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NO. 79761-7

SUPREME COURT
CLERK OF THE STATE OF WASHINGTON

In re the Personal Restraint of

DAYVA CROSS,

Petitioner.

PETITIONER'S SUPPLEMENTAL REPLY BRIEF

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I. INTRODUCTION

Several centuries after establishment of the common law rule prohibiting the acceptance of equivocal guilty pleas in capital cases, twentieth century courts began promulgating new “factual basis” rules to ensure the voluntariness of all guilty pleas. These rules were designed to ensure that a defendant’s choice to waive his constitutional rights by pleading guilty was a knowing and intelligent decision. The State seeks to persuade this Court that now that we have a factual basis rule for guilty pleas, we no longer need to continue to adhere to the common law rule.

The State’s argument fails for three reasons. First, the factual basis requirement, which applies to all guilty pleas (whether “equivocal” pleas or “straight” pleas), is not designed to promote the reliability of the determination that the defendant is actually guilty. Though not itself constitutionally required, the factual basis rule was promulgated to assist courts in making the determination that a defendant has made an intelligent waiver of his trial rights, with an understanding that he would truly be at risk of conviction if he went to trial. The factual basis rule does *not* address either the reliability or credibility of the proffered evidence and witnesses. Nor does it address whether there is other conflicting evidence which would tend to prevent a jury from convicting the defendant. The factual basis rule simply does not address the reliability concern which underlies the common law rule prohibiting equivocal guilty pleas in capital cases.

Second, assuming *arguendo*, that the factual basis requirement

provides some minimal indication that the defendant may actually be guilty – by providing a limited record of evidence the State would present if the case were tried – such a minimal indication of possible guilt is particularly weak because it is made by a single person, a judge, who is simply called upon to determine that it is possible that a rational jury of twelve lay persons “could” convict the defendant on the basis of such proffered evidence. Moreover, whatever assurance of actual guilt is provided by a judicial prediction that a jury verdict of guilty is possible, that assurance is extremely minimal because in Washington State, under *Newton*, an equivocal *Alford* plea is acceptable so long as the proffered evidence is merely “sufficient” to support a jury finding of guilt.

Third, even if this Court were to be persuaded that the common law rule is no longer really needed to provide protection against executing someone who is not actually guilty of capital murder, only the Legislature can make the policy decision to repeal or modify RCW 9A.04.060 which directs continued adherence to the common law rule. Ultimately, the prosecution’s entire argument is being presented in the wrong forum.

II. ARGUMENT IN REPLY

A. THE FACTUAL BASIS RULE WAS DEVELOPED AS A SAFEGUARD AGAINST THE ACCEPTANCE OF INVOLUNTARY WAIVERS OF THE RIGHT TO TRIAL.

The factual basis requirement was first imposed by an amendment to FRCP 11 which took effect on July 1, 1966. CrR 4.2(d) imposes a similar factual basis requirement. CrR 4.2 was based upon the federal rule and was adopted on April 18, 1973. See *In re Keene*, 95 Wn.2d 203, 206 n.1, 622 P.2d 360 (1981).

In *McCarthy v. United States*, 394 U.S. 459, 465 (1969), the Court explained that the rule served two purposes:

First, although the procedure embodied in Rule 11 has not been held to be constitutionally mandated, it is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary. Second, the rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination.

Similarly, in *Keene*, this Court acknowledged that CrR 4.2 was adopted "to fulfill the constitutional requirement that a plea of guilty be made voluntarily." *Keene*, 95 Wn.2d at 206, citing *McCarthy, supra*.

A guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy*, 394 U.S. at 466. A defendant who enters a guilty plea

simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." [Citation]. Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.

Id. Accord Keene, 95 Wn.2d at 364. The factual basis requirement was thus "designed to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge *without realizing* that his conduct does not actually fall within the charge." *Id.* at 467 (italics added).

Thus, *Keene* recognizes that the factual basis requirement is relevant to what is going on inside the defendant's mind at the time he enters his guilty plea. In *In re Hews*, 108 Wn.2d 579, 592, 741 P.2d 983 (1987), this Court noted that the factual basis requirement *has no significance at all*

beyond this issue of voluntariness:

[T]he establishment of a factual basis is not an independent constitutional requirement, and is constitutionally significant *only* insofar as it relates to the defendant's understanding of his or her plea.

Hews, 108 Wn.2d at 591-92 (emphasis added). The *McCarthy* Court further explained that the rule also forces the creation of a record of the defendant's understanding of the nature of the charge and of the relationship between the charge and his own conduct.¹

If there is no evidence – no factual basis – available to establish one of the elements of the offense, then a defendant who pleads guilty without understanding this deficiency enters an involuntary plea because he does not realize that he is actually *not* guilty. This is equally true when a defendant enters an *Alford* plea. If a defendant who is asserting his actual innocence does not realize that there is no factual basis for one of the elements of the crime, then his risk assessment – that it is to his benefit to obtain a promised concession by pleading guilty – is founded upon a faulty premise of risk because in reality he is not facing any risk of conviction at all. If he does not realize that there is no factual basis for his plea, then his plea is *involuntary* because it is an unintelligent and unknowing waiver of his constitutional trial rights.

Conversely, if a defendant entering an *Alford* plea understands that there *is* evidence available to the prosecution which could persuade a jury

¹ “To the extent that the [plea] judge thus exposes the defendant's state of mind on the record through personal interrogation, he not only facilitates [the judge's] own determination of a guilty plea's voluntariness, but he also facilitates that determination in any post-conviction proceeding based upon a claim that the plea was involuntary.” *McCarthy*, 394 U.S. at 467.

that each element of the offense has been proved, then a plea bargain based on an *Alford* plea is constitutionally valid because the defendant's decision to avoid the risk of conviction by pleading guilty in exchange for some tangible concession is an intelligent and thus voluntary decision.

B. AS THE DECISIONS IN *BARR* AND *ZHAO* DEMONSTRATE, A CONSTITUTIONALLY VALID PLEA BARGAIN CAN BE MADE FOR ENTRY OF A GUILTY PLEA TO A REDUCED CHARGE THAT EVERYONE AGREES THE DEFENDANT DID NOT COMMIT.

There is no better illustration of the point that the factual basis requirement has no relationship to the reliability of the determination that the defendant is guilty than the holdings in *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984), and *State v. Zhao*, 157 Wn.2d 188, 137 P.3d 835 (2006). In *Barr*, the defendant entered a straight guilty plea and in *Zhao* the defendant entered an equivocal guilty plea under *Alford*. But in *both* cases, all parties and this Court agreed that neither defendant actually committed the crime to which he pled guilty. In each case, this Court held that since there was a factual basis for the original charge, it did not matter that the defendant wound up pleading guilty to a crime that everyone agreed he did *not* commit. The important point was simply that both defendants made a voluntary decision to plead guilty. They both intelligently concluded that it was preferable to be sentenced for a crime they did not commit than go to trial and take the risk of being convicted of a more serious offense. *See Barr*, 102 Wn.2d at 269-270; *Zhao*, 157 Wn.2d at 202.

Thus, in both cases the factual basis requirement fulfilled its

purpose of making sure the defendant's decision to waive his constitutional rights was a voluntary decision, even though the determination of guilt for the offense to which these two defendants pled was obviously totally *unreliable* because *neither defendant committed the offense for which they were convicted*. This simply shows that the factual basis requirement is not intended to promote the reliability a determination of guilt. As this Court stated in *Zhao*, “[s]ince the factual basis requirement, both in case law and in this court’s rule is founded on the concept of voluntariness, we hold that a defendant can plead guilty to an amended charge for which there is no factual basis,” provided the record establishes that the defendant did so knowingly and voluntarily, and there was a factual basis for the original charge. *See* 157 Wn.2d at 200.

C. A DETERMINATION THAT THERE IS “SUFFICIENT” EVIDENCE SUCH THAT A RATIONAL JURY *COULD* CONVICT IS NOT A DETERMINATION OF THE RELIABILITY OF SUCH A HYPOTHETICAL VERDICT.

a. An Alford Plea Need Only be Supported by a Proffer of “Sufficient Evidence” to Support a Jury Verdict of Guilty.

In *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976), this Court held that an equivocal guilty plea could be accepted notwithstanding an assertion of innocence, so long as there was a proffer on the record of evidence “sufficient” to support a guilty verdict. Relying upon a federal case involving a straight plea, this Court said:

The factual basis requirement of CrR 4.2(d) does not mean the trial court must be convinced beyond a reasonable doubt that defendant is in fact guilty. “It should be enough if there is sufficient evidence for a jury to conclude that he is guilty.”

Newton, at 370.

The sufficiency standard protects a defendant from irrational jury verdicts, but it does precious little to assure the reliability of the verdict. Every day thousands of criminal cases are tried where there is conflicting evidence on at least one element of the crime. In each such case, a rational jury *could* return a verdict of either guilty or not guilty. Since even incredibly weak prosecution evidence can be constitutionally “sufficient” to support a guilty verdict, this standard provides very little assurance that an actual jury verdict of guilty is in fact a reliable guilt determination. This standard provides even less assurance of the reliability of a guilt determination which is nothing more than a judge’s prediction that a rational jury *could* return a guilty verdict based upon the proffered evidence.

b. **Alford’s Sufficiency Requirement Ensures That A Defendant’s Plea is Voluntary By Requiring Confirmation That The Defendant Actually Does Face Some Risk of Conviction Because There Is Some Available Evidence Upon Which a Jury Could Convict Him. As Long as Such a Risk Actually Exists, the Decision to Forego Trial and Thus Avoid the Risk of Conviction In Exchange for Some Benefit Is an Intelligent and Voluntary Decision.**

In *North Carolina v. Alford*, 400 U.S. 25 (1970), the defendant attacked his guilty plea to a reduced charge of second degree (*noncapital*) murder. Initially he was charged with a capital offense. But the charge was reduced to a noncapital offense in exchange for his plea. Thus Alford pled guilty in order to avoid any possibility of the death penalty.²

² The Supreme Court noted that after Alford entered his plea, North Carolina changed its law and by the time the Supreme Court ruled in his case “North Carolina no longer permit[ted] pleas of guilty to capital charges . . .” *Id.* at 39 n.12.

At his plea hearing, Alford “testified that he had not committed the murder but that he was pleading guilty because he faced the threat of the death penalty if he did not do so.” 400 U.S. at 28. He explained: “I ain’t shot no man,” and that “I just pleaded guilty because they said if I didn’t they would gas me for it, and that is all.” *Id.* at 29, n.2.

Alford then made a post-conviction attack on his plea, stating that it “was invalid because it was the product of fear and coercion.” *Id.* at 29. The Court rejected his claim, holding that simply because his plea was motivated by a desire to escape a harsher penalty, that did not mean that it was not the product of a free and rational choice. *Id.* at 31. The Court held that entry of a guilty plea under these circumstances, even by one who asserted his innocence, was not unconstitutionally coerced. *See id.* at 37. Since there was evidence of his guilt, the Court concluded that Alford “quite reasonably” decided to forego his right to trial on the greater capital charge and chose to plead guilty to an offense for which he could not receive anything greater than 30 years in prison. As the Court concluded, “When his plea is viewed in the light of the evidence against him, which substantially negated his claim of innocence,” there was no error in finding that the plea was voluntary entered because the evidence showed that the plea was “intelligently entered.” *Alford*, 400 U.S. at 38.

c. **The Standard of Sufficiency to Support a Jury Verdict Is Extremely Low and Heavily Weighted In Favor of the State. It Only Protects Defendants From Irrational Jury Verdicts.**

In *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976), this Court chose to follow *Alford* and to allow the acceptance of equivocal guilty

pleas accompanied by assertions of innocence. But whereas *Alford* involved a *constitutional* due process claim that the defendant's plea was involuntary, *Newton* involved a claim that the trial judge failed to comply with CrR 4.2(d)'s non-constitutional "factual basis" requirement. This Court held that this requirement was met because the proffered evidence satisfied the ordinary "sufficiency of the evidence" test used to test the validity of jury guilty verdicts:

The factual basis requirement of CrR 4.2(d) does not mean the trial court must be convinced beyond a reasonable doubt that defendant is in fact guilty. "It should be enough if there is sufficient evidence for a jury to conclude that he is guilty." *United States v. Webb*, 433 F.2d 400, 403 (1st Cir. 1970). The standard in *Webb* was met in this case. The evidence presented to the court by the prosecutor – the witness affidavits, the presentence report, and the prosecutor's statement – was sufficient evidence from which a jury could find beyond a reasonable doubt that defendant intentionally killed decedent, and was therefore guilty of at least second degree murder.

Newton, 87 Wn.2d at 370. *Accord State v. Osborne*, 102 Wn.2d 87, 95, 684 P.2d 683 (1984).

In *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999), this Court applied the *Newton* sufficiency test to a guilty plea to aggravated murder in a death penalty case. Defendant Elmore was charged with aggravated murder based in part upon the accusation that he committed the murder to conceal the commission of a crime.³ Although the State's proffer of

³ The State's theory was that Elmore killed his 14-year-old stepdaughter in order to conceal the fact that he had previously sexually molested her when she was five years old. At the plea hearing, to create a record of a factual basis for accepting a guilty plea to this aggravating factor, the prosecutor read a statement that Elmore had acknowledged molesting Kristy when she was about five years old and that Kristy had threatened him many times with disclosing this fact. *See* 139 Wn.2d at 270-271. Elmore claimed that this statement was not enough to satisfy the factual basis requirement.

evidence regarding this aggravating factor was extremely weak, this Court held that because a hypothetically rational jury “could” find the aggravating factor proved, the factual basis requirement was met:

Based on the evidence presented, a jury could rationally find beyond a reasonable doubt that Elmore, tired of Kristy’s threats of disclosure, succumbed to one of his many “thoughts of killing her.”

Elmore, 139 Wn.2d at 271, citing *State v. Sass*, 118 Wn.2d 37, 43, 820 P.2d 505 (1991) and *Newton*, 87 Wn.2d at 370.

Evidence “sufficient” to support a rational jury verdict is a remarkably low standard which is appropriately deferential to the unanimous decision of twelve lay people who have actually heard and considered live testimony and concluded that proof beyond a reasonable doubt of every element was presented. “The test for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When determining sufficiency of the evidence “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Salinas*, 119 Wn.2d at 201. Since the sufficiency test is so remarkably slanted in favor of the prosecution and allows convictions based upon incredibly flimsy evidence to stand,⁴ it is clear that extremely weak evidence can clear the hurdle of sufficiency.

⁴ In *Sass*, for example, this Court said simply that since the State’s proffered factual basis evidence revealed enough “to support an argument to the jury on the issue of Sass’ guilt,” it satisfied the factual basis requirement of CrR 4.2(d).

In the context of an *Alford* plea, however, while this very low CrR 4.2(d) standard does serve to promote the voluntariness requirement for all guilty pleas, it provides virtually no assurance that a defendant – who is asserting his innocence at the same time he is pleading guilty – *is actually guilty*. Therefore, it simply does not provide any meaningful protection against the danger of executing an actually innocent person, which is the danger which the common law rule against acceptance of equivocal pleas in capital cases was established to prevent. As scholars have noted, because an equivocal plea provides “reduced certainty” of actual guilt, such pleas cannot be taken in capital cases. See Cogan, “Entering Judgment on a Plea of *Nolo Contendere*,” 17 *Ariz. L. Rev.* 992, 1011 (1975). Accord *Commonwealth v. Shrope*, 264 Pa. 246, 251, 107 A. 729 (1919) (because of the “extreme penalty that follows conviction in . . . capital cases,” *nolo contendere* pleas are not permitted because they “cannot rise to the degree of certainty” which is required).

d. Petitioner Adopts the Argument of Amicus That Acceptance of an *Alford* Plea in a Capital Case Would Violate the State Constitutional Right to A Jury Trial.

Petitioner adopts and fully endorses the argument of amicus that Wash. Const., art. 1, §§ 21 & 22 are also violated by acceptance of *Alford* pleas in capital cases. As this State’s unbroken legislative history demonstrates, the Washington Legislature has *never* allowed a death sentence to rest upon a judge’s determination of the defendant’s guilt of the charged capital murder. See *Petitioner’s Supplemental Brief*, pp. 10-13. Thus, the right to a jury determination of guilt has been inextricably

tied to capital cases, and many of the same concerns underlying the requirements of art. 1, §§ 3 and 14 in capital cases, are also reflected in art. 1, §§ 21 and 22.⁵

Instead, pointing to another statute (RCW 10.95.050(1)), the State claims that RCW 10.01.060 has now been repealed by implication. *See id.* The State's argument is misguided, and it points to no case which supports its expansive claim.⁶ Implied repeal is strongly disfavored. *See, e.g., State v. Conte*, 159 Wn.2d 797, 815, 154 P.3d 194 (2007). Rather, where potentially conflicting acts can be harmonized, the court must construe each to maintain the integrity of the other. *See, e.g., Anderson v. Dept. of Corrections*, 159 Wn.2d 849, 859 (2007).

RCW 10.95.050(1) outlines the procedures for empanelling a jury to hear the death penalty phase of a criminal trial. The statute does not clearly state that the defendant can waive jury and agree to a bench trial in any capital case. The statute does mention the possibility of a "decision by the trial court," but it does not provide that such a "decision" may be rendered even if it conflicts with the principles in the Washington State constitution and RCW 10.01.060.

D. THE PROMULGATION OF CrR 4.2(d) DID NOT, AND IN FACT COULD NOT POSSIBLY HAVE REPEALED RCW 9A.04.060, BECAUSE THE COURT RULE WAS ADOPTED BEFORE THE STATUTE WAS ENACTED.

The State suggests that once Washington adopted the factual basis

⁵ These same principles are embodied in RCW 10.01.060. The State seems to argue that this statute no longer applies in capital cases, *see* Response at 14, notwithstanding its clear language.

⁶ It is noteworthy that the statute has been cited as good law in several recent cases. *See, e.g., State v. Oakley*, 117 Wn.App. 730, 735-36 (2003) (discussing RCW 10.01.060).

requirement (for all types of guilty pleas) in 1973, RCW 9A.04.060's command that common law rules be followed in this State became inoperative. This argument is particularly strange for three reasons.

First, nothing in CrR 4.2(d) states that it is abrogating any provision of the common law. Second, implied abrogation of the common law is disfavored. Third, and most significantly, RCW 9A.04.060 was enacted *after* promulgation of CrR 4.2(d). Thus, adoption of CrR 4.2(d)'s factual basis requirement could not possibly have repealed RCW 9A.04.060 because that statute did not even exist yet.

E. THE STATE'S ARGUMENT THAT THE COMMON LAW RULE IS NO LONGER NECESSARY IS BEING MADE IN THE WRONG FORUM. ONLY THE LEGISLATURE CAN REPEAL OR MODIFY RCW 9A.04.060.

Ultimately the State's argument that the common law rule against accepting equivocal guilty pleas in capital cases is no longer needed is an argument that can only be made to the Legislature. Washington courts have repeatedly recognized that the Legislature has directed the courts to continue to apply all common law rules which are not inconsistent with any statute in criminal cases.

Recently, in *State v. Chavez*, 163 Wn.2d 262, 274, 180 P.3d 1250 (2008), this Court held that the common law definition of the crime of assault was properly applied because the Legislature directed courts to use common law to supplement the criminal code:

Courts are of course legitimately the source of the common law, and when the legislature adopted the current criminal code in 1975, it made the common law supplemental to the code. RCW 9A.04.060. FN 10. Long before then, the common law provided for the

definition of assault in criminal cases. [Citation]. The legislature can be deemed to have acquiesced in the definition when it supplemented the criminal code with the common law in 1975.

Chavez, 163 Wn.2d at 274.

The Court of Appeals expressly relied upon RCW 9A.04.060's command to use the common law to supplement criminal statutes when it held in *State v. David*, 134 Wn.App. 470, 481, 141 P.3d 646 (2006), that "the judiciary would be acting contrary to the Legislature's legitimate, express expectations, as well as failing to fulfill judicial duties, if the courts did not employ long standing common law definitions to fill in legislative blanks in statutory crimes."

Similarly, in *State v. Smith*, 72 Wn.App. 237, 684 P.2d 406 (1993), the Court noted that in forgery cases the courts had long applied a common law rule requiring the prosecution to prove that the instrument in question had "legal efficacy." The court concluded that "the rule of legal efficacy is a 'provision of the common law' that 'shall supplement all penal statutes of this state.'" *Id.* at 241, quoting RCW 9A.04.060.⁷

The State argues that there is no longer "any policy reason" to

⁷ For other cases holding that common law rules applied in criminal cases since there was no legislative indication that they should be discontinued, *see, e.g., State v. Lively*, 130 Wn.2d 1, 11, 921 P.2d 1035 (1996) ("[L]egislation is not intended to change the burden of proof established under common law unless specified in the statute."); *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983) ("In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law."); *State v. David*, *supra* (proper to employ common law definition of proximate cause in vehicular homicide prosecution where Legislature did not define that term); *State v. Bailey*, 22 Wn.App. 646, 650, 591 P.2d 1212 (1979) ("By adopting this new [criminal] code [Title 9A, effective July 1, 1976] the legislature did not change the common law requirement that in considering self-defense a jury should consider all the facts and circumstances known to the defendant . . .", citing to RCW 9A.04.060); *State v. Fischer*, 23 Wn.App. 756, 758, 598 P.2d 742 (1979)(same); *State v. Diana*, 24 Wn.App. 908, 914, 604 P.2d 1312 (1979) ("The common law has long recognized the existence of a defense of necessity.").

continue to adhere to the common law rule prohibiting equivocal pleas in capital cases because “[t]he modern situation is much different” since “[c]ourts of the present era” are “much better equipped than were their common law predecessors to assess the factual basis for a guilty plea when a defendant refuses to admit guilt . . .” Putting aside for the moment the fact that the factual basis requirement is not designed to ensure the reliability of the guilt determination and “is constitutionally significant *only* insofar as it relates to the defendant’s understanding of his or her plea,” *Hews*, 108 Wn.2d at 592, the State’s policy argument is precluded by a more fundamental objection. As this Court said in *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999), “The State’s public policy argument is better addressed to the Legislature . . .” *Id.*⁸ In sum, even if this Court believed that the common law rule was no longer necessary and should be abandoned, only the Legislature can make that policy choice.

F. NONE OF THE CASES CITED BY THE STATE DEAL WITH EITHER THE COMMON LAW RULE PROHIBITING *NOLO CONTENDERE* PLEAS IN CAPITAL CASES, OR WITH A STATE CONSTITUTIONAL RULE SIMILAR TO THE *BARTHOLOMEW* RULE REQUIRING ENHANCED RELIABILITY OF FACT FINDING IN CAPITAL CASES.

The State now claims, by reference to its own unique appraisal of reported decisions from other jurisdictions, that “it *appears* that many states that permit capital punishment also permit the taking of an *Alford* plea in a capital case.” *Response* at 12 (emphasis added). The State’s

⁸ *Accord Davis v. Department of Licensing*, 137 Wn.2d 957, 976 n.12, 977 P.2d 554 (1999)(It is not the province of this Court to second guess the Legislature’s policy judgment . . .”); *State v. Gentry*, 125 Wn.2d 570, 629, 888 P.2d 1105 (1995)(“The defendant’s argument in this regard essentially involves a policy issue and we defer to the judgment of the Legislature . . .”).

contention is flawed for numerous reasons.

As a threshold matter, it is important to emphasize that the State has identified no case which addresses the arguments that are presented by the petitioner in this case. While the State does cite a handful of foreign cases, none of these court decisions discuss the long-standing common law rule prohibiting equivocal pleas of guilty in capital cases.

Nevertheless, the State would now like to claim that equivocal guilty pleas are “permissible” in capital cases throughout the country. *See Response* at 12 n. 7 (citing authorities from Delaware, Florida, Kansas, Nebraska, Oklahoma, Texas, South Carolina and Virginia). Yet, the State does not claim, and it does not appear, that any of these other jurisdictions have a statute comparable to RCW 9A.04.060, which directs that the provisions of the common law shall be applied to supplement all penal statutes. Nor do these states’ own constitutions provide guarantees similar to those found in Article 1, §§ 3 and 14 of the Washington Constitution (as interpreted by this Court in *Bartholomew II*). Moreover, after a careful review of the authorities in the State’s Appendix, it is clear that equivocal guilty pleas are rarely, if ever, permitted in other states.

In *Hicks v. Oliver*, 523 F.Supp. 64 (D. Kan. 1981), the defendant entered a plea of *nolo contendere* to first degree murder under Kansas law. He was *not* sentenced to death; he received a term of life imprisonment. The *Hicks* case provides no support for the State’s claim that a *nolo* plea of guilty is permitted in a capital case in the state of Kansas.

In *Pennell v. State*, 604 A.2d 1368 (Del. 1992), the defendant was a

“volunteer” for the death penalty who acted *pro se* during the state court proceedings. Apparently, once the trial court granted this defendant’s motion for self representation, he entered pleas of *nolo contendere*. No party sought to challenge these pleas. In fact, the defendant did not file an appeal and he repeatedly argued that his death sentence must be affirmed. This is hardly proof that the Delaware courts authorize equivocal pleas in capital cases.

Even though Texas has executed far more defendants than any other state, the State has not identified even one decision in which a capital defendant was permitted to enter an equivocal guilty plea. There are, however, several cases in which the Texas courts have refused to permit *Alford*-type pleas. See, e.g., *Ex Parte Klem*, 269 S.W.3d 711, 718-19 (Tex.App. 2008); *Thornton v. State*, 601 S.W.2d 340 (Tex.Crim.App. 1979). In one case of note, *McDonald v. State*, 2002 Tex.App. LEXIS 5807 (Tex.App. 2002), the Court explained:

The [*Alford*] Court’s opinion makes no mention of a procedure allowing a defendant to “plead guilty without an admission of guilt.” More specifically appellant does not point to any other authority allowing him to do so in Texas state courts. We conclude appellant’s third ground is without merit and does not present an arguable point of error.

Id. at *9 (footnote omitted). Nevertheless, citing a snippet from a treatise, the State contends that Texas “appears to allow *Alford* pleas in capital cases but requires that *any* type of plea be entered in front of the jury.” *Response*, at A-8. There is no case support for this novel contention and, the absence of authority strongly suggests that the state of Texas does *not*

permit *Alford* pleas in capital cases.

Florida decisions are particularly instructive. While it is true that a capital defendant may enter a plea of *nolo contendere* in Florida, *see, e.g., Seay v. State*, 286 So.2d 532, 536 (Fla. 1973), this was not always the case. Accepting the common law rule, the Florida Supreme Court had previously ruled that a *nolo* plea was not permitted in capital cases. *See Smith v. State*, 197 So.2d 497 (Fla. 1967). The *Smith* court acknowledged that “the courts are unanimous in holding that in the absence of a statute to the contrary, the courts cannot accept a plea of *nolo contendere* to an indictment for a capital offense for which capital punishment is prescribed.” *Id.* (quoting from 89 A.L.R.2d 556). The court also pointed to a Florida statute, F.S.A. § 912.01, which provided that in all cases “except where a sentence of death may be imposed, trial by jury may be waived by the defendant.” *Smith*, 197 So.2d at 499. The *Smith* decision was overturned by the Florida legislature which repealed F.S.A. § 912.01. *See Seay*, 286 So.2d at 536. This history belies the State’s argument that legislative action is not needed to take an *Alford* plea in a capital case.

The State did locate two cases – one from South Carolina and one from Virginia – where the court decisions *report* that the defendant entered an *Alford* plea in a capital case. *See State v. Ray*, 427 S.E.2d 171 (S.C. 1993); *Reid v. Johnson*, 333 F.Supp.2d 543 (E.D. Va. 2004). *Reid* is a civil case in which the condemned inmate sought to challenge Virginia’s lethal injection protocol, so that case does not advance any of the arguments in this case. The *Ray* case is somewhat closer to the mark.

There, the defendant argued that the trial judge erred in accepting his guilty plea to capital murder “in the absence of an admission of guilt of the crimes charged.” 427 S.E.2d at 434. The South Carolina Supreme Court rejected the defendant’s argument and announced, without citation to any authority, “that an *Alford* plea may form a valid basis for imposition of a death penalty.” *Id.* But, this decision is of little precedential value. First, the Court did not explain its reasoning and did not cite any supporting authority. Second, the court ultimately *vacated* the sentence of death and remanded the case for further proceedings.

Thus, after conducting an exhaustive search of cases from throughout the country, the State was able to locate a sum total of two cases in which a trial court seemed to accept an *Alford* plea in a capital case. In one of those cases (*State v. Ray*), the sentence of death was vacated by the reviewing court. In the other case (*Reid v. Johnson*), there is no indication that any issue was raised as to whether that plea should have been accepted.

Alford was decided in 1970. Nearly four decades later, the State is unable to locate any case in which an appellate court has concluded that such an equivocal plea of guilty is just and appropriate in a capital case. The South Carolina Supreme Court suggested as much in the *Ray* case (without any exception), but then went on to set aside the death sentence that was premised upon that defendant’s plea. Thus, the State has been unable to locate any court decision that would support its claim that *Alford* pleas are permissible and fitting in a capital case. The dearth of such

evidence speaks volumes.

III. CONCLUSION

The trial court's acceptance of Petitioner's *Alford* plea violated (1) the common law rule against the acceptance of *nolo contendere* pleas in capital cases; and (2) the *Bartholomew* rule requiring enhanced reliability of fact finding in a capital case. Petitioner asks this Court to either vacate his conviction because it is based upon a plea which the trial court lacked authority to accept,⁹ or to vacate his death sentence and remand for entry of a sentence of life without possibility of parole.

DATED this 19th day of June, 2009.

CARNEY BADLEY SPELLMAN, P.S.

By James E. Lobsenz *James Lobsenz* *by TM*
James E. Lobsenz, WSBA No. 8787

ALLEN HANSEN & MAYBROWN

By Todd Maybrown
Todd Maybrown, WSBA No. 18557

Attorneys for Petitioner

⁹ Petitioner has previously responded to the State's spurious procedural contention that the entry of his *Alford* plea was invited error. *See Supplemental Brief of Petitioner*, at 17-20, and *Petitioner's Response in Opposition to State's Motion for Consideration of Belated Answer*, at 4-8 (attached as Appendix A).

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2009, I filed the foregoing document with the Clerk of the Supreme Court by e-mail and served copies by e-mail to Paul Weisser, Assistant Attorney General, and James Whisman, Senior Deputy Prosecuting Attorney and Randi Austell, Deputy Prosecuting Attorney.

DATED at Seattle, Washington this 19th day of June, 2009.



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APPENDIX A

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SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of
DAYVA CROSS,
Petitioner.

NO. 79761-7
PETITIONER'S RESPONSE IN
OPPOSITION TO STATE'S MOTION
FOR CONSIDERATION OF BELATED
ANSWER

1. Identity of Moving Party.

Petitioner Dayva Cross, by and through undersigned counsel, makes this opposition to the Motion to Consider the State's Answer to Cross's Motion Before Issuance of Order, filed on April 7, 2009.

2. Facts Relevant to this Motion.

On February 13, 2009, Petitioner filed his Motion for Order Setting Case for Oral Argument on Limited Issues ("Motion for Oral Argument"). Respondent chose not to file any response to the Motion for Oral Argument. Rather, the State prosecutors notified the Clerk of this Court that they were not intending to answer the motion unless directed to do so.

Thereafter, on April 3, 2009, the Court granted Petitioner's motion in part. In that Order, the Court scheduled oral argument and additional briefing regarding only the *Alford* plea issues in this case. The Order concludes with the following directive to the parties: "All other issues raised in this case, including discovery on the lethal injection issues, will be stayed pending resolution of the *Alford* plea issues." Order at 2.

1 Now, unsatisfied with this Court's ruling, the State has filed a pleading which it
2 describes as a Motion to Consider State's Answer to Cross's Motion before Issuance of Order
3 ("Answer"). In fact, the belated Answer is nothing more than a motion for reconsideration
4 and it must be denied.

5 **3. Argument Why Motion Should be Denied.**

6 Respondent's Motion to Consider State's Answer to Cross's Motion before Issuance
7 should be denied for numerous reasons. First, the court rules do not permit the filing of such
8 a motion for reconsideration. Second, Respondent seems to misunderstand the basis for this
9 Court's ruling. Third, Respondent's arguments regarding the merits of Petitioner's *Alford*
10 plea issues are flawed and unconvincing. Fourth, Petitioner's counsel has already made
11 significant plans and arrangements in an effort to comply with this Court's Order.

12 **A. Respondent's Motion for Reconsideration Must Be Denied.**

13 The *En Banc* Court's Order of April 3, 2009 is a final ruling on Petitioner's Motion for
14 Oral Argument. Obviously, Respondent is unhappy with the Court's Order. Now,
15 Respondent's counsel would like this Court to reconsider that ruling and to review the State's
16 belated Answer to the motion. However, such motions are not permitted under the court
17 rules.
18

19 RAP 12.4 provides very specific guidelines regarding the filing of a motion for
20 reconsideration in appellate proceedings. The Rule provides: "A party may file a motion for
21 reconsideration only of a decision by the judges (1) terminating review, or (2) granting or
22 denying a personal restraint petition on the merits." RAP 12.4(a). Neither situation applies in
23 this case.
24

25 For strategic reasons, Respondent made a conscious decision not to file a timely
26 response to Petitioner's Motion for Oral Argument. As such, Respondent waived its

1 opportunity to present an answer to the Motion for Oral Argument – and it should not be
2 allowed a “do over” now that the *En Banc* Court has entered its ruling.

3 **B. Respondent Misunderstands Petitioner’s Motion for Oral**
4 **Argument.**

5 Respondent seems to misunderstand the nature of Petitioner’s Motion for Oral
6 Argument, and the basis for this Court’s ruling. As such, Respondent fails to discuss all of
7 the benefits that are likely to flow from such a bifurcated procedure.

8 Petitioner has presented many significant legal claims in support of his Petition. Most
9 of these legal claims – particularly the myriad ineffective assistance of counsel claims and
10 lethal injection claims – are fact intensive. As explained in Petitioner’s Motion, it will be
11 extremely time-consuming and very costly for these claims to be litigated and resolved. The
12 *Alford* claims (Claims 7, 8 and 9), by contrast, present purely legal issues. As Petitioner
13 explained in his Motion for Oral Argument:
14

15 Petitioner’s counsel respectfully submits that this Court is likely to
16 agree with Petitioner that one or more of these three *Alford* plea claims is
17 meritorious, and that Petitioner is entitled to relief which would result in the
18 vacation of at least the death sentence, and most likely the vacation of his
19 conviction as well. Thus, the proposed bifurcation of this case offers this
20 Court a way of cutting through the Gordian knot, and achieving an extremely
21 fast, and must less expensive, way of finally resolving this entire case.

22 Petitioner’s Motion at 9.

23 Respondent has no real response to this logic, except to protest that it does not agree
24 with these claims on the merits. Yet, for the sake of economy, this Court has properly
25 concluded that it should first consider these *Alford* plea claims. This bifurcated procedure
26 will not prejudice Respondent in any respect. And, if Petitioner is correct, this procedure is

1 certain to serve the interests of judicial economy and to save the tax payers many thousands of
2 dollars.

3
4 The *En Banc* Court has properly decided to focus all attention on the *Alford* plea
5 issues for the time-being, and to stay all other matters pertaining to the claims in the case.
6 The Court has set an accelerated schedule to consider these important legal issues and,
7 contrary to Respondent's belated protestations, this procedure will not significantly delay
8 resolution of the case. On the contrary, the bifurcated procedure is likely to streamline the
9 process and speed up the resolution of this case. If this Court concluded that Cross is entitled
10 to relief as a matter of law under Claim 7, or 8, or 9, there would never be any need to reach
11 any of the thorny issues presented by Petitioner's fact dependent claims, and no need at all to
12 launch the parties on a protracted course of litigating factual matters regarding the
13 performance of Cross' trial attorneys.

14
15 **C. Respondent's Arguments Regarding the Merits are Unpersuasive.**

16 This is not the time to argue the merits of Petitioner's *Alford* plea claims. Rather, as
17 set forth in this Court's Order of April 3, 2009, both parties will submit supplemental briefing
18 regarding the merits of these claims. However, suffice it to say, Respondent's procedural
19 objections are of no moment.

20 **1. Invited Error**

21 On several occasions this Court has "held that a guilty plea does not usually preclude a
22 defendant from raising collateral questions such as the validity of the statute, sufficiency of
23 the information, jurisdiction of the court, or the circumstances in which the plea was made."
24 *State v. Majors*, 94 Wn.2d 354, 356 (1980) (citing *Young v. Konz*, 88 Wn.2d 276 (1977); *State*
25 *ex rel Fisher v. Bowman*, 57 Wn.2d 535, 536 (1961)). Collateral attacks on guilty pleas are
26

1 permitted where the defendant raises a serious constitutional question about the validity of his
2 plea, such as whether it was entered voluntarily. *See, e.g., In re Hews*, 99, Wn.2d 80 (1983);
3 *State v. Vensel*, 88 Wn.2d 552 (1977).¹

4 From the very earliest days of statehood up to the present this Court has repeatedly
5 held that “sentences in excess of lawful authority could be successfully challenged” in a
6 collateral attack proceeding notwithstanding the fact that the defendant pled guilty. *See In re*
7 *Goodwin*, 146 Wn.2d 861, 868 (2002). Moreover, the Court has always recognized that
8 “sentences imposed without jurisdiction or in excess of that authorized by law” are void and
9 can be corrected at any time. *See id.*

11 *Gossett v. Smith*, 34 Wn.2d 220, 224 (1949), states the rule that “when the court has
12 jurisdiction of the person and the subject matter, and *the punishment is of the character*
13 *prescribed by law*, habeas corpus will not lie for the release of a prisoner because of other
14 mere errors, irregularities and defects in the sentence which do not render it void.” *Id.* at 868.
15 “If, however, the court lacked the ‘authority to render the particular judgment,’ the judgment
16 was ‘fatally defective and open to collateral attack.’” *Id.* at 869.

18 In *In re Carle*, 93 Wn.2d 31 (1980), the defendant pled guilty to first degree robbery
19 and acknowledged that he was armed with a deadly weapon. The sentencing court imposed a
20 20-year maximum sentence, and pursuant to the deadly weapon sentencing enhancement
21 statute the court also imposed a nonsuspendable five year mandatory minimum sentence.
22

23
24 ¹ *See also In re Moore*, 116 Wn.2d 30, 33 (1991) (sentence of life without possibility of parole was
25 not authorized and thus violated due process); *In re Thompson*, 141 Wn.2d 712 (2000) (guilty plea did
26 not preclude collateral attack raising *ex post facto* and due process clause arguments, conviction
vacated); *In re Barr*, 102 Wn.2d 265, 269 (1984) (where PRP “raises a constitutional error, petitioner
may challenge the [guilty] plea in a collateral proceeding”); *White v. Schneekloth*, 56 Wn.2d 173
(1960) (defendant who pled guilty may collaterally attack conviction on grounds of lack of jurisdiction
over the offense).

1 Thereafter, this Court ruled that the deadly weapon enhancement could not be applied to first
2 degree robbery. Carle then filed a personal restraint petition and collaterally attacked his
3 unlawful mandatory minimum sentence. Despite the fact that he pled guilty to both the
4 offense and to the sentencing enhancement allegation, this Court held that Carle was entitled
5 to attack his sentence because “[a] trial court only possesses the power to impose sentences
6 provided by law.” 93 Wn.2d at 33.
7

8 Even if a defendant agrees that he is subject to a particular punishment, pleads guilty
9 expecting to receive it, and stipulates that he will receive it, a defendant still cannot make an
10 illegal sentence into a legal one because he cannot give the court sentencing authority which it
11 does not have. As this Court said in *State v. Eilts*, 94 Wn.2d 489, 495-96 (1980), “a defendant
12 cannot empower a sentencing court to exceed its statutory authorization.” *Id. Accord In re*
13 *Gardner*, 94 Wn.2d 504 (1980) (“A plea bargaining agreement cannot exceed the statutory
14 authority given to the courts.”).

15
16 Here, Petitioner maintains that “the punishment” imposed is not “of the character
17 prescribed by law,” because death sentences based upon a conviction obtained by an *Alford*
18 plea are forbidden by the common law, and by the state and federal constitutions. Petitioner
19 maintains that the sentencing court “lacked the authority to render that particular judgment” –
20 a death sentence – and therefore this claim may be raised in a collateral attack proceeding
21 notwithstanding prior entry of a guilty plea. Because such a sentence is in excess of lawful
22 authority, it can be collaterally attacked and corrected at any time.²
23

24
25 ² The petitioners in *Goodwin*, *Carle*, and *Gardner* all pled guilty, and despite that fact they were all
26 permitted to collaterally attack their judgment and sentences, and they were all granted relief. Carle
and Gardner were granted relief even though they had *agreed* to the illegal portions of their sentence.
Here Cross never said he agreed that the Superior Court had the lawful authority to sentence him to
death; but even if he had *stipulated* to a death sentence he could not lawfully receive one, and he

1 Defendant Moore, like Cross, entered guilty pleas to multiple murders. He pled guilty
2 to one count of first-degree aggravated murder, and one count of first degree murder. *See*
3 *Moore*, 116 Wn.2d at 32. At the time he entered the plea, Moore mistakenly believed that the
4 sentencing court was required to give him a sentence of life without possibility of parole
5 (“LWOP”). The sentencing judge did impose an LWOP sentence and Moore did not appeal.
6 Later, Moore discovered that the statutory scheme for sentencing in aggravated murder cases
7 did *not* authorize an LWOP sentence in his case, so he filed a PRP challenging his sentence.
8 Despite the fact that he entered a plea of guilty, and even though he did so with the
9 understanding that he would receive an LWOP sentence on the aggravated murder count, this
10 Court held that Moore *could* challenge that sentence because imposition of a sentence which
11 is not authorized by law is “the kind of fundamental defect” which a pleading defendant never
12 waives. *See* 116 Wn.2d at 33. This Court noted that even though he agreed to it, and even
13 though he wanted to plead guilty, “a defendant cannot agree to be punished more than the
14 Legislature has allowed for.” *Id.* at 38.

17 Petitioner Dayva Cross asserts that the law does not authorize a death sentence in
18 cases where the defendant’s conviction has been procured by means of an *Alford* plea. Like
19 Moore, he is entitled to collaterally attack his sentence notwithstanding his guilty plea,
20 because death sentences in *Alford* plea cases are forbidden by the common law, and by the
21 state and federal constitutions.

22 **2. Retroactivity**

23 Relying upon federal habeas corpus principles, Respondent claims that Petitioner is
24 asking this Court to announce a new rule of criminal procedure and that such a rule could not
25

26 would be entitled to collaterally attack it later, as *Carle* and *Gardner* demonstrate.

1 apply in this personal restraint proceeding. See Answer at 5. Respondent is incorrect for
2 several reasons.

3
4 For centuries the common law recognized that *Alford*-type pleas such as *nolo*
5 *contendere* pleas could never be accepted in capital cases because it was unacceptable to
6 permit a death sentence to rest on anything less than a jury's factual determination that a
7 capital offense was committed. See *Hudson v. United States*, 272 U.S. 451, 454, n.1 (1926);
8 *Commonwealth v. Shrope*, 264 Pa. 246, 252, 107 A. 729 (1919) ("neither in England nor in
9 this country has the plea ever been allowable in capital cases"); *United States v. Tucker*, 196
10 F. 260, 263 (7th Cir. 1912) ("unquestionable" that capital cases "were not within the rule for
11 allowance of the plea when the common law rules became operative in this country"). The
12 common law rule prohibiting such pleas in capital cases was based upon the conclusion that
13 such pleas did not establish the fact that a capital offense was committed with sufficient
14 reliability to permit a death sentence to be based upon them. See *Shrope*, 264 Pa. at 250. As
15 Petitioner has noted in his PRP brief, the same insistence upon a higher level of reliability in
16 capital cases is reflected in both this Court's and the United States Supreme Court's capital
17 jurisprudence. See *State v. Bartholomew*, 101 Wn.2d 631 (1984) (death sentences based upon
18 evidence "which lacks reliability" are "particularly offensive to the concept of fairness");
19 *Gardner v. Florida*, 430 U.S. 349, 364 (1977) (death penalty procedure unconstitutional
20 because "it fails to meet the 'need for reliability in the determination that death is the
21 appropriate punishment' which this Court indicated was required . . .").

22 Based upon these authorities and the unbroken historical record of refusing to permit
23 death sentences to rest upon *nolo contendere* pleas, Petitioner has argued in three related
24 claims that a trial court may not rely upon the guilty plea procedure set forth in *North*
25 *Carolina v. Alford*, 400 U.S. 25 (1970), in lieu of a trial or some other reliable fact-finding
26 procedure, as the foundation for a sentence of death.

1 When considering Respondent's objections, it is important to emphasize that
2 Petitioner is simply asking this Court to enforce RCW 9A.04.060 - a statute that was enacted
3 in at least 1881. When this Court construes a statute, its construction is deemed to be what
4 the statute has meant since its enactment. *See State v. Moen*, 129 Wn.2d 535, 538 (1996).
5 Such a ruling is "automatically 'retroactive.'" *In re Greening*, 141 Wn.2d 687, 693 n.7
6 (2000) (*quoting Moen*, 129 Wn.2d at 538).

7 Moreover, Petitioner is not asking this Court to announce any new rule. As the
8 historical evidence shows, this isn't a new rule at all. It is a really old rule. Rather than
9 asking the Court to create any new rule, Petitioner is pointing out that RCW 9A.04.060
10 requires application of all common law rules which are not inconsistent with Washington
11 statutes and the Constitution. The Legislative command is to keep on applying these *old*
12 rules. Obeying that legislative directive raises no issue of retroactivity. The common law rule
13 against such pleas in capital cases has *always* been the rule in Washington State because it has
14 never been legislatively abrogated.

15
16 **D. Petitioner's Attorneys Have Already Taken Steps to Meet this
Court's Accelerated Schedule**

17 Petitioner's attorneys have already taken steps to ensure that they can meet with this
18 Court's schedule. Attorney Maybrown promptly notified opposing counsel that he may need
19 to seek an adjournment of a trial that is currently scheduled in the United States District
20 Court. *See United States v. Roueche*, District Court No. 07-CR-344-RSL (trial scheduled to
21 commence on June 22, 2009).

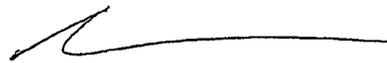
22 Petitioner's lead counsel, James Lobsenz, has taken even more dramatic steps. Upon
23 receipt of the Court's order scheduling oral argument, he changed travel plans as he was
24 scheduled to leave on June 17, 2009 to attend his father's 90th birthday celebration in Nevada
25 and to go from there to southern Oregon to attend a college reunion at the Oregon
26 Shakespeare festival in Ashland, before returning home to Seattle on June 29, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2009, I filed the foregoing document with the Clerk of the Supreme Court by e-mail and served copies by e-mail to Paul Weisser, Assistant Attorney General, and James Whisman, Senior Deputy Prosecuting Attorney and Randi Austell, Deputy Prosecuting Attorney.

DATED at Seattle, Washington this 8th day of April, 2009.



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To: Todd Maybrown
Cc: Lobsenz, Jim; David@DavidZuckermanLaw.com; Qriff4141@msn.com; Paul Weisser; Austell, Randi; Blam, Sarah; Whisman, Jim; Bausch, Lisa
Subject: RE: Dayva Cross, No. 79761-7 (capital case)

Rec. 6-19-09

From: Todd Maybrown [mailto:Todd@ahmlawyers.com]

Sent: Friday, June 19, 2009 10:08 AM

To: OFFICE RECEPTIONIST, CLERK

Cc: Lobsenz, Jim; David@DavidZuckermanLaw.com; Qriff4141@msn.com; Paul Weisser; Austell, Randi; Blam, Sarah; Whisman, Jim; Bausch, Lisa

Subject: Dayva Cross, No. 79761-7 (capital case)

Dear Supreme Court Clerk,

Attached is a supplemental reply brief as requested by the Court's order of 4/3/09. The Court has scheduled argument for June 25, 2009. Counsel for the parties and amici are copied on this electronic message. Please let me know if there are any difficulties with this filing.

Thank you.

Todd

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