UNITED STATES DISTRICT COURT DISTRICT OF PUERTO RICO

DAVID SUSTACHE-RIVERA,

Petitioner,

v.

Civil No. 14-1018 (JAF)

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

UNITED STATES OF AMERICA,

Respondent.

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.)

Civil No. 14-1018 (JAF)

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

- 7
- 8

II.

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 federal prisoner may challenge her sentence on the ground that, inter alia, it "was 11 12 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 13 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 collateral review is an extraordinary remedy, available only on a sufficient showing of 16 17 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 18 Massaro v. United States, 538 U.S. 500, 123 (2003) (holding that failure to raise 19 ineffective assistance of counsel claim on direct appeal does not bar subsequent § 2255 20 review). 21

1	

/

III.

Discussion

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

Section 2255 disfavors "second or successive" habeas petitions seeking to vacate,
set aside, or correct a sentence. See 28 U.S.C. § 2255; Burton v. Stewart, 549 U.S. 147,
153 (2007). A later petition that raises the same grounds as a previous petition is
considered a second or successive petition. Sustache-Rivera, 221 F.3d at 12-13. We
denied Petitioner's first Section 2255 motion on the merits. (Civ. 97-1709, Docket
No. 6.) Therefore, Petitioner's present motion is a "second or successive" application for
relief.

14 Before filing a second or successive motion under Section 2255, a defendant "shall move the appropriate court of appeals for an order authorizing the district court to 15 consider the application." 28 U.S.C. § 2244(b)(3)(A); see also, 28 U.S.C. § 2255 ("A 16 second or successive motion must be certified as provided in section 2244 by a panel of 17 the appropriate court of appeals"). The court of appeals may authorize a second or 18 19 successive Section 2255 petition only if it presents a claim not previously raised, and 20 contains either "newly discovered evidence" that establishes the defendant's innocence or "a new rule of constitutional law, made retroactive to cases on collateral review by the 21 22 Supreme Court." 28 U.S.C. § 2255; Burton, 549 U.S. 152; Tyler v. Cain, 533 U.S. 656, 661-62 (2001). A district court lacks jurisdiction over a second or successive petition 23

Civil No. 14-1018 (JAF)

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

Here, Petitioner neither sought nor received authorization from the First Circuit 3 4 Court of Appeals before filing his second motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Furthermore, Petitioner provides no grounds for 5 this court to conclude that the First Circuit Court of Appeals would certify his second 6 7 petition. Petitioner's reliance on Alleyne is misplaced: neither the Supreme Court nor the First Circuit has held Allevne to be retroactively applicable. See Lassalle-Velazquez v. 8 United States, 2013 WL 4459044 (D.P.R. Aug. 16, 2013); Simpson v. United States, 721 9 F.3d 875, 2013 WL 3455876, at * 1 (7th Cir. July 10, 2013). Therefore, this court has no 10 authority to consider Petitioner's present 2255 motion, and it must be dismissed. 11 12 IV. 13 **Certificate of Appealability** 14 In accordance with Rule 11 of the Rules Governing § 2255 Proceedings, whenever 15 issuing a denial of § 2255 relief we must concurrently determine whether to issue a 16 certificate of appealability ("COA"). We grant a COA only upon "a substantial showing 17 of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this showing, 18 "[t]he petitioner must demonstrate that reasonable jurists would find the district court's 19 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 Petitioner has not yet requested a COA, we see no way in which a reasonable jurist could 22 23 find our assessment of his constitutional claims debatable or wrong. Petitioner may request a COA directly from the First Circuit, pursuant to Rule of Appellate Procedure 24 22. 25

1	V.
2	Conclusion
3	For the foregoing reasons, we hereby DENY Petitioner's § 2255 motion (Docket
4	No. 1). Pursuant to Rule 4(b) of the Rules Governing § 2255 Proceedings, summary
5	dismissal is in order because it plainly appears from the record that Petitioner is not
6	entitled to § 2255 relief from this court.
7	IT IS SO ORDERED.
8	San Juan, Puerto Rico, this 20th day of February, 2014.
9 10 11	<u>S/José Antonio Fusté</u> JOSE ANTONIO FUSTE U. S. DISTRICT JUDGE