SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. KAREN MORGAN, Defendant.	)	No. 11-C-08500-3 SEA STATE'S TRIAL MEMORANDUM

I. CHARGES AND PARTIES

The defendant Karen Morgan has been charged by amended information with Count II, Criminal Mistreatment in the Second Degree. She entered a plea of not guilty on January 4, 2012. Karen Morgan is represented by Jesse Dubow and Carlos Gonzales.

The co-defendant Regina Daniels pled guilty to one count of Criminal Mistreatment in the Second Degree on January 4, 2013. Regina Daniels is represented by Katherine Hurley and Paul Vernon.

The State is represented by Senior Deputy Prosecuting Attorney Page Ulrey and Deputy Prosecuting Attorney Brian Wynne.

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II. TIME ESTIMATES

This jury trial should last approximately two to three weeks.

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.

- James "Sam" Robison
- Esther Tagoe
- Courtney Tarr
- Mary Hayes, Department of Social and Health Services (DSHS)
- Susan Aromi, DSHS
- Gloria Morrison, DSHS
- Laura Vadman, R.N., Swedish Hospital
- Mary Ellen Reed Dobson, R.N. Swedish Hospital
- Qi Pang "Pam" Pan
- Detective Michael Gordon, King County Sheriff's Office
- Paul Sytman, M.D., Minor and James Medical Center
- Benjamin Seo, M.D., Swedish Hospital
- Cynthia Sobie, Department of Health
- Laura Mosqueda, M.D.
- David Schutte, M.D., Swedish Hospital

IV. FACTS

The State initially filed charges of Criminal Mistreatment in the First Degree in this case against co-defendant Regina Daniels on February 10, 2011. On January 4, 2012, it filed one count of Criminal Mistreatment in the Second Degree against the defendant, Karen Morgan. The information alleges that the defendant, "during a period of time intervening between December 22, 2009 through December 27, 2009, being a person employed to provide to the dependent person, to-wit: Hannah Sinnett, the basic necessities of life, did recklessly create an imminent and substantial risk of death or great bodily harm to that person by withholding any of the basic necessities of life."

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As the certification for determination of probable clause describes, at the time of this incident, Hannah Sinnett lived at Seattle Heights adult family home[1], an adult family home with three elderly residents, all unable to care for themselves. The home was one of two adult family homes owned by co-defendant Daniels. Sinnett was 92 years old, wheelchair-bound, and suffered from numerous serious medical conditions, including advanced dementia, heart disease, and arthritis. Sinnett was placed in Seattle Heights in the fall of 2006 by her brother-in-law, power of attorney, and close friend, Sam Robison. Robison paid Daniels $3800 per month to care for Hannah.

When Hannah Sinnett moved into the home, the defendant became her "Nurse Delegator." Washington law requires that if medications are to be administered to a resident of an adult family home, it must be done by a licensed practitioner, by nurse delegation, or by a family member or legal representative. WAC 388-76-10455. A Nurse Delegator is a registered nurse who trains certain nursing assistants to provide basic nursing tasks to patients in certain settings. The role of a Nurse Delegator in an adult family home is to examine the residents at least every 90 days, and, if the patient is in "a stable and predictable condition," to train and delegate specific nursing care tasks to qualified and appropriately trained nursing assistants. WAC 246-840-910, -930. According to this section of the Washington Administrative Code, the Nurse Delegator may delegate the administration of medications and other nursing tasks to a nursing assistant, provided that the nurse delegator, among other requirements, first analyze the complexity of the task and determine the training needed by the nursing assistant to competently accomplish it; second, verify that the nursing assistant is registered or certified, and has completed the appropriate training; third, assess his/her ability to competently perform the delegated task in the

[1] An "adult family home" is a long-term care facility for 2-6 adults who are unable to care for themselves. They are licensed, regulated, and inspected by Residential Care Services, a division of DSHS.

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absence of the nurse; and fourth, teach the nursing assistant how to perform the task. The WAC further requires that the Nurse Delegator discuss the delegation process with the patient or their representative, obtain his/her written consent, document the rationale for the delegation, provide specific written instructions to the assistant, and supervise and evaluate his/her performance. The defendant charged Sam Robison $200 for her annual assessment of Hannah, plus $330 every quarter. Robison has no recollection of meeting the defendant prior to December 22, 2009. The only time he remembers speaking to her prior to that date was when she called him on one occasion when he forgot to sign one of the checks he had written her.

Robison first began to have significant concerns about Hannah's health in the fall of 2009. In the fall of 2009, Robison remembers, Hannah was beginning to talk to herself, and became wheelchair bound. On October 26, 2009, he took her to Swedish Hospital because he was concerned about her health. Hospital records indicate Hannah was unable to provide any information due to her dementia. She was diagnosed with a urinary tract infection, altered mental status, and weakness and discharged the same day. No pressure ulcers were noted. Hospital staff apparently spoke to Daniels who indicated she could meet Hannah's care needs at the adult family home.

On November 23, 2009, Robison took Hannah to her treating physician, Dr. Paul Sytman. Concerned that she may have an infection, Dr. Sytman requested a urine sample. Unable to collect a sample from her at his office, Dr. Sytman provided Robison with a collection container. Upon returning Sinnett to Seattle Heights, Robison gave the container to Tagoe, and asked her to let him know when she got the sample so he could take it to the lab for analysis. In the days that followed, Robison followed up with Daniels regarding the sample, but the sample was not taken. Finally, on December 22, 2009, Daniels called Robison and informed him that Karen Morgan, the defendant,

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had obtained the urine sample. Robison went to the home to pick up the sample, and saw Sinnett. She was, he said, delirious. The next day, Robison recalls the defendant calling him and telling him that Sinnett had some serious bedsores, but that she could treat them. He said she implied that Hannah could go to the hospital, but told him that she could take care of the wounds in the home. Not understanding the gravity of Sinnett's condition and wanting to avoid an unnecessary hospital visit just before the holidays, Robison agreed to allow the defendant to treat Hannah's wounds in the adult family home.

On December 28, 2009, Barbara Woodworth, a social worker at Swedish First Hill Medical Center, called the Department of Social and Health Services (DSHS) to report that Hannah Sinnett had been brought to their emergency room with multiple, severe decubitus ulcers[2] (pressure ulcers) on her legs and buttocks. "They are extremely deep and very serious," she stated. She further noted that Sinnett was unable to communicate, and that the hospital did not have a safe place for her to go once discharged. Sinnett was seen by the on-call emergency

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[2] According to the National Pressure Ulcer Advisory Panel, a pressure ulcer is localized injury to the skin and/or underlying tissue usually over a bony prominence, as a result of pressure, or pressure in combination with shear and/or friction. The severity of pressure ulcers is measured in stages:

Stage I: Intact skin with non-blanchable redness of a localized area usually over a bony prominence. Darkly pigmented skin may not have visible blanching; its color may differ from the surrounding area. The area may be painful, firm, soft, warmer or cooler as compared to adjacent tissue.

Stage II: Partial thickness loss of dermis presenting as a shallow open ulcer with a red pink wound bed, without slough. May also present as an intact or open/ruptured serum-filled blister. Presents as a shiny or dry shallow ulcer without slough or bruising.

Stage III: Full thickness tissue loss. Subcutaneous fat may be visible but bone, tendon or muscle are not exposed. Slough may be present but does not obscure the depth of tissue loss. May include undermining and tunneling. The depth of a stage III pressure ulcer varies by anatomical location. Bone/tendon is not visible or directly palpable.

Stage IV: Full thickness tissue loss with exposed bone, tendon or muscle. Slough or eschar may be present on some parts of the wound bed. Often include undermining and tunneling. The depth of a stage IV pressure ulcer varies by anatomical location. Stage IV ulcers can extend into muscle and/or supporting structures (e.g., fascia, tendon or joint capsule) making osteomyelitis possible. Exposed bone/tendon is visible or directly palpable.

Unstageable: Full thickness tissue loss in which the base of the ulcer is covered by slough (yellow, tan, gray, green or brown) and/or eschar (tan, brown or black) in the wound bed. Until enough slough and/or eschar is removed to expose the base of the wound, the true depth, and therefore stage, cannot be determined.

URL of this page: http://www.npuap.org/pr2.htm (National Pressure Ulcer Advisory Panel)

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department physician, Dr. Benjamin Seo. The on-duty charge nurse, Mary Ellen Reed Dobson, photographed the pressure ulcers.

Swedish records indicate that the day before, on December 27, 2009, Sinnett was brought to the Swedish Cherry Hill emergency department by ambulance from the Seattle Heights adult family home. She was admitted with tailbone, hip, and ankle decubitus ulcers with surrounding cellulitis (infection of the skin), low blood pressure, dehydration, and an altered mental status. Additionally, staff noted that she was drowsy and incoherent.

On December 28, 2009, Sinnett showed signs of increased confusion, progression of her pressure ulcers, very low blood pressure, and an irregular heartbeat. She was transferred to the intensive care unit, where she was diagnosed with sepsis, or blood poisoning, due to the pressure ulcers. Sinnett's attending physician, Dr. David Schutte, wrote in his notes that he was concerned about her long-term prognosis given the severity of her wounds.

DSHS responded to Woodworth's report and assigned an investigator to the case. The first investigator was Susan Aromi. Aromi's investigation led to the involvement of two other DSHS investigators, Mary Hayes and Gloria Morrison. The investigators interviewed witnesses regarding the care Sinnett received at the adult family home, and reviewed documents and medical records related to Sinnett's care and condition during this time period. According to the DSHS investigation, at the time Sinnett left Seattle Heights for the Swedish ER, the adult family home was staffed only by Esther Tagoe. Tagoe, a Nursing Assistant Registered (NAR), had been hired by owner Regina Daniels to work 24 hours a day, 7 days a week as the only caregiver for all three adult residents. Each resident of the Seattle Heights house had numerous medical issues and was unable to care for themselves.

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Prior to this incident in December of 2009, the defendant's records indicate that she had last examined Hannah on September 10, 2009, at which time she noted that Hannah did not have any wounds on her skin, but was at risk of skin breakdown due to edema (swelling due to fluid accumulation) in her legs, and yeast under the folds of her skin.

The defendant's records indicate that on December 22, 2009, she was notified by Daniels that Sinnett had some skin problems and needed to have a urine sample taken. The defendant arrived at the home, and conducted a full-body exam of Hannah on that date. During her exam, she discovered multiple severe pressure ulcers on Sinnett's back, hip, buttocks, and right foot.

Despite the fact that Hannah had Medicare and full insurance coverage, Morgan charged Robison $400 per day to provide this care. The defendant never informed Robison that Sinnett would have qualified for in-home care by a home health agency paid for by Medicare, in the unlikely event that in-home care was appropriate for someone in her condition. After examining Hannah on December 22, 2009, the defendant called Dr. Sytman's office and spoke with an assistant to Dr. Sytman, Pam Pan. In that call, the defendant said that she saw the patient that day, that her urine was cloudy and darkened and had a bad odor. She said Hannah seemed quiet and confused, and that she suspected she had a urinary tract infection (UTI). The defendant told Pan that she needed an antibiotic to treat the UTI. In that conversation, she made absolutely no mention of Hannah's pressure sores. Not until sometime the following day, December 23, 2009, did the defendant notify Hanna's treating physician of the pressure sores. She did so by sending a fax to Dr. Sytman, in which she gave a sparsely-detailed description of the wounds and requested prescriptions for wound care treatment supplies. In her faxed note, she said, "Hannah Sinnett has developed open areas on her. I am asking for some orders to address these wounds." She went on to vaguely describe four of the wounds. Only one did she stage, saying it was a Stage 4. She failed

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to provide the stages of the other wounds, and failed to provide the size and depth of any of the wounds. She scheduled a follow-up appointment for December 30, 2009.

On that same day, December 23, 2009, Courtney Tarr, a visiting wound care nurse in charge of wound care for another resident at the adult family home, arrived at Seattle Heights to treat her patient. As soon as she walked in the front door, Tarr noticed an unpleasant smell, and immediately began to feel sick to her stomach. Tarr found Esther Tagoe, and asked her about the smell. Tagoe took her into Sinnett's room, from where the smell was emanating. Tarr described Sinnett as lying on her right side, with deep, black, draining wounds on her body. She stated that the wounds were all over Sinnett's back side. Tarr questioned Tagoe about Sinnett's wounds. Tagoe told her Daniels knew about the wounds, and also said that the defendant, Sinnett's wound care nurse, knew about them. Tarr said it was obvious to her that Sinnett needed to be hospitalized. Tarr then spoke to Daniels on the phone, and informed her that Hannah needed to be taken to the ER. She told Daniels that if she did not take her, Tarr would call Adult Protective Services and report Daniels. Daniels responded that she was coming to the adult family home. Tarr waited an hour for her, but Daniels did not appear. Tarr again called Daniels and asked her what she intended to do. Daniels told her they would take Sinnett to the ER. Later that day, Tarr received a call by a woman believed to be the defendant, who identified herself as Sinnett's wound care nurse. The caller wanted to know why Tarr thought Sinnett needed to go to the ER. The caller wanted to know why Tarr did not believe pressure relief and antibiotics were sufficient. Tarr explained that the odor, the deep dead dark tissue, the drainage—all of those symptoms indicated to her that Sinnett had sepsis or infection and needed to get to the hospital immediately. The defendant stated that she wanted to leave Sinnett in the home under her care plan. She said she was Hannah's wound care nurse, that she had known the patient a lot longer than Tarr had, and that she knew best. After much discussion, the defendant

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finally told Tarr she would have Sinnett taken to the ER that day. The defendant did not take Sinnett to the ER that day. Sinnett remained in the home for four more days after that conversation.

During the six days that the defendant kept Hannah in the home, her health and the wounds deteriorated further. Finally, on December 27, 2009, the day before Tarr was scheduled to return to the home, the defendant called 911 and had Sinnett taken to the hospital. Also, on that day, the defendant called and made an anonymous report to DSHS of "possible neglect." She said that Hannah Sinnett had open wounds, stage IV. At no point prior to December 27th did the defendant report the neglect of Hannah Sinnett to DSHS.

The next day, December 28, 2009, the defendant faxed a second letter to Dr. Sytman. She entitled this "Completed Consultation Report" and back-dated it to December 22, 2009. In this letter, she summarized what had allegedly happened, stating that after observing Hannah's wounds and condition on December 22nd, she called Dr. Sytman's office and ended up speaking with Dr. Martin, who ordered an antibiotic for Hannah. She then stated, "I agreed to come do the dressing changes, monitor her care, communicate receive orders from the doctor and report any change in status daily and as needed." She went on to say that the wounds had been developing "for an extended period of time… Strongly feel these open areas have developed as a result of neglect and poor care." The Plan of Care that she submitted as part of that report included the following: "Do not lift or transfer Hannah without a Hoyer or 2 person assist. Report any redness or change in her condition to appropriate person. Report incident to Hotline."

Sinnett died two weeks after the date of her admission to the hospital, on January 12, 2010. The Medical Examiner's Office was not notified of Sinnett's death. Therefore, no autopsy was performed.

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The State initially filed charges of Criminal Mistreatment in the First Degree against Regina Daniels, the owner of the adult family home, on February 10, 2011. While the case was pending, the State continued to investigate and further analyze the case. The prosecutors on the case had several meetings with defense counsel for Daniels regarding a possible resolution of the case. As part of these plea negotiations, on September 20, 2011, Daniels' counsel provided the State with a proffer that indicated what Daniels would say if she were to testify at trial against the defendant. The statement was written by Daniels' counsel for the sole purpose of plea negotiations. The State had concerns about the self-serving nature of the proffer, and negotiations for a possible plea fell through. In its ongoing analysis of the case as it progressed, the State became increasingly cognizant of the significant role that the defendant had played in Sinnett's death. This was evident from the statements of other State's witnesses, including Courtney Tarr and Sam Robison, as well as from the defendant's own records. As a result, the State filed an amended information on December 21, 2011, in which it added Karen Morgan as a co-defendant. Morgan was charged with one count of Criminal Mistreatment in the Second Degree for recklessly creating an imminent risk of great bodily harm or death, from 12/22/09—the day she agreed to provide wound care to Hannah Sinnett—to 12/27/09—the day Sinnett was finally taken to the hospital.

Subsequently, on January 4, 2013, Daniels pled guilty to one count of Criminal Mistreatment in the Second Degree. Specifically, she pled guilty to recklessly causing substantial bodily harm to Hannah Sinnett by withholding any of the basic necessities of life, from December 1, 2009 through December 22, 2009. See, Statement of Defendant on Plea of Guilty, attached hereto as "Appendix A." In return for her plea, she agreed to testify truthfully at the trial of the defendant. See, Immunity Agreement, attached hereto as "Appendix B." After Daniels entered her guilty plea, counsel for the defendant interviewed her on two occasions with the prosecutors present. In the

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interviews, it was apparent to both the defendant's counsel and the prosecutors that Daniels was not being truthful about numerous aspects of the incident. As a result of her lack of credibility, the State determined that it would not call Daniels as a witness. After informing defense counsel of this, Morgan's counsel advised that they would call Daniels as a witness for the defense.

V. PRETRIAL RULINGS

In prior hearings, the court granted the State's motion to amend the information to add defendant Karen Morgan. It denied the defendants' motion to sever their trials. It further denied the defendants' motions to exclude the testimony of Dr. Laura Mosqueda. The court also denied the defendants' motions to sequester evidence of the defendants' banking activity pending the outcome of a CrR 3.6 hearing.

VI. EVIDENTIARY ISSUES

Introduction

Washington courts encourage early rulings by a trial court on motions in limine for a number of reasons. Such rulings are "helpful to both parties and [avoid] interruption of proceedings before the jury." State v. Porter, 36 Wn.App. 451, 453, 674 P.2d 694 (1984); see also State v. Moore, 33 Wn. App. 55, 651 P.2d 765 (1982). It is particularly important to obtain rulings on sensitive evidentiary issues in criminal cases before a jury is impaneled. See, e.g., State v. Porter, 36 Wn.App. at 452; State v. Latham, 30 Wn.App. 776, 638 P.2d 592 (1981), aff'd, 100 Wn.2d 59, 667 P.2d 56 (1983); State v. Koloske, 34 Wn.App. 882, 667 P.2d 635 (1982). One important purpose of a motion in limine is to "dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his [or her] presentation." State v. Evans, 96 Wn.2d 119, 123, 634 P.2d 845 (1981). An early ruling on matters concerning the admissibility of certain evidence also facilitates the efficient

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administration of justice. See State v. Latham, 30 Wn.App. at 780; Tegland, Courtroom Handbook on Washington Evidence, at 166 (1998).

With these principles in mind, the State asks the Court to rule on its motions in limine, except where otherwise noted. Legal authority for these motions is provided where appropriate. The State reserves the right to bring further motions if necessary during the course of this trial.

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 Michael Gordon of the King County Sheriff's Office.

2. Defendant's Statements – CrR 3.5

In this case, the defendant made several statements to various Department of Social and Health Services investigators and gave two written statements to a Washington State Department of Health investigator. The State will move to introduce the defendant's statements in its case in chief. None of the individuals to whom the defendant made statements are law enforcement personnel, nor were law enforcement present when the statements were made. Therefore, the defendant was not in custody at the time the statements were made. The State asks this court to find that these statements are admissible without the need for a CrR 3.5 hearing.

Under the Fifth Amendment of the United States Constitution, an individual has the right to be free from compelled self-incrimination while in police custody.[3] U.S. Const. amend. V;

[3] Article I, section 9 of the Washington State Constitution is equivalent to the Fifth Amendment and is subject to the same definitions and interpretations as have been given to the Fifth Amendment. State v. Templeton, 148 Wn.2d 193, 207-08, 59 P.3d 632 (2002) (citing City of Tacoma v. Heater, 67 Wn.2d 733, 736, 409 P.2d 867 (1966).

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U.S. Const. amend. XIV; Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); State v. Sargent, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988). To protect this right, law enforcement is required to provide Miranda warnings to a person in custody before that person is subjected to interrogation. Miranda, 384 U.S. at 479. Whether a specific defendant must be advised of Miranda rights, therefore, depends on whether the questioning is (1) custodial (2) interrogation (3) by a state agent. State v. Post, 118 Wn.2d 596, 605, 826 P.2d 172 (1992) (citing Sargent, 111 Wn.2d at 649-53). Unless all three factors are present, Miranda warnings are not required. Post, 118 Wn.2d 596.

For the purposes of Miranda, a suspect is in "custody" when his or her "freedom of action is curtailed to a 'degree associated with formal arrest.'" Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (citing California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983)); see also State v. Harris, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986). The question of "custody" is objective and focuses purely on whether a reasonable person in the person's position would conclude that they were in custody. State v. Lorenz, 152 Wn.2d 22, 36-37, 93 P.2d 133 (2004).

For the purposes of Miranda, a suspect is "interrogated" whenever the police subject him to either express questioning or its functional equivalent. Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Interrogation includes words or actions on the part of police, other than those normally attendant to arrest and custody, that police should know are reasonably likely to elicit an incriminating response from the suspect. Id; State v. Pejsa, 75 Wn. App. 139, 147, 876 P.2d 963 (1994).

Before any statements obtained during a custodial interrogation may be admitted against a defendant at trial, the State must show by a preponderance of the evidence that the defendant

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knowingly and intelligently waived the right to remain silent. Id. at 475; State v Athan, 160 Wn.2d 354, 380, 158 P.3d 27 (2007). Courts determine whether there has been a waiver by examining the totality of the circumstances, including the background, experience, and conduct of the defendant. North Carolina v. Butler, 441 U.S. 369, 374-75, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979); State v. Young, 89 Wn.2d 613, 620, 574 P.2d 1171 (1978). Although a waiver of Miranda rights is often shown by either a written waiver or an explicit verbal waiver, such express waivers are not required. Butler, 441 U.S. at 373-74. Rather, courts should examine the entire record to determine if the defendant has impliedly waived the right to silence by his or her conduct.

In this case, the defendant made verbal statements to various Department of Health and Social Services investigators and provided two written statements to a Department of Health investigator. While these investigators are state actors, they are not law enforcement officers. Furthermore, no law enforcement officers were present during her questioning. In fact, the defendant was never questioned by a law enforcement officer during the investigation of this case. Therefore, the defendant was never in custody for purposes of CrR 3.5; thus, all of her statements, both oral and written, should be deemed admissible without the need for a CrR 3.5 hearing.

Should the court decide that a CrR 3.5 hearing is necessary, the State anticipates calling four witnesses.

3. Defendant's Motion to Suppress Evidence – *CrR 3.6 Hearing Not Necessary*

The State obtained a judicially authorized search warrant for the bank records of defendant. The defendant filed a motion to suppress the evidence obtained via that search warrant pursuant to

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CrR 3.6. The State does not intend to offer into evidence the documents obtained with this search warrant. Therefore, a CrR 3.6 hearing will not be necessary.

4. Discovery Demand

The State believes that it has been provided complete discovery by the defense as required by CrR 4.7. In an abundance of caution, however, the State moves pursuant to CrR 4.7 and State v. Yates, 111 Wn.2d 793, 765 P. 2d 291 (1988) for discovery of any witness statements not provided by the State that the defense may have in its possession and have not yet provided to the State. Additionally, the State requests that the defense allow inspection of physical or documentary evidence in the defense's possession which may be offered by the defense 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. Further, the State seeks any investigator's summary statements (should formal written or recorded statements not exist) prior to their use by the defense for impeachment of State's witnesses or when defense witnesses are called to the stand.

To date, the defendant has disclosed the following witness:

- John Fullerton, M.D.;
- Beldina Owour;
- Regina Daniels; and
- Kevin Steward

If the defense intends to call any other witnesses, the State requests the names, dates of birth, contact information and summaries of expected testimony of yet unrevealed witnesses.

5. 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

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denial." The State moves to preclude the defendant from offering evidence of or arguing any other defense not previously disclosed to the State.

6. Motion to Admit Photographs from Swedish Medical Center

The State intends to offer photographs into evidence at trial. Among these will be a limited number of photos depicting Hannah Sinnett's pressure ulcers taken at Swedish Medical Center. The defense may argue that some of these photos should be excluded because their prejudice to the defendant outweighs their probative value. ER 403. Even if gruesome, photographic representations are admissible if their probative value outweighs their prejudicial effect. State v. Kendrick, 47 Wn.App. 620, 624, 736 P.2d 1079 (1987). A trial court's decision to admit such photographs is reviewable only for a manifest abuse of discretion. State v. Harris, 106 Wn.2d 784, 791, 725 P.2d 975 (1986).

Admission of photos will be upheld "unless it is clear from the record that the primary reason to admit gruesome photographs is to inflame the jury's passion." State v. Daniels, 56 Wn. App. 646, 649, 784 P.2d 579 (1990). The State is not offering the photos of Hannah Sinnett's wounds to inflame the jury. The photographs are relevant because they show the severity of the pressure ulcers as they existed under Morgan's care. These photographs are essential to explaining the medical witnesses' observations and conclusions and to accurately depict the injuries to the jury. A jury should not be denied an opportunity to view exhibits that aid in its understanding of the evidence. The State seeks to admit only those photos necessary to explain the injuries to the victim which are relevant to the issue of neglect. The State's photographs depicting the victim's body should be admitted.

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7. Motion to Admit In-life Photographs of Victim

The State intends to offer two in-life photographs of the victim, Hannah Sinnett—one of Sinnett as a younger woman, and another more recent photograph. In State v. Rice, 110 Wn.2d 577, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989), the Washington Supreme Court upheld the admission of in-life photographs of the victim. In State v. Brett, 126 Wn.2d 136, 159, 892 P.2d 29 (1995), the court followed the Rice holding and observed, "(i)n-life photographs are not inherently prejudicial, especially when the jury also sees 'after death' pictures of the victims' body." Additionally, in State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995), the court upheld the admission of in-life photographs of the victims because their probative value was outweighed by any potential for prejudice to the defendant. The court reasoned that "in light of the gruesome photos of the victims that were also before the jury, it cannot be said that the 'in-life' photos could have added much additional prejudice." Pirtle, supra at 653. The court should admit in-life photos of the victim in order to identify her, give the jury a glimpse of who she was as a person, and because the probative value of the photographs outweighs any potential for unfair prejudice to the defendant.

8. Use of Photographs during Opening and Closing

The State anticipates that it will use photographs 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 presentations.

9. Motions Regarding Impeachment of Witnesses and Defendant

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

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confinement (whichever date is later). Crimes of dishonesty that occurred beyond the ten-year 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 histories of all the State's civilian witnesses to the defendant. The only witness who has a criminal history in this case is Regina Daniels. Her history is limited to her recent conviction of Criminal Mistreatment 2 on this case. Because that crime is not a crime of dishonesty, it is not admissible under ER 609. However, the State and the defense intend to offer evidence of the plea on other grounds, to be discussed below.

10. Motion to Limit Admissibility of Reputation and "Prior Bad Acts" of State's Witnesses

The State seeks clarification regarding any prior bad acts or reputation evidence the defendants seek to introduce at trial regarding any of the State's witnesses. The State moves for disclosure of any specific instances of misconduct that the defendants intend 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.

ER 608 governs the use of character evidence to impeach a witness' credibility at trial. ER 608 provides:

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> (a) Reputation evidence of character - The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to these limitations: (1) the evidence may relate only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.
> (b) Specific Instances of Conduct - specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness'' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness, (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross examined has testified.

Established case law makes clear that when a party attacks a witness' credibility they may not "prove up" a specific instance of misconduct with extrinsic evidence. State v. Emanuel, 42 Wn.2d 1, 13, 253 P.2d 386 (1953). In other words, a party may not impeach a witness with every lie he or she has ever told.

If the defendant intends to impeach a witness' "character for truthfulness," he may only do so by way of reputation evidence. Counsel may conduct the following limited inquiry:

> 1) Do you know the general reputation at the present time of (witness), in the community in which he lives, for truth and veracity?
> 2) Is his reputation good or bad?

Tegland, (2000). Any deviation from this standard script is error. State v. Maule, 35 Wash. App. 287, 667 P.2d 96 (1983).

Moreover, if the defendant intends to elicit reputation evidence by a witness, the State respectfully requests the opportunity to voir dire the witness outside the presence of the jury. Only if the court finds that a proper foundation is laid for such reputation should such evidence be allowed.

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11. Motion to Preclude Evidence of Regina Daniels' Prior Bad Acts and Bad Character.

Similarly, the State moves to preclude evidence of any prior bad acts or reputation evidence the defendants seek to introduce at trial regarding Regina Daniels. It also moves to preclude evidence of specific instances of misconduct of Daniels that the defense intends to use for the purpose of attacking Daniels' credibility or character, pursuant to ER 608. The State does not oppose the admission of Daniels' guilty plea, as it is clearly relevant to the defense.

The State anticipates that the defense will attempt to offer evidence that Daniels frequented casinos and drove an expensive car, that she lied to DSHS about the date she hired Esther Tagoe, and of numerous other prior bad acts or bad character traits. The State asks this Court to preclude such evidence, on the same grounds as is set out above. ER 608 and ER 404(b) clearly delineate the circumstances under which the prior bad acts, specific instances of conduct, or character traits of a witness may be admitted into evidence. The fact that Daniels is now a defense witness, rather than a State's witness, does not change the applicability of these court rules.

Regina Daniels pled guilty to recklessly causing substantial bodily harm to Hannah Sinnett by withholding any of the basic necessities of life, from December 1, 2009 through December 22, 2009. The defendant is charged with recklessly creating an imminent risk of death or great bodily harm to Sinnett by withholding any of the basic necessities of life, from December 22, 2009 through December 27, 2009—a period of time after the time period for which Daniels pled guilty. Although Sinnett remained in Daniels' care while the defendant was treating her, the defense theory is that by December 22, 2009, the damage had been done and Hannah was already dying. Because the defense theory is to blame the neglect on Daniels, the State does not contest the admission of Daniels' guilty plea. However, evidence regarding Daniels' spending

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habits, dishonesty, and other bad acts she may have committed is simply not relevant to whether the defendant neglected Sinnett from December 22 -27, 2009.

12. Motion for Pretrial Hearing to Determine on What Subjects Defense May Question Daniels, and Whether She May Assert her Privilege Against Self-Incrimination.

As stated above, co-defendant Daniels has pled guilty to one count of Criminal Mistreatment in the Second Degree. As part of her plea agreement, she agreed to testify truthfully for the State. She has not yet been sentenced. During the defense interviews of her, it appeared to the State and counsel for Ms. Morgan that many of her statements were not credible and were self-serving. For that reason, the State concluded that it would not call Daniels as a witness.

Counsel for the defendant has since announced their intent to call Daniels as a defense witness. As mentioned above, they have indicated their intent to elicit testimony from Daniels regarding inconsistent statements she has made, prior bad acts she has committed, and about her bad character. It is the stated intent of the defense to argue "only suspect" evidence: that Daniels was the sole person responsible for the neglect of Sinnett. As a means of bolstering their defense, they intend to bring forth negative facts about Daniels through the testimony of Daniels herself.

The State's belief is that the primary purpose for which the defense intends to call Daniels is to impeach her with her prior inconsistent statements, and offer evidence of her prior bad acts. The State does not believe that defense should be allowed to call Daniels for this purpose. The credibility of a witness may be attacked by any party, including the party calling the witness. ER 607. However, a party may not call a witness for the primary purpose of eliciting testimony in order to impeach the witness with testimony that would be otherwise

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inadmissible. State v, Allen S., 98 Wn.App. 452, 464, 989 P.2d 1222 (1999); accord State v. Hancock, 109 Wn.2d 760, 763, 748 P.2d 611 (1988); see State v. Lavaris, 106 Wn.2d 340, 345, 721 P.2d 515 (1986) (a party may not call a witness as a mere subterfuge to place before the jury evidence not otherwise admissible). See also State v. Howard, 127 Wn.App. 862, 869-70, 113 P.3d 511 (2005).

In Howard, the Court of Appeals considered whether the rule articulated in Lavaris applied equally to the State and defendant. The court noted that while Lavaris dealt with prosecutorial abuse of the rule, the defendant cited no cases and the court found no cases that hold that the application of the principle stated in Lavaris is limited to the State. 127 Wn.App. at 869-70. In fact, our court once noted that "calling a [defense] witness for the sole purpose of impeaching him is a pointless exercise. If the impeachment would involve use of otherwise inadmissible evidence, it would be improper." The argument that exclusion of such improper evidence is limited to when the State offers such evidence is illogical. The purpose of the rule, regardless of the party against whom it is applied, is to avoid the subterfuge of putting before a jury evidence that is otherwise inadmissible. There is nothing in the language of the cases that suggests that the rule should be selectively applied only against the State. State v. Howard, 127 Wash. App. 862, 869-70, 113 P.3d 511, 515 (2005).

Defense may argue that a defendant's right to confrontation trumps any limitation on confronting any and all potential witnesses. Although the right to confrontation should be zealously guarded, that right is not without limitation. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) (the right to confrontation is not absolute). The right to confrontation, and the associated right to cross-examine adverse witnesses, are limited by general considerations of

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relevance. Id. There is no constitutional right to admission of irrelevant evidence. State v. O'Connor, 155 Wn.2d 335, 348-49, 119 P.3d 806, 813 (2005)

Regarding the impeachment of Daniels, if counsel for Morgan can show that there is relevant, substantive testimony that they wish to elicit from Daniels, the State would not object to the defense calling Daniels for that limited purpose. If the primary purpose Daniels is being called is to impeach her with inconsistent statements, then her testimony should be excluded pursuant to Hancock and Levaris.

Additionally, in her interviews with Morgan's attorneys, Daniels made numerous statements that appear to be self-serving and untrue. In her plea agreement with the State, Daniels agreed to testify truthfully in the defendant's trial. Her failure to do so could constitute grounds for the State to assert that Daniels violated her plea agreement. For these reasons and because of defense counsel's stated intent to question Daniels on numerous subjects that the State does not believe are relevant, the State requests that this court hold a pretrial hearing with Daniels' counsel present so that all of these matters can be ruled on in advance of her testimony. This will allow the parties to safely address her testimony in their opening statements, and eliminate the inevitable necessity to address these same issues during the course of the trial after the jury has been empaneled.

To be clear, the State does not contest that the defendant may call Daniels as a witness. However, it does contest that they may call her for the sole purpose of attacking her. Daniels has pleaded guilty to neglecting Hannah Sinnett for the time period *before* the date on which Morgan assumed responsibility for her care. The State does not claim that the two defendants were responsible for Sinnett's neglect at the same time. Whether Daniels is a dishonest person, whether she gambles, whether she told lies to various parties during the earlier charging period is

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irrelevant to whether or not Morgan committed Criminal Mistreatment in the Second Degree during the six days she was responsible for Sinnett's care. By calling Daniels as a witness and then attacking her with her prior bad acts and conflicting statements, the defense will do nothing but confuse the jury. The State does not contest that the defense has the right to argue that Daniels, not Morgan, is responsible for the neglect. But the right to argue that Daniels is the only suspect does not extend to allowing Daniels' to be cross-examined on matters that are not relevant to the 12/22/09 through 12/27/09 charging period.

13. Motion to Require the Defendant to Confront Witnesses with Prior Statements Prior to Impeachment.

Pursuant to ER 613, the State moves for an order requiring the defendant, during cross-examination, to show the witnesses their statements or to play the precise contents of their recorded statements when confronting them with prior statements. ER 613 provides that "In the examination of a witness concerning a prior statement made by the witness, whether written or not, the court may require that the statement be shown or its contents disclosed to the witness at that time…"

The State anticipates that the defendant may attempt to impeach the State's witnesses with prior statements made in defense interviews or other hearings. Under ER 613, the State requests that the witnesses be given a transcript or be afforded the opportunity to listen to the recording when being confronted with a prior inconsistent statement. Following the procedure of ER 613 will ensure that the witnesses are properly and fairly confronted with a prior statement that is actually inconsistent, rather than counsel's memory of a statement. Therefore, the defendant should be required to show the witnesses a transcript or be prepared to play the audio portion of the interview when impeaching witnesses.

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14. Motion to Exclude Evidence of State's Witnesses' Bad Character

The State has received no notice of any ER 404(a) or 404(b) evidence that the defense intends to offer against witnesses named by the State. The State moves in limine to preclude any such evidence absent the defense bringing it to the attention of the court and the State at a pretrial hearing so the matter can be addressed and ruled on. This motion is based on ER 404(a) and ER 404(b).

15. Impeachment of the Defendant With Prior Convictions.

The defendant has no known criminal convictions. As such, should the defendant testify, the State will not impeach the defendant pursuant to ER 609.

16. Motion to Exclude Evidence of the Defendant's Lack of Prior Arrests and/or Criminal History for Similar Crimes.

The defendant does not have any convictions for Criminal Mistreatment in the Second Degree or any other crimes. The State makes a motion to prevent the defense from eliciting any testimony regarding the defendant's lack of convictions or prior arrests for similar crimes. Additionally, the State moves to preclude defense counsel from making any argument relating to the defendant's apparent lack of criminal history of similar offenses since doing so would be improper character evidence.

17. 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 are not relevant to the charge and should be excluded. The State asks that the defense advise the

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

18. Motion to Exclude Self-Serving Hearsay by Defendant.

Although the State may offer the defendant's statements under ER 801(d)(2), the State also moves in limine to preclude the defendant from eliciting her own self-serving statements from any witness under ER 802 as out-of-court statements that are offered for their truth and not availed of any applicable hearsay exceptions. 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-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:

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> 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 of the defendant where such statements are clearly self-serving statements. Such statements are hearsay, and should not be admitted into evidence unless an applicable exception to the hearsay rule can be identified.

19. Motion to Exclude Mention of Date of Proffer and Dates Charges Were Filed Against Either Defendant.

The State filed one count of Criminal Mistreatment in the First Degree against Regina Daniels on February 10, 2011. Pursuant to plea negotiations with Daniels, on September 20, 2011, her counsel presented the State with a proffer of what the defendant would testify to if she were called as a witness against Morgan. The State declined to enter into a plea deal with Daniels at that time. Charges were not filed against the defendant until December 21, 2011. The State moves in limine pursuant to ER 401 and ER 403 to preclude defense from eliciting these facts at trial or arguing about them as they are not relevant and would confuse the issues and mislead the jury. The dates of plea negotiations and when defendants are charged has no bearing on a jury's consideration of guilt. They are procedural matters that are up to the State, have no relevance to these proceedings and should, therefore, be excluded. The State expects the defendant may attempt to elicit this information in order to argue that it is indicative of the fact that the evidence against the defendant is weaker than it was against the co-defendant. That is an improper argument and should be excluded.

Even if the Court were to find that this evidence is marginally relevant, the Court should still

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exclude the evidence under ER 403. Pursuant to ER 403, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. In this case, the date of the proffer and of the filing of charges is not relevant to the criminal culpability of the defendant. The admission of such evidence would confuse the jury as to the issue before it, namely evaluating the evidence and determining whether the defendant committed Criminal Mistreatment in the Second Degree at the Seattle Heights home in December of 2009. Additionally, the admission of such evidence would create a distracting side issue that is not pertinent to the charge, and that would likely mislead the jury.

20. Motion to Exclude Evidence that Courtney Tarr and Esther Tagoe were not Charged with Crimes.

On similar grounds, the State moves to exclude any evidence or comment during openings, testimony or closing argument regarding the fact that neither Courtney Tarr nor Ester Tagoe were charged with crimes. This motion is based on ER 401 and ER 403. Whether Courtney Tarr or Esther Tagoe were charged with crimes has nothing to do with whether the defendant committed the crime of Criminal Mistreatment. Such evidence or argument will do nothing but confuse the jury, and distract them from their charge of determining whether the State has met its burden of proof with regard to its case against the defendant. The State moves this Court to exclude any evidence or comment on this subject.

21. 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 defendants' attorneys, defense witnesses, and any person connected with the defense

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from making references, 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.

22. 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

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of invited error will not preclude the tardy argument.[4]

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 defendants 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.

[4] 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, 975 P.2d 520 (1999).

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23. Motion to Preclude Inappropriate Witness Opinions and/or Legal Conclusions.

The defense may ask questions of lay witnesses that call for or allow them to present personal opinions, legal conclusions, or medical opinions that those witnesses are not qualified to offer. The State moves to preclude the defense from asking such questions during trial. Further, the State moves to exclude such lay opinions and conclusions and asks that witnesses be instructed of this prohibition. This type of testimony is irrelevant under ER 401, is more prejudicial than probative under ER 403, and is not appropriate character evidence under ER 404(a) (2) & (3). Aside from being inappropriate character evidence, it is additionally not in the form of reputation as is required by ER 405(b) and ER 608.

24. Motion to Exclude Evidence that Witnesses were Surprised that Criminal Charges were Filed.

The State moves to exclude any evidence or comment regarding witnesses being surprised that criminal charges were filed. The State also moves to exclude any allusion to the fact that charges are not typically brought after DSHS investigations. Evidence that witnesses were surprised that criminal charges were filed or that criminal charges do not commonly follow after DSHS investigations is not relevant and should be excluded. This motion is based on ER 401 and ER 403.

VII. STIPULATIONS

The parties met several times in advance of the trial in order to confer on stipulations. As a result of these meetings, the parties have reached stipulations on numerous matters. The parties will alert the Court to all stipulations as they arise during the course of the trial.

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VIII. SCHEDULING

A few of the State's witnesses have issues that may make them unavailable to testify on a given day or days of trial. The State has five medical professionals who will be testifying, some of whom will need to have the day and time of their testimony hard-set. In addition, one of the counsels for the State, Page Ulrey, has a vacation out of state commencing on August 31st. If the trial is not completed by that date, Brian Wynne will conclude the trial on behalf of the State.

IX. 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 August, 2013.

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