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“As I Lay Dying”¹”

A Halloween meditation on the use of dying declarations in Montana

By Cynthia Ford

Montana, like the federal system, has a hearsay exception for “dying declarations.” If the out-of-court declarant is unavailable for trial, either by death or some other 804(a) reason¹, his/her out-of-court statement may be admissible despite a hearsay objection if both of two requirements are met:

1. At the time the declarant made the statement, she believed that her death was imminent
AND
2. The statement concerns the cause or circumstance of that impending death.

There are two primary explanations for the admissibility of this sort of hearsay. One is religiously-based: if you are about to die, and you believe in any form of judgment after death, you would be least likely to lie at the very moment that judgment is upon you. I always picture the declarant lying on his deathbed, able to see the tunnel of light and perhaps St. Peter at the gate at the end of it, and deciding that it would be a bad time to add a lie to the list of sins already on the book. Even if you are not a firm believer, Pascal’s utilitarian “wager” for belief in God may make sense now, and even more on your deathbed:

Let us weigh up the gain and the loss involved in calling heads that God exists. Let us assess the two cases: if you win, you win everything: if you lose, you lose nothing. Do not hesitate then: wager that he does exist.²

¹ This is the title of William Faulkner’s seventh novel, which in turn was taken from Homer’s *Odyssey*. Agamemnon is speaking to Odysseus: “As I lay dying, the woman with the dog’s eyes would not close my eyes as I descended into Hades.” (Ok, used my first major, English. Stand by for the Philosophy component.)

¹ A common misconception is that the declarant must have actually died soon after making the statement. This was apparently true under the prior Montana statute, but the Commission Comment indicates this was abandoned on adoption of the MRE provision. Now, in both state and federal court, a dying declaration may be admissible even if the declarant later miraculously recovered, so long as he believed that he was about to die at the time he made the statement. Although 804(a) requires unavailability at trial before any of the 804(b) exceptions can succeed, the declarant can be unavailable by refusing to testify despite a court order, asserting a privilege, being too sick, or simply failing to appear despite the best efforts of the proponent. Of course, death is another—and the clearest—form of unavailability under 804(a), but the death can either be caused by the circumstance which gave rise to the belief of impending death, or something else altogether.

² Pascal, Blaise, 1670, *Pensées*, translated by W. F. Trotter, London: Dent, 1910. There is a host of secondary sources which will explain far more accurately and in far more detail Pascal’s analysis. I recommend, as one starting point, <http://plato.stanford.edu/entries/pascal-wager/#4> See also, At last, my second major in Philosophy is somewhat relevant!

If you are more interested in modern rappers than old dead Frenchmen, you may prefer the version from Kendrick Lamar³:

*I’d rather not live like there isn’t a God
Than die and find out there really is
Think about it*

The second rationale often expressed for the dying declaration exception is that a person about to die doesn’t have much skin left in the game, and stands neither to profit nor lose from telling a lie just before he dies. Both this, and the religiously based rationale, are wide open to rebuttal and criticism, but the exception lives on. Indeed, the U.S. Supreme Court has alluded to the dying declaration as an example of a “firmly rooted” hearsay exception⁴, and several of its recent cases on the Confrontation Clause contain dicta indicating that dying declarations may escape the 6th Amendment altogether because of their special status.

Montana vs. Federal Dying Declaration Exceptions

Montana recognized the dying declaration exception for criminal cases at common law and then by statute⁵ prior to the M.R.E.. When the Supreme Court adopted the M.R.E. in 1977⁶, largely based on the F.R.E., Montana consciously chose to expand its version of this hearsay exception beyond the federal model. If the out-of-court declarant is unavailable for testimony at trial for one of the reasons set forth in 804(a), M.R.E. 804(b)(2) provides an exception to the hearsay rule for:

(2) Statement under belief of impending death. A statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstance of what the declarant believed to be impending death.

The federal version of this rule is F.R.E. 804(b)(2):

(2) Statement Under the Belief of Imminent

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³ <http://rapgenius.com/Kendrick-lamar-faith-lyrics#note-159794>

⁴ See, *Crawford v. Washington*, 541 U.S. 36, 72 (Rehnquist, CJ, concurring); *Ohio v. Roberts*, 448 U.S. 56, 66 n.9 (recognizing dying declaration as one category of hearsay which “rest[s] upon such solid foundations that admission of virtually any evidence within them comports with the ‘substance of the constitutional protection.’”

⁵ Section 93-401-27(4), R.C.M. 1947.

⁶ Like virtually all of the M.R.E., 804(b)(2) is substantively identical to the original version adopted by Supreme Court Order in 1976, effective July 1, 1977.

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Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

Different from the federal rule, Montana allows use of this exception in all cases, both civil and criminal, whereas the federal use is restricted to civil and homicide cases. The Montana Evidence Commission commented:

This exception is identical to Federal and Uniform Rules (1974) Rule 804(b)(2) except that an introductory clause reading "in a prosecution for homicide or a civil action or proceeding", is deleted. The Commission deleted this clause because it feels that **if statements of this sort are to be admissible in homicide prosecutions, they should also be admissible in any other criminal prosecutions.** Section 93-401-27(4), R.C.M. 1947 [superseded], admits dying declarations in all criminal actions, and so the adoption of the Federal rule would have been a restriction on existing Montana law. None of the cases have expressed the rule that dying declarations are only admissible in prosecutions for homicide, although the cases considering admitting dying declarations have all been this type of prosecution. Note that **the Federal, Uniform, and Montana rule all admit statements of this sort in civil actions**; this is a major change from the common law. The Commission feels that **if statements of this sort are reliable enough for use in criminal prosecutions, then they should also be used in civil cases where the outcome does not involve personal freedom.** (Emphasis added).

There were no Montana cases dealing with dying declarations in a civil context before the M.R.E. were adopted, presumably because the antecedent statute was confined to criminal cases. Furthermore, despite the invitation of the Montana Commission to extend use of this hearsay exception to all cases, that has not yet occurred in any case appealed to the Montana Supreme Court since 1977.

ONLY ONE MONTANA STATE DYING DECLARATION CASE SINCE 1977, AND IT IS CRIMINAL

The only 804(b)(2) case from the Montana Supreme Court since the M.R.E. were adopted was decided in 2008. Raul Sanchez shot and killed his girlfriend, Aleasha Chenowith, apparently because she had cheated on him with his co-worker. At Sanchez's trial, the prosecutor was allowed to introduce a note written by Aleasha, apparently several days before she was killed. The note read:

To whom it concerns:

On July 8, 04 around 10:30 p[sic] Raul Sanchez Cardines told me if I ever was caught [sic] with another man while I was dating him, that he would kill me. Raul told me he had friends in Mexico that had medicine that would kill me and our doctors wouldn't know what it was till it was to [sic] late and I would be dead.

So if I unexspetly [sic] become sick and on the edge of death, and perhaps I die no [sic] you will have some answers.

Aleasha Chenowith (written and printed signature)

The trial court admitted this exhibit over the defendant's hearsay objection⁷, holding that this note fell within the dying declarations exception in 804(b)(2), as well as two other hearsay exceptions. The trial judge also overruled the defense objection to a neighbor's testimony about an oral statement Aleasha made to her:

Pamela Ehrlich testified that Aleasha told her that, during an argument, Sanchez stated, "[m]e love you, [Aleasha]. Me not love you that much. You cross me, I kill you."

On appeal, the State argued that both the note and the oral statement were dying declarations and thus admissible. The Montana Supreme Court made short shrift of this argument about both types of evidence, applying the express requirements of the exception and finding that neither met these requirements:

the District Court incorrectly relied on the "statement under belief of impending death" hearsay exception to admit Aleasha's note. This exception applies to statements "made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstance of what the declarant believed to be impending death." M.R. Evid. 804(b)(2). Aleasha's statements that "if I [unexpectedly] become sick" and "perhaps I die" indicate that she viewed her death as neither certain nor imminent. (Emphasis original.)

State v. Sanchez, 341 Mont. 240, 247-248, 177 P.3d 444, 2008 MT 27. The Court also found that nothing in the oral

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⁷ The defendant also objected to the note on Confrontation Clause grounds, but the trial judge never ruled on this objection. The Montana Supreme Court held that Aleasha's note was "testimonial" even though it was not made directly to a law enforcement officer, and that although its admission might violate the state and federal confrontation clauses, Sanchez forfeited his right to object on those grounds when he murdered Aleasha. 341 Mont. at 257. But see, *Giles v. California*, 554 U.S. 353 (2008) (holding that the U.S. 6th Amendment right is forfeited only when the defendant's wrongful act was intended to prevent the declarant from testifying against the defendant.)

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statement indicated fear of imminent death at the time Aleasha was speaking to her neighbor. Thus, the Court found, the trial judge committed two evidentiary errors when it admitted these forms of hearsay. (The Court went on to hold that both errors were harmless, in view of other evidence properly admitted on the same point, including Sanchez's own statements of his intention to either slap Aleasha around or shoot her.)

The M.R.E. were adopted the year before I graduated from law school, so we are almost the same legal age. In that time (a lot of time), M.R.E. 804(b)(2) has been the subject of only one case in the Montana Supreme Court. That case, *Sanchez*, was criminal. Despite the Commission's intention to open the use of dying declarations to civil as well as criminal litigants, no civil cases in Montana's state courts appear to have taken advantage of the extension.

A POST-RULES U.S. DISTRICT COURT CIVIL CASE

The U.S. District Court for the District of Montana decided a very interesting and illuminative dying declaration case in 1999, *Sternhagen v. Dow Chemical*, 198 F.Supp. 2d 1113. (It was a civil case, to boot). The plaintiff had grown up to become a board-certified radiation oncologist, but as a teenager he had worked three summers mixing and spraying herbicides on fields of crops. Thirty years later, he was diagnosed with non-Hodgkin's lymphoma, which he believed was caused by his exposure to the herbicide chemicals. On August 22, 1988, he filed a products liability complaint in federal court.

Eight days later, he gave a sworn videotaped statement "upon questioning from his attorney." The defendants were not notified of this event at the time, and had no opportunity to cross-examine Dr. Sternhagen. In the statement,

Sternhagen said he could recall four labels on the 2, 4-D barrels with which he worked while employed with Valley Flyers and the Fuhrman Ranch. The four were Dow, Ortho (Chevron), Monsanto and Stauffer, i.e., the defendants in this action. Sternhagen also described, *inter alia*, how his non-Hodgkin's lymphoma was in "stage four," the disease's final stage and the point at which the disease is considered incurable. He stated, based upon his experience as a doctor with other cancer patients, that the average survival time for a person in his condition was three months, and survival of six months would be considered "quite outstanding." Sternhagen said he had received the sacrament of Last Rites from the Roman Catholic Church about 25 times since he was diagnosed as a step to prepare himself for death.
108 F.Supp.2d at 1115.

Clearly, Dr. Sternhagen's attorney had read the dying declarations rule and was trying to lay the foundation for the posthumous use of the statement at trial.

Dr. Sternhagen did die before trial⁸, and before the defendants moved for summary judgment. The plaintiffs submitted the sworn statement in opposition to summary judgment, to prove the truth of the facts it asserted, as the primary basis for liability of the four named defendants:

Q: Do you recall, I realize we are going back almost exactly 40 years—?

A: Yes, sir.

Q:—but, as you sit here now, do you recall any labels on the 2, 4-D barrels?

A: I believe I can recall four labels. Those four would be Dow, Ortho, Monsanto and Stauffer, as best as I can recollect.

Q: And those would all be suppliers of the 2, 4-D which you mixed?

A: Yes, sir.

Q: And which you sprayed?

A: Yes.

108 F.Supp.2d at 1116.

Judge Hatfield found that the statement conformed to federal precedent that descriptions of ingested substances adequately "concern the cause or circumstances" of the imminent death. However, the judge held that the other requirement of the exception, that the declarant believe at the time of making his statement that his death was "imminent," was not met in this case. He quoted the following language from the U.S. Supreme Court's best-known dying declaration case, *Shepard v. U.S.*, 290 U.S. 96, 99-100 (1933):

[T]he declarant must have spoken without hope of recovery and in the shadow of impending death.... Fear or even belief that illness will end in death will not avail 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.... 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.

Mrs. Shepard's statement to her nurse about her belief that her husband had poisoned her was disqualified because about the same time, Mrs. Shepard had experienced an improvement in her physical condition, and had asked her doctor "you will get me well, won't you?" The U.S. Supreme Court held that these facts contraindicated the required "settled hopeless expectation" and rendered the statement inadmissible.

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⁸ The parties had agreed to take Dr. Sternhagen's deposition on December 14, but he died on December 4, before that could occur.

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Dr. Sternhagen fared no better. Despite the great “I am positive I am going to die, and soon” language in his statement, his post-statement conduct made the hearsay objection for the defendants. Remember that he gave his statement on August 30, 1988, and prior to that date had had last rites administered about 25 times. The fatal (sorry) facts occurred after that date:

In this court’s opinion, Sternhagen’s statement does not fall within the dying declaration exception. When he made the statement, he stated he expected to live another three to six months. He also said he continued to work in a limited way and stated his plans to attempt more work if his condition improved. These are not the type of statements that support a belief in “imminent” death, as contemplated in Rule 804(b)(2). They do not convey a state of mind exhibiting “consciousness of a swift and certain doom” and thus do not provide sufficient indicia of trustworthiness to satisfy the dying declaration exception to the hearsay rule. Additionally, his act of taking a trip to a religious shrine to “receive healing” does not support the notion of a “settled hopeless expectation” that his death was near at hand. For these reasons, the court finds the dying declaration exception inapplicable to Sternhagen’s statement.

108 F.Supp.2d at 1118.

(The court also rebuffed the plaintiff’s attempt to get the statement in through the “residual” exception of F.R.E. 807.⁹) It is hard to say if there was anything else plaintiff’s counsel could or should have done to try to preserve Dr. Sternhagen’s identification of the toxins, and it is certainly impossible to counsel your dying clients that they should forsake additional treatment because it might interfere with your evidentiary strategy. We don’t make the facts, which is one of the hardest things to accept about lawyering...

ILLUSTRATIVE PRE-RULES DYING DECLARATION CASES IN MONTANA

My research¹⁰ revealed about 20 published cases in Montana decided before M.R.E. 804(b)(2) went into effect. All of them are criminal cases. I have selected just two to discuss here, one of which is my favorite¹¹ of all the dying declaration cases I have ever read, both because of its colorful facts and because it shows the paradigmatic application of the exception. The other case shows a reversal for an improper admission of a hearsay statement which did not meet the requirements of the exception. Taken together, these two cases provide a good

⁹ Montana has retained two versions of this “catch-all” exception as 803(24) and 804(b)(5); there is no M.R.E. 807.

¹⁰ See, “A Word/Warning about Research,” below.

¹¹ This is also the case the Montana Commission discussed (in much less detail, more’s the pity) in its Comment to 804(b)(2): “The leading case considering this foundation is *State v. Morran*, 131 Mont. 17, 30, 306 2d 679 (1956), in which the Court reviewed most of the Montana cases in this area.”

diagram of the proper use of this hearsay exception in Montana.

Dying declarations in spades

Sadly, I can only excerpt a small portion of this case, but I hope it will be enough to induce you to read more of *State v. Morran*, 131 Mont. 17, 306 P.2d 679 (1957) sometime soon.

All was not well at Buster Morran’s gas station in Malta. He was already way behind in paying for his gas and oil, as well as his rent, and the lessor was going to cancel his lease in August. He had not had fire insurance, but bought and paid for a new policy, effective June 11. At 1:00 a.m. on June 19, Buster went to his bookkeeper’s house and dropped off the bank deposit from the day before, as well as the books, some adding machine tapes, and other records. At 2:45 that same morning, June 20, a fire broke out at the gas station. Not surprisingly, the fire marshal later determined it had been set.

Unfortunately, Morran did not act alone in the arson. Shortly after the fire started, the whole station exploded, and two men ran out of the building. They were Mervin Bishop and “Turk” or “Turkey” Freestone (see why I love this case?). Both were taken to the hospital. When they arrived, Bishop was 85% covered with 3rd degree burns, and Freestone was almost 100% covered with the same. Freestone died less than 12 hours after the explosion; Bishop lived until the afternoon of June 23 (about 3 ½ days). The treating physician at the hospital for both men was none other than the father of the Hon. Donald Molloy. Dr. Molloy testified at the trial, both establishing the foundation for the dying declarations and recounting those declarations.

Here is the testimony of Dr. Molloy which established the foundation for the declarations:

‘Mervin Bishop asked me what was the condition of Turk Freestone. I informed him that Turk Freestone died shortly after they were admitted to the hospital, and he said, ‘Am I burned as badly as Turk?’ I said, ‘Not quite, but just about as bad, Merv.’ He said, ‘Am I going to live, Doc?’ I said, ‘No, Merv, you are not.’ ...

On Monday evening, June 20, 1955, Mervin Bishop said to Dr. Molloy, ‘I am going to die’. Bishop also made a statement to his friend, Clinton Dennis, which was overheard by Dr. Molloy to the effect that he (Bishop, a former boxer) was ‘going down for the long count.’

The local priest also testified at the trial to reinforce the fact that the declarant knew his death was imminent:

Within a few hours after the fire a Catholic priest was summoned to the hospital and the last rites of the church were administered to both Mervin Bishop and Donald Freestone. The priest, before administering the last rites to Mervin Bishop, received his confession. The testimony of the priest given at appellant’s trial indicated that Mervin Bishop was able to respond intelligently to the priest’s statements and that the injured

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man seemed to understand the solemnity of the ceremony being performed.

With this foundation, Dr. Molloy was allowed to testify about the contents of the statement which Bishop made in his hospital room on the Tuesday evening (only part of which I reproduce here), indicating that the fire was orchestrated by Morran and that Bishop believed Morran purposely tried to kill him and Turk to destroy evidence of the arson. Bishop said that Morran originally contacted Turk, and Turk had Bishop hide in the men's room at the gas station to listen in on the proposition:

Mervin Bishop sneaked into the back room and into the men's rest room. Buster Morran then came to the back room with his proposition to Turk Freestone. He stated that he would give him fifty to five hundred dollars, depending on how good a job he did on burning down the Hi-Line Servicenter. He laid the plans for them...

'So about 2:30, 2:00 to 2:30 in the morning Turk Freestone entered the northwest window of the Hi-Line Servicenter and Mervin Bishop stood jiggers while Turk Freestone entered. Mervin Bishop then followed Turk Freestone through the window. Then instead of setting about their business as they were supposed to, Turk went to the back room to obtain two tires for his car. After he obtained the tires for his car, Mervin was standing jiggers at the front door to make sure no one came.

'Turk threw a 15-gallon drum of gasoline into the back room as he was instructed, toward the water heater. At this point Mervin Bishop interjected that Buster was supposed to have turned off the flame, the pilot light in the water heater, but he did not, and 'I think he left it on on purpose to catch Turkey and destroy all the evidence.'

The trial court allowed the admission of Bishop's hospital statements as "dying declarations" under the Montana evidence statute then in effect. The defendant argued on appeal that the fact Bishop had said to one person "If you don't stop asking me questions, you're going to give me a nervous breakdown" indicated that he expected to live. The Supreme Court used the appeal as an opportunity to review prior Montana case law on this exception to the hearsay rule, observing that:

"...if all the facts and circumstances surrounding the declarant at the time of making the declarations show them to have been made under the sense of impending death, notwithstanding declarant may not have said he was without hope of recovery, or was dying, or going to die, then such declarations are admissible in evidence."

131 Mont. at 31, quoting from *State v. Russell*, 13

Mont. 164, 168, 32 P. 854, 856 (1893).

The Supreme Court affirmed the judge's admission of the dying declaration, and affirmed the conviction.

No go: No sense of impending death at time of the statement, even though died the same day

State v. Newman, 162 Mont. 450, 513 P.2d 258 (1973) was decided four years before the MRE became effective. Jack Newman was convicted of involuntary manslaughter of his wife, Elsie Newman. She died in the late afternoon in an ambulance on her way from Bozeman to Billings. Early that Saturday morning, Mrs. Newman had asked two of her neighbors to come over to the house after Mr. Newman left. Both neighbors testified at trial that Mrs. Newman told them defendant "had beaten her Friday night after supper and again Saturday morning, and that she was frightened and had to get out of the house." After these conversations, the county attorney came out to the house and, observing the wife's physical condition as well as knowing of her continuing difficulty with alcohol, took her to the local hospital. Several hours later, at the hospital, Mrs. Newman's condition deteriorated and arrangements were made for her to travel to Billings for further treatment. The patient had unexpected seizures in the ambulance about halfway to Billings, and died in Park City. At trial, the husband/defendant's hearsay objection was overruled and the neighbors' testimony about Mrs. Newman's statements was admitted. On appeal, the Supreme Court stated simply:

The 'dying declarations' exception as stated in section 93-401-27, R.C.M.1947, is not applicable in the instant case because a 'sense of impending death' was never demonstrated.

For these errors, and others, the conviction was reversed and the case remanded for a new trial.

A Quick Look at Dying Declarations and the Confrontation Clause 6th Amendment

As the U.S. Supreme Court has struggled to enunciate its current Confrontation Clause jurisprudence,¹² it has abandoned its former test of "circumstantial guarantees of trustworthiness" in favor of a clear requirement of confrontation through cross-examination, either at trial or beforehand, of a person whose out of court "testimonial" statement is used against the accused. However, a recurring theme is suggestive dicta that dying declarations may be exempt from the Confrontation Clause because they were so firmly accepted before the Founders adopted the Bill of Rights. In *Crawford v. Washington*, 541 U.S. 36 (2004), the landmark case for modern Confrontation Clause application, the Court devoted footnote 6 to the treatment of dying declarations:

The existence of that exception [dying

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¹² The "new" jurisprudence began with *Crawford v. Washington*, 541 U.S. 36 (2004), and continues apace today. The criminal bar will be well aware of these cases, and the Montana corollaries; the civil lawyers among us may well be, and may remain, oblivious, because the 6th Amendment applies only to criminal defendants.

declarations] as a general rule of criminal hearsay law cannot be disputed. Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.

541 U.S. at 56, note 6. In *Giles v. California*, 554 U.S. 353 (2008), the Court said:

... two forms of testimonial statements were admitted at common law even though they were unfronted. The first of these were declarations made by a speaker who was both on the brink of death and aware that he was dying. Avie did not make the unfronted statements admitted at Giles' trial when she was dying, so her statements do not fall within this historic exception.

In *Michigan v. Bryant*, 181 S.Ct. 1143 (2011), the out of court statements of the murder victim, made to police as he lay mortally wounded in a gas station parking lot, might have been dying declarations which would have forced the Supreme Court to actually rule definitively on the effect of the Sixth Amendment on the Confrontation Clause (or vice versa). The victim told the police who had shot him; the gunshot wound did in fact cause the victim's death soon thereafter. However,

The Supreme Court of Michigan held that the question of whether the victim's statements would have been admissible as "dying declarations" was not properly before it because at the preliminary examination, the prosecution ... established the factual foundation only for admission of the statements as excited utterances... Because of the State's failure to preserve its argument with regard to dying declarations, we similarly [to *Crawford*] need not decide that question here.

Bryant, 131 S.Ct., at 1151, note 1. Justice Ginsburg's dissent went further:

In *Crawford v. Washington*... this Court noted that, in the law we inherited from England, there was a well-established exception to the confrontation requirement: The cloak protecting the accused against admission of out-of-court testimonial statements was removed for dying declarations. This historic exception, we recalled in *Giles v. California*, 554 U.S. 353, 358 (2008); see *id.*, at 361-362, 368, applied to statements made by a person about to die and aware that death was imminent. Were the issue properly tendered here, I would take up the question whether the exception for dying declarations survives our recent Confrontation Clause exceptions.... *Id.*, at 1177.

Thus, the U.S. Supreme Court has not yet dealt with a case which squarely presented the status of the dying declaration vis a vis the post-*Crawford* Confrontation Clause. Several state courts have, and so far, have followed the Supreme Court's intimations that the Confrontation Clause does not bar dying declarations, even where the declarations were testimonial, and even where the accused had no opportunity to cross-examine the declarant either at or before trial. E.g., *State v. Beauchamp*, 796 N.W. 2d 780, 788-95 (Wis. 2011), citing a string of other post-*Crawford* state court decisions¹³. See also, Peter Nicolas¹⁴, 'I'm Dying to Tell You What Happened': *The Admissibility of Testimonial Dying Declarations Post-Crawford*, 37 *Hastings Const. L.Q.* 487 (2010). Montana has not yet ruled on this issue because no dying declaration case has been presented to the Supreme Court in the past several years.

MONTANA CONSTITUTION

Article II, Section 24 of Montana's 1972 Constitution provides "[i]n all criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face." The Montana Supreme Court has held that Montana's version of the Confrontation Clause provides even more protection to the accused than the federal version. *State v. Clark*, 1998 MT 221, 290 Mont. 479, 964 P.2d 766. See also, *State v. Mizenko*¹⁵, 2006 MT 11, ¶57, 330 Mont. 299 (Nelson, J., dissenting); *State v. Sanchez*, 2008 MT 27, 341 Mont. 240, ¶32.

In *State v. Sanchez*, discussed above, the prosecutor was erroneously allowed to admit two out-of-court statements by the murder victim, each identifying the accused as the person who probably would kill her. The trial judge held both statements (one written and one oral) to be dying declarations, but the Supreme Court found that neither indicated any awareness that the declarant's death was imminent, as required by Rule 804b2, and thus were inadmissible hearsay. The defense also objected at trial on Confrontation grounds, but the trial court never ruled on these.

On appeal, the Montana Supreme Court devoted a great deal of time and effort to the Confrontation claim. It found that Aleasha's note was indeed "testimonial" and ordinarily inadmissible under both the state and federal confrontation

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13 *Cobb v. State*, 16 So.3d 207, 212 (Fla.App.2009); *People v. Gilmore*, 356 Ill. App.3d 1023, 293 Ill.Dec. 323, 828 N.E.2d 293, 302 (2005); *Wallace v. State*, 836 N.E.2d 985, 996 (Ind.Ct.App.2005); *State v. Jones*, 287 Kan. 559, 197 P.3d 815, 822 (2008); *Commonwealth v. Nesbitt*, 452 Mass. 236, 892 N.E.2d 299, 310-11 (2008); *People v. Taylor*, 275 Mich.App. 177, 737 N.W.2d 790, 795 (2007); *State v. Martin*, 695 N.W.2d 578, 585-86 (Minn.2005); *State v. Minner*, 311 S.W.3d 313, 323, n. 9 (Mo.App.2010); *Harkins v. State*, 122 Nev. 974, 143 P.3d 706, 711 (2006); *State v. Calhoun*, 189 N.C.App. 166, 657 S.E.2d 424, 427-28 (2008); *State v. Lewis*, 235 S.W.3d 136, 147-48 (Tenn.2007); *Gardner v. State*, 306 S.W.3d 274, 289 n. 20 (Tex. Crim.App.2009); *Satterwhite v. Commonwealth*, 56 Va.App. 557, 695 S.E.2d 555, 560 (2010).

14 Prof. Nicolas teaches law at the University of Washington, and is the author of the casebook which I use to teach Evidence at UMLS.

15 The majority opinion in *Mizenko* noted in passing *Crawford's* language footnote about the possibility of the dying declaration exemption from the Confrontation Clause, but like *Crawford*, the out-of-court statement at issue was not a dying declaration.

DYING, from previous page

clauses because the defendant had had no chance to cross-examine her. However, the Court went on to consider and eventually agree with the State's argument that Sanchez's murder of Aleasha extinguished his constitutional rights to confrontation, regardless of the motive behind the murder.

Since *Sanchez* was decided, the U.S. Supreme Court has taken the other tack: in order to forfeit a federal 6th Amendment right by wrongdoing, the defendant's wrongful act must have been intended to prevent the declarant/victim from testifying. *Giles v. California*, 554 U.S. 353 (2008). The Montana Supreme Court is free to continue its broader interpretation of the grounds for forfeiting the state confrontation right¹⁶, of course, but must follow *Giles's* narrower version of forfeiture when the defendant's claim is based on the 6th Amendment.

Like the U.S. Supreme Court, Montana has not yet had to face the issue of whether a dying declaration which meets the hearsay exception also must survive a confrontation clause objection, or whether the Montana Constitution impliedly exempts these out of court statements from the right of the accused to "meet the witnesses against him face-to-face."

A WORD/WARNING ABOUT RESEARCH

For no particular reason, my preferred search engine for legal research is WestlawNext. However, I lately have had some disconcerting results, which I thought to share with my readers as a cautionary tale. In researching this article, I first typed in "Rule 804 hearsay" and got immediately to M.R.E. 804, including the text of the rule and the complete set of Commission Comments. I then scrolled down to "Notes of Decisions" and saw that there were 125 cases about Rule 804. They are categorized according to their subject, so I went to the category labeled "Statements Under Belief of Impending Death." There, I found only one case, the Sternhagen case, which technically was decided under the FRE rather than the MRE. I already knew about this case, but I also knew there were other Montana dying declaration cases out there. I modified my search, omitting the reference to the rule and

¹⁶ Ironically, the broader approach to forfeiture yields a narrower application of the state's confrontation right, apparently in contrast to the prior cases interpreting the state right as stronger for the defendant than the federal version.

typing simply "dying declarations," to cover cases decided before the M.R.E. were adopted. This approach was much more satisfactory, yielding not only the rule but also 24 cases,¹⁷ all of them from the Montana Supreme Court (and none of them Sternhagen).¹⁸ The third method of research was to go to the actual books (remember them?), in this case, West's Montana Code Annotated.¹⁹ This time, under M.R.E. 804(b)(2), I found the same two cases as I found by doing the rule-based search electronically. I looked in the actual "pocket part" supplement to update my results, but still did not find the Sanchez case even though it clearly was decided under 804(b)(2).

What's the moral? Cover all your bases, use your common sense. If you think the search results look thin, look again. For best results, cross-check your electronic results with the hard copy.

CONCLUSION

Dying declarations may be "firmly rooted" and historic exception to the hearsay rule, if not the Confrontation Clause. Montana explicitly included this exception to the hearsay prohibition in M.R.E. 804(b)(2), so out of court statements made by declarants who believe they are about to die, discussing the cause or circumstances of that imminent death, are admissible to prove the truth of the matters they assert. However, my review of the use of this hearsay exception indicates that it might itself be suffering from non-use, and in danger of wasting away on the vine. Don't forget that it is out there, and that you can use it in both civil and criminal cases.

Happy Halloween.

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¹⁷ Not all of the 24 cases actually involved application of Rule 804(b)(2), but at least mentioned the term "dying declarations." It is a lot easier for me to read a case and decide that it is not useful than it is to work not even knowing the cases are there.

¹⁸ It also indicated that there are 1,657 "secondary sources" on dying declarations. Wow!

¹⁹ Actually, I asked the law school's brilliant research librarian, Cynthia Condit, to do this for me. As always when I need help, and quick, she came through and emailed the scan to me at my remote location. (Who says you can't write at home in your jammies?)

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