DYING DECLARATION [1]

As you are aware, there was testimony that the deceased, (*specify name*), made a statement when he/she was under a sense of impending death, with no hope of recovery.

While the law permits that testimony, experience shows that such testimony is not always true and 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.

Thus, our law instructs that such testimony, as with all testimony, be carefully evaluated, and further that such testimony not be accorded the same value and weight as the testimony of a witness, given under oath, in open court, and subject to cross-examination.

---

[1] *People v Mleczko*, 298 NY 153, 161, 81 NE2d 65, 68–69 [1948] ("Made without the test of cross-examination, 'with no fear of prosecution for perjury' and with only the uncertain promptings of 'fear of punishment after death' to assure truthfulness, and at a time 'when the body is in pain, the mind agitated, and the memory shaken by the certainty of impending death,' dying declarations have been characterized as 'dangerous.' As this court has observed, 'Experience shows that dying declarations are not always true' and 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'.")

Note: The identification of an assailant via an excited utterance by a declarant who dies does not necessarily constitute a dying declaration and does not therefore require a jury instruction akin to the instruction for a dying declaration. *See People v Jones*, 201 AD3d 481, 481-82 [1st Dept 2022] ["The trial court, which properly admitted as an excited utterance the victim's statement at the scene of the crime identifying defendant as his assailant, correctly declined to charge the jury on the subject of dying declarations. 'Unlike dying declarations, excited utterances do not require special instructions to the jury.' The record fails to support defendant's assertion that the excited utterance was effectively a dying declaration. The evidence did not establish the core requirement of a dying declaration, that the dying person was 'under a sense of impending death, with no hope of recovery', and the prosecutor made no such claim in summation." (citations omitted)].

Of course, if the record supports both instructions, then the court should decide whether to charge either excited utterance or dying declaration, or both.