IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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AVERY CLEMMONS,

Petitioner,

v.

J.T. O'BRIEN, WARDEN,
UNITED STATES OF AMERICA,

Respondents.

OPINION AND ORDER

00-C-0278-C

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This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241. Petitioner is an inmate at the Federal Correctional Institution in Oxford, Wisconsin, serving a sentence imposed in the Southern District of Ohio. Petitioner contends that the conviction underlying his sentence is invalid because it was based upon evidence obtained in violation of the Fourth Amendment. The $5.00 filing fee has been paid in full.

From his petition and the record evidence attached to it, I find the following facts.

FACTS

On October 15, 1991, police officers received an anonymous telephone call. The caller

said that petitioner and two others (petitioner and a second man were identified by name) soon would leave an apartment at 3881 Reading Road, enter a white car with temporary license plates, drive to Kellogg Avenue and consummate a drug transaction. Police in an unmarked car proceeded to 3881 Reading Road. Within five to ten minutes, the police officers observed petitioner and two others exit the apartment building carrying a brown bag, enter a white car with temporary license plates and proceed south on Reading Road, which is in the direction of Kellogg Avenue. Because petitioner's car sped up, changed lanes quickly several times and made a sudden turn, the police officers believed the driver had spotted them and was attempting to elude them. A marked police car pulled petitioner's car over. The brown bag was found to contain several thousand dollars in cash. After being advised of his rights, petitioner offered to show the officers "where all the dope was" in exchange for a deal.

DISCUSSION

The primary avenue for collateral attack on a federal conviction is 28 U.S.C. § 2255. See Walker v. O'Brien, Nos. 96-4010, 98-1328, slip. op. at 12 (7th Cir. June 22, 2000). Under § 2255, a prisoner may file one motion to vacate, correct or set aside his sentence with the court that imposed the sentence. Petitioner has already filed one such motion in the Southern District of Ohio. A second or successive § 2255 motion may be filed only with leave of the

Court of Appeals for the Sixth Circuit. Granting of leave is limited to instances in which there is newly discovered evidence or the Supreme Court establishes a new constitutional right that is available retroactively. See § 2255.

Critically, for federal prisoners, § 2255 is nearly a complete substitute for the writ of habeas corpus. See In re Davenport, 147 F.3d 605, 607 (7th Cir. 1998). There is only a very narrow exception to § 2255 allowing a federal prisoner to seek a writ of habeas corpus under § 2241 when the remedies of § 2255 are "inadequate or ineffective to test the legality of his detention."

> A federal prisoner should be permitted to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion.

Davenport, 147 F.3d at 611. In Davenport, the court held that a federal prisoner who contended that his conviction was unsound in light of a new interpretation of a federal statute was allowed to petition for a writ of habeas corpus under § 2241 in the district court for the district in which he was imprisoned. For Davenport, the remedies afforded under § 2255 were inadequate. Although his argument was of a type that could have been raised in a § 2255 motion, he had already filed one such motion in the court in which he was convicted and could not obtain leave from the court of appeals to file another such motion because he was seeking relief pursuant to the Supreme Court's new interpretation of a federal statute, not because of

any newly established constitutional right. See Davenport, 147 F.3d at 610-611.

Petitioner contends that his claim qualifies for the narrow Davenport exception because of the Supreme Court's decision in Florida v. J.L., 120 S. Ct. 1375 (2000), which he argues renders the stop that led to his arrest and subsequent conviction unconstitutional under the Fourth Amendment. However, regardless whether petitioner's claim qualifies for the Davenport exception, it is blocked by the rule that habeas corpus relief may not be granted on the ground that evidence was obtained in violation of the Fourth Amendment where the prisoner has been provided an opportunity for full and fair litigation of a Fourth Amendment claim. See Stone v. Powell, 428 U.S. 465, 494 (1976). The record reveals that petitioner received a separate hearing solely devoted to his Fourth Amendment claim.

Morever, even in the very unlikely event that petitioner's Fourth Amendment claim was not barred under Stone, it would not qualify for the Davenport exception because it is meritless in light of Alabama v. White, 496 U.S. 325 (1990). Rarely is any case as similar to another as Alabama is to petitioner's. In Alabama, the police received an anonymous tip that a woman carrying cocaine in a brown attache case would be leaving her apartment at a particular time and driving a brown station wagon with a broken tail light to a particular motel. See id. at 327. The police then observed the suspect leave her apartment and drive a brown station wagon with a broken tail light toward the motel. See id. Although conceding that it was a "close case,"

the Supreme Court held that because of the indicia of reliability provided by the informant's corroborated predictive information, the decision to stop the suspect's vehicle did not violate the Fourth Amendment's prohibition against unreasonable searches ands seizures. Id. at 332.

Under Alabama, the decision to stop petitioner's vehicle was not unlawful. Because the anonymous tip was accompanied by predictive information regarding who petitioner was, when he would be leaving his apartment, what vehicle he would driving and where he would be going, all of which was corroborated by the police officers' independent observations, it provided sufficient indicia of reliability to establish the reasonable suspicion necessary to justify an investigatory stop. See id. Petitioner's only hope would be if Alabama were no longer good law, but it is. In Florida, 120 S. Ct. at 1378, the Supreme Court held that an anonymous tip, stating that a young black male standing at a bus stop wearing a plaid shirt was carrying a gun, lacked sufficient indicia of reliability to establish reasonable suspicion and justify an investigatory stop. In so holding, the Court also expressly reaffirmed Alabama's holding that anonymous tips accompanied by the indicia of reliability provided by predictive information establish reasonable suspicion to justify an investigatory stop. Id. at 1378.

For all of the foregoing reasons, petitioner's claim is without merit and must be dismissed.

ORDER

IT IS ORDERED that this court has no jurisdiction to entertain petitioner Avery Clemmon's petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241; his claim may be brought only under 28 U.S.C. § 2255 and only after he has obtained leave to file a second and successive petition from the Court of Appeals for the Sixth Circuit.

Entered this _____ day of June, 2000.

BY THE COURT:

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BARBARA B. CRABB
District Judge