

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

| | | |
|---------------------------|---|------------------------------|
| BRANDON HAU, |) | |
| |) | Civil No: _____ |
| Petitioner, |) | |
| |) | |
| v. |) | |
| |) | |
| UNITED STATES OF AMERICA, |) | Criminal No. 04-CR-30011-MJR |
| |) | |
| Respondent. |) | |

MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE
PURSUANT TO 28 U.S.C. § 2255

Comes Now, Petitioner, Brandon Hau, presently incarcerated in the Bureau of Prison facility located in Yankton, South Dakota, Register Number 29867-112, by and through his attorney, John D. Stobbs II, and respectfully moves this Honorable Court under 28 U.S.C. § 2255 for any relief and/or remedy available as a result of the sentence imposed by this Honorable Court on January 21, 2005, which violated Movant’s right to due process. This Motion is based upon the allegations contained herein, the Memorandum of Law submitted herewith, as well as all pleadings currently in the Court’s file. In support of his allegations, Mr. Hau states as follows:

JURISDICTION

1. Movant is “[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States.” As such original relief for Petitioner is properly within this Court and as such jurisdiction is proper pursuant to 28 U.S.C. §2255.

VENUE

2. As the sentencing court, the Southern District of Illinois is the appropriate venue pursuant to 28 U.S.C. §2255.

MOVANT

3. Movant Brandon Hau, Federal Register Number 29867-112, is currently incarcerated at the F.P.C. Durand, South Dakota, under a Judgment in a Criminal Case (“J&C”) filed January 21, 2005, from the United States District Court for the Southern District of Illinois (Hon. Michael J. Reagan, U.S.D.J., presiding); based on Mr. Hau’s guilty plea on October 5, 2004, this Court ordered Mr. Hau to serve a term of imprisonment of 30 months and recommended that he be admitted into the Bureau of Prisons’ Intensive Confinement Center for one count of possession with intent to distribute MDMA (ecstasy) in violation of 21 U.S.C. §841(a)(1).

EXHAUSTION OF REMEDIES AND ABSENCE OF OTHER FEDERAL FILINGS

4. Inasmuch as Mr. Hau has not proceeded administratively with the claims raised herein, he would point out that the Intensive Confinement Centers commonly referred to as the “boot camp” program have been abolished. They no longer exist.

5. The buildings used for the “boot camp” program have been vacated and the staff has been reassigned to other positions within the Bureau of Prisons.

6. Going through an administrative grievance procedure will not reopen the “boot camps.”

7. Likewise, by filing an administrative grievance with the Bureau of Prisons would not be worthwhile because the Bureau of Prisons would not have the authority to reduce Mr. Hau’s sentence or grant a sentencing alternative.

8. As such the pursuit of any administrative remedy within the Bureau of Prisons would be futile.

9. No administrative remedies exist through which Mr. Hau can address his claim besides a Motion under § 2255.

10. Mr. Hau has filed no direct appeal, collateral attack, or any other judicial process with respect to the Judgment here challenged, and no such matter is currently pending in any forum.

FACTUAL BACKGROUND

11. On October 5, 2004, Petitioner, Brandon Hau pled guilty in the United States District Court for the Southern District of Illinois (Hon. Michael J. Reagan, U.S.D.J., presiding) to one count of possession with intent to distribute MDMA (ecstasy) in violation of 21 U.S.C. §841(a)(1).

12. At the time Mr. Hau pleaded guilty in October of 2004, the state of the United States Sentencing Guidelines was in *flux*. It was not until January 12, 2005 that the Supreme Court decided *Booker v. Washington*, 543 U.S. 220 which made the Guidelines advisory and would have allowed for Mr. Hau to argue for a sentence of less than 30 months in accord with 18 U.S.C. §3553(a) and to avoid the disparity in sentencing that has occurred due to co-defendant Pham receiving the identical sentence as Mr. Hau.

13. Prior to his sentencing, Petitioner filed a Motion for Recommendation Pursuant to U.S. Sentencing Guideline Section 5F1.7 and to Self-Surrender to the Intensive Confinement Center.

14. Said Motion was granted by this Honorable Court but because the “boot camp” program had been abolished by the Bureau of Prisons, and unbeknownst to anyone, Petitioner is now required to be incarcerated for 30 months which is the same sentence his co-defendant Au Duy Pham received.

15. On January 14, 2005, all of the Intensive Confinement Centers within the Bureau of Prisons were unilaterally abolished by the Director of the Bureau of Prisons, Harley P. Lappin.

16. The announcement that the “boot camp” program no longer existed was not received by this Honorable Court until January 26, 2005.

17. Because, at the time of sentencing this Honorable Court was not aware that the “boot camp” program had been abolished a recommendation could not have been made that Mr. Hau participate in such a program, nor could Petitioner’s Motion for Recommendation Pursuant to U.S. Sentencing Guideline Section 5F1.7 and to Self-Surrender to the Intensive Confinement Center be granted.

18. As such this Honorable Court based its sentence on an objectively unreliable fact that was material to the sentence imposed, and it is Mr. Hau's position that his sentence was imposed in violation of his right to due process.

19. Mr. Hau respectfully submits that had the Court known at sentencing that the "boot camp" program had been abolished and pursuant to *Booker* another sentence could have been imposed.

20. In these respects, Mr. Hau respectfully submits that this Honorable Court inadvertently allowed an error; that this error substantially prejudiced Mr. Hau's right to full, individualized consideration at sentencing; and that this error in sentencing seriously affects the integrity of this Court's sentencing plan, and the fairness underlying the instant sentence vis-a-vis co-defendant Pham.

ALLEGATIONS

21. Movant adopts and incorporates by reference Paragraphs 1 to 20 as set forth, *supra*.

22. This Honorable Court accepted Mr. Hau's guilty plea on October 5, 2004 and sentenced him on January 21, 2005 while applying the United States Sentencing Guidelines (U.S.S.G.) as a mandatory body of laws, without regard to other factors mandated at 18 U.S.C. § 3553(a). *See transcript attached to Memorandum*

23. Mr. Hau's guilty plea and the subsequent sentence were based upon Mr. Hau's understanding that the "boot camp" program was still in existence. This Honorable Court incorrectly believed that the "boot camp" program was in existence at the time of sentencing and fashioned a sentence which would allow Mr. Hau to participate in the "boot camp" program.

24. Such misapprehension was false and unreliable.

25. This Honorable Court relied on the "boot camp" being in existence when it announced its sentence.

26. Such error was plain at the time of sentencing.

27. This constituted a material error of law and substantially affected Mr. Hau's rights by requiring him to be incarcerated for 30 months as opposed to what he would have received had he participated in the "boot camp" program.

28. Mr. Hau meets all requirement for vacation, and re-sentencing for error in his prior sentencing, in that Mr. Hau believes he has shown an error that is obvious, that affected his substantial rights, and that seriously affects the fairness, integrity, and public reputation of the instant sentencing proceedings.

RELIEF REQUESTED

WHEREFORE, Mr. Hau prays this Honorable Court:

1. **Declare** and adjudge that Mr. Hau's sentence was rendered in error, in light of the fact that there was no "boot camp" at the time he was sentenced;
2. **Declare**, and adjudge that because there was no "boot" camp" program when Mr. Hau was sentenced the instant sentence violates his right to due process;
3. **Grant** Mr. Hau's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255;
4. **Order** this matter scheduled for re-sentencing; and
5. **Grant** such other and further relief as may be appropriate.

Verification: I verify that the above allegations are true and correct to the best of my knowledge, information and belief.

BRANDON HAU

STOBBS LAW OFFICES

BY:

/s/John D. Stobbs,II
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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2005 a copy of the attached *Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255* was served on the following persons by depositing a copy of same in an envelope with postage prepaid in the United States Mails in the Post Office in Alton, Illinois addressed as set out, namely:

Mr. Jim Porter
Assistant U.S. Attorney
Nine Executive Drive, Suite 300
Fairview Heights, Illinois 62208

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