No. 12-5890

In the Supreme Court of the United States

RICHARD LOUIS ARNOLD PHILLIPS,

Petitioner,

v.

KEVIN R. CHAPPELL, WARDEN,

Respondent.

OPPOSITION TO PETITION FOR CERTIORARI

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR CERTIORARI

KAMALA D. HARRIS
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
SEAN M. MCCOY
Deputy Attorney General
WARD A. CAMPBELL
Supervising Deputy Attorney General
Counsel of Record
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5251
Fax: (916) 322-2368
Ward.Campbell@doj.ca.gov
Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly applied *Strickland v. Washington*, 466 U.S. 668 (1984), and *Cullen v. Pinholster*, 563 U.S. __, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), to require only that counsel make reasonable decisions and conduct a reasonable investigation in light of the particular facts of the case.

2. Whether this Court's law of the case doctrine applies where the appellate court reviews on remand the same issue with the benefit of new authority from this Court as well as new facts from the evidentiary hearing the appellate court previously ordered.

LIST OF PARTIES

1. Richard Louis Arnold Phillips
2. Kevin R. Chappell, Warden

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

COURT RULES

STATEMENT OF THE CASE

In December 1977, petitioner Phillips instructed Bruce Bartulis (the robbery and murder victim, and Ronald Rose (the robbery and attempted murder victim) to gather as much money as they could, and lured them to a vacant area by telling them falsely that petitioner's "brother" would sell them some stolen insulation. *Phillips v. Ornoski*, 673 F.3d 1168, 1172-1175 (9th Cir. 2012) (*Phillips III*). Petitioner and his girlfriend, Colman, drove in one car, while Bartulis and Rose drove in another. Once at the rendevous location, petitioner shot both Bartulis and Rose at close range, killing Bartulis. *Id.* Petitioner stole their wallets and complained to Colman about not finding the money Batulis and Rose were supposed to have. *Id.*

Petitioner then poured gasoline on Bartulis, Rose, and the car, and set the car on fire. *Phillips III*, 673 F.3d at 1174-1175. Rose, who was still alive, escaped from the burning car. *Id.* Phillips, upon seeing that Rose was still alive, drove at him, hitting Rose and cracking the car's windshield. Petitioner and Colman left the area and fled out of the state approximately a week later. *Id.*

Rose survived his wounds and identified petitioner as the person who had shot him and killed Bartulis. *Phillips III*, 673 F.3d at 1175-1176. Colman returned to California within two weeks and turned herself into the police. Both Rose and Colman testified against petitioner at his murder trial.

Id.; see *Phillips v. Woodford*, 267 F.3d 966, 989 (9th Cir. 2001) (Kleinfeld, J., dissenting) (*Phillips II*).

Petitioner testified in his own defense, insisting that he was not present when the murder occurred, but that he had been at a business meeting elsewhere. *Phillips III*, 673 F.3d at 1176. In addition to petitioner's alibi defense, defense counsel Martin also argued that the murder had not occurred during a robbery, but "that Colman and Rose and defendant's erstwhile friend, Richard Graybill (who aided police in their efforts to apprehend [petitioner]) were involved in a conspiracy to fix [petitioner] with the blame for the shootings, which were purportedly committed by Graybill and Colman." *People v. Phillips*, 41 Cal.3d 29, 222 Cal.Rptr. 127, 711 P.2d 423, 428-429 (1985) (footnote omitted); *Phillips III*, at 1176-1177. During his testimony, petitioner claimed that the night of the shooting, he had loaned the car used to run over Rose to Graybill, who returned it with a damaged windshield the next morning. *People v. Phillips*, 711 P.2d at 429.

Petitioner was convicted of the first degree murder of Bruce Bartulis, with a "special circumstance" finding of murder during the commission of a robbery. *People v. Phillips*, 711 P.2d. at 459. The California Supreme Court affirmed petitioner's conviction, but set aside the penalty. Id. Later, in October 1991, petitioner was again sentenced to death. That sentence was was affirmed by the California Supreme Court. *People v. Phillips*, 22 Cal.4th 226, 92 Cal.Rptr.2d 58, 991 P.2d 145, 156 (2000).

While petitioner's second appeal was pending in the state court, he filed a petition for writ of habeas corpus in the district court. In 1995, the Ninth Circuit reversed and remanded the district court, holding that Petitioner could pursue a federal habeas corpus petition as to guilt phase claims. *Phillips v. Vasquez*, 56 F.3d 1030, 1037-1038 (9th Cir. 1995) (*Phillips I*).

Petitioner filed an amended petition for writ of habeas corpus in 1995. *Phillips II*, 267 F.3d at 973. The federal district court denied petitioner's request for an evidentiary hearing and entered summary judgment. *Id.* at 973, 988. In 2001, the Ninth Circuit Court of Appeals reversed the district court's order, and remanded the case for an evidentiary hearing on petitioner's *Brady*/*Napue* claim, and for a determination of whether petitioner suffered prejudice regarding his ineffective assistance of counsel claim. *Phillips II*, 267 F.3d at 980-983, 988; *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959).

In 2004, following the evidentiary hearing, the district court denied both claims, and specifically determined that petitioner had not been prejudiced by any violations that occurred with respect to his ineffective assistance of counsel claim. *Phillips III*, 673 F.3d at 1178. On appeal, the Ninth Circuit reversed as to the *Brady*/*Napue* claim, but affirmed the district court's rejection of petitioner's ineffective assistance of counsel claim. *Phillips III*, at 1180-1181. Further, the appellate court statd that its earlier decision that counsel had rendered deficient performance was erroneous. *Id.*

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Ninth Circuit Properly Applied *Strickland v. Washington*, and *Cullen v. Pinholster*, In Finding that Counsel Was Not Deficient Because He Had Investigated the Defense Petitioner Provided and Insisted Upon

Petitioner asks this Court to determine whether the Ninth Circuit erred and created new circuit law by interpreting this Court's decision in *Cullen v. Pinholster*, 131 S.Ct. 1388, as holding that counsel has no constitutional duty to investigate before selecting a defense. Petitioner misapprehends the decision of the appellate court.

This Court has long held that trial counsel has a duty to make reasonable decisions in determining the scope and direction of any investigation or action taken on the defendant's behalf. *Strickland, v. Washington*, 466 U.S. at 688–689. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions ...." *Id.* More recently, this Court has observed that it is "[r]are" that constitutionally competent representation will require "any one technique or approach." *Harrington v. Richter*, 562 U.S. __, 131 S.Ct. 770, 779, 178 L.Ed.2d 624 (2011). Further, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, at 691. Thus, counsel's duty to his client is "to make

reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*

In an earlier appeal in 2001, the Ninth Circuit concluded that petitioner's defense counsel had rendered deficient performance because he did not select the alibi defense presented at trial based on a reasonable investigation or strategic decision. *Phillips v. Woodford*, 267 F.3d 966, 980 (9th Cir. 2001) (*Phillips II*); see *Phillips v. Ornoski*, 673 F.3d 1168, 1180 (9th Cir. 2012) (*Phillips III*). The appellate court remanded the case to the district court for an evidentiary hearing to assess whether the deficient performance was prejudicial under *Strickland*. *Phillips II*, 267 F.3d at 980-983, 988. Following an evidentiary hearing, the district court determined that petitioner had suffered no prejudice with respect to his ineffective assistance of counsel claim. *Phillips III*, 673 F.3d at 1178.

Subsequent to the district court's evidentiary hearing, this Court issued its opinion in *Cullen v. Pinholster*, 131 S.Ct. 1388. In that case, the Ninth Circuit had reasoned that counsel had a "constitutional duty to investigate," and held that "[i]t is prima facie ineffective assistance for counsel to 'abandon[ ] their investigation of [the] petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources.'" *Id.* at 1406 (*quoting Wiggins v. Smith*, 539 U.S. 510, 524–525, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)). This Court reversed the Ninth Circuit's decision, explaining that:

> [t]he Court of Appeals misapplied Strickland and overlooked "the constitutionally protected independence of counsel and ... the wide latitude counsel must have in making tactical decisions." 466 U.S., at 689, 104 S.Ct. 2052. Beyond the general requirement of reasonableness, "specific guidelines are not appropriate." *Id.*, at 688, 104 S.Ct. 2052. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions ...." *Id.*, at 688–689, 104 S.Ct. 2052. Strickland itself rejected the notion that the same investigation will be required in every case. Id., at 691, 104 S.Ct. 2052 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). It is "[r]are" that constitutionally competent representation will require "any one technique or approach." *Richter*, 131 S.Ct., at 779.

Pinholster, 131 S.Ct. at 1406-1407.

In *Phillips II*, the Ninth Circuit had committed error similar to the error it had committed in *Pinholster*. *See Phillips III*, 673 F.3d at 1180, *Phillips II*, 267 F.3d at 980. Specifically, the appellate court found deficient performance because Petitioner's trial counsel, Martin, had investigated only the alibi defense that Petitioner had insisted upon, and which Petitioner supported with his own testimony, rather than an alternate shoot-out "defense." *Phillips III*, 673 F.3d at 1180-1181; *cf. Phillips II*, 267 F.3d. at 990 (Kleinfeld, J., dissenting) (noting that petitioner insisted on false alibi defense until 10 years after conviction when he asserted shoot-out as theory for ineffective assistance). Revisiting the case after the evidentiary hearing, Judge Reinhardt's opinion observed that:

> Although [counsel's] decision to pursue the defense at trial was most assuredly ill-advised, we cannot, in light of Pinholster, maintain our conclusion that his decision to pursue the strategy urged by his client did not fall within the "wide latitude counsel

> must have in making tactical decisions." 131 S.Ct. at 1406. Accordingly, in light of the Supreme Court's intervening decision, we are compelled to overrule our 2001 holding that Martin's performance at Phillips's trial was constitutionally ineffective, and to now hold that his shortcomings were not such as to overcome the "strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 1407.

Phillips III, 673 F.3d at 1181.

Contrary to petitioner's argument, the Ninth Circuit did not hold that, under *Pinholster*, trial counsel had no duty to investigate. In *Phillips II*, the Ninth Circuit had found deficient performance because the court believed counsel investigated only the false alibi defense petitioner insisted upon, and not the equally false shoot-out defense. *Phillips II*, 267 F.3d at 980; *see id.* at 989-990 (Kleinfeld, J., dissenting). In *Phillips III*, the appellate court recognized that its earlier holding had failed to give adequate deference to the "'wide latitude counsel must have in making tactical decisions.'" *Phillips III*, 673 F.3d at 1181, *quoting Pinholster*, 131 S.Ct. at 1406. That is, even though the majority still found the decision highly questionable, counsel's tactical decision to accept petitioner's story, investigate it, and even find corroboration for it, rather than investigating and presenting a different, equally non-existent, conflicting theory in the face of petitioner's insistence that he was not present, was not outside the wide range of latitude counsel must have in making such decisions. *Phillips III*, 673 F.3d at 1181; *see Phillips II*, 273 F.3d at 990 (Kleinfeld, J., dissenting).

The Ninth Circuit did not misconstrue *Strickland* or *Pinholster* to mean that counsel had no duty to investigate; rather, the appellate court understood that counsel had a duty to make reasonable choices under the particular circumstances, and applied that rule to this case. *Phillips III*, 673 F.3d at 1181; *see Pinholster*, 131 S.Ct. at 1406-1407.

There is no reason to grant certiorari as to this question. See Sup. Ct. Rule 10(a).

2. The Doctrine of Law of the Case did not Require the Ninth Circuit, Upon Consideration of New Facts and Authority from this Court, to Leave Uncorrected Its Earlier Erroneous Finding of Deficient Performance

Petitioner asks this Court to determine whether the Ninth Circuit Court of Appeals erred by failing to apply this Court's law of the case doctrine. But the doctrine of law of the case did not bar the appellate court from reconsidering its earlier ruling where the court had new authority and new facts to consider.

The doctrine of law of the case is based on the assumption that once a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. *Pepper v. United States*, 131 S.Ct. 1229, 1250, 179 L.Ed.2d 196 (2011) (*citing Arizona v. California*, 460 U.S. 605, 618 (1983)). However, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice. *Arizona v. California*, 460 U.S. at 618 n. 8; *Agostini v.*

Felton, 521 U.S. 203, 236 (1997). The doctrine, thus, directs a court's discretion, but it does not limit the court's power. *Arizona v. California*, at 618 n. 8 (citing *Southern R. v. Clift*, 260 U.S. 316, 319 (1922), and *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)).

In *Phillips II*, the Ninth Circuit found deficient performance because counsel investigated the alibi defense petitioner insisted upon, but not the slightly more plausible, but still false, "shoot-out" defense. *Phillips II*, 267 F.3d at 980; *see id*. at 989-990 (Kleinfeld, J., dissenting). Because neither the parties nor the district court had addressed the prejudice prong of petitioner's ineffective assistance claim under *Strickland*, the appellate court remanded the case for an evidentiary hearing on that prong. *Id*. at 980-983. Thus, it is clear that the appellate court did not find ineffective assistance of counsel, but determined only that, based on the record before it at that time, petitioner had provided evidence of deficient performance sufficient to warrant an evidentiary hearing on prejudice. *Phillips II*, at 980-983, 988; see *Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

In *Phillips III*, the appellate court had the benefit of both additional evidence and new precedent from this Court on the proper application of *Strickland*. First, after taking evidence, the district court ruled on the merits that petitioner had not been prejudiced by any violations that occurred with

respect to his ineffective assistance of counsel claim. *See Phillips III*, 673 F.3d at 1178. Then, in 2011, this Court issued its decision in *Pinholster*, 131 S.Ct. at 3410, in which the Court reiterated that, under *Strickland*, counsel is afforded wide latitude in making reasonable decisions regarding tactics and investigation. *Pinholster*, at 1406-1407; *Strickland*, 466 U.S. at 688-689.

In reviewing the district court's prejudice determination, the appellate court noted that its own prior holding had failed to give adequate deference to the "'wide latitude counsel must have in making tactical decisions.'" *Phillips III*, 673 F.3d at 1181, *quoting Pinholster*, 131 S.Ct. at 1406. Judge Reinhardt's opinion observed:

> [A]lthough [trial counsel] Martin's strategic decision to proceed with an alibi defense was highly questionable at best, the record suggests that Martin did attempt to explain to Phillips that alibi defenses generally are not feasible when the defendant refuses to account for his whereabouts at the time of the crime. Moreover, Martin's investigation did yield a witness whose testimony provided modest support for Phillips's alibi defense: the proprietor of a business not far from the scene of the crime testified that the morning after the shootings, an individual other than Phillips loitered in his establishment brandishing a .45 automatic weapon of the sort used in the shootings, and that the individual's car had multiple bullet holes in it. In short, Martin attempted to confront his client with the shortcomings of his alibi defense and, remarkably, found a witness whose testimony tended to corroborate that defense. Although Martin's decision to pursue the defense at trial was most assuredly ill-advised, we cannot, in light of *Pinholster*, maintain our conclusion that his decision to pursue the strategy urged by his client did not fall within the "wide latitude counsel must have in making tactical decisions." 131 S.Ct. at 1406. Accordingly, in light of the Supreme Court's intervening decision, we are compelled to overrule our 2001 holding that Martin's performance at Phillips's trial was constitutionally ineffective, and to now hold that his shortcomings were not such as

> to overcome the "strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 1407

Phillips III, at 1181.

Faced with the additional facts from the evidentiary hearing, as well as the lower court's finding of no prejudice, the Ninth Circuit could have merely adopted that finding and resolved the ineffective assistance claim in that manner. That is, even if there had been deficient performance, as found in *Phillips II*, 267 F.3d at 980, the lack of prejudice to Petitioner would defeat the claim. *See Strickland*, 466 U.S. at 694; *Phillips III*, 673 F.3d at 1178. So, ultimately, the fact that the appellate court also chose to reverse its earlier finding of deficient performance did not alter the result reached as to petitioner's claim of ineffective assistance of counsel. However, in light of this Court's reiteration that, under *Strickland*, a court "'must indulge [the] strong presumption' that counsel 'made all significant decisions in the exercise of reasonable professional judgment,'" *Pinholster*, 131 S.Ct. at 1407 (*quoting Strickland*, 466 U.S., at 689–690), the Ninth Circuit reasoned that its prior holding in *Phillips II*, that counsel's performance had been necessarily deficient for investigating and advancing Petitioner's claimed alibi defense, was clearly erroneous. Further, the appellate court implicitly determined that to allow that earlier determination to remain uncorrected would work a manifest injustice.

Law of the case did not prevent the appellate court from revisiting its own prior ruling the validity of which had been called into question by new facts and intervening authority. *Phillips III*, 673 F.3d at 1181; *see Arizona v. California*, 460 U.S. at 618 n. 8; *Agostini v. Felton*, 521 U.S. at 236.

So, there is no reason to grant certiorari as to this question either. See Sup. Ct. Rule 10(a).

CONCLUSION

Petitioner's petition for writ of certiorari should be denied.

Dated: September 20, 2012

Respectfully submitted

KAMALA D. HARRIS
Attorney General Of California
MANUEL M. MEDEIROS
State Solicitor General
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
SEAN M. MCCOY
Deputy Attorney General

WARD A. CAMPBELL
Supervising Deputy Attorney General
Counsel For Respondent