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## The Admissibility of Dying Declaration

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## COMMENTS

### THE ADMISSIBILITY OF DYING DECLARATIONS

#### I. INTRODUCTION

It has been said that of all the exceptions to the hearsay rule, the dying declaration is the "most mystical in its theory and the most arbitrary in its limitations."<sup>1</sup> In recent years the dying declaration exception has been attacked by several writers.<sup>2</sup> It has been suggested that dying declarations should not be admitted in either civil or criminal cases.<sup>3</sup>

In 1968 the Supreme Court, in *Bruton v. United States*,<sup>4</sup> held that the admission of an out-of-court inculpatory statement of one co-defendant, in a joint trial, violated the confrontation clause of the sixth amendment<sup>5</sup> because it deprived the other co-defendant of his right of cross-examination. The Court reasoned that, despite instructions to the contrary, there was a substantial risk that the jury would look to the extrajudicial incriminatory statements of one co-defendant to determine the guilt of the other co-defendant.<sup>6</sup> *Bruton* and other recent Supreme Court decisions, together with the general infirmities of the doctrine itself, cast doubt on the reliability and constitutionality of the dying declaration.

#### II. APPLICATION OF THE DYING DECLARATION

Dying declarations are admitted as an exception to the hearsay rule when they are made by declarants who are dead at the time of trial<sup>7</sup> and who, at the time they made the declaration, believed that their death was near and certain.<sup>8</sup> It must also appear that the declarant, if living, would have been competent to

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1. C. McCormick, Law of Evidence § 258 (1954) [hereinafter cited as McCormick].

2. Quick, Some Reflections on Dying Declarations, 6 How. L.J. 109 (1960); Note, Dying Declarations in Louisiana Law, 22 La. L. Rev. 651 (1962); Note, Evidence—Admissibility of Dying Declarations in Civil Actions, 16 Va. L. Rev. 825 (1930).

3. 16 Va. L. Rev., supra note 2, at 829.

4. 391 U.S. 123 (1968). This was a 6-2 decision of the Supreme Court. Mr. Justice Marshall took no part in the consideration or decision of this case.

5. U.S. Const. amend. VI: "In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him . . ."

6. 391 U.S. at 135-36.

7. *Kennecott Copper Corp. v. Industrial Comm'n*, 4 Ariz. App. 327, 420 P.2d 194 (1966). 5 J. Wigmore, Evidence § 1431 (3d. ed. 1940) [hereinafter cited as Wigmore].

8. *Shepard v. United States*, 290 U.S. 96 (1933); *People v. Beier*, 29 Ill. 2d 511, 194 N.E.2d 280 (1963); *Connor v. State*, 225 Md. 543, 171 A.2d 699, cert. denied, 368 U.S. 906 (1961). The evidence that the declarant believes that his death is near and certain may come from his own statement. *Miller v. Goodwin*, 246 Ark. 540, 439 S.W.2d 308 (1969), but it will usually come from the circumstances surrounding his death. Circumstances which would tend to show that the declarant believed his death to be near and certain would include the fact that the declarant had received the last rites, or the type of wound from which the declarant was suffering. Wigmore § 1442.

testify.<sup>9</sup> Moreover, dying declarations are admissible only in trials for homicide, where the accused is charged with the death of the declarant.<sup>10</sup> This last restriction has been criticized by many writers.<sup>11</sup> Professor Wigmore points out that the restriction of dying declarations to homicides developed because the "misconstrued words of a treatise-writer, followed by a 'nisi prius' decision or two, started a heresy which . . . limits the [dying declaration's] use to *criminal cases of homicide*."<sup>12</sup> The text writer to whom Wigmore was referring was Serjeant East who, in *Pleas of the Crown*<sup>13</sup> said:

Besides the usual evidence of guilt in general cases of felony, . . . there is one kind of evidence more peculiar to the case of homicide, which is the declaration of the deceased after the mortal blow, as to the fact itself, and the party by whom it was committed. Evidence of this sort is admissible in this case on the fullest necessity; for it often happens that there is no third person present to be an eye-witness to the fact; and the usual witness on occasion of other felonies, namely, the party injured himself, is gotten rid of.<sup>14</sup>

At early common law, the English courts made no distinction between receiving dying declarations in criminal or civil cases.<sup>15</sup> A good example of the early view is the case of *Wright v. Littler*,<sup>16</sup> in which Lord Mansfield admitted a dying declaration in an action of ejectment.<sup>17</sup> Although no authority was cited by Serjeant East<sup>18</sup> for his assertion that dying declarations were peculiar to homicide cases,<sup>19</sup> and even though the early common law view was to the con-

9. The declarant may be impeached in the normal manner. *Hutcherson v. State*, 40 Ala. App. 77, 108 So. 2d 177, cert. denied, 268 Ala. 696, 108 So. 2d 180 (1958). The declarant must have had first hand knowledge; he must have perceived the facts contained in his dying declaration. See Quick, *supra* note 2, at 114-15 for a discussion of the fact that many cases which reject statements of the declarant for violation of the opinion rule are, in fact, grounded on the failure of the proponent of the evidence to show that the declarant personally perceived the facts contained in his declaration. See also Wigmore § 1447. In addition, the dying declaration must concern the facts leading to, causing, or attending the injurious act which has resulted in the declarant's death. See Wigmore § 1434 n.1 for collected cases.

10. See note 21 *infra*.

11. See, e.g., Ryan, *Dying Declarations in Civil Actions*, 10 B.U.L. Rev. 470, 485-87 (1930); Smith, *Dying Declarations*, 3 Wis. L. Rev. 193, 197-209 (1925); 25 Mich. L. Rev. 673 (1927); 21 Rocky Mt. L. Rev. 106, 107-08 (1948); 61 W. Va. L. Rev. 132, 139-40 (1959).

12. Wigmore § 1431.

13. S. East, 1 *Pleas of the Crown* (1803).

14. *Id.* at 353.

15. Smith, *supra* note 11, at 202.

16. 97 Eng. Rep. 812 (K.B. 1761).

17. See also *The King v. Drummond*, 168 Eng. Rep. 271 (Cr. 1784) (defendant indicted for robbery).

18. See note 13 *supra*.

19. Smith, *supra* note 11, at 206.

trary, his position has become the majority view in the United States.<sup>20</sup> One of the reasons why the majority of American courts have been reluctant to extend the dying declaration to cases other than homicide appears to be a reluctance to approve departures from the general rule excluding hearsay.<sup>21</sup>

Logically, it would seem that the admissibility of a dying declaration should not hinge upon the type of case in which it is offered in evidence. But it may be that the common law "heretical" limitation has operated as a salutary check upon the "dying declarations" exception itself—an exception reluctantly made by the courts . . . and an exception which most courts apply with great caution. Perhaps the limitation was but a refusal (albeit an illogical refusal) to extend what might be said to be an unsound exception to the hearsay rule. In other words, it may be that the illogical insistence of courts that the use of dying declarations be limited to homicide cases results from their natural disinclination to approve departures from the basic general rule excluding hearsay testimony.<sup>22</sup>

Another reason advanced for refusing to admit dying declarations other than in homicide cases is that a dying declarant who has a family would be tempted to falsify his statement in a civil case where a pecuniary recovery is the measure of damages.<sup>23</sup>

Although the restrictive view of the dying declaration is still the majority view, there has been a gradual extension of the dying declaration exception by legislative enactment and decisional law. In *Thurston v. Fritz*<sup>24</sup> the Kansas Supreme Court held that the dying declaration of a grantor concerning the circumstances of the sale of his farm was admissible in an action on the contract for the sale of the land.<sup>25</sup> Since the decision in *Thurston* only one other court has, without the aid of a statute, expressly adopted the *Thurston* doctrine.<sup>26</sup>

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20. E.g., *Kennecott Copper Corp. v. Industrial Comm'n*, 4 Ariz. App. 327, 420 P.2d 194 (1966); *Phillips v. Dow Chem. Co.*, 247 Miss. 293, 151 So. 2d 199 (1963). In *Cummings v. Illinois Cent. R.R.*, 364 Mo. 868, 269 S.W.2d 111 (1954), the Missouri Supreme Court felt that if there was to be an extension of the dying declaration exception to the hearsay rule, it should be accomplished by the legislature. Accord, *People v. Allen*, 300 N.Y. 222, 228, 90 N.E.2d 48, 51 (1949) where the New York Court of Appeals said: "The settled rules as to dying declarations 'may not be broadened except by statute,'" quoting *People v. Becker*, 215 N.Y. 126, 146, 109 N.E. 127, 133 (1915).

21. *Cummings v. Illinois Cent. R.R.*, 364 Mo. 868, 269 S.W.2d 111 (1954).

22. *Id.* at 377, 269 S.W.2d at 120.

23. *Marler v. Texas & P. Ry.*, 52 La. Ann. 727, 742, 27 So. 176, 182 (1900).

24. 91 Kan. 468, 138 P. 625 (1914).

25. *Id.* at 470-71, 138 P. at 626-27. The *Thurston* rule has been followed in Kansas by *Vassar v. Swift & Co.*, 106 Kan. 836, 189 P. 943 (1920), and *McDonnell v. Swift & Co.*, 124 Kan. 327, 259 P. 695 (1927). Both of these cases involved Workman's Compensation claims. See *Helm v. Hines*, 109 Kan. 48, 196 P. 426 (1921) (wrongful death action).

26. *McCredie v. Commercial Cas. Ins. Co.*, 142 Ore. 229, 20 P.2d 232 (1933). This was an action by the beneficiary on a personal accident insurance policy. In order to prove the accidental death of the insured, the beneficiary offered the dying declaration of the insured as evidence of cause of death. The Oregon Supreme Court was, however, aided in reaching its decision to admit the dying declaration by an Oregon statute which had been amended

Dying declarations have also been admitted in wrongful death actions,<sup>27</sup> negligence actions,<sup>28</sup> and in actions to revoke the license of a physician who performed a criminal abortion resulting in death.<sup>29</sup>

While state legislatures have been almost as reluctant as the courts to extend dying declarations to cases other than homicide, there are several states that have liberal statutes. Only two states, Colorado<sup>30</sup> and Oregon,<sup>31</sup> have statutes which provide that a dying declaration may be admitted in all civil or criminal cases. However, other states have enacted legislation allowing dying declarations in wrongful death actions, where the declaration is used at the trial of the person who is alleged to have been responsible for the declarant's death.<sup>32</sup> Other jurisdictions have passed statutes allowing dying declarations in quasi-criminal bastardy proceedings,<sup>33</sup> and some allow the dying declaration of the deceased woman in prosecutions for abortion.<sup>34</sup>

Rule 63(5) of the Uniform Rules of Evidence<sup>35</sup> makes certain changes in the common law relating to dying declarations in civil cases as well as criminal prosecutions. The content of the dying declaration is not restricted to an exposition of the circumstances attending the death of the declarant.<sup>36</sup> Rule 63(5) also omits any requirement that the deceased declarant be the victim of defendant's crime in a criminal prosecution, or that he be a party who is represented in a civil action. The liberality of the Rule has been criticized.<sup>37</sup>

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to strike out the limiting phrase, "in criminal actions." This permitted the inference that the legislature intended to allow the admission of dying declarations in civil actions.

27. E.g., *Williams v. Randolph & C. Ry.*, 182 N.C. 267, 108 S.E. 915 (1921); *Latham v. Andrews Mfg. Co.*, 180 N.C. 627, 105 S.E. 423 (1920). Both of these decisions were based on a North Carolina statute, N.C. Gen. Stat. § 28-173 (1966), which admits dying declarations in wrongful death actions. See also *Barsch v. Hammond*, 110 Colo. 441, 135 P.2d 519 (1943).

28. See *Stevens v. Stevens*, 255 Mich. 363, 94 N.W.2d 858 (1959), which held that the admission of a dying declaration in a negligence action was not error where there was sufficient other evidence of negligence.

29. *State ex rel. Sorensen v. Lake*, 121 Neb. 331, 236 N.W. 762 (1931).

30. Colo. Rev. Stat. Ann. § 52-1-20 (1963).

31. Ore. Rev. Stat. § 41.900 (1968). See also Mass. Gen. Laws ch. 233 § 64 (1932).

32. See, e.g., N.C. Gen. Stat. § 28-173 (1966); *Quick*, supra note 2, at 121.

33. See, e.g., Ark. Stat. Ann. § 34-712 (1947); Miss. Code Ann. § 391 (1942); N.M. Stat. Ann. 22-4-14 (1953).

34. See, e.g., Mo. Rev. Stat. § 546.310 (1959); Ohio Rev. Code Ann. § 2901.17 (1953).

35. The Uniform Rules of Evidence, Rule 63(5) provides that: "A statement by a person unavailable as a witness because of his death if the judge finds that it was made voluntarily and in good faith and while the declarant was conscious of his impending death and believed that there was no hope of his recovery . . ." may be admitted.

36. *Id.* For a discussion of the prior law on this point, see Wigmore § 1434.

37. E.g., Note, Evidence—A Comparison of the New York and Uniform Rules on Admissibility of Hearsay Evidence, 31 N.Y.U.L. Rev. 1100 (1956); See Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A.L. Rev. 43, 65 n.74 (1954) for a discussion of the overlapping similarities and differences between Uniform Rule 63(4) and 63(5).

## III. RATIONALE OF THE DYING DECLARATION

While it has been recognized that dying declarations are not always true<sup>38</sup> and in many cases are contradictory,<sup>39</sup> they have been admitted as an exception to the hearsay rule because of an historical belief in their reliability, and because of necessity. It had long been believed that a man about to die and meet his maker would be unwilling to die with a lie on his lips.<sup>40</sup> As Dean Wigmore stated, "[a]ll Courts have agreed, with more or less difference of language, that the *approach of death* produces a state of mind in which the utterances of the dying person are to be taken as free from all ordinary motives to mis-state."<sup>41</sup> Nineteenth century courts in both the United States and England, reflecting that century's "practically universal belief in a system of rewards and punishments to follow moral dissolution,"<sup>42</sup> accepted this circumstantial guarantee of reliability as the equivalent of an oath and cross-examination.<sup>43</sup> The "divine retribution" rationale underlying the acceptance of the reliability of dying declarations has been severely criticized<sup>44</sup> and is looked upon with suspicion by some courts.<sup>45</sup> They question whether a rule based on nineteenth century religious beliefs has relevance in today's society:<sup>46</sup>

38. E.g., *Carver v. United States*, 164 U.S. 694, 697 (1897); *People v. Falletto*, 202 N.Y. 494, 499-500, 96 N.E. 355, 357-58 (1911), wherein Judge Vann said "[e]xperience shows that dying declarations are not always true. . . . Men sometimes lie even when facing death, as has frequently been known of convicts about to be executed, and the motive of self-exoneration which induced them to lay the crime on someone else might move a declarant to say that the accused was the aggressor by committing the first assault. Experience shows that dying persons have made self-serving declarations, such as false accusations, in order to destroy their enemies, and false excuses in order to save their friends." See also *White v. State*, 30 Tex. App. 652, 18 S.W. 462 (1892) where the decedent first stated that a Mr. Mason, along with two other persons that the decedent named, shot him. Shortly thereafter, the decedent said that only Mr. Mason knew of the plan to murder him. Both accusations as to the complicity of Mr. Mason in the murder were totally false.

39. See *Moore v. State*, 12 Ala. 764, 46 Am. Dec. 276 (1848).

40. See W. Shakespeare, *King John*, Act V, Scene 4.

41. Wigmore § 1438. For a further discussion of the purported effect of impending death on the veracity of the dying person see Quick, *supra* note 2, at 111-12.

42. 16 Va. L. Rev., *supra* note 2, at 827.

43. Wigmore § 1438 and cases noted therein. The "sincerity" guarantee with its religious aspects is still accepted by most modern courts. *People v. Aarhus*, 111 Ill. App. 2d 167, 248 N.E.2d 820 (1969); *People v. Gezzo*, 307 N.Y. 385, 121 N.E.2d 380 (1954).

44. See Note, Evidence—A Comparison of the New York and Uniform Rules on Admissibility of Hearsay Evidence, 31 N.Y.U.L. Rev. 1100, 1114 (1956); 16 Va. L. Rev., *supra* note 2, at 827-28.

45. E.g., *People v. Bartelini*, 285 N.Y. 433, 35 N.E.2d 29 (1941), where the court, in speaking of dying declarations, said: "If we look for the basis upon which rests this exception, we find it in the assumption, born of experience, that 'the approach of death produces a state of mind in which the utterances of the dying person are to be taken as free of ordinary motives to mis-state. . . .' The fact that the exception has as its basis only the assumption mentioned above . . . [means] that extreme caution is required of the trial court before a dying declaration is received in evidence . . . ." 285 N.Y. at 439-40, 35 N.E.2d at 32 [emphasis omitted].

Belief in the imminence of death . . . is considered an effective deterrent to conscious or unconscious falsification, and when supernaturalism had a more zealous following, this may have acted as a substantial barrier to falsification. It is dubious, however, whether under modern conditions, with the breakdown of unquestioning belief in, and concern with, religious doctrines on the part of many, the inference is a valid one. Even in deeply religious communities it is very doubtful that the inference could be properly drawn.<sup>47</sup>

It has also been pointed out that no empirical studies are available as to the psychological effect that the knowledge of imminent, certain death has on a human being.<sup>48</sup>

There are several other factors which tend to weaken the argument that dying declarations are inherently trustworthy. First, the declarant, being in pain and agony as a result of the wounds that he received, may have a defective memory. Second, the declarant, surrounded by his family and friends, is apt to state only his side of the affair. Third, the dying declaration is apt to be distracting and confusing to the witness to whom it is related. Fourth, those about the declarant do not usually seek to elicit qualifying facts unfavorable to the declarant.<sup>49</sup>

Dying declarations are also admitted because they are necessary. The necessity principle has been given two interpretations. The first interpretation argues that since the declarant is unavailable the court will be deprived of his evidence unless it is allowed to use his extra-judicial statements.<sup>50</sup> This broad view of necessity appears tenuous, since in every hearsay situation, unless an exception is made, the court is being deprived of the declarant's statement; nevertheless, the evidence is excluded.

The narrower and more widely accepted view is that dying declarations are necessary in order to bring murderers to justice.<sup>51</sup> Those who agree with the second interpretation believe that since homicide is often a secret crime the dying declarant is often the only witness, and the guilty person may escape punishment if the declaration is not admitted into evidence. However, dying declarations have been admitted in cases where the killing was not secret, where

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46. An illustration of the secularization of our society is the fact that at common law a dying declarant could be impeached on the ground that he did not believe in a Supreme Being. *State v. Elliot*, 45 Iowa 486 (1877); *Hill v. State*, 64 Miss. 431, 1 So. 494 (1887). But the modern view is that the constitutional provisions which guarantee freedom of religion have eliminated the common law requirement that the dying declarant believe in a Supreme Being. *Wright v. State*, 24 Ala. App. 378, 135 So. 636 (1931). Swancara, *Religion in the Law of Dying Declarations*, 66 U.S.L. Rev. 192 (1932).

47. Quick, *supra* note 2, at 111-12. See also Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. Pa. L. Rev. 741, 749-50 (1965).

48. Quick, *supra* note 2, at 112.

49. 16 Va. L. Rev., *supra* note 2, at 828.

50. Wigmore § 1421.

51. E.g., *Phillips v. Dow Chem. Co.*, 247 Miss. 293, 151 So. 2d 199 (1963); *People v. Portugay*, 140 Misc. 688, 251 N.Y.S. 389 (N.Y. County Ct. 1931); *Railing v. Commonwealth*, 110 Pa. 100, 1 A. 314 (1885). See 1 S. Greenleaf, *Evidence* § 156 (16th ed. 1899).

there was other adequate testimony,<sup>52</sup> and even where the murder was conceded.<sup>53</sup> Some writers feel that this illustrates the self-contradictory aspects of this rationale, in that if public necessity was logically construed, a dying declaration would be used only where it was the only evidence that the prosecution had against the accused.<sup>54</sup> There could be situations where the only evidence possessed by the prosecution in a homicide case is the dying declaration of the victim, and in such a case the narrower view would make more sense. However, the denial of the accused's right to confront the witnesses against him, and the possible prejudicial effect of the dying declaration being admitted into evidence in the vast majority of cases where it is not the only evidence possessed by the prosecution,<sup>55</sup> greatly outweighs upholding the dying declaration because it might be necessary for conviction in a few cases.

Even in those cases where the dying declaration is the only evidence against the accused, the absence of other evidence and the dramatic effect of the dying declaration, which might cause a jury to give it greater weight than it actually merits, would appear to militate against its admission.<sup>56</sup> However, it appears at present that an accused may properly be found guilty solely on an uncorroborated dying declaration.<sup>57</sup> The "public necessity" rationale has been criticized as "obviously a makeshift reason"<sup>58</sup> and since practically every murder conviction is obtained without the aid of dying declarations,<sup>59</sup> it would appear that dying declarations are not indispensable to the prosecution of homicides. The "public

52. *Lyles v. State*, 48 Tex. Crim. 119, 86 S.W. 763 (1905).

53. *State v. Saunders*, 14 Ore. 300, 12 P. 441 (1886).

54. 16 Va. L. Rev., *supra* note 2, at 826-27.

55. See *id.* at 827.

56. See Note, *Dying Declarations—Instructions by the Trial Court*, 32 Neb. L. Rev. 461, 467 (1953).

57. See, e.g., *Crowell v. State*, 233 Ala. 201, 171 So. 267 (1936); *People v. Amaya*, 134 Cal. 531, 66 P. 794 (1901). Cf. *People v. Ludkowitz*, 266 N.Y. 233, 194 N.E. 688 (1935) (*dictum*).

58. *Quick*, *supra* note 2, at 111.

59. Letter from Irwin J. Goldsmith, First Assistant District Attorney, Bronx County to the *Fordham Law Review*, November 13, 1969. Mr. Goldsmith, a noted prosecutor, stated in his letter that, "In my 23 years as a Trial Assistant in this office and having been Chief of the Rackets Bureau . . . I have never had occasion to use a 'dying declaration' . . ."

I might further add that in my experience as Chief of the Homicide Bureau of this office in the past three years we have handled about 700 cases of homicide and have never used a 'dying declaration'. In my experience as a Trial Assistant . . . I have handled at least 2000 to 2500 cases and never once had occasion to use a 'dying declaration.'" Assistant District Attorney Goldsmith feels, however, that dying declarations are generally reliable and the primary reason that they are not used are the unrealistically stringent requirements governing their admission into evidence, i.e., the declarant must be in extremis and have no hope of recovery before his declaration will qualify as a dying declaration.

Mr. Goldsmith's statement as to the use of dying declarations by the Bronx D.A.'s office illustrates that the dying declaration is unnecessary for the successful prosecution of homicides. For a further discussion of the infrequency of use of dying declarations in obtaining homicide convictions, see 16 Va. L. Rev., *supra* note 2, at 827.



necessity" doctrine developed at a time when police detection was not nearly as scientific and efficient as it is today. As one writer has stated, "it seems that the science of criminology has largely obviated this necessity [of dying declarations] by development of new techniques such as fingerprinting, ballistics and the like. True, evidence by these means is largely circumstantial, but it cannot be seriously doubted that it is ordinarily more reliable than statements of a man whose faculties may be greatly impaired by a mortal wound and thoughts of approaching death."<sup>60</sup> In no class of cases should doubtful evidence be more severely restricted or excluded than in cases that may result in incarceration for life or a sentence of death. It would appear that the "public necessity" rationale is self-contradictory and is not supported by empirical evidence.<sup>61</sup>

#### IV. WEIGHT TO BE GIVEN DYING DECLARATIONS AND JURY INSTRUCTIONS

##### A. *Evidentiary Weight*

"As a general rule, it is the function of the trial judge to determine the competency and admissibility of evidence and the function of the jury to weigh its probative value and credibility."<sup>62</sup> However, there is disagreement among courts as to the proper weight to be given dying declarations and as to the instructions, if any, that are to be given by the court to the jury regarding such declarations.<sup>63</sup> Some courts have held that the evidentiary value or weight of dying declarations is equal to that of the evidence presented under oath and before the jury.<sup>64</sup> However, many courts have stated that dying declarations are of less evidentiary value and weight than evidence given under oath which is subject to cross-examination.<sup>65</sup> The courts which hold that dying declarations are of less evidentiary value than statements made under oath do so because of a suspicion that dying declarations are not inherently trustworthy.<sup>66</sup>

##### B. *Instructions to the Jury*

There is also a disagreement among American jurisdictions as to what a judge may or should tell the jury about the weight to be given dying declarations.<sup>67</sup> The answer to this question depends in part on whether, in a particular juris-

60. 22 La. L. Rev. 651, *supra* note 2, at 662-63.

61. 16 Va. L. Rev., *supra* note 2, at 827.

62. Note, Dying Declarations, 46 Iowa L. Rev. 375, 386 (1961). See Annot., 167 A.L.R. 147, 148-58 (1947).

63. Annot., 167 A.L.R. 184-94 (1947).

64. State v. Johns, 152 Iowa 383, 132 N.W. 832 (1911); Commonwealth v. Brown, 388 Pa. 613, 131 A.2d 367 (1957), which held that while the dying declaration should be given the same weight as other evidence, it would be error for the court to so instruct the jury. See also Hubbard v. State, 208 Ga. 472, 67 S.E.2d 562 (1951).

65. People v. Młeczko, 298 N.Y. 153, 81 N.E.2d 65 (1948); People v. Ludkowitz, 266 N.Y. 233, 194 N.E. 688 (1935); People v. Falletto, 202 N.Y. 494, 96 N.E. 355 (1911). Cf. State v. Gallegos, 28 N.M. 403, 213 P. 1030 (1923), where the court held it error to give instructions to the jury that dying declarations are entitled to the same weight as statements made under oath.

66. 202 N.Y. 494, 499-500, 96 N.E. 357, 358 (1911).

67. Quick, *supra* note 2, at 132.

diction, the judge has a right to comment on the evidence.<sup>68</sup> If the judge has this right then he may instruct the jury on the evidentiary weight of the dying declaration.<sup>69</sup> Where the judge is not allowed to comment, because it is felt that his remarks would be an invasion of the jury function, then he would of course be prohibited from instructing on the weight to be given the dying declaration.<sup>70</sup> However, even though they disagree as to what a judge may or should say, the courts of this country are in general agreement with the proposition that dying declarations should be weighed by the jury with great caution.<sup>71</sup> There is a difference between instructing the jury to receive and weigh dying declarations with caution, and instructing the jury as to the amount of evidentiary weight to be given such declarations.<sup>72</sup> The former is held not to be a comment on the evidence, while the latter is held to be a comment on the evidence.<sup>73</sup> As a result, some states require<sup>74</sup> or permit<sup>75</sup> the judge to instruct the jury that dying declarations are to be weighed with great caution, while some do not permit instructions to this effect.<sup>76</sup> The courts which require or permit cautionary instructions do so because they recognize that a dying declaration is a dramatic piece of evidence, which might impress the jury far beyond its probative value.<sup>77</sup> While this inherent weakness of dying declarations has not received the attention from the courts that it deserves,<sup>78</sup> it has been seriously considered by some courts and writers.<sup>79</sup> Professor Wharton has said:

Dying declarations have every element of dramatic evidence. As the last utterance of a sentient, conscious being, standing on the threshold of eternity, they possess an impressiveness out of all proportion to their evidentiary value. In all homicide cases, the elemental passions are at any moment apt to override the judgment. A court may be judicial and impartial, and a jury dispassionate, up to the point where the dying declaration is admitted, and then find its impartiality and self-restraint seriously tried over the recital of the dying declaration.<sup>80</sup>

In *Commonwealth v. Mulferno*,<sup>81</sup> the court, although affirming the defendant's

68. In the majority of American jurisdictions, the judge does not have the right to comment upon the evidence. McCormick § 263.

69. *Id.*

70. Quick, *supra* note 2, at 132.

71. *People v. Johnson*, 334 Mich. 169, 54 N.W.2d 206 (1952); *People v. Bartelini*, 285 N.Y. 433, 35 N.E.2d 29 (1941); *Annot.*, 167 A.L.R. 147, 159 (1947).

72. 32 Neb. L. Rev., *supra* note 56, at 463.

73. *Id.*

74. *Humphreys v. State*, 166 Tenn. 523, 64 S.W.2d 5 (1933); *State v. Mayo*, 42 Wash. 540, 85 P. 251 (1906).

75. *Dowdell v. State*, 194 Ga. 578, 22 S.E.2d 310 (1942); *Commonwealth v. Meleskie*, 278 Pa. 383, 123 A. 310 (1924).

76. See, e.g., *Shenkenberger v. State*, 154 Ind. 630, 57 N.E. 519 (1900).

77. 46 Iowa L. Rev., *supra* note 62, at 376.

78. 32 Neb. L. Rev., *supra* note 56, at 467.

79. See, e.g., *State v. Le Duc*, 89 Mont. 545, 300 P. 919 (1931) (dissenting opinion); *Still v. State*, 125 Tenn. 80, 140 S.W. 298 (1911); *Hale v. State*, 112 Tex. Crim. 422, 16 S.W.2d 1068 (1929). See 1 F. Wharton, *Evidence in Criminal Issues* 529 (10th ed.) [hereinafter cited as Wharton].

80. Wharton at 529.

81. 265 Pa. 247, 108 A. 639 (1919).

conviction of murder, said, "[w]e realize the force of the suggestion, that dying declarations possess an impressiveness, which is sometimes out of all proportion to their evidentiary value, and the court and jury may sometimes have their better judgment overridden by the admission of such statements, having the effect of sweeping away their impartial attitude, and substituting for it the emotional element, as presented by the picture depicted by the dying man . . . ."<sup>82</sup> There have been cases where the court has reversed a conviction for homicide, in part because they recognized the dramatic effect that a dying declaration may have had on a jury.<sup>83</sup> The dramatic and emotional impact of a dying declaration, when considered with the doubtful reasons for allowing their admission, is of great importance in considering the possible unconstitutionality of dying declarations.

#### V. RECENT CASES

In *Bruton v. United States*,<sup>84</sup> the petitioner and his co-defendant Evans were charged with armed postal robbery<sup>85</sup> and were convicted in a joint federal trial, largely on the basis of a postal inspector's testimony that Evans had made an oral confession which inculpated petitioner. Petitioner contended on appeal that the admission of the confession was prejudicial because he had been denied his constitutional right to cross-examine the witness against him. The Court of Appeals<sup>86</sup> found that Evans' confession was coerced, and set aside his conviction,<sup>87</sup> but affirmed the finding of the petitioner's guilt. The Court of Appeals relied on the Supreme Court's holding in *Delli Paoli v. United States*,<sup>88</sup> that the limiting instructions employed by the trial judge were sufficient, under the circumstances of the case, to enable the jury to determine the defendant's guilt without considering the inadmissible hearsay.<sup>89</sup> The Supreme Court, rely-

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82. *Id.* at 249, 108 A. at 640.

83. See *Jollay v. State*, 130 Tenn. 286, 170 S.W. 58 (1914). The defendant Jollay was convicted of murder. The decedent's dying declaration was declared to be inadmissible because it did not appear that he had sufficient consciousness and intelligence to make a factual dying declaration. Therefore, the court, recognizing the dramatic impact of his dying declaration, coupled with the fact that there was a good deal of evidence that tended to weaken or destroy certain of the prosecution witness' testimony, declared that the dying declaration was so prejudicial as to constitute reversible error. 130 Tenn. at 309-10, 170 S.W. at 64-65. The court felt there was ample evidence in the record to support the state's contentions without the dying declaration. The court felt that any doubt as to its admissibility should be resolved more against the dying declaration being admissible, due in part to its emotional impact upon the jury.

84. 391 U.S. 123 (1968).

85. 18 U.S.C. § 2114 (1964).

86. 375 F.2d 355 (8th Cir. 1967).

87. The Court of Appeals ruling reversing Evans' conviction was based on *Miranda v. Arizona*, 384 U.S. 436 (1966) because Evans had not been notified of his rights before he made the alleged confession to the postal inspector. 375 F.2d at 361.

88. 352 U.S. 232 (1957).

89. *Delli Paoli* was a modification of *Blumenthal v. United States*, 332 U.S. 539 (1947) which held that the jury's ability to follow the instructions of the trial judge was not open

ing on *Jackson v. Denno*,<sup>90</sup> *Pointer v. Texas*,<sup>91</sup> and *Douglas v. Alabama*,<sup>92</sup> held that petitioner's right to confront the witnesses against him had been violated and reversed his conviction, thereby overturning *Delli Paoli*.<sup>93</sup> The Supreme Court in *Bruton* applied the rationale of *Jackson* by agreeing with the suggestion made in *People v. Aranda*,<sup>94</sup> that "[i]f it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a co-defendant's confession implicating another defendant when it is determining that defendant's guilt or innocence."<sup>95</sup> However, in *Bruton*, Mr. Justice Brennan refused to accept *Jackson* as meaning that a jury can never follow instructions to disregard inadmissible evidence.<sup>96</sup> The Court in *Bruton* appeared to establish a balancing test to determine whether a limiting instruction is proper. The test would weigh the probability that the jury would not be able to follow the court's instructions against the amount of harm which would be done to the defendant if the jury failed to follow the instructions.<sup>97</sup>

Several courts have regarded limiting instructions with suspicion. In *Nash v. United States*,<sup>98</sup> Judge Learned Hand said that the limiting instruction is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else [sic]."<sup>99</sup> Moreover, a well known study of jury behavior concluded that limiting instructions, rather than furthering the

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to question. However, in *Delli Paoli* the Supreme Court held that the circumstances of each case have to be considered in determining whether limiting instructions are sufficient to protect a co-defendants' trial position. 352 U.S. at 239.

90. 378 U.S. 368 (1964).

91. 380 U.S. 400 (1965).

92. 380 U.S. 415 (1965).

93. 391 U.S. at 126. *Bruton* was held to be retroactive in *Roberts v. Russell*, 392 U.S. 293 (1968).

94. 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965).

95. *Id.* at 528-29, 407 P.2d at 271, 47 Cal. Rptr. at 359. In *Jackson*, the New York procedure of allowing the jury to decide the voluntariness of the defendant's confession was held to be a violation of due process. The Court, in overruling *Stein v. New York*, 346 U.S. 156 (1953), adopted the statement that "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (concurring opinion) (citations omitted).

96. 391 U.S. at 135. Mr. Justice Brennan cited *Lutwak v. United States*, 344 U.S. 604 (1953) and *Hopt v. Utah*, 120 U.S. 430 (1887) (dictum) as two examples of cases where limiting instructions would remedy an error by the trial court. In *Lutwak*, a single admission of hearsay was not error in light of the other evidence against the accused. In *Hopt*, an error of improper admission of expert testimony was cured by its withdrawal and instructions to the jury to disregard it.

97. 391 U.S. at 136-37; Note, *The Supreme Court, 1967 Term*, 82 Harv. L. Rev. 63, 234 (1968) [hereinafter cited as 1967 Term].

98. 54 F.2d 1006, 1007 (2d Cir. 1932), cert. denied, 285 U.S. 556 (1932).

99. *Id.* See *Krulewitch v. United States*, 336 U.S. 440 (1949) (dissent); *People v. Aranda*, supra note 94; *People v. Barbaro*, 395 Ill. 264, 69 N.E.2d 692 (1946); *State v. Rosen*, 151 Ohio 339, 86 N.E.2d 24 (1949).

search for truth, probably confuses the jurors and increases the possibility of injustice.<sup>100</sup> In *Bruton*, Mr. Justice Brennan, agreeing that jury instructions can be confusing and prejudicial said, "[d]espite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculcating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all."<sup>101</sup>

In recent years, the Supreme Court has decided several important cases involving the confrontation clause. In *Pointer v. Texas*, the Supreme Court held that the constitutional right of an accused to confront witnesses against him is made obligatory on the states by the fourteenth amendment.<sup>102</sup> The Court felt that the right of confrontation necessarily included the right of cross-examination. Mr. Justice Black, writing for the majority in *Pointer* stated:

It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. . . . The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution.<sup>103</sup>

In *Douglas v. Alabama*,<sup>104</sup> which applied *Pointer*, and was relied upon in *Bruton*, the prosecution read statements from the out-of-court confession of one co-defendant under the guise of refreshing his memory. These statements inculpated petitioner. The codefendant, relying on his privilege against self-incrimination, neither denied nor affirmed that he had made the confession. The

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100. Kalven, A Report on the Jury Project of the University of Chicago Law School, 24 *Ins. Counsel J.* 368, 371-72 (1957). One hypothesis of the project dealt with the ability of the jury to follow curative instructions. In a personal injury action to recover damages from an auto accident, the following variables were presented to an experimental jury: (1) the defendant disclosed that he had no liability insurance and no objection was made by the plaintiff. The average verdict for the plaintiff was \$33,000. (2) the defendant disclosed that he had liability insurance and no objection was made by the plaintiff. The average verdict was \$37,000. (3) the defendant disclosed that he had liability insurance and an objection was made by the plaintiff. The judge then instructed the jury to disregard this evidence. The average verdict was \$46,000.

The conclusion was that an instruction to disregard, instead of preventing the jurors from considering the insurance, sensitized the jury to that evidence. Broeder, *The University of Chicago Jury Project*, 38 *Neb. L. Rev.* 744, 754 (1959). If a jury can disregard a clear curative instruction concerning certain prejudicial evidence, it must be seriously questioned whether a cautionary instruction to the jury as to the weight to be given a "dramatic" dying declaration can be adhered to.

101. 391 U.S. at 137.

102. 380 U.S. at 406.

103. *Id.* at 404.

104. 380 U.S. 415 (1965)

Supreme Court held that petitioner was denied his right to cross-examine the witnesses against him.<sup>105</sup>

It has been noted that the decision in *Bruton* did not have to have constitutional implications.<sup>106</sup> The question concerning the Court in *Bruton* was whether, and if so, why, the inculpatory parts of Evans' confession had to be excluded from evidence. Under the federal evidentiary rules, the statement "was inadmissible hearsay, a presumptively unreliable out-of-court statement of a non-party who was not a witness subject to cross-examination."<sup>107</sup> Thus, the Court could have held that limiting instructions would no longer be acceptable to remove the type of prejudicial inadmissible hearsay evidence that was used in the case at bar from the consideration of the jury.<sup>108</sup> The Court specifically refused to answer the question as to the possible effects that the decision would have on the established exceptions to the hearsay rule.<sup>109</sup> The hearsay rule and the confrontation clause have been thought to be generally coextensive insofar as their protection for criminal defendants extends,<sup>110</sup> because at the very core of both is the right of cross-examination.<sup>111</sup> The Supreme Court has never suggested that the overlap is definitely coextensive.<sup>112</sup> However, the Court, in deciding cases which involved an interpretation of the sixth amendment, has had to consider whether the hearsay exceptions recognized by the common law are permitted under the sixth amendment.<sup>113</sup> In general the Court has answered in the affirmative.<sup>114</sup> This static view of the sixth amendment as sanctioning the exceptions which existed at the time of the sixth amendment's adoption has been criticized as violative of the principle that the Constitution has to be constantly reevaluated in light of society's changing needs and attitudes.<sup>115</sup> As

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105. *Id.* at 419.

106. 1967 Term, *supra* note 97, at 235-36.

107. 391 U.S. at 138 (White, J., dissenting).

108. Since *Bruton* involved a joint trial of two codefendants, the Court could have ordered a severance under R. Fed. R. Crim. P. 14 without having to consider the constitutional issue of denial of confrontation.

109. 391 U.S. at 128 n.3, where the Court stated: "There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause."

110. Wigmore § 1397; 1967 Term, *supra* note 97, at 236.

111. The main objection to hearsay evidence is the inability of a defendant to cross-examine witnesses against him. McCormick § 225, Wigmore § 1362. Two additional objections are the inability of the jury to observe the demeanor of the witness, *Mattox v. United States*, 156 U.S. 237, 242 (1895); and the fact that the declarant is not under oath and there is a possibility that the evidence will not be repeated exactly as it was related to the witness. McCormick § 225.

112. 1967 Term, *supra* note 97, at 236.

113. *Id.*

114. *Dowdell v. United States*, 221 U.S. 325, 330 (1911); *Mattox v. United States*, 156 U.S. 237, 243 (1895). See McCoy, *The Right of Confrontation*, 1959 Wash. U.L.Q. 122, 126.

115. Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. Pa. L. Rev. 741, 746 (1965).

stated by Chief Justice Marshall, "we must never forget, that it is a *constitution* we are expounding,"<sup>116</sup> and that it is "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."<sup>117</sup>

#### VI. THE CONSTITUTIONALITY OF THE DYING DECLARATION

The United States Supreme Court has never decided whether the dying declaration violates the confrontation clause.<sup>118</sup> However, there are statements in several decisions which indicate that dying declarations are thought to be constitutional.<sup>119</sup> The cases in which the Supreme Court has viewed the dying declaration as not being violative of the confrontation clause involved exceptions to the hearsay rule other than the dying declaration.<sup>120</sup> The Supreme Court has justified the constitutionality of the dying declaration on the basis that the Court is bound "to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject . . .,"<sup>121</sup> and therefore recognized that exceptions to the rights guaranteed by the Bill of Rights, such as dying declarations, were to be respected. This is clearly not consonant with Chief Justice Marshall's view of constitutional interpretation.<sup>122</sup> The dying declaration is no longer relevant to the needs or beliefs of the nation.

In sustaining the constitutionality of the dying declaration, some courts have taken the position that the dying declarant is not to be regarded as the witness whom the accused is constitutionally entitled to confront or to meet face to face.<sup>123</sup> This reasoning has not received unanimous acceptance. In *State v. Houser*,<sup>124</sup> the court, in commenting upon the reasoning that the witness who relates the dying declaration to the court is the real witness, said, "[i]t is the dying man who is speaking through him, whose evidence is to have weight and

116. *McCulluch v. Maryland*, 17 U.S. (4 Wheat.) 207, 264 (1819).

117. *Id.* at 269.

118. See, e.g., *Pointer v. Texas*, 380 U.S. 400, 407 (1965) (dictum); *Shepard v. United States*, 290 U.S. 96 (1933) (by implication); *Dowdell v. United States*, 221 U.S. 325, 330 (1911) (dictum); *Mattox v. United States*, 156 U.S. 237, 243 (1895) (dictum).

119. See cases cited note 118 *supra*.

120. *Pointer v. Texas*, 380 U.S. 400 (1965) (testimony of unavailable witness); *Shepard v. United States*, 290 U.S. 96 (1933) (prosecution tried to use statement of decedent that "Dr. Shepard has poisoned me" as evidence evincing a state of mind of the decedent contrary to a suicidal state of mind. The prosecutor was trying to rebut evidence presented by the defendant that the decedent was contemplating suicide. The declaration of the decedent was not a dying declaration because the decedent had hopes of recovery from her illness); *Dowdell v. United States*, 221 U.S. 325 (1911) (certification of trial record on appeal); *Mattox v. United States*, 156 U.S. 237 (1895) (testimony of witnesses unavailable due to their death).

121. 156 U.S. at 243.

122. *McCulluch v. Maryland*, 17 U.S. (4 Wheat.) 207 (1819).

123. *State v. Kindle*, 47 Ohio 358, 361, 24 N.E. 485, 486 (1890). See also *Hawkins v. State*, 220 Tenn. 383, 417 S.W.2d 774 (1967).

124. 26 Mo. 431 (1858).

efficacy sufficient . . . to take away the prisoner's life. The living witness is but a conduit pipe—a mere organ, through whom this evidence is conveyed to the court and jury."<sup>125</sup> This seems the better view, since in the jury's mind a dying declaration may well be the equivalent of testimony from the grave, thereby giving it undue weight and probative force, greatly prejudicing the defendant. In *Douglas*, Mr. Justice Brennan found that the reading by the prosecuting attorney of the co-defendants' confession was prejudicial to petitioner in that "[a]lthough the Solicitor's reading of Loyd's alleged statement . . . [was] not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement . . . ."<sup>126</sup> Similarly, in a trial involving a dying declaration, the dying declarant is the real witness whose words are given probative value.

The theories justifying admission of the dying declaration as an exception to the hearsay rule are therefore, at their best, most questionable. The basis for admitting such statements as an exception to the hearsay rule, coupled with the possible dramatic effect of dying declarations upon a jury,<sup>127</sup> and the inability of the defendant to cross-examine the "real" witness, the dying declarant, arguably makes the dying declaration violative of the confrontation clause of the sixth amendment.<sup>128</sup> "A basic premise of the Confrontation Clause . . . is that certain kinds of hearsay . . . are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever instructions the trial judge might give."<sup>129</sup> The dying declaration falls into this category of hearsay and should be declared inadmissible, at least in criminal cases.

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125. *Id.* at 438. However, the court felt that dying declarations were constitutional because of the long acquiescence of courts to their not being violative of the confrontation clause.

126. 380 U.S. at 419.

127. The Supreme Court in *Bruton* recognized the impossibility of determining whether in fact the jury did or did not ignore the inadmissible inculpatory confession of one co-defendant in determining the petitioner's guilt. But as long as the introduction of the out-of-court confession posed a substantial threat to the petitioner's right to confront the witnesses against him, the Court could not ignore the possible prejudice to the petitioner. 391 U.S. at 136-37.

128. The dying declaration may also be violative of due process in that its admission into evidence may so prejudice a defendant as to be a denial of the fundamental fairness "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). A defendant who has been denied due process, rather than a specific constitutional provision, such as the confrontation clause, may still have his conviction upheld under the "harmless error" doctrine of *Chapman v. California*, 386 U.S. 18 (1967). However, if a specific constitutional provision is violated, no degree of prejudice will be tolerated. *Fahy v. Connecticut*, 375 U.S. 85 (1963).

129. 391 U.S. at 138 (Stewart, J., concurring) (citations and emphasis omitted).