ADMISSIBILTY OF DYING DECLARATIONS

In a local, high-profile homicide trial a couple of years ago, an off-duty Toronto police officer testified that on May 20th, 20216, he was visiting Buffalo and dining at the Anchor Bar when several shots rang out and all hell broke loose. Patrons fled in a panic and the victim, Freddie Dizon (whom the officer later encountered outside in the rear parking lot on the ground, bleeding), was scurrying about the restaurant in apparent shock after having been shot in the side of his chest by gunman wearing a t-shirt wrapped around his head as a makeshift mask. When the officer asked the victim, "who shot you," he replied, "Jorge Quinones."

Whether this statement purporting to identify the shooter would have qualified as a dying declaration never had to be determined because the defense made the decision not to contest it. This strategic choice undoubtedly had more than a little to do with the fact that the defendant's last name was Suarez, not Quinones. Unfortunately for the defendant, the People had significant inculpatory evidence including some damning statements that he made to the police and to an informant, circumstantial identification evidence and a strong motive (to punish the victim, who was his cousin, for making unsavory accusations against him on social media).

If the victim had named "Jorge Suarez" as the shooter (a statement the defense would likely have opposed), the People would have had to demonstrate that the statement was based on the deceased's personal knowledge (not speculation or hearsay; People v Shaw, 63 NY 36 [1875]); that he was in extremis (at death's door) when he made it, and was conscious of his impending demise with no hope of recovery. (See People v Nieves, 67 NY2d 125 [1986], People v Liccione, 63 AD2d 305 [4th dept 1978]).

The statement must also relate to the cause and circumstances of the deceased's impending death (e.g. how it happened, who did it), and not include recitations of past events. (People v Smith, 172 NY 210 [1902]). (See, Dying Declarations Exception to Hearsay Rule; Judicial Advisory Committee on Rules of Evidence at NYCOURTS. GOV).

Unlike the Federal "Statement Under Belief of Imminent Death" Exception (FRE 804[b][2]) which: a. applies to both homicide prosecutions and civil cases, b. does not require that the victim actually die (only be unavailable), and c. requires a belief that the declarant's death is imminent, the New York rule applies only in homicide cases where the death of the declarant is the subject of the charge (People v Becker, 215 NY 126 [1915]), and the victim in fact, dies. In both forums, the statement must pertain to the cause and circumstances of the impending death.

DYING DECLARATIONS AND THE CONFRONTATION CLAUSE

Interestingly, even where the statement may not qualify as one made for the primary purpose of helping the police meet an on-going emergency (Davis v Washington, 541 US 36 [2004]; People v Bradley, 8 NY3d 124 [2006]), a dying declaration made under circumstances objectively indicating that it is obtained for future use against the accused at a trial may still be admitted as an exception to the rule precluding testimonial hearsay that violates the defendant's right of confrontation under the Sixth Amendment to the Constitution. (Crawford v Washington, 541 US 36 [2004]; See also NY Const. Art. 1

Sec 6). Under Crawford, testimonial hearsay statements, whether reliable or not, are not admissible against the accused unless the declarant, who does not testify at trial, qualifies as unavailable and the defense had a prior opportunity for cross examination.

In People v Clay, 88 AD3d 14 (2d dep't 2011), the Court, relying on dicta from Crawford supra, and referencing a long history of common law authority (e.g. Mattox v. US, 156 US 237 [1899]; Wilson v Boerem, 15 St John 286, [Sup Ct, NY County 1818], determined that testimonial dying declarations qualify as an exception to the right of confrontation. Consequently, even though the victim's statement, "Tom shot me," made to a late-arriving police captain who pressed him to name his shooter after exclaiming, "I don't think you're going to make it," was deemed to be testimonial in nature, it was not ruled inadmissible on Confrontation Clause grounds.

Turning then to the question whether the victim's statement qualified as a dying declaration, the court found that the victim, having been shot six times at close range in his abdomen, suffering from severe internal injuries (and gasping for air while laying on the ground), manifested a settled expectation that death was at hand. The court was also satisfied that his statement providing the first name of the defendant (who was also identified as the shooter by his estranged wife and a cooperating witness) was based on personal knowledge and, therefore, properly admitted into evidence. (Whether the victim would have given the shooter's correct last name, unlike the victim in the Anchor Bar shooting, will never be known).

Dying declarations that meet the foundational requirements for admissibility are considered to be reliable on the theory that a person who knows that he/she is about to die is unlikely to lie about the circumstances of his/her impending demise (including the identity of the perpetrator). For those who believe in a higher power, the mantra may be "nemo moriturus praesumitur mentire," (one will not wish to meet his/her maker with a lie on his/her lips).

For non-believers, it may just be a matter of hedging their bets or simply concluding that's one's parting words should not be false ones. As noted in Rex v Woodcock 168 Eng. Rep. 352 (KB 1789), "the general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth, a situation so solemn and so awful, is considered by the law as creating an obligation equal to that which is created by a positive oath administered in a Court of Justice." (See also Shephard v US 290 US 96 [1933]; People v Allen 300 NY 222 [1949]).

Besides trustworthiness, the other basis for admitting dying declarations is that of necessity. As a practical matter, the only evidence describing the circumstances of the victim's death or identifying the perpetrator may be the declarant's dying words. If they meet the foundational requirements of trustworthiness, they are likely to be admitted.

In summary, the elements of dying declarations are:

1.The unavailability of the declarant due to death which is the subject of the prosecution.

2.The prosecution is for homicide.

3. At the time of the statement, the declarant (who is in extremis with no hope of recovery), believes that death is imminent.

4.The statement is about the cause or circumstances of the declarant's impending death.