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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

In re the Personal Restraint of,

DAVYA CROSS,  
Petitioner.

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SUPREME COURT  
STATE OF WASHINGTON  
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BRIEF OF *AMICUS CURIAE* WASHINGTON ASSOCIATION OF  
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## TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. IDENTITY AND INTERESTS OF AMICUS.....	1
III. SUMMARY OF ARGUMENT.....	2
IV. STATEMENT OF THE CASE.....	4
V. ARGUMENT.....	4
A. AN ALFORD PLEA IS VALID ONLY WHEN THE DEFENDANT RECEIVES MEANINGFUL BENEFIT IN EXCHANGE FOR IT; THAT IS NEVER THE CASE WHEN THE PLEA LEAVES THE DEFENDANT EXPOSED TO THE DEATH PENALTY.....	4
B. AN ALFORD PLEA IS NOT SUFFICIENTLY RELIABLE TO SUPPORT A DEATH SENTENCE.....	12
C. THE WASHINGTON CONSTITUTIONAL RIGHT TO A JURY TRIAL SUPPORTS CROSS'S ARGUMENT THAT AN ALFORD PLEA IS TOO UNRELIABLE TO SUPPORT A DEATH SENTENCE. ....	15
1. Introduction.....	15
2. The Washington Constitution's Right to Trial by Jury is More Protective than the Sixth Amendment and Supports Prohibiting Alford Pleas in Capital Cases .....	16
VI. CONCLUSION .....	22

## TABLE OF AUTHORITIES

### Cases

<u>Bordenkircher v. Hayes</u> , 434 U.S. 357, 364, 98 S. Ct. 495, 54 L. Ed. 2d 604 (1978) .....	3
<u>Chaney v. Missouri</u> , 223 S.W.2d 200 (Mo.App. 2007).....	9
<u>Ford v. Wainwright</u> , 477 U.S. 399, 411, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986) .....	11
<u>Furman v. Georgia</u> , 408 U.S. 238, 92 S. Ct. 2726, 2760, 33 L. Ed. 2d 346 (1972) .....	11
<u>Gardner v. Florida</u> , 430 U.S. 349, 357, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) .....	12
<u>Hudson v. United States</u> , 272 U.S. 451, 453-54, 47 S. Ct. 127, 71 L. Ed. 347 (1926) .....	4
<u>In re Brown</u> , Washington Supreme Court Cause No. 82711-7 .....	1
<u>Kahn v. Chandler</u> , 2005 WL 2346955 (W.D. Ky. 2005).....	9
<u>Madison v. State</u> , 161 Wn.2d 85, 92-95, 163 P.3d 757 (2007) .....	14
<u>Mills v. Jones</u> , 1995 WL 9661 (5 <sup>th</sup> Cir. 1995).....	9
<u>North Carolina v. Alford</u> , 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) .....	passim
<u>Pasco v. Mace</u> , 98 Wn.2d 87, 96, 653 P.2d 618 (1982) .....	15
<u>Prokop v. Vasquez</u> , 1992 WL 338953 (9 <sup>th</sup> Cir. 1992).....	9
<u>Santobello v. New York</u> , 404 U.S. 257, 260-61, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971) .....	3
<u>Sofie v. Fibreboard Corp.</u> , 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989) .....	16

<u>State v. Adams</u> , 277 NC. 427, 178 S.E.2d 72 (1970).....	9
<u>State v. Baker</u> , 78 Wn.2d 327, 334-35, 474 P.2d 254 (1970).....	17
<u>State v. Bartholomew</u> , 101 Wn.2d 631, 640, 683 P.2d 1074 (1984).....	12
<u>State v. Coleman</u> , 1987 WL 14197 (Ohio App. 1987).....	9
<u>State v. Cross</u> , 156 Wn.2d 580, 600, 132 P.3d 80 (2007).....	10
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	15
<u>State v. Hicks</u> , 163 Wn.2d 477, 181 P.3d 831 (2008).....	13
<u>State v. Newton</u> , 87 Wn.2d 363, 552 P.2d 682 (1976).....	passim
<u>State v. Roberts</u> , 147 Wn.2d 471, 14 P.3d 713 (2000).....	1
<u>State v. Russell</u> , 125 Wn.2d 24, 61, 882 P.2d 747 (1994).....	18
<u>State v. Sagastegui</u> , 135 Wn.2d 67, 954 P.2d 1311 (1998).....	1
<u>State v. Schaaf</u> , 109 Wn.2d 1, 13-14, 743 P.2d 240 (1987).....	17
<u>State v. Smith</u> , 150 Wn.2d 135, 150, 75 P.3d 934 (2003).....	15
<u>State v. Strasburg</u> , 60 Wn. 106, 110 P.1020 (1910).....	17
<u>State v. Zhao</u> , 157 Wn.2d 188, 137 P.3d 835 (2006).....	8
<u>Summerlin v. Schriro</u> , 427 F.3d 623, 640-41 (9 <sup>th</sup> Cir. 2005).....	9
<u>Woodson v. North Carolina</u> , 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).....	11
<u>Zant v. Stephens</u> , 462 U.S. 862, 885. 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).....	11

**Statutes**

RCW 10.01.060.....	17
RCW 10.95.060.....	10

RCW 9A.04.060 .....16

**Other Authorities**

Albert W. Alschuler, The Defense Attorney’s Role in Plea Bargaining, 84 Yale L.J. 1179, 1292-98 (1975) .....8

Bilbas, Harmonizing Substantive Criminal Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas, 88 Cornell L.Rev. 1361, 1373 (2003).....6

Frank Easterbrook, Criminal Procedure as a Market System, 12 J. Legal Stud. 289, 308-09 (1983)..... 8

Levin, Nolo Contendere: Its Nature and Implications, 51 Yale L.Rev. 1255 (1946) .....4

Major Steven E. Wallburn, Should the Military Adopt an Alford-Type Guilty Plea?, 44 A.F.L. Rev. 119, 140-44, 160 (1998) ..... 8

Mnookin, Uncertain Bargains: The Rise of Plea Bargaining in America, 7 Stanford L.Rev. 1721, 1722-23 (2003).....3

Note, The Alford Plea: A Necessary but Unpredictable Tool for the Criminal Defendant, 72 Iowa L. Rev. 1063, 1073-74, 1086, 1089 (1987) .....8

Ross, The Entrenched Position of Plea Bargaining in United States Legal Practice, 54 Am.J.Comp.L. 717 (2006).....3

*Webster's Third New International Dictionary* 1190 (1993).....15

**Rules**

GR 14.1.....9

**Treatises**

4 Blackstone Commentaries on the Laws of England, 343-44 (1769) (online at <http://avalon.law.yale.edu>). .....19

**Constitutional Provisions**

Const. Art. 1, § 3 (due process) .....12  
Const. Art. 1, § 14 (cruel punishment) .....12  
Const., Art. I §22 (jury trial).....16, 17  
Const., Art. I, §21 (jury trial).....13, 14, 15, 19  
U.S. Const. amend. VI (jury trial).....16

## I. INTRODUCTION

The Washington Association of Criminal Defense Lawyers (“WACDL”) recognizes that Alford pleas are a valid plea bargaining tool in many cases. WACDL maintains, however, that they are never acceptable when the plea leaves the defendant exposed to the death penalty.

## II. IDENTITY AND INTERESTS OF AMICUS

WACDL is a statewide nonpartisan, not-for-profit, association made up of more than 1100 member-attorneys practicing criminal defense law in Washington State. The association’s general objective is to improve the quality and administration of justice throughout the state and the nation. Accordingly, WACDL has participated in death penalty litigation in Washington for many years, with this Court accepting its amicus briefs in several capital cases, including State v. Roberts, 147 Wn.2d 471, 14 P.3d 713 (2000); State v. Sagastegui, 135 Wn.2d 67, 954 P.2d 1311 (1998); and In re Brown, Washington Supreme Court Cause No. 82711-7.

WACDL has a long-standing interest in the protections contained in the state and federal constitutions, including due process, the Eighth Amendment’s prohibition against cruel and unusual punishment and the

Washington Constitution's prohibition on cruel punishment. The proper resolution of these questions is a matter of substantial importance to this group and its members. WACDL hopes that its experience in addressing these constitutional issues will assist the Court by providing additional relevant authority.

### III. SUMMARY OF ARGUMENT

Alford pleas are generally accepted today as a plea bargaining tool in Washington and other states. They have been accepted in capital cases when the defendant *avoids* the death penalty as a result of the plea. This case appears to be unique, however, in that the trial court accepted an Alford plea even though the defendant received no benefit and remained subject to the death penalty.

The Court should not accept Alford pleas under such circumstances for at least three reasons: 1) the rationale for accepting Alford pleas disappears when the defendant receives no benefit for the plea; 2) such pleas do not provide a sufficiently reliable factual basis for imposition of the death penalty; and 3) the Washington Constitution's strong protection for the right to a jury trial counsels against accepting Alford pleas in this setting.

#### IV. STATEMENT OF THE CASE

WACDL adopts the statement of the case from Cross's Brief in Support of Personal Restraint Petition.

#### V. ARGUMENT

A. AN ALFORD PLEA IS VALID ONLY WHEN THE DEFENDANT RECEIVES MEANINGFUL BENEFIT IN EXCHANGE FOR IT; THAT IS NEVER THE CASE WHEN THE PLEA LEAVES THE DEFENDANT EXPOSED TO THE DEATH PENALTY.

Plea bargaining has become a popular tool in criminal cases and this practice now dominates the day-to-day operation of the American criminal justice system. See Ross, The Entrenched Position of Plea Bargaining in United States Legal Practice, 54 Am.J.Comp.L. 717 (2006); Mnookin, Uncertain Bargains: The Rise of Plea Bargaining in America, 7 Stanford L.Rev. 1721, 1722-23 (2003). As the United States Supreme Court has explained, "by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S. Ct. 495, 54 L. Ed. 2d 604 (1978). See also Santobello v. New York, 404 U.S. 257, 260-61, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971).

Disposition of charges after plea bargaining is not only an essential part of the process but a highly desirable part . . . . It leads to prompt and largely final disposition of most criminal cases; . . . and, by shortening the time between charges and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Santobello, 404 U.S. at 261.

Pleas that do not admit guilt – whether they are described as “nolo pleas” or “Alford pleas” – are now recognized as a legitimate facet of the plea bargaining process. They are for most purposes the functional equivalent of a traditional plea of guilty.

At common law, a defendant could ask the Court to impose sentence without confessing guilt. See generally Hudson v. United States, 272 U.S. 451, 453-54, 47 S. Ct. 127, 71 L. Ed. 347 (1926). In modern times, this became the formal plea of nolo contendere. See, e.g., Levin, Nolo Contendere: Its Nature and Implications, 51 Yale L.Rev. 1255 (1946). See also Reynolds v. Donoho, 39 Wn.2d 451, 236 P.2d 552 (1951). However, such pleas were never permitted in capital cases. See Levin, supra, at 1258.

In 1970, the United States Supreme Court authorized what is now known as the Alford plea in North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). Henry Alford was indicted for first-

degree murder, a capital offense under North Carolina law. His lawyer interviewed several witnesses who led him to believe that Alford was guilty and would almost certainly be convicted at trial. Although there were no eyewitnesses to the killing itself, witnesses maintained that shortly before the victim was killed, Alford came home and picked up his gun, stated his intention to kill the victim, and later returned home and declared that he had carried out the killing. While Alford claimed that certain witnesses would substantiate his alibi, they only confirmed his guilt. Even so, Alford insisted that he had not committed the murder. At the same time, he accepted a plea bargain that allowed him to plead guilty to a reduced charge (second-degree murder) and thus avoid any possibility of a death sentence.

After the trial court accepted that plea bargain and imposed sentence, Alford sought to undo his agreement. In essence, Alford claimed that the plea was the product of coercion. The Supreme Court rejected these objections and explained that Alford's plea was certainly voluntary (the product of a "free and rational choice"), particularly because he was represented by competent counsel who advised him that the plea would be to his advantage. *Id.* at 28 n.2. If defendants were permitted to plead *nolo contendere* while refusing to admit guilt, the Court saw no

reason to bar Alford from pleading guilty while protesting his innocence. The Court noted that Alford's decision to plead guilty to a lesser charge when faced with "grim alternatives" was a reasonable choice that the courts should honor. Id. at 35-36.

After Alford, this form of plea has become commonly used when a defendant chooses to accept a plea bargain but still claims he did not commit the offense. In fact, forty-seven states, including Washington, permit Alford pleas (sometimes called "best-interest pleas") as part of the plea bargaining process. See Bilbas, Harmonizing Substantive Criminal Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas, 88 Cornell L.Rev. 1361, 1373 (2003).

In 1976, this Court adopted the Alford rationale in State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976). Edwin Newton was charged in the Snohomish County Superior Court with first-degree murder for the killing of Robert Campbell. At the time, conviction on such a charge made the defendant eligible for the death penalty. As in Alford, several witnesses provided strong evidence that the defendant was guilty of the charged offense. Id. at 364-65. Newton told them that he had a grudge against Campbell and intended to kill him. After the crime, Newton admitted that he had killed a person, pointed out to two people

where he had hidden the body, and forced one of them to help him move the body to another location. Upon his arrest, Newton told a police officer that he had an argument with Campbell and that Campbell was killed in a struggle over the gun, although Newton could not explain exactly how the shooting occurred. Id. at 364-66.

Newton negotiated a plea to a reduced charge of second-degree murder. This limited his exposure to a maximum sentence of life with the possibility of parole. Before signing the plea form, he deleted the sentence admitting that he committed the crime in the manner charged. The trial court accepted the plea and imposed sentence. Id. at 366-67.

Later, Newton filed a petition for post-conviction relief in which he argued that the trial court should have required an admission of guilt and that his prison sentence constituted a violation of due process. Id. at 368. On review, this Court rejected Newton's claims because there was "no contention defendant's guilty plea was not freely, understandingly and competently made." Id. at 373. The Court followed the reasoning of similar federal cases, and cited Alford for the proposition that the defendant's plea did not amount to a violation of due process. Id. at 369-72.

Since then, Washington courts have consistently upheld the validity of Alford pleas to facilitate the plea bargaining process. As this Court has recently explained, “An Alford/Newton plea allows a defendant to plead guilty **to take advantage of a plea bargain** even if he or she is unwilling or unable to admit guilt.” State v. Zhao, 157 Wn.2d 188, 197-98, 137 P.3d 835 (2006) (emphasis added).<sup>1</sup> Similarly, most commentators and scholars endorse such guilty pleas, however named, as an acceptable part of the plea bargaining process. See, e.g., Albert W. Alschuler, The Defense Attorney’s Role in Plea Bargaining, 84 Yale L.J. 1179, 1292-98 (1975); Frank Easterbrook, Criminal Procedure as a Market System, 12 J. Legal Stud. 289, 308-09 (1983); Major Steven E. Wallburn, Should the Military Adopt an *Alford*-Type Guilty Plea?, 44 A.F.L. Rev. 119, 140-44, 160 (1998); Note, The *Alford* Plea: A Necessary but Unpredictable Tool for the Criminal Defendant, 72 Iowa L. Rev. 1063, 1073-74, 1086, 1089 (1987).

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<sup>1</sup> Along the way, the Zhao Court explained: “This analysis is consistent with the purpose of an Alford/Newton plea, in that it allows the defendant to take advantage of a plea offer without having to admit that his or her conduct satisfies the elements of the crime charged.” Id. at 841. The Court also noted: “Doing so supports a flexible plea bargaining system through which a defendant can chose to plead guilty to a related charge that was not committed, in order to avoid near certain conviction for a greater offense.” Id.

As the above discussion shows, the fundamental reason for accepting Alford pleas is that a defendant should be able to obtain the benefit of a plea bargain without acknowledging guilt. In the leading cases of Alford and Newton, the defendants received the substantial benefit of avoiding any possibility of a death sentence. Many other courts have accepted such pleas when the defendant thereby avoided death. See, e.g., Mills v. Jones, 1995 WL 9661 (5<sup>th</sup> Cir. 1995) (Alford plea)<sup>2</sup>; Prokop v. Vasquez, 1992 WL 338953 (9<sup>th</sup> Cir. 1992) (Alford plea); Kahn v. Chandler, 2005 WL 2346955 (W.D. Ky. 2005) (Alford plea); Chaney v. Missouri, 223 S.W.2d 200 (Mo.App. 2007) (Alford plea); State v. Coleman, 1987 WL 14197 (Ohio App. 1987) (Alford plea); State v. Adams, 277 NC. 427, 178 S.E.2d 72 (1970) (plea of nolo contendere). Cf. Summerlin v. Schriro, 427 F.3d 623, 640-41 (9<sup>th</sup> Cir. 2005) (defendant declined State's offer to enter an Alford plea that would have removed the possibility of death sentence).

The rationale of Alford and Newton does not apply, however, if the defendant pleads guilty as charged to a capital offense, leaving the government free to seek the death penalty. It is not surprising, therefore,

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<sup>2</sup> The unpublished cases mentioned in this section are not cited as legal "authority", *see* GR 14.1, but rather as factual proof that Alford pleas have been commonly accepted when the defendant thereby avoids the death penalty.

that there does not seem to be any case other than this one in which a trial court accepted an Alford plea under those circumstances.

In this case, Cross did not plead guilty as part of any plea bargaining process. Rather, he entered an equivocal guilty plea that was (a) against the advice of his counsel and (b) in no way beneficial to his own legal interests. The State offered nothing to Cross in exchange for this plea<sup>3</sup>. The plea did not even serve to limit the evidence that the jury would hear.

[I]f the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

RCW 10.95.060.

Thus, as Cross's case demonstrates, a defendant gains nothing by pleading guilty as charged to aggravated murder when the State remains free to seek the death penalty. Under these circumstances, the central rationale supporting the decisions in Alford and Newton are lacking. The Court should conclude that such pleas are invalid.

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<sup>3</sup> In an attempt to convince Cross to change his plea to guilty, the State prosecutors did inform Cross that he might, somehow, be able to challenge the element of premeditation during the penalty phase of his trial. See State v. Cross, 156 Wn.2d 580, 600, 132 P.3d 80 (2007). This was a false promise and provides additional grounds for this Court to vacate the judgment in this case.

B. AN ALFORD PLEA IS NOT SUFFICIENTLY RELIABLE TO SUPPORT A DEATH SENTENCE.

When upholding the constitutionality of the death penalty in 1976, the Supreme Court relied heavily on a belief that adequate procedures were in place that would avoid the danger of arbitrary application and excessiveness. See Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 2760, 33 L. Ed. 2d 346 (1972). The stringent, "trial-like" procedures that govern capital sentencing derive from the Supreme Court's unique concern with reliability in death penalty cases. "In capital proceedings generally, th[e] Court has demanded that factfinding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." Ford v. Wainwright, 477 U.S. 399, 411, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986) (internal citations omitted). Accord Zant v. Stephens, 462 U.S. 862, 885. 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). As explained in the oft-quoted passage from Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976):

The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality differs more from life imprisonment than a 100-year term differs from one of just a year or two. Because of that qualitative difference, there is a

corresponding need for reliability in the determination that death is the appropriate punishment in a specific case.

Id. at 305. See also Gardner v. Florida, 430 U.S. 349, 357, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

This Court relied upon – and extended – many of these same principles when interpreting the Washington Constitution in State v. Bartholomew, 101 Wn.2d 631, 640, 683 P.2d 1074 (1984) (Const. Art. 1, § 3 (due process) and § 14 (cruel punishment) are even more protective than the federal constitution; and, therefore, the court “deem[ed] particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability”).

As Cross has argued in his Brief in Support of Personal Restraint Petition at 206-11, an Alford plea is not supported by the sort of reliable evidence required for imposition of the death penalty. The defendant has not admitted his guilt and no jury has unanimously determined his guilt beyond a reasonable doubt. Rather, an Alford plea may be accepted as long as the trial court concludes that there is “sufficient evidence” to support a finding of guilt. See Newton, 87 Wn.2d at 370. That evidence may come from various second-hand sources including a presentence report and a prosecutor’s statement. Id. The trial court is not even required to make an express finding regarding the sufficiency of the

evidence. Id. The court typically has no opportunity to evaluate the credibility of the witnesses, and their statements are not subject to cross-examination or rebuttal. This is an inadequate procedure for determining whether a person is eligible for the ultimate punishment.

Thus, an Alford/Newton plea is not sufficiently reliable to support imposition of the death penalty.

C. THE WASHINGTON CONSTITUTIONAL RIGHT TO A JURY TRIAL SUPPORTS CROSS'S ARGUMENT THAT AN ALFORD PLEA IS TOO UNRELIABLE TO SUPPORT A DEATH SENTENCE.

1. Introduction

The heightened requirements of reliability imposed by Article I, §3 (due process) and Article I, §14 (cruel punishment) of the Washington Constitution are also intertwined with the right to a jury trial found in Article I, §21. This Court has previously recognized that Article I, §21 may shed light on other constitutional provisions. In State v. Hicks, 163 Wn.2d 477, 181 P.3d 831 (2008), the defendant relied primarily on the equal protection clause to argue that the prosecutor improperly struck the only African-American juror from the panel. Id. at 489. This Court found helpful the *Amicus* brief of the American Civil Liberties Union of Washington, which explained how Article I, §21 provided greater

protection for jury trials than its counterpart in the federal constitution.

“The increased protection of jury trials under the Washington Constitution further supports allowing the trial judge, in his discretion, to find a prima facie case of discrimination when the State removes the sole remaining venire person from a constitutionally cognizable group.” *Id.* at 492.

WACDL hopes that the Court will likewise find a discussion of Article I, §21 helpful in deciding Cross’s case.

2. The Washington Constitution’s Right to Trial by Jury is More Protective than the Sixth Amendment and Supports Prohibiting Alford Pleas in Capital Cases

In evaluating whether the Washington Constitution's right to a jury provides protection beyond the federal constitutional right, this Court first determines whether the Washington provision at issue should be given an independent interpretation and then, if so, whether it affords greater protection than its federal counterpart. *Madison v. State*, 161 Wn.2d 85, 92-95, 163 P.3d 757 (2007). The Court should answer both questions in the affirmative here.

To determine whether a provision of the Washington Constitution requires an interpretation independent from its federal counterpart the Court analyzes six factors established in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Those factors are: (1) the textual language of the state

constitution provision; (2) differences in the texts of the parallel state and federal constitutional provisions; (3) state constitutional history; (4) preexisting state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state or local concern.

Gunwall, 106 Wn.2d at 58. Each factor weighs in favor of an independent analysis of the trial by jury right under the Washington Constitution.

Factor One, the text of the Washington Constitution, favors an independent analysis. Article I, §21 states: "The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record." This provision "preserves the right as it existed at common law in the territory at the time of its adoption." Pasco v. Mace, 98 Wn.2d 87, 96, 653 P.2d 618 (1982).

In interpreting "inviolate," the Court has previously relied on Webster's definition: "free from change or blemish: PURE, UNBROKEN ... free from assault or trespass: UNTOUCHED, INTACT." State v. Smith, 150 Wn.2d 135, 150, 75 P.3d 934 (2003) (emphasis added) (quoting *Webster's Third New International Dictionary* 1190 (1993)). This Court has held that "inviolate" "connotes deserving of the highest protection" (quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989)), and "indicates a strong protection of the

jury trial right.”<sup>4</sup> Id. This clear constitutional commitment to preserving the right to a jury trial “free from change” is also consistent with RCW 9A.04.060, which explains that the provisions of the common law are to “supplement all penal statutes of this state.”

Factor Two, the difference between the text of the Washington and federal constitutions, also favors an independent analysis. The federal constitution mentions the right only in the Sixth Amendment: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....” U.S. Const. amend. VI. The Washington Constitution, in contrast, has two separate provisions protecting the right to trial by jury. Indeed, the Court has observed that “the fact that the Washington Constitution mentions the right to a jury trial in two provisions instead of one indicates the general importance of the right under our state constitution.” Smith, 150 Wn.2d at 151. Further, although the Sixth Amendment and Article I §22 are similar, “article I, section 21

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<sup>4</sup> Article I §22, the other provision of the Washington Constitution dealing with the right to a trial by jury states: “in criminal prosecutions the accused shall have the right to ... have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed ....”

has *no federal equivalent*." Id. (emphasis added) (citing State v. Schaaf, 109 Wn.2d 1, 13-14, 743 P.2d 240 (1987)).

Factors Three and Four, state constitutional history and preexisting state law, also favor an independent and broader right to trial by jury in the context of capital cases. As Cross has pointed out, jury trials were mandatory in capital cases at the time Washington became a state. Supplemental Brief of Petitioner at 10-11. In fact, for many years, bench trials were prohibited in *all* cases. Id. at 11. When the option of a bench trial was restored in 1951, capital cases were expressly excluded. Id. at 11-12. The 1951 statute, now codified at RCW 10.01.060, is still on the books. This demonstrates an historical distrust of judicial fact-finding in capital cases, and a strong preference for jury trials. See also, State v. Baker, 78 Wn.2d 327, 334-35, 474 P.2d 254 (1970) (denying defendant's claim that a statute prohibiting bench trials in capital cases, but not in lesser cases, violated his right to equal protection; requiring a jury trial can never amount to "invidious discrimination" because "the basic constitutional right that deserves protection is the right to have a trial by jury"); State v. Strasburg, 60 Wn. 106, 110 P.1020 (1910) (Legislature could not remove question of sanity from jury's consideration).

Factor Five, differences in structure between the Washington and federal constitutions, always weighs in favor of an independent analysis because the Washington Constitution is a limitation on the State's otherwise plenary powers while the federal constitution is an affirmative grant of power. Smith, 150 Wn.2d at 151-52 (citing State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994)).

Finally, Factor Six, state interest and local concern, also favors an independent analysis. To determine whether an issue is of particular state interest or local concern, the Court considers whether an issue requires national uniformity. Smith, 150 Wn.2d at 152 (citing Schaaf, 109 Wn.2d at 16, which held that providing jury trials for juveniles was a matter of local concern rather than an issue requiring national uniformity). Here, that question has already been answered by the U.S. Supreme Court. “[T]he States may bar their courts from accepting guilty pleas from any defendants who assert their innocence.” North Carolina v. Alford, 400 U.S. 25, 38 n.11, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Accordingly, all six factors favor an independent analysis of the jury trial right under the Washington Constitution. The increased jury trial protections of Article I, §21 support Cross’s argument that Alford pleas

are not sufficiently reliable to be accepted when a defendant pleads to a capital offense.<sup>5</sup>

As Blackstone warned, “convenient” incursions on the right to jury trial might eventually lead to “the utter disuse of juries in questions of the most momentous concern.”<sup>4</sup> Blackstone Commentaries on the Laws of England, 343-44 (1769) (online at <http://avalon.law.yale.edu>). No legal concern is more “momentous” than whether a defendant is eligible for the death penalty. Whatever convenience an Alford plea may provide should not displace the fundamental right to a jury trial when the defendant denies his guilt in a capital case.

## VI. CONCLUSION

For the foregoing reasons, this Court should find that an Alford plea can never make a defendant eligible for the death penalty. A capital sentencing proceeding may take place only if the defendant has been found guilty of aggravated murder at trial by proof beyond a reasonable doubt, or has unequivocally admitted his guilt in open court.

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<sup>5</sup> This does not mean that an Alford plea would be improper when a defendant initially charged with a capital offense pleads to a lesser charge, thereby avoiding any possibility of a death sentence. In that situation, as in Alford itself, the defendant’s strong interest in waiving his jury trial right should overcome any concerns about the reliability of the conviction.

DATED this 26th day of May, 2009.

Respectfully submitted,

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Rita J. Griffith, WSBA #14360  
Attorneys for *Amicus Curiae* WACDL

**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by e-mail and United States Mail one copy of this brief on the following:

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Date

\_\_\_\_\_  
David Zuckerman

**CERTIFICATE OF SERVICE**

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2009 MAY 26 P 1:53

BY RONALD R. CARPENTER

I hereby certify that on the date listed below, I served by e-mail and

United States Mail one copy of this motion on the following:

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Date

\_\_\_\_\_  
David Zuckerman

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State v. Davya Cross, No. 79761-7

Attached are two documents:

1. Motion of Washington Association of Criminal Defense Lawyers (WACDL) to file Amicus Curiae Brief
2. Amicus Curiae Brief of WACDL

The documents have been served on the parties by mail and e-mail.

--David Zuckerman, WSBA #18221  
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