

No. 25-3459

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**FILED**

Oct 30, 2025

KELLY L. STEPHENS, Clerk

DREW MILLER,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: BATCHELDER, Circuit Judge.

Pro se federal supervisee Drew Miller appeals the district court's judgment denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Miller moves the court for a certificate of appealability (COA), to proceed in forma pauperis on appeal, and for the appointment of counsel. The court denies Miller's COA application for the reasons below.

Miller pleaded guilty to two counts of possessing unregistered firearm silencers, in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871.¹ The district court sentenced Miller to concurrent terms of 46 months of imprisonment and three years of supervised release.

As relevant here, Miller argued on appeal that § 5861(d) is facially unconstitutional under *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), and therefore his convictions were invalid. We reviewed this argument for plain error because Miller did not raise it in the district court. We then rejected Miller's facial challenge because he did not point to any caselaw holding that § 5861(d) is unconstitutional, and *Bruen* did not clearly dictate that result. *See United*

¹ Collectively, these statutes prohibit the possession of unregistered firearms. A silencer is a "firearm" under 26 U.S.C. § 5845(a)(7).

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States v. Miller, No. 24-3254, 2025 WL 1012727, at *4 (6th Cir. Mar. 31, 2025). We thus affirmed Miller's convictions.

Miller then filed a § 2255 motion, an addendum, and a supplement in the district court, raising two claims. First, Miller claimed that his trial attorneys performed ineffectively because they disobeyed his instructions to raise a *Bruen* challenge to § 5861(d). Miller asserted that his attorneys' refusal to move to dismiss in the district court doomed his *Bruen* claim on appeal because of the plain-error standard. Second, Miller claimed that his guilty plea was involuntary because he objected during his plea hearing that he did not want to lose his gun rights under 18 U.S.C. § 922(g)(1), which prohibits convicted felons from possessing firearms. Further, Miller argued that his guilty plea was involuntary because his trial attorney failed to advise him that plain-error review would apply to his *Bruen* claim on appeal, and pressure from family members and the harsh conditions of his pretrial confinement coerced him into pleading guilty.

The district court held that a silencer is a firearm accessory and not a "bearable arm" under the Second Amendment. The court concluded therefore that *Bruen* did not apply to § 5861(d) and that any argument to the contrary would have been meritless. As a result, the court concluded that Miller's attorneys did not perform ineffectively by refusing to move to dismiss. The court then found that Miller's guilty plea was not involuntary, despite his objection, because he chose to proceed with the plea hearing after the court advised him that his convictions would prohibit him from possessing firearms. The court therefore denied Miller's motion to vacate and declined to issue a COA.

Miller then filed a second and third supplement to his motion to vacate and a Federal Rule of Civil Procedure 59(e) motion to alter or amend the judgment. Miller's second supplement claimed that his trial attorneys performed ineffectively because they did not move to suppress evidence from the two car searches that yielded the unregistered silencers. Miller's third supplement submitted purportedly new evidence that his family coerced him into pleading guilty. Miller's Rule 59(e) motion argued that the district court erred by denying his § 2255 motion without considering his second and third supplements and his allegedly coercive pretrial

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confinement conditions. Miller also asserted that the court erred by not considering that the Department of Justice (DOJ) might soon decide that silencers qualify as protected firearms.

The district court pointed out that it could not have considered Miller's second and third supplements because he did not file them until after it had denied his motion to vacate. Nevertheless, the court found that nothing in Miller's supplements would have altered its conclusion that he was not entitled to relief from his convictions. The court then found that even if the DOJ changed its position on silencers, Miller still had no case law to support his claim that his convictions violate the Second Amendment. The court thus denied Miller's Rule 59(e) motion and once again declined to issue a COA.

Miller appealed and now moves this court for a COA.

A COA may be issued on a § 2255 motion "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Miller first claimed that his trial attorneys should have raised a *Bruen* challenge to § 5861(d). *Bruen* held that the government must prove that any regulation that infringes an individual's Second Amendment right to possess firearms "is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 1.

To prevail on an ineffective-assistance claim, Miller had to demonstrate both constitutionally deficient performance by his attorneys and a reasonable probability that the result of the proceedings would have been different absent the alleged errors. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1987). In evaluating an attorney's performance, the reviewing court must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

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The grand jury first indicted Miller in May 2022 (a superseding indictment followed in September 2022), the Supreme Court decided *Bruen* in June 2022, Miller pleaded guilty in July 2023, and the district court sentenced him in March 2024. During this approximately two-year period, no federal circuit court of appeals addressed whether *Bruen* applies to silencers. And the consensus, both before and after *Bruen*, is that the Second Amendment does not protect the possession of a silencer.² *United States v. Saleem*, No. 23-4693, 2024 WL 5084523, at *2 (4th Cir. Dec. 12, 2024) (per curiam); *United States v. Cox*, 906 F.3d 1170, 1186 (10th Cir. 2018); *United States v. Bradley*, 766 F. Supp. 3d 769, 781-82 (S.D. Ohio 2025) (collecting cases). And no case law supported an argument to the contrary. Cf. *United States v. Bolatete*, 977 F.3d 1022, 1036 (11th Cir. 2020) (“Neither this Court nor the Supreme Court has ever held that silencers are ‘typically possessed by law-abiding citizens for lawful purposes.’ In fact, neither Court has ever decided the preliminary question of whether silencers are ‘Arms’ for Second Amendment purposes.” (quoting *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008))). Consequently, Miller’s attorneys could have reasonably concluded that a *Bruen* challenge to § 5861(d) would not have succeeded. An attorney does not render ineffective assistance by refusing to file meritless motions. See *Moore v. Mitchell*, 708 F.3d 760, 776 (6th Cir. 2013). Accordingly, reasonable jurists would not debate the district court’s denial of this claim.

Miller next claimed that his guilty plea was involuntary because during his plea hearing he objected to losing his right to possess firearms. The district court denied this claim as meritless because Miller pleaded guilty despite his objection. Because Miller could have but did not raise his involuntary-plea claim on direct appeal, he procedurally defaulted it. See *Witham v. United States*, 97 F.4th 1027, 1031 (6th Cir. 2024), cert. denied, 145 S. Ct. 1438 (2025); *Ray v. United States*, 721 F.3d 758, 761 (6th Cir. 2013). A federal prisoner cannot obtain relief on a procedurally defaulted claim. See *Witham*, 97 F.4th at 1031. And Miller cannot establish cause and prejudice

² In *United States v. Peterson*, ___ F.4th ___, No. 24-30043, 2025 WL 2462665, at *4-7 (5th Cir. Aug. 27, 2025), the Fifth Circuit assumed that a silencer is an “arm” under the Second Amendment but rejected the defendant’s as-applied *Bruen* challenge to the National Firearms Act’s suppression-registration requirement.

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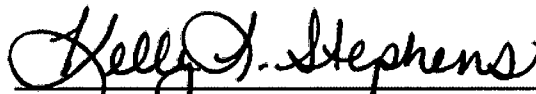
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to overcome the default. Miller procedurally defaulted ineffective assistance of appellate counsel as cause by not raising that claim in his § 2255 motion, *see Edwards v. Carpenter*, 529 U.S. 446, 453 (2000), and he is not actually innocent of possessing unregistered silencers, *see Witham*, 97 F.4th at 1031. Accordingly, reasonable jurists would not debate whether this claim deserves encouragement to proceed further. *See Moody v. United States*, 958 F.3d 485, 488 (6th Cir. 2020).

Finally, Miller's § 2255 motion was ripe for disposition when the district court issued its order. The court, in other words, did not prematurely deny the motion. And because Miller's second and third supplements were not before the district court at that time, reasonable jurists would not debate whether the court erred in denying Miller's Rule 59(e) motion. *See United States v. Hardin*, 481 F.3d 924, 926 & n.1 (6th Cir. 2007).

For these reasons, the court **DENIES** Miller's COA application and **DENIES** all other pending motions as moot.

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 10/30/2025.

Case Name: Drew Miller v. USA

Case Number: 25-3459

Docket Text:

ORDER filed UPON FULL REVIEW of the record and any submissions by the parties, IT IS ORDERED that the application for a certificate of appealability is DENIED. [7370727-2] [7375610-2] and DENIES all other pending motions as moot. motion to proceed ifp [7370735-2] appointment of counsel [7396221-2]. Alice M. Batchelder, Circuit Judge.

The following document(s) are associated with this transaction:

Document Description: Order

Notice will be sent to:

Mr. Drew Miller

Unit 1122
5210 Hyland Hills Avenue
Sarasota, FL 34241

A copy of this notice will be issued to:

Mr. Peter E. Daly
Ms. Sandy Opacich

No. 25-3459

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

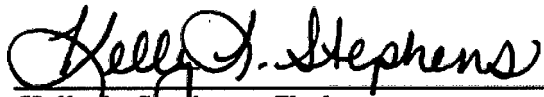
FILED
Dec 17, 2025
KELLY L. STEPHENS, Clerk

DREW MILLER,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	<u>ORDER</u>
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent-Appellee.	)	

Before: WHITE, BUSH, and NALBANDIAN, Circuit Judges.

Drew Miller petitions for rehearing en banc of this court's order entered on October 30, 2025, denying his application for a certificate of appealability. 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 application 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


Kelly L. Stephens, Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Kelly L. Stephens
Clerk

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Filed: December 17, 2025

Mr. Drew Miller
Unit 1122
5210 Hyland Hills Avenue
Sarasota, FL 34241

Re: Case No. 25-3459
Drew Miller v. USA
Originating Case No. 5:22-cr-00269-15:25-cv-00769

Dear Mr. Miller,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Kelly Stephens
En Banc Coordinator: Beverly
Direct Dial No. 513-564-7077

cc: Mr. Peter E. Daly

Enclosure