

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TERRELL BROWN,

Plaintiff,

v.

R. WERLINGER, Warden,

Defendant.

ORDER

13-cv-692-bbc

Petitioner Terrell Brown, a federal inmate housed at the Federal Correctional Institution at Oxford, Wisconsin, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241 and has paid the required filing fee. Citing Begay v. United States, 553 U.S. 137 (2008), he argues that his sentencing court (the United States District Court for the Northern District of Indiana) erred in finding him a career offender under the sentencing guidelines when it sentenced him in September 2002. According to petitioner, when the court calculated his sentencing guidelines, it took into account a Wisconsin conviction for reckless homicide in violation of Wis. Stat. § 940.06(a), considering it a crime of violence under U.S.S.G. § 4B1.1. Although this was correct at the time, petitioner argues that the Court's opinion in Begay requires his resentencing.

In Begay, the Court decided that a prior conviction cannot be used to support a finding that a person is an armed career criminal under 18 U.S.C. § 922(g) unless the prior

conviction was for a “violent felony,” that is, for a crime that involved “purposeful, violent and aggressive conduct.” A conviction for conduct that is merely negligent, reckless or merely accidental does not amount to a violent felony supporting a finding that the defendant is an armed career criminal. Begay has been held to apply retroactively on collateral review, Narvaez v. United States, 674 F.3d 621, 625 (7th Cir. 2011) (citing Welsh v. United States, 604 F.3d 408, 415 (7th Cir. 2010)), and applicable not just to sentences imposed under 18 U.S.C. § 922(g), but also to sentences for non-gun crimes imposed on persons found to have committed crimes of violence under U.S.S.G. § 4B1.1. Id. (citing United States v. Templeton, 543 F.3d 378, 380 (7th Cir. 2008)).

In addition, the Court of Appeals for the Seventh Circuit has held that a person in petitioner’s situation may bring a challenge to his conviction under 28 U.S.C. § 2241. Brown v. Caraway, 719 F.3d 583, 587 (7th Cir. 2013) (“[O]ur decision in Narvaez . . . requires finding that the erroneous application of the mandatory career offender Guideline is a fundamental sentencing defect that can be remedied under § 2241.”) Accordingly, petitioner will be allowed to proceed on his § 2241 petition and respondent will be directed to respond to the petition.

Additionally, petitioner has filed a motion for appointment of counsel. Under 18 U.S.C. § 3006A(a)(2), this court shall provide counsel for “financially eligible” litigants bringing § 2241 petitions when it determines that “the interests of justice so require.” I will deny petitioner’s motion at this time. Although it seems that he is financially eligible for appointment of counsel, at this time I do not believe that the interests of justice require an

appointment. The complexity of the issues raised in the petition cannot be determined until after the court has had an opportunity to review and consider respondent's answer to the petition. I will deny petitioner's motion without prejudice.

ORDER

IT IS ORDERED that

1. No later than 20 days from the service of this petition, respondent R. Werlinger is to file a response showing cause, if any, why this writ should not issue with respect to petitioner Terrell Brown's claim that his sentence was enhanced unlawfully.
2. Petitioner may have 10 days from the service of the response in which to file a traverse to the allegations of the response submitted by respondent.
3. For the sake of expediency, I will send the petition to Warden Werlinger, the local United States Attorney and the United States Attorney General via certified mail in accordance with Fed. R. Civ. P. 4(i), along with a copy of this order.
4. Petitioner's motion for appointment of counsel, dkt. #3, is DENIED without prejudice.

Entered this 13th day of November, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge