
**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 11-3428

UNITED STATES OF AMERICA,

Appellee,

v.

GERALD LEBEAU,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION
THE HONORABLE KAREN E. SCHREIER
CHIEF U.S. DISTRICT JUDGE

APPELLANT'S BRIEF

Neil Fulton, Federal Public Defender
Gary G. Colbath, Jr., Assistant Federal Public Defender
On the Brief: Scott D. McGregor
703 Main Street, Second Floor
Rapid City, SD 57701
Telephone: (605) 343-5110
Facsimile: (605) 343-1498

ATTORNEYS FOR APPELLANT

SUMMARY OF THE CASE

After a year and a half of successful supervised release, LeBeau admitted violating his release by using cocaine and failing to reside and participate in a community correction program. The district court revoked LeBeau's release, sentencing him to three months in prison. It also reimposed twelve months of supervised release summarily continuing the conditions originally imposed on LeBeau in 2002.

The court did not, however, make any findings or undertake an individual analysis of the facts and circumstances underlying LeBeau's case to justify the current need for those conditions, particularly the condition requiring that LeBeau not consume any alcoholic beverages or frequent establishments whose primary business is the sale of alcoholic beverages.

Alcohol use was not an issue in the revocation of LeBeau's supervised release. Continuing the no alcohol restriction was, therefore, a significantly greater deprivation of LeBeau's liberty than was reasonably necessary.

REQUEST FOR ORAL ARGUMENT

LeBeau requests ten minutes of oral argument to discuss the unwarranted continuation of special conditions imposed on his further supervised release.

TABLE OF CONTENTS

	<u>Page</u>
Summary of the Case.....	i
Request for Oral Argument.	i
Table of Authorities.....	iv
Preliminary Statement.	1
Jurisdictional Statement.....	1
Statement of the Issues Presented for Review.....	3
Statement of the Case.....	4
Statement of the Facts.	6
Summary of the Argument.....	13
Argument.	15
I. CONTINUED SPECIAL CONDITIONS OF LEBEAU’S SUPERVISED RELEASE, ESPECIALLY CONDITION ONE REQUIRING THAT HE NOT CONSUME ANY ALCOHOLIC BEVERAGES OR FREQUENT ESTABLISHMENTS WHOSE PRIMARY BUSINESS IS THE SALE OF ALCOHOLIC BEVERAGES, ARE UNWARRANTED.	15
II. DID THE UNITED STATES OBTAIN JURISDICTION OVER LEBEAU AS REQUIRED BY THE FORT LARAMIE TREATY OF APRIL 29, 1868?	21
Conclusion.	23
Certificate of Service.	25

Certificate of Compliance.	26
------------------------------------	----

Addendum

Judgment for Revocation of Supervised Release - October 23, 2011..	Add. 1
--	--------

Unpublished Opinion, <i>United States v. LeBeau</i> , 44 Fed. Appx. 63 (8th Cir. 2002).	Add. 2
--	--------

TABLE OF AUTHORITIES

<u>United States Supreme Court Cases</u>	<u>Page(s)</u>
<i>LeBeaux v. United States</i> , 549 U.S. 819 (2006).....	5
<i>Louisville & Nashville R. Co. v. Mottley</i> , 211 U.S. 149 (1908).....	22
<i>United States v. Cotton</i> , 535 U.S. 625 (2002).	22
<i>United States v. Olano</i> , 507 U.S. 725 (1993).....	15
<u>United States Court of Appeal Cases</u>	<u>Page(s)</u>
<i>LeBeaux v. United States</i> , 165 Fed. Appx. 496 (8th Cir. 2006).....	5, 23
<i>United States v. Asalati</i> , 615 F.3d 1001 (8th Cir. 2010).	15
<i>United States v. Bass</i> , 121 F.3d 1218 (8th Cir. 1997).	3, 19, 20
<i>United States v. Behler</i> , 187 F.3d 772 (8th Cir. 1999).....	19, 20
<i>United States v. Bender</i> , 566 F.3d 748 (8th Cir. 2009)	17
<i>United States v. Crose</i> , 284 F.3d 911 (8th Cir. 2002).	20
<i>United States v. Curry</i> , 627 F.3d 312 (8th Cir. 2010).	15, 17, 21
<i>United States v. Davis</i> , 452 F.3d 991 (8th Cir. 2006).	17
<i>United States v. Drapeau</i> , 414 F.3d 869 (8th Cir. 2005).....	22, 23
<i>United States v. Ghost Bear</i> , 387 Fed. Appx. 659, 2010 U.S. App. LEXIS 15015 (8th Cir. S.D. 2010).	23
<i>United States v. Jacobs</i> , 638 F.3d 567 (8th Cir. 2011).	22
<i>United States v. Kane</i> , 537 F.2d 310 (8th Cir. 1976) (per curiam).	22

<i>United States v. Kelly</i> , 625 F.3d 516 (8th Cir. 2010).....	17
<i>United States v. Lawrence</i> , 51 F.3d 150, 152 (8th Cir. 1995), rehearing denied, 1995 U.S. App. LEXIS 15148.	3, 21
<i>United States v. LeBeau</i> , 44 Fed. Appx. 63 (8th Cir. 2002).	4, 6
<i>United States v. Ristine</i> , 335 F.3d 692 (8th Cir. 2003).	15
<i>United States v. Schrader</i> , No. 10-2706, 411 Fed. Appx. 946, 2011 U.S. App. LEXIS 3920, 2011 WL 679342 (8th Cir. Feb. 28, 2011).	22
<i>United States v. Simons</i> , 614 F.3d 475 (8th Cir. 2010).	3, 19, 20
<i>United States v. Snyder</i> , 511 F.3d 813 (8th Cir. 2008).	22
<i>United States v. Walters</i> , 643 F.3d 1077 (8th Cir. 2011)	3, 20
<i>United States v. White Mountain</i> , 402 Fed. Appx. 154 (8th Cir. 2010).....	23
<i>United States v. Wiedower</i> , 634 F.3d 490 (8th Cir. 2011).....	3, 17

<u>Statutes</u>	<u>Page(s)</u>
18 U.S.C. § 3231.	1
18 U.S.C. § 3553(a).....	17
18 U.S.C. § 3563(b)(11) and (22).	7
18 U.S.C. § 3583(d).....	17
18 U.S.C. § 3583(e).....	2
18 U.S.C. § 3742(a).....	2
28 U.S.C. § 1291.	2

28 U.S.C. § 2255.	4, 5
------------------------	------

<u>Rules</u>	<u>Page(s)</u>
--------------	----------------

Eighth Circuit Rule 28A(i)..	6
-----------------------------------	---

<u>Treaties and Supplemental Legislation</u>	<u>Page(s)</u>
--	----------------

Fort Laramie Treaty of April 29, 1868, 15 Stat. 635.....	3, 21, 22
--	-----------

PRELIMINARY STATEMENT

Throughout this brief the Appellant, Gerald LeBeau, will be referred to as “LeBeau.” References to the docket entries in the clerk’s record below will be designated as “CR,” followed by the appropriate entry number. References to the transcript of LeBeau’s final supervised release revocation hearing held October 21, 2011, will be prefaced by the designation “RH” (Revocation Hearing) followed by the appropriate page number(s) of the transcript. References to the October 14, 2011, supplemental presentence report prepared for LeBeau’s revocation hearing will be prefaced with the designation “SPSR” followed by the appropriate paragraph number of the report.

JURISDICTIONAL STATEMENT

The decision appealed: LeBeau appeals from the judgment of the district court filed October 24, 2011, upon revocation of his supervised release, (CR 212), by the Honorable Karen E. Schreier, Chief United States District Judge for the District of South Dakota, sentencing him to serve an additional three months in custody and twelve months of supervised release thereafter.

Jurisdiction of the District Court: The district court had jurisdiction over LeBeau’s revocation prosecution and sentencing pursuant to 18 U.S.C. § 3231 (“The district courts of the United States shall have original jurisdiction . . . of all

offenses against the laws of the United States”) and 18 U.S.C. § 3583(e) (modification or revocation of supervised release).

Jurisdiction of this Court: This Court has jurisdiction over LeBeau’s appeal pursuant to 28 U.S.C. § 1291 (“The court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.”) and 18 U.S.C. § 3742(a) (review of a sentence - appeal by a defendant).

Notice of Appeal: LeBeau, *pro se*, timely filed his Notice of Appeal on November 4, 2011. (CR 215). This Court docketed his appeal on November 8, 2011.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I.

CONTINUED SPECIAL CONDITIONS OF LEBEAU'S SUPERVISED RELEASE, ESPECIALLY CONDITION ONE REQUIRING THAT HE NOT CONSUME ANY ALCOHOLIC BEVERAGES OR FREQUENT ESTABLISHMENTS WHOSE PRIMARY BUSINESS IS THE SALE OF ALCOHOLIC BEVERAGES, ARE UNWARRANTED.

Authorities

1. *United States v. Wiedower*, 634 F.3d 490 (8th Cir. 2011)
2. *United States v. Walters*, 643 F.3d 1077 (8th Cir. 2011)
3. *United States v. Simons*, 614 F.3d 475 (8th Cir. 2010)
4. *United States v. Bass*, 121 F.3d 1218 (8th Cir. 1997)

II.

DID THE UNITED STATES OBTAIN JURISDICTION OVER LEBEAU AS REQUIRED BY THE FORT LARAMIE TREATY OF APRIL 29, 1868?

Authorities

1. Fort Laramie Treaty of April 29, 1868, 15 Stat. 635
2. *United States v. Lawrence*, 51 F.3d 150 (8th Cir. 1995), rehearing denied, 1995 U.S. App. LEXIS 15148

STATEMENT OF THE CASE

Nature of the Case: LeBeau's supervised release was revoked upon his admission to having violated several of the terms and conditions of that release. The Honorable Karen E. Schreier, Chief United States District Court Judge for the District of South Dakota, thereupon sentenced LeBeau to serve an additional three months of imprisonment and twelve months of supervised release.

Procedural History: LeBeau and his son, Neil LeBeau, were convicted at trial of possession with intent to distribute cocaine. The jury found them not guilty, however, of conspiracy to distribute cocaine. (CR 103). LeBeau was thereupon sentenced to serve 120 months of imprisonment and three years on supervised release. (CR 139, 141, 157).

On direct appeal, LeBeau challenged the sufficiency of the evidence to support his conviction. This Court affirmed in an unpublished opinion filed August 27, 2002. *United States v. LeBeau*, 44 Fed. Appx. 63 (8th Cir. 2002).

Thereafter, on August 28, 2003, LeBeau timely filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. (*LeBeau v. United States*, No. 03-CV-5088, U.S. District Court, District of South Dakota, CR 1). Following a hearing on LeBeau's petition before the magistrate, (*Id.* at CR 48), the district

court adopted the magistrate's report and recommendation and denied LeBeau's § 2255 motion. (*Id.* at CR 54).

LeBeau appealed. (*Id.* at CR 59). On January 31, 2006, this Court filed an unpublished opinion denying that appeal. *LeBeaux v. United States*, 165 Fed. Appx. 496 (8th Cir. 2006). The Supreme Court denied certiorari review on October 2, 2006. *LeBeaux v. United States*, 549 U.S. 819 (2006).

LeBeau completed his term of imprisonment and began serving his supervised release on April 9, 2010. A petition to revoke that supervised release was filed September 7, 2011. (CR 201). Arrested September 27, 2011, LeBeau initially appeared, was arraigned, and waived his right to preliminary examination on September 28, 2011. (CR 203, 204). He was ordered detained. (CR 206).

A final revocation hearing was held October 21, 2011, at which LeBeau admitted certain violations of his supervised release. The district court revoked LeBeau's release sentencing him to serve an additional three months in prison to be followed by twelve more months of supervised release. (CR 211, 212).

On November 4, 2011, LeBeau *pro se* filed a timely notice of appeal. (CR 215). His appeal was docketed in this Court on November 8, 2011.

STATEMENT OF THE FACTS

The facts underlying LeBeau's original 2002 conviction for possession with intent to distribute a controlled substance were summarized by this Court in its unpublished opinion affirming LeBeau's direct appeal. *United States v. LeBeau*, 44 Fed. Appx. 63 (8th Cir. 2002).¹ See also SPSR ¶¶ 4-5.

As a part of his supervised release, the district court ordered that LeBeau comply with the following release conditions among others:

- | | |
|--------------------------|--|
| General Condition: | The defendant shall not commit another federal, state, local, or tribal crime. |
| Special Condition No.1: | The defendant shall not consume any alcoholic beverages or intoxicants or frequent establishments whose primary business is the sale of alcoholic beverages. |
| Standard Condition No.7: | The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician. |
| Standard Condition No.6: | The defendant shall notify the probation officer at least ten days prior to any change in residence or employment. |

¹Although unpublished, this Court's decision in LeBeau's direct appeal is cited and referred to pursuant to Eighth Circuit Rule 28A(i) as it is of significant and direct relevance to this appeal. A copy of the opinion is contained in the addendum to this brief (Add. 2).

Special Condition No.6: The defendant shall reside and participate in a community corrections facility program, as directed by the probation officer, under the provisions of 18 U. S.C. §§ 3563(b)(11) and (22).

On April 9, 2010, LeBeau began his term of supervised release residing at Community Alternatives of the Black Hills (CABH). While at CABH, LeBeau completed outpatient substance abuse treatment on June 28, 2010. He enrolled in domestic violence treatment at Horseplay Productions Healing Center in Rapid City on September 20, 2010, and completed Moral Reconation Therapy on October 12, 2011 [sic]. (SPSR ¶ 7).

LeBeau was permitted to move to his sister's residence in Pine Ridge, South Dakota, on October 13, 2010. He planned to find employment and travel to Rapid City weekly to complete his domestic violence treatment. Because transportation to and from Rapid City to Pine Ridge became an issue, LeBeau was authorized to finish his domestic violence class at the Indian Health Service Hospital in Pine Ridge. (SPSR ¶ 8).

LeBeau obtained employment on November 9, 2010, as the maintenance/security person for the Oglala Sioux Tribe Transportation Department. He completed his domestic violence course at the IHS Hospital in Pine Ridge on February 2, 2011. *Id.*

All in all, LeBeau appeared to be on course, completing his required counseling courses in addition to attending regular Native American ceremonies and maintaining his employment at OST Transportation. There were little or no difficulties with his supervised release until August 27, 2011. On that day, he was arrested for tribal liquor, criminal trespass, elderly abuse, and child abuse violations. (SPSR ¶ 9).

Upon his arrest, LeBeau was taken to the Pine Ridge Jail. He was placed back in CABH on September 1, 2011. There he tried unsuccessfully to bribe CABH staff members offering \$100 to falsify his initial urine test. LeBeau's subsequent test results were positive for cocaine. On September 2, 2011, LeBeau was questioned about his apparent cocaine use. Although he denied using cocaine, he admitted handling it. (SPSR ¶ 10).

LeBeau was verbally reprimanded. He was told his stay at CABH would be extended because of his positive test results. On September 6, 2011, a CABH staff member contacted the probation office and informed them a urine test taken earlier that day was also positive for cocaine. On September 7, 2011, CABH staff again contacted probation indicating LeBeau had absconded from CABH. *Id.*

During his time at CABH, LeBeau was employed from May 10, 2010, to July 9, 2010, at the Flying J Truck Stop and from July 24, 2010, to October 13,

2010, at the International House of Pancakes, both in Rapid City. He continued his employment at the Oglala Sioux Tribe Transportation Department until his tribal arrest. (SPSR ¶ 11).

When LeBeau was questioned on October 5, 2011, he explained he had been doing well on supervision until the evening he was arrested in Pine Ridge. He asked that he be put back on supervised release under the same conditions as previously ordered. (SPSR ¶ 12).

On September 7, 2011, a petition was filed alleging LeBeau had violated certain conditions of his supervised release. (CR 201). The petition alleged that:

1. On or about 8/27/2011, at Pine Ridge, SD, Gerald LeBeau did violate tribal law and was arrested for Liquor Violation, Criminal Trespass, Elderly Abuse, and Child Abuse, in violation of the General Conditions of Supervised Release.
2. On or about 8/27/2011, at Pine Ridge, SD, Gerald LeBeau did consume alcoholic beverages, in violation of Special Condition No. 1 of the Conditions of Supervised Release.
3. On or about 8/30/2011, at Rapid City, SD, Gerald LeBeau did possess and use a controlled substance, that is, Cocaine in violation of Standard Condition No.7 of the Conditions of Supervised Release.

4. On or about 9/6/2011, at Rapid City, SD, Gerald LeBeau did possess and use a controlled substance, that is, Cocaine, in violation of Standard Condition No.7 of the Conditions of Supervised Release.
5. On or about 9/7/2011, at Rapid City, SD, Gerald LeBeau did fail to notify his probation officer 10 days prior of his change in residence, in violation of Standard Condition No. 6 of the Conditions of Supervised Release.
6. On or about 9/7/2011, at Rapid City, SD, Gerald LeBeau did fail to reside and participate in the program of the community corrections center, CABH, and was terminated for cause, that is, he did fail to comply with the CABH Resident/Rules Agreement by his absconding from the facility, in violation of Special Condition No. 6 of the Conditions of Supervised Release.

LeBeau admitted violating allegations 3 and 6 of the Petition which asserted violations of Standard Condition No. 7 and Special Condition No. 6 of his supervised release conditions. (RH 3, 4). The prosecution then dismissed the four violations, numbers 1, 2, 4, and 5, denied by LeBeau. (RH 4).

Based on his admissions, the court found LeBeau had violated his supervised release. Both violations admitted by LeBeau were grade C violations.

(SPSR ¶¶ 16, 18; RH 5). The resulting guideline range for LeBeau, a category VI criminal history defendant, was 8 to 14 months. Both LeBeau and the prosecution agreed this was the proper guideline range. (SPSR, p. 5; RH 5).

LeBeau requested a sentence of time served and to be placed back on supervision. He asked that if the court, however, believed some additional time was necessary, he serve that time in a community corrections facility or halfway house. (RH 10). Lastly, LeBeau asked that if the court imposed a guideline sentence he not then be placed back on further supervised release given his record of accomplishments while on supervised release. (RH 12).

The prosecution made no particular sentence recommendation but did note LeBeau had been hard to supervise. The prosecution stated that it believed it would continue to be hard for the probation office to supervise LeBeau. (RH 15-16).

The district court noted that for the first year and a half of his supervised release LeBeau had been doing well, was easily supervised, had maintained employment, and done well at all of his jobs. (RH 16). The court also observed LeBeau had successfully completed the program at CABH, finished his substance abuse program, went to domestic violence training, and completed moral reconnection therapy. (RH 16-17; *see also* SPSR ¶¶ 7-9). The court commented that

LeBeau had been absolutely right on course and doing great until his arrest. (RH 17).

The court said it gave LeBeau a lot of credit for doing as well as he had done and noted that it was actually pleased LeBeau had done so well for so long. But, the court also said it was concerned LeBeau had tried to bribe a staff member at CABH and had relapsed, testing positive for cocaine. (RH 18). LeBeau told the court he would like to simply go back on supervision to look after his wife. He informed the court he already had a job lined up. (RH 19-20).

The court told LeBeau it was going to give him credit for the year and half he had done well on probation but would still punish him for his use of cocaine and attempt to bribe the CABH staffer. (RH 21). The court consequently sentenced LeBeau to serve an additional three months in prison and then go back on supervised release for a further twelve months “under all of the same terms and conditions as previously imposed.” *Id.*

The amended judgment entered January 14, 2002, upon LeBeau’s underlying conviction and sentencing, (CR 157), over nine years prior to revocation of LeBeau’s supervised release on October 21, 2011, required as a condition of LeBeau’s eventual supervised release that he “shall not consume any alcoholic beverages or frequent establishments whose primary purpose is the sale

of alcoholic beverages.” (CR 157 at 4). Additional conditions originally imposed at that time on LeBeau required that he participate in an approved substance abuse treatment program and domestic violence counseling. Further conditions required LeBeau to reside and participate in the program of a residential substance abuse facility and the program of a community corrections facility. These conditions were all summarily continued as part of LeBeau’s additional twelve months of supervised release. (CR 212 at 4).

LeBeau appeals the continued applicability of these conditions on his further supervised release, particularly the condition that he “not consume any alcoholic beverages or frequent establishments whose primary purpose is the sale of alcoholic beverages.”

SUMMARY OF THE ARGUMENT

LeBeau admitted possessing and using cocaine. He denied violating tribal law and arrests for an unspecific liquor violation, criminal trespass, and elder and child abuse. The prosecution dismissed this allegation of LeBeau’s purported supervised release violations.

At his revocation hearing, the district court specifically noted LeBeau had (1) successfully completed the program at Community Alternatives of the Black

Hills (CABH), (2) finished his substance abuse program, (3) did the domestic violence training, and (4) finished moral recondition therapy.

When sentencing LeBeau after revoking his supervised release, the court made no comments about alcohol use or any concern it had with drinking by LeBeau. The court, in fact, undertook no evaluation of LeBeau's current condition and circumstances in deciding what special terms and conditions of supervised release to impose on LeBeau. The court did not make the required individualized inquiry into the facts and circumstances underlying LeBeau's case, nor did it make sufficient findings on the record to ensure the special conditions of supervised release it ordered for LeBeau satisfied the statutory requirements for supervised release. The court simply directed that those supervised release conditions previously imposed over nine years earlier would be continued.

In fact, the comments made by the district court about LeBeau's success while on supervised release belie any need for the conditions imposed. The court's comments demonstrate that the continued conditions imposed on LeBeau's further supervised release are not reasonably related to the statutory sentencing factors nor involve no greater deprivation of liberty than is reasonably necessary. The conditions, therefore, should be excised from LeBeau's October 23, 2011, revocation judgment. (CR 212).

ARGUMENT

I. CONTINUED SPECIAL CONDITIONS OF LEBEAU'S SUPERVISED RELEASE, ESPECIALLY CONDITION ONE REQUIRING THAT HE NOT CONSUME ANY ALCOHOLIC BEVERAGES OR FREQUENT ESTABLISHMENTS WHOSE PRIMARY BUSINESS IS THE SALE OF ALCOHOLIC BEVERAGES, ARE UNWARRANTED.

A. Standard of Review.

This Court generally reviews the terms and conditions of supervised release for abuse of discretion. *United States v. Asalati*, 615 F.3d 1001, 1006 (8th Cir. 2010). Because LeBeau at his sentencing did not object to the challenged conditions imposed on his supervised release by the district court, those conditions are appropriately reviewed for plain error. Under the plain error standard, LeBeau must show the district court committed a clear error under current law affecting his substantial rights and seriously affecting the fairness, integrity, or public reputation of judicial proceedings. *United States v. Curry*, 627 F.3d 312, 314-315 (8th Cir. 2010), *citing*, *United States v. Ristine*, 335 F.3d 692, 694 (8th Cir. 2003) and *United States v. Olano*, 507 U.S. 725, 732 (1993).

B. Merits.

On his further twelve months of supervised release, the district court continued the special conditions originally imposed in 2002 on LeBeau's initial

period of supervised release. These included, as special condition number 1, the requirement that LeBeau “not consume any alcoholic beverages of [sic] frequent establishments whose primary business is the sale of alcoholic beverages.” (CR 212 at page 4). The continued conditions also required LeBeau to participate in a substance abuse program, (special conditions numbers 4 and 5), participate in a community corrections facility program, (special condition number 6), and participate in domestic violence counseling (special condition number 8).

Alcohol abuse, however, was not an issue in the revocation of the LeBeau’s supervised release. The district court itself said it revoked LeBeau’s supervised release, sentencing him to an additional three months in prison and a further twelve months of supervised release, because LeBeau had tried to bribe a CABH staff member and admitted to having used cocaine. (RH 21).

The court also specifically noted that LeBeau had already successfully completed the community corrections program at CABH, finished his substance abuse program, and completed domestic violence training as well as a program of moral reconnection therapy. (RH 16-17). Consequently, there was no longer a need to continue special conditions 1, 4, 5, 6, or 8.

A district court possesses broad discretion when imposing conditions of supervised release. However, each condition imposed must 1) be reasonably

related to the sentencing factors set forth in 18 U.S.C. § 3553(a); 2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth in § 3553(a); and 3) be consistent with any pertinent policy statements issued by the Sentencing Commission. *United States v. Bender*, 566 F.3d 748, 751 (8th Cir. 2009) (internal quotation marks omitted); *see also* 18 U.S.C. § 3583(d). “A condition is reasonably related to the statutory factors if tailored to the nature and circumstances of the offense, the defendant’s history and characteristics, the deterrence of criminal conduct, the protection of the public from further crimes of the defendant, and the defendant’s educational, vocational, medicinal, or other correctional needs.” *United States v. Kelly*, 625 F.3d 516, 519 (8th Cir. 2010) (internal quotation marks omitted).

“When crafting a special condition of supervised release, the district court must make an individualized inquiry into the facts and circumstances underlying a case and make sufficient findings on the record so as ‘to ensure that the special condition satisfies the statutory requirements.’ ” *United States v. Wiedower*, 634 F.3d 490, 493 (8th Cir. 2011) (quoting *Curry*, 627 F.3d at 315). The district court “may not impose a special condition on all those found guilty of a particular offense.” *United States v. Davis*, 452 F.3d 991, 995 (8th Cir. 2006).

The first special condition the district court continued on LeBeau's further twelve months of supervised release, special condition number 1, (CR 212, p. 4), was that he not consume any alcoholic beverages or frequent establishments whose primary business is the sale of alcoholic beverages. ("I hereby sentence you to . . . a period of 12 months of supervised release under all of the same terms and conditions as previously imposed.") (RH 21). The court, however, offered no justification or reasons for either this or the other special conditions requiring LeBeau to complete programs he had in fact already completed. Nothing in the record supports the imposition of the no alcohol use restriction.

Alcohol was not a factor in the supervised release violations admitted by LeBeau. (RH 2-4; CR 201). His supplemental presentence report reveals no abuse of alcohol. It mentions that LeBeau was arrested for a tribal law liquor violation and other tribal offenses, (SPSR ¶ 9), but does not offer anything about the facts and circumstances of that violation which LeBeau denied and the prosecution did not pursue. Alcohol abuse did not play a part in the district court's decision to revoke LeBeau's supervised release or his sentence. The mere mention of an arrest for a tribal liquor violation, denied by LeBeau, does not justify a complete prohibition on the use of alcohol by LeBeau while on supervised release as special condition number 1 requires.

This Court in general has upheld no alcohol bans for defendants proven to have an alcohol abuse problem. *United States v. Simons*, 614 F.3d 475, 480 (8th Cir. 2010). Nothing in the LeBeau’s case, however, suggests he has a problem with alcohol. The prohibition was originally imposed in January 2002. LeBeau was then in custody until April 9, 2010, when he was released from custody and began his supervised release. (SPSR ¶ 7). The district court found LeBeau was very successful on supervised release for the following year and a half. (RH 16, 18, 20). No information was presented in LeBeau’s supplemental presentence report regarding his alcohol use. The court made no finding LeBeau had a problem with alcohol nor did it point to anything in the record showing LeBeau has an alcohol abuse problem. To the contrary, the court noted LeBeau had successfully completed substance abuse treatment. (RH 16).

This Court has reversed “where the defendant’s history or crime of conviction did not support a complete ban on alcohol” *Id.* See *United States v. Bass*, 121 F.3d 1218, 1224–25 (8th Cir. 1997) (vacating a condition banning the consumption of alcohol when no evidence existed that the defendant was prone to abuse alcohol, that alcohol contributed to his criminal activity, or that the defendant was drug dependent, despite regular use of marijuana); *United States v. Behler*, 187 F.3d 772, 779 (8th Cir. 1999) (alcohol ban approved because record

showed that “any alcohol use would hinder the defendant’s rehabilitation process.”). *See Simons*, 614 F.3d at 480 (collecting cases); *see also United States v. Crose*, 284 F.3d 911, 913 (8th Cir. 2002) (court may not impose a ban on alcohol “on the basis of pure speculation or assumptions uncreated to the rehabilitative process.”) (quoting *Behler*, 187 F.3d at 779).

In *United States v. Walters*, 643 F.3d 1077 (8th Cir. 2011), this Court vacated a supervised release condition which, like the condition imposed on LeBeau, prohibited the defendant from using alcohol. Citing *Simons*, the Court invalidated the condition agreeing with Walters it was overbroad and improperly tailored to his situation because alcohol did not play a role in his offense and the record was devoid of any evidence of alcoholism. *Id.* So too is it the case with LeBeau.

LeBeau’s situation falls within the *Simons*, *Walters*, *Bass*, and *Behler* line of cases. Since no evidence is present that LeBeau was prone to alcohol abuse, that alcohol was a contributing factor of any kind in supervised release violations, or that LeBeau was alcohol dependent, the continuation of special condition number 1 of LeBeau’s supervised release requiring that he not consume any alcoholic beverages or frequent businesses whose primary purpose is the sale of those

beverages was clear error. This condition is an unjustified restriction on LeBeau's liberty affecting his substantial rights.

Because the district court failed to explain why it imposed this or any of the other special conditions, including those LeBeau had already satisfied, "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Curry*, 627 F.3d at 315. Special condition number 1 of LeBeau's supervised release prohibiting his consumption of alcohol or frequenting businesses that sell it, should, therefore, be stricken under this Court's precedents as unwarranted and without justification. Likewise, those further continued special conditions, numbers 4, 5, 6, and 8, which LeBeau, by the court's own admission, had already satisfied should be stricken as well.

II. DID THE UNITED STATES HAVE JURISDICTION OVER LEBEAU UNDER THE FORT LARAMIE TREATY OF APRIL 29, 1868 ?

A. Standard of Review.

When determining whether the record establishes subject matter jurisdiction for a prosecution under the Major Crimes Act, this Court conducts *de novo* review. *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995), rehearing denied, 1995 U.S. App. LEXIS 15148. Although LeBeau did not raise this claim below, a claim premised on a court's "statutory or constitutional power to adjudicate the

case” can never be forfeited or waived. *United States v. Cotton*, 535 U.S. 625, 630 (2002). “Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court.” *Id.*, citing *e.g.*, *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908).

B. Merits.

LeBeau contends the district court lacked jurisdiction over him because of the government’s failure to comply with the Fort Laramie Treaty of 1868. He recognizes, however, that this Court has on several occasions decided this issue contrary to his position and that one panel of this court may not overrule the decision of another panel. *See United States v. Snyder*, 511 F.3d 813, 818 (8th Cir. 2008) (“one panel of this court cannot overrule another’s opinion.”). *See also United States v. Jacobs*, 638 F.3d 567, 568-569 (8th Cir. 2011) (Ft. Laramie Treaty does not require investigation by the United States agent, written findings and a decision by the Commissioner of Indian Affairs or notice to the Tribe and an opportunity to be heard before federal courts obtain criminal jurisdiction over a tribal member); *United States v. Drapeau*, 414 F.3d 869, 878 (8th Cir. 2005); *United States v. Kane*, 537 F.2d 310, 311 (8th Cir. 1976) (per curiam); *see also United States v. Schrader*, No. 10-2706, 411 Fed. Appx. 946, 2011 U.S. App. LEXIS 3920, 2011 WL 679342, at *1 (8th Cir. Feb. 28, 2011) (unpublished per

curiam) (rejecting an Article I notice jurisdictional challenge as “materially indistinguishable” from *Drapeau*); *United States v. White Mountain*, 402 Fed. Appx. 154 (8th Cir. 2010) (finding no material distinction between White Mountain’s case and *Drapeau*); *United States v. Ghost Bear*, 387 Fed. Appx. 659, 2010 U.S. App. LEXIS 15015 (8th Cir. S.D. 2010); *Lebeaux v. United States*, 165 Fed. Appx. 496, 2006 U.S. App. LEXIS 2400 (8th Cir. S.D. 2006).

LeBeau, accordingly, raises the issue to preserve it for further review should he decide to pursue a Petition for Rehearing En Banc or a Petition for Certiorari in the event of an adverse panel ruling in his appeal.

CONCLUSION

For these reasons, and upon the above and foregoing arguments and authorities, LeBeau’s revocation sentence should be vacated and case remanded for resentencing with instruction to the district court to enter an amended judgment deleting special conditions numbers 1, 4, 5, 6, and 8 of LeBeau’s supervised release.

Dated this 12th day of December, 2011.

Respectfully submitted,

Neil Fulton
Federal Public Defender

By: /s/ Gary G. Colbath, Jr.

Gary G. Colbath, Jr.
Assistant Federal Public Defender
Attorney for Appellant Gerald LeBeau
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
703 Main Street, Second Floor
Rapid City, SD 57701
Telephone: (605)343-5110; Fax: (605)343-1498
filinguser_SDND@fd.org

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By: /s/ Gary G. Colbath, Jr.

Gary G. Colbath, Jr.
Assistant Federal Public Defender
Attorney for Appellant Gerald LeBeau

I further certify that the electronic version of the foregoing has been scanned for viruses using Symantec Anti Virus Corporate Edition, and that the scan showed the foregoing is virus free.

By: /s/ Gary G. Colbath, Jr.

Gary G. Colbath, Jr.
Assistant Federal Public Defender
Attorney for Appellant Gerald LeBeau

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Word Perfect Version X3 was used in the preparation of the foregoing Appellant's Brief and that the word count done pursuant to that word processing system shows that there are 4,633 words in the foregoing Appellant's Brief.

Dated this 12th day of December, 2011.

By: /s/ Gary G. Colbath, Jr.

Gary G. Colbath, Jr.

Assistant Federal Public Defender

Attorney for Appellant Gerald LeBeau

ADDENDUM

1. Judgment for Revocation of Supervised Release - October 23, 2011.. Add. 1
2. Unpublished Opinion, *United States v. LeBeau*,
44 Fed. Appx. 63 (8th Cir. 2002). Add. 2