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[Unpublished]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.

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[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.

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B

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 Claim

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

O R D E R

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,)
) SCT.
In the Supreme Court)

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:	

CV-13-282 Kevin Brewer v. Clark County Circuit Clerk
3-6-13 Tendered Petition for Writ Of Mandamus
4-18-13 Supreme Court Order
Contexte Case Summary

IN TESTIMONY, That the above copy of the Tendered Writ of Mandamus, the Supreme Court Order, and the Contexte Case Summary of said Supreme Court rendered in the case therein stated,
I, Stacey Pectol, 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 28th day of October, A.D. 2021.

Clerk

By _____ D.C.

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.

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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

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[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.

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[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.

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[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

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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

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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

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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.

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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

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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.

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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

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[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

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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.

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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

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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

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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,

Additional material from this filing is available in the Clerk's Office.