No. 15-50991

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

V.

ADAM DANIEL SHEPHERD,
DEFENDANT - APPELLANT

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

BRIEF OF DEFENDANT-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

United States v. Adam Daniel Shepherd

No. 15-50991

The undersigned counsel of record certifies that the persons having an interest in the outcome of this case are those listed below:

1. **Adam Daniel Shepherd,** Defendant-Appellant;
2. **Richard L. Durbin Jr.,** United States Attorney;
3. **Ms. Sara Wannarka,** Assistant United States Attorney, who represented Plaintiff-Appellee in the district court;
4. **George W. Aristotelidis,** Attorney at Law, who represented Defendant-Appellant in the district court and represents him in this Court; and

This certificate is made to allow the judges of this Court to evaluate possible disqualification or recusal issues.

By: */s/* George W. Aristotelidis
GEORGE W. ARISTOTELIDIS
Attorney for Appellant

REQUEST FOR ORAL ARGUMENT

Adam Daniel Shepherd (Shepherd) requests oral argument. This case presents a number of unique and important issues relating to the voluntariness of Shepherd's plea of guilty, which was based on his complete ignorance of the fact that Texas law no longer required that he report as a sex offender at the time of his plea, and his lawyer's faulty advice (based on his lawyer's own ignorance of that fact), that Shepherd should plead guilty because the government could prove his guilt, and because to do so would benefit him at sentencing.

At issue is also whether Shepherd is actually innocent of the offense of failing to report as a sex offender, given conflicting testimony by two attorneys for the Texas Department of Public Safety (DPS), about the manner in which Texas determines whether the offense of which Shepherd was convicted in the State of Arizona required him to register in Texas.

Oral argument would assist the Court in considering and resolving the issues presented by this appeal.

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SUBJECT MATTER AND APPELLATE JURISDICTION

This is a direct appeal from the district court's final decision denying Shepherd's 28 U.S.C. § 2255 petition, which was followed by the District Court's grant of the Appellant's application for a certificate of appealability (CoA) on all issues raised. The district court had jurisdiction of this case under 28 U.S.C. § 2255.

The district court's written judgment denying relief on Shepherd's 2255 motion was entered on September 1, 2016. Record on Appeal at p. 283 (ROA.283). The district court's order granting Shepherd's certificate of appealability (CoA) was entered on October 13, 2015. ROA.283. Shepherd filed notice of appeal on October 14, 2015. ROA.66. *See* FED. R. APP. P. 4(b)(4). This Court has jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

ISSUES PRESENTED

Whether Shepherd's plea of guilty to having knowingly failed to register and update his registration as a sex offender after arriving in Texas was rendered involuntary, upon learning, after he was released from his term of incarceration, that his Arizona conviction was not a reportable offense at the time that he pled guilty, thus meriting a new trial.

Whether Shepherd is actually innocent of the offense of conviction, under *Schlup v. Delo*, 513 U.S. 298 (1995) and its progeny, thus meriting a new trial.

STATEMENT OF THE CASE

The facts track the careful and accurate narrative conducted by the magistrate judge in her report and recommendations (R&R) to the district court. ROA.231-261. Neither party submitted any objections to the facts contained in her report, [1] nor did the District Court reject and/or correct any facts therein.

A. Background:

In January 2003, Appellant Adam Daniel Shepherd (Shepherd) was convicted in Arizona of attempting to commit public indecency, for which he was given a suspended sentence of 230 days and lifetime probation. ROA.232. On January 11, 2007, Shepherd was convicted in Nevada for indecent exposure and was sentenced to prison for a term of twelve to thirty-four months. *Id*.

Shepherd moved to Texas and lived in an apartment with his brother in San Antonio, Texas, from August 2011 until February of 2012, after which Shepherd and his brother moved to 102 W. Rampart Dr. *Id*.

[1] Shepherd filed an objection to the magistrate judge's recommendation for relief,

On July 11, 2012, a federal grand jury indicted defendant for one count of failing to register as a sex offender as follows:

> From on or about August, 2011, and continuing through June 15, 2012, within the Western District of Texas, and elsewhere, the Defendant, ADAM DANIEL SHEPHERD, a person required to register under the Sex Offender Registration and Notification Act, and having traveled in interstate commerce, did knowingly fail to register and update his registration as required by the Sex Offender Registration and Notification Act (SORNA),
>
> All in violation of Title 18, United States Code, Section 2250(a).

ROA.233;32. On September 24, 2012, defendant pleaded guilty to count one in the indictment. ROA.233;60-61.

The transcript of the rearraignment hearing indicates the Government provided the following factual basis in support of defendant's plea of guilty:

> If this case proceeded to trial, Your Honor, the Government would prove that on January 7 of 2003, Mr. Shepherd was convicted in Maricopa County, Arizona, for attempting public sexual indecency with a minor for exposing himself to two girls ages nine and 11. He was sentenced to lifetime probation for that offense and required to register as a sex offender for life by Arizona law, including the requirement to register in any new state in which Mr. Shepherd resides.
>
> The Government would also prove that on January 11 of 2007, Mr. Shepherd was convicted in Nevada for indecent exposure for exposing himself multiple times during a two-day

> period to adults and children in a school zone. For that offense, Mr. Shepherd was sentenced to a prison term of 12 to 34 months and required to register as a sex offender for life under Nevada law, which includes the requirement to register in any new state in which Mr. Shepherd resides.
>
> *Both of those convictions qualify Mr. Shepherd as a sex offender under the Sex Offender Registration and Notification Act.* The Government would show that the last registration for Mr. Shepherd occurred on December 30th of 2010. After that date, Mr. Shepherd moved to the Western District of Texas and began living in Bandera, Texas, between August 2011 and February of 2012 and at no time did Mr. Shepherd register as a sex offender anywhere in the state of Texas.

ROA.233-34;326-27 (emphasis added). The transcript shows the following exchange occurred between the Court and defendant regarding the accuracy of the factual basis:

> THE COURT: Do you agree with the factual summary read by the Government's attorney?
>
> DEFENDANT SHEPHERD: Yes, sir.

ROA.234; 328. [2]

[2] As noted by the magistrate in her R&R, "[t]o be clear, as discussed below, Texas Department of Public Safety has determined that, at the present time, neither of defendant's two prior convictions referenced in the factual basis require defendant to register as a sex offender in Texas and the evidence shows that, on or about June 13, 2012, Texas Department of Public Safety determined that defendant's prior conviction in Arizona only did require defendant to register as a sex offender in Texas, but, as discussed below, later determined it did not require registration in Texas." ROA.235 at n. 15.

Thereafter, the United States Probation Office prepared and filed defendant's Presentence Investigation Report ("PSR").10 The PSR included the following information:

> Later on June 15, 2012, Adam Shepherd gave a statement to the USMS. He stated that he had been living in San Antonio, Texas since January 2011 and had been employed doing body work on cars. He admitted that he had not registered anywhere in Texas because he did not believe he was required to register in the State of Texas. He stated he had researched the State of Texas on the internet prior to moving and believed that his offense did not require registration in Texas as a sex offender. Shepherd admitted that he had not checked with any law enforcement agency to be sure he did not have to register. Further, Shepherd acknowledged that he had a probation violation warrant out of Arizona, but knew it was not an extradition warrant. He knew that if he avoided Arizona that he would not be arrested.

ROA.234-35; 506.

On December 19, 2012, the Court sentenced Shepherd to serve a 24-month term of imprisonment (approximately the mid-point of the advisory guideline range) followed by a 30-year term of supervised release and payment of the $100 mandatory assessment; the Court did not order the payment of any fine, given Shepherd's inability to pay. ROA.235-36;69-74. Defendant filed his notice of direct criminal appeal on December 20, 2012. ROA.66.

The United States Court of Appeals affirmed defendant's conviction by way of a *per curiam* opinion filed October 17, 2013. The Fifth Circuit's opinion stated, in part:

> Adam Daniel Shepherd was convicted of one charge of failing to register as a sex offender and was sentenced to serve 24 months in prison and 30 years on supervised release. *In this appeal, he challenges only the term of supervised release, arguing that it is unreasonable and amounts to plain error because it is more than needed to achieve the sentencing goals of 18 U.S.C. § 3553(a) and because the district court failed to properly weigh his prior offenses, the abuse he suffered as a child, and his ignorance concerning his obligation to register.* Under Shepherd's view, the 30-year term of supervised release exaggerates the severity of his offenses and the danger he presents to the public.
>
> As Shepherd acknowledges, his failure to raise his reasonableness challenge in the district court results in application of the plain error standard in this appeal. *See United States v. Allison*, 447 F.3d 402, 405 (5th Cir. 2006).
>
> Under this standard, one must show a clear or obvious error that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). This court has discretion to correct a plain error but will do so only if it seriously affects the fairness, integrity, or public reputation of the proceedings. *See id*.
>
> The record reflects that the district court properly considered the nature and circumstances of the offense as well as Shepherd's history and characteristics in determining his sentence. See § 3553(a). There is no indication that the district court failed to account for a sentencing factor that should have

> been accorded substantial weight, gave substantial weight to an "irrelevant or improper factor," or made "a clear error of judgment in balancing [the] sentencing factors." *See United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009). Shepherd's arguments amount to no more than a disagreement with the district court's weighing of the pertinent factors and the propriety of the sentence imposed, which does not suffice to show error, plain or otherwise, in connection with his sentence. *See United States v. Ruiz*, 621 F.3d 390, 398 (5th Cir. 2010).

ROA.236-37;94-95 (citing *United States v. Shepherd*, No. 12-51298 at *346-47 (5th Cir. Tex. 2013) (*per curiam*)).

B. <u>Shepherd's 28 USC § 2255 Petition</u>:

On October 30, 2014, defendant filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. ROA.237; 97. Defendant's motion listed three grounds for relief. First, defendant asserted "Texas does not require me to register as a sex offender," and he has "signed documents from the Attorney General in Austin, TX stating that I do not have to register," such that he should not have been convicted for failure to register as a sex offender. ROA.237; 100. Second, defendant argued he notified the Reno, Nevada police department he was moving out of state, he did move to Texas, he had been living in San Antonio since January 3, 2011, and because he "was never required to register in Texas," he could not be charged and convicted

of failing to register in Texas. ROA.237-38;101. With respect to both grounds one and two, defendant further asserted that his appellate counsel was ineffective because his attorney was "suppose to appeal my case on this issue," or his "attorney did not file my appeal [on the issue]," but did not do so. ROA.238;100;102. Third, defendant argued that his trial attorney was ineffective because he did not "attempt to get any kind of paperwork for [Shepherd] stating…I do not have to register as a sex offender," but advised Shepherd "that the best thing to do was plead guilty and get a point reduction for lesser time." ROA.238;103. Shepherd explained that he had "to get the paperwork" showing he was not required to register in Texas after he had been released from prison and the paperwork demonstrated that Shepherd "shouldn't have been convicted at all." *Id*. Shepherd stated he told his appellate attorney about "this issue," that is, apparently, that defendant was not required to register in Texas, "but she did nothing about it and argued the wrong point in [his] appeal." *Id*.

The magistrate issued two orders to show cause requiring defendant to clarify his claims. In response to the November 18, 2014 first order to show cause, Shepherd stated, in part:

> Upon release from the federal Detention Center I was sent to Austin and was told by the federal government that ran the facility I was in to go to the Police Department Sex Offender Division and register as a sex offender. Upon going to the Austin PD I was informed after numerous hours of waiting and research done by the Sex offender team that I DO NOT have duties to Register As a sex offender in the state of Texas because my charges do no cross over or link to any that are on the paperwork of requirements by the government. And therefore there is no way for me to update my registration either if the state I reside in does not require me to do so.

ROA.113-114. Shepherd again asserted he asked his trial and appellate attorneys to specifically research whether he was required to register in Texas and had they done so they would have discovered what defendant discovered on his own after release from custody in this case, namely, that he is not required to register in Texas. ROA.239. Defendant stated: "And therefore I believe that convicting me or accepting my plea on this charge should be consider[ed] a mishap in the law and a simple mistake and I am asking that my Community supervision be dismissed and case closed." *Id*.

In response to the December 29, 2014 magistrate's second order to show cause and, specifically, in response to the language in the second order to show cause which invited defendant "to present an affidavit of a reliable third party" to support his assertion he is not required to register as a sex

offender in Texas, Shepherd submitted a letter, dated January 6, 2015, from the "managing attorney" of a Texas Department of Public Safety (at times, "DPS") legal department, in which the attorney stated defendant did not have "a legal duty to register as a sex offender" in Texas based on defendant's convictions in Arizona and Nevada. ROA.239; 121-123. On January 22, 2015, the Court ordered that defendant's § 2255 motion, and related documents, be served on the Government for response. ROA.239-40; 124.

On April 22, 2015, after one extension of time, the Government filed its response to Shepherd's motion. ROA.240; 129. The Government represented its understanding that after the Texas Third Court of Appeals' decision in *Texas Department of Public Safety v. Anonymous Adult Texas Resident*, 382 S.W.3d 531 (Tex. App.—Austin, 2012) (*Anonymous*), The Texas Department of Public Safety (DPS) changed the way in which it determined when persons convicted of sex offenses in other states were required to register as a sex offender in Texas and, based on that change, determined that Shepherd did not have a duty to register as a sex offender in Texas, contrary to its determination on or before June 13, 2012, that

Shepherd was required to register as a sex offender in Texas. *Id*.;143. Although the Government disagreed with DPS' prevailing determination that defendant did not have a duty to register as a sex offender in Texas based on either his Nevada or Arizona convictions (ROA.240 at n.33;143-146), *the Government conceded that Texas law gives DPS the authority to determine if registration is required. Id*.; 141 (emphasis added by Shepherd).

The Government argued Shepherd's plea counsel did not render deficient performance because it was objectively reasonable for plea counsel to conclude Shepherd had a duty to register as a sex offender in Texas at the time he pleaded guilty and was sentenced in this case. ROA.240-41. The Government argued, in sum, that the evidence at the time of defendant's conviction in this Court showed that: defendant had two mandatory lifetime reporting requirements in Nevada and Arizona; defendant "never attempted to register or even inquire about his obligation or status with local authorities" in Texas after moving to Texas in January 2011; the DPS correctly determined in June 2012 that defendant was required to register as a sex offender in Texas between "August of 2011 through June 15, 2012;" (ROA.148) and for the same reasons an attorney with the Texas Department

of Public Safety determined (in e-mails to the case agent dated as late as June 13, 2012) that defendant was required to register in Texas, it was reasonable for defendant's trial and appellate attorneys to conclude defendant was required to register as a sex offender in Texas such that he could be convicted of failure to register in this Court premised on a failure to register in Texas. ROA.240-41;146-149.

On May 12, 2015, Shepherd filed a reply in support of his § 2255 motion. ROA.241; 194. Shepherd presented further arguments in support of his motion and asserted:

> The District Attorney also stated that I failed to check with local law enforcement upon arriving in the state of Texas City of San Antonio. I was interviewed in person at the La Cantera mall by Sheriff office, Constables, SAPD, and Federal Marshal[]. Where at that time I told them I did go down to the police station and I was turned away because my final disposition charge did not qualify me to have to register as a sex offender. Which is the exact same thing that was said again upon release from Federal Detention in March 2014. That was the absolute first thing that I told my Attorney Clark Adams shortly after I was detained at the federal building. At that time and without doing any research he claimed I have my information wrong. I asked the SAPD if I could have it in writing back in January of 2011 when I arrived here in San Antonio. The police officers in the Sex Offender Division replied "NO you don't have to register but I can't write you a note saying that otherwise we could have everyone in the city have us write them a note for the same reason[.]" The only way

> it was even possible for me to get the paper in writing from Managing Attorney Randy S. Ortega was through the help of the parole department.

ROA.241-42;195.

The magistrate held an evidentiary hearing on Shepherd's 2255 motion on August 6, 2015. The Government called three witnesses (Deputy Nick Rose, Mr. Randy Ortega, and Mr. Clark Adams) and introduced four exhibits; Defendant introduced two exhibits. ROA.242.

C. Magistrate Judge's Report and Recommendations (R&R):

After the evidentiary hearing, the magistrate judge filed its R&R to the district court on Shepherd's 2255 motion. ROA.231. The following are the magistrate's relevant findings:

1. The Government's response to defendant's § 2255 motion failed to raise any procedural bars to Shepherd's claims, and thus, the magistrate recommended a finding that the Government had waived any objection based on procedural bars. ROA.250-51.

2. Even if the government did not waive procedural bars, the record "would support finding defendant…satisfied the 'cause and prejudice' and

'fundamental miscarriage of justice' exceptions to the procedural bar rule." ROA.251-52.

3. Shepherd's *pro se* § 2255 motion could be fairly construed as seeking relief based on a violations of defendant's Sixth (ineffective assistance of counsel) and Fourteenth Amendment (due process, related to the voluntariness of his plea) rights that resulted in a fundamental miscarriage of justice. ROA.252.

4. The Government did not provide argument and authority to show that Shepherd's arguments, evidence and proffered evidence do not satisfy the "cause" and "prejudice," and "fundamental miscarriage of justice" standards. ROA.252-53.

5. Despite Shepherd's broad argument, made in his *pro se* submissions, that he "was never required to register in Texas" such that he never should have been charged and convicted of failing to register in Texas, the record showed that the Government obtained confirmation on and before

June 13, 2012 [3] that Shepherd was required to register as a sex offender in Texas at that time based on his Arizona conviction. ROA.253-54;141-47.

6. Based on Randy Ortega's (managing attorney with DPS's offense classification department) testimony it seemed fair to conclude that Shepherd was no longer going to be required to register in Texas at any time after August 30, 2012 (a period of time that preceded the date of the plea), but it was not correct to is not correct to say Shepherd "never" was required to register as a sex offender in Texas. ROA.254.

7. Nevertheless, because Shepherd pleaded guilty on September 24, 2012, and was sentenced on December 19, 2012, the magistrate had a "significant concern" that Shepherd would not have pleaded guilty and/or would have been sentenced differently had the implications of *Anonymous* been recognized and clearly addressed at that time. *Id*.

8. Ortega testified that had he been asked on August 31, 2012 to determine whether Shepherd was required to register as a sex offender in

[3] The Government submitted copies of e-mails to its response, the last of which is dated June 13, 2012, in which the Texas Department of Public Safety (DPS) confirmed for the case agent in Shepherd's criminal investigation that Shepherd was required to register as a sex offender in Texas. ROA.253 at n.85 (citing ROA.186-189).

Texas, he knew of no reason why he would not have concluded, as he did when asked in 2014, that defendant was not required to register as a sex offender in Texas. *Id*.

9. Thus, there was evidence to show that by the time Shepherd pleaded guilty and was sentenced it was no longer a crime for defendant to live in Texas without registering as a sex offender in Texas. Further, the evidence indicated that at the time of Shepherd's plea hearing and sentencing, no one (not the case agent, prosecutor, defense counsel, defendant, Probation Officer, District Judge) understood at the time that it was no longer a crime for defendant to fail to register as a sex offender in Texas. ROA.254-55.

10. Despite this global ignorance, Shepherd had been insisting to his attorney that he was not required to register as a sex offender in Texas and pleaded guilty only because his attorney told him the Government could prove he was required to register as a sex offender in Texas and it would be better to plead guilty and build a case for leniency at sentencing. ROA.255.

11. Although both the criminal complaint and the indictment clearly stated dates for the offense, the factual basis in support of Shepherd's plea of

guilty did not clearly limit the time period to that charged in the indictment and suggests defendant's failure to register extended into the present (as of the time of the plea); the magistrate noted that this same defect existed with the description of the offense conduct in the PSR. Thus, further noted the magistrate, there was cause for concern that Shepherd would not have pleaded guilty had he known that it was no longer a crime for him to fail to register as a sex offender in Texas as of the time of the plea. *Id*.

12. The magistrate determined that Shepherd satisfied the "cause," "prejudice," and "manifest injustice" tests, on the assumption that the Government did not waive procedural bar.

13. Based on its findings, and for the purpose of determining whether Shepherd "Entered a Knowing, Intelligent and Voluntary Plea and Received Effective Assistance of Trial…Counsel" (*Id*.) the magistrate made the following "threshold observations":

(1) The Government appeared to concede that at present, Shepherd was not required to register as a sex offender in Texas based on any of his prior convictions; (ROA.256)

(2) The Government appeared to concede that the DPS based its determination that defendant is not now required to register as a sex offender in Texas on the Texas Third Court of Appeals' decision in *Anonymous* that became final on August 30, 2012; (*Id*.)

(3) Mr. Ortega, the manager of the DPS section charged with the responsibility of making sex offender registration decisions for Texas, testified he knows of no reason why, if defendant had asked about his duty to register in Texas on and after August 31, 2012, defendant would not have been told he was not required to register as a sex offender in Texas based on any of his prior convictions; (*Id*.) [4] and

(4) Shepherd's plea hearing was held on September 24, 2012 (approximately one month after the decision in *Anonymous*); the District Judge accepted the guilty plea the same day; and the District Judge sentenced Shepherd on December 19, 2012, with the judgment and

[4] The magistrate noted that "Ortega, the manager in charge of the Texas Department of Public Safety section charged with the responsibility of making decisions on sex offender register, testified that if anyone had contacted him on and after August 31, 2012, there is no reason for him to conclude that he would not have made the same determination he made, when asked, in 2014, namely that, based on *Anonymous Adult Texas Resident*, defendant was not required to register as a sex offender in Texas." ROA.256 at n.89.

commitment order signed, filed and entered on December 21, 2013 (approximately four months after the decision in *Anonymous*). ROA.266

14. When Shepherd pleaded guilty to the one-count indictment which charged him with failing to register between on or about "August 2011 and June 15, 2012," the Government provided a factual basis in which it stated it "would prove" certain facts. The magistrate noted that the statement of facts in support of the plea contained two "ambiguities" of "serious concern in this proceeding." ROA.257.

15. First, the Government stated it would prove that "[b]oth of those convictions [referring to defendant's convictions in Arizona and Nevada] qualify Mr. Shepherd as a sex offender under the Sex Offender Registration and Notification Act," but the evidence showed that on or about June 13, 2012, DPS determined defendant was required to register as a sex offender in Texas based only on defendant's prior conviction in Arizona. *Id.*

16. Second, the factual basis states that "at no time did Mr. Shepherd register as a sex offender anywhere in the state of Texas," with the context unclear as to whether defendant's failure to register applied only to the time period "between August 2011 and February of 2012" (the period referenced

in the factual basis) or to between "August 2011 and June 15, 2012" (the period alleged in the indictment) or was a reference to a purported failure to register continuing through the time of the plea hearing. *Id.*

17. Based on the record developed in the § 2255 hearing, reasoned the magistrate, it can be said only that on June 13, 2012, the DPS determined defendant had a duty to register in Texas based on Shepherd's Arizona conviction (not his Nevada conviction) and on and after August 30, 2012, the DPS would have told anyone who had asked that defendant had no duty to register as a sex offender in Texas. ROA.257-258.

18. Given the stipulation by Shepherd and the government that defendant would have proceeded to trial if he had known at the time of his plea hearing he was not (no longer) required to register as a sex offender in Texas, the failure of the factual basis to clearly limit the time period to that before August 20, 2012 is material and affects the knowing, voluntary, and intelligent basis for the plea. ROA.258. [5]

[5] The magistrate noted that "[a]t the § 2255 hearing, defense counsel raised several points about inconsistencies or lack of clarity in defendant's conviction papers for his Arizona conviction. For example, the description of the offense of conviction in the Arizona plea and sentencing documents make no reference to a "minor" as an element of the offence (citing docket no. 60-1 at 3, 6; Government Exhibit 1 at 3, 6). Thus, even

18. Defendant has consistently argued he only pleaded guilty because his attorney told him the Government could prove defendant was required to register as a sex offender. Also, defense counsel testified he would not have advised defendant to plead guilty on September 24, 2012, but would have recommended defendant pursue other steps (for example, filing a motion to dismiss the indictment; preparing information to mitigate/limit guilt and sentencing), supporting the finding that the failure to know about *Anonymous* and consider its impact was material and prejudicial. ROA.258-59;420-21.

19. There is evidence to show that, in spite of Shepherd's "sworn declarations…when pleading guilty that he understood 'the nature of the charge,' [Shepherd] agreed with the Government's factual basis, and was satisfied with his attorney's representation of him (*See* ROA.259 at n.96)," nevertheless, Shepherd did not enter a knowing, intentional, and voluntary plea with "proper advice" from, and the effective assistance of, trial counsel,

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though both documents refer to a "class 6 felony offense," the documents do not show that defendant was not convicted of what would be misdemeanor offense. In part, Mr. Ortega considered these inconsistencies when he concluded that the elements of the Arizona offense were not substantially similar to a Texas offense that required defendant to register as a sex offender in Texas. ROA.258 at n. 84.

and that defendant's guilty plea was wrongfully induced—however innocently— by information conveyed to defendant by defense counsel (based on information provided to defendant in discovery) that defendant was required to register as a sex offender in Texas without limitation as to the time period. The failure of this record to show that defendant, the prosecutor, defense counsel, and the District Judge understood defendant was pleading guilty and being sentenced for something that was no longer a crime (for him) at the time of the entry of the guilty plea and sentencing is unsettling and, after careful consideration, merits § 2255 relief. ROA.259-60.

20. The magistrate concluded that Shepherd's § 2255 motion should be granted and his conviction, sentence, and plea of guilty for failing to register as a sex offender under federal law based on defendant's failure to register as a sex offender in Texas be set aside. ROA.260.

D. Shepherd's Objection to the Magistrate's R&R:

On August 21, 2015, Shepherd filed his "Movant-Defendant's Objection to the Magistrate Judge's Report and Recommendation." ROA.263. Shepherd agreed with the recommendation to grant relief, but

objected to the magistrate's failure to find that Shepherd was actually innocent of the offense of failing to report as a sex offender in Texas. ROA.263-274.

The government filed no objections to the magistrate's report.

E. The District Court's Order:

On September 1, 2016, the district Court entered its order rejecting the magistrate judge's recommendation that Shepherd's conviction be vacated. ROA.275. The Court conducted a *de novo* review of the magistrate judge's R&R. ROA.278.

Of note, the Court did not analyze Shepherd's ineffective assistance and due process (voluntariness) arguments. Rather, the District Court determined that "the DPS erred in concluding in January 2015 that Shepherd was not required to register" because "

R. S. § 13-1403 is substantially similar to Texas Penal Code § 21.11." ROA.280. It reasoned that "Unlike *Texas Dept. of Public Safety v. Anonymous Adult Texas Resident*, which dealt with section 21.11(a)(1)(engaging in sexual contact), the proper analysis in this case begins with section 21.11(a)(2), which states: '(a) A person commits an

offense if, with a child younger than 17 years of age, whether the child is of the same or opposite sex, the person: … (2) with intent to arouse or gratify the sexual desire of any person: (A) exposes the person's anus or any part of the person's genitals, knowing the child is present.'" *Id*. "Comparing the elements of the Texas and Arizona statutes," the Court reasoned, "the elements display a high degree of likeness and are substantially similar with respect to the individual or public interests protected and impact of the elements on the seriousness of the offenses." ROA.281. The Court denied Shepherd's motion to vacate, and ordered the case closed. ROA.281.

F. Shepherd's Request for a Certificate of Appealability (CoA):

On September 7, 2015, Shepherd requested that the district court issue a CoA on the following questions:

1. Whether Mr. Shepherd's lack of knowledge about DPS' change in position (which relates back to August 31st, 2012, as per testimony presented by DPS Sex Offender Registration Managing Attorney Randy Ortega), that his Arizona conviction did not, after all, require that he report as a sexual offender in Texas, at a time before he pled guilty (on September 24, 2012) to the federal offense of failure to register, render his plea involuntary, as determined and recommended by Magistrate Judge Pamela Mathy, in her R & R?

2. Whether Mr. Shepherd's lack of knowledge about DPS' change in position (which relates back to August 31st, 2012, as per testimony presented by DPS Sex Offender Registration Managing Attorney Randy Ortega), that his Arizona conviction did not, after all, require that he report as a sexual offender in Texas, at a time before he pled guilty (on September 24, 2012) to the federal offense of failure to register, render him "actually innocent" of the federal offense?

ROA.283;285.

G. District Court's Granting of CoA on All Claims Presented:

On October 15, 2015, the District Court granted Shepherd's motion for a certificate of appealability (ROA.283) on whether his plea was involuntary, and whether he was actually innocent of the offense of conviction. ROA.283-87. The Court explained:

> Reasonable minds could disagree with this Court's conclusion that movant is not entitled to relief from his sentence pursuant to Section 2255. In fact, the Magistrate Judge and this Court reached vastly different conclusions regarding whether movant was entitled to relief under Section 2255. Under such circumstances, movant is entitled to a CoA on all of his claims herein.

ROA.295-97.

SUMMARY OF THE ARGUMENTS

I. SHEPHERD'S PLEA OF GUILTY WAS NOT KNOWING AND VOLUNTARY:

Shepherd's plea to the offense of failing to report as a sex offender in Texas was not knowing and voluntary. From the outset, Shepherd contested, based on his own research, a requirement that he register as a sex offender upon arriving in Texas. He expressed this concern to his plea lawyer, who, after reviewing discovery, advised him erroneously, that it would be in Shepherd's best interest if he agreed to plead guilty, because the government could, without qualifications, prove his guilt, and thus that by forgoing a jury trial, he would receive more lenient punishment at his sentencing.

Shepherd agreed to plead guilty, and accepted as true the government's representations that his convictions from both Nevada and Arizona were both reportable, and that his obligation to report extended to the day that he pled guilty. Shepherd was sentenced to, and served 24 months in the bureau of prisons. He only learned after he was released from prison that his only reportable conviction was from Arizona, and that by the time he pled guilty, his Arizona conviction was no longer a reportable offense. Neither Shepherd, his lawyer, the District Court, the government or the probation department were aware of this at the time of Shepherd's plea.

Therefore, Shepherd's plea was rendered involuntary both because of his lawyer's faulty advice, and because of the global ignorance by all parties about the non-reporting status of his prior conviction at the time of his plea. Both Shepherd's plea lawyer, and the government, stipulated that had Shepherd learned that his offense was no longer reportable at the time of his plea, he would have chosen to contest his non-reporting charge *via* jury trial.

II. SHEPHERD IS ACTUALLY INNOCENT:

Shepherd discovered new, reliable evidence of his innocence, when he discovered not only that DPS had changed its position about the reporting status of his prior conviction, but that the process followed by the DPS managing attorney who was entrusted with classifying his conviction as reportable was largely discretionary, and devoid of any proper and reviewable standards, which would have allowed him to contest this process before a jury. Shepherd has a gateway to an innocence finding given the his lawyer's ineffective assistance, and his otherwise unconstitutional plea of guilty. Moreover, it was more likely than not that had Shepherd contested the process by which his reporting status was determined by the jury at trial, no reasonable juror would have convicted him.

ARGUMENTS AND AUTHORITIES:

I. SHEPHERD'S PLEA OF GUILTY WAS NOT KNOWING AND VOLUNTARY:

A. Introduction to Legal Arguments:

Neither Shepherd, his plea lawyer, the government, or the District Court were aware that by the time Shepherd pled guilty to the offense of failing to report as a sex offender in Texas for a prior Arizona conviction, the Texas Attorney General's Office had determined that the Arizona conviction was no longer a reportable offense. Thus, Shepherd's plea was rendered involuntary *via* a combination of Shepherd's lawyer's inaccurate advise about Shepherd's reporting duties, and the ignorance by Shepherd and all parties involved in his plea process, of the Attorney General's posture on the subject, *at the time of his plea*. Because the government has conceded, and the record amply supports Shepherd's contention that he would not have pled guilty had he discovered the Attorney General's new position at the time of his plea, this Court should vacate his conviction, and grant him a new trial.

B. Standard of Review:

Before a Movant may appeal the denial of a motion to vacate sentence filed under Section 2255, the Movant must obtain a Certificate of Appealability ("CoA"). *Hohn v. United States*, 524 U.S. 236, 239-40 (1998); *United States v. Hall*, 455 F.3d 508, 513 (5th Cir. 2006), *cert. denied*, 549 U.S. 1343 (2007); 28 U.S.C. §2253(c)(1)(B). Appellate review is limited to the issues on which a CoA is granted. *Larry v. Dretke*, 361 F.3d 890, 896 (5th Cir. 2004) (holding a CoA is granted on an issue-by-issue basis, thereby limiting appellate review to those issues), *cert. denied*, 543 U.S. 893 (2004). Shepherd's requested a CoA on the claim that his plea was involuntary, to wit:

> Whether Mr. Shepherd's lack of knowledge about DPS' change in position (which relates back to August 31st, 2012, as per testimony presented by DPS Sex Offender Registration Managing Attorney Randy Ortega), that his Arizona conviction did not, after all, require that he report as a sexual offender in Texas, at a time before he pled guilty (on September 24, 2012) to the federal offense of failure to register, render his plea involuntary, as determined and recommended by Magistrate Judge Pamela Mathy, in her R & R?

ROA.285. The District Court granted the CoA on this ground. ROA.295-97.

The district court's interpretation of constitutional questions raised in an appeal are reviewed *de novo*. *Sixta v. Thaler*, 615 F.3d 569 (5th Cir. Tex. 2010) (citing *United States v. Perez-Macias*, 335 F.3d 421, 425 (5th Cir. 2003)). This Court "review[s] the district court's factual findings relating to a § 2255 motion for clear error and its conclusions of law de novo." *United States v. Redd*, 562 F.3d 309, 311 (5th Cir. 2009).

C. Procedural Bars to a 28 USC § 2255 Relevant to Shepherd's Involuntary Plea Claims:

1. Ineffective Assistance of Counsel Claims:

As noted by the magistrate, "It is well settled that where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in a § 2255 motion only if the movant can first demonstrate either (1) 'cause' and 'prejudice,' or (2) that he is 'actually innocent' of the crime for which he was convicted." ROA.244 at n.49 (citing *United States v. Torres*, 163 F.3d 909, 911 (5th Cir. 1999) (citing *United States v. Sorrells*, 145 F.3d 744, 749 (5th Cir. 1998)); *United States v. Mackey*, 299 F. Supp. 2d 636, 639-640 (E.D. La. 2004).

Ineffective assistance of counsel claims, if proven, establish the cause and prejudice necessary to overcome a procedural default. ROA.244 at n. 50

(citing *United States v. Teshima-Jiminez*, No. Crim. 97-087, 1999 WL 600326, at *3 (E.D. La. Aug. 5, 1999) (citing *United States v. Acklen*, 47 F.3d 739, 741 (5th Cir. 1995)). [6] Thus Shepherd's ineffective assistance of plea and appellate counsel claims in his motion were not procedurally barred. [7] Specifically, Shepherd argued, and the magistrate recognized his claim to be that his plea was rendered involuntary, by virtue of his counsel's incorrect advise about his obligation to register. [8]

2. Other Constitutional Claims – Stand-Alone Voluntariness:

A defendant "may not raise an issue, regardless of whether constitutional or jurisdictional in nature, for the first time on collateral review without showing both 'cause' and 'actual prejudice' resulting from the error." ROA.243 n. 45 (citing *United States v. Patten*, 40 F.3d 774, 776

[6] The magistrate correctly noted that "…under the settled law of this Circuit, defendant's claim of ineffective assistance of trial and appellate counsel is not subject to the procedural bar rule." ROA.250 at n. 74.

[7] In this appeal, Shepherd complains of the effectiveness of his plea counsel's assistance, but does not present an ineffective assistance challenge to his appellate counsel's representation.

[8] *See Smith v. Estelle*, 711 F.2d 677, 682 (5th Cir. 1983) (explaining that "once a guilty plea has been entered, all nonjurisdictional defects in the proceedings against a defendant are waived (citation omitted)" including "all claims of ineffective assistance of counsel (citation omitted)…*except* insofar as the alleged ineffectiveness relates to the voluntariness of the giving of the guilty plea…". (citation omitted) (original emphasis).

(5th Cir. 1994), *cert. denied*, 515 U.S. 1132, 115 S. Ct. 2558 (1995)). "For a collateral attack under § 2255, 'a distinction is drawn between constitutional or jurisdictional errors on the one hand, and mere errors of law on the other.'" ROA.243 at n. 46 (citing *United States v. Shaid*, 937 F.2d 228, 231 (5th Cir. 1991); *Castanon v. United States*, No. EP-05-CA-178-DB, 2005 WL 1958369, at *3 (W.D. Tex. Aug. 9, 2005). Thus, constitutional claims, such as a due process challenge to the voluntariness of a plea that is not appended to counsel's ineffectiveness, that could have been raised on direct appeal can be procedurally barred from review in a § 2255 proceeding. To the extent that Shepherd's "pure" involuntary plea claim is procedurally barred from being presented for the first time on a 2255 motion, the magistrate correctly noted that objections by the government based on a procedural bar can be, and were waived in Shepherd's proceedings. ROA.251 at n. 78 (citing *Sotirion v. United States*, 617 F.3d 27, 32 (1st Cir. 2010) (upon Government's failure to object, petitioner may challenge validity of appellate waiver despite failure to raise claim on direct appeal); *Welch v. United States*, 604 F.3d 408, 413 (7th Cir. 2010) (petitioner could raise new issue not presented on direct appeal when Government did not

object); *Howard v. United States*, 374 F.3d 1068, 1073 (11th Cir. 2004) (same)). [9] Restated, along with counsel's ineffective assistance in rendering incorrect advice (which rendered his plea involuntary), the magistrate also appears to have identified another of Shepherd's claim as alleging, as a stand-alone voluntariness challenge, that his plea was not "[k]nowing, [i]ntelligent and [v]oluntary," (see ROA.255, par. B), and thus in violation of the Due Process Clause of the 14th Amendment. The magistrate determined that the government waived a procedural bar challenge to this claim. The government did not contest the magistrate's conclusion, nor did it object to this finding during the fourteen days allotted to file any such objections with the District Court. *See* ROA.260-61 (citing 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)).

But even if not waived, the magistrate correctly noted that Shepherd could still raise the voluntariness of his plea, *via* a satisfactory showing of

[9] The magistrate also recognized Fifth Circuit precedent holding that "upon the Government's failure to object, the Court may raise procedural bar when petitioner had notice of the issue of procedural bar, had reasonable opportunity to argue against the bar and the Government had not intentionally waived its objection." ROA.251 n. 78 (citing *United States v. Willis*, 273 F.3d 592, 597 (5th Cir. 2001)). Other than the magistrate judge's discussion of the government's waiver of any procedural bars, at no time was Shepherd put on notice by the government of the procedural bars, nor did the government, at any point during the life of the 2255 trial proceedings, invoke any such bar.

"cause." ROA.251 at n. 79 (citing *McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991) ("a showing that the factual or legal basis for a claim was not reasonably available to counsel" as well as "constitutionally '[i]neffective assistance of counsel'" are "cause.") (citations omitted). It is undisputed that neither Shepherd, his plea lawyer, the government, the probation department, the District Court, nor anyone involved in Shepherd's plea process were aware that the Department of Public Safety no longer required Shepherd to report his Arizona conviction in Texas. Thus Shepherd satisfies the "cause and prejudice" exception to a 2255 procedural bar.

3. District Court's Order:

Notably, the District Court did not address the magistrate's findings and recommendations on the subject of plea counsel's ineffective assistance of counsel, and its relationship to his claim that is plea was involuntary, nor did the District Court otherwise address the voluntariness of Shepherd's plea, or, for that matter, his actual innocence claim. Neither did the District Court address the prejudice that the combination of Shepherd's counsel's ineffective advice, and Shepherd's ignorance (and that of all parties involved) of his reportability status at the time of his plea caused Shepherd;

that is, that but for these factors, Shepherd would have undoubtedly contested his charge *via* jury trial.

Rather, conducting its own "*de novo*" analysis, the Court simply disagreed with Randy Ortega's analysis and conclusion, and determined that the Arizona and Texas statutes were sufficiently similar as to require that Shepherd report upon arriving in Texas. But this did not remedy the fact that, but for Shepherd's failure to know that Texas no longer required him to report at the time of his plea, he would not have pled guilty and would certainly have contested his case *via* jury trial, which is all that he had to prove under the *Hill v. Lockhart* ineffective assistance of counsel analysis applicable to guilty pleas (argued below).

5. Preamble to Involuntariness of Plea Arguments:

Shepherd will next argue how his plea was rendered involuntary on two closely related, yet legally distinct grounds. He will first argue that his plea was rendered involuntary by virtue of his lawyer's ineffective assistance of counsel, in giving him erroneous advise that led him, despite Shepherd's resistance, to plead guilty.

His second argument is that his plea was involuntary, as a stand-alone argument, simply by virtue of the fact that neither he, nor any of the parties - including the District Court - were aware that he was no longer required to register under Texas law, an argument that merits full consideration by this Court, given the government's waiver of a procedural bar, or alternatively, because Shepherd satisfied, as found by the magistrate, the "cause and prejudice" exception.

D. Involuntariness of Plea as a Result of Ineffective Assistance of Counsel:

In *Hill v. Lockhart*, 474 U.S. 52, 56 (1985), the United States Supreme Court held that the two part *Strickland v. Washington*, 466 U.S. 668 (1984) test applies to challenges to guilty pleas based on ineffective assistance of counsel. *LeDee v. Warden, Winn Corr. Ctr.*, CIVIL ACTION NO. 07-1190 SECTION P at *27 (W.D.La. 2008) (citing *Hill v. Lockhart*, 474 U.S. at 58 (1985)). Thus, under both *Hill* and *Strickland*, in order to establish ineffective assistance of counsel, a petitioner who attacks his guilty plea raising a claim of ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Id*. (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "In

the context of guilty pleas, the 'prejudice' requirement 'focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id*. at *28 (citing *Hill* at 59 (1985)). Thus, petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty." *Id*.

Shepherd argued, as recognized by the magistrate, that his plea was rendered involuntary by virtue of his lawyer's ineffective assistance. Specifically, that despite Shepherd's "insisting to his attorney that he was not required to register as a sex offender in Texas and pleaded guilty only because his attorney told him the Government could prove he was required to register as a sex offender in Texas and it would be better to plead guilty and build a case for leniency at sentencing." ROA.255. It matters not that counsel's erroneous advice was given "however innocently (ROA.259)"; the operative concept is that Shepherd relied on it, as the producing cause of his decision to plea guilty.

E. Plea was not Knowingly, Intelligently and Voluntarily Made:

A plea of guilty must be a voluntary, knowing, and intelligent act. ROA.28 at n.95 (citing *Brady v. United States*, 397 U.S. 742, 747-48 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *Patton v. United States*, 281 U.S. 276, 312 (1930)).” “To be an intelligent act, it must be ‘done with sufficient awareness of the relevant circumstances and likely consequences.’” *Id*. (citing *McMann v. Richardson*, 397 U.S. 759, 766 (1970) (quoting *Brady*, 397 U.S. at 748). Because the government did not raise a procedural bar to Shepherd’s involuntary plea allegation, this Court should consider it *de novo*. Shepherd presents several arguments in support of his stand-alone involuntariness claim.

First, Shepherd did not know that he was no longer required under Texas law to report his Arizona conviction, by the time he pled guilty. Not only was he ignorant of this fact, so was his lawyer, the District Court, the government, and even the probation department. As noted in his ineffective assistance ground argument, Shepherd harbored doubts about whether he was required to report at all, and, as confirmed by his lawyer, and as conceded by the government, had Shepherd learned of the Attorney

General's post-*Anonymous* posture on his obligation to report his Arizona conviction, he would have proceeded to try his case to a jury.

Second, as noted by the magistrate, as a result of his ignorance of Texas law post-*Anonymous*, Shepherd pled guilty to a factual basis that alleged that he was guilty of failing to report at a time *after Anonymous* was published. ROA.256-57. As explained by the magistrate, "[w]"hen defendant pleaded guilty to the one-count indictment which charged him with failing to register between on or about 'August 2011 and June 15, 2012,' the Government provided a factual basis in which it stated it 'would prove' certain facts." ROA.257. The statement of facts in support of the plea contained "two 'ambiguities' that [were] of serious concern" to her at Shepherd's 2255 motion hearing. *Id*. "First," she noted, "the Government stated it would prove that '[b]oth of those convictions [referring to defendant's convictions in Arizona and Nevada] qualif[ied] Mr. Shepherd as a sex offender under the Sex Offender Registration and Notification Act,' but the evidence show[ed] that on or about June 13, 2012, Texas Department of Public Safety determined defendant was required to register as a sex

offender in Texas based only on defendant's prior conviction in Arizona." *Id*.

"Second," she added, "the factual basis state[d] that 'at no time did Mr. Shepherd register as a sex offender anywhere in the state of Texas,' with the context unclear as to whether defendant's failure to register applied only to the time period 'between August 2011 and February of 2012' (the period referenced in the factual basis) or to between 'August 2011 and June 15, 2012' (the period alleged in the indictment) or was a reference to a purported failure to register continuing through the time of the plea hearing." *Id*. "Based on the record developed in the § 2255 hearing," she determined that "it can be said only that on June 13, 2012, the Texas Department of Public Safety determined defendant had a duty to register in Texas based on defendant's Arizona conviction (not his Nevada conviction) and on and after August 30, 2012, the Texas Department of Public Safety would have told anyone who had asked that defendant had no duty to register as a sex offender in Texas." ROA.257-58. Clearly, Shepherd would not have admitted to have been guilty of non-reporting in the period after *Anonymous*

was published, had he been aware that the opinion changed, as per Ortega, DPS's determination that his offense of conviction was no longer reportable.

The magistrate also pointed out that at Shepherd's 2255 motion hearing, the defense (undersigned) counsel raised "several points about inconsistencies or lack of clarity in defendant's conviction papers for his Arizona conviction." ROA.258 at n. 94. "For example," she explained, "the description of the offense of conviction in the Arizona plea and sentencing documents ma[d]e no reference to a "minor" as an element of the offence. *Id*. (citing docket no. 60-1 at 3, 6; Government Exhibit 1 at 3, 6). "Thus," she noted, "even though both documents refer to a 'class 6 felony offense,' the documents do not show that defendant was not convicted of what would be misdemeanor offense." *Id*. "In part," she added, "Mr. Ortega considered these inconsistencies when he concluded that the elements of the Arizona offense were not substantially similar to a Texas offense that required defendant to register as a sex offender in Texas." *Id*. Had Shepherd known this information, his resolve to try his case would have been redoubled, because it would have actually provided him with a defense at trial that the

analysis conducted by DPS did not support a reporting requirement for the Arizona conviction.

In light of the parties' stipulation that Shepherd would have proceeded to trial if he had known at the time of his plea hearing that was "no longer" required to register as a sex offender in Texas, "the failure of the factual basis to clearly limit the time period to that before August 20, 2012 [wa]s material and affect[ed] the knowing, voluntary, and intelligent basis for the plea." ROA.258.

Lastly, the magistrate noted that Shepherd "consistently argued" that he pled guilty only because his lawyer's advised him that the Government could prove that Shepherd was required to register as a sex offender. ROA.259. Moreover, plea counsel also testified "that he would not have advised [Shepherd] to plead guilty on September 24, 2012, but would have recommended defendant pursue other steps (for example, filing a motion to dismiss the indictment; preparing information to mitigate/limit guilt and sentencing)," which supported her finding that Shepherd's "failure to know about *Anonymous* and consider its impact was material and prejudicial." *Id*.

In sum, the magistrate found "evidence to show [Shepherd] did not enter a knowing, intentional, and voluntary plea with 'proper advice' from, and the effective assistance of, trial counsel, and that defendant's guilty plea was wrongfully induced—however innocently— by information conveyed to defendant by defense counsel (based on information provided to defendant in discovery) that defendant was required to register as a sex offender in Texas without limitation as to the time period." *Id*.

Respectfully, it is beyond cavil that Shepherd did not enter a knowing, intelligent and voluntary plea to the offense of failing to report as a sex offender in Texas. He thus merits a new trial.

II. SHEPHERD IS ACTUALLY INNOCENT:

A. Standard of Review:

Shepherd requested a CoA on his claim that he was actually innocent of the reporting offense, to wit:

> Whether Mr. Shepherd's lack of knowledge about DPS' change in position (which relates back to August 31st, 2012, as per testimony presented by DPS Sex Offender Registration Managing Attorney Randy Ortega), that his Arizona conviction did not, after all, require that he report as a sexual offender in Texas, at a time before he pled guilty (on September 24, 2012) to the federal offense of failure to register, render him "actually innocent" of the federal offense?

ROA.285. The District Court granted Shepherd's requested CoA on this claim as well. ROA.295-297.

As with his previous issue on appeal, the district court's interpretation of constitutional questions raised in an appeal are reviewed *de novo*; it reviews the district court's factual findings relating to a § 2255 motion for clear error and its conclusions of law *de novo*. *Supra* at 31.

B. Procedural Bar to 28 USC § 2255 Motions Relevant to Shepherd's Actual Innocence Claim:

Other than claims of Ineffective Assistance of Counsel, or error of constitutional magnitude, any other type of error may not be raised in a collateral attack, unless the defendant demonstrates that the error could not have been raised on direct appeal, and if condoned would result in a complete miscarriage of justice. ROA.244 at n. 48 (citing *Patten*, 40 F.3d at 776; *United States v. Pierce*, 959 F.2d 1297, 1301 (5th Cir. Tex. 1992) (citation omitted)).

In order for a habeas corpus petitioner to avoid a procedural default by showing a fundamental miscarriage of justice, the petitioner must assert his actual innocence by showing that "a constitutional violation has probably

resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Glover v. Cain*, 128 F.3d 900 at 904 (5th Cir. 1997). The magistrate determined that Shepherd's "pro se § 2255 motion fairly can be construed as seeking relief based on a violations of defendant's Sixth and Fourteenth Amendment rights that resulted in a fundamental miscarriage of justice." ROA.252. [10] The magistrate further expressed that "[its] report include[d] no recommendation on whether the separate "actual innocence" exception to the procedural bar rule applie[d]." ROA.252 at n.80. At the conclusion of the 2255 hearing, the undersigned counsel specifically asked the magistrate judge whether Shepherd's 2255 motion properly raised an actual innocence ground for relief, and the magistrate responded that Shepherd "probably alleged enough in his *pro se* submission to raise the issue." ROA.438. The government also did not object to this finding. Shepherd's actual innocence claim is thus properly before this Court.

[10] As noted, "[i]n the evidentiary hearing held on August 6, 2015, the parties entered into a 'stipulation' that had defendant known the Texas Department of Public Safety would determine defendant was not required to register as a sex offender in Texas based on a Texas state court decision that became final on August 30, 2012, defendant would not have pleaded guilty in this case and would have proceeded to trial." ROA.252 at n.82.

C. Actual Innocence:

1. Introduction to Legal Arguments:

This issue on appeal concerns the "actual innocence" gateway to federal habeas review applied in *Schlup v. Delo*, 513 U.S. 298 (1995) and further explained in *House v. Bell*, 547 U.S. 518 (2006), which "enables habeas petitioners to overcome a procedural bar to consideration of the merits of their constitutional claims." *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013). Specifically, "*Schlup's* claim of innocence does not by itself provide a basis for relief," but depends instead, "critically" on the validity of his constitutional claim, which in his case, are his ineffective assistance of counsel, and stand-alone (unwaived) involuntariness of his plea claims. *See Schlup*, at 315. *Schlup's* claim of innocence is thus "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* (citations omitted). "In an 'extraordinary case,' where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Id*. at 321. (citing

Carrier at 496 (other citations omitted). The relief afforded a successful *Schlup* claim is not outright acquittal, but a new trial.

Recently, the Fifth Circuit discussed the type of evidence that must be presented in order to satisfy the *Schlup* standard:

> Proving such a claim is daunting indeed, requiring the petitioner to show, as a factual matter, that he did not commit the crime of conviction. The petitioner must support his allegations with new, reliable evidence that was not presented at trial and must show that it was more likely than not that no reasonable juror would have convicted him in the light of the new evidence. Such new, reliable evidence may include, by way of example, exculpatory scientific evidence, credible declarations of guilt by another, trustworthy eyewitness accounts, and certain physical evidence.

McGowen v. Thaler, 675 F.3d 482, 499-500 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 647, 184 L. Ed.2d 482 (2012). But "the habeas court's analysis is not limited to such evidence." *House*, 547 U.S. at 537. Rather, "the habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *Id*. at 538 (internal quotation marks and citation omitted). In doing so, the Court may assess the credibility of the witnesses who testified at the applicant's trial. *Id*. (citation omitted).

2. New, Reliable Evidence:

Shepherd presented new, reliable evidence that was not reasonably available at the time of his plea. Specifically, he found out that he was not required to register in Texas after he had been released from prison.

> "Upon release from the federal Detention Center I was sent to Austin and was told by the federal government that ran the facility I was in to go to the Police Department Sex Offender Division and register as a sex offender. Upon going to the Austin PD I was informed after numerous hours of waiting and research done by the Sex offender team that I DO NOT have duties to Register As a sex offender in the state of Texas because my charges do no cross over or link to any that are on the paperwork of requirements by the government. And therefore there is no way for me to update my registration either if the state I reside in does not require me to do so.

ROA.239 (citing ROA.113-14).

D. <u>Legal Arguments</u>:

Mr. Shepherd's facts support a claim of actual innocence. Clearly, he could not have been found guilty of failing to report at any time after *Anonymous* was published. Though the magistrate included no recommendation as to whether the actual innocence exception to the procedural bar rule applied in Shepherd's case, and further expressed that her "report does not conclude defendant could not have been successfully

prosecuted for failure to register as a sex offender in Texas between 'on or about August 2011 and continuing through June 15, 2012, as charged in the indictment (ROA.260 at n.98),'" this finding does not preclude a finding of actual innocence by this Court. Shepherd's burden is not to prove that a conviction with the new evidence is not possible *at all*, but that it was more likely than not that no reasonable juror would have convicted him in the light of the new evidence. For the following reasons, he meets this burden. To answer this inquiry, Shepherd will discuss the vague, and substantially discretionary process behind DPS's decision that a foreign conviction requires registration in Texas, as explained by Randy Ortega at Shepherd's hearing.

1. A Vague Standard:

Randy Ortega was the Managing Attorney for the crime records service with the DPS, in charge of making the determinations about sex-offender registration, since the fall of 2011. ROA.380. Prior to June of 2012, the duties fell on one of his staff, Michelle Galaviz, who at the time of the 2255 hearing had left for other employment. *Id*. Explaining how it was that Shepherd would have been required to register as a sex offender in June

of 2012, Ortega stated that under Chapter 62 of the Texas Code of Criminal Procedure (TCCP) (subdivision 003), the legislature requires the DPS to make the determination if the elements of an out of state statutory scheme are substantially similar to a Texas reportable conviction. ROA.281. He added that though the legislature does not assign the task to an attorney, the "department" in its wisdom, decided to have legal counsel make that determination. *Id*. TCCP Section 62.005, subdivision 5, gives a list of "about 18 or so offenses," and "if an out of state offense is substantially similar to an offense that's on that list, there is a duty to register based on substantial similarity." *Id*. Ortega determined that "back in 2012", Shepherd was required to register "because at that time the department was allowed to look at facts in any sex offender registration case. And the facts of that case are substantially similar to behavior that would otherwise be qualified as a reportable conviction in the state of Texas." ROA.383. But "the power to do so or the discretion to look at facts," he claimed, "was restricted," after Galaviz' initial determination, in the *Anonymous* opinion. *Id.* He explained that what *Anonymous* did was require DPS to "look at the elements alone." Once "you can look at the elements alone and determine that the out of state

offense is substantially similar," he explained, "the analysis stops there." ROA.384. Conversely, "[i]f you look at the elements alone and none of the elements are substantially similar to a Texas reportable conviction, then the analysis stops there. There's no duty." *Id*. Basically, he added, *Anonymous* was "the case that changed some of the jurisprudence as to how the department makes the determinations." *Id*. Ortega agreed, after continued questioning by the magistrate, that Shepherd did not have to report as of August 31, 2012. ROA.387.

2. The Anonymous Myth:

But while Ortega testified that the law "changed," after *Anonymous* was published, a close analysis of *Anonymous*, and other controlling Texas cases rebuff this contention. Ortega's allegation can be deconstructed by a simple legal analysis of the holdings in each of the opinions discussed during the hearing, and about which counsel vigorously cross-examined Ortega. Shepherd submits that Ortega's response was an attempt to justify his predecessor's determination that Mr. Shepherd was legally required to register as a sex offender at a time before August 30th, 2012, in an effort to

leave undisturbed the initial determination that Shepherd had a duty to report at some point in the past. The following illustrates this point:

In *Anonymous*, the Austin Court of Appeals wrote:

> The DPS contends that…[b]ased on *Texas Department of Public Safety v. Garcia*, 327 S.W.3d 898 (Tex. App.—Austin 2010, *pet._denied*)…we must always consider the underlying conduct in determining whether the elements of another state's statute are substantially similar to the elements of a reportable SORA offense if conduct that constitutes a violation of the greater offense could satisfy the elements of the lesser offense. Consequently, on appeal, the DPS asserts that the trial court erred in excluding the police report with the victim's statement, which is the only evidence the DPS has concerning the appellee's alleged conduct. In the alternative, the DPS maintains that the substantial similarity requirement is satisfied in this case even without considering the excluded police report or the alleged circumstances underlying the appellee's Massachusetts conviction.
>
> Contrary to the DPS's assertion, we do not read *Garcia* to require consideration of the individual facts and circumstances of the appellee's conviction in determining whether he is required to report as a sex offender in Texas. In *Garcia* we considered whether the elements of Oregon's statutory-rape statute were substantially similar to the elements of the Texas statutory-rape statute. *Id*. at 903-06. We concluded that, objectively, the elements of the two statutes were substantially similar. *See id*. at 904-05. However, the Oregon statute was broader and criminalized sexual intercourse with a child under the age of 18 whereas the Texas statute only criminalized such conduct with a child under the age of 17. *Id*. Therefore, although the elements of the two statutes were substantially [] similar, some conduct criminalized under the

> Oregon statute would not be illegal in Texas. *Id*. at 906. We held that, in such circumstances, the elements of the Texas statute and the foreign statute must first be compared to determine whether they are objectively substantially similar. *Id*. If they are, but if the foreign statute also criminalizes behavior that is not illegal in Texas, "the [DPS] must review the conduct underlying the foreign conviction to determine if that conduct is, in fact, within the scope of the Texas offense." *Id*. In so holding, we opined that the legislature could not have intended to require lifetime registration as a sex offender for conduct that does not constitute criminal behavior in this state. *Id*. We concluded that it was necessary to review the conduct underlying Garcia's Oregon conviction because "the Oregon statute covers some activity—sexual conduct with persons aged 17—not encompassed in the Texas offense." *Id*. Applying this standard, we concluded that Garcia's conviction was not reportable or registerable under SORA because it was undisputed that he had engaged in consensual sexual conduct with his 17-year-old girlfriend. *Id*. at 906-07.

Anonymous, at 534-535. The fact is that the decision in *Garcia*, after *first* determining that the statutes were "objectively substantially similar," ultimately considered that "the individual facts and circumstances of [Garcia's] conviction" was based on unique circumstances, stemming from a basic concept of fundamental fairness:

> "To construe the relevant provisions of the code of criminal procedure to require a person whose conduct does not constitute criminal behavior in this state to register as a sex offender for life would yield an unjust and unreasonable result--one we presume the legislature did not intend."

See Tex. Dep't of Pub. Safety v. Garcia, 327 S.W.3d 898, 906 (Tex. App. - Austin 2010). *Anonymous* elaborated:

> In some cases, however, the purposes of the sex-offender-registration requirement are not served by a strict application of an elements-based approach. *Garcia* presented such a case. *See Garcia*, 327 S.W.3d at 906 (observing that legislature could not have intended sex-offender status to be placed on conduct not criminalized under Texas law). While there may be other cases where the two-pronged analysis applied in *Garcia* is essential, such cases may be relatively rare, and our examination of the statutes at issue in the present case indicates that this is not one of them. Even though the breadth of some language in *Garcia* could be construed to support the DPS's interpretation of the case, the actual analysis employed in *Garcia* is consistent with our interpretation of SORA as requiring that, except in unusual cases, the elements of the relevant offenses be compared for substantial similarity without regard to individual facts and circumstances. *Cf. id*. at 905-06 ("[W]e do not believe that such an inquiry is called for in all cases involving a conviction under [the Oregon statute]."). In accordance with our construction of SORA and *Garcia*, we proceed to the threshold inquiry in this case of whether the elements of the statutes at issue are substantially similar.

Anonymous, at 535. The Austin Court of Appeals' comment that the "breadth" of some language in *Garcia* may support DPS's argument for an expansive analysis of the registration requirement, was the appellate court's polite way of reminding DPS that cherry-picking language from an opinion, to support a legal argument, will not carry the day. The fact is that the law

has not changed since *Garcia*, and *Anonymous* simply reaffirmed the notion that, save for the rare occasion when conduct in one state is not criminal conduct in Texas, application of an "objectively substantially similar" analysis remains the proper test.

Because *Anonymous* did not, as claimed by Ortega, change the manner in which the substantial similarity analysis is conducted by DPS, it exposes DPS's classification system as a highly malleable process, left to the unchecked discretion of the managing attorney in charge at the time of the analysis. This does not change the fact that flawed as it is, a determination by the managing attorney is the final word for federal and state law enforcement agencies entrusted with investigating an filing charges of the type that Shepherd was convicted of. The finality of this determination is highlighted in a recent decision by the Texas Court of Criminal Appeals, *Crabtree v. Texas*, 389 S.W.3d 820 (Tex. Crim. App., 2013), which was acknowledged in the Magistrate Judge's R&R. *See* R&R 10 n.33. In *Crabtree:*

> the Texas Court of Criminal Appeals vacated the conviction (following a jury trial) of defendant for failing to register in Texas based on prior Washington convictions for sex offenses **on the ground there had been no proof that the**

> **Texas Department of Public Safety had determined** that the Washington sex offenses had elements that were substantially similar to the elements of Texas offenses that required registration.

Id. (citing *Crabtree* at 833) (emphasis added). Specifically, Judge Keasler, of the Texas Court of Criminal Appeals wrote:

> The record was silent as to whether the Texas Department of Public Safety (DPS) previously determined that the Washington offense rape of a child in the first degree was substantially similar to a Texas offense statutorily defined as a "reportable conviction or adjudication…Establishing that defendant had a reportable conviction or adjudication under the definition of [Tex. Crim. Pro. art. 62.001(5)(H) (defining a "Reportable conviction or adjudication") was **a condition precedent to proving he had a duty to register and failed to comply with that burden**.

See Crabtree, at 832 (emphasis added).

3. Evidence of Shepherd's Actual Innocence:

The relevance of uncovering the manner in which DPS determines someone's duty to register, coupled with its function as the final, and dispositive authority on the subject, presents Shepherd with material evidence of his innocence. By debunking the vacuous claim by Ortega that *Anonymous* changed the manner in which Shepherd's Arizona conviction was evaluated *vis* similar Texas offenses, a jury would be in a position to

determine, in the proverbial war of the experts, whether to believe Galaviz, Ortega, or neither, and conclude that Texas' classification system is largely subject to the discretionary whims of the DPS' managing attorney *du jour*, and that at the end of the day, the government would fail to meet its burden to convince it that Shepherd was required to register under the SORNA, which if unproven by the government, would absolve him of the charges. [11] In fact, plea counsel testified that had he learned that Shepherd was no longer required to report, he would have fully supported Shepherd's decision to try his case, including pretrial and other efforts.

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[11] The general instruction 2.83 of the Fifth Circuit Criminal Pattern Jury Instructions, titled "18 U.S.C. § 2250 – Failure to Register as Sex Offender" provides the following language (emphasis added):

> For you to find the defendant guilty of this crime,
> you must be convinced that the government has proven
> each of the following beyond a reasonable doubt [in the following sequence]:
>
> **First: That the defendant was required to register**
> **under the Sex Offender Registration and Notification Act, as charged;**
>
> Second: That the defendant traveled in interstate
> [foreign] commerce; and
>
> Third: That the defendant knowingly failed to register
> and keep a current registration as required by the
> Sex Offender Registration and Notification Act.

Therefore, on the facts of this case, Shepherd makes the strong showing necessary to discharge a showing of actual innocence, as a gateway claim for a new trial and therefore meets his burden to prove with new, and reliable evidence, that it was more likely than not that no reasonable juror would have convicted him in light of the new evidence presented before the magistrate judge.

CONCLUSION

For the foregoing reasons, Appellant Adam Daniel Shepherd's conviction should be reversed, and his case remanded for a new trial.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that, on July 11, 2016, I electronically filed this Brief with the Clerk of Court using the CM/ECF system which will send notification of such filing to Richard L. Durbin Jr., U.S. Attorney for the Western District of Texas (Attn: Assistant U.S. Attorney, Joseph H. Gay Jr.), *via* electronic mail.

By: */s/* George W. Aristotelidis
GEORGE W. ARISTOTELIDIS
Attorney for Defendant-Appellant

ECF CERTIFICATION

I certify that: 1) required privacy redactions have been made; 2) the electronic submission is an exact copy of the paper document; and 3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

By: */s/ George W. Aristotelidis*
GEORGE W. ARISTOTELIDIS
Attorney for Defendant-Appellant

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By: */s/ George W. Aristotelidis*
GEORGE W. ARISTOTELIDIS
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Dated: July 11, 2016

United States Court of Appeals

FIFTH CIRCUIT
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July 19, 2016

Mr. George William Aristotelidis
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San Antonio, TX 78205

No. 15-50991 USA v. Adam Shepherd
USDC No. 5:14-CV-956

Dear Mr. Aristotelidis,

The following pertains to your brief electronically filed on **July 15, 2016.**

We filed your brief. However, you must make the following corrections by **July 25, 2016.**

You need to correct:

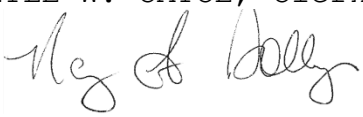
1) Record References: Every assertion in briefs regarding matter in the record must be supported by a reference to the page number of the original record, whether in paper or electronic form, where the matter is found, using the record citation form as directed by the Clerk of Court. Although your brief contains citations to the record, they are not in proper form. (See 5TH CIR. R. 28.2.2)
(example: ROA.283)

Once you have prepared your sufficient brief, you must select from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further corrections are necessary.

Opposing counsel's briefing time continues to run.

Sincerely,

LYLE W. CAYCE, Clerk



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cc:
Mr. Joseph H. Gay Jr.

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July 26, 2016

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No. 15-50991 USA v. Adam Shepherd
USDC No. 5:14-CV-956

Dear Mr. Aristotelidis,

We have reviewed your electronically filed Appellant's Brief and it is now deemed sufficient.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Failure to timely provide the appropriate number of copies may result in the dismissal of your appeal pursuant to 5TH CIR. R. 42.3.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
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504-310-7683

cc:
Mr. Joseph H. Gay Jr.