



# THE STRANGE GLITCH IN THE RHODE ISLAND RULES OF EVIDENCE

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**P**OLICE AND PROSECUTORS depend heavily on lineups, photo arrays, and other arrangements that enable a crime victim or witness to view and identify the perpetrator, often by selecting that person from among several others who closely resemble each other. When the witness declares “*That’s the one,*” the statement closely resembles classic hearsay, because it is an assertion made out of court. Nevertheless, such statements have long been admissible at trial, even to prove the truth of the matter asserted, because “pretrial identifications are considered generally more reliable than those made in court.”<sup>1</sup> The well-settled admissibility of such evidence is based on “the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with

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<sup>1</sup> CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE 794 (4th ed. 2009).

those made at an earlier time under less suggestive conditions.”<sup>2</sup>

The Federal Rule of Evidence that codifies this doctrine is perhaps not a model of perfect clarity. When originally enacted, it applied to statements identifying “a person after perceiving *him*.”<sup>3</sup> That language was clear and precise, but it struck some as sexist, and so it was amended in 1987 to refer to a statement identifying “a person after perceiving *the person*.”<sup>4</sup> That change had the intended benefit of making the rule gender-neutral, but only by slightly diluting its clarity. The problem arises from the fact that the same rule defines hearsay as a statement made out of court by a “declarant,” who is defined in turn as “a *person* who makes a statement.”<sup>5</sup> The rule further provides that when this “person” testifies at trial and is available to be cross-examined about that statement, the statement by that “person” will be admissible if it is “one of identification of a *person* made after perceiving the *person*.”<sup>6</sup> Because of its gender-neutral reference to two different “persons,” the rule apparently leaves a tiny bit of room for some confusion as to whether “the person” referred to at the end of the sentence – the one being “perceived” – is (1) the “person” who *made* the statement or (2) the “person” *identified* in the statement.

When the Rhode Island Rules of Evidence were drafted, the framers evidently regarded this ambiguity as undesirable, and thought it would be helpful to clarify which of these two persons must be “perceived” just before one of them identifies the other. Unfortunately, those drafters guessed wrong. Rhode Island Evidence Rule 801 provides that statements by a witness at a lineup are admissible if “the declarant” is available to be questioned at trial about his statement “of identification of a person made after perceiving the *declarant*.”<sup>7</sup> Although this rule has been quoted a few times

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<sup>2</sup> Advisory Committee Note to FED. R. EVID. 801(d)(1)(C).

<sup>3</sup> 5 WEINSTEIN’S FEDERAL EVIDENCE § 801 App.03 (2010)(emphasis added).

<sup>4</sup> *Id.*

<sup>5</sup> FED. R. EVID. 801(b) (emphasis added).

<sup>6</sup> FED. R. EVID. 801(d)(1)(C) (emphasis added).

<sup>7</sup> RHODE ISLAND RULE OF EVIDENCE 801(d)(1)(C) (emphasis added).

## The Strange Glitch

by the state's highest court, the first time more than a decade ago,<sup>8</sup> nobody else to my knowledge has ever suggested that this rule may need revision. But it is obviously wrong.

Until recently, Hawaii was the only other state in the country that made this same mistake when attempting to improve the language of the federal rule, and required a showing that the declarant identified some person "after perceiving the *declarant*."<sup>9</sup> That language was changed, however, shortly after the Supreme Court of Hawaii correctly observed that it was "mistaken and nonsensical."<sup>10</sup> The Hawaii rule now mirrors the Federal Rule, leaving Rhode Island as the only state that still refers to a statement made by "the *declarant* . . . after perceiving the *declarant*." That bizarre language, taken literally, means that a statement by a witness identifying a criminal suspect will be admissible at trial only if the witness also took a good look at *herself* just before she identified the perpetrator.

It is extremely difficult for even the most charitable observer to imagine any rational reason for such a requirement. Perhaps the point was to require every witness at a lineup to look in the mirror while the police ask "Are you certain that *you* are not the real killer?" – to avoid the extraordinary embarrassment that results when such facts are elicited from the prosecution's star witness for the first time at trial by a cross-examiner like Perry Mason. Or maybe the intent of the rule was to ensure that every witness takes a moment to search his heart before making a public accusation against another, in keeping with the Biblical principle that he without sin shall cast the first stone.<sup>11</sup> But such explanations are not very likely. It seems fairly safe to conclude that the framers of the Rhode Island rule simply guessed wrong when they tried to remove the ambiguity

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<sup>8</sup> State v. Reyes, 984 A.2d 606, 620 n.11 (R.I. 2009); State v. Barkmeyer, 949 A.2d 984, 1005 (R.I. 2008); State v. Gomes, 764 A.2d 125, 131 (R.I. 2001).

<sup>9</sup> State v. Ildefonso, 827 P.2d 648, 651 n.2 (Haw. 1992) (emphasis in original).

<sup>10</sup> *Id.* Later that same year, the Hawaii rule was amended so that it now refers, much as Federal Evidence Rule 801 does, to a statement "of identification of a person made after perceiving that person." HAWAII RULE OF EVIDENCE 802.1(3).

<sup>11</sup> See JOHN 8:7 ("If any one of you is without sin, let him be the first to throw a stone at her").

in the federal version of the rule. The Rhode Island rule, like the federal rule, is based on the assumption that pretrial identifications “are more reliable than later, courtroom identifications,”<sup>12</sup> and that reliability has nothing to do with whether the declarant takes a moment to look at herself one last time before identifying some other individual.

Obviously Rhode Island Evidence Rule 801 needs to be changed, and the sooner the better. Until that happens, every careful police officer who wishes to conduct a lineup in Rhode Island – and who wants to make sure that the results of that procedure will be admissible in court – needs to have a mirror on hand, just to be safe.



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<sup>12</sup> Advisory Committee Note to Rhode Island Rule of Evidence 801(d)(1)(C).