241 F. App’x 727, 729 (2d
12 Cir. 2007).

13 Subsequent to his conviction, court decisions have altered the meaning
14 of the ACCA statute. In 2010, the Supreme Court interpreted the phrase
15 “physical force” in the Force Clause. *See Johnson v. United States*, 559 U.S. 133
16 (2010) (“2010 *Johnson*”). The Supreme Court reasoned that because the term
17 “physical force” occurred “in the context of a statutory definition of ‘violent
18 felony,’” the physical force invoked by the statute needed to be “violent

1 force—that is, force capable of causing physical pain or injury to another
2 person.” *Id.* at 140 (emphasis in original). Therefore, in order for a previous
3 conviction to qualify as an ACCA predicate under the Force Clause, the
4 statutory definition of the crime must require force capable of causing
5 physical pain or injury to another person, or the threat of such force. *Id.* Then,
6 in 2015, in *Johnson v. Unites States*, 153 S. Ct. 2551 (2015) (“2015 *Johnson*”), the
7 Supreme Court struck down ACCA’s Residual Clause, finding it to be
8 unconstitutionally vague.

9 After 2015 *Johnson*, Shabazz brought this petition, arguing that his
10 sentence must be set aside because, to the extent the application of ACCA
11 might have depended on the Residual Clause, that clause has since been
12 invalidated, and to the extent it might have depended on the Force Clause,
13 that would have been improper because the crime of robbery as defined by
14 § 53a-133 can be committed by use of force that is not sufficient to cause pain
15 or injury.

16 The issue before the district court was whether any three of Shabazz’s
17 prior Connecticut robbery convictions were obtained under a statute that

1 required as an essential element the use or threat of force capable of causing
2 pain or injury.

3 On January 3, 2017, the district court issued a written ruling granting
4 Shabazz's § 2255 motion and vacating his sentence. The court ruled that
5 simple robbery under § 53a-133, without aggravating factors, does not qualify
6 as an ACCA predicate because the crime can be committed by use of levels of
7 force so slight that they are not capable of causing pain or injury. Thus,
8 notwithstanding that two of Shabazz's convictions for first degree robbery
9 qualified as crimes of violence because the aggravating factor necessarily
10 involved violent force, his other robbery convictions did not require violence.
11 Having only two, and not three, prior violent felonies, Shabazz did not
12 qualify for mandatory sentencing under ACCA.³ The government brought
13 this appeal.

14 DISCUSSION

³ The district court, in adjudicating Shabazz's petition under § 2255, concluded that, in passing Shabazz's sentence in 2005, it had probably relied, at least in part, on the now-unconstitutional Residual Clause to determine that ACCA's mandatory sentencing provision applied. If the elements of § 53a-133 require violent force, ACCA's sentencing provision mandatorily applied to Shabazz under the Force Clause, so that even if the sentencing court had erroneously relied on the Residual Clause, the error was harmless.

1 The government contends that robbery under § 53a-133 requires force
2 capable of causing pain or injury, so that, regardless of whether Shabazz was
3 convicted of aggravating factors, each of his Connecticut robbery convictions
4 qualifies as a violent felony within the meaning of ACCA’s Force Clause.
5 Employing the categorical approach mandated by *Taylor*, 495 U.S. at 600; *see*
6 *also Mathis v. United States*, 136 S. Ct. 2243, 2248-49 (2016) (outlining the
7 categorical approach); *Descamps v. United States*, 570 U.S. 254, 257 (2013)
8 (same), courts identify “the minimum criminal conduct necessary for
9 conviction under a particular statute.” *United States v. Acosta*, 470 F.3d 132, 135
10 (2d Cir. 2006). “The reviewing court ‘cannot go behind the offense as it was
11 charged to reach [its] own determination as to whether the underlying facts’
12 qualify the offense as,” in this case, a violent felony. *Hill*, 890 F.3d at 55
13 (quoting *Ming Lam Sui v. INS*, 250 F.3d 105, 117-18 (2d Cir. 2001)).

14 Connecticut’s statute defines robbery essentially as it is understood in
15 the common law and largely throughout the United States, as requiring the
16 use or threat of force to take property from the person of another without the
17 person’s consent. Robbery has consistently been treated as an aggravated
18 form of larceny because the taking of property from the person of another

1 against the victim's will by force or threat of force is inevitably capable of
2 causing physical harm to the victim, regardless of whether the force actually
3 employed in the taking of the property is by itself sufficient to cause pain or
4 injury. Scholars of the criminal law underline the inherent potential for
5 physical harm to the victim as the explanation why robbery developed as,
6 and continues to be treated as, an aggravated felony, generally carrying
7 harsher punishments than other forms of larceny. *See* 3 W. LaFare,
8 Substantive Criminal Law § 20.3, p. 221 (3d ed. 2017) ("Robbery, a common-
9 law felony, and today everywhere a statutory felony regardless of the amount
10 taken, may be thought of as aggravated larceny—misappropriation of
11 property *under circumstances involving a danger to the person* as well as a danger
12 to property—and thus deserving of a greater punishment than that provided
13 for larceny. Robbery consists of all six elements of larceny . . . plus two
14 additional requirements: [(1)] that the property be taken from the person or
15 presence of the other and [(2)] that the taking be accomplished by means of
16 force or putting in fear.") (emphasis added); *see also id.* at 222 n.4 ("Robbery
17 may be considered a greater crime than the sum of the two lesser crimes of
18 larceny and assault (or battery). As stated in Model Penal Code § 222.1,

1 Comment at 98 (1980): . . . [T]he robber may be distinguished from the
2 stealthy thief by the hardihood that enables him to carry out his purpose in
3 the presence of his victim and over his opposition—obstacles that might deter
4 ordinary sneak thieves and that justify the feeling of *special danger evoked by*
5 *robbery.*) (emphasis added); E. Podgor, P. Henning, and N. Cohen, *Mastering*
6 *Criminal Law*, p. 215 (2d ed. 2015) (“Robbery, often punished by a lengthy
7 prison term, is an aggravated form of larceny. The offense entails a larceny
8 coupled with the use of force or a threat of violence to dispossess the victim of
9 the property. Robbery is deemed a very serious crime, a felony in every
10 jurisdiction, *because it presents the real danger of immediate serious physical harm*
11 *to the victim.* . . . Because the actual or potential bodily harm is the primary
12 concern with robbery, it occurs irrespective of the value of the items taken.”)
13 (emphasis added).

14 Notwithstanding a robber’s actual use of minimal force (that would not
15 in itself cause pain or injury) to take property from the person of another
16 against the victim’s will, those face-to-face circumstances inherently carry an
17 implicit threat of escalation, perhaps because of the victim’s predictable
18 reaction, capable of resulting in physical harm. Therefore, even such minimal

1 force, when employed in a taking of property from the person of another,
2 inherently implicates a realistic threat of causing pain or injury, so that the
3 crime qualifies as an ACCA predicate under *2010 Johnson*.⁴ We therefore
4 conclude that the district court erred in its belief that, because the crime of
5 robbery could be committed through the actual use of minimal physical force,
6 it should not be deemed to fall within the category of a crime capable of
7 causing pain or injury.

8 We conclude that the use or threat of even minimal force on another
9 person in aid of the theft of that person's property, as required by § 53a-133, is
10 inherently capable of causing pain or injury, with the consequence that any
11 violation of § 53a-133 qualifies as an ACCA predicate. Shabazz had three or

⁴ We note that the Supreme Court, in a very recent decision, *see United States v. Stitt*, 139 S. Ct. 399 (2018), considered whether two state burglary statutes covering entry into vehicles designed or adapted for overnight accommodation categorically fit within the generic definition of "burglary" in the Enumerated Felonies Clause. In holding in the affirmative and distinguishing from earlier cases, *Stitt* relied in significant part on the "inherently dangerous" nature of such burglaries because they create a more significant likelihood of in-person confrontation than burglaries of premises that are less likely to be occupied. *See id.* at 406-07. Because, among other reasons, the statutes in question applied exclusively to a category of burglaries more likely to result in a violent confrontation, the Court held that they fit the enumerated felony of burglary.

1 more such ACCA predicates. ACCA therefore mandated that he be sentenced
2 to no less than fifteen years imprisonment.

3 Accordingly, we VACATE the district court's judgment. The district
4 court's judgment on Shabazz's petition vacated his original sentence,
5 substituting the court's new, lesser sentence. The effect of our ruling vacating
6 that judgment is to reinstate the original sentence.

7 CONCLUSION

8 For the foregoing reasons, the district court's judgment vacating
9 Shabazz's sentence is VACATED, with the consequence that the original
10 sentence is reinstated.