

NO. 11-3428
Criminal

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

GERALD LEBEAU,

Defendant and Appellant.

Appeal from the United States District Court
for the District of South Dakota
Western Division

The Honorable Karen E. Schreier
Chief United States District Judge

APPELLEE'S BRIEF

BRENDAN V. JOHNSON
UNITED STATES ATTORNEY
Jay P. Miller
Assistant U.S. Attorney
PO Box 7240
Pierre, SD 57501-2489
Telephone: (605) 224-5402
Attorneys for Appellee.

SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

Gerald LeBeau appeals his sentence following the district court's revocation of his multiple terms of supervised release. He challenges the special conditions of supervised release imposed by the district court, particularly the one requiring that he not consume alcoholic beverages or frequent establishments whose primary business is the sale of alcoholic beverages. LeBeau also asserts that the district court lacked jurisdiction over him because of the Government's failure to comply with the Fort Laramie Treaty of 1868.

The Government opposes each of LeBeau's arguments. It also respectfully submits that the facts and legal arguments are adequately presented in the briefs and record and that the decisional process would not be significantly aided by oral argument. Accordingly, the Government does not request oral argument. If oral argument is allowed, the Government requests equal time to that granted to LeBeau.

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JURISDICTIONAL STATEMENT

LeBeau appeals the final judgment of the district court upon revocation of his supervised release. CR 212.¹ The district court had jurisdiction over Lebeau's revocation proceedings and sentencing pursuant to 18 U.S.C. §§ 3231 and 3583(e). Following his admission to violating the terms and conditions of his supervised release, the district court imposed its sentence on October 21, 2011, with the written judgment entered on October 24, 2011. CR 211-12. LeBeau filed a timely notice of appeal on November 4, 2011. CR 215. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

¹ References to the clerk's record will be denoted by the letters "CR" followed by the appropriate docket number. References to the trial transcript will be denoted by the letters "TT." References to the Sentencing Transcript will be denoted by the letters "ST." References to the transcript from the Revocation Hearing will be denoted by the letters "RT." References to the Presentence Report will be denoted by the letters "PSR." References to the Supplemental Presentence Report will be denoted by the letters "SPSR." References to LeBeau's brief will be cited as "AB." Each of these references will be followed by the appropriate page or paragraph number.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. WHETHER THE DISTRICT COURT PLAINLY ERRED BY REQUIRING THAT LEBEAU'S CONTINUED SUPERVISED RELEASE REMAIN CONDITIONED UPON AVOIDING CONSUMPTION OF ALCOHOL OR ESTABLISHMENTS WHOSE PRIMARY BUSINESS IS THE SALE OF ALCOHOL.**

United States v. Anderson, No. 11-2121, 2012 WL 10880
(8th Cir. Jan. 4, 2012)
United States v. Behler, 187 F.3d 772 (8th Cir. 1999)
United States v. Curry, 627 F.3d 312 (8th Cir. 2010)
United States v. Wisecarver, 644 F.3d 764 (8th Cir. 2011)

- II. WHETHER THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION OVER A FEDERAL DRUG TRAFFICKING CRIME UNDER THE 1868 FORT LARAMIE TREATY.**

United States v. Drapeau, 414 F.3d 869 (8th Cir. 2005)
United States v. Lawrence, 51 F.3d 150 (8th Cir. 1995)
United States v. Jacobs, 638 F.3d 567 (8th Cir. 2011)

STATEMENT OF THE CASE

Gerald LeBeau and his son, Neil LeBeau, were initially charged by a Criminal Complaint issued and filed in the United States District Court for the District of South Dakota, Western Division, on May 1, 2001. CR 1, 2. An Indictment was subsequently filed on May 17, 2001, charging Gerald and Neil LeBeau with two drug-related offenses. Count I charged both men with conspiracy to distribute cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1). Count II charged each with possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). CR 15.

Gerald LeBeau and Neil LeBeau were tried together at a jury trial held October 9-11, 2001. The jury returned a verdict acquitting both men of the conspiracy charge, but finding each guilty of possession with intent to distribute cocaine. CR 103.

Gerald LeBeau was sentenced on January 7, 2002. CR 140. He faced sentencing classified as a career offender. The district court granted LeBeau's motion for a downward departure and reduced his total offense level by seven levels. He was sentenced to 120 months of imprisonment and 3 years of supervised release. CR 141. A \$700 fine was also imposed. CR 141.

On direct appeal, LeBeau challenged the sufficiency of the evidence to support his conviction. This Court affirmed his conviction in an unpublished opinion filed

August 27, 2002. *United States v. LeBeau*, 44 Fed. Appx. 63 (8th Cir. 2002) (unpublished) (per curiam).

Thereafter, on August 28, 2003, LeBeau filed a motion to vacate, set aside, or correct his sentence under 18 U.S.C. § 2255. *See LeBeau v. United States*, District Court No. 03-CV-5088 at Doc. 1 (8th Cir. 2003). Following a hearing on LeBeau's petition before the magistrate, the district court adopted the magistrate's report and recommendation and denied LeBeau's § 2255 motion. *Id.* at Doc. 48, 54. The district court granted LeBeau's application for certificate of appealability. *Id.* at Doc. 61.

LeBeau appealed. *Id.* at Doc. 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).² The Supreme Court denied certiorari on October 2, 2006. *LeBeaux v. United States*, 549 U.S. 819 (2006).

LeBeau completed his custody sentence, and commenced his supervised release on April 9, 2010. CR 201. A petition to revoke supervised release was filed on September 7, 2011. CR 201. LeBeau admitted to violating various conditions of his supervised release. RT 3, 4. The district court revoked LeBeau's supervised release and sentenced him below the Chapter 7 advisory Guidelines range to serve an

² In this Court's Docket No. 02-1164, Appellant's name was spelled "LeBeau." In his 2005 appeal, Appellant's surname is spelled "LeBeaux." LeBeaux himself, in pro se filings, has spelled his name both ways.

additional 3 months in prison followed by 12 more months of supervised release.

CR 212. On November 4, 2011, LeBeau filed a notice of appeal. CR 215.

STATEMENT OF FACTS

A. Underlying Case.

After an officer with the Oglala Sioux Tribe Department of Public Safety tried to initiate a traffic stop of LeBeau's loaned rental car, he fled with Neil LeBeau as his passenger and led police on a high speed chase. During the chase, an officer saw the men run to a hay bale in a remote area "with something." After they apprehended the LeBeaus, the officers returned to the hay bale and discovered a large quantity of cocaine – much of it packaged for retail sale.¹ *United States v. LeBeau*, 44 Fed. Appx. 63 (8th Cir. 2002).² See also PSR ¶¶ 7-19; SPSR ¶¶ 4-5.

B. History of Alcohol and Substance Abuse.

Following LeBeau's conviction, the district court ordered that a Presentence Report (PSR) be prepared. The PSR indicated that LeBeau began drinking alcohol at age 14. PSR ¶ 53. LeBeau reported that as a teenager, he drank alcohol like most other teenagers. PSR ¶ 53. In the dozen years leading up to his arrest, LeBeau

¹ The attempted traffic stop was based upon a tip from a witness who suspected LeBeau was driving while intoxicated. PSR ¶ 8.

² Although 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 significant and has direct relevance to this appeal. A copy of the opinion is contained in the addendum to this brief. (Add. 1).

indicated that he drank one or two beers once per month. PSR ¶ 53. However, reports from family and associates indicated that LeBeau's alcohol use had been more substantial than he reported. PSR ¶ 53.

The PSR contained other information indicating a history of substance abuse. LeBeau had used marihuana and cocaine, but his drug of choice was cocaine. PSR ¶ 52. LeBeau first used cocaine at age 14, and he used the substance until his arrest in this case. PSR ¶ 55. His preferred method of use was inhalation, but LeBeau had also used cocaine intravenously. PSR ¶ 55. From age 18 forward, LeBeau used cocaine heavily, binging for three to five days, then taking two to three days off to sleep. PSR ¶ 55. LeBeau reported that he used one-quarter to one-half ounce of cocaine per day by himself. PSR ¶ 55. However, he did not believe he had a cocaine addiction. PSR ¶ 55.

In 1998, LeBeau was convicted of driving while impaired in Adams County, Colorado. PSR ¶ 39. In addition, Oglala Sioux Tribal Court records indicate that LeBeau was arrested in January 1996 for public intoxication and disorderly conduct. PSR ¶ 39.³ The disposition of those charges is unknown. PSR ¶ 39. He also had a tribal arrest, unrelated to the federal drug prosecution, in April 2001 for possession of marijuana, disorderly conduct, and violence to a policeman or judge. PSR ¶ 39. In September 1997 LeBeau was arrested in Gering, Nebraska, for possession of cocaine,

³ The paragraphs in the Presentence Report are misnumbered. The paragraphs progress numerically from 1 to 50, but then go back to 39 and continue from there.

driving while under the influence, refusal to submit to a chemical test, and possession of narcotic paraphernalia. PSR ¶ 50. Those charges were dismissed. PSR ¶ 50.

LeBeau did not report any history of family substance abuse. PSR ¶ 43. However, others who know LeBeau and his family indicated that he grew up around significant substance abuse. PSR ¶ 43. Also, the mother of LeBeau's two children indicated the couple did not remain together because LeBeau would not abstain from alcohol and drugs and stay out of criminal trouble. PSR ¶ 45.

A mental health report issued in 1994 indicated that LeBeau was "not motivated toward treatment and appears to be an anxious, naive individual with ideas of grandiosity who may experience irritability, hostility, and aggressiveness, all of which may become magnified during his use of alcohol." PSR ¶ 50. The report recommended that LeBeau be required to participate in a long-term outpatient therapy program that included individual therapy and an aftercare component. PSR ¶ 51.

C. History of Violent Behavior.

At age 28 LeBeau was convicted of the felony offenses of criminal sexual penetration in the second degree, conspiracy to commit criminal sexual penetration, and kidnaping. PSR ¶ 37. The offenses involved LeBeau picking up a female, driving her to a remote rural area, and raping her. PSR ¶ 37. In 1997, he was charged with third degree assault. PSR ¶ 38. The charge was amended to the offense of

harassment, and LeBeau pled guilty to that offense. PSR ¶ 38. As a part of his supervision, he was required to complete anger management classes. PSR ¶ 38. In 1999, LeBeau was convicted of the misdemeanor offense of threats to person or property. PSR ¶ 40. Also in 1999, LeBeau was convicted of the offense of assault in the third degree in Colorado and sentenced to 14 months of custody. PSR ¶ 43.

Besides these convictions, LeBeau was arrested multiple times for crimes of violence that did not result in convictions. PSR ¶ 39, 50. Criminal justice records indicate LeBeau was arrested for robbery in 1979, simple assault/domestic violence in 1986, and disorderly conduct and resisting arrest in 1986. PSR ¶ 50. Oglala Sioux Tribal Court records indicate that LeBeau was arrested for disorderly conduct in 1996, and violence to a police officer or judge in 2001. PSR ¶ 39.

D. History of Non-Compliant Behavior.

LeBeau was sentenced to 18 months of intensive supervision following his conviction for harassment in 1997. PSR ¶ 38. While he was on supervision, he violated the terms and conditions of his probation, and a petition to revoke was filed. PSR ¶ 38. Following his 1999 conviction in Colorado for the felony offense of providing false information to a pawnbroker, LeBeau was paroled to South Dakota. PSR ¶ 41. He was still on parole for that offense at the time of his arrest for the underlying offense in this case. PSR ¶ 41. A warrant for probation violation was also

issued following LeBeau's convictions for conspiracy to commit theft and the third degree assault. PSR ¶¶ 42, 43.

E. Original Sentence.

Despite LeBeau's classification as a career offender, the district court reduced LeBeau's total offense level by 7 levels and sentenced him to 120 months of imprisonment followed by 3 years of supervised release. CR 141. As a part of the sentence, the district court imposed both standard and special conditions that LeBeau was to follow while he was on supervised release.

The district court imposed ten special conditions of supervision, including that LeBeau not consume any alcoholic beverages or frequent establishments whose primary business is the sale of alcoholic beverages. CR 141. Other special conditions required LeBeau to participate in a substance abuse program, submit to testing for alcohol or drug usage, not possess a firearm, submit to warrantless searches, reside and participate in a community corrections facility program, participate in a program of domestic violence counseling, and pay current and past due child support. CR 141. LeBeau did not challenge any of his special conditions of supervised release in his direct appeal.

Standard Condition 7 required that LeBeau refrain from excessive use of alcohol and not purchase, possess, use, distribute, or administer any controlled

substance or any paraphernalia related to any controlled substances, except as prescribed by a physician. CR 141.

F. Supervised Release.

On April 19, 2010, LeBeau was released from custody to reside at Community Alternatives of the Black Hills (CABH). SPSR ¶ 7. While at CABH, he completed outpatient substance abuse treatment on June 28, 2010, through Recovery Outpatient Alcohol and Drug Services. SPSR ¶ 7.

On October 31, 2010, LeBeau was allowed to relocate to his sister's residence on the Pine Ridge Indian Reservation. SPSR ¶ 10. There was little or no difficulty with LeBeau's supervision until August 27, 2011, when he was arrested by tribal police for a liquor violation, criminal trespass, elderly abuse, and child abuse. SPSR ¶ 9.

He was placed in the Pine Ridge Jail, and on September 1, 2011, a United States Probation Officer required LeBeau to return to CABH. SPSR ¶ 10. Once there, LeBeau attempted to bribe CABH staff members with \$100 to falsify his initial urine test. SPSR ¶ 10. His bribe was unsuccessful, and his subsequent test results were positive for cocaine. SPSR ¶ 10. When questioned by his probation officer about his apparent cocaine use, LeBeau denied using cocaine, but admitted handling the substance. SPSR ¶ 10.

Another urine sample was collected from LeBeau on September 6, 2011, while he was still at CABH. SPSR ¶ 11. That sample also tested positive for cocaine. SPSR ¶ 11. The following day, LeBeau absconded from CABH and supervision. SPSR ¶ 11.

A Petition to Revoke Supervised Release was filed on September 7, 2011, alleging that LeBeau had violated the terms and conditions of his supervised release in six respects. CR 201. At his revocation hearing, LeBeau admitted to violating the terms and conditions of his supervised release by possessing and using cocaine and absconding from CABH. RT 3, 4. Additional allegations that LeBeau committed new law violations, consumed alcohol, used cocaine, and failed to notify his probation office ten days prior to changing his residence were dismissed. RT 2-4.

G. Revocation Sentencing.

During the sentencing portion of the revocation hearing, LeBeau's counsel argued that his relapse into drug usage was "not terribly unexpected for a man that's had drug problems throughout his life for 20 plus years, 30 plus years."⁴ RT 8. Counsel asked the district court to allow his client to go back to treatment. RT 10.

LeBeau, himself, acknowledged his addiction, indicating, "Like they say, once drug-addicted, always, because you can always relapse. It's easy if you let yourself go down to that bottom." RT 19. The district court noted that battling an addiction

⁴ LeBeau was born in 1961 and is currently 50 years old.

was a daunting task, indicating to LeBeau that “[i]t is easy to relapse. It’s hard to stay clean and sober every day, but you need to do that. . . . You need to work with [probation] during [your 12 months of supervision] and stay clean and sober.” RT 19, 21.

During his presentence interview, LeBeau requested that the district court put him back on supervised release with the same conditions as previously ordered – if he could avoid further jail time. SPSR ¶ 12. Though not specifically mentioned in the Supplemental Presentence Report, one of those conditions was that LeBeau not consume any alcoholic beverages or intoxicants or frequent establishments whose primary business is the sale of alcoholic beverages. CR 141.

The district court sentenced LeBeau to 3 months in custody and then placed him back on supervision for 12 more months under all of the same terms and conditions previously imposed. RT 21. As a part of his supervised release, the district court reimposed the following conditions that were a part of the original judgment:

General 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; ⁵
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⁵ LeBeau is not appealing the General Condition that he refrain from excessive use of alcohol.

- 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.
- Special Condition No. 4: The defendant shall participate in a program approved by and at the direction of the United States Probation Officer for treatment of substance abuse, which will include testing to determine if defendant has reverted to the use of alcohol or drugs.
- Special Condition No. 5: The defendant shall reside and participate in a program of a residential substance abuse facility as instructed by his probation officer until discharged by the facility director.
- 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). The defendant shall be classified as a pre-release case.
- Special Condition No. 8: The defendant shall participate in a program of domestic violence counseling, if available, as directed by the probation officer.

Despite having an opportunity to object to the sentence after the district court stated it, but before it imposed it, LeBeau did not object to the sentence, including the reimposition of the conditions of supervised release. RT 21.

SUMMARY OF ARGUMENT

The district court did not plainly err by reimposing LeBeau's original conditions of supervised release. The record indicates LeBeau has struggled with substance abuse throughout his life and has a history of abusing alcohol. According to the 1994 mental health report, LeBeau's use of alcohol may have a negative impact upon his irritability, hostility, and aggressiveness. The restrictions upon alcohol use and the other conditions LeBeau challenges were all part of his original judgment of conviction and were not challenged on direct appeal. These conditions complied with the requirements of 18 U.S.C. § 3583(d) at the time when they were originally imposed and continue to meet those standards. LeBeau's claim that his relatively short period of compliant behavior while on supervision has ameliorated the need for these conditions overlooks the fact that he continues to struggle with his addiction to controlled substances and the additional fact that the conditions may well have contributed to his short-lived previous success while on supervision.

The United States had jurisdiction to prosecute LeBeau. In *United States v. Drapeau*, 414 F.3d 869 (8th Cir. 2005), this Court rejected the claim that the 1868 Fort Laramie Treaty deprives a district court of jurisdiction over criminal cases arising under federal law.

ARGUMENTS

I. THE DISTRICT COURT DID NOT PLAINLY ERR IN IMPOSING CONTINUED SPECIAL CONDITIONS OF LEBEAU'S SUPERVISED RELEASE.

A. Standard of review.

LeBeau did not challenge the special conditions of supervised release imposed by the district court at the time of sentencing. Accordingly, the claims have been forfeited and are reviewable only under the stringent standards of the plain error doctrine. *See United States v. Curry*, 627 F.3d 312, 314 (8th Cir. 2010) (per curiam); *United States v. Miller*, 557 F.3d 910, 916 (8th Cir. 2009).

“To establish plain error, [a defendant] must prove that (1) there was error, (2) the error was plain, and (3) the error affected his substantial rights.” *Miller*, 557 F.3d at 916 (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)). An error affects substantial rights if it is prejudicial, but a sentencing error is prejudicial only if the defendant demonstrates a reasonable probability that he would have received a lighter sentence in the absence of the error. *United States v. Pirani*, 406 F.3d 543, 552 (8th Cir. 2005) (en banc). Finally, even if a plain error exists, this Court will exercise its discretion to correct the error only if it “seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Miller*, 557 F.3d at 916 (citing *Olano*, 507 U.S. at 734).

B. The district court did not plainly err by imposing as a special condition of his supervised release that LeBeau not consume alcohol or frequent establishments whose primary business is the sale of alcoholic beverages.

A sentencing court has broad discretion to order any of the optional or special conditions of supervised release set forth in 18 U.S.C. § 3563(b) – or any other condition it considers appropriate – provided each of those conditions:

- 1) is reasonably related to the sentencing factors set forth in 18 U.S.C. § 3553(a);
- 2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in § 3553(a); and
- 3) is consistent with any pertinent policy statements issued by the Sentencing Commission.

18 U.S.C. § 3583(d); *United States v. Anderson*, No. 11-2121, 2012 WL 10880 (8th Cir. Jan. 4, 2012); *United States v. Bender*, 566 F.3d 748, 751 (8th Cir. 2009). “In crafting special conditions, the district court must be careful to conduct an inquiry ‘on an individualized basis,’ looking at the specific facts of the defendant's case.” *Anderson*, 2012 WL 10880, *6, quoting *United States v. Davis*, 452 F.3d 991, 995 (8th Cir. 2006). “Furthermore, ‘[c]ourts generally cannot impose [] a condition . . . without evidence that the condition imposed is reasonably related . . . to the crime or to something in the defendant's history.’” *Id.*, quoting *United States v. Pruden*, 398 F.3d 241, 248–49 (3d Cir. 2005).

As a part of LeBeau’s original sentencing on January 7, 2002, the district court imposed a requirement that LeBeau not consume any alcoholic beverages or frequent

establishments whose primary business is the sale of alcoholic beverages, participate in a substance abuse program, participate in a community corrections facility program, and participate in domestic violence counseling. CR 141. At the time of sentencing, LeBeau did not object to the imposition of those conditions (ST 38-44), nor did he contend on direct appeal that the district court erred in imposing those conditions. *See United States v. LeBeau*, 44 Fed. Appx. 63 (8th Cir. 2002) (unpublished) (per curiam).

The record supports the restrictions imposed by the district court originally and reimposed following the district court's revocation of LeBeau's supervised release.⁶ These conditions are reasonably related to the goal of LeBeau's successful supervision, and the restrictions were warranted based upon LeBeau's use and abuse of alcohol and his addiction to cocaine, along with his history of violence and non-compliant behavior, each of which was well documented in the original Presentence Report.

In addition, during the revocation sentencing, the district court made individualized findings on the record regarding LeBeau's history of substance abuse, cocaine addiction, and the need to remain "sober." Specifically, the district court noted:

⁶ If LeBeau had not violated the terms and conditions of his supervised release, all of the conditions imposed by the district court at the time of his original sentence would have remained in effect. LeBeau should not have a chance to ease his conditions of supervised release only because he violated them.

The fact that you tested positive for cocaine is a relapse and I know that you were doing well before that. I think anybody that is involved with drugs sometimes they relapse and hopefully you are back on track now and drug free and realize how important it is for you to stay drug free.

RT 18-19. The district court went on to find that “It is easy to relapse. It's hard to stay clean and sober every day, but you need to do that. . . . You need to work with [probation] during [your supervised release] and stay clean and sober.” RT 19, 21.

The special conditions imposed by the district court were “tailored to the nature and circumstances of the offense, [LeBeau’s] history and characteristics, the deterrence of criminal conduct, the protection of the public from further crimes of [LeBeau], and [LeBeau’s] educational, vocational, medicinal, or other correctional needs.” *United States v. Kelly*, 625 F.3d 516, 519 (8th Cir. 2010) (internal quotation marks omitted). In short, all of the special conditions have the dual purpose of promoting LeBeau’s rehabilitation and facilitating the prevention of a relapse, which serve LeBeau’s needs and protect the community.

Alcohol played a negative role in LeBeau’s life. The imposition of a special condition that LeBeau not consume any alcoholic beverages or frequent establishments whose primary business is the sale of alcoholic beverages is supported by his documented history of substance abuse. LeBeau began drinking alcohol at age 14. PSR ¶ 53. LeBeau also has a criminal history involving alcohol consumption. He was convicted of driving while impaired. PSR ¶ 39. He was also arrested on separate occasions for public intoxication and driving while under the influence. PSR

¶¶ 39, 50. Although LeBeau provided information indicating that he did not have a problem with alcohol, reports from family and associates indicated that LeBeau's alcohol use had been more substantial than he reported. PSR ¶ 53. A mental health assessment conducted on LeBeau in 1994 indicated that alcohol could exacerbate his irritability, hostility, and aggressiveness. PSR ¶ 50.

The ban on alcohol is appropriate even if the substance LeBeau has historically abused most often was not alcohol. This Court has previously upheld such bans for defendants with substance abuse problems.

In *United States v. Behler*, 187 F.3d 772 (8th Cir. 1999), for example, this Court upheld a supervised release condition requiring alcohol abstinence for the defendant who, like LeBeau, was convicted of a drug-trafficking offense and had a significant history of substance abuse. This Court held that the ban was supported by the fact that alcohol use was inconsistent with the defendant's rehabilitation process and because "the evidence . . . indicated that any use of alcohol would limit [his] ability to maintain a drug-free lifestyle." *Behler*, 187 F.3d at 778-79. In *Behler*, there was no indication that alcohol played any role in his offense, and there was no direct evidence that the defendant had ever abused alcohol. *Behler*, 187 F.3d at 779. He had no family history of alcohol abuse, no prior offenses resulting from the use of alcohol, and he completed a substance abuse treatment program. *Id.* Nevertheless, this Court held that the district court was entitled to rely on the evidence in the record indicating that an alcohol ban was necessary for Behler's total rehabilitation. *Id.* This Court found

that such an objective was consistent with the statutory goals of deterrence and protecting the public from future offenses. *Id.*

LeBeau has a history of substance abuse. He had used marihuana and cocaine, but his drug of choice was cocaine. PSR ¶ 52. LeBeau first used cocaine at age 14, and he used the substance until his arrest in this case. PSR ¶ 55. From age 18 forward, LeBeau used cocaine heavily. PSR ¶ 55. Despite this, LeBeau did not believe he had a cocaine addiction. PSR ¶ 55.

The fact that LeBeau did not admit to possessing or consuming alcohol on August 27, 2011, does not support the inference that his conduct leading to his revocation was not alcohol related. At a minimum, he was arrested for a tribal liquor violation – a fact the district court could consider in imposing conditions of supervised release. In addition, it was acknowledged by LeBeau, his counsel, and the district court that the events from that day precipitated his “tail spin” and relapse to cocaine usage. RT 5-7, 17, 19; SPSR ¶ 12. LeBeau, himself, admitted that “once drug-addicted, always, because you can always relapse. It's easy if you let yourself go down to that bottom.” RT 19. Therefore, based on LeBeau’s history of cocaine addiction and alcohol use, the condition that he not consume alcohol is directly connected to the goal of preventing future cocaine usage relapses.

The alcohol ban is reasonably related to the goal of LeBeau’s success on supervision. Any use of alcohol would limit LeBeau’s ability to maintain a drug-free

lifestyle and hinder his rehabilitation process. Given this evidence, the district court did not plainly err by prohibiting LeBeau from consuming alcohol or frequenting bars.

LeBeau's brief focuses on the alcohol ban, but also touches upon the requirement that he participate in a substance abuse program, participate in a community corrections facility program, and participate in domestic violence counseling. AB 18. Like the alcohol ban, these conditions are designed to insure LeBeau's success on supervision. LeBeau had a history of violent and non-compliant behavior. These conditions were designed to address those issues. In addition, the record supports that a single episode in LeBeau's life, namely his tribal arrest on August 27, 2011, triggered a relapse to cocaine usage, which required the probation officer to order LeBeau into community confinement. SPSR ¶ 10. Following his release from custody on the revocation sentence, if there is another relapse or further issues arise, the probation officer will not have the ability to deal with those issues without these provisions. These additional conditions provide the United States Probation Office and LeBeau with the opportunity for correctional treatment if needed.

LeBeau's violation conduct is directly related to his relapse into cocaine usage. His effort to avoid a requirement that he participate in a substance abuse program or a community corrections facility program belies the established record in this case. LeBeau's history of violent behavior, coupled with the information in the mental health status report, supports the condition that LeBeau attend alcohol treatment or

domestic violence counseling if deemed necessary. The mental status report establishes that LeBeau may experience irritability, hostility, and aggressiveness, all of which may become magnified during his use of alcohol. PSR ¶ 50. Plus, LeBeau admitted he remains an addict. RT 19.

The special conditions allowing LeBeau's participation in a community corrections program, substance abuse treatment, or domestic violence counseling are not automatic. The requirement that he participate in substance abuse treatment is triggered only if LeBeau reverts to using alcohol or drugs. CR 141. The other two conditions are discretionary, and are only invoked if his probation officer feels it is warranted. CR 141.

LeBeau cites to *United States v. Bass*, 121 F.3d 1218 (8th Cir. 1997); *United States v. Simons*, 614 F.3d 475 (8th Cir. 2010); and *United States v. Walters*, 643 F.3d 1077 (8th Cir. 2010), as authority for the proposition that the special conditions imposed upon his supervised release were unwarranted. However, *Bass* and *Walters* are distinguishable in that the record in those cases provided little or no basis for the restrictions imposed by the sentencing court. Here, though, the established record in this case supports the conditions imposed.

In *Simons*, this Court ruled that imposition of a special condition prohibiting the defendant from purchasing, possessing, using, distributing, or administering any alcohol was not plain error. *Simons*, 614 F.3d at 480. This Court noted that it has generally upheld bans on alcohol for defendants with substance abuse problems. *Id.*

This Court relied, in part, on Simons' dishonesty about his alcohol use, sufficient to justify a ban on using or possessing alcohol. *Id.* In addition, this Court ruled that even if the district court erred in imposing this special condition, it did not rise to the level of plain error. *Id.* The same is true here. LeBeau has a substance abuse problem, thus warranting the special conditions imposed by the district court.

In *Bass*, this Court indicated that it would not have rejected the alcohol ban if there had been evidence showing the defendant was marihuana dependent. *Bass*, 121 F.3d at 1124 at FN3. Likewise, in *Walters* this Court found that there was no evidence to suggest that the defendant's use of alcohol impeded efforts to rehabilitate him or that he was drug dependent. *Walters*, 643 F.3d at 1079. Here, there was cogent evidence that LeBeau abused alcohol, that the use of alcohol would impede his rehabilitation, and that he was cocaine dependent. *Bass* and *Walters* are also distinguishable in that they involve conditions of supervised release imposed at the time of the original sentencing rather the re-imposition of conditions as a part of a revocation sentencing.

LeBeau also contends that since he successfully completed the community corrections program at CABH, finished the substance abuse program, and completed domestic violence training, as well as a program of moral reconnection therapy, there was no longer a need to continue special conditions barring him from consuming alcohol or frequenting bars, and requiring him to participate in a substance abuse program, a residential substance abuse facility program, a community corrections

facility program, or domestic violence counseling.⁷ AB 16. This argument, however, is not persuasive.

LeBeau was in custody from his federal arrest on May 8, 2001, until April 9, 2010, when his period of supervised release began. SPSR ¶¶ 1, 7. At that point, he was placed at the Community Alternatives of the Black Hills until October 13, 2010, when he was allowed to transition back into the community. SPSR ¶¶ 8, 10. Ten months later, he was arrested, which arrest led to his relapsing to cocaine usage. SPSR ¶ 9. Although LeBeau's abstention from alcohol during this ten month period of time was compliant, it is not dispositive proof that he is not susceptible to relapsing into substance abuse, including alcohol. LeBeau's argument that he should be relieved of the conditions because he had a short period of success overlooks his relapse and continuing need for assistance – a fact he himself acknowledged to the writer of the Supplemental Presentence Report and at sentencing. SPSR ¶ 12. LeBeau's argument also overlooks the logical conclusion that the imposed conditions may well have assisted him in achieving the measure of success he had while on supervision, and they should continue to guide his conduct during his supervision.

Lastly, LeBeau requests the special conditions be stricken from his judgment. The Government disagrees. Even if this Court agrees that the district court plainly

⁷ In an interview with the writer of the Supplemental Presentence Report, LeBeau indicated that he was willing to continue all of his conditions of supervised release if he could avoid further jail time.

erred in imposing the special conditions of supervised release, the remedy is not to strike them from the Judgment. Rather, if this Court vacates the special conditions, this matter should be remanded to the district court for an individualized assessment of whether the challenged conditions satisfy the requirements of 18 U.S.C. §§ 3583(d)(1)-(3). *United States v. Wisecarver*, 644 F.3d 764 (8th Cir. 2011). On remand, the parties may seek to present evidence relating to the special conditions, and the district court can make particularized findings about any special conditions that are imposed. *Id.*

II. THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION OVER A FEDERAL DRUG TRAFFICKING CRIME UNDER THE 1868 FORT LARAMIE TREATY.

A. Standard of review.

LeBeau did not raise the issue of whether the district court had jurisdiction over his case, so there was no order issued by the district court for this Court to review. This Court reviews questions of jurisdiction *de novo*. *De novo* review is appropriate where subject-matter jurisdiction is at issue. *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995).

B. LeBeau's jurisdictional claim is foreclosed by Eighth Circuit precedent.⁸

LeBeau raised this same issue as a part of his appeal to this Court of the denial of his 2003 motion to vacate, set aside, or correct his sentence under 18 U.S.C. § 2255. In its unpublished decision, this Court held that the Fort Laramie Treaty did not deprive federal courts of subject matter jurisdiction over LeBeau's case. *LeBeaux v. United States*, 165 Fed. Appx. 496 (8th Cir. 2006).⁹ It is, therefore, the law of the

⁸ It is not clear from LeBeau's brief what conduct he alleges violated the provisions of the 1868 Fort Laramie Treaty or when it occurred – during the underlying proceeding or as a part of the revocation proceeding. If it is the former, the issue is waived because he did not raise it in the direct appeal from the conviction. Regardless, the argument lacks merit given this Court's prior determination of the issue and its well-settled decisional law foreclosing any such jurisdictional challenge.

⁹ Although unpublished, this Court's decision in LeBeau's appeal from the denial of his motion pursuant to 18 U.S.C. § 2255 is cited and referred to pursuant to Eighth Circuit Rule 28A(i) as it is significant and has direct relevance to this appeal. A copy of the opinion is contained in the addendum to this brief. (Add. 2).

case. *United States v. Bloate*, 655 F.3d 750 (8th Cir. 2011) (Law of the case doctrine prevents the relitigation of a settled issue in a case and requires courts to adhere to decisions made in earlier proceedings in order to ensure uniformity of decisions, protect the expectations of the parties, and promote judicial economy.); *see, e.g., Baranski v. United States*, 515 F.3d 857, 861 (8th Cir. 2008) (Fourth Amendment determination in direct appeal was law of the case in subsequent 2255 proceeding.).

Furthermore, the claim is foreclosed by binding Eighth Circuit precedent. *See United States v. Drapeau*, 414 F.3d at 869, 878 (8th Cir. 2005). In *Drapeau*, this Court held that the Fort Laramie Treaty does not deprive federal courts of subject matter jurisdiction over federal drug trafficking cases. *Id.* This Court ruled in *Drapeau* that the 1868 Fort Laramie Treaty did not create the type of notice requirement Drapeau claimed was a prerequisite to federal court jurisdiction. *Id.* Rather, this Court found that the Treaty imposes an obligation on the tribe to “‘deliver up the wrong-doer to the United States,’ upon proof and notice to the tribe.” *Id.* Finally, this Court found that to the extent the treaty could be construed to impose a notice and request obligation on the United States, Congress’ grant of citizenship to the Indians “‘makes them ‘subject to all restrictions to which any other American citizen is subject, in any state,’ and that the ‘legislative history and the language of the statute itself are sufficient expression of a clear Congressional intent to abrogate or modify any treaty provisions to the contrary.’” *Id.*

This Court adhered to *Drapeau* and applied its holding in several subsequent cases. *See, e.g., United States v. Jacobs*, 638 F.3d 567, 568-69 (8th Cir. 2011) (Fort 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); *see also United States v. Schrader*, 411 Fed. Appx. 946 (8th Cir. 2011) (unpublished per curiam) (rejecting 1868 Treaty jurisdictional claim as “materially indistinguishable from *Drapeau*”); *United States v. White Mountain*, 402 Fed. Appx. 154 (8th Cir. 2010) (unpublished) (finding no material distinction between White Mountain’s case and *Drapeau*); *United States v. Ghost Bear*, 387 Fed. Appx. 659 (8th Cir. 2010) (unpublished) (Fort Laramie Treaty of 1868 did not require United States to give tribe notice of charges against tribe members as a prerequisite to jurisdiction to prosecute).

CONCLUSION

For the reasons set forth above, LeBeau's sentence should be affirmed in all respects.

Dated this 24th day of January, 2012.

BRENDAN V. JOHNSON
UNITED STATES ATTORNEY

/s/ Jay P. Miller

Jay P. Miller
Assistant United States Attorney
PO Box 7240
Pierre, SD 57501
(605) 224-5402

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Eighth Circuit Rule 10.6.3, I certify that this brief was prepared using Corel WordPerfect X4. I further certify that I have provided to each party separately represented by counsel a CD containing the full text of the brief. The CDs have been scanned for viruses using Trend Micro OfficeScan Corporate Edition 8.0 and are virus free.

I further certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,498 words.

Dated this 24th day of January, 2012.

/s/ Jay P. Miller

Jay P. Miller
Attorney for Appellee
United States of America
P.O. Box 7240
Pierre, SD 57501
(605) 224-5402

CERTIFICATE OF SERVICE

The undersigned attorney for Appellee United States of America hereby certifies that a true and correct copy of the foregoing Appellee's Brief was electronically transmitted by the clerk's office to the appellant's attorney of record on this 24th day of January, 2012:

Gary G. Colbath, Jr.
Assistant Federal Public Defender
703 Main Street, 2nd Floor
Rapid City, South Dakota 57701

/s/ Jay P. Miller

Jay P. Miller
Assistant United States Attorney