

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

CARLOS H. ROSADO-MÁRQUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No. 15-1042 (JAF)

(Crim. No. 10-251-14)

5
6 **OPINION AND ORDER**

7 Petitioner Carlos H. Rosado-Márquez (“Rosado-Márquez”) comes before the court
8 with a habeas corpus petition pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct
9 the sentence we imposed in Criminal No. 10-251-14 (Docket No. 1), and a motion for the
10 setting of an evidentiary hearing (Docket No. 9). For the following reasons, we deny
11 both his petition and his motion.

12 **I.**

13 **Background**

14 On November 12, 2010, Rosado-Márquez pleaded guilty to conspiracy to possess
15 with the intent to distribute at least two-hundred (200) grams but less than three-hundred
16 (300) grams of cocaine, in violation of 21 U.S.C. § 841(a)(1) and 860. He also pleaded
17 guilty to use or carrying of firearms during and in relation to a drug trafficking crime, in
18 violation of 18 U.S.C. § 924(c)(1)(A)(i) and (2). (Crim. No. 10-251-14, Docket
19 Nos. 727, 1189.) We sentenced Rosado-Márquez to thirty-seven (37) months
20 imprisonment as to count one and one-hundred and twenty (120) months as to count two,
21 to be served consecutively, for a total of one-hundred fifty-seven (157) months. (Crim.

1 No. 10-251-14, Docket No. 1189.) We also sentenced him to six years supervised release
2 as to count one and five years supervised release as to count two, to be served
3 concurrently. *Id.* On July 6, 2014, the First Circuit affirmed our judgment. (Crim.
4 No. 10-251-14, Docket No. 3114.) On April 7, 2014, the United States Supreme Court
5 denied Rosado-Márquez' petition for writ of certiorari. *Carlos H. Rosado-Márquez v.*
6 *United States*, 134 S. Ct. 1804 (2014).

7 On January 21, 2015, Rosado-Márquez filed the instant motion to vacate, set
8 aside, or correct his sentence pursuant to 28 U.S.C. § 2255. (Docket No. 1; Crim.
9 No. 10-251-14, Docket No. 3309.) The government responded. (Docket No. 7.)
10 Rosado-Márquez filed a reply and a motion for the setting of an evidentiary hearing.
11 (Docket Nos. 8, 9.)

12 II.

13 Jurisdiction

14 Rosado-Márquez is currently in federal custody, having been sentenced by this
15 district court. To file a timely motion, Rosado-Márquez had one year from the date his
16 judgment became final. 28 U.S.C. § 2255(f). His judgment became final when the
17 United States Supreme Court denied his petition for certiorari on April 7, 2014, and this
18 habeas petition falls within the time limit. *See Clay v. United States*, 537 U.S. 522, 527
19 (2003); *Rosado-Márquez*, 134 S.Ct. 1804 (2014); (Docket No. 1).

20 III.

21 Analysis

22 Rosado-Márquez argues that we lacked subject matter jurisdiction in this matter;
23 that he received ineffective assistance of counsel; and that we committed an abuse of

1 discretion. He also requests an evidentiary hearing. (Docket Nos. 1, 1-1, 9.) For the
2 following reasons, we deny his petition and his request for an evidentiary hearing.

3 **A. Subject Matter Jurisdiction**

4 Rosado-Márquez argues that we lacked subject matter jurisdiction because he was
5 allegedly incarcerated at the time the charged conduct occurred and was only involved in
6 the conspiracy for three months. (Docket No. 1 at 8; Docket No. 1-1 a 30.) We clearly
7 had subject matter jurisdiction, because a federal district court undoubtedly has
8 jurisdiction over federal crimes. We instead read this as an argument that no factual basis
9 existed for accepting his guilty plea. As the First Circuit already stated in deciding
10 Rosado-Márquez's appeal, "the district court was entitled to rely upon defendant's own
11 judicial admissions in determining that there was a factual basis for his guilty plea."
12 (Crim. No. 10-251-14, Docket No. 3114.)

13 **B. Ineffective Assistance of Counsel**

14 Rosado-Márquez argues that he received ineffective assistance of counsel on
15 several grounds. (Dockets No. 1, 4.) To prove this, Rosado-Márquez must show that
16 both: (1) the attorney's conduct "fell below an objective standard of reasonableness;" and
17 (2) there is a "reasonable probability that, but for counsel's unprofessional errors, the
18 result of the proceeding would have been different." *Strickland v. Wash.*, 466 U.S. 688-
19 94 (1984). In the context of plea agreements, the prejudice prong requires a "reasonable
20 probability that, but for counsel's errors, he would not have pleaded guilty and would
21 have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *Lafler v.*
22 *Cooper*, 132 S. Ct. 1376, 1384 (2012).

23 Rosado-Márquez alleges that his appellate counsel was ineffective for failure to
24 raise an *Alleyne* argument. (Docket No. 1 at 5.) Rosado-Márquez alleges that,

1 his sentence for the firearm crime, pursuant to 18
2 U.S.C. § 924(c), was increased above the mandatory
3 minimum of 5-years based on facts that were not
4 charged by indictment, submitted to a jury, proved
5 beyond a reasonable doubt by a jury, or agreed to be
6 stipulation, in violation of his Sixth Amendment right
7 to a jury trial.
8

9 (Docket No. 1 at 5.) However, the First Circuit already ruled on this exact issue in their
10 post-*Alleyne* decision on Rosado-Márquez's appeal, stating:

11 to the extent defendant argues pro se that the district
12 court improperly increased the mandatory minimum
13 on his firearm charge from five years to ten years
14 without notice, the court correctly noted the statutory
15 minimum and guideline sentence of five years, but
16 determined that an upward variance was warranted
17 based on the seriousness of defendant's crime, the need
18 for deterrence, and his risk of recidivism. See *United*
19 *States v. Politano*, 522 F.3d 69, 75-76 (1st Cir. 2008)
20 (no prior notice required for upward variance based on
21 need for deterrence and seriousness of defendant's
22 crime).
23

24 (Crim. No. 10-251-14, Docket No. 3114.)

25 Rosado-Márquez also alleges that his trial counsel was ineffective for failure “to
26 submit a pre-trial motion seeking to quash the vague and defective indictment.” (Docket
27 No. 1-1 at 23.) We have reviewed the 26-page indictment and do not find it to be vague.
28 (Crim. No. 10-251-14, Docket No. 3.)

29 Rosado-Márquez also contends that his trial counsel provided ineffective
30 assistance of counsel when he advised Rosado-Márquez to enter into an “erroneous plea
31 agreement where there was no evidence to support the plea/ and a erroneous stipulation to
32 an insufficient factual basis.” (Docket No. 1-1 at 28) (sic). The First Circuit already ruled
33 that a factual basis existed for Rosado-Márquez's plea. (Crim. No. 10-251-14, Docket

1 No. 3114.) Rosado-Márquez further alleges that he “made it clear to the presiding judge
2 that he did not understand what was really transpiring” and did not give a voluntary
3 confession. (Docket No. 1-1 at 29.) However, this is belied by the transcript, in which
4 Rosado-Márquez was lucid throughout, and in which the following dialogue occurred:

5 THE COURT: Do you feel competent to plead? That means
6 capable of accepting the charges in this case and your
7 involvement with knowledge of consequences.
8

9 THE DEFENDANT: Yes.
10

11 (Crim. No. 10-251-14, Docket No. 2133 at 5.)

12 **C. Abuse of Discretion**

13 Rosado-Márquez argues that we committed an abuse of discretion when we
14 “erroneously allowed the government, and his counsel to use an erroneous indictment and
15 stipulations in order to establish an erroneous factual basis, to impose a sentence.”
16 (Docket No. 1-1 at 31; *see also* Docket No. 1 at 9) (sic). We have already established
17 that this is contradicted by the record.

18 **D. Evidentiary Hearing**

19 Rosado-Márquez requests an evidentiary hearing. (Docket No. 1-1 at 32; Docket
20 No. 9.) Evidentiary hearings “are the exception, not the rule.” *United States v. McGill*,
21 11 F.3d 223, 225 (1st Cir. 1993). A hearing is unnecessary “when a § 2255 motion (1) is
22 inadequate on its face, or (2) although facially adequate is conclusively refuted as to the
23 alleged facts by the files and records of the case.” *McGill*, 11 F.3d at 226) (quoting
24 *Moran v. Hogan*, 494 F.2d 1220, 1222 (1st Cr. 1974)). All of Rosado-Márquez’ claims
25 have been dismissed and the alleged facts have been conclusively refuted by the record.
26 Therefore, there is no need for an evidentiary hearing.

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IV.**Certificate of Appealability**

In accordance with Rule 11 of the Rules Governing § 2255 Proceedings, whenever issuing a denial of § 2255 relief we must concurrently determine whether to issue a certificate of appealability (“COA”). In this respect, we state that it has become common practice to collaterally challenge federal convictions in federal court by raising arguments of dubious merit. This practice is overburdening federal district courts to the point of having some of these criminal cases re-litigated on § 2255 grounds. We look at this matter with respect to the rights of litigants, but also must protect the integrity of the system against meritless allegations. *See Davis v. U.S.*, 417 U.S. 333, 346 (1974) (in a motion to vacate judgment under §2255, the claimed error of law must be a fundamental defect which inherently results in a complete miscarriage of justice); *see also Dirring v. U.S.*, 370 F.2d 862 (1st Cir. 1967) (§ 2255 is a remedy available when some basic fundamental right is denied—not as vehicle for routine review for defendant who is dissatisfied with his sentence).

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)). While Rosado-Márquez has not yet requested a COA, we see no way in which a reasonable jurist could find our assessment of his constitutional claims debatable or wrong. Rosado-Márquez may request a COA directly from the First Circuit, pursuant to Rule of Appellate Procedure 22.

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V.

Conclusion

For the foregoing reasons, we hereby **DENY** Rosado-Márquez’s § 2255 motion (Docket No. 1) and **DENY** his motion for setting of an evidentiary hearing (Docket No. 9). 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 24th day of April, 2015.

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