STATE OF WISCONSIN : CIRCUIT COURT : KENOSHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

-vs-

MEMORANDUM REGARDING THE DYING DECLARATION

Case No. 02 CF 0314

MARK D. JENSEN,

Defendant.

On the day of sentence, I promised a memorandum more extensively explaining the trial ruling admitting the letter attributed to Julie Jensen as a Dying Declaration.

The History of the Letter in this Case

Prior to the decision of the Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004), I had ruled, under the then-existing rule of *Ohio v. Roberts*, 448 U.S. 56 (1980), that the letter was admissible at the trial. After *Crawford's* release, the case was reargued, and the prosecution contended that the defendant had forfeited his confrontation rights relative to Mrs. Jensen's statements because he had killed her for the purpose of "getting her out of the way so that she wouldn't be litigating any issues about visitation or child custody, about disposition of the marital estate; she would simply be put out of the way." Transcript, June 7, 2004, p. 10, l. 23 to p. 11, l. 3.

At the hearing, I expressed my belief that the defect in the state's forfeiture position arose from an analysis of the historic co-existence of the three rules of antiquity at play in this case: the Confrontation Clause, the Dying Declaration Rule, and the Waiver/Forfeiture Rule. The Confrontation Clause, of course, sets the constitutional standard, and dates, in that form, from the First Congress in 1789. The rule excepting Dying Declarations from its confrontation requirement, which the Court refers to as "[T]he one deviation we have found" to the requirement of cross-examination, *Crawford* at 20, fn. 6., is an ancient one, dating at least to *King v. Reason*, 16 How. St. Tr. 1, 24-38 (K.B. 1722). The Court in *Crawford* also indicated its acceptance of the rule of forfeiture by wrongdoing, *Crawford*, Slip Op. at 26, citing *Reynolds v. United States*, 98 U.S. 145, 158-159 (1879). *Reynolds*, in turn, cited *Lord Morley's Case*, 6 State Trials, 770 (H.L. 1666) in support of the rule. Thus, it was clear that both the Dying Declaration Rule and the Forfeiture Rule existed at the time of the adoption of the Sixth Amendment's Confrontation Clause.

It was, and remains, my impression that the criteria suggested by the state for invocation of the Forfeiture Rule cannot be reconciled with this history. If an accused forfeits the right of cross-examination merely by killing the victim to "put her out of the way," then there would have been no reason for the continued existence, and repeated utilization, of the Dying Declaration Rule, which contains the added requirement that the declarant's statement have been made "while believing that the declarant's death was imminent." The existence of the Dying Declaration Rule makes sense only in an evidentiary framework in which the mere fact that the defendant can be shown by the greater weight of the evidence to have killed the declarant does not, by itself, justify

exception to the requirements of the Confrontation Clause. Indeed, I commented in my memorandum of August 4, 2004, that expansion of the forfeiture rule to the extent suggested by the state sounded suspiciously like the type of judicial "reliability" findings denounced by the Court in *Crawford*, Slip Op. at 32.

The Wisconsin Supreme Court agreed with the state's view, and overruled my decision denying receipt of the letter. When the case was remitted to this court, I indicated my intent, of course, to try the case under the law as it had been interpreted by the Wisconsin Supreme Court, but I continued to express my apprehension that its decision was incongruent with *Crawford.* My memorandum of May 8, 2007, expressed my view that "the rule adopted in this case is far broader that the historical Rule of Forfeiture which existed at the time of the creation of the Sixth Amendment." p.1-2. It was, and is my concern that, as Justice Butler aptly noted in dissent, the rule adopted by the supreme court literally created an automatic exception to the Sixth Amendment in every murder case." It seems very odd that the framers of the Amendment would not have alerted us to so enormous a deviance from the text, and from what was the practice at the time. The supreme court's adoption of the "broad rule of forfeiture" certainly represented an expedient rule, but not one which adhered to the view of the historic Right of Confrontation boldly discussed in *Crawford.*

And, again, as I stated in my May 8, 2007 memorandum, "I still do not understand why there is an entire body of law concerning the requirement that a declarant have been *in extremis* at the time of the statement, if the mere fact that the accused caused his death avoided the Confrontation Rule," citing *Shepard v. U.S.*, 290 U.S. 96 (1933),

in which the Supreme Court instructed that "[T]o make out a dying declaration, the declarant must have spoken *without hope of recovery* and in the shadow of impending death." 290 U.S. 99. [Italics added]. Memorandum of May 8, 2007, p. 2-3.

To illustrate the devastating impact upon the Right of Confrontation which can arise from the sweeping "broad forfeiture by wrongdoing doctrine" adopted by the Wisconsin Supreme Court in *State v. Jensen*, 2007 WI 26, my memorandum posited a hypothetical case.

> Two men, Mr. Goode and Mr. Malis, attend a party together. During the course of the evening, Malis encounters Ms. Morte. At some point, he lures her out onto a concealed area of the veranda and strangles her with a sash cord. The body is found, and the police are called. They question Goode, who has witnessed nothing, and who therefore denies any knowledge of the event. They then question Malis, who, in an effort to shift suspicion from himself, falsely claims that he saw Goode escorting Morte out onto the veranda, and that he noticed that Goode had a length of sash cord protruding from his jacket pocket. He claims that about ten minutes later, he saw Goode again, sweaty and beet-red, and that he heard Goode say that he had "had enough of that bitch." Although suspicious of Goode because of Malis's statement, the police do not arrest Goode that night.
>
> A week later, Malis is a passenger in Goode's car. It is a snowy night, and the roads are ice-covered. Goode loses control of the car, and Malis is killed.
>
> Based principally on the false statement of the now-deceased Malis, Goode is arrested, and tried for the murder of Ms. Morte. Under the sweeping rule adopted by the supreme court in *State v. Jensen*, this damning falsehood will be heard by the jury, without the defendant being allowed any right to confront his accuser. Memorandum of May 8, 2007, p. 3-4.

In accord with the instructions which I had been given by the Wisconsin Supreme Court, I conducted a hearing and determined that by the greater weight of the evidence, the state had proved that Mr. Jensen killed his wife, and thereby forfeited his confrontation rights respecting her statements.

On the fifth day of the trial of this case, the Supreme Court of the United States granted certiorari in the case of *Giles v. California*, in which the California Supreme

Court had adopted a rule which also departed from the historic rule of forfeiture as it existed at the time of the adoption of the Sixth Amendment.

Prior to the close of the evidence at the trial, I announced my view that Mrs. Jensen's letter, which had already been received under the Forfeiture Rule, would also correctly be admitted as a Dying Declaration. This was done due to the seven week length of this trial, and my concern that ultimately, the Supreme Court of the United States may find that alteration of the ancient rule of forfeiture is unconstitutional, which would mean that grave constitutional error occurred in this trial.

At the hearing on June 7, 2004, I had inquired of the District Attorney whether he asserted that Mrs. Jensen's letter was a Dying Declaration. He responded that since at the time that she wrote the letter, she did not expect to die; he felt that it did not qualify. Transcript of June 7, 2004, page 20, lines 8-14.

From the beginning, it was my impression that the letter might properly qualify as a Dying Declaration. After having heard all of the evidence in this case, I concluded that it did.

A Dying Declaration, which is the only recognized exception to the Rule of Confrontation, is defined in our law as "a statement made by the declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death." § 908.045(3). This codification accords with the historic definition of a Dying Declaration, embraced by the United States Supreme Court.

I have analyzed the State's Exhibit 230, the letter attributed to Julie Jensen, under this statute. First, there is no dispute that the letter is the statement of Julie Jensen.

Second, it is clear that the letter directly discusses the causes and circumstances of Mrs. Jensen's death.

The only remaining element of a dying declaration, then, is whether Mrs. Jensen believed her death to be imminent when she made the statement. To determine whether this element is present, it is necessary to determine when the statement was made.

The Framers of Sixth Amendment's View of Dying Declarations

Crawford v. Washington, 541 U.S. 36 (2004), teaches us that "Amdt. 6 is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." 541 U.S. at 54. From the emphasis which the Court placed, in ascertaining the meaning of our rights, on the historical roots of the Clause, it is clear that an analysis of any exception to the Rule of Confrontation must also be premised upon the common law known to the Framers.

The rule exempting Dying Declarations from the Rule of Confrontation is almost a thousand years old, predating even the formalized rule of confrontation itself. It originated in medieval England, and its roots are not in law, or even in logic, but in religion. Its basis is in the concept of unabsolved mortal sin.

Religion affected every aspect of medieval life: the inheritance of literature, art, and architecture that we enjoy today reflect the saturation of daily life with religious concepts. When geographic names are chosen nowadays for the moon and the planets, does anyone consider the name "Holy Savior," as Columbus named his first discovery? In America today, is the most prominent structure in every city a house of worship, as

was the case with the cathedrals of the Middle Ages? Do modern state documents begin, "In the name of God?"

All of this may seem quite odd to us in this secular age, but, even today, we see the proof in the world that has been left to us.

The law was no exception to this phenomenon.

One of the principles of English law which was driven by religious belief was represented by the maxim, *Nemo moriturus praesumitur mentiri*, that is, "a dying person is not presumed to lie." The premise from which the English courts derived this principle was the belief that a dying person would not go to his judgment with a grievous lie on his tongue, because the Church taught that a grave offence against God's law was a mortal sin, which, unless absolved after confession to a priest, would bring everlasting torment and damnation to the sinner.

Unlike today, when the focus of the rule has become the imminence and certainty of death; the basis of the rule at common law was the motivation of the declarant, which was the awareness of the imminence and certainty of death *while burdened with unabsolved mortal sin*, which would, at death, result in immediate condemnation of the declarant to an eternity in hell. It was the fearful consequence of damnation which guaranteed the truth of the declarant's statement, not the mere imminence or certainty of death.

The concept was not reserved to the law. It was believed at the time that, for this same reason, a dying person would not lie about *anything*. It was only later developments that led to the limitations now imposed which require that the declaration have related to the cause and circumstances of the declarant's death. Wigmore, Evidence

§1430, n. 1 (Chadbourne rev. 1974) notes that Shakespeare, in King John, *circa* 1595, alludes to the probably accurate account of the mortally wounded Count of Melun, warning the English nobles about the Dauphin's design to kill them all. When the Earl of Salisbury questions the accuracy of the report, the dying Count responds:

> Have I not hideous death within my view,
> Retaining but a quantity of life,
> Which bleeds away, even as a form of wax
> Resolveth from his figure 'gainst the fire?
> What in the world should make me now deceive,
> Since I must lose the use of all deceit?
> Why should I then be false, since it is true
> That I must die here and live hence by truth?
>
> Act V, Scene 4.

Although the enemy Count's dying statement does not relate to his own death, the Earl responds, "We do believe thee…."

For the same reason, in 1797, only six years removed from the addition of the Sixth Amendment to our Constitution, Lord Mansfield, Chief Justice of the Court of King's Bench, reasoned in the *Douglas Peerage Case*, 2 Hargr. Collect Jurid. 387. 397 that Lady Douglas's dying declaration regarding the birth of her child must have been truthful, for she would not have died "with a lie in her mouth."

In the case of the *King v. Reason*, 16 How. St. Tr. 1, 24-38 (K. B. 1722), a case cited by the Supreme Court in *Crawford*, fn. 6, a clergyman was called to the side of the wounded victim. He testified:

> [H]e seemed desirous, that I would pray to Almighty God for his soul, for he believed he had but a little time to continue in this world, and therefore he desired to make the best use of it; I was ready to assist him; and desired him to consider how far he might be instrumental in bringing this misfortune on himself. I desired him to consider, that as a dying man great weight would be laid on his words, therefore if he said any thing not strictly true, he might involve innocent

> people in the guilt, and the punishment: therefore I desired him to lay his hand upon his heart and consider.
>
> He told me, "As a dying man, *he expected to be tried for this very fact at the bar of heaven*, as well as the person who had injured him…. [sic] [Emphasis added].

Cooley's treatise, Constitutional Limitations Which Rest Upon the States of the American Union, Boston, 1868, also cited by the Court in *Crawford*, fn. 6, notes that "the condition of the party who made [the dying declarations] being such that every motive to falsehood must be supposed to be silenced, and the mind to be induced by the most powerful considerations to speak the truth. [Citation omitted]."

Lest there be any doubt that at the core of the rule was the expectation of eternal damnation for the making of a false declaration, the report of the *Reason* case contains the observation that "it may be conjectured, that the dying declarations of a person, of whom it should be proved that at the time of making them, he did not believe in a future state of moral retribution, would not be received." *Reason*, p. 25. Although the weight of modern authority does not permit showing lack of belief in the afterlife based upon moral conduct, Wigmore, *supra*, the point is clear that the life of the rule in existence at the birth of the Sixth Amendment was the fear of the judgment of God.

Clearly, then, the heart of the justification for the rule at common law was the declarant's fear of death with unabsolved mortal sin on his soul. The imminence of death was important only to the extent that it defined the risk faced by the declarant: that he would die before the sin of making a false accusation could be absolved. With time and secularization, the focus has shifted from that motivation of the declarant, which is the very *raison d'etre* for the rule, to the imminence of death, so that today, the rule is, in

some views, little more than a glorified excited utterance, a *treatment that has absolutely no historical basis*.

It would seem that nearly every dying declaration would definitionally be an excited utterance. Certainly being poisoned, or sustaining a mortal wound, would constitute a startling event. One would think that a person in such a position, who would be aware of impending death from the event, would be under the stress of excitement. And a statement about the cause or circumstances of the event would unquestionably constitute a statement relating to the startling event or condition made while the declarant was under the stress of excitement caused by the event. Why have a separate Dying Declaration rule, limited to cases in which the declarant is unavailable, when the statement would already qualify as an excited utterance, whose use would be permissive regardless of the availability of the declarant? That makes no sense whatsoever. The excessive focus on timing and certainty, while ignoring the true rationale for the rule, yields that very result.

This is as much a corruption of the Dying Declaration exception known to the Framers as the reasoning of *Ohio v. Roberts,* 448 U.S. 56 (1980) is a corruption of the Framer's intent in the adoption of the Confrontation Clause.

Some may scoff in this secular age at the religious premise of this rule which has been considered quite sensible for hundreds of years, but the critical question is not what is *now* believed, but rather, what the common law, at the time of the adoption of the Confrontation Clause, considered the single exception trustworthy enough to justify an exemption from the Rule of Confrontation. *Crawford*, fn. 6. *Crawford* teaches that in

analyzing the extent of the Confrontation Clause, a court must look to the Rule as it existed in 1791, not to how it has eroded to its present form.

There is, of course, nothing particularly peculiar about the presence in law of provisions derived from religious belief. The very jury which heard Mr. Jensen's case took an oath to render a "true verdict." Even in this secular era, the giving of an oath to the jury is an indispensable requirement of a valid verdict.

> Every defendant in a criminal case has a fundamental right to have his or her guilt decided by "an impartial jury." U.S. CONST. amend. VI; *Duncan v. Louisiana*, 391 U.S. 145, 149 (Sixth Amendment's guarantee of right to jury trial is applicable to states via Fourteenth Amendment); WIS. CONST. art. I, sec. 7. *The juror's oath is an integral element of this right*…. [Emphasis added].
> *State v. Block*, 170 Wis.2d 676, 489 N.W.2d 715 (Ct.App. 1992).

See also *Spencer v. Georgia*, 281 Ga. 533, 640 S.E.2d 267 (2007).

Yet what does the juror's oath signify in 2008? Does anyone realistically believe that a jury which does not give "a true verdict, according to the evidence" is going to suffer some earthly consequence for the violation of their oaths? The oath, like the Dying Declaration Rule, is a remnant of the common law, and the beliefs which underlay it. Oaths meant more in the common law era. Many, Thomas More being the most prominent, gave everything, their lives included, rather than make a false oath, in spite of the fact that no one would have known that they took the oath only due to duress, and did not really adhere to the belief attested. Some still attach a moral significance to the taking of an oath, but in this secular age, the fact is that this remnant of the common law era remains, and although there is no earthly consequence to a false oath by the jurors, an unsworn jury cannot return a valid verdict, and no judge in this nation can decide the least important issue in the lowliest case without having first taken an oath to uphold the Federal Constitution.

The law thus expects, and in some cases demands, adherence to concepts derived from religion. It is with this recognition that the Doomsday letter of Julie Jensen must be considered.

The inquiry which faced this court was not whether the Dying Declaration Rule is a logical one, or even desirable one, but rather, whether the particular statement conformed to the common law concept of a Dying Declaration, which is the Confrontation test; and whether it corresponded to the requirements established by our hearsay law, § 908.045(3), Stats., which is the statutory test. Because it conformed to both, it was admissible. The statutory test was met through the forfeiture finding made by this court under the directions of the Wisconsin Supreme Court, which controls hearsay regulation. Thus, there remained only the application of the confrontation analysis.

The Timing of the Statement

A "statement," in the law of evidence, is an "oral or written assertion." § 908.01(1)(a), Stats. People do not make assertions by what they think, or by what they do not communicate to others. Until Mrs. Jensen's letter was opened, and read, it was no more than a piece of paper in an envelope. It did not assert anything, or communicate anything to anyone. It was not therefore a "statement," but was merely an inchoate thought, to be asserted only in the event of her death. Absent the condition precedent to its opening, that is, as she told her neighbor, "something happening to me," it asserted no more than an oral remark which one might be at the point of uttering, but withhold.

The use of a written communication allowed Mrs. Jensen the luxury to preserve her utterance until the feared event occurred, when her belief of impending death would be made certain; a luxury which obviously would not exist with the spoken word. In effect, it would be as if the spoken word, after utterance by Mrs. Jensen, could have been snatched from the air before it reached the ears of the listeners, and held in her hand until released to be heard from her dying hand.

This Doomsday letter came to life only with her death; became an assertion and statement only then; becoming the Dying Declaration of the ghost of Julie Jensen.

This case differs from *Shepard,* because there, the Supreme Court found that the declarant's oral statement was unaccompanied by evidence that she expected to die. Here, the statement was not completely uttered until the feared expected death had actually occurred. In *Shepard*, the Court noted

> Nothing in the condition of the patient on May 22 gives fair support to the conclusion that hope had then been lost. She may have thought she was going to die and have said so to her nurse, but this was consistent with hope, which could not have been put aside without more to quench it. Indeed, a fortnight later, she said to one of her physicians, though her condition was then grave, "You will get me well, won't you?" Fear or even belief that illness will end in death will not avail of itself to make a dying declaration. There must be "a settled hopeless expectation" that death is near at hand, and what is said must have been spoken in the hush of its impending presence. Despair of recovery may indeed be gathered from the circumstances if the facts support the inference. There is no unyielding ritual of words to be spoken by the dying. Despair may even be gathered, though the period of survival outruns the bounds of expectation. What is decisive is the state of mind. Even so, the state of mind must be exhibited in the evidence, and not left to conjecture. The patient must have spoken with the *consciousness of a swift and certain doom.* [Internal citations omitted] [Italic added]. *Shepard*, 290 U.S. 99-100.

The difference between the two cases is that Mrs. Shepard was lucid and hopeful of survival at the time that she made her declarations; Julie Jensen, though hoping that her suspicions were erroneous and feeling trapped because of her fear that she was

thought delusional, was conscious that if her letter discussing the cause and circumstances of her death ever ended in police hands, it would be there because of her death, a *swift and certain doom* which would have befallen her within days after her committal of the thoughts to writing.

The defendant suggested at the trial that the court's interpretation could lead to the letter's admission even if Mrs. Jensen had died in 2020 of cancer. But this is not correct. First, the letter would then not relate to the cause and circumstances of her death from cancer; and second, the evidentiary circumstances would not support the motivation of fear of eternal punishment which is the prerequisite to a dying declaration.

Some find it difficult to accept the concept that a statement can be delayed, and "made" later than the time it is written. But if a decision by the Supreme Court is fully prepared for release on May 1, but is not released until May 15, when is the decision made? No one could successfully contend that it was made on May 1, because until it is actually released, the Court has absolute control over its content, and could, before the release occurs, choose to speak differently, alter the outcome altogether, or withdraw the opinion entirely. Mrs. Jensen enjoyed the same absolute right of control with respect to this letter, and until it was delivered to the police, she had complete control to withdraw it. By allowing it to remain in the care of Mr. Wojt with the instructions which she had given, she continuously ratified the assertions that she had made, to the very hour when the poison silenced her. When the Supreme Court issues the decision on May 15, in fact it is merely ratifying by its inaction the statement it committed to writing on May 1, but it is reflective of the Court's view as of the later date. Mrs. Jensen's ratification of her statement was no different.

Because she feared that Mark Jensen had great power; because she already knew that the police did not share her fears about the photograph which was later characterized as "alarming" by Dr. Denton; she had no practical avenue for help except through a letter which would tell her story after the swift and certain doom against which she hoped to guard.

When is a statement made? Well, when is a bill paid? Payment of a bill would ordinarily be a statement of the payor acknowledging the existence of the obligation.

Most folks try not to pay bills that they don't owe. This morning, I paid my credit card statement. Actually, I didn't pay it. I accessed the creditor's website and scheduled a payment for May 8. If I do not alter it beforehand, on May 8, the creditor will take $441 from my checking account, with my approval. As of this time, have I made a payment? No. Does the law recognize me as having made a payment? No. If on May 5, I realize that I don't really owe some of the money, I may decide to change the payment to a smaller amount, or eliminate it altogether. I need only cancel or retract it. Only when May 8 arrives, and then only if I have not altered the scheduled payment will the transaction actually occur. Only then will the law recognize my payment. Until then, the scheduled event is nothing more than an inchoate transaction. But *by allowing the payment to occur* as scheduled on a future date, I will express *my then-current* belief that I am obliged to pay the money, and *that belief will be as strong as on the day the payment was scheduled*.

So if there is a later inquiry as to when I made the payment, what will the law determine? If the payment is actually due on May 5, the creditor will charge me a late payment fee. If I say in response, "No, I made the payment April 7," the law will say,

"You may have scheduled it on that day, but you paid it on May 8, because that is when you intended that it should be paid." Not every payment, or every statement, is intended for immediate receipt, and the written word allows the declarant the ability to utter the words, but delay their receipt. By knowingly scheduling a future communication, and by knowingly permitting it to occur as scheduled, I am, at a future date, ratifying and confirming my current belief, manifesting it as my then-current belief.

Again, the timed letter of Julie Jensen must be analyzed not by the flawed imminence-focused rule of the modern era, but in the light of the common law rule which existed at the time that the Framers adopted the Sixth Amendment. The focus must be on the fact that according to the common law analysis, if the letter's contents were false, Julie Jensen was as guilty of a mortal sin on the day of her death as she was on the day that she wrote it, because she failed to recall it from the Wojts, but instead willfully allowed it to bring this pernicious accusation against an innocent man. In the eyes of the common law at the time of the adoption of the Confrontation Clause, this would be a ticket to hell. In the view of the common law, her motivation would have been to give a truthful account, to avoid her own condemnation.

Moreover, the modern approach to Dying Declarations, with its placement of the emphasis on the timing and certainty of belief of impending death at the time of the utterance, moves the focus entirely away from the motivation of the declarant to truth, focusing instead upon the stealth and efficiency of the killer. One in dread of poisoning by another, who fears that she will suddenly and unexpectedly lose her ability to communicate, may have as much desire to leave a statement denouncing her killer as another whose fate allows her the post-injury consciousness to utter it. To allow the

languishing declarant the ability to make a dying declaration, but to deny it to one whose loss of consciousness and life is swift and unexpected, is a grotesque perversion of the common law rule known by the Framers, and rewards a cunning and adroit murderer.

Can there be any doubt that had Mrs. Jensen not been intoxicated by the poison, and had she prepared the letter *after* the poisoning, knowing that she was dying, it would have qualified as a dying declaration? Disqualifying a letter written in fear of death, which was left with instructions to give it to the police in the event of her mysterious death, because she feared that she would be unable after the lethal act to communicate, on the basis that the lethal act had not yet occurred, gives short shrift to the human experience of paralyzing fear, and turns the common law rule on its heel. Indeed, applying the correct common law analysis, her risk of damnation for allowing a false doomsday letter to destroy Mr. Jensen after her death would be certain, which would motivate her to truth; whereas a conscious statement made after the administration of the poison would unquestionably have been attended by a lesser degree of certitude of eternal punishment.

Fidelity to the Sixth Amendment, then, requires that every determination respecting a proffered Dying Declaration should utilize a common law analysis to determine whether the declarant, in making the statement, would have been motivated to truth by fear of damnation. Of course there can be no Dying Declaration without a fear of impending death, but in making the analysis, timing and certainty of the belief of impending death are relevant only as they bear on whether the declarant would have believed herself able to obtain absolution prior to her death, in the event that the statement was a falsehood.

There is no doubt, from the evidence in this case, that Julie Jensen feared that she would soon and swiftly lose her ability to communicate; that her efforts to obtain assistance from the police were rebuffed, because she was thought delusional, leaving her with only heightened fear and helplessness; that for this very reason she created the doomsday letter naming her husband as her likely murderer, based upon suspicious acts and events which she reported observing; and that she scheduled the letter for delivery in the event that her fear was confirmed and the belief in her impending death was made certain. There is also no doubt that Julie Jensen purposely allowed the letter to remain in the conduit she had devised to transmit it to the police, with knowledge that, in the event of her death, it would denounce Mark Jensen as her murderer. Finally, there can be no doubt that these acts, if the allegations of the letter were false, would be viewed at common law as a mortal sin, and that having permitted the letter to remain in conduit, Mrs. Jensen's last conscious moments on this earth were spent with knowledge that the letter was still in the conduit and that she would, by failing to retrieve it, ratify this mortal sin; that she would have known that she would therefore have no chance of absolution, and that on the day of judgment, she would be condemned to eternal torment and damnation. This satisfies the common law's demand for motivation to truth sufficient to allow the letter's receipt as a Dying Declaration, and the ruling of the court at trial is confirmed.

Kenosha, Wisconsin, Monday, April 07, 2008.

BY THE COURT:

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Bruce E. Schroeder
Circuit Judge