

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 9, 2022
DEBORAH S. HUNT, Clerk

NORMAN ALAN KERR,

Petitioner-Appellant,

v.

CHRISTOPHER GOMEZ, WARDEN,

Respondent-Appellee.

ORDER

Before: GRIFFIN, NALBANDIAN, and READLER, Circuit Judges.

Norman Alan Kerr, a federal prisoner, petitions the court to rehear en banc its order denying his motion to recall the mandate that was issued in this appeal on March 2, 2022, following the panel order that affirmed the judgment of the district court dismissing his 28 U.S.C. § 2241 habeas corpus petition. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEBORAH S. HUNT, Clerk

ORDER

In 2009, a federal jury in the Middle District of North Carolina found Kerr guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). During Kerr’s trial, the government read to the jury a stipulation agreed to by both Kerr and the government that, “at the time of this offense,” Kerr had been convicted by a North Carolina court in 2008 of a crime punishable by a term of imprisonment exceeding one year and that Kerr knew of this conviction. The stipulation also noted that the conviction had not been expunged and that Kerr’s rights to possess a firearm had not been restored at the time of his alleged possession of a firearm. Indeed, Kerr had been convicted of three such crimes by the North Carolina court. At sentencing, Kerr objected to his designation as an armed career criminal under § 924(e) based on these three “violent felonies,” but the district court overruled the objection and sentenced Kerr as an armed career criminal to 268 months of imprisonment. On appeal, the Fourth Circuit Court of Appeals vacated the sentence and remanded the case for resentencing in light of *United States v. Simmons*, 649 F.3d

Appendix A

237 (4th Cir. 2011) (en banc). On resentencing, the district court again designated Kerr as an armed career criminal and imposed the same 268-month custodial sentence, and the court of appeals affirmed. *United States v. Kerr*, 737 F.3d 33 (4th Cir. 2013).

Kerr subsequently filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. The district court denied the motion, and the Fourth Circuit denied Kerr a certificate of appealability. *United States v. Kerr*, No. 18-6018 (4th Cir. Mar. 27, 2018). Kerr also filed multiple unsuccessful motions for authorization to file second or successive § 2255 motions. *See, e.g., In re Kerr*, No. 19-139 (4th Cir. Mar. 4, 2019).

In 2019, Kerr filed a § 2241 petition for a writ of habeas corpus in the district court for the Eastern District of Kentucky, which has jurisdiction over the warden of U.S. Penitentiary McCreary, where Kerr is confined. Kerr argued that his 2009 conviction for the § 922(g) firearm-possession offense should be vacated in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The district court entered judgment dismissing the petition with prejudice, determining that Kerr's claim, which challenged the legality of his detention, did not meet the requirements for the savings clause of 28 U.S.C. § 2255(e) that would permit habeas relief under § 2241. The court also denied relief on Kerr's "emergency motion under 'extraordinary and compelling' circumstances," which was filed in July 2020. Kerr filed a motion for reconsideration, which was similarly denied.

On appeal, the panel order affirmed the judgment of the district court. The panel concluded that Kerr could not demonstrate that *Rehaif* applied to the merits of his petition, such that it would be more likely than not that no reasonable juror would have found him guilty of the firearm-possession offense, even if the savings clause could make him eligible for § 2241 habeas relief. The panel observed that Kerr stipulated at trial that he knew of his status as a felon and that there was no evidence undermining the stipulation. The panel also noted the district court's observation that Kerr did not challenge the admissibility of the stipulation in his direct appeals or in his § 2255 motion, so he could not challenge the stipulation using the savings clause in a § 2241 petition. *See Taylor v. Owens*, 990 F.3d 493, 499 (6th Cir. 2021).

Appendix A

Kerr subsequently filed a petition for rehearing that the panel denied, concluding that it did not misapprehend or overlook any point of law or fact in its original order. After the mandate was issued, Kerr filed a petition for a writ of certiorari with the Supreme Court. The Supreme Court denied the petition and denied his subsequent petition for rehearing. Kerr then filed this motion to recall the mandate.

A motion to recall the mandate is referred by the clerk of the court “as a single-judge matter, to the judge who wrote the opinion.” 6 Cir. I.O.P. 41(b). The court has the inherent authority to recall its mandate, but “such power should only be exercised in extraordinary circumstances because of the profound interests in repose attached to a court of appeals mandate.” *United States v. Saikaly*, 424 F.3d 514, 517 (6th Cir. 2005). “The sparing use of the power demonstrates [that] it is one of last resort, to be held in reserve against grave, unforeseen contingencies.” *Calderon v. Thompson*, 523 U.S. 538, 550 (1998). Accordingly, a party seeking the recall of a mandate must demonstrate good cause through a showing of exceptional circumstances such as a fraud upon the court, clarification of an outstanding mandate, or correction of a clerical mistake. *Patterson v. Haskins*, 470 F.3d 645, 662 (6th Cir. 2006); *BellSouth Corp. v. FCC*, 96 F.3d 849, 851-52 (6th Cir. 1996) (enumerating “frequently cited” grounds for recalling a mandate).

Such extraordinary or exceptional circumstances or grave, unforeseen contingencies are not present here. In his motion, Kerr argues that he did not agree to the stipulation that he knew of his status as a felon, that the stipulation amounted to a forced and false confession, and that *United States v. Werle*, 35 F.4th 1195 (9th Cir. 2022), and *Seabrooks v. United States*, 32 F.4th 1375 (11th Cir. 2022), demonstrate intervening changes in law supporting his interpretation of *Rehaif*. He also argues that “[t]he same procedure used to deny Kerr relief was also used in” *United States v. Williams*, 850 F. App’x 393 (6th Cir. 2021). Although his citations of *Werle*, *Seabrooks*, and *Williams* in the motion to recall the mandate are new, Kerr’s challenges to the stipulation are based on exactly the same argument that he unsuccessfully raised in his petition for rehearing. The panel order affirming the district court’s judgment made clear that § 2241 habeas relief through the savings clause in the Sixth Circuit requires a Supreme Court decision potentially

Appendix A

affecting Kerr's conviction or sentence that was rendered after Kerr's first § 2255 motion was denied. *See Hueso v. Barnhart*, 948 F.3d 324, 333 (6th Cir. 2020). *Werle, Seabrooks, and Williams* are not decisions of the Supreme Court.

Kerr's arguments did not warrant rehearing when they were raised in his petition for rehearing, and they do not warrant recall of the mandate now that they have been raised in his current motion. The motion to recall the mandate is therefore **DENIED**.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk

Appendix A

Attach # 4 (A)

N.C. Sentencing
Record 4(B)
(10-Back Also)



NORMAN A KERR
Offender ID: 0534541
Inmate Status: INACTIVE
Probation/Parole/Post Release Status: INACTIVE
Gender: MALE
Race: WHITE
Ethnic Group: EUROPEAN/N.AM./AUST
Birth Date: 12/16/1962
Age: 55

Name(s) Of Record				
Last Name	Suffix	First Name	Middle Name	Name type
KERR		MORMAN	ALAN	COMMITTED
KERR		NORMAN		COMMITTED
KERR		NORMAN	A	COMMITTED
KERR		NORMAN	ALAN	COMMITTED
KERR		NORMAN	ALLEN	COMMITTED
KERR		NORMAN	ALAN	ALIAS

Most Recent Incarceration Summary	
Incarceration Status: INACTIVE	Total Incarceration Term: 10 MONTHS
Conviction Date: 10/31/2008	Projected Release Date: 04/25/2009
Primary Crime: RECEIVING STOLEN VEHICLE (PRINCIPAL)	Primary Crime Type: FELON
Special Characteristics: REGULAR	Current Status: N/A
Admission Date: 11/12/2008	Admission Facility: PIEDMONT CI
Control Status: REGULAR POPULATION	Next Control Review: UNKNOWN
Custody Classification: MINIMUM 1	Next Custody Review: 05/01/2009
Current Location: DAVIDSON COUNTY	Previous Location: DAVIDSON CC
Last Movement : EXPIRATION	Last Movement Date: 04/25/2009
Escapes?: N	

Appendix B (1)

Attach # 3

Appeal: 12-4775

Doc: 54

Filed: 12/03/2013

Pg: 18 of 31

U S V KERR
737 F 3d 33
4th Cir 2013
Dec 3 2013

DAVIS, Circuit Judge, dissenting:

Respectfully, I dissent.

The majority opinion runs counter to Supreme Court precedent, Carachuri-Rosendo v. Holder, 130 S. Ct. 27 (2010), and effectively guts our Circuit precedent, United States v. Simmons, 649 F.3d 237 (4th Cir. 2011) (en banc). It violates principles of comity and federalism by directing federal district courts to ignore the careful sentencing decisions of their state counterparts. And it goes to such lengths all to affirm a twenty-two-year sentence imposed on a fifty-one-year old mentally ill veteran who had previously never served more than ten months in prison, tagging him with the moniker "armed career criminal." We can do much better than this.

The Armed Career Criminal Act requires a fifteen-year minimum prison term for a defendant convicted of being a felon in possession of a firearm if he had three previous convictions "for a violent felony or a serious drug offense." 18 U.S.C. §§ 924(e)(1), 922(g). A "violent felony" is defined as, among other things, "any crime punishable by imprisonment for a term exceeding one year." Id. § 924(e)(2)(B). The issue in this case is: When a North Carolina state judge has made a finding that mitigating factors are present and sufficient to outweigh any aggravating factors, and the defendant's mitigated sentencing range for a North Carolina conviction therefore does not exceed

appendix C

No. 21-5027

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Sep 27, 2022

DEBORAH S. HUNT, Clerk

NORMAN ALAN KERR,

Petitioner-Appellant,

v.

CHRISTOPHER GOMEZ, WARDEN,

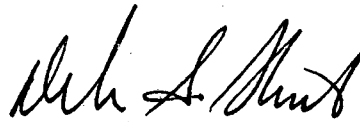
Respondent-Appellee.

ORDER

Before: GRIFFIN, NALBANDIAN, and READLER, Circuit Judges.

Norman Alan Kerr petitions for rehearing en banc of this court's order entered on August 3, 2022, denying his motion to recall the mandate that was issued in this appeal on March 2, 2022, following the panel order that affirmed the judgment of the district court dismissing his 28 U.S.C. § 2241 habeas corpus petition. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original motion was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Appendix D

**Additional material
from this filing is
available in the
Clerk's Office.**