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**GARNER v. STATE: MARYLAND'S IMPLIED RETREAT  
FROM IMPLIED ASSERTIONS**

LINDSEY N. LANZENDORFER\*

In *Garner v. State*,<sup>1</sup> the Court of Appeals of Maryland confronted the concept of implied assertions<sup>2</sup> for the fourth time in the history of the court's hearsay jurisprudence.<sup>3</sup> The *Garner* court addressed the admissibility of an out-of-court declarant's question, "can I get a 40?,"<sup>4</sup> when the State offered the question to prove that the defendant sold drugs.<sup>5</sup> Pursuant to Maryland Rule of Evidence 5-801,<sup>6</sup> the court held that the utterance was not hearsay, in part because it did not contain the assertion it was offered to prove, and, thus, the question was admissible.<sup>7</sup>

In so holding, the *Garner* court failed to apply its precedent, which states that an implied assertion is usually hearsay.<sup>8</sup> Instead, the

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1. 414 Md. 372, 995 A.2d 694 (2010).

2. An implied assertion is an out-of-court utterance that its proponent offers to prove the truth of something the declarant implied but did not directly state. See Paul S. Milich, *Hearsay Antinomies: The Case for Abolishing The Rule and Starting Over*, 71 OR. L. REV. 723, 728-29 (1992) (discussing when implied assertions will be considered hearsay).

3. The first time the court confronted implied assertions was in *Waters v. Waters*, 35 Md. 531 (1872). The second time was in *Stoddard v. State*, 389 Md. 681, 887 A.2d 564 (2005). The third time was in *Bernadyn v. State*, 390 Md. 1, 887 A.2d 602 (2005).

4. *Garner*, 414 Md. at 374, 995 A.2d at 695. The State used the statement to argue that Garner was selling cocaine. *Id.* at 376, 995 A.2d at 696.

5. *Id.* at 376, 995 A.2d at 696-97.

6. Rule 5-801 has three parts. 5-801(a) states, "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MD. R. 5-801(a). Rule 5-801(b) states, "A 'declarant' is a person who makes a statement." MD. R. 5-801(b). Rule 5-801(c) states, "'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." MD. R. 5-801(c).

7. *Garner*, 414 Md. at 388, 995 A.2d at 704.

8. See *infra* Part IV.A.

court implicitly followed federal and state courts' holdings that implied assertions are typically *not* hearsay and, in turn, altered Maryland precedent for determining whether an implied assertion is hearsay under Maryland law.<sup>9</sup> This holding, because of its vagueness, could lead to inconsistent arguments by litigants, ad hoc rulings by trial judges, and conflicting standards of review by appellate judges.<sup>10</sup> To avoid unpredictability in the application of implied assertion admissibility standards in Maryland, the Court of Appeals should have explicitly held that implied assertions are not hearsay under Maryland Rule of Evidence 5-801.<sup>11</sup> Such a holding would have ended the struggle that Maryland courts have with implied assertions and prevented implied assertions from swallowing the hearsay rule.<sup>12</sup>

### I. THE CASE

The Maryland State Police arrested Alphonso Garner on June 22, 2006, for driving with a suspended license.<sup>13</sup> The police searched his car as an incident to his arrest and discovered thirteen individually wrapped baggies of cocaine inside a fuse box in the glove compartment.<sup>14</sup> At the police station, one trooper confiscated Garner's cell phone.<sup>15</sup> Later, the phone rang and the trooper answered it.<sup>16</sup> After the trooper said hello, the caller asked, "can I get a 40?," but hung up when the trooper asked the caller his name.<sup>17</sup>

At Garner's trial, the State offered the unidentified caller's question to show that Garner was a drug dealer.<sup>18</sup> First, an officer testified that the caller asked, "can I get a 40?," and then a corporal testified that a "40" is a common reference to four-tenths of a gram of crack cocaine. The State used the out-of-court utterance in closing argument to show Garner was a drug dealer and not merely a drug user.<sup>19</sup> The prosecutor said, "why pr[ay]-tell [sic], would you call [a] user and ask him for a 40[?] Because he is not a user."<sup>20</sup> Further, in his rebut-

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9. See *infra* Part IV.B.1–2.

10. See *infra* Part IV.B.3.

11. See *infra* Part IV.C.1.

12. See *infra* Part IV.C.2.

13. Garner v. State, 183 Md. App. 122, 126, 960 A.2d 649, 650–51 (2008), *aff'd*, 414 Md. 372, 995 A.2d 694 (2010).

14. *Id.*, 960 A.2d at 651.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 135, 960 A.2d at 656.

19. *Id.*

20. Garner v. State, 414 Md. 372, 376, 995 A.2d 694, 697 (2010).

tal argument, the prosecutor argued, “[B]ut I keep coming back, I know I said this before, you do not, you do not ca[ll] [a] user [—] a mere user of cocaine [—] and ask him for a 40.”<sup>21</sup>

A jury in the Circuit Court for Queen Anne’s County convicted Garner for, *inter alia*, possession of cocaine with the intent to distribute.<sup>22</sup> Garner appealed his conviction to the Court of Special Appeals, arguing that he was denied a fair trial because the trial court admitted the anonymous caller’s question into evidence.<sup>23</sup> Garner argued that the trooper who answered Garner’s cell phone should not have been allowed to testify as to the substance of the conversation because it was hearsay.<sup>24</sup>

Garner argued that the anonymous caller was asserting that he believed Garner was a drug dealer when he asked if he could “get a 40.”<sup>25</sup> Since the caller did not actually say Garner sold cocaine, this assertion would necessarily be implied. Because the State offered the question to prove that Garner sold cocaine, the implied assertion was offered for the matter impliedly asserted. As such, Garner argued, the question was hearsay and should not have been admitted into evidence.<sup>26</sup>

The Maryland Court of Special Appeals disagreed and held that the question was not hearsay, in part, because the question did not contain an assertion.<sup>27</sup> Although Maryland includes implied assertions in its hearsay ambit, the Court of Special Appeals determined that it would not interpret implied assertions broadly enough to include the out-of-court question in Garner’s case.<sup>28</sup> The court explained that defining implied assertion as any utterance that a party can use to prove any relevant fact effectively excises the word “assertion” out of the definition of hearsay.<sup>29</sup> Indeed, the court determined

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21. *Id.*

22. *Garner*, 183 Md. App. at 125, 960 A.2d at 650. He was also convicted of driving with a revoked license, and other related offenses that were merged for sentencing. *Id.*

23. *Id.*

24. *Id.* at 134–35, 960 A.2d at 655–56.

25. *Id.* at 145, 960 A.2d at 662.

26. *Id.*

27. *See id.* at 146, 150, 960 A.2d at 662, 665 (explaining that a narrow reading of implied assertion precedent would permit the court to find the anonymous caller’s question was non-hearsay and concluding that the court would not give implied assertion precedent a liberal interpretation).

28. *See id.* at 145–50, 960 A.2d at 662–65 (explaining and interpreting the Court of Appeals implied assertion precedent).

29. *Id.* at 145–46, 960 A.2d at 662.

that, in this case, every utterance could be deemed an implied assertion of what it is offered to prove.<sup>30</sup>

The Court of Appeals granted Garner's petition for certiorari to determine whether the Court of Special Appeals erred in finding the out-of-court caller's question was not hearsay.<sup>31</sup>

## II. LEGAL BACKGROUND

Both Maryland and federal courts have traditionally held hearsay to be inadmissible evidence.<sup>32</sup> The definition of hearsay is similar across jurisdictions: hearsay is an out-of-court statement (assertion), made by a declarant, offered for the truth of the matter asserted.<sup>33</sup> However, for years courts have debated what falls under that definition. For instance, courts often struggle with whether implied assertions can be considered hearsay. An English common law court first considered implied assertions as part of the hearsay definition.<sup>34</sup> Maryland courts have followed the same path and held that implied assertions can still fall into the definition of hearsay, but have struggled to determine the scope of implied assertions.<sup>35</sup> By contrast, a majority of federal and state courts have eliminated implied assertion from the definition of hearsay.<sup>36</sup>

### A. Hearsay

Under the Maryland and federal rules of evidence, hearsay is generally inadmissible as evidence.<sup>37</sup> The rules define 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."<sup>38</sup> The rules define declarant as "a person who makes a statement."<sup>39</sup> Finally, the rules define 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."<sup>40</sup>

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30. *Id.* at 145, 960 A.2d at 662.

31. *Garner v. State*, 414 Md. 372, 374, 995 A.2d 694, 695 (2010).

32. *See infra* Part II.A.

33. *See infra* Part II.A.

34. *See infra* Part II.B.

35. *See infra* Part II.C.

36. *See infra* Part II.D.

37. MD. R. 5-802; FED. R. EVID. 802.

38. MD. R. 5-801(c); FED. R. EVID. 801(c).

39. MD. R. 5-801(b); FED. R. EVID. 801(b).

40. MD. R. 5-801(a); FED. R. EVID. 801(a).

The rules do not define an assertion, but the courts have defined it as words that can be proven true or false.<sup>41</sup> Generally an assertion is in the indicative or declarative speech, rather than in the interrogative, the imperative, or the subjunctive forms of speech.<sup>42</sup> Finally, if a proponent of an out-of-court utterance offers the utterance to prove the truth of something the declarant believed, but did not directly state, then the utterance is considered to be an implied assertion.<sup>43</sup> The question is whether implied assertions are to be included as assertions under the hearsay definition.

Whether implied assertions qualify as assertions under the hearsay definition is important because the rules exclude hearsay from evidence at trial.<sup>44</sup> Hearsay is excluded to protect the trier of fact from considering unreliable evidence.<sup>45</sup> The Supreme Court of the United States has recognized that out-of-court statements pose four risks of unreliability: memory, perception, narration, and sincerity. First, the declarant may have a faulty recollection of the event when she made the statement about the event.<sup>46</sup> Second, she may not have accurately observed the event when she made the statement.<sup>47</sup> Third, her words may have been ambiguous.<sup>48</sup> Fourth, she may have fabricated her statement.<sup>49</sup> Without cross-examination, an out-of-court utterance is untested as to these four dangers.<sup>50</sup> For these reasons, courts do not admit hearsay into evidence unless it falls under an exception.<sup>51</sup>

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41. *E.g.*, *Holland v. State*, 122 Md. App. 532, 543–44, 713 A.2d 364, 369–70 (1998).

42. *Id.*

43. Milich, *supra* note 2, at 728–29.

44. MD. R. 5-802; FED. R. EVID. 802.

45. *See, e.g.*, *Williamson v. United States*, 512 U.S. 594, 598 (1994) (explaining the dangers of presenting an out-of-court statement to the jury).

46. *See id.* (“The declarant might . . . have faulty memory.”).

47. *See id.* (“The declarant might . . . have misperceived the events which he relates.”).

48. *See id.* (“The declarant[’s] words might be misunderstood or taken out of context by the listener.”).

49. *See id.* (“The declarant might be lying.”); *see also Stoddard v. State*, 389 Md. 681, 696, 887 A.2d 564, 573 (2005) (identifying fabrication as one of the four hearsay factors).

50. *Stoddard*, 389 Md. at 697, 887 A.2d at 573.

51. MD. R. 5-802. The exceptions are located under Md. R. 5-802.1, 5-803, 5-804, and 5-805.

B. *Wright v. Tatham Includes Implied Assertions in the Definition of Hearsay*

The English common law case *Wright v. Tatham*<sup>52</sup> first discussed the concept of implied assertion.<sup>53</sup> There, an heir filed suit to recover land from a deceased man, John Marsden, as a devisee under will.<sup>54</sup> The case turned on whether Marsden had been competent to make a will.<sup>55</sup> To prove Marsden's competence, the defense provided three letters written to Marsden that discussed business and personal affairs to show the writers of the letters believed Marsden was a competent man.<sup>56</sup> The Court of Exchequer Chamber, an English appellate court, was divided, and issued six written opinions.<sup>57</sup> Baron Parke, one of the judges, argued that the letters did contain an assertion that Marsden was competent and therefore should be excluded from evidence. Finding that implied assertions are inadmissible, he wrote:

[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 . . . .<sup>58</sup>

Baron Parke explained this reasoning in a hypothetical. Suppose that a sea captain put his family on board a vessel and embarked into the sea.<sup>59</sup> If his conduct were offered in court to prove the vessel was seaworthy, it would be hearsay because the captain must have believed the vessel was seaworthy or he would not have put his family on board. In other words, his actions impliedly assert the vessel was seaworthy, even though the sea captain did not directly state the vessel was seaworthy.<sup>60</sup>

Similarly, Baron Parke determined that the letters written to Marsden were inadmissible because the defense offered those letters to prove the competence of the testator—the truth of the implied

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52. (1837) 112 Eng. Rep. 488 (K.B.); see *Stoddard*, 389 Md. at 691, 887 A.2d at 570 (noting that *Wright v. Tatham* is the “starting point for a discussion of the implied assertion doctrine”).

53. 112 Eng. Rep. at 516–17.

54. *Id.* at 489.

55. See *id.* at 492–93 (explaining the significance of the letters written to the testator).

56. *Id.* at 488–89 (describing the content of the letters). The content of the letters are reproduced in the court's opinion. *Id.* at 490–93.

57. *Id.* at 524.

58. *Id.* at 516.

59. *Id.*

60. *Id.*

statements contained in the letter.<sup>61</sup> More generally, if an out-of-court implied assertion is offered for the truth, then it is hearsay.<sup>62</sup>

*C. Maryland Appellate Courts Consistently Included Implied Assertions in Their Definition of Hearsay, but Have Struggled to Determine the Scope of Implied Assertions*

The Maryland Court of Appeals found that implied assertions were hearsay when offered for their truth, following Baron Parke's reasoning, before and after the adoption of the Maryland Rules of Evidence in 1994.<sup>63</sup> But the Maryland Court of Special Appeals has struggled to determine exactly what out-of-court utterances fall into the category of implied assertions.<sup>64</sup>

*1. The Maryland Court of Appeals Holds Implied Assertions Can Be Hearsay Before and After Maryland Codified Its Rules of Evidence*

The Court of Appeals had only addressed the issue of implied assertions three times before 2010's *Garner v. State*. The first time was in the 1872 case *Waters v. Waters*,<sup>65</sup> decided well before Maryland codified its rules of evidence.<sup>66</sup> The second and third times were in *Stoddard v. State*<sup>67</sup> and *Bernadyn v. State*,<sup>68</sup> which were decided on the same day in 2005, eleven years after Maryland's adoption of its rules of evidence.<sup>69</sup>

In *Waters*, the Court of Appeals considered whether two written letters of a testator's friend were hearsay when they were offered to prove the testator was competent and sane to transact business.<sup>70</sup> Under facts that were strikingly similar to the facts of the English case, *Wright*, the court held that the proponent of the letters offered them

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61. *Id.* at 517.

62. For another example, see *United States v. Pacelli*, 491 F.2d 1108, 1111–16 (2d Cir. 1974) (finding defendant's family members' statements, such as "there is a million places to put a body and you don't have to . . . burn it up and leave it laying right out in the middle of nowhere for people to find," were inadmissible to demonstrate the defendant's family believed he committed a murder because the statements were hearsay).

63. See *infra* Part II.C.1.

64. See *infra* Part II.C.2.

65. 35 Md. 531 (1872).

66. The rules were codified in 1994. Barry Herman, Note, *Closing the Door on the Residual Hearsay Exception*, 57 MD. L. REV. 865, 875 (1998).

67. 389 Md. 681, 887 A.2d 564 (2005).

68. 390 Md. 1, 887 A.2d 602 (2005).

69. The date was December 8, 2005. See *Stoddard*, 389 Md. at 681, 887 A.2d at 564; *Bernadyn*, 390 Md. at 1, 887 A.2d at 602.

70. *Waters*, 35 Md. at 536.



for the implied assertion that the testator was competent, and therefore the letters were inadmissible.<sup>71</sup> Explaining why the letters should be excluded, the court stated that the letters were assertions of the writer but the writer had not been under oath when he made them.<sup>72</sup>

The Court of Appeals did not address implied assertions again until after Maryland codified the Maryland Rules of Evidence in 1994. Although the Maryland Rules of Evidence define hearsay as a statement and a statement as an assertion,<sup>73</sup> the rules committee left the definition of assertion up to the courts, finding that it was a “concept best left to the development in the case law.”<sup>74</sup> In turn, the Court of Appeals has joined a minority of courts in holding that implied assertions are hearsay when offered for their truth because they contain the same hearsay dangers as direct assertions.<sup>75</sup>

For example, in *Stoddard v. State*, decided in 2005, the Court of Appeals addressed the admissibility of a young girl’s out-of-court statement, “Is Erik going to get me?”<sup>76</sup> The State offered the statement to prove that the girl witnessed Erik Stoddard, the defendant, harm another child.<sup>77</sup> The defendant argued that the utterance was hearsay because it included the implied assertion that the girl actually saw the defendant harm another child.<sup>78</sup> In other words, when the girl asked her mother “Is Erik going to get me?” she also was implicitly stating, “I saw Erik hit Calen.”<sup>79</sup>

The Court of Appeals explained that if “the probative value of words, as offered, depends on the declarant having communicated a factual proposition, the words constitute an ‘assertion’ of that proposition.”<sup>80</sup> That is, if the proponent of evidence offers an out-of-court utterance to prove a proposition that was not directly asserted in the

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71. *Id.* at 544–45.

72. *Id.* at 544.

73. *See supra* notes 38–40.

74. MD. R. 5–801 advisory committee’s note. Maryland’s intermediate appellate court has acknowledged the difference between the federal and Maryland advisory committees’ notes. *See Carlton v. State*, 111 Md. App. 436, 442, 681 A.2d 1181, 1184 (1996) (“Based on the committee’s note, it would appear that the drafters of Maryland Rule 5-801 rejected the view that implied assertions are never hearsay.”).

75. *See infra* notes 76–93 and accompanying text.

76. 389 Md. 681, 683, 887 A.2d 564, 565 (2005).

77. *See id.* at 686, 887 A.2d at 567 (citing the State’s closing argument where the State argued that the girl was the only eyewitness to Stoddard’s crime).

78. *Id.* at 686–87, 887 A.2d at 567.

79. *See id.* at 689, 887 A.2d at 569 (explaining that the statement was offered to prove the girl had witnessed Stoddard assault Calen). Calen was the child Stoddard allegedly murdered. *Id.* at 683, 887 A.2d at 565.

80. *Id.* at 703–04, 887 A.2d at 577.

utterance, but the declarant must have believed the proposition for the utterance to be relevant, then the utterance is inadmissible hearsay. In support of including implied assertions offered for their truth in the definition of hearsay, the court stated that implied assertions raise the same dangers as direct assertions, including insincerity.<sup>81</sup> Indeed, the court argued that if the direct assertion is insincere, then the implied assertion is just as insincere and unreliable.<sup>82</sup>

The *Stoddard* court also reasoned that whether the declarant intended to communicate a particular factual proposition is irrelevant because the declarant still had to believe that proposition.<sup>83</sup> Moreover, even if the declarant did not intend to make the assertion he or she made, it does not reveal whether the declarant clearly remembers the underlying events.<sup>84</sup>

Applying this reasoning to the facts in *Stoddard*, the Court of Appeals first looked to the probative value of the statement (what the proponent of the statement offered the statement to prove).<sup>85</sup> The court found the probative value of the out-of-court utterance, “Is Erik going to get me?,” depended on the declarant communicating that she saw Stoddard hurt another child.<sup>86</sup> Looking then to the declarant’s actual statement, the court found she impliedly asserted that she saw Stoddard hit another child.<sup>87</sup> But the implied assertion was untested as to whether the declarant was serious or joking, untested as to whether she might have feared Stoddard because she saw him harm another child or for another reason, and untested as to her perception of the event, which could have been faulty.<sup>88</sup> As such, hearsay dangers were present in the implied assertion and the court found the out-of-court question was inadmissible hearsay.<sup>89</sup>

In *Bernadyn v. State*, the Court of Appeals considered whether a medical bill containing the defendant’s name, Michael Bernadyn, and

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81. *Id.* at 703, 887 A.2d at 577.

82. *Id.* (citing *State v. Dullard*, 668 N.W.2d 585, 594 (Iowa 2003)).

83. *Id.* at 698, 887 A.2d at 574.

84. *Id.*

85. *Id.* at 711, 887 A.2d at 582.

86. *See id.* (explaining that the State offered the statement to prove that the child saw the defendant harm another child).

87. *See id.* (describing the multiple inferences the jury had to make to accept that the girl saw Stoddard harm Calen).

88. *Id.* at 711–12, 887 A.2d at 582. This applies the four hearsay dangers to the facts of the case. *See also supra* text accompanying notes 46–49.

89. *See Stoddard*, 389 Md. at 712, 887 A.2d at 582 (“The dangers that arose from the State’s use of this question demonstrate the continued utility of the common law approach to hearsay.”).

an address was hearsay.<sup>90</sup> The court first looked to what the State offered the bill to prove.<sup>91</sup> The State offered the bill to prove the addresser believed Bernadyn lived at that particular address.<sup>92</sup> The court then explained that the bill did not directly assert, “I believe the defendant lives at the address on this envelope,” but that assertion was implied. The court found the bill was hearsay because the State offered the addressed bill for the truth of its implied assertion.<sup>93</sup> These cases demonstrate that the Court of Appeals has repeatedly found that implied assertions are “assertions” under the hearsay definition.

2. *The Maryland Court of Special Appeals Creates a Distinction Between Implied Assertions and Circumstantial Evidence*

Before the Court of Appeals decided *Stoddard* and *Bernadyn*, the Maryland Court of Special Appeals found, in an unreported opinion, *Fields v. State*,<sup>94</sup> that a defendant’s name on a bowling alley screen was not hearsay when offered to prove the defendant was present at the bowling alley on a particular night.<sup>95</sup> However, after the Court of Appeals decided *Stoddard* and *Bernadyn*, it vacated the Court of Special Appeals’ judgment and remanded *Fields* to the Court of Special Appeals.<sup>96</sup>

On remand, the Court of Special Appeals again considered whether the defendant’s name on the screen was hearsay.<sup>97</sup> A person present at the bowling alley had put the defendant’s nickname, Sat Dogg, on one of the alley’s screens.<sup>98</sup> The defendant argued that the name was hearsay because the person who typed the name “Sat Dogg” on the screen implied that the defendant was present in the bowling alley that night.<sup>99</sup>

Reconsidering its decision in light of *Bernadyn*, the Court of Special Appeals distinguished the two cases.<sup>100</sup> The court found that un-

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90. 390 Md. 1, 3, 887 A.2d 602, 603 (2005).

91. *Id.* at 9, 887 A.2d at 607.

92. *Id.*

93. *See id.* at 11, 889 A.2d at 608 (explaining that the jury must make several inferences to accept the words as proof that Bernadyn lived at the stated address).

94. 162 Md. App. 767 (2005), *vacated*, 390 Md. 513, 889 A.2d 1025 (2006).

95. *See Fields v. State*, 168 Md. App. 22, 26, 895 A.2d 339, 341–42 (2006), *aff’d*, 395 Md. 758, 912 A.2d 637 (2006) (describing the court’s previous ruling).

96. *Fields v. State*, 390 Md. 513, 889 A.2d 1025 (2006).

97. *Fields*, 168 Md. App. at 26, 895 A.2d at 341–42.

98. *See id.* at 29, 895 A.2d at 343 (explaining that a detective copied the names from a bowling alley screen, and one of them was “Sat Dogg”).

99. *Id.* at 29, 895 A.2d at 343.

100. *Id.* at 36–37, 882 A.2d at 347–48. The court explained:

like *Bernadyn*, where the State offered an addressed letter to prove that the defendant lived at the address because the addresser *believed* he lived at the address, in the present case, the State did not contend that the person who wrote the defendant's name on the bowling alley screen *believed* that the defendant was there.<sup>101</sup> As such, the court determined that the name was not an implied assertion. In fact, the court found the declarant did not make any assertion when he or she put the name on the bowling alley screen.<sup>102</sup>

Although the name on the bowling alley screen did not contain an assertion, the Court of Special Appeals still determined that the probative value of the name on the screen was that it had a tendency to show the appellant was at the bowling alley that night.<sup>103</sup> Instead of containing an *implied assertion* of what it was offered to prove (that the declarant put the defendant's name on the screen because the declarant saw the defendant there), the court determined the name was merely *circumstantial evidence* that the appellant was at the bowling alley and therefore not hearsay. In other words, the name was an item at the crime scene that the juror could use to infer the defendant was at the bowling alley.<sup>104</sup>

Judge Kenney dissented, arguing that following *Bernadyn*, the name on the bowling alley screen was hearsay.<sup>105</sup> Unlike the majority, which claimed that the name was circumstantial evidence, Judge Kenney contended that circumstantial evidence is more akin to shell casings or a vehicle at a crime scene. But, unlike physical evidence, the probative value of the defendant's name on the bowling alley screen was dependent on an unknown person's belief that one of the bowlers was the defendant.<sup>106</sup> Thus, Judge Kenney argued, if the declarant did not believe that the defendant was at the bowling alley, the evidence would have no purpose. Judge Kenney pointed out that the State had offered the bowling alley screen to prove the declarant's be-

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The prosecutor did not attempt to use the evidence of the words "Sat Dogg" on the screen at the bowling alley to show that a known declarant believed the appellant was present there, had reason to accurately hold that belief, and therefore was impliedly asserting that factual proposition by entering his nickname on the screen.

*Id.* at 37, 895 A.2d at 348.

101. The State argued that the defendant's nickname was Sat Dogg because that name was tattooed on the defendant's arm and a witness testified that Sat Dogg was the defendant's nickname. *Id.* at 31, 895 A.2d at 344–45.

102. *Id.* at 38, 895 A.2d at 348.

103. *Id.*

104. *Id.*

105. *Id.* at 48, 895 A.2d at 354 (Kenney, J., dissenting).

106. *Id.* at 49–50, 895 A.2d at 355.

lief in a certain fact: that the defendant was at the bowling alley.<sup>107</sup> Therefore, the name was hearsay.

After the Court of Special Appeals handed down its decision in *Fields*, the defendant appealed.<sup>108</sup> The Court of Appeals declined to answer whether the name on the screen was hearsay, instead finding that even if the trial judge should not have admitted the name into evidence, the error was harmless.<sup>109</sup> This holding, as well as the Court of Special Appeals holding and Judge Kenney's dissent in *Fields*, demonstrates that the Maryland courts are struggling to define the scope of implied assertions.

*C. Following the Adoption of Federal Rule of Evidence 801, Many Courts Removed Implied Assertions from the Hearsay Definition*

Contrary to Maryland courts, a majority of courts nationwide have joined a school of thought that finds implied assertions are no longer considered assertions for the purpose of hearsay.<sup>110</sup> This largely can be attributed to the adoption of the Federal Rules of Evidence in 1975.<sup>111</sup> The federal hearsay definition is exactly the same as the Maryland definition;<sup>112</sup> Maryland merely adopted the federal language. But the Maryland advisory committee's note to the hearsay rule leaves the definition of assertion up to the courts, while the federal advisory committee's note defines assertion.<sup>113</sup> The federal committee's note finds that nothing is an assertion unless the declarant intends it to be an assertion.<sup>114</sup> Although the advisory committee's notes are not binding, many federal courts and state courts that

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107. *Id.* at 49, 895 A.2d at 355.

108. *Fields v. State*, 395 Md. 758, 759, 912 A.2d 637 (2006).

109. *Id.* After fully explaining the majority's and the dissent's reasoning, the court concluded that the State established beyond a reasonable doubt that the defendant was present at the bowling alley even without the nickname on the bowling alley screen. *Id.* at 762-64, 912 A.2d at 639-40.

110. *See Stoddard v. State*, 389 Md. 681, 731-33, 887 A.2d 564, 594-95 (2005) (Wilner, J., concurring) (providing a list of federal and state cases that have found implied assertions are no longer considered to be hearsay).

111. Alan D. Hornstein, *The New Maryland Rules of Evidence: Survey, Analysis and Critique*, 54 MD. L. REV. 1032, 1033 (1995). For a discussion of why the Federal Rules of Evidence changed many courts' approach to implied assertions, see *infra* Part II.C.1.

112. *See* FED. R. EVID. 801 (defining 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.").

113. *Compare* FED. R. EVID. 801 advisory committee's note ("The key to the definition is that nothing is an assertion unless intended to be one."), *with* MD. R. 5-801 advisory committee's note ("This Rule does not attempt to define 'assertion,' a concept best left to development in case law.").

114. FED. R. EVID. 801 advisory committee's note; *see also infra* Part II.C.1.

adopted the Federal Rules have eliminated implied assertions from hearsay, citing the note.<sup>115</sup>

1. *The Advisory Committee's Note to Federal Rule of Evidence 801 Eliminates Implied Assertions from the Definition of Assertion*

The federal rules define 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.”<sup>116</sup> The rules define 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.”<sup>117</sup>

The rules do not further define assertion, but unlike the Maryland advisory committee's note, which leaves the definition up to the courts,<sup>118</sup> the federal committee's note states, “[T]he key to the definition [of a statement] is that nothing is an assertion unless intended to be one.”<sup>119</sup>

To explain this definition, the federal committee's note describes the difference between assertions and implied assertions. A verbal utterance is almost always an assertion because the declarant intends to assert what he utters.<sup>120</sup> Verbal conduct that is assertive, but offered as a basis for inferring something other than the matter asserted, is an implied assertion.<sup>121</sup> A non-verbal assertion is an act that the declarant intends to be an assertion, such as the act of pointing to identify a suspect in a lineup, because it is the same as assertive words.<sup>122</sup> A non-verbal implied assertion is conduct that the proponent of the action offers to prove a condition by showing that the person acted as he or she did because the person believes in the existence of the condition the proponent seeks to prove. However, the person does not actually state his or her belief in the condition, so the belief must be inferred.<sup>123</sup>

Under these definitions, implied assertions cannot be hearsay under the federal rules because the declarant never intends to communicate the assertion, since the assertion is implied. In addition, the

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115. See *infra* Part II.C.2.

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

117. FED. R. EVID. 801(a).

118. MD. R. 5-801 advisory committee's note.

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

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

federal committee's note explicitly finds that the hearsay definition excludes an implied assertion because implied assertions lack the risks of sincerity against which the hearsay rule is meant to protect.<sup>124</sup>

2. *Federal Case Law Follows the Advisory Committee's Note to Federal Rule of Evidence 801 and Excludes Implied Assertions from the Hearsay Definition*

After the passage of the Federal Rules of Evidence, very few federal courts continued to find implied assertions to be hearsay.<sup>125</sup> Although Federal Rule of Evidence 801 does not explicitly exclude implied assertions from hearsay, a majority of courts have followed the advisory committee's note to rule 801, and other hearsay treatises, to conclude that implied assertions are not hearsay.<sup>126</sup> Federal courts have held that implied assertions cannot be assertions because the declarants do not intend to make the assertions.<sup>127</sup> State courts that derive their rules of evidence from the Federal Rules of Evidence follow the same pattern.<sup>128</sup>

As for federal courts, in *United States v. Rodriguez-Lopez*<sup>129</sup> and *Headley v. Tilghman*,<sup>130</sup> the United States Courts of Appeals for the Sixth Circuit and the Second Circuit did not find implied assertions to be assertions for hearsay purposes.<sup>131</sup> In both cases the questions of unidentified callers were offered to prove the party on the other end

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124. The advisory committee's note explains:

Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less likely with nonverbal than with assertive verbal conduct.

FED. R. EVID. 801 advisory committee's note. *Id.* Besides sincerity, the other risks of unreliability are memory, perception, and narration. *See supra* notes 45–49 and accompanying text.

125. *See supra* note 110.

126. *See infra* notes 129–157 and accompanying text.

127. *See infra* notes 129–144 and accompanying text.

128. *See infra* notes 145–157 and accompanying text.

129. 565 F.3d 312 (6th Cir. 2009).

130. 53 F.3d 472 (2d Cir. 1995).

131. *See Rodriguez-Lopez*, 565 F.3d at 315 (finding that gleaning an inference from a statement does not implicate the dangers of hearsay); *Headley*, 53 F.2d at 477 (finding that if a question implies a belief that the declarant is speaking with a drug dealer, the hearsay risks are not as intensively implicated as they are in a direct assertion). *But see* *Park v. Huff*, 493 F.2d 923, 927 (5th Cir. 1974) (noting that with an implied assertion, the hearsay dangers are still present and therefore the statement is still hearsay unless there is no possibility that the declarant intended to leave a particular impression).

of the call sold drugs. In *Rodriguez-Lopez*, the unidentified callers requested heroin.<sup>132</sup> The Sixth Circuit reasoned that the requests were not hearsay because they were not assertive speech.<sup>133</sup> The speech was not assertive because the requests were in the form of questions or commands regarding heroin so they could not be proven true or false.<sup>134</sup>

Similarly, in *Headley*, the callers asked, “Are you up? Can I come by? Are you ready?”<sup>135</sup> The Second Circuit held these unidentified caller’s questions were admissible when offered to prove that another party sold drugs because any assertions made were implied and implied assertions do not contain the same risks of insincerity as direct assertions.<sup>136</sup>

Moreover, in *United States v. Jackson*<sup>137</sup> and *United States v. Lewis*,<sup>138</sup> the Tenth Circuit and the Fifth Circuit found implied assertions cannot be hearsay because the declarant does not intend for an implied assertion to be an assertion. In *Jackson*, after the police confiscated a pager from the defendant, the pager received a message containing a phone number. Police called the number, and an anonymous person answered and asked, “Is this Kenny?”<sup>139</sup> The court determined that the anonymous person’s question may have revealed that the person believed Kenny Jackson, the defendant, was in possession of a pager at the time and therefore was the person who would have responded to a pager message.<sup>140</sup> But, the Tenth Circuit found, the question was not an assertion because the anonymous person could not have intended to make any assertion.<sup>141</sup> Without an assertion, a necessary element of hearsay, the question was not hearsay. Similarly in *Lewis*, the Second Circuit addressed whether an unidentified caller’s ques-

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132. *Rodriguez-Lopez*, 565 F.3d at 314.

133. *Id.*

134. *Id.*

135. *Headley*, 53 F.2d at 477.

136. *Id.* See also *United States v. Long*, 905 F.2d 1572, 1579–80 (D.C. Cir. 1990) (finding an unidentified caller’s questions about whether “Keith” “still had any stuff” was not hearsay because any question will likely convey an implied message, and when a declarant does not intend to communicate anything, his sincerity is not in question and therefore the inference derived from the statement is more reliable).

137. 88 F.3d 845 (10th Cir. 1996).

138. 902 F.2d 1176 (5th Cir. 1990).

139. *Jackson*, 88 F.3d at 846.

140. *Id.* at 848.

141. *Id.* Indeed, the court found that almost every question would contain an implicit message, but it is not hearsay unless the declarant intended to convey that implicit message. *Id.*



tions “[d]id you get the stuff?” and “[w]here is dog?” were hearsay.<sup>142</sup> The questions were offered to prove that the defendant was a drug dealer.<sup>143</sup> The court focused on intent in finding that the questions were not hearsay because they did not contain any assertions. The court determined that the caller did not intend to make an assertion that the defendant was a drug dealer.<sup>144</sup>

In addition to many federal courts, state courts with a hearsay definition identical to the federal definition have determined that hearsay cannot exist without intent to assert. In *Hernandez v. State*,<sup>145</sup> for example, the Florida District Court of Appeals addressed whether a name and address on an envelope was hearsay.<sup>146</sup> Florida’s hearsay definition mirrors the federal definition of hearsay.<sup>147</sup> The facts of *Hernandez* are almost identical to the Maryland case *Bernadyn v. State*. In *Hernandez*, the State introduced an envelope with the defendant’s name and address to prove the defendant lived at the stated address.<sup>148</sup> The defendant argued that it was hearsay because the person who addressed the letter necessarily implied that he or she believed the defendant lived at the address.<sup>149</sup> The Florida appellate court disagreed and found that the writing of the name and address was not intended to “communicate [the] thought, idea, or fact” that Hernandez lived at the address.<sup>150</sup> The court stated that any inference that the sender believed the defendant lived at the address did not make the letter hearsay without some form of intent.<sup>151</sup> Because a declarant

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

143. *Id.* at 1178–79.

144. *Id.* at 1179. The court gave little rationale for why the declarant must intend to make an assertion. Instead, it concluded that Rule 801 precluded any other interpretation of assertions. *See id.* (“However, Rule 801, through its definition of statement, forecloses appellants’ argument by removing implied assertions from the coverage of the hearsay rule.” (citations omitted)).

145. 863 So.2d 484 (Fla. Dist. Ct. App. 2004).

146. *Id.* at 486.

147. *See* FLA. STAT. ANN. § 90.801 (West 2011) (“(a) A ‘statement’ is: 1. An oral or written assertion; or 2. Nonverbal conduct of a person if it is intended by the person as an assertion. (b) A ‘declarant’ is a person who makes a statement. (c) ‘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.”).

148. *Hernandez*, 863 So.2d at 486. *Cf.* *Bernadyn v. State*, 390 Md. 1, 4–5, 887 A.2d 602, 603–04 (2005) (explaining that officers seized a medical bill from the defendant’s home and the State argued the bill showed the defendant lived at the address on the bill).

149. *Hernandez*, 863 So.2d at 486. *Cf.* *Bernadyn*, 390 Md. at 8, 887 A.2d at 606 (explaining that the defendant argued that the addressed bill was hearsay because the sender’s conduct was an implied assertion).

150. *Hernandez*, 863 So.2d at 486.

151. *See id.* (“Conduct, such as placing an address on an envelope, ‘offered as evidence that the person acted as he did because of his belief in the existence of the condition

must intend to make an assertion for his or her conduct to be an assertion, the court found the letter was not hearsay.<sup>152</sup>

In *State v. Stevens*,<sup>153</sup> the Court of Appeals of Washington addressed whether a young girl's pleas for the defendant to stop were hearsay.<sup>154</sup> The facts of this case are similar to the Maryland case *Stoddard v. State*. In *Stevens*, the girl said, "Arne, stop. Arne, please don't," during her sleep.<sup>155</sup> The court found that the utterances were not hearsay when offered to prove the defendant sexually abused the girl because the girl could not have intended to convey that the defendant abused her when she talked during her sleep. Indeed, she could not have intended to make any assertion since she was asleep.<sup>156</sup> Because the court found an assertion must be intended to be hearsay, the utterances were not hearsay.<sup>157</sup>

In sum, although implied assertions were considered assertions for the purposes of hearsay at common law, the Federal Rules of Evidence changed the outlook on implied assertions. Most courts eliminated implied assertions from the hearsay definition. Maryland, however, has continued to follow common law and include implied assertions in its hearsay definition.

### III. THE COURT'S REASONING

In *Garner v. State*,<sup>158</sup> the Court of Appeals of Maryland found an unidentified caller's question, "can I get a 40?," was admissible because it did not contain the implied assertion the State offered it to prove, and further because it was not a direct assertion. Judge Mur-

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sought to be proved' is not a statement that falls within the hearsay rule."). The court in *Bernadyn* found the exact opposite. See *Bernadyn*, 390 Md. at 11, 887 A.2d at 608 ("[T]he jury needed to reach two conclusions. It needed to conclude, first, that Bayview Physicians wrote those words because it believed Bernadyn to live at that address, and second, that Bayview Physicians was accurate in that belief . . . the bill was hearsay . . .").

152. *Hernandez*, 863 So.2d at 486.

153. 794 P.2d 38 (Wash. Ct. App. 1990).

154. *Id.* at 43.

155. *Id.* Cf. *Stoddard v. State*, 389 Md. 681, 683, 887 A.2d 564, 565 (2005) (stating that the court was addressing whether a girl's statement, "Is Erik going to get me?" was hearsay).

156. *Stevens*, 794 P.2d at 44. Cf. *Stoddard*, 389 Md. at 703, 887 A.2d at 577 (concluding that a declarant's lack of intent is irrelevant when determining whether the out-of-court utterance was hearsay).

157. *Stevens*, 794 P.2d at 44.

158. 414 Md. 372, 995 A.2d 694 (2010).

phy, writing for the court,<sup>159</sup> began by stating that although Maryland law finds certain implied assertions are hearsay, the Maryland precedent on implied assertions has not addressed (1) whether a “verbal part of an act” is subject to exclusion under hearsay, or (2) whether implied assertions reach “every out-of-court declaration that constitutes circumstantial evidence of the declarant’s state of mind.”<sup>160</sup>

First, with respect to verbal parts of acts, the court explained that under Maryland precedent a telephone call is admissible as non-hearsay when the call is actually an instrumentality of a crime, such as placing bets and, in the present case, requesting drugs.<sup>161</sup> For support, the court reasoned that “[t]elephone calls like the one testified by Trooper Gussoni have been held to be admissible in an unbroken line of state and federal appellate decisions.”<sup>162</sup> The court found that

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159. Judge Adkins, Judge Barbera, Judge Battaglia, and Judge Greene joined Judge Murphy in the majority opinion. Judge Harrell joined the majority as to Part II, dealing with an issue not discussed in this Note.

160. 414 Md. at 381, 995 A.2d at 699. A verbal part of an act explains or gives character to a transaction that might otherwise be ambiguous. *E.g.*, *Cassidy v. State*, 74 Md. App. 1, 13, 536 A.2d 666, 671–72 (1987) (citation omitted). Courts find verbal parts of acts are admissible non-hearsay because they are not offered for the truth of the matter asserted in the out-of-court utterance; whether what the declarant said is true or false is irrelevant if the utterance is a verbal part of an act. *Id.* at 9 n.4, 536 A.2d at 670 n.4 (citing *Moore v. State*, 26 Md. App. 556, 560 n.1, 338 A.2d 344, 346 n.1 (1975)).

161. *Garner*, 414 Md. at 382–84, 995 A.2d at 700–01. The court stated “[t]he making of a wager or the purchase of a drug, legally or illegally, is a form of a contract.” *Id.* at 382, 995 A.2d at 700 (citation omitted). The court used several cases to support its contention that drug requests were verbal acts. First, the court cited *Baum v. State*, 163 Md. 153, 161 A. 244 (1932), where the Maryland Court of Appeals found that the words uttered when a police officer called the defendant’s residence and placed a bet were admissible because they were offered to show that a bet could be made at that residence. *Garner*, 414 Md. at 382–83, 995 A.2d at 700. The court also cited *Courtney v. State*, 187 Md. 1, 48 A.2d 430 (1946). There, an officer was searching a location, answered a telephone call, and the caller placed a bet. The court found the words admissible to show the defendant received bets at the premises. *Garner*, 414 Md. at 383–84, 995 A.2d at 700–01. Finally, the court cited *Little v. State*, 204 Md. 518, 105 A.2d 501 (1954), where the court found the words “I got it up” were admissible to show that a bet was taken on the premises. *Garner*, 414 Md. at 383–84, 995 A.2d at 701. Although the *Garner* court uses the phrases “verbal parts of acts” and “verbal acts” interchangeably, many commentators describe them as two different concepts. Compare MCLAIN, MARYLAND EVIDENCE, §§ 801.7–801.8 (West 2001) (defining verbal act as words necessary to create certain elements of legal claims, and defining verbal parts of acts as words that give character to an otherwise ambiguous act), with *Garner*, 414 Md. at 382–83, 995 A.2d at 700 (finding that bet request and drug request phone calls were verbal acts because these calls are part of an offer in a contract while also finding that bet request and drug request phone calls were verbal acts because they characterized an action), and *id.* at 381, 388, 995 A.2d at 699, 704 (identifying the out-of-court utterance, “can I get a 40?,” as a verbal part of an act and as a verbal act).

162. *Garner*, 414 Md. at 384, 995 A.2d at 701. The court acknowledged that some federal courts exclude the evidence because the evidence is offered as an “implied assertion”

although commentators disagree about why courts admit the calls, commentators believe the calls are admissible nonetheless.<sup>163</sup>

Second, the court, addressing implied assertions, considered another line of cases that held calls, such as the one in the present case, were admissible because the declarant asked a question and therefore did not intend to make an assertion.<sup>164</sup> The court cited jurisdictions that held utterances cannot be assertions unless the declarant intended to assert what the proponent is offering the assertion to prove. In other words, the courts found that without intent to assert, an out-of-court utterance cannot be hearsay.

Turning to the current case, the Court of Appeals found that even though any question can contain an implied assertion, the question “can I get a 40?” only contained the implied assertion “that the caller had the funds to purchase the drugs that he wanted to purchase.”<sup>165</sup> Further, the court concluded that the question was a “verbal act” because it established that Garner possessed a cell phone that a drug buyer called.<sup>166</sup> As such, the unidentified caller’s question was not excluded by the hearsay rule.<sup>167</sup>

In dissent, Chief Judge Bell opined that the out-of-court utterance “can I get a 40?” was, in fact, hearsay under Maryland precedent.<sup>168</sup> Chief Judge Bell contended that the majority’s reasoning was illogical because although the majority acknowledged that (a)

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and those courts find that implied assertions are non-hearsay under the Federal Rules of Evidence. *See id.* at 382 n.3, 995 A.2d at 701 n.3.

163. *Id.* at 384–86, 995 A.2d at 701–02 (citations omitted). Interestingly, the court cited Professor Graham, who argues that although some consider drug calls and bet calls as verbal acts, they are actually offered for the implied assertion that the declarant believed the establishment sold drugs or took bets. *Id.* at 385–86, 995 A.2d at 702 (quoting MICHAEL H. GRAHAM, EVIDENCE, AN INTRODUCTORY PROBLEM APPROACH 81 (2002)).

164. *Id.* at 386–88, 995 A.2d at 702–04. The court cited *United States v. Lewis*, 902 F.2d 1176 (5th Cir. 1990), where the Fifth Circuit found the words “did you get the stuff” and “where is dog” were non-hearsay when offered to prove the defendant sold drugs because a declarant does not intend to assert anything with a question. *Garner*, 414 Md. at 386–87, 995 A.2d at 702–03 (citation omitted). The court also cited *United States v. Rodriguez-Lopez*, 565 F.3d 312 (6th Cir. 2009), where the Sixth Circuit found ten requests to purchase heroin over the phone were admissible because questions and commands are not assertions. *Garner*, 414 Md. at 387–88, 995 A.2d at 703–04. (citing *Rodriguez-Lopez*, 565 F.3d at 314–15 (citing *United States v. Wright*, 343 F.3d 849, 865 (6th Cir. 2003) (“[A] question is typically not hearsay because it does not assert the truth or falsity of a fact.”))); *see also* *United States v. Thomas*, 451 F.3d 543, 548 (8th Cir. 2006) (“Questions and commands generally are not intended assertions, and therefore cannot constitute hearsay.”) (citations omitted)).

165. *Garner*, 414 Md. at 388, 995 A.2d at 704.

166. *Id.*

167. *Id.*

168. *Id.* at 406–14, 995 A.2d at 714–19 (Bell, C.J., dissenting). Judge Harrell joined Chief Judge Bell as to Part I of the dissent, discussing implied assertions.

under Maryland precedent an implied assertion is hearsay and (b) the question at issue contained an implied assertion, the majority arbitrarily found that the out-of-court question impliedly asserted only that the declarant had the funds to purchase the drugs that he wanted but not that Garner was a drug dealer.<sup>169</sup> Thus, according to Chief Judge Bell, the majority ignored the common law definition of assertion discussed in *Stoddard* and *Bernadyn*, which would have required the court to find “can I get a 40?” to be inadmissible hearsay.<sup>170</sup>

In addition to rejecting the majority’s finding that the out-of-court utterance was a verbal act,<sup>171</sup> Chief Judge Bell found the anonymous caller’s question fell squarely within the definition of assertion under Maryland precedent.<sup>172</sup> To come to this conclusion, he first explained that an implied assertion is considered hearsay when the implied assertion is only relevant if the declarant revealed, by implication, that he or she believed in the implied assertion.<sup>173</sup> To explain this rule, Chief Judge Bell discussed the utterances in *Stoddard* and *Bernadyn* and found no difference between the utterances in those cases and the utterance in the instant case. In this case, the State offered the unidentified caller’s question to show Garner was a drug dealer. But, according to Chief Judge Bell, “can I get a 40?” only connects Garner to the crime—intent to distribute cocaine—if first, the caller believed that the owner of the cell phone sold cocaine, and second, if the declarant’s belief is true.<sup>174</sup> “[I]f the declarant, the caller, did not believe those two assumptions to be true, then the State would have no reason to introduce the statement; the statement, in that event, as it relates to the petitioner, simply would be neither

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169. *Id.* at 396–97, 995 A.2d at 708–09.

170. *Id.* at 397, 995 A.2d at 709.

171. *See id.* at 399–406, 995 A.2d at 710–14 (arguing that a verbal act describes actions of an individual and in this case, the words did not describe any action of the defendant).

172. *See id.* at 414, 995 A.2d at 719 (explaining that the state used the utterance to prove an assertion implied in the utterance).

173. *Id.* at 406, 995 A.2d at 714 (citing *Stoddard v. State* 389 Md. 681, 689, 887 A.2d 564, 569 (2005)).

174. *Id.* at 413–14, 995 A.2d at 718–19. As stated, Chief Judge Bell compared the present utterance with Maryland precedent. *See Stoddard*, 389 Md. at 690, 887 A.2d at 569 (finding the utterance “is Erik going to get me?” was only relevant if the declarant had a reason to fear Erik and that reason was that the declarant saw Erik assault a specific person); *Bernadyn v. State*, 390 Md. 1, 11, 887 A.2d 602, 608 (2005) (finding an envelope containing a name and an address was only relevant if first, the addresser of the envelope believed the named person lived at the named address, and second, that the belief was true). Applying the reasoning of *Stoddard* and *Bernadyn*, if the caller did not believe that Garner was the owner of the phone and that he sold cocaine, then his or her question would not be relevant. *Garner*, 414 Md. at 413–14, 995 A.2d at 718–19.

probative nor relevant.”<sup>175</sup> As such, Chief Judge Bell determined that the question contained an implied assertion that the State offered for its truth and therefore the question was inadmissible hearsay under Maryland Rule 5-801.<sup>176</sup>

#### IV. ANALYSIS

In *Garner v. State*, the Court of Appeals held an unidentified caller’s utterance, “can I get a 40?,” was not hearsay in part because it did not contain the implied assertion the State offered it to prove.<sup>177</sup> In so holding, the court failed to properly apply its definition of implied assertion.<sup>178</sup> Instead, the court implicitly applied the federal hearsay definition, which excludes implied assertions.<sup>179</sup> This holding will cause litigants to make inconsistent arguments, judges to make arbitrary rulings, and appellate courts to apply unpredictable standards.<sup>180</sup> The court should have expressly overturned its precedent in *Stoddard v. State* and *Bernadyn v. State* and adopted the federal definition of hearsay—excluding implied assertions—to avoid unpredictability in the application of implied assertion admissibility standards and to prevent the concept of implied assertions from converting every out-of-court utterance into hearsay.<sup>181</sup>

##### A. *The Court of Appeals Failed to Apply Its Precedent Regarding Implied Assertions*

Under Maryland precedent, “where the probative value of words, as offered, depends on the declarant having communicated a factual proposition, the words constitute an ‘assertion’ of that proposition.”<sup>182</sup>

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175. *Garner*, 414 Md. at 414, 995 A.2d at 719.

176. *Id.*

177. *Id.* at 388, 995 A.2d at 704 (majority opinion). The proponent of the out-of-court utterance offered it to prove that Garner was a drug dealer because the declarant believed he was a drug dealer. *Id.* at 376, 995 A.2d at 696. The court determined that the out-of-court utterance only contained the implied assertion that the declarant wanted to purchase drugs and had the funds to do so. *Id.* at 388, 995 A.2d at 704.

178. *See infra* Part IV.A.

179. *See infra* Part IV.B.

180. *See infra* Part IV.B.

181. *See infra* Part IV.C.

182. *Stoddard v. State*, 389 Md. 681, 703, 887 A.2d 564, 577 (2005). This is a typical implied assertion definition. *See, e.g.*, Ted Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. REV. 682, 682–83 (1962) (defining implied assertion as verbal or nonverbal conduct that does not expressly assert the matter it is offered to prove but the conduct implies that the action belies such an assertion); James M. Ulam, Note, *The Hearsay Rule: Are Telephone Calls Intercepted by Police Admissible to Prove the Truth of Matters Impliedly Asserted?*, 11 MISS. C. L. REV. 349, 352 (1991) (“An out-of-court statement is

By finding the unidentified caller's question contained an assertion that it was not offered to prove, the *Garner* court ignored its own precedent. In so doing, the court incorrectly admitted the unidentified caller's question.

In determining that the question, "can I get a 40?," was not hearsay, the Court of Appeals found "the only assertion implied in the anonymous caller's question was the assertion that the caller had the funds to purchase the drugs that he wanted to purchase."<sup>183</sup> This analysis necessarily begins with identifying the implied assertions that the court believes exists in a statement and then asking whether the statement was offered to prove those implied assertions. In contrast, precedent directs the court to start with determining what the utterance was offered to prove and then ask whether what it was offered to prove was a factual proposition the declarant had to have impliedly communicated with his or her words.<sup>184</sup> The Court of Appeals did not attempt to analyze the statement under Maryland's implied assertion definition when it determined that the unidentified caller's question was not hearsay.

Had the court applied the traditional Maryland definition of implied assertion, it would have found the State offered the out-of-court question to prove the truth of an implied assertion. The State offered the unidentified caller's question to show that Garner was a drug dealer, not merely a drug user.<sup>185</sup> The question offered only tends to show that Garner was a drug dealer *if* the caller *believed* Garner sold

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an implied assertion if the trier [of fact] is being asked to infer a fact from the declarant's utterance.").

183. *Garner v. State*, 414 Md. 372, 388, 995 A.2d 694, 704 (2010).

184. *See Bernadyn v. State*, 390 Md. 1, 11 & n.4, 887 A.2d 602, 608 & n.4 (2005) (stressing that whether an out-of-court utterance contained an implied assertion depends on what the proponent offers the evidence to prove). Maryland's approach to implied assertions is the same as the approach of other courts that find implied assertions are hearsay. *Accord, e.g., State v. Dullard*, 668 N.W.2d 585, 595 (Iowa 2003) ("We think the best approach is to evaluate the relevant assertion in the context of the purpose for which the evidence is offered.") (citation omitted); *Mosley v. State*, 141 S.W.3d 816, 830 (Tex. Ct. App. 2004) ("'[T]ruth of the matter asserted' includes any matter explicitly asserted, but also includes within hearsay any matter implied by a statement, if the probative value of the statement *as offered* flows from the declarant's belief as to the matter." (emphasis added) (citation omitted)).

185. *See Garner v. State*, 183 Md. App. 122, 135, 960 A.2d 646, 656 (2008), *aff'd*, 414 Md. 372, 995 A.2d 684 (2010) (quoting the State to show it argued that the caller would not have called Garner and asked for a 40 if Garner was not a drug dealer); *see also Garner*, 414 Md. at 414, 995 A.2d at 719 (Bell, C.J., dissenting) (arguing that the State introduced the statement for a particular purpose: to establish that the person on the phone wanted cocaine, which could be purchased upon request from the defendant, who sold drugs).

drugs.<sup>186</sup> If the caller did not believe Garner sold drugs—for example if the caller had the wrong number, was telling a joke, or was asking for a forty of something other than drugs—then the question would not tend to show that Garner was a drug dealer.<sup>187</sup> Thus, the probative value of the question—showing that Garner was a drug dealer—depends on whether the declarant asked “can I get a 40?” because he believed Garner to be a drug dealer.

In fact, one frequent commentator on the Maryland Rules of Evidence, Lynn McLain, used this type of question as an example of an utterance that would be inadmissible as an implied assertion.<sup>188</sup> Among McLain’s list of inadmissible implied assertions is “did you get the stuff?” when offered to prove the defendant was a drug dealer.<sup>189</sup> There is little difference between the example “did you get the stuff?” and the actual question in *Garner* (“can I get a 40?”). In *Garner*, the question was offered to prove an implied assertion and, in accordance with Maryland precedent, was hearsay.

*B. Because the Court of Appeals Applied the Federal Definition of Assertion, Which Excluded Implied Assertions from Hearsay, It Has Created Contradictory Precedent*

In *Garner*, the Court of Appeals ultimately concluded that the unidentified caller’s question did not contain the implied assertion it was offered to prove.<sup>190</sup> In so holding, the court did not rely on its precedent.<sup>191</sup> Instead, the court cited many federal cases that have found implied assertions are not hearsay.<sup>192</sup> The theory of implied assertions the court relied on is the polar opposite of its own precedent. Two schools of thought exist for dealing with implied assertions. One school, which this Note will call school A, is the common law thinking that implied assertions can be hearsay when the relevance of the declarant’s utterance depends on the declarant communicating the im-

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186. *Cf.* *United States v. Reynolds*, 715 F.2d 99, 103–04 (3d Cir. 1983) (holding the statement “I didn’t tell them anything about you” only tended to show that the defendant participated in the crime if the declarant was making the statement because he knew the defendant participated in the crime).

187. *Cf. id.* at 103 (finding that if the declarant of “I didn’t tell them anything about you” did not believe the defendant was involved in a crime, but made the statement because he actually believed there was nothing to tell, then the statement would not have been relevant).

188. LYNN MCLAIN, MARYLAND RULES OF EVIDENCE 193 (West Group 2d ed. 2002).

189. *Id.*

190. *Garner*, 414 at 388, 995 A.2d at 704.

191. *See supra* Part IV.A.

192. *See infra* Part IV.B.1.



plied assertion. The second school, which this Note will call school *B*, follows the federal rules advisory committee's note that the declarant must have an intent to assert for any assertion to be considered hearsay, which excludes implied assertions because they do not involve intent.<sup>193</sup> Maryland is part of school *A*, but the *Garner* court cited to cases from courts that are part of school *B* to find that the unidentified caller's question was not hearsay. As such, although the Court of Appeals stated that it was analyzing the unidentified caller's question under Maryland's hearsay definition, it in fact assessed the question under the federal standard.<sup>194</sup>

The court did not explicitly overrule its precedent, however, and thus created an incoherent definition of implied assertions. In fact, the court's former implied assertion cases would not be implied assertions under its *Garner* analysis.<sup>195</sup> This ambiguity in the realm of hearsay will create a guessing game among trial judges and litigants, and will cause appellate court judges to make ad hoc decisions regarding hearsay statements.

1. *The Court Followed the Federal Definition of Hearsay in Finding the Unidentified Caller's Question Was Not Hearsay*

The *Garner* court relied on federal court rulings that a declarant must intend to make an assertion for any utterance to be an assertion. For example, the court cited *United States v. Lewis*, in which the Fifth Circuit found the questions "[d]id you get the stuff?" and "[w]here is dog?" were not hearsay because the caller did not intend to make an assertion.<sup>196</sup>

In *Headley v. Tilghman*,<sup>197</sup> another case relied on by the Court of Appeals, the Second Circuit held that the questions "[a]re you up? [c]an I come by? [a]re you ready?" were not hearsay because the assertion that the party on the other line sold drugs was an implied as-

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193. *Compare* Stoddard v. State, 389 Md. 681, 703, 887 A.2d 564, 577 (2005) ("[W]here the probative value of words, as offered, depends on the declarant having communicated a factual proposition, the words constitute an 'assertion' of that proposition."), with FED. R. EVID. 801(a) advisory committee's note ("The key to the definition [of a statement] is that nothing is an assertion unless intended to be one.").

194. See *infra* Part IV.B.1.

195. See *infra* Part IV.B.2.

196. 902 F.2d 1176, 1179 (5th Cir. 1990). In fact, the court actually rejected the argument that the words contained an implied assertion because the implied assertions are not part of the federal definition of hearsay. *Id.*

197. 53 F.3d 472 (2d Cir. 1995).

sertion and therefore not hearsay.<sup>198</sup> The court also relied on *Rodriguez-Lopez*, where the Sixth Circuit found that an unidentified caller's questions asking for heroin were not hearsay because they were not assertive speech.<sup>199</sup> By suggesting that these cases supported its ultimate finding regarding implied assertions, the *Garner* court articulated an unspoken retreat from the common law theory of implied assertions.

The *Garner* court also relied on commentators to support its holding.<sup>200</sup> At least one of these commentators, however, does not support the court's conclusion. Professor Graham reasons that statements where the declarant takes bets can sometimes fall into the residual hearsay exception.<sup>201</sup> Professor Graham argues that calls such as the one in *Garner* are hearsay because they are relevant only when offered to prove the truth of the matter implicitly being asserted by the out-of-court declarant.<sup>202</sup> As an example, Professor Graham explains that if a caller places bets over the phone, that conversation is only relevant if the caller believed he was calling a betting parlor.<sup>203</sup> He criticizes those who find such calls are not being offered for their truth and states that the calls clearly fall into the definition of hearsay.<sup>204</sup> Thus, although Professor Graham may have found that the utterance could fall into a hearsay exception, his finding does not support the conclusion that implied assertions are not hearsay—the conclusion the *Garner* court implies by in part relying on Professor Graham's work.

The court's reliance on federal cases was not relevant to Maryland's standard for whether a statement containing an implied assertion is hearsay. Maryland's definition depends on whether the declarant of an out-of-court utterance believed a fact implied in his or her

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198. *Id.* at 477. Instead, the court claimed the utterances were circumstantial evidence of the speaker's belief. *Id.*

199. 565 F.3d 312, 314–15 (6th Cir. 2009).

200. *Garner v. State*, 414 Md. 372, 384–86, 995 A.2d 694, 701–02 (2010).

201. See GRAHAM, *supra* note 163, at 81 (“As presented such statements also fall within the residual hearsay exception of Rule 807.”).

202. *Id.*

203. *Id.*

204. *Id.*; see also 3 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801.7, at 73–74 (5th ed. 2001) (“The Advisory Committee’s apparent attempted rejection of *Wright v. Doe d. Tatham* is as unfortunate as it is incorrect. When a statement is offered to infer the declarant’s state of mind from which a given fact is inferred in the form of an opinion or otherwise, since the truth of the matter asserted must be assumed in order for the nonasserted inference to be drawn, the statement is properly classified as hearsay under the language of Rule 801(c).” (footnotes omitted)).

statement.<sup>205</sup> The school of thought based on the Federal Advisory Committee's Note asks solely if the declarant intended to make an assertion.<sup>206</sup> Because the *Garner* court relied on the latter standard while purporting to apply the Maryland standard, the current state of Maryland's implied assertion definition is unknown.

2. *The Garner Court's Reasoning Would Overrule Its Previous Implied Assertion Decisions*

In relying on whether the declarant intended to make an assertion and finding that the only implied assertion present in the unidentified caller's statement was that the caller wanted drugs and had the money to pay for them, the Court of Appeals ignored its own precedent. Indeed, if the analysis in *Garner* were applied to Maryland's previous cases that addressed implied assertions, the statements in those cases would not have been labeled hearsay.

For example, in *Stoddard v. State*, the Maryland Court of Appeals found that a girl's utterance "is Erik going to get me?" was hearsay because it was only relevant if the girl impliedly asserted that she saw Stoddard harm another person and because the assertion was untested as to whether the girl was sincere and whether she meant what the State claimed she meant.<sup>207</sup> Had the court applied the analysis it applied in *Garner*, where it determined that the only implied assertion in the unidentified caller's question was that he wanted to and had the money to purchase drugs, it could have simply found that the only implied assertions in the utterance "is Erik going to get me?" are, for instance, that the declarant is scared of Stoddard and wants to be kept away from him.<sup>208</sup> Using the *Garner* court's reasoning, the court could have found that the girl did not intend to assert that she saw Stoddard harm another person,<sup>209</sup> and so the utterance was not hearsay.

Similarly, the Maryland court's holding in *Bernadyn v. State* would not stand under the federal standard for hearsay. In *Bernadyn*, the court found that a letter addressed to the defendant was hearsay because it was only relevant if the addresser believed the defendant lived

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205. *See supra* Part II.C.

206. *See supra* Part II.B.

207. *Stoddard v. State*, 389 Md. 681, 711–12, 887 A.2d 564, 582 (2005).

208. *Cf. Garner v. State*, 414 Md. 372, 388, 995 A.2d 694, 704 (2010) (finding that the out-of-court utterance only contained certain implied assertions).

209. *Cf. id.* at 387, 995 A.2d at 703 (finding that the unknown caller's question was not an assertion after citing a case that found questions are not assertions because the declarant of a question does not intend to make an assertion).

at the written address.<sup>210</sup> Had the court employed the federal standard for defining assertion, as it did in *Garner*, the court could have held that the addresser did not intend to assert that he believed the defendant lived at the stated address, and therefore the addressed letter was not hearsay.

Further, like *Garner's* finding that the caller only impliedly asserted that he wanted to purchase drugs and had the money to do so, the addresser in *Bernadyn* could have been said to have only impliedly asserted that he wanted the defendant to receive the letter or merely that he was instructed to address a standard form letter. As shown through analyzing *Bernadyn* and *Stoddard* under the *Garner* court's reasoning, the Court of Appeals has abandoned its previous standard for determining whether an assertion is hearsay.

### 3. *The Garner Court Holding Will Create Difficulty for Litigants, Trial Court Judges, and Appellate Court Judges*

Lawyers and judges must address the question of hearsay during trials. Trials require quick, persuasive arguments and even faster decisions on the admissibility of evidence. As such, rules of evidence have little value unless lawyers and judges can understand and apply them with relative ease.<sup>211</sup> Without a clear definition of implied assertions, litigators will understandably make inconsistent arguments. Based on the holding in *Garner*, litigators must prepare to argue that implied assertions are hearsay under Maryland law, but that a declarant must intend to make an assertion for it to be hearsay. Because the declarant does not typically intend to make an implied assertion, litigators are being asked to make illogical arguments.

Trial judges may end up applying Maryland's hearsay law arbitrarily. Maryland trial court judges, who have to make quick rulings during trial, need a clear rule to properly decide whether an utterance contains an assertion, expressed or implied, and whether implied assertions contain the dangers of hearsay and therefore should be withheld from the trier of fact.<sup>212</sup> In breaking its consistent use of the common law definition of assertion, the Court of Appeals has left lower courts unable to quickly determine whether a particular assertion is hearsay.

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210. *Bernadyn v. State*, 390 Md. 1, 14, 887 A.2d 602, 609 (2005).

211. *Finman*, *supra* note 182, at 695.

212. *Cf.* Alan D. Hornstein & Nichole G. Mazade, *A Match Made in Maryland: Howard Chasanow and the Law of Evidence*, 60 MD. L. REV. 315, 370 (2001) (discussing how it is almost impossible to run an error-free trial because objections and rulings come "too thick and fast").

Finally, appellate courts will be at a loss for what standard to apply when deciding whether an utterance was offered for an implied assertion and, if so, whether it is hearsay. This became apparent in *Fair v. State*,<sup>213</sup> decided in March 2011, in which the Court of Special Appeals once again confronted implied assertions. The court considered whether the date on a paycheck was hearsay.<sup>214</sup> The court stated that to follow the *Garner* precedent, it needed to look to whether the paycheck contained any relevant implied assertions.<sup>215</sup> The court decided that the only assertions the paycheck implied were that the city owed, or believed it owed, a named employee wages for a period worked, and that the Payroll Division had, or believed it had, the funds in its account to cover the check for those wages.<sup>216</sup> After determining what implied assertions were contained in the paycheck, the court indicated that because the paycheck was not offered to prove the truth of any of these implied assertions, the paycheck was not hearsay.<sup>217</sup>

This holding does not follow the common law standard for implied assertions, which requires the court to look at the probative value of the statement (what the proponent offered the statement to prove).<sup>218</sup> Instead the court goes backward, as the *Garner* court did, and merely states some implied assertions that could be present in the statement and then dismisses them because the proponent of the paycheck did not offer the paycheck to prove those implied assertions.<sup>219</sup> This case demonstrates the Court of Appeals has created conflicting precedent that will necessarily cause inconsistent arguments by litigants, arbitrary rulings by trial judges, and unsound holdings by appellate judges.

*C. The Court of Appeals Should Have Acknowledged Its Adoption of the Federal Definition of Hearsay to Stop the Unpredictability in the Application of Implied Assertion Admissibility Standards and to*

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213. 198 Md. App. 1, 16 A.3d 211 (2011).

214. *Id.* at 13, 16 A.3d at 218. The Mayor and City Council of Baltimore's Central Payroll Division issued the check to the appellant. *Id.* The pay period was June 18, 2007, through June 24, 2007. *Id.* at 7, 16 A.3d at 214.

215. *See id.* at 38, 16 A.3d at 232 (“[W]e recognize that the *Garner* Court also considered whether, by its question, the anonymous caller made an implied assertion.”).

216. *Id.*

217. *Id.*, 16 A.3d at 232–33.

218. *See supra* note 80 and accompanying text (stating Maryland's standard for determining whether a statement contains an implied assertion that is offered for its truth).

219. *Cf. supra* notes 183–184 and accompanying text.

*Prevent Implied Assertions from Eventually Swallowing the Hearsay Rule*

After the passage of the Federal Rules of Evidence, a majority of federal and state courts moved into a school of thought that implied assertions are no longer hearsay.<sup>220</sup> Although Maryland claims to continue to hold implied assertions are hearsay, it has implicitly adopted the majority rule.<sup>221</sup> To stop the inconsistent interpretation of the term assertion, the Court of Appeals should have acknowledged this adoption<sup>222</sup> because a narrower definition of assertion provides a clear rule and prevents the concept of implied assertions from swallowing the hearsay rule.<sup>223</sup>

*1. To Avoid Inconsistent Interpretations of What Constitutes an Implied Assertion, the Court of Appeals Should Have Formally Found That Implied Assertions Were No Longer Hearsay*

Even though the Maryland Court of Appeals claimed that implied assertions fell under the ambit of hearsay in *Stoddard v. State* and *Bernadyn v. State*,<sup>224</sup> the Maryland Court of Special Appeals immediately struggled to interpret the scope of implied assertions in *Fields v. State*.<sup>225</sup> Further, in declining to address the issue when the opportunity arose in *Fields*, the Court of Appeals seems to have acknowledged the difficulty in determining when an utterance contains an implied assertion and if that assertion is hearsay.<sup>226</sup> To avoid perpetuating this confusion, the *Garner* court should have formally adopted the federal definition of assertion—eliminating implied assertions from hearsay—to create a workable standard for assertion that does not invite unpredictable application.<sup>227</sup>

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220. See *supra* Part II.C.2.

221. See *supra* Part IV.B.1.

222. See *infra* Part IV.C.1.

223. See *intra* Part IV.C.2.

224. See *Stoddard v. State*, 389 Md. 681, 703, 887 A.2d 565, 577 (2005) (finding that an implied assertion is not excluded from the hearsay rule); *Bernadyn v. State*, 390 Md. 1, 11, 887 A.2d 602, 608 (2005) (affirming and applying the *Stoddard* court's hearsay definition).

225. 168 Md. App. 22, 36, 895 A.2d 339, 347 (2006), *aff'd*, 395 Md. 758, 912 A.2d 637 (2006) (creating a distinction between an implied assertion and using words as circumstantial evidence).

226. See *Fields v. State*, 395 Md. 758, 764, 912 A.2d 637, 640 (2006) (deciding not to address whether the name on the bowling alley screen was an implied assertion because any error finding that it was not an implied assertion was "most certainly" harmless).

227. See FED. R. EVID. 801(a) advisory committee's note (explaining that utterances are only assertions if the declarant intended to make an assertion); see also *supra* Part II.C.

Despite that many federal and state courts have found that implied assertions are no longer hearsay after the adoption of the Federal Rules of Evidence,<sup>228</sup> the Maryland court held steadfastly to implied assertions. In *Stoddard v. State*, the Court of Appeals stated:

We conclude that ... out-of-court words offered for the truth of unintentional implications are not different substantially from out-of-court words offered for the truth of intentional communications. The declarant's lack of intent to communicate the implied proposition does not increase the reliability of the declarant's words in a degree sufficient to justify exemption from the hearsay rule.<sup>229</sup>

In *Bernadyn v. State*, the Court of Appeals affirmed *Stoddard* and held that if the proponent of evidence offers it to prove something the declarant had to believe, but did not actually assert, then the statement is hearsay.<sup>230</sup>

Courts immediately applied the holdings in *Stoddard* and *Bernadyn* unpredictably. Indeed, less than a year after *Bernadyn*, in *Fields v. State*, the Maryland Court of Special Appeals, purporting to apply *Stoddard* and *Bernadyn*, determined that although the probative value of an out-of-court written name depended on whether it showed the defendant was present at the location where someone wrote the defendant's name, it was not hearsay.<sup>231</sup> According to the court, the name was merely circumstantial evidence of the implied fact.<sup>232</sup> Although the Court of Appeals granted certiorari for a second time, it decided not to decide the issue and instead found the error was harmless.<sup>233</sup> This arguably reveals the Court of Appeals' uneasiness regarding implied assertions.

The confusion continued four years later, in the lower court decision in *Garner v. State*. There, the Court of Special Appeals stated that the Court of Appeals' failure to address the implied assertion in *Fields* was a sign that the Court of Appeals did not wish to extend *Stoddard* and *Bernadyn* beyond their literal holdings.<sup>234</sup> The court stated

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228. *E.g.*, *United States v. Rodriguez-Lopez*, 565 F.3d 312, 315 (6th Cir. 2009); *United States v. Jackson*, 88 F.3d 845, 848 (10th Cir. 1996); *Hernandez v. State*, 863 So.2d 484, 486 (Fla. Dist. Ct. App. 2004); *State v. Stevens*, 794 P.2d 38, 44 (Wash. Ct. App. 1990).

229. *Stoddard v. State*, 389 Md. 681, 703, 887 A.2d 564, 577 (2005).

230. *Bernadyn v. State*, 390 Md. 1, 11 887 A.2d 602, 608 (2005).

231. *Fields v. State*, 168 Md. App. 22, 38, 895 A.2d 339, 348 (2006).

232. *Id.*

233. *Fields v. State*, 395 Md. 758, 764, 912 A.2d 637, 640 (2006).

234. *Garner v. State*, 183 Md. App. 122, 150, 960 A.2d 649, 665 (2008), *aff'd*, 414 Md. 372, 995 A.2d 684 (2010) ("We would have to be blind not to conclude that something was in ferment behind the scenes; and that it was something other than a ringing endorsement

that an expansionist tide produced those two opinions. And further, the court stated that it had to “read the tea leaves” to determine whether the out-of-court question at hand was hearsay.<sup>235</sup> Turning away from the decision in *Stoddard* and *Bernadyn*, the Court of Special Appeals found the question, “can I get a 40?,” was not hearsay, in part, by relying on courts that followed the school of thought that excludes implied assertions from hearsay.<sup>236</sup>

Finally, now that the Court of Appeals has decided *Garner*, the unpredictability continues. In *Fair v. State*, decided less than a year after *Garner*, the Court of Special Appeals did not address intent of the declarant or even discuss the probative value of an out-of-court paycheck or what the proponent offered it to prove, merely finding that the paycheck contained two implied assertions but was not hearsay because it was not offered to prove those assertions.<sup>237</sup>

The Maryland courts’ different explanations of implied assertions over the last seven years cannot be reconciled. These inconsistencies will continue until the Court of Appeals provides a clear standard for determining whether an implied assertion is hearsay.

2. *Excluding Implied Assertions from Hearsay Would Have Ensured That the Trier of Fact Accounted for Reliable Evidence and Every Out-of-Court Utterance Could Not Be Deemed an Implied Assertion*

Instead of trying to arbitrarily limit the scope of implied assertions, the *Garner* court should have held that implied assertions were no longer hearsay under Maryland law. Such a holding would have solved the many problems inherent in finding implied assertions can be hearsay. Finding that implied assertions offered for their truth are hearsay severely restricts the information available to the trier of fact.<sup>238</sup> Further, an objective line cannot be drawn between an out-of-court utterance that contains the implied assertion it was offered to

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of *Stoddard* and *Bernadyn*. Perhaps the energy that fueled the *Stoddard* and *Bernadyn* decisions a year ago has to some greater or lesser extent cooled.”).

235. *Id.*

236. *Id.* at 136–45, 960 A.2d at 656–63. The court cited several cases, *e.g.*, *United States v. Long*, 905 F.2d 1572, 1579–80 (D.C. Cir. 1990) (holding that an unidentified caller’s question regarding drugs was not hearsay because the caller did not intend to make an assertion); *United States v. Lewis*, 902 F.2d 1176, 1179 (5th Cir. 1990) (same).

237. 198 Md. App. 1, 38, 16 A.3d 211, 232 (2011). *Cf.* *Bernadyn v. State*, 390 Md. 1, 10–11, 887 A.2d 602, 607–08 (2005) (explaining that an utterance is hearsay if the probative value of the utterance is an assertion present in the utterance and applying that logic to specific facts).

238. *See infra* Part IV.C.2.a.



prove and one that does not. If no line can be drawn, then implied assertions could ultimately encompass all out-of-court statements.<sup>239</sup>

*a. The Trier of Fact Should Be Able to Consider Implied Assertions*

The trier of fact should be able to consider implied assertions because they are more reliable than hearsay and do not contain the same risks as hearsay. To be fully informed, the trier of fact must have liberal access to all reliable evidence.<sup>240</sup> As such, courts should only exclude out-of-court statements if they pose all four risks of unreliability: memory, perception, narration, and sincerity.<sup>241</sup> Implied assertions do not pose the last risk, sincerity, because a declarant cannot fabricate a statement he did not intend to make.<sup>242</sup> For this reason, many courts find implied assertions to be more reliable than express assertions.<sup>243</sup> As one scholar has stated, “In the case of non-assertive acts, the actor by definition does not intend to make an assertion, meaning that the risk of insincerity is substantially diminished. The actor is at least not trying to lie.”<sup>244</sup>

For example, in *Garner* the State offered the question “can I get a 40?” to prove that the defendant sold drugs.<sup>245</sup> The caller who made that statement could not have fabricated the statement that the de-

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239. See *infra* Part IV.C.2.b.

240. MD. R. 5-102 (“The rules in this Title shall be construed to secure fairness in administration, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”).

241. See *Williamson v. United States*, 512 U.S. 594, 598 (1994). See also MD. R. 5-801(c) (“‘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.”).

242. Paul Kirgis, *Meaning, Intention, and the Hearsay Rule*, 43 WM. & MARY L. REV. 275, 285 (2001) (“[E]vidence that does not implicate the sincerity of an out-of-court declarant is not hearsay.”). But see Paul R. Rice, *Should Unintended Implications of Speech Be Considered Hearsay? The Assertive/Nonassertive Distinction Under Rule 801(a) of the Federal Rules of Evidence*, 65 TEMP. L. REV. 529, 534 (1992) (“It is illogical to conclude that the question of sincerity is eliminated and that the problem of unreliability is reduced for unintended implications of speech if that speech might have been insincere in the first instance, relative to the direct message intentionally communicated.”).

243. See, e.g., *Headley v. Tilghman* 53 F.3d 472, 477 (2d Cir. 1995) (“An assumption has a fair claim to be treated as non-hearsay since the attendant risks are not as intensively implicated as when the idea is directly enunciated in a statement.”); *United States v. Long*, 905 F.2d 1572, 1580 (D.C. Cir. 1990) (“When a declarant does not intend to communicate anything, however, his sincerity is not in question and the need for cross-examination is sharply diminished. Thus, an unintentional message is presumptively more reliable.”).

244. STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 801.02[1][c] at 801–15 (9th ed. 2006).

245. *Garner v. State*, 414 Md. 372, 376, 995 A.2d 694, 696–97 (2010).

fendant sold drugs because he never made that statement.<sup>246</sup> Because little risk of insincerity exists in this type of situation, and because the trier of fact needs to have liberal access to reliable evidence, the trier of fact should be able to consider implied assertions as evidence.

*b. The Concept of Implied Assertions Could Swallow the Hearsay Rule*

In addition to ensuring the trier of fact could consider relevant and reliable evidence, the Court of Appeals also should have explicitly excluded implied assertions from hearsay because there is no way to stop the concept from encompassing all out-of-court utterances.<sup>247</sup> The Court of Appeals even pointed out the ability of the concept of implied assertion to swallow the hearsay rule in *Garner*.<sup>248</sup> Yet, under Maryland precedent, a court is supposed to find that an utterance or other act is hearsay if an assertion, however attenuated, could be implied from the utterance or act.<sup>249</sup>

Essentially, implied assertions could encompass all out-of-court utterances because no person can reasonably distinguish offering an utterance for an implied assertion from offering it for another reason. Indeed, whether certain conduct conceivably could produce an implied assertion is subjective.<sup>250</sup> The term implied assertion, when the declarant does not intend to communicate, essentially means evidence regardless of communicative words.<sup>251</sup>

For instance, a judge would determine that an ordinary letter is an implied assertion that its recipient is competent under the same reasoning he would use to determine a cloudy sky was an implied assertion that it would likely rain.<sup>252</sup> No difference between non-communicative conduct and communicative conduct exists unless the

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246. *Cf. Long*, 905 F.2d at 1580 (“Long has not provided any evidence to suggest that the caller, through her questions, intended to assert that he was involved in drug dealing.”).

247. *See infra* text accompanying notes 250–258.

248. *Garner*, 414 Md. at 388, 995 A.2d at 704 (explaining that almost any question contains an implied assertion).

249. *Fields v. State*, 168 Md. App. 22, 32, 895 A.2d 339, 345 (2006), *aff'd*, 395 Md. 758, 912 A.2d 637 (2006).

250. *Stoddard v. State*, 389 Md. 681, 737, 887 A.2d 564, 597 (Wilner, J., concurring) (explaining that all conduct could arguably be an implied assertion and how the implied assertion doctrine is becoming entwined with circumstantial evidence and state of mind).

251. *See* Christopher B. Mueller, *Post Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 418 n.153 (1992) (finding implied assertion “divorces” the word assertion from normal usage and changes it into evidence).

252. *Id.*

judge takes intent to express or communicate into account.<sup>253</sup> Since implied assertions do not account for communicative intent, they could encompass all verbal and non-verbal conduct.<sup>254</sup> In turn, there could be no end to what could be considered hearsay.<sup>255</sup>

That almost every out-of-court utterance could be said to contain any inference it is offered to prove makes it difficult for judges and litigants to limit the scope of implied assertions. As the D.C. Circuit has noted, “It is difficult to imagine any question, or for that matter any act, that does not in some way convey an implicit message.”<sup>256</sup> In *Garner*, the Court of Special Appeals acknowledged, “[E]very utterance can arguably be deemed to be an implied assertion of the thing it is offered to prove.”<sup>257</sup> And the Court of Appeals in *Garner* even stated that every question may contain an implied assertion.<sup>258</sup>

In sum, courts should not consider all out-of-court utterances hearsay merely because the proponent of the utterances uses them to support a material inference.<sup>259</sup> The drafters of the rules of evidences and the courts likely do not wish to deem every out-of-court utterance inadmissible. As such, to remain consistent with the purpose of the hearsay rule, and to avoid confusion among judges and litigants, the Court of Appeals should have expressly acknowledged that implied assertions were no longer hearsay under the Maryland Rules of Evidence.

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253. *Id.*

254. See DAVID F. BINDER, HEARSAY HANDBOOK § 1.10 at 1–17 (4th ed. 2001) (explaining that any conduct could imply an assertion and giving the example of a person fleeing a scene, impliedly asserting that they did something wrong). Typically, this fleeing would be mere circumstantial evidence that the person fleeing committed the murder. *Id.* As seen in this example, almost identical evidence currently can be deemed hearsay in some courts and circumstantial evidence in other courts. Compare *Headley v. Tilghman*, 53 F.3d 472, 477 (2d Cir. 1995) (holding that questions from an unidentified caller, “Are you up? Can I come by? Are you ready?,” were not admitted for their truth but as circumstantial evidence that the defendant used his beeper to receive requests for drugs), with *Mosley v. State*, 141 S.W.3d 816, 829–31 (Tex. Ct. App. 2004) (holding that the words, “Well, I can’t watch them all the time” were hearsay when offered to prove the truth of the declarant’s implied belief that her husband had sexually assaulted their granddaughter).

255. BINDER, *supra* note 254, at 1–17.

256. *United States v. Long*, 905 F.2d 1572, 1580 (D.C. Cir. 1990).

257. *Garner v. State*, 183 Md. App. 122, 145, 960 A.2d 646, 662 (2008), *aff’d*, 414 Md. 372, 995 A.2d 684 (2010).

258. *Garner v. State*, 414 Md. 372, 388, 995 A.2d 694, 704 (2010).

259. *United States v. Rodriguez-Lopez*, 565 F.3d 312, 315 (6th Cir. 2009).

## V. CONCLUSION

In *Garner v. State*, the Court of Appeals of Maryland addressed the admissibility of a question asked out-of-court that was offered to prove that a person sold drugs.<sup>260</sup> The court held the question admissible pursuant to Maryland's hearsay definition, in part because the question did not contain the implied assertion that the person sold drugs.<sup>261</sup> In so holding, the court failed to apply its precedent regarding implied assertions<sup>262</sup> and substituted the definition of assertion used by a majority of federal and state courts.<sup>263</sup> This unspoken adoption creates conflicting precedent and will necessarily cause inconsistent arguments by litigants, ad hoc rulings by trial judges, and unsound holdings by appellate judges.<sup>264</sup> The court could have avoided this conflicting precedent and stopped implied assertions from swallowing the hearsay rule by officially embracing the federal definition of assertion and ending Maryland's struggle with implied assertions.<sup>265</sup>

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260. 414 Md. 372, 374, 995 A.2d 694, 695 (2010).

261. *Id.* at 388, 995 A.2d at 704.

262. *See supra* Part IV.A.

263. *See supra* Part IV.B.1.

264. *See supra* Part IV.B.3.

265. *See supra* Part IV.C.