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3 **NOT FOR PUBLICATION**
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5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Victor Allen Amos,

10 Movant,

11 v.

12 United States of America,

13 Respondent.
14

No. CV-16-01324-PHX-SRB

ORDER

15 The Court now considers Movant Victor Allen Amos's Motion to Vacate, Set
16 Aside, or Correct Sentence Under 28 U.S.C. § 2255 ("Mot.") (Doc. 1). The matter was
17 referred to a Magistrate Judge for a Report and Recommendation. The Magistrate Judge
18 filed her Report and Recommendation recommending that the Motion be denied. (Doc. 8,
19 Report and Recommendation ("R. & R.")). She further recommended denying a
20 certificate of appealability because Movant had not made a substantial showing of the
21 denial of a constitutional right. (*Id.* at 20.) Movant filed his objections to the Report and
22 Recommendation. (Doc. 9, Obj. to R & R.) Having reviewed the record de novo, the
23 Court sustains Movant's objections and grants the Motion.

24 **I. BACKGROUND**

25 The background of this case was summarized in the Report and Recommendation:

26 Movant had multiple convictions in the Arizona and Illinois state
27 courts for a variety of crimes, including, an attempted rape in Illinois,
28 assorted robberies and armed robberies in Illinois, possession of narcotic
drugs for sale in Arizona, and facilitation of robbery in Arizona. (CV Doc.
6 at 2 (citing to PSR ¶¶ 30-37); CR Doc. 46 at 7.) Following these
convictions, in 2006, Movant possessed a semi-automatic pistol in violation

1 of federal law. He was charged and convicted of Felon in Possession of a
2 Firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) and 3559(a)(3).

3 The record reflects that Movant initially agreed with the government
4 to a ten-year stipulated sentence, but following the preparation of the PSR,
5 the Court deferred acceptance of the plea agreement until the parties could
6 determine whether the Armed Career Criminal Act (“ACCA”), 18 U.S.C. §
7 924(e), predicates would automatically enhance the statutory maximum.
8 (CR Doc. 58 - RT 03/31/2008 at 6.) The parties ultimately concluded that
9 the ACCA predicates would enhance the sentence, and in an effort to keep
10 the sentencing bargain, the Assistant U.S. Attorney worked with defense
11 counsel to propose to the Court a plea to two counts of a lesser firearms
12 offense, but ultimately the Court expressed concern that such a plea could
13 not be effectuated under the Guidelines. (CR Doc. 59 - RT 04/28/2008 at
14 19-20.) Prior to setting the trial, the parties reworked the original plea
15 agreement to provide notice of the increased statutory maximum and
16 minimum under the ACCA, and the Court held a combined change of plea
17 and sentencing in May 2008. (CR Doc. 57 – RT 05/19/2008.)

18 At sentencing, and as contemplated by the revised plea agreement,
19 Movant’s sentence (and the maximum and mandatory minimum ranges for
20 the offense) was statutorily enhanced by the ACCA. The Court accepted the
21 stipulation of the parties and imposed the mandatory minimum sentence of
22 180 months of incarceration (CR Doc. 45), with credit for time served
23 dating back to his arrest date of May 10, 2007. (CV Doc. 6 (citing to PSR at
24 1).)

25 In the § 2255 Motion, Movant alleges that his sentence was rendered
26 unlawful by the Supreme Court’s recent decision in Johnson v. United
27 States, ___ U.S. ___, 135 S.Ct. 2551 (2015). Specifically, Movant claims
28 that in the wake of Johnson, he no longer has three qualifying prior
convictions under the ACCA. Movant argues that the Court should grant
his § 2255 motion and resentence him to a term of imprisonment of not
more than 10 years, to be followed by a term of supervised release not more
than 3 years. In its Response, the government contends that the Court
should address the merits of Movant’s claim, and argues that the 1975
attempted rape, the 1995 possession of narcotic drugs for sale, and either
the 1988 armed robbery or the 2002 facilitation of robbery convictions
constitute valid predicates under the ACCA. As such, the government
asserts that the Court should deny relief in this matter.

(R. & R. at 1-3.)

On May 3, 2016, Movant filed this Motion to Vacate, Set Aside, or Correct
Sentence pursuant to 28 U.S.C. § 2255. (Mot at 1.) In his Motion, Movant raised two
arguments: (1) that his 1988 Illinois armed robbery conviction does not qualify as a
violent felony under the force clause of the ACCA and (2) that his 2000 Arizona
facilitation of robbery conviction does not qualify as a violent felony under the force

1 clause. (Mot. at 4-7.)¹ The Report and Recommendation concluded that the Illinois crime
2 of robbery is a violent felony and therefore Mr. Amos had been convicted of three
3 predicate offenses and his conviction ought not be overturned. (R. & R. at 4-7.)

4 **II. LEGAL STANDARD AND ANALYSIS**

5 A district court “must make a de novo determination of those portions of the report
6 . . . to which objection is made,” and “may accept, reject, or modify, in whole or in part,
7 the findings or recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1)(C). A
8 court need only review those portions objected to by a party, meaning a court can adopt
9 without further review all unobjected-to portions. *See United States v. Reyna–Tapia*, 328
10 F.3d 1114, 1121 (9th Cir. 2003).

11 Movant brings this action pursuant to 28 U.S.C. § 2255. (Mot. at 1.) Movant
12 concedes that his prior convictions for attempted rape and possession of narcotic drugs
13 constitute two of the three predicate offenses required for the mandatory ACCA
14 enhancement. (*Id.* at 5; Obj. to R. & R. at 2.) Movant argues, however, that the other two
15 predicate offenses on which the Government relies are not violent felonies under the
16 ACCA, and therefore his sentence should be overturned. (Mot. at 4-7.) The Government
17 argues that it is clear that the Illinois armed robbery statute qualifies as a violent felony
18 and that although there is no Ninth Circuit precedent on the Arizona non-aggravated
19 robbery statute, it is arguably a violent felony as well. (Doc. 6, Gov’t Resp. in Opp’n to
20 Mot (“Resp. to Mot.”) at 7-12.) The Court will consider the offenses in turn.

21 **A. Illinois Armed Robbery Statute**

22 Movant argues that the Illinois crime of armed robbery is not a violent felony
23 because Illinois only requires use of force sufficient to overcome “slight resistance.”
24 (Mot. at 4-5.) The Government argues that Illinois requires more than minimal force and
25 therefore qualifies as a crime of violence. (Resp. to Mot. at 7-9.) To determine whether a
26 state statute of conviction meets the ACCA’s definition of “violent felony,” a court must

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28 ¹ Neither party argues that either crime qualifies under the enumerated offenses
clause of the ACCA. *See* 18 U.S.C. § 924(e)(2)(B)(ii) (enumerating burglary, arson, and
extortion).

1 apply the categorical approach announced by the Supreme Court in *Taylor v. United*
2 *States*, 495 U.S. 575 (1990). *See, e.g., United States v. Grisel*, 488 F.3d 844, 847 (9th Cir.
3 2007) (en banc). We review de novo whether a state statute of conviction is a categorical
4 match to the definition of “violent felony.” *See id.* at 846. Under *Taylor*’s categorical
5 approach, a court determines whether a prior conviction under a state statute qualifies as
6 a “violent felony” conviction under the ACCA by looking “only to the fact of conviction
7 and the statutory definition of the prior offense,” not to the facts underlying the
8 conviction. *Id.* at 847 (quoting *Taylor*, 495 U.S. at 602). A violation of a state statute is
9 categorically a “violent felony” under the ACCA “only if the [state] statute’s elements
10 are the same as, or narrower than,” those included in the ACCA’s definition of “violent
11 felony.” *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). In identifying the
12 elements of a state statute, a court considers the language of the statute and judicial
13 opinions interpreting it. *Rodriguez–Castellon v. Holder*, 733 F.3d 847, 853 (9th Cir.
14 2013); *United States v. Bonat*, 106 F.3d 1472, 1475–76 (9th Cir. 1997).

15 The magistrate judge erred by concluding that the Illinois armed robbery statute
16 constitutes a violent felony under the ACCA. “A person commits robbery when he takes
17 property from the person or presence of another by the use of force or by threatening the
18 imminent use of force.” Ill. Rev. Stat. 1985, ch. 38, ¶ 18-1. Armed robbery is defined by
19 statute as a robbery committed while one “carries on or about his or her person, or is
20 otherwise armed with a dangerous weapon.” Ill. Rev. Stat. 1985, ch. 38, ¶ 18-2. “While
21 the mere act of swiftly taking property from a victim’s hands does not constitute robbery,
22 when the slightest degree of force is used the act may constitute robbery.” *People v. Hay*,
23 840 N.E.2d 735, 741 (Ill. App. Ct. 2005). Illinois has upheld a conviction of robbery on
24 force as minimal as blocking the path when the victim did not feel threatened. *See, e.g.,*
25 *People v. Nance*, 2014 IL App (1st) 123143, ¶ 20 (Sep. 18, 2014) (“[A] reasonable finder
26 of fact could conclude that defendant and the woman jointly effected the taking of Soria’s
27 wallet by using force in excess of merely swiftly taking it from her purse in her hand.
28 That Soria did not feel threatened by the brief blockage of her path does not change that

1 the woman, defendant’s accomplice, applied force to Soria’s back in conjunction with
2 defendant kneeling in front of her to affect the taking of her wallet.”); *see United States v.*
3 *Parnell*, 818 F.3d 974, 979 (9th Cir. 2016) (concluding that because any force, “however
4 slight,” will satisfy the force element of a Massachusetts robbery statute, the force
5 requirement was insufficient to constitute a violent felony under *Johnson*). The Illinois
6 robbery statute can include conduct that would not be included under the force clause.
7 *United States v. Dixon*, 805 F.3d 1193, 1197–98 (9th Cir. 2015) (“Because *Anderson*
8 shows that one can realistically violate CPC § 211 in a manner that is not covered by the
9 ACCA’s definition of ‘violent felony,’ a violation of CPC § 211 is not categorically a
10 ‘violent felony’ under the ACCA.”). *Johnson* requires that “physical force” used must be
11 “violent force,” or “force capable of causing physical pain or injury to another
12 person.” *Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis in original). The
13 Court is not persuaded by the Government’s or Magistrate Judge’s reliance on *United*
14 *States v. Dickerson*, which held that the Illinois robbery statute constituted a violent
15 felony under the ACCA, because in so holding, the Seventh Circuit relied on the fact that
16 the Illinois law required the use of force without analyzing the amount of force required
17 and relied on the actual circumstances of the defendant’s crime instead of the elements of
18 the charge. 901 F.2d 579, 584 (7th Cir. 1990) (“We agree with the district court that the
19 Illinois robbery statute in its own terms includes the elements of either ‘use of force or . .
20 . threatening the imminent use of force,’ that clearly come within the scope of 18 U.S.C.
21 § 924(e)(2)(B)” and “the circumstances of Dickerson’s own crime reflect elements of use
22 or threatened use of physical force”). Because Illinois’ armed robbery statute only adds
23 the element of carrying a dangerous weapon while committing the robbery, it does not
24 further raise the amount of force required. Therefore, the Court concludes that the Illinois
25 crime of armed robbery does not categorically constitute a violent felony for ACCA
26 purposes.

27 **B. Arizona Facilitation of Robbery Statute**

28 In his Objection Movant requested that the Court consider his argument regarding

1 this crime in his original Motion as the Magistrate Judge did not rule on this ground.
2 (Obj. to R. & R. at 3.) The Government did not address this argument in its Response to
3 the Objections, but the Court will consider its original response which argued that even
4 non-aggravated robbery in Arizona requires force “of such a nature to show that it
5 intended to overpower the party robbed.” (*See* Doc. 10, Resp. to Obj. to R. & R.; Resp. to
6 Mot. at 11-12.) “A person commits robbery if in the course of taking any property of
7 another from his person or immediate presence and against his will, such person threatens
8 or uses force against any person with intent either to coerce surrender of property or to
9 prevent resistance to such person taking or retaining property.” Ariz. Rev. Stat. Ann. §
10 13-1902. “‘Force’ means any physical act directed against a person as a means of gaining
11 control of property.” Ariz. Rev. Stat. Ann. § 13-1901(1). “A person commits facilitation
12 if, acting with knowledge that another person is committing or intends to commit an
13 offense, the person knowingly provides the other person with means or opportunity for
14 the commission of the offense.” Ariz. Rev. Stat. Ann. § 13-1004(A).

15 As the Government concedes, there is no case law analyzing whether the Arizona
16 robbery statute is categorically a violent felony. A violent felony, which is not
17 specifically enumerated, requires the use, attempted use, or threatened use of physical force
18 against another. 18 U.S.C. § 924(e)(2)(B)(i). First, the “physical force” used must be
19 “*violent* force,” or “force capable of causing physical pain or injury to another
20 person.” *Johnson*, 559 U.S. at 140 (emphasis in original). Second, the use of force must
21 be intentional, not just reckless or negligent. *United States v. Lawrence*, 627 F.3d 1281,
22 1284 (9th Cir. 2010); *see also Leocal v. Ashcroft*, 543 U.S. 1, 12–13 (2004). Arizona’s
23 statute criminalizes a person who threatens or uses “any physical act directed against a
24 person as a means of gaining control of property” “with intent to either coerce surrender
25 of property or to prevent resistance to such person taking or retaining property.” *See* Ariz.
26 Rev. Stat. §§ 1901-1902. While Arizona’s statute clearly requires intent, the use of “any
27 physical act” does not require sufficient force under *Johnson*—“force capable of causing
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1 physical pain.”² Therefore, the Court concludes that Arizona’s robbery statute does not
2 constitute a violent felony for purposes of the ACCA.

3 **III. CONCLUSION**

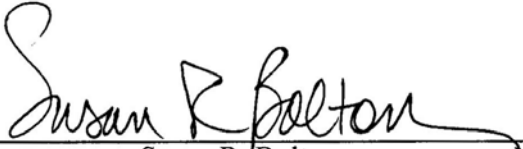
4 Because the Court concludes that Movant’s convictions under Illinois’ robbery
5 statute and Arizona’s robbery statute do not qualify as ACCA predicate offenses, the
6 Court sustains Movant’s Objections to the Magistrate Judge’s Report and
7 Recommendation and grants the Motion. The Court further vacates Movant’s sentence
8 and orders resentencing. *See, e.g., Grisel*, 488 F.3d at 852.

9 **IT IS ORDERED** sustaining Movant’s Objections to the Report and
10 Recommendation of the Magistrate Judge.

11 **IT IS FURTHER ORDERED** granting Movant Victor Allen Amos’s Motion to
12 Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (Doc. 1).

13 **IT IS FURTHER ORDERED** resentencing Movant within 60 days of the date of
14 this Order.

15 Dated this 30th day of May, 2017.

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Susan R. Bolton
United States District Judge

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² Furthermore, it is unlikely that facilitation of robbery would be a lesser included offense of robbery under Arizona law. *C.f. State v. Harris*, 655 P.2d 1339, 1340 (Ariz. Ct. App. 1982) (“A.R.S. § 13–1004, gives the prosecuting attorney the option to charge a person as an aider and abettor under that statute rather than as a principal in the substantive offense.”). A conviction as a facilitator is different than as an accomplice, who “aids, counsels and agrees to aid or attempts to aid a person in planning or committing the offense, [and] also provides the means or opportunity to another to commit the offense.” *Id.* 1340 at n.2.