SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. CHRISTOPHER WISE, Defendant.	No. 09-1-04552-2 SEA STATE'S TRIAL MEMORANDUM

I. THE CHARGES & THE PARTIES

This case was filed on June 22, 2009. The defendant, Christopher Wise, was charged by original information with one count of manslaughter in the first degree, domestic violence. He entered a plea of not guilty on July 6, 2009.

The State gave notice on February 21, 2009, that it intended to move to amend the information for purposes of trial to murder in the second degree, with criminal mistreatment as the underlying felony. The defendant was arraigned on the amended information on April 2, 2010. The amended information reflects two counts: murder in the second degree domestic violence, and manslaughter in the first degree, domestic violence. Each charge also alleges a vulnerable victim

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

aggravator under RCW 9.94A.535 (3)(b) – specifically, that the victim of these crimes, Ruby Wise, was "particularly vulnerable or incapable of resistance" due to advanced age, disability, or ill health.

The defendant, who is in custody, is represented by Kevin McConnell and Jesse Dubow. The State is represented by Senior Deputy Prosecuting Attorney Page Ulrey and Deputy Prosecuting Attorney Patrick Hinds.

II. TIME ESTIMATES

This trial, including pretrial motions, should last approximately ten to twelve days, including pretrial motions and jury selection.

III. POTENTIAL STATE WITNESSES

The following is a list of potential witnesses that the State may call to testify in its case-in-chief. The State offers this list to assist the court in determining whether any of the jurors are acquainted with the people involved in this case.

- Joel Marangon, EMT
- Chris True, EMT
- KCSO Deputy Scott McDonald
- KCSO Deputy Robert Lein
- KCSO Sergeant Cameron Lefler
- KCSO Detective Malcolm Chang
- KCSO Deputy Christopher Johnson
- KCSO Detective Sue Peters
- KCSO Detective Thien Do
- KCSO Detective Melissa Rogers
- Sarah Ray
- Leslie Hodges
- Tim Hodges
- Todd Johnson
- Eddie (Norman) Roosa
- Donald Dahl
- Gerina Dahl
- Carol Seepersad-Green
- Carrie Marsh

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

- Ralph Lewis
- Stephanie Mossett
- Pamela Leeming
- Richard Harruff, MD
- Jim Hardtke
- Betty Hanrahan, RN
- David Sweiger, MD

IV. STATEMENT OF FACTS

Ruby Wise was 88 years old when she died. She had two adopted children—the defendant, and a daughter, from whom she was estranged. She spent much of her life in Florida, where she worked at Lee Ward, a craft and hobby business. In 1985, Ruby fell while at work and suffered shoulder and brain injuries, resulting in her total disability. She lost her husband to pancreatic cancer in 1987. In 1996, she suffered a stroke that caused her to suffer short term memory loss. In 1998, she underwent eye and brain surgery, as well as rotator cuff repair. At that time, she also suffered from 50 to 60% blockage of her carotid arteries. In September, 1999, Ruby moved to Washington State to be with her son, the defendant. The defendant is forty-two years old and has a degree in computer science. Since her fall in 1985 and until the time of her death, Ruby received disability benefits from Liberty Mutual Insurance Company, Social Security benefits, and a pension. Her total income was approximately $2000/month. The defendant has been unemployed and without any income since 2003.

On June 16, 2009, the defendant called 911 to report that his mother had died. EMTs and King County Sheriff's Office Deputy McDonald arrived at the home to find Ruby dead in her bed. When they pulled back the blanket that was covering her, they saw that Ruby was emaciated, with multiple severe pressure ulcers (bedsores) on various parts of her body. The sore on her left shoulder was so large and deep that the bone protruded through it. The defendant

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

told the deputy that his mother was not under the care of any medical providers, and that she was on no medications. He stated that he was her sole caregiver. In response to McDonald's call, Sergeant Lefler arrived at the scene. In addition to the emaciation and pressure sores, he noted that small flies were covering Ruby's face. He also saw that Ruby was wearing an adult diaper that was soiled, and that she had feces caked on her buttocks. The defendant told Lefler that his mother's health had been deteriorating for the past two weeks, and that she hadn't been to a doctor in two years. In looking around the home, Sgt. Lefler noted piles of dirty dishes in the sink and multiple bags of trash by the front door. The kitchen and refrigerator contained very little food. Ruby's bedroom was similarly bare. A television hanging from the wall was unplugged and covered with cobwebs. The room contained no radio or books, no telephone, and no photographs or other items to comfort one who is bedridden and dying.

Upon further questioning, the defendant stated that his mother had begun to show signs of dementia about six months earlier. Three months earlier, he said, she had become incontinent of urine and bowel. He claimed he changed her diaper every day to day and a half. He said she had been unable to get out of bed on her own for three to five weeks, so he had been giving her an "alcohol rub bath" periodically. He admitted to seeing bedsores on his mother, and claimed that they had shown up as bruises ten days ago, and become sores five days earlier. As for food intake, the defendant claimed he fed his mother bread soaked in juice, bananas, and Snickers bars. He said that several weeks earlier, his mother had told him she wanted to die and that he should just "let her be."

In a subsequent interview by law enforcement of the defendant, he stated that he had first observed his mother's dementia five to six years earlier. When questioned about neighbors' reports that they could hear his mother moaning, he responded that that was because she liked to

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

hear herself talk. He said she had become bedridden one month prior. This time, he stated that he first noticed her pressure sores "a couple of weeks ago." The defendant said that his mother had not left the house in the past two years.

On the night of her death, the defendant said that he went out at 6:30 p.m. to go grocery shopping and to go to a local bar for a beer. He stated that he left the bar at 8:30 p.m. When he entered the house, he heard his mother "wailing," which, he said, she had been doing for a while. Rather than go to her, he went downstairs to his bedroom and played poker on his computer, coming up one time to feed his mother a banana. He said that at 11:00 p.m. he returned to his mother's room, and found her gasping for breath. Records indicate that he called 911 at 12:23 a.m.

Interviews with the Wise's neighbors revealed that prior to Ruby's death, she had been heard crying for help from within the house. On one occasion, neighbor Ed (Norman) Roosa, after hearing Ruby calling for help, called the defendant. When the defendant didn't answer the call, Roosa called their mutual landlord. The defendant later called Roosa and said that Ruby had fallen out of bed, and that he hoped Roosa had not been bothered. About two weeks ago, Roosa had heard Ruby moaning loudly. He said this went on 24 hours a day, and lasted about two weeks.

The autopsy on Ruby Wise conducted by Chief Medical Examiner Richard Harruff found that she had multiple deep pressure ulcers of her left shoulder, left hip and buttock, sacral region, left thoracic back, and right hip region that occurred due to immobilization in bed. Two of these wounds were so deep that her bones were visible. Ruby's right hip bone was so exposed that the sutures from an earlier hip surgery were visible. In addition, Dr. Harruff noted cutaneous erosions and bruises involving her torso, and upper and lower extremities. Cerebral atrophy was

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

noted, which is consistent with Alzheimer 's disease. She was also noted to suffer from cardiovascular disease, arteriolonephrosclerosis (hardening of the kidney, diverticular disease, emaciation, and dehydration. The autopsy report states, "Because of the absence of appropriate care for the pressure ulcers, the manner of death is classified undetermined."

A search of the residence revealed, among other things, ear plugs that the defendant admitted he wore to block out the sounds of his mother moaning. Also seized were journals written by Ruby Wise during the last years of her life, describing in detail her blood pressure, medical condition, and care needs.

A living will created by Ruby in 1992 gave the defendant decision-making authority regarding her medical care at the point that she lost capacity to make her own decisions. In the declaration, Ruby directed that she be given only medications and comfort care when she is dying. Ruby Wise's medical records obtained pursuant to the investigation on this case revealed that she had a long history of obtaining medical care. In November, 2008, the defendant called 911 after he had left home for six hours and returned to find that his mother had fallen out of bed. She was taken to Overlake Medical Center where she was treated. In none of her medical records was there any indication that she did not wish to have medical treatment.

Leslie Hodges, one of the defendant's friends from the Four Corners Bar that he frequented in Black Diamond, will testify that she spoke and emailed with Wise on numerous occasions about his mother. Hodges' own mother had suffered from dementia, and had come to live with Leslie and her husband during the last months of her life. Knowing how difficult caretaking of someone with dementia can be, Hodges referred the defendant to Carrie Marsh, an employee of A Place for Mom, an elder care referral service. Marsh will testify that she spoke to Wise and emailed with him about numerous care options that his mother could afford. In

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

response to their conversation, she located six different adult family homes into which Ruby could be moved, and which would cost no more than Ruby received in monthly benefits. The defendant failed to follow up on any of these options. The last email Marsh received from him was on January 26, 2009, just six months before Ruby's death. The defendant informed Marsh that he was keeping his mother "fat and happy" and that he and his mother would be staying in their home. Marsh responded by sending an email to the defendant in which she offered to get Ruby in-home care a few hours a week to assist the defendant with bathing his mother and other care. The defendant did not respond to that email.

V. EVIDENTIARY ISSUES

1. Exclusion of Witnesses

The State requests that the court exclude witnesses from the courtroom. ER 615 generally authorizes the court to exclude witnesses upon the motion of any party, or upon its own motion. The rule specifically does not authorize exclusion of an officer designated by the State. ER 615. In this case, if an officer does sit with the State during trial, it would be Detective Thien Do of the King County Sheriff's Office.

2. Defendant's Statements – *CrR 3.5 Hearing Necessary*

In this case, the defendant gave several statements to law enforcement. Thus, a hearing pursuant to CrR 3.5 is necessary. The State estimates that it will call six witnesses for this hearing.

3. Defendant's Motion to Suppress Evidence – *CrR 3.6 Hearing Necessary*

Shortly after the victim's body was discovered, King County Sheriff's Detective Thien Do obtained a search warrant for a complete search of the victim and suspect's residence. The defense has moved to suppress the evidence obtained during this search. Therefore, a 3.6 motion will be

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

necessary. The defense motion to suppress is based entirely on the fact that the warrant relies in part on information obtained during the first interview with the defendant. Thus, there will be no need for additional testimony for this hearing.

4. Discovery Demand

The State moves for the discovery of:

(a) All defense witnesses not already provided to the State, including any alibi witnesses. Specifically their names, addresses, sex, date of birth and a written summary of testimony or substance of all oral statements;

(b) All potential exhibits, allow inspection of physical or documentary evidence in defendant's possession which may be offered by defendant at any stage of the hearings for trial of this case, including cross-examination of State's witnesses, in defendant's case, or in rebuttal.

A defendant's discovery obligations are outlined in CrR 4.7(b) and in the common law. In brief, every defendant is required to provide the State with discovery of all material and information within the defendant's control, as outlined above. This discovery should include endorsement of all witnesses a defendant intends to call as a witness, even if the same witness has been endorsed by the State. To date, the defendant has disclosed the following witnesses:

- Carolyn Berge
- Jim Berge
- Cindy Bess
- Stephen Manning

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

5. Motion to Compel Disclosure of Recorded Statements and Defense Investigator Notes

The State moves for the disclosure of any written or recorded statements of all potential defense witnesses, and the State's potential witnesses, signed or unsigned, which were not prepared by the State.

Further, should the defendant decide to call the defense investigator as witness, the State moves for an order compelling the defendant to provide to the State -- prior the investigator's testimony -- copies of the defense investigator's notes concerning any interview about which the investigator is being called to testify. State v. Yates, 111 Wn.2d 793, 765 P.2d 291 (1988).

6. Disclosure of Defense

The nature of the defense has been disclosed as general denial. Pursuant to CrR 4.7, the State demands further disclosure of the general nature of the defense if it is other than "general denial." The State moves to preclude the defendant from offering evidence of or arguing any other defense not previously disclosed to the State.

7. Use of Photographs/Films during Opening and Closing.

The State anticipates that it will use photographs and/or films during opening statement and closing argument. The State will provide notice of precisely which such items it is planning on using to the defense and the court prior to using them. The State requests that any objections to the use of such items be addressed prior to the beginning of the State's presentation.

8. Motions Regarding Impeachment of Witnesses and Defendant (ER 609)

ER 609(a) and (b) permit impeachment of a witness with prior crimes of dishonesty that occurred within the last ten years, as calculated by date of conviction or date of release from confinement (whichever date is later). Crimes of dishonesty that occurred beyond the ten-year

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

time limit may still be admissible if the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. ER 609(b). Convictions more than ten years old are not admissible unless the other party has been given notice of intent to offer the evidence in a timely fashion. ER 609(b).

The State has provided the criminal history of all State's witnesses to the defendant. One of the State's witnesses, Norman Roosa, has convictions for Rape of a Child 3 (4 counts) from 1998, and one for Attempted Failure to Register from 2008. Neither of these crimes is a crime of dishonesty and therefore should not be admissible for any purpose at trial. In State v. Alexis, 95 Wn.2d 15, 621 P.2d 1269 (1980), the Washington Supreme Court held that rape is not a crime of dishonesty for purposes of this rule. While there is no case law on point, the rather illogical crime of attempted failure to register involves merely an attempt not to keep the state updated as to one's address. Such a conviction could be explained by a defendant's being homeless, being unclear on what his registration requirements are, being apathetic or angry. Unlike theft or possession of stolen property, that crime does not inherently involve lying or dishonesty. Further, if the conviction for attempted failure to register were admitted, evidence of the defendant's prior sex convictions would come in through the back door, which would result in tremendous prejudice to the State's case. For all of these reasons, the State requests that the defense be ordered not to question Roosa about any of his prior convictions.

Stephanie Mossett, another State's witness, has prior driving convictions, including a DUI and multiple DWLS 3s. These crimes are not admissible under ER 609. The State asks that the defense be ordered not to question Mossett about any of these convictions.

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

9. Motion to Limit Admissibility of Reputation and "Prior Bad Acts" of State's Witnesses (ER 608 and ER 404).

The State seeks clarification regarding any prior bad acts or reputation evidence the defendant seeks to introduce at trial regarding any of the State's witnesses. The State moves for disclosure of any specific instances of misconduct that the defense intends to use for the purpose of attacking any witness's credibility, pursuant to ER 608. In order for the court to be able to exercise its discretion, as required by ER 608, the court must have advance notice of any such evidence. This is true of both ER 404(b) and ER 608. The Court is tasked with exercising its discretion in ruling on these matters, and in order to allow the parties to argue any proposed evidence, these matters should be decided pretrial. The State requests that the Court require offers of proof related to any such evidence.

Further, the defendant is not entitled to "prove up" specific instances of misconduct with extrinsic evidence in order to attack mere credibility. The defendant is asked to disclose any such evidence.

10. Motion to Admit Summaries of Bank Records

The State will offer the testimony of Jim Hardtke, investigator for the Special Operations Unit of the King County Prosecuting Attorney's Office, as a summary witness. Mr. Hardtke will summarize his review of Ruby Wise's checking and savings account records and the Puget Sound Energy records for their home. He will also testify to the public records of the defendant's bankruptcies that he obtained. He will then testify to various facts he observed in his review of these records.

The bank records that Mr. Hardtke will be summarizing are typical bank records: monthly statements, checks, deposit items, etc., generated by checking and savings accounts.

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

These records are of the ordinary type maintained by those institutions in the normal course of business, and will therefore be admissible into evidence as business records, pursuant to RCW 5.45.020.

ER 1006 reads:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Summaries are admissible under ER 1006 when they promote the jury's convenience, and the proponent of the summary establishes that the original records are too voluminous for easy use in court and makes the records available for examination by the opposing party. State v. Barnes, 85 Wn. App. 638, 662-63, 932 P.2d 669 (1997); State v. Marshall, 25 Wn. App. 240, 243, 606 P.2d 278 (1980), *review denied*, 95 Wn.2d 1005 (1981); State v. Kane, 23 Wn. App. 107, 110-11, 594 P.2d 1357 (1979). In addition, Karl Tegland points out, ER 1006 is identical to Fed. R. Evid. 1006, and federal case law should therefore be helpful in interpreting ER 1006. 5C K. Tegland, Wash. Prac., Evidence §1006.1, at 270 (4th ed. 1999). The federal courts have held that Fed. R. Evid. 1006 should not be read restrictively as to the requirement that the underlying documents be "voluminous." United States v. Winn, 948 F.2d 145, 158 (5th Cir. 1991), *cert. denied*, 503 U.S. 976, 112 S.Ct. 1599, 118 L.Ed.2d 313 (1992). The federal courts have also held that Fed. R. Evid. 1006 does not require that it be literally impossible to examine the underlying documents in court before a chart or summary may be used at trial. Instead, the rule requires only that the underlying documents be voluminous and that in-court examination not be convenient. United States v. Possick, 849 F.2d 332, 339 (8th Cir. 1988); United States v. Scales, 594 F.2d 558, 562 (6th Cir.), *cert. denied*, 441 U.S. 946, 99 S.Ct. 2168, 60 L.Ed.2d 1049 (1979).

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

Here, the State can establish through the testimony of Mr. Hardtke that the documents underlying his summary exhibits – the records of the bank and Puget Sound Energy accounts – together take up approximately 70 pages, and are too voluminous for easy use in court. Under these circumstances, Mr. Hardtke's summaries can only be of assistance to the jury, while preserving the defendant's right to cross-examine Mr. Hardtke about his preparation of the summaries. The State can also establish that the defense has had access to both the summaries and the underlying records for several months, and was provided physical copies of all of the records reviewed by Mr. Hardtke in the preparation of his summaries.

The proponent of a summary must also establish that the documents underlying the summary are admissible into evidence. State v. Barnes, 85 Wn. App. at 662-63; State v. Marshall, 25 Wn. App. at 243; State v. Kane, 23 Wn. App. at 110-11. The defense has agreed to stipulate to the foundation for the admissibility of these records.

One final issue is whether the physical summaries to be introduced as part of the testimony of Jim Hardtke constitute substantive evidence that should go to the jury room. In State v. Lord, 117 Wn.2d 829, 856 n. 5, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992), the Washington Supreme Court held that summaries prepared pursuant to ER 1006 (as opposed to illustrative charts) are in fact substantive evidence, and do go to the jury room. The State respectfully submits that the demonstrative exhibits illustrating various points of Jim Hardtke's summary of records should therefore be admissible as substantive evidence since they summarize numerous pages of separate records that will not, for the most part, be offered into evidence, and cannot be conveniently examined by the jury. The alternative – to have Mr. Hardtke plod his way through a ream of bank and energy company records and point out one by one each record's significance in the case – would be time-

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

consuming and frustrating for the jury, the Court, and the parties alike. The defendant will still preserve his full right to cross-examine the witness concerning his summaries. For that reason, the State respectfully urges that the Court exercise its discretion to admit into evidence the summaries of these documents as substantive evidence in their own right.

11. Motions Regarding Out-of-Court Statements

(a) Out-of-Court Statements of the Victim Offered by the State

The State will be seeking to introduce out-of-court statements made by victim Ruby Wise as evidence of her state of mind under ER 803(a)(3), as present sense impressions under ER 803(a)(1), and as statements for medical diagnosis or treatment under ER 803(a)(4). The statements at issue are as follows:

- Three journals/blood pressure logs written by Ruby Wise during the last several years of her life: 1/23/06-1/14/07; 1/20/07-9/2/07; 2007-2008 (specific dates difficult to ascertain);
- Letter from Ruby Wise to her daughter, Jennifer, dated 9/5/99, describing moving in with Chris, that she is staying with him temporarily while her house is redone, that Chris sleeps most of the time and she is alone, and that her weight is 136 pounds;
- Summary of her medical history written by Ruby Wise in 2000, entitled "For Medical Records for New Dr.";
- Will and living will declaration of Ruby Wise;

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

- List of important contacts written by Ruby Wise in 2000, including doctors in Florida and in Seattle.[1]

ER 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(a), in turn, defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if intended by the person as an assertion." ER 803(a) contains various specific exceptions to the general rule that hearsay is not admissible in which the availability of the declarant is immaterial.

(i) Then-Existing Mental, Emotional, or Physical Condition (ER 803(a)(3))

All of the entries in Ruby Wise's journals describe her then-existing physical, emotional, or mental condition. A typical entry begins with her reading of her blood pressure for that day, and is followed by a brief note describing what she did that day, a comment about being in pain or being cold, needs she had such as batteries for her flashlight, new glasses, heat, medication, or other descriptions of how she was feeling at the time. Occasionally, she would say that the defendant was out and she was alone in the house. These statements are admissible under ER 803(a)(3) because they show Ms. Wise's condition—emotional, mental, and physical—during the three and a half years prior to her death.

ER 803(a)(3) reads:

> (3) *Then Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then existing mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact

[1] Because this list is not being offered to prove the truth of the matter asserted—that those names on the list actually were Ruby Wise's physicians—it is the State's position that the phone list is not hearsay. This evidence is relevant because it shows the victim's interest in and desire for medical care, which is an essential component of the State's case.

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

> remembered or believed unless it relates to the execution, revocation, identification, or terms of a decedent's will.

In State v. Russell**,** 33 Wash. App. 579, 657 P.2d 338 (1983) (reversed in part on other grounds, 101 Wn.2d 349, 678 P.2d 332), the Court of Appeals upheld the defendant's use of his wife's journals in his trial on murder and rape charges, to establish the couple's disintegrating relationship. The Court found that the trial court had properly admitted the journal entries under ER 803(a)(3) to show the victim's state of mind at the time of the declaration. Ruby Wise's statements in her journal of her then-existing mental and physical state are similarly indicative of her state of mind during the last years of her life.

Relevant evidence is defined under ER 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." These statements are relevant because they establish the fact that the defendant was not providing proper care to the victim. They are further relevant because they rebut the defense claim that the victim did not want medical care or intervention. The underlying felony charged in this case is Criminal Mistreatment, or neglect. The defendant will claim that he was not neglecting his mother, but referring to her wishes not to have medical care and to die at home. Therefore, Ruby Wise's complaints of pain, her documentation of her medical condition, her requests for new glasses and for medications are of tremendous consequence to whether or not she was refusing medical care and intervention. Because the victim's state of mind lies at the heart of his case, these statements should be admitted under ER 803(a)(3).

Ruby Wise's will is similarly admissible under ER 803(a)(3). Although statements of a declarant's wishes are not normally considered state of mind, ER 803a(3) specifically mentions

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

that statements relating to the execution, revocation, identification, or terms of a declarant's will are admissible under that rule.

Ruby Wise's living will declaration is also admissible under ER 803(a)(3). In State v. Crowder, 103 Wash. App. 20, 26, 11 P.3d 828 (2000), an elder financial exploitation case, Division One of the Court of Appeals upheld the trial court's admission of the victim's comment to a neighbor that "my adopted daughter [the defendant] has taken care of everything." The trial court allowed the statement as circumstantial evidence of the victim's state of mind, showing that he had "reposed his complete confidence in and dependency upon his daughter (Crowder) to provide for his needs." Id. The Court of Appeals held:

> Burns' statement to Erickson was not admitted to prove that Crowder had actually "taken care of everything," the matter asserted by the declaration. Rather, the testimony went to Burns' state of mind, his reliance on Crowder's supervision of his affairs. The statement is not hearsay under ER 803(a)(3).

Id. Ruby Wise's living will declaration directs that she be given only medications and comfort care when she is dying. It places her medical decisions in the defendant's hands at the point that she no longer has capacity to make them. These statements are indicative of her state of mind and her reliance on the defendant to take care of her. Therefore, it should be admitted under ER 803(a)(3).

Ruby Wise's letter to her daughter describing her life in 2000 is similarly under this exception, as it describes her then-existing mental, emotional, and physical condition. It is true that the relevancy of this letter is limited by the fact that it was written nine years prior. However, because Ruby Wise was so isolated and disconnected from her friends in the last years of her life, this letter provide a rare glimpse into her experience and who she was as a person

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

then. Her statements regarding the defendant's absence and her being alone are relevant to rebut the defendant's claim that he provided her with proper care.

(ii) Present Sense Impressions (ER 803(a)(1))

Ms. Wise's many journal entries are further admissible as present sense impressions. Under ER 803(a)(1), a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is admissible regardless of the availability of the declarant. In her journals, Ruby Wise was describing what was occurring to her as it occurred. The journals very simply described how she was feeling and what was happening to her at the time. They contain no memories, no reference to the past. They are, very simply, impressions of what she perceived at the time she wrote them.

(iii) Statements of Medical Diagnosis or Treatment (ER 803(a)(4))

ER 803(a)(4) admits hearsay testimony if the statement was made for the purpose of a medical diagnosis or treatment. State v. Ashcraft, 71 Wn. App. 444, 456, 859 P.2d 60 (1993); State v. Sims, 77 Wn. App. 236, 890 P.2d 521 (1995). Such statements are admissible on the theory that people seeking medical help are unlikely to lie. State v. Florczak, 76 Wn. App. 55, 69, 882 P.2d 199 (1994). This self-interest motive underlies the reason courts have found ER 803(a)(4) is a "firmly rooted" exception having "particularized guarantees of trustworthiness." Ring v. Erickson, 983 F.2d 818, 820 (8th Cir.1992) (quoting Idaho v. Wright, 497 U.S. 805, 815, 110 S. Ct. 3139, 3146, 111 L. Ed. 2d 638 (1990)). The primary limitation in the rule is that the statement must be reasonably pertinent to medical diagnosis or treatment. ER 803(a)(4).

In this case, Ruby Wise wrote a lengthy summary of her medical history for her new doctor. It is clearly intended to provide her new physician with the information necessary to provide her proper medical care. As such, it should be admitted under ER 803(a)(4).

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

(b) Out-of-Court Statements of the Victim Offered by the Defendant

The defendant has alluded to claims that Ruby Wise wanted to die at home without medical care, and that his father asked him to take care of his mother. In order to present these defenses, the defendant will presumably seek to introduce out-of-court statements by either his father or Ms. Wise at trial as evidence of either her state of mind or the defendant's state of mind under ER 803(a)(3). The defense will offer this evidence through testimony of the defendant and of defense witness Stephen Manning. The State asks for an offer of proof regarding what specific statements or assertions of the defendant's father or Ms. Wise, if any, will be offered by the defense. For the reasons stated below, the State would object to the introduction of such statements as inadmissible hearsay.

(i) Under Parr and Crowder, the Defendant Cannot Establish the Reliability of the Statements to Justify Their Admission

Though an exception is frequently made to the rule excluding hearsay when the state of mind or intention of a person is in question, the court still must analyze the statement to determine if it passes a two-part test: (1) that there is some degree of necessity to use out-of-court, uncross-examined declarations, and (2) that there is circumstantial probability of the trustworthiness of the out-of court, uncross-examined declarations. State v. Parr, 95 Wn.2d 95, 98-99, 606 P.2d 263 (1980), citing Raborn v. Hayton, 34 Wn.2d 105, 208 P.2d 133 (1949). As the Parr Court explains:

> If the circumstances do not impart trustworthiness, such evidence may be inadmissible unless there is some other corroborating evidence. This court has been mindful that evidence of this type may be misused by the jury and is easily fabricated.

Parr, 95 Wn.2d at 99.

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

In this case, the first part of the state-of-mind hearsay test is met because both declarants are deceased and therefore unavailable to testify regarding their intent. However, the second part of the test is not met, and for this reason the statements or assertions of Ms. Wise or her husband offered by the defendant should be excluded barring a presentation of further corroborating evidence of reliability.

In Crowder, *supra*, the court was correct to admit out-of-court, uncross-examined statements of the elderly victim regarding his intent to have the defendant handle his affairs and finances. However, Crowder does not apply in this case. The difference between Crowder and this one is that, to the State's knowledge, none of the statements that the defendant may allege to support his theory were made to anyone other than the defendant and his best friend.

In Crowder, the statements at issue were made to a variety of disinterested third parties, including a social worker, an attorney, a legal assistant, and a neighbor – that is, people who have no imaginable motive, pecuniary or otherwise, to fabricate such statements. Because they were made to disinterested third parties, they are substantially reliable. In contrast, any statements purported to have been heard by the defendant or Mr. Manning regarding the victim's end of life care are substantially unreliable, are easily fabricated, and have absolutely no external corroboration, and thus should not be admitted. The defendant's requests of Carrie Marsh to find an adult family home placement for his mother in 2008 support an allegation of recent fabrication. The victim's living will in which she requested comfort care and medication for pain relief further support that allegation.

(ii) Should the Court Permit the Defendant to Present the Victim's Hearsay Statements, then the Victim's Statements Inconsistent with that Testimony Should Be Admissible Under ER 806.

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

Should the court determine that statements and assertions of Ruby Wise offered by the defendant to support his theory are, in fact, admissible, the State would argue that Ms. Wise's journal entries, letter to her daughter, will, living will, and written medical history are further admissible as inconsistent statements for purposes of impeachment of the declarant under ER 806:

> When a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain….

The principle behind this rule is that when a hearsay statement is admitted into evidence, the out-of-court declarant (in this case, Ruby Wise) is treated as a witness, and her credibility is subject to impeachment and support, just as if she had testified. To this end, statements that she made that are inconsistent with statements she allegedly made to the defendant should be admissible.

The victim's journal entries, letters, wills, and medical history should also be admitted, if the defendant is permitted to offer unsubstantiated hearsay, because it is fundamentally fair to do so in order to give the jury all of the information they need in order to reach a decision of guilt or innocence.

(c) Out-of-Court Statements of the Defendant Offered by the Defendant (Self-Serving Hearsay)

It is not clear whether the defense will be offering into evidence at trial out-of-court statements by the defendant either by defense witnesses in its case-in-chief or through cross-

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

examination of State witnesses. The State will nevertheless offer this brief review of the law concerning the admissibility of such statements.

ER 801(d)(2) is entitled *Admissions by a Party Opponent* and excludes from the hearsay rule various categories of out-of-court statements. ER 801(d)(2) defines the term *Admission by a Party-Opponent* and it reads:

> (2) *Admission by Party-Opponent.* The statement is offered against a party and is (i) the party's own statement, in either an individual or representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Out-of-court statements that a defendant seeks to introduce on his own behalf (as opposed to statements "offered against a party") are not admissions at all, but in fact self-serving hearsay. As such, they are inadmissible under the Washington Rules of Evidence. State v. Finch, 137 Wn.2d 792, 824-25, 975 P.2d 967, *cert. denied*, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999); State v. Haga, 8 Wn. App. 481, 495, 507 P.2d 159 (1973). As our Supreme Court has noted:

> The problem with allowing such testimony is that it places the defendant's version of the facts before the jury without subjecting the defendant to cross-examination. State v. Bennett, 20 Wn. App. 783, 787, 582 P.2d 569 (1978). This deprives the State of the benefit of testing the credibility of the statements and also denies the jury an objective basis for weighing the probative value of the evidence. Id.

State v. Finch, 137 Wn.2d at 825. The State will therefore be objecting to the statements of any defense witness or cross-examination of any State witnesses concerning out-of-court statements

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

of the defendant where such statements are clearly self-serving statements and not admissions. Such statements are hearsay, and should not be admitted into evidence.

(d) Out-of-Court Statements of the Defendant Offered by the State

As noted above, ER 801(d)(2) excludes from the hearsay rule out-of-court statements of a party that are offered against a party. The State anticipates offering numerous out-of-court statements made by the defendant made to the State's witnesses. Since these statements will be offered by the State against the defendant, they are nonhearsay and admissible under ER 801(d)(2), assuming they are relevant, material, and found admissible after the 3.5 hearing.

(e) *Crawford v. Washington* Issues

Because Ruby Wise cannot testify, there remains the issue of the admissibility of her out-of-court statements under the United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and subsequent opinions expanding upon the holding in Crawford, particularly Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 2274-2279, 165 L.Ed.2d 224 (2006). In Crawford, the Supreme Court held that the admissibility of out-of-court statements of a declarant required both the unavailability of the declarant and an opportunity to cross-examine that declarant if the statements sought to be admitted were "testimonial." A few years later, in Davis, the Supreme Court furnished a bit more guidance on the term "testimonial":

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. (footnote omitted).

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

Davis v. Washington, 126 S.Ct. at 2273-2274. In State v. Hopkins, 137 Wn. App. 441, 154 P.3d 250 (2007), the court cites *dicta* from State v. Shafer, 156 Wn.2d 381, 389, 128 P.3d 87 (2006) that "statements made to governmental officials, especially when those officials are performing duties that are overlapping with and assisting law enforcement are generally considered to be 'testimonial' in nature." This is still an unsettled area of law.

All of the out-of-court statements of Ruby Wise which the State seeks to introduce in its case-in-chief were made to herself or to people who were not government officials (herself, her daughter, and her future doctor) and thus fall well on the non-testimonial side of Crawford and Davis.

12. Evidence of Victim's Habits Regarding Medical Treatment (ER 406)

The State will be seeking to admit medical records of the victim since she moved to Seattle under ER 406. The defendant essentially claims that he neglected the victim because that was what she wanted him to do—that she did not want medical care. Because this will be his defense at trial, evidence of the victim's history of seeking medical care in the past is essential to rebut this claim and therefore should be admitted at trial.

13. Motion to Exclude Evidence of Defendant's Good Character (ER 404(a))

The State moves for an order preventing the defense from offering non-pertinent character evidence of the defendant. ER 404(a) prohibits either party from offering evidence of the defendant's character for the purpose of proving action in conformity therewith. The defendant may, however, offer evidence of the defendant's character to rebut the nature of the charge. ER 404(a)(1). Thus, in this case, the defendant's reputation for truthfulness and honesty is not relevant and should be excluded. The State asks that the defense advise the court of what,

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

if any, character evidence of the defendant it will offer so that the matter may be addressed pre-trial.

14. Cross Examination Of The Defendant With Prior Convictions.

The defendant has no known criminal convictions.

15. ER 404(b)

The State is not seeking to admit any evidence that it considers to fall within the scope of ER 404(b). However, counsel for the State has been surprised in the past as to the things that others consider to be covered by the rule. The State requests that the defense disclose whether it believes that ER 404(b) prohibits introduction of any evidence listed in the discovery that the State might reasonably seek to admit. If such a matter arises once trial has begun, the State asks to address any such issue outside the presence of the jury if the issue unexpectedly arises.

16. Motion to Exclude Any Allusion to Punishment

The State moves in limine for an order prohibiting the defense – at any point in this trial, including voir dire – from arguing, eliciting testimony, offering evidence, suggesting, or alluding in any way to the possibility of punishment or effect of punishment in this case. This should include the defendant's attorney, defense witnesses, and any person connected with the defense from making references either express or implied that might be heard or seen by the fact-finders concerning the penalty that might flow from the conviction.

The sentence is irrelevant to the issues before the jury. The facts of consequence in the prosecution of the underlying crime are those related to the elements. The sentence that follows the verdict in either instance has no bearing on those facts of consequence, and, therefore, the sentence is irrelevant. ER 402.

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

17. Motion To Allow Sidebars During Jury Selection To Address Potential Batson Challenges.

Under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986), a party has a right to object when it believes the other party's exercise of a peremptory challenge against a potential juror constitutes discrimination. In Washington, this rule was recently supplemented by State v. Rhone, No. 80037-5, slip op. (filed 4/1/10) (2010 WL 1240983). Rhone appears to require that the State must provide a race-neutral reason for exercising a peremptory challenge whenever it strikes a juror of the same minority group as the defendant. The prejudice to the State of having one of its peremptory challenges -- made in open court -- disallowed by the court based on Batson and/or Rhone is obvious. The State, therefore, will request a sidebar prior to exercising a peremptory challenge against any potential juror that is subjectively perceived to be part of a qualifying minority group. The State would request that the defense articulate at that sidebar whether a Batson/Rhone objection will be made to the exercise of the peremptory challenge. If such an objection will be made, the State requests that the court address the matter outside of the presence of the jury.

18. Scheduling And Witness Issues

A few of the State's witnesses have issues that may make them unavailable to testify on a given day or days of trial. In addition, counsels for the State have some issues that may cause them to ask for a late start or an early recess on various days of the trial. The State has, and will continue to, exert every effort to schedule its case in a manner that allows for the most efficient use of the court's time possible. However, certain delays may be inevitable. The State asks for the court's indulgence should such a situation arise.

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

19. Motion To Compel Submission Of Jury Instructions.

Trial counsels have an obligation to assist the court in drafting accurate jury instructions so that the parties' rights to a fair trial are addressed. The time to ensure accuracy of jury instructions is before such instructions are submitted. To that end, CrR 6.15 dictates in relevant part that:

> Proposed jury instructions *shall* be served and filed when a case is called for trial by serving one copy upon counsel for *each* party, by filing one copy with the clerk, and by delivering the original and one additional copy for *each* party to the trial judge.

CrR 6.15(a) (emphasis added). As is clear from the rule's plain language, it applies equally to defense counsel, and its use of the word "shall" means that compliance is mandatory. The clear purpose is to provide the defendant and the State an opportunity to advise the court of their respective views on the best way to protect a defendant's rights at a time when the court can actually do that -- before the jury is instructed.

Despite this, many defense counsel in King County frequently submit an incomplete packet of proposed instructions or no proposed instructions at all. This practice is apparently deliberate; counsel hopes that by withholding jury instructions his or her client might be able to argue on appeal that the giving of an instruction constituted reversible error and that the doctrine of invited error will not preclude the tardy argument.[2]

---

[2] Many instructional errors are presumed prejudicial unless it affirmatively appears that the error was harmless, and error of a constitutional magnitude can be raised for the first time on appeal unless the invited error doctrine applies. State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2004); State v. Henderson, 114 Wn.2d 867, 870 792 P.2d 514 (1990). The invited error doctrine precludes review of instructions proposed by the defendant, but only when the defense actually *proposes* the instruction at issue. State v. Boyer, 91 Wn.2d 342, 588 P.2d 1151 (1979); see also State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). And, unfortunately, the appellate courts have held that, "failing to except to an instruction does not constitute invited error." State v. Corn, 95 Wn. App. 41, 56,

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

The State respectfully submits that trial courts should not acquiesce to such a strategy, particularly in light of the mandatory language of CrR 6.15. Failure to comply with CrR 6.15 prevents the court from addressing avoidable errors at the trial stage, leaving such errors to be addressed for the first time on appeal -- after countless taxpayer dollars have been spent on appointed counsel in the trial and appellate courts, on court staff, on judicial time, and on prosecutorial resources.

If the defendant were to comply with the rules and submit a *complete* set of proposed jury instructions, the court would have the opportunity to rule on the propriety of those instructions now, rather than wait for a claim of instructional error on appeal. Such an approach serves the dual purposes of giving defense counsel an opportunity to protect their clients' rights at this stage of the proceedings rather than waiting until an appeal, and allowing the court to address any instructional problems before they prejudice the defendant.

For these reasons, the State respectfully asks this court to require the defendant to comply with CrR 6.15 and submit a complete set of proposed instructions. However, if defense counsel fully agrees with the State's proposed instructions, counsel can certainly affirmatively adopt the State's proposed instructions.

20. Jury Instructions on "Vulnerable Victim"

Counts I and II of the Amended Information allege that the charges of murder in the second degree and manslaughter in the first degree were aggravated by the fact that the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to advanced age, disability, or ill health, as provided in

---

975 P.2d 520 (1999).

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

RCW 9.94A.535 (3)(b) (as effective April 15, 2005). The language alleging the "vulnerable victim" aggravator was added to provide notice to the defendant that, if a jury convicts him of either of these crimes, the State would ask the sentencing court to impose a sentence greater than that called for in his standard sentencing range.

The State added this language alleging this aggravator in response to, and in compliance with, the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), filed on June 24, 2004. In Blakely, the United States Supreme Court held that the Sixth Amendment entitles a defendant in Washington to have a jury determine the existence of aggravating factors, other than recidivist facts, that support the imposition of an exceptional sentence above the standard range. On April 15, 2005, Governor Gregoire signed into law SB 5477, the "Blakely-fix" bill designed to make Washington's procedure for exceptional sentences upward comply with the dictates of Blakely v. Washington. SB 5477 amended RCW 9.94A.530 and 9.94A.535, and created a new section, subsequently recodified as RCW 9.94A.537.

The State submits that the provisions of SB 5477 apply to the case at bar. It further submits that should the defendant be convicted of murder in the second degree as charged in Count I or manslaughter in the first degree as charged in Count II, the jury should be instructed appropriately, and be asked to determine whether Ruby Wise was a "vulnerable victim," pursuant to the factors set out in the aggravator in the Amended Information and the language set out in what is now RCW 9.94A.535(3)(b). The State will be submitting appropriate special jury verdict form on the aggravator for the Court to consider using with the jury should the jury convict the defendant of either crime.

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

VI. CONCLUSION

This memorandum has been prepared solely to acquaint the trial court with the issues as they will be presented at trial.

DATED this _____ day of _____, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

_____
By: PAGE ULREY, WSBA #23585
Senior Deputy Prosecuting Attorney

_____
By: PATRICK HINDS, WSBA#34049
Deputy Prosecuting Attorney

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104