No. 22-6782

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD LEON WILBERN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's due-process rights were violated when three witnesses familiar with his appearance testified in court that he was the person captured on video robbing a bank.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D.N.Y.):

United States v. Wilbern, No. 17-cr-6017 (Sept. 3, 2020)

United States Court of Appeals (2d Cir.):

United States v. Wilbern, No. 20-3494 (Oct. 18, 2022)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-10) is not published in the Federal Reporter but is available at 2022 WL 10225144. The order of the district court is reported at 424 F. Supp. 3d 79.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 2022. A petition for rehearing was denied on January 4, 2023 (Pet. App. 11). The petition for a writ of certiorari was filed on February 10, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, petitioner was convicted of robbing a credit union resulting in death, in violation of 18 U.S.C. 2113(a) and (e). Judgment 1. The district court sentenced petitioner to life imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-10.

1. On August 12, 2003, petitioner -- who had been fired by Xerox in 2001, had his unlawful-termination suit dismissed in 2002, and was experiencing financial difficulties -- entered the Xerox Federal Credit Union where he maintained an account. Gov't C.A. Br. 5-6. Petitioner was carrying an umbrella with Japanese characters and wearing a jacket with "FBI" written on it, a wig that fit him poorly, gloves, and sunglasses. Presentence Investigation Report (PSR) ¶ 14.

Petitioner proceeded to demand money. PSR ¶¶ 15-16. Petitioner then shot a customer, killing him. PSR ¶ 16. After shooting a second customer, who survived, petitioner fled with money but left behind his umbrella. PSR ¶¶ 16, 18. The credit union's surveillance system captured still photographs of petitioner. Gov't C.A. Br. 10.

Soon after the robbery, law enforcement officers publicized the surveillance photographs. Gov't C.A. Br. 10-11. Jamie Labbate, who had worked with petitioner at Xerox, "immediately"

recognized petitioner from television coverage. Id. at 11. When Labbate went to the local police department to make a report, however, he became upset with an officer and left. Ibid.; C.A. App. 72.

Law enforcement accordingly lacked a suspect for several years. See generally Gov't C.A. Br. 9-10. But they later adjusted the lighting in the photographs from the surveillance system, id. at 14, and developed a DNA profile from the umbrella that was left behind, id. at 12-13. And in 2016, they again published photographs of the assailant. Id. at 15.

The renewed publicity led Labbate to now make a full report to law enforcement stating that he recognized petitioner as the robber. C.A. App. 72. Three other witnesses also individually met with law enforcement officers, who questioned each witness about his or her relationship with petitioner. Gov't C.A. Br. 23-26. Two of the witnesses had dated petitioner, and the third had traveled to Japan with petitioner several times, all before or around 2003. Ibid.; C.A. App. 67-74. Officers showed all four individuals the surveillance system photographs, and each independently identified petitioner as the robber. Gov't C.A. Br. 23-26.

2. A grand jury in the Western District of New York returned an indictment charging petitioner with robbery of a credit union resulting in death, in violation of 18 U.S.C. 2113(a) and (e), and murder with a firearm in furtherance of a crime of violence, in

violation of 18 U.S.C. 924(c)(1)(A)(iii) and (j)(1). Indictment 1-2. The government later dismissed the Section 924(c) count. D. Ct. Doc. 183, at 1 (Sept. 30, 2019).

Before trial, petitioner moved to suppress in-court identifications from the witnesses who had identified petitioner from the surveillance system photographs. D. Ct. Doc. 82, at 12-13 (July 31, 2018). Petitioner argued that law-enforcement officers had used "unduly suggestive" procedures and that "any in-court identification" would not be "independently reliable." Id. at 12.

The government informed the court that "no traditional pre-trial identification procedures, such as a line-up, show-up or photo array involving an eyewitness, occurred in this case." D. Ct. Doc. 84, at 63 (Oct. 1, 2018). The government further explained that the witnesses' identifications were admissible as lay witness opinion testimony under Federal Rule of Evidence 701, and that petitioner's concerns about suggestiveness and reliability were misplaced because the witnesses were not identifying a stranger. Id. at 67-76.

At a hearing, the district court stated that "if the witness and the defendant are known to each other, then there's no danger of suggestibility"; the court made clear, however, that if the identification testimony was admitted, petitioner could "explore[]" whether each witness was "telling the truth * * * or [wa]s not." C.A. App. 282, 284. And in a written order issued

several days later, the district court stated that "[w]hile none of the * * * prospective government witnesses was an eyewitness to the crime," it would "assume arguendo that what occurred with respect to each [witness] was some type of pretrial identification procedure." C.A. App. 60.

The district court's written order identified the legal test for "determining the admissibility of in-court identification testimony subsequent to arguably suggestive pretrial identification procedures," stating that it must first "determine whether the 'identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" C.A. App. 60 (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)). The court explained that if the identification procedure was "impermissibly suggestive," then it was required to determine "under the totality of the circumstances, whether the identification was nevertheless reliable." Id. at 60-61 (citing Manson v. Brathwaite, 432 U.S. 98, 105-114 (1977); Neil v. Biggers, 409 U.S. 188, 196-197 (1972); United States v. Concepcion, 983 F.2d 369, 377 (2d Cir. 1992), cert. denied, 510 U.S. 856 (1993)).

The district court further observed that, applying Federal Rule of Evidence 701, "a number of circuits have ruled in a variety of circumstances that opinion testimony identifying a defendant from surveillance photographs may indeed be helpful to the jury and is therefore admissible in the trial court's discretion," at

least "when the witness possesses sufficient[] relevant familiarity with the defendant that the jury cannot also possess, and when the photographs are not either so unmistakably clear or so hopelessly obscure that the witness is no better-suited than the jury to make the identification." C.A. App. 62 (quoting United States v. Whittle, No. 15-cv-170, 2016 WL 4408992, at *6 (W.D. Ky. Aug. 16, 2016), aff'd, 713 Fed. Appx. 457 (6th Cir. 2017), cert. denied, 138 S. Ct. 1580 (2018)) (emphasis omitted). And the court emphasized that "even if a pre-trial identification procedure is unduly suggestive, an in-court identification is still allowed as long as it is 'independently reliable rather than the product of the earlier suggestive procedures.'" Id. at 63 (quoting United States v. Crumble, No. 18-cr-32, 2018 WL 1737642, at *2 (E.D.N.Y. Apr. 11, 2018)).

The district court also emphasized that a witness's familiarity with a defendant "prior to the incident" suggests such independent reliability. C.A. App. 63. The court therefore ordered the government to file detailed affidavits describing each witness's relationship with petitioner before he or she saw the surveillance photographs. Id. at 63-64. The government subsequently filed affidavits for Labbate and the three other witnesses, each of which explained that the witness had spent significant time with petitioner and was familiar with his appearance. Id. at 67-74.

Labbate stated that "[f]rom 1997 to 2001, [he] saw and spoke with [petitioner] every day where [they] shared the same [work] shift, which was often." C.A. App. 71. Another former coworker and girlfriend estimated that between 1997 and 2001, she saw and spoke with petitioner "on hundreds of occasions." Id. at 74. A third witness, who was 60 years old at the time, stated that she had known petitioner since she was 14, and that her sister was married to petitioner's brother. Id. at 67-68. And the fourth witness stated that between 1997 and 2002, he and petitioner had "spent a significant amount of time together" and "travelled to Tokyo, Japan approximately 15 times." Id. at 69.

After reviewing the affidavits, the district court denied the motion to suppress the identification testimony because the witnesses all "possesse[d] sufficiently relevant familiarity with" petitioner around the time of the crime. C.A. App. 107. At trial, all four witnesses identified petitioner as the robber in the surveillance photographs. Gov't C.A. Br. 21-22. The jury found petitioner guilty. C.A. App. 3605-3606.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1-10. On appeal, petitioner did not challenge Labbate's identification. Pet. C.A. Br. 57. And the court rejected petitioner's argument that the admission of the other three witnesses' identification testimony violated his due process rights. Pet. App. 9. The court stated that, "[u]pon review of the entire record," the "district court neither clearly

erred in admitting the identification testimony nor abused its discretion in declining to hold an evidentiary hearing" on petitioner's motion. Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 6-14) that the district court's admission of identification testimony from three of the four identification witnesses who knew him before the crime violated his right to due process. No further review of that contention is warranted. The court of appeals' unpublished, summary disposition is correct. And petitioner cannot identify any other circuit in which his due-process claim would have prevailed. The petition for a writ of certiorari should accordingly be denied.

1. The court of appeals correctly determined that the admission of identification testimony from three witnesses did not violate petitioner's due process rights.

a. Federal Rule of Evidence 701 permits the admission of non-scientific opinion testimony by lay witnesses where the testimony is "rationally based on the witness's perception" and "helpful * * * to determining a fact in issue." Fed. R. Evid. 701(a) and (b). And where identification testimony meets those requirements, courts routinely uphold its admission. See, e.g., United States v. White, 639 F.3d 331, 335 (7th Cir. 2011); United States v. Beck, 418 F.3d 1008, 1015 & n.4 (9th Cir. 2005); United States v. Jackman, 48 F.3d 1, 5-6 (1st Cir. 1995); United States

v. Farnsworth, 729 F.2d 1158, 1160-1161 (8th Cir. 1984). Petitioner does not appear to dispute (Pet. 6-14) the lower courts' determination that Rule 701's prerequisites were satisfied here, based on the witnesses' extensive prior knowledge of his appearance and the light that their identifications could shed on the robber's identity. He instead argues (ibid.) only that the court of appeals erred in rejecting his argument that the identifications violated the Due Process Clause. That argument lacks merit.

As a general matter, the Constitution protects a defendant against allegedly unreliable evidence "not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." Perry v. New Hampshire, 565 U.S. 228, 237 (2012). Those constitutional protections include the right to counsel, see Gideon v. Wainwright, 372 U.S. 335, 343-345 (1963); the right to confront the witnesses offered against him, see Crawford v. Washington, 541 U.S. 36, 61-62 (2004); and the right to compel witnesses to testify in his defense and to present to the jury his own evidence, see Taylor v. Illinois, 484 U.S. 400, 408-409 (1988). Federal and state statutes and rules provide additional protection against potentially unreliable evidence, and "juries are assigned the task of determining the reliability of the evidence presented at trial." Perry, 565 U.S. at 237. Only when the admission of evidence "is so extremely unfair that its admission violates fundamental conceptions of justice" does the

Due Process Clause impose further limitations. Ibid. (citation omitted).

In "a series of decisions involving police-arranged identification procedures," the Court has held that the Due Process Clause may be violated where a defendant establishes that an eyewitness's out-of-court identification was the result of "improper police conduct" that created "unnecessarily suggestive" circumstances. Perry, 565 U.S. at 237, 239, 241; see, e.g., Manson v. Brathwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972); Foster v. California, 394 U.S. 440 (1969); Simmons v. United States, 390 U.S. 377 (1968); Stovall v. Denno, 388 U.S. 293 (1967). The Court reiterated in those decisions that the reliability of eyewitness identifications "like the credibility of the other parts of the prosecution's case" is typically "a matter for the jury." Foster, 394 U.S. at 442 n.2; see Perry, 565 U.S. at 237. But it held that, in rare cases, "the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible." Foster, 394 U.S. at 442-443 n.2; see Perry, 565 U.S. at 238-239; Simmons, 390 U.S. at 383-384. The Court thus adopted a "due process check" that protects against "police rigging" of out-of-court identification procedures. Perry, 565 U.S. at 242-243.

The Court has emphasized, however, that even "when law enforcement officers use an identification procedure that is both suggestive and unnecessary[,] * * * suppression of the resulting

identification is not * * * inevitable." Perry, 565 U.S. at 238-239 (citation omitted). Instead, courts must "assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.'" Id. at 239 (quoting Biggers, 409 U.S. at 201). The courts of appeals accordingly have generally employed a "sequential inquiry," in which the district court first determines whether the identification procedures were "unduly and unnecessarily suggest[ive]," and if so, "whether the identification was nonetheless independently reliable." Raheem v. Kelly, 257 F.3d 122, 133 (2d Cir. 2001), cert. denied, 534 U.S. 1118 (2002). If the procedures were either nonsuggestive, or the testimony was independently reliable, the identification testimony does not violate the defendant's due-process rights. See Perry, 565 U.S. at 248; Brathwaite, 432 U.S. at 114; Biggers, 409 U.S. at 199.

b. Here, the court of appeals "[u]pon review of the entire record," correctly rejected petitioner's request to vacate his conviction on grounds of constitutionally improper identification testimony. Pet. App. 9. As the district court explained, the witnesses had "sufficiently relevant familiarity with" petitioner, C.A. App. 107, to eliminate the danger of any suggestion, id. at 62; see id. at 105 n.1, 282.

This Court's decisions concerning suggestive police procedures, in contrast, emphasize the particular "problems of eyewitness identification" that occur when a victim or other

"witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress." Brathwaite, 432 U.S. at 111-112. In those circumstances, the witness's "recollection * * * can be distorted easily by the circumstances or by later actions of the police." Id. at 112; see, e.g., Moss v. Hofbauer, 286 F.3d 851, 862 (6th Cir. 2002) (explaining that the "primary concern * * * with eyewitness identification relates to a witness observing and subsequently identifying a stranger.") (emphasis omitted).

But "[w]itnesses are very likely to recognize under any circumstance the people in their lives with whom they are most familiar, and any prior acquaintance with another person substantially increases the likelihood of an accurate identification." Haliym v. Mitchell, 492 F.3d 680, 706 (6th Cir. 2007). A witness who is familiar with a defendant may have knowledge of the defendant's voice or appearance that is "so firm that [it] is not susceptible to suggestion." United States v. Hall, 28 F.4th 445, 455 (3d Cir. 2022) (citation omitted; brackets in original). And the lower courts' decisions in this case accord with that commonsense observation.

2. Petitioner does not suggest that any court of appeals has rejected witness identification testimony in circumstances akin to this case. Instead, he contends (Pet. 6-14) that the court of appeals should have reviewed the district court's decision de novo, rather than for clear error. But petitioner himself

expressly invoked the latter standard in the court of appeals, explaining that "[a]dmission of identification evidence is reviewed for clear error." Pet. C.A. Br. 31. And his assertion of a circuit conflict is overstated.

Many of the decisions on which petitioner relies (Pet. 9) in advocating a de novo standard make clear that underlying factual findings -- such as the nature and extent of the witness's prior relationship with the defendant -- should be reviewed deferentially. See, e.g., Hall, 28 F.4th at 449 n.1; United States v. Saunders, 501 F.3d 384, 389 (4th Cir. 2007); United States v. Davis, 754 F.3d 278, 282 (5th Cir. 2014); United States v. Meyer, 359 F.3d 820, 824 (6th Cir.), cert. denied, 543 U.S. 906 (2004); United States v. Recendiz, 557 F.3d 511, 524 (7th Cir. 2009); United States v. Curtis, 344 F.3d 1057, 1062 (10th Cir. 2003), cert. denied, 540 U.S. 1157 (2004); United States v. Kelsey, 917 F.3d 740, 750 (D.C. Cir. 2019). Cf. United States v. Smith, 967 F.3d 1196, 1203 (11th Cir. 2020) (reviewing "the district court's finding that the identification procedures was not unduly suggestive only for clear error"), cert. denied, 141 S. Ct. 2538 (2021). And the scope of any disagreement on the standard of review of reliability determinations is narrow and unlikely to make a difference in a significant number of cases.

In assessing reliability determinations, the circuits generally apply the factors from Neil v. Biggers, which "include the opportunity of the witness to view the criminal at the time of

the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." 409 U.S. at 199-200.[1] And as at least two courts of appeals have observed that the standard of review does not make a difference in practice. United States v. Constant, 814 F.3d 570, 576 (1st Cir. 2016) (tension between cases applying "abuse of discretion" and "de novo" review to decisions to admit identification evidence "may be more apparent than real" because the standard of review did not "make any difference" in the outcome of cases) (citation omitted); United States v. Jarrad, 754 F.2d 1451, 1455 (9th Cir.) ("Whether reviewed under a 'de novo' or 'clearly erroneous' standard, the district court did not err in permitting the in-court identification." (footnote omitted)), cert. denied, 474 U.S. 830 (1985).

In particular, several courts of appeals have affirmed, on de novo review, the admission of witness identification evidence

[1] See, e.g., United States v. Constant, 814 F.3d 570, 576 (1st Cir. 2016); United States v. Gershman, 31 F.4th 80, 94 (2d Cir. 2022), cert. denied, 143 S. Ct. 816 (2023); Hall, 28 F.4th at 456; Saunders, 501 F.3d at 391-393; United States v. Rice, 607 F.3d 133, 142-143 (5th Cir. 2010), cert. denied, 562 U.S. 941 (2010); Meyer, 359 F.3d at 825; Recendiz, 557 F.3d at 526; United States v. Mshihiri, 816 F.3d 997, 1008 (8th Cir.), cert. denied, 137 S. Ct. 319 (2016); United States v. Duran-Orozco, 192 F.3d 1277, 1282 (9th Cir. 1999); United States v. Worku, 800 F.3d 1195, 1204-1207 (10th Cir. 2015), cert. denied, 577 U.S. 1159 (2016); United States v. Caldwell, 963 F.3d 1067, 1075-1076 (11th Cir.), cert. denied, 141 S. Ct. 832 (2020); Kelsey, 917 F.3d at 750.

where, as here, the witnesses had significant prior knowledge of the defendant. See, e.g., Hall, 28 F.4th at 449 n.1, 455; United States v. Simmons, 633 Fed. Appx. 316, 320-321 (6th Cir. 2015); United States v. Puckett, 147 F.3d 765, 769 (8th Cir. 1998); United States v. Burgos, 55 F.3d 933, 942-943 (4th Cir. 1995). It is therefore far from clear that petitioner's claim would have succeeded in any other circuit. No further review of that claim is warranted.

3. In any event, even assuming that admission of the three challenged witnesses' identification testimony did in fact violate petitioner's due-process rights, that error would be harmless in light of the overwhelming evidence of petitioner's guilt, much of which petitioner does not challenge in this Court. That evidence includes Labbate's unchallenged identification of petitioner; Labbate's testimony that he saw petitioner wearing an "FBI" jacket before the robbery; testimony that such a jacket was found on petitioner's property; DNA evidence linking petitioner to the umbrella left at the crime scene; and evidence of petitioner's link to the Xerox Federal Credit Union and his financial struggles and aggrievement with Xerox at the time of the robbery. Pet. App. 5-6; Gov't C.A. Br. 6, 16. Petitioner therefore would not be entitled to relief even if the question presented were resolved in his favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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