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.

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

REPLY BRIEF OF DEFENDANT-APPELLANT JOHN A. FORD

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ARGUMENT

I. The district court committed reversible error when it excluded the defendant's sole witness.

The Sixth Amendment grants a defendant the right "to call witnesses whose testimony is material and favorable to his defense." *Rock v. Arkansas*, 483 U.S. 44, 52 (1987) (internal citations omitted). When the district court prohibited the testimony of Russ Martin—John Ford's only witness—it denied Ford his right to present a defense.

The district court erred in: (1) applying notice-of-alibi requirements to Martin's non-alibi testimony; and (2) applying a non-existent presumption in favor of excluding testimony, when Supreme Court precedent requires a careful balancing of private rights against public interests. Because Martin was Ford's only witness, these errors had a substantial effect on the jury. This Court should reverse Ford's conviction.

A. Because Martin was a relevant, non-alibi witness, Rule 12.1's notice requirements do not apply to his testimony.

Bank manager Danny Thomas described the robber as skinny and pale. (App. B. 32.) By trial, Ford was no longer a personal trainer and had been in jail for over a year. During the timeframe surrounding the robbery, however, Ford was muscular; Russ Martin could have testified to that. (App. B. 29.) Further, from October 2007 to January 2008—the four months surrounding the robbery—Martin trained with Ford two to three times per week, giving him extensive first-hand knowledge of Ford's physical appearance and demeanor. (R. 72; R. 74, Ex. E.)

Martin could attest that Ford always appeared "calm, friendly and professional" during the time period surrounding November 20, 2007. (App. B. 28.) The jury could have inferred a person's behavior might change after robbing a bank and that a person in regular contact with him would have noticed that difference. It could have concluded further that the absence of such a change in Ford made it less likely that he robbed the bank, thus casting doubt on the government's case. The district court erred in excluding him from trial.

Although Martin was important to Ford's defense, he was not an alibi witness, as the government contends. It is axiomatic that Rule 12.1 has absolutely "no relevance to a witness who testified about the defendant's physical appearance around the time of the crime." 1A Charles Alan Wright & Andrew D. Leipold, *Federal Practice and Procedure* § 201 n.2 (4th ed. 2011) (citing *United States v. Tille*, 729 F.2d 615, 622 (9th Cir. 1984)). An alibi under Rule 12.1 encompasses only the "specific place where the defendant claims to have been at the time of the alleged offense." Fed. R. Crim. P. 12.1(a)(2); *accord Black's Law Dictionary* 84 (9th ed. 2009) (an alibi places the defendant "in a location other than the scene of the crime *at the relevant time*.") (emphasis added); Michael H. Graham, *Handbook of Federal Evidence* § 303.1 (6th ed. 2006) (alibi is "nothing more than a denial of the crime by reason of being elsewhere *when it was committed*.") (emphasis added).

Martin's testimony would not have placed Ford with him at the time of the robbery, so he cannot be an alibi witness under Rule 12.1.[1]

To overcome Rule 12.1's explicit language limiting it to actual alibis, the government instead frames its discussion in terms of its own request for notice—not Rule 12.1 itself. (*See* Gov't Brief 19.) But unlike Rule 12.1, the government requested notice of "'any alibi *or similar defense*' that would assert [Ford's] 'unavailability *on or about*' the date and time of the charged robbery." (*Id*.) (emphasis added). Then, building on this broadened interpretation of Rule 12.1's requirements, the government boldly asserts—without citation—that the concerns embodied in Rule 12.1 are "equally implicated when the defendant announces at the last minute a witness who claims the defendant was somewhere else either just before, just after, or at the exact moment that a crime was committed." (Gov't Br. 21.) Such a claim is in clear conflict with the Rule 12.1's plain language, which clearly limits the rule's scope to alibi testimony.[2]

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[1] Non-alibi witnesses are not subject to advance disclosure requirements. *Cf.* Fed. R. Crim. P. 12.1-12.4, 16 (listing the types of evidence subject to special disclosure requirements). Wright, *supra* page 2, § 201 n.2 (establishing that Rule 12.1 only applies to alibi witnesses).

[2] Unable to circumvent Rule 12.1's plain language and Martin's relevance to Ford's case, the government invokes a forfeiture argument, claiming that the defense "never suggested" Martin's testimony could be used to demonstrate Ford's demeanor (Gov't Br. 22), and "never indicated" either below or on appeal that Martin could testify about Ford's appearance (Gov't Br. 23 & n.4). The record is clear, however, that both purposes were raised with the trial court and preserved on appeal. (App. A. 40) (defense counsel stating, "demeanor by default, default setting is that it's inconsistent with someone that robbed a bank"); (R.72, Mot. for New Trial & Aff. of Russ Martin) (stating that Martin would have provided evidence of Ford's height, weight, and demeanor); (Br. 4, 6, 12, 16-18, 22-23) (discussing how Martin's testimony could be used to establish Ford's appearance and demeanor). Each of these statements was sufficient to preserve the issue for this Court's review because they provide an "indication of what he thought such questioning would produce that would be material." *Cobige v. City of Chicago*, 651 F.3d 780, 785 (7th Cir. 2011) ("Defendants preserved [their claim] by trying multiple times to have this evidence admitted . . . we reject

Because the district court's classification of Martin's testimony is a "clearly erroneous assessment of the evidence," it constitutes 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.").

B. Even if Martin was an alibi witness, the district court erroneously presumed that Rule 12.1 favors exclusion and failed to balance the relevant factors and make appropriate findings.

The government seizes on defendant's suggestion that, given the severity of complete preclusion as a sanction, a court should reserve preclusion for instances of willful misconduct, and embarks on a prolonged discussion on the dangers of a categorical rule. (Gov't Br. 25-28.) It is beyond dispute that the Supreme Court treats this harsh sanction with caution. *Taylor v. Illinois*, 484 U.S. 400, 413-14 (1988). And although such a "willful-misconduct" rule would be fully consistent with existing precedent,[3] this Court need not adopt a categorical rule to decide this case.

[the] contention that the absence of a formal offer of proof at trial is conclusive against the defendants") (citing Fed. R. Evid. 103(a)).

[3] Courts of appeals also uniformly consider evidence of willfulness as a matter of course in deciding whether to exclude evidence for discovery violations. *United States v. Mizell,* 88 F.3d 288, 294-95 (5th Cir. 1996) (noting that the lower court had not found that the defendant had "willfully violated the discovery rules" and thus the district court "erroneously concluded that preclusion was permissible for any discovery violation."); *United States v. Levy-Cordero*, 67 F.3d 1002, 1014-15 (1st Cir. 1995) (emphasizing that "[e]xclusion of potentially exculpatory alibi evidence is the most severe of discovery sanctions" and because of the "extreme consequences of exclusion" concluding that the district court must hold a hearing to reevaluate the willfulness determination); *United States v. Peters*, 937 F.2d 1422, 1426 (9th Cir. 1991) (stating that because "no willful and blatant discovery violations occurred . . . application of the exclusionary sanction is impermissible"); *Noble v. Kelly*, 246 F.3d 93, 100 n.3 (2d Cir. 2001) (stating "where

Rather, the core issue for this Court is the very standard the government concedes this Court must apply, but which the district court overlooked: *Taylor*'s important "guideposts, directing courts to balance the defendant's right to call favorable witnesses with 'countervailing public interests.'" (Gov't Br. 25) (citing *Taylor*, 484 U.S. at 414-15). Instead of hewing to these guideposts in its decision, the district court excluded Martin's testimony on the presumption that "Rule 12.1 favors not permitting an alibi witness." (App. A. 43.) Had the district court engaged in the required balancing—a legal determination that courts review *de novo*—it would have found neither bad faith nor sufficient countervailing government interests to trump Ford's right to present the only evidence in his defense. *See, e.g.*, *United States v. Portela*, 167 F.3d 687, 705 (1st Cir. 1999); *United States v. Hamilton,*128 F.3d 996, 1002 (6th Cir. 1997). For both of these reasons, Ford's conviction should be reversed.

1. Rule 12.1 requires a careful balancing of interests, not the mechanistic application of a presumption in favor of exclusion.

As the government acknowledges, the Sixth Amendment "guarantees a criminal defendant the right to present relevant testimony in his defense." (Gov't Br. 24.) The Supreme Court has consistently noted that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), and that the

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prejudice to the prosecution can be minimized with relative ease a trial court's exclusion of alibi testimony *must be supported* by a finding of some degree of willfulness" in order to justify exclusion) (emphasis added).

right to present witnesses is "a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967).

While it is certainly true that these rights are not unlimited, the Supreme Court requires a close examination of the competing interests before denying or significantly impinging on that right. *Chambers*, 410 U.S. at 295. Similarly, rules affecting this right must "not be applied mechanistically to defeat the ends of justice." *Id.* at 302. The district court mechanistically applied Rule 12.1 when it summarily concluded that "the rule favors not permitting an alibi witness" and completely excluded Martin's testimony. (App. A. 43.) It neither engaged in the requisite balancing nor made any findings to show that it even considered the defendant's weighty constitutional interests. The record contains no discussion of the importance of Martin's testimony to Ford's defense, no close inspection of the competing state interests, and no indication that the district court weighed these interests against each other at all.

Contrary to the district court's ruling, Rule 12.1 does *not* favor excluding testimony. (App. A. 43) (stating that the district court read [Rule 12.1] and that it "favors" exclusion);[4] (s*ee* Br. § I.B). Any such presumption in favor of exclusion would be squarely at odds with Supreme Court precedent, which acknowledges three fundamental principles. First, the exclusion of

[4] The application of a non-existent presumption in lieu of the Supreme Court's clear direction that "competing interests be closely examined" is a clear indication—not a "mere inference"—that the district court judge did not "know and understand the law." (Gov't Br. 33.)

testimony is the harshest sanction available for violating notice-of-alibi rules. *See, e.g., Taylor*, 484 U.S. at 413-14 (referring to complete preclusion of defense testimony as "the severest sanction" available). Second, exclusion is not appropriate in most cases. *Michigan v. Lucas*, 500 U.S. 145, 152 (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") (internal quotation marks omitted). Third, competing interests must be "closely examined" prior to the "denial or significant diminution" of a defendant's Sixth Amendment rights. *See Chambers*, 410 U.S. at 295 ("[The] denial or significant diminution [of a defendant's Sixth Amendment rights] calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined.") (internal quotations omitted).

The government points out in response that Rule 12.1's advisory committee notes say that the availability of exclusion as a sanction is "essential if the notice-of-alibi rule is to have practical significance." (Gov't Br. 19) (internal citation omitted). But the government cannot conflate an available remedy with a default remedy simply to defend the district court's presumption in favor of exclusion. Because the district court failed to balance and instead applied an erroneous presumption and because, as discussed below, the equities clearly favor allowing Martin's testimony, this Court should reverse and remand for a new trial.[5]

[5] Alternatively, this Court should, at a minimum, remand to the district court to apply the proper test and make adequate findings.

2. Ford did not engage in willful misconduct, and the countervailing government interests were insufficient to overcome Ford's constitutional right to present his defense.

Because Ford's counsel informed the government of Martin's testimony at the earliest possible opportunity, neither the record nor the government can demonstrate that he acted in bad faith. Absent such a showing, it falls upon the government to demonstrate an important interest served by preclusion that is proportionate to the severity of that sanction. *See Rock*, 483 U.S. at 56. As the government cannot satisfy this burden, the careful balancing of interests required by *Taylor* demonstrates that Martin's testimony should have been admitted at trial.

a. There was no evidence that defense counsel engaged in willful misconduct.

Despite acknowledging that defense counsel informed the government of Martin as a potential witness on October 12, 2010 (Gov't Br. 15 n.3)—the very first day of trial—the government says the record "strongly suggests defense counsel made a tactical decision to delay disclosure to maximize the surprise defense's impact," (Gov't Br. 24). But the following timeline demonstrates that Ford gave adequate notice under the circumstances and did not act in bad faith. Thus, Martin should not have been excluded from trial on that basis, even if the district court had considered the question of willful misconduct.

Date	Days Until Trial	Activity
10/5/2010	**7 days**	• Defense counsel first emails Martin • Martin confirms training session with Ford on November 20, 2007 • Martin preliminarily agrees to testify (R. 74, Ex. D.)
10/8/2011	**4 days**	• Petro receives Jencks materials, which demonstrate that the government was aware of as early as September 2010 (Gov't Br. 14 n.2.)
10/9/2011	**3 days**	• Petro officially asks Martin to testify (R. 74, Ex. D.)
10/11/2011	**1 days**	• Martin agrees to testify (R. 74, Ex. D.)
10/12/2011	**0 days**	• Trial begins • Petro informs government that he may call Martin as a witness (R. 74 at 15.)

While it is true that Ford's attorney had brief email contact with Martin as early as October 5, he did not receive confirmation that Martin could testify at the trial until October 11—the day before trial. Defense counsel promptly notified the government the following day. The government, however, takes a narrow view of counsel's conduct in order to create the appearance of bad faith. Claiming that counsel was "clearly aware of the government's disclosure requests," it ignores that these requests were issued on January 15, 2010 and September 24, 2010—well before defense counsel: (1) knew of Martin's identity; (2) confirmed that Martin trained with Ford during the time frame of the robbery; and (3) confirmed that Martin would testify at trial. The record unequivocally demonstrates that Ford

received confirmation from Martin on October 11, and informed the government of his intention to testify on October 12, a fact the government explicitly acknowledges. (Gov't Br. 15 n.3.) Yet, the government persists in its unsupported claim that defense counsel both "knew of Martin's planned testimony for at least one week before trial," and "waited until the third day of trial at the end of the government's case to unveil a surprise witness." (Gov't Br. 29.) Because Martin was either not an alibi witness and thus not subject to advance disclosure, *see supra* note 1, or was disclosed within a reasonable time, the government's insistence that Ford offered "no excuse" for not disclosing him sooner is simply wrong. (Gov't Br. 24.)

b. The government suffered no prejudice that would outweigh Ford's interest in presenting his defense.

In the absence of bad faith, the government must demonstrate an interest sufficiently important to justify the "severe sanction of preclusion." *Lucas*, 500 U.S. at 153. The government cannot meet this burden because it suffered de minimis prejudice, if any. Despite Martin's importance to Ford's case, the scope of his testimony was discrete and focused. Martin's affidavits indicate that his testimony would have been limited to: Ford's general appearance and demeanor; the fact that he had approximately twenty personal training sessions with Ford over the four months surrounding the robbery; that he likely met with Ford on November 20, although he does not remember the specific details of that meeting; Ford's work habits during their sessions; and the likely location of the November 20 training session. (R. 72, Mot. for New Trial & Aff. of Russ Martin); (R. 74, Ex. D, E). None of

these topics required extensive additional investigation or rebuttal witnesses. Further, although the government claims it was deprived of an opportunity to "thoroughly interview Martin" before the trial, (Gov't Br. 30), it did in fact interview Martin during a recess, and that interview covered all pertinent portions of Martin's very limited testimony (R. 74, Ex. C) (affidavit from October 14 describing interview with Martin and stating that: (1) he hired Ford as his personal trainer in the Fall of 2007; (2) he met with Ford approximately twenty times; (3) that he cannot specifically remember either Ford's specific clothing or arrival time on November 20; and (4) that Ford was usually on time to appointments, though sometimes he arrived early). Thus, there are insufficient countervailing government interests to merit Martin's exclusion from trial.

C. Because Martin was Ford's only witness, the erroneous exclusion of Martin's testimony is de facto reversible error.

The erroneous exclusion of Ford's only witness was reversible error. *United States v. Peak*, 856 F.2d 825, 834 (7th Cir. 1988) ("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."). Because errors deemed to have a "substantial effect on the jury" cannot be "harmless beyond a reasonable doubt," the government has failed to meet its burden of proving that the district court's de facto abuse of discretion was harmless error. *Chapman v. California*, 386 U.S. 18, 24 (1967) ("Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.").

Rather than address this Court's clear precedent—indeed, the government does not even acknowledge *Peak* in its response—the government focuses instead on the purported strength of its evidence, particularly Thomas's testimony and the DNA analysis. This focus is misplaced. Setting aside that Thomas's testimony was plagued with inconsistency, *see infra*, Section II.B, it is always reversible, prejudicial error to erroneously exclude a criminal defendant's only evidence. *Peak*, 856 F.2d at 834 ("If the defendant were utterly precluded from defending himself, it would be clear that his conviction had to be reversed *even if* the evidence of guilt was overwhelming and could not have been offset by the evidence that the defendant would have introduced") (emphasis added) (quoting *United States v. Cerro*, 775 F.2d 908, 916 (7th Cir. 1985)). Because the primary evidence in support of Ford's defense was erroneously excluded, the weight of the government's case is irrelevant to this determination.

The government counters that Ford was not denied his right to present a defense, but rather his defense was merely "less complete than he might have preferred." (Gov't Br. 36.) Ford's defense was sufficient, the government claims, because he: (1) was allowed to cross-examine and challenge the prosecution's evidence; (2) could have called other witnesses to establish the same information about his height, weight, and demeanor; and (3) was not precluded from testifying himself. (Gov't Br. 36.) None of these factors—alone or in combination—are sufficient to satisfy the Sixth Amendment's right to present a defense. To begin, this Court has never held that cross-examination is sufficient to establish a defense

in the face of excluding a defendant's only evidence. *See generally, e.g.*, *Peak*, 856 F.2d 825 (right to present a defense violated despite defendant's ability to cross-examine government witnesses); *United States v. King*, 75 F.3d 1217 (7th Cir. 1996) (same). Regardless, the question is not whether the defendant has the opportunity to cross-examine the government witnesses or testify himself, but rather whether the evidence that he claims on appeal formed his entire defense was available elsewhere. *See United States v. Barnette*, 211 F.3d 803, 824 (4th Cir. 2000) ("questions from an attorney [during cross examination] are not nearly so effective as a qualified expert witness"). Ford could not have cross-examined the government witnesses about his own demeanor, and the record reveals only Martin as the individual that had contact with Ford before and after the alleged incident. And even ignoring Ford's absolute right not to testify, U.S. Const. amend. V; *Carter v. Kentucky*, 450 U.S. 288, 301 (1981), it is absurd to suggest that Ford's own testimony that he was "calm, friendly and professional" would have the same probative impact as Martin's.

The only remaining argument offered to satisfy the government's burden of demonstrating that excluding Martin's testimony was harmless beyond a reasonable doubt is that his testimony was "characterized by uncertainty." (Gov't Br. 35.) Even if that were true, which it is not, it is insufficient to satisfy its burden of proving the error harmless beyond a reasonable doubt. Martin's testimony would have assisted Ford's defense by allowing jurors to infer that his appearance and behavior around the time of the crime was inconsistent with the bank robber's. In

any event, the strength and credibility of Martin's testimony was a question of weight that the jury should have been given the opportunity to weigh and decide.

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

A. The photo array was unduly suggestive.

The photo array was impermissibly suggestive because: (1) Ford's photo—but no others—emphasized the very characteristics that Thomas described; and (2) the simultaneous-display method that Detective Bice chose for the array only exacerbated this disparity.[6] The government's response brief does not dispel these concerns, for three reasons.

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[6] As a threshold matter, this Court need not accept the government's invitation to accord complete deference to the district court "findings" it sets forth in its brief. (*See* Gov't Br. 39-41); *see generally United States v. Harris*, 281 F.3d 667, 670 (7th Cir. 2002) (stating that appellate courts generally defer to a district court's factual findings). Many of those findings are actually mere legal conclusions, which this Court reviews *de novo*. *Id*. at 670 (stating that questions of law are reviewed *de novo*); (Gov't Br. 39-40) (quoting the district court's determination as to the admissibility of the photo array); *id.* at 40 (quoting the district court's determination that Bice conducted "good police work"); *id*. (stating that the district court found Thomas's identification was reliable). Although this Court does defer to a district court's proper credibility determinations, *United States v. Kempf*, 400 F.3d 501, 503 (7th Cir. 2005), that rule should not apply unblinkingly in this case because the district court's findings were made in a vacuum. Specifically, at the time of the district court's credibility findings, it was unaware that Thomas had identified another person as the robber the day after the crime and that Bice knew about it. Neither witness disclosed that information during the suppression hearing. And although the district court refused to revisit the suppression hearing or its earlier findings when defense counsel requested it to do so, (10/08/10 Tr. 15) (district court stating "I don't even know if . . . you're asking me to reconsider, but I'm not going to."), those omissions of such critically important facts directly implicate the certainty of Thomas's identification of Ford and undermine the district court's credibility findings such that this Court should not defer to them. *Korniejew v. Ashcroft*, 371 F.3d 377, 383 (7th Cir. 2004) (stating in an immigration context that this Court "shall not defer to credibility determinations 'drawn from insufficient or incomplete evidence'") (quoting *Georgis v. Ashcroft*, 328 F.3d 962, 968 (7th Cir. 2003)); *cf. United States v. Griffin*, 84 F.3d 912, 930 (7th Cir. 1996) (stating credibility determinations will not be disturbed unless "clearly erroneous.").

First, Ford was the only individual depicted in the array who matched Thomas's sparse description. Ford does not dispute that the photo array depicted six Caucasian males featured from the shoulders up, or that they were printed on the same size paper. However, this array was suggestive because only one photograph in the array emphasized the same exact features that Thomas relied upon so heavily in his description of the robber. When a witness relies upon particular characteristics in his description, an array where only the defendant possesses those characteristics can render the array unduly suggestive. *Raheem v. Kelly*, 257 F.3d 122, 134 (2d Cir. 2001). Ford is the only individual pictured with very pale, freckled skin, and light eyebrows. (App. B. 7.) The other five individuals either have dark hair, a ruddy complexion, dark eyes, or some combination thereof. (App. B. 7.) The government asserts that the photo array could not have been suggestive because the other witnesses did not make an identification, (Gov't Br. 45), but that is only because Thomas was the *sole* witness who was able to identify any specific features about the robber apart from gender, race, and clothing (App. B. 11–17). It is therefore unsurprising that he was the only one able to make an identification; it does not eradicate the suggestibility of the array to Thomas, the only witness looking for a suspect who had pale, freckled skin and light eyebrows.

Second, those characteristics which Thomas relied upon were magnified through Bice's manipulation of Ford's photograph. After Bice manipulated Ford's photograph, the error of including five individuals in the array who did not match Thomas's spotty description of the robber was exacerbated. The government is

correct in stating that minor differences in the exposure of a photograph do not render an array unduly suggestive. (Gov't Br. 48.) However, when those differences emphasize the very characteristics a witness points to in his description, the manipulation is more than a "minor, inevitable difference." (Gov't Br. 48.) Whatever Bice's stated good intentions, the manipulation of Ford's photograph washed out his skin, making it very pale, and altered the contrast such that freckles became extremely prominent. *Compare* (App. B. 35) (source photo), *with* (App. B. 2) (array photo). Thus, the original error of choosing five photographs for the array that did not match Thomas's description was compounded because the very features Thomas identified in the robber were emphasized in Ford's photo.

Third, one need not engage in a social science debate, (Gov't Br. 49-50), to understand that the two aforementioned errors in the array were then, once again, amplified when Bice used the simultaneous-presentation method for his photo array, as opposed to the sequential-presentation method preferred by this Court. *See United States v. Brown*, 471 F.3d 802, 804-05 (7th Cir. 2006). Thomas was tasked with determining which of the six photographs most resembled the robber relative to the other individuals in the lineup; Thomas did not need to rely on his memory to do this. (App. A. 24, 27); Gary L. Wells, *What Do We Know About Eyewitness Identification*, 48 AM. PSYCHOLOGIST 553, 560 (1993) (highlighting the pitfalls when a witness chooses which individual matches the description of the culprit relative to the other individuals present rather than who best resembles his memory of the culprit). The errors in the photo array exponentially built upon each

other and these aggregate errors meant that Ford's photo was unduly emphasized and the array was suggestive to the government's lone eyewitness.

B. The identification was not reliable under the totality of the circumstances.

As noted in the opening brief, all five of the *Biggers* factors weigh in favor of finding Thomas's identification unreliable. *See Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). Ford need not prevail on all five, however, in order to secure a reversal. *See United States v. Rogers*, 387 F.3d 925, 938-39 (7th Cir. 2004) (finding an identification unreliable when the record was silent as to the third factor and the witness displayed certainty in his identification as per the fourth factor); *see also Kubat v. Thieret*, 867 F.2d 351, 358-59 (7th Cir. 1989) (characterizing the consideration of *Biggers* factors as a balancing test, weighing the various factors). As the government's brief shows, at least three factors—a majority—favor Ford.

First, the government concedes that the last *Biggers* factor—the length of time between the crime and the identification—counsels for a finding of unreliability. (Gov't Br. 56.) As for the third *Biggers* factor, Thomas's testimony was inaccurate. Appellant's opening brief canvassed the litany of mistakes and inconsistencies throughout Thomas's descriptions of the robber over time, but a few additional salient points merit mention. Minutes after the robbery, Thomas was unable to identify elementary characteristics, such as the robber's age, hair color, hair length, facial hair, or the color of the robber's shirt. (App. B. 27.) And even though Thomas claimed to have been "eyeball to eyeball" with the robber, he could not identify the color of the robber's eyes (*Id.*; 10/8/2010 Tr. 13), or even determine if

the robber wore glasses (App. B. 32). Yet Thomas repeatedly testified in the suppression hearing and at trial that he identified Ford in large part because of Ford's "intense" and "light" eyes. (*See, e.g.*, App. A. 10; Trial Tr. 83-84.) Thus, contrary to the government's assertion that Thomas's discrepancies "were not the basis for [his] identification" (Gov't Br. 55), they were in fact essential to his identification.

Regarding the fourth *Biggers* factor, Thomas's supposed certainty in his identification was neutralized by Bice's confirmatory feedback after the photo array, which only served to embolden and entrench Thomas's belief in the accuracy of his identification. *See Biggers*, 409 U.S. at 199-200. The government concedes that "it is generally undesirable for an administrator to provide feedback to the witness before obtaining a contemporaneous confidence assessment." (Gov't Br. 56.) Bice not only informed Thomas after the identification that Thomas chose the suspect, but even more troublingly, mentioned that there was DNA evidence in the case. Because of the powerful aura of DNA evidence, *see McDaniel v. Brown*, 130 S. Ct. 665, 675 (2010) (noting the "persuasiveness of such evidence in the eyes of the jury"); *see also* Pub. Defender Serv. for the District of Columbia, Brady Poll Results 2 (2003) (concluding that those surveyed found DNA to be the most powerful form of evidence), [7] once Thomas was told that there was DNA evidence in the case, his certainty in the identification was fixed. *Cf. Newsome v. McCabe*, 319 F.3d 301, 305 (7th Cir. 2003) (noting in habeas context the fallibility of eyewitness testimony and

[7] *Available at*: http://www.pdsdc.org/Resources/SLD/Brady%20Poll%20Results,%20December%202003.pdf.

that "once the witness decides that 'X is it' the view may be unshakeable"). Finally, for the same reasons that this Court should not defer to the district court's credibility findings, *see supra* note 6, it should not be swayed by Thomas's self-proclaimed certainty in his identification, particularly when that certainty was tainted by Bice's confirmatory feedback and was undermined by the tardy disclosure that Thomas had erroneously identified someone else as "nearly identical" to the robber the day afterwards. *See Kosik v. Napoli,* 814 F.2d 1151, 1159 (7th Cir. 1987) ("Determinations of the reliability suggested by a witness's certainty after the use of suggestive procedures are complicated by the possibility that the certainty may reflect the corrupting effect of the suggestive procedures"); *McFowler v. Jaimet*, 349 F.3d 436, 445 (7th Cir. 2003) (characterizing an in-court identification as unreliable where the witness identified another individual hours after the crime).

C. The government waived any harmless-error argument.

The government bears the burden of demonstrating that an error was harmless, *United States v. McKinney*, 954 F.2d 471, 475 (7th Cir. 1992), and where the government fails to address harmless error, as it has done here, the argument is waived, *United States v. Giovanetti*, 928 F.2d 225, 227 (7th Cir. 1991). This Court does have discretion to conduct a harmless-error analysis of its own accord, although the controlling considerations when making the decision are "the length and complexity of the record, whether the harmlessness of the error . . . is certain or debatable, and whether a reversal will result in protracted, costly, and ultimately

futile proceedings in the district court." *Id.* It is clear based upon the government's strident attempts to fight suppression of Thomas's testimony that he was absolutely crucial to the government's case, and it is likely that had the district court not erred in allowing the unreliable testimony, the outcome of the case would have been different. *See United States v. Emanuele*, 51 F.3d 1123, 1132 (3d Cir. 1995) (finding that it was not harmless error when the district court admitted an impermissibly suggestive in-court identification when the defendant's identity was the crucial issue at trial).

Even if this Court opts to review for harmless error, the government could not have met its burden of showing that these errors in the photo array and identification were harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24 (declaring that the government bears the burden to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict."). Thomas was the government's star witness, and the only witness to the crime able to offer *any* details about the robber's physical characteristics, aside from age and gender. *See Cross v. Hardy*, 632 F.3d 356, 360 (7th Cir. 2011), *rev'd on other grounds*, 132 S. Ct. 490 (2011) (stating that the credibility of "the sole eyewitness . . . may be crucial"). The government cannot prove beyond a reasonable doubt that no rational juror would have been affected in its decision-making if Thomas–the sole eyewitness to the crime–had not testified.

What is more, the prejudice from failing to suppress Thomas's identification was compounded when the district court refused to reconsider the suppression after

the eleventh-hour disclosure of the Theiler report. At a minimum, the court should have held another suppression hearing to see if Thomas was still a reliable witness with this new information. Indeed, the court's judgments as to Thomas's reliability bore out to be incorrect at trial. When quickly dismissing Ford's renewed objection to Thomas's testimony after the Theiler disclosure, the district court, based upon its conclusions about Thomas's "demeanor" at the suppression hearing, was confident that Thomas would remember the Theiler incident at trial. (10/08/10 Tr. 18.) Thomas's memory, however, proved not so reliable. (Trial Tr. 73) ("I don't recall . . . it's very vague . . . it had no value for me to remember anything"). As a result, defense counsel could not effectively cross-examine the government's star witness, further enhancing the prejudicial effect. Because Thomas could not be held accountable to prior, Theiler-free testimony, he was free to jump around between his various descriptions with impunity, as the various versions of Thomas's statements show:

November 20th Report	**Theiler Report**	**Suppression Testimony**	**Trial Testimony**
Thomas says robber was a white male, with light colored eyebrows and pale, freckled skin and a medium pitched voice. (App. B. 20.)	Thomas stated that Theiler's appearance was "very similar" to the robber, his voice was "nearly identical" to the robber's voice, and his neck was hunched just like the robber's. (App. B. 27.)	Thomas made no mention of Theiler but referenced facts from the Theiler report like that he knew the robber was a male because of his voice, (8/24/10 Tr. 48), and that the robber was "hunched." (*Id.* at 9.) District court finds	Thomas stated he did not mention Theiler earlier because "I don't remember really much of it, . . . it had no value for me to remember anything." (Trial Tr. 73.) Thomas also stated he did not recall the voice, (*id.* at 73), and that he identified the robber's eyes and that "he had like a slight hunch sort

		Thomas credible. (9/21/10 Tr. 54.)	of thing." (*Id*. at 60.)
Thomas did not mention eyes at all. (App. B. 13; 20; 32.) In 911 call, Thomas "could not tell" if the robber wore glasses. (App. B. 32.)	Thomas stated that Theiler's eyes were a "nearly identical *shape*" to the robber. (App. B. 27.)	Thomas identified Ford because of the "light" and "intense" eyes. (*See*, *e.g.*, 8/24/10 Tr. 37.)	Thomas relied on Theiler facts in confirming how he knew Ford was the robber: "I knew they were light colored . . . it was also the *shape of the eyes*, the intensity of the eyes." (Trial Tr. 104.)
Thomas stated in the 911 call that the robber wore black boots. (App. B. 33.) In his later report, the type and color of shoes are unknown. (App. B. 20.)	"Although [Thomas] was unable to describe the offender's shoes, he states that Theiler's gym shoes reminded him of the ones worn by the offender." (App. B. 27.)	Thomas admitting he was incorrect in saying the robber was wearing boots after viewing security stills. (8/24/10 Tr. 44.)	Thomas relied on Theiler facts when insisting on cross that he did not incorrectly identify the robber as wearing boots because "in the police report, too, the following day, I said gym shoes." (Trial Tr. 102.)

As demonstrated here, Thomas was able to change his story without consequence and the jury was never given the chance to appreciate the full extent of his slippery testimony. Thus, Ford was likewise prejudiced by the district court's failure to suppress Thomas's identification in the wake of the Theiler report.

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CONCLUSION

For the foregoing reasons, the appellant, John A. Ford, respectfully requests this Court to vacate his conviction and remand for a new trial or, at a minimum, remand to the district court for additional findings.

Dated: January 26, 2012

Respectfully submitted,

JOHN A. FORD
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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 the foregoing with the clerk of the Seventh Circuit Court of Appeals on January 26, 2012, which will send notification of such filing to the attorneys listed below.

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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 6,329 words.

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