

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO
3
4

FÉLIX GABRIEL CASTRO-DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No. 13-1648 (JAF)

(Criminal No. 07-186-2)

5
6 **OPINION AND ORDER**

7 Petitioner, Félix Gabriel Castro-Davis, brings this pro-se petition under 28 U.S.C.
8 § 2255 for relief from sentencing by a federal court, alleging that the sentence imposed
9 violated his rights under federal law. He requests an order to vacate, set aside, or correct
10 the sentence imposed in Cr. No. 07-186. (Docket No. 1.)

11 **I.**

12 **Background**

13 On April 25, 2007, the grand jury rendered an indictment against Petitioner and
14 two co-defendants—including his brother Félix Alberto Castro-Davis—for several
15 offenses relating to a carjacking that resulted in death. On March 5, 2008, a jury found
16 Petitioner guilty on all counts. (Crim. Docket No. 244.) Petitioner was sentenced to
17 sixty months for conspiracy, eighty-four months for the use of a firearm during the
18 carjacking, and a life sentence. (Crim. Docket No. 276.) Petitioner timely appealed his
19 conviction. The First Circuit affirmed Petitioner's judgment, but remanded for
20 sentencing. United States v. Castro-Davis, 612 F.3d 53 (1st Cir. 2010). On
21 December 15, 2010, Petitioner was resentenced to the same terms of the original

1 judgment. (Crim. Docket No. 345.) An Amended judgment was entered on
2 December 20, 2010. (Crim. Docket No. 347.) On December 21, 2010, Petitioner
3 appealed the life sentence imposed on remand. On May 15, 2012, the First Circuit
4 affirmed Petitioner's sentence. (Crim. Docket No. 380.) On October 1, 2012, the
5 Supreme Court denied Petitioner's writ of certiorari. S.Ct. No. 12-5644. On August 26,
6 2013, Petitioner filed this petition, alleging, among other things, various types of
7 ineffective assistance of counsel. (Docket No. 1.) The government opposed. (Docket
8 No. 3.) Castro-Davis replied. (Docket No. 6.)

9 II.

10 Legal Standard

11 A federal district court has jurisdiction to entertain a § 2255 petition when the
12 petitioner is in custody under the sentence of a federal court. See 28 U.S.C. § 2255. A
13 federal prisoner may challenge his sentence on the ground that, inter alia, it “was imposed
14 in violation of the Constitution or laws of the United States.” Id. A petitioner cannot be
15 granted relief on a claim that has not been raised at trial or direct appeal, unless he can
16 demonstrate both cause and actual prejudice for his procedural default. See United States
17 v. Frady, 456 U.S. 152, 167 (1982). Indeed, “[p]ostconviction relief on collateral review
18 is an extraordinary remedy, available only on a sufficient showing of fundamental
19 unfairness.” Singleton v. United States, 26 F.3d 233, 236 (1st Cir. 1994). Claims of
20 ineffective assistance of counsel, however, are exceptions to this rule. See Massaro v.
21 United States, 538 U.S. 500, 123 (2003) (holding that failure to raise ineffective
22 assistance of counsel claim on direct appeal does not bar subsequent § 2255 review).

1 **III.**

2 **Discussion**

3 Because Petitioner appears pro se, we construe his pleadings more favorably than
4 we would those drafted by an attorney. See Erickson v. Pardus, 551 U.S. 89, 94 (2007).
5 Nevertheless, Petitioner’s pro-se status does not excuse him from complying with
6 procedural and substantive law. See Dutil v. Murphy, 550 F.3d 154, 158 (1st Cir. 2008).

7 Petitioner alleges several species of ineffective assistance of counsel. To prevail
8 on an ineffective assistance of counsel claim, a movant must show (1) that his counsel’s
9 performance fell below an objective standard of reasonableness, and (2) that there is a
10 reasonable probability that, but for his counsel’s errors, the result of the proceedings
11 would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052,
12 80 L.Ed.2d 674 (1984). Both prongs of the Strickland test must be met to demonstrate
13 ineffective assistance. Id.

14 **A. Counsel was not ineffective for failing to object an allegedly improper**
15 **conclusion of a witness**

16
17 Petitioner alleges that counsel failed to object to an “improper” conclusion of a
18 witness. Specifically, Petitioner contends that José Figueroa’s description of the
19 carjacking as “policeman style” constitutes an improper conclusion that should have been
20 objected to by his counsel. This issue was raised and considered on appeal. The First
21 Circuit rejected Petitioner’s contention that the use of the phrase “policeman style” was
22 too vague to support a jury finding that the taking of the car was done “by force and
23 violence by intimidation.” See Castro-Davis, 612 F.3d at 62.

24 The First Circuit has held that when an issue has been disposed of on direct
25 appeal, it will not be reviewed again through a § 2255 motion. United States v. Doyon,

1 16 Fed.Appx. 6, 9 (1st Cir. 2001); Singleton v. United States, 26 F.3d 233, 240 (1st Cir.
2 1994) (citing Durring v. United States, 370 F.2d 862, 863 (1st Cir. 1967)). The Supreme
3 Court has held that if a claim “was raised and rejected on direct review, the habeas court
4 will not readjudicate it absent countervailing equitable considerations.” Withrow v.
5 Williams, 507 U.S. 680, 721 (1993). Given the First Circuit’s decision in Petitioner’s
6 appeal that the phrase “policeman style” could support a jury finding that the taking of
7 the car was done by force and violence, this issue does not warrant further consideration.

8 **B. Counsel was not ineffective for failing to move for a mistrial because of a**
9 **question we asked of a witness**

10
11 Petitioner alleges that counsel failed to move for a mistrial after we asked a
12 witness, in the presence of the jury, whether she was afraid of being in court. Petitioner
13 is precluded from raising this issue in a Section 2255 motion because he failed to raise
14 the issue on appeal. Bucci v. United States, 662 F.3d 18,27 (1st Cir. 2011). But even if
15 he had not failed to raise it on appeal, it fails on the merits. First, Petitioner takes the
16 question we asked the witness out of context. After allowing the prosecution to treat her
17 as hostile, the witness was still unable to provide answers to the government’s questions.
18 We were concerned that the witness had been tampered with:

19 THE COURT: Any cross?

20 MR. MORALES-CRUZ: Yes, Your Honor.

21 THE COURT: Please. Aside from law enforcement agents,
22 has somebody else contacted you regarding your testimony in
23 this case?

24
25 THE WITNESS: Law enforcement?

26 THE COURT: Aside from FBI agents or police officers, has
27 somebody knocked on your door to ask you questions about
28 this case?

1 THE WITNESS: I was called and -- I was called to -- to -- I
2 don't remember exactly what it was. I remember I called
3 Agent Means and asked him if I should talk to the defense.
4 His name is Alvin something. I don't remember his last name.
5 And I asked Agent Means if that was necessary, and he told
6 me it wasn't necessary. That it was up to me. So I chose not
7 to.

8
9 THE COURT: Okay.

10
11 THE WITNESS: And then this week I got -- he went to my
12 house, knocked on my door, and gave me a Subpoena to
13 come here. Same guy.

14
15 THE COURT: All right. Are you afraid of being here today?

16
17 THE WITNESS: I'm really uncomfortable with it.

18
19 THE COURT: Why?

20
21 THE WITNESS: I'd rather not be.

22
23 THE COURT: What bothers you being here?

24
25 THE WITNESS: That I don't really know what happened.

26
27 (Crim. Docket No. 290 at 197-98.)

28 Here, our interaction with the witness was brief and her response in no way
29 indicated that her fear of the courtroom was related to any fear she might have had of the
30 Petitioner. Nothing about her response could reasonably have prejudiced the jury against
31 him. Petitioner's claim fails.

32 C. **Counsel was not ineffective for failing to object to the introduction of taped**
33 **conversation**

34
35 Petitioner claims that counsel was ineffective for failing to object to the
36 introduction and admission of a taped conversation. Petitioner asserts that the taped
37 conversation, between his brother, mother, and Carmen Davis, contained testimonial

1 statements. The First Circuit addressed the admissibility of the tape as evidence and
2 concluded that “Alberto’s statements were not made under circumstances that render
3 them testimonial ... and thus cannot be treated as testimonial.” Castro-Davis, 612 F.3d at
4 65-66. As this claim was previously raised on direct appeal, Petitioner is precluded from
5 raising it anew here. Doyon, 16 Fed.Appx. at 9.

6 **D. Counsel was not ineffective for failing to object to alleged prosecutorial**
7 **misconduct in closing statement**

8
9 Next, Petitioner claims that his counsel was ineffective failing to object to
10 misconduct during the prosecution’s closing argument. Petitioner raised this issue on
11 appeal. Addressing this issue, the First Circuit held:

12 [T]he court’s general closing instructions did properly
13 counsel the jury regarding what constituted evidence and the
14 fact that they were the sole judges of credibility. The
15 instructions specifically reminded jurors they were the “sole
16 judges of the credibility of the witnesses” and that “arguments
17 and statements of counsel are not evidence.” Given the
18 evidence presented at trial from multiple witnesses, any
19 potentially harmful effect from the prosecutor’s closing was
20 safeguarded by the district court’s final jury instructions. See
21 United States v. Mejía-Lozano, 829 F.2d 268, 274 (1st
22 Cir.1987) (finding that the district judge’s standard instruction
23 was sufficient to overcome any prejudice). [Quotations and
24 citation in original.]

25
26 Castro-Davis, 612 F.3d at 68.

27 Again, because Petitioner raised this issue previously on direct appeal, he is
28 precluded from asserting it anew in a collateral proceeding. Singleton, 26 F.3d at 240.

29 **E. Alleyne**

30 Finally, Petitioner asserts that he is entitled to a reduction in his sentence because
31 the Supreme Court’s decision in Alleyne v. United States, 133 S. Ct. 2151 (2013),
32 provides a new constitutional rule that should be applied retroactively. Petitioner’s

1 Alleyne argument is misplaced. In Apprendi v. New Jersey, 530 U.S. 466 (2000), the
2 Supreme Court held that a fact must be submitted to a jury and found beyond a
3 reasonable doubt if it increases a defendant's statutory mandatory maximum sentence.
4 Alleyne extends this principle to facts that increase a defendant's statutory mandatory
5 minimum sentence. The Supreme Court held, in United States v. Booker, 543 U.S. 220
6 (2005), that Apprendi was not retroactively applicable. While the Supreme Court has not
7 decided whether Alleyne applies retroactively to cases on collateral review, the United
8 States Court of Appeals for the Seventh Circuit has suggested, without deciding, that
9 because "Alleyne is an extension of Apprendi ... [t]his implies that the Court will not
10 declare Alleyne to be retroactive." Simpson v. United States, 721 F.3d 875, 2013 WL
11 3455876, at * 1 (7th Cir. July 10, 2013). At this time, several district courts have held
12 that Alleyne does not apply retroactively to cases on collateral review. See Lassalle-
13 Velazquez v. United States, 2013 WL 4459044 (D.P.R. Aug. 16, 2013); United States v.
14 Stanley, 2013 WL 3752126, at *7 (N.D.Okla. July 16, 2013); United States v. Eziolisa,
15 2013 WL 3812087, at *2 (S.D.Ohio July 22, 2013); Affolter v. United States, 2013 WL
16 3884176, at *2 (E.D.Mo. July 26, 2013); United States v. Reyes, 2013 WL 4042508, at
17 *19 (E.D.Pa. Aug. 8, 2013). Since neither the Supreme Court nor the First Circuit has
18 held Alleyne to be retroactively applicable, we decline to do so here.

19 Petitioner has made no argument that would justify equitable tolling. Summary
20 dismissal is in order. See Lattimore v. Dubois, 311 F.3d 46, 54 (1st Cir.2002) (holding
21 that a prisoner's habeas petition filed one day late was time-barred by § 2255(f)).
22 Therefore, this court has no authority to consider Petitioner's present 2255 motion, and it
23 must be dismissed.

IV.**Certificate of Appealability**

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4 In accordance with Rule 11 of the Rules Governing § 2255 Proceedings, whenever
5 issuing a denial of § 2255 relief we must concurrently determine whether to issue a
6 certificate of appealability (“COA”). We grant a COA only upon “a substantial showing
7 of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make this showing,
8 “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s
9 assessment of the constitutional claims debatable or wrong.” Miller-El v. Cockrell, 537
10 U.S. 322, 338 (2003) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). While
11 Castro-Davis has not yet requested a COA, we see no way in which a reasonable jurist
12 could find our assessment of his constitutional claims debatable or wrong. Castro-Davis
13 may request a COA directly from the First Circuit, pursuant to Rule of Appellate
14 Procedure 22.

V.**Conclusion**

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16
17 For the foregoing reasons, we hereby **DENY** Petitioner’s § 2255 motion (Docket
18 No. 1). Pursuant to Rule 4(b) of the Rules Governing § 2255 proceedings, summary
19 dismissal is in order because it plainly appears from the record that Petitioner is not
20 entitled to § 2255 relief from this court.

21 **IT IS SO ORDERED.**

22 San Juan, Puerto Rico, this 20th day of February, 2014.

23 S/José Antonio Fusté
24 JOSE ANTONIO FUSTE
25 U. S. DISTRICT JUDGE