

APPENDIX A

No. 23-2049

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jun 5, 2024

KELLY L. STEPHENS, Clerk

In re: BABUBHAI PATEL,
Movant.

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O R D E R

Before: NORRIS, SUHRHEINRICH, and READLER, Circuit Judges.

Babubhai Patel, a federal prisoner proceeding pro se, moves this court for an order authorizing the district court to consider a second or successive 28 U.S.C. § 2255 motion to vacate his sentence. *See* 28 U.S.C. §§ 2244(b)(3)(A), 2255(h).

A jury convicted Patel of numerous counts of healthcare fraud and distribution of controlled substances. *See United States v. Patel*, 579 F. App'x 449, 451 (6th Cir. 2014). His convictions stemmed from a conspiracy where pharmacies owned or controlled by Patel billed insurance companies for fraudulent drug orders. *Id.* The district court sentenced Patel to 204 months' imprisonment, and we affirmed. *Id.* at 452, 466. In 2015, Patel moved to vacate his sentence. The district court denied Patel relief, and we denied his application for a certificate of appealability. *See Patel v. United States*, No. 17-1889, 2018 WL 3726821 (6th Cir. Mar. 15, 2018). We denied Patel permission to file a second or successive motion to vacate in January 2019, *see In re Patel*, No. 18-1573 (6th Cir. Jan. 3, 2019), and again in September 2019, *see In re Patel*, No. 19-1483 (6th Cir. Sept. 11, 2019).

Patel moves for authorization to file a second or successive motion to vacate, seeking to bring a claim based on *Ruan v. United States*, 597 U.S. 450 (2022). In his motion, he argues that, because the Court decided *Ruan* after he filed his first § 2255 motion, his current proposed motion to vacate should not be considered second or successive. He requests a remand to the district court to consider the merits of his proposed claim.

We may authorize the filing of a second or successive § 2255 motion only if the movant makes a *prima facie* showing that the motion relies either on "newly discovered evidence" that

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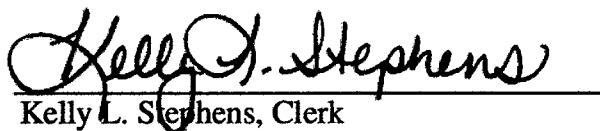
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“would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense” or on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255(h); *see* 28 U.S.C. § 2244(b)(3)(C). Although not all § 2255 motions that are filed second in time are considered second or successive, *see Magwood v. Patterson*, 561 U.S. 320, 341-42 (2010), we have explicitly rejected Patel’s argument “that a petition is not second or successive whenever it relies on a rule that did not exist when the petitioner filed his first petition,” *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (applying rule in § 2254 context).

Thus, Patel’s proposed claim must contain new evidence that establishes his innocence or rely on a new constitutional rule. Patel’s claim does neither. He acknowledges that his claim does not rely on “newly discovered evidence,” and *Ruan* did not announce a new rule of constitutional law. Instead, *Ruan* analyzed an issue of statutory interpretation, 21 U.S.C. § 841(a)’s mens rea requirement. *See Ruan*, 597 U.S. at 468; *see also In re Conzelmann*, 872 F.3d 375, 377 (6th Cir. 2017) (noting that cases involving issues of statutory interpretation do not satisfy § 2255(h)(2)).

Accordingly, Patel’s motion for authorization to file a second or successive § 2255 motion is **DENIED** and his motion to remand is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BABUBHAI PATEL,

Defendant.

2:11-CR-20468-TGB-MKM-1

HON. TERRENCE G. BERG

**ORDER DENYING MOTION
TO VACATE FOR WANT OF
JURISDICTION AND
GRANTING THE
GOVERNMENT'S MOTION
TO TRANSFER
PETITIONER'S SUCCESSIVE
MOTION TO VACATE TO
UNITED STATES COURT OF
APPEALS FOR THE SIXTH
CIRCUIT
(ECF NO. 1746, 1751)**

Babubhai Patel filed a motion to vacate his sentence under 28 U.S.C. § 2255 on July 12, 2023. ECF No. 1746, PageID.22347 (“Second-in-time 2255 Motion”). On August 21, 2023, the government moved to transfer the motion to the Sixth Circuit. ECF No. 1751, Page ID.22359 (“Government’s Motion and Brief to Transfer Petitioner’s Successive Motion to the Vacate to the Sixth Circuit”). Patel responded opposing the motion to transfer on September 1, 2023. ECF No. 1752. This is his fourth motion to vacate, and the prior three were not granted. ECF Nos. 1475, 1619, 1652, 1688, 1678, 1699. After reviewing the filings, this Court construes the instant motion as successive.

The Sixth Circuit has stated: “[w]hen a habeas petitioner files a motion attacking the merits of a conviction or sentence after the adjudication of her habeas petition is complete—meaning that the petitioner has lost on the merits and has exhausted her appellate remedies—the motion, irrespective of its characterization, is really a second or successive habeas petition.” *Clark v. United States*, 764 F.3d 653, 658 (6th Cir. 2014). The “paradigm case” is “when the prisoner files a motion, loses on the merits, exhausts appellate remedies, and then files another motion,” and it is conclusively considered “second or successive” “even though the second motion presents grounds that could not have been raised earlier.” *Id.* (citing *Johnson v. United States*, 196 F.3d 802, 804 (7th Cir. 1999)). That is what happened here. Patel’s motion claims that his jury instructions were erroneous under a 2022 Supreme Court opinion in *Ruan v. United States*, 597 U.S. ___ (2022). ECF No. 1746, PageID.22350–51.

The law requires that any “second or successive” motion “must be certified” by a panel of the Court of Appeals before it can be filed at the district court. 28 U.S.C. §§ 2255(h), 2244(b)(3). Because Patel did not first file this motion at the Sixth Circuit and has not been certified to file a successive motion, this Court does not have the jurisdiction to consider the motion. Therefore, it must deny the motion at this time and transfer the motion to the Sixth Circuit pursuant to 28 U.S.C. § 1631. *In re Smith*,

690 F.3d 809, 810 (6th Cir. 2012) (citing *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997)).

Accordingly, **IT IS ORDERED** that Movant's Motion to Vacate is construed as a successive § 2255 motion and is hereby **DENIED** for want of jurisdiction and **TRANSFERRED** to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1631. In doing so, the government's motion to transfer is **GRANTED**.

SO ORDERED.

Dated: November 29, 2023

/s/Terrence G. Berg

TERRENCE G. BERG

UNITED STATES DISTRICT JUDGE