19-8226 ORIGINAL

No.

IN THE

SUPREME COURT OF THE UNITED STATES

RANDY PHIPPS – PETITIONER

vs.

MICHAEL MILLER, Warden: Crowley Correctional Facility, and

RICK RAEMISCH, Director: Colorado Department of Corrections,

PHILIP J. WEISER, Attorney General: State of Colorado,
Respondent's

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Randy Phipps #156655

P. O. Box 100

Olney Springs, Colorado 81062

QUESTION(S) PRESENTED

1. If a laymen criminal defendant has presented the general and operative facts supporting Fourth, Fifth, and Fourteenth Amendment claims in the United States Constitution advanced to the highest state court, and a state court acknowledges the federal claims and rules on the claims. Are the federal constitutional claims fairly presented under federal law?

2. **a.** Under Federal law if an indigent prisoner has clearly presented and alerted the state courts that "there are multiple issues infused into each claim of this motion he clearly and "respectfully" requested the district court "make adequate finding of fact and conclusions of law as to *each* issue raised", then thoroughly defines specific Fourth, Fifth, and Fourteenth Amendment violations in the U.S. Constitution throughout his post-conviction claims consistent with his alert to the state courts. Are his federal claims fairly presented for review?

b. Subsequently, if a prisoner is not a professional and expert lawyer in his form and format when introducing the claims in a motion. Is that a fatal error in the fair representation requirement, even when the state court acknowledged and ruled on the federal claims?

3. **a.** Under federal law, is it judicious, proper or legal for the lower federal courts in a Habeas Corpus proceeding to allow constitutional claims other than Fourth Amendment claims when Fifth and Fourteenth Amendment claims were

clearly and fairly presented in the same manner and within the body of other claims just as the Fourth Amendment claims were?

b. If the Fifth and Fourteenth Amendment claims were presented in the same manner as the Fourth Amendment claims, but the Fifth and Fourteenth Amendment claims were not dismissed with prejudice and the Fourth Amendment claims were, does federal law allow for dismissal with prejudice of claims that were fairly and fully presented in the exact same way the claims that were accepted and ruled upon?

4. **a.** Does federal law allow the lower federal courts to cheery pick, and or, sanction the cheery picking of claims that can be easily denied?

b. Does federal law allow the lower courts to dismiss with prejudice the claims that posses inconvenient facts for the government, that may result in an adverse ruling against the government in a criminal proceeding?

5. **a.** Under the Sixth Amendment, ADEPA and settled law, does a defendant have a right to "accurate" information from appointed counsel, especially if he asks defense counsel for very important, particular and precise information that rests in the body of statutory law?

b. Subsequent to that, does a defendant have the right to not accept, and not negotiate on specific concerns and issues critically important to him in a plea? This when inaccurate, and or, false information resting in the body of law is presented by appointed counsel?

6. Under the Fourth Amendment ADEPA and settled law, does a U.S. Citizen have a right to expect the protections of the Fourth Amendment's right to privacy, and the right to be free from unreasonable searches and seizures by the government, in computer files housed on a password protected personal computer hard drive in his private home that have not been made available in any form or fashion for any person or entity to access by the U.S. Citizen?

7. Under the Fourth and Sixth Amendments, ADEPA and settled law, does a Citizen have a right to have the critical and fundamental Fourth Amendment elements of knowing, intelligent, willing, unequivocal and specific permission for a warrant-less search and seizure by the government applied to the specific facts, actions, and evidence, and or, the lack thereof in a criminal case by the courts, and or, appointed defense counsel during the course of a criminal preceeding?

8. **a.** Under the Fourth Amendment ADEPA and settled law, is it legal for the government (law enforcement), to bypass the warrant requirements and protections of the Fourth Amendment and its settled law to use interstate underground telephone lines to without permission enter beyond the legal threshold of a U.S. Citizens home for the purposes of a search and seizure?

b. If not then, under the Fourth Amendment, ADEPA and settled law, is it legal for the government (law enforcement) without a warrant, or knowing,

intelligent, unequivocal, and specific permission from a U.S. Citizen to wittingly piggy back onto, or enjoy the fruits of, exploit, and or, sanction illegal privacy violations akin to a digital trojan horse. This for the purposes of accessing a Citizens private home and office, and password protected private computer (now PC) without any knowledge or permission of any kind to search, and or, seize evidence?

9. Under the Fourth and Sixth Amendment, ADEPA and settled law, does a criminal defendant have a right to have his state appointed attorney apply the critical and fundamental Fourth Amendment elements of knowing, intelligent, willing, unequivocal and specific permission for an unreasonable unwarranted search and seizure by the government to the facts, his actions, and or, the lack thereof in a criminal case?

10. Under federal law, in claims of United States Constitution violations, how is a laymen incarcerated prisoner capable of overcoming the presumption of correctness of the state court that was used by the lower federal courts in part to deny claims, if he cannot further develop a specific claim, or claims without assistance of an attorney to investigate if the lower courts have denied him a hearing at all levels?

11. Under the Fourth and Sixth Amendments, ADEPA and settled law, if the

entirety of the state court record shows zero evidence of any type of deliberate knowing and intelligent permission for an unreasonable search and seizure by the government. Is it proper, judicious, fundamentally fair, neutral, or detached for lower state and federal courts to manufacture facts and evidence outside of the state court record, or to sanction manufactured facts by a lower court to deny a criminal defendant's claims of Fourth and Sixth Amendment violations?

12. Under the Fourth and Sixth Amendments, ADEPA and settled law, Is it proper, judicious, fundamentally fair, neutral, or detached for lower state and federal courts to presuppose, assume, presume, and or, purely speculate without any evidence in the record of a defendants physical keystroke, and computer mouse click actions, as well as, intent, and knowledge of the inner workings of a specific computer software for purposes of either disregarding legal permission under the Fourth Amendment, or manufacturing the actions, intent and knowledge necessary for a state or federal court to postulate and deny specific constitutional claims of Fourth and Sixth Amendment violations?

13. **a.** Under the Fourth and Sixth Amendments, ADEPA and settled law, Is a government entity (law enforcement) allowed to in reckless disregard for the truth, lie on a sworn search warrant affidavit?

b. If not then, Under the Fourth and Sixth Amendments is it objectively unreasonable for an appointed defense attorney to not thoroughly investigate and vigorously litigate a corrupted search warrant, especially if the attorney on

numerous occasions himself acknowledged the distinct existence of a Fourth Amendment violation regarding this specific issue?

14. Under the Sixth Amendment, ADEPA and settled law, if the record is barren of any evidence granting legal permission under the Fourth Amendment, does a criminal defendant have the right to a state appointed attorney who will investigate the evidence independent of the states forensic examination of evidence in the technical manner he promised he would?

15. Under the Fourth and Sixth Amendment, ADEPA and settled law, does a criminal defendant have the right to an independent investigation of the facts and specific Electronically Stored Information (now ESI) evidence of a case if ?:

a. In the total absence of any information or evidence in the entirety of the record regarding legal permission for a warrant-less search an seizure sanctioned by the Fourth Amendment and settled law. The independent investigation of the ESI evidence would forensically and precisely define unequivocal, specific, knowing, and intelligent permission, or the lack thereof regarding a warrant-less search and seizure, and or;

b. If the independent forensic investigation into possible Fourth Amendment violations, and the outcome of said investigation could inject a distinct calculus founded in the fruit of the poisonous tree doctrine with respect to a reasonable probability as to a defendants decision regarding a plea in a criminal case, and or;

c. If the independent investigation would uncover the actual objective facts regarding the governments vitiation of the defendants Fourth Amendment rights and deliberate, and or reckless deception in the case and more importantly in the the sworn affidavit for a search warrant for the purposes of omitting inconvenient illegal facts, and or;

d. If the investigation would uncover additional facts showing a gross failure of the government to follow proper, fair, and basic investigative, and forensic procedures that may have resulted in a failure of the government to properly preserve the evidence and disclose the original untainted evidence as it was when it was seized to the defense for full and fair review and use in a sound, coherent and intelligent defense.

16. a. Under the Fourth and Sixth Amendment, ADEPA and settled law, does a criminal defendant have the right to a state appointed attorney who will place an adversarial test on the government regarding counsels self described existence of multiple Fourth Amendment claims before he urges on a defendant to accept a plea agreement?

b. Should a professional attorney substantially examine, investigate and test Fourth Amendment violations he himself uncovered and defined before he leads his client to accept a plea?

17. Under Federal law does a state prisoner in a Habeas proceeding have the right to a federal court to liberally construe his filings, and not hold against him

the fact that he may not have cited the correct or proper legal authority, and or, may not have presented the filings in an expert format of a professional lawyer, and or, may have been confused about legal theories?

18. Under the Sixth Amendment, ADEPA and settled law, does a criminal defendant have the right to an evidentiary hearing in a state district court when the entirety of the lower federal and state judiciary either manufactured, or sanctioned and deferred to the state courts manufacturing of physical actions, material evidence, intent and knowledge of a defendant for the purposes of denying federal Fourth and Sixth Amendment claims without any evidence to support the manufactured facts in the state court record?

19. a. Under the Sixth Amendment, ADEPA and settled law to include *Strickland v. Washington*, and *Hill v. Lockhart,* is it objectively reasonable that a criminal defendant would have plead not guilty and proceeded to trial had he uncovered the fact that the Fourth Amendment issues in his case were not properly or independently investigated by the state appointed attorney thus possibly nullifying the fruit of the poisonous tree doctrine, and allowing the governments possible illicit actions to stand with impunity?

b. Is an independent investigation for the purpose of this question an investigation by the defense experts that was equal to the opportunity the state afforded themselves on the physical evidence in its original seized state?

c. Should the purpose -in part- of an investigation insure not only the

propriety or impropriety of the states forensic examination, but also evidence directly contradicting the governments sworn statements as well as direct evidence contradicting the entirety of the lower courts manufacturing of facts and sanctioning of those manufactured facts?

20. **a.** Under the Sixth Amendment, ADEPA and settled law to include *Strickland v. Washington*, and *Hill v. Lockhart,* is it constitutionally proper for a state appointed attorney to acknowledge in meetings with a defendant the probability of the governments reckless disregard for the truth in the search warrant affidavit but not place an adversarial test on the government subsequent to his professional findings, then urge the client to waive a preliminary hearing and to plead guilty thus allowing the government to recklessly lie with impunity on a search warrant affidavit to cover up illegal inconvenient facts in favor of the defendant?

b. If the record does not show any evidence the attorney held the government responsible, and the defendant who did not understand the workings of the criminal court procedure and did not uncover the fact that counsel lied and did nothing regarding this issue, is it a reasonable probability he would have still plead guilty but for this gross dishonest action, or lack thereof, by counsel?

21. Under the Fourth and Sixth Amendments and settled law, to include *Strickland v. Washington*, and *Hill v. Lockhart,* does a criminal defendant have the right to: 1. A state appointed attorney who places the burden of proof on the

government regarding legal permission embraced by Fourth Amendment law for a warrant-less search and seizure before or during a preliminary hearing or pretrial motions hearing?; **2.** A state appointed attorney to compel the government to give any and all direct physical evidence of any type of permission, or lack thereof, for a warrant-less search and seizure under the Fourth, Fifth, Sixth, and Fourteenth Amendments?

22. **a.** Under the Fourth, Fifth, Sixth and Fourteenth Amendments and settled law, to include *Strickland v. Washington, and Hill v. Lockhart,* does a criminal defendant have the right to the original physical ESI evidence in its originally sealed state it was in the minute it was seized for full and fair review by the defense?

b. If a criminal defendant does have a right to this. Then does a criminal defendant also have the right to a state appointed attorney who will test the evidence and procedures of the government for the propriety of their forensic investigation procedures, when the record and statements of the government shows they they may not have followed basic and fundamental forensic procedures for the purposes of preserving the evidence for the defense to review regarding exculpatory, and or, favorable evidence available for the defense regarding guilt, and or, punishment?

23. **a.** Under the Sixth Amendment and settled law, is it a Sixth Amendment violation if before a criminal defendant has been arrested, and or, represented by counsel, the government fails to follow basic and fundamental forensic procedures when accessing

and assessing physical evidence to preserve it for defense?

b. Then, once he is appointed counsel, said counsel neglects to hold the government responsible for gross violations of his clients constitutional rights and appointed counsels ability to defend his client? Subsequent to this, would the reasonable probability that the defendant would have still accepted a plea agreement be objectively reasonable if the gross failures of the government been properly uncovered and litigated before the defendant plead?

24. **a.** Under the Sixth Amendment and settled law, does a criminal defendant have a right to an attorney who does not misrepresent the truth, or outright lie regarding very important if not paramount core issues to the client and case?

b. If a criminal defendant does have the right to a truthful and honest lawyer. Then, is it a reasonable probability that the defendant in this case would have still plead guilty had he known before he plead, or was sentenced that his attorney did not properly, fairly or thoroughly investigate the physical ESI evidence with experts consistent with his demonstrable multiple promises to do so?

25. **a.** Under the Sixth Amendment, ADEPA and settled law, is it constitutionally ineffective if an attorney for a criminal defendant places himself in a position to where he could be called to testify on the stand in a court hearing for his client as a computer forensic expert in a criminal case while representing his state appointed client?

b. If it is constitutionally ineffective for a lawyer to put himself in the position where he may need to testify as an expert, even-though he is not a computer forensic expert. Then is there a reasonable probability that a criminal defendant would still plead guilty had he known before he plead and was sentenced that his attorney acted grossly contrary to the defense of his client?

26. Under the Fourth and Sixth Amendments and settled law, if the criminal defendant was not notified by his attorney or any entity in the process that if he plead guilty he would waive his Fourth Amendment rights. Are his Fourth Amendment rights waived under the Fourth or within the Sixth Amendments?

27. Under the Fourth, Fifth, Sixth and Fourteenth Amendments and settled law, does a criminal defendant who has been convicted of a sex crime have the same rights as anyone else accused or convicted of a crime?

28. Under the Fifth, Sixth and Fourteenth Amendments and settled law, is it a violation of a criminal defendants rights enumerated above if the government does not properly preserve evidence for assessment by the defense, and or, does not use peer established evidence access and assessment procedures on physical evidence, while exploiting the luxury to access and asses the physical evidence in the exact condition it was in when it was seized by the government?

29. **a.** Under the Fifth, Sixth and Fourteenth Amendments and settled law, if

the government has suppressed exculpatory evidence because of a failure to follow proper ESI forensic evidence procedures, and defense counsel has failed to litigate this issue. Is that failure of counsel, constitutionally ineffective?

b. Is it objectively unreasonable for a criminal defendant in a post-conviction proceeding to claim that had he known before he plead and was sentenced that defense counsel did not investigate or litigate this issue in any way, that he would have plead not guilty and proceeded to trail?

30. **a.** Under the Fifth, Sixth and Fourteenth Amendments and settled law, does a criminal defendant have the right to accurate transcripts of his case proceedings?

b. If a transcript has been falsified to hide damaging testimony stated by the government in a court hearing, and the defendant has sworn affidavits presented to the state and federal courts. Does this in any measure undermine the presumption of correctness in proceedings, and does the defendant have the right to correct the transcripts and record to accurately convey what occurred in the hearings?

31. **a.** Under the Fifth, Sixth and Fourteenth Amendments and settled law, is it constitutionally sound for a state government to induce compulsion and waiver of a defendant, and or, prisoners Fifth Amendment right against compelled self incrimination and right to remain silent in his plea agreement without eliminating the threat of incrimination in a sexual history review requirement and provision

of the plea agreement?

b. Is it constitutionally ineffective for appointed counsel to not inform his client of the legal criminal penalties associated with possible incrimination, thus allowing the state in a plea agreement to require a laymen of the law citizen to possibly incriminate oneself in crimes that by law may be prosecuted thereby neutralizing the foundation the plea itself was founded on?

32. Under the Fifth, Sixth and Fourteenth Amendments and settled law, does a criminal defendant have the right to accurate information from his counsel resting in law regarding the time he will be eligible for parole, especially if parole is the single carrot of liberty, and the law requires him to do more than 40% more time in prison before he sees parole than he was told numerous times by appointed counsel before the defendant plead?

33. **a.** Under the Fifth, Sixth and Fourteenth Amendments and settled law, does a criminal defendant have the right to an attorney who is truthful regarding issues and the attorneys actions or lack thereof?

b. If an attorney has an habitual propensity to lie to his client numerous during the case, and a defendant has claimed numerous mendacious actions by counsel. Does a defendant have the right to present evidence in a hearing undermining the judiciary's presumption that counsel acted ethically and thus counsels actions presumptive constitutionally sound?

34. Under the Fifth, Sixth and Fourteenth Amendments and settled law, if a criminal defendant does not uncover multiple mendacious actions of counsel until after he has plead guilty and is sentenced, and has referenced evidence of these lies in his Constitutional aims. Is it objectively reasonable the defendant would have plead guilty regardless of the depth and breadth of counsels mendacity, and or, unethical actions?

35. Under the Fifth, Sixth and Fourteenth Amendments and settled law, is it legal for a state appointed attorney to deliberately, and or, maliciously lie to his client for the purposes of prodding, and or, extorting a plea of guilty from his client?

36. Under the Fifth, Sixth and Fourteenth Amendments, ADEPA, Habeas Corpus, and settled law, if a criminal defendant has claimed numerous lies perpetrated by counsel, and numerous claims of ineffective assistance of counsel, but the record has not been developed for these numerous claims, has the defendants claims of the cumulative effect of two or more claims been fully or fairly disposed of by the lower courts?

37. Under the Fifth, and Fourteenth Amendments, ADEPA and settled law, are a federal habeas petitioner's due process and equal protection rights violated, and or, ignored by the lower federal courts if?: **1.** The federal district court ordered the state to disclose and present all physical evidence regarding Phipps' asserted

claims, but the state ignored this order and disclosed zero physical evidence, and or, ; **2.** The lower federal courts disregarded this contempt of the court order, and disposed of the claims without the physical evidence the court required from the state, and or, **3.** When the defendant filed a motion to object to the states failure to follow a federal court order thus, vitiating the process. The federal court ignored the motion to object, sanction, and compel and disposed of the case.

38. Under the Fifth, and Fourteenth Amendments, ADEPA and settled law, is it a simple dismiss-able inadvertent mistake for a federal appeals court to deliberately manipulate and misrepresent a habeas petitioners specific factual claims of a reckless disregard for the truth by law enforcement regarding a sworn affidavit for search warrant without any evidence supporting the manipulation, thus diminishing, vitiating and ultimately ignoring the claim, and possibly disinfecting a precedent setting ruling?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

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"Rule 10. Considerations Governing Review on Certiorari: (a), (b) and (c)."

OTHER

N/A

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix [A] to the petition and is

[x] The petitioner does not know if the case has been reported at this time.

The opinion of the United States district court appears at Appendix [B] to the petition and is

[x] The petitioner does not know if the case has been reported at this time.

JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 11-7-19.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 12-31-19, and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment in the United Stated Constitution/ Fruit of the poisonous tree doctrine.

Fifth Amendment in the United Stated Constitution

Sixth Amendment in the United Stated Constitution

Fourteenth Amendment in the United Stated Constitution

AEDPA

Habeas Corpus pursuant to 28 U.S.C. 2254

INTRODUCTION

COMES NOW, Petitioner, Randy Phipps, pro se., submits this Writ of Ceriorari to the Supreme Court of the United States. He prays the court liberally construe his papers pursuant to: *Haines v. Kerner* 404 US 519 92 S. Ct. 594 (1972).

Randy Phipps (hereinafter Phipps) prays the court look beyond a possible failure to cite proper legal authority and confusion of a laymen in legal theories, and lack of professional format of the post conviction briefs before this brief, and below.

As in *Hains v. Kerner*, the sufficiency of the allegations asserted by Phipps, however inartfully pleaded, appear reasonably sufficient to call for the opportunity for him to offer supporting evidence in a hearing with the assistance of an attorney. Phipps prays this court does not construe his inexpert presentation of facts as conclusive. He is only presenting the facts as he as an inexpert laymen of the law sees them.

Additionally, Phipps respectfully requests this court grant him the opportunity to correct any discrepancies due to his lack of experience in the law. He also requests this court appoint an attorney for this process because he has just uncovered weeks ago that he has not had full, and or, fair access to updated federal case law database for approximately 3 years. It appears he has not been able to fully or fairly research and access federal cases to present proper or developed arguments in his entire federal Habeas proceeding, thus possibly tainting the fairness of this brief.

Phipps does not understand if it is proper to introduce new evidence supporting his claims at any level other than the state district court level. If he is mistaken, he respectfully requests this court allow him to supplement this filing and present the

physical, testimonial, and direct evidence outside of the state court record supporting his claims.

STATEMENT OF THE CASE AND REFERENCES TO QUESTIONS PRESENTED IN THE COVER PAGES

1. **RE: "QUESTION(S) PRESENTED" in 1 thru 4:** The Tenth Circuit upheld the dismissal of all "non-IAC" claims in claims 1-7 of Phipps' Habeas petition.

a. Phipps presented the general and operative facts supporting his distinct Fourth, Fifth, and Fourteenth Amendment claims in the United States Constitution and they were advanced to the highest state court, and that court acknowledged the federal constitutional violation claims and ruled on the Federal claims. Evidence of Phipps' assertions is in the CCA's Order (States Exhibit E), dated December 29, 2016 (**2016COA190**), at 8, lines 12-13; where the CCA acknowledged Phipps' Fourth Amendment Challenge as (**A. Fourth Amendment Challenge to the Remote Search of Phipps' Computer**); See also; Phipps' Petition for Writ of Certiorari to the CSC, (Exhibit F.1), at. 1, 15-17; at. 2, 18-20; at 8, 12-20; at. 9, et. seq.; at. 12, 12-14; at. 13, ¶ 6; at. 15, 15-19.

b. Phipps was alerted by the federal District court that only his "non-IAC" Due Process claims were deficient. See, (Docket No. 33 at 8, 5-7; 21-22; and at 9, 1-3), See also; ((Docket No. 33 at 10, 20-22). He was not made aware of any other claim deficiencies by the federal court.

c. A liberal reading of Phipps' claims could show that he may not have crafted the claims in a professional format. He also may not have cited proper legal

authority. Phipps did fairly present his distinct "non-IAC-[Fourth Amendment]-" claims as federal claims to the highest state court and those claims were acknowledged and ruled on by the state courts.

d. Phipps asserts that it appears he has been held to a higher standard than a pro se litigant. See: above in this document at. 2, 2-7. Therefore, Phipps requests this court consider actual facts overlooked and misapprehended by the lower courts on this issue, and remand for full and fair review if appropriate.

e. Phipps claims this is not a simple mistake by the lower courts, but a studied disregard of inconvenient Fourth, Fifth, and Fourteenth Amendment claims while simultaneously allowing in other federal claims presented in the same format and manner. The Fourth Amendment claims were clearly and fairly presented and acknowledged by the highest state courts. The "non-IAC" claims in claims 1-7 that were dismissed with prejudice were presented in greater detail than the "non-IAC" claims in claims 8-12 were. Those claims briefly presented in claims 8-12 were not dismissed with prejudice.

2. RE: "QUESTION PRESENTED" in 5 and 10: In Colorado, a person can be convicted of a crime of violence without violence being a element of the underlying facts. Phipps has claimed ab initio he would not plead guilty to any type of a crime of violence. He has claimed ad nauseam and claims here that he does have the basic right as a U.S. Citizen to not accept, or negotiate regarding specific elements in a plea he will not accept. Furthermore, wordsmithing, disregard, or diminishing of this right by the state and lower courts does not neutralize this basic right Phipps has claimed ab initio.

a. Phipps asserted ad nauseam counsels rendered erroneous information regarding the law as it related to his "non-negotiable stance". *See, Padilla v. Kentucky*, 599 US__ (2010) at. 284 (Counsels advise must be "accurate" regarding law). Phipps has original correspondence from counsel showing counsel lied and manufactured facts when confronted with this issue. Phipps has not been allowed to present the physical evidence in a hearing to develop the record supporting his claims. Then his claims have been dismissed because the lower courts only rule on the court record. This is an insidious and disgustingly unfair catch 22 Phipps has been subject to by the courts.

b. It appears the lower courts have departed from established United States Supreme Court precedent and carved out a new class of U.S. Citizen who should not expect the established protections of the Sixth Amendment, and concluded that a criminal defendant is not allowed to expect "accurate" information from his attorney that rests in the law, this contrary to *Padilla, supra*. Additionally, it appears that counsels constitutional ineffectiveness stands with impunity because of a defendants makes statements in a sentencing hearing long before he uncovers the corrupt actions of counsel. That had he known of these corrupt acts he would have remained silent in accordance with the Fifth Amendment plead not guilty and proceeded to trial.

Phipps requested and needed specific accurate information resting in law to settle his personal and strong aversions on this issue. It appears that an attorneys inaccurate information resting in law does not matter when it is tied to a citizens

non-negotiable stance on an issue critically important to him. It appears that the constitutional safeguards afforded Phipps at birth do not really apply or matter here.

The erroneous information was rendered by counsel before Phipps plead, he found out the information was grossly inaccurate after sentencing and in prison. Then ADC counsel Scott Poland lied multiple times in multiple attorney-client correspondence letters in an attempt it appears to cover for his derelict counsel.

Phipps was prejudiced because regardless of what he said in the allocution statement. Because of his refusal to plea guilty to any type of a crime of violence. He would have never plead guilty but for counsels constitutional deficiency. *Strickland v. Washington, 466 US 668 S. Ct (1984), Hill v. Lockhart,474 US 52 S. Ct (1985) Padilla v. Kentucky*, 599 US__ (2010), *U.S. v. Chronic 466 US 648 S. Ct (1984)*. Had Phipps received accurate advice from counsel on this issue. Phipps would not have waived his Fifth Amendment rights and the lower courts would not have allocution testimony they have used against him to conclude there is no prejudice on this issue.

c. When Phipps actually needed his court appointed lawyer to to provide him with professional and accurate information his lawyer grossly failed him.

d. Phipps cannot overcome the presumption of correctness of the state court. He is a prisoner and cannot further develop a claim with the evidence he possess' and without assistance to investigate because the courts denied him a

hearing at all levels. Phipps has made reasonable attempts to investigate without the necessary assistance and a court hearing via *Milton v. Miller*, 744 F. 3d 660, 672-73 (10th cir. 2014)

e. Phipps has made claims that if true may establish the two prongs of *Strickland* as well as *prejudice* in *Hill v. Lockhart*.. The state courts have denied him the opportunity to supplement the record with further evidence.

f. In conclusion to this issue, Phipps did plead guilty to a crime of violence in the state of Colorado. This directly antithetical to his refusal to plead or negotiate on this specific and distinct issue.

Phipps can prove appointed defense counsel not only provided erroneous information that rests in the body of Colorado law. Phipps can also prove -and the record clearly shows- that once he did find out that he had plead to a crime of violence and confronted counsel in attorney-client correspondence after the fact. Defense counsel Poland dishonestly and recklessly lied claiming that in the plea hearing the judge [Munch] went to "some length" to insure that Phipps understood that he was pleading guilty to a crime of violence. There is not a single word uttered by the judge in this case in any hearing regarding a crime of violence as the record clearly shows. Phipps contends that this is not a mere mistake by counsel, specifically because the phrase "some length" is reasonably defined as at least multiple sentences spoken by the judge on this issues up to a paragraph in the transcript record possibly more. Additionally, Phipps did not acknowledge that he understood this fact.

Appointed defense counsel was constitutionally ineffective on this specific issue in multiple ways defined above. Phipps has not been afforded what is now a luxury of supplementing the record with the direct physical evidence supporting his claims.

Phipps asserts that it is objectively unreasonable to plead guilty to elements of a plea he has stated clearly to his attorney he would not plead guilty to or negotiate on. Appointed counsels actions may be considered a deliberate misinformation action to get his client to plead guilty. Phipps cannot find any case in the cannons of criminal law that sanction and approve of this type of conduct by a lawyer in a criminal proceeding.

Phipps asserts this claim may meet the requirements in the Rules of the Supreme Court of the United States; "Rule 10. Considerations Governing Review on Certiorari: (a), (b) and (c)."

3. **RE: "QUESTION(S) PRESENTED" in 6 thru 9 and 11 thru 12:** The lower courts conclusions on Phipps' Fourth Amendment claims fall far outside the intent of the founding fathers, the four corners of the Fourth Amendment and its settled law progeny, and is fundamentally antithetical to this courts clear and concise rulings regarding the Fourth Amendment established in, *United States v. Balsys,* (1998) 524 US 666, 141 L Ed 2d 575, 118 S. Ct. 2218, 98 CDOS 4936, 98 Daily Journal DAR 6916, 1998 Colo J CAR 3303, 49 Fed. Rules Evid. Serv. 371, 11 FLW Fed S 708; *Love v. United States,* (1948, CA4 NC) 170 F.2d 32, cert den (1949) 336 US 912, 93 L Ed 1076, 69 S. Ct. 601; *Mincey v. Arizona,* (1978) 437 US 385, 57 L Ed 2d 290, 98 S. Ct. 2408; *Florida v. Jardines,* 596

US___, (2013); *Terry v. Ohio*, 392 US 1, 20, (1968); *Katz v United States*, 389 US 347, 19 L Ed 2d 576, 88 S. Ct. 507 (1967) at 358; *Beck v. Ohio*, 379 US 89, 96, 13 l ed 2d 142, 147, 85 S Ct. 223; *Wong Sun v. United States*, 371 US 471, 481-482, 9 L Ed 2d 441, 451, 83 S. Ct. 407; *Hester v. United States*, 256 US 57, 68 L ed 898, 44 C. Ct. 445; *Bumper v. California*, 391 US 543, 88 S. Ct. 1788 20 L Ed. 2D 797 (1968); *United States v. Jones*, 701 F. 3d (10th Cir 2012) at 1317, and 1318.

The lower courts have used grossly flawed logic regarding the physical evidence, scientific, technical and computer forensics, in conjunction with ignoring objective facts in the record as well as the plain language in the Fourth Amendment and clear established Supreme Court precedent to deny Phipps' Fourth and Sixth Amendment claims encompassing this issue. In the (Colorado Court of Appeals now CCA's Order at. 10, ¶ 26), the CCA concluded that "an individual has a reasonable expectation of privacy... **at least with respect to..."** files not **MADE** available through the file sharing software. This objectively reasonable and accurate conclusion denotes the existence of specific, distinct, demonstrable and confirmed knowing, intelligent physical actions that are separate from simply downloading a software that may have file sharing capabilities. Even Facebook has robust and vast file sharing capabilities, and a user has to deliberately, specifically, and physically give permission for each and every file to share, and to whom specifically it is shared with, and in certain circumstances for how long. If the user doesn't give permission to access personal files then that is simply and clearly a state and federal felony crime defined as hacking, and or, using a trojan horse to access a private U.S. Citizens password protected computer hard drive in his private home which is also in any

other circumstance a federal and state crime other that this case.

According the the Fourth Amendment, settle law and the cases used by the lower courts to deny these claims. A United States Citizen must make demonstrable specific knowing physical actions over and above just downloading a software to ***MAKE*** or to have ***MADE*** any personal information and files stored inside a persons home and on his password protected computer available to share and relinquishing a persons reasonable expectation of privacy, and permission for a search and seizure by the government under the Fourth Amendment.

The lower courts have not fairly or equally applied the fundamental elements of the Fourth Amendment and its settled law to this case including appointed counsels actions, and or, lack of action thereof in not applying the fundamental elements of the Fourth Amendment and its settled law to this case knowing there was no permission in any form given to the government for their illicit search and seizure of Phipps' private home and office.

a. The record plainly shows that Phipps DID NOT by way of **knowing, willing, intelligent, and deliberate** action **"MAKE"** a single digital Byte of personal computer information (ESI) available to any person or entity. No court, or brief by the People has cited or referenced from the "record" even a scintilla of evidence to support a fair, objectionably reasonable, or judicious conclusion that Phipps did without ambiguity and by a knowingly, intelligent, and willing ***ACTION*** **"MAKE"** any information available to share. The lower appeals court repeatedly stated in its order that "AEDPA limits review of a state court decision to the **record** before the

state court". It is clearly evident that the "**record** before the state courts" does not establish in any way, any type of action(s) by Phipps to **"MAKE"** any information available to share. Thereby, possibly establishing Fourth and Sixth Amendment violations. Phipps has and does concede the fact that if there is evidence of his physical actions or specific knowledge granting legal permission under the Fourth Amendment. Then he would not have any reasonable expectation of privacy regarding computer files in his home and on his password protected computer inside his office. There is zero evidence of this, frankly because it is and was never there.

Counsel is constitutionally derelict and ineffective by not placing the burden of proof on the government to prove they had legal permission under the Fourth Amendment and settled law.

b. Phipps correctly claimed subsequent to the "**record** before the state courts" that the CCA did **manufacture or fabricate** Phipps' physical actions, intent, and testimony to support the grossly erroneous conclusion by the CCA that the warrantless "unreasonable" search and seizure perpetrated by law enforcement on March 22, 2011 was legal. See, CCA's Order at. 10, ¶ 26. The record clearly shows Phipps did not in any form or fashion take any actions to relinquishing his reasonable expectation of privacy, nor did he give any type of permission for any search or seizure by the government. If Phipps did in some form or fashion give lawful permission for the search and seizure on March 22, 2011 then it should be in the record. Specific physical actions of permission Phipps never took, and

knowledge he never had cannot be placed on, or attributed to him for the purposes of relinquishment of his Fourth Amendment rights. See: The Fourth Amendment against unreasonable searches and seizures; See also: *Mincey v. Arizona*, (1978) 437 US 385, 57 L Ed 2d 290, 98 S. Ct. 2408; *Terry v. Ohio*, 392 US 1, 20, (1968); *Love v. United States*, (1948, CA4 NC) 170 F.2d 32, cert den (1949) 336 US 912, 93 L Ed 1076, 69 S. Ct. 601; *Katz v United States*, 389 US 347, 19 L Ed 2d 576, 88 S. Ct. 507 (1967); *Wong Sun v. United States*, 371 US 471, 481-482,9 L Ed 2d 441, 451, 83 S. Ct. 407; *Bumper v. California*, 391 US 543, 88 S. Ct. 1788 20 L Ed. 2D 797 (1968).

c. It appears the lower courts have established a new class of U.S. Citizen who should not, and now, will not enjoy the protections of the Fourth Amendment, and has forged new rules and case law that is diametrically opposed to other Federal Circuit Courts, and Supreme Court rulings regarding Fourth and Sixth Amendment protections. Additionally, under the Fourth, Fifth, and Fourteenth Amendments alleged derivative evidence against Phipps may fall under fruit of the poisonous tree doctrine. See; *Wong Sun v. United States*, (1963) 371 US 471, 9 L Ed 2d 441, 83 S Ct. 407.

d. The Tenth Circuit concluded that Phipps did not: "address the legal authority on which the CCA relied in deciding the computer searches were lawful". *See*: 10th Circuits Order, pg. 17, at. 5-9 This is antithetic to a liberal reading, supra *Haines v. Kerner*. But Phipps did cite the case law relevant to the factual perimeters of this case. See; *Love v. United States*, (1948, CA4 NC) 170 F.2d 32, cert den (1949) 336 US 912, 93 L Ed 1076, 69 S. Ct. 601; *Mincey v. Arizona*, (1978) 437

US 385, 57 L Ed 2d 290, 98 S. Ct. 2408; *Katz v. United States,* 389 US 347, 19 L Ed 2d 576, 88 S. Ct. 507 (1967); *Beck v. Ohio,* 379 US 89, 96, 13 l ed 2d 142, 147, 85 S Ct. 223; *Wong Sun v. United States,* 371 US 471, 481-482, 9 L Ed 2d 441, 451, 83 S. Ct. 407; *Hester v. United States,* 256 US 57, 68 L ed 898, 44 C. Ct. 445; *Bumper v. California,* 391 US 543, 88 S. Ct. 1788 20 L Ed. 2D 797 (1968). See also: The Fourth Amendment in the United States Constitution. Phipps did raise these appropriate cases to the lower federal and state courts

It is objective fact that the initial warrant-less search and seizure perpetrated by the government was for the purposes of obtaining potential evidence to use for obtaining a search warrant to then enter the same home and seize the same evidence two weeks later.

e. Antithetic to the court record and actual facts. The lower courts have attached numerous specific physical actions, testimony, intent, physical evidence, and ESI evidence to Phipps that he never executed, or had any knowledge of that the Fourth Amendment and its settled law progeny state are required to **"MAKE"** information from his personal computer available to share. There isn't a single word or hint of evidence cited by any court or proponent in this case that supports the grossly prejudicial conclusion that Phipps executed specific and deliberate actions to relinquish his Fourth Amendment rights. See, *Bumper v. California,* 391 US 543, 88 S. Ct. 1788 20 L Ed. 2D 797 (1968); and *United States v. Jones,* 701 F. 3d (10th Cir 2012) at 1317, and at 1318.

Phipps asserts this claim may meet the requirements in the Rules of the

Supreme Court of the United States; "Rule 10. Considerations Governing Review on Certiorari: (a), (b) and (c)."

It appears CCA approached this case without any real sense of intellectual rigor. The courts have placed ultimate importance on the CCAs' manufactured facts that have no support in the **"record"**. This is especially so because there is no evidence to support CCAs' conclusions other than their own fabrications. Then using those fabricated facts and actions they attached to Phipps to then deny his claims. This is absurd judicial conduct. Phipps cannot find any law or cite-able place in any canon of law, and or, AEDPA that says the deference standard allows federal courts to defer to manufactured or invented facts of a state court. This appears to be unmistakable bias because there is no evidence in the record, or outside of the record to support CCAs' factual conclusion here.

f. Phipps asserts the courts may have abandoned neutrality and fundamental fairness and appears to have established a new class of citizen with this ruling. A citizen here does not enjoy the protections of the Fourth, or Sixth Amendments. The courts rely on case law that in pertinent part does not apply to distinct facts of this case. Phipps does concede an axiomatic fact supported by the Fourth Amendment and its case law progeny that if Phipps did take deliberate, knowing, and intelligent actions to **"MAKE"** information available to share on his personal computer resting in his private home. Then he -without doubt- would not have a reasonable expectation of privacy, nor should he expect any protections of

the Fourth Amendment, nor should he have an expectation for counsel to investigate this region of the case under the legal parameters of the Sixth Amendment and its settled law progeny.

That is not the case here. In the cases cited by the CCA as foundation for their ruling in *U.S. v. Ganoe,* 583 F.3d 1117, 1127 (9th Cir. 2008); and, *U.S. v. Borowy, 595 F.3d 1045 (9th Cir 2010).* There are clear facts in these cases that establish two distinct prongs of action by a defendant to legally relinquish his or her Fourth Amendment rights. The first prong is that a person knowingly and intelligently downloads a software that he knows has the capability of open file sharing. To which the record is absent any information showing Phipps knew this. The second prong in those cases is that there are manifest facts that show the defendants knowingly executed actions that **"MADE"** files available to share. To which the record clearly shows in the absence of even a single action by Phipps to make any information available to share to any person or entity. In *Ganoe*, the facts in the record show that he knew he was sharing files, and acknowledged it, so he did not have a reasonable expectation of privacy. The record shows that was not even remotely the case here in any form or fashion.

g. In *Borowy,* the facts show he unequivocally knew his files were being shared. So he downloaded a completely different software program specifically designed to not share his files. The added software application *Borowy* knowingly and intelligently downloaded and installed onto his computer for the "purpose" of preserving his privacy was in fact "not engaged". Therefore, he did not have a

reasonable expectation of privacy. There are no facts in this case that establish same or equivalent distinct facts. Subsequently, Phipps has never relinquished his reasonable expectation of privacy under the Fourth Amendment nor its precedent setting case law progeny in, *United States v. Jones*, 701 F. 3d (10th Cir 2012) at 1317, and at. 1318, and; *Bumper v. California*, 391 US 543, 88 S. Ct. 1788 20 L Ed. 2D 797 (1968), *Supra. Katz*. Specifically because the facts of Phipps' case are not merely mistakes by the lower courts, but are clearly opposite to the conclusions of these cases. Subsequently, the following foundation cases Phipps cited supporting the Fourth Amendment do apply to this case; *U.S. Const. Amend. 4, Mincey, Katz, Beck, supra.,* as well as the nearly 250 year old Fourth Amendment clause itself, as well as the fundamental reasons for the Fourth Amendment in colonial America in the first place.

h. Because the cases above do apply to this specific case, and the added facts that there is nothing in the record that show any actions by Phipps relinquishing his Fourth Amendment rights, and that defense counsel did not place any burden of proof on the government regarding lawful permission, or an exigent circumstance is objectively unreasonable and is IAC under the Sixth Amendment, *Strickland v. Washington* 466 US 668 (1984), and *Kimmelman v. Morrison*, 477 US 365, 385087, 105 s. ct. 2574, 2588 89, 91 Led 2d 305, 326-27 (1986), *McMann v. Richardson*. See: Phipps' MEMORANDUM. at. 40, ¶ 140. Because of this, counsels' conduct was objectionably unreasonable for not conducting pre-trial discovery challenging the warrant-less computer search inside Phipps' private home, and

subsequently failing to file a motion to suppress illegally seized evidence. See Phipps' MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR POST CONVICTION RELIEF PURSUANT TO CRIM. P. RULE 35(c) FORM 4 7/04. (hereinafter MEMORANDUM), pg. 40, ¶140.

i. It appears the lower courts have established a new exception to the Fourth Amendments law prohibiting unreasonable searches ans seizures. This, because there is no evidence in the "**record**"of unequivocal specific and knowing permission in any written, physical, or testimonial form by Phipps. This new third exception will now allow the government to legally enter a U.S. Citizens home via technological digital means through the wire ad infinitum without any evidence of permission of any kind, or a warrant of any kind. This smells of parallels to King Georges general surreptitious warrants of the colonial era, to which, it appears was rectified in part with the revolutionary war and the writing and ratification of the Constitution of the United States of America, and further clarified by this court in the numerous case law referenced above and below in this document regarding the Fourth Amendment. This all appears to be disregarded by the lower courts in this case.

j. The absurd logic employed in this ruling would force all U.S. Citizens using technical computer software to either learn computer programming science, and or, hire a professional computer programmer to check the software they have downloaded to ensure constitutional safety or civil rights pitfalls before use. It appears that society would not accept this objectively unreasonable burden under

the Fourth Amendment as well as the Sixth Amendment attorney standards. Moreover, the Fourth Amendment and its progeny do not permit government entities to exploit known privacy violations or sanction trojan horse viruses in technical computer software over the landline phone wires for the purposes of a search and seizure of a United States citizen. Then deliberately lie about the technical facts and physical evidence for the purposes of obtaining a legal search warrant.

k. Additionally, attaching knowledge, intent, and physical actions to Phipps that he never had, or executed may be a precedent setting fact in and of itself in this case. Phipps asserts the conclusions of this case -in a grotesque manner- have eroded the foundation of the Fourth and Sixth Amendment protections in the United States Constitution.

In the age of the quantum speed of computer and internet technology advances. Nowhere in the constitution does it say, or is there a cite-table place in any federal case law. That allows law enforcement to exploit and use digital, computer science, and or, internet technology for the purposes of circumventing or skirting around the warrant requirement of the Fourth Amendment protections of a U. S. Citizen.

Not only does this case allow the government -with complete impunity- to enter a citizens private home through the underground phone wires without a warrant or permission. It also hides -it appears purposely- the illicit clandestine actions the government took to violate ta U.S. Citizens Fourth Amendment rights,

but also strengthens the governments confidence and determination to continue these constitutionally grotesque actions against U. S. Citizens without their knowledge or permission.

l. Moreover, Phipps does not need to address any evidence against him because any derivative evidence obtained after the tainted corrupt acts may be fruit of the poisonous tree if the facts and law of the Sixth and Fourth Amendments are equally and fairly applied to Phipps' case on these issues.

Phipps asserts this claim may meet the requirements in the Rules of the Supreme Court of the United States; "Rule 10. Considerations Governing Review on Certiorari: (a), (b) and (c)."

4. **RE: "QUESTION(S) PRESENTED" in 13, 15 and 20:** The 10th Circuit appeals courts gross studied and distorted misquote of Phipps' claim regarding law enforcement's reckless disregard for the truth as it pertained to the actual specific and distinct software and settings present on the computer that was used in violation of Phipps' Fourth and Sixth Amendment rights as permission for the warrant.

a. For the court to conclude that "Phipps...claims...the police...and state courts misidentified" the software *See*: 10th Circuits Order, pg.16, at 11-14. In the opinion of Phipps is a studied distortion and prejudicial disregard of actual facts on a precedent setting case, and should not be construed as a simple mistake by a lower court. It belies the actual facts claimed by Phipps ad nauseam in the record, and all briefs up and to the 10th Circuit appeals court and the fact that the deliberate lie by law enforcement is the foundation of so-called permission belied

by the record, for invading a U.S. Citizens home is based on. Counsel was objectively unreasonable for not placing an adversarial test on the government for this malicious and illegal act. See: Fourth and Sixth Amendment; *Missouri v. Frye*, 132 S. Ct. 1399; *Lafler v. Cooper*, 132 S. Ct. 1376. See also: *Sontobello v. New York*, 404 US 257, 30 L Ed 2d 427, 92 S. Ct. 495; and *McMann v. Richardson,and Kimmelman v. Morrison*, 477 US 365, 385087, 105 s. ct. 2574, 2588 89, 91 Led 2d 305, 326-27 (1986)

b. Regarding these issues, and the CCA manufacturing facts sanctioned by the lower federal courts under the deference (AEDPA) standard. The Honorable Supreme Court Justice Gorsuch recently outlined his cardinal rules for his law clerks to a news reporter. He stated in pertinent part the only two rules he has for his clerks are: 1. Never make ***IT*** up!, and 2. No matter how many people ask you to make it up... "Never make ***IT*** up!". These actions of the lower courts question the credibility and neutrality of the courts, not to mention the fundamental fairness and basic dignity of these Unite States Judicial proceedings.

c. Because of the court actions stated above, this claim has not been fully or fairly reviewed. Nor has this issue been litigated in any manner by counsel. This allowing this illicit action of law enforcement to stand with impunity. Phipps has a right under *Franks v. Delaware* to challenge this issue. His attorney was constitutionally derelict here. Defense counsel acknowledged the probability of a Fourth Amendment violation here to include possible criminality by law enforcement for the deliberate falsification of a sworn search warrant affidavit.

These issues above may be the reasoning for the systematic disregard by all lower courts of this claim.

Phipps asserts this claim may meet the requirements in the Rules of the Supreme Court of the United States; "Rule 10. Considerations Governing Review on Certiorari: (a), (b) and (c)."

5. **RE: "QUESTION(S) PRESENTED" in 14-19 and 21-23 and 25, 28-29:** Computer ESI evidence and the state's forensic procedures were botched, not preserved, and grossly, as well as, prejudicially mishandled by law enforcement and the district attorney.

a. If the elements of the claimed Fourth and Sixth Amendment violations are applied consistent to the law and facts. Then any evidence used to convict Phipps would be excluded. (PLEASE NOTE: See lower federal district court order of Nov. 7, 2019, at. 18, lines 1-3: This is a malicious fabrication. Phipps never admitted any action, or made any statement to the police. Once he was Mirandized. He chose to remain silent. There are taped recordings of the Miranda warnings. The police asked again in an interrogation room with the same answer from Phipps. They then took him to jail without further attempts to interrogate. These are disgusting falsities. If the initial unreasonable search is unlawful the other derived action and evidence is tainted. See: *Nordone v. United States*, (1939) 308 US 388, 84 L Ed 307, 60 S. Ct 266; See also; *Murray v. United States*, (1988) 487 US 533; Supra, *Wong Sun.*

b. Counsels lack of action here is objectively unreasonable. There is no

evidence of any actions by Phipps to relinquish any Fourth Amendment rights. Counsel didn't even look at the evidence to confirm if law enforcement lied on the search warrant affidavit, or if they had lawful permission for the unreasonable search. Even though he admitted to the possibility of the corrupt actions of law enforcement numerous times to Phipps.

c. The destruction of evidence because of the "botched" procedures blatantly clear in the "**record** before the state courts" has nothing to do with destruction of evidence against Phipps as maliciously stated by the CCA. It has everything to do with exculpatory evidence, corrupt conduct of government officials, Illegal foreknowledge and sanctioning of the trojan horse and clandestine software settings by the government including the FBI and the Colorado state authorities, as well as IAC that the untainted ESI evidence will show.

d. Counsel did not investigate the ESI evidence with the consult of experts as he promised he would. Before the plea, Phipps can demonstrably prove defense counsel stated that he thoroughly investigated the evidence with experts and there were no positive results for the defense to squeeze a plea out of him. This was a deliberate and malicious lie. Then, after Phipps uncovered these lies after he was sentenced and in prison. Phipps can demonstrably prove defense counsel said he himself did the required expert investigating of the Fourth Amendment violations!? This is outrageous conduct of a criminal defense attorney.

e. Defense counsel was not a computer forensic expert and cannot conduct a forensic investigation on computer ESI evidence himself. If he did, he would have

to testify on the stand in a pre-trail hearing or at trial. To which a defense attorney cannot do in a criminal proceeding. An expert must be employed by the defense. See, *Ake v. Oklahoma*, 470 U,S, 68, 71 (1985) Where that court held that: without independent experts a defendant may be denied "meaningful access to justice." *Id. At* 76-77. It also "may be fundamentally unfair when a party is left without expert assistance." *Id. at*. 80. It is further asserted that the "expert" must be independent of the state.

Phipps asserts this claim may meet the requirements in the Rules of the Supreme Court of the United States; "Rule 10. Considerations Governing Review on Certiorari: (a), (b) and (c)."

6. **RE: "QUESTION(S) PRESENTED" in 31:** Sexual history review and interview and unconstitutional Fifth Amendment compulsion and IAC claim.

a. This court concluded that Phipps "failed to identify clearly established Supreme Court law" See 10th cir. courts order at. 21, 10-11. Phipps is pro se "**the court is to look beyond a failure to cite proper legal authority**". Phipps did cite, *Murphy*, 465 US at. 435 n.7. The government must "eliminate[ ] the threat of incrimination". It appears the lower federal courts has held Phipps to a higher professional attorney standard.

b. The Fifth Amendment draws one sharp line in the sand: no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend V. (emphasis added). See: *Lacy v. Butts*, No. 17-3256, (7th cir. 2019).

c. The federals court held in pertinent part that Phipps failed to cite clearly

established federal law. See courts Nov. 7th Order, at 21, 4-11. Phipps did claim his Fifth Amendment rights were violated. Even the possibility of compelled self incrimination on this issue is a violation under the Fifth Amendment.

d. This is IAC, Phipps does not understand the intricacies of the law. The State of Colorado requires a citizen to reveal possible past crimes that by law must be prosecuted. What citizen would reasonably believe their government for the people would be allowed to trick, and or, coerce a it's citizen to self-incriminate oneself in gross violation of the Fifth Amendment.

Phipps claimed counsel was constitutionally ineffective for not apprising Phipps of the law and statutes of limitation regarding this issue as well as not challenging the constitutionality of the sexual history review as it pertains to the plea and Phipps' Fifth Amendment rights.

e. Had Phipps been made aware of this he clearly and reasonably claimed prejudice under *Strickland, Hill v. Lockhart,* he would have never plead guilty and pursued the illegality of the forced compelled self-incrimination requirement in the plea agreement.

The 10th Circuit courts ruling is antithetical to the 7th circuits ruling below. In *Lacy v. Butts, 2019 WL 1858276 No. 17-3256 decided on April 25, 2019.* In *Lacy v. Butts,* the 7th circuit concluded in pertinent part that: a person claiming the privilege against self-incrimination need not incriminate himself to claim the privilege, US const. Amend 5 requiring him to reveal complete sexual history to sex offender treatment agency during polygraph testing presented real risk of self-

incrimination, thus supporting his claimed violation of his Fifth Amendment rights; if complete revelation of sexual history included any past sexual criminal offenses, and if statute of limitations had not run on such offenses, then, depending on underlying facts of defendant's history, answers to those questions would pose real and appreciable risk of self-incrimination. > U.S. Const. Amend. 5; > 18 U.S.C.A. §§ 2252A(a)(2)(B), > 3583(d) United States of America, Plaintiff,v. Brian Von Behren, Defendant. Criminal Case No. 04-cr-00341-REB Signed August 26, 2014.

f. In *McKune v. Lile, at. 122 S. Ct. 2036*; "The text of the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself. "It is well settled that the prohibition "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.' " > *Minnesota v. Murphy,* 465 U.S. 420, 426, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (quoting > *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973)).). Prison inmates-including sex offenders-do not forfeit the privilege at the jailhouse gate. See: *Murphy,* 465 U.S., at 426, 104 S.Ct. 1136." Phipps did cite *Murphy* in his claims.

g. In Colorado the compelled sexual history review requirement is in part for the purposes of uncovering other crimes that can, will and have been prosecuted in the state of Colorado. Phipps asserts that it appears to be objectively

reasonable for him not to have plead guilty as he has claimed ad nauseam, had he been notified of this issue by his attorney or any proponent in this case to include the courts.

h. Additionally, the state of Colorado has and will use their polygraph tests in the courts for the purposes of revocation of parole and the charging and conviction of other crimes. This is absurd conduct perpetrated on a specific legislatively defined class of people. Polygraphs are allowed in a court of law in Colorado but it doesn't appear to be allowed anywhere else.

Phipps asserts this claim may meet the requirements in the Rules of the Supreme Court of the United States; "Rule 10. Considerations Governing Review on Certiorari: (a), (b) and (c)."

7. **RE: "QUESTION(S) PRESENTED" in 32:** Parole eligibility regarding Phipps' Fifth, Sixth, and Fourteenth Amendment claims.

a. In denying this claim under the prejudice prong of *Strickland*. The courts use words Phipps spoke in a hearing before he uncovered the gross inaccuracies resting in law corruptly presented to him by appointed counsel. Had Phipps been given accurate information in the first place pursuant to the Sixth Amendment and *Supra, Padilla v. Kentuckey.* The courts would have no words spoke in a sentencing hearing. Because Phipps would have never plead guilty had he been given accurate information resting in the law he sought from counsel on numerous occasions. *Supra, Hill v. Lockhart.*

b. Phipps was not confused at the time of the plea hearing contrary to the lower courts conclusions, because he had already sought what he thought at the time was correct statutory information from counsel regarding the law. He only uncovered his confusion after he was sentenced and in prison. Phipps is required to trust his attorney by the courts regarding the law.

c. Under federal law Phipps is obligated to trust his attorney. Now he has been denied a hearing to demonstrably prove with physical evidence that his attorney provided him erroneous information resting in the body of law again and again in a habitual manner defense counsel Scott Poland lied to him and provided addition erroneous advice to cover for his original erroneous advice that Phipps specifically asked him about. Phipps does request if appropriate for this honorable court to remand this case for hearings on this and all claims above and below for the purpose of further development and support of his claims.

Phipps asserts this claim may meet the requirements in the Rules of the Supreme Court of the United States; "Rule 10. Considerations Governing Review on Certiorari: (a), (b) and (c)."

8. **RE: "QUESTION(S) PRESENTED" in 24 and 33 thru 36:** Cumulative-error claims under the Fifth, Sixth and Fourteenth Amendments in the United States Constitution regarding Phipps' numerous claims of appointed counsels IAC and corrupt habitual propensity to habitually lie to his client to ultimately compel a coerced guilty plea.

a. Phipps contends that cumulative error under the Fifth Sixth and Fourteenth Amendments may attach if the law and facts in the record, and or

completely absent of the record are equally, fairly, and justly applied. The lower federal courts allowed this claim in under the Fifth Sixth and Fourteenth Amendments. Phipps has a right to prove these United States Constitutional claims. He to this point has not been allowed the luxury of a hearing to establish as fact these claims.

b. Phipps has factually and demonstrably claimed that appointed defense counsel possessed a grossly mendacious disposition as it pertained to numerous issues in the criminal proceeding. That include deliberate misrepresentations of the following: Appointed counsel Poland stating to Phipps numerous times that he thoroughly investigated the physical what he called digital evidence with the appropriate experts. It is now understood that the evidence is Electronically Stored Information. This is a deliberate lie, as neither counsel even accessed the seized computer hard drive in any way. The fact is they never could access the ESI in its original seized state because the government tainted it pursuant their own words stating in the affidavit for search warrant dated 2011 APR-7 AM 11:39 that: "On April 6, 2011 technician Carly Satula began checking Randy Phipps' computer". This statement is the only sentence in the entire record that defines this self described "forensic examination". In a criminal proceeding a government entity accessing and assessing ESI evidence or any evidence for that matter does not access or assess the physical evidence in any way that would taint it from its original condition. The record shows the government did not employ any proper computer forensic procedures at all.

If counsel would have accessed the the ESI physical evidence with the proper professional computer forensic experts it would substantiate the governments shocking statements in the record directly above. Which may establish a *Brady* violation of the most serious order.

c. Counsel Poland also lied when after Phipps had plead was sentenced and in prison. He stated in correspondence that he had thoroughly investigated the multiple Fourth Amendment violations himself. *See*: pg. 23, ¶ **e.** above in this document.

Counsel Poland also lied regarding the amount of time Phipps would have to serve before being eligible for parole, *See:* pg. 26, claim **7.** above in this document. Phipps asserts this is a deliberate lie because he asked counsel Poland about this issue numerous times before the plea, and during the reading of the plea.

Counsel Poland also maliciously lied to Phipps regarding the crime of violence issue. See: pg. 8-9, ¶ **f.** above in this document.

Phipps asserts this claim may meet the requirements in the Rules of the Supreme Court of the United States; "Rule 10. Considerations Governing Review on Certiorari: (a), (b) and (c)." Phipps has not found any case in the legal cannons that permit or accept a defense attorney to deliberately, or recklessly lie to their client for any purpose. Phipps can prove the claims above. He requests an opportunity to do so in any way this court deems appropriate.

9. RE: "QUESTION(S) PRESENTED" in 37 and 38: Claims of prejudicial actions of the lower federal courts.

a. The lower federal courts may have violated the due process and equal protection rights of Phipps by their actions. The federal district court erred, and that may rise to the level of an abuse of discretion when it Ordered the Respondent's, -after it had reviewed Phipps' asserted claims in the Habeas petition- to disclose the "physical evidence" "relevant to the "asserted claims" presented by Phipps within 30 days of the date of the order, *See:* (Docket No 33). *See also*: Phipps' opening brief to the 10th Circuit Court of appeals pgs. 53 and 54 et. seq.

b. Phipps has bot found a law to cite that allows a federal court of appeals to deliberately misrepresent an appellants claim for any purpose. Phipps asserts that he can reasonable define the lower courts actions here as deliberate because of the dozens of time in the record including the federal record where he distinctly categorized law enforcement's actions on this issue as a reckless disregard for the truth. The deliberate lie of LimeWire when it was actually a completely different software FrostWire was a foundational element for the affidavit for search warrant. *See:* Phipps' opening brief to the 10th Circuit Court of Appeals, pgs. 25-29 et. seq. *See also:* Claim 6 pgs. 42-46.

10. RE: "QUESTION(S) PRESENTED" in 30: Phipps claimed the state district court falsified the sentencing hearing transcripts of the proceeding to extract very damaging statements made by the ADA Kristen Lorenz.

a. The federal district court erred in dismissing this issue because of the following facts. The CCA concluded that "Phipps does not identify what portions of the transcripts were missing or how he was prejudiced." This conclusion is not supported by, and is profoundly contrary to the record and the Applicant's claims of

what was specifically extracted from the transcripts record without an order of the court, a sidebar, or motion to strike. *See*, in the record the MEMORANDUM, at 54-57, ¶ 190-202.

This conclusion by the CCA is either evidence that they did not fairly review the record, or that they again are manufacturing facts, and or, deliberately lying about actual facts to clean up this illicit actions of the proponents. The federal district court erred because it sanctioned the corrupt and malicious manufacturing of material facts, and deliberately lying about facts.

b. Phipps has presented numerous sworn affidavits supporting that factual assertion of the falsification of the sentencing transcripts to the courts at the state and federal levels. There were people at the hearing in question that remember what was said and are appalled. He also requested that the state district court as well as the CCA to correct the record. Those motions were ignored, and or, denied and do not appear to be in the record, as well as complete and thorough scientific explanations regarding the falsification. The district court did not place these documents and sworn affidavits in the state court record at profound prejudice to Phipps. Without those documents or a hearing Phipps cannot overcome the presumption of regularity. Phipps can prove through witness testimony, basic English language structure, common sense and science. That the transcripts were falsified in part because they were falsified so very sloppily. Phipps asserts the sloppiness and haphazard way the transcripts were falsified (which is multiple paragraphs of damaging comments made by the ADA just hacked from the

transcripts without any foundational context) is in part specifically because the courts have the presumption of regularity on their side. The presumption of regularity doctrine employed by the courts has ignored the asserted facts of Phipps and has silenced the witnesses appalled at the conduct of the state district court in falsifying official court transcripts. Again Phipps does not know of the propriety of introducing evidence regarding this claim that is not in the state court record.

11. RE: "QUESTION(S) PRESENTED" in 26 and 27: Phipps never knowingly waived his rights under the Fourth Amendment.

a. Phipps has claimed that had he known his attorney did not investigate in the specific manner he promised he would he would have never plead guilty and proceeded to trial to fully and fairly litigate his Fourth Amendment rights.

b. Phipps as a U.S. Citizen does deserve the same rights in a criminal proceeding as any other citizen accused of a crime. As claimed above he has had his constitutional rights enumerated above violated and not yet cured.

CONCLUSIONS

In conclusion, and because of the facts and assertions in this petition. Phipps asserts the claims above may meet the requirements in the Rules of the Supreme Court of the United States; "Rule 10. Considerations Governing Review on Certiorari: (a), (b) and (c).". Phipps requests this court reverse the lower appeals courts ruling and remand for hearings on the merits of the claims of this case to the state district court if appropriate.

Phipps understands that this Court is a final road block to a U.S. citizen being denied his core Constitutional rights residing in the Fourth, Fifth, Sixth, and Fourteenth Amendments in the United States Constitution.

Phipps prays this court will exercise its supervisory power on the lower federal and state judiciary and allow him the basic right to a hearing in state court to develop, support and substantiate his numerous factual claims that are of a serious Constitutional dimension.

REASONS FOR GRANTING THE PETITION

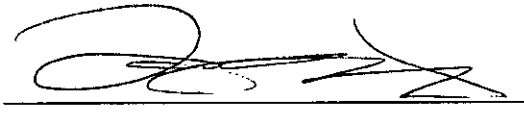
Phipps respectfully asserts that this petition should be granted pursuant to the Rules of the Supreme Court of the United States; "Rule 10. Considerations Governing Review on Certiorari: (a), (b) and (c)."

Rule 10(a): The United States Court of Appeals for the Tenth Circuit has entered a decision on the claims and questions above See: Appendix: A not only in conflict with this Court, but also, other United States courts of appeals to include the (7th Circuit), and the Tenth Circuits own decisions in prior cases. The 10th Cir. Court of Appeals has "sanctioned such a departure by a lower court, as to call for the exercise of this courts supervisory power;" this in claims 1-11 above.

Rule 10(b): The State court of last resort has decided the important questions of federal law above that conflicts with a United States Court of Appeals to include the protections of the Fourth Amendment, the fruit of the poisonous tree doctrine, The Sixth Amendment including the Two Prongs of *Strickland*, the Fifth Amendment right against compulsion, and the Fifth, Sixth, and Fourteenth Amendment rights to Due Process and

Equal protection. Phipps is not a trained professional attorney and requests this court liberally construe the writings above, and if proper allow him to correct and or supplement these documents above if they are faulty and if proper. He may not fully understand the complicated legal theories, but does assert his United States Constitutional rights under all claims asserted, or not fully asserted, or mistakenly asserted. Phipps respectfully requests this petition for Writ of Certiorari should be granted.

Respectfully submitted on this 21st day of March, 2020. This petition for writ of certiorari to the Supreme Court of the United States is timely filed.

 , pro se.

Date: 3-30-20