United States Court of Appeals
For the Eighth Circuit

No. 21-1286

United States of America

Plaintiff - Appellee

v.

Kevin Lamont Brewer

Defendant - Appellant

Appeal from United States District Court
for the Western District of Arkansas - Hot Springs

Submitted: July 8, 2021
Filed: July 13, 2021
[Unpublished]

Before SHEPHERD, GRASZ, and STRAS, Circuit Judges.

PER CURIAM.

A

Kevin Brewer appeals the district court's[1] order denying his petition for a certificate of innocence under 28 U.S.C. § 2513. Our review of the record satisfies us that the district court did not abuse its discretion. *See United States v. Racing Servs., Inc.*, 580 F.3d 710, 713 (8th Cir. 2009) (standard of review). Brewer's conduct underlying his 18 U.S.C. § 2250(a) conviction, which was ultimately vacated pursuant to proceedings under 28 U.S.C. § 2255, *see United States v. Brewer*, 766 F.3d 884, 886-92 (8th Cir. 2014), constituted a violation of state law, *see United States v. Brewer*, 628 F.3d 975, 977-78 (8th Cir. 2010); *see also United States v. Mills*, 773 F.3d 563, 566-67 (4th Cir. 2014) (The plain language of § 2513(a) places the burden on petitioner to "allege and prove" predicates entitling him to relief, including that acts underlying vacated conviction constitute no federal or state crime.). The judgment is affirmed. *See* 8th Cir. R. 47B.

---

[1]The Honorable Robert T. Dawson, United States District Judge for the Western District of Arkansas, adopting the Report and Recommendation of the Honorable Barry A. Bryant, United States Magistrate Judge for the Western District of Arkansas.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

UNITED STATES OF AMERICA PLAINTIFF

V. Criminal No. 6:09-CR-60007-RTD

KEVIN LAMONTE BREWER DEFENDANT

ORDER

The Court has received a Report and Recommendation (ECF No. 142) from United States Magistrate Judge Barry A. Bryant. Petitioner Kevin Brewer, proceeding in *pro se*, filed a Petition for Certificate of Innocence pursuant to 28 U.S.C. §2513 (ECF Nos. 136, 137). Upon review of the Petition, the responses in opposition (ECF Nos. 139, 140) and the reply thereto (ECF No. 141), Judge Bryant recommended that the Petition be denied for failure to meet the requirements of 28 U.S.C. § 2513(a). Movant timely filed an Objection to the Report and Recommendation (ECF No. 143), and the matter is now ripe for consideration.

Having conducted a *de novo* review of the portions of the report and recommendation to which Petitioner has objected, 28 U.S.C. 636(b)(1), this Court finds the Objections offer neither law nor fact requiring departure from the Magistrate's findings. Accordingly, the report and recommendation (ECF No. 142) is proper, contains no clear error, and should be and hereby is ADOPTED IN ITS ENTIRETY.

//

IT IS THEREFORE ORDERED that the Petition for Certificate of Innocence (ECF Nos. 136, 137) should be and hereby is DENIED in its entirety. Petitioner's Motion to Grant Relief (ECF No. 138) is DENIED as moot.

SO ORDERED this 26th day of January 2021.

/s/Robert T. Dawson

ROBERT T. DAWSON
SENIOR U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

UNITED STATES OF AMERICA RESPONDENT

vs. Criminal No. 6:09-cr-60007
Civil No. 6:10-cv-06003

KEVIN BREWER MOVANT

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Movant is Kevin Brewer ("Brewer") who is proceeding *pro se*. On September 16, 2020, Brewer filed this Petition for Certificate of Innocence pursuant to 28 U.S.C. § 2513.[1] ECF No. 136. Thereafter, on October 19, 2020, the Government responded to this Motion. ECF No. 140. Brewer replied on October 26, 2020. ECF No. 141. This matter is now ripe for consideration.

The Motion was referred for findings of fact, conclusions of law, and recommendations for the disposition of the case. The Court has reviewed the Motion, the response, and the reply; and based upon that review, the Court recommends this Motion be **DENIED**.

1. Procedural Background[2]:

On April 22, 2009, a grand jury sitting in the Western District of Arkansas returned an Indictment against Brewer charging him with knowingly failing to register as a sex offender after traveling in interstate commerce in violation of Title 18 U.S.C. § 2250 (SORNA). ECF No. 5. On September 8, 2009, Brewer entered a conditional plea of guilty to the Indictment for knowingly failing to register as a sex offender after traveling in interstate commerce, reserving the right to appeal the denial of pretrial motions. He was sentenced to 18 months imprisonment, followed by

[1] Brewer also filed an amended motion on the same date. ECF No. 137. The Court has also considered that amended motion.
[2] The "Procedural Background" is taken from the pleadings and publicly filed documents in this case.

C

a term of 15 years supervised release, a $1,000 fine, and a $100 special assessment. ECF Nos. 41-42, 47, 53.

Brewer appealed this conviction and sentence, and the Eighth Circuit Court of Appeals affirmed the district court. *See United States v. Brewer,* 628 F.3d 975 (8th Cir. 2010). His petition for writ of *certiorari* was likewise denied. *See Brewer v. United States,* 132 S.Ct. 126 (2011). Simultaneous with the Eighth Circuit appeal, Brewer filed a motion seeking relief under 18 U.S.C. § 2255 with the district court. ECF No. 59. The district court denied this 18 U.S.C. § 2255 Motion. ECF No. 69.

In 2012, Brewer filed a second motion under 18 U.S.C. § 2255, and this second motion as likewise denied. ECF Nos. 83, 90, 93. The district court granted Brewer's request for Certificate of Appealability, and Brewer appealed that denial of his 18 U.S.C. § 2255 to the Eighth Circuit. In 2013, while Brewer's second appeal was pending, his supervised release was revoked, and he was sentenced to 24 months' imprisonment. ECF No. 127. On September 10, 2014, the Eighth Circuit issued an opinion reversing the district court's ruling denying the 18 U.S.C. § 2255 motion and overturned Brewer's SORNA's conviction, finding that SORNA was in violation of the non-delegation doctrine, and the enactment of the Interim Rule applying SORNA to pre-act sex offenders was a violation of the APA. *See United States v. Brewer,* 766 F.3d 884 (8th Cir. 2014). He was released shortly thereafter from the Bureau of Prisons.

Thereafter, Brewer then filed the present *pro se* Petition for a Certificate of Innocence. ECF No. 136. The Government has responded, and this Petition is now ripe for consideration.[3]

[3] It appears the Government's response was filed late, and Brewer argues it should not be considered based upon that untimeliness. ECF No. 141. This response, however, was less than a month untimely; and the Court finds no prejudice to Brewer in considering the response despite its untimeliness. Furthermore, the Court has independently reviewed this Petition; and even without a response from the Government, the Court would recommend it be denied.

2. **Discussion**:

The Government claims Brewer's Petition for Certificate of Innocence should be denied in its entirety because Brewer has not demonstrated he is entitled to this Certificate of Innocence. ECF No. 140. Upon review, the Court agrees with the Government and finds Brewer has not met the standard for relief.

To be entitled to a "Certificate of Innocence" for an unjust conviction and imprisonment, Brewer must demonstrate *more* than that his conviction and sentence were overturned. Instead, he must demonstrate the following:

> (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and
>
> (2) *He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.*

28 U.S.C. § 2513 (a) (2004) (emphasis added). Here, as a result of the decision of the Eighth Circuit, "the Government does not dispute that Brewer meets the requirement of § 2513(a)(1), because he was not 'guilty of the offense of which he was convicted.'" ECF No. 140, p. 7. However, the statute clearly contemplates more than an overturned conviction and sentence.

Notably, in the present action, Brewer only claims his conviction and sentence were overturned by the Eighth Circuit; he has not demonstrated the requirements of part two of this statute have been met. He has failed to even allege he did not violate any other law (state or federal) with his actions.

Indeed, Brewer has not demonstrated that his own misconduct or neglect did not cause his

prosecution. Based upon the case history in this matter, it was unclear in 2007 whether SORNA required Brewer to register as a sex offender in Arkansas or not. Brewer, aware of sex offender registration requirements having previously complied same, could have avoided prosecution entirely by *first* seeking a determination of whether he was required to register as a sex offender back in 2007. Because he did not do so, his own neglect led to his prosecution.

Further, it is also clear that Brewer's conduct was a violation of state law, specifically the Arkansas Sex Offender Registration Statute, Ark. Code Ann. § 12-12-905. To prove a violation of the Arkansas Sex Offender Registration Statute, the state must show the person has been convicted of a qualifying sex offense and that he failed to register. *See Guyton v. State*, 601 S.W.3d 440, 445-446 (Ark. 2020). In Brewer's first appeal, the Eighth Circuit engaged in an analysis of this statute. The Eighth Circuit recognized his culpability under the Arkansas statute in its first opinion in this case. *See United States v. Brewer*, 628 F.3d 975, 978 (8th Cir. 2010). Accordingly, despite his conviction and sentence being overturned, Brewer still has not demonstrated he is entitled to a "Certificate of Innocence."

3. Conclusion:

Because Brewer has not demonstrated he meets the requirements of 28 U.S.C. § 2513 (a), Brewer's Petition for a Certificate of Innocence (ECF No. 136) and Amended Motion (ECF No. 137) should be **DENIED** in their entirety.

The Parties have fourteen (14) days from receipt of this Report and Recommendation in which to file written objections pursuant to 28 U.S.C. § 636(b)(1). The failure to file timely objections may result in waiver of the right to appeal questions of fact. The Parties are reminded that objections must be both timely and specific to trigger *de novo* review by the

district court. *See* ***Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir. 1990).**

DATED this **10th day of December 2020.**

/s/ *Barry A. Bryant*
HON. BARRY A. BRYANT
UNITED STATES MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-1286

United States of America

Appellee

v.

Kevin Lamont Brewer

Appellant

Appeal from U.S. District Court for the Western District of Arkansas - Hot Springs
(6:09-cr-60007-RTD-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 13, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

D

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

KEVIN LAMONTE BREWER,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2021-1872

Appeal from the United States Court of Federal Claims in No. 1:20-cv-01209-ZNS.

ON MOTION

PER CURIAM.

O R D E R

Kevin Lamonte Brewer moves without opposition to stay proceedings pending the disposition of *United States v. Brewer*, No. 21-1286 (8th Cir.).

The court notes that the United States Court of Federal Claims denied a similar motion in the underlying case. The court deems it the better course for Mr. Brewer

to raise any argument concerning that ruling or to alternatively request a stay in his merits brief.

Accordingly,

IT IS ORDERED THAT:

(1) The motion is denied.

(2) Mr. Brewer's informal opening brief is due no later than 21 days from the date of filing of this order.

FOR THE COURT

June 21, 2021
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

s31

In the United States Court of Federal Claims

No. 20-1209
(Filed: February 19, 2021)
(NOT FOR PUBLICATION)

* *

KEVIN LAMONTE BREWER,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

* *

Kevin Lamonte Brewer, *pro se*, of Avon, IN.

Zachary John Sullivan, Trial Attorney, Civil Division, U.S. Department of Justice, Washington, D.C., for defendant.

MEMORANDUM OPINION AND ORDER

SOMERS, Judge.

Pro se plaintiff, Kevin L. Brewer, filed a complaint on September 14, 2020, seeking money damages for wrongful conviction and imprisonment pursuant to 28 U.S.C. § 1495 and 28 U.S.C. § 2513. On November 13, 2020, the government filed a motion to dismiss the plaintiff's complaint under Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC") for failure to state a claim upon which relief can be granted. While the Court agrees with the government that the plaintiff's complaint must be dismissed, based on the text of the relevant statutes and previous decisions regarding those statutes, the proper grounds for dismissal of the plaintiff's complaint is for lack of subject matter jurisdiction. Accordingly, for the following reasons, this case is **DISMISSED** pursuant to RCFC 12(h)(3).

I. BACKGROUND

Congress passed the Sex Offender and Registration Notification Act ("SORNA"), 42 U.S.C. §§ 16901–16991, in 2006, requiring those convicted of sex offenses to "provide state governments with (and to update) information, such as names and current addresses, for inclusion on state and federal sex offender registries." *Reynolds v. United States*, 565 U.S. 432, 434 (2012). Congress did not make SORNA's registration requirements effective on those convicted of sex offenses before its enactment; rather, SORNA provided the Attorney General

with rule-making authority to determine registration requirements for pre-SORNA offenders. 42 U.S.C. § 16913(d). In February 2007, the Attorney General promulgated an Interim Rule making SORNA registration requirements applicable to individuals convicted of pre-SORNA sex offenses. 72 Fed. Reg. 8894, 8897 (Feb. 28, 2007).

Based on the Attorney General's Interim Rule, in 2009, the plaintiff was arrested and pleaded guilty for failing to register under SORNA due to a 1997 sex offense conviction. *United States v. Brewer*, 766 F.3d 884, 886 (8th Cir. 2014). However, in 2014, the Court of Appeals for the Eighth Circuit overturned plaintiff's conviction, finding the Attorney General's Interim Rule violated the Administrative Procedure Act. *Id.* at 892.

Following the Eighth Circuit's ruling, the District Court for the Western District of Arkansas ("district court") vacated plaintiff's conviction and discharged him from federal custody on October 6, 2014. Order on Defendant's Motion for Release, *United States v. Brewer*, No. 09-60007 (W.D. Ark. Oct. 6, 2014), ECF No. 131. On September 16, 2020, plaintiff filed a petition for certificate of innocence from the district court pursuant to 28 U.S.C. § 2513. Petition for Certificate of Innocence, *United States v. Brewer*, No. 09-60007 (W.D. Ark. Sept. 16, 2020), ECF No. 136; Motion to Amend Petition for Certificate of Innocence, *United States v. Brewer*, No. 09-60007 (W.D. Ark. Sept. 16, 2020), ECF No. 137. Plaintiff's petition for a certificate of innocence was denied by the district court on January 26, 2021. Order Adopting Report and Recommendation, *United States v. Brewer*, No. 09-60007 (W.D. Ark. Jan. 26, 2021), ECF No. 144.

On September 14, 2020, plaintiff filed a wrongful conviction and imprisonment complaint in this Court seeking monetary damages pursuant to 28 U.S.C. § 1495 and § 2513. *See* Compl. ¶1.

II. DISCUSSION

A. Legal Standard

The government moved to dismiss the plaintiff's complaint for failure to state a claim; however, the proper grounds for dismissal of the plaintiff's complaint is for lack of subject matter jurisdiction. As "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore . . . must raise and decide jurisdictional questions that the parties either overlook or elect not to press," *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011) (citations omitted), the Court is within its authority to raise jurisdictional issues with the complaint *sua sponte*. RCFC 12(h)(3); *see also Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) ("The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment.").

In applying RCFC 12(h)(3) to the complaint, the Court recognizes that it is well established that a *pro se* plaintiff is held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). However, while "[t]he fact that [a plaintiff] acted *pro se* in the drafting of his complaint may explain its ambiguities, . . . it

does not excuse its failures, if such there be." *Henke v. United States*, 60 F.3d 795, 799 (Fed. Cir. 1995). Accordingly, although the Court should afford a *pro se* litigant leniency with respect to mere formalities, that leniency does not immunize a *pro se* plaintiff from meeting jurisdictional requirements. *Kelley v. Sec'y, U.S. Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987) ("[L]eniency with respect to mere formalities should be extended to a *pro se* party. . . . However, . . . a court may not similarly take a liberal view of [a] jurisdictional requirement and set a different rule for *pro se* litigants only."). Thus, a *pro se* plaintiff still "bears the burden of establishing the Court's jurisdiction by a preponderance of the evidence." *Riles v. United States*, 93 Fed. Cl. 163, 165 (2010) (citing *Taylor v. United States*, 303 F.3d 1357, 1359 (Fed. Cir. 2002)).

B. Analysis

When sufficiently pleaded, 28 U.S.C. § 1495 provides this Court with jurisdiction over claims seeking monetary damages for unjust conviction and imprisonment: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned." 28 U.S.C. § 1495. Section 1495, though, "must be read in conjunction with 28 U.S.C. § 2513" to meet the statute's jurisdictional requirements, which are "strictly construed" and place "a heavy burden . . . upon a claimant seeking relief. . . ." *Humphrey v. United States*, 52 Fed. Cl. 593, 596 (2002), *aff'd*, 60 F. App'x 292 (Fed. Cir. 2003). "When [sections 1495 and 2513] are read together it becomes manifest that the sections confer jurisdiction on this court only in cases where there has been conviction and in which the other conditions set out in section 2513 are complied with." *Grayson v. United States*, 141 Ct. Cl. 866, 869 (1958); *Moore v. United States*, 230 Ct. Cl. 819, 820 (1982) ("A claim [brought pursuant to section 1495] is severely restricted by the requirements of 28 U.S.C. § 2513 (1976) which is jurisdictional and therefore must be strictly construed."); *Lucas v. United States*, 228 Ct. Cl. 862, 863 (1981); *Vincin v. United States*, 199 Ct. Cl. 762, 766 (1972).[1]

The government moved to dismiss the plaintiff's complaint for failure to state a claim upon which relief can be granted. The government's reliance on RCFC 12(b)(6) for dismissal is understandable; this Court has occasionally dismissed similar complaints for failure to state a claim. *See, e.g., Sykes v. United States*, 105 Fed. Cl. 231 (2012). However, binding precedent from the Court of Claims (*see* cases cited above and a full discussion of those cases in *Wood v. United States*, 91 Fed. Cl. 569 (2009)) and the text of 28 U.S.C. § 1495 establish that Congress conditioned the exercise of jurisdiction under section 1495 upon a plaintiff further meeting the requirements of section 2513. Stated differently, in order for a plaintiff seeking money damages for unjust conviction and imprisonment to be within the class of plaintiffs covered by the jurisdictional grant in section 1495, that plaintiff must satisfy the requirements of section 2513. *See, e.g., Jan's Helicopter Service, Inc. v. United States*, 525 F.3d 1299, 1307 (Fed. Cir. 2008)

[1] *See also Humphrey v. United States*, 60 Fed. Appx. 292, 295 (Fed. Cir. 2003) (holding that Court of Federal Claims lacked jurisdiction under § 2513 when trial court's order dismissing plaintiff's indictment and vacating his sentence failed to "satisfy the jurisdictional requirements of § 2513"); *Caudle v. United States*, 36 F.3d 1116, 1994 WL 502934, at *1 (Fed. Cir. 1994) (unpublished table decision) ("The courts have repeatedly held that the requirements of 28 U.S.C. § 2513 are jurisdictional and that the plaintiff cannot recover under this statute unless he furnishes a certificate of the convicting court that his conviction has been reversed on the grounds of his innocence.").

(explaining that once a claimant has identified a money-mandating source, that source must additionally be reasonably amenable to the reading that the plaintiff is within the class of plaintiffs entitled to recover under the statute in order for the Court of Federal Claims to have jurisdiction) (internal quotations omitted).

The requirements that must be complied with in section 2513(a) are that:

> (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and
>
> (2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

28 U.S.C. § 2513. Moreover, according to section 2513(b), "[p]roof of the requisite facts shall be by a certificate of the court . . . wherein such facts are alleged to appear, and other evidence thereof shall not be received." 28 U.S.C. § 2513(b). In other words, according to section 1495, when read in conjunction with section 2513, the plaintiff must have a certificate of innocence for this Court to have jurisdiction over his wrongful conviction claim under section 1495. *E.g.*, *Abu-Shawish v. United States*, 120 Fed. Cl. 812, 813 (2015) ("[I]n order for this court to have jurisdiction, a plaintiff must obtain a certificate of innocence from the district court which states that not only was he not guilty of the crime of conviction, but also that none of his acts related to the charged crime were other crimes."); *Wood v. United States*, 91. Fed. Cl. 569, 577 (2009) ("[T]his court holds that compliance with § 2513, including submission of a certificate of innocence from the federal district court, is a prerequisite to the jurisdiction of the Court of Federal Claims.").

Plaintiff's petition for a certificate of innocence was denied on January 26, 2021, by the district court. Order Adopting Report and Recommendation, *United States v. Brewer*, No. 09-60007 (W.D. Ark. Jan. 26, 2021), ECF No. 144. Therefore, the plaintiff cannot meet the requirements set forth in section 28 U.S.C. § 2513 for this Court to have jurisdiction over his wrongful conviction claim under 28 U.S.C. § 1495. Moreover, neither the district court order that released the plaintiff from custody, Order on Defendant's Motion for Release, *United States v. Brewer*, No. 09-60007 (W.D. Ark. Oct. 6, 2014), ECF No. 131, nor the Eighth Circuit's decision vacating the plaintiff's conviction, *United States v. Brewer*, 766 F.3d 884 (8th Cir. 2014), satisfy the requirements of section 2513 and, therefore, cannot themselves be considered a certificate of innocence.

Accordingly, because Plaintiff does not have a certificate of innocence, this Court must dismiss plaintiff's complaint pursuant to RCFC Rule 12(h)(3) for lack of subject matter jurisdiction.

III. CONCLUSION

For the forgoing reasons, the plaintiff's complaint (ECF No. 1) is hereby **DISMISSED.** In addition, Plaintiff's motions for a stay (ECF Nos. 10, 15) are **DENIED**[2]. The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

s/ Zachary N. Somers
ZACHARY N. SOMERS
Judge

[2] Plaintiff moved, in his response to the government's motion to dismiss and in his sur-reply, for a stay of proceedings until the district court ruled on his motion for a certificate of innocence. The district court has now ruled making his motion for a stay moot; however, to the extent that the plaintiff's motion for a stay could be read as a request to stay proceedings while the district court's ruling is on appeal, this Court is nonetheless without power to grant such a stay because it does not have jurisdiction over the plaintiff's complaint. *Johns-Manville v. United States*, 855 F.2d 1556, 1565 (Fed. Cir. 1988) ("A court may not in any case, even in the interest of justice, extend its jurisdiction where none exists.").

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

KEVIN LAMONTE BREWER,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2021-1872

Appeal from the United States Court of Federal Claims in No. 1:20-cv-01209-ZNS, Judge Zachary N. Somers.

ON MOTION

ORDER

Upon consideration of Kevin Lamonte Brewer's motion to extend the time to file his reply brief,

IT IS ORDERED THAT:

The motion is granted to the extent that Mr. Brewer's

reply brief is due no later than November 29, 2021.

FOR THE COURT

August 26, 2021
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

s31

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 13-1444

In re: Kevin Lamont Brewer

Petitioner

Petition for Writ of Mandamus
(6:09-cr-60007-RTD-1)

JUDGMENT

On February 14, 2013, Kevin Brewer submitted a notice of appeal which was not filed on the district court docket or forwarded to this court. Kevin Brewer has filed a petition for writ of mandamus, seeking an order compelling the district court to file his notice of appeal. Upon consideration, it appears the unfiled notice of appeal can be construed as an amended notice of appeal under Federal Rule of Appellate Procedure 4(a)(4)(B)(ii), from the February 1, 2013, order denying his motion for reconsideration. Accordingly, the district court is directed to file this amended notice of appeal and forward the notice to this court. The petition for writ of mandamus is denied as moot. Mandate shall issue forthwith.

March 06, 2013

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

H

STATE OF ARKANSAS,)
)
In the Supreme Court)

SCT.

BE IT REMEMBERED, That at a session of the Supreme Court of the State of Arkansas, begun and held in the City of Little Rock, on April 18, 2013, amongst others were the following proceedings, to-wit:

13 00282

Kevin Brewer

Petitioner

vs. Appeal from Clark Circuit - Lower court case number not available

Clark County Circuit Clerk

Respondent

Pro se motion to proceed in forma pauperis. Moot.

Pro se motion for rule on clerk. Moot.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated; I, Leslie W. Steen, Clerk of said Supreme Court, hereunto set my hand and affix the seal of said Supreme Court, at my office in the city of Little Rock, this 18th day of April, 2013.

Clerk

By: D.C

Original to Clerk
cc: Kevin Brewer
Amy L. Ford, Ass't Attorney General

I

Contexte Case Summary

STATE OF ARKANSAS of the SUPREME COURT

Case ID: **CV-13-282**	**KEVIN BREWER V CLARK COUNTY CIRCUIT CLERK**	Sealed: No	Case Type: APPELLATE WRIT - OTHER - CR	Filing Date: April 1, 2013
Case Age: 0 Days	Case Status: FINAL		Trial Type:	Claim/Amt:

- Parties

Type	Name	Party Start Date	Party End Date	Violations	Balance Owed
ATTORNEY	ATTORNEY GENERAL Case Party Details	01-APR-2013			.00
MAILING PARTY	CLARK COUNTY Case Party Details	01-APR-2013			.00
PETITIONER	BREWER, KEVIN Case Party Details	01-APR-2013			.00
RESPONDENT	CLARK COUNTY CIRCUIT CLERK Case Party Details	01-APR-2013			.00

- Dockets

FORMAL ORDERS - SC — **Date: April 18, 2013 08:00:00 AM** — **Filed by: BREWER, KEVIN**

FORMAL ORDERS - SUPREME COURT

FILING - OTHER — **Date: April 8, 2013 08:00:00 AM** — **Filed by: BREWER, KEVIN**

TENDERED APPLICATION FOR TERMINATION OF SEX O | TENDERED APPLICATION FOR TERMINATION OF SEX OFFENDER REGISTRATION

RESPONSE TO PET FOR REVIEW — **Date: April 8, 2013 08:00:00 AM** — **Filed by: CLARK COUNTY CIRCUIT CLERK**

RESPONSE TO PETITION FOR WRIT OF MANDAMUS - C | AMY L. FORD

PET PROCEED IN FORMA PAUPER — **Date: April 1, 2013 08:00:00 AM** — **Filed by: BREWER, KEVIN**

MOTION TO PROCEED IN FORMA PAUPERIS - KEVIN B | MOTION TO PROCEED IN FORMA PAUPERIS. MOOT.AFFIDAVIT ATTACHED.

PRO SE MOT FOR RULE ON CLERK **Date: April 1, 2013 08:00:00 AM** **Filed by: BREWER, KEVIN**

PRO SE MOTION FOR RULE ON CLERK - KEVIN BREWE | PRO SE MOTION FOR RULE ON CLERK. MOOT.

MOTION OTHER **Date: April 1, 2013 08:00:00 AM** **Filed by: BREWER, KEVIN**

TENDERED PRO SE MOTION FOR COURT TO CLARIFY - | TENDERED PRO SE MOTION ARKANSAS SUPREME COURT TO CLARIFY AND INTERPRET THE CONSTRUCTION AND APPLICATION OF ARKANSAS SEX OFFENDER REGISTRATION ACT IN REGARDS TO OUT-OF-STATE CONVICTIONS

MOTION OTHER **Date: March 13, 2013 08:00:00 AM** **Filed by: BREWER, KEVIN**

TENDERED PRO SE MOTION TO PROCEED WITHOUT REC | TENDERED PRO SE MOTION TO PROCEED WITHOUT CERTIFIED RECORD

PRO SE PET FOR WRIT MANDAMUS **Date: March 6, 2013 08:00:00 AM** **Filed by: BREWER, KEVIN**

TENDERED PRO SE PETITION FOR WRIT OF MANDAMUS | TENDERED PRO SE PETITION FOR WRIT OF MANDAMUS

FILING - OTHER **Date: March 6, 2013 08:00:00 AM** **Filed by:**

NO RECORD

Totals

Case Balance Owed:	.00
Total Balance Owed:	.00
Number of Dockets:	9
Number of Events:	
Number of Violations:	
Number of Defendants:	

A C S

Cite as 2013 Ark. App. 475

ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-13-283

KEVIN BREWER APPELLANT V. ARKANSAS SEX OFFENDER ASSESSMENT COMMITTEE APPELLEE	**OPINION DELIVERED** SEPTEMBER 11, 2013 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, THIRTEENTH DIVISION [NO. 60CV-2012-4077-13] HONORABLE COLLINS KILGORE, JUDGE AFFIRMED

ROBERT J. GLADWIN, Chief Judge

Appellant Kevin Brewer appeals the January 29, 2013 order of the Pulaski County Circuit Court denying his request to change his status from community-notification Level 3 by default by the Arkansas Sex Offender Committee ("Committee") and the subsequent deemed-denied motion of reconsideration. He argues that the Level 3 risk-level assessment is not supported by substantial evidence, and, as a subset of that argument, that the results of the polygraph examination are incorrect, misleading, inconclusive, and contradictory to such an extent that the administrative record needs to be clarified and amended. We affirm.

Text

Appellant was convicted of second-degree sexual assault in Honolulu Circuit Court, in Case No. CR94-0049, on September 3, 1997. The offense date was January 1, 1994, and the victim was a thirty-three-year-old stranger who was in the room with appellant's roommate in Hawaii.

J

Subsequently, on June 22, 1998, appellant was convicted of second-degree attempted murder in Clark County Circuit Court. That offense date was February 8, 1997, and the victim was appellant's ex-wife. She stated that she met appellant at his grandmother's house in order to allow appellant to have their children for weekend visitation. Appellant pulled the victim out of the car and physically assaulted her. He then pointed a pistol at her face and pulled the trigger, but she suffered no actual physical injury from the incident.

Appellant was also convicted of failure to register as a sex offender in Arkansas on February 9, 2010. At the time of his community-notification level assessment, appellant reported that he had filed an appeal challenging the requirement that he register and contended that he had not been required to register in Hawaii. Appellant stated during the assessment that he had consistently registered as a sex offender in Arkansas beginning February 9, 1998, and continuing until he moved to South Africa in 2004. He admitted that upon returning to Arkansas from South Africa in 2007, he did not register as a sex offender.

During his reassessment, appellant submitted to a polygraph examination on April 17, 2012. During that examination he revealed additional violent criminal actions. He said that the most violent act that he has ever committed was when he stabbed an adult female, which occurred when he was living in South Africa.

The Sex Offender Screening and Risk Assessment ("SOSRA") unit determined appellant's community-notification level to be a Level 3. Appellant sought and received an administrative review of that decision by the Committee. The Committee upheld the community-notification Level 3 decision, after which appellant sought judicial review in

Pulaski County Circuit Court. The circuit court upheld the Committee's assessment of a community-notification Level 3, and appellant filed a motion for reconsideration, which was deemed denied.

This court has held that pro se appellants receive no special consideration of their argument and are held to the same standard as a licensed attorney. *Hayes v. Otto*, 2009 Ark. App. 654, 344 S.W.3d 689; *see also Bell v. Bank of Am., N.A.*, 2012 Ark. App. 445, 422 S.W.3d 138; *Light v. Duvall*, 2011 Ark. App. 535, 385 S.W.3d 399. Judicial review of the decision by the Committee concerning the assigned community-notification level is governed by the Administrative Procedure Act ("APA"). Ark. Code Ann. §§ 25-15-201 to -217. The limited scope of judicial review pursuant to the APA is premised on the recognition that administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than courts, to determine and analyze legal issues affecting their agencies. *Williams v. Ark. State Bd. of Physical Therapy*, 353 Ark. 778, 120 S.W.3d 581 (2003).

It is not the role of the circuit courts or the appellate courts to conduct a de novo review of the record; rather, review is limited to ascertaining whether there is substantial evidence to support the Committee's decision or whether the decision runs afoul of one of the other criteria set out in section 25-15-212(h). *See Arkansas Bd. of Exam'rs v. Carlson*, 334 Ark. 614, 976 S.W.2d 934 (1998). In reviewing the record, the evidence is given its strongest probative force in favor of the Committee's ruling. *Arkansas Soil & Water Conservation Comm'n v. City of Bentonville*, 351 Ark. 289, 92 S.W.3d 47 (2002).

The petitioner has the burden of proving that there is an absence of substantial evidence. *McQuay v. Ark. State Bd. of Architects*, 337 Ark. 339, 989 S.W.2d 499 (1999). Substantial evidence is evidence that is valid, legal, and persuasive and that a reasonable mind might accept to support a conclusion and force the mind to pass beyond speculation and conjecture. *Carlson*, *supra*. The question is not whether the testimony would have supported a contrary finding, but whether it would support the finding that was made. *Id.* It is the prerogative of the board to believe or disbelieve any witness and to decide what weight to accord the evidence. *Id.*

Appellant's brief simply states that he reiterates his argument previously presented to the circuit court and asks this court to review that argument as the argument submitted on this appeal. Because the only substantial question on appeal is sufficiency and because the Committee's opinion adequately explains its decision, we affirm by this memorandum opinion pursuant to sections (a) and (b) of our per curiam, *In re Memorandum Opinions*, 16 Ark. App. 301, 700 S.W.2d 63 (1985).

Affirmed.

WALMSLEY and HARRISON, JJ., agree.

Kevin Brewer, pro se appellant.

Dustin McDaniel, Att'y Gen., by: *Amy L. Ford*, Ass't Att'y Gen., for appellee.

IN THE CIRCUIT COURT OF CLARK COUNTY, ARKANSAS
CIVIL DIVISION

IN THE MATTER OF
KEVIN BREWER FOR
A.C.A. 12-12-919 APPLICATION **CLARK COUNTY CASE NO. CV-2013-043**

ORDER

This case is governed by A.C.A. Section 12-12-919 which provides a statutory framework for the termination of a defendant's obligation to register as a sex offender if certain statutory requirements are proven by a preponderance of the evidence. The primary requirement at issue in this case is whether "The applicant [Kevin Brewer] is not likely to pose a threat to the safety of others." The following evidence on this issue was introduced at the December 20, 2013 hearing:

1. The ADC Sex Offender Risk Assessment and Profile Report reported that Mr. Brewer was a Risk Level 3 and had been convicted in Hawaii of 5 counts of Sexual Assault-2d Degree and 2 counts of Sexual Assault-3rd Degree. The report described the crime as follows: "offense involved pinning a 33-year old female down, covering her mouth so that she could not scream, and threatening to hurt her if she did not comply. He then proceeded to perform oral sex on her, digitally penetrated her vagina and anus, and then forced her to engage in sexual intercourse."

2. On June 22, 1998, Mr. Brewer was convicted of Attempted Murder in the Second Degree in Clark County, Arkansas based upon the allegation that he pointed a pistol at a female and pulled the trigger while he was verbally threatening her. The pistol did not discharge but then he pointed the pistol in the air and pulled the trigger and the pistol did fire. Mr. Brewer was sentenced to 10 years in prison and a $10,000 fine.

3. Mr. Brewer was convicted in federal court of failing to register as a sex offender when federal officials discovered that he had failed to register in 2009 after he returned to Arkansas from living in Africa. He was placed on probation in Criminal Case No. 6:09-cr-060007 out of the U.S. District Court, Western District of Arkansas. His probation has now been revoked for his failure to comply with probation requirements and he will begin a 2 year prison sentence in January of 2014. At least in part, the

probation revocation is based upon Mr. Brewer's refusal to comply with a probation department screening tool "that is designed to head off some ramping up sexual behavior, deviant sexual behavior . . . that may ultimately culminate in a sexual offense." Petitioner's Exhibit No. 1 - transcript of detention hearing in federal court on September 3, 2013.

4. The above referenced transcript also states that there was testimony that Mr. Brewer "was deported from Africa for some assault on a women" that happened when Mr. Brewer was residing in Africa around 2007.

When considering this evidence presented at the hearing, I find that Mr. Kevin Brewer continues to pose a threat to the safety of others at this time, and therefore, his petition is denied.

IT IS SO ORDERED.

Robert McCallum, Circuit Judge

Dated: 12/30/13

Distribution: Kevin Brewer
Dan Turner, Deputy Prosecuting Attorney
Paula Stitz, Sex Offender Registry Manager
Sheri Flynn, SOSRA Administrator

File for Record 30 day of Dec 2013 at 4:46 o'clock
Martha J. Smith, Circuit Clerk
By _____ Deputy Clerk

United States Court of Appeals
For the Eighth Circuit

No. 13-1261

United States of America

Plaintiff - Appellee

v.

Kevin Lamont Brewer

Defendant - Appellant

Appeal from United States District Court
for the Western District of Arkansas - Hot Springs

Submitted: April 16, 2014
Filed: September 10, 2014

Before WOLLMAN, BYE, and KELLY, Circuit Judges.

KELLY, Circuit Judge.

Kevin Brewer was convicted of failing to register as a sex offender under 18 U.S.C. § 2250(a) and sentenced to 18 months in prison and 15 years of supervised release. Brewer moved to vacate his conviction under 28 U.S.C. § 2255. The district court denied the motion. Brewer then moved to reconsider and requested a certificate of appealability. The district court denied Brewer's motion to reconsider but granted

Brewer a certificate of appealability on two issues. Having jurisdiction under 28 U.S.C. § 1291, we reverse and remand for further proceedings.

I. Background

In 2006, Congress enacted the Sex Offender and Registration Notification Act ("SORNA"), which established a national registration system for persons convicted of sex offenses under state and federal laws. 42 U.S.C. §§ 16901–16991. SORNA "requires those convicted of certain sex crimes to provide state governments with (and to update) information, such as names and current addresses, for inclusion on state and federal sex offender registries." Reynolds v. United States, 132 S. Ct. 975, 978 (2012). Specifically, under SORNA, a person is criminally liable for failure to register if he (1) is required to register under SORNA; (2) is a sex offender by reason of a federal conviction or, alternatively, is a person who "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country"; and (3) "knowingly fails to register or update a registration as required" by SORNA. 18 U.S.C. § 2250(a).

SORNA's registration requirements were not immediately applicable to persons who, like Brewer, were convicted of a sex offense prior to the enactment of SORNA. Reynolds, 132 S. Ct. at 978. SORNA mandated that the registration requirements would not apply to "pre-Act offenders until the Attorney General specifies that they do apply." Id.; see also 42 U.S.C. § 16913(d) (granting the Attorney General rule-making authority regarding applicability). On February 28, 2007, the Attorney General promulgated an Interim Rule that made registration requirements applicable to all pre-Act offenders. See 72 Fed. Reg. 8894, 8897 (Feb. 28, 2007). The Attorney General did not establish a period for pre-promulgation notice and comment and bypassed the 30-day publication requirement because, he asserted, there was "good cause" to waive those requirements. See 72 Fed. Reg. 8894, 8896–97. Three months later the Attorney General published the

proposed "SMART" Guidelines to "interpret and implement SORNA." 72 Fed. Reg. 30,210 (May 30, 2007); see United States v. Knutson, 680 F.3d 1021, 1023 (8th Cir. 2012). The "SMART" Guidelines became effective on August 1, 2008, and "reaffirmed the interim rule applying SORNA to pre-Act offenders." Knutson, 680 F.3d at 1023; see 73 Fed. Reg. 38,030 (July 2, 2008)[1]. Though the Attorney General maintained that SORNA had been effective to all pre-Act offenders all along, the Supreme Court in Reynolds rejected that position and held that SORNA's registration requirements did not apply to pre-Act offenders until the Attorney General issued a rule saying so. See Reynolds, 132 S. Ct. at 984.

Brewer currently is required to register under SORNA because of a 1997 conviction for a sex offense in Hawaii. At the time of SORNA's enactment, Brewer was living in South Africa. In December 2007, he moved back to the United States and settled in Arkansas, but he did not register as a sex offender. He was arrested in March 2009 and pleaded guilty in September 2009.

Following his release from prison, Brewer moved to vacate his sentence under 28 U.S.C. § 2255. As relevant to this appeal, Brewer argued that (1) the Attorney General lacked "good cause" and thereby violated the Administrative Procedures Act (APA) when he promulgated and made effective the Interim Rule without allowing for the required public notice-and-comment period and minimum 30-day publication period, and (2) SORNA violates the nondelegation doctrine by providing the Attorney General with the authority to determine when, and if, SORNA will apply to pre-SORNA offenders. The district court adopted the magistrate judge's report and denied Brewer's motion to vacate on all grounds. Brewer then moved for reconsideration and asked the district court for a certificate of appealability. The

---

[1] Subsequently, the Attorney General has issued a "Final rule," which mirrors the language of the Interim Rule. 75 Fed. Reg. 81,849 (Dec. 29, 2010); see also Knutson, 680 F.3d at 1023.

district court declined to reconsider its earlier ruling but certified for appeal the two issues stated above.

II. Discussion

We review de novo the district court's denial of a motion under section 2255. United States v. Hernandez, 436 F.3d 851, 855 (8th Cir. 2006). Any underlying factual findings are reviewed for clear error. Id.

On appeal Brewer maintains that the Attorney General's Interim Rule is invalid and, therefore, his conviction is illegal. Brewer presses the same grounds for vacating his conviction that he argued in the district court: (1) the "Interim Rule violated the [APA] because Appellant was prejudiced by the Attorney General's failure to comply with the required procedures for substantive rulemaking and failure to provide sufficient good cause for avoiding those procedures";[2] and (2) "[c]ontrary to Circuit precedent, [SORNA] violates nondelegation doctrine with regards to state sex offenders whose prior conviction pre-dates the enactment or implementation of the Act." We address each of his arguments in turn.

---

[2] The government asserted in the district court that Brewer had procedurally defaulted this argument by failing to raise it on direct appeal. The magistrate judge did not consider the issue defaulted and recommended addressing the merits of Brewer's argument. The government did not object to the magistrate judge's recommendation, did not cross-appeal the district court's order adopting the magistrate judge's report, and does not maintain on appeal that Brewer's APA argument is defaulted. Thus, we believe the government has waived procedural default as an affirmative defense and will not further address the issue. See Jones v. Norman, 633 F.3d 661, 666 (8th Cir. 2011).

A. Good Cause[3]

As a state-law sex offender, Brewer is guilty of failing to register under SORNA if he "travels in interstate or foreign commerce" while knowingly failing to register or update his registration. 18 U.S.C. § 2250(a)(2)(B). Brewer suggests, however, that SORNA was not yet effective as to him when he traveled from Africa to Arkansas in December 2007 because, he argues, the Interim Rule, which for the first time made SORNA applicable to sex offenders convicted before the Act's enactment, is invalid. Because the "final rule" did not become effective until August 2008, Brewer cannot be guilty under that rule for his December 2007 move. Thus, if the Interim Rule is invalid, then Brewer's conviction also is invalid.

Brewer asserts that the Interim Rule is invalid because the Attorney General failed to comply with the APA rulemaking procedures without good cause. We review de novo whether an agency has complied with the APA's procedural requirements because compliance "is not a matter that Congress has committed to the agency's discretion." Iowa League of Cities v. EPA, 711 F.3d 844, 872 (8th Cir. 2013). "Agencies must conduct 'rule making' in accord with the APA's notice and comment procedures." Id. at 855 (citing 5 U.S.C. § 553(b), (c)). "The APA's rulemaking provisions require three steps to enact substantive rules: notice of the proposed rule, a hearing or receipt and consideration of public comments, and the publication of the new rule." United States v. DeLeon, 330 F.3d 1033, 1036 (8th Cir.

---

[3] Brewer argues on appeal not only that the Attorney General lacked good cause but also that the issue of good cause is foreclosed on appeal because the government failed to object to the magistrate judge's report and recommendation or cross-appeal the district court's adoption of that ruling. As a result, Brewer asserts that he must prevail on this issue. But the district court did not explicitly find that the Attorney General had good cause. Rather, the district court held that even if the Attorney General lacked good cause, the error was harmless. Thus, we address this issue on appeal.

2003). The third step, publication of a new substantive rule, must be completed "not less than 30 days before [the rule's] effective date." See 5 U.S.C. § 553(d).

An agency may waive the requirements of a notice and comment period and the 30-day grace period before publication if the agency finds "good cause" to do so. See 5 U.S.C. § 553(b)(B), (d)(3). We have cautioned, however, that courts should not conflate the pre-adoption notice-and-comment requirements, listed in § 553(b) and (c), with the post-adoption publication requirements, listed in § 553(d). United States v. Gavrilovic, 551 F.2d 1099, 1104 n.9 (8th Cir. 1977). Because these are separate requirements, the agency must have good cause to waive each.

We note that there is a conflict among the circuits regarding the appropriate standard of review for an agency's assertion of good cause under § 553(b)(B). We have in the past deferred to the agency's determination and reviewed only "whether the agency's determination of good cause complies with the congressional intent" in § 553(d). Gavrilovic, 551 F.2d at 1105. This deferential standard appears similar to the approach taken by the Fifth and Eleventh Circuits, which each used an arbitrary-and-capricious standard found in 5 U.S.C. § 706(2)(A). See United States v. Reynolds (Reynolds II), 710 F.3d 498, 506–07 (3d Cir. 2013) (collecting and reviewing conflicting standards of review). The Fourth and Sixth Circuits, however, applied de novo review and cited § 706(2)(D). Id. at 507. While we recognize that this division is unhelpful, we agree with the Third Circuit that the Attorney General's assertion of good cause fails under any of the above standards.

In promulgating the Interim Rule, the Attorney General asserted good cause to waive the procedural requirements and make the rule effective immediately:

> The immediate effectiveness of this rule is necessary to eliminate any possible uncertainty about the applicability of the Act's requirements—and related means of enforcement, including criminal

> liability under 18 U.S.C. 2250 for sex offenders who knowingly fail to register as required—to sex offenders whose predicate convictions predate the enactment of SORNA. Delay in the implementation of this rule would impede the effective registration of such sex offenders and would impair immediate efforts to protect the public from sex offenders who fail to register through prosecution and the imposition of criminal sanctions. The resulting practical dangers include the commission of additional sexual assaults and child sexual abuse or exploitation offenses by sex offenders that could have been prevented had local authorities and the community been aware of their presence, in addition to greater difficulty in apprehending perpetrators who have not been registered and tracked as provided by SORNA. This would thwart the legislative objective of "protect[ing] the public from sex offenders and offenders against children" by establishing "a comprehensive national system for the registration of those offenders," SORNA § 102, because a substantial class of sex offenders could evade the Act's registration requirements and enforcement mechanisms during the pendency of a proposed rule and delay in the effectiveness of a final rule.
>
> It would accordingly be contrary to the public interest to adopt this rule with the prior notice and comment period normally required under 5 U.S.C. 553(b) or with the delayed effective date normally required under 5 U.S.C. 553(d).

72 Fed. Reg. 8894, 8896–97. Thus, the Attorney General offered two rationales for waiving the requirements: (1) the need to eliminate "any possible uncertainty" about the applicability of SORNA; and (2) the concern that further delay would endanger the public. Id.

The appellate courts are divided over whether the Attorney General's justifications for extending SORNA to all pre-Act offenders without adhering to the requirements of the APA were sufficient. The parties' arguments in this appeal largely track the divide in the circuits. Two circuits, the Fourth and the Eleventh, have held that the Attorney General had good cause to bypass the notice and comment

provisions.[4] In United States v. Gould, the Fourth Circuit noted that there was some ambiguity about SORNA's effectiveness and reasoned that the Interim Rule was necessary to provide "legal certainty about SORNA's 'retroactive' application." 568 F.3d 459, 469–70 (4th Cir. 2009). Similarly, in United States v. Dean, the Eleventh Circuit held that the Interim Rule served to promote public safety and that the public safety exception applied not only to true "emergency situations" but also to situations "where delay could result in serious harm." 604 F.3d 1275, 1281 (4th Cir. 2010) (quoting Jifry v. F.A.A., 370 F.3d 1174, 1179 (D.C. Cir. 2004)). The court found that despite the long delay between SORNA's passage and the promulgation of the Interim Rule, the Attorney General "reasonably determined that waiting thirty additional days for the notice and comment period to pass would do real harm." Id. at 1282–83.

In contrast, four circuits—the Third, Fifth, Sixth, and Ninth—have found that the Attorney General's stated reasons for finding good cause to bypass the 30-day advance-publication and notice-and-comment requirements—alleviating uncertainty and protecting the public safety—were insufficient. See Reynolds II, 710 F.3d at 509; United States v. Johnson, 632 F.3d 912, 928 (5th Cir. 2011); United States v. Valverde, 628 F.3d 1159, 1168 (9th Cir. 2010); United States v. Cain, 583 F.3d 408, 421–24 (6th Cir. 2009). We agree with these circuits that the Attorney General lacked good cause to waive the procedural requirements.

The Attorney General's first rationale, the need to eliminate "uncertainty" about the law, simply reflects a generalized concern that exists any time an act requires further substantive rulemaking. There always will be some level of

---

[4] The Seventh Circuit also has suggested that the Interim Rule was effective immediately. See United States v. Dixon, 551 F.3d 578 (7th Cir. 2008), rev'd on other grounds sub nom., Carr v. United States, 560 U.S. 438 (2010). The court rejected the defendant's APA argument as "frivolous" but did not elaborate on its reasoning. Id. at 583.

uncertainty about the breadth and timing of applicability until the agency has promulgated a rule. See Reynolds II, 710 F.3d at 510 ("[S]ome uncertainty follows the enactment of any law that provides the agency with administrative responsibility."). But in this situation, "[t]he desire to eliminate uncertainty, by itself, cannot constitute good cause." Id. "If good cause could be satisfied by an Agency's assertion that normal procedures were not followed because of the need to provide immediate guidance and information[,] . . . then an exception to the notice requirement would be created that would swallow the rule." Valverde, 628 F.3d at 1166 (internal quotation marks omitted). Congress could have alleviated this uncertainty by providing that SORNA be immediately applicable to all pre-Act offenders. Instead, Congress granted the Attorney General discretion to decide how, and if, SORNA would apply to pre-Act offenders. As such, this level of uncertainty inherent in the Congressional directive itself cannot constitute an emergency or public neccesity.

We also note that the Attorney General did not actually find a concrete uncertainty to remedy but rather was acting to "eliminat[e] any possible uncertainty." 72 Fed. Reg. 8894, 8896–97 (emphasis added). There is a difference between addressing present legal uncertainty and addressing the possibility of future legal uncertainty. Although the risk of future harm may, under some circumstances, justify a finding of good cause, that risk must be more substantial than a mere possibility.

Similarly, the Attorney General's "public safety rationale cannot constitute a reasoned basis for good cause because it is nothing more than a rewording of the statutory purpose Congress provided in the text of SORNA." Reynolds II, 710 F.3d at 512. The Attorney General posited that delay in implementing the Interim Rule "would impair immediate efforts to protect the public from sex offenders who fail to register." 72 Fed. Reg. 8894, 8896–97. But delay in implementing a statute always will cause additional danger from the same harm the statute seeks to avoid. And the

Attorney General's stated concern for public safety further is undermined by his own seven-month delay in promulgating the Interim Rule. Moreover, just as the Attorney General failed to show any substantial risk of uncertainty about SORNA's application to pre-Act offenders, his concern for public safety fails to "point to something specific that illustrates a particular harm that will be caused by the delay required for notice and comment." Reynolds II, 710 F.3d at 513.

We thus conclude that, even under an arbitrary and capricious standard of review, there is an insufficient showing of good cause for bypassing the APA's requirements of notice and comment and pre-enactment publication.

B. Prejudice

In the alternative, the government argues that any violation of the APA's procedural requirements was harmless to Brewer. The APA instructs courts reviewing agency action to take "due account . . . of the rule of prejudicial error." 5 U.S.C. § 706; see Shinseki v. Sanders, 556 U.S. 396, 406–07 (2009) (explaining that intent of APA's reference to "prejudicial error" is to summarize harmless-error rule applied by courts). Because the underlying matter in this case involves a criminal conviction, the government bears the burden of showing that there was no prejudicial error. See Reynolds II, 710 F.3d at 515–16; see also Sanders, 556 U.S. at 410–11 (noting that in criminal matters, the government has the burden of showing harmless error because of the defendant's liberty interest at stake).

The minimum publication period required prior to a rule becoming effective is 30 days. 5 U.S.C. § 553(d). Since the Interim Rule was issued on February 28, 2007, the government argues that if it had observed proper procedure, the Interim Rule would have become effective 30 days later on March 30, 2007. Because Brewer did not violate the act until December 2007, the government contends, it is irrelevant

to Brewer's conviction whether the rule became effective immediately in February or later in March. We agree. Brewer's violation of the Interim Rule occurred nine months after it would have gone into effect. The absence of those extra thirty days between effectuation and violation did not result in any prejudice to him.

But the Attorney General also bypassed the requirement of a period for notice and comment. To support its position that this error also was harmless, the government primarily relies on the Fifth Circuit's decision in United States v. Johnson, 632 F.3d 912. In Johnson, the Fifth Circuit found that any procedural error as to the notice-and-comment provision was not prejudicial because the Attorney General had "thoroughly engage[d] the issues and challenges inherent in the regulation" when enacting the Interim Rule. 632 F.3d at 931. Because the Attorney General had "considered the arguments . . . asserted and responded to those arguments during the interim rulemaking," albeit without notice and comment, the Fifth Circuit held that "the error in failing to solicit public comment before issuing the rule was not prejudicial." Id. at 932.

In its brief on appeal, the government here argues:

> Like Johnson, Brewer fails to show he involved himself in the post-promulgation comment period. Neither does Brewer allege or show that he participated in the Attorney General's subsequent rulemaking process that crafted regulations regarding the more detailed provisions of SORNA, in which the Attorney General also considered the retroactivity of SORNA, free of APA error. Finally, because Brewer makes no showing that the outcome of the process would have differed had notice and comment been proper, it is clear that the Attorney General's alleged APA violations would be harmless error as applied to him.

We disagree with the government. We first note that the Attorney General's failure to follow the APA's pre-promulgation requirements was a "complete failure," compared to a "technical failure." See Reynolds II, 710 F.3d at 516–17. It is not that the method of allowing notice and comment was flawed; rather, there was no method at all. Because there was no period during which Brewer, or anyone else, could have offered comments before the Interim Rule was promulgated, he does not need to show that any hypothetical comments would have changed the rationale underlying that rule. Id. at 516 (citing Shell Oil Co. v. EPA, 950 F.2d 741, 752 (D.C. Cir. 1991)).

Second, the government's argument improperly shifts to Brewer the burden to show that the outcome of the process would have been different with the proper procedures. Moreover, it is irrelevant that Brewer did not participate in the post-promulgation comment period. As we earlier noted, his only movement in interstate or foreign commerce occurred after the Interim Rule had been promulgated but before the Final Rule was published. Thus, Brewer could not be guilty of violating the final rule, which is the only rule that may have been affected by the post-promulgation comments. The only notice-and-comment period relevant to his conviction is the one that the Attorney General failed to provide before promulgation of the Interim Rule.

Nor can we accept the government's assumption that the enacted rule certainly would have been the same. Contrary to the government's contention, the Attorney General did not face a simple "yes or no" decision. Compare Johnson, 632 F.3d at 932, with Reynolds II, 710 F.3d at 520–21. In fact, the Attorney General had a range of options: from applying SORNA to all pre-Act offenders to applying SORNA to no pre-Act offenders. The Attorney General also had the opportunity to distinguish between "'offenders who have fully left the system and merged into the general population'" and those "'who remain in the system as prisoners, supervisees, or registrants, or reenter the system through subsequent convictions.'" Reynolds II, 710

F.3d at 521 (quoting the "SMART" Guidelines, 73 Fed. Reg. 38,030, 38,035 (July 2, 2008), which note the Attorney General's ability to distinguish between prior offenders on the basis of status). Given this range of choices, we do not believe that the Attorney General's final choice was inevitable or that the outcome certainly would have been the same had there been a period for notice and comment.

Brewer argues that "even if confronted with just a binary question, the Attorney General did not give both options full consideration." We agree. As Brewer notes, at the time the Interim Rule was promulgated, the Attorney General was persisting in his view that no rulemaking was needed for SORNA to apply to pre-Act offenders. See United States v. May, 535 F.3d 912, 919 (8th Cir. 2008) ("The Attorney General did not believe a rule was even needed to confirm SORNA's applicability to defendants [including pre-Act offenders]. Rather, the Attorney General only promulgated the rule as a precautionary measure to 'foreclose [ ] such claims [of pre-Act offenders] by making it indisputably clear that SORNA applies to all sex offenders (as the Act defines that term) regardless of when they were convicted.'" (first alteration in original) (quoting 72 Fed. Reg. at 8896)), abrogated in part by Reynolds, 132 S. Ct. 975. The Attorney General's attempt to foreclose the possible claims of pre-Act offenders seems incompatible with his duty seriously to consider whether SORNA applies to those offenders, and if so, which ones. Such an approach certainly does not suggest the sort of "flexible and open-minded attitude towards its own rules," that is generally required for the notice-and-comment period. See Prometheus Radio Project v. FCC, 652 F.3d 431, 449 (3d Cir. 2011) (internal quotation marks omitted). Based on the record before us, we cannot say the immediate effectiveness of the Interim Rule was harmless as to Brewer.

In sum, the Attorney General lacked good cause to waive the procedural requirements of notice and comment when promulgating the Interim Rule, and this

procedural error prejudiced Brewer. As a result, SORNA did not apply to Brewer in 2007, so his conviction for failing to register is invalid.

C. Nondelegation Doctrine

Because we conclude that the Attorney General lacked good cause to bypass the APA's procedural requirements, we need not address Brewer's second argument that SORNA violates the nondelegation doctrine. We note, however, that Brewer acknowledges that his argument is contrary to this circuit's precedent. See United States v. Kuehl, 706 F.3d 917 (8th Cir. 2013) (concluding that SORNA did not violate the nondelegation doctrine).

III. Conclusion

For the reasons discussed above, we reverse the district court's denial of Brewer's motion under § 2255 and remand. The district court is ordered to vacate Brewer's conviction.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 13-1261

United States of America

Appellee

v.

Kevin Lamont Brewer

Appellant

Appeal from U.S. District Court for the Western District of Arkansas - Hot Springs
(6:10-cv-06003-RTD)

ORDER

Pursuant to counsel's response to appellant's pro se motion to expand the certificate of appealability, the tendered motion shall remain unfiled.

March 14, 2013

Order Entered Under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

M

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

UNITED STATES OF AMERICA PLAINTIFF/RESPONDENT

v. No. 2:12CV6026
No. 2:09CR60007

KEVIN LAMONT BREWER DEFENDANT/PETITIONER

ORDER

Now on this 1st day of February 2013, there comes on for consideration the report and recommendation filed herein on November 26, 2012, by the Honorable Barry A. Bryant, United States Magistrate Judge for the Western District of Arkansas. (Doc. 103). Also before the Court are Mr. Brewer's objections and supplement to his motion for reconsideration (docs. 101, 104).

The court has reviewed this case de novo and, being well and sufficiently advised, finds as follows: The report and recommendation is proper and should be and hereby is adopted in its entirety. Mr. Brewer's motions (docs. 96, 101) are DENIED to the extent they are construed as a motion to reconsider the denial of his §2255 motion and GRANTED IN PART as to his request for a Certificate of Appealability. Accordingly, pursuant to 28 U.S.C. § 2253(c)(2), the following issues are certified for appeal:

Whether Congress improperly delegated its authority to

the Attorney General to issue the Interim Rules and Final Rules applying SORNA to pre-SORNA offenders.

If the Delegation of authority to the Attorney General was proper, whether the Attorney General's implementation of the Interim Rules and Final Rules violated the Administrative Procedures Act and what impact, if any, such a violation had on the validity of Brewer's conviction.

Mr. Brewer's motion requesting his mail be sent by certified mail (doc. 102) is DENIED. No mail has been returned to the Court as undeliverable, and there is nothing in the record to indicate that Mr. Brewer is not receiving all correspondence from the Court.

Finally, the Court DENIES Mr. Brewer's Motion in Request for Hearing to Clarify Supervision Conditions (doc. 105). Mr. Brewer makes vague assertions that he is not permitted to live and/or work in certain places and contends that being required to complete the standard PROB/PTS 25 form constitutes a modification of his conditions of supervised release.

Among other conditions, Mr. Brewer "shall not leave the judicial district without the permission of the court or probation officer", "shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each months" and "shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer". (Doc. 53). The standard PROB/PTS 25 form falls within the purview of these conditions and does not

constitute a modification of Mr. Brewer's supervised release conditions. Accordingly, the motion (doc. 105) is DENIED.

The Court will consider a motion to appoint counsel to assist Mr. Brewer with any appeal in this matter. However, the U.S. District Clerk is instructed to present any further correspondence from Mr. Brewer to the Court for review prior to filing it in this matter.

IT IS SO ORDERED.

/s/ Robert T. Dawson
Honorable Robert T. Dawson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

UNITED STATES OF AMERICA PLAINTIFF

vs. Criminal No. 6:09-cr-060007
Civil No. 6:12-cv-06026

KEVIN LAMONT BREWER DEFENDANT

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Before this Court is Kevin Brewer's (hereinafter "Brewer") Motion for Reconsideration, Certificate of Appealability, and Notice of Appeal. ECF No. 96. This motion was referred to the undersigned for decision or recommendation by United States District Judge Robert T. Dawson. The Government has responded to the Motion. ECF No. 100. The matter is ready for decision.

1. Background[1]:

On April 22, 2009, Movant was indicted on one count of knowingly failing to register as a sex offender or update his registration as a sex offender as a required by the Sex Offender Registration and Notification Act ("SORNA") in violation of 18 U.S.C. § 2250 (2006). ECF No. 5. On September 8, 2009, Movant pled guilty and was sentenced to 18 months imprisonment and 15 years supervised release. ECF No. 45. The United States Court of Appeals for the Eighth Circuit affirmed the conviction on January 14, 2011.[2]

[1] See the Report and Recommendation (ECF No. 90) denying Brewer's Motion to Vacate Set Aside, or Correct Sentence for a more thorough discussion of the background of this case..

[2]The court notes that in his direct appeal, Brewer argued his conviction should be overturned because he did not knowingly violate SORNA. In its decision, the Eighth Circuit reaffirmed its previous holdings regarding SORNA: (1) the prosecution of a sex offender who violates 18 U.S.C. § 2250 after the enactment of SORNA does

O

On February 10, 2012, Brewer filed his Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. ECF No. 83. This Motion was denied on September 17, 2012. ECF No. 93. Brewer thereafter filed the instant Motion for Reconsideration, Certificate of Appealability, and Notice of Appeal. ECF No. 96.

2. Instant Motion:

In the instant Motion, Brewer asks for reconsideration of the Court's denial of his Motion to Vacate sentence. He asserts the Court should reconsider its prior decision regarding the validity of "the Interim Rule and the effective date of SORNA in regards predate offenders" under Rules 59(e) and 60(b) of the FED.R.CIV.P. He asserts there have been rulings from other district courts which mandate a reconsideration of this Court's prior order. The Government asserts that reconsideration is not appropriate under either rule in this case.

Brewer also seeks a Certificate of Appealability regarding the following issues:

(1) Whether Brewer was denied effective assistance of Counsel.

(2) Whether the "Interim Rule" should be applied to SORNA offenders whose conduct predates SORNA.

(3) Whether Brewer was denied due process under state law and SORNA.

(4) Whether Brewer was able to comply with SORNA because he was not residing within the United States at the time it was enacted.

(5) Whether Brewer's sentence was unreasonable.

(6) Whether Brewer was subjected to an ex post facto application of SORNA.

---

not violate the *Ex Post Facto Clause* and (2) the scienter requirement of SORNA is satisfied by proof of a knowing violation of state and local registration requirements, even if the defendant had no notice of his SORNA obligations. *Id.* The Eighth Circuit also addressed Movant's argument that he did not knowingly violate 18 U.S.C. § 2250 because "he had no duty to register under the Arkansas Sex Offender Registration Act when he returned to Arkansas from South Africa in 2007." The Eighth Circuit rejected his argument on this issue and found the Arkansas Sex Offender Registration Act required Movant to register as a sex offender in Arkansas when he returned in 2007.

(7) Whether Brewer possessed the requisite knowledge to be held criminally liable under SORNA.

(8) Whether Brewer met the requirements of SORNA.

(9) Whether Brewer was subjected to prosecutorial misconduct.

(10) Whether Brewer is actually innocent of the offense for which he was convicted.

The Government denies Brewer has made a substantial showing of denial of a constitutional right regarding any of these issues.

3. **Discussion**:

A. Motion to Reconsider-FED.R.CIV.P. 59(e): Brewer first asks the Court to reconsider its denial of his Motion to Vacate pursuant to Rule 59(e). Rule 59(e) motions typically serve the limited function of allowing a court to correct "manifest errors" of law or fact or to present "newly discovered evidence." *Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir.1998) (*quoting Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 413 (8th Cir.1988)). In this case, Brewer points to no "manifest error" of law. Rather, he cites several other district courts, asserting this Court's ruling is contrary to rulings from those courts. He also fails to allege any manifest error of fact or any newly discovered evidence. Accordingly, relief under Rule 59(e) is not appropriate and should be **DENIED**.

B. Motion to Reconsider-FED.R.CIV.P. 60(b): Brewer also asks the Court to reconsider its prior order denying his Motion to vacate pursuant to Rule 60(b). Rule 60(b) motions allow relief from a judgment or order because of:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been

> discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Brewer alleges nothing which would implicate Rule 60(b)(1-5). Rule 60(b)(6) allows relief for any reason that "justifies relief." The Eighth Circuit has held that Rule 60(b) relief is "justified only under 'exceptional circumstances.' " *Prudential Ins. Co. of America v. National Park Med. Ctr., Inc.*, 413 F.3d 897, 903 (8th Cir.2005) (*quoting Watkins v. Lundell*, 169 F.3d 540, 544 (8th Cir.1999)). Here Brewer does not urge any argument or issue not previously considered by this Court in its denial of his Motion to Vacate.

A Rule 60(b) motion should be considered a "successive" motion to vacate when it simply reargues grounds already decided by the Court in its rulings on a motion filed pursuant to § 2255. *See Mathenia v. Delo*, 99 F.3d 1476, 1480 (8th Cir.1996). That is what Brewer does here, reargue points already addressed by this Court. Brewer's Motion to Reconsider pursuant to Rule 60(b) should be **DENIED**.

C. Certificate of Appealability: A federal prisoner may not appeal a final order in a proceeding under 28 U.S.C. § 2255 without first securing a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B). A district court should not grant a certificate of appealability unless the movant "has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2)

This standard requires a demonstration that "jurists of reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude that issues presented are adequate to deserve encouragement to proceed further." *Miller-el v. Cockrell*, 537 U.S. 322, 327 (2003). In other words, an applicant must show that the district court's resolution of the constitutional claim was either "debatable or wrong." *Miller-el*, 537 U.S. at 338. Any Certificate of Appealability issued by the Court must state "which specific issue or issues satisfy the showing required by paragraph (2)." 28 U.S.C. § 2253(c)(3).

After consideration of the issues for which Brewer requests a Certificate of Appealability the Court finds only one issue potentially involves a substantial showing of the denial of a constitutional right. Brewer raised three claims in his § 2255 Motion questioning the Attorney General's authority to issue the Interim and Final Rules under SORNA: (1) Congress's delegation of power under SORNA to the Attorney General was improper and violated the nondelegation doctrine; (2) the Attorney General's Interim Rule was enacted in violation of the Administrative Procedure Act ("APA"); and (3) the Attorney General's Final Rule was enacted in violation of the APA. ECF No. 83 at 5-6. While this Court denied Brewer's § 2255 Motion on these issues, an issue exists about which "jurists of reason could disagree. . . [or] conclude that issues presented are adequate to deserve encouragement to proceed further." *Miller-el v. Cockrell*, 537 U.S. at 327. Accordingly, the Court finds the following issue(s) should be certified for appeal by this Court.

1. Whether Congress improperly delegated its authority to the United States Attorney General to issue the Interim Rule and Final Rules applying SORNA to pre-SORNA offenders.

2. If the Delegation of authority to the Attorney General was proper, whether the Attorney General's implementation of the Interim Rule and Final Rule violated the Administrative Procedures

Act.

Brewer fails to make a substantial showing of the denial of a constitutional right as to the remaining issues raised in his Motion for Certificate of Appealability.

4. Conclusion

For the foregoing reasons, the undersigned recommends as follows:

The Court should **DENY** Brewer's Motion for Reconsideration.

The Court should **GRANT**, in part, Brewer's request for a Certificate of Appealability, and pursuant to 28 U.S.C. 2253(c)(2) certify the following issues for appeal:

> Whether Congress improperly delegated its authority to the Attorney General to issue the Interim Rules and Final Rules applying SORNA to pre-SORNA offenders.
>
> If the Delegation of authority to the Attorney General was proper, whether the Attorney General's implementation of the Interim Rules and Final Rules violated the Administrative Procedures Act and what impact, if any, such a violation had on the validity of Brewer's conviction.

The parties have fourteen (14) days from receipt of this Report and Recommendation in which to file written objections pursuant to 28 U.S.C. § 636(b)(1). The failure to file timely objections may result in waiver of the right to appeal questions of fact. The parties are reminded that objections must be both timely and specific to trigger *de novo* review by the district court. *See Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir. 1990).

DATED this 26th day of November 2012.

/s/ Barry A. Bryant
HON. BARRY A. BRYANT
U.S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

UNITED STATES OF AMERICA PLAINTIFF/RESPONDENT

v. No. 2:12CV6026
No. 2:09CR60007

KEVIN LAMONT BREWER DEFENDANT/PETITIONER

ORDER

Now on this 17th day of September 2012, there comes on for consideration the report and recommendation filed herein on August 2, 2012, by the Honorable Barry A. Bryant, United States Magistrate Judge for the Western District of Arkansas. (Doc. 90). Also before the Court are Mr. Brewer's objections (doc. 92).

The court has reviewed this case de novo and, being well and sufficiently advised, finds as follows: The report and recommendation is proper and should be and hereby is adopted in its entirety. Accordingly, the 28 U.S.C. § 2255 motion (Doc. 83) is DENIED and DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

/s/ Robert T. Dawson
Honorable Robert T. Dawson
United States District Judge

P

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

UNITED STATES OF AMERICA PLAINTIFF

vs. Criminal No. 6:09-cr-060007
Civil No. 6:12-cv-06026

KEVIN LAMONT BREWER DEFENDANT

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Before this Court is Kevin Brewer's (hereinafter "Movant") Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. ECF No. 83. Movant Kevin Brewer is currently not incarcerated but is under supervised release pursuant to a sentence entered by the Honorable Robert T. Dawson of the Western District of Arkansas, Hot Springs Division.

On February 10, 2012, he filed the instant Motion to Vacate under 28 U.S.C. § 2255 (2008). ECF No. 83. This motion was referred to the undersigned for findings of fact, conclusions of law, and recommendations for the disposition of this case. Consistent with the following analysis, this Court recommends this motion be DENIED in its entirety.

[1] Movant previously filed a Motion to Vacate pursuant to 28 U.S.C. § 2255 on January 13, 2010. ECF No. 59. That motion was denied as premature because Movant's direct appeal was still ongoing at that time. ECF No. 73. Judge Dawson, however, stated Movant would "be permitted to re-file his [2255] motion at the conclusion of his direct appeal." Id. On October 7, 2011, Movant's petition for a writ of certiorari was denied by the United States Supreme Court, and his direct appeal was finalized. ECF No. 80. Thus, the instant motion is properly before this Court.

Q

1. Background[2]

On April 22, 2009, Movant was indicted on one count of knowingly failing to register as a sex offender or update his registration as a sex offender as a required by the Sex Offender Registration and Notification Act ("SORNA") in violation of 18 U.S.C. § 2250 (2006). ECF No. 5. On September 8, 2009, Movant pled guilty to this count. ECF No. 42. In his Plea Agreement, Movant stated that he had moved from South Africa to Arkansas in December of 2007. *Id.* Prior to living in South Africa, he had originally lived in Arkansas; and although it is unclear when he moved from Arkansas to South Africa, Movant last registered as a sex offender in Arkansas in 2004. *Id.* On December 9, 2009, Movant was sentenced to 18 months imprisonment and 15 years supervised release. ECF No. 45. Movant was also fined $1,000.00 and charged a $100.00 special assessment. *Id.*

On December 15, 2009, Movant appealed his conviction to the Eighth Circuit. ECF No. 49. In his appeal, Movant argued his conviction should be overturned because he did not knowingly violate SORNA. *Id.* Thereafter, on January 14, 2011, the Eighth Circuit affirmed Movant's conviction. ECF No. 74. In its decision, the Eighth Circuit reaffirmed its previous holdings regarding SORNA: (1) the prosecution of a sex offender who violates 18 U.S.C. § 2250 after the enactment of SORNA does not violate the *Ex Post Facto Clause* and (2) the scienter requirement of SORNA is satisfied by proof of a knowing violation of state and local registration requirements, even if the defendant had no notice of his SORNA obligations. *Id.* The Eighth Circuit also addressed Movant's argument that he did not knowingly violate 18 U.S.C. § 2250 because "he had

[2] The facts and procedural background were taken from the motion (ECF No. 83), the response (ECF No. 86), the reply (ECF No. 88), and the supplement to the response (ECF No. 89) as well as the docket in this case.

no duty to register under the Arkansas Sex Offender Registration Act when he returned to Arkansas from South Africa in 2007." *Id.* The Eighth Circuit rejected his argument on this issue and found the Arkansas Sex Offender Registration Act required Movant to register as a sex offender in Arkansas when he returned in 2007. *Id.*

Movant filed the current motion on February 10, 2012. ECF No. 83. The Government responded to this motion on March 12, 2012, and Movant filed his reply on March 28, 2012. ECF Nos. 86, 88-89. No hearing has been held on this motion, and this Court finds no hearing is necessary.[3] This motion is now ready for consideration.

2. Applicable Law

Pursuant to 28 U.S.C. § 2255, a "prisoner in custody"[4] may petition "the court which imposed the sentence to vacate, set aside or correct the sentence." Relief may be granted if the sentence was imposed in violation of the Constitution or laws of the United States, if the court was without jurisdiction to impose such a sentence, if the sentence was in excess of the maximum authorized by law, or if the sentence is otherwise subject to collateral attack.

Section 2255 "was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." *Davis v. United States,* 417 U.S. 333, 343 (1974). Like *habeas corpus*, the remedy

---

[3] No evidentiary hearing is necessary because even assuming all of Movant's factual allegations are true, he is still not entitled to relief on his claims. *See Tinajero-Ortiz v. United States,* 635 F.3d 1100, 1105 (8th Cir. 2011) (holding that a "§ 2255 motion can be dismissed without a hearing if '(1) the petitioner's allegations, accepted as true, would not entitle the petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact'"). *See also Rogers v. United States,* 1 F.3d 697, 699 (8th Cir. 1993) (holding that when all the information necessary for the court to make a decision with regard to claims raised in a § 2255 is included in the record, there is no need for an evidentiary hearing").

[4] Section 2255 motions may only be brought by individuals "in custody." 28 U.S.C. § 2255. Even though Movant has been released, he is still considered "in custody" because he is serving a term of supervised release. *See Barks v. Armontrout,* 872 F.2d 237, 238 (8th Cir. 1989). Thus, he has standing to bring this action.

"does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio,* 442 U.S. 178, 185 (1979). It provides a remedy for jurisdictional and constitutional errors, but, beyond that, the permissible scope of a § 2255 collateral attack on a final conviction or sentence is severely limited. *See Sun Bear v. United States,* 644 F.3d 700, 704 (8th Cir. 2011). The Supreme Court has held that an error of law does not provide a basis for collateral attack unless the claimed error constituted a "a fundamental defect which inherently results in a complete miscarriage of justice." *Addonizio,* 442 U.S. at 185 (*quoting Hill v. United States,* 368 U.S. 424, 428 (1962)).

A Section 2255 motion is generally a federal inmate's exclusive remedy for collaterally attacking the constitutional validity of his or her sentence. *See Rojas v. Apker,* No. 11-3458, 2012 WL 1994678, at *1 (8th Cir. June 5, 2012) (unpublished). The prisoner may only seek a different avenue for relief if he or she "shows the remedy afforded by section 2255 is inadequate or ineffective." *Id.* Further, with rare exceptions, a § 2255 motion may not be used to relitigate matters decided on direct appeal. *See Sun Bear,* 644 F.3d at 702.

3. Discussion

In this motion, Movant raises five arguments for relief: (A) the United States Attorney General improperly issued the Interim and Final Rules regarding the applicability of SORNIA to pre-SORNA offenders; (B) Movant was not properly notified of his obligations under SORNA[5]; (C) Movant is in the category of offenders who are unable to comply with the plain language of SORNA;

[5] Movant raises three arguments on this issue: (1) inadequate insufficient due process notice under state law and SORNA, including violation of due process, procedural due process, substantive due process, and due process notice; (2) no initial registration or notification of requirements in jurisdiction of conviction by the appropriate official as required by SORNA and state law which violates due process notice and the requirements of SORNA to be initially registered in the jurisdiction of conviction within specified time frames by the appropriate official; and (3) no notice of duration of registration as required under Hawaii state law, Arkansas state law, and SORNA. ECF No. 83 at 6-8. Because each argument raises the same issue of notice, this Court will address these issues together.

(D) Movant was given insufficient and inadequate notification of the registration requirements such that he could not have knowingly failed to register; and (E) Movant's counsel was ineffective because she did not preserve the issue of whether his sentence was substantially unreasonable. ECF No. 83.[6] This Court will address each of these arguments separately.

A. Interim and Final Rules

Movant raises three claims questioning the Attorney General's authority to issue the Interim and Final Rules under SORNA: (1) Congress's delegation of power under SORNA to the Attorney General was improper and violated the nondelegation doctrine; (2) the Attorney General's Interim Rule was enacted in violation of the Administrative Procedure Act ("APA"); and (3) the Attorney General's Final Rule was enacted in violation of the APA. ECF No. 83 at 5-6.

The Government claims Movant has procedurally defaulted on these claims because he did not present them as a part of his direct appeal. ECF No. 86 at 18-19. Such a default may, however, may be excused upon a showing of ineffective assistance of counsel or "actual innocence." *See United States v. Perales,* 212 F.3d 1110, 1111 (8th Cir. 2000). Because Movant has made colorable claims sufficient to raise the issues of ineffective assistance of counsel and actual innocence, this Court finds it is necessary to address the merits of Movant's claims and will address each of the arguments Movant raised.

As an initial matter, by way of background, SORNA was enacted in 2006. *See* 18 U.S.C. § 2250. As a part of SORNA, the Attorney General was authorized to extend SORNA and its registration requirements to sex offenders whose convictions pre-date the enactment of SORNA.

[6] Movant also states as Ground One that his counsel was ineffective for failing to raise these five arguments. ECF No. 83 at 5. Thus, when addressing each of these five grounds, this Court will also address whether Movant's counsel was ineffective for not raising each separate claim.

See 42 U.S.C. § 16913 (2006). The statute states, "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction." *Id.* The Attorney General exercised that authority on February 28, 2007 and passed an Interim Rule extending the registration requirement to pre-SORNA offenders. *See* 72 Fed. Reg. 8897 (2007). On July 2, 2008, that Interim Rule was adopted as a Final Rule. *See* 73 Fed. Reg. 38030-01 (2008).

Subsequently, in 2012, the United States Supreme Court issued a decision addressing the applicability of SORNA to pre-SORNA offenders. *See Reynolds v. United States,* 132 S.Ct. 975 (2012). The Supreme Court concluded a decision was necessary on this issue because several circuits had determined SORNA was applicable to pre-SORNA sex offenders as of 2006 (when SORNA was enacted), even though the Attorney General did not apply SORNA to pre-SORNA offenders until 2007 with the Interim Rule and 2008 with the Final Rule. *Id.* at 980. In *Reynolds,* the Supreme Court held that, under the language of SORNA, the Attorney General must act to apply SORNA to pre-SORNA offenders. *Id.* SORNA *did not* automatically apply to pre-SORNA offenders as of the date of its enactment in 2006. *Id.* Accordingly, assuming the Interim and Final Rules were validly enacted, SORNA did not apply to pre-SORNA offenders until 2007. *Id.*

1. Nondelegation Doctrine

As his first argument, Movant claims the Attorney General's authority to issue the Interim Rule and Final Rule applying SORNA to pre-SORNA offenders violates the nondelegation doctrine. ECF No. 83 at 5-6. As discussed below, the nondelegation doctrine prohibits Congress from delegating excessive power to other branches or entities of government. *See Loving v. United States,* 517 U.S. 748, 771 (1996). This would include a delegation of power to the office of the Attorney

General, which is under the Executive Branch. *See id.*

a. Supreme Court's Interpretation in *Reynolds*

The Supreme Court has never directly addressed the issue of whether Congress properly delegated its power to the Attorney General under SORNA. Nevertheless, although this issue has not been directly addressed, it appears the Supreme Court in *Reynolds* implicitly held Congress properly delegated the authority to the Attorney General to enforce SORNA upon pre-SORNA offenders. 132 S.Ct. at 980. Notably, in *Reynolds,* the defendant raised this issue as an argument against SORNA by characterizing the Attorney General's authority to selectively enforce SORNA through its rule making authority as an exercise of Congress's nondelegable power. *Id.* Despite this argument, the Supreme Court still found the Attorney General had the authority to require pre-SORNA sex offenders to comply with SORNA. 132 S.Ct. at 984. The Supreme Court expressly stated, "the Act's [SORNA's] registration requirements do not apply to pre-Act offenders *until* the Attorney General *so specifies*." 132 S.Ct. at 984 (emphasis added). Such a holding certainly assumes this authority was properly delegated.

Further, the dissent filed in *Reynolds* indicates the delegation issue had been decided. In their dissent, Justices Scalia and Ginsburg criticized the majority for granting this authority to the Attorney General. 132 S.Ct. at 986. The dissent stated, "it is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide–with no statutory standard whatever governing his discretion–whether a criminal statue will or will not apply to certain individuals. That seems to me sailing close to the wind with regard to the principle that legislative powers are *nondelegable*." *Id.* (emphasis added).

However, because the Supreme Court's decision in *Reynolds* did not directly address whether

Congress's delegation was proper, many courts have found this issue is still unresolved. *See, e.g., United States v. Sudbury,* No. 11-cr-5536, 2012 WL 925960, at *1 (W.D. Wash. Mar. 19, 2012). The Eighth Circuit has also ruled this issue is not yet resolved. On several occasions, the Eighth Circuit has held that *Reynolds* permits a pre-SORNA sex offender challenging Congress's delegation of power to have a nondelegation claim addressed on the merits. *See United States v. Mefford,* 463 F. App'x 605, at *1 (8th Cir. 2012) (unpublished). *See also United States v. Springston,* No. 10-2820, 2012 WL 2849514, at *1 (8th Cir. July 12, 2012) (unpublished); *United States v. Curry,* No. 09-03031, 2012 WL 1698316, at *1 (8th Cir. May 16, 2012) (unpublished); *United States v. Fernandez,* 671 F.3d 697, 698 (8th Cir. 2012). For instance, the *Mefford* court found "[u]nder *Reynolds,* Mefford also is entitled to have his nondelegation challenge addressed on the merits." *Id.* Because the Eighth Circuit requires that a challenge to SORNA on nondelegation grounds be addressed on the merits, this Court will address that claim on the merits.

b. Merits of Movant's Delegation Challenge

In a delegation challenge, the constitutional question is whether the statute has improperly delegated legislative power to an agency. *See Whitman v. Am. Trucking Associations,* 531 U.S. 457, 472 (2001). Article I, § 1 of the Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States." This text permits no delegation of those powers. *See id.; Loving v. United States,* 517 U.S. 748, 771 (1996). The Supreme Court has repeatedly held that when Congress confers decision making authority upon agencies, Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman,* 531 U.S. at 472 (*quoting J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409 (1928)).

This "intelligible principle" doctrine has been interpreted broadly by the courts. *See Sudbury,* 2012 WL 925960, at *1. *See also Yakus v. United States,* 321 U.S. 414, 426 (1944) (upholding a delegation to a price administrator to fix commodity prices that would be "fair and equitable"); *Federal Power Comm'n v. Hope Natural Gas Co.,* 320 U.S. 591, 600 (1944) (upholding a delegation to the Federal Power Commission to determine "just and reasonable rates"); *Nat'l Broad. Co. v. United States,* 319 U.S. 190, 225-26 (1943) (granting the FCC the power to regulate based upon "public interest, convenience or necessity"); *Mistretta v. United States,* 488 U.S. 361, 412 (1989) (upholding the creation of the Sentencing Commission as a proper delegation of authority). In *Mistretta*, the Supreme Court stated, "[u]ntil 1935, this Court never struck down a challenged statute on delegation grounds." 488 U.S. at 412. The Supreme Court also stated that even though they struck down two statutes in 1935 as excessive delegations, they have upheld "again without deviation, Congress' ability to delegate power under broad standards." *Id.*

In the present action, Congress outlined its purposes for SORNA as establishing "a comprehensive national system for the registration of those [sex] offenders." 42 U.S.C. § 16901. Consistent with its purpose, Congress delegated to the Attorney General the authority to specify the applicability of the requirements of SORNA to "sex offenders convicted before the enactment of this chapter [prior to 2006] or its implementation in a particular jurisdiction." 42 U.S.C. § 16913(d). This Court finds the purpose behind SORNA to create this "comprehensive national system" is a sufficient "intelligible principle" which limits the Attorney General's authority under SORNA such that it does not violate the nondelegation principle. *See United States v. Guzman,* 591 F.3d 83 (2nd Cir. 2010), *cert. denied,* 130 S.Ct. 3487 (2010) (upholding this delegation of authority as proper because of the limited nature of the Attorney General's authority). Thus, this Court finds Congress's

grant of authority to the Attorney General under SORNA was not improper and did not violate the nondelegation doctrine.

2. Interim Rule by the Attorney General

As his second argument, Movant claims the Attorney General's Interim Rule was issued in violation of the APA. ECF No. 83 at 5-6. In *Reynolds,* the Supreme Court noted the Attorney General issued an Interim Rule on February 28, 2007. *See* 72 Fed. Reg. 8897. In that Interim Rule, the Attorney General stated, "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act [SORNA]." *Id.* This Interim Rule was issued "with [a] request for comments," and the comment deadline was stated to be April 30, 2007. *Id.*

Also in the Interim Rule, the Attorney General stated it would be effective immediately with only *post-promulgation* public comments. *See* 72 Fed. Reg. 8897. Generally, under the APA, prior to a federal rule being enacted, notice and an opportunity for comment are required: "General notice of proposed rule making shall be published in the Federal Register. . . . the notice shall include–(1)a statement of the time place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b). This public notice and opportunity to comment may be excused "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Id.*

With the Interim Rule, the Attorney General stated there was "good cause" for circumventing the notice and public comment procedure of the APA. *See* 72 Fed. Reg. 8897. Specifically, the

Attorney General stated, "[t]he immediate effectiveness of this rule is necessary to eliminate any possible uncertainty about the applicability of the Act's requirements–and related means of enforcement, including criminal liability under 18 U.S.C. 2250 for sex offenders who knowingly fail to register as required–to sex offenders whose predicate convictions predate the enactment of SORNA." *Id.* In *Reynolds,* the Supreme Court did not state whether the Interim Rule was validly issued under the APA. 132 S.Ct. at 984. Instead, the Supreme Court recognized that the validity of this Interim Rule was in dispute and stated "[w]hether the Attorney General's Interim Rule sets forth a valid specification consequently matters in the case before us." *Id.* Then, the Supreme Court reserved that issue for the Third Circuit to decide and remanded the case for further findings. *Id.* The Third Circuit has not yet issued a ruling on this issue.

a. Applicability to Movant

On the surface, it appears that in the present action, whether the Interim Rule was validly issued under the APA does not impact the outcome of Movant's case. The Interim Rule was only in place from February 28, 2007 until July 2, 2008 when the Final Rule was enacted. *See* 73 Fed. Reg. 38030-01. Movant was indicted for failing to register as a sex offender from December of 2007 until March 18, 2009, and March 18, 2009 was well after the Final Rule was enacted. ECF No. 5. Movant also stated in his Plea Agreement that he had failed to register as a sex offender on February 12, 2009, also well after the Final Rule was enacted. ECF No. 42. Because he was in violation of SORNA after the Final Rule passed, it appears he has no basis for challenging the Interim Rule. *See Mefford,* 463 F. App'x at *1 (holding that "it is undisputed that Mefford failed to register in 2009, after the Attorney General had issued a final rule exercising the authority to apply SORNA's requirements to pre-SORNA offenders . . . . Therefore, unlike the petitioner in *Reynolds,* Mefford

could not (and did not) assert any challenge to the interim rule").

However, upon review, Movant's violation of 18 U.S.C. § 2250 *did occur* while the Interim Rule was in effect. Notably, in his motion, Movant argues the Interim Rule applies to him because "interstate travel occurred before Final Valid Rule." ECF No. 83 at 5. Specifically, based upon his Plea Agreement, Movant was found to have "returned to Arkansas in December 2007." ECF No. 42 at 2. Movant argues that because he traveled in interstate commerce while the Interim Rule was in effect in 2007, he has a basis for challenging that rule. Based upon the requirements of 18 U.S.C. § 2250(a), Movant is correct that he was subject to the Interim Rule because he traveled in 2007.

There are three requirements for establishing criminal liability under 18 U.S.C. § 2250(a): (1) the person must be required to register as a sex offender under SORNA; (2) "is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States" or "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country"; and (3) knowingly fails to register or update a registration as required by SORNA.

As for the first requirement, by virtue of the Interim Rule, Movant was required to register as a sex offender under SORNA as of February 28, 2007; and by virtue of the Final Rule, Movant was required to register as a sex offender under SORNA as of July 2, 2008. *See* 72 Fed. Reg. 8897, 73 Fed. Reg. 38030-01. Second, Movant must be a sex offender who has traveled in interstate commerce.[7] *See* 18 U.S.C. § 2250(a). Accordingly, to be found guilty of violating Section 2250,

[7] The second requirement also applies to "a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of

he must be found to be a person who "travels in interstate or foreign commerce."

The Supreme Court has found the requirements of 18 U.S.C. § 2250(a) should be read sequentially such that the defendant must *first* be required to register under SORNA and *then* must have traveled in interstate commerce. *See Carr v. United States,* 130 S.Ct. at 2235-36 (holding that "[o]nce a person becomes subject to SORNA's registration requirements, which can occur only after the statute's effective date, that person can be convicted under § 2250 if he thereafter travels and then fails to register"). In the present action, Movant traveled in December of 2007. ECF No. 42 at 1-2. Since the travel must occur *after* the registration requirement, Movant must have been subject to registration prior to December of 2007. Accordingly, Movant was subject to the Interim Rule of February 28, 2007 and not the Final Rule of July 2, 2008.

b. Enactment of the Interim Rule

Because Movant has demonstrated that he was subject to the Interim Rule, the question then becomes whether the Interim Rule was properly enacted under the APA. In general, the APA requires a notice and comment period and a thirty-day waiting period. *See* 5 U.S.C. § 553(b)-(d). There is a "good cause" exception that dispenses with the notice, comment, and waiting period requirements. *Id.* In the present action, the Attorney General found this "good cause" exception existed and immediately enacted the Interim Rule on February 28, 2007. *See* 72 Fed. Reg. 8897. There is at least some dispute as to whether the Attorney General demonstrated sufficient "good cause." *See, e.g., United States v. Knutson,* 680 F.3d 1021, 1023 (8th Cir. 2012) (recognizing the

---

the United States." *See* 18 U.S.C. § 2250(a). It appears this section, however, only applies to sex offenders who were required to *initially* register in a given state. *See Carr v. United States,* 130 S.Ct. 2229, 2235-36 (2010). Because Movant did properly initially register in Arkansas prior to leaving for South Africa, it appears Movant does not meet the requirements of this subpart. Thus, this Court will not address this issue further.

fact the validity of the Interim Rule is in dispute).

The Fifth Circuit has directly addressed this issue and found that even if the Interim Rule had been improperly enacted, this error was "harmless" because the rule would have been finally adopted thirty days after February 28, 2007 had the Attorney General complied with the APA. *See United States v. Byrd,* 419 F. App'x 485, 490 (5th Cir. 2011) (unpublished). Such a holding was consistent with the Fifth Circuit's previous holding in *United States v. Johnson,* 632 F.3d 912 (2011).

As of this date, the Eighth Circuit has not yet ruled on the validity of the Interim Rule, but the Fifth Circuit's holding on this issue appears to be consistent with Eighth Circuit precedent. *See United States v. Gavrilovic,* 551 F.2d 1099, 1106 (8th Cir. 1977). In *Gavrilovic,* the Administrator of the Drug Enforcement Administration ("DEA") added mecloqualone as a Schedule I controlled substance without the required thirty-day waiting period of the APA. *Id.* Citing the "danger inherent in mecloqualone," the Administrator found there was good cause for placing it on Schedule I "at a date earlier than thirty days from the date of publication of this order in the Federal Register." *Id.* at 1102-03. The Eighth Circuit found the DEA's actions were improper. *Id.*

However, instead of nullifying the DEA's actions, the Eighth Circuit held that regulation was not effective until "30 days after . . . publication in the Federal Register." *Id.* Consistent with the holding in *Gavrilovic* and *Byrd*, this Court finds that even if the Attorney General did not provide sufficient "good cause" to avoid the thirty-day notice period, that error was still harmless. The thirty-day period would have elapsed on March 30, 2007. Movant admittedly traveled in December of 2007, well after this waiting period would have expired. Thus, Movant meets the second requirement of 18 U.S.C. § 2250 as it applied to him in 2007, and Movant has not shown he was exempt from complying with SORNA.

3. Final Rule by the Attorney General

In his briefing, Movant claims the Final Rule of the Attorney General was enacted in violation of the APA. ECF No. 83 at 5. Movant also does not elaborate on this claim or provide any additional briefing on this claim. *Id.* The Final Rule was enacted by the Attorney General after a notice and comment period and a thirty-day waiting period. *See* 5 U.S.C. § 553(b)-(d). There is no indication that the enactment of the Final Rule violated the APA and this Court will not address this issue further.

4. Ineffective Assistance of Counsel

As a final note, Movant claims his counsel was ineffective for failing to raise the arguments stated in his briefing, including the challenges to the Attorney General's Interim Rule and Final Rule. ECF No. 83 at 5. To establish ineffective assistance of counsel, Movant must meet two requirements: (1) deficient performance such that counsel was not functioning as the "counsel" guaranteed Movant by the Sixth Amendment; and (2) prejudice such that the errors were so serious as to deprive Movant a fair trial. *See Strickland v. Washington,* 466 U.S. 668, 687 (1984).

As noted above, Movant's challenges to the Interim and Final Rules would have failed. Additionally, any attack on the Supreme Court's decision in *Reynolds* would have been impossible because that case had not been decided. *See Parker v. Bowersox,* 188 F.3d 923, 929 (8th Cir. 1999) (holding that an attorney's failure to anticipate a change in the law is not ineffective assistance of counsel). Thus, this Court finds counsel was not deficient for failing to raise these arguments. Additionally, even if she were deficient, this failure did not prejudice Movant.

B. Notification of SORNA

Movant claims he is entitled to relief under § 2255 because he was not properly notified of

the registration requirements under SORNA. ECF No. 83 at 6-8. Specifically, he raises three arguments regarding notification: (1) inadequate insufficient due process notice under state law and SORNA, including violation of due process, procedural due process, substantive due process, and due process notice; (2) no initial registration or notification of requirements in jurisdiction of conviction by the appropriate official as required by SORNA and state law which violates due process notice and the requirements of SORNA to be initially registered in the jurisdiction of conviction within specified time frames by the appropriate official; and (3) no notice of duration of registration as required under Hawaii state law, Arkansas state law, and SORNA. *Id.*

This Eighth Circuit has directly addressed the issue of notice of SORNA in *United States v. Baccam,* 562 F.3d 1197, 1199 (8th Cir. 2009). The Eighth Circuit found the defendant's rights were not violated by SORNA because "he had not received notice of the statute's registration requirements." *Id.* Thus, consistent with *Baccam,* this Court rejects Movant's arguments on this issue. Further, this Court finds Movant's counsel was not deficient for failing to raise these arguments; and even if she were deficient, this failure did not prejudice Movant.

C. Compliance with SORNA

Movant claims he is in a category of offenders unable to comply with the plain language of SORNA. ECF No. 83 at 8-9. With this claim, Movant again raises the issue that he was not properly notified of the requirements of SORNA. *Id.* Movant also claims that because he was not within the United States when SORNA was passed, he was unable to comply with the requirements of SORNA. *Id.* Based upon a review of the requirements of SORNA, this Court finds Movant's argument is without merit.

Under SORNA, a sex offender has an obligation to "initially register." 42 U.S.C. § 16913(b).

For those sex offenders who unable to "initially register," such as Movant in the present action, the "Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section." *Id.* § 16913(d).

As noted above, the Attorney General issued a Interim Rule and a Final Rule, both stating that SORNA applies to those individuals who were not required to initially register under SORNA. That rule has been codified in the Code of Federal Regulations: "The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3 (2011). An example is also provided as a part of this regulation:

> Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required but relocates to another state in 2009 and fails to register in the new state of residence. The sex offender has violated the requirements under the Sex Offender Registration and Notification Act to register in any jurisdiction in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

Id. Although the facts involved are somewhat distinguishable, this scenario is almost identical to Movant's situation. Accordingly, this Court finds even though Movant was convicted prior to the enactment of SORNA and even though he was not within the United States when SORNA was enacted, he is still bound to follow the requirements of SORNA. Further, this Court finds Movant's counsel was not deficient for failing to raise these arguments; and even if she were deficient, this failure did not prejudice Movant

D. Knowingly Failure to Register

Movant claims that because he did not know he was required to register under SORNA, he could not have "knowingly" failed to register as a sex offender. ECF No. 83 at 9-10. Movant raised this issue on direct appeal, and the Eighth Circuit rejected Movant's claim and held that "the scienter requirement of SORNA is satisfied by proof of a knowing violation of state or local requirements, even if the defendant had no notice of his SORNA obligations." ECF No. 74-2 at 2-3. Because this issue was raised as a part of Movant's direct appeal, this Court will not address this argument again. *See Sun Bear,* 644 F.3d at 702. Further, this Court also finds Movant's counsel was not deficient for failing to raise these arguments; and even if she were deficient, this failure did not prejudice Movant

E. Sentence as Substantially Unreasonable

Movant claims his sentence was substantially unreasonable, and his counsel erred by failing to raise this issue. ECF No. 83 at 11-12. In the present action, Movant was sentenced to 18 months imprisonment and 15 years supervised release. ECF No. 45. The 18 month prison term is much less than the maximum penalty for a violation of SORNA, namely up to ten years imprisonment. 18 U.S.C. § 2250. Further, the term of supervised release imposed in this case was well below the statutory maximum of life. *See* 18 U.S.C. § 3583(k). Accordingly, this Court finds Movant's sentence was not substantially unreasonable.

Further, Movant raised the issue of whether his sentence was substantively unreasonable on direct appeal. ECF No. 74-2 at 5. The Eighth Circuit found this issue was not properly preserved for appeal. *Id.* However, even though the Eighth Circuit found it was not properly preserved, the Eighth Circuit still addressed this issue. *Id.* The Eighth Circuit noted Judge Dawson properly

reviewed the sentencing factors and imposed a term of supervised release that was in accordance with the sentencing guidelines. *Id.* The Eighth Circuit then stated, "we cannot conclude that the district court's imposition of a fifteen-year term was a substantively unreasonable abuse of discretion in this case." *Id.* Accordingly, this Court finds that even if Movant's counsel erred by not raising preserving this issue at trial, Movant was not prejudiced by this error.

4. Conclusion

For the foregoing reasons, the undersigned recommends this motion under 28 U.S.C. § 2255 be **DENIED.**

The parties have fourteen (14) days from receipt of this Report and Recommendation in which to file written objections pursuant to 28 U.S.C. § 636(b)(1). The failure to file timely objections may result in waiver of the right to appeal questions of fact. The parties are reminded that objections must be both timely and specific to trigger *de novo* review by the district court. *See Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir. 1990).

DATED this 1st day of August 2012.

/s/ Barry A. Bryant
HON. BARRY A. BRYANT
U.S. MAGISTRATE JUDGE

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 09-3898

United States of America,	*	
	*	
Plaintiff - Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Western District of Arkansas.
Kevin Lamont Brewer,	*	
	*	
Defendant - Appellant.	*	

Submitted: September 23, 2010
Filed: December 20, 2010

Before LOKEN, HANSEN, and BENTON, Circuit Judges.

LOKEN, Circuit Judge.

Kevin Lamont Brewer was charged with knowingly failing to register as a sex offender in violation of 18 U.S.C. § 2250, part of the Sex Offender Registration and Notification Act (SORNA). He entered a conditional guilty plea, reserving the right to appeal the district court's[1] denial of his two motions to dismiss the indictment. He now appeals, arguing that the indictment should be dismissed, and that the district court imposed a substantively unreasonable fifteen-year term of supervised release. We affirm.

[1]The Honorable Robert T. Dawson, United States District Judge for the Western District of Arkansas.

R

I. The Motions to Dismiss

In April 1997, Brewer pleaded guilty to qualifying sex offenses in a Hawaii state court. He was sentenced to five years probation in September 1997. Under Hawaii law, that conviction required him to register as a sex offender with the Hawaii attorney general and, if he moves to another State, to register with that State if it has a registration requirement. Haw. Rev. Stat. § 846E-2(a), -6(a), -10.

By mid-1997, Brewer had relocated to Arkansas. The Arkansas Sex Offender Registration Act, effective August 1, 1997, before Brewer was sentenced in Hawaii, provided that a sex offender "moving to or returning to this state from another jurisdiction shall register with the local law enforcement agency having jurisdiction no later than thirty (30) days after August 1, 1997, or thirty (30) days after the offender establishes residency in . . . this state, whichever is later." Ark. Code. Ann. § 12-12-906(a)(4) (1997). The record reflects that Brewer first registered under the Arkansas Act in February 1998, disclosing his Hawaii conviction and signing a form acknowledging his duties as a sex offender under that Act. He registered again in Arkansas in August 2000, September 2003, and February 2004. He moved to South Africa and began educational studies in 2005. He returned to Arkansas in 2007 but did not re-register. A Deputy U.S. Marshal learned Brewer was living in Arkansas in March 2009. This federal indictment for failure to register followed.

Brewer's two motions argued the indictment should be dismissed on three grounds. Two of these contentions are foreclosed by recent decisions of this court. In United States v. May, 535 F.3d 912, 920 (8th Cir. 2008), cert. denied, 129 S. Ct. 2431 (2009), we held that prosecution of a sex offender who violates 18 U.S.C. § 2250 after the enactment of SORNA does not violate the *Ex Post Facto Clause*. In United States v. Baccam, 562 F.3d 1197, 1198-99 (8th Cir.), cert. denied, 130 S. Ct. 432 (2009), we held that the scienter requirement of SORNA is satisfied by proof of a knowing violation of state or local registration requirements, even if the defendant

had no notice of his SORNA obligations. Brewer raises these issues on appeal to preserve them but acknowledges that May and Baccam are binding on our panel. Thus, only his third ground for dismissal requires discussion. We review denial of a motion to dismiss an indictment *de novo*. United States v. Howell, 531 F.3d 621, 622 (8th Cir. 2008).

Brewer argues that he cannot be convicted of a knowing violation of 18 U.S.C. § 2250 because, despite four prior registrations, he had no duty to register under the Arkansas Sex Offender Registration Act when he returned to Arkansas from South Africa in 2007. This counter-intuitive argument is based upon Brewer's strained construction of what is now Ark. Code. Ann. § 12-12-905(a)(2). When enacted in 1997, this portion of section 12-12-905 provided in relevant part:

> The registration requirements of this subchapter apply to . . . (2) A person who is serving a sentence of incarceration, probation, parole, or other form of community supervision as a result of an adjudication of guilt for . . . a sex offense . . . on August 1, 1997.

Following a 2006 amendment, this sub-part of § 12-12-905 now provides:

> (a) The registration or registration verification requirements of this subchapter apply to a person who . . . (2) Is serving a sentence of incarceration, probation, parole, or other form of community supervision as a result of *an adjudication of guilt on or after August 1, 1997*, for a sex offense . . . .

(Emphasis added.) Brewer pleaded guilty to the Hawaii sex offense in April 1997 and was sentenced to probation in September 1997. He argues that the guilty plea was an "adjudication of guilt" *before* August 1, 1997. Therefore, the 1997 Act does not apply, he had no duty to register in Arkansas when he returned from South Africa in 2007, and he cannot be guilty of knowingly violating 18 U.S.C. § 2250.

The district court rejected this contention, relying on two decisions of the Supreme Court of Arkansas construing § 12-12-905 of the Arkansas Sex Offender Registration Act as applying to persons "still serving a sentence of incarceration, probation, parole, or other form of community supervision at the time of the Act's effective date, August 1, 1997." Kellar v. Fayetteville Police Dept., 5 S.W.3d 402, 404 (Ark. 1999); see Williams v. State, 91 S.W.3d 68, 70 (Ark. 2002) (applying this interpretation to a prior conviction in another State). Brewer urges us to ignore these decisions because they did not address the argument he makes in this case. Of course, that is necessarily true, because Kellar and Williams were decided before the 2006 amendment to § 12-12-905(a)(2) upon which Brewer relies and which he self-servingly characterizes as a clarifying amendment. Like the district court, we will follow, not ignore, these Supreme Court of Arkansas decisions, both because they are controlling interpretations of state law, and because they are consistent with the plain meaning of § 12-12-905(a)(2) as first enacted. Therefore, as a result of his Hawaii conviction, Brewer was subject to the registration requirements of the Arkansas Sex Offender Registration Act when he registered in Arkansas in February 1998, disclosing that conviction.

As Brewer was subject to Arkansas registration requirements as a result of his 1997 Hawaii conviction, it is clear that he had a duty to re-register when he returned to Arkansas in 2007. See Ark. Code Ann. § 12-12-906(a)(2)(B)(i), which provides that any person living in Arkansas who must register as a sex offender in the jurisdiction where he was adjudicated "shall register as a sex offender in this state." In his reply brief and in a *pro se* supplemental brief, Brewer argues that, despite registering four times in Arkansas based upon the Hawaii conviction, he cannot be convicted of a knowing violation of SORNA because Hawaii officials never notified him of his duty to register in that State. Assuming without deciding that this is a sound interpretation of SORNA's scienter requirement as construed in Baccam , it raises an issue of fact -- whether he knowingly violated 18 U.S.C. § 2250 -- not an issue of law warranting dismissal of the indictment. Accordingly, like other issues of

fact, this issue was foreclosed by Brewer's guilty plea. See, e.g., United States v. Taylor, 519 F.3d 832, 835-36 (8th Cir. 2008). His pretrial motions to dismiss were properly denied. Therefore, his conviction must be affirmed.

II. The Sentencing Issue

On appeal, Brewer argues that the fifteen-year term of supervised release imposed by the district court was substantively unreasonable. In support, he argues that we cannot conduct a meaningful review of reasonableness because the district court failed to explain its reasons for imposing this lengthy term and the sentencing factors it considered under 18 U.S.C. § 3583(c). But this is a claim of procedural error which is foreclosed because it was neither preserved in the district court nor argued on appeal. See United States v. Collier, 585 F.3d 1093, 1096 (8th Cir. 2009).

At sentencing, the district court expressly stated that it reviewed the sentencing factors in 18 U.S.C. § 3553(a). The term of supervised release it imposed was well below the statutory maximum of life. See 18 U.S.C. § 3583(k). Because "Congress deliberately chose to impose longer terms of supervised release on persons convicted of certain sex offenses," including SORNA offenses, we cannot conclude that the district court's imposition of a fifteen-year term was a substantively unreasonable abuse of discretion in this case. United States v. Thundershield, 474 F.3d 503, 510 (8th Cir. 2007).

The judgment of the district court is affirmed.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

UNITED STATES OF AMERICA PLAINTIFF

v. No: 6:09-cr-60007

KEVIN BREWER DEFENDANT

O R D E R

Before the Court are Defendant's Second Motion to Dismiss Indictment (Doc. 28) and the Government's Response (Doc. 37). On August 25, 2009, the Court denied Defendant's First Motion to Dismiss the indictment (Doc. 32). Defendant now moves the Court to dismiss the indictment stating that the Arkansas Sex Offender Registration statute, Ark. Code Ann. § 12-12-905, is inapplicable to him; therefore he was not required to register under Arkansas law and SORNA is not applicable to him.

Section 12-12-905(2) of the Arkansas Code states, in pertinent part, that a person must register if he was serving a sentence of probation as a result of an adjudication of guilt on or after August 1, 1997 for a sex offense. The Arkansas Supreme Court has considered this provision and determined it requires a person to register if he was serving a sentence on or after August 1, 1997 whether or not the adjudication of guilt took place on or after August 1, 1997. See Williams v. State, 91 S.W.3d 68 (Ark. 2002); Kellar v. Fayetteville Police Department, 5 S.W.3d 402 (Ark. 1999).

Defendant pleaded guilty to four counts of sexual assault

S

in the second degree and to two counts of sexual assault in the third degree on April 24, 1997. On September 3, 1997, Defendant was sentenced to five years of probation. Accordingly, Defendant was required to register under Arkansas law, and his motion (Doc. 36) is DENIED.

IT IS SO ORDERED this 2nd day of September, 2009.

/s/ Robert T. Dawson
Honorable Robert T. Dawson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

UNITED STATES OF AMERICA

v. No: 6:09-cr-60007

KEVIN BREWER

ORDER

Before the Court is Defendant Kevin Brewer's Motion to Dismiss Indictment (Doc. 28). Brewer is charged with failure to register as a Sex Offender as required by the Sexual Offender Registration and Notification Act ("SORNA"). For the reasons reflected below, Brewer's Motion is **DENIED.**

I. Facts

According to documents produced by the government, Brewer was convicted of four counts of sexual assault in the first degree and three counts of sexual assault in the third degree in Hawaii in 1994. Brewer's conviction was vacated on appeal. On September 3, 1997, Brewer was found guilty of five counts of sexual assault in the Second Degree and two counts of Sexual Assault in the Third Degree and sentenced to five years probation. Brewer subsequently moved to Arkansas.

While in Arkansas, Brewer completed sex offender registration forms in 1998, 2000, 2003, and 2004. From 2004 to 2007, Brewer lived in Africa. In 2009, the Marshal's service

T

became aware that Brewer had returned to Arkansas and was unregistered. Brewer seeks to dismiss the indictment on the bases that he did not know of the requirement to register and that his indictment is based on an unconstitutional ex post facto law.

II. Discussion

A. Notice

Brewer's first contention is that he was actually under no duty to register as a sex offender under Arkansas law. The sex offense that triggered the requirement to register was entered in Hawaii on September 3, 1997. Arkansas law requires registration for persons "adjudicated guilty on or after August 1, 1997 of a sex offense, aggravated sex offense, or sexually violent offense." Ark. Code Ann. § 12-12-908(a)(1). As Brewer's convictions are subsequent to August 1, 1997, Brewer was required to register under Arkansas law.

Brewer next contends that the indictment should be dismissed since, as a matter of law, he cannot have failed to register in violation of SORNA unless he was notified of the requirement to do so and that due process is not satisfied by the lack of notification. However, the failure to provide notice of federal registration requirements in state forms does not preclude conviction. See United States v. Baccam, 562 F.3d 1197, 1200 (8th Cir. 2009). Furthermore, state notifications of

the need to register, as evidenced by the forms produced by the government, satisfies the notification requirements of due process. Id. Failure to provide notification of the federal sex offender registration requirement does not mean, as a matter of law, that the Defendant had no knowledge of the registration requirement or that the law is unconstitutional. Id. Dismissal of the indictment is therefore inappropriate.

B. Ex Post Facto

Brewer also contends that § 2250 is an unconstitutional ex post facto law that increases the punishment under existing law. However, the statute does not punish an individual for conviction of a sex crime; the statute punishes for failure to register. See United States v. May, 535 F.3d 912, 920, (8th Cir. 2008). A § 2250 conviction requires the offender to both travel in interstate commerce and knowingly fail to register or update a registration. 18 U.S.C. § 2250(a). Both the interstate travel and the knowing failure to register must occur after July 27, 2006. Since the conduct for which Brewer is accused happened from December 2007 to March 18, 2009, the indictment does not violate the ex post facto clause of the constitution and dismissal on that ground is inappropriate.

III. Conclusion

Brewer's Motion to Dismiss (Doc. 28) is DENIED. This case remains set for trial on September 8, 2009 in Hot Springs,

Appeal No. 21-1286

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KEVIN BREWER APPELLANT

VS.

UNITED STATES OF AMERICA APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

Honorable Robert T. Dawson
Senior United States District Judge

REPLY BRIEF FOR APPELLANT

TABLE OF CONTENTS

Pages

Table Of Contents.....2

Table Of Authorities.....3

Argument.....4

Conclusion.....10

Certificate of Service/Compliance.....12

TABLE OF AUTHORITIES

Cases Pages

Brewer v. Ark. Sex Offender Assessment Comm.(Ark. App. 475(Ark. Ct. App. 2013).....8

Termination Of Obligation to Register AR Code § 12-12-919 Kevin Brewer Clark County Case No. Cv-2013-043 (2013).....8

Lambert v. California, 355 U.S. 225 (1957).....*passim*

United States v. Brewer, 628 F.3d 975, 978 (8th Cir. 2010).....*passim*

United States v. Brewer No. 13-1261 (8th Cir. 2014).....*passim*

United States v. Graham, 608 F.3d 164, 173-74 (4th Cir. 2010).....8

Statutes and Provisions

Ark. Code Ann.§ 12-12-906 (2) (A).....4,6

Ark. Code Ann.§ 12-12-906(c)(1) (A)(vi)(ix) (A) (B)(i) (C) (D) (E) (F)(G(H(3).....7

HI Rev Stat H.R.S § 846E-4.....4, 7

ARGUMENT

The fundamental argument in this case, and this being the fourth time this case has been brought before this court, surrounds knowledge of the duty to register and the requirements. This is result of Hawaii, the jurisdiction of conviction, failing in their duty to notify Brewer of his requirements and duration period of registration. If jurisdiction of conviction would have notified him of his requirements and had him sign acknowledgement form as required by state law in Hawaii, see *HI Rev Stat H.R.S § 846E-4*, any argument regarding the duty and requirements of registration would be foreclosed based on the proof of the fact he acknowledged and understood his duty and the requirements of registration in the first initial most important registration. That fact and proof does not exist on record in this case, yet Brewer is the one being held liable for being in violation of a duty to register under Arkansas state law which also requires some form of notification of requirements and duration period of registration from jurisdiction of conviction. Registration in other jurisdictions is based on the notification and knowledge of requirements in jurisdiction of conviction which entails the basis and cause as to why registration is even required and what upon Arkansas state law relies upon to determine registration of sex offenders from other jurisdictions. See *AR Code § 12-12-906 (2) (A)*

A sex offender who moves to or returns to this state from another jurisdiction and who would be required to register as a sex offender in the jurisdiction in which he or she was adjudicated guilty or delinquent of a sex offense shall register with the local law enforcement agency having jurisdiction within seven (7) calendar days after the sex offender moves to a municipality or county of this state. Brewer's circumstances are within an apparent loophole in the law.

There are three things the district court relied upon in denying certificate of innocence, Brewer was aware of his obligations and requirements, Brewer failed to register by his own neglect and knowledge of obligations and requirements under Arkansas state law is not required to prove a violation of Arkansas state sex offender registration laws because it is a strict liability offense.

AWARENESS

In being *aware* of a registration requirement, it requires sufficient notification, knowledge and acknowledgement. The district court relied on the fact that Brewer registered and complied four times in the past as the basis that he was *aware* of the *amended registration requirements and duration of period of registration.* But only if you look closer into the requirements Brewer was notified of in the past acknowledgement

forms submitted to the record in exhibits in petition and amended petition *(see exhibits)*, can it determined if they are sufficient for his circumstances and gave him sufficient knowledge and also the duration period of registration after he completed his sentence and community supervision. See *(Government Brief, p. 15, 16)*. The acknowledgment forms were amended with new requirements while he was living and attending studies in South Africa, in which Brewer never received notice or had knowledge. *There are no facts on record to support that Brewer violated any of the requirements he was notified of even though he had registered four times in the past.* He was never notified of amended requirements in effect at time of his arrest, two being in how many days and time period was he required to register after returning to Arkansas and reentering the sex offender registration system and duration period of registration. *AR Code § 12-12-906 Reads: (2) (A) A sex offender who moves to or returns to this state from another jurisdiction and who would be required to register as a sex offender in the jurisdiction in which he or she was adjudicated guilty or delinquent of a sex offense shall register with the local law enforcement agency having jurisdiction within seven (7) calendar days after the sex offender moves to a municipality or county of this state*. This law requires notification of obligations and requirements in jurisdiction of conviction and the jurisdiction it involves. The jurisdiction of conviction Hawaii, never gave him notification of his registration obligation, requirements and

duration of period of registration or any notice that he was that he was required to register for life. Because of lack of notice of obligations and requirements in jurisdiction of conviction he lost his opportunity to petition the Hawaii state court for relief over 15 years ago. *See exhibits and (Government Brief, p. 7).*

NEGLECT

In order for Brewer to *neglect* a duty to register, obligations and requirements, Brewer must have sufficient knowledge of the obligations, requirements and duration of period of registration. See *(Government Brief, p. 15, 16)*. There are provisions under Arkansas state law and Hawaii state law that require appropriate officials to give notice of requirements, such as *Ark. Code Ann.§12-12-906(c)(1)A)(vi)(ix)(A) (B)(i) (C) (D) (E) (F) (G) (H)(3) and HI Rev Stat H.R.S § 846E-4*. These provisions do not state that an offender is required to seek notification of his requirements, but that appropriate officials must notify him and make sure he is aware of the requirements. The Supreme Court also ruled in *Lambert v. California, 355 U.S. 225 (1957)* that knowledge of obligations and requirements is required. In its Appellee brief the government states, *see (Government Brief, p. 16)* "Thus, Brewer was well advised of how to fulfill his obligations to register as a sex offender, and if he disagreed with being required to register upon his return to Arkansas in 2007, he could have sought relief in Arkansas state court." When Brewer did become aware of his registration requirements,

he did seek relief, see *Brewer v. Ark. Sex Offender Assessment Comm.(Ark. App. 475 (Ark. Ct. App. 2013), Termination Of Obligation to Register AR Code § 12-12-919 Kevin Brewer Clark County Case No. Cv-2013-043 (2013)*. Brewer argues he was not well advised his requirements and obligations and especially of the requirements that had been amended. *See exhibits.*

In the case relied upon by the government (Government Brief, p. 16) *United States v. Graham, 608 F.3d 164, 173-74 (4th Cir. 2010)* (upholding denial of certificate of innocence in part because the defendant executive of non-profit corporation, in a case charging him with conversion of sick leave benefits to cash without authorization, brought about his prosecution through neglect, as the executive could have but negligently failed to seek board approval before converting the sick leave benefits to cash, a fact which helped form the basis the criminal charge against him). That case is distinguished from Brewer's case in that there was not a requirement and provisions of law that provides for knowledge and notice of any requirement or obligation as do registration laws require, as stated by Supreme Court in *Lambert v. California, 355 U.S. 225 (1957).*

KNOWLEDGE REQUIREMENT

The government argues that sufficient knowledge of obligations, requirements and duration of period of registration is not required under Arkansas law to prove a violation because it is a strict liability offense. *See (Government Brief, p. 17)*. Brewer argues that sufficient knowledge

is required and that Arkansas state law just as California state law is not exempt from the United States Supreme Court ruling in *Lambert v. California, 355 U.S. 225 (1957). "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process"," But what the Court here does is to draw a constitutional line between a State's requirement of doing and not doing"*. If Brewer cannot be convicted without having knowledge, according to *Lambert v. California, 355 U.S. 225 (1957),* he cannot be held liable for the violation under Arkansas state law and therefore meets the requirements for a certificate of innocence.

In *United States v. Kevin Brewer, No. 09-3898 (8th Cir. 2010)* it is stated "In his reply brief and in a pro se supplemental brief, Brewer argues that, despite registering four times in Arkansas based upon the Hawaii conviction, he cannot be convicted of a knowing violation of SORNA because Hawaii officials never notified him of his duty to register in that State. Assuming without deciding that this is a sound interpretation of SORNA's scienter requirement as construed in Baccam, it raises an issue of fact -- whether he knowingly violated 18 U.S.C. § 2250 -- not an issue of law warranting dismissal of the indictment. Accordingly, like other issues of fact, this issue was foreclosed by Brewer's guilty plea. See, e.g., United States v. Taylor, 519 F.3d 832, 835-36 (8th Cir. 2008). In *United States v. Kevin Brewer, 13-1261 (8th*

Cir. 2014), the 8th Circuit Court ruled his conviction invalid, therefore the guilty plea should be invalid. The facts related the knowledge, notice requirement, and claims relating to constitutional rights in this case should no longer be foreclosed by the guilty plea. This court should be able to take all the facts and lack of facts in this case under consideration in review. This court should now be able to address and distinguish between the duty to register and the requirement of notice, knowledge and acknowledgement and if the notice Brewer did receive is sufficient.

CONCLUSION

Brewer would also like to acknowledge that in his opinion the Appellee in their capacity as a U S Attorney filed a proper thorough brief especially in regards to statement of the case with the facts and record within the circumstances of this case, even though Brewer argues that the argument and facts are misplaced.

The Appellant's and Appellee's briefs and reply briefs have fundamentally been a reiteration of arguments made in prior briefs and the objections to report and recommendation. Brewer ask the court to review his argument in the petition, the objections to the report and recommendation with his appeal brief and reply as his argument in this appeal, in order to prevent his argument on appeal from being continually unnecessarily repetitious.

For the aforementioned reasons above, this Court should reverse the lower court's conclusion in its denial of certificate of innocence and grant Appellant the appropriate requested relief.

Respectfully Submitted,
Kevin Lamonte Brewer
Appellant, Pro Se

Appeal No. 21-1286

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

KEVIN BREWER APPELLANT

VS.

UNITED STATES OF AMERICA APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

Honorable Robert T. Dawson

Senior United States District Judge

PETITION FOR REHEARING

AND

REHEARING EN BANC

V

STATEMENT WITH REASONS

The panel's decision and review conflicts with a decision of the United States Supreme Court in *Lambert v. California, 355 U.S. 225 (1957)*. Consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions to the U S Supreme Court. The court's opinion fails to address with an explanation and evades the merits of the issue of a Constitutional right under the Due Process Clause of the Fourteenth Amendment and the Notice and Knowledge (including knowledge of duration) it requires under the United States Constitution, that Brewer has put before this court on appeal, the real issue this case presents. This is the most important underlying issue in this appeal, yet to be appropriately addressed in a fact-bound and legal context, of the certificate of innocence in this case. Brewer puts before this court that this is a very simple issue to remedy and cure and should not take a lot of the courts time. The necessary parts of the record and briefing in this case is very short compared to most cases submitted to this court on appeal. This appeal is pro se.

STANDARD OF REVIEW

This case should have been reviewed under all the different standards of review Brewer put before the court in his appeal. The opinion and review did not address as to why the other standards of review Brewer put forth in his appeal are not applicable to this case.

DISCUSSION

The merits of the panel's opinion is only three sentences long. (1)"Our review of the record satisfies us that the district court did not abuse its discretion." (2)" Brewer's conduct underlying his 18 U.S.C. § 2250(a) conviction, which was ultimately vacated pursuant to proceedings under 28 U.S.C. § 2255, constituted a violation of state law." (3)"The plain language of § 2513(a) places the burden on petitioner to "allege and prove" predicates entitling him to relief, including that acts underlying vacated conviction constitute no federal or state crime". This opinion and review does not address *all* of Brewer's argument

and the real issue on appeal, Also, it evades and does not address *how* Brewer did not "allege and prove" that he did not have the sufficient notice and knowledge required by Due Process Clause of the Fourteenth Amendment and the Notice and Knowledge (including knowledge of duration) within its scienter requirements under the United States Constitution.

In the court's opinion, it did not address or disclose and evaded in its review, the issue of the Constitutional right under the Due Process Clause of the Fourteenth Amendment and the Notice and Knowledge (including knowledge of duration) it requires under the United States Constitution, that Brewer brought before the court as his issue on appeal. The conduct that the court concluded (constituted a violation of state law), requires due process notice and acknowledgment. The lack of sufficient notice and knowledge including knowledge of duration required by the United States Constitution has not been disputed by the court's opinion nor addressed. The applicability of the ruling by the U S Supreme Court in *Lambert v. California, 355 U.S. 225 (1957)* to this case has been evaded in

the court's opinion, just as it was avoided and ignored by the district court in earlier proceedings.

Brewer seeks reconsideration in the court's opinion in which it has *set precedent* and *agreed* with the district court's *erroneous conclusion of law* that notice and knowledge (including knowledge of duration) of sex offender registration laws under Hawaii and Arkansas State law is not required by the United States Constitution, the supreme law of the United States, and that it need not be addressed. This is a self-evident violation of the United States Constitution. S*ee* Lambert v. California, 355 U.S. 225 (1957). *"Held: when applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge, this ordinance violates the Due Process Clause of the Fourteenth Amendment."" We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand."* The facts surrounding Brewer's actual or probable knowledge or lack thereof, has not been addressed or disputed, but evaded in the court's review, and it

pertains to a Constitutional right. The conduct in which the court stated in it's opinion, *constituted a violation of state law*, does not apply the applicability of due process notice and its requirements under the United States Constitution, as set out by the U S Supreme Court in Lambert v. California, 355 U.S. 225 (1957)

Brewer brought the underlying issue of the requirement of due process notice and its requirements before the courts many times on all possible occasions, in his motion to dismiss indictment, in a letter to the judge at sentencing, in his first appeal, in his 28 U.S.C. § 2255 motion, in appeal of 28 U.S.C. § 2255 motion, petition for certificate of innocence, in his objections to report and recommendation, in the present appeal, and in this petition for rehearing and rehearing en banc, before this court now. The issue was briefly but not fully addressed in *United States v. Kevin Brewer, No. 09-3898 (8th Cir. 2010)" Brewer argues that, despite registering four times in Arkansas based upon the Hawaii conviction, he cannot be convicted of a knowing violation of SORNA because Hawaii officials never notified him of his duty to register in that State. Assuming without deciding*

that this is a sound interpretation of SORNA's scienter requirement as construed in Baccam, it raises an issue of fact -- whether he knowingly violated 18 U.S.C. § 2250 -- not an issue of law warranting dismissal of the indictment. Accordingly, like other issues of fact, this issue was foreclosed by Brewer's guilty plea." Brewer's argument with facts in regards to lack of sufficient due process notice and its requirements should no longer be foreclosed because the underlying conviction has been vacated. This continuous argument and pleading on the issue of a right to due process notice and its *scienter* requirements under the United States Constitution, has continually been evaded and not fully addressed in any review, which discloses the reasoning with an explanation as to why the scienter requirement of due process notice and its requirements is not applicable to the circumstances of this case and the issue on appeal.

EFFECTS OF THIS RULING

The ruling in this case sets the precedent in the 8th Circuit and the courts that it encompasses and that follow, that the States of Hawaii and Arkansas, and possibly other states, are exempt from

the United States Constitution, the supreme law of the United States, in regards to the notice and knowledge (including duration) requirement of their sex offender registration laws and it need not to even be addressed or explained by the court in its review and opinion. The damaging effects of the ruling in the court's opinion with the lack of addressing the issue in review with an explanation, can further be summed up by the U S Supreme Court in Lambert v. California, 355 U.S. 225 (1957). *"Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. Recent cases illustrating the point are Mullane v. Central Hanover Trust Co., 339 U.S. 306 ; Covey v. Town of Somers, 351 U.S. 141 ; Walker v. Hutchinson City, 352 U.S. 112 . These cases involved only property interests in civil litigation. But the principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case. [355 U.S. 225, 229]" MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN and*

MR. JUSTICE WHITTAKER join, dissenting "But what the Court here does is to draw a constitutional line between a State's requirement of doing and not doing." This Supreme Court judgement and ruling is now in possible conflict as a result of the court's opinion which lacks factually addressing the issue on review.

The ruling shall have effect on many others than just Brewer. Just as abused in this case when Brewer was prosecuted and sentenced by the government under SORNA under an invalid law, this court's ruling opinion and review is now open for further abuse in any situation and circumstance in which a law should require notice and knowledge (including knowledge of a duration period). As stated in *United States v. John A. Kroh, Jr., 915 F.2d 326 (8th Cir. 1990) by LAY, Chief Judge, with whom McMILLIAN and MAGILL, Circuit Jdges, join, dissenting. "This is particularly true when the obvious purpose of the government is not to adduce factual evidence of the conspiracy nor to supply other needed evidence, but simply to bring to the jury's attention the guilty plea of the alleged co-conspirator of the defendant. This court now allows the prejudicial use of the*

guilty plea without any exacting analysis of the government's tactic in calling an alleged co-conspirator for the primary purpose of eliciting the guilty plea" The fundamental principle is the same as in this case when the government sought a guilty plea and evaded the issue of due process notice and its requirements under the U S Constitution. The government is highly probable to skillfully and obviously not adduce factual evidence nor supply other needed evidence in a case or prosecution.

The court's ruling opinion in this case now sets the course and precedent on how even addressing the issue involving a constitutional right can be completely evaded by the government, district court and the 8th Circuit Court of Appeals without any further explanation or discussion on public record. By not addressing and evading the underlying issue on appeal, which is merits of the issue of a Constitutional right under the Due Process Clause of the Fourteenth Amendment and the Notice and Knowledge (including knowledge of duration) it requires under the United States Constitution, it borders on abuse of discretion and a violation of *28 U.S. Code § 453 Oaths*

of justices and judges, Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God." Brewer puts before the court that it is a great miscarriage of justice and violation of the Constitution of the United States to have the basis of his pleading for relief continually evaded and not addressed, especially in regards to the Constitutional rights in which judges have sworn to God to uphold.

WRIT OF CERTIORARI

If Brewer is unsuccessful within this present petition for rehearing and rehearing en banc, his next and last option for relief is to petition the U S Supreme Court. Brewer will have to petition the U S Supreme Court in an attempt to get his issue of due process notice and requirements under the United States

Constitution reviewed and addressed. In precedent of the U S Supreme Court and this court, under the similar circumstance of this court failing to fully clearly address an issue, a case was remanded back to the 8th Circuit. *See Jody Lombardo, et al. v. City of St. Louis, Missouri, et al. 594 U.S (2021)* *"We instead grant the petition for certiorari, vacate the judgment of the Eighth Circuit, and remand the case to give the court the opportunity to employ an inquiry that clearly attends to the facts and circumstances in answering those questions in the first instance." "3 While the dissent suggests we should give the Eighth Circuit the benefit of the doubt, in assessing the appropriateness of review in this fact-bound context, it is more prudent to afford the Eighth Circuit an opportunity to clarify its opinion rather than to speculate as to its basis"* That case shows the precedent of the U S Supreme Court when the 8th Circuit fails to clearly attend to the facts and circumstances of a case. If this court evades and does not address the applicability of due process notice and requirements under the circumstances of this case, it will fail to clearly attend to the facts and circumstances of this case and further evade and deny a constitutional right to due process and acknowledgement of its requirements, within

the violation the court stated in its opinion, ("constituted a violation of state law"). Brewer ask this court as a panel to address the underlying issue of the applicability of due process notice and its requirements to this case and avoid the probability of the U S Supreme Court unnecessarily having to remand this case back to this court to get the issue clearly and appropriately addressed, which should have been done in the first instance.

Brewer is prejudiced by this court's opinion, just as he was prejudiced by the district court's ruling and review, it is a prejudicial error to evade the issue of due process notice and its requirements in applicability to the circumstances in this case, by it not being addressed in first instance. The court has unconstitutionally evaded any fact-bound context substance Brewer has brought before this court and hindering and voiding any fact-bound context substance that can be brought for review before the U S Supreme Court, that supports the lack of sufficient due process notice and acknowledgement of its requirements, by not addressing the issue in first instance.

CONCLUSION

For the aforementioned reasons, Brewer begs and pleads to the court to finally address, with explanation of the reasoning, within a fact-bound context, the issue of due process notice and its scienter and provide a remedy and cure the opinion as a panel and in en banc, and (or) also address with an explanation of the reasoning, as to why the issue of due process notice and its requirements has not been addressed under the circumstances of this case, and the inapplicability or applicability of *Lambert v. California, 355 U.S. 225 (1957)* to the circumstances of this case. Brewer pleads for it to no longer be evaded, as it pertains to a Constitutional right under the Due Process Clause of the Fourteenth Amendment and the Notice and Knowledge (including knowledge of duration), its scienter requirements under the United States Constitution. In this case, the lack of the facts of sufficient notice and knowledge (including knowledge of duration) required by the United States Constitution has not been disputed by the government, nor by the court's review and opinion. Brewer asks the court as a panel to grant petition for

rehearing and rehearing en banc, and review this case under all other appropriate standards of review, not just abuse of discretion, even though Brewer argues that the panel's decision is also abuse of discretion, he also argues that it also fails under the other applicable standards of review. Brewer puts before this court, that its opinion is outweighed by the ruling of the U S Supreme Court in *Lambert v. California, 355 U.S. 225 (1957)*.

Respectfully Submitted,

Kevin Brewer, Pro Se

/s/ KEVIN BREWER

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS HOT SPRINGS DIVISION

KEVIN LAMONTE BREWER) PETITIONER

Vs. Criminal No. 6:09-cr-60007

Civil No. 6:10-cv-06003

United States Of America) DEFENDANT

OBJECTIONS TO REPORT AND RECOMMENDATION

It appears to the Petitioner that the report and recommendation is biased in favor of the government. The report and recommendation only addressed the government's argument, it does not address or discuss what Petitioner has objected to in his objections to report and recommendation, which address not having sufficient knowledge and notice under the Due Process Clause of the Fourteenth Amendment and procedural failures of officials and law enforcement having jurisdiction who were liable for notification of registration requirements, duties, obligations and duration. Not receiving the notice required by law is one of the basis that his conviction was vacated by the 8th Circuit. See United States v. Brewer No. 13-1261 (8th Cir. 2014)

W

" In sum, the Attorney General lacked good cause to waive the procedural requirements of *notice* and comment when promulgating the Interim Rule, and this procedural error prejudiced Brewer. As a result, SORNA did not apply to Brewer in 2007, so his conviction for failing to register is invalid"

It is cited in the report and recommendation "He has failed to even allege he did not violate any other law (state or federal) with his actions". Petitioner did allege he is not liable for any violation of any state or federal law for failure to register offense because he did not receive sufficient notice or have sufficient knowledge of the duty and requirements and that violates his right to due process notice. There is no other offense on record in question or related. Petitioner also alleged that he had no knowledge of his duty to register because he thought he did not have to register after completing parole and probation because he was never sufficiently notified of that duty or requirements, such as the duration of registration. A document filed pro se is "to be liberally construed," Estelle, 429 U. S., at 106, and "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," ibid. (internal quotation marks omitted). Cf. Fed. Rule Civ. Proc. 8(f) ("All pleadings shall be so construed as to do substantial justice")

The report and recommendation does not distinguish between the duty to register and the requirement of the US Constitution and state law to be notified of the requirements, duties, obligations and duration of that duty under the Due Process Clause of the Fourteenth Amendment.

There is no question that the Petitioner was considered to be liable in the violation of state and federal law and had a duty and obligation to register. The question is whether he was *liable* under state law or federal law of that violation of the duty and obligations to register, if the US Constitution and state law requires knowledge and notice of the *requirements, duties, obligations and duration,* and if Petitioner did or did not receive sufficient notice of those *requirements, duties, obligations and duration of the duty to register* in order to comply, even though he registered in the four times in the past.

The report and recommendation has not addressed or disputed any of the facts alleged by the Petitioner in regards to past registration and acknowledgement forms being insufficient due process notice in the circumstances of this case. It has only been stated that he was *aware*, but not how he was aware, except that he had a duty and registered and complied 4 times in the past

In the case of Lambert v. California, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957) just as the Petitioner in this case, it is clear that there is a duty and obligation register under State law and considered as being liable for the violation of the State law. The Supreme Court ruled "held: When applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge, this ordinance violates the Due Process Clause of the Fourteenth Amendment.

Having a duty and obligation to register and failing to register does not automatically make an offender liable of a violation of failing to register even though an offender is considered to be in violation of the law. Having a duty and obligation to register triggers the provisions of the act or law that requires registration. When the provisions of the act are triggered, you will find the requirement of notification and review of requirements, such as Ark. Code Ann. § 12-12-906((c) (1) D) Require the sex offender to read and sign a form stating that the duty of the sex offender to register under this subchapter has been reviewed. The Arkansas Sex Offender Act does have an affirmative defense for failing to register Ark. Code Ann. § 12-12-904(a)(2) It is an affirmative defense to prosecution if the person:(A) Delayed reporting a change in address because of:(i) An eviction;(ii) A natural disaster; or(iii) *Any other unforeseen circumstance*. SORNA also has affirmative defense 18 U.S. Code § 2250(c) Affirmative Defense.—In a prosecution for a violation under subsection (a) or (b), it is an affirmative defense that—(1) uncontrollable circumstances prevented the individual from complying; (2) *the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply*; and (3) the individual complied as soon as such circumstances ceased to exist.

Facts related to due process notice and sufficient knowledge of the duty and the requirements, duties, obligations and duration should also be considered a defense against prosecution and liability of a violation, as it

is the duty of appropriate officials codified in Arkansas State law to be notified of those requirements including amended requirements Ark.Code § 12-12-906 (c) (1) (A)(D) Require the sex offender to read and sign a form stating that the duty of the sex offender to register under this subchapter has been reviewed.

As cited in the report and recommendation "Further, it is also clear that Brewer's conduct was a violation of state law, specifically the Arkansas Sex Offender Registration Statute, Ark. Code Ann. § 12-12-905. To prove a violation of the Arkansas Sex Offender Registration Statute, the state must show the person has been convicted of a qualifying sex offense and that he failed to register. See Guyton v. State, 601 S.W.3d 440, 445-446 (Ark. 2020)" This is only in regards to the fact of proving a violation exist, not proving *liability* of that violation because there are some affirmative defenses against those violations.

As cited in the report and recommendation "In Brewer's first appeal, the Eighth Circuit engaged in an analysis of this statute. The Eighth Circuit recognized his culpability under the Arkansas statute(Ark. Code Ann. § 12-12-905) in its first opinion in this case. See United States v. Brewer, 628 F.3d 975, 978 (8th Cir. 2010)". The question of culpability under state law was left open in regards to state notification of the duty, requirements, duties, obligations and duration See United States v. Brewer, 628 F.3d 975, 978 (8th Cir. 2010) "In his reply brief and in a pro se supplemental brief, Brewer argues that, despite registering four times in Arkansas based upon the Hawaii conviction, he cannot be

convicted of a knowing violation of SORNA because Hawaii officials never notified him of his duty to register in that State. Assuming without deciding that this is a sound interpretation of SORNA's scienter requirement as construed in Baccam, *it raises an issue of fact* -- whether he knowingly violated 18 U.S.C. § 2250 -- not an issue of law warranting dismissal of the indictment." This reflects back down to receiving sufficient notification and having sufficient knowledge of requirements, obligations, duties, and duration under Arkansas state, Hawaii state and federal law.

Reflecting upon the case of Lambert v. California, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957) the Supreme Court states "There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition. See Chicago, B. Q. R. Co. v. United States, 220 U.S. 559, 578. *But we deal here with conduct that is wholly passive — mere failure to register. It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed.* Cf. Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57; United States v. Balint, 258 U.S. 250; United States v. Dotterweich, 320 U.S. 277, 284. The rule that "ignorance of the law will not excuse" (Shevlin-Carpenter Co. v. Minnesota, supra, p. 68) is deep in our law, as is the principle that of all the powers of local government, the police power is "one of the least limitable." District of Columbia v. Brooke, 214 U.S. 138, 149. On the other hand, due process places some limits on its exercise. Engrained in

our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. Recent cases illustrating the point are Mullane v. Central Hanover Trust Co., 339 U.S. 306; Covey v. Town of Somers, 351 U.S. 141; Walker v. Hutchinson City, 352 U.S. 112. These cases involved only property interests in civil litigation. But the principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case". Even though that case is referring to notice of the *duty* to register, it also encompasses notice of the *requirements, obligations, duties and duration* of that duty to register in order to comply. An offender cannot comply without sufficient knowledge and sufficient notice of the requirements, obligations, duties and duration.

The report and recommendation has not addressed or disputed the insufficiency of the acknowledgement forms submitted to the court or which specific requirements Petitioner violated, or how long he was notified he was required to register.

As cited in the report in recommendation " Brewer, aware of sex offender registration requirements having previously complied same" The only facts to allege that petitioner was aware of requirements are the past four signed acknowledgement forms he signed, with the last

acknowledgement forms being the most important and relevant because it was the last requirements Petitioner was notified of which Petitioner alleges to be insufficient.

As stated by the Eighth Circuit in United States v. Brewer, 628 F.3d 975, 978 (8th Cir. 2010) "As Brewer was subject to Arkansas registration requirements as a result of his 1997 Hawaii conviction, it is clear that he had a duty to re-register when he returned to Arkansas in 2007. See Ark.Code Ann. § 12-12-906(a)(2)(B)(i), which provides that any person living in Arkansas who must register as a sex offender in the jurisdiction where he was adjudicated "shall register as a sex offender in this state."

The other provisions of this law also provides that there be a form of due process notice such as Ark.Code § 12-12-906 (c) (1) (A)(D) Require the sex offender to read and sign a form stating that the duty of the sex offender to register under this subchapter has been reviewed and Hawaii state law H. R. S. 846E-4 Duties upon discharge, parole, or release of covered offender (6) Require the covered offender to sign a statement indicating that the duty to register has been explained to the covered offender

Petitioner did not violate any of the requirements in which he was notified of in past acknowledgment forms because the acknowledgment forms had not yet been amended with the requirements that applied to him at time of arrest, strangely they do not apply to his circumstances and situation, such as within what time period he was required to register after moving and returning to Arkansas or duration of registration. The report

and recommendation has not disputed the facts regarding the acknowledgement forms alleged by Petitioner.

At first thought and glance it can easily be assumed that someone who has registered four times in the past would be aware of that duty to register, but only if you look closer into exactly what the acknowledgement forms state, and what is written, can it be determined if it is sufficient notice and what specific requirements Petitioner was notified of and violated.

If you compare the acknowledgement forms in exhibits within petition, you will find they have been amended many times and vary with the requirements, duties, obligations of the duty to register and each one has been amended with more requirements. Facts surrounding what registration requirements, duties, obligations and duration of the duty to register signed and acknowledged by offender in the past, and which requirements violated, is not addressed in report and recommendation.

Even though Petitioner registered four times before being arrested, none of the acknowledgement forms signed by the Petitioner covers his circumstances returning to Arkansas, give duration period of registration, or give any time period in which he was required to register after moving or returning to Arkansas. The amended acknowledgement forms do give those requirements in which Petitioner was never notified. In this case the past acknowledgement forms signed was insufficient notice of requirements at the time Petitioner was arrested. Petitioner did not did not know he was still required to register after his probation parole was completed. If jurisdiction of conviction and law enforcement

having jurisdiction had not failed in their procedural duty with their omission to notify Petitioner of his registration requirements and the duration, this case would not even be argued or would all the other questions of law have arisen. Duty to register and the duration stems from notification of duty to register in and from jurisdiction of conviction State of Hawaii.

As cited in the report in recommendation "Brewer, *aware* of sex offender registration requirements having previously complied same, could have avoided prosecution entirely by first seeking a determination of whether he was required to register as a sex offender back in 2007. Because he did not do so, his own neglect led to his prosecution." Only if Petitioner was properly notified of requirements making him aware of a duty to register would he have a reason to seek determination of the requirements. The cost and effects of prosecution, court time, incarceration and supervised release with a total sentence of 42 months imprisonment and 15 years supervised release could have also been avoided, if law enforcement having jurisdiction would have notified Petitioner of the amended registration requirements he submitted to this court in this petition, and gave him the opportunity to comply, instead of notifying the US Marshal Service to prosecute him, especially because of the fact there were no other related criminal offenses or activity on record in this case at the time of arrest. It was the duty law enforcement in that jurisdiction, in which they *neglected* and failed in their duty to notify Petitioner of his requirements before prosecuting him. See

Ark.Code § 12-12-906. Duty to register or verify registration generally -- Review of requirements with offenders (local law enforcement agency having jurisdiction) and H. R. S. 846E-4 Duties upon discharge, parole, or release of covered offender (6) Require the covered offender to sign a statement indicating that the duty to register has been explained to the covered offender.

At first look it can easily be assumed that someone who has registered four times in the past would be aware of that duty to register and its requirements, but only if you look closer into related provisions of law and the requirements, duties, obligations of that duty that is assumed to be violated, can it be determined if Petitioner received sufficient notice or had sufficient knowledge of that duty and what specific *requirements, duties, obligations and duration of the duty to register,* the Petitioner was notified of and violated.

There are no facts on record to show Petitioner, even though registering four times in the past, at time of arrest, was aware or knew requirements, duties, obligations and *duration* of the duty to register, after sentence, probation and parole was completed and not being required or having to register for 3 years.

To satisfy "28 U.S.C. § 2513 (a) (2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution". Only if the Petitioner had sufficient

knowledge and sufficient due process notice of his registration requirements, obligations, duties and duration under US Constitution and State Law, could he be liable of committing any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and did not by misconduct or neglect cause or bring about his own prosecution. As stated by Supreme Court in Lambert v. California "*But we deal here with conduct that is wholly passive — mere failure to register. It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed*" This ruling applies to the State of Arkansas sex offender registration law and any all other related state or federal laws. This is alleged in Petitioner's petition for certificate of innocence.

NOTE FOR THE RECORD

Petitioner would like to note something for the record. Its very likely this case will be back before Senior District Judge Robert T. Dawson who has had final ruling in district court in all the proceedings in this case.

This certificate of innocence is committed to the sound discretion of the district court. See United States v. Racing Services, Inc. (8th Cir. 2009)" The decision to deny a certificate of innocence is committed to the sound discretion of the district court. Betts, 10 F.3d at 1283.) A

certificate of innocence serves no purpose other than to permit its bearer to sue the government for damages — a quintessentially civil action. Granted, in deciding whether or not to issue the certificate, the district court must consider whether the petitioner is truly innocent — that is, whether he committed the acts charged and, if so, whether those acts constituted a criminal offense (§ 2513(a)(2)); Rigsbee, 204 F.2d at 72 — but the court makes that determination independent of the outcome of the trial or appeal, taking into account not only whether the petitioner was innocent but also whether he may deemed responsible for his own prosecution". As the 8th Circuit discussed in United States v. Brewer, 628 F.3d 975 (8th Cir. 2010) "The district court rejected this contention, relying on two decisions of the Supreme Court of Arkansas construing § 12-12-905 of the Arkansas Sex Offender Registration Act as applying to persons "still serving a sentence of incarceration, probation, parole, or other form of community supervision at the time of the Act's effective date, August 1, 1997." Kellar v. Fayetteville Police Dept., 339 Ark. 274, 5 S.W.3d 402, 404 (1999); see Williams v. State, 351 Ark. 229, 91 S.W.3d 68, 70 (2002) (applying this interpretation to a prior conviction in another State). Brewer urges us to ignore these decisions because they did not address the argument he makes in this case. Of course, that is necessarily true, because Kellar and Williams were decided before the 2006 amendment to § 12-12-905(a)(2) upon which Brewer relies and which he self-servingly characterizes as a clarifying amendment. Like the district court, we will follow, not ignore, these Supreme *978 Court

of Arkansas decisions, both because they are controlling interpretations of state law, and because they are consistent with the plain meaning of § 12-12-905(a)(2) as first enacted." As Brewer was subject to Arkansas registration requirements as a result of his 1997 Hawaii conviction, it is clear that he had a duty to re-register when he returned to Arkansas in 2007. See Ark.Code Ann. § 12-12-906(a)(2)(B)(i), which provides that any person living in Arkansas who must register as a sex offender in the jurisdiction where he was adjudicated "shall register as a sex offender in this state". When this question was before Judge Dawson, he expressed doubt, but went along with the Arkansas Supreme Court Ruling.

Petitioner now poses this scenario, that a offender has completed and is *no longer still serving* sentence of incarceration, probation, parole, or other form of community supervision and was adjudicated guilty before the acts effective date and never notified of duration or registration requirements in the jurisdiction where he was adjudicated guilty, in regards to Supreme Court of Arkansas construing § 12-12-905 of the Arkansas Sex Offender Registration Act as applying to persons "still serving a sentence of incarceration, probation, parole, or other form of community supervision at the time of the Act's effective date, August 1, 1997(this law has a history of ambiguity), it comes down to this scenario in this case and what the Petitioner has tried to argue on his behalf from the beginning of this case to prove he is truly innocent. To distinguish between having a duty to register and the procedural requirement of the law to provide due process notice of those requirements, what requirements he was notified

of, how in his particular situation and circumstances he did not have sufficient notice and sufficient knowledge and the reasons and circumstances as to why.

Respectfully Submitted,

Kevin Brewer
Petitioner /s/KevinBrewer

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS

KEVIN BREWER — Plaintiff

v. — Case 6:09-cr-60007-RTD

UNITED STATES OF AMERICA — **Defendant**

Motion to amend Petition for Certificate of Innocence

Petitioner request to submit Arkansas acknowledgment forms and U S Supreme court citation to his petition. To make amendment simple, Petitioner would like to add the Arkansas acknowledgment forms as exhibits 4a, 4b and Supreme Court citation as exhibit 5, and not be required to file another amended petition.

Respectfully Submitted,

/s/ Kevin Brewer

Kevin Brewer, Petitioner

X

EXHIBIT 4(a)

Sex Offender Acknowledgement Form

Read, sign and return this form to your local law enforcement agency

1. Pursuant to Act 989 of 1997, anyone convicted of a sex offense as defined by state and federal law are required to register prior to release from incarceration, placed on probation or upon entry to this state from another state. All offenders are required to provide fingerprints, photos, DNA and pay all fees pertaining to registration before or upon registration.

2. Pursuant to §12-12-906 (g) and §12-12-909 (b),The Arkansas Crime Information Center (ACIC) requires the offender to report any changes in residence, mailing address, temporary domicile, employment, email, social network information **IN Person** to the local law enforcement agency having jurisdiction. When changing residence/mailing address or temporary domicile, this must be in writing, **signed by the offender** no later than ten (10) days before the offender establishes residence or domicile unless otherwise indicated such as eviction or natural disaster. If the offender moves here from another state and is required to register in the other state, the offender must report to the jurisdictional law enforcement agency to register within three (3) business days after establishing residency. Offender must also report any travel or move to a foreign country.

3. If the offender moves to another state or lives in Arkansas and works in another state, the offender must register in that state no later than three (3) business days after the offender establishes residency or employment in the new state. If the offender attends school, does volunteer work or is employed at any institute of higher education, the offender shall register with the law enforcement agency having jurisdiction over the campus. This may be a Department of Public Safety or the local law enforcement agency. A nonresident worker or student shall register in compliance with Pub. L. No. 109-248 as exists 01-01-07 no later than three (3) business days after establishing residency, employment or student status.

4. Pursuant to § 12-12-909, the offender is required to verify their residence within Ten (10) days after the *Verification of Residency date* indicated on the bottom portion of this form. Verification of residency is required of every registered offender either every (6) six months after registration, or every ninety (90) days depending on the offender's assessment level.

5. All offenders are required to submit to a risk assessment to be completed by the Department of Correction Sex Offender Screening and Risk Assessment Program (SOSRA). The offender will be notified by certified mail of the location, date and time of the assessment. It is a Class C Felony to fail to appear for assessment or to not fully submit to the assessment process. The offender will be assessed as a default Level 3 should this occur. The offender can request a reassessment after 5 years from the date of the original assessment. Offender is responsible for contacting SOSRA to arrange this reassessment.

6. Pursuant to Act 330 of 2003, It is unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12- 12-901 et seq. and who has been assessed as a Level 3 or Level 4 offender to reside within two thousand (2,000) feet of the property on which any public, private, secondary school or daycare facility is located. Act 818 of 2007 includes public parks and youth centers and Act 394 of 2007 prohibits Level 3 and Level 4 offenders from residing within 2000 feet of the residence of his/ her victim or to have direct or indirect contact with his/ her victim for the purpose of harassment as defined under § 5-17-208.

7. Pursuant to Act 1779 of 2005, it is unlawful for a sex offender who is required to register under the sex offender registration act of 1997, §12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to engage in an occupation or participate in a volunteer position that requires the sex offender to work or interact primarily and directly with children under sixteen (16) years of age. It is also unlawful under the sex offender registry act for a level 3 or level 4 offender to knowingly enter a water park owned or operated by a local government.

offender initial and date _____

EXHIBIT 4(b)

Sex Offender Acknowledgement Form

8 Pursuant to § 12-12-907 no later than ten (10) days after release from incarceration or after the date of sentencing, the offender shall report to the local law enforcement agency having jurisdiction to update registration information

9 Pursuant to Title 18, United States Code, Section 2250, if a sex offender fails to register or fails to report a change in residence, employment or student status, and travels in or moves across state lines, the offender can be charged with a federal crime and punished by up to ten(10) years imprisonment Pursuant to § 5-14-130 (1), it is a Class D Felony to provide false information to obtain identification cards or driver's licenses with incorrect permanent physical addresses.

10 Pursuant to Act 992 of 2007 it is unlawful for a sex offender who is required to register under the Sex offender Registration Act of 1997, § 12-12-901 et seq , and who has been assessed as a Level 3 or Level 4 offender to knowingly enter upon the campus of a public school except under certain circumstances listed in the act

11 Pursuant to §12-12-919 termination of obligation to register is the responsibility of the offender In order to be removed from the Arkansas state registry the offender who has been convicted as an adult must petition the sentencing court if convicted in Arkansas Offender must register for a minimum of 15 years If the conviction was out of state, the offender must petition the court in the county in which they reside The offender will continue to be required to register in Arkansas if petition is not granted or if the offender does not petition Any offender who is required to register for life cannot petition the court for removal

I have read and understand all of the above rules regarding my registration as a sex offender. I further acknowledge that my failure to comply with the requirements to register as a sex offender, failure to comply with any part of the assessment process or failure to report changes in address constitutes a Class C felony. I understand failure to comply could result in my arrest and/or prosecution.

I acknowledge I have read and/or understand that I must verify my residence every ____ months by appearing *in person* to the jurisdictional law enforcement agency where I reside as required Arkansas statute. I understand that not doing so could result in arrest and prosecution. I also verify that my mailing and/or residency or temporary domicile is correct and that I will appear in person to the jurisdictional agency as required.

Offender Signature _____ Date signed: _____

Print Offender name clearly _____

Witness signature (law enforcement only) _____ Agency Name _____

OFFENDER MUST BE PROVIDED A COPY OF THIS SIGNED FORM

EXHIBIT 5

Lambert v. California, 355 US 225 - Supreme Court 1957 " We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand. As Holmes wrote in The Common Law, "A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." Id., at 50. Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it. Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community."

THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS

United States Of America) Defendant

v. Case 6:09-cr-60007-RTD

Kevin Lamonte Brewer) Petitioner

Petition for Certificate of Innocence

Petitioner, Pro Se, in this case was arrested for violating the Sex Offender Registration and Notification Act In 2009 and sentenced to 18 months imprisonment and 15 years supervised release. The court vacated his conviction in 2014. The Petitioner now seeks a certificate of innocence pursuant to 28 U.S.C. Sections 1495 and 2513.

Y

SUMMARY OF THE ARGUMENT

Petitioner was never informed of his registration requirements and duration of registration according to the registration law in jurisdiction of conviction which is State of Hawaii. The times in which Petitioner did register in Arkansas, it was a requirement of his Probation and Parole and was never notified that the duration of registration extended beyond the date Probation and Parole ended. It is also a violation of the due process notice required in State and Federal law for Petitioner to have been prosecuted for a violation, without the requirements of the law being followed by the appropriate officials in jurisdiction of conviction.

The Arkansas law in effect at the time of Petitioner's arrest AR Code § 12-12-906 Reads: (2) (A) A sex offender who moves to or returns to this state from another jurisdiction and who would be required to register as a sex offender in the jurisdiction in which he or she was adjudicated guilty or delinquent of a sex offense shall register with the local law enforcement agency having jurisdiction within seven (7) calendar days after the sex offender moves to a municipality or county of this state. This law requires notification in jurisdiction of conviction and the jurisdiction it involves.

The acknowledgement forms Petitioner signed in the past does not encompass his circumstances and were not sufficient of notifying him of his requirements. The forms don't give any duration or timeline for registering except for moving within or

out of state. Petitioner had not registered in 5 years since completing parole and did not know he was required.

The Arkansas registration law and acknowledgement forms have been amended and additional requirements added several times since law was first implemented. See exhibits 1-3.

SORNA also requires initial registration in jurisdiction of conviction. 42 U.S.C. 16917 reads: Duty to Notify Sex Offenders of Registration & Requirements and to Register

(a) In General –An appropriate official shall, shortly before release of the sex offender from custody, or, if the sex offender is not in custody, immediately after the sentencing of the sex offender, for the offense giving rise to the duty to register -

(1) inform the sex offender of the duties of a sex offender under this title and explain those duties;

(2) require the sex offender to read and sign a form stating that the duty to

register has been explained and that the sex offender understands the registration requirements; and

(3) ensure that the sex offender is registered.

The Hawaii State law in effect at the time Petitioner was arrested for failure to register reads:

H.R.S 846E-4 Duties upon discharge, parole, or release of covered offender. (a) Each person, or that person's designee, in charge of a jail, prison, hospital, school, or other institution to which a covered offender has been committed pursuant to a conviction, or an acquittal or finding of unfitness to proceed pursuant to chapter 704, for a covered offense, and each judge, or that judge's designee, who continues bail for or releases a covered offender following a guilty verdict or a plea of guilty or nolo contendere, who releases a covered offender on probation or who discharges a covered offender upon payment of a fine, and each agency having jurisdiction, shall, prior to the discharge, parole, or release of the covered offender:

(1) Explain to the covered offender the duty to register and the consequences of failing to register under this chapter;

(2) Obtain from the covered offender all of the registration information required by this chapter;

(3) Inform the covered offender that if at any time the covered offender changes any of the covered offender's registration information, the covered offender shall notify the attorney general of the new registration information in writing within three working days;

(4) Inform the covered offender that, if at any time the covered offender changes residence to another state, the covered offender shall register the new address with the attorney general and also with a designated law enforcement agency in the new state, if the new state has a registration

requirement, within the period of time mandated by the new state's sex offender registration laws;

(5) Obtain and verify fingerprints and a photograph of the covered offender, if these have not already been obtained or verified in connection with the offense that triggers the registration;

(6) Require the covered offender to sign a statement indicating that the duty to register has been explained to the covered offender; and

(7) Give one copy of the signed statement and one copy of the registration information to the covered offender.

(b) No covered offender required to register under this chapter shall be discharged, released from any confinement, or placed on parole or probation unless the requirements of subsection (a) have been satisfied and all registration information required under section 846E-2 has been obtained.

It was not by the omission, acts, deeds, misconduct or neglect by the Petitioner, but by the omission of the state officials in Hawaii who were responsible for initial registration, who failed in their legal duty to notify the Petitioner of registration requirements, which led to a failure to register offense.

If the Petitioner would have been notified according to the law in jurisdiction of conviction, there would be no question as to If Petitioner knew his registration requirements and duration or if

his due process notice rights have been violated. Registration in any state or jurisdiction arises and stems from jurisdiction of conviction, and if jurisdiction of conviction fails to do so as in this case, it can cause someone not aware of the requirements in jurisdiction of conviction to fail to register in another jurisdiction. Petitioner has no history of failing to register when notified of requirements by an appropriate official, as he did when instructed by probation and parole officer .

Petitioner would also like to note that lack of notification of his requirements in jurisdiction of conviction also caused him to be unaware of his registration period in which he was eligible to have his registration terminated. Because the jurisdiction of conviction failed to notify him of his requirements, he could not petition the court in the time specified by the law at time of conviction. He lost his opportunity to petition the court for termination of requirements over 15 years ago. At time of conviction Petitioner could have petitioned the court in 5 years to terminate his registration requirements.

The law was then amended to 15 years, then amended to 25 years, (See exhibits A and B) then amended again in the present law, and the opportunity to petition the court for termination of requirements was amended to 40 years. Duration of registration period has steadily been increased while already serving period of registration. H.R.S §846E-10 Reads:

TERMINATION OF REQUIREMENTS. (a) Tier 3 offenses. A covered offender whose covered offense is any of the following offenses shall register for life and, except as provided in subsection (e), may not petition the court, in a civil proceeding, for termination of registration requirements:

(e) Notwithstanding any other provisions in this section, any covered offender, forty years after the covered offender's date of release or sentencing, whichever is later, for the covered offender's most recent covered offense, may petition the court, in a civil proceeding, for termination of registration requirements.

Sex offender registration laws have survived on the basis that they are not punitive, but because of all the amendments, onerous restrictions and additions that have been added since they were first implemented some judges argue that they have now become punitive in nature and a Bill of Attainder.

In case of Muniz v. Pennsylvania (2017) At Mr. Muniz's sentencing, one of these new requirements was applied: he was ordered to comply with the new lifetime registration requirement instead of the 10-year requirement that had been in effect at the time of his conviction. Mr. Muniz appealed the application of the new lifetime registration requirement. The Superior Court held Pennsylvania's Sex Offender Registration and Notification Act (SORNA) registration provisions were not punishment, and therefore retroactive application to appellant Jose Muniz, who was convicted of sex offenses prior to

SORNA's effective date but sentenced afterwards. The court held that sentencing did not violate either the federal or state ex post facto clauses. Appellant argued that applying SORNA retroactively to him was unconstitutional. The Pennsylvania Supreme Court reversed, holding: (1) SORNA's registration provisions constituted punishment notwithstanding the General Assembly's identification of the provisions as non punitive; (2) retroactive application of SORNA's registration provisions violated the federal ex post facto clause; and (3) retroactive application of SORNA's registration provisions also violated the ex post facto clause of the Pennsylvania Constitution.

Petitioner prays for relief and that this Certificate of Innocence be granted.

Respectfully Submitted,

/s/ Kevin Brewer

Kevin Brewer, Petitioner

<<-(d) Give one copy of the signed statement containing the address to the offender and mail one copy to the chief of police or head of the law enforcement agency having jurisdiction of the area in which the sex offender expects to reside.->>

<<-(6) No earlier than five years following a conviction for a felony sexual assault or five years following release from any incarceration imposed pursuant to such conviction, whichever is later, a sex offender registered under this section may apply to any circuit court for an order relieving the sex offender of the duty of further registration. The court shall hold a hearing on the application at which the applicant and any interested persons may present witnesses and other evidence If, after the hearing, the court is satisfied, upon clear and convincing evidence, that the sex offender is rehabilitated, the court may grant an order relieving the sex offender of the duty of further registration. If the application is denied, a new application may not be submitted earlier than one year following the denial.->>

<<-(7) Any person required to register under this section who intentionally or knowingly fails to comply with any of the requirements of this section is guilty of a misdemeanor.->>

SECTION 5 There is appropriated out of the general revenues of the State of Hawaii, the sum of $300,000, or so much thereof as may be necessary for fiscal year 1997-1998 and the sum of $300,000 or so much thereof as may be necessary for fiscal year 1998-1999 for ongoing operational costs of the sex offender registration and notification program required under this Act, including the hiring of necessary staff. The sums appropriated shall be expended by the department of the attorney general for the purposes of this Act.

SECTION 6. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 7. This Act shall apply to any acts committed prior to, on, or after its effective date.

SECTION 8. Statutory material to be repealed is bracketed.

SECTION 9. This Act shall take effect on July 1, 1997

Approved June 30, 1997.

HI LEGIS 316 (1997)

END OF DOCUMENT

HI LEGIS 45 (2005)
2005 Hawaii Laws Act 45 (S.B. 708)
(Publication page references are not available for this document.)

HAWAII 2005 SESSION LAWS
2005 REGULAR SESSION OF THE 23rd LEGISLATURE

Additions are indicated by Text; deletions by ~~Text~~. Changes in tables are made but not highlighted.
Vetoed provisions within tabular material are not displayed.

Act 45
S.B. No. 708

CHAPTER 846E--REGISTRATION--NOTIFICATION

A BILL FOR AN ACT RELATING TO CHAPTER 846E

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter 846E, Hawaii Revised Statutes, is amended by adding four new sections to be appropriately designated and to read as follows:

"§ 846E-A Termination of registration requirements.

(a) A covered offender whose most serious covered offense is a class A felony or its non-Hawaii equivalent, who has substantially complied with the registration requirements of this chapter for the previous twenty-five years, who is not a sexually violent predator, who is not an aggravated sex offender, and who is not a repeat covered offender, may petition the court, in a civil proceeding, for termination of registration requirements on the ground that registration is no longer necessary for the protection of the public.

(b) A covered offender whose most serious covered offense is a class B felony or its non-Hawaii equivalent, who has substantially complied with the registration requirements of this chapter for the previous fifteen years, who is not a sexually violent predator, who is not an aggravated sex offender, and who is not a repeat covered offender, may petition the court, in a civil proceeding, for termination of registration requirements on the ground that registration is no longer necessary for the protection of the public.

(c) A covered offender whose most serious covered offense is a class C felony or its non-Hawaii equivalent, or a misdemeanor or its non-Hawaii equivalent, who has substantially complied with the registration requirements of this chapter for the previous ten years, who is not a sexually violent predator, who is not an aggravated sex offender, and who is not a repeat covered offender, may petition the court, in a civil proceeding, for termination of registration requirements on the

4192089

Attachment #1

Sex and Child Offender Notification Form

1. Pursuant to Act 989 of 1997, all sex and child offenders are required to be registered prior to release from incarceration.

2. If after release the offender changes address, the offender is required to give the new address to the Arkansas Crime Information Center in writing no later than 10 days before the offender establishes residence or is temporarily domiciled at the new address.

3. If the offender changes address to another state, the offender shall register the new address with the Arkansas Crime Information Center and with a designated law enforcement agency in the new state no later than 10 days before the offender establishes residence or is temporarily domiciled in the new state if the new state has a registration requirement.

I have read and understand the above rules regarding my registration as a sex and child offender. I further acknowledge that my failure to comply with the requirements to register as a sex and child offender or my failure to report changes in address constitutes a Class D felony and may result in my subsequent arrest and prosecution, or other administrative hearings which could result in a deprivation of my liberty.

[signature] 12645
NAME

8-1-00
DATE

SCORA.doc (970717)

A RECEIVED A
C AUG 03 2000 C
I I
C ACIC C

4

EXHIBIT
tabbies 1

Sex Offender Acknowledgement Form

Read, sign and return this form to your local law enforcement agency.

1. Pursuant to Act 989 of 1997, sex and child offenders are required to register prior to release from incarceration.

2. If the offender changes address, the offender is required to give the new address to the Arkansas Crime Information Center in writing no later than TEN (10) days before the offender establishes residence or is temporarily domiciled at the new address. Pursuant to §12-12-909 (d), ACIC can require the offender to report this change of address in person to the local law enforcement agency having jurisdiction.

3. If the offender changes address to another state, the offender shall register the new address with the Arkansas Crime Information Center no later than TEN (10) days before the offender establishes residency in the new state. The offender must register with the new state upon arrival in that state.

4. If the offender attends school, does volunteer work or is employed at any institute of higher education, the offender shall register with the law enforcement agency having jurisdiction over the campus. This may be a Department of Public Safety or the local law enforcement agency.

5. The offender is required to verify their residence within TEN (10) days after receipt of the *Verification of Residency* form which will be mailed to the offender's home every six months after registration, or every 90 days depending on the offender's assessment level. The Verification of Residency form is to be taken in person to the local law enforcement agency having jurisdiction.

6. All offenders are required to submit to a risk assessment to be completed by the Department of Correction Sex Offender Screening and Risk Assessment Program. The offender will be notified by mail of the location, date and time of the assessment.

I have read and understand the above rules regarding my registration as a sex offender. I further acknowledge that my failure to comply with the requirements to register as a sex offender, failure to comply with any part of the assessment process, or my failure to report changes in address constitutes a Class D felony. Failure to comply may result in my subsequent arrest and prosecution, or other administrative hearings that could result in a deprivation of liberty.

Name

9-15-03

Date

ACIC 01/1502

EXHIBIT 2

Sex Offender Acknowledgement Form

Read, sign and return this form to your local law enforcement agency

1. Pursuant to Act 989 of 1997, sex and child offenders are required to register prior to release from incarceration.

2. If the offender changes address, the offender is required to give the new address to the Arkansas Crime Information Center in writing no later than TEN (10) days before the offender establishes residence or is temporarily domiciled at the new address. Pursuant to §12-12-909 (d), ACIC can require the offender to report this change of address in person to the local law enforcement agency having jurisdiction.

3. If the offender changes address to another state, the offender shall register the new address with the Arkansas Crime Information Center no later than TEN (10) days before the offender establishes residency in the new state. The offender must register with the new state upon arrival in that state.

4. If the offender attends school, does volunteer work or is employed at any institute of higher education, the offender shall register with the law enforcement agency having jurisdiction over the campus. This may be a Department of Public Safety or the local law enforcement agency.

5. The offender is required to verify their residence within TEN (10) days after receipt of the *Verification of Residency* form which will be mailed to the offender's home every six months after registration, or every 90 days depending on the offender's assessment level. The Verification of Residency form is to be taken in person to the local law enforcement agency having jurisdiction.

6. All offenders are required to submit to a risk assessment to be completed by the Department of Correction Sex Offender Screening and Risk Assessment Program. The offender will be notified by mail of the location, date and time of the assessment.

7. Pursuant to Act 330 of 2003, *"It shall be unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq. and who has been assessed as a Level 3 or Level 4 offender to reside within two thousand (2,000) feet of the property on which any public or private elementary or secondary school or daycare facility is located.*

I have read and understand the above rules regarding my registration as a sex offender. I further acknowledge that my failure to comply with the requirements to register as a sex offender, failure to comply with any part of the assessment process, or my failure to report changes in address constitutes a Class D felony. Failure to comply may result in my subsequent arrest and prosecution, or other administrative hearings that could result in a deprivation of liberty.

Kevin Brewer
Name

2-10-04
Date

EXHIBIT 3

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

20-1209 C

KEVIN BREWER **PLAINTIFF**

V.

UNITED STATES OF AMERICA **DEFENDANT**

COMPLAINT FOR RELIEF AND COMPENSATION

Plaintiff, Pro Se, in this case was arrested for violating SEX OFFENDER REGISTRATION AND NOTIFICATION ACT In 2009 and sentenced to 18 months imprisonment and 15 years supervised release. The 8th Circuit Court Of Appeals reversed the district court's denial of Brewer's motion under § 2255 and the district court vacated his conviction October 6, 2014. The Plaintiff now seeks compensation pursuant to 28 U.S.C. Sections 1495 and 2513, In which this court has jurisdiction.

Z

STATEMENT OF THE CLAIM

The 8th Circuit Court Of Appeal's judgement order remanding the case back to district court, and the district court's order vacating the conviction on the basis SORNA did not apply him at time of offense, should serve as certificates of the court.

The Plaintiff was never notified of the duration and requirements or had been initially registered in jurisdiction of conviction at time of offense. The law requirement in the of jurisdiction of conviction the State of Hawaii, at time of offence, H.R.S 846E-4 Duties upon discharge, parole, or release of covered offender required an appropriate official to notify him of his requirements. Registration in any state or jurisdiction arises and stems from jurisdiction of conviction.

It was not by the omission, acts, deeds, misconduct or neglect by the Plaintiff, but by the omission of the state officials in Hawaii in jurisdiction of conviction who were responsible for initial registration, who failed in their legal duty to notify the Plaintiff of registration requirements and duration and who are responsible for a failure to register offense.

The law in the State of Arkansas, the only other jurisdiction involved, AR § 12-12-906. Duty to register or verify registration generally--Review of requirements with offenders, also requires a duty of notifying offenders of requirements and stems from jurisdiction of conviction.

This establishes Plaintiff could not be guilty of a failure to register offense if he was never notified of the requirements and duration in accordance to the law in jurisdiction of conviction. The only way Plaintiff's actions could constitute an offense is to deny right to due process and ignore the fact the law states and requires notifying him of the requirements and duration, in which there is no record of in this case.

See Lambert v. California, 355 US 225 - Supreme Court 1957 " We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand. As Holmes wrote in The Common Law, "A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." Id., at 50. Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it. Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.

The order vacating conviction is on record with U S District Court Western District Arkansas. In The case of Bolduc v. united states, 248 Fed. App'x. 162, 164-65, 2007 u.s. App. LEXIS 21185 (Fed. Cir. 2007) it appears to state that a "Certificate of Innocence" is unnecessary. Nevertheless a petition for certificate of innocence is pending in the U S District Court Western District Arkansas.

RELIEF

Plaintiff seeks full amount due under law, $50,000 per year for years and days spent in pretrial detention, halfway house, correctional facility and home confinement. And asking the court to inform Plaintiff on any form of relief he can get from injury suffered from supervised relief.

Respectfully Submitted,

/s/ Kevin Brewer September 8th 2020

Kevin Brewer, Plaintiff

FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF ARKANSAS

Bruce D. Eddy
Federal Defender

Investigators
Rafael Marquez
Michael Schriver

3739 Steele Blvd., Suite 280
Fayetteville, AR 72703
(479)442-2306
FAX 443-1904

Jack Schisler
Senior Litigator

Assistant Defenders
James B. Pierce
Angela L. Pitts

March 13, 2013

Michael Gans, Clerk of Court
U. S. Court of Appeals For the Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, MO 63102

Re: U.S. v. Kevin Brewer, No. 13-1261

Dear Mr. Gans:

Kevin Brewer filed a pro se motion to expand the certificate of appealability. This Court, pursuant to an Order filed February 27, 2013, directed me to review the pro se motion and advise the Court within 7 days if the motion should be filed. I obtained one extension to review the lengthy record.

After reviewing the motion as well as all of the pleadings filed by the parties, the reports and recommendations filed by the magistrate judge, and the orders filed by the district court, I advise the Court that the motion should not be filed. The district court properly identified the two issues to be reviewed on appeal in granting in part Mr. Brewer's previous motion for certificate of appealability. Counsel does note that this Court recently addressed one of the issues and circuit precedent is now against Mr. Brewer; however, we wish to preserve the issue for possible Supreme Court review, if necessary.

I respectfully request that this Court not file the Appellant's pro se motion to expand the certificate of appealability and the Court release a new briefing schedule for the instant habeas appeal.

Highest regards,

Angela L. Pitts

Angela L. Pitts
Assistant Federal Defender

AA

S:\BREWER_KEVIN_2013_00090\LETTERS\Clerk of Court letter response 3 13 2013.wpd

U. S DISTRICT COURT WESTERN DISTRICT OF ARKANSAS HOT SPRINGS DIVISION

UNITED STATES OF AMERICA PLANTIFF

VS. CRIMINAL CASE NO. 6:09-cr-060007

CIVIL NO. 6:12-cv-06026

KEVIN BREWER DEFENDANT

Motion for Reconsideration, Certificate of Appealability and Notice of Appeal

This motion is to serve as request for Reconsideration, Certificate of Appealability and Notice of Appeal. Movant request the court first Reconsider the recent judgement in this case. The ruling within the request for reconsideration determines the courts response to movant's request for COA.

Request for reconsideration is brought forth in this motion under Rule 59(e) and under Rule 60(b). The movant request the court to first reconsider this motion under the factors of Rule 59(e) and if court finds this motion does not meet the requirements of those factors, movant request the court reconsider this motion under the factors of Rule 60(b) which is a catch-all provision allowing the trial court to relieve a party from a judgment for "any other reason justifying relief from the operation of the judgment."

This motion is only requesting reconsideration on the issue of the validity of the Interim Rule and effective date of SORNA in regards predate offenders. This motion is brought forth on the grounds that after movant filed objections to the report and recommendation there has been new rulings of law in regards to the validity of the Interim Rule that was not able to be presented to the court. Even though this issue has not been decided by 8th Circuit Court of Appeals other district courts within the 8th Circuit have addressed it as also district courts within the 2nd Circuit. The 2nd Circuit precedent was the same as the 8th Circuit in that both circuits ruled that SORNA was effective to predate offenders on the date of its enactment, that precedent was overruled by the Supreme Court in U S v. Reynolds, in that SORNA

BB

did not apply to predate offenders until the AG specifies a valid rule. See United States v James Coppock US District of Nebraska August 31, 2012 "It has been held that the Interim Rule issued by the Attorney General in February 2007 was not valid under the APA because the Attorney General lacked good cause to dispense with the notice-and-comment and thirty-day publication requirements. See United States v. Stevenson, 676 F.3d 557, 561 & n.2 (6th Cir. 2012). The Final Rule, however, was made available for comment—on May 30, 2007, the Attorney General published proposed guidelines from the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking ("the SMART guidelines"). 72 Fed. Reg. 30,210, 30,212; see Stevenson, 676 F.3d at 660. Following review and discussion of the comments, the Attorney General issued a Final Rule on July 2, 2008. 73 Fed. Reg. 38,030." See also United States of America v. David M. Mullins US District of Vermont August 29, 2012" This ruling only prevents the government from relying on the Interim Rule to charge sex offenders with violating SORNA during the period from February 2007, when the Interim Rule took effect, until August 2008, when the SMART Guidelines came into force. The government did not have a valid basis to prosecute pre-Act sex offenders under SORNA for conduct committed during that brief window."

Movant request the court to reconsider the weight of persuasive authority, as this court is the only court to rule that SORNA applied to predate offenders before the Final Rule was issued in 2008 and adopt harmless error within the US Circuit Courts since the Supreme Court's ruling in U S v. Reynolds, even though it found the Interim rule invalid. The case of United States v. Steven Ray Walls US DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION (July 20, 2012) " I agree that by August 1, 2008 the SORNA rules were retroactive to pre-Act offenders. The Attorney General published the Final Smart Guidelines on July 2, 2008. Thirty days from that is August 1, 2008. This meets the notice and publication requirement of the APA.", was cited in objections to report and recommendation, but the cases of United States v. James Coppock and United States of America v. David M. Mullins was not. These are 3 cases of persuasive authority and there is no ruling in other cases to the knowledge of movant that are contrary to those rulings since the Supreme Court ruled in U S v. Reynolds. The only courts except this court not to rule that SORNA did not apply until 2008 to predate are those circuits who must uphold their precedent which was decided {before} Supreme Court's ruling in U S v. Reynolds. The movant request the court to reconsider this issue on the weight of persuasive authority since there is no other case ruled to contrary. Movant also request the court to reconsider the cases used to adopt harmless error in its ruling, which are the cases of US V Gavrilovic 8th Cir.(1977) and United States v. Byrd (5th cir 2011). It was stated in the adopted report and recommendation that the 5th circuit's ruling appears to be consistent with the 8th Circuit, in that in the case of US V Gavrilovic, the DEA acted

without following the 30 day notice requirement and the 8th circuit ruled the DEA publication valid after 30 days. What distinguishes these cases is the fact that a comment period was carried out after the DEA's publication in the Federal Register, see US V Gavrilovic " Since the DEA received no comments after publication, a hearing was not necessary", see Federal Register a notice entitled "Proposed Placement of Mecloqualone and the Thiophene Analog of Phencyclidine in Schedule I." 40 Fed.Reg. 23306. 21 CFR part 1308. "All interested persons are invited to submit their comment....and must be received no later than July 1, 1975...If no objections presenting a reasonable grounds for a hearing on the proposal are received within the time limitations, and all interested parties are waive or are deemed waive their opportunity for a hearing or to participate in the hearing, the administrator may without a hearing and after giving consideration to written comments, issue his final order....without a hearing." This is not the same scenario in United States v. Byrd and the case at hand in which there was not a comment period before the interim rule became effective. Therefore, the violation of the comments requirement of the APA in US V Gavrilovic and United States v. Byrd is very much distinguishable in those cases, and therefore, these rulings in US V Gavrilovic 8th Cir.(1977) and United States v. Byrd (5th cir 2011) cannot be considered consistent, similar and comparable circumstances since the issue of violations in comments requirements of APA did not exist in US V Gavrilovic as in United States v. Byrd and this case at hand. It is general practice and procedure for district courts to follow the persuasive authority within their own circuit "first", then if needed also rely on similar and, or other rulings of authorities from other circuits, {before} relying on authorities that are not within its own circuit and that are contrary to the authorities within its own circuit.

In this case the court adopted the ruling of harmless error even though the authority it followed from another circuit (5th Circuit) conceded that their authority has no persuasive authority in the majority of the circuit courts, See US V Johnson 5th Cir. (2011) footnotes 127(in which the precedent in the case of United States v. Byrd relies in regards to validity of the interim rule) "In so holding, we recognize that our interpretation of SORNA is a position not previously held by the majority in another circuit. Cf. Dean, 604 F.3d at 1288 (Wilson, J., concurring) (endorsing the harmless error doctrine's applicability to SORNA)."

In the case of U S v. Mefford W. District Arkansas July 12, 2012, "Considering the weight of persuasive authority, the Court finds that Congress' grant of authority to the Attorney General to determine the retroactivity of SORNA does not violate the non-delegation doctrine." The same court and judge who ruled on that motion to dismiss and who will also rule on this motion, considered the

persuasive authority even though the 8th Circuit was yet to rule on that issue, just as it is yet to rule on this issue concerning the interim rule. All courts who have made new rulings regarding the interim have determined that the interim rule did not apply to predate offenders until 2008, except for the courts who must follow their precedent before the Supreme court ruled in U S v. Reynolds, travel in the case at hand occurred in 2007. Movant request the court to consider the persuasive authority in this case just as it did in U S v. Mefford. The case of US v Stevenson (6th Cir.2012) with the citations of US v Utesch 6th Cir.(2010) appears to be the case adopted by the majority of the courts and adopted within other district courts within the 8th Circuit and should be thoroughly considered in reconsideration within the grounds and argument within this motion.

In the case at hand, movant filed a Motion to Set Aside or Vacate Conviction, although the Court denied movant relief, this case involves serious claims and warrants careful reconsideration, Finally, "[i]n behalf of the unfortunates, federal courts should act in doing justice if the record makes plain a right to relief." United States v. Morgan, 346 U.S. 502, 505 (1954).

The movant request the court to reconsider and vacate and set aside sentence or stay conviction until this matter is fully settled by the higher courts, due to the weight of persuasive authority and the fact that this court's ruling has created a split among the district courts within its own circuit and that there is already a split among all the circuits regarding this issue, but since the ruling in U S v. Reynolds there has not been a ruling of harmless error and no court has ruled SORNA applied to predate offenders before a Final Rule became effective in 2008 except this court. Due to all grounds set forth in this motion movant prays for the relief requested.

Certificate of Appealability

The movant, Kevin Brewer, respectfully request a COA in order to appeal to the 8th Circuit Court of Appeals issues within this case following denial of 2255 motion on grounds specified in this motion.

Movant's claims make a substantial showing of the denial of a constitutional right. This Court accordingly should issue a COA indicating that movant's claims satisfies the statutory prerequisites to appeal final orders in proceedings under 28 U.S.C. § 2255. See 28 U.S.C. § 2253(c). Before a movant may appeal from the final order in a proceeding under 28 U.S.C. § 2255, he must first obtain a COA. See 28 U.S.C. § 2253. A COA should issue where "the applicant has made a substantial showing of the denial of a constitutional right." !d. Where the district court has denied relief on the merits, the "substantial

showing" standard requires "that jurists of reason would find it debatable whether [1] the petition states a valid claim of the denial of a constitutional right" or [2] presents issues "adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). In cases where the district court has denied relief on procedural grounds, the "substantial showing" standard requires that the movant demonstrate the debatabililty of any underlying constitutional claims and that the movant show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id.

The determination of whether a COA should issue is a "threshold inquiry" only. Miller-£! v. Cockrell, 537 U.S. 322, 336-337 (2003). A claim can be debatable "even though every jurist of reason might agree, after the certificate of appealability has been granted and the case has received full consideration, that the petitioner will not prevail." Id. at 338. Thus, "the COA can be granted" so long as "the petitioner's claim does not appear utterly without merit after a quick look." Mateo v. United States, 310 F.3d 39,42 (1sT Cir. 2002) (followingJ fferson v. Welborn, 222 FJd 286,289 (7T11 Cir. 2000)). See Sechrest v. Ignacio, 549 F.3d 789, 803 (9m Cir. 2008) ("quick look at the face of the petition"); Gibson v. Klinger, 232 F.3d 799, 803 (IOTH Cir. 2000) ("only take a quick look .. to determine whether [the petitioner] has facially alleged the denial of a constitutional right").

ISSUES IN REQUEST FOR COA AND ARGUMENT IN SUPPORT

1) INEFFECTIVE ASSISSTANCE OF COUNSEL

All grounds in 2255 motion were brought forth under Ineffective Assistance of Counsel, but the challenge to the Interim rule was also raised as a stand alone claim of a new ruling of law by the Supreme Court. The issue of Ineffective Assistance of Counsel is debatable as the 8th Circuit Court of Appeals can review merits de novo and that determines Ineffective Assistance of Counsel, as none of the grounds and issues in 2255 motion were presented or preserved by counsel. "defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case," Strickland, at 693, but rather "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, at 695-96. Strickland v. Washington, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

2) INTERIM RULE AND EFFECTIVE DATE OF SORNA TO PREDATE OFFENDERS

Its requested that a COA in regards to challenging to the validity of the Interim Rule to be sought only on the grounds of a new law and a new Supreme court ruling, not under Ineffective Assistance of Counsel.

The validity of the Interim Rule is debatable as the 8th Circuits Court of Appeals has not yet ruled on the issue. Several courts and within the 8th Circuit have ruled the Interim Rule invalid since case of U S v. Reynolds was remanded by the Supreme Court, See United States v James Coppock US District of Nebraska August 2012 " It has been held that the Interim Rule issued by the Attorney General in February 2007 was not valid under the APA because the Attorney General lacked good cause to dispense with the notice-and-comment and thirty-day publication requirements. See United States v. Stevenson, 676 F.3d 557, 561 & n.2 (6th Cir. 2012). The Final Rule, however, was made available for comment—on May 30, 2007, the Attorney General published proposed guidelines from the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking("the SMART guidelines"). 72 Fed. Reg. 30,210, 30,212; see Stevenson, 676 F.3d at 660. Following review and discussion of the comments, the Attorney General issued a Final Rule on July 2, 2008. 73 Fed. Reg. 38,030." See also United States v. Steven Ray Walls U S District Court Western Missouri Western Division July 2012 " I agree that by August 1, 2008 the SORNA rules were retroactive to pre-Act offenders. The Attorney General published the Final Smart Guidelines on July 2, 2008. Thirty days from that is August 1, 2008. This meets the notice and publication requirement of the APA. The defendant cites United States v. Springer for the premise that proposed regulations do not carry the force of law. 354 F.3d 772, 776 (8th Cir. 2004)." See also United States of America v. David M. Mullins US District of Vermont August 2012 2nd Circuit " This ruling only prevents the government from relying on the Interim Rule to charge sex offenders with violating SORNA during the period from February 2007, when the Interim Rule took effect, until August 2008, when the SMART Guidelines came into force. The government did not have a valid basis to prosecute pre-Act sex offenders under SORNA for conduct committed during that brief window." In my case the court appears to be the only court to rule the violation of the APA harmless in any circuit except those circuits which must uphold their precedent which was ruled before U S v. Reynolds.

3) INADEQUATE INSUFFICENT DUE PROCESS AND DUE PROCESS NOTICE STATE LAW

Issues specified in grounds 3,4,5,7 in 2255 motion encompass the constitutional right to due process, Inadequate Insufficient Due Process Notice under State law and SORNA, including violation of due process, procedural due process, substantive due process and due process notice, No Initial Registration or notification of requirements in Jurisdiction of Conviction by Appropriate Official as required by SORNA and State law which violates due process notice and the requirement of SORNA to be Initially Registered in jurisdiction of conviction within specified time frames by Appropriate Official, No notice of Duration of registration as required under Hawaii State law, Arkansas State Law and SORNA, Insufficient inadequate notification of registration requirements within acknowledgement forms under Arkansas State law in which sex offender could not knowingly fail to register.

In State v. Bani, 36 P.3d 1255 (Haw. 2001), the Hawaii State Supreme Court held that Hawaii's sex offender registration statute violated the due process clause of the Constitution of Hawaii, ruling that it deprived potential registrants of "of a protected liberty interest without due process of law." The Court reasoned that the sex offender law authorized "public notification of (the potential registrant's) status as a convicted sex offender without notice, an opportunity to be heard, or any preliminary determination of whether and to what extent (he) actually represents a danger to society.

Hawaii Supreme Court in State v. Bani has ruled It is a violation of due process not to have the opportunity challenge or to be heard in regards Hawaii registration requirements under Hawaii State Law. Arkansas Law requires registration if registration would be required in jurisdiction of conviction and that requires notification by appropriate official IN jurisdiction of conviction See Ark. Code Ann 12-12-906 B)(i) Any person living in this state who would be required to register as a sex offender in the jurisdiction in which he or she was adjudicated guilty of a sex offense shall register as a sex offender in this state whether living, working, or attending school or other training in Arkansas. If you are to be required to register in jurisdiction of conviction, it requires notification of requirements and duration in that jurisdiction under jurisdiction of conviction State law with an opportunity to be heard in convicting jurisdiction.

Even though these grounds all encompass Due process, the fact there was never any initial registration in jurisdiction of conviction is yet to be addressed as whether it is a fundamental defect and violation of due process under State laws deemed sufficient notice of SORNA and as a requirement of

SORNA as a matter of law. Each of these grounds though all encompass Due Process stands alone as an individual claim as each is a different element of a Due process violation.

4) UNABLE TO COMPLY TO SORNA

This case is very unique in that the offender was not in Jurisdiction of the US when SORNA was passed and not required to register in country where resided for 2 years and not initially registered in jurisdiction of conviction. According TO 42 U.S.C 16913(d) the AG is to specify applicability and prescribe rules for those unable to comply with initial registration. The AG did specify applicability but still did not prescribe rules or guidelines in any form for such registration until July 2008 after interstate travel occurred in this case when final guidelines was published, when the interim rule was published, nor 30 days after, there was no prescribed rules or guidelines in place on how to register those unable to comply 42 U.S.C 16913(b)(d). See United States v. Springer for the premise that proposed regulations do not carry the force of law. 354 F.3d 772, 776 (8th Cir. 2004) The AG statement within the publication of the interim rule states " The purpose of this interim rule is not to address the full range of matters that are within the Attorney General's authority under section 113(d), much less to carry out the direction to the Attorney General in section 112(b) to issue guidelines and regulations to interpret" Even though I was subject to SORNA there was no rules or guidelines in place when interstate travel occurred or interim rule published as to how in my specific circumstances I was to be notified and registered.. Due to the uniqueness of the circumstances surrounding this issue in this case, brings fourth this issue as jurists of reason would find it debatable.

5) SENTENCE SUBSTANTIALLY UNREASONABLE

On direct appeal the 8th circuit stated it could not conclude whether sentence was substantially unreasonable because it was not preserved as a procedural error. It was addressed in 2255 motion as a procedural error. The procedural error of the judge not giving specific reason or factors to lengthy 15 years supervised release sentence denies defendant of right to appeal sentence as there is no basis or factors to conclude by Appeal Court if sentence is substantively unreasonable as result of the procedural error. See UNITED STATES v. BREWER No. 09-3898.Dec 20,2010 " this is a claim of procedural error which is foreclosed because it was neither preserved in the district court nor argued on appeal" and "we cannot conclude that the district court's imposition of a fifteen-year term was a substantively unreasonable abuse of discretion in this case".

6) EX POST FACTO VIOLATION

The Ex Post Facto claim raised and requested to be addressed and preserved was not addressed. New grounds, facts, laws, scenario and circumstances regarding this claim have been introduced and presented. It is a new constitutional and debatable issue. See Weaver v. Graham, 450 U S 24, 101 SUPREME CT 960(1981) holds that even if a statute merely alters the penal provision, it yet violates the Ex post facto clause if its both retrospective and more onerous than the law in effect on the date of offense". In this case the notification being debated and deemed sufficient gave notification of a penalty that was less onerous than that of SORNA.

7) KNOWINGLY FAILING TO REGISTER

Knowingly failure to register is determined by Sex Offender Acknowledgement forms. See U S v Kevin Brewer 8th (2010) "we held that the scienter requirement of SORNA is satisfied by proof of a knowing violation of state or local registration requirements, even if the defendant had no notice of his SORNA obligations. See also U S v. Baccam 8th Cir. (2009) "We conclude that Baccam had adequate notice of his registration obligations based on the information provided him in the California registration forms, even if that notice did not explain that failure to register would be a violation of federal law as well as state law" Whether the actual acknowledgement forms that were signed are sufficient within the grounds and facts brought forth in 2255 motion are debatable in that jurists of reason would find it debatable, and yet to be addressed as a matter of law and is a constitutional issue in regards to sufficient adequate due process notice.

8) MOVANT DOES NOT MEET REQUIREMENTS OF SORNA

It is stated in footnote 7 of the report and recommendation I do not meet the requirement of U.S.C. 2250(a). If movant does not meet that requirement SORNA was not violated. In See U S v Carr 130 S.Ct. (2010) (JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE GINSBURG join, dissenting) "The Court's answer is that §2250(a) applies only to sex offenders who moved from State to State after SORNA became law." Which is not the circumstances and scenario in this case and brings fourth this issue as jurists of reason would find it debatable.

9) ATTORNEY GENERAL'S MISCONCEPTION OF SORNA AND PROSECUTORIAL MISCONDUCT AND ABUSE OF AUTHORITY AND DISCRETION

SORNA is not retroactive on its effective date and the Attorney General was under the assumption and misconception that is was, as its self admitted grounds and reason for bypassing notice and comment of the APA and promulgating a Interim rule, that means SORNA is not retroactive at all and the interim rule and final rule is pointless and invalid as the basis of determining when SORNA became effective for predate offenders.

United States Solicitor General (HEAD GOVERNMENT PROSECUTOR) Has ALREADY CONCEDED that the AG was under the wrong assumptions and under misconception when it promulgated the Interim Rule. See United States Reply brief U S v Reynolds S CT 2012 in its entirety it CONTINUALLY CONCEDES the wrong assumptions and misconception of SORNA, but for starters "The Attorney General further stated that SORNA's direct federal law registration requirements for sex offenders are not subject to any deferral of effectiveness. They took effect when SORNA was enacted on July 27, 2006, and "currently" apply to all offenders in the categories for which SORNA requires registration." Id. at 8895. the Attorney General issued an interim rule "CONFIRMING" that " the requirements of SORNA apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of [SORNA]." 28 C.F.R. 72.3 Now, due to the new Supreme Court ruling in U S v. Reynolds the basis and grounds in which the interim rule was promulgated and in specific regards to the AG's statement that SORNA's "direct federal law registration requirements for sex offenders are not subject to any "deferral of effectiveness". They took effect when SORNA was enacted on July 27, 2006, and "currently" apply to all offenders in the categories for which SORNA requires registration." Id. at 8895, has already been found invalid in U S v. Reynolds. But yet predate offenders are still being prosecuted. This is a issue jurists of reason would find it debatable

10) <u>ACTUAL INNOCENCE</u>

This claim was raised and requested to be addressed and preserved but was not addressed. A combination of all the facts within the grounds of 2255 motion and objections are constitutional in regards to due process and debatable as whether they contribute overall to actual innocence. "It is important to note in this regard that "actual innocence" means factual innocence, not mere legal insufficiency. See Sawyer v. Whitley, 505 U.S. 333, 339 (1992). To establish actual innocence, petitioner must demonstrate that, " in light of all the evidence,' " "it is more likely than not that no reasonable juror would have convicted him." Schlup v. Delo, 513 U.S. 298, 327—328 (1995) (quoting Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev 142, 160 (1970)).

Like the Great Writ from which it draws its essence, see Engle v. Isaac, 456 U. S. 107, 456 U. S. 126 (1982), the root principle underlying 28 U.S.C. § 2254 is that government in a civilized society must always be accountable for an individual's imprisonment; if the imprisonment does not conform to the fundamental requirements of law, the individual is entitled to his immediate release. Of course, the habeas corpus relief available under § 2254 differs in many respects from its common law counterpart. Most significantly, the scope of the writ has been adjusted to meet changed conceptions of the kind of criminal proceedings so fundamentally defective as to make imprisonment under them unacceptable. See, e.g. Moore v. Dempsey, 261 U. S. 86 (1923); Murray v. Carrier, 477 U.S. 478 (1986)

The Government has had opportunity to reply and respond to all grounds and issues raised.

Conviction Constitutes a Miscarriage of Justice

Jurists of reason could debate whether movants's conviction constitutes a miscarriage of justice. Miscarriages of justice apply "in this 'extremely rare' and 'extraordinary case' where the petitioner is actually innocent of the of the crime ...." Gomez v. Jaimet, 350 F.3d 673, 679 (7m Cir.2003) (quoting Schlup v. Delo, 513 U.S. 238 (1995) Based on the record, this is a "extremely rare" and "extraordinary case" because he actually innocent of the crime for which he has been convicted and sentenced, especially fundamentally in regards to due process with no notification of requirements by sentencing court or officials in jurisdiction of conviction. Thus, his conviction constitutes a clear miscarriage of justice. Therefore, reasonable jurists could debate whether movant's conviction constitutes a miscarriage of justice and a COA should be granted on these claims

CONCLUSION

In the case at bar, movant filed a Motion to Set Aside or Vacate Conviction, Although the Court denied movant relief, this case involves serious claims and warrants careful review, Finally, "[i]n behalf of the unfortunates, federal courts should act in doing justice if the record makes plain a right to relief." United Stales v. Morgan, 346 U.S. 502, 505 (1954). For the reasons set forth, movant respectfully requests that the Court certify all of movant's claims for appeal.

Respectfully Submitted,

Kevin Brewer

August 27, 2012

U. S DISTRICT COURT WESTERN DISTRICT OF ARKANSAS HOT SPRINGS DIVISION

UNITED STATES OF AMERICA PLANTIFF

VS. CRIMINAL CASE NO. 6:09-cr-060007

CIVIL NO. 6:12-cv-06026

KEVIN BREWER DEFENDANT

OBJECTIONS TO REPORT AND RECOMMENDATION

Objection 1

Non Delegation

This district court has already made a ruling regarding the Non delegation claim. I request my argument be reviewed de novo and preserved.

CC

Objection 2

Interim Rule by the Attorney General

Due to new the Supreme Court ruling in US v Reynolds, I have the right to challenge interim rule whether under ineffective assistance of counsel or not within a new Supreme Court ruling. (I wish to reiterate this claim is not only under ineffective counsel but also standing alone as a new ruling of law) The Interim rule does not set forth a valid specification as the new Supreme Court ruling requires. The interim rule does not establish a effective date as to when SORNA applies to predate offenders. The interim rule only confirmed a effective date of the statute to be July 2006, that date has been found invalid in U S V Reynolds S.Ct (2012). The interim rule was promulgated on the basis the effective date was July 2006. The interim rule is invalid for more reasons than just notice of the APA, it is also invalid because there is no indication that the notice and comment process was actually carried out. Under standard APA procedure, an agency issues a proposed rule, requests comments, reviews those comments, and then publishes a final rule. See United States v. Springer for the premise that proposed regulations do not carry the force of law. 354 F.3d 772, 776 (8th Cir. 2004)

US Supreme Court states the interim rule must be valid, in the case US V Gavrilovic 8th Cir.(1977) referred to in the report and recommendation, the regulation was different than the interim rule in that it was not a rule confirming another effective date as the purpose of the interim rule being promulgated in which it confirmed July 2006 effective date for predate offenders, this date was found to be invalid by Supreme Court, the issue of conduct occurring after 30 days of the regulation in US V Gavrilovic and violation in notice comment procedures of APA was not challenged or issue raised, argued and addressed in court as within the scenario of this case or was there a ruling of harmless error, there was

not a Supreme Court ruling that stated that rule must be valid as is in this case. The AG did not have good cause to violate the 30 day notice or comment of the APA, it is not just the 30 day notice, it is also the required procedures of comments that makes the interim rule invalid, there is no indication that the comment process was actually carried) See also US v Utesch 6th Cir.(2010) "We now hold that a defendant in Utesch's position is not bound by the interim rule. While the thirty-day advance publication requirement is met here, such that Utesch had time to comply with the rule, see Rowell v. Andrus, 631 F.2d 699, 704 (10th Cir.1980) (holding that a regulation made effective less than thirty days after publication, in violation of 5 U.S.C. § 553(d), may be held valid after the passage of thirty days), we have no indication that the notice and comment process was actually carried out. Under standard APA procedure, an agency issues a proposed rule, requests comments, reviews those comments, and then publishes a final rule. As the D.C. Circuit has explained, "notice and an opportunity for comment are to precede rule-making"; the APA requires that "affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas." N.J. Dep't of Envtl. Prot. v. EPA, 626 F.2d 1038, 1049-50 (D.C.Cir.1980) (internal quotation marks omitted). In this case, the Attorney General the agency solicited comments, but the interim rule became effective immediately, before receipt and review of any public feedback. There was never any follow up publication corresponding to the interim regulation that evidenced actual consideration of public commentary. Therefore, we conclude that the interim rule did not make SORNA effective against Utesch or any other defendants convicted before SORNA's enactment". The Interim Rule remained invalid after 30 days because there were still no prescribed registration guidelines effective until August 2008 in accordance to. 42 U.S.C 16913(d) and 42 U.S.C 16917(b). See also United States v. Springer for the premise that proposed regulations do not carry the force of law. 354 F.3d 772, 776 8th Cir. (2004). No opportunity existed for me to submit comments or participate in the drafting because I was not in a jurisdiction of the USA during the period necessary , but

if I would have had the opportunity to comment, I would have participated and I would have commented that I was never initially registered in jurisdiction of conviction as required by state and federal law SORNA and its guidelines and there were no guidelines or rules in place as to how I should be registered or notified before or during the promulgation of interim rule or 30 days after. During the period comments should have been accepted and considered there was still no guidelines or rules prescribed as to how notification and registration of predate offenders should take place in accordance to 42 U.S.C 16913(d) and 42 U.S.C 16917(b). Publishing a interim rule specifying applicability and prescribing rules and guidelines for registration are two different and separate requirements within the same law subpart of 42 U.S.C 16913(d),) See also United States v. Springer for the premise that proposed regulations do not carry the force of law. 354 F.3d 772, 776 (8th Cir. 2004) See also 5 U.S.C. § 706(2)(D) "The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be without observance of procedure required by law.".

In the last cases I have on record in the 8th circuit in regards to APA , See United States v. Steven Ray Walls US DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION (July 20, 2012) " I agree that by August 1, 2008 the SORNA rules were retroactive to pre-Act offenders. The Attorney General published the Final Smart Guidelines on July 2, 2008. Thirty days from that is August 1, 2008. This meets the notice and publication requirement of the APA." and See UNITED STATES v. KNUTSON 8th Cir (2012) (even though my date of interstate travel differs, they appear to be following the reasoning in United States v. Stevenson) "He does not assert that the final rule is defective under the APA. Knutson cannot challenge the interim rule See Mefford, 2012 WL 1059019, at *1 n. 1; United States v. Stevenson, 676 F.3d 557, 565–66 (6th Cir.2012)." (I can challenge the interim rule because interstate travel occurred before the final rule in this case) it appears 8th circuit is not using the 5th circuit's reasoning, but instead the 6th circuit's reasoning, within the 6th circuit's reasoning is the case of US v Stevenson (6th Cir.2012) with the citations of US v Utesch 6th Cir.(2010) in which I am in the same scenario and

6th Circuit ruled the interim rule invalid, even though 30 day notice requirement can be met, the failure in the comment procedures of APA can't be met, the 5th Circuit states in its opinion ". See US V Johnson 5th Cir. (2011) footnotes 127 "In so holding, we recognize that our interpretation of SORNA is a position not previously held by the majority in another circuit. Cf. Dean, 604 F.3d at 1288 (Wilson, J., concurring) (endorsing the harmless error doctrine's applicability to SORNA)." All prosecutions that took place before the interim rule pertaining to predate offenders are now invalid and several Circuits have already found the interim rule invalid, in this case these views and arguments took place after the interim rule and final rule was published and after the U S Supreme Court has ruled in US v. Reynolds that the interim rule must be a valid specification. The opportunity to fully challenge the interim rule did not exist until after U S v Reynolds in the 8th circuit, specifically the issue that the Attorney General never within its own capacity of delegated authority decided or determined SORNA was retroactive, but only confirmed within the interim rule an effective date of July 2006 applied to predate offenders, now the Supreme Court has found the July 2006 effective date invalid as to when SORNA applies to predate offenders. The interim rule does not within itself establish a effective date of when SORNA applies to predate offenders as to why there is so much controversy within this interim rule that has split the circuit courts. Each circuit has to create their own effective date as to the retroactivity of SORNA and the interim and final rule. A sister court within the 8th circuit has addressed this issue with the effective date of August 2008 as to when SORNA applies to predate offenders, See United States v. Steven Ray Walls US DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION (July 20, 2012) " I agree that by August 1, 2008 the SORNA rules were retroactive to pre-Act offenders. The Attorney General published the Final Smart Guidelines on July 2, 2008. Thirty days from that is August 1, 2008. This meets the notice and publication requirement of the APA. The defendant cites United States v. Springer for the premise that proposed regulations do not carry the force of law. 354 F.3d 772, 776 (8th Cir. 2004)" This report and recommendation was adopted by that district judge. Also See 5 U.S.C. §

706(2)(D) "The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be without observance of procedure required by law." in regards to the validity of the interim rule.

Interim Rule Invalid on other Grounds besides APA

The purpose of the interim was to CONFIRM SORNA applied to preenactment offenders as of July 2006 at the enactment of SORNA. AG'S statement in the Federal Register in publishing the interim rule "SORNA's direct federal law registration requirements for sex offenders are not subject to any deferral of effectiveness. They took effect when SORNA was enacted on July 27, 2006, and currently apply to all offenders in the categories for which SORNA requires registration." This date has been found invalid by the Supreme Court in US v Reynolds. The Supreme Court ruled that the interim rule must be a valid specification. See US v Reynolds "For these reasons, we conclude that the Act's registration requirements do not apply to pre-Act offenders until the Attorney General so specifies. Whether the Attorney General's Interim Rule sets forth a valid specification consequently matters in the case before us. And we reverse the Third Circuit's judgment to the contrary." The interim rule cannot be valid specifying and confirming another effective date for preenactment offenders in which the Supreme Court ruled is not the date SORNA applies to preenactment offenders. The interim rule and the final rule which is based on the interim are invalid specifications of when SORNA applies to preenactment offenders. I request this be addressed as its own grounds and preserved in the motion for relief, that the interim rule is a invalid specification of when SORNA applies to preenactment offenders not just under the APA.

No Good Cause for AG to Violate APA Procedures and Interim Rule Invalid on other Grounds

The AG statements within the promulgation of the interim rule. "The resulting practical dangers include the commission of additional sexual assaults and child sexual abuse or exploitation offenses by sex offenders that could have been prevented had local authorities and the community been aware of their presence, in addition to greater difficulty in apprehending perpetrators who have not been registered and tracked as provided by SORNA. This would thwart the legislative objective of "protect[ing] the public from sex offenders and offenders against children" by establishing "a comprehensive national system for the registration of those offenders," SORNA § 102, because a substantial class of sex offenders could evade the Act's registration requirements and enforcement mechanisms during the pendency of a proposed rule and delay in the effectiveness of a final rule." Makes no sense. The Interim rule does nothing to notify the public of whereabouts of unregistered offender, because AG was yet to prescribe rules on how they should be registered and notified when the interim rule was published. A immediate rule should have contained how they should be registered and notified, until they are notified of their requirement by the rules the AG must prescribe, their whereabouts will not be known or will they be able to be prosecuted. The interim rule sets up prosecution of those already subject to prosecution under state law because they must be in violation of a state law registration requirement to be prosecuted, with no notice to them that they are subject to federal prosecution, and with no guidelines or rules set in place on how the substantial class of offenders the AG claimed could evade registration should be registered, also they had not been notified of requirements or received the opportunity to make a comment within notice and comment of APA as they did not even know they had a registration requirement. The Interim rule was applied to those

already subject to registration requirements and prosecution under state law as those newly required to register must be notified of requirements, with no rules prescribed or guidelines for registration and notification in place when interim rule was published or 30 days after. See AG statement in publication of interim rule stating " The purpose of this interim rule is not to address the full range of matters that are within the Attorney General's authority under section 113(d), much less to carry out the direction to the Attorney General in section 112(b) to issue guidelines and regulations to interpret" The interim rule does nothing to protect the public from those newly subject to federal registration requirements who must be notified of requirements or those already subject to prosecution under state law. Good cause to violate notice and comment of the APA is invalid. Because the interim rule is invalid and the Final Rule is a finalized Interim Rule, the Final Rule is not valid and neither are the final guidelines based on the Final Rule.

Objection 3

Final Rule by the Attorney General

The final rule does not matter in this case as interstate travel occurred and was completed in my case before the final rule was published or became effective, the date of interstate travel is the date which must be used as to when I supposedly violated SORNA, even though you may be subject to SORNA and SORNA applied when final rule was published, it is not violated until interstate travel occurs and the undisputed date of interstate travel in this case was December 2007 when interim rule was in place, It is also my argument that the final rule is invalid and because the interim rule is invalid and the final rule is a finalized interim rule and confirms a invalid effective date of July 2006, as to when SORNA applies to predate offenders. This was briefed in the APA AND SORNA'S RETROACTIVE RULE AS APPLIED TO

PREDATE OFFENDERS and BRIEF SUMMARY OF MOTION IN ITS ENTIRETY sections of reply to government's response but was addressed as not being briefed and not fully addressed in the report and recommendation.

Objection 4

Ineffective Assistance of Counsel

Ineffective assistance of counsel lies in the validity of the merits, if merits are valid there is ineffective assistance counsel by not raising these issues properly in court. In de novo review of this report and recommendation it will be reviewed if my grounds therein this motion have merit. Counsel never raised any of the specific issues in this somewhat lengthy motion.

Objection 5

Notification of SORNA

IT IS NOT THE FACT THAT I DID NOT RECIEVE ACTUAL SPECIFIC NOTICE OF SORNA that I am claiming within the facts in the grounds in this motion, it is that notification under STATE Law that is fundamentally flawed and insufficient in many areas, starting with jurisdiction of conviction Hawaii and with Arkansas notification acknowledgement forms. STATE Law notification of duty to register must be sufficient and adequate if it is to suffice as adequate notice of SORNA when direct notification of SORNA is not required. See U S v Baccam 8th Cir. (2009) "We conclude that Baccam had adequate notice of his registration obligations based on the information provided him in the California registration forms, even if that notice did not explain that failure to register would be a violation of federal law as well as state

law" SORNA does have a scienter requirement of having adequate sufficient notice under State law, see U S v Kevin Brewer 8th (2010) "we held that the scienter requirement of SORNA is satisfied by proof of a knowing violation of state or local registration requirements, even if the defendant had no notice of his SORNA obligations". These specific grounds brought forth in this motion of whether notification and acknowledgement forms in this case were adequate and sufficient for due process notification were not before the court or addressed on direct appeal. Notification and acknowledgements attached to this motion need to be reviewed as to determine if they are sufficient adequate notice as in Baccam case along with the related SPECIFIC facts in grounds 3,4,5,7, memorandum in support, reply to government response and attachments of registration forms in this motion pertaining to inadequate insufficient State due process notice of requirements, which was not fully addressed and appears to be ignored in the report and recommendation and was simply addressed as foreclosed. The specific notification of SORNA issue foreclosed is not the same issue in this motion of State notification being inadequate and insufficient. The circuit court in direct appeal of this case addressed the issue of no notification of registration requirements in jurisdiction of conviction as a issue of fact not law, it is brought forth in this motion as a issue of fact and law. I am yet to be notified by sentencing court in jurisdiction of conviction of registration requirements and duration as to how long I must register as a sex offender. <u>There has been no notification of how long I am required to register by any official.</u> No opportunity existed for me to challenge due process and due process notice of those Hawaii State requirements I am being held accountable for violating under SORNA. Even if specific notice of SORNA is not needed it must still conform to the constitutional rights of due process notice, and that begins in jurisdiction of conviction under state law. See facts within ground three, memorandum in support and section INADEQUATE INSUFFICIENT DUE PROCESS AND NOTICE UNDER STATE LAW NOT ADDRESSED ON DIRECT APPEAL OR IS IT BEING RELITIGATED of the reply to government response within this motion. Each SPECIFIC fact in the

grounds supporting is a different element of violation of due process. Each ground stands alone as a violation of due process on its own yet to be addressed on its own individual specific merit.

Objection 6

Compliance of SORNA

According TO 42 U.S.C 16913(d) the AG is to specify applicability and prescribe rules for those unable to comply with initial registration. The AG did specify applicability but still did not prescribe rules or guidelines in any form for such registration until July 2008 after interstate travel occurred in this case when final guidelines was published. When the interim rule was published, nor 30 days after, there was no prescribed rules or guidelines in place on how to register those unable to comply 42 U.S.C 16913(b)(d). The AG statement within the publication of the interim rule states " The purpose of this interim rule is not to address the full range of matters that are within the Attorney General's authority under section 113(d), much less to carry out the direction to the Attorney General in section 112(b) to issue guidelines and regulations to interpret" Even though I was subject to SORNA there was no rules or guidelines in place when interstate travel occurred or interim rule published as to how in my specific circumstances I was to be notified and registered. There was not even any sentencing guidelines for those convicted of violating SORNA for a significant period of time after SORNA was enacted. The example referred to in the section regarding compliance to SORNA in RR is very much distinguishable from the scenario of this case, that sex offender traveled from a state they were required to register to another state they were required to register and was properly initially registered in jurisdiction of conviction, I was unregistered in a foreign country and not properly initially registered in jurisdiction of conviction which is a completely different scenario than that example. That example due to the ruling in U S v Carr and U S v. Reynolds, that prosecution, would have been found invalid if this person would

have traveled before the interim rule and if he would have traveled within the states of the 6th and 9th circuits before August 30, 2008. Interstate travel in this case is December 2007. The SPECIFIC facts in ground six and the memorandum in support of this motion pertaining to being unable to comply to SORNA was not fully addressed in the report and recommendation.

Objection 7

Knowingly failure to Register

This ground was discussed in the report and recommendation as a issue of its own, but is also intertwined with but also stands on its own grounds as resulting from a violation of due process notice and inadequate notification within circumstances of this case. Knowingly failing to register relies on notification through acknowledgement forms signed by the offender. I have shown in ground seven, attached forms and memorandum in support of this motion how my notification and acknowledgement forms is flawed, inadequate and insufficient with no initial registration or notice of requirements and duration in jurisdiction of conviction Hawaii and is insufficient inadequate notice of Arkansas registration requirements. Arkansas is not my jurisdiction of conviction and Arkansas registration requirements also require due process notice in jurisdiction of conviction, in this case Hawaii. See U S v Kevin Brewer 8th (2010) "we held that the scienter requirement of SORNA is satisfied by proof of a knowing violation of state or local registration requirements, even if the defendant had no notice of his SORNA obligations. None of the SPECIFIC facts regarding those acknowledgment forms in ground seven and supporting memorandum were fully addressed in the report and recommendation. Note, that I was never notified of requirements by jurisdiction of conviction or of the most recent Arkansas State registration requirements that cover the circumstances of interstate travel in this case that were in place when interstate travel occurred. See PageID #: 333 of this 2255 motion.

Objection 8

Sentence Substantially Unreasonable

The Circuit Court stated it could not conclude whether sentence was substantially unreasonable due to a procedural error not being preserved by trial counsel as such. This issue was addressed but could not be concluded, the issue was addressed as being a procedural error which falls under ineffective assistance of counsel. Ground eight of this motion pertaining sentence being substantially unreasonable was not fully addressed in regards to SPECIFIC facts in ground eight in the report and recommendation.

Objection 9

Footnote 7 in Report and Recommendation

It is stated in footnote 7 of the report and recommendation that I was properly initially registered in Arkansas. Arkansas is not the jurisdiction of conviction in this case where initial registration should occur. There was no initial registration in jurisdiction of conviction and Arkansas law, Hawaii law and SORNA and its guidelines requires notification of registration duties in jurisdiction of conviction first and foremost. Jurisdiction of conviction Hawaii is yet to notify me of my duty to register and requirements and duration as to the date of this motion. Ground four and memorandum in support goes in detail

about this issue and it was not fully addressed, it was simply mentioned in a footnote, it is one of the most important grounds in this motion yet to be addressed.

It is also unclear as to what is meant in this footnote regarding I do not meet the requirement of U.S.C. 2250(a). If I don't meet that requirement I DID NOT VIOLATE SORNA. In See U S v Carr 130 S.Ct. (2010) (JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE GINSBURG join, dissenting) "The Court's answer is that §2250(a) applies only to sex offenders who moved from State to State after SORNA became law." Also, this example on PageId #:398 of RR due to the ruling in U S v Carr and U S v. Reynolds, that prosecution would have been found invalid if this person would have traveled before the interim rule and if he would have traveled within the states of the 6th and 9th circuits before August 30, 2008 effective date of final rule. In this case there was no interstate travel from a state in which I was required to register or update my registration upon leaving to another state. I was supposed to be under jurisdiction of conviction Hawaii registration requirements when interstate travel occurred, in which I never received any notice. I fall in the category of all other out of state sex offenders when I returned to Arkansas, in which I never received adequate notice of the requirements within the specific circumstances of this case. See ground seven within this motion and memorandum in support regarding insufficient notification.

Objection 10

<u>No Initial Registration and Notification of Requirements by Sentencing Court and Jurisdiction of Conviction is a Violation of Due Process and Due Notice</u>

See 42 U.S.C 16913 The fact that there was no and still no initial registration or notification of duration of registration in jurisdiction of conviction Hawaii has yet to be addressed as a issue of law in regards to violation of STATE due process and STATE due process notice and the requirements of SORNA and requirements of SORNA'S guidelines. Even if specific notice of SORNA is not needed it must still conform to the right of due process notice under U S Constitution, and that begins in jurisdiction of conviction under state law. Sex offense requiring registration in jurisdiction of conviction is the very reason registration is required, and that fundamental flaw of no notification of requirements in jurisdiction of conviction forms the basis that leads to all argument and grounds in this motion. See 42 U.S.C 16913(a)(b)(d) and grounds 3, 4, 5 in this motion and memorandum in support.

Objection 11

Ex Post Facto

The Ex Post Facto claim and grounds which was requested to be addressed and preserved for the record in reply to government's response was not addressed and I request it be reviewed in this de novo review and addressed. This Specific Ex Post Facto claim has not been raised or addressed in the 8th circuit and is not foreclosed as New Facts, Laws and circumstances that have not been addressed regarding this claim have been presented. See DUE PROCESS VIOLATION LEADS TO EX POST FACTO VIOLATION section of reply to government's response.

Objection 12

Actual Innocence

Actual innocence is a claim and grounds brought forth by the government in their response to this motion. I request it be brought forth and claimed as a ground for relief in this motion. Actual innocence lies in the combination all the facts which have merit in this motion. If all the grounds I have set forth and stated and briefed are not addressed, the specific facts within the facts supporting the grounds of this motion must be determined and concluded as fact and those facts have not been disputed by the government. Circuit Court stated in my direct appeal even though I was never notified of my duty to register in jurisdiction conviction, that it is a issue of FACT not LAW. but still, in regards to "FACT", "It is important to note in this regard that "actual innocence" means factual innocence, not mere legal insufficiency. See Sawyer v. Whitley, 505 U.S. 333, 339 (1992) In this motion it is brought forth as fact and law.

Respectfully Submitted,

Kevin Brewer August 14 2012

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District WESTERN ARKANSAS
Name (under which you were convicted): KEVIN BREWER	Docket or Case No.: 6:09-cr-60007
Place of Confinement: SERVING SUPERVISED RELEASE	Prisoner No.:
UNITED STATES OF AMERICA v.	Movant (include name under which you were convicted) KEVIN BREWER

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

   WESTERN DISTRICT OF ARKANSAS HOT SPRINGS DIVISION

   (b) Criminal docket or case number (if you know): 6:09-cr-60009

2. (a) Date of the judgment of conviction (if you know): 9/8/2009

   (b) Date of sentencing: 12/9/2009

3. Length of sentence: 18 MONTHS IMPRISONMENT 15 YEARS SUPERVISED RELEASE

4. Nature of crime (all counts):

   1 COUNT 18 U.S.C. 2250 FAILURE TO REGISTER AS A SEX OFFENDER

5. (a) What was your plea? (Check one)

   (1) Not guilty ☐ (2) Guilty ☑ (3) Nolo contendere (no contest) ☐

   (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐

DD

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☑

8. Did you appeal from the judgment of conviction? Yes ☑ No ☐

9. If you did appeal, answer the following:

(a) Name of court: 8TH CIRCUIT COURT OF APPEALS

(b) Docket or case number (if you know): 09-3898

(c) Result: AFFIRMED

(d) Date of result (if you know): 12/10/2010

(e) Citation to the case (if you know):

(f) Grounds raised:

1. WAS SORNA VIOLATED WHEN DEFENDANT WAS NOT NOTIFIED BY APPROPRIATE OFFICIAL UNDER THE STATUE

2. WAS 15 YEAR SUPERVISED RELEASE SUBTANTIALLY UNREASONABLE

3. DOES ARKANSAS SEX OFFENDER ACT APPLY TO DEFENDANT

4 DOES SORNA VIOLATE EX POST FACTO CLAUSE

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☑ No ☐

If "Yes," answer the following:

(1) Docket or case number (if you know):

(2) Result:

DENIED

(3) Date of result (if you know):

(4) Citation to the case (if you know):

(5) Grounds raised:

1 CAN A PRE-SORNA OFFENDER KNOWINGLY FAIL TO REGISTER WITH NO NOTICE OF SORNA BY APPROPRIATE OFFICIAL AND DOES LACK OF NOTICE VIOLATE DUE PROCESS

2 DOES SORNA VIOLATE THE CONSTITUTION AND SHOULD APPEALS COURT HEAR THIS CASE TO RESOLVE LOWER COURTS OPINION REGARDING THE EX POST FACTO CLAUSE

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ☑ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: WESTERN DISTRICT OF ARKANSAS HOT SPRINGS DIVISION

(2) Docket or case number (if you know): 6:09-cr-60007-RTD

(3) Date of filing (if you know): 1/13/2010

(4) Nature of the proceeding: 2255 MOTION

(5) Grounds raised:

INADEQUATE INSUFFICIENT DUE PROCESS NOTICE UNDER STATE LAW AND SORNA

INCORRECT INFORMATION ON PRESENTENCE REPORT

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☑ No ☐

(7) Result: DIMISSED AS PREMATURE

(8) Date of result (if you know):

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐

(7) Result:

(8) Date of result (if you know):

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

WHEN MOTION WAS DISMISSED WAS ADVISED BY COURT TO WAIT UNTIL DIIRECT APPEAL AND PETITION FOR CERTIORI WAS DECIDED

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE
Ineffective Counsel

(a) Supporting facts
Counsel was ineffective and failed in properly presenting to the court the ALL grounds therein this petition and the court erred in not addressing grounds therein this petition.

(b) Direct Appeal of Ground One:
(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: This issue of ineffective counsel could not be raised on direct appeal

(c) Post-Conviction Proceedings:
(1) Did you raise this issue in any post-conviction motion, petition, or application? No

(2) If your answer to Question (c)(1) is "Yes," state:
Type of motion or petition:
Name and location of the court where the motion or petition was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):
(3) Did you receive a hearing on your motion, petition, or application?
(4) Did you appeal from the denial of your motion, petition, or application?
(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?
(6) If your answer to Question (c)(4) is "Yes," state:
Name and location of the court where the appeal was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):
(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO:
New Supreme Court ruling on issue of when SORNA became applicable to Pre-SORNA offenders and the Attorney General's authority to make a Interim Rule violates the Non Delegation Doctrine and the Administrative Procedure Act. None of these claims were presented to the court by counsel or preserved by counsel in order to appeal

(a) Supporting facts
Supreme Court recently ruled in U S v Reynolds that SORNA did not apply to pre-SORNA offenders until the Attorney General issued a valid rule

A Valid Final Rule was not issued until 2008. In this case interstate travel occurred before Final Valid Rule.
Congress delegated the Attorney General the Authority to make and determine the Interim and Final Rule regarding SORNA retroactiveness which violates the Non Delegation Doctrine and the Administrative Procedure Act.
The Interim Rule Did not follow the Administrative Procedure Act requirements of notice and comment, the Final Rule did follow the proper procedures of the APA

(b) Direct Appeal of Ground Two:
(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: This issue could not be raised on

direct appeal and not preserved or presented by counsel, nor had Supreme court made ruling

(c) Post-Conviction Proceedings:
(1) Did you raise this issue in any post-conviction motion, petition, or application? No

(2) If your answer to Question (c)(1) is "Yes," state:
Type of motion or petition:
Name and location of the court where the motion or petition was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):
(3) Did you receive a hearing on your motion, petition, or application?
(4) Did you appeal from the denial of your motion, petition, or application?
(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?
(6) If your answer to Question (c)(4) is "Yes," state:
Name and location of the court where the appeal was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):
(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND THREE:
Inadequate Insufficient Due Process Notice under State law and SORNA, including violation of due process, procedural due process, substantive due process and due process notice

(a) Supporting facts

No notice of registration requirements or duration of registration, or opportunity to be heard or challenge Hawaii registration law at relevant meaningful time within and under Hawaii State law, the convicting jurisdiction, and Arkansas registration law under any State law procedure, at meaningful relevant time in any form of Due process hearing in which to address the specific circumstances of this particular case, in the past or upon reentering the state of Arkansas or after the Arkansas registration law had been amended

If law enforcement had not violated their procedural protocol and sex offender was notified he was required to register he would have had a opportunity to be heard challenge State law in a State due process hearing to determine if he was required to register and or be notified of registration duties

(b) Direct Appeal of Ground Three:
(1) If you appealed from the judgment of conviction, did you raise this issue? Yes, It was raised in pro se supplement, but not preserved claim by counsel or specifically addressed by appeals court

(2) If you did not raise this issue in your direct appeal, explain why

(c) Post-Conviction Proceedings:
(1) Did you raise this issue in any post-conviction motion, petition, or application? Yes
(2) If your answer to Question (c)(1) is "Yes," state: Type of motion or petition: 2255 motion

Name and location of the court where the motion or petition was filed: U S DISTRICT COURT WESTERN DISTRICT ARKANSAS

Docket or case number (if you know): 6:09-cr-60007-RTD
Date of the court's decision: Unknown

Result: Dismissed as Premature

(3) Did you receive a hearing on your motion, petition, or application? No

(4) Did you appeal from the denial of your motion, petition, or application? No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?
(6) If your answer to Question (c)(4) is "Yes," state:
Name and location of the court where the appeal was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):
(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue

GROUND FOUR:
No Initial Registration or notification of requirements in Jurisdiction of Conviction by Appropriate Official as required by SORNA and State law which violates due process notice and the requirement of SORNA to be Initially Registered in jurisdiction of conviction within specified time frames by Appropriate Official

(a) Supporting facts
Hawaii State law, Arkansas State law, and SORNA ALL require notification of requirements in jurisdiction of conviction by Appropriate Official in THAT jurisdiction.

Hawaii had sex offender registration law in effect at the time of sex offense conviction which required notification of requirements by an Appropriate Official in that jurisdiction, but yet failed to notify sex offender of his duties or duration.

(b) Direct Appeal of Ground Four:
(1) If you appealed from the judgment of conviction, did you raise this issue? Yes, It was raised in pro se supplement, but not a preserved claim by counsel or specifically addressed by appeals court

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:
(1) Did you raise this issue in any post-conviction motion, petition, or application? Yes
(2) If your answer to Question (c)(1) is "Yes," state: Type of motion or petition: 2255 motion

Name and location of the court where the motion or petition was filed: U S DISTRICT COURT
WESTERN DISTRICT ARKANSAS

Docket or case number (if you know): 6:09-cr-60007-RTD
Date of the court's decision: Unknown
Result: Dismissed as Premature
(3) Did you receive a hearing on your motion, petition, or application? No

(4) Did you appeal from the denial of your motion, petition, or application? No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?
(6) If your answer to Question (c)(4) is "Yes," state:
Name and location of the court where the appeal was filed:
Docket or case number (if you know):

Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):
(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue

GROUND FIVE:
No notice of Duration of registration as required under Hawaii State law, Arkansas State Law and SORNA

(a) Supporting facts
Instructed to register by Arkansas parole officer while serving parole for unrelated offense with no notification how long the duration of registration would be required after serving parole or after leaving or reentering jurisdiction

No notification of duration of registration by convicting jurisdiction or under Arkansas law notifications

(b) Direct Appeal of Ground Five:
(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: Issue was not a preserved claim by counsel in order to raise on appeal

(c) Post-Conviction Proceedings:
(1) Did you raise this issue in any post-conviction motion, petition, or application? No

(2) If your answer to Question (c)(1) is "Yes," state:
Type of motion or petition:
Name and location of the court where the motion or petition was filed:
Docket or case number (if you know):
Date of the court's decision:
Result:
(3) Did you receive a hearing on your motion, petition, or application? No
(4) Did you appeal from the denial of your motion, petition, or application?
(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?
(6) If your answer to Question (c)(4) is "Yes," state:
Name and location of the court where the appeal was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):
(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue

GROUND SIX:
In category of offenders Unable to Comply to Plain Language of SORNA

(a) Supporting facts
Legally unregistered and not in jurisdiction of United States when SORNA became effective

Not residing in any jurisdiction in which required to register or update registration when leaving that jurisdiction for 3 years when SORNA became effective

No Interstate Travel from state or jurisdiction in which registration or updating registration was required, Was supposed to be under jurisdiction of conviction Hawaii State registration law when Interstate travel occurred, in which there was no notification as required by law

No Interstate Travel while being required to register or update registration in jurisdiction moved from, and registration was not required in Arkansas until within 3 days after establishing residence, which also requires notification of that requirement in which there was no notification of

No notification that registration is required within 3 days within establishing residence in Arkansas when reentering the state

No notification of any new and amended registration laws after residing out of U S jurisdiction for 3 years as the law had been amended since last registration

There are no registration requirements prescribed for sex offenders who enter the U S from non U S jurisdictions or foreign country after SORNA became effective without being initially registered in jurisdiction of conviction as required by SORNA

SORNA has guidelines and rules for sex offenders unregistered and out of the system and not initially registered in jurisdiction of conviction within its specified time frames upon its effective date, which require them to be notified of requirements and re-registered

(b) Direct Appeal of Ground Six:
(1) If you appealed from the judgment of conviction, did you raise this issue? Yes, It was raised in pro se supplement, but not preserved claim by counsel or specifically addressed by appeals court

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:
(1) Did you raise this issue in any post-conviction motion, petition, or application? Yes

(2) If your answer to Question (c)(1) is "Yes," state: Type of motion or petition: 2255 motion

Name and location of the court where the motion or petition was filed: U S DISTRICT COURT WESTERN DISTRICT ARKANSAS

Docket or case number (if you know): 6:09-cr-60007-RTD
Date of the court's decision: Unknown

Result: Dismissed as premature

(3) Did you receive a hearing on your motion, petition, or application? No

(4) Did you appeal from the denial of your motion, petition, or application? No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?
(6) If your answer to Question (c)(4) is "Yes," state:
Name and location of the court where the appeal was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):
(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue

GROUND SEVEN:
Insufficient inadequate notification of registration requirements within acknowledgement forms under Arkansas State law in which sex offender could not knowingly fail to register

(a) Supporting facts
Knowingly failing to register is a element of SORNA which must be proven through sufficient notification under State law as in sufficient signed acknowledgement forms that conform to the standards of SORNA

No past notification of registration requirements within time frames specified by SORNA or performed by Appropriate Official in jurisdiction of conviction

First Arkansas Initial Registration form signed and acknowledged does not list registration requirements and was not completed by Appropriate official in jurisdiction of conviction

Last Arkansas registration notification acknowledgement form signed is notifications of requirements for In State and Out of State moves address changes only, as notification to Arkansas authorities must take place 10 days Before move.

No notification that registration is required within 3 days within establishing residence in Arkansas when reentering the state, as it is different than within the state moves and out of state moves which require notification 10 days before move.

New amended Arkansas registration forms give notification of reentering the State registration requirements which are different than IN State and OUT of State address change notification requirements and which there was no notification

Impossible to comply to the Arkansas registration requirements accused of violating as it must be done 10 days Before move and is a IN STATE or Out of State address change requirement and not notification of reentering the state requirement

No notification of duration of registration requirement of registration under Arkansas State Law

Law Enforcement official came to defendants residence 5 months before he was arrested for failure to register and knew he was a sex offender, but officials never notified him he was required to register.

Law Enforcement violated their procedural protocol in not notifying sex offender he was required to register

(b) Direct Appeal of Ground Seven:
(1) If you appealed from the judgment of conviction, did you raise this issue? Yes, It was raised in pro se supplement, but not preserved claim by counsel or specifically addressed by appeals court

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:
(1) Did you raise this issue in any post-conviction motion, petition, or application? Yes

(2) If your answer to Question (c)(1) is "Yes," state: Type of motion or petition: 2255 motion

Name and location of the court where the motion or petition was filed: U S DISTRICT COURT WESTERN DISTRICT ARKANSAS

Docket or case number (if you know): 6:09-cr-60007-RTD

Date of the court's decision: Unknown

Result: Dismissed as premature

(3) Did you receive a hearing on your motion, petition, or application? No

(4) Did you appeal from the denial of your motion, petition, or application? No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?
(6) If your answer to Question (c)(4) is "Yes," state:
Name and location of the court where the appeal was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):
(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue

GROUND EIGHT:
Violation of Procedural Due process within right to appeal sentence as being substantially unreasonable as a result of ineffective counsel

(a) Supporting facts
Claim of sentence being substantially unreasonable was not preserved as a procedural error by counsel nor argued on appeal

(b) Direct Appeal of Ground Eight:
(1) If you appealed from the judgment of conviction, did you raise this issue? Yes

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:
(1) Did you raise this issue in any post-conviction motion, petition, or application? Yes
(2) If your answer to Question (c)(1) is "Yes," state Type of motion or petition: 2255 motion

Name and location of the court where the motion or petition was filed: U S DISTRICT COURT WESTERN DISTRICT ARKANSAS

Docket or case number (if you know): 6:09-cr-60007-RTD

Date of the court's decision: Unknown
Result: Dismissed as premature

(3) Did you receive a hearing on your motion, petition, or application? No

(4) Did you appeal from the denial of your motion, petition, or application? No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?
(6) If your answer to Question (c)(4) is "Yes," state:
Name and location of the court where the appeal was filed:
Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):
(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue

MEMORANDUM IN SUPPORT

No Notification or Initial Registration in Jurisdiction of Conviction and by Appropriate Official and violation of Due Process

What is of the most Important element in this entire case regarding registration is Jurisdiction of Conviction. Jurisdiction Conviction is the element giving rise to the very reason of registration and notification, without notification by Appropriate Official in convicting jurisdiction there is a Fundamental Flaw In Due Process, Procedural Due process, Substantive Due Process and Due process Notice. Only jurisdiction of conviction can determine Duration the of registration and Hawaii State Law demands for notice thereof. Notification to the Offender and Public are the main elements and purpose of SORNA. The issue of no notification of registration requirements by convicting jurisdiction never being properly raised or addressed by counsel is major ineffective counsel and it violates the constitutional right of due process.

In State v. Bani, 36 P.3d 1255 (Haw. 2001), the Hawaii State Supreme Court held that Hawaii's sex offender registration statute violated the due process clause of the Constitution of Hawaii, ruling that it deprived potential registrants of "of a protected liberty interest without due process of law." The Court reasoned that the sex offender law authorized "public notification of (the potential registrant's) status as a convicted sex offender without notice, an opportunity to be heard, or any preliminary determination of whether and to what extent (he) actually represents a danger to society.

Hawaii Supreme Court in State v Bani has ruled It is a violation of due process not to have the opportunity challenge or to be heard in regards Hawaii registration requirements under Hawaii State Law. Arkansas Law requires registration if registration would be required in jurisdiction of conviction and that requires notification by appropriate official IN jurisdiction of conviction See Ark.Code Ann 12-12-906 B)(i) Any person living in this state who would be required to register as a sex offender in the jurisdiction in which he or she was adjudicated guilty of a sex offense shall register as a sex offender in this state whether living, working, or attending school or other training in Arkansas.

If you are to be required to register in jurisdiction of conviction, it requires notification of requirements and duration in that jurisdiction under jurisdiction of conviction State law with a opportunity to be heard in convicting jurisdiction.

8th Circuit in appeal ruled Arkansas Supreme Court interpretation law stands in cases pertaining to Arkansas law in this case. See UNITED STATES v. BREWER No. 09-3898.Dec 20,2010(Like the district court, we will follow, not ignore, these Supreme Court of Arkansas decisions, both because they are controlling interpretations of state law,) If that is true there must be the opportunity to be heard and challenge at a relevant meaningful time in regards to that law in some form of State Due Process hearing, as is that interpretation of law that must be able to be heard and challenge in regards to circumstances of this particular specific case. In NO case used in citation and interpretation regarding this case under state law was there a CONVICTION OF failure to register under State law and those laws have also been amended. See Kellar v. Fayetteville Police Dept., 5 S.W.3d 402, 404 (Ark.1999)and Williams v. State, 91 S.W.3d 68, 70 (Ark.2002) the main cases used as interpretation of Arkansas law in this case, there was no conviction of failure to register and there was a different rules on evidence, as Williams was not convicted of Failure to register but violation of a suspended sentence which holds different rules of evidence, and under a law that has since been amended. Not being able to challenge or be heard in regards Arkansas registration law at a meaningful point in time under the specific circumstances of this case in which it is relevant and meaningful in a State hearing, is a violation of due process, especially upon return to the

Arkansas due to the fact the registration laws and requirements have been amended since residing out of state 3 years.

Hawaii State Law, Arkansas State Law and SORNA ALL require Initial registration and notification of duties of registration by convicting jurisdiction of offense..See Federal law 42 USC § 16913, 42 USC § 16917, Section VIII and IX of Federal SORNA Guidelines, Hawaii State law H.R.E 846E-4, Arkansas State Law Ark.Code Ann 12-12-906(B)(i)
A offender must also be notified of duration of registration as it depends on offense in jurisdiction of conviction. If Jurisdiction of conviction would have properly carried out INITIAL REGISTRATION under the law that was in EFFECT at time of conviction in accordance to Hawaii State law there would have been no doubt and Argument of notification of duty to register, there would have been notification of all registration requirements and DURATION OF REGISTRATION. It would have been signed and acknowledged within the Specific time frames of SORNA. Lack of Notification in convicting jurisdiction is the Fundamental Flaw that violates right to Due Process Notice.

There can be no conviction under State law of Hawaii for failure to register due to the fact under Hawaii State Law there was no notification of requirements or Duration. This stands to proves there is a Fundamental Flaw in due process notice Though I am supposed to be required to Register under Hawaii State law is not a valid stand under the law when the law requires signed acknowledgement of notification of requirements of Convicting court by Appropriate Official in that jurisdiction.

Unable to comply to Plain language of SORNA

I fall into the category of those unable to comply to SORNA, 42 USC 16913(d) and which the Attorney General must prescribe rules and must be re-registered and notified of new registration requirements, as I resided out of the US for 3 years and unregistered at the time of SORNA effective date with no notification of requirements or Initial Registration done within jurisdiction of conviction within the Time frames specified for SORNA. See Section VIII and IX of Federal SORNA Guidelines
Initial registration of sex offenders unable to comply with subsection 42 USC 16913 (b) of this section. The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

After specifying SORNA's applicability to past sex offenders under § 113(d), the Attorney General also had to specify how such sex offenders would be registered in accordance with § 117(b). The Guidelines state that to register these sex offenders in conformance with SORNA they need to be fully instructed about SORNA's requirements, obtain signed acknowledgments of such instructions, and enter into the system all information required under SORNA. The Guidelines note this may require the re-registration of a large number of sex offenders in these existing sex offender populations who cannot be registered within the SORNA time frame outlined in § 113(b).
in order for State registration requirements to be sufficient notice of SORNA there must be Initial registration and notification in jurisdiction of conviction and it must fall within SORNA's specified time frames, if not offendeer must be notified and re-registered. IN ALL OTHER SORNA CASES EXCEPT THIS ONE when state law registration requirements were considered sufficient, initial registration took place in jurisdiction of conviction within the time frames specified by SORNA, also Interstate Travel was from a State in which offender was required to register in which they were notified they were required to notify State from which they traveled of their move as also the state in which they relocated. That is not the circumstances of this case in which no interstate travel occurred from a state in which registration or updating registration upon leaving was required .See CARR v. UNITED STATES No. 08–1301. - CERTIORARI TO THE UNITED STATES COURT Oct Term 2009, ALITO, J., dissenting "The Court's answer is that §2250(a) applies only to sex offenders who moved from State to State after SORNA became law".

In this case no notifications of requirements were within the specified time frames of SORNA when Sorna became effective. I was unregistered residing in a jurisdiction in which I was not required to register for 3

YEARS. I did not interstate travel from a jurisdiction(STATE)in which I was required to register or update registration. I had no notification of Amended registration requirements of any State in The US or Duration of registration as I was Legally Unregistered for 3 years. See SORNA Guidelines Section IX which states I must be re-registered when I reenter the system and Notified of present requirements. I was unregistered out of the system for 3 years when SORNA became
effective. The SORNA law and guidelines also state the Attorney General must prescribe rules for such circumstances.

Insufficient Notification Forms and Ackowledgements

I was never properly notified at beginning of registration period, and even though I registered in the past it led to not being properly notified in the future because of that fundamental flaw, as it involved travel between jurisdictions in which there was no adequate notice. By the first registration form signed not listing my registration requirements, it stands to prove I was never properly notified of registration requirements from the beginning with faulty initial registration that is insufficient of SORNA requirements. (See motion attachment) I was instructed to register by Arkansas parole officer while serving parole for unrelated offense with no notification how long the duration of registration would be required after serving parole for the unrelated offense. SORNA states Initial registration must be done within time frames of offense giving rise to need for registration. The last ackowledgement form acknowledged and signed before I reentered Arkansas do not notify of Duration of registration or requirements or reentering back in to Arkansas and contain only registration requirements for Within State and Out of State movement as the notification must be done 10 DAYS BEFORE Move.(see motion attachments) This clause in past registration forms was used by the Government to show which registration requirement was violated. This particular clause was not violated as there is a different requirement for moving or reentering Arkansas which states registration must be done within 3 days of establishing residence and there was no notification of that particular requirement. The present amended forms have a New Clause with requirements for returning to Arkansas as with also the same previous requirements for In State and Out Of State address changes which I was accused of violating, which are also in past registration forms.(See motion attachment) This stands to show the last acknowledgment form I signed were specific requirements for Within State and Out of state moves address changes only and I was not notified of requirements of reentering the state of Arkansas in past acknowledgements I signed,(See motion attachments) as reentering the state has different registration requirement. No notification of registration requirements were completed by APPROPRIATE OFFICIAL IN JURISDICTION OF CONVICTION in accordance to State law and SORNA within specified time frames. None of the Arkansas registration requirements signed and acknowledged were violated and they are insufficient notice of the circumstances of this case. Knowingly failure to register is a element of SORNA that must be proven. Knowingly failing to register can only be proven through signed notification and acknowledgement forms. If notification of requirement is insufficient, knowingly failing to register is not proven. Law enforcement came to sex offender home 5 months before he was arrested and violated their protocol by never notifying him of his duty to register.(See motion attachments) If law enforcement had not violated their protocol and sex offender was notified he was required to register he would have had a opportunity to be heard under State law to determine if he was required to register

SENTENCING

No opportunity to appeal to challenge or be heard in regards to lengthy 15 year supervised release sentence being substantively unreasonable, as counsel did not preserve the procedural error for appeal nor was it argued on appeal. See UNITED STATES v. BREWER No. 09-3898.Dec 20,2010 " this is a claim of procedural error which is foreclosed because it was neither preserved in the district court nor argued on appeal" and "we cannot conclude that the district court's imposition of a fifteen-year term was a substantively unreasonable abuse of discretion in this case". The procedural error of the judge not giving specific reason or factors to lengthy 15 years supervised release sentence denies defendant of right to appeal sentence as there is no basis or factors to conclude by Appeal Court if sentence is substantively unreasonable as result of the procedural error. Even though sentence is within guideline range, there must be given reasons and factors by the judge, as the guideline range in this case is the longest range within the entire sentencing guidelines of the Federal Court system. Therefore, a reason and factors for such a sentence must be given by judge to determine if sentence is substantively unreasonable because of the

extensive range of the sentencing guidelines in this case.

New Supreme Court Ruling

In violation of the Non Delegation Doctrine, Congress gave the Attorney General the authority to determine how SORNA would be applied to Pre-SORNA offenders and make that into law with a Interim Rule that did not meet the Due Process Notice and Comments requirements of the APA. The regulation could not take immediate legal effect because the Attorney General did not comply with the APA's requirement of thirty-day advance publication.

The APA requires that a "substantive rule" must be published "not less than 30 days before its effective date." 5 U.S.C. § 553(d). When an agency fails to follow this requirement, its regulations have no effect on anyone who did not receive actual and timely notice. *Id.* § 552(a)(1). Publication of "substantive rules of general applicability," *id.* § 552(a)(1)(D), is required "for the guidance of the public," *id.* § 552(a)(1). This public notice gives persons affected by the change in the law time to prepare to comply with the new rule. *See Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992) (holding that the purpose is "to give affected parties time to adjust their behavior before the final rule takes effect"). Notice is nowhere more important than in the criminal law, where individual liberty is at stake. As the Eighth Circuit has noted,

> [i]n determining whether the good cause exception is to be invoked, an administrative agency is required to balance the necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded a reasonable time to prepare for the effective date of its ruling. When the consequence of agency rule making is to make previously lawful conduct unlawful and to impose criminal sanctions, the balance of these competing policies imposes a heavy burden upon the agency to show public necessity.

United States v. Gavrilovic, 551 F.2d 1099, 1105 (8th Cir. 1977).

If SORNA would have applied to Pre-SORNA offenders on its effective date, the Attorney General and Congress could not have been charged with violating the Non Delegation Doctrine as it would have been retroactive on its effective date, but due to the fact the retroactivity of SORNA did not apply until the Attorney General said so, it stands to prove a plain violation of that doctrine as the Attorney General was acting as a DECIDING lawmaker. The Attorney General stated it bypassed the APA due to the fact it was in the best interest of public safety and had just cause to bypass APA and have a immediate Interim Rule, within that reason the Attorney General is contradicting itself due to the fact the Attorney General gave 3 YEARS for states to implement SORNA and even extended that period. States do not even have to even implement SORNA into their law and it is NOT MANDATORY, as they will only receive a reduction in Federal funding. All States had a registration system in place and could simply have issued a warrant for those not in compliance and the Federal government with agencies such as the U S Marshal Service could have simple used their resources to assist them and help notify those who have become newly required to register under the new SORNA law. SORNA does nothing to STOP or PREVENT a failure to register offense, .SORNA only increases the criminal punishment. MAJORITY of states till this date have NOT implemented SORNA. This stands to prove that Attorney General's basis in bypassing APA was not sufficient to bypass the DUE PROCESS NOTICE of APA for reason of protecting the public and was not just cause, contradicting and UNCONSTITUTIONAL. What this boils down to is that the Attorney General, The PROSECUTOR, has taken way the Due Process Notice rights of sex offenders under the APA, who have the greatest liberty interest at stake, There is no JUST CAUSE to take away any citizens Constitutional Rights without the due process of law If no violation of the Non Delegation Doctrine and

Administrative Procedure Act is found within Congress giving the Attorney General AUTHORITY to determine, decide and make laws it will create a New Dangerous PRECEDENT for the Attorney General to bypass the Administrative Procedure Act and create determine, decide and make laws in the FUTURE that effect the Constitutional Rights of ALL U S Citizens.
In light of this argument interstate travel in this case occurred before the Valid Final Rule ,which had went through the due process notice regarding when SORNA applied to Pre-SORNA offenders.

Ineffective Counsel

The "defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case," Strickland, at 693, but rather "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, at 695-96. Strickland v. Washington, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)

The defendant has a right to expect that his attorney will use every skill, expend every energy, and tap every legitimate resource in exercise of independent professional judgment on behalf of defendant and in undertaking representation. Frazer v. United States, 18 F.3d 778, 779 (9th Cir. 1994)
U.S.C.A. Const. Amend 6. Counsel owes defendant duty of loyalty, unhindered by state or by counsel's constitutionally deficient performance.

Prejudice requirement does not require petitioner to prove that he would not have been found guilty. Prejudice in *pro se* motions is not strictly construed. In cases which "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," ineffectiveness will be presumed under United States v. Cronic, 466 U.S. 648, 80 L.Ed.2d.657, 140 S.Ct. 2039 (1984).

Closing Summary

Fundamental Flaws in Due process and procedural due process notice, also in regards to Administrative Procedure Act and beginning in the jurisdiction of conviction the most inportant element of notification, in relation to Arkansas law and SORNA is the basis of all arguments regarding notification of requirements and due process. By this issue of Convicting jurisdiction due process notification and these aspects of due process just now reaching the court without and opportunity in the past to be heard until now in a significant meaningful relevant hearing under Federal or State law, stands to prove violation of Due process and all aspects of due process pertaining within the law and ineffective counsel. Initial registration is Flawed under the plain language and guidelines of SORNA and not being properly notified of requirements from the beginning of registration period is important element of all argument and dispute in this case which accumulated from that fundamental flaw. In order for notification of requirements under state law to be sufficient for SORNA, past notification of requirement should have been more sufficient and compliant to SORNA and it's guidelines. Arkansas still has not implemented or become compliant to SORNA and convicting jurisdiction, State of Hawaii still to date of this motion has not notified sex offender of registration requirements and duty as required by Hawaii State law, Arkansas State law and SORNA. If state law is to be considered sufficient notice of SORNA, it must conform and be more sufficient under Due process notice rights under state law, SORNA and U S Constitution.

I sincerely pray that the court upholds to the original and traditional sole purpose of 2255 motion which is rooted in the original purpose of Habeas Corpus . I feel the court needs a reminded of the sole purpose as Habeas Corpus as laws seem to have evolved through time to leave behind their original purpose and intent. If the judge who first reviews this finds any merit to this motion, I should receive immediate relief or a stay of my conviction until this motion goes through the complete procedures of law as that will KEEP to the true purpose of HABEAS CORPUS

Respectfully Submitted

Therefore, movant asks that the Court to grant the following relief::

To vacate, Set Aside Conviction and to Stay Conviction until this motion goes through the procedures and processes of law to be Vacated, Set Aside and if Conviction is not Vacated, Set Aside to be resentenced with Judge giving factors and reasons for the lengthy 15 years supervised release, so basis will be established to have right to appeal sentence as being Substantially Unreasonable

or any other relief to which movant may be entitled.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct

Executed (signed) on (date).

Kevin Brewer Jan 31, 2012
Signature of Movant

TABLE OF AUTHORITIES

State v. Bani, 36 P.3d 1255 (Haw. 2001),

UNITED STATES v. BREWER No. 09-3898.Dec 20,2010

42 USC § 16913

42 USC § 16917,

Section VIII and IX of Federal SORNA Guidelines

Hawaii State law H.R.E 846E-4,

Ark.Code Ann 12-12-906 (B)(i)

CARR v. UNITED STATES No. 08–1301. CERTIORARI TO THE UNITED STATES COURT Oct Term 2009

Kellar v. Fayetteville Police Dept., 5 S.W.3d 402, 404 (Ark.1999)

Williams v. State, 91 S.W.3d 68, 70 (Ark.2002)

REYNOLDS *v.* UNITED STATES S.CT-2012 WL 171120 (2012)

Strickland, at 695-96. Strickland v. Washington, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)

Frazer v. United States, 18 F.3d 778, 779 (9th Cir. 1994)

U.S.C.A. Const. Amend 6.

United States v. Cronic, 466 U.S. 648, 80 L.Ed.2d.657, 140 S.Ct. 2039 (1984).

United States v. Gavrilovic, 551 F.2d 1099, 1105 (8th Cir. 1977).

Riverbend Farms, Inc. v. Madigan, 958 F.2d
1479, 1485 (9th Cir. 1992)

1998 ARKANSAS SEX OFFENDER ACKNOWLEDGEMENT FORM

2004 ARKANSAS SEX OFFENDER ACKNOWLEDGEMENT FORM

2011 ARKANSAS SEX OFFENDER ACKNOWLEDGEMENT FORM

2008 Police Report

Arkansas Law Enforcement Protocol

State of Arkansas

Sex Offender Registration Form

Reporting this information is required by Act 989 of 1997. This form shall be sent to the Arkansas Crime Information Center within 3 days after completion for entry into the state and national Sex Offender Registration Files.

Type or Print Black Ink Only

Sentencing Court: Honolulu County -

Registered as: (Check Box) Sex or Child Offender ☒ Sexually Violent Predator ☐

Name of Offender	AKA or Alias Name(s)
Kevin Lamonte Brewer	

Date of Birth	Race	Sex	Height	Weight	Hair Color	Eye Color	Social Security #
2-26-73	B	M	6Ft 1 in	210	Blk	Brn	429638084

State Ident # (Arkansas SID)	FBI # (if available)	Driver License #	ID Card #	State of DL or ID Card
AR741262	345386MB	429638084		AR

Scars/Marks/Tattoos: SCAR L WRIST

Sex or Child Offense Information (If additional space is needed, list on separate sheet and attach to this form)

Date of Arrest	Arresting Agency	Offense for which found guilty or acquitted by reason	Arrest Tracking #
1-1-94	Honolulu CITY/CO Hawaii	2nd Degree Sexual Assault	
Date of Arrest	Arresting Agency	Offense for which found guilty or acquitted by reason	Arrest Tracking #
Date of Arrest	Arresting Agency	Offense for which found guilty or acquitted by reason	Arrest Tracking #

Residence Address (known or anticipated)

Street #, Street Name; Route # & Box; Apt #; Mobile Home # (Do not use P.O. Box here)	City	State	Zip
1806 Sanford Dr	Little Rock	AR	72227

Mailing Address (if different, for example P.O.Box)

Street #, Street Name; Route # & Box; Apt #; Mobile Home # or P.O. Box #	City	State	Zip

Place of Employment

Name of Employer (company and/or individual)
NONE

Address of Employment

Street #, Street Name; Rural Route & Box #	City	State	Zip

Brief Description of the Crime(s) for which this registration is required

Forcible sex with an adult without their consent

Acknowledgement by Offender

I do hereby acknowledge that I have been advised of my duty to register as a sex or child offender, or sexually violent predator, as required under the provisions of Arkansas Act 989 of 1997. I have also been advised that failure to regularly verify my address or failure to report any change of address as required under Act 989 of 1997 constitutes a Class D felony and may result in my subsequent arrest and prosecution.

Kevin Brewer
Signature of Offender

2-9-98
Date

Little Rock Police Dept.
Registering Agency or Court

Det. P.W. Hudson #1158 501 3714660
Print Name of Official completing this form — Area Code & Phone #

This Sex Offender Registration Form shall be sent to the Arkansas Crime Information Center, One Capitol Mall, Little Rock, AR 72201. Failure to complete and forward this form to ACIC within 3 days after registering an offender is a Class B misdemeanor under Act 989.

(ACIC SOR Form 7-23-97)

Sex Offender Acknowledgement Form

Read, sign and return this form to your local law enforcement agency

1. Pursuant to Act 989 of 1997, sex and child offenders are required to register prior to release from incarceration.

2. If the offender changes address, the offender is required to give the new address to the Arkansas Crime Information Center in writing no later than TEN (10) days before the offender establishes residence or is temporarily domiciled at the new address. Pursuant to §12-12-909 (d), ACIC can require the offender to report this change of address in person to the local law enforcement agency having jurisdiction.

3. If the offender changes address to another state, the offender shall register the new address with the Arkansas Crime Information Center no later than TEN (10) days before the offender establishes residency in the new state. The offender must register with the new state upon arrival in that state.

4. **If the offender attends school, does volunteer work or is employed at any institute of higher education, the offender shall register with the law enforcement agency having jurisdiction over the campus. This may be a Department of Public Safety or the local law enforcement agency.**

5. The offender is required to verify their residence within TEN (10) days after receipt of the *Verification of Residency* form which will be mailed to the offender's home every six months after registration, or every 90 days depending on the offender's assessment level. The Verification of Residency form is to be taken in person to the local law enforcement agency having jurisdiction.

6. All offenders are required to submit to a risk assessment to be completed by the Department of Correction Sex Offender Screening and Risk Assessment Program. The offender will be notified by mail of the location, date and time of the assessment.

7. Pursuant to Act 330 of 2003, ***"It shall be unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq. and who has been assessed as a Level 3 or Level 4 offender to reside within two thousand (2,000) feet of the property on which any public or private elementary or secondary school or daycare facility is located.***

I have read and understand the above rules regarding my registration as a sex offender. I further acknowledge that my failure to comply with the requirements to register as a sex offender, failure to comply with any part of the assessment process, or my failure to report changes in address constitutes a Class D felony. Failure to comply may result in my subsequent arrest and prosecution, or other administrative hearings that could result in a deprivation of liberty.

Kevin Beaver
Name

2-10-04
Date

4192089

Offender CSN

Sex Offender Acknowledgement Form

Read, sign and return this form to your local law enforcement agency

1. Pursuant to Act 989 of 1997, anyone convicted of a sex offense as defined by state and federal law are required to register prior to release from incarceration, placed on probation or upon entry to this state from another state. All offenders are required to provide fingerprints, photos, DNA and pay all fees pertaining to registration before or upon registration.

2. Pursuant to §12-12-909 (b), The Arkansas Crime Information Center (ACIC) requires the offender to report any changes in residence or employment **IN Person** to the local law enforcement agency having jurisdiction. When changing residence/mailing address from within the state, this must be in writing, **signed by the offender** no later than ten (10) days before the offender establishes residence. If the offender moves here from another state and is required to register in the other state, the offender must report to the jurisdictional law enforcement agency to register within three (3) business days after establishing residency.

3. If the offender moves to another state or lives in Arkansas and works in another state, the offender must register in that state no later than three (3) business days after the offender establishes residency or employment in the new state. If the offender attends school, does volunteer work or is employed at any institute of higher education, the offender shall register with the law enforcement agency having jurisdiction over the campus. This may be a Department of Public Safety or the local law enforcement agency. A nonresident worker or student shall register in compliance with Pub. L. No. 109-248 as exists 01-01-07 no later than three (3) business days after establishing residency, employment or student status.

4. Pursuant to § 12-12-909, the offender is required to verify their residence within Ten (10) days after the *Verification of Residency date* indicated on the bottom portion of this form. Verification of residency is required of every registered offender either every (6) six months after registration, or every ninety (90) days depending on the offender's assessment level.

5. All offenders are required to submit to a risk assessment to be completed by the Department of Correction Sex Offender Screening and Risk Assessment Program (SOSRA). The offender will be notified by certified mail of the location, date and time of the assessment. It is a Class C Felony to fail to appear for assessment or to not fully submit to the assessment process. The offender will be assessed as a default Level 3 should this occur. The offender can request a reassessment after 5 years from the date of the original assessment. Offender is responsible for contacting SOSRA to arrange this reassessment.

6. Pursuant to Act 330 of 2003, It is unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12- 12-901 et seq. and who has been assessed as a Level 3 or Level 4 offender to reside within two thousand (2,000) feet of the property on which any public, private, secondary school or daycare facility is located. Act 818 of 2007 includes public parks and youth centers and Act 394 of 2007 prohibits Level 3 and Level 4 offenders from residing within 2000 feet of the residence of his/ her victim or to have direct or indirect contact with his/ her victim for the purpose of harassment as defined under § 5-17-208.

7. Pursuant to Act 1779 of 2005, it is unlawful for a sex offender who is required to register under the sex offender registration act of 1997, §12-12-901 et seq., and who has been assessed as a Level 3 or Level 4 offender to engage in an occupation or participate in a volunteer position that requires the sex offender to work or interact primarily and directly with children under sixteen (16) years of age.

8. Pursuant to § 12-12-907 no later than ten (10) days after release from incarceration or after the date of sentencing, the offender shall report to the local law enforcement agency having jurisdiction to update registration information.

9. Pursuant to Title 18, United States Code, Section 2250, if a sex offender fails to register or fails to report a change in residence, employment or student status, and travels in or moves across state lines, the offender can be charged with a federal crime and punished by up to ten(10) years imprisonment. Pursuant to § 5-14-130 (1), it is a Class D Felony to provide false information to obtain identification cards or driver's licenses with incorrect permanent physical addresses.

State Sex Offender Registry
PROTOCOL TRAINING MANUAL
Fifth Addition
Page 14

Registration Process
Pursuant to § 12-12-906, Law enforcement agencies are responsible for registering sex offenders who:
1. Move from one Arkansas jurisdiction to another;
2. Who have previously registered in Arkansas, moved to another state, and are returning to Arkansas; and
3. Those convicted in another state having moved to Arkansas.
If an offender is required to register in their state of conviction, that offender will be required to register in Arkansas. States differ on the offenses that constitute a sex offense, and thus, registration as a sex offender. It is possible for a convicted offender to not have to register as a sex offender in one state, and yet be obligated to register in another state if the offender moved there. The registration of sex offenders moving from one state to another is very important in terms of the national sex offender registry established by the Pam Lychner Act. An offender can only be registered in one state through the national sex offender registry maintained by the National Crime Information Center (NCIC).
When notified that a sex offender has established residence in an area, the local law enforcement agency with jurisdiction is required to inform the offender of their duty to register as a sex offender. The local police agency with jurisdiction must obtain the information required for registration from the offender, if the offender is not already registered.

lent # 08-00754

e 2 of 2

Clark County Sheriff's Department

Incident Report

Report Date 10/6/2008

Report Time 8:16 AM

ject #1

)/TIN	Title	Name	DOB	Age	Sex	Resident Status
		Brewer, Kevin	02/26/1973	35	M	Resident

	Ethnicity	Home Phone	Work Phone	Other Phone	DL (#, ST)
	Not Hispanic				,

izen	Legal Alien	Doc Type	Immig Doc #	Nationality

Address	Employer
ewer RD,Arkadelphia, AR 71923	
ddress	Occupation

	Weight	Eyes	Build	AKA
	-			

ive & Statements

ive - Plyler, Robbie - 10/06/2008 (Initial)

n 10-05-08 at or around 2338 Hours i was dispatched to 161 Brewer Rd. Neighbors and people passing by stated that a black male sitting on porch was cursing, screaming, and yelling. I had Gurdon Police Unit standby by until i arrived on scene. I made contact with Kevin Brewer. wer advised that he was having a conversation on the phone. Brewer was being very obtuse. I advised Brewer to calm down, and he eventually I then ran Brewer's ID. Brewer is a registered Sex Offender, out of state. Information turned over to investigator. No further.

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

UNITED STATES OF AMERICA	)	PLAINTIFF
	)	
vs.	)	Case No. 6:09CR60007-001
	)	
	)	
KEVIN LAMONT BREWER	)	DEFENDANT

DEFENDANT BREWER'S SECOND MOTION TO DISMISS INDICTMENT

Comes the defendant, Kevin Brewer, by and through undersigned counsel, and for this Second Motion to Dismiss Indictment hereby states:

FACTS:

Mr. Brewer is charged with knowingly failing to register as a sex offender. Trial in this matter is scheduled for September 8, 2009.

According to documents provided by the office of the United States Attorney, on September 9, 1994, Mr. Brewer was found guilty of four counts of sexual assault first degree and three counts of sexual assault third degree of an adult female in the State of Hawaii. Mr. Brewer timely appealed this conviction, and the sentence was later reduced to second and third degree sexual assault. On April 24, 1997, Mr. Brewer pled guilty to these offenses. (*See* Defense Exhibit 1).

In the Government's response to the Defendant's First Motion to Dismiss Indictment, the Government stated that a new "judgment of guilty" was entered on September 3, 1997. The Court adopted this date as the date Mr. Brewer was adjudicated guilty.

The defense argues that Mr. Brewer was not adjudicated guilty on September 3, 1997; rather, he was adjudicated guilty on April 24, 1997. He was sentenced to five years of probation on September 3, 1997.

EE

ANALYSIS:

Sex Offender Registration:

A.C.A. §12-12-905 requires that the following persons must register:

(1) A person who is adjudicated guilty on or after August 1, 1997, of a sex offense, aggravated sex offense, or sexually violent offense;

(2) A person who is serving a sentence of incarceration, probation, parole, or other form of community supervision as a result of an adjudication of guilt on or after August 1, 1997, for a sex offense, aggravated sex offense, or sexually violent offense;

(3) A person who is acquitted on or after August 1, 1997, on the grounds of mental disease or defect for a sex offense, aggravated sex offense, or sexually violent offense;

(4) A person who is serving a commitment as a result of an acquittal on or after August 1, 1997, on the grounds of mental disease or defect for a sex offense, aggravated sex offense, or sexually violent offense; and

(5) A person who is required to be registered under the Habitual Child Sex Offender Registration Act, formerly §12-12-901 et seq., enacted by Acts 587 of 1987, §§1-10 and 989 of 1997, §23.

Pursuant to A.C.A. §9-27-356, the court determines whether or not a juvenile is required to register. (*See* Defense Exhibit 2).

The salient portions of this Code, as applied to this defendant, are found in Sections 1 and 2, and deal with the terminology "adjudication of guilt".

"Adjudication" is defined in Black's Law as follows:

1. The legal process of resolving a dispute; the process of judicially deciding a case. 2. Judgment.

More specifically, it is defined in §12-12-903 as a plea of guilty. (*See* Exhibit 3).

On April 24, 1997, Mr. Brewer entered a guilty plea to four counts of sexual assault in the second degree, and to two counts of sexual assault in the third degree. (*See* Defendant's Exhibit 1). On April 24, 1997, the dispute was resolved. On April 24, 1997,

Mr. Brewer was adjudicated guilty. The registration requirements of A.C.A. §12-12-905 clearly state in Sections 1 and 2 that its requirements apply to those offenders who are adjudicated guilty on or after August 1, 1997. He was not.[1]

Although not on point with the present case, *U.S. v. Leach*, 491 F.3d 858 (8th Cir. 2007) attempts to determine the fact of whether a prior conviction counts as an enhancement against a defendant who has pled guilty, but has not yet been sentenced. The *Leach* court pondered whether the defendant had to be "sentenced for the prior offense or merely have been *adjudicated guilty by plea of guilty,* nolo contendre, or a finding of guilt". *Id* at 866.

As well, *U.S. v. Davis,* 251 F.3d 765 (8th Cir. 2001) held that a prior sentence meant any sentence previously imposed upon an "adjudication of guilt - e.g., by guilty plea...." *Id* at 766.

This Court often says after the entry of a guilty plea that a defendant is now adjudged guilty of the offense. That statement is in compliance with the law, and has to now be applicable to Mr. Brewer. Simply put, Mr. Brewer was adjudged guilty on the date he pled, and because of that, the registration requirement as outlined in the Arkansas statute was inapplicable to him; thus, he cannot, based upon this legal premise, be found guilty of knowingly failing to update his registration.

ADEQUATE NOTICE

The Government even states in its response to the First Motion to Dismiss that "[O]n February 28, 2007, the Attorney General of the United States issued an interim rule pursuant to 42 U.S.C. §16913(d) announcing that SORNA applies to sex offenders convicted before the enactment of SORNA ***of an offense for which registration[2] is required.***"

---

[1]Mr. Brewer was sentenced on September 3, 1997, but he had already pled guilty in April.

[2]The emphasis is the writer's.

Because the Arkansas statute was inapplicable to Mr. Brewer, and he was not required to register, there was no way the provisions of SORNA were applicable to him. Further, because his prior registrations and updates were, pursuant to §A.C.A. 12-12-905, not necessary, the fact that he did register during some periods cannot be looked upon as an excuse that adequate notice was given to this defendant. Simply put, Mr. Brewer did not have a legal duty to register under state law; thus, he did not receive adequate notice of any requirements under SORNA.

SORNA mandates that the Attorney General has the duty to notify sex offenders of the registration requirements. *See* 42 U.S.C. §16917. It also states that initial registration should be done by the state of conviction. In Mr. Brewer's case, that state was Hawaii. He has never been notified by Hawaii regarding any registration requirement; only that he was to receive treatment as a part of his agreement to plead guilty. Since Mr. Brewer did not receive initial notification of any duty to register, and since the Arkansas statute specifically exempted him as an individual who needed to register, he legally cannot now be charged with knowingly failing to register or update a registration.[3]

CONCLUSION

For the above stated reasons, defendant requests a hearing on this Motion, for dismissal of the Indictment, and for all other just and appropriate relief.

---

[3]Since being released on bond, Mr. Brewer has registered with local authorities. Further, the new sex offender acknowledgment form does now advise offenders of the SORNA requirements.

130 N. NIMITZ HIGHWAY - SUITE A-135 BY: WILLIAM M. BENTO 4361-0
ONOLULU, HI 96817 TEL: 586-2200 DEPUTY PUBLIC DEFENDER

STATE OF HAWAI'I CIRCUIT COURT OF THE FIRST CIRCUIT	GUILTY PLEA NO CONTEST	CASE NUMBER CR. NO. 94-0049

TATE OF HAWAI'I VS (Defendant) EVIN BREWER	POLICE REPORT NUMBER See attached	
	DEFENDANT'S AGE 2$ Years	EDUCATION: LAST GRADE COMPLETED 12th
HARGE(s) OUNTS I—V: EXUAL ASSAULT IN THE SECOND DEGREE OUNTS VI—VII: EXUAL ASSAULT IN THE THIRD DEGREE	MAXIMUM INDETERMINATE SENTENCE See attached YRS.	
	MAXIMUM FINE $ See attached	
	EXTENDED MAXIMUM INDETERMINATE SENTENCE See attached YRS.	

1. I plead ☒ GUILTY ☐ NO CONTEST to the charge(s) indicated above.

2. *My mind is clear. I have not taken any pills or drugs or medicines or alcoholic drinks within the last 48 hours. I am not sick. I understand the English language. My age and education are indicated above. I have never been under treatment for any mental illness.*

3. I have received a written copy of the original charge in this case. My lawyer has explained the charges to me. I understand the original charge against me. I told my lawyer all the facts I know about the case. He / she discussed with me the government's evidence against me, and advised me of the facts which the government must prove in order to convict me and of the possible defenses which I might have.

4. My lawyer has also explained to me the reduced charge which the government has agreed to charge me with, instead of the original charge. (Applicable only if original charge has been reduced.)

5. ☒ I plead guilty because, after discussing all the evidence and receiving advice on the law from my lawyer, I believe that I am guilty.

☐ I plead no contest because, after discussing all the evidence and receiving advice on the law from my lawyer, I believe that it is better to put myself at the mercy of the court.

. I know that I still have the right to plead not guilty and have a trial by jury or by the court in which the government will be required to prove me guilty beyond a reasonable doubt. I know that in a trial, I can see, hear and question the witnesses who may testify against me, I can call my own witnesses to testify for me, and I do not have to take the stand and testify if I do not wish to do so. I know that I have a right to a speedy and public trial. I know that by pleading in this matter, I am giving up my right to a trial and may be found guilty and sentenced without a trial of any kind. I plead in this manner because (give brief factual statement of what defendant did):

On January 1, 1994, I did have sexual relations and sexual contact with Michelle Feaver absent her consent.

EXHIBIT
1

My lawyer has told me about the possible maximum indeterminate sentence indicated above for my offense. He / she also explained to me the possibility of my indeterminate maximum term of imprisonment being extended and explained that I may have to serve a mandatory minimum term of imprisonment without possibility of parole.

I am pleading of my own free will. No one is putting any kind of pressure on me or threatening me or anyone close to me to force me to plead. I am not taking the rap or pleading to protect someone else from prosecution.

GUILTY PLEA NO CONTEST (Continued)

CASE NUMBER

CR. NO. 94-0049

9. I have not been promised any kind of deal or favor or leniency by anyone for my plea, except that I have been told that the government has agreed as follows: (If None, Write None)

See attached copy of letter from Deputy Prosecuting Attorney Gary Senaga which outlines the plea agreement.

I know that the court is not a party to, so that it does not have to recognize, any deal or agreement between the prosecutor and my lawyer or me. I know that the court has not promised me leniency.

10. I further state that (any further statements; if none, write "none"):

None.

11. I know that if I am not a citizen of the United States, a conviction for this or these offenses may have the consequences of deportation, exclusion form admission to the United States, or denial of naturalization pursuant to the laws of the United States.

12. I am signing this paper after I have gone over all of it together with my lawyer, and I am signing it in the presence of my lawyer. I have no complaints about my lawyer and I am satisfied with what he / she has done for me.

DATE	DEFENDANT'S SIGNATURE
April 24, 1997	/s/Kevin Brewer

CERTIFICATE OF COUNSEL

As counsel for defendant and as an officer of the Court, I certify that I have read and explained fully the foregoing, that I believe that the defendant understands the document in its entirety, that the statements contained herein are in conformity with my understanding of the defendant's position, that I believe that the defendant's plea is made voluntarily and with intelligent understanding of the nature of the charge and possible consequences, and that the defendant signed the foregoing in my presence.

ATE	ATTORNEY FOR DEFENDANT	SIGNATURE
April 24, 1997	WILLIAM M. BENTO DEPUTY PUBLIC DEFENDER	/s/William M. Bento

I acknowledge that the indicated Judge questioned me personally in open court to make sure that I know what I was doing in pleading guilty or no contest and understood this form before I signed it.

IE OF JUDGE DOING QUESTIONING	
HE HONORABLE WILFRED K. WATANABE	
	SIGNATURE OF DEFENDANT (To be Signed in Open Court After Questioning)
ril 24, 1997	/s/Kevin Brewer

the juvenile court judge, or acquitted on the grounds of mental disease or defect of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.

History. Acts 1997, No. 989, § 3; 1999, No. 1353, § 1.

Amendments. The 1999 amendment added (7)(C); in (8)(F), inserted "for a tribal court offense", substituted "similar" for "substantially equivalent" and added "or when that adjudication of guilt requires registration under another state's sex offender registration laws"; added (13)(a)(xviii) and (13)(a)(xix); added (13)(C)(ii); inserted "adjudicated delinquent of and ordered to register by the juvenile court judge" in (14) and (16); and made stylistic changes.

CASE NOTES

Adjudication of Guilt.

Defendant could not be certified as an habitual child sex offender since his prior juvenile delinquency adjudication could not be considered a prior conviction under the 1987 version of this subchapter. Snyder v. State, 332 Ark. 279, 965 S.W.2d 121 (1998).

12-12-904. Failure to register — Failure to comply with reporting requirements.

(a)(1) A person who fails to register or who fails to report changes of address as required under this subchapter shall be guilty of a Class D felony.

(2) It is an affirmative defense to prosecution if:

(A) The delay in reporting a change in address is caused by:

(i) An eviction;

(ii) A natural disaster; or

(iii) Any other unforeseen circumstance; and

(B) The person provides the new address to the Arkansas Crime Information Center in writing no later than five (5) business days after the offender establishes residency.

(b) Any agency or official subject to reporting requirements under this subchapter that knowingly fails to comply with such reporting requirements shall be guilty of a Class B misdemeanor.

History. Acts 1997, No. 989, § 11; 1999, No. 1353, § 2.

Amendments. The 1999 amendment added (a)(2).

12-12-905. Applicability.

(a) The registration requirements of this subchapter apply to:

(1) A person who is adjudicated guilty on or after August 1, 1997, of:

(A) A sexually violent offense;

(B) A sex offense; or

(C) An offense against a victim who is a minor;

(2) A person who is serving a sentence of incarceration, probation, parole, or other form of community supervision as a result of an adjudication of guilt on August 1, 1997, for:

(A) A sexually violent offense;

EXHIBIT tabbies 2

(B) A sex offense; or

(C) An offense against a victim who is a minor;

(3) A person who is committed following an acquittal on or after August 1, 1997, on the grounds of mental disease or defect for:

(A) A sexually violent offense;

(B) A sex offense; or

(C) An offense against a victim who is a minor;

(4) A person who is serving a commitment as a result of an acquittal on August 1, 1997, on the grounds of mental disease or defect for:

(A) A sexually violent offense;

(B) A sex offense; or

(C) An offense against a victim who is a minor;

(5) A person who was required to be registered under the Habitual Child Sex Offender Registration Act, former § 12-12-901 et seq., enacted by Acts 1987, No. 587, §§ 1-10, which was repealed by Acts 1997, No. 989, § 23;

(6) A juvenile who has been ordered to register by a juvenile court judge after an adjudication of delinquency on or after September 1, 1999, of:

(A) A sexually violent offense;

(B) A sex offense; or

(C) An offense against a victim who is a minor; and

(7) A juvenile who is serving an order of commitment, transfer of legal custody, probation, court-approved voluntary service in the community, juvenile detention, residential detention, or other form of commitment as prescribed under § 9-27-330 after an adjudication of delinquency for a sexually violent offense, a sex offense, or an offense against a victim who is a minor, on September 1, 1999, and after being ordered to register by the juvenile court judge having jurisdiction.

(b)(1) A person who has been adjudicated guilty of a sexually violent offense, a sex offense, or an offense against a victim who is a minor and whose record of conviction will be expunged under the provisions of §§ 16-93-301 — 16-93-303 is not relieved of the duty to register.

(2)(A)(i) However, a person's obligation to register under this subchapter is terminated upon an expungement of the record by the court.

(ii) The burden shall be on the offender to file a petition of expungement with the court having jurisdiction and to present that order to the Arkansas Crime Information Center in order to stop the notification process.

(B) Upon receiving the order of expungement, the Arkansas Crime Information Center shall notify the Department of Correction and the appropriate local law enforcement official that the person is no longer required to be registered and to cease notification to the public.

History. Acts 1997, No. 989, § 4; 1999, No. 1353, § 3.

Amendments. The 1999 amendment rewrote (a)(5); added (a)(6), (a)(7), and (b); and made stylistic changes.

12-12-902. Legislative findings.

The General Assembly finds that sex offenders pose a high risk of reoffending after release from custody, that protecting the public from sex offenders is a primary governmental interest, that the privacy interest of persons adjudicated guilty of sex offenses is less important than the government's interest in public safety, and that the release of certain information about sex offenders to criminal justice agencies and the general public will assist in protecting the public safety.

History. Acts 1997, No. 989, § 2.

12-12-903. Definitions.

For the purposes of this subchapter:

(1) "Adjudication of guilt" or other words of similar import means a:

(A) Plea of guilty;

(B) Plea of nolo contendere;

(C) Negotiated plea;

(D) Finding of guilt by a judge; or

(E) Finding of guilt by a jury;

(2)(A) "Administration of criminal justice" means performing functions of investigation, apprehension, detention, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders.

(B) The administration of criminal justice also includes criminal identification activities and the collection, maintenance, and dissemination of criminal justice information;

(3) "Change of address" or other words of similar import means a change of residence or a change for more than thirty (30) days of temporary domicile;

(4) "Criminal justice agency" means a government agency or any subunit thereof which is authorized by law to perform the administration of criminal justice and which allocates more than one-half (½) of its annual budget to the administration of criminal justice;

(5) "Local law enforcement agency having jurisdiction" means the:

(A) Chief law enforcement officer of the municipality in which an offender resides or expects to reside; or

(B) County sheriff, if the municipality does not have a chief law enforcement officer or if an offender resides or expects to reside in an unincorporated area of a county;

(6) "Mental abnormality" means a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminally sexual acts to a degree that makes the person a menace to the health and safety of other persons;

(7) "Offender" means:

(A) A sexually violent predator;

(B) A sex or child offender; or

EXHIBIT 3

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

UNITED STATES OF AMERICA	)	PLAINTIFF
	)	
vs.	)	Case No. 6:09CR60007-001
	)	
	)	
KEVIN LAMONT BREWER	)	DEFENDANT

MOTION TO DISMISS INDICTMENT
AND BRIEF IN SUPPORT

Comes the defendant, Kevin Brewer, by and through undersigned counsel, and for this Motion to Dismiss the Indictment hereby states:

FACTS:

Mr. Brewer is charged with knowingly failing to register as a sex offender. Trial in this matter is scheduled for September 8, 2009.

According to documents provided by the office of the United States Attorney, on September 9, 1994, Mr. Brewer was found guilty of four counts of sexual assault first degree (later reduced to second degree), and three counts of sexual assault third degree of an adult female in the State of Hawaii.

In 1994, there was no Hawaii statute in effect which required sex offenders to register. Mr. Brewer was never ordered or notified by the State of Hawaii that he was required to register as a sex offender. However, as part of his probation, Mr. Brewer was ordered and agreed to participate in Hawaii's Sex Offender Treatment Program (HSOTP), with the proviso that he obtain and maintain sex offender treatment.

FF

On July 1, 1997, the Hawaii Legislature enacted its sex offender registration statutes, and made them retroactive. See Hawaii Laws, Act 316, at §9. By that time, Mr. Brewer had left the State of Hawaii.

When Mr. Brewer moved to Arkansas, he subjected himself to the Arkansas Sex Offender Registration Act of 1997, codified at A.C.A. 12-12-905 (1997). Upon review of the documents provided by the Government, it appears that Mr. Brewer signed a Sex and Child Offender Notification Form on August 1, 2000, acknowledging that failure to comply with the requirements to register constituted a Class D felony. This form is attached as Exhibit 1.

On September 15, 2003, Mr. Brewer signed the Sex and Child Offender Notification Form. That form is attached as Exhibit 2. Nothing in the Acknowledgment form addresses the Adam Walsh Act or SORNA and its requirements, as the Act had not yet passed. This form notified Mr. Brewer that if he failed to comply with the requirements to register as a sex offender, failed to comply with the assessment process, or failed to report a change of address, then it would constitute a Class D felony.

On February 10, 2004, Mr. Brewer again signed the Sex Offender Acknowledgment Form, attached hereto as Exhibit 3. Again, nothing in the form addresses SORNA, or its requirements. It simply reiterates language as outlined above, notifying Mr. Brewer that he subjected himself to a possible six year sentence, which is the maximum for a Class D felony.

On February 12, 2009, the Marshal's service was notified that Mr. Brewer was living in Gurdon, Arkansas. On February 18, 2009, the Marshal's service was advised that Mr.

Brewer was not currently registered. On March 18, 2009, Mr. Brewer was interviewed and advised that he had moved from Africa back to Arkansas in December of 2007, and was unaware of any federal registration requirements.

ANALYSIS:

NOTICE REQUIREMENT:

In order for Mr. Brewer to be rightfully convicted of violating 18 U.S.C. §2250, the Government must show that Mr. Brewer had a duty to register, and that he thereafter knowingly failed to register.

There is no evidence that Mr. Brewer was aware of the requirement to register, pursuant to SORNA. 42 U.S.C. §16917 requires that Mr. Brewer be advised of this particular requirement. Since he was not, he cannot, as a matter of law, have knowingly failed to register pursuant to SORNA.

42 U.S.C. 16917 reads:

Duty to Notify Sex Offenders of Registration & Requirements and t

(a) In General –An appropriate official shall, shortly before release of the sex offender from custody, or, if the sex offender is not in custody, immediately after the sentencing of the sex offender, for the offense giving rise to the duty to register -

(1) inform the sex offender of the duties of a sex offender under this title and explain those duties;

(2) require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirements; and

(3) ensure that the sex offender is registered.

(b) Notification of Sex Offenders Who Cannot Comply with Subsection

(c) The Attorney General shall prescribe rules for the notification of sex offenders who cannot be registered in accordance with subsection (a).

Mr. Brewer was not in custody, nor had he recently received a sentence; therefore, he clearly falls under the ambit of subsection (b). So, one must view the "rules" to see if any were prescribed to notify Mr. Brewer of his registration obligations under federal law.

The rule- 28 C.F.R §72.3 -reads:

Applicability of the Sex Offender Registration and Notification Act.

The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

Example 1. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and could be held criminally liable under 18 U.S.C. 2250 for failing to register or keep the registration current in any jurisdiction in which the sex offender resides, is an employee, or is a student.

Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required, but disappears after a couple of years and does not register in any other jurisdiction. Following the enactment of the Sex Offender Registration and Notification Act, the sex offender is found to be living in another state and is arrested there. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in each state in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.
28 C.F.R. §72.3

Nothing in this rule speaks to Mr. Brewer's circumstances regarding the requirements of SORNA.

He simply was not given notice of the requirements.

> Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges....Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act....the principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case.

United States v. Barnes, 2007 WL 2119895, quoting *Lambert v. California*, 355 U.S. 225 a 228 (1958).

> The Due Process Clause also encompasses the notion of fair warning. As explained by the Supreme Court in *United States v. Lanier*, 520 U.S. 259 (1997), the fair warning requirement is based on the principle "that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id* at 265. Defendant cannot be siad to have known that SORNA was applicable to him until the date of his arrest. While he was aware that his conduct was proscribed under state law, he was unaware that it was proscribed under federal law with the result being stiffer penalties for the same behavior. This Court rejects the position taken by the government and the court in *Hinen* that knowledge of the state law requiring registration is equivalent to knowledge of SORNA's requirements. *See supra* p. 5; 42 U.S.C. §16917; *see also Hinen*, 2007 WL 1447853 at 4. The Constitutional mandate that defendants be given adequate notice and fair warning applies not only to what conduct is criminal but to the punishment which may be imposed. *Cf United States v. Kilkenny*, No. 05 Cr. 6847 (2d Cir. July 5, 2007).
>
> *United States v. Barnes*, 2007 WL 2119895 (S.D.N.Y. 2007).

Likewise, Mr. Brewer should not be held criminally liable for failing to register federally, when he had no notice that he was required to register federally.

The elements of 18 U.S.C. §2250 require that Mr. Brewer *knowingly* fail to register. As a matter of law, the government cannot show that Mr. Brewer *knowingly* failed to register, as the government cannot show Mr. Brewer was notified of the need to register pursuant to federal law, and thereafter did not do so.

---

[1] The *Barnes* ruling was based solely on the fact that the Defendant was arrested on the exact date it was clear to officials that SORNA would apply to Mr. Barnes. The Court felt this inherently unfair. The same logic, though, applies to the case at hand.

If a defendant's general knowledge of a registration/updating requirement by way of state law was sufficient to give notice, the Adam Walsh Act could have simply been written to include this method of notice. *See Barnes, supra*. But, SORNA mandates that the Attorney General has the duty to notify sex offenders of the registration requirements. *See* 42 U.S.C. §16917. As the Government cannot show that Mr. Brewer was so notified by the Attorney General or an appropriate official, and that he thereafter *knowingly* failed to register, the indictment must be dismissed.

No duty to register at the state level

Additionally, it appears that Mr. Brewer had no duty to register with Arkansas officials at all. When viewing the Arkansas Crime Information Center regarding information as who was required to register, Mr. Brewer observed the following language:

Sex Offender Registration:

A.C.A. §12-12-905 requires that the following persons must register:

(1) A person who is adjudicated guilty on or after August 1, 1997, of a sex offense, aggravated sex offense, or sexually violent offense;

(2) A person who is serving a sentence of incarceration, probation, parole, or other form of community supervision as a result of an adjudication of guilt on or after August 1, 1997, for a sex offense, aggravated sex offense, or sexually violent offense;

(3) A person who is acquitted on or after August 1, 1997, on the grounds of mental disease or defect for a sex offense, aggravated sex offense, or sexually violent offense;

(4) A person who is serving a commitment as a result of an acquittal on or after August 1, 1997, on the grounds of mental disease or defect for a sex offense, aggravated sex offense, or sexually violent offense; and

(5) A person who is required to be registered under the Habitual Child Sex Offender Registration Act, formerly §12-12-901 et seq., enacted by Acts 587 of 1987, §§1-10 and 989 of 1997, §23.

> Pursuant to A.C.A. §9-27-356, the court determines whether or not a juvenile is required to register.

See Defendant's Exhibit 4.

Nothing in this reading posted by the Arkansas Crime Information Center requires that Mr. Brewer register, as he had been doing. Mr. Brewer's conviction and adjudication of guilt occurred in 1994, three years before this interpretation of the statute required him to register. Based on the Rule of Lenity, Mr. Brewer should not be held criminally responsible now, as the literal wording of this statute did not require him to register.

Ex Post Facto Argument

The Ex Post Facto Clause states:

"No Bill of Attainder or ex post facto law shall be passed." U.S.C.A Consti. Art.1, §9, cl. 3.

Assuming 28 C.F.R. §72.3 does not violate the non-delegation doctrine[2], §2250 has been made retroactive. It also increases the punishment authorized by an already existing failure to register statute, 42 U.S.C. §14072(I). This offense is a Class A misdemeanor, and carries a maximum sentence of one year imprisonment, and a fine of up to $100,000. The statute reads:

---

[2] Congress delegated the issue of retroactivity to the Attorney General: "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section." 42 USC 16913(d). In Mistretta, the Supreme Court outlined the parameters of this doctrine: "So long as Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id*, at 409, 48 S.Ct., at 352. *Mistretta v. United States*, 488 U.S. 361, 372, 109 S.Ct 647, 654-655 (U.S. Mo., 1989). Mr. Brewer argues there is no intelligible principle involved in this delegation, and thus the statute itself is unconstitutional.

> A person [convicted of a sexual offense} who is...required to register...and knowingly fails to comply...shall, in the case of a first offense under this subsection, be imprisoned for not more than one year.

The state law exposed him to six years, but now Mr. Brewer has an exposure of up to ten years. This is clearly violative, as Mr. Brewer was not given adequate notice, yet the government has increased punishment beyond what was prescribed when the crime was committed.

Weaver v. Graham, 450 U.S. 24, 101 S.Ct 960 (1981) holds that even if a statute merely alters the penal provisions, it yet violates the Ex Post Facto clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

As the law is more onerous, and being applied retrospectively, defendant argues that it violates the Ex Post Facto provisions of law; thus, the indictment against him must be dismissed.

WHEREFORE, defendant prays for dismissal of the indictment, with prejudice, and for all other just and appropriate relief.

Respectfully submitted,

JENNIFFER HORAN
FEDERAL DEFENDER

By: /s/ Lisa G. Peters

Lisa G. Peters, Bar No. 89-099
Assistant Federal Defender
The Victory Building, Suite 490
1401 West Capitol Avenue
Little Rock, AR 72201
Phone: (501) 324-6113
Email: Lisa_Peters@fd.org

For: Kevin Lamont Brewer, Defendant

4192089

Attachment #1

Sex and Child Offender Notification Form

1. Pursuant to Act 989 of 1997, all sex and child offenders are required to be registered prior to release from incarceration.

2. If after release the offender changes address, the offender is required to give the new address to the Arkansas Crime Information Center in writing no later than 10 days before the offender establishes residence or is temporarily domiciled at the new address.

3. If the offender changes address to another state, the offender shall register the new address with the Arkansas Crime Information Center and with a designated law enforcement agency in the new state no later than 10 days before the offender establishes residence or is temporarily domiciled in the new state if the new state has a registration requirement.

I have read and understand the above rules regarding my registration as a sex and child offender. I further acknowledge that my failure to comply with the requirements to register as a sex and child offender or my failure to report changes in address constitutes a Class D felony and may result in my subsequent arrest and prosecution, or other administrative hearings which could result in a deprivation of my liberty.

[signature] 11265
NAME

8-1-00
DATE

SCORA.doc (970717)

A RECEIVED A
C AUG 03 2000 C
I I
C ACIC C

EXHIBIT
tabbies
1

Sex Offender Acknowledgement Form

Read, sign and return this form to your local law enforcement agency.

1. Pursuant to Act 989 of 1997, sex and child offenders are required to register prior to release from incarceration.

2. If the offender changes address, the offender is required to give the new address to the Arkansas Crime Information Center in writing no later than TEN (10) days before the offender establishes residence or is temporarily domiciled at the new address. Pursuant to §12-12-909 (d), ACIC can require the offender to report this change of address in person to the local law enforcement agency having jurisdiction.

3. If the offender changes address to another state, the offender shall register the new address with the Arkansas Crime Information Center no later than TEN (10) days before the offender establishes residency in the new state. The offender must register with the new state upon arrival in that state.

4. If the offender attends school, does volunteer work or is employed at any institute of higher education, the offender shall register with the law enforcement agency having jurisdiction over the campus. This may be a Department of Public Safety or the local law enforcement agency.

5. The offender is required to verify their residence within TEN (10) days after receipt of the *Verification of Residency* form which will be mailed to the offender's home every six months after registration, or every 90 days depending on the offender's assessment level. The Verification of Residency form is to be taken in person to the local law enforcement agency having jurisdiction.

6. All offenders are required to submit to a risk assessment to be completed by the Department of Correction Sex Offender Screening and Risk Assessment Program. The offender will be notified by mail of the location, date and time of the assessment.

I have read and understand the above rules regarding my registration as a sex offender. I further acknowledge that my failure to comply with the requirements to register as a sex offender, failure to comply with any part of the assessment process, or my failure to report changes in address constitutes a Class D felony. Failure to comply may result in my subsequent arrest and prosecution, or other administrative hearings that could result in a deprivation of liberty.

Ken Brown
Name

9-15-03
Date

ACIC 01/15/02

EXHIBIT
tabbies 2

Sex Offender Acknowledgement Form

Read, sign and return this form to your local law enforcement agency

1. Pursuant to Act 989 of 1997, sex and child offenders are required to register prior to release from incarceration.

2. If the offender changes address, the offender is required to give the new address to the Arkansas Crime Information Center in writing no later than TEN (10) days before the offender establishes residence or is temporarily domiciled at the new address. Pursuant to §12-12-909 (d), ACIC can require the offender to report this change of address in person to the local law enforcement agency having jurisdiction.

3. If the offender changes address to another state, the offender shall register the new address with the Arkansas Crime Information Center no later than TEN (10) days before the offender establishes residency in the new state. The offender must register with the new state upon arrival in that state.

4. If the offender attends school, does volunteer work or is employed at any institute of higher education, the offender shall register with the law enforcement agency having jurisdiction over the campus. This may be a Department of Public Safety or the local law enforcement agency.

5. The offender is required to verify their residence within TEN (10) days after receipt of the *Verification of Residency* form which will be mailed to the offender's home every six months after registration, or every 90 days depending on the offender's assessment level. The Verification of Residency form is to be taken in person to the local law enforcement agency having jurisdiction.

6. All offenders are required to submit to a risk assessment to be completed by the Department of Correction Sex Offender Screening and Risk Assessment Program. The offender will be notified by mail of the location, date and time of the assessment.

7. Pursuant to Act 330 of 2003, *"It shall be unlawful for a sex offender who is required to register under the Sex Offender Registration Act of 1997, § 12-12-901 et seq. and who has been assessed as a Level 3 or Level 4 offender to reside within two thousand (2,000) feet of the property on which any public or private elementary or secondary school or daycare facility is located.*

I have read and understand the above rules regarding my registration as a sex offender. I further acknowledge that my failure to comply with the requirements to register as a sex offender, failure to comply with any part of the assessment process, or my failure to report changes in address constitutes a Class D felony. Failure to comply may result in my subsequent arrest and prosecution, or other administrative hearings that could result in a deprivation of liberty.

Kevin Brewer
Name

2-10-04
Date

EXHIBIT
3

Offender Registry at ACIC are (501) 682-7439 or (501) 682-7441. The fax number is (501) 683-5592.

The ACIC may release information regarding individual offenders only to members of the criminal justice system. However, if a member of the public believes that a sex offender should have registered, but did not, or has changed address or employment without proper notification, that information is to be given to the ACIC by that member of the public at the numbers listed above.

The ACIC maintains a website that provides information on level 2 adult offenders where the victim was fourteen (14) years of age or younger, and all level 3 and level 4 sex offenders. The public may access that website at http://www.acic.org.

Sex Offender Registration

A.C.A. § 12-12-905 requires that the following persons must register:

(1) A person who is adjudicated guilty on or after August 1, 1997, of a sex offense, aggravated sex offense, or sexually violent offense;

(2) A person who is serving a sentence of incarceration, probation, parole, or other form of community supervision as a result of an adjudication of guilt on or after August 1, 1997, for a sex offense, aggravated sex offense, or sexually violent offense;

(3) A person who is acquitted on or after August 1, 1997, on the grounds of mental disease or defect for a sex offense, aggravated sex offense, or sexually violent offense;

(4) A person who is serving a commitment as a result of an acquittal on or after August 1, 1997, on the grounds of mental disease or defect for a sex offense, aggravated sex offense, or sexually violent offense; and

(5) A person who was required to be registered under the Habitual Child Sex Offender Registration Act, formerly § 12-12-901 et seq., enacted by Acts 587 of 1987, §§ 1-10 and 989 of 1997, § 23.

Pursuant to A.C.A. § 9-27-356, the court determines whether or not a juvenile is required to register.

Target Offenses:

Pursuant to federal law, (42 U.S.C. 14071 a, (3) A and B), target offenses include:

- Kidnapping of a minor, except by a parent;
- False imprisonment of a minor, except by a parent;
- Criminal sexual conduct toward a minor;
- Solicitation of a minor to engage in sexual conduct;
- Use of a minor in a sexual performance;
- Solicitation of a minor to practice prostitution;
- Any conduct that by its nature is a sexual offense against a minor;

EXHIBIT tabbies 4

Sex Offender Registration and Notification In the United States Current Case Law and Issues — March 2019

Retroactive Application & Ex Post Facto Considerations

One of the first issues to be litigated as sex offender registration systems were established across the country was whether or not an offender who had been convicted prior to the passage of the laws requiring registration could be required to register.[1] Numerous challenges to the retroactive application of registration laws were heard throughout the 1990s and 2000s.

United States Supreme Court

In 2003, the United States Supreme Court seemingly settled the issue in the case of Smith v. Doe, a challenge from a sex offender in Alaska who argued that the imposition of registration requirements on him violated the ex post facto clause of the Constitution. [2] The court held that registration and notification — under the specific facts of that case — were not punitive, and therefore could be retroactively imposed as regulatory actions[3]

While the issue was settled for a time, subsequent litigation has ensued based on increased sex offender registration and notification requirements in many jurisdictions since the Doe decision.[4] In a series of recent cases interpreting 18 U.S.C. § 2250, the Supreme Court has declined to take a fresh look at any ex post facto implications raised by the increasing requirements that have been placed on registered sex offenders over the past 16 years since the Doe case[5]

Federal Courts

From the Smith v. Doe decision until 2017, federal courts had nearly universally held that sex offender registration and notification schemes did not violate the ex post facto clause[6]. However, in Doe v. Snyder, the Sixth Circuit Court of Appeals held in an as-applied challenge that Michigan's SORNA-implementing law is punitive and, therefore, could not be applied retroactively.[7] In addition, in Alabama a federal court held that the retroactive application of certain provisions regarding homeless offenders and in-state travel notifications violated the ex post facto clause.[8]

Significant State Court Decisions

Eight state supreme courts in recent years have held that the retroactive application of their sex offender registration and notification laws violate their respective state constitutions. [9] Other state courts have found issues with the retroactive application of their sex offender registration laws in less sweeping fashion. [10] Conversely, many courts continue to stand by the reasoning of the Smith v. Doe case in affirming the retroactive application of sex offender registration laws.[11] However, at least one state that has found an ex post facto violation as applied

to its own offenders does not apply to persons convicted in another state who then relocate.[12]

Occasionally an offender's registration requirements might begin — or become more onerous — when laws are amended after the date of an offender's sentencing. Some courts require the specific performance of a plea agreement or court order when sex offender registration was not specifically ordered by the sentencing court, was bargained away as part of plea negotiations or when an offender was given a specific classification or tier at sentencing. [13] However, many states continue to require registration and notification under such circumstances. For example, California held that a defendant was properly subjected to community notification in 2004 even though he had entered a plea agreement in 1991 that was silent on the issue.[14]

Additional Court Opinions

A federal court enjoined the enactment of Nevada's SORNA-implementing legislation based on ex post facto concerns for a number of years.[15] In Kentucky, one court has held that increasing the penalties for a failure to register does not violate the ex post facto clause.[16] In other states, some offenders have been able to be removed from the registry when the statute is changed in a way that benefits them. [17]

---

1 SORNA Guidelines require that jurisdictions register offenders whose "predicate convictions predate the enactment of SORNA or the implementation of SORNA in the jurisdiction" when an offender is —

i. incarcerated or under supervision, either for the predicate sex offense or for some other crime;
ii. already registered or subject to a pre-existing sex offender registration requirement under the jurisdiction's law; or
iii. re-enters the jurisdiction's justice system because of a subsequent felony conviction.

The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,046 (July 2, 2008); Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630, 1639 (Jan. 11, 2011), available at https://www.govinfo.gov/content/pkg/FR-2008-07-02/pdf/E8-14656.pdf.

2 Smith v. Doe, 538 U.S. 1009 (2003).

3 *Id.*

4 *See, e.g.,* Jensen v. State, 905 N.E.2d 384 (Ind. 2009) (person convicted after the initial passage of the law could be required to comply with amended requirements).

5 *See* United States v. Kebodeaux, 570 U.S. 387 (2013) (assuming without deciding that Congress did not violate the ex post facto clause in enacting SORNA's registration requirements); United States v. Juvenile Male, 564 U.S. 932 (2011) (declining to address whether SORNA's requirements violated the ex post facto clause on grounds of mootness); Carr v. United States, 560 U.S. 438 (2010) (declining to address the issue of whether SORNA violates the ex post facto clause).

6 *See, e.g.*, Shaw v. Patton, 823 F.3d 556 (10th Cir. 2016); United States v. Parks, 698 F.3d 1 (1st Cir. 2012); United States v. W.B.H., 664 F.3d 848 (11th Cir. 2011).

7 Doe v. Snyder, 834 F.3d 696 (6th Cir. 2016).

8 McGuire v. Strange, 83 F. Supp. 3d 1231 (M.D. Ala. 2015).

9 Doe v. State, 189 P.3d 999 (Alaska 2008); Wallace v. State, 905 N.E.2d 371 (Ind. 2009); State v. Letalien, 985 A.2d 4 (Me. 2009); Doe v. Dep't of Pub. Safety & Corr. Servs., 62 A.3d 123 (Md. 2013); State v. Williams, 952 N.E.2d 1108 (Ohio 2011); Starkey v. Okla. Dep't of Corr., 305 P.3d 1004 (Okla. 2013) (detailing all case law from state courts regarding retroactive application of sex offender registration and notification statutes); Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017). One additional case along these lines, Doe v. Phillips, 194 S.W.3d 833 (Mo. 2006), has subsequently been rendered moot, Doe v. Keathley, 2009 Mo. App. LEXIS 4 (Jan. 6, 2009). In 2016, an unusual series of cases in Kansas first held that the state's registration system was punitive in effect — and thus retroactive application was unconstitutional — then overturned that decision. Doe v. Thompson, 373 P.3d 750 (Kan. 2016) (registration system is punitive); State v. Buser, 371 P.3d 886 (Kan. 2016) (same); State v. Redmond, 371 P.3d 900 (Kan. 2016) (same). *But*

see State v. Petersen-Beard, 304 Kan. 192 (2016) (registration system does not violate the ex post facto clause).

[10] The New Hampshire Supreme Court held that requiring lifetime registration without the opportunity for review violates the ex post facto provisions of the state's constitution. Doe v. State, 111 A.3d 1077 (N.H. 2015) (registration requirements can only be applied to the petitioner if he is "promptly given an opportunity for either a court hearing, or an administrative hearing subject to judicial review, at which he is permitted to demonstrate that he no longer poses a risk sufficient to justify continued registration ....[and] must be afforded periodic opportunities for further hearings, at reasonable intervals, to revisit whether registration continues to be necessary to protect the public").

[11] *See, e.g.*, Shaw v. Patton, 823 F.3d 556 (10th Cir. 2016); State v. Yeoman, 236 P.3d 1265 (Idaho 2010); Smith v. Commonwealth, 743 S.E.2d 146 (Va. 2013); Kammerer v. State, 322 P.3d 827 (Wyo. 2014). In addition, one federal circuit concluded that retroactive application of New York's registration amendments to an offender did not violate the ex post facto clause. Doe v. Cuomo, 755 F.3d 105 (2d Cir. 2014).

[12] State v. Zerbe, 50 N.E.3d 368 (Ind. 2016).

[13] Commonwealth v. Hainesworth, 82 A.3d 444 (Pa. 2014) (defendant entitled to specific performance of his plea agreement, a component of whose negotiation was that he would not be required to register as a sex offender). *But see* United States v. Paul, 718 Fed. Appx. 360 (6th Cir. 2017) (trial court excused defendant from registration at sentencing but federal requirement to register still applied); Jensen v. State, 882 N.W.2d 873 (Iowa Ct. App. 2016) (defendant not entitled to a 10-year registration duration, as ordered by the court per a plea agreement, when the determination of registration duration was vested in the state's Department of Public Safety); Commonwealth v. Giannatonio, 114 A.3d 429 (Pa. Super. Ct. 2015) (extension of state duration of registration period did not violate ex post facto when conviction secured pursuant to federal plea agreement).

[14] Doe v. Harris, 302 P.3d 598 (Cal. 2013).

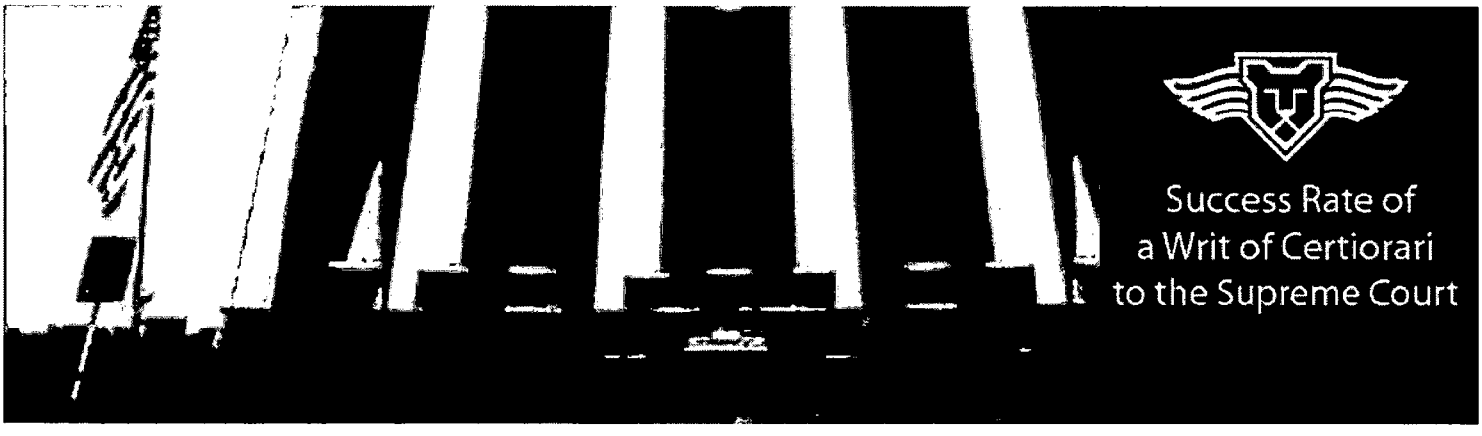
[15] ACLU v. Masto, 2:08-cv-00822-JCM-PAL (D. Nev., Oct. 7, 2008).

[16] Buck v. Commonwealth, 308 S.W.3d 661 (Ky. 2010).

[17] State v. Jedlicka, 747 N.W.2d 580 (Minn. Ct. App. 2008); *see also* Flanders v. State, 955 N.E.2d 732 (Ind. Ct. App. 2011).

SUPREME COURT PRESS
Legal Brief Preparation and Printing for the United States Supreme Court

(888) 958-5705
NATIONWIDE TOLL FREE
(617) 505-1088



Success Rate of a Petition for Writ of Certiorari to the Supreme Cou

Caution: The Supreme Court Press does not provide legal advice. The Rules of the United States Supreme Court are subject to interpretation and change. You are encouraged to visit their website at www.supremecourtus.gov. The Supreme Court Press is not responsible for any errors on this website.

What is the Probability that Certiorari will be Granted?

Getting a case heard by the Supreme Court is considerably more difficult than gaining admission to Harvard. In 2010, there were 5,910 petitions for a Writ of Certiorari filed with the Supreme Court, but cert was granted for only 165 cases. That is a success rate of only 2.8%. (In contrast, Harvard admitted 5.9% of its applicants in the year 2012). Over half the petitions submitted come from *pro se* and/or indigent criminal defendants or civil litigants. Since these petitions are drafted by non-attorneys, they enjoy a considerably lower success rate. Focusing only on attorney-submitted petitions, the success rate is closer to 6%, a rate that at least offers a ray of hope.

Here are some interesting statistics that are compiled from data supplied by the Administrative Office of the United States Courts, between 2007-2010 and compiled in the Sourcebook of Criminal Justice published by the University of Albany.

Petitions for a Writ of Certiorari Filed Between 2014-2017

	2014	2015	2016	2017
Criminal	3,563	2,673	2,432	2,449
U.S. Civil	923	780	856	783
Private Civil	2,429	2,545	2,407	2,513
Administrative	188	156	165	165
TOTAL	7,103	6,154	5,860	5,910

Success Rate of Petitions for Writ of Certiorari (Granted/Filed)%

	2014	2015	2016	2017
Criminal	2.1%	6.4%	2.8%	1.8%
U.S. Civil	1.4%	2.6%	3.2%	1.9%
Private Civil	2.5%	2.0%	2.7%	3.4%
Administrative	2.1%	10.9%	5.5%	11.5%
TOTAL	2.1%	4.2%	2.9%	2.8%

HH

STATE OF HAWAII CIRCUIT COURT OF THE FIRST CIRCUIT	**JUDGMENT** **GUILTY CONVICTION AND SENTENCE** ☒ Young Adult Defendant NOTICE OF ENTRY	CASE NUMBER CR. NO. 94-0049

STATE OF HAWAII VS (DEFENDANT)

KEVIN BREWER

POLICE REPORT NUMBER

94000659 94000806
94000807 94000808
94000809 94000811
94000812

DEFENDANT'S PLEA

☒ GUILTY ☐ NOT GUILTY ☐ NO CONTEST ☒ JURY VERDICT ☐ JUDGE FINDINGS

ORIGINAL CHARGE(S)

I-V: SEXUAL ASSAULT 1°
VI & VII: SEXUAL ASSAULT 3°

CHARGE TO WHICH DEFENDANT PLEAD

DEFENDANT IS CONVICTED AND FOUND GUILTY OF

I-V: SEXUAL ASSAULT 1°
VI & VII: SEXUAL ASSAULT 3°

FINAL JUDGMENT AND SENTENCE OF THE COURT

☐ FINE $_____ TO BE PAID TO THE CLERK OF COURT
☐ RESTITUTION $_____
☒ INCARCERATION *

☐ MITTIMUS TO ISSUE IMMEDIATELY
☒ MITTIMUS STAYED UNTIL PENDING APPEAL
☐ OTHER:

YEARS	MONTHS	DAYS
I-V: EIGHT (8) YEARS as to each count VI & VII: FOUR (4) YEARS as to each count (As a Young Adult Offender)		

* Said sentence to run concurrently as to each count with credit for time served

I do hereby certify that this is a full, true, and correct copy of the original on file in this office pursuant to Section 6-40, Hawaii Revised Statutes.

Clerk, Circuit Court, First Circuit,
State of Hawaii

☐ The Defendant entered the plea(s) indicated. It is adjudged that the Defendant has been convicted of and is guilty of the offense stated above, committed in the manner and form set forth in the charge.

☐ The court finds that the Defendant comes within the classification of a young adult defendant under HRS Section 667 and that in lieu of any other sentence of imprisonment authorized by law, defendant should be sentenced to a special indeterminate term of imprisonment. The court is of the opinion that such special term is adequate for defendant's correction and rehabilitation and will not jeopardize the protection of the public.

THE JUDGMENT AND SENTENCE OF THIS COURT IS AS STATED HEREIN.

DATE SIGNED	JUDGE	SIGNATURE
SEPT. 9, 1994	GAIL C. NAKATANI	Gail C. Nakatani

NOTICE OF ENTRY

THIS JUDGMENT HAS BEEN ENTERED AND COPIES MAILED OR DELIVERED TO ALL PARTIES.

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED
SEP - 9 1994 19____
4:30 o'clock P M
S. Nozaki
Clerk, 4th Division

DATE	CLERK
SEPT. 9, 1994	L. NOZAKI S. Nozaki

DISTRIBUTION ☐ ORIG. FILE, ☐ PROS., ☐ DEF., ☐ APD, ☐ POLICE

FORM NO. 000118 3.84

JUDGMENT GUILTY CONVICTION AND SENTENCE (YOUNG ADULT DEFENDANT)

AUTION: NOT TO BE USED FOR IDENTIFICATION PURPOSES

THIS IS AN IMPORTANT RECORD. SAFEGUARD IT.

ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID

CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

1. NAME (Last, First, Middle)	2. DEPARTMENT, COMPONENT AND BRANCH	3. SOCIAL SECURITY NO.
[redacted] KEVIN LANCKE	USMC-11	[redacted]

4.a. GRADE, RATE OR RANK	4.b. PAY GRADE	5. DATE OF BIRTH (YYMMDD)	6. RESERVE OBLIG. TERM. DATE		
			Year	Month	Day
SGT	E-4	730226	06	00	00

7.a. PLACE OF ENTRY INTO ACTIVE DUTY	7.b. HOME OF RECORD AT TIME OF ENTRY (City and state, or complete address if known)
LITTLE ROCK AR MEPS	LITTLE ROCK AR
9. LAST DUTY ASSIGNMENT AND MAJOR COMMAND	8.a. STATION WHERE SEPARATED
1ST MARINE EXPEDITIONARY BRIGADE FMF	MCBH HI 96863-3004
10. COMMAND TO WHICH TRANSFERRED	10. SGLI COVERAGE
[redacted] MCRSC 10950 BL KNOX OVERLAND PARK KS 66211 RUC 36005	Amount: $ 200,000.00

11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.)	12. RECORD OF SERVICE	Year(s)	Month(s)	Day(s)
1371 ACE ENGINEER	a. Date Entered AD This Period	01	07	08
02 YEARS 08 MONTHS	b. Separation Date This Period	04	09	19
	c. Net Active Service This Period	03	02	11
	d. Total Prior Active Service	00	00	00
	e. Total Prior Inactive Service	00	11	22
	f. Foreign Service	00	00	00
	g. Sea Service	00	00	00
	h. Effective Date of Pay Grade	02	04	05

13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (All periods of service)

NATIONAL DEFENSE SERVICE MEDAL; SEA SERVICE DEPLOYMENT RIBBON; RIFLE EXPERT MARKSMANSHIP BDGE 3D AND GOOD CONDUCT MEDAL

14. MILITARY EDUCATION (Course title, number of weeks, and month and year completed)

JJ

13-1444

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

In re: Kevin Brewer

Petitioner

CIVIL NO. 6:12-cv-06026

6:09-cr-60007-RTD-1

PETITION FOR WRIT OF MANDAMUS

Petitioner brings forth this Petition Pro Se, Pursuant to 28 U.S.C. § 1651. This matter is quickly briefed. On February 1, 2013 the Honorable Robert T Dawson of U S District Court Western District of Arkansas Hot Springs Division issued an order to the U S District Clerk not file any correspondence from petitioner before it is presented to the court for review. This is a violation of Due Process, a form of obstruction of justice and usurpation of judicial power and disregard for rights under the US Constitution. This denies petitioner access to the courts and the right to have pleadings timely filed. Petitioner recently attempted to file notice of appeal, when the court clerk was contacted, Petitioner was told it was being returned with a letter explaining why it was not filed. Its only able to be verified that notice of appeal was sent through receipt of confirmation of delivery. Petitioner is yet to receive letter from court explaining why appeal notice was not filed. Notice of appeal and delivery confirmation has been attached as exhibits. Petitioner request this court order the Honorable Robert T Dawson to allow petitioner's pleadings to be filed when received by court clerk and review after filing through the proper normal course and procedure of law.

Petitioners seeking mandamus must demonstrate that they "lack adequate alternative means to obtain the relief they seek" and they "carry the burden of showing that their right to issuance of the writ is 'clear and indisputable.'" Mallard, 490 U.S., at 309 (quotations, brackets and citations omitted). See also In re Patenaude, 210 F.3d at 141;. In re Jacobs, 213 F.3d 289 (5th Cir. 2000) (mandamus should be "granted only in the clearest and most compelling cases in which a party seeking mandamus shows that no other adequate means exist to obtain the requested relief"); In re Crowder, 201 F.3d 435 (table decision), 1999 WL 1003847, at *1 (4th Cir. Nov. 5, 1999) ("A petitioner must show that he has a clear right to the relief sought, that the respondent has a clear duty to perform the act requested the petitioner, and that there is no adequate remedy available.")

KK

In regards to determining appropriate relief, defendant respectfully request this court go by its precedent in regards to this Pro Se defendant. "the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." Bonner v. Circuit Court of St. Louis, 526 F.2d 1331, 1334 (8th Cir. 1975) (quoting Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974)). Thus, if this court were to entertain any motion to dismiss this court would have to apply the standards of White v. Bloom. Furthermore, if there is any possible theory that would entitle the Plaintiff to relief, even one that the Plaintiff hasn't thought of, the court cannot dismiss this case.

Respectfully Submitted,
Kevin Brewer
Kevin Brewer

February 22, 2013

ARKANSAS SUPREME COURT

In re: Kevin Brewer

Petitioner

PETITION FOR WRIT OF MANDAMUS

Petitioner Kevin Brewer comes now before this court Pro se. This petition is brought forth under Rules of Civil Procedure Rule 81(c) and Rules of the Supreme Court and Court of Appeals of the State of Arkansas 6-1, In which this court has jurisdiction. Petitioner also request attached In Forma Pauperis Petition to serve as Petition for In Forma Pauperis in this court for this proceeding, due to the fact petition has already been initiated in the circuit court and a issue of this petition.

PRO SE STANDARD OF REVIEW

Because the Plaintiff is pro se, the Court has a higher standard when faced with a motion to dismiss, White v. Bloom, 621 F.2d 276(8th Cir. 1980) makes this point clear and states: A court faced with a motion to dismiss a pro se complaint must read the complaint's allegations expansively, Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 596, 30 L. Ed. 2d 652 (1972), and take them as true for purposes of deciding whether they state a claim. Cruz v. Beto, 405 U.S. 319, 322, 92 S. Ct. 1079, 1081, 31 L. Ed. 2d 263 (1972). Pro se litigants' court submissions are to be construed liberally and held to less stringent standards than submissions of lawyers. If the court can reasonably read the submissions, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant's unfamiliarity with rule requirements. Boag v. MacDougall, 454 U.S. 364, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982); Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)(quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)); Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); McDowell v. Delaware State Police, 88 F.3d 188, 189 (3rd Cir. 1996); United States v. Day, 969 F.2d 39, 42 (3rd Cir. 1992)(holding pro se petition cannot be held to same standard as pleadings drafted by attorneys); Then v. I.N.S., 58 F.Supp.2d 422, 429 (D.N.J. 1999). The courts provide pro se parties wide latitude when construing their pleadings and papers. When interpreting pro se papers, the Court should use common sense to determine what relief the party desires. S.E.C. v. Elliott, 953 F.2d 1560, 1582 (11th Poling v. K.Hovnanian Enterprises, 99 F.Supp.2d 502, 506-07 (D.N.J. 2000). Defendant has the right to. See also, United States v. Miller, 197 F.3d 644, 648 (3rd Cir. 1999) (Court has special obligation to construe pro se litigants' pleadings liberally); submit pro se briefs on appeal, even though they may be in artfully drawn but the court can reasonably read and understand them. See, Vega v. Johnson, 149 F.3d 354 (5th Cir. 1998). Courts will go to particular pains to protect pro se litigants against consequences of technical errors if injustice would otherwise result. U.S. v. Sanchez, 88 F.3d 1243 (D.C.Cir. 1996). Moreover, "the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." Bonner v. Circuit Court of St. Louis, 526 F.2d 1331, 1334 (8th Cir. 1975) (quoting Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974)). Thus, if this court were to entertain any motion to dismiss this court would have to

LL

apply the standards of White v. Bloom. Furthermore, if there is any possible theory that would entitle the Plaintiff to relief, even one that the Plaintiff hasn't thought of, the court cannot dismiss this case

BRIEF BACKGROUND

On Friday March 1, 2013, Petitioner filed an In Forma Pauperis petition in order to proceed Pro Se in a Application for Termination Sex Offender Registration in Clark County Circuit Court. Shortly after petitioner received a phone call from the County Clerk Martha Smith and Clark County Sheriff Jason Watson and was ordered to stay away from the County Clerk's Office and that the Clerk would not file Petition for free even though it was already stamped filed and even if I did pay filing fee judge would not accept it. Petitioner was told if he had any questions to contact the Sheriff. Petitioner has attached recordings of some of the conversations as exhibit. Petitioner now brings forth this petition.

Brief in Support

Petitioner request this court order the Clark County Sheriff and Clerk to allow Petitioner to have access to courts and right to file any pleading and not just present application to be brought before the judge for review through standard course procedure of law and to allow petitioner to proceed Pro Se in Forma Pauperis if qualified for in forma pauperis. This is a violation of right to Due Process, a form of obstruction of justice, usurpation of judicial power and disregard for rights under the Arkansas and US Constitution(cited as authorities) to be denied right to file pleadings and access to courts in this manner.

Arkansas Law

Rules of Civil Procedure Rule 72 (a) Every indigent person who shall have a cause of action against another may petition the court in which the action is pending, or in which it is intended to be brought, for leave to prosecute the suit in forma pauperis.

(b) All such petitions shall be accompanied by an assertion of indigency, verified by a supporting affidavit. The affidavit form is set out below. Any petition not in compliance with this provision will be returned to the petitioner. There shall be attached to the petition a copy of the complaint or proposed complaint.

(c) The court shall make a finding regarding indigency based on the affidavit. In making its determination, the court may consider the current federal poverty guidelines which may be obtained from the Administrative Office of the Courts. If satisfied from the facts alleged that the petitioner has a colorable cause of action, the court may by order allow the petitoner to prosecute the suit in forma pauperis. Every person permitted to proceed in forma pauperis may prosecute the suit without paying filing fees and other fees charged by the clerk and shall not be prevented from prosecuting the suit by reason of being liable for the costs of a former suit brought against the same defendant.

Rules of Civil Procedure Rule 81 (a) Applicability in General. These rules shall apply to all civil proceedings cognizable in the circuit courts of this state except in those instances where a statute which creates a right, remedy or proceeding specifically provides a different procedure in which event the procedure so specified shall apply.

Rules of Civil Procedure Rule 52. Findings By The Court. (a) Effect. If requested by a party at any time prior to entry of judgment, in all contested actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions, the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous (clearly against the preponderance of the evidence), and due regard shall be given to the opportunity of the circuit court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under these rules.

Rules of Civil Procedure Rule 54 (a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. **A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.**

Rules of Civil Procedure Rule 58. Subject to the provisions of Rule 54(b), **upon a general or special verdict, or upon a decision by the court granting or denying the relief sought, the court may direct the prevailing party to promptly prepare and submit, for approval by the court and opposing counsel, a form of judgment or decree which shall then be entered as the judgment or decree of the court. The court may enter its own form of judgment or decree or may enter the form prepared by the prevailing party without the consent of opposing counsel.** A judgment or decree shall omit or redact confidential information as provided in Rule 5(c)(2).

SUMMARY

Due to the fact the Clark County court needs instruction on how to process present application through the legal system in their county, Petitioner is attaching an order for the Clark County Circuit Judge so that he can grant at his sole discretion, as it is "SOLELY" in the Clark County Circuit Judge's discretion to grant application for Termination Sex Offender Registration. Petitioner request if this court grants this petition, that the order be attached with order to be allowed to file Pro Se In Forma Pauperis. This is also notice to Clark County Circuit court that I waive my right to hearing if no interested parties object. This is in order to notify Clark County Circuit Court that Application for Termination Sex Offender Registration and attached order (with requested procedure of law) are in accordance to the law.

Petitioner states under oath all statements true and a copy has been served upon Clark County Clerk through mail with postal confirmation.

Respectfully Submitted,
Kevin Brewer
Kevin Brewer March 6, 2013

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

UNITED STATES OF AMERICA)
)
v.) **CRIMINAL NO. 6:09CR60007-001**
)
KEVIN LAMONT BREWER)

PLEA AGREEMENT

Pursuant to Rule 11(c)(1) of the Federal Rules of Criminal Procedure, the parties hereto acknowledge that they have entered into negotiations which have resulted in this agreement. The agreement of the parties is as follows:

PLEA OF GUILTY TO INDICTMENT

1. The Defendant, KEVIN LAMONT BREWER, hereby agrees to plead guilty to the one count Indictment, charging him with failing to register and/or update his registration as a sex offender, in violation of 18 U.S.C. § 2250.

CONDITIONAL PLEA

2. The parties agree that the defendant's entry of a guilty plea to Count 1 is made pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure. The defendant hereby reserves the right to appeal the denial of his first and second Motion to Dismiss Indictment. If the defendant prevails on appeal, he shall be allowed to withdraw his guilty plea.

STIPULATION OF FACTS

3. On September 9, 1994, the defendant, Kevin Brewer was sentenced to five years probation for five counts of Sexual Assault in the Second Degree and two counts of Sexual Assault in the Third Degree in the Circuit Court of the First Circuit in the State of Hawaii. On February 9,

AR Code § 12-12-906 (2015) (a) (1) (A) (i) At the time of adjudication of guilt, the sentencing court shall enter on the judgment and commitment or judgment and disposition form that the offender is required to register as a sex offender and shall indicate whether the: (a) Offense is an aggravated sex offense; (b) Sex offender has been adjudicated guilty of a prior sex offense under a separate case number; or (c) Sex offender has been classified as a sexually dangerous person.

(ii) If the sentencing court finds the offender is required to register as a sex offender, then at the time of adjudication of guilt the sentencing court shall require the sex offender to complete the sex offender registration form prepared by the Director of the Arkansas Crime Information Center pursuant to § 12-12-908 and shall forward the completed sex offender registration form to the Arkansas Crime Information Center.

(B) (i) The Department of Correction shall ensure that a sex offender received for incarceration has completed the sex offender registration form.

(ii) If the Department of Correction cannot confirm that the sex offender has completed the sex offender registration form, the Department of Correction shall require the sex offender to complete the sex offender registration form upon intake, release, or discharge.

(C) (i) The Department of Community Correction shall ensure that a sex offender placed on probation or another form of community supervision has completed the sex offender registration form.

(ii) If the Department of Community Correction cannot confirm that the sex offender has completed the sex offender registration form, the Department of Community Correction shall require the sex offender to complete the sex offender registration form upon intake, release, or discharge.

(D) (i) The Arkansas State Hospital shall ensure that the sex offender registration form has been completed for any sex offender found not guilty by reason of insanity and shall arrange an evaluation by Community Notification Assessment.

(ii) If the Arkansas State Hospital cannot confirm that the sex offender has completed the sex offender registration form, the Arkansas State Hospital shall ensure that the sex offender registration form is completed for the sex offender upon intake, release, or discharge.

(2) (A) A sex offender who moves to or returns to this state from another jurisdiction and who would be required to register as a sex offender in the jurisdiction in which he or she was adjudicated guilty or delinquent of a sex offense shall register with the local law enforcement agency having jurisdiction within seven (7) calendar days after the sex offender moves to a municipality or county of this state.

(B) (i) Any person living in this state who would be required to register as a sex offender in the jurisdiction in which he or she was adjudicated guilty or delinquent of a sex offense shall register as a sex offender in this state whether living, working, or attending school or other training in Arkansas.

(ii) A nonresident worker or student who enters the state shall register in compliance with the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, as it existed on January 1, 2007.

NN

July 14, 2011

SORNA Substantial Implementation Review
State of Alabama

The U.S. Department of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) would like to thank the State of Alabama for the extensive work that has gone into its effort to substantially implement Title I of the Adam Walsh Act, the Sex Offender Registration and Notification Act (SORNA). The SMART Office has completed its review of Alabama's SORNA substantial implementation packet and has found the State of Alabama to have substantially implemented SORNA.

On June 20, 2011, the Alabama Department of Public Safety and the Office of Prosecution Services submitted a substantial implementation package that included a completed Substantial Implementation Checklist-Revised, Alabama's sex offender registration and notification act, sex offender registry system documentation, Alabama's public sex offender registry website documentation, relevant sex offense statutes, and an explanation of the State's working relationship with the Indian tribe located within the state.

Our review of these materials follows the outline of the SMART Office Substantial Implementation Checklist-Revised, and contains 15 sections addressing the SORNA requirements. Under each section, we indicate whether Alabama meets SORNA requirements of that section or deviates from the requirements in some way. In instances of deviation, we specify that the departure(s) from a particular requirement does not substantially disserve the purpose of that requirement. In other words, Alabama is encouraged to work toward rectifying deviations from requirements in order to achieve full implementation of SORNA, but this is not necessary for substantial implementation purposes.

This is an exhaustive review and meant to detail every area in which the state has not met SORNA standards. We encourage you to review the information below, share it with relevant stakeholders in the state, and get back in touch with us to develop a strategy to address these remaining issues.

I. Immediate Transfer of Information

SORNA requires that when an offender initially registers and/or updates his information in a jurisdiction, that that initial registration information/updated information be immediately sent to other jurisdictions where the offender has to register, as well as to NCIC/NSOR and the jurisdiction's public sex offender registry website.

Alabama meets all of the SORNA requirements in this section.

ALABAMA LAW ENFORCEMENT AGENCY

Sex Offender Registration Unit

Adult Sex Offender Responsibilities Acknowledgement

Full Requirements

The Alabama Sex Offender Registration and Community Notification Act[1] ("Act") places requirements and restrictions on adult sex offenders. This document summarizes the responsibilities of an adult sex offender within Alabama. The provisions of the Act are applicable without regard to when the crime or crimes were committed, or when the duty to register pursuant to the Act arose.

Select Registration Cycle (determined by offender's birth month)

☐ January, April, July, October — Initial:	☐ February, May, August, November — Initial:	☐ March, June, September, December — Initial:

To complete registration, an adult sex offender must acknowledge the following responsibilities:

No.	Initial	Provision
1.		The offender shall register all required registration information listed in §15-20A-7 at least 30 days prior to release or immediately upon notice of release if release is less than 30 days. §15-20A-9
2.		The offender must appear in person within three (3) business days of release from incarceration or within three (3) business days of conviction if the offender is not incarcerated, and register all required registration information with local law enforcement[2] in each county where the offender resides or intends to reside, accepts or intends to accept employment, accepts or intends to accept a volunteer position[3], and begins or intends to begin school attendance. §15-20A-10
3.		Within three (3) business days of establishing a new residence, accepting employment, accepting a volunteer position or beginning school attendance, the offender must appear in person to register with local law enforcement in each county where the offender establishes a residence, accepts employment, accepts a volunteer position or begins school attendance. §15-20A-10
4.		Within three (3) business days of transferring or terminating[4] any residence, employment or school attendance, the offender must appear in person to notify local law enforcement in each county where the offender is transferring or terminating residence, employment or school attendance. §15-20A-10
5.		Within three (3) business days of any name change, the offender must appear in person to update the information with local law enforcement in each county in which the offender is required to register. No offender may change his or her name unless the change is incident to a change in marital status or necessary to effect the exercise of his or her religion. §§15-20A-10, -36

[1] §§15-20A-1 *et seq.*, Code of Alabama 1975, as amended by Act 2017-414.

[2] Local Law Enforcement – The sheriff of the county and, if the location subject to registration is within the corporate limits of any municipality, the chief of police, or the chief law enforcement officer for a federally recognized Indian tribe, if applicable.

[3] Volunteer Position - Any arrangement where a person works without compensation for any period of time on behalf of a business, school, charity, child care facility, or other organization or entity, provided that a volunteer position does not include any time spent traveling as a necessary incident to performing the uncompensated work.

[4] The phrase "transferred or terminated" a residence is when an offender vacates his or her residence or fails to spend three (3) or more consecutive days at his or her residence without previously notifying local law enforcement or completing a travel notification document.

No.	Initial	Provision
6.		Within three (3) business days of changing any required registration information, including transferring or terminating a residence, the offender must appear in person and update the required registration information with local law enforcement in each county in which the offender resides. However, any changes in telephone numbers may be reported to local law enforcement in person, electronically, or telephonically as required by the local law enforcement agency. §15-20A-10
7.		The offender has seven (7) days from release to comply with the residency restrictions listed in Section 15-20A-11(a). §15-20A-10
8.		The offender shall not establish a residence or maintain a residence after release or conviction within 2,000[5] feet of the property of any school, child care facility or resident camp facility. §15-20A-11
9.		The offender shall not establish a residence or maintain a residence after release or conviction within 2,000 feet of the property on which any of his or her former victim/s or an immediate family member of the victim/s reside. §15-20A-11
10.		The offender shall not reside or conduct an overnight visit[6] with a person under the age of 18 years, except as elsewhere provided by law in Section 15-20A-11. §15-20A-11
11.		An offender who no longer has a fixed residence[7] is considered homeless and must appear in person within three (3) business days and report the change in his or her fixed residence to local law enforcement where he or she is registered. §15-20A-12
12.		In addition to complying with the registration and verification requirements in Section 15-20A-10 (listed above), a homeless sex offender who lacks a fixed residence, or who does not provide an address at a fixed residence at the time of release or registration, must report in person once every seven (7) days to the law enforcement agency where he or she resides. If the offender resides within the city limits of a municipality, the offender must report to the chief of police. If the offender resides outside the city limits of a municipality, the offender must report to the sheriff of the county. §15-20A-12
13.		If a homeless sex offender obtains a fixed residence in compliance with Section 15-20A-11, within three (3) business days, the offender must appear in person to update his or her residence information with local law enforcement in each county of residence. §15-20A-10, -12
14.		The offender shall not accept or maintain employment or a volunteer position at any school, childcare facility, mobile vending business that provides services primarily to children, or any other business or organization that provides services primarily to children, or any amusement or water park. §15-20A-13
15.		The offender shall not accept or maintain employment or a volunteer position within 2,000 feet of the property on which a school or childcare facility is located unless otherwise exempted pursuant to Sections 15-20A-24 and 15-20A-25. §15-20A-13
16.		An offender convicted of an offense involving a child shall not accept or maintain employment or a volunteer position within 500 feet of a playground, park, athletic field or facility, or any other business or facility having a principal purpose of caring for, educating, or entertaining minors. §15-20A-13
17.		The offender must appear in person to verify all required registration information with local law enforcement in each county where the offender resides during the offender's birth month and every three (3) months thereafter for the duration of the offender's life. §15-20A-10

[5] 2000 foot measurement - Measurements are calculated by measuring from property line to property line, in a straight line.
[6] Overnight Visit – any presence between the hours of 10:30 pm and 6:00 am.
[7] Fixed Residence – a building or structure, having a physical address or street number, that provides shelter in which a person resides.

No.	Initial	Provision
18.		Within three (3) business days before an offender temporarily leaves his or her county of residence for a period of three (3) or more consecutive days, the offender must report in person to the sheriff in each county of residence and complete and sign a travel notification document. §15-20A-15
19.		An offender who intends to travel outside the United States must report in person to the sheriff in each county of residence and complete a travel notification document at least twenty-one (21) days prior to travel. If the travel outside of the United States is for a family or personal medical emergency or death in the family, the offender must report in person to the sheriff within three (3) days prior to travel. §15-20A-15
20.		Upon returning to the county of residence after travel, the offender must report to the sheriff in each county of residence within three (3) business days. §15-20A-15
21.		The offender shall not contact, directly or indirectly, in person or through others, by phone, mail, or electronic means, any former victim unless otherwise exempted pursuant to Section 15-20A-16. §15-20A-16
22.		The offender shall not knowingly come within 100 feet of any of his or her former victims unless otherwise exempted pursuant to Section 15-20A-16. §15-20A-16
23.		No offender shall make any harassing communication, directly or indirectly, in person or through others, by phone, mail or electronic means to the victim or any immediate family member of the victim. §15-20A-16
24.		An offender convicted of a sex offense involving a person under the age of 18, shall not loiter on or within 500 feet of the property line of any property on which there is a school, childcare facility, playground, park, athletic field or facility, school bus stop, college or university, or any other business or facility having a principal purpose of caring for, educating, or entertaining minors. §15-20A-17
25.		An offender convicted of a sex offense involving a person under the age of 18 shall not enter onto the property of a K-12 school while school is in session or attend any K-12 school activity unless the offender has previously notified the principal of the school, or his or her designee, and meets all the requirements of Section 15-20A-17(b). §15-20A-17
26.		The offender shall obtain and have in his or her possession at all times a valid driver license or identification card issued by the Alabama Law Enforcement Agency. This driver license or identification card shall bear a designation that enables law enforcement officers to identify the licensee as a sex offender. The offender shall obtain this within fourteen (14) days of his or her initial registration following release, initial registration upon entering this state to become a resident, or immediately following his or her next registration after July 1, 2011. §15-20A-18
27.		Whenever the offender obtains such driver license or identification card, the offender shall relinquish to the Alabama Law Enforcement Agency any other driver license or identification card previously issued to him or her by a state motor vehicle agency which does not bear a designation that enables law enforcement officers to identify the licensee as a sex offender. §15-20A-18
28.		The offender shall not mutilate, mar, change, reproduce, alter, deface, disfigure, or otherwise change the form of any driver license or identification card issued to him or her by the Alabama Law Enforcement Agency which bears any designation that enables law enforcement officers to identify the licensee as a sex offender. §15-20A-18
29.		All out-of-state offenders must appear in person within three (3) business days of entering this state to establish a residence, accept employment, accept a volunteer position or begin school attendance, and register all required registration information with local law enforcement in each county of residence, employment, volunteering or school attendance. §15-20A-14

No.	Initial	Provision
30.		An out-of-state offender must provide each registering agency with a certified copy of his or her sex offense conviction within thirty (30) days of initial registration. §15-20A-14
31.		The offender shall pay a registration fee of $10 to each registering agency where the offender resides beginning with the first quarterly registration on or after July 1, 2011 and at each quarterly registration thereafter. §15-20A-22
32.		Each time the offender terminates his or her residence and establishes a new residence, he or she shall pay a registration fee of $10 to each registering agency where the offender establishes a new residence. §15-20A-22
33.		Any offender who knowingly violates the Act shall be guilty of a Class C felony. §§15-20A-1 et seq.
34.		Any offender convicted of violating the Act shall be subject to a $250 fine. §§15-20A-1 et seq.

By signing below, I acknowledge that I have read the above information and responsibilities and that I am aware of all that is required of me under the Alabama Sex Offender Registration and Community Notification Act. If I fail to comply with any provision of the Act, I understand that I may be charged with a Class C felony in Alabama. Additionally, I have been advised and understand that under the Act and Federal law, I must register as a sex offender. I understand that I must register and keep my registration current in each jurisdiction in which I reside, in each jurisdiction where I am employed, in each jurisdiction where I volunteer and in each jurisdiction where I am a student. I have been advised and understand that failure to comply with these obligations subjects me to prosecution for failure to register or update my registration under Federal law, 18 U.S.C. 2250, punishable by up to 10 years of imprisonment.

Offender

Signature

Printed Name

Date

Registering Agency

Officer's Signature

Officer's Printed Name

Date

TRAVEL PERMIT

2016 Code of Alabama
Title 15 - CRIMINAL PROCEDURE.
Chapter 20A - ALABAMA SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION ACT.
Section 15-20A-15 - Adult sex offender - Travel.

Adult sex offender - Travel.

(a) Prior to an adult sex offender temporarily leaving from his or her county of residence for a period of three or more consecutive days, the adult sex offender shall report such information in person immediately prior to leaving his or her county of residence for such travel to the sheriff in each county of residence.

(b) The adult sex offender shall complete a travel permit form immediately prior to travel and provide the dates of travel and temporary lodging information.

(c) If a sex offender intends to travel to another country, he or she shall report in person the sheriff in each county of residence at least 21 days prior to such travel. Any information reported to the sheriff in each county of residence shall immediately be reported to the United States Marshals Service and the Alabama State Law Enforcement Agency.

(d) The travel permit shall explain the duties of the adult sex offender regarding travel. The adult sex offender shall sign the travel permit stating that he or she understands the duties required of him or her. If the adult sex offender refuses to sign the travel permit form, the travel permit shall be denied.

(e) The sheriff in each county of residence shall immediately notify local law enforcement in the county or the jurisdiction to which the adult sex offender will be traveling.

(f) Upon return to the county of residence, the adult sex offender shall immediately report to the sheriff in each county of residence.

(g) All travel permits shall be included with the adult sex offender's required registration information.

(h) Any person who knowingly violates this section shall be guilty of a Class C felony.

PP

TO:

U.S. Probation
111 S. 10th Street, Suite 2.325
St. Louis, MO 63102

TRAVEL REQUEST FORM

Date: _____

Name: _____

Address/Zip: _____

Phone Number: _____

Destination: _____

Departure Date: _____

Return Date: _____

Purpose of Trip: _____

Persons Traveling With: _____

Accommodations (will be verified):
Name: _____
Address/Zip: _____

Phone Number: Area Code ( ) _____

Mode of Transportation:

Vehicle:
Make and Model: _____

Tag Number: _____

Owner of Vehicle: _____

Airline:
Name of Airline: _____

Departure Flight # and Time: _____
Return Flight # and Time: _____

Other Mode of Transportation (specify): _____

STANDARD CONDITIONS OF SUPERVISION

As part of your probation, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of the time you were sentenced, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this order containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

QQ

2017 Sex Offender/Predator Registration Update (Spanish Version)

View ReRegistration Days, Times and Locations by County (Spanish Version)

Expand All | Collapse All

General Requirements for Registrants

ReRegistration Requirements for Registrants

A sexual predator or sexual offender subject to registration, including a juvenile sexual offender adjudicated delinquent, must report in person to the Sheriff's Office in the county in which he or she resides or is otherwise located to ReRegister. ReRegistration requirements apply to both sexual predators and sexual offenders who have been released from sanctions for their qualifying sex offense, as well as those currently under some form of supervision with the Department of Corrections, Department of Juvenile Justice, or those under federal supervision. If no sanction is imposed the person is deemed to be released upon conviction.

A **sexual predator** or **juvenile sexual offender adjudicated delinquent** must report in person to the Sheriff's Office in the county in which he or she resides or is otherwise located to ReRegister **FOUR** times per year- (once during the month of his or her birth and every 3rd month thereafter).

A **sexual offender** who has been convicted as an adult, must report to the Sheriff's Office to ReRegister either **TWO** times per year (once during the month of his or her birth and during the sixth month following his or her birth month) or **FOUR** times per year (once during the month of his or her birth and every 3rd month thereafter), depending upon the offense of conviction requiring registration. See below for details.

- Section 787.01, where the victim is a minor;
- Section 787.02, where the victim is a minor;
- Section 794.011, excluding s. 794.011(10);
- Section 800.04(4)(a)2., where the court finds the offense involved a victim under 12 years of age or sexual activity by the use of force or coercion;
- Section 800.04(5)(b);
- Section 800.04(5)(c)1., where the court finds molestation involving unclothed genitals or genital area;
- Section 800.04(5)(c)2., where the court finds molestation involving the use of force or coercion and genitals or genital area;
- Section 800.04(5)(d), where the court finds the use of force or coercion and unclothed genitals or genital area;
- Section 825.1025(2)(a);
- Any attempt or conspiracy to commit such offense;
- A violation of a similar law in another jurisdiction; or
- A violation of a Florida offense that has been redesignated from a former statute number to one listed above.

RR

A **sexual offender** subject to registration who has been convicted as an adult of one of the qualifying crimes not listed above must report to the Sheriff's Office in the county in which he or she resides or is otherwise located to

Offender Registration and Notification" (the "SORNA Supplemental Guidelines"), published at 76 FR 1630 (Jan. 11, 2011).

(7) Proposed supplemental guidelines, published at 81 FR 21397 (Apr. 11, 2016), whose general purpose was to afford registration jurisdictions greater flexibility in their efforts to substantially implement SORNA's juvenile registration requirement. These proposed supplemental guidelines solicited public comment, and the comment period closed on June 10, 2016.

(8) Final supplemental guidelines regarding substantial implementation of SORNA's juvenile registration requirement entitled, "Supplemental Guidelines for Juvenile Registration Under the Sex Offender Registration and Notification Act," published at 81 FR 50552 (Aug. 1, 2016).

Section-by-Section Analysis

The present proposed rule expands part 72 of title 28 of the Code of Federal Regulations to provide a full statement of the registration requirements for sex offenders under SORNA. It revises the statement of purpose and definitional sections in 28 CFR 72.1 and 72.2. It maintains the existing provision in 28 CFR 72.3 stating that SORNA's requirements apply to all sex offenders, regardless of when they were convicted, and incorporates additional language in § 72.3 to reinforce that point. It also adds to part 72 provisions—§§ 72.4 through 72.8—articulating where sex offenders must register, how long they must register, what information they must provide, how they must register and keep their registrations current to satisfy SORNA's requirements, and the liability they face for violations, following SORNA's express requirements and the prior articulation of standards for these matters in the SORNA Guidelines and the SORNA Supplemental Guidelines.

Section 72.1—Purpose

Section 72.1(a) states part 72's purpose to specify SORNA's registration requirements and their scope of application. It further notes that the Attorney General has the authority pursuant to provisions of SORNA to specify these requirements and their applicability as provided in part 72.

Section 72.1(b) states that part 72 does not preempt or limit any obligations of or requirements relating to sex offenders under other laws, rules, or policies. It further notes that states and other governmental entities may prescribe requirements, with which sex offenders must comply, that are more extensive or stringent than those prescribed by SORNA. This reflects the fact that SORNA provides minimum national standards for sex offender registration. It is intended to establish a floor rather than a ceiling for the registration programs of states and other jurisdictions, which can prescribe registration requirements binding on sex offenders under their own laws independent of SORNA. Jurisdictions accordingly are free to adopt more stringent or extensive registration requirements for sex offenders than those set forth in this part, including more stringent or extensive requirements regarding where, when, and how long sex offenders must register, what information they must provide, and what they must do to keep their registrations current. *See* 73 FR at 38032–35, 38046.

Section 72.2—Definitions

Section 72.2 states that terms used in part 72 have the same meaning as in SORNA. Hence, for example, references in the part to registration "jurisdictions" mean the 50 states, the District of Columbia, the five principal U.S. territories, and Indian tribes qualifying under 34 U.S.C. 20929. *See id.* 20911(10); 73 FR at 38045, 38048. Likewise, where the part uses such terms as sex offender (and tiers thereof), sex offense, convicted or conviction, sex offender registry, student, employee or employment, and reside or residence, the meaning is the same as in SORNA. *See* 34 U.S.C. 20911(1)–(9), (11)–(13); 73 FR at 38050–57, 38061–62.

Section 72.3—Applicability of the Sex Offender Registration and Notification Act

Section 72.3 carries forward in substance current 28 CFR 72.3, which states that SORNA's requirements apply to all sex offenders, including those whose sex offense convictions predate SORNA's enactment. This section was initially adopted on February 28, 2007, and amended on December 29, 2010. The section and its rationale are explained further in the interim and final rulemakings that adopted it. *See* 72 FR 8894; 75 FR 81849.

Section 72.3, and its modification by this rulemaking, are constitutionally sound. In *Smith* v. *Doe,* 538 U.S. 84 (2003), the Supreme Court upheld the retroactive application of sex offender registration requirements against an ex post facto challenge, in reviewing a state registration system whose major features paralleled SORNA's in many ways. The commonalities between SORNA and the state registration program upheld in *Smith* include required registration before release from imprisonment; provision of name, address, employment, vehicle, and other registration information; continued registration and periodic verification of registration information for at least 15 years; lifetime registration and quarterly verification for certain registrants convicted of aggravated or multiple sex offenses; and public internet posting of information about registrants. *See id.* at 90–91. The Federal courts have consistently rejected ex post facto challenges to SORNA itself. *See, e.g., United States* v. *Felts,* 674 F.3d 599, 605–06 (6th Cir. 2012).

Section 72.3 also is not premised on any constitutionally impermissible delegation of legislative authority to the executive branch of government. Congress intended that SORNA apply to all sex offenders, regardless of when they were convicted. *See Reynolds* v. *United States,* 565 U.S. 432, 442–45 (2012); *id.* at 448–49 & n. (Scalia, J., dissenting) (agreeing that Congress intended for SORNA to apply to all sex offenders). Congress authorized the Attorney General to specify the applicability of SORNA's requirements to sex offenders with pre-SORNA and pre-SORNA-implementation convictions, *see* 34 U.S.C. 20913(d), in order to effectuate that intent while enabling the Attorney General to address transitional issues presented in integrating the existing sex offender population into SORNA's comprehensive nationwide registration system. *See Reynolds,* 565 U.S. at 440–42; 72 FR at 8895–97; 73 FR at 38035–36, 38046, 38063–64; 75 FR at 81850–52. In adopting § 72.3, the Attorney General implemented the relevant legislative policy—that SORNA's requirements should apply to all sex offenders—to the maximum, having found no reason to delay or qualify its implementation. Consequently, as an articulation of a legislative policy embodied in SORNA, the issuance of § 72.3 pursuant to 34 U.S.C. 20913(d) involved no exercise of legislative authority and did not contravene the non-delegation doctrine. *See Gundy* v. *United States,* 139 S. Ct. 2116, 2123–30 (2019) (plurality opinion); *id.* at 2130–31 (Alito, J., concurring in the judgment); *id.,* Brief for the United States at 22–38.

Moreover, regardless of any question concerning the validity of 34 U.S.C. 20913(d), § 72.3 is adequately supported on the basis of the Attorney General's authority to issue guidelines and regulations to interpret and implement SORNA, appearing in 34 U.S.C. 20912(b). In § 72.3, the Attorney General interpreted SORNA as intended by

Congress to apply to all sex offenders regardless of when they were convicted—an interpretation endorsed by the Supreme Court, *see Reynolds,* 565 U.S. at 440–45; *see also Gundy,* 139 S. Ct. at 2123–31—and he implemented that legislative policy by embodying it in a clearly stated rule.

The same considerations apply to the amended version of § 72.3 proposed here, which effectuates more reliably the legislative policy judgment that SORNA's requirements should apply to all sex offenders by restating the current rule with additional specificity, but which involves no change in substance. In comparison with the current formulation of § 72.3, this proposed rule adds a second sentence stating that (i) all sex offenders must comply with all requirements of SORNA, regardless of when they were convicted; (ii) this is so regardless of whether a registration jurisdiction has substantially implemented SORNA or any particular SORNA requirement; and (iii) this is so regardless of whether a particular requirement or class of sex offenders is mentioned in examples in the rules or guidelines issued by the Attorney General.

The first part of the added sentence reiterates § 72.3's specification of SORNA's applicability to all sex offenders in the form of an affirmative direction to sex offenders, and it states explicitly that all of SORNA's requirements so apply.

The added sentence further states that the registration duties SORNA prescribes for sex offenders are not conditional on registration jurisdictions' having adopted SORNA's requirements in their own registration laws or policies. For example, SORNA requires sex offenders to register in the states (and other registration jurisdictions) in which they reside, work, or attend school. *See* 34 U.S.C. 20913(a). All of the states have sex offender registration programs, which were initially established long before the enactment of SORNA. Hence, sex offenders are able to register in these existing state programs. The fact that a particular state has not modified its registration program at this time to incorporate the full range of SORNA requirements does not prevent a sex offender required to register by SORNA from registering in the state or excuse a failure to do so. *See, e.g., Felts,* 674 F.3d at 603–05.

The same principle applies in situations in which a jurisdiction's law does not track or incorporate a particular SORNA requirement affecting a sex offender. Consider a situation of this nature in which SORNA requires a sex offender to register but the law of the state in which he resides does not. This may occur, for example, because state law does not require registration based on the particular sex offense for which the offender was convicted, or because state law requires registration by sex offenders for shorter periods of time than SORNA, or because state law does not apply its registration requirements "retroactively" as broadly as § 72.3 applies SORNA's requirements to sex offenders with pre-SORNA convictions. Notwithstanding the absence of a parallel state law, the registration authorities in the state may be willing to register the sex offender because Federal law (*i.e.,* SORNA) requires him to register. *Cf. Doe* v. *Keathley,* 290 SW3d 719 (Mo. 2009) (state constitutional prohibition of retrospective laws does not preclude registration based on SORNA). If the state registration authorities are willing to register the sex offender, he is not relieved of the duty to register merely because state law does not track the Federal law registration requirement.

Hence, sex offenders can be held liable for violating any requirement stated in this rule, regardless of when they were convicted, and regardless of whether the jurisdiction in which the violation occurs has adopted the requirement in its own law. This does not mean, however, that SORNA unfairly holds sex offenders liable for failing to comply with its requirements, where the requirement is unknown to the sex offender or impossible for him to carry out. *Cf. Felts,* 674 F.3d at 605 (noting concern). Federal enforcement of SORNA's requirements occurs primarily through SORNA's criminal provision, 18 U.S.C. 2250. That provision makes it a Federal crime for a person required to register by SORNA to knowingly fail to register or update a registration as required by SORNA under circumstances supporting Federal jurisdiction, such as conviction of a Federal sex offense or interstate or foreign travel. As discussed below, section 2250 holds sex offenders liable only for violations of known registration obligations, and it excuses failures to comply with SORNA under certain conditions if the non-compliance results from circumstances beyond the sex offenders' control.

Consider first the concern that sex offenders may lack notice regarding registration obligations. Under the procedures prescribed by SORNA, and under standard procedures that have generally been adopted by registration jurisdictions whether or not they have implemented SORNA's requirements, the registration of sex offenders normally involves (i) informing sex offenders of their registration duties, (ii) obtaining from sex offenders signed acknowledgments confirming receipt of that information, and (iii) having sex offenders provide the required registration information. *See* 34 U.S.C. 20919(a); 73 FR at 38062–63.

Registration procedures of this nature inform sex offenders of what they must do, and the acknowledgments obtained from them provide evidence that they were so informed. *See* 76 FR at 1638. If a jurisdiction that registers a sex offender has not fully revised its processes for conformity to SORNA, then it may not tell the sex offender about some of the registration requirements imposed by SORNA, such as those that the jurisdiction has not incorporated in its own laws. If the jurisdiction fails to inform a sex offender about some of SORNA's registration requirements, the sex offender then does not know about some of his registration obligations under SORNA based on the information received from the jurisdiction, and may not learn of them from other sources. In such cases, the possibility of liability under 18 U.S.C. 2250 continues to be limited to cases in which a sex offender "knowingly fails to register or update a registration as required by [SORNA]." The limitation to "knowing[ ]" violations provides a safeguard against liability based on unwitting violations of SORNA requirements of which a sex offender was not aware. Section 72.8(a)(1)(iii) of this rule, and the accompanying discussion below, provide further explanation about the limitation of liability under 18 U.S.C. 2250 to cases involving violation of known registration obligations.

The second concern about fairness involves situations in which a sex offender has failed to do something SORNA requires because it is impossible for him to do so. For example, as noted above, a jurisdiction with laws that do not require registration based on the particular offense for which a sex offender was convicted may nevertheless be willing to register him in light of his Federal law (SORNA) registration obligation. But alternatively, the jurisdiction's law or practice may constrain its registration personnel to register only sex offenders whom its own laws require to register. In such a case, it is impossible for the sex offender to register in that jurisdiction, though subject to a registration duty under SORNA. This is so because registration is by its nature a two-party transaction, involving a sex offender's providing information about where he resides and other matters as required, and acceptance of that

information by the jurisdiction for inclusion in the sex offender registry. If the jurisdiction is unwilling to carry out its side of the transaction, then the sex offender cannot register.

Concerns of this nature are also addressed in SORNA's criminal provision, 18 U.S.C. 2250. Subsection (c) of section 2250 provides an affirmative defense to liability for SORNA violations if "(1) uncontrollable circumstances prevented the individual from complying; (2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and (3) the individual complied as soon as such circumstances ceased to exist." A registration jurisdiction's law or practice that precludes registration of a sex offender, as described above, is a circumstance that the sex offender cannot control and to which he did not contribute, so he cannot be held liable for failure to register with that jurisdiction as SORNA requires.

The defense in section 2250(c) comes with the proviso that the defendant must comply with SORNA "as soon as [the preventing] circumstances cease[] to exist." For example, consider the case posed above of a jurisdiction that refuses to register sex offenders based on a particular offense for which SORNA requires registration, so that a sex offender residing in the jurisdiction who was convicted of that offense cannot register there. Suppose that the jurisdiction later progresses in its implementation of SORNA and becomes willing to register offenders who have been convicted for that sex offense. In light of the proviso, the sex offender's obligation to register revives once the jurisdiction becomes willing to register him. That is fair, because the circumstance preventing his compliance with the SORNA registration requirement no longer exists.

Section 72.8(a)(2) of this rule, and the accompanying discussion below, provide further explanation about the contours of the impossibility defense under 18 U.S.C. 2250(c).

Returning to the text of proposed § 72.3, the added sentence states at the end that sex offenders must comply with SORNA's requirements "regardless of whether any particular requirement or class of sex offenders is mentioned in examples in this regulation or in other regulations or guidelines issued by the Attorney General." In conjunction with the earlier statement in the provision that all sex offenders must comply with all SORNA requirements, the added language responds to a judicial decision that did not give full effect to the current regulation.

Section 72.3, as currently formulated, states that SORNA's "requirements . . . apply to all sex offenders," exercising the Attorney General's "authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before the enactment of [SORNA] or its implementation in a particular jurisdiction." 34 U.S.C. 20913(d); *see Reynolds,* 565 U.S. at 441–45 (explaining Congress's decision to give the Attorney General authority to apply SORNA's requirements to sex offenders with pre-SORNA convictions). Nevertheless, in *United States* v. *DeJarnette,* 741 F.3d 971 (9th Cir. 2013), the court believed that the Attorney General had not made all of SORNA's requirements applicable to all sex offenders. The case concerned the applicability of SORNA's requirement that a sex offender register initially in the jurisdiction in which he is convicted, if it differs from his residence jurisdiction, *see* 34 U.S.C. 20913(a) (second sentence), where the sex offender's conviction predated SORNA's enactment. Notwithstanding 28 CFR 72.3, the court concluded that the Attorney General had not made this SORNA requirement applicable to sex offenders with pre-SORNA convictions, if they were already subject to state law registration requirements. *DeJarnette,* 741 F.3d at 982. The decision was largely premised on the fact that the particular SORNA requirement at issue was not mentioned in relation to that particular class of sex offenders in the examples of sex offenders subject to SORNA's requirements in 28 CFR 72.3 and the SORNA Guidelines. *DeJarnette,* 741 F.3d at 976–80.

The sentence added to § 72.3 by this rulemaking will foreclose future decisions of this nature and ensure that § 72.3's application of SORNA's requirements to all sex offenders is given effect consistently.

The proposed rule includes one further change in § 72.3, affecting the first example in the provision. The example as currently formulated describes a sex offender convicted in 1990 and released following imprisonment in 2007, and says that the sex offender is subject to SORNA's requirements. In *Reynolds,* the Supreme Court held that SORNA's requirements did not apply to sex offenders with pre-SORNA convictions prior to the Attorney General's exercise of the authority under 34 U.S.C. 20913(d) to specify SORNA's applicability to those offenders. 565 U.S. at 434–35. It follows that SORNA's requirements did not apply to such sex offenders before the Attorney General's original issuance of 28 CFR 72.3 on February 28, 2007. Example 1 in § 72.3 might be misunderstood as suggesting the contrary, *i.e.,* that a sex offender with a pre-SORNA conviction released from imprisonment at any time in 2007 was immediately subject to SORNA's requirements. Hence, to avoid any possible inconsistency or apparent inconsistency with the Supreme Court's decision in *Reynolds,* the rule proposes to change the example by substituting a later year for 2007.

Section 72.4—Where sex offenders must register

Section 72.4 tracks SORNA's express requirement that a sex offender must register and keep the registration current in each jurisdiction in which the sex offender resides, is an employee, or is a student, and must also initially register in the jurisdiction in which the offender was convicted if that jurisdiction differs from the jurisdiction of residence. *See* 34 U.S.C. 20913(a); 73 FR at 38061–62.

Section 72.5—How long sex offenders must register

Section 72.5 sets out SORNA's requirements regarding the duration of registration. SORNA classifies sex offenders into three "tiers," based on the nature and seriousness of their sex offenses and their histories of recidivism. *See* 34 U.S.C. 20911(2)–(4); 73 FR at 38052–54. The tier in which a sex offender falls affects how long the offender must continue to register under SORNA. The required registration periods are generally 15 years for a tier I sex offender, 25 years for a tier II sex offender, and life for a tier III sex offender. *See* 34 U.S.C. 20915(a); 73 FR at 38068. Paragraph (a) in § 72.5 reproduces these requirements.

Paragraph (a) of § 72.5 provides an exception "when the sex offender is in custody or civilly committed," incorporating in substance an express proviso appearing in SORNA, 34 U.S.C. 20915(a). The exception and proviso mean that SORNA does not require a sex offender to carry out its processes for registering or updating registrations during subsequent periods of confinement, *e.g.,* when imprisoned because of conviction for some other offense following his release from imprisonment for the sex offense. This reflects that "the SORNA procedures for keeping up the registration . . . generally presuppose the case of a sex offender who is free in the community" and that "[w]here a sex offender is confined, the public is protected against the risk of his reoffending in a more direct way, and more certain means are available for tracking his whereabouts."

provided in 18 U.S.C. 2250(c) and § 72.8(a)(2).

§ 72.8 Liability for violations.

(a) *Criminal liability*—(1) *Offense.* (i) A sex offender who knowingly fails to register or update a registration as required by SORNA may be liable to criminal penalties under 18 U.S.C. 2250(a).

(ii) A sex offender who knowingly fails to provide information required by SORNA relating to intended travel outside the United States may be liable to criminal penalties under 18 U.S.C. 2250(b).

(iii) As a condition of liability under 18 U.S.C. 2250(a)–(b) for failing to comply with a requirement of SORNA, a sex offender must have been aware of the requirement he is charged with violating, but need not have been aware that the requirement is imposed by SORNA.

(2) *Defense.* A sex offender may have an affirmative defense to liability, as provided in 18 U.S.C. 2250(c), if uncontrollable circumstances prevented the sex offender from complying with SORNA, where the sex offender did not contribute to the creation of those circumstances in reckless disregard of the requirement to comply and complied as soon as the circumstances preventing compliance ceased to exist.

Example 1. A sex offender changes residence from one jurisdiction to another, bringing into play SORNA's requirement to register in each jurisdiction where the sex offender resides and SORNA's requirement to appear in person and report changes of residence within three business days. *See* 34 U.S.C. 20913(a), (c). The sex offender attempts to comply with these requirements by contacting the local sheriff's office, which is responsible for sex offender registration in the destination jurisdiction. The sheriff's office advises that it cannot schedule an appointment for him to register within three business days but that he should come by in a week. The sex offender would have a defense to liability if he appeared at the sheriff's office at the appointed time and registered as required. The sex offender's temporary inability to register and inability to report the change of residence within three business days in the new residence jurisdiction was due to a circumstance beyond his control—the sheriff office's refusal to meet with him until a week had passed—and he complied with the requirement to register as soon as the circumstance preventing compliance ceased to exist.

Example 2. A sex offender cannot register in a state in which he resides because its registration authorities will not register offenders on the basis of the offense for which the sex offender was convicted. The sex offender would have a defense to liability because the state's unwillingness to register sex offenders like him is a circumstance beyond his control. However, if the sex offender failed to register after becoming aware of a change in state policy or practice allowing his registration, the 18 U.S.C. 2250(c) defense would no longer apply, because in such a case the circumstance preventing compliance with the registration requirement would no longer exist.

Example 3. A sex offender needs to travel to a foreign country on short notice—less than 21 days—because of an unforeseeable family or work emergency. The sex offender would have a defense to liability for failing to report the intended travel 21 days in advance, as required by § 72.7(f), because it is impossible to report an intention to travel outside the United States before the intention exists. However, if the sex offender failed to inform the registration jurisdiction (albeit on short notice) once he intended to travel, 18 U.S.C. 2250(c) would not excuse that failure, because the preventing circumstance—absence of an intent to travel abroad—would no longer exist.

(b) *Supervision condition.* For a sex offender convicted of a Federal offense, compliance with SORNA is a mandatory condition of probation, supervised release, and parole. The release of such an offender who does not comply with SORNA may be revoked.

Dated: July 15, 2020.

William P. Barr,

Attorney General.

[FR Doc. 2020–15804 Filed 8–12–20; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 200723–0200]

RIN 0648–BJ76

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Shrimp Fishery Off the South Atlantic States; Amendment 11

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to implement Amendment 11 to the Fishery Management Plan (FMP) for the Shrimp Fishery of the South Atlantic Region (Shrimp FMP), as prepared and submitted by the South Atlantic Fishery Management Council (Council). This proposed rule would modify the transit provisions for shrimp trawl vessels with penaeid shrimp, *i.e.*, brown, pink, and white shrimp, on board in Federal waters of the South Atlantic that have been closed to shrimp trawling to protect white shrimp as a result of cold weather events. The purpose of this proposed rule is to update the regulations to more closely align with current fishing practices, reduce the socio-economic impacts for fishermen who transit these closed areas, and improve safety at sea while maintaining protection for overwintering white shrimp.

DATES: Written comments must be received on or before September 14, 2020.

ADDRESSES: You may submit comments on the proposed rule, identified by "NOAA–NMFS–2020–0066," by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0066,* click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Frank Helies, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.*, name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

Electronic copies of Amendment 11, which includes a fishery impact statement, a Regulatory Flexibility Act (RFA) analysis, and a regulatory impact review, may be obtained from the Southeast Regional Office website at

SMART
Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking

Substantially Implemented

Jurisdictions That Have Substantially Implemented SORNA

158 jurisdictions (18 states, 136 tribes and 4 territories) have substantially implemented SORNA's requirements.

States

Alabama
Colorado
Delaware
Florida
Kansas
Louisiana
Maryland
Michigan
Mississippi
Missouri
Nevada
Ohio
Oklahoma
South Carolina
South Dakota