

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

DAVID SUSTACHE-RIVERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No. 14-1018 (JAF)

(Crim. No. 92-348 (JAF))

5  
6  
7 **OPINION AND ORDER**

8 Petitioner, David Sustache-Rivera, brings this petition under 28 U.S.C. § 2255 for  
9 relief from sentencing by a federal court, alleging that the sentence imposed violated his  
10 rights under federal law. He requests an order to vacate, set aside, or correct the sentence  
11 imposed in Cr. No. 92-348. (Docket No. 1.)

12 **I.**

13 **Background**

14 After a jury trial, Petitioner was found guilty for three separate charges of armed  
15 carjacking. (Crim. Docket No. 80.) Petitioner was sentenced to thirty-seven years. (Id.)  
16 Judgment was entered on September 18, 2008. (Crim. Docket No. 108.) Petitioner's  
17 convictions were affirmed on appeal. United States v. Rivera, 39 F.3d 1166 (1st Cir.  
18 1994). On May 6, 1997, Petitioner filed his first petition under Section 2255, claiming  
19 ineffective assistance of counsel. (Civ. 97-1709, Docket No. 2.) His motion was  
20 summarily dismissed. (Civ. 97-1709, Docket No. 7.) On April 13, 1999, Petitioner filed  
21 a motion for reconsideration. This motion was denied. (Civ. 97-1709, Docket No. 8.)

1 Petitioner then requested from the First Circuit authorization to file a second Section  
2 2255 petition. The First Circuit declined to grant his request. Sustache-Rivera v. United  
3 States, 221 F.3d 8 (1st Cir. 2000). On March 19, 2001, Petitioner’s writ of certiorari was  
4 denied by the Supreme Court. Sustache-Rivera v. United States, 532 U.S. 924 (2001).  
5 Petitioner now files a second motion for relief under 28 U.S.C. § 2255. (Docket No. 1.)  
6 Respondent opposes. (Docket No. 3.)

## 7 II.

### 8 Legal Standard

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



1 unless the defendant obtains certification from the appropriate court of appeals. Trenkler  
2 v. United States, 536 F.3d 85, X (1st Cir. 2008).

3 Here, Petitioner neither sought nor received authorization from the First Circuit  
4 Court of Appeals before filing his second motion to vacate, set aside, or correct his  
5 sentence pursuant to 28 U.S.C. § 2255. Furthermore, Petitioner provides no grounds for  
6 this court to conclude that the First Circuit Court of Appeals would certify his second  
7 petition. Petitioner's reliance on Alleyne is misplaced: neither the Supreme Court nor the  
8 First Circuit has held Alleyne to be retroactively applicable. See Lassalle-Velazquez v.  
9 United States, 2013 WL 4459044 (D.P.R. Aug. 16, 2013); Simpson v. United States, 721  
10 F.3d 875, 2013 WL 3455876, at \* 1 (7th Cir. July 10, 2013). Therefore, this court has no  
11 authority to consider Petitioner's present 2255 motion, and it must be dismissed.

#### 12 IV.

#### 13 Certificate of Appealability

14  
15 In accordance with Rule 11 of the Rules Governing § 2255 Proceedings, whenever  
16 issuing a denial of § 2255 relief we must concurrently determine whether to issue a  
17 certificate of appealability ("COA"). We grant a COA only upon "a substantial showing  
18 of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this showing,  
19 "[t]he petitioner must demonstrate that reasonable jurists would find the district court's  
20 assessment of the constitutional claims debatable or wrong." Miller-El v. Cockrell, 537  
21 U.S. 322, 338 (2003) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). While  
22 Petitioner has not yet requested a COA, we see no way in which a reasonable jurist could  
23 find our assessment of his constitutional claims debatable or wrong. Petitioner may  
24 request a COA directly from the First Circuit, pursuant to Rule of Appellate Procedure  
25 22.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11

**V.**

**Conclusion**

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

**IT IS SO ORDERED.**

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

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