

1 people who are ostensibly the victims of an attempt
2 murder, plus other crimes. You have somebody who is
3 still at large who is responsible. And under those
4 circumstances, where you have a public safety issue at
5 that point, I don't think necessarily the showing of the
6 one photograph, if you have the information that they
7 had, is necessarily improper.

8 So I'm not as concerned about showing the one
9 photograph on the MDT as I am, if a comment was made that
10 you have described, that somebody has already been
11 identified. If law enforcement said that to Mr. Mendell,
12 I can't even imagine why they would do that. I think
13 that taints Mr. Mendell's identification, no matter how
14 good or bad it was. I think it is fatal, frankly, to his
15 identification.

16 I don't think I need a Franks hearing to make
17 that determination, to be honest with you. And if, in
18 fact, that happened, and I don't see that there's much
19 dispute that that happened between the two of you, I'm
20 not hearing that there's a dispute that that happened,
21 although there appears to be a dispute about what words
22 were said. But if it's anything like that -- frankly,
23 if they said anything about anyone else making an
24 identification that's enough to taint it. They shouldn't
25 be saying anything about anybody else's identification,
26 period. It just shouldn't happen. That's just the way
27 it is. And I don't think you can recover from that. I
28 don't think you can recover the identification.

1 ~~So I think his identification of anybody in the~~
2 ~~six pack is tainted by that, and I would exclude that.~~

3 I don't think the identification of the MDT
4 ~~photograph is excluded, because that happened before.~~

5 And you can argue the strength and weaknesses of a single
6 photo ID all you want to a fact finder later on. But the
7 six pack ID I think is tainted beyond redemption.

8 Yeah.

9 MR. MOAWAD: The Court's determination here,
10 obviously, is for the purposes of the motion to quash and
11 motion to traverse.

12 THE COURT: Right.

13 MR. MOAWAD: And obviously, the steps for the
14 substantial likelihood of misidentification are factual
15 and would be heard by the trial court, should that become
16 an issue, as I assume it will. This Court isn't
17 necessarily taking a position on that for that other
18 purpose.

19 THE COURT: Correct. I'm not in the position
20 to do that. I'm --

21 MR. MOAWAD: Understood.

22 THE COURT: ~~The scope of my review is strictly~~
23 ~~as it pertains to the warrant --~~

24 MR. MOAWAD: Understood. Thank you.

25 THE COURT: -- correct. So I take that out of
26 the equation for my review, for my re-review, of the
27 affidavit. And in my estimation, taking that totally out
28 of the equation, and re-weighing the affidavit to see if