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The Hearsay Rule: Are Telephone Calls Intercepted by Police Admissible to Prove the Truth of Matters Impliedly Asserted - United States v. Lewis, United States v. Long

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THE HEARSAY RULE: ARE TELEPHONE CALLS INTERCEPTED BY POLICE ADMISSIBLE TO PROVE THE TRUTH OF MATTERS IMPLIEDLY ASSERTED?

United States v. Lewis,
902 F.2d 1176 (5th Cir. 1990)

United States v. Long,
905 F.2d 1572 (D.C. Cir. 1990)

I. INTRODUCTION

Congress adopted the Federal Rules of Evidence in 1975. These rules are the culmination of a long process of work by lawyers, judges, scholars, and Congress. Federal Rule of Evidence 801 deals with hearsay which it defines as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[1]

With the decisions in *United States v. Lewis*[2] and *United States v. Long*,[3] the Fifth Circuit Court of Appeals and the District of Columbia Circuit Court of Appeals addressed whether telephone calls intercepted by police from unknown callers were admissible over hearsay objections. The probative value of the telephone calls as relevant evidence depended on the truth of the matter impliedly asserted in the calls.

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1. FED. R. EVID. 801(c). All of the Federal Rules of Evidence may be found at FED. R. EVID., 28 U.S.C.A. (West Supp. 1991). In its entirety, Rule 801 provides:

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if –

(1) Prior statement by witness. – The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. – The statement is offered against a party and is (A) party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

FED. R. EVID. 801.

2. 902 F.2d 1176 (5th Cir. 1990).

3. 905 F.2d 1572 (D.C. Cir.), *cert. denied*, 111 S. Ct. 365 (1990).

This note analyzes the treatment of implied assertions within common law hearsay views and under Rule 801 of the Federal Rules of Evidence. This note also analyzes whether the decisions in *Lewis* and *Long* can be reconciled with the purpose of the hearsay rule.

II. FACTS

A. United States v. Lewis

In *United States v. Lewis*,[4] the United States Postal Inspection Service, acting on an internal warning that a parcel containing suspected non-mailable materials would be arriving in Jackson, Mississippi, via Express Mail, intercepted a package containing approximately 237 grams of crack cocaine. After examining the contents, the Postal Service prepared the package for a controlled delivery by substituting paraffin wax for the crack cocaine.[5]

Following delivery, federal and state officers kept the addressee's apartment under surveillance until co-defendants Wade and Lewis were arrested and charged with conspiracy, possession of cocaine with intent to distribute, and use of the mails to facilitate the conspiracy.[6] At the time of the arrest, the police seized each defendant's electronic pager. One of the pagers began beeping while in the custody of the police. A police officer called the number displayed on the beeper and identified himself as one of the defendants. The unidentified person on the other end of the call asked the police officer, (1) "Did you get the stuff?," and (2) "Where is Dog?" The police officer then tried to arrange a meeting with the unidentified person, but no one showed up at the arranged time.[7]

The Fifth Circuit Court of Appeals affirmed Wade's conviction and sentence[8] but reversed Lewis' conviction because of insufficient evidence.[9] The court held "that because the questions asked by the unknown caller were not assertions, the questions were not hearsay . . . ."[10]

B. United States v. Long

In *United States v. Long*,[11] pursuant to a valid search warrant, several Washington, D.C. police officers raided an apartment whose lessee[12] was a suspect in drug-related activities. The police arrested defendant Keith Long along with the lessee of the apartment and two other individuals who were found in the apartment. The

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4. 902 F.2d 1176 (5th Cir. 1990).

5. "The suspect package was addressed to 'Nicole Harris' at an address in Ridgeland, Mississippi. The evidence later revealed that no one named 'Nicole Harris' resided at the listed address. Rather, the apartment was actually occupied by Ms. Sudie Jones, a friend of . . . Lewis, and her young daughter." *Id.* at 1178.

6. *Id.*

7. *Id.* at 1179.

8. *Id.* at 1181.

9. *Id.* at 1181-82.

10. *Id.* at 1179. The court also held Wade guilty of possession of cocaine since "a co-conspirator had possession of the cocaine in furtherance of the conspiracy." *Id.* at 1181.

11. 905 F.2d 1572 (D.C. Cir. 1990).

12. Sonia Mayfield was the lessee of the apartment. *Id.* at 1575.

search yielded rock cocaine, drug paraphernalia, cocaine in powder form, a large amount of cash, and an unloaded revolver. Long was convicted of possession of cocaine with intent to distribute and possession of a firearm.[13]

During the search of the apartment, the police answered a telephone call. The caller asked to speak to "Keith" and then asked whether Keith "still had any stuff." When asked what the caller meant, she responded "a fifty." The substance of this telephone call was admitted over Long's hearsay objection.[14] The District of Columbia Circuit Court of Appeals affirmed Long's narcotics conviction but reversed his firearms conviction.[15] The court held that "[b]ecause the caller's questions were nonassertive, they fall outside the scope of the hearsay rule . . . ."[16]

III. HISTORICAL BACKGROUND

The Anglo-American judicial system developed three conditions for testimony to induce witnesses to be accurate and to expose any inaccuracies in sincerity, perception, memory or narration.[17] Those conditions are: oath, personal presence at the trial, and cross-examination.[18] Testimony about an out of court declarant's statement that does not meet these conditions is subject to exclusion as hearsay. "The primary reason for excluding hearsay is that the trier of fact has no adequate basis for evaluating the declarant's credibility, because the declarant was not subject to cross-examination under oath in the trier's presence."[19]

A. Common Law

The history of the hearsay rule as a distinct common law rule began in the 1500's and gained a complete development and final precision in the early 1700's.[20] "No precise date or ruling stands out as decisive; but between 1675 and 1690 . . . the fixing of the doctrine [took] place."[21] During the period in which the adversary system became established, the courts adopted the rule excluding hearsay.[22]

> Before the opening of the eighteenth century, then, we find three reasons advanced for excluding hearsay. The court and the jury must base their finding upon

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13. Sonia Mayfield was also convicted of the same charges as Long. *Id.* at 1573-75.

14. *Id.* at 1579.

15. Mayfield's appeal was not properly before the court due to late filing of the appeal in violation of FED. R. APP. P. 4(b). *Id.* at 1574-75.

16. *Id.* at 1580. The court also held that a firearms conviction must be supported by evidence that shows a reasonable inference that the accused used the revolver. *Id.* at 1576.

17. C. MCCORMICK, MCCORMICK ON EVIDENCE § 245, at 726-27 (E. Cleary 3d ed. 1984) [hereinafter MCCORMICK].

18. *Id.* at 727.

19. R. Park, *"I Didn't Tell Them Anything About You": Implied Assertions as Hearsay Under the Federal Rules of Evidence*, 74 MINN. L. REV. 783, 785 (1990) [hereinafter Park].

20. 5 J. WIGMORE, EVIDENCE § 1364, at 12 (J. Chadbourn rev. 1974).

21. *Id.* at 18.

22. E. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 181 (1948) [hereinafter Morgan].

> what the witness knows and not upon what he is credulous enough to believe; the witness must make that knowledge known under sanction of fear of the consequences which falsehood will bring; and the adversary must have an opportunity to cross-examine.[23]
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> . . . [In modern common law], the notion that the court and jury cannot be permitted to rely upon the possible credulity of the witness seems to have gone by the board, for unless the adversary objects, the court may admit inadmissible hearsay and the trier of fact may give it such value as is within the bounds of reason. The trier has the right to only such protection from this pitfall as the adversary sees fit to insist upon.[24]

At common law, the hearsay rule was applied only to out-of-court statements offered to prove the truth of the matter asserted.[25] Case law conflicts on whether the hearsay rule applies to implied assertions. An out-of-court statement is an implied assertion if the trier is being asked to infer a fact from the declarant's utterance. "The utterance containing the implied assertion does not directly assert the proposition it is offered to prove."[26]

A good starting point for any discussion of implied assertions is the durable case of *Wright v. Tatham.*[27] The case illustrates how verbal and nonverbal conduct can contain implied assertions and how a declarant's implied assertions can pose hearsay dangers when used as evidence.[28]

In *Wright v. Tatham*, Baron Parke stated: [P]roof of a particular fact, which is not of itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath would be of itself inadmissible . . . .[29]

This dictum has carried great weight and can be traced through numerous common law cases up to the adoption of the Federal Rules of Evidence by Congress in 1975.[30]

Wright v. Tatham involved a will contest between the heir at law and the beneficiary under the will. The competency of the decedent was at issue in an effort to void the will. In support of the decedent's competency, the beneficiary offered into evidence several letters that third persons had written to the decedent.[31]

These letters were written in language suggesting the writers believed the decedent was mentally competent, and the beneficiary offered them to show that the decedent was in fact mentally competent. The beneficiary wanted the trier to infer

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23. *Id.* at 182-83.

24. *Id.* at 183.

25. United States v. Zenni, 492 F. Supp. 464, 465 (E.D. Ky. 1980).

26. Park, *supra* note 19, at 788.

27. 112 Eng. Rep. 488 (Ex. Ch. 1837).

28. Park, *supra* note 19, at 788.

29. Park v. Huff, 493 F.2d 923, 928 (5th Cir. 1974)(citing Wright v. Tatham, 112 Eng. Rep. 488, 516-17 (Ex. Ch. 1837)).

30. O. Wellborn, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 TEX. L. REV. 49, 57-58 (1982) [hereinafter Wellborn].

31. *Wright*, 112 Eng. Rep. at 489-93.

from the writer's belief in the decedent's competence that the decedent was in fact competent.[32] The court held the letters to be hearsay.

The probative value of the letters depended on the sincerity and credibility of the declarant letter writers.[33]

> "*Wright v. Tatham* . . . illustrates how implied assertions derived from *verbal* conduct can involve hearsay dangers. The use of the letters to [the decedent] requires an inference from the declarant's statement to the declarant's belief to the truth of the belief, so use involves reliance on the declarant's credibility."[34]

The hearsay dangers of sincerity, narration/ambiguity, perception, and memory are the primary justifications for excluding evidence when "cross-examination is not available to help evaluate the strength of the inferences from the out-of-court declarant's words to the declarant's belief to the 'truth' of what happened in the real world."[35]

From *Wright v. Tatham,* two views developed concerning whether implied assertions fell within the hearsay exclusionary rule. Professor Morgan, a leading proponent of one view, would include implied assertions within the hearsay rule in that "the rational basis for the hearsay classification is not the formula, 'assertions offered for the truth of the matter asserted,' but rather the presence of substantial risks of insincerity and faulty narration, memory, and perception[.]"[36] Morgan's comprehensive definition of hearsay includes:

> (1) all conduct of a person, verbal or nonverbal, intended by him to operate as an assertion when offered either to prove the truth of the matter asserted or to prove that the asserter believed the matter asserted to be true, and (2) all conduct of a person, verbal or nonverbal, not intended by him to operate as an assertion, when offered either to prove both his state of mind and the external event or condition which caused him to have that state of mind, or to prove that his state of mind was truly reflected by that conduct.[37]
>
> Thus, if Proponent is seeking to prove that X forged a will, each of the following utterances of Declarant to X must be treated as if it were a direct accusation of forgery by X: "When do you plan to forge another kinsman's will?"; Well, *I* never forged a kinsman's will, anyway!" There is, and can be, no debate as to the classification of any of these utterances. They are hearsay by the strictest definition.[38]

Therefore, the Morgan view is triggered by conduct. If the trier of fact has to rely on the declarant's state of mind to interpret his statement, then that statement is hearsay.[39] The hearsay dangers of perception, memory, narration/ambiguity,

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32. Park, *supra* note 19, at 789.
33. *Id.*
34. *Id.* at 791 (emphasis in original).
35. R. ALLEN & R. KUHNS, AN ANALYTICAL APPROACH TO EVIDENCE 300 (1989).
36. Morgan, *supra* note 22, at 218.
37. E. Morgan, *Hearsay and Non-Hearsay,* 48 HARV. L. REV. 1138, 1144-45 (1935).
38. Morgan, *supra* note 22, at 189.
39. *Id.* at 179.

and sincerity are involved; yet, the declarant is not subject to cross-examination to expose any inaccuracies in his statement.[40]

Numerous courts have adopted the Morgan view and have held that implied assertions were hearsay and therefore not admissible unless there was an exception to the hearsay rule. The United States Supreme Court in *Krulewitch v. United States*[41] held that a statement[42] which implied that the defendant was guilty of the crime for which he was on trial was hearsay and therefore not admissible.[43] The case involved an alleged conspiracy to transport a woman for the purpose of prostitution.[44] The hearsay statement was made by an alleged co-conspirator to the prosecution witness and implied that the defendant was guilty of the crime.[45] The Court then evaluated whether the hearsay statement was admissible under the co-conspirator exception to the hearsay rule and concluded that since the statement was not made in furtherance of the conspiracy, it would not be admissible under that exception.[46]

The Fifth Circuit Court of Appeals considered whether an implied assertion was hearsay in *Park v. Huff*.[47] The sole evidence against the defendant was a statement[48] by an alleged co-conspirator implicating the defendant as the person behind the conspiracy to murder a prosecuting attorney.[49] The prosecuting attorney had been murdered on the day he was to present evidence against a liquor conspiracy to a grand jury in which the defendant had been implicated.[50] The court held that "[w]hen the possibility is real that an out-of-court statement which implies the existence of the ultimate fact in issue was made with assertive intent, it is essential that the statement be treated as hearsay if a direct declaration of that fact would be so treated."[51] The court then evaluated whether the hearsay statements were admissible under the co-conspirator exception to the hearsay rule and concluded on rehearing *en banc* that they were.[52]

The court in *Park* stated that Professor Morgan identified the rationale of the hearsay rule as based on the untrustworthiness of hearsay statements.[53] "Implied assertions may in certain circumstances carry less danger of insincerity or untrust-

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40. *Id.* at 178.

41. 336 U.S. 440 (1949).

42. "It would be better for us two girls to take the blame than Kay (the defendant) because he couldn't stand it, he couldn't stand to take it." *Id.* at 441.

43. *Id.* at 442-43.

44. *Id.* at 441.

45. *Id.* at 442.

46. *Id.* at 443-44.

47. 493 F.2d 923 (5th Cir. 1974), *reh'g granted*, 506 F.2d 849 (5th Cir.), *cert. denied*, 423 U.S. 824 (1975).

48. A co-conspirator told a prosecution witness that a man wanted the prosecuting attorney done away with and that he was willing to pay $5,000. "[T]he old man won't go up anymore" and if the alleged co-conspirator did not go through with the killing, the "old man" would have "something done" to him or his family. *Id.* at 925-26. (The defendant was known as "old man" in the community).

49. *Id.* at 925.

50. *Id.*

51. *Id.* at 928.

52. Park v. Huff, 506 F.2d 849 (5th Cir. 1975).

53. Park v. Huff, 493 F.2d 923, 927 (5th Cir. 1974).

worthiness than direct assertions, . . . but not always. The danger of insincerity or untrustworthiness is decreased only where there is no possibility that the declarant intended to leave a particular impression."[54] It follows from this analysis that if the trier must infer a proposition by using an utterance as indirect evidence of a belief or state of mind of the declarant, then the hearsay dangers of perception, memory, narration/ambiguity, and sincerity are present; thus, the utterance should be excluded by the hearsay rule.

Professor McCormick was the leading proponent of the opposing common law view of the status of implied assertions under the hearsay rule. McCormick's view would not include implied assertions within the hearsay rule. Under the McCormick view, conduct, verbal or nonverbal, is hearsay only if it is specifically intended as an assertion.[55] "If the statement is not an assertion or is not offered to prove the facts asserted, it is not hearsay."[56] "[T]he out-of-court assertion is not hearsay if offered as proof of something other than the matter asserted."[57]

The following illustrates Professor McCormick's view: In a hypothetical setting, on a theory of liability asserting that a defendant was driving his car while intoxicated, plaintiff presents evidence that defendant was at a party, alcohol was served at the party, and defendant drank some of the alcohol. In addition, plaintiff calls witness to the stand to testify that shortly before defendant left the party, he overheard two of defendant's friends respond to questions of whether they would be riding home with the defendant. One friend responded "I'd rather walk home than ride with anyone as drunk as [the defendant]." The other friend responded, "I'd rather crawl home on my hands and knees." Under the McCormick view, the first response would be hearsay, although probably within a hearsay exception, since it would be offered to prove the truth of the matter asserted, that the defendant was drunk. The second response would not be hearsay because it isn't offered to prove the truth of the matter explicitly asserted therein, "I'd rather crawl home on my hands and knees." It is being offered to prove the truth of the matter impliedly asserted therein, that the defendant was too drunk to drive.[58]

The second response in the hypothetical, "I'd rather crawl home on my hands and knees," is a good example of an implied assertion in that the trier is being asked to infer a fact from the declarant's utterance. This utterance does not directly assert that the defendant is drunk, which is what the statement is being offered to prove. Therefore, under an assertion-based hearsay rule, an utterance offered to prove the truth of the matter impliedly asserted therein is not hearsay.[59]

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54. *Id.*

55. MCCORMICK, *supra* note 17, § 249 at 732.

56. *Id.*

57. *Id.* at § 250 at 740.

58. Seidelson, *Implied Assertions and Federal Rule of Evidence 801: A Quandary for Federal Courts*, 24 DUQ. L. REV. 741, 760 (1986) (entire hypothetical adopted from this source) [hereinafter Seidelson].

59. *Id.* at 760.

The Connecticut Supreme Court of Errors adopted the McCormick view in *State v. Tolisano*.[60] In *Tolisano*, while searching the defendant's apartment for evidence of illegal gambling, police answered twenty-five to thirty telephone calls. The unknown callers asked for the defendant and placed a bet[61] on a horse or horses running that day. The court held that "the telephone calls [were] admissible as evidence that bets were being placed but not that the statements made to the officers were true. The evidence [was] admitted, not as an exception to the hearsay rule, but because it [was] not within the rule."[62]

The McCormick view will not find an utterance to be hearsay unless the proponent of the utterance is trying to prove the truth of facts asserted in the utterance. Since the bets in *Tolisano* were not being offered to prove the truth of facts asserted in the bets but only to prove that bets were being placed, under the McCormick view the bets are not hearsay.[63]

B. Federal Rules of Evidence

Federal Rule of Evidence 801 has been the subject of much scholarly debate and inconsistent judicial treatment. The bulk of the debate stems from the advisory committee note to Rule 801(a) which seems to go well beyond the actual language in the rule. The note provides that "[t]he effect of the definition of 'statement' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one."[64] The note further states that verbal assertions and nonverbal conduct intended to be assertive are hearsay.[65] Finally, the note asserts that (1) nonverbal conduct not intended as an assertion, (2) "nonassertive verbal conduct," and (3) "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted" are excluded from the definition of hearsay by the language of 801(c).[66] The rationale to support the note's conclusion that these three types of conduct are not hearsay is that there is less likelihood of fabrication and insincerity to justify the loss of the evidence on hearsay grounds.[67]

The Federal Rules definition of hearsay is an assertion definition because it focuses on whether the declarant is making an assertion and "the purpose for which the assertion is being offered in evidence."[68] The Federal Rules and the advisory

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60. 70 A.2d 118 (1949).

61. An example of the bets taken by the police: "This is Al, Charlie; the Doc wants a $10.00 number hitch on eight races at Saratoga." The court admitted the testimony not to establish the truth of the facts related by the telephone calls but to establish the calls as verbal acts to show that the defendant was engaged in the activities described in the information. *Id.* at 119.

62. *Id.* at 120 (citation omitted).

63. MCCORMICK, *supra* note 17, § 249 at 732-33.

64. FED. R. EVID. 801(a) advisory committee's note.

65. *Id.*

66. *Id.*

67. *Id.*

68. Park, *supra* note 19, at 786.

committee notes, however, do not explicitly deal with the hearsay status of implied assertions from verbal conduct. The advisory committee notes, as stated above, describe two categories of verbal conduct that are excluded from the definition of hearsay by Rule 801: (1) "nonassertive verbal conduct" and (2) "verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted."[69]

"The Advisory Committee Note's desire to have 'verbal conduct which is assertive but offered as the basis for inferring something other than the matter asserted, . . . excluded from the definition of hearsay' is . . . not well supported by the Note's reasoning . . . [and] not compelled by the language of Rule 801 . . . ."[70] The rule defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[71] The rule then defines a statement as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."[72] It is obvious that the advisory committee note contradicts the plain language of the rule in excluding from the definition of hearsay verbal conduct which is assertive but offered as the basis for inferring something other than the matter asserted. The rule states that verbal assertions are hearsay but the advisory committee notes state that some verbal assertions are not hearsay.

Courts reach contradictory results when trying to apply the rule and advisory committee notes to verbal conduct which is assertive but offered as the basis for inferring something other than the matter asserted.

The Eastern District Court of Kentucky in *United States v. Zenni*[73] analyzed the treatment of statements from unknown telephone callers under both the common law and the Federal Rules of Evidence. The court stated that "[a]t common law this situation occupied a controversial no-man's land."[74] The McCormick view would argue that the calls were not hearsay and the Morgan view would argue that the calls were hearsay.[75] Under the Federal Rules of Evidence the court held that:

> The utterances of the bettors telephoning in their bets were nonassertive verbal conduct, offered as relevant for an implied assertion to be inferred from them, namely that bets could be placed at the premises being telephoned. The language is not an assertion on its face, and it is obvious these persons did not intend to make an assertion about the fact sought to be proved or anything else.[76]

Relying on the advisory committee notes to Federal Rules of Evidence 801(a) and (c), the court concluded that "[s]ubdivision (a)(2) of Rule 801 removes implied

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69. *Id.* at 794.
70. Seidelson, *supra* note 58, at 775.
71. FED. R. EVID. 801(c).
72. FED. R. EVID. 801(a).
73. 492 F. Supp. 464 (E.D. Ky. 1980).
74. *Id.* at 466.
75. *Id.* at 466-67.
76. *Id.* at 469.

assertions from the definition of statement and consequently from the operation of the hearsay rule."[77]

There is no wording in the advisory committee note to support the *Zenni* court's conclusion that implied assertions are removed from the definition of statement and the operation of the hearsay rule. The *Zenni* court relied on the advisory committee language that the hearsay dangers of sincerity, perception, memory, and narration are minimal in the absence of an intent to assert.[78] For this reason the court adopts the advisory committee language that "nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, [are] also excluded from the definition of hearsay by the language of subdivision (c)."[79]

The unknown telephone callers in *Zenni* placed bets such as "[p]ut $2 to win on Paul Revere in the third at Pimlico . . . . "[80] Certainly, the words in the bet have no relevance in themselves, but implicit in the bet is the proposition that the defendant is running an illegal betting operation. The probative value of this bet is dependent on the bettor's belief that the defendant is operating a betting establishment, but the bettor is not available to be cross-examined.

The hearsay dangers of perception, narration/ambiguity, and sincerity are present in the better's statement. The bettor "could have dialed incorrectly[,] . . . could have been acting on the basis of incorrect declarations . . . made to him by someone else [and] . . . could have been an acquaintance of the [defendant] who . . . engaged in 'friendly' no-money-changes-hands betting . . . . "[81] Cross-examination of the bettors would have revealed any one of those explanations.[82]

The Third Circuit Court of Appeals in *United States v. Reynolds*[83] and the Sixth Circuit Court of Appeals in *Lyle v. Koehler*[84] considered implied assertions under the Federal Rules of Evidence and reached the opposite result of *Zenni*. In *Reynolds*, when postal inspectors arrested one co-defendant on the street, he said to another co-defendant, in the presence of arresting officers, "I didn't tell them anything about you."[85] Government prosecutors offered the statement to prove guilt and argued it was not hearsay because the statement was not offered to prove the truth of the matter asserted.[86] The court rejected the government's argument and excluded the statement as hearsay since the only relevance of the statement to the

77. *Id.* (citations omitted).
78. *Id.*
79. FED. R. EVID. 801(a) advisory committee's note.
80. *Zenni*, 492 F. Supp. at 466 n.7.
81. Seidelson, *supra* note 58, at 767.
82. *Id.*
83. 715 F.2d 99 (3d Cir. 1983).
84. 720 F.2d 426 (6th Cir. 1983).
85. *Reynolds*, 715 F.2d at 101.
86. *Id.*

case was tied to an assumed fact of the co-defendant's guilt that the prosecutor argued the statement proved.[87]

In *Lyle*, law enforcement officials intercepted two letters written by one co-defendant asking friends to testify to an alibi.[88] The prosecution offered the letters to show consciousness of guilt.[89] The court stated that "[u]nder Morgan's view, the inference of Kemp's guilty mind, as reflected in the letters, is not severable from Kemp's raw statements; the letters accordingly present a hearsay problem."[90] Thus, the court held that the letters were hearsay.

As a result of the contradictory results in *Zenni*, *Reynolds*, and *Lyle*, there is still an issue of whether Federal Rule of Evidence 801 adopted the common law definition of hearsay or changed the common law. "[F]ew courts seem to believe Rule 801(c) changed the common law definition of hearsay. This conclusion is understandable because the rule's familiar truth-of-the-matter-asserted language often was used at common law."[91]

IV. Instant Cases

A. United States v. Lewis

In *Lewis*[92], the question for review by the Fifth Circuit Court of Appeals was whether the district court erred by allowing a police officer to testify to questions asked by an unidentified caller to Wade's beeper.[93] "Appellants argue[d] that while the questions in [the telephone conversation were] not direct assertions, there are certain assertions implicit in the questions."[94] "[I]mplicit in the question 'Did you get the stuff?' is an assertion that [Lewis was] expecting to receive some 'stuff'."[95] The court found that the caller's questions were not assertions and therefore not

87. *Id.* at 104.

88. *Lyle*, 720 F.2d at 429.

89. *Id.* at 432.

90. *Id.* at 433.

91. Park, *supra* note 19, at 806.

92. 902 F.2d 1176 (5th Cir. 1990).

93. The court also considered whether the postal inspectors violated Wade's fourth amendment rights by detaining the Express Mail package for an unreasonable time; whether Wade was denied effective assistance of counsel; and whether there was sufficient evidence to support Wade's and Lewis' convictions. *Id.* at 1180.

94. *Id.* at 1179. Wade in reference to his fourth amendment claim argued that the postal inspectors should have delivered the package on the afternoon of the day when the package was received instead of waiting until the next morning. In support of his claims of denial of effective assistance by counsel, Wade contended "that his trial counsel failed to move to suppress evidence obtained under the allegedly illegal search warrant, was unprepared to make the proper argument on the legality of the search warrant at trial, was not personally present at his arraignment hearing and failed to introduce the slippers as evidence that his story that he was expecting only slippers was true." *Id.* at 1180.

95. *Id.* at 1179. Also implicit in the questions was that 'stuff' was transported and that Wade and/or Lewis were to transfer the "stuff" to the caller. "As to the question "Where is Dog?," it carries with it an assertion that Dog (Wade) had some involvement with the caller and with the expected 'stuff'. Wade argued that this conversation was offered by the prosecution to prove the truth of the matters impliedly asserted and was therefore inadmissible. (Appellant Wade's Brief on Appeal at 9, United States v. Lewis, 902 F.2d 1176 (5th Cir. 1990)(No. 89-4371)).

hearsay.[96] In support of its holding, the court relied on the advisory committee notes of Rule 801(a) and dicta from *U.S. v. Groce*[97] that excluded implied assertions from the coverage of the hearsay rule.[98]

B. United States v. Long

In *Long*,[99] the question for review by the District of Columbia Circuit was whether the trial court erred by allowing a police officer to testify to questions asked by an unidentified telephone caller.[100] Long argued that implicit in the conversation were assertions that Long had crack cocaine and that he sold it out of the lessee's apartment.[101] He argued that "the government introduced this testimony to prove the truth of precisely these assertions, and that the testimony, thus, should have been excluded as hearsay."[102]

The court held that the calls fell outside the scope of the hearsay rule because the caller's questions were nonassertive in that "Long [had] not provided any evidence to suggest that the caller, through her questions, intended to assert that he was involved in drug dealing."[103] In support of this holding, the court relied on the advisory committee notes of Rule 801(a) in pigeon-holing these calls as nonassertive verbal conduct which is excluded from the hearsay rule under 801(a).[104] This

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96. *Id.* at 1179. The court also held that Wade's fourth amendment rights were not violated since the detention of the Express Mail package was pursuant to a warrant issued by a magistrate and based on probable cause. Wade's claim of ineffective assistance of counsel could not be resolved on direct appeal since the claim had not been raised before the district court and no opportunity existed to develop the record on the merits of the allegations. Finally, however, the court held that the evidence was sufficient to sustain Wade's conviction. *Id.* at 1180-81.

97. 682 F.2d 1359, 1364 (11th Cir. 1982). This case involved the admissibility of nautical maps with pencil markings that expert testimony opined were relevant in that the maps and markings indicate that the defendants had the means to accomplish the conspiracy, and were subject to the inference that they had intent. The court resolved this issue by holding that the nautical maps and pencil markings were not assertions and therefore not hearsay. This case had nothing to do with implied verbal assertions. *Id.* at 1364.

98. *Lewis*, 902 F.2d at 1179.

99. 905 F.2d 1572 (D.C. Cir. 1990).

100. *Long*, 905 F.2d at 1579. The court also addressed the issues of whether there was sufficient evidence to support Long's conviction for using or carrying a firearm in relation to a drug trafficking crime, whether Mayfield had filed a timely notice of appeal, and whether the district court abused its discretion in denying Long's motion to sever his trial from Mayfield's. *Id.* at 1574-80.

101. *Id.* at 1579.

102. *Id.* Other arguments on appeal included Mayfield's argument that the district court implicitly granted her a thirty-day extension to file an appeal by "accepting" her untimely notice of appeal. Also, Long argued that the evidence adduced at trial was insufficient to support a jury finding that he "used or carried" a firearm to support his conviction. Finally, Long argued that the evidence against Mayfield was far more damning than that against him, and therefore the district court abused its discretion in denying his motion to sever his trial from hers. *Id.* at 1576-80.

103. *Id.* at 1580. The court also remanded Mayfield's case to the district court for a determination of whether she should be granted a thirty-day extension permitted by FED. R. OF APP. P. 4(b). *Id.* at 1575. In addressing Long's firearm conviction, the court held "that the government failed to provide any evidence to support a reasonable inference that Long 'used' the revolver" and therefore reversed his firearm conviction. *Id.* at 1576. Finally, the court held that "[t]his case [involved] nowhere near the 'gross disparity' of evidence required before [it is held] that a district court has abused its discretion in denying a motion to sever." *Id.* at 1581.

104. *Id.* at 1580.

court also relied on dicta from *U.S. v. Groce*[105] that states that implied assertions are not hearsay.[106]

V. ANALYSIS

A. Hearsay and Implied Assertions

Lewis and *Long* involve classic verbal implied assertion issues under Federal Rule of Evidence 801 and its accompanying advisory committee notes. Both cases involve the admissibility of evidence of telephone calls between *one* unknown caller and a police officer. In *Lewis*, the unknown caller placed a telephone call to the defendant's beeper number only to have the call intercepted and returned by the police officer.[107] Whereas in *Long*, a telephone call was made to a telephone number not listed in the defendant's name but purportedly asking for the defendant by his first name.[108] The courts in *Lewis* and *Long* admitted the calls over hearsay objections on the theory that "[t]he questions asked by the unknown caller, like most questions and inquiries, are not hearsay because they do not, and were not intended to, assert anything."[109] In both *Lewis* and *Long*, the incriminating telephone calls were the primary evidence to support the defendants' convictions.

Federal Rule of Evidence 801 defines hearsay as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[110] The Fifth Circuit in *Lewis* concluded that the Federal Rules definition is an assertion definition, because the Rule focuses on whether an assertion is made and the purpose for which the assertion is offered.[111] However, the Fifth Circuit then cited Webster's Ninth New Collegiate Dictionary for the proposition that "[w]hile 'assertion' is not defined in the rule, the term has the connotation of a positive declaration."[112] "Under [the Federal Rules] definition, an out-of-court utterance is hearsay [only] if it is an assertion offered to prove the truth of the matter asserted."[113] To say that an utterance is offered as an implied assertion

> means that the trier is being asked to infer that fact from the declarant's utterance. The utterance containing the implied assertion does not directly assert the proposition it is offered to prove. The trier must infer the proposition by using the utterance as indirect evidence of a belief or state of mind of the declarant.[114]

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105. 682 F.2d 1359, 1364 (11th Cir. 1982).

106. *Long*, 905 F.2d at 1580.

107. "[The police officer] then tried to arrange a meeting with the unknown caller, but no one showed up at the appointed rendezvous." *Lewis*, 902 F.2d at 1179.

108. *Long*, 905 F.2d at 1580.

109. *Lewis*, 902 F.2d at 1179 (citations omitted).

110. FED. R. EVID. 801(c).

111. *Lewis*, 902 F.2d at 1179.

112. *Id.*

113. Park, *supra* note 19, at 786.

114. *Id.* at 788.

In *Lewis*, the unknown caller's utterances were "[d]id you get the stuff?" and "[w]here is Dog?"[115] In *Long*, the unknown caller asked to speak with "Keith" and asked if Keith "still had any stuff." When asked what she meant she responded, "a fifty," and she finally asked whether "Mike" could come around to pick up the "fifty."[116] These utterances standing alone are useless and irrelevant and should be inadmissible under Federal Rules of Evidence 401.[117] However, if the utterances in *Lewis* are considered for the assertions implicit in the questions that Wade was expecting to receive stuff (cocaine), and the utterances in *Long* are considered for the assertions implicit in the statements that *Long* had crack cocaine and sold it, then the assertions are relevant evidence.

> If helpfulness depends on the trier's belief that the declarant intended to assert a fact that supports the proponent's case, then the court should consider the statement hearsay under the truth-of-the-matter-asserted definition . . . . This result makes sense because no difference in hearsay dangers exists between a direct and an indirect accusation. Under this approach, therefore, the court does not determine actual intent. Instead, it traces the path the trier would take in drawing inferences favorable to the proponent.[118]

The courts in *Lewis* and *Long* did not discuss the relevance of the utterances for the purpose for which they were being admitted. Instead, they simply just made conclusionary rulings that the utterances were not assertions since the unknown callers did not intend to make assertions. Therefore, the courts concluded the utterances were not hearsay under Federal Rule of Evidence 801. There is no doubt the utterances in both cases were only relevant for the truth of the matter impliedly asserted in them. There is also no doubt that the relevance of the utterances depends on the jury's belief that the declarant intended to assert a fact that supports the proponent's case.

In *Park v. Huff*, Judge Wisdom's majority opinion for the Fifth Circuit stated, "[w]hen the possibility is real that an out-of-court statement which implies the existence of the ultimate fact in issue was made with assertive intent, it is essential that the statement be treated as hearsay if a direct declaration of that fact would be so treated."[119] If the unknown caller in *Lewis* stated that Wade received cocaine, and if the unknown caller in *Long* stated that Long was distributing cocaine, both of these statements would be hearsay and inadmissible under Federal Rule of Evidence 801 subject to the hearsay exceptions. The hearsay dangers of perception, memory, narration and sincerity are present to the same extent in the implied assertions as well as in the direct statements. To hold otherwise is to adopt a position directly opposing the common law position on implied assertions set forth in

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115. *Lewis*, 902 F.2d at 1179.

116. *Long*, 905 F.2d at 1579.

117. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

118. Park, *supra* note 19, at 800.

119. 493 F.2d 923, 928 (5th Cir. 1974).

Wright v. Tatham.[120] If the drafters of Federal Rule of Evidence 801 intended to adopt a rule that overturns 200 years of common law precedent, the plain language of the Rule does not accomplish their intention. The overturning of 200 years of common law by the Eastern District Court of Kentucky in *United States v. Zenni*[121] therefore, "stands as a landmark for any court wishing to conclude that the Federal Rules assertion definition leads to a different result from *Wright v. Tatham* . . . ."[122]

The Fifth Circuit in effect overrules *Park* in its *Lewis* decision but does not even discuss this fact. The Fifth Circuit could have used the same reasoning as the court in *People v. Scalzi.*[123] In *Scalzi*, the California First District Court of Appeals held that evidence of telephone calls intercepted by a police officer during a drug arrest were hearsay.[124] The facts of *Scalzi* were similar to *Lewis* and *Long* in that one call from an unknown caller was intercepted. The unknown caller asked for the defendant, even though it was not the defendant's house, and then asked if the defendant "had taken care of business" which the caller explained to mean whether the defendant had gotten the drugs bagged up.[125]

The case law discussed throughout this note "shows first that the Supreme Court has not written about the implied assertion problem . . . . [However], [s]cattered lower court cases [have] specifically consider[ed] the implied assertion issue."[126] As this note indicates, "[s]ince [the] enactment of the Federal Rules in 1975, a handful of courts have expressly adopted or rejected the position that implied assertions are hearsay."[127]

The plain language of Rule 801 supports the position of courts that conclude that verbal implied assertions are hearsay. By combining Rule 801(a) and 801(c), any oral assertion, other than one made by the declarant while testifying at the trial or hearing, is hearsay if offered in evidence to prove the truth of the matter asserted. Rule 801 does not require that only oral assertions offered to prove the truth of the matter explicitly asserted are hearsay while an oral assertion offered to prove the truth of the matter implicitly asserted is non-hearsay. Courts that attempt to draw such a distinction while relying on the advisory committee notes to support the distinction are in error. The advisory committee notes exceed the scope of the plain language of Rule 801.

B. Co-conspirator Exception to Hearsay

A conclusion that the questions in the *Lewis* and *Long* telephone calls were hearsay does not permanently exclude the admissibility of the questions. Federal

120. 112 Eng. Rep. 488 (Ex. Ch. 1837).
121. 492 F. Supp. 464 (E.D. Ky. 1980).
122. Park, *supra* note 19, at 811.
123. 126 Cal. App. 3d 901 (1981).
124. *Id.* at 907.
125. *Id.* at 905-06.
126. Park, *supra* note 19, at 826.
127. *Id.*

Rule of Evidence 801(d)(2)(E) is a hearsay exemption which states that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."[128] Before admitting a co-conspirator's statements under Federal Rule of Evidence 801(d)(2)(E), there must be evidence of a conspiracy involving the declarant and the defendant, and the statement must be made in the course and in furtherance of the conspiracy.[129] Admissibility is a preliminary question for the court under Federal Rule of Evidence 104(a).[130] The offering party must prove the preliminary facts of the conspiracy by a preponderance of the evidence.[131] In making a preliminary fact determination under Federal Rule of Evidence 801(d)(2)(E), the court may examine the hearsay statement sought to be admitted.[132]

In *Lewis,* Wade was convicted of conspiring to possess cocaine with intent to distribute.[133] Therefore, the court could evaluate the hearsay questions from the unknown telephone caller under the co-conspirator exemption test set forth in *Bourjaily v. United States.*[134] The critical issue in applying this test in *Lewis* is whether there was evidence to link the telephone caller declarant and Wade to the conspiracy for which Wade was convicted. If the unknown caller was a co-conspirator under the *Bourjaily* test, then the hearsay questions would be admissible under Federal Rule of Evidence 801(d)(2)(E). If the unknown caller was not a co-conspirator under the *Bourjaily* test, then the hearsay questions would not be admissible unless another hearsay exemption is applicable.

In *Long,* even though Long was not convicted of a conspiracy, the hearsay questions still must be evaluated under the co-conspirator exemption to the hearsay rule. The questions should be evaluated under the *Bourjaily* co-conspirator exemption test, and the result of this analysis would be the same as the result under the *Lewis* analysis.

C. Confrontation Clause Implications

Holding as the courts did in *Lewis* and *Long* that the utterances from the unknown telephone callers were not hearsay, the courts failed to analyze the utterances against the defendants' confrontation clause rights. The court's failure to do

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128. FED. R. EVID. 801(d)(2)(E).

129. Bourjaily v. United States, 483 U.S. 171, 183 (1987).

130. *Id.* at 178.

> Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

FED. R. EVID. 104(a).

131. *Bourjaily,* 483 U.S. at 176.

132. *Id.* at 181.

133. *Lewis,* 902 F.2d at 1181.

134. A co-conspirator statement may be admitted under the exception if there is evidence of a conspiracy involving the declarant and the defendant, and the statement is made in the course and in furtherance of the conspiracy. *Bourjaily,* 483 U.S. at 177-78.

so is a violation of the defendants' constitutional rights. Under the sixth amendment to the United States Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[135]

In *Lewis*, Wade presented an argument that his confrontation clause rights were violated by admission of the incriminating telephone calls against him. "The purpose of the Confrontation Clause is to promote the accuracy of the truth-seeking process in criminal trials by assuring that the 'trier of fact has a satisfactory basis for evaluating the truth' of an out-of-court statement."[136] However, the court did not address the proposed argument.

Ohio v. Roberts[137] establishes the test for confrontation clause analysis of hearsay statements.

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[138]

The "indicia of reliability" portion of the *Ohio v. Roberts* confrontation clause test would fail under both *Lewis* and *Long*. The unavailability of the declarant portion of the test can be satisfied as long as good faith efforts were undertaken prior to trial to locate and present the unknown callers.[139] Since the questions by the unknown telephone callers were not analyzed and admitted under the co-conspirator exemption, which is a deeply rooted hearsay exception, the admissibility of the questions would most likely violate the defendant's confrontation clause rights. It is difficult to see how unknown callers could qualify for any showing of a particularized guarantee of trustworthiness.

It is impossible in *Lewis* and *Long* to establish the sincerity and perception of the unknown callers. The calls could have been set ups. There is no corroboration through other calls to establish the trustworthiness of the unknown caller. There is no other evidence establishing that the calls were the defendants' normal mode of operation which would satisfy any showing of particularized guarantees of trustworthiness of the callers.

VI. CONCLUSION

Lewis and *Long* suggest that the definition of hearsay in Federal Rule of Evidence 801(c) has sometimes has led courts to classify utterances as non-hearsay

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135. U.S. CONST. amend VI.

136. Appellant Wade's Brief on Appeal at 12, United States v. Lewis, 902 F.2d 1176, 1178-80 n.3 (5th Cir. 1990)(No. 89-4371) (quoting California v. Green, 399 U.S. 149, 161 (1970)).

137. 448 U.S. 56 (1980).

138. *Id.* at 66.

139. *Id.* at 74.

despite the presence of obvious hearsay dangers. The statements made and questions asked by the unknown telephone callers in *Lewis* and *Long* were oral assertions within the definition of a statement under Rule 801(a). Furthermore, the statements made and questions asked by the unknown telephone callers were offered in evidence to prove the truth of the matter impliedly asserted in them. Rule 801(c) does not exclude verbal implied assertions from the hearsay rule, and the contradictory advisory committee notes should not be construed to remedy any defect in Rule 801.

"The defects of Federal Rule [of Evidence] 801 cannot be eliminated satisfactorily through judicial construction. Indeed, one of the worst features of the rule is its susceptibility to various interpretations."[140] Because of the defects in Federal Rule of Evidence 801 and the conflicting precedents of the various federal circuit courts of appeal interpreting the Rule, there is a need to adopt some changes to the Rule. The changes should be geared toward making hearsay analysis more uniform and consistent with the holding in *Wright v. Tatham* and its common law approach toward verbal hearsay. Many commentators agree with Professor Morgan "that the rational basis for the hearsay classification is not the formula, 'assertions offered for the truth of the matter asserted,' but rather the presence of substantial risks of insincerity and faulty narration, memory, and perception[.]"[141] The fact that the utterance of the out-of-court declarant is not under oath and subject to cross-examination makes the declarant's utterance susceptible to hearsay dangers. It should not matter whether the utterance is a direct verbal assertion or an implied verbal assertion.

If the unknown caller in *Long* had stated directly that the defendant had crack cocaine and that he sold it, the statement would be excluded as hearsay since it is a direct verbal assertion offered to prove the truth of the matter asserted. Why should the hearsay rule be circumvented when the unknown caller asks if the defendant has a "fifty" and whether someone could come by to pick it up?[142] The questions clearly reveal assumptions that are the functional equivalent of the direct assertion. Both the direct assertion and the implied assertion contain hearsay dangers which justify the exclusion of the evidence on hearsay grounds.

Professor Wellborn,[143] who served as Reporter of the State Bar of Texas Liaison Committee on the Federal Rules of Evidence recommends two ways of changing the hearsay rule.

> One way of making the change would be to amend Rule 801(c) to provide that all verbal expressions whose probative value depends on the declarant's credibility are hearsay. Another way would be to amend Rule 801(c) to define as hearsay any verbal expression offered as evidence of the declarant's belief in a matter, to prove the

140. Wellborn, *supra* note 30, at 92.

141. Morgan, *supra* note 22, at 218.

142. *Long*, 905 F.2d at 1579.

143. Professor of Law, the University of Texas. A.B. 1970, J.D. 1973, Harvard University.

matter believed. Either form of revision would codify the doctrine of *Wright v. Tatham*[144] as it applies to verbal conduct.[145]

Professor Wellborn proposes the following minor changes to Federal Rule of Evidence 801:

(a) Statement. A "statement" is (1) an oral or written *verbal expression* or (2) nonverbal conduct of a person if it is intended by him as *a communication.*

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered *as evidence of declarant's belief in a matter, to prove the matter believed.*[146]

Under this proposed change to Federal Rule of Evidence 801, the rule would trigger on communication, instead of assertion and thus eliminate the ambiguity in the present rule. This rule would also codify the *Wright v. Tatham* common law hearsay rule for verbal conduct but at the same time continue to exclude nonverbal nonassertive conduct from the definition of hearsay. Applying Wellborn's proposed rule would result in a more uniform analysis of hearsay evidence while codifying the common law rule. The questions in *Lewis* and *Long* were offered as evidence of the declarant's belief that Wade was to receive cocaine and that Long was to distribute crack cocaine in order to prove that Wade and Long were involved in illegal drug activities. Therefore, the questions from both of the telephone calls should be considered hearsay and inadmissible unless there is an applicable hearsay exception or exemption.

James M. Ulam

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144. 112 Eng. Rep. 488 (Ex. Ch. 1837).

145. Park, *supra* note 19, at 829-30.

146. Wellborn, *supra* note 30, at 92.