UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-61345-CIV-COHN/SELTZER
(Case No. 09-60229-CR-COHN)

JAY ANTHONY RICHITELLI,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT

THIS CAUSE is before the Court upon the Report and Recommendation [DE 19] ("Report") of Magistrate Judge Barry S. Seltzer to Movant Jay Anthony Richitelli's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [DE 4] ("Motion"). The Court has reviewed *de novo* the Motion, the Report, Movant's Objections [DE 20] ("Objections"), the record in this case, and is otherwise advised in the premises. Upon careful consideration, the Court will adopt the Report in its entirety and dismiss the Motion as untimely, or in the alternative, deny it on the merits.

The Court agrees with Judge Seltzer's thorough analysis. The Motion fails on the merits because Movant's instant conviction for attempted Hobbs Act robbery and his prior convictions for Florida armed robbery qualify as "serious violent felonies" under 18 U.S.C. 3559(c)'s elements/use-of-force clause, as well as under its enumerated offenses clause, and therefore remain a proper predicate for Movant's § 3559(c) enhancement . As § 3559(c)'s residual clause is not implicated in this case, the Court

need not decide whether Johnson v. United States, 135 S. Ct. 2551 (2015) extends to same.

The Motion is also untimely. Because Johnson does not apply Movant's case, Movant cannot rely on the date of the Johnson decision to calculate the applicable one-year limitations period. Nor did Movant file his Motion within one year of the date that his conviction became final.

Movant objects to the Report on several grounds, none of which the Court finds persuasive. First, Movant argues that the Report improperly relied upon the Eleventh Circuit's decision in In re Saint Fleur, 824 F.3d 1337 (11th Cir. 2016), in concluding that attempted Hobbs Act robbery qualifies as a "serious violent felony" under § 3559(c). The Court finds nothing misplaced about Judge Seltzer's reliance on Fleur. Like many other judges in this Circuit, the Court finds Fleur to be highly persuasive, if not controlling, authority, notwithstanding that it arose on an application for leave to file a second or successive § 2255 motion. See, e.g., Smith v. United States, CV 416-150, 2016 WL 4942019, at *1 (S.D. Ga. Sept. 15, 2016); Wallace v. United States, CV 116-048, 2016 WL 4147164, at *1 (S.D. Ga. Aug. 4, 2016); United States v. Perry, Civ. No. 16-00292, 2016 WL 3676596, at *2 (S.D. Ala. July 5, 2016); see also In re Gordon, 827 F.3d 1289, 1294 (11th Cir. 2016) (describing Fleur as controlling).

Second, Movant argues that even if substantive Hobbs Act robbery qualifies as a "serious violent felony" under § 3559(c), attempted Hobbs Act robbery does not because one can attempt to commit Hobbs Act robbery without attempting to use any force. This objection is without merit. As the Report correctly explains in great detail, an individual convicted of attempted Hobbs Act robbery has acted with a specific intent

and taken a substantial step to unlawfully take property from another, against his will, by means of actual or threatened force, violence, or fear of injury, and has therefore committed an offense that involves the attempted or threatened use of physical force against another.

In support of his argument to the contrary, Movant cites several cases, including one from the Eleventh Circuit, United States v. Gonzalez, 322 Fed. Appx. 963 (11th Cir. 2009), as allegedly establishing that one can attempt to commit Hobbs Act robbery without actually attempting or threatening to use physical force. Movant asserts that in Gonzalez, the Eleventh Circuit upheld a conviction for attempted Hobbs Act robbery although the defendants had "merely traveled to [a prearranged] location in preparation for committing robbery." [DE 20 at 12.] The Hobbs Act robbery conviction in Gonzalez involved more than mere travel, however, as the Eleventh Circuit noted that the defendants were arrested with brass knuckles and multiple black stockings. 322 Fed. Appx. at 969. Thus, Gonzalez does not demonstrate that one can attempt to commit Hobbs Act robbery without attempting to use any force.

Finally, Movant argues that the Report improperly concluded that pre-1999 Florida robbery convictions required more force than a sudden snatching. Although, in United States v. Jenkins, 651 Fed. Appx. 920 (11th Cir. 2016), the Eleventh Circuit held that a 1999 Florida robbery conviction[1] qualified as a crime of violence under the elements clause of the career offender guidelines (which is nearly identically worded to § 3559(c)'s elements/use-of-force clause), Movant argues that Jenkins is unpublished,

[1] The 1999 robbery conviction in Jenkins pre-dated the Florida Legislature's 1999 enactment of a separate robbery by sudden snatching statute. 651 Fed. Appx. at 922-23.

and therefore non-binding, and that the Court should find Jenkins unpersuasive because, *inter alia*, it "appears to conflict with" the published decision of United States v. Welch, 683 F.3d 1304 (11th Cir. 2012). [DE 20 at 15] (quoting Report and Recommendation in Melvin Jones v. United States, Civ. No. 15-81380, DE 35 at 21-22 (S.D. Fla. June 23, 2016)).

Movant ignores, however, that the Eleventh Circuit recently reaffirmed that "from the 1970's to the present," Florida robbery has had as an element "the use, attempted use, or threatened us of physical force." United States v. Seabrooks, 839 F.3d 1326, 1343 (11th Cir. 2016) (citing United States v. Lockley, 632 F.3d 1238 (11th Cir. 2011)). Seabrooks even noted the limitation of the holding in Welch, explaining that "Welch held only that a 1996 Florida robbery conviction was a violent felony under the ACCA's residual clause . . . Welch contains no ruling, much less a holding, about Florida's robbery statute under the elements clause." Id. at 1344 (emphasis in original). The Eleventh Circuit further explained that "even as to its residual-clause analysis, Welch contains no holding about whether sudden snatching sufficed for Florida robbery prior to 1997." Id. at 1345. The Court therefore finds no err in the Report's reliance on Jenkins in support of its conclusion that Movant's pre-1999 Florida robbery convictions qualify as § 3559(c) predicates.

In light of the foregoing, it is hereby

ORDERED and ADJUDGED as follows:

1. The Report and Recommendation [DE 19] is hereby **ADOPTED** in its entirety.

2. Movant's Objections [DE 20] are **OVERRULED**.

3. The Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 [DE 4] is **DISMISSED** as untimely.

4. Alternatively, the Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 [DE 4] is hereby **DENIED**.

5. Pursuant to Rule 11 of the Rules Governing Section 2255 Cases, Movant is hereby **DENIED** a certificate of appealabilty because Movant has failed to make a substantial showing that he was denied a constitutional right. The Court notes that pursuant to Rule 22(b)(1) of the Federal Rules of Appellate Procedure, Movant may request issuance of a certificate of appealability from the Eleventh Circuit.

6. The Clerk shall **CLOSE** this case and **DENY** all pending motions as **MOOT**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 6th day of December, 2016.

JAMES I. COHN
United States District Judge

Copies provided to:
United States Magistrate Judge Barry S. Seltzer
Counsel of record via CM/ECF