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NO. 79761-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of

DAYVA CROSS,

Petitioner.

**SUPPLEMENTAL BRIEF OF RESPONDENT RE:
ALFORD PLEA OF GUILTY**

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A. INTRODUCTION

The key distinction between common law *nolo contendere* pleas and the modern Alford plea of guilty is the absence of any requirement that the common law *nolo* plea be supported by a factual basis.

Under a common law *nolo* plea, a defendant was silent as to guilt and simply submitted his plea to seek mercy from the court. The common law courts were not equipped to gather and determine facts independent of trial, making it difficult to determine that the plea was knowing and voluntary if a defendant remained silent. Moreover, since trial informed sentencing, common law judges were ill-equipped to impose sentence absent objective information about the defendant's actual role in the crime. Thus, the *nolo* plea was mistrusted by common law courts in serious cases because the courts were blind as to whether the plea was knowing, intelligent and voluntary, and uninformed as to what sentence to impose.

The modern situation is much different. Current rules require a factual basis for any guilty plea. Courts of the present are – due to modern professional police investigative practices, defense counsel and defense investigators, professional prosecutors, and modern forensic sciences and technology – 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 but wants to plead guilty. Thus, limits on common

law *nolo* pleas have not been imported into modern Alford practice. Most states -- even those which previously refused *nolo* pleas -- now permit Alford or *nolo*-type pleas in serious cases.

Cross asserts that *no* court has *ever* accepted a *nolo* plea in a capital case. He is incorrect. Almost one-quarter of the states with capital punishment have accepted either a *nolo* plea or an Alford guilty plea in a capital case, as long as the plea was supported by a firm factual basis. Under the rules of many other states, an Alford plea *could* be accepted in a capital case, but the situation appears not to have arisen. Washington has never recognized *nolo* pleas but it has clearly embraced Alford pleas by court rule and this Court's decisions. No rule, statute, or decision in Washington restricts Alford pleas.

Nor is there any policy reason to announce such a ban in this case. The 400-plus pages of discovery reviewed by the trial judge in this case corroborated Cross' assertion that there was a substantial likelihood the jury would find him guilty of premeditated murder. In the eight years since conviction, Cross has never suggested that the trial court erred in concluding that a factual basis existed for his plea. In any event, a newly announced rule of criminal procedure banning Alford pleas in capital cases could not apply to Cross under this Court's precedents.

B. FACTS PERTAINING TO CROSS' GUILTY PLEA

The facts surrounding entry of Cross' guilty plea are set forth in previous briefing. The relevant clerk's papers on the Alford issue are at CP 1171-78, 1195-1205, 1626-37, 1638-47, 1960-62. Documents relied upon by the court to determine a factual basis for Cross' plea are at CP 1212-1625. The trial court's ruling accepting Cross' plea is at CP 1960-62.

C. ARGUMENT

By order dated April 3, 2009, this Court invited supplemental briefing on whether an Alford plea may be accepted in a capital case. Cross now argues that Alford pleas are the same as *nolo contendere* pleas and that, since the common law forbade *nolo* pleas, this Court must forbid Alford pleas.¹ He also argues that Alford pleas are not authorized in capital cases because the Washington legislature never authorized *nolo* pleas, and that Alford pleas are essentially bench trials, and bench trials are forbidden in capital cases. Finally, Cross argues that the factual basis requirement of CrR 4.2 provides unreliable evidence of a capital defendant's guilt. Supp. Br. at 15-17.

¹ Cross' original argument on this issue was that a defendant could never enter a *nolo contendere* plea in a capital case at common law, the common law prohibition applies in Washington pursuant to RCW 9A.04, so no Alford plea may be accepted in a capital case. PRP at 192-207. The State responded that historical *nolo contendere* practices were unclear, that the Supreme Court recognized that no definitive rule existed in the common law, that CrR 4.2 (not statutory law) controlled guilty pleas in Washington, that Alford pleas were expressly authorized by this Court, and that no statute or rule prevented such a plea in a capital case. Response to PRP at 225-31.

These arguments commit the fallacy of false comparison because they falsely equate Alford pleas to *nolo* pleas and bench trials. Alford pleas are distinct from both (and Washington permits bench trials in capital cases, anyway). Many states, Washington included, permit an Alford plea supported by a firm factual basis, even in capital cases. Moreover, it proves nothing to show that the legislature has never authorized *nolo contendere* pleas in Washington because Cross did not enter a *nolo* plea. And, in Washington, Alford practice is controlled by court rule, not statute. Finally, the factual basis requirement ensures reliable convictions, as this case establishes.

1. ALFORD PLEAS ARE DIFFERENT FROM COMMON LAW *NOLO* PLEAS BECAUSE ALFORD PLEAS CAN BE ACCEPTED ONLY IF SUPPORTED BY A FACTUAL BASIS; *NOLO* PLEAS REQUIRED NO FACTUAL INQUIRY AT ALL.

This Court invited the parties to "address the similarities and differences between the common law no contest pleas and the modern Alford plea." Order dated 4/3/09. Cross responds with the assertion that "Alford pleas are simply *nolo contendere* pleas with a new name." Supp. Br. at 14 (citing Alford, 400 U.S. at 37). He argues that since a *nolo* plea would never have been accepted in the 15th through 18th centuries, Alford pleas should similarly be rejected now. Cross' assertions are flawed and must be rejected. Common law *nolo* pleas were accepted with no inquiry

into whether there was a factual basis for the plea. Accordingly, they were not widely used in serious cases. On the other hand, Alford pleas are more widely accepted -- even in capital cases -- because the factual basis requirement allows an important check as to the voluntariness of the plea and a safeguard against convicting the innocent.

A comparison between common law *nolo* pleas and modern Alford pleas is of marginal value absent consideration of the common law context in which the *nolo* plea originated. Yet, Cross fails to even mention the fundamental changes in court practices and society that have occurred over hundreds of years since the plea originated.

Fifteenth-century English trials bore little resemblance to modern trials. Such trials were essentially a confrontation between the accused and the accuser in which defense counsel was forbidden, the trial court acted as counsel for the accused, it was assumed that the defendant should personally testify to the court, there was no public prosecutor, there was no organized police force or investigation, and juries often decided facts and sentences. See John H. Langbein, The Origins of Adversary Criminal Trial, 2, 10-64. Burglars and pickpockets were eligible for the death penalty. Id. at 334-36. Plea bargaining did not exist, and all guilty pleas were actively discouraged. Id. at 18-20.

The manner of bringing facts before the tribunal was limited, too. Over time, citizen prosecutors were slowly replaced by professional prosecutors but, even into the 19th century, there was little investigation and imperfect fact-finding done by criminal common law courts. Id. at 112. In fact, such courts apparently exhibited little appetite for detailed fact-finding. Id. The common law justices of the peace had no fact-gathering capacity of their own. Id. at 6. ("The judges had always taken the evidence as outsiders delivered it. English judges had never been responsible for fact-gathering; they lacked the resources, the authority, and the mission to investigate what they were deciding.")² Moreover, because trial framed the issues for sentencing, a defendant who pled guilty lost much of his opportunity to present mitigating evidence. Id. at 59; Alford, at 36 n.8 (after a *nolo* plea "...evidence in mitigation was precluded by the finding of actual guilt").

Accordingly, when a defendant entered a plea of *nolo contendere* to a common law justice of the peace, it appears there would have been little information available on which to assess the voluntariness or appropriateness of the plea, and upon which to make a sentencing

² See also id. at 104-05 ("in cases of ordinary crime the investigating and charging functions remained largely privatized, in the hands of the victim...[and j]udges had neither the responsibility nor the resources for investigating the merits of the cases coming before them.").

determination. Detailed police reports, witness statements, photographs, audio or video recordings, autopsy reports, forensic reports -- all the information relied upon in Cross' case -- would not have existed. It is little wonder that common law courts were reluctant to accept *nolo* pleas, especially when death was often the likely punishment. The risk of involuntary pleas and conviction of the innocent would seem too high.

Although its precise roots are unknown, "the [*nolo*] plea may have originated in the early medieval practice by which defendants wishing to avoid imprisonment would seek to make an end of the matter ... by offering to pay a sum of money to the king." Alford, 400 U.S. at 36 n.8 (citing an historical text and an early 15th century English case). Even as court procedures developed over the ensuing hundreds of years, there was no *requirement* that a judge accepting a *nolo* plea inquire into the basis for the plea. Some courts apparently believed the lack of inquiry into factual guilt was a virtue of the *nolo* plea. See Miller v. State, 617 P.2d 516, 518 n.8 (Alaska 1980) (factual basis was not required for *nolo* plea because it would "destroy[] the unique purpose of the *nolo* plea, which is that the issue of guilt shall not be contested"). The Supreme Court concluded that "...it is impossible to state precisely what a defendant does admit when he enters a *nolo* plea in a way that will consistently fit all the cases." Alford, at 36 n.8. Still, the Supreme Court held long ago that *nolo* pleas could

constitutionally be accepted -- or refused -- and a prison sentence imposed, even without an admission of guilt from the defendant. Alford, 400 U.S. 35-37 (citing, *inter alia*, Hudson v. United States, 272 U.S. 451, 47 S. Ct. 127, 71 L. Ed. 347 (1926)).

The question in North Carolina v. Alford was whether to extend the reasoning of cases like Hudson beyond *nolo* pleas to pleas of *guilty* where the defendant asserts *innocence* rather than simply remaining mute. It was in this context that the Court examined the similarities and differences between the two pleas. Ultimately, the Court held that remaining silent as to factual guilt (*nolo* plea) was not constitutionally distinct from asserting innocence while entering an actual plea of guilty (Alford plea) because each plea was inherently ambiguous and the effect of the plea was the same; it did not matter that one was called a "*nolo*" plea and the other a "guilty" plea. Alford, 400 U.S. at 37-38. The Court held that the Constitution required only that the plea be a voluntary and intelligent choice among alternatives. Id. It held that sentence could be imposed if the court found the plea to be voluntary. Id.

Cross argues that North Carolina v. Alford shows that *nolo* and Alford pleas are identical. Supp. Br. at 14. He is mistaken. The Supreme Court simply noted that the two pleas were similar in that they were both ambiguous as to guilt and that they had similar consequences, i.e.,

imposition of sentence following acceptance of the plea. It did not hold that the pleas were identical.³

In fact, in discussing the history and nature of the *nolo* plea, the Supreme Court noted the historical absence of any factual basis requirement for a *nolo* plea. The Court noted that *nolo* pleas and jury verdicts differed in that "in the former the defendant could introduce evidence of innocence in mitigation of punishment, whereas in the latter such evidence was precluded by the finding of actual guilt." Alford, 400 U.S. at 36 n.8. The court went on to observe as follows:

³ At least one state supreme court has considered and rejected Cross' precise argument that the Supreme Court meant to equate the two pleas. See State v. Salisbury, 143 Idaho 476, 479, 147 P.3d 108 (2006) ("At no time ... did the Court suggest an Alford plea and a plea of *nolo contendere* were "without distinction" or that the two pleas were so analogous as to be considered "interchangeable...").

Many other federal and state courts recognize that *nolo* pleas and Alford pleas are different. State v. Crowe, 168 S.W.3d 731, 746 (Tenn.2005) (holding that Alford plea and *nolo contendere* plea are different and that factual basis is not required for *nolo contendere* plea); 1A Charles Alan Wright, 1A FEDERAL PRACTICE AND PROCEDURE, § 177, at 284-85 (3rd ed.1999); Blohm v. Comm'r, 994 F.2d 1542, 1554 (11th Cir.1993) (stating that guilty pleas must be rooted in fact before they may be accepted and emphasizing that no similar requirement exists for pleas of *nolo contendere*); United States v. Prince, 533 F.2d 205, 208 (5th Cir.1976) ("[Fed.]Rule 11 does not require that the district court find a factual basis for a plea of *nolo contendere*, as opposed to a plea of guilty."); Cortese v. Black, 838 F.Supp. 485, 492 (D.Colo.1993) ("Courts may accept a plea of *nolo contendere* without inquiring into actual guilt."); United States v. Wolfson, 52 F.R.D. 170, 174-76 (D.Del.1971), aff'd memo, 474 F.2d 1340 (3d Cir.1973) ("If the plea is 'guilty,' the Court must be satisfied that there is a factual basis for that plea, but if the plea is '*nolo contendere*' no such duty is imposed upon the Court."); State v. Godek, 182 Conn. 353, 438 A.2d 114, 119-20 (1980) (holding that Connecticut's version of Rule 11 does not require a factual basis for a *nolo contendere* plea); State v. Merino, 81 Hawai'i 198, 915 P.2d 672, 689-93 (1996) (holding that Hawaii's version of Rule 11 does not require a factual basis for a *nolo contendere* plea); Johnson v. Mullen, 120 R.I. 701, 390 A.2d 909, 912 (1978) (holding that the prior version of Rhode Island's Rule 11, applicable when the petitioner entered his plea, had not required a factual basis for a *nolo contendere* plea, but noting that the rule had been amended, effective September 1, 1972, to require a factual basis for both guilty pleas and *nolo contendere* pleas).

Throughout its history, that is, the plea of *nolo contendere* has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency. Fed. Rule Crim.Proc. 11 preserves this distinction in its requirement that *a court cannot accept a guilty plea 'unless it is satisfied that there is a factual basis for the plea'; there is no similar requirement for pleas of nolo contendere*, since it was thought desirable to permit defendants to plead nolo without making any inquiry into their actual guilt. See Notes of Advisory Committee to Rule 11.⁴

Id. (italics added).⁵ Thus, a *nolo* plea may be accepted regardless of what the trial court knows about the defendant's actual guilt.

Under an Alford plea, however, a trial court or a reviewing court must evaluate objective evidence to assure itself that, despite equivocation as to guilt or outright protestations of innocence, there is a basis to conclude that the defendant committed the charged crime and can be punished. This inquiry allows the court to conclude that the plea is knowing and voluntary, not fanciful. With a plea of *nolo contendere*,

⁴ The 1966 amendments to Rule 11 included the following: "A new sentence is added at the end of the rule to impose a duty on the court in cases where the defendant pleads guilty to satisfy itself that there is a factual basis for the plea before entering judgment. The court should satisfy itself, by inquiring of the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. . . . For a variety of reasons it is desirable in some cases to permit entry of judgment upon a plea of *nolo contendere* without inquiry into the factual basis for the plea. The new third sentence is not, therefore, made applicable to pleas of *nolo contendere*. It is not intended by this omission to reflect any view upon the effect of a plea of *nolo contendere* in relation to the plea of guilty." See <http://www.law.cornell.edu/rules/frcmp/NRule11.htm>.

⁵ The Supreme Court encouraged a factual basis inquiry as a way to guard against conviction of the innocent; it held, however, that such an inquiry was not constitutionally required. Id. at 38 n.10.

however, the trial court makes no inquiry at all as to factual guilt or innocence, so there is no basis (objective or otherwise) to ensure that the accused actually committed any crime, and that the plea is knowing and voluntary.

2. THERE IS NO GENERAL BAN ON *NOLO* OR ALFORD PLEAS IN CAPITAL CASES.

This distinction between *nolo* and Alford pleas explains why many courts were historically reluctant to accept common law *nolo* pleas, whereas most modern courts seem very willing to accept such pleas, even in serious and capital cases, if a strong factual basis exists.

There is now broad acceptance of Alford pleas in modern courts, as approximately 48 states permit Alford pleas. See Appendix A. Indiana and New Jersey forbid Alford pleas in any type of case. As for states that accept *nolo* pleas, the practice varies widely. Some states have engrafted a factual basis requirement onto the traditional *nolo* plea, thus blurring the distinction between the two pleas. Other states, and the federal courts, have kept *nolo* pleas and Alford pleas distinct, and simply do not require a factual basis for a *nolo* plea. See, e.g., Fed. Rule 11.

A centerpiece of Cross' argument is the repeated assertion that no state has ever allowed *nolo* pleas in a capital case.⁶ This is simply not

⁶ See Supp. Br. of Pet. at 2 ("[COURTS] ALL AGREE THAT [NOLO CONDENDERE PLEAS] MAY NOT BE ACCEPTED IN CAPITAL CASES"; at 3 ("...there has never

true. At least eight states have accepted *nolo* or Alford pleas in capital cases; almost one-quarter of the 35 states that have a death penalty.⁷

In the 26 other states, rules and statutes seem to permit Alford pleas but there appear to have been no appellate cases in those states where an Alford plea was entered in a capital case. This may be due to the fact that Alford pleas are rare in capital cases, or it may be that some appellate decisions simply do not mention the fact that guilt was determined by Alford plea, or it may be that some cases were not appealed because the death penalty was not imposed by the jury. In any event, no state that generally accepts Alford pleas has rejected such a plea in a capital case. Only Georgia and Louisiana allow Alford pleas but prohibit them by statute in capital cases. See Appendix A.

Thus, it appears that many states that permit capital punishment also permit the taking of an Alford plea in a capital case. Whatever historical antipathy there might have been toward common law *nolo* pleas in serious cases, that antipathy does not continue in modern courts, even as to guilty pleas when the death penalty might be imposed. This modern

been any disagreement with the per se rule that a *nolo contendere* plea may never be accepted in a capital case."); at 7 ("...all courts, both in England and in this country, have always limited the acceptability of *nolo contendere* pleas to 'a case not capital.'" (bold, italics and quotes in original)).

⁷ See Appendix A (Delaware, Florida, Kansas, Nebraska, Oklahoma, South Carolina, Texas,* Virginia; see note in table as to Texas).

trend is perfectly understandable given that modern courts do, and can, assess the propriety of an Alford guilty plea, whereas common law courts could not, or did not. Cross is mistaken to claim that there is a general ban on Alford pleas in capital cases.

3. LEGISLATIVE AUTHORIZATION IS NOT NEEDED TO TAKE AN ALFORD PLEA IN A CAPITAL CASE.

Cross argues that because the Washington legislature has never authorized *nolo* pleas this Court must conclude that the legislature has prohibited Alford pleas in capital cases. Supp. Br. at 10. This argument proves nothing as it involves a false comparison. As discussed above, *nolo* pleas and Alford pleas are different, so a lack of statutory authority for *nolo* pleas cannot logically preclude use of an Alford plea. At least six other states accept Alford pleas but do not recognize *nolo* pleas, showing that different rules apply to different types of pleas.⁸

Also, modern plea practice in Washington is governed by CrR 4.2, not by statute. See Response to PRP at 215-19. If the Washington legislature wanted to preclude any type of Alford plea it would have to pass a statute expressly limiting CrR 4.2 in this manner. In the decades since CrR 4.2 was passed, no such legislation has been forthcoming. Moreover, the legislature has not outlawed Alford pleas in capital cases in

⁸ See Appendix A (Alabama, Idaho, Kentucky, Minnesota, Missouri, New York).

spite of the press coverage in Cross' trial eight years ago and the published opinion of his direct appeal three years ago in which this Court affirmed his judgment and sentence. There is simply no basis to conclude that the Washington legislature is opposed to the courts accepting Alford pleas in capital cases.

4. **COMPARING ALFORD PLEAS TO BENCH TRIALS DOES NOT ADVANCE CROSS' ARGUMENT.**

Cross argues that because bench trials were *once* prohibited in capital cases a judge may not accept an Alford plea in a capital case. Supp. Br. at 10-13. This argument, based on repealed statutes, is unpersuasive because Washington's present death penalty statute expressly 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..."). Thus, applying Cross' logic, Alford pleas can be accepted because bench trials *are* permitted.

Still, Cross' argument suffers the fallacy of faulty comparison, as it ignores the many distinctions between bench trials and Alford pleas. The purpose of a bench trial is to determine beyond a reasonable doubt whether a defendant is guilty of each element of the crime. Thus, in a bench trial, the judge reviews a body of evidence and finds facts, i.e.,

decides what is true and what is not true, which evidence is to be accepted and which is to be rejected. The judge then decides whether the facts constitute the crime charged.

In contrast, the purpose of the Alford plea is to allow the defendant to enter a *guilty plea* when he deems it to be in his self-interest, even though he does not wish to admit guilt. State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976) (Alford plea may be ambiguous but it is not "equivocal" because its purpose is clear); State v. Osborne, 102 Wn.2d 87, 91, 684 P.2d 683, 687 (1984); In re Montoya, 109 Wn.2d 270, 744 P.2d 340 (1987). Alford pleas are, for purposes of adjudicating guilt, exactly like any other guilty plea. By entering the plea, the defendant expresses his willingness NOT to contest the facts and he consents to the entry of judgment and sentence on the conviction. When a judge accepts an Alford plea, the defendant's plea establishes guilt and the judge simply decides whether, in light of the ambiguity in his plea, the facts show a substantial likelihood that a jury would find the defendant guilty beyond a reasonable doubt. If the facts are strong, there is reason to conclude that the defendant's choice is knowing and voluntary. The judge does not, however, review the evidence to determine guilt or to decide what happened as to contested facts. See State v. Keene, 630 N.W.2d 579, 581 (Iowa 2001) ("[T]he trial court is not required to extract a confession from

the defendant. Instead, it must only be satisfied that the facts support the crime, not necessarily that the defendant is guilty"). An Alford plea is a guilty plea, not a trial, so even if Washington still banned bench trials in capital cases, Cross' argument would be inapposite.

5. THIS CASE SHOWS THAT AN ALFORD PLEA CAN BE APPROPRIATE IN A CAPITAL CASE.

Cross insisted on pleading guilty in this case because he quite properly realized that the jury was going to convict him of aggravated first degree murder. He realized a plea was to his advantage because then 14-year-old Melissa would not have to appear and testify before the jury, the over-all quantum of evidence presented would be reduced, and he could argue that he had taken some degree of responsibility for the crime, even as he argued that the crimes were not "planned." This was a shrewd tactical decision that allowed Cross to argue for leniency while avoiding the full brunt of the State's evidence.

The Honorable Joan DuBuque did not lightly accept Cross' proposed strategy and the State was reluctant too.⁹ Before accepting Cross' plea, the court asked for briefing on whether the plea was legally permitted. The parties told the court they could find no authority prohibiting an Alford plea, and the State submitted a case holding that the

⁹ The prosecutor told the court that he would rather present the State's case at trial than create appellate issues by accepting a questionable guilty plea. CP 1200.

plea was allowed. CP 1638-47 (defense brief); CP 1171-78 (state's brief, citing State v. Ray, 310 S.C. 431, 427 S.E.2d 171 (1993)). The court then considered a wealth of information before accepting Cross' guilty plea to ensure that there was a factual basis for the plea and to ensure that it was knowing and voluntary. CP 1212-1625. Included were photographs, audio recordings of the defendant's confession, detailed witness statements, reports of scientific analysis, and detailed autopsy reports. CP 1213-14 (Table of Contents for documents considered by the court; attached to this brief as Appendix B). Such a quantity and quality of information would never have been available to a common law justice of the peace. But, it was available to the trial court, and it allowed the court to conclude that Cross was correct when he said that he certainly would be convicted, and that it was to his advantage to enter a guilty plea.

Cross suggests that the factual basis requirement adds nothing because "neither party has any incentive to inform the Court of the facts which suggest that the defendant is *not* really guilty." Supp. Br. at 16.

First, the argument proves too much because it applies with equal force to straight pleas. A defendant who is "admitting" to an offense has no reason to point out facts that illustrate his innocence. Yet, guilty pleas are clearly permitted in capital cases because the court can assess the

propriety of the plea by examining the factual basis for that plea. State v. Sagastegui, 135 Wn.2d 67, 80, 954 P.2d 1311 (1998).

Second, to the extent this argument is a variant on Cross' earlier claim that he and his lawyers "lied" in order to fool the trial judge into accepting his Alford plea, it should be rejected. Supp. Br. at 16 n.20; PRP at 67. A defendant could just as easily lie to the court in "admitting" the crime when he enters a straight plea. Thus, banning Alford pleas because a defendant might lie would require banning straight pleas, too. Neither ban would be appropriate. The factual basis requirement ensures that trial courts may assess the veracity of the defendant's assertions and the voluntariness of his plea. Moreover, a defendant who commits a fraud on the court cannot be allowed to profit from that fraud. See State v. Hardesty, 129 Wn.2d 303, 312-13, 915 P.2d 1080 (1996). To the extent Cross wishes to argue that he lied to trick the judge into accepting his Alford plea, he should not be heard to complain that his fraud succeeded, and that the plea is legally unavailable.¹⁰

Third, Cross ignores this Court's prior authority holding that under Washington's court rules, a defendant has an absolute right to plead guilty if the requirements of the rule are satisfied. State v. Martin, 94 Wn.2d 1,

¹⁰ The State has earlier stated its reasons for believing that Cross did not lie to the trial court. See Response to PRP at 28-29, 37-39.

6, 614 P.2d 164 (1980). Given this authority, and the paucity of any authority banning Alford pleas in capital cases, the trial court would likely have committed error by refusing Cross' plea. See State v. Hubbard, 106 Wn. App. 149, 22 P.3d 296 (2001) (trial court erred in refusing Alford plea simply because charges were serious). Cross would certainly have claimed post-conviction that the trial court violated his right to plead guilty, to his detriment, since the jury considered damaging testimony it otherwise would not have heard. The trial court properly avoided this difficulty and followed the law as set forth in the Washington rules of court and this Court's decisions. This Court should not announce a change in the law in this collateral attack when the trial court followed the existing rules.

Finally, Cross has changed the remedy he seeks, without comment or analysis. Compare PRP at 197, 219-20 (asking that death penalty not be imposed) with Supp. Br. at 20 (suggesting that remedy is to withdraw the plea). Withdrawal of a guilty plea is permitted only to prevent a manifest injustice. CrR 4.2(f); State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974) ("manifest injustice" is one "that is obvious, directly observable, overt, not obscure" and is a "demanding standard"). Cross has the burden in this PRP to establish prejudice and to meet the demanding standard of showing a "manifest injustice." He has not even attempted to

prove either. In fact, a manifest injustice would occur if Cross' were permitted to withdraw his plea. His new request to withdraw his guilty plea should be denied.

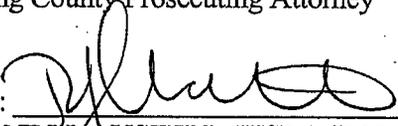
D. CONCLUSION

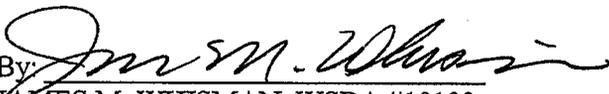
Dayva Cross was provided exactly what he insisted upon: the opportunity to plead guilty and then to ask a jury to spare his life. His attack on his Alford plea is baseless, and should be rejected.

DATED this 8th day of June, 2009.

Respectfully submitted,

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By: 
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APPENDIX A

State	Alford (rule / statute / case)	Nolo (rule / statute / case)	Capital Cases
ALABAMA	Allows <u>Alford</u> pleas. <u>Pierce v. State</u> , 484 So. 2d 506, 508 (Ala. Crim. App. 1985). <u>Allison v. State</u> , 495 So. 2d 739 (Ala. Crim. App. 1986).	<i>Nolo contendere</i> pleas not allowed. May v. Lingo, 167 So. 2d 267, 270 (Ala. 1964).	
ALASKA	<u>Alford</u> guilty plea is permitted with factual basis finding. <u>Miller v. State</u> , 617 P.2d 516, 518 n.8 (Alaska 1980); Alaska R. Crim. P. 11(f).	A defendant may plead <i>nolo contendere</i> ; factual basis is not required b/c it would "destroy[] the unique purpose of the nolo plea, which is that the issue of guilt shall not be contested." <u>Miller v. State</u> , 617 P.2d 516, 518 n.8 (Alaska 1980); Alaska R. Crim. P. 11(a).	No death penalty
ARIZONA	<u>Alford</u> plea permitted. <u>State ex rel. McDougall v. Nastro</u> , 166 Ariz. 108, 109, 800 P.2d 974, 975 (Ariz. 1990). <u>State v. Fowler</u> , 137 Ariz. 381, 382, 670 P.2d 1205, 1206 (Ariz. Ct. App. 1983).	Allows <i>nolo contendere</i> pleas. <u>Wilson v. Riley Whittle, Inc.</u> , 145 Ariz. 317, 323, 701 P.2d 575, 581 (Ariz. Ct. App. 1984). Ariz. R. Crim. P. 17.1(a)(1).	
ARKANSAS	<u>Alford</u> plea permitted. <u>Davis v. State</u> , 366 Ark. 401, 402, 235 S.W.3d 902, 903 (Ark. 2006).	Allows <i>nolo contendere</i> pleas. Ark. R. Crim. P. 24.3.	
CALIFORNIA	<u>Alford</u> and <i>nolo contendere</i> pleas may be accepted if there is a factual basis. <u>In re Alvernaz</u> , 2 Cal. 4th 924, 939 n.9, 830 P.2d 747, 757 n.9, 8 Cal. Rptr. 2d 713, 723 n.9 (Cal. 1992).	<i>Nolo contendere</i> is an allowable plea. Cal Penal Code § 1016(3).	
COLORADO	Allows <u>Alford</u> pleas. <u>People v. Venzor</u> , 121 P.3d 260, 261 (Colo. App. 2005).	<i>Nolo contendere</i> Pleas are available. Colo. Crim. P. 11(a). <u>People v. Canino</u> , 508 P.2d 1273, 1274 (Colo. 1973) ("There is no difference between a plea of <i>nolo contendere</i> and a plea of guilty for sentencing purposes.").	

State	Alford (rule / statute / case)	Nolo (rule / statute / case)	Capital Cases
CONNECTICUT	<p>Alford pleas are allowed.</p> <p><u>State v. Faraday</u>, 268 Conn. 174, 205, 842 A.2d 567, 588 (Conn. 2004).</p> <p><u>State v. Amarillo</u>, 198 Conn. 285, 503 A.2d 146 (Conn. 1986).</p>	<p><i>Nolo contendere</i> pleas are allowed.</p> <p>Conn. R. Super. Ct. § 37-7.</p> <p><u>Anonymous v. Warden</u>, 36 Conn. Supp. 168, 415 A.2d 764 (Conn. Super. Ct. 1980).</p>	
DELAWARE	<p>Permits Alford pleas.</p> <p><u>Robinson v. State</u>, 291 A.2d 279, 281 (Del. 1972).</p> <p><u>Fromal v. State</u>, 399 A.2d 529 (Del. 1979).</p>	<p><i>Nolo contendere</i> pleas are allowed.</p> <p>Del. Super. Ct. R. Crim. P. 11(a)(1).</p>	<p><u>Pennell v. State</u>, 604 A.2d 1368 (Del. 1992) (defendant pled <i>nolo contendere</i> and was sentenced to death).</p>
FLORIDA	<p>Accepts Alford pleas.</p> <p><u>Boykin v. Garrison</u>, 658 So. 2d 1090, 1090-1091 (Fla. Dist. Ct. App. 4th Dist. 1995).</p> <p><u>Rigabar v. Broome</u>, 658 So. 2d 1038, 1040-1041 (Fla. Dist. Ct. App. 4th Dist. 1995) (discretion of the judge to accept "best interest" pleas ends when express elements (voluntary and factual basis) have been met and the state agrees to the plea. ("best interests" does not mean a plea deal)).</p> <p>Fla. R. Crim. P. 3.170. Fla. R. Crim. P. 3.171. Fla. R. Crim. P. 3.172(d) (allows defendants to plea in their "best interest" while maintaining innocence).</p>	<p><i>Nolo contendere</i> pleas are allowed.</p> <p>Fla. R. Crim. P. 3.170(a).</p>	<p>History:</p> <p>Historically Florida allowed <i>nolo</i> pleas in capital cases. <u>Peel v. State</u>, 150 So. 2d 281 (Fla. Dist. Ct. App. 2d Dist. 1963).</p> <p>For a short period of time <i>nolo</i> pleas were disallowed in capital cases because it conflicted with a Florida statute. <u>Smith v. State</u>, 197 So.2d 497, 499 (Fla. 1967); <u>Roberts v. State</u>, 199 So.2d 340, 342 (Fla. Dist. Ct. App. 2d Dist. 1967).</p> <p>When the relevant statute was repealed, the court held that <i>nolo</i> pleas were again allowed in capital cases. <u>Seay v. State</u>, 286 So. 2d 532, 536 (Fla. 1973); <u>Slater v. State</u>, 316 So. 2d 539 (Fla. 1975).</p>
GEORGIA	<p>Permits Alford pleas.</p> <p><u>Goodman v. Davis</u>, 249 Ga. 11, 287 S.E.2d 26 (Ga. 1982).</p>	<p>May plead <i>nolo contendere</i> in all felony cases EXCEPT capital cases.</p> <p>GA. CODE ANN. § 17-7-95(a).</p>	<p>Generally, <i>nolo contendere</i> pleas are not allowed in capital cases but accepting a <i>nolo</i> plea in a capital case can be "induced" or harmless error where the defendant does not receive the death penalty.</p> <p><u>Fortson v. Hopper</u>, 242 Ga. 81, 82-84, 247 S.E.2d 875, 876-877 (Ga. 1978).</p>

State	Alford (rule / statute / case)	Nolo (rule / statute / case)	Capital Cases
HAWAII	Accepts <u>Alford</u> pleas. <u>State v. Smith</u> , 61 Haw. 522, 606 P.2d 86 (Haw. 1980).	May plead <i>nolo contendere</i> . Haw. R. Penal P. 11(a)(1). <u>State v. Gomes</u> , 79 Haw. 32, 897 P.2d 959 (Haw. 1995).	No death penalty
IDAHO	Accepts <u>Alford</u> pleas. <u>Sparrow v. State</u> , 102 Idaho 60, 61-62, 625 P.2d 414, 415 (Idaho 1981).	<i>Nolo contendere</i> pleas not recognized; distinguishes between <i>nolo</i> and <u>Alford</u> . <u>State v. Salisbury</u> , 143 Idaho 476, 479, 147 P.3d 108, 111 (Idaho Ct. App. 2006).	
ILLINOIS	Accepts <u>Alford</u> pleas. <u>People v. Barker</u> , 83 Ill. 2d 319, 331, 415 N.E.2d 404, 410 (Ill. 1980).	Plea of <i>nolo contendere</i> is available only for violations of income tax law. 725 ILL. COMP. STAT. 5/113-4.1.	
INDIANA	Rejects <u>Alford</u> pleas. <u>Ross v. State</u> , 456 N.E.2d 420, 423 (Ind. 1983).	<i>Nolo contendere</i> pleas not allowed. <u>Corbin v. State</u> , 713 N.E.2d 906 (Ind. Ct. App. 1999).	
IOWA	Accepts <u>Alford</u> Pleas. <u>State v. Hansen</u> , 344 N.W.2d 725, 728 (Iowa Ct. App. 1983).	No pertinent cases or statutes.	No death penalty
KANSAS	Accepts <u>Alford</u> Pleas. <u>State v. McCray</u> , 32 Kan. App. 2d 673, 87 P.3d 369 (Kan. Ct. App. 2004). <u>State v. Dillon</u> , 242 Kan. 410, 414, 748 P.2d 856, 859-860 (Kan. 1988).	The <i>nolo contendere</i> plea is available. KAN. STAT. ANN. § 22-3208(1).	<u>Hicks v. Oliver</u> , 523 F. Supp. 64, 65 (D. Kan. 1981) (defendant plead <i>nolo contendere</i> in a capital murder case; "the Court informed him that the maximum sentence which could be imposed was death by hanging, and that he had the right to have his guilt determined beyond a reasonable doubt by a jury.").
KENTUCKY	Allows <u>Alford</u> pleas. Equates them to guilty pleas saying <u>Alford</u> is a "procedural device". <u>Commonwealth v. Corey</u> , 826 S.W.2d 319, 321 (Ky. 1992).	<u>Commonwealth v. Hillhaven Corp.</u> , 687 S.W.2d 545, 548-549 (Ky. Ct. App. 1984) (expressly rejects <i>nolo</i> until the legislature allows it).	KY. REV. STAT. ANN. § 532.025 (seems to suggest that since an <u>Alford</u> is a guilty plea that it would be allowed in a capital case).
LOUISIANA	Allows <u>Alford</u> ("best interest") pleas. <u>State v. Blanchard</u> , 786 So. 2d 701, 702 (La. 2001).	<i>Nolo contendere</i> plea accepted. LA CODE CRIM. PROC. ANN. art. 556.1.	<i>Nolo</i> pleas are forbidden in capital cases. LA CODE CRIM. PROC. ANN. art. 552(4).

State	Alford (rule / statute / case)	Nolo (rule / statute / case)	Capital Cases
MAINE	Accepts <u>Alford</u> pleas. <u>Oken v. State</u> , 1998 ME 196, 716 A.2d 1007. <u>Cote v. State</u> , 286 A.2d 868, 875 (Me. 1972).	A defendant may plead <i>nolo contendere</i> . Me. R. Crim. P. 11(a)(1). <u>State v. Lambert</u> , 2001 ME 113, 775 A.2d 1140.	No death penalty
MARYLAND	Permits <u>Alford</u> pleas. <u>Banegura v. Taylor</u> , 541 A.2d 969 (Md. 1988).	A defendant may plead <i>nolo contendere</i> . MD. CODE ANN., [CRIM. CAUSES] § 4-242(a). <u>Williams v. State</u> , 10 Md. App. 570, 271 A.2d 777 (Md. Ct. Spec. App. 1970).	
MASSACHUSETTS	Accepts <u>Alford</u> pleas. <u>United States v. Kobrosky</u> , 711 F.2d 449, 452 (1st Cir. Mass. 1983). <u>Commonwealth v. Lewis</u> , 399 Mass. 761, 762, 506 N.E.2d 891, 892 (Mass. 1987).	<i>Nolo contendere</i> pleas allowed. Mass. R. Crim. P. 12(a)(1). <u>Commonwealth v. MacNeil</u> , 23 Mass. App. Ct. 1022, 505 N.E.2d 558 (Mass. App. Ct. 1987).	No death penalty.
MICHIGAN	Allows <u>Alford</u> pleas. <u>People v. Clark</u> , 129 Mich. App. 119, 125-126, 341 N.W.2d 248, 252 (Mich. Ct. App. 1983). <u>People v. Mauch</u> , 397 Mich. 646, 667, 247 N.W.2d 5, 14 (Mich. 1976). <u>People v. Wolff</u> , 389 Mich. 398, 412, 208 N.W.2d 457, 463 (Mich. 1973).	A defendant may plead <i>nolo contendere</i> . Mich. Ct. R. 6.301(a). <u>People v. Holmes</u> , 181 Mich. App. 488, 449 N.W.2d 917 (Mich. Ct. App. 1989).	No death penalty.
MINNESOTA	Expressly allows for <u>Alford</u> pleas. <u>State v. Goulette</u> , 258 N.W.2d 758, 760 (Minn. 1977).	Does not recognize <i>nolo contendere</i> pleas. <u>State v. Brown</u> , 758 N.W.2d 594, 599 (Minn. Ct. App. 2008). <u>State v. Kiewel</u> , 166 Minn. 302, 207 N.W. 646 (Minn. 1926).	No death penalty.

State	Alford (rule / statute / case)	Nolo (rule / statute / case)	Capital Cases
MISSISSIPPI	Allows <u>Alford</u> pleas. <u>Cole v. State</u> , 918 So. 2d 890, 893 (Miss. Ct. App. 2006). <u>Reynolds v. State</u> , 521 So. 2d 914, 916 (Miss. 1988).	A defendant may plead <i>nolo contendere</i> . Miss. Unif. Cir. & County Ct. R. 8.04(a)(1) <u>Bruno v. Cook</u> , 224 So. 2d 567 (Miss. 1969) (suggest that <i>nolo contendere</i> is not allowed for felonies, but if it is pled knowingly and voluntarily then it will be upheld). <u>Welch v. State</u> , 958 So.2d 1288, 1289 (Miss. Ct. App. 2007) (same).	
MISSOURI	Accepts <u>Alford</u> pleas. <u>Brown v. State</u> , 45 S.W.3d 506, 508 (Mo. Ct. App. 2001).	<i>Nolo contendere</i> pleas not allowed. <u>State v. Norman</u> , 380 S.W.2d 406 (Mo. 1964).	
MONTANA	Accepts <u>Alford</u> pleas. <u>State v. Cameron</u> , 253 Mont. 95 (Mont. 1992).	<i>Nolo contendere</i> pleas allowed with consent of the court and state. MONT. CODE ANN. § 46-12-204(1). <u>State v. Bullplume</u> , 2009 Mont. 145 (Mont. 2009).	
NEBRASKA	Accepts <u>Alford</u> pleas of guilty. <u>State v. Rhodes</u> , 445 N.W.2d 622, 625 (Neb. 1989).	May plead <i>nolo contendere</i> ; factual basis requirement might apply. <u>State v. Irish</u> , 223 Neb. 814, 394 N.W.2d 879, 883 (Neb.1986); NEB. REV. STAT. ANN § 29-1819.01.	<u>Holtan v. Black</u> , 838 F.2d 984 (8th Cir. Neb. 1988) (capital case where defendant was sentenced to death after the submission of a <i>nolo contendere</i> plea).
NEVADA	We hold that a plea entered pursuant to <u>Alford</u> is a plea of <i>nolo contendere</i> . <u>State v. Gomes</u> , 930 P.2d 701, 703 (Nev. 1996).	<i>Nolo contendere</i> pleas are allowed. NEV. REV. STAT. ANN. § 174.035(1). <u>Mathis v. Warden Nev. State Penitentiary</u> , 471 P.2d 233 (Nev. 1970).	
NEW HAMPSHIRE	Allows pleas pursuant to <u>Alford</u> . <u>Wellington v. Commissioner, State Dep't of Corrections</u> , 666 A.2d 969 (N.H. 1995).	"A plea of <i>nolo contendere</i> may be accepted in any criminal case, and when such a plea is accepted, the court or justice may enter a finding of guilty upon such plea." N.H. REV. STAT. ANN § 605:6.	

State	Alford (rule / statute / case)	Nolo (rule / statute / case)	Capital Cases
NEW JERSEY	Does not permit <u>Alford</u> pleas. <u>Dep't of Law & Pub. Safety, Div. of Gaming Enforcement v. Gonzalez</u> , 273 N.J. Super. 239, 246, 641 A.2d 1060, 1063 (N.J. Super. Ct. App. Div. 1994).	Historically allowed <i>nolo contendere</i> ("non vult") pleas. <u>State v. Deutsch</u> , 34 N.J. 190, 195, 168 A.2d 12, 15 (N.J. 1961).	No death penalty.
NEW MEXICO	<u>Alford</u> pleas are allowed. <u>State v. Herrera</u> , 2001 NMCA 73, 131 N.M. 22, 33 P.3d 22. <u>State v. Hodge</u> , 118 N.M. 410, 882 P.2d 1 (N.M. 1994).	Accepts "no contest" (<i>nolo</i>) pleas. N.M. Dist. Ct. R. Crim. P. 5-304(A). <u>State v. Sharpe</u> , 81 N.M. 637, 471 P.2d 671 (N.M. Ct. App. 1970).	No death penalty as of 3/2009
NEW YORK	Allows <u>Alford</u> pleas. <u>People v. Hicks</u> , 608 N.Y.S.2d 543, 201 A.D.2d 831 (N.Y. App. Div. 1994).	<i>Nolo contendere</i> pleas not allowed. N.Y. [CRIM. PROC.] LAW § 220.10 (Consol. 2009). <u>People v. Daiboch</u> , 265 N.Y. 125, 191 N.E. 859 (N.Y. 1934).	No death penalty.
NORTH CAROLINA	Accepts <u>Alford</u> pleas. <u>State v. Alston</u> , 534 S.E.2d 666 (N.C. Ct. App. 2000). <u>State v. McClure</u> , 185 S.E.2d 693, 696 (N.C. 1972).	A defendant may plead no contest. N.C. GEN. STAT. § 15A-1011(a). <u>State v. Adams</u> , 178 S.E.2d 72 (N.C. 1970).	
NORTH DAKOTA	Accepts <u>Alford</u> Pleas. <u>State v. Lium</u> , 2008 ND 33, 744 N.W.2d 775. <u>State v. Bates</u> , 2007 ND 15, 726 N.W.2d 595.	No pertinent cases or statutes.	No death penalty.
OHIO	State accepts <u>Alford</u> Pleas. <u>State v. Padgett</u> , 586 N.E.2d 1194, 1199 (Ohio Ct. App. 1990).	Allows <i>nolo contendere</i> ("no contest") pleas. Ohio Crim. R. 11(a). <u>State v. Denton</u> , No. 11376, 1989 Ohio App. LEXIS 4948 (Ohio Ct. App. Dec. 29, 1989).	
OKLAHOMA	Accepts <u>Alford</u> plea. <u>Ocampo v. State</u> , 778 P.2d 920 (Okla. Crim. App. 1989).	<i>Nolo contendere</i> pleas are permitted OKLA. STAT. ANN. tit. 22, § 513.	<u>Carpenter v. State</u> , 929 P.2d 988 (Okla. 1996) (defendant plead <i>nolo contendere</i> and was sentenced to death). <u>Braun v. State</u> , 909 P.2d 783 (Okla. Crim. App. 1995) (capital case where the defendant plead <i>nolo contendere</i> and was sentenced to death).

State	Alford (rule / statute / case)	Nolo (rule / statute / case)	Capital Cases
OREGON	Allows <u>Alford</u> Pleas. <u>State v. Sullivan</u> , 197 Ore. App. 26, 104 P.3d 636 (Or. Ct. App. 2005).	Defendant may plea "no contest". OR. REV. STAT. ANN. § 135.335(1)(c).	
PENNSYLVANIA	Accept pleas with assertion of innocence but courts simply consider it to be a guilty plea and do not often refer to it as an <u>Alford</u> plea. <u>Commonwealth v. Fluharty</u> , 429 Pa. Super. 213, 224, 632 A.2d 312, 313 (Pa. Super. Ct. 1993).	A defendant may plead, with the consent of the judge, <i>nolo contendere</i> . Pa. R. Crim. P. 590(A)(2).	<u>Com. ex rel. Monaghan v. Burke</u> , 74 A.2d 802 (Pa. Super. Ct. 1950) (plea of <i>nolo contendere</i> was not admissible in a capital case).
RHODE ISLAND	Accepts <u>Alford</u> pleas. <u>Armenakes v. State</u> , 821 A.2d 239, 244 (R.I. 2003). <u>State v. Fontaine</u> , 559 A.2d 622, 624 (R.I. 1989).	A defendant may plead, with the consent of the court, <i>nolo contendere</i> . R.I. Super. Ct. R. Crim. P. 11. <u>State v. Ouimette</u> , No. PM/98-4646 and P2/75-1436, 2000 R.I. Super. LEXIS 10 (R.I. Super. Ct. 2000).	No death penalty
SOUTH CAROLINA	Accepts <u>Alford</u> pleas. <u>Gaines v. State</u> , 517 S.E.2d 439, 440 (S.C. 1999).	<u>Kibler v. State</u> , 227 S.E.2d 199, 201 (S.C. 1976) (allows a <i>nolo contendere</i> plea in a felony case, but states they feel it is best left to the legislature to determine if this type of plea is allowed for felony cases).	<u>State v. Ray</u> , 427 S.E.2d 171 (S.C. 1993) (capital case where <u>Alford</u> was pled and defendant received death penalty).
SOUTH DAKOTA	Accepts <u>Alford</u> pleas. <u>State v. Engelmann</u> , 541 N.W.2d 96, 100 (S.D. 1995).	A defendant may plead <i>nolo contendere</i> . S.D. CODIFIED LAWS § 23A-7-2(4).	
TENNESSEE	Allows <u>Alford</u> pleas. <u>State v. Crowe</u> , 168 S.W.3d 731, 746 (Tenn.2005) (holding that <u>Alford</u> plea and <i>nolo contendere</i> plea are different and that factual basis is not <i>required</i> for <i>nolo contendere</i> plea).	A defendant may plead <i>nolo contendere</i> without a factual basis but judge may exercise discretion and require a factual basis. <u>State v. Crowe</u> , 168 S.W.3d 731, 747 n.18 (Tenn.2005) Tenn. R. Crim. P. RULE 11(a)(1).	

State	Alford (rule / statute / case)	Nolo (rule / statute / case)	Capital Cases
TEXAS*	<u>Johnson v. State</u> , 478 S.W.2d 954, 956 (Tex. Crim. App. 1972) (cites <u>Alford</u> in allowing the defendant to enter a guilty plea despite his protestations of innocence).	A plea of <i>nolo contendere</i> [is permitted], [and] the legal effect of which shall be the same as that of a plea of guilty. TEX. CODE CRIM. PROC. ANN. art. 27.02(5).	Texas appears to allow <u>Alford</u> pleas in capital cases but requires that <i>any</i> type of guilty plea be entered in front of the jury. See 23 Tex. Jur.3d Criminal Law § 2769 ("Capital Cases. Although it has been held that a court errs in accepting a plea of guilty in a capital case, the current statute regarding making of a plea of guilty or nolo contendere -- unlike the statute regarding waiver of jury trial -- makes no distinction between capital and non-capital cases and a defendant's guilty plea to a capital offense has been upheld where other requirements as to accepting a guilty plea are met.") (footnotes omitted). TEX. CODE CRIM. PROC. ANN. art. 1.13.
UTAH	Accepts pleas pursuant to <u>Alford</u> . <u>State v. Stilling</u> , 856 P.2d 666, 670 (Utah Ct. App. 1993).	Plea of "no contest" (<i>nolo</i>) is permitted. UTAH CODE ANN. § 77-13-1(c). <u>State v. Smith</u> , 812 P.2d 470 (Utah Ct. App. 1991).	
VERMONT	<u>Alford</u> pleas are accepted. <u>State v. Coleman</u> , 160 Vt. 638, 632 A.2d 21 (Vt. 1993).	A defendant may plead <i>nolo contendere</i> . Vt. R. Crim. P. 11(a)(1). <u>In re Parks</u> , 956 A.2d 545 (Vt. 2008).	No death penalty
VIRGINIA	Permits <u>Alford</u> pleas. <u>Perry v. Commonwealth</u> , 533 S.E.2d 651 (Va. Ct. App. 2000).	In misdemeanor and felony cases the court shall not refuse to accept a plea of <i>nolo contendere</i> . Va. Code Ann. § 19.2-254.	<u>Reid v. Johnson</u> , 333 F. Supp. 2d 543 (E.D. Va. 2004) (defendant plead <u>Alford</u> and was sentenced to death). Historical View: <u>Roach v. Com.</u> , 162 S.E. 50 (Va. 1932) (pleas of <i>nolo contendere</i> are not to be accepted in capital cases).

State	Alford (rule / statute / case)	Nolo (rule / statute / case)	Capital Cases
WASHINGTON	Accepts <u>Alford</u> pleas. <u>State v. Newton</u> , 87 Wn.2d 363, 552 P.2d 682 (1976). <u>State v. Osborne</u> , 102 Wn.2d 87, 91, 684 P.2d 683, 687 (1984).	<i>Nolo</i> plea not recognized.	
WEST VIRGINIA	Recognizes availability of <u>Alford</u> plea. <u>Kennedy v. Frazier</u> , 357 S.E.2d 43, 44 (W. Va. 1987).	A defendant may plead <i>nolo contendere</i> . W. Va. R. Crim. P. 11(a)(1). <u>Gibson v. McKenzie</u> , 163 W. Va. 615, 259 S.E.2d 616 (W. Va. 1979).	No death penalty
WISCONSIN	Expressly accepts <u>Alford</u> pleas. <u>State v. Garcia</u> , 532 N.W.2d 111, 114 (Wis. 1995).	<i>Nolo contendere</i> ("no contest") pleas allowed. WIS. STAT. ANN. § 971.06. <u>Witzel v. State</u> , 45 Wis. 2d 295, 172 N.W.2d 692 (Wis. 1969).	No death penalty
WYOMING	<u>Alford</u> pleas permitted. <u>Johnston v. State</u> , 829 P.2d 1179, 1180 (Wyo. 1992).	A defendant may plead <i>nolo contendere</i> . Wyo. R. Crim. P. 11(a)(1). <u>Davila v. State</u> , 831 P.2d 204 (Wyo. 1992).	

APPENDIX B

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KING COUNTY, WASHINGTON

OCT 23 2000

SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)

Plaintiff,)

vs.)

DAYVA CROSS,)

Defendant.)

NO. 99-1-02212-9

FACTUAL BASIS FOR ALFORD PLEA

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Table of Contents for Factual Basis for Alford Plea

1. Certification for Determination of Probable Cause
2. Scene diagram
3. Scene and Autopsy Photographs
4. Incident Report
5. Report of Forensic Scientist Kim Duddy
6. Report of Forensic Scientist Robin Bussoletti
7. Autopsy Reports for Anouchka Cross, Amanda Baldwin, and Salome Holly
8. King County Latent Lab Report
9. Order for Child Support

Statements made by the defendant, Dayva Cross

10. Statement to Detective Jim Doyon
11. Statement heard by Department of Adult Detention Officer Marshall Coolidge
(Defendant's statements to Sgt. Soule and Officer Silcox are contained in their reports below)
12. Answering machine message left by the defendant for Jeff Myers at 9:29 am on the date of the murders
13. Court's CrR 3.5 Findings and Conclusions
14. Court's Ruling, Findings and Conclusions as to the Defendant's Competency - Court ruled not necessary as a factual basis. Excluded.

Officer Statements and Detective Follow-up Reports

15. Officer Robert Henry
16. Detective Jim Doyon & Autopsy/Defendant Evidence List
17. Master Police Officer James Covey
18. Medic Bruce McLaughlin
19. Officer Greg Silcox plus the toxicology results of defendant's blood samples taken after arrest
20. Sergeant Bonnie Soule
21. Detective Ruby Robicheau
22. Detective Denny Gulla & Scene Evidence List
23. Detective Mike Mullinax
24. Captain David Maehren

Civilian statements

25. Mellissa Baldwin's statement to Det. Robicheau
26. Mellissa Baldwin's statement to Det. Robicheau and Tim Bradshaw
27. Mellissa Baldwin's statement to Defense counsel and investigators
28. Mellissa Baldwin's and Lori Schlahts' statements to 911
29. Rebecca Rodriguez's redacted statement to Thorson - Excluded by court.
30. Al Hardee's March 18, 1999 redacted statement to Det. Doyon

Page 1

31. Lou Ann Hardee's March 18, 1999 redacted statement to Det. Doyon
32. Joseph McElroy's statement to Det. Mullinax
33. Clyde Schlaht's statement to Det. Doyon
34. Statement of Snoqualmie Officer M.D. Johnson

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STATE OF WASHINGTON

2009 JUN -8 P 4: 10

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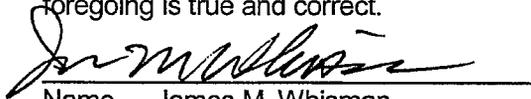
BY RONALD R. CARPENTER

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

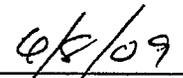
David Zuckerman Attorney for Amicus Curiae (Washington Assoc. of Criminal Defense Lawyers) 705 2 nd Avenue Suite 1300 Seattle, WA 98104-1797 David@DavidZuckermanLaw.com	Rita Griffith Attorney for Amicus Curiae (Washington Assoc. of Criminal Defense Lawyers) 4616 25 th Avenue NE PMB 453 Seattle, WA 98105-4523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

containing a copy of the Supplemental Brief of Respondent Re: Alford Plea of Guilty, 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


June 8, 2009

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, June 08, 2009 4:14 PM
To: 'Whisman, Jim'; Faulk, Camilla
Cc: Lobsenz, Jim; Todd Maybrown; David@DavidZuckermanLaw.com; Qriff4141@msn.com; Paul Weisser; Gilliam, Alice; Austell, Randi; Blam, Sarah; Pam Loginsky
Subject: RE: Dayva Cross, No. 79761-7 (capital case)

Rec. 6-8-09

From: Whisman, Jim [mailto:Jim.Whisman@kingcounty.gov]
Sent: Monday, June 08, 2009 4:13 PM
To: OFFICE RECEPTIONIST, CLERK; Faulk, Camilla
Cc: Lobsenz, Jim; Todd Maybrown; David@DavidZuckermanLaw.com; Qriff4141@msn.com; Paul Weisser; Gilliam, Alice; Austell, Randi; Blam, Sarah; Pam Loginsky
Subject: Dayva Cross, No. 79761-7 (capital case)

Dear Supreme Court Clerk,

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

James M. Whisman, WSBA No, 19109
Senior Deputy Prosecuting Attorney
Appellate Unit Chair
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206-296-9660