

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 -----
4 August Term, 2001

5
6 (Argued: March 6, 2002 Decided: December 5, 2002
7 Motion Decided: February 9, 2009)
8

9 Docket No. 01-1471-cr

10 -----X
11 UNITED STATES OF AMERICA,
12
13 Appellee,
14
15 - v. -
16
17 WAYNE FABIAN,
18
19 Defendant-Appellant.
20 -----X

21 Before: McLAUGHLIN and POOLER, Circuit Judges.*
22

23 Defendant-Appellant moves to recall the mandate in this
24 case, which the Court issued in 2002. We construe the motion as
25 an application for leave to file a successive motion to vacate
26 Defendant-Appellant's sentence pursuant to 28 U.S.C. § 2255.
27 Because Defendant-Appellant has failed to meet the standard for

* This motion has been assigned to the same panel that decided the original appeal in this case. The third member of that panel, the Honorable Fred I. Parker, died in 2003. The two remaining members of the panel decide the motion pursuant to Second Circuit Local Rules § 0.14.

1 permission to file a successive § 2255 motion, the motion is
2 denied.

3 MOTION DENIED.

1 Wayne Fabian, pro se,
2 Defendant-Appellant.

3
4 PER CURIAM:

5 Defendant-Appellant Wayne Fabian moves, pro se, to recall
6 the December 2002 mandate affirming his conviction. The motion
7 is DENIED.

8 **BACKGROUND**

9 Fabian was convicted after a jury trial in the Eastern
10 District of New York on two counts of conspiracy to commit
11 robbery in violation of the Hobbs Act, 18 U.S.C. § 1951; one
12 count of attempted Hobbs Act robbery; and one count of
13 brandishing a weapon during a crime of violence. The Hobbs Act
14 prohibits robberies that "obstruct[], delay[], or affect[]
15 [interstate] commerce." 18 U.S.C. § 1951(a). Evidence at trial
16 showed that Fabian robbed people he believed to be loan sharks
17 and drug dealers. The district court instructed the jury that
18 loansharking and drug trafficking affected interstate commerce
19 and that, if the jury found the purpose of the conspiracies was
20 to obtain proceeds from loansharking and drug trafficking, it
21 should find the interstate-commerce element of the Hobbs Act to
22 be satisfied.

1 In December 2002, we affirmed Fabian's conviction, rejecting
2 his argument that the Government failed to prove that his crimes
3 affected interstate commerce. We held that, as a matter of law,
4 drug dealing and loansharking have an effect on interstate
5 commerce. See United States v. Fabian, 312 F.3d 550, 555-56 (2d
6 Cir. 2002). That same month, we issued the mandate affirming
7 Fabian's conviction.

8 In May 2004, Fabian, pro se, moved to vacate his sentence
9 pursuant to 28 U.S.C. § 2255. Fabian argued, among other things,
10 that the jury instructions that drug trafficking and loansharking
11 affected interstate commerce violated his rights to due process
12 and a jury trial. While that motion was pending in the district
13 court, this Court held that the Government must prove beyond a
14 reasonable doubt that a defendant's conduct affected interstate
15 commerce under the Hobbs Act, abrogating in part our decision
16 affirming Fabian's conviction. See United States v. Parkes, 497
17 F.3d 220, 229-30 (2d Cir. 2007). Shortly after the Court decided
18 Parkes, the district court denied Fabian's § 2255 motion, holding
19 that Parkes did not entitle Fabian to relief. In February 2008,
20 we denied Fabian's motion for a certificate of appealability.

21 Fabian now moves to recall the 2002 mandate affirming his
22 conviction.

1 **DISCUSSION**

2 We have held that when a defendant moves to recall the
3 mandate based on intervening precedent that calls into question
4 the merits of the decision affirming his conviction, we construe
5 the motion as one to vacate the defendant's sentence pursuant to
6 28 U.S.C. § 2255. See Bottone v. United States, 350 F.3d 59, 63
7 (2d Cir. 2003). The defendant in Bottone had previously filed an
8 unsuccessful § 2255 motion, and we denied the motion to recall
9 the mandate because it did not satisfy the standard for filing a
10 second or successive motion. See id. at 62-63. Section 2255 "is
11 generally the proper vehicle for a federal prisoner's challenge
12 to his conviction and sentence," Jiminian v. Nash, 245 F.3d 144,
13 146-47 (2d Cir. 2001), and it prevents a defendant from filing a
14 second collateral challenge unless we determine that the motion
15 is based on newly discovered evidence demonstrating that no
16 reasonable factfinder would have found the defendant guilty, or
17 "a new rule of constitutional law, made retroactive to cases on
18 collateral review by the Supreme Court, that was previously
19 unavailable." 28 U.S.C. § 2255(h).

20 Bottone is controlling here. Fabian relies on this Court's
21 decision in Parkes to argue that his conviction was wrongly
22 upheld. He therefore "questions the merits of the underlying
23 decision" affirming his conviction. Bottone, 350 F.3d at 63.
24 Because this motion would be Fabian's second under § 2255, he

1 must demonstrate that it is based on newly discovered evidence or
2 a new rule of constitutional law made retroactive by the Supreme
3 Court. See 28 U.S.C. § 2255(h). He has done neither. Fabian
4 presents no new evidence, and, even assuming Parkes established a
5 new constitutional rule, the Supreme Court has not made any such
6 new rule retroactive to cases on collateral review. Therefore,
7 Fabian cannot file a second § 2255 motion. As we have said, a
8 defendant "cannot evade the successive petition restrictions of
9 28 U.S.C. § 2255 . . . by framing his claims as a motion to
10 recall the mandate." Bottone, 350 F.3d at 63.

11 **CONCLUSION**

12 For the foregoing reasons, the motion to recall the mandate,
13 construed as an application to file a second or successive § 2255
14 motion, is DENIED.