NO. 07-110

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

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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

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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**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?

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## 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 president 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).

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[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."

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[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.

The sentencing phase of the trial began on June 9, 1989. After weighing the aggravating and mitigating circumstances, the court imposed the death penalty.[3] On July 25, 1989, Hoffman filed a post-conviction petition in state court. The state court denied the petition. On January 29, 1993, the Idaho Supreme Court affirmed Hoffman's sentence. *See Hoffman,* 851 P.2d at 945.

B. Federal Habeas Proceedings

Hoffman filed an initial habeas petition in the United States District Court for the District of Idaho on December 1, 1994. On June 13, 1997, the district court dismissed several claims on the grounds of procedural default. On December 28, 1998, the district court dismissed the remainder of the claims on their merits. On January 3, 2001, we concluded that Hoffman's ineffective assistance of counsel claims were not procedurally barred. *See Hoffman,* 236 F.3d at 535-36. We also held that Hoffman's pre-sentencing interview conducted by the state probation officer was a "critical stage" of the proceeding, during which the Sixth Amendment right to counsel attached. *See id.* at 540-41. We remanded for further evidentiary hearings on Hoffman's ineffective assistance of counsel claims, and for a finding whether the deprivation of counsel during the pre-sentencing interview was harmless. *See id.* at 542-43. We affirmed dismissal of the remainder of Hoffman's claims. *See id.*

On remand, the district court held a five-day evidentiary hearing. The court heard substantial expert testimony about Hoffman's mental capacity, and testimony from Hoffman's trial counsel. After hearing oral argument by both parties, the district court granted Hoffman's habeas petition in part and denied it in part. The district court rejected three of Hoffman's ineffective assistance of counsel claims, specifically that counsel: (a) failed to challenge Hoffman's competency to stand trial; (b) advised Hoffman to reject a plea agreement that would have foreclosed the State from seeking the death penalty; and (c) failed to investigate or present evidence of Hoffman's diminished capacity at trial.

But the district court did accept one of Hoffman's ineffective assistance of counsel claims: that Hoffman had received ineffective assistance of counsel during sentencing. The district court found that Wellman and Coulter had not sufficiently investigated and presented mitigation evidence at sentencing that might have kept the trial judge from imposing a death sentence. The district court also found that the state trial judge's

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[3] The Ninth Circuit noted, "[t]he Idaho death penalty scheme in existence at the time of Hoffman's sentencing called for the judge, not a jury, to decide whether the death penalty was warranted. *See State v. Charboneau*, 116 Idaho 129, 774 P.2d 299, 315-17 (1989), *withdrawn and superseded by* 124 Idaho 497, 861 P.2d 67 (1993). To impose the death penalty, the court had to find that the mitigating factors, considered cumulatively, did not outweigh the gravity of each aggravating factor, considered separately." *See Hoffman*, 455 F.3d at 930.

> decision to deprive Hoffman of counsel during the pre-sentence interview was not harmless because it "dictated" trial counsels' sentencing strategy. The district court granted the habeas petition on these two claims and ordered the State to re-sentence Hoffman within 120 days of its order.

*Hoffman v. Arave,* 455 F.3d at 929-30. The Court granted relief finding that trial counsel's representation of Hoffman during the plea bargaining stage was ineffective.

Counsel's Ineffective Assistance During the Plea Process

On February 6, 1989, the Owyhee County prosecutor proposed that Hoffman plead guilty to first-degree murder in exchange for an agreement by the State not to pursue the death penalty against Hoffman during sentencing. The offer expired ten days later on February 16, 1989.

Counsel's research yielded the Ninth Circuit opinion, *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) in which the circuit court invalidated Arizona's death penalty scheme. Counsel recognized that both the Arizona and Idaho death penalty schemes allowed judges to make factual determinations to support a death sentence. *Adamson* proclaimed this practice unconstitutional. *Id.* at 1029-39. Based on the similarities between the Arizona and Idaho schemes at the time, counsel advised Mr. Hoffman to reject the State's offer.

In the month preceding the State's offer but after *Adamson*, the legal landscape altered notably with no sign of calming during the ten day duration of the State's offer. The Arizona Supreme Court decided *State v. Walton*, 769 P.2d 1017 (Ariz. 1989), *overruled in part by Ring v. Arizona*, 536 U.S. 584, 603 (2002), reaffirming its position that jury sentencing was not constitutionally mandated in death penalty cases; two challenges to Idaho's death penalty scheme were raised on an *Adamson* theory and a mere four days prior to the State's offer, the Ninth Circuit stayed the mandate in *Adamson* until the Supreme Court chose to grant or deny a Writ of

Certiorari. At the time of the plea offer, the Arizona Supreme Court decision in *Walton* was in direct conflict with the Ninth Circuit decision in *Adamson*. Counsel was unaware of this conflict.

The Ninth Circuit in the present matter did not find it unreasonable that counsel failed to predict which of the theories would eventually become the law, nor did it find unreasonable counsel's attempt to draw a connection between the Arizona and Idaho statutes, or even for arguing a reasonable extension of the Ninth Circuit's precedent. However, the Ninth Circuit found:

> [C]ounsel advised Hoffman to give up the certainty of avoiding the death penalty so that he could go to trial, a risky proposition with a substantial downside. More importantly, he offered this flawed advice without conducting reasonable research into the legal landscape. We therefore conclude that Wellman's legal representation of Hoffman during the plea bargaining stage was not objectively reasonable.

*Hoffman v. Arave*, 455 F.3d 941 (9th Cir. 2006).

As a result of this deficient performance, the court also found that Hoffman suffered prejudice:

> Had Hoffman been presented with an accurate evaluation (1) of the very real possibility of receiving the death penalty at the end of the penalty phase; (2) of the very real chance that the Idaho death penalty scheme would be upheld; and (3) of the almost nonexistent chance that if he had gone to trial he could have achieved anything better than the result promised in the plea agreement, there is more than a reasonable probability that he would have accepted the plea.

*Id.* at 942.

## REASONS FOR DENYING THE PETITION

Petitioner's ("State") challenge of the Ninth Circuit's application of longstanding precedent is not a compelling reason for the Court to grant a Writ of Certiorari. S. Ct. R. 10 (2007). This case does not deserve a Writ of Certiorari.

In the proceedings below, the Ninth Circuit Court of Appeals applied the long standing precedent of *Strickland v. Washington*, 466 U.S. 668 (1984). Despite arguments to the contrary, the Court of Appeals followed the appropriate legal standards without opening the door to "a cavalcade of challenges." Petition at 9. The Ninth Circuit made conscious efforts to "eliminate the distorting effects of hindsight, reconstruct the circumstances of counsel's challenged conduct, and . . . . evaluate the conduct from counsel's perspective at the time." *Id.* at 689. As a result, the Court found that counsel's failure to completely research the law, in light of the precipitous consequences facing Mr. Hoffman, fell below "the range of competence demanded of attorneys in criminal cases." *Strickland*, 466 U.S. at 687.

The Circuit Court then determined that the prejudicial effect of counsel's unprofessional conduct resulted in a reasonable probability that, but for counsel's errors, Mr. Hoffman would have accepted the prosecution's offer and pled guilty. Mr. Hoffman complied with all of the necessary pleading requirements to establish that there was a reasonable probability that he would have accepted the plea offer but for counsel's unprofessional error. Despite Petitioner's protestations, the Ninth Circuit established no new standards or precedents.

## I.

## THE NINTH CIRCUIT REASONABLY APPLIED LONGSTANDING SUPREME COURT PRECEDENT TO A PARTICULARIZED FACT PATTERN, ADOPTED NO NEW STANDARDS, AND CREATED NO NEW PRECEDENTS

### A. Counsel's Actions Fell Below an Objective Standard of Reasonableness - the Proper Standard Which Encompasses Any Alleged 'Gross Error Standard'

1. The State Demands a Higher Standard of Deficient Performance Than *Strickland*

Petitioner first argues that this Court must grant its Petition for Writ of Certiorari because the Ninth Circuit failed to follow the 'gross error standard' allegedly established in *McMann v. Richardson*, 397 U.S. 759 (1970). The State asserts that "[i]n the context of recommending a client plead guilty, when the client is informed of the plea offer, the defendant 'must demonstrate gross error on the part of counsel.'" Petition at 11, *quoting McMann*, 397 U.S. at 772. Petitioner's reliance on the single quotation is misplaced. *McMann* does not offer any reasonable analysis as to the establishment and implementation of the purported 'Gross Error Standard.' There is no further discussion, no citation, internally in *McMann* or to any other case, where the Court provides instruction as to the method in which the lower courts are to interpret and employ this 'Gross Error Standard.' In fact, nowhere in *McMann* is the phrase, 'gross error' used other than in the quotation asserted by Petitioner. The case law Petitioner cites as supporting *McMann* also fails to discuss the issue. Each case cited in support of the 'Gross Error Standard' relies exclusively on *McMann* as the foundation for this theory.[4]

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[4] *Turner v. Calderon*, 281 F.3d 851(9th Cir. 2002), which followed *McMann*, is itself cited only seven times; never as support of application of a 'Gross Error Standard.' Of those citations, four are for the proposition that trial counsel are not required to predict what a jury will do, two for the proposition that plea negotiations constitute a critical stage in the trial process for Sixth Amendment purposes, and one stating that *Strickland* applies to claims of ineffective assistance of counsel arising out of the plea process.

Another fault in relying upon the 'Gross Error Standard' is that it ignores clearly established precedent. *Strickland* has been applied in the context of challenges to a defendant's Sixth Amendment right to the effective assistance of counsel since 1984. *McMann* is the predecessor of *Strickland*. To rely on a single phrase from a prior case would be stepping back in time. While *McMann* may speak to the context of rejecting a plea offer in 1970, any standards would be, and in fact were, replaced by the *Strickland* two-prong ineffective assistance of counsel test, the test properly applied by the Ninth Circuit.

> As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. The Court indirectly recognized as much when it stated in *McMann v. Richardson*, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded of attorneys in criminal cases.' When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

*Strickland*, 466 U.S. at 687-88, *quoting, McMann v. Richardson*, 397 U.S. at 770, 771 (internal citations omitted).

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*Wade v. California*, 450 F.2d 726 (9th Cir. 1971), was last cited in 1974 to support the position that a prisoner had exhausted each of his remedies. *Harris v. Sup. Ct. of Cal.*, 500 F.2d 1124 (9th Cir. 1974).

Finally, and perhaps most telling is, *Long v. Brewer*, 667 F.2d 742 (8th Cir. 1982) which was cited in note 24 of the Attorney General of Florida's Brief of Petitioner in *Strickland v. Washington* as an example of "behavior that fell miserably below that which might be expected from an ordinary fallible lawyer" to support the idea that "[w]ithout guidance from this Court, various courts have extended the McMann 'standard' to all Sixth Amendment ineffective assistance claims in general and have affirmatively abandoned any fair trial/fundamental due process analysis, in favor of a labyrinth of lists and a mush of semantics conceived in the serenity of the appellate process." Strickland v. Washington Briefs, Petitioner's Brief, 1982 U.S. Briefs 1554. What Petitioner in this case should have realized was that each of these cases, all decided prior to the advent of *Strickland* and its two prong test for ineffective assistance of counsel, point directly towards the proper standard.

2. Counsel's Sole Reliance on an Incomplete Understanding of the Law Falls Below an Objective Standard of Reasonableness

The Circuit Court correctly held that counsel's sole reliance on *Adamson* "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Counsel relied exclusively on *Adamson v. Ricketts*, 865 F.2d at 1028-29 and advised Mr. Hoffman to reject a plea offer that would eliminate the possibility of receiving a death sentence. Soon after the *Adamson* decision, however, the Arizona Supreme Court reaffirmed its opinion as to the constitutionality of its death penalty scheme. Further, shortly before the State extended the plea offer, the Ninth Circuit granted a stay of the mandate of *Adamson* pending a United States Supreme Court ruling and the Arizona Supreme Court reaffirmed its position in direct conflict with the Ninth Circuit. *See State v. Walton*, 769 P.2d 1017 (1989), *overruled in part by Ring v. Arizona*, 536 U.S. 584 (2002). Having based his decision on *Adamson* from weeks prior and the similarity of the Arizona and Idaho death penalty schemes, counsel advised that Mr. Hoffman reject the State's plea offer. Counsel was inexcusably unaware of how rapidly the law was changing at the time of the plea offer. As such, his decision to advise Mr. Hoffman to reject the offer was made without a clear understanding of what the law was at the time.

> [W]ith the state of the law in turmoil both in Arizona and in Idaho, and with conflicts between this court and the state supreme courts of both states, a reasonable attorney would have recognized the substantial risk of advising a client to reject a plea agreement. Because [counsel] possessed a deficient understanding of the law, he led Hoffman to believe that his sentence would be the same whether he accepted the plea bargain or was convicted at trial.

*Hoffman v. Arave*, 455 F.3d at 926, 941.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms," *Strickland*, 466 U.S. at 688. The "[p]revailing norms of practice

as reflected in American Bar Association standards . . . are guides to determining what is reasonable . . . ." *Id.* at 689.

Each attorney possesses a "duty under the Rules of Professional Conduct to 'provide competent representation to a client,' which requires the legal knowledge, skill, thoroughness and preparation necessary for a complex and specialized area of the law." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases R. 6.1 (2003) (*quoting* ABA Model Rules of Prof'l Conduct R. 1.1 cmt. 1 (2007)). *See also* ABA Model Rules of Prof'l Conduct R. 1.1 cmt. 5 (2007) (Competent handling of a particular matter includes inquiry into and analysis of . . . legal elements of the problem . . . adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation . . . require[s] more extensive treatment than matters of . . . lesser complexity and consequence).

Petitioner scoffs at the Ninth Circuit's concern that "[Mr. Hoffman] risked much in exchange for very little." Petition at 9. The Ninth Circuit's opinion recognizes that the consequences of litigation *do* in fact play a significant role in the determination of counsel's competence. In fact, the greater the risk, the greater the degree of competence required. "The required attention and preparation are determined in part by what is at stake." Model Rules Prof'l Conduct 1.1 cmt. 5 (2007). While Petitioner argues that "no jurisdiction has required an attorney to assess the validity of a federal circuit case based upon the degree of risks associated with receiving a particular sentence," Petition at 16, it blindly ignores the wisdom and guidance provided by the Model Rules.

In light of this principle, the Ninth Circuit found that, "[i]f there was a high probability that Hoffman was not going to receive the death penalty, [counsel] might have been reasonable in

considering our decision in *Adamson* as an additional reason to reject the plea agreement." *Hoffman v. Arave*, 455 F.3d. 926, 941. "But Hoffman's chance of receiving the death penalty was not minimal, a fact that counsel vastly underestimated and that made counsel's failure to investigate *Adamson* more disastrous." *Id.*

Petitioner argues that "[i]t is incomprehensible that *Adamson* is 'good law' if there was not a 'high probability Hoffman was going to receive the death penalty,' but 'bad law' if there was a high probability that he would receive the death penalty." Petition at 16. This argument misstates the Ninth Circuit's position. It isn't that the character of *Adamson* changes depending upon the penalty to be imposed, but rather, the standard by which the courts measure the competence required of counsel in a given matter and therefore, the standard by which the courts measure the effectiveness of counsel that changes depending upon the consequences of the litigation. *See Strickland*, 466 U.S. at 687-89; Model Rules of Prof'l Conduct 1.1 cmt. 5 (2007). Thus, the correct position is precisely stated by the Ninth Circuit. "If there was a high probability that Hoffman was not going to receive the death penalty, [counsel] might have been reasonable in considering our decision in *Adamson* as an additional reason to reject the plea agreement." *Hoffman*, 455 F.3d. at 941. "But Hoffman's chance of receiving the death penalty was not minimal, a fact that counsel vastly underestimated and that made counsel's failure to investigate *Adamson* more disastrous." *Id.* By following *Strickland*, the ABA Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases, and the Model Rules of Professional Conduct, "risking much" increased the demand for competent representation by counsel. As a result, counsel's actions fell below an objective standard of reasonableness when

he advised Mr. Hoffman to reject a plea offer based on a sole reading of *Adamson* without understanding the rapidly changing legal landscape.

**B. The State's Claim That Mr. Hoffman Failed to Plead Facts Sufficient under *Hill* Comes Too Late and Mr. Hoffman Has Pled Facts More than Sufficient to Satisfy Any Pleading Requirement**

1. The State is Procedurally Barred from Arguing that Mr. Hoffman Failed to Plead Facts Sufficient Under *Hill* When it Raised the Argument for the First Time in its Request for Rehearing

The State argued for the first time that Mr. Hoffman hadn't *affirmatively stated* in his Writ of Habeas Corpus that he would have accepted the plea offer but for counsel's unprofessional errors in its Request for Rehearing With Suggestion for Rehearing En Banc. The State did not raise this argument in the district court. Nor did it raise this issue in its appeal to the Ninth Circuit. A party may not raise new and additional matters for the first time in a petition for rehearing. *United States v. Bongiorno*, 110 F.3d 132, 133 (1st Cir. 1997); *Kale v. Combined Ins. Co.*, 924 F.2d 1161, 1169 (1st Cir. 1991) ("[a] party cannot be permitted to raise a new issue for the first time on a petition for rehearing in the circuit court"); *FDIC v. Massingil*, 30 F.3d 601 (5th Cir. 1994); *Cosco v. United States*, 922 F.2d 302 (6th Cir. 1990); *Pentax Corp. v. Robison*, 135 F.3d 760 (Fed. Cir. 1998); *Lockard v. Equifax, Inc.*, 163 F.3d 1259 (11th Cir. 1998). The State must not be permitted to raise the issue in a Petition for Writ of Certiorari.

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

The State places particular emphasis on the Court's opinion in *Hill v. Lockhart*, 474 U.S. 52 (1985). "Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to

trial." *Id.*, at 60. What the State fails to appreciate is the very next sentence of the *Hill* opinion. "He alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty." *Hill* does *not* create a *per se* rule whereby a defendant *must affirmatively state* that but for counsel's unprofessional errors, they would have acted differently.

Mr. Hoffman pled special circumstances that support the conclusion that he placed particular emphasis on the importance of the plea process; namely, that he suffers from a diminished mental capacity resulting in a compliant personality.

> Had Petitioner been properly advised regarding his exposure to the death penalty and had defense counsel fully developed and understood Petitioner's mental state including his brain damage, dyslexia, mental illness including psychosis, and mental retardation, counsel could have secured to Petitioner adequate care and treatment that would have rendered Petitioner sufficiently competent to determine to take advantage of the plea bargain offered and plead guilty.

Second Amended Petition for Writ of Habeas Corpus at 19.

These special circumstances support the Court of Appeals' conclusion that Mr. Hoffman relied entirely on the wisdom of counsel in determining whether to accept a plea agreement or not. Had counsel made himself competently aware of the general landscape of the law, his advice to Mr. Hoffman would have been different and Mr. Hoffman would have followed that advice and pled guilty.

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

"Any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U.S. 668, 692 (1984); *Nunes v. Mueller*, 350 F.3d 1045 (9th Cir. 2003); *Cullen v. United States*, 194 F.3d 401, 403 (2nd

Cir. 1999); *Wanatee v. Ault*, 259 F.3d 700, 704 (8th Cir. 2001). Despite the State's argument that Mr. Hoffman must "prov[e] prejudice," Petition at 18, the Court has held that, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "[A] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Counsel specifically advised Mr. Hoffman that as a result of the Arizona case, *Adamson v. Ricketts*, he *would not* be executed due to the similar statutory language of the Arizona and Idaho schemes. This advice remained unchanged and unaltered through trial and conviction. As a result and in reliance on counsel's erroneous advice, Mr. Hoffman rejected a plea bargain which would have foreclosed the State from seeking the death penalty. Mr. Hoffman therefore proceeded to trial due to the advice of trial counsel that he *would not* be executed regardless of the outcome.

Mr. Hoffman possessed a compliant personality. "Wellman testified that Hoffman had a 'compliant personality,' and would frequently defer to Wellman's decision-making." *Hoffman*, 455 F.3d at 942. Mr. Hoffman was quoted by trial counsel at the evidentiary hearing as saying, "Well, Bill you are the lawyer, you know, you know more about it than I do." *Id.* Mr. Hoffman's other trial counsel testified that Mr. Hoffman would frequently defer to the decisions of his attorneys, further lending credence to his compliant nature and the reasonable probability that he would have pled guilty but for counsel's unprofessional errors. *Id.* "This strongly suggests that, had [counsel] fully presented Hoffman's options and told Hoffman that he was

giving up very little in exchange for the security of the death penalty being off the table, Hoffman probably would have gone along with Wellman's suggestion and would have accepted the plea agreement." *Id.*

The dissent from the Ninth Circuit's denial of the State's Request for Rehearing with Suggestion for Rehearing En Banc voice concern that Mr. Hoffman has not pled that he would have accepted the plea if he were competent. This mischaracterizes the pleadings as Mr. Hoffman has in fact pled that, "counsel could have secured to Petitioner adequate care and treatment that would have rendered Petitioner sufficiently competent to determine to take advantage of the plea bargain offered and plead guilty." Second Amended Petition for Writ of Habeas Corpus at 19. In the preceding sentence, the phrase 'would have' modifies two subsequent actions. Thus, "[h]ad Petitioner been properly advised . . . counsel could have secured . . . treatment that would have rendered Petitioner sufficiently competent . . . and [would have] plead guilty. The pleadings show that if Mr. Hoffman had been advised properly, and had counsel sought proper attention for Mr. Hoffman's mental deficiencies, he would have plead guilty. In any event, the evidence shows that if advised properly by counsel, he would have accepted the plea agreement offered by the State.

Counsel's advice to Mr. Hoffman would have been different if he competently researched the general landscape of the law at the time. Counsel would have recognized that there was in fact a very real chance that the Idaho courts would uphold the death penalty scheme in Idaho. Furthermore, counsel would have deduced that there was little, if anything to gain by going to trial that could not be secured through accepting the plea offer. Thus, there was unquestionably more than a reasonable probability that, but for counsel's unprofessional errors, his advice to Mr.

Hoffman would be different and a reasonable probability that Mr. Hoffman would have accepted the plea.

> Had Mr. Hoffman been presented with an *accurate evaluation* (1) of the very real possibility of receiving the death penalty at the end of the penalty phase; (2) of the very real chance that the Idaho death penalty scheme would be upheld; and (3) of the almost nonexistent chance that if he had gone to trial he could have achieved anything better than the result promised in the plea agreement, there is more than a reasonable probability that he would have accepted the plea.

*Hoffman*, 455 F.3d at 942.

While the judges dissenting from the Ninth Circuit's denial of the State's Request for Rehearing with Suggestion for Rehearing En Banc disagree with the finding of the panel, their reasoning fails to honor *Strickland*. They create a higher standard by which a defendant must 'prove' prejudice as opposed to showing a *reasonable probability* that they were prejudiced, as required by *Strickland*. "*Hill v. Lockhart*, requires more: (1) an allegation in the habeas petition that but for counsel's ineffective assistance, petitioner would have pleaded guilty and (2) **proof** - not just post-hoc appellate court speculation - that petitioner would have accepted the plea agreement had the attorney correctly advised the petitioner." *Hoffman v. Arave*, 481 F.3d 686, 688-89 (2007) (internal citations omitted) (emphasis added). The dissenting judges would impose a greater burden on Mr. Hoffman than the Court permitted in *Strickland*. "[A] defendant *need not* show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693; *see also Woodford v. Visciotti*, 537 U.S. 19, 22 (2002) ("[*Strickland*] specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered").

Mr. Hoffman was prejudiced by the unprofessional errors of counsel. But for those errors, there is a reasonable probability that counsel would have realized there was little, if anything to gain from trial; a substantial risk of receiving a death sentence; and that Idaho's death penalty scheme would likely be upheld and advised Mr. Hoffman to accept the State's plea offer. Further, due to his reliance upon trial counsel and his diminished mental capacity leading to his compliant nature, there is more than a reasonable probability that Mr. Hoffman would have accepted the State's offer.

## II.

## THE STATE FAILS TO STATE A COMPELLING REASON TO GRANT CERTIORARI

The State has not, and cannot, show a conflict in the courts or even a deviation from the usual course of proceedings. Rather, the State's Petition claims, first, that the panel misapplied the law of the deficient performance prong of the law on ineffective assistance of counsel, and second, that the panel made erroneous factual findings as to the prejudice prong. Petition at 10, 16. These are insufficient bases for review on *certiorari*. *See* Supreme Court Rule 10.

On the law, the panel's unanimous decision is entirely consistent with this Court's authority and that of other circuits. Contrary to the State's assertions, the panel did not require "defense counsel to be prescient about the direction a law will take," Petition at 16, but rather made a routine application of the twenty-three-year old *Strickland* rule. *See Hoffman v. Arave*, 455 F.3d 926, 931, 941-42 (9th Cir. 2006) ("We do not expect counsel to be prescient about the direction the law will take.") (citing *Strickland v. Washington*, 466 U.S. at 694).

Here, the Court of Appeals was not wrong on the law (as evidenced by the denial of rehearing under Federal Rule of Appellate Procedure 40 and the opinion's reasoning), and closely scrutinized the facts. The Court of Appeals' opinion accurately reflects the law of ineffective assistance generally, and specifically ineffective assistance at plea bargaining. *See Hoffman*, 455 F.3d at 941-42 (citing *Strickland v. Washington*, 466 U.S. at 694; *Nunes v. Mueller*, 350 F.3d 1045, 1054 (9th Cir. 2003); *Cullen v. United States*, 194 F.3d 401, 403-04 (2nd Cir. 1999); *Wanatee v. Ault*, 259 F.3d 700, 704 (8th Cir. 2001); and *Meyers v. Gillis*, 142 F.3d 664, 666-68 (3rd Cir. 1998)). This Court has held steady to the law of effective assistance of counsel for over twenty years. The opinion below does nothing more than apply a set of facts to the well-established standards.

This Court should not take up the factual issue of whether Mr. Hoffman would have accepted the plea offer. "[C]ertiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases," *Watt v. Alaska*, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring), and should be used only in those "cases of peculiar gravity and general importance" or to secure uniformity in the Circuits. *Rogers v. Missouri P.R. Co.*, 352 U.S. 521, 531 (1957) (Frankfurter, J. dissenting) (citing *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)). This Court does not seek to correct factually erroneous decisions, and instead looks for cases "involving unsettled questions of federal constitutional or statutory law of general interest." Rehnquist, The Supreme Court: How it Was, How it Is 269 (1987). This is not that case.

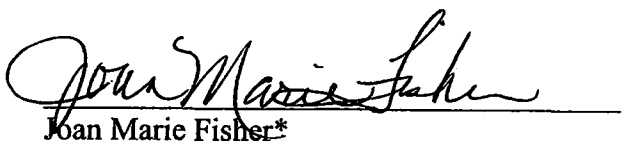
Petitioner has failed to state a compelling reason for the Court to grant *certiorari* review. This case does not involve an important question of federal law, nor does this decision conflict

with any other circuit court decision or the decision of a state court of last resort. Further, Petitioner is grasping at straws as it attempts to find new standards and precedents in the Ninth Circuit's opinion. It turns a blind eye to the Ninth Circuit's reasonable application of a twenty-three year precedent to the facts of this case. Petitioner cannot be permitted to litigate an issue raised for the first time in a Petition for Rehearing before a circuit court. Mr. Hoffman has pled and provided substantial evidence to support the Ninth Circuit's finding that counsel's failure to completely research the law and then advise Mr. Hoffman to reject a plea offer that would foreclose the State from seeking the death penalty fell below an objective standard of reasonableness. The Ninth Circuit also properly found that there was a reasonable probability that Mr. Hoffman was prejudiced by counsel's unprofessional errors and that, but for counsel's errors, he would have accepted the plea offer.

## CONCLUSION

Therefore, for the reasons and arguments above, Mr. Hoffman respectfully requests that the court DENY the State's Petition for a Writ of Certiorari.

Respectfully submitted,



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