

8.15 Dying Declaration¹

In a prosecution for homicide, a statement of the deceased is admissible when it is based upon personal knowledge made by a declarant in extremis, while under a sense of impending death with no hope of recovery, concerning the cause or circumstances of the deceased's impending death.

Note

This rule is derived from *People v Nieves* (67 NY2d 125, 131-134 [1986]); *People v Allen* (300 NY 222, 227 [1949]); *People v Ludkowitz* (266 NY 233, 238-239 [1935]); and *People v Becker* (215 NY 126, 145-146 [1915]).

As noted in these decisions, the key elements for its invocation are that the declarant be “in extremis” *and* is conscious of “impending death without hope of recovery.” These elements are to be strictly construed. (*See People v Nieves*, 67 NY2d at 133; *People v Liccione*, 63 AD2d 305, 316 [4th Dept 1978, Simons, J.], *affd* 50 NY2d 850 [1980] [exception applied with “great care”]; *People v Kraft*, 148 NY 631, 634 [1896] [dying declaration is not regarded “as of the same value and weight as the evidence of a witness given in a court of justice”].) Additionally, the exception encompasses only those statements that relate to the cause or circumstances of the declarant’s death. (*See People v Smith*, 172 NY 210, 242-243 [1902] [“dying declarations are admissible . . . only (as to) the circumstances of the death . . . , and . . . they may not properly include narratives of past occurrences”].)

Where the statement is nothing more than the declarant’s speculation concerning the cause of the declarant’s impending death, it is not admissible. (*See People v Gumbs*, 143 AD3d 403, 404 [1st Dept 2016] [The trial “court erred in admitting, as dying declarations, the victim’s statements implicating defendants, since they were his ‘mere expression of belief and suspici(ons)’ that defendants were involved in his shooting rather than ‘statements of facts to which a living witness would have been permitted to testify, if placed upon the stand’ (*People v Shaw*, 63 NY 36, 40 [1875])”]; *see also People v Liccione*, 63 AD2d at 319-320, citing to *Shepard v United States*, 290 US 96, 101 [1933, Cardozo, J.]].)

Historically, the exception has been limited to a prosecution for a homicide. (*See People v Becker*, 215 NY at 145 [noting that the Court had held “that dying declarations were admissible in cases of homicide only, where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declarations”].) *Becker* added that such restriction was “so clearly established,” that any expansion of the exception would require legislative action. (*Id.*) In other jurisdictions, the exception has been

expanded to encompass civil actions and to non-homicide prosecutions. (*See e.g.* Fed Rules Evid rule 804 [b] [2] [homicide and civil cases]; Cal Evid Code § 1242 [all cases]; Colo Rev Stat § 13-25-119 [all cases]; Fla Evid Code § 90.804 [2] [b] [all cases]; Ind Rules Evid rule 804 [b] [2] [all cases]; NJ Rules Evid rule 804 [b] [2] [all criminal cases].)

In *Crawford v Washington* (541 US 36, 56 n 6 [2004]), the United States Supreme Court left open the issue of the effect, if any, of its Confrontation Clause holding upon the dying declaration exception. The Appellate Division, Second Department has held that the United States Supreme Court would likely determine that the Confrontation Clause incorporates an exception for testimonial dying declarations and so held. (*People v Clay*, 88 AD3d 14 [2d Dept 2011].) The vast majority of courts in other jurisdictions have reached the same conclusion. (*See Bishop v State*, 40 NE3d 935 [Ind Ct App 2015] [collecting cases].)

In any event, the Criminal Jury Instructions recognize that a dying declaration “is not always true,” and instruct a jury that a dying declaration “be carefully evaluated, and further that such testimony not be accorded the same value and weight as the testimony of a witness, given under oath, in open court, and subject to cross-examination.” (CJI2d[NY] General Applicability, Evidence: Dying Declaration.)

¹ In June 2022, the Note was amended to add the last paragraph.