The original documents are located in Box 31, folder "10/16/75 S1549 To Amend the Federal Rules of Evidence and for Other Purposes" of the White House Records Office: Legislation Case Files at the Gerald R. Ford Presidential Library.

Signed 10/16

APPROVED
OCT 16 1975

THE WHITE HOUSE

WASHINGTON

October 14, 1975

ACTION

Last Day: October 20

Posted 10/17

To Archives 10/17

MEMORANDUM FOR THE PRESIDENT

FROM: JIM CANNON

SUBJECT: S. 1549 - To Amend the Federal Rules of Evidence and for Other Purposes

Attached for your consideration is S. 1549, sponsored by Senators Hart, Hruska and McClellan, which would permit prior statements of identification made by witnesses, who later testify under oath in a trial or hearing, to be admitted in evidence.

A discussion of the enrolled bill is provided in OMB's enrolled bill report at Tab A.

OMB, Max Friedersdorf, Counsel's Office (Lazarus) and I recommend approval of the enrolled bill.

RECOMMENDATION

That you sign S. 1549 at Tab B.

A

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OCT 10 1975

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 1549 - To amend the Federal Rules of Evidence and for other purposes
Sponsors - Sen. Hart (D) Michigan, Sen. Hruska (R) Nebraska and Sen. McClellan (D) Arkansas

Last Day for Action

October 20, 1975 - Monday

Purpose

Permit prior statements of identification made by witnesses, who later testify under oath in a trial or hearing, to be admitted in evidence.

Agency Recommendations

Office of Management and Budget	Approval
Department of Justice	Approval
Administrative Office of the U.S. Courts	Approval

Discussion

The enrolled bill would amend the definitions of "hearsay" in the Federal Rules of Evidence, which took effect July 1, 1975, to make clear that nonsuggestive lineup, photographic and other identification, made in compliance with the Constitution, are admissible in evidence. The basic reason for a non-hearsay classification of such statements is that prior identifications are commonly made soon after the offense. Consequently, they are inherently more reliable than later in-court statements, and, therefore, would provide greater fairness to both the prosecution and the defendant in a criminal case.

The enrolled bill's amending provision was originally contained in the Federal Rules of Evidence, as approved by the Judicial Conference of the United States and promulgated by the Supreme Court. It was later deleted in conference by the 93rd Congress prior to passage of H.R. 5463, which codified the Rules, because of concern that a conviction could be based solely upon such unsworn, out-of-court testimony. The enrolled bill overrides this concern as unwarranted and restores this provision on the basis that: (1) this exception to the hearsay rule addresses the admissibility of evidence and not the sufficiency of evidence to prove guilt; (2) the Constitution places limits on the admissibility of prior identifications, requiring that they be nonsuggestive and not conducive to mistaken identities. Stovall v. Denno, 388 U.S. 293 (1967); Foster v. California, 394 U.S. 440 (1969); and (3) the prior identification is admissible only when that witness testifies at trial and is subject to cross-examination. (California v. Green, 399 U.S. 149 (1970).

James M. Frey
Assistant Director
for Legislative Reference

Enclosures

B

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 604

Date: October 10 Time: 730pm

FOR ACTION: Dick Parsons
Ken Lazarus
Max Friedersdorf

cc (for information): Jim Cavanaugh
Jack Marsh
Warren Hendriks

FROM THE STAFF SECRETARY

DUE: Date: Tuesday, October 14 Time: noon

SUBJECT:

S. 1549 - To amend the Federal rules of Evidence

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

____ For Your Comments ____ Draft Remarks

REMARKS:

Please return to Judy Johnston, Ground Floor West Wing

Recommend approval as soon as possible. Justice Department anticipates a need for this change in several upcoming cases. Kindly advise when the Enrolled Bill is signed.

Ken Lazarus 10/13/75

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

To Cavanaugh 10.10.75 RD

OCT 10 1975

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 1549 - To amend the Federal Rules of Evidence and for other purposes
Sponsors - Sen. Hart (D) Michigan, Sen. Hruska (R) Nebraska and Sen. McClellan (D) Arkansas

Last Day for Action

October 20, 1975 - Monday

Purpose

Permit prior statements of identification made by witnesses, who later testify under oath in a trial or hearing, to be admitted in evidence.

Agency Recommendations

Office of Management and Budget	Approval
Department of Justice	Approval
Administrative Office of the U.S. Courts	Approval

Discussion

The enrolled bill would amend the definitions of "hearsay" in the Federal Rules of Evidence, which took effect July 1, 1975, to make clear that nonsuggestive lineup, photographic and other identification, made in compliance with the Constitution, are admissible in evidence. The basic reason for a non-hearsay classification of such statements is that prior identifications are commonly made soon after the offense. Consequently, they are inherently more reliable than later in-court statements, and, therefore, would provide greater fairness to both the prosecution and the defendant in a criminal case.

The enrolled bill's amending provision was originally contained in the Federal Rules of Evidence, as approved by the Judicial Conference of the United States and promulgated by the Supreme Court. It was later deleted in conference by the 93rd Congress prior to passage of H.R. 5463, which codified the Rules, because of concern that a conviction could be based solely upon such unsworn, out-of-court testimony. The enrolled bill overrides this concern as unwarranted and restores this provision on the basis that: (1) this exception to the hearsay rule addresses the admissibility of evidence and not the sufficiency of evidence to prove guilt; (2) the Constitution places limits on the admissibility of prior identifications, requiring that they be nonsuggestive and not conducive to mistaken identities. Stovall v. Denno, 388 U.S. 293 (1967); Foster v. California, 394 U.S. 440 (1969); and (3) the prior identification is admissible only when that witness testifies at trial and is subject to cross-examination. (California v. Green, 399 U.S. 149 (1970).

(Signed) James M. Frey

Assistant Director
for Legislative Reference

Enclosures

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 604

Date: October 10 Time: 730pm

FOR ACTION: Dick Parsons
Ken Lazarus
Max Friedersdorf

cc (for information): Jim Cavanaugh
Jack Marsh
Warren Hendriks

FROM THE STAFF SECRETARY

DUE: Date: Tuesday, October 14 Time: noon

SUBJECT:

S. 1549 - To amend the Federal rules of Evidence

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

____ For Your Comments ____ Draft Remarks

REMARKS:

Please return to Judy Johnston, Ground Floor West Wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

K. R. COLE, JR.
For the President

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

October 10, 1975

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Lynn:

In compliance with your request, I have examined a facsimile of the enrolled bill S. 1549 to amend Rule 801(d)(1)(c) of the Federal Rules of Evidence.

The Federal Rules of Evidence (P.L. 93-595) went into effect on July 1, 1975. Omitted from the Rules as enacted was proposed Rule 801(d)(1)(c), which had been recommended by the Judicial Conference of the United States and submitted to Congress by the Supreme Court. The Rule as proposed would have codified current federal decisions permitting the introduction as substantive evidence of a witness's prior statements of identification of a defendant, such as those made during a lineup, photographic display, or on-the-scene confrontation. See, e.g., Clemons v. United States, 408 F.2d 1230 (D.C. Cir. 1968), cert. denied, 394 U.S. 964 (1969). The deletion of the Rule by Congress portended grave problems in the not infrequent situation where a witness who was once certain of his identification is unable to positively identify a defendant because of the passage of time, the changed appearance of the defendant, intimidation, or any other reason.

S. 1549 would restore Rule 801(d)(1)(c) to the Federal Rules of Evidence. The restoration promises to be of significant benefit particularly in robbery offenses where the issue of identification is often critical. The Department of Justice recommends Executive approval of this bill.

Sincerely,

Michael M. Uhlmann

Michael M. Uhlmann

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

ROWLAND F. KIRKS
DIRECTOR

WILLIAM E. FOLEY
DEPUTY DIRECTOR

October 8, 1975

Mr. James M. Frey
Assistant Director
for Legislative Reference
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. Frey:

Reference is made to your enrolled bill request of August 8, 1975 relating to S. 1549 to amend the Federal Rules of Evidence.

Inasmuch as the clause restored to the Federal Rules of Evidence by virtue of S. 1549 has previously been approved by the Judicial Conference of the United States and promulgated by the Supreme Court of the United States, Executive approval is recommended.

Sincerely,

William E. Foley
Deputy Director

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OCT 10 1975

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 1549 - To amend the Federal Rules of Evidence and for other purposes
Sponsors - Sen. Hart (D) Michigan, Sen. Hruska (R) Nebraska and Sen. McClellan (D) Arkansas

Last Day for Action

October 20, 1975 - Monday

Purpose

Permit prior statements of identification made by witnesses, who later testify under oath in a trial or hearing, to be admitted in evidence.

Agency Recommendations

Office of Management and Budget	Approval
Department of Justice	Approval
Administrative Office of the U.S. Courts	Approval

Discussion

The enrolled bill would amend the definitions of "hearsay" in the Federal Rules of Evidence, which took effect July 1, 1975, to make clear that nonsuggestive lineup, photographic and other identification, made in compliance with the Constitution, are admissible in evidence. The basic reason for a non-hearsay classification of such statements is that prior identifications are commonly made soon after the offense. Consequently, they are inherently more reliable than later in-court statements, and, therefore, would provide greater fairness to both the prosecution and the defendant in a criminal case.

The enrolled bill's amending provision was originally contained in the Federal Rules of Evidence, as approved by the Judicial Conference of the United States and promulgated by the Supreme Court. It was later deleted in conference by the 93rd Congress prior to passage of H.R. 5463, which codified the Rules, because of concern that a conviction could be based solely upon such unsworn, out-of-court testimony. The enrolled bill overrides this concern as unwarranted and restores this provision on the basis that: (1) this exception to the hearsay rule addresses the admissibility of evidence and not the sufficiency of evidence to prove guilt; (2) the Constitution places limits on the admissibility of prior identifications, requiring that they be nonsuggestive and not conducive to mistaken identities. Stovall v. Denno, 388 U.S. 293 (1967); Foster v. California, 394 U.S. 440 (1969); and (3) the prior identification is admissible only when that witness testifies at trial and is subject to cross-examination. (California v. Green, 399 U.S. 149 (1970).

(Signed) James M. Frey

Assistant Director
for Legislative Reference

Enclosures

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 604

Date: October 10 Time: 730pm

FOR ACTION: Dick Parsons
Ken Lazarus
Max Friedersdorf

cc (for information): Jim Cavanaugh
Jack Marsh
Warren Hendriks

FROM THE STAFF SECRETARY

DUE: Date: Tuesday, October 14 Time: noon

SUBJECT:

S. 1549 - To amend the Federal rules of Evidence

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

____ For Your Comments ____ Draft Remarks

REMARKS: Approve. RLP

Please return to Judy Johnston, Ground Floor West Wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

THE WHITE HOUSE

WASHINGTON

October 13, 1975

MEMORANDUM FOR: JIM CAVANAUGH

FROM: MAX L. FRIEDERSDORF M.L.F.

SUBJECT: S. 1549 - To amend the Federal rules of Evidence

The Office of Legislative Affairs concurs with the agencies that the subject bill be signed.

Attachments

Calendar No. 196

94TH CONGRESS
1st Session

SENATE

REPORT
No. 94-199

AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

JUNE 18 (legislative day, JUNE 6), 1975.—Ordered to be printed

Mr. PHILIP A. HART, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1549]

The Committee on the Judiciary, to which was referred the bill (S. 1549) to amend the Federal Rules of Evidence for certain courts and proceedings, having considered the same, reports favorably thereon and recommends that the bill do pass.

PURPOSE

The purpose of this legislation is to amend the Federal Rules of Evidence to make clear that nonsuggestive lineup, photographic and other identifications, made in compliance with the Constitution, are admissible in evidence.

STATEMENT

The Federal Rules of Evidence, as submitted by the Supreme Court and passed by the House of Representatives, included the following provision in Rule 801(d)(1)(C):

> A statement is not hearsay if * * * the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * *one of identification of a person made after perceiving him.* [Emphasis supplied.]

A similar provision was contained in the Preliminary Draft of the Proposed Rules (March 1969), the Revised Draft (March 1971), the Judicial Conference Proposed Draft, and the Supreme Court Draft (November 1972).

Senator Philip A. Hart (for himself and Senators Hruska and McClellan) introduced S. 1549 on April 29, 1975, to add a new subparagraph (d)(1) to Rule 801, Definitions, of Article VIII (Hearsay).

The purpose of the provision was to make clear, in line with the recent law in the area, that nonsuggestive lineup, photographic and other identifications are not hearsay and therefore are admissible. In the lineup case of *Gilbert* v. *California*. 388 U.S. 263, 272 n. 3 (1967), the Supreme Court, noting the split of authority in admitting prior out-of-court identifications, stated, "The recent trend, however, is to admit the prior identification under the exception [to the hearsay rule] that admits as substantive evidence a prior communication by a witness who is available for cross-examination at the trial." And the Federal Courts of Appeals have generally admitted these identifications. See, e.g., *Clemons* v. *United States*, 408 F. 2d 1230 (D.C. Cir. 1968) (*en banc*), *cert. denied*, 394, U.S. 964 (1969); *United States* v. *Miller*, 381 F. 2d 529, 538 (2d Cir. 1967) (Friendly, J.); *Edison* v. *United States*, 272 F. 2d 684, 686 (10th Cir. 1959). See also 4 *Wigmore, Evidence*, Sec. 1130 (Chadbourn rev. 1972) which strongly supports admissibility of prior identifications. Additional authority is collected in Rothstein, *Understanding the New Federal Rules of Evidence*, pp. 385–86, 390, and 669–70 (1975 Supplement).

In the course of processing the Rules of Evidence in the final weeks of the 93d Congress, the provision excluding such statements of identification from the hearsay category was deleted. Although there was no suggestion in the committee report that prior identifications are not probative, concern was there expressed that a conviction could be based upon such unsworn, out-of-court testimony. Upon further reflection, that concern appears misdirected. First, this exception is addressed to the "admissibility" of evidence and not to the "sufficiency" of evidence to prove guilt. Secondly, except for the former testimony exception to the hearsay exclusion, all hearsay exceptions allow into evidence statements which may not have been made under oath. Moreover, under this rule, unlike a significant majority of the hearsay exceptions, the prior identification is admissible only when the person who made it testifies at trial and is subject to cross-examination. This assures that if any discrepancy occurs between the witness' in-court and out-of-court testimony, the opportunity is available to probe, with the witness under oath, the reasons for that discrepancy so that the trier of fact might determine which statement is to be believed.

Upon reflection, then, it appears the rule is desirable. Since these identifications take place reasonably soon after an offense has been committed, the witness' observations are still fresh in his mind. The identification occurs before his recollection has been dimmed by the passage of time. Equally as important, it also takes place before the defendant or some other party has had the opportunity, through bribe or threat, to influence the witness to change his mind.

Both experience and psychological studies suggest that identifications consisting of nonsuggestive lineups, photographic spreads, or similar identifications, made reasonably soon after the offense, are most reliable than in-court identifications. Admitting these prior identifications therefore provides greater fairness to both the prosecution and defense in a criminal trial. See McCormick, Evidence, 602 (2d ed. 1972). Their exclusion would thus be detrimental to the fair administration of justice.

That the trier of fact, whether it be judge or jury, cannot properly perform its function if highly probative and constitutional identification evidence is kept from it has been recognized by the Court of Appeals for the District of Columbia Circuit in an *en banc* decision in *Clemons* v. *United States*, 408 F. 2d at 1243:

> The rationale behind the exclusion of hearsay evidence has little force in the case of witnesses * * * who are available for cross-examination. We also think that juries in criminal cases, before being called upon to decide the awesome question of guilt or innocence, are entitled to know more of the circumstances which culminate in a courtroom identification—an event which, standing alone, often means very little to a conscientious and intelligent juror, who routinely expects the witnesses to identify the defendant in court and who may not attach great weight to such an identification in the absence of corroboration.

For these reasons, evidence of an earlier identification made by a person who is now testifying at the trial should not be treated as inadmissible hearsay.

Again, it should be emphasized that though the rule makes prior identifications admissible, they *still* must meet constitutional muster. In *Gilbert* v. *California*, 388 U.S. 218 (1967), the Supreme Court held that the Sixth Amendment right to assistance of counsel applied to lineup identifications. Even though the Court held that the right to counsel applied only to post-indictment lineups, *Kirby* v. *Illinois*, 406 U.S. 682 (1972), other cases make clear that the Due Process Clause is applicable to *all* pretrial lineups and that it forbids a lineup that is unnecessarily suggestive and conducive to mistaken identification. *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Foster* v. *California*, 394 U.S. 440 (1969). Having the identifying witness on the stand (which is required by the first clause of Rule 801 (d)(1)), coupled with these constitutional safeguards, provide adequate assurances of trustworthiness to warrant the admissibility of such prior identifications.

Finally, the committee notes that several States which have adopted Evidence Codes in the last few years have included a rule which provides for the admissibility of prior identifications. Cal. Evid. Code § 1238 (West 1966); Kan. Civ. Pro. Stat. Ann. § 60–460(a) (Vernon 1964); Nev. Rev. Stat. § 51.035(2)(c) (1973); New Jersey Evidence Rule § 63(1)(c); N.M. Stat. Ann. § 20–4–801(d)(1)(C) (1973); N.Y. Crim. Pro. § 60.25 (McKinney Supp. 1971); Utah Rules of Evidence § 63(1) (1971); Wis. Stat. Ann. § 908.01(4)(a) (Spec. Pamphlet 1974); Proposed Maine Rules of Evidence § 801(d)(1)(C) (Tent. Draft. Dec. 1974).

Conclusion

For these reasons, the committee recommends that the bill do pass.

Changes in Existing Law

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows(new matter is printed in italic, existing law in which no change is proposed is shown in roman):

* * * * * * *

ARTICLE VIII. HEARSAY

RULE 801. DEFINITIONS

The following definitions apply under this article:

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

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

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

(d) STATEMENTS WHICH ARE NOT HEARSAY.—A statement is not hearsay if—

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

* * * * * * *

○

94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 94-355

AMENDING THE FEDERAL RULES OF EVIDENCE

JULY 14, 1975.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

MR. HUNGATE, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany S. 1549]

The Committee on the Judiciary, to whom was referred the bill (S. 1549) to amend the Federal Rules of Evidence, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of this legislation is to amend Rule 801(d)(1) of the Federal Rules of Evidence.

BACKGROUND

The Federal Rules of Evidence govern proceedings in federal courts and before United States magistrates. Article VIII of those Rules deals with hearsay evidence, and Rule 801 provides general definitions for Article VIII. Subdivision (d)(1) of Rule 801 defines certain statements not to be hearsay and therefore not inadmissible under Rule 802, which makes hearsay statements generally inadmissible.

When the Federal Rules of Evidence bill (H.R. 5463) passed the House on February 6, 1974, by a vote of 377 to 13, it contained the following provision:

> A statement is not hearsay it . . . the defendant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . *(C) one of identification of a person made after perceiving him.* [Emphasis added.]

The Senate-passed version of H.R. 5463 omitted the italicized language.

The House-Senate Conference Committee on H.R. 5463 met in December 1974 to iron out the differences between the House and Senate versions of the bill. The Senate strenuously insisted upon its version of Rule 801(d)(1); in fact, it was indicated that any compromise that included the House version of the rule would face extended discussion during the Senate debate. In the face of this, the House Conferees agreed to the Senate version of Rule 801(d)(1).

S. 1549, which is cosponsored in the Senate by Senators Philip A. Hart, John L. McClellan and Roman Hruska, seeks to put back into Rule 801(d)(1) the language that was struck at Conference. In other words, the Senate is now acceding to the House version of Rule 801(d)(1).

Analysis of the Bill

Rule 801(d)(1)(C), as it is proposed to read, has a precondition to the use of the out-of-court statement of identification. The person who made the statement (the "declarant") must testify at the trial or hearing and must be subject to cross-examination concerning the statement. Even if this precondition is met, the out-of-court statement of identification must still meet constitutional standards. If the precondition is satisfied and the constitutional standards are met, then the out-of-court statement of identification is admissible.

A. Constitutional Standards

Out-of-court statements of identification can be made in different contexts. They can be made at a preindictment or a postindictment lineup. They can be made at a one-person showup that takes place shortly after the crime. They can also be made after being shown a series of photographs.

When there is a postindictment lineup, the Constitution requires that the defendant's counsel be present. *United States* v. *Wade*, 388 U.S. 218 (1967). When there is a preindictment lineup, there is no requirement that defendant's counsel be present. *Kirby* v. *Illinois*, 406 U.S. 682 (1972). Likewise, when a group of photographs is shown to someone, there is no requirement that the defendant's lawyer be present. *Simmons* v. *United States*, 390 U.S. 377 (1968).

Out-of-court identification procedures—including lineups, showups and displays of photographs—must meet the due process standard of the Fifth and Fourteenth Amendments to the United States Constitution. *Kirby* v. *Illinois*, 406 U.S. 682 (1972) (preindictment lineup); *Foster* v. *California*, 394 U.S. 440 (1969) (preindictment lineup followed by face-to-face showup); *Stovall* v. *Denno*, 388 U.S. 293 (1967) (one-person showup); *Simmons* v. *United States*, 390 U.S. 377 (1968) (display of photographs). The due process standard requires looking at the totality of the circumstances to determine whether the identification procedure was "unnecessarily suggestive and conducive to irreparably mistaken identification." *Kirby* v. *Illinois*, 406 U.S. 682, 691 (1972).

If the identification procedure does not measure up to the Constitutional standard, then the witness' out-of-court statement is not admissible. Furthermore, the witness cannot make an in-court identification unless there is clear and convincing evidence that there is an independent basis for the in-court identification. *United States* v. *Wade*, 388 U.S. 218 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967).

B. Case Law

There was a split among the authorities as to whether out-of-court statements of identification are admissible. See Annot., 71 A.L.R. 2d 449.

> The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at trial.
>
> *Gilbert* v. *California*, 388 U.S. 263, 272 n. 3 (1967)

Federal courts admit out-of-court statements of identification. See, e.g., *United States* v. *Miller*, 381 F.2d 529 (2d Cir. 1967) (photographic display); *United States* v. *Shannon*, 424 F.2d 475 (3d Cir. 1970), cert. denied 400 U.S. 844 (photographic display followed by one-person showup); *Bolling* v. *United States*, 18 F.2d 863 (4th Cir. 1927) (on-the-scene identification); *United States* v. *Fabio*, 394 F.2d 132 (4th Cir. 1968) (preindictment lineup); *United States* v. *Cooper*, 472 F.2d 64 (5th Cir. 1973), cert. denied 414 U.S. 840 (photographic display); *United States* v. *Lincoln*, 494 F.2d 833 (9th Cir. 1974) (photographic display); *Edison* v. *United States*, 272 F.2d 684 (10th Cir. 1959) (preindictment lineup); *Clemons* v. *United States*, 408 F.2d 1230 (D.C. Cir. 1968 (cellblock confrontation).

Thus, Rule 801(d)(1)(C) as proposed in S. 1549 is fully consistent with current Federal case law. Federal case law treats such statements as exceptions to the hearsay rule; Rule 801(d)(1)(C) defines them not to be hearsay. The result is the same in either instance—the statement is admissible if the person who made it testifies and is subject to cross-examination.

C. Rationale

Courtroom identifications can be very suggestive. The defendant is known to be present and generally sits in a certain location. Out-of-court identifications are generally more reliable. They take place relatively soon after the offense, while the incident is still reasonably fresh in the witness' mind. Out-of-court identifications are particularly important in jurisdictions where there may be a long delay between arrest or indictment and trial. As time goes by, a witness' memory will fade and his identification will become less reliable. An early, out-of-court identification provides fairness to defendants by ensuring accuracy of the identification. At the same time, it aids the government by making sure that delays in the criminal justice system do not lead to cases falling through because the witness can no longer recall the identity of the person he saw commit the crime.

The justification for not admitting out-of-court statements of identification was stated in the Senate Report on the Federal Rules of Evidence bill (H.R. 5463) to be a "concern that a person could be convicted solely upon evidence admitted under this [exception]." Senate Report No. 93–1277, at 16. However, Rule 801(d)(1) is not addressed to the issue of the sufficiency of evidence but to the issue of its admissibility.

This was pointed out in Senate Report on the Federal Rules of Evidence in reference to subdivision (A) of Rule 801(d)(1).

> It would appear that some of the opposition to this Rule is based on a concern that a person could be convicted solely upon evidence admissible under this Rule. The Rule, however, is not addressed to the question of the sufficiency of evidence to send a case to the jury, but merely to its admissibility.

Senate Report No. 93–1277, at 16 n. 20.

Conclusion

S. 1549 will put into the Federal Rules of Evidence the prevailing Federal practice and will reinstate language that the House overwhelmingly approved last Congress. It will simply provide that out-of-court identifications are admissible if they meet constitutional requirements. The Committee recommends passage of S. 1549.

Committee Vote

This bill was reported out of Committee on June 23, 1975, by a voice vote.

New Budget Authority

This bill creates no new budget authority.

Statement of the Budget Committee

No statement on this bill has been received from the House Committee on the Budget.

Inflationary Impact Statement

This legislation will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

Statement of the Committee on Government Operations

No statement on this bill has been received from the House Committee on Government Operations.

Oversight

Since the Federal Rules of Evidence did not go into effect until July 1, 1975, the Committee on the Judiciary has not studied the application, administration, execution and effectiveness of those Rules.

Estimate of Cost

Pursuant to clause 7, rule XIII of the Rules of the House of Representatives, the Committee estimates that no new cost to the United States is entailed by S. 1549.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics, existing law in which no change is proposed is shown in roman):

RULE 801 OF THE FEDERAL RULES OF EVIDENCE

Article VIII. Hearsay

Rule 801. Definitions

The following definitions apply under this article:

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

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

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

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

(1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or

(C) one of identification of a person made after perceiving him; or

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

DISSENTING VIEWS OF HON. ELIZABETH HOLTZMAN ON S. 1549

I dissent from the Committee's favorable recommendation of S. 1549.

Eyewitness testimony is nortoriously unreliable. As the Supreme Court has stated: "The vagaries of eyewitness identification are well-known; the annuals of criminal law are rife with instances of mistaken identification." *U.S.* v. *Wade*, 388 U.S. 218 (1967).

Nonetheless, S. 1549 would open the doors wide to the admission of all kinds of out-of-court eyewitness identification. The bill creates a new Rule of Evidence for the federal courts. In a departure from current practice, this rule would allow the admission of a prior out-of-court identification made by a witness. The identification could be admitted even if: (1) The witness subsequently retracted it, and (2) the identification were made under highly suggestive circumstances.

Since the use of such identification testimony raises complex questions, certainly it should not be enacted without careful consideration. Unfortunately, no hearings have been held on this bill either in the Senate or the House.

The only reason given for the undue haste in which this bill has been brought to the full Committee is to try to enact it before July 1. This would allow it to go into effect on that date, together with the new Federal Rules of Evidence.[1]

In my judgment, the need for urgency is not apparent, and, in fact, passing this bill at this time may confuse members of the bar. The Rules of Evidence were signed into law last January. Pamphlets and booklets have been widely circulated with respect to all the rules which will go into effect on July 1. No one has had any notice of this rule, and thus if it is enacted now, I am afraid it will take members of the bar by surprise.

S. 1549 would allow unsworn out-of-court identification testimony to be used as substantive evidence against the defendant. This means that where the defendant has previously been identified by a witness, that identification may be used to convict the defendant—even if the witness subsequently retracts the identification in testimony before the jury. Thus, for example, a witness may have identified a defendant under confusing or highly suggestive circumstances (as after a robbery or in a hospital room), but upon reflection may realize that the identification was mistaken. Under this rule, the earlier, admittedly incorrect, identification could be used to convict the defendant.

In addition, this rule would permit a third party to testify to a witness' out-of-court identification. Thus, a policeman could testify that a witness had identified the defendant at a lineup even though

[1] Although this rule was contained in the new Rules of Evidence as passed by the House, very little attention was paid to it. It was stricken from the final version of the Rules as a result of vigorous objection by Senator Ervin.

the witness no longer believes the defendant committed the particular crime. The policeman's uniform and office would lend special weight to his testimony, regardless of whether the identification about which he testified was accurate.

A prior eyewitness identification may even be suspect in the case where a witness has not retracted it, or it is not being admitted through the testimony of a third party, such as a police officer. Despite recent Supreme Court rulings, highly prejudicial and suggestible identifications *are* still admissible into evidence. And, as we know, eyewitness identifications—however unreliable—have a powerful impact on the jury.

I do not mean by the foregoing to indicate that there are no circumstances under which prior identifications should be admitted into evidence. But those circumstances ought to have been specified in the rule. Had the Subcommittee on Criminal Justice held hearings on this rule, we might have been able to draw it more carefully to serve the ends of justice. Without such care, however, I fear that this rule will result in the admission of highly unreliable and prejudicial evidence of identification—evidence which may be the sole basis for the conviction of the wrong defendant. This obviously serves neither the interests of the government nor of society.

ELIZABETH HOLTZMAN.

S. 1549

Ninety-fourth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the fourteenth day of January, one thousand nine hundred and seventy-five

An Act

To amend the Federal Rules of Evidence, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That rule 801(d)(1) of the Federal Rules of Evidence (88 Stat. 1938) is amended by adding at the end thereof a new clause (C), as follows: "(C) one of identification of a person made after perceiving him; or".

SEC. 2. This Act shall become effective on the fifteenth day after the date of the enactment of this Act.

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

October 8, 1975

Dear Mr. Director:

The following bills were received at the White House on October 8th:

S. 824
S. 1327 ✓
S. 1549 ✓
H.R. 5952 ✓

Please let the President have reports and recommendations as to the approval of these bills as soon as possible.

Sincerely,

Robert D. Linder
Chief Executive Clerk

The Honorable James T. Lynn
Director
Office of Management and Budget
Washington, D. C.