

NO. 07-110

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

A. J. ARAVE,
Petitioner,

v.

MAXWELL HOFFMAN,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

JOAN M. FISHER*
Capital Habeas Unit
Federal Defender Services of Idaho
317 West Sixth Street, Suite 204
Moscow ID 83843
Telephone: 208-883-0810
Facsimile: 208-883-1472

ELLISON MATTHEWS
Attorney at Law
PO Box 1988
Boise ID 83701-1988
Telephone: 208-336-1433
Facsimile: 208-336-9133

Attorneys for Respondent

* Counsel of Record

CAPITAL CASE

QUESTIONS PRESENTED

Respondent paraphrases Petitioner's questions as follows:

1. Does the reference to "gross error" in this Court's 1970 opinion of *McMann v. Richardson* superimpose a higher level of deficient performance than was later established in *Strickland v. Washington*?
2. Does *Hill v. Lockhart* impose a higher, more rigid pleading and proof requirement than *Strickland v. Washington*, including in part a demand of specific wording the lack of which can be challenged for the first time on a petition for rehearing and suggestion for rehearing *en banc* to the Court of Appeals?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	7
I. THE NINTH CIRCUIT REASONABLY APPLIED LONGSTANDING SUPREME COURT PRECEDENT TO A PARTICULARIZED FACT PATTERN, ADOPTED NO NEW STANDARDS, AND CREATED NO NEW PRECEDENTS	8
A. Counsel’s Actions Fell Below an Objective Standard of Reasonableness - the Proper Standard Which Encompasses Any Alleged ‘Gross Standard Error’	8
1. The State Demands A Higher Standard of Deficient Performance Than <i>Strickland</i>	8
2. Counsel’s Sole Reliance on an Incomplete Understanding of the Law Falls Below an Objective Standard of Reasonableness	10
B. The State’s Claim That Mr. Hoffman Failed to Plead Facts Sufficient Under <i>Hill</i> Comes Too Late and Mr. Hoffman Has Pled Facts More Than Sufficient to Satisfy Any Pleading Requirement	13
1. The State is Procedurally Barred from Arguing that Mr. Hoffman Failed to Plead Facts Sufficient Under <i>Hill</i> When it Raised the Argument for the First Time in its Request for Rehearing	13

2. Mr. Hoffman Pled Facts Sufficient to Satisfy Pleading Requirements Mentioned in *Hill* 13

3. The Ninth Circuit Correctly Found That There Was a Reasonable Probability That Counsel’s Unprofessional Errors Prejudiced Mr. Hoffman 14

II. THE STATE FAILS TO STATE A COMPELLING REASON TO GRANT CERTIORARI 18

CONCLUSION 21

APPENDIX

APPENDIX A Memorandum Decision and Order on Remand dated March 30, 2002, United States District Court Case No. 94-0200-S-BLW

NO. 07-110

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

**A. J. ARAVE,
Petitioner,**

v.

**MAXWELL HOFFMAN,
Respondent.**

**On Petition For Writ Of Certiorari
To The United States Court of Appeals For The Ninth Circuit**

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

JOAN M. FISHER*
Capital Habeas Unit
Federal Defender Services of Idaho
317 West Sixth Street, Suite 204
Moscow ID 83843
Telephone: 208-883-0810
Facsimile: 208-883-1472

ELLISON MATTHEWS
Attorney at Law
PO Box 1988
Boise ID 83701-1988
Telephone: 208-336-1433
Facsimile: 208-336-9133

Attorneys for Respondent

* Counsel of Record

CAPITAL CASE

QUESTIONS PRESENTED

Respondent paraphrases Petitioner's questions as follows:

1. Does the reference to "gross error" in this Court's 1970 opinion of *McMann v. Richardson* superimpose a higher level of deficient performance than was later established in *Strickland v. Washington*?
2. Does *Hill v. Lockhart* impose a higher, more rigid pleading and proof requirement than *Strickland v. Washington*, including in part a demand of specific wording the lack of which can be challenged for the first time on a petition for rehearing and suggestion for rehearing *en banc* to the Court of Appeals?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	7
I. THE NINTH CIRCUIT REASONABLY APPLIED LONGSTANDING SUPREME COURT PRECEDENT TO A PARTICULARIZED FACT PATTERN, ADOPTED NO NEW STANDARDS, AND CREATED NO NEW PRECEDENTS	8
A. Counsel’s Actions Fell Below an Objective Standard of Reasonableness - the Proper Standard Which Encompasses Any Alleged ‘Gross Standard Error’	8
1. The State Demands A Higher Standard of Deficient Performance Than <i>Strickland</i>	8
2. Counsel’s Sole Reliance on an Incomplete Understanding of the Law Falls Below an Objective Standard of Reasonableness	10
B. The State’s Claim That Mr. Hoffman Failed to Plead Facts Sufficient Under <i>Hill</i> Comes Too Late and Mr. Hoffman Has Pled Facts More Than Sufficient to Satisfy Any Pleading Requirement	13
1. The State is Procedurally Barred from Arguing that Mr. Hoffman Failed to Plead Facts Sufficient Under <i>Hill</i> When it Raised the Argument for the First Time in its Request for Rehearing	13

2. Mr. Hoffman Pled Facts Sufficient to Satisfy Pleading
Requirements Mentioned in *Hill* 13

3. The Ninth Circuit Correctly Found That There Was
a Reasonable Probability That Counsel’s Unprofessional
Errors Prejudiced Mr. Hoffman 14

II. THE STATE FAILS TO STATE A COMPELLING REASON
TO GRANT CERTIORARI 18

CONCLUSION 21

APPENDIX

APPENDIX A Memorandum Decision and Order on Remand dated
March 30, 2002, United States District Court Case
No. 94-0200-S-BLW

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Adamson v. Ricketts</i> , 865 F.2d 1011 (9th Cir.1988)	3, 5, 10
<i>Cosco v. United States</i> , 922 F.2d 302 (6th Cir. 1990)	13
<i>Cullen v. United States</i> , 194 F.3d 401 (2nd Cir. 1999)	14, 19
<i>FDIC v. Massingil</i> , 30 F.3d 601 (5th Cir. 1994)	13
<i>Harris v. Sup. Ct. of Cal.</i> , 500 F.2d 1124 (9th Cir. 1974)	9
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985)	13, 14
<i>Hoffman v. Arave</i> , 73 F. Supp. 2d 1192 (D. Idaho 1998)	2
<i>Hoffman v. Arave</i> , 236 F.3d 523 (9th Cir. 2001)	2, 4
<i>Hoffman v. Arave</i> , 455 F.3d 926 (9th Cir. 2006)	2, 3, 4, 5, 10, 12, 18
<i>Hoffman v. Arave</i> , 455 F.3d 941 (9th Cir. 2006)	6, 12, 15, 16, 17, 19
<i>Hoffman v. Arave</i> , 481 F.3d 686 (2007)	17
<i>Hoffman v. Arave</i> , 973 F. Supp. 1152 (D. Idaho 1997)	2
<i>Kale v. Combined Insurance Co.</i> , 924 F.2d 1161 (1st Cir. 1991)	13
<i>Lockard v. Equifax, Inc.</i> , 163 F.3d 1259 (11th Cir. 1998)	13
<i>Long v. Brewer</i> , 667 F.2d 742 (8th Cir. 1982)	9
<i>McMann v. Richardson</i> , 397 U.S. 759 (1970)	8
<i>Meyers v. Gillis</i> , 142 F.3d 664 (3rd Cir. 1998)	19
<i>Nunes v. Mueller</i> , 350 F.3d 1045 (9th Cir. 2003)	14, 19
<i>Pentax Corp. v. Robison</i> , 135 F.3d 760 (Fed. Cir. 1998)	13

<i>Rogers v. Missouri P.R. Co.</i> , 352 U.S. 521 (1957)	19
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	passim
<i>Turner v. Calderon</i> , 281 F.3d 851 (9th Cir. 2002)	8
<i>United States v. Bongiorno</i> , 110 F.3d 132 (1st Cir. 1997)	13
<i>Wade v. California</i> , 450 F.2d 726 (9th Cir. 1971)	9
<i>Walton v. Arizona</i> , 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990)	3
<i>Wanatee v. Ault</i> , 259 F.3d 700 (8th Cir. 2001)	15, 19
<i>Watt v. Alaska</i> , 451 U.S. 259 (1981)	19
<i>Woodford v. Visciotti</i> , 537 U.S. 19 (2002)	17

STATE CASES

<i>Hoffman v. State</i> , 121 P.3d 958 (Idaho 2005)	2
<i>State v. Hoffman</i> , 851 P.2d 934 (Idaho1993)	2, 4
<i>State v. Walton</i> , 769 P.2d 1017 (Ariz. 1989), <i>overruled in part by Ring v. Arizona</i> , 536 U.S. 584, 603 (2002)	5, 10

DOCKETED CASES

<i>Hoffman v. Arave</i> , No. 94-0200, (Idaho, Mar. 30, 2002)	1
---	---

**BRIEF IN OPPOSITION TO PETITIONER'S
PETITION FOR WRIT OF CERTIORARI**

Maxwell Hoffman, by and through his attorneys, Joan M. Fisher and Ellison Matthews, files this Brief in Opposition to the Petition for Writ of Certiorari and respectfully requests that the Court decline *certiorari* review to the Ninth Circuit Court of Appeals. The Court of Appeals' decision and its application of longstanding precedent to the facts of the plea bargaining process is correct, is consistent with this Court's and the Circuit Court of Appeals' decisions and involves no question of exceptional importance. The State's petition should be denied.

STATEMENT OF THE CASE

Maxwell Hoffman's limited ability to perceive and understand the complex proceedings to which he has been subjected, the lack of fundamental fairness in the proceedings which led to the imposition of the death penalty, and the relative culpability of the actors underlie the issues here.

The District Court summarized best Mr. Hoffman's unique history:

There is no question that Hoffman suffered from mental, intellectual and drug abuse problems in the years leading up to the murder of Denise Williams. Hoffman was raised in a violent and abusive household, and was both a victim of abuse, and exposed to the abuse of his siblings. After his father's death when Hoffman was 10 years old, Hoffman's mother placed him in foster care because of his behavior problems. Hoffman was admitted to the Metropolitan State Hospital in California, when he was 24 years old, and was diagnosed with "psychosis manifested by delusional and violent behavior," and anti-social personality disorder.

Hoffman also has significant problems learning, and is not well-educated. At the time of the offense Hoffman could not read or write, and could not be taught to read or write. Hoffman has had numerous IQ tests over the years. The most recent testing indicated that Hoffman's IQ is 74. This puts Hoffman in the borderline mentally retarded range.

Hoffman v. Arave, No. 94-0200, 11 (D. Idaho, Mar. 30, 2002); App. at 11.

The Ninth Circuit Court of Appeals set out the relevant factual background relating to the murder:

The facts of the murder of Denise Williams have been recounted in numerous prior decisions in state and federal courts, and are recited only briefly here.¹ Hoffman was employed by Richard Holmes, a drug dealer. Williams, a police informant, initiated a controlled buy with Holmes, and as a consequence, Holmes was arrested for distributing controlled substances. After Holmes was released on bail, Sam Longstreet and Jeff Slawson, two of Williams's friends, went to meet with Holmes to assure him that they had nothing to do with his arrest. Holmes brokered a deal for these two friends to deliver Williams to Holmes at a camp in Idaho. Longstreet and Slawson dropped Williams off and left her with Ron Wages, one of Holmes's associates. Thereafter, Hoffman and Holmes went to the camp and met up with Wages and Williams. Holmes kicked Williams in the head, and told Williams that she was "a dead bitch." Holmes told Hoffman and Wages, "You know what to do," and left.

Hoffman, Wages, and Williams drove around for several hours. Hoffman and Wages forced Williams to write letters exonerating Holmes of the controlled substances charges. At some point, Hoffman stopped the car and took Williams into a cave. He cut her throat while Wages waited in the car. As Hoffman was coming back to the car, Williams began to crawl up an embankment near the cave. Wages ran over to Williams, and stabbed her with the knife Hoffman was carrying. Wages then began to bury her with rocks, and Hoffman joined in. The evidence showed that Williams might have eventually died either from the original cut by Hoffman or from the wound inflicted by Wages, but that the actual cause of death was a blow from a rock.

Hoffman and Wages then drove to Wages's[sic] sisters' house, where the two cleaned the car, and burned their clothes and Williams's[sic] clothes. Later, at Holmes's[sic] house, Hoffman cut up the knife with a cutting torch.

Hoffman v. Arave, 455 F. 3d 926, 928-29 (9th Cir. 2006).

¹ See *Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001); *Hoffman v. Arave*, 73 F.Supp.2d 1192 (D. Idaho 1998); *Hoffman v. Arave*, 973 F.Supp. 1152 (D. Idaho 1997); *Hoffman v. State*, 142 Idaho 27, 121 P.3d 958 (2005); *State v. Hoffman*, 123 Idaho 638, 851 P.2d 934 (1993).

The Ninth Circuit also set out the relevant procedural history.

A. Idaho State Proceedings

On August 22, 1988, Hoffman was charged with first-degree murder. The court appointed William Wellman as counsel. Wellman had never tried a murder case, and had no formal training on defending capital cases. At the time he was selected to represent Hoffman, Wellman had done contract work with the Owyhee County public defender's office for several years, and criminal defense work constituted about half of his practice.

Five weeks before trial, the State offered Hoffman a plea bargain: If Hoffman would plead guilty to first-degree murder, the State would not pursue the death penalty. The State also made clear that it intended to seek the death penalty if Hoffman rejected the plea agreement. Wellman advised Hoffman that he should reject the plea agreement. Wellman believed that the Idaho death penalty scheme was unconstitutional based on *Adamson v. Ricketts*, 865 F.2d 1011, 1023-28 (9th Cir.1988) (en banc), *abrogated by Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), where this court found Arizona's death penalty scheme unconstitutional. Wellman saw no material difference between Arizona's death penalty scheme and the death penalty scheme in Idaho. He thus recommended that Hoffman reject the plea agreement because he believed it was only a matter of time until Idaho's death penalty scheme would be declared unconstitutional as well. Hoffman took Wellman's advice and rejected the plea agreement.

In February 1989, only three weeks before trial, the court appointed co-counsel Charles Coulter. Coulter had tried two vehicular manslaughter cases, but that was the extent of his homicide experience. He had no experience with capital cases.

The guilt phase of Hoffman's trial commenced on March 7, 1989. The jury heard eight days of testimony. Defense counsel presented no evidence of Hoffman's mental capacity on the night of Williams's murder. Instead, Wellman and Coulter's central strategy was to paint Wages as the more culpable of the two.² After five hours of deliberation, the jury returned a conviction for first-degree murder and found a sentencing enhancement, making Hoffman "death eligible."

² At trial, Wages was one of the principle witnesses against Hoffman. In exchange for Wages' testimony, the prosecution agreed not to seek the death penalty against him. Both Longstreet and Slawson pleaded to second-degree kidnaping charges. The prosecution recommended a sentence of at least six months in jail, and each received a sentence of only one year in jail. Holmes was originally charged with kidnaping as well, but was killed in prison before he was brought to trial. Thus, in the end, the State pursued the death penalty only against Hoffman. *Hoffman v. Arave*, 455 F.3d at 929.