UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

TEOBALDO CANCEL-RUIZ, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Civil No. 11-1078 (JAF) (Crim. No. 03-52)

OPINION AND ORDER

Petitioner, Teobaldo Cancel-Ruiz, brings this pro-se petition for a certificate of appealability ("COA"). (Docket No. 17.) For the following reasons, we deny his motion.

I.

Background

On October 13, 2012, we denied Petitioner's motion under 28 U.S.C. § 2255. (Docket No. 13.) In our opinion, we found that Petitioner had filed his § 2255 motion more than three years and nine months after the one-year limitations period of § 2255(f) had elapsed. (Docket No. 13 at 2.) We found that the "extraordinary circumstances" required to invoke equitable tolling were not present in Petitioner's case, noting that Petitioner had failed to carry his burden of demonstrating that he had been "1) pursuing his rights diligently, and 2) that some extraordinary circumstance stood in his way and prevented timely filing." Id. at 4 (quoting United States v. Ramos-Martinez, 638 F.3d 315, 322 (1st

Cir. 2011)). Therefore, we denied Petitioner's § 2255 motion for relief on timeliness grounds. (Docket No. 13 at 5.) Petitioner then filed a motion for reconsideration. (Docket No. 15.) We denied that motion. (Docket No. 16.) Petitioner now brings a motion for a COA. (Docket No. 17.) For the reasons that follow, we deny this motion as well.

II.

Analysis

In our earlier orders denying his § 2255 motion and his motion for reconsideration, we denied Petitioner a COA, pursuant to Rule 11 of the Rules Governing Rules Governing Section 2254 and 2255 Cases (hereinafter "Rules Governing § 2255 Cases"). (Docket Nos. 13, 16.) Petitioner argues that we mistakenly denied a COA without first considering his arguments in favor of one. (Docket No. 17 at 1.) The plain text of Rule 11 shows that Petitioner's argument is mistaken.

Rule 11 provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct parties to submit arguments on whether a certificate should issue." Rules Governing § 2255 Cases, Rule 11(a) (emphasis added). Thus, we were under no obligation to consider Petitioner's arguments in favor of a COA before denying him one.

Petitioner now presents four arguments that he should be granted a COA. He argues that in our previous orders we erred in the following ways: 1) by dismissing his § 2255 motion as untimely without reaching the merits; 2) by finding that Carachuri-Rosendo v. Holder, 130 S.Ct. 2577 (2010), did not apply to his case; 3) by failing to determine whether

Carachuri was retroactive; and 4) by failing to address the merits of his claim under Holland v. Florida, 130 S.Ct. 2549 (2010), and failing to determine whether that case was retroactive. (Docket No. 17 at 4-6.) Each of these arguments is without merit.

We grant a COA only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this showing, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

The Supreme Court has also made clear that, notwithstanding the express language in § 2253 about "a constitutional right," that language is not to be interpreted to mean "only constitutional rulings may be appealed." See Patrick v. United States, 298 F.Supp.2d 206, 212 (D.Mass. 2004) (quoting Slack, 529 U.S. at 483). When the Petitioner's § 2255 motion is denied on procedural grounds, as it was here, a modified standard applies. In Slack, the Supreme Court held:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Id. at 484.

1 Under these standards, each of Petitioner's remaining four arguments fail. First, we
2 see no way in which "jurists of reason would find it debatable" whether we were correct in
3 denying Petitioner's § 2255 motion on procedural grounds. Slack, 529 U.S. at 484.
4 Petitioner's motion was filed more than three years and nine months after § 2255(f)'s one-
5 year limitations period expired. Petitioner had the burden of demonstrating that
6 "extraordinary circumstances" warranted equitable tolling. Ramos-Martinez, 638 F.3d at
7 323-24 (citations omitted). Faced with that burden, he made no showing that he exercised
8 "reasonable diligence" during this long period to protect his own rights. Ramos-Martinez,
9 638 F.3d at 323-324. Thus, Petitioner's motion was clearly barred by 2255(f)'s limitations
10 period. (Docket No. 13 at 5.)

11 In his current motion, Petitioner argues that we did not correctly evaluate the merits
12 of his claim under Holland v. United States, 130 S.Ct. 2549, 2563 (2010). Yet, in his three
13 filings here—his § 2255 motion, his motion for reconsideration, and this motion—he makes
14 no showing that he had been "1) pursuing his rights diligently, and 2) that some
15 extraordinary circumstance stood in his way and prevented timely filing." Holland, 130
16 S.Ct. at 2562. As we noted in our opinion denying his § 2255 motion, see Docket No. 13 at
17 5, Petitioner's "failure to contemplate" his claim earlier is "neither an extraordinary
18 circumstance, nor a circumstance which was out of [his] hands." Barreto-Barreto v. United
19 States, 551 F.3d 95, 101 (1st Cir. 2008). Petitioner makes vague references to "attorney
20 misconduct" in his motion, but does not allege anywhere near the type of "extraordinary
21 circumstance" necessary to invoke equitable tolling. See id. at 101 n.5 (noting that attorney

error may justify equitable tolling where attorney error was egregious or in a death-penalty case).

We do not see any way in which a reasonable jurist would disagree with our decision that Carachuri does not apply to Petitioner's case. As we explained in our order, Petitioner's argument under Carachuri was foreclosed by clear First Circuit precedent. (Docket No. 16 at 3.) The First Circuit has held that when a prosecutor seeks an enhancement of a statutory maximum or minimum penalty, § 851 imposes a set of "mandatory prerequisites to obtaining a punishment based on the fact of a prior conviction." United States v. Curet, 670 F.3d 296, 299 (1st Cir. 1990) (quoting Carachuri, 130 S.Ct. at 2582). Clearly, then, "§ 851 is triggered only by enhancements to defendants' statutory minimum or maximum penalties under that part, and not to increases in defendants' guidelines ranges based on the fact of prior convictions." Curet, 670 F.3d at 302 n.5. As we noted in our earlier order, see Docket No. 16 at 3, Petitioner received no such sentencing enhancement. Therefore, § 851 and Carachuri do not apply to his case. In his motion here, Petitioner has provided no argument why this conclusion was incorrect. (Docket No. 17.) Nor can we think of any reason.

Because Carachuri and Holland clearly do not apply to the facts of Petitioner's case, it was unnecessary to determine whether those cases were retroactive. Thus, under Rule 11 of the Rules Governing § 2255 Cases, we again deny Petitioner a COA. We see no way in which jurists of reason would find debatable whether Petitioner stated a valid claim of the denial of a constitutional right or whether we were correct in our procedural ruling. See Slack, 529 U.S. at 484.

1 **III.**

2 **Conclusion**

3 For the foregoing reasons, we hereby **DENY** Petitioner's motion for a certificate of
4 appealability. (Docket No. 17.)

5 **IT IS SO ORDERED.**

6 San Juan, Puerto Rico, this 16th day of April, 2013.

7 s/José Antonio Fusté
8 JOSE ANTONIO FUSTE
9 United States District Judge