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.	)	

MOVANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

I. Introduction

2255's deal with fault. This case is unique because the fault involves the Bureau of Prisons' abrupt decision to terminate the Intensive Confinement Center, hereinafter referred to as the "boot camp." This decision blind-sided everyone involved and caused an inadvertent, yet obvious error regarding Mr. Hau's sentence.

At the outset it is crucial to make clear that this matter is ***not*** about Mr. Hau's eligibility in the "boot camp" program for the simple reason that at the time of his sentencing there was no "boot camp" program for which he could be eligible.

The purpose of this 2255 is to argue that the cancellation of the "boot camp" program prior to Mr. Hau's sentencing seems to have stifled the Court's sentencing intent, and frustrates the Court's recommendations regarding Mr. Hau's participation in the "boot camp" program. The sentence frustrates the purpose of 18 U.S.C. §3553(a) insofar as there is a disparity in sentencing. Mr. Hau, who everyone agrees was a minor participant in the underlying crime, received the exact sentence as his co-defendant Au Du Pham.

Mr. Hau requests that the Court review his unique circumstances, and find that as a result of the inadvertent error regarding the "boot camp" program that he should be resentenced to 15 months incarceration.

II. Waiver of Appeal

In his Plea Agreement, Mr. Hau waived "all appellate issues that might have been available had he exercised his right to trial." In the event the Government argues that Mr. Hau's Plea Agreement precludes him from raising the issues herein, it is his position that said waiver would be invalid and unenforceable because the errors at sentencing that form the basis for his claim were not contemplated in the Plea Agreement and invalidate the waiver of appellate rights.

Similarly, the fact that no one learned that the "boot camp" program had been abolished until after Mr. Hau was sentenced constitutes newly discovered evidence.

Mr. Hau contests the validity of his sentence because the sentence imposed was based on the erroneous belief that the Bureau of Prison's "boot camp" program was available. The validity of a sentence may be challenged under §2255 even though the constitutionality or lawfulness of the sentence was not at issue, because the error of law regarding the Bureau of Prisons' authority to make direct commitments made the sentence "otherwise open to collateral attack." See *U.S.A. v. Eakman*, 378 F.3d 294, at 298-99 (citing 28 U.S.C. § 2255).

III. Parity with co-defendant Pham

The underlying facts of this case show that co-defendant Pham was a "target" of law enforcement. He negotiated for the purchase of the pills in question and was in the process of negotiating for additional purchases from the undercover agent. Mr. Hau simply "held" the pills for Mr. Pham.

Both Mr. Hau and Mr. Pham are first time offenders who received a "safety valve" adjustment which meant that each was sentenced in Criminal History Category I. As a result of Mr. Hau's participation in the crime, he received a two level reduction for "minimal role" in the offense. Common sense suggests that Mr. Hau's sentence should be less than Mr. Pham's. Yet, Mr. Hau received the ***identical*** sentence as co-defendant Pham who actually received a 7 month reduction in his Guideline sentence at the time of his sentencing. Mr. Hau requests at the very least that he receive the same 7 month reduction received by Mr. Pham.

There is ***no*** mention whatsoever of 18 U.S.C. §3553(a) in the sentencing transcript. This Honorable Court did not discuss the sentence co-defendant Pham received, because it was expected that the "boot camp" program existed which would afford Mr. Hau the opportunity to serve less than 30 months in jail.

Mr. Hau would respectfully submit to this Honorable Court that for purposes of 18 U.S.C. §3553(a) his sentence should be reduced so that it reflects his role vis-a-vis Mr. Pham and feels that a sentence of 15 months would be appropriate.

IV. Due Process Violation

Turning to Mr. Hau's due process argument, his sentence should be vacated because it was imposed based on an objectively ascertainable error that prevented him from having a fair and accurate sentencing.

The Due Process Clause is violated when sentence is imposed in reliance on inaccurate information. *United States v. Tucker*, 404 U.S. 443, 447 (1972) (vacating sentence imposed not "in the informed discretion of a trial judge, but . . . founded at least in part upon misinformation of a constitutional magnitude"). The accuracy of the information is especially critical given Section 3553(a)'s command that the sentencing court consider factors under the advisory Guidelines, which include the need for education and vocational training and other corrections programs under 18 U.S.C. § 3553(a)(2)(D). Also see *Booker v. Washington*, 125 S. Ct. at 764-65.

At sentencing, this Honorable Court stated the following:

Page 12, Lines 9 - 19:

> ". . . I think this is particularly appropriate case for an individual such as Mr. Hau who is here on his first offense to receive any benefit he can and relief from a mandatory minimum sentence. Mr. Hau's participation in this offense appears to be limited to holding the 991 or 990 ecstasy tablets for co-defendant Faum, while Mr. Faum met with the undercover agent. For his participation, Mr. Hau was paid an unknown amount of money. Based on his conduct, he did receive a reduction for a mitigating role under the guidelines, which I failed to mention when I went through my colloquy regarding that. In addition, this is his first felony conviction."

Page 13, starting at line 11:

" . . . The program which Mr. Hau has requested by way of motion filed yesterday is called the intensive confinement center placement. It is highly structured, no frills, shock incarceration facility that is designed to provide specialized programs for nonviolent first time offenders through a daily regimen of physical training, military drill, and labor intensive work assignments. The program attempts to instill self esteem, discipline, and motivation in men who have not yet become career criminals. There is one at Lewisburg and one at Lompoc. Lewisburg is in Pennsylvania, Lompoc is in California. They are designed to promote positive change and behavior and create preparedness for successful reintegration into society. Acceptance in that program is not automatic. In fact, they very rigidly and strictly screen individuals. First, you have to have the concurrence or recommendation of the sentencing judge. That would be me. Second, you have to be serving a sentence of at least 12 months and one day, but not more than 30 months, and you are within 24 months of release. You must be serving your first period of incarceration or have only a minor history of prior incarceration. You must not be serving your imprisonment for a crime of violence or for a felony that has an element of the actual attempted or threatened use of physical force against the person or property of another, or that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives, or that by its very nature or conduct presented a serious potential risk of physical force against any person or property of another, or that by its nature or conduct involves sexual abuse offenses committed upon children, and you must not have the 2 points weapon enhancement. Of those things, the only question I would have is whether or not the fleeing and alluding will preclude him. That is not a decision that I make. I think the fact that I did not apply the enhancement would work in his favor, but that is an argument you are going to have to, Mr. Stobbs - -

MR. STOBBS: I understand.

THE COURT: Next, he has to volunteer for the program. Next, he has to be appropriate for housing in minimum security institutions. Next, he must be physically and mentally capable of participating in the program. He must undergo and pass a complete physical examination prior to beginning the program. It is physically very demanding.

Mr. Hau, do you think that you are in the physical shape necessary to enter this program, because it requires a lot of physical work?

MR. HAU: Yes, sir.

THE COURT: Okay. Considering all the factors in this post *Blakely* world, including the guidelines, I think that an appropriate sentence in this case is 30 months incarceration with a recommendation that you be placed in the intensive confinement program. You have to understand, Mr. Hau, that I cannot force them to put you in that program. It is completely up to them.

It is the judgment of the Court that the defendant, Brandon Hau, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 30 months."
Page 17, Lines 24 - 25:

" . . . So the bottom line is 30 months. I am going to recommend intensive confinement, 24 months of supervised release, $300 . . ."

The foregoing shows that this Honorable Court reasonably relied on 18 U.S.C. §4046 and U.S.S.G. §5F1.7 when it imposed a 30-month sentence with the recommendation that Mr. Hau be placed in a "boot camp" program. The 30-month sentence and recommendation for "boot camp" also reflected the Court's determination that the rehabilitative and vocational program, with its incentive of a reduction in custody time, was appropriate for Mr. Hau.

Had Mr. Hau proceeded to sentencing knowing the "boot camp" program was not available, he and his counsel and the Court could have considered other options, including home confinement for accomplishing the requisite sentencing goals. The undersigned would have pointed out the obvious disparity of sentence vis-a-vis co-defendant Pham which is contrary to 18 U.S.C. §3553(a)(6).

In *Pearson v. United States*, 265 F.Supp.2d 973 (E.D. Wis. 2003) Judge Adelman vacated the Defendant's sentence based because of misinformation regarding Bureau of Prison's community corrections policy. Judge Adelman cited *Culter v. United States*, 241 F. Supp. 2d 19 (2003 D.D.C. 2003) where Judge Huville expressed her frustration at not being told by the Bureau of Prisons what their policy was regarding a recommendation that a Defendant be incarcerated in a community correction facility. In *Pearson* and the cases

cited therein, sentencing courts depended on the Bureau of Prisons to do as they had done in the past—follow the sentencing courts' recommendations regarding community correction facilities.

Like Mr. Hau, *Pearson* and the cases cited therein do ***NOT*** deal with a Defendant's frustrated expectation as to how the Bureau of Prisons will "view" their cases. These cases deal with a sentencing court not having the proper information before it when handing down a sentence. In Mr. Hau's case, this Honorable Court was operating under the mistaken belief that the "boot camp" program still existed and made the requisite recommendation that Mr. Hau be allowed to participate in the program expecting that this would give him a "break" from a 30 month sentence.

Because this Honorable Court sentenced Mr. Hau under the false impression that there existed a "boot camp" program which he could participate in, with the possibility for early release, re-sentencing is necessary to fashion an appropriate sentence that is sufficient, but not greater than necessary pursuant to 18 U.S.C. § 3553(a)(4). At a re-sentencing, the undersigned would request that Mr. Hau be sentenced to 15 months of incarceration in the Bureau of Prisons.

As the Supreme Court has repeatedly recognized: "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the Defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Lynce v. Mathis*, 519 U.S. 433 at 445-46 (citing *Weaver v. Graham*, 450 U.S. 24, 32 (1981)); *see also Castellini v. Lappin, 365 F. Supp. 2d 197*, 2005 *LEXIS 6256* (elimination of boot camp program to defendant recommended for placement violated ex post facto clause because elimination of program constitutes an increase in punishment and because eligibility for placement was a significant factor in decision to plead guilty).

Everyone's reliance on the existence of the "boot camp" program when sentencing Mr. Hau was inaccurate and prevented him from having a fair and accurate sentencing which in turn violated Mr. Hau's right to due process at sentencing. As such he should be re-sentenced.

V. Eakman and Addonizio

This argument is buttressed by *United States v. Eakman*, 378 F.3d 294 (3rd Cir. 2004). In *Eakman*, the Third Circuit was presented with a petitioner, who had been sentenced with the recommendation to the Bureau of Prisons that he be placed in community corrections. The sentencing court's recommendation was made under the mistaken belief that the Bureau of Prisons had the authority to place prisoners in community corrections for service of their terms of imprisonment.

Mr. Hau's situation parallels that of the Defendant in *Eakman*. In *Eakman* the Court granted §2255 relief because the sentencing court's recommendation was based on a material error of law. The Court concluded that this material error of law was ascertainable at the time it was made and as such was of a Constitutional magnitude requiring re-sentencing.

In *Eakman*, the record showed that the sentencing court believed the Bureau of Prisons had the authority to make direct commitments, as evidenced by the court's recommendation that the Bureau of Prisons designate the petitioner to community corrections, "otherwise the judge's recommendation to that effect would have been pointless." 378 F.3d at 301. *Eakman* concluded that the sentencing court committed an error of law if the Bureau of Prisons did not have the authority to do what the sentencing judge requested. 378 F.3d at 301. As such a mistake of law was relied on in determining the sentence and the 2255 Motion was granted and the petitioner was re-sentenced.

As was the case in *Eakman*, the record here clearly shows that this Honorable Court was under the erroneous assumption that the Bureau of Prisons' "boot camp" program was in existence at the time it sentenced Mr. Hau. This is proved by the recommendation of "boot camp" placement and in granting Petitioner's Motion for Recommendation Pursuant to U.S. Sentencing Guideline Section 5F1.7 and to Self-Surrender to the Intensive Confinement Center. This assumption was incorrect as evidenced by the fact that the "boot camp" program had been abolished approximately one week prior to Mr. Hau's sentencing.

Applying *United States v. Addonizio*, 442 U.S. 178 (1979) and *Hill v. United States*, 368 U.S. 424 (1962), *Eakman* held that an error may warrant vacating the sentence if 1) the

sentencing court received "misinformation of a Constitutional magnitude" and 2) the sentencing court relied at least in part on that misinformation in fashioning the sentence. *Eakman*, 378 F.3d at 298. See also, *United States v. Rone*, 743 F.2d 1169 (7th Cir. 1984), *United States ex rel. Welch v. Lane*, 783 F.2d 863 (7th Cir. 1984) and, *Lechner v. Frank* 341 F.3d 635 (7th Cir. 2003). The court reasoned that "objectively ascertainable errors that a sentencing court has materially relied upon will always be of 'Constitutional magnitude.'" *Id.* At 301. The error asserted need not have a Constitutional basis because an individual's right to due process is violated where the error of law or fact is material and influenced the sentence. *Eakman*, 378 F.3d at 299-300

An objectively ascertainable error is one supported by the record, not the subjective intent of the sentencing judge. With regard to Mr. Hau's case, the record is clear that at the time of sentencing there was no "boot camp" program. The problem is magnified because co-defendant Pham received the identical sentence of Mr. Hau, who everyone agrees was a minor participant in the underlying crime. That simply is unfair and should be corrected by this Honorable Court.

At page 302, *Eakman* held:

> [D]ue process clearly guarantees all defendants the right to be sentenced under an accurate understanding of the law (*United States v. Barnhart*, 980 F.2d 219, 225 (3rd Cir. 1992)). And the record before us unequivocally shows the district judge did not contemplate the total absence of Bureau discretion, an absence as to which the parties now concur. We conclude that *Eakman*'s Section 2255 Motion has sufficiently alleged that the district judge made an objectively ascertainable error during his sentencing proceeding.

Mr. Hau's due process rights were violated when this Honorable Court sentenced him under incorrect assumptions about the existence of the "boot camp" program. Mr. Hau believes that so that there is not a disparity between the sentence he receives and that received by co-defendant Pham, he should be re-sentenced to 15 months incarceration which would meet all of the sentencing requirements set out in 18 U.S.C. §3553(a).

This error of law was ascertainable at the time of sentencing. At sentencing the undersigned stated at page 10:

> "I called Lewisburg yesterday to see when the next boot camp was that started, because I think they stagger them every two months, and unfortunately, I was not able to talk to anyone who would know. They sent me to someone in Washington who was out of the office for the inauguration, but I would request that when the time comes to take into consideration the motion I filed, that that be the Court's recommendation, that he be sentenced to 30 months and my motion be granted and that he be recommended to the boot camp."

When the undersigned called the Bureau of Prisons the "boot camp" had already been abolished. Had he known that it would have been impossible for Mr. Hau to be placed into the "boot camp," pursuant to *Booker* the undersigned could have argued under 18 U.S.C. §3553(a) that a 30 month sentence would have been disproportionate to co-defendant Pham's 30 month sentence and would have requested a 15 month sentence. The Motion for Recommendation Pursuant to U.S. Sentencing Guideline Section 5F1.7 and to Self-Surrender to the Intensive Confinement Center would have been denied as *moot* because this Honorable Court would have been precluded from granting a Motion which could not be enforced.

On the other side of the spectrum is *United States v. Addonizio*, 442 U.S. 178 (1979), where the Supreme Court concluded that a sentence was subject to collateral attack under §2255 if it were imposed under an objectively ascertainable error of constitutional magnitude. In *Addonizio*, (*at 187*) the sentencing court's frustrated expectations on how the sentence would be administered was not an objectively ascertainable error warranting relief. Mr. Hau would agree that if the Bureau of Prisons decided not to admit him into the "boot camp" program under *Addonizio* he would have no recourse.

But, if there were no "boot camp" program to be admitted into and if the sentencing court relied on the existence of the "boot camp" program when fashioning its sentence then in accord with *Eakman* Mr. Hau could and should receive relief.

Actually, the Court in *Eakman* analyzed *Addonizio* and concluded that the mistaken assumption that the Bureau of Prisons could place prisoners in community corrections for service of a term or imprisonment was a legal error of Constitutional magnitude that required re-sentencing. The reasoning of *Eakman* apply here, and the sentence should be vacated and he should be re-sentenced to a period of incarceration of not more than 15 months.

VI. McLean

U.S.A. v. McLean, 2005 WL 2371990 (attached hereto) from the District of Oregon, and decided September 27, 2005, is on point. The undersigned realizes that this Honorable Court is not required to give any value whatsoever to a case emanating from another District Court. But, *McLean* is demonstrative of how another District Court has grappled with the issues presented by Mr. Hau.

The facts are almost identical. Defendant McClean was sentenced with a recommendation made that he be allowed to participate in the "boot camp" program. At the time Mr. McLean was sentenced the Bureau of Prisons was not admitting individuals into the "boot camp" program. Mr. Hau is actually in a better position than Mr. McLean because when Mr. Hau was sentenced the Bureau of Prisons had already abolished the "boot camp" program.

Judge Aiken agreed that Mr. McLean's due process rights had been violated. She concluded that:

> "when imposing sentence I relied on the fact that the Program was an available option and that defendant would be considered for participation in the Program. . . However this fact was not correct or reliable at the time of sentencing on December 14, 2004. . . in contrast, I relied on objectively unreliable fact that was material to my determination of sentence and demonstrably formed the basis of the sentence imposed. Therefore, defendant's sentence was imposed in violation of his right to due process."

Mr. McLean was ultimately re-sentenced to one year and one day. Mr. Hau hopes that this Honorable Court will do what Judge Aiken did and re-sentence him to 15 months incarceration.

VII. Position Regarding Hearing on Motion

Mr. Hau is ***not*** requesting a Hearing on his Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. §2255. He is confident that the Government will be able to adequately brief its position after which time this Honorable Court can determine whether or not Mr. Hau should be resentenced to a lower sentence. Mr. Hau does not want to endure traveling from South Dakota to a county jail via the holding facility in Oklahoma City.

If this Honorable Court determines that a Hearing should be held, Mr. Hau is expressly waiving his right to be at such Hearing. 28 U.S.C. §2255 states that "a court may entertain and determine such motion without requiring the production of the prisoner at the hearing."

Furthermore, pursuant to Federal Rule of Criminal Procedure 43(b)(3) a Defendant's presence is not required where the "proceeding involves only a conference or hearing on a question of law." This is the case here. See *U.S.A. v. Johnson*, 859 F.2d 1289 (7th Cir. 1988) where the Seventh Circuit determined that a Defendant's presence was not required at a Suppression Hearing since it dealt with an argument based on a question of law.

VIII. Conclusion

Mr. Hau requests that this Honorable Court conclude that his right to due process was violated in light in light of the fact that there was no "boot camp" at the time he was sentenced and grant the Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 and for any such other and further relief as may be appropriate.

BRANDON HAU

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2005, a copy of the attached *Movant's Memorandum of Law in Support of 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:

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