DEATH PENALTY CASE

Case No. _____

CAPITAL CASE

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD LOUIS ARNOLD PHILLIPS, Petitioner,	)
vs.	)
KEVIN R. CHAPPELL, Warden, (a) San Quentin State Prison, Respondent.	)

On Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

RICHARD L.A. PHILLIPS
pro se by Order of
Ninth Circuit Court of Appeals
C-13707 1-EB-108
San Quentin State Prison
San Quentin, CA 94964-0489

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(Death Penalty Case)

QUESTIONS PRESENTED

I.

This is a pre-AEDPA case. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held there exists a Sixth Amendment constitutional right to effective assistance of counsel at all stages of criminal trials, including the obligation to investigate before selecting a defense. In *Cullen v. Pinholster* (*Pinholster*), 563 U.S. _____ (2011) this Court reiterated *Strickland* controls for trial counsel's obligation to investigate all phases of a capital case. Did the Ninth Circuit err in creating a new law of the Circuit that held, pursuant to the Ninth's reading of *Pinholster*, trial counsel has no constitutional duty to conduct any investigation into police reports, ballistics evidence, and crime scene photos before selecting a defense?

II.

This Court has established a clear "law of the case doctrine." In 2001 the Ninth Circuit held Phillips' right to effective assistance of counsel, within the meaning of *Strickland*, had been violated because counsel conducted no investigation before selecting a defense. In its latest decision the Ninth Circuit found it was "compelled" to overturn the 2001 decision in light of this Court's ruling in *Pinholster* that the Sixth Amendment does not impose a "constitutional duty to investigate" in capital cases. Was it a violation of Phillips' constitutionally protected right to Due Process under the Fourteenth Amendment when the Ninth Circuit declined to follow this Court's law of the case doctrine?

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PETITION FOR WRIT OF CERTIORARI

RICHARD LOUIS ARNOLD PHILLIPS (Phillips), *pro se* by Order of Ninth Circuit Court of Appeals, with Katherine L. Hart, advisory counsel by appointment of the Ninth, petition for writ of *certiorari*.

I. OPINIONS BELOW:

The Ninth Circuit Order in Case No. 04-99005, *Phillips v. Ornoski (Phillips III)*, Amending Opinion, and Denying Rehearing En Banc and Amended Opinion (Amended Op.) is attached as Appendix A. *Phillips v. Woodford (Phillips II)*, 267 F.3d 966 (9th Cir. 2001) is attached as Appendix B.

II. JURISDICTION:

The Ninth Circuit entered judgment on 25 May 2012. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254 (1).

III. CONSTITUTIONAL PROVISIONS INVOLVED:

1. The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

2. The Fourteenth Amendment to the United States Constitution provides no citizen may be denied life or liberty, by either the U.S. Government or a State, without due process.

IV. INTRODUCTION AND STATEMENT OF THE CASE:

In this pre-AEDPA case the Ninth Circuit has thrown down the gauntlet to this Court to reaffirm that (1) *Strickland* remains the law after *Pinholster* and (2) final judgments cannot be tossed aside without prior notice to litigants and legally sufficient cause to do so.

Phillips, the only California death row inmate granted permission to proceed *pro se* in his capital litigation, has received a partial reversal from arguably one of the most liberal judges on the federal bench. Yet Phillips is now asking this Court to review that ruling. Phillips requests *cert.* issue because the Ninth Circuit, despite the recent flood of reversal from this Court; being warned Justice Scalia 'still has his eye on it,' has challenged this Court to again question its analysis. To move this case to such a point, the Ninth has announced a new, ostensibly more conservative, interpretation of *Strickland v. Washington*, 466 U.S. 668 (1984), establishing a new law of the Ninth Circuit.

Specifically, the Ninth now says this Court, in *Cullen v. Pinholster* (*Pinholster*), 563 U.S. _____ (2011) held "the Sixth Amendment does not impose a strict "constitutional duty to investigate" [before selecting a defense] upon attorneys working in capital cases." (Amended Op. at 5796.) Per Judge Reinhardt, this new perceived contraction of habeas corpus review "compels" reversal of a prior final decision in this case. (Amended Op. at 5797.) In *Phillips II*, decided in 2001, the Ninth had previously found Phillips' court appointed trial counsel Paul Martin's

(Martin) performance deficient under *Strickland,* for failing to investigate the readily available facts of the case, and interview witnesses, before selecting the alibi defense used at trial.

A. **The Case:**

1. At midnight on 07 December 1977, enveloped in the thick tule fog of Central California, Phillips, Ronald Rose (Rose) and Bruce Bartulis (Bartulis) met at a Hwy. 99 off-ramp for purpose of participating in criminal activity. Phillips' then girlfriend Sharon Colman (Colman) was also present. Colman was tangential to the events, however, she became the State's star witness. Although how events unfolded remain in dispute, Bartulis died from a single gunshot wound to the chest.

2. Following the confrontation Phillips removed the identification of both Rose and Bartulis, leaving behind several thousand dollars of cash located in two different pockets in Rose's clothing. Phillips then set the crime scene alight, before fleeing with Colman.

3. Phillips' case was tried to a jury upon a pleading of not guilty. Phillips was convicted of first degree murder for the death of Bartulis; attempted first degree murder of Rose; two counts of robbery, all while using a firearm. The special circumstance murder in the commission of robbery was found to be true. On 20 February 1980 Phillips was sentenced to death.

B. **Pre-trial:**

1. Phillips and Colman fled to Utah, subsequently parting ways. Before leaving Phillips, Colman had secretly been making arrangements through Richard Graybill (Graybill) to cross

Phillips, surrender, and cooperate with law enforcement. Graybill, who became a prosecution witness, was a business partner of Phillips; Colman's ex-boyfriend.

After deciding to become a witness for the State, en route to turning herself in, Colman met with Dr. ReVille (ReVille). ReVille was at that time Phillips' brother-in-law, and owner of the Corvette Colman was traveling in. ReVille asked Colman how the windshield of the vehicle that Phillips and she had been driving the night of the confrontation, had been damaged. Colman told ReVille that once she and Phillips met the other people, "both parties started shooting at each other at the same time."[1]

2. After speaking with ReVille, later that night Colman turned herself in to Madera Sheriff's department. Colman was arrested; held without bail; charged with capital murder and attempted murder. Several days later Colman participated in a lengthy interview with Madera County detectives, the County Prosecutor David Minier (Minier), and an attorney from the public defender's office. Although in her two interviews with law enforcement, Colman did not mention the shoot-out, before her first interview she met with Graybill. An officer at the jail wrote a report stating he had overheard Graybill instructing Colman to "bluff it all the way." During her first interview Colman also did not indicate the meeting between Phillips, Rose and Bartulis was for purpose of robbery; denied knowledge of

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[1] As it was never raised at trial, discussion of the shoot-out was a major point in *Phillips II*. In *Phillips III* the shootout is not mentioned.

Phillips being in possession of a gun;[2] knew where Phillips was.

After the first interview with law enforcement, Colman again met with Graybill. Several days later one of the detectives from the first meeting, along with the attorney assigned from the public defender's office, interviewed Colman a second time. During this second interview, for the first time, Colman said the underlying motive of the meeting was robbery. Colman again denied she knew Phillips was in possession of a gun.

3. In March 1978 Colman finally agreed to assist the FBI by allowing them to trace a telephone call between her and Phillips. Phillips was arrested several hours later, in Salt Lake City, Utah.

Following extradition to California, Phillips was appointed counsel who, without meeting with Phillips (except in front of a courtroom holding cell), conducted a short preliminary hearing. Phillips was bound over to superior court. After still not meeting with counsel, Phillips filed *pro per* a motion for substitution of counsel. Phillips' motion was granted and attorney Paul Martin was appointed as replacement counsel. Martin,

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[2] On *Phillips II* remand, during ordered depositions, Colman initially lied — then, trapped by co-counsel Ms. Hart — admitted the truth: She had testified falsely at every turn in this case. On the day of the shoot-out, she, NOT Phillips, transported and possessed Phillips' gun. This was a cornerstone of Phillips' subsequent Appeal (a) because Phillips had been denied funding from both state and federal courts, to investigate and show Colman's trial testimony was false; (b) this information should have been discovered by Martin during pre-trial investigation; (c) Phillips was prejudiced by this because since police reports showed Colman was supposed to be with someone else that night, this would have made a *prima facie* showing Phillips would have been without his gun, eroding the charge of premeditation. Although fully briefed in Phillips' latest Appeal, there is also no mention of this in *Phillips III*.

without meeting with Phillips, dropped off all police reports provided to him through the prosecutor's "open file" policy, for jail staff to deliver to Phillips. Shortly thereafter Martin came to the jail to retrieve the police reports and to meet with Phillips. During this first of only four meetings with Martin, Phillips stated, "screw'um, I'll just say I wasn't there." Based on this statement, without further investigation, Martin selected the alibi defense presented at trial.

C. The Trial:

1. A single police report said a Mr. Atkins (Atkins) had called the Sheriff's office the day after the confrontation to say a man was waiving a .45 automatic at Atkin's junk yard, claiming involvement in an incident the previous night.

Martin's investigation files do not show, pre-trial, Atkins was ever interviewed. Martin subpoenaed Atkins as a witness in Phillips' guilt trial. Martin presented 46 lines of direct testimony from Atkins, half of which was spent debating the exact date Atkins had seen the man with the gun. Cross-examination took seven pages of transcripts. There was no redirect. This was the total support for the alibi defense Martin subsequently testified he "never thought had any merit." (*Phillips II* at 978.)

2. Phillips' two trials (guilt, then penalty) generated slightly more than 500 total pages of transcripts.

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V. LEGAL ARGUMENTS:

In a criminal case, counsel has two constitutional obligations with respect to selection of a defense: (a) On the one hand, counsel must conduct a reasonable investigation of potential defenses; (b) having conducted such investigation, counsel's selection of the defense to present must be reasonable. (See *Strickland* at 690-691.) Well-settled law of this Court is:

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable[.]" (*Id.* at 690.)
> ...
> "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances[.] (*Strickland* at 691.)

A. The Ninth's Correct Prior Final Decision, Finding IAC:

1. In *Phillips II* the Ninth Circuit held:

> "It is undisputed that Martin did not investigate any defense other than the alibi defense that was presented at trial." (*Id.* at 978.)

The *Phillips II* Court succinctly recounted the evidence in the record that would have alerted reasonably competent counsel to the need for investigation into possible alternative defenses, prior to selecting the alibi defense.[3]

> "That evidence consists of: (1) autopsy photographs of Bartulis that show the bullet's trajectory and demonstrate that Phillips could not have fired the fatal shot from where Rose and Colman testified that he was standing, and

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[3] Post-conviction, Martin testified once Phillips made the statement "screw-um, I'll just say I wasn't there" (see previous page), Martin thought that under the law he was ethically prohibited from investigating other defenses. Martin's failure to investigate the applicable law is also a violation of *Strickland*. (See *Phillips III* Amended Op. at 5796.)

> by declaration by Madera County Sheriff/ Corner Edward Bates that support the conclusion; (2) a police report stating that Colman, the State's principal witness, had told one Dr. ReVille that "both parties shot at each other at the same time, shooting out the window shield on [Phillips's] Toyota;" (3) a taped police interview in which Colman said that immediately after the shooting, Phillips reached into the victim's truck and retrieved Rose's gun, thus demonstrating that Phillips knew Rose had a gun and that the gun was accessible rather than hidden; (4) evidence that Graybill, who Phillips contends was present during the shooting, told his companion Tamera Nichols that a "business deal had gone sour" and that "all of a sudden both parties just started shooting each other," and (5) evidence that Graybill told Gary Bishop, another associate of Phillips's, that Graybill had been present at the crime scene and that "all hell broke loose" and Phillips had been "lucky to survive."" (Appendix B: *Phillips II* at 976-77, footnote omitted.)

B. **The Ninth's Ruling in Phillips III, Overturning Prior Final Decision:**

1. In *Phillips III*, without holding any of the *Phillips II* findings of fact had been refuted during remand for evidentiary hearing, the Ninth flushed away the above by finding *Pinholster* established a new interpretation of *Strickland*, holding "the Sixth Amendment does not impose a strict "constitutional duty to investigate" upon attorneys working in capital cases[]," and,

> "[a]ccordingly, in light of the Supreme Court's intervening decision, we are compelled to overturn our 2001 holding that Martin's performance at Phillips's trial was constitutionally ineffective[.]" (*Phillips III* Amended Op. at 5797.)

In so holding, the Ninth lost track of this Court's standard for evaluating Phillips' claim of ineffective assistance of counsel. In *Wiggins v. Smith*, 539 U.S. 510 at 527 (2003) this

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Pivotal to this Court's analysis was the fact the record amply demonstrated the reasonableness of Pinholster's lawyers' strategic decisions. The analysis of the reasonableness of trial counsel's strategy decision began "with the premise that 'under the circumstances, the challenged action[s] might be considered sound trial strategy.'" (Cite omitted.) This Court then reviewed a litany of case-specific factors. The Court began by quoting from Judge Kozinski's Ninth Circuit dissenting opinion, that detailed the reasons Pinholster's attorney's rejection of a "humanizing" penalty phase defense reflected a reasonable strategic judgment:

> "[Pinholster's attorneys] were fully aware that they would have to deal with the mitigation sometime during the course of the trial, did spend considerable time and effort investigating avenues for mitigation[,] and made a reasoned professional judgment that the best way to serve their client would be to rely on the fact that they never got [the required §190.3] notice and hope the judge would bar the state from putting on their aggravation witnesses." (Cite omitted.) (USSC Op. p. 19.)

This Court then elaborated at length on the reasonableness of the decisions by Pinholster's attorneys.

> "Further, if their motion was denied, counsel were prepared to present only Pinholster's mother ... to create sympathy[.] ... Rather than displaying neglect, we presume that Dettmar's arguments were part of this trial strategy.
> ...
> The state records supports the idea that Pinholster's counsel acted strategically to get the prosecution's aggravation witnesses excluded[.]" (USSC Op. p. 19.)
> ...
> "Timesheets indicate that Pinholster's trial counsel investigated mitigating evidence. Long before the guilty verdict, Dettmar talked

> with Pinholster's mother and contacted a psychiatrist." (USSC Op. p. 20.)
> ...
> "In sum ... billing records show that they spent time investigating mitigating evidence." (USSC Op. at p. 22.)

2. *Pinholster* is an AEDPA case. Notably, even after all the above, the holding was not that Mr. Pinholster's attorneys in fact conducted a reasonable investigation and then rejected a defense, but that the state court would not have been unreasonable to reach that conclusion. Nor did this Court hold Pinholster's arguments would be insufficient under the *de novo* standard that is applicable to Phillips' appeal. As a pre-AEDPA case, Phillips' case involves no second layer of deference, but only the single layer where the Ninth had previously and correctly held had been amply overcome.

In *Phillips II* the Ninth Circuit made none of the errors that led to the *Pinholster* reversal. The *Phillips II* Court applied no "strict rule" to counsel's performance. Indeed, after acknowledging the strong presumption of reasonableness in counsel's strategic choices, made after adequate investigation as established in *Strickland*, the *Phillips II* Court engaged in <u>exactly</u> the type of analysis *Pinholster* requires, finding:

> "We hold Phillips's defense counsel *did not* reasonably select the alibi defense used at trial. In this case ... the defense used at trial was not selected on the basis of a reasonable investigation or strategic decision. Martin testified at a state-court evidentiary hearing that he would have presented the alternative defense had he had certain documents in his possession; the state habeas court later made a factual finding that Martin indeed had the information in his possession at the time of the

> trial.[4] Moreover, by his own admission, Martin believed Phillips's alibi defense to be an unreasonable one." (Appendix B: *Phillips II* at 980 – Footnote added; Emphasis in original.)

Martin was substituted as defense counsel, after Phillips' preliminary hearing. Phillips' preliminary hearing transcripts were readily available to Martin. In *Rompilla v. Beard*, 545 U.S. 374 at 389 (2005) the majority noted "looking at a file the prosecution says it will use is a true bet: whatever may be in that file is going to tell defense counsel something about what the prosecution can produce." Without making reasonable efforts to review the readily available preliminary hearing transcripts, then comparing them with the police reports provided by the prosecution, Martin could have no hope of knowing there had been a mutual exchange of gunfire; the single shot killing Bartulis could not have come from where both Rose and Colman testified Phillips was standing. Nor could Martin discover the other evidence readily available to support an argument to the jury that the shootout was not pre-planned.

Pinholster does not eviscerate counsel's *Strickland* obligation to thoroughly investigate the case facts and applicable law before selecting a defense. The Ninth Circuit erred in establishing a new law of the circuit stating trial counsel, under

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[4] During state habeas proceedings Martin testified he did not receive the "shoot-out" report, and how, if he had received the report in question, he would have used it. The habeas court found Martin in fact did have the report. Once Phillips then asserted ineffective assistance of counsel for failing to act on the report, Martin changed his position and subsequently testified that even if he did have it, he would not have used the report.

for failing to investigate possible alternative defenses. *Strickland* requires counsel to conduct a reasonable investigation before selecting a defense. In *Phillips II* the Ninth applied the correct legal standard – *Strickland's* requirement defense counsel conduct a reasonable investigation before selecting a defense.

Pinholster did not overrule, change or in any way modify *Strickland's* requirement that criminal defense counsel conduct a reasonable investigation; rather, *Pinholster expressly reaffirmed and applied Strickland's reasonable investigation standard.*

4. In *Pinholster* the California Supreme Court rejected Pinholster's habeas corpus claim that his lawyers were ineffective for failing to present mitigating evidence regarding his life and background at the penalty phase of his trial. Defense lawyers first attempted to bar the prosecution from presenting aggravating evidence. When that failed, counsel only presented evidence designed to induce sympathy for Pinholster's mother.

The federal district court found trial counsel to be ineffective and granted habeas corpus relief. The Ninth Circuit affirmed, holding the California Supreme Court had unreasonably applied *Strickland.*[5]

The Ninth Circuit drew from this Court's cases, a constitutional duty to investigate, and the principle that it is *prima facie* ineffective assistance for counsel to abandon their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of

[5] As noted above the AEDPA applied to Pinholster, resulting in double deference to the state court decision that his trial counsel were not ineffective, does not apply to Phillips.

sources. This Court rejected the Ninth's analysis as follows:

> "The Court of Appeals misapplied *Strickland* and overlooked 'the constitutionally protected independence of counsel and ... the wide latitude counsel must have in making tactical decisions.' 486 U.S. at 689, 104 S.Ct. 2052 80 L.Ed.2d 674. Beyond the general requirement of reasonableness, "specific guidelines are not appropriate." *Id.* at 688. "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. *Strickland* itself rejected the notion that same investigation will be required in every case. *Id.*, at 691 ("[C]ounsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary" (emphasis added)). It is "[r]are" that constitutionally competent representation will require "any one technique or approach." *Richter*, 562 U.S. at _____ (slip op. at 17). The Court of Appeals erred in attributing strict rules to this Court's recent case law." (Footnote omitted.) (USSC Op. at pp. 23-24.)

The quotation above makes it clear *Pinholster* did not in any way change the law as stated in *Strickland*.

4. Since there has been no change in the applicable law, there is no legal justification for vacating the prior <u>final decision</u> correctly holding that under *Strickland* Phillips' constitutional right to effective assistance of counsel, under the Sixth Amendment, was violated when Martin unreasonably failed to conduct sufficient investigation then consider the alternative defenses the readily available evidence would have pointed to, before selecting the alibi defense presented at trial.

VI. <u>CONCLUSION</u>:

In *Pinholster* this Court leaves unchanged the established law there can be no strict guidelines for <u>review</u> of counsel's

performance when there is a claim of constitutionally deficient representation. In establishing a new, purportedly more conservative, law of the circuit that fails to distinguish between no strict standard for review, and no "strict "constitutional duty to investigate"" before selecting a defense, the Ninth Circuit Court of Appeals erred in its reading of *Pinholster*. *Pinholster* does not alter a defendant's constitutional right to effective assistance of counsel. Due process, resulting in a trial this Court can have confidence in, can never be provided without counsel fulfilling his obligation to investigate the fact and the applicable law before selecting a defense.

In fashioning a novel, heretofore never argued theory of the case, the Ninth clearly ignored this Court's dictates.

The Ninth further erred in declining to follow the "law of the case doctrine" established by this Court. Left uncorrected, this will potentially impact all cases sent back to the district court for further proceedings.

Writ of *certiorari* should issue.

Phillips so prays.

DATED: 14 August 2012

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

DATED: Aug. 6'12

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Appointment of the Ninth