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NO. 79761-7

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re Personal Restraint Petition of

DAYVA CROSS,

Petitioner.

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**RESPONSE TO BRIEF OF AMICUS CURIAE WASHINGTON  
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

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**A. ISSUES**

1. May an Alford<sup>1</sup> plea be accepted in a capital case where the defendant makes a knowing, intelligent, and voluntary choice to plead guilty because he believes a guilty plea to be in his interest, even though the State has not offered to reduce charges?

2. Was there a strong factual basis for Cross' guilty plea, as the trial court found after reviewing hundreds of pages of discovery?

3. Should this Court reject the argument of the Washington Association of Criminal Defense Lawyers (WACDL), not raised by Cross himself, that the Washington Constitution's right to jury trial forbids Alford pleas in capital cases?

**B. FACTS**

Cross' reasons for rejecting a not guilty by reason of insanity ("NGI") plea and his reasons for pleading guilty were intertwined. On direct appeal, the State prepared a detailed summary of the circumstances surrounding withdrawal of Cross' NGI plea and entry of his guilty plea. See Br. of Resp. at 34-60. That summary contains many direct quotes from the trial court and from Cross, and can be helpful in deciding the arguments made in the WACDL brief. For this brief, however, a summary of those facts is supplied below.

In September 2000, Cross informed his counsel and the court that he wanted to enter guilty pleas as charged. See 9/7/00RP 2. Cross stated that his counsel had discussed his options with him, including the entry of

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<sup>1</sup> North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

an Alford plea. 9/19/00RP 15. Cross said that he wanted to plead guilty because, "I am guilty and I said this all along. . . ." 9/19/00RP 15.

After several days of taking expert testimony concerning Cross' mental state, on September 19, 2000, the trial court found Cross competent to stand trial and to enter a plea in this case. 9/19/00RP 33-36; CP 2156-62.

On September 25, 2000, Cross advised the court that he wanted to withdraw his NGI plea. 9/25/00RP 19. Cross stated, "I remember the crimes, I was sane." 9/19/00RP 45. Although Cross' decision was against the advice of counsel, the court concluded that Cross should be permitted to withdraw his NGI plea. 9/25/00RP 19, 49-51; CP 2144-47.

On October 16, 2000, the trial court held a hearing to determine whether it could or should accept Cross' guilty pleas because Cross had "indicated his wish to enter into an plea." 10/16/00RP 11-30; CP 1638-39. The parties each briefed the issue for the court's consideration and each party concluded that, under the laws of the State of Washington, the court could accept an Alford plea in a death penalty case. CP 1171-77, 1638-47; see also 10/16/00RP 27. Defense counsel stated that Cross' right to plead guilty "includes the right to enter an Alford plea." CP 1636.

The defense noted that the circumstances in the instant case were unusual because generally a defendant enters an Alford plea in exchange

for the State's agreement to either reduce the charges or forgo filing additional charges. 10/16/00RP 12-14; CP 1645-46. However, after analyzing the history of Alford pleas in Washington, counsel concluded that if the trial court found a factual basis, pursuant to CrR 4.2(d), and determined that Cross was entering the plea knowingly, intelligently and voluntarily, the court could accept the plea. CP 1639-47.<sup>2</sup>

The State argued that, although it was not offering the usual quid pro quo, Cross still benefitted, both strategically and personally, from entering an Alford plea. 10/16/00RP 16-21; CP 1175-76, 1199. Specifically, the State's presentation of evidence during the penalty phase would be limited, whereas a trial would "fully explore the horrific nature of the[] murders." CP 1175. Cross would also benefit because he could argue during the penalty phase that a mitigating factor was that he had taken responsibility for his actions. CP 1175, 1199.

The court stated that it did not believe that an Alford plea necessarily required a quid pro quo from the State. 10/16/00RP 29. Rather, the benefit derived from entering the plea could be personal to a defendant. 10/16/00RP 29-30; CP 1961. The court ruled, "[A] defendant charged with capital offenses may enter Alford pleas as charged if the

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<sup>2</sup> Counsel made no argument that Cross' proposed plea was *not* voluntary. Cross made it very clear that he wanted to plead guilty; he said it has been his desire to enter guilty pleas for the last year and a half. 1023/00RP 111.

defendant is competent, a factual basis for the plea exists, and the plea is entered knowingly, voluntarily, and intelligently." CP 1961.

The parties filed memoranda for the court (which it reviewed) concerning the factual basis for Cross' plea, and the State delineated the language that it believed was required in Cross' statement of defendant on plea of guilty ("guilty plea") to ensure its validity. CP 1195-1205, 1626-37; 10/19/00RP 5-6.

The State expressed its concern that Cross' guilty plea draft omitted his strategic benefits, such as eliminating the need for the sole survivor, then 14-year-old Melissa, from having to testify. CP 1199. The State expressed its concern that "these omissions are not inadvertent but [are] an intentional attempt to create appellate issues." CP 1199.

Moreover, the State had concern over Cross' proposed language in paragraph 11 of his guilty plea. The State said:

The Court has no obligation to accept the defendant's plea. Under the disguise of a plea, the defense should [not] be allowed to create potential appellate issues. The defendant should be questioned as to why he, or his counsel, reject the clarity and certain[ty] of written documentation of the reasons he wishes to enter an Alford plea. The defense should not be allowed to use entry of [a] plea to create artificial appellate issues that would not exist if a guilt phase was conducted.

CP 1200.

Cross argued that the language in his guilty plea was "legally and factually sufficient for an Alford plea." CP 1629. In his guilty plea, Cross admitted to killing Amanda Baldwin, Salome Holly, and Anouchka Baldwin. CP 1629. Cross explained his benefits of entering an Alford plea:

I am not pleading guilty to take advantage of any plea bargain. Instead, I am pleading guilty to accept responsibility for my terrible actions. I am pleading guilty because I am sorry for what I have done and I do not want to cause any additional and unnecessary trauma to Melissa Baldwin - who is 14-years-old - by having her testify at trial.

CP 1629. The defense submitted to the court that this language was "sufficient, both legally and factually, *and must be accepted.*" CP 1630 (emphasis added). Moreover, the defense vehemently opposed allowing the State to set forth the benefit that it believed Cross would receive by entering the plea, because "[t]he State cannot possibly be privy to the reasons Mr. Cross has indicated to his attorneys for entering the plea." CP 1636.

On October 19, 2000, the trial court asked the defense to submit a list of evidence that it had reviewed with Cross so that the court could determine whether Cross' decision, that a "substantial likelihood" of his guilt existed, was informed. 10/19/00RP 21-22. The court asked counsel to have Cross initial the bottom of each of the documents that he had

reviewed with counsel. 10/19/00RP 21-22. The court wanted to keep separate the 5-inch binder with 32 subdocuments that were to form the factual basis of Cross' plea,<sup>3</sup> from the evidence that the court should consider in determining whether Cross' plea was knowing, voluntary and intelligent. 10/19/00RP 2, 24-29.

The court then reviewed with counsel the court's understanding of the Alford plea procedure. 10/19/00RP 26-28.

On October 23, 2000, Cross acknowledged his intent to plead guilty, by way of an Alford plea, to the three charges of aggravated murder in the first degree, and that he was making the plea freely and voluntarily, without any threats or promises. 10/23/00RP 105-06, 108, 142-43. Cross explained his understanding of an Alford plea: "The Alford plea would mean that you are innocent but pleading guilty because I am sure the jury would find me guilty." 10/23/00RP 143. Cross agreed that, even though he believed that he was innocent as to premeditated intent, there was a substantial likelihood that a jury would find him guilty beyond a reasonable doubt of premeditated murder in the first degree with the aggravating circumstances. 10/23/00RP 143.

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<sup>3</sup> The final documents that the parties agreed the trial court could review to determine the factual basis of the plea are located at CP 1212-1625.

The court asked counsel to describe what they have gone over with Cross in preparation for his guilty plea, which counsel did in detail.

10/23/00RP 82-88. Cross agreed that his attorneys had gone over every document contained in the binder that the State had submitted as a factual basis for the Alford plea and that the court could consider the contents of the binder in deciding whether there was a factual basis for the plea.

10/23/00RP 144.

Cross confirmed that his attorneys had strongly advised him not to plead guilty to the charges and that the decision was one that he made, in spite of their legal advice. 10/23/00RP 116. When the court asked Cross why he decided to ignore counsel's advice, Cross responded, "I told you it was my decision all along to plead guilty. I am guilty and I want to plead to it." 10/23/00RP 118.

The court asked Cross to state why he believed it was in his interest, i.e. what benefit he believed there was for him to enter the guilty pleas. 10/23/00RP 151. Cross responded,

Like I have said all along, I want to take responsibility for what I have done. I admitted guilt from the start and I don't want to have a trial. I'm going to tell the jury I'm guilty and I will be found guilty as sure as crap . . . And because of not having Melissa come in and testify, I feel bad for her.

10/23/00RP 151.

After a very extensive plea colloquy, the court found Cross' plea a "knowing one," "voluntary," and that Cross' decision to enter the plea was an "intelligent one." 10/23/00RP 163-66. The court then addressed the factual basis for the plea (CP 1212-1625). After a painstaking review of the inferences that could be drawn from the evidence to establish premeditated intent, the court found that a jury would conclude beyond a reasonable doubt that Cross' actions made him guilty of premeditated murder in the first degree with aggravating circumstances. 10/23/00RP 166-69. The court accepted Cross' guilty pleas. 10/23/00RP 169.

C. ARGUMENT

WACDL argues that an Alford plea may be accepted only if the defendant receives something from the prosecutor in return for his plea. WACDL is mistaken as a matter of law; a defendant can make a cost-benefit analysis and enter a guilty plea as charged if he believes there are personal or strategic benefits to his plea. WACDL asserts that Cross did not benefit from this plea, but the record does not support its claim. Finally, WACDL raises arguments under the state constitution that Cross has never advanced. Those arguments should not be a basis for this Court's decision. Moreover, it is difficult to see the relevance of the right to a jury trial when Cross insisted on waiving that right.

1. **AN ALFORD PLEA MAY BE ACCEPTED  
WHENEVER A DEFENDANT "BENEFITS" FROM  
THE PLEA; THERE NEED BE NO "BARGAIN."**

WACDL argues that the "central rationale supporting the decisions in Alford and Newton" is the desire to promote plea bargaining. WACDL Br. at 10. From this premise, it argues that an Alford plea "as charged" is invalid because there was no bargain. WACDL's argument is flawed and should be rejected.

First, WACDL's primary premise is flawed. The central rationale in Alford and Newton was the holding that a defendant should not be precluded -- simply because he protests his innocence -- from entering a knowing, intelligent and voluntary waiver of his trial rights, if he believes a waiver of his rights will be to his benefit. Alford, like Cross,

[had not] waived in his desire to have the trial court determine his guilt without a jury trial. Although denying the charge against him, he nevertheless preferred the dispute between him and the State to be settled by the judge in the context of a guilty plea proceeding rather than by formal trial.

Alford, 400 U.S. at 32. The issue for the Supreme Court was a split in the lower appellate courts over whether "our law only authorizes a conviction where guilt is shown" or whether courts "should not force any defense on a defendant in a criminal case, particularly when advancement of the defense might end in disaster." Id. at 33 (internal quotation marks and

citations omitted). In other words, did the law demand an admission of guilt before accepting a guilty plea, even if refusal of an ambiguous plea could harm the defendant?

The Supreme Court resolved this question by siding with courts that respected the defendant's choice to enter a guilty plea even though the defendant professed innocence.

[A guilty plea can be accepted] when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt. Here the State had a strong case of first-degree murder against Alford. Whether he realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading. *Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired* Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term. When his plea is viewed in light of the evidence against him, which substantially negated his claim of innocence and which further provided a means by which the judge could test whether the plea was being intelligently entered, . . . its validity cannot be seriously questioned. In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it.

Alford, at 37-38 (citations and footnotes omitted). Thus, the Supreme Court decided that a defendant's choice -- based on a cost-benefit analysis

-- to enter a guilty plea could not be frustrated only because he refused to admit guilt.

Nothing in Alford or in any other case cited by WACDL holds that the cost-benefit analysis must include a reduction in charges or a lesser sentence recommendation from the State. To be sure, a reduction in charges *is* a benefit and defendants often plead guilty by Alford plea to take advantage of the State's offer to reduce charges. But nothing in Alford or Newton *requires* such a bargain before an Alford plea may be accepted. Indeed, such an argument would undercut the rationale of the cases relied upon by the Supreme Court in Alford which emphasized respect for a defendant's informed choice. See Alford, 400 U.S. at 33-34.

The Court cited to a federal decision that observed:

. . .since guilt, or the degree of guilt, is at times uncertain and elusive, an accused, though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty . . . .

Id. at 33 (citing McCoy v. United States, 124 U.S.App.D.C. 177, 179, 363 F.2d 306, 308 (1966)) (internal brackets and quotation marks omitted).

The Court also quoted dictum from a century-old state case: "(r)easons other than the fact that he is guilty may induce a defendant to so plead, . . . and he must be permitted to judge for himself in this respect." Id. (citing

State v. Kaufman, 51 Iowa 578, 580, 2 N.W. 275, 276 (1879)) (internal brackets and quotation marks omitted).

Thus, after Alford, the trial court has discretion to either accept or reject an Alford plea, depending on whether the plea is voluntary. There is no independent requirement that the State reduce charges to entice the plea. In fact, in State v. Osborne, 102 Wn.2d 87, 684 P.2d 683 (1984), two co-defendants pled guilty, as charged, to second degree felony murder where they believed such a plea to be in their interest.

In essence, WACDL is attempting to interject contract notions like "consideration" where there is no contract. Courts have repeatedly held that plea agreements are to be interpreted like contracts. State v. Wakefield, 130 Wn.2d 464, 480, 925 P.2d 183 (1996). But, in his case, there was no plea agreement, so there was no contract; therefore, whether Cross received consideration from the State is irrelevant. Cross simply decided that it was in his best interest to plead guilty and so he did. Alford and Newton only require that the defendant believes the plea to be advantageous, that he be accurately advised of the law and its consequences, and that a factual basis exists for the plea.

Second, WACDL mistakenly alleges that courts do not accept Alford pleas without a bargain. In the many cases WACDL cites, defendants *did* receive a bargain -- but none of the cases holds that the

defendant *must have* received a bargain in order to validate the plea. And, such a limit would countermand the letter and spirit of Alford, which permits a defendant to assess the costs and benefits of a plea, regardless of the State's willingness to bargain.

Third, WACDL asserts that no court has ever allowed an Alford-type plea in a capital case because there is no consideration. As the State has previously argued, a number of states accept Alford or *nolo contendere* pleas even in capital cases where there has been no reduction in charges. See State's Supplemental Brief re: Alford Guilty Plea, at 11-13 and Appendix A (citing Pennell v. State, 604 A.2d 1368 (Del. 1992); Seay v. State, 286 So. 2d 532, 536 (Fla. 1973); Slater v. State, 316 So. 2d 539 (Fla. 1975); Hicks v. Oliver, 523 F. Supp. 64, 65 (D. Kan. 1981); Holtan v. Black, 838 F.2d 984 (8th Cir. Neb. 1988); Carpenter v. State, 929 P.2d 988 (Okla. 1996); Braun v. State, 909 P.2d 783 (Okla. Crim. App. 1995); State v. Ray, 427 S.E.2d 171 (S.C. 1993); and Reid v. Johnson, 333 F. Supp. 2d 543 (E.D. Va. 2004)).

Finally, contrary to WACDL's assertion, Cross received substantial personal and strategic benefits by entering a guilty plea. Cross had long harbored reservations about going to trial, especially based on an insanity defense, and those reservations surfaced in September 2000. After September, Cross persistently told the trial court that he did not want a

trial, that he thought pleading guilty would be the honest thing to do, and that he believed a jury would not likely sentence him to death. In a January 2001 letter directed to the trial judge he said, "[I] would like to tell you that from the very beginning I just wanted to plead guilty all along. But I was told you can't plead guilty in this case." CP 3168.

Melissa's potential testimony loomed large over this trial. Cross said that he did not want to put Melissa through a trial because he felt bad for her. That sentiment alone is a significant benefit that would justify a finding that the plea was proper. Cross summarized his situation as follows:

Like I have said all along, I want to take responsibility for what I have done. I admitted guilt from the start and I don't want to have a trial. I'm going to tell the jury I'm guilty and I will be found guilty as sure as crap. . . . And because of not having Melissa come in and testify, I feel bad for her.

10/23/00RP 151. In his guilty plea, later read to the jury in the penalty phase, Cross said:

I am not pleading guilty to take advantage of any plea bargain. Instead, I am pleading guilty to accept responsibility for my terrible actions. I am pleading guilty because I am sorry for what I have done and I do not want to cause any additional and unnecessary trauma to Melissa Baldwin -- who is 14-years-old -- by having her testify.

CP 1656 (Statement of Defendant on Plea of Guilty). In fact, trial counsel filed a brief arguing that Cross' plea was an expression of remorse that he

could make to the jury in the penalty phase, CP 1766-74, and trial counsel did just that in opening statement. 4/11/01RP 43-46.

Thus, Cross reduced the quantum of evidence against him by avoiding a jury trial on guilt, he gained the ability to say that he had taken responsibility for the crimes, even though he did not admit premeditation, and he was able to say he had spared Melissa further harm. These factors are personal benefits to Cross and strategic benefits to his case. It can hardly be said that Cross was unable to intelligently weigh his options and choose a guilty plea over a trial, especially based on the strong evidence of guilt and the record made by the trial judge that shows he made a knowing, intelligent, voluntary choice. There is no rule of law that would bar accepting a guilty plea from a defendant under these circumstances.

**2. THE EVIDENCE USED TO ESTABLISH A  
FACTUAL BASIS FOR CROSS' PLEA IS  
UNASSAILABLE.**

WACDL argues that an Alford plea is not sufficiently reliable to meet the heightened evidentiary standards applicable to capital cases. WACDL Br. at 11-13. WACDL acknowledges that this argument is the same argument made by Cross in his petition at pages 206-11. The State has already responded to the argument and it will not repeat that response here. Resp. to PRP at 229-31. In short, the argument confuses the

standards applicable to evidence admitted in the penalty phase of a capital case with evidence needed to find a factual basis for a guilty plea.

Moreover, Cross has never attacked the quality or quantity of evidence that supports the factual basis requirement for his guilty plea, likely because that evidence is so strong. Cross admitted killing three people; he did not deny that he did so intentionally and he did not argue insanity or diminished capacity. So, the only element in dispute was premeditation. Although there is an important legal distinction between premeditation and intent, the factual difference is not great. This Court already observed on direct appeal that the evidence showed unusual cruelty and that there was sufficient evidence of premeditation. See State v. Cross, 156 Wn.2d 580, 632, 132 P.3d 80 (2006). The Court observed that, "[t]here was a marked level of cruelty in this case. At least one of Cross's victims was conscious and pleaded with him." Id. The Court also said,

Our review of the evidence shows sufficient circumstantial evidence to uphold the trial judge's decision. See generally CP at 1212-1625 (evidence submitted in support of plea). Cross killed three people with two knives. He stabbed one stepdaughter 22 times. RP (May 8, 2001) at 34-36. Multiple blows are strong evidence of premeditation. Furthermore, the trial court conducted a searching review of the evidence before accepting the Alford plea. See RP (Oct. 23, 2000) at 5-191. She reviewed evidence from which a rational trier of fact could find premeditation: the location and severity of the wounds, the evidence of

domestic violence leading up to the murders, the planning and use of the murder weapons, the evidence of secondary assault, the statements made by Cross to the surviving victim, and the evidence of forced entry.

Id. On this record, it can hardly be said that Cross' plea was unsupported by the evidence.

**3. ART. I, § 21 HAS NOT BEEN CITED BY CROSS AND MAY NOT SERVE AS A BASIS TO GRANT CROSS' PRP.**

WACDL argues that heightened protection of the right to a jury trial in Washington means that Alford pleas cannot be accepted in capital cases. This argument should be rejected. First, this Court may not grant relief based on a theory advanced solely by an amicus. Second, the argument is baseless, and should be rejected on its merits.

WACDL raises a new state constitutional issue in its amicus brief. It argues that the Washington State Constitution is more protective of the right to a jury trial than the United States Constitution and mandates application of more strict protections for guilty pleas. WACDL Br. at 13-19. This case has been briefed over nine years of appellate and collateral attack litigation involving well over 500 pages of briefing from Cross and amici. Yet, Cross has never claimed that his Alford plea was a violation of Art. I, § 21. Indeed, that provision is not cited in any brief.

This Court does not consider issues raised first and only by amicus. Mains Farm Homeowners Ass'n v. Worthington, 121 Wn.2d 810, 827, 854

P.2d 1072 (1993). In fact, had Cross himself belatedly claimed a state constitutional error, this Court would normally not consider it. Issues raised for the first time in a petition for review or in supplemental briefs are normally not considered. State v. Robbins, 138 Wn.2d 486, 491 n.4, 980 P.2d 725 (1999); Fisher v. Allstate Insurance Co., 136 Wn.2d 240, 252, 961 P.2d 350 (1998); State v. Clark, 124 Wn.2d 90, 95 n.2, 875 P.2d 613 (1994), overruled on other grounds by, State v. Catelett, 133 Wn.2d 355, 945 P.2d 700 (1997); State v. Collins, 121 Wn.2d 168, 178-79, 847 P.2d 919 (1993).

Because WACDL's claim of a state constitutional violation was never raised before the trial court or this Court in the direct appeal or on collateral attack in primary or supplemental briefing, this Court should not consider it.

In any event, the argument is meritless. Although this Court has found some situations where the right to jury trial in Washington is more protective than the right under the U.S. Constitution, those holdings are specific. Just because a constitutional provision is more protective in some ways does not mean it is more protective in any situation. For instance, in State v. Brown, 132 Wn.2d 529, 595-97, 940 P.2d 546 (1997), this Court held that Art. I, § 21 did not provide a basis for expanding prohibitions against death-qualifying a jury in capital cases. In State v.

Hobble, 126 Wn.2d 283, 297-302, 892 P.2d 85 (1995), this Court held that there was no evidence to conclude that Art. I, § 21 provided greater rights in contempt proceedings. In State v. Oakley, 117 Wn. App. 730, 72 P.3d 1114 (2003), the Court of Appeals held that there was no basis to conclude that the right to jury trial guaranteed additional rights to a bench trial.

We find no textual, historical, or structural support in the state constitution for the proposition that a defendant has any right to demand a trial by the court. Two provisions of the Washington Constitution guarantee criminal defendants the right to trial by jury. Article 1, section 22 guarantees criminal defendants a number of procedural rights, including the right to trial “by an impartial jury[.]” In addition, article 1, section 21 provides that “[t]he right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record[.]” Neither provision addresses waiver or gives a defendant a right to a bench trial.

State v. Oakley, 117 Wn. App. at 739.

WACDL cites no authority for the proposition that Art. I, § 21 limits waivers of jury trial or guilty pleas. Without such authority, there is no basis to conclude that the state constitution is an impediment to entry of Alford pleas.

WACDL also argues that this state has a history of refusing to allow bench trials in capital cases. That prohibition stemmed from statutory law; Washington's current statute permits bench trials in capital cases. RCW 10.95.050(1) (“If a defendant is adjudicated guilty of aggravated first degree murder, whether by acceptance of a plea of guilty,

by verdict of a jury, or by decision of the trial court..."). In light of modern practice, WACDL's argument cannot support independent analysis of the state constitution.

Finally, it can hardly be said that accepting an Alford plea this case was a "convenient" incursion on the right to jury trial. WACDL Br. at 19. Cross was not allowed to enter an Alford plea for convenience -- either his or the court's. Rather, he was allowed to enter the plea because he demanded it, because it was in his interest, because the requirements of CrR 4.2 were met, and because to deny him the plea likely would have led to claims that his rights were prejudicially violated. The Art. I, § 21 claim should be rejected.

**D. CONCLUSION**

For the reasons above, WACDL's arguments should be rejected.

DATED this 15<sup>th</sup> day of June, 2009.

Respectfully submitted,

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JAMES M. WHISMAN, WSBA #19109  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
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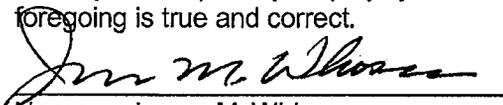
BY RONALD R. CARPENTER

Today I directed electronic mail addressed to the attorney's for the petitioner,

David Zuckerman Attorney for Amicus Curiae (Washington Assoc. of Criminal Defense Lawyers) 705 2 <sup>nd</sup> Avenue Suite 1300 Seattle, WA 98104-1797 <a href="mailto:David@DavidZuckermanLaw.com">David@DavidZuckermanLaw.com</a>	Rita Griffith Attorney for Amicus Curiae (Washington Assoc. of Criminal Defense Lawyers) 4616 25 <sup>th</sup> Avenue NE PMB 453 Seattle, WA 98105-4523 <a href="mailto:griff4141@msn.com">griff4141@msn.com</a>
John Blonien Washington State Department of Corrections PO Box 41101 Olympia, WA 98504-0116 <a href="mailto:JSBlonien@DOC1.wa.gov">JSBlonien@DOC1.wa.gov</a>	Paul Weisser AG Criminal Justice Division PO Box 40116 Olympia, WA 98504-0116
James Lobsenz Carney Badley Spellman 701 5 <sup>th</sup> Avenue Suite 3600 Seattle, WA 98104-7010 <a href="mailto:lobsenz@carneylaw.com">lobsenz@carneylaw.com</a>	Todd Maybrown Allen Hansen & Maybrown PS 600 University Street Suite 3020 Seattle, WA 98101-4105 <a href="mailto:todd@ahmlawyers.com">todd@ahmlawyers.com</a>

containing a copy of the Response to Brief of Amicus Curiae Washington  
Association of Criminal Defense Lawyers, in STATE V. DAYVA CROSS, Cause No:  
79761-7, in the Supreme Court for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the  
foregoing is true and correct.

  
Name James M. Whisman  
Done in Seattle, Washington

6/15/09  
June 15, 2009

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ATTACHMENT TO EMAIL

ORIGINAL

## OFFICE RECEPTIONIST, CLERK

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**To:** Whisman, Jim; Faulk, Camilla  
**Cc:** Lobsenz, Jim; Todd Maybrown; Weisser, Paul (ATG); Raz, Don; Austell, Randi; Gilliam, Alice; David@DavidZuckermanLaw.com  
**Subject:** RE: Dayva Cross (capital case)

Rec. 6-15-09

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**From:** Whisman, Jim [mailto:Jim.Whisman@kingcounty.gov]  
**Sent:** Monday, June 15, 2009 4:34 PM  
**To:** OFFICE RECEPTIONIST, CLERK; Faulk, Camilla  
**Cc:** Lobsenz, Jim; Todd Maybrown; Weisser, Paul (ATG); Raz, Don; Austell, Randi; Gilliam, Alice; David@DavidZuckermanLaw.com  
**Subject:** Dayva Cross (capital case)

Dear Supreme Court Clerk,

Attached is a response to the brief filed by WACDL in this matter. All counsel are copied on this message. Please let me know if there are any difficulties with this filing.

Jim Whisman  
Senior Deputy Prosecuting Attorney  
Appellate Unit Chair  
King County Prosecuting Attorney's Office  
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Seattle, Washington 98104  
206-296-9660