UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR AN ORDER AUTHORIZING THE DISTRICT COURT
TO CONSIDER A SUCCESSIVE OR SECOND MOTION TO
VACATE, SET ASIDE OR CORRECT SENTENCE
PURSUANT to 28 U.S.C. §§ 2244 (b), 2255(h)
BY A PRISONER IN FEDERAL CUSTODY

NAME:
Al-Malik Fruitkwan Shabazz, f/k/a Edward Singer

PLACE OF CONFINEMENT:	PRISONER NUMBER:
FCI Berlin	16097-014

Instructions–Read Carefully

(1) This motion must be legibly handwritten or typewritten and signed by the applicant under penalty of perjury. All documents must be on 8½ x 11 inch paper; the Court will not accept other paper sizes. Any false statements of a material fact may serve as the basis for prosecution and conviction for perjury.

(2) All questions must be answered concisely in the proper space on the form.

(3) Movant seeking leave to file a second or successive petition is required to use this form.

(4) Movant may use additional pages only to explain additional grounds for relief and facts that support those grounds. Separate petitions, motions, briefs, arguments, etc. should not be submitted.

(5) In capital cases only, the use of this form is optional, and separate petitions, motions, briefs, arguments may be submitted.

(6) Movant must show in the motion to the Court of Appeals that the claim to be presented in a second or successive habeas corpus application is based upon either

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(7) Send the completed motion, the original and two copies, to:

Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Court House
40 Foley Square
New York, New York 10007

MOTION

1. (a) State and division of the United States District Court which entered the judgment of conviction under attack
District of Connecticut

(b) Case number No. 3:04-cr-210-SRU

2. Date of judgment of conviction filed April 6, 2005

3. Length of sentence 235 months Sentencing Judge Judge Underhill

4. Nature of offense or offenses for which you were convicted:
possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and 924(e)

5. Have you taken a direct appeal relating to this conviction and sentence in the federal court?
Yes ☑ No ☐ If "yes", please note below:

(a) Name of court U.S. Court of Appeals for the Second Circuit
(b) Case number 05-2010-cr
(c) Grounds raised (list all grounds; use extra pages if necessary)
whether defendant was entitled to jury instruction for justification defense
whether district court erred in denying request for mistrial and that jury deliberate further

(d) Result affirmed by summary order
(e) Date of result June 20, 2007

6. Related to this conviction and sentence, have you ever filed a motion to vacate in any federal court?
Yes ☑ No ☐
If "yes", how many times? 1 (also filed 2241 motions) (if more than one, complete7 and 8 below as necessary
(a) Name of court U.S. District Court for District of Connecticut
(b) Case number 3:12-cv-1825-SRU
(c) Nature of proceeding Motion to vacate pursuant to 28 USC 2255 (copy attached)

(d) Grounds raised (list all grounds; use extra pages if necessary)

the ACCA should not apply to his sentence because two of his prior convictions should not have been treated as "violent felony" offenses and seeking relief from judgment for related reasons, including that that Begay v. United States, 553 U.S. 137 (2008), should apply retroactively and impact his case

(e) Did you receive an evidentiary hearing on your motion? Yes ( ) No (x)

(f) Result Denied by Order

(g) Date of result filed Dec. 16, 2013 (copy attached)

7. As to any second federal motion, give the same information:

(a) Name of court

(b) Case number

(c) Nature of proceeding

(d) Grounds raised (list all grounds; use extra pages if necessary)

(e) Did you receive an evidentiary hearing on your motion? Yes ( ) No (x)

(f) Result

(g) Date of result

8. As to any third federal motion, give the same information:

(a) Name of court

(b) Case number

(c) Nature of proceeding

(d) Grounds raised (list all grounds; use extra pages if necessary)

(e) Did you receive an evidentiary hearing on your motion? Yes ( ) No ( )

(f) Result

(g) Date of result

9. Did you appeal the result of any action taken on your federal motions? (Use extra pages to reflect additional federal motions if necessary)
(1) First motion No ☐ Yes ☑ Appeal No. 14-146
(2) Second motion No ☐ Yes ☐ Appeal No. _____
(3) Third motion No ☐ Yes ☐ Appeal No._____

10. If you did not appeal from the adverse action on any motion, explain briefly why you did not: _____

11. State concisely every ground on which you now claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

A. Ground one: Petitioner is entitled to resentencing due to the retroactive change in the law set forth in Johnson v. United States, 135 S. Ct. 2551 (2015), and Welch v. United States, 136 S. Ct. 1257 (2016)

Supporting FACTS (tell your story briefly without citing cases or law):
Petitioner was sentenced as an armed career criminal based, in part, on prior convictions for robbery. Those offenses, post-Johnson, are no longer categorically crimes of violence, so Petitioner should re resentenced. The Court has authorized successive habeas petitions in cases where the petitioners had robbery convictions, as discussed in the attached memo of law, which is inconsistent with the denial of the previous motion for authorization filed by Petitioner in No. 15-3306.

Was this claim raised in a prior motion? Yes ☑ No ☐

Does this claim rely on a "new rule of law?" Yes ☑ No ☐
If "yes," state the new rule of law (give case name and citation):
The residual clause of the ACCA definition of "violent felony" is unconstitutional and requires a resentencing here. See Johnson v. United States, 135 S. Ct. 2551 (2015); Welch v. United States, 136 S. Ct. 1257 (2016). The issue is discussed further in the memo submitted herewith.

Does this claim rely on "newly discovered evidence?" Yes ☐ No ☑
If "yes," briefly state the newly discovered evidence when it was discovered, and why it was not previously available to you.

B. Ground two: _____

_____

Supporting FACTS (tell your story briefly without citing cases or law):

_____

_____

_____

_____

_____

_____

Was this claim raised in a prior motion? Yes ☐ No ☐

Does this claim rely on a "new rule of law?" Yes ☐ No ☐
If "yes," state the new rule of law (give case name and citation):

_____

_____

Does this claim rely on "newly discovered evidence?" Yes ☐ No ☐
If "yes," briefly state the newly discovered evidence when it was discovered, and why it was not previously available to you.

_____

_____

_____

_____

_____

_____

_____

[Additional grounds may be asserted on additional pages if necessary]

12. Do you have any motion or appeal now pending in any court as to the judgment now under attack? Yes ☐ No ☑
If "yes," Name of court _____ Case number _____

Wherefore, movant prays that the United States Court of Appeals for the Second Circuit grant an Order Authorizing the District Court to Consider Movant's Second or Successive Motion to Vacate under 28 U.S.C. § 2255.

/s/Charles F. Willson/s/ for Shabazz
Movant's Signature

I declare under Penalty of Perjury that my answers to all the questions in this motion are true and correct.

Executed on 5/17/2016 /s/Charles F. Willson/s/
[date] Movant' s Signature

PROOF OF SERVICE

Movant must send a copy of this motion and all attachments to the United States Attorney's office in the district in which you were convicted.

I certify that on May 17, 2016, I mailed a copy of this motion*
[date]

and all attachments to the Government at the following address:

via the Court's CM/ECF system and email to the Government's counsel

/s/Charles F. Willson/s/
Movant's Signature

---

* Pursuant to FRAP 25(a), " Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day of filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid."

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. __-____

AL-MALIK FRUITKWAN SHABAZZ

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

MEMORANDUM IN SUPPORT OF MOTION FOR AN ORDER AUTHORIZING THE DISTRICT COURT TO CONSIDER A SUCCESSIVE OR SECOND HABEAS MOTION

Petitioner Al-Malik Fruitkwan Shabazz hereby submits this memorandum in support of his Motion For An Order Authorizing The District Court To Consider A Successive Or Second Habeas Motion. As explained below, in light of *Johnson v. United States*, 135 S. Ct. 2251 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016), Petitioner can state a *prima facie* claim for immediate relief and he has already served the statutory maximum ten-year sentence that will apply if the District Court grants a successive habeas motion. Accordingly, the Court should issue the order forthwith.

BACKGROUND

I. Conviction and Appeal

On October 27, 2004, Mr. Shabazz, then known as Edward Singer, was convicted by a jury of one count of a two-count indictment that charged him with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and 924(e). A "felon-in-possession" conviction normally risks a statutory maximum ten-year term of imprisonment. 18 U.S.C. § 924(a)(2). The Government, however, sought a sentencing enhancement under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), which calls for a 15-year mandatory minimum sentence where a defendant has any combination of three prior convictions for serious drug offenses or crimes of violence.

In advising that Mr. Shabazz was "determined to be an Armed Career Offender" and thus subject to the Guidelines' Section 4B1.4 adjustments, the presentence report noted that Mr. Shabazz's record included "four violent felonies, with disposition dates on June 24, 1991, and March 15, 1991." See PSR, ¶ 20. The criminal history section reflected two second-degree robbery convictions and three first-degree robbery convictions arising from a short period in January 1990, with the dates of convictions noted previously, see PSR, ¶¶ 31-34, 36. The PSR also noted a 1991 conviction for first-degree escape, and a 1987 conviction for third-degree burglary. *Id.*, ¶¶ 29, 35.

On April 6, 2005, the District Court filed the judgment, imposing a 235-month sentence, followed by a five-year term of supervised release. *See* Judgment, *United States v. Singer*, No. 3:04-cr-210-SRU, Doc. No. 88. On April 11, 2005, Mr. Shabazz filed a notice of appeal. The Court of Appeals affirmed by summary order. *See United States v. Singer*, 241 Fed. Appx. 727 (2d Cir. 2007).

II. Previous Section 2255 Motions

On December 21, 2012, Mr. Shabazz filed a *pro se* motion pursuant to 28 U.S.C. § 2255. *See Shabazz v. United States*, No. 3:12-cv-1825-SRU, Doc. No. 1. The motion challenged the reliance on his prior convictions for third-degree burglary and escape as "violent felonies" for applying ACCA. *See id.*, Claim One. Mr. Shabazz also asserted that *Begay v. United States*, 553 U.S. 137 (2008), should apply retroactively and impact his case. *See id.*, Claim Two. The Government countered, asserting that the motion was untimely and that, regardless of the late filing and whether the noted priors still were ACCA predicates, the robbery convictions supported applying ACCA. *See id.*, Memo. In Opposition, Doc. No. 14.

On December 16, 2013, the District Court denied the habeas motion, finding that his petition was barred due to a lack of timeliness and noting that, even considering the two challenged convictions, "Shabazz appears to have as many as five other prior convictions that would qualify as ACCA predicates, i.e., first and second degree burglary [*sic*]." *Shabazz*, No. 3:12-cv-1825-SRU, Doc. No. 21, at 2-3. The

Court reiterated the point regarding there being five other qualifying felonies in answering a motion for reconsideration. *See id.*, Ruling and Order, dated June 2, 2014, Doc. No. 31, at 2-3.

On January 2, 2014, Mr. Shabazz filed a notice of appeal, *see id.*, Doc. No. 26. On September 10, 2014, the Court of Appeals issued a mandate, releasing the order dismissing the appeal for failure to move the Court of Appeals for a certificate of appealability. *See Shabazz v. United States*, No. 14-146, Doc. No. 23.

On October 19, 2015, acting *pro se*, Petitioner filed the Motion For An Order Authorizing The District Court To Consider A Successive Or Second Motion To Vacate, Set Aside Or Correct Sentence ("Motion for Authorization"). *See Shabazz v. United States*, No. 15-3306, Doc. Nos. 1 & 2. On November 13, 2013, counsel appeared and filed a memorandum in support of the *pro se* motion, but was then instructed that a motion for leave to file the memo was required. *See id.*, Doc. Nos. 24-26.

On November 17, 2016, the Court denied the Motion for Authorization. *See id.*, Doc. No. 33. The Order pointed to that "the Presentence Report indicated that Petitioner had three convictions in 1991 for first-degree robbery," under Connecticut General Statutes § 53a-134. *Id.* at 1-2. The panel concluded that those three convictions still qualified as "violent felonies" under 18 U.S.C. § 924(e)(2)(B)(i),

rendering "irrelevant" whether other convictions no longer qualified after *Johnson*. *Id.* at 2.

On November 18, 2014, the Court denied the motion for leave to file a supplemental brief as moot. See Doc. No. 37. On November 24, 2015, the panel withdrew its prior orders and granted leave to file the supplemental brief, but nonetheless denied the Motion. See Doc. No. 39. There was no new analysis in the order.

As detailed below, multiple orders have since been issued that are entirely inconsistent with the Order issued in No. 15-3306. That inconsistency, and the Supreme Court's resolution of retroactivity issue in *Welch*, compel this Court to return to the gate-keeping role assigned by the 28 U.S.C. § 2255(h) and permit Petitioner to pursue his claims in a successive petition before the District Court.

III. The Present Application to File a Successive § 2255 Motion

This motion requests authorization from this Court for Mr. Shabazz to file a successive § 2255 motion based on *Johnson v. United States*, 135 S. Ct. 2251 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016). In *Johnson*, the Supreme Court overruled *Sykes v. United States*, 131 S. Ct. 2267 (2011), and *James v. United States*, 550 U.S. 192 (2007), and held that imposing an increased sentence under the residual clause of the ACCA violates the Constitution's guarantee of due process. With *Johnson*'s "new rule of constitutional law," 28 U.S.C. §§ 2244(b)(2)(A), 2255(h)(2),

Petitioner can state a *prima facie* case that he is actually innocent of being an armed career criminal and is entitled to relief, warranting further proceedings before the District Court.

Welch left no question regarding *Johnson*'s retroactivity, which this Court previously directed the district courts to resolve in granting successive petitions. *See, e.g.*, Order, *Keith Johnson v. United States*, No. 15-3746, Doc. No. 39, filed Jan. 6, 2016, at 1-2 ("the district court is directed to address, as a preliminary inquiry under § 2244(b)(4), whether the Supreme Court's decision in *Johnson* announced a new rule of constitutional law made retroactive to cases on collateral review, thus permitting Petitioner's new § 2255 claim to proceed"). Now, the Court needs to rectify the inconsistency of denying authorization to a petitioner with robbery convictions in his criminal history, but granting authorization to others with the same or similar convictions.

LEGAL STANDARDS

Before a federal prisoner may file a successive motion in the district court under § 2255, a court of appeals must certify that the motion satisfies one of the "gatekeeping" conditions in 28 U.S.C. § 2255(h). A court of appeals should authorize a successive § 2255 motion when the individual makes a "prima facie showing," 28 U.S.C. § 2244(b)(3)(C), that his motion will include one of the substantive grounds for a successive motion. *See* 28 U.S.C. § 2255(h) (incorporating standards from §

2244 into § 2255). One such ground is asserting that there is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *See id.*, § 2255(h)(2); *Tyler v. Cain*, 533 U.S. 656, 662 (2001).

The movant need not show a probability of success. *See, e.g., Lane v. Butler*, --- F. Supp. 3d ---, 2015 WL 5612246, 4 (E.D. Ky. Sept. 21, 2015). Indeed, "[a] prima facie showing is not a particularly high standard. An application need only show sufficient likelihood of satisfying the strict standards of § 2255 to 'warrant a fuller exploration by the district court.'" *Bell v. United States*, 296 F.3d 127, 128 (2d Cir. 2002). *See Thompson v. Calderon*, 151 F.3d 918, 925 (9th Cir. 1998) (requiring "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court" (emphasis added)). "[T]he remedy under § 2255 does not become 'inadequate and ineffective' merely because the movant's claim may not succeed. The question is merely whether the type of claim asserted falls within the scope of § 2255." *Lane*, --- F. Supp. 3d ---, 2015 WL 5612246, *4. That standard is easily met here.

While the Court already has denied a motion for authorization to file a successive petition filed by Petitioner, that denial does not control or preclude consideration here. In *Stone v. United States*, No. 13-1486, the Court demonstrated its discretion to vacate a prior order and authorize a successive petition. *See* Order,

Stone v. United States, No. 13-1486, filed June 7, 2013, Doc. No. 26. In *Stone*, a panel had denied a motion for authorization to file a successive petition. *See id.* at 1. The panel subsequently denied a motion to reconsider because "such motions are barred pursuant to 28 U.S.C. § 2244(b)(3)(E)" *Id.* The panel decided, however, to "*sua sponte* . . . reopen this proceeding," and vacate the prior order and grant his previously filed motion for authorization. *Id.*

Here, the Court should exercise its discretion again. *Welch* removed any question about *Johnson*'s retroactivity. Without vacating the Order, the Court will undermine the integrity of the judicial process, denying the opportunity to have the case reviewed in the District Court while permitting that review in the following cases, all of which involved petitioners with Connecticut robbery convictions.

- *Keith Johnson v. United States***,** No. 15-3746, Order, filed Jan. 6, 2016, at Doc. No. 39

In *Keith Johnson*, the panel granted a motion seeking authorization over argument from the Government that Johnson had multiple prior robbery convictions. See Gov't Opposition, *Johnson v. United States*, No. 15-3746, Doc. No. 22, at 11-19 (recounting Johnson's convictions for 1987 conspiracy to commit first-degree robbery; 1988 third-degree robbery, 1990 first-degree robbery, and 1991 attempted first-degree robbery as bases for denying motion for successive petition). The Order did not note Johnson's prior convictions for robbery. This Order cannot be squared with the denial of the Motion for Authorization in Petitioner's case, other than to note

that *Welch*'s certainty opens the retroactivity gate for which the Court is the gatekeeper.

- *Delgado v. United States***,** No. 16-597, Order, filed May 2, 2016, at Doc. No. 48

In *Delgado*, the panel granted a motion seeking authorization over argument from the Government that Delgado's criminal history, including a second-degree robbery conviction, precluded relief. Unlike the *Keith Johnson* Order, the *Delgado* Order addressed the Government's position squarely, leaving no question about whether the robbery issue had been reviewed.

> The Government asserts that Petitioner had four prior convictions that qualify as ACCA predicate offenses and were not affected by *Johnson*, including two convictions for assault in the second degree under Connecticut General Statutes ("CGS") § 53a-60 and one conviction for robbery in the second degree under CGS § 53a-135. However, we conclude that Petitioner has made a prima facie showing that his prior assault and robbery convictions are not violent felonies under any provision of the ACCA that remains in effect after *Johnson*.

Order, at 1 (emphasis added). The retroactivity issue had been resolved, but the panel gave further guidance to the District Court.

> We do not conclusively reject the Government's arguments, and leave to the district court a final determination whether the Petitioner's prior assault and robbery convictions remain proper ACCA predicates after *Johnson*. The court should address (among any other issues that prove relevant) whether the specific provision or provisions of CGS § 53a-60 under which Petitioner was convicted for assault and the specific provision of CGS § 53a-135(a) under which Petitioner was convicted for robbery, as well as whether the amount of

> force needed for those convictions, is sufficient for those convictions to qualify as ACCA predicates under § 924(e)(2)(B)(i). We also note that it currently is not clear whether the district court found that Petitioner had three ACCA predicate convictions, as stated in his plea agreement, or four, as stated in his PSR, or whether Petitioner's 1997 assault and robbery convictions were "committed on occasions different from one another," 18 U.S.C. § 924(e)(1).

Order, at 2 (emphasis added). Again, this Order cannot be squared with the denial of the Motion for Authorization in Petitioner's case, other than to note that *Welch*'s certainty opens the retroactivity gate for which the Court is the gatekeeper.

- *Dailey v. United States***,** No. 16-853,
  Order, filed May 2, 2016, at Doc. No. 41

The contrast with the Order in *Dailey* is even more stark. Again, a panel granted a motion seeking authorization over argument from the Government that Dailey's criminal history, including robbery convictions, precluded relief. Unlike the *Keith Johnson* Order, but like the *Delgado* Order, the *Dailey* Order addressed the Government's position squarely, leaving no question about whether the robbery issue had been reviewed.

> The Government asserts that Petitioner had eight prior convictions that qualify as ACCA predicate offenses and were not affected by Johnson, including: two convictions for assault on an officer under Connecticut General Statutes ("CGS") § 53a-167c; one conviction for assault in the second degree under CGS § 53a-60; and three convictions for robbery—one each for first, second, and third-degree robbery—under CGS §§ 53a-134, -135, and -136. However, we conclude that Petitioner has made a prima facie showing that these six assault and robbery convictions are not violent felonies under any provision of the

> ACCA that remains in effect after *Johnson*, and he therefore lacks the three predicate convictions required to authorize a sentence enhancement under 18 U.S.C. § 924(e)(1).

Order, at 1-2 (emphasis added). As in *Delgado*, the *Dailey* Order gave similar guidance.

> We do not conclusively reject the Government's arguments, and leave to the district court a final determination of whether any of Petitioner's six assault and robbery convictions remain proper ACCA predicates after *Johnson*. The court should address (among any other issues that prove relevant): (1) whether robbery, as defined in CGS § 53a-133, assault-on-an-officer, under CGS § 53a-167c, or second-degree assault, under CGS § 53a-60, are categorically "violent felon[ies]" under 18 U.S.C. § 924(e)(2)(B)(i); (2) if they are not, whether first or second-degree robbery, as defined in CGS §§ 53a-134 and -135, are categorical ACCA predicates under § 924(e)(2)(B)(i); and (3) if they are not, whether there is a proper evidentiary basis with respect to any of Petitioner's assault and first or second-degree robbery convictions on which to make a determination under the modified categorical approach.

Order, at 2 (emphasis added). Again, this Order cannot be squared with the denial of the Motion for Authorization in Petitioner's case, other than to note that *Welch*'s certainty opens the retroactivity gate for which the Court is the gatekeeper.

- *Figueroa v. United States***,** No. 16-865,
  Order, filed May 10, 2016, at Doc. No. 48

The *Figueroa* panel issued a similar order granting authorization for Figueroa to pursue a successive habeas motion, even though the Government argued against it and noted a conviction for second-degree robbery.

> The Government asserts that Petitioner had several prior convictions that still qualify as ACCA predicate offenses, including two convictions for assault in the second degree under Connecticut General Statutes ("CGS") § 53a-60, one for attempted assault in the first degree under CGS § 53a-59(a)(1), and one for robbery in the second degree under CGS § 53a-135. However, we conclude that Petitioner has made a prima facie showing that these prior convictions are not violent felonies under any provision of the ACCA that remains in effect after Johnson.

Order, at 1-2 (emphasis added). The *Figueroa* panel likewise provided guidance to the District Court in reviewing the issues. Order, at 2.

In short, since the denial of the Motion for Authorization, multiple orders have followed that demonstrate an inconsistency in denying the Motion. The Court should grant the instant motion and issue an order like those in *Delgado*, *Dailey*, and *Figueroa*, that recognizes that a prima facie claim exists and leaves the questions about whether first-degree robbery categorically requires the amount of force needed to qualify as an ACCA predicate and, if not, whether the Government can prove here that violent force was used in connection with any pertinent prior convictions.

The panel's denial of the Motion for Authorization also puts this Court in conflict with other courts of appeals that are not delving into the issues of whether a petitioner will ultimately prevail. For example, the Court of Appeals for the Seventh Circuit addressed this point in *Price v. United States*, 795 F.3d 731 (7th Cir. Aug. 4, 2015). In *Price*, the Court granted authorization for a successive collateral attack in

response to a *pro se* motion made pursuant to *Johnson*, closing its opinion with the following.

> We add a cautionary note in closing. Our review of Price's substantive claim is necessarily preliminary, and as we just noted, our holding is limited to the conclusion that Price has made a *prima facie* showing of a tenable claim under *Johnson.* The district court will have the opportunity to examine the claim in more detail as the case proceeds. That court is authorized under § 2244(b)(4) to dismiss any claim that it concludes upon closer examination does not satisfy the criteria for authorization. The judge is likely to be familiar with the case (or to become familiar easily) because § 2255 motions must be filed in the applicant's sentencing court, which has access to the criminal record and familiarity with the case. Our conclusions are tentative largely because of the strict time constraints under which we must review these applications. *Tyler,* 533 U.S. at 664, 121 S. Ct. 2478 ("It is unlikely that a court of appeals could make such a determination in the allotted time [30 days] if it had to do more than simply rely on Supreme Court holdings."). For example, we do not know whether Price has other qualifying convictions that were not considered at sentencing because, at that time, the three on which the court relied were sufficient. If he is successful in vacating his sentence under *Johnson*, the parties will be free to argue this and any other pertinent questions on resentencing.

Price, 795 F.3d at 735. *See also* Brief of the Government, *Pakala v. United States*, No. 15-1799 (1st Cir.), filed Sept. 1, 2015, Doc. No. at 19, at 6 (". . ., although the government may argue to the district court that the petitioner is not entitled to relief, it agrees that the Court should authorize the filing of a second petition based on *Johnson*."). As *Price* and the minimal requirements to establish a prima facie case indicate, and as the orders in *Delgado, Dailey*, and *Figueroa* evidence, the issue of

whether convictions support a post-*Johnson* ACCA enhancement is best left, in the first instance, for the District Court.

With *Johnson* clearly retroactive, Shabazz can assert that his prior robbery convictions no longer categorically qualify as ACCA predicates, just as Delgado, Dailey, and Figueroa have been permitted to do. As one court has observed in considering whether a robbery conviction constitutes a crime of violence, even though "[a]t first blush it may appear obvious," *Johnson* itself illustrates the need to reconsider virtually all priors. *United States v. Litzy*, --- F. Supp. 3d. ---, 2015 WL 5895199, *3 (S.D. W. Va. Oct. 8, 2015). Here, to determine the degree of force sufficient to sustain a Connecticut robbery conviction, the District Court will look to the statutes at issue and interpretations of those statutes by Connecticut courts. *See, e.g.*, *Johnson*, 559 U.S. at 138 (looking at Florida Supreme Court's analysis of "touching" in Florida battery statute).

While that analysis is not necessary in considering whether a *prima facie* claim is made so that a successive petition should be permitted, nonetheless, looking ahead, and largely reiterating the arguments made on behalf of Delgado, Dailey, and Figueroa, currently,[1] the Connecticut statutory definitions of first-degree and, to some extent, second-degree robbery largely rely on a core definition found in Conn. Gen.

[1] According to the PSR, Shabazz's robbery convictions arose from conduct in 1990.

Stat. § 53a-133. *See* Conn. Gen. Stat. § 53a-134 (defining first-degree robbery as occurring "when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom . . ."); Conn. Gen. Stat. § 53a-134 (defining second-degree robbery as occurring "when such person (1) commits robbery, as defined in section 53a-133 . . . or (2) in the course of committing a larceny while on the premises of a bank, . . . intimidates an employee of the bank . . . by intentionally engaging in conduct that causes another person to reasonably fear for his or her physical safety or the physical safety of another"). Section 53a-133 defines robbery as occurring where "[a] person . . . when, in the course of committing a larceny, . . . 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." *Id.* (emphasis added).

Although the term "physical force" plainly is there, and thus included in first-degree robbery and the first option in second-degree robbery, a review of Connecticut penal statutes indicates that "physical force" is not synonymous with "violent force." *Cf. Johnson,* 559 U.S. at 139-140. For example, in defining "use of force" within sex offense statutes, the statutes recognize a difference: "'[u]se of force' means: (A) Use of a dangerous instrument; or (B) use of actual physical force *or* violence *or* superior

physical strength against the victim." Conn. Gen. Stat. § 53a-65 (emphasis added). Similarly, on the issue of terrorism, the statutes again recognize a difference: "A person is guilty of an act of terrorism when such person, with intent to intimidate or coerce the civilian population or a unit of government, commits a felony involving the unlawful use or threatened use of physical force or violence." Conn. Gen. Stat. § 53a-300 (emphasis added). With the statutes defining terms as "physical force" *or* "violence," or even "superior physical strength," clearly physical force allows for non-violent conduct. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (collecting cases cautioning treating statutory terms as surplusage, noting that "[i]t is our duty 'to give effect, if possible, to every clause and word of a statute'").

Turning to Connecticut state courts, the definition of force clearly is broader than the violent force required in the 2010 *Johnson*. Standard jury instructions suggest an extremely broad definition is considered by Connecticut factfinders:

> "Physical force" is a common readily understandable expression which has its ordinary meaning in the everyday use of language. It means the application of external physical power to the person. It can be effected by the hand or other part of the actor's body applied to the victim's body. It can be effected by the use of a weapon. In other words, the expression is general and unlimited in regard to the means by which it can be applied or inflicted. Physical force against a person may take many forms, but must be for the purpose of committing the larceny.

5A Conn. Prac., Criminal Jury Instructions, *First Degree Robbery*, § 13.6 (4th ed.) (2014) (emphasis added). Not only does the definition allow for "general and

unlimited" possibilities, it makes no mention of "violence" or force "capable of causing physical harm to a person." *Cf. Johnson*, 559 U.S. at 140.

In light of the foregoing, the issue of whether Shabazz's prior robbery convictions continue to qualify as ACCA predicates is far from clear. *See Litzy*, 2015 WL 5895199, *3. Consequently, and because only a *prima facie* claim need be asserted and one clearly is made here, the issue of whether Connecticut robbery still qualifies as an ACCA predicate is for the District Court to address. That will occur for Delgado, Dailey, and Figueroa, and it should occur for Petitioner, too.

CONCLUSION

Because Mr. Shabazz has presented a prima facie showing of a tenable claim that meets the requirements of § 2255(h), the Court should grant this motion and allow Mr. Shabazz to present the *Johnson* and related claims to the District Court.

AL-MALIK FRUITKWAN SHABAZZ

By _/s/Charles F. Willson/s/____

Dated: May 17, 2016

Charles F. Willson, Esq.
Attorney for Al-Malik Fruitkwan Shabazz
FEDERAL DEFENDER'S OFFICE
10 Columbus Boulevard, 6th Floor
Hartford, CT 06106
Tel: (860) 493-6260
Fax: (860) 493-6269
email: Charles_Willson@fd.org

CERTIFICATION

The undersigned certifies that on May 17, 2016, the foregoing will be served on counsel to the Government via the Court's CM/ECF system, and that a copy will be sent via email as well.

/Charles F. Willson/s/___
Charles F. Willson

Al-Malik Fruitkwan Shabazz, formerly known as Edward Singer, v. United States

Prior Habeas Motion and Order

MEMORANDUM OF RECORD
In accordance with FRCVP
Rule 44 & F.R.E. 902

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Al-Malik Fruitkwan Shabazz fka
Edward Levi Singer [16097-014
Federal Correctional Institution
P.O. Box 699]
Estill, South Carolina
near - [29918]
Email: edwardsinger2012@gmail.com
edward.singer.165@facebook.com
Petitioner/Applicant[,]

Case No.: _____

Ref. Cause: 3:03cr210(SRU)

Verified Petition

[v.

UNITED STATES OF AMERICA, ET-AL,
Respondent(s).]

MOTION TO VACATE JUDGMENT
PURSUANT OT 28 U.S.C. § 2255 AND/OR
FED. R. CIV. P. 60(b)(4)

CONVICTION UNDER ATTACK

1. Name and location of the Court which entered the judgment of conviction under attack: United States District Court for the District of Connecticut 915 Lafayette Blvd., Bridgeport, Connecticut 06604.
2. Date judgment of conviction was entered: April 5, 2005.
3. Case number: 3:04cr210(SRU).
4. Type and Length of Sentence Imposed: 235 months.
5. Are you presently serving a sentence imposed for a conviction other than the conviction under attack in this motion: No.
6. Nature of the offense involved: Violation of Title(s) 18 U.S.C. § 922(g)(1) and 924(e), which is merely a finding aid to the statutes of the United States, prima facie of Law. All Rights Reserved for Collateral attack on the charged violations.
7. What was your plea: Not Guilty.
8. Convicted by: Jury Trial.
9. Did you testify at trial: No.

28 U.S.C. § 2255

I.

DIRECT APPEAL

10. Did you appeal from the judgment of conviction: Yes.

11. Location of Appeal: United States Court of Appeals for the Secord Circuit 40 Foley Square, New York, N.Y. 10007. Case No. 05-2010-cr, which Affirmed the District Court's judgment and sentence.

POST-CONVICTION PROCEEDING

12. Have you filed any other petitions, applications, or motions with respect to this judgment in any federal court: Petitioner filed two prior § 2241 petitions in the Connecticut federal Court, one attempting to challege that trial counsel was ineffective in his trial, had been in collusion with the court and government in arguing a justicfication defense in light of there being no nexus between the Petitioner and the contraband [firearm], requesting new appellate cousel to re-resent him on his direct appeal to argue his counsels ineffectiveness during his trial, and two that the judgment in his criminal case was void on its face, a nullity, and of no legal effect because the record was construed under violation of law, the Fifth & Sixth Amendments to the United States Constitution, without compliance with due process clauses of the Fifth Amendment, and jury findings by the Sixth Amendment upon sentence or enhancemets.

CLAIMS

Claim One:

Petitioner, Al-Malik Frutitkwan Shabazz fka Edward Levi Singer, complaining shows that he is detained by virtue of an Order obtained by violation of Law.

1. Suppoting Facts: The United States District Court for the District of Connecticut sentenced Petitioner principally to a term of imprisonment of 235 months under the Armed Career Criminal Act ("ACCA"), 18 U.S.C.S. § 924(e). However, Petitioner asserts that two of his prior convictions; first degree escape in violation of Conn. Gen. Stat. § 53a-169 and third degree burglary in violation of Conn. Gen. Stat. § 53a-103, should not have been treated as "violent felony" offenses within the meaning of the statute.

Claim Two:

Petitioner, Al-Malik Fruitkwan Shabazz fka Edward Levi Singer, complaining shows that because there was a substantive change pertaining to this ruling in light of Begay it should apply retroactively.

1. Supporting Facts: The supreme Court placed on the categories of prior convictions that will support sentence enhancements for firearm offenses in Begay v. United States, 83 CrL 76 (U.S. 2008), apply retroactively to cases on collateral review, the U.S. Court of Appeals for the sixth Circuit held July 31. (Jones v. United States, 6th Cir., No. 10-5105, July 31, 2012).

13. Petitioner has recently refiled an Affidavit in Opposition to Order Returning Submission of Writ of Error Coram Nobis under Article I Redress of Grievance under Ninth Amendment Reservation for Resolution and Equatable Settlement under Necessity, dated November 21, 2012

WHEREFORE: this Petitioner requests that this Court for assurance that his Constitutional rights will no longer be denied him, that a Writ of Habeas Corpus be directed to the Warden at the Federal Correctional Institution 100 Prison Road, Estill, South Carolina 29918 in his behalf pursuant to statute in such case made, so that this Petitioner may be forewith be brought before this Court to do and submit and receive what the Law may require. Release from all impairement to liberty ordered on cause shown should issue.

"Without Prejudice/All Rights Reserved"

L.S. Edward Levi Singer

Al-Malik Fruitkwan Shabazz fka
Edward Levi Singer, Petitioner [16097-014]
Petitioner's Original Signature

DECLARATION UNDER PENALTY OF PERJURY

The Undersigned delares under penalty of perjury that he is the Petitioner in this action, that he has read this petition and that the information contained in the petition is true, correct, complete, and certain. [28 U.S.C. §§ 1746(1) & 1621].

Executed this 3 day of ~~November~~ December, 2012, C.E.

L.S. Edward Levi Singer

Petitoner's Original Signature

T Hardy, Case Manager 12/3/12

Authorized by the Act of July 07, 1955, as amended, to administer oaths(18 USC 4004)

28 U.S.C. § 2255

III.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AL-MALIK FRUITKWAN SHABAZZ
f/k/a/ EDWARD LEVI SINGER,

v.

UNITED STATES OF AMERICA.

No. 3:12-CV-1825 (SRU)

RULING ON MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE AND MOTION FOR RELIEF FROM JUDGMENT

Al-Malik Fruitkwan Shabazz, f/k/a Edward Singer, appearing *pro se*, has moved to vacate judgment and for writ of habeas corpus pursuant to 28 U.S.C. § 2255, and moves for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Shabazz is currently confined to Berlin Federal Correctional Institution in Berlin, New Hampshire, having been sentenced to 235 months' imprisonment to be followed by a period of five years of supervised release for his conviction of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). A jury returned a guilty verdict against Shabazz on October 27, 2004 and he was sentenced on April 6, 2005. The court held that the Armed Career Criminal Act, 18 U.S.C. § 924(c) ("ACCA"), and United States Sentencing Guidelines §4B1.4 applied to Shabazz's sentence. Shabazz appealed and on July 20, 2007, the Second Circuit Court of Appeals affirmed his sentence. *United States v. Singer*, 241 F. App'x 727 (2d Cir. 2007). On December 21, 2012, Shabazz filed the present motions, arguing that the ACCA should not apply to his sentence because two of his prior convictions should not have been treated as "violent felony" offenses and seeking relief from judgment for related reasons. For the reasons stated below, Shabbaz's motions are **DENIED**.

Shabbaz's habeas petition is barred by the one-year statute of limitations governing section 2255 motions. This one-year statute of limitations begins to run after the latest of one of the following: (1) the date on which the judgment of conviction becomes final; (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the facts supporting the claim presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2255(f). Shabbaz filed this motion to vacate more than four years after the expiration of the one-year statute of limitations and none of the alternative dates for commencement of the running of the limitations period applies.

Shabbaz's judgment became final on November 21, 2007, 90 days after the district court's entry of final judgment following the Court of Appeals decision. Thus, the statute of limitations expired on November 21, 2008. There was no "impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States" blocking Shabbaz's ability to file a petition, accordingly section 2255(f)(2) does not apply. Section 2255(f)(3) does not apply because Shabazz's claim does not involve a newly recognized right. Finally, section 2255(f)(4) does not apply because the only facts supporting Shabazz's claim—that his prior convictions were not a proper basis for the application of ACCA to his sentence—were reasonably discoverable long before the conviction became final because those convictions were known to him before his sentencing on April 6, 2005. In any event, Shabazz appears to have as many as five other prior convictions that would qualify as ACCA predicates,

i.e., first and second degree burglary.

Shabbaz has also moved for relief under Rule 60(b) of the Federal Rules of Civil Procedure. Rule 60(b) sets forth grounds for relief from a final judgment or order, which are "addressed to the sound discretion of the district court." *Mendell v. Gollust*, 909 F.2d 724, 731 (2d Cir. 1990) (citation omitted). In pertinent part, Rule 60(b) permits courts to grant such relief when:

> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (4) a judgment is void; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b)(2), (4), (6). "Properly applied Rule 60(b) strikes a balance between serving the ends of justice and preserving the finality of judgments." *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986). However, "[a] motion for relief from judgment is generally not favored and is properly granted only upon a showing of exceptional circumstances." *United States v. Int'l Bhd. of Teamsters*, 247 F.3d 370, 391 (2d Cir. 2001); *accord Pichardo v. Ashcroft*, 374 F.3d 46, 55 (2d Cir. 2004). "Generally, courts require that the evidence in support of [a Rule 60(b) motion] be highly convincing, that a party show good cause for the failure to act sooner, and that no undue hardship be imposed on other parties." *Kotlicky v. U.S. Fid. & Guar. Co.*, 817 F.2d 6, 9 (2d Cir. 1987) (internal quotation marks and citations omitted). "The burden of proof is on the party seeking relief from judgment." *Int'l Bhd. of Teamsters*, 247 F.3d at 391.

No exceptional circumstances suggest that relief from judgment is proper here. Shabbaz has presented no valid argument challenging this court's jurisdiction when it entered judgment against him. Nor has he presented any newly discovered evidence not available to him at the time of sentencing with respect to his prior convictions or shown that he was obstructed in his

efforts to discover that his prior convictions were not ACCA predicates and, thus, there was "fraud on the court" justifying relief from judgment.

For the reasons set forth above, Singer's motion is **DENIED**.

It is so ordered.

Dated at Bridgeport, Connecticut, this 16th day of December 2013.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge