No. _____

In the Supreme Court of the United States

JUAN E. SEARY-COLON, A/K/A RICKY DIABLO,
PETITIONER,

v.

UNITED STATES,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Evidence was Totally Insufficient for the Conviction to Stand.

PARTIES TO THE PROCEEDINGS

The Parties to the Instant Proceedings Are Contained in the Caption of the Case.

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Petitioner Juan E. Seary-Colon (hereinafter Petitioner) respectfully petitions for a writ of certiorari to review and vacate the judgment of the U.S. Court of Appeals for the First Circuit.

OPINION BELOW

The Judgment (App., *infra*, 1a) was entered on May 4th, 2021, in *U. S. v. Juan E. Seary-Colon*, under docket number 18-1859.

JURISDICTION

After the judgment was entered, no petition for rehearing was filed in this case. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . .nor be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the U.S. Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Eighth Amendment to the U.S. Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

A. District Court Proceedings:

On April 19th, 2012, a District of Puerto Rico Grand Jury rendered a four count indictment charging among others violations of 18 U.S.C. §§ 1951(a), 924(c)(1), 924(j), 922(g) and 924(a)(2)(DE 10).

On April 23rd, 2012, a death penalty eligibility notice was entered (DE 12) and the arraignment and bail were held (DE 17). Petitioner was ordered detained (DE 18).

On April 24th, 2012, a discovery order was issued (DE 13) and on April 26th, 2012, a status conference was held (DE 34).

On June 5th, 2012, Death Penalty Learned Counsel was appointed and on June 12th, 2012, a second status conference was held (DE 35).

After multiple status conferences (DE 40, 46, 47, 65, 70, 95, 99, 100, 106, 110, 123, 127, 128, 129, 132, 133), discovery, mitigation and other pretrial proceedings, on September 21st, 2015, the United States informed that it would not seek the death penalty in this case (DE 125).

Thereafter, on September 20th, 2016, Petitioner moved for change of plea (DE 137). However, after several continuances, Petitioner moved to withdraw motion for change of plea (DE 156, 161).

On April 7th, 2017, Petitioner moved to suppress his identification (DE 164) and on May 3rd, 2017, the United States filed its response in opposition (DE 170). On May 4th, 2017, District Court denied this motion to suppress (DE 171). During trial (DE 220 at 76, 79; DE 200 at 167; DE 256 at 43), on February 23rd, 2018, Petitioner moved for reconsideration (DE 210), however, on February 25th, 2018, same was denied (DE 216).

After several other status conferences (DE 174, 178, 180), on January 19th, 2018, Petitioner filed a motion in limine (DE 190) and on January 24th, 2018, the government responded in agreement (DE 192, 193).

On February 5th, 2018, a pretrial hearing was held (DE 195) and on February 7th, 2018, the government filed its proposed jury instructions (DE 194).

On February 12th, 2018, Petitioner and on February 15th, 2018, the government submitted their respective proposed voir dire (DE 196 & 199).

On February 16th, 2018, the jury was selected (DE 200 & 257) and on February 20th, 2018, the first day of trial began (DE 203, 213, 219). Thereafter,

the jury trial continued until (DE 209, 215, 220) until February 26th, 2018 (DE 221 & 256), when the jury reached a guilty verdict as to counts 1 through 4 (DE 222).

Meanwhile, on February 23rd, 2018, Petitioner submitted proposed jury instructions and verdict form (DE 211, 212). On February 24th, 2018, the government filed a response to Petitioner's proposed jury instructions (DE 214). And on February 25th, 2018, the district court ruled that proposed jury instructions at Docket No. 211 were noted and that Petitioner's jury proposed instruction 1 and 2 would be provided but it would be as in the First Circuit pattern instructions. Nonetheless, instructions 3 and 4 would be provided(DE 217).

On April 27th, 2018, the presentence investigation report (hereinafter PSR)(DE 231) was disclosed and on June 6th, 2018, the PSR was filed jointly with its addendum (DE 234). Thereafter, on July 27th, 2018, the amended PSR was disclosed (DE 236).

On August 17th, 2018, Petitioner submitted a sentencing memorandum (DE 239) and on the following day the district court entered Order (DE 241), taking notice of its content. And on August 19th, 2018, the government filed its sentencing memorandum (DE 242).

On August 20th, 2018, Petitioner was sentenced to an imprisonment term of 240 months as to Count One, Life as to Count 2, 120 months as to Count Four, to be served concurrently with each other, but consecutively with any state case (DE 244 & 257). No supervised release term was imposed. Judgment and the Statement of Reasons were entered this same day (DE 246 & 253).

On August 22nd, 2018, the corrections to the PSR were made (DE 243) and on August 30th, 2018, the notice of appeal was filed (DE 247).

On September 7th, 2018, the record below was certified and transmitted to the Court below (DE 249 & 251).

B. Appellate Proceedings:

On March 3rd, 2020, Petitioner, through his defense counsel, submitted his brief and on March 20th, 2020, Petitioner submitted an amended brief. On August 19th, 2020, the government submitted its brief.

Subsequently, on March 9th, 2021, oral arguments were presented and on May 4th, 2021, the Court of Appeals entered Opinion and Judgment, affirming the conviction and sentence imposed at the district court level.

REASONS FOR GRANTING THE PETITION

In the whereby case, the U.S. Court of Appeals (USCA) affirmed the district court judgment, concluding among others, “Here, we conclude that the sum of all the evidence presented by the government and the inferences drawn therefrom was sufficient for a rational jury to conclude beyond a reasonable doubt that Seary was the armed robber who murdered Méndez-Calderón on April 3rd, 2012. *See U.S. v. Santos-Soto*, 799 F.3d at 62 (noting that a sufficiency-of-the-evidence challenge will fail if the defendant's conviction "rests on sufficient evidence," even if the jury's finding of guilt is not "inevitable based on the evidence").”

Despite the findings made by the Court of Appeals, Petitioner still believes that the district court committed a miscarriage of justice against him. In this regard, Petitioner believes that the record and available transcripts reveal that the evidence considered by the jury was insufficient for his conviction to validly stand and the District Court abused its discretion. Likewise, the verdicts entered by the jury were inconsistent and not supported by the evidence.

The record at hand reveals that the government did not meet its burden of proof as it failed to establish the elements of the offense of conviction beyond a

reasonable doubt. Hence, the evidence presented by the United States failed to establish that Petitioner's alleged involvement in the offense of conviction.

In this particular case, the record and available transcripts reveal that the evidence considered by the jury was insufficient for the conviction to validly stand and to find Petitioner guilty beyond a reasonable doubt. And the identification process is so suggestive and contaminated that any testimonial identification evidence should have been suppressed and barred at trial.

Based on the record at hand, it is difficult to determine whether the instant police investigation was deficient or simply put, Petitioner’s identification seem to have been anticipated. Otherwise, if there was no extrinsic or scientific evidence to connect Petitioner to the instant offense of conviction, how could we explain that his photograph was included in two different photo arrays that did not follow any particular protocol whatsoever as one was conducted with nine photos and the other with six right after Petitioner’s newsworthy arrest. Hence, Petitioner is of the opinion that the two photo arrays purpose was to contravene his Due Process rights as he was certainly denied an opportunity to participate in an impartial identification line up, especially, after his famous media arrest.

Moreover, Petitioner totally concedes that the jury is the ultimate fact finder. However, when the identification process has been so contaminated and when same is so suggestive by the government own acts or unintentional results of a negligent investigation, the government should not be rewarded with a second turn at the bat with the jury. It becomes a question of submitting to the jury a greatly unreliable, suspect and untrustworthy evidentiary item. This is the main reason our Forefathers included the Due Process Clause in our beloved Constitution in an attempt among others to prevent this kind of foresaw abuse in the process on the part of the government. The line is simply too thin to leave the particulars of the instant investigation and its irregular identification unattended.

The record at hand reveals that the government did not meet its burden of proof as it failed to establish the elements of the offenses of conviction beyond a reasonable doubt. *See* DE 256 at 118 (Closing Statement). Hence, the evidence presented by the United States failed to establish that Petitioner actually participated in the offenses of conviction.

First, the identification of Petitioner in the alleged offense of conviction is in question. In this regards, the testimony by a witness as to identity must be received with caution and scrutinized with care. And this analysis should be

examined under higher scrutiny as the instant investigation failed to produce any ballistic, fingerprint, gun powder, fiber residue or DNA blood spattered analysis comparison to corroborate the alleged identification of the witnesses at hand, leaving us only with unreliable memory identification.

Petitioner concedes that the offenses of conviction constitute an abominable act, in which a good man, Mr. David Méndez-Calderón, was killed. Based on the testimonies of witnesses Ms. Maria Judith Sanabria-Rivera and Mr. José Méndez-Del-Valle, we can conclude that the victim was a hardworking man and a person who was appreciated by his colleagues. However, the despicability of the offenses and the attributes of the victim should not suffice by themselves to convict an individual beyond a reasonable doubt.

Moreover, Petitioner concedes that on April 3rd, 2012, a robbery took place at Piezas Importadas in Carolina, Puerto Rico. Two persons went into that business establishment with the purpose to commit a robbery as depicted in the video recording played for the jury. And the testimony of the witnesses corroborated that indeed a robbery took place because these two individuals did take the petty cash that was at the premises of such store. Nevertheless, out of the

12 witnesses employed by the government, only two witnesses were presented in an effort to identify Petitioner as one of the two assailants.

In this regards, first witness Mr. José Méndez-Del-Valle, who had been an employee in this business for approximately a year and who was working during thisrobbery, jumped to the floor immediately when the two assailants instructed him. He did not have much time to view the alleged assailants and was under a high level of stress and anxiety at that moment. Mr. Méndez-Del-Valle did identify Petitioner but from a nine photograph array. However, the record does show that Mr. Méndez-Del-Valle's identification may have been compromised with the newspaper article and front page photograph of Petitioner, which was published contemporaneously with the photographic array identification procedure. This identification tampering may have been unwantedly or wilful, but it is certainly so significant that Petitioner strongly believes that it irreparably lacerated this important impartial process. To exacerbate matters, Mr. Méndez-Del-Valle did not attempt to identify Petitioner in open court. Instead, the government attempted to fill this gap in the identification through the testimony of Agent Caamaño. The government claimed at trial that Mr. Méndez-Del-Valle identified Petitioner to Agent Caamargo, who then identified Petitioner before the

jury. Nonetheless, Petitioner believes that this strategy shows the government's desperation to convict him instead of finding the true guilty aggressor.

Furthermore, the government's reliance on a single witness to identify Petitioner seems at odds with a fair conviction. Again, we must remember that there are no DNA, gun powder, fibers, or fingerprints comparison evidence and much lessa firearm or ammunition to tie Petitioner to the offenses of conviction. There is simply no corroborating evidence to place Petitioner at the scene of the robbery and much less in possession of a firearm.

Still, Petitioner cannot understand how in this stressful fast situation, the witness allegedly saw the assailant but cannot state what this assailant was saying. Either he saw or did not see the alleged suspect. Likewise, if the witness did claim that Petitioner had the same jacket, why this jacket was not submitted to laboratory testing for example to test for DNA, blood spatter or gun powder residue, or state whether Petitioner was wearing this jacket with a very distinctive emblem. The instant investigation purpose does not seem intended to catch the guilty perpetrator but rather an elaborated scheme to blame Petitioner out of the agents' gut feeling. Regrettably and as Robert Heller wrote: "Never ignore a gut feeling, but never believe that it is enough."

Later, Ms. Maria Judith Sanabria-Rivera identified Petitioner one week later in a six photo array. Under the eyes of Petitioner, he simply does not understand why one photograph array was conducted with nine photos while the other only with six. Certainly, the less number of photographs, the higher the chances for human error and to select a particular individual irregardless of guilt. Hence, there was no specific or standard array identification procedure followed. Why this could be permitted? Does this lack of standard accepted procedure affect the identification reliability and trustworthiness? Did the police rely in any scientific studies or research? On top of these issues, Ms. Sanabria-Rivera did allegedly describe Petitioner, however, she either failed to report the tattoo on Petitioner's left leg or the agents failed to memorialize same. However, at trial, Ms. Sanabria-Rivera and F.B.I. Agent Emanuel Martinez testified about same, making this testimony highly suspicious. These testimonial incongruencies are extremely suspect and tend to be just shocking for a sound mind and same could potentially lead the jury to confusion and to err in its appreciation of the facts. We must remember that this is an awful violent event for which our human nature demands immediate vindictiveness on our part. However, our hurry to punish the culpable could lead us to err and to commit a travesty of justice like the one at bar.

Ms. Sanabria-Rivera additionally is the only witness who testified that there were two shots made during the robbery. However, only one casing was recovered at the scene of the robbery. Hence, there is no evidence in this case to corroborate this allegation. One thing is for sure, at the time of the robbery Ms. Sanabria was in a state of panic, stress and anxiety, hence, her honest memory recollection is at issue, especially, when we do not have any other corroborating physical or testimonial evidence to corroborate such claim.

Again, Petitioner is of the opinion that the government through its scene witnesses could not positively identify the alleged robbers. Instead, by the time that those interviews by the agents with the witnesses took place, Petitioner had been placed under custody and the photographs of his legs had been taken and disseminated. This is why Petitioner believes that the witnesses' identification had been tampered or at least contaminated by the agents either purposely or through willful blindness and dereliction.

As above-mentioned, the government allegedly seized at one time or another during the course of the instant investigation a casing, a fragment of a bullet and a jacket casing (Exhibit 24). However, it did not conduct any ballistic

test or examination and much less it could connect Petitioner to any of these evidentiary items.

Additionally, Agent Maria Cruz testified about the execution of the search warrant on April 13th, 2012. However, during this search, no clothing, shoes, little box with the petty cash, baseball hats, or any other evidentiary item was seized that could connect Petitioner to the offenses of conviction. The only item seized at the time was one fairly extremely common Federal brand .40 Smith & Wesson bullet and all government witnesses again testified that this is a very common ammunition. And we invite this Court to take judicial notice that this is certainly a very-very common brand and caliber of ammunition in the United States.

Moreover, Petitioner's step father testified that he had found such ammunition and used same for a religious purpose. Despite this one bullet seizure, no ballistic examinations were made and this bullet could not be linked to the offenses at bar and much less to Petitioner. A bullet comparison cannot be made because the government failed to conduct a ballistic examination. Imagine to be linked to a robbery offense simply because the police found at your parents' home one single round of a common brand of ammunition. This premise is simply

preposterous, nevertheless, these are the facts, which seem to be partly designed to totally confuse the jury.

In this particular case, the government forensic expert testified that the victim was shot from a distance of about two feet as there was no powder residue allegedly found. This projectile allegedly shattered some bone. However, no blood spattering was sought. This issue intensifies because the police investigation failed to reveal whether any clothing from Petitioner was seized, revealing blood or DNA residue or stains from the victim. At the distance the victim was shot, it is reasonable to infer that there would be blood spattered everywhere at the scene of the robbery.

Nonetheless, this important part of the investigation was not pursued or addressed, even though there were claims that Petitioner was wearing the same clothes as the assailant and the victim drowned in his own blood. And the police and its forensic team failed to link and match anyone with this blood and DNA samples that were not collected but simply and recklessly ignored. This was certainly a poor investigation on the part of the police and forensic examiners and now, we have an innocent man behind bars because of such negligent performance. This criticism exacerbates when we consider that several witnesses

spoke about some video recordings taken from the scene the day of the robbery at bar, however, such footage was not enhanced to identify the actual culpable parties as there were two alleged robbers.

On top of this deficient investigation, we have two witnesses, Mr. Méndez Del-Valle and Ms. Sanabria-Rivera, who work together every day. As a matter of fact, Ms. Sanabria-Rivera is the co-owner or at least married to the owner of Piezas Importadas. This is why it is shocking to hear Mr. Méndez Del-Valle declaring that he did not speak with Ms. Sanabria-Rivera about the alleged suspect's identification. It constitutes such a naive story which is certainly difficult to swallow in such friendly and closely working environment.

In this particular case, Petitioner must concede that "a sufficiency of the evidence challenge to a jury's verdict will not succeed unless no rational jury could have concluded that the government proved all of the essential elements of the offense beyond a reasonable doubt." *U.S. v. Rogers*, 714 F.3d 82, 86 (1st Cir. 2013).

Hence, "the facts and all reasonable inferences must be drawn and evaluated in favor of the verdict." *Rogers*, 714 F.3d at 86; *U.S. v. Rodríguez-Marrero*, 390 F.3d 1, 6 (1st Cir.2004). However, "we must ascertain whether, after assaying all

the evidence in the light most amiable to the government, and taking all reasonable inferences in its favor, a rational factfinder could find, beyond a reasonable doubt, that the prosecution successfully proved the essential elements of the crime." *U.S. v. Spinney*, 65 F.3d 231, 234 (1st Cir.1995).

In this case, the police faulty investigation seems to have contaminated the witnesses identification.This severe contamination is more than evident in this criminal case as the government failed to connect Petitioner with the scene of the offense. This missing factual link can be easily appreciated as the police failed to compare any fingerprint, fiber, gun powder residue, blood spattered samples, DNA, or any other evidentiary physical item which could be associated or connected with Petitioner. This lack of comparison shows a very deficient police and forensic investigation, which alarmingly becomes more apparent when we consider that the instant investigation fails to reflect any DNA or ballistic comparison. This means that besides the inconsistency of the two alleges identifications of Petitioner, the investigation failed to reveal any other evidence to either substantiate or support such identification and much less to justify Petitioner's photo inclusion in the identification arrays at hand. Likewise, the police had other investigative tools available, however, it seems that the agents

were so certain that they had caught the culpable that they potentially or unwantedly pressured and influenced the alleged witnesses into identifying Petitioner as one of the robbers. For example, the agents seized some video footage of the alleged robbery scene. Nonetheless, such video recordings were not enhanced to attempt to identify the two alleged suspects. No particular part or segment of these videos was enlarged or enhanced to attempt to accurately identify the two suspects. And the only logical explanation seems that the agents were certain that they had arrested the culpable party. Nevertheless, the agents total reliance on their assumption led them to conduct and complete a faulty investigation.

In sum, the instant offense of conviction constitutes an horrible violent crime. However, the instant police investigation is grossly deficient for the multiple reasons above-mentioned. And unfortunately, it is better to have one hundred guilty individuals acquitted than to pass sentence of condemnation against one innocent person like Petitioner. *See* Benjamin Franklyn, letter to Benjamin Vaughan, March 14th, 1785, *The Writings of Benjamin Franklin*, ed. Albert H. Smyth, vol. 9, p. 293 (1906)(*quoting* François-Marie Arouet, aka

Voltaire: “It is better to risk saving a guilty man than to condemn an innocent one.”).

In this particular case, Petitioner attempted several times below to suppress his contaminated identification (DE 164; DE 220 at 72-77, 79; 167, 172). This means that Petitioner validly safeguarded this controversy for this forum. *See, e.g., U.S. v. Gomez-Benabe*, 985 F.2d 607 (1st Cir.1993).

As to the identification, Petitioner is alleged to have shot and killed Mr. David Mendez Calderon, who was the store manager of Piezas Importadas, Inc., on April 3rd, 2012. At the time of the alleged crime, more than a dozen people were in the small motor-parts store. Of these, only two persons have allegedly identified Petitioner from two different photographic lineups before trial. The prosecution in this case was based solely on the identification made by these two (2) putative eyewitnesses who presumably were in or about the place where the events took place.

There is no other physical or scientific evidence that could tie Petitioner to the alleged events. The United States produced a copy of a video recorded during the robbery, but its quality only serves to demonstrate that the event occurred, and

not who participated in the robbery. Only Petitioner was arrested and the other putative robber remains at large and has yet to be identified.

Petitioner was arrested at his grandmother's house. However, no physical or forensic evidence was found to link Petitioner to this incident. Althoughapproximately $1,000 was stolen in the robbery, no money was recovered from Petitioner. No clothes, hats or shoes were seized from his home and no gun was recovered either. An examination of the crime scene failed to disclose any latent fingerprints, gun powder residue or blood spattered comparison that would place Petitioner in or around the store. It is significant to note that neither of the alleged suspects were wearing gloves. As observed from the store's video recording, the suspects entered through one door and exited through another door. As can be seen from the video recording, one participant placed his hand on the counter to jump over the counter to get the store's money and both the entry and exit doors were touched by either of the suspects. The video indicates that the robbery, from entry to exit, lasted between 30-40 seconds and the victims were ordered to lay face-down on the floor while the robbery took place.

Following the robbery, only two eyewitnesses selected Petitioner from a photo-array. The first witness selected Petitioner on April 4th, 2012. In a statement

provided on April 4th, 2012, at the Puerto Rico District Attorney's Office, said person stated that he was standing outside the store talking on the phone when the two suspects entered. He stated that the shooter, who allegedly is Petitioner, was "about 5'6" and was wearing tennis shoes. At the time of booking, personnel at M.D.C. Guaynabo measured Petitioner as standing 5'10" in his bare feet. From a photo array prepared the day following the events and out of presumably thousands of photos available to the Police of Puerto Rico, and Petitioner not being a suspect, they happened to include his photo in the photo array. From this initial nine photo display, this witness was able to select Petitioner as the shooter. It is highly questionable how Petitioner made it into the array when he was not a suspect of this robbery. And the instant records fails to justify Petitioner's inclusion in such array. Moreover, the description given by this witness lacks reliability as it is unduly suggestive and conducive to a mistaken identity.

The second witness selected Petitioner from a six photo array on April 17th, 2012. All the large media outlets in Puerto Rico covered his arrest. One prominent newspaper ran his photograph from a perp walk displayed above the fold on its front page. This large photograph appeared with a headline announcing the apprehension of "El Diablo" ("The Devil"). On this occasion, it is clear that

Petitioner had already been detained(DE 220 at 79). However, on this occasion, and in order to eschew any type of misidentification, the law enforcement agents chose to prepare a photo array that contained only six (6) photographs, rather than the number available on the prior occasion. This out-of-court identification was impermissibly contaminated since the person who presumably identified Petitioner, had already been made aware of the factthat Petitioner had been arrested for precisely the same offense. As anyone may surmise, this significant contamination of this second putative witness surely raises questions as to its reliability and trustworthiness. As a witness of the robbery, and since the agents had already arrested Petitioner as one of the perpetrators, it would have been the best investigative course of action to conduct a line-up with all the identifiable witness at the store. Likewise, since Petitioner had already been arrested by the time this second identification array took place, Petitioner believes that he should have been given the opportunity to personally or through his defense counsel to participate in same(DE 220 at 75, 79). However, it seems that the intent was for Petitioner to be selected from the photograph array and not to search for the guilty perpetrator.

Moreover, the best practices developed by the social scientists who study identification issues to reduce the chance of misidentification were not fully complied with. It appears that the photos were not shown in a sequential manner, and the array was not presented in a "double blind" manner (DE 164). *See, e.g.*, Deputy Attorney General's Memorandum for Heads of Department Law Enforcement Components and all Department Prosecutors, regarding Procedures for Conducting Photo Arrays, dated January 6th, 2017. While Petitioner is aware of the fact that the Memorandum was issued after the events in this case, the reasoning for the directive is precisely thereason why the method used in this case has deemed to be unreliable. And it would have taken two additional seconds for this identification array to have been video recorded(DE 220 at 73), which would have guarded against the evils of a contaminated and unreliable identification process. Again, this photographic array process simply leaves a bad taste and perpetuates the major risks associated with the conviction of an innocent man. This is why once Petitioner had been arrested, the police should have notified him and his defense counsel and afford him an opportunity to participate in this identification process. Since Petitioner was not afforded this opportunity, this whole process seems unduly unfair and fishy at best.

Furthermore, no witness from the store mentioned or reported having observed any tattoo on the suspect thought to be Petitioner. The perpetrators' hands were un-gloved and their lower legs were exposed. As it is easily ascertainable, Petitioner's hand and leg tattoos would have been visible had he been the perpetrator. And a simple fingerprint analysis would have identified the actual perpetrator. However, this reckless investigation only goal was to arrest whomever the agents intended, not the actual individuals who committed this barbarous offense.

Throughout history, courts have warned of the unreliability of eyewitness testimony. In *U.S. v. Wade*, 388 U.S. 218 (1966), for instance, Justice Brennan noted, "The vagaries of eye-witness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *Id*. at 228. Justice Frankfurter once wrote, "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy." *Id*. The Court's concern and skepticism about eyewitness testimony are supported by statistics. According to The Innocence Project, "Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75% of convictions overturned through DNA testing." Indeed, these

concerns have caused the U.S. Supreme Court to establish tests that an identification must pass to be admissible in court. If an identification procedure is "*so unnecessarily suggestive and conducive to irreparable mistaken identification, the defendant is denied due process of law*." *Stovall v. Denno*, 388 U.S. 293, 302 (1967). "It is the likelihood of misidentification which violates the defendant's right to due process, and it is this which is the basis of the exclusion of evidence . . ." *Neil v. Biggers*, 409 U.S. 188, 198 (1972). *Neil v. Biggers* set forth five factors in determining whether a substantial likelihood of irreparable misidentification exists. These factors are: (1) The opportunity of the witness to view the criminal at the time of the crime; (2) The witness' degree of attention; (3) The accuracy of his prior description of the criminal; (4) The level of certainty demonstrated at the confrontation; and (5) The time betweenthe crime and the confrontation. *Id.* 409 U.S. at 199-200; *U.S. v. Constant*, 814 F.3d 570, 576 (1st Cir.2016). "The corrupting effect of the unduly suggestive procedure is then weighed against an analysis of these factors." *U.S. v. Constant*, 814 F.3d at 576. *Manson v. Braithwaite*, 432 U.S. 98 (1977), reaffirmed these guidelines and stressed that "*reliability is the linchpin in determining the admissibility of identification testimony*." *Id*. at 114.

Petitioner does concede that the U.S. Supreme Court has held that "[i]t is the likelihood of misidentification which violates the defendant's right to due process," *Neil v. Biggers*, 409 U.S. at 198, not the suggestive act by a state agent. This is why the Court emphasized that "reliability is the linchpin."

Moreover, an in-court identification may be tainted by an earlier suggestive identification and therefore it must also be excluded. Before admitting a challenged in-court identification, the trial court must conduct voir dire to determine by clear and convincing evidence whether the in-court identification is of an independent origin and not the product of a suggestive identification. In making this determination, the court should consider the above-noted five factors set forth in *Neil v. Biggers*. *Id*. at 172.

Furthermore, *Perry v. New Hampshire*, U.S. , 132 S.Ct. 716, 724, 181 L.Ed.2d 694 (2012), held among others "[t]he Due Process Clause requires courts toassess, on a case-by-case basis, whether improper police conduct created a "substantial likelihood of misidentification." *See also, Neil v. Biggers*, 409 U.S. 188, 201, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). In addition, "a primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances, the Court said, is to deter law enforcement use of improper lineups,

show ups, and photo arrays in the first place. *Perry v. New Hampshire*, at 726; *Manson v. Brathwaite*, 432 U.S. 98, 112, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). Nonetheless, Petitioner must concede that "the very purpose of the check, the Court noted, was to avoid depriving the jury of identification evidence that is reliable, notwithstanding improper police conduct."*Perry v. New Hampshire*, at 726; *Manson v. Brathwaite*, at 112-113.

Therefore, "[t]he Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." *Id*. at 730.

Conversely, should the *Neil v. Biggers* test fail and "if this weighing points to a very substantial likelihood of irreparable misidentification, the identification evidence must be suppressed." *Perry*, 132 S.Ct. at 720; *U.S. v. Constant*, 814 F.3d at 576. However, again, "but if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, theidentification evidence ordinarily will be admitted, and the jury will ultimately determine its worth. And because we usually entrust the jury with the responsibility of determining whether lay witness testimony is reliable, we have

said that only extraordinary circumstances warrant the withholding of identification evidence from it." *U.S. v. Constant*, 814 F.3d at 576(*quoting U.S. v. de Jesus-Rios*, 990 F.2d 672, 677 (1st Cir.1993); *see also Perry*, 132 S.Ct. at 723 ("Only when evidence is so extremely unfair that its admission violates fundamental conceptions of justice have we imposed a constraint tied to the Due Process Clause.").

In this regard,"typically, the district court's ultimate decision to admit or suppress identification evidence is subject to a plenary, de novo standard of review, with underlying findings of fact reviewed for clear error." *U.S. v. De León-Quiñones*, 588 F.3d 748, 753 (1st Cir.2009); *U.S. v. Constant*, 814 F.3d at 576; *see also, U.S. v. Espinal-Almeida*, 699 F.3d 588, 602 (1st Cir.2012); *U.S. v. Casey*, 825 F.3d 1, 17 (1st Cir.2016)("District court decisions denying motions to suppress pre-trial identifications are reviewed de novo, but with deference to any findings of fact."). Nevertheless,"simply put, gauging the reliability of a witness's testimony in a case like this is precisely the type of judgment that trial judges are both well-equipped and well-positioned to make." *U.S. v. Constant*, 814 F.3d at 576-577. And as abovedescribed, Petitioner has grounds to be alarmed as his

identification process seems suspicious, unduly suggestive and full of irregularities which should bar its usage at trial.

Again, in this case, we have two photo arrays. One with 9 photos and the other with 6 conducted at different times. The second photo array was conducted after Petitioner's newsworthy arrest and neither photo array was recorded. Petitioner does not understand why his particular photograph was included in both photo arrays when there was no evidence at all to link him to the offense at bar. Likewise, Petitioner does not understand why one photo array had 9 photographs while the other 6 photographs. Under these same lines, if Petitioner had already been arrested and allegedly identified in the first photo array, why was not he or his defense counsel notified of this second photo array. Why the police simply did not conduct a normal identification line up process? Even if the police did not intend to be unfair, this identification process seems contaminated and corrupted. The police agents did not follow any particular identification protocol, building the same suspicious grounds that tainted and invalidated the instant identification process. And even though the instant record contains no documentation of the array assembly procedure or any report about the identification process, common sense should not be left behind in this analysis. Hence, after examining the

multiple irregularities herein committed by the investigative agents, Petitioner is of the opinion that his identification process seems to be unduly suggestive and therefore, shocking to the senses.

Based the above mentioned contamination, Petitioner believes that both photographic arrays should have been suppressed as well as the in court identifications should have not been allowed. *See U.S. v. Santiago-Colon*, 917 F.3d 43 (1st Cir. 2019). The multiple negligent acts committed during the course of the instant investigation on the part of the police in its identification process clearly and convincingly to show that the in-court identification was based upon observations of the suspect in the lineup identification. *See, e.g., Moore v. Illinois*, 434 U.S. 220, 225-26 (1977); *U.S. v. Wade*, 388 U.S. 218, 240 (1967). And the mere appearance of impropriety should more than suffice as the own conduct of the agents adversely affected the two photo arrays and in court identification of Petitioner.

In sum, "a court should exclude an out-of-court identification based on a photo array only in those extraordinary cases where there is a very substantial likelihood of irreparable misidentification, a situation which could result in an unfair trial in violation of the defendant's due process rights." *U.S. v. Casey*, 825

F.3d 1, 17 (1st Cir.2016)(*quoting U.S. v. Henderson*, 320 F.3d 92, 100 (1st Cir. 2003) and *U.S. v. De Jesus-Rios*, 990 F.2d 672, 677 (1st Cir. 1993). "Short of that point, such evidence is for the jury to weigh ... for evidence with some element of untrustworthiness is customary grist for the jury mill." *Manson v. Brathwaite*, 432 U.S. 98, 116, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

Furthermore, "the defendant bears the burden to establish an out-of-court identification was infirm. A two-step analysis is applied to such contentions: (1) whether an impermissibly suggestive procedure was used, and (2), if so, whether the identification was nevertheless reliable under a "totality of the circumstances." *U.S. v. Casey*, 825 F.3d at 17 (*quoting U.S. v. Rivera-Rivera*, 555 F.3d 277, 283 (1st Cir. 2009). Again, *Neil v. Biggers* five factors become relevant for this reliability issue.

In this particular case, it seems that the circumstances of the pre-trial identification were unduly suggestive. Petitioner appears in both the 9 and 6 photo arrays without any justification as there was no evidence to connect him to the offense of conviction. And we must remind this Court that before the second photo array was conducted Petitioner's arrest photograph appeared in the front page news and second and more importantly, Petitioner was not given an opportunity to

participate in the second identification process. To exacerbate matters, there is not a single report in which the witnesses reported any marking or tattoo on the alleged suspects, being the in court identification the first time that such allegations are made on the part of the only scene witness who identified Petitioner in open court. And the district court permitted the agents who conducted the out of court photo arrays to identify Petitioner at trial. This was simply and totally self serving on the part of the agents.These irregularities certainly adversely affected and contaminated the witnesses' in court identification, making same unduly suggestive and unreliable in violation of the Due Process Clause and the right to the fair administration of justice.

CONCLUSION

For the reasons set forth above, it is hereby hence very respectfully requested for this Honorable Court to grant this petition for a writ of certiorari.

RESPECTFULLY SUBMITTED.

At San Juan, Puerto Rico, this 1st day of June, 2021.

/s/ Johnny Rivera-González
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United States Court of Appeals
For the First Circuit

No. 18-1859

UNITED STATES OF AMERICA,

Appellee,

v.

JUAN E. SEARY-COLÓN,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Gustavo A. Gelpí, U.S. District Judge]

Before

Howard, Chief Judge,
Thompson and Barron, Circuit Judges.

Johnny Rivera-González for appellant.
Seth A. Tremble, Special Assistant United States Attorney, with whom W. Stephen Muldrow, United States Attorney, and Mariana E. Bauzá-Almonte, Assistant United States Attorney, Chief, Appellate Division, were on brief, for appellee.

May 4, 2021

THOMPSON, Circuit Judge. Defendant-appellant Juan E. Seary-Colón ("Seary") was charged with Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count One); murdering a person through the use of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(j) (Count Two); possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii) (Count Three); and being a convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count Four). After a three-day trial, the jury convicted him on all counts. Seary now challenges the district court's denial of his motion to suppress identification evidence, the sufficiency of the evidence supporting his convictions, and the district court's determination that Hobbs Act robbery qualifies as a "crime of violence" under 18 U.S.C. § 924(c), which underpinned his convictions on Counts Two and Three. Finding no error, we affirm.

I. Background

A. Factual Background

On April 3, 2012, around 3:20 p.m., two men entered the Piezas Importadas located on Monserrate Avenue in Carolina, Puerto Rico, to commit a robbery. Piezas Importadas is an auto parts store that sells merchandise obtained from suppliers located in the mainland and abroad. April 3rd, 2012 was a busy day at the store, and several customers and employees were around at the time

of the robbery. Five employees, including José Méndez-del Valle ("Méndez") and the store manager David Méndez-Calderón ("Méndez-Calderón"), were working behind the service counter facing the door through which the robbers entered. As the store owner's wife and store accountant, María Judith Sanabria-Rivera ("Sanabria"), was getting ready to leave for the day and was heading towards the door, the two men burst into the store. The first man to enter was wearing a cap and a dark hoodie. He entered the store while brandishing a firearm, announced the robbery, and ordered everyone to "lie on the ground." Sanabria noticed that the man had "very specific" eyebrows that "were marked going up and then thin coming down; not . . . like . . . regular eyebrows that men usually have." She also noticed that he had a peculiar tattoo on his left leg, which had light, basic colors, "not like the tattoos that are used nowadays with . . . lot[s] of color[s]." Before anyone could get down, the gunman walked straight to the service counter, pointed his gun at Méndez-Calderón, and shot him once in the face. Méndez-Calderón fell to the ground and died shortly thereafter as a result of the gunshot wound. The gunman started walking from one side of the store to the other while cursing and yelling at everyone not to look at him. Meanwhile, the other robber jumped over the service counter and asked Méndez for the store's petty cash. Méndez complied and handed him a metal box with approximately

$1,020. The robber took the box with the money, pushed Méndez to the floor, and told him to stay on the ground and not look at him. The robber then jumped back over the counter, joined the gunman, and ran out of the store with the gunman. The robbery lasted approximately forty seconds. After realizing that the robbers were gone, Sanabria called 9-1-1, reported the robbery and asked for help for Méndez-Calderón. The store closed to the public after the robbery and remained closed for more than a day.

Law enforcement officers arrived at the scene shortly thereafter. Agent Calixto Caamaño-De Jesús ("Agent Caamaño") from the Puerto Rico Police was one of the officers who arrived at the scene and was initially in charge of the investigation. Agent Caamaño was at the time assigned to the Homicide Division of the Center for Criminal Investigations in Carolina. Two Federal Bureau of Investigation ("FBI") task force agents, Emmanuel Martínez-Martínez ("Agent Martínez") and José Bocanegra-Ortiz ("Agent Bocanegra"), also arrived at the scene. Law enforcement recovered from the scene a projectile jacket, a fired projectile, and a Federal Smith & Wesson .40-caliber shell casing. They also interviewed Méndez and Sanabria that same day.

The next day, April 4, Agent Caamaño showed Méndez a nine-photo array that included Seary's photo, along with eight fillers. The array included photos of male subjects of roughly

the same ages and eye color. All subjects also had the same hair color, and eight of the nine subjects, including Seary, had relatively short hair. At least six of the subjects, including Seary, seemed to have manicured eyebrows. Agent Caamaño warned Méndez regarding the procedure for the array and instructed him that "if he sees" the photo of the person who had shot Méndez-Calderón the day before, he should let Agent Caamaño know. Méndez picked Seary's photo, which occupied the fourth position in the array, as that of the man who had shot Méndez-Calderón during the Piezas Importadas robbery.

On April 6, 2012, local law enforcement agents arrested Seary at a two-level house located in Villa Fontana, Carolina, that was shared by some of Seary's relatives. The agents found Seary hiding inside a cut-out box spring that was under a mattress in a bedroom located on the first floor of the house. His arrest, however, was unrelated to the Piezas Importadas robbery and Méndez-Calderón's murder. Instead, Seary's arrest was related to a local criminal case in which he was a fugitive. Seary's arrest was featured on the cover of Primera Hora, a local newspaper, on April 9, 2012. Two days later, Agent Caamaño called Méndez and asked him if he had seen the April 9 Primera Hora newspaper. Méndez responded that he had not but that he would get a copy of the newspaper. Agent Caamaño instructed him to call him if he saw

anything that caught his attention in the newspaper. Later that day, Méndez obtained a copy of the newspaper and called Agent Caamaño. Méndez told him that the man featured in the newspaper cover was the same man that had killed Méndez-Calderón, that he had the "same" face, and that the man was wearing the same dark hoodie that the gunman had worn on the day of the robbery. That same day, Agent Caamaño went to Piezas Importadas to have Méndez date and sign the Primera Hora newspaper cover. During that interaction, Méndez repeated that the man portrayed in the newspaper cover had killed Méndez-Calderón and stated that "he had the same deep look [in the picture] that he had when he had come into the business and had killed David [Méndez-Calderón]."

Following Seary's arrest, the FBI officially took over the case, and Agent Bocanegra became the case agent. Agents Bocanegra and Martínez interviewed Sanabria at her house on April 11, 2012. Sanabria described the gunman to the agents and mentioned the peculiar tattoo that he had on his left leg.[1] On April 17, 2012, Agents Bocanegra and Martínez returned to Sanabria's house to show her a six-photo array. The array included Seary's photo as well as those of five of the fillers from the

[1] At the time of the trial, in 2018, Agent Martínez did not remember if Sanabria had mentioned the gunman's tattoo during her interview with him and Agent Bocanegra, though Sanabria testified that she had mentioned it at some point.

April 4 array, though the positioning of the photos was altered.[2] Hence, the photos included in the April 17 array shared the same similarities as those in the April 4 array. Agent Martínez advised Sanabria that the array "may or may not contain a picture of the person who committed the crime" at Piezas Importadas. Sanabria looked at the photo array and "quickly" picked Seary's photo.

In mid-April, several FBI task force agents executed a search warrant in the Villa Fontana house where Seary had been arrested the week before. During the search, one of the officers seized a Federal Smith & Wesson .40-caliber bullet inside a pot located on the second floor of the house.

B. Procedural Background

Based on the April 3, 2012 incident, a federal grand jury returned an indictment on April 19, 2012, charging Seary with Counts One through Four.

Seary moved to suppress Méndez's and Sanabria's out-of-court identifications and to prevent them from identifying him in court. He argued that it was "highly questionable how [Seary's photo] made it into the array" in the first place, that Méndez's description of Seary "lack[ed] reliability," and that the circumstances surrounding Sanabria's identification "raise[d]

[2] In the April 4 photo array, Seary's photo occupied position number four out of nine whereas in the April 17 photo array Seary's photo occupied position number five out of six.

questions as to its reliability." He also complained that the April 17 array had only six photos, that the agents conducted a photo array instead of a line-up, and that the procedures used for conducting the photo array did not "fully compl[y]" with the "best practices" stated in a U.S. Department of Justice memorandum dated January 6, 2017.

The government opposed the motion, arguing that the photo arrays used in this case were not unduly suggestive. After reviewing the photo arrays, the district court agreed with the government. Accordingly, it denied Seary's motion to suppress.

Seary's jury trial began on February 20, 2018. The government introduced Méndez's and Sanabria's out-of-court identifications as exhibits at trial, as well as the testimony of twelve witnesses, including both Méndez and Sanabria. Méndez testified that he was standing next to Méndez-Calderón and approximately three feet across from Seary when he saw Seary shoot Méndez-Calderón. According to Méndez, he looked at Seary's face for two or three seconds and he "couldn't forget that face because [Seary] had a look that was cold, as if he didn't care anything about life." Méndez admitted that he had been mistaken when on April 11, 2012, he told Agent Caamaño that the man featured in the newspaper cover had the same dark hoodie that the gunman had been wearing during the Piezas Importadas robbery, and attributed the

mistake to the fact that he was focused on Seary's face and firearm, not on his clothing, and to both pieces of clothing being similar. For her part, Sanabria testified that she looked at Seary for two seconds, including the exact moment when he shot Méndez-Calderón,[3] and that Seary's manicured eyebrows and unusual tattoo on his left leg caught her attention. Sanabria also identified Seary in court as Méndez-Calderón's shooter.

After all of the government's identification evidence had been presented, Seary moved the district court to reconsider its denial of his motion to suppress. Seary argued that Méndez's identification was not reliable because Méndez had seen the gunman's face for only two or three seconds and had admitted to being wrong about the gunman's clothing. Seary contended that Sanabria's identification should also be suppressed as unreliable because she too only saw the gunman's face for approximately three seconds, the FBI conducted a photo array instead of a line-up, her photo array contained only six photos, and there were inconsistencies between her testimony and that of Agent Martínez as to whether Sanabria had previously mentioned seeing a tattoo on the gunman's left leg. The district court denied Seary's motion

[3] The government introduced into evidence a still image of Sanabria looking at the gunman pointing a firearm at Méndez-Calderón.

for reconsideration on the same grounds that it had denied his original motion to suppress and clarified that the court's ruling "d[id] not preclude [Seary] from arguing to the jury that the government has not met its burden of proof as to the fact that [he] was indeed the person who committed the crime."

At the close of the government's case, Seary moved for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure, which the district court denied. Seary then presented one witness in his defense: his stepfather, Santiago Muñiz-Cruz ("Muñiz"). Muñiz testified that he lived on the second floor of the Villa Fontana house where Seary had been arrested, and that the Federal Smith & Wesson .40-caliber bullet seized from inside a pot in mid-April 2012 belonged to him. According to Muñiz, he practiced Santeria, and in 2006 or 2007 he found that bullet on the street and brought it home to use in his Santeria rites.

After presenting his witness, Seary renewed his motion for a judgment of acquittal, which the court again denied. On February 26, 2018, the jury found Seary guilty of all counts. Seary renewed his motion for acquittal, which the court denied for a third time.

On August 20, 2018, the district court sentenced Seary to imprisonment terms of 240 months for Count One, life for Count

Two, 120 months as to Count Three, which the court merged with Count Two after finding that Count Three was a lesser-included offense of Count Two, and 120 months for Count Four. Seary timely appealed.

II. Discussion

A. The Motion to Suppress

Seary challenges the district court's denial of his motion to suppress Méndez's and Sanabria's out-of-court identifications of him in the photo arrays and to prevent them from identifying him in court. He generally contends that the photo arrays constructed by the police were in violation of the Due Process Clause. See Neil v. Biggers, 409 U.S. 188, 196–98 (1972).

Identification evidence -- both out-of-court and in-court identifications -- "should be suppressed as a matter of due process 'only in extraordinary cases.'" United States v. Holliday, 457 F.3d 121, 125 (1st Cir. 2006) (quoting United States v. Henderson, 320 F.3d 92, 100 (1st Cir. 2003)). To withhold identification evidence from a jury, the defendant must persuade the court that the "identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Biggers, 409 U.S. at 197 (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)); see also

United States v. Casey, 825 F.3d 1, 17 (1st Cir. 2016) (noting that "[t]he defendant bears the burden to establish [that] an out-of-court identification was infirm"). The defendant must first establish that the identification procedure was unduly suggestive. Perry v. New Hampshire, 565 U.S. 228, 241-42 (2012). "If it was not, the inquiry ends," United States v. Melvin, 730 F.3d 29, 34 (1st Cir. 2013), and it is for the jury to determine how much weight to afford the identification evidence, Casey, 825 F.3d at 17. If, however, the defendant can successfully establish that the identification procedure was unduly suggestive, we must "then examine the totality of the circumstances to ascertain whether the identification was nevertheless reliable."[4] Melvin, 730 F.3d at

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[4] In Biggers, the Supreme Court set forth the following factors for evaluating the reliability of identifications:

> [(1)] the opportunity of the witness to view the criminal at the time of the crime, [(2)] the witness' degree of attention, [(3)] the accuracy of the witness' prior description of the criminal, [(4)] the level of certainty demonstrated by the witness at the confrontation, and [(5)] the length of time between the crime and the confrontation.

409 U.S. at 199-200. "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." Manson v. Brathwaite, 432 U.S. 98, 114 (1977). Absent a finding of a "substantial likelihood of irreparable misidentification," "such evidence is for the jury to weigh," as "some element of untrustworthiness is customary grist for the jury mill" because "[j]uries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." Id. at 116.

34 (citing United States v. DeCologero, 530 F.3d 36, 62 (1st Cir. 2008)). "[I]f the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." Perry, 565 U.S. at 232. The same analysis applies to both pretrial and in-court identifications. See Holliday, 457 F.3d at 125 (noting that the two steps outlined above apply "[b]oth as to pretrial identifications and in-court identifications"); id. ("When the conviction is 'based on eyewitness identification at trial following a pretrial identification by photograph,' we will reverse on a constitutional basis only if the 'very substantial likelihood of misidentification' was 'irreparable,' despite the defendant's opportunity to cross-examine the witness about the accuracy of the identification." (quoting Simmons, 390 U.S. at 384)).

We review de novo the district court's denial of a motion to suppress a photo identification. Id. Seary asserts two grounds as to why Méndez's identification of him in the April 4 photo array should have been suppressed. First, he contends that Méndez's identification should have been suppressed because "[i]t is highly questionable" and "suspicious" how Seary made it into the array in the first place. This, however, is not enough to

suppress Méndez's identification of Seary. The record shows that Seary was the only suspect included in the arrays -- the rest were fillers -- and there is no evidence in the record suggesting that he was improperly included as a suspect. Although Seary complains that the record is silent as to why he was included in the photo arrays, he had the burden of establishing improper police conduct and developing the record below in this respect. See Casey, 825 F.3d at 17; see also Moore v. Dickhaut, 842 F.3d 97, 101 (1st Cir. 2016). Second, Seary argues that the gunman's description that Méndez provided "lacks reliability," which may lead to a mistaken identification. The fatal flaw with Seary's argument, however, is that it centers on the reliability of Méndez's identification. We do not, however, reach the reliability issue unless the defendant first establishes that the identification procedure was unduly suggestive. See Moore, 842 F.3d at 101 (stating that "the issue of reliability 'comes into play only after the defendant establishes improper police conduct'" (quoting Perry, 565 U.S. at 241)). And here, Seary does not claim, let alone establish, that the April 4 photo array was unduly suggestive. "Absent unnecessarily suggestive procedures, reliability is ensured through traditional trial protections, such as '. . . vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification

and the requirement that guilt be proved beyond a reasonable doubt,'" id. (quoting Perry, 565 U.S. at 233), which Seary received in this case.

Next, Seary argues that Sanabria's identification of him in the April 17 photo array should have been suppressed because: (1) the array contained only six photos and not nine, as the April 4 photo array; (2) the procedures used for conducting the photo array did not "fully compl[y]" with "best practices" stated in a U.S. Department of Justice memorandum dated January 6, 2017; (3) "it would have been the best investigative course of action to conduct a line-up" where defense counsel could have participated, instead of a photo array; (4) Seary's photo had been featured in the Primera Hora newspaper cover and Sanabria was allegedly aware that Seary had been arrested at the time of her identification; and (5) Sanabria allegedly failed to mention Seary's leg tattoo before trial.

Seary's first two arguments relate to the procedure selected by law enforcement to conduct the April 17 photo array. These arguments, however, lack merit because Seary has failed to establish that the procedure followed in this case made the photo array unduly suggestive. Furthermore, although Seary complains that the April 4 array had nine photographs, whereas the April 17 array had only six, the evidence shows that the number of photos

varied because each photo array identification was conducted by a different law enforcement agency following its own standard procedures. The first array was conducted by Agent Caamaño, a local law enforcement officer, who testified that in conducting the array he followed the Puerto Rico Police's "Norms that Govern the Photographic Identification Procedure," which establish that "the witness will be shown no less than nine photographs including the one of the suspect with similar traits to the suspect." The April 17 array, however, was conducted by FBI task force agents after the case had been transferred to the federal jurisdiction and followed FBI's "custom[s] at th[e] time." In addition, although Seary argues that the FBI did "not fully compl[y] with" all of the "best practices" for conducting photo arrays stated in a January 6, 2017 U.S. Department of Justice memorandum, he acknowledges that said memorandum was issued almost five years after the April 17 photo array was conducted.[5] Moreover, that memorandum clearly states that the procedures outlined therein "are not a step-by-step description of how to conduct photo arrays, but rather set out principles and describe examples of how to perform them." Sally Yates, U.S. Dep't of Just., Eyewitness

[5] In any event, we note that the memorandum establishes that a photo array should include only one suspect and at least five filler photographs, which the April 17 photo array clearly complied with. See Sally Yates, U.S. Dep't of Just., Eyewitness Identification: Procedures for Conducting Photo Arrays 3 (2017).

Identification: Procedures for Conducting Photo Arrays 2 (2017). It further clarifies that "nothing in th[at] memorandum implies that an identification not done in accordance with th[ose] procedures is unreliable or inadmissible in court." Id.

Seary's third argument fares no better. Although he might have preferred that the FBI conduct a line-up in the presence of defense counsel instead of a photo array identification, he has failed to show any illegality behind the FBI's decision to conduct a photo array. In fact, Agent Martínez testified that the FBI's usual practice is to conduct photo arrays instead of line-ups, that during his approximately seven years working with the FBI he had conducted over forty photo arrays and not a single line-up, and that the fact that defense counsel might have been present during a line-up had no bearing on the FBI's decision to conduct a photo array in this case.[6]

[6] We note that Seary had not yet been indicted when the FBI conducted the April 17 photo array. Thus, the constitutional right to counsel would not have attached if a line-up had been conducted at that time. See Gullick v. Perrin, 669 F.2d 1, 3 n.5 (1st Cir. 1981) ("At the time of the lineup, the petitioner had not yet been indicted and, thus, his right to counsel at the lineup had not yet attached." (citing Kirby v. Illinois, 406 U.S. 682, 690 (1972))); but cf. Roberts v. Maine, 48 F.3d 1287, 1291 (1st Cir. 1995) (considering the possibility that an exception to that rule might apply in "extremely limited" circumstances not present in this case).

Seary's next contention also fails. Although Seary's photo had been featured in the newspaper cover eight days before Sanabria identified him in the April 17 photo array, there is no evidence that law enforcement showed Sanabria Seary's photo in the newspaper or directed her to that photo, or that she had even seen it.[7] Accordingly, any potential suggestiveness stemming from Sanabria having seen the newspaper cover is not subject to suppression under the two-step analysis. See Perry, 565 U.S. at 243-44, 248 (noting that a witness's out-of-court identification of a "defendant to police officers after seeing a photograph of the defendant in the press captioned 'theft suspect,'" might be affected by "[e]xternal suggestion," but holding that the two-step "due process check" does not apply "when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement"). Furthermore, the newspaper article was unrelated to the Piezas Importadas robbery, and Sanabria was informed that the array "may or may not contain a picture of the person who committed the [robbery]." Nor is there any evidence that Méndez's prior identification of Seary influenced Sanabria's identification. Sanabria denied having learned of Seary's arrest from Méndez, who in turn denied having told anyone that he had

[7] There is no evidence that Sanabria was aware that Seary had been arrested at the time that she identified him in the photo array.

identified Seary in the April 4 array. There is simply nothing in the record to conclude that Sanabria's identification procedure was unduly suggestive or otherwise tainted by either the photo on the newspaper cover or Méndez's prior identification.

Seary's last contention -- that Sanabria allegedly failed to mention his leg tattoo before trial -- relates to the reliability of Sanabria's identification, and not to the suggestiveness of the identification procedure. Yet, as discussed above, when, as here, a defendant fails to establish that the identification procedure was unduly suggestive, we do not reach the reliability issue. See Moore, 842 F.3d at 101; Perry, 565 U.S. at 241. Instead, "reliability is ensured through traditional trial protections," and it is up to the jury to determine how much weight to afford to the identification evidence. Moore, 842 F.3d at 101 (citing Perry, 565 U.S. at 233).

Finally, Seary also contests Sanabria's in-court identification, arguing that it was "tainted by [her] earlier [improper pretrial] identification and therefore it must also be excluded." Because the success of Seary's challenge to Sanabria's in-court identification is contingent on the success of his arguments contesting her pretrial identification, which we have already rejected, his challenge to the in-court identification likewise fails.

In sum, identification evidence should be withheld from a jury "only in extraordinary cases." Melvin, 730 F.3d at 34 (quoting United States v. Rivera-Rivera, 555 F.3d 277, 282 (1st Cir. 2009)). Seary has failed to show that the district court erred in denying his motion to suppress the identification evidence here.

B. Sufficiency of the Evidence

Seary's sufficiency-of-the evidence challenge on appeal is quite limited. Seary concedes that an armed robbery took place at Piezas Importadas on April 3, 2012, during which Méndez-Calderón was murdered, but he claims that the evidence is insufficient to link him to the armed robbery and murder.

Because Seary preserved his challenge to the sufficiency of the evidence, we review de novo the district court's denial of his motion for a judgment of acquittal. United States v. Trinidad-Acosta, 773 F.3d 298, 310 (1st Cir. 2014), superseded in part on other grounds, U.S.S.G. App. C Supp., Amend. 794, as recognized in United States v. De la Cruz-Gutiérrez, 881 F.3d 221, 225 (1st Cir. 2018). In so doing, we determine whether "any reasonable jury could find all the elements of the crime [proven] beyond a reasonable doubt." United States v. Santos-Soto, 799 F.3d 49, 57 (1st Cir. 2015) (quoting United States v. Azubike, 564 F.3d 59, 64 (1st Cir. 2009)). We need not conclude that "no verdict other

than a guilty verdict could sensibly be reached, but must only [be] satisf[ied] . . . that the guilty verdict finds support in a plausible rendition of the record." United States v. Hatch, 434 F.3d 1, 4 (1st Cir. 2006) (internal quotation marks omitted).

In determining whether the record provides such support, we do not view each piece of evidence separately, re-weigh the evidence, or second-guess the jury's credibility calls. Santos-Soto, 799 F.3d at 57; United States v. Acosta-Colón, 741 F.3d 179, 191 (1st Cir. 2013). Instead, we evaluate the sum of all the evidence and inferences drawn therefrom in the light most favorable to the government, resolve all credibility disputes in its favor, and "determine whether that sum is enough for any reasonable jury to find all the elements of the crime proven beyond a reasonable doubt, even if the individual pieces of evidence are not enough when viewed in isolation." Santos-Soto, 799 F.3d at 57; see also United States v. Gaw, 817 F.3d 1, 3-4 (1st Cir. 2016). We will only reverse on a sufficiency challenge if, "after viewing the evidence and reasonable inferences in the light most flattering to the prosecution, [we conclude that] no rational jury could have found him guilty beyond a reasonable doubt." Acosta-Colón, 741 F.3d at 191.

Here, the government presented several pieces of evidence to prove that Seary was the armed robber who murdered

Méndez-Calderón. During the government's case in chief, Méndez testified that he was behind the service counter facing the door through which Seary and his accomplice entered the store in the afternoon of April 3, 2012. Méndez further testified that he looked at Seary for two or three seconds as Seary entered the store while brandishing a firearm, walked towards Méndez-Calderón, pointed his firearm at Méndez-Calderón, and shot him. Méndez explained that this occurred while he was standing next to Méndez-Calderón, approximately three feet away from Seary, that his attention was focused on Seary's face and firearm, and that he could not forget the facial expression that Seary had as these tragic events unfolded. Méndez further testified that he identified Seary in the nine-photo array presented to him on the day following the robbery and again in a picture featured in the cover of the Primera Hora newspaper published on April 9, 2012.[8] Agent Caamaño also testified as to both of Méndez's out-of-court identifications of Seary. In addition, the government presented Sanabria's testimony. Sanabria's testimony corroborated Méndez's account of how Seary entered the store with a firearm at hand and murdered Méndez-Calderón. She testified that she looked at Seary for approximately two seconds, noticed his "very specific"

[8] We note that the cover of the April 9 Primera Hora newspaper was introduced at trial without objection, and Seary does not challenge that evidence on appeal.

eyebrows and the peculiar tattoo on his left leg, and saw the exact moment when Seary shot Méndez-Calderón. Sanabria identified Seary as the robber who murdered Méndez-Calderón both in the six-photo array conducted on April 17, 2012, and in court. FBI task force Agent Martínez also testified as to Sanabria's out-of-court identification of Seary and how "quickly" she had picked Seary's photo from the array conducted on April 17, 2012. Additional evidence, including two surveillance videos and still images from those videos, corroborated Méndez's and Sanabria's accounts. In addition, other government witnesses testified to having recovered a projectile jacket, a fired projectile, and a Federal Smith & Wesson .40-caliber shell casing from the scene, and having later found a matching Federal Smith & Wesson .40-caliber bullet during the execution of a search warrant at the Villa Fontana house where Seary was arrested.

Seary argues that this evidence is insufficient because only two eyewitnesses identified him in photo arrays despite there being several other employees and customers at the store when the robbery occurred, and only one of them also identified him in court. Seary's argument is a non-starter as we have repeatedly held that "[t]estimony from even just 'one witness can support a conviction.'" United States v. Alejandro-Montañez, 778 F.3d 352, 357 (1st Cir. 2015) (quoting United States v. De La Paz-Rentas,

613 F.3d 18, 25 (1st Cir. 2010)); Foxworth v. St. Amand, 570 F.3d 414, 426 (1st Cir. 2009) (noting that "a criminal conviction can rest on the testimony of a single eyewitness" and "[e]ven if the eyewitness's testimony is uncorroborated and comes from an individual of dubious veracity, it can suffice to ground a conviction"). Furthermore, "[t]here is no requirement . . . that a witness who makes an extrajudicial identification must repeat the identification in the courtroom." Foxworth, 570 F.3d at 427.

Seary also argues that the evidence supporting his convictions is insufficient because the identifications made by Méndez and Sanabria are unreliable and their testimony was untrustworthy. Specifically, Seary argues that Méndez and Sanabria "did not have much time to view the [gunman]," and that they must have been in a state of "panic, stress[,] and anxiety" during the robbery, which casts doubts about the accuracy of their recollections. Seary also contends that it strains credulity that Méndez "allegedly saw [him] but cannot state what [he] was saying [during the robbery]" or that Méndez did not speak with Sanabria about his identification of Seary as the gunman. In addition, he notes that there were some inconsistencies between Sanabria's and Agent Martínez's testimony regarding whether Sanabria had previously mentioned to law enforcement that the gunman had a tattoo on his left leg, which makes Sanabria's testimony "highly

suspicious." Seary further notes that Sanabria testified to having heard two gunshots, yet, because law enforcement recovered only one shell casing at the scene, there was no evidence corroborating Sanabria's version.

In making these arguments, Seary tries to call into question the credibility of the witnesses' testimony and the reliability of their out-of-court identification of him. Yet, in assessing the sufficiency of the evidence supporting a defendant's conviction, we do not re-weigh the evidence or second-guess the jury's credibility determinations. Santos-Soto, 799 F.3d at 57, 61. Defense counsel vigorously cross-examined the witnesses and tried to undermine their credibility by highlighting these inaccuracies and inconsistencies, but the witnesses' testimony "was neither inherently improbable nor materially undermined by any other unimpeachable proof." Foxworth, 570 F.3d at 426. The jurors were free to credit the witnesses' testimony, and we cannot disturb their decision. See Santos-Soto, 799 F.3d at 57.

Seary next argues that Méndez's identification of him in the nine-photo array "may have been compromised [by] the newspaper['s] . . . front page photograph of [Seary]," and that the "reliability and trustworthiness" of Sanabria's out-of-court identification of him may have also been "affect[ed]" because the array shown to her had fewer photos than the one shown to Méndez.

Seary's argument regarding Méndez's identification is based on an incorrect premise. The evidence shows that Méndez first identified Seary in the nine-photo array on April 4, 2012, one day after the robbery, and that Seary's photo was featured on the newspaper cover five days later, on April 9, 2012. Hence, Méndez's prior identification of Seary in the nine-photo array could not have been influenced by something that had not yet occurred. The evidence also shows that while Méndez's photo array was conducted by local law enforcement officers pursuant to local standard procedures, Sanabria's photo array was conducted by the FBI pursuant to FBI standard procedures. In any event, the reliability of the identification of Seary in the photo arrays was a matter to be determined by the jury after defense counsel argued the point vociferously to the jury. We cannot re-weigh the evidence presented to the jury or second-guess the jury's credibility determinations. Id.

Finally, Seary protests that law enforcement did not test the clothes he was wearing when he was arrested for DNA, analyze "blood spatter or gun powder residue," "conduct any ballistic test or examination," lift any fingerprints from the scene, or enhance the surveillance footage for a better image of the robbers. Nor did law enforcement recover physical evidence linking him to the crime scene, such as the clothes he was wearing

during the robbery or the metal box and money taken from Piezas Importadas. Although Seary acknowledges that the Federal Smith & Wesson .40-caliber bullet that was seized from his house matched the Federal Smith & Wesson .40-caliber shell casing recovered at the crime scene, he attempts to undermine the significance of this evidence by arguing that this is "a very common ammunition" and that his stepfather testified at trial that the bullet belonged to him, not to Seary.

We decline Seary's invitation to overturn his convictions because the government did not procure additional testing. When assessing the sufficiency of the evidence supporting a conviction, we look only at the evidence presented at trial. See Trinidad-Acosta, 773 F.3d at 310-11. We do "'not consider the potential magnitude of the evidence not presented,' because doing so would be 'an invitation to examine whether the Government might have presented a more convincing case, not whether it in fact presented a sufficient one.'" Santos-Soto, 799 F.3d at 62 (quoting United States v. García, 758 F.3d 714, 721-22 (6th Cir. 2014)). Lastly, we note that, although Seary's stepfather testified at trial that the bullet recovered during the execution of a search warrant was not Seary's but his, "[t]he actual resolution of the conflicting evidence, the credibility of witnesses, and the plausibility of competing explanations is

exactly the task to be performed by a rational jury." Foxworth, 570 F.3d at 427 (quoting Matthews v. Abramajtys, 319 F.3d 780, 790 (6th Cir. 2003)); Acosta-Colón, 741 F.3d at 191 (noting that in assessing the sufficiency of the evidence, we must choose the inference "most compatible with the jury's guilty verdict" when confronted with competing inferences). Moreover, we do not need to be convinced "that the government succeeded in eliminating every possible theory consistent with the defendant's innocence." Trinidad-Acosta, 773 F.3d at 311 (quoting United States v. Troy, 583 F.3d 20, 24 (1st Cir. 2009)).

Here, we conclude that the sum of all the evidence presented by the government and the inferences drawn therefrom was sufficient for a rational jury to conclude beyond a reasonable doubt that Seary was the armed robber who murdered Méndez-Calderón on April 3, 2012. See Santos-Soto, 799 F.3d at 62 (noting that a sufficiency-of-the-evidence challenge will fail if the defendant's conviction "rests on sufficient evidence," even if the jury's finding of guilt is not "inevitable based on the evidence").

C. "Crime of Violence"

Seary argues that Hobbs Act robbery is not categorically a crime of violence for purposes of 18 U.S.C. § 924(c) and thus cannot constitute a predicate offense for his possession of a firearm or murder convictions under sections 924(c)(1)(A)(iii) and

924(j), respectively. Because, in his view, Hobbs Act robbery could only constitute a crime of violence under the residual clause invalidated by the Supreme Court in United States v. Davis, 139 S. Ct. 2319, 2336 (2019), Davis compels the conclusion that his sections 924(c)(1)(A)(iii) and 924(j) convictions are unconstitutional.

We have previously rejected Seary's argument. We held in United States v. García-Ortiz, that "because the offense of Hobbs Act robbery has as an element the use or threatened use of physical force capable of causing injury to a person or property, a conviction for Hobbs Act robbery categorically constitutes a 'crime of violence' under section 924(c)'s force clause." 904 F.3d 102, 109 (1st Cir. 2018). We therefore affirm Seary's convictions on Counts Two and Three.

III. Conclusion

For the foregoing reasons, we affirm Seary's convictions on all counts.

Affirmed.

United States Court of Appeals
For the First Circuit

No. 18-1859

UNITED STATES OF AMERICA,

Appellee,

v.

JUAN E. SEARY-COLÓN,

Defendant, Appellant.

JUDGMENT

Entered: May 4, 2021

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: Juan E. Seary-Colón's convictions on all counts are affirmed.

By the Court:

Maria R. Hamilton, Clerk

cc: Johnny Rivera-Gonzalez Sr., Mariana E. Bauza Almonte, Nicholas Warren Cannon, Seth A. Tremble, Juan E. Seary-Colón