IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

JOHN E. HARGROVE,

Petitioner,

v. Civil Action No. **3:19CV364**

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION

John E. Hargrove, a federal inmate proceeding *pro se*, submitted a 28 U.S.C. § 2241 Petition. ("§ 2241 Petition," ECF No. 1.) For the reasons set forth below, the § 2241 Petition will be dismissed without prejudice for want of jurisdiction.

I. Procedural History

On October 3, 2018, a jury sitting in the United States District Court for the Northern District of West Virginia ("Sentencing Court") convicted Hargrove of attempted transfer of obscenity to a minor (Count One), transportation of child pornography (Count Two), and attempted enticement of a minor (Count Three). *See Hargrove v. United States*, Nos. 3:12–CV–124, 3:07–cr–58, 2013 WL 6148071, at *6–7 (W.D. Va. Nov. 22, 2013). The Sentencing Court sentenced Hargrove to 120 months on Count One, 240 months on Count Two, and life on Count Three, to be served concurrently. *See id.* at *7. The United States Court of Appeals for the Fourth Circuit affirmed his convictions and sentences. *See United States v. Hargrove*, 625 F.3d 170, 172 (4th Cir. 2010). By Memorandum Opinion and Order entered on November 22, 2013, the Sentencing Court denied a 28 U.S.C. § 2255 motion filed by Hargrove. *Hargrove*, Nos. 3:12–CV–124, 3:07–cr–58, 2013 WL 6148071, at *5. In his present § 2241 Petition, Hargrove

attacks the validity of the search warrants leading to his arrest and the sufficiency of the evidence to sustain his convictions.

II. Analysis

A motion pursuant to 28 U.S.C. § 2255 "provides the primary means of collateral attack" on the imposition of a federal conviction and sentence, and such motion must be filed with the sentencing court. *See Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000) (quoting *Cox v. Warden, Fed. Det. Ctr.*, 911 F.2d 1111, 1113 (5th Cir. 1990)). A federal inmate may not proceed under 28 U.S.C. § 2241 unless she or he demonstrates that the remedy afforded by 28 U.S.C. § 2255 "is inadequate or ineffective to test the legality of [her or his] detention." 28 U.S.C. § 2255(e).[1] "For example, attacks on the execution of a sentence are properly raised in a § 2241 petition." *In re Vial*, 115 F.3d 1192, 1194 n.5 (4th Cir. 1997) (citing *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996); *Hanahan v. Luther*, 693 F.2d 629, 632 n.1 (7th Cir. 1982)). Nevertheless, the Fourth Circuit has emphasized that "the remedy afforded by § 2255 is not rendered inadequate or ineffective merely because an individual has been unable to obtain relief under that provision or because an individual is procedurally barred from filing a § 2255 motion." *Id.* (citations omitted).[2]

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[1] "This 'inadequate and ineffective' exception is known as the 'savings clause' to [the] limitations imposed by § 2255." *Wilson v. Wilson*, No. 1:11cv645 (TSE/TCB), 2012 WL 1245671, at *3 (E.D. Va. Apr. 12, 2012) (quoting *In re Jones*, 226 F.3d 328, 333 (4th Cir. 2000)).

[2] Hargrove cannot avoid the bar on filing successive 28 U.S.C. § 2255 motions by suggesting he is filing a petition for a writ of habeas corpus under 28 U.S.C. § 2241. "Call it a motion for a new trial, arrest of judgment, mandamus, prohibition, coram nobis, coram vobis, audit querela . . . , the name makes no difference. It is substance that controls." *Melton v. United States*, 359 F.3d 855, 857 (7th Cir. 2004) (citing *Thurman v. Gramley*, 97 F.3d 185, 186–87 (7th Cir. 1996)).

The Fourth Circuit has stressed that an inmate may proceed under § 2241 to challenge his conviction "in only very limited circumstances." *United States v. Poole*, 531 F.3d 263, 269 (4th Cir. 2008) (citation omitted) (internal quotation marks omitted). The "controlling test," *id.*, in the Fourth Circuit is as follows:

> [Section] 2255 is inadequate and ineffective to test the legality of a conviction when: (1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner *was convicted is deemed not to be criminal*; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law.

In re Jones, 226 F.3d 328, 333–34 (4th Cir. 2000) (emphasis added). The Fourth Circuit formulated this test to provide a remedy for the "fundamental defect presented by a situation in which *an individual is incarcerated for conduct that is not criminal* but, through no fault of his own, has no source of redress." *Id.* at 333 n.3 (emphasis added).

Hargrove fails to satisfy the second prong of *In re Jones*. *See id.* at 334. Hargrove fails to demonstrate that "subsequent to his direct appeal and his first § 2255 motion, the substantive law changed such that the conduct of which he *was convicted is deemed not to be criminal*." *Id.* (emphasis added). The conduct of which Hargrove stands convicted—attempted transfer of obscenity to a minor, transportation of child pornography, and attempted enticement of a minor—remains criminal. Rather than demonstrate how he satisfies the test for bringing a § 2241 petition, Hargrove continues to argue that the evidence was insufficient to convict him and that he is innocent. Those arguments are not properly brought by way of § 2241 simply because he is barred from raising those claims by way of § 2255.

Because Hargrove fails to demonstrate that § 2255 is inadequate and ineffective to test the legality of his conviction, he may not proceed under § 2241. Accordingly, the § 2241 Petition (ECF No. 1) will be DISMISSED WITHOUT PREJUDICE for want of jurisdiction.

An appropriate Order shall issue.

/s/
M. Hannah Lauck
United States District Judge

Date: JUL 02 2019
Richmond, Virginia