UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v. Case No. 6:21-cr-141-RBD-EJK

EMMET BOWENS

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS PRE-TRIAL AND IN-COURT IDENTIFICATIONS

The United States of America hereby files its response in opposition to the defendant's motion to suppress pre-trial and in-court identifications, Doc. 45. In his motion the defendant argues that the photo identification procedures used by the FBI were unduly suggestive and that the witness identifications lack reliability. *See* Doc. 45. The defendant further asserts that the flaws in the out of court identifications have tainted any potential in-court identification by these same witnesses and so the Court should suppress any in-court identification by these witnesses. *Id.*

The Court should deny the defendant's motion. The identification procedures were not unduly suggestive and the witness identifications are reliable under the totality of the circumstances. As such, the Court should permit in-court identifications by the witnesses should the United States seek to enter such evidence at a trial.

BACKGROUND

On November 10, 2021, a federal grand jury returned an Indictment charging the defendant with Wire Fraud, in violation of 18 U.S.C. § 1343 (Counts One and Two) and Money Laundering, in violation on 18 U.S.C. § 1957 (Count Three through Six). Doc. 1. The defendant was arrested on December 2, 2021, Doc. 9.

The United States anticipates that at an evidentiary hearing on this matter the testimony would include information as follows. Prior to the defendant's arrest, around October 2020, the FBI attempted to contact the defendant. No contact was made with the defendant, however the FBI provided their contact information during these attempts. It is believed that the defendant received this information because the FBI received an inquiry from an attorney about the attempted contact. In a follow up communication with that attorney, the FBI learned that the defendant terminated his relationship with the attorney. Thereafter, the FBI made other unsuccessful attempts to contact the defendant and later learned that his phone was disconnected.

Later, after the indictment was returned, the FBI attempted to locate the defendant to execute the warrant for his arrest. After the defendant was arrested, the FBI continued to make efforts to determine where the defendant had been residing. As a part of those efforts, on December 6, 2021, the FBI conducted the interviews and photo identifications detailed in Docs. 45-1, 45-

2, 45-3. In so doing, the FBI showed the witnesses the defendant's photo from DAVID, a redacted copy of which is filed at Doc. 45-4. Each witness who identified the defendant lived near the residence at 246 Fairway Drive in Mississippi, where the defendant is suspected of residing for a time. Each witness was interviewed separately, was told that the agent worked for the FBI, and that he was attempting to verify who lived at the residence at 246 Fairway Drive.

Witness One lived immediately to the left of the residence at 246 Fairway Drive. Doc. 45-1. She described the prior resident as a "black male" and stated that she rarely saw him. *Id.* Witness One explained that the man moved in about one year ago and moved out six months prior to the date of the interview. *Id.* Witness One noticed packages stacked up on the porch of the residence, as well as an eviction notice on the front door to the house. *Id.* Witness One was shown the photo of the defendant in Doc. 45-4 and identified him, with 60% to 70% certainty, as the prior resident of 246 Fairway Drive. *Id.*

Witness Two resided across the street from 246 Fairway Drive. Doc. 45-2. Witness Two also identified the defendant as the prior resident of 246 Fairway Drive and gauged his certainty at 80%. *Id.* Like Witness One, Witness Two estimated that the defendant had moved into the residence at 246 Fairway Drive approximately one year prior to the date of the interview

and moved out a few months later. *Id.* Witness Two described the defendant as secretive and explained that he did not come out much or talk to other neighbors. *Id.* Witness Two also stated that when the defendant moved out, he did so in the middle of the night by backing a trailer up to the house. *Id.*

Witness Three also resided across the street from 246 Fairway Drive. Doc. 45-3. When Witness Three was shown the photo of the defendant, she identified him as the individual who previously lived at 246 Fairway Drive with 95% certainty. *Id.* Witness Three recalled that the defendant moved into 246 Fairway Drive approximately a year prior to the interview and moved out of the residence a few months prior to the interview. *Id.* Witness Three observed that the defendant did not come outside much and that, when he was outside, he would duck his head down and go back inside if he saw any of the neighbors. *Id.* Witness Three also noticed the accumulation of packages and was under the impression that the defendant did not live at the residence all the time, instead coming by the residence only every now and again. *Id.* Finally, Witness Three mentioned seeing two different women stop by the residence on two different occasions. *Id.*

The defendant filed the instant motion on May 5, 2022, arguing that the out of court identifications should be suppressed as unduly suggestive and unreliable and that any in-court identification should be precluded. The defendant's motion should be denied.

MEMORANDUM OF LAW

I. The Identification Procedures were not Unduly Suggestive and the Witness Identifications are Reliable under the Totality of the Circumstances.

The identification procedures were not unduly suggestive, and the witness identifications are reliable under the totality of the circumstances. The identification procedures did not creates a substantial likelihood of irreparable misidentification. Additionally, the defendant was known to the witnesses prior to the identification.

To determine the constitutionality of identification procedures Courts employ a two-part test. *See Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2559 (2018); *Blanco v. Singletary*, 943 F.2d 1477, 1508 (11th Cir. 1991). First, the Court must determine if the procedures used were unduly suggestive. *See Manson v. Brathwaite*, 432 U.S. 98 (1977); *Blanco*, 943 F.2d at 1508. The United States Supreme Court has explained that, "[t]o be 'impermissibly suggestive,' the procedure must 'give rise to a very substantial likelihood of irreparable misidentification'" and that "[i]t is not enough that the procedure 'may have in some respects fallen short of the ideal.'" *Sexton*, 138 S. Ct. at 2559 (2018) (internal citations omitted).

If the Court finds that the procedures used were unduly suggestive, it turns to the second part of the test to determine whether, based on the totality of the circumstances, the identification is reliable. *See Neil v. Biggers*, 409 U.S. 188, 199 (1972); *Blanco*, 943 F.2d at 1508. The factors to be considered in

determining the reliability of the identification include: 1) the opportunity of the witness to view the suspect at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of the witness's description of the suspect; 4) the level of certainty of the identification; 5) the time between the crime and identification. *Sexton*, 138 S. Ct. at 2559; *Blanco*, 943 F.2d at 1508.

Presenting a witness with a single photo from which the witness identifies a suspect does not automatically render the identification unreliable. *See United States v. Walls*, 237 F. App'x 599 (11th Cir. 2007). In *Walls*, the Eleventh Circuit considered whether a single photo identification was reliable. *Id.* There, after a bank robbery, a teller (Alvarez) provided a description of the suspect to the police. *Id.* at 600. Alvarez described the suspect as, "a black male between twenty and thirty years old. Alvarez wrote that he was between five feet, seven inches and six feet in height. Alvarez also wrote that he had a scar near his eye, a broad nose, and a narrow chin." *Id.* While Alvarez was writing this description her manager handed her a Florida ID card depicting the defendant, who she then positively identified as the bank robber. *Id.* The FBI subsequently asked Alvarez if the man on the ID was the bank robber without showing her the ID again or any other photos. *Id.* In finding the identification reliable the Eleventh Circuit explained:

> All of the reliability factors indicate that Alvarez' identification had a well-founded independent source, and was not suggested by Walls's photo on the Florida ID. In the first place, Alvarez had an extended opportunity to view the robber's face at close distance while he passed her the note, stood

> at the counter, and accepted the money she gave him. Then, during that encounter, her degree of attention was very high, both because she was the direct object of the robber's threat and because, as a bank employee, she had been trained to remember the physical features of bank robbers. Third, Alvarez' prior written description of the robber was completely consistent with Walls's actual appearance, as depicted by the ID card. Fourth, Alvarez' identification of Walls as the culprit was at all times unequivocal. Finally, Alvarez viewed the ID card very shortly after the robbery occurred. It is unlikely that the photo on the ID card drowned out her memory of the actual incident, when that incident was so fresh in her mind.

Id. at 601. The Court further explained that in this case it was significant to this analysis that law enforcement played a minimal role in the identification procedures. However, the Court went on to state, "[w]e have previously upheld identifications where the police apprehend a suspect and present him, one-on-one, to a witness for identification." *Id.*; *Johnson v. Dugger*, 817 F.2d 726, 729 (11th Cir. 1987) (finding show-up identification reliable where the witness had good opportunity to observe the men in broad daylight, both before and after they entered and left the bank, he thoroughly described them to the police, he was certain of the identification at the time, and he identified the suspects only minutes after the crime while his memory was still fresh).

First, the identification procedures here were not unduly suggestive because the procedures did not create a substantial risk of misidentification. The risk of misidentification is low where a witness has multiple opportunities to view the suspect over a lengthy period of time. The defendant was known to all three witnesses. As detailed in Docs. 45-1, 45-2, 45-3, all of the witnesses

indicated that the defendant was a resident at 246 Fairway Drive for approximately six months, giving the witnesses multiple opportunities to see the defendant. Further, the FBI took reasonable steps to minimize the risk of misidentification. Each witness was interviewed separately, minimizing the risk that one witness' identification would influence the another.

As explained by the United States Supreme Court, "[t]o be 'impermissibly suggestive,' the procedure must 'give rise to a very substantial likelihood of irreparable misidentification'" and that "[i]t is not enough that the procedure "may have in some respects fallen short of the ideal." *Sexton*, 138 S. Ct. at 2559 (2018) (internal citations omitted). Because the defendant was already known to the witnesses at the time of the identification and the FBI took reasonable steps to minimize the possibility of improperly influencing the witness identifications, the procedures did not create a "very substantial likelihood of irreparable misidentification."

Second, the witness identifications are reliable. As stated, the defendant was known to the witnesses. The details of each witness' statements as captured in the FBI reports demonstrate that the witness identifications were reliable. And, although the witnesses described the defendant as secretive and stated that they saw him infrequently, the details provided by these witnesses show that it was this same behavior that made the defendant memorable.

Witness One, lived immediately to the left of the defendant for

approximately six months. Doc. 45-1. Though the Witness One stated that she rarely saw the defendant, she was able to accurately describe him as a black male showing that she had an opportunity to view him over the approximately six months during which they were neighbors. *Id.* Further, the witness' statement, as captured in the report, indicates that she was paying attention. For example, the witness noticed the packages piling up on the defendant's porch and the eviction notice on his door. *Id.* Finally, this witness stated she was 60% to70% certain of her identification. *Id.* Under the totality of the circumstances, this witness' identification is reliable.

Witness Two's identification is also reliable. Witness Two also had many months during which to observe the defendant. *See* Doc. 45-2. Witness Two further provided details about the defendant's behavior, evidencing a familiarity with the defendant and demonstrating his degree of attention. For example, Witness Two observed that the defendant was secretive and did not come out much to talk to the other neighbors. *Id.* Witness Two also described the defendant moving out of the house in the middle of the night by backing a trailer up to the house. *Id.* These descriptive details show not only that the witness was familiar with the defendant, but also that he was paying attention. Finally, this witness expressed a high degree of certainty in his identification, gauging it at 80%. For these reasons, Witness Two's identification is reliable.

Finally, Witness Three provided a reliable identification. Like the other

two witnesses, Witness Three had the opportunity to observe the defendant for months. Doc. 45-3. Witness Three provided a detailed description of the defendant's behavior, demonstrating her familiarity with him and her degree of attention. For example, Witness Three stated that the defendant did not come outside much. *Id.* The witness further described that, when the defendant was outside, he would duck his head down and go back inside if he saw any of the neighbors. *Id.* Witness Three also noticed the accumulation of packages and was under the impression that the defendant did not live at the residence all the time, and instead visited the residence only every now and again. *Id.* Witness Three mentioned seeing two different women stop by the residence on two different occasions. *Id.* These details show that, not only was Witness Three familiar with the defendant, she was paying attention to him. Lastly, this witness expressed a high degree of certainty in her identification, stating that she was 95% certain of her identification. For these reasons, Witness Three's identification is reliable.

In his motion the defendant argues that the image used for the identification, which contained the defendant's name, gender, race, and state of birth as Mississippi, rendered the identification unreliable. This fact on its own does not render the identifications unreliable. In *Walls* for example, the witness was presented with a single photo of the defendant from his Florida ID. *Walls*, 237 F. App'x at 600. There, the Court found that despite this fact,

"All of the reliability factors indicate that Alvarez' identification had a well-founded independent source, and was not suggested by Walls's photo on the Florida ID." *Id.* at 601. As in Walls, the witnesses here have well founded independent sources for their identifications.

Here the out of court witness identifications are admissible. The identification procedures were not unduly suggestive. The witness identifications are reliable under the totality of the circumstances. For these reasons, the defendant's motion should be denied.

II. The Witnesses' in-court identification should be permitted.

The witnesses in-court identification should also be permitted because even if the Court were to find the identification procedures unduly suggestive, the witnesses had a substantial independent basis for making the identification.

Where an in-court identification is proceeded by a suggestive out of identification, the in-court identification may still be admissible where it has a permissible independent source. *See United States v. Wade*, 388 U.S. 218 (1967); *United States v. Cannington*, 729 F.2d 702, 711 (11th Cir. 1984). For example, in *Cannington*, the Eleventh Circuit affirmed the trial court's ruling that single photo identification "did not create a substantial likelihood of improper in-court identification because each of the witnesses to whom the photograph had been shown had had a substantial independent basis for making the identification even though it was unduly suggestive." 729 F.2d at 711; *See also*

United States v. Felix, 591 F. App'x 777, 781 (11th Cir. 2014) (finding in court identification reliable where witness worked alongside the defendant for a period of time and knew him well).

Even if the Court were to find that the out of court identification procedures here were unduly suggestive and the witness identifications unreliable, the witnesses should still be allowed to provide in-court identifications, should the United States seek to introduce such evidence at a trial. The witnesses have knowledge of the defendant's identity independent from the identification procedures. In *Felix*, the Court found the in-court identification reliable, explaining that the witness worked alongside the defendant for a period of time and knew him well. Here the witnesses were also familiar with the defendant. As detailed in the FBI reports at Doc. 45-1, 45-2, 45-3 and in the sections above, the witnesses all had independent knowledge of defendant prior to their out of court identifications having been his neighbor and observed his behaviors for months. As such, the Court should deny the defendant's motion.

CONCLUSION

For the foregoing reasons, this Court should deny defendant's motion to suppress pre-trial and in-court identifications, Doc. 45. In the alternative, the United States requests a hearing to determine whether suppression is appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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