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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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United States of America,

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CV 16-1324-PHX-SRB (MHB)

10

Plaintiff,

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CR 07-0539-PHX-SRB

**REPORT AND RECOMMENDATION**

11

v.

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Victor Allen Amos,

)

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Defendant/Movant.

)

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TO THE HONORABLE SUSAN R. BOLTON, UNITED STATES DISTRICT JUDGE:

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Defendant/Movant Victor Allen Amos, who is represented by counsel, filed a Motion

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to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255. (CV 16-1324 (“CV”)

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Doc. 1 and CR 07-0539 (“CR”) Doc. 54.) Plaintiff United States of America (the

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“government”) filed a Response, and Movant has filed a Reply. (CV Docs. 6,7.)

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**BACKGROUND<sup>1</sup>**

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According to the pleadings, Movant had multiple convictions in the Arizona and

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Illinois state courts for a variety of crimes, including, an attempted rape in Illinois, assorted

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robberies and armed robberies in Illinois, possession of narcotic drugs for sale in Arizona,

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and facilitation of robbery in Arizona. (CV Doc. 6 at 2 (citing to PSR ¶¶ 30-37); CR Doc. 46

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at 7.) Following these convictions, in 2006, Movant possessed a semi-automatic pistol in

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<sup>1</sup> The following facts are derived from the government’s response, exhibits and attachments submitted thereto, Movant’s pleadings, as well as, the other documents set forth in this matter’s civil and criminal record.

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

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

21 In the § 2255 Motion, Movant alleges that his sentence was rendered unlawful by the  
22 Supreme Court’s recent decision in Johnson v. United States, \_\_\_ U.S. \_\_\_, 135 S.Ct. 2551  
23 (2015). Specifically, Movant claims that in the wake of Johnson, he no longer has three  
24 qualifying prior convictions under the ACCA. Movant argues that the Court should grant his  
25 § 2255 motion and resentence him to a term of imprisonment of not more than 10 years, to  
26 be followed by a term of supervised release not more than 3 years.

27 In its Response, the government contends that the Court should address the merits of  
28 Movant’s claim, and argues that the 1975 attempted rape, the 1995 possession of narcotic

1 drugs for sale, and either the 1988 armed robbery or the 2002 facilitation of robbery  
2 convictions constitute valid predicates under the ACCA. As such, the government asserts that  
3 the Court should deny relief in this matter.

#### 4 DISCUSSION

5 In Johnson v. United States, 135 S.Ct. 2551 (2015), the Supreme Court examined  
6 language from the ACCA, which provides for a mandatory minimum sentence of 15 years  
7 of imprisonment for a defendant who violates 18 U.S.C. § 922(g) and has three prior  
8 convictions for a “violent felony” or a “serious drug offense.” 18 U.S.C. § 924(e). There are  
9 three “clauses” in the statute defining what type of prior crime qualifies as a “violent felony”:

- 10 • The “elements” or “force” clause: “has as an element the use, or attempted use, or  
11 threatened use of physical force against the person of another”;
- 12 • The “enumerated offenses” clause: “is burglary, arson, or extortion, [or] involves use  
of explosives” and
- 13 • The “residual” clause: “or otherwise involves conduct that presents a serious  
14 potential risk of physical injury to another.”

15 See 18 U.S.C. § 924(e)(2)(B). The Supreme Court held that imposing an increased sentence  
16 under ACCA’s residual clause violates the Due Process Clause because the residual clause  
17 is impermissibly vague on its face. Because no “principled and objective standard” could  
18 identify what crimes fell under the language of the residual clause, the Supreme Court held  
19 that it “both denies fair notice to defendants and invites arbitrary enforcement by judges.”  
20 Johnson, 135 S.Ct. at 2557. In so doing, the Court overruled its decisions in James v. United  
21 States, 550 U.S. 192 (2007), and Sykes v. United States, 564 U.S. 1 (2011), in which it had  
22 previously rejected vagueness challenges to the residual clause. See Johnson, 135 S.Ct. at  
23 2563.

24 The Johnson Court explicitly noted that its decision “does not call into question  
25 application of the [ACCA] to ... the remainder of the Act’s definition of a violent felony.”  
26 135 S.Ct. at 2563. This includes a felony offense that “has as an element the use, attempted  
27 use, or threatened use of physical force against the person of another,” 18 U.S.C. §  
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1 924(e)(2)(B)(i), and a felony offense that “is burglary, arson, or extortion, [or] involves use  
2 of explosives,” 18 U.S.C. § 924(e)(2)(B)(ii). Johnson, 135 S.Ct. at 2563.

3 According to the documents set forth in this Court’s record, Movant had previously  
4 been convicted of the following drug offenses in Arizona: possession of narcotic drugs for  
5 sale and possession of narcotic drugs. Movant has also been convicted of the following  
6 offenses that were considered as “violent felonies” for ACCA purposes:

- 7 a. Illinois robbery, on May 2, 1975;
- 8 b. Illinois attempted rape, on May 9, 1975;
- 9 c. Illinois armed robbery, on October 26, 1979;
- 10 d. Illinois armed robbery, on October 31, 1988; and
- 11 e. Arizona facilitation of robbery, on February 4, 2002.

12 (CV Docs. 1,6 (citing to PSR ¶¶ 30-37); CR Doc. 46 at 6-7.)

13 The Court notes that the parties agree that Movant’s 1975 conviction for Illinois  
14 attempted rape qualifies as a “violent felony” under ACCA. The parties also agree that  
15 Movant’s 1995 conviction for Arizona possession of narcotic drugs for sale amounts to a  
16 “serious drug offense” under ACCA. Thus, Movant agrees with the government that the  
17 validity of his ACCA-enhanced sentence depends on whether the 1988 Illinois armed  
18 robbery conviction or the subsequent Arizona facilitation of robbery conviction qualify as  
19 “violent felonies” under the ACCA. This Court will focus on the 1988 Illinois armed robbery  
20 conviction.

21 The government states that Movant was convicted and incarcerated for a string of  
22 crimes in Illinois prior to his arrival in Arizona, and argues that the 1988 Illinois armed  
23 robbery conviction, in particular, “is fully supported outside the four corners of the PSR, as  
24 the information in the PSR matches references to this crime in the criminal history  
25 assessment in the Arizona trafficking conviction.”

26 Illinois armed robbery at the time of Movant’s offense in 1987 required the following  
27 elements:

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1 Armed robbery is defined by statute as a robbery committed while one “carries  
2 on or about his or her person, or is otherwise armed with a dangerous  
3 weapon.” (Ill. Rev. Stat. 1985, ch. 38, par. 18-2.) Robbery is the taking of  
“property from the person or presence of another by the use of force or by  
threatening the imminent use of force.” Ill. Rev. Stat. 1985, ch. 38, par. 18-1.

4 People v. Ortiz, 509 N.E. 2d 633, 635 (Ill. App. 1987); see People v. Brooks, 559 N.E. 2d  
5 859, 862 (Ill. App. Ct. 1990), abrogated on other grounds, People v. Williams, 599 N.E. 2d  
6 913 (Ill. 1992).

7 In [Curtis] Johnson v. United States, 559 U.S. 133 (2010), the Supreme Court clarified  
8 what constitutes a “violent felony” under the elements or force clause of the ACCA. The  
9 district court in Johnson imposed an additional sentence based on defendant’s three prior  
10 “violent felony” convictions, one of which was for felony battery under Florida law. The  
11 Florida statute provided that “a battery occurs when a person either ‘[a]ctually and  
12 intentionally touches or strikes another person against his [will],’ or ‘[i]ntentionally causes  
13 bodily harm to another person.’” Id. at 136-37. In reversing, the Supreme Court stated that  
14 the phrase “physical force” as used in the force clause of the ACCA “means violent force –  
15 that is, force capable of causing physical pain or injury to another person.” Id. at 140-41.  
16 Applying the categorical approach set forth in Taylor v. United States, 495 U.S. 575 (1990),  
17 the Court, relying on the Florida Supreme Court’s interpretation of state law, held that  
18 because the Florida felony offense of battery could be committed by actually and  
19 intentionally touching another person, by any physical contact, no matter how slight, battery  
20 was not a “violent felony” under the ACCA.

21 Unlike the Florida battery statute at issue in [Curtis] Johnson, armed robbery under  
22 Illinois law is not a crime that can be accomplished any intentional physical contact – “no  
23 matter how slight.” In evaluating the elements of the Illinois statute, Movant was convicted  
24 of armed robbery, which at that time provided: Robbery is the taking of “property from the  
25 person or presence of another by the use of force or by threatening the imminent use of  
26 force.” Ill. Rev. Stat. 1985, ch. 38, par. 18-1. Armed robbery is defined by statute as a  
27 robbery committed while one “carries on or about his or her person, or is otherwise armed  
28 with a dangerous weapon.” Ill. Rev. Stat. 1985, ch. 38, par. 18-2. Accordingly, the elements

1 of armed robbery clearly included the use, attempted use, or threatened use of physical force  
2 against the person of another and would qualify as a “violent felony” or “crime of violence”  
3 under the elements or force clause – even under [Curtis] Johnson. District courts have  
4 previously concluded that a conviction for armed robbery under this same language  
5 constitutes a crime of violence. See United States v. Caverl, 2016 WL 3024042 (D. Minn.  
6 2016) (holding Illinois armed robbery to be an ACCA predicate under United States v.  
7 Dickerson, 901 F.2d 579, 584 (7<sup>th</sup> Cir. 1990)); Adams v. United States, 2016 WL 4487835  
8 (C.D. Ill. Aug. 25, 2016) (finding that the elements of both robbery and armed robbery  
9 include the use, attempted use, or threatened use of physical force against the person of  
10 another and qualify as a “violent felony” or “crime of violence” under the elements clause  
11 of the ACCA); Mosley v. United States, 2017 WL 67600 (S.D. Ill. Jan. 6, 2017) (finding  
12 Illinois robbery is a crime of violence under the ACCA). Furthermore, the Seventh Circuit  
13 analyzing this same statutory language has repeatedly held that robbery as defined by Illinois  
14 law is a crime of violence. See United States v. Watson-El, 376 F. App’x 605, 608 (7<sup>th</sup> Cir.  
15 2010) (holding robbery under Illinois law is a violent felony under the ACCA); Dickerson,  
16 901 F.2d at 584 (holding that a conviction for robbery under Illinois law is a crime of  
17 violence under the elements clause of the ACCA); see also United States v. Smith, 2016 WL  
18 5867263, at \*1 (7<sup>th</sup> Cir. Oct. 7, 2016) (noting previous holdings that a conviction for robbery  
19 under Illinois law is a crime of violence under the elements clause of USSG § 4B1.2 and  
20 similarly worded statutes); United States v. Bedell, 981 F.2d 915, 916 (7<sup>th</sup> Cir. 1992)  
21 (discussing why a conviction for robbery under Illinois law is a crime of violence under  
22 USSG § 4B1.2); United States v. Carter, 910 F.2d 1524, 1532 (7<sup>th</sup> Cir. 1990) (holding that  
23 in Illinois, robbery is a crime of violence under the USSG “because it is defined as the taking  
24 of property ‘by the use of force or by threatening the imminent use of force’”); United States  
25 v. Templeton, 543 F.3d 378, 380 (7<sup>th</sup> Cir. 2008) (“Section 924 – a section of the ACCA –  
26 defines ‘violent felony’ in the same way as § 4B1.2 defines ‘crime of violence,’ and we  
27 interpret § 4B1.2 in the same way as § 924(e).”).

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1 Movant’s relies on United States v. Parnell, 818 F.3d 974 (9<sup>th</sup> Cir. 2016) stating that  
2 under Illinois law, armed robbery can be committed using the minimal amount of force  
3 required to overcome slight resistance and, as such, it does not qualify as a “violent felony”  
4 under the ACCA. The Court is not persuaded. In Parnell, the Ninth Circuit held that a  
5 Massachusetts armed robbery statute criminalizing “any force, however slight ... so long as  
6 the victim is aware of it” did not qualify as a crime of violence, as it could entail even purse  
7 snatching. Id. at 979.

8 The minimal force requirement set forth in the Massachusetts armed robbery statute  
9 illustrated in Parnell is far less than the strictures of the Illinois robbery statute at issue – and  
10 as interpreted by the Seventh Circuit and the various district court’s analyzing the same  
11 statutory language. Accordingly, the Court finds that Illinois armed robbery is a crime of  
12 violence and, as such, Movant’s 1988 armed robbery conviction is an ACCA predicate.

13 Thus, the Court finds that Movant’s 1975 conviction for Illinois attempted rape,  
14 Movant’s 1995 conviction for Arizona possession of narcotic drugs for sale, and Movant’s  
15 1988 conviction for Illinois armed robbery are all valid predicates under the ACCA. Movant  
16 is not entitled to any relief.

## 17 CONCLUSION

18 Having determined that Movant’s claim is meritless, the Court will recommend that  
19 Movant’s Motion to Vacate, Set Aside, or Correct Sentence be denied and dismissed with  
20 prejudice.

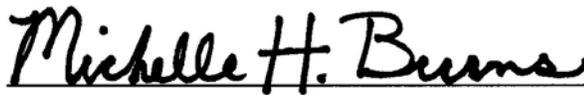
21 **IT IS THEREFORE RECOMMENDED** that Movant’s Motion to Vacate, Set  
22 Aside, or Correct Sentence Under 28 U.S.C. § 2255 (CV Doc. 1 and CR Doc. 54) be  
23 **DENIED and DISMISSED WITH PREJUDICE;**

24 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave  
25 to proceed *in forma pauperis* on appeal be **DENIED** because Petitioner has not made a  
26 substantial showing of the denial of a constitutional right.

27 This recommendation is not an order that is immediately appealable to the Ninth  
28 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of

1 Appellate Procedure, should not be filed until entry of the district court’s judgment. The  
2 parties shall have fourteen days from the date of service of a copy of this recommendation  
3 within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1);  
4 Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen  
5 days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of  
6 Civil Procedure for the United States District Court for the District of Arizona, objections  
7 to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure  
8 timely to file objections to the Magistrate Judge’s Report and Recommendation may result  
9 in the acceptance of the Report and Recommendation by the district court without further  
10 review. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003). Failure  
11 timely to file objections to any factual determinations of the Magistrate Judge will be  
12 considered a waiver of a party’s right to appellate review of the findings of fact in an order  
13 or judgment entered pursuant to the Magistrate Judge’s recommendation. See Rule 72,  
14 Federal Rules of Civil Procedure.

15 DATED this 23<sup>rd</sup> day of January, 2017.

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18 Michelle H. Burns  
19 United States Magistrate Judge  
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