UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 6:21−cr−00141−RBD−EJK
	)	
EMMET BOWENS,	)	
	)	
Defendant.	)	
	)	

DEFENDANT EMMET BOWENS'
MOTION TO SUPPRESS PRE-TRIAL AND IN-COURT IDENTIFICATIONS

The Defendant, Emmet Bowens ("Mr. Bowens"), by and through the undersigned counsel, hereby moves to suppress, pursuant to the Due Process clause of the Fifth Amendment to the U.S. Constitution: (a) out-of-court photographic identifications of Mr. Bowens conducted by the Federal Bureau of Investigation ("FBI") on December 6, 2021; and (b) any in-court identifications attempted by the three witnesses who previously identified Mr. Bowens in the out-of-court photographic identifications conducted on December 6, 2021. In support thereof, Mr. Bowens states as follows:

STATEMENT OF FACTS

Relevant Procedural History

1. On November 10, 2021, a federal grand jury in the Middle District of Florida returned an indictment charging Mr. Bowens with two counts of wire fraud, in violation of 18 U.S.C. § 1343 (Counts One and Two), and four counts of money laundering, in violation of 18 U.S.C. § 1957 (Counts Three through Six). Doc. 1.

2. On December 1, 2021, Mr. Bowens was arrested in connection with a warrant issued in this case. The following day, December 2, 2021, Mr. Bowens was brought before a U.S. Magistrate Judge for an initial appearance. Docs. 7, 9.

The December 6, 2021 Out-of-Court Identifications

3. On December 6, 2021, after Mr. Bowens' arrest, FBI agents interviewed three witnesses who allegedly identified Mr. Bowens in single-photograph identification procedures. The details of these identifications are memorialized in three FBI 302 reports which the government provided to Mr. Bowens as part of the government's discovery production in this case. Redacted versions of these FBI 302 reports are attached hereto as *Exhibits A*, *B*, and *C*, respectively. As set forth in the FBI 302 reports, the interviews of the three witnesses focused on a neighbor who had previously resided at 246 Fairway Trace Drive, Hernando, Mississippi 38632 ("the Mississippi address") for a brief period

of time. *See Exhibits A*, *B*, and *C*. The witnesses described this neighbor as "secretive" and someone who did not interact often with his neighbors. *Id.* One of the witnesses described the neighbor as a "black male," however, it does not appear that the witnesses were able to provide a detailed description of the neighbor. *Id.* Further, all three of the witnesses told the FBI that several packages were delivered to the Mississippi address when the neighbor was living there. *Id.* One of the witnesses stated that she observed an eviction notice on the door to the Mississippi address around the time period that the neighbor was residing at the address. *Exhibit A*. Another witness stated that it appeared that the neighbor was not staying at the residence every night and that the police were eventually called to the Mississippi address to conduct a welfare check, but that no one was home. *Exhibit B*. The third witness stated that the neighbor was not living at the residence full time and that on two separate occasions two different "black female[s]" arrived at the residence, and backed up into the driveway or garage. *Exhibit C*. After the females backed up their vehicles towards the Mississippi address, the delivered packages that had accumulated in front of the residence were removed. *Id.*

4. FBI agents eventually showed each of the three witnesses a single photograph of Mr. Bowens and asked the witnesses if the photograph depicted the neighbor they had described during their interviews. *See Exhibits A*, *B*, and *C*. To

add insult to injury, the photograph the FBI chose to show to the witnesses was a printout from a driver's license database, which contained all of Mr. Bowen's pedigree information including his place of birth, Mississippi. A redacted copy of this photograph is attached hereto as *Exhibit D*. In response to seeing this photograph, all three of the witnesses identified Mr. Bowens as the so-called "secretive" neighbor. *See Exhibits A*, *B*, and *C*. However, none of the witnesses were one-hundred percent certain in their identifications. One witness stated she was "sixty percent to seventy percent sure," the second witness stated he was "eighty percent" certain, and the third witness was "ninety-five percent sure." *Id.*

5. Based on the foregoing, Mr. Bowens hereby moves to suppress the three out-of-court identification procedures conducted by the FBI on December 6, 2021, on the grounds that such identifications were unduly suggestive and unreliable, in violation of the Due Process clause of the Fifth Amendment to the U.S. Constitution. Moreover, a sufficient "independent source" is lacking to justify any in-court identifications of Mr. Bowens by the three witnesses who were asked by the FBI to identify him on December 6, 2021. Accordingly, this Court should suppress the out-of-court identifications of Mr. Bowens by the three witnesses on December 6, 2021 and prohibit the government from introducing any testimony whatsoever concerning these identifications, including any subsequent in-court identifications by these same three witnesses.

MEMORANDUM OF LAW

Legal Standards

"A pretrial identification and subsequent in-court identification may amount to a due process violation if the pretrial procedure was 'unnecessarily suggestive and conducive to irreparable mistaken identification.' " *Jones v. Kemp*, 794 F.2d 1536, 1539 (11th Cir. 1986) (quoting *Stovall v. Denno*, 388 U.S. 293, 302 (1967).[1] The Supreme Court has recognized this "due process check on the admission of eyewitness identification, applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime." *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012). "If there is 'a very substantial likelihood of irreparable misidentification,' [ ] the judge must disallow presentation of the evidence at trial. *Id.* (quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)).

A two-step test is used to determine whether the admission of an out-of-court identification [and subsequent in-court identification] violates due process. *Cikora v. Dugger*, 840 F.2d 893, 895 (11th Cir. 1988); *United States v. Walls*, 237 F. App'x 599, 600-01 (11th Cir. 2007); *United States v. Jean*, 315 F. App'x 907, 912 (11th

[1] Although independently reliable in-court identifications can "cure" unconstitutionally suggestive out-of-court identifications. *See United States v. Sutherland*, 428 F.2d 1152 (5th Cir. 1970), cert. denied 409 U.S. 1078, 93 S. Ct. 698, 34 L. Ed. 2d 668 (1972).

Cir. 2009). First, a court must determine if the original identification procedures were unduly suggestive. *Cikora*, 840 F.2d at 895. If the Court determines that the procedures were unduly suggestive, then a court must consider whether, under the totality of circumstances, the identification was nonetheless reliable. *Cikora*, 840 F.2d at 895; *United States v. Felix*, 591 F. App'x 777, 780 (11th Cir. 2014). Thus, in order to warrant exclusion of identification evidence, the Defendant must convince the Court that both the identification procedure was unduly suggestive and that the identification was not reliable. *United States v. King*, 751 F.3d 1268, 1277 (11th Cir. 2014).

The Out-of-Court Identifications Were Unduly Suggestive

With regard to the first step in the analysis, i.e., whether the identification procedure was unnecessarily suggestive — courts have consistently held that "single photograph" identifications are an unduly suggestive procedure, which trigger a review of the totality of the circumstances to determine reliability. *See Manson v. Brathwaite*, 432 U.S. 98, 109 (1977) (single photograph of defendant suggestive and unnecessary); accord *United States v. Cannington*, 729 F.2d 702, 711 (11th Cir. 1984); *Hudson v. Blackburn*, 601 F.2d 785, 788 (5th Cir. 1979) ("a single photograph display is one of the most suggestive methods of identification and is always to be viewed with suspicion"); *see also Jean*, 315 F. App'x at 912.

Here, the three witnesses identified Mr. Bowens on December 6, 2021, during FBI interviews in which the witnesses were shown a single photograph of Mr. Bowens. Based on the legal authority cited above, Mr. Bowens' out-of-court identifications by these witnesses was unduly suggestive. Thus, Mr. Bowens has satisfied step one of the two-step analysis for determining the inadmissibility of identifications.

The Out-of-Court Identifications Are Lacking In Reliability

When examining the second step in the analysis – whether an identification is reliable, the Court should consider the following factors: (1) whether the witness had an opportunity to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the level of certainty demonstrated by the witness at the time of identification; and (5) the length of time between the crime and identification. *Biggers*, 409 U.S. at 199-200.

Here, the witnesses all indicated that they rarely saw the so-called "secretive" neighbor that they identified Mr. Bowens to be. Moreover, the witnesses stated that this neighbor lived at the Mississippi address for a brief period of time and that he was sporadically present at the residence. There is no indication that the witnesses paid special attention to the so-called "secretive" neighbor or had an opportunity to observe him up close or for a lengthy period of

time. The witnesses also did not provide a detailed description of the neighbor. In addition, none of the witnesses were one-hundred percent certain in their identifications of Mr. Bowens. Thus, the identifications present a lack of certainty. Further still, the witnesses acknowledged that the neighbor had moved out of the residence months before they were asked to identify Mr. Bowens in the unduly suggestive single photograph identification procedures described above. One witness indicated that the neighbor had moved out in May of 2021, while the interviews and identification procedures were conducted on December 6, 2021. *See Exhibit B*. Another witness recalled that the neighbor had moved out six months prior to the December 6, 2021 interviews and identification procedures. *See Exhibit A*. Based on the foregoing, the December 6, 2021 out-of-court identifications of Mr. Bowens by the three witnesses are not reliable and should be suppressed by the Court.

In-Court Identifications By The Witnesses Cannot Cure the Unconstitutional Nature of the Prior Out-of-Court Identifications

An in-court identification, even if preceded by a suggestive out-of-court identification procedure, can nevertheless be admissible if the in-court identification has an "independent source." *Cannington*, 729 F.2d at 711 (citing *United States v. Wade*, 388 U.S. 218, 241 (1967). "Among the indicia of a sufficient, independent basis for identification are the witness's opportunity to observe the defendant at the time of the offense, the witness's degree of attention, the degree

of certainty shown at the confrontation, and the length of time between the crime and the confrontation." *Id.* (citing *Biggers*, 409 U.S. at 199-200). Here, there does not appear to be a sufficient "independent source" to cure the unconstitutional pre-trial identifications that were conducted by the FBI on December 6, 2021. As noted above, the three identifying witnesses rarely saw the so-called "secretive" neighbor and did not have an opportunity to see him up-close. As noted, none of the witnesses were one-hundred percent certain in their identifications, and the so-called neighbor moved out six to seven months before the identifications occurred. Accordingly, the Court should not permit the three witnesses who previously identified Mr. Bowens on December 6, 2021 to attempt to identify him in-court during the trial of this matter.

Based on the foregoing, the admission at trial of the out-of-court single photograph identifications of Mr. Bowens on December 6, 2021 would be a violation of his due process rights. Based on this constitutional violation, the Court should also suppress any in-court identification of Mr. Bowens by the same witnesses who identified him on December 6, 2021.

CERTIFICATION OF CONFERRING WITH OPPOSING COUNSEL

Pursuant to the Court's Criminal Scheduling Order (Doc. 16), the undersigned certifies: (1) that the undersigned counsel conferred with opposing counsel; (2) that counsel have been unable to resolve the instant motion by

agreement; and (3) that the motion concerns matters not covered by the scheduling order.

CONCLUSION

WHEREFORE, the Defendant, Emmet Bowens, moves this Honorable Court to enter an Order: (a) suppressing the three out-of-court identifications of the Defendant that occurred on December 6, 2021; (b) precluding the government from introducing any testimony or evidence concerning these out-of-court identifications; and (c) precluding the three witnesses, who identified the Defendant on December 6, 2021, from attempting subsequent, in-court identifications of the Defendant during the trial of this matter.

Respectfully submitted on this 5th day of May, 2022.

s/ Andrew C. Searle
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on May 5, 2022, I filed a copy of the foregoing with the Clerk of the Court via the CM/ECF system. I further certify that all parties to this case are equipped to receive service of documents via that system.

s/Andrew C. Searle
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