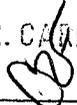


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NO. 79761-7

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Personal Restraint of

DAYVA CROSS,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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Pursuant to this Court's Order of May 3, 2009, Petitioner Dayva Cross files this supplemental brief addressing the legality of accepting *nolo contendere* and *Alford* pleas in capital cases.

I. BECAUSE ALFORD PLEAS ARE THE SAME AS NOLO CONTENDERE PLEAS, THE COMMON LAW FORBIDS THEIR USE IN CAPITAL CASES.

A. AT COMMON LAW, BY ENTERING A NOLO CONTENDERE PLEA A DEFENDANT COULD SEEK A LENIENT SENTENCE WITHOUT HAVING TO ADMIT HIS GUILT. WHETHER TO SO EXTEND THE KING'S GRACE WAS PURELY DISCRETIONARY.

As American courts have noted, under the common law “the so-called plea of *nolo contendere* is not a plea in the strict sense of that term in criminal law,” *McNab v. State*, 42 Wyo. 396, 295 P. 278, 280 (1931), accord *Commonwealth v. Holstine*, 132 Pa. 357, 361, 19 A. 273 (1890). “[N]olo contendere was not a plea in the accepted sense but was more in the nature of a petition to the sovereign’s mercy.” N. Levin, “Nolo Contendere: Its Nature and Implications,” 51 *Yale L. J.* 1255, 1256 (1942). A defendant entering such a plea “doth not directly own himself guilty, but in a manner admits it by yielding to the King’s mercy,” 2. Hawkins, *A Treatise on Pleas of the Crown* 466 (8th Ed. 1824). “At common law a defendant could ask the court to impose a merciful sentence without confessing guilt . . .” Bibas, “Harmonizing Substantive Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas,” 88 *Cornell L. Rev.* 1361, 1370 (2003).

It has frequently been described as “an implied confession” and it

was entirely discretionary whether a court would accept such a plea. *Commonwealth v. Horton*, 26 Mass. 206, 207 (1829); *Commonwealth v. Ferguson*, 44 Pa. Super. 626 (1910). *State v. Barbour*, 243 N.C. 265, 266, 90 S.E.2d 388, 389 (1955).¹ It has been described as “a gentleman’s plea of guilty” because it allows a defendant to submit to milder than usual punishment without having to admit his guilt. N. Levin, *supra*, at 1255.

B. ALTHOUGH COURTS DISAGREE AS TO WHETHER *NOLO CONTENDERE* PLEAS ARE ACCEPTABLE IN FELONY CASES, THEY ALL AGREE THAT THEY MAY NOT BE ACCEPTED IN CAPITAL CASES.

American courts which have considered whether a *nolo contendere* plea may be accepted in a felony case are divided into three groups. Some will accept the plea in felony cases; some accept the plea only in cases of “light misdemeanors and feel constrained to limit punishment to a fine; and some will impose prison sentences if the offense is punishable by either a fine or imprisonment.” Levin, *supra*, at 1258-59. But all courts agree that such pleas may never be accepted in capital cases:

All courts, both state and federal, have held that, in the absence of a statute, *the plea cannot be accepted to an indictment for a capital offense.*

Levin, *supra*, at 1258 (bold italics added). See, e.g., *Commonwealth v. Shrope*, 264 Pa. 246, 250, 107 A. 729, 730 (1919) (“neither in England nor in this country has the plea ever been allowable in capital cases”).²

¹ “The acceptance of such a plea . . . is a matter of grace and it is not a plea open to the defendant as a matter of right.”

² *Accord State v. Chriceol*, 645 So.2d 286, 287 n.1 (La. App. 1994) (“A court may accept a plea of *nolo contendere* only if the offense charged is not a capital offense”); (*State v. Kiewel*, 166 Minn. 302, 304, 207 N.W. 646, 647 (1926) (“the plea of *nolo contendere* never was permitted except in the case of a misdemeanor, which could be punished by

Thus, while there has been disagreement in this country as to the types of criminal charges to which a *nolo contendere* plea may be accepted, there has never been any disagreement with the per se rule that a *nolo contendere* plea may never be accepted in a capital case.

C. THERE WAS A DIRECT RELATIONSHIP BETWEEN THE SEVERITY OF AN OFFENSE AND THE ACCEPTABILITY OF A *NOLO CONTENDERE* PLEA. THE MORE SERIOUS THE OFFENSE, THE MORE CERTAINTY OF THE DEFENDANT'S GUILT WAS REQUIRED. ENGLISH JUDGES REFUSED TO ACCEPT *NOLO CONTENDERE* PLEAS IN THE MORE SERIOUS CASES.

I. Initially An Accused Could Only Confess or Deny His Guilt

The *nolo contendere* plea developed from earlier judicial rules regarding the types of responses to criminal accusations which English courts would accept. From the 13th to the 16th century, in felony cases they would only accept two kinds of pleas: "confession" (now called a guilty plea) and "denial" (now called a not guilty plea). A defendant could plead "denial" only if he also joined his plea with a "consent" to some recognized mode of resolving the accusation, such as trial by combat, or

fine alone"); *Williams v. State*, 130 Miss. 827, 844, 94 So. 882, 884 (1922)("It is pleadable only . . . in light misdemeanors"); *Roach v. Commonwealth*, 157 Va. 954, 960, 162 S.E. 50, 52 (1932)("In no felony case should the plea be received"); *State ex rel Clark v. Adams*, 144 W.Va. 771, 778, 111 S.E.2d 336, 342-43 (1959)(courts "do not permit the interposition of a plea of *nolo contendere* to an indictment for an offense in which the death penalty is mandatory or may be lawfully imposed"); *United States v. Tucker*, 196 F. 260, 263 (7th Cir. 1912)("Thus formulated in the eighteenth century, the common law rule distinctly limits the plea . . . to 'a case not capital'. . .").

The same rule is recognized by American treatise writers. See Bishop, *New Criminal Procedure* § 802 (2d ed.) (pleadable only in light misdemeanors); *Chitty's Criminal Law* 432 (4th Am. Ed) ("in a case not capital, a defendant does not directly own himself to be guilty, but tacitly admits it by throwing himself on the king's mercy"); John Frederick Archbold, *Pleading and Evidence in Criminal Cases* 139 (New York 1846)(available only in misdemeanor cases in which the defendant wishes to submit to a small fine).

jury trial. See N. Cogan, "Entering Judgment on a Plea of Nolo Contendere," 17 *Ariz. L. Rev.* 992, 999 (1975) & authorities cited at fn. 68. Up until 1772, a defendant simply was not allowed to refuse to plead.

If the accused felon refused to either confess, or to deny and consent, he was imprisoned, and often tortured, until he consented to a trial. By the beginning of the 14th century this coercive practice was known as "peine forte et dure" (pain strong and hard). Cogan, *supra*, at 1002 & n. 86. English judges refused to enter judgment on a felony against an accused who would neither confess nor deny and consent to a trial, because they believed that these were the only two acceptable bases for imposing punishment for a felony.³

2. **Over Time The Practice Developed of Allowing Defendants To Refuse to Plead Either Confession or Denial, and To Place Themselves in the King's Grace Instead.**

Although an "implied" confession could not provide the basis for a felony conviction, over time a process developed whereby misdemeanors could be treated differently:

Proof which would have been insufficient to determine felonies appears to have been considered sufficient at common law in the 13th and 14th centuries to determine offenses less serious than felonies. For example, judgment for trespasses which were subject to making fine appears to have been entered during this period not only upon confession or trial, but also upon an implied admission.

Cogan, *supra*, at 1004 (footnotes omitted).

³ "[C]onfession was the product of a mode of proof – one's admission against oneself – recognized at common law as providing sufficient proof upon which to enter judgment. Denial/consent resulted in a verdict by another mode of proof – trial by jury – also recognized as providing sufficient proof. However, an accused's refusal to confess or deny/consent, even if characterized as an implied admission, provided no such sufficient proof . . ." Cogan, *supra*, at 1003 (footnotes omitted).

The practice developed in misdemeanor cases of permitting the accused to “plead” by responding to the accusation that “*ponit se in gratiam domini Regis*” – that he put himself in the grace of the lord King. *Id.* at 1005 & n. 103. At first, English judges refused to permit such responses. *See, e.g., Robert of Kelsey’s Case*⁴ where the accused asked to put himself in the grace of the King, and was told that he could not do that without first either admitting or denying the charge.⁵

But by the mid-14th or early 15th century this “plea” of “*ponit se in gratiam*” became judicially acceptable and was recognized in misdemeanor cases. *Cogan, supra*, at 1007. As English case reports and treatises demonstrate, like modern day *Alford* pleas some of these requests for mercy were accompanied with protestations of innocence:

In 1583, Crompton referred to the practice as one by which an accused makes fine “*oue protestac*” – ***with protestation***, and as one by which he “*render luy*” – surrenders or submits himself.

Id. at 1008 (bold italics added).

After two or three more centuries, a pattern developed indicating that while pleas of *ponit se in gratiam* were now firmly established, they were being accepted by judges only in cases of less serious misdemeanors:

[S]everal circumstances appear to indicate – particularly in the late

⁴ (1321), YEAR BOOKS OF EDWARD II, THE EYRE OF LONDON, 14 EDWARD II, A.D. 1321, at 44-47 (H. Cam ed 1968).

⁵ *Id.* at 45-47. Robert was not permitted to “plead” *ponit se in gratiam*. Eventually the Court entered a plea of *non potest dedicare* (not able to deny) in lieu of a plea of confession, even though the defendant refused to enter either a confession or a denial. This plea formerly had applied only to defendants who were caught in the midst of the criminal act, e.g., literally red-handed in cases of murder, or with stolen goods in their possession. These defendants were summarily executed. 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 386 (S.Thorne ed. 1968).

16th and early 17th centuries – that their lesser certainty of proof, as compared, for example, with confession’s greater certainty, might have inhibited their entry to the most serious trespasses. Although the published records are not conclusive, the absence or virtual absence of *ponit se in gratiam* in cases of the most serious trespasses appears purposeful.

Cogan, *supra*, at 1010. In sum, scholars have found

substantial evidence of a correlation between the seriousness of the offense charged and the acceptability of a *ponit se in gratiam* plea. A similar correlation seems to have existed in the area of punishment. Because the plea of *ponit se in gratiam* presented proof of guilt with reduced certainty, the punishment meted out to the accused appears to have been correspondingly reduced.

Id. at 1011.⁶

3. **Finally, the Concept of Seeking The King’s Mercy Was Coupled With the Idea That By Declining to Contest the Charge the Accused Was Impliedly Admitting It.**

Eventually the courts began using a new term, *nolo contendere*, to describe a nonresponsive type of “response” to a criminal allegation. The first recorded mention of a *nolo contendere* plea came in the report of *The Queen v. Templeman*, 1 Salk. 55, 91 Eng. Rep. 54 (1702). The defendant, charged with an assault, made “a motion to submit to a small fine.” In the course of his opinion, Chief Justice Holt described the accused’s “plea” in a manner which combined recognition of the fact that he was seeking the King’s grace with the comment that he was also impliedly conceding his guilt by asserting an unwillingness to contest the accusation. The defendant’s “plea” was described as “*non vult contendere cum domina*

⁶ In time, the English courts used *ponit se in gratiam* as a form of plea bargaining (between the defendant and the Court) and held that judges accepting such pleas could disregard fixed statutory fines and to impose more lenient fines instead. *Id.* at 1011-12.

Regina & pon. Se in gratiam Curiae.”⁷ *Id.* This formula became accepted and thus the concept of an implicit form of confession became attached to the response of *ponit se in gratiam*.

Thus, the old *ponit se in gratiam* plea acquired a new name – *nolo contendere* -- which imparted to it a judicial gloss of “implied confession.” But the common law continued to restrict the plea to cases where the potential punishments were less severe. English judges continued to require a high degree of certainty that the defendant was in fact guilty before they would impose the more serious degrees of punishment, and a *nolo contendere* plea simply could not provide sufficient certainty:

The refusal of the common law to recognize waiver of trial in the absence of express admission of guilt to a felony charge was based on a fundamental concern for maintaining a proper relationship between certainty of proof and severity of consequences.

Cogan, *supra*, at 1020.

Since a death sentence is the severest punishment possible, courts required the highest degree of certainty before it could be imposed.⁸ Therefore, **all** courts, both in England and in this country, have **always** limited the acceptability of *nolo contendere* pleas to “a case not capital.” 2 Hawkins, *A Treatise on the Pleas of the Crown* (8th ed.) book 2, c. 31, p. 466, quoted in *Hudson v. United States*, 272 U.S. 451, 453 (1926).

⁷ He has no desire to contend with the lord King and places himself in the Court’s grace.

⁸ “The reason for this limitation becomes apparent when we consider the extreme penalty that follows a conviction in what we call capital cases. The law . . . requires that before conviction his guilt must be established by evidence which excludes all reasonable doubt. An implied confession of guilt *cannot rise to the degree of certainty* which would make it the equivalent of an express confession.” *Shrope*, 264 Pa. at 251 (bold italics added).

D. THROUGHOUT ITS EXISTENCE, THE WASHINGTON LEGISLATURE HAS NEVER AUTHORIZED ENTRY OF A PLEA OF *NOLO CONTENDERE*.

Thirty-eight states and the District of Columbia expressly permit *nolo contendere* pleas. See statutes collected in Bibas, *supra*, at n. 44. Washington State is *not* one of them. On the contrary, for over a century the Washington Legislature continuously refused to recognize the legality of a plea of *nolo contendere*. From 1881 until 1984 (when the statute was superseded by a court rule), the Legislature forbade the courts to accept anything other than three specified pleas, as follows:

There are but three pleas to the indictment. A plea of: 1. Guilty. 2. Not guilty. 3. A former judgment of conviction or acquittal of the offense charged which may be pleaded with or without the plea of not guilty.

Laws of 1881, § 1054.⁹

A *nolo contendere* “plea” is neither an assertion of guilt nor an assertion of innocence. It is merely a refusal to contest the charge. It does not fit within either the “guilty” or the “not guilty” categories. Since it obviously is also not a plea of insanity, it simply is not the type of plea which courts in this State have ever been authorized to accept.¹⁰

⁹ This statute was reenacted in 1891 with one minor change (the words “or information” were added to the first sentence). *Laws of 1891*, § 57. It was recodified without any change, first as Rev.Rem.Stat. § 2108, and then as RCW 10.40.150. In 1984 this last statute was repealed (*Laws of 1984*, ch. 76, § 27) and was superseded by CrR 4.2(a), which added a reference to an insanity plea, deleted the reference to a plea of former judgment, and thus continues Washington’s history of refusing to recognize a plea of *nolo contendere*. CrR 4.2(a) provides: “A defendant may plead not guilty, not guilty by reason of insanity, or guilty.”

¹⁰ Under similar circumstances, the Kentucky Court of Appeals concluded that *nolo contendere* pleas could not be accepted in Kentucky because the clear wording of its court rule on pleas “expressly prohibits the use of any pleas except guilty or not guilty.” *Commonwealth v. Hillhaven Corporation*, 687 S.W.2d 545, 547 (1985). The Minnesota Supreme Court reached the same conclusion: “[T]here is no such thing as a plea of *nolo*

An *Alford* plea is merely a specific type of a *nolo contendere* plea. All *nolo contendere* pleas contain the defendant's acknowledgment that he declines to contest the charge brought against him. Some *nolo contendere* pleas were also accompanied with a protestation of innocence. See, e.g., *Horton*, 26 Mass. at 208.¹¹ *Accord Buck v. Commonwealth*, 107 Pa. 486, 1884 WL 13370 (Pa.) at *3.

Similarly, all *Alford* pleas contain the defendant's acknowledgment that he declines to contest the charge. He agrees to be found guilty and declines to take his case to trial. Some *Alford* pleas are also accompanied by a protestation of innocence. See, e.g., *Clark v. Baines*, 150 Wn.2d 905, 909, 84 P.3d 245 (2004) ("I maintain my innocence . . .").¹² Other *Alford* pleas are tendered *without* assertions of innocence, often by defendants who simply do not know, either because of mental illness, intoxication, or the ingestion of drugs, whether they are guilty or not. See, e.g., *In re Montoya*, 109 Wn.2d 270, 272 744 P.2d 340 (1987) ("Defendant cannot remember the events involved in the crime."). In sum, defendants who decline to admit their guilt, and who go further and assert their innocence,

contendere under our statute . . . which enumerates as the 'three pleas to the indictment' those of guilty, not guilty, and of judgment of conviction or of acquittal. This statutory enumeration necessarily excludes a plea of *nolo contendere*." *Kiewel*, 207 N.W. at 647.

¹¹ "The plea of *nolo contendere* *pleaded with a protestation that the party was not guilty*, would clearly not conclude the party in his defence against the civil action. [¶] But so far as the commonwealth is concerned, the judgment of conviction follows as well the one plea, as the other." (Bold italics added).

¹² In this case, Petitioner Cross steadfastly denied that his murders were premeditated and denied that there was any "common scheme or plan" linking the murders. RP 9/18/00, at 73, 117; RP 10/23/00 at 48, 106; CP 1656 ("I do not believe I acted with premeditated intent. I also do not believe that the three murders were part of any common scheme or plan . . ."). Thus he denied both an element of the crime and the aggravating factor that made his case capital, but he consistently admitted that he was guilty of three murders.

are entering *Alford* pleas which are virtually identical to pleas of "*non vult contendere*" accompanied with protestations of innocence, which were known at common law as *nolo contendere* pleas.

Throughout this State's entire history the Legislature has never authorized the entry of a *nolo contendere* plea for any crime, much less for a capital crime. Moreover, it has never specifically authorized acceptance of an *Alford* plea – the modern day equivalent of a *nolo contendere* plea -- in a capital case. This is consistent with the Legislature's command that the common law supplement the criminal law statutes in this state, and the common law's refusal to countenance *nolo contendere* pleas in capital cases. Therefore, this Court can only conclude that the Legislature has declined to authorize the acceptance of an *Alford* plea in a capital case.¹³

E. THE WASHINGTON LEGISLATURE HAS NEVER PERMITTED TRIAL TO A JUDGE IN A CAPITAL CASE.

Moreover, throughout its existence Washington has *never* permitted judges in capital cases to decide the issue of the defendant's guilt or innocence. In 1854, the Washington Territorial Legislature enacted a statute which provided as follows: "The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court, *except in capital cases.*" (Bold italics added). That statute was still on the books in 1938, codified as Rem.Rev.Stat. § 2144. *State v. Karsunky*, 197 Wash. 87, 100, 84 P.2d 390 (1938).

¹³ Cf. *State v. Furman*, 122 Wn.2d 440, 458, 858 P.2d 1092 (1993)(because statutes do not clearly authorize death penalty for juveniles, no death sentence can be imposed upon a juvenile).

At the same time, another statute, Rev.Rev.Stat. § 2309,¹⁴ (also derived from a law originally enacted in 1854), on its face literally prohibited bench trials in *all* criminal cases.¹⁵ This Court noted that the two statutes were “in hopeless conflict,” and decided that the later statute, § 2309, had operated to repeal the earlier statute. *Id.* at 100. Thus, Karunsky’s conviction for manslaughter was overturned because Karunsky had been convicted in a bench trial, a proceeding which, due to Rem.Rev.Stat. § 2309, the trial court had no authority to conduct.¹⁶

It was not until 1951 that the Legislature amended the statute, and once again permitted defendants to waive their right to jury trial and submit to a bench trial. But the amendment *excepted* capital cases and thus continued the uninterrupted policy of refusing to permit bench trials

¹⁴ “No person informed against or indicted for a crime shall be convicted thereof, unless by admitting the truth of the charge in his plea, by confession in open court, or by the verdict of a jury, accepted and recorded by the court.”

¹⁵ Rem.Rev.Stat. § 2309 was derived from a series of seven statutes which dated back to a nearly identically worded territorial statute, *Laws of 1854*, p. 76, § 3. Thereafter this statute was amended seven times, each time carrying forward its flat prohibition against bench trials in all criminal cases. See *Laws of 1859*, p. 105, § 3; *Laws of 1869*, p. 198, § 3; *Laws of 1873*, p. 180, § 3; *Laws of 1881*, p. 158, § 767; *Laws of 1891*, ch. 28, § 91; *Laws of 1909*, ch. 249, § 57; and finally Rem.Rev.Stat. § 2309. This Court held that by enacting Section 2309, the right to have a bench trial in a criminal case had been legislatively “taken away.” *Karsunky*, 197 Wash. at 101.

¹⁶ Moreover, for nearly a century Washington statutes even prohibited a defendant from entering a guilty plea to first degree murder precisely because first degree murder was a capital offense. See the discussion of *Laws of 1854*, p. 115, § 87, carried forward into Rem.Rev.Stat. § 2116, and discussed in *Brandon v. Webb*, 23 Wn.2d 155, 160 P.2d 529 (1945). That statute provided that if charged with murder, the defendant could plead guilty to murder, but required the court in all cases of murder to impanel a jury to hear testimony and to “determine the degree of murder and the punishment therefor.” See *Horner v. Webb*, 19 Wash.2d 51, 141 P.2d 151 (1943), holding that even though Horner entered a plea of guilty to murder in the first degree, the trial court was not authorized to accept such a plea and Horner “did not – and indeed, *could not – waive a jury by his plea of guilty*, and . . . the *trial judge had no authority to enter judgment and sentence* unless and until a jury determined the degree of the crime . . .”)(bold italics added).

in capital cases. Now codified as RCW 10.01.060, the statute reads:

No person informed against or indicted for a crime shall be convicted thereof, unless by admitting the truth of the charge in his plea, by confession in open court, or by the verdict of a jury, accepted and recorded by the court: PROVIDED HOWEVER, That ***except in capital cases***, where the person informed against or indicted for a crime is represented by counsel, such person may with the assent of the court, waive trial by jury and submit to trial by the court.

(Bold italics added).

Thus the Washington Legislature has *never* permitted trial court judges to decide the guilt of a capital defendant. This unbroken policy of prohibiting judicial fact finding in a capital case is in conflict with the actions of the trial court judge in this case, who accepted an *Alford* plea after making a judicial determination that *if* a jury trial were to be held, the jurors would likely find that the defendant was guilty of aggravated premeditated murder as charged.

The Legislature's continuous opposition to judicial fact finding in capital cases, which has endured for well over a century, demonstrates fidelity to the similar policy embodied both in the common law rule regarding *nolo contendere* pleas, and in RCW 10.01.060, that a defendant can never be convicted of a capital offense on the basis of a plea which fails to "admit the truth of the charge." In RCW 10.01.060, the Legislature has flatly forbidden trial judges from making factual determinations in capital cases. It would be utterly inconsistent to conclude that while judges may not try capital defendants themselves, nevertheless they may convict those who assert their innocence so long as

they make a prediction that *if* the case were tried to a jury, it is probable or “likely” that the jury would convict the defendant of capital murder.¹⁷

F. NOLO CONTENDERE PLEAS WERE NOT ACCORDED ANY COLLATERAL ESTOPPEL EFFECT. DEFENDANTS WHO ENTERED SUCH PLEAS WERE FREE TO DENY THEIR GUILT IN ANY SUBSEQUENT CIVIL ACTION.

At common law a *nolo contendere* plea only could be used to establish the defendant’s guilt in the criminal case in which it was entered; the defendant remained free to contest his guilt in any subsequent civil litigation. “The only advantage in a plea of *nolo contendere* gained by the defendant is that it gives him the advantage of not being estopped to deny his guilt in civil action based upon the same facts.” *State v. Burnett*, 174 S.C. 796, 93 S.E. 473, 474 (1917).¹⁸ Thus, a defendant could enter a *nolo*

¹⁷ Moreover, the Washington Constitution demonstrates that our constitutional framers had a profound distrust of judges and were determined to prohibit them from influencing jurors. Art. 4, § 16 commands that “judges shall not charge juries with respect to matters of fact, *nor comment thereon . . .*” (Bold italics added).¹⁷ “The purpose of article IV, section 16 is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court’s opinion of the evidence submitted.” *State v. Elmore*, 139 Wn.2d 250, 275, 985 P.2d 289 (1999).

It would make no sense to hold that although our trial judges are constitutionally forbidden from *influencing* jury factual determinations by means of commenting upon the evidence, nevertheless, a death sentence can rest on nothing more than a prediction by a judge as to what a jury “could” do, or “might” do based on the judges review of the case. See *State v. Hyde*, 20 Wash. 234, 236, 55 P. 49 (1898)(where trial judge violates art. 4, § 16, it is impermissible for an appellate judge to try and assess the “probable consequences” of that judicial comment upon the jury). Similarly, at least in a capital case, art. 4, § 16 should be read as prohibiting a plea judge from basing a conviction on the predicted “probable consequences” of a jury trial on the disputed issues of premeditation and common scheme or plan, when all the plea judge can say is that a jury “could” infer the existence of these things.

¹⁸ Accord *Twin Ports Oil Co. v. Pure Oil*, 26 F. Supp. 366, 376 (D. Minn. 1939); *People ex rel. Attorney General v. Edison*, 100 Colo. 574, 577, 69 P.2d 246, 248 (1937); *State v. La Rose*, 71 N.H. 435, 52 A. 943, 946 (1902); *Commonwealth v. Horton*, 26 Mass. at 207; *Commonwealth v. Tilton*, 49 Mass. 232, 233 (1844); *White v. Creamer*, 175 Mass. 567, 56 N.E. 832, 833 (1900); *In re Corcoran*, 215 Or. 660, 662, 337 P.2d 307, 308 (1959); *State v. Conway*, 20 R.I. 270, 38 A. 656, 657 (1897).

contendere plea, receive a light criminal sentence, and if later sued for damages as a result of the same criminal act for which he had been sentenced, he could deny commission of the act and litigate that issue in the civil case without facing any preclusive collateral estoppel effect.

If a defendant could be executed on the basis of a *nolo contendere* plea, this advantage would cease to be of any significance. Avoiding the preclusive effect of collateral estoppel is of little use if one is dead. This special collateral estoppel rule for *nolo contendere* pleas simply illustrates and reinforces the obvious point already made – that *nolo contendere* pleas were never acceptable in capital cases.

G. THIS COURT HAS REFUSED TO ACCORD COLLATERAL ESTOPPEL EFFECT TO ALFORD PLEAS.

As both the Supreme Court and scholars have noted, *Alford* pleas are simply *nolo contendere* pleas with a new name. *Alford v. North Carolina*, 400 U.S. 25, 37 (1970) (“The fact that [Alford’s] plea was denominated a guilty plea rather than a plea of *nolo contendere* is of no constitutional significance . . .”); Bibas, *supra*, at 1373 (“By and large, however, *Alford* is a new extension of the age-old *nolo* plea.”).

This identity between the two pleas is further illustrated by the fact that, like a *nolo contendere* plea, an *Alford* plea does *not* create a collateral estoppel which precludes litigation of the same allegation in a subsequent civil case. *Clark v. Baines*, 150 Wn.2d 905, 84 P.3d 245 (2004).¹⁹ In

¹⁹ In *Clark* the defendant in a civil case had previously been found guilty in a criminal case as a result of his entry of *Alford* pleas to two counts of Assault 4 with sexual motivation for assaulting one Piety Ann Clark. *Id.* at 907. Clark then brought a civil suit against Baines, seeking damage for the same assault. Baines counterclaimed against

Clark this Court noted that

Where a defendant is convicted pursuant to an *Alford* plea not only has there *been no verdict* of guilty after a trial but *the defendant has not admitted committing the crime*. [Citations]. As such an *Alford plea cannot be said to be preclusive of the underlying facts* and issues in a subsequent civil action.

Clark, 150 Wn.2d at 2004 (bold italics added).

If an *Alford* plea cannot provide the factual basis for resolving claims for money damages based upon the same act as that for which the defendant has already been adjudged guilty, then what sense does it make to allow such a plea to provide the basis for an execution of that person? It is not sufficient to answer simply that the defendant agreed that his plea could be used in the criminal case for sentencing purposes, and knew that his *Alford* plea might lead to a death sentence. No matter what he agreed to, the procedure of determining guilt by predicting that a jury would “likely” convict a person who claims not to have committed the alleged capital crime, is not sufficiently reliable to permit the State to execute the defendant for the offense. Regardless of what the defendant agreed to, society needs more certainty than that in order to kill someone.

H. THE FACTUAL BASIS REQUIREMENT FOR AN ALFORD PLEA DOES NOT PROVIDE ANY MEANINGFUL CERTAINTY THAT THE DEFENDANT IS GUILTY.

The State claims that an *Alford* plea is not the equivalent of a *nolo*

Clark for malicious prosecution, alleging that the assault accusation was malicious and unfounded. Clark argued that Baines was collaterally estopped by his convictions from denying that he committed the assaults. But this Court held that Baine’s convictions, because they were based on *Alford* pleas, did not give rise to any collateral estoppel, and that Baines was free to litigate his claim for damages against Clark. Like Petitioner Cross, Baines’ *Alford* plea included an express assertion of innocence. *Id.* at 909.

contendere plea because before it can be accepted, the plea judge must find there is a factual basis for the plea. But this requirement provides scant assurance that the defendant is truly guilty.

First of all, when an *Alford* plea is tendered to the Court, neither party has any incentive to inform the Court of the facts which suggest that the defendant is *not* really guilty. Since a defendant who wants to enter an *Alford* plea must persuade the judge that there is a factual basis for his plea, no such defendant will ever tell the Court that there is *not* a factual basis for his plea. Indeed, in this case defense counsel told Cross that “notwithstanding his insistence that he did not premeditate, that the judge would not accept an *Alford* plea unless he told the judge that he agreed the jury probably would find premeditation.” *Larranaga Decl.*, ¶ 33.²⁰

Moreover, in Washington in order to pronounce an *Alford* plea supportable by an adequate factual basis, a plea judge need only determine that “there is sufficient evidence for a jury to conclude that he is guilty.” *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).²¹ In the present case, the plea judge reviewed a 425 page package of document prepared by the prosecution. The prosecution acknowledged that “there will be nothing in

²⁰ Defense counsel concluded that Cross simply followed this advice and that he “would have said whatever he needed to say in order to have the plea accepted.” *Id.* And yet Cross had previously stated that he thought there was a *less* than 50% chance that a jury would find that his murders were premeditated. RP 9/18/00, at 117.

²¹ Mere *sufficiency* is a remarkably low standard. Evidence which is merely *sufficient* to support a conviction may enable the State to survive a motion to dismiss after the State rests, and yet may also easily result in an acquittal. *Newton* borrowed the sufficiency standard from the First Circuit’s decision in *United States v. Webb*, 433 F.2d 400, 403 (1st Cir. 1970). But *Webb* was not an *Alford* plea case. *Webb* was actually decided about two months before *Alford*, and the defendant in *Webb* did *not* assert his innocence at the time he entered his plea. Moreover, neither *Webb* nor *Newton* was a capital case.

the 425 pages that will say there is premeditation,” RP 10/23/00 at 43, and repeatedly informed the Court that notwithstanding acceptance of the *Alford* plea, Cross would remain free to deny and to litigate the issue of premeditation during the penalty phase of the trial. RP 10/23/00, at 154. The plea judge merely found that there was “documentation” from which “the jury could infer premeditation . . .” RP 10/23/00, at 149-150. See also p. 168.²² In sum, the rote pronouncement of a defendant who wants to enter an *Alford* plea that he thinks a jury would probably find him guilty does virtually nothing to enhance the reliability of the determination of guilt, particularly where the factual basis requirement is set so low.

II. THE STATE’S MERITLESS PROCEDURAL OBJECTIONS.

A. THE INVITED ERROR DOCTRINE DOES NOT APPLY.

The State is clearly mistaken when it contends that the invited error doctrine prohibits Cross from attacking his *Alford* plea. This Court has repeatedly “held that a guilty plea does not usually preclude a defendant from raising collateral questions such as the validity of the statute, sufficiency of the information, jurisdiction of the court, or the circumstances in which the plea was made.” *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980).²³ Collateral attacks on guilty pleas are permitted where the defendant raises a serious constitutional question

²² Although Cross’ own plea statement said that he believed there was a substantial likelihood that a jury would find him guilty of premeditated murder, Judge Dubuque herself never made any such finding with respect to the murders. When accepting his plea to kidnapping 1, however, she did make a finding that there was a “substantial likelihood” that a jury would find Cross guilty of that offense. RP 10/23/01, at 191.

²³ *Accord Young v. Konz*, 88 Wn.2d 276, 283, 558 P.2d 791 (1977) and *State ex rel Fisher v. Bowman*, 57 Wn.2d 535, 536, 358 P.2d 316 (1961).

about the validity of his plea, such as whether it was entered voluntarily. *In re Hews*, 99 Wn.2d 80, 660 P.2d 263 (1983).²⁴

Moreover, from the very earliest days of statehood up to the present, this Court has repeatedly held that “sentences in excess of lawful authority could be successfully challenged” in a collateral attack proceeding, notwithstanding the fact that the defendant plead guilty. *In re Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 2002 (2002). “[S]entences imposed without jurisdiction or in excess of that authorized by law” are void and can be corrected at any time. *Id.*²⁵ Even when a defendant pleads guilty to a sentencing enhancement allegation, he may still attack his enhanced sentence if it is not authorized by law. *In re Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980)(defendant who plead guilty to deadly weapon sentencing enhancement held not precluded from collaterally attacking that part of his sentence).²⁶ A defendant simply cannot give a sentencing court more sentencing authority than the court has been granted

²⁴ See also *In re Moore*, 116 Wn.2d 30, 33, 803 P.2d 300 (1991) (sentence of life without possibility of parole was not authorized and thus violated due process); *In re Thompson*, 141 Wn.2d 712, 10 P.3d 380 (2000) (guilty plea did not preclude collateral attack raising ex post facto and due process clause arguments, conviction vacated); *In re Barr*, 102 Wn.2d 265, 269, 684 P.2d 712 (1984) (where PRP “raises a constitutional error, petitioner may challenge the [guilty] plea in a collateral proceeding”); *White v. Schneekloth*, 56 Wn.2d 173, 351 P.2d 919 (1960)(defendant who plead guilty may collaterally attack conviction on grounds of lack of jurisdiction over the offense).

²⁵ “If, however, the court lacked the ‘authority to render the particular judgment,’ the judgment was ‘fatally defective and open to collateral attack.’” *Goodwin*, at 869, quoting *Gossett v. Smith*, 34 Wash.2d 220, 224, 208 P.2d 870 (1949).

²⁶ Accord *State v. Eilts*, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980)(“a defendant cannot empower a sentencing court to exceed its statutory authorization.”); *In re Gardner*, 94 Wn.2d 504, 507, 617 P.2d 1001 (1980).

by the Legislature.²⁷

In this case, as in *Horner*, the Superior Court accepted a guilty plea to a murder charge which it was not authorized by law to accept. Twenty-five years after receiving a life sentence, Horner sought relief pointing out that in murder cases the Superior court was prohibited by Rem.Rev.Stat. § 2116 from accepting a guilty plea, because “the trial judge had no authority to enter judgment and sentence unless and until a jury determined the degree of the crime . . .” *Horner*, 19 Wn.2d at 57. This Court agreed, and vacated his conviction and his sentence.

Cross is entitled to the same relief. The punishment imposed upon him is *not* “of the character prescribed by law.” *Gossett*, 34 Wash.2d at 224. The trial court lacked “the authority to render the particular judgment” she entered, *Horner*, at 55, because death sentences based upon *Alford* pleas are forbidden by the common law, and by the state and federal constitutions. Therefore, here, as in *Horner*, Cross’ judgment and sentence may be collaterally attacked notwithstanding his prior entry of a guilty plea, because it exceeds the court’s lawful authority.²⁸

B. RCW 9A.04.060 EXPRESSLY STATES THAT IT APPLIES TO COMMON LAW RULES AFFECTING PUNISHMENT.

The State argues that “the plain language” of RCW 9A.04.060

²⁷ See, e.g., *Moore*, 116 Wn.2d at 33 (defendant who asked for sentence of LWOP may collaterally attack that sentence because imposition of a sentence not authorized by law is “the kind of fundamental defect” which a pleading defendant never waives). In *Moore* this Court noted that even though he agreed to it, “a defendant cannot agree to be punished more than the Legislature has allowed for.” *Id.* at 38.

²⁸ Similarly, although the *Goodwin*, *Carle*, and *Gardner* petitioners all plead guilty, they were permitted to collaterally attack their sentences. *Carle* and *Gardner* were granted relief even though they had *agreed* to the illegal portions of their sentence.

shows “that its purpose was to preserve common law principles of substantive criminal law, not rules of criminal procedure.” *Response to Petition*, at 214. And yet nowhere does RCW 9A.04.060 contain any reference to either “substantive” or “procedural” rules.

Moreover, even if RCW 9A.04.060 contained language which limited its scope to “substantive” provisions of the common law, as the case law pertaining to *ex post facto* laws demonstrates, rules limiting the amount of punishment which may be imposed *are* “substantive” rules.²⁹ Thus, the common law rule prohibiting death sentences in *nolo contendere* plea cases is clearly covered by the statute.³⁰

C. CONCLUSION

Petitioner asks this Court to vacate both his sentence and his conviction, and to remand with directions that the *Alford* plea is set aside.

²⁹ “A law violates the *ex post facto* clause if it (1) is substantive as opposed to merely procedural; (2) is retrospective . . . and (3) disadvantages the person affected by it.” *State v. Powell*, 117 Wn.2d 175, 185, 814 P.2d 635 (1991). *Accord Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). Unless the law makes a substantive change it cannot be an *ex post facto* law. *See, e.g., State v. Edwards*, 104 Wn.2d 63, 701 P.2d 508 (1985). “[T]he mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts.” *State v. Schmidt*, 143 Wn.2d 658, 673, 23 P.3d 462 (2001).

³⁰ The State also claims that RCW 9A.04.060 is limited to those common law rules which defined crimes. But this argument ignores the plain language of the statute which refers to “provisions of the common law relating to” *both* “the commission of crimes and the punishment thereof.” The State would have this Court read the words “and the punishment thereof” right out of the statute. But that no court can do.

Because CrR 4.2(a) makes no mention of *Alford* pleas or *nolo contendere* pleas the State suggests that this Court should infer that the common law rule against *Alford*-type pleas in capital cases has been abandoned. *Response*, at 217. But courts “are hesitant to recognize an abrogation or derogation from the common law absent clear evidence of the legislature’s intent to deviate from the common law.” *Potter v. State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691, 695 (2008).

DATED this 11th day of May, 2009.

CARNEY BADLEY SPELLMAN, P.S.

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NO. 79761-7

BY RONALD R. CARPENTER

SUPREME COURT
OF THE STATE OF WASHINGTON _____
CLERK

In re the Personal Restraint of

DAYVA CROSS,

Petitioner.

CERTIFICATE OF SERVICE

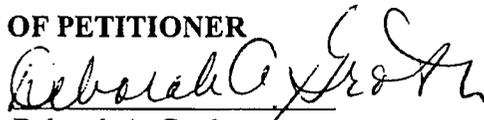
The undersigned, under penalty of perjury, hereby declares as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause.
2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing addresses are both 701 Fifth Avenue, Suite 3600, Seattle, WA 98104.
3. On May 11, 2009, I caused to be served via E-mail and US Mail, a copy of the following document on:

James Whisman
Randi Austell
King County Prosecutor's Office
516 3rd Avenue Room W554
Seattle, WA 98104

Entitled exactly:

SUPPLEMENTAL BRIEF OF PETITIONER


Deborah A. Groth

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Cc: Jim.Whisman@kingcounty.gov; Randi.Austell@kingcounty.gov; Todd Maybrown; Lobsenz, Jim
Subject: RE: Emailing: Cross-Supp Brief of Petitioner.pdf

Rec. 5-11-09

-----Original Message-----

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Sent: Monday, May 11, 2009 10:11 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Jim.Whisman@kingcounty.gov; Randi.Austell@kingcounty.gov; Todd Maybrown; Lobsenz, Jim
Subject: Emailing: Cross-Supp Brief of Petitioner.pdf

Attached for filing is SUPPLEMENTAL BRIEF OF PETITIONER; CERTIFICATE OF SERVICE
Regarding: IN RE PRP DAYVA CROSS, NO. 79761-7
Filed by: James E. Lobsenz WSBA No. 8787
206/622-8020 lobsenz@carneylaw.com

The message is ready to be sent with the following file or link attachments:

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