

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

3
4 August Term, 2017

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

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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 _____

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24 Before:

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

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29 Petitioner Al-Malik Fruitkwan Shabazz petitions for rehearing of our
30 decision of January 4, 2019, in which we concluded that his prior convictions
31 for robbery under Con. Gen. Stat. § 53a-133 qualify as predicates under the
32 Force Clause of the Armed Career Criminal Act of 1984 (“ACCA”), 18 U.S.C.
33 § 924(e), and reinstated his original ACCA sentence. Held, the petition for
34 rehearing is DENIED.
35

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

1 CHARLES F. WILLSON, Federal
2 Defender’s Office, Hartford, CT, *for*
3 *Petitioner-Appellee*.

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

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11 LEVAL, *Circuit Judge*:

12 Petitioner Al-Malik Fruitkwan Shabazz petitions for rehearing of our
13 decision of January 4, 2019, in which we ruled that his prior Connecticut
14 convictions for robbery under Con. Gen. Stat. § 53a-133 qualify as predicate
15 convictions under the Force Clause of the Armed Career Criminal Act of 1984
16 (“ACCA”), 18 U.S.C. § 924(e), and reinstated his original ACCA-based
17 sentence. *See Shabazz v. United States*, 912 F.3d 73 (2d Cir. 2019). He contends
18 that our disposition is incompatible with our prior holding in *Villanueva v.*
19 *United States*, 893 F.3d 123 (2d Cir. 2018) and with the Supreme Court’s ruling
20 in *Pepper v. United States*, 562 U.S. 476 (2011), and that we could not lawfully
21 reinstate the original sentence that may have been imposed in reliance on an
22 ACCA provision since found to be unconstitutional, because such reliance
23 would have been a “structural error” not amenable to harmless error analysis.

1 We assume familiarity with the facts set forth in the January 4 opinion. We
2 reject Shabazz’s arguments and deny his motion.

3 1. Shabazz misreads *Villanueva*. While he is correct that in *Villanueva* we
4 remanded for resentencing, rather than direct the District Court to reimpose
5 the original sentence that had impermissibly relied on ACCA’s now-defunct
6 “Residual Clause,” *Johnson v. Unites States*, 153 S. Ct. 2551 (2015) (“2015
7 *Johnson*”) (striking down the Residual Clause as unconstitutionally vague), we
8 neither ruled nor suggested that the latter course would have been
9 impermissible, much less ruled that future courts in similar circumstances
10 should follow the same course. The decision to remand for resentencing was
11 discretionary. *See Villanueva*, 893 F.3d at 132 n.12 (“Because we have remanded
12 for resentencing, we need not determine whether the District Court’s pre-
13 *Johnson* error of using the residual clause in imposing the original sentence was
14 a structural or harmless error.”). While it is true that we observed that the
15 district court’s duty on remand would be “to sentence the defendant as he
16 stands before the court on the day of sentencing,” *id.* at 132 (quoting *United*
17 *States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000)), that obligation was a
18 consequence of our decision to remand for a full resentencing. It was not

1 compelled by the fact that the original sentence was passed in reliance on a
2 statutory provision later found to be unconstitutional, nor by the fact that the
3 district court had vacated the original sentence (based on its erroneous
4 conclusion that the Force Clause did not apply to Villanueva's convictions).

5 2. Shabazz also misconstrues *Pepper*. In *Pepper*, the Court of Appeals for
6 the Eighth Circuit had remanded to a district court for resentencing in light of
7 the Supreme Court's intervening decision in *United States v. Booker*, 543 U.S. 220
8 (2005). On remand, the district court granted a downward variance based on
9 evidence of the defendant's rehabilitation in prison since the time of the
10 original sentence. The Eighth Circuit reversed, holding that "post-sentence
11 rehabilitation is an impermissible factor to consider in granting a downward
12 variance." *Pepper*, 562 U.S. at 484-85 (quoting *Pepper v. United States*, 518 F.3d
13 949, 953 (8th Cir. 2008)). The Supreme Court reversed the Eighth Circuit,
14 concluding that the Court of Appeals "erred in categorically precluding the
15 District Court from considering evidence of [the defendant's] postsentencing
16 rehabilitation after his initial sentence was set aside on appeal." *Id.* at 504. The
17 Supreme Court explained that, upon a remand for a plenary resentencing, a
18 sentencing court must be allowed to consider the mandatory sentencing factors

1 in 18 U.S.C. § 3553(a) as of the time of imposition of the new sentence, and, if
2 appropriate, to grant a departure or variance based on the defendant’s conduct
3 since the original sentencing. *Pepper* expressly clarified that it did not “mean to
4 preclude courts of appeals from issuing remand orders, in appropriate cases,
5 that may render evidence of postsentencing rehabilitation irrelevant in light of
6 the narrow purposes of the remand proceeding.” *Id.* at 505 n.17. In sum, *Pepper*
7 held that where a Court of Appeals remands for a plenary resentencing, the
8 district court must be allowed to consider the facts as they are at the time of
9 imposing the new sentence. *Pepper* did not preclude remands that would
10 reopen only limited aspects of the previously imposed sentence, much less
11 require a full resentencing in cases such as this one, where the court concludes
12 that the aspect of the sentence attacked as erroneous was in fact mandated by
13 law, even if for a reason that differs from that given by the sentencing court.

14 3. Nor is *Shabazz* correct that a sentencing court’s reliance on ACCA’s
15 Residual Clause, later determined to be unconstitutional, would be a structural
16 error not susceptible to harmless error analysis. Categories of error found by
17 the Supreme Court to be “structural” ordinarily relate to “certain basic,
18 constitutional guarantees that should define the framework of any criminal

1 trial." See *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). The conclusion
2 that an error is structural depends on it being one of the "rare cases," see
3 *Washington v. Recuenco*, 548 U.S. 212, 218 (2006), where the error is "per se
4 prejudicial," *Lainfiesta v. Artuz*, 253 F.3d 151, 157 (2d Cir. 2001), "infect[ing] the
5 entire [proceeding]," *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and
6 "necessarily render[ing] a criminal [proceeding] fundamentally unfair or . . .
7 unreliable," *Recuenco, supra*, at 218.¹ The Supreme Court has, however,
8 "repeatedly recognized that the commission of a constitutional error . . . alone
9 does not entitle a defendant to automatic reversal." *Id.*

10 Assuming that the District Court relied on the Residual Clause in
11 originally sentencing Shabazz (as it later concluded that it probably had), there
12 is no reason to consider that error structural. The ACCA enhancement applies
13 under the Force Clause in exactly the same, quantifiable manner that it would
14 have under the Residual Clause. To the extent the court concluded it was
15 required to impose a sentence of at least 15 years' imprisonment, and that
16 ACCA's provisions affecting the calculation of a defendant's offense level and

¹ Errors categorized by the Supreme Court as structural have included complete denial of counsel, a biased trial judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of public trial, and a defective reasonable-doubt instruction. *Recuenco*, 548 U.S. at 218 n.2.

1 criminal history category applied to Shabazz, that conclusion was correct.
2 Notwithstanding the fact that the court may have relied on a provision of
3 ACCA later determined to be unconstitutional, the same conclusion was
4 compelled by the Force Clause. The court's reliance on the Residual Clause
5 rather than the Force Clause resulted in no prejudice, much less "fundamental[]
6 unfair[ness] or unreliab[ility]." *See id.* at 219. If the district court had based its
7 original sentence on the conclusion that ACCA applied under the Force Clause,
8 there would have been no error at all.

9 We have considered Shabazz's other arguments and find them to be
10 unpersuasive.

11 **CONCLUSION**

12 For the foregoing reasons, the Petition for Rehearing is hereby **DENIED**.