No. 14-7683

In The
Supreme Court of the United States

DAYVA CROSS,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Washington

AMICUS CURIAE BRIEF OF WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND WASHINGTON DEFENDER ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE*[1]

Amici curiae Washington Association of Criminal Defense Lawyers and Washington Defender Association respectfully submit this brief in support of petitioner Dayva Cross, and urge that the petition for writ of certiorari be granted.

INTEREST OF *AMICI CURIAE*

The Washington Association of Criminal Defense Lawyers ("WACDL") is a nonprofit association of over 1,100 attorneys practicing criminal defense law in Washington State. As stated in its bylaws, WACDL was formed "to improve the quality and administration of justice," and the organization's primary objective is "to protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, and to resist all efforts made to curtail such rights."

The Washington Defender Association is an association of Washington State defense attorneys

[1] Pursuant to Rule 37.6, *amici* certify that no party's counsel authored this brief in whole or in part and that no person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a). Consent was requested and obtained 10 days before the due date of this brief. Copies of the requisite consent letters have been filed with the Clerk.

and public defenders, social workers, investigators and those committed to improving indigent defense.

SUMMARY OF ARGUMENT

This Court should grant certiorari because there is a lack of national uniformity regarding the standards for accepting guilty pleas where defendants profess innocence. The standards adopted by some states, like Washington, are not only of questionable constitutionality, but increase the incidence of wrongful convictions. As the phenomenon is especially troubling in capital cases, Mr. Cross's petition provides the appropriate vehicle for reviewing the issues.

ARGUMENT

I. Washington law conflicts with decisions of other jurisdictions applying this Court's decision in *North Carolina v. Alford*.

In *North Carolina v. Alford,* 400 U.S. 25, 37 (1970), this Court held that the Due Process Clause was not offended by the acceptance of a guilty plea from a person who professed his innocence, where the defendant made an informed choice and the record contained "strong evidence of actual guilt." In the wake of *Alford*, several jurisdictions permitted guilty pleas in cases where defendants continued to claim innocence, but only where the record similarly demonstrated strong evidence of guilt. *See, e.g.,*

Silmon v. Travis, 741 N.E.2d 501, 503-04 (N.Y. 2000); *State v. Smith*, 549 N.W.2d 232, 234 (Wis. 1996).

Washington, in contrast, has not adopted the "strong evidence" standard. Instead, when evaluating the validity of an *Alford* plea, Washington courts apply the same rule used to determine whether sufficient evidence supports a jury's finding of guilt. *Clark v. Baines*, 84 P.3d 245, 246 n.1 (Wash. 2004); *see Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979) ("[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.").

Petitioner Dayva Cross signed an *Alford* plea in which he specifically denied guilt on two elements essential to his conviction and death sentence. In holding that the plea was properly accepted, the Washington Supreme Court stated that there is a "satisfactory evidentiary basis to accept the plea" where the evidence is "sufficient for a jury to conclude the defendant is guilty." *In re Cross*, 309 P.3d 1186, 1189 (Wash. 2013). Because this holding directly conflicts with decisions of other jurisdictions applying the Fourteenth Amendment, this Court should grant review.

II. Application of a "strong evidence" standard for *Alford* pleas is critical given the significant number of innocent defendants convicted after waiving trial.

Review is also warranted because the questions presented raise issues of broad concern. The vast majority of criminal convictions result from plea bargains. *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). This Court has generally been untroubled by the practice because it permits prosecutors to manage their caseloads and defendants to obtain reduced sentences. *See Brady v. United States,* 397 U.S. 742, 752 (1970). It also preserves scarce resources for those cases in which guilt is truly contested. *See id.*

But one premise on which this Court's confidence was based is proving to be weaker than originally believed. In *Brady*, this Court stated that it would be concerned about defendants waiving their rights to trial in order to avoid the death penalty if the encouragement of pleas increased the likelihood that defendants "would falsely condemn themselves." *Brady*, 397 U.S. at 758. This Court did not think this would happen, because judges would ensure "that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged." *Id.* And although a defendant could waive trial while claiming

innocence, courts would prevent convictions of defendants who were *actually* innocent by permitting such pleas only where the government presented "strong evidence of guilt." *Alford*, 400 U.S. at 37. Thus, the due process standards set forth in *Brady*, *Alford*, and other cases would not only preclude involuntary pleas, but also avert wrongful convictions.

Experience has disproved these presumptions. Of the 325 DNA exonerees in the United States, 31 entered guilty pleas for crimes they did not commit.[2] Several were *Alford* pleas. For example, in order to avoid the death penalty, David Vasquez entered an *Alford* plea to a brutal rape and murder he did not commit.[3] Like the petitioner in this case, Mr. Vasquez had mental disabilities. In part because of this problem, he provided a false confession and was sentenced to prison while the real murderer roamed free and killed again. Vasquez was finally pardoned after the true perpetrator was convicted of four other murders.

Bernard Ward also falsely confessed to a murder and entered an *Alford* plea in order to obtain a sentence of life with the possibility of parole.[4] The plea

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[2] *See* http://www.innocenceproject.org/know/Browse-Profiles.php (last viewed 1/13/15).

[3] http://www.crimelibrary.com/blog/article/the-dna-exoneration-of-david-vasquez/index.html (last viewed 1/13/15); http://www.innocenceproject.org/Content/David_Vasquez.php (last viewed 1/13/15).

[4] http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4206 (last viewed (1/13/15).

was negotiated after several days of trial had already occurred. During trial, multiple witnesses testified that Ward was out of state at the time of the crime. The trial court nevertheless accepted the *Alford* plea, and the appellate courts affirmed over the defendant's protestations that the plea should have been rejected in light of the alibi evidence. Ward finally obtained relief after a newspaper exposed the injustice.

These cases demonstrate that it is critical to enforce a "strong evidence" standard for *Alford* pleas in order to reduce the incidence of wrongful convictions. This is especially so given that the data discussed above likely underestimate the problem. *See* Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. Crim. L. & Criminology 1 (2013) (hereafter "*Innocence Problem*"). Exoneration databases predominately focus on serious felony cases where there is available DNA evidence and where defendants' sentences are lengthy enough to permit collateral attacks and to provide incentives to challenge the judgments. *Id.* at 21. Most cases do not fall within this category, and therefore many studies significantly undervalue "the true extent of plea bargaining's innocence problem." *Id.* at 22.

Professors Dervan and Edkins addressed the issue by administering a study in which they accused students of cheating on a controlled test. *Innocence Problem* at 28-30. Each student took the test in a

room with one other student. Unbeknownst to the student subjects, each subject's partner was a student who was a confederate working with the researchers. In half of the 82 pairings, the confederate would "cheat" by talking to the other student after they had been ordered not to discuss their answers. In the other half of the cases, the students followed the rules.

After the fake test was administered, the researchers accused *all* of the students of cheating, and gauged their responses to "plea" offers. *Id.* at 30-32. Researchers told the students they could admit guilt and face a light monetary sanction. In the alternative, they could fight the accusations before the Academic Review Board, which tended to find guilt 80-90% of the time. If found guilty after this process, the monetary sanction would be imposed, the student's faculty adviser would be notified, and the student would be required to complete an ethics course. *Id.* at 32-33. Not surprisingly, almost 90% of the "guilty" students accepted the plea deal. The shocking result, however, was that over 55% of the innocent students were willing to falsely admit guilt in order to obtain a slightly less onerous "sentence." *Innocence Problem* at 34-35. The researchers concluded that the plea bargaining system "has the potential to capture far more innocent defendants than predicted," and that this Court should "reevaluate the constitutionality of the institution." *Id.* at 48.

At a minimum, the "innocence problem" should spur this Court to enforce the due process standards

it already suggested in *Alford*. Contrary to the Washington Supreme Court's conclusion in this case, a person protesting his innocence should not be convicted – and certainly should not be executed – absent either a finding of guilt beyond a reasonable doubt or strong evidence of guilt in the record.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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