Dying Declarations in an Ever-Changing World: A Peek into the Implications of Expansion

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“Of the doctrines that authorize the admission of special classes of hearsay, the doctrine relating to dying declarations is the most mystical in its theory and traditionally among the most arbitrary in its limitations.”¹

Are all exceptions to the hearsay rule 100% trustworthy? What if the reasoning for codifying the exception has since changed? Should the rule change as the justifications change? When dying declarations were excepted from the hearsay rule, the belief was that these statements were, by their very nature, trustworthy since persons chanced fear of eternal punishment if they lied.² But what happens in a secular world where a person may no longer fear eternal retribution? Or what should happen when a person takes essential elements away from the traditional dying declaration?

The United States allows the dying declaration exception to the hearsay rule to be used in civil cases. Problems relating to the expansion of this exception are pronounced in the most recent United States case on the issue: Garza v. Delta Tau Delta Fraternity National.³ In Garza, the Louisiana First Circuit Court of Appeal affirmed the decision of a district court to allow a suicide note to fall within the “statement under belief of impending death” hearsay exception.⁴ Relying on the only other United States case that ruled the same way,⁵ the Garza court determined that a woman who killed herself immediately after writing a suicide note believed her death was imminent, even though she had complete control over her death.

I. Historical Perspective

A. The Hearsay Rule and Its Exceptions

The need for the hearsay rule appeared in the 1500s when the prevalence of witnesses testifying in open court rose.⁶ The purpose of the hearsay rule was to ensure that the ideal conditions, testifying by oath, in person, and by cross-examination, were met. An oath was considered important because it may induce “a feeling of special obligation to tell the truth, and it may also impress upon the witness the danger of

³ Garza v. Delta Tau Delta Fraternity Nat’l, 04-1484 (La. App. 1 Cir. 5/6/05); 916 So. 2d 185, writ granted, 05-1527 (La. 1/9/06); 918 So. 2d 1019.
⁴ Id. at 190. The terms “dying declaration” and “statement under belief of impending death” are used interchangeably in the jurisprudence and statutes.
⁶ McCormick § 244.
criminal punishment for perjury.”7 Personal presence at trial was viewed as a way for the trier of fact to determine whether the witness was credible by observing his demeanor. It was easier to believe that a statement was accurate if the declarant was actually testifying in court. The main justification for the hearsay rule is the lack of opportunity to cross-examine the declarant. It is supported by the premise that “[a] person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties . . . [H]e entrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author.”8

Numerous exceptions to the hearsay rule have been established. These exceptions are allowed when “circumstantial guarantees of trustworthiness” justify the inclusion.9 Exceptions pertaining to an unavailable declarant were deemed admissible although live testimony was preferred. Exceptions that were admissible regardless of whether the declarant was available were considered reliable if in-court testimony would be pointless. Ultimately, trustworthiness was the deciding factor as evidenced by Federal Rule of Evidence article 102, which states that “[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”10

B. The Dying Declaration First Appears in England

In 1788, Silvia Woodcock was severely beaten. Two days before she died from the bludgeoning, she told a magistrate that her husband, William Woodcock, was the perpetrator. For the first time, the court encountered a problem in which hearsay evidence was available, but the witness was not. In an effort to allow the magistrate to testify to Silvia’s deathbed statements, the court formulated an exception to the hearsay rule, in the case of a dying declaration by a person who has received a fatal blow.11 Chief Baron Eyre stated:

[T]he 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.12

This exception was very limited. The declarant had to be speaking at the moment of death when there was no hope of recovery.

This decision was further explained almost 100 years later in Regina v. Osman. The court held that the exception’s trustworthiness requirement was satisfied because no person “who is immediately going into the presence of his Maker will do so with a lie upon his lips.”13 The statement was thought to be reliable even though the declarant did not take an oath because a person’s religious conviction would compel him to tell the truth.14

7 Id. at § 245.
8 Id. at 353.
9 MCCORMICK § 253.
10 FED. R. EVID. 102.
12 Id. at 353.
13 (1881) 15 Cox. C.C. 1 (Eng.).
C. The Common Law Rule Manifests in the United States

Around the same time, the traditional common law rule developed in the United States. The requirements were substantially similar to the English rule. “Although originally the use of dying declarations was not limited to particular types of cases, by the early 19th century common-law courts had begun to restrict their use to homicide prosecutions . . . .”

The statement could be offered only in a criminal homicide prosecution for the death of the declarant. Furthermore, the declarant must have actually died after making the statement. Still today, “it is a rule of almost universal application in the United States that in the absence of statute dying declarations are admissible only in criminal cases where the prosecution is for homicide or for abortion in which the death of the victim is an element of the offense.”

The rule was thought to be trustworthy because “the fear of impending death assumed to be as powerful an incentive to truth as the obligation of an oath.” The courts determined that the necessity of convicting the murderer overrode the risk of untruthfulness, even though it acknowledged that declarants do lie at the moment of death. To qualify, it must be apparent that the declarations are made “by the victim under the fixed belief and moral conviction that death is impending and certain to follow almost immediately, without opportunity for repentance and in the absence of all hope of avoidance, when he has despaired of life and looks to death as inevitable and at hand.”

As the world became more secular, the underlying rationale of the trustworthiness of dying declarations came into issue. However, “the thought persist[ed] that psychological forces produce a final truthful impulse, and it [was] said that memory and perception [were] not likely to be serious risks with dying statements relating to the cause or circumstances of death.”

D. United States Federal Rule of Evidence 804(b)(2)

In 1975, the concept was codified in the Federal Rules of Evidence. The adopted language states:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

The traditional common law rule was expanded to include civil actions in addition to criminal homicides. Still relying on the

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16 People v. Nieves, 492 N.E.2d 109, 113 (N.Y. 1986) (citing 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1430 (Chadbourn ed. 1974)).
17 FED. R. EVID. 804(b)(2) advisory committee’s note; 56 F.R.D. 183, 326. See also McCORMICK § 311 at 306-09.
18 GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 294 (2nd ed. 1987).
20 Carver v. United States, 164 U.S. 694, 695 (1897).
21 Id. at 697. See also People v. Falletto, 96 N.E. 355 (N.Y. 1911).
22 People v. Tilley, 94 N.E.2d 328, 331 (Ill. 1950).
24 FED. R. EVID. 804.
25 PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE: RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES 422 (2nd ed. 1994).
English and common law rules, courts held that Rule 804(b)(2) provided for an exception to the hearsay rule “because the circumstances of belief of impending death seem to obviate any motive on the part of the declarant to misstate the truth. More realistically, the dying declaration is admitted, because of compelling need for the statement rather than any inherent trustworthiness.” Proponents for expansion of the rule to include all criminal and civil cases have been unsuccessful because “[t]he Committee did not consider dying declarations as among the most reliable forms of hearsay. Consequently, it amended the provision to limit their admissibility in criminal cases to homicide prosecutions, where exceptional need for the evidence is present.”

E. Louisiana Code of Evidence 804 (B)(2)

Louisiana, the only civil law jurisdiction in the United States, adopted a similar rule in 1989. The article provides in pertinent part:

B. Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

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

The only difference between the Louisiana rule and the federal rule is that there is no requirement that the statements be used only in cases of criminal homicides. This similarity is also apparent when the legislative intent is analyzed. “[T]he adoption of this Code facilitates the movement towards a uniform national law of evidence . . . . Louisiana courts now have available a body of persuasive authority which may be instructive in interpreting the Louisiana Code.” The language is virtually identical to the federal rule except that the Louisiana rule allows the statement to be used in all cases, both criminal and civil.

F. Explanation of Belief of Imminent Death Requirement

The need for the declarant to believe that his death is imminent has been a requirement since the concept was first applied in 1789. The concept carried on throughout the years as the United States adopted and codified the rule, as did many states, including Louisiana.

Mattox v. United States is one of the earliest cases in the United States that pronounced this rule. The Court stated that dying declarations could be admissible in a criminal homicide, “[b]ut it must be shown by the party offering them in evidence that they were made under a sense of impending death.” The determination must consider the statements of the declarant, the nature of the wound, the declarant’s conduct, and communications made by the medical advisors. Imminence was not precisely defined as a specific time after the statement was made, although the length of time was a relevant factor. “[I]t is the impression of almost immediate dissolution, and not the rapid succession of death, in point of fact, that renders the testimony admissible.” It is left to the courts to look at the totality of the circumstances to determine the declarant’s state of mind. This is a subjective standard, and “not what a
'reasonable person' under similar conditions would believe regarding the imminence of his or her demise.33

The United States Supreme Court went further to require that the declarant be ‘fully aware of the fact that his recovery was impossible, and in this particular the requirement of the law is very stringent.’34 Later, the Court reaffirmed Chief Baron Eyre’s holding that ‘when the party is at the point of death, and when every hope of this world is gone,’35 dying declarations are admissible. In Shepard v. United States, the Court held that ‘the declarant must have spoken without hope of recovery and in the shadow of impending death.’36 The Court went further to add that “[f]ear or even belief that illness will end in death will not avail of itself to making 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.”37 There must have been a notion of a “swift and certain doom.”38

Some states, including Louisiana,39 required that the declarant be “in possession of his mental faculties sufficiently to understand what he is doing and to be able to give a true and correct account of the facts to which the statement relates.”40 The Louisiana Supreme Court stated that dying declarations “must be the utterance of a sane and rational mind.”41 The court went further to add that in considering whether “the declarant was in such a mental state at the time of making a dying declaration as to entitle such declaration to admission in evidence, resort may be had to all the circumstances of the case, and expressed utterances are not necessary to such a determination.”42 Other states held that the declarant “must have felt or known that he could not survive.”43 Spontaneity plays an important role in determining whether a statement was uttered under belief of impending death.

It must be noted that the exception for dying declarations presumes that the declarant’s statements possess a degree of spontaneity, thus resembling the underlying characteristics of the exceptions for present sense impressions under Rule 803(1) and excited utterances under Rule 803(2). This element is reflected in the Rule’s use of the word ‘imminent.’44

“The lack of spontaneity makes it even more essential that the statement be made in the belief of imminent and certain death.”45

G. Requirement that the Statement Pertain to a Cause or Circumstance of the Death

There is not much jurisprudence on what exactly constitutes a cause or circumstance of a person’s death. The Federal Rules of Evidence, and the state statutes that mimic them, specifically provide that the statement must relate to a cause or circumstance of the

33 Weissenberger, supra note 23, at 1110 (citing MUELLER & KIRKPATRICK § 488, at 1120-23). “Rule 804(b)(2) expressly provides that before a dying declaration may be admitted, foundational evidence must establish that the declarant possessed a subjective belief in the certainty of his or her death. In theory, it is subjective consciousness of death that critically reduces the motivation for fabrication.”
34 Carver v. United States, 164 U.S. 694, 697 (1897).
36 See Shepard, 290 U.S. at 99.
37 Id.
38 Id.
39 State v. Rankins, 30 So. 2d 837 (La. 1947).
40 People v. Tilley, 94 N.E.2d 328, 331 (Ill. 1950).
41 Rankins, 30 So. 2d at 840.
42 Id.
death.\textsuperscript{46} The belief is that a person is less likely to implicate the wrong person and let the guilty person go free if he is at the moment of his death. However, “[a] statement about past events, rather than about the cause or circumstances of death, is not a dying declaration, unless those events explain the predicament that brought the declarant to death’s door.”\textsuperscript{47} To fit the exception, “a statement must relate to cause or circumstances of impending death. The requirement is satisfied if the statement identifies the person who inflicted what seems to be the mortal wound, or describes the accident, assault, or catastrophe that caused what seems to be the fatal injury.”\textsuperscript{48} Therefore, a statement naming the person who just shot the declarant fits the exception, but a statement made by a gunshot victim exculpating another person from fraud, for instance, does not.

H. International Cases

International law has also interpreted dying declaration statutes in substantially similar ways.\textsuperscript{49} For instance, Justice Davis stated that “dying declarations are to be received with scrupulous, I had almost said with superstitious, care. The declarant is subject to no cross-examination. No oath need be administered. There can be no prosecution for perjury. There is always danger of mistake which cannot be corrected.”\textsuperscript{50} Canada jurisprudence, like the United States case law, requires that the declarant have a “settled, hopeless expectation that he [is] about to die almost immediately.”\textsuperscript{51} Even as recent as 2000, the courts have acknowledged that dying declarations are deemed admissible because an “apprehension of approaching death [is] a powerful spur to a person to tell the truth.”\textsuperscript{52} The Canadian courts have also adopted the requirement that the statement relate to the cause or circumstance of death.

England has analyzed the issue in the same manner. The four requirements include the following: that the declarant has died; that there was a trial for his death; that the statement relates to the cause or circumstance of death; and that the declarant has a settled hopeless expectation of death.\textsuperscript{53} The justification is that “the deceased, had he survived, would very often have been better placed than anyone to identify the author and describe the circumstances of the fatal assault.”\textsuperscript{54}

II. United States Cases

There have been only four relevant United States cases that directly confronted the issue of suicide notes as dying declarations.\textsuperscript{55} Only one of the four, State v. Satterfield, allowed the statement in the note to be considered admissible as an exception to the hearsay rule.

A. State v. Hodge

Hodge was convicted of assault in the first degree for attempting to kill his ex-wife, Karlene Hodge.\textsuperscript{56} Evidence indicated that Hodge had hired Kenneth McCurdy to kill Karlene. The day after authorities questioned McCurdy, he committed suicide. He left a suicide note stating that he committed the assault and that Hodge hired him. The trial court admitted the note into evidence. The appellate court held that the note was admissible under the dying declaration exception.

\begin{itemize}
\item \textsuperscript{47} United States v. Angleton, 269 F. Supp. 2d 878, 888 (S.D. Tex. 2003).
\item \textsuperscript{48} MUELLER & KIRKPATRICK, supra note 23.
\item \textsuperscript{49} Most foreign jurisdictions allow dying declarations only in cases of homicide where the declarant’s death is the subject of the charge.
\item \textsuperscript{50} Schwartzenhauer v. Rex, [1935] S.C.R. 367.
\item \textsuperscript{52} Regina v. F. (J.G.), 2000 B.C.C.A. 140.
\item \textsuperscript{53} Rex v. Larson, [1998] Crim. L.R. 883.
\item \textsuperscript{54} Id.
\item \textsuperscript{56} Hodge, 655 S.W.2d at 740.
\end{itemize}
note was not a dying declaration because it was not used in a homicide prosecution. The court reasoned that “[a] person contemplating suicide, and leaving a note to be found after his death, would not be in fear of legal punishment. The writer of a suicide note might have a motive to implicate another other than the truth.”

The court held that although the note should not have been admitted, the error was harmless because other evidence indicated that he would have been found guilty anyway.

B. United States v. Lemonakis

Lemonakis and Enten were convicted of conspiracy, burglary, grand larceny, interstate transportation of stolen property, and bringing stolen property into the District of Columbia.

Among defendants’ grounds for appealing, they claimed that the trial court erred in denying the admission of a suicide note written by Scouloukas, a key governmental witness, which asserted Lemonakis’ innocence. Lemonakis wanted to introduce the suicide note to rebut evidence, which included a recording of Scouloukas implicating Lemonakis in the robberies.

The court held that the note should have been admitted, but the error was harmless. Lemonakis wanted to show that Scouloukas was not a reliable and truthful witness. However, the recording would have been impeached by other means. The court found that the note was not made with the belief of imminent death, nor did it relate to a cause or circumstance of his death.

C. United States v. Angleton

Robert Angleton was on trial for murder when his brother, Roger Angleton, committed suicide in his jail cell. Roger left five handwritten notes in his cell. In three of the five notes, Roger admitted killing Doris Angleton and stated that he tried to make it look like Robert had committed the murder. Three of the notes were undated, and in one note, the handwriting became shaky toward the end. The government argued that the notes were not written when Roger believed his death was imminent because some notes were written weeks before the suicide. It also claimed that the notes contained many topics, such as funeral arrangements, relationships with others, and property disposal, not all of which related to the cause and circumstance of his death.

The court held that the suicide notes did not qualify as dying declarations. It noted that if “a suicide is unwitnessed and the declaration is contained in a writing discovered after the suicide, no one can testify as to the making of the declaration. It can be difficult to show when a statement was written or whether it was written in the belief that death was imminent.”

Spontaneity is a critical part of this exception and the control of taking one’s own life clearly diminishes the truthfulness factor.

In the “Mark” note, in which Roger stated he had taken painkillers, the handwriting became shakier at the end. After the court found nothing in the record regarding when Roger Angleton took painkillers or when he inflicted the wounds that caused his death, it went on to hold, “[a]lthough this is the closest case, there is an inadequate basis to conclude that when Roger Angleton wrote the relevant part of the note to ‘Mark,’ he believed his death was imminent.” Thus, the suicide notes did not qualify as dying declarations.

D. State v. Satterfield

Satterfield appealed his conviction of first-degree murder. The issue on appeal

57 Id. at 743.
58 Lemonakis, 485 F.2d at 945.
59 Angleton, 269 F. Supp. 2d at 881.
60 Id. at 885.
61 Id. at 888.
was whether the trial judge erroneously admitted a suicide note under the dying declaration exception to the hearsay rule. During the trial, the state’s witness, Bucky Moore, committed suicide after being vigorously cross-examined and implicated in the murder. Moore’s note stated, “I didn’t kill Harper and I won’t do time for something that I didn’t do. I’m sorry but I just can’t take the pressure [sic] of going through a trial.”63 The note did not implicate Satterfield.

The court examined the exception and held that since the rules of evidence have broadened over the years to include declarants who are not murder victims, other situations should also be contemplated. The court stated that Moore believed his death was imminent because he killed himself soon after. It held that because the note explained why he killed himself, it satisfied the cause or circumstance requirement.

In a strong dissent, Chief Justice Neely stated that “[t]reating a self-serving suicide note as the equivalent of a spontaneous declaration made in anticipation of imminent death lacks basic common sense.”64 He noted that there should be a distinction between a person who is facing inevitable death due to uncontrollable circumstances and a person who controls when and how he will die.

III. Garza v. Delta Tau Delta Fraternity National

The most recent United States decision involving a suicide note admitted as a dying declaration is the Garza case. On April 9, 2001, Courtney Garza, a student at Southeastern Louisiana University (SLU), was found hanged in her parents’ Baton Rouge, Louisiana, home.65 A “hand-written three-page suicide note, dated 04/08/01 Sunday 12:30,” was also found.66 In the note, Courtney Garza, among other things, accused Paul Upshaw, a member of Delta Tau Delta fraternity, of rape.

Courtney’s family filed a wrongful death claim in a state district court. The petition alleged that Paul Upshaw raped Courtney on February 6, 2001, that SLU negligently failed to supervise the activities of the fraternity, and that SLU did not provide adequate crisis intervention programs. The Garzas claimed that the defendants’ actions and omissions proximately caused Courtney’s death.

Defendants sought to exclude the suicide note as inadmissible hearsay by filing motions in limine. In his oral reasons for judgment, the trial judge posed and answered two questions. First, he asked whether Courtney made the statement while believing her death was imminent. He reasoned that the time between the writing and the death was short and that the language of the note indicated that she was about to act, and thus, she truly believed that her death was imminent. Second, he asked whether the note related to the cause or circumstance of her death. Without explanation, he reasoned that the answer was self-explanatory and met the criteria to constitute a dying declaration. However, he did exclude the last part of the note, which contained Courtney’s farewells.

The defendants filed supervisory writs to the Louisiana First Circuit Court of Appeal. After reviewing the record, the court affirmed the lower court’s decision. The Garza court heavily relied on State v. Satterfield67 and found that the note expressed Courtney’s desire to take her life soon after writing the note. Regarding the issue of whether the note related to the cause or circumstance of Courtney’s death, the court held that Courtney “recount[ed] past events, explaining the causes and circumstances that she perceived to have

63 Id. at 447.
64 Id. at 455 (Neely, C.J., dissenting).
65 Garza v. Delta Tau Delta Fraternity Nat’l, 04-1484 (La. App. 1 Cir. 5/6/05); 916 So. 2d 185, 187.
66 Id.
67 Satterfield, 457 S.E.2d at 440. (The only case in which a court has classified a suicide note as a dying declaration.).
brought her to suicide." In turn, the court denied the writs.

Judge Michael McDonald, in a strong dissent, distinguished this case from the "classic" dying declaration. He stated that "the 'classic' dying declaration is made by a person near death from fatal wounds or illness, who makes a statement to a third party about who inflicted the wounds or caused the illness." The third party testifies in court. He explained that "[s]uch a statement is made spontaneously by one who is unexpectedly facing imminent certain death. In contrast, a suicide note is a deliberate communication composed in advance of the act itself. The writer intends for the note to be found and read."

He touched on the problems that may arise when the writer "carefully and methodically select[s] the words she wishes to use. [Then,] the author has the opportunity to tell some things and omit others, to accuse or exonerate, to clarify or confound, or even seek revenge against someone who is blameless." He also showed concern regarding the truthfulness of the statement when the declarant has other motives or may not fear religious conviction.

IV. Analysis and Future Implications

A. Courts’ Analysis

Regarding the first requirement for the statement to classify as a dying declaration, the trial judge held that Courtney believed her death was imminent, because she planned to act out her suicide immediately after writing the note. The fact that she followed through was enough for the trial judge to put trust in Courtney’s state of mind at the time the declaration was made. The appellate court, in considering the defendants’ argument that there was no evidence to indicate that Courtney injured herself before writing the note, pointed out that “there is no requirement in [LCE] Article 804 (B)(2) that a wound or injury be inflicted prior to the making of a dying declaration. Nor does Article 804 (B)(2) require that death be by the hand of a third party.” The court then quoted from the suicide note to show how Courtney expressed her state of mind while writing the note.

The appellate court relied heavily on State v. Satterfield, which allowed a suicide note, written less than twenty-four hours before the suicide, to be admitted under the dying declaration exception. However, there are marked differences between Satterfield and the Garza case. The most important distinction between the cases is that, in Satterfield, the note was not used to implicate the defendant in the crime. The Satterfield note was written by a state witness who had been vigorously cross-examined the day before his suicide. The defense counsel tried to show that the state witness had actually committed the murder, and in his note, he stated that he was innocent but could not take the pressure of trial. The suicide note was not being used to show that Satterfield actually committed the murder, but that Moore did not. A second difference is that Moore had taken an oath in court and had been questioned and cross-examined. The suicide note did not give any additional information that Moore had not already testified to under oath. The trial court allowed the suicide note, more on the basis that it countered the attack on his credibility.

The Garza court did not consider the only three other relevant United States cases, however, a brief comparison and contrast is relevant. State v. Hodge did not admit the suicide note because at that time a dying declaration could be admitted only in

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68 Garza, 916 So. 2d at 189.
69 Id. at 190 (McDonald, J., dissenting).
70 Id.
71 Id.
72 Id. at 188.
73 Id. “She writes, ‘I thought I would’ve cut it short sometime before now . . . I’m still scared right now as I plan it out, but I’m really doing it this time.’ Her closing words are, ‘This is goodbye.’”
74 457 S.E.2d 440 (W.V. 1995).
criminal homicide prosecutions. However, the court felt the need to imply that suicide notes are unreliable as dying declarations because the author may have ulterior motives.75 Although the suicide note was admitted, the court found that it was harmless error because there was other reliable evidence that proved Hodge’s guilt. This case is distinguished from Garza because the suicide note is the only evidence that would suggest wrongful death occurred. Courtney had never expressed her state of mind or that she was suicidal due to the alleged rape.

In Lemonakis, the court actually held that the suicide note should have been admitted, though not as a dying declaration exception to the hearsay rule.76 The State had introduced recordings between Scouloukas and Lemonakis that were against Lemonakis’s interest. Scouloukas committed suicide before Lemonakis was able to cross-examine him as a witness. In his suicide note to a girlfriend, Scouloukas asserted Lemonakis’s innocence. The court stated that the note was clearly not under belief of impending death and that it did not relate to the cause or circumstance of his death, but that it should have been admitted to show that Scouloukas was not credible.77 Unlike in Garza, where there is no other evidence in favor of the plaintiff, it would undoubtedly be harmful error to allow the note to be admitted. There is no other corroborating testimony or evidence that the suicide note could be used to attack.

Finally, Angleton, the most recent decision dealing with this topic, provides the best analysis for this issue. The court refused to admit several suicide notes that Angleton wrote before his death.78 The court was unable to determine exactly when Angleton wrote the notes. The court relied heavily on the fact that no one witnessed Angleton writing the notes and that there was no way to show that he truly believed that death was imminent. The same is true of Courtney’s note. The note was dated on Sunday April 8, 2001 at 12:30; however, Courtney was not found until April 9. There is no way to confirm that Courtney actually wrote the note on April 8. Furthermore, does “12:30” refer to morning or nearly noon? This creates either a twelve or thirty-six hour time lapse. More interestingly, the court failed to allow a suicide note to be admitted even though Roger stated that he had just taken painkillers, and the writing became shaky at the end of the note. In this case, it appears as though Roger had actually inflicted injury before finishing pertinent parts of the note. On the other hand, Courtney had not inflicted injury before writing the note.

The requirement for a belief of imminent death should have undergone a more critical analysis. The court did not delve into whether Courtney had lost all hope of recovery or whether she was fully aware that her recovery was impossible. Furthermore, there is no mention of whether Courtney knew that doom was certain. Courtney, by planning and controlling the details of her death, took away an essential element - spontaneity.79 “In light of the modern attitude that psychological forces tend to insure truthfulness, spontaneity seems important . . . .”80 As the Petitioners in Garza stated in their brief, “[t]he application of pen to paper, the orchestration of ideas, and the careful construction and consideration of the words and thoughts to be recorded for one’s loved ones to read is not consistent with the spontaneous and unrehearsed common law dying declaration.”81

75 State v. Hodge, 655 S.W. 2d 738, 743 (S.D. Mo. 1983).
77 Id. at 957 n. 24.
80 See MUELLER & KIRKPATRICK, supra note 23.
81 Original Brief on Behalf of Petitioner, Garza v. Delta Tau Delta Fraternity Nat’l, 04-1484 (La. App. 1st Cir. 5/6/05), 916 So. 2d 185.
How could Courtney be so sure, or know that it was impossible for something to stop her suicide? She stated that she had thought about it many times, for months. The thought processes of a person contemplating suicide are completely different from what goes through the mind of a person mortally wounded. Courtney had the opportunity to plan every detail of her death. She decided when she would take her own life, how her life would be ended, and where her death would occur. She had two months to think about what she would write in the suicide note. She did not write the note after wounds were inflicted. Respondent stated in brief that “[h]er reference in the note to the pain she was enduring can even be read to mean that she was actually writing the suicide note in the midst of attempting it.”82 That would be impossible in this case. Courtney hanged herself in the bedroom closest with a clothing rod, but the note was found in another area of the room. Courtney had to write the note, place it where it would be found, then proceed to the closet, place the rope around her neck, and hang herself on a clothing rod. There was nothing spontaneous about Courtney’s suicide note.

Numerous things could have prevented her suicide. She could have decided not to take her own life that night. She had thought about it several times; how did she know she would go through with it this time? In addition, her parents or brother could have returned before she followed through with the affirmative act of hanging herself.

Even less analysis was given to determine whether the second requirement, that the suicide note relate to the cause of circumstance of Courtney’s death, was met. The trial judge merely stated that the note was self-explanatory and that it met the appropriate criteria. The appellate court held that this requirement was satisfied because “Courtney recount[ed] past events, explaining the causes and circumstances she perceived to have brought her to suicide.”83

The court made no mention of the rope and clothing rod, which were the actual causes of Courtney’s death. Paul Upshaw did not put the rope around her neck; Courtney did. Paul did not cause Courtney to knock on “death’s door.” Courtney made a conscious choice to end her life. She was the only person who controlled and determined when death would occur. In addition, Courtney mentioned other possible motives that may have caused her to commit suicide. Courtney stated that she was constantly depressed. She indicated that she had money problems. Courtney also stated that she “went back to eating,” indicating that she had an eating problem before her alleged rape. It should be noted that these motives are different from causes. A motive is “[s]omething, esp[ecially] willful desire, that leads one to act,” while a cause is “[s]omething that produces an effect or result.”84 While being depressed, having an eating problem, having money issues, or possibly being raped may give a person a willful desire to act, these motives do not, by themselves, automatically produce a result. Something else must cause the result to happen.

Furthermore, suicide pathology is very hard to predict. “On the basis of available knowledge of suicide, it would appear impossible, without psychiatric examination of the [declarant], for the state to negate all motives . . . .”85 While possible motives to commit suicide are mentioned above, there are many potential motives as to why Courtney may have been untruthful in her suicide note. One is the need to protect the interests of one’s family. Courtney stated that she “never wanted to tell [her] mom & dad because [she] figured that they would believe that it was all [her] fault.”86 She

82 Original Brief on Behalf of Plaintiffs-Respondents, at 11, Garza v. Delta Tau Delta Fraternity Nat’l, 04-1484 (La. App. 1st Cir. 5/6/05), 916 So. 2d 185.
83 Garza, 916 So. 2d at 189.
84 BLACK’S LAW DICTIONARY 461 (8th ed. 2004).
85 Note, Judicial Interpretation of Suicide, 105 U. PA. L. REV. 391, 393, 396 (1957).
86 Original Brief on Behalf of Petitioner, supra note 81, at Exhibit 1.
may have wanted to deflect blame or justify her decision to take her life. This would have taken criticism away from her and her parents and held someone else accountable.

B. Problems with the Garza Decision

A major concern regarding allowing suicide notes to be admissible under a hearsay exception is whether the statement is trustworthy. Several courts have indicated that the reliability that such statements once had is diminishing. In addition to considering whether the statement was made under oath, was voluntary, and was contradicted by previous statements, other factors that courts consider to determine trustworthiness include: “the statement’s proximity in time to the events it describes” and “whether the statement has been corroborated,” whether there is a motive to fabricate, and “the statement’s spontaneity.” As mentioned above, no one can be sure of the time that elapsed between when Courtney wrote the note and when she committed suicide. The whole incident was unwitnessed. There is no corroborating evidence that would indicate whether the facts of the note were true or whether Courtney truly believed she was about to die. Motives have been discussed above, and it is important to note again that they are numerous. Finally, the statements were not spontaneous in the least. The note was carefully planned out, possibly for months. Neither court evaluated other motives Courtney may have had to implicate the “Delts” when she committed suicide. Several of Courtney’s statements in the suicide note showed signs that she may have wanted revenge. Self-exoneration is another possible motive. Courtney admitted that she was unable to remember what happened that night because she was drunk; however, she knew she was raped. Paul Upshaw admitted having consensual sex with Courtney. Courtney may have regretted her decision to have sex with Upshaw. Another motive could be that she was embarrassed and wanted to deflect blame. Petitioner indicated that other possible motives were found in her diary. She had been depressed, she experienced weight gain, she overspent money, and she had just suffered a breakup.

Another problem involves Courtney’s state of mind at the time she wrote the note and committed suicide. Courts have held that the declarant must have been “in possession of his mental faculties sufficiently to understand what he is doing and to be able to give a true and correct account of the facts to which the statement relates.” Louisiana has specifically stated that dying declarations “must be the utterance of a sane and rational mind.” There is an issue of whether Courtney’s alcohol consumption substantially altered her state of mind. She also made some illogical comments throughout the note that seemed randomly inserted at various intervals. Her possible impairment should have been considered by the courts.

87 United States v. Valdez-Soto, 31 F.3d 1467, 1470-72 (9th Cir. 1994).
88 United States v. George, 960 F.2d 97, 100 (9th Cir. 1992).
89 Valdez-Soto, 31 F.3d 1467 at 1472.
90 Original Brief on Behalf of Petitioner, supra note 81, at Exhibit 1. “There are other girls & I don’t know who they are, but the Delts will get theirs hopefully.” “Paul Upshaw ruined my life.” “I hope every Delta Tau Delta Fraternity guy rots in hell for what they did to me.”
91 Reply Memorandum by Delta Tau Delta Defendants in Support of Their Motion in Limine, Garza v. Delta Tau Delta Fraternity Nat’l, 04-1484 (La. App. 1st Cir. 5/6/05); 916 So. 2d 185.
92 People v. Tilley, 94 N.E.2d 328, 331 (Ill. 1950).
94 Original Brief on Behalf of Petitioner, supra note 81, at Exhibit 1. “I hope you can read this. It explains it all for you. I have bruises on my arms from tug of war & volleyball. I only stay happy for a period of 2 hours a day at the very most.” “Jose Cuervo & Dr. Pepper do not go together. In 6 months I’ll be forgotten.” “Sorry mom, I spilled a little drink on the carpet. I love Moby. He’s a great artist.”
Regarding hearsay in general, some courts have enumerated principles favoring exclusion.

The chief grounds of its exclusion are, that the reported declaration (if in fact made) is made without the sanction of an oath, with no responsibility on the part of the declarant for error or falsification, without opportunity for the court, jury, or parties to observe the demeanor and temperament of the witness, and to search his motives and test his accuracy and veracity by cross-examination . . . .

Other critics report that the possibility of the declarant having a reason to falsify his statement should be evaluated. Liang notes that “the traditional ‘guarantee’ against such actions – the ‘threat’ of divine punishment – may simply not exist for those who do not adhere to religious sects that embrace such ideals.” Why should the trier of fact determine that the declarant was truthful when he has no fear of eternal retribution? Without this fear, the declarant could “falsely incriminate his or her enemies, or friends, or anyone he or she disliked at that particular moment.”

V. Conclusion

The Garza decision, if not reversed, will open the floodgates to misuse of the already mystic dying declaration exception to the hearsay rule. Courts will have to admit a suicide note that may not express the truth. Relying on this precedent, persons who plan to end their lives will know that their words will be taken as the truth. What prevents these persons from rewriting their lives or implicating an enemy for a crime, perhaps even implicating such enemy in their own death?

This is an important case as it shows how the hearsay exception can be expanded and leads to nontraditional decisions. As the definition of dying declaration, or statement under belief of impending death in Louisiana’s civil law jurisdiction, is virtually identical to the definitions throughout common law jurisdictions, the Garza case can be persuasive authority in other jurisdictions. Although most international statutes presently allow such statements only in cases of homicide where the declarant’s death is the subject of the trial, it is important to note that the United States jurisprudence once limited the exception to those cases. However, though the years, application of the exception has developed and expanded to include civil cases. From there, the Garza case has expanded the exception even further to a situation that cannot be justified by the original purpose of the rule.

An example of the misuse that could result is in the case of a person who has a terminal illness, such as AIDS or cancer. This person could decide to take his own life rather than suffer a long, painful death. Under the present holding in Garza, this person could plan his death and write a suicide note that implicates someone in his death. He could express some motive, such as depression caused by a friend’s unkind act, and that would relate to the cause of his death. If this decision is affirmed, there will be no limit to what this exception could apply. The primary justifications will no longer protect the defendants’ rights to have trustworthy evidence admitted at trial.

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97 Id. at 238. See also Kidd v. State, 258 So. 2d 423, 430 (Miss. 1972).
98 Liang, supra note 96, at 238.