CERTIFICATE OF SERVICE

KEVIN R. CHAPPELL, Warden,
Petitioner,

vs.

RICHARD LOUIS ARNOLD PHILLIPS,
Respondent.

Case No. 12-544

I, the undersigned, hereby declare: I am a citizen of the United States; over the age of 18 years; am a party to the above titled matter. My business address is:

C-13707 1-EB-108
San Quentin State Prison
San Quentin, CA 94964-0489

and that I sent a true and correct copy of:

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

to the below listed parties by placing same in an envelope, first class postage prepaid, and placing same envelope in the institution mail for processing in accordance with institution procedures for the handling of outgoing inmate legal mail.

ERIC CHRISTOFFERSON
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Appointment of the Ninth Circuit
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I declare under penalty of perjury that the foregoing is true and correct; this was executed on the 21st day of January 2013 at San Quentin, California.

Richard L.A. Phillips

RICHARD L.A. PHILLIPS
filing *pro se*

TABLE OF AUTHORITIES

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In this fact intensive pre-AEDPA capital case, Richard Louis Arnold Phillips (Phillips), filing *pro se*, timely submits the following Opposition to Petition for Writ of Certiorari as required by Court Rule 15.1.

I. ARGUMENTS:

A. THE STATE ERRS IN ASSERTING THE CIRCUIT COURT MODIFIED THE LAW OF THIS COURT.

The State, quoting dictum from the dissent in *Phillips v. Ornoski (Phillips III)*,[1] urges the majority substituted "any conceivable, speculative possibility" of a different result, for the "reasonable likelihood" materiality standards of *Napue*[2] and *Brady*.[3]

The Ninth Circuit Court of Appeals correctly stated the law applicable to this issue as follows:

> "The test for materiality under *Napue* is distinct from that under *Brady*; a *Napue* violation is material when there is "any reasonable likelihood that the false testimony *could* have affected the judgment of the jury," *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (emphasis added); in contrast a *Brady* violation is material to a jury's verdict when "there is a reasonable probability that ... the result of the proceedings *would* have been different" but for the violation. *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (emphasis added.)" (*Phillips III* at 1189.)

The State does not contend otherwise. Instead, the State

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[1] 673 F.3d 1168 (9th Cir. 2012)

[2] *Napue v. Illinois*, 360 U.S. 264 (1959)

[3] *Brady v. Maryland*, 373. U.S. 83 (1963)

asserts the Ninth Circuit erred in applying the correct law to the facts of this case.

No one, not even the dissent, disputes there was a constitutional violation in this case. The only "dispute" is whether the State can meet its burden of establishing there is no reasonable likelihood that the prosecutor's intentional circumvention of *Brady/Napue* effected the jury's finding of special circumstance.

The State's petition for writ of certiorari is, at its core, a request for error correction. However, it is not the function of this highest Court in the land to correct erroneous factual judgments of the Court of Appeals. (See USSC Rule 10: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated law.") This Court simply lacks the resources to perform such a function. Of necessity, it must restrict itself to deciding cases of significant legal import. This is clearly not such a case. Since it presents only factual issues, a decision by this Court will have little if any precedential value.

Because the State's petition for writ of certiorari failed to apprise this Court of facts "inconvenient" to its question presented, and that inform the decision whether to grant certiorari in this case, Phillips will first put the lower court's decision in the appropriate context to demonstrate the majority articulated and applied the correct prejudice standard; did not deviate from *Napue*.

Both the majority and dissent herein acknowledged Madera County District Attorney David Minier (Minier) orchestrated a deliberate policy[4] to circumvent *Brady* disclosure and persuade the jury falsely that there was no deal/offer. Minier would routinely make deals with attorneys representing a potential witness of Minier's, but instruct counsel not to communicate the details of the deal to the client, so the client could then testify "truthfully" there was no deal. To make matters worse, Minier would then, as here, stand up during closing arguments and attack defense counsel before the jury by stating counsel's insinuation there was a deal was completely unsupported. (See p. 5., point 4. below.)

B. **THIS CASE INVOLVES NUMEROUS EGREGIOUS INTENTIONAL CONSTITUTIONAL VIOLATIONS BY PROSECUTOR DAVID MINIER. THEREFORE, THE PREJUDICE RESULTING FROM SUCH DESPICABLE CONDUCT SHOULD BE AS BROAD AS POSSIBLE.**

The applicable law starts with the basic question: Did Phillips receive a fundamentally fair trial this Court can have confidence in? (See *Kyles v. Whitley*, 514 U.S. 419 (1995).)

This Court has held: "A rule declaring "prosecution may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process...." (See *Banks v. Dretke*, 124 S.Ct. 1256 (2004) – citing cases back to 1926.)

This Court has further held the lower courts cannot review each instance of non-disclosure or prosecutorial misconduct in

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[4] The first case cited in *Phillips III* was also a case involving David Minier, wherein Judge J. Trott called Minier's policy "a pernicious scheme without any redeeming features." (See *Willhoite v. Vasquez*, 921 F.247 at 251 (9th Cir. 1990).)

isolation, but rather must view them collectively in light of the entire record. (See *Kyles, supra,* at 436; *Darden v. Wainwright,* 477 U.S. 168 at 172 (1986).)

Minier's slick plan to get around *Brady* was reviewed by the Ninth Circuit in the same vein this Court found a policy of "question first, warn later" designed to circumvent *Miranda*[5] was unconstitutional. (See *Missouri v. Seibert (Seibert),* 542 U.S. 600 (2004).)

In *Seibert* Justice Kennedy (concurring) held techniques used to distort the meaning of this Court's law "furthers no legitimate countervailing interest." (*Id.* at 661.)

The following is a brief outline of some, but certainly not all, the constitutional violations before the Ninth Circuit in this case. The lower court repeatedly applied the correct prejudice standard, as outlined by this Court, to the below facts to determine entitlement of relief.

The State does not dispute that the record before the Court of Appeals in this case clearly shows:

1. Madera County Prosecutor David Minier *took the stand* at Phillips' trial and falsely testified there was no deal with Phillips' co-defendant Sharon Colman (Colman) in exchange for her testimony; the Madera County prosecutor's office withheld for more than 29 years the letter authored by Minier, to Colman's attorney, stating they had met and agreed that in exchange for Colman's assistance in the capture of Phillips, then testimony at his trial, all charges against Colman would be dismissed.

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[5] *Miranda v. Arizona,* 384 U.S. 436 (1966)

2. During Phillips' guilt trial the prosecutor elicited from Colman, false testimony – that she had not received or been promised any benefits in exchange for her testimony.

3. During 2003 federal court depositions it was disclosed for the first time that a second and separate package of pre-trial benefits were given Colman by the prosecution. This second deal was intercession to ensure Colman would avoid prosecution on a heroin sales case.[6] In exchange for these second benefits Colman finally disclosed to law enforcement information she had previously denied knowledge of – Phillips' whereabouts – and participated in a traced telephone call that led to Phillips' arrest that afternoon.

4. Regarding the benefits given Colman, during closing arguments Minier told the jury: "What bargain[?] [W]e don't know. It doesn't even make any sense. *I'd suggest to you, that that kind of an argument is sheer fabrication, just pulled out of the air, totally meaningless.*" (*Phillips III* at 1182; emphasis in original.)

In *Phillips v. Woodford* (*Phillips II*), 267 F.3d 966 at 985 (9th Cir. 2001), without knowledge of the second pre-guilt trial package of benefits given by the prosecution to Colman, the Ninth understood Colman was the prosecution's star witness, holding:

> "It was Colman's testimony, and principally hers, that provided the basis for the finding of premeditation and the special circumstance of murder during the commission of a robbery..." and, "[h]ad the issue at trial been the circumstance of the shooting... there would have been little, if any, corroboration of Colman's account.""

[6] At penalty retrial Minier successfully argued this should not be disclosed to the jury, emphatically stating his office had nothing to do with the heroin sales case been dismissed.

The *Phillips II* Court also realized the lengths Minier went to ensure the credibility of Colman was not decimated; the potential impact Minier's efforts had on the jury, holding:

> "Although Phillips' counsel did attack Colman's credibility by arguing that there appeared to be a deal, the prosecution argued otherwise, and the jury was never informed that such a deal actually existed. More important, had the jury known that Colman *lied* about the existence of a deal, it might have been less willing to credit her testimony about other matters as well." (*Id.* at 986, fn. 12 — emphasis in original.)

Also before the *Phillips III* Court were transcripts of a 1991 pre-trial hearing of penalty retrial. Perhaps the best analysis regarding the importance of Colman's testimony to the prosecution's case was articulated by Prosecutor Minier himself.

Phillips voiced concerns Colman, having received release from custody an dismissal of all charges, would now become "unavailable" as a witness. Minier responded to the trial court:

> "Your Honor, if Miss Coleman [sic] declined to show up, I don't even know if we can proceed, ... Without her testimony, we would have about half a case. If she didn't show up, I think we would re-evaluate our case." (Phillips' AOB at p. 63; Excerpts p. 531.)

5. On *Phillips II* remand, during federal depositions, Colman admitted for the first time that she had lied at every turn in this case. The night of the confrontation between Phillips, Ronald Rose (Rose) and Bruce Bartulis (Bartulis), she, not Phillips, transported and had possession of Phillips' .45 automatic.

Minier, through at least his investigator who was sitting at

the prosecution table, knew Colman was giving false testimony.[7] Yet Minier continued to present this perjured testimony through Phillips' penalty retrial where, in closing, he told the jury:

> "Why did defendant [Phillips] fly to Sacramento to set up his alibi?"
> ...
> "[W]hy did he bring his .45 automatic pistol with him?"
> ...
> "He told Dr. ReVille ... how when you take your gun with you on the airlines how you always put it in your suitcase. He told Dr. ReVille, "always put your gun in your suitcase." *That's undoubtedly how he got his .45 with him on the airplane up to Sacramento.*" (Emphasis added.)

Also before the Ninth were documents demonstrating that when Phillips filed for a new trial based on Colman's false testimony she did not transport and have possession of Phillips' gun the evening in question, the prosecution "vouched" for the credibility of Colman, writing 'it is our position Colman's testimony was truthful.'

With the above facts, plus the totality of the record before it, the Court of Appeals correctly stated and applied the appropriate legal standard for assessing whether *Napue* violations are harmless beyond a reasonable doubt.

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[7] As noted by the Ninth, defense counsel conducted no pre-trial investigation. This included the Orange County airport's physical layout or publicly known security procedures. This would have disclosed Phillips could NOT have entered the airport, or checked in his luggage, without first going through a metal detector; Colman passed through a satellite terminal that did not have a metal detector. Counsel was thus not prepared to refute this important point to argue that had Colman's evening gone according to her plan, as she detailed to detectives after turning herself in and agreeing to become a witness for the State, Phillips would have been without a weapon at the meeting to deal with the semi-truck of stolen building supplies, and, therefore, no pre-meditation. (See Phillips' Petition for Writ of Certiorari, Case No. 12-5890.)

The State has manufactured a non-existent Question Presented unworthy of review because the Court of Appeals painstakingly articulated and applied the correct standard for assessing harmlessness *vel non* of a *Napue* violation; looked at the relevant facts of the case, i.e., the false evidence; the testimony of relevant witnesses; the prosecutor's arguments and representations to the jury, and the court came to a decision the State does not like. Given there is no important legal question in this highly fact-bound case, certiorari should be denied.

II. CONCLUSION:

Unlike the Ninth's ruling regarding ineffective assistance of counsel in this case (see Phillips' Writ of Certiorari, Case No. 12-5890), as noted above, the finding of the majority in *Phillips III* at best involves on alleged factual error, and, therefore, cannot be precedent for other cases.

In 1995, opposing a previous warden's Petition for Writ of Certiorari in *Calderon v. Phillips*, Case No. 95-616, I concluded by telling this Court: "The state can only delay so long. Sooner or later they are going to have to face the music - Phillips caught Madera County officials with their hands dirty." Some 17 years later, that time is now, as the majority in *Phillips III* correctly held.

The State's Petition for Writ of Certiorari should be denied.

DATED: 21 January 2013

Richard L.A. Phillips
RICHARD L.A. PHILLIPS
filing *pro se*