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.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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RECOMMENDATION ON ORAL ARGUMENT

The United States of America suggests oral argument would not significantly aid the decisional process in this case. The issue(s) raised on appeal can be determined upon the briefs that adequately present the record and legal arguments relevant to this appeal. See FED.R.APP.P. 34(a)(2)(C).

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JURISDICTION

This is an appeal from the district court's final judgment in a criminal case denying a motion to vacate pursuant to 22 U.S.C. § 2255. The jurisdiction of this Court is invoked pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether Appellant received effective assistance of counsel that rendered his plea involuntary, and whether he is guilty of the offense charged.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

By grand jury indictment returned on July 11, 2012, Appellant was charged with the offense of failing to register as a sex offender "from on or about August 2011 and continuing through June 15, 2012," in violation of 18 U.S.C. § 2250(a). ROA.32.[1] The Federal Public Defender was appointed to represent Appellant, and on September 24, 2012, Appellant

[1] References to the Record on Appeal are designated by "ROA" and the pertinent page number(s) assigned by the Clerk of the District Court.

pleaded guilty to the indictment. ROA.318-320. At the sentencing hearing on December 19, 2012, the district court adopted the PSR, and after reviewing all the sentencing factors of 18 U.S.C. § 3553(a), the district court sentenced Appellant to 24 months of imprisonment, 30 years of supervised release, and a $100 special assessment. ROA.333-334.

On direct appeal, Appellant challenged the term of supervised release as plainly unreasonable. ROA.94. This Court affirmed the conviction and sentence on October 17, 2013. *United States v. Shepherd*, 542 Fed.Appx.346 (5th Cir. 2013). Appellant did not file a writ of certiorari.

Motion to Vacate:

On October 30, 2014, Appellant filed a Motion to Vacate, Set Aside, or Correct Sentence, pursuant to 28 U.S.C. § 2255, arguing the law did not require him to register as a sex offender, and therefore he could not be charged and convicted of an offense, and that he was "actually innocent" of the offense. He also argued that his trial counsel failed to properly advise him regarding whether Texas required Appellant to register, thereby rendering ineffective assistance of counsel, and that his

appellate attorney failed to address this issue in his direct appeal, thereby rendering ineffective assistance of counsel on appeal.[2] ROA.100. In support of his § 2255 motion, Shepherd provided a letter from Attorney Randy Ortega, of the Texas Department of Public Safety, that stated that Appellant did not have a duty to register, which was a reversal of the DPS's previous opinion that the Department issued prior to Shepherd's indictment. ROA.123; ROA.186. A hearing was held before the magistrate judge and the report and recommendation was forwarded to the district court. ROA.231-260.

District Court's Order

After a *de novo* review, the district court denied Appellant's § 2255 motion. ROA.275; ROA.281. The district court found "the DPS erred in concluding in January 2015 that Shepherd was not required to register." The court found that the Arizona offense was "substantially similar to Texas Penal Code § 21.11. . . Comparing the elements of the Texas and Arizona statutes, the elements display a high degree of likeness and are substantially similar with respect to the individual or public interests

[2] On appeal of the denial of his § 2255, Appellant has abandoned his claim of ineffective assistance of appellate counsel for failing to raise the claims presented here on direct appeal.

protected and impact of the elements on the seriousness of the offenses." ROA.281.

Notice of Appeal

Appellant filed a notice of appeal and a motion for a Certificate of Appealability on September 7, 2015, which the district court granted on October 13, 2015. ROA.283-287; ROA.294-296. Appellant filed a notice of appeal on October 14, 2015.

B. Statement of Facts.

Arizona Offense:

Offense Conduct

On August 28, 2002, Phoenix police officers were dispatched to an elementary school after a report that a man had exposed himself to a young girl. ROA.509. The 11-year old victim stated that she was walking to school when a man, later identified as Appellant, pulled up in his vehicle beside her. ROA.509. Appellant began talking to the girl and rubbing his penis through his clothing, and then exposed his penis to the child. ROA.510. The girl stated that Appellant was rubbing his exposed penis up and down and asked the girl if she could see his penis. ROA.509-510. Appellant also admitted exposing himself the following day to a

nine-year old victim, (the victim of count one of the indictment). ROA.15; ROA.159. When questioned by police, Appellant stated that he gets sexually excited by exposing his genitals to people because it is a prohibited and taboo activity. ROA.510. He further admitted he drove around in his car the day of the offense with his penis exposed, searching for someone who would look at it. ROA.510.

Indictment

In Arizona, Appellant was charged in a two count indictment with (count one), indecent exposure, a class 6 felony; and (count two) public sexual indecency to a minor, a class five felony. [3] Specifically the indictment alleged:

> COUNT 1:
> ADAM DANIEL SHEPHERD, on or about the 29th day of August, 2002, in the presence of [the victim, J.B.], exposed his genitals and was reckless about whether [J.B], who was a minor under the age of fifteen years, as a reasonable person, would have been offended or alarmed by the act, in violation of A.R.S. § § 13-1402, 13-3821, 13-701, 13-702, 13-702.01, and 13-801.
> COUNT 2:
> ADAM DANIEL SHEPHERD, on or about the 28th day of August, 2002, in the presence of [the victim, P.R.], intentionally or knowingly engaged in an act of sexual contact

[3] Arizona has six classes of felony offenses. A.R.S. § 13-601. An "attempt" offense is punishable as one class below the offense attempted. For example, sexual indecency to a minor is a class five felony offense; an attempted sexual indecency to a minor is a class six felony. A.R.S. § 13-1001; A.R.S. § 13-1403 (C).

> and was reckless about whether a minor under the age of fifteen years was present, in violation of A.R.S. § § 13-1403, 13-1401, 13-3821, 31-281, 13-701, 13-702, 13-801, and 13-812.
>
> (ROA.159-160).

Statutes

Arizona's penal code in effect at the time of Appellant's indictment and conviction provided:

> **§ 13-1403. Public sexual indecency; public sexual indecency to a minor; classifications**
>
> A. A person commits public sexual indecency by intentionally or knowingly engaging in any of the following acts, if another person is present, and the defendant is reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act:
>
> 1. An act of sexual contact.
>
> 2. An act of oral sexual contact.
>
> 3. An act of sexual intercourse.
>
> 4. An act involving contact between the person's mouth, vulva or genitals and the anus or genitals of an animal.
>
> B. A person commits public sexual indecency to a minor if he intentionally or knowingly engages in any of the acts listed in subsection A and such person is reckless whether a minor under the age of fifteen years is present.
>
> C. Public sexual indecency is a class 1 misdemeanor. **Public sexual indecency to a minor is a class 5 felony.**

A.R.S. § 13-1403 (2002) (emphasis added).

Guilty Plea

Appellant pleaded guilty to attempted public sexual indecency to a minor.[4] (ROA.162-163; ROA.505). Appellant's plea agreement provided, "The defendant agrees to plead guilty to:

> **Count 2,** Amended, Attempted Public Sexual Indecency, **a class 6 designated felony**, in violation of A.R.S. 13-1403, 13-13-1401, 13-3821, 13-1001, 13-701, 13-702, 13-801, 13-812, 31-281, committed on August 28, 2002."(emphasis added).

ROA.162.

Arizona Sentence and Post Conviction Conduct:

Appellant was sentenced to lifetime probation.ROA.27; ROA.162. Appellant was notified he was required to register as a sex offender for life. ROA.155; ROA.162. His probation was reinstated three times after numerous violations of his probation, and in November 2006, a motion to revoke probation was filed. Thereafter, Arizona issued a warrant for Shepherd's arrest. ROA.27; ROA.505.

[4] The judgment apparently abbreviated the title of the offense to "attempted public sexual indecency," omitting the words "to a minor." However, the judgment reflected the plea was to count two, as amended, and that the offense was a class six felony. ROA.162-163. Because the Arizona statutory system provided that a class five felony, such as public indecency to a minor, when charged as an attempt becomes a class six felony, it is evident that Appellant, who pleaded guilty to count two, which charged public sexual indecency to a minor, amended to reflect an attempted offense, entered his plea to "attempted public sexual indecency to a minor."

Nevada Offense:

Offense Conduct

On November 15, 2006, Sparks, Nevada, Police officers responded to a local parking lot to address a report of indecent exposure. ROA.511. The girl victim stated that a few minutes before, a vehicle rolled up beside her with the driver's window rolled down. ROA.511. The driver called the girl to his vehicle, and when she went to see what he was saying, she noticed the driver, Appellant, was naked from the waist down and was masturbating. ROA.511-512. Appellant's penis and testicles were exposed. ROA.512. As Appellant drove away, the victim recorded the license plate number of the car, which was registered to Daniel Shepherd, Appellant's brother. ROA.512. Appellant was stopped a short time later near a high school. ROA.512. A school district police officer stated that a student there had earlier reported a similar incident as the one above, and the student had described the same vehicle. ROA.512. Both victims positively identified Shepherd as the person who exposed himself to the victims while masturbating. ROA.512.

Indictment, Guilty Plea, and Sentence

Shepherd was charged by information with indecent exposure, in violation of N.R.S. § 201.220, a felony. ROA.176-177. Shepherd entered a guilty plea, and was convicted as charged.[5] ROA.179-183; ROA.184-185. He was sentenced to 12 to 34 months of imprisonment. ROA.510; ROA.184. Appellant was advised of his duty to register. ROA.175. Appellant registered as a sex offender in Nevada. His last updated registration was on December 30, 2010. (ROA.350; ROA.175).

Instant Offense:

On June 12, 2012, Inspector Rose from the United States Marshal's Service received information that Appellant was a convicted sex offender who was residing in Texas and that Appellant had not registered as a sex offender. ROA.505. Appellant's Arizona and Nevada convictions imposed a lifetime requirement that he register as a sex offender and those requirements are applicable throughout the United States. ROA.505. At the time the USMS received information regarding Shepherd, officials in Nevada were in the process of issuing a warrant for Shepherd's arrest

[5] Previously, in Nevada, Shepherd was charged with Conspiracy to fail to register as a Sex Offender and with obtaining and/or using the personal identification of another. ROA.510-511.

and a probation warrant had been issued for violation of probation in Arizona. ROA.505.

Inspector Rose contacted the Texas Department of Public Safety (DPS), the agency charged with determining whether a sex offense from another jurisdiction is substantially similar to a Texas sex offense, and therefore requiring registration in Texas. *See generally* Tex. Code Crim. Proc. Ann. arts. 62.001-.005. DPS determined that Shepherd was required to register based upon his Arizona conviction. (ROA.186).

Shepherd was contacted and arrested. (ROA.506). He gave a statement in which he admitted living in Texas since 2011 without registering. ROA.506. He admitted that he had not registered in Texas and that he had not checked with any law enforcement agency to determine whether he had to register. ROA.506. He admitted that he traveled from Nevada to Texas [in interstate commerce] and claimed he did so after his research on the internet caused him to believe he was not required to register in the State of Texas. ROA.506. Shepherd also stated that he knew he had a probation violation warrant out of Arizona for that sex offense conviction, but he knew it was not an extradition warrant and that if he avoided Arizona, he would not be arrested. ROA.506.

Evidentiary Hearing on § 2255 Motion:

On August 6, 2015, the magistrate judge held an evidentiary hearing on Appellant's § 2255 motion to vacate. ROA.338-459.

Inspector Rose, U.S. Marshal's Service:

Inspector Rose, employed by the U.S. Marshal's Service (USMS), testified he had contacted the Texas Department of Public Safety (DPS) in order to determine whether Shepherd's convictions from Arizona and Nevada met with requirements that Shepherd register in Texas as a sex offender. ROA.347. Rose obtained the conviction documents from Arizona and Nevada and submitted them to DPS. ROA.343-344. Rose stated that the purpose for submitting the documents to DPS was to obtain a legal determination that the offenses were comparable to an offense requiring registration in Texas. ROA.345. DPS determined that the Nevada conviction did not require registration; however, the Arizona conviction did require registration for ten years after Shepherd had completed either prison or probation. ROA.347. (G.Ex. 3).

After receiving the information regarding the requirement to register, Inspector Rose and a SAPD detective obtained a warrant and complaint for failure to register as a sex offender, and they arrested

Shepherd. ROA.348; ROA.349. Shepherd stated, after receiving his Miranda warnings, that he last registered in Nevada in 2010. ROA.350.

Shepherd stated he came to Texas around January of 2011. ROA.350. Prior to coming to Texas, Shepherd stated he did research on the internet, and he did not believe he was required to register in Texas as a sex offender. ROA.350. Shepherd stated that he never checked with any law enforcement agency to learn whether he was required to register, and he never attempted to register prior to his arrest. ROA.350.

Department of Public Safety Attorney:

Randy Ortega, the managing attorney for the crime records service department of the DPS, testified that "under Chapter 62 of the Texas Code of Criminal Procedure, specifically subdivision 003, the legislature requires the Department of Public Safety to make the determination if the elements of an out-of-state statutory scheme are substantially similar to a Texas reportable conviction." ROA.381.

Ortega stated that Shepherd was required to register back in 2012 because the Department of Public Safety made the determination that there was a substantial similarity between Shepherd's Arizona conviction and a Texas reportable conviction. ROA.382. Ortega stated

that at the time the DPS made the determination on Appellant's Arizona conviction, DPS "was allowed to look at facts in any sex offender registration case. And the facts of that case [Shepherd's Arizona conviction] are substantially similar to behavior that would otherwise be qualified as a reportable conviction in the state of Texas." ROA.383. Ortega further explained that after the case of *Texas Dept. Public Safety v. Anonymous Adult Texas Resident*, 382 S.W.3d 531 (Tex. App.---Austin Aug. 30, 2012, no pet.), was decided on August 30, 2012, DPS was restricted in its ability to look at facts.[6] Although there was no statutory change in what was a reportable conviction, DPS was directed to use "the *Prudholm* test," a different way of comparing statutes after *Anonymous* was decided. ROA.383-384. Therefore, Ortega testified, after the decision in *Anonymous*, Shepherd's offense was no longer, in his opinion, an offense where Texas required registration and reporting as a sex offender. ROA.383-384. Ortega stated:

> What Anonymous did was require the department to look at the elements alone. If you can look at the elements alone and determine that the out-of-state offense is substantially

[6] In *Anonymous*, the Court of Appeals held that an examination of the facts of the case is appropriate in rare cases where the elements of the out-of-state conviction are substantially similar to a Texas reportable offense but of greater breadth and then necessitates an examination of the facts to insure that a defendant is not required to register for behavior not illegal in Texas. *Anonymous*, 382 S.W. 3d at 535.

> similar, the analysis stops there. The person has a duty to register. If 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. It's only when there are some elements of an out-of state statutory scheme that are substantially similar. And within that same statute there are also elements that are not substantially similar. The department has to look at the facts to see if it's more substantially similar than not. That case, *Anonymous v. State*, which I've reiterated, is the case that changed some of the jurisprudence as to how the department makes the determinations.
> ROA.384.

Ortega testified that because the title of the offense of conviction in Arizona was listed as Public Sexual Indecency but omitted the word "minor," it was Ortega's opinion, in essence, that the elements of the offense were no longer substantially similar to a Texas reportable conviction. ROA.385-386. Ortega noted the Arizona court information sheet stated Shepherd was charged with Public sexual indecency to a minor, a class 5 felony, but that the plea was entered to "attempted public sexual indecency." ROA.3. Ortega further noted that attempted public sexual indecency would be a misdemeanor, but that Shepherd pleaded guilty to a class 6 felony. He stated "it looks like they left out the language 'to a minor.' I don't know whether that was intentional or not", and "that's where the problem lies." ROA.402. Ortega further stated:

> Whether it [the plea] was to a minor or not, I don't know. It appears like that may have been the intent of someone to plea it that way, but it didn't use the words "to a minor" in the judgment, yet at the same time had the class 6 felony. . . . Which would have only applied to --- it appears that's the only way the public sexual indecency [to a minor] can be pled down from the 5 to a 6 class felony, is when it's pled to an attempt version of that offense. But erring on the side of caution, because they left out the words "to a minor," I gave the defendant the benefit of the doubt. Furthermore, the offense, as I read it, seemed more substantially similar to public lewdness. I can, however, see that if Anonymous had not come down, I may have determined this substantially similar to indecency with a child by exposure, which would be a post-ten-year requirement. ROA.403.

Regardless of Ortega's opinion issued in 2015, Ortega firmly stated that Appellant had a duty to register at the time he was charged. Ortega stated that his determination was that the offense would not require a current duty to register; however, "[t]hat does not change the fact that there may have been a prior duty" to register before Ortega's determination. ROA.385-386. Ortega testified that Shepherd was required to register in Texas and still had a duty to register until DPS determined that Shepherd no longer had that duty. ROA.386-387. ". . . [T]he code still requires the department to make the determination. So until the department changes their determination, the person still has a duty [to register]." ROA.387.

Ortega acknowledged that if Shepherd had asked DPS on August 31, 2012, the day after *Anonymous* was decided, his current opinion regarding Shepherd not having a duty to register would likely be the same. ROA.387.

Defense Counsel:

Clark Adams, Assistant Federal Public Defender, Shepherd's trial counsel, also testified at the hearing. Adams testified that he believed through his representation of Shepherd that Shepherd was required to register as a sex offender, and that determination ultimately led to Adams' advice to Shepherd to avail himself of the benefits of accepting responsibility and plead guilty. ROA.416. Adams stated he "compared the Arizona statute with the Texas statute, and I did not read any case law because at the time I thought in my analysis it was clear." ROA.418. Adams "found a Texas statute indecency with a child which has almost exactly the same elements as the --- as the Arizona statute." ROA.418-419. Adams stated "If I had decided [Shepherd] didn't have to register, I would have told him so, and I wouldn't have cared what DPS said." ROA.419.

Adams' believed that if he had told Shepherd there was some ambiguity about whether Shepherd was required to register in Texas, Shepherd would not have pleaded guilty; he would have gone to trial. ROA.421.

SUMMARY OF THE ARGUMENTS

Appellant argues the district court erred in denying his motion to vacate pursuant to 28 U.S.C. § 2255. Specifically, Appellant claims he is actually innocent of the offense of failing to register as a sex offender; and that Appellant's guilty plea, entered September 24, 2012, was involuntary due to his counsel's failure to advise him that he was allegedly no longer required to report. Shepherd argues he lacked the knowledge that after August 31, 2012, DPS would have determined he was not required to register in Texas as a sex offender, and therefore, his plea was not knowing and voluntarily made, and he lacked effective assistance of counsel.

Contrary to his arguments, Appellant is not "actually innocent" of failing to register as a sex offender pursuant to 18 U.S.C. § 2250. Shepherd had a duty to register as a sex offender in Texas after he traveled in interstate commerce and resided in Texas during the time charged in the indictment. Indeed, Appellant's actions strike at the heart

of SORNA's registration requirements. *See United States v. Whaley*, 577 F.3d 254, 259 (2009)(Failure to register statute plainly aimed at ensuring that sex offenders register and update registrations when moving among jurisdictions).

Appellant's prior conviction for public sexual indecency to a minor qualifies as a sex offense that is substantially similar to the Texas reportable sex offense of public indecency with a minor. Texas Department of Public Safety had determined that Shepherd had a duty to register in Texas for a period of ten years after any type of supervision in Arizona, where he was on lifetime probation. Shepherd clearly violated his duty to register. Moreover, any change in DPS' methodology for analyzing "substantially similar" offenses after the Texas Third Court of Appeals decided Anonymous did not invalidate Shepherd's duty to register during the time charged in the indictment when he resided in Texas without registering as required and determined by DPS.

Shepherd's counsel provided effective assistance of counsel, and Shepherd's plea was knowing and voluntary. Indeed, Shepherd's ineffective assistance claims fail under both prongs of the *Strickland* analysis: counsel's performance was not deficient, and Shepherd suffered

no harm or prejudice. Shepherd asserts that because his counsel failed to inform him that he was not required to register in Texas after the Texas court decided *Anonymous*, his plea was involuntary. Shepherd's argument is without merit, however, because, as the district court determined, the assertion of the DPS attorney that his prior offense was not substantially similar to a Texas reportable offense was incorrect. Consequently, because Appellant's prior Arizona offense was a reportable offense in Texas and Appellant was required to register as a sex offender, Appellant cannot show his plea was involuntary or unknowing, and he cannot demonstrate ineffective counsel or prejudice and harm. Shepherd's duty to register and his subsequent sentence would be exactly the same, regardless of counsel's conduct here.

ARGUMENTS AND AUTHORITIES

APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL; HIS PLEA WAS VOLUNTARY, AND APPELLANT IS GUILTY OF THE OFFENSE CHARGED.

(Responsive to Appellant's Issues I and II)

Appellant argues he received ineffective assistance of counsel and that his plea was thus involuntary. He further claims he is actually innocent of the offense of which he was convicted. For the reasons set out below, Appellant's contentions are without merit.

Standard of Review and Ineffective Assistance of Counsel:

This Court reviews a district court's findings of fact in relation to a motion filed pursuant to 28 U.S.C. § 2255 for clear error, and it reviews questions of law *de novo*. *United States v. Cavitt*, 550 F.3d 430, 435 (5th Cir.2008); *United States v. Ghali*, 699 F.3d 845, 846 (5th Cir.2012); *United States v. Torres*, 163 F.3d 909, 910 (1999). This Court "may affirm for any reason supported by the record, even if not relied on by the district court." *United States v. Gonzalez*, 592 F.3d 675, 681 (5th Cir.2009); *United States v. Batamula*, 823 F.3d 2-*37, 239–40 (5th Cir. 2016).

The constitutional standard for determining whether a criminal defendant has been denied effective assistance of counsel, as guaranteed by the Sixth Amendment, was set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To show that counsel was so deficient that reversal is required, a defendant must show "[f]irst . . . that counsel's performance was deficient." *Id*. at 687. Secondly, the movant must show that the deficient performance prejudiced movant's defense. Id. If the movant fails to show that counsel's performance was deficient, it is unnecessary to examine the second prong. A failure to establish either deficient performance or prejudice under the *Strickland* test makes it unnecessary

to examine the other prong. *Id*. at 700; *United States v. Seyfert*, 67 F.3d 544, 547 (5th Cir. 1995). Thus, failure to show that counsel's performance fell below an objective standard or reasonableness avoids the need to examine prejudice, and if there is no prejudice, an examination of counsel's performance is unnecessary. *See United States v. Hoskins*, 910 F.2d 309, 311 (5th Cir. 1990); *Thomas v. Lynaugh*, 812 F.2d 225, 229-30 (5th Cir.), cert. denied, 484 U.S. 842, 108 S.Ct. 132 (1987).

The courts are deferential in scrutinizing the performance of counsel. *See United States v. Drones*, 218 F.3d 496, 500-04 (5th Cir. 2000) *cert denied*, 531 U.S. 1151, 121 S. Ct 1095 (2001); *Williams v. Cain*, 125 F.3d 269, 276 (5th Cir. 1997), *cert denied*, 525 U.S. 859, 119 S. Ct. 144 (1998). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 687-89. A reviewing court should indulge a strong presumption that counsel's performance falls within the wide range of reasonably prudent professional assistance. *Id*., at 689, 104 S. Ct. at 2065. An attorney's strategic choices, usually based on information

supplied by defendant and from a thorough examination of relevant facts and law, are virtually unchallengeable. *Jones v. Jones*, 163 F.3d 285, 300 (5th Cir. 1998), *cert. denied*, 528 U.S. 895, 120 S. Ct. 224 (1999). Counsel is not required to investigate every conceivable matter. *See Neal v. Cain*, 141 F.3d 207, 214-15 (5th Cir. 1998); *United States v. Gibson,* 55 f.3d 173, 179 (5th Cir. 1995); *Smith v. Collins*, 977 F.2d 951, 960 (5th Cir. 1992), *cert.denied*, 510 U.S. 829, 114 S. Ct. 97 (1993).

SORNA and DPS:

The Sex Offender Registration and Notification Act (SORNA), Title I of the Adam Walsh Child Protection & Safety Act was passed in 2006. See 42 U.S.C. § 16911, et seq. SORNA's registration requirements were created, in part, as a means of furthering the goal of preventing offenders from slipping through the cracks by changing jurisdictions. See *United States v. Whaley*, 577 F.3d 254, 260 (5th Cir. 2009); 42 U.S.C. § 16911. When an out of state sex offender moves to Texas, he is required to register if he falls within the requirements of Texas Code of Criminal Procedure Chapter 62. See generally, Tex. Code Crim. Proc. Ann. arts. 62.001-.005. A "reportable conviction or adjudication," is defined in Art. 62.001(5) as a conviction or adjudication for specifically identified

Texas sex offense or offense containing a sexual component, and it includes "attempts" and "a violation of the laws of another state, federal law, the laws of a foreign country, or the Uniform Code of Military Justice for or based on the violation of an offense containing elements that are substantially similar to the elements of an offense listed under Paragraph (A), (B), (B-1), (C), (D), (E), (G), (J), or (K), but not if the violation results in a deferred adjudication. Tex. Crim. Proc. Code Ann. § art. 62.001 (West). Article 62.001(A) includes a conviction for indecency with a child under Section 21.11 of the Texas Penal Code as a "reportable conviction or adjudication."

Whether an extra-jurisdictional conviction or adjudication triggers a requirement to register is determined by the Texas Department of Public Safety (DPS) pursuant to Article 62.003. Tex. Crim. Proc. Code Ann. § 62.003(a). *See Crabtree v. State*, 389 S.W. 3d 820, 826 (Tex. Crim. App. Oct. 31, 2012).

In June of 2012, just prior to Appellant's indictment in this cause, the DPS determined that Appellant was required to register based upon his Arizona (but not his Nevada conviction) conviction, for attempted public sexual indecency to a minor because it was substantially similar

to Texas's attempted indecency with a child by exposure. ROA.186. Given the opinion rendered by DPS, the government brought an indictment against Appellant for failing to register pursuant to 18 U.S.C. § 2050.

After Appellant's conviction and sentence, an attorney from DPS opined that Appellant was not required to register because of the Texas Third Court of Appeals' decision in *Texas Dept. of Public Safety v. Anonymous Adult Texas Resident*, 382 S.W. 3d 531 (Tex. App.---Austin Aug. 30, 2012). In *Anonymous*, the Court of Appeals held that the elements of the Massachusetts indecency offense are not substantially similar to the elements of the Texas offense of sexual assault. Comparison of the elements does not reveal a 'high degree of likeness.' Although both crimes encompass intentional behavior, the nature of the sexual conduct criminalized under the two statutes is markedly different. The 'indecent touching' of clothed or unclothed parts of the anatomy encompassed by the Massachusetts statute differs significantly from the 'contact or penetration' of a person's 'anus' or 'sexual organ' required under [Texas] section 22.011(a)(1)." 382 S.W.3d at 538.

The Austin Court also restated that "[f]or a foreign statute to be substantially similar to a reportable SORA offense, the elements being

compared . . . must display a high degree of likeness, but may be less than identical." *Id.* at 55. Further the "high degree of likeness" required "must involve more than similarity in merely a general sense.'" *Id.* at 536. "[T]he elements must be substantially similar with respect to the individual or public interests protected and impact of the elements on the seriousness of the offenses.'" *Id.* "Whether or not the statutes are substantially similar is a question of law." *Id.*

Argument:

In concluding in January of 2015 that Appellant was not required to register, DPS erred in its determination. The statute of conviction in Arizona, A.R.S. § 13-1403 is substantially similar to Texas Penal Code § 21.11, as the district court found. Section 21.11(a)(2) 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."

The elements of the offense of indecency with a child pursuant to § 21.11(a)(2) are (1) a child, younger than 17 years and not the spouse of

the accused; (2) the accused exposed any part of his genitals; (3) knowing the child was present; (4) with intent to arouse or gratify the sexual desire of any person. *Breckenridge v. State*, 40 S.W.3d 118, 128 (Tex. App. – San Antonio 2000, pet. ref'd). The requisite specific intent to arouse or gratify the sexual desire of any person can be inferred from the defendant's conduct, remarks, and all surrounding circumstances. *Id*.

Under the Arizona statute, A.R.S. 13-1403, the state must prove a defendant had knowingly engaged in sexual conduct and was "reckless about whether a minor who is under fifteen years of age [wa]s present." § 13–1403(A), (B). *State v. Bruggeman*, No. 2 CA-CR 2013-0041, 2014 WL 340026, at *5 (Ariz. Ct. App. Jan. 30, 2014). The phrase "sexual contact" has been interpreted by Arizona courts to include a defendant masturbating in public or exposing his penis in public. See *State v. Davis*, 226 Ariz. 97, 98, 244 P.3d 101, 102 (Ct. App. 2010); *State v. Jannamon*, 169 Ariz. 435, 819 P.2d 1021 (Ct. App. 1991); *State v. Malott*, 169 Ariz. 518, 821 P.2d 179 (Ct. App. 1991); *State v. Whitaker*, 164 Ariz. 359, 793 P.2d 116 (Ct. App. 1990).

It is apparent, as the district court correctly concluded, that in comparing the elements of the two statutes, the elements display a high

degree of likeness and are substantially similar. ROA.281. Both offenses require that the defendant knowingly expose his genitals before a minor. The elements of the offense need not be identical; they must be however substantially similar, as they are here. Accordingly, the opinion of the DPS rescinding their prior determination that the elements of the two offenses were similar, was erroneous.

Thus, as the district court implicitly found, Appellant's arguments that his plea was involuntary due to ineffective assistance of counsel and that he is actually innocent of the offense are without merit. In the instant case, Appellant has failed to show that his counsel's performance was deficient, and, therefore, his ineffective assistance claim must fail. As the district court determined, it is apparent that the DPS later determination finding a lack of similarity in the Arizona and Texas offenses after the decision in *Anonymous*, was erroneous.

Indeed, it is apparent from the testimony of Mr. Ortega that he failed to correctly examine the elements of the offenses involved. Mr. Ortega looked only at the truncated title of the offense listed in the judgment, and he failed to examine the elements of the offense of attempted public sexual indecency to a minor, pursuant to A.R.S. § 13-

1403(B) and § 13-1001 with the Texas offense of indecency with a child by exposure pursuant to § 21.11(a)(2).

Although the attorney for DPS failed to appropriately analyze the elements of the offense, Appellant's counsel, in comparing the two statutes determined correctly that they were substantially similar and that Appellant had a duty to register and had failed to do so, which established his guilt of the charged SORNA offense.

Furthermore, irrespective of the second DPS determination, DPS had determined that the Arizona offense required registration during the time alleged in the indictment. The conduct alleged in the indictment occurred prior to the Texas case, *Anonymous*, and the Texas court did not deem *Anonymous* to be retroactive. *See generally, Taylor v. State*, 10 S.W. 3d 673 (Tex.Crim.App.2000). Under SORNA, Appellant had a continuing duty to register, and Appellant's ongoing duty to register in Texas was unaffected.

Moreover, not only was the decision in Anonymous not automatically retroactive, DPS's modification of its analysis of what elements were substantially similar to Texas statutes also was not retroactive. Indeed, the DPS attorney testified that the decision was not

retroactive when he stressed that Appellant had an ongoing duty to register until DPS determined that he did not. ROA.385-386; ROA.387. Ortega stated, " . . . [T]he code still requires the department to make the determination. So until the department changes their determination, the person still has a duty [to register]. ROA.387.

Therefore, it is clear, during the time set forth in the indictment, Appellant had a duty to register and knowingly failed to do so; thus, Appellant was guilty of the offense charged, and his counsel was not deficient. Because Appellant was required to report and as the court found his offense is a substantially similar offense to a reportable Texas offense, Appellant's claims are without foundation and should be overruled.

Regarding Appellant's claim of ineffective assistance, in determining whether a criminal defendant has been denied his Sixth Amendment right to effective assistance of counsel, the Supreme Court held in *Strickland v. Washington:*

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made erros so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth

> Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trail whose result is reliable. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

As *Strickland* held the benchmark for judging any claim of ineffective assistance of counsel is whether counsel's performance was so deficient that it undermined the proper function of the adversarial process such that the trial cannot be relied upon as having produced a just result. *Id.* at 686. Unless the movant in a § 2255 makes both showings (deficient performance and prejudice), it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. *Id. at 687.* Certainly, here, there was no breakdown in the adversary process that rendered an unreliable result. Rather, Appellant freely and voluntarily entered a plea, and regardless of DPS's second opinion, Appellant was required to register and nothing about his plea, sentence, conviction would have changed.

Voluntariness:

Although as noted, Appellant also claims his plea was rendered involuntary and unknowing, the record does not support his claim. Appellant entered a plea of guilty to the failure to register charge. For a

plea to be knowing and voluntary, a defendant must have a "full understanding of what the plea connotes and of its consequences." *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). He must have notice of the nature of the charges and the consequences of his plea, and he must understand the nature of the constitutional rights he is waiving. The plea must not be the result of threats or coercion. The record of Appellant's plea shows that Appellant (a person experienced with the criminal justice system) was fully aware of the charges against him and the consequences of his plea, that he entered the plea without coercion, and that he agreed with the factual basis. ROA.321-329. Counsel properly advised Appellant of the law and his performance was not deficient. As the district court determined, the analysis made by DPS that Appellant is no longer required to report is faulty. Thus, Appellant's claims that his counsel failed to properly advise him and his plea was involuntary are without merit and should be overruled.

Actual Innocence:

Shepherd was charged with failing to register as a sex offender, in violation of 18 U.S.C. § 2250. In order to prove such a violation, the government must show that 1) the defendant was required to register

under the Sex Offender Registration and Notification Act; (2) that the defendant traveled in interstate commerce; and (3) that the defendant knowingly failed to register as required by the Sex Offender Registration and Notification Act.

In order to establish actual innocence, a petitioner must demonstrate that in light of all the evidence, he is factually innocent and that it is more likely than not that no reasonable juror would have convicted him. S*ee Bousley v. United States*, 523 U.S. 614, 623-624 (1998). The term "actual innocence" means factual, as opposed to legal, innocence. *United States v. Sorrells*, 145 F.3d 744, 750 (5th Cir. 1998). Actual innocence means that the person did not commit the crime. *Johnson v. Hargett*, 978 F.2d 855, 860 (5th Cir. 1992)(quoting *McCleskey v. Zant*, 499 U.S. 467 (1991).

Here, Appellant cannot demonstrate that he is "actually innocent." The indictment charged Appellant with "[f]rom on or about August, 2011, and continuing through June 15, 2012," being a person required to register under the Sex Offender Registration and Notification Act, and having traveled in interstate commerce, knowingly failed to register and update his registration as required by SORNA, in violation

of 18 U.S.C. § 2250(a). At the time Appellant was indicted, the DPS had determined that he was a sex offender whose prior Arizona conviction mandated that he register as a sex offender in the State of Texas.

As the district court concluded, the Arizona offense, A.R.S. § 13-1403, is substantially similar to Texas Penal Code § 21.11. Appellant admitted that he was a sex offender and admitted that he had failed to register in the State of Texas. Based on these facts, it cannot be said that no reasonable juror would have convicted him of failing to register as a sex offender. Accordingly, Appellant has failed to show that he "did not commit the crime" and this Court should find that Appellant is not "actually innocent" of the offense of failing to register as a sex offender.

CONCLUSION

For the foregoing reasons, Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

RICHARD L. DURBIN, JR.
United States Attorney

By: ***/s/ Margaret M. Embry***
MARGARET M. EMBRY
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October, 2016, I filed this document with the Fifth Circuit Court of Appeals using the CM/ECF filing system, which will cause a copy of the document to be electronically delivered to Appellant's counsel, George William Aristotelidis, via electronic mail.

/s/ Margaret M. Embry

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains **6,779** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using **Century Schoolbook, size 14 font**.

/s/ Margaret M. Embry
MARGARET M. EMBRY
Assistant United States Attorney
Attorney for the United States
Dated: October 14, 2016

United States Court of Appeals

FIFTH CIRCUIT
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October 18, 2016

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

Dear Ms. Embry,

The following pertains to your brief electronically filed on **October 14, 2016.**

We filed your brief. However, you must make the following corrections by **October 24, 2016.**

You need to correct or add:

1) Statement of the Issues Needs to Be Double Spaced, see Fed R. App. P. 32(a)(4).

2) Certificate of Service Needs to Have the Day, Month, and Counsels Name Inserted

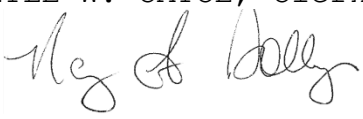
3) Certificate of Compliance Needs Contain Word Count

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. George William Aristotelidis
Mr. Joseph H. Gay Jr.

United States Court of Appeals

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

Dear Ms. Embry,

We have reviewed your electronically filed Appellee'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.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
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cc:
Mr. George William Aristotelidis
Mr. Joseph H. Gay Jr.