

NOT RECOMMENDED FOR PUBLICATION

No. 23-1161

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Sep 7, 2023

DEBORAH S. HUNT, Clerk

GEMAR MORGAN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

)
)
)
)
) ON APPEAL FROM THE UNITED
) STATES DISTRICT COURT FOR
) THE EASTERN DISTRICT OF
) MICHIGAN

ORDER

Before: GIBBONS, Circuit Judge.

Gemar Morgan, a federal prisoner proceeding pro se, appeals from a district court judgment denying his motion to vacate, alter, or amend judgment filed under 28 U.S.C. § 2255. Morgan now applies for a certificate of appealability (COA). Morgan also moves to proceed in forma pauperis. As discussed below, we deny Morgan's COA application.

In October 2019, a grand jury returned a superseding indictment charging Morgan with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The indictment contained an allegation that Morgan knew that “he had previously been convicted of at least one crime punishable by imprisonment for a term exceeding one year” when he possessed the firearm. A jury convicted Morgan following a two-day trial. The district court found four predicate offenses qualifying Morgan for a sentence enhancement under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), and imposed a prison sentence of 180 months and two years of supervised release.

On direct appeal, Morgan challenged the sufficiency of the indictment, the sufficiency of the evidence, and the procedural reasonableness of his sentence. *United States v. Morgan*,

APPENDIX 14

over

"[A] COA may not issue unless 'the applicant has made a substantial showing of the denial of a constitutional right.'" *Slack v. McDaniel*, 529 U.S. 473, 483 (2000) (quoting 28 U.S.C. § 2253(c)(2)). A substantial showing is made where the applicant demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

In this § 2255 motion, Morgan challenged the findings that his right to possess a firearm had not been restored under state and federal law and argued that his prior sentences should not have been considered in reaching his current sentence. Morgan raised similar or even identical claims on direct appeal. "Absent exceptional circumstances, or an intervening change in the case law, [Morgan] may not use his § 2255 petition to relitigate" those claims. *Wright v. United States*, 182 F.3d 458, 467 (6th Cir. 1999) (collecting cases). Morgan has not demonstrated an exceptional circumstance or an intervening change in the case law that would allow him to present either claim in his § 2255 petition. Reasonable jurists could not debate whether the petition should have been

resolved in a different manner.

Morgan also complains that the district court did not provide him an opportunity to file a reply to the Government's response. "The moving party may file a reply to the respondent's answer or other pleading." Rules Governing Section 2255 Proceedings of the United States District Courts Rule 5(d). Morgan did file a reply, albeit after the judgment. Morgan also filed a motion for reconsideration, arguing that he had a right to file a reply before the district court denied the § 2255 motion. The district court denied Morgan's reconsideration motion, finding that Morgan's reply "contains no compelling arguments that would alter the Court's decision to deny Morgan's habeas petition." Contrary to Morgan's assertion, the district court did consider his reply. He suffered no prejudice. Reasonable jurists could not debate whether this issue deserves encouragement to proceed further. See *Slack*, 529 U.S. at 484 (addressing COA standard for "procedural ruling").

APPENDIX 14

OVER

RECEIVED

No. 23-1161

DEC 08 2023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KELLY L. STEPHENS, Clerk
GEMAR MORGAN, Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

FILED

Nov 22, 2023

KELLY L. STEPHENS, Clerk

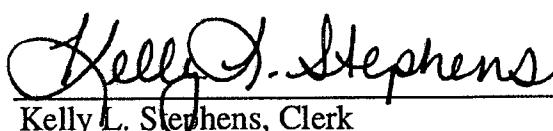
ORDER

Before: BOGGS, McKEAGUE, and BLOOMEKATZ, Circuit Judges.

Gemar Morgan, a federal prisoner, petitions for rehearing of our September 7, 2023, order denying his motion for a certificate of appealability. We have reviewed the petition and conclude that this court did not overlook or misapprehend any point of law or fact in denying his motion for a certificate of appealability. *See* Fed. R. App. P. 40(a)(2).

Accordingly, the petition for rehearing is **DENIED**. The motion for a certificate of appealability is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk