Appeal No. 10-2617

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MILO BLAINE WHITETAIL,

Defendant - Appellant

and

SPIRIT LAKE TRIBE,

Garnishee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA, NORTHEASTERN DIVISION

APPELLEE'S BRIEF

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SUMMARY OF THE CASE AND WAIVER OF ORAL ARGUMENT

On December 7, 2009, the United States served a Writ of Continuing Garnishment on defendant Milo Blaine Whitetail ("Whitetail") and garnishee Spirit Lake Tribe, which was preparing to issue a disbursement to Whitetail and other members of the Tribe. Whitetail did not submit a claim for exemptions, request a hearing, or file an objection to the Writ of Continuing Garnishment or the Garnishee's Answer. On January 12, 2010, the District Court entered an Order of Garnishment, ordering Spirit Lake Tribe to issue a check in the sum of $316.00 to the Clerk of Court for application to the criminal monetary penalties assessed against Whitetail. Three months after the Order was entered, Whitetail filed a combined Motion to Vacate Garnishment and Motion for Appointment of Counsel, arguing: 1) he was not served with notice of the garnishment, 2) he was entitled to counsel, and 3) the property garnished was exempt. In its response, the United States offered evidence showing Whitetail was properly served, and cited legal authority providing the property garnished was not exempt. On July 8, 2010, the Court denied Whitetail's Motion to Vacate. Whitetail appealed.

The United States submits that the briefs and record adequately present the facts and legal arguments. Oral argument would not significantly aid this Court in its decision-making process.

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STATEMENT OF JURISDICTION

On July 16, 2010, Whitetail filed a timely appeal of the District Court's Order Denying Defendant's Motion to Vacate Garnishment. An order denying a motion to vacate is an appealable order. Jones v. Swanson, 512 F.3d 1045, 1048-1049 (8th Cir. 2008). Consequently, this Court has jurisdiction to hear Whitetail's appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. Whether the District Court's Denial of Whitetail's Motion to Vacate its Garnishment Order Was a Clear Abuse of Discretion.

28 U.S.C. §§ 3202, 3205

Federal Rule of Civil Procedure 60

Arnold v. Wood, 238 F.3d 992, 998 (8th Cir. 2001)

Sec. & Exch. Comm'n v. Quinlan, 373 Fed. Appx. 581, 583 n. 2 (6th Cir. Apr. 21, 2010)

II. Whether the District Court Abused its Discretion in Ordering the Garnishment of Whitetail's Tribal Disbursement.

18 U.S.C. § 3613

28 U.S.C. §§ 3202, 3205

Federal Rule of Civil Procedure 5

Dusenbery v. United States, 534 U.S. 161, 170-171 (2002)

STATEMENT OF THE FACTS

On December 22, 2008, defendant Milo Blaine Whitetail ("Whitetail") was convicted of assault resulting in serious bodily injury. Doc. No. [33] (Judgment). Whitetail was sentenced to serve 71 months. Id. He is still incarcerated. In addition to a term of incarceration, the District Court imposed a $100.00 Special Assessment and ordered Whitetail to pay $127,764.35 in restitution, with interest accruing at the rate of 0.40 percent per annum. Id. Whitetail has not satisfied this debt.

In late November 2009, the United States learned Spirit Lake Tribe[1] was about to issue a disbursement to Whitetail and other members of the Tribe. On behalf of the victims of Whitetail's crimes, the United States applied for a Writ of Continuing Garnishment, ordering garnishee Spirit Lake Tribe to withhold and retain the disbursement Whitetail was entitled to receive until the District Court entered a disposition Order. Doc. No. [35] (Appl. for Writ of Garn.).

The Clerk of Court issued the Writ of Continuing Garnishment on December 1, 2009. Doc. No. [36] (Writ. of Garn.). Pursuant to the Federal Debt Collection Procedures Act of 1990 (FDCPA), 28 U.S.C. §§ 3202, 3205, the United States served both Whitetail and Spirit Lake Tribe with the Application for Writ of

[1]Spirit Lake Tribe is a federally-recognized Indian Tribe whose governing offices are located within the Spirit Lake Reservation, Fort Totten, County of Benson, State of North Dakota.

Continuing Garnishment, Writ of Continuing Garnishment, Instructions to the Garnishee, a blank Answer of the Garnishee form, and the Clerk's Notice of Post-Judgment Garnishment and Instructions to Debtor, which included a blank Claim for Exemption form and a Request for Hearing form. Appellee Add. at 4. Service was accomplished by sending the documents via certified mail, return receipt requested. Id. Both Whitetail and Spirit Lake Tribe acknowledged receipt of these materials on December 7, 2009. Doc. No. [39] (Answer); Appellee Add. at 7.

Spirit Lake Tribe filed an Answer stating that Whitetail was an enrolled member of the Tribe and, therefore, eligible to receive a disbursement in the amount of $316.00. See Doc. No. [39] (Answer). Spirit Lake Tribe did not assert that it was immune from suit[2] or otherwise object to the garnishment. In fact, in its Answer, it made "no claims of exemptions on the part of the Defendants nor state[d] any objections or set-offs to the United States' garnishment of the defendant's non-exempt property." Id.

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[2]A claim of immunity from suit would have been rejected in any event. See 28 U.S.C. § 3002(7), (10) (defining a garnishee to include an Indian tribe); United States v. Weddell, 12 F. Supp. 2d 999, 1000-1001 (D.S.D. 1998), aff'd, 187 F.3d 645, 1999 WL 319323 (8th Cir. 1999) (holding that an Indian tribe is not immune from suit under the FDCPA); United States v. Arch, No. 2:03CR78, 2006 WL 2708589, at *1 (W.D.N.C. Sept. 19, 2006) (unpublished) (same).

Whitetail did not file a claim of exemption, request a hearing, or file an objection to the Writ of Continuing Garnishment or Spirit Lake Tribe's Answer.

On January 12, 2010, the District Court ordered Spirit Lake Tribe to issue a check in the amount of $316.00 to the Clerk of Court for application to Whitetail's criminal monetary penalties. See Doc. No. [40] (Order of Garn.).

Three months after the Order of Garnishment was filed and nearly four months after he was served with the Writ of Continuing Garnishment, Whitetail filed a combined Motion to Vacate Garnishment and Motion for Appointment of Counsel, claiming he was not provided with proper service under 28 U.S.C. § 3202(b); he did not receive court-appointed counsel or a hearing; and he was entitled to an exemption allegedly precluding the United States from garnishing the tribal disbursement he was entitled to receive. Doc. No. [42] (Mot. to Vacate). In its response opposing this motion, the United States offered evidence that Whitetail was properly served with the garnishment pleadings. The United States also cited legal authority providing that Whitetail's exemption claims were inapplicable to this garnishment and that defendants do not have a constitutional or statutory right to court-appointed counsel in a garnishment proceeding. See Doc. No. [44] (Reply to Def's. Mot. to Vacate).

On July 8, 2010, the District Court denied Whitetail's Motion to Vacate the Garnishment entered in this case. Whitetail appealed.

SUMMARY OF THE ARGUMENT

The District Court's decision to deny Whitetail's motion to vacate and his request for court-appointed counsel was not an abuse of discretion. Whitetail was served as required by the Federal Debt Collections Procedure Act. 28 U.S.C. § 3205 (c)(3). Contrary to Whitetail's arguments, the tribal disbursement subject to the garnishment was not exempt property under 18 U.S.C. § 3613(a)(1), and the garnishment did not modify Whitetail's sentence. Whitetail's claim that he could not read and did not understand the pleadings served upon him, and his argument that he was entitled to court-appointed counsel are not sufficient to meet the exceptional circumstances standard required to justify relief under Rule 60(b). The District Court did not abuse its discretion by denying Whitetail's requests. Accordingly, the District Court's Order Denying Defendant's Motion to Vacate Garnishment should be affirmed.

ARGUMENT

A. Appellate Standard of Review.

A district court has wide discretion in ruling on a motion to vacate an order under Rule 60(b) of the Federal Rules of Civil Procedure. Jones v. Swanson, 512 F.3d 1045, 1048-1049 (8th Cir. 2008). "Reversal of a district court's denial of a Rule 60(b) motion is rare because Rule 60(b) authorizes relief in only the most exceptional of cases." Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope

Elec. Corp., 293 F.3d 409, 415 (8th Cir. 2002) (citations omitted). "Because Rule 60(b) cannot substitute for an appeal, an appeal from the denial of a Rule 60(b) motion does not present the underlying judgment for [appellate] review." Arnold v. Wood, 238 F.3d 992, 998 (8th Cir. 2001) (citation omitted); Hunter v. Underwood, 362 F.3d 468, 475-476 (8th Cir. 2004).

This Court generally reviews a district court's denial of a Rule 60(b) motion for clear abuse of discretion. Jones, 512 F.3d at 1048-1049; Sellers v. Mineta, 350 F.3d 706, 715-716 (8th Cir. 2003). However, if the district court's denial of a motion to vacate is based entirely on legal grounds, this Court reviews the district court's order de novo. Jones, 512 F.3d at 1048-1049.

B. The District Court's Denial of Whitetail's Motion to Vacate its Garnishment Order Was Not a Clear Abuse of Discretion.

In his Motion to Vacate, Whitetail (who was acting pro se) offered no legal support and cited no rule of procedure permitting relief from the Order of Garnishment. Characterizing the motion by the relief sought, the United States addressed the motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure.

Rule 60(b)(6) is the catch-all provision that allows the district court to grant relief from a judgment or order for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). "Relief is available under Rule 60(b)(6) only where 'exceptional circumstances prevented the moving party from seeking redress through the usual

channels.'" Atkinson v. Prudential Prop. Co., Inc., 43 F.3d 367, 373 (8th Cir. 1994) (citing In re Zimmerman, 869 F.2d 1126, 1128 (8th Cir. 1989)).

Although the grounds that justify relief under Rule 60(b)(6) are not specified, it is clear that this provision may not be used as a substitute for a timely appeal. Hunter, 362 F.3d at 476. Further, an appeal from the denial of a Rule 60(b) motion does not present the underlying judgment for [appellate] review." Arnold, 238 F.3d at 998. In other words, the merits of the garnishment are not at issue in this appeal.

Whitetail did not meet his burden of demonstrating exceptional circumstance justifying relief from the Order of Garnishment. The District Court's denial of Whitetail's Motion to Vacate should be affirmed.

1. The District Court did not abuse its discretion by rejecting Whitetail's claim that he was not properly served with notice of the garnishment proceedings.

The primary argument on which Whitetail bases his motion to vacate is lack of notice. Specifically, Whitetail claimed that the United States did not properly serve the garnishment pleadings as required under 28 U.S.C. § 3202(b). Doc. No. [42] (Mot. to Vacate).

In its Order for Garnishment, the District Court found that Whitetail was "served with the Writ of Continuing Garnishment, Clerk's Notice of Post-Judgment Garnishment and Instructions to Debtor, and a Request for Hearing

form." Doc. No. [40] (Order for Garn.). It also found that the United States met the procedural requirements for garnishment under 28 U.S.C. §§ 3202 and 3205. Id.

Prompted by Whitetail's Motion to Vacate, the District Court reviewed the notice issue a second time and found that the United States met the procedural requirements of 28 U.S.C. § 3202 and properly served Whitetail by mailing a copy of the garnishment pleadings to the place of his incarceration. Appellee's Add. at 1-2. In support of this finding, the District Court cited to the United States' Certificate of Service with copies of certified mail receipts attached. Id. at 1 (citing Doc. No. 38). The District Court also noted that Whitetail signed a mail receipt log accepting the garnishment pleadings sent by certified mail on December 7, 2009. Id. at 2. The District Court correctly observed that the Due Process Clause does not require the United States show that Whitetail actually received the garnishment pleadings, but found that the United States had proven receipt as well as service. Id. at 2; see Dusenbery v. United States, 534 U.S. 161, 170-171 (2002) (the Due Process Clause does not demand actual notice, only notice "'reasonably calculated' to apprise a party of the pendency of the action").

In his reply brief, Whitetail acknowledged that he "received a copy of a 'Writ of Continuing Garnishment.'" Doc. No. [45] (Def's. Reply Br. at 1). On appeal, Whitetail now suggests that he did not receive notice of the garnishment

until after the Order of Garnishment was entered. Appellant's Br. at 5. Whitetail accepted service of the garnishment pleadings on December 7, 2009, more than a month before the Order of Garnishment was entered on January 12, 2010. Appellee Add. at 5, 7. His argument is spurious and falls far short of meeting the "exceptional circumstances" standard under Rule 60(b)(6). The District Court did not abuse its discretion in rejecting Whitetail's request for relief based on an alleged failure to provide notice of the garnishment proceedings. Its decision to deny Whitetail's Motion to Vacate on this ground should be affirmed.

2. The District Court did not abuse its discretion in denying Whitetail's Motion to Vacate the Garnishment Order despite Whitetail's claim he could not read the pleadings or understand their content.

As a justification for the delay in objecting to the garnishment, or claiming an exemption or filing a timely appeal, Whitetail also suggests he was unable to read or understand the documents he received. Appellant's Br. at 4. However, he did not assert that there was no one available to assist him by reading the documents and he did not explain how he was prevented from requesting a hearing, during which he could have asked the District Court to explain the significance of the information. To the contrary, his pleadings indicate that he "employed assistance from a fellow inmate who is literate." Doc. No. [45] (Def's. Reply Br. at 2). The justification offered by Whitetail is not sufficient to meet the

exceptional circumstances requirement under Rule 60(b). Casio Computer Co., Ltd. v. Noren, 35 Fed. Appx. 247, 249-250 (7th Cir. Apr. 5, 2002) (unpublished) (affirming the district court's order denying Rule 60(b) motion by finding that defendant's "inability or refusal to read and follow the Federal Rules' plain language certainly does not rise to the level of excusable neglect."); United States v. Ruiz, Cr. No. C-05-643 (2), 2008 WL 5412399, *1, 3 (S.D. Tex. Dec. 29, 2008) (unpublished) (finding that defendant's "claim of mental disability is not a reason justifying relief from the judgment under 60(b)(6)."). The District Court did not abuse its discretion by declining to grant Whitetail the relief he sought.

3. The District Court did not abuse its discretion by declining to appoint counsel to represent Whitetail in this civil garnishment proceeding.

In his appellate brief, Whitetail argues that he was entitled to court-appointed counsel in the garnishment proceeding before the District Court, and that failure to provide counsel justifies an order vacating the Order of Garnishment. Appellant Br. at 5. This argument is not sufficient to meet the exceptional circumstances standard. Appointment of counsel under the Sixth Amendment is "explicitly confined to 'criminal prosecution.'" Austin v. United States, 509 U.S. 602, 608 (1993). Rule 44 of the Federal Rules of Criminal Procedure provides that "a defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding

from initial appearance through appeal, . . .” Fed. R. Crim. P. 44(a). The time frame provided within this rule has long since passed in Whitetail’s case since he was sentenced in 2008. Further, a post-judgment collection matter does not fall within the kind of proceedings provided for under Rule 44, since the mechanism used to enforce the restitution debt is considered civil in nature. See 28 U.S.C. § 3205; 18 U.S.C. § 3613 (a). See also, Sec. & Exch. Comm’n v. Quinlan, 373 Fed. Appx. 581, 583 n. 2 (6th Cir. Apr. 21, 2010) (unpublished) (noting that defendant did not have a Sixth Amendment right to counsel in a civil enforcement proceeding); United States v. Grimes, 15 F.3d 1092, 1994 WL 19051 *2 (9th Cir. Jan. 25, 1994) (unpublished) (noting that since garnishment is a civil proceeding, normally there is “no constitutional right to counsel.”) (citation omitted); United States v. Littlewind, No. 2:08-cr-6, 2010 WL 703140, at *1 (D.N.D. Jan. 27, 2010) (unpublished) (finding that “[t]his Court’s research has identified no caselaw establishing a right to appointed counsel in garnishment proceedings . . .”). Accordingly, Whitetail did not have a constitutional or statutory right to appointment of counsel to represent him in this garnishment matter.

Although Whitetail did not possess a constitutional right to counsel, the District Court had discretionary authority to request that a lawyer represent him in this collection matter. See 28 U.S.C. § 1915 (e)(1). See also, Mallard v. United States Dist. Ct. for the S. Dist. of Iowa, 490 U.S. 296, 301-302 (1989); O’Connor

v. Jones, 946 F.2d 1395, 1397 n. 2 (8th Cir. 1991). However, courts typically exercise this discretion only when the defendant and the court will both benefit substantially from the counsel's assistance. See Plummer v. Grimes, 87 F.3d 1032, 1033 (8th Cir. 1996); Nelson v. Redfield Lithograph Printing, 728 F.2d 1003, 1005 (8th Cir. 1984). This analysis includes weighing the factual and legal complexities of the case, the capability of the defendant to investigate the facts, defendant's ability to present his contentions, and the existence of conflicting evidence. Davis v. Scott, 94 F.3d 444, 447 (8th Cir. 1996); Plummer, 87 F.3d at 1033; Swope v. Cameron, 73 F.3d 850, 852 (8th Cir. 1996).

The procedures for enforcing the restitution debt via garnishment are set forth in 28 U.S.C. §§ 3201, 3202 and 3205, and reprinted in the garnishment package served upon Whitetail. The procedures are not complex. The District Court reviewed the pleadings and certificate of service filed by the United States and found that the United States complied with the garnishment procedures. Whitetail filed no timely objections or claim for exemptions. His arguments in support of a Motion to Vacate were not complex. The District Court did not clearly abuse its discretion by declining to appoint counsel for Whitetail in this garnishment proceeding.

In his appellate brief, Whitetail suggests (for the first time on appeal) that the United States was required to serve the Federal Public Defender--who

represented Whitetail during the criminal proceedings--with notice of the garnishment. Appellant Br. at 3. Whitetail offered no evidence in support of the proposition that the Federal Public Defender represented him in this criminal collection matter. Based on the District Court's criminal docket for this case, it appears that the Federal Public Defender was terminated as counsel of record on April 6, 2009. Had this argument been raised with the District Court, the United States could have offered additional evidence addressing this issue, and is prejudiced by an inability to do so now. Since this argument was not raised before the District Court and since Whitetail cited no authority for the proposition that court-appointed counsel in a criminal matter must be notified of a civil garnishment proceeding, Whitetail's argument should be rejected. United of Omaha Life Ins. Co. v. Honea, 458 F.3d 788, 791 (8th Cir. 2006) ("We ordinarily do not consider issues raised for the first time on appeal."); United States v. Mosbrucker, 340 F.3d 664, 666 n. 2 (8th Cir. 2003) (declining to address appellants' arguments raised for the first time on appeal); Fritz v. United States, 995 F.2d 136, 137 (8th Cir. 1993) (same).

4. Whitetail's argument that the United States modified his sentence by filing a garnishment action is untimely and unpersuasive.

For the first time on appeal, Whitetail argues that "[t]he garnishment order served to change the terms of Whitetail's criminal sentence." Appellant Br. at 5.

This argument was raised for the first time on appeal and should be rejected for that reason alone. Honea, 458 F.3d at 791. In addition, Whitetail's argument should be rejected because the United States did not seek to modify his sentence, it sought to enforce it. The District Court's Order of Garnishment did not alter or amend Whitetail's term of incarceration or the restitution sum he was ordered to pay. Instead, the Order of Garnishment ordered Spirit Lake Tribe to turn over Whitetail's nonexempt property, which partially satisfied the criminal judgment requiring him to pay restitution to the victims of his crime. Whitetail's argument is without merit and should be rejected.

Whitetail did not show exceptional circumstances warranting relief under Rule 60(b)(6). The District Court did not clearly abuse its discretion in denying the relief requested. Its decision should be affirmed.

C. Even if Review of the Underlying Garnishment Order Was Proper on Appeal, Whitetail Could Not Show That the District Court Abused its Discretion in Granting the Order of Garnishment.

1. The United States complied with all statutory requirements for the post-judgment garnishment remedy it sought.

In this case, the United States opted to enforce its criminal restitution judgment using the garnishment procedures set forth in the FDCPA.[3] 28 U.S.C.

[3]The legislative history of the FDCPA reveals that it was enacted to create a uniform, nationwide system of federal debt collection procedures. "Under the act, the Government would be able to collect civil, criminal and tax judgments through such means as attachments, garnishments, judgment liens and sales, confessed

§ 3205; 18 U.S.C. § 3613(a); Doc. No. [36] (Writ of Garn.). Sections 3202 and 3205 of the FDCPA set forth the procedural requirements the United States was required to follow to ensure that Whitetail received proper service of the garnishment proceedings. Under the Federal Rules of Civil Procedure, service may be accomplished by mailing the Writ to the person's last known address. Fed. R. Civ. P. 5(b)(2)(C). As noted above, the United States properly served Whitetail with a copy the Writ of Continuing Garnishment and other garnishment pleadings at his place of incarceration (FCI - Pekin, IL) on December 7, 2009, by certified mail.[4] Appellee's Add. at 5, 7.

Under federal rules, service is complete upon mailing. Fed. R. Civ. P. 5(b)(2)(C). The Due Process Clause does not compel the United States to demonstrate that Whitetail received the Writ. Dusenbery, 534 U.S. at 170-171 (finding that service by certified mail to the prison where defendant was incarcerated was "reasonably calculated" to provide adequate notice under the Due

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judgments and restraining orders in all judicial districts." 135 Cong. Rec. S289-01, S406 (statement of Senator Joseph Biden).

[4]Specifically, the United States mailed a copy of the Writ of Continuing Garnishment, Clerk's Notice of Post-Judgment Garnishment and Instructions to Debtor, a Claim of Exemption form and a Request for Hearing form to Whitetail's attention in care of the Federal Correctional Institute, 2600 South Second Street, Pekin, Illinois. According to Bureau of Prison records, this is the street address for the Federal Correction Institution located in Pekin, Illinois. A Bureau of Prison employee acknowledged receipt of the Writ of Garnishment. Appellee's Add. at 5.

Process Clause); Nat'l Labor Relations Bd. v. E.D.P. Med. Computer Sys., Inc., 6 F.3d 951, 957 (2d Cir. 1993) (finding that compliance with the FDCPA pre-judgment writ of garnishment procedures provided respondents adequate due process protections); United States v. Enigwe, 17 F. Supp. 2d 388, 390 (E.D. Pa. 1998) (relying on the government's certificate of service verifying that defendant was served at his place of incarceration with the post-judgment writ of execution, the district court rejected defendant's Due Process argument). Rather, the United States need only show that it used a method of service reasonably calculated to apprise Whitetail of the garnishment proceeding. Sending a copy of the Writ via certified mail to the prison where Whitetail is incarcerated is sufficient to meet constitutional Due Process standards. See Dusenbery, 534 U.S. at 168-171; United States v. Clark, 84 F.3d 378, 381 (10th Cir. 1996) (finding that service by certified mail to the address at which defendant was incarcerated was "reasonably calculated" to apprise defendant of the pending action); United States v. Triplett, No. 2:00CR20053-001, 2006 WL 1656873, at *2 (W.D. Ark. June 12, 2006) (unpublished) (finding that "due process does not require actual notice or actual receipt of notice"); United States v. Patterson, No. 96-03008-06-CR-S-ODS, 2007 WL 1343676 (W.D. Mo. May 7, 2007) (unpublished) (finding that service by certified mail upon an incarcerated defendant is a "reasonably calculated" method of notification); 4B Charles Alan Wright & Arthur R. Miller, Federal Practice and

Procedure, § 1148 (3d ed. 2010) (explaining that service is complete under Rule 5(b) upon mailing, and a party's claim that he or she did not receive the mailing does not affect the validity of the service).

Although the United States was not required to show actual service, it did so in this case. FCI Pekin's records reflect that Whitetail signed a mail receipt log accepting the certified mail on December 7, 2009.[5] See Appellee Add. at 7.

Since the United States accomplished service by sending a copy of the garnishment pleadings via certified mail to the place of Whitetail's incarceration, and since there is evidence that Whitetail actually received the certified mail it sent, the United States met the procedural requirements for serving the garnishment pleadings initiated under the FDCPA. Accordingly, the District Court did not abuse its discretion in concluding that the United States properly served the garnishment pleadings. The District Court's Order should be affirmed.

2. The tribal disbursement garnished in this case was not exempt from an enforcement action brought to satisfy a criminal restitution debt.

On appeal, Whitetail argues that the tribal disbursement garnished in this case was exempt and the District Court erred by ordering the garnishment of it.

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[5]See Doc. No. [44] (Reply to Def's Mot. to Vacate at 5 n. 1) (explaining that the Certified/Legal Mail log attached as Exhibit A to the United States' Memorandum provided that Blaine Whitetail signed for a certified mail sent by the United States on December 7, 2009. The United States verified with FCI Pekin personnel that the Register Number 09961-059 is assigned to defendant Milo Blaine Whitetail).

Appellant Br. at 4-5. The District Court rejected Whitetail's exemption claim for two reasons. First, the District Court correctly concluded that "tribal disbursements were not exempt from the reach of the Court under 28 U.S.C. § 1651." Appellee Add. at 2. Section 1651, the All Writs Act, does not provide authority for the exemption Whitetail seeks.

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.

Pennsylvania Bureau of Corr. v. United States Marshals Serv., 474 U.S. 34, 43 (1985). In this case the Mandatory Victims Restitution Act and the FDCPA provide statutory authority for enforcement of the criminal monetary penalties Whitetail was ordered to pay, and for the garnishment proceeding at issue. Whitetail's request for an exemption under 28 U.S.C. § 1651 was properly rejected by the District Court.

Second, the District Court correctly concluded that tribal disbursements are not exempt from garnishment in a criminal case. Appellee Add. at 2. The exemptions available to a criminal defendant are limited to those set out in 18 U.S.C. § 3613(a), (f). The disbursement at issue in this case does not fall within any of the categories of assets exempt from levy. Accordingly, the District Court did not err in finding that the tribal disbursement garnished by the United

States was not exempt property. See United States v. Taylor, Criminal No. 2:99-cr-13, 2007 WL 87746 (W.D.N.C. Jan. 9, 2007) (denying defendant's claimed exemptions in wearing apparel and school books because the exemptions did not relate to the property garnished, and further finding that garnishment of per capita distribution of gaming revenues from the Eastern Band of Cherokee Indians was valid and enforceable); United States v. Calcutt, Criminal No. 1:04CR72 & 1:04CR87, 2006 WL 2938853, *2 (W.D.N.C. Oct. 12, 2006) (rejecting defendant's claimed exemptions in wearing apparel and school books, fuel, furniture and personal effects, tools of the trade and undelivered mail because the exemptions did not relate to the securities which the United States sought to garnish).

Although not specifically raised by the District Court, Whitetail's deadline to file an objection to the garnishment initiated in this case and/or file a claim of exemption expired on or about January 10, 2010, more than three months before he filed his Motion to Vacate, asserting he was entitled to this exemption. His request for an exemption was, therefore, untimely and should be rejected. Enigwe, 17 F. Supp. 2d at 390 (finding that defendant waived his right to claim exemptions because he did not file his claim within 20 days after receiving notice of the garnishment); United States v. Armstrong, No. 3:04-cv-1852-H, 2005 WL 937857, *3 (N.D. Tex. Apr. 21, 2005) (unpublished) ("Armstrong's failure to timely

request exemptions and a hearing does not constitute an extraordinary circumstance justifying relief from the Garnishment Order."); United States v. Oligmueller, 198 F.3d 669, 671 (8th Cir. 1999) (Finding that a district court's decision may be affirmed "on any basis supported by the record."); Artis v. Francis Howell North Band Booster Assoc., Inc., 161 F.3d 1178, 1180 (8th Cir. 1998) (same).

Accordingly, even if the validity of the District Court's Order of Garnishment were at issue on appeal, the Order should be affirmed.

CONCLUSION

For the reasons set forth above, the United States respectfully requests this Court to AFFIRM the District Court's Order Denying Defendant's Motion to Vacate Garnishment.

Respectfully submitted this 13th day of October, 2010.

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By: /s/ Shon Hastings

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7) and 8th Cir. R. 28A(h) in that the number of words contained in this brief is 4751. The brief and addendum have been scanned for viruses and they are virus-free.

Dated: October 13, 2010.

/s/ Margo M. Kern
MARGO M. KERN, Legal Assistant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the District of North Dakota and is a person of such age and discretion as to be competent to serve papers.

The undersigned further certifies that on October 13, 2010, she submitted to the Clerk, United States Court of Appeals for the Eighth Circuit, St. Louis, Missouri, by CM/ECF the APPELLEE'S BRIEF and ADDENDUM.

That upon receipt of the Notice of Filing from the Court of Appeals, nine copies and the original of the APPELLEE'S BRIEF with APPELLEE'S ADDENDUM will be sent via Federal Express to the Clerk, United States Court of Appeals for the Eighth Circuit, St. Louis, Missouri; with one copy mailed to the Defendant / Appellant at his last-known address:

Milo Blaine Whitetail - 09961-059
Federal Correctional Institution
P.O. Box 5000
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