

NOT RECOMMENDED FOR PUBLICATION

No. 19-5569

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JERRY LUKE,

Defendant-Appellant.

FILED
Apr 15, 2020
DEBORAH S. HUNT, Clerk

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF
KENTUCKY

ORDER

Before: GRIFFIN, KETHLEDGE, and STRANCH, Circuit Judges.

Jerry Luke, a pro se federal prisoner, appeals a district court's order denying his motion for a hearing to expand the record. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*.

Pursuant to a written agreement, Luke pleaded guilty to possession of child pornography and waived his right to appeal and collaterally attack his plea, conviction, and sentence on grounds other than ineffective assistance of counsel. The district court sentenced Luke to 150 months in prison and a life term of supervised release and, over a year later, imposed restitution in the amount of \$10,500.

On appeal, we affirmed the restitution award and concluded that we did not have jurisdiction over issues unrelated to restitution. *United States v. Luke*, No. 18-5857 (6th Cir. July 10, 2019) (order).

While the matter of restitution was pending, Luke filed a § 2255 motion and asserted that trial counsel rendered ineffective assistance. Upon the recommendation of a magistrate judge, the

No. 19-5569

- 2 -

district court denied the § 2255 motion on the merits. We declined to issue a certificate of appealability. *Luke v. United States*, No. 18-6251 (6th Cir. Mar. 25, 2019) (order).

Shortly thereafter, Luke filed his motion for a hearing to expand the record, seeking to add all exculpatory evidence that the prosecutor possessed and “all *Brady* [v. *Maryland*, 373 U.S. 83 (1963),] violations.” The district court denied the motion based on Luke’s collateral appeal waiver.

In his timely appeal, Luke does not argue that the district court erred by denying his motion. Instead, he reasserts his *Brady* claims and raises new claims of ineffective assistance of trial counsel, prosecutorial misconduct, and judicial misconduct. The United States responds that Luke’s motion for a hearing is an impermissible successive § 2255 motion and that his claims are barred by the law-of-the-case doctrine. The United States also moves to dismiss the case based upon the appeal waiver.

To the extent that Luke’s motion for a hearing raised claims challenging his conviction, his pleading was in fact a second or successive § 2255 motion that the district court lacked jurisdiction to consider. *See Moreland v. Robinson*, 813 F.3d 315, 322 (6th Cir. 2016). In lieu of denying Luke’s motion, the district court should have transferred it to this court as a request for leave to file a second or successive § 2255 motion. *See id.* at 325 (citing *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997)). We may remedy the error by construing Luke’s brief as making that request. *See id.*

To obtain leave to file a second or successive § 2255 motion, a movant must make a *prima facie* showing of:

- (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
- (2) 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 also* 28 U.S.C. § 2244(b); *Tyler v. Cain*, 533 U.S. 656, 662 (2001). Section 2255(h) does not require the dismissal of claims presented in a prior motion to vacate. *Williams v. United States*, 927 F.3d 427, 434 (6th Cir. 2019).

No. 19-5569

- 3 -

Luke has failed to make a *prima facie* showing because he does not rely on newly discovered evidence or a new rule of constitutional law made retroactive by the Supreme Court to cases on collateral review. We decline to consider other arguments raised by the United States.

Accordingly, we **AFFIRM** the district court's order, we **DENY** the construed motion for leave to file a second or successive § 2255 motion, and we **DENY** all other pending motions as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk