In The

Supreme Court of the United States

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

PETITION FOR WRIT OF CERTIORARI

LAWRENCE G. WASDEN
Attorney General of Idaho

L. LAMONT ANDERSON*
Deputy Attorney General
Chief, Capital Litigation Unit
Criminal Law Division
700 W. State Street
Boise, Idaho 83720-0010
Telephone: (208) 334-4539

Attorneys for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE

QUESTIONS PRESENTED

Five weeks before his trial, Respondent Maxwell Hoffman rejected an offer by the state to recommend a life sentence if he would plead guilty to first-degree murder. Hoffman's attorney, William Wellman, recommended Hoffman reject the offer because the Ninth Circuit had earlier determined the Constitution required juries to find statutory aggravating factors, while in Idaho, judges made such findings. Wellman believed if Hoffman received a death sentence it would be reversed on appeal. However, in *Walton v. Arizona*, 497 U.S. 639 (1990), the Supreme Court determined the Constitution permits judges to find statutory aggravating factors. Nevertheless, the Ninth Circuit determined Wellman's representation was ineffective during plea negotiations because he "based his advice on incomplete research, and second, Wellman recommended that his client risk much in exchange for very little." The Ninth Circuit also concluded, "Hoffman's desire to have the State prove its case was not a principled stand against accepting a plea agreement," but "a misunderstanding of aiding and abetting liability led him to believe that the State was not likely to prove a first-degree murder charge against him."

1. Because the Ninth Circuit did not require Hoffman to prove Wellman's recommendation constituted "gross error" and mandated Wellman "be prescient about the direction the law will take," did the Ninth Circuit err by rejecting this Court's prohibition regarding the use of hindsight to conclude Hoffman established deficient performance?

QUESTIONS PRESENTED – Continued

2. Because Hoffman failed to allege he would have accepted the state's plea offer but for Wellman's advice and the Ninth Circuit determined Hoffman's decision to reject the offer was not a "principled stand," did the Ninth Circuit err by concluding Hoffman established prejudice?

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

The Attorney General for the State of Idaho, on behalf of A. J. Arave, Warden of the Idaho Maximum Security Institution, respectfully petitions for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals, which overturned an eighteen-year-old first-degree murder conviction based upon an allegation of ineffective assistance of counsel stemming from counsel's recommendation to reject a plea offer that Hoffman rejected irrespective of counsel's recommendation.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, App., *infra*, at 1-37, is reported at *Hoffman v. Arave*, 455 F.3d 926 (9th Cir. 2006). The Ninth Circuit's Order denying Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc and the dissenting opinion from that Order, App., *infra*, at 66-74, is reported at *Hoffman v. Arave*, 481 F.3d 686 (9th Cir. 2007).

JURISDICTION

The opinion of the Ninth Circuit was filed July 5, 2006. (App. 1.) On March 6, 2007, the Ninth Circuit denied Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc. App. 66. Petitioner requested and received two extensions of time to file his Petition for Writ of Certiorari, to and including July 26, 2007. This case

arose under 28 U.S.C. § 2254 and Petitioner invokes the jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

The facts leading to Hoffman's conviction for Denise Williams's first-degree murder and his death sentence are summarized in *State v. Hoffman*, 851 P.2d 934, 935-37 (1993):

> [O]n September 10, 1987, Denise Williams (Williams), a confidential informant working for Nampa narcotic officers, made a controlled drug buy from Richard Holmes (Holmes) which resulted in the arrest of Holmes. During the arrest it became apparent that Williams was working

for the police. Holmes was subsequently released from custody on bail.

Upon Holmes' release, Sam Longstreet, Jr. (Longstreet) and James Slawson (Slawson) arranged for a meeting with Holmes. Longstreet and Slawson, who were responsible for introducing Williams to Holmes for the purpose of purchasing drugs, testified that they met with Holmes in an effort to assure him that they had nothing to do with his arrest. They further testified that when they arrived at Holmes' residence, two other men, defendant Hoffman and Ronald Wages (Wages), were present. Both Wages and Hoffman worked for Holmes as part of his drug operation, and both men were heavy drug users themselves. During this meeting, outside the presence of Hoffman and Wages, Holmes asked Longstreet and Slawson if they would kill Williams for her involvement in his arrest and to prevent her from testifying at Holmes' preliminary hearing on drug charges. Longstreet and Slawson stated that they were incapable of killing Williams but would help in other ways. In response, Holmes' [sic] stated that if it were up to him he would cut Williams' throat and "let her bleed like an animal."

The next day, Longstreet and Slawson returned to Holmes' house. Hoffman and Wages were again present. Holmes had Hoffman conduct a strip search of Longstreet and Slawson to ensure that they were not wired and working for the police. During this meeting, an agreement was reached between Holmes, Longstreet and Slawson wherein Longstreet and Slawson were to kidnap Williams and take her to a spot in Owyhee County known as the Boy Scout Camp. Holmes, Wages, Longstreet and Slawson then

drove to the Boy Scout Camp where they planned the details of the kidnapping. It was agreed that Longstreet and Slawson would call Holmes once they had kidnapped Williams and that Wages would be waiting at the camp when they arrived. It was also agreed that Williams was to be tied up to a tree in the area until Holmes arrived.

The following evening, Holmes and Hoffman took Wages to the Boy Scout Camp where they all ingested drugs. Holmes and Hoffman then left, leaving Wages at the Camp. Longstreet and Slawson arrived at the camp sometime later with Williams. Longstreet testified that he and Slawson tricked Williams into going with them by telling her that they would take her to buy alcohol. The three drove around drinking and ingesting drugs, stopping only once to allow Longstreet to call Holmes and leave a message that he had Williams. Longstreet and Slawson then pretended to get lost and eventually made their way to the Boy Scout Camp as was earlier planned. Upon their arrival at the camp, Wages, who was wearing a bandanna and carrying a sawed off shotgun, ordered Longstreet and Slawson to strip Williams of her clothes and to tie her up. The two men complied with Wages' order. Longstreet and Slawson then left the camp, leaving Williams with Wages.

Hoffman arrived at the camp a short time later. Hoffman and Wages loaded Williams into a car and met Holmes at the old ION highway cut-off. Holmes kicked Williams in the head and told her she was "a dead bitch." Holmes left and subsequently returned in a brown Nissan four-wheel drive and told Hoffman and Wages, "You know what to do." Holmes then left again.

Hoffman and Wages then took Williams in the Nissan. After driving around for several hours they stopped the vehicle in Delamar, Idaho. Wages and Hoffman instructed Williams to write two letters to the press, which were intended to exonerate Holmes of the drug charges. After the letters were written, Williams was taken to a cave outside of Silver City, Idaho. Hoffman took Williams into the cave and slashed her throat with a knife. As Hoffman was returning to the vehicle, Wages spotted Williams crawling up an embankment near the cave. Wages then pursued Williams and stabbed her under the arm with Hoffman's knife. Thinking Williams was dead, both men buried her with rocks. It would later be determined that the cause of death was a crushing blow by a rock to William's [sic] head.

Upon William's [sic] disappearance, a police investigation ensued. Eventually, Longstreet and Slawson agreed to provide the police with information regarding William's [sic] disappearance in exchange for a recommendation of a year in jail for kidnapping. Based on this information, Holmes and Wages were indicted on charges of conspiracy to commit murder. In an effort to secure a plea agreement, Holmes led the police to Williams' body. The conspiracy charges against Holmes were vacated, but Holmes was subsequently charged with aiding and abetting first degree murder on August 22, 1988.

After Williams' body was found, Wages confessed to the killing and became a cooperative witness for the state and agreed to give a full account of how it occurred.

On August 22, 1988, the day Hoffman was charged, William Wellman was appointed to represent Hoffman. App. at 3. Trial commenced March 7, 1989, after which Hoffman was found guilty of Denise's first-degree murder. App. at 4.

Prior to trial, on December 22, 1988, the Ninth Circuit issued *Adamson v. Ricketts*, 865 F.2d 1011, 1023-29 (9th Cir. 1988), concluding Arizona's use of judges to find statutory aggravating factors was unconstitutional. App. at 24. At the time of Hoffman's trial, Idaho, like Arizona, used judge sentencing; the two states' capital sentencing procedures were "virtually identical," *State v. Charboneau*, 774 P.2d 299, 326 (Idaho 1989) (Huntley, J., concurring and dissenting), a fact recognized by Wellman. App. at 24.

On February 6, 1989, the state extended Hoffman a plea offer, which expired on February 16, 1989, agreeing to withdraw the death penalty if he pled guilty to first-degree murder. App. at 24. Wellman recommended Hoffman reject the offer because he did not believe Hoffman was "giving up a lot by going to trial because [he] didn't think there was a reasonable probability that one, Judge Weston would impose the death sentence, and two, that a death sentence would be upheld given my reading of *Adamson* and my knowledge that *Adamson* was reversed before Max went to sentencing." App. at 81. Wellman explained the risk of not taking the offer, but Hoffman rejected it, stating, "I am not going to take it. I will take my chances." App. at 83. Hoffman was convicted of first-degree murder and sentenced to death. App. at 5. The Idaho Supreme Court affirmed Hoffman's conviction and sentence. *Hoffman*, 851 P.2d 934.

Hoffman filed a Petition for Writ of Habeas Corpus, which the district court denied. App. at 5. Pursuant to the procedural default doctrine, the district court dismissed a number of claims, including Hoffman's ineffective assistance of counsel claims. App. at 5; *see also Hoffman v. Arave*, 937 F.Supp. 1152 (D. Idaho 1997). Hoffman's remaining claims were subsequently dismissed by the district court on the merits. App. at 5; *see also Hoffman v. Arave*, 73 F.Supp.2d 1192 (D. Idaho 1998).

While the Ninth Circuit affirmed most of the district court's opinion, it concluded Hoffman's ineffective assistance of counsel claims were not procedurally defaulted and remanded for an evidentiary hearing. *Hoffman v. Arave*, 236 F.3d 523, 530-36 (9th Cir. 2001), *cert. denied*, *Arave v. Hoffman*, 534 U.S. 944 (2001).[1]

After an evidentiary hearing, the district court granted Hoffman habeas relief based on ineffective assistance at sentencing and the violation of his Sixth Amendment right to counsel during the presentence interview, but denied relief based upon ineffective assistance during plea negotiations and trial. App. at 38-65. Both parties initially filed appeals. App. at 7. However, Petitioner subsequently withdrew his cross-appeal regarding sentencing-phase ineffective assistance of counsel claims, leaving only Hoffman's appeal before the Ninth Circuit regarding guilt-phase ineffective assistance of counsel claims. App. at 7.

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[1] The Ninth Circuit also concluded Hoffman's Sixth Amendment right to counsel was violated during his presentence interview and remanded for an evidentiary hearing to determine whether the error was harmless. App. at 5; *see also Hoffman*, 236 F.3d at 540-41.

On July 5, 2006, a Ninth Circuit panel affirmed in part and reversed in part. The panel affirmed the district court's denial of habeas relief based upon counsel's alleged failure to investigate and present a diminished capacity defense and counsel's alleged failure to challenge Hoffman's competency. App. at 9-23. However, the panel granted relief based upon Hoffman's claim that he was denied effective assistance during plea negotiations when Wellman recommended Hoffman reject the state's offer. App. at 23-32. Addressing deficient performance, the panel concluded, "Wellman based his advice on incomplete research, and second, Wellman recommended that his client risk much in exchange for very little." App. at 27. The panel also concluded Hoffman established prejudice because, "had Wellman 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." App. at 30 (emphasis added). Rejecting Petitioner's assertion that, regardless of Wellman's advice, Hoffman would not have taken the plea agreement because he wanted the state to prove he was guilty of first-degree murder, the panel opined, "Hoffman's desire to have the State prove its case was not a principled stand against accepting a plea agreement. Rather, Hoffman's misunderstanding of aiding and abetting liability led him to believe that the State was not likely to prove a first-degree murder charge against him." App. at 31. The panel ordered Hoffman's release unless "the State offers Hoffman a plea agreement with the 'same material terms' offered in the original plea agreement." App. at 31-32.

On March 6, 2007, the state's Petition for Rehearing with Suggestion for Rehearing En Banc was denied, failing to receive a majority of votes of the active judges in favor of en banc rehearing. App. at 66. However, seven judges joined in dissenting from the panel's decision, concluding, "not only does the panel find deficient performance in an attorney's failure to correctly predict future court decisions (the Crystal Ball Rule), the panel finds prejudice in a mere supposition by this court that the defendant would have taken the plea had his attorney guessed correctly." App. at 74.

REASONS FOR GRANTING THE PETITION

In this habeas proceeding, the Ninth Circuit adopted a standard, not supported by this Court's precedents and in conflict with the rulings of other circuits, that greatly reduces the standard defendants must meet to establish ineffective assistance of counsel relating to plea negotiations. As recognized by the dissenting judges, the panel's conclusion, that Wellman's recommendation was based upon incomplete research and "that his client risk[ed] much in exchange for very little," App. at 27:

> open[s] this court up to a cavalcade of challenges. Every defendant whose attorney reasonably predicted a likely sentence which turned out to be wrong, or who erroneously predicted the direction of the court's constitutional holdings, has a claim of deficient performance. And yet, how often does an attorney give advice that does not in some way predict future court action?

App. at 69-70.

As further recognized by the dissenting judges, App. at 70-74, the panel's decision ignores the pleading requirements established by this Court in *Hill v. Lockhart*, 474 U.S. 52, 60 (1985), significantly reduced Hoffman's burden of establishing he would have pled guilty if Wellman had offered different advice, and establishes a new requirement that Hoffman's rejection of the state's offer be based upon a "principled stand."

This Court admonished against this very result in *Strickland v. Washington*, 466 U.S. 668, 697 (1984), when it recognized, "Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result."

A. To Establish Deficient Performance, Hoffman Was Required To Establish Wellman's Recommendation Constituted Gross Error, Without The Distorting Effects Of Hindsight

While this Court has never expressly stated plea negotiations are a "critical stage" at which the Sixth Amendment right to counsel adheres, the Court has explained entry of a guilty plea, whether a misdemeanor or felony "ranks as a 'critical stage' at which the Sixth Amendment right to counsel adheres." *Iowa v. Tovar*, 541 U.S. 77, 81 (2004). Additionally, this Court implicitly concluded pretrial plea negotiations are a critical stage in *Burger v. Kemp*, 483 U.S. 776, 803 (1987) ("The separate trials in this case, however, did absolutely nothing to reduce the potential for divergence of interests at the two critical stages that petitioner argues were adversely affected by the conflict of interest, that is, pretrial plea negotiations and post-trial appeal").

This Court has further held "that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. at 58. Deficient performance is not based upon "whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970); *see also Hill*, 474 U.S. at 58-59 ("In the context of guilty pleas, the first half of the *Strickland v. Washington* test is nothing more than a restatement of the standard of attorney competency already set forth in *Tollet v. Henderson* [411 U.S. 258 (1973)], and *McMann v. Richardson*"). This is an objective standard protected by a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." *Bell v. Cone*, 535 U.S. 685, 702 (2002). In 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." *McMann*, 397 U.S. at 772; *see also Turner v. Calderon*, 281 F.3d 851, 880 (9th Cir. 2002); *Wade v. California*, 450 F.2d 726, 732 (9th Cir. 1971); *Long v. Brewer*, 667 F.2d 742, 745-46 (8th Cir. 1982) (quoting *McMann*, 397 U.S. at 772).

The panel did not even cite *McMann*, *Hill* or the "gross error" standard, let alone determine whether Wellman's advice constituted "gross error." Rather, the panel merely opined Wellman's research was "incomplete" and that his recommendation required "his client risk much in exchange for very little." App. at 27.

The panel's conclusion regarding Wellman's research relies upon impermissible hindsight. As recently reaffirmed in *Bell*, 535 U.S. at 698 (quoting *Strickland*, 466 U.S. at 689), "[j]udicial scrutiny of a counsel's performance must be highly deferential" and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."

Detailing the procedural history of *Adamson* and *State v. Walton*, 769 P.2d 1017 (Ariz. 1989), the panel concluded Wellman's performance was deficient because he did not understand the "general landscape in which [*Adamson*] arose." App. at 27. While the panel noted Wellman was aware Idaho's courts had "considered and consistently rejected claims similar to *Adamson*," App. at 27-28, the panel lost sight of the fact that the Idaho cases cited by the panel were decided prior to the Ninth Circuit's decision in *Adamson*. Undoubtedly, Wellman was aware of Idaho's prior rejection of arguments similar to those adopted in *Adamson*, and also knew "that a pair of cases was well on its way to the Idaho Supreme Court that would challenge the continuing viability of these Idaho Supreme Court cases in light of [the Ninth Circuit's] holding in *Adamson*." App. at 27. However, Wellman had no basis for relying upon pre-*Adamson* decisions or believing the Idaho Supreme Court would not follow *Adamson* until after it was rejected by the Idaho Supreme Court on April 4, 1989, in *Charboneau*, 774 P.2d at 146-47, nearly two months after the expiration of the state's offer. This is particularly true in light of the Ninth Circuit's conclusion regarding the binding nature of its decisions upon the respective states. *See Yniquez v. Arizona*, 939 F.2d 727,

736 (9th Cir. 1991) (expressing "serious doubts" regarding the "view that the state courts are free to ignore decisions of the lower federal courts on federal questions").

The panel's discussion of the procedural history of *Walton* is likewise unavailing. App. at 27-28. First, counsel is not expected to research the law in other jurisdictions. *Nelson v. Estelle*, 642 F.2d 903, 908 (5th Cir. 1981) ("counsel is normally not expected to . . . research parallel jurisdictions"). More importantly, while Arizona may have signaled its intention to appeal *Adamson*, Wellman was not required to guess whether the United States Supreme Court would grant certiorari in either *Adamson* or *Walton*.

As recognized by the dissenting judges, "*Adamson* was good law while the plea bargain was available. The Idaho Supreme Court had not rejected our *Adamson* position, and, in a pre-AEDPA world, our decision would have made federal habeas relief for Hoffman likely." App. at 69. Contrary to the panel's conclusion regarding the necessity of researching the "general landscape" in which a case arose, Wellman's advice was not objectively unreasonable "while the law was still unsettled." *Jones v. United States*, 224 F.3d 1251, 1257-58 (11th Cir. 2000). In fact, the Supreme Court refused to grant certiorari in *Adamson*, even after granting certiorari in *Walton*. *See Lewis v. Adamson*, 497 U.S. 1031 (1990); *Walton v. Arizona*, 493 U.S. 808 (1989). More significantly, Wellman was not required to guess the Supreme Court would affirm the constitutionality of Arizona's sentencing scheme in *Walton v. Arizona*, 497 U.S. 639 (1990). In fact, twenty-two years after *Walton*, the Supreme Court reversed its decision and concluded juries must find statutory aggravating factors. *Ring v. Arizona*, 536 U.S. 584 (2002). Based upon *Ring,* even if Wellman had conducted the additional research

advocated by the panel, it was just as likely, at that time, the Supreme Court would have reversed the Arizona Supreme Court in *Walton*, and Wellman's conclusions that Idaho's capital statutory sentencing scheme was unconstitutional would have been validated.

Numerous circuits have addressed similar situations and determined counsel are not required to guess what may happen regarding future court decisions. In *United States v. Gonzalez-Lerma*, 71 F.3d 1537, 1539 (10th Cir. 1995), the defendant challenged his attorney's failure to seek a continuance after the district court made statements about a forthcoming change in the law, mandated by a circuit opinion, that would effect his sentence. The court recognized, "Counsel's assistance is not ineffective simply because counsel fails to base its decisions on laws that might be passed in the future" and that the courts must "distinguish the failure of an attorney to be aware of prior **controlling precedent** – which might render counsel's assistance ineffective – from the failure of an attorney to foresee future developments in the law." *Id.* at 1542 (emphasis added).

In *Fountain v. Kyler*, 420 F.3d 267, 270-71 (3rd Cir. 2005), the court refused to find ineffective assistance based upon erroneous advice not to file an appeal when the attorney believed a newly enacted statute would be applied retroactively subjecting her client to the death penalty. The court recognized it "must judge the reasonableness of [counsel's] conduct based on the law and the facts as they were known in January 1980." *Id.* at 275; *see also Sophanthavong v. Palmateer*, 378 F.3d 859, 870 (9th Cir. 2004) ("Counsel was not required to predict accurately how the Oregon courts would resolve the question whether the evidence was legally sufficient to support a conviction

for aggravated murder if the matter had gone to trial"); *Lowry v. Lewis*, 21 F.3d 344, 356 (9th Cir. 1994) (counsel "cannot be required to anticipate our decision in this later case, because his conduct must be evaluated for purposes of the performance standard of *Strickland* 'as of the time of counsel's conduct' "); *United States v. Harms*, 371 F.3d 1208, 1211-12 (10th Cir. 2004) (counsel's failure to anticipate the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), was not ineffective); *Bullock v. Carver*, 297 F.3d 1036, 1052 (10th Cir. 2002) (quoting *Gonzalez-Lerma*, 71 F.3d at 1542) ("we have rejected ineffective assistance claims where a defendant faults his former counsel not for failing to find existing law, but for failing to predict future law and have warned 'that clairvoyance is not a required attribute of effective representation' ").

While at the time the plea offer was available *Adamson* was clearly good law upon which Wellman could objectively base his recommendation that Hoffman reject the state's plea offer, the panel inexplicably concluded, "If there was a high probability that Hoffman was not going to receive the death penalty, Wellman might have been reasonable in considering our decision in *Adamson* as an additional reason to reject the plea agreement." App. at 28. It 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 he would receive the death penalty. Presumably, this constitutes the basis for the panel's conclusion that Wellman's performance was deficient because "his client risk[ed] much in exchange for very little." App. at 27. However, 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. This is particularly true in Hoffman's case because Wellman "didn't think there was a reasonable probability . . . Judge Weston would impose the death sentence," App. at 81, since Hoffman's co-defendant, Ronald Wages, did not receive the death penalty and Wellman was defending Hoffman on an "aiding and abetting" principle to reduce his culpability.

By requiring counsel to "be prescient about the direction the law will take," App. at 26, the panel violated one of the standard principles of ineffective assistance of counsel, which prohibits the courts from examining such claims under the distorting effects of hindsight by requiring counsel to guess what direction the courts will go when examining new or expanded issues that are placed before them. This is such a marked departure from *Strickland* and its progeny that certiorari is required to prevent a flood of ineffective assistance of counsel claims that will be based upon inadequate legal research because counsel was not "prescient about the direction the law will take," App. at 26, a requirement clearly not mandated by *Strickland* or its progeny.

B. To Establish Prejudice, Hoffman Must Allege And Prove, Based Upon A Reasonable Probability, He Would Have Accepted The State's Offer But For Wellman's Actions

Not only does Hoffman have the burden of establishing deficient performance, he must establish prejudice, which requires him to prove "there is a reasonable probability that, but for counsel's errors, he would . . . have pleaded guilty." *Hill*, 474 U.S. at 59. The starting point for determining prejudice is whether Hoffman affirmatively

alleged he would have pled guilty if not for Wellman's actions. In *Hill*, the Supreme Court declined to decide whether there was ineffective assistance of counsel because:

> 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. 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.

Id. at 371.

As recognized by the dissenting judges, App. at 72-73, Hoffman has never alleged he would have pled guilty but for Wellman's actions. Rather, in Hoffman's Second Amended Petition for Writ of Habeas Corpus, his attorney merely alleged:

> Had [Hoffman] 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 [Hoffman] adequate care and treatment that would have rendered [Hoffman] sufficiently competent to determine to take advantage of the plea bargain offered and plead guilty.

App. at 105.

This does not constitute the type of affirmation required to establish Hoffman would have pled guilty but for Wellman's actions. Hoffman did not even sign the

Second Amended Petition; it was signed only by his attorney. App. at 131. Neither has Hoffman submitted affidavits or testified he would have accepted the plea offer. Even the panel merely assumed Hoffman will accept the plea agreement. App. at 34 ("Given our holding above, Hoffman will almost certainly not be subject to the death penalty, **assuming** he accepts the plea agreement") (emphasis added). As recognized by the dissenting judges, based upon the manner in which Hoffman pled his claim regarding plea negotiations, "there is no causal connection between Wellman's supposedly ineffective assistance in predicting constitutional law and Hoffman's refusal to plead guilty." App. at 73.

While there is evidence Hoffman "had a 'compliant personality,' and would frequently defer to Wellman's decision-making," App. at 30, that alone is insufficient for Hoffman to meet his burden of affirmatively alleging and proving prejudice.[2] First, Hoffman has never affirmatively stated he would accept the state's offer. Second, Wellman testified Hoffman rejected the state's offer irrespective of his advice. At the federal evidentiary hearing, while Wellman was being pressed regarding whether he recommended Hoffman reject the state's offer, the following questioning occurred:

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[2] Considering the number of times Hoffman has moved to withdraw his appeals, discharge various attorneys and then have his appeals and attorneys reinstated, *Hoffman*, 236 F.3d 529 n.6, the conclusion that Hoffman "probably would have gone along with Wellman's suggestion and would have accepted the plea agreement," App. at 30, is on a dubious foundation.

Q. Would it be fair Mr. Wellman, to state that Mr. Hoffman was going to reject that plea agreement because he was a con's con, irrespective of what your recommendation was?

A. Well, I don't think there is any question, Mr. Anderson, that **Max, in my opinion, saw his best procedure to require the State to prove those matters against him**. I think he had a sense of – you know, I would describe that he was of the old school. He was not, he was not going to snitch on anybody, he was not going to turn on anybody. **And if the State charged him, then they needed to prove it.**

Now, I can't tell you whether if in all of his previous criminal proceedings that he went to trial on each and every one of those. I don't know that he did. But –

Q. But as far as this case?

A. I think the whole odd nature of these events, and I go back to the point in time when Denise disappeared and the Nampa police and the Canyon County prosecutor brought the indictments against Wages and Holmes and Max was dodging the charging, that he perceived himself as being out of the circle and was really a bit surprised that he got drawn into the circle. **And he needed to see the evidence that the state had in order to satisfy his mind or convince him that yeah, maybe there was a case here.**

I don't know. All I can tell you is that Max was there, I think I explained to him the risk of

> not taking and **he said, "I am not going to take it. I will take my chances."**

App. at 82-83 (emphasis added).[3]

Rejecting the state's argument that Hoffman declined the state's offer irrespective of Wellman's advice, the panel concluded, "Hoffman's desire to have the State prove its case was not a principled stand against accepting a plea agreement. Rather, Hoffman's misunderstanding of aiding and abetting liability led him to believe that the State was not likely to prove a first-degree murder charge against him." App. at 31. Whether Hoffman's decision was a "principled stand" is entirely irrelevant.

The Supreme Court has reaffirmed the fundamental principle that the ultimate decision to plead guilty must be left to the defendant. In *Florida v. Nixon*, 543 U.S. 175, 181 (2004), counsel embarked on a defense to concede guilt at trial preserving his credibility in urging leniency during the penalty phase. The Court reviewed the duties of counsel and reaffirmed:

> [C]ertain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant, this Court affirmed, has the ultimate authority to determine whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.

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[3] Because the state respectively disagrees with the panel's opinion that the state has "pull[ed] Wellman's testimony out of context," App. at 31, the entirety of the cross-examination of Wellman regarding plea negotiations is attached to this petition. App. at 78-83.

Id. at 187 (internal quotations and citations omitted). The Court further explained, "While a guilty plea may be tactically advantageous for the defendant, the plea is not simply a strategic choice; it is itself a conviction and the high stakes for the defendant require the utmost solicitude." *Id.* (internal quotations and citations omitted). As explained by the dissenting judges, "Requiring a 'principled stand' to validate a refusal to enter a plea agreement hardly demonstrates 'the utmost solicitude' for a defendant's choice. To the contrary, it creates a barrier to effective pleading out." App. at 71.

The federal circuits have also recognized the sanctity of a defendant's "ultimate decision" to plead guilty or reject a plea offer and proceed to trial. In *Smith v. United States*, 348 F.3d 545, 552 (6th Cir. 2003), the court rejected an ineffective assistance claim based upon his attorney's failure to "insist" the defendant accept a plea offer, explaining:

> The decision to plead guilty – first, last, and always – rests with the defendant, not his lawyer. Although the attorney may provide an opinion on the strength of the government's case, the likelihood of a successful defense, and the wisdom of a chosen course of action, the ultimate decision of whether to go to trial must be made by the person who will bear the ultimate consequence of a conviction.

See also Nunes v. Mueller, 350 F.3d 1045, 1053 (9th Cir. 2003) (quoting *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("the ultimate authority remains with the defendant 'to make certain fundamental decisions regarding the case, as to whether to plead guilty' "); *Purdy v. United States*, 208

F.3d 41, 45 (2nd Cir. 2000) ("the ultimate decision whether to plead guilty must be made by the defendant").

While Hoffman's decision may not have been "principled," it was his decision, and the panel was not permitted to second-guess the reasons for that decision and force him to accept a plea agreement without the state being required to prove its case. The panel's conclusion, "Hoffman's misunderstanding of aiding and abetting liability led him to believe that the State was not likely to prove a first-degree murder charge against him," App. at 31, does not change the analysis. Defendants often misunderstand the nuances of criminal law and procedure, particularly with regard to aiding and abetting liability. However, there is no allegation Wellman failed to explain the principle to Hoffman or that his explanation was deficient. Rather, the panel concluded:

> 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.

App. at 31.

The panel failed to explain how, if these three sentencing issues had been explained to Hoffman, they would have illuminated his understanding of aiding and abetting liability, the reason determined by the panel for Hoffman's "[un]principled stand against accepting a plea agreement." App. at 31.

Because Hoffman has failed to **allege** he would have accepted the plea agreement and failed to **provide** sufficient evidence he would have accepted the plea agreement irrespective of Wellman's recommendation, Hoffman has failed to establish prejudice based upon the dictates in *Strickland* and *Hill*. By virtually eliminating the *Hill* pleading requirements, reducing the bar for deficient performance and requiring the prosecutor to prove defendants based their rejections of plea offers on a "principled stand," the courts will "be forced to find ineffective assistance of counsel in every case where an attorney makes a prediction about law or judges and the prediction turns sour." App. at 74.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari be granted and the judgment of the Ninth Circuit Court of Appeals be summarily reversed.

Respectfully submitted,

LAWRENCE G. WASDEN
Attorney General of Idaho

L. LAMONT ANDERSON*
Deputy Attorney General
Chief, Capital Litigation Unit
Criminal Law Division
700 W. State Street
Boise, Idaho 83720-0010
Telephone: (208) 334-4539
Attorneys for Petitioner

**Counsel of Record*