UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

FELIX ALBERTO CASTRO-DAVIS, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	Civil No. 13-1662 (JAF) (Crim. No. 07-186-01)

OPINION AND ORDER

Petitioner Félix Alberto Castro-Davis ("Castro-Davis") comes before the court with a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct the sentence we imposed in Criminal No. 07-186-01. (Docket No. 1.) For the reasons set forth below, we order a hearing on the issue of whether or not Castro-Davis was advised of all plea options, but we deny the remainder of the motion.

I.

Background

On April 25, 2007, the grand jury indicted Castro-Davis for several offenses relating to a carjacking that resulted in death. (Crim. No. 07-186-01, Docket No. 13.) On March 10, 2008, the jury found Castro-Davis guilty on all three counts. (Crim. No. 07-186-01, Docket No. 244.) We sentenced Castro-Davis to five years imprisonment for conspiracy; to the remainder of his natural life for the carjacking itself, to be served concurrently; and to seven years for the use of a firearm during the crime, to be served consecutively to the other sentences. Through this point, his lawyer was Epifanio Morales-Cruz (Crim. No. 07-186-01, Docket No. 275.) Mr. Morales-Cruz is an

experienced attorney, having served as an Assistant U.S. Attorney and as an Assistant Federal Public Defender for many years.

Castro-Davis timely appealed. U.S. v. Castro-Davis, 612 F.3d 53 (1st Cir. 2010). On July 16, 2010, the First Circuit affirmed Castro-Davis' convictions, but remanded for resentencing. Id.; (Crim. No. 07-186-01, Docket No. 305). On November 30, 2010, we resentenced Castro-Davis to the same terms as in the original judgment. He was represented at resentencing by Rafael Anglada-López (Crim. No. 07-186-01, Docket No. 342.) Castro-Davis timely appealed, and his resentencing was affirmed on May 15, 2012. (Crim. No. 07-186-01, Docket Nos. 363, 379.) The First Circuit issued its mandate on July 2, 2012. On August 28, 2013, Castro-Davis filed the instant motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. (Docket No. 1.) The government opposed. (Docket No. 3.) Castro-Davis replied. (Docket No. 6.)

II.

Legal Standard

A federal district court has jurisdiction to entertain a § 2255 petition when the petitioner is in custody under the sentence of a federal court. See 28 U.S.C. § 2255. To file a timely motion, a petitioner has one year from the date his judgment becomes final. 28 U.S.C. § 2255(f). His judgment became final on the last day that he could have filed a petition for a writ of certiorari, which was ninety days after the entry of the Court of Appeals' judgment. Sup. Ct. R. 13(1); Clay v. United States, 537 U.S. 522 (2003). Therefore, Castro-Davis' petition is timely and we have jurisdiction.

A federal prisoner may challenge his sentence on the ground that, inter alia, it "was imposed in violation of the Constitution or laws of the United States." Id. A petitioner cannot be granted relief on a claim that has not been raised at trial or direct

appeal, unless he can demonstrate both cause and actual prejudice for his procedural default. See United States v. Frady, 456 U.S. 152, 167 (1982). Indeed, "[p]ostconviction relief on collateral review is an extraordinary remedy, available only on a sufficient showing of fundamental unfairness." Singleton v. United States, 26 F.3d 233, 236 (1st Cir. 1994). Claims of ineffective assistance of counsel, however, are exceptions to this rule. See Massaro v. United States, 538 U.S. 500, 123 (2003) (holding that failure to raise ineffective assistance of counsel claim on direct appeal does not bar subsequent § 2255 review.)

III.

Discussion

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

Castro-Davis alleges several grounds for habeas relief. He alleges that trial counsel was ineffective for failing to make proper objections; that his eighty-four-month sentence must be reduced to sixty months in light of Alleyne v. United States, ___ U.S. ___ (2013), 133 S. Ct. 2151 (2013); and that trial counsel provided inaccurate advice during plea discussions. (Docket No. 1.)

A. Failure to make proper objections

To prove a claim of ineffective assistance of counsel, Castro-Davis must show that both: (1) the attorney's conduct "fell below an objective standard of reasonableness;" and (2) there is a "reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different." Strickland v. Wash., 466 U.S. 688, 688-94 (1984).

First, a trial witness testified that Castro-Davis told him "they" had done it "policeman style," and said that he understood that phrase to mean that they stopped the victim's car with a weapon and claimed to be policemen. Trial counsel did not object. Castro-Davis alleges that the witness' testimony as to the meaning of the phrase was improper because it was a "conclusion." (Docket No. 1 at 5.) This issue was already raised and considered on appeal. The First Circuit rejected the contention that the use of the phrase "policeman style" was too vague to support a jury finding that the taking of the car was done "by force and violence by intimidation." See Castro-Davis, 612 F.3d at 62. The First Circuit has held that when an issue has been disposed of on direct appeal, it will not be reviewed again through a § 2255 motion. United States v. Doyon, 16 Fed.Appx. 6, 9) 1st Cir. 2001); Singleton v. United States, 26 F.3d 233, 240 (1st Cir. 1994) (citing Dirring v. United States, 370 F.2d 862, 863 (1st Cir. 1967)). The Supreme Court has held that if a claim "was raised and rejected on direct review, the habeas court will not readjudicate it absent countervailing equitable considerations." Withrow v. Williams, 507 U.S. 680, 721 (1993). Given the First Circuit's decision in Castro-Davis' appeal that the phrase "policeman style" could support a jury finding that the taking of the car was done by force and violence, this issue does not warrant further consideration.

Secondly, at trial, we asked a witness in the presence of the jury whether she was afraid of being in court. Castro-Davis alleges that his counsel's failure to move for a mistrial constituted ineffectiveness. (Docket No. 1 at 5.) Petitioner is precluded from raising this issue in a Section 2255 motion because he failed to raise the issue on appeal. Bucci v. United States, 662 F.3d 18, 27 (1st Cir. 2011). However, even if it were not

precluded, it fails on the merits. Petitioner takes the question we asked the witness out of context. After allowing the prosecution to treat her as hostile, the witness was still unable to provide answers to the government's questions. We were concerned that the witness had been tampered with:

> THE COURT: Any cross?
>
> MR. MORALES-CRUZ: Yes, Your Honor.
>
> THE COURT: Please. Aside from law enforcement agents, has somebody else contacted you regarding your testimony in this case?
>
> THE WITNESS: Law enforcement?
>
> THE COURT: Aside from FBI agents or police officers, has somebody knocked on your door to ask you questions about this case?
>
> THE WITNESS: I was called and – I was called to – to – I don't remember exactly what it was. I remember I called Agent Means and asked him if I should talk to the defense. His name is Alvin something. I don't remember his last name. And I asked Agent Means if that was necessary, and he told me it wasn't necessary. That it was up to me. So I chose not to.
>
> THE COURT: Okay.
>
> THE WITNESS: And then this week I got – he went to my house, knocked on my door, and gave me a Subpoena to come here. Same guy.
>
> THE COURT: All right. Are you afraid of being here today?
>
> THE WITNESS: I'm really uncomfortable with it.
>
> THE COURT: Why?
>
> THE WITNESS: I'd rather not be.

THE COURT: What bothers you being here?

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

(Crim. No. 07-186-01, Docket No. 290 at 197-98). Here, our interaction with the witness was brief and her response in no way indicated that her fear of the courtroom was related to any fear she might have had of Castro-Davis. Nothing about her response could reasonably have prejudiced the jury against him. Castro-Davis' claim fails.

Castro-Davis also alleges that his counsel was ineffective for failing to object to several statements the government made during closing argument. First, the prosecutor told the jury: "And you hold them accountable for what they did, all three of them. You hold them accountable." (Docket No. 1 at 5.) Second, the government said: "Because you heard Jose Figueroa tell you how Felix Alberto described to him how they had done it police style, pointing a gun at him, slapping handcuffs on him, throw him in the backseat of his own car, and drove him to Jose Figueroa-Cartagena's house," which Castro-Davis claims is a misstatement. (Docket No. 1 at 6.) Third, the prosecutor said: "So Felix Gabriel did not say that they couldn't control Don Perez. That's not what he said. Think back to Jose Figueroa's testimony before you. What Felix Gabriel told Jose Figueroa was, we couldn't strangle him, that's what he said." (Docket No. 1 at 6.)

Castro-Davis already raised this issue on appeal. Addressing the issue, the First Circuit held:

> [T]he court's general closing instructions did properly counsel the jury regarding what constituted evidence and the fact that they were the sole judges of credibility. The instructions specifically reminded jurors they were the "sole judges of the credibility of the witnesses" and that "arguments and statements of counsel are not evidence." Given the evidence presented at trial from multiple witnesses, any potentially harmful effect from the prosecutor's closing was

> safeguarded by the district court's final jury instructions. See United States v. Mejía-Lozano, 829 F.2d 268, 274 (1st Cir. 1987)(finding that the district judge's standard instruction was sufficient to overcome any prejudice). [Quotations and citation in original.]

Castro-Davis, 612 F.3d at 68. Again, because Castro-Davis previously raised this issue on direct appeal, he is precluded from asserting it anew in a collateral proceeding. Singleton, 26 F.3d at 240.

B. Alleyne v. United States

Castro-Davis alleges that his sentence must be reduced from eighty-four months to sixty months in light of Alleyne v. United States, ___ U.S. ___ (2013), 133 S. Ct. 2151 (2013). He argues that this is because our 84-month mandatory minimum sentence was not authorized by the jury's verdict. (Docket No. 1 at 7.) Castro-Davis' Alleyne argument is misplaced. In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Supreme Court held that a fact must be submitted to a jury and found beyond a reasonable doubt if it increases a defendant's statutory mandatory maximum sentence. Alleyne extends this principle to facts that increase a defendant's statutory mandatory minimum sentence. The Supreme Court held in United States v. Booker, 543 U.S. 220 (2005), that Apprendi was not retroactively applicable. While the Supreme Court has not decided whether Alleyne applies retroactively to cases on collateral review, the United States Court of Appeals for the Seventh Circuit has suggested, without deciding, that because "Alleyne is an extension of Apprendi … [t]his implies that the Court will not declare Alleyne to be retroactive." Simpson v. United States, 721 F.3d 875 (7th Cir. 2013). At this time, several district courts have held that Alleyne does not apply retroactively to cases on collateral review. See Lassalle-Velazquez v. United States, 2013 WL 4459044 (D.P.R. Aug. 16, 2013); United States v. Stanley, 2013 WL 3752126, at *7 (N.D.Okla. July 16,

2013); United States v. Eziolisa, 2013 WL 3812087, at *2 (S.D.Ohio July 22, 2013); Affolter v. United States, 2013 WL 3884176, at *2 (E.D.Mo. July 26, 2013); United States v. Reyes, 2013 WL 4042508, at *19 (E.D.Pa. Aug. 8, 2013). Since neither the Supreme Court nor the First Circuit has held Alleyne to be retroactively applicable, we decline to do so here.

C. Advice during plea discussions

Castro-Davis alleges that his trial counsel provided inaccurate advice during plea discussions. He claims that he told counsel he wanted a plea option that did not require cooperation with the government, but that trial counsel said that was not available. Castro-Davis alleges that counsel "failed to advise the petitioner that he could have entered an 'open guilty plea.'" (Docket No. 1 at 9.) He points to a case from another circuit, United States v. Booth, 432 F.3d 542 (3rd Cir. 2005). According to Booth, an "open guilty plea" is a guilty plea made by the defendant without the benefit of a plea agreement. Id at n.1. We refer to it as a "straight plea."

We are skeptical of this claim, and Castro-Davis' assertion that he would have accepted a guilty plea is less credible given the record evidence that he steadfastly maintained his innocence post-conviction. (Docket No. 2 at 13.) However, due to an abundance of caution, we will hold an evidentiary hearing with Castro-Davis, as well as his two lead lawyers, Epifanio Morales-Cruz and Rafael Anglada-López. The evidentiary hearing will only investigate whether or not counsel advised Castro-Davis that he had the option to plead guilty without entering a cooperation agreement with the government. All other claims are summarily dismissed.

IV.

Conclusion

We will hold an evidentiary hearing to determine whether Castro-Davis was advised of his plea options. We **ORDER** that Castro-Davis, Morales-Cruz, and Anglada-López be available at the hearing to be held on **April 23, 2014, at 9:30 A.M.**

For the foregoing reasons, we hereby **DENY** the remainder of Castro-Davis' § 2255 motion (Docket No. 1). Pursuant to Rule 4(b) of the Rules Governing § 2255 Proceedings, summary dismissal of these claims is in order because it plainly appears from the record that Castro-Davis is not entitled to § 2255 relief from this court on those claims. Since this is not a final disposition until we address the issues described in Part C above during a hearing, we defer entry of judgment and a decision on the issuance of a certificate of appealability.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 18th day of March, 2014.

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