No. 11-2034

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN A. FORD,

Defendant-Appellant.

On Appeal from the United States District Court
For the Northern District of Illinois
The Honorable Judge Robert W. Gettleman
Case No. 09-CR-846

BRIEF OF DEFENDANT-APPELLANT JOHN A. FORD

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DISCLOSURE STATEMENT

I, the undersigned counsel for the Defendant-Appellant, John A. Ford, furnish the following list in compliance with FED. R. APP. P. 26.1 and CIR. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case: JOHN A. FORD.

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court: Sarah O. Schrup (attorney of record), Owen McGovern (senior law student), and Kate Riordan (senior law student) of the Bluhm Legal Clinic at the Northwestern University School of Law. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear:

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DISCLOSURE STATEMENT (CONTINUED)

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes[X] No[]**

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STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Illinois, Eastern Division, had jurisdiction over appellant John Ford's federal criminal prosecution pursuant to 18 U.S.C. § 3231 (2006), which states that "the district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." This jurisdiction was based on a one-count indictment charging Ford with a violation of 18 U.S.C. § 2113(a) (2006). (App. A. 1.)[1]

The government indicted Ford on December 10, 2009, and he was eventually tried before a jury. (App. A. 1.) After a four-day trial, the jury returned a verdict of guilty on October 15, 2010. (R. 63.) Ford filed a motion for a new trial, which the district court denied. (R. 72; R. 75.)

The district court sentenced Ford on April 21, 2011, and the judgment was filed on that day. (R. 84, 85.) The district court entered final judgment on the verdict on May 4, 2011. (R. 85.) Ford was sentenced to 240 months in prison followed by three years of supervised release conditioned upon Ford making restitution in the amount of $1,146. (App. A. 4-8.) Ford filed a timely notice of appeal on May 4, 2011. (R. 86.) This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (2006), which grants jurisdiction over "all final decisions of the district courts of the United States" to its courts of appeal.

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[1] References to the sequentially paginated trial transcript shall be denoted as (Trial Tr. __) and references to the pretrial suppression hearing as ([DATE] Mot. to Suppress Hr'g Tr. at __). All other references to the Record shall be denoted with the appropriate docket number as (R. __). References to the material in the short appendix shall be denotes as (App. A. __) and material in the long appendix as (App. B. __).

STATEMENT OF THE ISSUES

I. Was the defendant denied his right to present a defense when the district court excluded the only witness capable of establishing the defendant's whereabouts, appearance, and demeanor on the night of the robbery.

II. Whether the district court erred in admitting identification testimony when: (1) an inferior procedure was used and a photo in the array was altered to emphasize the characteristics identified by the witness; (2) the witness's prior descriptions of the perpetrator were vague, sparse, and inaccurate and sixteen months passed between the incident and the identification; and (3) the government acknowledged just days before trial that the witness had identified another as the robber in the immediate wake of the crime.

STATEMENT OF THE CASE

This case arises out of a robbery of the U.S. Bank in Palatine, Illinois on November 20, 2007. After a two-year investigation, the police arrested John Ford. Ford was indicted under 18 U.S.C. § 2113(a) for robbing the U.S. Bank of $1,146. (App. A. 1.)

On April 8, 2010, Ford moved to suppress bank manager Dannie Thomas's identification of him from a photo lineup. (R. 24.) Specifically, Ford argued that the identification procedures were inherently suggestive and Thomas's identification was unreliable. (R. 24 at 2-3.) On August 24, 2010, and September 21, 2010, the district court held two suppression hearings to assess the reliability and fairness of the pretrial photo array identification. (8/24/2010 Mot. to Suppress Hr'g Tr.; 9/21/2010 Mot. to Suppress Hr'g Tr.) After hearing from witnesses and examining the photo array, the district court denied Ford's motion to suppress the identification. (R. 57.)

On September 20, 2010, Ford filed a motion to continue the trial date. (R. 43 at 1.) Ford informed the district court that he needed additional time to locate his former personal training clients, who potentially could serve as witnesses at trial. (R. 43 at 1-2.) On September 21, 2010, during the suppression hearing, the district court denied Ford's motion for a continuance. (9/21/2010 Mot. to Suppress Hr'g Tr. 63.)

Ford's case went to trial on October 12, 2010. (Trial Tr. 1.) Just before trial the government's Jencks materials revealed the identity of Russ Martin, one of

Ford's clients. At trial Ford attempted to call Martin as a witness, who would have testified that he was training with Ford on the night of the robbery and would have described Ford's appearance and demeanor at that time. (Trial Tr. 378.) Despite the fact that Martin was present in the courthouse and, thus, would not have delayed the trial, the district court refused to allow him to testify. (Trial Tr. 385.) The district court concluded that Martin was an alibi witness and must therefore be excluded for failure to give adequate notice to the government. (Trial Tr. 385.) The district court found no other relevance to Martin's testimony. (Trial Tr. 383.) On October 15, 2010, after a four-day trial, the jury found Ford guilty of the bank robbery. (Trial Tr. 460; R. 63.)

The district court sentenced Ford to 240 months' imprisonment, with three years' supervised release. (App. A. 4-5.) Ford was also required to pay restitution to U.S. Bank in the amount of $1,146. (App. A. 7-8.) The district court entered final judgment on May 4, 2011, (App. A. 4), and Ford filed a timely notice of appeal on May 4, 2011 (R. 86).

STATEMENT OF FACTS

At 7:30 p.m. on November 20, 2007, John Ford was leading a personal training session at Bodyfit Athletic Club, located at 4704 N. Broadway St. in Chicago. (App. B. 28.) Had his client, Russ Martin, been given the opportunity to testify at trial, he would have stated that Ford was "calm, friendly and professional" during this session, and would have described his appearance as "approximately 190 to 200 pounds with a muscular build." (App. B. 28-29.) Although Russ Martin was the only proffered defense witness who was with Ford on November 20, the district court excluded his testimony under the rules governing notice-of-alibi witnesses. (App. A. 43.)

Two hours earlier, at approximately 5:25 p.m., Merlyn Agravante ("Agravante"), an employee of U.S. Bank in Palatine, IL, walked out the back door of the U.S. Bank building to head home for the day. (Trial Tr. 32-33.) As she walked out the door, she saw a white man, who she described as wearing a floppy hat, a long black coat, and a white dust mask that obscured his hair and most of his face. (App. B. 17.) The man had a gun; he entered through the back door past Agravante and said, "this is a robbery." (Trial Tr. 33-34.)

Once inside the bank the robber confronted the remaining three employees and demanded access to the bank vault and safety deposit boxes. (Trial Tr. 34-37.) Bank manager Dannie Thomas ("Thomas") and another employee informed the robber that security measures prevented them from accessing the vault. (Trial Tr. 34-37.) As a result, an employee at the teller station emptied her drawer, totaling

about $1,100, into the robber's two pillowcases. (Trial Tr. 38.) In the four to five minutes during which the robbery occurred (App. B. 13), Thomas was generally walking four to six feet in front of the robber with his hands up so they were visible to the robber (Trial Tr. 35-36). Thomas stated that he tried to converse with the robber and occasionally made eye contact with him. (Trial Tr. 39.) Because of the robber's disguise he was unable to see anything but the robber's eyes and neck. (Trial Tr. 34, 59.) After being told repeatedly that the bank employees could not access additional money, the robber fled through the bank's rear entrance. (Trial Tr. 40.) He was last spotted by Thomas fleeing south along the fence line behind the building. (Trial Tr. 58.)

Thomas spoke with a 911 responder in the minutes following the robbery. (App. B. 31.) During the call Thomas had to confirm his impression of the robber's appearance with other witnesses before providing an answer. (App. B. 32) (stating "Yah, yah, a surgical mask. Right? He was wearing like a surgical—Yah, a surgical mask"); (*see also* Trial Tr. 111) (stating, "[s]o basically I confirmed with the mask, the other employees, after I kinda gave a description of what he was wearing, you know, to try and confirm it"). Thomas described the robber as a thin, white male with pale skin and freckles. (App. B. 31-32.) Thomas told the 911 responder that the robber wore all black, including a black floppy hat, black pea-coat, and black boots, along with a surgical mask (App. B. 32-33), although the photos introduced at trial ultimately proved that Thomas's description was inaccurate (App. B. 10) (showing that the robber was wearing a blue hat, tennis shoes, and a dust mask).

Police arrived shortly after this call and Thomas again provided a description of the robber, which was later memorialized in an offense report. (App. B. 11-14.) Thomas's description in that report was similar to his initial 911 call, but he added that the offender had light eyebrows and, now, a familiar voice.[2] (App. B. 13.) Thomas never mentioned the robber's eyes or eye color in either the 911 call or in his report to police on the day of the robbery. (*See* App. B. 31-33; App. B. 12-14.)

Shortly after the robbery, Detective Robert Bice ("Bice"), accompanied by a few other officers, recovered a wet white dust mask along the fence line approximately 150 feet south of the bank. (App. B. 17; Trial Tr. 117.) Bice placed the wet mask in a bag (Trial Tr. 145-46), but did not take any pictures of the mask or of where it was found (Trial Tr. 144).

On November 21, 2007—the day after the robbery—a man walked into the U.S. Bank in Palatine to deposit a check. (Trial Tr. 63.) Thomas was now certain that "the shape of the eyes and the voice of the person . . . was [sic] nearly identical" to the robber from the day before. (App. B. 27; Trial Tr. 71.) Thomas also stated that although he was unable to exactly describe the robber's shoes, the man's gym shoes reminded him of those worn by the robber the night before. (App. B. 27; Trial Tr. 103.) Based on this encounter, Thomas immediately notified the police and turned over the check that the man attempted to deposit. (App. B. 24; Trial Tr. 63.) The man was named John Theiler. (Trial Tr. 390.) Despite Thomas's certainty that Theiler was "nearly identical" to the robber and although the police apparently

[2] Bank employee Samrajnee Pathare also told police that the robber's voice seemed like a customer's voice that she had heard before. (App. B. 16.)

followed this lead (Trial Tr. 150-51), the police never created any reports regarding the follow-up investigation (Trial Tr. 151). Although police summarized Thomas's identification of Theiler as the potential robber in a report, the government did not turn that report over to the defense until eight days before trial and well after the suppression hearing. (*See* App. B. 23.)

Having discounted the Theiler lead and with no other potential suspects, the police now turned to the only other evidence recovered from the scene: the dust mask found down the fence line from the bank's back entrance. (Trial Tr. 117.) This evidence, which had been found on the ground during a rainstorm, had been sitting in a paper bag in the police department's evidence locker for about three months. (Trial Tr. 123, 145.) When the officers finally sent it for forensic testing the technicians from the lab described the mask as worn and dirty. (Trial Tr. 145.) Using the Combined DNA Index System (CODIS) database, the lab determined that some of the DNA alleles found in the mask matched the DNA profile of a man named John A. Ford. (R. 52 at 1; Trial Tr. 336-38.)

With the DNA findings in hand, the police decided to bring the bank employees in to view a six-person photo lineup that contained Ford's photo. (App. B. 18; Trial Tr. 125.) The lineup occurred in March 2009—approximately sixteen months after the robbery. (R. 32 at 3.) Bice conducted the photo lineup and laid the photos out in two rows—all at once—and then left the room for the witnesses to identify the robber. (App. A. 24.) Bice, as one of the lead investigators on the case from the beginning, chose the photos for the lineup and also knew which one was

Ford's photo. (9/21/2010 Mot. to Suppress Hr'g Tr. 8; App. A. 27.) Bice asked each of the bank employees present at the robbery if the culprit was included among the images. (9/21/2010 Mot. to Suppress Hr'g Tr. 16-17; App. B. 18.) Three of the four employees were unable to identify anyone from the lineup. (App. B. 18.) Thomas, however, claimed to be able to identify the alleged perpetrator from the photo lineup. (App. A. 10; App. B. 18.) Thomas picked a photo of John Ford. (App. B. 8, 18.)

After Thomas identified Ford, Thomas asked Bice whether he had identified the correct suspect. (App. A. 11, 24.) Bice not only confirmed that the person he picked was the one the police were investigating (App. A. 24; Trial Tr. 157), but also told Thomas that they had DNA evidence in the case (App. A. 24; Trial Tr. 158).

Although Bice insisted that he did not "enhance" Ford's photo (Trial Tr. 160-61; R. 33 Ex. H at 2), he did admit that he had altered it (Trial Tr. 159) (stating that he cropped John Ford's photo). Bice cropped the photo to make Ford's face larger; it ended up being 133% larger than the original source photo and more closely cropped than the other five photos in the lineup. (R. 35 at 8 n.2.) Bice placed Ford's photo in the center of the array. (App. A. 9.) Further, the contrast of Ford's photo was increased, making Ford's photo brighter than its companions and emphasizing "pale and freckle-ish" skin: the very characteristics Thomas pointed out so often in his identification. (R. 35 at 8 n.2; *see*, *e.g.,* App. A. 18) (quoting Thomas saying, "I described that, you know, prior to seeing any photos . . . the pale skin with freckles. So that's the image, and that's how basically I picked him out of a lineup."). Despite

identifying another man as "nearly identical" to the bank robber the day after the robbery, at trial Thomas was now "100 percent" certain that Ford was the man who robbed the bank. (App. B. 27; Trial Tr. 68.)

The police then attempted to contact Ford, and were unable to get ahold of him. (R. 45 at 2.) On July 23, 2009, Ford contacted the police to inquire why law enforcement personnel were looking for him. (R. 45 at 2.) He was informed that they wanted to discuss a bank robbery that occurred in Palatine. (R. 45 at 2.) Ford agreed meet with law enforcement and retained an attorney. (R. 45 at 2.) The attorney contacted the police on July 25 and set up a meeting for July 29. (R. 45 at 2.) On July 28, however, the attorney cancelled the meeting, stating that he could not reach his client. (R. 45 at 2.) A criminal complaint was filed on October 16, 2009, and Ford was arraigned in the Northern District of Illinois on December 15, 2009. (R. 1; R. 12.)

Ford moved pretrial to suppress Thomas's identification, claiming that the lineup was both unduly suggestive and that Thomas's identification was unreliable. (R. 24.) During the suppression hearing Thomas first testified about the events of the day of the robbery and then about the lineup. (8/24/2010 Mot. to Suppress Hr'g Tr. 8-14, 27-32.) With respect to the lineup Thomas now stated, for the first time, that it was the intensity and light color of Ford's eyes that were the hallmark identifying characteristics of the robber that caused Thomas to pick Ford from the lineup. (App. A. 10) (stating, "the intensity of the eyes" along with other characteristics "is how I picked [John Ford's photo] out."). Neither his 911 call nor

his report to police mentioned anything about the robber's eyes, their shape, color, or their intensity. (*See* App. B. 31-33) (App. B. 13, 20) (never mentioning eyes at all, but stating that the robber had "light-colored *eyebrows*") (emphasis added). In fact, it was mostly the eyes that caused Thomas to identify John Theiler the day after the robbery. (App. B. 27) (stating that the "shape of the suspect's [Theiler] eyes . . . was nearly identical to those of the offender.").

Thomas also insisted at the suppression hearing that he did not recognize anything familiar about the robber when he entered the bank (App. A. 12), though his contemporaneous police report said he did (App. B. 13) (stating that the robber's voice "sounded familiar" and that the robber was "possibly . . . a customer of the bank."). Thomas also wholly failed to mention his earlier identification of Theiler. He later claimed at trial that he had forgotten about his first mistaken identification of Theiler. (Trial Tr. 68-69.)

No other witnesses were able to give detailed descriptions of the characteristics of the robber in their reports to the police. (App. B. 15-17.) Two of the witnesses mentioned nothing about physical characteristics, and the other two only mentioned that he was a white male, with one noting he was likely in his forties. (App. B. 15-17.) Thomas was the only one able to give enough details to form even a bare-bones description of the robber for the police. (App. B. 13.)

Furthermore, Thomas admitted that the encounter was highly stressful. He conceded that during the robbery he was "focus[ed] on different things" and that his "primary concern was the other employees." (App. A. 13-14.)

Ford requested a continuance of the trial date in order to speak with potential witnesses and, specifically, to determine if Ford had met with any of his personal training clients that evening. (R. 43 at 1.) The district court assumed in denying Ford's request that "he would know who he was with," even though more than two years had passed since the robbery. (9/21/2010 Mot. to Suppress Hr'g Tr. 59.) Counsel also wanted to find an expert witness to challenge the DNA evidence. (9/21/2010 Mot. to Suppress Hr'g Tr. 57-58.) The district court denied this request, as well as Ford's motion to suppress. (App. A. 30-32; 9/21/2010 Mot. to Suppress Hr'g Tr. 58-59.) The case went to trial on October 12, 2010. (Trial Tr. 1.)

During the trial the parties focused on the quality of the DNA evidence, the photo lineup and identification by Thomas, and the identification of Theiler as a potential suspect, which, as noted above, the government had tardily disclosed to Ford on October 4, 2010. (App. B. 23–24.) Just before trial Ford received the government's Jencks materials, which identified Russ Martin. (App. A. 38.) Defense counsel interviewed Martin and determined that he could provide relevant information regarding Ford's whereabouts, demeanor, and appearance on the night of the robbery. (App. A. 37, 40.) But even though Martin voluntarily appeared at the courthouse during trial to testify on Ford's behalf, the district court refused to allow his testimony for failure to give sufficient notice of alibi witnesses. (App. A. 43.) The jury deliberated for three hours, during which time it requested, but was not given, additional photographs of Ford. (R. 65; Trial Tr. 457.) The jury returned a guilty verdict. (Trial Tr. 460.) Defense counsel timely moved for a new trial. (R.

72.) The district court denied Ford's motion for a new trial (R. 75), and ultimately sentenced Ford to 240 months in prison, with three years of supervised release (Sentencing Hr'g Tr. 12; App. A. 4-6).

SUMMARY OF THE ARGUMENT

Ford was denied his Sixth Amendment right to present a defense when the district court erroneously excluded the primary evidence supporting his theory of the case. The court erred at the outset by classifying Russ Martin's testimony as alibi evidence, even though he was not offered to establish Ford's whereabouts at the time of the robbery. Because the testimony was not an alibi, the district court should not have applied the notice requirements from Federal Rule of Criminal Procedure 12.1. And, even if Rule 12.1 had some applicability, the district court further erred in presuming that preclusion was the default or preferred remedy. No such presumption exists. Instead, notice-of-alibi rules require a careful balancing of defendant's right to present a defense against important state interests justifying the harsh sanction of preclusion. Had the district court engaged in this balancing, it would have determined that Martin's testimony was critical to Ford's case while causing only *de minimis*, if any, harm to the government. Finally, because Martin was the only witness who saw Ford the night of the robbery, he was the only evidence supporting Ford's defense. Excluding such evidence was prejudicial error.

The conviction should also be overturned because the photo array was unduly suggestive and Thomas's identification was unreliable under the totality of the circumstances. The photo array was unduly suggestive because: (1) the array was constructed in such a way that Ford's photo stood out from the other photos in the array; and (2) law enforcement failed to follow certain procedures that would have minimized the risk of a suggestive photo array.

Thomas's identification was also unreliable under the Supreme Court's five-factor test. Thomas had only brief glimpses of the robber's eye area during the robbery and admitted that he was mostly not paying attention to him anyway. Thomas's descriptions of the robber were vague and inconsistent. Thomas's degree of certainty about his identification was tainted by the officer's post-identification confirmation. Finally, sixteen months passed between the robbery and Thomas's identification, which vastly increased the risk of misidentification.

In any event, the district court should have barred Thomas's testimony after the suppression hearing but before trial when the court learned that Thomas had identified another man as the robber just one day after the robbery occurred. This additional piece of late-breaking evidence tipped the unreliability scale in Ford's favor. This Court should reverse and remand.

ARGUMENT

I. Ford was denied his right to present a defense when the district court completely excluded the only witness who saw Ford the night of the robbery.

Erroneously excluding "the only or the primary evidence in support of a defense" constitutes reversible error. *United States v. Byrd*, 208 F.3d 592, 594 (7th Cir. 2000). The district court erred in excluding the only defense witness who saw Ford the day of the robbery and who could otherwise describe his appearance and demeanor at that time: Russ Martin. (*See* App. A. 36-43.) Martin's testimony was relevant and important to Ford's defense, yet the district court completely excluded Martin's testimony at trial on the ground that Ford had not complied with notice-of-alibi requirements under Federal Rule of Criminal Procedure 12.1. Despite the fact that Martin could not testify to Ford's location "at the time of the alleged offense," FED. R. CRIM. P. 12.1(2)(a), the district court nonetheless presumed that Martin was an alibi witness and improperly applied Rule 12.1 to exclude Martin's testimony. And even if Martin could be construed as an alibi witness, the district court further erred in presuming that exclusion was the default remedy under Rule 12.1. (App. A. 43.) Finally, even if exclusion is appropriate in some circumstances, the district court failed to weigh the importance of Martin's testimony to Ford's defense against the government interest served by the rule. Thus, the district court abused its discretion and this Court should reverse and remand for a new trial.

A. Martin was not an alibi witness, so Rule 12.1 did not apply.

Because Martin's testimony did not establish an alibi, the district court abused its discretion by excluding it under Rule 12.1. FED. R. CRIM. P. 12.1(a)(2) (requiring written notice of any alibi defense including the location of the defendant "at the time of the alleged offense" and the witness's contact information). Black's Law Dictionary defines an alibi as "[a] defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time." BLACK'S LAW DICTIONARY 84 (9th ed. 2009); *see also Watley v. Williams*, 218 F.3d 1156, 1157 n.1 (10th Cir. 2000) (suggesting that testimony concerning defendant's presence at a party both before and after the time of the crime is not true alibi testimony, as it does not establish the defendant's whereabouts at the time of the crime). Based on these definitions, the district court incorrectly classified Martin as an alibi witness, which is a per se abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.").

Martin's testimony simply does not establish Ford's whereabouts at the time of the robbery. Nor was Martin's testimony offered for this purpose. Indeed, Martin could not have said that it was impossible for Ford to have been at the bank in Palatine at the time of the robbery. What he could have done, however, is make it less likely than without his testimony that Ford committed the robbery, as a man who just robbed a bank is less likely to be "calm, friendly and professional" a mere

two hours later. Ford made this point clearly at trial, stating "[i]t's not technically an alibi," and arguing that it would be used to demonstrate that Ford's "demeanor . . . [was] inconsistent with someone that robbed a bank." (App. A. 40.) Ford renewed this argument in his motion for a new trial, again arguing that "this witness technically was not an alibi witness as defined by the rule." (R. 72 at 2.) Despite the testimony's non-alibi relevance and the clear definition of "alibi," the district court ruled that "[e]ven though you say it's not an alibi witness, I don't see any other purpose for it." (App. A. 43.)

This threshold determination incorrectly framed the district court's decision and resulted in an incorrect ruling on admissibility. Therefore, the district court erred in the first instance by classifying Martin as an alibi witness and then using Rule 12.1 to exclude his testimony.

B. There is no presumption favoring preclusion under Rule 12.1.

Assuming *arguendo* that Rule 12.1 applied, the district court still erred by presuming that preclusion was the default remedy under that rule. (App. A. 43) (district court stating "[t]he government requested the alibi witness, if there was going to be one, and notice wasn't given. The rule favors not permitting an alibi witness."). But preclusion is not the presumed, or even the preferred, remedy for violations of Rule 12.1. By basing its decision on a non-existent preference, the district court made an error of law, which again is a per se abuse of discretion. *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005) ("[I]t is always an abuse of discretion to base a decision on an incorrect view of law.").

The Supreme Court has consistently noted that: (1) exclusion of testimony is the harshest sanction available for violating notice-of-alibi rules; and (2) exclusion is not appropriate in most cases. *E.g., Taylor v. Illinois*, 484 U.S. 400, 413-14 (1988) ("[I]t may well be true that alternative sanctions [to preclusion for violating the notice-of-alibi requirements] are adequate and appropriate in most cases."); *see also Michigan v. Lucas*, 500 U.S. 145, 153 (1991) (clarifying that *Taylor* "did not hold . . . that preclusion is permissible every time a discovery rule is violated," and reaffirming that "alternative sanctions would be 'adequate and appropriate in most cases[,]'" although "the severe sanction of preclusion" may be justified in some cases). Because the "denial or significant diminution" of the right to present a defense "calls into question the ultimate integrity of the fact-finding process," *see Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (internal quotation marks omitted), preclusion should only be applied when there is a strong suspicion of willful misconduct, *Taylor*, 484 U.S. at 417 (describing the defendant's discovery violations as "willful misconduct" designed to obtain a "tactical advantage" and concluding that such conduct "g[ave] rise to a sufficiently strong inference . . . to justify the sanction of preclusion"). Thus, under *Taylor* and *Lucas*, the preclusion of alibi testimony for failure to provide notice should only be used in situations of suspected fabrication or manipulation.

This Court has similarly acknowledged that "[p]erhaps there are situations where preclusion is a necessary sanction, such as a defendant's intentional suppression of alibi evidence to gain tactical advantage." *Alicea v. Gagnon*, 675

F.2d 913, 925 (7th Cir. 1982). Absent such egregious conduct, however, "[t]o exact so great a price to further a rule which serves little or no purpose in this context is both illogical and impermissible." *Id.* (finding the notice-of-alibi requirements were "unconstitutionally applied against petitioner" because surprise to government and judicial administration are insufficient to exclude testimony as to defendant's whereabouts on the day of the crime); *see also Fendler v. Goldsmith*, 728 F.2d 1181, 1190 (9th Cir. 1983) (noting that exclusion was simply "too high a price to exact for failure to comply with discovery orders").

The district court automatically assumed Martin's testimony should be precluded. While such preclusion may have been proper if the court felt that the non-disclosure was a tactical ploy or an attempt to manipulate the evidence, there is no evidence that Ford engaged in a deliberate effort to manipulate the discovery process. Indeed, at the September 21, 2010, hearing, Ford's attorney requested a continuance specifically for the purpose of looking for potential witnesses. (9/21/2010 Mot. to Suppress Hr'g Tr. 58.) This continuance was denied. And while the government knew of Martin's existence as a potential witness for about a year, (*see* App. A. 37), Ford was not able to secure Martin's testimony until just before trial (App. A. 38, 40). The district court found none of the "willful and blatant" discovery misconduct presented in *Taylor v. Illinois.* Completely excluding Martin's testimony based on a supposed presumption in favor of preclusion was an abuse of discretion.

C. The government did not demonstrate an interest sufficient to justify complete preclusion of Martin's testimony.

Finally, the district court also erred in applying the harsh sanction of preclusion without holding the government to its burden of demonstrating an important government interest served by excluding Martin's testimony. As a result, the district court improperly imposed the harshest sanction available. Notice-of-alibi rules serve three important governmental interests. The principal interest is preventing surprise to the government. *Alicea*, 675 F.2d at 924. These rules also assist in preventing fabricated alibis and in the orderly administration of justice. *Id.* at 916-17. However, notice-of-alibi rules are not intended to punish the accused for "mere technical errors or omissions." *Id.* at 924. The "denial or significant diminution" of the right to present a defense "requires that the competing interest be closely examined." *Chambers*, 410 U.S. at 295. No such examination occurred in this case.

Had the district court weighed the competing interests, it would have found very little risk of surprise to the government. The government knew about Martin as early as October 2009, giving it more than enough time to prepare for a thorough cross-examination. (App. A. 37.) Further, Martin's testimony, while critical to Ford's defense, was also limited in scope. The burden of preparing for such limited testimony would have been minimal to the government, and cannot justify the complete exclusion of Ford's only affirmative evidence. It also would have found no evidence of fabrication, the other concern addressed by notice-of-alibi rules. Ford's attorney requested a continuance to follow up on witnesses well in advance of trial,

so it was not an eleventh-hour concoction. (R. 43 at 1-2; 9/21/2010 Mot. to Suppress Hr'g Tr. 58.) In any event, even if there was some possibility of prejudice to the government by this testimony, the proper course of action would have been a continuance, not complete exclusion of the relevant evidence. *See Alicea*, 675 F.2d at 924. Indeed, this is precisely the course of action Ford's attorney requested weeks before trial. (R. 43 at 1-2; 9/21/2010 Mot. to Suppress Hr'g Tr. 58.)

The district court not only failed to examine the government's interests in excluding Martin, but it also failed to recognize the harm to Ford's right to present his defense. "When erroneously excluded evidence would have been the only or primary evidence in support of or in opposition to a claim or defense, its exclusion is deemed to have had a substantial effect on the jury." *United States v. Peak*, 856 F.2d 825, 834 (7th Cir. 1988); *Byrd*, 208 F.3d at 594. This is particularly true when the defendant is unable to present other evidence in support of his theory of the case. *Peak*, 856 F.2d at 835 ("[H]ad the defendant not been able to present other evidence to support his theory of the case, the error would not have been harmless.").

Martin's testimony was particularly important because he was the only witness Ford could offer that was with him the night of the robbery. *See Peak*, 856 F.2d at 834. And although the government is sure to claim that this error is harmless in light of the other evidence in the case, this Court's precedent says otherwise. It is clear that even reliably strong evidence is insufficient to overcome the defendant's right to present his case, particularly if it is the only evidence in

support of defendant's theory of the case. *Peak*, 856 F.2d at 834-35 (reversible conviction when defendant was prevented from introducing only evidence to disprove "intent" requirement, as there is "a substantial difference between having *some* evidence and having *no* evidence to support a defense"); *see also Allison v. Gray*, 603 F.2d 633, 635 (7th Cir. 1979) (warning against "giving too much emphasis to 'overwhelming evidence' of guilt, where constitutional error affects substantial rights") (quoting *Harrington v. California*, 395 U.S. 250, 254 (1969)). Although the government may argue that DNA is strong evidence of Ford's guilt, it is not conclusive nor is it dispositive of this constitutional issue. As a threshold matter, the jury did not find the DNA conclusive because, if it had, it would not have asked to see additional photographs of Ford during its deliberations. (Trial Tr. 457; R. 65.) In any event the relevant question, one of constitutional magnitude, turns on the effect the excluded evidence might have had on the jury, not the strength of the government's case.

Evidence demonstrating that Ford was "calm, friendly and professional" a mere two hours after the robbery could raise doubt in the minds of the jury. (App. B. 28.) Similarly, evidence that Ford was more muscular or heavier than the identifying witness's physical description could have raised doubts. Thus, by erroneously excluding the only evidence in support of Ford's theory of the case, the district court's ruling denied Ford his constitutional right to present a defense.

II. The photo array was unduly suggestive and Thomas's identification was unreliable under the totality of the circumstances.

This Court should overturn Ford's conviction because it was based upon an unreliable identification as a result of an overly suggestive photo array. Eyewitness identification testimony violates a defendant's right to due process of law when there is a "substantial likelihood of irreparable misidentification." *Neil v. Biggers*, 409 U.S. 188, 198 (1972) (internal citations omitted). Courts apply a two-part test to determine the admissibility of a lineup—whether in person or by photo array. *McGowan v. Miller*, 109 F.3d 1168, 1173 (7th Cir. 1997). First, the court examines whether the lineup or photo array procedure was unduly suggestive. *Gregory-Bey v. Hanks*, 332 F.3d 1036, 1045 (7th Cir. 2003) (internal citations omitted). If the court concludes that the procedure was unduly suggestive, it then determines whether, under the "totality of the circumstances," the identification was nonetheless sufficiently reliable. *United States v. Harris*, 281 F.3d 667, 670 (7th Cir. 2002). This Court examines *de novo* a district court's decision to admit or suppress an identification, giving due deference to the court's determination of historical fact. *Id.*

A. The photo array was unduly suggestive.

The photo array in this case was unduly suggestive for two reasons. First, the photo array was constructed to overemphasize Ford's photo compared to the other five photos. Additionally, Ford's photo was copied and enlarged in such a way that further highlighted certain identifying characteristics. Second, law

enforcement failed to follow procedures during the photo array that would have minimized suggestiveness.

It is now well-acknowledged that "[e]ven under the best circumstances, the probability of erroneous identification of a stranger seen briefly is uncomfortably high." *United States v. Brown*, 471 F.3d 802, 804 (7th Cir. 2006). Troublingly, eyewitness misidentifications are the leading cause of wrongful convictions in the United States, slightly more than four times more likely to contribute to a wrongful conviction than a false confession. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 76 (2008); *see also United States v. Brownlee*, 454 F.3d 131, 141-42 (3d Cir. 2006). And yet, "despite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries." *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting).

1. Ford's photo overemphasizes the characteristics identified by the witness compared to the other photos in the array.

The police composed the photo array in a way that overemphasized the "freckle-ish, pale skin" that Thomas found so important to his identification. (*See, e.g.*, App. A. 10.) Further, the photo was then enlarged, skewing the contrast and emphasizing those features to an even greater degree. Therefore, the array was unduly suggestive.

The Supreme Court has warned that the "hazards of initial identification by photograph" are further increased if the police show a witness an array where one of the individual's photos is emphasized. *See Simmons v. United States*, 390 U.S. 377, 383-84 (1968); *United States v. Downs*, 230 F.3d 272, 273 (7th Cir. 2000)

(finding a photo array wherein the defendant was the only individual pictured without a moustache unduly suggestive). Undue emphasis can happen both through the selection of the persons to include alongside the suspect in the array and in the actual preparation of the photos.

Turning first to the selection of participants for the array, a lineup of "clones" is not required, *United States v. Galati*, 230 F.3d 254, 260 (7th Cir. 2000); arrays are impermissibly suggestive, however, where only the defendant's photo contains a distinctive feature that "corresponds to the witness's descriptions." *United States v. Rattler*, 475 F.3d 408, 413 (D.C. Cir. 2007); *Raheem v. Kelly*, 257 F.3d 122, 134 (2d Cir. 2001) ("Where one witness has emphasized a particular characteristic of the perpetrator in giving a description to the police, a lineup in which only the defendant has that characteristic may well taint the identification of the defendant"). Similarly, when law enforcement officers manipulate the color, size, or contrast of the photos within the arrays, the procedure may be unduly suggestive. *Good v. Curtis*, 601 F.3d 393, 396, 401 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 206 (2010) (holding that a defendant's due process rights were violated when an officer altered the light settings on a camera in order to make the picture of the defendant match the "dark tan" of the suspect).

Thomas was the only witness to provide any additional details about the robber's physical attributes aside from race and gender.[3] (*Compare* App. B. 13 *with* App. B. 15-17.) He was also the only witness able to make an identification. (App.

[3] While Thomas could not identify the age of the perpetrator, one witness, Samrajnee Panthare, further described the robber as in his forties. (App. B. 16.)

B. 18.) Thomas assigned a great deal of importance to the fact that the robber had pale, freckled skin.[4] He mentioned it no less than six times during his testimony in the suppression hearing. (*See, e.g.*, App. A. 10) ("Pretty much because I focused on his . . . freckle-ish, pale skin").[5] Thomas even acknowledged that the lineup photo seemed to emphasize the very characteristics that he reported to the police. (App. A. 17.) Defense counsel asked Thomas, "[i]sn't it fair to say, sir, that the photo you signed is enhanced to make it look as if the person in photo B has freckles?" (App. A. 17.) Thomas answered, "I mean, it appears that he does, and that's what I recall is his skin. The skin tone with freckles is exactly what I described in the 911 call when I spoke to the officers. I, you know, gave the description pale skin with freckles." (App. A. 17.) Ford was the only individual of the six in the array who appeared to have pale, freckled skin and pale eyebrows, details that precisely matched Thomas's description. Singling out Ford in this manner rendered the photo array unduly suggestive.

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[4] Thomas also stated multiple times during the suppression hearing that he identified Ford out of the photo array due to his "intense" eyes, although he never mentioned that feature in his 911 call or post-robbery report. (App. B. 31-33; App. B. 13.) Thomas's first mention of the robber's eyes occurred the day after the robbery when he identified Theiler as the robber. (App. B. 27) (stating to police that the shape of Theiler's eyes "was nearly identical to that of the robber's"). Yet at various points during the suppression hearing and trial Thomas described the robber as having "light" eyes. (App. A. 10) ("pretty much I focused on his eyes . . . the intensity of the eyes is how I picked it out"); (*see also* Trial Tr. 83-84) ("Light colored is what I recall . . . . Light colored, I know they were light colored."). In the photo array, Ford's eyes are extremely prominent, certainly more than the other individuals' eyes. (App. B. 7.)

[5] *See also* (8/24/2010 Mot. to Suppress Hr'g Tr. 47) ("he had very pale, you know, freckle-ish kind of skin tone"); (8/24/2010 Mot. to Suppress Hr'g Tr. 49) ("[w]hite, pale skin, you know, freckle-ish skin"); (App. A. 18) ([I]n the 911 call, I described . . . the pale skin with freckles."); (App. A. 22) ("pale white with freckles").

Second, the way in which Officer Bice enlarged and cropped Ford's photo also made the array suggestive because, again, it overemphasized the "pale and freckle-ish skin" that Thomas identified. There are two main problems with Ford's photo. First, Ford's face is the largest among the six array photos. (App. B. 7.) Bice denied enhancing or altering the photo in any way except for cropping it for "a more uniform appearance." (9/21/2010 Mot. to Suppress Hr'g Tr. 8; *see also* App. A. 26-27.) This cropping process, however, actually increased the size of Ford's face compared to the other photos—defense counsel had the photo analyzed and determined that his face was 133% larger in the photo used in the array than in the original source photo. (R. 24 at 3; R. 35 at 8 n.2.) Moreover, although Bice denied altering the contrast of the photo, a quick comparison of the source photo with the photo used in the array suggests otherwise. *Compare* (App. B. 35) (source photo), *with* (App. B. 2) (array photo). Ford's photo stands out from the other photos as the brightest because of the high degree of contrast. (R. 24 at 3; 9/21/2010 Mot. to Suppress Hr'g Tr. 24.) While minor differences in exposure and quality of photographs do not necessarily render an array unduly suggestive, *United States v. L'Allier*, 838 F.2d 234, 239-40 (7th Cir. 1988), the odd contrast of the photo is particularly problematic here because it emphasizes the "pale and freckle-ish" skin that Thomas found so crucial to his identification (*see, e.g.*, Trial Tr. 31). "Even a glance at the photographs" suffices to show how Ford "jumps out from the others." *Downs*, 230 F.3d at 275; (*see also* App. B. 7). Because only Ford's photo matched the

witness's description in the array and that photo had been enhanced to emphasize the identifying characteristics, the photo array was unduly suggestive.

2. Law enforcement failed to use procedures that protect against suggestibility.

The procedure used in the array also was suggestive. This Court has expressed a preference for photo arrays conducted as double-blind displays. *Brown*, 471 F.3d at 804-05 (describing the sequential double-blind procedure as "better" than merely a lineup of individuals who have a similar appearance). In this procedure, reliability is improved because the police officer conducting the array does not know which, if any, of the photos depicts the suspect. *Id.* Research has shown that police officers who know the suspect "may leak their hypotheses by consciously or unconsciously communicating to witnesses which lineup member is the suspect." Sarah M. Greathouse & Margaret Bull Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification*, 33 LAW & HUM. BEHAV. 70, 71 (2009). Unconscious and seemingly innocuous changes in posture and expression, gestures, hesitations, or smiles can affect the identification procedure. Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator–Witness Contact on Eyewitness Identification Accuracy,* 89 J. APPLIED PSYCHOL. 1106, 1107 (2004). "The consequences are clear: a non-blind lineup procedure can affect the reliability of a lineup because even the best-intentioned, non-blind administrator can act in a way that inadvertently sways an eyewitness trying to identify a suspect." *State v. Henderson*, 27 A.3d 872, 897 (N.J. 2011)

(announcing a new, stricter standard for eyewitness testimony due to the number of scientific studies casting doubt on the reliability of eyewitnesses).

This Court also prefers a procedure where the witness is shown one photo at a time, rather than an approach where all of the photos are presented to the witness at the same time. *Brown*, 471 F.3d at 804-05. The latter procedure problematically leads the witness to "choos[e] the lineup member who most resembles the culprit *relative to the other members of the lineup*." Gary L. Wells, *What Do We Know About Eyewitness Identification?*, 48 AM. PSYCHOLOGIST 553, 560 (1993). When a witness compares a photo against other photos as opposed to his or her own memory, the risk of misidentification is increased. *Id.*

From the beginning, Bice was the lead investigating officer on the case. He not only selected the photos for the array, but also conducted the array with the witnesses. (App. A. 28.) He laid the photos out in two rows, all at once. (App. A. 24, 27.) Because Bice was so intimately involved in the case, the danger of an inadvertent or subconscious cue to Thomas as to which of the pictures was of the suspect was increased. Furthermore, because Bice used the simultaneous display method, there was a much greater risk that Thomas merely compared the photos against each other to see which one had the palest, most freckled skin. Therefore, the suggestibility of the photo array was further exacerbated by the law enforcement officer's failure to follow the lineup procedures preferred by this Court.

B. Thomas's identification was not sufficiently reliable under the totality of the circumstances.

Not only was the photo array unduly suggestive, Thomas's identification was unreliable under the "totality of the circumstances." *United States v. Traeger*, 289 F.3d 461, 474 (7th Cir. 2002). As a threshold matter, "study after study reveal[s] a troubling lack of reliability in eyewitness identifications." *Henderson*, 27 A.3d at 877. Indeed, the International Association of Chiefs of Police concedes that "[o]f all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work." *Id.* at 885-86 (quoting Int'l Ass'n of Chiefs of Police, Training Key No. 600, Eyewitness Identification 5 (2006)). Applying the reliability factors here shows that this case is no exception. This Court should rule that Thomas's identification was unreliable.

This Court considers several factors in determining whether an identification was reliable under a totality of the circumstances:

> 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.

Biggers, 409 U.S. at 199-200.

Applying these factors in this case overwhelmingly favors a finding of unreliability.

1. Thomas did not have a good opportunity to view the robber.

Under the first *Biggers* factor, Thomas did not have a good opportunity to view the criminal because the robber was wearing a disguise and the encounter lasted only a few minutes. *Downs*, 230 F.3d at 275; *Biggers*, 409 U.S. at 199-200. Masks hinder the opportunity of the witness to see the criminal. *United States v. Funches*, 84 F.3d 249, 255 (7th Cir. 1996) (noting the witness saw the perpetrator before he put his mask on). In fact, disguises generally affect a witness's ability to correctly remember a perpetrator. Studies have found that even something as simple as a hat reduces accuracy in identifications. Brian L. Cutler et. al, *Improving the Reliability of Eyewitness Identification, Putting Context into Context*, 72 J. APPLIED PSYCHOL. 629, 635 (1987). Identifications based upon very brief encounters are similarly less accurate. *Thigpen v. Cory*, 804 F.2d 893, 896-97 (6th Cir. 1986) (finding an identification to be unreliable when the witness "barely looked" at the robber during a five-minute encounter). Although Thomas testified that he was engaged in fairly close contact with the robber for the short duration of the robbery, the robber was wearing a dust mask that completely covered his nose, mouth, and chin, and a floppy hat that obscured the top half of his face. (Trial Tr. 39.) Because it was physically impossible for Thomas to see the majority of the robber's face, and Thomas did not consider the heights or weights of the individuals in the photo array that depicted only the individuals' heads and shoulders, (App. A. 13; App. B. 1-6), this factor weighs against reliability.

2. Thomas did not pay sufficient attention to the robber.

Thomas was too distracted to make a reliable identification. The second *Biggers* factor is "the degree of attention" paid by the witness. *Downs*, 230 F.3d at 275. This factor examines whether the witness took advantage of the opportunity to see the incident. *U.S. ex rel. Kosik v. Napoli*, 814 F.2d 1151, 1158 (7th Cir. 1987). Courts have found that witnesses are reliable when they are not distracted by a fear of violence, *see United States v. Cord*, 654 F.2d 490, 493 (7th Cir. 1981); the risk of misidentification "is increased when the observation was made at a time of stress or excitement," *United States v. Russell*, 532 F.2d 1063, 1066 (6th Cir. 1976). Studies have consistently shown that "high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details." Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687, 699 (2004). Furthermore, it has also been shown that when there is a visible weapon, "weapon focus" distracts a witness from the perpetrator. One study found that on average, there was a 10% decrease in accuracy when a weapon was present. Nancy M. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413, 415-17 (1992).

Here, Thomas claimed to have paid attention to the robber, but it was a short, high-stress encounter. Thomas described the event as "stressful" (App. A. 13), even admitted that he was "focus[ed] on different things" (App. A. 13), and said that his "primary concern was the other employees" (App. A. 13-14). The robber

was carrying a gun and wearing a disguise. (Trial Tr. 35.) The other witnesses were only able to offer scant details about the robber's sex, race, disguise, and weapon.[6] An identification based upon a solitary, high-stress encounter where the perpetrator was wearing a disguise and carrying a gun is suspect.

3. Thomas's prior descriptions were inadequate and inaccurate.

Thomas's descriptions of the robber were vague, inconsistent and, often, inaccurate. The third *Biggers* factor—the accuracy of the witness's prior description—focuses on "if and when the witness developed and expressed a concrete and specific impression of the individual's characteristics firm enough to remain reliable despite the vagaries of time and the pressures of any undue suggestiveness." *Kosick*, 814 F.2d at 1159; *see also Downs*, 230 F.3d at 275 (describing third factor). Most people have difficulty remembering or describing a stranger's features. *Newsome v. McCabe*, 319 F.3d 301, 305 (7th Cir. 2003) (noting that viewing photographs often solidifies a witness's earlier vague impressions of a suspect). Accuracy not only relates to correctness, but also precision. *Thigpen*, 804 F.2d at 897 (noting that the witness was "unable even to describe the robbers' weights, builds, hairstyles, or facial hair"); *Kosick*, 814 F.2d at 1159 (finding

[6] Witness Julie Boge saw "a white male subject wearing white dust mask and a blue floppy hat;" witness Svetlana Sisso was only able to state that the robber was holding a handgun and two pillowcases; witness Samrajnee Pathare described the robber as "a male white possibly in his 40s wearing a floppy hat and a white dust mask" and holding a black handgun; witness Merlyn Agravante described the robber as carrying a black handgun and a pillowcase and wearing "a black long coat, a brimmed floppy hat, and a white dust mask." (App. B. 15-17.)

sufficient identification where the witness could accurately describe the perpetrator's age, skin color, hair color, and facial hair).

Thomas's various descriptions of the robber at the time of the robbery were rife with inconsistencies and inaccuracies. First, Thomas was never able to identify the suspect's eye color, even though he insisted that he remained in eye-to-eye contact with him throughout the robbery. (App. B. 20.) He was similarly unable to identify the robber's age, hair color, hair length, hair style, facial hair, or the color of the robber's shirt even in the first minutes after the robbery. (App. B. 20.) In fact, the only feature of which Thomas remained certain was the suspect's pale, freckled skin. (*See, e.g.*, App. A. 17-18.) During the 911 call, Thomas stated the robber was wearing gloves, but in the identification report afterwards he stated he was "unsure" if the robber was wearing gloves. (App. B. 32; App. B. 13.) Thomas also claimed during that call that the robber was wearing black boots. (App. B. 33.) In misidentifying John Theiler the following day, however, he reported to police that it was Theiler's gym shoes, among other things, that convinced him that Theiler was the robber. (App. B. 27) (Officer Martino's report stated that "while [Thomas] was unable to describe the offender's shoes, he stated that Theiler's gym shoes reminded him of the ones worn by the offender."). Surveillance footage at trial ultimately revealed that the robber was wearing white athletic shoes. (Trial Tr. 101-02.) Thomas's sparse and vague description weighs against reliability.

4. Thomas's degree of certainty about his identification should be discounted due to Bice's confirmation feedback.

By confirming Thomas's identification, Bice "significantly inflat[ed]" Thomas's certainty, thus undercutting the fourth *Biggers* factor. *Downs*, 230 F.3d at 275 (identifying the fourth *Biggers* factor); Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859, 864-65 (2006) (studying the effect of confirmatory bias). That is, although a witness may seem certain when testifying about an earlier identification, that certainty may simply "reflect the corrupting effect of the suggestive procedures." *Kosik*, 814 F.2d at 1159. Significantly, "those who receive a simple post-identification confirmation regarding the accuracy of their identification significantly inflate their reports to suggest better witnessing conditions at the time of the crime, stronger memory at the time of the lineup, and sharper memory abilities in general." Douglass & Steblay, *Memory Distortion, supra* at 864-65. This Court has noted that "once the witness decides that 'X is it' the view may be unshakeable." *Newsome,* 319 F.3d at 305.

Thomas did testify that he had a high level of certainty in the identification, but this factor deserves closer scrutiny. (Trial Tr. 68.) Here, Detective Bice confirmed to Thomas post-identification that Thomas picked out the suspect and further informed the witness that there was DNA evidence in the case. (App. A. 24.) Under the circumstances of Bice's admitted confirmation feedback, Thomas's level of certainty actually carries very little weight in terms of establishing the reliability of his identification.

5. Too much time passed between the incident and the photo array for the identification to be reliable.

Sixteen months lapsed between the robbery and identification, which exponentially amplifies the risk that Thomas misidentified the robber. (R. 33 Ex. G) (showing Thomas viewed the photo array on March 24, 2009; the robbery occurred on November 20, 2007); *see also Biggers*, 409 U.S. at 201 (finding a comparatively short seven-month lapse "a seriously negative factor in most cases"). The final factor, "the length of time between the crime and the confrontation" weighs heavily against a finding of reliability in this case. *Downs*, 230 F.3d at 275. Lapses of weeks or months between the incident and the identification weaken reliability. *See Manson v. Brathwaite*, 432 U.S. 98, 116-17 (1977) (finding the fifth factor weighed in favor of reliability because "[w]e do not have here the passage of weeks or months between the crime and the viewing of the photograph"). Extremely long lapses in time are viewed with suspicion. *See, e.g., McFowler v. Jaimet*, 349 F.3d 436, 450 (7th Cir. 2003) (stating that "the passage of twenty-nine months . . . detracts significantly from the weight to be given that identification); *Cossel v. Miller*, 229 F.3d 649, 656 (7th Cir. 2000) (rejecting an identification as unreliable, in part, because three years elapsed between the crime and the lineup). Thus, the sixteen-month lapse in this case weighs heavily against reliability, particularly given Thomas's brief and stress-laden encounter with the robber.

Based upon the "totality of the circumstances," the inaccuracies of Thomas's identification, the disguise, the weapon, the stress involved, the confirmation feedback from Bice and, particularly, the sixteen-month lapse of time between the

crime and the photo array, this Court should find Thomas's identification unreliable and reverse and remand for a new trial.

C. The district court further erred when it denied Ford's renewed objection to Thomas's testimony after the government disclosed that Thomas identified another individual as the robber the day after the robbery.

Even if the district court did not err in initially denying the motion to suppress Thomas's identification, the district court should have barred the testimony after the government disclosed to defense counsel, only eight days before trial, that Thomas had identified another individual—John Theiler—as the robber the day after the crime. At the very least, this new information compelled a careful reexamination of the testimony at a hearing.

Although the Theiler evidence arguably falls outside of the Jencks Act's and Rule 26.2's strict requirements, *United States v. Allen*, 798 F.2d 985, 993-94 (7th Cir. 1986) (laying out the Jencks requirements), the purpose of Jencks disclosures and the legislative and judicial intent underlying the rule apply equally to the government's tardy disclosure of Thomas's prior identification. *See e.g.*, *United States v. Johnson*, 200 F.3d 529, 534 (7th Cir. 2000) (stating that the Jencks Act ensures "the meaningful confrontation of government witnesses"). Specifically, this tardy disclosure prejudiced Ford because he was unable to properly cross-examine the government's star witness in the context in which it really mattered: suppression. *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (stating that "suppression hearings often are as important as the trial itself" in holding that suppression hearings must be public under the Sixth Amendment); *Phillips v. Lane*, 787 F.2d

208, 216 (7th Cir. 1986) (noting that there are cases wherein the suppression hearing "may be more important than the trial itself."), *abrogation on other grounds recognized by Rogers-Bey v. Lane*, 896 F.2d 279 (7th Cir. 1990). If Ford had been supplied the information about the Theiler identification and been given the opportunity to probe Thomas about it, Ford could have more fulsomely established not only Thomas's unreliability under the *Biggers* factors, *see McFowler*, 349 F.3d at 445 (characterizing an in-court identification as unreliable where the witness identified another individual hours after the crime), but also could have seriously undercut Thomas's general credibility. Thomas cherry-picked facts from the Theiler report during the suppression hearing, unequivocally relying on those that bolstered his identification of Ford as the robber and ignoring those that did not, including the very existence of the Theiler identification.

First, Thomas specifically referred to facts from the Theiler report when he testified for the first time during the suppression hearing that the robber had intense, light-colored eyes, facts that were crucial to his identification of Ford. (*See, e.g.*, App. A. 10) (stating he knew it was the picture of the robber because "[p]retty much because I focused on his eyes, the eyes and the tone of the skin, you know, kind of freckle-ish, pale skin, and the intensity of the eyes is how I picked it out"); (App. A. 16) (stating that the robber's eyes were "pretty intense. Just light eye color. I know it was a light eye color."). The only mention of eyes came from the Theiler report. (App. B. 27) (stating that the shape of the man's eyes "was nearly identical to that of the robber's"). In the reports that stemmed from the night of the

robbery—the ones that the defense actually had at the suppression hearing—Thomas never mentioned the robber's eyes, their color, or their intensity. Because the defense did not have the benefit of the Theiler report, the defense had no way of challenging Thomas's new assertion that the robber's eyes were a definitive characteristic. Nor could the defense explore whether Ford's eyes matched the robber's or whether they merely reminded Thomas of Theiler's eyes.

Second, although Thomas invoked facts from the Theiler report to establish Ford's culpability, he ignored the report entirely when it did not support his identification. For example, during the 911 call, Thomas stated that the robber was wearing black boots. (App. B. 33.) When Thomas reported John Theiler to the police the next day, however, he claimed that "Theiler's gym shoes reminded him of the ones worn by the offender." (App. B. 27.) At the suppression hearing, defense counsel attempted to impeach Thomas with the surveillance photos that showed the robber wearing gym shoes. Thomas never mentioned the fact that he had altered his original description of the robber's shoes in a supplementary report, nor did he mention that report at all. He claimed to have simply made a mistake when he initially described the robber as wearing boots rather than shoes. (8/24/2010 Mot. to Suppress Hr'g Tr. 44-45.) At trial, however, Thomas affirmatively relied on the now-disclosed Theiler report to bolster his accuracy in identifying the robber's shoes. (Trial Tr. 102) ("But also in the police report, too, the following day I said gym shoes.").

Ford's cross-examination necessarily was hamstrung in the absence of this crucial piece of evidence that showed at best that Thomas was superimposing Theiler's characteristics into the Ford photo array or, at worst, that he was not entirely truthful when he neither admitted during suppression that he had fingered someone else nor when he claimed at trial to have forgotten that he had done so. (Trial Tr. 69) ("Basically, yeah, I did not remember.").[7] But when it really mattered—during the suppression hearing—Ford lacked the pieces of the puzzle necessary to show that Thomas's identification was unreliable and should have been excluded.

Rather than recognize the seriousness of this new development, however, the district court brushed off the defendant's concerns and informed him that it was an issue to be handled on cross-examination at trial. (App. A. 35) ("So, you know, I don't see how that affects his ability to testify. It might give you some cause to cross-examine him."); *see also Rosenberg v. United States*, 360 U.S. 367, 375 (1959) (Brennan, J., dissenting) (stating that the rationale of the Jencks case and statute is to require production of documents to the defense "regardless of a judge's opinion as to how useful they might be on cross-examination, for only the defense can fully appreciate their possible utility for impeachment"). Cross-examination on an

[7] Detective Bice, the lead detective in the case, also never mentioned the Theiler report during the September 21, 2010, suppression hearing. (9/21/2010 Mot. to Suppress Hr'g Tr.); (10/08/2010 Mot. Hr'g Tr. 12) (defense counsel renewing his objection to Thomas's testimony in light of the tardy Theiler disclosure and stating "if you don't impugn any particular bad faith to Mr. Thomas, you certainly should impugn some bad faith to the lead agent or the lead detective in this particular case . . . . We had all this testimony about how quickly [Thomas] was able to identify the picture. And never once did [the Theiler identification] come up from this professional witness.").

admitted identification is no substitute for suppression of that identification. *Rodriguez v. Young*, 906 F.2d 1153, 1160 (7th Cir. 1990) (in habeas review, stating that an attorney's decision to cross examine a witness at trial in lieu of moving to suppress identification could not be strategic because "even the most withering cross examination could not substitute for suppression"). Thomas was the government's vital witness and the only individual who claimed to be able to identify Ford as the perpetrator. Without Thomas's testimony, the only evidence against Ford was an incomplete DNA profile, evidence the jury likely did not find determinative. (Trial Tr. 457); (R. 65) (responding to jury note requesting additional photos of Ford and answering that all the photos of Ford were in evidence). Thomas's claims at trial that he was "one hundred percent" sure Ford was the perpetrator (Trial Tr. 68), were not credible after the Theiler report revealed that he had identified someone else right after the robbery, a fact that Thomas claims to have "forgot" (Trial Tr. 69). It is clear that Thomas conflated his identifications and descriptions of Theiler and Ford. The district court's failure to carefully re-examine Thomas's reliability as a witness in light of the eleventh-hour disclosure was an abuse of discretion and this Court should reverse and remand.

CONCLUSION

For the foregoing reasons, the appellant, John A. Ford, respectfully requests this Court to reverse his conviction and remand for a new trial.

Dated: November 14, 2011

Respectfully submitted,

John A. Ford
Defendant-Appellant

By: /s/ SARAH O'ROURKE SCHRUP
Attorney
OWEN McGOVERN
Senior Law Student
KATE RIORDAN
Senior Law Student

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Counsel for Defendant-Appellant
JOHN A. FORD

No. 11-2034

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN A. FORD,

Defendant-Appellant.

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, John A. Ford, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on November 14, 2011, which will send the filing to the person listed below. I also served two copies of this brief and one copy of the separate appendix by placing them in an envelope with sufficient postage affixed and directed to the person named below at the address indicated, and depositing that envelope in the United States mail box located at 375 East Chicago Ave., Chicago, Illinois on November 16, 2011.

CAROL BELL
Assistant United States Attorney
219 S. Dearborn Street, 5th Floor
Chicago, IL 60604

/s/ SARAH O'ROURKE SCHRUP
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Dated: November 14, 2011

No. 11-2034

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN A. FORD,

Defendant-Appellant.

CERTIFICATE OF COMPLIANCE WIH FED. R. APP. P. 32(A)(7)

I, the undersigned, counsel for the Defendant-Appellant, John A. Ford, hereby certify that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(7) for a brief produced with a proportionally spaced font. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 12-point Century Schoolbook font.

The length of this brief is 11,142 words.

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Dated: November 14, 2011

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN A. FORD,

Defendant-Appellant.

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(D)

I, the undersigned, counsel for the Defendant-Appellant, John A. Ford, hereby state that all of the materials required by Circuit Rules 30(a) and 30(b) are included in the Appendix to this brief.

/s/SARAH O'ROURKE SCHRUP
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Dated: November 14, 2011

No. 11-2034

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN A. FORD,

Defendant-Appellant.

On Appeal from the United States District Court
For the Northern District of Illinois
The Honorable Judge Robert W. Gettleman
Case No. 09-CR-846

ATTACHED REQUIRED 30(A) APPENDIX OF DEFENDANT-APPELLANT JOHN A. FORD

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John A. Ford

RULE 30(a) SHORT APPENDIX TABLE OF CONTENTS

RULE 30(b) APPENDIX TABLE OF CONTENTS

NF

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGE GETTLEMAN

UNITED STATES OF AMERICA	)	
	)	No. 09 CR 846
vs.	)	
	)	Violation: Title 18, United States Code,
JOHN A . FORD	)	Section 2113(a).

MAGISTRATE JUDGE NOLAN

The SPECIAL JANUARY 2009 GRAND JURY charges:

On or about November 20, 2007, at Palatine, in the Northern District of Illinois, Eastern Division,

JOHN A. FORD,

defendant herein, by force and violence and by intimidation, did take from the person and presence of a bank employee approximately $1,146 in United States Currency belonging to, and in the care, custody, control, management, and possession of U.S. Bank, located at 1586 North Rand Road in Palatine, Illinois, the deposits of which were then insured by the Federal Deposit Insurance Corporation;

In violation of Title 18, United States Code, Section 2113(a).

FORFEITURE ALLEGATION

The SPECIAL JANUARY 2009 GRAND JURY further charges:

1. The allegation contained in this Indictment is re-alleged and incorporated herein by reference for the purpose of alleging forfeiture pursuant to Title 18, United States Code, Section 981(a)(1)(C), and Title 28, United States Code, Section 2461.

2. As a result of his violation of Title 18, United States Code, Section 2113(a), as alleged in Count One of the foregoing Indictment,

JOHN A. FORD,

defendant herein, shall forfeit to the United States, pursuant to Title 18, United States Code, Section, 981(a)(1)(C), any and all right, title and interest in property, real and personal, which constitutes and is derived from proceeds traceable to the charged offense.

3. The interest of the defendant subject to forfeiture pursuant to Title 18, United States Code, Section, 981(a)(1)(C) includes but is not limited to:

$1,146.

4. If any of the property subject to forfeiture and described above, as a result of any act or omission of the defendant, or either of them:

(a) Cannot be located upon the exercise of due diligence;

(b) Has been transferred or sold to, or deposited with,

a third party;

(c) Has been placed beyond the jurisdiction of the Court;

(d) Has been substantially diminished in value; or

(e) Has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property under the provisions of Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 982(b)(1).

All pursuant to Title 18, United States Code, Section 981(a)(1)(C), and Title 28, United States Code, Section 2461.

A TRUE BILL:

_____

FOREPERSON

_____

UNITED STATES ATTORNEY

AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Northern District of Illinois

UNITED STATES OF AMERICA
v.
JOHN A. FORD

JUDGMENT IN A CRIMINAL CASE

Case Number: 09 Cr 846 -1

USM Number: 02162028

Michael J. Petro
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) 1 of the indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 2113(a)	bank robbery by force, violence and intimidation	11/20/2007	1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

4/21/2011
Date of Imposition of Judgment

Signature of Judge

Robert W. Gettleman — US District Court Judge
Name of Judge — Title of Judge

4/21/2011
Date

DEFENDANT: JOHN A. FORD
CASE NUMBER: 09 Cr 846 -1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

TWO HUNDRED FORTY (240) MONTHS.

☑ The court makes the following recommendations to the Bureau of Prisons:

that the Bureau select a facility as close to Chicago, Illinois, as possible, as the designated institution.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JOHN A. FORD
CASE NUMBER: 09 Cr 846

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

THREE (3) YEARS. A condition of supervised release is that defendant make restitution in the amount of $1,146.00.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: JOHN A. FORD
CASE NUMBER: 09 Cr 846 -1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$	$ 1,146.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
U.S. Bank, attention: Shelly Collins,			
4455 Montgomery Road, Naperville, Illinois 60564	$1,146.00		

TOTALS	$ 1,146.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JOHN A. FORD
CASE NUMBER: 09 Cr 846

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 1,246.00 due immediately, balance due

☐ not later than _____, or
☑ in accordance ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

Any balance of the $1,146.00 restitution is to be paid in monthly installments of at least 10% of defendant's net income.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

THE COURT: You don't have to call Ms. Bell. And you won't call Ms. Bell. And the objection is overruled.

BY MS. BELL:

Q. Mr. Thomas, how much time approximately elapsed between when you reviewed and signed and dated Government Exhibit 3 and when you looked at the photographs?

A. It was immediate, so less than a minute probably.

Q. I'm showing you now what have been marked as Government's Exhibits 4-A through F.

MS. BELL: May I approach, Your Honor?

BY MS. BELL:

Q. Mr. Thomas, do you recognize Government's Exhibits 4-A through F?

A. Yes.

Q. What do you recognize them to be?

A. These were the photos that day in March that we looked at.

Q. And how are you able to recognize these photos as the ones you viewed on March 24th, 2009?

A. Photo 4-B, I signed it and dated it. This is the photo that I picked.

Q. Mr. Thomas, could you please explain to the Court how those photographs were presented to you that day?

A. The officer pretty much laid it in two rows, three and three on there. The photo I picked was in the center, you know. And I can't recall if it was on the top or bottom, but I know it was in

the center.
Q. And that was the photo you picked. You previously mentioned that you signed and dated one.
A. Correct.
Q. Which photo did you identify as being that of the bank robber from November 20th, 2007?
A. 4-B.
Q. And how long did it take you to identify that photograph as being of the robber?
MR. PETRO: Objection, asked and answered, Judge.
THE COURT: Overruled.
BY THE WITNESS:
A. Relatively quick. It was less than a minute.
BY MS. BELL:
Q. How did you know that that was the robber?
A. Pretty much because I focused on his eyes, the eyes and the tone of the skin, you know, kind of freckle-ish, pale skin, and the intensity of the eyes is how I picked it out.
Q. Had you seen the bank surveillance video before making this identification?
A. No.
Q. Now, after you identified Government Exhibit 4-B as being a photograph of the robber, did you have any further conversation with the Palatine detective?
A. I did from there, you know, out of curiosity, I asked him if

there was any certain way they kind of lay out the pictures or anything from that. From memory, he said no.

Also asked if they had caught the robber. And at that time he explained kind of he knew who he was. I don't think he was in custody at that time. But they had a DNA match, you know, from the mask, because they found a mask, or the painter or surgical mask, and they had a DNA match from it.

MS. BELL: Thank you very much, Mr. Thomas.

The government has no further questions at this time, Your Honor.

THE COURT: Thank you.

Your witness.

MR. PETRO: May I, Judge? Thank you.

CROSS-EXAMINATION

BY MR. PETRO:

Q. Sir, my name is Michael Petro. I'm here and I represent John Ford, who has been accused of this crime. You know that, is that correct?

A. Yes.

Q. And we've never met before, is that correct?

A. Yes.

Q. And with respect to the date in question, November 20th, 2007 at 5:25 p.m., would it be fair to say, sir, that you had never met the robber that came in to the U.S. Bank?

A. Yes, it would be true to say.

Q. You didn't recognize anything familiar about him, is that correct, or her? Is it a him or her?
A. Prior to?
Q. Yeah.
A. No.
Q. Did you have any impression on November 20th of 2007 that the person that came into the bank was a customer of the bank?
A. We were closed, so it wouldn't be a customer at that point.
Q. Well, how long had you been at that particular U.S. Bank as manager?
A. Five years, over five years.
Q. Well, you see a lot of people over five years, is that correct?
A. Yes.
Q. Was there anything about the person that came in and took the money, was there anything familiar that led you to believe that that person was a customer of the U.S. Bank?
A. No.
Q. Now, you mentioned specifically that 911 called you, is that correct? Did Palatine 911 or someone from the 911 phone call bank, did they call you up and ask what was going on over there?
A. The, the -- from the police department called back the branch, correct, yes.
Q. You didn't call them?
A. No. That's not procedure on there.

Q. They called you?
A. Yes.
Q. And then you said at the time that they called you that you provided a description of the person that came in to the bank, isn't that correct?
A. Yes.
Q. What was that description, sir?
A. That he was pretty much dressed in black, most of his attire was black; that he was wearing like a floppy hat; a painter's mask, like a surgical mask sort of thing. I remember, you know, saying he was probably about five-ten or so, you know, maybe around 180 pounds, roughly that much.
Q. That's what you remember today in court?
A. Correct.
Q. Well, is it fair to say that your memory at the time that you made the 911 call was better than it was here today in court?
A. Of that time, kind of both, yes, it was, say, better than today. But you're also dealing with a stressful matter, you know, so --
Q. The stress of the situation distracted you during the situation, is that correct?
A. Not really. You know --
Q. Well, you said you were focused on --
A. -- you focus on different things.
Q. Yeah, you were focused and concerned. You said your primary

concern was the other employees, is that fair to say?
A. Yes.
Q. So you were focused on the situation, but you were also focused on keeping track of the various employees and what they were doing and what was going on, isn't that correct?
A. No.
Q. Well, the robber, if you look at the particular pictures, you went through 21 pages of pictures, I think?
A. Uh-huh.
Q. It's fair to say from reviewing those pictures that the robber is not directly in front of you, isn't that correct?
A. On my side, in front of me, you know.
Q. Sometimes behind you though, isn't that correct?
A. Sometimes, sometimes behind me, correct.
Q. So you didn't have an opportunity to view that particular person, the person that took the money, you never had an opportunity to view that person all the time that that person was in the bank, is that correct?
A. Not all the time, no.
Q. You were walking around and back and forth, is that correct?
A. I was pretty much within 4 feet of him at all times roughly.
Q. Well, you can only see him if he's in front of you is my point though, is that correct?
A. Or on the side of me.
Q. Peripherally?

A. Correct.
Q. Peripheral vision means that it's not your primary focus though. Isn't that your definition --
A. Yes, correct.
Q. -- of peripheral vision?
A. Uh-huh.
Q. So you weren't peripherally -- peripherally you were concerned about the person that was taking the money, but it wasn't always your direct focus, is that correct?
A. Direct focus for me was pretty much kind of trying to engage in a conversation with him and keep his focus on me.
Q. You were thinking about what you were saying, is that correct?
A. Yes.
Q. Well, had you ever received in the five years, had you ever had a prior incident like this at the U.S. Bank?
A. No.
Q. Have you ever -- are you still working in the bank industry?
A. No.
Q. Are you still working at U.S. Bank?
A. No.
Q. And with respect to that conversation, that 911 conversation, the first event that you have to give a description of the person that took the money, what did you tell the 911 person regarding the eye color of that person?

A. Light eye color. I remember it being, you know, light eye color.
Q. Well, did you give a color?
A. I don't believe I did. I'm not sure if I did.
Q. Well, since your memory seems to be approximately the same today as it was then, what was the eye color of the person that came in and took the money?
A. It was pretty intense. Just light eye color. I know it was a light eye color.
Q. Well, did you give a color?
A. I did not, I don't believe I have.
Q. You've never given a color, have you?
A. I don't believe I did.
Q. You didn't know what color the eyes were, is that correct?
A. They were light eye colored.
Q. Well, you never told anyone that, did you?
A. I don't believe I did.
Q. Never once have you told anyone -- the 911 caller, you never told them an eye color, is that correct?
A. I don't recall telling them.
Q. And then you were interviewed by someone by the Palatine Police Department after the event, is that correct?
A. Yes.
Q. And you never told them an eye color, did you?
A. I wasn't asked.

isn't that correct?

MS. BELL: Your Honor, objection.

THE COURT: Hold on. There is an objection.

BY THE WITNESS:

A. I can't say if it was in --

THE COURT: Excuse me, Mr. Witness. If there is an objection, please hold your answer.

MS. BELL: The defense lawyer is asking the witness to speculate as to how the photo array was put together, whether they were enhanced or caused freckles.

THE COURT: I think he's asking to give his own description of these photographs, which is perfectly okay. Overruled.

All right. Go ahead. Put the question again.

BY MR. PETRO:

Q. Isn't it fair to say, sir, that the photo that you signed is enhanced to make it look as if the person in photo B has freckles?

A. I don't know if it's to make him look as if he has freckles.

Q. Well, it also --

A. I mean, it appears that he does, and that's what I recall is his skin. The skin tone with freckles is exactly what I described in the 911 call when I spoke to the officers. I, you know, gave the description pale skin with freckles.

Q. Well, sir, can I ask you the question --

MS. BELL: Your Honor, if the defense lawyer would please let the witness finish his answer.

THE COURT: Let him finish.

MR. PETRO: All right.

BY THE WITNESS:

Q. So in the 911 call, I described that, you know, prior to seeing any photos, I mean, I described the pale skin with freckles. So that's the image, and that's how basically I picked him out of a lineup.

BY MR. PETRO:

Q. Well, anyone else -- you couldn't see anything in that particular photo other than the eye area, isn't that correct?

A. In which photo?

Q. Well, it's really not a fair photo, because you're using things other than what you were able to observe on the date of the offense, isn't that correct, on the date that the person took the money? You can't see that whole head shot, can you?

A. The head shot, yes. You could see basically what I was focusing on, which is the eyes and the neck area.

Q. But you can also see other things like the ears. You couldn't see the ears on that day, isn't that correct?

A. I don't recall looking at his ears, no.

Q. And you can't remember whether you could see his ears not on that particular day, is that correct?

A. His ears, correct, yeah.

Q. And were you able to see the nose. There is a nose on the person you've identified in 4-B. Were you able to see the nose area?
A. No.
Q. Were you able to see the facial hair that exhibits on Exhibit 4-B?
A. No.
Q. You weren't able to see that on the date that the person took the money, is that correct?
A. Correct, because --
Q. And you weren't able to see the chin area, is that correct?
A. Correct.
Q. And you weren't able to see the hair color, is that correct?
A. Correct.
Q. And you weren't able to determine whether or not those are the lips of that particular person, is that correct?
A. Correct.
Q. You couldn't see any of that on the date that the person took the money, is that correct?
A. Correct. But I could see his eyes and his neck and --
Q. All right. Could you just circle for me on Exhibit 4-B --
MR. PETRO: And I'll use mine if you don't mind, counsel.
BY MR. PETRO:
Q. -- what area of the person that you could see in Exhibit No.

4-B, what area of that particular head shot were you able to observe on the date that the person took the money?
A. (Drawing)
Q. And you're absolutely certain that a person in the photos and the person that took the money wasn't wearing something on the neck?
A. Correct.
Q. I want to be 100 percent clear about this. Do you know -- apparently you had talked to the person that took the money very, very, very closely. You were within 4 feet at all times. I know you weren't looking at him. But do you know if the person that took the money was wearing makeup to change or alter in any way the color of their skin?
A. It didn't appear to.
Q. You were close enough to determine whether or not the person was wearing concealer or coverup to alter the color of their skin?
A. I'm not a makeup expert. I have no idea. It appeared to be regular --
Q. Well, were you able to see or do you know?
A. The skin.
Q. Huh?
A. I mean the skin tone. I mean --
Q. Well, indicating for the record the hand area, is that correct?

A. Well, I'm using this as an example.
Q. The example of where you --
A. But what I mean is on my skin.
Q. -- determined the color of the skin from, is that correct? You looked at the person's hand and determined that the color of that person's --
A. I looked at his facial, not his hand. I looked at his eyes.
Q. -- hands was from the hand area, is that correct?
A. No.
THE COURT: Will you stop talking over each other, please.
BY THE WITNESS:
A. No. His eye area and the neck area. I'm rubbing my hand as an example for just the skin. But that's my determination from what I remember picking out the photo is from his eyes and the facial area, the neck and, you know, around there, from seeing the skin tone from there.
BY MR. PETRO:
Q. What about the hands? The hands would be a good area, just by going by your example here in court, the hands were an important area for determining the shade of the skin, is that correct?
A. I didn't focus on his hands.
Q. You didn't look at his hands? You were that close to him, and you didn't look at his hands, is that correct?

A. I didn't focus on his hands. I probably glanced at his hand. I know that he had the gun in the right hand, you know. But I didn't focus on his hand. I focused trying to keep his attention to me and engage in conversation. So I primarily, to hold most of the time, I engaged him just trying to have eye-to-eye contact.
Q. Well, let me ask you this, sir: Did the complexion of the person who took the money hands, did the complexion of the skin on his hands match the area of the skin that you could see in his head area?
A. I don't recall looking at his hands.
Q. You never observed his hands?
A. I may have. But I don't remember focusing on his hands.
Q. Well, your memory is as good today as it was back then, is that correct?
A. You can't say a hundred percent. But I do recall it. I mean, it was a very traumatic thing that stuck in my head. So the vision of it is pretty fresh.
Q. Well, what was -- did the color of the hand area, did it match the color that you saw of the facial area?
A. I can't say that, because I didn't focus on his hand. I can tell you what the color of his facial area is, which is pale white with freckles.
Q. But you don't know for 100 percent, you don't know for 100 percent certain whether the person that took the money was

(Proceedings in open court.)

THE CLERK: 09 CR 846, United States versus John A. Ford; for hearing

MR. YOUNG: Good morning, Your Honor.

Rick Young and Carol Bell on behalf of the United States.

MS. MICHAELIS: Good morning.

Quinn Michaelis and Michael Petro on behalf of John Ford.

THE COURT: Before we begin, Mr. Young, there is an envelope that you had delivered to me with the voir dire and proposed jury instructions?

MR. YOUNG: Yes, Judge.

THE COURT: It was delivered -- first of all, I haven't been in 1788 since June. There is a sign on the door. Whoever delivered it from your office removed the tape that was blocking the mail slot in the chambers next to mine, not even 1788, because I have tape on that as well, and that chambers has been vacant for a long time, and removed the tape and put it into that chambers. It never even would have been discovered had it not been for the construction going on up there, and some of the Turner people found it.

Somebody in your office should be told that judges are moving around the building and not to do sewer service to any judge of a paper as important as this.

A. He did.
Q. Can you tell us how you went about presenting the photo lineup to Mr. Thomas on March 24th?
A. Yes. I took the six pictures, and I spread them out in front of Mr. Thomas on the table he was sitting at with 1, 2, 3 being in the top row, and then 4, 5, 6 from left to right being in the bottom row.
Q. After you spread the photographs out on the table for Mr. Thomas, what happened?
A. I left the room. I went to my desk for a few minutes. I then returned to the room. And Mr. Thomas identified picture number 2, John Ford, as the man who had robbed the bank.
Q. After Mr. Thomas identified photograph number 2, which is marked as Government Exhibit 4-B, as the robber, John Ford, what, if any, discussion did you have with Mr. Thomas?
A. Mr. Thomas asked me if Mr. Ford was the suspect which we were investigating in the case.
Q. What, if anything, did you tell him?
A. I told him that yes, we were.
Q. Did you have any other discussion about the case at that time?
A. I told him the case was, the investigation was ongoing, and that we had some DNA evidence that we were working on.
MR. YOUNG: May I have a moment, Your Honor?
(Discussion off the record.)

BY MR. PETRO:
Q. That document is labeled on the top "A Physical Description Form," isn't that correct?
A. That's what it says, yes.
Q. Are you aware of whether witness Thomas ever completed a physical description form?
A. I've never seen this form before.
MR. PETRO: With respect to -- I'm going to now label this Group 2, Judge.
BY MR. PETRO:
Q. There is three forms here. The witnesses of those particular forms are the witnesses that were present in the bank at the time that the bank was robbed. You've never seen these three forms, sir?
A. No.
Q. And you don't know whether witness Thomas ever completed a form called "A Physical Description Form" that I just showed you?
A. Our department does not possess forms like those. We do not have people fill those out.
Q. That is not a form that was generated by your department then, is that correct?
A. Correct.
Q. Did you know witness Thomas before November 20th of 2007?
A. No.
Q. And you stated that you interviewed him on March 24th of

Q. Why would you make a photo lineup that contained the whole face of a person if the person wasn't able to view the whole face?
A. From the date of the initial investigation, the date of the robbery, several witnesses described much more than just the offender's eyes.
Q. They described clothing.
A. Doing a photo lineup of just eyes would be disregarding descriptors from the witnesses.
Q. Well, what descriptors are you talking about? Are you talking about the color of the hat, for instance?
A. Skin color.
Q. All right. So the skin color.
A. Eyebrow color, freckles on the skin.
Q. Well, was John Ford's photo enhanced and enlarged to make it appear as if there were freckles on his skin?
A. His photo was not enhanced.
Q. Well, it was enlarged though. It was enlarged, isn't that correct?
A. It was cropped to fit with the other five photos in the lineup.
Q. Well, you seem to have difficulty with this basic concept. But it's bigger. You enlarged it. It's bigger than the source photo, isn't that correct?
A. All of the photos were cropped to be of a similar nature to

be fair to your client.
Q. When you showed the lineup to Dannie Thomas, you stated that you put all six pictures on a desk, is that correct?
A. On a table, yes.
Q. On a table. And you showed them all to him at exactly the same time, is that correct?
A. Correct.
Q. Isn't it true in your training, sir, that you've learned that the sequential photo lineup method is the preferred way to do a photo lineup?
A. No.
Q. Isn't it true that you should show the photos one at a time and ask the person specifically at the end of each photo whether he recognizes that person to be the person that robbed the bank?
MR. YOUNG: Objection, asked and answered.
THE COURT: Overruled.
BY THE WITNESS:
A. That is not how I've been trained in my 14 years as a policeman.
BY MR. PETRO:
Q. Isn't it true, sir, that in your training, that a person who knows who the suspect is should never be the one that provides the lineup to the person identifying the lineup? Isn't that true?
A. No.

Q. And the reason that they don't want you, the person that knows -- you knew which suspect you were looking for when you showed the lineup to Dannie Thomas, isn't that true?
A. That I knew which picture was John Ford? Yes.
Q. And that's the person that you wanted to be identified, is that correct?
A. There is no one that I want to be identified. Just working --
Q. But you knew who the suspect was, isn't that true and accurate?
A. I wanted Mr. Thomas to make an identification based on his own knowledge and observations.
Q. But you knew who the suspect was that you wanted identified, isn't that true?
A. I knew who the suspect was.
Q. Well, isn't it true in your investigation and training that a person who knows who the suspect is should never provide the lineup --
A. No, that's not --
Q. -- to the person making the identification?
A. No.
Q. And the reason for that, did you give any cues to witness Thomas as to who the person or the suspect was?
A. No.
Q. But apparently after the interview was over, you did give him

get it right or they make it up because there has been suggestions. But this isn't one of those cases at all. In fact, I'm looking at page 2. There is another picture of Mr. Thomas looking directly at the robber with the robber's head cocked back a bit.

So I think this was a fair photo array. Just judging from what I see of it, judging from what Mr. Thomas saw of it, and what the officer put together, the officer was very clear in his testimony and also in the written form that confirmed the testimony that he wasn't representing that the suspect was even in the photo array. That's good police work to me, to make sure that the witness doesn't think that there is somebody he has to identify, you must identify somebody here, because then the chances are one out of six at least that he would get somebody. And that's not what happened here.

And I believe the officer when he says he didn't make any suggestion or anything else. He answered a question after the fact, which as he says was a fairly human response by someone who has identified a perpetrator. And I think that there would be absolutely no reason to conclude that this photo array was suggestive or that Mr. Thomas was doing anything other than his best to identify him.

You're certainly able to and very capable of cross-examining the witness at trial, and you'll be able to do that. It will be up to the jury to determine the credibility of

the witness and the reliability of his identification. But there is absolutely no reason that I can see to suppress this evidence. The motion will be denied.

Now, there is another motion here.

(Discussion off the record.)

THE COURT: There is a motion to continue the trial date. I have a serious problem with that, because I'm pretty well booked up for many, many months.

What's the government's position with that?

MS. BELL: Your Honor, we have the same scheduling concern as Your Honor where we are, if the trial were to be continued, our schedule would not allow either of us to try the case until, you know, sometime next year.

THE COURT: And your client is in custody, so I would --

MR. PETRO: He is in custody, Judge. I've spoken to my client about a continuance. He desires and seeks a continuance of this matter.

THE COURT: Give me a good reason.

MR. PETRO: Well, the DNA evidence in this case is particularly complicated, Judge. We do have particular problems with the DNA evidence. We are in the process of determining whether Mr. Ford has the funds to hire an expert to evaluate the DNA evidence.

THE COURT: Are you retained counsel?

MR. PETRO: I am retained.

MR. PETRO: Well, not really. We didn't have an opportunity to view the actual mask in contention in this particular case until a couple of weeks ago, Judge, I don't believe. So we were kind of waiting for --

THE COURT: You didn't have the opportunity or you didn't do it?

MR. PETRO: We didn't have the opportunity. We had asked to view the mask.

THE COURT: Hadn't it been available? Hasn't all the discovery?

MS. BELL: It has, Your Honor.

THE COURT: My notes say all the discovery was turned over in January.

MR. PETRO: Not the actual mask that was in the evidence vault, Judge. That was one of the things that we were asking to look at, and we didn't get those --

THE COURT: Well, but you knew it was there, right?

MS. BELL: The government wrote Mr. Petro and said that it was available for his inspection at any time. And the first time he asked to see it we brought it to him.

THE COURT: I don't see -- you've still got a number of weeks. And, obviously, you can see the mask. It doesn't take very long to look at a mask.

MS. BELL: He's seen it, Your Honor.

THE COURT: I mean, the DNA evidence, if there is a

battle of experts brewing here, I want you to have enough time to get your expert. But you've had enough time to get your expert, because you've known about this forever.

I'm denying the motion. We're going to go ahead.

Now let's talk about the jury instructions. I just got because of the misdirection and all this, I just got a hold of these. Let me set a pretrial conference and have a chance to -- will you guys get together.

What I like is a unified set of jury instructions. Again, they're not carved in stone. We can always adjust them if the evidence requires. But I would like to get this case ready for trial as much as I can before the trial, and that's part of it.

But you say that the defendant's proffered instructions you think you'd be able to integrate into yours.

MR. YOUNG: Yes, Judge.

THE COURT: I haven't even looked at any of them. So let's do this, if you can try to do that and get me a revised set. And hopefully there will be no -- I mean, it's a bank robbery case. There shouldn't be a lot of difficulties here. This month has really disappeared on us, hasn't it? Let's say a week from today at 2:30. Just get me those in advance. We'll go through voir dire and everything else at that point, and we'll be ready to go. So that will be a pretrial conference, 2:30 on the 28th. I'll take a look at these briefly, but hopefully I'll get

Court. And that professional witness has misled the Court.

If there was a prior identification made by Mr. Thomas, he should have made that available. If anything, if they're saying it's just a memory lapse, well, the Court should consider that memory lapse as to his ability to observe. He made a number of wrong identifications at the time of the offense. And to allow him to come in here under these circumstances and say that this is a good, solid, reliable identification of Mr. Ford in this photo lineup, and then have him come in and say or to remember, to find these reports where he identified another person that committed this bank robbery, surely that calls into question the reliability of his identification.

The Court should bar his testimony. And this is just further evidence of the unreliability of his identification, Judge, further evidence.

THE COURT: Well, that's for the jury to decide. I mean, that's not for me to decide. He hasn't demonstrated the type of unreliability where a judge would ever be permitted or should even consider seriously barring the testimony of an eyewitness who we've seen from the videos was eyeball to eyeball with the bank robber. He's certainly competent to testify.

If I thought that he had hidden something or done something, you know, very seriously wrong, I might be more sympathetic to this. But this is consistent in a sense with his ability to identify people, because he apparently on his own

recognized or thought he recognized the robber when Mr. Ford came in the next day.

MR. PETRO: It wasn't Mr. Ford. It was a different person. It's not Mr. Ford that comes into the bank the next day.

THE COURT: All right. So then you've got impeachment. What he thought was Mr. Ford, what he thought was the robber, I'll stand corrected.

MR. PETRO: What he thought was the robber.

THE COURT: Right. So, I mean, isn't that --

MR. PETRO: I think you should bar his testimony because of the reliability of his observations. I mean, 18 months later he looks at a photo array. Clearly, there was some suggestability at the time of the identification by the officer.

THE COURT: He thought the man, he thought the man who came into the bank the next day was the robber or he thought he might be the robber, and he reported it, right? That's what happened here?

MS. BELL: Yes, Your Honor.

MR. PETRO: That's a prior identification, and it certainly goes --

THE COURT: It's a subsequent identification.

MR. PETRO: Well, it was prior to the lineup identification photo.

THE COURT: It was prior to the lineup. And he's doing his job in a sense by saying "I think, I think that somebody came

in who looked an awful lot like the guy who just robbed us."

So, you know, I don't see how that affects his ability to testify. It might give you some cause to cross-examine him. And the government, you know, disclosed this to you as soon as they got it. So you have some ammunition here. I think that's what it means. It wouldn't give -- I mean, to bar an eyewitness to a robbery like this would be totally incorrect.

MR. PETRO: Sir, can I bring up another --

THE COURT: I don't even know if there is any motion pending or if you're asking me to reconsider, but I'm not going to.

MR. PETRO: I have no idea for the purposes of impeachment whether Officer Martino, who authored the report or apparently talked to this Danny Thomas the day after the offense, and I want to make it clear to the Court I don't know if he's available. I don't know if he can be available. But if for whatever reason, and I think that there is probably a strong probability here, I ask Danny Thomas whether, in fact, this occurred on November 21st, and he denies it, I would need Officer Martino to come in.

And I don't know what his availability is since I just found, I have this information yesterday. Obviously, if the government does not know their availability, if they are willing to stipulate to this report that this, in fact, occurred, I'm sure they're going to caution Mr. Thomas that this is what

gentlemen, we're going to take a quick break, and at that point the defense would be entitled to put on its case if it chooses to.

(Jury out.)

MR. YOUNG: Your Honor, there is a matter we need to raise.

THE COURT: Okay.

MS. BELL: Your Honor, during the last break, Mr. Petro gave us some documents, an e-mail, a testimonial by a former client of Mr. Ford's vouching for Mr. Ford's abilities as a personal trainer, as well as a page of a photocopy of a calendar from November 20th, including November 20th, 2007, and expressed his intention to call a witness to testify that he was with Mr. Ford on November 20th, 2007, I'm not certain where other than somewhere at 7:30 with him.

When I asked him: What would be the purpose of the testimony of the testimonial? Was this a character witness?

Mr. Petro said: No.

I said: Is this an alibi witness?

Mr. Petro said: No.

The government has not received any notice of this. The Court's procedures were not complied with. The government has made two written requests to Mr. Petro beginning back in December 2009 for notice of alibi. That request was renewed again by letter this month. We've discussed that with Your Honor in

court. So the government has issues with the planned testimony presentation of this witness.

MR. PETRO: Judge, they have known about this witness since October of 2009. They had an opportunity to interview him. In fact, with respect to the testimonial on this particular person, the testimonial that this particular person made on behalf of John Ford, I provided that, because the government provided it to me. They knew who this person was. They had every opportunity and it was my belief that they --

THE COURT: Is this a character witness?

MR. PETRO: No. He's going to testify that John Ford was his personal trainer. I asked him if he could check his records for the date of November 20th, 2007. He then got back to me and said that he, in fact, checked his records for November 20th, 2007, and his records indicate that he did have a personal training session with John Ford.

Mr. Martin was kind enough to respond today and come down to the cafeteria over the lunch hour. He has the actual notebook with him that would substantiate that at 7:30 p.m. on that particular day, that he was, in fact, training with John Ford. He has the actual -- I just made a copy for the purposes of allowing the government to see the actual, a copy of what was in the particular book.

But it's not technically an alibi, Judge. What it is, it's testimony that at 7:30 on that particular day, he was, in

fact, at a gym and training with John Ford, his personal trainer.

MS. BELL: Your Honor, I don't see how that testimony is relevant unless it is to alibi Mr. Ford. Indeed on cross with Blake Aper, Mr. Petro brought up the issue of, you know, if this guy, if he had an alibi. So he's raised that with the jury. That seems to be the clear intention here.

The records, the e-mail correspondence that Mr. Petro just provided us show that Mr. Petro had corresponded with Russ Martin and that he knew Russ Martin was going to testify about this issue before this trial began. He did not notify the government. He did not comply with the Court's procedures or the rule.

THE COURT: Well, it's not an alibi, because the robbery was at 5:25, right?

MR. PETRO: No, it's not.

MS. BELL: The argument will be that because of the training, what's in this correspondence is that the training was held at gyms not at Palatine, but either Chicago or Evanston, outside or far away from the location of the bank robbery.

MR. PETRO: Judge, I just want to make it clear that the identity of this particular person was provided to me by the government when they tendered their Jencks material to me on Thursday or shortly before. I mean, my first conversation was on Tuesday, October 5th, after I received the --

THE COURT: What's the relevance of the testimony if not

an alibi?

MR. PETRO: The relevance of the testimony, Judge, is based on their submission to me, I went and sought out this person named Russ Martin. I asked him if he had any records as to whether he had been training with John Ford. And it's to show that at 7:30 on that particular evening, that John Ford, in fact, had a training session with Russ Martin.

THE COURT: Assume that that's the fact. What is the relevance of that fact?

MR. PETRO: The relevance is obviously to show that if a person were to rob a bank in one particular location at this time, and John was at this particular location at this time, it's not technically an alibi.

And the bottom line is, if they were to cross-examine, their first question would always be, "But you can't tell me where Johnny Ford was at 5:30 that particular evening." I've done this a little bit of time, Judge. That's always their first question. It's not an alibi. I discovered this --

THE COURT: But you haven't answered my question. What is the relevance? If it's not an alibi, what is the purpose of the testimony?

MR. PETRO: The purpose of the testimony is to show that on that date, time, and location, that John Ford was somewhere in the Chicago area at 7:30 that night.

MS. BELL: That's an alibi, Your Honor.

MR. PETRO: The jury can draw any type of conclusion that they want with respect to that particular testimony, Judge.

And if they had given me this Jencks material earlier, I would have responded earlier. I didn't even find out about the darn -- I mean, I had heard about it, but I just found out about it.

THE COURT: You said they knew about it, and you knew about it last year.

MR. PETRO: They knew about it. How can they say that they're prejudiced by this testimony, Judge? How can they say they're possibly prejudiced?

THE COURT: Putting aside the element of surprise about the witness, I'm still unclear about, if it's an alibi witness, you know you have to give them advance notice.

MR. PETRO: It's not technically an alibi.

THE COURT: Okay. Then what is it then? The fact that he, you know, several hours later or an hour and a half later was, you know, somewhere else? Then it's nothing. Now, if you could say, you know, he was acting inconsistent with the demeanor of someone who just robbed a bank at gunpoint -- but there is, you know, there is a big disconnect here.

MR. PETRO: Judge, a personal trainer two hours after a bank robbery, his demeanor by default, default setting is that it's inconsistent with someone that robbed a bank. And they had this information, and the jury should be -- it's not a question

of admissibility, Judge. It's a question for the weight of this particular testimony. And they have an opportunity, two fine attorneys over here, to cross-examine and excoriate Mr. Martin like I've been doing to their witnesses, they can excoriate him. It's not about -- it's about admissibility. This is about the weight that's to be given to it. And it's not their job to assign weight to it. It's not the Court's job. The finder of fact assigns this weight, Judge.

MS. BELL: Your Honor, the evidence to be admissible, it has to be relevant. And if Mr. Petro is saying it's not for an alibi, then it's not relevant. The only thing that would come in then is to look at it as a character witness. But that's not what Mr. Petro is using it for. He already started heading that way with the cross of the last witness when he brought up alibi. He gave the government no notice of any alibi witness. It's clear in his correspondence that he knew about this witness coming to testify about this issue before this trial started.

The government has big problems with him being allowed to put on a witness without our ability to have time to investigate someone who is going to suddenly come up with an alibi this late in the trial.

MR. PETRO: That's what cross-examination is for.

THE COURT: I'm not sure it's a question of notice since you all, since both sides knew about him. It's a question of relevance. I'll think about it over the break.

MR. PETRO: Well, Judge, relevance, I would just say one last thing, relevance is easy, because if the other side complains, you know it's relevant.

MS. BELL: The other side is complaining, Your Honor, because of the use.

THE COURT: If that were the test, we'd really be in trouble.

MR. PETRO: It always is.

THE COURT: It might actually cut against your client, you know, Mr. Petro, because it shows that he was in town at that point.

MR. PETRO: Well, I'm willing to take that chance. I'm willing to take it.

THE COURT: I understand you must be. Okay. I'll think about it.

Do you have any other witnesses besides that, Mr. Petro?

MR. PETRO: I'm trying to straighten out one issue with respect to -- we have a stipulation obviously that we're going to be entering.

THE COURT: Are you calling Officer Martino?

MR. PETRO: We're going through right now with respect to Officer Martino, there is some confusion about one particular aspect of this.

THE COURT: Okay. Well, let me know when we come back. I'll come back in before.

(Recess. Jury out.)

MR. YOUNG: I'm sorry, Your Honor.

MS. BELL: I apologize, Your Honor.

THE COURT: That's okay. No problem.

All right. I've taken another look at Rule 12, not that I had to be reminded. The government requested the alibi witness, if there is going to be one, and notice wasn't given. The rule favors not permitting an alibi witness.

Even though you say it's not an alibi witness, I don't see any other purpose for it, for the testimony of that witness. So I'm going to exclude evidence based on the proffer that I've heard.

I also want to ask you since we're here without the jury, does the defendant wish to testify or not?

MR. PETRO: No.

THE COURT: All right.

MR. PETRO: Do you want to testify, John?

THE DEFENDANT: No.

THE COURT: All right. Mr. Ford, you do have a right to testify if you choose to. You've been advised of that right, I assume, is that correct, sir?

THE DEFENDANT: Yes.

THE COURT: Do you know that you have a right to testify?

THE DEFENDANT: Yes, I do.